ITEM NO. 115

JA-1

25121772605130000000000025

B1 (Official Form 1) (1/08)

United States Bankruptcy Court District of Delaware	Voluntary Petition

Name of Debtor (if individual, enter Last, First, Middle): **Sea Launch Limited Partnership**	Name of Joint Debtor (Spouse) (Last, First, Middle):
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):
Last four digits of Social Security or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all): **98-0158182**	Last four digits of Social Security or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all):
Street Address of Debtor (No. & Street, City, and State): **2700 Nimitz Road** **Long Beach, CA** ZIP CODE **90802-0000**	Street Address of Joint Debtor (No. & Street, City, and State): ZIP CODE
County of Residence or of the Principal Place of Business:	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address): ZIP CODE	Mailing Address of Joint Debtor (if different from street address): ZIP CODE
Location of Principal Assets of Business Debtor (if different from street address above):	

Type of Debtor
(Form of Organization)
(Check one box.)

- ☐ Individual (includes Joint Debtors)
  See Exhibit D on page 2 of this form.
- ☐ Corporation (includes LLC and LLP)
- ☒ Partnership
- ☐ Other (If debtor is not one of the above entities, check this box and state type of entity below.)

Nature of Business
(Check **one** box.)

- ☐ Health Care Business
- ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101(51B)
- ☐ Railroad
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Clearing Bank
- ☒ Other

Tax-Exempt Entity
(Check box, if applicable.)

- ☐ Debtor is a tax-exempt organization under Title 26 of the United States Code (the Internal Revenue Code).

Chapter of Bankruptcy Code Under Which the Petition is Filed (Check one box)

- ☐ Chapter 7
- ☐ Chapter 9
- ☒ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13
- ☐ Chapter 15 Petition for Recognition of a Foreign Main Proceeding
- ☐ Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding

Nature of Debts
(Check one box)

- ☐ Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."
- ☒ Debts are primarily business debts.

Filing Fee (Check one box.)

- ☒ Full Filing Fee attached
- ☐ Filing Fee to be paid in installments (Applicable to individuals only) Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A.
- ☐ Filing Fee waiver requested (Applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.

Chapter 11 Debtors

Check one box:

- ☐ Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).
- ☒ Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D).

Check if:

- ☐ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,190,000

Check all applicable boxes:

- ☐ A plan is being filed with this petition.
- ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).

Statistical/Administrative Information

- ☒ Debtor estimates that funds will be available for distribution to unsecured creditors.
- ☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors									
☐ 1-49	☐ 50-99	☐ 100-199	☒ 200-999	☐ 1,000-5,000	☐ 5001-10,000	☐ 10,001-25,000	☐ 25,001-50,000	☐ 50,001-100,000	☐ OVER 100,000
Estimated Assets									
☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	☐ $1,000,001 to $10 million	☐ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☒ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☐ More than $1 billion
Estimated Debts									
☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	☐ $1,000,001 to $10 million	☐ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☐ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☒ More than $1 billion

JA-1

B1 (Official Form 1) (1/08)

Voluntary Petition *(This page must be completed and filed in every case)*	Name of Debtor(s): **Sea Launch Limited Partnership**	
All Prior Bankruptcy Cases Filed Within Last 8 Years (If more than two, attach additional sheet.)		
Location Where Filed: **- None -**	Case Number:	Date Filed:
Location Where Filed:	Case Number:	Date Filed:
Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (If more than one, attach additional sheet.)		
Name of Debtor: **5 Affiliated Debtors, See Addendum hereto**	Case Number:	Date Filed:
District:	Relationship:	Judge:

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts.)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I delivered to the debtor the notice required by 11 U.S.C. § 342(b).

X _____
Signature of Attorney for Debtor(s) Date

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.

☒ No

Exhibit D

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

☐ Exhibit D completed and signed by the debtor is attached and made a part of this petition.

If this is a joint petition:

☐ Exhibit D also completed and signed by the joint debtor is attached and made a part of this petition.

Information Regarding the Debtor - Venue

(Check any applicable box)

☐ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

☒ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

☐ Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

Certification by a Debtor Who Resides as a Tenant of Residential Property

Check all applicable boxes.

☐ Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

(Name of landlord that obtained judgment)

(Address of landlord)

☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and

☐ Debtor has included in this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

☐ Debtor certifies that he/she has served the Landlord with this certification. (11 U.S.C. § 362(l)).

B1 (Official Form 1) (1/08) Page 3

Voluntary Petition *(This page must be completed and filed in every case)*	Name of Debtor(s): **Sea Launch Limited Partnership**

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.

[If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (If not represented by attorney)

_____
Date

Signature of a Foreign Representative

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.

(Check only one box.)

☐ I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. § 1515 are attached.

☐ Pursuant to 11 U.S.C. § 1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X _____
Signature of Foreign Representative

_____
Printed Name of Foreign Representative

_____
Date

Signature of Attorney*

X _____
Signature of Attorney for Debtor(s)

Joel A. Waite (No. 2925)
Printed Name of Attorney for Debtor(s)

YOUNG CONAWAY STARGATT & TAYLOR, LLP
Firm Name

1000 West Street, 17th Floor
P.O. Box 391
Wilmington, DE 19801-0391
Address

(302) 571-6600 Fax:(302) 571-1253
Telephone Number

6/22/09
Date

*In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect.

Signature of Non-Attorney Bankruptcy Petition Preparer

I declare under penalty of perjury that: 1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; 2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, 3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official form 19 is attached.

_____
Printed Name and title, if any, of Bankruptcy Petition Preparer

_____
Social-Security number (If the bankruptcy petition preparer is not an individual, state the Social Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.)(Required by 11 U.S.C. § 110.)

_____
Address

X _____

_____
Date

Signature of Bankruptcy Petition Preparer or officer, principal, responsible person, or partner whose social security number is provided above.

Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both 11 U.S.C. § 110; 18 U.S.C. § 156.

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.
The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X /s/ Kjell Karlsen
Signature of Authorized Individual

Kjell Karlsen
Printed Name of Authorized Individual

Authorized Officer; President and General Manager, Sea Launch Co., L.L.C.
Title of Authorized Individual

_____
Date **06/22/09**

Addendum to the Voluntary Petition

Pending Bankruptcy Case Filed By Any Spouse, Partner Or Affiliate Of This Debtor.

On the date hereof, each of the affiliated entities listed below (including the Debtor in this chapter 11 case) filed a voluntary petition for relief under chapter 11 of Title 11 of the United State Code in the United States Bankruptcy Court for the District of Delaware:

- Sea Launch Company, L.L.C.
- Sea Launch Limited Partnership
- Platform Company, LDC
- Platform Limited Partnership
- Sea Launch ACS Limited
- Sea Launch ACS Limited Partnership

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	)	Chapter 11
	)	
SEA LAUNCH COMPANY, L.L.C., *et al.*,[1]	)	Case No. 09-_____
	)	
Debtors.	)	Joint Administration Pending
	)	

CONSOLIDATED LIST OF CREDITORS HOLDING THE THIRTY LARGEST UNSECURED CLAIMS AGAINST THE DEBTORS

The following is the consolidated list of creditors (the "List of Creditors") holding the thirty (30) largest unsecured claims against Sea Launch Company, L.L.C ("Sea Launch") and its wholly-owned subsidiaries, each a debtor and debtor-in-possession in the above-captioned cases (collectively, the "Debtors"). The List of Creditors reflects the estimated amounts owed by the Debtors as of June 22, 2009 (the "Petition Date"), as reflected in the Debtors' books and records, and may not reflect the actual amounts owing by the Debtors as of the Petition Date. The List of Creditors does not include any unsecured claims that a Debtor may hold against another Debtor.

The Debtors take no position at this time regarding whether any of the parties included in the List of Creditors are "insiders" of the Debtors, as that term is defined in section 101(31) of title 11 of the United States Code (the "Bankruptcy Code"), and the inclusion in or exclusion from this List of Creditors of any person or entity shall not constitute an admission by, nor shall it be binding on, the Debtors in any respect. The Debtors expressly reserve the right to, in their sole discretion, challenge the validity, priority and/or amount of any obligation reflected herein.

(1) *Name of creditor and complete mailing address including zip code*	(2) *Name, telephone number and complete mailing address, including zip code, of employee, agent, or department of creditor familiar with claim who may be contacted*	(3) *Nature of claim (trade debt, bank loan, government contract, etc.)*	(4) *Indicate if claim is contingent, unliquidated, disputed, or subject to setoff*	(5) *Amount of claim [if secured, also state value of security]*
Boeing Commercial Space Co. P. O. Box 3707 Seattle, Washington 98124	**Boeing Commercial Space Co. P. O. Box 3707 Seattle, WA 98124 Ph: 206-655-1131**	**Loans, Trade Debt, Partner Liabilities**	**Contingent Unliquidated Disputed Subject to Setoff**	**$977,533,990.20**

[1] The last four digits of the taxpayer identification numbers for each of the Debtors follow in parenthesis: (i) Sea Launch Company, L.L.C. (1590); (ii) Sea Launch Limited Partnership (Cayman) (8182); (iii) Sea Launch ACS Limited (5999); (iv) Sea Launch ACS Limited Partnership (Isle of Man) (6216); (v) Platform LDC (3177); and (vi) Platform Limited Partnership (3173). The mailing address for all of the Debtors is 2700 Nimitz Road, Long Beach, CA 90802.

(1) *Name of creditor and complete mailing address including zip code*	(2) *Name, telephone number and complete mailing address, including zip code, of employee, agent, or department of creditor familiar with claim who may be contacted*	(3) *Nature of claim (trade debt, bank loan, government contract, etc.)*	(4) *Indicate if claim is contingent, unliquidated, disputed, or subject to setoff*	(5) *Amount of claim [if secured, also state value of security]*
Aker Maritime Finance AS **Lilleakerveien 8** **P.O. Box 245, Lilleaker** **NO-0216 Oslo** **Norway**	**Aker ASA** **Fjordalleen 16** **P.O. Box 1423 Vika** **NO-0115 Oslo** **Norway** **Ph: +47 24 13 00 00** **Fax: +47 24 13 01 01**	**Loans, Trade Debt, Partner Liabilities**	**Contingent Unliquidated Disputed Subject to Setoff**	**$312,744,106.00**
PO Yuzhnoye Mashinostroitel Ny Zavod P.A. **1, Krivorozhskaya Street** **Dniepropetrovsk, 49008** **Ukraine**	**1, Krivorozhskaya Street** **Dniepropetrovsk, 49008** **Ukraine**	**Trade Debt, Partner Liabilities**	**Contingent Unliquidated Disputed Subject to Setoff**	**$140,665,041.00**
S. P. Korolev Rocket and Space Corporation Energia **Russia 141070,** **Moscow Region, Korolev** **4a Lenin Street**	**S. P. Korolev Rocket and Space Corporation Energia** **Attn: Mr. V. Legostaev** **Russia 141070** **Moscow Region, Korolev** **4a Lenin Street** **Ph: (495) 513-72-48** **Fax: (495) 513-86-20** **E-mail: post@rsce.ru**	**Trade Debt; Partner Liabilities**	**Contingent Unliquidated Disputed Subject to Setoff**	**$74,135,335.00**
Hughes Network Systems, LLC **11717 Exploration Lane** **Germantown, MD 20876**	**Kenneth D. Klein, Esq.** **Amy M. Gallegos, Esq.** **Hogan & Hartson LLP** **1999 Avenue of the Stars, Suite 1400** **Los Angeles, CA 90067** **Ph: (310) 785-4725** **Fax: (310) 785-4601**	**Arbitration Award**	**Disputed**	**$52,300,000.00**
ING Bank N.V. **1 South Orange Street** **Wilmington, DE 19801**	**1 South Orange Street** **Wilmington, DE 19801** **Ph: (800) 464-3473** **Fax. (302) 658-7707**	**Loans ($27,222,222.21 and $16,666,667.00)**		**$43,888,889.21**
Bayerische Landesbank New York Branch **560 Lexington Avenue, 22nd Floor** **New York, N.Y. 10022**	**560 Lexington Avenue, 22nd Floor** **New York, N.Y. 10022** **Ph: (212) 310-9800** **Fax: (212) 310-9822**	**Loans ($22,685,185.18 and $16,666,667.00)**		**$39,351,852.18**
Calyon New York Branch **1301 Avenue of the Americas** **New York, NY 10019**	**Legal Department** **1301 Avenue of the Americas** **New York, NY 10019** **Ph: (212) 261-7000** **Fax: (212) 459-3182**	**Loans ($22,685,185.18 and $16,666,667.00)**		**$39,351,852.18**
Sumitomo Mitsui Banking Corporation **601 South Figueroa Street, Suite 1800** **Los Angeles, CA 90017**	**601 South Figueroa Street, Suite 1800,** **Los Angeles, CA 90017** **Ph: (213) 452-7800** **Fax: (213) 623-6832**	**Loan ($13,611,111.11; $16,666,667.00 and $3,100,000.00)**		**$33,377,778.11**

(1) *Name of creditor and complete mailing address including zip code*	(2) *Name, telephone number and complete mailing address, including zip code, of employee, agent, or department of creditor familiar with claim who may be contacted*	(3) *Nature of claim (trade debt, bank loan, government contract, etc.)*	(4) *Indicate if claim is contingent, unliquidated, disputed, or subject to setoff*	(5) *Amount of claim [if secured, also state value of security]*
Citicorp USA, Inc 388 Greenwich St. New York, NY 10013	**Attn: Joseph J. Martinelli 388 Greenwich St. New York, NY 10013**	**Loan**		**$31,759,259.29**
Sanpaolo IMI S.p.A. Piazza San Carlo, 156 10121 Torino	**Piazza San Carlo, 156 10121 Torino**	**Loan**		**$31,759,259.26**
PNC Bank, National Association One PNC Plaza 249 Fifth Avenue Pittsburgh, PA 15222-2707	**One PNC Plaza 249 Fifth Avenue Pittsburgh, PA 15222-2707 Ph: (412) 762-2000 Fax: (412) 762-7829**	**Loans ($13,611,111.11 and $16,666,666.00)**		**$30,277,777.11**
AEGON USA Investment Mgmt Inc. 4333 Edgewood Road, N.E. Cedar Rapids, Iowa 52499-5335	**Liz Taylor Email: lataylor@aegonusa.com Fax: (502) 560-2030 4333 Edgewood Road, N.E. Cedar Rapids, Iowa 52499-5335**	**Loan**		**$30,000,000.00**
JP Morgan Chase Bank, N.A.	**Legal Department 270 Park Ave, 8th Fl New York, NY 10017 Ph: 800-242-7338 Fax: (866) 699-0618**	**Loan**		**$27,222,222.22**
Allstate Life Insurance Company 3075 Sanders Road; Suite G4A Northbrook, IL 60062	**Allstate Life Insurance Company Allstate Investments LLC Attn: Matthew Carter 3075 Sanders Road; Suite G4A Northbrook, IL 60062 Email: matthew.carter@allstate.com Fax: (847) 326-7032**	**Loan**		**$25,000,000.00**
Hartford Life Insurance Company P.O. Box 1744 Hartford, CO 06144-1744	**Jayme Lamthere Email:jayme.lamthere@thehartford.com Fax: (860) 297-8875 c/o Investment Department - Private Placements P.O. Box 1744 Hartford, CO 06144-1744**	**Loans ($12,000,000.00 and $13,000,000.00)**		**$25,000,000.00**
Wachovia Bank, N.A. P.O. Box 536966 Charlotte, NC 28256-3966	**P.O. Box 536966 Charlotte, NC 28256-3966 Ph: 1 (800) 922-4684 Fax number not listed by company**	**Loan**		**$22,685,185.18**

(1) *Name of creditor and complete mailing address including zip code*	(2) *Name, telephone number and complete mailing address, including zip code, of employee, agent, or department of creditor familiar with claim who may be contacted*	(3) *Nature of claim (trade debt, bank loan, government contract, etc.)*	(4) *Indicate if claim is contingent, unliquidated, disputed, or subject to setoff*	(5) *Amount of claim [if secured, also state value of security]*
Societe Generale **17 Cours Valmy** **92972 Paris** **La Defense Cedex** **France**	**Societe Generale** **17 Cours Valmy** **92972 Paris** **La Defense Cedex** **France** **c/o CT Corporation System** **818 West Seventh Street** **Los Angeles, CA 90017** **Ph: 213-996-8581** **Fax: 213-996-8542**	**Loan**		**$16,666,666.00**
Banca di Roma - San Francisco Branch **1 Market Plaza, Steuart Tower, Suite 1000** **San Francisco, CA 94105**	**Attn: Luca Balestra** **1 Market Plaza, Steuart Tower, Suite 1000** **San Francisco, CA 94105**	**Loan**		**$13,611,111.11**
Massachusetts Mutual Life Insurance Co. **1500 Main Street** **Springfield, MA 01115**	**Massachusetts Mutual Life Insurance Co.** **c/o Babson Capital Management LLC** **1500 Main Street** **Springfield, MA 01115** **Mary Deboise** **Email: mdeboise@babsoncapital.com** **Steven Anderstrom** **Email: sanderstrom@babsoncapital.com** **Fax: (413) 226-2819**	**Loans ($1,650,000.00; 4,000,000.00 and $7,900,000.00)**		**$13,550,000.00**
Banco Bilbao Vizcaya Argentaria S.A. **580 California Street, Ste.1900** **San Francisco, CA 94104**	**Attn: Alfonso Balba** **580 California Street, Ste.1900** **San Francisco, CA 94104**	**Loan**		**$9,074,074.07**
Deutsche Bank AG New York Branch **60 Wall Street** **New York, NY 10005**	**60 Wall Street** **New York, NY 10005** **Ph: 212 250 2500** **Fax: no US direct fax number available - 49 69 910-34225 (Germany)**	**Loan**		**$9,074,074.07**
KB Yuzhnoye **3, Krivorozhskaya Street** **Dniepropetrovsk, 49008, UKRAINE**	**3, Krivorozhskaya Street** **Dniepropetrovsk, 49008, UKRAINE** **Ph: +380 56 770 04 47** **Fax: +380 56 770 01 25**	**Trade Debt; Partner Liabilities**	**Contingent Unliquidated Disputed Subject to Setoff**	**$6,835,777.00**
Boeing – IDS **PO Box 516** **St Louis MO 63166-0000**	**PO Box 516** **St Louis, MO 63166-0000** **Ph: (314) 232-0232** **Fax number not listed by company**	**Trade Debt**	**Contingent Unliquidated Disputed Subject to Setoff**	**$6,161,677.80**

(1) *Name of creditor and complete mailing address including zip code*	(2) *Name, telephone number and complete mailing address, including zip code, of employee, agent, or department of creditor familiar with claim who may be contacted*	(3) *Nature of claim (trade debt, bank loan, government contract, etc.)*	(4) *Indicate if claim is contingent, unliquidated, disputed, or subject to setoff*	(5) *Amount of claim [if secured, also state value of security]*
Allstate Insurance Company 3075 Sanders Road, STE G5D Northbrook, IL 60062-7127	**Attention: Private Placements Department 3075 Sanders Road, STE G5D Northbrook, IL 60062-7127 Email: privateIOD@allstate.com Ph: (847) 402-6672**	**Loan**		**$5,000,000.00**
CM Life Insurance Co 1500 Main Street Springfield, MA 01115	**c/o Babson Capital Management LLC 1500 Main Street Springfield, MA 01115 Mary Deboise Email: mdeboise@babsoncapital.com Steven Anderstrom Email: sanderstrom@babsoncapital.com Fax: (413) 226-2819**	**Loan**		**$1,450,000.00**
Ukrobonservice State Enterprise Lepse Blvd.4 Kyiv 03067 Ukraine	**Lepse Blvd.4 Kyiv 03067 Ukraine Ph : +380 44 5866245 Fax : +380 44 5866256**	**Trade Debt**		**$605,628.00**
Marsh USA, Inc. PO Box 19601 Newark, NJ 07195-0601	**Marsh USA, Inc. PO Box 19601 Newark, NJ 07195-0601 Ph: (212) 345-6000 Fax: (212) 345-4808 Marsh USA, Inc. Dept. 44509 PO Box 44000 San Francisco, CA 94144-4509 Ph: (415) 743-8000 Fax: (415) 743-8080**	**Insurance Contract**		**$464,749.99**
Port of Long Beach	**Port of Long Beach P. O. Box 570 Long Beach CA 91801-0000 Ph: (562) 590-4136 Fax: (562) 901-1727**	**Lease**		**$307,500.00**
Barwill Ukraine Ltd. 4D Shevchenko Ave Business Centre Shevchenkoskiy Ollice 23-24	**Barwill Oslo in favor of Barwill Ukraine Ltd. Strandveien 20, P.O.Box 33 NO-1324 Lysaker Oslo, Norway Ph: +47 67 58 47 00 Fax: +47 67 58 45 70 barwil.oslo@barwil.com**	**Trade Debt**	**Disputed**	**$227,891.09**

DECLARATION REGARDING THE CONSOLIDATED LIST OF CREDITORS HOLDING THE THIRTY LARGEST UNSECURED CLAIMS AGAINST THE DEBTORS

I, Brett A. Carman, Vice President and Chief Financial Officer of Sea Launch Company, L.L.C., the General Partner in Sea Launch Limited Partnership and direct or indirect owner of Sea Launch ACS Limited Partnership, Sea Launch ACS Limited, Platform Limited Partnership, and Platform LDC (collectively, the "Debtors"), and in such capacity am familiar with the financial affairs of the Debtors. I declare under penalty of perjury that I have read and reviewed the foregoing Consolidated List of Creditors Holding the Thirty Largest Unsecured Claims Against the Debtors and that the information included therein is true and correct to the best of my knowledge, information and belief.

Date **June 22, 2009** Signature **/s/ Brett A. Carman**

Brett A. Carman
Vice President and Chief Financial Officer
Sea Launch Co., L.L.C.

Penalty for making a false statement or concealing property: Fine of up to $500,000 or imprisonment for up to 5 years or both.
18 U.S.C. §§ 152 and 3571.

SEA LAUNCH LIMITED PARTNERSHIP
CONFIDENTIAL AND PROPRIETARY INFORMATION.

SEA LAUNCH LIMITED PARTNERSHIP
CERTIFICATE OF RESOLUTION

June 2009

Resolution Number 2009-06-6-99

Sea Launch Company, L.L.C., a Delaware limited liability corporation, by and through Kjell Karlsen, its undersigned President and General Manager, as General Partner in Sea Launch Limited Partnership, a Cayman Islands limited partnership (the "Partnership") and pursuant to the General Partner's authority and management powers under the Agreement of Sea Launch Limited Partnership, hereby resolves as follows;

WHEREAS, the General Partner has determined that the Partnership does not have sufficient funds to pay its debts and does not have the ability to refinance such debts, and it has been proposed that the Partnership file a petition seeking relief under the provisions of Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code").

NOW, THEREFORE, BE IT RESOLVED, that in the judgment of the General Partner, it is desirable and in the best interests of the Partnership, its creditors, partners, and other interested parties, that a petition be filed by the Partnership seeking relief under the provisions of Chapter 11 of the Bankruptcy Code; and it is further

RESOLVED, that the individual duly appointed by the Members of the General Partner as President and General Manager of the General Partner (the "Authorized Officer") is authorized and directed, for and on behalf of and in the name of the Partnership, to execute and verify or certify a petition under Chapter 11 of the Bankruptcy Code and to cause the same to be filed with the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") at such time as such officer executing the same shall determine; and it is further

RESOLVED, that the law firms of Alston & Bird LLP, One Atlantic Center, 1201 West Peachtree Street, Atlanta, GA 30309-3424; Young, Conaway Stargatt & Taylor LLP, The Brandywine Building, 1000 West Street, 17 Floor, Wilmington, Delaware 19801; and Thorp Alberga, Harbor Place, 2nd Floor, 103 South Church Street, P.O. Box 472, George Town, Grand Cayman KY1-1106, Cayman Islands be employed as counsel for the Partnership, and all related debtors, for the purposes of its Chapter 11 case and otherwise; and it is further

RESOLVED, that the appointment of Thorp Alberga to act as Cayman Islands legal counsel for the Partnership, including its appointment to represent

SEA LAUNCH LIMITED PARTNERSHIP
CONFIDENTIAL AND PROPRIETARY INFORMATION.

and defend the Partnership's interests in respect of inter alia any corporate reorganization, litigation, liquidation, winding up or dissolution proceedings, actions or filings in the Courts of the Cayman Islands, be and is hereby approved, confirmed and ratified in all respects, and that Thorp Alberga is hereby authorized and instructed to appoint such additional counsel to represent the Partnership as it thinks necessary or desirable including, but not limited to, the appointment of Queens Counsel; and it is further

RESOLVED, that the Authorized Officer, and such other officers as the General Partner shall from time to time designate, be, and they hereby are, authorized and empowered to execute and file all petitions, schedules, lists, and other papers and to take any and all action that they may deem necessary or proper to commence and administer the Chapter 11 case, and in that connection to retain and employ all assistance by attorneys, investment bankers, accountants and other professionals that they may deem necessary or proper with a view to the successful administration of the Chapter 11 case; and it is further

RESOLVED, that the Authorized Officer be, and hereby is, authorized, empowered and directed to take all other actions and do all other things additional to the execution and delivery of documents as he, in his discretion, may deem necessary or desirable and in the best interests of the Partnership in connection with the foregoing resolutions, this taking of any such action or his doing of any such thing for and on behalf and in the name of the Partnership to be conclusive evidence that he did so deem the same to be necessary or desirable and in the best interests of the Partnership; and it is further

RESOLVED, that the Authorized Officer is hereby authorized, empowered and directed to do all things and to take all actions which such officer may deem necessary or advisable to accomplish the purposes and intent of the foregoing resolutions.

IN WITNESS WHEREOF, I have hereunto set my hand this ____ day of June 2009.

SEA LAUNCH LIMITED PARTNERSHIP acting through its General Partner, Sea Launch Company, L.L.C.

By: _____

Name: Kjell Karlsen

Title: President and General Manager, Sea Launch Company, L.L.C.

United States Bankruptcy Court
District of Delaware

In re **Sea Launch Limited Partnership** Debtor(s)

Case No.

Chapter **11**

LIST OF EQUITY SECURITY HOLDERS

Following is the list of the Debtor's equity security holders which is prepared in accordance with rule 1007(a)(3) for filing in this Chapter 11 Case

Name and last known address or place of business of holder	Security Class	Number of Securities	Kind of Interest
Boeing Commerical Space Co P. O. Box 3707 Seattle, Washington 98124		**152,000 Units**	**38% Ownership**
KB Yuzhnoye 3, Krivorozhskaya Street Dniepropetrovsk, 49008, Ukraine		**19,000 Units**	**4.75% Ownership**
Kvaerner Sea Launch Limited and Kvaerner US Sea Launch Inc. c/o Aker ASA Fjordalleen 16 P.O. Box 1423 Vika NO-0115 Oslo Norway		**76,000 Units**	**19% Ownership**
PO Yuzhnye Mashinostroitelny Zavod PA 1, Krivorozhskaya Street Dniepropetrovsk, 49008, Ukraine		**38,000 Units**	**9.5% Ownership**
S. P. Korolev Rocket and Space Corporation Energia		**95,000 Units**	**23.75% Ownership**
Sea Launch Company L.L.C. 2700 Nimitz Road Long Beach, CA 90802		**20,000 Units**	**5% Ownership**

DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF CORPORATION OR PARTNERSHIP

I, the President and Manager of Sea Launch Co., L.L.C., and the Authorized Officer of the partnership named as the debtor in this case, declare under penalty of perjury that I have read the foregoing List of Equity Security Holders and that it is true and correct to the best of my information and belief.

Date 6/22/09

Signature /s/ Kjell Karlsen
Kjell Karlsen, Authorized Officer

Penalty for making a false statement of concealing property: Fine of up to $500,000 or imprisonment for up to 5 years or both. 18 U.S.C. §§ 152 and 3571.

ITEM NO. 116

JA-2

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	)	Chapter 11
	)	
SEA LAUNCH COMPANY, L.L.C., *et al.*,[1]	)	Case No. 09-12153
	)	
Debtors.	)	Joint Administration Pending
	)	

DECLARATION OF BRETT A. CARMAN IN SUPPORT OF CHAPTER 11 PETITIONS AND FIRST DAY MOTIONS

I, Brett A. Carman, declare and state as follows:

I. GENERAL BACKGROUND

1. I am the Vice President and Chief Financial Officer of Sea Launch Company, L.L.C., a Delaware limited liability company ("**Sea Launch Company**"), one of the above-captioned debtors (the "**Debtors**"). I have been employed by the Debtors since 1999 and I am familiar with the day-to-day operations, businesses, and financial affairs of the Debtors.

2. I submit this Declaration in support of the Debtors' petitions for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "**Bankruptcy Code**"), and the Debtors' First Day Motions (as defined below). I am authorized to submit this Declaration on behalf of the Debtors.

3. Upon commencement of these Chapter 11 cases (the "**Bankruptcy Cases**"), the Debtors will continue to operate as debtors in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

[1] The last four digits of the taxpayer identification numbers for each of the Debtors follow in parenthesis: (i) Sea Launch Company, L.L.C. (1590); (ii) Sea Launch Limited Partnership (Cayman) (8182); (iii) Sea Launch ACS Limited (5999); (iv) Sea Launch ACS Limited Partnership (Isle of Man) (6216); (v) Platform LDC (3177); and (vi) Platform Limited Partnership (3173). The mailing address for all of the Debtors is 2700 Nimitz Road, Long Beach, CA 90802.

4. I submit this Declaration to assist the Court and other parties in interest in understanding the circumstances that compelled the commencement of these Bankruptcy Cases, and in support of the First Day Motions.

5. Except as otherwise indicated, all statements in this Declaration are based on my personal knowledge, my review of relevant documents or my opinion based upon my experience and knowledge of the Debtors' business operations and financial condition. If I were called upon to testify, I could and would testify to each of the facts set forth herein based on such personal knowledge, review of the documents or opinion.

II. OVERVIEW OF THE DEBTORS' BUSINESSES

A. The Debtors' Formation

6. Sea Launch Limited Partnership, a Cayman Islands exempted limited partnership ("**Sea Launch LP**"); its General Partner, Sea Launch Company, L.L.C. ("**Sea Launch Company**"); and its direct and indirect subsidiaries, Sea Launch ACS Limited, an Isle of Man exempted company ("**Sea Launch ACS**"); Sea Launch ACS Limited Partnership, an Isle of Man exempted limited partnership ("**Sea Launch ACS LP**"); Platform LDC, a Cayman Islands exempted limited duration company ("**Platform LDC**"); and Platform Limited Partnership, a Cayman Islands exempted limited partnership ("**Platform LP**" and collectively, with Sea Launch Company, Sea Launch LP, Sea Launch ACS, Sea Launch ACS LP, and Platform LDC, the "**Debtors**") were formed in May 1995 by Boeing Commercial Space and Communications ("**Boeing**"); RSC Energia, a corporation partly owned by the Government of Russia ("**Energia**"); Kvaerner US Sea Launch Inc. (US) and Kvaerner Sea Launch Ltd. (UK) (9.5%) located in Oslo, Norway (collectively "**Aker**"),[2] Yuzhnoye State Design Office ("**Yuzhnoye**"), a

[2] The Aker entities are collectively owned by Aker Maritime Finance AS (formerly Kvaerner ASA).

corporation wholly owned by the Government of Ukraine; and PA Yuzhny Mashinostroitelny Zavod, a corporation wholly owned by the Government of Ukraine ("**Yuzhmash**" and, collectively with Boeing, Energia, Aker and Yuzhnoye, the "**Investors**").[3]

7. Though the Debtors have approximately 100 suppliers of goods and services, the goods and services provided by the Investors make up a substantial portion of the costs associated with the Debtors' day-to-day operations and the costs incurred in connection with the commercial launch of satellites. For example, the majority of all capital equipment purchased by the Debtors related to their commercial launch of satellites was either purchased from or constructed and installed by the Investors.

B. The Debtors' Operations

8. The Debtors comprise a business that draws upon an international consortium of American, Russian, Ukrainian and Norwegian businesses and provides a reliable, cost effective, heavy-lift commercial satellite launch service for primarily commercial customers.

9. The Debtors offer a one-of-a-kind sea-based equatorial launch site that provides the most direct route to geostationary orbit, offering maximum lift capacity for increased payload mass or extended spacecraft life.

10. For equatorial launches, the Debtors provide fully integrated launch services out of their home port in Long Beach, California. Specifically, following completion of fueling and encapsulation in the state-of-the-art payload processing facility, the satellite payload capsule is transferred to the assembly command ship named "Sea Launch Commander" (the "**ACS**") for integration with the launch rocket. After the satellite capsule is integrated into the launch rocket,

[3] The Investors have the following approximate percentage ownership interests: (a) Boeing: 40%; (b) Energia – 25%; (c) Aker – 20%;(d) Yuzhoye – 10%;(e) Yuzhmash – 5%.

the integrated rocket is transferred to the launch platform, where it is stored in an environmentally controlled hangar during transit to the launch site at the equator.

11. At the equatorial launch site, once the launch platform is positioned, the launch rocket is rolled out of its environmentally protected hangar and automatically erected on the semi-submersible launch platform named "Odyssey" (the "**Launch Platform**") and prepared for launch. After the launch rocket receives its final preparations, the satellite is a "go" for launch.

12. In 2005, using existing infrastructure at the Baikonur Space Center, in Kazakhstan, the Debtors supplemented their equatorial sea-based launch site with a land-based launch system based upon the Debtors' sea-based launch vehicle. At the land-based site, the Debtors provide contracting and management functions for the land launch system. Space International Services, Ltd., based in Moscow, provides hardware and services originating in Russia, Ukraine and Kazakhstan, in a subcontracting arrangement with the Debtors.

13. In addition to forming Sea Launch LP, Yuzhnoye, Yuzhmash, Energia, and Boeing have provided and continue to provide certain goods and services to the Debtors.

14. Yuzhnoye and Yuzhmash design and manufacture the first and second stages of the rocket that the Debtors use to launch their customers' commercial satellites. Yuzhnoye also provides payload integration and mission analysis ("**PIMA**") services to the Debtors, along with Energia and Boeing. The PIMA services are required to launch each particular satellite into its proper orbit. Yuzhnoye and Yuzhmash also provide the Debtors with necessary personnel to conduct and oversee the launch operations, along with Energia and Boeing.

15. Energia designs and builds the third or upper stage of the rocket that provides the final propulsion to place the satellites into geosynchronous orbit. As described above, in

addition to the upper stage rocket, Energia also provides the Debtors with essential PIMA services and necessary personnel to conduct and oversee the launch operations.

16. Boeing designs and builds the payload assembly that encapsulates and protects the satellites during the initial ascent of the launch. As described above, in addition to the payload assembly, Boeing also provides the Debtors with essential PIMA services and necessary personnel to conduct and oversee the launch operations.

17. Aker designed, built, and modified the ACS and the Launch Platform, both of which form the infrastructure of the Debtors' marine-based satellite launch system. Yuzhnoye, Yuzhmash, and Energia manufactured and installed the launch support systems on the ACS and the Launch Platform.

C. Launch History

18. On March 27, 1999, the Debtors executed a precisely controlled inaugural flight that demonstrated their sea-based launch facilities – the Launch Platform. The success of the Debtors' inaugural mission represented the culmination of four years of intense development work performed by aerospace and marine professionals throughout the world. Since the Debtors' inaugural mission, the Debtors have experienced performance enhancements that have enabled them to increase the payload capacity of their launch vehicles, increase reliability, and streamline processing operations.

19. Since the successful inaugural flight, the Debtors have experienced twenty-nine (29) successful launches, twenty-seven (27) from the Launch Platform (sea-based) and two (2) from the Baikonur Space Center (land-based), the most recent of which occurred on Sunday, June 21, 2009.

D. Customer Payments/Obligations

20. The Debtors' primary customers consist of commercial satellite manufacturers and operators in the United States and throughout the world. Due to timing and financial requirements associated with launching commercial satellites, pursuant to the terms of the parties' launch services agreement, customers remit initial payments and progress payments (collectively, the "**Payments**") to the Debtors for launch services to be provided in the future.

21. All customer launch services agreements contain termination clauses that enable customers to terminate the agreements for cause or to repurpose (i.e., modify) the launch detail. Depending on the reason for the termination, a creditor may be entitled to a return of all of the Payments or a fraction thereof.

E. Launch Anomaly

22. On January 30, 2007, the Debtors experienced an unsuccessful launch on their 24th sea-based mission (the "**Launch Anomaly**"). The incident occurred seconds after ignition, resulting in the loss of both the launch vehicle and its payload. While the Launch Platform remained intact and suffered no structural damage, critical launch support equipment was damaged. Accordingly, the Debtors decided to bring the Launch Platform and ACS back to their home port for inspection and necessary repairs.

23. As a result of the Launch Anomaly and the required inspection and repair, the Debtors informed Hughes Network Systems, LLC ("**Hughes**") that it would be unable to proceed with the Hughes launch schedule to occur in May 2007 (the "**Hughes Launch**").[4] Hughes entered into negotiations with one of the Debtors' competitors, Arianespace, to arrange a

[4] The Hughes Launch was originally scheduled to occur in March 2007.

replacement launch in July or August 2007. Thereafter, Hughes announced that it had entered into a launch services agreement with Arianespace for the replacement launch.

24. In response to Hughes' launch services agreement with Arianespace, a dispute arose between the Debtors and Hughes concerning Hughes' obligation to proceed with the Hughes Launch, the status of the Hughes Launch, the effect of Hughes' contract with Arianespace, and the parties' rights and obligations.

25. On May 11, 2007, Hughes terminated the launch services agreement relating to Hughes' Spaceway-3 Launch as a result of the Launch Anomaly and filed a claim for the refund of $44,400,000 in advance payments plus interest related to the launch contract. The Debtors contested the validity of Hughes' termination and/or its entitlement to any amounts. In March 2009, the International Centre for Dispute Resolution concluded that Hughes was entitled to recover the amounts advanced plus simple interest at a rate of 10% per annum on the advances, accruing from July 10, 2007, plus the arbitration expenses, totaling approximately $52.3 million (the "**Hughes Arbitration Award**").

26. After the International Centre for Dispute Resolution entered the Hughes Arbitration Award, Hughes and the Debtors entered into a standstill agreement whereby Hughes agreed not to confirm or otherwise seek to enforce the Hughes Arbitration Award.

27. After the expiration of the standstill agreement, Hughes filed its Petition for Confirmation of Arbitration Award in the Superior Court of the State of California for the County of Los Angeles on June 4, 2009. Hughes and the Debtors subsequently entered into a stipulation extending the time within which the Debtors had to answer the petition to enforce the Hughes Arbitration Award through and including June 22, 2009.

F. Return to Sea-Based Launch Capabilities

28. On November 1, 2007, the Debtors dispatched the Launch Platform and ACS for the launch of the Thuraya-3 satellite. After minor weather delays, the first post-anomaly liftoff proceeded without complication on January 15, 2008.

29. Since the January 15, 2008 launch, the Debtors have had seven (7) successful launches, five (5) from the Launch Platform (sea-based) and two (2) from the Baikonur Space Center (land-based).

30. On April 20, 2009, the Debtors successfully launched Telespazio's SICRAL 1B communications satellite from the Launch Platform.

31. On June 21, 2009, the Debtors successfully launched MEASAT Satellite Systems' MEASAT-3a communications satellite from the Baikonur Space Center.

III. DEBTORS' DEBT STRUCTURE

A. Bank Debt

32. On October 13, 2004, Debtor Sea Launch ACS LP completed the financing of its Sea Launch ACS Loan (the "**ACS Loan**") for $31,000,000 with Sumitomo Mitsui Banking Corporation. The ACS Loan accrues interest at a rate of 4.0375% and matures on October 13, 2009. The current balance on the ACS Loan is approximately $3.1 million and Boeing and Aker have guaranteed the ACS Loan in full.

33. On July 13, 2005, Sea Launch LP entered into a $100,000,000 Private Placement Loan through Citibank (the "**Citibank Loan**"). The Citibank Loan matures on July 12, 2015, with a balloon payment of full principal amount due at maturity. Interest on the Citibank Loan accrues interest at a floating rate, based on the three-month USD Libor and is paid quarterly.

34. On August 31, 2005, Sea Launch LP entered in a $100,000,000 credit agreement arranged by Sumitomo Mitsui Banking Corporation (the "**Sumitomo Credit Agreement**"). The Sumitomo Bank Loan matures on August 31, 2010, with a balloon payment of full principal amount due at maturity. Interest on the Sumitomo Bank Loan accrues interest at a floating rate, based on the three-month USD Libor and is paid quarterly.

35. On June 19, 2006, Sea Launch LP signed an amended and restated credit agreement with Citicorp USA, Inc. (the "**Citibank $260m Loan**") that replaced a previous loan with Citicorp USA, Inc. (the "**Citibank $270m Loan**"). On June 12, 2008, Sea Launch signed letter Amendment No. 1 to the Citibank $260m Loan, which eliminated the installment payment due in 2008 and revised the amount due upon maturity to $245,000,000. Interest on the Citibank $260m Loan accrues interest at a floating rate, based on the USD Libor rate. Boeing and Aker have guaranteed the Citibank $260m Loan in full.

36. The principal payment requirements associated with the ACS Loan, the Citibank Loan, the Sumitomo Credit Agreement, and the Citibank $260m Loan (collectively, the "**Bank Loans**") require principal payments of $251,200,000 in 2009; $100,000,000 in 2010; no payments in 2011, 2012, or 2013; and $100,000,000 thereafter.

B. Investor Debt

Investor Loans

37. In addition to providing essential goods and services to the Debtors, since the Debtors' formation, the Investors have provided significant financial resources to the Debtors. First, in February 1996, Boeing and Aker entered into loan agreements with the Debtors whereby Boeing and Aker lent the Debtors $276,000,000 (the "**Investor Loans**"). Upon the issuance of the Bank Loans, the Investors subordinated the Investor Loans to the Bank Loans.

38. The Investor Loans originally accrued interest at an annual rate of interest of 12% per year, compounded quarterly. In February 2002, Boeing and Aker agreed to lower the interest rate on the Investor Loans to 6% effective January 1, 2002, and continuing through December 31, 2004. Subsequently, Boeing and Aker agreed to maintain the interest rate at 6% through December 2008, at which time the interest rate will be reevaluated. As of December 31, 2008, the balance of the Investor Loans, including principal and interest, totaled $760,801,984. Energia, Yuzhnoye, and Yuzhmash guaranteed the Investor Loans.

39. Pursuant to the terms of the Investor Loans, the Debtors' repayment obligations are tied to the Debtors' ability to make distributions to the Investors. Specifically, the Debtors are required to pay Boeing and Aker 100% of cash available for distribution to the Investors, after all external debts have been repaid, until the Investor Loans are repaid in full.

40. In connection with the Investor Loans, Sea Launch LP granted Boeing and Aker a security interest in all revenues, income, receipts, and money received by or on behalf of Sea Launch LP, as a stand-alone entity, and real property, equipment furnishings, fixtures, and other tangible personal property owned by Sea Launch LP, in existence or acquired. Boeing and Aker, however, took no steps to perfect their security interests and, therefore, do not hold perfected security interests in any property of the Debtors.

Cost Overruns

41. During the Debtors' development phase, the Investors experienced cost overruns on certain fixed-price contracts that the Investors had with the Debtors (the "**Cost Overruns**"). These Cost Overruns totaled $119,000,000. In 1998, the Investors determined that the Debtors would reimburse the Investors for the Cost Overruns. However, due to insufficient funds, in

2000 the Investors agreed to defer the Debtors' obligation to repay the Cost Overruns for an indefinite period of time without interest. The Cost Overruns remain outstanding.

IV. THE DEBTORS' BUSINESS AND LIQUIDITY CRISIS

42. Since its formation, the Debtors have struggled to recognize the success envisioned and during the Debtors' development phase, the Debtors experienced Cost Overruns totaling $119,000,000. Because the Debtors were not yet able to provide commercial launch services, the Debtors incurred indebtedness to finance its developmental costs as well as day-to-day cash needs. Though the Debtors successfully completed the design and construction of the ACS and Launch Platform, and have had a number of significant and valuable launch services contracts, due to an unexpected increase in the costs of launch hardware (rockets and boosters), the cost of its debt, and government-financed competition, the Debtors have not been able to stabilize their business or meet their financial targets. As a result, the Debtors' cost structure is not in line with the revenues they can generate and has resulted in operating losses.

43. To manage the Debtors' liquidity position, the Investors agreed to defer the Debtors' obligation to repay the Cost Overruns for an indefinite period of time without interest. When the Debtors' liquidity worsened, to enable the Debtors to make required cash payments due and owing to unaffiliated creditors, the Debtors stopped paying the Investors for goods and services that the Investors provided to the Debtors in connection with the Debtors' launch services.

44. The Investors have been informed of the Debtors' decision to stop paying for ongoing goods and services provided and have consented to the decision.

45. The Debtors are actively pursuing launch opportunities with numerous customers. However, the Debtors' operating results have been negatively impacted by the worldwide

economic recession, a glut of available launch slots offered by competitors, and the Debtors' precarious finances.

46. Given the ongoing credit constrictions, economic decline, weakness in the commercial satellite industry, and the effect of the Launch Anomaly, the Debtors have been unable to resolve their liquidity and cash flow problems. Accordingly, the Debtors continue to look for alternatives.

V. THE DEBTORS ELECT TO SEEK RELIEF UNDER CHAPTER 11

47. As result of the Debtors' liquidity position, recurring losses from operations, declining conditions, the Launch Anomaly, and the Hughes Arbitration Award, the Debtors began to consider various alternatives to maximize the value of their businesses for the benefit of all of their stakeholders. Working with their counsel and advisors, the Debtors determined that commencing cases under Chapter 11 of the Bankruptcy Code provided the best avenue to preserve value and maximize the value of their estates.

VI. THE DEBTORS' INTENT TO MAXIMIZE GOING CONCERN VALUE

48. The Debtors intend to focus their reorganization efforts on restructuring their debt, reviewing their existing executory contracts to determine whether those contracts are in line with the Debtors' cost structure, and strengthening the Debtors' core operations. The Debtors also intend to explore the potential sale of one or more of their divisions, owned technology, or other business units to maximize the value of their businesses.

49. The bankruptcy filing also preserves the Debtors' ability to analyze their short-term and long-term obligations, and to determine what steps should be taken to preserve value for their estates.

VII. SUPPORT OF FIRST DAY MOTIONS

50. As a result of my first-hand experience, my review of various materials and information, discussions with the Debtors' executives, and discussions with the Debtors' advisors, I have formed opinions as to (a) the necessity of obtaining the relief sought by the Debtors in the motions addressed below (the "**First Day Motions**"), (b) the need for the Debtors to continue to operate effectively, and (c) the deleterious effects upon the Debtors of not obtaining such relief.

51. I have reviewed each of the First Day Motions (including the exhibits and schedules attached thereto) and, to the best of my knowledge, believe the facts set forth therein are true and correct. Such representation is based upon information and belief and through my review of various materials and information, as well as my experience and knowledge of the Debtors' operations and financial condition. In connection with the First Day Motions, I declare as follows:

A. Motion for Joint Administration

52. The Debtors' operations are conducted through multiple international entities, all of which are Debtors in these Bankruptcy Cases. The organization chart attached hereto as "Exhibit A" shows all of the Debtors. All of the Debtors are affiliates of one another because Sea Launch Company is the general partner of the entity that directly or indirectly owns 100% of each of the other Debtors.

53. Despite common ownership and interrelated business operations, each Debtor maintains separate books and records, including audited financial statements, and bank accounts (only Sea Launch LP and Sea Launch ACS maintain bank accounts).

54. Although the Debtors have separate and distinct assets, the Debtors work in concert to provide the Debtors' commercial satellite launch capabilities. Moreover, in providing their commercial launch services, the Debtors put forth a single integrated business model to their satellite launch customers. Accordingly, in some instances, multiple Debtors were parties to the same transaction or multiple related transactions. Therefore, many of the notices, applications, motions, and other pleadings filed, and much of the relief sought, in these cases will concern more than one, or all, of the Debtors. Moreover, the Debtors anticipate that these Bankruptcy Cases will proceed on the same timetable. Absent joint administration, the resources of the Debtors, the Court and other parties would be wasted by the filing and service of the same or similar pleadings in multiple cases.

55. The joint administration of these Bankruptcy Cases will ease the administrative burden on the Court by allowing the Clerk of the Court, parties in interest, and the Debtors to use a single general docket for these cases rather than maintaining and updating six different dockets. Similarly, joint administration will eliminate the need for duplicative notices, applications and orders, allowing the Debtors, their creditors and other parties in interest to file one pleading in a consolidated case rather than several pleadings in the Debtors' several individual cases, to combine and streamline service of those pleadings and other notices on creditors and other parties in interest, and to monitor these Bankruptcy Cases by reviewing one docket rather than six separate dockets. Joint administration will reduce the number of documents that must be prepared, filed and served in connection with these Bankruptcy Cases, reduce the administrative burden of coordinating these cases, and reduce the monitoring burden that these cases will impose on the Court, the Clerk of the Court, the Office of the United States Trustee and all other parties in interest.

56. The rights of the respective creditors of the Debtors will not be adversely affected by the proposed joint administration of these Bankruptcy Cases because the rights of each creditor against the respective estates will be preserved. The Debtors' Motion for Joint Administration is not a motion for substantive consolidation of the Debtors' estates and does not seek to change the relative rights and remedies of creditors against any of the individual Debtors. Accordingly, the substantive rights of parties in interest should not be prejudiced or otherwise negatively affected by the entry of an order directing the procedural joint administration of these Bankruptcy Cases.

B. Motion Regarding Cash Management

57. Sea Launch LP maintains three (3) Bank Accounts at Manufacturers Bank ("**Manufacturers**") that are regularly utilized in the course of the Debtors' businesses: the general depository account (the "**Depository Account**"), the general operating account (the "**Operating Account**"), and the account from which Sea Launch LP receives and issues payments relating to land launch missions (the "**Land Launch Account**"). Sea Launch LP also maintains two (2) Bank Accounts at City National Bank ("**City National**"): the account used only for customs, duties, and related fees, which has a zero balance (the "**Customs and Duties Account**"), and the account used for the reimbursement of employee expenses (the "**Reimbursement Account**"). Additionally, Sea Launch ACS maintains one account at Manufacturers from which Sea Launch ACS services its bank debt (the "**ACS Loan Account**").

58. Immediately prior to the Petition Date, Sea Launch LP transferred substantially all of its cash into the Reimbursement Account at City National, which previously had a balance of approximately $175,000.00 and on which no checks or obligations were outstanding. Sea Launch LP maintained only enough cash in the Operating Account to cover certain checks issued

prepetition, for which the Debtors are seeking authority to honor postpetition by separate motion, and nominal amounts in the other accounts so as to keep those accounts active. As a result, the Debtors will be able to identify all prepetition checks and other forms of payment outstanding on the Petition Date and will notify Manufacturers not to pay such checks or obligations, except to the extent such payment has been authorized by Order of this Court.

59. The Debtors are expecting at least one substantial payment from a contract counterparty to be transferred to the Depository Account shortly after the Petition Date. Closing this Account could significantly delay or otherwise jeopardize the receipt of this payment.

60. The continued use and maintenance of the Debtors' existing Accounts, at least on a temporary basis, as well as the continued use of the checks and forms relating to those Accounts, will prevent the Debtors from incurring unnecessary administrative expense and burden, and will allow the Debtors to focus on reorganizing their businesses and operating the same so as to maximize value for the estates and their creditors.

C. Motion to Honor Employee Obligations

61. Through the Motion For Entry of an Order (A) authorizing, but not directing, the Debtors to pay certain prepetition employee wages and salaries, reimbursable expenses, health plan claims, and insurance premiums; (B) authorizing, but not directing, the Debtors to maintain their employee-related insurance programs postpetition, and honor any prepetition obligations in respect thereof; (C) authorizing, but not directing, the Debtors to make deductions from employees' paychecks; (D) authorizing, but not directing, the Debtors to continue workers' compensation programs and pay all prepetition obligations in respect thereof; and (E) authorizing and directing banks and other financial institutions to honor all checks and electronic payment requests made by the Debtors related to the foregoing (the "**Motion to Honor Employee**

Obligations"), the Debtors are seeking the Court's permission to take certain actions as to certain unpaid prepetition employee obligations and to continue certain employment procedures and programs that will ensure the Debtors' workforce will remain available to preserve the Debtors' value as a going concern.

62. The relief sought is vital to the employees as well. Nonpayment of employee compensation and benefits and the inability to create some level of normality in the postpetition workplace by assuring employees that the Debtors can continue certain prepetition employment practices and programs, such as employee health benefits and vacation and sick time practices, could severely undermine morale, thus creating a significant risk of attrition at a time when the employees' support is critical. In fact, if the Motion to Honor Employee Obligations is not granted, the disruption to usual operations that would be caused by the loss of employees would have other significant costs – including the out-of-pocket and intangible costs to recruit and train new employees – and would strain the Debtors' relationships with customers and vendors, with whom the employees are often the primary point of contact. Without its existing workforce, the Debtors would face substantial risk of being unable to meet their obligations to the detriment of the Debtors' ability to reorganize.

Salaries and Wages

63. The Debtors' forty-three employees (24 salaried and 19 hourly) are the lifeblood of their businesses. Certain positions held and services provided by the Debtors' employees are clearly related to the satellite launch industry and specifically to the Debtors' one-of-a-kind sea-based equatorial launch site, such as marine agents and security specialists and environmental and chemical engineering, while other positions, such as translators and customs brokers, are necessitated by the Debtors' international business operations. Virtually every position within

the Debtors' companies requires familiarity and expertise either within the satellite launch industry or in the management of an international business. For example, the Debtors' procurement agents are responsible for negotiating contracts and purchasing critical and technically complex materials used by the Debtors in conjunction with launches, the Debtors' facilities managers and staff are responsible for ensuring compliance with applicable security and regulatory requirements imposed upon the Debtors by local, state, federal and foreign regulations, the Debtors' administrative support staff is required to manage frequent international travel by the Debtors' management and clientele, and the Debtors' translators must provide translation services in multiple languages (primarily Russian and Ukrainian) both in corporate settings such as board meetings and during launches at sea and in the field. The unique skill set and expertise of the Debtors' employees is demonstrated by the fact that a substantial number of the Debtors' employees—including administrative and accounting staff—worked for other companies within the aerospace industry before joining the Debtors. The highly technical and international focus of the Debtors' businesses requires that the Debtors employ these skilled and trained individuals, who are not easily replaced because of their experience and expertise within the satellite launch industry.

64. The Debtors utilize Automatic Data Processing Inc., ("**ADP**") to provide payroll oversight and management services. In furtherance of overseeing and managing the Debtors' payroll obligations, ADP is authorized to draw on the Debtors' bank accounts to fund the payments to the Debtors' employees. In particular, ADP deducts amounts necessary from the Debtors' bank accounts the day before the Debtors' payroll obligations are due to fund the Debtors' payroll checks. ADP is also responsible for all employee deductions, such as tax

withholdings, though the Debtors are ultimately responsible for remitting the deducted amounts to the appropriate recipient.

65. The Debtors owe their employees salaries and wages for work performed prepetition. The Debtors' employees are paid either on a salaried or hourly wage basis. All employees are paid bi-weekly and the average payroll aggregates approximately $150,000.00 per pay period.

66. As of the Petition Date, the Debtors had not paid their employees for certain prepetition services or had paid their employees by checks or transfers which have not yet cleared the Debtors' bank accounts. Specifically, as of the Petition Date, the Debtors owed their salaried employees accrued and unpaid wages for 10 days work, and their hourly employees accrued and unpaid wages for 10 days work. Moreover, some checks that have been issued to employees may not have been presented for payment or may not have cleared through the Debtors' bank accounts. The Debtors believe that the aggregate amount of such accrued but unpaid salaries and wages that have not yet been paid, or that have been paid but not yet presented for payment or cleared through the banking system, should not exceed $150,000.00.

67. Included in the payroll amounts described above are funds withheld by the Debtors for the benefit of third parties, including amounts relating to employee taxes, deductions, insurance, and other withholdings as required by federal, state, and local laws. The Debtors transfer such withheld funds to the appropriate recipient on the same day the funds are withheld, or as soon thereafter as is practicable. As such, the Debtors believe that as of the Petition Date some funds withheld from employee wages and salaries may not have been transferred to the appropriate agency or recipient. Accordingly, the Debtors are also seeking authority to release those withheld funds to the appropriate recipient.

401(k) Plan

68. The Debtors sponsor a tax-qualified retirement savings plan pursuant to Section 401k of the Internal Revenue Code (the "**401k Plan**"). The 401k Plan is managed by Securian Retirement Services. All of the Debtors' employees who have completed their first complete calendar month of service are eligible to participate in the 401k Plan. The Debtors match $0.75 for each dollar invested of the first 8% of the employee's compensation contributed to the 401k Plan. Ordinarily, 401(k) contributions total approximately $18,000 per pay period, including $11,000 of employee contributions and $7,000 from matching contributions. Although the 401(k) contributions are normally transferred to the 401k Plan on the day in which such contributions were withheld, the Debtors anticipate that as of the Petition Date they will have approximately $17,000.00 in employee contributions that have not been transferred to the 401k Plan. Accordingly, the Debtors seek authority, but not direction, to honor and continue the 401k Plan.

Garnishment

69. The Debtors garnish specific amounts from certain employees' wages earned during each payroll cycle and transfer them in accordance with certain court orders. Ordinarily, the Debtors transfer such garnished wages within one week of the payroll pay date. As of the Petition Date, the Debtors had garnished approximately $300.00 from certain employees' paychecks that had not yet been transferred.

70. The Debtors anticipate that, as of the Petition Date, some transfers made in accordance with garnishment orders may not yet have been presented for payment or may not have cleared through the banking system. The Debtors estimate that the total amount of such transfers will not exceed $300.00.

Reimbursement of Expenses

71. The Debtors reimburse certain employees for various expenses incurred in connection with services rendered for the benefit of the Debtors, including, without limitation, tuition, cellular phone use, business travel, and business expenses. Other than the tuition expenses (for which no employee is currently seeking reimbursement), the expenses incurred by the Debtors employees and reimbursed by the Debtors were expenses incurred directly related to the Debtors' businesses. These expenses are ordinarily reimbursed during the month after the expense is incurred. As of the Petition Date, certain employees may not yet have submitted expense reimbursement requests or such requests may have been submitted but not yet processed. As of the Petition Date, the amount of expenses accrued but not yet reimbursed should not exceed $110,000.00.

Paid Vacation and Holiday Pay

72. The Debtors provide vacation pay to all full-time employees. Employees generally accrue annual paid vacation based on their length of continuous service with the Debtors. Specifically, an employee who has been employed by the Debtors for 1-4 years accrues 80 hours of vacation time in a year, an employee who has been employed by the Debtors 5-9 years accrues 96 hours of vacation time in a year, an employee who has been employed by the Debtors 10-15 years accrues 120 hours of vacation time in a year, and an employee who has been employed by the Debtors over 16 years accrues 160 hours of vacation time in a year. Several employees who negotiated additional vacation time during the offer of employment stage earn amounts slightly above those set forth above. The President and General Manager and Vice President level employees accrue 168 hours of vacation time per year. All full-time employees receive twelve (12) paid holidays per year, New Years Day, Memorial Day, Independence Day,

Labor Day, Thanksgiving, the day after Thanksgiving, and Winter Break (generally, the last week in December).

73. As required by certain state laws, the Debtors customarily pay severed employees for accrued but unused vacation days in the employees' final pay checks. As of the Petition Date, the approximate amount of accrued vacation and holiday pay should not exceed $275,000.00.

74. The Debtors anticipate that employees will be critically concerned about their ability to take vacation time following the commencement of these Bankruptcy Cases. As a result, the Debtors are concerned that if they cannot advise employees on their ability to take vacation time, the employees may have adverse reactions and heightened concerns about their ability to obtain fair treatment going forward, which may lead to rapid attrition.

75. The Debtors believe that to maintain employee morale and retain their skilled employees, they be authorized to: (i) allow employees to use vacation time accrued before the Petition Date in accordance with their existing vacation policy, but only up to 160 hours of vacation per year, and (ii) pay, in the ordinary course, the liquidated amounts for any vacation hours accrued after the Petition Date to any employees who separate from their respective Debtor employers after the Petition Date.

Personal Leave

76. In January 2002, the Debtors replaced their sick leave program with a personal leave program (the "**Personal Leave Program**") because many employees rely on their sick time to deal not only with their own health conditions, but also with those of family members. Under the Personal Leave Program, the Debtors provide each employee with 96 paid hours per year for personal leave. The personal leave time accrues at 3.69 hours per pay period and may

be carried over from year to year up to a maximum accrual of 144 hours. Employees are not entitled to compensation relating to their unused time under the Personal Leave Program.

77. As with vacation time, the Debtors anticipate that their employees will express substantial and immediate concern about their ability to continue to use personal leave time granted to them prior to the Petition Date. The inability to advise the employees early on with respect to this issue could lead to unnecessary stress among the employees and thus create substantial detriment to the morale of the workforce. Accordingly, the Debtors seek authority, but not direction, to allow employees to use personal leave time granted to them prior to the Petition Date and to pay the employees for the corresponding time off. Thus, to maintain employee morale and retain their skilled employees, the Debtors believe that it is appropriate to allow employees to use personal leave time granted to them prior to the Petition Date and to pay the employees for the corresponding time off.

Medical, Dental, and Accident Benefits

78. The Debtors provide medical, vision, dental, employee assistance, accident, and sickness benefits to their employees (the "**Medical Benefits**"). The Medical Benefits are funded, in part, by deductions from the employees' wages. The Debtors utilize Blue Shield of California as third-party administrators to process medical and pharmaceutical claims and to prepare benefit checks for a monthly fee. The dental, vision, and employee assistance plans are fully funded by the Debtors.

79. Pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 (as amended, "**COBRA**"), the Debtors are obligated to offer eligible terminated employees (not all terminated employees are eligible for COBRA participation) the opportunity to continue insurance coverage under the Debtors' then-existing insurance plans. Any eligible former

employee and his or her dependents that elect to participate are entitled by law to insurance coverage from the Debtors for between 18 and 36 months. Although participating former employees pay the full premium amounts associated with such coverage, because the insurance plans in which these former employees participate are self-funded by the Debtors, the ultimate liability to the Debtors, including some claims that accrued pre-petition but that have not yet been paid, may well exceed the premiums paid by the participants. Through the COBRA coverage, there are currently an estimated 3 former employees participating in the Debtors' insurance programs.

80. The Debtors anticipate that as of the Petition Date there will be no unpaid Medical Benefits that accrued prior to the Petition Date.

81. As with vacation and personal leave time, the Debtors anticipate that their employees will express substantial and immediate concern about their employment if the Debtors cease providing or do not honor the Medical Benefits. Accordingly, the Debtors seek authority, but not direction, to honor and continue the Medical Benefits. Thus, to maintain employee morale and retain their skilled employees, the Debtors believe that it is appropriate to honor and continue the Medical Benefits.

Disability, Accident and Life Insurance Benefits

82. The Debtors also provide short-term disability insurance, long-term disability insurance, Ground Term Life Insurance, AD&D Insurance, and accident insurance through Unum Life Insurance Company of America, to their employees (the "**Life Insurance Programs**"). The short-term disability insurance provides 60% of weekly earnings to a maximum of $3,464 per week for 22 weeks (after 30 day wait period). The long-term disability insurance provides 60% income continuation after a 180 day period while continuously disabled,

up to age 65, with a maximum coverage of $15,000 per month. Through the accident insurance program, employees injured or killed while traveling on business are eligible to receive two and one-half years annual salary. Through the Ground Term Life Insurance and AD&D Insurance, the Debtors provide life insurance and accidental death coverage equal to two times annual salary. The premiums associated with the Insurance Programs average approximately $2720.37 per month. As of the Petition Date, there were no unpaid premiums associated with the Life Insurance Programs.

Workers' Compensation

83. Under the laws of the various states in which they operate, the Debtors are required to provide their employees with workers' compensation coverage for injuries occurring in the course of their employment with the Debtors. The Debtors maintain a workers' compensation insurance policy with Zurich Insurance (the "**Workers' Compensation Policy**"), pursuant to which the Debtors provide workers' compensation coverage to substantially all of their employees.

84. Under the Zurich Insurance Policy, the Debtors pay an annual premium of $26,716.00 ("**Estimated Premium**"), subject to a "true-up," regardless of the number of claims filed. At the conclusion of each policy year, Zurich Insurance performs an audit of the premium based on (i) an average of the initial base employee count provided at the commencement of the policy period and the actual number of employees for each subsequent quarter and (ii) the actual annual payroll for the policy period. If the number of the Debtors' quarterly employees exceed those used to calculate the Estimated Premium, the Debtors are required to pay an additional premium to Zurich Insurance in a true-up. The Debtors are seeking the Court's authorization to pay the Estimated Premium or any true-up, in their discretion, as they come due.

D. Motion to Provide Adequate Assurance as to Utilities.

85. The Debtors maintain many operations at complex plants and facilities, which depend on the constant and reliable provision of utility services. Should companies providing utility services ("**Utility Companies**") refuse or discontinue service, even for a brief period of time, the Debtors' business operations would be severely disrupted.

86. Other than the current utility bills that are not yet due and owing as of the petition date, which the Debtors cannot pay as a result of the commencement of these Bankruptcy Cases, the Debtors historically have paid their undisputed utility bills in full when due.

87. Prior to the petition date, the Debtors paid approximately $85,000 per month to the Utility Providers on account of Utility Services. Based on budget analysis performed in preparation for the Bankruptcy Cases, the Debtors' management believes that they have or will have sufficient availability of funds with which to pay all postpetition charges for utility services.

88. To provide adequate assurance of payment for future services to the Utility Companies, the Debtors propose to deposit a sum equal to fifty percent (50%) of the Debtors' estimated monthly cost of utility service into an interest-bearing, newly created segregated account on or before thirty (30) days after the Petition Date (the "**Utility Deposit**"). If any Utility Company believes additional adequate assurance is required, they may request such additional assurance pursuant to the procedures set forth in the Utility Providers Motion.

E. Motion to Retain Epiq as Claims and Noticing Agent.

89. The Debtors seek authority to retain Epiq Systems, Inc. ("**Epiq**") as their noticing agent and claims processor based on the terms and conditions set forth in that certain Bankruptcy Services Agreement, dated June 22, 2009 (the "**Agreement**").

90. I have reviewed the Bankruptcy Services Agreement filed with the Debtors' motion seeking Court approval of Epiq's retention. Given the nature of the Debtors' business and the number of creditors involved, the Debtors expect thousands of claims. As a result of the Debtors' limited staffing and the cost benefit of having claims administration and notice matters handled by someone other than counsel, I and the Debtors' management believe it would be in the best interest of the estates to utilize the services of an experienced claims processor such as Epiq.

91. I and the Debtors' management consulted with the Debtors' legal and financial advisors and determined that based on the size, scope, and geography of the Bankruptcy Cases, Epiq was the appropriate choice. Additionally, given prior relationships from other matters, the Debtors' advisors were also able to secure extremely competitive pricing from Epiq for these services.

92. Epiq has been retained in large and complex cases filed in this Court as well as other courts across the country. I and the Debtors' management believe, in our business judgment, that Epiq has the necessary experience and expertise to render the necessary services in a professional and efficient manner in accordance with the Bankruptcy Rules and Local Bankruptcy Rules. The Debtors believe that the proposed compensation to Epiq is fair and reasonable.

F. Motion for Authority to File Certain Portions of the Creditor Matrix Under Seal.

93. The Debtors provide a reliable, cost effective, heavy lift launch service for primarily commercial customers.

94. The Debtors' customers, which include large commercial and government entities, secure commercial launch services by entering into launch services contracts many months if not years in advance. Due to the sensitive nature of the customers' launches, the Debtors' launch services contracts preclude the dissemination of information relating to the launch services agreement – including the existence of the launch – without the customers' consent. The Debtors' launch services contracts also require that their customers submit a significant deposit in connection with the future launch, meaning that these customers will be included on the Debtors' schedules as creditors or potential creditors.

95. Without an order authorizing the Debtors to file under seal certain portions of their consolidated list of creditors (the "**Creditor Matrix**"), the Debtors may breach their launch services contracts by filing their complete Creditor Matrix, which could result in significant administrative priority claims against the Debtors' estates.

96. Additionally, if the Debtors are required to file their complete Creditor Matrix on the public docket, competitors will be able to determine who the Debtors are doing business with.

97. Because the disclosure of the Debtors' customers is commercially sensitive information, the dissemination of this information will have a negative affect on the Debtors' future viability. The Debtors therefore seek authority to file certain portions of their Creditor Matrix under seal.

G. Motion to Pay Taxes.

98. In connection with the normal operation of their businesses, the Debtors (i) incur property, sales and use, franchise and similar taxes (collectively, the "**Taxes**") and (ii) are charged fees, licenses and similar charges (collectively, the "**Fees**"), on behalf of numerous taxing, regulatory, and licensing authorities (collectively, the "**Authorities**"). Timely payment of the Taxes and Fees in the ordinary course, whether relating to the Debtors' prepetition or postpetition periods is necessary to the Debtors' continued operations and the Debtors seek authority to pay Taxes and Fees to the respective authorities in the ordinary course of the Debtors' businesses.

99. The Taxes and Fees are paid to the Authorities on a periodic basis (monthly, quarterly, or yearly, depending on the particular Taxes and Fees) with funds drawn by checks or by means of electronic fund transfers. As detailed on Exhibit A to the Motion to Pay Taxes, there are certain accrued/accruing taxes that are not yet due, but coming due soon, and/or certain checks issued, prior to the Petition Date, to Authorities for Taxes and Fees that did not clear the bank prior to the Petition Date (the "**Prepetition Taxes and Fees**"). Accordingly, the Debtors request that this Court authorize payment of Taxes and Fees and direct the banks, when requested by the Debtors in their sole discretion, to receive, process, honor, and pay such checks or electronic transfers.

100. To the extent the Authorities have otherwise not received payment for all Prepetition Taxes and Fees owed, the Debtors believe that some, if not all, of the Authorities may attempt to suspend the Debtors' business operations or suspend launch rights. Disruptions in the Debtors' business activities will materially affect the Debtors' reorganization prospects

and unnecessarily divert the Debtors' attention away from the prosecution of these Bankruptcy Cases.

101. Without question, the payment of the Prepetition Taxes and Fees is necessary to avoid interruption of the Debtors' business activities. Withholding payment of the Prepetition Taxes and Fees likely would cause taxing and other authorities to take precipitous action, including a marked increase in state audits, a flurry of lien filings or lift-stay motions, and significant administrative problems. Prompt and regular payment of the Prepetition Taxes and Fees will avoid these unnecessary governmental actions. It is in the best interests of the Debtors' estates and consistent with the reorganization policy of the Bankruptcy Code to eliminate the possibility of such time consuming and potentially damaging distractions.

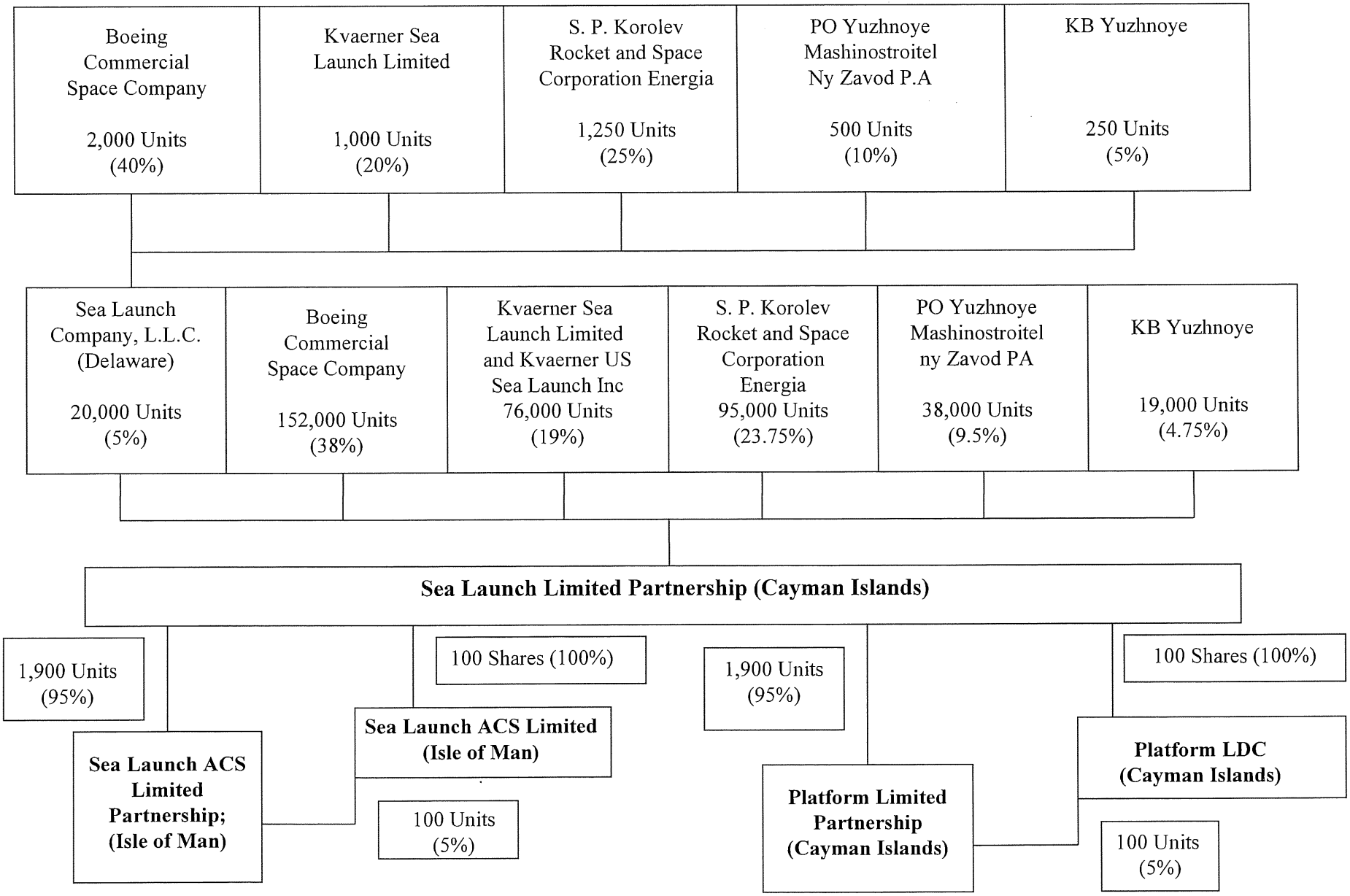
VIII. CONCLUSION

102. I hereby certify that the foregoing statements are true and correct to the best of my knowledge information and belief, and respectfully request that all of the relief requested in the First Day Motions be granted, together with such other and further relief as is just.

Dated: June 22, 2009
Long Beach, California

/s/ Brett A. Carman
By: Brett A. Carman
Vice President and Chief Financial Officer Sea Launch Co., L.L.C.

Exhibit A


Boeing Commercial Space Company
2,000 Units (40%)
Kvaerner Sea Launch Limited
1,000 Units (20%)
S. P. Korolev Rocket and Space Corporation Energia
1,250 Units (25%)
PO Yuzhnoye Mashinostroitel Ny Zavod P.A
500 Units (10%)
KB Yuzhnoye
250 Units (5%)
Sea Launch Company, L.L.C. (Delaware)
20,000 Units (5%)
Boeing Commercial Space Company
152,000 Units (38%)
Kvaerner Sea Launch Limited and Kvaerner US Sea Launch Inc
76,000 Units (19%)
S. P. Korolev Rocket and Space Corporation Energia
95,000 Units (23.75%)
PO Yuzhnoye Mashinostroitel ny Zavod PA
38,000 Units (9.5%)
KB Yuzhnoye
19,000 Units (4.75%)
Sea Launch Limited Partnership (Cayman Islands)
1,900 Units (95%)
Sea Launch ACS Limited Partnership; (Isle of Man)
100 Shares (100%)
Sea Launch ACS Limited (Isle of Man)
100 Units (5%)
1,900 Units (95%)
Platform Limited Partnership (Cayman Islands)
100 Shares (100%)
Platform LDC (Cayman Islands)
100 Units (5%)

ITEM NO. 117

JA-3

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re	) Chapter 11
SEA LAUNCH COMPANY, L.L.C., *et al.*,[1]	) Case No. 09-12153 (BLS)
Debtors.	) Jointly Administered
	) **Ref. Doc. No. 795**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER CONFIRMING THE DEBTORS' SECOND AMENDED PLAN OF REORGANIZATION

This case is before the Court on a request for confirmation of the Second Amended Plan of Reorganization Proposed by Sea Launch Limited Partnership, a Cayman Islands exempted limited partnership ("Sea Launch LP"); its General Partner, Sea Launch Company, L.L.C. ("Sea Launch Company"); and its direct and indirect subsidiaries, Sea Launch ACS Limited, an Isle of Man exempted company ("Sea Launch ACS"); Sea Launch ACS Limited Partnership, an Isle of Man exempted limited partnership ("Sea Launch ACS LP"); Platform LDC, a Cayman Islands exempted limited duration company ("Platform LDC"); and Platform Limited Partnership, a Cayman Islands exempted limited partnership ("Platform LP" and collectively, with Sea Launch Company, Sea Launch LP, Sea Launch ACS, Sea Launch ACS LP, and Platform LDC (collectively, the "Debtors"). After notice, a hearing was held on confirmation on July 27, 2010.

Procedural Background

a. On June 22, 2009 (the "Petition Date"), the Debtors each filed a voluntary petition in this Court for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §§ 101-

[1] The last four digits of the taxpayer identification numbers for each of the Debtors follow in parenthesis: (i) Sea Launch Company, L.L.C. (1590); (ii) Sea Launch Limited Partnership (Cayman) (8182); (iii) Sea Launch ACS Limited (5999); (iv) Sea Launch ACS Limited Partnership (Isle of Man) (6216); (v) Platform LDC (3177); and (vi) Platform Limited Partnership (3173). The mailing address for all of the Debtors is 2700 Nimitz Road, Long Beach, CA 90802.

JA-3

1532 (the "Bankruptcy Code"), and continued to manage their business as debtors in possession pursuant to Section 1107 of the Bankruptcy Code;

b On May 10, 2010, the Debtors filed their Plan of Reorganization and the related Disclosure Statement for the Debtors' Plan of Reorganization [Docket Nos. 690, 691];

c. On June 18, 2010, the Debtors filed their First Amended Plan of Reorganization and its related disclosure statement [Docket Nos. 787 and 788], as subsequently amended by the Debtors' Second Amended Plan of Reorganization filed on June 21, 2010, (together with the Plan Supplement, the other exhibits thereto and all other documents and actions necessary to carry out, consummate, finalize and effectuate the Plan, the "Plan")[2] and related disclosure statement (the "Disclosure Statement") [Docket Nos. 795 and 796];

d. On June 21, 2010, following a hearing on the adequacy of the Disclosure Statement, the Court entered its Order (I) Approving Disclosure Statement; (II) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Plan, Including (A) Approving Form and Manner of Solicitation Procedures, (B) Approving Form and Notice of Confirmation Hearing, (C) Establishing Record Date, (D) Approving Procedures for Distribution of Solicitation Packages, (E) Approving Forms of Ballots, (F) Establishing Deadline for Receipt of Ballots, and (G) Approving Procedures for Vote Tabulations; (III) Establishing Deadline and Procedures for Filing Objections to (A) Confirmation of the Plan, and (B) Proposed Cure Amounts Related to any Contracts and Leases Potentially Assumed under the Plan; and (IV) Granting Related Relief [Docket No. 793] (the "Solicitation Order");

e. Pursuant to the Solicitation Order, the Court (i) established July 20, 2010, at 4:00 p.m. ET as the deadline for submitting Ballots accepting or rejecting the Plan (the "Voting

[2] Capitalized terms not defined herein shall have the meaning ascribed to them in the Plan.

Deadline") and for filing objections to confirmation of the Plan (the "Objection Deadline") and (ii) scheduled a hearing to consider confirmation of the Plan commencing on July 27, 2010, at 1:00 p.m. (EDT) (the "Confirmation Hearing");

f. On July 7, 2010, the Debtors filed their Notice of (I) Possible Assumption of Executory Contracts, (II) Fixing of Cure Amounts in Connection Therewith, and (III) Deadline to Object Thereto [Docket No. 836], as supplemented on July 22, 2010 by the Debtors' Supplemental Notice of (I) Possible Assumption of Executory Contracts, (II) Fixing of Cure Amounts in Connection Therewith, and (III) Deadline to Object Thereto [Docket No. 882] (together, the "Notice of Assumption");

g. On July 13, 2010, the Debtors filed the Plan Supplement, including the Articles of Incorporation Before Share Capital Increase (Exhibit 1(a) to the Plan Supplement), the Articles of Incorporation After Share Capital Increase (Exhibit 1(b) to the Plan Supplement), the Exit Financing Credit Agreement (Exhibit 2 to the Plan Supplement), The Reorganized Sea Launch Shareholders Agreement (Exhibit 3 to the Plan Supplement), the Corporate Reorganization Transaction Steps (Exhibit 4 to the Plan Supplement), the Current Trade Vendor List (Exhibit 5 to the Plan Supplement), the Creditor Trust Agreement (Exhibit 6 to the Plan Supplement), the Exit Financing Commitment Letter Sea Launch Board (Exhibit 7 to the Plan Supplement), the Resolution No. 2010-04-1-103 dated April, 2010 (Exhibit 8 to the Plan Supplement), and the List of Directors & Officers for Sea Launch and the Reorganized Debtors (Exhibit 9 to the Plan Supplement, as revised on July 19, 2010 [Docket No. 865]) [Docket No. 857];

h. On July 16, 2010, the Debtors filed, the New Investment Agreement in connection with the Plan [Docket No. 862];

i. On July 19, 2010, this Court entered an order approving the stipulation between the Debtors and Yuzhny PA Mashinostroiteny Zavod ("Yuzhmash") to allow Yuzhmash's claim against the Debtors for Plan voting purposes in the amount of $76,000,000 pursuant to Rule 3018 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") [Docket No. 867]; and on July 16, 2010, the Debtors, the Boeing Company ("Boeing") and Boeing Commercial Space Company ("BCSC") and Aker Maritime Finance AS, Kvaerner Sea Launch Ltd., Kvaerner Sea Launch Inc., and Kvaerner AS (collectively, "Aker"), entered into a Stipulation allowing Boeing's and BCSC's claims against the Debtors for Plan voting purposes in the amount of $52,000,000, and allowing Aker's claims against the Debtors for Plan voting purposes in the amount of $5,000,000 pursuant to Bankruptcy Rule 3018.

j. On July 19, 2010, an objection to confirmation (the "Lloyd's Objection") was filed by certain underwriters at Lloyd's London [Docket No. 864]; on July 20, 2010, objections to confirmation were filed by Yuzhmash (the "Yuzhmash Objection") [Docket No. 870] and the United States of America (the "IRS Objection") [Docket No. 874]; and reservations of rights with respect to confirmation were filed by O3b USA, LLC (the "O3b Reservation") [Docket No. 869] and the Official Committee of Unsecured Creditors (the "Committee Reservation") [Docket No. 875]; and on July 21, 2010, objections to confirmation were filed by Boeing and BCSC (the "Boeing Objection") [Docket No. 876] and Aker (the "Aker Objection") [Docket No. 877]; and on July 21, 2010, an objection to the cure amount stated in the Notice of Assumption was filed by Yuzhnoye State Design Office ("Yuzhnoye") (the "Yuzhnoye Objection") [Docket No. 878] (the foregoing objections being sometimes collectively referred to as the "Objections");

k. On July 21, 2010, the Debtors filed their Motion for an Order Pursuant to 11 U.S.C. §§ 105(a) and 363(b)(1) Authorizing Payment of the Break Up Fee and Expense

Reimbursement Under the Exit Financing Commitment Letter (the "Expense Reimbursement Motion") [Docket No. 880], and the motion to shorten notice with respect to the hearing thereon, seeking an order authorizing payment of the break up fee of $3.1 million contemplated by Section 9.1 (the "Break Up Fee") of the Exit Financing Commitment Letter (the "Commitment Letter"), dated March 29, 2010, as revised on June 27, 2010, between Sea Launch LP and Energia Overseas Limited Russia, a Russian Federation limited liability company and a joint venture entity (together with its subsidiary Energia Overseas LLC, a Delaware limited liability company, "Energia Overseas" or the "New Investor"), and authorizing payment of expenses, not to exceed $1.3 million, contemplated by Section 10.1 (the "Expense Reimbursement") of the Commitment Letter;

l. On July 22, 2010, the Debtors filed the Declaration of Stephenie Kjontvedt of Epiq Bankruptcy Solutions, LLC Certifying Voting On, And Tabulation of, Ballots Accepting and Rejecting the Debtors' Second Amended Joint Plan of Reorganization (the "Voting Declaration") [Docket No. 884], and on July 23, 2010, the Debtors filed their Memorandum of Law in Support of Confirmation of the Debtors Second Amended Plan of Reorganization (the "Confirmation Brief") [Docket No. 891], both in support of confirmation of the Plan;

m. On July 27, 2010, the Court entered an Order approving the Boeing Aker UCC Settlement Agreement.

n. The Court having heard the statements of counsel and evidentiary proffers of testimony by Bemnet Kibreab, Jefferies & Company, and Christopher Picone, Sea Launch CRO, in respect of confirmation of the Plan.

NOW THEREFORE, based upon the Court's review of the Plan, the Disclosure Statement, the Plan Supplement and other documents filed in connection with the Plan, the

Confirmation Brief, the Voting Declaration, and the Objections, and upon (i) all of the evidence proffered or adduced and arguments of counsel made at the Confirmation Hearing and (ii) the entire record of these Bankruptcy Cases, and after due deliberation thereon, discussions made on the record at the Confirmation Hearing and good cause appearing therefore, this Court hereby makes and issues the following Findings of Fact, Conclusions of Law and Orders:[3]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Exclusive Jurisdiction; Venue; Core Proceeding (28 U.S.C. §§ 157(b)(2) and 1334(a)). On the Petition Date, the Debtors commenced the Bankruptcy Cases by filing voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. The Debtors were qualified and are qualified to be debtors under Section 109 of the Bankruptcy Code. Each of the Debtors is authorized to and has been operating as debtor-in-possession since the commencement of the reorganization cases. No Trustee or examiner has been hereto for appointed in any of the cases. Venue was proper as of the Petition Date and continues to be proper pursuant to 28 U.S.C. §§ 1408 and 1409. This Court has jurisdiction over these Bankruptcy Cases pursuant to 28 U.S.C. §§ 157 and 1334. Confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L), and this Court has exclusive jurisdiction to determine whether the Plan complies with the applicable provisions of the Bankruptcy Code and should be confirmed. The Court has the power to authorize and direct each of the actions contemplated by the Plan including, but not limited to, consummation of transactions required by the New Investment Agreement.

B. Findings Regarding the Debtors. Each of the Debtors has been duly incorporated or formed under the laws of jurisdiction in which they were organized. Sea Launch LLC is in

[3] This order (the "Confirmation Order") constitutes this Court's findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure (the "Federal Rules"), as made applicable herein by Bankruptcy Rules 7052 and 9014. Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. *See* Fed. R. Bankr. P. 7052.

good standing in the Commonwealth of Delaware. Each of the Debtors is in good standing in its jurisdiction of organization and is registered and/or authorized to do business as a foreign corporation, partnership or limited liability company in the jurisdictions in which such authorization is necessary for the implementation, effectuation and consummation of this Plan. As debtors-in-possession, the management and members of each general partner of the Debtors for itself and one Debtor limited partnership, including but not limited to their boards of directors and officers are and were duly authorized and empowered to take any and all such actions contemplated by and giving rise to the Plan and the New Investment Agreement. Each action, agreement and transaction contemplated by the Plan, the New Investment Agreement and this Confirmation Order, and all related actions, agreements and transactions necessary to implement, effectuate and confirm the Plan are authorized and lawful under the formation documents of each Debtor.

The Debtors, without further action by the shareholders of the Debtors including, but not limited to, the owners of the Sea Launch Equity Interests, acting by and through their officers or managers, are duly authorized and empowered to take any and all such actions as any of these may determine are necessary or appropriate to implement, effectuate and consummate any and all documents or transactions contemplated by the Plan or this Confirmation Order. Each Debtor has duly authorized, or is empowered to duly authorize, each of the acts, documents, agreements and transactions contemplated in the Plan and this Confirmation Order (the "Plan Documents") to implement, effect and consummate the Plan.

C. Judicial Notice. The Court takes judicial notice of the docket in these Bankruptcy Cases maintained by the clerk of the Court, including, without limitation, all pleadings and other documents filed, all orders entered, all prior hearing transcripts and evidence and argument

made, proffered or adduced at the hearings held before the Court during the pendency of these Bankruptcy Cases.

D. Burden of Proof. The Debtors, as proponents of the Plan, have met their burden of proving the elements of Sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence, as further found and determined herein.

E. Transmittal of Solicitation Materials. To obtain requisite acceptance of the Plan, on or about June 28, 2010, the Debtors completed solicitation of acceptances and rejections of the Plan by distributing, through Epiq Bankruptcy Solutions, LLC (the "Voting Agent"), the Plan, Disclosure Statement, and related materials as required by the Solicitation Order. As evidenced by the Affidavit of Christine Azzaro, filed with this Court on July 1, 2010 (the "Solicitation Mailing Affidavit") [Docket No. 818], and as required by the Solicitation Order, the Debtors transmitted: (i) written notice (the "Confirmation Hearing Notice") of (a) the Court's approval of the Disclosure Statement, (b) the deadline for voting on the Plan, (c) the date of the Confirmation Hearing, and (d) the deadline and procedures for filing objections to confirmation of the Plan; (ii) a CD-ROM containing PDF copies of the Plan and the Disclosure Statement; (iii) Ballots, as appropriate, and a Ballot return envelope (postage prepaid) (collectively, the "Solicitation Package") to the Holders of Class 3—Current Trade Vendor Unsecured Claims, Class 4—Customer or Trade Vendor Unsecured Claims, Class 5—Aker and Boeing Claims, Class 6— S.P. Korolev Rocket & Space Corporation, Energia ("RSC Energia") Claims, and Class 7—Yuzhmash and Yuzhnoye Claims (collectively, the "Voting Parties"). Further, the Debtors transmitted a Confirmation Hearing Notice to each of the known counterparties to the Assumed Executory Contracts. Additionally, the Debtors transmitted a notice, which set forth, among other things: (i) the non-voting classes under the Plan; (ii) a summary of the treatment of

Claims and Interests under the Plan; (iii) the date and time of the Confirmation Hearing; and (iv) the deadline and procedures for filing objections to the Plan (the "Non-Voting Creditor or Interest Holder Notice") to the Holders of Administrative Expense Claims, DIP Facility Claims, Priority Tax Claims, Class 1—Priority Non-Tax Claims, Class 2—Other Secured Claims, Class 8—Sea Launch Equity Interests, and Class 9—Subsidiary Interests (collectively, the "Non-Voting Parties").

F. Good Faith Solicitation; No Requirement for Resolicitation. Votes for acceptance and rejection of the Plan were solicited in good faith and in compliance with Sections 1125 and 1126 of the Bankruptcy Code, Bankruptcy Rules 3017 and 3018, the Disclosure Statement, the Solicitation Order, and all other applicable provisions of the Bankruptcy Code and all other applicable rules, laws and regulations. Accordingly, the Court finds no need to resolicit any votes.

G. Adequacy of Notice. Notice of the Confirmation Hearing, including all deadlines in the Solicitation Order, was given in compliance with the Bankruptcy Rules and the Solicitation Order and the materials served in conjunction therewith were good and sufficient notice in accordance with Bankruptcy Rules 2002(b) and 3020(b)(2). Votes for acceptance or rejection of the Plan were solicited by the Debtors in good faith, after transmittal of a disclosure statement containing adequate information, and otherwise in compliance with Bankruptcy Code Sections 1125 and 1126 and Bankruptcy Rules 3017 and 3018. The Plan Supplement, and all amendments, modifications, and supplements thereto, were transmitted and served in compliance with the Bankruptcy Rules. All parties in interest had the opportunity to appear and be heard at the Confirmation Hearing and no other or further notice is required.

H. Bar Date. On October 6, 2009, the Court entered an order (the "Bar Date Order") [Docket No. 301] establishing November 20, 2009, as the general deadline to file proofs of claim for prepetition claims against the Debtors (the "General Bar Date") and December 21, 2009, as the bar date for governmental Units (the "Governmental Unit Bar Date").

I. Impaired Classes Voting to Accept the Plan. As evidenced by the Voting Declaration, Class 3—Current Trade Vendor Unsecured Claims, Class 4—Customer or Trade Vendor Unsecured Claims, Class 5—Aker and Boeing Claims,[4] Class 6—RSC Energia Claims, Class 7—Yuzhmash and Yuzhnoye Claims[5] are each impaired and have each voted to accept the Plan pursuant to the requirements of Sections 1124 and 1126 of the Bankruptcy Code. Thus, at least one Impaired class of Claims has voted to accept the Plan.

J. Classes Deemed To Accept the Plan. Class 1—Priority Claims, Class 2—Other Secured Claims, and Class 9—Subsidiary Interests are not impaired under the Plan and are deemed to have accepted the Plan pursuant to Section 1126(f) of the Bankruptcy Code.

K. Classes Deemed to Reject the Plan. Class 8—Sea Launch Equity Interests are deemed to have rejected the Plan pursuant to Section 1126(g) of the Bankruptcy Code because

---

[4] Based on the Global Settlement Agreement and Release to be entered into by and among the Debtors, the Committee, each of the members of the Committee, Boeing, BCSC, and Aker (the "Boeing Aker UCC Settlement Agreement"), which Settlement was approved by this Court on the record at the Confirmation Hearing, Boeing and Aker agreed to change their votes on the Plan from rejecting to accepting votes, which changes were stated on the record at the Confirmation Hearing. Considering Boeing's and Aker's changed votes, Class 5 is an accepting Class with 100% in amount and 100% in number having voted to accept the Plan. *See Debtors' Motion for an Order Approving the Settlement and Compromise of Certain Claims Between (i) the Debtors (ii) the Official Committee of Unsecured Creditors (iii) the Members of the Official Committee of Unsecured Creditors, (iv) the Boeing Company, (v) Boeing Commercial Space Company, and (vi) Aker Maritime Finance AS* [Docket No. 894].

[5] Based on an agreement between Yuzhmash, the Debtors and the New Investor, as set forth in further detail in Paragraph 47 of this Order, which will result in the assumption of the modified Yuzhmash BOAs and the modified treatment of Yuzhmash under the Plan, which BOA assumption and Plan modification were approved by this Court on the record at the Confirmation Hearing and as stated herein. As a result of such agreements, Yuzhmash agreed to change its vote on the Plan from rejecting to accepting, which change was stated on the record at the Confirmation Hearing. Considering Yuzhmash's changed vote, Class 7 is an accepting Class with the requisite amount of claims and number of voting claims having voted to accept the Plan.

the Holders of Class 8 Interests will not receive or retain any distribution or property under the Plan on account of such Interests.

L. Preservation of Causes of Action. Pursuant to the Plan and Disclosure Statement, the Debtors have provided due and sufficient notice that the Plan preserves all Causes of Action, including actions under Chapter 5 of the Bankruptcy Code, except as otherwise set forth in the Plan, the Plan Supplement, and any settlement agreements approved by this Court or this Confirmation Order.

M. Rule 9019(a) Settlement. Except as otherwise provided in the Plan and this Confirmation Order, the Plan is a settlement between and among the Debtors and their creditors and equity holders of all claims and litigation against the Debtors, pending or threatened, or that were or could have been commenced against the Debtors prior to the date of entry of this Confirmation Order (other than the Reorganized Debtors' ability to prosecute objections to Claims and other retained Causes of Action to the extent preserved by the Plan). Such settlement, as reflected in the relative distributions and recoveries or other benefits provided to holders of Claims or Interests under the Plan, (i) will save the Debtors and their Estates the costs and expenses of prosecuting various disputes, the outcome of which is likely to consume substantial resources of the Debtors' Estates and require substantial time to adjudicate, and (ii) has facilitated the creation and implementation of the Plan and benefits of the Debtors' Estates and creditors. Accordingly, such settlement is fair and reasonable.

N. Releases, Exculpations and Injunctions. Pursuant to Section 1123(b)(3) of the Bankruptcy Code and Bankruptcy Rule 9019(a), the settlements, compromises, releases, discharges, exculpations and injunctions set forth in Sections 10.2 and 10.3 of the Plan and herein, and implemented by this Confirmation Order, are fair, equitable, reasonable and in the

best interests of the Debtors, the Reorganized Debtors and their Estates, creditors and equity holders. The releases of non-Debtors under the Plan are fair to holders of Claims and are necessary to the proposed reorganization, thereby satisfying the requirements of *In re Continental Airlines, Inc.*, 203 F.3d 203, 214 (3d Cir. 2000) and *In re Zenith Electronics Corp.*, 241 B.R. 92, 110-11 (Bankr. D. Del. 1999). The record of the Confirmation Hearing and these Bankruptcy Cases is sufficient to support the releases, exculpations, and injunctions provided for in Article X of the Plan and herein.

O. Assumption and Rejection of Executory Contracts and Unexpired Leases. Article VII of the Plan governing the assumption and rejection of executory contracts and unexpired leases satisfies the requirements of all applicable provisions of Section 365 of the Bankruptcy Code. The assumption or rejection of any executory contract or unexpired lease pursuant to Article VII of the Plan, the Notice of Assumption and this Confirmation Order shall be legal, valid, and binding upon the applicable Debtor or Reorganized Debtor and all parties to such executory contract or unexpired lease to the same extent as if such assumption or rejection had been effectuated pursuant to an order of the Court entered before the confirmation of the Plan.

P. Assumption and Assignment of Certain Indemnity Agreements. Sea Launch Limited Partnership, is a party to certain prepetition and postpetition indemnity agreements with The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Limited (the "Club"): The P&I Defence Rules and Correspondents 2008/2009 (the "2008 Policy"), The P&I Defence Rules and Correspondents 2009/2010 (the "2009 Policy"), and The P&I Defence Rules and Correspondents 2010/2011 (the "2010 Policy"). Sea Launch Limited Partnership and the Club are also parties to similar indemnity agreements for the years 2004 through 2007. Sea

Launch ACS Limited and Platform Limited Partnership are additional insured parties under the Policies and assumption and assignment of such Agreements is hereby approved.

Q. New Investment Agreement. The Debtors and Energia Overseas and their respective professionals have negotiated in good faith and at arms-length the New Investment Agreement, pursuant to which Energia Overseas has agreed to provide one hundred and fifty-five million dollars ($155,000,000),[6] to be invested in exchange for ninety-five percent (95%) of the New Common Stock in Reorganized Sea Launch, less the conversion, as requested by Energia Overseas, of some or all of the outstanding amounts due to Energia Overseas under the DIP Facility Agreement. The New Investment Agreement forms an integral component of the Plan, represents a fair and reasonable exercise of the Debtors' and Reorganized Debtors' business judgment and is vital to the effectuation and implementation of the Plan. The final execution of the New Investment Agreement, in substantially the form filed with the Bankruptcy Court, and the effectuation of the same are approved by this Confirmation Order.

R. Exit Financing. On the Effective Date, the Reorganized Debtors shall enter into the Exit Financing Credit Agreement, as guarantors of the $200,000,000 provided thereunder by Energia Overseas to Energia Logistics Ltd. The Exit Financing Credit Agreement was negotiated between the Debtors, Energia Overseas and Energia Logistics Ltd., and was negotiated in good faith and at arm's length. The Exit Financing Credit Agreement forms an integral component of the Plan, represents a fair and reasonable exercise of the Debtors' and Reorganized Debtors' business judgment and is vital to the effectuation and implementation of the Debtors' Plan. The terms of the Plan and the Exit Financing Credit Agreement are in the best

[6] If Class 4 had not accepted the Plan, Energia Overseas would have provided one hundred and forty million dollars ($140,000,000), and received eighty-five percent (85%) of the New Common Stock in Reorganized Sea Launch.

interests of the Reorganized Debtors, the Debtors and their Estates, creditors and other parties in interest. All of the liens and security interests to be created under the Exit Financing Credit Agreement are hereby approved. The New Investor has made the necessary filings to establish itself as a Delaware Limited Liability Company and, along with the Reorganized Debtors, is authorized to make all flings and recordings, and to obtain all governmental approvals and consents necessary to establish and perfect such liens and security interests under the provisions of state, provincial, federal or other law (whether domestic or foreign) that would be applicable in the absence of this Confirmation Order and no further order or authorization shall be required. The Reorganized Debtors shall cooperate to make all other filings and recordings that otherwise would be necessary under applicable law and to give notice of such liens and security interests to third parties of the Reorganized Debtors, the Debtors and their Estates, creditors and other parties in interest.

S. Exemption from Securities Laws. Pursuant to Section 1125(e) of the Bankruptcy Code, the Debtors' transmittal of the Plan solicitation materials as set forth herein, their solicitation of acceptances of the Plan, and the Reorganized Debtors' issuance and distribution of the New Common Stock, the Preferred Stock and the Creditor Trust Equity Interests pursuant to the Plan, are not and will not be governed by or subject to any otherwise applicable law, rule, or regulation governing the solicitation or acceptance of a plan of reorganization or the offer, issuance, sale, or purchase of securities.

Energia Overseas and the Creditor Trust are successors to the Debtors under the Plan for purposes of Section 1145 of the Bankruptcy Code and, accordingly, pursuant to, and to the fullest extent permitted under, Section 1145 of the Bankruptcy Code, Section 4(2) of the Securities Act of 1933, and any other applicable state or federal securities law, the offer,

issuance, distribution, conversion, transfer or exchange of the New Common Stock, the Preferred Stock and the Creditor Trust Equity Interests (to the extent such interests are a security) are exempted from the registration requirements of the Securities Act of 1933, any similar state securities or "blue sky" laws and any other applicable law requiring registration prior to the offering, issuance distribution or sale of securities to the extent otherwise appropriate.

In addition, under Section 1145 of the Bankruptcy Code, any securities contemplated by the Plan, including the New Common Stock, the Preferred Stock and the Creditor Trust Equity Interests, will be freely tradable by the recipients thereof, subject to (i) the provisions of Section 1145(b) of the Bankruptcy Code relating to the definition of an underwriter in Section 2(a)(11) of the Securities Act of 1933, and compliance with any rules and regulations of the Securities and Exchange Commission, if any, applicable at the time of any future transfer of such securities or instruments; and (ii) the restrictions, if any, on the transferability of such securities and instruments under the Plan and the Plan Documents, including but not limited to the Shareholders' Agreement.

T. Plan's Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(1)). The Plan complies with the applicable provisions of the Bankruptcy Code, including, without limitation, Sections 1122 and 1123, thereby satisfying Section 1129(a)(1) of the Bankruptcy Code.

(i) Proper Classification (11 U.S.C. §§ 1122, 1123(a)(1)). In addition to Administrative Claims and Priority Tax Claims, which are not and do not need to be classified, the Plan designates separate Classes of Claims and interests for and against the Debtors. The Claims and interests placed in each Class are substantially similar to other Claims and Interests, as the case may be, in each such Class. Valid business, factual and legal reasons exist for separately classifying the various Classes of Claims and Interests created under the Plan, and

such Classes do not unfairly discriminate between holders of Claims and Interests or the holders of such Claims and Interests have consented to such classification. Thus, the Plan satisfies Sections 1122 and 1123(a)(1) of the Bankruptcy Code.

(ii) Specify Unimpaired Classes (11 U.S.C. § 1123(a)(2)). Article II of the Plan specifies that Class 1—Priority Claims, Class 2—Other Secured Claims, and Class 9—Subsidiary Interests are not impaired in that the legal, equitable or contractual rights of Holders of Claims or Interests in these Classes are not altered under the Plan, which satisfies Section 1123(a)(2) of the Bankruptcy Code.

(iii) Specify Treatment of Impaired Classes (11 U.S.C. § 1123(a)(3)). Article II of the Plan designates Class 3—Current Trade Vendor Unsecured Claims, Class 4—Customer or Trade Vendor Unsecured Claims, Class 5—Aker and Boeing Claims, Class 6—RSC Energia Claims, Class 7—Yuzhmash and Yuzhnoye Claims, and Class 8—Sea Launch Equity Interests as impaired under the Plan and Article III of the Plan specifies the treatment of Claims and Interests in those Classes, which satisfies Section 1123(a)(3) of the Bankruptcy Code.

(iv) No Discrimination (11 U.S.C. § 1123(a)(4)). Article III of the Plan provides for the same treatment by the Debtors for each Claim or Interest in each respective Class unless the Holder of a particular Claim or Interest has agreed to a less favorable treatment of such Claim or Interest, which satisfies Section 1123(a)(4) of the Bankruptcy Code.

(v) Implementation of the Plan (11 U.S.C. § 1123(a)(5)). Article V of the Plan contains numerous provisions to adequately facilitate implementation of the Plan, including, without limitation, provisions for the following: (i) the continued corporate existence of the Debtors; (ii) the cancellation of the Sea Launch Equity Interests on or before the Effective Date; (iii) the vesting of assets in Reorganized Sea Launch and certain of the Reorganized Debtors free

and clear of all Claims, Liens, charges other encumbrances and interests on or before the Effective Date; (iv) the transfer of Reorganized Sea Launch from the State of Delaware to Berne, Canton of Berne in Switzerland; (v) the approval that Reorganized Sea Launch shall become a Swiss corporation (*Aktiengesellschaft* or "AG") and that the name of Reorganized Sea Launch shall be "Sea Launch AG" and its corporate purpose shall be that set forth in the Articles of Incorporation; (vi) the adoption and the filing of Articles of Incorporation; (vii) the entry into the New Investor Agreement; (viii) the entry by the New Investor, RSC Energia, Reorganized Sea Launch and the Creditor Trust into the Shareholder Agreement; (ix) the formation of a Creditor Trust and the entry into a Creditor Trust Agreement, including the appointment of a Creditor Trust Manager, who shall act as the intermediate shareholder for the Creditor Trust and to vote on its behalf; (x) the appointment of directors and officers of the Reorganized Debtors; (xi) the issuance and distribution of the New Common Stock to the New Investor and the Creditor Trust; (xii) the issuance of the Preferred Stock to RSC Energia and the funding of the Creditor Trust; (xiii) the cancelation and release of all Liens, and the further requirement that all Holder of Liens take all actions requested by the Debtors or the Reorganized Debtors to evidence their release; (xiv) entry by the Reorganized Debtors into the Exit Financing Credit Agreement and all related notes, guarantees, documents and agreements in connection therewith; (xv) the adoption by the Reorganized Debtors of any obligations owing under the SLEIP; (xvi) the termination of the Debtors' current boards of directors and the designation of the initial directors of the Reorganized Debtors; and (xvii) authorization to take all necessary corporate actions. The Plan provides adequate and proper means for its implementation, which satisfies Section 1123(a)(5) of the Bankruptcy Code.

(vi) Non-Voting Equity Securities (11 U.S.C. § 1123(a)(6)). The Articles of Incorporation for the Reorganized Debtors, attached to the Plan Supplement as Exhibits 1(a) and 1(b), initially prohibit the issuance of nonvoting equity securities and otherwise comply with the requirements of Section 1123(a)(6) of the Bankruptcy Code.

(vii) Selection of Officers, Directors and the Trustee (11 U.S.C. § 1123(a)(7)). Pursuant to Section 5.4(b) of the Plan and as set forth in the List of Directors and Officers for Sea Launch and the Reorganized Debtors attached to the Plan Supplement as Exhibit 9, as revised on July 19, 2010, eight (8) individuals have been identified to serve on the board of directors of Reorganized Sea Launch and eight (8) executive officers have been designated. As required by Section 1123(a)(7) of the Bankruptcy Code, the Debtors and the New Investor have selected the directors and officers in a manner consistent with the interests of creditors and equity security holders and with public policy. Section 5.8(c) the Plan and the Creditor Trust Agreement provide for the selection of the Creditor Trust Manager. The selection of the initial directors and officers of the Reorganized Debtors and the Creditor Trust Manager, and the procedures for the selection of their successors, are consistent with the interests of Holders of Claims and Interests and public policy.

(viii) Additional Provisions of the Plan (11 U.S.C. § 1123(b)). The Plan contains additional permissive provisions, including, without limitation: (i) Section 7.1 of the Plan provides for the assumption of certain executory contracts; (ii) Section 7.3 of the Plan provides for the assignment of all contracts, agreements and leases entered into or assumed by the Debtors after the Petition Date to the Reorganized Debtors or to an affiliate of the New Investor in accordance with the terms of the New Investment Agreement; (iii) Section 8.1 of the Plan Authorizes the Debtors and the Reorganized Debtors to object to the allowance of any

Claim and empowers them to allow or settle the claims without notice to any party or approval of, or notice to, the Bankruptcy Court; (iv) Sections 10.2(b) and 10.2(c) of the Plan provide for optional releases as of the Effective Date by the Debtors, the Reorganized Debtors and all Holders of Claims or Interests of, among other things, claims, rights and causes of action that the Debtors may have against, among others, the present and former officers and directors of the Debtors, and the attorneys, accountants, investment bankers, restructuring consultants and financial advisors of each of the Debtors; (v) Section 10.2(f) provides that all consideration exchanged under the Plan shall be in exchange for, and in complete satisfaction, settlement, discharge and release of, all Claims and Interests of any nature whatsoever against the Debtors or any of their Estates, assets, properties or interest in property; and (vi) Section 10.2(g) of the Plan provides that the Debtors and their Estates shall retain their Causes of Action, and the Reorganized Debtors, as successors in interest to the Debtors and the Estates, may enforce, sue on settle or compromise any or all of the Causes of Action. The injunctions and stays issued pursuant to Section 10.3 of the Plan preserve and enforce the releases granted by the Plan and are narrowly tailored to achieve that purpose. Such provisions, and all other provisions of the Plan are consistent with Section 1123(b)(6) of the Bankruptcy Code, and not inconsistent with the applicable provisions of the Bankruptcy Code.

U. Compliance with Bankruptcy Rule 3016. The Plan is dated and identifies the entities submitting it, thereby satisfying Bankruptcy Rule 3016(a). The filing of the Disclosure Statement with the Court satisfies Bankruptcy Rule 3016(b). The Plan describes in specific and conspicuous language all acts to be enjoined under the Plan and identifies all entities that are subject to the injunctions set forth in the Plan in accordance with Bankruptcy Rule 3016(c).

V. Compliance with Bankruptcy Rule 3018. As set forth more fully in Paragraphs D, E, and F above, the solicitation of votes to accept or reject the Plan satisfies Bankruptcy Rule 3018. The Solicitation Materials described in Finding D, above, including the Plan, were transmitted to all creditors entitled to vote on the Plan (*i.e.*, Holders of Impaired Claims, other than those in Classes deemed to reject the Plan pursuant to Section 1126(g) of the Bankruptcy Code), sufficient time was prescribed for the Voting Parties to accept or reject the Plan, and the Solicitation Materials and related solicitation procedures comply with Section 1126 of the Bankruptcy Code, thereby satisfying the requirements of Bankruptcy Rule 3018.

W. Debtors' Compliance with Bankruptcy Code (11 U.S.C. § 1129(a)(2)). The Debtors have complied with the applicable provisions of the Bankruptcy Code, the Bankruptcy Rules and the Solicitation Order in transmitting the Plan, the Disclosure Statement, and the Solicitation Materials in soliciting and tabulating votes on the Plan and have otherwise complied with the provisions of Title 11, thereby satisfying Section 1129(a)(2) of the Bankruptcy Code.

X. Plan Proposed in Good Faith (11 U.S.C. § 1129(a)(3)). The Debtors have proposed the Plan in good faith and not by any means forbidden by law, thereby satisfying Section 1129(a)(3) of the Bankruptcy Code. The Plan is designed to allow the Debtors to reorganize on a going concern basis while maximizing recoveries to their creditors. Moreover, the Plan itself, the process leading to its formation, and the support for the Plan received from the Voting Parties provides independent evidence of the Debtors' good faith. The Debtors, the New Investor and their predecessors, successors and assigns (whether by operation of law or otherwise) and their respective present and former affiliates and subsidiaries and each of their respective current and former members, partners, equity holders, officers, directors, employees, managers, shareholders, financial advisors, attorneys, accountants, investment bankers,

consultants, agents, and professionals, or other representatives have acted in "good faith" within the meaning of Section 1125(e) of the Bankruptcy Code, thus satisfying the "good faith" requirement of Section 1129(a)(3). Further, the Plan is the product of extensive, arm's length negotiations among the Debtors, the Committee, the Debtors' investors and partners, the Debtors' customers, the New Investor and each of their respective representatives, and reflects the results of these arm's length negotiations and embodies the best interests of all of the constituencies of the Debtors' Estates. In determining that the Plan has been proposed in good faith, this Court has examined the totality of the circumstances surrounding the formulation of the Plan.

Y. Payments for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4)). Any payment made or to be made by the Debtors or by any person issuing securities or acquiring property under the Plan, for services or for costs and expenses in or in connection with the Bankruptcy Cases, or in connection with the Plan and incident to the Bankruptcy Cases, has been disclosed to this Court. Any such payment made on a final basis before confirmation of the Plan is reasonable and any such payment to be fixed or approved on a final basis after confirmation of the Plan is subject to Court approval, as reasonable. The Plan therefore satisfies Section 1129(a)(4) of the Bankruptcy Code.

Z. Directors, Officers and Insiders (11 U.S.C. § 1129(a)(5)). Pursuant to Section 1129(a)(5) of the Bankruptcy Code, the Debtors disclosed the identity and affiliations of the proposed directors and officers of the Reorganized Debtors in Exhibit 9, as revised, to the Plan Supplement. The manner in which the directors and officers were chosen was disclosed in Section 5.4(b) of the Plan. The appointment of the proposed directors and officers is consistent with the interests of the Holders of Claims and Interests and with public policy. The provisions

are consistent with the requirements of Section 1129(a)(5) and are in the best interests of Creditors and therefore, the Plan satisfies the requirements of Section 1129(a)(5) of the Bankruptcy Code.

AA. No Rate Changes (11 U.S.C. § 1129(a)(6)). The Plan does not provide for the change of any rates subject to the oversight of a governmental regulatory commission. Thus, Section 1129(a)(6) of the Bankruptcy Code is inapplicable.

BB. Best Interests Test (11 U.S.C. § 1129(a)(7)). The Plan satisfies Section 1129(a)(7) of the Bankruptcy Code. The Voting Declaration and the liquidation analysis attached as Exhibit C to the Disclosure Statement (the "Liquidation Analysis") indicate that each Holder of a Claim or Interest in an Impaired Class has either accepted the Plan or will receive or retain under the Plan on account of such Claim or Interest property of a value, as of the Effective Date, that is not less than the amount such Holder would receive or retain in a Chapter 7 liquidation. The Liquidation Analysis, including the methodology used and estimations and assumptions made therein, and the evidence related thereto that was proffered at the Confirmation Hearing, (a) are persuasive and credible as of the dates such evidence was prepared, presented or proffered, (b) either have not been controverted by other persuasive evidence or have not been challenged, (c) are based upon reasonable and sound assumptions, and (d) provide a reasonable estimate of the liquidation value of the Debtors' Estates upon conversion to Chapter 7 proceedings. Because each Holder of Claims or Interests in each Class has either (i) accepted the Plan, or (ii) will receive at least as much under the Plan as they would under a Chapter 7 liquidation, the Plan satisfies Section 1129(a)(7) of the Bankruptcy Code.

CC. Acceptance or Rejection by Certain Classes (11 U.S.C. § 1129(a)(8)). Each of Class 1—Priority Non-Tax Claims, Class 2—Other Secured Claims and Class 9—Subsidiary

Interests are not impaired under the Plan and are conclusively presumed to have accepted the Plan under Section 1126(f) of the Bankruptcy Code. Each of Class 3—Current Trade Vendor Unsecured Claims, Class 4—Non-Insider General Unsecured Claims, Class 5—Aker and Boeing Claims, and Class 6—RSC Energia Claims, and Class 7—Yuzhmash and Yuzhnoye Claims has voted to accept the Plan in accordance with Section 1126(c) of the Bankruptcy Code. Class 8—Sea Launch Equity Interests are deemed to have rejected the Plan pursuant to Section 1126(g) of the Bankruptcy Code because such Holders are not entitled to receive or retain any distribution or property under the Plan on account of such Interests and, therefore, the Debtors were not required to solicit votes to accept or reject the Plan from Holders of Class 8 Interests. Although Section 1129(a)(8) has not been satisfied with respect to Class 8, the Plan may still be confirmed because the Plan satisfies Section 1129(b) of the Bankruptcy Code with respect to such Class. As set forth in the Voting Declaration, and as announced by Boeing, Aker and Yuzhmash at the Confirmation Hearing with regard to their changed votes, the percentages of Holders of Claims in the Classes entitled to vote on the Plan that voted to accept or reject the Plan are as follows:

Plan Class of Impaired Creditors	% of Dollar Amount of Claims Voting to Accept the Plan	% of Number of Holders Voting to Accept the Plan	% of Dollar Amount of Claims Voting to Reject the Plan	% of Number of Holders Voting to Reject the Plan
Class 3	$52,813.17 (85.61%)	17 (94.44%)	$8,873,83 (14.39%)	1 (5.56%)
Class 4	$258,292,693.20 (94.85%)	10 (90.91%)	$14,023,500.00 (5.15%)	1 (9.09%)
Class 5	$57,000,000.00 (100%)	3 (100%)	$0.00 (0%)	0 (0%)
Class 6	$79,697,109.00 (100%)	3 (100%)	$0.00 (0%)	0 (0%)
Class 7	$76,000,000.00 (100%)	1 (100%)	$0.00 (0%)	0 (0%)

DD. Treatment of Administrative, Priority and Tax Claims (11 U.S.C. § 1129(a)(9)). The Plan provides for treatment of Allowed Claims entitled to priority pursuant to Section

507(a)(2)-(8) of the Bankruptcy Code in the manner required by Section 1129(a)(9) of the Bankruptcy Code.

EE. Acceptance By Impaired Class (11 U.S.C. § 1129(a)(10)). Class 3—Current Trade Vendor Unsecured Claims, Class 4—Customer or Trade Vendor Unsecured Claims, Class 5—Aker and Boeing Claims, Class 6—RSC Energia Claims and Class 7—Yuzhmash and Yuzhnoye Claims are each impaired and have each voted to accept the Plan in accordance with Sections 1126(c) of the Bankruptcy Code, thereby satisfying the requirements of Section 1129(a)(10) of the Bankruptcy Code.

FF. Feasibility (11 U.S.C. § 1129(a)(11)). The Plan is feasible as the Debtors have demonstrated, through the projected financial information provided as Exhibit B to the Disclosure Statement (the "Projections") and evidence proffered or adduced at the Confirmation Hearing, that confirmation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the Debtors, the Reorganized Debtors or any successor to the Reorganized Debtors. The Plan therefore complies with Section 1129(a)(11) of the Bankruptcy Code.

GG. Payment of Fees (11 U.S.C. § 1129(a)(12)). Section 12.15 of the Plan provides that the Debtors, or Reorganized Debtors as the case may be, will pay any fees due to the United States Trustee as they become due. Section 12.7 of the Plan further provides that all fees payable pursuant to Section 1930 of Title 28 of the United States Code, as determined by the Bankruptcy Court at the Confirmation Hearing, shall be paid on the Effective Date. Therefore the Plan meets the requirements of Section 1129(a)(12) of the Bankruptcy Code.

HH. Retiree Benefits (11 U.S.C. § 1129(a)(13)). The Debtors have no obligation to pay for retiree benefits and therefore Section 1129(a)(13) is not applicable to the Plan.

II. Payment of Domestic Support Obligations (11 U.S.C. § 1129(a)(14)). The Debtors are not required by any judicial or administrative order, or by statute, to pay any domestic support obligation and Section 1129(a)(14) is therefore inapplicable to the Plan.

JJ. Certain Payments by Individual Debtors (11 U.S.C. § 1129(a)(15)). The Debtors are not individuals and therefore Section 1129(a)(15) is inapplicable to the Plan.

KK. Transfers of property of a Debtor that is not a moneyed interest (11 U.S.C. § 1129(a)(16)). The Debtors are for-profit corporations or partnerships and Section 1129(a)(16) by its terms applies only to corporations and trusts that are *not* "moneyed, business, or commercial." Section 1129(a)(16) is therefore inapplicable to the Plan.

LL. No Unfair Discrimination; Fair and Equitable (11 U.S.C. § 1129(b)). Holders of Interests in Class 8 are impaired and are deemed to have rejected the Plan. The Debtors presented uncontroverted evidence at the Confirmation Hearing that the Plan does not discriminate unfairly and is fair and equitable with respect to Class 8 as required by the "cramdown" requirements of Section 1129(b)(1) of the Bankruptcy Code. Thus, the Court may confirm the Plan notwithstanding the Debtors' failure to satisfy Section 1129(a)(8) of the Bankruptcy Code. On the Effective Date, the Plan will be binding upon Holders of Interests in Class 8.

MM. Principal Purpose (11 U.S.C. § 1129(d)). The avoidance of Section 5 of the Securities Act of 1933 is not the principal purpose of the Plan, nor is the avoidance of taxes or any provision of applicable tax law a principal purpose of the plan, and no governmental unit has objected to the confirmation of the Plan asserting such avoidance. The Plan, therefore, satisfies the requirements of Section 1129(d) of the Bankruptcy Code.

NN. Good Faith Solicitation (11 U.S.C. § 1125(e)). Based on the record in these Bankruptcy Cases, the Debtors and their directors, officers, employees, advisors and attorneys have acted in "good faith" within the meaning of Section 1125(e) of the Bankruptcy Code and Bankruptcy Rules in compliance with all of their respective activities related to the solicitation of acceptances of the Plan and their participation in the activities described in Section 1125 of the Bankruptcy Code and, accordingly, such parties are entitled to the protections afforded by Section 1125(e) of the Bankruptcy Code and the exculpation provisions set forth in Article X of the Plan. Based upon the Court's review of the amendments and modifications embodied in the Plan, no further solicitation or resolicitation is necessary.

OO. Satisfaction of Confirmation Requirements. The Plan satisfies the requirements for confirmation set forth in Section 1129 of the Bankruptcy Code.

PP. Energia Overseas Expense Reimbursement. The reimbursement of the reasonable fees, costs, and expenses incurred by Energia Overseas in connection with the Exit Financing is reasonable and appropriate and does not violate any provision of the Bankruptcy Code.

QQ. SLEIP. The Sea Launch Employee Incentive Plan, as adopted by the Reorganized Debtors by virtue of Section 5.7 of the Plan, is reasonable and justified under the facts and circumstances of these Bankruptcy Cases and is permissible under and does not violate any provision of the Bankruptcy Code including, without limitation, Section 503(c) of the Bankruptcy Code. The only remaining amount owing under the terms of the SLEIP is equal to $857,527.53 in the aggregate, of which $601,764 is owing to management, and no other amounts shall be due and payable thereunder.

RR. Retention of Jurisdiction. Pursuant to Sections 105(a) and 1142 of the Bankruptcy Code, and notwithstanding the entry of this Confirmation Order or the occurrence of

the Effective Date, this Court, except as otherwise provided in the Plan or herein, shall retain exclusive jurisdiction over all matters arising out of, and related to, these Bankruptcy Cases and the Plan to the fullest extent permitted by law, including, but not limited to, the matters set forth in Article XI of the Plan.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. Solicitation and Disclosure. The Disclosure Statement contains adequate information in accordance with Sections 1125 and 1126 of the Bankruptcy Code. Votes for the acceptance or rejection of the Plan were solicited by the Debtors in good faith and in compliance with Sections 1125 and 1126 of the Bankruptcy Code, Bankruptcy Rules 3017 and 3018, all other applicable provisions of the Bankruptcy Code and all other rules, laws and regulations, and the solicitation procedures and solicitation are hereby approved in all respects.

2. Confirmation of the Plan. The Plan (as deemed amended by this Confirmation Order) is approved and confirmed under Section 1129 of the Bankruptcy Code. The terms of each of the documents in the Plan, including the Plan Supplement and any other exhibits or annexations thereto (subject to further modifications by the Debtors, which modifications shall not be inconsistent with the Plan or this Confirmation Order) , and any documents necessary in the judgment of the Reorganized Debtors or Energia Overseas to implement, effectuate and finalize the Plan, whether or not specifically contemplated in the Plan and the Plan Documents, are approved, are an integral part of the Plan, and are incorporated by reference into the Plan and this Confirmation Order.

3. Objections Withdrawn or Overruled. The Objections, and all other objections and responses to the Plan, if any, not heretofore withdrawn or resolved, or otherwise resolved at the Confirmation Hearing as announced on the record, are overruled in their entirety or deemed withdrawn with prejudice.

4. Plan Classification Controlling. The classifications of Claims and Interests for purposes of distributions under the Plan shall be governed solely by the terms of the Plan. The classifications included in the Ballots tendered to or returned by the Holders of Claims for purposes of voting on the Plan (a) were included in the Ballots solely for purposes of voting on the Plan; (b) do not necessarily represent and in no event shall be deemed to modify or otherwise affect the actual classification of such Claims under the Plan for distribution purposes; (c) may not be relied upon by any Holder of a Claim as representing the actual classification of such Claims under the Plan for distribution purposes; and (d) shall not be binding on the Debtors or on the Reorganized Debtors.

5. Provisions of Plan and Order Non-severable and Mutually Dependent. The provisions of the Plan and this Confirmation Order, including the findings of fact and conclusions of law set forth herein, are non-severable and mutually dependent.

6. Record Closed. The record of the Confirmation Hearing is hereby closed.

7. Notice. As established by the Solicitation Mailing Affidavit, and as set forth in Paragraph F above, the Debtors provided good and sufficient notice of the Confirmation Hearing and the deadline for filing and serving objections to the Plan and Disclosure Statement, which notice is hereby approved.

8. Authorization and Direction to Act. In accordance with Section 1142 of the Bankruptcy Code, Section 213 of the Delaware Limited Liability Company Act, and any other

applicable law of any jurisdiction, the Debtors, the Reorganized Debtors and each other appropriate party are hereby authorized and directed to take all steps and perform such acts as may be necessary, desirable or appropriate, to comply with, implement and effectuate the Plan, whether or not such action is specifically contemplated by the Plan, the Plan Documents or this Confirmation Order.

No further approval by the Bankruptcy Court shall be required for any action, transaction or agreement that the management of the Debtors, or the directors of the Reorganized Debtors determines is necessary or appropriate to implement the Investment Agreement and effectuate or consummate the Plan, whether or not such action, transaction or agreement is specifically contemplated in the Plan or the Confirmation Order. This Confirmation Order shall further constitute all approvals, consents and directions required for management of the Debtors or the Directors of the Reorganized Debtors to act consistent with the Plan and the New Investment Agreement, if any, by the laws, rules, and regulations of all states and any other governmental authority with respect to the implementation or consummation of the Plan including each of the Corporate Transaction Reorganization steps, and any documents, instruments, or agreements, and any other acts and transactions referred to in or contemplated by the Plan and the Plan Supplement.

Unless specifically directed by this Confirmation Order, no further action of the Debtors or the Reorganized Debtors, or their respective members or partners, boards of directors, officers, managers or shareholders, including, but not limited to, the owners of the Sea Launch Equity Interests shall be necessary to perform any act to comply with, implement and effectuate the Plan. The approvals and authorizations specifically set forth in this Confirmation Order are nonexclusive and are not intended to limit the authority of any Debtor or Reorganized Debtor or

any officer, director, partner or member thereof as the case may be, and their agents, to take any and all actions necessary or appropriate to implement, effectuate and consummate any and all documents or transactions contemplated by the Plan, the Plan Documents or this Confirmation Order.

Such actions shall include, without limitation, the transfer of Reorganized Sea Launch to Berne, Canton of Berne, Switzerland, the conversion to a Swiss corporation and the issuance of, the Creditor Trust Equity Interests, the Preferred Stock and the New Common Stock and the related filings and the entry into the New Investment Agreement and the Exit Financing Credit Agreement, and the parties are further authorized and directed to execute and deliver any instrument and perform any other act that is necessary for consummation of the Plan including, without limitation, all steps and acts set forth in Article V of the Plan. The authorized and mandated actions include, but are not limited to, the Corporate Reorganization Transaction Steps. The obligations under such executed and delivered Plan Documents shall constitute legal, valid, binding and authorized obligations of each of the respective parties thereto, enforceable in accordance with their terms without the need for any shareholder or board of directors' approval.

In particular, the Corporation Reorganization Transactions Steps that all parties are authorized and directed to take prior to or on the Effective Date include, but are not limited to:

(a) with respect to Reorganized Sea Launch:

(i) the cancellation of all of the Sea Launch Equity Interests;

(ii) Execution of a resolution by RSC Energia as the Preferred Stock shareholder and the Creditor Trust as sole Common Stock shareholder (both as the transition shareholders of the Reorganized Debtors) encompassing each of the matters described in

subparagraphs (iii) – (xiii) below

(iii) the transfer of Reorganized Sea Launch from Wilmington, Delaware, USA, to Berne, Canton of Berne, Switzerland in accordance with Sec. 18-213 of the Delaware Limited Liability Company Act (without continuance in Delaware, USA) (the "Migration") the domestication of Reorganized Sea Launch in Switzerland as a Swiss corporation (Aktiengesellschaft) under the name of Sea Launch AG and with the corporate purpose stated in the Articles of Incorporation Before Capital Increase;

(iv) the filing of a Certificate of Transfer, upon the effectiveness of which Sea Launch shall cease to exist as a limited liability company of the State of Delaware;

(v) the agreement of Reorganized Sea Launch that it may be served with process in the State of Delaware in any action, suit or proceeding for enforcement of any obligation of Sea Launch arising while it was a limited liability company of the State of Delaware except to the extent discharged pursuant to or under the Bankruptcy Code or released under the Plan, and the irrevocable appointment by Reorganized Sea Launch of the Secretary of State of Delaware as its agent to accept service of process in any such action, suit or proceeding;

(vi) the adoption of the Articles of Incorporation Before Capital Increase of Reorganized Sea Launch as a Swiss corporation at the

time of its first registration with the Commercial Register of the Canton of Berne, Switzerland (the "Commercial Register") in Switzerland, in German and English (with the German version as the governing version) contained in the Plan Supplement which Articles contain, *inter alia,* the following provisions: (i) the new name of Reorganized Sea Launch; (ii) a statement of Reorganized Sea Launch's corporate purpose; and (iii) details of the rights and preferences of the New Common Stock and the Preferred Stock;

(vii) the issuance, immediately prior to and effective upon registration in the Commercial Register of the new share capital of the Company of the CHF equivalent of USD 18,478,947 as of the time of the registration, divided into the CHF equivalent of USD 14,400,000 of Preferred Stock of CHF 10 par value each, fully paid in, to RSC Energia in exchange for each Allowed Partner Currency Control Claim held by RSC Energia and the CHF Franc Equivalent of up to USD 4,078,947.50 of New Common Stock of CHF 10 par value each, fully paid in, to the Creditors Trust in exchange for Allowed Partner Claims, which amounts shall be converted into CHF using the USD-CHF exchange rate set forth in the Wall Street Journal on the day that is two business days prior to the filing of such Articles of Incorporation Prior to Capital Increase (the "Exchange Rate");

(viii) the election of the existing Chief Executive Officer of the

Company, Kjell Karlsen, who is residing outside Switzerland, as the transition Chairman of the Board, and Aiaz Bakasov, a Swiss resident, as new Board members; both with sole signatory power (the "Transition Directors");

(ix) the election of KPMG AG, Badenerstrasse 172, 8004 Zurich, Switzerland (responsible: Roger Neininger, Vice Chairman of the Board of Directors and Head of Audit) as statutory auditors for Reorganized Sea Launch, having their registered office in Switzerland (the "Auditors"), provided KPMG AG shall have accepted the mandate, or such other statutory auditor as may be nominated by the Transition Directors;

(x) the registration of the two Transition Directors and the Auditors in the Commercial Register;

(xi) an ordinary share capital increase immediately after registration of Reorganized Sea Launch in the Commercial Register, in the amount of the CHF equivalent of up to USD 81,578,947.50-(the "New Investment Capital Increase") CHF 10 par value (for a total share capital of the CHF equivalent of 95,978,947.50), divided into up to the CHF equivalent of up to USD 81,578,947.50 of New Common Stock (equal to the New Investor Equity Amount) of CHF 10 par value each, fully paid in, to Energia Overseas in exchange for (i) the conversion as required by the New Investor of the principal amount of money borrowed by the Debtors-in-

Possession under the Bankruptcy Court approved DIP Facility Agreement currently in the amount of USD 30,000,000 and (ii) a cash contribution of the equivalent in CHF of the New Investment Amount of USD 125,000,000, all amounts to be converted at the Exchange Rate;

(xii) the adoption of the Articles of Incorporation After Capital Increase of Reorganized Sea Launch (the Swiss corporation) after such share capital increase encompassing (i) the increased and, thus, "final" issued share capital, (ii) authorized share capital in the total amount of 50% of the then issued share capital, and (iii) conditional share capital in the total amount of 50% of the then issued share capital, all amounts to be completed using the Exchange Rate;

(xiii) the election of the Directors of Reorganized Sea Launch set forth on Exhibit 9 of the Plan Supplement.

(b) With respect to Sea Launch L.P.:

(i) the approval of an Assignment and Assumption Agreement (the "Sea Launch Assignment Agreement") for Sea Launch L.P., the Assignor, by the Reorganized Sea Launch as general partner of Sea Launch L.P. and by the limited partners;

(ii) the approval of the Sea Launch Assignment Agreement for Reorganized Sea Launch as Assignee;

(iii) the execution and delivery of the Sea Launch Assignment

Agreement by and among the parties thereto;

(iv) the execution of new time charter to Reorganized Sea Launch for each of the Sea Launch Commander and the Odyssey and, to the extent necessary, related Deeds of Subrogation;

(v) the sending of a Notice of Assignment to contract counterparties, and, where required, obtain consent to assignment by counterparties;

(c) with respect to Platform Limited Partnership and Platform Company LDC:

(i) the approval of an Assignment and Assumption Agreement (the "Platform Assignment Agreement") for Platform Limited Partnership, the Assignor, by Platform Company LDC as general partner of Platform Limited Partnership and by Sea Launch Limited Partnership as Platform LP's limited partner;

(ii) the approval of (i) the Platform Assignment Agreement for Platform Company LDC as Assignee and (ii) an amendment to the Articles of Association of Platform Company LDC to make it a single purpose company whose sole object is the ownership and operation of Liberian registered vessels, by Sea Launch Limited Partnership as 100% shareholder of Platform Company LDC (the "Platform LDC Amendment"), and authorization of (iii) the filing and of the Platform LDC Amendment;

(iii) the execution and delivery of the Platform Assignment Agreement and related required documentation in connection with transfer of

ownership of the vessel named "Odyssey" by and among the parties thereto;

(iv) the sending of a Notice of Assignment to contract counterparties, and, where required, obtaining consent to assignment by counterparties;

(v) the registration of Platform Company LDC as the new owner of "Odyssey" with the LISCR;

(d) with respect to Sea Launch ACS Limited Partnership and Sea Launch ACS Limited

(i) the approval of an Assignment and Assumption Agreement (the "ACS Assignment Agreement") for Sea Launch ACS Limited Partnership, the Assignor, by Sea Launch Limited Partnership as limited partner of Sea Launch ACS Limited Partnership and by Sea Launch ACS Limited as Sea Launch ACS Limited Partnership's general partner;

(ii) the execution and delivery of the ACS Assignment Agreement and related required documentation in connection with asset and liability transfer other than ownership of the vessel named "Sea Launch Commander" already held by Sea Launch ACS Limited, by and among the parties thereto; and

(iii) the sending of a Notice of Assignment to contract counterparties, and, where required, obtaining consent to assignment by counterparties.

9. Binding Effect. In accordance with Section 1141 of the Bankruptcy Code, the Plan shall be binding upon and inure to the benefit of the Debtors, the Reorganized Debtors, any person acquiring or receiving property under the Plan, any party to a contract with the Debtors, any lessor or lessee of property to or from the Debtors and any Holder of a Claim against or Interest in the Debtors, whether or not such Claim or Interest is Impaired under the Plan and whether or not such Holder will receive or retain any property or interest in property under the Plan, has filed a Proof of Claim in the Bankruptcy Cases or failed to vote to accept or reject the Plan or affirmatively voted to reject the Plan, and the respective successors and assigns, if any, of the foregoing. Pursuant to Sections 1123(a) and 1142(a) of the Bankruptcy Code and the provisions of this Confirmation Order, the Plan, and all documents related to the Plan shall apply and be enforceable notwithstanding any otherwise applicable non-bankruptcy law. The rights, benefits, and obligations of any Debtor, Reorganized Debtor, Holder of a Claim or Interest or any other person or entity named or referred to in the Plan shall be binding on, and shall inure to the benefit of any heir, executor, administrator, successor or assign, affiliate, officer, director, agent, representative, attorney, beneficiaries, or guardian, if any, of each Debtor, Reorganized Debtor, Holder of a Claim or Interest or any other person or entity.

10. Vesting of Assets Free and Clear of Claims and Interests. Upon Confirmation of the Plan, and except as otherwise provided in the Plan, the Plan Documents or the Confirmation Order, all property of the Estates of the Debtors, including all Causes of Action (including Creditor Trust Actions unless expressly assigned to the Creditor Trust) and any property acquired by the Debtors or the Reorganized Debtors under or in connection with this Plan, shall vest in the Reorganized Debtors free and clear of all Claims, Liens, charges, other encumbrances and Interests. Such vesting does not constitute a voidable transfer under the Bankruptcy Code or

applicable non-bankruptcy law. On and after the Effective Date, the Debtors and the Reorganized Debtors may operate their businesses and may use, acquire and dispose of property and compromise or settle any Claims without supervision of or approval by the Bankruptcy Court and free and clear of any restrictions of the Bankruptcy Code or the Bankruptcy Rules, other than restrictions expressly imposed by this Plan or the Confirmation Order. Without limiting the foregoing, the Reorganized Debtors may pay the charges that they incur on or after the Effective Date for professionals' fees, disbursements, expenses or related support services without application to the Bankruptcy Court.

11. Cancellation of DIP Facility Claims. On the Effective Date, except as otherwise provided in the Plan or herein, in full satisfaction, settlement, release, and discharge of and in exchange for each DIP Facility Claim, all Allowed DIP Facility Claims shall, at the election of the DIP Lender, either (a) be paid in full and in Cash from the proceeds of the Exit Financing, or (b) be converted into New Common Stock to the extent requested by the DIP Lender in accordance with the DIP Facility Agreement, and, in each case, all commitments under the DIP Facility Agreement shall be canceled. Notwithstanding anything to the contrary herein, the liens and security interests securing the DIP Facility Claims shall continue in full force and effect until such time as the Allowed DIP Facility Claims have been paid in full and in Cash or converted into New Common Stock, after which such liens and security interests shall be deemed canceled.

12. Release of Liens. Upon satisfaction in full, pursuant to the terms of the Plan, of the DIP Facility Claims, if any, on the Effective Date, any liens securing the DIP Facility Claims shall be deemed irrevocably released and the persons holding such DIP Facility Claims shall release any collateral or other property of the Debtors held by such persons and shall take such actions as may be reasonably requested by the Reorganized Debtors or any lender or prospective

lender of the Reorganized Debtors to evidence the release of such liens, including, without limitation, the execution, delivery, and filing or recording of such releases as may be reasonably requested by the Reorganized Debtors.

13. Cancellation of Outstanding Interests. As of the Effective Date, except as otherwise provided for in the Plan or herein, all Sea Launch Equity Interests shall be canceled, and the obligations of the Debtors under any stockholder agreements, registration rights agreements, repurchase agreements and repurchase arrangements, or other instruments or documents evidencing or creating any obligations of the Debtors with respect to such Sea Launch Equity Interests, shall be rejected and discharged; provided, however, that notwithstanding the foregoing or Paragraph 8 of this Confirmation Order to the contrary, such rejection and discharge of the Debtors' obligations pursuant to this subsection shall not affect or impair the existence, validity and enforceability of any such stockholders agreement, registration rights agreement, repurchase agreement and repurchase arrangement, or other such instrument or document, or any rights, claims, or defenses thereunder, with respect to and among non-Debtor entities. Prior to or as of the Effective Date, all Sea Launch Equity Interests that have been authorized to be issued but that have not been issued, if any, shall be deemed canceled and extinguished without any further action of any party.

14. Issuance of New Instruments. All New Common Stock, Preferred Stock, and Creditor Trust Equity Interests issued pursuant to the Plan shall, upon issuance, be duly authorized and validly issued, fully paid and non-assessable, and the conditions precedent to the issuance thereof shall be deemed satisfied.

15. Articles of Incorporation, Shareholders' Agreement, and Creditor Trust Agreement. Prior to or on the Effective Date, the Articles of Incorporation (in the form of the

Articles of Incorporation Before Capital Increase and the Articles of Incorporation After Capital Increase), Shareholders' Agreement and Creditor Trust Agreement substantially in the form attached as Exhibits 1(a), 1(b), 3, and 6 to the Plan Supplement shall be made effective. After the Effective Date, the Reorganized Debtors may amend and restate the Articles of Incorporation, Shareholders' Agreement and Creditor Trust Agreement as permitted by the constituent documents of such Reorganized Debtors and as permitted by applicable law.

16. Corporate Action. Prior to, on, or after the Effective Date, as appropriate, all matters expressly provided for under the Plan that would otherwise require approval of the partners, shareholders, directors, members or managers of one (1) or more of the Debtors or Reorganized Debtors shall be deemed to have occurred and shall be in effect prior to, on, or after the Effective Date (as appropriate) pursuant to the applicable general corporation or other applicable law of the jurisdictions in which the Debtors or Reorganized Debtors are incorporated without any requirement of further action by such partners, shareholders, directors, members or managers of the Debtors or Reorganized Debtors. Specifically, and without limitation of the foregoing, Energia Overseas is deemed to have received the requisite approval of the partners, shareholders, directors, members and managers of the Debtors and Reorganized Debtors under the applicable laws of the State of Delaware or the laws of any other applicable jurisdiction, and all corporate and partnership actions and authorizations required to be taken under the laws of the State of Delaware shall be deemed to have occurred.

17. SLEIP. The Sea Launch Employee Incentive Plan and the payments thereunder, as contemplated by Section 5.7 of the Plan and determined in accordance with the provisions of the SLEIP, are hereby approved.

18. New Investment Agreement. The terms of the New Investment Agreement (in substantially the form filed with the Bankruptcy Court) and any related agreements contemplated in connection therewith are hereby approved. Sea Launch and Sea Launch LP are hereby authorized and directed to enter into the New Investment Agreement with Energia Overseas and to execute and deliver, to the satisfaction of Energia Overseas, all agreements, documents, instruments and certificates relating thereto and to perform their obligations thereunder, without the further approval of this Court or the Debtors, the Reorganized or their respective members, partners, boards of directors, officers, managers or shareholders, including, but not limited to, the owners of the Sea Launch Equity Interests, or any other entities or persons. Provided that Energia Overseas deems all conditions, representations, warranties and pre-closing covenants to have been satisfied, the New Investment Agreement, once executed, shall be in full force and effect and valid, binding and enforceable in accordance with its terms. Sea Launch and Sea Launch LLP shall deliver all shares purchased by Energia Overseas free and clear of all Liens other than those Liens created or approved by the New Investor. The guaranties, mortgages, pledges, liens and other security interests granted pursuant to the New Investment Agreement are granted in good faith as an inducement to Energia Overseas to purchase the shares of the Reorganized Company and shall be, and hereby are, deemed not to constitute a fraudulent transfer or conveyance and shall be unavoidable for all purposes.

19. Exit Financing Credit Agreement. The terms of the Exit Financing Credit Agreement and any related agreements, and the loans and other extensions of credit contemplated in connection therewith, are hereby approved. The Reorganized Debtors are hereby authorized and directed to enter into the Exit Financing Credit Agreement with Energia Overseas and to execute and deliver, to the satisfaction of Energia Overseas, all agreements,

documents, instruments and certificates relating thereto and to perform their obligations thereunder, without the further approval of this Court or the Debtors, the Reorganized or their respective members, partners, boards of directors, officers, managers or shareholders, including, but not limited to, the owners of the Sea Launch Equity Interests, or any other entities or persons. Provided that Energia Overseas deems all conditions, representations, warranties and pre-closing covenants to have been satisfied, the Exit Financing Credit Agreement, once executed, shall be in full force and effect and valid, binding and enforceable in accordance with its terms. The obligations of the Reorganized Debtors under the Exit Financing Credit Agreement shall be secured by valid, binding and enforceable liens on the collateral specified in the relevant security agreements. The guaranties, mortgages, pledges, liens and other security interests granted pursuant to the Exit Financing Credit Agreement are granted in good faith as an inducement to Energia Overseas to provide credit thereunder and shall be, and hereby are, deemed not to constitute a fraudulent transfer or conveyance, and shall be unavoidable for all purposes.

20. Exit Financing Credit Agreement – Effect of Reversal on Appeal. Any and all credit provided to the Reorganized Debtors under the Exit Financing Credit Facility shall be, and hereby is, deemed to have been provided in good faith and any reversal or appeal of this Confirmation Order or the provisions of this Confirmation Order approving the provision of credit under the Exit Financing Credit Agreement or the granting of liens to Energia Overseas, will not affect the validity of any debt incurred by the Reorganized Debtors pursuant to this Confirmation Order, the Plan and/or the Exit Financing Credit Agreement, unless the authorization and incurring of such debt, or the granting of such priority or lien, has been stayed pending appeal, and written notice thereof has been given to the Debtors and Energia Overseas.

21. Litigation Claims—Retention of Causes of Action. Except as otherwise provided expressly in the Plan, in this Confirmation Order, or in any document, instrument, settlement agreement approved by the Court, release or other agreement entered into in connection with the Plan, the Debtors, on behalf of themselves and their Estates, and the Reorganized Debtors have retained and reserved all rights to commence, pursue, settle or compromise, or decline to do any of the foregoing, as appropriate, any and all Causes of Action, which expressly include Chapter 5 Causes of Action and any actions against Space Launch Services, LLC and The Robert A. and Virginia Heinlein Prize Trust, whether arising prior to or after the Petition Date, in any court or other tribunal, including, without limitation, in an adversary proceeding filed in these Bankruptcy Cases. The failure to specifically list in the Disclosure Statement or in the Plan any potential or existing Causes of Action generally or specifically does not limit the rights of the Debtors or the Reorganized Debtors to pursue such action. Nothing in this paragraph shall be deemed to affect the validity of any release or waiver by the Debtors set forth in the Plan or any Final Order.

22. Distributions and Claims Reconciliation. The provisions of Articles VI and VIII of the Plan governing distributions and the resolution and treatment of disputed Claims and Interests under the Plan are hereby approved in all respect and found to be fair and reasonable. Except as otherwise provided in the Plan, on and after the Effective Date, the Reorganized Debtors shall have sole responsibility and authority for administering, disputing, objecting to, compromising and settling, or otherwise resolving and making distributions (if any) with respect to all Claims, including all Administrative Expense Claims, without notice to any other party or approval of, or notice to the Court.

23. Assumption and Rejection of Executory Contracts. Through Section 7.1 of the Plan and this Confirmation Order, except as set forth in the Notice of Assumption or as otherwise provided herein, all of the Debtors executory contracts and unexpired leases are deemed rejected in accordance with Sections 365 and 1123 of the Bankruptcy Code unless such executory contract or unexpired lease (i) was previously assumed or rejected by the Debtors, (ii) previously expired or terminated pursuant to its own terms, (iii) is subject to a pending motion to assume or reject, or (iv) is listed on the Notice of Assumption or any amendment thereto. The final Notice of Assumption, as has been amended from time to time, is attached hereto as Exhibit A. Entry of this Confirmation Order shall constitute approval or such rejections and assumptions, as applicable, pursuant to Sections 365(a) and 1123 of the Bankruptcy Code and each executory contract assumed shall revest in and be fully enforceable by the respective Reorganized Debtors in accordance with its terms, except as modified by the provisions of the Plan or any order of the Court authorizing and providing for its assumption or applicable federal law.

24. Bar Date for Rejection Claims. Pursuant to the Bar Date Order, Claims arising out of the rejection of executory contracts or unexpired leases rejected as of the Confirmation Date pursuant to the Plan must be filed no later than thirty (30) days after the entry of the Confirmation Order effectuating the rejection.

25. Cure of Defaults Under Assumed Executory Contracts. For those contracts or leases identified as being assumed in the New Investment Agreement and listed in the Notice of Assumption, pursuant to Section 7.3 of the Plan, or as may have been previously assumed by the Debtors with such assumption having been approved by a Final Order of this Court, the Debtors shall pay the cure amounts (the "Cure Amount") set forth in the schedule (the "Cure Payment

Schedule") attached to the Notice of Assumption, or in such other Final Order authorizing such assumption, as soon as practicable after the Effective Date or at such other time as the Debtors and the non-Debtor parties to such executory contracts shall agree. With respect to any non-Debtor party to an executory contract or unexpired lease listed in the Notice of Assumption, but who failed to assert an objection to the assumption of their contract or lease or to object to the Cure Amount are hereby deemed to have (i) waived any claim of default such parties may have against the Debtors under the applicable executory contracts or unexpired leases, and (ii) consented to the assumption of the applicable executory contracts or unexpired leases to which they are a party with the Debtors, and the assignment of such executory contracts or unexpired leases to the Reorganized Debtors, or Energia Overseas as the case may be, in accordance with and pursuant to the Plan and this Confirmation Order.

26. Assumption, Assignment, and Cure of Certain Indemnity Agreements. With respect to the prepetition and postpetition indemnity agreements with The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Limited (the "Club") detailed in Paragraph P above, pursuant to Sections 7.1 and 7.2 of the Plan, and conditioned on the receipt by the Club of the $95,000 Cure Amount with respect to the 2008 Policy, the 2008 and 2009 Policies are hereby deemed to be assumed by the Debtors and assigned to Reorganized Sea Launch, or Energia Logistics as the case may be, effective as of the Effective Date. The final payment due under the 2009 Policy shall be made by Reorganized Sea Launch (or Energia Logistics) pursuant to the terms of the 2009 Policy in November 2010. Pursuant to Section 7.3 of the Plan, and conditioned on the receipt by the Club of the $95,000 Cure Amount with respect to the 2008 Policy, the 2010 Policy is hereby deemed to be assumed by the Debtors and assigned to Reorganized Sea Launch, or Energia Logistics as the case may be, effective as of the Effective

Date. All terms and conditions of the 2008, 2009 and 2010 Policies, and The P&I Defence Rules and Correspondents from 2004 through 2007 to which Sea Launch LP and the Club are parties, shall remain in full force and effect following the Effective Date.

27. Section 1145 and Other Securities Law Exemptions. Pursuant to, and to the fullest extent permitted under, Section 1145 of the Bankruptcy Code, Section 4(2) of the Securities Act of 1933, and any other applicable state or federal securities law, the offer, issuance, distribution, conversion, transfer or exchange of the New Common Stock or the Creditor Trust Equity Interests (to the extent such contingent value rights are a security) shall be exempted from the registration requirements of the Securities Act of 1933 and of any similar state securities or "blue sky" laws to the extent otherwise appropriate

28. Exemption from Certain Taxes. Pursuant to Section 1146(a) of the Bankruptcy Code, (a) the issuance, transfer or exchange of debt, notes or equity securities or other interest under or in connection with or in contemplation of the Plan; (b) the creation, modification, consolidation, or recording of any mortgage, deed of trust, lien, pledge or other security interest, or the securing of additional indebtedness by such other means under or in connection with the Plan; (c) the making or assignment of any lease or sublease under or in connection with the Plan; or (d) the making or delivery of any deed or other instrument of transfer under or in connection with the Plan including, without limitation, merger agreements, agreements of consolidation, restructuring, disposition, liquidation or dissolution, deeds, bills of sale, and transfers of tangible property, will not be subject to any stamp tax, document recording tax, conveyance fee, intangibles or similar tax, mortgage tax, real estate transfer tax, mortgage recording tax, Uniform Commercial Code filing or recording fee, FERC filing or recording fee, or other similar tax or governmental assessment, and the appropriate state or local governmental officials or agents

shall forego the collection of any such tax or governmental assessment and to accept for filing and recordation any of the foregoing instruments or other documents without the payment of any such tax or governmental assessment. The Debtors are hereby authorized to deliver a notice or short form of this Confirmation Order to any state recording officer to the effect that such officer must accept for filing such security interests without charging any stamp tax or other similar tax.

29. Exculpation. Unless otherwise elected by a holder of a claim or interest under the Plan, from and after the Effective Date, (i) the Debtors, (ii) the Debtors' present and former Board representatives, (iii) the present and former officers and employees of the Debtors who were serving in such capacity on or after the Petition Date, (iv) the Chief Restructuring Officer of the Debtors and his employer, Buccino & Associates, Inc., (v) RSC Energia, (vi) the New Investor, (vii) the Committee and its members (but only in their capacity as members of the Committee), and (viii) any attorneys, financial advisors, investment bankers, accountants, consultants, or other professionals of the parties described in clauses (i) through (vii) hereof; provided, however, that such attorneys and professional advisors shall only include those that provided services related to the Debtors, the Bankruptcy Cases, the Plan, and the transactions contemplated by the Plan (collectively, the "Released Parties") shall neither have nor incur any liability to, or be subject to any right of action by, any Holder of a Claim or Interest, or any other party in interest, or any of their respective employees, representatives, financial advisors, attorneys, or agents acting in such capacity, or affiliates, or any of their successors or assigns, for any act or omission in connection with, relating to, or arising out of, the Bankruptcy Cases, formulating, negotiating or implementing the Plan, the solicitation of acceptances of the Plan, the pursuit of approval of the Disclosure Statement and confirmation of the Plan, the confirmation of the Plan, the Plan Documents, the consummation of the Plan or the administration of the Plan or

the property to be distributed under the Plan, or the restructuring transactions contemplated hereunder; provided, however, that the foregoing provision shall not apply to an act or omission that is determined by a Final Order of the Bankruptcy Court to have constituted willful misconduct or gross negligence. Any of the Released Parties shall be entitled to rely, in all respects, upon the advice of counsel with respect to their duties and responsibilities under the Plan.

30. Releases by the Debtors. As of the Effective Date, for good and valuable consideration, the adequacy of which is hereby confirmed, the Debtors and Reorganized Debtors in their individual capacities and as debtors-in-possession on behalf of each of the Debtors' Estates will be deemed to release and forever waive and discharge all claims, obligations, suits, judgments, damages, demands, debts, rights, causes of action and liabilities whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise against the Released Parties, that are based in whole or part on any act, omission, transaction, event or other occurrence taking place on or prior to the Effective Date in any way relating to the Debtors, the Reorganized Debtors, the Bankruptcy Cases, the Plan or the Disclosure Statement, or any document or agreement related thereto; provided, however, that the foregoing provision shall not apply to an act or omission that is determined by a Final Order of the Bankruptcy Court to have constituted willful misconduct or gross negligence.

31. Releases by Holders of Claims and Interests. As of the Effective Date, to the fullest extent permitted by law, each Holder of a Claim or Interest that did not otherwise elect in accordance with voting on the Plan, shall in consideration for the obligations of the Debtors and the Reorganized Debtors under the Plan and the Cash, the securities, including the Call Option

under the Exit Financing Commitment Letter, the New Investment Agreement and the Reorganized Sea Launch Shareholders Agreement, the Exit Financing Credit Agreement, contracts, instruments, releases and other agreements or documents to be delivered in connection with the Plan, be deemed to have forever released, waived and discharged all claims, demands, debts, rights, causes of action or liabilities, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise, relating to the Debtors, the Reorganized Debtors, the Bankruptcy Cases, the Plan or the Disclosure Statement, the Plan Documents, or the restructuring transactions contemplated thereby, existing as of the Effective Date or thereafter that are based in whole or part on or connected or related to any act, omission, transaction event, or other occurrence taking place on or prior to the Effective Date, against the Released Parties. With regard to the foregoing releases, no release of the Debtors or Reorganized Debtors shall be deemed to release any third party including, without limitation, the Debtors' or Reorganized Debtors' insurers. Any Holder of a Claim or Interest who does not elect to offer the Releases described in this paragraph, to the extent receiving any securities pursuant to the Plan, shall not be entitled to any direct or indirect benefits from the Call Option under the Exit Financing Commitment Letter and New Investment Agreement.

32. Injunction Related to Exculpation and Releases. All Persons that have held, hold or may hold any liabilities released or exculpated pursuant to Section 10.2 of the Plan will be permanently enjoined from taking any of the following actions against any Released Party or its property on account of such released liabilities: (i) commencing, conducting or continuing in any manner, directly or indirectly, any suit, action or other proceeding of any kind; (ii) enforcing, levying, attaching, collecting or otherwise recovering by any manner or means, directly or

indirectly, any judgment, award, decree or order; (iii) creating, perfecting or otherwise enforcing in any manner, directly or indirectly, any lien; (iv) except as provided herein, asserting any setoff, right of subrogation or recoupment of any kind, directly or indirectly, against any obligation due a Released Party; and (v) commencing or continuing any action, in any manner, in any place that does not comply with or is inconsistent with the provisions of the Plan or this Confirmation Order.

33. Survival of Indemnification Obligations. The obligations of the Debtors to indemnify individuals who, as of the Petition Date or thereafter, are or were directors, officers, agents, employees and representatives, pursuant to certificates or articles of incorporation, by-laws, contracts and/or applicable statutes, in respect of all actions, suits and proceedings against any of such officers, directors, agents, employees and representatives, based upon any act or omission related to service with or for or on behalf of the Debtors, other than grossly negligent or willful conduct, shall not be discharged or Impaired by, and shall survive, confirmation or consummation of the Plan and shall be assumed by the other Reorganized Debtors.

34. Discharge of Claims and Termination of Interests. Except as otherwise provided in the Plan or this Confirmation Order, all consideration distributed under the Plan shall be in exchange for, and in complete satisfaction, settlement, discharge and release of, all Claims and Interests (other than Unimpaired Claims under the Plan) of any nature whatsoever against the Debtors or any of their Estates, assets, properties or interest in property, and regardless of whether any property shall have been distributed or retained pursuant to the Plan on account of such Claims and Interests. Upon the Effective Date, the Debtors shall be deemed discharged and released under Section 1141(d)(1)(A) of the Bankruptcy Code from any and all Claims and Interests (other than Unimpaired Claims), including, but not limited to, demands and liabilities

that arose before the Effective Date, and all debts of the kind specified in Section 502(g), 502(h) or 502(i) of the Bankruptcy Code, and the Sea Launch Equity Interests. With regard to the foregoing discharge and release, no discharge or release of the Debtors or Reorganized Debtors shall be deemed to discharge or release any third party including, without limitation, the Debtors' or Reorganized Debtors' insurers.

35. Release of Boeing and Aker by Holders of Claims and Interests. In accordance with the Boeing Aker UCC Settlement Agreement, as of the Effective Date, to the fullest extent permitted by law, each Holder of a Claim or Interest that did not otherwise elect in accordance with voting on the Plan, shall, in consideration for Boeing and Aker agreeing to the Boeing Aker UCC Settlement Agreement, the adequacy of which is hereby confirmed, be deemed to have forever released, waived and discharged all claims, demands, debts, rights, causes of action or liabilities, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise, relating to the Debtors, the Reorganized Debtors, the Bankruptcy Cases, the Plan or the Disclosure Statement, the Plan Documents, or the restructuring transactions contemplated thereby, existing as of the Effective Date or thereafter that are based in whole or part on any act, omission, transaction event, or other occurrence taking place on or prior to the Effective Date, against Boeing and Aker, provided that the releases set forth in this Paragraph shall not contradict Section 10.5 of the Plan.

36. Injunction. Except as otherwise provided in the Plan or this Confirmation Order, from and after the Effective Date all Persons who have held, hold or may hold Claims (other than Unimpaired Claims under the Plan) against or Interests in the Debtors, are (i) permanently enjoined from taking any of the following actions against the Estate(s), or any of their property,

on account of any such Claims or Interests and (ii) permanently enjoined from taking any of the following actions against any of the Debtors, the Reorganized Debtors, RSC Energia, Energia Overseas or their property on account of such Claims or Interests: (A) commencing or continuing, in any manner or in any place, any action, or other proceeding; (B) enforcing, attaching, collecting or recovering in any manner any judgment, award, decree or order; (C) creating, perfecting or enforcing any lien or encumbrance; (D) asserting any right of setoff, subrogation or recoupment of any kind and (E) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of the Plan; provided, however, that nothing contained herein shall preclude such persons from exercising their rights pursuant to and consistent with the terms of the Plan and this Confirmation Order, including, without limitation, Section 10.5 of the Plan. By accepting distributions pursuant to the Plan, each Holder of an Allowed Claim will be deemed to have specifically consented to the injunctions set forth in Section 10.3 of the Plan.

37. Term of Bankruptcy Injunction or Stays. All injunctions or stays provided for in the Bankruptcy Cases under Section 105 or 362 of the Bankruptcy Code, or otherwise, and in existence on the Confirmation Date, shall remain in full force and effect until the Effective Date.

38. Exception to Releases. Nothing in the Plan, including, but not limited to, Sections 10.2 and 10.3 of the Plan, the Confirmation Order, including, but not limited to, Finding Paragraph N, and Decretal Paragraphs 29-36, and 39-40, or any other document in connection with such documents shall release or discharge the claims, if any, of The Boeing Company, Boeing Commercial Space Company, Kvaerner Sea Launch Limited, Kvaerner Sea Launch U.S., Inc., Aker Maritime Finance AS, Kvaerner AS, Aker ASA, S.P. Korolev Rocket and Space Corporation Energia, KB Yuzhnoye, and PO Yuzhny Mashinostroitelny Zavod Production

Association, against entities other than the Debtors; provided, however, that nothing contained in this paragraph or Section 10.5 of the Plan shall constitute an acknowledgement by any party of any right or fact with respect to any claims; and provided, further, however, that nothing in this paragraph shall affect the releases provided by The Boeing Company, Boeing Commercial Space Company, Kvaerner Sea Launch Limited, Kvaerner Sea Launch U.S., Inc., Aker Maritime Finance AS, and/or Kvaerner AS, Aker ASA pursuant to the Boeing Aker UCC Settlement Agreement.

39. Injunction Against Certain Acts. From and after entry of this Confirmation Order, all Persons who have held, hold or may hold Claims against or interests in the Debtors are enjoined from taking any of the following actions against the Debtors, their Estates, the Plan Administrator, the Official Creditors' Committee, and/or the Plan Committee: (i) commencing or continuing, in any manner or any place, any action or other proceeding; (ii) enforcing, attaching, collecting, or recovering in any manner any judgment, award, decree, or order; (iii) creating, perfecting, or enforcing any lien or encumbrance; and (iv) commencing or continuing, in any manner or in any place, any action that does not comply with or is inconsistent with the provisions of the Plan; provided, however, that nothing contained herein shall preclude any Person from exercising their rights pursuant to and consistent with the terms of the Plan and/or this Confirmation Order. Notwithstanding anything to the contrary set forth in the Plan, Creditors' rights of setoff and recoupment are preserved, and the injunctions referenced herein shall not enjoin the valid exercise of such rights of setoff or recoupment.

40. Discharge of Debtors. Pursuant to Section 1141(d) of the Bankruptcy Code, and except as otherwise provided in this Confirmation Order, all distributions and rights afforded under the Plan and the treatment of Claims and Interests under the Plan shall be, and shall be

deemed to be, in exchange for, and in complete satisfaction, settlement, discharge and release of, all Claims or other obligations, suits, judgments, damages, debts, rights, remedies, causes of action or liabilities, and of all Interests, or other rights of a Holder of an Interest, related to any of the Debtors or the Reorganized Debtors or any of their respective assets, property and Estates, or interests of any nature whatsoever, including any interest accrued on such Claims from and after the Petition Date and regardless of whether any property will have been distributed or retained pursuant to the Plan on account of such Claims or other obligations, suits, judgments, damages, debts, rights, remedies, causes of action or liabilities, or Interests or other rights of a Holder of an Interest, and upon the Effective Date, (i) the Debtors and the Reorganized Debtors shall be deemed discharged under Section 1141(d)(1)(A) and any other applicable section of the Bankruptcy Code and released from any and all Claims or other obligations, suits, judgment, damages, debts, rights, remedies, causes of action or liabilities, or any Interests or other rights of a Holder of an Interest, or any nature whatsoever, including, without limitation, liabilities that arose before the Effective Date, and all debts of the kind specified in Sections 502(g), 502(h), or 502(i) of the Bankruptcy Code, whether or not (a) a Proof of Claim based upon such debt is filed or deemed filed under Section 501 of the Bankruptcy Code, (b) a Claim based upon such debt is Allowed under Section 502 of the Bankruptcy Code (or is otherwise resolved), or (c) the Holder of a Claim based upon such debt voted to accept or reject the Plan (or failed to vote) and (ii) all Interests (other than Subsidiary Interests) shall be deemed terminated and canceled for all purposes.

As of the Effective Date, except as expressly provided in the Plan or this Confirmation Order, all Persons shall be precluded from asserting against each of the Debtors, the Debtors' respective assets, property and Estates, the Reorganized Debtors and their respective assets or

property any other or further Claims, or any other obligations, suits, judgments, damages, debts, rights, remedies, causes of action or liabilities of any nature whatsoever, or Interests or other rights of a Holder of an Interest, relating to any of the Debtors or the Reorganized Debtors or their respective Estates based upon any act, omission, transaction or other activity of any nature that occurred prior to the Effective Date. In accordance with the foregoing, except as expressly provided in the Plan, this Confirmation Order shall be a judicial determination, as of the Effective Date, of the discharge of all such Claims or other obligations, suits, judgments, damages, debts, rights, remedies, causes of action or liabilities, or Interests or other rights of a Holder of an Interest and termination or all rights of any Holder of an Interest in the Debtors and all Interests (except for Subsidiary Interests), pursuant to Sections 524 and 1141 of the Bankruptcy Code, and such discharge shall void and extinguish any judgment obtained against the Debtors or the Reorganized Debtors or any of their respective assets, property and Estates at any time, to the extent such judgment is related to a discharged Claim, debt or liability or terminated right of any Interest Holder in any of the Debtors or a terminated Interest.

41. Continuing Estimated Claim of the IRS. Notwithstanding the foregoing, to the extent that any Governmental Unit asserts an Allowed Section 1446 Claim, such an Allowed Section 1446 Claim shall be addressed and treated as a Priority Tax Claim and shall be treated as follows:

a. pursuant to Section 502(c) of the Bankruptcy Code, the aggregate amount of such claims shall not exceed, and shall be estimated for purposes of distribution, voting and all other purposes under the Plan, the amount of $250,000;

b. at the option of the Reorganized Debtors, such amount referred to in Section 3.1(c)(ii)(a) of the Plan shall either be held in reserve in the Creditor Trust for and on behalf of such Governmental Unit(s) or shall be paid by the Reorganized Debtors pursuant to the provisions of Section 3.1(c)(i) of the Plan;

c. any such Governmental Unit asserting a Section 1446 Claim is hereby enjoined from enforcing or making any claim for any penalty, interest or attorney's fees in respect of such withholding liability arising on or before the Effective Date of the Plan and from the collection of such Claim other than against the Reorganized Debtors or the successor to the Estate for this limited purpose, the Creditor Trust, as holder of the reserve. Any such Governmental Unit shall be limited in its rights to seek Bankruptcy Code Section 502(j) relief and shall be required to seek such relief in respect of any such Section 1446 Claim estimated under Bankruptcy Code Section 502(c) no later than 20 days after the entry of the Confirmation Order.

42. Failure to Timely File Proof of Claim. Any person or entity (including, without limitation, any individual, partnership, joint venture, corporation, limited liability company, estate, trust or governmental unit) that was required to file a timely proof of claim in the form and manner specified by the Bar Date Order and failed to do so on or before the General Bar Date or the Governmental Unit Bar Date, as applicable, shall be forever barred, estopped, and enjoined from asserting such claim against the Debtors or the Reorganized Debtors and shall not receive or be entitled to receive any payment or distribution of property from the Debtors or their successors or assigns with respect to such claim.

43. Committee. From the date of the entry of this Confirmation Order through and including the Effective Date, the members of the Committee shall continue to serve. On the Effective Date, the Committee shall be dissolved and the members of the Committee and the professionals retained by the Committee shall be released and discharged from their respective authority, fiduciary obligations, duties, and responsibilities, provided, however, that obligations arising under any confidentiality or non-disclosure agreement executed by the members of, or professionals retained by, the Committee, or obligations imposed by order of the Court, shall remain in effect pursuant to the terms thereof, and, provided further, that the professionals retained by the Committee shall be entitled to be compensated for reasonable fees and reimbursed for reasonable expenses incurred in connection with (i) preparation and prosecution of fee applications for allowance of fees and expenses incurred prior to the Effective Date, (ii) preparation and review of final applications for allowance of fees and expense and attendance at any hearing with respect to the same, (iii) review and objections, if any, to the applications of other professionals retained in these cases for allowance of fees and expenses for services rendered prior to and after the Effective Date, and (iv) successful enforcement of any agreement to which the Committee is a party entered into in connection with the Plan (including the Plan). Nothing contained herein shall impair the Committee's professionals' rights to seek allowance of any claims and payment thereof pursuant to Section 503(b) of the Bankruptcy Code.

44. Post-Effective Date Retention of Professionals. From and after the Effective Date, any requirement that professionals employed by the Reorganized Debtors comply with Sections 327 through 331 of the Bankruptcy Code in seeking retention or compensation for services rendered after such date shall terminate, and the Reorganized Debtors shall be

authorized to employ and compensate professionals in the ordinary course of business and without the need for Bankruptcy Court approval.

45. Energia Expense Reimbursement. Consistent with this Court's Order approving the Expense Reimbursement Motion, the Debtors shall pay the reasonable fees, costs and charges incurred by Energia Overseas in connection with the Exit Financing.

46. Effectuation of Boeing Aker UCC Settlement Agreement. This Confirmation Order shall constitute a amendment to the last sentence of Section 12.9 of the Plan, to provide as follows:

> "The Confirmation Order will constitute a judicial determination and will provide that each term and provision of the Plan, as it may have been altered or interpreted in accordance with the foregoing, is valid and enforceable pursuant to its terms, and further, that the terms of the Global Settlement Agreement and Release by and between the parties thereto as approved by the Bankruptcy Court on July 27, 2010, are integral to the Plan and may not be deleted or modified without the consent of the parties thereto, and are nonseverable from the Plan and mutually dependent."

47. Class 7 Settlement. The agreement between Yuzhmash, the Debtors and the New Investor (the "Yuzhmash Agreement") will result in (i) the assumption of a modified Yuzhmash BOA pursuant to the terms of that certain settlement letter dated July 26, 2010 the "Settlement Letter") [Docket No. 906], and (ii) the modified treatment of Yuzhmash under the Plan. The Cure Amount dispute in connection with the Debtors' assumption of the Yuzhmash BOAs has been resolved as part of the Yuzhmash Agreement. In accordance with the terms of the Yuzhmash Agreement, the treatment of Class 7 under the Plan shall be deemed amended by amending Section 3.2(g)(ii) as follows:

> On the Effective Date, or as soon as practicable after the Effective Date, in full satisfaction, settlement, release, and discharge of and in exchange for each Partner Claim against the Debtors held by Yuzhmash and Yuzhnoye, (i) Reorganized Sea Launch shall be deemed to have assumed the Yuzhmash BOAs as modified pursuant to the terms of the Yuzhmash Agreement, and the Yuzhnoye BOA as initialed by Energia Logistics Russia on or about July 23, 2010, and (ii) future

incremental payments of equal quarterly payments beginning on November 30, 2010 (assuming the Effective Date occurs by September 30, 2010, otherwise on the last day of the month following the month in which the Effective Date occurs), and continuing at the end of each successive three month period for a period of two years up to a maximum of eleven million dollars ($11,000,000), and Yuzhmash and Yuzhnoye shall be deemed to have waived any Partner Claims against the Debtors held by Yuzhmash and Yuzhnoye that are not resolved by the Yuzhmash Agreement and the Yuzhnoye BOA.

As a result of the Yuzhmash Agreement, on the Effective Date the Committee will withdraw with prejudice its *Second Omnibus Substantive Objection to Claim Nos. 80 and 123 Filed by Yuzhmash* [Docket No. 673], and as of the Effective Date, except as otherwise set forth in the Yuzhmash Agreement, and subject to section 10.5 of the Plan, to the fullest extent permitted by law, the Debtors, the Reorganized Debtors, and the Committee, shall, in consideration for Yuzhmash agreeing to the Yuzhmash Agreement, the adequacy of which is hereby confirmed, be deemed to have forever released, waived and discharged all claims, demands, debts, rights, causes of action or liabilities, whether liquidated or unliquidated, fixed or contingent, matured or unmatured, known or unknown, foreseen or unforeseen, then existing or thereafter arising, in law, equity or otherwise, relating to the Debtors, the Reorganized Debtors, the Bankruptcy Cases, the Plan or the Disclosure Statement, the Plan Documents, or the restructuring transactions contemplated thereby, existing as of the Effective Date or thereafter that are based in whole or part on any act, omission, transaction event, or other occurrence taking place on or prior to the Effective Date, against Yuzhmash, except as otherwise provided and to the extent set forth in the Settlement Letter.

48. Escrow of Unsecured Creditor Payments. Notwithstanding Section 6.8 of the Plan, on the Effective Date, Reorganized Sea Launch shall cause cash in an amount equal to the total distributions to be made on the Initial Distribution Date to the Holders of Allowed Claims in Class 4 under the Plan to be deposited into a segregated Swiss bank account, which funds shall

not be used for any purpose other than to fund distributions to the Holders of Allowed Claims in Class 4 under the Plan. Furthermore, the first sentence of Section 6.1 of the Plan shall be amended to read "Unless the Holder of a Class 3, 4, 5, 6 or 7 Claim agrees to a different distribution date or except as otherwise provided herein or as ordered by the Bankruptcy Court, all distributions to be made on account of Allowed Claims in Classes 3, 4, 5, 6 and 7 shall be made on the Initial Distribution Date and any additional distributions, if any, with the exception of dividends, shall be made on such subsequent distribution dates as the Distribution Agent determines to be appropriate in its discretion, but no less frequently then bi-annually." The Debtors shall provide the Committee with a detailed, but non-final and non-binding list of all then Allowed Claims in Class 4 not more than ten (10) business days after the entry of this Confirmation Order and on the Effective Date. Further, any objections to claims in Classes 1 through 4 shall be filed no later than one hundred and twenty (120) days after the Effective Date, unless such deadline is extended for cause shown.

49. Incorporation of Various Settlements and Contracts. Pursuant to the terms of various settlement agreements and contracts, including: the Settlement Agreement dated July 8, 2010 with Asia Satellite Telecommunications Company Limited (as approved by the Bankruptcy Court on July 26, 2010), the Settlement Agreement dated July 9, 2010 with SkyTerra LP n/k/a/ LightSquared (as approved by the Bankruptcy Court on July 26, 2010), the Settlement Agreement with Hughes Network Systems, LLC dated May 27, 2010, the Amendment to the contract and the Confidential Settlement Agreement with O3b USA, LLC, the Amendment to the contract with Eutelsat, the Amendment to the contract with EchoStar Satellite Operating Corporation and DISH Orbital II, L.L.C., and the Amendment to the Contract with Intelsat LLC (collectively, the "Customer Agreements"), the terms and conditions of such Customer

Agreements are integral to, and nonseverable from, the Plan, and are incorporated herein by reference as if fully set forth herein, and, to the extent of any conflict between the Plan or this Confirmation Order or any other order of this Court and such Customer Agreements, the terms and conditions of such Customer Agreements shall control. Further, the Customer Agreements are valid and enforceable pursuant to their terms and conditions, and nothing contained in the Plan, this Confirmation Order or any other order of this Court shall amend, alter or modify such terms and conditions.

50. Additional Conditions Precedent. Section 9.2 of the Plan shall be deemed amended by this Confirmation Order to add additional conditions precedent to the Effective Date of the Plan of Reorganization that are incapable of being waived by any party and that require (x) that the Settlement Agreement between Hughes Network Systems, LLC, on the one hand, and Sea Launch Limited Partnership and Sea Launch Company, L.L.C., on the other hand, dated May 27, 2010, be in full force and effect under the terms thereof and (y) that the Global Settlement Agreement and Release between Sea Launch Company, L.L.C. and the various parties thereto dated as of July 27, 2010, be in full force and effect under the terms thereof.

51. Bar Date for Certain Administrative Expense Claims. All applications for final allowance of fees and expenses of professional persons employed pursuant to orders entered by the Bankruptcy Court and on account of services rendered prior to the Effective Date, shall be filed with the Bankruptcy Court and served upon counsel for each of the Reorganized Debtors', the Committee, the New Investor and the Fee Auditor at the addresses set forth in Section 12.12 of the Plan no later than forty-five (45) days after the Effective Date. Any such claim that is not filed within this time period shall be discharged and forever barred. Objections to any application for allowance of Administrative Expense Claims described in herein and in Section

12.3 of the Plan must be filed within thirty (30) days after the filing thereof, as may be extended by the Bankruptcy Court upon request of the Reorganized Debtors. On the Effective Date, the Reorganized Debtors shall pay all amounts then due and payable in accordance with the Interim Compensation Order for fees and expenses of professional persons employed pursuant to orders entered by the Bankruptcy Court, subject to final allowance of such fees and expenses; provided, however, that the Reorganized Debtors shall not be required to pay any amounts designated as "holdbacks" in the Interim Compensation Order until final allowance thereof.

52. References to Provisions of the Plan. The failure to specifically include or reference any particular provision of the Plan, including any provision in a document in the Plan Supplement, in this Confirmation Order shall not diminish or impair the effectiveness of such provision, it being the intent of the Court that the Plan be confirmed in its entirety and such provisions shall have the same binding effect, enforceability or legality as every other provision of the Plan. Each term and provision of the Plan, as it may have been altered or interpreted by this Court, is valid and enforceable pursuant to its terms.

53. Substantial Consummation. The substantial consummation of the Plan, within the meaning of Section 1101(2) of the Bankruptcy Code, shall be deemed to occur on or as of the Effective Date.

54. Notice of Entry of Confirmation Order. Pursuant to Bankruptcy Rules 2002(f)(7)and 3020(c), promptly after entry of this Confirmation Order, the Debtors shall cause a notice of the entry of this Confirmation Order to be served on all Holders of Claims or Interests and any other persons on whom the notice of the Confirmation Hearing was served.

55. Reversal. If any or all of the provisions of this Confirmation Order are hereafter reversed, modified, or vacated by subsequent order of this Court of any other court of competent

jurisdiction, such reversal, modification, or vacatur shall not affect the validity of the acts or obligations incurred or undertaken under or in connection with the Plan prior to the Debtors' or other applicable persons' receipt of written notice of such order. Notwithstanding any such reversal, modification, or vacatur of this Confirmation Order, any such act or obligation incurred or undertaken pursuant to, and in reliance on, this Confirmation Order prior to the Effective Date of such reversal, modification, or vacatur shall be governed in all respects by the provisions of this Confirmation Order or any amendments or modifications thereto.

56. Confirmation Order Controlling. If there is any inconsistency between the provisions of the Plan and this Confirmation Order, the terms and conditions contained in this Confirmation Order shall govern. However, any inconsistencies shall be interpreted so as to further the goals of and to facilitate the finalization, effectuation and implementation of the Plan. Furthermore, no ambiguity in this Confirmation Order shall be interpreted to prejudice the rights of RSC Energia, Energia Overseas and Energia Logistics Ltd. under the Plan.

57. Applicable Non-Bankruptcy Law. Pursuant to Section 1123(a) and 1142(a) of the Bankruptcy Code, the provisions of this Confirmation Order and the Plan shall apply and be enforceable notwithstanding any otherwise applicable non-bankruptcy law.

58. Retention of Jurisdiction. Pursuant to Sections 105(a) and 1142 of the Bankruptcy Code, and notwithstanding the entry of this Confirmation Order or the occurrence of the Effective Date, this Court, except as otherwise provided in the Plan or herein, shall retain exclusive jurisdiction over all matters arising in, arising out of, and related to, the Bankruptcy Cases and the Plan including, but not limited to, those matters set forth in Article XI of the Plan.

59. Final Order, Effective Date. This Confirmation Order is a final order and the period in which an appeal must be filed shall commence upon the entry hereof. Notwithstanding Bankruptcy Rules 7062 or 3020(e), this Confirmation Order shall be effective and enforceable immediately upon its entry.

Dated: Wilmington, Delaware
July 30, 2010

HONORABLE BRENDAN L. SHANNON
UNITED STATES BANKRUPTCY JUDGE

ITEM NO. 118

JA-4

Fill in this information to identify the case:

United States Bankruptcy Court for the:

Southern District of New York
(State)

Case number (*If known*): _____ Chapter 11

☐ Check if this is an amended filing

Official Form 201

Voluntary Petition for Non-Individuals Filing for Bankruptcy 04/20

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write the debtor's name and the case number (if known). For more information, a separate document, *Instructions for Bankruptcy Forms for Non-Individuals,* is available.

1. **Debtor's name** MatlinPatterson Global Opportunities Partners (Cayman) II L.P.

2. **All other names debtor used in the last 8 years**
   Include any assumed names, trade names, and *doing business as* names

3. **Debtor's federal Employer Identification Number** (EIN) 20-0028246

4. **Debtor's address**

Principal place of business

600 Fifth Avenue
Number Street

22nd Floor

New York NY 10022
City State ZIP Code

New York
County

Mailing address, if different from principal place of business

Number Street

P.O. Box

City State ZIP Code

Location of principal assets, if different from principal place of business

Number Street

City State ZIP Code

5. **Debtor's website** (URL) n/a

JA-4

Debtor MatlinPatterson Global Opportunities Partners (Cayman) II L.P.
Name

Case number (*if known*)_____

6. Type of debtor

- ☐ Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))
- ☑ Partnership (excluding LLP)
- ☐ Other. Specify: _____

7. Describe debtor's business

A. *Check one:*

- ☐ Health Care Business (as defined in 11 U.S.C. § 101(27A))
- ☐ Single Asset Real Estate (as defined in 11 U.S.C. § 101(51B))
- ☐ Railroad (as defined in 11 U.S.C. § 101(44))
- ☐ Stockbroker (as defined in 11 U.S.C. § 101(53A))
- ☐ Commodity Broker (as defined in 11 U.S.C. § 101(6))
- ☐ Clearing Bank (as defined in 11 U.S.C. § 781(3))
- ☑ None of the above

B. *Check all that apply:*

- ☐ Tax-exempt entity (as described in 26 U.S.C. § 501)
- ☐ Investment company, including hedge fund or pooled investment vehicle (as defined in 15 U.S.C. § 80a-3)
- ☐ Investment advisor (as defined in 15 U.S.C. § 80b-2(a)(11))

C. NAICS (North American Industry Classification System) 4-digit code that best describes debtor. See http://www.uscourts.gov/four-digit-national-association-naics-codes .

5 2 5 9

8. Under which chapter of the Bankruptcy Code is the debtor filing?

A debtor who is a "small business debtor" must check the first sub-box. A debtor as defined in § 1182(1) who elects to proceed under subchapter V of chapter 11 (whether or not the debtor is a "small business debtor") must check the second sub-box.

Check one:

- ☐ Chapter 7
- ☐ Chapter 9
- ☑ Chapter 11. *Check **all** that apply*:
  - ☐ The debtor is a small business debtor as defined in 11 U.S.C. § 101(51D), and its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,725,625. If this sub-box is selected, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
  - ☐ The debtor is a debtor as defined in 11 U.S.C. § 1182(1), its aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $7,500,000, **and it chooses to proceed under Subchapter V of Chapter 11.** If this sub-box is selected, attach the most recent balance sheet, statement of operations, cash-flow statement, and federal income tax return, or if any of these documents do not exist, follow the procedure in 11 U.S.C. § 1116(1)(B).
  - ☑ A plan is being filed with this petition.
  - ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).
  - ☐ The debtor is required to file periodic reports (for example, 10K and 10Q) with the Securities and Exchange Commission according to § 13 or 15(d) of the Securities Exchange Act of 1934. File the *Attachment to Voluntary Petition for Non-Individuals Filing for Bankruptcy under Chapter 11* (Official Form 201A) with this form.
  - ☐ The debtor is a shell company as defined in the Securities Exchange Act of 1934 Rule 12b-2.
- ☐ Chapter 12

Debtor MatlinPatterson Global Opportunities Partners (Cayman) II L.P. Case number (*if known*) _____

Name

9. Were prior bankruptcy cases filed by or against the debtor within the last 8 years?

If more than 2 cases, attach a separate list.

☑ No

☐ Yes. District _____ When _____ Case number _____
MM / DD / YYYY

District _____ When _____ Case number _____
MM / DD / YYYY

10. Are any bankruptcy cases pending or being filed by a business partner or an affiliate of the debtor?

List all cases. If more than 1, attach a separate list.

☐ No

☑ Yes. Debtor See Attachment A Relationship Affiliates

District Southern District of New York When _____
MM / DD / YYYY

Case number, if known _____

11. Why is the case filed in *this district*?

Check all that apply:

☑ Debtor has had its domicile, principal place of business, or principal assets in this district for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other district.

☑ A bankruptcy case concerning debtor's affiliate, general partner, or partnership is pending in this district.

12. Does the debtor own or have possession of any real property or personal property that needs immediate attention?

☑ No

☐ Yes. Answer below for each property that needs immediate attention. Attach additional sheets if needed.

Why does the property need immediate attention? (*Check all that apply.*)

☐ It poses or is alleged to pose a threat of imminent and identifiable hazard to public health or safety.
What is the hazard? _____

☐ It needs to be physically secured or protected from the weather.

☐ It includes perishable goods or assets that could quickly deteriorate or lose value without attention (for example, livestock, seasonal goods, meat, dairy, produce, or securities-related assets or other options).

☐ Other _____

Where is the property? _____
Number Street

_____

_____ _____ _____
City State ZIP Code

Is the property insured?

☐ No

☐ Yes. Insurance agency _____

Contact name _____

Phone _____

Statistical and administrative information

Debtor MatlinPatterson Global Opportunities Partners (Cayman) II L.P.
Name

Case number (*if known*)_____

13. Debtor's estimation of available funds

Check one:

☑ Funds will be available for distribution to unsecured creditors.
☐ After any administrative expenses are paid, no funds will be available for distribution to unsecured creditors.

14. Estimated number of creditors

☑ 1-49	☐ 1,000-5,000	☐ 25,001-50,000
☐ 50-99	☐ 5,001-10,000	☐ 50,001-100,000
☐ 100-199	☐ 10,001-25,000	☐ More than 100,000
☐ 200-999		

15. Estimated assets

☑ $0-$50,000	☐ $1,000,001-$10 million	☐ $500,000,001-$1 billion
☐ $50,001-$100,000	☐ $10,000,001-$50 million	☐ $1,000,000,001-$10 billion
☐ $100,001-$500,000	☐ $50,000,001-$100 million	☐ $10,000,000,001-$50 billion
☐ $500,001-$1 million	☐ $100,000,001-$500 million	☐ More than $50 billion

16. Estimated liabilities

☐ $0-$50,000	☐ $1,000,001-$10 million	☐ $500,000,001-$1 billion
☐ $50,001-$100,000	☑ $10,000,001-$50 million	☐ $1,000,000,001-$10 billion
☐ $100,001-$500,000	☐ $50,000,001-$100 million	☐ $10,000,000,001-$50 billion
☐ $500,001-$1 million	☐ $100,000,001-$500 million	☐ More than $50 billion

Request for Relief, Declaration, and Signatures

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

17. Declaration and signature of authorized representative of debtor

The debtor requests relief in accordance with the chapter of title 11, United States Code, specified in this petition.

I have been authorized to file this petition on behalf of the debtor.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 07/06/2021
MM / DD / YYYY

✘ /s/ Matthew Doheny
Signature of authorized representative of debtor

Matthew Doheny
Printed name

Title Chief Restructuring Officer of General Partner

Debtor MatlinPatterson Global Opportunities Partners (Cayman) II L.P.
Name

Case number (*if known*)_____

18. Signature of attorney

✘ /s/ Elisha D. Graff
Signature of attorney for debtor

Date 07/06/2021
MM / DD / YYYY

Elisha D. Graff
Printed name

Simpson Thacher & Bartlett LLP
Firm name

425 Lexington Ave
Number Street

New York NY 10017
City State ZIP Code

212-455-2000
Contact phone

egraff@stblaw.com
Email address

3945292 New York
Bar number State

ATTACHMENT A

Pending Bankruptcy Cases Filed by the Debtor and Affiliates of the Debtor

On the date hereof, each of the related entities listed below (collectively, the "***Debtors***"), including the debtor in this chapter 11 case, will file or have filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of New York. Contemporaneously with the filing of their voluntary petitions, the Debtors requested procedural consolidation and joint administration of their chapter 11 cases under the case number assigned to the chapter 11 case of MatlinPatterson Global Opportunities Partners II L.P.

1. MatlinPatterson Global Opportunities Partners II L.P. (20-0028284)
2. MatlinPatterson Global Opportunities Partners (Cayman) II L.P. (20-0028246)
3. MatlinPatterson Global Opportunities Partners (SUB) II L.P. (86-3749209)
4. MatlinPatterson Global Partners II LLC (43-2016962)
5. MatlinPatterson Global Advisers LLC (13-4202931)
6. MatlinPatterson PE Holdings LLC (42-1546900)
7. Volo Logistics LLC (20-3348287)

ATTACHMENT B

Written Consent of the General Partner of MatlinPatterson Global Opportunities Partners II L.P., MatlinPatterson Global Opportunities Partners (Cayman) II L.P. and MatlinPatterson Global Opportunities Partners (SUB) II L.P.

WRITTEN CONSENT OF THE GENERAL PARTNER OF MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS II L.P., MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS (CAYMAN) II L.P. AND MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS (SUB) II L.P.

July 6, 2021

WHEREAS, MatlinPatterson Global Partners II LLC, a Delaware limited liability company, the General Partner (the "**General Partner**") of MatlinPatterson Global Opportunities Partners II L.P., a Delaware limited partnership ("**MP Delaware**"), MatlinPatterson Global Opportunities Partners (Cayman) II L.P., a Cayman Islands exempted limited partnership ("**MP Cayman**"), and MatlinPatterson Global Opportunities Partners (SUB) II L.P., a Delaware limited partnership ("**MP SUB**" and together with MP Delaware and MP Cayman, the "**MP Funds**") hereby adopts the following resolutions of each of the MP Funds, pursuant to (x) the Revised Uniform Delaware Limited Partnership Act and the General Partner's authority to act on behalf of MP Delaware under the Amended and Restated Limited Partnership Agreement of MP Delaware (as amended from time to time, the "**MP Delaware Partnership Agreement**") and MP SUB under the Limited Partnership Agreement of MatlinPatterson Global Opportunities Partners (SUB) II L.P. (as amended from time to time, the "**MP SUB Partnership Agreement**") and (y) the Exempted Limited Partnership Law of the Cayman Islands (2018 Revision) and the General Partner's authority to act on behalf of MP Cayman under the Amended and Restated Limited Partnership Agreement of MP Cayman (as amended from time to time, the "**MP Cayman Partnership Agreement**", and, together with the MP Delaware Partnership Agreement and the MP SUB Partnership Agreement, the "**Partnership Agreements**"), without a meeting of the General Partner, and directs that this Written Consent of the General Partner be filed with the minutes of the respective proceedings of the General Partner;

WHEREAS, the term of MP Delaware and MP Cayman expired on September 30, 2013 and the General Partner determined to dissolve MP SUB on May 12, 2021;

WHEREAS, the General Partner has appointed MP GOP GP II LLC, a Delaware limited liability company to act as liquidating trustee (the "**Liquidating Trustee**"), pursuant to those certain resolutions of the General Partner, dated October 2, 2018, and those certain resolutions of the General Partner, dated May 12, 2021 to manage the orderly wind up of the affairs of MP Delaware and MP SUB;

WHEREAS, the General Partner is currently acting as liquidating trustee to manage the orderly wind up of the affairs of MP Cayman;

WHEREAS, notwithstanding the appointment of the Liquidating Trustee, the General Partner retains all powers and authorities not delegated to the Liquidating Trustee and remains authorized under the Partnership Agreements to approve the following resolutions on behalf of each of the MP Funds;

WHEREAS, the General Partner has reviewed and has had the opportunity to ask questions of and consult with the management of each of the MP Funds and their legal advisors

regarding the liabilities and liquidity of each of the MP Funds and has had the opportunity to fully consider each of the strategic alternatives available to each of the MP Funds;

WHEREAS, in furtherance of the foregoing, the General Partner has determined pursuant to its duties under the Partnership Agreements that it is in the best interests of each of the MP Funds and their limited partners to approve the following resolutions in continuation of the winding up of the affairs and business activities of each of the MP Funds:

NOW, THEREFORE, BE IT HEREBY

I. Commencement of Chapter 11 Cases

RESOLVED, that the General Partner has determined, after consultation with the management of each of the MP Funds and their legal advisors, that it is desirable and in the best interests of each of the MP Funds, their creditors and other parties in interest that a petition be filed by each of the MP Funds seeking relief under the provisions of chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**"); and be it further

RESOLVED, the General Partner, the Liquidating Trustee or any of their respective officers, including, without limitation, Chief Restructuring Officer of each of the MP Funds, Matthew Doheny (each, an "**Authorized Officer**"), in each case, acting singly or jointly, be, and each hereby is, authorized, empowered, and directed to execute and file in the name and on behalf of each of the MP Funds all petitions, schedules, motions, lists, applications, pleadings, and other papers in the Bankruptcy Court, and, in connection therewith, to employ and retain all assistance by legal counsel, accountants, financial advisors, investment bankers and other professionals, and to take and perform any and all further acts and deeds which such Authorized Officer deems necessary, proper, or desirable in connection with each of the MP Funds' chapter 11 cases (each, a "**Chapter 11 Case**" and, collectively, the "**Chapter 11 Cases**"), including, without limitation, negotiating, executing, delivering and performing any and all documents, agreements, certificates and/or instruments in connection with the transactions and professional retentions set forth in this resolution, with a view to the successful prosecution of each of the Chapter 11 Cases; and be it further

II. Retention of Advisors

RESOLVED, that the law firm of Simpson Thacher & Bartlett, LLP, located at 425 Lexington Avenue, New York, New York 10017, is hereby retained as general restructuring counsel for each of the MP Funds in the Chapter 11 Cases, subject to Bankruptcy Court approval; and be it further

RESOLVED, that the law firm of Schulte Roth & Zabel, LLP, located at 919 Third Avenue, New York, New York 10022, is hereby retained as conflicts counsel for each of the MP Funds in the Chapter 11 Cases, subject to Bankruptcy Court approval; and be it further

RESOLVED, that the firm of Altemis Capital Management LLC, located at 1056 Fifth Avenue, 17th Floor, New York, New York 10028, is hereby retained to provide a chief

financial officer and accounting personnel for each of the MP Funds in the Chapter 11 Cases, subject to Bankruptcy Court approval; and be it further

RESOLVED, that the firm of North Country Capital, LLC, located at 215 Washington Street, Suite 0006, Watertown, New York 13601, is hereby retained to provide a chief restructuring officer for each of the MP Funds in the Chapter 11 Cases, subject to Bankruptcy Court approval; and be it further

RESOLVED, that the firm of Kurtzman Carson Consultants LLC, located at 2335 Alaska Ave., El Segundo, California 90245, is hereby retained as claims and noticing agent and administrative advisor for each of the MP Funds in the Chapter 11 Cases, subject to Bankruptcy Court approval; and be it further

RESOLVED, that each of the Authorized Officers be, and hereby is, authorized and directed to employ any other professionals to assist each of the MP Funds in carrying out their duties under the Bankruptcy Code in the Chapter 11 Cases, and, in connection therewith, each Authorized Officer, with power of delegation, is hereby authorized and directed to execute appropriate retention agreements, pay appropriate retainers and fees and to cause to be filed an appropriate application for authority to retain the services of any other professionals as necessary; and be it further

III. General

RESOLVED, that any Authorized Officer is hereby authorized, empowered, and directed, in the name and on behalf of each of the MP Funds, to cause each of the MP Funds to enter into, execute, deliver, certify, file and/or record, and perform, such agreements, instruments, motions, affidavits, applications for approvals or rulings of governmental or regulatory authorities, certificates, or other documents, and to take such other actions that in the judgment of the Authorized Officer shall be or become necessary, proper, or desirable in connection with the Chapter 11 Cases; and be it further

RESOLVED, that any actions taken by any Authorized Officer, for or on behalf of each of the MP Funds, prior to the date hereof that would have been authorized by these resolutions but for the fact that such actions were taken prior to the date hereof be, and they hereby are, authorized, adopted, approved, confirmed and ratified in all respects as the actions and deeds of each of the MP Funds.

[Signature Page Follows]

IN WITNESS WHEREOF, the undersigned has executed this written consent of the General Partner as of the date first written above.

MATLINPATTERSON GLOBAL PARTNERS II LLC

DocuSigned by:
2ED4589632494A7...

Name: Matt Doheny
Title: Chief Restructuring Officer

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
MatlinPatterson Global Opportunities Partners II L.P., *et al.*,	)	Case No. 21-_____ (___)
Debtors.[1]	)	(Joint Administration Pending)

DEBTORS' CORPORATE OWNERSHIP STATEMENT PURSUANT TO FED. R. BANKR. P. 1007(a)(1) AND LOCAL BANKRUPTCY RULE 1007-3

Pursuant to Rule 1007(a)(1) of the Federal Rules of Bankruptcy Procedure and Rule 1007-3 of the Local Bankruptcy Rules, MatlinPatterson Global Opportunities Partners II L.P., on behalf of itself and certain of its affiliates as debtors in the above-captioned Chapter 11 Case (the "***Debtors***") hereby represents as follows:

All Debtors – Publicly Traded Securities

None of the Debtors directly or indirectly owns ten percent (10%) or more of any class of equity of a corporation whose securities are publicly traded.

MatlinPatterson PE Holdings LLC

1. 100% of the equity of MatlinPatterson PE Holdings LLC is directly owned by MatlinPatterson LLC.

MatlinPatterson Global Advisers LLC

2. 100% of the equity of MatlinPatterson Global Advisers LLC is directly owned by MatlinPatterson PE Holdings LLC.

MatlinPatterson Global Partners II LLC

3. 100% of the equity of MatlinPatterson Global Partners II LLC is directly owned by MatlinPatterson PE Holdings LLC.

4. MattlinPatterson Global Partners II LLC owns a partnership interest in, and is the general partner of, MatlinPatterson Global Opportunities Partners II L.P. and MatlinPatterson Global Opportunities Partners (Cayman) II L.P. and MatlinPatterson Global Opportunities Partners (SUB) II L.P., all Debtor entities.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if any, are: MatlinPatterson Global Opportunities Partners II L.P. (8284); MatlinPatterson Global Opportunities Partners (Cayman) II L.P. (8246); MatlinPatterson Global Partners II LLC (6962); MatlinPatterson Global Advisers LLC (2931); MatlinPatterson PE Holdings LLC (6900); Volo Logistics LLC (8287); MatlinPatterson Global Opportunities Partners (SUB) II L.P. (9209). The location of the Debtors' address is: 600 Fifth Avenue, 22nd Floor; New York, New York 10022.

MatlinPatterson Global Opportunities Partners II L.P.

5. On information and belief, a corporate pension fund owns ten percent (10%) or more of the equity interests of MatlinPatterson Global Opportunities Partners II L.P.[2]

6. On information and belief, no other entity directly or indirectly owns ten percent (10%) or more of the equity interests of MatlinPatterson Global Opportunities Partners II L.P. and, in accordance with Rule 7007.1 of the Federal Rules of Bankruptcy Procedure and Rule 1007-3 of the Local Bankruptcy Rules, and there are no other entities to be disclosed herein.

MatlinPatterson Global Opportunities Partners (Cayman) II L.P.

7. On information and belief, each of (i) a subsidiary of a state-owned corporation and (ii) a foreign pension company owns ten percent (10%) or more of the equity interests of MatlinPatterson Global Opportunities Partners (Cayman) II L.P.[3]

8. On information and belief, no other entity directly or indirectly owns ten percent (10%) or more of the equity interests of MatlinPatterson Global Opportunities Partners (Cayman) II L.P., and, in accordance with Rule 7007.1 of the Federal Rules of Bankruptcy Procedure and Rule 1007-3 of the Local Bankruptcy Rules, there are no other entities to be disclosed herein.

MatlinPatterson Global Opportunities Partners (SUB) II L.P.

9. On information and belief, each of (i) a subsidiary of a state-owned corporation and (ii) a foreign pension company owns ten percent (10%) or more of the equity interests of MatlinPatterson Global Opportunities Partners (SUB) II L.P.[4]

10. On information and belief, no other entity directly or indirectly owns ten percent (10%) or more of the equity interests of MatlinPatterson Global Opportunities

---

[2] Pursuant to various confidentiality arrangements with the limited partners of MatlinPatterson Global Opportunities Partners II L.P., descriptions of the entity that holds ten percent (10%) or more of the equity interests of MatlinPatterson Global Opportunities Partners II L.P. is set forth above instead of the entity's name. The Debtors have filed a motion requesting authority to redact the names and addresses of the limited partners from all documents filed with the court, including this Corporate Ownership Statement. Pursuant to that motion, unredacted copies of this Corporate Ownership Statement will be provided to the Court and the Office of the United States Trustee for the Southern District of New York (the "***U.S. Trustee***").

[3] Pursuant to various confidentiality arrangements with the limited partners of MatlinPatterson Global Opportunities Partners (Cayman) II L.P., descriptions of the two entities that each hold ten percent (10%) or more of the equity interests of MatlinPatterson Global Opportunities Partners (Cayman) II L.P. are set forth above instead of the entity's name. The Debtors have filed a motion requesting authority to redact the names and addresses of the limited partners from all documents filed with the court, including this Corporate Ownership Statement. Pursuant to that motion, unredacted copies of this Corporate Ownership Statement will be provided to the Court and the U.S. Trustee.

[4] Pursuant to various confidentiality arrangements with the limited partners of MatlinPatterson Global Opportunities Partners (Cayman) II L.P., the predecessor of MatlinPatterson Global Opportunities Partners (SUB) II L.P., descriptions of the two entities that each hold ten percent (10%) or more of the equity interests of MatlinPatterson Global Opportunities Partners (SUB) II L.P. are set forth above instead of the entity's name. The Debtors have filed a motion requesting authority to redact the names and addresses of the limited partners from all documents filed with the court, including this Corporate Ownership Statement. Pursuant to that motion, unredacted copies of this Corporate Ownership Statement will be provided to the Court and the U.S. Trustee.

Partners (SUB) II L.P., and, in accordance with Rule 7007.1 of the Federal Rules of Bankruptcy Procedure and Rule 1007-3 of the Local Bankruptcy Rules, there are no other entities to be disclosed herein.

Volo Logistics LLC

11. 100% of the equity of Volo Logistics LLC is directly owned by Oskars Investments Ltd., a non-debtor affiliate of the Debtors. Volo Logistics LLC and Oskars Investments Ltd. are indirectly owned by Debtor entities MatlinPatterson Global Opportunities Partners II L.P. and MatlinPatterson Global Opportunities Partners (Cayman) II L.P.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
MatlinPatterson Global Opportunities Partners II L.P., *et al.*,	)	Case No. 21-_____ (___)
Debtors.[1]	)	(Joint Administration Pending)

DEBTORS' LIST OF EQUITY SECURITY HOLDERS PURSUANT TO FED. R. BANKR. P. 1007(A)(3)

Pursuant to Rule 1007(a)(3) of the Federal Rules of Bankruptcy Procedure, MatlinPatterson Global Opportunities Partners II L.P., on behalf of itself and certain of its affiliates as debtors in the above-captioned Chapter 11 Cases (the "***Debtors***") hereby represents as follows:

Debtor	Equity Security Holder(s)	Kind of Interest	Number/% of Interests Held
MatlinPatterson PE Holdings LLC	MatlinPatterson LLC	Membership	100%
MatlinPatterson Global Advisers LLC	MatlinPatterson PE Holdings LLC	Membership	100%
MatlinPatterson Global Partners II LLC	MatlinPatterson PE Holdings LLC	Membership	100%
MatlinPatterson Global Opportunities Partners II L.P.	MatlinPatterson Global Partners II LLC	Partnership Interest (General Partner)	1.14%
MatlinPatterson Global Opportunities Partners II L.P.	Limited Partners (not listed[2])	Partnership Interest (Limited Partners)	98.86%
MatlinPatterson Global Opportunities Partners (Cayman) II L.P.	MatlinPatterson Global Partners II LLC	Partnership Interest (General Partner)	1.26%

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if any, are: MatlinPatterson Global Opportunities Partners II L.P. (8284); MatlinPatterson Global Opportunities Partners (Cayman) II L.P. (8246); MatlinPatterson Global Partners II LLC (6962); MatlinPatterson Global Advisers LLC (2931); MatlinPatterson PE Holdings LLC (6900); Volo Logistics LLC (8287); MatlinPatterson Global Opportunities Partners (SUB) II L.P. (9209). The location of the Debtors' address is: 600 Fifth Avenue, 22nd Floor; New York, New York 10022.

[2] The Debtors are requesting a waiver from the requirement to file a list of the limited partner equity security holders for this entity.

Debtor	Equity Security Holder(s)	Kind of Interest	Number/% of Interests Held
MatlinPatterson Global Opportunities Partners (Cayman) II L.P.	Limited Partners (not listed[3])	Partnership Interest (Limited Partners)	98.74%
MatlinPatterson Global Opportunities Partners (SUB) II L.P.	MatlinPatterson Global Partners II LLC	Partnership Interest (General Partner)	1.26%
MatlinPatterson Global Opportunities Partners (SUB) II L.P.	Limited Partners of MatlinPatterson Global Opportunities Partners (Cayman) II L.P. (not listed[4])	Partnership Interest (Limited Partners)	98.74%
Volo Logistics LLC	Oskars Investments Ltd.	Membership Interest	100%

[3] The Debtors are requesting a waiver from the requirement to file a list of the limited partner equity security holders for this entity.

[4] The Debtors are requesting a waiver from the requirement to file a list of the limited partner equity security holders for this entity.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
MatlinPatterson Global Opportunities Partners II L.P., *et al.*,	)	Case No. 21-_____ (___)
Debtors.[1]	)	(Joint Administration Pending)

CONSOLIDATED LIST OF CREDITORS HOLDING FIVE LARGEST SECURED CLAIMS

The following is a list of those creditors holding the five largest secured claims against the Debtors, on a consolidated basis, as of the Petition Date. This list has been prepared from the books and records of the Debtors for filing in the Debtors' Chapter 11 Cases.

Name of Creditor and Contact Information	Claim Amount	Debt Type	Collateral
MP II Preferred Partners L.P. 600 Fifth Avenue 22nd Floor New York, NY 10022 Telephone: 212-651-9500 Fax: 212-651-4010 Email: matlin@matlinpatterson.com Attn: David Matlin	$57,965,995.00	Intercompany Notes	Assets and accounts of MatlinPatterson Global Opportunities Partners II L.P., MatlinPatterson Global Opportunities Partners (Cayman) II L.P., and MatlinPatterson Global Opportunities Partners (SUB) II L.P.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if any, are: MatlinPatterson Global Opportunities Partners II L.P. (8284); MatlinPatterson Global Opportunities Partners (Cayman) II L.P. (8246); MatlinPatterson Global Partners II LLC (6962); MatlinPatterson Global Advisers LLC (2931); MatlinPatterson PE Holdings LLC (6900); Volo Logistics LLC (8287); MatlinPatterson Global Opportunities Partners (SUB) II L.P. (9209). The location of the Debtors' address is: 600 Fifth Avenue, 22nd Floor; New York, New York 10022.

Fill in this information to identify the case:

Debtor name MatlinPatterson Global Opportunities Partners II L.P., et al.

United States Bankruptcy Court for the: Southern District of New York (State)

Case number (If known): _____

❑ Check if this is an amended filing

Official Form 204

Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders

12/15

A list of creditors holding the 20 largest unsecured claims must be filed in a Chapter 11 or Chapter 9 case. Include claims which the debtor disputes. Do not include claims by any person or entity who is an *insider,* as defined in 11 U.S.C. § 101(31). Also, do not include claims by secured creditors, unless the unsecured claim resulting from inadequate collateral value places the creditor among the holders of the 20 largest unsecured claims.

	Name of creditor and complete mailing address, including zip code	Name, telephone number, and email address of creditor contact	Nature of the claim (for example, trade debts, bank loans, professional services, and government contracts)	Indicate if claim is contingent, unliquidated, or disputed	Amount of unsecured claim. If the claim is fully unsecured, fill in only unsecured claim amount. If claim is partially secured, fill in total claim amount and deduction for value of collateral or setoff to calculate unsecured claim.		
					Total claim, if partially secured	Deduction for value of collateral or setoff	Unsecured claim
1	GOL Linhas Aereas S.A. (formerly VRG Linhas Aereas S.A.) Avenida Vinte de Janeiro s/n Passenger Terminal No. 2 Rio de Janeiro International Airport Rio de Janeiro, Brazil	Attn: Richard Lark Telephone: +55 11 2128-4700 Fax: +55 11 3169 6245 Email: ri@voegol.com.br	Litigation	disputed; contingent			$60,000,000.00
2	Varig Logistica S.A. Rua Gomes de Carvalho, no. 1609 Vila Olimpia Sao Paulo FL 33130 Brazil	ADJUD Administradores Judiciais Ltd., Trustee Attn: Vânio Cesar Pickler Aguiar Telephone: +55 11 2533 Email: adjud@adjud.com.br	Litigation	disputed; contingent; unliquidated			unliquidated
3	HJDK Aeroespacial S/A Aquillino La Guardia, no. 08 IGRA Building Panama City, Panama	Licastro & Focaccia Sociedade de Advogados Counsel to HJDK Aeroespacial S/A Telephone: +55 11 3062-1432 E-mail: contato@licastroadvogados.com.br	Litigation	disputed; contingent; unliquidated			unliquidated
4							
5							
6							
7							
8							

Debtor _____ Case number (*if known*)_____
Name

	Name of creditor and complete mailing address, including zip code	Name, telephone number, and email address of creditor contact	Nature of the claim (for example, trade debts, bank loans, professional services, and government contracts)	Indicate if claim is contingent, unliquidated, or disputed	Amount of unsecured claim If the claim is fully unsecured, fill in only unsecured claim amount. If claim is partially secured, fill in total claim amount and deduction for value of collateral or setoff to calculate unsecured claim.		
					Total claim, if partially secured	Deduction for value of collateral or setoff	Unsecured claim
9							
10							
11							
12							
13							
14							
15							
16							
17							
18							
19							
20							

Fill in this information to identify the case and this filing:

Debtor Name MatlinPatterson Global Opportunities Partners II L.P., et al.

United States Bankruptcy Court for the: Southern District of New York (State)

Case number (*If known*): _____

Official Form 202

Declaration Under Penalty of Perjury for Non-Individual Debtors

12/15

An individual who is authorized to act on behalf of a non-individual debtor, such as a corporation or partnership, must sign and submit this form for the schedules of assets and liabilities, any other document that requires a declaration that is not included in the document, and any amendments of those documents. This form must state the individual's position or relationship to the debtor, the identity of the document, and the date. Bankruptcy Rules 1008 and 9011.

WARNING -- Bankruptcy fraud is a serious crime. Making a false statement, concealing property, or obtaining money or property by fraud in connection with a bankruptcy case can result in fines up to $500,000 or imprisonment for up to 20 years, or both. 18 U.S.C. §§ 152, 1341, 1519, and 3571.

Declaration and signature

I am the president, another officer, or an authorized agent of the corporation; a member or an authorized agent of the partnership; or another individual serving as a representative of the debtor in this case.

I have examined the information in the documents checked below and I have a reasonable belief that the information is true and correct:

- ☐ *Schedule A/B: Assets–Real and Personal Property* (Official Form 206A/B)
- ☐ *Schedule D: Creditors Who Have Claims Secured by Property* (Official Form 206D)
- ☐ *Schedule E/F: Creditors Who Have Unsecured Claims* (Official Form 206E/F)
- ☐ *Schedule G: Executory Contracts and Unexpired Leases* (Official Form 206G)
- ☐ *Schedule H: Codebtors* (Official Form 206H)
- ☐ *Summary of Assets and Liabilities for Non-Individuals* (Official Form 206Sum)
- ☐ Amended *Schedule* ____
- ☑ *Chapter 11 or Chapter 9 Cases: List of Creditors Who Have the 20 Largest Unsecured Claims and Are Not Insiders* (Official Form 204)
- ☑ Other document that requires a declaration Corporate Ownership Statement; Electronic Creditor Matrix; Schedule of 5 Largest Secured Claims

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 07/06/2021
MM / DD / YYYY

✘ /s/ Matthew Doheny
Signature of individual signing on behalf of debtor

Matthew Doheny
Printed name

Chief Restructuring Officer
Position or relationship to debtor

ITEM NO. 119

JA-5

Elisha D. Graff
Kathrine A. McLendon
David R. Zylberberg
Jamie J. Fell
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000 Telephone
(212) 455-2502 Facsimile

Tyler B. Robinson
Lauren W. Brazier (*pro hac vice* pending)
SIMPSON THACHER & BARTLETT LLP
CityPoint
One Ropemaker Street
London EC2Y 9HU, England
+44-(0)20-7275-6500 Telephone
+44-(0)20-7275-6592 Facsimile

Proposed Counsel to the Debtors and Debtors-in-Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
MatlinPatterson Global Opportunities Partners II L.P., *et al.*,	)	Case No. 21-11255 (___)
Debtors.[1]	)	(Joint Administration Pending)

DECLARATION OF MATTHEW DOHENY, CHIEF RESTRUCTURING OFFICER OF THE DEBTORS, IN SUPPORT OF CHAPTER 11 PETITIONS AND FIRST DAY MOTIONS IN COMPLIANCE WITH LOCAL RULE 1007-2

I, Matthew A. Doheny, hereby declare under penalty of perjury:

1. I am the President of North Country Capital, an advisory and investment firm focused on challenging advisory assignments and special situation opportunities. I am the Chief Restructuring Officer of each of the above-captioned debtors (collectively, the "***Debtors***"). I was appointed to this role effective April 2021. Prior to my retention by the Debtors, I served as a director or chair of the board of several companies undergoing financial restructuring or other chapter 11 and distressed scenarios. I also worked for 18 years as a managing director or portfolio

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if any, are: MatlinPatterson Global Opportunities Partners II L.P. (8284); MatlinPatterson Global Opportunities Partners (Cayman) II L.P. (8246); MatlinPatterson Global Partners II LLC (6962); MatlinPatterson Global Advisers LLC (2931); MatlinPatterson PE Holdings LLC (6900); Volo Logistics LLC (8287); MatlinPatterson Global Opportunities Partners (SUB) II L.P. (9209). The location of the Debtors' address is: 600 Fifth Avenue, 22nd Floor, New York, New York 10022.

JA-5

manager focused on special situations at HSBC Securities Inc., Fintech Advisory Inc., and Deutsche Bank Securities Inc. Prior to that I spent five years as a corporate and restructuring attorney with several New York law firms. I hold a J.D. from Cornell Law School and a B.A. from Alleghany College.

2. I submit this declaration pursuant to Rule 1007-2 of the Local Bankruptcy Rules for the Southern District of New York (the "***Local Rules***") to provide an overview of the Debtors, their history, and the Debtors' chapter 11 petitions (the "***Chapter 11 Cases***"), as well as to support the Debtors' chapter 11 petitions and the motions seeking various types of "first day" relief (collectively, the "***First Day Motions***"). I am generally familiar with the facts set forth below, including the Debtors' financial affairs and books and records. Except as otherwise indicated, all facts set forth in this declaration are based upon my personal knowledge of the Debtors, information learned from my review of relevant documents, information supplied to me by other members of management of the Debtors and by the Debtors' professional advisors. I am authorized to submit this declaration on behalf of the Debtors, and, if called upon to testify, I could and would testify competently to the facts set forth below.

3. The Debtors are investment funds and affiliated entities that have been ready to wind up and pay out their remaining assets to their limited partners for many years. The Debtors' efforts have been hamstrung by several litigations filed abroad that seek to recover assets in the United States, held almost exclusively by entities formed in the United States, under legal theories that run counter either to prior *res judicata* determinations by U.S. courts or settled U.S. law. The sum total of these speculative claims exceed the Debtors' assets and have thus far prevented the Debtors from distributing assets to their stakeholders.

4. The Debtors face three primary fronts of litigation, all of which are counter to established U.S. law and cannot result in a judgment enforceable in the United States against the Debtors and their assets.

5. *First*, as described in detail below, the Debtors were subjected to an arbitration award in Brazil in 2010. The United States Court of Appeals for the Second Circuit has since determined fully and finally that the arbitration award was rendered against the Debtors without jurisdiction over them, because the Debtors never consented to arbitration in Brazil, and thus the award is unenforceable in the United States as a matter of U.S. public policy and the fundamental interests of the United States. The award creditor, having lost its effort to enforce the award in the United States, then sought a second bite at the apple by pursuing enforcement of the same award in the Cayman Islands, the only other jurisdiction in which one of the Debtors is organized.[2] The Cayman trial court determined that the award was also unenforceable in the Cayman Islands, but an intermediate appellate court reversed the trial court and upheld the award in 2020. A further appeal of that decision is now pending, but regardless of the outcome, a Cayman judgment enforcing an arbitration award that the U.S. courts have already determined, *res judicata*, is not enforceable in the United States cannot be satisfied by assets located in the United States. The filing of the Chapter 11 Cases would appropriately place before this Court any dispute over the enforceability against U.S. assets of a Cayman judgment upholding a Brazilian arbitration award that U.S. courts have already determined is unenforceable in the United States.

6. *Second*, the Debtors have been targeted in litigation in Brazil by the bankruptcy administrator of the estate of their former Brazilian investment vehicle, for claims that are based

[2] MP Cayman is a Cayman Islands exempted limited partnership. Additionally, the General Partner is a foreign registered company in the Cayman Islands in connection with its role as the general partner of MP Cayman.

on factual allegations dating from more than a decade ago, and which were expressly released and indemnified under the terms of two New York law and jurisdiction-governed contracts. Although the Debtors are of the firm position that these claims, in addition to being meritless, have already been fully released in accordance with U.S. law, even speculative actions caught in Brazil's legal system drag on, and this action is not anticipated to be finally resolved for a decade or more.

7. *Finally*, certain Debtors were joined in an enforcement proceeding in a Brazilian court for their portfolio company's failure to repay certain loans. The Debtors were not served until five and a half years after the court, *ex parte*, permitted them to be added to the action on an alter ego theory of liability. The joinder of the Debtors was premised on the baseless allegation that the Debtors were responsible for the "disappearance" of approximately R$24 million from the bank account of the portfolio company's bankruptcy counsel. In fact, the funds were used to pay prepetition claims and were fully accounted for in the bankruptcy proceeding. Nonetheless, the claimant was able to exploit the *ex parte* nature of the enforcement proceeding and present unchallenged "evidence" to falsely suggest to the Brazilian court that the Debtors had acted improperly. The *ex parte* proceedings and extensive delay have prejudiced the Debtors. But fundamentally, any resultant judgment against the Debtors in Brazil will have been procured by fraud and cannot be enforced in a U.S. court. A special appeal and full merits defense are pending in Brazil, but this action may also take many years to resolve.

8. The Debtors have filed the Chapter 11 Cases to prevent these meritless foreign litigations from undermining U.S. law in respect of the Debtors' U.S. assets, and to effect an orderly, consolidated dissolution and distribution of those U.S. assets to their legitimate stakeholders. Because the Debtors face litigation in multiple fora seeking recourse to the same assets, a centralized forum is necessary to fairly and expeditiously resolve any potential liabilities

and to ensure that the Debtors' assets are liquidated and distributed in an efficient and equitable manner. This Court can manage the litigation in a singular, centralized forum to unshackle the Debtors and their stakeholders from foreign proceedings, the outcomes of which are not enforceable against the Debtors' U.S. assets as a matter of U.S. law, regardless of what the foreign courts may decide, so that the Debtors can finally wind up and rightfully distribute their U.S. assets to U.S. creditors and investors after so many years of delay.

OVERVIEW OF THE DEBTORS

9. As more fully described below, on the date hereof (the "***Petition Date***"), the Debtors commenced the Chapter 11 Cases by filing voluntary petitions in the Bankruptcy Court for the Southern District of New York (the "***Court***"). The Debtors are also filing a limited number of "first day" pleadings, including (i) pleadings seeking relief intended to allow the Debtors to perform and meet those obligations that are necessary to fulfill their duties as debtors in possession in the Chapter 11 Cases, (ii) a chapter 11 plan of liquidation (the "***Plan***") and attendant disclosure statement (the "***Disclosure Statement***"), and (iii) a motion seeking to establish a claims bar date for the VRG, VarigLog and HJDK Claims described herein and approving the form and manner of notice thereof.

I. Background

A. The MP Funds

10. Debtors MatlinPatterson Global Opportunities Partners II L.P. ("***MP Delaware***") and MatlinPatterson Global Opportunities Partners (Cayman) II L.P. ("***MP Cayman***" and together with MP Delaware, the "***MP Funds***"), are private investment funds structured as limited partnership entities organized in the State of Delaware and the Cayman Islands, respectively, which together comprise MatlinPatterson Global Opportunities Fund II. The MP Funds (along with the other Debtors) are headquartered in New York.

11. While one of the Debtors is a Cayman Islands exempted limited partnership and another Debtor is a foreign registered company in the Cayman Islands, none of the Debtors has a substantial connection to the Cayman Islands. All of the Debtors have their principal place of business in New York, all of the Debtors' management is based in New York and all of the Debtors' material assets, namely the cash in their bank accounts, are held in the United States at banks in New York branches.

12. The MP Funds were formed in 2003 and together closed their capital raising in 2004 with $1.65 billion in capital commitments. The MP Funds specialize in distressed investing.

13. The MP Funds were funded primarily by institutional investors—principally financial institutions, insurance companies and corporate and government pension funds. They invested their capital in various companies, across a diverse range of industries around the world that were in or near insolvency or that otherwise faced difficult financial circumstances. The MP Funds sought a return on investment by acquiring and/or providing the capital financing and advisory expertise necessary to reorganize and restructure the companies in which they invested, to help those companies reverse their perilous financial circumstances.

14. As is typical of private investment funds of this nature, the MP Funds were comprised of both an onshore (Delaware) limited partnership and an offshore (Cayman Islands) limited partnership. As parallel limited partnerships, the MP Funds co-invested on a side-by-side basis, and shared the same investments and liabilities ratably based on their respective sizes. Investors could choose either of the MP Funds as their investment vehicle, depending on the legal, tax, regulatory or other similar considerations specific to each such investor.

15. As is also typical among private equity investment funds, the MP Funds structured their investments through special purpose entities ("***SPEs***"), which are often created or acquired

to be subsidiaries of the MP Funds and invest in portfolio companies. The MP Funds' investments were operated at the portfolio-company level through SPEs, so that the portfolio companies operate independently of the MP Funds, and the MP Funds are better able to manage their investment risk.

B. Management of the MP Funds

16. Management of each of the MP Funds has historically been carried out by MatlinPatterson Global Partners II LLC, the general partner of the MP Funds (the "***General Partner***"). The General Partner is a limited liability company organized in the State of Delaware. It is also a foreign registered company in the Cayman Islands in connection with its role as the general partner of MP Cayman. The General Partner was formed in 2003 to serve as the general partner to, and manage and conduct the business and affairs of, the MP Funds and various alternative investment vehicles and parallel vehicles. The General Partner has also served as general partner to various SPEs through which portfolio investments are made. Prior to the Petition Date, the General Partner designated an affiliate of the MP Funds as liquidating trustee to manage the orderly wind up of the affairs of MP Delaware. The General Partner retains management authority to wind up the affairs of MP Cayman, as I understand is permitted under Cayman law.

17. The General Partner's management team was employed by Debtor MatlinPatterson Global Advisers LLC, a Delaware limited liability company ("***MP Advisers***"). However, all employees were terminated on December 31, 2020, and staffing personnel are now employed through Altemis, a third-party employment contractor. None of the other Debtors has any employees.

18. MP Advisers also acts as investment adviser to other, non-Debtor fund entities. None of the other Debtors has any operations beyond the management and ownership of the MP Funds and the related non-Debtor vehicles, including most of the remaining SPEs.

C. MP Funds Start Winding Up

19. Between 2004 and 2013, the MP Funds made a number of investments in financially-distressed companies in various sectors, including chemicals, utilities, metals, security services, fashion, textiles, manufacturing, food, finance, electronics and the air cargo and airline passenger industries.

20. The MP Funds are now at the end of their life. Their organizational documents triggered dissolution on September 30, 2013, and the MP Funds began to liquidate their assets and wind up their affairs. The MP Funds have already sold or liquidated all of their portfolio companies and a majority of the SPEs. The remaining SPEs have *de minimis* activities and are in the process of being liquidated.

21. To facilitate the wind up of the MP Funds, on September 27, 2018, Debtor MatlinPatterson PE Holdings LLC, the managing member of the General Partner, formed a new subsidiary entity MP GOP GP II LLC, a Delaware limited liability company ("***MP GOP GP II***"). On October 2, 2018, the General Partner delegated management of the liquidation of MP Delaware to MP GOP GP II and appointed it to serve as liquidating trustee (in such capacity, the "***Liquidating Trustee***") of MP Delaware. By its grant of authority from the General Partner, the Liquidating Trustee is charged with the proper distribution of the remainder of MP Delaware's assets to its creditors and limited partners.

22. Under Cayman law, as I understand, on the expiration of MP Cayman's term on September 30, 2013, the General Partner became charged with the responsibility of winding up the affairs of MP Cayman and distribution of its remaining assets. The General Partner retained authority over winding up the affairs of MP Cayman, and the same team manages the General Partner and the Liquidating Trustee as they oversee the orderly liquidation of the MP Funds and the distribution of their assets in accordance with their governing documents.

23. As detailed below, as of June 30, 2021, the Debtors' assets are comprised principally of $142 million in cash, all of which is held in bank accounts in the United States. In October 2020, MP Cayman entered into a Distribution and Contribution Agreement (as amended or modified from time to time, the "***Contribution Agreement***") with MatlinPatterson Global Opportunities Partners (SUB) II L.P., a Delaware limited partnership ("***SUB II***"), whereby MP Cayman transferred all of its assets and liabilities to SUB II (such assets together with the assets of MP Delaware, the "***Fund II Assets***") in exchange for the partnership interests in SUB II, which MP Cayman then distributed to its limited partners and general partner. Given the structure of the MP Funds, the events leading up to the commencement of the Chapter 11 Cases, and the fact that all of the material assets are held in the United States by U.S. entities, the administrative interests and position of MP Cayman are inextricably linked to those of the other Debtors and the Chapter 11 Cases.

24. Other than Volo Logistics LLC ("***Volo Logistics***"), the non-Debtor SPEs in which the MP Funds retain an interest are not anticipated to file any chapter 11 cases,[3] and are in the process of being liquidated under applicable non-bankruptcy law. Accordingly, the remaining SPEs are not expected to be affected by the commencement of the Chapter 11 Cases.

II. Organizational and Capital Structure

A. Organizational Structure

25. An organizational chart illustrating the corporate structure of the Debtors is annexed to this declaration as **Exhibit A**.

[3] Volo Logistics was included as a Debtor in these Chapter 11 Cases because it is a named defendant in the Variglog Brazil litigation.

B. The Debtors' Prepetition Capital Structure.

26. As of the Petition Date, the Debtors' sole funded indebtedness consists of three intercompany promissory notes held by Fund II-A (defined below) against the MP Funds in an aggregate principal amount outstanding, together with accrued and unpaid interest, of approximately $58.0 million as of June 30, 2021, secured by the Collateral Assignment and Security Agreement dated as of August 31, 2020 (described below).

1. Fund II-A Promissory Notes

27. The MP Funds are each a borrower under three separate intercompany promissory notes (the "***Fund II-A Promissory Notes***") under three secured note agreements, two dated December 4, 2009 and one dated September 14, 2011 (as may be amended, restated, supplemented or otherwise modified from time to time prior to the Petition Date, the "***Promissory Note Agreements***"), by and among each of the MP Funds, respectively as borrower, and MP II Preferred Partners L.P., as lender under each of the Promissory Note Agreements (in such capacity, the "***Note Lender***" and, together its general partner, "***Fund II-A***"). Fund II-A was formed to provide capital support to the remaining portfolio companies and/or SPEs of the MP Funds and operating capital to the MP Funds.[4] Pursuant to the Promissory Note Agreements, upon the request of such MP Fund and on the terms and conditions set forth therein, the Note Lender loaned amounts to the MP Funds in an aggregate principal amount of $16 million (the "***Promissory Note Loans***"). The maturity of these loans is to occur upon the filing of a cancellation of the MP Funds' certificate of limited partnership, or such earlier date as determined by the general partner of the Note Lender and a majority in interest of certain of the investors in the Note Lender. Under that certain

[4] While related to the MP Funds, none of the entities in Fund II-A is a Debtor in the Chapter 11 Cases. The winding up of Fund II-A is expected to occur after the winding up of the MP Funds. Accordingly, the commencement of the Chapter 11 Cases is not expected to materially impact Fund II-A.

Collateral Assignment and Security Agreement dated as of August 31, 2020, between the MP Funds and Fund II-A, the obligations under the Fund II-A Promissory Notes (the "***Promissory Note Obligations***") became secured and perfected by duly perfected liens on all assets of the MP Funds (but with a provision, consistent with section 363(c)(2)(A) of the Bankruptcy Code, that the MP Funds may use the collateral exclusive of 105% of the respective Promissory Note Obligations), in favor of Fund II-A. SUB II became a party to that agreement by the effectiveness of the Contribution Agreement and that certain Collateral Assignment and Security Agreement, dated as of June 25, 2021, between SUB II and Fund II-A. The Promissory Note Agreements are valid, binding and, subject to applicable bankruptcy law, enforceable against the Debtors in accordance with their terms.

2. Partnership Interests

28. None of the Debtors has any publicly-listed securities. The General Partner is a wholly-owned subsidiary of MatlinPatterson PE Holdings LLC, an affiliated Debtor that also wholly owns MP Advisers. MatlinPatterson PE Holdings LLC in turn is wholly owned by non-Debtor affiliate MatlinPatterson LLC.

29. MP Delaware's authorized capital structure consists of one class of interests: the limited partnership interests held by the General Partner and those held by each of the approximately 100 limited partners of MP Delaware. MP Delaware's General Partner and limited partners hold pro-rata percentages of such interests in MP Delaware based on their respective capital commitments to MP Delaware.

30. Upon effectiveness of the Contribution Agreement, SUB II stepped into the place of MP Cayman, and its ownership consists of one class of interests: the limited partnership interests held by the General Partner and those held by each of the approximately 35 limited partners of MP

Cayman. MP Cayman's General Partner and limited partners hold pro-rata percentages of such interests in MP Cayman and SUB II based on their capital commitments to MP Cayman.

31. Volo Logistics is an indirectly held, but wholly-owned SPE of the MP Funds (and now SUB II after giving effect to the Contribution Agreement).

C. The Debtors' Other Prepetition Assets and Liabilities.

32. As of the Petition Date, the Debtors' other material assets and liabilities are as follows:

- Assets:
  - the General Partner owns partnership interests in each of the MP Funds and in other related non-Debtor entities and *de minimis* amounts of cash in its accounts;
  - MP Delaware and SUB II (after execution of the Contribution Agreement), own equity interests in non-Debtor SPEs that are in the process of winding up, and class C limited partnership interests in Fund II-A, each of which has immaterial economic value, other than contingent unliquidated litigation claims that may inure to the benefit of the SPEs;
  - The MP Funds (and, as a result of the Contribution Agreement, SUB II) also have asserted insurance reimbursement claims to recoup certain fees and expenses arising out of the litigations with VarigLog and HJDK (each as defined below) which claims are under review by their insurance carrier;
  - MatlinPatterson PE Holdings LLC holds *de minimis* amounts of cash in its accounts, and the equity interests in each of the General Partner, MP Advisers, and MP Preferred Partners GP LLC (the general partner of Fund II-A and the sole owner of the Liquidating Trustee);
  - MP Advisers holds approximately $75,000 in its accounts and does not own interests in any affiliated entities, and its only prior earnings came in respect of management fees earned from the funds it managed;
  - Volo Logistics has no material holdings nor assets; and
  - Cash held by the Debtors in the aggregate amount of $142 million as of June 30, 2021 broken out by the following holdings among the Debtors:
    - MP Delaware has $104 million in its accounts;

- SUB II has $38 million in its accounts (*i.e.*, cash formerly held by MP Cayman that was transferred to SUB II pursuant to the Contribution Agreement);
- The Management Company has $50,000 in its accounts; and
- The other Debtors have zero or *de minimis* cash balances in their accounts.

- Liabilities:
  - a disputed claim asserted by GOL Linhas Aéreas S.A. (formerly VRG Linhas Aéreas S.A.) ("***VRG***") against certain of the Debtors on account of a decision of the Cayman Court of Appeal upholding the enforceability of a Brazilian arbitration award, further described below, in the approximate amount of R$93 million Brazilian Reais plus interest (which, including interest and costs, is approximately $60.0 million U.S. dollars based on the exchange rate as of the Petition Date), (the "***Brazilian Arbitral Award***", and the Cayman proceedings collectively, the "***Cayman Proceedings***");[5]
  - a contingent, disputed liability with respect to proceedings (the "***Brazilian Action***") brought against each of the Debtors (other than SUB II) (together, the "***MP Parties***") in the Bankruptcy First Court of the City of São Paulo, State of São Paulo ("***Brazilian Bankruptcy Court***") by the Bankrupt Estate of Varig Logistica S.A. ("***VarigLog***"), seeking to pierce the corporate veil of a portfolio company and various other entities within the investment structure, or otherwise on the basis of undue shareholder control, to hold certain of the Debtors accountable for approximately R$1.76 billion Brazilian Reais (which is approximately $345.6 million U.S. dollars based on the exchange rate as of the Petition Date); and
  - the disputed claim held by HJDK Aerospacial S/A ("***HJDK***") seeking to pierce the corporate veil of a portfolio company to hold certain of the Debtors accountable for approximately R$89 million Brazilian Reais (which is approximately $17.5 million U.S. dollars based on the exchange rate as of the Petition Date) for the failure of the portfolio company to repay certain loans.

[5] Under Brazilian law, interest on the Brazilian Arbitral Award may continue to accrue until it is paid in full. The amount of the Brazilian Arbitral Award is subject to exchange rate fluctuations, which may be significant.

The following table depicts the Debtors' material assets and the asserted liabilities:

Assets	**Liabilities**			
	Action/Claim	*Asserted Amount*	*Forum*	*Judgement Expected*
$142 million in cash	*Fund II-A Promissory Note*	$58.0 million	N/A	N/A
	VRG	$60.0 million	Cayman Islands	2022-2023
	VarigLog *Action*	$345.6 million	Brazil	2030-2036
	HJDK Action	$17.5 million	Brazil	2027-2030
	Total Liabilities	**$481 million**		

33. All of the Debtors' cash is held in accounts in the United States. The cash held by the Debtors represents the primary source of funds available to fund ongoing expenses, including professional fees and other fees associated with the Chapter 11 Cases.

34. As elaborated on below, the Debtors have not made any material disbursements of their cash to investors and have always maintained funds more than sufficient to satisfy the amount of the Brazilian Arbitral Award with interest, consistent with a voluntary undertaking that was given to VRG in connection with the Cayman Proceedings (described in footnote 11 below). Accordingly, other than paying ongoing legal fees and some *de minimis* ordinary course expenses, the cash balances described above have remained materially unchanged for a number of years.

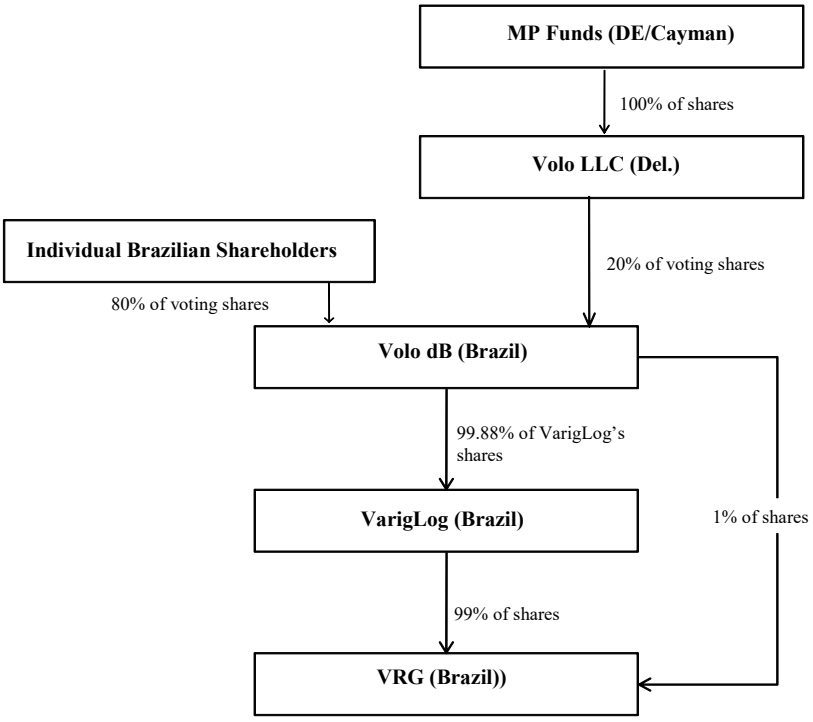
EVENTS LEADING TO THESE CHAPTER 11 PROCEEDINGS

35. As described above, the MP Funds have reached the end of their life and the time has come for an orderly distribution of their remaining assets to their investors after addressing all of their remaining legitimate liabilities. This section sets out the key events leading to the need for judicial assistance in this process, namely the Cayman Proceedings and the Brazilian Action, and further explains the reasons for the Debtors' decision to file the Chapter 11 Cases.

I. The MP Funds' Investments

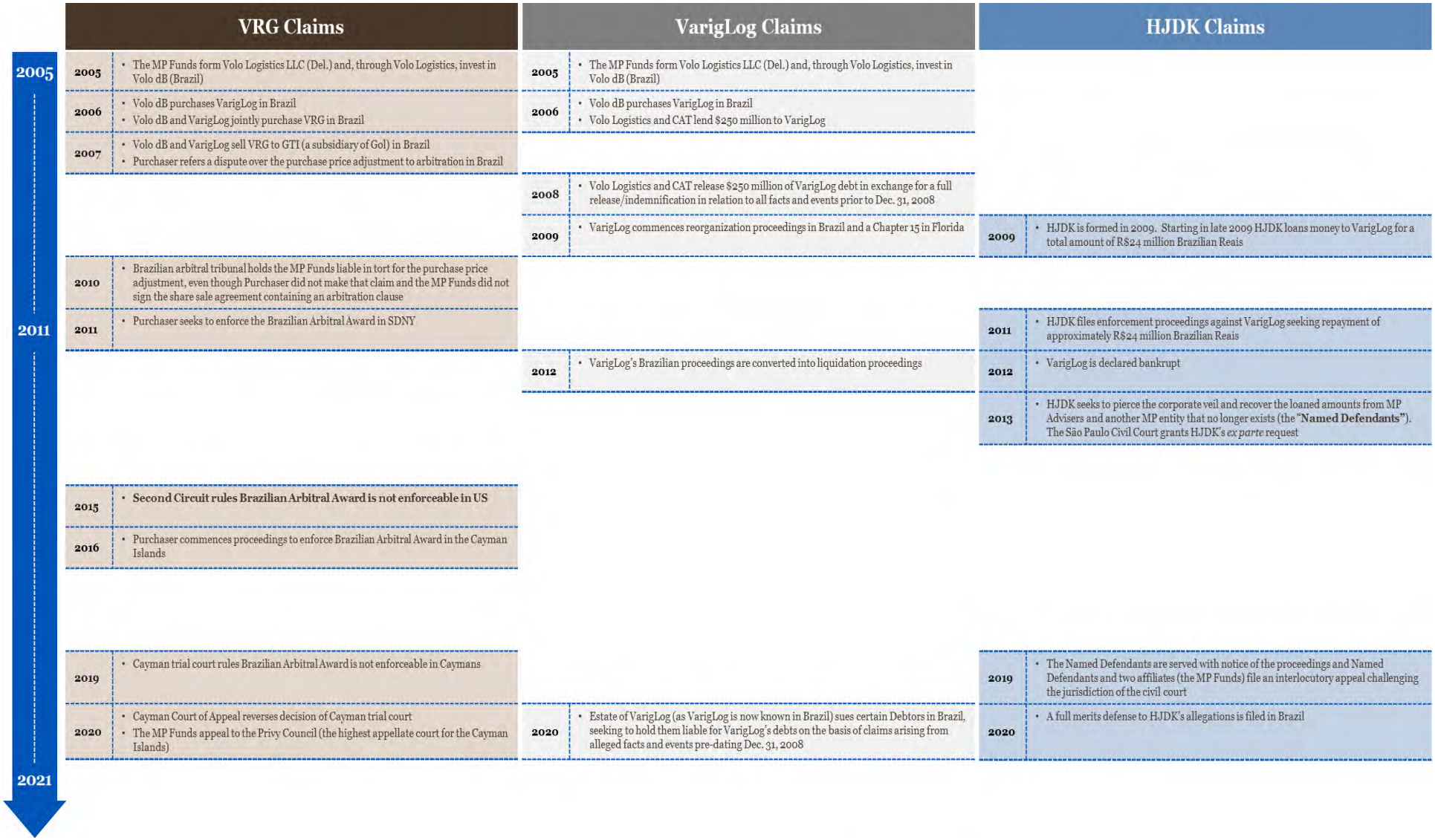
36. In 2005, the MP Funds established Volo Logistics in Delaware to serve as an investment vehicle for pursuing opportunities in the Brazilian aviation industry. Volo Logistics together with three Brazilian individual investors (the "***Brazilian Shareholders***") formed a company called Volo do Brasil S.A. ("***Volo dB***"). The Brazilian Shareholders owned and controlled 80% of Volo dB's voting stock and Volo Logistics owned the remaining 20%.

37. In early 2006, Volo dB purchased VarigLog, a Brazilian cargo airline. Later in 2006, VarigLog and Volo dB purchased the passenger airline business of VarigLog's former parent via a Brazilian special purpose vehicle that was later renamed VRG. VRG became a subsidiary of VarigLog and Volo dB. The following depicts the MP Funds' historical investment structure in Brazil, consistent with how U.S. private equity firms acquire, hold and capitalize foreign, portfolio-company investments:[6]



[6] The remaining 0.12% of VarigLog's shares were held by Fudação Ruben Berta (the Ruben Berta Foundation).

38. The MP Funds' investment into the Brazilian aviation industry has generated a substantial loss for the MP Funds and led to years of meritless litigation against the MP Funds in Brazil. The MP Funds have been drawn into three unmeritorious proceedings relating to their now historic investment, including litigations commenced in 2019 and 2020 that concern events occurring more than a decade ago. The following depicts a timeline of the events leading up to and following the commencement of the VRG, VarigLog and HJDK actions:



VRG Claims		VarigLog Claims		HJDK Claims	
2005	• The MP Funds form Volo Logistics LLC (Del.) and, through Volo Logistics, invest in Volo dB (Brazil)	2005	• The MP Funds form Volo Logistics LLC (Del.) and, through Volo Logistics, invest in Volo dB (Brazil)		
2006	• Volo dB purchases VarigLog in Brazil • Volo dB and VarigLog jointly purchase VRG in Brazil	2006	• Volo dB purchases VarigLog in Brazil • Volo Logistics and CAT lend $250 million to VarigLog		
2007	• Volo dB and VarigLog sell VRG to GTI (a subsidiary of Gol) in Brazil • Purchaser refers a dispute over the purchase price adjustment to arbitration in Brazil				
		2008	• Volo Logistics and CAT release $250 million of VarigLog debt in exchange for a full release/indemnification in relation to all facts and events prior to Dec. 31, 2008		
		2009	• VarigLog commences reorganization proceedings in Brazil and a Chapter 15 in Florida	2009	• HJDK is formed in 2009. Starting in late 2009 HJDK loans money to VarigLog for a total amount of R$24 million Brazilian Reais
2010	• Brazilian arbitral tribunal holds the MP Funds liable in tort for the purchase price adjustment, even though Purchaser did not make that claim and the MP Funds did not sign the share sale agreement containing an arbitration clause				
2011	• Purchaser seeks to enforce the Brazilian Arbitral Award in SDNY			2011	• HJDK files enforcement proceedings against VarigLog seeking repayment of approximately R$24 million Brazilian Reais
		2012	• VarigLog's Brazilian proceedings are converted into liquidation proceedings	2012	• VarigLog is declared bankrupt
				2013	• HJDK seeks to pierce the corporate veil and recover the loaned amounts from MP Advisers and another MP entity that no longer exists (the "**Named Defendants**"). The São Paulo Civil Court grants HJDK's *ex parte* request
2015	• **Second Circuit rules Brazilian Arbitral Award is not enforceable in US**				
2016	• Purchaser commences proceedings to enforce Brazilian Arbitral Award in the Cayman Islands				
2019	• Cayman trial court rules Brazilian Arbitral Award is not enforceable in Caymans			2019	• The Named Defendants are served with notice of the proceedings and Named Defendants and two affiliates (the MP Funds) file an interlocutory appeal challenging the jurisdiction of the civil court
2020	• Cayman Court of Appeal reverses decision of Cayman trial court • The MP Funds appeal to the Privy Council (the highest appellate court for the Cayman Islands)	2020	• Estate of VarigLog (as VarigLog is now known in Brazil) sues certain Debtors in Brazil, seeking to hold them liable for VarigLog's debts on the basis of claims arising from alleged facts and events pre-dating Dec. 31, 2008	2020	• A full merits defense to HJDK's allegations is filed in Brazil

II. The VRG Claim

39. In 2011, VRG sought recognition and enforcement in New York of a Brazilian arbitral award rendered against certain of the Debtors. After years of litigation, in 2015, the Second Circuit fully and finally determined that the Brazilian Arbitral Award is ***not*** enforceable in the United States, as a matter of federal law and U.S. public policy, because the Brazilian arbitral tribunal never had any jurisdiction over the Debtors. Following that decision, VRG pursued recognition of the same unenforceable award from the courts of the Cayman Islands. The Cayman Grand Court also concluded that the award was unenforceable, under Cayman law, but the Cayman Court of Appeal reversed the decision in favor of VRG. The matter is currently pending before the Judicial Committee of the Privy Council (the "***Privy Council***") in the United Kingdom, which serves as the court of final appeal for the Cayman Islands. As I understand, even if VRG prevailed in the Cayman Proceedings, VRG must still seek recognition and enforcement of the Cayman judgment in New York, where substantially all of the Debtors' assets are located.

40. Provided below is an overview of the VRG proceedings and the developments that have occurred subsequent to the Second Circuit decision.

A. Sale of VRG and the Share Purchase and Sale Agreement

41. During 2007, VarigLog and Volo dB sold their shares in VRG to GTI S.A. ("***GTI***"), a subsidiary of the Brazilian airline Gol, pursuant to a Share Purchase and Sale Agreement, dated March 28, 2007 (the "***PSA***").

42. The PSA, which included an arbitration clause, specifically identified the "Parties" to the PSA as VarigLog and Volo dB (the "***Sellers***") and GTI (the "***Buyer***"). Gol, as parent to GTI, also signed the PSA as a guarantor of the Buyer's obligations. Crucially, none of Volo Logistics, the MP Funds, nor the General Partner signed the PSA or were Parties to it.

43. Pursuant to a side letter agreement dated March 28, 2007, the MP Funds (as indirect parents of the Sellers) agreed (as is customary in such transactions) not to compete with VRG, the airline being sold, or to invest in any of its competitors in the Brazilian passenger airline market, for a period of three years. The side letter contained only a non-compete obligation of the MP Funds, and did not contain an arbitration clause.

B. A Brazilian Arbitral Award is Rendered Against the MP Funds

44. As is common in the purchase and sale of a going concern, the PSA included a purchase price adjustment to account for the fluctuation in working capital during the time between signing the PSA and closing the sale.

45. In 2007, after the completion of the sale of VRG to GTI, a dispute arose as to the purchase price adjustment due under the PSA. GTI (referred to hereafter as VRG as it was known between 2008 and 2016 following the merger of GTI and VRG in late 2008, during the arbitration) referred the purchase price adjustment dispute to arbitration under the arbitration clause contained in the PSA. VRG named the MP Funds as parties in the arbitration, even though they were not parties to the PSA or its arbitration clause.

46. Over the MP Funds' objections that they were not parties to the PSA and never agreed to be bound by the arbitration provision contained therein, the Brazilian arbitral tribunal found that it had jurisdiction over the MP Funds. The decision was made on the basis that the MP Funds had entered into the non-compete side letter, even though the side letter contained no agreement to arbitrate and the purchase price dispute was wholly unrelated to the non-compete obligation.

47. In its final award on the purchase price dispute, dated September 2, 2010, the Brazilian tribunal rejected VRG's claim that the MP Funds were alter egos of the Sellers, but held the MP Funds jointly and severally liable with the sellers of VRG for the entire purchase price

adjustment obligation of the Sellers. The tribunal awarded these contractual damages on the basis of a surprise tort liability claim that the tribunal itself came up with and even though VRG never advanced any tort claims against the MP Funds but rather premised their liability on the alter ego claim that the tribunal specifically rejected. The MP Funds sought to have the Brazilian Arbitral Award set aside in Brazil, as the seat of the arbitration, but the Brazilian courts declined to vacate it.

C. The U.S. Courts Fully and Finally Determine that the Brazilian Arbitral Award is Unenforceable in the United States

48. In January 2011, VRG filed a petition in the Southern District of New York to enforce the Brazilian Arbitral Award in the United States against the MP Funds, in accordance with the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "***New York Convention***"), incorporated into U.S. law by section 207 of the Federal Arbitration Act.[7]

49. Over the next four and a half years, the MP Funds and VRG fully litigated the enforceability of the Brazilian Arbitral Award, including two substantive hearings before the U.S. District Court for the Southern District Court of New York and two appeals to the United States Court of Appeal for the Second Circuit (collectively, the "***United States Proceedings***").[8] The MP Funds raised three defenses to enforcement of the Award in the United States: (1) that it was rendered without jurisdiction over the MP Funds because they never agreed to the arbitration

---

[7] *See* Verified Petition to Confirm Arbitration Award and for An Entry of Judgment at ¶¶ 5–6, *VRG Linhas Aereas S.A., v. Matlinpatterson Glob. Opportunities Partners II L.P.*, 2011 WL 160966 (S.D.N.Y.). This petition is not attached here but can be provided to the Court upon request.

[8] For the Court's ease of reference, copies of the 2014 Southern District of New York decision and the 2015 Second Circuit decision, which were not selected for publication, are attached hereto as **Exhibits B-1** and **B-2**, respectively. If requested by the Court, the Debtors can provide the Court with the other decisions from the United States Proceedings.

clause contained in the PSA which they intentionally did not sign (signing instead only a side letter providing for a non-compete); (2) that the arbitral tribunal violated the MP Funds due process rights by imposing liability on a the basis of a surprise tort claim that the tribunal introduced for the first time only in the final award and which VRG never advanced in the case; and (3) relatedly, that the tribunal exceeded the scope of the issues submitted by the parties for determination in the arbitration when imposing liability on the basis of a tort claim that the claimant did not allege.

50. VRG's attempts to enforce the Brazilian Arbitral Award in the United States were denied at every step of the way. Both the District Court and the Second Circuit, applying *de novo* review, concluded that the Brazilian Arbitral Award is not enforceable in the United States because the arbitral tribunal lacked jurisdiction over the MP Funds as intentional non-parties to the PSA and its arbitration clause. In so concluding, the U.S. Courts applied Article V(2) of the New York Convention and found the Brazilian Arbitral Award contrary to the public policy of the United States. Because the U.S. Courts rejected the Brazilian Arbitral Award for lack of any jurisdiction over the MP Funds, they did not address the MP Funds' other, due-process and excess-of-authority defenses.

51. VRG sought rehearing and rehearing *en banc* before the Second Circuit. By order dated August 20, 2015, the Second Circuit denied the request. VRG did not seek U.S. Supreme Court review and, as I understand, any such application is now time-barred.

52. Thus, as a matter of U.S. law, and as a result of nearly five years of litigation before the U.S. courts, the Brazilian Arbitral Award has been fully and finally adjudicated as unenforceable in the United States.

D. VRG Seeks Enforcement of the Same Brazilian Arbitral Award in the Cayman Islands After the U.S. Courts Refuse Enforcement of the Award

53. Disregarding the U.S. courts' final determination that the Brazilian Arbitration Award should not be enforced, VRG commenced proceedings in the Cayman Grand Court on September 1, 2016, one day before the Cayman limitation period expired, seeking to enforce the Brazilian Arbitral Award in the Cayman Islands under the same New York Convention that the U.S. Courts applied when rendering their decision. VRG named MP Delaware, MP Cayman and the General Partner as defendants. The MP Funds opposed enforcement of the Brazilian Arbitral Award in the Cayman Islands on the same three grounds under the New York Convention, described above, that they had raised in the U.S. proceedings.[9]

54. The Cayman Grand Court held that the Brazilian Arbitral Award was unenforceable in the Cayman Islands for all three of the grounds advanced by the MP Funds: lack of arbitral jurisdiction, denial of due process (or breach of natural justice, as it is called under Cayman law) and breach of the scope of the issues submitted by the parties to arbitration.[10]

55. VRG appealed the decision to the Cayman Court of Appeal. Notably, VRG did *not* appeal the finding of the Cayman Grand Court that the MP Funds never consented to arbitration in Brazil, only that the Cayman courts should be estopped from considering that point (and the question as to scope of the parties' submission to arbitration) because the Brazilian courts had

---

[9] In connection with the Cayman Proceedings, the General Partner, in its capacity as general partner to the MP Funds, has voluntarily undertaken to VRG that the MP Funds would maintain at all times assets sufficient to satisfy the amount of the disputed Brazilian Arbitral Award and that no steps would be taken to dispose of such assets to external parties other than to satisfy routine expenses in the ordinary course of business), pending the outcome of VRG's application. This undertaking was strictly voluntary and served to preserve assets to which the MP Funds have recourse sufficient to satisfy any ultimate final judgment and allow the Cayman Proceeding to run its course and has been complied with at all times. The Debtors did not, by their voluntary undertaking, waive any of their legal rights, including to come before this Court in these Chapter 11 Cases, with full opportunity for VRG to be heard before the Debtors may distribute assets under the Plan.

[10] For the Court's ease of reference, a copy of the Cayman Grand Court decision is attached hereto as **Exhibit B-3**.

refused to set aside the Brazilian Arbitral Award and, under Cayman law, the question of consent to arbitrate was a question of Brazilian law.

56. The Cayman Court of Appeal overturned the decision, holding, *inter alia,* that the Cayman Islands' courts are estopped from considering whether the MP Funds agreed to arbitration in Brazil.[11] The Cayman Court of Appeal therefore declined to consider the issue upon which the U.S. courts determined that the Brazilian Arbitral Award is *not* enforceable in the United States under the New York Convention (*i.e.,* that the MP Funds never consented to arbitration, such that the arbitrators never had any jurisdiction over them). Accordingly, the Cayman Court of Appeal rendered a decision against the MP Funds in the approximate amount of $60 million U.S. dollars (based on the exchange rate as of the Petition Date).[12]

57. The MP Funds have appealed to the Judicial Committee of the Privy Council. The appeal remains pending, and the MP Funds expect that a final adjudication could take at least until the end of 2022 and most likely until 2023. The MP Funds appealed to the Privy Council because they are concerned VRG will seek to enforce the Brazilian Arbitration Award via the Cayman court judgment against the Fund II Assets, despite the Second Circuit decision protecting these Fund II Assets from such enforcement. While the MP Funds would vigorously contest any such proceedings in the United States as being in direct contravention of the Second Circuit decision, they nevertheless decided to appeal to the Privy Council as well.

---

[11] For the Court's ease of reference, a copy of the decision of the Court of Appeal of the Cayman Islands is attached hereto as **Exhibit B-4**.

[12] Nothing herein shall be deemed a waiver of the Debtors' rights to appeal or challenge the decision of the Cayman Court of Appeal in any jurisdiction. Such rights are fully preserved.

III. The Varig Claim

58. More recently, the Debtors have been targeted by new, unrelated litigation in Brazil that likewise seeks to sidestep U.S. law. The Debtors' local indirect subsidiary, VarigLog, fell upon financial distress that ultimately led to Brazilian reorganization proceedings in 2009 and then liquidation proceedings in 2012, which remain ongoing. In May 2020, the administrator of VarigLog's estate filed a lawsuit in Brazil against certain Debtors, claiming they had abused their control of VarigLog and caused its bankruptcy, and should therefore be liable for VarigLog's debts. As set forth in further detail below, VarigLog's claims are clearly barred by two New York-law governed Debt Assumption Agreements, in which certain of the Debtors agreed to release VarigLog from $250 million in debt obligations in exchange for releases and indemnifications by VarigLog against any claims relating to the parties' relationship prior to December 31, 2008.

A. The Debt Assumption Agreements and VarigLog's Bankruptcy

59. In the course of the MP Funds' investments in Brazil, Volo Logistics made loans to VarigLog, and Volo Logistics and CAT Aérea LLC ("***CAT***"), now a wholly-owned subsidiary of Volo Logistics, also made loans to VRG. The loans made to VRG by Volo Logistics were subsequently assumed by VarigLog, such that VarigLog held all of the debts owed to Volo Logistics and CAT.

60. In 2008, VarigLog experienced financial difficulty. Volo Logistics and CAT took various steps to improve its performance, including to allow VarigLog to assign to Volo dB $250 million in debt obligations that VarigLog owed to Volo Logistics and CAT, and to release VarigLog from any obligation to repay the loans. This assignment and assumption of the loans was effected in two debt assumption agreements, both dated December 31, 2008 (the "***Debt***

Assumption Agreements").[13] The Debt Assumption Agreements are governed by New York law and contain a forum selection clause specifying New York courts.

61. In exchange for Volo Logistics and CAT agreeing to release VarigLog from its obligations to repay the $250 million owed to them, VarigLog, on behalf of itself and all successors and anyone claiming by or through it, released Volo Logistics, CAT and their related and affiliated parties from all claims, including those that could be asserted in the future, "*based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to*" December 31, 2008, that in any way relate to VarigLog (the "***Releases***"). VarigLog also agreed to indemnify and hold the released parties harmless from and against any and all claims and losses (including damages and expenses) incurred by any of them as a result of claims by any person including VarigLog relating to their transactions or relationship with VarigLog (the "***Indemnifications***").

62. Volo Logistics and CAT relied on the Releases, Indemnifications, and New York choice of law and forum in entering into the Debt Assumption Agreements. The Releases, Indemnifications, and choice of New York law and forum were a valuable part of the consideration that VarigLog provided to Volo Logistics and CAT in exchange for their release of the $250 million in debt obligations that VarigLog owed to them.

63. As a result of entering into the Debt Assumption Agreements, Volo Logistics and CAT changed their position *vis-à-vis* VarigLog, including by losing any recourse that they would have had against VarigLog in respect of the $250 million debt. Volo Logistics and CAT have not received repayment of the loans assumed by Volo dB. Further, as events have transpired, they are

[13] Copies of the Debt Assumption Agreements are attached as **Exhibit C-1** and **Exhibit C-2**.

now disadvantaged in VarigLog's Brazilian bankruptcy for having foregone combined unsecured claims of approximately $250 million.

B. VarigLog's Administrator Files Brazilian Lawsuit Against the MP Parties Over a Decade After VarigLog Entered Bankruptcy in Brazil

64. VarigLog's financial situation did not improve and in 2009 it entered into judicial restructuring proceedings in Brazil. On March 31, 2009, VarigLog also filed a petition for Chapter 15 Relief and Recognition of a Foreign Proceeding in the Bankruptcy Court in the Southern District of Florida.

65. In September 2012, the Brazilian reorganization was converted to a liquidation proceeding. In connection with that conversion, in 2013 VarigLog's Trustee filed a report with the public attorney's office in São Paulo, assessing the probable causes for VarigLog's bankruptcy. A year later the Trustee filed a second report confirming the first report. Neither report suggested any sort of misconduct by the MP Parties or that the MP Parties had caused VarigLog's bankruptcy. Instead, the reports pinpoint the causes of the bankruptcy to the decline in demand for air transportation services and VarigLog's general inability to generate positive results.

66. Nevertheless, on May 11, 2020, VarigLog filed proceedings in the 1st Bankruptcy and Judicial Reorganization Court of the Judicial District of São Paulo against the MP Parties seeking to hold them responsible for the entirety of VarigLog's debt (seeking approximately $345.6 million U.S. dollars based on the exchange rate as of the Petition Date).

67. The Brazilian Action alleges that the MP Parties had an improper relationship with VarigLog and caused its bankruptcy by breaching fiduciary duties allegedly owed to VarigLog and by acting as its alter ego. It relies on acts, omissions, transactions, and events that occurred more than 12 years ago, and prior to the two reports filed with the public attorney attributing the causes of the bankruptcy to other factors. All but one of the alleged events occurred during the

period between January 27, 2006 and the end of August 2008. In so doing, VarigLog impermissibly seeks to enjoy the New York-law benefits of the Debt Assumption Agreements while disavowing the New York-law consideration that VarigLog gave for that relief, *i.e.,* the Releases and Indemnities that bar the claims it now pursues in the Brazilian Action.

68. Due to the nature of the Brazilian court system I have been advised by local counsel in Brazil that, even for speculative and meritless claims such as this one, the Brazilian Action may take approximately 9–15 years to be finally resolved, including receiving a trial court judgment and concluding any opportunities to appeal.

C. The MP Parties' Adversary Proceeding in the Bankruptcy Court for the Southern District of Florida

69. On June 23, 2020, the MP Parties filed a complaint in the chapter 15 proceeding[14] that VarigLog had commenced in the Bankruptcy Court in the Southern District of Florida. The complaint requests that the court give effect to the Releases and Indemnifications granted by VarigLog to the MP Parties, or alternatively, for relief from the automatic stay to allow the MP Parties to pursue their claims in New York under the New York-law governed Releases and Indemnifications.

70. On July 27, 2020, VarigLog's chapter 15 foreign representative moved to dismiss the Debtors' Adversary Proceeding on various bases, including that the court should afford comity to the Brazilian Action and force the MP Parties to assert the Releases and Indemnifications within the same action in Brazil that the MP Parties claim breaches their New York-law rights. The foreign representative also raised various Brazilian law arguments in support of the view that the Releases were not effective.

---

[14] *In re Varig Logistica S.A.*, Case No. 09-15717-RAM; Adv. Pro. No. 20-01243-BKC-RAM-A) (the "***Adversary Proceeding***").

71. The foreign representative's motion to dismiss was fully briefed by the parties between August and October 2020. The court heard oral argument on the motion to dismiss on October 19, 2020, and the parties are awaiting a decision.

IV. The HJDK Claim

72. HJDK is a Panamanian entity controlled by German Efromovich.

73. Starting in late 2009, while VarigLog was undergoing judicial restructuring in Brazil, HJDK made loans to VarigLog totaling approximately R$24 million (approximately USD $4.6 million based on the exchange rate as of the Petition Date).[15] The Debtors were not involved in VarigLog's business at that point because it had been in judicial restructuring since March 2009 and a trustee was appointed to oversee the estate.

74. VarigLog thereafter allegedly defaulted on its loans from HJDK and, on April 28, 2011, HJDK filed enforcement proceedings in the 2nd Civil Court of the Central Courthouse of the Judicial District of São Paulo (the "***São Paulo Civil Court***") seeking repayment. The São Paolo Civil Court issued a preliminary injunction to freeze R$24 million in VarigLog's accounts, but this was overturned on appeal by the Court of Appeals of São Paulo, and the funds released.

75. On September 27, 2012, VarigLog's judicial restructuring was converted to a liquidation proceeding. The Brazilian Bankruptcy Court subsequently ordered the R$24 million that had previously been frozen be used to pay certain prepetition claims.

76. Meanwhile, in 2011, other entities related to MatlinPatterson (the "***Remora Entities***") sued Mr. Efromovich in New York state court for breach of a personal guaranty given by Mr. Efromovich in September 2010 in support of HJDK's obligations as buyer to pay the

[15] The outstanding amount, accounting for inflation and interest as of January 2021 is R$89 million (which is approximately USD$17.5 million as of the Petition Date).

purchase price under an agreement between the Remora Entities and HJDK for the purchase of another Brazilian company. Between 2012 and 2014, the Remora Entities obtained various decisions in their favor, including summary judgment in January 2012 and ultimately a New York state court judgment against Mr. Efromovich entered in 2014, in the amount of approximately USD$12.8 million (which presently stands at USD$19 million including interest). That judgment was obtained in relation to a personal guaranty given by Mr. Eformovich in support of HJDK's obligations as buyer to pay the purchase price under a sale and purchase agreement between the Remora Entities and HJDK for the purchase of another Brazilian company. After HJDK defaulted on its obligation to pay the purchase price, the Remora Entities obtained judgment on the personal guaranty provided by Mr. Efromovich.

77. In September 2013, HJDK filed an *ex parte* application in the São Paolo Civil Court to pierce VarigLog's corporate veil and hold MP Advisers and another entity, MatlinPatterson Global Opportunities Partners LP, which was an entity that was affiliated with MatlinPatterson Global Opportunities Fund I and no longer exists (the "**Named Defendants**"), liable for the unpaid VarigLog loans.

78. In those *ex parte* proceedings, HJDK blatantly misrepresented to the São Paolo Civil Court that the Named Defendants had misappropriated the R$24 million that had been the subject of the prior injunction. HJDK presented evidence that it had obtained from court submissions made in VarigLog's judicial restructuring proceedings. But HJDK *did not* also present the answers to those same submissions, which would have made it clear that the purportedly "missing" funds were required to pay prepetition claims in accordance with the Brazilian Bankruptcy Court's order. The full record from the Brazilian Bankruptcy Court makes

perfectly clear that those funds were *not* taken by the Debtors, but rather had been used to satisfy prepetition claims pursuant to the Brazilian Bankruptcy Court's order.

79. Based on HJDK's false representations, the São Paolo Civil Court ruled *ex parte* in HJDK's favor on October 7, 2013. Having obtained this judgment for HJDK in Brazil, Mr. Efromovich has sought to argue that it should be set off against the judgment debt that he owes to the Remora Entities. He has claimed that the HJDK judgment is an asset assigned to him for these purposes.

80. MP Advisers and the MP Funds were not made aware of, and therefore did not have the opportunity to appear in the *ex parte* veil piercing lawsuit. As a result, they did not have the opportunity to defend themselves, correct the record, or otherwise challenge the jurisdiction of the São Paolo Civil Court. MP Advisers was not served with the claim and court decision against it until over five years later, on May 23, 2019. The relevant Debtors (*i.e.,* MP Advisers and the MP Funds) now find themselves in a costly and lengthy legal battle in Brazil trying to *undo* the prejudice done to them by HJDK.

81. The relevant Debtors are seeking to correct the prejudice caused them by HJDK by challenging both the São Paolo Civil Court's jurisdiction to hear the matter and the merits of HJDK's claim. At present, HJDK is pursuing procedural arguments designed to deprive the relevant Debtors of ever having a chance to present their substantive defenses on the merits.

82. Separately, on February 25, 2021, the São Paulo Civil Court issued a Letter Rogatory requesting that the Named Defendants and the MP Funds pay approximately $15 million U.S. dollars (based on the exchange rate as of the Petition Date) in connection with the loan agreements HJDK entered into with VarigLog. It is not clear why the São Paulo Civil Court issued this Letter Rogatory. The relevant Debtors have not yet been served.

83. The litigation with HJDK remains pending in Brazil, and I understand from consultation with counsel involved that it is expected to take many years to resolve and potentially not before 2027.

V. The Debtors' Decision to File the Chapter 11 Cases in New York

84. As explained above, the MP Funds are at the end of their life. The Fund II Assets, the principal assets of the Debtors, are now reduced principally to cash sitting in bank accounts in the United States. The litigation claims asserted by VRG, VarigLog, and HJDK against the Debtors seek recourse to that cash located in the United States, and the quantum of such claims surpasses $400 million, which substantially exceeds the value of the Debtors' total assets. Because all of the claims seek recourse to the same limited pool of assets located in the United States, the Debtors have determined that chapter 11 relief enables the Debtors to resolve such liabilities in a manner that maximizes distributable value for all stakeholders and ensures that the Debtors' assets are liquidated and distributed in an efficient and equitable manner. In particular, in these Chapter 11 Cases, this Court will provide a single, centralized forum in which the MP Funds and the Fund II Assets can be wound up without further delay and through an orderly liquidation, in a manner that comports with the fundamental interests and public policy of the United States, the jurisdiction where the substantial majority of the Debtors and their creditors, investors and assets are located.

85. Given the number of years that have elapsed since the MP Funds were launched and the occurrence of the date of dissolution of the MP Funds in 2013 as provided under the organizational documents of the MP Funds, completion of the winding up of the MP Funds is long overdue yet is stalled indefinitely primarily due to the ongoing foreign litigations that the Debtors expect to continue well into the foreseeable future. Through these Chapter 11 Cases, the Debtors'

goal is to complete a prompt, orderly and efficient distribution of the Fund II Assets to the Debtors' legitimate creditors, investors and other parties in interest.

86. In particular, given the long history of multi-jurisdictional litigation and arbitration involving the Debtors, the presence of conflicting judicial decisions in different jurisdictions in respect of the arbitral award, and the likelihood of continued multi-jurisdictional litigation asserting claims that far exceed the Debtors' assets for an extended period of time (including potential ongoing attempts to enforce the Brazilian Arbitral Award against the Debtors through the Cayman court decision as well as ongoing attempts to hold the MP Parties liable for the entirety of VarigLog's debts in Brazil), the Debtors have determined that the only way to implement an orderly and equitable claims and distribution process for their legitimate creditors, investors and other stakeholders, and further to maximize the recovery available for those parties with valid claims that are enforceable in the United States, is to seek the assistance of this Court as the appropriate centralized forum for the winding up of these Debtors.

87. The Debtors consider that the protections afforded by the bankruptcy process, including the breathing space afforded by the automatic stay imposed upon the commencement of a chapter 11 case, the exclusivity period afforded to debtors for proposing a plan, the transparency of chapter 11 proceedings and the distribution scheme provided under a court-supervised process that results in equitable treatment for all stakeholders, will greatly benefit the orderly liquidation process of the Debtors and ultimately maximize the value of the estate for distribution to the Debtors' legitimate creditors, investors and other stakeholders.

88. Further, the Debtors have been conducting the wind down since 2013 consistent with obligations under the partnership agreements and the commencement of these Chapter 11 Cases is the last step to complete the process and fulfill the responsibilities of the General Partner.

Due to the complex structure of the MP Funds, the nature of their investments and the winding up of affairs across multiple jurisdictions, it will take time, along with very specific knowledge and experience, to ensure that Debtors' assets are liquidated in a manner that provides the maximum benefit to the Debtors' creditors and investors. The management team employed by the Debtors, including the Chief Restructuring Officer, is best equipped to oversee and carry out this winding up process.

89. Finally, the Debtors recognize New York as the appropriate venue for the orderly liquidation and distribution because it is the location of the Debtors' principal place of business, the Debtors' only material asset – their remaining cash – is deposited in bank accounts located in New York and, as relates to the conflicting cross-border judicial decisions, U.S. courts sitting in the Second Circuit have already fully and finally adjudicated that the Brazilian Arbitral Award is unenforceable against the MP Funds in the United States as a matter of the fundamental interests of the United States and public policy. Additionally, the Releases and Indemnifications implicated in the Brazilian Action are in instruments governed by New York law and subject to the jurisdiction of the New York courts.

VI. The Litigation Claims Bar Date Motion and the Debtors' Proposed Plan

90. To further an orderly and centralized liquidation, concurrently herewith the Debtors have filed a Litigation Claims Bar Date Motion (as defined below) setting forth an overview of the factual and legal arguments as to why the VRG, VarigLog and HJDK Claims should be disallowed and seeking to establish a bar date by which the litigation claimants must file their proofs of claim, in order to permit the Debtors to promptly object to such claims, the disallowance of which is a condition to the effectiveness of the Debtors' proposed Plan.

91. The Debtors' proposed Plan treats as unimpaired all claims against each of the Debtors (with the various litigation claims being subject to disallowance as determined by the Bankruptcy Court following disallowance proceedings); only the partnership interests in the Debtors are impaired. Under the circumstances, the Debtors believe that the Plan and disallowance proceedings present the best opportunity for optimal recoveries for those with valid claims and interests against the Debtors that are enforceable in the U.S. against the Debtors' assets. The Debtors firmly believe that it is long overdue to proceed with the liquidation and distribution of these Fund II Assets and that further delay will only result in a reduction of value of these estates due to spurious litigation, a suboptimal outcome for the interested creditors and limited partners.

FIRST DAY MOTIONS

92. Contemporaneously herewith, the Debtors filed the following First Day Motions seeking targeted relief intended to establish procedures for the smooth and efficient administration of the Chapter 11 Cases. While the relief sought in the First Day Motions is primarily driven by bankruptcy procedural matters resulting from the commencement of the Chapter 11 Cases, the Debtors nevertheless reserve their rights to file additional First Day Motions as to the ongoing business activities of the Debtors as needed:

- *Debtors' Motion for Entry of an Order (I) Directing Joint Administration of the Debtors' Chapter 11 Cases and (II) Granting Related Relief* (the "***Joint Administration Motion***");
- *Debtors' Application for Entry of an Order Appointing Kurtzman Carson Consultants LLC as Claims and Noticing Agent Pursuant to 28 U.S.C. § 156(c), 11 U.S.C. § 105(a), and Local Rule 5075-1 Effective Nunc Pro Tunc to the Petition Date* (the "***KCC 156(c) Application***");
- *Debtors' Motion for Entry of an Order (I) Extending the Time to File Schedules of Assets and Liabilities, Statements of Financial Affairs, and the Initial Rule 2015.3 Financial Report; and (II) Granting Related Relief* (the "***SOFA Extension Motion***");

- *Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing, but not Directing the Debtors to Continue Using their Cash Management System, Including (A) Existing Bank Accounts and (B) Incurring Intercompany Claims on a Limited Basis; (II) Waiving Certain Requirements of Section 345(b) of the U.S. Trustee Guidelines; and (III) Granting Related Relief* (the "***Cash Management Motion***");

- *Debtors' Motion for Entry of an Order (I) Restating and Enforcing Protections of 11 U.S.C. §§ 105(a), 362, 365, 525 and 541(c) and (II) Granting Related Relief* (the "***Automatic Stay Motion***");

- *Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to (A) File a Consolidated List of Creditors and (B) File a Consolidated List of the Debtors' Largest Unsecured Creditors, (II) Waiving the Requirement to File the List of Equity Security Holders, and (III) Approving Form and Manner of Notifying Creditors and Interest Holders of Commencement of these Chapter 11 Cases* (the "***Consolidated Creditor Matrix Motion***");

- *Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Redact and File Under Seal (A) Certain Personally Identifiable Information in Creditor Matrix and any other Filed Documents, and (B) the Names and Addresses of all Limited Partners of Certain Debtors in all Filed Documents, including the Corporate Ownership Statement, other than Disclosures in Retention Applications, and (II) Granting Related Relief* (the "***Motion to Seal***"); and

- *Debtors' Motion to Set Limited Bar Date for VRG, VarigLog and HJDK Litigation Claims* (the "***Litigation Claims Bar Date Motion***").

93. By the First Day Motions, the Debtors seek authority to, among other things, continue using their cash management system, including prepetition bank accounts and incurrence of limited intercompany claims, employ a claims and noticing agent, jointly administer the Chapter 11 Cases under a single case header and establish certain administrative procedures to facilitate a smooth transition into chapter 11.

94. I am familiar with the content and substance of the First Day Motions. I believe that the relief sought in each of the First Day Motions (a) is necessary to ensure minimal disruption due to the commencement of the Chapter 11 Cases and to permit the Debtors to administer the Chapter 11 Cases smoothly, (b) constitutes a critical element in the Debtors achieving their goals in this Chapter 11 process and (c) best serves the Debtors' estates and their stakeholders' interests.

I have reviewed each of the First Day Motions and the facts set forth therein are true and correct to the best of my knowledge and belief with appropriate reliance on corporate officers and advisors. If asked to testify as to the facts supporting each of the First Day Motions filed contemporaneously herewith, I would testify to the facts as set forth in such motions.

Information Required by Local Rule 1007-2

95. Local Rule 1007-2 requires certain information related to the Debtors, which I have provided:

- Pursuant to Local Rule 1007-2(a)(3), **Schedule 1** provides that, to the best of the Debtors' knowledge and belief, prior to the Petition Date there were no committees formed to participate in the Debtors' ongoing restructuring efforts.

- Pursuant to Local Rule 1007-2(a)(4), **Schedule 2** lists, for each of the holders of the twenty largest unsecured claims on a consolidated basis, the name, address, telephone number, e-mail address, the name(s) of person(s) familiar with the Debtors' account, the amount of the claim, and an indication of whether the claim is contingent, unliquidated, disputed or partially secured.

- Pursuant to Local Rule 1007-2(a)(5), **Schedule 3** lists, for each of the holders of the five largest secured claims on a consolidated basis the name, the address, the amount of the claim, a brief description and an estimate of the value of the collateral securing the claims, and whether the claim or lien is disputed.

- Pursuant to Local Rule 1007-2(a)(6), **Schedule 4** provides a summary of the Debtors' assets and liabilities.

- Pursuant to Local Rule 1007-2(a)(7), **Schedule 5** provides a summary of the publicly held securities of the Debtors.

- Pursuant to Local Rule 1007-2(a)(8), **Schedule 6** provides the following information with respect to any property in possession or custody of any custodian, public officer, mortgagee, pledge, assignee of rents, or secured creditors, or agent for such entity: the name; address; and telephone number of such entity and the court in which any proceeding relating thereto is pending.

- Pursuant to Local Rule 1007-2(a)(9), **Schedule 7** lists all of the premises owned, leased, or held under other arrangement from which the Debtors' operate their business.

- Pursuant to Local Rule 1007-2(a)(10), **Schedule 8** provides the location of the Debtors' substantial assets, the location of its books and records, and the nature,

location and value of any assets held by the Debtors outside the territorial limits of the United States.

- Pursuant to Local Rule 1007-2(a)(11), **Schedule 9** provides a list of the nature and present status of each action or proceeding, pending or threatened, against the Debtors or their property where a judgment or seizure of their property may be imminent.

- Pursuant to Local Rule 1007-2(a)(12), **Schedule 10** sets forth a list of the names of the individuals who comprise the Debtors' existing senior management, their tenure with the Debtors, and a brief summary of their relevant responsibilities and experience.

- Pursuant to Local Rule 1007-2(b)(1), (2)(A), (2)(B) and (2)(C), **Schedule 11** provides the estimated amount of payroll to the Debtors' employees (not including officers, directors, stockholders and partners), the estimated amounts to be paid to officers, directors, stockholders and partners, and the estimated amounts to be paid to financial and business consultants retained by the Debtors, for the 30-day period following the Petition Date.

- Pursuant to Local Rule 1007-2(b)(3), **Schedule 12** provides a schedule for the 30-day period following the Petition Date, of estimated cash receipts and disbursements, net gain or loss, obligations and receivables expected to accrue but remain unpaid, other than professional fees, and any other information relevant to understanding the foregoing.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

New York, New York
Dated: July 6, 2021

/s/ Matthew A. Doheny
Matthew A. Doheny
Chief Restructuring Officer of the Debtors

Schedule 1
Committees Organized Prepetition

Pursuant to Local Bankruptcy Rule 1007-2(a)(3), to the best of the Debtors' knowledge and belief, prior to the Petition Date there were no committees formed to participate in the Debtors' ongoing restructuring efforts.

Schedule 2
Twenty Largest Unsecured Creditors

Name of Creditor and Contact Information	Claim Amount	Claim Status
GOL LINHAS AÉREAS S.A. (formerly VRG LINHAS AÉREAS S.A.) Avenida Vinte de Janeiro s/n Passenger Terminal No. 2 Rio de Janeiro International Airport Rio de Janeiro, Brazil Telephone: +55 11 2128-4700 Fax: +55 11 3169 6245 Email: ri@voegol.com.br Attn: Richard Lark AND Rua Gomes Carvalho 1629 Vila Olimpia Sao Paulo 05457-006, Brazil Attn: Officer or Director AND **Wilberforce Chambers** **Counsel to GOL LINHAS AÉREAS S.A. (formerly VRG LINHAS AÉREAS S.A.)** Lincoln's Inn, 8 New Square London, WC2A 3QP United Kingdom Telephone: +44 (0)20 7306 0102 Email: tlowe@wilberforce.co.uk Attn: Thomas Lowe QC AND **Ogier Group L.P.** **Counsel to GOL LINHAS AÉREAS S.A. (formerly VRG LINHAS AÉREAS S.A.)** 89 Nexus Way Camana Bay Grand Cayman Cayman Islands KY1-9009 Telephone: +1 345 949 9876 Fax: +1 345 949 9877	$0	Disputed; contingent

Email: marc.kish@ogier.com; william.jones@ogier.com; anna.snead@ogier.com Attn: Marc Kish, William Jones and Anna Snead		
Varig Logistica S.A. Rua Gomes Carvalho 1629 ADJUD Administradores Rua Tabapua, no. 474, 8th floor, Suites 84 to 88 Itaim Bibi Sao Paulo 04533-001 Brazil Email: adjud@adjud.com.br Telephone: +55 11 2533-4673 Attn: Vanio Cesar Pickler Aguiar AND **Krikor Kaysserlian e Advogados Associados** **Counsel to Varig Logistica S.A.** Av. Paulista no. 1499, 19th floor, Suite 1906 Bela Vista Sao Paulo 01311-928 Brazil Telephone: +55 11 3086-1114 Attn: Rodrigo Kaysserlian, Mauricio Custodio Dourado, and Marina Michelletti Torres Email: kaysserlian@kaysserlian.com.br; rodrigo@kaysserlian.com.br AND **Sequor Law** **Counsel to Varig Logistica S.A.** 1111 Brickell Avenue, Suite 1250 Miami, FL 33131 Email: ggrossman@sequorlaw.com; jmendoza@sequorlaw.com; rfracasso@shutts.com; gilbertsquires@squiresbenson.com; nmiller@sequorlaw.com Telephone: 305-372-8282 Attn: Gregory S. Grossman, Juan J. Mendoza, Robert G. Fracasso Jr., Gilbert K. Squires, Nyana A. Miller	$0	Disputed; contingent; unliquidated

HJDK Aeroespacial S/A[16] Aquillino La Guardia, no. 08 IGRA Building Panama City Panama Attn: Officer or Director AND **Licastro & Focaccia Sociedade de Advogados** **Counsel to HJDK Aeroespacial S/A** Rua Apeninos, no. 664 - 7th floor Paraíso Sao Paulo 01533-000 Brazil Telephone: +55 11 3062-1432 E-mail: contato@licastroadvogados.com.br	$0	Disputed; contingent; unliquidated

[16] The Debtors do not have an email address for HJDK at this time but have provided an email address for counsel to HJDK.

Schedule 3
Five Largest Secured Claims

Name of Creditor and Contact Information	Claim Amount	Collateral Description and Estimated Value	Debt Status
MP II Preferred Partners L.P. 600 Fifth Avenue 22nd Floor New York, NY 10022	$57,965,995.00	*Description*: Assets and accounts of MatlinPatterson Global Opportunities Partners II L.P., MatlinPatterson Global Opportunities Partners (Cayman) II L.P., and MatlinPatterson Global Opportunities Partners (SUB) II L.P. *Estimated Value*: $142 million (secured by all assets of the MP Funds (but with a provision, consistent with section 363(c)(2)(A) of the Bankruptcy Code, that the MP Funds may use the collateral exclusive of 105% of the respective Promissory Note Obligations))	Undisputed

Schedule 4
Summary of Assets and Liabilities of the Debtor as of March 31, 2021

Pursuant to Local Bankruptcy Rule 1007-2(a)(6), the following are estimates of the Debtors' total assets and liabilities on a consolidated basis. The following financial data is the latest available information and reflects the Debtors' financial condition.

The information contained herein shall not constitute an admission of liability by, nor is it binding on, the Debtors. The Debtors reserve all rights to assert that any debt or claim included herein is a disputed claim or debt, and to challenge the priority, nature, amount, or status of any such claim or debt.

The total value of the Debtors' assets is approximately $142 million and the total amount of the Debtors' liabilities is $57,965,995.00.

Schedule 5
Publicly Held Securities

Pursuant to Local Bankruptcy Rule 1007-2(a)(7), the Debtors have not issued any publicly held shares of stock, debentures or other securities.

Schedule 6
Debtors' Property Not in the Debtors' Possession

Pursuant to Local Bankruptcy Rule 1007-2(a)(8), the Debtors do not own any property that is in possession or custody of any custodian, public officer, mortgagee, pledgee, assignee of rents, secured creditor, or agent for any such entity, other than the following deposit accounts at JPMorgan Chase Bank, N.A., which are subject to account control agreements in favor of MP II Preferred Partners L.P. and executed by each of the account holders, MP II Preferred Partners L.P., and JPMorgan Chase Bank, N.A.

Schedule 7
Premises from which Debtors Operate Their Business

Pursuant to Local Bankruptcy Rule 1007-2(a)(9), the following lists the premises owned, leased, or held under other arrangement from which the Debtors' operate their business. The Debtors operate their business at 600 Fifth Avenue, 22nd Floor, New York, NY 10022. The Debtors do not own or lease that property; instead, the property owner allows the Debtors to conduct their business from the premises at no charge.

Schedule 8
Information Regarding Debtors' Assets, Books and Records

Pursuant to Local Bankruptcy Rule 1007-2(a)(10), the following provides the location of the Debtors' substantial assets, books and records, and the nature, location and value of any assets held by the Debtors outside the territorial limits of the United States as of the Petition Date.

Location of Debtors' Substantial Assets

The Debtors' assets are exclusively held in the United States. The Debtors have assets of approximately $142 million, all held in banks with branches in New York.

Books and Records

The Debtors' books and records are primarily located at 600 Fifth Avenue, 22nd Floor, New York, NY 10022.

Debtors' Assets Outside the United States

The Debtors do not have any assets outside the territorial limits of the United States.

Schedule 9

Nature and Status of Actions or Proceedings Against the Debtors Where a Judgment or Seizure of Their Property may be Imminent

Pursuant to Local Bankruptcy Rule 1007-2(a)(11), the Debtors do not believe that there are actions or proceedings, pending or threatened, in which a judgment against the Debtors or a seizure of their property is imminent. The status of ongoing litigation is detailed in the First Day Declaration, and the litigants that are asserting claims against the Debtors are included in the Debtors' list of creditors.

Schedule 10
Debtors' Senior Management

Pursuant to Local Bankruptcy Rule 1007-2(a)(12), the following provides the names of the individuals who constitute the Debtors' existing senior management, their tenure with the Debtors, and a brief summary of their responsibilities and relevant experience as of the Petition Date.

Name	Position	Tenure, Responsibilities and Experience
David J. Matlin	Co-Founder, Chief Executive Officer, and Chief Investment Officer of MatlinPatterson Global Advisers LLC	David J. Matlin is the Co-Founder, Chief Executive Officer and Chief Investment Officer of MatlinPatterson Global Advisers LLC. Prior to forming MatlinPatterson, Mr. Matlin was a Managing Director at Credit Suisse, and headed their Global Distressed Securities Group upon its inception in 1994. Mr. Matlin was also a Managing Director and a founding partner of Merrion Group, L.P., from 1988 to 1994. He began his career as a securities analyst at Halcyon Investments from 1986 to 1988. Mr. Matlin holds a JD degree from the Law School of the University of California at Los Angeles and a BS in Economics from the Wharton School of the University of Pennsylvania.
Peter H. Schoels	Managing Partner of MatlinPatterson Global Advisers LLC.\	Peter H. Schoels has been the Managing Partner of MatlinPatterson since 2009 and has been a partner with MatlinPatterson since its inception in July 2002. In his capacity as Managing Partner, Mr. Schoels has been involved in the supervision of all investments made by certain private investment partnerships managed by MatlinPatterson. Prior to joining MatlinPatterson, he was a Vice President of the Credit Suisse Global Distressed Securities Group, investing in North America, Latin America, and Europe. Prior to joining Credit Suisse, Mr. Schoels was a Director of Finance and Strategy of Itim Group Plc. from 2000 to 2001. Previously, Mr. Schoels was Manager of Mergers and Acquisitions for Ispat International NV from 1998 to 2000, now ArcelorMittal, which specialized in buying distressed steel assets globally. Mr. Schoels holds an MBA from United Business Institutes in Brussels, Belgium, and a BA in International Business from Eckerd College, St. Petersburg, Florida.

Matthew Doheny	Chief Restructuring Officer of the Debtors	Matthew Doheny is the Chief Restructuring Officer of each of the Debtors. Mr. Doheny is the President of North Country Capital, an advisory and investment firm focused on challenging advisory assignments and special situation opportunities. Mr. Doheny was appointed to this role effective April 2021. Prior to his retention by the Debtors, he served as a director or chair of the board for the boards of several companies undergoing financial restructuring or other chapter 11 and distress scenarios. Mr. Doheny also worked for 18 years as a managing director or portfolio manager focused on special situations at HSBC Securities Inc., Fintech Advisory Inc., and Deutsche Bank Securities Inc. Prior to that Mr. Doheny spent five years as a corporate and restructuring attorney with several New York law firms. Mr. Doheny holds a J.D. from Cornell Law School and a B.A. from Alleghany College.
Florina Klingbaum	Chief Financial Officer of the Debtors	Florina Klingbaum is the Chief Financial Officer of the Debtors. Ms. Klingbaum is also Chief Executive Officer of Altemis Capital Management, which she organized in 2013 to provide accounting, administration and other services to private equity and hedge fund clients. Before forming Altemis, she had more than 15 years of industry experience, including with Credit Suisse and Citibank's alternative investments platforms. Ms. Klingbaum received her MBA from Pace University in 1995 before joining KPMG in 1995.

Schedule 11
Estimated Payroll for the 30-day Period Following the Petition Date

Pursuant to Local Bankruptcy Rules 1007-2(b)(1), 2(A), 2(B) and 2(C), the following provides, for the 30-day period following the Petition Date, the estimated amount of weekly payroll to the Debtors' employees (exclusive of officers, directors, stockholders and partners), the estimated amount paid and proposed to be paid to officers, directors and stockholders, the estimated amount paid and proposed to be paid to the partners of any partnership, and the estimated amount paid or proposed to be paid to financial and business consultants retained by the Debtors.

Payroll for Employees	N/A
Payments to Officers, Directors and Stockholders	$0.00
Payments to Partners	$0.00
Payments to Financial and Business Consultants	$0.00

Schedule 12

Cash Receipts and Disbursements, Net Cash Gain or Loss, Unpaid Obligations and Receivables for the 30-day Period Following the Petition Date

Pursuant to Local Bankruptcy Rule 1007-2(b)(3), the following provides an estimate of, for the 30-day period following the Petition Date, cash receipts and disbursements, net gain or loss, and obligations and receivables expected to accrue but remain unpaid, other than professional fees.

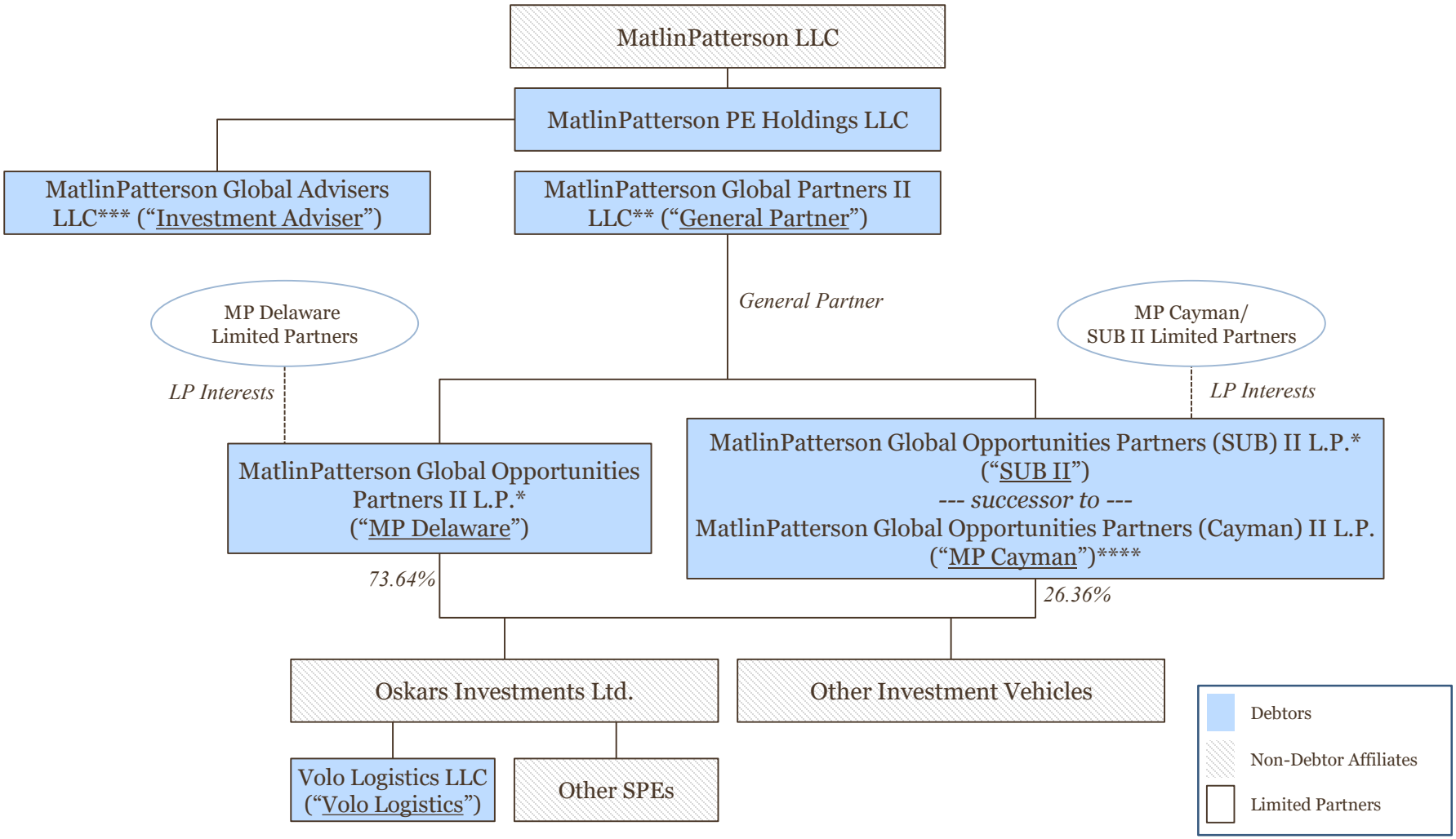
Cash Receipts	$0.00
Cash Disbursements	$0.00
Net Cash (Gain or Loss)	$0.00
Unpaid Obligations	$0.00
Uncollected Receivables	$0.00

Exhibit A

Organizational Chart

(see attached)

MatlinPatterson "Fund II" Debtors' Structure Chart



* MP GOP GP II LLC, a Delaware limited liability company formed on September 27, 2018, is the appointed "Liquidating Trustee" of this entity.
** The General Partner assigned its interests in the SPEs to the Liquidating Trustee on October 2, 2018.
*** Pursuant to an Investment Advisory Agreement with MP Delaware and MP Cayman, before the funds were in wind down the Investment Adviser received a management fee for its adviser work.
**** SUB II succeeded to all of the assets and liabilities of MP Cayman pursuant to a Distribution and Contribution Agreement effective as of October 23, 2020.

Exhibit B-1

2014 SDNY Decision

(see attached)

2014 WL 4928929
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

VRG LINHAS AÉREAS S.A., Petitioner,
v.
MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS II L.P., and Matlinpatterson Global Opportunities Partners (Cayman) II L.P., Respondents.

No. 11 Civ. 0198(MGC).
|
Signed Oct. 2, 2014.

Attorneys and Law Firms

Debevoise & Plimpton, LLP, by: Donald Francis Donovan, Esq., Amanda Dimauro Zakowich., Esq., Carl Micarelli, Esq., New York, NY, for Petitioner.

Quinn Emanuel Urquhart & Sullivan LLP, by: Richard Irving Werder, Jr., Esq., New York, NY, for Petitioner.

Simpson Thacher & Bartlett LLP, by: Tyler Brooks Robinson, Esq., Michelle Hertz, Esq., Robert H. Smit, Esq., Joshua Slocum, Esq., New York, NY, for Respondents.

OPINION

CEDARBAUM, District Judge.

***1** VRG Linhas Aereas S.A. ("VRG") filed a petition with this Court to confirm an arbitration award against MatlinPatterson Global Opportunities Partners II LP and MatlinPatterson Global Opportunities Partners (Cayman) II L.P. (collectively "MatlinPatterson") in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201–08. I denied that petition and VRG appealed. The Second Circuit vacated my decision and remanded the case so that I could decide whether the parties agreed to an arbitration clause that clearly and unmistakably entrusted questions of arbitrability to the Arbitral Tribunal rather than to the court. For the following reasons, the petition to confirm the arbitration award is denied.

Background

VRG is a subsidiary of Gol Linhas Aereas Inteligentes S.A. ("Gol"), a Brazilian airline, and is based in Brazil. MatlinPatterson is a New York based private equity firm. Gol, through a subsidiary, GTI, acquired VRG in 2007 from two of MatlinPatterson's indirect subsidiaries, Varig Logistica S.A. and Volo do Brasil S.A., via a Share Purchase and Sale Agreement ("the Agreement"). The Agreement, which is written in Portuguese, was signed on March 28, 2007 by all of the aforementioned parties except MatlinPatterson.

Several Addenda to the Agreement were also executed, including Addendum 5, which MatlinPatterson did sign. This one page document, also signed by GTI and Gol, stated that MatlinPatterson agreed not to compete with VRG or to invest in any of its competitors in the passenger airline market for three years. While Addendum 5 did not mention arbitration, the parties dispute whether the signatories to Addendum 5 somehow incorporated by reference the agreement to arbitrate contained in Section 14 of the Agreement (which MatlinPatterson did not sign).

In December 2007, a disagreement over an adjustment to the purchase price caused VRG to refer the dispute to arbitration, naming MatlinPatterson as a party. The Arbitral Tribunal ruled that MatlinPatterson had agreed to arbitration and that its agreement to arbitrate encompassed the parties' dispute over the purchase price. After a hearing on the merits of that dispute, in September 2010 the Tribunal issued an award holding MatlinPatterson liable for damages from fraudulent misrepresentation during the sale of VRG.

In January 2011, VRG filed a petition to confirm its foreign arbitral award against MatlinPatterson in this Court under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 207. MatlinPatterson argued that the Arbitral Tribunal lacked jurisdiction over its dispute with VRG and I agreed, finding that even if MatlinPatterson had agreed to arbitrate disputes over its non-compete agreement with VRG (an issue I did not reach, instead assuming its premise for the sake of argument), it had not agreed to arbitrate an entirely different issue (the purchase price) arising under an agreement it did not sign (the Agreement).

***2** VRG appealed, and the Second Circuit vacated and remanded the decision. In so doing, the Second Circuit explained that this Court must resolve the initial inquiry of

"whether the parties ... clearly and unmistakably committed to arbitrate questions regarding the scope of their arbitration agreement." *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P.,* 717 F.3d 322, 326 (2d Cir.2013).

Discussion

The present inquiry is simplified by the Second Circuit's holding in *Shaw Group Inc. v. Triplefine Int'l. Corp.,* 322 F.3d 115 (2d. Cir.2003), which instructed that "an arbitration clause subjecting disputes to the rules and procedures of the ICC International Court of Arbitration clearly and unmistakably commits to arbitration any questions about the arbitrability of particular disputes." *MatlinPatterson,* 717 F.3d at 326 (citing *Shaw,* 322 F.3d at 122). As the Second Circuit explained, "Section 14 of the Agreement does exactly this." *Id.* Thus, if MatlinPatterson agreed to the terms of Section 14, the Second Circuit's precedent "compels the conclusion that MatlinPatterson thereby clearly and unmistakably committed questions of scope to the arbitrators." *Id.* at 327. On the other hand, "[i]f ... the district court determines that MatlinPatterson did *not* agree to the terms of Section 14, no further analysis would be necessary." *Id.* This finding would "compel the denial of VRG's petition to confirm the award on the grounds that MatlinPatterson never consented to submit disputes—whether about arbitrability or anything else—to arbitration." *Id.*

Upon careful review of all the relevant documents, it is clear that MatlinPatterson did not agree to the terms of Section 14 of the Agreement. MatlinPatterson signed only an Addendum to that Agreement which explicitly spells out the single obligation MatlinPatterson was prepared to assume. The plain language of the contracts is unambiguous: Addendum 5 refers *only* to the non-compete provision of the Agreement contained in Clause 11.1 and restates that clause in its entirety in the text. No language within Addendum 5 purports to obligate MatlinPatterson, a nonparty to the Agreement, to all the other provisions contained therein. Thus, MatlinPatterson did not agree to the arbitration clause contained in the Agreement, and in accordance with the Second Circuit's remand instructions, this finding "compel[s] the denial of VRG's petition to confirm the award." *Id.*

This finding is in accordance with this Court's holding in *Zimring v. Coinmach Corp.,* No. 00 Civ. 8111(LMM), 2000 WL 1855115 (S.D.N.Y. Dec. 19, 2000). In *Zimring,* the buyer under a purchase agreement (which contained an arbitration clause) sought to compel the owner of the seller company to arbitrate claims in his individual capacity, alleging that he breached the agreement not to compete. *Id.* at *1. While the seller, Zimring, had signed the purchase agreement both on behalf of the seller and in his individual capacity, the signature block where he signed individually contained a footnote providing that he signed "only for purposes of Section 11.3 and Article IX hereof," the provisions containing the agreement's non-compete and confidentiality terms. *Id.* The court determined that Zimring had not clearly and unmistakably delegated to arbitration the issue of whether Defendant's claims against Plaintiff were arbitrable because "Zimring limited his individual signature to two portions of the ... [purchase agreement] ..., neither of which encompassed the arbitration clause." *Id.* at *2. Similarly, MatlinPatterson elected not to sign the Agreement containing the arbitration clause and instead limited its signature to the non-compete provisions referenced and fully restated in Addendum 5.

CONCLUSION

***3** Because MatlinPatterson did not consent to the arbitration clause contained in the Agreement, Petitioner's motion to confirm the arbitration award is denied.

SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 4928929

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

Exhibit B-2

2015 Second Circuit Decision

(see attached)

605 Fed.Appx. 59

This case was not selected for publication in West's Federal Reporter.
RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

United States Court of Appeals,
Second Circuit.

VRG LINHAS AEREAS S/A, Petitioner–Appellant,
v.
MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS II L.P., MatlinPatterson Global Opportunities Partners (Cayman) II, L.P., Respondents–Appellees.

No. 14–3906–CV.
|
July 1, 2015.

Appeal from an October 2, 2014 judgment of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, Judge).

Attorneys and Law Firms

Donald Francis Donovan (Carl J. Micarelli, Terra L. Gearhart–Serna, Natalie J. Lockwood, on the brief), Debevoise & Plimpton LLP, New York, NY, for Petitioner–Appellant.

Robert H. Smit (Tyler B. Robinson, Joshua M. Slocum, William Pilon, on the brief), Simpson Thacher & Bartlett LLP, New York, NY, for Respondents–Appellees.

Present: JOSt A. CABRANES, ROSEMARY S. POOLER, DENNY CHIN, Circuit Judges.

***60 SUMMARY ORDER**

UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court be and hereby is **AFFIRMED.**

Before us is the second appeal taken by Petitioner–Appellant VRG Linhas Aereas S.A. ("VRG") in an effort, thus far unsuccessful, to confirm in U.S. courts an arbitral award issued by a Arbitral Tribunal in Brazil against Respondents–Appellees MatlinPatterson Global Opportunities Partners II L.P. and MatlinPatterson Global Opportunities Partners (Cayman) II L.P. (collectively, "MatlinPatterson").

We assume the parties' familiarity with the underlying facts, procedural history of the case, and issues on appeal, and we recite here only those facts most relevant to the resolution of this appeal. This case arose out of the 2007 acquisition of VRG by a Brazilian corporation from two of MatlinPatterson's indirect subsidiaries, by means of a Purchase and Sale Agreement ("PSA"), which, notably, MatlinPatterson did *not* sign. MatlinPatterson *did* simultaneously execute a one-page letter agreement, known as Addendum 5, by which it agreed not to compete with VRG for a period of three years. When a dispute arose shortly thereafter regarding a purchase price adjustment provision in the PSA, VRG referred the dispute to arbitration and named MatlinPatterson a party, over its objections. Ultimately, a three-member Arbitral Tribunal found that MatlinPatterson had agreed to arbitrate all issues arising under the PSA, including the parties' purchase price dispute, and issued an award holding MatlinPatterson liable for what the arbitrators characterized as fraudulent misrepresentations to VRG. Brazilian courts later denied MatlinPatterson's successive attempts to vacate the arbitral award.

When VRG sought to confirm the award here pursuant to the New York Convention, the District Court denied enforcement on the grounds that, even assuming for the sake of argument that MatlinPatterson had agreed to arbitrate disputes over its non-compete agreement, it had not agreed to arbitrate the purchase price issue, which arose under the PSA it did not sign. On an initial appeal, this Court vacated and remanded. *VRG Linhas Aereas S.A. v. MatlinPatterson Global Opportunities Partners II L.P.,* 717 F.3d 322 (2d Cir.2013). We instructed that the District Court must decide

 © 2021 Thomson Reuters. No claim to original U.S. Government Works.

the issue it had previously assumed—that is, "whether the parties *actually* reached an agreement to arbitrate...." *Id.* at 326. We further instructed that such an agreement could only be found if the District Court determined that the parties "clearly and unmistakably committed to arbitrate questions of arbitrability." Id. Given the contractual circumstances of this case, we explained that, if MatlinPatterson had agreed to be bound by the terms of the arbitration clause appearing at Section 14 of the PSA, the District Court would be required to confirm the arbitral award. Conversely, if MatlinPatterson had not agreed to the terms of PSA Section 14, the District Court would be compelled to deny VRG's petition. On remand, the District Court found that MatlinPatterson had not agreed to the terms of Section 14, and thus denied VRG's petition to confirm the award. This second appeal followed.

We review a district court's legal interpretations of the New York Convention as well as its contract interpretation *de novo,* and review findings of fact for clear error. *VRG Linhas Aereas S.A.,* 717 F.3d at 325 (citations omitted). Though VRG contends, once again, that the District Court erred by failing to directly enforce or give preclusive effect to the judgments of the ***61** Brazilian courts, we have already decided that the threshold issues of arbitrability arising here are "question[s] to be decided under United States arbitration law." *Id.* (citing *Sarhank Grp. v. Oracle Corp.,* 404 F.3d 657, 659 (2d Cir.2005)).

Upon review, we affirm the District Court's holding that MatlinPatterson did not agree to the terms of Section 14 of the PSA. As the District Court found, MatlinPatterson signed only Addendum 5, a separate letter agreement containing a single non-compete obligation. J.A. 169. Though it mentions the PSA in the subject line and once again in the text, Addendum 5 does not expressly incorporate the entirety of the PSA's terms. Rather, by its terms, Addendum 5 is itself an "instrument [that] shall constitute pursuant to the best terms of the law a firm and valid commitment." *Id.* Notably, Addendum 5 refers only to a single specific provision in the PSA-the non-compete clause. Where, as here, the parties to an agreement choose to cite in the operative contract "only a specific portion" of another agreement, we apply "the well-established rule that 'a reference by the contracting parties to an extraneous writing for a particular purpose makes it part of their agreement only for the purpose specified.' " *Lodges 743 & 1746, Int'l Ass'n of Machinists & Aerospace Workers v. United Aircraft Corp.,* 534 F.2d 422, 441 (2d Cir.1975) (quoting *Guerini Stone Co. v. P.J. Carlin Constr. Co.,* 240 U.S. 264, 277, 36 S.Ct. 300, 60 L.Ed. 636 (1916)). Further, because Addendum 5 actually restates the referenced non-compete provision in full within its own text, it functions as a self-contained, stand-alone agreement, without requiring separate consultation of the PSA.

Because Addendum 5 contains no arbitration clause of its own, and because it does not incorporate the PSA's arbitration clause within Section 14, we conclude, like the District Court, that MatlinPatterson did not agree to arbitrate. In the absence of any threshold arbitration agreement, and in accordance with the calculus set forth in our prior decision, we affirm the District Court's judgment denying VRG's petition to confirm the arbitral award.

CONCLUSION

We have considered all of the remaining arguments raised by VRG on appeal and find them to be without merit. For the foregoing reasons, we AFFIRM the judgment of the District Court.

All Citations

605 Fed.Appx. 59

End of Document

© 2021 Thomson Reuters. No claim to original U.S. Government Works.

Exhibit B-3

2019 Cayman Grand Court Decision

(see attached)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 137 of 2016 (IMJ)

IN THE MATTER OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT LAW (1997 REVISION)

AND IN THE MATTER OF AN ARBITRATION

BETWEEN

VRG LINHAS AEREAS S.A.

Plaintiff

AND

(1) MATLIN PATTERSON GLOBAL OPPORTUNITIES PARTNERS (CAYMAN) II L.P.
(2) MATLIN PATTERSON GLOBAL OPPORTUNITIES PARTNERS II L.P.
(3) MATLIN PATTERSON PARTNERS II LLC

Defendants

IN OPEN COURT, SITTING AS CHAMBERS

Appearances: Mr. Vernon Flynn QC instructed by Mr. Luke Stockdale of Maples and Calder on behalf of the Applicants/Defendants

Mr. Tom Lowe QC instructed by Mr. Ulrich Payne and Mr. Shaun Maloney of Ogier for the Respondent/Plaintiff

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **18, 19, 20 and 21 June 2018**

Draft Judgment: **13 February 2019**

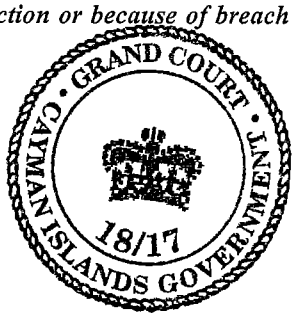
Judgment Delivered: **19 February 2019**

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 18/17

HEADNOTE

The Foreign Arbitral Enforcement Awards (1997 Revision) – Section 22 Arbitration Law (2001 Revision) – Section 72(2) The Arbitration Law, 2012 - Convention Award - New York Convention - Order 73, Part II of the Grand Court Rules (1995 Revision) - ICC Arbitration in Brazil - Arbitration - Enforcement - Whether

enforcement of award should be refused on grounds that arbitrators lacked jurisdiction or because of breach of natural justice or on grounds of public policy.



JUDGMENT

Introduction - The Application

1. This is an application by the Defendants ("**the MP Funds**") opposing the attempt by the Plaintiff ("**VRG**") to enforce an arbitration award VRG's predecessor obtained against the MP Funds in Brazil on 2 September 2010 ("**the Award**").

2. The MP Funds say that this application for refusal has a good basis for all three reasons (or any one of them) set out below:

   (1) First basis for refusal: Arbitration is a consensual process. However, the MP Funds did not consent to arbitration. They were not a party to the arbitration agreement pursuant to which the arbitral Tribunal purported to exercise jurisdiction. The MP funds therefore are not bound by its decision.

   (2) Second basis for refusal: Arbitration awards that offend against natural justice or the public policy of the enforcing court will not be enforced. The arbitral process in this case was infected by a breach of natural justice of the most fundamental kind: the Tribunal held the MP Funds liable in tort under a particular provision of the Brazilian Civil Code ("**BCC**"), when no tort claim was pleaded or argued and on which the MP Funds were never given the right to be heard. To enforce an award that so manifestly infringes the *audi alteram partem rule* is contrary to the public policy of the Cayman Islands (in common with multiple other jurisdictions).

   (3) Third basis for refusal: Even if the parties had consented to arbitration, the parties to an arbitration consent only to the Tribunal determining the particular matter submitted to it for decision by the particular reference to arbitration. The Tribunal must not trespass beyond the scope of those matters and purport to decide matters not submitted to it for decision. That is what it is submitted the Tribunal did in this case. It purported to decide a tort claim against the MP Funds that had never

GRAND COURT CAYMAN ISLANDS GOVERNMENT 18/17

been submitted to it for decision and purported to grant relief that had never been sought from it.

Background

3. The original proceedings were commenced by way of an *ex parte* Originating Summons filed 1 September 2016 by VRG, seeking the following orders:

> *"(1) granting leave, pursuant to section 5 of the Foreign Arbitral Award Enforcement Law (1997 Revision), to enforce the award dated 2 September 2010, in the above mentioned arbitration, of Juan Fernandez-Armesto, Pedro Antonio Batista Martins and Gustavo Jose Mendes Tepedino, the arbitrators therein, in the same manner as a judgment or order of the court to the same effect;*
>
> *(2) granting leave to serve this Originating Summons and the Order made herein out of the jurisdiction on the Second Defendant at its registered office at...."*

4. These proceedings came before me on 14 October 2016 and I delivered a Ruling on 26 October 2016, in which I expressed satisfaction that the Plaintiff had a "*good prima facie case for enforcement*". I made an order that:

> *"1. pursuant to section 5 of the **Foreign Arbitral Awards Enforcement Law** (1997 Revision), the Plaintiff has leave to enforce in the same manner as a judgment or order of the Court to the same effect the following award made in an arbitration between the Plaintiff and the First and Second Defendants;*
>
> *(a) The award dated 2 September 2010 (the "**Award**") in the above mentioned arbitration, of Juan Fernandez-Armesto, Pedro Antonio Batista Martins and Gustavo Jose Mendes Tepedino, the Arbitrators therein.*



2. *Judgment is hereby entered against the Defendants in the terms of the Award, in the sum of R$92,987,672 in damages, together with interest thereon at the 'SELIC rate' from 31 December 2007 to the date of actual and full payment, plus R$4,199,421 in costs.*

3. *The Plaintiff has leave to serve this Order and the Ex Parte Originating summons herein out of jurisdiction…*

4. *Within 14 days after service of this Order, the First Defendant and the Third Defendant may apply to set aside this Order, and the Award shall not be enforced until after the expiration of that period, or, if the First Defendant or the Third Defendant applies within the 14 day period to set aside this Order, until after that application is finally disposed of.*

5. *Within 28 days after service of this Order, the Second Defendant may apply to set aside this Order, and the Award shall not be enforced until after the expiration of that period or, if the Second Defendant applies within the 28 day period to set aside this Order, until after that application is finally disposed of…*"

5. On 17 November 2016 and on 1 December 2016, the First and Third Defendants, and the Second Defendant respectively filed summonses seeking orders that:

> "*1. The Ex Parte Order dated 14 October 2016 be set aside pursuant to GCR O.73, r. 31(8) and section 7 of the Foreign Arbitral Awards Enforcement Law (1997 Revision).*"

The Witnesses

6. Mr. Mauricio Gomm Santos, who swore three affidavits in these proceedings filed by the MP Funds, is a founding partner of GST LLP, an international dispute resolution practice with offices in Miami and Washington D.C. He is a citizen of Brazil and of the United States of America, and is a lawyer qualified to practice in Brazil and New York, and a



Certified Foreign Legal Consultant in Florida. He has been in private practice for over 30 years, specializing in international arbitration and litigation disputes in Brazil and international arbitration in the United States. The MP Funds also put in evidence three affidavits of Robert Weiss, General Counsel of Matlin Patterson Global Advisers LLC, as well as the affidavit of Pedro Soares Maciel. Mr. Maciel was Lead Counsel to the First and Second Defendants in the Arbitration which resulted in the Award which VRG is seeking to enforce. Mr. Gomm Santos gave live evidence, and was cross-examined by Mr. Lowe QC on behalf of VRG.

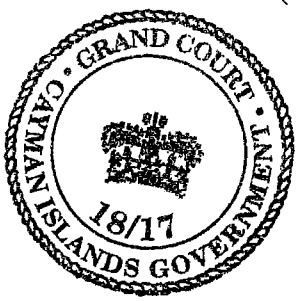
7. Two witnesses were called to give live evidence by VRG. They were assisted by Portuguese translators. Although they swore their affidavits in English, Mr. Lowe QC indicated that these witnesses, whilst comfortable with expressing themselves in English in, for example Reports, for the purposes of cross-examination wanted to ensure they understood precisely what the dialogue is and any nuances or technicalities in the questions. The witnesses who gave live evidence were Professor Carlos Alberto Carmona, a Professor at the University of Sao Paulo, Brazil, expert in civil procedure, litigation and arbitration, and who has acted as an arbitrator in domestic arbitrations in Brazil, and Mr. Gilberto Giusti. Mr. Giusti, amongst other qualifications, acts as an arbitrator in complex civil, commercial, corporate, securities and construction disputes. Both Professor Carmona and Mr. Giusti were cross-examined by Mr. Flynn Q.C. on behalf of the MP Funds.

The legal framework and the grounds on which the enforcing court may refuse recognition and enforcement under the New York Convention

8. The following aspects of this matter are common ground:

   (a) that the question of whether the Court should refuse to recognize and enforce the Award is governed by the ***Foreign Arbitral Awards Enforcement Law 1975 (1997 Revision)*** (the "***Enforcement Law***"). The ***Enforcement Law*** gives effect to the New York Convention 1958 as a matter of Cayman Islands Law.

   (b) that Brazil is a party to the Convention.

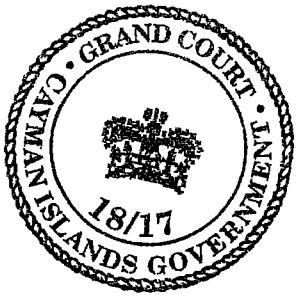


(c) that it is an aim of the New York Convention to achieve the effective and speedy enforcement of international arbitration awards falling within its scope. The New York Convention envisages a process by which a party with a Convention award in its favour can enforce it in Convention jurisdictions. This is reflected in the ***Enforcement Law*** which provides that *"subject to this Law"* a Convention Award shall be enforceable *"in the same manner as an award under section 22 of the **Arbitration Law (1996 Revision)** and shall be treated as binding for all purposes on the persons between whom it was made."* (Section 5).

The MP Funds Submissions

9. However, Mr. Flynn Q.C. places emphasis in the MP Funds' Skeleton Argument (**"SKA"**) (at paragraph 4), on the fact that critical to the success of this regime, is that it includes safeguards to protect against fundamental injustice. He submits, (and this is accepted by VRG), that it is the corollary of the ability speedily to enforce a Convention award across the globe, that such an award must not contravene basic principles of fairness. Article 5 of the Convention outlines the circumstances in which the enforcing court can refuse to recognize and enforce the award. These are reflected in terms in the ***Enforcement Law***, at section 7. Emphasis was placed by Learned Queen's Counsel on those terms, relevant to this case, as follows:

> *"Art. 5.1 Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes…proof that:*
>
> *(a) The parties to the [arbitration] agreement were, under the law applicable to them, under some incapacity, or **the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made**; or*
>
> *(b) **The party against whom the award was invoked was not given proper notice** of the appointment of the arbitrator or **of the arbitration proceedings or was otherwise unable to present his case;** or*
>
> *(c) **The award deals with a difference not contemplated by or falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to***



arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized or enforced; *or*

(d) The composition of the arbitral authority or ***the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place;*** *or*

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Art 5.2 *Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) ***The recognition and enforcement of the award would be contrary to the public policy of that country.***"

10. Thus, it was submitted that, if therefore, the arbitral process was not consensual, then the award will not be enforced. So too, if the process by which the award was reached offends against the basic tenets of due process, including the right to be heard, or if it otherwise offends against the public policy of the enforcing court, then the court is under no obligation to enforce it.

11. Mr. Flynn submits that the New York Convention is therefore only "*pro-enforcement*" insofar as it places the burden on the party resisting enforcement to make out one of the grounds under Article V. It was pointed out that the enforcement court is not meant to favour the enforcing party. Learned Counsel submits that the UK Supreme Court has made precisely this point, by analogy to tennis, in its decision in ***Dallah Co v Ministry of Religious Affairs of Pakistan*** [2011] 1 A.C. 763. Reference was made to paragraph 30 of the judgment, where Lord Mance, in an oft-quoted passage, stated:

> *"The scheme of the New York Convention, reflected in sections 101-103 of the 1996 Act* [i.e. the English law equivalent of ***the Enforcement Law***] *may give limited prima facie credit to apparently valid arbitration awards*



based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in Article V(1) and section 103. But that is as far as it goes in law, ***Dallah*** [the party seeking to enforce the award] *starts with the advantage of service, but it does not start 15 or 30 love up.*"

12. VRG has already attempted to enforce this Award in the United States. The United States Courts have refused to recognize it. By this application, MP Funds ask this Court to do the same, on the basis that this is one of those rare cases where recognition and enforcement under the New York Convention should be refused.

13. It was pointed out that the United States Courts, both at first instance and at the appellate level, have held that the Award should not be enforced because the MP Funds had never agreed to arbitration. The MP Funds say that, because they had not agreed to arbitrate the dispute in the first place, there was no need for the United States Courts even to go on to consider the failure of due process. Similarly, it was argued here, if this Court concludes that the MP Funds were not a party to the alleged arbitration agreement, it would not be necessary (though it was stated that the Court may think it desirable), to go on to consider the failure of due process or whether the matters decided were beyond the scope of the submission to arbitration.

14. Learned Counsel emphasized that on his side, it was not being suggested that the Court is *bound* to follow the US Courts' decision, and that it was for this Court to consider for itself, afresh, whether any of the grounds for refusal of recognition of the Award under the New York Convention is engaged. However, the Court was invited to take the same approach, because it is alleged that the same fundamental breaches arise on this application.

The First Ground for Refusal of Enforcement: The MP Funds did not consent to arbitration

15. It was submitted that the arbitration process deprives the parties of their basic right to go to court. Accordingly, it is only if the parties have validly consented to the removal of

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 18/17

that right and agreed that their dispute should be arbitrated, that an arbitration award will be enforceable against them.

16. Reference was made to paragraph 24 of ***Dallah***, where Lord Mance puts it this way:

> *"Arbitration of the kind with which this appeal is concerned [i.e. under the New York Convention] is consensual - the manifestation of parties' choice to submit present or future issues between them to arbitration."*

The Arbitration Agreement must be in writing

17. As Mr. Flynn points out, in order for the ***Enforcement Law*** to apply at all, the applicant must be the recipient of a *"Convention award"*. Section 2(1) of the ***Enforcement Law*** defines "*Convention award*" to mean "*an award made in pursuance of an arbitration agreement in the territory of a State, other than the Islands, which is a party to the New York Convention.*" (Learned Counsel's emphasis).

18. Section 2(1) defines "*arbitration agreement*" to mean *"an agreement in writing (including an agreement contained in an exchange of letters or telegrams) to submit to arbitration present or future differences capable of being settled by arbitration."* (Learned Counsel's emphasis)

19. The MP Funds submit that the requirement that the arbitration agreement be in writing is taken from Article II of the Convention.

20. Reference was made to the fact that this requirement for the arbitration agreement to be in writing also appears in the ***English Arbitration Act 1996***, section 5. Learned Counsel relied upon the Report of the Department Advisory Committee dated February 1996, chaired by Lord Justice Saville ("**the DAC Report**"), which provides commentary on the provisions of the English Act. At paragraph 33, it is stated that:

> *"An arbitration agreement has the important effect of contracting out of the right to go to court, i.e. it deprives the parties of that basic right. To our minds an agreement of such importance should be in some written form. Furthermore the need for such form should help to reduce disputes*

CAYMAN ISLANDS GOVERNMENT 18/17

as to whether or not an arbitration agreement was made and as to its terms." (Learned Counsel's emphasis)

The Arbitration Agreement must be valid as between the parties

21. Under Article V.1 (a) of the New York Convention and section 7(2)(b) of the ***Enforcement Law***, the written arbitration agreement must be *"valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."*

22. This means that, under the law of the seat of the arbitration, the written agreement must be valid and binding between the parties to it. The MP Funds submit that there are two important points to note about the application of this provision to this case, as follows:

    i. it is common ground that the law governing whether the MP Funds are properly construed as having entered into a valid arbitration agreement is Brazilian law, that being the law of the country where the award was made.

    ii. Secondly, the nature of the exercise that the Court must perform in deciding whether an arbitration agreement existed under such law, is that the Court must decide for itself whether or not the MP Funds actually consented to arbitration. Thus, the Court has to consider that question *de novo* (or afresh) and reach its own independent answer to it. It was submitted that, in that regard, the fact that the Tribunal reached the view that it had jurisdiction over the MP Funds is legally irrelevant.

23. Again, guidance was sought from ***Dallah***, where, at paragraph [30], Lord Mance elucidated the proposition at 22(ii) above, as follows:

> *"The nature of the present exercise is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal's own view of its jurisdiction has no legal or*



evidential value, when the issue is whether the tribunal has any legitimate authority in relation to the Government [which was the party objecting to enforcement] *at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion."*

(My emphasis)

24. Mr. Flynn makes the substantial and important point that if even under Brazilian Law, a Brazilian Court applying the New York Convention considers itself bound by, or restricted to a review of the Tribunal's decision, that is not Cayman Islands Law. Cayman Islands Law is that this Court must make an independent determination of the agreement's validity, albeit applying substantive Brazilian law principles of contractual construction to determine that question.

25. Reference was once again made to ***Dallah***, at paragraph 24 where Lord Mance explained that arbitrators may:

> *"...from time to time find themselves faced with challenges to their role or powers, and have in that event to consider the existence and extent of their authority to decide particular issues involving particular persons. But, absent specific authority to do this, they cannot by their own decision on such matters create or extend the authority conferred on them."*

Brazilian Law principles as to consent: no different than Cayman Islands/English/US law

26. Reference was made to the three expert reports before the Court on Brazilian law of contractual interpretation governing whether the MP Funds consented to the arbitration agreement. VRG's expert on this point, and others, is Mr. Giusti. The MP Funds' expert is Mr. Gomm Santos. It is noted that these are the same experts as each party used before the United States Courts, and they both have reaffirmed and resubmitted before this Court, the same expert reports that they made before the United States Courts.

27. Although VRG has adduced a second expert report from Professor Carmona, he does not address the question of consent to an arbitration agreement.

It is recorded in the US Court of Appeals judgment of 3 June 2013, that the parties were in agreement that the standard principles of contractual interpretation are no different under Brazilian Law than under U.S. Law.

29. The principles of contractual interpretation under U.S. Law are the same as those under Cayman Islands law or English law. It was submitted by Mr. Flynn that neither expert gives evidence that suggests in any way that the Court should be approaching the question of whether the MP Funds were a party to the arbitration agreement differently under Brazilian law than it would under Cayman Islands law.

30. It was put forward that another important aspect of the evidence is that the experts appear to be in agreement as to the principles of contractual interpretation under Brazilian law. What they are in disagreement about is as to how these principles should be applied, which is, of course, really a matter for this Court to decide. In particular:

i. Brazilian law, like Cayman and English law, requires that an arbitration agreement can only be made in writing: Article 4, paragraph 1 of the Brazilian Arbitration Law.

ii. In Giusti 1, paragraph 43, VRG's expert expressly confirms that this is because the parties are agreeing to contract out of their constitutional right to go to court.

iii. The question of whether the parties have agreed to waive their constitutional right to go to court is a question of the intention of the parties - Giusti 1, paragraphs 54-60 (just as it is under English, U.S. or Cayman law).

31. Mr. Flynn submits that the parties' intention to arbitrate must therefore be stated expressly and in writing. It cannot be inferred. The parties can record their agreement to arbitrate by incorporating the arbitration agreement from another agreement into their contract. But that intention must be express, he submits.

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 18/17

(1) Whether the MP Funds entered into an Arbitration Agreement with VRG

The facts as set out by the MP Funds - The business model of the MP Funds

32. The MP Funds describe the business structure that they operate. The First and Second Defendant are the MP Funds. The Third Defendant is their General Partner and is joined in the proceedings as a matter of form. The MP Funds are private investment funds that specialize in what is termed "*distressed investing*". They are funded by institutional investors, and invest their capital in companies that are in financial difficulty. The MP Funds seek a return on their investment by providing financing and operational expertise to reorganize and structure the companies in their portfolio, with a view to helping these companies recover.

33. It is asserted that, as is common in the private equity industry, where a portfolio company enters into a contract with a third party, the funds themselves do not contract directly with that third party. Mr. Weiss, at paragraph 11 of his affidavit, describes this contractual structure as follows:

> *"11. The MP Funds, as a business matter, undertake to structure their investments so as not to become parties to contracts entered into by portfolio companies. The MP Funds could not sensibly or predictably manage their investment risk if they subjected themselves to the obligations of their portfolio companies ... This is fundamental to the kind of investing in which the MP Funds engage."*

34. It was submitted that this was the contractual structure adopted in this case:

a. In 2005, the MP Funds established a Delaware company called Volo Logistics LLC (**"Volo Logistics"**) to serve as an investment vehicle for pursuing an opportunity in the Brazilian aviation industry.

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 18/17

b. Volo Logistics, together with three Brazilian investors ("**the Brazilian Shareholders**") formed a Brazilian company called Volo do Brasil SA ("**Volo dB**"). The Brazilian Shareholders owned and controlled 80% of Volo dB's voting stock and Volo Logistics owned the remaining 20% of the voting stock.

c. In early 2006, Volo dB purchased Varig Logistica SA ("**Varilog**"), which operated a Brazilian cargo airline.

d. Later in 2006, Varilog and Volo dB purchased the passenger airline business of Varilog's former parent. This purchase was made through a Brazilian special purpose vehicle that came to be named VRG Linhas Aereas SA. The stock of VRG was held by Varilog, save for 1% which was held by Volo dB.

35. In March 2007, Volo dB and Varilog sold 100% of their shares in VRG to a Brazilian company, called GTI SA ("**GTI**"). GTI was a subsidiary of Gol Linhas Aeras Intelligentes SA, the Brazilian airline. This sale took place pursuant to a Share Purchase and Sale Agreement dated 28 March 2007 ("**the PSA**").

36. It is the PSA that is the subject of the parties' dispute. The English translation is at page 10 of Mr. Weiss' exhibit. Mr. Flynn submits that there are the following five features to be noted:

a. The sellers under the PSA were Volo dB and Varilog ("**the Sellers**").

b. The buyer under the PSA was GTI.

c. The MP Funds were not parties to the PSA.

d. Other than Volo dB and Varilog, the only other signatories to the PSA were VRG (as the target company being sold) and Gol, the parent company of GTI, the buyer. Gol executed the PSA in order to guarantee the performance of GTI's



obligations under the PSA (Clause 14.11). The MP Funds did not guarantee the obligations of Volo dB or Varilog.

e. The PSA contained an arbitration agreement at Clause 14, by which the Parties to the PSA agreed to submit all disputes between them to arbitration. The arbitration was to take place in Sao Paulo, Brazil in Portuguese.

37. As pointed out by Learned Counsel, and I accept, it is common for the seller of a business to agree that, for a period of time, it will not compete with the business being sold, because this could damage the value of the business. The Sellers agreed to a non-compete obligation at Clause 11.1 of the PSA.

38. It was submitted that it is also common practice where the seller is a portfolio investment of a private equity investment fund, for the buyer to request the principal shareholders in the seller also to undertake not to compete with the business for a period of time. Therefore the MP Funds and the three Brazilian shareholders undertook to the Buyers that they would not compete with VRG's business.

39. The MP Funds and the three Brazilian Shareholders gave this undertaking by way of a letter from them to GTI ("**the Non-Compete Letter**") undertaking that they would not compete with VRG's business. This was annexed to the PSA.

40. Mr. Flynn advances the following four points about the PSA:

(1) The parties to the Non-Compete Letter are Brazilian Shareholders and the MP Funds on the one hand and GTI and Gol on the other. The Sellers and VRG are not party to the Non-Compete Letter, although they are Parties to the PSA. The parties to the Non-Compete Letter and PSA are therefore different.

(2) The non-compete obligation is the only obligation undertaken by the Brazilian Shareholders and the MP Funds in the letter.



(3) The letter expressly sets out the terms of the non-compete obligation undertaken by the MP Funds and the Brazilian Shareholders. This mirrors Clause 11.1 of the PSA (i.e. the Seller's non-compete obligation), to which the letter refers.

(4) The Non-Compete Letter does not contain an arbitration agreement.

41. It was submitted that, for the reasons described by Mr. Weiss in his affidavit, it was absolutely intentional that the MP Funds were not a party to the PSA or any of its terms, including the arbitration agreement in Clause 14. Rather, the MP Funds were providing to GTI the single non-compete obligation specifically set out in the Non-Compete Letter. It was submitted that the PSA was between the parties who had executed it (the Sellers, GTI, GoI and VRG) on 27 March 2007, and the Non-Compete Letter was between the *different* parties who had, on the very *same* day, executed that document (the three Brazilian Shareholders, the MP Funds, GTI and GoI). (Learned Counsel's emphasis)

42. Later in 2007, a dispute arose between the Sellers and GTI as to the operation of a price adjustment mechanism contained within the PSA. There was a provision allowing the purchase price to be adjusted to account for changes in working capital during the period required to complete and close the sale.

43. It was argued that in that way, the purchase price adjustment is not a revaluation of the entire business, it is merely an adjustment made, usually by professional accountants, to reflect fluctuations in working capital. It was suggested that this adjustment would normally only be a fraction of the overall purchase price.

44. Clause 5 of the PSA provides a procedure for calculating a purchase price adjustment to the initial acquisition price to reflect changes in VRG's working capital accounts between the date of the PSA and the date of the necessary regulatory approval. It provided that the Sellers could prepare an adjusted calculation and that GTI would then appoint its own accounting firm to validate PWC's calculation. GTI appointed Ernst & Young. In the event of a divergence between the two firms' views, a third accounting firm was to be appointed to take a final and binding view.

45. PWC and Ernst & Young's views did diverge significantly in various respects, but the Sellers and GTI were unable to agree the appointment of a third firm. GTI therefore referred the purchase price adjustment dispute to arbitration in Sao Paulo under the arbitration agreement in Clause 14 of the PSA. (GTI merged with VRG in 2008 and thereafter became known as VRG. The claimant in the arbitration is therefore VRG.)

46. However, instead of commencing those proceedings against the Sellers only, VRG also commenced those proceedings against Volo Logistics and the MP Funds (but not the Brazilian shareholders), on the basis that they were the alter egos of the Sellers and therefore bound by the arbitration agreement of the Sellers. Learned Counsel asked the Court to note that when it commenced the arbitration and for nearly a year thereafter, VRG did not claim that MP Funds had consented to arbitration by virtue of the Non-Compete Letter. He submits that VRG subsequently introduced this theory, as an additional basis upon which the Tribunal could exercise jurisdiction over the MP Funds, notwithstanding the MP Funds say, that the price adjustment dispute had nothing whatsoever to do with the Non-Compete Letter, which contained the only obligation to GTI that the MP Funds had undertaken.

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 18/17

The MP Funds object to jurisdiction

47. From the outset, the MP Funds have objected to the Tribunal's jurisdiction. They have maintained that they were not parties to the PSA and therefore not parties to the arbitration agreement contained at Clause 14.

48. The Tribunal dealt with the MP Funds' objection in its partial award dated 7 April 2009. It held, by a 2:1 majority, that it had jurisdiction over the MP Funds on the basis that the MP Funds had entered into the Non-Compete Letter. It was submitted that they so decided even though they recognized that the dispute was unconnected with the non-compete obligation undertaken by the MP Funds in that letter.

49. At a later hearing in September 2009, the Tribunal went on to determine the merits of the price adjustment dispute. The MP Funds have indicated that they participated under protest.

VRG's Claim

50. VRG's claim against the Sellers was for specific performance of the purchase price adjustment process under Clause 5 of the PSA and relief in the amount of the negative balance that VRG claimed it was owed under the PSA. VRG also claimed against the MP Funds, that although they were not a party to Clause 5 of the PSA, they should be jointly and severally liable with the Sellers for the amount of the purchase price adjustment due under the PSA because they were the "*alter egos*" of the Sellers and therefore the corporate veil should be lifted.

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 18/17

The Tribunal's Award

51. The Tribunal awarded the amount of the contractual purchase price adjustment which it calculated was owed by the Sellers to VRG. Mr. Flynn however says that, instead of ordering that, the price should be adjusted to reflect the changes in the working capital of the airline during the period between the initial working capital calculation and the date of regulatory approval (which was a period of 11 days), as Clause 5 of the PSA contemplated, the Tribunal wholesale revalued VRG downwards, arriving at a purchase price "*adjustment*" of approximately R$93 million, reflecting more than 20% of the entire acquisition price.

52. VRG's *alter ego* claim was rejected by the Tribunal. It found that there were no grounds for piercing the corporate veil, as the MP Funds had not abused the doctrine of separate corporate structure and personality and were not to be regarded as liable for the contractual obligations of the Sellers under Clause 5 as VRG had alleged.

53. However, what the Tribunal did was to find the MP Funds liable for the entire purchase price adjustment amount on the basis of a tort under Article 148 of the Brazilian Civil Code known as "*third party malice*". Mr. Flynn characterizes this occurrence as a surprise to the MP Funds, because it fundamentally contradicted the basis upon which the Tribunal had previously determined in its partial award on jurisdiction that the MP Funds were bound by the PSA arbitration clause - as parties to all of the PSA's terms - and the Tribunal also held the MP Funds liable for a contractual remedy on the basis of tort

damages that were never pleaded nor sought by VRG. (The MP Funds' emphasis). The MP Funds maintain that, because tort liability and tort damages had never been pleaded or alleged by VRG, they had never been put by the Tribunal to it and it was never given the opportunity to be heard on them.

The Brazilian Proceedings

54. In 2010, proceedings were issued by the MP Funds in Brazil, under Brazil's domestic arbitration law. It sought "*vacatur*" (vacation) of the Award. Thus far, the Brazilian Courts have upheld the Award under Brazil's arbitration legislation. However, proceedings remain ongoing, with an appeal presently pending before the Special Chamber of the Superior Court of Justice. Mr. Flynn reminded the Court that of course, in upholding the Award, this has taken place under Brazilian legislation, and not applying the New York Convention, which applies only to enforcement and recognition proceedings in respect of foreign awards.

The US Proceedings

55. In January 2011, VRG applied to the United States Courts in New York to have the Award recognized and enforced under the New York Convention. In New York, the MP Funds mounted opposition to recognition on the same three bases that they do here before the Cayman Islands Courts.

56. The US Courts have refused to recognize and enforce the Award at a number of junctures, as follows:

    i. On 19 January 2012, the United States District Court refused to enforce the Award on the basis that even if one assumed in VRG's favour, for the sake of argument, that the MP Funds had agreed to arbitrate in the Non-Compete Letter, they only agreed to arbitrate disputes in connection with their non-compete undertaking and not a dispute under the PSA to which they were not party.

ii. VRG appealed that decision to the United States Court of Appeals for the Second Circuit, arguing that the US Court should follow the decision of the Brazilian Court of first instance not to vacate the Award. The Court of Appeals rejected that position, and held that it was for the U.S. Court to determine *de novo* whether the MP Funds had agreed to arbitrate. One aspect of the Court's decision was, however, to remit the matter to the District Court to determine whether or not the MP Funds were a party to the arbitration agreement in Clause 14 of the PSA (i.e. that the District Court should determine the issue that had been assumed in VRG's favour).



iii. When the matter was remitted, the District Court held in a judgment dated 2 October 2014, that it was clear that the MP Funds did not agree to the terms of Clause 14 of the PSA.

iv. VRG appealed that decision to the Court of Appeals. The appeal was refused. The Court of Appeals held, as had the District Court, that the MP Funds did not agree to the arbitration clause in the PSA and did not agree to arbitrate.

v. VRG's application for permission to have a re-hearing by the Court of Appeals *en banc*, was refused.

Whether there was an Arbitration Agreement covering dispute in respect of the price adjustment mechanism under the PSA

57. The MP Funds argue that, in any event, even if Clause 14 of the PSA were incorporated into the Non-Compete Letter, which they strenuously deny, it could only apply to disputes relating to the subject matter of that letter. That means that it is expressly limited to the undertaking of the MP Funds not to compete with VRG on the terms set out in the letter.

58. They submit that the dispute referred by VRG to arbitration had nothing whatsoever to do with the MP Funds' non-compete undertaking.

The Second Ground for Refusal: The Tribunal Breached Natural Justice by Finding Liability on a basis neither pleaded nor argued and awarding relief that was never requested

59. The MP Funds point out that the New York Convention and the ***Enforcement Law*** provide two alternative routes by which the Court can refuse to recognize and enforce an Award that offends against natural justice in the manner alleged. These bases are found in sub-sections 7(2)(c) and 7(3) of the ***Enforcement Law***. Sub-section 7(2)(c) provides that the enforcing court can refuse recognition and enforcement where the party against whom it is invoked can show that "*he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.*" (The MP Funds' emphasis)

60. Section 7(3) provides that "*Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.*"

61. Reference was made by the MP Funds to a number of authorities, including ***Cukurova Holding v Sonera Holding*** [2014] UKPC 15, which is a decision of the Judicial Committee of the Privy Council, on appeal from the Court of Appeal of the British Virgin Islands.

62. The Headnote in my view contains an accurate summary of the decision, and for convenience. I set it out here, as follows:



> *"The respondent, Sonera, held 47.09% of the shares in a Turkish holding company which held 51% of the shares in Turkey's largest mobile phone operator. The other 52.91% of shares in the holding company were held by the appellant, Cukorova. The parties entered into a letter agreement regarding the potential purchase by Sonera of the Cukorova shareholding. The letter agreement obliged the parties to execute a final share purchase agreement (SPA) after certain conditions had been satisfied or waived. The letter agreement was governed by Turkish law, but contained an arbitration agreement governed by Swiss law and providing for ICC arbitration. The parties initialed a draft share purchase agreement which, like the letter agreement, was governed by Turkish law but contained an arbitration agreement governed by Swiss law in similar terms to that in*



the letter agreement. The Final SPA was not executed within the 60 day period set by the letter agreement, and Sonera commenced arbitration proceedings against Cukorova pursuant to the arbitration clause in the letter agreement. Sonera sought an award ordering Cukorova to comply with the obligation in the letter agreement to execute the final SPA and to transfer the shares to Sonera against payment of the purchase price. Cukorova contended that the tribunal had no jurisdiction to entertain Sonera's claims or to grant such relief because (amongst other things) the arbitration had been commenced under the arbitration clause in the letter agreement yet sought relief under the final SPA, which was a separate contract which contained its own arbitration clause. Further, Cukorova argued that the terms of the final SPA had not been agreed during the 60 day period provided for in the letter agreement and that the letter agreement had therefore lapsed and the transaction had been abandoned.

The tribunal, in a first partial award, rejected Cukorova's objections to its jurisdiction and found in favour of Sonera on the merits. The tribunal found that the parties had reached agreement on the terms of the final SPA, that the conditions in the letter agreement had been met, that Cukorova owed a contractual obligation to execute the SPA and that, although it had not been executed by Cukurova, under Turkish law the final SPA had been concluded in a valid and binding form. In a second partial award the tribunal ordered Cukorova to deliver the shares to Sonera against payment of the purchase price.

Sonera then waived its claim for specific performance and sought damages for non-delivery of the shares. The tribunal issued a final award which found that Cukorova was liable to pay Sonera damages in the sum of US$932 million.

The BVI High Court granted permission to enforce the final award in the same manner as a judgment. Cukorova applied unsuccessfully to set aside the judgment and its appeal was dismissed by the Court of Appeal.

Cukorova appealed arguing that as a matter of Swiss law the issue as to whether the final SPA was binding could not be arbitrated under the letter agreement arbitration clause, but only under the SPA arbitration clause. Cukorova further argued that it had not been able to present its case to the tribunal, in breach of the rules of natural justice, so that enforcement should be refused under s.36(2) (c) of the BVI Arbitration Ordinance

and/or under s. 36(3) on the basis that it would be contrary to public policy.

Held, dismissing Cukorova's appeal:

1. *To say that there were two independent contracts each with its own arbitration clause did not fully reflect the unusual circumstances of the case. It was never intended that the parties should be bound by two concurrent sets of differing contractual obligations. The final SPA was prospective until the conditions in the letter agreement were fulfilled; the letter agreement would terminate in accordance with its terms on execution of the final SPA. The contracts were intended to be component parts of a single seamless transaction. Cukorova failed to show that there was any impediment in Swiss law to prevent Sonera from having the whole dispute between the parties dealt with under the letter agreement arbitration. The parties could not have intended that, if the tribunal found, as it did, that the letter agreement had been breached, Sonera would be required to commence a fresh arbitration under the final SPA. The terms of the arbitration clause in the letter agreement were cast in wide terms and were not limited to disputes about rights and obligations specifically created in the letter agreement itself. Sonera's claim, based on Cukorova's failure to execute and deliver the final SPA, was made in respect of 'any dispute, controversy or claim arising out of or in connection with' the letter agreement. The judge was correct to hold that the tribunal had jurisdiction to make the award it did.*
2. *If a particular breach of natural justice did not fall within s.36(2)(c) because it was not one which meant that the party could not present its case, it was in principle open to the court to refuse to enforce the award on the ground of public policy. However, on the facts of the present case the Board was of the view that only if Cukurova succeeded under s.36(2)(c) should the court refuse to enforce the award. There had to be good reasons for refusing to enforce a New York Convention award. The Board could see no basis for refusing to enforce the award if Cukorova failed to show that it was unable to present its case for reasons beyond its control. The Board rejected the submission that there was a fundamental breach of natural justice on the ground that the tribunal decided the key issue in the dispute (namely, whether the parties had agreed the terms of the SPA) on a basis that had never been put to Cukorova and that Cukorova never had an opportunity to address. Similarly, the tribunal had not ignored or failed to give any reasons for rejecting Cukorova's evidence and submissions on a key point in relation to the quantification of Sonera's alleged loss."*

63. Mr. Flynn made a number of points about the Privy Council's decision, as follows:

i. That a breach of natural justice taking the form of a party not being able to present its case fell within the exact equivalent under the BVI legislation of section 7(2)(c) of the ***Enforcement Law*** and that other breaches of natural justice fell within the exact BVI equivalent of section 7(3) - Judgment of Lord Clarke - paragraph 33.



ii. That in applying these principles the enforcing court must apply <u>its own</u> concept of natural justice. Thus, to the extent that the Brazilian concept of natural justice and the Cayman Islands concept may differ, it is the Cayman Islands concept that this Court must consider and apply.

iii. Reference was made to paragraph 32 of the judgment, and it was submitted that the following is also true of Cayman Islands public policy:

> "[That] *it is contrary to public policy in England to enforce a foreign arbitral award where the foreign proceedings violated English principles of natural justice: see e.g. Adams v Cape Industries [1990] Ch 433. The same is true of BVI public policy."*

iv. On the facts of the case before it, the Privy Council found that the applicant had not been deprived of the opportunity to present its case, nor had there been any other failure of natural justice. There, however, it was submitted that the applicant's complaint was not that it had been held liable on a basis of liability not pleaded or argued; rather its complaint was that there had been various procedural failures at the hearing, in particular the Tribunal's alleged failure to hear live evidence from a particular witness.

64. I note that the issue of the witness is discussed at paragraphs 36 – 54 of the Privy Council's judgment.

65. Reference was also made by Mr. Flynn to the decision of the English Commercial Court in ***Malicorp v Government of the Arab Republic of Egypt*** [2015] 1 Lloyd's Report 423, which he submits, by way of contrast with the facts and circumstances in ***Cukorova***, is a situation precisely on "*all fours*" with the present case, as follows:

i. In that case, ***Malicorp*** had pursued a claim against Egypt for compensation for breach of contract. The Tribunal rejected that claim, but instead held Egypt liable to ***Malicorp*** under Article 142 of the Egyptian Civil Code.



ii. Article 142 had not been pleaded or argued by ***Malicorp***. Nor had it been raised by the Tribunal until the award.

iii. The Court held that the failure of the Tribunal to ensure that Egypt had warning that Article 142 was the anticipated basis of proceeding against it constituted a "*serious*" breach of natural justice "*manifestly repugnant to elementary principles of fairness*" (paragraphs 41 and 42).

iv. Applying ***Cukorova***, the Court refused to recognize the Award under section 103(2)(c) of the English Arbitration Act, which is the English equivalent to section 7(2)(c) of the ***Enforcement Law***.

v. At paragraphs 31 and 32, Walker J stated the legal principles as follows:

> *"31. There can in my view be no doubt that a grant of remedies on a basis which was neither pleaded nor argued will be capable of falling within this subsection. Nor can there be any doubt that under principles of English private international law the test as to ability of the party to present its case involves an application of relevant English principles as opposed to those of Egypt or anywhere else: see* ***Cukorova Holdings AS v Sonera*** *...para 32.*
>
> *32.* ***Malicorp*** *asserts that the "character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates" have to be taken into account when considering if the procedure adopted was fair and in compliance with the requirements of natural justice. I accept that relevant English principles require consideration of these matters. I do not accept, however, that the applicable arbitration procedures in the present case called for any lessening of the essential need for Egypt to have notice of the basis on which the tribunal would grant any remedy and approach the quantification of any monetary award. Nor can I accept that*

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 18/17

there was anything arbitrary in requiring, before permitting enforcement here, that the foreign arbitral procedure respected this essential need." (My emphasis)

Third Ground for Refusal - The Tribunal Purported to Decide Matters beyond the Scope of the Submission to Arbitration

66. Section 7(2)(d) provides that the Court may refuse enforcement/ recognition where:

> "*the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration."*

67. Reference was made to paragraph 19.54 of *Merkin on Arbitration*, where the learned author opines as follows:

> "*the proper analysis of this provision is that it may cover both excess of jurisdiction(eg. Invalid or non-existent arbitration agreement) and excess of authority or power (eg. including in the award a remedy not claimed sometimes referred to as ultra petita)."*

68. It was submitted that in this case, both heads of refusal are satisfied: either the MP Funds were not a party to the arbitration agreement at all, which would amount to there being no jurisdiction, or, if they were a party to the arbitration agreement, the Tribunal has exceeded its authority by purporting to include in the Award a remedy not claimed.

69. Reference was made to two cases emanating from Singapore as demonstrating that a two stage test is to be applied: (a) did the parties consent to arbitrate at all; (b) if they did, did they consent to arbitrate the particular matters decided by the arbitrators. The cases are ***PT Asuransi Jasa Indonesia v Dexia Bank*** [2007] 1 SLR (R) 597 and ***Kempinski Hotels v PT Prima International*** [2011] SGHC.

70. It was further submitted that the ICC Rules of Arbitration that governed this arbitration (Article 18 of the 1998 Rules), contained a provision designed to facilitate the precise delineation of the matters submitted to the arbitrators for decision (So also does Article



23 of the 2012 Rules). The arbitration Terms of Reference set the outer parameters of the submission to arbitration, and it was submitted that these Terms clearly demonstrate the boundaries of the scope of the matters submitted to the arbitrators, and that it is only to the determination of those matters that the parties had submitted.

71. The Court was asked to refuse enforcement on this third ground also.

The Submissions Advanced on Behalf of VRG

72. As part of the background recited in its SKA, VRG states that the MP Funds, GTI and GoI signed one of a series of documents called "*Aditivos*", which included Aditivo No 5 ("**Aditivo No 5"**).

73. In the SKA, the following points are made about Aditivo No 5:

a. By it, the MP Funds agreed to refrain from competing with VRG for three years.
b. It was in Portuguese.
c. Rather than being signed by the Sellers, VLog or Volo DB, it was signed by the principal stakeholder.
d. Like all but one of the other five Aditivos, it was executed on the same day as the PSA.
e. It referred to the PSA and was expressed to be "*a valid and enforceable agreement between the parties amending the terms of the* [PSA]."

74. Mr. Lowe QC, in VRG's SKA refers to the MP Funds' evidence, as advanced through Mr. Weiss, as to its business practice and the fact that in essence, it was said that the MP Funds do not contract directly with third parties. It was submitted that the implication of Mr. Weiss' evidence is that the MP Funds management deals through a special purpose vehicle in order to "*avoid liabilities of that management being brought back home*". It was asserted that Mr. Weiss the witness was not, however, (as he himself indicated) involved in the negotiations, and the evidence on this score was characterized as being largely irrelevant argument. I must say by way of passing comment regarding the alleged implication that this seems to me to be not unheard of commercial practice, but in any

CAYMAN ISLANDS GOVERNMENT · GRAND COURT · 18/17

event, it does not take the matter of construction any further. What in my judgment need to be scrutinized and construed are the relevant documents, i.e. the Non-Compete Letter and the PSA.

75. It was argued that it was also not relevant to any common law approach for the Court to examine the MP Funds' subjective intention in order to arrive at the correct interpretation of a contract. Reference was made to the oft-cited judgment of Lord Hoffman in ***Investment Compensation Scheme Limited v West Bromwich Building Soc*** [1998] 1 WLR 896 at 912-3.

76. The submissions describe the Arbitration proceedings, as well as the Brazilian proceedings, and then, having described the various appeals in Brazil, at paragraphs 24 and 25, it is pointed out that, to date, the MP Funds have failed in its challenge to the Award. It was argued as follows:

> *"24. The only possible avenue of appeal left after the additional interlocutory appeal is determined is by way of extraordinary appeal to the Supreme Federal Court (the Constitutional Court). However, there is no constitutional point here - and none was raised in the courts below. The Supreme Federal Court would have to give leave for an appeal to be heard.*
>
> *25. The parties in these Brazilian Proceedings are the same as the parties before the Court now. If this were a final ruling then the MP Funds would be bound by these findings by means of an issue estoppel, if not res judicata. The only reason that may not be so now is because the MP Funds have launched appeals - all of which have failed to date, and none of which, VRG submits, have any sensible or reasonable prospect of success in the future."*

The US Proceedings

77. VRG acknowledge that it has not been successful in enforcing the Award in the U.S. However, it was submitted that there is a substantial difference between the value of

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 18/17

Brazilian Court decisions (the seat of the arbitration) and decisions of the US Courts. It was submitted that the US decisions (and their reasoning) are irrelevant because they turn on issues of arbitrability argued from the point of view of US law only.

Legal Framework in the Cayman Islands

(1) Enforcement

78. It is common ground that the legal burden is on the person against whom the award is made to prove that its recognition or enforcement should be refused on one of the grounds set out in section 7(2) on the balance of probabilities. VRG submit that this is so even when enforcement is resisted on the basis of section 7(2)(b) -.i.e., the award debtor was not a party to it. Reference was made to ***Dardana Ltd. v Yukos Oil*** [2002] EWCA Civ, paragraph [77] of ***Dallah***, and ***Sovarex SA v Romero Alvarez SA*** [2011] EWHC 1661 (Comm); [2011] 2 CLC 691 at [43].

79. It is also common ground that this Court must determine for itself whether the arbitrational Tribunal had competence and jurisdiction, including deciding whether there was an arbitration agreement for the purposes of Section 7(2)(b).

(2) Issue Estoppel

80. In my view it is interesting to see how the submissions developed. Mr. Lowe accepts that therefore the decision of the Tribunal itself on competence and jurisdiction is not determinative for this Court. However, he now submits that the decision on the MP Funds' enforcement challenges in the Brazilian Courts does give rise to an issue estoppel, notwithstanding the fact that there is an application for leave to appeal outstanding and notwithstanding the arguments raised at the *ex parte* stage.

81. Learned Counsel makes the argument that the question is one of issue estoppel because the Brazilian Courts have decided issues of fact, and arguments on those facts, which are said to be materially the same as those which arise here. Thus, the argument runs that the findings of the District Court, Court of Appeal and STJ in Brazil are enforceable and are to be recognized by the Cayman Court by way of issue estoppel because they are final

and conclusive on the merits. Reference was made to a number of cases, including ***Carl Zeiss Stiftung v Rayner & Keeler*** [1967] 1 A.C. 853 and ***The Sennar (No. 2)***[1985] 1 WLR 490.

82. It was submitted that the doctrine of issue estoppel must, in principle, be available. Mr. Lowe further stated (at paragraph 6 of further written submissions handed up "**Supplemental SKA**") that:



> *"It has not been suggested that VRG is to be prevented from taking the stance it did at the ex parte hearing, namely that there was no issue estoppel which they relied on at the ex parte hearing. Had they relied on estoppel at an ex parte hearing, the Order would presumably have been immediately challenged."*

83. It was contended that there is an obvious symmetry between issues arising on enforcement appeals and issues arising before a supervisory court hearing an action to annul an award on grounds in a modern arbitration law.

84. At paragraph 53 of its Supplemental SKA, VRG argues that, because the legal issues are in substance the same, the complaints which MP Funds bring before this Court are almost certain to be precisely the same as the complaints which were before the Sao Paulo Court.

85. At paragraph 54 it was argued that the issues before the Brazilian Courts under Article 32 and the issues before the Cayman Court are completely identical and therefore issue estoppel arises.

86. Thus, it is now clear that VRG are relying on the principle of issue estoppel after all.

87. Reference was made to a long running line of authorities, starting with ***Scott v Pilkington*** (1862) 2 B&S 11, and ***Nouvian v Freeman*** (1889) 15 Ap Cas 1, and culminating with ***Midtown Acquisitions LP v Essar Global Ltd*** [2017] 1 W.L.R. 3083, where ***The Sennar (No. 2)*** was applied.

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 18/17

88. In contrast, as the case of ***Nouvian*** explains and demonstrates, there is no issue estoppel where the foreign judgment is liable to be abrogated or varied by the very Court that pronounced it, so for example, where what is involved is a maintenance order.

89. Learned Counsel advocates that it is irrelevant, if it be the case, that under Brazilian procedural law the judgments of the Courts concerned are not described as being "*res judicata*" whilst a possible appeal is pending. It was argued that here the question arises under Cayman law as an issue of procedure of the lex fori applying its own rules to characterize the foreign judgment.

90. It was further or in the alternative, submitted that, even when the issue is one of public policy, as the MP Funds here contend, because enforcement arises in the context of an arbitration, the Court should not refuse to enforce an arbitration award upheld by the supervisory Court because of the strong public policy in enforcing awards upheld by the supervisory court, even if there is no issue estoppel. Reference was made to ***Minmetals Germany GmbH v Ferco Steel Ltd*** [1999] CLC 647; ***Gao Haiyan v Keeneye Holdings Limited*** [2012] 1 HKLRD 627 at [67]-[68]).

(3) Procedural Fairness and the Maxim *Iura Novit Curia*

91. During his oral opening, Mr. Lowe referred heavily to the maxim *Iura Novit Curia* ("***I.N.C.***").

92. It was submitted that when the Court is looking at the question of procedural fairness, it has to apply its own notions of fundamental fairness, but must recall that one is looking at a civil law system. He argued that in civil courts, the Judge has a more fundamental role in formulating the arguments. Reference was made to the maxim of *I.N.C.* as being applied by tribunals throughout the civil world, notably the International Court of Justice, the European Court of Justice, and the European Court of Human Rights.

93. It was submitted that what the Court would hear from the experts, and see from the documents, is that in Brazil, as in many other civil jurisdictions, the Courts expect that

GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 18/17

the parties will be bound by the relief they seek, but that they are not bound by their characterization of the law.

The Existence of an Arbitration Agreement

94. Mr. Lowe submits that the question whether the MP Funds were parties to the arbitration agreement and, if so, whether that agreement extended to the dispute, has been decided against the MP Funds by the lower court and the Court of Appeals in Brazil. The highest non-constitutional court has refused to review these decisions. The suggestion is that the MP Funds are now estopped from contending otherwise.

95. As to the matter of contractual intention, it was submitted that under Cayman law that is a matter to be objectively determined by reference to both parties. It was submitted that, whilst certain broad or standard contractual principles are the same between Brazilian and Cayman Islands law, it is evident from the differences between the experts in their evidence and from the decisions of the Brazilian Courts that these broad principles cannot be assumed to be applicable with a common lawyer's approach at the more detailed level.

96. By way of example, reference was made to Mr. Gomm Santos' evidence that it has to be shown that the MP Funds intended to be bound by the PSA, However, under Cayman law, the argument runs, contractual intention is a matter to be determined objectively, by reference to both parties.

97. It was proferred that the evidence of Mr. Giusti offers additional Brazilian contractual law construction principles to guide the court, and which were largely undisputed (Reference was made to Gomm 1 and Giusti 1), and was supported by the decisions of the Brazilian lower court, the Court of Appeals and the STJ.

98. VRG suggests that the question of contractual interpretation involves the following:

    a. (As was common ground), the person construing the contract should look at the express terms of the agreement, the overall structure of the contractual documentation and the applicable Brazilian law, in particular the doctrine of good faith under Article 422 of the Brazilian Civil Code.



b. Construing the express terms, involves consideration of factors that tend to bolster a given construction of the express terms of an agreement, such as whether the construction (i) accords with conventional usage in the relevant business environment; (ii) gives effect to a legitimate business objective (e.g., providing for predictability in resolving disputes by choosing the governing law, a forum and/or (iii) confers effect and meaning to a provision that would otherwise not be meaningful. Reference was made to Mr. Giusti's US Declaration.

99. It was suggested by Learned Queen's Counsel for VRG that, the fact that ten arbitrators and judges have ruled on the meaning of Aditivo 5 does not of course bind the court, but is at least suggestive of a firmly held, consensus view of the meaning of the operative language *"an amendment to the contract... amended the original contract, binding the plaintiffs."*

100. Further, reference was made to Mr. Gomm Santos' First declaration in the New York proceedings, where he conceded that the express terms of Aditivo 5 could be understood, depending on the intention of the parties, to amend the PSA and be bound by its terms. Mr. Gomm Santos, at paragraph [14], stated "*...there can be more than one way to interpret the contractual intent of this phrase"*. However, even handedly, Learned Counsel pointed out, that in his Affidavit in these proceedings, Mr. Gomm Santos subsequently retracted that concession, by stating "*Aditamento 5 demonstrates a lack of clear and manifest or unequivocal intent... to be bound to arbitrate").*

101. It was submitted that, this change in view was critical, since Mr. Gomm Santos previously claimed that the same language could have amended the PSA, subject only to an investigation of intent, whereas he now says the language is too equivocal to support that reading. It was argued that, failing that change in opinion, the MP Funds would have had to provide evidence of their subjective intent somehow, which it was submitted they have not done.

102. VRG went on to submit that other factors that should be involved in the consideration are whether the proposed construction: (a) accords with the usage of the same terms in other, related transaction documents; and (b) promotes greater clarity and precision in the use of key terms, including, defined terms.

103. The MP Funds' case is that Aditivo No. 5 is a standalone side letter. It was submitted by VRG that a clear view of it shows that Aditivo No. 5:



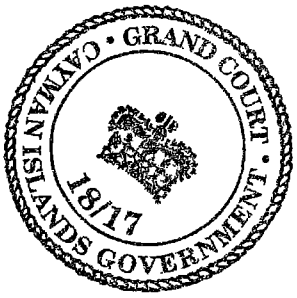
a. Clearly did reference the PSA as one of a series of Aditivos.
b. Expressly refers to the PSA "*for shareholding control of [VRG] and other covenants*" in its heading.
c. It refers to Clause 11 and Clause 9.2 and refers the signatories to the Aditivo to read into the PSA.
d. It refers to <u>including</u> for the purpose of "*supplementing*" ("*aditando os termos do Contrato*") the above-captioned Agreement (Queen's Counsel's emphasis).

104. Then, in clear demonstration that the MP Funds, and VRG are poles apart when it comes to their views on the correct contractual interpretation, VRG submits as follows (paragraph 57 of its SKA):

> *"The six Aditivos all have one thing in common: they bind the contracting parties to specific covenants with the shareholders of parties. Aditivos 1 to 4 relate to the purchasers' parent GOL. Aditivo No 5 binds the sellers' parent, the MP Funds. The obvious rationale is to prevent those parties from being parties to the operative duties of seller or buyer (e.g. price and payment Clauses 4 and 5, Warranties in Clauses 6 and 7 or indemnification Clause 8). However, there is in fact no logical reason they would have wanted to exclude the general provisions."*

105. It was said that the MP Funds concede that Aditivos 1- 4 and 6 constitute amendments (paragraph 56(6) of VRG's SKA).

106. Learned Counsel for VRG also posits that the arbitration clause itself refers to disputes "*arising*" from the PSA which would encompass all the specific obligations under the PSA as well as the Aditivos. According to Mr. Lowe: (paragraph 17 of VRG's Supplemental SKA):



"It would be bizarre for the parties of the Aditivos (i) to have been aware of that; and (ii) to have decided disputes relating to the Aditivos would be decided by the Brazilian Courts instead. Bifurcating the dispute resolution provisions for a single overarching transaction would self-evidently lead to a risk of contradictory and unworkable decisions with respect to disputes."

107. VRG sought to counteract the argument that the MP Funds would not have wanted to submit to Brazilian arbitration. This, it says would be by no means obvious. The Portuguese aditivo in relation to a "*very Brazilian Contract*", it was submitted, would obviously have been determined under Brazilian law. Therefore, the argument continues, if there was no ICC arbitration clause, the Brazilian Courts would have had jurisdiction.

108. It was next submitted that, in considering applicable Brazilian law and the principle of good faith, the highest value should be placed on the principle of *pacta sunt servanda*, i.e. that agreements must be honoured. Thus, parties cannot be allowed to disavow their own commitments, as expressed by their binding agreements. Reference was made to Article 422 of the BCC and to Mr. Giusti's US Declaration.

Discretionary Factors and Power to Stay

109. It was acknowledged that the discretion referred to in section 7(2) is not at large. Reference was made to ***Dardana*** , at paragraphs 8 and 18, where Mance L.J. (as he then was), stated:

> *"8...Section 103(2) cannot introduce an open discretion. The use of the word "may" must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances,*



the right to rely upon them had been lost, by for example, another agreement or estoppel...

18.....The word "may" at the start of s.103(2) ... is designed, as I have said in para. 8, to enable the court to consider other circumstances, which might on some recognizable legal principle affect the prima facie right to have an award set aside arising in the cases listed in s. 103(2)."

110. Mr. Lowe submitted that this is one of those cases for which the discretion was precisely designed, and that, given the comprehensive challenges made before the Brazilian Courts, which have all failed, this Court should exercise discretion in favour of enforcement and dismiss the application.

Stay of Enforcement Proceedings

111. In the alternative, it was argued that, if the Court considers that the outcome of the application for permission to appeal to the final Court in Brazil should be awaited, then it may stay the further enforcement pending the outcome of that proceeding. Reference was made to a number of cases, including ***Scott v Pilkington***, and ***The Varna No. 2*** [1994] 2 Ll R 41.

112. At paragraph 43 of its SKA, VRG makes this point:

> "*43. The MP Funds specifically insisted on this trial despite VRG arguing that it would be more cost-effective to await the conclusion of all possible appeals, knowing full well that its applications for leave to appeal had no real prospect of success. But for these more or less hopeless applications for leave to appeal, the MP Funds could not avoid the finality of res judicata. It is wrong to stay enforcement and the Court should instead exercise its discretion against the MP Funds."*

The Defendant's Reply Skeleton

113. Mr. Flynn kicked off his Reply SKA by focusing on the fact that VRG for the first time in its SKA say that the Brazilian decisions, despite not being final in Brazil, give rise to an issue estoppel binding on this Court.

114. The MP Funds submit that the core requirements that must be established to create an issue estoppel are trite law, and are set out in the judgment of the House of Lords in ***The Sennar (No.2)*** [1985] 1 W.L.R. 490, where at 499 it is stated:

> *"The first requirement is that the judgment in the earlier action relied on as creating an estoppel must be (a) a court of competent jurisdiction, (b)* ***final and conclusive*** *and (c) on the merits. The second requirement is that the parties (or privies) in the earlier action relied on as creating an estoppel, and those in the later action in which that estoppel is raised as a bar, must be the same. The third requirement is that the issue in the later action, in which the estoppel is raised as a bar, must be the* ***same issue*** *as that decided by the judgment in the earlier action."* (Learned Counsel's emphasis)

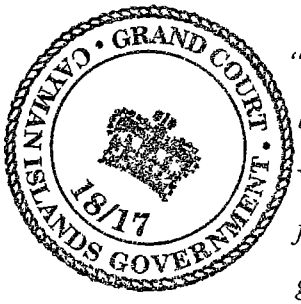
GRAND COURT • CAYMAN ISLANDS GOVERNMENT • 18/17

The Brazilian decisions are not final and conclusive

115. It was submitted that VRG's suggestion that the Brazilian decisions could be treated as *"final and binding"* for the purposes of issue estoppel is premised on a striking error of law. Mr. Flynn QC submits that VRG appears to be under the fundamental misapprehension that the question of whether the Brazilian decisions are "*final and binding"* is a question of *Cayman* law. Reference was made to VRG's SKA, at paragraph 36(5) which refers to no authorities, where it is stated as follows:

> *"It is irrelevant, if it be the case, that under Brazilian procedural law the judgments of the Courts are not described as being res judicata whilst a possible appeal is pending. Here the question arises under Cayman law as an issue of procedure of the lex fori applying its own rules to characterize the foreign judgment."*

116. Mr. Flynn asserts that this is not the law, and that in fact the law is exactly the opposite. Further, that decades of authorities, including at the level of the House of Lords, confirm that the question of whether a foreign judgment is *"final and conclusive"* for the purposes of issue estoppel is a question of law of the foreign courts that gave the judgment, and not a question for the law of the forum. Reference was made to the speech of Lord Wilberforce in ***Carl Zeiss*** [1967] 1 AC 853, where at pages 969 F-970, he expressed the principle thus:



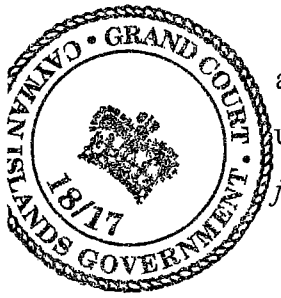
> *"The textbooks are in agreement in stating that for a foreign judgment to be set up as a bar in this country it must be res judicata in the country in which it is given... generally, it would seem unacceptable to give a foreign judgment a more conclusive force in this country than it has where it is given... Moreover, I think it is for the defendant, who sets up the bar, to establish the conclusive character of the judgment."*

117. Reference was also made to the judgment of Sales J in ***Seven Arts Entertainment v Content Media*** [2013] EWHC 588(Ch), where at [43] he held:

> *"It is common ground that in order for an issue estoppel to arise in the courts in England by reference to a judgment of a court in a foreign jurisdiction (here, the Ontario Judgment), it is necessary to show not only that the requirements to establish issue estoppel according to the law of the lex fori (England) are satisfied, but also that the issue in question would be treated as res judicata according to the law of that foreign jurisdiction: see* ***Carl Zeiss****."*

118. Reference was also made to the Cayman decision in ***TMSF v Merrill Lynch*** [2008] CILR 267, where the Grand Court applied Turkish law to the question of whether a Turkish judgment was final and conclusive.

119. Mr. Flynn also referred to the submissions made at the *ex parte* hearing before this Court. As he says, oddly, at that hearing, those included VRG expressly recognizing that (a) for



a foreign judgment to give rise to an issue estoppel, the decision needed to be res *judicata* under the law of the foreign jurisdiction; and (b) that the Brazilian decisions were not *res judicata* unless and until they were finally determined by the Superior Court of Justice.

Whether this trial should be stayed

120. The MP Funds contend that this informal late application for a stay should not be countenanced for the following reasons:

(A) There is no application before the Court for a stay, no summons and no supporting evidence. It was submitted that such an application cannot be made "*in passing in a responsive skeleton argument (served late) days before trial. This is a grave deviation from due process.*"

(B) The position is made worse by the fact that from as long ago as November 2017, the MP Funds made clear that they would not agree to a stay, and that if VRG wished to seek one, it would have to apply in the usual way.

(C) It would appear that the sudden *volte face* on this position days before trial is motivated by a belief that VRG is more likely to succeed in Brazil than before this Court.

(D) Waiting for the Brazilian Courts will not achieve anything, since the Brazilian Courts will not decide (a) *de novo*, whether the arbitration agreement is binding on the MP Funds or whether it covered obligations other than those in the Non-Compete Letter; and (b) whether the Award is contrary to Cayman public policy. Since there will be no issue estoppel, there is no purpose in a stay.

(E) The wait for the Brazilian Courts to decide anything at all might be very long indeed. According to paragraph 2.6 of Santos 3, it might take years. The Court will not normally grant a stay in such circumstances.

(F) VRG is seeking to have this Court convert the Award into a judgment of this Court. If it believes that the Award is enforceable here in the Cayman Islands, it should pursue its enforcement here with conviction. It should not be allowed *"to dangle the proceedings over the head of the MP Funds in this jurisdiction for an*



indeterminate amount of time that it would take to conclude matters in Brazil, in the hope that this will improve its position in this jurisdiction."

(G) It is now too late for VRG to seek a stay. If it had wished one, it should have sought this at the earliest opportunity.

DISCUSSION AND ANALYSIS

ISSUE ESTOPPEL

121. VRG does not suggest that under Brazilian law the Brazilian law decisions do give rise to *res judicata.* There does not seem to be any doubt about the Brazilian law position on this score.

122. Indeed, Article 502 of the BCCP, provides as follows:

> *"**Section V- Res Judicata***
>
> *Art. 502. Substantive res judicata is the authority that renders immutable and indisputable a decision on merits that is no longer subject to appeal."*

123. It is for VRG to establish that the requirements to establish issue estoppel according to the law of the lex fori (the Cayman Islands) are satisfied, and also that the issue in question would be treated as *res judicata* according to the law of that foreign jurisdiction: see ***Carl Zeiss*** and ***Seven Arts Entertainment v Content Media***.

124. In my judgment, the Brazilian decisions made thus far are plainly not final and conclusive under Brazilian law.

125. It is also the case that the issues before the Brazilian Court are not identical to the issues before this Court. As stated in ***Barnett,*** referred to above, the burden of clearing the threshold of showing that the issues are identical is on VRG.

126. VRG variously describes the issues before the Brazilian courts and those now before this Court as *"substantially the same"* (paragraph 16) and *"materially the same"* (paragraph 35(1)). However, that is not enough. What is required is that VRG show the issues are identical. It was common ground that the issue for the Cayman Court is whether,

CAYMAN ISLANDS GOVERNMENT · GRAND COURT · 18/17

considering the issue afresh, *de novo*, the MP Funds agreed (i) to arbitrate at all, and (ii) even if they did, whether that arbitration agreement in Clause 14 applied only to the MP Funds' obligations under the Non-Compete Letter that they had signed, or whether it was an agreement to arbitrate in respect of every clause in the body of the PSA, which they had not signed.

127. That is the issue where the award comes before an English Court or a Cayman Court as confirmed by the House of Lords' decision in ***Dallah***. I accept that that is not the issue in all jurisdictions. In many other jurisdictions, the issue is a different one, i.e. whether on a *review* of the tribunal's decision on jurisdiction, paying due deference to the decision of the tribunal, the tribunal's decision on jurisdiction should stand. In those jurisdictions, the Courts are not conducting a *de novo* trial on jurisdiction themselves.

128. However, in any event, when in Brazil, an application is made for *vacatur* of an arbitration award on the basis that the tribunal lacked jurisdiction, the courts are <u>not</u> required to reach a decision *de novo* on the question of jurisdiction. The Brazilian Court of Appeal's references to "*competence-competence*", which is the principle that the tribunal has the power to rule on its own jurisdiction, amply assist in demonstrating this point.

129. It is not enough for VRG to say that the Brazilian Courts found that the Tribunal was right. This is because it would have to be established on the evidence that the Brazilian Courts found *de novo* that the arbitration agreement bound the MP Funds and extended to the subject matter of the arbitration. There is therefore no issue estoppel regarding the question of jurisdiction.

130. Further, it is common ground that the question of whether the finding of liability on the basis of Article 148 of the BCC constituted a breach of Cayman public policy and in particular Cayman standards of natural justice, is a question of Cayman law.

131. Therefore, quite obviously, the decision of the Brazilian Court on the issue of whether Brazilian public policy was breached by this finding is not the same as the issue of whether Cayman public policy was breached by it.

132. Reference was made by the MP Funds to the decision of the English Commercial Court in ***Stati v Kazakhstan*** [2017] 2 Lloyd's Rep. 201. That case specifically involved consideration of the New York Convention, and where ***Stati*** argued that Kazakhstan was issue estopped by a decision of the Swedish courts. At paragraph [84], the Court held:



> *"The New York Convention is addressed, at Article V 2(b), to the public policy of the country of enforcement. Relevant public policy can and does differ from country to country. It is correct to say that the Swedish Court did not decide whether under English law public policy required the application to enforce the award in this jurisdiction to be refused."*
>
> (My emphasis)

133. That reasoning is also in my judgment applicable here, because the Brazilian Court did not (and indeed, could not) decide as a matter of Cayman public policy whether the application to enforce the Award in this jurisdiction should be refused.

134. It is for those reasons that I find that no issue estoppel exists in this case, either in respect of the question whether the Tribunal had jurisdiction, or in respect of the question of whether the Award complies with Cayman public policy, or standards of natural justice and fairness.

135. In my judgment not only are the issues not identical; but they are not even materially or substantially the same. The Court also cannot act on the basis that if there is no actual issue estoppel, there was potential issue estoppel. It is a defining feature of issue estoppel that the decision giving rise to the estoppel must be final and conclusive.

136. VRG seems to be suggesting that one basis for acting on a potential issue estoppel would be deference, given that the Brazilian courts are the courts of the seat.

137. However, in my judgment, that would be wrong as a matter of international arbitration law. Lord Mance makes this clear at paragraph [29] of ***Dallah*** where he discussed this precise issue as follows:



"The very issue is whether the person resisting enforcement had agreed to submit to arbitration in that country. Such a person has, as I have indicated, no obligation to recognize the tribunal's activity or the country where the tribunal conceives itself to be entitled to carry on its activity. Further, what matters, self-evidently, to both parties is the enforceability of the award in the country where enforcement is sought."

138. As submitted by Mr. Flynn, what VRG are seeking is for the Court to enforce the Award as if it were a judgment *of this Court.* Therefore, as stated at paragraph [94] of ***Stati***:

> *"It is relevant to recognize that, on behalf of the Claimants, Mr. Sprange QC asks ultimately that the Award should be recognized 'as a judgment of this Court'. Sir John Donaldson MR, in* ***Deutsche Shachtbau v Shell*** *[1987] 2 Lloyd's Rep 246, at page 254 col 1, highlighted that enforcement is one of the 'powers of the state' and that these powers are exercised on behalf of the public. These points reinforce the seriousness of what is involved."*

139. Further there is in any event no *"potential"* estoppel at all, since even once the Brazilian Courts have finally and conclusively determined the Brazil proceedings (and regardless of the outcome), the issues before this Court are different from the issues decided, or to be decided, by the Brazilian Courts.

The PSA

140. The PSA defined the parties thereto expressly. Clause 11.1 of the translated version of the PSA, reads as follows:

> ***"Clause 11***
>
> ***NON-COMPETE***
>
> *I - By VarigLog and Volo*



Clause 11.1. *By means of this Agreement and in full accordance with the law, VarigLog and Volo agree not to engage, for the period of 3 (three) years counted from the granting of the prior approval by ANAC, in any of the following acts: (i) participation, directly or indirectly, whether as partners, shareholders or quotaholders or beneficial owners, through positions as managers, directors or consultants, or, finally, as employees, service providers or independent contractors, in any companies, businesses or undertakings that operate in Brazil in the same field of endeavor of VRG, namely, air transportation of passengers in all its forms; or (ii) to persuade, attract or contract with any person employed and/or contracted with by VRG and/or GTI and/or by their Affiliates, to leave their employ or to terminate that contractual connection, for any reason or any purpose, that results in a breach of the other provisions set forth in this Clause.*

....."

141. Sub-Clauses 13.1, 13.6 and 13.7 provide as follows:

"*Clause Thirteen*

GENERAL PROVISIONS

Clause 13.1. *This Agreement is irrevocable and irretrievable and binding on the Parties and their respective successors and assigns authorized in any way. This Agreement (and rights and obligations set forth herein) may not be assigned by any party without the written consent of the other parties to this Agreement.*

....

Clause 13.6. *This Agreement and its Exhibits, signed and initialed on the date hereof, constitute the entire understanding of the Parties with regard to the negotiation hereby performed. This Agreement and its Exhibits will*



govern the relations among the parties concerning the transaction contracted therein.

Clause 13.7*. No change, alteration or amendment of this Agreement shall be considered valid or binding on the Parties unless such change, alteration or amendment is made in writing and is duly signed by all the Parties.*

……"

142. Clause 14 deals with the topics of *"Arbitration, Applicable Law and Election of Jurisdiction*" and Sub-Clauses 14.1 - 14.3 and 14.5- 14.7 provide as follows:

"Clause Fourteen

ARBITRATION, APPLICABLE LAW AND ELECTION OF JURISDICTION

Clause 14.1*. All disputes arising from or related to this Agreement, including those concerning its validity, effectiveness, breach, interpretation, termination, rescission and their corollaries, will be resolved by arbitration, in accordance with the provisions of Law No. 9307/96 ("Arbitration Law"), pursuant to the conditions below.*

Clause 14.2. *The dispute will be submitted to the CCI ("CCI") in accordance with its Regulations ("Regulations") in effect as of the date of the request for arbitration.*

Clause 14.3. *The hearings, petitions and documents of the arbitration will be conducted in the Portuguese language and, if requested by any of the Parties or the arbitrator, will be translated simultaneously into the English language. The place of the arbitration will be the city of São Paulo.*

....

Clause 14.5. *The arbitrators selected must know the English language, regardless of their nationality.*



Clause 14.6. *This Agreement will be interpreted and governed by the laws of Brazil and the Arbitration Panel will decide on disputes and disagreements in accordance with the laws of Brazil, ignoring any other rule of international private law that may cause the laws of any other country or jurisdiction other than Brazil to be applicable.*

Clause 14.7. *The Arbitration Panel shall decide the matters submitted to it only in accordance with provisions of law, and must base their decision on the laws of Brazil."*

143. *"Aditamento No. 5"* as translated by the MP Funds, sets out the following terms:

> "*Addendum SL/VRG/005*
> ***To:***
> ***GTI S.A***
> ……
> *cc:* ***GOL LINHAS AÉREAS INTELIGENTES, SA***
> **……..**
> *Ref.: Purchase Agreement for the Shareholding Control of VRG Linhas Aéreas SA and Other Covenants:*
> .....
> *We refer to Clause 11.1 of the above-captioned agreement to mention the following:*
>
> *Further to what was set out in said clause, the undersigned hereto, by means of this instrument, undertake to refrain from performing, for a period of 3 (three) years as from the granting of preliminary approval from the ANAC [Brazilian Civil Aviation Agency], pursuant to Clause 9.2 of the above-captioned Agreement, any of the following acts: (i) participating, whether directly or indirectly, as partners, shareholders or quotaholders or usufruct beneficiaries, whether in the exercise of positions of management, administration or consultancy, lastly, whether as employees, service providers or freelance workers, in any companies,*



deals or undertakings that take place in Brazil in the line of business of VRG, that is, regular air transport for passengers in either the domestic or international spheres; or (ii) persuading or attracting any employee and/or contractee of VRG and/or GTI and/or their Affiliates, to leave said job or terminate this contractual bond, for any reason whatsoever or for any purpose, that might entail a violation of the other stipulations set out herein.

Finally, we mention that with the "AGREED" affixed by you, this instrument shall constitute pursuant to the best terms of the law a firm and valid commitment by and between the parties, including for the purposes of supplementing the terms of the above-captioned Agreement……"

(My emphasis)

The First Ground for Refusal of Enforcement: The MP Funds did not consent to Arbitration

144. In my judgment, it is clear that the MP Funds were intentionally, and as a matter of objective construction, not a party to the PSA. They were therefore not parties to the arbitration agreement contained in the PSA at all.

145. It seems obvious on the face of the Non-Compete Letter that it does not contain or incorporate an arbitration agreement. By it, the MP Funds undertake only one obligation, i.e. the obligation not to compete with VRG's business as set out in the Non-Compete Letter. It does not incorporate Clause 14 of the PSA or any other term of that agreement. Indeed, instead, it refers only to Clause 11 of the PSA, which was the Sellers' non-compete obligation. It does seem to me that the MP Funds are correct that the Non-Compete Letter refers to Clause 11 and the PSA only to record that the non-compete obligation undertaken by the MP Funds under the PSA mirrored that undertaken by the Sellers under the PSA, to which the MP Funds were not parties.

146. Indeed, if the parties' intention had been to make the MP Funds parties to the PSA, including the arbitration agreement in Clause 14, then the MP Funds would simply have executed the PSA. I accept the submission that the deliberate intention behind the MP Funds (and the Brazilian Shareholders) not executing the PSA (in contrast to the Buyer's shareholder, GoI) and only executing the Non-Compete Letter containing its express

CAYMAN ISLANDS GOVERNMENT · GRAND COURT · 18/17

single obligation, was that the MP Funds were bound by this free-standing obligation alone.

147. It is to be noted that the "*Parties*" to the PSA are expressly defined in it; they are the Sellers and the Buyer. They do not include the MP Funds. Clause 14 expressly applies only to the *"Parties"*.

VRG's Changing Theories

148. As Mr. Flynn points out, VRG has itself adopted different theories at different times, and each of those rationales differ from that expressed by the Tribunal. So, for example, before this Court, it has been suggested that all of the terms of the PSA are incorporated into the Non-Compete Letter - see Giusti 1, paragraph 107. Mr Giusti there says that the Non-Compete Letter "*is clear and express in incorporating all the terms of the Purchase Agreement that have not been amended."*

149. On the other hand, before the U.S. Courts, it was contended that the Non-Compete Letter incorporated not the whole of the PSA, but only the provisions referred to as the PSA's *"generally applicable provisions"* – see paragraph 11 of Mr. Giusti's Declaration before the New York Court. Counsel for VRG expressly conceded before the U.S. Courts that - contrary to the view now offered by Mr. Giusti *"in this additivo [i.e. the Non-Compete Letter] Matlin Patterson did not bind itself to all of the obligations of the original document."*

150. It does seem to me that there are a number of matters on the face of the Non-Compete Letter that belie VRG's theories.

151. Firstly, the Non-Compete Letter says nothing at all about the arbitration clause. It is therefore difficult to see, how if at all, the arbitration clause could be said to be incorporated by reference.

152. Nor does the Non-Compete Letter refer in any way at all to any other provision of the PSA besides Clause 11.



153. If the parties had intended by the Non-Compete Letter to make the MP Funds a party to any other terms of the PSA, those would have been listed. It would have been fairly facile for the parties to have plainly said so if they intended to make the MP Funds party to any other terms of the PSA, or indeed, the entire PSA. It is, as the MP Funds argue, difficult to see why parties, much less sophisticated, Attorney-advised parties, would have used the Non-Compete Letter to achieve them.

154. I note that in addition, Clause 14 provides for arbitration in Sao Paulo conducted in Portuguese (there was, though, provision allowing for an English translation to be requested). I accept Mr. Flynn's submission that the exclusively Brazilian nature of the proceedings is entirely consistent with a Brazilian arbitration between the two Brazilian parties to the PSA: the Sellers and the Buyer.

155. The Tribunal's theory was also that the Non-Compete Letter had amended the PSA itself, so as to make the parties to it, party to the whole PSA. At paragraphs 49-50 of the Partial Award on Jurisdiction, the Tribunal found that the MP Funds were "*integrated*" into the PSA, with the Tribunal concluding that "*all the terms and conditions contained in the Principal Contract*" were "*reproduced*" in the letter.

156. In my view, the Tribunal's conclusions are not correct, for a number of reasons. It seems plain to me that the Non-Compete Letter supplements the PSA by providing an undertaking by non-parties to the PSA. The Non-Compete Letter is described as "*aditando*", and this in my view should be understood as meaning "*adding*" or "*supplementing*", not "*amending*" or "*changing*".

157. It seems to me in any event, that even if the Non-Compete Letter did purport to change something about the PSA, a non-signatory to an agreement cannot amend an agreement between two different parties. Indeed, this is how the New York Court treated with the matter in an exchange with Counsel for VRG - pages 35-36 of the transcript of hearing before the District Judge.

158. That is so as a matter of logic. Additionally, the express terms of the PSA, in particular Clause 13.7 of the PSA does not permit amendment of the agreement, except in writing

CAYMAN ISLANDS GOVERNMENT • GRAND COURT • 18/17

signed by all Parties to the PSA. However, plainly, the Sellers and VRG signed the PSA, but did not sign the Non-Compete Letter. Therefore, the letter could not amend the PSA.

159. The MP Funds make a not insubstantial point to bolster the argument that it is extraordinary to say that these sophisticated, externally advised, commercial parties would not simply have made the MP Funds a signatory to the PSA if this is what they had intended. They say the point is all the more underlined by the fact that both the PSA and the Non-Compete Letter were executed on the same day. They pose the, in my view, logical question : "*why then would the "Parties" to the PSA and the signature blocks not simply have been amended to include the MP Funds if this had truly been the parties' intention?"*

160. I find, on a proper construction of the relevant documentation, that the MP Funds were not intended by the parties to accept incorporation of the PSA's terms into the Non-Compete Letter.

161. Accordingly, in all of the circumstances, and considering the issue, as I must, *de novo*, applying Brazilian law which is in my view plainly not different from Cayman law on contractual interpretation and construction issues, I am satisfied that the MP Funds were not parties to the arbitration agreement pursuant to which the Tribunal purported to exercise jurisdiction over them.

Whether there was Arbitration Agreement covering dispute in respect of the price adjustment mechanism under the PSA

162. In my judgment, again considering the matter *de novo*, there was no arbitration agreement in respect of the matters submitted to arbitration. Even if there was agreement to arbitration, that only extended to the non-compete undertaking, and not to the price adjustment mechanism under the PSA. This offends against Article V.1(a), since there was no valid arbitration agreement. It also offends against Article V.1(c), since there was no jurisdiction to determine the matters outside the scope of the arbitration agreement/ tribunal in excess of its powers under the arbitration agreement.

163. In my view, the MP Funds have therefore made out the first ground for refusal, i.e. that the MP Funds were not a party to the arbitration agreement, pursuant to which the arbitral Tribunal purported to exercise jurisdiction.

164. Alternatively, even if the MP Funds did consent to arbitration at all, which I have found that they did not, in my judgment, the Award plainly purports to determine issues that were not within the bounds or scope of any agreement to arbitrate.

165. Based upon my findings on this ground, it is not strictly necessary for me to go on to deal with the other two grounds. However, in light of the in-depth arguments and important issues involved, I have gone on to make findings upon both of the other grounds.

The Second Ground for Refusal: The Tribunal Breached Natural Justice by Finding Liability on a basis neither Pleaded nor argued and awarding Relief that was never requested

INC

166. In his declaration, given for the purposes of the proceedings before the Southern District Court of New York, Professor Carmona, at paragraphs 16 -19, discusses the *INC* principles and his opinion as to the applicability to the Arbitration as follows:

> *"16. Due process, under Brazilian law, subsumes, among other rules and principles, the principle of the contradictory proceedings (principio de contraditorio), which requires each party to be afforded an opportunity to respond to the arguments of the other party and to express its views on any relevant fact, document, or element of evidence placed before a tribunal. However, a party is not automatically entitled under Brazilian arbitration law to be given an opportunity to address legal theories properly raised by the factual allegations of the parties. Under Brazilian arbitration law, an arbitral tribunal is free to fit Brazilian law to the facts before it and to enter an award based on applicable Brazilian law regardless whether or not the specific statutory provision or legal doctrine was expressly cited or relied upon by one of the parties. This is a fundamental and well known aspect of Brazilian practice.*

CAYMAN ISLANDS GOVERNMENT · GRAND COURT · 18/17



17. *In fact, the general rule in a Brazilian arbitration is that the parties should assume and expect that a tribunal will apply the relevant law to the facts pleaded by each party. This rule is typically referred to in Brazil and other Civil Law countries by the Latin phrase "iura novit curia", which means that the court, (as opposed to the parties) is charged with applying the law. The Final Award explicitly applies the law to the facts in Paragraphs 625 to 638, under the title "Fitting the Facts to the concept of malice".) ("Encaixe dos fatos no conceito de dolo"). This aspect of the Final Award is fully consistent with Brazilian practice.*

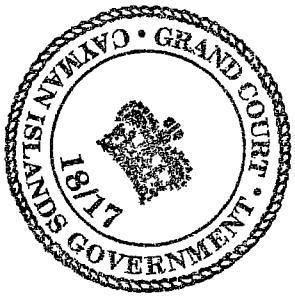
18. *MP argues that, in doing so, the Tribunal surprised the parties. Under Brazilian arbitration law and procedure, the Tribunal's imposition of liability under a theory of dolo should have been no surprise, as the facts that were argued in the Terms of Reference and detailed during the Arbitration clearly raised the issue of dolo. It is uncontroversial under Brazilian law that parties bear the burden of identifying and discussing the legal theories that may be raised by the factual allegations of other parties. The failure of a party to consider a legal theory ultimately applied by a court or tribunal does not vitiate the proceedings or violate the rights of any party, so long as the legal theory was properly raised by the limits of the controversy as presented to the court or tribunal.*

19. *In my opinion, as a matter of international arbitration as practiced in Brazil (and setting aside the application of domestic Brazilian arbitration law), MP could not have been unfairly surprised by the Final Award's application of dolo as a basis for liability, given the context, the matters in dispute, and the procedural rules applicable to the arbitration."*

167. Mr. Giusti also gave a Declaration in the New York Proceedings, but it is in his First Affidavit for these proceedings that he addresses the principle of *INC* and responds to Mr. Gomm Santos' Declaration in the New York Proceedings so I will now turn to Mr. Gomm Santos' Declaration.

168. At paragraphs 21-25, and 27- 29, Mr. Gomm Santos gave the following evidence:

"21. It appears to be common ground for the basis of Professor



Carmona's opinions that (i) the only legal claim that was raised in the arbitration to hold the MP Funds liable was a contract claim on a veil piercing theory of liability under Article 50 of the Brazilian Civil Code; (ii) the arbitral tribunal rejected the veil piercing theory and instead held the MP Fund liable in its final award under Article 148 of the Brazilian Civil Code ("a CC 148 Claim"); (iii) a CC 148 claim was not included in the TOR; (iv) a CC 148 Claim was never subsequently added as a legal claim to the arbitration under Article 19 of the ICC Rules after the TOR was signed; and (v) the arbitral tribunal applied CC 148 as the basis for the MP Funds' liability in its final award without inviting the parties, prior to issuing its final award, to address the applicability of CC 148 to the facts that had been developed during the arbitration.

22. *I disagree with Professor Carmona that Brazilian law concerning international arbitration allows a tribunal to fit the facts developed during the arbitration in its final award into any legal theory it may choose to apply, regardless of whether any party has alleged that legal claim, or the tribunal has otherwise raised the new point of law with the parties on its own, with an opportunity for the parties to be heard before the tribunal issues a decision. Professor Carmona does not cite any legal authority to support this view of due process in international arbitration, and I am aware of none. In international arbitration, unlike domestic Brazilian litigation, the scope of the arbitral tribunal's authority both to determine the facts and to apply the law is determined by the parties. Unlike under the principle of iura novit curia to which Professor Carmona refers, it is in principle the parties - not the arbitrators - who define the legal issues to be determined by the tribunal.*

23. *I note is this regard, that Professor Carmona suggests there are more than three-dozen different provisions of the Brazilian Civil Code that impose legal consequences for conduct that constitutes dolo (malice). [Para] 11. This helps to illustrate why the concept of iura novit curia cannot apply in international arbitration in the same way as it may in litigation in some countries. In international arbitration, the arbitrators (and parties) do not necessarily come from the country whose laws apply to the dispute and therefore, in the case of Brazil, cannot be expected to know the Civil Code and*



all of the several dozen provisions potentially applicable to facts that implicate dolo, unless the parties, through their Brazilian Counsel, assert the claim and explain the law to the tribunal. In fact, under the ICC Rules of Arbitration, absent express agreement, a sole arbitrator or chairman of the tribunal appointed by the ICC cannot be a national of the same country as any party, and so it is very common that the arbitrator or chairman of the tribunal in ICC international arbitrations will not be familiar with the applicable law when the applicable law (as is the case here, and is commonly true) coincides with the nationality of any one of the parties. See Arteaga Decl. Ex 37 (ICC Rules, Art 9(5)).

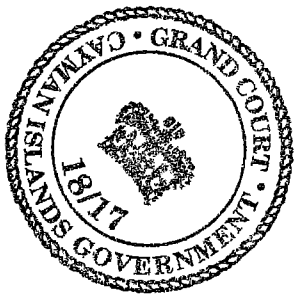
24. *Similarly, it would be unreasonable to expect a respondent in international arbitration to "anticipate" every possible legal theory that might apply to hold them liable. Carmona Decl. para. 24. This would put respondents in the unfair position of either arguing the claimant's case for it, even where the claimant did not raise a particular claim, or otherwise risk having no opportunity to be heard on a claim that was never raised in the arbitration but only imposed by the tribunal in its final award. In my view, such a concept makes no sense, either in Brazil or anywhere else where international arbitrations are conducted. Also, such a concept may impair the ability of a country to be chosen as the seat of international arbitrations. Moreover, the prospect of requiring parties to address every possible legal basis for a claim or defense regardless of whether the other party or tribunal has raised it would tend to defeat the well-recognized goals of international arbitration to provide an efficient, time- and cost-effective dispute resolution mechanism as an alternative to litigation in the courts.*

25. *Perhaps most importantly, the relevant elements of proof required under the different provisions of the Brazilian Civil Code that apply to conduct that is dolo, will vary. As with any "claim" for relief recognized at law, the merits of the claim raise a mixed question of law and fact - an application of the former to the latter. Any party to international arbitration would expect in fairness to have an opportunity to address the "claim" - the application of the law to the facts - not just one ingredient or the other, in isolation. This is why the authority of arbitral tribunals in international arbitration is circumscribed to the claims - fact and law - that are*

raised during the arbitration and that the parties are afforded an opportunity to address.

Professor Carmona's Opinions on Due Process in International Arbitration

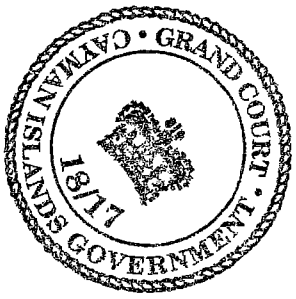
...



27. *First, I agree with Professor Carmona, in paragraph 15 of his Declaration, that due process is required under Brazilian law. I further agree with Professor Carmona, in paragraph 16 of his Declaration, that Brazil's notion of due process adheres to the principle of contradictory proceedings, which "requires each party to be afforded an opportunity to respond to the arguments of the other party and to express its views". As noted above, it also appears to be common ground that the arbitral tribunal did not give any forewarning that it was considering deciding the case on the basis of a CC 148 claim that had not been raised, and that the parties were not invited to provide their arguments or views on the applicability of CC 148 prior to the Tribunal rendering its final award.*

28. *Where Professor Carmona and I part ways is on the idea that the principle of contradictory proceedings in international arbitration in Brazil - the right to have one's "arguments" and "views" heard- only apples to the facts of a case and not the applicable law raised by the factual allegations. In international arbitration in Brazil, it applies to both. The resolution of disputes in arbitration, and the opportunity to be heard and influence that – as the principle of contradictory proceedings underlying due process in Brazilian arbitration that Professor Carmona describes in paragraph 16 of his Declaration contemplates- necessarily involves both the law and the facts, and how the former applies to the latter.*

29. *Professor Carmona relies on the principle of iura novit curia to conclude that international arbitrators can decide what legal theory to apply without any input from the parties. Although I agree that this principle may be applicable in purely domestic litigation in Brazil, I disagree that this principle applies in the international arbitration context for the reasons discussed above. But even supposing that the principle did apply, as a matter of due*



process and fairness in international arbitration, if an arbitral award contemplates deciding the case on a legal basis that has not been raised by any of the parties, the tribunal must at least raise the legal point with the parties and afford them an opportunity to present their "arguments" and "views" prior to deciding the dispute on a different legal basis than has been addressed by the parties' submissions." (My emphasis)

169. In his First Affidavit in these proceedings, Mr. Gomm Santos also referred to Article 10 of the Brazilian Code of Civil Procedure of 2015 (**"the BCCP"**), which came into effect in 2016. Article 10 provides as follows:

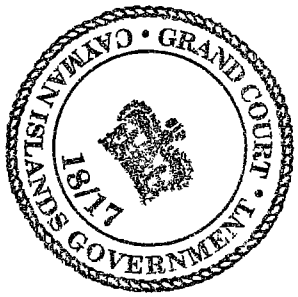
> *"Art 10. A judge shall not decide, at any level of jurisdiction, based on grounds with respect to which the parties have not been given opportunity to make statements, even if the matter is one which the judge should decide by administrative initiative."*

170. Said Mr. Gomm Santos at paragraph 5.12 of his Affidavit:

> *"**Due Process under Brazilian Law***
>
> .....
>
> *5.12. Article 10 of the BCCP codifies the principle of adversary proceedings and prevents the court from issuing unexpected decisions. Article 10 basically states that a court cannot decide at any point in a proceeding an issue before it unless it has given the parties an opportunity to be heard on that issue. The underlying principle of Article 10 of the BCCP is not new to the Brazilian legal system. Even though Article 10 is a recent addition to the BCCP, the codification reflects the state of the law that has developed through scholarly literature and court decisions, as the prohibition against unexpected decisions has long been upheld by the constitutional principles of due process and adversary proceedings and is supported by prior Brazilian case law."*

171. In his First Affidavit in these proceedings, Mr. Giusti, having stated that he agrees with the contents of Professor Carmona's Declaration in the New York proceedings, and

having stated that he disagrees with Mr. Gomm Santos' opinion that due process has been violated because the Arbitral Tribunal did not respect the principle of adversarial proceedings, at paragraphs 115- 119, and 121-128 states as follows:



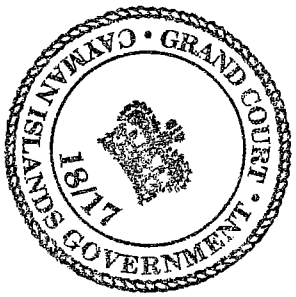
"115. For the reasons set out below, I disagree with the above statement and Mr. Gomm's suggestion that failure to allow a party to comment on a specific article of the BCC constitutes a violation of due process. I further disagree with Mr. Gomm's inference that, in the case at hand, the Arbitral Tribunal failed to afford a meaningful opportunity for the Respondents to comment on the relevant legal theory on which the Final Award rested.

116. First, the principle of adversarial proceedings is not incompatible with the principle of iura novit curia.

117. The principle of adversarial proceedings (or "adversary proceedings", as it is described by Mr. Gomm) may be applied differently across different jurisdictions. Under the Brazilian procedural rules in effect at the time of the Final Award (which have been amended in the interim in a manner that would not affect the outcome of the Arbitration, as discussed below) the principle of adversarial proceedings protected the rights of the parties to comment on and dispute the facts as well as argue the legal aspects of the case as they deemed appropriate, but the principle did not constrain the ability of an arbitrator to decide a case on the basis of legal grounds (much less the specific articles), sections or items of a particular piece of legislation) that had not been specifically discussed by the parties.

118. Under the principle of iura novit curia, as was in effect at the time of the Final Award, the decision of the arbitrator was not and should not be constrained by the articles of laws referred to by the parties during the proceeding.

119. The parties were fully entitled to argue the legal grounds that they submitted were applicable to the facts of the case. However, in making its determination, the Arbitral Tribunal was not limited by the submissions of the parties as to the legal or specific articles of pieces of legislation applicable to the dispute. The Arbitral



Tribunal was only constrained in its decision-making by the factual issues raised by the parties, and could have only awarded such relief as had been requested by the parties. The parties, assisted by their Brazilian Counsel, were free to choose the legal arguments that they considered might be most persuasive to the Arbitral Tribunal. However, they did not have any right to be heard on any specific legal grounds, or articles of pieces of legislation, upon which the Arbitral Tribunal may have ultimately made its determination; an arbitral tribunal can decide upon such issues without reference to the parties at all.

....

121. *Article 10 of the BCCP (which codifies the principle of adversarial proceedings and which Mr. Gomm relies upon in his Affidavits) is not applicable in this matter because it was not in force until after the Final Award was issued and does not have retrospective effect. The predecessor to the BCCP, which was in effect from 1973 to 2015 (BCCP/1973), did not contain any similar provision.*

122. *Furthermore, contrary to Mr. Gomm's assertions, the vast majority of the STJ's case law prior to the enactment of Article 10 of the BCCP supports the principle that an arbitrator is not bound by the legal grounds presented by the parties, but rather was free to apply the law to the facts of the case (as those facts had been presented by the parties):*

> *"The jurisdictional activity is restricted to the limits of the request and cause of action. However, the judge applies the law to the species without binding on the legal grounds inferred in the complaint due to the iura novit curia principle. Indeed, there is no decision outside the scope of the suit, as the relief provided by the Court of origin has the same nature of the one requested (ruling the donation null), but only with different grounds from the one indicated by the petitioners"* [Superior Tribunal of Justice, Interlocutory Appeal in Sepcial Appeal (AgRg No AREsp].

123. *Even if Article 10 of BCCP had been in force when the Final Award was issued (which it was not), Article 10 provides that an arbitrator must not decide a case based on a "ground" which the parties did not have the opportunity to discuss. Mr. Gomm*

construes the term "ground" to refer to the legal consequences of the facts when it actually refers to the factual basis that supports a party's requested relief.

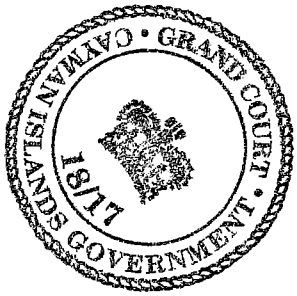
124. *The interpretative statements issued by the National School of Formation and Development of Magistrates (a research and teaching institution run by the Brazilian federal court system under the authority of the Brazilian Constitution) with the approval of the more than 500 judges involved in their issuance offers the following views on the correct interpretation of Article 10 of BCCP:*



> *"1) the words 'Grounds' mentioned in art. 10 of the Code of Civil Procedure/2015 is understood as the factual reasons guiding the request, and not the legal classification attributed by the parties.*
>
> *2) the rule of the adversary proceeding under art. 10 of the Code of Civil Procedure/2015 is not violated by the court decision that invokes a principle, when the legal rule applied previously discussed in the course of action is the emergence of said principle.*
>
> *...*
>
> *6) A judgment supported by legal grounds is not a surprise judgment, even if such grounds differ from those presented by the parties, provided they are based on evidence submitted to adversarial testing.*

125. *Consequently, the same outcome would be reached in the present case, regardless of whether one applies the principles of adversarial proceedings and iura novit curia as set out in the BCCP or as set out in the BCCP/1973. Both procedural codes lead to the conclusion that an arbitrator is constrained exclusively by the factual basis of the case and the limits of the parties' claims for relief, and not by the legal grounds submitted by the parties in support their respective requests for relief.*

126. *Mr. Gomm appears to imply that the principle of iura novit curia cannot be applied to international arbitrations. ....*



127. *However, the above is not correct: the Brazilian arbitration system is not binary. The BAL makes no distinction between domestic and international arbitrations seated in Brazil with regard to the conduct of the proceedings. Any arbitration seated in Brazil will be conducted under the same procedural principles and rules regardless of whether or not it contains international elements.*

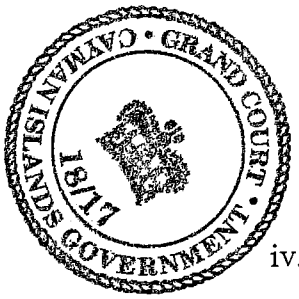
128. *Thus, the principle of iura novit curia applies to the Arbitration, notwithstanding any international aspect to the contrary."* (My emphasis)

172. However, whilst I bear in mind the fact that this was an arbitration taking place in Brazil, what I am required to do is to apply Cayman Islands standards of fairness. Applying Cayman Islands standards of fairness and due process, it is plain that the MP Funds could not reasonably have foreseen that they would be held liable as third parties in tort, for tort damages, when the claim against them, and relief sought throughout the arbitration, was to hold them responsible for a contractual obligation of their indirect subsidiaries. This is for the following reasons:

i. Article 148 imposes tortious liability; whereas the liability that VRG alleged against the MP Funds in the arbitration was contractual.

ii. This finding of liability under Article 148 is completely at odds with the Tribunal's jurisdictional determination that the MP Funds were made party to the PSA's terms by virtue of the Non-Compete Letter. On the merits, VRG had only alleged an *alter ego* theory of liability against the MP Funds that depended on the corporate personality of the Sellers and the MP Funds not being taken account of so that they were found to be parties to the purchase price adjustment obligation, not third parties.

iii. The evidence concerning the alleged misrepresentations by the MP Funds was not directed at establishing or answering an allegation of "*malice*" by the MP Funds for the purposes of a claim in tort; it was directed at an entirely different matter of



whether there was an abuse of the corporate form such as to warrant the lifting of the corporate veil under Article 50.

iv. Further, Article 148 requires the person relying on it to prove that the third party's intentional conduct actually *caused* the entry into the contract by the alleged innocent party, or otherwise that it caused the damages claimed. The evidence and argument before the Tribunal did not in any way aim at establishing that the requirement under Article 148 was satisfied. The MP Funds therefore maintain that they were given no opportunity to make or develop any argument that this requirement was not made out. It was submitted that, oddly, the Tribunal imposed a contractual liability on the MP Funds, the measure of which was the purchase price adjustment, as if this would equate to tort damages caused by malice.

v. I accept that, where damages are claimed as the remedy for Article 148, the claimant must adduce evidence to establish causation between the third party's malice and any loss allegedly suffered by the claimant as a result thereof. The fact that neither side adduced evidence or made an argument to this effect was put forward as a further demonstration that this was not the relief sought by VRG at all.

173. VRG had suggested that Article 148 was raised by reference to an expert report served by VRG by Professor Azevedo, but that for some *"tactical"* reason, the MP Funds had decided not to address this matter.

174. In my judgment, such an argument must fail. For one thing, Professor Azevedo's opinion was prepared for the purposes of entirely different proceedings, which were not directed to the Arbitration, and in any event, VRG submitted the report only in support of its alter ego claim contractual claim. Additionally, Professor Azevedo was not tendered by VRG as a witness in the Arbitration to give oral evidence, he was not cross-examined, and did not appear before the Tribunal at all. This sort of "*one-liner*" in Professor Azevedo's

CAYMAN ISLANDS GRAND COURT 18/17 GOVERNMENT

opinion could not possibly have raised a claim for tortious damages against the MP Funds, as strangers to the PSA, under Article 148.

175. Further, to say that the MP Funds did not advance such a defence for "*tactical*" reasons, does itself suggest that the MP Funds' defence to the *alter ego* claim was not in fact interchangeable with an Article 148 defence and that the MP Funds were not heard by the Tribunal on Article 148.

176. As to the evidence of the experts, there are a number of areas where they agree, and other areas where they disagree, and areas where the lines are blurred. In my judgment, once it is admitted, as Mr Giusti did in paragraphs 119 and 125 of his Affidavit, that the arbitrators are constrained by the factual basis of the parties' case and the limits of the parties' claims for relief, it seems to me that the MP Funds have made out their case under the second ground.

177. I found guidance in the case of ***Malicorp*** and the discussion of the principles in ***Cukurova***. This Court, like the Court in ***Malicorp***, has to look to see whether liability under Article 148 of the Brazilian Civil Code was (i) pleaded; (ii) argued in written submissions; (iii) argued in oral submissions and (iv) whether the MP Funds were given a fair warning that a case under Article 148 was proceeding against them such that they had a proper opportunity to respond to that case.

178. Even if VRG could show the Court that questions similar to those raised by Article 148 were put to the MP Funds, ***Malicorp*** is authority for the proposition that similarity is not enough. At paragraph 37 of ***Malicorp***, Walker J discussed this matter as follows:

> *"37.* ***Malicorp*** *has relied on a passage in the transcript as indicating that the Chairman was asking Egypt what their view would be if the arbitral tribunal, without seeking to prejudge any issue, were to find there was no proven evidence of fraud or forgery and that what they simply found instead was that there had been a misrepresentation. I am prepared to accept that this question is similar to asking what the position would be if there had been an*



error but no fraud. What it does not show, however, is that Egypt had any notice of a proposal to award damages under article 142." (My emphasis)

179. In my view, what was required is express notice to the MP Funds of a proposal to award damages against it under Article 148 and there was none such to be found anywhere in the entire record of the proceedings before the Tribunal. In that regard, I have in any event preferred the evidence of Mr. Gomm Santos to that of Professor Carmona and Mr. Giusti, as being more intrinsically logical and persuasive. I found particularly convincing Mr. Gomm Santos' reasoning at paragraphs 24 and 25 of his Declaration, cited in paragraph 168 above. However, in any event, it is a question of Cayman law as to whether there was procedural fairness.

180. In my judgment the MP Funds have also therefore discharged the burden of showing that there was a breach of natural justice.

Third Ground for Refusal - The Tribunal Purported to Decide Matters Beyond the Scope of the Submission to Arbitration

181. This ground is closely related to the second ground. In my judgment, the specific ground for refusal to enforce an arbitration award, set out in section 7(2)(d) of the ***Enforcement Law*** is made out i.e. the Award deals with a difference not contemplated nor falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration.

182. Thus, at the time of the Award, the MP Funds were entitled to understand the Tribunal to be treating them as a party to the PSA in its own right. It was on that basis that the claim was made that the MP Funds should be treated as responsible for the price adjustment mechanism with the PSA on the basis that it was the *alter ego* of the Sellers.

183. It was therefore not within the scope of the Tribunal's jurisdiction to award as tortious damages a contractual price adjustment amount, which had never been sought by VRG.

Conclusion and Disposition

184. The matter of the Court's power to refuse to enforce an arbitration award is a matter of discretion but this discretion is not at large. It must be exercised upon a principled basis, in respect of which there is a long line of cases that provide some guidance, and which have been referred to in this judgment. In all of the circumstances it is my view that it is just to refuse to enforce the Award, as it offends against the underlying principle of arbitration, that it must be consensual. That this Award does so is made out on two bases: (a) the purported exercise of jurisdiction pursuant to an arbitration agreement to which the MP Funds were not parties; and (b) by the purported exercise of jurisdiction whereby the Tribunal found the MP Funds liable for a particular provision of the Brazilian Code that had never been pleaded or set out, and therefore falling outside of the boundaries of the submission. The Award also offends against the cardinal principle of natural justice that enshrines a party's right to be heard and is contrary to the public policy of the Cayman Islands. This is contrary to the express provisions of the New York Convention, and the ***Enforcement Law***.

Issue of Stay

185. For all of the reasons advanced by the MP Funds, and referred to at paragraph 120 above, it is in my judgment inappropriate to stay or adjourn the proceedings.

ORDER

186. In the circumstances, for the reasons previously discussed, I set aside the *ex parte* order dated 14 October 2016 pursuant to G.C.R, O.73, r.31(8) and section 7 of the ***Enforcement Law***, as sought by the MP Funds. Costs are awarded to the MP Funds against VRG, to be taxed if not agreed.

THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT

CAYMAN ISLANDS · GRAND COURT · 18/17 · GOVERNMENT

Exhibit B-4

2020 Cayman Court of Appeal Decision

(see attached)

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal 12 of 2019
(Formerly FSD 137 of 2016)

IN THE MATTER OF THE FOREIGN ARBITRAL AWARDS ENFORCEMENT LAW (1997 REVISION)

AND IN THE MATTER OF AN ARBITRATION BETWEEN
VRG LINHAS AÉREAS SA (Claimant) and
MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS (CAYMAN) II LP and
MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS II LP (Respondents)

BETWEEN:

GOL LINHAS AÉREAS SA
(formerly VRG LINHAS AÉREAS SA)

Plaintiff/Appellant

and

1) MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS (CAYMAN) II LP

2) MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS II LP

3) MATLINPATTERSON GLOBAL PARTNERS II LLC

Defendants/Respondents

BEFORE:	**The Rt Hon Sir John Goldring, President** **The Rt Hon Sir Bernard Rix, Justice of Appeal** **The Hon John Martin QC, Justice of Appeal**
Appearances:	**Mr Tom Lowe QC instructed by Mr. Marc Kish and Mr. William Jones of Ogier, Attorneys for the proposed Appellant** **Mr. Vernon Flynn QC instructed by Mr. Luke Stockdale of Maples and Calder for the proposed Respondents**
Heard:	**20 – 21 November 2019**
Draft judgment Circulated:	**29 July 2020**
Judgment Delivered:	**11 August 2020**

JUDGMENT

Sir Bernard Rix JA

Introduction

1. This appeal (it began life and came before the Court as an application for permission to appeal) concerns a claim to enforce a Brazilian arbitration award, decided under Brazilian substantive and curial law, and upheld by the Brazilian courts in annulment proceedings in Brazil brought by the award debtors. I would grant permission to appeal. The case raises important and difficult issues. Permission to appeal was refused by the Judge, Justice Mangatal, and was strenuously challenged by the Respondents in this Court. This judgment will demonstrate, however, that permission ought to be granted.

2. The award was challenged before Mangatal J on four grounds, all of which had previously been raised before the Brazilian courts. The four grounds were and are: (i) the Respondents were not party to the arbitration agreement relied on; (ii) if they were, the claims raised in arbitration were outside the scope of the arbitration agreement; (iii) the arbitral tribunal decided the case on a legal ground (article 148 of the Brazilian Civil Code) not promoted by the claimant, which was contrary to Cayman Islands public policy; and (iv) the legal ground relied on by the arbitral tribunal was not within the Terms of Reference of the arbitration and therefore had never been referred or submitted to the arbitral tribunal for decision. Mangatal J agreed with all four grounds and therefore refused to enforce the award in the Cayman Islands.

3. It is common ground that grounds (i) and (ii) are matters for Brazilian law, and that ground (iii) is ultimately a matter for Cayman Islands law (although the appellant submitted that Brazilian law played an important role in providing the material on which these courts, applying Cayman Islands law and public policy, had to make a judgment). There was no clarity about the law which governed ground (iv), but in my judgment it too is a matter for Brazilian law as the law of the seat.

4. The parties deployed expert witnesses on Brazilian law to assist in the presentation of Brazilian law to these courts. It might be said, however, that the best evidence of Brazilian law lay in the decisions of the Brazilian courts in the instant case.

5. Before Mangatal J the appellant relied both on Brazilian law (as reflected in the Brazilian courts' decisions in this case and in the evidence of the Brazilian law experts) and on a submission of estoppel by reason of the Brazilian courts' decisions in this case. In essence, there is not much to choose between these approaches. In this appeal, the appellant concentrated exclusively on its argument of estoppel. In doing so, it might be said that it took upon itself a burden (the proof of estoppel) which prima facie (subject to the decisions of the Judge) lay on

the Respondents (the proof of Brazilian law). Be that as it may, if the argument on estoppel were to succeed, it would follow (in the absence of proof that the Brazilian courts had somehow got Brazilian law wrong) that Brazilian law was as stated by the Brazilian courts.

The underlying dispute

6. The arbitration arose out of an Agreement for the Sale and Purchase of Equity Control in VRG Linhas Aéreas SA, dated 28 March 2007 (the **Agreement**).

7. VRG Linhas Aéreas SA (**VRG** or the **airline**), the then, but now former, name of Gol Linhas Aéreas SA, the appellant in this appeal and the plaintiff before Mangatal J (**Gol**), is the universal successor under Brazilian law of GTI SA (**GTI**), which was merged into VRG. GTI has therefore become VRG and then Gol. It was as GTI that the company acted as purchaser under the Agreement and commenced the arbitration proceedings in Brazil. The annulment proceedings, however, were named against VRG. It will be convenient to refer to the appellant throughout as VRG, as the judge did below.

8. GTI then was the purchaser under the Agreement from Varig Logistica SA and Volo do Brasil SA as sellers (the **Sellers**). The Agreement provided for the sale of 100% of the issued shares of VRG, a Brazilian airline. The dispute which subsequently arose concerned the overstatement of the airline's working capital and a demand therefore for an adjustment to the price paid under the Agreement.

9. The defendant respondents are aspects of the ultimately US based funds which promoted the sale of VRG. The first respondent, MatlinPatterson Global Opportunities Partners (Cayman) II LP (**MP Cayman**), is a Cayman Islands exempted limited partnership. The second respondent, MatlinPatterson Global Opportunities Partners II LP (**MP USA**), is a Delaware registered partnership. The third respondent, MatlinPatterson Global Partners II LLC (the **GP**), is the general partner of MP Cayman, and is a Delaware incorporated limited liability company. Mangatal J described the three defendants as the **MP Funds**. I shall also use that expression when convenient to describe any of the respondents or any combination of them.

10. The Sellers were special purpose companies set up by the MP Funds to perform the sale of the airline to GTI. The price under the Agreement was USD 275 million, but clause 5 of the Agreement provided for a price adjustment in case the working capital of GTI was less than warranted. Once paid, the price of USD 275 million had been removed by the MP Funds from the Sellers, and the Sellers were left essentially without means.

11. Neither MP Cayman nor MP USA were signatories of the Agreement itself. However, MP USA signed an addendum to the Agreement which joined MP USA to a non-compete provision in the Agreement. My understanding is that it is essentially MP Cayman and MP USA against whom VRG seeks enforcement, for it was against them (and the Sellers) that the award sought to be enforced was made.

12. A dispute subsequently arose concerning the working capital of GTI, or VRG as it had become. VRG complained that it had been fraudulently misled by both the Sellers and the MP Funds as to the working capital of the airline. A price adjustment clause, clause 5 of the Agreement, provided for an adjustment to the price to the extent that the working capital of the airline as of the date of the Agreement was overstated in the accounts. The working capital as of the date of the Agreement had been warranted, and was supposed to have been confirmed by PwC.

13. Accordingly, on or about 27 December 2007 VRG brought ICC arbitration proceedings against both the Sellers and the MP Funds in the form of MP Cayman and MP USA. The claim against the MP Funds was premised on the MP Funds' fraudulent misuse of the Sellers in the sale of the airline. It was said that this entitled VRG to pierce the corporate veil. The Sellers and the MP Funds were therefore said to be alter egos. The MP Funds (MP USA and MP Cayman) were described, together, as fourth respondents to the arbitration.

14. The arbitrators constituting the arbitral tribunal were: Juan Fernández-Armesto (chairman), Pedro Antônio Batista Martins and Gustavo José Mendes Tepedino (co-arbitrators). Dr Fernández-Armesto is a distinguished Spanish lawyer and arbitrator, who has been President of the Spanish Securities Commission and a professor of commercial law and is currently a vice-president of ICCA (the International Council for Commercial Arbitration). Messrs Martins and Tepedino are distinguished Brazilian lawyers and arbitrators, the former being inter alia an officer of the commercial committee of the Latin-American Arbitration Association and the latter being a professor of civil law and former Director of the Faculty of Law of the State University of Rio de Janeiro.

15. The MP Funds disputed the arbitrators' jurisdiction over them. They submitted both that they were not parties to the arbitration agreement contained in the Agreement, and that in any event, even if they were, the scope of any such arbitration agreement in their case could not extend beyond the non-compete obligation contained in the addendum.

16. The arbitrators, exercising their *compétence compétence* rights, subject to review by the Brazilian courts, to adjudicate on the challenge to their jurisdiction, issued a Partial Award (by a majority) dated 7 April 2009 rejecting that challenge.

17. The arbitration thereafter proceeded to the merits stage, with the MP Funds reserving their right to have the question of the arbitrators' jurisdiction reviewed by the courts.

18. In their Final Award dated 2 September 2010, the arbitrators found fraud proven, and awarded R$ 92,987,672 to VRG against the Sellers and the MP Funds jointly. They found that the airline, instead of having a working capital, as VRG had been assured, in the sum of R$ 40,750,874 (referred to frequently as R$ 40 million), in reality had a negative working capital of R$ 52,236,786 (referred to frequently as R$ 52 million).

19. The arbitrators found the Sellers liable under the price adjustment clause of the Agreement and the MP Funds liable for third party malice under article 148 of the Brazilian Civil Code for damages in the same amount. However, they rejected VRG's claim against the MP Funds based on the doctrines of *alter ego* and piercing the corporate veil.

20. The respondents submit in these proceedings that the arbitrators' reliance on article 148, as a distinct legal ground of liability, without warning to the MP Funds in advance of issue of the Award, deprived the MP Funds of the opportunity to present their case and was against public policy.

The Agreement

21. As stated above the Agreement was between GTI (subsequently VRG and now Gol) and the Sellers. The MP Funds were not parties or signatories. Gol, at that time the parent of GTI, guaranteed GTI's obligations. There was no guarantee by the MP Funds of the Sellers' obligations.

22. Clause 14 contained an arbitration agreement, as well as an express choice of Brazilian law. Any dispute was to be submitted to the ICC in accordance with its Rules. Relevant parts of clause 14 are as follows:

> **Clause 14.1** All disputes arising from or related to this Agreement, including those concerning its validity, effectiveness, breach, interpretation, termination, rescission and their corollaries, will be resolved by arbitration, in accordance with the provisions of Law No. 9307/96 ("Arbitration Law"), pursuant to the provisions below…
>
> **Clause 14.3** The hearings, petitions and documents of the arbitration will be conducted in the Portuguese language and, if requested by any of the Parties or the arbitrator, will be translated simultaneously into the English language. The place of the arbitration will be the city of São Paulo…

> **Clause 14.5.** The arbitrators selected must know the English language, regardless of their nationality.
>
> **Clause 14.6** This Agreement will be interpreted and governed by the laws of Brazil and the Arbitration Panel will decide on disputes and disagreements in accordance with the laws of Brazil, ignoring any other rule of international private law that may cause the laws of any other country or jurisdiction other than Brazil to be applicable.
>
> **Clause 14.7** The Arbitration Panel shall decide the matters submitted to it only in accordance with provisions of law, and must base their decision on the laws of Brazil…

23. There were a number of addenda of the same date as the Agreement. This Court is concerned with what has been referred to as Addendum 5 ("Addendum SL/VRG/005"), dated São Paulo, March 28, 2007. The MP Funds signed Addendum 5 in order to join themselves to the non-compete obligations of the Sellers contained in clause 11.1 of the Agreement. The Addendum took the form of a letter to GTI and its then parent Gol, countersigned by the addressees. The Addendum was annexed to the Agreement.

24. Addendum 5 provided in relevant part as follows:

> We refer to Clause 11.1 of the above-captioned agreement to mention the following:
>
> > Further to what was set out in the said clause, the undersigned hereto, by means of this instrument, undertake to refrain from performing for a period of 3 (three) years as from the granting of preliminary approval from the ANAC [Brazilian Civil Aviation Authority], pursuant to Clause 9.2 of the above-captioned Agreement, any of the following acts:…
> >
> > Finally, we mention that with the "AGREED" affixed by you, this instrument shall constitute pursuant to the best terms of the law a firm and valid commitment by and between the parties, including for the purposes of supplementing the terms of the above-captioned Agreement.

The Partial Award

25. The Partial Award dealt with the MP Funds' challenge to the arbitrators' jurisdiction. By a majority the arbitrators dismissed that challenge. They found that by attaching themselves to the Agreement by means of Addendum 5, the MP Funds had joined in the Agreement's arbitration clause 14. They also found that, even though the Addendum was concerned only with the Agreement's non-compete obligation, nevertheless the wide terms of clause 14.1 ("All disputes arising from or related to this Agreement") and the absence of any evidence that the MP Funds intended to limit the scope of arbitration to disputes related to the non-compete

clause, meant that the issues raised between GTI and the MP Funds were within the parties' arbitration agreement. In coming to that conclusion the arbitrators, as civil lawyers, considered both the "subjective" and the "objective" limits of contractual documents (paras 52 and 60).

The Final Award

26. Towards the end of their lengthy and careful Final Award, the three arbitrators found as matters of fact that VRG's explicit case of fraud had been wholly proven. Relevant passages are as follows:

> **1. CLAIMANT'S POSITION**
>
> 568. Claimant seeks to hold Respondents 2 and 4 [the latter being the MP Funds] liable for their allegedly fraudulent conduct during the course of the negotiations of the Agreement and its performance.
>
> Allegation of fraud by Respondent 4
>
> 569. According to Claimant, Respondent 4 manipulated the numbers that were provided to Claimant upon setting the price for the agreed deal. Respondent 4 thereby (albeit indirectly) received an amount greater than reasonable for the VRG shares than if the numbers had been provided in a proper manner.
>
> 570. The doctored numbers were provided to KPMG, the Purchaser's financial adviser, which was unable to detect such fraud because it was not given the opportunity to conduct a complete preliminary financial audit in VRG.
>
> 571. The fraud was perpetrated by Mr Lap Chan Respondent 4's executive officer [*director*], since the definition of the purchase price, the inclusion of the price adjustment clause, and the specification of Appendix III to the Agreement were devised and carried out by Mr Lap Chan, as Respondent 4's direct representative.
>
> 572. The existence of a commingling of assets and abuse of control between Respondent 4, as controlling party, and the Sellers, as subsidiaries [*filais*], contributed to such fraud.
>
> 573. Consequently, Respondent 4's bad faith actions ended up "*maliciously misleading Claimant, its counsel and consultants into believing that the company was in a financial position which was very different from reality.*"
>
> Qualifying Respondents' Actions
>
> 574. Claimant qualified Respondent 4's actions as follows:
>
> - "The conduct…illegal;"
> - "*Clear case of abuse of right and a violation of objective good faith*;"
> - "*Truly a wrongful act*;"
> - "*A contradictory behavior on Claimant's good faith noted in both the pre-contractual and post-contractual phases;*"

- "[which] *is repulsive to everyone who had access to the facts being discussed*;"
- "*Respondent 4 admittedly manipulated, doctored, defrauded*;"
- "*a falsification of numbers*;"
- "*repeated omissions and falsehoods*;"
- "*a clear accounting fraud*;"
- "*an omission of* [...] *adjustments caused a purposeful and highly detrimental distortion to the final result*;"
- "*unequivocally shows bad faith*;"
- "*changes that ended up maliciously misleading Claimant*;"
- "*Deliberately adulterated such numbers with the sole purpose of deceiving Claimant*;"
- "*A manifestly malicious omission of information and facts*."

575. Claimant attributes such conduct directly to Respondent 4, and extends it to all other Respondents; Claimant argues that bad faith and fraudulent misconduct was only made possible through Respondents' joint actions and the corporate structure created.

2. RESPONDENTS' POSITION

576. The Arbitration Tribunal, before describing Respondents' position, wants to state for the record that the allegations of bad faith and the attribution of such conduct to all Respondents are, as evidenced from previous paragraphs, continuously contained in Claimant's writings, ever since the beginning of this arbitration. Therefore, Respondents had ample opportunity to respond to such allegations.

...

Allegations by Respondent 4:

578. On its part, Respondent 4 begins its defense by alleging that it "*never used the legal personality of either Respondent 1 or 2 to defraud any third party. What has been proven is that Respondent 4 indirectly invested US$400 million in VRG, and in Respondents 1 and 2* [the Sellers], *and nothing has been recovered. Such corporate entities at all times had their own equity, management, employees, ultimately a separate existence as between each other. Nor could their existence be intermingled with that of* [Volo Logistics], *already excluded from this arbitration, or that of Respondent 4*."

579. Subsequently, Respondent 4 analyzes in detail how the negotiations of the Agreement developed. It acknowledges that Mr Lap Chan, Respondent 4's representative, "*has been the main intermediary in negotiations with the GoI Group,*" but that "*such negotiations, conducted primarily by Mr Lap Chan, were never conducted by him alone.*" In addition, it alleges that Mr Lap Chan had been travelling since March 17 and did not take part in the execution of the Agreement on March 28, 2007.

580. As regards the Initial Balance Sheet included in Appendix III to the Agreement, Respondent – supported by Mr Lap Chan's own assertions – believes it was prepared by Mr Márcia Nobre with PwC's assistance and checked by KPMG, the Purchaser's advisor, note by note. No number pertaining to the Agreement was imposed upon the GoI Group. The GoI

Group's top management received and analyzed the reports before making the decision to move forward with the deal.

581. KPMG exerted – as described by Respondent 4 – some extensive work checking on VRG's accounts and even issued three reports, a first one on February 24, a second one on March 16, and a third one in April, all of them in 2007. KPMG and GOL held at least one meeting to discuss the final draft and KPMG's impressions regarding the analysed documents. GOL was aware of the conditions for the deal upon receiving the reports issued by KPMG, and went on to close the deal.

3. ANALYSIS BY THE ARBITRATION TRIBUNAL

...

586. Claimant seeks in this arbitration to have the characterization of fraud in the negotiation and performance of the Agreement cause Respondent 4 to be held liable for the Respondent I's obligation to pay Claimant the price adjustment provided for in the Agreement. The dispute is therefore an issue related to the main Agreement, which falls fully under the scope of the Arbitration Tribunal's jurisdiction as affirmed in the Partial Award.

587. The Tribunal next shall proceed to analyse the claim made by the Claimant.

3.1 THE PROVEN FACTS

Mr Lap Chan's Person

588. Mr Lap Chan was an executive officer of and partner in the MatlinPatterson Fund. Such fund controlled Vlog, the company owning VRG, and which acted as Seller in the Sale and Purchase Agreement. Mr Lap Chan, acting as the MatlinPatterson Fund's representative, was the main intermediary with the GOL Group during the negotiations prior to the execution of the Agreement.

589. Mr Lap Chan was the person who prepared and/or ordered the preparation of the Initial Balance sheet. Such preparation used as its basis a balance sheet, i.e. a complete balance sheet, drawn from VRG's official books of account on the very day of March 15, 2007.

Manipulation of VRG's Bookkeeping

590. Upon preparing the Initial Balance Sheet, Mr Lap Chan ordered two significant changes introduced, arbitrarily altering the figures of two bookkeeping entries that appeared in VRG's official books of account.

591. (i) According to VRG's official bookkeeping, the amount of R$ 40,783,150 appeared in the balance sheet item "Commercial leasing payable." However, Mr Lap Chan ordered the figure reduced to R$ 20,737,278 in the Initial Balance Sheet. The only reason for rejecting the original figure was that Mr Lap Chan understood that the original figure was not reliable, and therefore he made an approximate calculation, taking as its basis the fleet of nineteen 737 and three MD-11 aircraft that the company then had to estimate the amount that should be inserted in the Initial Balance Sheet.

592. (ii) The balance sheet item "Fees, taxes and contributions – INFRAERO" had, as of March 15, 2007, an amount of R$ 10,512,166. However, Mr Lap Chan ordered the figure in the Initial Balance Sheet reduced to zero R$. Mr Lap Chan explained that he "*imagined it had to be zero, INFRAERO won't let you fly if you don't pay on time.*" With this simple argument he decided to reduce an account balance, which in the bookkeeping as of March 15 was more than R$ 10 million, to zero R$.

***

593. During the Evidentiary Hearing, Mr Lap Chan sought to justify his actions with the supposedly low quality of VRG's accounting information (at the Evidentiary Hearing Mr Lap Chan used the expression "*garbage in, garbage out*"). Mr Lap Chan's explanations could not be more unconvincing, and his actions have to be qualified as sheer manipulation.

594. VRG was a major airline which had sophisticated accounting systems based on the SAP program – one of the most complex in the market – controlled by experienced professionals. In spite of this, Mr Lap Chan in the first case reduced the figure, which was the result of official bookkeeping, to half, using as his basis a crude and unempirical calculation of what the balance of such an account should be, based on the number of leased aircraft, and in the second case, he reduced the balance completely to zero.

...

596. In short, even assuming that the quality of VRG's accounting information for the month of March was less than optimal, low quality absolutely does not justify the two interventions Mr Lap Chan made in the official bookkeeping numbers upon preparing the Initial Balance Sheet: by reducing two major liabilities accounts, that of "Commercial leasing payable," amounting to R$ 40 million, to exactly half, R$ 20 million, and that of "Fees, taxes and contributions – INFRAERO," amounting to R$ 10 million, to zero. This is why such conducts are deemed a conscious and voluntary falsification of VRG's bookkeeping in order for the Initial Balance Sheet to show a working capital higher than as stated in the official bookkeeping.

Misrepresentation that the Initial Balance Sheet was revised by PwC

597. The Agreement includes an express warranty that PwC had prepared and validated the figures of the Initial Balance Sheet (Sections 5.1 and 5.1.1). Mr Lap Chan himself (with no knowledge of Mr Humberto Tognelli's written statements) stated at the hearing that the Initial Balance sheet was revised by PwC. Such statements are most plainly untrue, because PwC itself stated that it never either prepared or revised the figures shown in the Initial Balance Sheet. GTI was, thus, led into believing that the figures shown in the Initial Balance Sheet had the approval of a prestigious audit firm. And this caused GTI to be unable to cast any doubt on the truthfulness of the Initial Balance Sheet.

The Misinformation facilitated to GTI

598. The Sellers also warranted in the Agreement that "*no information provided by* [the Sellers] *and VRG contains any misrepresentation or omission*

of any fact that might lead [the Purchaser] *into any misjudgment in connection with the information provided*" (Section 7.14 of the Agreement).

599. It has been proven that the information contained in Appendix III to the Agreement (Initial Balance Sheet) did not reflect a true and proper image of VRG's accounting. From the Initial Balance Sheet attached to the Agreement, it could be deduced that VRG's working capital, as of March 15, amounted to R$ 40,750,874. In reality, it was inflated by the two item changes ordered by Mr Lap Chan – by more than R$ 30 million. And with VRG's accounting duly revised, the Tribunal has come to the conclusion that the true working capital, as of the Consummation Date, amounted to R$ (52,236,798). Which is to say: instead of a positive working capital of R$ 40 million, the company in reality had, as of the Consummation Date, a working capital deficit of R$ 52 million.

Effects of the Sellers

600. Mr Lap Chan's and Sellers' joint actions, described in detail above, engendered in Claimant an error about VRG's working capital. GTI signed the Agreement convinced that such working capital amounted to R$ 40 million, uninformed that it was artificially inflated by more than R$ 30 million.

601. But there is more: the assertion that a company as renowned as PwC had revised and, consequently, supported the figures of the Initial Balance Sheet, created in Claimant the confidence that such figures were accurate, and that they reflected a true image of the equity position. It is to be presumed that, without PwC's warranty, Claimant would not have accepted the Initial Balance Sheet, but would have submitted it to a careful review by its own financial advisors. Consequently, the Purchaser could not realize that the Initial Balance Sheet gave a totally distorted image of VRG's working capital.

602. The misinformation facilitated to GTI is directly attributable to Respondent 4, as it was its representative, Mr Lap Chan, who ordered figures manipulated and current liabilities artificially [increased, *sc* decreased]. Respondents 1 and 2, as the main interested parties in the deal and controlled by Respondent 4, were aware of or at least should be acquainted with the financial statements which were the basis for the deal, and therefore were aware of the information erroneously provided to Claimant.

27. The arbitrators then proceeded to determine the consequences in law of the facts that they had found proven. They began with the doctrine of piercing the corporate veil, which VRG had put in the forefront of its submissions, and then turned to deal with the malice which VRG had also alleged, and had proved, and to its legal consequences. They did so by a process known to civil law as *iura novit curia* ("the court knows the law"), a doctrine which is also described by the expression *da mihi factum et dabo tibi legem* ("give me the facts and I will give you the law").

3.2 FITTING THE FACTS INTO BRAZILIAN LAW

603. Once the proven facts are established, it is necessary to determine how they fit into Brazilian law.

CC Article 50: Lifting the Corporate Veil

604. Claimant has repeatedly indicated throughout its briefs that this is a case of fraud. In its opinion, the manipulation of the balance sheets and commingling of assets between Respondent 4 and Respondent 1 reflect, in the first place, an abuse of legal personality under CC article 50.

605. CC article 50 provides:

> "*In the event of abuse of legal personality characterised by a diversion of purpose, or commingling of assets, the judge may, upon a motion by the party or the Attorney General, whenever the latter is authorized to intervene in the case, rule to extend the effects of certain and determined obligational relations to the personal assets of a legal entity's officers or partners.*"

606. This provision in fact regulates a presumed lifting of the corporate veil: CC article 50 describes a situation where the independent corporate entities of a controlling party and a controlled entity may be disregarded, with their independent equity liabilities not being acknowledged, and the liability for the controlled entity's debts being consequently extended to the controlling party. In order for such effects to be produced, the CC requires the existence of an "*abuse of legal personality*" characterized by a "*diversion of purpose*" or a "*commingling of assets*". As affirmed in Brazilian case law, in order for lifting the corporate veil to be authorized, "*an actual manipulation of the company's independent equity in favor of third parties must be present.*"

607. None of these requirements are present in our case: the MatlinPaterson Fund has not used Respondents 1 and 2 for any purpose other than the corporate purpose for which they were organized, their assets have not been commingled, and they have not caused the controlled companies' independent equities to be manipulated.

608. In the Tribunal's opinion, CC article 50 and the lifting the corporate veil doctrine regulated therein do not constitute the appropriate legal basis for grounding Respondent 4's liability as sought. Let the record show that the companies' personalities and their resulting independence are of great value in the Brazilian legal system, and are therefore a rule of Brazilian law.

CC articles 45 et seq: Malice

609. Having ruled out the application of CC article 50, the Tribunal has to rule on any liability by Respondent 4 regarding Claimant's allegations of the former's presumably malicious actions.

610. Claimant effectively argued that in the "*manipulation of numbers*" "*there was a manifestly malicious omission of information and facts,*" that Respondent 4's conduct presumed a violation of good faith, and that such malicious behavior was channelled through the corporate structure which was created.

611. In that respect, Prof Alvaro de Villaça de Azevedo concluded in his opinion, that such malicious actions by Respondent 4 fit into the breach of objective good faith doctrine (CC article 422), and into the third party's malice doctrine (CC article 148).

612. Respondents had ample opportunity to defend themselves from Claimant's allegations, but they focused their defense on allegations of a factual nature, and chose not to analyze the specific legal aspects of the allegations of malice made by the Claimant against them.

613. As charges of malicious conduct have been made, it is up to the Arbitration Tribunal, in accordance with the general provisions of Brazilian Procedural Law, to analyze and rule on this issue; and to do so the Tribunal (A) shall look into the concept and regulation of malice under Brazilian law, and then (B) shall analyze whether such actions fit into the legal concept of malice.

A. Regulation of Malice under Brazilian Law

614. Brazilian Law does not contain a definition of malice. But there is a unanimous opinion that it consists of:

> "*any suggestion or ruse anyone employs with the intention or awareness of misleading the maker of a statement* [of will], *or of keeping the latter misled, as well as any disguising by the recipient of a statement or by a third party, of an error by the maker of such statement.*"

615. Or using Clóvis' classic definition:

> "*Malice is a crafty ruse or device employed to mislead someone into performing a transaction harmful to the latter, to the benefit of the one engaging in malice or of a third party.*"

Causal malice and incidental malice

616. The CC makes a differentiation between two major categories in the concept of malice:

Causal malice, which is the equivalent of a serious mistake, and allows for the annulment of any transaction the cause of which is for this reason flawed, or compensation for losses and damage sustained (CC article 145: "*Transactions may be annulled or malice whenever the latter was the cause of the former*"); Incidental malice, representing a less transcendental mistake, which does not cause the transaction to be annulled, and only requires a satisfaction of losses and damages (CC article 146: "*Incidental malice only requires the payment of losses and damages.*").

…

619. In the case at hand, an allegedly malicious conduct is attributed to Respondent 4. But the latter does not participate in the Agreement either as Purchaser or Seller. Can its conduct, albeit originating from a third party, be qualified as malicious? The answer is yes.

Third-Party Malice

620. There is a second distinction that is greatly important to this arbitration: malice is usually committed by someone seeking to be counterparty to the transaction. Such counterparty makes a mistake precisely to mislead the lawful

party into accepting the deal. But it is also possible to have a third party break such pre-contractual relationship, make the mistake, and mislead the parties into closing on the contract. In that case, we are talking about third-party malice.

621. Brazilian Law, which on this point is more developed than other legal systems surrounding it, contains the following regulation under CC article 148:

> "*A transaction may also be annulled upon a third party's malice if the party benefitting from the transaction knew or should have known about such malice; otherwise, even if the transaction subsists, the third party shall be liable for all the deceived party's losses and damages.*"

622. Which is to say: Brazilian Law expressly provides that deception characterizing malice can be engaged in not only by the counterparty, but also by a third party. And the effects of deception again depend on whether malice is causal or incidental: in the first case, they cause the transaction to be annulled; in the second, "*even if the transaction subsists, the third party shall be liable for all the deceived party's losses and damages.*" Which is to say: "*if A, because of malice by C – which B, another party, knew about – signed the contract, it may not file an action for annulment against B, but instead, only an action for damages*" against C.

623. Silvio de Salvo Venosa gives the following example of a third-party malice situation:

> "*Imagine hypothetically that someone intends to acquire some jewellery, imagining it to be gold, when in reality it is not. The fact that it is not gold is not discussed by the seller, much less by the buyer. A third party, who has nothing to do with the deal, gives his opinion exalting the object as made out of gold. Thereupon the buyer is misled into making the purchase. There is clear* third-party malice *therein.*"

624. In the above example, the third party engaged in ploy to convince the buyer that the product was made out of gold. Third-party malice is characterized by a fraudulent collusion between the contracting party and a third party with the intent of maliciously misleading the other contracting party into closing the deal. In our case, Respondent engaged in a ploy to convince the Purchaser that the working capital in the Initial Balance Sheet was right and much higher than actual. And Respondents 1 and 2, aware of such ploy, stated that the working capital had been proved by PwC – thus covering up such a ploy.

B. How the Facts fit into the Concept of Malice

625. Brazilian case law finds the necessary elements for the existence of malice to be the following:

(i) The malicious party's intention to mislead the contracting party into performing a legal act;
(ii) Usage of seriously misleading resources;
(iii) That such ruses be the determinant cause of a fundamental element to the transaction;
(iv) That they originate from another contracting party or from a third party.

626. Let us analyze each element separately.

(i) Intention to mislead into the performance of a legal act

627. The MatlinPatterson Fund was no doubt greatly interested in getting GoI to acquire VRG. That coincides precisely with Respondent 4's corporate purpose, because the fund's purpose is to acquire distressed companies, and to resell them after their recovery. MatlinPatterson had acquired VRG in 2006, and obtained the company's control on December 15 of that year. It paid the price of US$24 million and, furthermore, has made maximum investments of US$75 million into the company itself. Only three months after the purchase was consummated the possibility arose of VRG being resold to the GoI Group for the amount of US$ 275 million (as stated in Section 4.1 of the Agreement). VRG's sale to GoI promised to be a transaction that would bring great benefits to the MatlinPatterson Fund, and therefore the latter was highly interested in having the transaction concluded successfully.

628. In its interest of obtaining a successful transaction, MatlinPatterson authorized a top-level executive, Mr Lap Chan, to play a major role in the negotiation process and in the preparation of the Initial Balance Sheet attached to the Agreement.

(ii) Usage of Seriously Fraudulent Resources

629. The Arbitration Tribunal has already ruled that Respondent 4 meddled in the preparation of the Initial Balance Sheet and maliciously manipulated VRG's bookkeeping.

630. Additionally, the Sellers, controlled by Respondent 4, warranted to GTI that the Initial Balance Sheet had been revised by PwC. – which is untrue, since PwC itself denies having done such work. That falsehood is an aggravating factor to a conduct already malicious in itself.

(iii) A Determinant Cause of a Fundamental Element to the Transaction

631. Upon signing the Agreement, GTI undertook to pay US$ 275 million for a company that seemingly had a positive working capital of R$ 40 million, such as stated on the Initial Balance Sheet, which purportedly had been revised by PwC. In the reality of the facts, its working capital had not been revised by the audit firm and, duly calculated as of the Consummation date, turned out to be negative by an amount of R$ 52 million.

632. Existence of a positive and sufficient working capital constitutes an essential element of the transaction. Good evidence of that is that the parties agreed on a price adjustment, R$ by R$, in case the actual working capital as of the Consummation Date were higher or lower than the figure of R$ 40,750,874 warranted in Appendix III.

633. If GTI had known upon signing the Agreement that VRG's working capital was not surplus, positive by R$ 40 million, but instead deficit by R$ 52 million, such knowledge would undoubtedly have impacted the agreed price; and such impact would be to lower the price by the capital it would have to inject into VRG to reinstate its working capital of (R$ 52 million) to R$ 40 million.

(iv) Knowledge of the Manipulation by the Sellers

634. The bookkeeping manipulation was not done directly by the Sellers but by its controlling party MatlinPattterson.

635. The Sellers in the Agreement had (or should have had) a perfect knowledge of MatlinPatterson's actions. Respondents 1 and 2 were companies controlled by MatlinPatterson, which directly benefited from VRG's sale. Engaged in air transportation, the Sellers were industry professionals, and therefore it must be assumed that they knew perfectly well what its controlled company VRG's equity position was. When they signed the Agreement, they were or should have been aware that the working capital being warranted was unreal, and that PwC had never validated the figures.

636. All necessary requirements, therefore, have been met for the third-party malice doctrine to occur; Respondent 4's actions allowed Vlog and Volo DB to sell VRG to GTI for a much higher price than would have been agreed if such conduct had not taken place.

637. Under CC article 148, third-party malice, if essential, constitutes defective consent, and can lead to the annulment of the transaction. In the case at hand, because the parties' interest is circumscribed to a price adjustment, this is incidental malice, which does not imply contract annulment. If incidental malice occurs, it gives rise to tort [*ilicito extracontractual* – extracontractual wrongdoing], for which the legal consequence is contained in CC article 146. Such conduct leads to the obligation to repair any losses and damage caused.

638. The Arbitration Tribunal has already determined that Respondent 4's malicious behaviour made the contract more onerous for Claimant. And the Tribunal shall dedicate the following section to determining the damage sustained by Claimant.

3.3 THE LEGAL CONSEQUENCE OF RESPONDENTS' BEHAVIOR

…

640. And what was the damage sustained?

641. Claimant alleges that the deceptions it suffered "*impl*[ied] *a much greater initial outlay by VRG.*"

642. The Tribunal agrees with the Claimant. The damage sustained by the Purchaser is clear: because of the Respondents' anti-legal conduct, Claimant acquired a company convinced that the latter's working capital was R$ 40,750874 and, in reality, it encountered a negative working capital of (R$ 52,236,786). To be able to take the company to the position Claimant thought it had acquired such company in, Claimant had to inject into the latter capital in an amount equal to R$ 92,987,672. This figure quantifies the damage incurred by it.

643. The damage coincides in its quantification with the price adjustment amount. This was not by chance: the compensatory principle is common and consists of repairing the deficit created in VRG's working capital.

28. In sum, the arbitral tribunal found as matters of fact (i) that the MP Funds, through Mr Lap Chan, whose evidence it had heard and rejected, had intentionally deceived GTI by manipulating the figures for the airline's working capital; (ii) that the difference between the working capital of the airline as represented and warranted and the truth was some R$ 92 million; and (iii) that Mr Lap Chan's fraud had induced VRG to enter into the Agreement. The tribunal had then gone on to conclude as a matter of law (iv) that although the MP Funds could not be regarded as alter egos of the Sellers, nevertheless they had jointly with the Sellers deceived GTI into buying the airline on a false financial basis; and (v) that the appropriate legal ground in Brazilian law for such a situation was article 148 dealing with third party malice. Furthermore, the tribunal pointed out that article 148 had been relied on in Professor de Azevedo's opinion (which had been presented by VRG as its Exhibit 4, see footnote 308 to the Final Award's para 611), and that the MP Funds had had ample opportunity to defend themselves but had concentrated on the factual issues rather than on the consequences in law of VRG's factual case. The consequence, given the R$ for R$ operation of clause 5 of the Agreement, was that VRG was entitled to be compensated by the difference between the working capital of the airline as represented and in truth, whether that was under clause 5 or as damages in deceit, viz some R$ 92 million.

Brazilian arbitration law

29. The MP Funds were entitled under Brazilian law to commence an action before the Brazilian courts to review the arbitral tribunal's decision in its Partial Award as to its jurisdiction; and were also entitled to challenge the Final Award on grounds of lack of due process. Both of which the MP Funds proceeded to do.

30. The relevant Brazilian law is found in Brazil's Arbitration Law, viz Lei 9.307/96. As translated into English it provides inter alia as follows:

> Article 8. An arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract…
>
> The arbitrator has jurisdiction to decide ex officio or at the parties' request, the issues concerning the existence, validity and effectiveness of the arbitration agreement.
>
> Article 20. The party wishing to raise issues related to the jurisdiction, suspicion or impediment of an arbitrator or arbitrators, or as to the nullity, invalidity or ineffectiveness of the arbitration agreement, must do so at the first opportunity, after the commencement of the arbitration.

20.1 When the challenge of suspicion or impediment is accepted, the arbitrator shall be replaced in accordance with Article 16 of this Law; and if the lack of jurisdiction of the arbitrator or arbitral tribunal, as well as the nullity, invalidity or ineffectiveness of the arbitration agreement is confirmed, the parties shall revert to the Judicial Authority competent to rule on the matter.

20.2 When the challenge is not accepted, the arbitration shall proceed normally, subject however to review of that decision by the competent Judicial Authority if a lawsuit referred to in Article 33 of this Law is filed.

Article 21. The sole arbitrator or the arbitral tribunal shall comply with the procedure agreed upon by the parties in the arbitration agreement, which may refer to the rules of an arbitration institution or specialised entity, it being possible for the parties to empower the sole arbitrator or arbitral tribunal to regulate the procedure.

21.1 In the absence of any provisions on the procedure, the sole arbitrator or arbitral tribunal shall conduct the arbitration in such manner it considers appropriate.

21.2 The principles of due process, equal treatment of the parties, impartiality of the arbitrator and freedom of decision shall always be respected…

Article 32. An arbitral award is null and void if:
1. The arbitration agreement is null;…
4. It has exceeded the limits of the arbitration agreement;…
8. It violates the principles set forth by Article 21.2 of this Law.

Article 33. The interested party may request to the competent Judicial Authority to declare the arbitral award null in the cases set forth in this law.

33.1 A request for the declaratory nullity of the arbitral award, whether partial or final, will comply with the rules of cognisance procedure set up in the Law No 5869 of January 11, 1973 (Code of Civil Procedure), and it must be filed within 90 (ninety) days…

33.2 If the request is granted, it will set the arbitral award aside…

33.3 A declaration of nullity may also be raised by means of a debtor's defence, according to Article 475-L et seq. of Law No 5869 of January 11, 1973 (Code of Civil Procedure), in case court enforcement proceedings are filed.

Article 34. A foreign arbitral award shall be recognised or enforced in Brazil in accordance with international treaties effective in the internal legal system, or, in its absence, in strict accordance with the terms of this Law…

Article 39. Recognition of a foreign arbitral award will also be refused if the Superior Court of Justice finds that:

…
2. The decision violates national public policy.

Cayman Islands law regarding the enforcement of a foreign award

31. The Cayman Islands are party to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the **New York Convention**). The essence of the New York Convention for present purposes is to be found in the Cayman Islands' Foreign Arbitral Awards Enforcement Law (1997 Revision) (the **CI Enforcement Law**). Reflecting article V of the New York Convention, section 7 of the CI Enforcement Law provides as follows:

> 7. (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in subsections (2) and (3).
> (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves:
>
> (a) …
> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where it was made;
> (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
> (d) subject to subsection (4), that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration;
> (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or
> (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
>
> (3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award…
>
> (5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in paragraph (f) of subsection (2), the court, before which enforcement of the award is sought, may, if it thinks fit, adjourn proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security.

The Dallah Case

32. *Dallah Real Estate and Tourism Holding Co v. Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46, [2011] 1 AC 763 (*Dallah*) is the leading modern authority in English jurisprudence on the issues arising out of an attempt to enforce a foreign arbitral award

in England in circumstances where there has been a challenge to the arbitrators' jurisdiction on the basis that the award debtor never agreed to arbitration in the first place.

33. The *Dallah* award was made in France, and therefore the issue in the English courts of whether or not the Government of Pakistan had been a party to the arbitration agreement and contract in that case was governed by French law (see article V(1)(a) of the New York Convention and section 103(2)(b) of the English Arbitration Act 1996). In that case there had been no express choice of law for the arbitration agreement or the contract in which it had been contained, and therefore the arbitrators had applied "those transnational principles and usages which reflect the fundamental requirements of justice in international trade and the concept of good faith in business". It followed that at the enforcement stage, the fall-back provision of article V(1)(a) and section 103(2)(b) – "under the law of the country where the award was made" – applied.

34. The Government of Pakistan had not been a signatory to the *Dallah* contract (although it had been to an earlier Memorandum of Agreement). Instead, a special Trust had been formed to make the contract with Dallah. Unfortunately, under Pakistani law the Trust had ceased after three months to continue in existence in the absence of its renewal. That is what had caused Dallah to pursue the Government of Pakistan. The arbitrators found nevertheless in its initial award on jurisdiction that the Government of Pakistan was a party to the contract and its arbitration agreement, and went on in a final award to render a monetary award against it. It was that award which Dallah was seeking to enforce.

35. The commercial court, the court of appeal and the Supreme Court, applying French law with the assistance of experts in French law on both sides, all held that the Government of Pakistan had never been a party to the contract or arbitration agreement and therefore refused enforcement of the award. There was no essential dispute between the experts as to what French law was, but they differed as to its application.

36. To the English courts' embarrassment, however, a subsequent attempt to enforce the award in France, challenged on the same ground of lack of agreement, succeeded, first in the tribunal de commerce of Paris and then in the Paris cour d'appel.[1] There was no further appeal to the cour de cassation. The English courts had got French law wrong. That should perhaps not come as a great surprise, since it can be very difficult for a foreign court to apply a different law correctly, shaking off the attitudes of domestic law and taking on the mantle of a foreign law. This is particularly true of some differences between the common and the civil law. There are

[1] Judgment of 17 February 2011, *Gouvernement du Pakistan – Ministère des Affaires Religieuses v. Dallah Real Estate & Tourism Holding Co, Case No 09/28533 (Paris Cour d'appel)*

important differences (as well as some important similarities) between common and civil law principles of contract interpretation: they have been authoritatively discussed in *Chartbrook Ltd v. Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1 AC 1101, see Lord Hoffmann at para [39], where he explained why the French philosophy of contract interpretation – which has been so influential in civil law jurisdictions throughout the world – "is altogether different from that of English law". It is also well known that the civil law has shown itself to be much better disposed to finding that non-signatories have bound themselves to arbitration agreements than is the common law: and the *Dallah* case, in its English and French ramifications, has illustrated that well.[2]

37. If the successful French enforcement proceedings had preceded the English proceedings, or if the Government of Pakistan had previously unsuccessfully challenged the jurisdiction of the arbitrators in that case in France, it is impossible to think that the English courts would have erred in its findings of French law. They would have had before them the French courts' own decisions on the instant case. Whether as a matter of French law as found in the English courts, or as a matter of estoppel, it is wholly improbable to think that the English courts would have professed to know and apply French law better than the French courts.

38. In the present case, however, unlike *Dallah*, the challenge in the country of the express choice of law, of the seat of the arbitration, and where the award was made, namely Brazil, has preceded the enforcement proceedings in the Cayman Islands. It is intuitively surprising therefore to find that the Cayman Islands judge has differed from the Brazilian courts in its findings about Brazilian law, at any rate on the issues concerning the arbitration agreement (admittedly the issue concerning public policy is a matter ultimately for Cayman Islands law, although even there Brazilian law and procedure very arguably enter in an important way into the analysis).

39. In my judgment, therefore, it is necessary to be cautious about the findings below, and to enquire carefully into the process by which Mangatal J arrived at her conclusions.

40. One of the matters discussed in this appeal, as it was before the judge, was the nature of the forensic examination which is required when there is a challenge in court to jurisdiction disputed before but upheld by arbitrators under their rights of *compétence compétence*.

---

[2] The English and French decisions are discussed by Prof Gary Born in his *International Commercial Arbitration* (2nd ed, Kluwer Law International 2014) at 3477-3479, where he comments on the danger of "national courts rejecting the expertise of foreign tribunals, including on matters of foreign law; in many instances, these decisions also appear to reflect an unstated preference for applying local law (of the recognition forum) rather than that of the arbitral seat to the arbitration agreement." The English and French decisions are also discussed in an interesting article by Jacob Grierson and Dr Mireille Taok "*Dallah*: Conflicting Judgments from the UK Supreme Court and the Paris Cour d'Appel" in (2011) 28 J Int Arb 4 at 407.

41. As the Supreme Court explains in *Dallah*, the arbitral tribunal's rights of *compétence compétence* always remain subject to challenge in the courts. The doctrine of *compétence compétence* does not mean the exclusion of the courts, or that the courts are prima facie bound by the arbitrators' solution, or that the party challenging jurisdiction in the courts bears the burden of displacing the arbitrators' solution, or that the arbitrators' solution survives unless the courts find it irrational. It is not as though the arbitrators were the primary decision makers and the courts' role was only that of judicial review as that is practised in public and administrative law.

42. It is because the absence of jurisdiction in the arbitral tribunal is totally destructive of their powers – and also because of the terms of the New York Convention itself – that English law requires that the court challenge to a tribunal's preliminary *compétence compétence* view as to its jurisdiction has to be conducted from the bottom up, or, as it has been said, *de novo*. That was affirmed in *Dallah*, approving the decision in *Azov Shipping Co v. Baltic Shipping Co* [1999] 1 All ER 476. I refer to Lord Mance's judgment at paras [25] to [29], to Lord Collins' judgment at paras [86] to [96]. The essence of the matter can be found in Lord Mance's statements that "a party who has not submitted to the arbitrator's jurisdiction is entitled to a full judicial determination on evidence of an issue of jurisdiction before the English court" (at para [26]), and that what is required is "ordinary judicial determination of that issue" (at para [28]); or in Lord Collins' statement that the English courts "will examine or re-examine for themselves the jurisdiction of arbitrators" so that they "should not be in a worse position than the arbitrator for the purpose of determining the challenge" (at para [96]). The position is the same in France and the United States (see at paras [20], [22], [24], [25] and [92], citing *République arabe d'Egypte v. Southern Pacific Properties Ltd* [1986] Rev Arb 75, [1987] Rev Arb 469 (12 July 1984, Paris cour d'appel and 6 January 1987, cour de cassation), and *First Options of Chicago Inc v. Kaplan* (1995) 514 US 938, 943 and *China Minmetals Materials Import and Export Co Ltd v. Chi Mei Corpn* (2003) 334 F 3d 274, 288. Indeed, it is not clear that the position is different anywhere (although there are differences as to the time at which the courts review arbitrators' jurisdiction).

43. However, the position alters or may alter once an award has already been subjected to review in the court with supervisory jurisdiction or has been subject to enforcement proceedings either in that court or even that of another country. At that stage, one is not dealing merely with the preliminary *compétence compétence* views of the arbitral tribunal, but with the judgment of a court, whose jurisdiction is not in question. The court's judgment will have particular significance when that court is applying as its own law the law which governed the arbitral decision. That was recognised by Lord Mance, when he said (at para [29]):

> …Whether it is binding in France could only be decided in French court proceedings to recognise or enforce, such as those which Dallah has now begun. I note, however, that an English judgment holding that the award is not valid could prove significant in relation to such proceedings, if French courts recognise any principle similar to the English principle of issue estoppel (as to which see *The Sennar (No 2)* [1985] 1 WLR 490). But that is a matter for the French courts to decide.

It was also recognised in what Lord Collins said at para [98]:

> Consequently, in an international commercial arbitration a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's jurisdiction in the courts of the arbitral seat; and it can resist enforcement in the court before which the award is brought for recognition and enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought.

And in the court of appeal in *Dallah*, the relevance of a decision in the supervisory court for another court later asked to enforce an award was also discussed in my judgment (at paras [89] and [90]), where I said:

> 89…It is possible to see that a defence allowed under Convention or statute may nevertheless no longer be open because of an estoppel (Professor van den Berg's view, see *The New York Arbitration Convention 1958*, at p 265)…
>
> 90. As for the case of a successful or unsuccessful (or waived) challenge in the courts of the country of origin, that is a more controversial area. My own view is that a successful challenge is not only in itself a potential defence under the Convention or our statute but likely also to raise an issue estoppel. As for an unsuccessful challenge, that may also set up an issue estoppel…

The Brazilian proceedings

44. In December 2010, the MP Funds brought proceedings against VRG under Brazil's Arbitration Law for annulment of the final award. They complained both about the arbitral tribunal's lack of jurisdiction and about the tribunal's application of the doctrine of *iura novit curia* in order to ground its decision on third party malice. The MP Funds' action was brought under article 33 of the Law.

45. The first instance judgment, dated 1 July 2011, was that of Judge Helmer Augusto Toqueton Amaral. He first rejected VRG's defence that the MP Funds' action was out of time. He then turned to the MP Funds' complaints and divided them into four points. His judgment reads in relevant part as follows (I have numbered the paragraphs, and the sentences within para [3] below, for the sake of convenience):

[1] I examine directly the claim, pursuant to Art 330, I of the Code of Civil Procedure, as this is primarily a matter of law, and the record is duly complete with respect to the facts…The discussion revolves around whether it is possible or not to nullify the arbitral sentence, which claim was based, primarily, on four points.

[2] The first point relates to whether it was possible for the plaintiffs to be bound by the arbitration clause. This, because the plaintiffs believe that the contract…would not be capable of extending its effects to the plaintiffs who are not parties to the agreement. However, such was not the case…It is even noted that the plaintiffs, in their own complaint, unequivocally confirm their participation in the creation of the referenced contract, stating that they even rejected the request by the respondent to include them expressly…Such an extension of responsibility occurred also by force of an amendment to the contract…an uncontested fact, and which, by express provision, amended the original contract, binding the plaintiffs. The explication of the responsibilities in the referenced amendment does not exclude the extension of the effects of the contract, including in relation to the possibility of arbitration. In this regard the first claim of the plaintiff is rejected.

[3] [i] The second aspect is related to the alleged decision with grounds different from what was argued, resulting in a nullity. This also did not occur. From what may be gleaned from the analysis of the documentation, there was given a different legal qualification to the conduct of the plaintiffs. That is, nothing was changed or altered about the facts of the discussion, but only the correct (in the opinion of the judge) legal definition of the facts established, applying the pertinent normative consequence, which was entirely natural, including in light of the old Latin maxim "*Da mihi factum, dabo tibi ius*." ["Give me the facts, and I shall give you the law"], i.e. the facts are what must be described, with the judge applying the relevant law. [ii] Remember, even, that pursuant to Clause 14.6, the contract would be construed and governed by the laws of Brazil, and the arbitration court must apply them in the event of a dispute (p.262). [iii] It is also observed that the clause of the contract itself, as it was drafted, did not limit the scope of jurisdiction over disputes of the arbitral tribunal, thus there is not verified any violation of Art 32, Clause IV of the Arbitration Act. The clause was express in submitting to arbitration "all disputes arising from or related to this instrument." [iv] It is important to also remember that in relation to the requested relief, the arbitration panel did not rule beyond it or outside it, respecting it, regardless of the grounds it adopted, this being the reason for which also in this aspect there was no vitiating overreach. In this manner no decision is observed that is unjustified or that violates the governing law in this matter.

[4] The third aspect is related to defects of a procedural nature, in the violation of the principle of due process of law (Art 21, Paragraph 2 of Law 9307/96). Such an allegation is also fragile, and does not support itself. The documentation offered by the parties unequivocally proves the broad possibility for argument, discussion and challenges…There is extensive documentation that accompanied the answer and that shows the entire path through the arbitration proceedings, from the initial filing until the conclusion by means of the sentence under discussion now. In truth, and indirectly, what the appellants in this instance question is, once again, the

> grounds that led to the decision. And dissatisfaction with the grounds cannot be argued as an unlawful constraint on the defense.
>
> [5] And lastly, the final aspect cited is one of the most fragile, or the absence of reasoned grounds for the decision. Now, we cannot confuse dissatisfaction as to grounds with the absence of reasoned grounds…

46. In our appeal, we are not concerned with the fourth, final, point there addressed, namely the absence of reasons. As to the other three points, it may be noted that what may be termed the due process and public policy arguments before this court are addressed both in paras [3] and [4] above; and that para [3] also covers, at sub-paras [iii] and [iv], the arguments addressed to this court that the issues before the arbitration were in any event beyond the scope of the arbitration agreement, and/or of the submission to arbitration, as found in the Terms of Reference.

47. The first instance judgment of Judge Amaral was appealed by the MP Funds to the Court of Appeals of the State of São Paulo. Their grounds of appeal specified four matters, viz –

> …on four main fundamentals: (a) the Arbitral Tribunal did not have jurisdiction over MatlinPatterson Funds; (b) the subject matter of the adverse judgment was not a matter submitted to arbitration; (c) the arbitration award violated due process and the right to adversary proceeding; and (d) the arbitration award is groundless.

48. The decision of the Court of Appeals was given on 16 October 2012. The appeal was dismissed. There was an initial objection to the effect that the first instance decision had been given by summary adjudication, that is to say on the documents, without further evidence. That objection was rejected. The court of appeals said:

> In the case in question, the issue, to be effectively elucidated, needed only documentary evidence, which was produced in full. One need only analyze the documents submitted in fourteen (14) volumes that make up the record of this case.
>
> It is the judge's duty, at his or her discretion, to analyze the record and the actions taken, including a verification of the evidence produced, and if applicable, as a result of his or her own convictions, to order other evidence to be produced as he or she deems fit in order to elucidate the case in question or to adjudicate the case summarily.
>
> The honorable lower-court judge had in hand all of the items needed to analyze the arguments made in this case. The documents submitted into the record were sufficient for the judge to form an opinion and allowed for adequate examination of the issues being disputed. Therefore, additional evidence did not need to be produced…
>
> It should be noted, because it is normally the case, as article 14, item IV, of the Civil Procedure Code stipulates…the participants in the proceeding, in particular

> the judge, are not allowed to produce unnecessary evidence for elucidating the case.

49. The Court of Appeals then turned to the merits of the appeal. It began with some general comments on the role of arbitration (for instance, that "it cannot be forgotten that arbitration is an institution that is an exception to the principle of free access to justice" at page 7 of the translation). It then turned to the doctrine of compétence-compétence, and by means of citations from treatise and precedent elucidated the explanation that although, for sound reasons, arbitrators are given the "initial" analysis of a jurisdictional challenge, the public courts "are not excluded, nor could they be, from examining the existence, validity and efficacy of the clause" (at page 11).

50. On the first issue of whether the MP Funds were party to the Agreement's arbitration clause, the court of appeals cited the judge's reasoning and continued, with particular reference to the Funds' execution of Addendum 5, as follows:

> Now, with all due respect, the appellants, constituting an international fund, after having signed a document that clearly and unquestionably stipulates their adherence to the contract unequivocably described in the aforementioned amendment, cannot now claim, even though skilfully made allegations, that they were not aware of or did not know that their participation in the deal in question would not be affected by the arbitration expressly agreed upon in the agreement to which they adhered.
>
> One also finds that, as stated, by signing the document on page 468 of the record, with an express provision regarding being bound to the agreement on pages 232-263 of the record, which stipulated arbitration as a form of conflict resolution, the appellants cannot try to allege absence of intention to participate in and submit to the arbitration court, under penalty of undeniable violation of the principle of "*venire contra factum proprium*", that is, the prohibition of contradictory behavior, since, as stated, having signed the amendment to the contract that called for arbitration, it is not reasonable later on for them to try to distance themselves from the extent of the effects resulting from the arbitral award.

51. The court went on to cite extensive material on the principle of *venire contra factum proprium*. It therefore rejected the MP Funds' contention that they were not bound by the arbitration clause in the Agreement.

52. The court then went on to consider what Judge Amaral had described as the second point, and again began by citing the judge's reasoning (at para [3] of his judgment). It continued, on the subject of *iura novit curia* or *da mihi factum, dabo tibi ius* as follows (at page 21):

> …the arbitrator, a private judge chosen by the parties, has the freedom to analyze the facts, arguments and theories that surround the dispute regarding alienable

> rights, which is why he is constrained by the facts provided, reflected in alienable rights that led to arbitration being initiated, and not the law that the party wants to see applied to the specific case. This is why one must also recognize that the theory of substantiation is applicable to arbitration, rather than the theory of individuation, which is the reason the judgment under appeal correctly and accurately specified application of the maxim "*mihi factum, dabo tibi ius*."

53. The court then cited from a jurist's Commentary on Code of Civil Procedure which emphasised the unity of the two Latin expressions, and continued (at page 22):

> As such, given that the party has the duty of stating the facts that affect the conflict of interests, the claim is unjustified that there was a violation of due process and adversarial proceedings, based on the argument that the arbitral award was based on legal grounds other than those that were argued or raised by the parties…
>
> Furthermore, the vast documentary evidence produced demonstrates that the petitioners had, consistent with the principle of equality of treatment, sufficient opportunity to demonstrate their allegations, and as duly noted in the appealed sentence…

and the court went on to cite what Judge Amaral had said in para [4] of his judgment.

54. The court concluded (at page 23):

> The arbitration clause was correctly agreed, the arbitration was duly instituted, and it produced its effects within the proper limits and for those who were actually involved in the dispute. It respected the right to an adversarial proceeding and to a fair defense, by meeting the requirements in article 26 of the aforementioned law, including adherence to the facts stated, which is why it is correct to uphold the judgment under appeal…

55. Since the judgment of the São Paulo court of appeals, the MP Funds have been fruitlessly petitioning the Brazilian Supreme Court (the Superior Court of Justice). The court of appeals denied permission to appeal on 7 November 2013. The Superior Court of Justice granted permission for a "special appeal" on 16 February 2017, but dismissed that appeal by a decision of 12 December 2017, on the ground that such a special appeal was impossible in matters of contractual interpretation (or reanalysis of factual evidence). There was then a so-called "interlocutory appeal", against that refusal of permission, again to the Superior Court of Justice, made on 15 February 2018, followed by a "full-panel decision" of that Court denying the appeal and upholding the decision of 12 December 2017. There was yet again an "additional interlocutory appeal" to the Superior Court of Justice made on 26 April 2018, said to be based on "jurisprudential divergence", and there the documentary material before us runs out. The MP Funds rely in these proceedings on the fact that the Brazilian proceedings had not yet

reached a final conclusion, for the purpose of meeting Gol's reliance on those proceedings as creating an estoppel in these courts.

The US proceedings

56. In the meantime, there were enforcement proceedings brought by VRG against the MP Funds in the United States, which failed. The MP Funds have previously sought to derive assistance from the failure of those proceedings, and even in their skeleton argument to this court have submitted that, if anything, it is the US proceedings, rather than the Brazilian proceedings, which would provide an estoppel in these proceedings, as being the first in time. By the end of the hearing before this court, however, the US proceedings had receded into the background, in part because they considered the matter under US rather than Brazilian law.

57. In the circumstances, I can be brief about them. VRG filed its petition for confirmation of the award pursuant to the New York Convention in January 2011. The MP Funds argued lack of jurisdiction. Cedarbaum J, sitting in the district court for the Southern District of New York, upheld the argument of lack of jurisdiction, saying that even if the MP Funds had agreed to arbitrate disputes over its non-compete agreement, it had not agreed to arbitrate an entirely different issue "[arising] under an agreement that it did not sign". In other words, the judge had decided the case on the basis of the scope, rather than the existence, of an agreement to arbitrate. There was an appeal by VRG to the US Court of Appeals for the Second Circuit. By its judgment, the Second Circuit considered the matter afresh, or as it said, "*de novo*". It held that the district court had failed to ask the initial question of who is to decide the scope of the parties' arbitration agreement. It held that if the MP Funds had agreed on arbitration, then, under US jurisprudence, the *scope* of such an agreement was for the arbitral tribunal, not for the court. The case was therefore remitted back to the district court. On this second occasion, on 2 October 2013, Cederbaum J held that the MP Funds had not agreed to the arbitration clause in the Agreement (*VRG Linhas Aéreas SA v. MatlinPatterson Global Opportunities Partners II LP* 2014 WL 4928929 (SDNY)). The matter was decided as a matter of US law and jurisprudence. There was no reference to Brazilian law. By that time the MP Funds' action to annul the final award in Brazil had already passed through the São Paulo court of appeals and its judgment.

58. It follows that the US proceedings are of no assistance.

The Cayman Islands proceedings

59. These enforcement proceedings in the Cayman Islands were commenced on 1 September 2016. VRG obtained an *ex parte* order granting leave to enforce on 26 October 2016. The MP Funds applied to set aside the *ex parte* order by summonses dated 17 November 2016 and 1 December 2016. An *inter partes* hearing took place over four days in June 2018, and Mangatal J delivered her judgment, setting aside the *ex parte* order, on 19 February 2019.

60. The judge had before her all the material referred to above, but also expert reports on Brazilian law, as well as cross-examination of the experts, or at least some of them.

61. The expert reports appear to have commenced their appearance for the purpose of the US proceedings. Thus, the first of them is dated 31 March 2011 and titled as having been produced for the district court. This was *before* the first instance judgment from Judge Amaral in Brazil. Mr Gilberto Giusti, an experienced arbitration lawyer in Brazil, gave a statement in support of VRG, expressing his agreement with the arbitrators' conclusion that the MP Funds had bound themselves to the arbitration clause in the Agreement. Also in support of VRG, Professor Carlos Alberto Carmona, a jurist of procedural law and a member of the commission responsible for drafting Brazil's Arbitration Law, gave a statement opposing the MP Funds' submissions that the arbitrators' reliance on article 148 of the Brazilian Civil Code was outside the scope of the arbitration as defined by its Terms of Reference or was in breach of Brazilian due process.

62. Professor Carmona's statement included this passage:

> 16. Due process, under Brazilian law, subsumes, among other rules and principles, the principle of the contradictory proceedings (*principio do contraditório*), which requires each party to be afforded an opportunity to respond to the arguments of the other party and to express its views on any relevant fact, document, or element of evidence placed before a tribunal. However, a party is not automatically entitled under Brazilian arbitration law to be given an opportunity to address legal theories properly raised by the factual allegations of the parties. Under Brazilian arbitration law, an arbitral tribunal is free to fit Brazilian law to the facts before it and to enter an award based on applicable Brazilian law regardless whether or not the specific statutory provision or legal doctrine was expressly cited or relied upon by one of the parties. This is a fundamental and well known aspect of Brazilian practice.
>
> 17. In fact, the general rule in a Brazilian arbitration is that parties should assume and expect that a tribunal will apply the relevant law to the facts pleaded by each party. This rule is typically referred to in Brazil and other Civil Law countries by the Latin phrase "iura novit curia," which means that the court (as opposed to the parties) is charged with applying the law. The Final Award specifically applies the law to the facts in Paragraphs 625 to 638, under the title "Fitting the facts to the concept of malice" ("Encaixe dos fatos no conceito de dolo"). This aspect of the Final Award is fully consistent with Brazilian practice.

63. As stated above, this account of the doctrine of *iura novit curia* in Brazilian law, as applicable in arbitration, was given before the judgment of Judge Amaral. Professor Carmona's views turned out to be fully justified by the decisions of Judge Amaral and of the São Paulo Court of Appeals.

64. In response, also in the US proceedings, the MP Funds filed an expert opinion of Mr Mauricio Gomm Santos (Mr Gomm), an experienced practitioner of international arbitration in Latin America, dated 22 April 2011. In his opinion report, he stated his view of Brazilian law, but did not seek to apply it to the Agreement or to the facts of the case ("It is my understanding that it is for the Court to apply the applicable law to the facts of the case"). As for Professor Carmona's opinion on the doctrine of *iura novit curia*, he said this:

> 22. I disagree with Professor Carmona that Brazilian law concerning international arbitration allows a tribunal to fit the facts developed during the arbitration in its final award into any legal theory it may choose to apply, regardless of whether any party has alleged that legal claim, or the tribunal has otherwise raised the new point of law with the parties on its own, with an opportunity for the parties to be heard before the tribunal issues a decision. Professor Carmona does not cite any legal authority to support this view of due process in international arbitration, and I am aware of none. In international arbitration, unlike domestic Brazilian arbitration, the scope of the arbitral tribunal's authority to determine the facts and to apply the law is determined by the parties. Unlike under the principle of *iura novit curia* to which Professor Carmona refers, it is in principle the parties – not the arbitrators – who define the legal issues to be determined by the tribunal…
>
> 28 …the principle of contradictory proceedings underlying due process in Brazilian arbitration that Professor Carmona describes in paragraph 16 of his Declaration…necessarily involves *both* the law and the facts, and how the former applies to the latter.
>
> 29. Professor Carmona relies on the principle of *iura novit curia* to conclude that international arbitrators can decide what legal theory to apply without any input from the parties. Although I agree that this principle may be applicable in purely domestic litigation in Brazil, I disagree that this principle applies in the international arbitration context for the reasons discussed above. But even supposing that the principle did apply, as a matter of due process and fairness in international arbitration, if an arbitral tribunal contemplates deciding the case on a legal basis that has not been raised by any of the parties, the tribunal must at least raise the legal point with the parties and afford them an opportunity to present their 'arguments" and "views" prior to deciding the dispute on a different legal basis than has been addressed by the parties' submissions.

65. In sum, Mr Gomm accepted the principle of *iura novit curia* in domestic Brazilian proceedings, but said that it did not apply in international arbitration. He appears to have the view that international arbitration is governed either entirely by the parties or by a form of international

arbitration law, or that in this context Brazilian law is directed and mandated by international arbitration law.

66. It will be appreciated that Mr Gomm's report of 22 April 2011 was also *before* Judge Amaral's judgment. It cannot be said that Mr Gomm's views, unlike those of Professor Carmona, are consistent with the judgments of the Brazilian courts.

67. In that context, I cite paragraphs 24 and 25 of Mr Gomm's report because they were relied on expressly by Mangatal J:

> 24. Similarly, it would be unreasonable to expect a respondent in international arbitration to "anticipate" every possible legal theory that might apply to hold them liable. Carmona Decl. § 24. This would put respondents in an unfair position of either arguing the claimant's case for it, even where the claimant did not raise a particular claim, or otherwise risk having no opportunity to be heard on a claim that was never raised in the arbitration but only imposed by the tribunal in its final award. In my view, such a concept makes no sense, either in Brazil or anywhere else where international arbitrations are conducted. Also such a concept may impair the ability of a country to be chosen as the seat of international arbitrations. Moreover, the prospect of requiring parties to address every possible legal basis for a claim or defense regardless of whether the other party or tribunal has raised it would tend to defeat the well-recognised goals of international arbitration to provide an efficient, time- and cost-effective dispute resolution mechanism as an alternative to litigation in the courts.
>
> 25. Perhaps most importantly, the relevant elements of proof required under different provisions of the Brazilian Civil Code that apply to conduct that is *dolo*, will vary. As with any "claim" for relief recognized at law, the merits of a claim raise a mixed question of law and fact – an application of the former to the latter. Any party to international arbitration would expect in fairness to have an opportunity to address the "claim" – the application of the law to the facts – not just one ingredient or the other, in isolation. This is why the authority of arbitral tribunals in international arbitration is circumscribed to the claims – fact and law – that are raised during the arbitration and that the parties are afforded an opportunity to address.

68. Those opinions were not used by the US courts in the US proceedings. There the matter rested until these proceedings commenced in the Cayman Islands. At that point, evidence was placed before the court as to the course of the annulment proceedings in Brazil (and as to the enforcement proceedings in the US). And on 28 February 2017, Mr Gomm gave, by affidavit, an "expert report for the Court's assistance concerning Brazilian law issues relevant to this proceeding" (at para 1.8), on the instructions of the MP Funds. He also referred to and exhibited his earlier report made in the US proceedings. On the subject of *res judicata,* he explained that under article 502 of the Brazilian Code of Civil Procedure (the **BCCP**)

> Substantive *res judicata* is the authority that renders immutable and indisputable a decision on [the] merits that is no longer subject to appeal.

69. Therefore, he observed, the Brazilian court decisions were not *res judicata* in Brazil. At that stage, the MP Funds had just been given permission for their "special appeal" to the Superior Court of Justice. On the subject of contract interpretation, he opined that Addendum 5 "demonstrates a lack of clear and manifest or unequivocal intent by its signatories to be bound to arbitrate any issues at all let alone issues under the [Agreement]". On the subject of article 148, he opined that the allegations and pleadings submitted by VRG throughout the arbitration did not encompass a claim under article 148. And on the subject of due process, he referred to a new provision of the BCCP which came into effect in 2016, but which he said codified developing law (article 10: "A judge shall not decide, at any level of jurisdiction, based on grounds with respect to which the parties have not been given the opportunity to make statements, even if the matter is one on which the judge should decide by administrative initiative"), which he opined required a judge to give the parties an opportunity to be heard on any issue which the court proposed to decide. He also continued to distinguish between Brazilian law and international arbitration law.

70. Mr Gomm's second report called forth a response from Professor Carmona, dated 19 April 2017, in which he simply referred to and annexed his report dated 31 March 2011 in the US proceedings.

71. In May 2017, Mr Giusti made a second report, in which he adopted his earlier report in the US proceedings and proceeded to respond to Mr Gomm's report in the Cayman proceedings. On the subject of *res judicata*, he accepted that there was still a possibility of the award being annulled, because of the outstanding appeal to the Superior Court of Justice. On contract interpretation, he said that that was subject to the exclusive jurisdiction of the arbitral tribunal, but that in any event in his opinion the MP Funds had agreed to arbitrate under the Agreement's arbitration clause. On the question of the submission to arbitration and the Terms of Reference, he opined that the claim or relief claimed by VRG had not altered and that reference to piercing the corporate veil was not a claim but a legal argument to make use of the illegal conduct of the MP Funds complained of. And on the subject of *iura novit curia* and due process, he disagreed with Mr Gomm, explaining that the principles of adversarial proceedings and *iura novit curia* required a tribunal to give the parties every opportunity to present and discuss the facts of the case, but not every potential legal theory. As for article 10 of the BCCP, that was not applicable as it only came into force without retrospective effect in 2016: and in any event by referring to "grounds" it was only speaking of the factual basis of the relief claimed, but not of the legal consequences of those facts. In support of that last opinion, he cited the statement

of the National School of Formation and Development of Magistrates, a research and teaching institution run by the Brazilian federal court system under the authority of the Brazilian Constitution, which spoke with the authority of 500 judges involved in the publication:

> The words 'Grounds' mentioned in art 10 of the Code of Civil Procedure/2015 is understood as the factual reasons guiding the request, and not the legal classification attributed by the parties.

72. As for Mr Gomm's view as to the dichotomy between domestic Brazilian law and international arbitration law, Mr Giusti said that there was no such distinction between domestic and international arbitrations seated in Brazil and that the principle of *iura novit curia* applied throughout. He observed as follows about ICC practice:

> Furthermore, it should be noted that the Awards were submitted to the scrutiny of the International Arbitration Court of the ICC, which includes experienced Brazilian lawyers and arbitrators as members of its Board. The scrutiny of the International Arbitration Court of the ICC is intended to correct mistakes, including minor issues of presentation and major issues of validity, and to evaluate whether the award is flawed because of any violation of due process. It is well-known for its excellence. The fact that the Awards underwent this level of scrutiny demonstrates that one of the most renowned arbitration chambers in the world concluded that the Arbitration was conducted in accordance with due process.

73. As for the arbitrators' reliance on article 148, Mr Giusti pointed out (at paras 141 and 163 of his report), as had the arbitrators, that it had been referred to earlier in the arbitration. I seek to precis briefly the 165 paragraphs of Mr Giusti's report.

74. On 13 July 2017, Mr Gomm responded with his third report (his "Second Affidavit"), which was not referred to in the hearing before us, and takes the disagreement between the Brazilian law experts no further.

75. On 3 May 2018, Mr Giusti filed a third report (his "Second Affidavit") in which he brought the position in the Brazilian proceedings up to date. He said that the prospects of the annulment proceedings succeeding are "now even more remote" (at para 32).

76. On 18 May 2018, Mr Gomm filed a fourth report (his "Third Affidavit") in which for the first time he raised an issue about the "standard of review a Brazilian court is required to apply in an annulment action under Article 33 of the BAA, whether on questions relating to the jurisdiction of the arbitral tribunal, or otherwise". He continued:

> 2.11 In the Annulment Proceedings, the Brazilian courts therefore were not required to consider the matters before them *de novo* from the arbitration

> tribunal's Award. In my opinion, it is very difficult in fact to identify what standard of review or consideration the Brazilian courts applied, but it appears they primarily reviewed the correctness of the tribunal's decision on jurisdiction rather than considering that question *de novo*.

That is all Mr Gomm said on that matter. There were no further reports.

77. There was cross-examination before Mangatal J. We have been referred to passages in the cross-examination of Mr Gomm (by Mr Lowe QC on behalf of VRG) at pages 62-71 and 144-149 of the transcript for Day 1 of the hearing. In those passages, Mr Gomm accepted that an annulment action under article 33 of the Arbitration Law was like any other action, and it was for the judge, and only the judge, before whom such action was heard to make up his or her own mind on questions such as whether there was due process in the arbitration, applying the ordinary procedural rules in the same way as any other action would be decided. Mr Gomm also accepted, in relation to the doctrine of *iura novit curia*, that the Brazilian courts' decisions in this case had stood as judicial precedent in relation to the application of the doctrine to international ICC arbitrations in Brazil, was referred to in relevant textbooks, and had not been questioned in any other authority.

The judgment below

78. The judge's discussion, analysis and decisions commence at para 121 of her judgment.

79. The judge began with issue estoppel arising out of the Brazilian proceedings. She rejected any estoppel for three reasons: (i) because by reason of article 502 of the BCCP, there can be no *res judicata* while the Brazilian annulment proceedings remain under appeal (citing *Carl Zeiss Stiftung v. Rayner & Keeler Ltd* [1967] 1 AC 853 (HL) and *Seven Arts Entertainment v. Content Corporation plc* [2013] EWHC 588; (ii) because the issues in the Brazilian courts and in the Cayman Islands are in any event not identical; and (iii) because the issue of public policy (the standards of natural justice) is in any event a matter for Cayman law. Reason (i) raises an issue of law discussed by English jurisprudence as to what is meant by "final and conclusive", which will have to be considered below. Reason (ii) is controversial and depends on the judge's finding that the Brazilian courts' decision was not a decision "*de novo*" on Brazilian law, but some kind of mere deference to the arbitrators' decision under their power to rule on their own jurisdiction (the doctrine of *compétence-compétence*). Thus, the judge, founding herself on the fact that in English law a court's consideration of an arbitrator's ruling on his own jurisdiction requires its independent consideration (and using the Latin tag *de novo*), concluded that that was not the case in Brazil. The judge's reasoning on this point was contained in the following two paragraphs of her judgment:

128. However, in any event, when in Brazil, an application is made for *vacatur* of an arbitration award on the basis that the tribunal lacked jurisdiction, the courts are not required to reach a decision *de novo* on the question of jurisdiction. The Brazilian Court of Appeal's references to "*competence-competence*", which is the principle that the tribunal has the power to rule on its own jurisdiction, amply assist in making this point.

129. It is not enough to say for VRG that the Brazilian Courts found that the Tribunal was right. This is because it would have to be established on the evidence that the Brazilian Courts found *de novo* that the arbitration agreement bound the MP Funds and extended to the subject matter of the arbitration. There is therefore no issue estoppel regarding the question of jurisdiction.

Reason (iii) is common ground. VRG's estoppel arguments are only directed at the issues of contract interpretation.

80. The judge next turned (at paras 140ff) to form her own views of contract interpretation under Brazilian law, for which purpose she seems to have paid no regard to the Brazilian courts' views, presumably on the ground already expressed that they merely reflected deference to those of the arbitral tribunal. Indeed, she had already expressed the view that the São Paulo court of appeals had, by referring to *compétence-compétence*, recognised the tribunal's "power to rule on its own jurisdiction". Instead, the judge adopted her own reasoning, essentially as a matter of Cayman law, albeit without reference to any Cayman or English jurisprudence and without reference, for instance, to the leading case of *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40, [2007] Bus LR 1719, to which she appears not to have been referred. She concluded:

161. Accordingly, in all the circumstances, and considering the issue, as I must, *de novo*, applying Brazilian law which is in my view plainly not different from Cayman law on contractual interpretation and construction issues, I am satisfied that the MP Funds were not parties to the arbitration agreement pursuant to which the Tribunal purported to exercise jurisdiction over them.

81. The judge went on to consider separately but briefly, and on the same basis, the further question of contract interpretation as to whether the arbitration clause in any event covered a price adjustment dispute (at paras 162ff). She stated that it did not, again without any reference to Brazilian law or the Brazilian proceedings.

82. Thirdly, the judge turned to the question of public policy (at paras 166ff). She framed this in the following terms: "The Second Ground for Refusal: The Tribunal Breached Natural Justice by Finding Liability on a basis neither Pleaded nor argued and awarding Relief that was never requested." She cited extensively from Professor Carmona's and Mr Gomm's reports on the

subject of *iura novit curia.* She also referred to Mr Gomm's reliance on the new article 10 of the BCCP and to what the experts had said about that. She then reasoned as follows:

> 172. However, whilst I bear in mind that this was an arbitration taking place in Brazil, what I am required to do is to apply Cayman Islands standards of fairness. Applying Cayman Islands standards of fairness, it is plain that the MP Funds could not reasonably have foreseen that they would be held liable as third parties in tort, for tort damages, when the claim against them, and relief sought throughout the arbitration, was to hold them responsible for a contractual obligation of their indirect subsidiaries. This is for the following reasons:
>
> i. Article 148 imposes tortious liability; whereas the liability VRG alleged against the MP Funds was contractual.
>
> ii. This finding of liability under Article 148 is completely at odds with the Tribunal's jurisdictional determination that the MP Funds were made party to the PSA's terms by virtue of the Non-Compete Letter. On the merits, VRG had only alleged an *alter ego* theory of liability against the MP Funds that depended on the corporate personality of the Sellers and the MP Funds not being taken account of so that they were found to be parties to the purchase adjustment obligation, not third parties.
>
> iii. The evidence concerning the alleged misrepresentations by the MP Funds was not directed at establishing or answering an allegation of "*malice*" by the MP Funds for the purposes of a claim in tort; it was directed at an entirely different matter of whether there was an abuse of the corporate form such as to warrant the lifting of the corporate veil under Article 50.
>
> iv. Further, Article 148 requires the person relying on it to prove the third party's intentional conduct actually *caused* the entry into the contract by the alleged innocent party, or otherwise that it caused the damages claimed. The evidence and argument before the Tribunal did not in any way aim at establishing that the requirement under Article 148 was satisfied. The MP Funds therefore maintain that they were given no opportunity to make or develop any argument that this requirement was not made out. It was submitted that, oddly, the Tribunal imposed a contractual liability on the MP Funds, the measure of which was the price adjustment, as if this would equate tort damages caused by malice.
>
> v. I accept that, where damages are claimed as the remedy for Article 148, the claimant must adduce evidence to establish causation between the third party's malice and any loss suffered by the claimant as a result thereof. The fact that neither side adduced evidence or made an argument to this effect was put forward as a further demonstration that this was not the relief sought by VRG at all.

83. The judge went on to dismiss Professor Azevedo's "one-liner" reference to article 148 (to which it will be recalled that the final award referred, albeit not as a "one-liner", which I assume to be a piece of advocacy) as being an inadequate basis for the application of article 148 (at para 174).

84. As for the evidence of the experts, which she had cited at length, her sole recourse to that on this issue was in the following paragraph:

> 176. As to the evidence of the experts, there are a number of areas where they agree, and other areas where they disagree, and areas where the lines are blurred. In my judgment, once it is admitted, as Mr Giusti did in paragraphs 119 and 125 of his Affidavit, that the arbitrators are constrained by the factual basis of the parties' case and the limits of the parties' claim for relief, it seems to me that the MP Funds have made out their case under the second ground.

85. The judge also found assistance in *Malicorp Ltd v. Government of the Arab Republic of Egypt* [2015] EWHC 361 (Comm), [2015] 1 Lloyd's Rep 423 (Walker J) at para [37] ("What it does not show, however, is that Egypt had any notice of a proposal to award damages under article 142").

86. She then concluded:

> 179. In my view, what was required was express notice to the MP Funds of a proposal to award damages against it under Article 148 and there was none such to be found anywhere in the entire record of the proceedings before the Tribunal. I have in any event preferred the evidence of Mr Gomm Santos to that of Professor Carmona, as being more intrinsically logical and persuasive. I found particularly convincing Mr Gomm Santos' reasoning at paragraphs 24 and 25 of his Declaration, cited in paragraph 168 above. However, in any event, it is a question of Cayman law as to whether there was procedural fairness.

87. Mr Gomm's paragraphs 24-25 there referred to are cited herein at para 67 above. Mr Gomm there expressed (as he did elsewhere) his views of international arbitration as being something apart from Brazilian law, and as departing from the doctrine of *iura novit curia* inter alia because the application of law to facts is to be regarded as "a mixed question of law and fact".

88. It is not clear whether the judge in this section of her judgment was dealing with this ground as being founded in Cayman public policy (under section 7(3) of the CI Enforcement Law, reflecting article V(2)(b) of the New York Convention) or as being founded on the MP Funds "being otherwise unable to present [their] case" (under section 7(2)(b) of the CI Enforcement Law, reflecting article V(1)(b) of the Convention). Perhaps she had both in mind, as appears to be the case from her para 184 referred to below.

89. Mangatal J proceeded to the "Third Ground for Refusal – The Tribunal Purported to Decide Matters Beyond the Scope of the Submission to Arbitration" (at paras 181ff). The judge dealt with this very briefly. She did not refer to the Terms of Reference, but simply said that VRG's claim having been made on the basis that the MP Funds were the *alter ego* of the Sellers –

> 183. It was therefore not within the scope of the Tribunal's jurisdiction to award as tortious damages a contractual price adjustment amount, which had never been sought by VRG.

90. Finally, the judge rejected VRG's submission that even with a New York Convention defence proved, the court still had a discretion, which it ought to exercise, in favour of enforcement. In that connection she said this, by way of "Conclusion and Disposition":

> 184 …In all of the circumstances it is my view that it is just to refuse to enforce the Award, as it offends against the underlying principle of arbitration, that it must be consensual. That this Award does so is made out on two bases: (a) the purported exercise of jurisdiction pursuant to an arbitration agreement to which the MP Funds were not parties; and (b) by the purported exercise of jurisdiction whereby the Tribunal found the MP Funds liable for a particular provision of the Brazilian Code that had never been pleaded or set out, and therefore falling outside the boundaries of the submission. The Award also offends against the cardinal principle of natural justice that enshrines a party's right to be heard and is contrary to the public policy of the Cayman Islands. This is contrary to the express provisions of the New York Convention.

The parties' submissions

91. On behalf of VRG, Mr Lowe QC submits as follows.

92. As to the estoppel issue, he submits first, that the judge was mistaken to say that the Brazilian annulment proceedings had not fundamentally put in issue, in the form of an ordinary action, both the jurisdiction of the arbitrators and the substantial justice of the arbitral proceedings. He complains that the passage in which the judge rejected the *de novo* nature of such an action and concluded that the Brazilian courts merely deferred to the power of the arbitrators to rule on their own jurisdiction (paras 128-129 of the judgment) was a flimsy and false basis for the judge's conclusion and betrayed a fundamental misunderstanding of the nature of the doctrine of *compétence-compétence*. He also complained of the judge's failure to engage with the terms of the Brazilian judgments, or Mr Gomm's evidence as tested in cross-examination, which he submits make it plain that the Brazilian courts were deciding the issues for themselves. Secondly, he submits that the judge was wrong to found herself on article 502 of the BCCP, rather than on the English jurisprudence that makes clear that, for the purposes of the

application of issue estoppel arising from foreign proceedings as a matter of English and thus Cayman law, the presence of an appeal does not affect the final and conclusive status of the foreign judgment: see *Nouvion v. Freeman* (1889) App Cas 1 and *The Sennar (No 2)* [1985] 1 WLR 490 (HL) among other cases, including the *Zeiss* case, which he submits the judge misunderstood.

93. In the circumstances, a proper understanding of the Brazilian proceedings proves estoppel, and incidentally Brazilian law, as to the issues of contract interpretation concerning the MP Funds agreement to arbitrate, the scope of the arbitration agreement, and the scope of the reference.

94. Turning to the question of natural justice and public policy, Mr Lowe accepts that ultimately such matters are to be judged by Cayman standards, but he submits that that judgment cannot be made in the abstract but can be arrived at only after a proper understanding and appreciation of Brazilian procedure and in particular the doctrine of *iura novit curia*. In that respect, he is critical of the judge's preference for Mr Gomm's view that the doctrine does not apply under Brazilian law in international arbitration, a view which he submits is wholly inconsistent both with the Brazilian judgments in this case and with academic treatises found in *Iura Novit Curia in International Arbitration*, 2018, published by NYU's Center for Transnational Litigation, Arbitration and Commercial Law. In the circumstances, he submits that the judge ought to have adopted the reasoning expressed by Colman J in *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] 1 All ER (Comm) 315, where he held that there would be no substantial injustice in enforcement of the award there under consideration.

95. Finally, and for much the same reasons, Mr Lowe repeats the submission which he made to the judge, which is that this court should be prepared to exercise the discretion it retains to enforce an award, even where a New York Convention defence has been prima facie made out, in the circumstances of this case.

96. On behalf of the MP Funds, on the other hand, Mr Flynn QC submits that the judge was right for the reasons she gave. Indeed, he had strongly pressed the court that no permission to appeal should be granted. He observes that there is no appeal against the judge's findings on contract interpretation under Brazilian law, only on estoppel; and no appeal on the issue of the scope of the submission to arbitration.

97. As to estoppel, he submits that even when attention is paid to the terms of the Brazilian judgments, it is apparent that there was only a form of "review" which fell short of *de novo* re-examination of the issues. In particular he draws attention to the use of the word "possible" in the forefront of Judge Amaral's judgment. There was no evidence from VRG to the contrary,

only Mr Giusti's evidence that the arbitrators' award was final and conclusive. Therefore, the judge was right to say that the issues before her and before the Brazilian courts were not the same, so that no estoppel could run. In any event, the judge was right to found herself on the absence of *res judicata* in Brazilian law as long as a judgment was under appeal (article 502 of the BCCP): a foreign judgment could not have greater effect in Cayman law by way of the doctrine of estoppel than it could have where it was made, citing, as had the judge, *Carl Zeiss* and *Seven Arts Entertainment.*

98. As to substantial justice and public policy, Mr Flynn submitted that that was entirely a matter for Cayman law and Cayman standards (citing *Cukorova Holding AS v. Sonera Holding BV* [2014] UKPC 15, [2015] 2 All ER 1061, and *Malicorp* (which the judge had relied on), a case said to be close to our facts. The judge's treatment of this, and her rejection of the doctrine of *iura novit curia*, was impeccable.

99. In all these circumstances, any discretion to enforce an award subject to such proven New York Convention defences was impossible, as *Dallah* broadly recognised.

Estoppel

100. I turn first to the issues arising out of the principles of estoppel. It will be recalled that the judge held, first, that estoppel was impossible where Brazil did not recognise *res judicata* pending the end of the appeal process; and secondly, that the issues in the Brazilian proceedings were not identical to those which arose in the Cayman Islands. I will address those two points in turn, and first the point about a pending appeal.

101. The leading case on the subject is *Nouvion v. Freeman*, which the judge did not mention. The plea of estoppel failed there because the foreign (Spanish) judgment in question was only a "remate" judgment, which could be entirely reopened in "plenary" proceedings. It was for that reason not "final and conclusive" for the purposes of the English doctrine, as distinct from a judgment which could only be questioned on appeal. Lord Herschell famously said this (at 9-10):

> The principle upon which I think our enforcement of foreign judgments must proceed is this: that in a Court of competent jurisdiction, where according to its established procedure the whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter be disputed, and can only be questioned in an appeal to a higher tribunal…But where, as in the present case, the adjudication is consistent with the nonexistence of the debt or obligation which it

> is sought to enforce, and it may thereafter be declared by the tribunal which pronounced it that there is no obligation and no debt, it appears to me that the very foundation upon which the Courts of this country would proceed in enforcing a foreign judgment altogether fails.

102. In *Carl Zeiss*, the issue was whether the defendant solicitors were estopped from contending that they had authority to bring an action in the name of the Carl-Zeiss Stiftung (or "foundation"). It was alleged that the West German courts had decided that issue against that contention. It was held however that the defendant solicitors were not estopped. A variety of reasons were given. However, among them was that the decision of the West German courts did not fulfil the requirements of the doctrine. The first requirement which was missing was identity of parties. The next question was whether the earlier judgment had been a "final judgment on the merits". There was no reason why a foreign judgment could not be such a final judgment, even if caution needed to be taken because of unfamiliarity with foreign law, albeit the grounds for that caution did not apply in that case (at 918, per Lord Reid). Lord Reid went on to say this (at 918-919):

> It is clear that there can be no estoppel of this character unless the former judgment was a final judgment on the merits. But what does this mean in connection with issue estoppel? When we are dealing with cause of action estoppel it means that the merits of the cause of action must be finally disposed of so that the matter cannot be raised again in the foreign country. In this connection the case of *Nouvion v. Freeman* is important. There had been in Spain a final judgment in a summary form of procedure. But that was not necessarily the end of the matter, because it was possible to reopen the whole question by commencing a different kind of action: so the summary judgment was not res judicata in Spain. I do not find it surprising that the House unanimously refused to give effect in England to that summary judgment.
>
> When we come to issue estoppel I think that, by parity of reasoning, we should have to be satisfied that the issues in question cannot be relitigated in the foreign country. In other words, it would have to be proved in this case that the German Federal Republic would not allow the re-opening in any new case between the same parties of the issues decided by the Supreme Court in 1960, which are now said to found an estoppel here. There would seem to be no authority of any kind on this matter, but it seems to me to verge on absurdity that we should regard as conclusive something in a German judgment which the German courts themselves would not regard as conclusive. It is quite true that estoppel is a matter for the lex fori but the lex fori ought to be developed in a manner consistent with good sense.

103. Ultimately Lord Reid rested his judgment on the absence of identity of parties (at 919). There is nothing in what I have cited above that goes beyond the *Nouvion v. Freeman* approach.

104. Lord Hodson said this (at 926-7):

> In order to comply with rule 183 as stated in Dicey's Conflict of Laws, 7th ed. (1958), p. 992, the judgment must be conclusive in order to create an estoppel. In section 1 (2) (a) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, the expression "final and conclusive" is to be found, but these words are repetitive and "conclusive" in the sense of the rule must mean that it cannot, although it may be subject to appeal, be varied by the court which made it, as are, for example, some maintenance or alimony orders. *Nouvion v. Freeman* is an example of an action which had been tried in Spain under a summary form of procedure leading to a "remate" judgment but held by this House not to amount to res judicata, since it was possible to reopen the matter which had been tried and obtain a "plenary" judgment rendering the "remate" judgment inoperative. One asks, about what is the judgment to be final and conclusive? The answer is that it must be on the merits and not only as to some interlocutory matter not affecting the merits. The question here, may, I think, properly be described as "on the merits," the issue being whether or not there was authority to proceed in an action representing the foundation.

There is nothing there which goes beyond the approach of *Nouvion v. Freeman*. Lord Hodson was satisfied that the West German decision was final and conclusive (at 927).

105. Lord Guest dealt with this issue at 935-936, where he said this:

> I turn, therefore, at once to the question of finality. This is understood to mean "final and conclusive on the merits" of the cause (Dicey, Conflict of Laws, 7th ed., r.196, p. 1052)…In other words, the cause of action must be extinguished by the decision which is said to create the estoppel (see *Nouvion v. Freeman*, Lord Herschell: It puts an end to and absolutely concludes that particular action.") The West German judgment was not a judgment on the merits, but on a preliminary point relating to the capacity of the Carl-Zeiss-Stiftung to sue…I have difficulty in seeing how a decision on capacity to sue can ever be final and conclusive…
>
> Another aspect of finality relates to the requirement that the decision relied upon as estoppel must itself be res judicata in the country in which it is made. This is made clear in *Nouvion v. Freeman*…It would indeed be illogical if the decision were to be res judicata in England, if it were not also res judicata in the foreign jurisdiction.

It is difficult to see that this goes beyond the approach of *Nouvion v. Freeman*.

106. Lord Upjohn took a somewhat different position, in that he considered that the concept of authority to sue depended so much on matters of procedure in each court that he would deny any foreign judgment on that concept of the status of *res judicata* on the basis of the interests of justice (at 949). However, he too cited *Nouvion v. Freeman* (*ibid*).

107. Finally, Lord Wilberforce said this (at 969-970):

> The textbooks are in agreement in stating that for a foreign judgment to be set up as a bar in this country it must be res judicata in the country in which it is given…The chief authority cited for this is *Nouvion v. Freeman*, in which both Lindley L.J. in the Court of Appeal and Lord Herschell in this House expressed themselves strongly in this sense. No doubt that was rather a special case since the

> remate judgment was no more than provisional, but, generally, it would seem unacceptable to give a foreign judgment more conclusive force in this country than it has where it was given. This must be so on principle and there is support for it in *Behrens v. Sieveking*. Unfortunately, there is no clear evidence whether the judgment of the Federal High Court is res judicata (in the sense I have mentioned) in Germany or not…

That is the one passage relied on by Mr Flynn which the judge cited as part of his submissions (at para [116] of her judgment). Unfortunately, she passed over the last sentence cited above in her citation, with its important qualification "in the sense I have mentioned". In holding, as Lord Wilberforce did (at 971) that he was not satisfied that the West German judgment was "conclusive in West Germany as regards other proceedings", I think that he was using both the expressions "res judicata" and "conclusive" in the sense used in *Nouvion v. Freeman*, namely as distinguishing between a judgment which could be revisited in other proceedings, and a judgment which was merely susceptible to appeal.

108. In the end their Lordships split on the question whether the West German judgment could be regarded as conclusive on the merits, and their division of opinion was centred on the peculiarity of the issue, under examination in that case, of authority to sue. However, I do not detect any falling away from the distinction drawn by *Nouvion v. Freeman* (frequently cited by their Lordships) between a judgment which could be re-opened in other proceedings, and a judgment which was merely susceptible to appeal.

109. Applying that distinction to the present appeal, the question becomes whether the judge, supported by Mr Flynn's submissions, is correct to say that article 502 is conclusive evidence derived from Brazilian law that any judgment under appeal is not "final and conclusive" which is the English law test, or whether Mr Lowe is correct to submit that the expression "res judicata" is merely a label used to describe the situation of a judgment which is not subject to appeal and does not render a Brazilian judgment other than "final and conclusive" in the sense defined in *Nouvion v. Freeman*.

110. Of course, the possibilities of appeal and of a reversal on appeal are universal (until one has received the judgment of the highest court). How then are such possibilities to be dealt with under the doctrine of estoppel and the authority of *Nouvion v. Freeman*? That was discussed by Lord Denning MR in *Colt Industries Inc v. Sarlie (No 2)* [1966] 1 WLR 1287 (CA), a decision rendered just a few weeks after *Carl Zeiss*. Reliance there rested on a decision of a New York court, which had been upheld on appeal to the Appellate Division. Permission to appeal further to the New York Court of Appeals (New York's highest court) had been refused, but that latter court had its own power to grant permission to appeal, and the English court was told that an

application for such permission was being made. The judgment (as converted into sterling) was for nearly £0.9 million, a large sum of money in those days.

111. Lord Denning, with whom Davies and Russell LJJ agreed, held that the New York judgment was final and conclusive and would be enforced, albeit a stay of execution might be appropriate where an appeal was in prospect. Lord Denning said as follows (at 1291B/C):

> At the present moment the appellate process in the State of New York is not exhausted. It is possible that the Court of Appeals may give Mr Sarlie leave to appeal and afterwards allow his appeal. But this is not sufficient of itself to show that the judgment is not final and conclusive. It is well established that, even though a judgment is under appeal, it is still final and conclusive so as to enable an action to be brought upon it. That was clearly stated in *Nouvion v. Freeman*.

Moreover, Lord Denning went on to say this (at 1291F-H):

> It may be that the courts of the other states would not enforce the judgment or would grant a stay of execution until the whole of the appellate process had been exhausted: but the judgment itself is available throughout the states of the United States. Even if this were not so, I am quite clearly of opinion that we in this court should give full faith and credit to this judgment in the State of New York. There has been an appeal to the Appellate Division which has been dismissed. The only outstanding possibility is the grant of leave to appeal by the Court of Appeals. The appeal itself does not render it not final and conclusive. Nor should the possibility of leave to appeal. It seems to me that the proper test is this: Is the judgment a final and conclusive judgment of a court of competent jurisdiction in the territory in which it was pronounced?

112. As it is, international arbitration being what it is, and the importance of foreign enforcement of awards being so vital to the system of international arbitration, the New York Convention, brief as it is, makes express provision for the problem of an arbitral award which is under challenge in the courts of its seat. Article VI, which is reflected in section 7(5) of the CI Enforcement Law (cited at para 31 above), provides that a court asked to enforce an arbitral award which is under challenge in the courts of the country where it was made may adjourn the enforcement proceedings, and may even, if requested, order the award debtor to give security. That has not arisen in this case: but it is entirely consistent with the situation where a court asked to enforce a foreign award under challenge in the courts of its seat would stay execution until all appeal possibilities of those challenge proceedings had been exhausted.

113. Some twenty years later, the subject matter of issue estoppel arising from a foreign judgment returned to the House of Lords in the shape of *The Sennar (No 2)* [1985] 1 WLR 490. The particular issue there was whether it could be said that a decision of a Dutch court, that, by reason of an exclusive jurisdiction clause in a bill of lading contract in favour of the courts of Sudan, the claimant could not found jurisdiction in Holland, estopped the claimant from a

similar attempt to found jurisdiction in England. It was submitted that this was not a judgment "on the merits" and merely procedural, but that submission failed. *Carl Zeiss* was relied on by their Lordships. *Nouvion v. Freeman* was not expressly mentioned, but its principle was expressed. Thus Lord Diplock said (at 494B):

> It is often said that the final judgment of the foreign court must be "on the merits". The moral overtones which this expression tends to conjure up may make it misleading. What it means in the context of judgments delivered by courts of justice is that the court has held that it has jurisdiction to adjudicate upon an issue raised in a cause of action to which the particular set of facts give rise; and that its judgment on that cause of action is one that cannot be varied, re-opened or set aside by the court that delivered it or any other court of co-ordinate jurisdiction although it may be subject to appeal to a court of higher jurisdiction.

And Lord Brandon said, citing *Carl Zeiss*, that the three requirements for the application of estoppel were, that there must be (i) a judgment of (a) a court of competent jurisdiction, which was (b) final and conclusive and (c) on the merits; (ii) identity of parties, and (iii) the same issue in both actions (at 499A/B).

114. *Seven Arts Entertainment Limited v. Content Media Corporation plc* [2013] EWHC 588 (Ch) (Sales J) concerns an application for summary judgment which failed. The application was based on an Ontario judgment between different claimants and respondents. Sales J held that there was no identity of parties and no identity of issue. As for the requirement of a final and conclusive judgment on the merits, Sales J held that the respondents had raised a triable issue that an Ontario court would not find the Ontario judgment final, both because of lack of privity (relied on by the claimant to get around lack of identity of parties) and also because it would consider the issue of the title to disputed copyrights afresh (at para [44]). In other words, it was a *Nouvion v. Freeman* situation. In the circumstances, the only passage relied on by Mr Flynn, and adopted by Mangatal J, namely para [43] in my view takes the matter no further. Sales J there said this:

> It is common ground that in order for an issue estoppel to arise in the courts in England by reference to a judgment of a court in a foreign jurisdiction (here, the Ontario judgment), it is necessary to show not only that the requirements to establish an issue estoppel according to the law of the *lex fori* (England) are satisfied, but also that the issue in question would be treated as *res judicata* according to the law of that foreign jurisdiction: see *Carl Zeiss* [1967] 1 AC 853, 919A-C (Lord Reid), 927C-D (Lord Hodson), 936A-B (Lord Guest), 949C-D (Lord Upjohn) and 969G-970A (Lord Wilberforce).

In my judgment, *Seven Arts* demonstrates that what is looked for as a matter of fact in the foreign jurisdiction is a final and conclusive judgment as that is understood in English law, applying the *Nouvion v. Freeman* distinction.

115. That is again what was emphasised by the English court of appeal in *Aeroflot v. Berezovsky* [2014] EWCA Civ 20, [2014] 1 CLC 53. There a first Russian judgment had been amended by a second Russian judgment (not on appeal), which had granted indexation of Aeroflot's loss as awarded by the first Russian judgment. Berezovsky had sought and obtained summary judgment dismissing Aeroflot's claim, which was based on the second Russian judgment. The reason for the dismissal of the claim was that the English judge at first instance (Floyd J) had held that the reopening of the claim was against public policy as being contrary to the "finality principle". The court of appeal allowed Aeroflot's appeal and said that its claim ought to go to trial, since "the English courts will not hold that a later foreign judgment infringes the finality principle when it interferes with a prior judgment if under the foreign law the prior judgment was not final and binding" (at para [29]). Therefore what had to be examined was whether the first Russian judgment was, under Russian law, liable to be re-opened by a subsequent judgment, a typical *Nouvion v. Freeman* situation; and that could not be ascertained and decided on summary judgment.

116. It was in this context that Arden LJ referred to *Carl Zeiss*. She pointed out that all members of the House of Lords had applied *Nouvion*. She summed the matter up as follows:

> 36. *Nouvion* is authority of the House of Lords for the proposition that, when the issue in English recognition and enforcement proceedings is whether a foreign judgment was final and binding, the choice of law rules are as follows: English law lays down the requirements for a final and binding judgment but the incidents in fact of the foreign judgment must be determined by the foreign law. As Lords Bramwell and Ashbourne held in the House of Lords, the English courts could not ascribe a higher status to a judgment governed by foreign law than that foreign law would ascribe to it.

117. The last and most recent authority to which I should refer under this issue is *Midtown Acquisitions LP v. Essar Global Fund Ltd* [2017] EWHC 519 (Comm), [2017] 1 WLR 3083 (Teare J). There, the claimant had obtained in New York a so-called "confession judgment" and then sued on it in England. The respondent opposed the claim, but summary judgment was granted, albeit subject to a stay, since there was currently an application in New York to vacate the judgment. The issue was whether the New York judgment was "final and conclusive" or was like the "remate" judgment in *Nouvion v. Freeman*. Teare J held that it was unlike the "remate" judgment since it could only be challenged on appeal or on grounds such as error, fraud, misrepresentation or other misconduct. As Teare J said (at para [32]):

> The judgment can be challenged on appeal (which challenge, it is common ground, is irrelevant to the question whether the judgment is final and binding) or on such grounds as error…

118. It is in the light of these authorities that I must revisit the issue before me of whether the Brazilian judgment is "final and conclusive" for the purposes of the English law of estoppel. It seems plain to me that "final and conclusive" is given by English law a special meaning. In one sense, any judgment subject to appeal is not final and conclusive. It may be set aside on appeal. However, it is clear on the authorities that the prospect of appeal is irrelevant to a judgment being final and conclusive. There is therefore no instance in English law that has been brought to our attention of any foreign judgment being refused enforcement on the ground that it is under appeal.

119. What then is to be made of article 502 of the Brazilian Civil Code? Mr Gomm's evidence (his first affidavit made in the Cayman proceedings) cites article 502 and states that the Brazilian doctrine of *res judicata* "is confirmed by the Brazilian Constitution [*footnoted*: Art 5, XXXVI *"The law shall not impair a vested right, a perfected juridical act, or a matter adjudged* [res judicata]"]. Under Brazilian procedural law, the *res judicata* doctrine applies when a decision is considered immutable and indisputable and it is no longer subject to change or appeal" (at para 3.1). It looks therefore as though in Brazil the doctrine of *res judicata* is tied up with a prohibition against impairing vested rights, a form of finality principle. It is possible therefore that the English doctrine of estoppel does not fit happily with the Brazilian doctrine of *res judicata*. However, there is no assistance on this matter from either Professor Carmona or Mr Giusti on the side of VRG. It is Mr Giusti, who in his second report of May 2017 responds to Mr Gomm on the subject of *res judicata* (at paras 15ff), but chooses to do so by emphasising the *res judicata* of the awards, not of the Brazilian judgments. Thus he says:

> 15. I agree with the general opinion expressed in paragraphs 3.1 and 3.2 of Mr Gomm's Affidavit on the doctrine of *res judicata*. However, for the reasons set out below, Mr Gomm is incorrect insofar as he suggests in his Affidavit that the fact that there is an appeal pending in a superior court in the annulment action…impairs or negates the res judicata of the Awards.

The trouble with that, however, is that reference to the awards as being *res judicata* is a fundamental *petitio principii*. The awards are certainly final and conclusive if they are valid, but their validity is the issue in question.

120. Even so, it would appear to be highly probable that the Brazilian courts' rejection of the MP Funds' annulment challenge, while still subject to an appeal process, cannot be altered or re-opened in any other way than by appeal. Therefore, this is a unique case in which there is a clash between what English law regards as final and conclusive and what Brazilian law regards as final and conclusive, with the difference between the two views being expressly covered in a series of English law decisions for well over a century which emphasise that the possibility

of appeal is not relevant to the test of estoppel. Ultimately the doctrine of estoppel is a matter of the *lex fori*, ie in this case Cayman law, which is no different in this respect from English law. If forced to choose, therefore, I would prefer to say that in the case of such a clash, the English test should predominate, while of course regard has to be given to the current extant possibilities of appeal. The doctrine of estoppel is designed to work justice and not injustice, as Lord Upjohn remarked in *Carl Zeiss* at 947D (and see *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No 2)*, [2014] EWCA Civ 855, [2014] QB 458 at 516E). Moreover, if it therefore might have been said that, as it has turned out, VRG's proceedings here are premature, there remains the possibility of adjournment, provided for by the New York Convention and the CI Enforcement Law.

121. I will proceed then to the second ground on which Mangatal J rejected an estoppel, namely that the issues in the Brazilian courts and in the Cayman Islands were not identical. After all, if the issues are not identical, indeed the judge said that they are "not even materially or substantially the same" (at para [135]), the question of estoppel fails in any event. But if they are the same, then those decisions of course are the best evidence of Brazilian law (in the absence at any rate of some compelling evidence that the Brazilian courts erred) and therefore, estoppel or not, these courts should not in justice come to a different conclusion on a matter of Brazilian law.

122. It will be recalled that the judge's reason for finding that the issues were not the same was that she concluded that the Brazilian courts are not required to reach a decision *de novo* as shown by the fact that the São Paulo Court of Appeals referred to *compétence-compétence* "which is the principle that the tribunal has the power to rule on its own jurisdiction" (at para [128]).

123. In reaching this conclusion, the judge cited nothing from the Brazilian courts' judgments, nor anything from the expert reports before her. It was sufficient that the Court of Appeals had made references to *compétence-compétence*.

124. In my judgment, however, the judge erred in this respect. The principle of *compétence-compétence* says nothing about the test which a court brings to bear when the issue of an arbitrator's jurisdiction is challenged. It is merely the doctrine which says that it is thought in general to be better and more efficient if the arbitrator takes the first, or initial, look at the issue, before it comes before a court for its definitive judgment. This is clear from the discussion about the principle in *Dallah*. It is also clear (i) from the Brazilian Arbitration Law, (ii) from what the Court of Appeals said in its judgment about the principle of *compétence-compétence* and (iii) from that Court's lengthy discussion (at pages 13-19 of its judgment) of the issues of contract interpretation which underlay the issue of jurisdiction.

125. As for (i), the Arbitration Law itself sets out both the *competence-competence* principle and the right to challenge the arbitrator's views in court by an action to annul: see articles 8, 20 and 20.2, 32 and 33 cited at para 30 above. It may be noted that where the arbitrator *declines jurisdiction*, that is definitive, but where the arbitrator *rejects the challenge* to his jurisdiction, his decision is subject to review in an action "to declare the arbitral award null in the cases set forth in this law". Article 33.1 emphasises that the action to annul should comply with the ordinary procedure set out in the Code of Civil Procedure. Mr Gomm confirmed in his cross-examination that an article 33 annulment action was like any other action and that it was for the judge to make up his own mind in it. That is what any neutral reading of the Arbitration Law confirms. Thus in the case of an annulment action under article 33, the issues for the court are set out plainly in article 32, inter alia "if (1) The arbitration agreement is null", or (4) "It has exceeded the principles of the arbitration agreement", or "(8) It violates the principles set forth by Article 21.2" ie the principles of due process. Those are the issues for the court. The due process issues under challenge plainly are not ultimately for the arbitrators to decide, but for the court, as Mr Gomm confirmed. The issues of contract interpretation under article 21.2 (1) and (4) are *in pari materia*.

126. As for (ii), the Court of Appeals cited a lengthy extract from a Brazilian treatise on arbitration about *compétence-compétence*, which included the following:

> The arbitrator's initial analysis has been mentioned numerous times, because at the right time, after the arbitral award, the matter can be submitted for examination by the courts, if a defect in the agreement results in any of the cases set out in article 32.1 of the Arbitration Law (causes of an invalidity of an arbitral award). In other words, the public courts are not excluded, nor could they be, from examining the "existence, validity and efficacy of the clause", after the arbitral award by the current, proposed, and highly regarded system.

The treatise's references to article 32.1, the expression "nor could they be", and the expression "examining", all support my understanding of the relevant provisions of the Arbitration Law, as well as Mr Gomm's evidence under cross-examination.

127. As for (iii), the Court of Appeals dealt with the merits of the issue as to the existence and scope of an arbitration agreement binding the MP Funds in a passage extending over many pages, all of which is in my judgment redolent of a court making its own independent decision. In that passage the Court of Appeals reviews the limited evidence underlying the issues of contract interpretation for itself, cites extensively from a treatise, which itself cites from further underlying authority, rehearses Brazilian jurisprudence, and naturally refers to the judgment under appeal. There is no suggestion that the Court of Appeals is paying deference to the arbitral

tribunal's own award, or is conducting some form of limited review, the nature of which has never at any time been explained by Mr Flynn, the judge, or Mr Gomm.

128. Although not directly relevant at this point, the Court of Appeals' judgment continues with its own examination of the due process challenge, again citing treatise authority, and stating that "the judgment under appeal correctly and accurately specified application of the maxim: "*mihi factum, dabo tibi ius*." Mr Gomm expressly accepted that the court was there making its own independent assessment.

129. It must be recognised that, apart from some incontrovertible facts relating to the contractual documents in issue, the questions for the Brazilian courts were pure points of their own law, points of contract interpretation. In such circumstances, it is difficult for me to understand how, in upholding the first instance judgment, or in finding the arbitrators' own understanding to be correct, the Court of Appeals was doing other than expressing its own consideration of the matter.

130. In para 27 of Mangatal J's judgment, she said that the independent judicial approach mandated by *Dallah*, approving *Azov*, was to be contrasted with the approach in other jurisdictions. She said: "In many jurisdictions, the issue is a different one, i.e. whether on a *review* [the judge's emphasis] of the tribunal's decision on jurisdiction, paying due deference to the decision of the tribunal, the tribunal's decision on jurisdiction should stand". "Review" is the word used by Mr Flynn to contrast with the independent consideration required by *Dallah*. In using that word, he appears to have been influenced by the use of it by Ms Hilary Heilbron QC in *Dallah*, who there submitted (unsuccessfully) that in effect the English court's consideration of the issue of agreement to arbitrate should be in some way aetiolated and all but determined by the arbitrators' decision (see Lord Mance at para [21]). However, as Lord Justice Moore-Bick pointed out in the court of appeal (at para [21]), the term "review" was unhelpful, because –

> If it meant no more than that the court should have regard to the tribunal's reasoning in reaching its own conclusion, I should have little difficulty with it, since the tribunal's reasons will almost invariably be before the court and will carry as much persuasive weight as their cogency gives them. That is not, however, what I took her to mean, since it was essential to her argument that the court should at least accord great weight to the tribunal's conclusions unless they are clearly wrong. However, as became clear in the course of argument, it is impossible to formulate any satisfactory principle that falls somewhere between a limited review akin to that which the court undertakes when exercising the exercise of a judicial discretion and a full rehearing, not to mention one that is capable of flexibility in its application.

131. Mangatal J did not identify the "many" jurisdictions where some other approach, described as a "review", takes place. In *Dallah*, England, France and the USA, three important arbitration jurisdictions are identified as all following the "full rehearing" approach, and none is identified as following a different approach, although Lord Mance comments (at para [25] of his judgment) that the US case of *China Minmetals* examines some of the "nuances (principally relating to the time at which courts review arbitrators' jurisdiction)".[3]

132. Moreover, the language of the New York Convention itself mandates the *Dallah* approach, as Lord Mance pointed out at para [28] of his judgment, where he says that "This language points strongly to ordinary judicial determination of that issue". The same point was made by Moore-Bick LJ in the court of appeal (at para [22] of his judgment, where he said, referring to what the judge of first instance had said, as cited at para [14] of Moore-Bick LJ's judgment) that –

> In the absence of any authority, either in this country or abroad, which tends to support the conclusion that the language of article V(1) is to be given a meaning different from that which it naturally bears and in the light of the close similarity of language between the Convention and the [English] statute, I think the judge was right to treat the question as one of statutory interpretation and that his conclusion on the meaning of section 103(2) was clearly correct.

The same point may be made about the language of the Brazilian Arbitration Law, which itself follows the New York Convention.

133. It is true that Mr Gomm had said in his fourth report both that "it is very difficult in fact to identify what standard of review or consideration the Brazilian courts applied" and that "it appears they primarily reviewed the correctness of the tribunal's decision on jurisdiction rather than considering that question *de novo*". However, he does not explain that comment further in his report; in cross-examination he accepted that the question of due process was considered by the courts afresh; and his written comment in no way explains what, in a matter which entirely depended on contract interpretation and where there were no facts in dispute, is the difference between reviewing the correctness of a decision of law and considering that question of law afresh.

134. In this connection, it is relevant to point out that in the *Azov* case the issue was whether *any* contract had ever been finalised. That was a heavily fought, heavily factual, issue which depended in part on expert evidence on foreign law which the arbitrators had heard over many days. The question which arose when the issue came before the commercial court under the English Arbitration Act's section 67 review of the arbitrators' substantive jurisdiction was

[3] Another nuance is that, as in Brazil, some jurisdictions do not permit a challenge from a decision of the arbitrators to *decline* jurisdiction.

whether fresh evidence and fresh reports could be placed before the court, or whether the matter had to be looked at exclusively with the same evidence and therefore it might be said through the same eyes as the arbitrators. No, said the court. As Lord Collins put it in *Dallah* (at para [96]), "where there was a substantial issue of fact as to whether a party had entered into an arbitration agreement, even if there had already been a full hearing before the arbitrator the court, on a challenge under section 67, should not be in a worse position than the arbitrator for the purpose of determining the challenge". Or as Lord Mance put it (at para [26]), the parties are "entitled to a full judicial determination on evidence". In *Dallah*, as in *Azov*, there was much dispute in fact. But in this case, because the law in the Brazilian courts was the law of the Agreement, and the facts were otherwise plain on the contractual documents, the dispute as to jurisdiction was one of law.

135. Mr Flynn submitted, nevertheless, that a reading of the Brazilian courts' judgments showed that they were not directing themselves by their views of Brazilian law but in some way by reference to what the arbitrators had decided. He emphasised the use of the word "possible" in Judge Amaral's ruling, eg in the sentence "The discussion revolves around whether it is possible or not to nullify the arbitral sentence, which claim was based, primarily, on four points". It is true that one might expect a different word or expression from "possible", such as "this court ought" or "the law allows". It remains, however, a case where the claimant for nullity bears the burden of showing that the arbitrators have gone wrong in some way. "Can it meet that burden?", is what I take the judge to be asking. In any event, I cannot read the judge's exposition as being other than an expression of his own view of what the law requires. Thus the third point discussed is the due process point. This is plainly not something on which deference is owed to the challenged tribunal. As Judge Amaral said in that regard: "The documentation offered by the parties unequivocally proves the broad possibility for argument, discussion and challenges." And the fourth point discussed is lack of reasons, which again is plainly a matter for the judge, on his reading of the award, as he says: "The mere reading of the referenced decision…allows one to verify that the subject-matter was analysed with a high degree of detail…" One would therefore not expect a different test or approach when it comes to the two points of contract interpretation: as to which the judge said first, on the question whether there was no agreement to arbitrate, that "such was not the case", and then gave his reasons, which included the facts about the Agreement and Addendum 5; and on the second point, as to the scope of the arbitration agreement, he said that "the clause of the contract itself, as it was drafted, did not limit the scope of jurisdiction, thus there is not verified any violation of Art 32, Clause IV…". I have already given my reasons for viewing the São Paulo Court of Appeals' judgment as its own judicial determination of the issues on appeal.

136. I therefore reject the submission that a different test was applied from that which obtains under English and Cayman law to the MP Funds' article 33 challenge to the validity of the arbitral tribunal's Awards. In my judgment the issues faced and decided by the Brazilian courts are the same issues as would arise on the MP Funds' defences under the New York Convention and the CI Enforcement Law.

137. In the circumstances, those Brazilian judgments are plainly the best evidence there is of Brazilian law, of what a Brazilian court would decide on the issues in question here. They are determinative (see for instance *Malicorp* at [25]). Mr Flynn submits that there has been no appeal on the issues of Brazilian law. But once it is decided that the Brazilian judgments in this case are decisions on the same issues as lie before this court, plainly within this appeal, it is impossible to go behind them as a matter of Brazilian law. That would remain the case even if there was no technical estoppel on the ground that those judgments were still under appeal in Brazil. Even if it would in theory be possible to show that those judgments had been overturned in another case, the MP Funds have not sought to do that.

138. I would therefore hold that the MP Funds are estopped from challenging the Brazilian law decisions handed down on the validity of the arbitrators' jurisdiction in this case. I will revert below on the subject of the outstanding possibility of appeal in Brazil.

139. It follows that, in turning now to the subject of due process and public policy, I do so on the basis that the MP Funds were involved in an arbitration to which they were bound by their agreement, and that the Brazilian courts have considered and given their independent answer to the question of due process.

Due process and public policy

140. It is common ground that public policy and substantial or natural justice are matters for Cayman law: see, for instance, *Pemberton v. Hughes* [1899] 1 Ch 781 at 790, *Yukos v. Rosneft* at [151] and *Cukorova* at [32]. However, where an enforcing court is concerned with litigation under a foreign law, the matter is not necessarily as straightforward as it might be with domestic litigation or with arbitration seated in England. Public policy might be an over-powerful tool to bring to bear, and not all issues of due process are matters of substantial justice.

141. In this connection, Mr Lowe refers to the influential decision of Mr Justice Colman, acknowledged to be an experienced judge in such matters, in *Minmetals*. There a Chinese award was challenged in the Chinese courts on the basis that the award debtor had not been given a chance to make representations about another award (in a sub-sale arbitration) which the

arbitrators had relied on for a question of quantum. The Chinese courts remitted the matter back to the arbitrators. On the resumed arbitration, the arbitrators invited the respondent to explain its complaint. It failed to do so, and the arbitrators affirmed their award. It was challenged again in the Chinese courts, this time unsuccessfully. It now came for enforcement in England, and the award debtor raised defences under section 103(2)(c) (inability to present a case) and (f) (public policy). The defences were dismissed and the award was enforced.

142. As to the section 103(2)(c) defence, Colman J said that the award debtor had failed to take advantage of the opportunities available to it on remission both to explain its complaint and to ask for a copy of the sub-award. These were matters within its control.

143. As to the section 103(2)(f) defence, Colman considered *Adams v. Cape Industries plc* [1990] Ch 433 (Scott J and CA) (as to which, see below) and observed that it had involved "quite exceptional facts" (at 329j). He pointed out, by reference to the case of *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd* [1999] QB 740, (at 330*j*) that –

> it was necessary to have regard not only to the public policy of discouraging international commercial corruption, but to the countervailing policy of giving effect so far as possible to the finality of international arbitration awards and to discouraging the relitigation of issues already determined by arbitrators by adducing evidence not shown to have been unavailable before the arbitrators.

144. Colman J continued as follows (at 331*c-h*):

> In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand. Just as great weight must be attached to the policy of sustaining the finality of international awards, so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction. I use the word 'normally' because there may be exceptional cases where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so. However, outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be reinvestigated by the English courts on an enforcement application is to be most strongly deprecated.
>
> In summary, therefore, in an case where an enforcee alleges that a New York Convention award should not be enforced on the grounds that such enforcement would lead to substantial injustice and therefore be contrary to English public policy the following must normally be included amongst the relevant considerations: (i) the nature of the procedural injustice; (ii) whether the enforcee has invoked the supervisory jurisdiction of the seat of the arbitration; (iii) whether a remedy was available under that jurisdiction; (iv) whether the courts of that

> jurisdiction have conclusively determined the enforcee's complaint in favour of upholding the award; and (v) if the enforcee has failed to invoke that remedial jurisdiction, for what reason, and in particular whether he was unreasonable in failing to do so.

145. In the present case, factor (v) above does not apply, factors (ii), (iii) and (iv) are all answered in VRG's favour, and factor (i) remains a live issue.

146. I consider other cases which have been cited to us on the question of English and Cayman public policy attitudes to due process challenges to a foreign judgment or award.

147. In *Adams v. Cape Industries* the question arose as to the enforcement of a Texas default judgment for over USD 15 million, in the absence of a judicial hearing. The defendants had not appeared, hence the default judgment, but the question of quantum remained. There were 462 separate plaintiffs. The judge accepted the plaintiffs' counsel's assessment as to the level of various quantum bands and the allocation of individual plaintiffs within those bands. Scott J at first instance had directed himself that the requirements of substantial justice "cannot…be divorced from the legitimate expectations of both [parties] in the context of the procedural rules applicable to the case, but had concluded that in the absence of any judicial assessment of the damages, there had been a breach of substantial justice (at 500). The essence of the decision was that, in simply accepting counsel's assessments for himself, the Texan judge *had not acted in accordance with Texan procedural law*. The court of appeal expressed itself thus (at 564):

> We have found this to be a matter of difficulty…Scott J expressed his view that the system of civil justice evidenced by the Federal Rules and explained by the witnesses was an unimpeachable system of justice within one of the great common law jurisdictions of the world and was plainly in accordance with the requirements of natural justice. We make the same respectful acknowledgment. But, as Scott J pointed out, the defendants make no criticism of that system of justice. Their complaint was that, at the invitation of the plaintiffs' counsel, Judge Steger did not proceed in accordance with it.

148. In *Hebei Import & Export Corporation* [1999] HKFCA 40 a Chinese award had been challenged in the Chinese courts but not on the public policy grounds raised as a defence to enforcement proceedings in Hong Kong. The leading judgment of the court, with which the other members agreed in their concurring judgments, was given by Sir Anthony Mason NPJ. There had been a factory inspection attended by experts and the Chief Arbitrator but not the parties, followed by an experts' report, after which the award debtor admitted liability. The award debtor now complained that it had not been able to attend the inspection, that improper communications had been made to the Chief Arbitrator at the inspection, that it had not had an opportunity to deal with the report, and that it had been denied a hearing. It complained in Hong

Kong of fundamental breaches of natural justice, and of bias. Those complaints were rejected. The complaints could have been raised before the arbitrators themselves, as well as the Chinese courts, but were not. What is of interest for present purposes is what the Final Court of Appeal said as a matter of principle.

149. Thus Sir Anthony Mason said this:

> 100. The question then is whether the two matters of which the respondent complains, namely the alleged refusal of a hearing and the communications to the Chief Arbitrator were fundamental conceptions of morality and justice of Hong Kong…
>
> 101. The critical question, however, is whether what happened in this case was contrary to these basic notions. In approaching this question, it is relevant to take account of the fact that the parties agreed to an arbitration which was to be governed by the CIETAC Arbitration Rules and the PRC Arbitration Law. The fact that the parties agreed to procedures which differ from those which would ordinarily apply in Hong Kong is a circumstance of which we must take account (see Ordnance s. 2AA(2)(a)).

150. And Mr Justice Bokhary PJ said this:

> 28. When a number of States enter into a treaty to enforce each other's arbitral awards, it stands to reason that they would do so in the realization that they, or some of them, will very likely have different outlooks in regard to internal matters. And they would hardly intend, when entering into the treaty or later when incorporating it into their domestic law, that these differences should be allowed to operate so as to undermine the broad uniformity which must be the obvious aim of such a treaty and the domestic laws incorporating it.
>
> 29. In regard to the refusal of Convention awards on public policy grounds, there are references in the cases and texts to what has been called "international public policy". Does this mean some standard common to all civilized nations? Or does it mean those elements of a State's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are also affected? I think it should be taken to mean the latter…
>
> 30. None of this is to say that the proper approach is insular. It is eclectic…

151. In *Cukorova* there was an ICC arbitration governed by Swiss curial law with respect to a substantive agreement governed by Turkish law. The award creditor sought to enforce the award in the BVI. The award debtor defended enforcement on the grounds that the arbitral tribunal lacked jurisdiction, that it, the enforcee, had not been able to present its case, and on public policy. The Privy Council rejected all three defences. Lord Clarke said:

34. The general approach to enforcement of an award should be pro-enforcement. See e.g. *Parsons & Whittemore Overseas Co Inc v Société Générale* 508 F 2d 969 (1974) at 973:

> 'The 1958 Convention's basic thrust was to liberalize procedures for enforcing foreign arbitral awards…[it] clearly shifted the burden of proof to the party defending against enforcement and limited his defences to seven set forth in Article V.'

152. The essence of the award debtor's complaint was that it was not given the chance to call a certain witness (Mr Berkmen), despite numerous requests that he be heard. There was also a complaint that its adherence to the disputed arbitration agreement in question was found on the basis of tacit acceptance, and that that had not been anticipated. But the Privy Council found that the claimant had, on the first day of the hearing, submitted that tacit adherence (acceptable under Turkish law) was part of its case; and that it was satisfied by the tribunal's own reasons for not calling Mr Berkmen. The defences against enforcement were therefore dismissed.

153. Mr Flynn relied in particular on *Malicorp*, which he submitted was a case on essentially similar facts. *Malicorp* concerned an Egyptian award, in favour of the English contractor, Malicorp, against the Egyptian Government. The arbitrators found that Egypt had validly avoided the concession contract for mistake, but nevertheless awarded damages against it on a basis which had never been sought or put. First, Malicorp sought unsuccessfully to enforce in France. Secondly, Egypt sought to set aside the award in Egypt, and succeeded, pending an appeal to the Egyptian cour de cassation. Thirdly, Malicorp sought to enforce in England, and failed on two grounds: the Egyptian set aside of the award would be recognised; and a defence under section 103(2)(c) of the English Arbitration Act had been proved.

154. It is not clear from Walker J's judgment in the English court on what ground the Egyptian courts had set aside the award, but he went into the arbitration proceedings with care. He established that Malicorp had sought damages against Egypt on the ground of breach of contract, and that Egypt claimed it was entitled to avoid the contract for fraud. However, the arbitrators rejected Malicorp's case, made no finding on Egypt's case, and found instead that Egypt was entitled to avoid the contract for mistake. They then went on, nevertheless, to award damages against Egypt under article 142 of the Egyptian Civil Code which entitled damages to be awarded where a contract is void but *restitutio in integrum* may not be possible. Nothing like this had been pleaded, argued or mentioned. The judge concluded that the award of damages under article 142 "must have been a complete surprise to Egypt" (at para [41]). He continued:

> It would have been astonishing, if there had been any suggestion that this was in contemplation that Egypt would fail to protest that the tribunal ought to make a finding on its case on fraud rather than allocate responsibility on the footing of a good faith mistake on the part of Malicorp. It would similarly have been astonishing, if there had been any suggestion that damages in place of reinstatement were contemplated, that Egypt would fail to protest that such damages could not properly incorporate an element of loss of profit.

155. A review of these authorities discloses that (i) where due process is concerned, although the standards are ultimately those for an English court to set, regard must properly be had for foreign procedure and what the courts of that foreign procedure have to say about the issue of due process; (ii) there has been no case in which an award which has been challenged in but upheld by the supervisory courts in the country of its seat has been refused enforcement on a due process challenge which has been considered and rejected by the foreign court; (iii) there has been no similar case in which a major doctrine of the civil law, such as *iura novit curia*, has been rejected as contrary to substantial justice as that is understood in English law.

156. I therefore turn to the doctrine of *iura novit curia*, which Mangatal J regarded as irrelevant, both on the ground that "it is a question of Cayman law as to whether there was procedural fairness" and on the ground that Mr Gomm's evidence that the doctrine did not apply as a matter of Brazilian law to international arbitration was to be accepted. As to the first of those grounds, the judge did not take into account that element of English law which refers as appropriate to foreign procedure; and as to the second of those grounds, the judge did not have the advantage of the scholarly material which is available to this court.

157. That material is a treatise entitled *Iura Novit Curia* in International Arbitration, published by NYU's Center for Transnational Litigation, Arbitration and Commercial Law, 2018. It comprises 15 chapters contributed by practitioners and scholars from 15 separate countries about the role of *iura novit arbiter* in those countries – from Argentina to the United States. There are then two concluding chapters: chapter 16 entitled *Iura Novit Curia* in International Law, and chapter 16 entitled General Report on *Jura Novit Curia*.

158. The treatise is too lengthy to cite in detail. I extract, however, some references from the chapters on Brazil (for obvious reasons), from France, Germany, Sweden and Switzerland, as being important civil law centres of international arbitration in Europe, and from the United States and England and Wales, as being important common law centres of international arbitration.

159. It seems (see at 426-7 of the treatise) that the doctrine of *iura novit curia* can be traced right the way back, past the great Roman jurists, to no less a figure than Aristotle, who in his *Rhetorics* said –

> Again, a litigant has clearly nothing to do but to show that the alleged fact is so or is not so, that it has or has not happened. As to whether a thing is important or unimportant, just or unjust, the judge must surely refuse to take his instructions from the litigants: he must decide for himself all such points as the law-giver has not already defined for him.

160. As for Brazil, the author, Rafael Alves, a practitioner and professor, refers to the instant case as being one of three paradigmatic cases on the subject, the other two being slightly later, *TEC* in 2013 and *EIT* in 2015 (at 72-75). In *TEC*, the São Paulo Court of Appeals upheld the first instance court in rejecting a due process challenge to a Brazilian award, "confirming the application of *jura novit curia* in arbitration under Brazilian law…because the arbitrators *may* apply a *different legal basis* compared to the ones argued by the parties, as long as the *questions of fact* remain the same". In *EIT*, the first instance court upheld a challenge "because the arbitral tribunal decided the case based on a *question of fact* (gross negligence) that had *not* been subject to prior discussion between the parties. The judge also clarified that, had the arbitral tribunal only applied a *different legal basis*, the "*jura novit curia* principle" would be applicable, and the arbitral award would be valid." All three cases await appeal. The author therefore concludes (at 81):

> Second, with respect to *domestic arbitral awards subject to Brazilian law*, so far, in general terms, Brazilian courts have been more lenient to *accept* the application of *jura novit curia* in arbitration and *reject* setting aside procedures…provided that only *questions of law* are concerned (not questions of fact), that is, when the arbitrators provided *a different legal basis or legal reasoning* for the proven facts, as compared to the ones brought by the parties. In any event, arbitrators should exercise *caution in avoiding surprises* and preserving *parties' procedural rights* in such regard, as violation of *due process of law* is also a ground to set a domestic award aside under Brazilian law (Article 32, VIII, of the Brazilian Arbitration Act).

161. As for France, the authors Gilles Cuniberti and Nicolina Bordian, respectively a professor and senior lecturer and both practitioners, make the opening point (at 169) that the New York Convention is almost never raised before French courts, which directly apply French law. French law recognises the doctrine of *iura novit curia* in international arbitration, but requires all points, whether of fact or law, to be submitted to the discussion of the parties (at 171).

162. As for Germany, the authors Burkhard Hess and Leon Marcel Kahl, respectively a professor and research fellow at the Max Planck Institute, conclude that the principles of *iura novit curia* or *da mihi factum dabo tibi ius* as understood in German law permit arbitrators to apply the laws they deem applicable even if not chosen or pleaded by the parties on the basis that while the parties are responsible for the facts, it is the tribunal that must apply the law. However,

neither court nor arbitral tribunal should surprise a party with a point that a conscientious and knowledgeable party could not expect (at 195, 215/6).

163. As for Sweden, the authors James Hope and Elisabeth Hallberg, both practitioners, observe that the principle of *iura novit curia* is mandatory for both courts and arbitral tribunals in Sweden (at 366). However, it is good practice, but not required, to invite parties to comment on matters which might take them by surprise (at 372). Failure to do so, however, is unlikely to provide any grounds for setting aside the award, "unless due process has been violated in a fundamental respect; for example, if the arbitral tribunal has been obviously partisan and thus violated the principle of equality" (at 374).

164. As for Switzerland, the authors Andrea Bonomi and David Bochatay, respectively a professor and practitioner, state that it is "undisputed that the rule *iura novit curia – or iura novit arbiter*, as it is often referred to in this context – is part of Swiss arbitration law" (at 381). That means that arbitrators "can freely assess and determine the legal implications of the facts of the case" and "are entitled to rely on legal grounds that were not pleaded by the parties" (at 382). That might even be their duty (at 386). However, they cannot go outside the relief requested (what in England we might call the prayer), a point made by other contributors: thus a party which had claimed a declaration that a contract was invalid could not be awarded damages for breach of it (383, and see also at 393). Although there is a general principle of due process of the right to be heard, this does not limit the principle of *iura novit curia*, but the other way round: "an award cannot be set aside on the sole ground that the arbitral tribunal has drawn from the facts legal consequences that were not pleaded, without giving the parties the opportunity to comment on such legal grounds". Only very exceptionally, where the relevance of the unpleaded and undiscussed grounds was unforeseeable, can the award be set aside. However, "this exception is construed narrowly by the Federal Tribunal…the parties have to demonstrate that the rule of law or legal argument was unforeseeable and truly came as a surprise. As case law shows, an annulment for violation of the right to be heard in connection with *iura novit curia* is very scarce" (at 389). Only two such cases have been found (at 390).

165. As for the United States, the author Aaron Simowitz, a legal scholar, sums up the matter in his conclusion as follows (at 423/4):

> A brief survey of the U.S. landscape reinforces the general rule as articulated by the United States Court of Appeals for the Ninth Circuit in *Iran v. Gould*[4]: Arbitral awards will be reviewed on the basis of arbitrators' powers, not parties' pleadings. A U.S. court should be extremely unlikely to disturb an international award on the basis of *jura novit arbiter* unless much more is shown. First, U.S. courts will

[4] *Ministry of Def. of the Islamic Republic of Iran v. Gould Inc* 969 F 2d 764, 771 (9th Cir 1992)

> almost certainly require a showing of prejudice. Second – even if a party can demonstrate prejudice – a U.S. court will require some additional, exceptional factors, such as significant *ex parte* communication.
>
> On occasion, U.S. courts have been accused of merely paying lip service to the principle of deference to arbitral tribunals (for example, in the long-running critiques of the 'manifest disregard of law' basis for setting aside a Convention award). However, in the realm of *jura novit arbiter*, one can expect U.S. courts to be as good as their word. U.S. courts are accustomed to practically unfettered discretion in whether to independently investigate questions of law. U.S. courts should find no basis to question their habitual deference to arbitral tribunals – quite the opposite.

166. As for England and Wales, the author Professor Loukas Mistelis states in his opening abstract that "Whereas courts in civil law jurisdictions accept this principle more broadly, courts in common law jurisdictions are less willing to accept its existence in international arbitration" (at 135). He speaks of a middle ground or "third way" developed and advocated for international arbitration. He confirms the nature of the doctrine in civil law, ie "As long as the parties establish the facts of the case, the courts will give them the law – or in the words of the well-known Latin maxim: "*da mihi facta, dabo tibi ius*" (at 136), but states that it is not a doctrine of the common law. He examines jurisprudence which shows that in arbitration seated in England under English law the courts have tended to regard a decision on a point of law without notice to the parties as a breach of natural justice; but he also mistakenly cites jurisprudence concerning new factual points as though they were concerned with new points of law (*The Vimeira* [1984] 2 Lloyd's Rep 66 (CA)). Even so, he cites (at 152) authority for it being sufficient notice that a point is raised "only briefly" (*Terna Bahrain Holding Co WLL v. Al Shamsi* [2012] EWHC 3283, [2013] 1 All ER (Comm) 580 at para [106], Popplewell J as he then was)[5]. Professor Mistelis concludes (at 167) as follows:

> Hence, it appears that arbitral tribunals seated in the UK may adopt a moderate *iura novit arbiter* approach which is not as wide as the one observed in civil law systems, but is wider than the discretion of the English judge. This development is embedded in the English Arbitration Act with the clear parameters of due process and efficiency and also the evolution of international arbitration rules, such as those of the ICC or the LCIA which vest arbitral tribunal with significant discretion as regards applicable law provided that due process is being observed.

[5] "If a point is raised only briefly, that is in accordance with the idea of speedy resolution which is an objective of the arbitral procedure (whether or not in a given case the objective is achieved). It is none the less so if a host of what turns out to be bad points are also raised and it is on those other points that the party raising the issues concentrates his exposition. Provided the issue is raised, however briefly, the opposing party has an opportunity to address it at whatever length and in whatever detail he chooses" *Terna* at para [106].

167. What Professor Mistelis does not cover, however, is the attitude of English law to the doctrine of *iura novit curia* or *iura novit arbiter* when it applies under foreign, civil, law in a foreign seated arbitration. For that, the jurisprudence discussed in this judgment above is all that avails from the researches of counsel in the appeal.

168. Chapter 16 of the treatise is entitled *Iura Novit Curia* in International Law, the author of which is Dr Friedrich Rosenfeld, a practitioner and professor in Germany. It is to Dr Rosenfeld that I owe the reference to Aristotle above. It is clear from his chapter that the doctrine is well represented in international law and that a broad range of international adjudicators have applied it.

169. Finally, chapter 17 of the treatise, the author of which is Dr Giuditta C Cordero-Moss, a professor of the University of Oslo, is headed "General Report on *Jura Novit Arbiter*. She concludes (at 480):

> *Jura novit arbiter*, the maxim that justifies the arbitral tribunal's development of its own legal reasoning, may *prima facie* be deemed to contradict the fundament of arbitration, that is, the supremacy of party autonomy. A deeper examination, however, shows that the vast majority of the examined legal systems give the tribunal the power to make its own legal inferences from the submitted facts, and to independently interpret and apply the law…In many legal systems, however, the arbitral tribunal is expected to inform the parties of its independent legal reasoning, so as to give them the possibility to comment. These powers of independent legal reasoning only in few systems go so far as to permit the tribunal to order remedies different from those that were requested by the parties. Also, these powers have to be exercised cautiously and in the respect of the legal framework (particularly, of the principle of fair hearing). Moreover, they should ensure predictability – and this may be achieved if the tribunal reasons according to the guidelines laid down in the private international law.
>
> Recognising the tribunal's power to develop its own legal reasoning is not detrimental to arbitration, but quite to the contrary: it supports the role of arbitration as a credible method to settle disputes, and it thus contributes to counteracting emerging trends to restrict the scope of arbitrability in the name of ensuring more accurate application of the law.

170. In my judgment, this review of the treatise on *iura novit curia / iura novit arbiter* enables the following conclusions to be drawn for the purposes of this appeal:

(i) It is clear that the doctrine is standard in the civil law, even if not practised in the common law world.

(ii) It is impossible to say that Brazilian law does not recognise the doctrine as being applicable to international arbitration seated in Brazil.

(iii) It is impossible to say in general that the doctrine is not recognised in international arbitration. That makes it all the more improbable that, despite

the Brazilian cases of *MP Funds, TEC and EIT*, it could be concluded that Brazilian law only recognises the doctrine in the courts and in entirely domestic arbitration but not in international arbitration.

(iv) A line, possibly an uneasy line, may have to be drawn between cases where the doctrine answers the due process question of the right to be heard and cases where even a reasonable and conscientious party can be said to be unfairly caught by surprise such as to be deprived of substantial or natural justice.

(v) It is a different matter for a tribunal, court or arbitrator, to trespass outside the relief requested.

171. It is in these circumstances that I must resolve the most delicate conflict in this appeal.

172. I do not know of any other case in English or Cayman jurisprudence in which the significance of the doctrine of *iura novit curia* has fallen for appreciation as part of a due process or public policy challenge to recognition or enforcement of a foreign arbitral award. Although it is clear that ultimately due process or public policy have to be judged by home standards, it is also clear from the jurisprudence cited above that, where foreign court judgments (*Adams v. Cape Industries*) or arbitral awards (*Minmetals*) are concerned, the English court will take account of foreign law and procedure. The doctrine of *iura novit curia* is so widespread and well recognised in the civil law that I would be concerned if English and Cayman law would simply seek to ignore it. Half the world practises civil law, including nations which have helped to build the system of international arbitration, of which Switzerland is a leading example.

173. In the case of international arbitration in particular (but also in the case of exclusive jurisdiction clauses) the place or seat of arbitration, with its governing curial law, is a matter of choice. The parties cannot easily be excused from the responsibility of being aware of the procedural law which governs their arbitration. This does not apply in the same way to court cases, in the absence of an exclusive jurisdiction clause, where jurisdiction may be imposed by law rather than by choice.

174. Although it is possible and acceptable to consider that due process and public policy can be tantamount to the same thing, at any rate in cases where the breach of due process constitutes a negation of substantial or natural justice, it also needs to be remembered that breaches of due process come in every degree, from the most insubstantial to the most outrageous – which is why the English Arbitration Act will only give effect to a challenge to an English award based on due process ("serious irregularity" under section 68 of that Act) if the complainant proves substantial injustice as well as serious irregularity. For that purpose, it must therefore prove that the opportunity to address the point might well have made a significance difference, otherwise no substantial injustice can be shown. There has been no serious attempt, however, to prove an

analogous requirement in this case. That said, and given the separate defence provided for due process, I am inclined to think that the New York Convention defence of public policy is really intended for something which goes beyond even serious breaches of due process. Ultimately, however, this does not matter.

175. It is the requirement of the proof of substantial injustice that is fundamental to a due process challenge under section 68 of the English Arbitration Act in the case of an English award. I have no doubt that the same is true for the purpose of a due process challenge in the Cayman Islands to a Cayman award. In *Terna*, a much cited authority, Popplewell J put the matter thus (at para [85(3)]):

> A balance has to be drawn between the need for finality of the award and the need to protect parties against the unfair conduct of the arbitration. In striking this balance, only an extreme case will justify the Court's intervention. Relief under section 68 will only be appropriate where the tribunal has gone so wrong in its conduct of the arbitration, and where its conduct is so far removed from what could reasonably be expected from the arbitral process, that justice calls out for it to be corrected.

Popplewell J repeated that in his judgment in *Reliance Industries Ltd v. The Union of India* [2018] EWHC 822 (Comm), where he added (at para [15]):

> The principle at (3) reflects what was said in the Report on the Arbitration Bill of February 1996 by the Departmental Advisory Committee on Arbitration (the 'DAC Report'), namely that '[t]he court does not have a general supervisory jurisdiction over arbitrations'; the parties having chosen arbitration rather than litigation, s. 68 is 'designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected.'

176. A fortiori, in my judgment, must be the position where an English or Cayman court has to consider a due process challenge to the enforcement of a foreign award rendered under the procedure of a foreign law and on its merits reflecting the application of a foreign substantive law.

177. In the present case, the due process issue raised by MP Funds has been, in one form or another, considered by (i) the arbitral tribunal itself, (ii) the ICC Court of Arbitration, (iii) Judge Amaral, (iv) the São Paulo Court of Appeals, (v) the Supreme Court of Brazil (even if there is still an outstanding appeal there), and (vi) Mangatal J. I say that it has been considered by the arbitral tribunal itself, because their award makes express its consideration of and reasons for application of the doctrine of *iura novit curia*. For the same reason, namely because the award is express about its application of the doctrine and its motivation therefor, it is relevant to point out that the doctrine and its application have passed the scrutiny of the ICC Court, which is a

scrupulous reviewer of draft awards. I have discussed the role of Judge Amaral and of the São Paulo Court of Appeals above. And Mangatal J, as I have also discussed above, felt able to ignore the doctrine on the basis that it was a matter for Cayman law and that it did not apply to domestic Brazilian arbitration concerning international parties (international arbitration in Brazil).

178. What do we know about the particular circumstances in which the arbitrators applied the doctrine? The essential factual issues concerned first, the proper level of the company's working capital, and secondly the alleged fraud or malice of the respondent parties, and in particular the MP Funds' Mr Lap Chan. Those matters were hotly disputed, but resolved in favour of VRG. Although the fraud was deployed by VRG in their pleadings and submissions in favour of lifting the corporate veil, as an abuse of the privilege of separate corporate personalities, it cannot or ought not to have been a surprise that it came to be regarded as a fraudulent misrepresentation inducing the contract; or that the damages were at least the R$ for R$ adjustment to the price provided by the contract which had been so induced. Moreover, article 148 had been raised, even if briefly or in passing. It is said in the MP Funds' evidence that the arbitrators' reliance on article 148 was a surprise, but I do not see why it should have been so or can be reasonably adjudged to have been so in the setting of a procedural system which allowed the arbitrators to fit the law to the facts: about which the MP Funds must or ought to have been advised. I do not see why a proven fraudster found guilty of intentional deceit in the negotiation of a contract on behalf of its special purpose vehicles should complain of the obvious consequences of that deceit. I do not consider that the MP Funds could bring themselves within, for instance, the German exception of what a conscientious and knowledgeable party could not expect in a legal regime where the doctrine of *iura novit curia* applies.

179. In these circumstances, I consider that the fact that the Brazilian courts (and the ICC Court) have considered the arbitrators' deployment of the doctrine without finding (or warning about) a breach of due process to be significant and a matter for serious reflection.

180. I recognise nevertheless English and Cayman law's concern for the common law preference of inviting discussion of a new point of law, in the absence of which the court may well be inclined to accept a supervisory challenge to an award. I pay the closest and most earnest regard to that concern, which is healthy and just. Nevertheless, I find myself unable to condemn as unjust and against our own public policy a doctrine which is upheld in one of the great systems of law throughout the world, a fortiori when it has passed through the supervisory protections of the courts of the seat. If a domestic award is faulted by an English court on the basis of proof of substantial injustice, the award will in all probability (absent something to undermine the

independence and impartiality of the arbitral tribunal) be remitted to the arbitrators so that the error can be repaired. If, however, a foreign supervisory court dismisses a challenge, applying its own procedural law as the law of the seat and/or its own substantive law as the law of the obligations concerned, it is a significant matter for a court of another nation, asked to enforce an award pursuant to its Convention obligations, to disregard the promptings of the supervisory seat and insist that it knows better. Ex hypothesi, there will be no possibility of remission to the arbitral tribunal.

181. I therefore turn to consider the reasons which Mangatal J gave (set out in her para 172, cited at para 82 herein above) for concluding that it would be unfair to expect the MP Funds reasonably to have foreseen the arbitral tribunal's decision. She gave four reasons. The first was that article 148 imposes a tortious liability whereas the liability VRG claimed was contractual. However, a party accused of fraud in the negotiation of a contract should not, in my judgment, in the civil law setting of *iura novit curia*, be surprised to be found liable on a tortious basis. To conclude otherwise is to set the doctrine of *iura novit curia* at nought (which is what the judge essentially did). In any event, the principle of making a parent company liable for a subsidiary's fault as an *alter ego* through the process of piercing the corporate veil is not itself based on contractual liability, but is *sui generis* and depends not only on the subsidiary's fault but on the parent's own personal wrongful abuse of the benefits of independent personality of the limited company: and that partakes as much of delict as of contract.

182. The second reason was to contrast liability under article 148 with the arbitral tribunal's determination of jurisdiction. However, that determination did not depend on the *alter ego* theory being contractual but on the width of the wording of the arbitration agreement, to which, for other reasons, the tribunal adjudged that the MP Funds had adhered.

183. The third reason was to suggest that neither VRG nor the MP Funds had directed their evidence to alleging, or defending themselves against, the charge of fraud or malice in the negotiation of the Agreement, but only to abuse of separate corporate personality. However, in my judgment it is impossible to read the Final Award, significant parts of which I have set out above, as justifying that conclusion. In any event, it is irrelevant that either party mistakes where to apply its ammunition.

184. The fourth reason was to deny that the parties to the arbitration were concerned with questions of causation or damage flowing from the fraudulent misrepresentations alleged. Again, I find that conclusion hard to understand. One only has to read paragraphs 573 or 600 (for instance) of the Award (cited at para 26 above) to find the question of causation answered. Indeed, it is somewhat odd to find a submission that misrepresentations about working capital were of no

causative consequence. As for loss and damage, it is plain that the parties to the arbitration were concerned with litigating the loss flowing from misrepresentations as to the airline's working capital. The quantum of the price adjustment provided for by the Agreement (which despite the fraud there was no question of rescinding), being a R$ for R$ compensation for a misrepresentation as to the working capital of the airline, appears as a most natural figure, negotiated by all the parties to the arbitration, for compensating VRG in damages against the fraud committed against it.

185. The judge's fifth reason was essentially the same point as her fourth, but joined by the conclusion that "this was not the relief sought by VRG at all". It is of course true that VRG did not expressly found its case on article 148 as distinct from an *alter ego* and piercing of the corporate veil theory. But it is not true that it did not claim as its relief the loss which it was awarded, viz compensation according to the criteria of the price adjustment clause (estimated at a figure greater than awarded) for which not only the Sellers but also the MP Funds were to be held liable, even though the latter had not signed the Agreement. I refer to the Terms of Reference and "Statement of Argument", about which I shall say more in the section below.

186. Finally, in dealing with the judge's reasons, I refer to her para 179 (cited at para 86 above, where she preferred Mr Gomm's view that the doctrine did not apply to an international arbitration seated in Brazil or to international arbitration in general, which in my judgment in the light of the Brazilian judgments and the treatise on *jura novit curia* is an improbable or impossible conclusion to arrive at.

187. In any event, the judge never appears to have been asked to ask herself whether the MP Funds could prove that substantial injustice might have been caused so that a significant difference in outcome might have resulted. For myself, I have not been so persuaded.

188. In all these circumstances, although I have found the issue, in its way novel to English and Cayman jurisprudence, difficult and challenging, I have concluded that a New York Convention or a CI Enforcement Law defence, whether of due process or public policy, has not been proven.

Scope of the reference, and Terms of Reference

189. Finally, the MP Funds submitted, and Mangatal J agreed, that the arbitral tribunal purported to decide matters beyond the scope of the submission to arbitration. The judge did not refer expressly to the Request for Arbitration or the Terms of Reference, but simply concluded that, because VRG's legal grounds for holding the MP Funds liable were premised on the *alter ego*

theory, "It was therefore not within the scope of the Tribunal's jurisdiction to award as tortious damages a contractual price adjustment amount, which had never been sought by VRG" (at para 183).

190. In my judgment, however, that conclusion is simply a further demonstration of the judge's decision to set at nought the doctrine of *iura novit curia*. Ex hypothesi, the doctrine comes into play when the tribunal adopts as its own legal grounds for decision a legal categorisation which a party has not adopted for itself. However, this final issue has to be considered on the basis that the arbitrators in this case were entitled to do so, at any rate as long as they did not go outside the *petitio* or relief or prayer claimed. As to that, Judge Amaral specifically covered this point in his judgment, at para [3][iv] thereof (my interpolated numbering, cited herein at para 45 above), a passage which was cited with approval by the São Paulo Court of Appeals.

191. In the arbitration, VRG claimed (inter alia) that the MP Funds had defrauded it in negotiating the Agreement by misrepresenting the airline's working capital accounts and that Mr Lap Chan had himself played a direct role in doing so and in preparing and altering critical figures in his own handwriting; and that it had done so in order by its deceitful conduct to induce VRG to pay a higher price than the airline's true book value (see for instance VRG's "statement of arguments" at paras 34ff). In order to remedy (inter alia) this deceit, VRG claimed in its prayer, both in its request for arbitration and in its statement of arguments, the payment of an amount to be ascertained by the arbitral tribunal (unquantified in the former document but quantified at over R$ 139 million in the latter document) "in accordance with the price adjustment criteria" set out in the Agreement's price adjustment clause 5, but not specifically designating such claim to payment to be either contractual or by way of damages.

192. As for the Terms of Reference, at that initial stage, the matters were addressed more broadly and with less detail, and it is fair to say that the emphasis was on performance of the price adjustment clause. Nevertheless, it was recorded that VRG claimed that the MP Funds' abuse and unlawful and inequitable conduct justified piercing the corporate veil. As is common with such ICC terms of reference, the document stated as to "Issues to be Determined" that –

> 43. The Tribunal shall decide on all of the issues to be determined resulting from the claims and requests of the parties described in paragraph D above and in the written documents that the parties present during the proceedings. The Tribunal may also decide on new claims by the parties, under the terms of Article 19 of the ICC Rules.
>
> 44. The Tribunal does not consider it appropriate at this time to list the issues to be determined, making use of the power granted to it to that end by Article 18 of the ICC Rules.

193. Such drafting is common in ICC terms of reference to avoid the potential of what are essentially pleading points turning into jurisdictional traps. If thereafter the parties or any of them considered that the claims or arguments being addressed raised procedural issues as to the scope of the reference which might need to be determined by the arbitral tribunal under the ICC Rules, then they could raise the issue before the tribunal. Neither this court nor Mangatal J have been asked to find that the MP Funds ever sought to do so. As stated above, Mangatal J decided this point merely as an adjunct to her rejection of the doctrine of *iura novit curia*.

194. In any event, in my judgment Mangatal J mistook the significance of a doctrine of piercing the corporate veil as being a contractual remedy and over-emphasised its distinction from an obligation in fraud. I can illustrate this by reference to the leading modern English authority on piercing the corporate veil found in *Petrodel Resources Ltd v. Prest* [2013] UKSC 34, [2013] 2 AC 415. There Lord Sumption explained that in the civil law piercing the corporate veil depended on showing abuse of rights such as fraud, malfeasance or evasion of legal obligations (at para [17]). In English law, the expression covered an amorphous net of principle, but was (similarly) founded on what he called the "evasion principle", which depended on "a legal right which exists independently of the company's involvement" (at para [28], and see also Lord Neuberger at para [81]). Moreover, it ultimately resided in the concept that "fraud unravels everything". As Lord Denning said in *Lazarus Estates Ltd v. Beasley* [1956] 1 QB 702 at 712, cited by Lord Sumption at para [18] and by Lord Neuberger at para [83], "No court in this land will allow a person to keep an advantage which he has obtained by fraud…Fraud unravels everything." So far as Brazilian law is concerned, we have of course all the material which I have referred to and relied on in this judgment.

195. This fourth defence raised by the MP Funds is one to which comparatively much less attention has been paid, so much so that it is possible, although the matter is arguable, that VRG failed to appeal against the judge's brief paragraphs about it. In any event, Mr Lowe has asked this court, if necessary, for leave to amend his grounds of appeal in order to meet it. I would grant leave, and put VRG on terms that it amend its grounds of appeal accordingly.

Discretion

196. Mr Lowe submits that even if he is wrong on each or even all of the above issues, this court still has a discretion to enforce the award. As it is, in my judgment VRG has no need for the exercise of such a discretion. But if it did, I would not exercise it in VRG's favour.

The outstanding appeal process in Brazil

197. It is still possible, even if on past form it seems unlikely, that the MP Funds could ultimately succeed in their outstanding appeal to the Supreme Court in Brazil. If such an appeal did succeed, then it is difficult to conceive, on the issues considered in this judgment, that the award ought to be enforced in the Cayman Islands. How is this possibility to be guarded against? Article VI of the New York Convention and section 7(5) of the CI Enforcement Law allow the court before which enforcement is sought to adjourn the enforcement proceedings pending the outcome of set aside proceedings in the courts of the seat. It is plainly too late for that. However, the next best thing is that execution of a judgment to enforce ought to be stayed pending the outcome of the MP Funds' Brazilian appeal. Were that appeal to be allowed, the MP Funds would be entitled to return to these courts to have the stay made permanent.

Conclusion

198. In conclusion, I would allow VRG's appeal and enforce the award, subject to a stay pending the conclusion of the Brazilian proceedings.

Sir John Martin JA

199. I agree

Sir John Goldring, President

200. I also agree.

Exhibit C-1

Debt Assumption Agreement
Between Volo do Brasil S.A., Varig Logistica S.A. and CAT Aérea LLC

(see attached)

CONTRATO DE ASSUNÇÃO DE DÍVIDA

Pelo presente Contrato de Assunção de Dívida ("Contrato") as partes:

I. **Volo do Brasil S.A.**, a sociedade anônima constituída e existente de acordo com as leis brasileiras, com sede na Rua Padre João Manuel, 450, cj. 127, São Paulo, S.P., Brasil, inscrita no CNPJ/MF sob o n° 01.574.036/0001-28 (doravante denominada simplesmente como "VoloBr");

II. **Varig Logística S.A.**, sociedade anônima constituída e existente de acordo com as leis do Brasil, com sede na Rua Gomes de Carvalho, 1609 – 1° Andar, Vila Olímpia, São Paulo, S.P., Brasil, inscrita no CNPJ/MF sob o n° 04.066.143/0001-57 (doravante denominada simplesmente "VarigLog");

E, ainda, como interveniente-anuente:

III. **CAT Aérea LLC**, uma *limited liability company* constituída e existente de acordo com as leis do Estado de Delaware, Estados Unidos da América, com sede a 2711 Centerville Road, Suite 400, Wilmington, Delaware (doravante denominada simplesmente "CAT" e, em conjunto com a VoloBr e a VarigLog, as "Partes").

CONSIDERANDO QUE, a CA T e a VarigLog são parte de certos contratos de empréstimo, através dos quais a CAT concedeu para a VRG Linhas Aéreas S.A. ("VRG") certos empréstimos nas datas e valores descritos no Anexo A, anexo ao presente instrumento, usados para financiar a VRG ou as operações da VRG (os contratos

DEBT ASSUMPTION AGREEMENT

By this Debt Assumption Agreement ("Agreement") the parties:

I. **Volo do Brasil S.A.**, a *sociedade anônima* organized and existing under the laws of Brazil, with principal offices at Rua Padre João Manuel, 450, cj. 127, São Paulo, S.P., Brazil, enrolled with the CNPJ/MF under No. 01.574.036/0001-28 (hereinafter referred to simply as "VoloBr");

II. **Varig Logística S.A.**, a *sociedade anônima* organized and existing under the laws of Brazil, with principal offices at Rua Gomes de Carvalho, 1609 – 9° floor, Vila Olímpia, São Paulo, S.P., Brazil, enrolled with the CNPJ/MF under No. 04.066.143/0001-57 (hereinafter referred to simply as "VarigLog");

and, as intervening-consenting party:

III. **CAT Aérea LLC**, a limited liability company organized and existing under the laws of the State of Delaware, United States of America, with principal offices at 2711 Centerville Road, Suite 400, Wilmington, Delaware (hereinafter referred to simply as "CAT" and, in conjunction with VoloBr and VarigLog, "Parties").

WHEREAS, CAT and VarigLog are parties to certain loan agreements pursuant to which CAT granted to VRG Linhas Aereas S.A. ("VRG"), certain loans on the dates and in the amounts described in Schedule A attached hereto, used to fund VRG and VRG operations (the loan agreements described in Schedule A shall hereinafter be referred to

descritos no Anexo A serão doravante denominados simplesmente os "Contratos de Mútuo");

simply as "Loan Agreements");

CONSIDERANDO QUE, nos termos de instrumentos em separado, a VarigLog assumiu as obrigações da VRG sob os Contratos de Mútuo;

WHEREAS, by way of separate agreements, VarigLog subsequently assumed VRG's obligations under the Loan Agreements;

CONSIDERANDO QUE, a VarigLog reconhece que a VRG recebeu integralmente da CAT os recursos provenientes dos Contratos de Mútuo, mas que, até a presente data, não efetuou o pagamento de qualquer parcela devida pelo principal das Dívidas, conforme os termos dos Contratos de Mútuo;

WHEREAS, VarigLog acknowledges that VRG received from CAT all the advances under the Loan Agreements in full, but that up to the date hereof it has not paid any installments of the Debt's principal pursuant to the terms of the Loan Agreements;

CONSIDERANDO QUE a CAT tem uma sentença condenatória contra a VarigLog (a "Sentença") no valor principal de US$18.300.000,00, acrescido de juros de 9% ao ano a partir de 26.11.2008, além de juros contratuais apurados até aquela data;

WHEREAS, CAT has a judgment against VarigLog (the "Judgment") for the principal amount of $18,300,000.00 that accrues interest at a rate of 9% as of November 26, 2008, which interest is in addition to contractual interest accrued up to that date;

CONSIDERANDO QUE, nos termos de um instrumento de renúncia de juros de 31 de dezembro de 2008, a CAT renunciou ao direito de receber juros devidos pela VarigLog até aquela data nos termos dos Contratos de Mútuo;

WHEREAS, pursuant to the terms of that certain Interest Forgiveness Agreement, dated as of December 31, 2008, CAT waived its right to interest payments for interest accrued up to that date under the Loan Agreements;

CONSIDERANDO QUE, a VarigLog deseja ceder para a VoloBr e a VoloBr deseja receber e assumir da VarigLog, todas as dívidas da VarigLog oriundas dos Contratos de Mútuo (doravante denominadas simplesmente as "Dívidas"); e.

WHEREAS, VarigLog wishes to assign to VoloBr and VoloBr wishes to receive and assume from VarigLog, the debt of VarigLog arising out of the Loan Agreements (hereinafter referred to simply as "Debt"); and

CONSIDERANDO QUE, como parte dos esforços para auxiliar a melhoria da condição financeira da VarigLog e, assim, permitir que a VarigLog apresente proposta em rentável contrato governamental, desta forma melhorando a perspectiva futura da VarigLog como um negócio, a CAT

WHEREAS, as part of their efforts to help improve VarigLog's financial condition and thus allow VarigLog to bid on profitable government contracts, thereby improving VarigLog's future prospects as a going concern, CAT has agreed to the assignment by VarigLog to VoloBr of the Loan

concorda com a cessão dos Contratos de Mútuo pela VarigLog para a VoloBr.

RESOLVE, CADA UMA DAS PARTES, por considerações razoáveis e válidas, cujo recebimento e suficiência são neste ato reconhecidos e legalmente vinculantes, celebrar o presente Contrato, em caráter irrevogável e irretratável, que se regerá pelas cláusulas e condições adiante estipuladas:

1. **Descrição da Dívida**. As Dívidas e os Contratos de Mútuo foram devidamente registrados junto ao Sistema Declaratório Eletrônico do Banco Central do Brasil, módulo Registro de Operações Financeiras (RDE-ROF) ("ROF"), conforme descritos no Anexo A.

2. **Cessão e Assunção de Dívida**. A VarigLog, por este instrumento, cede e transfere à VoloBr, em caráter irrevogável e irretratável, a totalidade das Dívidas, seus direitos e obrigações estabelecidos nos Contratos de Mútuo e as obrigações de pagamento estabelecidas na Sentença oriundas da execução dos Contratos de Mútuo, e a VoloBr, por este instrumento, assume referidas Dívidas e recebe em cessão tais direitos e obrigações, em caráter irrevogável e irretratável (as Dívidas e todos os direitos e obrigações estabelecidos nos Contratos de Mútuo e aquelas obrigações oriundas da Sentença ora cedidas, as "Obrigações Cedidas"). A VarigLog e a VoloBr reconhecem que a cessão e assunção descritas nesta cláusula operam-se de pleno direito, mediante a celebração, pelas Partes, deste Contrato, e sem a necessidade da celebração de qualquer instrumento adicional. Para evitar dúvidas, com relação a quaisquer dos Contratos de Mútuo que foram inicialmente firmados entre a CAT e a VRG e que contenham disposição de vencimento antecipado em caso de "Venda

Agreements.

EACH OF THE PARTIES HAS DECIDED, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and agreed and intending to be legally bound, to execute this Agreement, irrevocably and irreversibly, which will be governed by the following terms and conditions:

1. **Description of the Debt**. The Debt and the Loan Agreements were duly registered with the Electronic Declaratory System of the Central Bank of Brazil, module Registration of Financial Operations (RDE-ROF) ("ROF"), as described in Schedule A.

2. **Assignment and Assumption of Debt**. VarigLog hereby transfers and assigns to VoloBr, irrevocably and irreversibly, all of the Debt, its right and obligations under the Loan Agreements and those payment obligations under the Judgment arising out of the enforcement of the Loan Agreements, and VoloBr hereby, irrevocably and irreversibly, assumes such Debt and fully accepts the assigned rights and obligations (the Debt and all of the rights and obligations under the Loan Agreements and those obligations under the Judgment being assigned, the "Assigned Obligations"). VarigLog and VoloBr agree that the assignment and assumption contemplated in this section shall be in full force and effect upon the execution of this Agreement by the Parties, without the requirement for the Parties to execute any additional documents. For the avoidance of doubt, with respect to any of the Loan Agreements that were initially entered into CAT and VRG that provides for early maturity as a result of "Sale of the Borrower," the Parties confirm that such

da Mutuária", as Partes confirmam que tal expressão significará a venda da VRG, que ocorreu em 9.4.2007.

3. **Anuência da CAT**. Pelo presente instrumento e para os efeitos do Artigo 299 do Código Civil, a CAT neste ato consente com a assunção das Obrigações Cedidas, conforme contemplado pelo presente, e reconhece desde já a VoloBr como única devedora das Dívidas.

4. **Exoneração da CAT**. Definições. O termo "Exonerador" significará a VarigLog e seus antecessores, sucessores, cessionários, coligadas atuais ou passados, e cada um dos respectivos conselheiros, diretores, empregados e agentes, atuais ou passados, ou qualquer pessoa demandando por ou através de quaisquer destes. Os termos "Exonerados" e "Partes Indenizadas" significarão cada um de (i) CAT e seus antecessores, sucessores e cessionários, (ii) coligadas da CAT (com exceção da VarigLog e VoloBr), e seus antecessores, sucessores e cessionários e (iii) quaisquer gerentes, quotistas, acionistas, sócios (com responsabilidade limitada ou não), conselheiros, diretores, empregados, agentes ou assessores, atuais ou passados, incluindo os herdeiros e sucessores, da CAT, suas coligadas (com exceção da VarigLog e VoloBr) e quaisquer um dos respectivos antecessores, sucessores e cessionários. Para evitar dúvidas, os termos "Exonerados" e "Partes Indenizadas" não incluem e não incluirão (i) o Sr. Marco Michel Haftel ou (ii) o Sr. Marco Antonio Audi.

(b) Exoneração. O Exonerador concorda em exonerar, renunciar e para sempre dar quitação com relação a qualquer reclamação, ação, causa de pedir, demanda ou responsabilidade, seja direta ou derivatira, líquida ou não, fixa ou contingente, vencida ou vincenda, controversa ou não, conhecida ou desconhecida, prevista ou imprevista, agora existente ou futura, baseada em lei,

term shall mean the sale of VRG, which occurred on April 9, 2007.

3. **Consent of CAT**. For the purposes of Article 299 of the Brazilian Civil Code, CAT hereby consents to the assignment and assumption of the Assigned Obligations as contemplated hereby, and acknowledges VoloBr as the sole debtor of the Debt.

4. **Release of CAT**. (a) Definitions. The term "Releasor" shall mean VarigLog and its predecessors; successors; assigns; current and former affiliates and subsidiaries, and each of their respective current and former directors, officers and employees, agents and anyone claiming by or through any of the foregoing. The terms "Releasees" and "Indemnitees" shall mean each of (i) CAT and its predecessors, successors and assigns, (ii) CAT's affiliates (other than VarigLog and VoloBr), and their predecessors, successors and assigns, and (iii) any current and former managers, members, shareholders, partners (limited or general), directors, officers, employees, agents and advisers, including all such persons' heirs and assigns, of CAT, its affiliates (other than VarigLog and VoloBr) and each of their respective predecessors, successors and assigns. For the avoidance of doubt, the terms "Releasees" and "Indemnitees" do not and shall not include (i) Mr. Marcos Michel Haftel or (ii) Mr. Marco Antonio Audi.

(b) Release. Releasor agrees to forever release, waive and discharge all claims, actions, suits, causes of action demands, debts, and liabilities, whether direct or derivative liquidated or unliquidated, fixed or contingent, matured or unmatured, disputed or undisputed, known or unknown, foreseen or unforeseen, now existing or hereafter arising, in law, equity or otherwise that are

equidade ou outra causa, que sejam baseadas total ou parcialmente em qualquer ação ou omissão, operação, fato ou outra ocorrência que tenha ocorrida antes de ou na data deste Contrato de qualquer forma relacionada com o Exonerador e suas coligadas (exceto a VarigLog ou a VoloBr) que pudessem ter sido propostas a qualquer tempo, passado, presente ou futuro, por ou em nome do Exonerador contra as Exoneradas.

based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to date of execution of this Agreement any way relating to Releasor and its affiliates (other than VarigLog or VoloBr) that could have been asserted at any time, past, present or future by or on behalf of the Releasor, against Releasees.

(c) Indenização. A VarigLog concorda em indenizar e manter as Partes Indenizadas isentas de qualquer demanda, perdas, danos, responsabilidades, débitos ou despesas incorridas por qualquer das Partes Indenizadas como resultado de qualquer ação ou demanda (ou ameaça de ação ou demanda) por qualquer pessoa contra quaisquer das Partes Indenizadas, relativas as operações ou relacionamento das Partes Indenizadas com a VarigLog.

(c) Indemnification. VarigLog agrees to indemnify and hold harmless Indemnitees from and against any and all claims, damages, losses, liabilities, debts or expenses incurred by any of the Indemnitees as the result of any action or claim (or threatened action or claim) by any person against any of the Indemnitees in any way relating to any Indemnitees' transactions or relationship with VarigLog.

(d) As obrigações da VarigLog e da VoloBr nos termos desta cláusula deverão permanecer em vigor mesmo após o pagamento integral das Obrigações Cedidas ou a rescisão deste Contrato.

(d) The obligations of the VarigLog and VoloBr under this clause shall survive the payment in full of the Assigned Obligations as well as the termination of this Agreement.

5. **Exoneração perante a CAT**. Em razão do acordado neste Contrato, a partir desta data, a CAT exonera totalmente a VarigLog de todas as Obrigações Cedidas. Sem prejuízo do disposto na sentença anterior, a VarigLog deverá permanecer devedora da CAT com relação a contratos de empréstimo outros que não aqueles descritos no Anexo A do presente Contrato, que permanecerão devidas pela VarigLog para a CAT e não serão afetados pela assunção de dívida estabelecida neste Contrato ou a exoneração estabelecida nesta Cláusula 5.

5. **Release before CAT**. As of the date hereof, and pursuant to the terms of this Agreement, CAT releases VarigLog from the Assigned Obligations. Notwithstanding the terms of the preceding sentence, VarigLog shall remain indebted to CAT with respect to loan agreements other than those described in Schedule A hereto, which shall remain VarigLog's debt owed to CAT and shall not be affected or modified by the assumption contemplated by this Agreement or the release set forth in this Section 5.

6. **Obrigações Adicionais, ROF e Procedimentos Pendentes**. A qualquer

6. **Further Assurances, ROF and Pending Proceedings**. At any time, or from

momento, ou periodicamente, a VarigLog e a VoloBr deverão, mediante solicitação da CAT, prontamente firmar, reconhecer e entregar qualquer documentos adicionais e praticar todos os atos conforme solicitação razoável da CAT para (x) a consumação da cessão e assunção contempladas no presente instrumento, (y) para garantir, preservar, proteger ou manter os direitos da CAT nas e come relação às Obrigações Cedidas, ou (z) para criar em benefício da CAT um gravame de primeira prioridade em certos ativos da VoloBr que tenham sido indicados pela CAT para garantir as Obrigações Cedidas, e a efetuar os registros necessários com relação a tais obrigações conforme venha a ser solicitado pela CAT, incluindo mas não se limitando a (i) alterar o ROF das Obrigações Cedidas conforme necessário para refletir a cessão e assunção contemplada pelo presente instrumento, (ii) confirmar, ratificar ou consolidar as obrigações da VoloBr com relação Obrigações Cedidas e (iii) protocolar qualquer petição perante juizo competente no Brasil, nos Estados Unidos ou em qualquer outro pais, estado ou localidade, para comunicar ao juizo ou solicitar a ratificação, aceitação ou confirmação da cessão e assunção estabelecidas no presente instrumento, e ainda praticar todos os demais atos necessários em decorrência da referida comunicação.

time to time, VarigLog and VoloBr shall, upon the request of CAT, promptly execute, acknowledge and deliver such further documents and do such other acts and things as CAT may reasonably request in order (x) to consummate the assignment and assumption contemplated hereby, (y) to grant, preserve, protect or perfect the rights of CAT in and to the Assigned Obligations, or (z) to create in favor of CAT a first priority, perfected security interest in certain assets of VoloBr that have been designated by CAT which shall secure the Assigned Obligations, and make such customary filings in connection with such obligations as may be directed by CAT, including but not limited to (i) modify the ROF with respect to the Assigned Obligations as necessary to reflect the assignment and assumption contemplated hereby, (ii) confirm, ratify or consolidate the obligations of VoloBr in respect of the Assigned Obligations and (iii) make any necessary filings with any court of competent jurisdiction in Brazil, the United States of America or any other country, state or place to notify such courts or seek their ratification, acceptance or confirmation with respect to the assignment and assumption contemplated hereby, and do such other necessary acts as a result of such notification.

7. **Compromisso**. A VoloBr se compromete e acorda com a CAT que até que todas as Obrigações Cedidas sejam integralmente pagas e cumpridas, a VoloBr não poderá, e não deverá autorizar ou permitir que quaisquer de suas subsidiárias ou afiliadas, incluindo sem limitação a VarigLog (cada uma, uma "Subsidiária") possa, sem o consentimento prévio e por escrito da CAT, (a) transferir, vender, hipotecar, ceder, dar em penhor ou criar uma garantia real ou de qualquer outra forma gravar ou alienar quaisquer de seus ativos salvo no curso

7. **Covenants**. VoloBr covenants and agrees with CAT that until all Assigned Obligations are fully paid and performed, VoloBr shall not, and shall not authorize or permit any of its subsidiaries or affiliates to, including, without limitation, VarigLog (each, a "Subsidiary"), without the prior written consent of CAT, (a) transfer, sell, mortgage, assign, pledge or grant a security interest in or otherwise encumber or dispose of any of its assets other than in the ordinary course of business, including without limitation any interests (debt, equity or otherwise) of

normal de suas atividades, incluindo sem limitação quaisquer participações (débito, capital ou de outra forma) em ou da VarigLog detidos pela VoloBr, (b) ser liquidada ou se dissolver, (c) emitir novas ações ou dívida salvo para a VoloBr, (d) ser parte de qualquer fusão ou incorporação ou (e) efetuar qualquer distribuição a qualquer de seus sócios ou pagar dividendos. A VoloBr e a VarigLog deverão (i) imediatamente após a execução deste Contrato, praticar os atos necessários para fazer com que a restrição contida no item (a) acima seja anotada e/ou registrada no livro de ações nominativas da VarigLog e (ii) prontamente entregar à CAT comprovação de tal anotação e/ou registro em forma e substância satisfatórios à CAT.

VarigLog owned by VoloBr, (b) liquidate and dissolve, (c) issue additional equity or debt other than to VoloBr, (d) be a party to any merger or consolidation or (f) make distributions to any of its partners or pay any dividends. VoloBr and VarigLog shall (i) immediately after the execution of this Agreement, take all necessary measures to have the restriction set forth in item (a) above notated and/or registered in the share registry books of VarigLog and (ii) promptly furnish to CAT evidence of such notation/registration in form and substance satisfactory to CAT.

8. **Foro**. (i) Qualquer ação ou procedimento para interpretar ou executar este Contrato poderá ser iniciada perante a Suprema Corte do Estado de Nova Iorque, Condado de Nova Iorque, ou a Corte Distrital dos Estados Unidos para o Distrito Sul de Nova Iorque, se tal corte tiver competência material sobre a disputa. As partes se submetem, de maneira irrevogável, à jurisdição pessoal de tais cortes em quaisquer ações ou procedimentos para interpretar ou executar este Contrato. Cada uma das partes renuncia, de maneira irrevogável e com relação a qualquer ação para interpretar ou executar o presente Contrato, (i) qualquer objeção que possa ter, a qualquer tempo, à escolha de foro às cortes identificadas neste parágrafo, (2) qualquer alegação de que as cortes identificadas neste parágrafo são foro inconveniente e (3) o direito de se opor que uma das cortes identificadas neste parágrafo tenha jurisdição pessoal sobre tal parte. Sem prejuízo do disposto acima, a CAT poderá iniciar qualquer ação ou executar este Contrato perante qualquer tribunal competente no Brasil.

8. **Forum**. (i) Any action or proceeding to interpret or enforce this Agreement may be brought in the Supreme Court of the State of New York, New York County, or the United States District Court for the Southern District of New York, should that court have subject matter jurisdiction over the dispute. Each party irrevocably submits to the personal jurisdiction of such courts in any action or proceeding to interpret or enforce this Agreement Each party irrevocably waives, with respect to any action or proceeding to interpret or enforce this Agreement, (i) any objection which it may have at any time to the laying of venue in the courts identified in this paragraph, (2) any claim that either of the courts identified in this paragraph is an inconvenient forum, and (3) the right to object that either court identified in this Section does not have personal jurisdiction over such party. Notwithstanding the foregoing, CAT may bring suit and enforce this Agreement in any court of competent jurisdiction in Brazil.

(ii) Renúncia de Julgamento por Júri. As Partes renunciam qualquer direito a julgamento por juri em qualquer ação, procedimento ou reconvenção oriunda de ou relativa a este Contrato ou a qualquer Obrigação Cedida.

(ii) Waiver of Trial By Jury. The Parties waive any right to trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement (or any Loan Agreement).

9. Recebimento de Citação.

(a) Definições. Para os fins desta cláusula, uma "Parte Brasileira" incluirá a VoloBr e a VarigLog e deverá aplicar a qualquer uma entre a VoloBr ou a VarigLog a quem a citação ou intimação seja endereçada.

(b) Cada Parte Brasileira neste ato nomea, de forma irrevogável, Law Debenture Corporate Services Inc. (o "Agente para Citação"), com escritório nesta data em 400 Madison Avenue, 4th Floor, New York, New York 10017, como seu representante para receber em seu nome e em nome de seus ativos, citação ou intimação de qualquer ação ou qualquer outro processo legal entregue com relação a este Contrato ou as Obrigações Cedidas. Citação ou intimação entre ao Agente para Citação deverá ser considerada citação ou intimação pessoal para a Parte Brasileira e deverá ser legítima e vinculante citação ou intimação nas Partes Brasileiras para todos os efeitos independente do não envio de cópia de cortesia de tal reclamação para as Partes Brasileiras, ou o não recebimento de tal citação ou intimação pelas Partes Brasileiras. Independente do acima, as Partes Brasileiras poderão ser citadas ou intimadas por qualquer método autorizado por lei.

9. Service of Process.

(a) Definition. For purposes of this provision, a "Brazilian Party" shall include VoloBr and VarigLog and shall apply to whichever of VoloBr or VarigLog service is directed.

(b) Each Brazilian Party hereby irrevocably appoints Law Debenture Corporate Services Inc. (the "Process Agent"), with an office on the date hereof at 400 Madison Avenue, 4th Floor, New York, New York 10017, as its agent to receive on its behalf and on behalf of its property, service of copies of any summons and complaint or any other legal process that may be served in connection with this Agreement or any Assigned Obligations. Service upon the Process Agent shall be deemed to be personal service on the Brazilian Party and shall be legal and binding upon the Brazilian Party for all purposes notwithstanding any failure to mail courtesy copies of such legal process to the Brazilian Party, or any failure on the part of the the Brazilian Party to receive the same. Notwithstanding the above, the Brazilian Party may be served by any other method authorized by law.

9. **Lei Aplicável**. Este Contrato será regido, interpretado e exequível de acordo com as leis do Estado de Nova Iorque, sem considerar os princípios de conflitos de leis ("Leis de Nova Iorque"). As Leis de Nova

9. **Applicable Law**. This Agreement shall be interpreted, construed and enforced in accordance with the substantive laws of the State of New York, without regard to New York's principles of conflicts of laws

Iorque serão aplicáveis independente da corte perante a qual qualquer ação para interpretar ou executar este Contrato seja iniciada.

("New York Law"). New York Law shall apply regardless of the forum in which any action to interpret or enforce this Agreement is commenced.

10. **Representações e Garantias**. A VoloBr e a VarigLog representam e garantem que:

10. **Representations and Warranties**. Each of VoloBr and VarigLog hereby represents and warrants that:

(a) Cada uma entre a VoloBr e a VarigLog é uma sociedade anônima devidamente organizada e existente sob as leis brasileiras, (ii) tem as qualificações necessárias para desenvolver suas atividades em todas as jurisdições onde exerce tais atividades e (iii) tem poderes e autoridade e todas as autorizações, licenças, consentimentos, permissões e aprovações governamentais necessárias para a propriedade e operação de seus ativos, para conduzir suas atividades conforme atualmente conduzidas, para firmar este Contrato e para completar as operações ora previstas.

(a) Each of VoloBr and VarigLog (i) is a *sociedade anônima* duly organized and existing under the laws of Brazil, (ii) is qualified to do business in any jurisdiction where it does business, and (iii) has all requisite corporate power and authority and all governmental licenses, authorizations, permits, consents and approvals required to own and operate its properties, to carry on its business as now conducted and as proposed to be conducted, to enter into this Agreement and to carry out the transactions contemplated hereby.

(b) O capital autorizado da VarigLog consiste em 231.670.922 (duzentos e trinta e um milhões, seiscentos e setenta mil, novecentos e vinte e duas) ações ordinárias nominativas e 18.160.000 (dezoito milhões, cento e sessenta mil) ações preferenciais, todas devidamente emitidas e integralizadas na presente data. A VoloBr detém 213.564.086 (duzentos e treze milhões, quinhentos e sessenta e quatro mil e oitenta e seis) ações ordinárias nominativas e 18.154.552 (dezoito milhões, cento e cinquenta e quatro mil, quinhentos e cinquenta e duas) ações preferenciais do capital social da VarigLog.

(b) The authorized capital stock of VarigLog consists of two hundred thirty-one million six hundred seventy thousand nine hundred twenty-two (231,670,922) common shares and eighteen million one hundred sixty thousand (18,160,000) preferred shares, all of which are issued and outstanding and fully paid in as of the date hereof. VoloBr holds two hundred thirteen million five hundred sixty-four thousand eighty-six (213,564,086) common shares and eighteen million one hundred fifty-four thousand five hundred fifty-two (18,154,552) preferred shares of VarigLog's capital stock.

11. **Disposições Gerais**.

11. **Miscellaneous Provisions**.

(i) Este Contrato poderá ser alterado, modificado ou aditado apenas mediante

(i) This Agreement may only be altered, modified or amended by written agreement

acordo escrito devidamente assinado por todas as Partes.

duly signed by all Parties.

(ii) O atraso de qualquer Parte em exigir o cumprimento pela(s) outra(s) Parte(s) das obrigações previstas neste Contrato não afetará seu(s) direitos de exigir seu cumprimento em momento posterior. Exceto se reduzida a escrito e com a assinatura da Parte renunciando seus direitos, nenhuma renúncia por qualquer das Partes de garantias e direitos contidos neste Contrato será válida ou terá qualquer efeito.

(ii) Any delay of any Party in demanding the performance by the other Party(ies) of the obligations set forth in this Agreement will not affect its right to demand such performance at a later time. No waiver by any of the Parties of the rights contained in this Agreement shall be valid and binding unless such waiver shall be in writing signed by the Party waiving its rights.

(iii) Este Contrato é vinculante e beneficiará as Partes e seus respectivos sucessores e cessionários autorizados. A cessão de qualquer direito ou obrigação previstos neste Contrato, no todo ou em parte, apenas será válida, eficaz e oponível se contar com a anuência das outras Partes.

(iii) This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and authorized assigns. The full or partial assignment of any right or obligation hereunder shall only be valid and binding if consented to by the other Parties.

(iv) Este Contrato encerra todos os termos e condições relacionados ao seu objeto e supera e revoga quaisquer acordos, promessas, entendimentos ou contratos anteriores, orais ou escritos, existentes entre as Partes, em relação aos assuntos tratados neste Contrato.

(iv) This Agreement contains all of the terms and conditions related to its purpose and supersedes and revokes any prior agreements, promises, understandings or contracts, written or verbal, between the Parties with respect to the subject matter set forth herein.

(v) Este contrato está sendo assinado em português e inglês. Havendo divergência entre as duas versões, a versão em inglês deverá prevalecer.

(v) This Agreement is being executed in Portuguese and English versions. Should any conflicts arise between the two versions, the English version shall prevail.

(vi) Este Contrato foi redigido em conjunto pelas Partes. Cada uma das partes teve ampla oportunidade de consultar com seus advogados. A CAT foi representada por Bracewell & Giuliani LLP ("Bracewell") com relação à negociação, redação e execução deste Contrato. VarigLog foi representada por seus advogados internos na negociação, redação e execução deste Contrato. A VarigLog e a VoloBr reconhecem que tiveram ampla

(vi) This Agreement has been drafted jointly by the Parties at arm's length. Each Party has had ample opportunity to consult with legal counsel. CAT has been represented by Bracewell & Giuliani LLP ("Bracewell") in connection with the negotiation, drafting and execution of this Agreement. VarigLog has been represented by its in-house counsel in connection with the negotiation, drafting and execution of this Agreement. Each of

oportunidade de consultar com seus advogados externos, e reconhecem ainda que seua decisão de não consultar advogado externo (i) não diminuiu sua capacidade de negociar, redigir ou executar este Contrato, (ii) não afetou o poder de barganha relativo entre as Partes e (iii) de maneira alguma sugere que Bracewell representou a VarigLog ou a VoloBr com relação a este Contrato. Nenhuma disposição ou ambigüidade neste Contrato poderá ser decidida contra a Parte somente em virtude do fato de ter participado na redação deste Contrato.

VarigLog and VoloBr acknowledges that it has had ample opportunity to consult with outside counsel, and further acknowledges that its decision not to consult with outside counsel (i) has not impaired its ability to negotiate, draft or execute this Agreement, (ii) has not affected the relative bargaining power of the Parties and (iii) does not in any way suggest that Bracewell represented either VarigLog or VoloBr in connection with this Agreement. No provision or ambiguity in this Agreement shall be resolved against any Party solely by virtue of its participation in the drafting of this Agreement.

E, POR ESTAREM ASSIM CERTAS E AJUSTADAS, as Partes fizeram com que seus respectivos representantes devidamente autorizados assinassem o presente instrumento em 4 (quatro) vias de igual teor e valor, na presença das testemunhas abaixo nomeadas e com efeito a partir da data abaixo mencionada.

IN WITNESS WHEREOF, the Parties have caused their respective duly authorized representative(s) to execute this instrument in four (04) counterparts of equal content and effect, in the presence of the undersigned witnesses and with effect as of the date hereof.

31 de dezembro de 2008.

December 31, 2008.

Volo do Brasil S.A.

By: _____
Name: CHAN LUP WAI OHIRA
Title: _____

Varig Logística S.A.

By: _____
Name: _____
Title: _____

As Intervening Party:

CAT Aérea LLC

By: Volo Logistics LLC
Name: Manager
Title: _____
By: _____
Robert Chess
Authorized Person

By: _____
Name: Chan Lup Wai Ohira
Title: ~~Presidente~~
Varig Logística S.A.

Witnesses:

Name: _____
RG/CPF No.: _____

Name: _____
RG/CPF No.: _____

SCHEDULE A
LOAN AGREEMENTS

Date of Execution of the Loan Agreement	Principal Amount in US$	Maturity Date	ROF Nº
14/Sep/2006	18,300,000.00	20/Jul/2011	TA408642
21/Jul/2006	29,700,000.00	21/Jul/2007	TA427969
Total	**48,000,000**		

Exhibit C-2

Debt Assumption Agreement
Between Volo do Brasil S.A., Varig Logistica S.A. and Volo Logistics LLC

(see attached)

CONTRATO DE ASSUNÇÃO DE DÍVIDA

Pelo presente Contrato de Assunção de Dívida ("Contrato") as partes:

I. **Volo do Brasil S.A.**, a sociedade anônima constituída e existente de acordo com as leis brasileiras, com sede na Rua Padre João Manuel, 450, cj. 127, São Paulo, S.P., Brasil, inscrita no CNPJ/MF sob o n° 01.574.036/0001-28 (doravante denominada simplesmente como "VoloBr");

II. **Varig Logística S.A.**, sociedade anônima constituída e existente de acordo com as leis do Brasil, com sede na Rua Gomes de Carvalho, 1609 – 1° Andar, Vila Olímpia, São Paulo, S.P., Brasil, inscrita no CNPJ/MF sob o n° 04.066.143/0001-57 (doravante denominada simplesmente "VarigLog");

E, ainda, como interveniente-anuente:

III. **Volo Logistics LLC**, uma *limited liability company* constituída e existente de acordo com as leis do Estado de Delaware, Estados Unidos da América, com sede a 2711 Centerville Road, Suite 400, Wilmington, Delaware, inscrita no CNPJ/MF sob o n° 82.691.49/0001-82 (doravante denominada simplesmente "Volo LLC" e, em conjunto com a VoloBr e a VarigLog, as "Partes").

CONSIDERANDO QUE, a Volo LLC e a VarigLog são parte de certos contratos de empréstimo, através dos quais a Volo LLC concedeu para a VRG Linhas Aéreas S.A. ("VRG") e para a VarigLog certos empréstimos nas datas e valores descritos no

DEBT ASSUMPTION AGREEMENT

By this Debt Assumption Agreement ("Agreement") the parties:

I. **Volo do Brasil S.A.**, a *sociedade anônima* organized and existing under the laws of Brazil, with principal offices at Rua Padre João Manuel, 450, cj. 127, São Paulo, S.P., Brazil, enrolled with the CNPJ/MF under No. 01.574.036/0001-28 (hereinafter referred to simply as "VoloBr");

II. **Varig Logística S.A.**, a *sociedade anônima* organized and existing under the laws of Brazil, with principal offices at Rua Gomes de Carvalho, 1609 – 9° floor, Vila Olímpia, São Paulo, S.P., Brazil, enrolled with the CNPJ/MF under No. 04.066.143/0001-57 (hereinafter referred to simply as "VarigLog");

and, as intervening-consenting party:

III. **Volo Logistics LLC**, a limited liability company organized and existing under the laws of the State of Delaware, United States of America, with principal offices at 2711 Centerville Road, Suite 400, Wilmington, Delaware, enrolled with the CNPJ/MF under No. 82.691.49/0001-82 (hereinafter referred to simply as "Volo LLC" and, in conjunction with VoloBr and VarigLog, "Parties").

WHEREAS, Volo LLC and VarigLog are parties to certain loan agreements pursuant to which Volo LLC granted to VRG Linhas Aereas S.A. ("VRG") and to VarigLog, certain loans on the dates and in the amounts described in Schedule A attached hereto,

Anexo A, anexo ao presente instrumento, usados para financiar a VRG, a VarigLog ou as operações da VarigLog (os contratos descritos no Anexo A serão doravante denominados simplesmente os "Contratos de Mútuo");

used to fund VRG, VarigLog or VarigLog's operations (the loan agreements described in Schedule A shall hereinafter be referred to simply as "Loan Agreements");

CONSIDERANDO QUE, nos termos de instrumentos em separado, a VarigLog assumiu as obrigações da VRG sob certos Contratos de Mútuo;

WHEREAS, by way of separate agreements, VarigLog subsequently assumed VRG's obligations under certain of the Loan Agreements;

CONSIDERANDO QUE, a VarigLog reconhece que recebeu (ou que a VRG recebeu) integralmente da Volo LLC os recursos provenientes dos Contratos de Mútuo, mas que, até a presente data, não efetuou o pagamento de qualquer parcela devida pelo principal das Dívidas, conforme os termos dos Contratos de Mútuo;

WHEREAS, VarigLog acknowledges that it received (or that VRG received) from Volo LLC all the advances under the Loan Agreements in full, but that up to the date hereof it has not paid any installments of the Debt's principal pursuant to the terms of the Loan Agreements;

CONSIDERANDO QUE a Volo tem uma sentença condenatória contra a VarigLog (a "Sentença") no valor principal de US$39.435.616,66, acrescido de juros de 9% ao ano a partir de 26.11.2008, além de juros contratuais apurados até aquela data;

WHEREAS, Volo has a judgment against VarigLog (the "Judgment") for the principal amount of $39,435,616.66 that accrues interest at a rate of 9% as of November 26, 2008, which interest is in addition to contractual interest accrued up to that date;

CONSIDERANDO QUE, nos termos de um instrumento de renúncia de juros de 31 de dezembro de 2008, a Volo LLC renunciou ao direito de receber juros devidos pela VarigLog até aquela data nos termos dos Contratos de Mútuo;

WHEREAS, pursuant to the terms of that certain Interest Forgiveness Agreement, dated as of December 31, 2008, Volo LLC waived its right to interest payments for interest accrued up to that date under the Loan Agreements;

CONSIDERANDO QUE, a VarigLog deseja ceder para a VoloBr e a VoloBr deseja receber e assumir da VarigLog, todas as dívidas da VarigLog oriundas dos Contratos de Mútuo (doravante denominadas simplesmente as "Dívidas"); e.

WHEREAS, VarigLog wishes to assign to VoloBr and VoloBr wishes to receive and assume from VarigLog, the debt of VarigLog arising out of the Loan Agreements (hereinafter referred to simply as "Debt"); and

CONSIDERANDO QUE, como parte dos esforços para auxiliar a melhoria da

WHEREAS, as part of their efforts to help improve VarigLog's financial condition and

condição financeira da VarigLog e, assim, permitir que a VarigLog apresente proposta em rentável contrato governamental, desta forma melhorando a perspectiva futura da VarigLog como um negócio, a Volo LLC concorda com a cessão dos Contratos de Mútuo pela VarigLog para a VoloBr.

RESOLVE, CADA UMA DAS PARTES, por considerações razoáveis e válidas, cujo recebimento e suficiência são neste ato reconhecidos e legalmente vinculantes, celebrar o presente Contrato, em caráter irrevogável e irretratável, que se regerá pelas cláusulas e condições adiante estipuladas:

1. **Descrição da Dívida**. As Dívidas e os Contratos de Mútuo foram devidamente registrados junto ao Sistema Declaratório Eletrônico do Banco Central do Brasil, módulo Registro de Operações Financeiras (RDE-ROF) ("ROF"), conforme descritos no Anexo A, com exceção daquelas Dívidas e Contratos de Mútuo indicados no Anexo A como não tendo ROF.

2. **Cessão e Assunção de Dívida**. A VarigLog, por este instrumento, cede e transfere à VoloBr, em caráter irrevogável e irretratável, a totalidade das Dívidas, seus direitos e obrigações estabelecidos nos Contratos de Mútuo e as obrigações de pagamento estabelecidas na Sentença oriundas da execução dos Contratos de Mútuo, e a VoloBr, por este instrumento, assume referidas Dívidas e recebe em cessão tais direitos e obrigações, em caráter irrevogável e irretratável (as Dívidas e todos os direitos e obrigações estabelecidos nos Contratos de Mútuo e aquelas obrigações oriundas da Sentença ora cedidas, as "Obrigações Cedidas"). A VarigLog e a VoloBr reconhecem que a cessão e assunção descritas nesta cláusula operam-se de pleno direito, mediante a celebração, pelas Partes,

thus allow VarigLog to bid on profitable government contracts, thereby improving VarigLog's future prospects as a going concern, Volo LLC has agreed to the assignment by VarigLog to VoloBr of the Loan Agreements.

EACH OF THE PARTIES HAS DECIDED, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and agreed and intending to be legally bound, to execute this Agreement, irrevocably and irreversibly, which will be governed by the following terms and conditions:

1. **Description of the Debt**. The Debt and the Loan Agreements were duly registered with the Electronic Declaratory System of the Central Bank of Brazil, module Registration of Financial Operations (RDE-ROF) ("ROF"), as described in Schedule A, except for the Debt and Loan Agreements indicated in Schedule A as having no ROF.

2. **Assignment and Assumption of Debt**. VarigLog hereby transfers and assigns to VoloBr, irrevocably and irreversibly, all of the Debt, its right and obligations under the Loan Agreements and those payment obligations under the Judgment arising out of the enforcement of the Loan Agreements, and VoloBr hereby, irrevocably and irreversibly, assumes such Debt and fully accepts the assigned rights and obligations (the Debt and all of the rights and obligations under the Loan Agreements and those obligations under the Judgment being assigned, the "Assigned Obligations"). VarigLog and VoloBr agree that the assignment and assumption contemplated in this section shall be in full force and effect upon the execution of this Agreement by the Parties, without the

deste Contrato, e sem a necessidade da celebração de qualquer instrumento adicional. Para evitar dúvidas, com relação a quaisquer dos Contratos de Mútuo que foram inicialmente firmados entre a Volo LLC e a VRG e que contenham disposição de vencimento antecipado em caso de "Venda da Mutuária", as Partes confirmam que tal expressão significará a venda da VRG, que ocorreu em 9.4.2007.

3. **Anuência da Volo LLC**. Pelo presente instrumento e para os efeitos do Artigo 299 do Código Civil, a Volo LLC neste ato consente com a assunção das Obrigações Cedidas, conforme contemplado pelo presente, e reconhece desde já a VoloBr como única devedora das Dívidas.

4. **Exoneração da Volo LLC**. Definições. O termo "Exonerador" significará a VarigLog e seus antecessores, sucessores, cessionários, coligadas atuais ou passados, e cada um dos respectivos conselheiros, diretores, empregados e agentes, atuais ou passados, ou qualquer pessoa demandando por ou através de quaisquer destes. Os termos "Exonerados" e "Partes Indenizadas" significarão cada um de (i) Volo LLC e seus antecessores, sucessores e cessionários, (ii) coligadas da Volo LLC (com exceção da VarigLog e VoloBr), e seus antecessores, sucessores e cessionários e (iii) quaisquer gerentes, quotistas, acionistas, sócios (com responsabilidade limitada ou não), conselheiros, diretores, empregados, agentes ou assessores, atuais ou passados, incluindo os herdeiros e sucessores, da Volo LLC, suas coligadas (com exceção da VarigLog e VoloBr) e quaisquer um dos respectivos antecessores, sucessores e cessionários. Para evitar dúvidas, os termos "Exonerados" e "Partes Indenizadas" não incluem e não incluirão (i) o Sr. Marco Michel Haftel ou (ii) o Sr. Marco Antonio Audi.

requirement for the Parties to execute any additional documents. For the avoidance of doubt, with respect to any of the Loan Agreements that were initially entered into Volo LLC and VRG that provides for early maturity as a result of "Sale of the Borrower," the Parties confirm that such term shall mean the sale of VRG, which occurred on April 9, 2007.

3. **Consent of Volo LLC**. For the purposes of Article 299 of the Brazilian Civil Code, Volo LLC hereby consents to the assignment and assumption of the Assigned Obligations as contemplated hereby, and acknowledges VoloBr as the sole debtor of the Debt.

4. **Release of Volo LLC**. (a) Definitions. The term "Releasor" shall mean VarigLog and its predecessors; successors; assigns; current and former affiliates and subsidiaries, and each of their respective current and former directors, officers and employees, agents and anyone claiming by or through any of the foregoing. The terms "Releasees" and "Indemnitees" shall mean each of (i) Volo LLC and its predecessors, successors and assigns, (ii) Volo LLC's affiliates (other than VarigLog and VoloBr), and their predecessors, successors and assigns, and (iii) any current and former managers, members, shareholders, partners (limited or general), directors, officers, employees, agents and advisers, including all such persons' heirs and assigns, of Volo LLC, its affiliates (other than VarigLog and VoloBr) and each of their respective predecessors, successors and assigns. For the avoidance of doubt, the terms "Releasees" and "Indemnitees" do not and shall not include (i) Mr. Marcos Michel Haftel or (ii) Mr. Marco Antonio Audi.

(b) Exoneração. O Exonerador concorda em exonerar, renunciar e para sempre dar quitação com relação a qualquer reclamação, ação, causa de pedir, demanda ou responsabilidade, seja direta ou derivatira, líquida ou não, fixa ou contingente, vencida ou vincenda, controversa ou não, conhecida ou desconhecida, prevista ou imprevista, agora existente ou futura, baseada em lei, equidade ou outra causa, que sejam baseadas total ou parcialmente em qualquer ação ou omissão, operação, fato ou outra ocorrência que tenha ocorrida antes de ou na data deste Contrato de qualquer forma relacionada com o Exonerador e suas coligadas (exceto a VarigLog ou a VoloBr) que pudessem ter sido propostas a qualquer tempo, passado, presente ou futuro, por ou em nome do Exonerador contra as Exoneradas.

(b) Release. Releasor agrees to forever release, waive and discharge all claims, actions, suits, causes of action demands, debts, and liabilities, whether direct or derivative liquidated or unliquidated, fixed or contingent, matured or unmatured, disputed or undisputed, known or unknown, foreseen or unforeseen, now existing or hereafter arising, in law, equity or otherwise that are based in whole or in part on any act, omission, transaction, event or other occurrence taking place on or prior to date of execution of this Agreement any way relating to Releasor and its affiliates (other than VarigLog or VoloBr) that could have been asserted at any time, past, present or future by or on behalf of the Releasor, against Releasees.

(c) Indenização. A VarigLog concorda em indenizar e manter as Partes Indenizadas isentas de qualquer demanda, perdas, danos, responsabilidades, débitos ou despesas incorridas por qualquer das Partes Indenizadas como resultado de qualquer ação ou demanda (ou ameaça de ação ou demanda) por qualquer pessoa contra quaisquer das Partes Indenizadas, relativas as operações ou relacionamento das Partes Indenizadas com a VarigLog.

(c) Indemnification. VarigLog agrees to indemnify and hold harmless Indemnitees from and against any and all claims, damages, losses, liabilities, debts or expenses incurred by any of the Indemnitees as the result of any action or claim (or threatened action or claim) by any person against any of the Indemnitees in any way relating to any Indemnitees' transactions or relationship with VarigLog.

(d) As obrigações da VarigLog e da VoloBr nos termos desta cláusula deverão permanecer em vigor mesmo após o pagamento integral das Obrigações Cedidas ou a rescisão deste Contrato.

(d) The obligations of the VarigLog and VoloBr under this clause shall survive the payment in full of the Assigned Obligations as well as the termination of this Agreement.

5. **Exoneração perante a Volo LLC**. Em razão do acordado neste Contrato, a partir desta data, a Volo LLC exonera totalmente a VarigLog de todas as Obrigações Cedidas. Sem prejuízo do disposto na sentença anterior, a VarigLog deverá permanecer devedora da Volo LLC com relação a contratos de empréstimo outros que não

5. **Release before Volo LLC**. As of the date hereof, and pursuant to the terms of this Agreement, Volo LLC releases VarigLog from the Assigned Obligations. Notwithstanding the terms of the preceding sentence, VarigLog shall remain indebted to Volo LLC with respect to loan agreements other than those described in Schedule A

aqueles descritos no Anexo A do presente Contrato, que permanecerão devidas pela VarigLog para a Volo LLC e não serão afetados pela assunção de dívida estabelecida neste Contrato ou a exoneração estabelecida nesta Cláusula 5.

6. **Obrigações Adicionais, ROF e Procedimentos Pendentes**. A qualquer momento, ou periodicamente, a VarigLog e a VoloBr deverão, mediante solicitação da Volo LLC, prontamente firmar, reconhecer e entregar qualquer documentos adicionais e praticar todos os atos conforme solicitação razoável da Volo LLC para (x) a consumação da cessão e assunção contempladas no presente instrumento, (y) para garantir, preservar, proteger ou manter os direitos da Volo LLC nas e come relação às Obrigações Cedidas, ou (z) para criar em benefício da Volo LLC um gravame de primeira prioridade em certos ativos da VoloBr que tenham sido indicados pela Volo LLC para garantir as Obrigações Cedidas, e a efetuar os registros necessários com relação a tais obrigações conforme venha a ser solicitado pela Volo LLC, incluindo mas não se limitando a (i) alterar o ROF das Obrigações Cedidas conforme necessário para refletir a cessão e assunção contemplada pelo presente instrumento, (ii) confirmar, ratificar ou consolidar as obrigações da VoloBr com relação Obrigações Cedidas e (iii) protocolar qualquer petição perante juizo competente no Brasil, nos Estados Unidos ou em qualquer outro pais, estado ou localidade, para comunicar ao juizo ou solicitar a ratificação, aceitação ou confirmação da cessão e assunção estabelecidas no presente instrumento, e ainda praticar todos os demais atos necessários em decorrência da referida comunicação.

7. **Compromisso**. A VoloBr se compromete e acorda com a Volo LLC que até que todas as Obrigações Cedidas sejam integralmente

hereto, which shall remain VarigLog's debt owed to Volo LLC and shall not be affected or modified by the assumption contemplated by this Agreement or the release set forth in this Section 5.

6. **Further Assurances, ROF and Pending Proceedings**. At any time, or from time to time, VarigLog and VoloBr shall, upon the request of Volo LLC, promptly execute, acknowledge and deliver such further documents and do such other acts and things as Volo LLC may reasonably request in order (x) to consummate the assignment and assumption contemplated hereby, (y) to grant, preserve, protect or perfect the rights of Volo LLC in and to the Assigned Obligations, or (z) to create in favor of Volo LLC a first priority, perfected security interest in certain assets of VoloBr that have been designated by Volo LLC which shall secure the Assigned Obligations, and make such customary filings in connection with such obligations as may be directed by Volo LLC, including but not limited to (i) modify the ROF with respect to the Assigned Obligations as necessary to reflect the assignment and assumption contemplated hereby, (ii) confirm, ratify or consolidate the obligations of VoloBr in respect of the Assigned Obligations and (iii) make any necessary filings with any court of competent jurisdiction in Brazil, the United States of America or any other country, state or place to notify such courts or seek their ratification, acceptance or confirmation with respect to the assignment and assumption contemplated hereby, and do such other necessary acts as a result of such notification.

7. **Covenants**. VoloBr covenants and agrees with Volo LLC that until all Assigned Obligations are fully paid and performed,

pagas e cumpridas, a VoloBr não poderá, e não deverá autorizar ou permitir que quaisquer de suas subsidiárias ou afiliadas, incluindo sem limitação a VarigLog (cada uma, uma "Subsidiária") possa, sem o consentimento prévio e por escrito da Volo LLC, (a) transferir, vender, hipotecar, ceder, dar em penhor ou criar uma garantia real ou de qualquer outra forma gravar ou alienar quaisquer de seus ativos salvo no curso normal de suas atividades, incluindo sem limitação quaisquer participações (débito, capital ou de outra forma) em ou da VarigLog detidos pela VoloBr, (b) ser liquidada ou se dissolver, (c) emitir novas ações ou dívida salvo para a VoloBr, (d) ser parte de qualquer fusão ou incorporação ou (e) efetuar qualquer distribuição a qualquer de seus sócios ou pagar dividendos. A VoloBr e a VarigLog deverão (i) imediatamente após a execução deste Contrato, praticar os atos necessários para fazer com que a restrição contida no item (a) acima seja anotada e/ou registrada no livro de ações nominativas da VarigLog e (ii) prontamente entregar à Volo LLC comprovação de tal anotação e/ou registro em forma e substância satisfatórios à Volo LLC.

VoloBr shall not, and shall not authorize or permit any of its subsidiaries or affiliates to, including, without limitation, VarigLog (each, a "Subsidiary"), without the prior written consent of Volo LLC, (a) transfer, sell, mortgage, assign, pledge or grant a security interest in or otherwise encumber or dispose of any of its assets other than in the ordinary course of business, including without limitation any interests (debt, equity or otherwise) of VarigLog owned by VoloBr, (b) liquidate and dissolve, (c) issue additional equity or debt other than to VoloBr, (d) be a party to any merger or consolidation or (f) make distributions to any of its partners or pay any dividends. VoloBr and VarigLog shall (i) immediately after the execution of this Agreement, take all necessary measures to have the restriction set forth in item (a) above notated and/or registered in the share registry books of VarigLog and (ii) promptly furnish to Volo LLC evidence of such notation/registration in form and substance satisfactory to Volo LLC.

8. **Foro**. (i) Qualquer ação ou procedimento para interpretar ou executar este Contrato poderá ser iniciada perante a Suprema Corte do Estado de Nova Iorque, Condado de Nova Iorque, ou a Corte Distrital dos Estados Unidos para o Distrito Sul de Nova Iorque, se tal corte tiver competência material sobre a disputa. As partes se submetem, de maneira irrevogável, à jurisdição pessoal de tais cortes em quaisquer ações ou procedimentos para interpretar ou executar este Contrato. Cada uma das partes renuncia, de maneira irrevogável e com relação a qualquer ação para interpretar ou executar o presente Contrato, (i) qualquer objeção que possa ter, a qualquer tempo, à escolha de foro às cortes

8. **Forum**. (i) Any action or proceeding to interpret or enforce this Agreement may be brought in the Supreme Court of the State of New York, New York County, or the United States District Court for the Southern District of New York, should that court have subject matter jurisdiction over the dispute. Each party irrevocably submits to the personal jurisdiction of such courts in any action or proceeding to interpret or enforce this Agreement Each party irrevocably waives, with respect to any action or proceeding to interpret or enforce this Agreement, (i) any objection which it may have at any time to the laying of venue in the courts identified in this paragraph, (2) any claim that either of

identificadas neste parágrafo, (2) qualquer alegação de que as cortes identificadas neste parágrafo são foro inconveniente e (3) o direito de se opor que uma das cortes identificadas neste parágrafo tenha jurisdição pessoal sobre tal parte. Sem prejuízo do disposto acima, a Volo LLC poderá iniciar qualquer ação ou executar este Contrato perante qualquer tribunal competente no Brasil.

(ii) Renúncia de Julgamento por Júri. As Partes renunciam qualquer direito a julgamento por juri em qualquer ação, procedimento ou reconvenção oriunda de ou relativa a este Contrato ou a qualquer Obrigação Cedida.

9. Recebimento de Citação.

(a) Definições. Para os fins desta cláusula, uma "Parte Brasileira" incluirá a VoloBr e a VarigLog e deverá aplicar a qualquer uma entre a VoloBr ou a VarigLog a quem a citação ou intimação seja endereçada.

(b) Cada Parte Brasileira neste ato nomea, de forma irrevogável, Law Debenture Corporate Services Inc. (o "Agente para Citação"), com escritório nesta data em 400 Madison Avenue, 4th Floor, New York, New York 10017, como seu representante para receber em seu nome e em nome de seus ativos, citação ou intimação de qualquer ação ou qualquer outro processo legal entregue com relação a este Contrato ou as Obrigações Cedidas. Citação ou intimação entre ao Agente para Citação deverá ser considerada citação ou intimação pessoal para a Parte Brasileira e deverá ser legítima e vinculante citação ou intimação nas Partes Brasileiras para todos os efeitos independente do não envio de cópia de cortesia de tal reclamação para as Partes Brasileiras, ou o não recebimento de tal

the courts identified in this paragraph is an inconvenient forum, and (3) the right to object that either court identified in this Section does not have personal jurisdiction over such party. Notwithstanding the foregoing, Volo LLC may bring suit and enforce this Agreement in any court of competent jurisdiction in Brazil.

(ii) Waiver of Trial By Jury. The Parties waive any right to trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement (or any Loan Agreement).

9. Service of Process.

(a) Definition. For purposes of this provision, a "Brazilian Party" shall include VoloBr and VarigLog and shall apply to whichever of VoloBr or VarigLog service is directed.

(b) Each Brazilian Party hereby irrevocably appoints Law Debenture Corporate Services Inc. (the "Process Agent"), with an office on the date hereof at 400 Madison Avenue, 4th Floor, New York, New York 10017, as its agent to receive on its behalf and on behalf of its property, service of copies of any summons and complaint or any other legal process that may be served in connection with this Agreement or any Assigned Obligations. Service upon the Process Agent shall be deemed to be personal service on the Brazilian Party and shall be legal and binding upon the Brazilian Party for all purposes notwithstanding any failure to mail courtesy copies of such legal process to the Brazilian Party, or any failure on the part of the the Brazilian Party to receive the same. Notwithstanding the above, the Brazilian

citação ou intimação pelas Partes Brasileiras. Independente do acima, as Partes Brasileiras poderão ser citadas ou intimadas por qualquer método autorizado por lei.

Party may be served by any other method authorized by law.

9. **Lei Aplicável**. Este Contrato será regido, interpretado e exequível de acordo com as leis do Estado de Nova Iorque, sem considerar os princípios de conflitos de leis ("Leis de Nova Iorque"). As Leis de Nova Iorque serão aplicáveis independente da corte perante a qual qualquer ação para interpretar ou executar este Contrato seja iniciada.

9. **Applicable Law**. This Agreement shall be interpreted, construed and enforced in accordance with the substantive laws of the State of New York, without regard to New York's principles of conflicts of laws ("New York Law"). New York Law shall apply regardless of the forum in which any action to interpret or enforce this Agreement is commenced.

10. **Representações e Garantias**. A VoloBr e a VarigLog representam e garantem que:

10. **Representations and Warranties**. Each of VoloBr and VarigLog hereby represents and warrants that:

(a) Cada uma entre a VoloBr e a VarigLog é uma sociedade anônima devidamente organizada e existente sob as leis brasileiras, (ii) tem as qualificações necessárias para desenvolver suas atividades em todas as jurisdições onde exerce tais atividades e (iii) tem poderes e autoridade e todas as autorizações, licenças, consentimentos, permissões e aprovações governamentais necessárias para a propriedade e operação de seus ativos, para conduzir suas atividades conforme atualmente conduzidas, para firmar este Contrato e para completar as operações ora previstas.

(a) Each of VoloBr and VarigLog (i) is a *sociedade anônima* duly organized and existing under the laws of Brazil, (ii) is qualified to do business in any jurisdiction where it does business, and (iii) has all requisite corporate power and authority and all governmental licenses, authorizations, permits, consents and approvals required to own and operate its properties, to carry on its business as now conducted and as proposed to be conducted, to enter into this Agreement and to carry out the transactions contemplated hereby.

(b) O capital autorizado da VarigLog consiste em 231.670.922 (duzentos e trinta e um milhões, seiscentos e setenta mil, novecentos e vinte e duas) ações ordinárias nominativas e 18.160.000 (dezoito milhões, cento e sessenta mil) ações preferenciais, todas devidamente emitidas e integralizadas na presente data. A VoloBr detém 213.564.086 (duzentos e treze milhões, quinhentos e sessenta e quatro mil e oitenta e seis) ações ordinárias nominativas e 18.154.552 (dezoito milhões, cento e

(b) The authorized capital stock of VarigLog consists of two hundred thirty-one million six hundred seventy thousand nine hundred twenty-two (231,670,922) common shares and eighteen million one hundred sixty thousand (18,160,000) preferred shares, all of which are issued and outstanding and fully paid in as of the date hereof. VoloBr holds two hundred thirteen million five hundred sixty-four thousand eighty-six (213,564,086) common shares and eighteen million one hundred fifty-four thousand five hundred

cinquenta e quatro mil, quinhentos e cinquenta e duas) ações preferenciais do capital social da VarigLog.

11. **Disposições Gerais**.

(i) Este Contrato poderá ser alterado, modificado ou aditado apenas mediante acordo escrito devidamente assinado por todas as Partes.

(ii) O atraso de qualquer Parte em exigir o cumprimento pela(s) outra(s) Parte(s) das obrigações previstas neste Contrato não afetará seu(s) direitos de exigir seu cumprimento em momento posterior. Exceto se reduzida a escrito e com a assinatura da Parte renunciando seus direitos, nenhuma renúncia por qualquer das Partes de garantias e direitos contidos neste Contrato será válida ou terá qualquer efeito.

(iii) Este Contrato é vinculante e beneficiará as Partes e seus respectivos sucessores e cessionários autorizados. A cessão de qualquer direito ou obrigação previstos neste Contrato, no todo ou em parte, apenas será válida, eficaz e oponível se contar com a anuência das outras Partes.

(iv) Este Contrato encerra todos os termos e condições relacionados ao seu objeto e supera e revoga quaisquer acordos, promessas, entendimentos ou contratos anteriores, orais ou escritos, existentes entre as Partes, em relação aos assuntos tratados neste Contrato.

(v) Este contrato está sendo assinado em português e inglês. Havendo divergência entre as duas versões, a versão em inglês deverá prevalecer.

fifty-two (18,154,552) preferred shares of VarigLog's capital stock.

11. **Miscellaneous Provisions**.

(i) This Agreement may only be altered, modified or amended by written agreement duly signed by all Parties.

(ii) Any delay of any Party in demanding the performance by the other Party(ies) of the obligations set forth in this Agreement will not affect its right to demand such performance at a later time. No waiver by any of the Parties of the rights contained in this Agreement shall be valid and binding unless such waiver shall be in writing signed by the Party waiving its rights.

(iii) This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and authorized assigns. The full or partial assignment of any right or obligation hereunder shall only be valid and binding if consented to by the other Parties.

(iv) This Agreement contains all of the terms and conditions related to its purpose and supersedes and revokes any prior agreements, promises, understandings or contracts, written or verbal, between the Parties with respect to the subject matter set forth herein.

(v) This Agreement is being executed in Portuguese and English versions. Should any conflicts arise between the two versions, the English version shall prevail.

(vi) Este Contrato foi redigido em conjunto pelas Partes. Cada uma das partes teve ampla oportunidade de consultar com seus advogados. A Volo LLC foi representada por Bracewell & Giuliani LLP ("Bracewell") com relação à negociação, redação e execução deste Contrato. VarigLog foi representada por seus advogados internos na negociação, redação e execução deste Contrato. A VarigLog e a VoloBr reconhecem que tiveram ampla oportunidade de consultar com seus advogados externos, e reconhecem ainda que seua decisão de não consultar advogado externo (i) não diminuiu sua capacidade de negociar, redigir ou executar este Contrato, (ii) não afetou o poder de barganha relativo entre as Partes e (iii) de maneira alguma sugere que Bracewell representou a VarigLog ou a VoloBr com relação a este Contrato. Nenhuma disposição ou ambigüidade neste Contrato poderá ser decidida contra a Parte somente em virtude do fato de ter participado na redação deste Contrato.

(vi) This Agreement has been drafted jointly by the Parties at arm's length. Each Party has had ample opportunity to consult with legal counsel. Volo LLC has been represented by Bracewell & Giuliani LLP ("Bracewell") in connection with the negotiation, drafting and execution of this Agreement. VarigLog has been represented by its in-house counsel in connection with the negotiation, drafting and execution of this Agreement. Each of VarigLog and VoloBr acknowledges that it has had ample opportunity to consult with outside counsel, and further acknowledges that its decision not to consult with outside counsel (i) has not impaired its ability to negotiate, draft or execute this Agreement, (ii) has not affected the relative bargaining power of the Parties and (iii) does not in any way suggest that Bracewell represented either VarigLog or VoloBr in connection with this Agreement. No provision or ambiguity in this Agreement shall be resolved against any Party solely by virtue of its participation in the drafting of this Agreement.

E, POR ESTAREM ASSIM CERTAS E AJUSTADAS, as Partes fizeram com que seus respectivos representantes devidamente autorizados assinassem o presente instrumento em 4 (quatro) vias de igual teor e valor, na presença das testemunhas abaixo nomeadas e com efeito a partir da data abaixo mencionada.

IN WITNESS WHEREOF, the Parties have caused their respective duly authorized representative(s) to execute this instrument in four (04) counterparts of equal content and effect, in the presence of the undersigned witnesses and with effect as of the date hereof.

31 de dezembro de 2008.

December 31, 2008.

Volo do Brasil S.A.

By: _____
Name: HAN LIP WAI CHIRA

Varig Logística S.A.

By: _____
Name: _____

Title: _____

Title: _____

As Intervening Party:

Volo Logistics LLC

By: _____
Name: _____
Title: _____

By: _____
Name: Chan Lup Wai Ohira
Title: Presidente
Varig Logistica S.A.

Witnesses:

Name: _____
RG/CPF No.: _____

Name: _____
RG/CPF No.: _____

SCHEDULE A
LOAN AGREEMENTS

Date of Execution of the Loan Agreement	Principal Amount in US$	Maturity Date	ROF Nº
26/Jun/2006	20,000,000.00	26/Dec/2006	TA396965
22/Jul/2006	37,040,000.00	22/Jul/2007	TA389675
18/Dec/2006	1,600,000.00	18/Dec/2007	None
20/Dec/2006	500,000.00	20/Dec/2007	None
20/Dec/2006	1,700,000.00	20/Dec/2007	TA406658
19/Dec/2006	1,400,000.00	19/Dec/2007	TA406661
26/Dec/2006	4,700,000.00	26/Dec/2007	None
27/Dec/2006	2,000,000.00	26/Dec/2007	TA407500
04/Jan/2007	6,475,000.00	04/Jan/2008	TA408293
04/Jan/2007	2,000,000.00	04/Jan/2008	None
13/Dec/2006	5,860,323.26	20/Jul/2011	TA405833
13/Dec/2006	8,852,376.74	20/Jul/2011	TA405830
06/Feb/2007	17,300,000.00	06/Feb/2008	TA411830
06/Feb/2007	2,700,000.00	06/Feb/2007	None
05/Mar/2007	10,000,000.00	05/Mar/2008	TA414291
20/Mar/2007	6,000,000.00	20/Mar/2008	TA416078
09/Apr/2007	6,000,000.00	09/Apr/2008	None
02/Mar/2007	3,000,000.00	02/Mar/2008	None
21/Feb/2007	10,000,000.00	21/Aug/2007	TA425048
23/Jan/2007	4,000,000.00	23/Jan/2008	TA425049
30/Jan/2007	5,000,000.00	30/Jan/2008	TA425051
31/Jan/2007	5,000,000.00	31/Jan/2008	TA425052
15/Feb/2007	10,000,000.00	15/Feb/2008	TA425053
02/Mar/2007	10,000,000.00	02/Mar/2008	TA425054
08/Mar/2007	10,000,000.00	08/Mar/2008	TA425055
20/Mar/2007	10,000,000.00	20/Mar/2008	TA425056
Total	**201,127,700**		

ITEM NO. 120

JA-6

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
MatlinPatterson Global Opportunities Partners II L.P., *et al.*,	)	Case No. 21-11255 (DSJ)
Debtors.[1]	)	(Jointly Administered)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (I) CONFIRMING THE DEBTORS' SECOND AMENDED JOINT CHAPTER 11 PLAN OF LIQUIDATION AND (II) APPROVING THE RELATED DISCLOSURE STATEMENT ON A FINAL BASIS

WHEREAS the above-captioned debtors and debtors in possession (collectively, the "***Debtors***"), have, among other things:[2]

a. commenced the above-captioned chapter 11 cases (the "***Chapter 11 Cases***") by filing voluntary petitions for relief under chapter 11 of Title 11 of the United States Code (the "***Bankruptcy Code***") on July 6-7, 2021 (the "***Petition Date***");

b. continued to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code;

c. entered into and obtained approval of the VRG Settlement, the HJDK Settlement and the VarigLog Estate Settlement (collectively, the "***Settlements***");

d. filed, on September 30, 2022, the *First Amended Disclosure Statement for Debtors' First Amended Joint Chapter 11 Plan of Liquidation* [Docket No. 624] (the "***Initial Disclosure Statement***");

e. filed, on April 20, 2023, (i) the *Debtors' Second Amended Joint Chapter 11 Plan of Liquidation* [Docket No. 863], (ii) the *Supplemental Disclosure Statement for Debtors' Second Amended Joint Chapter 11 Plan of Liquidation* [Docket No. 864]

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if any, are: MatlinPatterson Global Opportunities Partners II L.P. (8284); MatlinPatterson Global Opportunities Partners (Cayman) II L.P. (8246); MatlinPatterson Global Partners II LLC (6962); MatlinPatterson Global Advisers LLC (2931); MatlinPatterson PE Holdings LLC (6900); Volo Logistics LLC (8287); MatlinPatterson Global Opportunities Partners (SUB) II L.P. (9209). The location of the Debtors' address is: 300 East 95th Street, Suite 102, New York, New York 10128.

[2] Unless otherwise noted, capitalized terms not defined in this order (the "***Confirmation Order***") shall have the meanings ascribed to them in the *Debtors' Second Amended Joint Chapter 11 Plan of Liquidation*, attached hereto as **Exhibit A** (as may be amended, supplemented, or otherwise modified from time to time in accordance with the terms thereof and this Confirmation Order, and including all exhibits and supplements thereto, the "***Plan***"). The rules of interpretation set forth in Article I.B of the Plan shall apply to this Confirmation Order.

(the "***Supplement***" and together with the Initial Disclosure Statement, the "***Disclosure Statement***"), and (iii) the *Debtors' Motion for Entry of an Order (I) Conditionally Approving the Disclosure Statement and Supplement; (II) Establishing Procedures for the Rejection of Executory Contracts and Unexpired Leases; (III) Approving Solicitation Packages and Solicitation Procedures; (IV) Approving the Forms of Ballots; (V) Establishing Voting and Tabulation Procedures; and (VI) Establishing Notice and Scheduling a Combined Hearing to Consider Final Approval of the Disclosure Statement and Confirmation of the Plan* [Docket No. 865] (the "***Disclosure Statement Motion***");

f. caused solicitation materials, the opt-out notices, notices of unimpaired and/or non-voting status, and notice of the deadline for objecting to confirmation of the Plan, each as modified consistent with the *Order (I) Conditionally Approving the Disclosure Statement and Supplement; (II) Establishing Procedures for the Rejection of Executory Contracts and Unexpired Leases; (III) Approving Solicitation Packages and Solicitation Procedures; (IV) Approving the Forms of Ballots; (V) Establishing Voting and Tabulation Procedures; and (VI) Establishing Notice and Scheduling a Combined Hearing to Consider Final Approval of the Disclosure Statement and Confirmation of the Plan* [Docket No. 884] (the "***Disclosure Statement Order***"), to be distributed on May 4, 2023 and May 10, 2023, consistent with the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure (the "***Bankruptcy Rules***"), and the Disclosure Statement Order, which Disclosure Statement Order also approved, among other things, solicitation procedures (the "***Solicitation and Voting Procedures***") and related notices, forms, Ballots, and Master Ballots (collectively, the "***Solicitation Packages***") and opt-out notices, as evidenced by, among other things, the *Certificate of Service of Solicitation Materials* [Docket No. 895] (the "***Solicitation Package Affidavit***");

g. caused notice of the combined hearing on the Disclosure Statement and Confirmation of the Plan (the "***Confirmation Hearing***") and the deadline for objecting to confirmation of the Plan (the "***Confirmation Hearing Notice***") to be distributed on May 10, 2023, and continuing thereafter, as evidenced by the *Supplemental Certificate of Service* [Docket No. 900] (the "***Confirmation Hearing Notice Affidavit***");

h. caused the Confirmation Hearing Notice to be published on May 4, 2023 in the national edition of the *New York Times* and the national edition of *Miami Herald,* as evidenced by the *Affidavit of Publication* [Docket No. 891] and the *Affidavit of Publication* [Docket No. 892] (the "***Publication Affidavits***," and together with the Solicitation Package Affidavit, and the Confirmation Hearing Notice Affidavit, the "***Solicitation Affidavits***");

i. filed, on May 11, 2023, the *Certification of Jeffrey R. Miller with Respect to the Tabulation of Votes on the Second Amended Joint Chapter 11 Plan of Liquidation* [Docket No. 896] (the "***Voting Certification***");

j. filed, on May 15, 2023, the *Debtors' Memorandum of Law and Reply In Support of (I) Final Approval of the Disclosure Statement and (II) Confirmation of the Second Amended Joint Chapter 11 Plan of Liquidation* [Docket No. 902] (the "***Confirmation Brief***"); and

k. filed, on May 15, 2023, the *Declaration of Matthew Doheny, Chief Restructuring Officer of the Debtors, in Support of Confirmation of the Second Amended Joint Chapter 11 Plan of Liquidation* [Docket No. 901] (the "***Confirmation Declaration***").

And WHEREAS this Court has, among other things:

a. entered on April 27, 2023 the Disclosure Statement Order approving the Solicitation Procedures and, on a provisional basis, the Disclosure Statement;

b. set May 8, 2023, at 5:00 p.m. (prevailing Eastern Time), as the deadline for voting on the Plan;

c. set May 11, 2023, at 4:00 p.m. (prevailing Eastern Time), as the deadline for filing objections to the Plan or objections to final approval of the Disclosure Statement;

d. set May 18, 2023, at 11:00 a.m. (prevailing Eastern Time), as the date and time for the commencement of the Confirmation Hearing pursuant to Bankruptcy Rules 3017 and 3018 and sections 1126, 1128, and 1129 of the Bankruptcy Code;

e. reviewed the Plan (including the discharge, compromises, settlements, releases, exculpations, and injunctions set forth in Article VIII of the Plan, and as modified herein), the Disclosure Statement, the Solicitation Affidavits, the Confirmation Brief, the Confirmation Declaration, and all pleadings, exhibits, statements, responses, and comments regarding Confirmation, including all objections filed by parties in interest on the docket of the Chapter 11 Cases;

f. held the Confirmation Hearing;

g. heard the statements, arguments, and objections made by counsel in respect of Confirmation;

h. considered all oral representations, testimony, documents, filings, and other evidence presented at the Confirmation Hearing;

i. entered rulings on the record at the Confirmation Hearing;

j. overruled any and all objections on the merits to the Plan and Disclosure Statement, and to Confirmation and all statements and reservations of rights not consensually resolved or withdrawn unless otherwise indicated herein; and

k. taken judicial notice of all pleadings and other documents filed, all orders entered, and all evidence and arguments presented in these Chapter 11 Cases.

NOW, THEREFORE, the Court having found that notice of the Plan and the Confirmation Hearing and the opportunity for any party in interest to object to Confirmation has been adequate and appropriate as to all parties affected or to be affected by the Plan and the transactions contemplated thereby, and that the legal and factual bases set forth in the documents filed in support of Confirmation and all evidence proffered or adduced by counsel at the Confirmation Hearing establish just cause for the relief granted herein; and after due deliberation thereon and good cause appearing therefor, the Court hereby makes and issues the following Findings of Fact and Conclusions of Law and hereby orders as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

IT IS HEREBY DETERMINED FOUND, ADJUDGED, DECREED, AND ORDERED THAT:

A. Findings and Conclusions

1. The findings and conclusions set forth herein and on the record of the Confirmation Hearing constitute the Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding by Bankruptcy Rule 9014. All findings of fact and conclusions of law announced by this Court at the Confirmation Hearing in relation to confirmation of the Plan and approval of the adequacy of the Disclosure Statement are hereby incorporated into this Confirmation Order. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. Jurisdiction, Venue, Core Proceeding (28 U.S.C. §§ 157(b)(2) and 1334(a))

2. The Court has jurisdiction over the Chapter 11 Cases pursuant to 28 U.S.C. § 1334. Confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157(b), and the Court has jurisdiction to enter a final order determining that the Disclosure Statement contains adequate

information and the Plan complies with the applicable provisions of the Bankruptcy Code and should be confirmed and approved. Venue is proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409.

C. Eligibility for Relief

3. The Debtors are entities eligible for relief under section 109 of the Bankruptcy Code.

D. Chapter 11 Petitions

4. On July 6-7, 2021, each Debtor commenced a voluntary case under chapter 11 of the Bankruptcy Code. Since the Petition Date, the Debtors have operated their businesses and managed their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No request for the appointment of a trustee or examiner has been made in these Chapter 11 Cases. No committee has been appointed in these Chapter 11 Cases.

E. Judicial Notice

5. The Court takes judicial notice of (and deems admitted into evidence for Confirmation) the docket of the Chapter 11 Cases maintained by the Clerk of the Court and/or its duly appointed agent, including all pleadings and other documents filed, all orders entered, all hearing transcripts, and all evidence and arguments made, proffered or adduced at, the hearings held before the Court during the pendency of the Chapter 11 Cases, including, without limitation, the hearing to conditionally approve the adequacy of the Disclosure Statement and the Confirmation Hearing. Any resolutions of any objections explained on the record at the Confirmation Hearing are incorporated herein by reference.

F. Disclosure Statement Order

6. On April 27, 2023, the Court entered the Disclosure Statement Order, which, among other things, fixed May 8, 2023, at 5:00 p.m. (prevailing Eastern Time) as the deadline for

voting to accept or reject the Plan (the "***Voting Deadline***"), and May 11, 2023, at 4:00 p.m. (prevailing Eastern Time) as the deadline for objecting to the Plan or to final approval of the Disclosure Statement (the "***Plan Objection Deadline***").

G. Notice and Transmittal of Solicitation Materials; Adequacy of Solicitation Notices

7. As evidenced by the Solicitation Affidavits, the Plan, the Disclosure Statement, the Disclosure Statement Order, the ballots for voting on the Plan (the "***Ballots***"), the Confirmation Hearing Notice, notices of unimpaired and/or non-voting status, and the other materials distributed by the Debtors in connection with Confirmation of the Plan (collectively, the "***Solicitation Materials***"), including notice of the Voting Deadline and the Plan Objection Deadline, were transmitted and served in compliance with the Bankruptcy Rules, including Bankruptcy Rules 3017 and 3018, with the Local Bankruptcy Rules for the Southern District of New York (the "***Local Rules***"), and with the procedures set forth in the Disclosure Statement Order. Notice of the Confirmation Hearing complied with the terms of the Disclosure Statement Order, was appropriate and satisfactory based on the circumstances of these Chapter 11 Cases, and was in compliance with the provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules. The transmittal and service of the Solicitation Materials complied with the approved Solicitation and Voting Procedures, were appropriate and satisfactory based upon the circumstances of the Chapter 11 Cases, were conducted in good faith, and were in compliance with the provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and any other applicable rules, laws, and regulations. Because such transmittal and service were adequate and sufficient, no other or further notice is necessary or shall be required.

8. The period during which the Debtors solicited acceptances to the Plan was a reasonable and adequate period of time and the manner of such solicitation was an appropriate process for creditors to have made an informed decision to vote to accept or reject the Plan.

H. Combined Hearing

9. It was appropriate to hold the combined Confirmation Hearing on the Debtors' request for final approval of the Disclosure Statement and confirmation of the Plan under sections 105(d)(2)(B)(vi) and 1125(g) of the Bankruptcy Code, and Bankruptcy Rule 3018(b).

I. Approval of the Disclosure Statement

10. The Disclosure Statement is approved in all respects on a final basis as containing "adequate information" (as such term is defined in section 1125(a) of the Bankruptcy Code and used in section 1126(b)(2) of the Bankruptcy Code) in accordance with section 1125 of the Bankruptcy Code. Any and all objections and reservations of rights to the Disclosure Statement that have not been withdrawn, waived, or resolved prior to the Combined Hearing are hereby overruled on the merits.

J. Good Faith Solicitation

11. Based on the record before the Court in the Chapter 11 Cases, the Debtors have solicited votes on the Plan in good faith and in compliance with the Bankruptcy Code and other applicable law, and pursuant to sections 1125 and 1126 of the Bankruptcy Code, and the Debtors and the Settling Parties and, as applicable, each of their respective Affiliates, and each of their and their Affiliates' agents, representatives, members, principals, shareholders, officers, directors, employees, advisors, and attorneys, in each case solely in their respective capacities as such, have participated in good faith and in compliance with the Bankruptcy Code.

K. Voting Certification

12. On May 11, 2023, the Debtors filed the Voting Certification with the Court, certifying the method and results of the Ballots tabulated for Class 4 (VRG Claims) and Class 5 (HJDK Claims) (the "***Voting Classes***"). As evidenced by the Voting Certification, votes to accept or reject the Plan have been solicited and tabulated fairly, in good faith, and in a manner consistent

with the Bankruptcy Code, the Bankruptcy Rules, the Solicitation and Voting Procedures, and the Local Rules.

13. As set forth in the Plan and the Disclosure Statement, only Holders of Claims in the Voting Classes were eligible to vote on the Plan. Under section 1126(f) of the Bankruptcy Code, Holders of Claims in Class 1 (Other Priority Claims), Class 2 (General Unsecured Claims), Class 3 (Promissory Note Claims), and Class 6 (VarigLog Claims) are Unimpaired and therefore presumed to accept the Plan. Under section 1126(g) of the Bankruptcy Code, Holders of Claims in Class 7 (Partnership Interests), Class 8 (Affiliate Equity Interests), and Class 9 (Intercompany Claims) will receive residual or no distributions under the Plan, and are therefore deemed to reject the Plan.

L. Objections

14. To the extent that any objections (whether formal or informal), reservations of rights, statements, or joinders to any of the foregoing relating, in each case, to final approval of the Disclosure Statement and/or Confirmation have not been resolved, withdrawn, waived, or settled prior to entry of this Confirmation Order, or otherwise resolved herein or as stated on the record of the Confirmation Hearing, they are hereby overruled on the merits based on the record before this Court.

M. Conditions Precedent

15. Article IX of the Plan is hereby modified to eliminate as a condition precedent to confirmation that the Brazilian Bankruptcy Court approve the VarigLog Estate's entry into and performance under the VarigLog Estate Settlement (set forth in Article IX.A.2). Rather, the Brazilian Bankruptcy Court's approval of the VarigLog Estate's entry into and performance under the VarigLog Estate Settlement shall be a condition precedent to the occurrence of the Effective Date under Article IX.B of the Plan. For the avoidance of doubt and notwithstanding Article IX.C

of the Plan, the Debtors (a) may not waive the requirement of an order of the Brazilian Bankruptcy Court that is in effect and not stayed as a condition to the occurrence of the Effective Date and (b) acknowledge that in the event the Brazilian Bankruptcy Court disapproves or cannot grant approval of the VarigLog Estate Settlement, the VarigLog Estate may seek relief in this Court to enforce the plan as modified by this Order.

N. Burden of Proof

16. The Debtors, as the proponents of the Plan, have met their burden of proving the elements of sections 1129(a) and (b) of the Bankruptcy Code by a preponderance of the evidence, which is the applicable evidentiary standard for Confirmation of the Plan. In addition, to the extent applicable, the Plan is confirmable under the clear and convincing evidentiary standard. Each witness who submitted a declaration in support of Confirmation in connection with the Confirmation Hearing was credible, reliable, and qualified to testify as to the topics addressed in his or her testimony.

O. Bankruptcy Rule 3016

17. The Plan is dated and identifies the Debtors as the Plan proponents, thereby satisfying Bankruptcy Rule 3016(a). The filing of the Disclosure Statement satisfied Bankruptcy Rule 3016(b). The discharge, release, injunction, and exculpation provisions of the Plan are set forth in bold therein and in the Disclosure Statement, thereby complying with Bankruptcy Rule 3016(c).

P. Plan Compliance with the Bankruptcy Code (11 U.S.C. § 1129(a)(1))

18. The Plan complies with the applicable provisions of the Bankruptcy Code, thereby satisfying section 1129(a)(1) of the Bankruptcy Code.

(i) Proper Classification (11 U.S.C. §§ 1122, 1123(a)(1))

19. The classification of Claims and Interests under the Plan is proper under the Bankruptcy Code. As required by section 1123(a)(1), in addition to Administrative Claims (including Professional Claims and statutory U.S. Trustee fees) and Priority Tax Claims, which need not be classified, Article III of the Plan designates nine Classes of Claims and Interests. As required by section 1122(a) of the Bankruptcy Code, the Claims and Interests placed in each Class are substantially similar to other Claims and Interests, as the case may be, in each such Class. Valid business, factual, and legal reasons exist for separately classifying the various Classes of Claims and Interests created under the Plan, the classifications were not implemented for improper purposes, and such Classes do not unfairly discriminate between or among Holders of Claims and Interests. Thus, the Plan satisfies sections 1122 and 1123(a)(1) of the Bankruptcy Code.

(ii) Specified Unimpaired Classes (11 U.S.C. § 1123(a)(2)).

20. Article III of the Plan specifies that Claims in Class 1 (Other Priority Claims), Class 2 (General Unsecured Claims), Class 3 (Promissory Note Claims), and Class 6 (VarigLog Claims) are Unimpaired under the Plan, thereby satisfying section 1123(a)(2) of the Bankruptcy Code.

(iii) Specified Treatment of Impaired Classes (11 U.S.C. § 1123(a)(3)).

21. Article III of the Plan specifies the treatment of each Impaired Class under the Plan, including Class 4 (VRG Claims), Class 5 (HJDK Claims), Class 7 (Partnership Interests), Class 8 (Affiliate Equity Interests), and Class 9 (Intercompany Claims), thereby satisfying section 1123(a)(3) of the Bankruptcy Code.

(iv) No Discrimination (11 U.S.C. § 1123(a)(4))

22. Article III of the Plan provides for the same treatment for each Claim or Interest within a particular Class except to the extent that a Holder of a particular Claim or Interest has

agreed to a less favorable treatment of such Claim or Interest. Accordingly, the Plan satisfies section 1123(a)(4) of the Bankruptcy Code.

(v) Adequate Means for Implementation of the Plan (11 U.S.C. § 1123(a)(5)).

23. The Plan and the various documents and agreements entered into in connection with the Plan provide adequate and proper means for implementation of the Plan, including, without limitation: (a) the consummation of the Dissolution Transactions; (b) the execution and delivery of appropriate agreements or other documents of transfer, disposition, liquidation or dissolution containing terms that are consistent with the terms of the Plan and that satisfy the requirements of applicable law; (c) the execution and delivery of appropriate instruments of transfer, assignment, assumption or delegation of any Asset, property, right, liability, duty or obligation on terms consistent with the terms of the Plan; (d) the filing of appropriate certificates or articles of dissolution or similar instruments with the applicable governmental authorities; (e) the continued vesting of the assets of the Debtors' Estates in the Wind Down Estates; and (f) all other actions that the Debtors or Plan Administrator determine to be necessary, including making filings or recordings that may be required by applicable law in connection with the Plan. Accordingly, the Plan satisfies the requirements of section 1123(a)(5) of the Bankruptcy Code.

(vi) Non-Voting Equity Securities (11 U.S.C. § 1123(a)(6)).

24. There will be no new Securities issued in connection with the Plan. Accordingly, the requirements of section 1123(a)(6) of the Bankruptcy Code are not applicable.

(vii) Designation of Directors and Officers (11 U.S.C. § 1123(a)(7)).

25. The Plan appropriate identifies the Plan Administrator. Accordingly, the requirements of section 1123(a)(7) of the Bankruptcy Code are satisfied.

Q. Discretionary Contents of the Plan (11 U.S.C. § 1123(b))

26. The additional provisions of the Plan are appropriate and consistent with the applicable provisions of the Bankruptcy Code. Thus, the Plan complies with section 1123(b) of the Bankruptcy Code.

(i) Impairment/Unimpairment of Any Class of Claims or Interests (11 U.S.C. § 1123(b)(1))

27. Pursuant to the Plan, Classes 1, 2, 3 and 6 are Unimpaired, Classes 4, 5, 7 8 and 9 are Impaired, as contemplated by section 1123(b)(1) of the Bankruptcy Code.

(ii) Assumption and Rejection of Executory Contracts and Unexpired Leases (11 U.S.C. § 1123(b)(2))

28. Article V.A of the Plan provides that, except as otherwise provided in the Plan, all of the Debtors' Executory Contracts and Unexpired Leases shall be deemed rejected as of the Effective Date except for any Executory Contracts or Unexpired Leases that: (a) were previously rejected or assumed by a Final Order; (b) were previously expired or terminated pursuant to their own terms or by agreement of the parties thereto; or (c) that are the subject of a separate motion to assume or reject that is pending on the Effective Date.

29. Notwithstanding the deemed rejection of Executory Contracts and Unexpired Leases under the Plan, certain month-to-month arrangements currently in place with the Debtors that are necessary to effectuate the Dissolution Transactions will ride through the Effective Date and shall be subject to termination by the Wind Down Estates in accordance with the terms of such arrangements.

30. The Plan contains additional provisions that provide for the Wind Down Estates' assumption of certain contracts relating to insurance.

(iii) Settlement, Releases, Exculpation, and Injunction (11 U.S.C. § 1123(b)(3)(A))

31. In accordance with section 1123(b)(3)(A) of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the classification, distributions, releases, and other benefits provided pursuant to the Plan, including the releases set forth in Article VIII thereof, the provisions of the Plan, including those incorporating the Settlements, constitute a good faith compromise and settlement of all Claims, Interests, Causes of Action, and controversies released, settled, compromised, discharged, satisfied, or otherwise resolved pursuant to the Plan. Such compromises and settlements are the product of extensive arm's-length, good faith negotiations and are fair, equitable, and reasonable and in the best interests of the Debtors and their Estates.

(iv) Preservation of Causes of Action (11 U.S.C. § 1123(b)(3)(B))

32. Article IV.K of the Plan provides for the preservation by the Debtors of certain Causes of Action in accordance with section 1123(b) of the Bankruptcy Code. In accordance with section 1123(b) of the Bankruptcy Code, the Wind Down Estates shall retain and may enforce all rights to commence and pursue any and all Causes of Action, whether arising before or after the Petition Date, and the Plan Administrator's rights to commence, prosecute, or settle such Causes of Action shall be preserved notwithstanding the occurrence of the Effective Date, other than the Causes of Action released by the Debtors pursuant to the releases and exculpations contained in the Plan. Unless any Cause of Action of the Debtors against an Entity is expressly waived, relinquished, exculpated, released, compromised, or settled in the Plan or pursuant to a Final Order, the Debtors and Plan Administrator expressly reserve all such Retained Causes of Action for later adjudication or settlement. Additionally, in accordance with section 1123(b)(3) of the Bankruptcy Code, any Retained Cause of Action that a Debtor may hold against any Entity shall vest in the Wind Down Estates, except as otherwise provided in the Plan. The provisions regarding the

Retained Causes of Action in the Plan are appropriate and in the best interests of the Debtors, their respective Estates, and Holders of Claims and Interests.

(v) Other Appropriate Provisions (11 U.S.C. § 1123(b)(6))

33. The Plan's other provisions (including to the extent modified by this Confirmation Order) are appropriate and consistent with the applicable provisions of the Bankruptcy Code, including, without limitation, provisions for (a) distributions to Holders of Claims and Interests, (b) resolution of Disputed Claims, (c) allowance of certain Claims, (d) the discharge of certain Claims and termination of certain Interests, (e) releases by the Debtors of certain parties, (f) consensual releases by certain third parties, (g) exculpations of certain parties (as modified herein), (h) the injunction of certain Claims and Causes of Action in order to implement the discharge, release, and exculpation provisions, and (i) retention of Court jurisdiction, thereby satisfying the requirements of section 1123(b)(6) of the Bankruptcy Code.

R. The Debtors' Compliance with the Applicable Provisions of the Bankruptcy Code (11 U.S.C. § 1129(a)(2))

34. The Debtors, as proponents of the Plan, have complied with all applicable provisions of the Bankruptcy Code as required by section 1129(a)(2) of the Bankruptcy Code. Specifically:

a. the Debtors are eligible debtors under section 109 of the Bankruptcy Code and are proper proponents of the Plan under section 1121(a) of the Bankruptcy Code;

b. the Debtors have complied with applicable provisions of the Bankruptcy Code, except as otherwise provided or permitted by orders of the Bankruptcy Court;

c. the Debtors and their agents solicited votes to accept or reject the Plan in compliance with sections 1125 and 1126 of the Bankruptcy Code, and all other applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and the Disclosure Statement Order; and

d. the Debtors have complied with other applicable provisions of the Bankruptcy Code, the Bankruptcy Rules, and the Local Rules except as otherwise provided or permitted by orders of the Court.

S. Good Faith Proposal of Plan (11 U.S.C. § 1129(a)(3))

35. The Debtors have proposed the Plan (including all other documents necessary or appropriate to effectuate the Plan) in good faith and not by any means forbidden by law, thereby satisfying section 1129(a)(3) of the Bankruptcy Code. In determining that the Plan has been proposed in good faith, the Court has examined the totality of the circumstances surrounding the filing of the Chapter 11 Cases, the Plan itself, the formulation of the Plan, the process leading to Confirmation, the support of Holders of Claims in the Voting Classes for the Plan, and the transactions to be implemented pursuant thereto. The Debtors' good faith is evident from the facts and record of the Chapter 11 Cases, the Disclosure Statement, the hearing on the Disclosure Statement, and the record of the Confirmation Hearing, and other proceedings held in the Chapter 11 Cases. The Plan was proposed with the legitimate and honest purpose of effectuating an orderly and value-maximizing liquidation of the Debtors. The Plan and all documents necessary to effectuate the Plan were the product of extensive negotiations conducted at arm's length among the Debtors and their key stakeholders, including the Settling Parties, and their respective professionals. Further, the Plan's classification, indemnification, settlement, discharge, exculpation, release, and injunction provisions have been negotiated in good faith and at arm's length, are consistent with sections 105, 1122, 1123(b)(3)(A), 1123(b)(6), 1129, and 1142 of the Bankruptcy Code, and are each integral to the Plan, supported by valuable consideration, and necessary to the Debtors' orderly liquidation. Accordingly, the requirements of section 1129(a)(3) of the Bankruptcy Code are satisfied.

36. The Plan gives effect to implementing value-maximizing wind down transactions. Accordingly, the Debtors, the Released Parties, and the Exculpated Parties have been, are, and will

continue to be acting in good faith if they proceed to: (a) consummate the Plan, the Dissolution Transactions, and the agreements, settlements, transactions, transfers, and other actions contemplated thereby, regardless of whether such agreements, settlements, transactions, transfers, and other actions are expressly identified by this Confirmation Order; and (b) take the actions authorized, directed, or contemplated by this Confirmation Order. Therefore, the Plan has been proposed in good faith to achieve a result consistent with the objectives and purposes of the Bankruptcy Code and the aforementioned parties have acted in good faith.

T. Payment for Services or Costs and Expenses (11 U.S.C. § 1129(a)(4))

37. Any payment made or to be made by the Debtors, or by any Person acquiring property under the Plan, for services or for costs and expenses in connection with the Chapter 11 Cases, or in connection with the Plan and incident to the Chapter 11 Cases, has been approved by or is subject to the approval of the Court as reasonable, including as set forth in this Confirmation Order, thereby satisfying section 1129(a)(4) of the Bankruptcy Code.

U. Directors, Officers, and Insiders (11 U.S.C. § 1129(a)(5))

38. The Debtors have complied with section 1129(a)(5) of the Bankruptcy Code. The identity and affiliations and compensation of any known Person proposed to be retained by the Debtors or Wind Down Estates, including the Plan Administrator, are disclosed in the Plan and the Confirmation Brief. The proposed Plan Administrator is qualified, and the appointment to such office is consistent with the interests of the Debtors' creditors and equity security holders and with public policy.

V. No Rate Changes (11 U.S.C. § 1129(a)(6))

39. Section 1129(a)(6) of the Bankruptcy Code is not applicable to the Chapter 11 Cases. The Plan proposes no rate change subject to the jurisdiction of any governmental regulatory commission.

W. Best Interests of Holders of Claims and Interests (11 U.S.C. § 1129(a)(7))

40. Each Holder of an Impaired Claim or Interest either has accepted the Plan or will receive or retain under the Plan, on account of such Claim or Interest, property of a value, as of the Effective Date, that is not less than the amount that such Holder would receive or retain if the Debtors were liquidated under chapter 7 of the Bankruptcy Code on such date.

41. The Holders of Claims in Classes 4 and 5 voted in favor of the Plan, and the Holders of Interest in Class 7 (Partnership Interests), Class 8 (Affiliate Equity Interests), and Class 9 (Intercompany Claims) will receive or retain property under the plan that is not less than the amount such a Holder would receive or retain in a chapter 7 liquidation. The Plan contemplates an orderly dissolution by satisfying Allowed Claims and paying residual assets to limited partners or other Interest Holders. The Settlements are all binding on a chapter 7 trustee, and a chapter 7 liquidation would only create an added layer of expense of trustee commissions and fees for a trustee's professionals. Accordingly, the Plan satisfies the "best interests of creditors" test under section 1129(a)(7) of the Bankruptcy Code.

X. Acceptance by Certain Classes (11 U.S.C. § 1129(a)(8))

42. Class 1 (Other Priority Claims), Class 2 (General Unsecured Claims), Class 3 (Promissory Note Claims), and Class 6 (VarigLog Claims) are Unimpaired by the Plan pursuant to section 1124 of the Bankruptcy Code and, accordingly, Holders of Claims in such Classes are conclusively presumed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Class 4 (VRG Claims) and Class 5 (HJDK Claims) are Impaired by the Plan and, as established by the Voting Certification, have voted to accept the Plan by the requisite numbers and amount of Claims. Holders of Claims or Interests in Class 7 (Partnership Interests), Class 8 (Affiliate Equity Interests), and Class 9 (Intercompany Claims) will not receive or retain any property on account of their Claims or Interests in such Class and, accordingly, such Claims and

Interests are Impaired and such Classes are deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. Notwithstanding the foregoing, the Plan is confirmable because it satisfies sections 1129(a)(10) and 1129(b) of the Bankruptcy Code.

Y. Treatment of Claims Entitled to Priority Under Section 507(a) of the Bankruptcy Code (11 U.S.C. § 1129(a)(9))

43. The treatment of Administrative Claims (including Professional Claims and statutory U.S. Trustee fees), Priority Tax Claims, and Other Priority Claims pursuant to Articles II and III of the Plan satisfies the requirements of section 1129(a)(9) of the Bankruptcy Code. Accordingly, the Debtors have satisfied the requirements of section 1129(a)(9) of the Bankruptcy Code.

Z. Acceptance By at Least One Impaired Class of Claims (11 U.S.C. § 1129(a)(10)).

44. Classes 4 (VRG Claims) and 5 (HJDK Claims) are both impaired and, as evidenced by the Voting Certification, have accepted the Plan, without including the acceptance of the Plan by any insiders in such Classes (of which there are none). Accordingly, the Plan satisfies section 1129(a)(10) of the Bankruptcy Code.

AA. Feasibility (11 U.S.C. § 1129(a)(11)).

45. The Plan proposes liquidation of the Debtors. The Plan provides for reasonable procedures, by which the Debtors, the Plan Administrator, and the Wind Down Estates, as applicable, may make the necessary distributions under the Plan Accordingly, the Plan satisfies the requirements of section 1129(a)(11) of the Bankruptcy Code.

BB. Payment of Statutory Fees (11 U.S.C. § 1129(a)(12))

46. As set forth in Article II.C of the Plan, the Debtors shall pay, in full in cash, any fees due and owing to the U.S. Trustee at the time of Confirmation. Thereafter, the Debtors or Wind Down Estates, as applicable, shall pay all U.S. Trustee fees due and owing under section

1930 of the Judicial Code in the ordinary course until the earliest of the last of the Chapter 11 Cases being closed, dismissed or converted to a case under chapter 7 of the Bankruptcy Code. Accordingly, the Plan satisfies the requirements of section 1129(a)(12) of the Bankruptcy Code.

CC. Retiree Benefits (11 U.S.C. § 1129(a)(13))

47. The Debtors have no obligations to pay any retiree benefits, and, therefore, section 1129(a)(13) of the Bankruptcy Code is inapplicable.

DD. Non-Applicability of Certain Sections (11 U.S.C. §§ 1129(a)(14), (15), and (16))

48. Sections 1129(a)(14), 1129(a)(15), and 1129(a)(16) of the Bankruptcy Code are not applicable to the Chapter 11 Cases. The Debtors owe no domestic support obligations, are not individuals, and are moneyed, business, or commercial corporations or trusts.

EE. Confirmation of Plan Over Non-Acceptance of Impaired Classes (11 U.S.C. § 1129(b))

49. The Plan may be confirmed pursuant to section 1129(b) of the Bankruptcy Code notwithstanding that the requirements of section 1129(a)(8) have not been met, because the Debtors have demonstrated by a preponderance of the evidence that the Plan (a) satisfies all of the other requirements of section 1129(a) of the Bankruptcy Code and (b) does not "discriminate unfairly" and is "fair and equitable" with respect to the Deemed Rejecting Classes (as defined below).

50. Based upon the evidence proffered, adduced, and presented by the Debtors prior to or at the Confirmation Hearing, the Plan does not "discriminate unfairly" against any Holders of Claims and Interests in Class 7 (Partnership Interests), Class 8 (Affiliate Equity Interests), and Class 9 (Intercompany Claims) (collectively, the "***Deemed Rejecting Classes***"), as required by section 1129(b)(1) of the Bankruptcy Code, because all similarly situated Holders of Claims and Interests will receive substantially similar treatment, and to the extent the Plan treats any Classes differently, there are valid business, legal, and factual reasons to do so.

51. The Plan is also "fair and equitable" with respect to the Deemed Rejecting Classes. Specifically, no Holder of Claims or Interests junior to each Class, as applicable, will receive or retain any property under the Plan on account of such junior Claims or Interests, and no Class senior to such Classes, as applicable, has received more than full consideration for its Claims or Interests.

52. The Plan, therefore, satisfies the requirements of section 1129(b) of the Bankruptcy Code and may be confirmed.

FF. Only One Plan (11 U.S.C. § 1129(c))

53. The Plan is the only plan filed in the Chapter 11 Cases, and, accordingly, satisfies section 1129(c) of the Bankruptcy Code.

GG. Principal Purpose of the Plan (11 U.S.C. § 1129(d))

54. The principal purpose of the Plan is not the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933 and there has been no filing by any Governmental Unit asserting any such attempted avoidance. Thus, the Plan satisfies section 1129(d) of the Bankruptcy Code.

HH. Not Small Business Cases (11 U.S.C. § 1129(e))

55. These Chapter 11 Cases are not small business cases, as that term is defined in the Bankruptcy Code, and accordingly, section 1129(e) of the Bankruptcy Code is inapplicable.

II. Satisfaction of Confirmation Requirements

56. Based upon the foregoing and all other pleadings and evidence proffered or adduced at or prior to the Confirmation Hearing, the Plan and the Debtors, as applicable, satisfy all the requirements for Confirmation set forth in section 1129 of the Bankruptcy Code.

JJ. Plan Implementation

57. The terms of the Plan, and all other agreements, instruments, or other documents filed in connection with the Plan and/or executed or to be executed in connection with the transactions contemplated by the Plan and all amendments and modifications of any of the foregoing made pursuant to the provisions of the Plan governing such amendments and modifications (collectively, and as each may be amended, supplemented, or modified, the "***Plan Documents***") are incorporated by reference, are approved in all respects, and constitute an integral part of this Confirmation Order. The Debtors have exercised reasonable business judgment in determining which agreements to enter into and have provided sufficient and adequate notice of such documents and agreements. The terms and conditions of such documents and agreements have been negotiated in good faith and at arm's length, are fair and reasonable, and are reaffirmed and approved.

KK. Binding and Enforceable

58. The Plan and the Plan Documents have been negotiated in good faith and at arm's length and, subject to the occurrence of the Effective Date, shall bind: (a) any and all Holders of Claims and/or Interests and each such Holder's respective agents, successors, and assigns (whether or not each such Holder's Claim and/or Interest is Impaired under the Plan, whether or not such Holder has accepted or rejected the Plan, and whether or not such Holder is entitled to a distribution under the Plan); (b) all Entities that are parties to or are subject to the settlements, compromises, releases, and injunctions described in the Plan and this Confirmation Order; (c) each Entity acquiring property under the Plan or this Confirmation Order; and (d) any and all non-Debtor parties to Executory Contracts or Unexpired Leases with the Debtors. The Plan and the Plan Documents constitute legal, valid, binding, and authorized obligations of the respective parties thereto and shall be enforceable in accordance with their terms. Pursuant to section 1142(a) of the

Bankruptcy Code, the Plan and the Plan Documents shall apply and be enforceable notwithstanding any otherwise applicable non-bankruptcy law. Subject to the consent and approval rights of applicable parties set forth in the Plan and the Settlements, the Debtors are authorized to take any action reasonably necessary or appropriate to consummate the Plan and the transactions contemplated thereby.

LL. Vesting of Assets

59. Except as otherwise provided in the Plan or any agreement, instrument, or other document incorporated in the Plan or this Confirmation Order, on the Effective Date, pursuant to section 1141 of the Bankruptcy Code, all property (including all interests, rights, and privileges related thereto) in each Debtor's Estate, all Retained Causes of Action, and any property acquired by any of the Debtors pursuant to the Plan, including Interests held by the Debtors in any non-Debtor Affiliates, shall vest in the Wind Down Estates, free and clear of all Liens, Claims, charges, encumbrances, or other interests, unless expressly provided otherwise by the Plan or this Confirmation Order, subject to and in accordance with the Plan. On and after the Effective Date, except as otherwise provided in the Plan or this Confirmation Order, the Plan Administrator may use, acquire, or dispose of property and compromise or settle any Claims, Interests, or Causes of Action without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or the Bankruptcy Rules. Without limiting the foregoing, the Wind Down Estates may pay the charges that they incur on or after the Effective Date for professional fees, disbursements, expenses, or related support services without application to or approval of the Bankruptcy Court.

MM. Executory Contracts and Unexpired Leases

60. The Debtors have exercised reasonable business judgment in determining whether to assume, assume and assign, or reject each of their Executory Contracts and Unexpired Leases

pursuant to sections 365 and 1123(b)(2) of the Bankruptcy Code, the Plan, including Article V of the Plan, and this Confirmation Order.

NN. Discharge, Compromise, Settlement, Release, Exculpation, and Injunction Provisions

61. The Court has jurisdiction under sections 1334(a) and (b) of title 28 of the United States Code to approve the discharge, compromises, settlements, releases, exculpations, and injunctions set forth in the Plan, including Article VIII of the Plan. Sections 105(a) and 1123(b) of the Bankruptcy Code permit the issuance of the injunctions and approval of the releases, exculpations, and injunctions set forth the Plan and the Confirmation Order. Based upon the record of the Chapter 11 Cases and the evidence proffered or adduced at the Confirmation Hearing, the Court finds that the discharge, compromises, settlements, releases, exculpations, and injunctions set forth in the Plan and the Confirmation Order are consistent with the Bankruptcy Code and applicable law. Further, the discharge, compromises, settlements, releases, exculpations, and injunctions contained in the Plan and the Confirmation Order are integral components of the Plan. The discharge, compromises, settlements, releases, exculpations, and injunctions set forth in the Plan and the Confirmation Order are hereby approved and authorized in their entirety.

62. The releases of the Released Parties, including, among others, the Debtors' directors and officers and the Settling Parties (including the VarigLog Estate, VRG, HJDK and the Participating Insurers), each in their capacity as such, are an integral component of the settlements and compromises embodied in the Plan and are given for good and valuable consideration provided by each of the Released Parties. The Third-Party Releases (as defined below) facilitated participation by the Released Parties in both the Plan and the chapter 11 process and were critical in reaching consensus to support the Plan. The releases in favor of the Released Parties were a necessary element of consideration that the respective Settling Parties required as a condition to entering into each of the Settlements and agreeing to support the Plan. The releases of the Released

Parties contained in the Plan have the consent of the Debtors and the other Releasing Parties and are in the best interests of the Debtors' Estates.

OO. The Debtor Release

63. The releases of Causes of Action by the Debtors described in Article VIII.B of the Plan in accordance with section 1123(b) of the Bankruptcy Code (the "***Debtor Release***") are: (a) essential to the Confirmation of the Plan; (b) a valid exercise of the Debtors' business judgment under section 363 of the Bankruptcy Code and Bankruptcy Rule 9019; (c) in exchange for the good and valuable consideration and substantial contributions provided by the Released Parties; (d) a good faith settlement and compromise of the Causes of Action released by the Debtor Release; (e) in the best interests of the Debtors, their Estates, and all Holders of Claims and Interests; (f) fair, equitable, and reasonable; (g) given and made after due notice and opportunity for hearing; and (h) a bar to any of the Debtors, the Wind Down Estates, the Plan Administrator, or any other party acting derivatively on behalf of any of the foregoing asserting any Cause of Action released pursuant to the Debtor Release.

64. Specifically, the Debtor Release is an integral part of the Plan and is in the best interests of the Debtors' Estates as a component of the court-approved Settlements implemented under the Plan. The Debtor Release is a vital component of the Plan, and was critical in securing mutual releases of potential claims and causes of action from the Settling Parties. The Plan, including the Debtor Release, was negotiated by sophisticated parties represented by able counsel and advisors, including the Settling Parties. The Debtor Release is therefore the result of a hard fought and arm's-length negotiation conducted in good faith.

65. The Debtor Release appropriately offers protection to parties that contributed to the Debtors' chapter 11 process. Each of the Released Parties made significant concessions in and contributions to these Chapter 11 Cases. The Debtor Release for the Debtors' directors and officers

is appropriate because the Debtors' directors and officers share an identity of interest with the Debtors, supported the Plan and these Chapter 11 Cases, and have provided other valuable consideration to the Debtors to facilitate the Debtors' liquidation. The Debtor Release of the Settling Parties is appropriate because the Settling Parties have agreed to actively support the Plan and the Chapter 11 Cases and waive substantial rights and Claims against the Debtors under the Plan.

66. The scope of the Debtor Release is appropriately tailored to the facts and circumstances of the Chapter 11 Cases. The Debtor Release is appropriate in light of, among other things, the value provided by the Released Parties to the Debtors' Estates and the critical importance of the Debtor Release to the Plan.

PP. The Third-Party Releases

67. Article VIII.C of the Plan describes certain releases granted by the Releasing Parties (the "***Third-Party Releases***"). The Third-Party Releases are an essential provision of the Plan and are: (a) essential to the Confirmation of the Plan; (b) given in exchange for the good and valuable consideration and substantial contributions provided by the Released Parties; (c) a good faith settlement and compromise of the Causes of Action released by the Third-Party Release; (d) materially beneficial to, and in the best interests of, the Debtors, their Estates and their stakeholders, and important to the overall objectives of the Plan; (e) fair, equitable, and reasonable; (f) given and made after due notice and opportunity for hearing; (g) consensual under applicable law; (h) a bar to any of the Releasing Parties asserting any Claim or Cause of Action released pursuant to the Third-Party Release; and (i) consistent with sections 105, 524, 1123, 1129, and 1141 and other applicable provisions of the Bankruptcy Code.

68. Specifically, like the Debtor Release, the Third-Party Releases facilitated participation of parties-in-interest in both the Plan process and the chapter 11 process generally.

The Third-Party Releases were critical to incentivizing parties-in-interest, including the Settling Parties, to support the Plan by providing critical concessions and funding, and to preventing costly and time-consuming litigation regarding various parties' respective rights and interests. The Third-Party Releases were a core negotiation point and instrumental in developing a Plan that maximized value for all of the Debtors' stakeholders. The Third-Party Releases are designed to provide finality for the Debtors, the Wind Down Estates, and the Released Parties. As such, the Third-Party Releases appropriately offer certain protections to parties who constructively participated in the Debtors' chapter 11 process.

69. The Third-Party Releases are consensual with respect to Holders of Claims and Interests who were provided notice by e-mail or first-class mail pursuant to the Solicitation Procedures (regardless of whether such Holder had actual notice) and did not opt out of the Plan's Third-Party Releases. The Plan, the Disclosure Statement, the Solicitation Materials, and the opt-out notices provide appropriate and specific disclosure with respect to the Entities and Causes of Action that are subject to the Third-Party Releases and no additional disclosure is necessary. As evidenced by the Solicitation Affidavits, the Debtors provided actual notice to all known Holders of Claims and Interests (other than Holders of Claims or Interests in Classes 8 and 9), as well as published notice in national and international publications for the benefit of unknown parties-in-interest, and no further or other notice is necessary. Additionally, the release provisions of the Plan were conspicuous, emphasized with boldface type in the Plan, the Disclosure Statement, the Ballots, and the applicable notices. All Releasing Parties (except for Holders of Claims or Interests in Classes 8 and 9) were properly informed that unless they checked the "Opt Out" box on the applicable Ballot or opt-out form and returned the same in advance of the Voting Deadline, they

would be deemed to have expressly consented to the release of all Claims and Causes of Action against the Released Parties.

70. The scope of the Third-Party Releases are appropriately tailored to the facts and circumstances of these Chapter 11 Cases. In light of, among other things, the consensual nature of the Third-Party Releases, the critical role of the Third-Party Releases in obtaining the requisite support of the Debtors' stakeholders needed to confirm the Plan, and the significant value provided by the Released Parties to the Debtors' Estates, the Third-Party Releases are appropriate.

QQ. Exculpation

71. The exculpation provisions set forth in Article VIII.D of the Plan, as modified by this Order, are essential to the Plan, appropriate under applicable law, and constitute a proper exercise of the Debtors' business judgment. The exculpation provisions were proposed in good faith, were formulated following extensive arm's-length negotiations with key constituents, and are appropriately limited in scope to achieve the overall purpose of the Plan. Each Exculpated Party made significant contributions to the Chapter 11 Cases, including with respect to the negotiation and implementation of the transactions embodied in the Plan. Each Exculpated Party participated in good faith and in compliance with applicable law with regard to the solicitation of, and distribution of consideration pursuant to, the Plan and, therefore, is not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or such distributions made pursuant to the Plan. The exculpation provisions do not relieve any party of liability for an act or omission to the extent such act or omission is determined by a Final Order of a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence. The record in the Chapter 11 Cases fully supports the exculpation provisions, which are appropriately tailored to protect the Exculpated Parties from inappropriate litigation arising from

their participation in the Chapter 11 Cases and are consistent with the Bankruptcy Code and applicable law.

72. The exculpation provisions contained in Article VIII.D of the Plan are hereby modified as follows, and such modifications are reflected in the Plan attached hereto as **Exhibit A** (deletions are stricken through, and added language is indicated by bolded and underlined text).

> Except as otherwise specifically provided in the Plan, no Exculpated Party shall have or incur liability for and each Exculpated Party is hereby released and exculpated from any Cause of Action for any claim related to any act or omission in connection with, relating to, or arising out of, the Chapter 11 Cases, the formulation, preparation, dissemination, solicitation, negotiation, or filing of the Disclosure Statement, the Plan, the Plan Supplement, or any contract, instrument, release, or other agreement or document created or entered into in connection with the Disclosure Statement, the Plan, the Plan Supplement, the Chapter 11 Cases, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the administration of the Wind Down Estates and distribution of property under the Plan or any other related agreement, or upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date, except for claims related to any act or omission that is determined in a Final Order by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence~~, but in all respects such Entities shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan~~.
>
> The Exculpated Parties shall be deemed to have participated in good faith and in compliance with the applicable laws with regard to the solicitation of votes and distribution of consideration pursuant to the Plan and, therefore, are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or distributions made pursuant to the Plan.
>
> **Nothing in the Plan shall limit the liability of attorneys to their respective clients pursuant to Rule 1.8(h) of the New York Rules of Professional Conduct.**
>
> "Exculpated Parties" means each of the following, solely in its capacity as such: (a) the Debtors, (b) the Wind Down Estates; (c) the Plan Administrator, (d) the Disbursing Agent, (e) the Settling Parties, which, for the avoidance of doubt, includes VRG, HJDK, the VarigLog Estate, Zurich and the Participating Insurers, (f) with respect to preceding clauses (a) through (e), each such Entity's current and former Affiliates; and (g) with respect to preceding clauses (a) through (f), each such Entity's current and former directors, managers, officers, principals, members, managed accounts or funds, fund advisors, employees, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors,

assigns, subsidiaries, agents, advisory board members, financial advisors, investment advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals.

RR. Injunction

73. The injunction provisions set forth in Article VIII.E of the Plan are essential to the Plan and are necessary to implement, preserve, and enforce the discharge, release, and exculpation provisions of the Plan. The injunction provisions are appropriately tailored to achieve those purposes.

SS. Disclosure of Facts

74. The Debtors have disclosed all material facts regarding the Plan, the Plan Documents, and the adoption, execution, and implementation of the other matters provided for under the Plan involving corporate action to be taken by or required of the Debtors.

TT. Retention of Jurisdiction

75. Except as otherwise provided in the Plan, any of the Plan Documents, or this Confirmation Order, the Court shall retain jurisdiction over the Chapter 11 Cases and all matters arising out of, or related to, the Chapter 11 Cases and the Plan, including the matters set forth in Article XI of the Plan.

ORDER

BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

76. Confirmation. The Plan, attached hereto as **Exhibit A** (as modified), and each of its provisions are confirmed pursuant to section 1129 of the Bankruptcy Code. The documents contained in or contemplated by the Plan, including any other Plan Documents, are hereby authorized and approved. The terms of the Plan are incorporated herein by reference and are an integral part of this Confirmation Order. The Debtors are authorized to implement and consummate the Plan and the Plan Documents, including taking all actions necessary, advisable,

or appropriate to finalize the Plan Documents and to effectuate the Plan and the Dissolution Transactions, without any further authorization or action by any person, body or board of directors except as may be expressly required by the Plan or this Confirmation Order. The terms of the Plan (including all consent rights provided therein) and all other relevant and necessary documents shall be effective and binding as of the Effective Date on all parties-in-interest, including the Wind Down Estates and all Holders of Claims and Interests. Any amendments or modifications to the Plan described or set forth in this Confirmation Order are hereby approved, without further order of the Bankruptcy Court.

77. Objections. All objections to Confirmation of the Plan and other responses, comments, statements, or reservation of rights, if any, in opposition to the Plan have been overruled in their entirety and on the merits to the extent not otherwise withdrawn, waived, or otherwise resolved by the Debtors prior to entry of this Confirmation Order or on the record at, the Confirmation Hearing, unless otherwise indicated herein. All withdrawn objections, if any, are deemed withdrawn with prejudice.

78. Deemed Acceptance of the Plan as Modified. In accordance with section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, all Holders of Claims who voted to accept the Plan or who are conclusively presumed to have accepted the Plan are deemed to accept the Plan, subject to modifications, if any. No Holder of a Claim shall be permitted to change its vote as a consequence of Plan modifications. All modifications to the Plan made after the Solicitation Date are hereby approved, pursuant to section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019.

79. Continued Corporate Existence. Except as otherwise provided in the Plan or any agreement, instrument, or other document incorporated in the Plan, on or after the Effective Date, the Debtors shall remain in existence for the sole purpose of dissolving. The Wind Down Estates

may continue after one or more of the Debtors is dissolved, as determined by the Plan Administrator in accordance with the terms of the Plan. The Debtors or the Wind Down Estates may dissolve and wind up any of the Debtors and non-Debtor Affiliates in accordance with applicable non-bankruptcy law. The Debtors or Plan Administrator, as applicable, are authorized, but not required, to take any actions they determine to be necessary or advisable to effectuate the Dissolution Transactions without further court order, approval or action.

80. Vesting of Assets. Except as otherwise provided in the Plan, the Plan Documents, or this Confirmation Order, on the Effective Date, pursuant to sections 1141(b) and (c) of the Bankruptcy Code, all property (including all interests, rights, and privileges related thereto) in each Debtor's Estate, all Retained Causes of Action, and any property acquired by any of the Debtors pursuant to the Plan, shall vest in the Wind Down Estates, free and clear of all Liens, Claims, charges, encumbrances, or other interests, unless expressly provided otherwise by the Plan or this Confirmation Order, subject to and in accordance with the Plan. On and after the Effective Date, except as otherwise provided in the Plan or this Confirmation Order, the Plan Administrator may use, acquire or dispose of property and compromise or settle any Claims without supervision or approval by the Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules, other than those restrictions expressly imposed by the Plan or this Confirmation Order.

81. Plan Implementation. The transactions described in the Plan, the Plan Documents, and this Confirmation Order, including the Dissolution Transactions, are hereby approved. On or before the Effective Date, and after the Effective Date, as necessary, and without any further order of the Court, other authority, or corporate action, the Debtors or the Wind Down Estates, as applicable, and their respective directors, managers, officers, employees, members, agents (including the Plan Administrator and Disbursing Agent), attorneys, financial advisors, and

investment bankers are authorized and empowered pursuant to section 1142(b) of the Bankruptcy Code and other applicable laws to and shall (a) grant, issue, execute, deliver, file, or record any agreement, document, or security, and the documents contained in the Plan or the Plan Documents or any other documents related thereto and (b) take any action necessary, advisable, or appropriate to implement, effectuate, and consummate the Plan, the Plan Documents, the Dissolution Transactions, or this Confirmation Order. All such actions taken or caused to be taken shall be deemed to have been authorized and approved by the Court without further approval, act, or action under any applicable law, order, rule, or regulation, including, among other things, (x) all transfers of assets that are to occur pursuant to the Plan, the Plan Documents, or this Confirmation Order, (y) the incurrence of all obligations contemplated by the Plan, the Dissolution Transactions, the Plan Documents, or this Confirmation Order and the making of all distributions under the Plan, the Plan Documents, or this Confirmation Order, and (z) entering into any and all transactions, contracts, leases, instruments, releases, and other documents and arrangements permitted by applicable law, order, rule, or regulation. The approvals and authorizations specifically set forth in this Confirmation Order are nonexclusive and are not intended to limit the authority of the Debtors or the Wind Down Estates, as applicable, and their respective directors, managers, officers, employees, members, agents (including the Plan Administrator and Disbursing Agent), attorneys, financial advisors, and investment bankers to take any and all actions necessary, advisable, or appropriate to implement, effectuate, and consummate any and all documents or transactions contemplated by the Plan, the Plan Documents, or this Confirmation Order pursuant to section 1142(b) of the Bankruptcy Code. Pursuant to section 1142 of the Bankruptcy Code, to the extent that, under applicable non-bankruptcy law or the rules of any stock exchange, any of the foregoing actions that would otherwise require approval of the equityholders, directors, or managers (or any

equivalent body) of the Debtors or the Wind Down Estates, as applicable, such approval shall be deemed to have occurred and shall be in effect from and after the Effective Date without any further action by the equityholders, directors, or managers (or any equivalent body) of the Debtors or the Wind Down Estates. Prior to, on, or as soon as reasonably practicable after the Effective Date, the Debtors or the Plan Administrator shall, if required, file any documents required to be filed in such jurisdictions so as to effectuate the provisions of the Plan, the Plan Documents, and the Dissolution Transactions. Any or all documents contemplated herein shall be accepted by each of the respective filing offices and recorded, if required, in accordance with applicable law. To the maximum extent permitted under section 1142 of the Bankruptcy Code, all counterparties to any documents described in this paragraph are hereby directed to execute such documents as may be required or provided by such documents, without any further order of the Court. Each of the Plan Documents, once executed, constitutes a legal, valid, binding, and authorized obligation of the respective parties thereto, enforceable in accordance with its terms, and the terms contained in each such executed Plan Document shall supersede any description of such terms contained in the Plan or otherwise set forth in a term sheet or unexecuted version of such document.

82. No Action. Pursuant to section 1142(b) of the Bankruptcy Code and other applicable law, this Confirmation Order shall constitute authorization for the Debtors or the Wind Down Estates to enter into, execute, deliver, file, adopt, amend, restate, consummate, or effectuate, as the case may be, the Plan, the Plan Documents, the Dissolution Transactions, this Confirmation Order, and any contract, instrument, or other document to be executed, delivered, adopted, or amended in connection with the implementation of the Plan, the Plan Documents, the Dissolution Transactions, or this Confirmation Order, and the respective directors, stockholders, managers, or members of the Debtors or the Wind Down Estates shall not be required to take any actions in

connection with the implementation of the Plan, the Plan Documents, or this Confirmation Order. The Wind Down Estates may also, consistent with the Plan and Plan Documents, take any additional steps on, prior to, and after the Effective Date to consolidate and streamline their organization, including, among other things, the merger, liquidation, dissolution, or consolidation of one or more of the Debtors. The Plan Documents are hereby approved, adopted and effective upon the Effective Date.

83. Immediate Binding Effect. Notwithstanding Bankruptcy Rules 3020(e), 6004(h), 7062 or otherwise, as of 5:00 p.m. (Prevailing Eastern Time) on May 24, 2023, and subject to Article IX of the Plan and occurrence of the Effective Date, the Plan, the Plan Documents, and this Confirmation Order shall be immediately effective and enforceable and deemed binding upon the Debtors, the Wind Down Estates, all Entities that are parties to or are subject to the settlements, compromises, releases, discharges, and injunctions described in the Plan and this Confirmation Order, each Entity acquiring property under the Plan or this Confirmation Order, any and all non-Debtor parties to Executory Contracts and Unexpired Leases with the Debtors, any Holder of a Claim or Interest, and each of their respective heirs executors, administrators, successors, and assigns, whether or not: (a) the Claim or Interest is Impaired under the Plan; (b) such Holder has accepted or rejected the Plan; (c) such Holder has failed to vote to accept or reject the Plan; (d) such Holder is entitled to a distribution under the Plan; (e) such Holder will receive or retain any property or interests in property under the Plan; or (f) such Holder has filed a Proof of Claim in the Chapter 11 Cases.

84. Plan Classification Controlling. The terms of the Plan shall govern the classification of Claims and Interests for purposes of the distributions to be made thereunder. The classifications set forth on the Ballots tendered to or returned by the Holders of Claims or Interests in connection

with voting on the Plan: (a) were set forth on the Ballots solely for purposes of voting to accept or reject the Plan; (b) do not necessarily represent, and in no event shall be deemed to modify or otherwise affect, the actual classification of such Claims and Interests under the Plan for distribution purposes; (c) may not be relied upon by any Holder of a Claim or Interest as representing the actual classification of such Claim or Interest under the Plan for distribution purposes; and (d) shall not be binding on the Debtors except for voting purposes. All rights of the Debtors and the Wind Down Estates to challenge, object to, or seek to reclassify Claims (other than Claims expressly Allowed under Article III of the Plan) and/or Interests are expressly reserved, and the corresponding rights of Holders of Claims are similarly reserved.

85. Operation as of the Effective Date. Upon occurrence of the Effective Date, the terms of the Plan, the Plan Documents, and this Confirmation Order shall be immediately effective and enforceable and deemed binding upon the Debtors, the Wind Down Estates, any and all Holders of Claims against or Interests in the Debtors (irrespective of whether such Claims or Interests are presumed to have accepted or deemed to have rejected the Plan), all Entities that are parties to or are subject to the settlements, compromises, releases, discharges, and injunctions described in the Plan and this Confirmation Order, each Entity or Person giving, acquiring, or receiving property under the Plan, and any and all non-Debtor parties to Executory Contracts and Unexpired Leases with any of the Debtors.

86. HJDK Settlement Effectiveness. For the avoidance of doubt, on or prior to the Effective Date, Zurich shall fund the Zurich Escrow Account with the HJDK Settlement Amount pursuant to the terms of the HJDK Settlement Term Sheet. The only conditions to release and transfer on the Effective Date of the HJDK Settlement Amount from the Zurich Escrow Account to the IOLA or IOLTA bank account (such account, the "***HJDK Escrow Account***") held and

maintained by Koutsoudakis & Iakovou Law Group PLLC as set forth in the HJDK Term Sheet, or such other account as may be agreed by the Debtors, Zurich and HJDK, shall be satisfaction by HJDK of clauses (ix) and (xi) under the heading "HJDK's Commitments" as set forth in the HJDK Settlement Term Sheet (the "***Zurich Escrow Release Conditions***"). The Debtors, Zurich and HJDK agree that upon satisfaction of the Zurich Escrow Release Conditions, Zurich shall transfer (i) $2,504,074.39 (the "***Cianflone Settlement Payment Amount***") to the Debtors, for further distribution to Mr. Cianflone, and (ii) an amount equal to the HJDK Settlement Amount less the Cianflone Settlement Payment Amount to the HJDK Escrow Account. The transfer of funds from the Zurich Escrow Account to the HJDK Escrow Account in accordance with clause (ii) and the due transfer of the Cianflone Settlement Payment Amount to Mr. Cianflone in the immediately preceding sentence shall be deemed satisfaction of the HJDK Claim and shall constitute "receipt of the HJDK Settlement Amount", "payment in full", and all words of similar meaning or import, for all purposes under the Plan and the HJDK Settlement Term Sheet, including (but not limited to) for purposes of Article VIII.C of the Plan.

87. Dissolution Transactions. The Dissolution Transactions pursuant to the Plan are approved and authorized in all respects. The Debtors and the Plan Administrator are authorized to implement and consummate the Dissolution Transactions (as may be modified, amended, and supplemented pursuant to the provisions of the Plan governing such modifications, amendments, and supplements) pursuant to the Plan, the Plan Documents, and this Confirmation Order and to enter into any transactions and to take any actions as many be necessary or appropriate to effectuate the Dissolution Transactions, including but not limited to the actions described in Article IV of the Plan. In accordance with section 1142 of the Bankruptcy Code and applicable non-bankruptcy law, such actions may be taken without further action by any stockholders, managers, or directors of

any of the Debtors or Wind Down Estates. For purposes of consummating the Plan and the Dissolution Transactions, neither the occurrence of the Effective Date, nor any of the transactions contemplated in Article IV of the Plan, shall constitute a change of control under any agreement, contract, or document of the Debtors.

88. Distributions. All distributions pursuant to the Plan shall be made in accordance with Article VI of the Plan, and such methods of distribution are approved. For the avoidance of doubt, except as otherwise provided in the Plan or this Confirmation Order, nothing in the Plan or this Confirmation Order shall affect the Debtors' or the Wind Down Estates' rights regarding any Claims or Interests, including all rights in respect of legal and equitable defenses to, or setoffs or recoupment against, any such Claims or Interests. The Debtors or Wind Down Estates shall have no duty or obligation to make distributions to any holder of an Allowed Claim unless and until such Holder executes and delivers, in a form reasonably acceptable to the Debtors or Plan Administrator, any and all documents applicable to such distributions in accordance with Article VI of the Plan and/or responds to the Debtors' or Plan Administrator's reasonable requests for information necessary to facilitate a particular distribution as set forth in Article VI of the Plan.

89. Retained Assets. To the extent that the retention by the Debtors or the Wind Down Estates of assets held immediately prior to emergence in accordance with the Plan is deemed, in any instance, to constitute a "transfer" of property, such transfer of property to the Debtors or the Wind Down Estates (a) is or shall be a legal, valid, and effective transfer of property; (b) vests or shall vest the Debtors or the Wind Down Estates with good title to such property, free and clear of all liens, charges, Claims, encumbrances, or interests, except as expressly provided in the Plan or this Confirmation Order; (c) does not and shall not constitute an avoidable transfer under the Bankruptcy Code or under applicable non-bankruptcy law; and (d) does not and shall not subject

the Debtors or the Wind Down Estates to any liability by reason of such transfer under the Bankruptcy Code or under applicable non-bankruptcy law, including by laws affecting successor or transferee liability.

90. Treatment of Executory Contracts and Unexpired Leases. The provisions governing the treatment of Executory Contracts and Unexpired Leases set forth in Article V of the Plan (including to the extent modified by this Confirmation Order) are hereby approved and authorized in their entirety. The Debtors have represented to the Court on the record that they have not rejected any Executory Contracts and have not provided notice to reject any Executory Contracts pursuant to the Plan. Rather, notwithstanding anything to the contrary contained herein or in the Plan, on or after the Effective Date, certain month-to-month arrangements to which the Debtors are party for administrative services necessary to effectuate the Dissolution Transactions shall continue in full force and effect and shall be subject to termination by the Wind Down Estates in accordance with their terms..

91. Any Executory Contracts and Unexpired Leases entered into by the Debtors after the Petition Date shall remain enforceable after the Effective Date by all parties pursuant to their terms.

92. Except as otherwise provided by the Plan, this Confirmation Order, or by separate order of the Court, modifications, amendments, supplements, and restatements to prepetition Executory Contracts and Unexpired Leases that have been executed by the Debtors during the Chapter 11 Cases and actions taken in accordance therewith (a) shall not be deemed to alter the prepetition nature of the Executory Contract or Unexpired Lease, or the validity, priority, or amount of any Claims against any Debtor that may arise in connection therewith, (b) are not and do not create postpetition contracts or leases, (c) do not elevate to administrative expense priority

any Claims of the counterparties to such Executory Contracts and Unexpired Leases against any of the Debtors, and (d) do not entitle any Entity to a Claim against any of the Debtors under any section of the Bankruptcy Code on account of the difference between the terms of any prepetition Executory Contracts or Unexpired Leases and subsequent modifications, amendments, supplements, or restatements.

93. In the event that the Effective Date does not occur, the Bankruptcy Court shall retain jurisdiction with respect to any request to extend the deadline for assuming or rejecting Unexpired Leases pursuant to section 365(d)(4) of the Bankruptcy Code.

94. Contracts and leases entered into after the Petition Date by any Debtor, including any Executory Contracts and Unexpired Leases assumed by such Debtor, shall be performed by the applicable Debtor or Wind Down Estates liable thereunder in the ordinary course of its business. Accordingly, any such contracts and leases (including any assumed Executory Contracts and Unexpired Leases) that have not been rejected as of the date of Confirmation will survive and remain obligations of the Wind Down Estates.

95. Exemption from Transfer Taxes and Recording Fees. To the fullest extent permitted by section 1146(a) of the Bankruptcy Code, any transfers of property pursuant to the Plan shall not be subject to any stamp tax, document recording tax, conveyance fee, intangibles, or similar tax, mortgage tax, real estate transfer tax, personal property transfer tax, mortgage recording tax, sales or use tax, Uniform Commercial Code filing or recording fee, regulatory filing or recording fee, or other similar tax or governmental assessment in the United States, or any state or political subdivision thereof. The appropriate federal, state, or local governmental officials or agents are directed to forgo the collection of any such tax or governmental assessment and to accept for filing and recordation instruments or other documents pursuant to such transfers of property without the

payment of any such tax or governmental assessment. Such exemption specifically applies, without limitation, to (a) the creation, modification, consolidation, or recording of any mortgage, deed of trust, Lien, or other security interest, or the securing of indebtedness by such means or other means, (b) the making or assignment of any lease or sublease, (c) any Dissolution Transaction authorized by the Plan, and (d) the making or delivery of any deed or other instrument of transfer under, in furtherance of, or in connection with the Plan, including: (i) any merger agreements; (ii) agreements of consolidation, restructuring, disposition, liquidation, or dissolution; (iii) deeds; (iv) bills of sale; (v) assignments executed in connection with any Dissolution Transaction occurring under the Plan; or (vi) any of the other Definitive Documents.

96. Governmental Approvals Not Required. This Confirmation Order shall constitute all approvals and consents required, if any, by the laws, rules, or regulations of any state or any other governmental authority with respect to the implementation or consummation of the Plan and the Plan Documents.

97. Filing and Recording. This Confirmation Order is and shall be binding upon and shall govern the acts of all persons or entities including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, registrars of deeds, administrative agencies, governmental departments, governmental agencies, secretaries of state, federal, state, and local officials, and all other Persons and Entities who may be required, by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any document or instrument, including, for the avoidance of doubt, the United States Patent and Trademark Office, the United States Copyright Office, and any other governmental intellectual property office. Each and every federal, state, and local government agency, including, for the avoidance of doubt, the United States Patent and Trademark Office, the United States

Copyright Office, and any other governmental intellectual property office is hereby directed to accept any and all documents and instruments necessary, useful, or appropriate (including financing statements under the applicable uniform commercial code) to effectuate, implement, and consummate the transactions contemplated by the Plan and this Confirmation Order without payment of any stamp tax or similar tax imposed by state or local law.

98. Tax Withholding. In connection with the Plan, to the extent applicable, the Wind Down Estates shall comply with all tax withholding and reporting requirements imposed on them by any Governmental Unit, and all distributions pursuant to the Plan shall be subject to such withholding and reporting requirements. Notwithstanding any provision in the Plan to the contrary, the Wind Down Estates and the Disbursing Agent shall be authorized to take all actions necessary or appropriate to comply with such withholding and reporting requirements, including, without limitation, liquidating a portion of the distribution to be made under the Plan to generate sufficient funds to pay applicable withholding taxes, withholding distributions pending receipt of information, documentation, and certifications necessary to facilitate such distributions, or establishing any other mechanisms they believe are reasonable or appropriate. All Persons holding Claims against any Debtor shall be required to provide any information necessary for the Wind Down Estates to comply with all tax withholding and reporting requirements imposed on them by any Governmental Unit. The Wind Down Estates reserve the right to allocate any distributions made under the Plan in compliance with applicable wage garnishments, alimony, child support, and other spousal awards, Liens, and encumbrances.

99. Notwithstanding any other provision of the Plan to the contrary, each Holder of an Allowed Claim shall have the sole and exclusive responsibility for the satisfaction and payment of any tax obligations imposed by any Governmental Unit on account of such distribution.

100. Compromise and Settlement of Claims, Interests, and Controversies. Pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for, and as a requirement to receive, the distributions and other benefits provided pursuant to the Plan, the provisions of the Plan shall constitute a good faith global and integrated compromise and settlement of all Claims, Interests, and controversies relating to the contractual, legal, and subordination rights that any Holder of a Claim or Interest may have with respect to any Allowed Claim or Interest, or any distribution to be made on account of such Allowed Claim or Interest, as well as any and all actual and potential disputes between and among the Debtors, the Settling Parties, and each other Releasing Party and all other disputes that might impact creditor recoveries, including, without limitation, any and all issues relating to the Debtors' litigation with the VarigLog Estate, VRG and/or HJDK. The entry of this Confirmation Order shall constitute the Bankruptcy Court's approval of the Plan Settlement as well as a finding by the Bankruptcy Court that the Plan Settlement is in the best interests of the Debtors, their Estates, and Holders of Claims and Interests and is fair, equitable, and reasonable. The Plan Settlement is binding upon all creditors and all other parties in interest pursuant to section 1141(a) of the Bankruptcy Code. In accordance with the provisions of the Plan, pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, without any further notice to or action, order, or approval of the Bankruptcy Court, after the Effective Date, the Plan Administrator may compromise and settle Claims against, and Interests in, the Debtors and their Estates and Causes of Action against other Entities.

101. Debtor Release; Third-Party Release; Insurer Release. Each of the release provisions as set forth in, among others, Articles VIII.B and VIII.C of the Plan, is hereby incorporated in its entirety, approved in its entirety, and shall be immediately effective as of the Effective Date and binding on all Persons and Entities to the extent set forth therein.

102. Bar Order. All persons and entities are permanently barred from commencing, prosecuting, continuing or asserting, either derivatively or on behalf of themselves, in any court or forum, domestic or foreign, any actions, cause and causes of action, claims, counterclaims, crossclaims, suits, proceedings, damages, punitive damages, claims for insurance coverage, costs, expenses and attorneys' fees, demands and liabilities whatsoever of every kind and nature, whether known or unknown, suspected or unsuspected, accrued or unaccrued, in law, equity, contract or otherwise which such persons or entities ever had or now have or may have against the Debtors, Zurich and/or the other Participating Insurers arising out of, related to, based upon, by reason of, or in any way involving, directly or indirectly, or in whole or in part, the (i) the VarigLog Claims, (ii) the Brazilian Action, (iii) the HJDK Claims, (iv) any of the facts or circumstances alleged by the VarigLog Estate in any matter (including, but not limited to, any claim of any creditor of the VarigLog Estate on whose behalf it has purported to act and bring claims in a representative capacity or for whom it could have done so), and/or (v) any of the facts or circumstances alleged by HJDK in any matter.

103. Release of Liens. Except as otherwise specifically provided in the Plan, or any other Plan Document, concurrently with all applicable distributions made pursuant to the Plan, all Liens, Claims or Interests in or against any property and Assets of the Estates shall be fully released, terminated, extinguished, and discharged, in each case, without any further approval or order of the Court and without any action or filing being required to be made by the Debtors. The presentation or filing of the Confirmation Order to or with any federal, state, provincial, or local agency or department shall constitute good and sufficient evidence of, but shall not be required to effect, the termination of such Liens, Claims or Interests.

104. Exculpation. The exculpation provisions set forth in Article VIII.D of the Plan, as modified by this Order, are hereby incorporated in their entirety, approved in their entirety, and shall be immediately effective as of the Effective Date and binding on all Persons and Entities to the extent set forth therein.

105. Injunction. Pursuant to Bankruptcy Rule 3020(c)(1), the following injunction provisions set forth in Article VIII.E of the Plan are approved in their entirety, and shall be immediately effective as of the Effective Date and binding on all Persons and Entities to the extent set forth therein.

> **Article VIII.E: Except as otherwise expressly provided in the Plan or for obligations issued or required to be paid pursuant to the Plan or the Confirmation Order, all Entities who have held, hold, or may hold Claims or Interests that have been released, discharged, or are subject to exculpation are, to the fullest extent permitted by applicable law, permanently enjoined, from and after the Effective Date, from taking any of the following actions against, as applicable, the Debtors, the Exculpated Parties, or the Released Parties: (1) commencing or continuing in any manner any action, suit or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests; (2) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against such Entities on account of or in connection with or with respect to any such Claims or Interests; (3) creating, perfecting, or enforcing any encumbrance of any kind against such Entities or the property or the estates of such Entities on account of or in connection with or with respect to any such Claims or Interests; (4) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any such Claims or Interests unless such Holder has Filed a motion requesting the right to perform such setoff on or before the Effective Date, and notwithstanding an indication of a Claim or Interest or otherwise that such Holder asserts, has, or intends to preserve any right of setoff pursuant to applicable law or otherwise; and (5) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests released or settled pursuant to the Plan.**

106. Regulatory Activities. Notwithstanding any language to the contrary contained in the Disclosure Statement, Plan, or Confirmation Order, no provision shall (a) preclude the SEC or any other Governmental Unit from enforcing its police or regulatory powers or (b) enjoin, limit,

impair, or delay the SEC from commencing or continuing any claims, causes of action, proceedings, or investigations against any non-Debtor person or non-Debtor entity in any forum.

107. Notice of Entry of Confirmation Order and Occurrence of the Effective Date. As soon as practicable after the Effective Date, the Debtors shall file with the Court and serve by first class mail or overnight delivery service a notice of the entry of this Confirmation Order and occurrence of the Effective Date (the "***Confirmation and Effective Date Notice***"), to all parties served with the Confirmation Hearing Notice. To supplement the notice procedures described in the preceding sentence, no later than fourteen days (14) after the Effective Date, the Plan Administrator shall cause the Confirmation and Effective Date Notice, modified for publication, to be published on one occasion in each of the *New York Times* and *Miami Herald*. Mailing and publication of the Confirmation and Effective Date Notice in the time and manner set forth in this paragraph shall constitute adequate and sufficient notice pursuant to Bankruptcy Rules 2002 and 3020(c) of Confirmation and occurrence of the Effective Date.

108. The Confirmation and Effective Date Notice will have the effect of an order of the Court, will constitute sufficient notice of the entry of this Confirmation Order and occurrence of the Effective Date to filing and recording officers, including such officers at the United States Patent and Trademark Office, the United States Copyright Office, and any other governmental intellectual property offices, and will be a recordable instrument notwithstanding any contrary provision of applicable non-bankruptcy law.

109. Cancellation of Existing Indebtedness and Securities. Except as otherwise expressly provided in the Plan, this Confirmation Order, or any agreement, instrument, or other document entered into in connection with or pursuant to the Plan or the Dissolution Transactions, on the Effective Date, (a) all notes, instruments, certificates, credit agreements, indentures, and

other documents evidencing Claims or Interests (including the Promissory Note Claims, Partnership Interests and Affiliate Equity Interests), and any Partnership Interests or Affiliate Equity Interests that are not represented by certificates or other instruments, shall be canceled, extinguished, released and surrendered and the obligations of the Debtors or Wind Down Estates thereunder or in any way related thereto shall be deemed satisfied in full, canceled, and of no force or effect against the Debtors or Wind Down Estates, without any further action on the part of the Debtors or Wind Down Estates or any other party. Holders of or parties to such canceled instruments and other documentation will have no rights arising from or relating to such instruments and other documentation, or the cancellation thereof, except the rights provided for pursuant to this Plan. Notwithstanding the foregoing, any provision in any document, instrument, lease, or other agreement that causes or effectuates, or purports to cause or effectuate, a default, termination, waiver, or other forfeiture of, or by, a Debtor or its Interests, as a result of the cancellations, terminations, satisfaction, releases, or discharges provided for herein shall be deemed null and void and shall be of no force and effect.

110. Professional and Reimbursement Claims. All final requests for payment of Professional Claims shall be Filed no later than the first Business Day that is forty-five (45) calendar days after the Effective Date. Such requests shall be Filed with the Bankruptcy Court and served as required by the Interim Compensation Order, as applicable. After notice and a hearing in accordance with the procedures established by the Bankruptcy Code and any applicable Bankruptcy Court orders, the Allowed amounts of such Professional Claims shall be determined by the Bankruptcy Court. The Allowed amount of Professional Claims owing to the Professionals, after taking into account any prior payments to and retainers held by such Professionals, shall be paid in full in Cash to such Professionals from funds held in the Professional Claims Escrow

Account as soon as reasonably practicable following the date when such Claims are Allowed by a Final Order. To the extent that funds held in the Professional Claims Escrow Account are unable to satisfy the Allowed amount of Professional Claims owing to the Professionals, each Professional shall have an Allowed Administrative Claim for any such deficiency, which shall be satisfied from the Distributions Reserve in the ordinary course of business and notwithstanding any obligation to File Proofs of Claim or requests for payment on or before the Administrative Claims Bar Date. After all Professional Claims have been paid in full, the escrow agent shall promptly return any excess amounts held in the Professional Claims Escrow Account, if any, to the Distributions Reserve, without any further action or Order of the Bankruptcy Court.

111. Effect of Confirmation Order on Other Orders. Unless expressly provided for herein, nothing in the Plan or this Confirmation Order shall affect any orders entered in the Chapter 11 Cases pursuant to Bankruptcy Rule 9019.

112. Inconsistency. In the event of any inconsistency between the Plan and this Confirmation Order, this Confirmation Order shall govern.

113. Injunctions and Automatic Stay. Unless otherwise provided in the Plan or in this Confirmation Order, all injunctions or stays in effect in the Chapter 11 Cases pursuant to sections 105 or 362 of the Bankruptcy Code or any order of the Court, and extant on this Confirmation Date (excluding any injunctions or stays contained in the Plan or this Confirmation Order) shall remain in full force and effect until the Effective Date. All injunctions or stays contained in the Plan or this Confirmation Order shall remain in full force and effect in accordance with their terms.

114. Authorization to Consummate. The Debtors are authorized to consummate the Plan and the Dissolution Transactions at any time after the entry of this Confirmation Order subject to

satisfaction or waiver (by the required parties) of the conditions precedent to Consummation set forth in Article IX of the Plan.

115. Substantial Consummation. On the Effective Date, the Plan shall be deemed to be substantially consummated under sections 1101 and 1127(b) of the Bankruptcy Code.

116. No Waiver. The failure to specifically include any particular Plan Document or provision of the Plan or Plan Document in this Confirmation Order will not diminish the effectiveness of such document or provision nor constitute a waiver thereof, it being the intent of this Court that the Plan is confirmed in its entirety, the Plan Documents are approved in their entirety, and all of the Plan Documents are incorporated herein by reference.

117. Severability. Each term and provision of the Plan, as it may have been altered or interpreted in accordance with the foregoing, is (a) valid and enforceable pursuant to its terms; (b) integral to the Plan and may not be deleted or modified without the Debtors' or Plan Administrator's consent (subject to the consent and approval rights of applicable parties to the extent provided in the Plan), consistent with the terms set forth herein; and (c) non-severable and mutually dependent.

118. Administrative Claims Bar Date. Unless otherwise provided by the Plan, this Confirmation Order, any other applicable order of the Court, or agreed to by the Holder of an Allowed Administrative Claim and the Debtors or the Wind Down Estates, requests for payment of Administrative Claims that accrued on or before the Effective Date (other than Professional Claims) must be Filed and served on the Plan Administrator pursuant to the procedures specified in this Confirmation Order and the Plan and the notice of entry of this Confirmation Order no later than the Administrative Claims Bar Date. **Holders of Administrative Claims that are required to, but do not, File and serve a request for payment of such Administrative Claims by such**

date shall be forever barred, estopped, and enjoined from asserting such Administrative Claims against the Debtors or their respective property, and such Administrative Claims shall be deemed discharged as of the Effective Date. If for any reason any such Administrative Claim is incapable of being forever barred and discharged, then the Holder of such Claim shall not have recourse to any property of the Wind Down Estates to be distributed pursuant to the Plan. Objections to such requests for payment of an Administrative Claim, if any, must be Filed and served on the Plan Administrator and the requesting party no later than the applicable objection deadline.

119. Reports. After the Effective Date, the Wind Down Estates shall have no obligation to file with the Court or serve on any parties reports that the Debtors were obligated to file under the Bankruptcy Code or a Court order, including monthly operating reports (even for those periods for which a monthly operating report was not filed prior to the Effective Date); *provided*, *however*, that the Wind Down Estates will comply with the U.S. Trustee's quarterly reporting requirements. Through the Effective Date, the Debtors will file such reports as are required under the Local Rules.

120. Debtors' Actions Post-Confirmation Through the Effective Date. During the period from entry of this Confirmation Order through and until the Effective Date, each of the Debtors shall continue to operate their business as a debtor in possession, subject to the oversight of the Court as provided under the Bankruptcy Code, the Bankruptcy Rules, and this Confirmation Order and any Final Order of the Court.

121. Conditions to Effective Date. The Plan shall not become effective unless and until the conditions set forth in Article IX.B of the Plan (as modified herein) have been satisfied or waived pursuant to Article IX.C of the Plan.

122. Partial Waiver of Fourteen-Day Stay. Notwithstanding any Bankruptcy Rule (including, without limitation, Bankruptcy Rules 3020(e), 6004(h), 6006(d), and 7062), this Confirmation Order is effective as of 5:00 p.m. (Prevailing Eastern Time) on May 24, 2023 and any stay (including, without limitation, as set forth in Bankruptcy Rules 3020(e), 6004(h), 6006(d), and 7062) is reduced accordingly, sufficient cause having been shown.

123. Post-Confirmation Modification of the Plan. The Debtors are hereby authorized to amend or modify the Plan at any time prior to the substantial consummation of the Plan, but only in accordance with section 1127 of the Bankruptcy Code and Article X.A of the Plan, without further order of this Court.

124. Closing of Chapter 11 Cases. Upon the occurrence of the Effective Date, the Plan Administrator shall be permitted to (a) at any time submit ~~an~~ **a proposed** order or separate orders to the Court under certification of counsel **to close** ~~closing~~ any of the Chapter 11 Cases, ~~and~~ **such that** all contested matters relating to each of the Debtors, including objections to Claims, shall be administered and heard in any remaining Chapter 11 Case; and (b) **submit a proposed order or orders to** change the name of the case caption of the remaining open Chapter 11 Case as desired, in the Plan Administrator's sole discretion. **[DSJ 5/23/2023]**

125. Retention of Jurisdiction. Except as otherwise provided in the Plan, any of the Plan Documents or this Confirmation Order, the Court shall retain jurisdiction over the Chapter 11 Cases and all matters arising under, arising out of, or related to, the Chapter 11 Cases and the Plan, including the matters set forth in Article XI of the Plan.

126. Final Order. This Confirmation Order is a final order and the period in which an

appeal must be filed will commence upon entry of this Confirmation Order.

Dated: New York, New York
May 22, 2023

s/ David S. Jones
HONORABLE DAVID S. JONES
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT A

Elisha D. Graff
Kathrine A. McLendon
Jamie J. Fell
Dov Gottlieb
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, NY 10017
(212) 455-2000 Telephone
(212) 455-2502 Facsimile

Tyler B. Robinson
Lauren W. Brazier (admitted *pro hac vice*)
SIMPSON THACHER & BARTLETT LLP
CityPoint
One Ropemaker Street
London EC2Y 9HU, England
+44-(0)20-7275-6500 Telephone
+44-(0)20-7275-6592 Facsimile

Counsel to the Debtors and Debtors-in-Possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 11
MatlinPatterson Global Opportunities Partners II L.P., *et al.*,	)	Case No. 21-11255 (DSJ)
Debtors.[1]	)	(Jointly Administered)

DEBTORS' SECOND AMENDED JOINT CHAPTER 11 PLAN OF LIQUIDATION

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, if any, are: MatlinPatterson Global Opportunities Partners II L.P. (8284); MatlinPatterson Global Opportunities Partners (Cayman) II L.P. (8246); MatlinPatterson Global Partners II LLC (6962); MatlinPatterson Global Advisers LLC (2931); MatlinPatterson PE Holdings LLC (6900); Volo Logistics LLC (8287); MatlinPatterson Global Opportunities Partners (SUB) II L.P. (9209). The location of the Debtors' address is: 300 East 95th Street, Suite 102, New York, New York 10128.

TABLE OF CONTENTS

ARTICLE I DEFINED TERMS, RULES OF INTERPRETATION, COMPUTATION OF TIME, AND GOVERNING LAW 1

A. Defined Terms. 1
B. Rules of Interpretation 13
C. Computation of Time 14
D. Governing Law 14
E. Reference to Monetary Figures 14
F. Controlling Document 15

ARTICLE II ADMINISTRATIVE CLAIMS AND PRIORITY CLAIMS 15

A. Administrative Claims 15
B. Administrative Claims Bar Date 15
C. U.S. Trustee Fees 15
D. Professional Claims 16
E. Priority Tax Claims 16

ARTICLE III CLASSIFICATION AND TREATMENT OF CLAIMS AND INTERESTS 17

A. Classification of Claims and Interests 17
B. Treatment of Claims and Interests 18
C. Special Provision Governing Unimpaired Claims 21
D. Elimination of Vacant Classes 22
E. Voting Classes, Presumed Acceptance by Non-Voting Classes 22
F. Confirmation Pursuant to Section 1129(b) of the Bankruptcy Code 22
G. Controversy Concerning Impairment 22
H. Subordinated Claims 22

ARTICLE IV MEANS FOR IMPLEMENTATION OF THE PLAN 23

A. Corporate and Organizational Existence 23
B. Wind Down Estates 23
C. Vesting of Assets 23
D. The Plan Administrator 23
E. Accounts for Plan Distributions 24
F. Corporate Action 24
G. Dissolution Transactions 25
H. Cancellation of Existing Securities and Agreements 25
I. Release of Liens, Claims and Interests 26
J. Director and Officer Liability Insurance 26
K. Preservation and Maintenance of Causes of Action 26
L. Effectuating Documents; Further Transactions 27
M. Settlements 27

ARTICLE V TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES 27

A. Treatment of Executory Contracts and Unexpired Leases 27
B. Claims Based on Rejection of Executory Contracts or Unexpired Leases 28
C. Assumption of Director and Officer Liability Insurance Policies 28
D. Reservation of Rights 29
E. Nonoccurrence of Effective Date 29

ARTICLE VI PROVISIONS GOVERNING DISTRIBUTIONS 29

A. Distributions as of the Effective Date 29
B. Distributions After the Effective Date 29
C. Entitlement to Distributions 29
D. Disbursing Agent 30
E. Delivery of Distributions and Undeliverable or Unclaimed Distributions 30
F. Manner of Payment 31
G. Compliance with Tax Requirements 32
H. Allocations 32
I. No Postpetition Interest on Claims 32
J. Foreign Currency Exchange Rate 32
K. Setoffs and Recoupment 33
L. Claims Paid or Payable by Third Parties 33

ARTICLE VII PROCEDURES FOR RESOLVING CONTINGENT, UNLIQUIDATED, AND DISPUTED CLAIMS 34

A. Disputed Claims 34
B. Claims and Interests Administration Responsibilities 34
C. Authority to Amend Schedules 35
D. Estimation of Claims 35
E. Adjustment to Claims or Interests without Objection 35
F. Disallowance of Claims or Interests 35
G. Reimbursement or Contribution 36
H. Amendments to Claims 36
I. No Distributions Pending Allowance 36
J. Single Satisfaction of Claims 36
K. Distributions After Allowance 36

ARTICLE VIII SETTLEMENT, RELEASE, INJUNCTION, AND RELATED PROVISIONS 37

A. General Settlement of Claims and Interests 37
B. Releases by the Debtors 37
C. Releases by the Releasing Parties Other Than the Debtors. 38
D. Exculpation. 40
E. Injunction. 40

ARTICLE IX CONDITIONS PRECEDENT TO CONFIRMATION AND CONSUMMATION OF THE PLAN 41

A. Conditions Precedent to Confirmation 41
B. Conditions Precedent to the Effective Date 41
C. Waiver of Conditions 42
D. Effect of Failure of Conditions 42
E. Substantial Consummation 42

ARTICLE X MODIFICATION, REVOCATION, OR WITHDRAWAL OF THE PLAN 42

A. Modification and Amendments 42
B. Effect of Confirmation on Modifications 43
C. Revocation or Withdrawal of Plan 43

ARTICLE XI RETENTION OF JURISDICTION 43

ARTICLE XII MISCELLANEOUS PROVISIONS 46

A. Immediate Binding Effect 46
B. Additional Documents 46
C. Request for Expedited Determination of Taxes 46
D. Reservation of Rights 46
E. Protections Against Discriminatory Treatment 47
F. Document Retention 47
G. Successors and Assigns 47
H. Notices 47
I. Term of Injunctions or Stays 48
J. Entire Agreement 48
K. Exhibits 49
L. Nonseverability of Plan Provisions 49
M. Votes Solicited in Good Faith 49
N. Closing of Chapter 11 Cases 49
O. No Stay of Confirmation Order 50
P. Waiver or Estoppel 50

INTRODUCTION

MatlinPatterson Global Opportunities Partners II L.P., MatlinPatterson Global Opportunities Partners (Cayman) II L.P., MatlinPatterson Global Partners II LLC, MatlinPatterson Global Advisers LLC, MatlinPatterson PE Holdings LLC, Volo Logistics LLC, and MatlinPatterson Global Opportunities Partners (SUB) II L.P. (collectively, the "***Debtors***") jointly propose this second amended chapter 11 plan of liquidation (the "***Plan***") for the resolution of all outstanding Claims against, and Interests in, the Debtors. Although proposed jointly for administrative purposes, the Plan constitutes a separate Plan for each Debtor for the resolution of outstanding Claims against, and Interests in, such Debtor. Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in Article I.A hereof, the Bankruptcy Code, or the Bankruptcy Rules. Holders of Claims and Interests should refer to the Disclosure Statement for a discussion of the Debtors' history, assets, historical financial information, risk factors, a summary of this Plan and certain related matters. The Debtors are the proponents of the Plan within the meaning of section 1129 of the Bankruptcy Code. VRG, HJDK the VarigLog Estate and MP II Preferred Partners L.P., as Holder of the Promissory Note Claim (each term as defined herein), also are in support of confirmation of this Plan.

ALL HOLDERS OF CLAIMS OR INTERESTS WHO ARE ELIGIBLE TO VOTE ARE ENCOURAGED TO READ THE PLAN AND THE DISCLOSURE STATEMENT IN THEIR ENTIRETY BEFORE VOTING TO ACCEPT OR REJECT THE PLAN.

ARTICLE I
DEFINED TERMS, RULES OF INTERPRETATION, COMPUTATION OF TIME, AND GOVERNING LAW

A. Defined Terms.

As used in this Plan, capitalized terms have the meanings set forth below.

1. "***Administrative Claim***" means a Claim arising on or after the Petition Date and prior to the Effective Date for a cost or expense of administration of the Chapter 11 Cases that is entitled to priority or superpriority under sections 365, 503(b), 503(c), 507(b), or 1114(e)(2) of the Bankruptcy Code, including: (a) the actual and necessary costs and expenses of preserving the Estates and operating the businesses of the Debtors incurred on or after the Petition Date and through the Effective Date; (b) all fees and charges assessed against the Estates under chapter 123 of the Judicial Code; and (c) Allowed Professional Claims.

2. "***Administrative Claims Bar Date***" means the deadline for Filing requests for payment of Administrative Claims, other than Professional Claims, which shall be 30 days after the Effective Date.

3. "***Affiliate***" has the meaning set forth in section 101(2) of the Bankruptcy Code.

4. "***Affiliate Equity Interests***" means any Interest that is held by another Debtor or Non-Debtor Affiliate. For the avoidance of doubt, "Affiliate Equity Interests" does not include Partnership Interests.

5. "***Allowed***" means, with reference to any Claim or Interest: (a) any Claim or Interest for which a Proof of Claim has been timely Filed and as to which no objection to allowance has been interposed (either in the Bankruptcy Court or in the ordinary course of business); (b) any Claim or Interest that is allowed by a Final Order of the Bankruptcy Court; (c) any Claim that is listed in the Unsecured Creditors List or the Schedules as liquidated, non-contingent, and undisputed; (d) any Claim or Interest as to which the liability of the Debtors and the amount thereof are determined by a Final Order of a court of competent jurisdiction other than the Bankruptcy Court; (e) any Claim or Interest allowed by agreement between the Holder of such Claim, on the one hand, and the applicable Debtor, or the Plan Administrator, as applicable, on the other hand; or (f) any Claim or Interest expressly deemed Allowed by the Plan; *provided*, that that no Claim shall be "Allowed" if it is subject to disallowance in accordance with section 502(d) of the Bankruptcy Code; *provided, further*, that any Claim that is listed in the Unsecured Creditors List or the Schedules as contingent, unliquidated or disputed and for which no Proof of Claim is timely Filed shall not be considered "Allowed" and shall be expunged without further action by the Debtors and without further notice to any party or action, approval or order of the Bankruptcy Court; *provided, further*, that notwithstanding the foregoing, the Wind Down Estates shall retain all claims and defenses with respect to Allowed Claims that are Unimpaired pursuant to the Plan.

6. "***Applicable Partnership Cash Allocation***" means the applicable amount of any Cash in the Distributions Reserve available to be distributed to each Holder of an Allowed Partnership Interest, which shall be calculated by (x) multiplying the amount of such Cash by the percentage share of such Cash attributable to the Limited Partnership Debtor in which the Holder holds an Interest and (y) multiplying the product determined in clause (x) by such Holder's (or its transferor, if applicable) Partnership Percentage Share.

7. "***Assets***" means all of the Debtors' property, rights, and interests that are property of the Estates pursuant to section 541 of the Bankruptcy Code.

8. "***Avoidance Actions***" means any and all actual or potential avoidance, recovery, subordination, or other Claims, Causes of Action, or remedies that may be brought by or on behalf of the Debtors or their Estates or other authorized parties in interest under the Bankruptcy Code or applicable non-bankruptcy law, including Claims, Causes of Action, or remedies under sections 502, 510, 542, 544, 545, 547 through 553, and 724(a) of the Bankruptcy Code or under similar local, state, federal, or foreign statutes and common law, including fraudulent transfer laws.

9. "***Bankruptcy Code***" means title 11 of the United States Code, 11 U.S.C. §§ 101–1532, as amended from time to time.

10. "***Bankruptcy Court***" means the United States Bankruptcy Court for the Southern District of New York.

11. "***Bankruptcy Rules***" means the Federal Rules of Bankruptcy Procedure promulgated under section 2075 of the Judicial Code and the general, local, and chambers rules of the Bankruptcy Court, each, as amended from time to time.

12. ***"Business Day***" means any day other than a Saturday, Sunday, or "legal holiday" (as defined in Bankruptcy Rule 9006(a)).

13. "***Cash***" means cash in legal tender of the United States of America and cash equivalents, including bank deposits, checks, and other similar items.

14. "***Cause of Action***" or "***Causes of Action***" means any claims, interests, damages, remedies, causes of action, demands, rights, actions, suits, obligations, liabilities, accounts, defenses, offsets, powers, privileges, licenses, liens, indemnities, guaranties, and franchises of any kind or character whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, contingent or non-contingent, liquidated or unliquidated, secured or unsecured, assertable, directly or derivatively, matured or unmatured, suspected or unsuspected, in contract, tort, law, equity, or otherwise. Causes of Action also include: (a) all rights of setoff, counterclaim, or recoupment and claims under contracts or for breaches of duties imposed by law; (b) the right to object to or otherwise contest Claims or Interests; (c) claims pursuant to sections 362, 510, 542, 543, 544 through 550, or 553 of the Bankruptcy Code; and (d) such claims and defenses as fraud, mistake, duress, and usury, and any other defenses set forth in section 558 of the Bankruptcy Code; and (e) any state or foreign law equivalents of any of the foregoing.

15. "***Chapter 11 Cases***" means (a) when used with reference to a particular Debtor, the case pending for that Debtor under chapter 11 of the Bankruptcy Code in the Bankruptcy Court and (b) when used with reference to all the Debtors, the jointly administered chapter 11 cases pending for the Debtors in the Bankruptcy Court under the case caption *In re MatlinPatterson Global Opportunities Partners II L.P., et al.*, Case No. 21-11255 (DSJ).

16. "***Claim***" means any claim, as defined in section 101(5) of the Bankruptcy Code, against a Debtor or its Estate.

17. "***Claims and Noticing Agent***" means Kurtzman Carson Consultants LLC, the claims, noticing, and solicitation agent for the Debtors in the Chapter 11 Cases.

18. "***Claims Register***" means the official register of Claims maintained by the Claims and Noticing Agent.

19. "***Class***" means a class of Claims or Interests as set forth in Article III hereof pursuant to section 1122(a) of the Bankruptcy Code.

20. "***Closing Cases***" shall have the meaning set forth in Article XII.N of this Plan.

21. "***CM/ECF***" means the Bankruptcy Court's Case Management and Electronic Case Filing system.

22. "***Confirmation***" means the Bankruptcy Court's entry of the Confirmation Order on the docket of the Chapter 11 Cases, subject to all conditions specified in Article IX.A hereof having been (a) satisfied or (b) waived pursuant to Article IX.C hereof.

23. "***Confirmation Date***" means the date upon which the Bankruptcy Court enters the Confirmation Order on the docket of the Chapter 11 Cases, within the meaning of Bankruptcy Rules 5003 and 9021.

24. "***Confirmation Hearing***" means the hearing to be held by the Bankruptcy Court on confirmation of the Plan, pursuant to Bankruptcy Rule 3020(b)(2) and sections 1128 and 1129 of the Bankruptcy Code, as such hearing may be continued from time to time.

25. "***Confirmation Order***" means the order of the Bankruptcy Court confirming this Plan pursuant to section 1129 of the Bankruptcy Code.

26. "***Consummation***" means the occurrence of the Effective Date.

27. "***D&O Liability Insurance Policies***" means all insurance policies (including any "tail policy") maintained by the Debtors as of the Petition Date for liabilities against any of the Debtors' current or former directors, managers, and officers, and all agreements, documents, or instruments relating thereto.

28. "***Debtor Releases***" means the releases granted pursuant to Article VIII.B of this Plan.

29. "***Defense Costs***" means defense expenses incurred in connection with the Debtors' investigation and defense of the VarigLog Claims, and investigation and defense of the HJDK Claims, in each case in the amount agreed between the Debtors and the Participating Insurers, and which, for the avoidance of doubt, will not be deducted or paid from the funds held in the Participating Insurers Escrow Account.

30. "***Defense Costs Escrow Account***" means the escrow account funded by the Participating Insurers to hold the Defense Costs, pursuant to and subject to the terms and conditions of the VarigLog Estate Settlement Term Sheet, this Plan, and/or any agreement between the Debtors and the Participating Insurers.

31. "***Disallowed***" means any Claim, or any portion thereof, that is not Allowed; *provided*, *however*, that a Disputed Claim shall not be considered Disallowed until so determined by entry of a Final Order or by agreement between the Holder thereof and the Debtors or the Plan Administrator, as applicable.

32. "***Disbursing Agent***" means the Debtors, the Plan Administrator, or the Entity or Entities selected by the Debtors or the Plan Administrator, as applicable, to make or facilitate distributions pursuant to the Plan.

33. "***Disclosure Statement***" means the *First Amended Disclosure Statement for the Debtors' First Amended Joint Chapter 11 Plan of Liquidation*, dated as of September 30, 2022, as may be amended, supplemented, or modified from time to time, including all exhibits and schedules thereto and references therein that relate to the Plan, that is prepared and distributed in accordance with the Bankruptcy Code, the Bankruptcy Rules, and any other applicable law, including the *Supplemental Disclosure Statement for Debtors' Second Amended Joint Chapter 11 Plan of Liquidation*, dated as of the date hereof.

34. "***Disputed***" means, with respect to any Claim or Interest, (a) any Claim or Interest that is disputed under Article VII hereof or as to which the Debtors have interposed and not withdrawn an objection or request for estimation that has not been determined by a Final Order,

(b) any Claim or Interest, proof of which was required to be Filed by order of the Bankruptcy Court but as to which a Proof of Claim or Interest was not timely or properly Filed, (c) any Claim or Interest that is listed in the Unsecured Creditors List or the Schedules, if any are Filed, as unliquidated, contingent or disputed, and as to which no request for payment or Proof of Claim or Interest has been Filed, (d) any Claim that is listed in the Debtors' list of largest unsecured creditors as unliquidated, contingent or disputed and as to which no Proof of Claim has been filed or (e) any Claim or Interest that is otherwise disputed by any of the Debtors in accordance with applicable law or contract, which dispute has not been withdrawn, resolved or overruled by a Final Order. To the extent the Debtors dispute only the amount of a Claim or Interest, such Claim or Interest shall be deemed Allowed in the amount the Debtors do not dispute, if any, and Disputed as to the balance of such Claim or Interest.

35. "***Dissolution Transactions***" means the transactions that the Debtors or the Plan Administrator, as applicable, determine to be necessary or appropriate to dissolve or otherwise terminate the corporate or organizational existence of certain of the Debtors and any non-Debtor Affiliates as of the Effective Date or as promptly as possible thereafter.

36. "***Distribution Date***" means, except as otherwise set forth herein, the date or dates determined by the Debtors or the Plan Administrator upon which the Disbursing Agent shall make distributions to Holders of Allowed Claims and Allowed Interests entitled to receive distributions under the Plan.

37. "***Distribution Record Date***" means the date for determining which Holders of Allowed Claims and Allowed Interests are eligible to receive distributions pursuant to the Plan, which date shall be the Confirmation Date or such other date indicated in the Confirmation Order.

38. "***Distributions Reserve***" means a reserve to be established by the Debtors on or before the Effective Date, which shall be comprised of Cash in such amount as determined by the Debtors or Plan Administrator, in their discretion, sufficient to (i) satisfy distributions made on the Effective Date on account of Allowed Claims and/or Allowed Interests; (ii) pay the costs and expenses of administering the Wind Down Estates; and (iii) satisfy any Administrative Claims, Priority Tax Claims, Other Priority Claims, and Allowed General Unsecured Claims, in each case, not otherwise paid on the Effective Date pursuant to the terms of the Plan.

39. "***Effective Date***" means the day, as determined by the Debtors, that is the Business Day as soon as reasonably practicable after all conditions precedent to the effectiveness of the Plan set forth in Article IX.B herein have been satisfied or waived in accordance with Article IX.C.

40. "***Entity***" has the meaning set forth in section 101(15) of the Bankruptcy Code.

41. "***Estate***" means as to each Debtor, the estate created for such Debtor in its Chapter 11 Case pursuant to section 541 of the Bankruptcy Code upon the commencement of such Debtor's Chapter 11 Case.

42. "***Exculpated Parties***" means each of the following, solely in its capacity as such: (a) the Debtors, (b) the Wind Down Estates; (c) the Plan Administrator, (d) the Disbursing Agent, (e) the Settling Parties, which, for the avoidance of doubt, includes VRG, HJDK, the VarigLog Estate, Zurich and the Participating Insurers, (f) with respect to preceding clauses (a) through (e),

each such Entity's current and former Affiliates; and (g) with respect to preceding clauses (a) through (f), each such Entity's current and former directors, managers, officers, principals, members, managed accounts or funds, fund advisors, employees, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, assigns, subsidiaries, agents, advisory board members, financial advisors, investment advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals.

43. "***Executory Contract***" means a contract to which one or more of the Debtors is a party and that is subject to assumption, assumption and assignment, or rejection under section 365 of the Bankruptcy Code.

44. "***File***," "***Filed***," or "***Filing***" means file, filed, or filing with the Bankruptcy Court or its authorized designee in the Chapter 11 Cases.

45. "***Final Order***" means as applicable, an order or judgment of the Bankruptcy Court or other court of competent jurisdiction with respect to the relevant subject matter that has not been reversed, stayed, modified, or amended, and as to which the time to appeal or seek certiorari has expired and no appeal or petition for certiorari has been timely taken, or as to which any appeal that has been taken or any petition for certiorari that has been or may be filed has been resolved by the highest court to which the order or judgment could be appealed or from which certiorari could be sought or the new trial, reargument, or rehearing shall have been denied, resulted in no modification of such order, or has otherwise been dismissed with prejudice.

46. "***General Unsecured Claim***" means any Claim against a Debtor that is not an Administrative Claim, Other Priority Claim, Priority Tax Claim, Promissory Note Claim, or Intercompany Claim. For the avoidance of doubt, Proofs of Claim filed by limited partner investors purporting to assert claims in respect of or arising out of Partnership Interests are not General Unsecured Claims.

47. "***Governmental Unit***" has the meaning set forth in section 101(27) of the Bankruptcy Code.

48. "***HJDK***" means HJDK Aeroespacial S/A.

49. "***HJDK Allowed Claim Amount***" means $17,000,000.00.

50. "***HJDK Claims***" means all direct and indirect Claims arising under, derived from, or based on proceedings brought by HJDK against certain of the Debtors and a related party in the 2nd Civil Court of the Central Courthouse of the Judicial District of São Paulo or included in any Proof of Claim Filed by HJDK in these Chapter 11 Cases, or the facts and circumstances giving rise to such Claims, inclusive of all fees, expenses, interest, costs, losses or amounts of any nature whatsoever and any other rights, claims or causes of action that HJDK (or any of its predecessors, successors, affiliates, assigns or any person acting by, through, under or in concert with HJDK or any of them) has, has ever had or may ever have against Debtors and their estates, their principals, directors, employees, affiliates, agents, attorneys and advisors, successors or assigns from every claim of every kind and nature whatsoever, in any forum or jurisdiction and under any applicable law, whether or not presently known or unknown to the parties, foreseen or unforeseen, accrued or unaccrued, and whether arising in equity or under common law or statute or otherwise, in each

case that arise out of or relate in any way to any of the Debtors from the beginning of time through the date of execution of the HJDK Settlement Term Sheet.

51. "***HJDK Settlement***" means the good faith compromise and settlement of the HJDK Claims by and among the Debtors, HJDK and Zurich in exchange for payment of the HJDK Settlement Amount and satisfaction of the other terms and conditions set forth in the HJDK Settlement Term Sheet, which settlement was approved by the Bankruptcy Court on October 13, 2022 pursuant to the HJDK Settlement Order.

52. "***HJDK Settlement Amount***" means $8,500,000.00 held in the Zurich Escrow Account.

53. "***HJDK Settlement Order***" means the *Order Approving the Settlement Between Debtors and HJDK Aeroespacial S/A.* [Docket No. 639].

54. "***HJDK Settlement Term Sheet***" means the term sheet attached as Exhibit B to the *Debtors' Motion for an Order Pursuant to Section 105 of the Bankruptcy Code and Bankruptcy Rule 9019 Approving the Settlement by and among Debtors, HJDK Aerospacial SA, and the Zurich American Insurance Company* [Docket No. 570].

55. "***Holder***" means a Person or Entity holding a Claim against or Interest in a Debtor, as applicable.

56. "***Impaired***" means with respect to a Class of Claims or Interests, a Class of Claims or Interests that is impaired within the meaning of section 1124 of the Bankruptcy Code.

57. "***Insurance Policy***" means any policy of insurance under which any of the Debtors could have asserted, did assert or may in the future assert a right to coverage for any claim, together with any other contracts, documents or instruments that pertain or relate to such policy.

58. "***Intercompany Claim***" means any Claim against a Debtor held by another Debtor or a non-Debtor Affiliate; *provided*, that Intercompany Claim shall not include any Promissory Note Claim.

59. "***Interest***" means any "equity security," as such term is defined in section 101(16) of the Bankruptcy Code, including all issued, unissued, authorized, or outstanding shares of capital stock and any other common stock, preferred stock, limited liability company interests, limited partnership interests, and any other equity, ownership, or profit interests of a Debtor, including all options, warrants, rights, stock appreciation rights, phantom stock rights, restricted stock units, redemption rights, repurchase rights, convertible, exercisable, or exchangeable securities, or other agreements, arrangements, or commitments of any character relating to, or whose value is related to, any such interest or other ownership interest in a Debtor.

60. "***Interim Compensation Order***" means the order entered by the Bankruptcy Court establishing the procedures for the payment of fees and expenses of Professionals [Docket No. 105].

61. "***Judicial Code***" means title 28 of the United States Code, 28 U.S.C. §§ 1–4001, as amended from time to time.

62. "***Lien***" has the meaning set forth in section 101(37) of the Bankruptcy Code.

63. "***Limited Partnership Debtors***" means MatlinPatterson Global Opportunities Partners II L.P., MatlinPatterson Global Opportunities Partners (Cayman) II L.P. and MatlinPatterson Global Opportunities Partners (SUB) II L.P.

64. "***Local Rules***" means the Local Bankruptcy Rules for the Southern District of New York.

65. "***Other Priority Claim***" means any Claim, other than an Administrative Claim or a Priority Tax Claim, entitled to priority in right of payment under section 507(a) of the Bankruptcy Code, to the extent such Claim has not already been paid during the Chapter 11 Cases.

66. "***Partnership Interests***" means the Interests in each of the Limited Partnership Debtors, as defined in the applicable Limited Partnership Agreement (including, for the avoidance of doubt, any general partner interest in any of the foregoing).

67. "***Participating Insurers***" means the insurer parties that are party to the VarigLog Estate Settlement.

68. "***Participating Insurers Escrow Account***" means the escrow account funded by the Participating Insurers to hold the VarigLog Settlement Amount, pursuant to and subject to the terms and conditions of the VarigLog Estate Settlement Term Sheet and VarigLog Settlement Order.

69. "***Partnership Percentage Share***" means each Holder's percentage share of the ending capital account balance to the total ending capital account balances for the applicable Limited Partnership Debtor, as reflected in the most recent quarterly report provided to Holders of Partnership Interests prior to the Distribution Record Date.

70. "***Person***" has the meaning set forth in section 101(41) of the Bankruptcy Code.

71. "***Petition Date***" means June 6-7, 2021.

72. "***Plan Administrator***" means Matthew Doheny, in his capacity as the designee to administer the Plan, including the Dissolution Transactions, and any successor thereto.

73. "***Plan Supplement***" means the compilation of documents and forms of documents, agreements, schedules, and exhibits to the Plan (in each case, as may be altered, amended, modified, or supplemented from time to time in accordance with the terms hereof and in accordance with the Bankruptcy Code and Bankruptcy Rules) to be Filed by the Debtors no later than seven days before the Voting Deadline.

74. "***Priority Tax Claim***" means any Claim that is entitled to priority in payment pursuant to section 507(a)(8) of the Bankruptcy Code.

75. "***Professional***" means an Entity: (a) employed pursuant to a Bankruptcy Court order in accordance with sections 327, 363, or 1103 of the Bankruptcy Code and to be compensated for services rendered prior to or on the Confirmation Date, pursuant to sections 327, 328, 329, 330, 331, and 363 of the Bankruptcy Code; or (b) awarded compensation and reimbursement by the Bankruptcy Court pursuant to section 503(b)(4) of the Bankruptcy Code.

76. "***Professional Claim***" means a Claim by a professional seeking an award by the Bankruptcy Court of compensation for services rendered or reimbursement of expenses incurred through and including the Effective Date under sections 330, 331, 503(b)(2), 503(b)(3), 503(b)(4), or 503(b)(5) of the Bankruptcy Code to the extent such fees and expenses have not been paid pursuant to the Interim Compensation Order or any other order of the Bankruptcy Court. To the extent the Bankruptcy Court denies or reduces by a Final Order any amount of a Professional's requested fees and expenses, then the amount by which such fees or expenses are reduced or denied shall reduce the applicable Allowed Professional Claim.

77. "***Professional Claims Amount***" means the aggregate amount of Professional Claims that the Professionals reasonably estimate they have incurred or will incur in rendering services to the Estates to and including the Effective Date as set forth in Article II.D..3 hereof.

78. ***"Professional Claims Bar Date***" means the deadline for Filing requests for payment of Professional Claims, which shall be 45 days after the Effective Date.

79. "***Professional Claims Escrow Account***" means an interest-bearing account funded by the Debtors with Cash on the Effective Date in an amount equal to the Professional Claims Amount.

80. ***"Promissory Note Agreements***" means those three note agreements, two of which are dated December 4, 2009 and the third of which is dated September 14, 2011, by and among MatlinPatterson Global Opportunities Partners II L.P. and MatlinPatterson Global Opportunities Partners (Cayman) II L.P., as borrowers, and MP II Preferred Partners L.P, as lender, as may be amended, restated, supplemented or otherwise modified from time to time.

81. "***Promissory Note Claim***" means any of the Claims arising under, derived from, or based on the Promissory Note Agreements.

82. "***Proof of Claim***" means a proof of Claim Filed against any of the Debtors in the Chapter 11 Cases.

83. "***Rejection Damages Bar Date***" means the deadline for Filing a Proof of Claim arising from the rejection of the Debtors' Executory Contracts or Unexpired Leases as set forth in the order approving such rejection, including the Confirmation Order.

84. "***Related Parties***" means, collectively, with respect to any Entity or Person, such Entity or Person's current and former directors, managers, officers, principals, members, partners, managed accounts or funds, fund advisors, employees, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, successors, assigns, subsidiaries, affiliates, parents, designees, agents, advisory board members, financial advisors, investment advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, other

professionals, and, solely with respect to Zurich and the Participating Insurers, insurers and reinsurers.

85. "***Released Party***" means each of the following, solely in its capacity as such: (a) the Debtors, (b) the Wind Down Estates, (c) the Plan Administrator, (d) the Disbursing Agent, (e) the Settling Parties, which, for the avoidance of doubt, includes VRG, HJDK, the VarigLog Estate, Zurich and the Participating Insurers; (f) all Holders of Claims or Interests not described in the preceding clauses (a) through (e); (g) with respect to preceding clauses (a) through (f), each such Entity's current and former Affiliates; and (g) with respect to preceding clauses (a) through (f), each such Entity's Related Parties; *provided*, that any Holder of a Claim or Interest that votes against the Plan (to the extent eligible to vote), objects to the Plan, or objects to or opts out of the releases contained herein, shall not be a "Released Party".

86. "***Releasing Parties***" means each of the following solely in its capacity as such: (a) each Released Party; (b) each Holder of a Claim or Interest that is deemed to accept the Plan unless they validly opt out of, or object to, the releases contained herein; (c) each Holder of a Claim or Interest who votes to accept the Plan; (d) each Holder of a Claim or Interest whose vote to accept or reject the Plan is solicited but who abstains from voting unless they validly opt out of, or object to, the releases set forth herein; (e) each Holder of a Claim or Interest who votes to reject the Plan or is deemed to reject the Plan unless they validly opt out of, or object to, the releases set forth herein; (f) each Holder of a Claim or Interest that was given notice of the opportunity to opt out of, or object to, the releases set forth herein and who does not validly opt out of, or object to, the releases set forth herein; and (g) with respect to preceding clauses (a) through (f), each such Entity's Related Parties.

87. "***Settling Parties***" means the non-Debtor parties to each of the VRG Settlement, the HJDK Settlement, the VarigLog Estate Settlement, and their respective Related Parties.

88. "***Schedules***" means, collectively, the schedules of assets and liabilities and statements of financial affairs if any are Filed by the Debtors pursuant to section 521 of the Bankruptcy Code and in substantial conformance with the Official Bankruptcy Forms, as the same may have been amended, modified, or supplemented from time to time.

89. "***Scheduling Order***" means the order to be entered by the Bankruptcy Court establishing, among other things, solicitation procedures for voting on the Plan.

90. "***Secured***" means a Claim: (a) secured by a Lien on property in which the applicable Estate has an interest, which Lien is valid, perfected, and enforceable pursuant to applicable law or by reason of a Bankruptcy Court order, or that is subject to setoff pursuant to section 553 of the Bankruptcy Code, to the extent of the value of the creditor's interest in such Estate's interest in such property or to the extent of the amount subject to setoff, as applicable, as determined pursuant to section 506(a) of the Bankruptcy Code; or (b) otherwise Allowed pursuant to the Plan as a Secured Claim.

91. "***Securities Act***" means the Securities Act of 1933, as amended, 15 U.S.C. §§ 77a–77aa, or any similar federal, state, or local law, as now in effect or hereafter amended, and the rules and regulations promulgated thereunder.

92. "***Security***" means any security, as defined in section 2(a)(1) of the Securities Act.

93. "***Tax***" means (a) any net income, alternative or add-on minimum, gross income, gross receipts, gross margin, sales, use, ad valorem, value added, transfer, franchise, profits, license, withholding, payroll, employment, excise, severance, stamp, occupation, premium, property, environmental, escheat, unclaimed property or windfall, custom, duty or other tax, governmental fee or like assessment or charge of any kind whatsoever (together in each instance with any interest, penalty, addition to tax or additional amount) imposed by any federal, state, local or foreign taxing authority; or (b) any liability for payment of any amounts of the foregoing types as a result of being a member of an affiliated, consolidated, combined or unitary group, or being a party to any agreement or arrangement whereby liability for payment of any such amounts is determined by reference to the liability of any other Person.

94. "***Third-Party Releases***" means the releases granted pursuant to Article VIII.C of the Plan.

95. "***U.S. Trustee Fees***" means the Administrative Claims for fees payable to the Office of the United States Trustee pursuant to 28 U.S.C. § 1930, including any fees payable on account of distributions made pursuant to the Plan on the Effective Date.

96. "***Unexpired Lease***" means a lease to which one or more of the Debtors is a party that is subject to assumption, assumption and assignment, or rejection under section 365 of the Bankruptcy Code.

97. "***Unimpaired***" means with respect to a Class of Claims or Interests, a Class of Claims or Interests that is unimpaired within the meaning of section 1124 of the Bankruptcy Code.

98. "***Unsecured***" means, with respect to a Claim, not Secured.

99. "***Unsecured Creditors List***" means the list of the Debtors' twenty largest Unsecured creditors required to be Filed by Local Rule 1007-2(a)(4), which is attached as Schedule 2 to the *Declaration of Matthew Doheny, Chief Restructuring Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Motions in Compliance with Local Rule 1007-2*, Filed on the Petition Date.

100. "***VarigLog***" means Varig Logistica S.A.

101. "***VarigLog Claims***" means all direct and indirect Claims arising under, derived from, or based on proceedings brought by or on behalf of VarigLog against certain of the Debtors in the Brazilian Bankruptcy Court or included in any Proof of Claim Filed by the VarigLog Estate in these Chapter 11 Cases, or the facts and circumstances giving rise to such Claims, inclusive of all fees, expenses, interest, costs, losses or amounts of any nature whatsoever and any and all other rights, claims or causes of action that the VarigLog Estate (or any of its predecessors, successors, affiliates, assigns or any person acting by, through, under or in concert with pre-bankruptcy VarigLog., or the VarigLog Estate or any of them, including all creditors of the VarigLog Estate on whose behalf it has purported to act and bring claims in a representative capacity or for whom it could have done so) has, has ever had or may ever have against Debtors and their estates, affiliates, and each of their principals, directors, employees, agents, attorneys, advisors, insurers

or reinsurers, successors and assigns, from every claim of every kind and nature whatsoever, in any forum or jurisdiction and under any applicable law, whether or not presently known or unknown to the parties, foreseen or unforeseen, accrued or unaccrued, and whether arising in equity or under common law or statute or otherwise, in each case that arise out of or relate in any way to any of the Debtors from the beginning of time through the date of full execution of the VarigLog Estate Settlement Term Sheet.

102. "***VarigLog Estate***" means the bankruptcy estate of VarigLog that is being administered in the Brazilian Bankruptcy Court.

103. "***VarigLog Estate Allowed Claim Amount***" means the Allowed amount of the VarigLog Claims which shall be equal to the VarigLog Settlement Amount.

104. "***VarigLog Estate Settlement***" means the good faith compromise and settlement of the VarigLog Claims by and among the Debtors, the VarigLog Estate and the Participating Insurers in exchange for payment of the VarigLog Settlement Amount and satisfaction of the other terms and conditions set forth in the VarigLog Estate Settlement Term Sheet, which settlement was approved by the Bankruptcy Court on [____] pursuant to the VarigLog Settlement Order.

105. "***VarigLog Estate Settlement Term Sheet***" means the term sheet attached as Exhibit B to the *Debtors' Motion for an Order Pursuant to Section 105 of the Bankruptcy Code and Bankruptcy Rule 9019 Approving the Settlement Among Debtors, the VarigLog Estate and the Participating Insurers* [Docket No. 862].

106. "***VarigLog Settlement Amount***" means $13,500,000.00 held in the Participating Insurers Escrow Account.

107. "***VarigLog Settlement Order***" means the *Order Approving the Settlement Among Debtors, the VarigLog Estate and the Participating Insurers* [Docket No. ___].

108. "***Voting Deadline***" means the deadline for voting to accept or reject this Plan as established by the Bankruptcy Court in an order approving the Debtors' solicitation procedures.

109. "***VRG***" means GOL Linhas Aéreas S.A. (formerly VRG Linhas Aéreas S.A.).

110. "***VRG Allowed Claim Amount***" means $60,000,000.00.

111. "***VRG Claims***" means all direct and indirect Claims arising under, derived from, or based on proceedings brought by VRG against certain of the Debtors in the courts of the Cayman Islands or included in any Proof of Claim Filed by VRG in these Chapter 11 Cases, or the facts and circumstances giving rise to such Claims, inclusive of all fees, expenses, interest, costs, losses or amounts of any nature whatsoever and any other rights, claims or causes of action that VRG (or any of its predecessors, successors, affiliates, assigns or any person acting by, through, under or in concert with VRG or any of them) has, has ever had or may ever have against Debtors and their estates, their principals, directors, employees, affiliates, agents, attorneys and advisors, successors or assigns from every claim of every kind and nature whatsoever, in any forum or jurisdiction and under any applicable law, whether or not presently known or unknown to the parties, foreseen or unforeseen, accrued or unaccrued, and whether arising in equity or under common law or statute

or otherwise, in each case that arise out of or relate in any way to any of the Debtors from the beginning of time through the date of execution of the VRG Settlement Term Sheet.

112. "***VRG Settlement***" means the good faith compromise and settlement of the VRG Claims by the Debtors and VRG in exchange for payment of the VRG Settlement Amount and satisfaction of the other terms and conditions set forth in the VRG Settlement Term Sheet, which settlement was approved by the Bankruptcy Court on August 30, 2022 pursuant to the VRG Settlement Order.

113. "***VRG Settlement Amount***" means $42,000,000.00 in Cash.

114. "***VRG Settlement Order***" means the *Order Approving the Settlement Between Debtors and GOL Linhas Aereas, S.A., Formerly VRG Linhas Aereas S.A.* [Docket No. 574].

115. "***VRG Settlement Term Sheet***" means the term sheet attached as Exhibit B to the *Debtors' Motion for an Order Pursuant to Section 105 of the Bankruptcy Code and Bankruptcy Rule 9019 Approving the Settlement between Debtors and Gol Linhas Aereas, S.A., formerly VRG Linhas Aereas S.A.* [Docket No. 494].

116. "***Wind Down Estates***" means the Estates of each Debtor after the Effective Date of this Plan and prior to the closing of the Chapter 11 Case of such Debtor.

117. "***Zurich***" means Zurich American Insurance Company.

118. "***Zurich Escrow Account***" means the escrow account established and funded by Zurich to hold the HJDK Settlement Amount, pursuant to and subject to the terms and conditions of the HJDK Settlement Term Sheet.

B. Rules of Interpretation

For purposes of this Plan: (i) in the appropriate context, each term, whether stated in the singular or the plural, shall include both the singular and the plural, and pronouns stated in the masculine, feminine, or neuter gender shall include the masculine, feminine, and the neuter gender; (ii) unless otherwise specified, any reference herein to a contract, lease, instrument, release, indenture, or other agreement or document being in a particular form or on particular terms and conditions means that the referenced document shall be substantially in that form or substantially on those terms and conditions; (iii) unless otherwise specified, any reference herein to an existing document, schedule, or exhibit, whether or not Filed, having been Filed or to be Filed shall mean that document, schedule, or exhibit, as it may thereafter be amended, modified, or supplemented; (iv) any reference to an Entity as a Holder of a Claim or Interest includes that Entity's successors and assigns; (v) unless otherwise specified, all references herein to "Articles" are references to Articles hereof or hereto; (vi) unless otherwise specified, all references herein to exhibits are references to exhibits in the Plan Supplement; (vii) unless otherwise specified, the words "herein," "hereof," and "hereto" refer to the Plan in its entirety rather than to a particular portion of the Plan; (viii) subject to the provisions of any contract, certificate of incorporation, by-law, instrument, release, or other agreement or document entered into in connection with the Plan, the rights and obligations arising pursuant to the Plan shall be governed by, and construed and enforced in accordance with the applicable federal law, including the Bankruptcy Code and Bankruptcy Rules;

(ix) captions and headings to Articles are inserted for convenience of reference only and are not intended to be a part of or to affect the interpretation of the Plan; (x) unless otherwise specified herein, the rules of construction set forth in section 102 of the Bankruptcy Code shall apply; (xi) any term used in capitalized form herein that is not otherwise defined but that is used in the Bankruptcy Code or the Bankruptcy Rules shall have the meaning assigned to that term in the Bankruptcy Code or the Bankruptcy Rules, as the case may be; (xii) all references to docket numbers of documents Filed in the Chapter 11 Cases are references to the docket numbers under the Bankruptcy Court's CM/ECF system; (xiii) all references to statutes, regulations, orders, rules of courts, and the like shall mean as amended from time to time, and as applicable to the Chapter 11 Cases, unless otherwise stated; (xiv) the words "include" and "including," and variations thereof, shall not be deemed to be terms of limitation, and shall be deemed to be followed by the words "without limitation"; (xv) references to "Proofs of Claim," "Holders of Claims," "Disputed Claims," and the like shall include "Proofs of Interest," "Holders of Interests," "Disputed Interests," and the like, as applicable; (xvi) any immaterial effectuating provisions may be interpreted by the Debtors or Plan Administrator in such a manner that is consistent with the overall purpose and intent of the Plan all without further notice to or action, order, or approval of the Bankruptcy Court or any other Entity; and (xvii) all references herein to consent, acceptance, or approval may be conveyed by counsel for the respective parties that have such consent, acceptance, or approval rights, including by electronic mail.

C. Computation of Time

Unless otherwise specifically stated herein, the provisions of Bankruptcy Rule 9006(a) shall apply in computing any period of time prescribed or allowed herein. If the date on which a transaction may occur pursuant to the Plan shall occur on a day that is not a Business Day, then such transaction shall instead occur on the next succeeding Business Day. Any action to be taken on the Effective Date may be taken on or as soon as reasonably practicable after the Effective Date.

D. Governing Law

Unless a rule of law or procedure is supplied by federal law (including the Bankruptcy Code and Bankruptcy Rules) or unless otherwise specifically stated herein, the laws of the State of New York, without giving effect to the principles of conflict of laws, shall govern the rights, obligations, construction, and implementation of the Plan and any agreements, documents, instruments, or contracts executed or entered into in connection with the Plan (except as otherwise set forth in those agreements, in which case the governing law of such agreement shall control); *provided that* corporate, partnership, or limited liability company governance matters relating to the Debtors, as applicable, shall be governed by the laws of the state or jurisdiction of incorporation or formation (as applicable) of the applicable Debtor.

E. Reference to Monetary Figures

All references in the Plan to monetary figures shall refer to currency of the United States of America, unless otherwise expressly provided herein.

F. Controlling Document

In the event of an inconsistency between the Plan and the Disclosure Statement, the terms of the Plan shall control in all respects. In the event of an inconsistency between the Plan and the Plan Supplement, the terms of the relevant provision in the Plan Supplement shall control in all respects (unless stated otherwise in such Plan Supplement document or in the Confirmation Order). In the event of an inconsistency between the Confirmation Order and the Plan, the Confirmation Order shall control in all respects.

ARTICLE II
ADMINISTRATIVE CLAIMS AND PRIORITY CLAIMS

In accordance with section 1123(a)(1) of the Bankruptcy Code, Administrative Claims, Professional Claims, and Priority Tax Claims have not been classified and, thus, are excluded from the Classes of Claims and Interests set forth in Article III hereof.

A. Administrative Claims

Unless otherwise agreed to by the Holder of an Allowed Administrative Claim and the Debtors, or the Plan Administrator, as applicable, each Holder of an Allowed Administrative Claim (other than Professional Claims and Claims for fees and expenses pursuant to section 1930 of chapter 123 of title 28 of the United States Code) shall receive (i) payment in full in Cash, which payments shall be made (a) in the ordinary course of business or (b) on the later of the Effective Date (or as soon as reasonably practicable thereafter) or the date on which such Administrative Claim becomes Allowed (or as soon as reasonably practicable thereafter); or (ii) treatment otherwise consistent with section 1129(a)(9) of the Bankruptcy Code.

B. Administrative Claims Bar Date

Requests for payment of Administrative Claims must be Filed with the Bankruptcy Court and served on the Debtors or the Plan Administrator, as applicable, no later than the Administrative Claims Bar Date. Holders of Administrative Claims that are required to, but do not, File and serve a request for payment of such Administrative Claims by such date shall be forever barred, estopped, and enjoined from asserting such Administrative Claims against the Debtors or their property and such Administrative Claims shall be deemed discharged as of the Effective Date.

C. U.S. Trustee Fees

Notwithstanding anything herein to the contrary, on the Effective Date, the Debtors shall pay, in full, in Cash, any fees due and owing to the U.S. Trustee at the time of Confirmation pursuant to 28 U.S.C. § 1930(a)(6). On and after the Effective Date, to the extent any of the Chapter 11 Cases remains open, and for so long as the Wind Down Estates remain obligated to pay quarterly fees, the Wind Down Estates shall file with the Bankruptcy Court quarterly reports in a form reasonably acceptable to the U.S. Trustee. The Debtors or Wind Down Estates, as applicable, shall remain obligated to pay quarterly fees to the U.S. Trustee until the earliest of the last of the Chapter 11 Cases being closed, dismissed or converted to a case under chapter 7 of the Bankruptcy Code.

D. Professional Claims

1. Final Fee Applications and Payment of Professional Claims

All requests for payment of Professional Claims for services rendered and reimbursement of expenses incurred prior to the Effective Date must be Filed no later than the Professional Claims Bar Date. The Bankruptcy Court shall determine the Allowed amounts of such Professional Claims after notice and a hearing in accordance with the procedures established by the Bankruptcy Code, the Bankruptcy Rules or prior orders by the Bankruptcy Court. Each Holder of an Allowed Professional Claim will be paid in Cash from the Professional Claims Escrow Account as soon as reasonably practicable after entry of the order approving such Allowed Professional Claim.

2. Professional Claims Escrow Account

On the Effective Date, the Debtors shall establish and fund the Professional Claims Escrow Account with Cash equal to the Professional Claims Amount. The Professional Claims Escrow Account shall be maintained in trust by the Plan Administrator or Disbursing Agent solely for the benefit of the Professionals. Such funds shall not be considered property of the Estates of the Debtors. If the Professional Claims Escrow Account is depleted, each Holder of an Allowed Professional Claim will be paid the full amount of such Allowed Professional Claim by the Wind Down Estates as soon as reasonably practicable after entry of the order approving such Allowed Professional Claim. All amounts remaining in the Professional Claims Escrow Account after all Allowed Professional Claims have been paid in full shall be irrevocably paid to the Distributions Reserve without any further action or order of the Bankruptcy Court.

3. Professional Amount

Professionals shall reasonably estimate their unpaid Professional Claims and other unpaid fees and expenses incurred in rendering services to the Debtors before and as of the Effective Date, as well as the estimated fees and expenses to be incurred in connection with preparing and filing any fee applications, and shall deliver such estimate to the Debtors no later than five days before the Effective Date; *provided, however*, that such estimate shall not be deemed to limit the amount of the fees and expenses that are the subject of each Professional's final request for payment in the Chapter 11 Cases. If a Professional does not provide an estimate, the Debtors or Plan Administrator, as applicable, may estimate the unpaid and unbilled fees and expenses of such Professional.

E. Priority Tax Claims

Except to the extent that a Holder of an Allowed Priority Tax Claim agrees to a less favorable treatment, in full and final satisfaction, settlement, and release of and in exchange for each Allowed Priority Tax Claim, each Holder of such Allowed Priority Tax Claim shall receive payment in full in Cash on (or as soon as reasonably practicable thereafter) the latest of (a) the Effective Date; (b) the date such Priority Tax Claim is Allowed; or (c) the date such Allowed Priority Tax Claim becomes due and payable.

Notwithstanding the foregoing, any penalty arising with respect to or in connection with an Allowed Priority Tax Claim shall be classified as a General Unsecured Claim and shall be

treated in accordance with Article III.B..2 of the Plan, if not subordinated to General Unsecured Claims pursuant to an order of the Bankruptcy Court. The Holder of an Allowed Priority Tax Claim shall not assess or attempt to collect such penalty from the Debtors or their respective property (other than as a Holder of a General Unsecured Claim and treated in accordance with Article III.B..2 of the Plan).

ARTICLE III
CLASSIFICATION AND TREATMENT OF CLAIMS AND INTERESTS

A. Classification of Claims and Interests

This Plan constitutes a separate Plan proposed by each Debtor. Except for the Claims addressed in Article II hereof, all Claims and Interests are classified in the Classes set forth below in accordance with sections 1122 and 1123(a)(1) of the Bankruptcy Code. A Claim or an Interest is classified in a particular Class only to the extent that the Claim or Interest fits within the description of that Class and is classified in other Class(es) to the extent that any portion of the Claim or Interest fits within the description of such other Class(es). A Claim or an Interest also is classified in a particular Class for the purpose of receiving distributions under the Plan only to the extent that such Claim or Interest is an Allowed Claim or Interest in that Class and has not been paid, released, or otherwise satisfied prior to the Effective Date.

The classification of Claims and Interests against the Debtors pursuant to the Plan is as follows:

Class	Claims and Interests	Status	Voting Rights
Class 1	Other Priority Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)
Class 2	General Unsecured Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)
Class 3	Promissory Note Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)
Class 4	VRG Claims	Impaired	Entitled to Vote
Class 5	HJDK Claims	Impaired	Entitled to Vote
Class 6	VarigLog Claims	Unimpaired	Not Entitled to Vote (Deemed to Accept)
Class 7	Partnership Interests	Impaired	Not Entitled to Vote (Deemed to Reject)
Class 8	Affiliate Equity Interests	Impaired	Not Entitled to Vote (Deemed to Reject)
Class 9	Intercompany Claims	Impaired	Not Entitled to Vote (Deemed to Reject)

B. Treatment of Claims and Interests

Each Holder of an Allowed Claim or Allowed Interest, as applicable, shall receive under the Plan the treatment described below in full and final satisfaction, settlement, and release of and in exchange for such Holder's Allowed Claim or Allowed Interest, except to the extent different treatment is agreed to by the Debtors and the Holder of such Allowed Claim or Allowed Interest, as applicable. Unless otherwise indicated, the Holder of an Allowed Claim or Allowed Interest, as applicable, shall receive such treatment on the Effective Date or as soon as reasonably practicable thereafter.

1. Class 1 – Other Priority Claims

(a) *Classification*: Class 1 consists of all Other Priority Claims.

(b) *Treatment*: Except to the extent that a Holder of an Allowed Other Priority Claim and the Debtors agree to a less favorable treatment, in full and final satisfaction, compromise, settlement, and release of and in exchange for each Allowed Other Priority Claim, each such Holder shall receive payment in full in Cash of its Allowed Other Priority Claim.

(c) *Voting*: Class 1 is conclusively deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Class 1 is not entitled to vote to accept or reject the Plan.

2. Class 2 – General Unsecured Claims

(a) *Classification*: Class 2 consists of all General Unsecured Claims.

(b) *Treatment*: Except to the extent that a Holder of an allowed General Unsecured Claim agrees to less favorable treatment, each Holder of an Allowed General Unsecured Claim shall receive, at the applicable Debtor's or the Plan Administrator's option:

(i) if such Allowed General Unsecured Claim is due and payable on or before the Effective Date, payment in full in Cash of the unpaid portion of its Allowed General Unsecured Claim on the later of (x) the Effective Date (or as soon as reasonably practicable thereafter) or (y) the date on which such General Unsecured Claim becomes Allowed (or as soon as reasonably practicable thereafter).

(ii) if such Allowed General Unsecured Claim is not due and payable on or before the Effective Date, payment in full in Cash in the ordinary course of business consistent with past practices; or

(iii) other treatment, as may be determined by the applicable Debtor or the Plan Administrator, as applicable, such that such Allowed General Unsecured Claim shall be rendered Unimpaired.

(c) *Voting*: Class 2 is conclusively deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Class 2 is not entitled to vote to accept or reject the Plan.

3. Class 3 – Promissory Note Claims

(a) *Classification*: Class 3 consists of all Promissory Note Claims. Promissory Note Claims will be Allowed in the aggregate amount of $57,965,995.00.

(b) *Treatment*: Except to the extent that a Holder of an Allowed Promissory Note Claim agrees to less favorable treatment, each Holder of an Allowed Promissory Note Claim shall receive, at the applicable Debtor's or the Plan Administrator's option:

(i) payment in full in Cash on the Effective Date (or as soon as reasonably practicable thereafter); or

(ii) other treatment, as may be determined by the applicable Debtor or the Plan Administrator, as applicable, such that such Allowed Promissory Note Claim shall be rendered Unimpaired.

(c) *Voting*: Class 3 is conclusively deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Class 3 is not entitled to vote to accept or reject the Plan.

4. Class 4 – VRG Claims

(a) *Classification*: Class 4 consists of the VRG Claims. The VRG Claims are Allowed in the VRG Allowed Claim Amount. The VRG Claims shall not be subject to any avoidance, reduction, setoff, recoupment, recharacterization, subordination, defense, disallowance, reconsideration, impairment, surcharge under section 506(c) of the Bankruptcy Code, objection, any challenges under applicable law or regulation, or any other claim or defense.

(b) *Treatment*: On the Effective Date (or as soon as reasonably practicable thereafter) VRG shall receive the VRG Settlement Amount, to be paid in full, in Cash, in full and final satisfaction, compromise, settlement, and release and discharge of the VRG Claims.

(c) *Voting*: Class 4 is Impaired under the Plan. VRG is entitled to vote to accept or reject the Plan.

5. Class 5 – HJDK Claims

(a) *Classification*: Class 4 consists of the HJDK Claims. The HJDK Claims are Allowed in the HJDK Allowed Claim Amount. The HJDK Claims shall not be subject to any avoidance, reduction, setoff, recoupment,

recharacterization, subordination, defense, disallowance, reconsideration, impairment, surcharge under section 506(c) of the Bankruptcy Code, objection, any challenges under applicable law or regulation, or any other claim or defense.

(b) *Treatment*: On the Effective Date (or as soon as reasonably practicable thereafter) HJDK shall receive the HJDK Settlement Amount, to be paid in full in Cash, solely with funds from the Zurich Escrow Account, in full and final satisfaction, compromise, settlement, and release and discharge of the HJDK Claims.

(c) *Voting*: Class 5 is Impaired under the Plan. HJDK is entitled to vote to accept or reject the Plan.

6. Class 6 – VarigLog Claims

(a) *Classification*: Class 6 consists of the VarigLog Claims. The VarigLog Claims are Allowed in the VarigLog Estate Allowed Claim Amount. The VarigLog Claims shall not be subject to any avoidance, reduction, setoff, recoupment, recharacterization, subordination, defense, disallowance, reconsideration, impairment, surcharge under section 506(c) of the Bankruptcy Code, objection, any challenges under applicable law or regulation, or any other claim or defense.

(b) *Treatment*: On the Effective Date (or as soon as reasonably practicable thereafter), the VarigLog Estate shall receive the VarigLog Settlement Amount, to be paid in full, in Cash, solely with funds from the Participating Insurers Escrow Account, in full and final satisfaction, compromise, settlement, and release and discharge of the VarigLog Claims.

(c) *Voting*: Class 6 is conclusively deemed to have accepted the Plan pursuant to section 1126(f) of the Bankruptcy Code. Class 6 is not entitled to vote to accept or reject the Plan.

7. Class 7 – Partnership Interests

(a) *Classification*: Class 7 consists of all Partnership Interests. Each Holder's Partnership Interest is Allowed in such Holder's Partnership Percentage Share.

(b) *Treatment*: All Allowed Partnership Interests are Impaired under the Plan. Except to the extent that a Holder of an Allowed Partnership Interest agrees to less favorable treatment, each Holder of an Allowed Partnership Interest shall receive, in exchange for the cancelation, release and extinguishment of such Allowed Partnership Interest:

(i) on the Effective Date (or as soon as reasonably practicable thereafter) such Holder's Applicable Partnership Cash Allocation of

any surplus Cash in the Distributions Reserve, such surplus determined by the Plan Administrator after determining items (ii) and (iii) in the definition of Distributions Reserve; and

(ii) after giving effect to all costs of administering the Plan and all applicable distributions on account of Allowed Claims pursuant to this Plan, such Holder's Applicable Partnership Cash Allocation of any Cash remaining in the Distributions Reserve.

(c) *Voting*: Class 7 is conclusively deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. Class 7 is not entitled to vote to accept or reject the Plan.

8. Class 8 – Affiliate Equity Interests

(a) *Classification*: Class 8 consists of all Affiliate Equity Interests.

(b) *Treatment*: Holders of Allowed Affiliate Equity Interests will not receive any distribution on account of such Interests, which will be canceled, released, and extinguished as of the Effective Date, and will be of no further force or effect.

(c) *Voting*: Class 8 is conclusively deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. Class 8 is not entitled to vote to accept or reject the Plan.

9. Class 9 – Intercompany Claims

(a) *Classification*: Class 9 consists of all Intercompany Claims.

(b) *Treatment*: Holders of Allowed Intercompany Claims will not receive any distribution on account of such Claims, which will be canceled, released, and extinguished as of the Effective Date, and will be of no further force or effect.

(c) *Voting*: Class 9 is conclusively deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. Class 9 is not entitled to vote to accept or reject the Plan.

C. Special Provision Governing Unimpaired Claims

Except as otherwise provided in the Plan, nothing under the Plan shall affect the Debtors' rights regarding any Unimpaired Claim, including all rights regarding legal and equitable defenses to or setoffs or recoupments against any such Unimpaired Claim.

D. Elimination of Vacant Classes

Any Class of Claims or Interests that does not have a Holder of an Allowed Claim or Allowed Interest or a Claim or Interest temporarily Allowed by the Bankruptcy Court as of the date of the Confirmation Hearing shall be deemed eliminated from the Plan for purposes of voting to accept or reject the Plan and for purposes of determining acceptance or rejection of the Plan by such Class pursuant to section 1129(a)(8) of the Bankruptcy Code.

E. Voting Classes, Presumed Acceptance by Non-Voting Classes

If a Class contains Claims or Interests eligible to vote and no Holders of Claims or Interests eligible to vote in such Class vote to accept or reject the Plan, the Holders of such Claims or Interests in such Class shall be deemed to have accepted the Plan.

F. Confirmation Pursuant to Section 1129(b) of the Bankruptcy Code

The Debtors request confirmation of this Plan under section 1129(b) of the Bankruptcy Code with respect to any Impaired Class that does not accept this Plan pursuant to section 1126 of the Bankruptcy Code. The Debtors reserve the right to modify the Plan in accordance with Article X hereof to the extent, if any, that Confirmation pursuant to section 1129(b) of the Bankruptcy Code requires modification, including by modifying the treatment applicable to a Class of Claims or Interests to render such Class of Claims or Interests Unimpaired to the extent permitted by the Bankruptcy Code and the Bankruptcy Rules. Controversy Concerning Impairment

G. Controversy Concerning Impairment

If a controversy arises as to whether any Claims or Interests, or any Class of Claims or Interests, are Impaired, the Bankruptcy Court shall, after notice and a hearing, determine such controversy on or before the Confirmation Date.

H. Subordinated Claims

The allowance, classification, and treatment of all Allowed Claims and Allowed Interests and the respective distributions and treatments under the Plan take into account and conform to the relative priority and rights of the Claims and Interests in each Class in connection with any contractual, legal, and equitable subordination rights relating thereto, whether arising under general principles of equitable subordination, section 510(b) of the Bankruptcy Code, or otherwise. Pursuant to section 510 of the Bankruptcy Code, the Debtors or Plan Administrator, as applicable, reserve the right to re-classify any Allowed Claim or Allowed Interest in accordance with any contractual, legal, or equitable subordination relating thereto.

ARTICLE IV
MEANS FOR IMPLEMENTATION OF THE PLAN

A. Corporate and Organizational Existence

On or after the Effective Date, the Debtors shall remain in existence for the sole purpose of dissolving. The Wind Down Estates may continue for a period of time after one or more of the Debtors is dissolved, as determined by the Plan Administrator in accordance with the terms of this Plan. In connection with the Dissolution Transactions, on or after the Effective Date, the Debtors or the Wind Down Estates may dissolve and wind up any of the Debtors and non-Debtor Affiliates in accordance with applicable non-bankruptcy law. The Debtors or Plan Administrator, as applicable, are authorized, but not required, to take any actions they determine to be necessary or advisable to effectuate the Dissolution Transactions under applicable law without further order, approval or action by the Bankruptcy Court.

B. Wind Down Estates

The purpose of the Wind Down Estates is to monetize and distribute the Debtors' Assets with no objective to continue or engage in the conduct of a trade or business. The Plan Administrator shall be vested with all powers and authority set forth in this Plan, shall be deemed to have been appointed as the Debtors' Estates' representative pursuant to section 1123(b)(3)(B) of the Bankruptcy Code, and shall have the duties of a trustee set forth in sections 704(a)(1), 704(a)(2) and 704(a)(5) of the Bankruptcy Code. All actions taken by the Plan Administrator in its capacity as such under this Plan shall be deemed to have been taken on behalf of the Wind Down Estates.

C. Vesting of Assets

Except as provided elsewhere in the Plan, or in the Confirmation Order, on or after the Effective Date, property and Assets of the Debtors' Estates (including Causes of Action and Avoidance Actions) and any property and Assets acquired by the Debtors pursuant to the Plan, will vest, in each case free and clear of all Liens or Claims, in the Wind Down Estates. Except as may be otherwise provided in the Plan, on and after the Effective Date, the Plan Administrator may use, acquire or dispose of property and compromise or settle any Claims without supervision or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or Bankruptcy Rules, other than those restrictions expressly imposed by the Plan or the Confirmation Order.

D. The Plan Administrator

The Plan Administrator shall be entitled to exercise all powers and duties as set forth in this Plan and to retain or designate any third party deemed necessary or appropriate to exercise such powers and duties. Except as otherwise ordered by the Bankruptcy Court, any compensation, fees, costs and expenses of the Plan Administrator in connection with administering the Plan (including without limitation, the actual fees and expenses of any professionals and any third parties retained by the Plan Administrator) shall be paid from the Distributions Reserve.

E. Accounts for Plan Distributions

1. Distributions Reserve

On the Effective Date, the Debtors shall establish the Distributions Reserve. The Distributions Reserve shall be held in trust by the Disbursing Agent for distributions to and/or payment of Allowed Claims (except as otherwise provided herein) and Allowed Interests and payment of fees and expenses incurred by the Disbursing Agent, Plan Administrator, Debtors or Wind Down Estates in accordance with the terms of the Plan.

2. Professional Claims Escrow Account

The Professional Claims Amount shall be held in trust in a segregated Professional Claims Escrow Account by the Disbursing Agent for distributions or payment in accordance with the terms of Article II of the Plan. Any Cash held in the Professional Claims Escrow Account after all applicable distributions and/or payments are made shall be irrevocably paid to the Distributions Reserve.

3. Zurich Escrow Account

The HJDK Settlement Amount shall be held in trust in the Zurich Escrow Account for distributions or payment in accordance with the terms of Article II of the Plan.

4. Participating Insurers Escrow Account

The VarigLog Settlement Amount shall be held in trust in the Participating Insurers Escrow Account for distributions or payment in accordance with the terms of Article II of the Plan.

5. Defense Costs Escrow Account

The Defense Costs shall be held in trust in the Defense Costs Escrow Account to be released in accordance the terms of this Plan and any agreement between the Debtors and the Participating Insurers. The Defense Costs reimbursed to the Debtors shall be paid to the Distributions Reserve.

The reimbursement of Defense Costs to the Debtors in the amount agreed between the Debtors and Participating Insurers shall be in full and final satisfaction of Debtors' Claims against the Participating Insurers for reimbursement of Defense Costs.

F. Corporate Action

On or before the Effective Date, as applicable, notwithstanding any requirements under non-bankruptcy law, all actions contemplated under the Plan or the Plan Supplement shall be deemed authorized, approved and effective in all respects. Any corporate action required by the Debtors or the Wind Down Estates in connection with the Plan shall be deemed to have occurred and shall be in effect, without any requirement of further action by the security holders, directors, managers, or officers thereof, as applicable. On or prior to the Effective Date, the appropriate officers of the Debtors and the Plan Administrator, as applicable, each shall be authorized to issue,

execute, and deliver the agreements, documents, securities, and instruments contemplated under the Plan (or necessary or desirable to effect the transactions contemplated under the Plan) in the name of and on behalf of the Debtors or the Wind Down Estates.

G. Dissolution Transactions

On or after the entry of the Confirmation Order, the Debtors or Plan Administrator will implement any other provision of the Plan and any applicable orders of the Bankruptcy Court, and shall have the power and authority to enter into such Dissolution Transactions (which transactions shall not be consummated prior to the Effective Date) and take such actions as may be necessary or appropriate to dissolve or otherwise terminate the corporate or other organizational existence of the Debtors and any non-Debtor Affiliates as of the Effective Date or as promptly as possible thereafter. The actions to effect the Dissolution Transactions may include: (i) the execution and delivery of appropriate agreements or other documents of transfer, disposition, liquidation or dissolution containing terms that are consistent with the terms of the Plan and that satisfy the requirements of applicable law, as well as other terms to which the applicable Entities may agree; (ii) the execution and delivery of appropriate instruments of transfer, assignment, assumption or delegation of any Asset, property, right, liability, duty or obligation on terms consistent with the terms of the Plan and having such other terms as these Entities may agree; (iii) the filing of appropriate certificates or articles of dissolution or similar instruments with the applicable governmental authorities; and (iv) the taking of all other actions that the Debtors or Plan Administrator determine to be necessary, desirable or appropriate to implement, effectuate and consummate the Plan or the Dissolution Transactions contemplated hereby. The Confirmation Order shall and shall be deemed to authorize, among other things, all actions as may be necessary or appropriate to effect any transaction described in, approved by, contemplated by, or necessary to effectuate the Plan.

Notwithstanding the foregoing and regardless of whether the actions described above have yet been taken with respect to a particular Debtor, as of the Effective Date, the Debtors shall be deemed dissolved and their business operations withdrawn for all purposes without any necessity of filing any document, taking any further action or making any payment to any governmental authority in connection therewith.

H. Cancellation of Existing Securities and Agreements

On the Effective Date, except to the extent otherwise provided in the Plan, all notes, instruments, certificates, credit agreements, indentures, and other documents evidencing Claims or Interests (including the Promissory Note Claims, Partnership Interests and Affiliate Equity Interests), and any Partnership Interests or Affiliate Equity Interests that are not represented by certificates or other instruments, shall be canceled, extinguished, released and surrendered and the obligations of the Debtors thereunder or in any way related thereto shall be deemed satisfied in full, canceled, and of no force or effect against the Debtors, without any further action on the part of the Debtors or any other party. Holders of or parties to such canceled instruments and other documentation will have no rights arising from or relating to such instruments and other documentation, or the cancellation thereof, except the rights provided for pursuant to this Plan.

Notwithstanding anything to the contrary in this Article IV.H, any provision in any document, instrument, lease, or other agreement that causes or effectuates, or purports to cause or effectuate, a default, termination, waiver, or other forfeiture of, or by, a Debtor or its Interests, as a result of the cancellations, terminations, satisfaction, releases, or discharges provided for in this Article IV.H, shall be deemed null and void and shall be of no force and effect.

I. Release of Liens, Claims and Interests

Except as otherwise provided in the Plan, concurrently with the applicable distributions made pursuant to the Plan, all Liens, Claims or Interests in or against the property and Assets of the Estates will be fully released, terminated, extinguished and discharged, in each case without further notice to or order of the Bankruptcy Court, act or action under applicable law, regulation, order or rule or the vote, consent, authorization or approval of any Entity.

J. Director and Officer Liability Insurance

The Debtors have continued their D&O Liability Insurance Policies through the purchase of a run-off or "tail" policy, for a six-year period commencing as of March 31, 2021, for the benefit of any person who is serving or has served as one of the Debtors' directors, officers, managers, or employees at any time prior to the Effective Date. Any and all such insurance in existence as of the Effective Date shall be continued in accordance with their existing terms or on comparable terms. All directors, officers, managers, or employees of the Debtors who served in such capacity at any time prior to the Effective Date shall be entitled to the full benefits of any such policy for the full term of such policy, to the extent set forth therein, regardless of whether such directors, officers, managers, or employees remain in such positions after the Effective Date.

K. Preservation and Maintenance of Causes of Action

In accordance with section 1123(b) of the Bankruptcy Code, the Wind Down Estates shall retain and may enforce all rights to commence and pursue any and all Causes of Action, whether arising before or after the Petition Date, including any actions specifically enumerated in the Plan Supplement, and the Plan Administrator's rights to commence, prosecute, or settle such Causes of Action shall be preserved notwithstanding the occurrence of the Effective Date, other than the Causes of Action released by the Debtors pursuant to the releases and exculpations contained in the Plan, including in Article VIII of the Plan, which shall be deemed released and waived by the Debtors as of the Effective Date. The Plan Administrator, on behalf of the Wind Down Estates, as the successors in interest to the Debtors and their Estates, may, in its sole and absolute discretion, and will have the exclusive right to, enforce, sue on, settle, compromise, transfer or assign (or decline to do any of the foregoing) any or all such Causes of Action, without notice to or approval from the Bankruptcy Court. The Plan Administrator may pursue such retained claims, rights or Causes of Action, suits or proceedings as appropriate, in accordance with the best interests of the Wind Down Estates.

Unless any Cause of Action against an Entity is expressly waived, relinquished, exculpated, released, compromised, or settled in the Plan or a Final Order of the Bankruptcy Court, the Debtors and Plan Administrator, as applicable, expressly reserve all Causes of Action, for later adjudication, and, therefore no preclusion doctrine, including the doctrines of res judicata,

collateral estoppel, issue preclusion, claim preclusion, estoppel (judicial, equitable, or otherwise), or laches, shall apply to such Causes of Action upon, after, or as a consequence of the Confirmation or Consummation.

L. Effectuating Documents; Further Transactions

The Debtors (prior to the Effective Date) and the Plan Administrator (on or after the Effective Date) are authorized to and may issue, execute, deliver, file, or record such contracts, securities, instruments, releases, and other agreements or documents and take such actions as may be necessary or appropriate to effectuate, implement and evidence the terms and conditions of this Plan and the Dissolution Transactions, in each case, in the name of and on behalf of any Debtor or the Wind Down Estates, as applicable, without the need for any approvals, authorization or consents except those expressly required pursuant to this Plan.

Pursuant to section 1146(a) of the Bankruptcy Code, the following will not be subject to any document recording Tax, stamp Tax, conveyance fee, intangibles or similar Tax, real estate transfer Tax, sale or use Tax, mortgage recording Tax, Uniform Commercial Code filing or recording fee, regulatory filing or recording fee or other similar Tax: (a) any transfer made by the Debtors; (b) the making or assignment of any lease or sublease; (c) any Dissolution Transaction; (d) the making or delivery of any deed or other instrument of transfer under, in furtherance of or in connection with the Plan, including any merger agreements, agreements of consolidation, restructuring, disposition, liquidation or dissolution, deeds, bills of sale, or assignments executed in connection with any of the foregoing or pursuant to the Plan.

M. Settlements

Except to the extent any portion of the VRG Settlement, the HJDK Settlement and/or the VarigLog Estate Settlement has previously become effective pursuant to the VRG Settlement Order, the HJDK Settlement Order and/or the VarigLog Settlement Order, as applicable, the VRG Settlement, the HJDK Settlement and the VarigLog Estate Settlement shall become effective with respect to all parties thereto upon the payment of the VRG Settlement Amount, the HJDK Settlement Amount and the VarigLog Settlement Amount, respectively, on the Effective Date in accordance with this Plan. The provisions of the VRG Settlement, HJDK Settlement and VarigLog Estate Settlement (including the release and injunctive provisions contained in Article VIII of this Plan) shall constitute a good faith compromise and settlement of Claims and controversies among the Debtors and the Settling Parties.

ARTICLE V
TREATMENT OF EXECUTORY CONTRACTS AND UNEXPIRED LEASES

A. Treatment of Executory Contracts and Unexpired Leases

On the Effective Date, except as otherwise provided herein or in any contract, instrument, release, or other agreement or document entered into in connection with the Plan, all Executory Contracts or Unexpired Leases shall be rejected as of the Effective Date without the need for any further notice to or action, order, or approval of the Bankruptcy Court, except for any Executory Contract and Unexpired Lease (1) that has been previously rejected or assumed by a Final Order; (2) that has previously expired or terminated pursuant to its own terms or by agreement of the

parties thereto; or (3) that is the subject of a separate motion to assume or reject that is pending on the Effective Date.

Entry of the Confirmation Order shall constitute the Bankruptcy Court's order approving the rejection of Executory Contracts or Unexpired Leases as set forth in the Plan pursuant to sections 365(a) and 1123 of the Bankruptcy Code. Except as otherwise specifically set forth herein, the rejection of Executory Contracts and Unexpired Leases pursuant to the Plan are effective as of the Effective Date. Any motions to reject Executory Contracts or Unexpired Leases pending on the Effective Date shall be subject to approval by the Bankruptcy Court on the Effective Date.

B. Claims Based on Rejection of Executory Contracts or Unexpired Leases

No Executory Contract or Unexpired Lease rejected by the Debtors on or prior to the Effective Date shall create any obligation or liability of the Debtors that is not a Claim. Unless otherwise provided by a Final Order of the Bankruptcy Court, all Proofs of Claim with respect to Claims arising from the rejection of Executory Contracts or Unexpired Leases, if any, must be Filed with the Claims and Noticing Agent at the address specified in any notice of entry of the Confirmation Order and served on the Debtors or Plan Administrator, as applicable, prior to the Rejection Damages Bar Date. Any Claims arising from the rejection of an Executory Contract or Unexpired Lease not Filed with the Bankruptcy Court within such time will be automatically Disallowed, forever barred from assertion, and shall not be enforceable against the Debtors, the Estates, the Wind Down Estates or their property without the need for any objection or further notice to, or action, order, or approval of the Bankruptcy Court or any other Entity. All Allowed Claims arising from the rejection of the Debtors' Executory Contracts or Unexpired Leases shall be classified as General Unsecured Claims and shall be treated in accordance with Article III.B..2 of this Plan.

C. Assumption of Director and Officer Liability Insurance Policies

Notwithstanding anything in the Plan to the contrary, on the Effective Date, pursuant to section 365(a) of the Bankruptcy Code, the Wind Down Estates shall be deemed to have assumed all D&O Liability Insurance Policies and any agreements, documents and instruments related thereto in accordance with Article IV.J of this Plan. Entry of the Confirmation Order will constitute the Bankruptcy Court's approval of such assumption.

After the Effective Date, the Wind Down Estates shall not terminate or otherwise reduce, modify or restrict in any way, the coverage under any D&O Liability Insurance Policy (including such tail coverage liability insurance) in effect or purchased as of the Petition Date, and all members, managers, directors and officers of the Debtors who served in such capacity at any time prior to the Effective Date or any other individuals covered by such D&O Liability Insurance Policy shall be entitled to the full benefits of any such policy for the full term of such policy (and all tail coverage related thereto) regardless of whether such members, managers, directors and/or officers remain in such positions after the Effective Date.

D. Reservation of Rights

Nothing contained in the Plan or the Plan Supplement shall constitute an admission by the Debtors or any other party that any contract or lease is in fact an Executory Contract or Unexpired Lease or that the Plan Administrator or Disbursing Agent have any liability thereunder.

E. Nonoccurrence of Effective Date

In the event that the Effective Date does not occur, the Bankruptcy Court shall retain jurisdiction with respect to any request to extend the deadline for assuming or rejecting Executory Contract or Unexpired Leases pursuant to section 365(d)(4) of the Bankruptcy Code.

ARTICLE VI
PROVISIONS GOVERNING DISTRIBUTIONS

A. Distributions as of the Effective Date

Unless otherwise provided in the Plan, on the Effective Date or as soon as reasonably practicable thereafter, each Holder of an Allowed Interest or an Allowed Claim, including any portion of a Claim that is an Allowed Claim notwithstanding that other portions of such Claim are a Disputed Claim, shall receive the full amount of the distributions to which such Holder is entitled as provided and in accordance with this Plan.

B. Distributions After the Effective Date

If a Claim is not Allowed on the Effective Date, on the date that such Claim becomes Allowed, or as soon as reasonably practicable thereafter, each Holder of such Allowed Claim, including any portion of such Claim that is Allowed notwithstanding that other portions of such Claim are a Disputed Claim, shall receive the full amount of the distributions to which such Holder is entitled as provided and in accordance with this Plan.

The Disbursing Agent shall make subsequent distributions from the Distributions Reserve after the Effective Date in accordance with this Plan, including to make any distributions to Holders of Allowed Partnership Interests after satisfying all other obligations for which the Distributions Reserve is established.

C. Entitlement to Distributions

On and after the Effective Date, the Disbursing Agent shall be authorized to recognize and deal only with those Holders of Claims or Interests listed on the Debtors' books and records as of the Distribution Record Date. Accordingly, the Disbursing Agent will have no obligation to recognize the transfer of, or the sale of any participation in, any Allowed Claim or Allowed Interest that occurs after the close of business on the Distribution Record Date, and will be entitled for all purposes herein to recognize and distribute Securities, property, notices, and other documents only to those Holders of Allowed Claims or Allowed Interests who are Holders of such Claims or Interests (or participants therein) as of the close of business on the Distribution Record Date.

D. Disbursing Agent

Except as otherwise provided in the Plan, all distributions under the Plan shall be made by the Disbursing Agent. Neither the Disbursing Agent nor the Plan Administrator shall be required to give any bond or surety or other security for the performance of its duties unless otherwise ordered by the Bankruptcy Court.

The Disbursing Agent shall be empowered to: (a) effect all actions and execute all agreements, instruments, and other documents necessary to perform its duties under the Plan; (b) make all distributions contemplated by the Plan; (c) employ professionals to represent it with respect to its responsibilities; and (d) exercise such other powers as may be vested in the Disbursing Agent by order of the Bankruptcy Court, pursuant to the Plan, or as deemed by the Disbursing Agent to be necessary and proper to implement the provisions of the Plan.

1. Expenses Incurred On or After the Effective Date

Except as otherwise ordered by the Bankruptcy Court, the amount of any reasonable fees and expenses incurred by the Disbursing Agent or Plan Administrator on or after the Effective Date, and any reasonable compensation and expense reimbursement claims (including reasonable attorney fees and expenses), made by the Disbursing Agent or Plan Administrator shall be paid in Cash from the Distributions Reserve.

2. No Liability

Except on account of gross negligence or willful misconduct, the Disbursing Agent shall have no (a) liability to any party for actions taken in accordance with this Plan or in reliance upon information provided to it in accordance with this Plan or (b) obligation or liability to any party who does not hold a Claim against the Debtors as of the Distribution Record Date or any other date on which a distribution is made or who does not otherwise comply with the terms of this Plan.

E. Delivery of Distributions and Undeliverable or Unclaimed Distributions

1. Record Date for Distribution

On the Distribution Record Date, the Claims Register and the Debtors' books and records shall be closed and any party responsible for making distributions shall instead be authorized and entitled to recognize only those record Holders listed on the Claims Register or in the Debtors' books and records as of the close of business on the Distribution Record Date. If a Claim is transferred 20 or fewer days before the Distribution Record Date, the Disbursing Agent shall make distributions to the transferee only to the extent practical and, in any event, only if the relevant transfer form contains an unconditional and explicit certification and waiver of any objection to the transfer by the transferor.

2. Delivery of Distributions in General

Except as otherwise provided herein, the Disbursing Agent shall make distributions to Holders of Allowed Claims and Allowed Interests as of the Distribution Record Date at the address for each such Holder as indicated on the Debtors' records as of the date of any such distribution;

provided, *however*, that the manner of such distributions shall be determined at the discretion of the Disbursing Agent.

In the event that any payment or act under the Plan is required to be made or performed on a date that is not a Business Day, then the making of such payment or the performance of such act may be completed on the next succeeding Business Day, but shall be deemed to have been completed as of the required date. If and to the extent that there are Disputed Claims, distributions on account of any such Disputed Claims shall be made pursuant to the provisions set forth in this Article VI of the Plan.

3. Minimum Distributions

No Distribution shall be made by the Disbursing Agent on account of an Allowed Claim if the amount to be distributed to the Holder of such Claim on the applicable Distribution Date has an economic value of less than $250.

4. Undeliverable Distributions and Unclaimed Property

In the event that any distribution to any Holder of an Allowed Claim or Allowed Interest (as applicable) is returned as undeliverable, no distribution to such Holder shall be made unless and until the Disbursing Agent has determined the then-current address of such Holder or the Holder informs the Disbursing Agent of its current address, at which time such distribution shall be made to such Holder without interest; *provided*, *however*, that such distributions shall be deemed unclaimed property under section 347(b) of the Bankruptcy Code at the expiration of one year from the Effective Date. After such date, all unclaimed property or interests in property shall revert to the Distributions Reserve automatically and without need for a further order by the Bankruptcy Court (notwithstanding any applicable federal, provincial or state escheat, abandoned, or unclaimed property laws to the contrary) and shall be distributed in accordance with the terms of this Plan, and the Claim of any Holder of Claims and Interests to such property or Interest in property shall be forever barred.

5. Surrender of Canceled Instruments or Securities

Except as otherwise provided herein, as a condition precedent to receiving any distribution on account of its Allowed Claim or Allowed Interest, each Holder of an Allowed Claim or Allowed Interest based upon an instrument or other security shall be deemed to have surrendered such instrument, security or other documentation underlying such Claim and all such surrendered instruments, securities and other documentation shall be deemed cancelled pursuant to Article IV.H of the Plan.

F. Manner of Payment

All distributions of Cash to the Holders of the applicable Allowed Claims or Allowed Interests under the Plan shall be made by the Disbursing Agent on behalf of the applicable Debtor.

At the option of the Disbursing Agent, any Cash payment to be made hereunder may be made by check or wire transfer or as otherwise required or provided in applicable agreements.

G. Compliance with Tax Requirements

In connection with the Plan, to the extent applicable, the Wind Down Estates, Plan Administrator, Disbursing Agent, and any applicable withholding agent shall comply with all Tax withholding and reporting requirements imposed on them by any Governmental Unit, and all distributions made pursuant to the Plan shall be subject to such withholding and reporting requirements. Notwithstanding any provision in the Plan to the contrary, such parties shall be authorized to take all actions necessary or appropriate to comply with such withholding and reporting requirements, including liquidating a portion of the distribution to be made under the Plan to generate sufficient funds to pay applicable withholding Taxes, withholding distributions pending receipt of information necessary to facilitate such distributions, or establishing any other mechanisms they believe are reasonable and appropriate. All Persons holding Claims against any Debtor shall be required to provide any additional information necessary for the Debtors, Disbursing Agent, and any applicable withholding agent to comply with all Tax withholding and reporting requirements imposed on them by any Governmental Unit, including an Internal Revenue Service Form W-8 or W-9, as applicable, and any other applicable tax forms. The Wind Down Estates, Plan Administrator and Disbursing Agent reserve the right to allocate all distributions made under the Plan in a manner that complies with all other legal requirements, such as applicable wage garnishments, alimony, child support, and other spousal awards, Liens, and encumbrances. Any amounts withheld pursuant to the Plan shall be deemed to have been distributed to and received by the applicable recipient for all purposes of the Plan. Notwithstanding any other provision of the Plan to the contrary, each Holder of an Allowed Claim or Allowed Interest shall have the sole and exclusive responsibility for the satisfaction and payment of any Tax obligations imposed on such Holder by any Governmental Unit, including income, withholding and other Tax obligations, on account of such distribution.

H. Allocations

Distributions in respect of Allowed Claims shall be allocated first to the principal amount of such Claims (as determined for federal income tax purposes) and then, to the extent the consideration exceeds the principal amount of the Claims, to any portion of such Claims for accrued but unpaid interest.

I. No Postpetition Interest on Claims

Unless otherwise specifically provided for in the Plan or the Confirmation Order, or required by applicable bankruptcy and non-bankruptcy law, postpetition interest shall not accrue or be paid on any prepetition Claims, and no Holder of a Claim shall be entitled to interest accruing on or after the Petition Date on such Claim.

J. Foreign Currency Exchange Rate

Except as otherwise provided in a Bankruptcy Court order, as of the Effective Date, any Claim asserted in currency other than U.S. dollars shall be automatically deemed converted to the equivalent U.S. dollar value using the exchange rate for the applicable currency as published in The Wall Street Journal, National Edition, on the Effective Date.

K. Setoffs and Recoupment

Except as expressly provided in this Plan, the Plan Administrator or Disbursing Agent may, pursuant to section 553 of the Bankruptcy Code, set off and/or recoup against any distributions to be made on account of any Allowed Claim, any and all claims, rights, and Causes of Action that the Debtors held against the Holder of such Allowed Claim to the extent such setoff or recoupment is either (1) agreed in amount among the Debtors or Plan Administrator, as applicable, and the Holder of the Allowed Claim or (2) otherwise adjudicated by the Bankruptcy Court or another court of competent jurisdiction.

L. Claims Paid or Payable by Third Parties

1. Claims Paid by Third Parties

The Debtors or the Plan Administrator, as applicable, shall reduce a Claim, and such Claim shall be Disallowed without a Claims objection having to be Filed by the Debtors or Plan Administrator, as applicable, and without any further notice to or action, order or approval of the Bankruptcy Court, to the extent that the Holder of such Claim receives payment on account of such Claim from a party that is not a Debtor. To the extent a Holder of a Claim receives a Distribution on account of such Claim and receives payment from a party that is not a Debtor, such Holder shall, within 14 days of receipt thereof, repay or return the Distribution to the Debtors or Plan Administrator, as applicable, to the extent the Holder's total recovery on account of such Claim from the third party and under this Plan exceeds the amount of such Allowed Claim as of the Effective Date.

2. Claims Payable by Third Parties

No distributions under the Plan will be made on account of an Allowed Claim that is payable pursuant to an Insurance Policy until the Holder of such Allowed Claim has exhausted all remedies with respect to such Insurance Policy. If the Debtors or Plan Administrator, as applicable, believe a Holder of an Allowed Claim has recourse to an Insurance Policy and intend to withhold a Distribution pursuant to this Article VI.L, the Debtors or the Plan Administrator, as applicable, shall provide written notice to such Holder as to what the Debtors or Plan Administrator believe to be the nature and scope of applicable insurance coverage. To the extent that one or more of the Debtors' insurers agrees to satisfy in full or in part a Claim (if and to the extent adjudicated by a court of competent jurisdiction), then immediately upon such insurer's agreement, such Claim (or the applicable portion of such Claim) may be expunged without a Claims objection having to be Filed and without any further notice to or action, order, or approval of the Bankruptcy Court.

3. Applicability and Preservation of Insurance Policies

Except as otherwise provided in the Plan, distributions to Holders of Allowed Claims shall be in accordance with the provisions of any applicable Insurance Policy. Nothing contained in the Plan shall constitute or be deemed a waiver of any Cause of Action that the Debtors or any Entity may hold against any other Entity, including insurers under any policies of insurance, nor shall anything contained herein constitute or be deemed a waiver by such insurers of any defenses, including coverage defenses, held by such insurers.

ARTICLE VII
PROCEDURES FOR RESOLVING CONTINGENT, UNLIQUIDATED, AND DISPUTED CLAIMS

A. Disputed Claims

On or after the Effective Date, the Wind Down Estates shall have and retain any and all rights and defenses that the Debtors had with respect to any Claim immediately prior to the Effective Date. If the Debtors or the Plan Administrator dispute or object to any Claim, such dispute shall be determined, resolved, or adjudicated in the Chapter 11 Cases in accordance with this Article VII or any applicable order entered by the Bankruptcy Court. Solely to the extent that an Entity is required to File a Proof of Claim and the Debtors or the Plan Administrator, as applicable, do not determine that the Claim subject to such Proof of Claim is Allowed, such Claim shall be Disputed unless Allowed or Disallowed by a Final Order. All Proofs of Claim required to be Filed by the Plan or order of the Bankruptcy Court that are Filed after the date that they are required to be Filed shall be Disallowed and forever barred, estopped and enjoined from assertion, and shall not be enforceable against any the Debtors or the Wind Down Estates, without the need for any objection by the Debtors or the Plan Administrator or any further notice to or action, order or approval of the Bankruptcy Court.

ANY CLAIM THAT HAS BEEN LISTED IN THE UNSECURED CREDITORS LIST OR THE SCHEDULES AS DISPUTED, CONTINGENT, OR UNLIQUIDATED, AND FOR WHICH NO PROOF OF CLAIM HAS BEEN TIMELY FILED, SHALL BE DEEMED DISALLOWED AND SHALL BE EXPUNGED WITHOUT FURTHER ACTION AND WITHOUT ANY FURTHER NOTICE TO OR ACTION, ORDER, OR APPROVAL OF THE BANKRUPTCY COURT.

EXCEPT AS PROVIDED HEREIN, IN AN ORDER OF THE BANKRUPTCY COURT, OR OTHERWISE AGREED, ANY AND ALL PROOFS OF CLAIM FILED AFTER THE APPLICABLE DEADLINE TO FILE SHALL BE DEEMED DISALLOWED AND EXPUNGED AS OF THE EFFECTIVE DATE WITHOUT ANY FURTHER NOTICE TO OR ACTION, ORDER, OR APPROVAL OF THE BANKRUPTCY COURT, AND HOLDERS OF SUCH CLAIMS MAY NOT RECEIVE ANY DISTRIBUTIONS ON ACCOUNT OF SUCH CLAIMS, UNLESS AT OR PRIOR TO THE CONFIRMATION HEARING SUCH LATE CLAIM HAS BEEN DEEMED TIMELY FILED BY A FINAL ORDER.

B. Claims and Interests Administration Responsibilities

Except as otherwise specifically provided in the Plan, the Debtors, prior to the Effective Date, and the Plan Administrator, after the Effective Date, have the sole authority: (1) to File, withdraw, or litigate to judgment, objections to Claims or Interests; (2) to settle or compromise any Disputed Claim without any further notice to or action, order, or approval by the Bankruptcy Court; and (3) to administer and adjust the Claims Register to reflect any such settlements or compromises without any further notice to or action, order, or approval by the Bankruptcy Court. For the avoidance of doubt, except as otherwise provided herein, from and after the Effective Date, the Wind Down Estates shall have and retain any and all rights and defenses such Debtor had

immediately prior to the Effective Date with respect to any Disputed Claim or Interest, including the Causes of Action retained pursuant to Article IV.K of the Plan.

C. Authority to Amend Schedules

The Debtors prior to the Effective Date, and the Plan Administrator, after the Effective Date, will have the authority to amend the Schedules with respect to any Claim and to make distributions based on such amended Schedules (if no Proof of Claim is timely Filed in response thereto) without approval of the Bankruptcy Court; *provided that* if any such amendment to the Schedules reduces the amount of a Claim or changes the nature or priority of a Claim, the Debtors or the Plan Administrator, as applicable, will provide the Holder of such Claim with notice of such amendment and such parties will have 21 days to File a Proof of Claim with respect to such Claim.

D. Estimation of Claims

The Debtors prior to the Effective Date, and the Plan Administrator, after the Effective Date, may (but are not required to) at any time request that the Bankruptcy Court disallow and/or estimate any Disputed Claim pursuant to section 502(c) of the Bankruptcy Code, regardless of whether any party previously has objected to such Claim or whether the Bankruptcy Court has ruled on any such objection, and the Bankruptcy Court shall retain jurisdiction to estimate any such Claim, including during the litigation of any objection to any Claim or during any appeal relating to such objection. In the event that the Bankruptcy Court estimates any Disputed Claim, that estimated amount shall constitute a maximum limitation on such Claim for all purposes under the Plan (including for purposes of distributions and the Distributions Reserve), and the Debtors may elect to pursue any supplemental proceedings to object to any ultimate Distribution on such Claim. Notwithstanding section 502(j) of the Bankruptcy Code, in no event shall any Holder of a Claim that has been estimated pursuant to section 502(c) of the Bankruptcy Code or otherwise be entitled to seek reconsideration of such estimation unless such Holder has Filed a motion requesting the right to seek such reconsideration on or before 21 days after the date on which such Claim is estimated. All of the aforementioned Claims and objection, estimation, and resolution procedures are cumulative and not exclusive of one another. Claims may be estimated and subsequently compromised, settled, withdrawn, or resolved by any mechanism approved by the Bankruptcy Court.

E. Adjustment to Claims or Interests without Objection

Any duplicate Claim or Interest or any Claim or Interest that has been paid, satisfied, amended, or superseded may be adjusted or expunged on the Claims Register or the Debtors' books and records by the Plan Administrator without the Plan Administrator having to File an application, motion, complaint, objection, or any other legal proceeding seeking to object to such Claim or Interest and without any further notice to or action, order, or approval of the Bankruptcy Court.

F. Disallowance of Claims or Interests

Any Claims held by Entities from which property is recoverable under section 542, 543, 550, or 553 of the Bankruptcy Code or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of the Bankruptcy Code, shall be deemed

Disallowed pursuant to section 502(d) of the Bankruptcy Code, and Holders of such Claims may not receive any distributions on account of such Claims until such time as such Causes of Action against that Entity have been settled or a court order with respect thereto has been entered and all sums due, if any, to the Debtors by that Entity have been turned over or paid to the Debtors or the Plan Administrator.

G. Reimbursement or Contribution

If the Bankruptcy Court disallows a Claim for reimbursement or contribution of an Entity pursuant to section 502(e)(1)(B) of the Bankruptcy Code, then to the extent that such Claim is contingent as of the time of Allowance or Disallowance, such Claim shall be forever Disallowed and expunged notwithstanding section 502(j) of the Bankruptcy Code, unless prior to the Confirmation Date: (1) such Claim has been adjudicated as non-contingent or (2) the relevant Holder of a Claim has Filed a non-contingent Proof of Claim on account of such Claim and a Final Order has been entered prior to the Confirmation Date determining such Claim as no longer contingent.

H. Amendments to Claims

On or after the Effective Date, except as provided in this Plan or the Confirmation Order, a Claim may not be Filed or amended without the prior authorization of the Bankruptcy Court and any such new or amended Claim Filed shall be deemed Disallowed in full and expunged without any further action, order, or approval of the Bankruptcy Court.

I. No Distributions Pending Allowance

No payment or distribution provided under the Plan shall be made to the extent that any Claim is a Disputed Claim, including if an objection to a Claim or portion thereof is Filed as set forth in Article VII, unless and until such Disputed Claim becomes an Allowed Claim; *provided* that any portion of a Claim that is an Allowed Claim shall receive the payment or distribution provided under the Plan thereon notwithstanding that any other portion of such Claim is a Disputed Claim.

J. Single Satisfaction of Claims

Holders of Allowed Claims may assert such Claims against each Debtor obligated with respect to such Claim, and such Claims shall be entitled to share in the recovery provided for the applicable Class of Claims against each obligated Debtor based upon the full Allowed amount of the Claim. Notwithstanding the foregoing, in no case shall the aggregate value of all property received or retained under the Plan on account of any Allowed Claim exceed 100% of such Allowed Claim plus interest, if applicable.

K. Distributions After Allowance

To the extent that a Disputed Claim ultimately becomes Allowed, distributions (if any) shall be made to the Holder of such Allowed Claim in accordance with the provisions of the Plan. As soon as reasonably practicable after the date that the order or judgment of the Bankruptcy Court allowing any Disputed Claim becomes a Final Order, the Disbursing Agent shall provide to the

Holder of such Claim the distribution (if any) to which such Holder is entitled under the Plan as of the Effective Date, without any interest to be paid on account of such Claim.

ARTICLE VIII
SETTLEMENT, RELEASE, INJUNCTION, AND RELATED PROVISIONS

A. General Settlement of Claims and Interests

As discussed in the Disclosure Statement and as otherwise provided herein, pursuant to section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, and in consideration for the classification, distributions, releases and other benefits provided under the Plan, upon the Effective Date, the provisions of the Plan shall constitute a good faith compromise and settlement of all Claims, Interests, issues, disputes and controversies that were, or could have been asserted in connection with the Chapter 11 Cases. The Plan shall be deemed a motion to approve the good faith compromise and settlement of all such Claims, Interests, issues, disputes and controversies pursuant to Bankruptcy Rule 9019, and the entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of such compromise and settlement under section 1123 of the Bankruptcy Code and Bankruptcy Rule 9019, as well as a finding by the Bankruptcy Court that such settlement and compromise is fair, equitable, reasonable and in the best interests of the Debtors, their Estates, the Wind Down Estates and Holders of Claims and Interests. Subject to Article VI hereof, all distributions made to Holders of Allowed Claims and Allowed Interests (as applicable) in any Class are intended to be and shall be final.

B. Releases by the Debtors

Notwithstanding anything contained in the Plan to the contrary, pursuant to section 1123(b) of the Bankruptcy Code, for good and valuable consideration, on and after the Effective Date, each Released Party is deemed released and discharged by the Debtors, the Debtors' Estates, and the Wind Down Estates from any and all Claims and Causes of Action, whether known or unknown, including any derivative claims, asserted on behalf of the Debtors or the Wind Down Estates, that the Debtors, their Estates or the Wind Down Estates would have been legally entitled to assert in their own right (whether individually or collectively) or on behalf of the Holder of any Claim against, or Interest in, a Debtor or other Entity, or that any Holder of any Claim against, or Interest in, a Debtor or other Entity could have asserted on behalf of the Debtors, based on or relating to, or in any manner arising from, in whole or in part, the Debtors (including the management, ownership, or operation thereof), any Securities issued by the Debtors and the ownership thereof, Debtors' in- or out-of-court restructuring efforts, any Avoidance Actions (but excluding Avoidance Actions brought as counterclaims or defenses to Claims asserted against the Debtors), intercompany transactions, the Chapter 11 Cases, the formulation, preparation, dissemination, solicitation, negotiation, entry into, or filing of the Disclosure Statement, the Plan, the Plan Supplement, or any contract, instrument, release, or other agreement or document created or entered into in connection with the Disclosure Statement, the Plan, the Plan Supplement, the Chapter 11 Cases, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the distribution of property under the Plan or any other related agreement, or upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on

or before the Effective Date. Notwithstanding anything to the contrary in the foregoing, the releases set forth above do not release (a) any post-Effective Date obligations of any party or Entity under the Plan or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan or (b) any Person from any claim or Causes of Action related to an act or omission that is determined in a Final Order by a court competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence by such Person.

On the Effective Date, and subject to receipt by the VarigLog Estate of the VarigLog Settlement Amount and receipt by HJDK of the HJDK Settlement Amount, the Debtors shall release and forever discharge (x) the Participating Insurers and their respective Related Parties, with respect to the Allowed VarigLog Claims, and (y) Zurich and its Related Parties, with respect to the Allowed HJDK Claims, from any and all demands, claims, potential claims, rights, damages, debts, liabilities, accounts, attorneys' fees, obligations, costs, expenses, liens, actions and causes of action of every kind and nature whatsoever, whether now known or unknown, which they now have, own or hold, or at any time heretofore had, owned or held, or could, shall or may hereafter have, own, or hold arising out of, related to, based upon, by reason of, or in any way involving the Allowed VarigLog Claims or Allowed HJDK Claims, as applicable, and any of the facts or circumstances alleged by the VarigLog Estate (including, but not limited to, any claim of any creditor of the VarigLog Estate on whose behalf it has purported to act and bring claims in a representative capacity or for whom it could have done so) or by HJDK, as applicable, including all loss incurred or to be incurred in connection with the Allowed VarigLog Claims or Allowed HJDK Claims, as applicable, and the defense or settlement thereof, except that the foregoing shall not release claims by the Debtors against Zurich and the Participating Insurers for reimbursement of Defense Costs, which is subject to Article IVE.5 herein.

Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of the Debtor Releases, which includes by reference each of the related provisions and definitions contained in the Plan, and further, shall constitute the Bankruptcy Court's finding that the Debtor Releases are: (a) in exchange for the good and valuable consideration provided by the Released Parties, including, without limitation, the Released Parties' contributions to facilitating and implementing the Plan; (b) a good faith settlement and compromise of the Claims released by the Debtor Releases; (c) in the best interests of the Debtors, their Estates, the Wind Down Estates and all Holders of Claims and Interests; (d) fair, equitable, and reasonable; (e) given and made after due notice and opportunity for hearing; and (f) a bar to any of the Debtors, the Debtors' Estates or the Wind Down Estates asserting any Claim or Cause of Action released pursuant to the Debtor Releases.

C. Releases by the Releasing Parties Other Than the Debtors.

Notwithstanding anything contained in the Plan to the contrary, as of the Effective Date, and subject to receipt by VRG of the VRG Settlement Amount, receipt by HJDK of the HJDK Settlement Amount, and receipt by the VarigLog Estate of the VarigLog Settlement Amount, each Releasing Party (other than the Debtors) is deemed to have released and discharged each Released Party from any and all Claims and Causes of Action, whether known or unknown, including any derivative claims, asserted on behalf of the

Debtors, that such Entity would have been legally entitled to assert (whether individually or collectively), based on or relating to, or in any manner arising from, in whole or in part, the Debtors (including the management, ownership or operation thereof), any Securities issued by the Debtors and the ownership thereof, the Debtors' in- or out-of-court restructuring efforts, any Avoidance Actions, intercompany transactions, the Chapter 11 Cases, the formulation, preparation, dissemination, solicitation, negotiation, or filing of the Disclosure Statement, the Plan, the Plan Supplement, or any contract, instrument, release, or other agreement or document created or entered into in connection with the Disclosure Statement, the Plan, the Plan Supplement, the Chapter 11 Cases, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the distribution of property under the Plan or any other related agreement, or upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date. Notwithstanding anything to the contrary in the foregoing, the releases set forth above do not release (a) any post-Effective Date obligations of any party or Entity under the Plan or any document, instrument, or agreement (including those set forth in the Plan Supplement) executed to implement the Plan, (b) any Person from any claim or Causes of Action related to an act or omission that is determined in a Final Order by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence by such Person, or (c) any Claims or Causes of Action that VRG, HJDK or the VarigLog Estate has or may have against each other.

On the Effective Date, (x) subject to receipt of the VarigLog Settlement Amount, the VarigLog Estate and its Related Parties shall release and forever discharge the Participating Insurers and their respective Related Parties, with respect to the Allowed VarigLog Claims, and (y) subject to receipt of the HJDK Settlement Amount, HJDK and its Related Parties shall release and forever discharge Zurich and its Related Parties, with respect to the Allowed HJDK Claims, from any and all demands, claims, potential claims, rights, damages, debts, liabilities, accounts, attorneys' fees, obligations, costs, expenses, liens, actions and causes of action of every kind and nature whatsoever, whether now known or unknown, which they now have, own or hold, or at any time heretofore had, owned or held, or could, shall or may hereafter have, own, or hold arising out of, related to, based upon, by reason of, or in any way involving the Allowed VarigLog Claims or Allowed HJDK Claims, as applicable, and any of the facts or circumstances alleged by the VarigLog Estate (including, but not limited to, any claim of any creditor of the VarigLog Estate on whose behalf it has purported to act and bring claims in a representative capacity or for whom it could have done so) or by HJDK, as applicable, including all loss incurred or to be incurred in connection with the Allowed VarigLog Claims or Allowed HJDK Claims, as applicable, and the defense or settlement thereof.

Entry of the Confirmation Order shall constitute the Bankruptcy Court's approval of the Third-Party Releases, which includes by reference each of the related provisions and definitions contained herein, and, further, shall constitute the Bankruptcy Court's finding that the Third-Party Releases are: (a) consensual; (b) essential to Confirmation of the Plan; (c) given in exchange for the good and valuable consideration provided by the Released Parties; (d) a good faith settlement and compromise of the Claims released by the Third-Party Releases; (e) in the best interests of the Debtors, their Estates and the Wind Down

Estates; (f) fair, equitable, and reasonable; (g) given and made after due notice and opportunity for hearing; and (h) a bar to any of the Releasing Parties asserting any claim or Cause of Action released pursuant to the Third-Party Releases.

D. Exculpation.

Except as otherwise specifically provided in the Plan, no Exculpated Party shall have or incur liability for and each Exculpated Party is hereby released and exculpated from any Cause of Action for any claim related to any act or omission in connection with, relating to, or arising out of, the Chapter 11 Cases, the formulation, preparation, dissemination, solicitation, negotiation, or filing of the Disclosure Statement, the Plan, the Plan Supplement, or any contract, instrument, release, or other agreement or document created or entered into in connection with the Disclosure Statement, the Plan, the Plan Supplement, the Chapter 11 Cases, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the administration of the Wind Down Estates and distribution of property under the Plan or any other related agreement, or upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date, except for claims related to any act or omission that is determined in a Final Order by a court of competent jurisdiction to have constituted actual fraud, willful misconduct, or gross negligence, but in all respects such Entities shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan.

The Exculpated Parties shall be deemed to have participated in good faith and in compliance with the applicable laws with regard to the solicitation of votes and distribution of consideration pursuant to the Plan and, therefore, are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or distributions made pursuant to the Plan.

E. Injunction.

Except as otherwise expressly provided in the Plan or for obligations issued or required to be paid pursuant to the Plan or the Confirmation Order, all Entities who have held, hold, or may hold Claims or Interests that have been released, discharged, or are subject to exculpation are, to the fullest extent permitted by applicable law, permanently enjoined, from and after the Effective Date, from taking any of the following actions against, as applicable, the Debtors, the Exculpated Parties, or the Released Parties: (1) commencing or continuing in any manner any action, suit or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests; (2) enforcing, attaching, collecting, or recovering by any manner or means any judgment, award, decree, or order against such Entities on account of or in connection with or with respect to any such Claims or Interests; (3) creating, perfecting, or enforcing any encumbrance of any kind against such Entities or the property or the estates of such Entities on account of or in connection with or with respect to any such Claims or Interests; (4) asserting any right of setoff, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect

to any such Claims or Interests unless such Holder has Filed a motion requesting the right to perform such setoff on or before the Effective Date, and notwithstanding an indication of a Claim or Interest or otherwise that such Holder asserts, has, or intends to preserve any right of setoff pursuant to applicable law or otherwise; and (5) commencing or continuing in any manner any action or other proceeding of any kind on account of or in connection with or with respect to any such Claims or Interests released or settled pursuant to the Plan.

Upon entry of the Confirmation Order, all Holders of Claims and Interests and their respective current and former employees, agents, officers, directors, principals, and direct and indirect Affiliates shall be enjoined from taking any actions to interfere with the implementation or Consummation of the Plan.

ARTICLE IX
CONDITIONS PRECEDENT TO CONFIRMATION AND CONSUMMATION OF THE PLAN

A. Conditions Precedent to Confirmation

The following conditions are conditions to the entry of the Confirmation Order unless such conditions, or any of them, have been satisfied or duly waived pursuant to Article IX.C of the Plan:

1. The Bankruptcy Court shall have entered an order approving the adequacy of the Disclosure Statement.

2. The Brazilian Bankruptcy Court shall have approved the VarigLog Estate's entry into and performance under the VarigLog Estate Settlement.

3. The final version of all schedules, documents, and exhibits in the Plan Supplement (if any) shall have been Filed.

4. The Plan shall not have been materially amended, altered or modified from the Plan as Filed, unless such material amendment, alteration or modification has been made in accordance with Article X of the Plan.

B. Conditions Precedent to the Effective Date

It shall be a condition to the Effective Date that the following conditions shall have been satisfied or waived pursuant to the provisions of Article IX.C of the Plan:

1. the Debtors shall have obtained all authorizations, consents, regulatory approvals, rulings, or documents that are necessary to implement and effectuate the Plan and each of the other transactions contemplated thereby;

2. the Bankruptcy Court shall have entered the Confirmation Order;

3. the Distributions Reserve shall have been established in accordance with terms herein;

4. the Professional Claims Escrow Account shall have been established and fully funded with Cash in the amount equal to the Professional Claims Amount minus any amounts paid prior to the Effective Date; and

5. the Plan and all documents in the Plan Supplement shall not have been materially amended, altered or modified from the Plan and Plan Supplement as confirmed by the Confirmation Order, unless such material amendment, alteration or modification has been made in accordance with Article X of the Plan.

C. Waiver of Conditions

The conditions to Confirmation and/or Consummation set forth in this Article IX may be waived by the Debtors without notice, leave, or order of the Bankruptcy Court or any formal action other than proceedings to confirm or consummate the Plan.

D. Effect of Failure of Conditions

If Consummation does not occur, the Plan shall be null and void in all respects and nothing contained in the Plan or the Disclosure Statement shall: (1) constitute a waiver or release of any Claims by the Debtors, Claims, or Interests; (2) prejudice in any manner the rights of the Debtors, any Holders of Claims or Interests, or any other Entity; (3) constitute an admission, acknowledgment, offer, or undertaking by the Debtors, any Holders of Claims or Interests, or any other Entity; or (4) be used by the Debtors or any Entity as evidence (or in any other way) in any litigation, including with regard to the strengths or weaknesses of any of the parties' positions, arguments or claims.

E. Substantial Consummation

"Substantial Consummation" of the Plan, as defined in 11 U.S.C. § 1101(2), shall be deemed to occur on the Effective Date.

ARTICLE X
MODIFICATION, REVOCATION, OR WITHDRAWAL OF THE PLAN

A. Modification and Amendments

Except as otherwise specifically provided in this Plan, subject to the rights of the Settling Parties pursuant to the VRG Settlement Term Sheet, the HJDK Settlement Term Sheet and/or the VarigLog Estate Settlement Term Sheet, the Debtors reserve the right to modify the Plan, whether such modification is material or immaterial, and seek Confirmation consistent with the Bankruptcy Code and, as appropriate, not resolicit votes on such modified Plan. Subject to those restrictions on modifications set forth in the Plan and the requirements of section 1127 of the Bankruptcy Code, Rule 3019 of the Federal Rules of Bankruptcy Procedure, and, to the extent applicable, sections 1122, 1123, and 1125 of the Bankruptcy Code, and subject to the rights of the Settling Parties pursuant to the VRG Settlement Term Sheet, the HJDK Settlement Term Sheet and/or the VarigLog Estate Settlement Term Sheet, each of the Debtors expressly reserves its respective rights to revoke or withdraw, or to alter, amend, or modify the Plan with respect to such Debtor, one or more times, after Confirmation, and, to the extent necessary may initiate proceedings in the

Bankruptcy Court to so alter, amend, or modify the Plan, or remedy any defect or omission, or reconcile any inconsistencies in the Plan, the Disclosure Statement, or the Confirmation Order, in such matters as may be necessary to carry out the purposes and intent of the Plan.

Prior to the Effective Date, without limiting the foregoing consent rights, the Debtors may make appropriate technical adjustments and modifications to the Plan without further order or approval of the Bankruptcy Court.

B. Effect of Confirmation on Modifications

Entry of the Confirmation Order shall mean that all modifications or amendments to the Plan since the solicitation thereof are approved pursuant to section 1127(a) of the Bankruptcy Code and do not require additional disclosure or resolicitation under Bankruptcy Rule 3019.

Holders of Claims that have accepted the Plan shall be deemed to have accepted the Plan, as amended, modified, or supplemented, if the proposed amendment, modification, or supplement does not materially and adversely change the treatment of the Claim of such Holder; provided, however, that any Holders of Claims who were deemed to accept the Plan because such Claims were Unimpaired shall continue to be deemed to accept the Plan only if, after giving effect to such amendment, modification, or supplement, such Claims continue to be Unimpaired.

C. Revocation or Withdrawal of Plan

Subject to the rights of the Settling Parties pursuant to the VRG Settlement Term Sheet, the HJDK Settlement Term Sheet and/or the VarigLog Estate Settlement Term Sheet, the Debtors reserve the right to revoke or withdraw the Plan as to any individual Debtor, combination of Debtors or all of the Debtors prior to the Confirmation Date and to File subsequent plans of reorganization or liquidation. If the Debtors revoke or withdraw the Plan, or if Confirmation or Consummation does not occur as to any or all of the Debtors, then: (1) the Plan shall be null and void in all respects with respect to such Debtor(s); (2) any settlement or compromise embodied in the Plan (including the fixing or limiting to an amount certain of any Claim or Interest or Class of Claims or Interests), assumption or rejection of Executory Contracts or Unexpired Leases effected under the Plan, and any document or agreement executed pursuant to the Plan, shall be deemed null and void as to such Debtor(s); and (3) nothing contained in the Plan shall: (a) constitute a waiver or release of any Claims or Interests as to such Debtor(s); (b) prejudice in any manner the rights of such Debtor(s) or any other Entity; (c) constitute an admission, acknowledgement, offer, or undertaking of any sort by such Debtor or any other Entity; or (d) be used by the Debtors or any Entity as evidence (or in any other way) in any litigation, including with regard to the strengths or weaknesses of any of the parties' positions, arguments or claims. The revocation or withdrawal of the Plan with respect to one or more Debtors shall not require the resolicitation of the Plan with respect to the remaining Debtors.

ARTICLE XI
RETENTION OF JURISDICTION

Notwithstanding the entry of the Confirmation Order and the occurrence of the Effective Date, on and after the Effective Date, the Bankruptcy Court shall retain exclusive jurisdiction over

all matters arising out of, or relating to, the Chapter 11 Cases, the Wind Down Estates, and the Plan pursuant to sections 105(a) and 1142 of the Bankruptcy Code, including jurisdiction to:

1. Allow, Disallow, determine, liquidate, classify, estimate, or establish the priority, secured or unsecured status, or amount of any Claim or Interest, including the resolution of any request for payment of any Administrative Claim and the resolution of any and all objections to the secured or unsecured status, priority, amount, or allowance of Claims or Interests;

2. decide and resolve all matters related to the granting and denying, in whole or in part, any applications for allowance of compensation or reimbursement of expenses to Professionals authorized pursuant to the Bankruptcy Code or the Plan;

3. resolve any matters related to: (a) the assumption, assumption and assignment, or rejection of any Executory Contract or Unexpired Lease to which a Debtor is party or with respect to which a Debtor may be liable and to hear, determine, and, if necessary, liquidate, any Claims arising therefrom; (b) any potential contractual obligation under any Executory Contract or Unexpired Lease that is assumed; and (c) any dispute regarding whether a contract or lease is or was executory or expired;

4. ensure that distributions to Holders of Allowed Claims and Allowed Interests are accomplished pursuant to the provisions of the Plan;

5. modify the Plan before or after the Effective Date pursuant to section 1127 of the Bankruptcy Code; modify the Confirmation Order or any contract, instrument, release or other agreement or document entered into or delivered in connection with the Plan, the Disclosure Statement or the Confirmation Order; or remedy any defect or omission or reconcile any inconsistency in any Bankruptcy Court order, the Plan, the Disclosure Statement, the Confirmation Order or any contract, instrument, release or other agreement or document entered into, delivered or created in connection with the Plan, the Disclosure Statement or the Confirmation Order, in such manner as may be necessary or appropriate to consummate the Plan;

6. adjudicate, decide, or resolve any motions, adversary proceedings, contested or litigated matters, and any other matters, and grant or deny any applications involving a Debtor that may be pending on the Effective Date;

7. adjudicate, decide, or resolve any and all matters related to Causes of Action by or against a Debtor;

8. adjudicate, decide, or resolve any and all matters related to sections 1141, 1145, or 1146 of the Bankruptcy Code;

9. enter and implement such orders as may be necessary to execute, implement, or consummate the provisions of the Plan and all contracts, instruments, releases, indentures, and other agreements or documents created in connection with the Plan or the Disclosure Statement;

10. resolve any cases, controversies, suits, disputes, or Causes of Action that may arise in connection with the Consummation, interpretation, or enforcement of the Plan or any Entity's obligations incurred in connection with the Plan;

11. issue injunctions, enter and implement other orders, or take such other actions as may be necessary to restrain interference by any Entity with Consummation or enforcement of the Plan;

12. resolve any cases, controversies, suits, disputes, or Causes of Action with respect to the releases, injunctions, exculpations, and other provisions contained in Article VIII hereof and enter such orders as may be necessary or appropriate to implement such releases, injunctions, and other provisions;

13. resolve any cases, controversies, suits, disputes, or Causes of Action with respect to the repayment or return of distributions and the recovery of additional amounts owed by the Holder of a Claim or Interest for amounts not timely repaid pursuant to Article VI.L hereof;

14. enter and implement such orders as are necessary if the Confirmation Order is for any reason modified, stayed, reversed, revoked, or vacated;

15. determine any other matters that may arise in connection with or relate to the Plan, the Plan Supplement, the Disclosure Statement, the Confirmation Order, or any contract, instrument, release, indenture, or other agreement or document created in connection with the Plan or the Disclosure Statement;

16. adjudicate any and all disputes arising from or relating to distributions under the Plan;

17. consider any modifications of the Plan, to cure any defect or omission, or to reconcile any inconsistency in any Bankruptcy Court order, including the Confirmation Order;

18. determine requests for the payment of Claims entitled to priority pursuant to section 507 of the Bankruptcy Code;

19. hear and determine disputes arising in connection with the interpretation, implementation, or enforcement of the Plan or the Confirmation Order, including disputes arising under agreements, documents, or instruments executed in connection with the Plan;

20. hear and determine matters concerning state, local, and federal Taxes in accordance with sections 346, 505, and 1146 of the Bankruptcy Code;

21. hear and determine all disputes involving the existence, nature, or scope of the release provisions set forth in the Plan;

22. hear and determine all disputes involving the existence, nature, scope, or enforcement of any exculpations, discharges, injunctions, and releases granted in the Plan, including under Article VIII hereof, regardless of whether such termination occurred prior to or after the Effective Date;

23. enforce, clarify, or modify any orders previously entered by the Bankruptcy Court;

24. recover all Assets of the Debtors and their Estates, wherever located;

25. enter a final decree or other order concluding or closing the Chapter 11 Cases; and

26. hear any other matter not inconsistent with the Bankruptcy Code and over with the Bankruptcy Court has jurisdiction.

If the Bankruptcy Court abstains from exercising, or declines to exercise, jurisdiction or is otherwise without jurisdiction over any matter, including the matters set forth in this Article XI, the provisions of this Article XI shall have no effect upon and shall not control, prohibit, or limit the exercise of jurisdiction by any other court having jurisdiction with respect to such matter.

ARTICLE XII
MISCELLANEOUS PROVISIONS

A. Immediate Binding Effect

Subject to Article IX hereof and notwithstanding Bankruptcy Rules 3020(e), 6004(h), or 7062 or otherwise, upon the occurrence of the Effective Date, the terms of the Plan (including, for the avoidance of doubt, the documents and instruments contained in the Plan Supplement) shall be immediately effective and enforceable and deemed binding upon the Debtors, the Plan Administrator, any and all Holders of Claims or Interests (irrespective of how Holders of such Claims or Interests voted or whether such Claims or Interests are deemed to have accepted the Plan), all Entities that are parties to or are subject to the settlements, compromises, releases, and injunctions described in the Plan, each Entity acquiring property under the Plan, and any and all non-Debtor parties to Executory Contracts and Unexpired Leases with the Debtors. All Claims and debts shall be fixed, adjusted, or compromised, as applicable, pursuant to the Plan regardless of whether any Holder of a Claim or debt has voted on the Plan.

B. Additional Documents

On or before the Effective Date, the Debtors may File with the Bankruptcy Court such agreements and other documents as may be necessary to effectuate and further evidence the terms and conditions of the Plan. The Debtors or the Plan Administrator, as applicable, and all Holders of Claims receiving distributions pursuant to the Plan and all other parties in interest shall, from time to time, prepare, execute, and deliver any agreements or documents and take any other actions as may be necessary or advisable to effectuate the provisions and intent of the Plan.

C. Request for Expedited Determination of Taxes

The Plan Administrator may request an expedited determination under section 505(b) of the Bankruptcy Code with respect to Tax returns filed, or to be filed, on behalf of any Debtor for any and all taxable periods ending after the Petition Date through and including the Effective Date.

D. Reservation of Rights

Except as expressly set forth in the Plan, the Plan shall have no force or effect unless the Bankruptcy Court shall enter the Confirmation Order, and the Confirmation Order shall have no force or effect if the Effective Date does not occur. None of the Filing of the Plan, any statement or provision contained in the Plan, or the taking of any action by any Debtor with respect to the

Plan, the Disclosure Statement, or the Plan Supplement shall be or shall be deemed to be an admission or waiver of any rights of any Debtor with respect to the Holders of Claims or Interests prior to the Effective Date.

If the requisite Classes do not vote to accept this Plan, or the Bankruptcy Court does not confirm this Plan, then, subject to the rights of the Settling Parties pursuant to the VRG Settlement Term Sheet, the HJDK Settlement Term Sheet and/or the VarigLog Estate Settlement Term Sheet, Debtors reserve the right to have any Debtor's Chapter 11 Case dismissed or converted, or to liquidate or dissolve any Debtor under applicable non-bankruptcy procedure or chapter 7 of the Bankruptcy Code.

E. Protections Against Discriminatory Treatment

Consistent with section 525 of the Bankruptcy Code and the Supremacy Clause of the U.S. Constitution, all Entities, including Governmental Units, shall not discriminate against the Plan Administrator or deny, revoke, suspend, or refuse to renew a license, permit, charter, franchise, or other similar grant to, condition such a grant to, discriminate with respect to such a grant against, the Plan Administrator, or another Entity with whom the Plan Administrator have been associated, solely because each Debtor has been a debtor under chapter 11 of the Bankruptcy Code, has been insolvent before the commencement of the Chapter 11 Cases (or during the Chapter 11 Cases but before the Debtors are granted or denied a discharge), or has not paid a debt that is dischargeable in the Chapter 11 Cases.

F. Document Retention

On and after the Effective Date, the Plan Administrator may maintain documents in accordance with their standard document retention policy, as may be altered, amended, modified, or supplemented by the Plan Administrator.

G. Successors and Assigns

The rights, benefits, and obligations of any Entity named or referred to in the Plan shall be binding on, and shall inure to the benefit of any heir, executor, administrator, successor or assign, Affiliate, officer, manager, director, agent, representative, attorney, beneficiaries, or guardian, if any, of each Entity.

H. Notices

To be effective, any pleading, notice, or other document required by the Plan to be served on or delivered to the Debtors shall be served on:

Debtors	Counsel to the Debtors
MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS II L.P. 300 East 95th Street, Suite 102 New York, NY 10128 Attn: Matthew Doheny, Chief Restructuring Officer	SIMPSON THACHER & BARTLETT LLP 425 Lexington Avenue New York, NY 10017 Attn: Elisha D. Graff, Kathrine A. McLendon, Jamie J. Fell, and Dov Gottlieb Email: egraff@stblaw.com; kmclendon@stblaw.com; jamie.fell@stblaw.com; dov.gottlieb@stblaw.com Citypoint One Ropemaker Street London EC2Y 9HU, England Attn: Tyler D. Robinson and Lauren W. Brazier Email: trobinson@stblaw.com; lauren.brazier@stblaw.com
United States Trustee	
OFFICE OF THE UNITED STATES TRUSTEE U.S Federal Office Building 201 Varick Street, Suite 1006 New York, NY 10014 Attn: Brian S. Masumoto Email: Brian.Masumoto@usdoj.gov	

After the Effective Date, the Plan Administrator is authorized to limit the list of Entities receiving documents pursuant to Bankruptcy Rule 2002 to those Entities who have Filed a renewed request to receive documents pursuant to Bankruptcy Rule 2002.

I. Term of Injunctions or Stays

Unless otherwise provided in the Plan or in the Confirmation Order, all injunctions or stays in effect in the Chapter 11 Cases pursuant to sections 105 or 362 of the Bankruptcy Code or any order of the Bankruptcy Court, and extant on the Confirmation Date (excluding any injunctions or stays contained in the Plan or the Confirmation Order) shall remain in full force and effect until the Effective Date. All injunctions or stays contained in the Plan or the Confirmation Order shall remain in full force and effect in accordance with their terms.

J. Entire Agreement

Except as otherwise indicated, the Plan (including, for the avoidance of doubt, the documents and instruments in the Plan Supplement) supersedes all previous and contemporaneous negotiations, promises, covenants, agreements, understandings, and representations on such subjects, all of which have become merged and integrated into the Plan.

K. Exhibits

All exhibits and documents included in the Plan Supplement are incorporated into and are a part of the Plan as if set forth in full in the Plan. After the exhibits and documents are Filed, copies of such exhibits and documents shall be available upon written request to the Debtors' counsel at the address above or by downloading such exhibits and documents from the Debtors' restructuring website at https://www.kccllc.net/mpii. To the extent any exhibit or document is inconsistent with the terms of the Plan, unless otherwise ordered by the Bankruptcy Court, the non-exhibit or non-document portion of the Plan shall control.

L. Nonseverability of Plan Provisions

If, prior to Confirmation, any term or provision of the Plan is held by the Bankruptcy Court to be invalid, void, or unenforceable, the Bankruptcy Court shall have the power to alter and interpret such term or provision to make it valid or enforceable to the maximum extent practicable, consistent with the original purpose of the term or provision held to be invalid, void, or unenforceable, and such term or provision shall then be applicable as altered or interpreted. Notwithstanding any such holding, alteration, or interpretation, the remainder of the terms and provisions of the Plan will remain in full force and effect and will in no way be affected, impaired, or invalidated by such holding, alteration, or interpretation. The Confirmation Order shall constitute a judicial determination and shall provide that each term and provision of the Plan, as it may have been altered or interpreted in accordance with the foregoing, is: (1) valid and enforceable pursuant to its terms; (2) integral to the Plan and may not be deleted or modified without the Debtors' or Plan Administrator's consent, as applicable; and (3) nonseverable and mutually dependent.

M. Votes Solicited in Good Faith

The Debtors have, and upon entry of the Confirmation Order, the Debtors shall be deemed to have, solicited votes on the Plan in good faith and in compliance with section 1125(g) of the Bankruptcy Code, and pursuant to section 1125(e) of the Bankruptcy Code, the Debtors and each of their respective Affiliates, agents, representatives, members, principals, shareholders, officers, directors, employees, advisors, and attorneys will be deemed to have participated in good faith and in compliance with the Bankruptcy Code in the offer, issuance, sale, and purchase of Securities offered and sold under the Plan, and, therefore, neither any of such parties or individuals or the Plan Administrator will have any liability for the violation of any applicable law, rule, or regulation governing the solicitation of votes on the Plan or the offer, issuance, sale, or purchase of the Securities offered, issued, and/or distributed under the Plan.

N. Closing of Chapter 11 Cases

On or after the Effective Date, the Plan Administrator shall be authorized, subject to compliance with Bankruptcy Rule 3022 and any applicable order of the Bankruptcy Court, at any time to submit an order or separate orders to the Bankruptcy Court under certification of counsel closing any of the Chapter 11 Cases (collectively, when closed, the "***Closing Cases***") without prejudice to the rights of any party in interest to seek to reopen such Chapter 11 Cases, and (1) all motions, contested matters, adversary proceedings, and other matters with respect to such Closing

Cases shall be administered in the remaining Chapter 11 Cases of one or more Debtors, without prejudice to the rights of any party in interest, (2) the caption of the remaining Chapter 11 Cases shall be amended as necessary to reflect the closure of the applicable Closing Cases, and (3) a docket entry shall be made by the clerk of the Bankruptcy Court in each of the Closing Cases that reflects the closure of those cases pursuant hereto.

O. No Stay of Confirmation Order

The Confirmation Order shall contain a waiver of any stay of enforcement otherwise applicable, including pursuant to Bankruptcy Rules 3020(e) and 7062.

P. Waiver or Estoppel

Each Holder of a Claim or an Interest shall be deemed to have waived any right to assert any argument, including the right to argue that its Claim or Interest should be Allowed in a certain amount, in a certain priority, secured or not subordinated by virtue of an agreement made with the Debtors or their counsel, or any other Entity, if such agreement was not disclosed in the Plan, the Disclosure Statement, or papers Filed with the Bankruptcy Court prior to the Confirmation Date.

* * * *

Dated: April 20, 2023
New York, New York

MATLINPATTERSON GLOBAL OPPORTUNITIES PARTNERS II L.P. and each of its Debtor Affiliates

By: */s/ Matthew Doheny*
Name: Matthew Doheny
Title: Chief Restructuring Officer

ITEM NO. 121

JA-7

B1 (Official Form 1)(4/10)

United States Bankruptcy Court
Southern District of New York

Voluntary Petition

Name of Debtor (if individual, enter Last, First, Middle):	Name of Joint Debtor (Spouse) (Last, First, Middle):
Petra Offshore Fund LP	
All Other Names used by the Debtor in the last 8 years (include married, maiden, and trade names):	All Other Names used by the Joint Debtor in the last 8 years (include married, maiden, and trade names):
Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all): 75-3220102	Last four digits of Soc. Sec. or Individual-Taxpayer I.D. (ITIN) No./Complete EIN (if more than one, state all):
Street Address of Debtor (No. and Street, City, and State): 1370 Avenue of the Americas, 23rd Flr New York, NY ZIP Code 10019	Street Address of Joint Debtor (No. and Street, City, and State): ZIP Code
County of Residence or of the Principal Place of Business: New York	County of Residence or of the Principal Place of Business:
Mailing Address of Debtor (if different from street address): ZIP Code	Mailing Address of Joint Debtor (if different from street address): ZIP Code
Location of Principal Assets of Business Debtor (if different from street address above):	

Type of Debtor (Form of Organization) (Check one box)

- ☐ Individual (includes Joint Debtors) *See Exhibit D on page 2 of this form.*
- ☐ Corporation (includes LLC and LLP)
- ■ Partnership
- ☐ Other (If debtor is not one of the above entities, check this box and state type of entity below.)

Nature of Business (Check one box)

- ☐ Health Care Business
- ☐ Single Asset Real Estate as defined in 11 U.S.C. § 101 (51B)
- ☐ Railroad
- ☐ Stockbroker
- ☐ Commodity Broker
- ☐ Clearing Bank
- ■ Other

Tax-Exempt Entity (Check box, if applicable)

- ☐ Debtor is a tax-exempt organization under Title 26 of the United States Code (the Internal Revenue Code).

Chapter of Bankruptcy Code Under Which the Petition is Filed (Check one box)

- ☐ Chapter 7
- ☐ Chapter 9
- ■ Chapter 11
- ☐ Chapter 12
- ☐ Chapter 13
- ☐ Chapter 15 Petition for Recognition of a Foreign Main Proceeding
- ☐ Chapter 15 Petition for Recognition of a Foreign Nonmain Proceeding

Nature of Debts (Check one box)

- ☐ Debts are primarily consumer debts, defined in 11 U.S.C. § 101(8) as "incurred by an individual primarily for a personal, family, or household purpose."
- ■ Debts are primarily business debts.

Filing Fee (Check one box)

- ■ Full Filing Fee attached
- ☐ Filing Fee to be paid in installments (applicable to individuals only). Must attach signed application for the court's consideration certifying that the debtor is unable to pay fee except in installments. Rule 1006(b). See Official Form 3A.
- ☐ Filing Fee waiver requested (applicable to chapter 7 individuals only). Must attach signed application for the court's consideration. See Official Form 3B.

Chapter 11 Debtors

Check one box:

- ☐ Debtor is a small business debtor as defined in 11 U.S.C. § 101(51D).
- ■ Debtor is not a small business debtor as defined in 11 U.S.C. § 101(51D).

Check if:

- ☐ Debtor's aggregate noncontingent liquidated debts (excluding debts owed to insiders or affiliates) are less than $2,343,300 *(amount subject to adjustment on 4/01/13 and every three years thereafter).*

Check all applicable boxes:

- ☐ A plan is being filed with this petition.
- ☐ Acceptances of the plan were solicited prepetition from one or more classes of creditors, in accordance with 11 U.S.C. § 1126(b).

Statistical/Administrative Information

- ■ Debtor estimates that funds will be available for distribution to unsecured creditors.
- ☐ Debtor estimates that, after any exempt property is excluded and administrative expenses paid, there will be no funds available for distribution to unsecured creditors.

THIS SPACE IS FOR COURT USE ONLY

Estimated Number of Creditors

■ 1-49	☐ 50-99	☐ 100-199	☐ 200-999	☐ 1,000-5,000	☐ 5,001-10,000	☐ 10,001-25,000	☐ 25,001-50,000	☐ 50,001-100,000	☐ OVER 100,000

Estimated Assets

☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	■ $1,000,001 to $10 million	☐ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	☐ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☐ More than $1 billion

Estimated Liabilities

☐ $0 to $50,000	☐ $50,001 to $100,000	☐ $100,001 to $500,000	☐ $500,001 to $1 million	☐ $1,000,001 to $10 million	☐ $10,000,001 to $50 million	☐ $50,000,001 to $100 million	■ $100,000,001 to $500 million	☐ $500,000,001 to $1 billion	☐ More than $1 billion

JA-7

Voluntary Petition *(This page must be completed and filed in every case)*	Name of Debtor(s): Petra Offshore Fund LP	
All Prior Bankruptcy Cases Filed Within Last 8 Years (If more than two, attach additional sheet)		
Location Where Filed: - None -	Case Number:	Date Filed:
Location Where Filed:	Case Number:	Date Filed:
Pending Bankruptcy Case Filed by any Spouse, Partner, or Affiliate of this Debtor (If more than one, attach additional sheet)		
Name of Debtor: Petra Fund REIT Corp.	Case Number:	Date Filed: 10/20/10
District: Southern District of NY	Relationship: Indirect subsidiary	Judge:

Exhibit A

(To be completed if debtor is required to file periodic reports (e.g., forms 10K and 10Q) with the Securities and Exchange Commission pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 and is requesting relief under chapter 11.)

☐ Exhibit A is attached and made a part of this petition.

Exhibit B

(To be completed if debtor is an individual whose debts are primarily consumer debts.)

I, the attorney for the petitioner named in the foregoing petition, declare that I have informed the petitioner that [he or she] may proceed under chapter 7, 11, 12, or 13 of title 11, United States Code, and have explained the relief available under each such chapter. I further certify that I delivered to the debtor the notice required by 11 U.S.C. §342(b).

X _____
Signature of Attorney for Debtor(s) (Date)

Exhibit C

Does the debtor own or have possession of any property that poses or is alleged to pose a threat of imminent and identifiable harm to public health or safety?

☐ Yes, and Exhibit C is attached and made a part of this petition.

■ No.

Exhibit D

(To be completed by every individual debtor. If a joint petition is filed, each spouse must complete and attach a separate Exhibit D.)

☐ Exhibit D completed and signed by the debtor is attached and made a part of this petition.

If this is a joint petition:

☐ Exhibit D also completed and signed by the joint debtor is attached and made a part of this petition.

Information Regarding the Debtor - Venue

(Check any applicable box)

■ Debtor has been domiciled or has had a residence, principal place of business, or principal assets in this District for 180 days immediately preceding the date of this petition or for a longer part of such 180 days than in any other District.

■ There is a bankruptcy case concerning debtor's affiliate, general partner, or partnership pending in this District.

☐ Debtor is a debtor in a foreign proceeding and has its principal place of business or principal assets in the United States in this District, or has no principal place of business or assets in the United States but is a defendant in an action or proceeding [in a federal or state court] in this District, or the interests of the parties will be served in regard to the relief sought in this District.

Certification by a Debtor Who Resides as a Tenant of Residential Property

(Check all applicable boxes)

☐ Landlord has a judgment against the debtor for possession of debtor's residence. (If box checked, complete the following.)

_____
(Name of landlord that obtained judgment)

_____
(Address of landlord)

☐ Debtor claims that under applicable nonbankruptcy law, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment for possession, after the judgment for possession was entered, and

☐ Debtor has included in this petition the deposit with the court of any rent that would become due during the 30-day period after the filing of the petition.

☐ Debtor certifies that he/she has served the Landlord with this certification. (11 U.S.C. § 362(l)).

Voluntary Petition
(This page must be completed and filed in every case.)

Name of Debtor(s): Petra Offshore Fund, L.P.

Signatures

Signature(s) of Debtor(s) (Individual/Joint)

I declare under penalty of perjury that the information provided in this petition is true and correct.
[If petitioner is an individual whose debts are primarily consumer debts and has chosen to file under chapter 7] I am aware that I may proceed under chapter 7, 11, 12 or 13 of title 11, United States Code, understand the relief available under each such chapter, and choose to proceed under chapter 7.
[If no attorney represents me and no bankruptcy petition preparer signs the petition] I have obtained and read the notice required by 11 U.S.C. § 342(b).

I request relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X _____
Signature of Debtor

X _____
Signature of Joint Debtor

_____
Telephone Number (if not represented by attorney)

_____
Date

Signature of a Foreign Representative

I declare under penalty of perjury that the information provided in this petition is true and correct, that I am the foreign representative of a debtor in a foreign proceeding, and that I am authorized to file this petition.

(Check only **one** box.)

☐ I request relief in accordance with chapter 15 of title 11, United States Code. Certified copies of the documents required by 11 U.S.C. § 1515 are attached.

☐ Pursuant to 11 U.S.C. § 1511, I request relief in accordance with the chapter of title 11 specified in this petition. A certified copy of the order granting recognition of the foreign main proceeding is attached.

X _____
(Signature of Foreign Representative)

_____
(Printed Name of Foreign Representative)

_____
Date

Signature of Attorney*

X /s/ Arnold Gulkowitz
Signature of Attorney for Debtor(s)
Arnold Gulkowitz, Esq.
Printed Name of Attorney for Debtor(s)
Dickstein Shapiro LLP
Firm Name
1633 Broadway
New York, NY 10019
Address
(212) 277-6500 Fax: (212) 277-6501
Telephone Number
10/20/2010
Date

*In a case in which § 707(b)(4)(D) applies, this signature also constitutes a certification that the attorney has no knowledge after an inquiry that the information in the schedules is incorrect.

Signature of Debtor (Corporation/Partnership)

I declare under penalty of perjury that the information provided in this petition is true and correct, and that I have been authorized to file this petition on behalf of the debtor.

The debtor requests the relief in accordance with the chapter of title 11, United States Code, specified in this petition.

X /s/ Kenneth Kornblau
Signature of Authorized Individual
Kenneth Kornblau
Printed Name of Authorized Individual
Authorized Signatory
Title of Authorized Individual
10/20/2010
Date

Signature of Non-Attorney Bankruptcy Petition Preparer

I declare under penalty of perjury that: (1) I am a bankruptcy petition preparer as defined in 11 U.S.C. § 110; (2) I prepared this document for compensation and have provided the debtor with a copy of this document and the notices and information required under 11 U.S.C. §§ 110(b), 110(h), and 342(b); and, (3) if rules or guidelines have been promulgated pursuant to 11 U.S.C. § 110(h) setting a maximum fee for services chargeable by bankruptcy petition preparers, I have given the debtor notice of the maximum amount before preparing any document for filing for a debtor or accepting any fee from the debtor, as required in that section. Official Form 19 is attached.

_____
Printed Name and title, if any, of Bankruptcy Petition Preparer

_____
Social-Security number (If the bankruptcy petition preparer is not an individual, state the Social-Security number of the officer, principal, responsible person or partner of the bankruptcy petition preparer.) (Required by 11 U.S.C. § 110.)

_____
_____
Address

X _____

_____
Date

Signature of bankruptcy petition preparer or officer, principal, responsible person, or partner whose Social-Security number is provided above.

Names and Social-Security numbers of all other individuals who prepared or assisted in preparing this document unless the bankruptcy petition preparer is not an individual.

If more than one person prepared this document, attach additional sheets conforming to the appropriate official form for each person.

A bankruptcy petition preparer's failure to comply with the provisions of title 11 and the Federal Rules of Bankruptcy Procedure may result in fines or imprisonment or both. 11 U.S.C. § 110; 18 U.S.C. § 156.

ACTION BY WRITTEN CONSENT
OF THE GENERAL PARTNER OF
Petra Offshore Fund L.P.
(a Cayman Islands exempted limited partnership)

The undersigned, being the general partner of Petra Offshore Fund, L.P., a Cayman Islands exempted limited partnership (the "**Company**"), hereby consents to the taking of the following actions and adopts the following resolutions, and any required notice having been waived, such resolutions to have the same force and effect as if adopted at a meeting which was duly called and held and at which a required number were present and acting throughout:

WHEREAS, the organizational documents of the Company, including but not limited to the limited partnership agreement, provide that the general partner of the Company has the power to manage and conduct the business and affairs of the Company;

NOW, THEREFORE, BE IT RESOLVED, that, in the judgment of the general partner of the Company, it is desirable and in the best interests of the Company to commence a voluntary chapter 11 bankruptcy case (the "**Case**") in the United States Bankruptcy Court for the Southern District of New York (the "**Bankruptcy Court**");

FURTHER RESOLVED, that notwithstanding any contrary provisions in the limited partnership agreement of the Company or elsewhere, that each person identified on Exhibit A hereto ("**Authorized Persons**"), acting together or individually, has full authority to act and hereby is, authorized, empowered and directed, on behalf of the Company, to execute and/or verify documents in the name of the Company relating to the Case, and to take such actions on behalf of the Company in connection with the Case (in addition to and including any specific actions approved pursuant to the resolutions set forth below) as the Authorized Person(s), in his discretion, deems necessary or desirable to carry out the intent and accomplish the purposes of these resolutions;

FURTHER RESOLVED, that the Company shall be, and hereby is, authorized to (a) file a voluntary petition ("**Petition**") to commence the Case in the Bankruptcy Court; and (b) perform any and all acts as are reasonable, advisable, convenient, proper or necessary to effect any of the foregoing;

FURTHER RESOLVED, that each Authorized Person, acting together or individually, shall be authorized, directed and empowered on behalf of and in the name of the Company to execute, verify, acknowledge and deliver, as applicable, the Petition as well as all other ancillary agreements, instruments, schedules, motions, applications, pleadings and other documents evidencing or creating or effectuating or otherwise related to the filing of the Petition or otherwise required by the Company or otherwise deemed necessary or desirable by the Company on behalf of the Company to be executed, verified, acknowledged and/or delivered on behalf of the Company in connection with the Petition or the Case (collectively, the "**Bankruptcy Documents**");

FURTHER RESOLVED, that each Authorized Person, acting together or individually, shall be authorized, directed and empowered on behalf of and in the name of the Company, to file or cause to be filed the Petition and the other Bankruptcy Documents;

FURTHER RESOLVED, that each Authorized Person, acting together or individually, shall be authorized, directed and empowered to retain, on behalf of the Company: (a) Dickstein Shapiro LLP; and (b) such additional professionals as in the judgment of the Authorized Person is necessary in connection with the Case and other related matters, on such terms as such Authorized Person shall approve;

FURTHER RESOLVED, that Dickstein Shapiro LLP, and any additional special counsel selected by the Authorized Persons, if any, shall be, and hereby are, authorized, empowered and directed to represent the Company as debtor and debtor in possession, in connection with the Case or any other bankruptcy case commenced by or against the Company;

FURTHER RESOLVED, that any and all actions heretofore taken by the Company in connection with the preparation and filing of the Petition or otherwise in anticipation of the Case are hereby ratified and confirmed;

FURTHER RESOLVED, that, in addition to the specific authorizations heretofore conferred upon each of the Authorized Persons, each of the Authorized Persons shall be, and hereby is, authorized, empowered and directed to take or cause to be taken all such further actions, to execute and deliver or cause to be executed and delivered all such further certificates, agreements, instruments and other documents and to incur all such fees and expenses, on behalf of and in the name of the Company, as in his judgment shall be necessary, appropriate, or advisable in order to carry out fully the intent and purposes of the resolutions adopted herein, it being understood that all such actions shall be performed in such manner and all such agreements, instruments and other documents shall be in such form, as such Authorized Persons performing or executing same shall approve, the performance or execution of the same by such Authorized Person(s) to be conclusive evidence of the approval thereof by such person(s) and by the Company; and it is

FURTHER RESOLVED, that the authority given hereunder shall be deemed retroactive and any and all acts authorized hereunder and performed prior to the date hereof are hereby ratified and affirmed.

IN WITNESS WHEREOF, the undersigned, acting as the general partner of the Company, has executed this written consent as of the 20th day of October, 2010.

By: Petra Capital GP LLC, its General Partner

By: Petra Capital Management, LLC, its Manager

By: _____
Kenneth Kornblau
Authorized Signatory

By: _____
Andrew Stone
Authorized Signatory

By: _____
Lawrence Shelley
Authorized Signatory

By: _____
Joseph Iacono
Authorized Signatory

EXHIBIT A to Consent - Authorized Persons

Andrew Stone
Kenneth Kornblau
Joseph Iacono
Lawrence Shelley

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re

Petra Offshore Fund L.P. Case No. _____

Debtor

Chapter _____

DECLARATION UNDER PENALTY OF PERJURY ON BEHALF OF CORPORATION OR PARTNERSHIP CONCERNING CONSOLIDATED LIST OF TWENTY LARGEST UNSECURED CREDITORS

I, an authorized signatory of the partnership named as the debtor in this case, declare under penalty of perjury that I have read the following consolidated list of twenty largest unsecured creditors (also filed in pending bankruptcy case of Petra Fund REIT Corp.) and that it is true and correct to the best of my information and belief.

Date: 10/20/10

Signature: /s/ Kenneth Kornblau
Kenneth Kornblau
Authorized Signatory

Penalty for making a false statement or concealing property: Fine of up to $500,000.00 or imprisonment for up to five years or both. 18 U.S.C. §§ 152 and 3571.

B4 (Official Form 4) (12/07)

United States Bankruptcy Court
Southern District of New York

In re Petra Fund REIT Corp. (Debtor(s))

Case No.

Chapter 11

LIST OF CREDITORS HOLDING 20 LARGEST UNSECURED CLAIMS

Following is the list of the debtor's creditors holding the 20 largest unsecured claims. The list is prepared in accordance with Fed. R. Bankr. P. 1007(d) for filing in this chapter 11 [*or* chapter 9] case. The list does not include (1) persons who come within the definition of "insider" set forth in 11 U.S.C. § 101, or (2) secured creditors unless the value of the collateral is such that the unsecured deficiency places the creditor among the holders of the 20 largest unsecured claims. If a minor child is one of the creditors holding the 20 largest unsecured claims, state the child's initials and the name and address of the child's parent or guardian, such as "A.B., a minor child, by John Doe, guardian." Do not disclose the child's name. See 11 U.S.C. § 112; Fed. R. Bankr. P. 1007(m).

(1) *Name of creditor and complete mailing address including zip code*	(2) *Name, telephone number and complete mailing address, including zip code, of employee, agent, or department of creditor familiar with claim who may be contacted*	(3) *Nature of claim (trade debt, bank loan, government contract, etc.)*	(4) *Indicate if claim is contingent, unliquidated, disputed, or subject to setoff*	(5) *Amount of claim [if secured, also state value of security]*
Bear Stearns Funding, Inc. c/o JP Morgan Chase Bank, NA 270 Park Avenue, 6th Floor New York, NY 10017	Kunal Singh Bear Stearns Funding, Inc. c/o JP Morgan-270 Park Ave.,6 Flr New York, NY 10017 212-834-5467	Securities Collateral	Contingent Unliquidated	Unknown (Unknown secured)
Fried, Frank Harris, Shriver & One New York Place New York, NY 10004	Jonathan Mechanic Fried, Frank Harris, Shriver & One New York Place New York, NY 10004 212-859-8222	Legal Services	Contingent Unliquidated	Unknown
Greenwich Cap. Fin. Prod. 600 Steamboat Rd Greenwich, CT 06830	Lance Haberin Greenwich Cap. Fin. Prod. 600 Steamboat Rd Greenwich, CT 06830 203-618-2777	Securities	Contingent Unliquidated Disputed	Unknown (Unknown secured)
KBS Preferred Holding I, LLC c/o KBS REIT 620 Newport Ctr Dr, Ste 1300 Newport Beach, CA 92660	Keith Hall KBS Preferred Holding I, LLC 620 Newport Ctr Dr,Ste 1300 Newport Beach, CA 92660 310-432-2102	Money Loaned and Judgment Obtained	Contingent Unliquidated Disputed	65,922,650.21
Petra Capital Management LLC 1370 Avenue of the Americas 23rd Floor New York, NY 10019	Richard Perlman Petra Capital Management LLC 1370 Ave of the Americas-23rd New York, NY 10019 212-710-3033	Management services		4,900,000.00
Pricewaterhouse Coopers 300 Madison Ave New York, NY 10017	James Guiry Pricewaterhouse Coopers 300 Madison Ave New York, NY 10017 646-471-3620	Accounting Services	Contingent Unliquidated	Unknown
Proskauer Rose 1585 Broadway New York, NY 10036	David Weinberger Proskauer Rose 1585 Broadway New York, NY 10036 212-969-3405	Legal Services	Contingent Unliquidated	Unknown

Software Copyright (c) 1996-2010 Best Case Solutions - Evanston, IL - bestcase.com

B4 (Official Form 4) (12/07) - Cont.
In re Petra Fund REIT Corp. Case No. _____
Debtor(s)

LIST OF CREDITORS HOLDING 20 LARGEST UNSECURED CLAIMS
(Continuation Sheet)

(1) *Name of creditor and complete mailing address including zip code*	(2) *Name, telephone number and complete mailing address, including zip code, of employee, agent, or department of creditor familiar with claim who may be contacted*	(3) *Nature of claim (trade debt, bank loan, government contract, etc.)*	(4) *Indicate if claim is contingent, unliquidated, disputed, or subject to setoff*	(5) *Amount of claim [if secured, also state value of security]*
Schulte Roth & Zabel LLP 919 Third Avenue New York, NY 10022	Bruce Cybul Schulte Roth & Zabel LLP 919 Third Avenue New York, NY 10022 212-756-2550	Legal Services	Contingent Unliquidated	Unknown
Sidley Austin LLP 787 Seventh Avenue New York, NY 10019	Renwick Martin Sidley Austin LLP 787 Seventh Avenue New York, NY 10019 212-839-5319	Legal Services	Contingent Unliquidated	Unknown
Winston Strawn LLP 200 Park Avenue New York, NY 10166	Corey Tessler Winston Strawn LLP 200 Park Avenue New York, NY 10166 212-294-6685	Legal Services	Contingent Unliquidated	Unknown

Software Copyright (c) 1996-2010 Best Case Solutions - Evanston, IL - bestcase.com

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re

Petra Offshore Fund L.P.

Debtor

Case No. _____

Chapter _____

CORPORATE OWNERSHIP STATEMENT OF PARTNERSHIP UNDER LOCAL RULE 1007-3 (Nothing to report)

I, an authorized signatory of the partnership named as the debtor in this case, declare under penalty of perjury that the partnership that is a debtor in this case does not own 10 percent or more of any class of equity of any corporation whose securities are publicly traded.

Date: 10/20/10

Signature: /s/ Kenneth Korblau
Kenneth Kornblau
Authorized Signatory

Penalty for making a false statement or concealing property: Fine of up to $500,000.00 or imprisonment for up to five years or both. 18 U.S.C. §§ 152 and 3571.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re

Petra Offshore Fund L.P. Case No. _____

Debtor

Chapter _____

DISCLOSURE OF COMPENSATION OF ATTORNEY FOR DEBTOR

1. Pursuant to 11 U.S.C. § 329 (a) and Fed. R. Bankr. P. 2016(b), I certify that I am the attorney for the above-named debtor(s) and that compensation paid to me within one year before the filing of the petition in bankruptcy, or agreed to be paid to me, for services rendered or to be rendered on behalf of the debtor(s) in contemplation of or in connection with the bankruptcy case is as follows:

   For legal services, I have agreed to accept . . . . . $ Court approved fees and expenses

   Prior to the filing of this statement I have received . . . . . .$ 15,000.00

   Balance Due . . . . . .$ None for preparation work.

2. The source of the compensation paid to me was:

   ☐ Debtor ☒ Other (specify) Officers of REIT

   paid one retainer to cover preparation of petition for both consolidated debtor filings.

3. The source of compensation to be paid to me is:

   ☒ Debtor ☐ Other (specify)

4. ☒ I have not agreed to share the above-disclosed compensation with any other person unless they are members and associates of my law firm.

   ☐ I have agreed to share the above-disclosed compensation with another person or persons who are not members or associates of my law firm. A copy of the agreement, together with a list of the names of the people sharing in the compensation, is attached.

5. In return for the above-disclosed fee, I have agreed to render legal service for all aspects of the bankruptcy case, including:

   a. Analysis of the debtor's financial situation, and rendering advice to the debtor in determining whether to file a petition in bankruptcy;

   b. Preparation and filing of any petition, schedules, statements of affairs and plan which may be required;

   c. Representation of the debtor at the meeting of creditors and confirmation hearing, and any adjourned hearings thereof;

   d. Representation of the debtor in adversary proceedings and other contested bankruptcy matters;

   e. Other services as needed.

6. By agreement with the debtor(s), the above-disclosed fee does not include the following services:

N/A

Certification

I certify that the foregoing is a complete statement of any agreement or arrangement for payment to me for representation of the debtor(s) in this bankruptcy proceedings.

10/20/10
Date

/s/ Arnold Gulkowitz
Signature of Attorney

Dickstein Shapiro LLP
Name of Law Firm
Arnold Gulkowitz
Dickstein Shapiro LLP
1633 Broadway
New York, NY 10019
(212)277-6500

United States Bankruptcy Court
Southern District of New York

In re Petra Offshore Fund LP
Debtor(s)

Case No.
Chapter 11

VERIFICATION OF CREDITOR MATRIX

I, the Authorized Signer of the partnership named as the debtor in this case, hereby verify that the attached list of creditors is true and correct to the best of my knowledge.

Date: 10/20/2010

/s/ Kenneth Kornblau
Kenneth Kornblau/Authorized Signer
Signer/Title

Software Copyright (c) 1996-2010 Best Case Solutions - Evanston, IL - bestcase.com

Bear Stearns Funding, Inc.
c/o JP Morgan Chase Bank, NA
270 Park Avenue, 6th Floor
New York, NY 10017

Fried, Frank Harris, Shriver &
One New York Place
New York, NY 10004

Greenwich Cap. Fin. Prod.
600 Steamboat Rd
Greenwich, CT 06830

KBS Preferred Holding I, LLC
c/o KBS REIT
620 Newport Ctr Dr, Ste 1300
Newport Beach, CA 92660

Petra Capital Management LLC
1370 Avenue of the Americas
23rd Floor
New York, NY 10019

Petra Fund REIT Corp.
1370 Avenue of the Americas
New York, NY 10019

Pricewaterhouse Coopers
300 Madison Ave
New York, NY 10017

Proskauer Rose
1585 Broadway
New York, NY 10036

Schulte Roth & Zabel LLP
919 Third Avenue
New York, NY 10022

Sidley Austin LLP
787 Seventh Avenue
New York, NY 10019

Winston Strawn LLP
200 Park Avenue
New York, NY 10166

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: **Petra Fund REIT Corp, et al.** **DEBTORS**	**CHAPTER 11** **CASE NO.** **(JOINT ADMINISTRATION REQUESTED)**

ORDER SCHEDULING INITIAL CASE CONFERENCE

Petra Fund REIT Corp. and Petra Offshore Fund LP (collectively, the "Debtors") having each filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on October 20, 2010, and the Court having determined that a case management conference will aid in the efficient administration of the case, it is

ORDERED, pursuant to 11 U.S.C. § 105(d), that an initial case conference will be conducted by the undersigned Bankruptcy Judge in Room ___, United States Bankruptcy Court, One Bowling Green, New York 10004 on _____ ___, 201_, at ____, or as soon thereafter as counsel may be heard, to consider the efficient administration of the case, which may include, inter alia, such topics as retention of professionals, creation of a committee, use of alternative dispute resolution, timetables, and scheduling of additional case management conferences, and it is further

ORDERED, that the Debtors shall give notice of this Order by mail at least seven days prior to the scheduled date to each committee appointed in this case to serve pursuant to 11 U.S.C. § 1102 (or, if no committee has been appointed, to the holders of the ten largest unsecured claims), the holders of the five largest unsecured claims, any post-petition lender, and the United States Trustee, and shall promptly file proof of such service with the Clerk of the Court.

DATED: New York, NY
_____, 2010

_____
UNITED STATES BANKRUPTCY JUDGE

ITEM NO. 122

JA-8

DICKSTEIN SHAPIRO LLP
1633 Broadway
New York, New York 10019
(212) 277-6500 (Telephone)
(212) 277-6501 (Facsimile)
Arnold Gulkowitz, Esq.
Howard Graff, Esq.
Mark S. Fawer, Esq.
Brian E. Goldberg, Esq.

Proposed counsel for Petra Fund REIT Corp. and Petra Offshore Fund, L.P., debtors and debtors-in-possession

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	**CHAPTER 11**
PETRA FUND REIT CORP., et al.,	**CASE NO.**
DEBTORS	**(JOINT ADMINISTRATION REQUESTED)**

AFFIDAVIT PURSUANT TO LOCAL RULE 1007-2

Lawrence Shelley, pursuant to 28 U.S.C. § 1746, hereby declares the following under penalty of perjury under the laws of the United States of America to the best of my knowledge, information and/or belief:

1. I am a Vice President and a member of the board of directors of Petra Fund REIT Corp. ("REIT"), a Maryland Corporation with principal place of business in New York State, New York County, which is part of an affiliated group of companies that includes Petra Offshore Fund L.P. ("Offshore Fund", and together with REIT, collectively, the "Debtors"), a Cayman

Islands exempted limited partnership that does business in the State of New York, County of New York. In these capacities, I have knowledge of and experience with the business and financial affairs of the Debtors.

Local Rule 1007-2(a)(1) – Nature of the Business and Concise Statement of Circumstances Leading to Chapter 11

General Background

2. The Debtors, together with their affiliates (collectively, "Petra") are in the business of originating, investing in, structuring and trading loans secured by commercial real-estate.

3. Offshore Fund is an ultimate parent of REIT and substantially all of the assets of Offshore Fund are invested in REIT. REIT is a real-estate investment trust whose ultimate assets include investments in real-estate and real-estate debt instruments.

4. The extraordinary and unprecedented collapse of the credit and commercial real estate markets has severely impacted Petra causing the mark-to-market value of its assets to plummet. Financing and liquidity which was previously readily available through banks and the capital markets evaporated as banks de-levered and investors withdrew from the market.

5. This shift severely constrained and essentially ended the market for securitized debt, which had been a crucial source of financing for the commercial real estate market, of which REIT is a participant.

6. Petra suspended the publication of Net Asset Valuation beginning after the November 2008 valuations because current market conditions make it difficult to accurately reflect the value of REIT's commercial real-estate assets (and render prior valuations, particularly by creditors, likely over-inflated.)

7. As a result of this unprecedented financial crisis, Petra's loan portfolio deteriorated due to the collapse of the market for securitized debt and resulted in insufficient capital to meet the needs of existing owners who need to refinance their current debt.

8. Petra has worked diligently to negotiate with and satisfy its short-term lenders without violating the debt covenants on its long term debt and to maximize value for its investors.

9. For the past several years, Petra has made numerous attempts to negotiate with substantially all of its creditors in an effort to formulate a consensual restructuring. While certain of Petra's creditors were amenable to restructuring discussions and substantial progress was made toward finalizing various proposed transactions, progress was not made respecting other creditors. These negotiations were further complicated because several of Petra's assets are encumbered by liens and/or asserted liens or similar claims.

KBS Debt

10. One creditor with whom Petra could not reach resolution was KBS Preferred Holding I, LLC ("KBS").

11. Ultimately, KBS sued Debtors in New York state court to collect on its asserted debt, arising out of an unsecured loan extended to REIT. KBS obtained a judgment on this debt and has begun to commence enforcement proceedings and assert various rights as a judgment creditor.

12. Despite the procedural posture of the KBS transaction, Petra continued to attempt consensual negotiations with KBS, which were unsuccessful.

REIT and CDO Structure Required Bankruptcy Protection and Led to Filing

13. An important component of Petra is that its integrated structure qualifies for the tax and other financial benefits available to real estate investment trusts, which includes REIT's direct and indirect ownership of certain equity and debt interests in Petra CRE CDO 2007-1, Ltd. (the "CDO"). Ultimately, the CDO effectively provides financing for a substantial portion of Petra's real estate transactions The CDO, in turn, has several senior noteholders who are primarily substantial financial and similar institutions, which means that this case has broader potential social and societal ramifications.

14. By filing for bankruptcy protection, Debtors hope to implement a restructuring solution that is in the best interests of the Debtors and their estates. To the extent a creditor of the Debtors (all of whom are structurally subordinated to the CDO's senior noteholders) was able to interfere with the REIT qualified structure of the Petra enterprise and/or the CDO, there would be potentially devastating financial consequences for the investors and noteholders in the CDO and the underlying value of the entire enterprise would be substantially diminished, to the ultimate detriment of all involved, including the Debtors and their estates.

15. Moreover, among the pre-bankruptcy restructuring discussions entered into by Petra, REIT and a secured creditor holding a lien on REIT's indirect equity interest in the CDO formulated a deal in principle (set forth on the Plan Support Agreement, attached hereto as Exhibit A), which Debtors believe provides the best hope to generate value for all parties. This proposed transaction requires a bankruptcy filing for its implementation.

16. Below is a description of the other information required by Local Rule 1007-2.

Local Rule 1007-2(a)(2)

17. This case was not originally commenced under Chapter 7 or 13 of the Bankruptcy Code.

Local Rule 1007-2(a)(3)

18. To the Debtors' knowledge, no committee was organized prior to the filing of the case (although as noted above, a deal in principle was pre-negotiated with one of the largest creditors in the case, who also has a lien on one of Petra's assets.)

Local Rule 1007-2 (a)(4)

19. A consolidated list of Debtors' twenty largest unsecured creditors is annexed hereto as Schedule 1. There are fewer than twenty listed because the Debtors have fewer than twenty creditors, even on a consolidated basis. A summary of such creditors' claims as contingent, unliquidated or disputed is included in connection with REIT's separately filed consolidated list of twenty largest unsecured creditors. Additionally, several of the creditors listed are professionals who performed services for the Debtors, some of which fees may be voluntarily written off to the extent required by this Court if such professionals are retained on a post-petition basis. In connection with the proposed engagement, all unsatisfied pre-petition receivables owed to Debtors' general bankruptcy counsel, Dickstein Shapiro LLP, have been voluntarily waived, assuming the retention is approved.

Local Rule 1007-2 (a)(5)

20. A schedule of the Debtors' secured creditors is annexed hereto as Schedule 2.

Local Rule 1007-2 (a)(6)

21. A summary of the Debtors' assets and liabilities is annexed hereto as Schedule 3.

Local Rule 1007-2 (a)(7)

22. The Debtors do not have any publicly held shares of stock, debentures or other securities.

Local Rule 1007-2 (a)(8)

23. A list of the Debtors' assets held in the possession or custody of any custodian, creditor, public officer, mortgagee, pledgee, secured creditor or agent is annexed hereto as Schedule 4.

Local Rule 1007-2 (a)(9)

24. The Debtors operate their businesses from the location of 1370 Avenue of the Americas, New York, NY 10019, but neither is the owner nor the tenant of such location.

Local Rule 1007-2 (a)(10)

25. The Debtors' substantial assets and their books and records are located at 1370 Avenue of the Americas, New York, NY 10019. A summary of any assets held by Debtors outside the territorial limits of the United States is annexed as Schedule 5.

Local Rule 1007-2 (a)(11)

26. To the best of Debtors' knowledge, no actions are currently pending, but Debtors were both defendants in an action commenced by KBS in New York State Supreme Court, New York County, and a judgment was obtained against both Debtors and creditor enforcement remedies had been commenced.

Local Rule 1007-2 (a)(12)

27. The Debtors' senior management consists of Andrew Stone, Kenneth Kornblau, Lawrence Shelley, and Joseph Iacono. Each has been with the Debtors since their formation or nearly so, and each has substantial experience in commercial real estate and real estate finance.

Local Rule 1007-2 (b)(1)

28. The estimated payroll of Debtors to employees (exclusive of officers, directors, stockholders and partners) for the thirty days following the filing of the chapter 11 petitions is none, because Debtors have no employees.

Local Rule 1007-2 (b)(2)

29. The estimated payment during the thirty days following the Debtors' bankruptcy petitions to the Debtors' partners, directors, officers, etc. is none, and the estimated payment to the Debtors' management company during the thirty days following the Debtors' bankruptcy petitions is also none, although a portion of the pre-petition receivable owed to them constitutes services to be performed during that period, and the Debtor anticipates paying the management company its customary fees for post-petition services as an administrative expense when sufficient funds become available. The Debtors anticipate receiving sufficient funds to pay all administrative expenses, but currently have essentially no cash on hand.

Local Rule 1007-2 (b)(3)

30. Annexed as schedule 6 is the estimated schedule of cash receipts and disbursements for the thirty day period following the Debtors' bankruptcy filing, net cash gain or loss, and obligations and receivables expected to accrue but remain unpaid (other than professional fees).

Dated: October 20, 2010

By: /s/ Lawrence Shelley

Lawrence Shelley

Schedule 1 – **Twenty Largest Unsecured Creditors (Consolidated)**

Name	Address	Contact	Telephone	Amount
Fried, Frank, Harris, Shriver & Jacobson LLP	One New York Plaza, NY, NY 10004	Jonathan Mechanic	212-859-8222	Unknown
Sidley Austin LLP	787 Seventh Ave., NY, NY 10019	Renwick Martin	212-839-5319	Unknown
Schulte Roth & Zabel LLP	919 Third Ave., NY, NY 10022	Bruce Cybul	212-756-2550	Unknown
Proskauer Rose	1585 Broadway, NY, NY 10036	David Weinberger	212-969-3405	Unknown
Winston & Strawn LLP	200 Park Ave., NY, NY 10166	Corey Tessler	212-294-6685	Unknown
Pricewaterhouse Coopers LLP	300 Madison Ave., NY, NY 10017	James Guiry	646-471-3620	Unknown
Petra Capital Management LLC	1370 Avenue of the Americas, NY, NY 10019	Richard Perlman	212-710-3033	Approximately $ 4.9 MM
KBS Preferred Holding I, LLC	c/o KBS Real Estate Investment Trust, 620 Newport Center Drive, Ste. 1300, Newport Beach, CA 92660	Keith Hall	310-432-2102	$ 65,922,650.21 (from judgment)
Bear Stearns Funding, Inc.	c/o JP Morgan Chase Bank NA, 270 Park Ave., 6th Flr., NY, NY 10017	Kunal Singh	212-834-5467	Subject of pre-petition pre-negotiated agreement in principle, but subject to updated valuation, paydowns, etc.

Name	Address	Contact	Telephone	Amount
				(Undersecured)
Greenwich Capital Financial Products, Inc.	600 Steamboat Road, Greenwich, CT 06830	Lance Haberin	203-618-2777	Unknown and disputed

Schedule 2 – **Secured Creditors (Consolidated)**

Name/Address	**Amount**	**Dispute or Re-Valuation**
Bear Stearns Funding, Inc. c/o JP Morgan Chase Bank NA, 270 Park Ave., 6th Flr., NY, NY 10017	(Subject of pre-petition pre-negotiated agreement in principle attached to Affidavit, but subject to updated valuation, paydowns, etc.)	Claim subject to updated valuation and accounting for paydowns from collateral (Undersecured). Counterparty to pre-negotiated deal-in-principle for restructuring.
Greenwich Capital Financial Products, Inc. 600 Steamboat Road, Greenwich, CT 06830	Unknown	Amount of alleged claim and value of collateral securing such claim, if any, is unknown, contingent and disputed.

Schedule 3 – **Assets and Liabilities (Consolidated)**

ASSETS		
	Direct and Indirect Debt and Equity Interests in CDO, substantially including the following: Classes F, G, J and K Bonds of Petra CRE CDO 2007-1 Preferred Shares of Petra CRE CDO 2007-1	De minimis value.
	Wholly-owned direct and indirect assets other than CDO interests	Less than $1MM
	Cash on hand	De minimis value
	Other assets	Approximately $3.75 MM
Liabilities		
	General trade and other debt	Approximately $50 MM
	KBS Debt	$ 65,922,650.21 (from judgment)
	Repurchase Obligations	Unknown and disputed
	Other	Approximately $5 MM

Schedule 4 – **Assets in possession of others**

Certain of the Debtors' directly and or indirectly owned debt interests in the CDO are held with Wells Fargo, as Trustee.

Certain of the Debtors' indirectly owned equity interests in the CDO are held with Bear Stearns Funding, Inc. or an affiliate as collateral for a secured claim.

Schedule 5 – **Assets of Debtors held outside territorial limits of United States**

None.

Schedule 6 –

FOR THE THIRTY DAY PERIOD FOLLOWING THE DEBTORS' BANKRUPTCY FILING, EXPECTED CASH RECEIPTS AND DISBURSEMENTS, NET CASH GAIN OR LOSS, AND OBLIGATIONS AND RECEIVABLES EXPECTED TO ACCRUE BUT REMAIN UNPAID (OTHER THAN PROFESSIONAL FEES)

Other than professional fees and similar bankruptcy-related administrative expenses, essentially no cash is anticipated to be spent in the next thirty days by the Debtors, and no substantial cash is anticipated to be received (other than possibly procuring post-petition financing to the extent needed due to exigent circumstances prior to subsequently anticipated receipt of funds.)

The only significant payable accruing during this time is the management fee owed to the Debtors' management company, but the payable covering this period has already been included in the consolidated claims on Schedule 1 of this Affidavit.

EXHIBIT A – Plan Support Agreement

EXECUTION VERSION

PLAN SUPPORT AGREEMENT

This PLAN SUPPORT AGREEMENT is made and entered into as of July 30, 2009 (this "*Agreement*") by and among (i) Petra Fund REIT Corp. ("*Petra*" or the "*Company*"); and (ii) the undersigned holders of debt (each, together with its affiliates, successors and assigns, a "*Consenting Creditor*" or "*Plan Support Party*" and, together with the Company and any subsequent person that becomes a party hereto in accordance with the terms hereof, a "*Party*," and collectively, the "*Parties*").

RECITALS

WHEREAS, the Company and each Plan Support Party are negotiating restructuring and recapitalization transactions (collectively, the "*Transactions*") with respect to the capital structure of the Company, including the Company's obligations, whether secured or unsecured, under (i) that certain Master Repurchase Agreement, dated November 29, 2006, between Bear, Stearns Funding, Inc. (together with its affiliates, successors and assigns, "*JPM*") and Petra (as amended, restated, supplemented, or otherwise modified from time to time, together with any related agreements, and together with any other repurchase agreements between JPM and Petra, the "*JPM Repo*") and (ii) the Bear Stearns Institutional Account Agreement, between JPM and Petra (together with documents executed in connection therewith or related thereto, the "*JPM Broker Documents*"), pursuant to the terms and conditions set forth in the Restructuring Term Sheet attached hereto as Exhibit A (the "*Term Sheet*") and in this Agreement;

WHEREAS, JPM has one or more claims (as such term is defined in section 101 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "*Bankruptcy Code*")) against Petra, arising out of, or related to, the JPM Repo and/or the JPM Broker Documents (the "*JPM Claims*" and, together with the claims of any other Consenting Creditors, the "*Claims*");

WHEREAS, the Parties have engaged in good faith negotiations with the objective of reaching an agreement with regard to restructuring of the outstanding indebtedness and liabilities of the Company, in accordance with the terms set forth in this Agreement;

WHEREAS, consummation of the Transactions may require Petra to commence a voluntary reorganization case (the "*Chapter 11 Case*") under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "*Bankruptcy Court*") to effect the Transactions through a prearranged chapter 11 plan of reorganization that implements and is otherwise materially consistent with the terms and conditions set forth in the Term Sheet and in this Agreement (the "*Plan*"); and

NOW, THEREFORE, in consideration of the covenants and agreements contained herein, and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, each Party, intending to be legally bound hereby, agrees as follows:

AGREEMENT

Section 1. ***Agreement Effective Date.*** This Agreement shall become effective and binding upon each of the Parties at 12:01 a.m. prevailing Eastern Time on the date on which the Parties shall have executed and delivered counterpart signature pages of this Agreement to counsel to the other Parties (or to their designated notice party, if not represented by counsel) (the "*Agreement Effective Date*").

Section 2. ***Term Sheet.*** The Term Sheet is expressly incorporated herein and is made part of this Agreement. The general terms and conditions of the Transactions are set forth in the Term Sheet; *provided, however*, that the Term Sheet is supplemented by the terms and conditions of this Agreement. In the event of any inconsistencies between the terms of this Agreement and the Term Sheet, this Agreement shall govern.

Section 3. ***Commitments Regarding the Transactions.***

3.1 Support for Restructuring

Subject to the terms and conditions of this Agreement, each of the Parties agrees and covenants that it shall: (i) consent to each and every commercially reasonable action contemplated or otherwise required to be taken to effectuate the Transactions, including executing any agreements or other documents necessary to effectuate the Transactions; (ii) take no actions inconsistent with the Transactions; and (iii) negotiate in good faith the definitive documentation contemplated by this Agreement or otherwise necessary to effectuate the Transactions, including, if necessary, the Plan.

3.2 Agreement to Vote.

(a) If Petra commences a Chapter 11 Case, as long as this Agreement has not been terminated in accordance with the terms hereof, each Plan Support Party agrees that it shall, subject to (i) the receipt by such Plan Support Party of a disclosure statement (the "*Disclosure Statement*") and other solicitation materials in respect of the Plan (together with the Disclosure Statement, the "*Solicitation Materials*"), which Solicitation Materials reflect the agreement set forth in the Term Sheet and have been approved by the Bankruptcy Court pursuant to section 1125 of the Bankruptcy Code and are in all material respects reasonably satisfactory to the Plan Support Party, (ii) the Plan Support Party's reasonable satisfaction with the Plan, Disclosure Statement, any pleadings or proposed orders related thereto, and any document that is appropriate or necessary to implement the Plan (collectively, the "*Plan Documents*"), and (iii) the Plan Support Party being entitled under such Plan to vote to accept or reject the Plan:

(i) vote its Claims (excluding, for the avoidance of doubt, the JPM REIT Collateral (as such term is defined in the Term Sheet)) to accept the Plan by delivering its duly executed and completed ballot accepting the Plan on a timely basis following the commencement of the Solicitation Period and its actual receipt of the Solicitation Materials and ballot;

(ii) not change or withdraw (or cause to be changed or withdrawn) such vote; and

(iii) not, in any material respect, (A) object to, delay, impede, or take any other action to interfere with acceptance or implementation of the Plan or (B) propose, file, support, or vote for any restructuring, workout, plan of arrangement, or plan of reorganization for the Company other than the Plan.

(b) For the avoidance of doubt, each Plan Support Party also agrees that, (i) unless this Agreement is terminated in accordance with the terms hereof, it will not take any action that would in any material respect interfere with, delay, or postpone the confirmation or consummation of the Plan and implementation of the Transactions and (ii) upon the commencement by the Company of the Chapter 11 Case and imposition of the automatic stay pursuant to section 362(a) of the Bankruptcy Code as a result thereof, each Plan Support Party agrees that, except as provided in the Agreement or the Term Sheet, it will not exercise any right or remedy for the enforcement, collection, or recovery of any of its Claims against the Company (or claims against the Company's direct or indirect subsidiaries arising out of or related to the Claims); *provided, however,* that, except as otherwise set forth in this Agreement, the foregoing prohibition will not limit any Plan Support Party's rights under any applicable indenture, credit agreement, other loan document, the Bankruptcy Code, or applicable law to (A) terminate, close out, liquidate or accelerate any "commodity contract", "forward contract", "securities contract", "repurchase agreement", "swap agreement", "master netting agreements" (each term as such term is defined in the Bankruptcy Code) or similar transaction with the Company to the extent the underlying agreement, the Bankruptcy Code or applicable law permits such termination or close-out or (B) to appear and participate as a party in interest in any matter to be adjudicated in any case under the Bankruptcy Code concerning the Company, so long as such appearance and the positions advocated in connection therewith are not materially inconsistent with the Plan and do not materially hinder, delay, or prevent consummation of the Transactions.

3.3 Commitment of Company. As long as this Agreement has not been terminated in accordance with the terms hereof, the Company shall (a) support and complete the Transactions embodied in the Term Sheet, and (b) do all things necessary and appropriate in furtherance of the Transactions embodied in the Term Sheet, including, without limitation, the following:

3.3.1 commence the Chapter 11 Case on or before August 31, 2009 (the "*Outside Petition Date,*" and the actual commencement date, the "*Petition Date*");

3.3.2 file the Disclosure Statement and Plan, each of which shall be reasonably satisfactory to the Plan Support Parties, no later than 60 days after the Petition Date (the "Plan Filing Deadline") or such later date as may be agreed to in writing by the Company and JPM;

3.3.3 seek a hearing for approval of the Disclosure Statement no later than 15 days after the date on which the Disclosure Statement and Plan is filed;

3.3.4 submit an order with the Bankruptcy Court approving the Disclosure Statement in form and substance satisfactory to JPM (the "Disclosure Statement Order") no later than 5 days after conclusion of the hearing on the Disclosure Statement;

3.3.5 complete the solicitation of the requisite acceptances of the Plan in accordance with section 1125 of the Bankruptcy Code no later than 30 days after the entry of the Disclosure Statement Order (the "Solicitation Period");

3.3.6 seek a hearing on confirmation of the Plan no later than 45 days after entry of the Disclosure Statement Order; submit an order with the Bankruptcy Court confirming the Plan in form and substance satisfactory to JPM (the "Confirmation Order") no later than 5 days after conclusion of the hearing on confirmation of the Plan (the "Confirmation Deadline");

3.3.7 cause the effective date of the Plan (the "Plan Effective Date") to occur no later than 30 days following the entry of the Confirmation Order;

3.3.8 obtain any and all required regulatory and/or third-party approvals for the Transactions embodied in the Term Sheet; and

3.3.9 not take any action that is inconsistent with, or is intended or is likely to interfere with consummation of, the restructuring and the Transactions embodied in the Term Sheet.

3.4 Transfer of Interests and Securities. Except as expressly provided herein, this Agreement shall not in any way restrict the right or ability of any Consenting Creditor to sell, use, assign, transfer or otherwise dispose of ("*Transfer*") any of its Claims against the Company; *provided, however*, that for the period commencing as of the date such Consenting Creditor, as applicable, executes this Agreement until termination of this Agreement pursuant to the terms hereof (such period, the "*Restricted Period*"), no Consenting Creditor shall Transfer any Claims against the Company, and any purported Transfer of Claims against the Company shall be void and without effect, unless (a) the transferee is a Consenting Creditor or (b) if the transferee is not a Consenting Creditor prior to the Transfer, such transferee delivers to the Company, at or prior to the time of the proposed Transfer, an executed copy of Exhibit B attached hereto pursuant to which such Transferee shall assume all obligations of the Consenting Creditor transferor hereunder in respect of the Claims being transferred (such transferee, if any, to also be a "*Consenting Creditor*", as applicable, hereunder). This Agreement shall in no way be construed to preclude a Consenting Creditor from acquiring additional Claims; *provided, however*, that (a) any Consenting Creditor that acquires additional Claims after executing this Agreement shall notify the Company of such acquisition within five business days after the closing of such trade and (b) additional Claims shall automatically and immediately upon acquisition by a Consenting Creditor be deemed subject to all of the terms of this Agreement whether or not notice is given to the Company of such acquisition.

3.5 Representation of Each Consenting Creditor with respect to its Claims. Each Consenting Creditor severally and not jointly represents and warrants that, with respect to its Claims, as of the date such Consenting Creditor executes and delivers this Agreement:

(a) it is the beneficial owner of the face amount of the Claims (excluding, for the avoidance of doubt, the JPM REIT Collateral (as such term is defined in the Term Sheet)) , or is the nominee, investment manager, or advisor for beneficial holders of such Claims (excluding, for the avoidance of doubt, the JPM REIT Collateral (as such term is defined in the Term Sheet)), as reflected in such Consenting Creditor's signature block to this Agreement, which amount the Company and each Consenting Creditor understands and acknowledges is proprietary and confidential to such Consenting Creditor, except as reasonably determined by the Company to be necessary to be disclosed in a Chapter 11 Case;

(b) other than pursuant to this Agreement and, with respect to the secured portions of its Claims, applicable law, such Claims (excluding, for the avoidance of doubt, the JPM REIT Collateral (as such term is defined in the Term Sheet)) are free and clear of any pledge, lien, security interest, charge, claim, equity, option, proxy, voting restriction, right of first refusal or other limitation on disposition, or encumbrances of any kind, that would materially and adversely affect in any way such Consenting Creditor's performance of its obligations contained in this Agreement at the time such obligations are required to be performed; and

(c) it is not aware of any event that, due to any fiduciary or similar duty to any other person, or due to any regulatory or legal requirement, would prevent it from taking any material action required of it under this Agreement.

Section 4. ***Mutual Representations, Warranties, and Covenants***. Each of the Parties, severally and not jointly, represents, warrants, and covenants to each other Party, as of the date of this Agreement, as follows (each of which is a continuing representation, warranty, and covenant):

4.1 Enforceability. It is validly existing and in good standing under the laws of the state or country of its organization, and this Agreement is a legal, valid, and binding obligation of such Party, enforceable against it in accordance with its terms, except as enforcement may be limited by applicable laws relating to or limiting creditor's rights generally or by equitable principles relating to enforceability.

4.2 No Consent or Approval. Except as expressly provided in this Agreement, or the Bankruptcy Code, as applicable, no consent or approval is required by any other person or entity in order for it to carry out the Transactions contemplated by, and perform the respective obligations under, this Agreement.

4.3 Power and Authority. Except as expressly provided in this Agreement, it has all requisite power and authority to enter into this Agreement and to carry out the Transactions contemplated by, and perform its respective obligations under, this Agreement.

4.4 Authorization. The execution and delivery of this Agreement and the performance of its obligations hereunder have been duly authorized by all necessary action on its part.

Section 5. ***Termination Events.***

5.1 Consenting Creditor Termination Events. This Agreement (i) will automatically terminate if the Plan Effective Date has not occurred by January 30, 2010, and (ii) may be terminated by the delivery of notice in accordance with Section 7.11 hereof to the Company by JPM upon the occurrence of any of the following (each a "*Consenting Creditor Termination Event*"):

(a) failure of the Company to commence the Chapter 11 Case in accordance with Section 3.3.1 hereof;

(b) failure of the Company to file the Plan and Disclosure Statement in accordance with Section 3.3.2 hereof;

(c) any modification to the Plan or a subsequent chapter 11 plan filed by the Company with the Bankruptcy Court (or a chapter 11 plan supported or endorsed by the Company) to which JPM does not consent, which consent shall not be unreasonably withheld, or that is inconsistent with the terms and conditions set forth in the Term Sheet or this Agreement in a manner that is materially adverse to JPM;

(d) failure of the Disclosure Statement Order to have been entered in accordance with Section 3.3.4 hereof;

(e) failure of the Company to solicit the requisite acceptances of the Plan in accordance with Section 3.3.5 hereof;

(f) failure of the Confirmation Order to have been entered in accordance with Section 3.3.6 hereof;

(g) failure of the Plan Effective Date to occur in accordance with Section 3.3.7 hereof;

(h) the breach in any material respect by the Company of any of the obligations, representations, warranties, or covenants of the Company set forth in this Agreement; provided, however, that the Consenting Creditor (or Consenting Creditors, if applicable) shall transmit a notice to the Company detailing any such breach, and the Company shall have five business days after receiving such notice to cure any breach;

(i) the issuance, promulgation, announcement or adoption by any governmental agency, authority or legislative body, including any regulatory agency or authority or court of competent jurisdiction, of any law, ruling, decree, regulation or order (i) enjoining the consummation of a material portion of the Transactions in a way that cannot be reasonably remedied by the Company within five business days after receiving notice thereof or (ii) which, in the judgment of any Consenting Creditor, would have a material adverse effect on the Transactions or any material portion thereof;

(j) failure of REIT counsel to the Company, Sidley Austin LLP, to deliver a legal opinion in the form attached as Exhibit A to the Term Sheet in the manner

contemplated by the Term Sheet, it being agreed and acknowledged by the parties hereto that the condition that such legal opinion be so delivered constitutes a material inducement for the Consenting Creditors agreement to enter into this Agreement, and in the absence of such condition, the Consenting Creditors would not have agreed to enter into this Agreement;

(k) the conversion of the Chapter 11 Case to a case under chapter 7 of the Bankruptcy Code, unless such conversion is made with the prior written consent of the Parties;

(l) the appointment of a trustee, receiver, or examiner with expanded powers in the Chapter 11 Case unless such appointment is made with the written consent of the Parties;

(m) the Chapter 11 Case is dismissed;

(n) the Confirmation Order is reversed on appeal or vacated;

(o) the Company files any motion or pleading with the Bankruptcy Court that is inconsistent in any material respect with this Agreement or the Term Sheet or, if filed, any of the Plan Documents;

(p) any court shall enter a final, non-appealable judgment or order declaring this Agreement or any material provision hereof to be unenforceable;

(q) the Company shall withdraw the Plan or publicly announce its intention not to support the Plan; or

(r) JPM obtains knowledge that any statement or information furnished by or on behalf of Petra to JPM regarding or relating to the performance of the Petra CDO (as such term is defined in the Term Sheet), the collateral manager under the Petra CDO or any collateral securing the Petra CDO contains any untrue statement of material fact or omits to state a material fact necessary in order to make such statement or information not misleading.

Notwithstanding any provision in this Agreement to the contrary, upon the written consent of JPM, the dates set forth in this Section may be extended prior to or upon each such date and such later dates agreed to in lieu thereof and shall be of the same force and effect as the dates provided herein. If this Agreement is terminated by JPM pursuant to this Section 5.1, this Agreement shall be automatically and simultaneously terminated as to any other Party that is a signatory to this Agreement and the Term Sheet shall be deemed null and void for all purposes. No Party shall terminate this Agreement if such Party is in breach of any provision hereof.

5.2 Company Termination Events. The Company may terminate this Agreement as to all Parties upon five business days' prior written notice, upon the occurrence of any of the following events (each, a "*Company Termination Event*"): (a) the breach by any Plan Support Party of any of the representations, warranties, or covenants of such Plan Support Party set forth in this Agreement that would have a material adverse impact on the Company, or the consummation of the Transactions, that remains uncured for a period of five business days after the receipt by the Plan Support Party of notice of such breach; (b) the directors, officers, or

managers of the Company reasonably determine based upon the written advice of counsel (which shall be provided in advance to the Consenting Creditors) that proceeding with the Transactions would be inconsistent with the exercise of its fiduciary duties, or (c) the issuance, promulgation, announcement or adoption by any governmental agency, authority or legislative body, including any regulatory agency or authority or court of competent jurisdiction, of any law, ruling, decree, regulation or order enjoining the consummation of a material portion of the Transactions in a way that cannot be reasonably remedied by the Company or a Consenting Creditor within five business days after receiving notice thereof.

5.3 Mutual Termination. This Agreement, and the obligations of all Parties hereunder, may be terminated by mutual agreement among (a) the Company and (b) JPM.

5.4 Effect of Termination. Upon termination of this Agreement under Section 5.1, 5.2, or 5.3, this Agreement shall be of no further force and effect and each Party hereto shall be released from its commitments, undertakings, and agreements under or related to this Agreement and shall have the rights and remedies that it would have had had it not entered into this Agreement, and shall be entitled to take all actions, whether with respect to the Transactions or otherwise, that it would have been entitled to take had it not entered into this Agreement. Upon the occurrence of any termination of this Agreement, any and all consents tendered by the Plan Support Party (or Plan Support Parties, as applicable) prior to such termination shall be deemed, for all purposes, to be null and void from the first instance and shall not be considered or otherwise used in any manner by the Parties in connection with the Transactions and this Agreement or otherwise.

5.5 Termination Upon Effectiveness. This Agreement shall terminate automatically without any further required action or notice on the Plan Effective Date.

Section 6. ***Effectiveness; Amendments.*** This Agreement, including the Term Sheet, may not be modified, amended, or supplemented (except as expressly provided herein or therein) except in writing signed by all Parties.

Section 7. ***Miscellaneous.***

7.1 Further Assurances. Subject to the other terms of this Agreement, the Parties agree to execute and deliver such other instruments and perform such acts, in addition to the matters herein specified, as may be reasonably appropriate or necessary, from time to time, to effectuate the Transactions, as applicable.

7.2 Complete Agreement. This Agreement is the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior agreements, oral or written, between the Parties with respect thereto. No claim of waiver, modification, consent, or acquiescence with respect to any provision of this Agreement shall be made against any Party, except on the basis of a written instrument executed by or on behalf of such Party.

7.3 Parties. This Agreement shall be binding upon, and inure to the benefit of, the Parties. No rights or obligations of any Party under this Agreement may be assigned or transferred to any other person or entity except as provided in Section 3.4 hereof. Nothing in this

Agreement, express or implied, shall give to any person or entity, other than the Parties, any benefit or any legal or equitable right, remedy, or claim under this Agreement.

7.4 Headings. The headings of all sections of this Agreement are inserted solely for the convenience of reference and are not a part of and are not intended to govern, limit, or aid in the construction or interpretation of any term or provision hereof.

7.5 GOVERNING LAW; SUBMISSION TO JURISDICTION; SELECTION OF FORUM; WAIVER OF TRIAL BY JURY. THIS AGREEMENT, TOGETHER WITH ANY CLAIMS, CONTROVERSIES OR DISPUTES ARISING UNDER OR RELATED TO THIS AGREEMENT, ARE TO BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND TO BE PERFORMED IN SUCH STATE, WITHOUT GIVING EFFECT TO THE CONFLICT OF LAWS PRINCIPLES THEREOF. Each Party hereto agrees that it shall bring any action or proceeding in respect of any claim arising out of or related to this Agreement, to the extent possible, in either the United States District Court for the Southern District of New York or any New York State court sitting in New York City (the "*Chosen Courts*"), and solely in connection with claims arising under this Agreement (a) irrevocably submits to the exclusive jurisdiction of the Chosen Courts, (b) waives any objection to laying venue in any such action or proceeding in the Chosen Courts, and (c) waives any objection that the Chosen Courts are an inconvenient forum or do not have jurisdiction over any Party hereto; *provided, however*, that if the Company commences the Chapter 11 Case, then the Bankruptcy Court shall be the sole Chosen Court. Each party hereto irrevocably waives any and all right to trial by jury in any legal proceeding arising out of or relating to this Agreement or the transactions contemplated hereby.

7.6 Execution of Agreement. This Agreement may be executed and delivered (by facsimile, electronic mail, or otherwise) in any number of counterparts, each of which, when executed and delivered, shall be deemed an original, and all of which together shall constitute the same agreement. Except as expressly provided in this Agreement, each individual executing this Agreement on behalf of a Party has been duly authorized and empowered to execute and deliver this Agreement on behalf of said Party.

7.7 Interpretation. This Agreement is the product of negotiations between the Company and the Consenting Creditor, and in the enforcement or interpretation hereof, is to be interpreted in a neutral manner, and any presumption with regard to interpretation for or against any Party by reason of that Party having drafted or caused to be drafted this Agreement, or any portion hereof, shall not be effective in regard to the interpretation hereof.

7.8 Successors and Assigns. This Agreement is intended to bind and inure to the benefit of the Parties and their respective successors, assigns, heirs, executors, administrators, and representatives, other than a trustee or similar representative appointed in a bankruptcy case. The Company shall not assign any of its rights or obligations under this Agreement to any person or entity without the prior written consent of JPM, and any attempt by the Company to assign any of its rights or obligations under this Agreement without the prior written consent of JPM shall be null and void.

7.9 Creditors' Committee. Notwithstanding anything herein to the contrary, if any Consenting Creditor is appointed to and serves on an official committee of creditors in the Chapter 11 Case, the terms of this Agreement shall not be construed so as to limit such Consenting Creditor's exercise (in its sole discretion) of its fiduciary duties to any person arising from its service on such committee, and any such exercise (in the sole discretion of such Consenting Creditor) of such fiduciary duties shall not be deemed to constitute a breach of the terms of this Agreement; *provided, however*, that nothing in this Agreement shall be construed as requiring any Consenting Creditor to serve on any official committee in any such Chapter 11 Case.

7.10 Relationship Among Parties. It is understood and agreed that no Plan Support Party has any fiduciary duty or other duty of trust or confidence in any form with any other Plan Support Party, and, except as provided in this Agreement, there are no commitments among or between them.

7.11 Notices. All notices hereunder shall be deemed given if in writing and delivered, if sent by telecopy, electronic mail, courier, or registered or certified mail (return receipt requested) to the following addresses and telecopier numbers (or at such other addresses or telecopier numbers as shall be specified by like notice):

(a) if to the Company, to:

Petra Fund REIT Corp.
1370 Avenue of the Americas, 23rd Floor
New York, New York 10019
Facsimile: 212-489-1629
Attn: Lawrence Shelley

with copies (which shall not constitute notice) to:

Dickstein Shapiro LLP
1177 Avenue of the Americas
New York, New York 10036
Facsimile: 212-277-6501
Attn: Mark S. Fawer, Esq.
E-mail address: fawerm@dicksteinshapiro.com

(b) if to JPM, to:
J.P. Morgan Securities, Inc.
270 Park Avenue
New York, NY 10017
Facsimile: 212-834-6047
Attn: Kunal K. Singh

with copies (which shall not constitute notice) to:

Cadwalader, Wickersham & Taft LLP
700 Sixth Street, N.W.
Washington, D.C. 20001

Facsimile: 202-862-2400
Attn: Mark C. Ellenberg, Esq.
E-mail address: mark.ellenberg@cwt.com

Any notice given by delivery, mail, or courier shall be effective when received. Any notice given by telecopier shall be effective upon oral or machine confirmation of transmission.

7.12 Access. The Company will afford the Plan Support Party and its respective attorneys, consultants, accountants, and other authorized representatives reasonable access, upon reasonable notice during normal business hours, to all properties, books, contracts, commitments, records, management personnel, lenders, and advisors of the Company; *provided, however,* that the Company's obligation hereunder shall be conditioned upon such Plan Support Party being party to an executed confidentiality agreement approved by and with the Company.

7.13 Waiver. Except as expressly provided in this Agreement, nothing herein is intended to, or does, in any manner waive, limit, impair, or restrict any right of any Party to protect and preserve its rights, remedies, and interests, including, without limitation, its claims against the Company. If the Transactions are not consummated, or if this Agreement is terminated for any reason (other than Section 5.5 hereof), the Parties fully reserve any and all of their rights. Pursuant to Federal Rule of Evidence 408 and any other applicable rules of evidence, this Agreement and all negotiations relating hereto shall not be admissible into evidence in any proceeding other than a proceeding to enforce its terms, or as reasonably necessary or appropriate to be disclosed in a Chapter 11 Case.

7.14 Specific Performance; Limitation on Damages. It is understood and agreed by the Parties that money damages would be an insufficient remedy for any breach of this Agreement by any Party and each non-breaching Party shall be entitled to specific performance and injunctive or other equitable relief as a remedy of any such breach, including, without limitation, an order of the Bankruptcy Court or other court of competent jurisdiction requiring any Party to comply promptly with any of its obligations hereunder; *provided, however*, that this provision shall in no way act to prevent a Party from seeking monetary damages to which it is otherwise entitled in addition to the specific performance and equitable relief described herein. Notwithstanding anything to the contrary set forth herein, the Parties hereby consent and agree that no Party shall be liable for any indirect, special, consequential or punitive damages whatsoever (included but not limited to lost profits) arising out of or relating to this Agreement, the Term Sheet or the Transaction, even if such Party has been informed of the likelihood thereof and regardless of the form of action.

7.15 Several, Not Joint, Obligations. The agreements, representations, and obligations of the Parties under this Agreement are, in all respects, several and not joint.

7.16 Remedies Cumulative. All rights, powers, and remedies provided under this Agreement or otherwise available in respect hereof at law or in equity shall be cumulative and not alternative, and the exercise of any right, power, or remedy thereof by any Party shall not preclude the simultaneous or later exercise of any other such right, power, or remedy by such Party.

7.17 No Third-Party Beneficiaries. Unless expressly stated herein, this Agreement shall be solely for the benefit of the Parties, and no other person or entity shall be a third-party beneficiary hereof.

Section 8. ***Disclosure.*** The Company shall publicly disclose (a) the existence of this Agreement and the material terms of the Term Sheet in a filing with the Bankruptcy Court on the Petition Date and (b) any material amendment to this Agreement and the Term Sheet in a filing with the Bankruptcy Court following the effective date of such amendment, each in form and substance reasonably acceptable to the Parties. The Company will provide to counsel for the Parties all press releases and filings relating to the Chapter 11 Case, this Agreement, the Term Sheet, or the transactions contemplated hereby and thereby and any amendments thereof, in each case, in advance of the public disclosure of any such press release or filing. To the extent that the Company fails to make such initial disclosure within five business days following the Agreement Effective Date or the effective date of any amendment hereto, the Consenting Creditor shall have the right, but not the obligation, to disclose such terms publicly. The Company shall not (a) use the name of any Plan Support Party in any press release without such Plan Support Party's prior written consent or (b) disclose to any person other than legal and financial advisors to the Company the principal amount or percentage of any notes or any other securities of the Company or any of their respective subsidiaries held by any Party, except as reasonably necessary or appropriate to do so in connection with a Chapter 11 Case.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the day and year first above written.

[signature pages follow]

Signature Page to the Plan Support Agreement

Petra Fund REIT Corp.

By: _____
Name: Andrew Stone
Title: President

Signature Page to the Plan Support Agreement

Consenting Creditor BEAR, STEARNS FUNDING, INC.

Name: Kunal K. Singh
Title: Executive Director

Address: 270 PARK AVENUE, 10th Fl, NEW YORK, NY 10019

Attention: KUNAL K. SINGH
Telephone: 212-834-5467
Facsimile: 212-834-6047

Aggregate principal amount of secured Claims:

Aggregate principal amount of Unsecured Claims:

EXHIBIT A
TERM SHEET

THIS IS NOT AN OFFERING MEMORANDUM OR PROSPECTUS AND SHOULD NOT BE TREATED AS OFFERING MATERIAL OF ANY SORT AND IS FOR INFORMATION PURPOSES ONLY

Petra Fund REIT Corp. Restructuring Term Sheet

July 30, 2009

Summary of Principal Terms of Proposed Restructuring Agreement

Please note that this term sheet (the "Term Sheet") is for discussion purposes only and sets forth terms and conditions that, other than as set forth in that certain Plan Support Agreement dated as of July 30, 2009, are non-binding in all respects and may or may not become part of a definitive agreement. The Term Sheet is not based on an existing agreement between the relevant parties and is not intended to impose any obligation whatsoever on any party. This Term Sheet is not to be construed as a commitment, offer, agreement-in-principle or other agreement or understanding of any kind by any party to any term or condition set forth herein.

Entity to be Restructured: Petra Fund REIT Corp. ("Debtor")

Parties:
Bear, Stearns Funding, Inc. ("JPM")
The Royal Bank of Scotland plc ("RBS")
General unsecured creditors ("GUCs")
Sponsors of the Debtor (the "Sponsors")

Transaction Summary: The restructuring will occur through a pre-packaged or pre-negotiated liquidating plan of reorganization (the "Plan") to be filed in the Debtor's voluntary chapter 11 case under the Bankruptcy Code (the "Case") for the Debtor before the United States Bankruptcy Court for the Southern District of New York (the "Court"), culminating in the confirmation of the Plan, the material terms and conditions of which are set forth in this Term Sheet.

Assumptions: For the purposes of this Term Sheet, it is assumed that the present fair market value of the JPM REIT Collateral (as defined below) is less than the amount of JPM's secured claims.

Existing Claims and Interests:

JPM: Secured claims secured by (i) those certain Class K Notes due 2047, in the original principal amount of $32,500,000 (the "Class K Notes") issued by the co-issuers in connection with the Petra CRE CDO 2007-1 (the "Petra CDO") and (ii) those certain Preferred Shares in the aggregate original notional amount of $130,000,000 issued by the issuer in connection with the Petra CDO (collectively, with the Class K Notes, the "JPM REIT Collateral"), and unsecured deficiency claims. JPM has foreclosed or otherwise exercised its available remedies with respect to certain of its collateral other than the JPM REIT Collateral (the "JPM Repo Collateral") arising under the repurchase agreement between JPM and Debtor.

RBS: Secured claims secured by those certain (i) Class F Notes due 2047, in the original principal amount of $33,000,000, (ii) Class G Notes due 2047, in the original principal amount of $20,000,000, and (iii) Class J Notes due 2047, in the original principal amount of $42,500,000, each issued by the co-issuers in

connection with the Petra CDO (collectively, the "RBS REIT Collateral" and, together with the JPM REIT Collateral, the "REIT Collateral"), and unsecured deficiency claims. RBS has foreclosed and otherwise exercised its available remedies, and continues to exercise its remedies, with respect to its collateral other than the RBS REIT Collateral (the "RBS Repo Collateral") arising under one or more repurchase agreements between RBS (or its affiliates) and Debtor.

GUCs: General unsecured claims.

Bankruptcy Administration:

- JPM will consent, on terms reasonably satisfactory to JPM, to the entry of a "cash collateral" or similar order that provides for the release to Debtor of those proceeds from the JPM Collateral necessary to satisfy ongoing administrative and priority expenses of the Debtor in the Case, including but not limited to (i) payment to Petra Capital Management LLC (the "New REIT Collateral Manager") of any monthly fees payable based on the same calculation as the New REIT Management Fees (as defined below), (ii) payment of all professional fees approved by the Bankruptcy Court, (iii) payment of all expenses or fees authorized or required by the Bankruptcy Court or applicable law, including the Bankruptcy Code or federal or local rules or procedures that govern cases within the Bankruptcy Court, and (iv) payment of any claims or expenses necessary or appropriate to support confirmation or consummation of the Plan.

Plan Mechanics:

- Debtor and/or Sponsors shall form and/or cause the formation of (along with the additional required number of stockholders) the following three companies: (i) Newco 1; (ii) Newco 2; and (iii) Newco 3. Newco 3 shall be a new real estate investment trust (the "New REIT"), and shall own 100% of the equity interests of both Newco 1 and Newco 2, each of which shall be treated as a Qualified REIT Subsidiary, Newco 1 shall own 100% of the equity interests of Petra PS SPV Corp and Petra PS SPV Corp shall continue to own the JPM REIT Collateral.

- Debtor shall (i) transfer (a) the JPM REIT Collateral, subsequent to the release of the existing liens held by JPM, and (b) all of the Debtor's shares of Petra PS SPV Corp. (a wholly-owned subsidiary of the Debtor), to Newco 1; and (ii) transfer the RBS REIT Collateral to Newco 2, subject to a lien in an amount equal to the current value of the RBS REIT Collateral, as determined by the Bankruptcy Court. The transfer of the REIT Collateral by Debtor shall be conditioned upon the delivery of an opinion of REIT counsel of the Debtor (Sidley Austin LLP), addressed to JPM, in the form attached as Exhibit A hereto, that the New REIT will qualify as a REIT, and that during and following the transfer of the REIT Collateral to

the New REIT or its subsidiaries, the issuer under the Petra CDO will continue to be treated as a Qualified REIT Subsidiary.

- The organizational documents of the New REIT shall provide for the issuance of one class of common stock (the "Common Stock"), the holders of which shall be identified in the Plan. In addition, the New REIT shall issue to at least ninety-nine additional stockholders (identified by Debtor in the Plan, in order to comply with the REIT rules under the federal tax code) Class P preferred stock (the "Class P Preferred Stock").

- Promptly following each "Payment Date" under the Petra CDO indenture, New REIT shall distribute all cash (whether constituting interest proceeds, principal proceeds or any other proceeds) received by it either directly or indirectly in connection with such Payment Date in respect of the JPM REIT Collateral, other than and subject to (i) any amounts applied to the payment of the New REIT Management Fees (as defined below) and (ii) any amounts reserved or allocated for distribution to the holders of the Class P Preferred Stock to comply with the REIT rules under the federal tax code (the "JPM REIT Collateral Cash Flow"), to the holders of the JPM Debt (as defined below). The JPM REIT Collateral Cash Flow shall be distributed to the holders of the JPM Debt on a monthly basis.

- Promptly following each "Payment Date" under the Petra CDO indenture, New REIT shall distribute all cash (whether constituting interest proceeds, principal proceeds or any other proceeds) received by it either directly or indirectly in connection with such Payment Date in respect of the RBS REIT Collateral (the "RBS REIT Collateral Cash Flow"), to the holders of the RBS Debt (as defined below). Notwithstanding the foregoing, in the event RBS makes a 1111(b) Election (as defined below), New REIT shall distribute to RBS an annual amount equal to the amount needed to satisfy that year's obligation under the 1111(b) Note (as defined below), with any remaining RBS REIT Collateral Cash Flow being distributed to New REIT for distribution to the holders of the Common Stock.

- For the avoidance of doubt, all New REIT Management Fees payable to the New REIT Collateral Manager in accordance with the New Management Agreement (as defined below) shall be payable on a non-cumulative basis and shall be deducted from the related JPM REIT Collateral Cash Flows before such JPM REIT Collateral Cash Flows are distributed to the holders of the JPM Debt in accordance with the preceding paragraphs.

- New REIT shall issue a debt instrument for the repayment of Debtor's reduced indebtedness to JPM in the outstanding principal amount of $14,598,737.00 (the "JPM Debt"). The JPM Debt will be non-recourse debt secured only by a perfected first-priority lien on, and payable solely from proceeds of, New REIT's shares of Newco 1. The Newco 1 shares

shall be delivered to an escrow agent of national reputation mutually acceptable to JPM and Debtor (the "Escrow Agent") pursuant to the related escrow agreement (the "Escrow Agreement"). The Escrow Agreement shall provide that so long as any JPM Debt remains outstanding, the Escrow Agent shall receive and distribute the JPM REIT Collateral Cash Flow to JPM in reduction of the JPM Debt. Upon the repayment of the JPM Debt in full, the Escrow Agent shall be instructed to release the Newco 1 shares to New REIT, and all liens in favor of JPM relating thereto shall be released.

- New REIT shall issue a debt instrument for the repayment of Debtor's reduced indebtedness to RBS in the outstanding principal amount of the then current value of the RBS REIT Collateral at the time of confirmation of the Plan, as then determined by and approved by the Bankruptcy Court (the "RBS Debt"). Notwithstanding the foregoing, in the event RBS makes an election under Section 1111(b) of the Bankruptcy Code to have its claims and the RBS REIT Collateral treated in accordance therewith (the "1111(b) Election"), (i) the RBS Debt shall be in the face amount of the total outstanding claims held by RBS against the Debtor at the time of confirmation of the Plan, regardless of the current value of the RBS REIT Collateral, but (ii) the debt instrument governing the payment of such RBS Debt (the "1111(b) Note") shall be calculated and structured such that the annual payments to RBS shall be limited to an amount such that the net present value of the total aggregate payments under the entirety of the 1111(b) Note are no greater than the current value of the RBS REIT Collateral at the time of confirmation of the Plan, as approved by the Bankruptcy Court. The RBS Debt will be non-recourse debt secured only by, and payable solely from proceeds of, the continuing lien of RBS on the RBS REIT Collateral. The RBS REIT Collateral shall be delivered to the Escrow Agent pursuant to the Escrow Agreement. The Escrow Agreement shall provide that so long as any RBS Debt remains outstanding, the Escrow Agent shall receive and distribute RBS's allocation specified above of the RBS REIT Collateral Cash Flow to RBS in reduction of the RBS Debt. Upon the repayment of the RBS Debt in full, the Escrow Agent shall be instructed to release the RBS REIT Collateral to Newco 2, and all liens in favor of RBS relating thereto shall be released.

- The New REIT shall enter into a management agreement with the New REIT Collateral Manager on terms similar to that certain existing Investment Management Agreement (the "New Management Agreement"), and the Sponsors shall cause the New REIT Collateral Manager to continue to diligently manage the assets of the New REIT in the best interests of its stockholders. On any date on which JPM REIT Collateral Cash Flow is payable to the holders of the JPM Debt, the New REIT shall also pay to the New REIT Collateral Manager a management fee (the "New REIT Management Fees"), as compensation for the ongoing

management of the assets of the New REIT by the New REIT Collateral Manager in an amount, if any, equal to the sum of: (i) an amount up to the first $150,000 of JPM REIT Collateral Cash Flow on such date that is attributable to the Petra CDO Preferred Shares on such date (or such lesser amount of JPM REIT Collateral Cash Flow, if any, that is attributable to the Petra CDO Preferred Shares on such date) plus (ii) if the total JPM REIT Collateral Cash Flow is greater than $500,000 (including the amount described in the preceding clause (i)), 7.5% of the total JPM REIT Collateral Cash Flow on such date (other than the amount up to $150,000 described in the preceding clause (i)), up to an aggregate cap of $250,000.[1]

Proposed Treatment of Existing Claims and Interests:

- JPM's secured and unsecured claims to be exchanged for the JPM Debt, secured by a pledge by New REIT of the shares of Newco 1.
- RBS's claims to be bifurcated into a secured and unsecured portion, with the unsecured portion treated as part of the GUCs and the secured portion to be subject to "cram down" under Section 1129(b) of the Bankruptcy Code, exchanged for the RBS Debt, secured by a continuing lien on the RBS REIT Collateral.
- The GUCs shall receive a distribution from the remainder of the assets of Debtor's estate.
- All equity interests in Debtor are to be extinguished and the Debtor will be liquidated.
- Debtor and New REIT shall use all commercially reasonable efforts, and take such actions as are requested by JPM or are necessary, to effectuate the full transfer of all JPM Repo Collateral to JPM.

[1]**Please note that the structure and proposed organizational document provisions are subject to Sidley Austin tax review in all respects.**

Claims/Interests Classification:

Type	Treatment of Claim Pursuant to Plan
Administrative	Paid in full in cash
Pre-Petition Secured	
JPM ("Class 1")	Impaired Payments on the JPM Debt
RBS ("Class 2")	Impaired Payments on the RBS Debt
Unsecured	
GUCs ("Class 3")	Impaired Distribution from remaining estate assets
Equity Interests	
All equity	Extinguished

Plan Timing: The Debtor shall do the following within the timeframes established in a plan support agreement: (i) file the Plan and disclosure statement in accordance with this Term Sheet, (ii) obtain approval of the disclosure statement by the Court, and (iii) obtain an order of the Court confirming the Plan. A plan support agreement shall provide that the requisite majority of Class 1 will vote for the Plan.

Miscellaneous: The Plan shall provide for customary releases, injunction against future claims, discharge of debts, and other usual terms.

EXHIBIT A TO TERM SHEET – FORM OF LEGAL OPINION

SIDLEY DRAFT August 5, 2009

SIDLEY AUSTIN LLP
SIDLEY

SIDLEY AUSTIN LLP
787 SEVENTH AVENUE
NEW YORK, NY 10019
(212) 839 5300
(212) 839 5599 FAX

BEIJING
BRUSSELS
CHICAGO
DALLAS
FRANKFURT
GENEVA
HONG KONG
LONDON
LOS ANGELES
NEW YORK
SAN FRANCISCO
SHANGHAI
SINGAPORE
SYDNEY
TOKYO
WASHINGTON, D.C.

FOUNDED 1866

August [], 2009

New Petra Fund REIT Corp.
1370 Avenue of the Americas
23rd Floor
New York, NY 10019

Petra Fund REIT Corp.
1370 Avenue of the Americas
23rd Floor
New York, NY 10019

Petra CRE CDO 2007-1, Ltd.
c/o Maples Finance Limited
P.O. Box 1093GT
George Town, Grand Cayman,
Cayman Islands

Bear, Stearns Funding, Inc.
383 Madison Avenue
New York, New York 10179

Re: Restructuring of Petra Fund REIT Corp.

Ladies and Gentlemen:

We have acted as special U.S. federal income tax counsel to Petra CRE CDO 2007-1, Ltd., (the "CDO"), Petra Fund REIT Corp. (the "Old REIT") and New Petra Fund REIT Corp. (the "New REIT") in connection with the restructuring (the "Restructuring") of Old REIT and the transfer of interests in and assets of Old REIT and CDO to New REIT pursuant to the Plan filed under the Case with the Court. All terms not otherwise defined herein have the meaning assigned to them in the Restructuring Agreement. [1]

[1] The agreement that will embody the details of the plan of restructuring, including the issuance of the RBS Debt and the JPM Debt (together with any stock issued in the restructuring, the "Securities").

Sidley Austin LLP is a limited liability partnership practicing in affiliation with other Sidley Austin partnerships

SIDLEY AUSTIN LLP
SIDLEY

In rendering our opinion, we have reviewed (1) the Restructuring Agreement, (2) a certificate containing certain factual representations and covenants of New REIT (the "Officers' Certificate"), and (3) such other documentation or information provided to us by you as we have deemed necessary or appropriate as a basis for our opinion set forth herein (the Restructuring Agreement, the Officer's Certificate and such other documents, together, the "Transaction Documents").

For purposes of our opinion, we have not independently verified all of the facts, representations and covenants set forth in the Transactions Documents. We have assumed and relied on your representation that the information presented in the Transaction Documents accurately and completely describes all material facts relevant to the Restructuring and our opinion. We have assumed that such statements, representations and covenants are true without regard to any qualification as to knowledge or belief. Our opinion is conditioned on, among other things, the initial and continuing accuracy of the facts, information, covenants and representations set forth in the Transaction Documents and the statements and representations made by representatives of the New REIT, without regard to any qualifications therein.

Our opinion is also based on the correctness of the following assumptions: (i) since the formation of the CDO and immediately prior to the Restructuring, the Old REIT has retained beneficial ownership of 100% of the "equity" (as that term is used for U.S. federal income tax purposes) in the CDO, (ii) the Old REIT will continue to qualify as a real estate investment trust (a "REIT") under the Internal Revenue Code of 1986, as amended (the "Code") through the last day of its taxable year (including any short taxable year) ending in 2009, (iii) the New REIT will file with its return for its taxable year ending December 31, 2009 an election to be a REIT (iv) the first day of the 2009 taxable year of the New REIT (including any short taxable year) will occur on or before the last day of the Old REIT's 2009 taxable year, (v) the New REIT and any of its affiliates have been and will continue to be operated in accordance with the laws of the jurisdictions in which they were formed and in the manner described in the relevant organizational documents, (vi) there will be no changes in the applicable laws of the State of Maryland or of any other jurisdiction under the laws of which any such entity has been formed, and (vii) each of the written agreements to which the New REIT or any such entity is a party will be implemented, construed and enforced in accordance with its terms.

In rendering our opinion, we have also considered the applicable provisions of the Code, the Treasury Regulations promulgated thereunder, judicial decisions, administrative rulings and other applicable authorities, in each case as in effect on the date hereof. The statutory provisions, regulations, decisions, rulings and other authorities on which this opinion is based are subject to change, and such changes could apply retroactively.

SIDLEY AUSTIN LLP
SIDLEY

In our examination, we have assumed the legal capacity of all natural persons, the genuineness of all signatures, the authenticity of all documents submitted to us as originals, the conformity to original documents of all documents submitted to us as certified, conformed, or photostatic copies, and the authenticity of the originals of such copies.

This opinion shall not be construed as or deemed to be a guaranty or insuring agreement. Opinions of counsel represent only counsel's best legal judgment and are not binding on the Internal Revenue Service (the "IRS") or on any court. Accordingly, no assurance can be given that the IRS will not challenge the conclusions of the opinion set forth herein or that such a challenge would not be successful.

* * * *

To comply with certain Treasury regulations, we inform you that this opinion was not intended or written to be used, and cannot be used, by any person for the purpose of avoiding U.S. federal tax penalties.

* * * *

Based on and subject to the foregoing, we are of the opinion that:

(1) Commencing with New REIT's taxable year ending December 31, 2009, the New REIT will be organized in conformity with the requirements for qualification as a REIT under the Code and the New REIT's proposed method of operation as described in the Officer's Certificate will enable the New REIT to continue to meet the requirements for qualification and taxation as a REIT under the Code.

(2) During and following the steps required by the Restructuring Agreement, including any transfers of assets and the issuance of the Securities, the CDO will not cease to be a "qualified REIT subsidiary" ("QRS") under section 856(i) of the Code and as such, the CDO will not be treated as a separate corporation from the New REIT.

Other than as expressly stated above, we express no opinion on any issue relating to the Old REIT, the New REIT, the CDO or to any investment therein or under any other law. Furthermore, the New REIT's qualification as a REIT, and the CDO's qualification as a QRS, will depend upon the New REIT meeting, in its actual operations, the applicable asset composition (including the New REIT's continuing, beneficial ownership of 100% of the

SIDLEY AUSTIN LLP
SIDLEY

"equity" in the CDO following the Restructuring), source of income, shareholder diversification, distribution and other requirements of the Code and Treasury Regulations necessary for a corporation to qualify as a REIT. We will not review these operations and no assurance can be given that the actual operations of the New REIT and any of its affiliates will meet these requirements or the representations made to us with respect thereto.

This opinion has been prepared for you in connection with the Restructuring. This opinion is rendered as of the date hereof and we undertake no obligation to update this opinion or advise you of any changes in the event there is any change in legal authorities, facts, assumptions or documents on which this opinion is based (including the taking of any action by any party to the Transaction Documents pursuant to any opinion of counsel or a waiver), or any inaccuracy in any of the representations, warranties or assumptions upon which we have relied in rendering this opinion unless we are specifically engaged to do so. This opinion is rendered only to those to whom it is addressed and may not be relied on in connection with any transactions other than the transactions contemplated herein. This opinion may not be relied upon for any other purpose, or relied upon by any other person, firm or corporation for any purpose, without our prior written consent.

Very truly yours,

EXHIBIT B
PROVISION FOR TRANSFER AGREEMENT

The undersigned ("*Transferee*") hereby acknowledges that it has read and understands the Plan Support Agreement, dated as of July 30, 2009 (the "*Agreement*"), by and among Petra Fund REIT Corp., and certain lenders and other creditors, including the transferor to the Transferee of any Claims (the "*Transferor*"), and agrees to be bound by the terms and conditions thereof to the extent Transferor was thereby bound, and shall be deemed a "*Consenting Secured Creditor*" or "*Consenting Unsecured Creditor,*" as applicable, under the terms of the Agreement.

The Transferee specifically agrees (i) to be bound by the terms and conditions of the Agreement, and (ii) to be bound by the vote of the Transferor if cast prior to the effectiveness of the transfer of the loans or claims, as applicable.

Date Executed: , 2009

_____
Print name of Transferee

_____
Name:
Title:

Address: _____
_____
_____
Attention: _____
Telephone: _____
Facsimile: _____

Aggregate principal amount of secured claims:

Aggregate principal amount of unsecured claims:

ITEM NO. 123

JA-9

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: **PETRA FUND REIT CORP., et al.,** **DEBTORS.**	**CHAPTER 11** **CASE NO. 10-15500 (SCC)** **JOINTLY ADMINISTERED**

ORDER CONFIRMING SECOND AMENDED PLAN OF REORGANIZATION OF PETRA FUND REIT CORP. AND PETRA OFFSHORE FUND, L.P., AS MODIFIED

The above-captioned debtors and debtors in possession (collectively, the "Debtors") having proposed the Second Amended Plan of Reorganization of Petra Fund REIT Corp. and Petra Offshore Fund, L.P., dated December 21, 2011, ("Second Amended Plan") (docket #225), pursuant to Section 1129 of Title 11 of the United States Code (the "Bankruptcy Code"); which was included in the Solicitation Materials (as defined below) distributed to creditors entitled to vote on the Plan, and as modified by revisions identified in the Certification of Brian E. Goldberg with Respect to the Mailing of Letter Relating to Auction Procedures Sent to All Parties-In-Interest (with exhibits) (docket # 246) (the "Auction Procedures Letter Certification", and together with the Second Amended Plan, including all exhibits and supplements thereto, and the modified Second Amended Plan filed at docket # 255 to reflect the revisions identified in the Auction Procedures Letter Certification, and as it may be further modified or amended, including the modifications reflected herein that include the amendment agreed to at the Confirmation Hearing, as hereinafter defined, collectively, the "Plan"[1]); this Court having conducted an

[1] Capitalized terms not otherwise defined herein shall have the meanings given to them in the Plan.

evidentiary hearing to consider confirmation of the Plan on February 28, 2012 (the "Confirmation Hearing"); this Court having considered:

(i) the testimony of the witnesses proffered and/or called at the Confirmation Hearing, including proffers previously filed as part of the Debtors' Confirmation Pleadings (as hereinafter defined) and any cross-examination and/or redirect examination of such witnesses;

(ii) any exhibits admitted into evidence at the Confirmation Hearing or other exhibits admitted for the purposes of the Confirmation Hearing;

(iii) the arguments of counsel and/or other parties in interest presented at the Confirmation Hearing;

(iv) the objection of KBS filed and/or asserted with respect to confirmation of the Plan (the "Objection");

(v) any exhibits or supplements to the Plan, including the Plan Supplement (docket # 229) (as it and/or they may be or have been further supplemented, in filings with the Court, including at docket # 256, or otherwise);

(vi) Report of the Examiner, (docket #211) (the "First Examiner Report") and the Second Report of the Examiner (docket #212) (the "Second Examiner Report"), (collectively, together with exhibits to each thereto, the "Examiner Reports"), of which this Court expressly takes judicial notice; and

(vi) the pleadings and other documentation filed by the Debtors in support of confirmation of the Plan (collectively, the "Debtors' Confirmation Pleadings"), all of which were admitted into evidence without objection as part of the record at the Confirmation Hearing, including:

A. Certification of Brian E. Goldberg with respect to the Mailing of Solicitation Packages and Certain Other Notices Sent to Other Parties in Interest (docket # 229) (the "Solicitation Certification");

B. Certification of Acceptance or Rejection of Chapter 11 Plan (docket # 241) (the "Voting Certification");

C. Memorandum of Law in Support of Confirmation of the Second Amended Plan of Reorganization of Petra Fund REIT Corp. and Petra Offshore Fund, L.P., and Reply to Lone Objection Thereto (docket # 241) (the "Confirmation Memorandum");

D. Declaration of Lawrence Shelley in Support of Second Amended Plan of Reorganization of Debtors and Debtors in Possession, dated January 30, 2012 (docket # 244) (the "Shelley Confirmation Declaration");

E. Supplemental Declaration of Lawrence Shelley in Support of Second Amended Plan of Reorganization of Debtors and Debtors in Possession, dated February 24, 2012 (docket # 254) (the "Supplemental Shelley Confirmation Declaration"); and

F. the Auction Procedures Letter Certification;

this Court having considered the docket in the Chapter 11 Cases (including but not limited to the Examiner Reports); this Court being familiar with the Plan and the other relevant factors affecting these Chapter 11 Cases pending under the Bankruptcy Code; this Court having found that due and proper notice has been given with respect to the Confirmation Hearing and the deadlines and procedures for filing objections to the Plan; the appearance of all interested parties (including the party asserting an Objection) having been duly noted in the record of the Confirmation Hearing; and upon the record of the Confirmation Hearing (which is incorporated herein by reference), and after due deliberation thereon, and sufficient cause appearing therefor;

IT IS HEREBY FOUND AND CONCLUDED THAT:[2]

JURISDICTION AND VENUE

A. The Bankruptcy Court has jurisdiction over this matter and these Chapter 11 Cases pursuant to 28 U.S.C. § 1334.

B. Confirmation of the Plan is a core proceeding pursuant to 28 U.S.C. § 157, and the Bankruptcy Court has jurisdiction to enter a final order with respect thereto.[3]

C. Venue is proper before the Bankruptcy Court pursuant to 28 U.S.C. §§ 1408 and 1409.

D. The Debtors are proper Debtors under section 109 of the Bankruptcy Code, and the Debtors are proper proponents of the Plan under section 1121(a) of the Bankruptcy Code.

E. The Chapter 11 Cases were filed in good faith and not for any improper purpose.[4]

F. There are no unsatisfied conditions precedent for entry of this Order that were not properly waived.

COMPLIANCE WITH STANDARDS FOR CONFIRMATION UNDER SECTION 1129 OF THE BANKRUPTCY CODE

G. Burden of Proof. Each of the Debtors, as proponents of the Plan, has met its burden of proving the standards of sections 1129(a) and 1129 (b) of the Bankruptcy Code by a preponderance of the evidence, which is the applicable evidentiary standard in the Bankruptcy Court.

H. Bankruptcy Rule 3016(a). The plan is dated and identifies the Debtors as the Plan proponents, thereby satisfying Bankruptcy Rule 3016(a).

I. Plan compliance with Bankruptcy Code (1129(a)(1)). The Plan complies with each applicable provision of the Bankruptcy Code. In particular, the Plan complies with the requirements of sections 1122 and 1123 of the Bankruptcy Code with respect to both mandatory and permitted contents of a plan, including but not limited to, (i) provisions

[2] This order shall constitute the Court's findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052, and to the extent necessary, determinations denominated as findings of fact may be considered to be conclusions of law and determinations denominated as conclusions of law may be considered to be findings of fact.

[3] In accordance with the Amended Standing Order of Reference of the United States District Court for the Southern District of New York, dated January 31, 2012 (12 Misc. 00032), this order may be considered to be proposed findings and conclusions, to the extent necessary.

[4] In this Court's discussion and findings herein related to whether the Plan was proposed in good faith, there are additional specific findings and conclusions that further support the determination that the Chapter 11 Cases were filed in good faith.

for classification, impairment/unimpairment and treatment of Creditors and holders of Equity Interests (including distribution provisions) are reasonable and proper under the circumstances of the Chapter 11 Cases and represent the result of good faith negotiations, (ii) there are adequate means for implementation of the Plan, (iii) the provisions for issuance of equity interests for Reorganized Petra and the selection of its officers and directors are proper and appropriate under the circumstances of the Chapter 11 Cases and are consistent with public policy and in the best interests of the creditors and equity security holders, (iv) the Plan includes provisions relating to assumption and rejection of executory contracts and unexpired leases, which are reasonable and proper under the circumstances; (v) all provisions (including the sale and auction procedures and release and exculpation and related provisions[5]) not expressly addressed by section 1123 are proper and not inconsistent with applicable provisions of the Bankruptcy Code; and (vi) Sections 1123(c) and (d) are inapplicable to this case because (a) these cases do not relate to individual personal bankruptcies and (b) the Debtors did not assume or assign any executory contracts or unexpired leases[6], respectively, although the Plan did provide appropriate procedures for establishing cure amounts if any such contracts had been assumed or assigned.

J. Debtors' Compliance with the Bankruptcy Code (11 U.S.C. §1129(a)(2)). The Debtors have complied with all applicable provisions of the Bankruptcy Code, with respect to the Plan and the solicitation of acceptances or rejections thereof. In particular, Sections 1125 and 1126 of the Bankruptcy Code have been satisfied, because among other things, (a) this Court has concluded that the Disclosure Statement contained "adequate information" as that term is used in the Bankruptcy Code, (b) the Solicitation Certification, the Voting Certification and the Auction Procedures Letter Certification demonstrate that the Plan and Disclosure Statement and related notices and other materials (collectively, the "Solicitation Materials") were distributed in a manner giving due and sufficient notice to all creditors, equity holders and/or other parties in interest of their rights to vote (as applicable) and of the objection deadlines and Confirmation Hearing and other applicable deadlines, (c) due and sufficient notice of the Confirmation Hearing was given, and (d) Debtors have received accepting votes from all of the creditors in Classes 1 and 1A under the Plan.

K. Plan proposed in Good Faith (11 U.S.C. § 1129(a)(3)). The Plan has been proposed in good faith and not by any means forbidden by law, and complies with section 1129(a)(3). The cases were filed and the Plan was ultimately proposed to try to maximize the value of the Debtors' estates for the benefit of the Debtors' creditors and parties in interest, and for no ulterior purposes. The Plan fairly achieves a result consistent with the objectives and purposes of the Bankruptcy Code; specifically the Plan provides an efficient means to restructure the Debtors' secured debt, efficiently dispose of the Debtors' assets and businesses in a means designed to maximize value for the Debtors' estates in light of the

[5] There are additional findings and conclusions relating to the sale and auction procedures and release, exculpation and related provisions.

[6] And the Court hereby specifically finds that all executory contracts and/or unexpired leases were properly rejected.

Debtors' current economic circumstances and the demonstrated lack of third-party interest in such assets and businesses, as well as globally resolve claims by and against Debtors and among Creditors and other parties.

The Plan is the result of extensive, good faith, arms length negotiations between the Debtors and certain of their principal constituencies, including their secured creditors, all of whom have voted to accept the Plan. The Debtors also made good faith attempts at negotiations on both a pre-bankruptcy and post-petition basis with the Creditor that filed the Objection (and was the only Creditor that voted to reject the Plan), but such negotiations were ultimately not successful. As evidenced by the unanimous acceptances by all secured creditors, who also continue to hold and/or waived substantial unsecured claims as part of the consensual restructuring, the Plan achieves the goal of an orderly and consensual restructuring and disposition and the fair and equitable distribution of the assets of the Debtors' estates. Further, the Plan's classification, indemnification, injunction, release and exculpation provisions have been negotiated in good faith, are consensual and voluntary and are consistent with all applicable sections of the Bankruptcy Code and the law of this Circuit, and were necessary for the Debtors to successfully reach agreement with the other parties in interest with regard to the Plan. As to Creditors, the release and exculpation provisions (and related injunctions) were negotiated as part of the Plan negotiations and given in consideration for their assistance in furthering the restructuring and Plan process, and to other non-Debtor parties, the release and exculpation provisions (and related injunctions) were in exchange for their assistance in furthering the restructuring and bankruptcy process, including the Plan process as well as responding to the various discovery requests and Examiner inquiries, as well as the fact that the Debtors' officers, directors, managers and management company received no salary, management fees, or similar compensation for their work on behalf of the Debtors for the entirety of the Chapter 11 Cases.

L. Based on (i) the Examiner Reports, as well as (ii) the Shelley Confirmation Declaration, and (iii) the Supplemental Shelley Confirmation Declaration, the Court finds and concludes that Debtors have not engaged in any fraudulent, preferential or otherwise avoidable or improper transactions with any of their principals, insiders, Professionals, managers, related parties or affiliates, or with any of their creditors or equity holders, on either a pre-bankruptcy basis or during the Chapter 11 Cases. Sections 1129(a)(4), (a)(5) and (a)(6) have either been satisfied or do not apply to the Plan.

M. Best Interest of Creditors (11 U.S.C. § 1129(a)(7)). Based on the evidence before the Court, it is apparent that each Creditor and each holder of Interests, dissenting or not, is receiving at least as much as it would receive in a Chapter 7 liquidation. In that scenario, there would be the added administrative costs of a trustee, and any disposition of the assets would result in even fewer proceeds because it would likely not have the benefit of minimum guaranteed bids provided by the current stalking horse bidder.

N. Sections 1129(a)(8) has been satisfied. Classes 1 and 1A have accepted the Plan, but the Plan is confirmable with respect to the remaining impaired classes because the Plan satisfies section 1129(b) with respect to the remaining impaired classes.

O. Section 1129(a)(9) has been satisfied.

P. Section 1129(a)(10) has been satisfied. Classes 1 and 1A have accepted the Plan, and both are impaired classes with no insiders.

Q. Feasibility (11 U.S.C. §1129(a)(11). The Plan is feasible, under either a liquidation-based analysis (because the guaranteed minimum sale proceeds are sufficient to satisfy all expenses needed for confirmation) or under a going-concern analysis (because the only Classes of Creditors impacted by Reorganized Petra have unanimously voted to accept the Plan, and the post-confirmation debt to be held by Reorganized Petra is nonetheless structured so as to not likely require the subsequent liquidation or bankruptcy of Reorganized Petra.)

R. Section 1129(a)(12) is satisfied, and Sections 1129(a)(13)-(16) are inapplicable to the Plan and to the Debtors' Chapter 11 Cases.

S. Cramdown (11 U.S.C. §1129(b)). The Plan's classification of Claims and Interests does not "discriminate unfairly" and is clearly reasonable and appropriate under the circumstances. The Plan is also "fair and equitable" as to all Classes that have not accepted the Plan. No holder of any Claim or Interest that is junior to any non-accepting, impaired class is receiving anything on account of such Claim or Interest. To the extent any holders of Interests or other insiders are receiving anything under the Plan, they are not being given anything on account of such relationship, but rather are only receiving anything in connection with their possible purchase of such assets pursuant to the sale and auction procedures provided under the Plan, which are fair and reasonable and in the best interests of Debtors and their estates under the facts and circumstances of these cases, and are discussed further below in finding U related to the Auction and Sale Procedures.

T. Sections 1129(c) and (d) are satisfied. In fact, there is a possibility that there will be additional tax consequences as a result of the consummation of the Plan, so clearly the intent of the Plan is not the improper avoidance of tax.

U. Auction and Sale procedures. The Court makes the general finding that the auction and sale procedures under the Plan (as amended herein to reflect, among other things, the amendments agreed to on the record of the Confirmation Hearing, and which amendments are set forth in paragraph 14 hereof), including the use of the stalking horse bid and bidder identified in the Plan, are reasonable and proper under the circumstances of the case and in the best interests of the Debtors and their estates, and further ensure that the stalking horse bids are exposed to an appropriate market test. The Court also makes the following specific findings regarding the auction and sale procedures under the Plan.

1. The Court finds these procedures reasonable and proper given the limited remaining value of the Debtors' assets, the lack of expressed interest in such assets to date, and the lack of cash in the estates. Based on the multiple invitations for substitute stalking horse bidders, as set forth in the Auction

Procedure Letter Certification and the Supplemental Shelley Confirmation Declaration, and as described further at hearings before this Court, and the lack of response to such invitations, it is clear that the existing stalking horse bidder (and the amounts of its respective stalking horse bids) is acting reasonably and that the existence of such bids are in the best interests of the Debtors and their estates.

2. The Court finds that the marketing efforts set forth in the Supplemental Shelley Confirmation Declaration, the Solicitation Certification, the Auction Procedures Letter Certification, as well as the notice to be sent pursuant to paragraph 14 hereof, are and were adequate and reasonable, and give and gave due and sufficient notice.

3. The Debtors have demonstrated good, sufficient, and sound business reasons and justifications for entering into the auction and sale procedures, and these procedures are reasonably structured to obtain the highest and best possible sales prices given the particular facts and circumstances of the Debtors' cases.

4. Although the existing stalking horse bid for each auction is simply a guaranteed minimum price and the ultimate prices paid may be higher, each of these respective initial bids would nonetheless be a fair and reasonable price for the assets to be sold therein. The initial bid for the Settlement Payments reasonably takes account of the risk inherent in the future payments, particularly given the history of the obligors with the Debtors, and the initial bid for the REIT Equity Interests reflects both the minimal value of the underlying assets and that many of these assets are further diminished in value by the existence of liens or other liabilities impairing such assets. Moreover, the possibility of competing bids (including the revised bidding procedures set forth in paragraph 14 hereof) further ensures that the ultimately winning bid for each auction will represent fair and reasonable consideration to the Debtors' estates that further constitutes fair value, full and fair consideration, reasonably equivalent value and reasonable market value.

5. Given the fair and reasonable amount for each stalking horse bid, neither the Debtors nor the stalking horse bidder have proposed or will enter into the proposed auction and related sales for the purpose of hindering, delaying or defrauding the Debtors' present or future creditors. Similarly, neither the Debtors nor the stalking horse have proposed or will enter into the proposed auction and related sales fraudulently, for the purpose of statutory or common law fraudulent conveyance and fraudulent transfer claims whether under the Bankruptcy Code or applicable non-bankruptcy law.

6. Based on the foregoing, any assets received by the ultimate purchasers (whether the stalking horse bidder or otherwise) in connection with their purchases under the auction and sale procedures under the Plan will solely be receiving such assets on account of the new consideration provided as part of the sales and there

is no bad faith associated with such transactions and such transactions are consistent with the Bankruptcy Code.

V. The Debtors' determinations regarding assumption, assignment and rejection of executory contracts and unexpired leases are based on and within the sound business judgment of the Debtors and are necessary to the implementation of the Plan. They are in the best interests of the Debtors and their estates.

W. Settlements and Releases, Exculpations and Injunctions. Pursuant to Bankruptcy Rule 9019, and in consideration for the benefits provided under the Plan, the provisions of the Plan constitute a good faith compromise and settlement of all Claims and controversies resulted pursuant to the Plan, which are in the best interests of the Debtors and their estates, and are fair, equitable and reasonable, and are essential to the successful implementation of the Plan. As described elsewhere in this Order, each of the injunctions, releases and exculpations set forth in the Plan constitutes a good faith compromise and settlement of the matters covered thereby, are in the best interests of the Debtors and their estates, and are fair and equitable, and are supported by valid consideration. Each of the parties released and exculpated by the releases and exculpation provisions of the Plan has made material contributions to these cases in the form of material compromises, settlements and otherwise. Releases by Creditors of Released Parties under section 10.10(b) of the Plan were voluntary, the voluntary nature of such releases was clearly disclosed, and the one party who filed an Objection to the Plan with respect to this release has in fact exercised its option to opt out of this release.

X. All parties have had a full and fair opportunity to litigate all issues raised by any objections to Confirmation of the Plan, including the Objection, or which might have been raised, and the Objection has been fully and fairly litigated.

Y. On January 27, 2012, the Debtors filed the Plan Supplement. The Debtors have subsequently filed certain amendments and additional exhibits to the Plan Supplement. The Plan Supplement complies with the terms of the Plan, and the filing and notice of such documents were good and proper and in accordance with the Bankruptcy Code, the Bankruptcy Rules, and the Disclosure Statement Order, and no other or further notice is or shall be required. The Debtors are authorized to modify the Plan Supplement following the entry of the Confirmation Order in accordance with the terms of the Plan.

Z. To avoid further delay in the resolution of the Chapter 11 Cases, and in light of the fact that both auctions have built in a ten day review period after the Confirmation Date for potential bidders to submit bids, thereby assuring that consummation will not occur prior to that time, good cause exists to support a waiver of the stay otherwise imposed by Bankruptcy Rule 3020(e), and such stay is hereby waived and eliminated with respect to the Plan.

AA. Based on all of the foregoing, the Plan satisfies the requirements for confirmation set forth in section 1129 of the Bankruptcy Code.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Plan and each of its provisions (whether or not specifically approved herein) are CONFIRMED in each and every respect, pursuant to section 1129 of the Bankruptcy Code (and Bankruptcy Rule 9019 to the extent applicable to any of the settlements reflected in the Plan, which such settlements are all approved.)

2. The Effective Date of the Plan shall occur on the date on which all conditions to effectiveness set forth in Section 8.1 of the Plan are satisfied or waived.

3. The Objection, and any other objections to Confirmation of the Plan, are hereby OVERRULED in their entirety and on their merits, and any withdrawn objection is deemed withdrawn with prejudice.

4. Upon the occurrence of the Effective Date, the releases, exculpations and related injunctions in favor of the Debtor-Released Parties, Released Parties and Exculpated Parties, respectively, shall be in full force and effect, expressly subject to all carve-outs and exclusions and exceptions set forth in the Plan. In satisfaction of the requirement that the Order confirming a plan describe any releases or injunctions within the Plan, in general terms, and subject to the more specific and fuller descriptions described in the Plan, including all carve-outs and exceptions and exclusions set forth in the Plan, the provisions in favor of the Debtor-Released Parties relate to direct and derivative claims of the Debtors, the provisions in favor of the Released Parties relate to claims of all Creditors who have not opted out of granting such releases, and the provisions in favor of the Exculpated Parties relate to claims of all parties in interest, but generally limited to those relating to or in connection with the Chapter 11 Cases and the related restructuring.

5. Upon the occurrence of the Effective Date, the terms of the Plan and this Order shall be binding on and inure to the benefit of (a) the Debtors, (b) all holders of Claims or Interests, (c) any person giving or receiving property under the Plan, (d) any parties to executory contracts or unexpired leases, and (e) all of their respective directors, officers, agents, representatives, successors and/or assigns, if any. Without limiting the foregoing, all parties (including but not limited to the trustee of the Petra CDO) are authorized and directed to recognize and permit any transfers and/or transactions provided for and/or contemplated under the Plan, including but not limited to the transfer to RBS of the Class F Bonds and the Class G Bonds, as well as any transfer relating to a subsequent foreclosure on either the JPM REIT Collateral or the RBS REIT Collateral. The transfer to RBS of the Class F Bonds and the Class G Bonds, as well as any transfer relating to a subsequent foreclosure on either the JPM REIT Collateral or the RBS REIT Collateral, shall be free and clear of any claims and/or mortgages, deeds of trust, Liens, pledges or other security interests or encumbrances.

6. Pursuant to Section 1146(a) of the Bankruptcy Code, the following shall not be subject to any stamp tax, real estate transfer tax, mortgage recording tax, filing fee, sales or use tax, or similar tax: (a) any transaction expressly contemplated under the Plan (including but not limited to the transfers to RBS of the Class F Bonds and Class

G Bonds, and any subsequent foreclosure on either the JPM REIT Collateral or the RBS REIT Collateral), or (b) the making or delivery of any deed or other instrument of transfer under, in furtherance of or in connection with the Plan, including the orderly and efficient disposition of the assets to be sold under the auctions and sales to be conducted pursuant to the Plan, including any merger agreements, agreements of consolidation, restructuring, disposition , liquidation or dissolution, deeds, bills of sale, deeds in lieu, certificates or statements executed or filed in connection with any of the foregoing or pursuant to the Plan.

7. Except as otherwise provided in the Plan or in any contract, instrument, release or other agreement or document created pursuant to or in connection with the Plan, on the Effective Date and concurrently with the applicable distributions made pursuant to the Plan, all mortgages, deeds of trust, Liens, pledges, or other security interests against any property of the estates shall be fully released and discharged.

8. All filing and recording officers are hereby directed to accept for filing or recording all instruments to be filed and recorded in accordance with the Plan or the Plan Supplement (or as otherwise described above in paragraph 6 of this Order) without payment of any such taxes described in paragraph 6 above. This Order shall be a recordable instrument notwithstanding any contrary provisions of applicable law. The Bankruptcy Court retains jurisdiction to enforce the foregoing direction.

9. Any transfers of owned or leased property undertaken by or on behalf of the Debtors pursuant to or in connection with the Plan and the consummation thereof are specifically for the purpose of effectuating the orderly disposition of the Debtors' estates and shall not trigger (a) any increase in applicable real estate taxes or (b) a reappraisal of any real property so transferred.

10. All provisions relating to executory contracts are approved in their entirety and the proposed assumptions, assignments and/or rejections are all approved.

11. In accordance with the Bankruptcy Code and applicable non-bankruptcy law, without further action or consent by the Court or by any other party, the Debtors and their respective directors, managers, partners, officers and agents are authorized to take any and all actions necessary or appropriate to implement, effectuate and consummate the Plan, including without limitation, (i) the auction and sale procedures contemplated under the Plan, including but not limited to the execution and delivery of contracts, agreements and documents, as well as the conducting of the auctions and sales in accordance with the Plan and (ii) the execution and delivery of the documentation evidencing the JPM Debt and the RBS Debt, which documentation shall be in form and substance reasonably acceptable to JPM and RBS, respectively.

12. To the extent necessary, this Order shall constitute the necessary consent or approval for such parties to take the actions described in the foregoing paragraph 11, and each federal, state, local, or foreign government official is hereby directed (or authorized, as applicable, including with respect to foreign officials) to accept any and all

documents, mortgages, instruments necessary or appropriate to effectuate, implement or consummate the transactions contemplated by the Plan and/or this Order.

13. If any or all of the provisions of this Order are hereafter reversed, modified or vacated by subsequent order of this Court or any other Court, such reversal, vacatur or modification shall not affect the validity of acts taken in connection with the Plan or this Order prior to the Debtors' receipt of written notice of such order.

14. Debtors are directed to serve a notice of entry of this Order and the establishment of any related deadlines for filing claims that are triggered by the Confirmation Date within three business days of the Confirmation Date; provided, however, that Debtors shall also include in this notice the following provisions relating to the auction and sale procedures, which amendments are approved, authorized and directed, and are further incorporated into the findings regarding the sale and auctions procedures contained herein, and include the amendments to the bidding procedures agreed to by Debtors at the Confirmation Hearing.

a. To participate in either of the two auctions to be conducted pursuant to Section 5.4 of the Plan, any submission of a bid must (i) be delivered in writing on or before the first day that is ten calendar days after entry of this Order (or the first Business Day thereafter if such day is not a Business Day) to Dickstein Shapiro LLP, attn: Brian E. Goldberg and Shaya M. Berger, 1633 Broadway, New York, NY 10019 (or via electronic mail if reasonably arranged with Debtors' counsel), (ii) include the information (including financial wherewithal and executed copy of proposed sale agreement) and otherwise meet the requirements of Section 5.4(A)(i) of the Plan with respect to a Potential SP Bidder submitting a Qualified SP Bid or Section 5.4(B)(i) of the Plan with respect to a Potential REIT Bidder submitting a Qualified REIT Bid, and (iii) otherwise meet the requirements of the Plan.

b. Any party submitting a Qualified SP Bid or a Qualified REIT Bid shall be notified by Debtors' counsel if such bid has been matched (with respect to ABC Corp. matching a Qualified REIT Bid) or topped (with respect to either auction) and asked by Debtors' counsel whether such bidder wishes to raise its bid in the required bid increment, and on the last day for submitting bids (as set forth in the Plan as supplemented by paragraph 14(a) hereof), to the extent there are still multiple parties who have indicated to Debtors' counsel that they wish to continue to raise their bids, Debtors' counsel shall conduct a telephonic conference call on that day with the remaining bidders to determine the highest bid and the second highest bid for each auction. The call (if any) with respect to the Settlement Payments to determine the Highest SP Bidder and potential Substitute Winning SP Bidder shall be a separate call from the call (if any) with respect to the REIT Equity Interests to determine the Highest REIT Bidder and potential Substitute Winning REIT Bidder. Debtors' counsel reserves the right to continue or delay such call or calls, if deemed appropriate.

c. Other than as set forth in this Order, the bidding procedures for the REIT Equity Interests are unchanged from the Plan and parties are directed to review Sections 5.4(B) of the Plan and paragraphs 14(a) and (b) hereof with respect thereto. With respect to the bidding procedures for the Settlement Payments, in addition to any other changes provided for in this Order, the following changes shall be made: (i) notwithstanding anything to the contrary in the Plan, including Sections 5.4(A)(ii) and 5.4(A)(iii) thereof, all parties that submit a Qualified SP Bid (together with ABC Corp.) shall be permitted to submit increasingly higher bids in bid increments of ten thousand dollars ($10,000.00) in the manner further prescribed in paragraph 14(b) of this Order until no higher bids are received and the Highest REIT Bidder and potential Substitute Winning REIT Bidder are declared by Debtors' counsel.

15. The documents evidencing the JPM Debt and RBS Debt (and any ancillary agreements, financing statements and other documents executed and/or delivered in connection therewith), any documents evidencing the termination and cancellation of any existing Liens on the JPM REIT Collateral and the RBS REIT Collateral, and the transactions contemplated by each of the foregoing are approved in their entirety and, upon execution and delivery of the applicable agreements and documents relating thereto by the applicable parties, the documents evidencing the JPM Debt and RBS Debt (and any ancillary agreements, financing statements and other documents executed and/or delivered in connection therewith) shall be in full force and effect and valid, binding, and enforceable in accordance with their terms without the need for any further notice to or action, order, or approval of the Bankruptcy Court, or other act or action under applicable law, regulation, order, or rule. The Liens on the JPM REIT Collateral shall be immediately effective, binding, valid, perfected, and enforceable first-priority Liens on the JPM REIT Collateral to secure the JPM Debt and the Liens on the RBS REIT Collateral shall be immediately effective, binding, valid, perfected, and enforceable first-priority Liens on the RBS REIT Collateral to secure the RBS Debt. The Debtors are, and after the Effective Date, Reorganized Petra is, authorized, without further approval of the Bankruptcy Court or any other party, to execute and deliver all agreements, documents, instruments, securities, and certificates relating to the foregoing or to any such agreements and perform their obligations thereunder.

16. On or before the Effective Date, the Debtors may file with the Bankruptcy Court such agreements and other documents as may be necessary or appropriate to effectuate and further evidence the terms and conditions of the Plan. The Debtors or Reorganized Petra, as applicable, and all Creditors receiving distributions pursuant to the Plan and all other parties in interest shall, from time to time, prepare, execute, and deliver any agreements or documents and take any other actions as may be necessary or advisable to effectuate the provisions and intent of the Plan.

17. Except as set forth in the Plan, all actions authorized to be taken pursuant to the Plan shall be effective on, prior to, or after the Effective Date pursuant to the Confirmation Order, without further application to, or order of the Bankruptcy Court, or further action by the respective officers, directors, members, or stockholders of Reorganized

Petra and with the effect that such actions had been taken by unanimous action of such officers, directors, members, or stockholders.

18. Pursuant to section 1142(b) of the Bankruptcy Code, section 303 of the Delaware General Corporation Law, and any comparable provision of the business corporation laws of any other state or applicable jurisdiction (including the State of Maryland), each of the Debtors and Reorganized Petra hereby is authorized and empowered to take such actions and to perform such acts as may be necessary, desirable, or appropriate to comply with or implement the Plan, the Plan Supplement, any other Plan documents, including execution and delivery of all documents, instruments, securities and agreements related thereto and all annexes, exhibits, and schedules appended thereto, and the obligations thereunder shall constitute legal, valid, binding and authorized obligations of each of the respective parties thereto, enforceable in accordance with their terms without the need for any stockholder or board of directors' approval. Each of the Debtors and Reorganized Petra hereby is authorized and empowered to take such actions, to perform all acts, to make, execute, and deliver all instruments and documents, and to pay all fees and expenses as set forth in the Plan and the documents relating to the Plan, and that may be required or necessary for its performance thereunder without the need for any stockholder or board of directors' approval (including, without limitation, in connection with the execution and delivery of the documents evidencing and securing the JPM Debt and RBS Debt and the documents evidencing the termination and cancellation of any Liens on the JPM REIT Collateral and RBS REIT Collateral, if any). On the Effective Date, the appropriate officers of Reorganized Petra and members of the Board of Directors of Reorganized Petra are authorized and empowered to issue, execute, and deliver the agreements, documents, securities, and instruments contemplated by the Plan in the name of and on behalf of Reorganized Petra (including, without limitation, in connection with the execution and delivery of the documents evidencing and securing the JPM Debt and RBS Debt and the documents evidencing the termination and cancellation of Liens on the JPM REIT Collateral and RBS REIT Collateral, if any). Subject to the terms of this Confirmation Order, each of the Debtors, Reorganized Petra and the officers and directors thereof are authorized to take any such actions without further corporate action or action of the directors or stockholders of the Debtors or Reorganized Petra. On the Effective Date, or as soon thereafter as is practicable, Reorganized Petra shall file its amended certificates of incorporation with the Secretary of State of the state in which each such entity is (or will be) organized, in accordance with the applicable general business law of each such jurisdiction.

19. This Confirmation Order shall constitute all approvals and consents required, if any, by the laws, rules, and regulations of all states and any other governmental authority with respect to the implementation or consummation of the Plan and any documents, instruments, or agreements, and any amendments or modifications thereto, and any other acts and transactions referred to in or contemplated by the Plan, the Plan Supplement, the Disclosure Statement, and any documents, instruments, securities, or agreements, and any amendments or modifications thereto (including, without limitation, in connection with the execution and delivery of the documents evidencing and securing the JPM Debt and the RBS Debt and the documents evidencing the

termination and cancellation of any Liens on the JPM REIT Collateral and RBS REIT Collateral, if any).

20. Subject to the restrictions on the alteration, modification and amendment set forth in section 1127 of the Bankruptcy Code and in the Plan, Debtors are authorized to amend the Plan prior to the Effective Date three business days after filing intention thereof.

21. Nothing in the Plan or this Order modifies the rights and/or obligations of the Debtors' insurers under applicable insurance policies or modifies the coverage provided thereunder.

22. Except as otherwise provided in the Plan or this Order, notice of subsequent pleadings shall be limited to Debtors' counsel and the United States Trustee, and any party known to be directly affected by the relief sought by such pleading.

23. Prior to the satisfaction or waiver of each condition to the occurrence of the Effective Date, the Debtors may move this Court to vacate this Order.

24. The businesses and assets of the Debtors shall remain subject to this Court's jurisdiction through the Effective Date, to the extent permissible by law. Thereafter, the Court shall retain jurisdiction as is permissible and is set forth in the Plan.

25. Each of the conditions to the Effective Date must be satisfied or duly waived, and the Effective Date must occur within 120 days after the Court enters this Confirmation Order, or by such later date established by Bankruptcy Court order. If the Effective Date has not occurred within 120 days from the date of the Confirmation Order (or such later date established by court order), then upon motion by a party-in-interest made before the Effective Date and a hearing, the Confirmation Order may be vacated by the Bankruptcy Court; provided, however, that, notwithstanding the filing of such motion to vacate, the Confirmation Order may not be vacated if the Effective Date occurs before the Bankruptcy Court enters an order granting such motion. If the Confirmation Order is vacated, then except as provided in any order of the Bankruptcy Court vacating the Confirmation Order, the Plan will be null and void in all respects, including the discharge of Claims and termination of Liens and interests pursuant to the Plan and section 1141 of the Bankruptcy Code and the assumptions, assignments or rejections of executory contracts, and nothing contained in the Plan or Disclosure Statement shall: (a) constitute a waiver or release of any Claims or Liens; (b) prejudice in any manner the rights of any Debtor or any other entity; or (c) constitute an admission, acknowledgment, offer or undertaking of any sort by such Debtor or any other entity.

26. Within ten days of the satisfaction or waiver of the conditions precedent to occurrence of the Effective Date, the Debtors shall file and serve upon all creditors and parties in interest a notice indicating all conditions precedent to the Effective Date have been satisfied or waived and setting the Effective Date.

Dated: March 2, 2012
New York, New York

/s/ Shelley C. Chapman
HONORABLE SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE

ITEM NO. 124

JA-10

Fill in this information to identify the case:

United States Bankruptcy Court for the:

Southern District of New York

Case number (*If known*): _____ Chapter 15

☐ Check if this is an amended filing

Official Form 401

Chapter 15 Petition for Recognition of a Foreign Proceeding 12/15

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write debtor's name and case number (if known).

1. Debtor's name

ECM Straits Fund I, LP (In Official Liquidation)

2. Debtor's unique identifier

For non-individual debtors:

☐ Federal Employer Identification Number (EIN) __ __ – __ __ __ __ __ __ __

☑ Other 73064. Describe identifier Cayman registration number.

For individual debtors:

☐ Social Security number: xxx – xx– ____ ____ ____ ____

☐ Individual Taxpayer Identification number (ITIN): 9xx – xx – ____ ____ ____ ____

☐ Other _____. Describe identifier _____.

3. Name of foreign representative(s)

Michael Green, Michael Penner and Matthew Becker

4. Foreign proceeding in which appointment of the foreign representative(s) occurred

Grand Court of the Cayman Islands Cause No. FSD 230 of 2022

5. Nature of the foreign proceeding

Check one:

☐ Foreign main proceeding
☐ Foreign nonmain proceeding
☑ Foreign main proceeding, or in the alternative foreign nonmain proceeding

6. Evidence of the foreign proceeding

☑ A certified copy, translated into English, of the decision commencing the foreign proceeding and appointing the foreign representative is attached.

☐ A certificate, translated into English, from the foreign court, affirming the existence of the foreign proceeding and of the appointment of the foreign representative, is attached.

☐ Other evidence of the existence of the foreign proceeding and of the appointment of the foreign representative is described below, and relevant documentation, translated into English, is attached.

_____

_____

7. Is this the only foreign proceeding with respect to the debtor known to the foreign representative(s)?

☐ No. (Attach a statement identifying each country in which a foreign proceeding by, regarding, or against the debtor is pending.)

☑ Yes

JA-10

Debtor ECM Straits Fund I, LP (In Official Liquidation) Case number (*if known*)
Name

8. Others entitled to notice

Attach a list containing the names and addresses of:

(i) all persons or bodies authorized to administer foreign proceedings of the debtor,

(ii) all parties to litigation pending in the United States in which the debtor is a party at the time of filing of this petition, and

(iii) all entities against whom provisional relief is being sought under § 1519 of the Bankruptcy Code.

9. Addresses

Country where the debtor has the center of its main interests:

Cayman Islands

Debtor's registered office:

60 Nexus Way, 8th Floor
Number Street

Camana Bay, PO Box 1787
P.O. Box

GeorgeTown KY1-1109
City State/Province/Region ZIP/Postal Code

Cayman Islands
Country

Individual debtor's habitual residence:

Number Street

P.O. Box

City State/Province/Region ZIP/Postal Code

Country

Address of foreign representative(s):

60 Nexus Way, 8th Floor
Number Street

Camana Bay, PO Box 1787
P.O. Box

GeorgeTown KY1-1109
City State/Province/Region ZIP/Postal Code

Cayman Islands
Country

10. Debtor's website (URL)

11. Type of debtor

Check one:

☑ Non-individual (*check one*):

☐ Corporation. Attach a corporate ownership statement containing the information described in Fed. R. Bankr. P. 7007.1.

☑ Partnership

☐ Other. Specify: _____

☐ Individual

Debtor ECM Straits Fund I, LP (In Official Liquidation) Case number (*if known*)

12. Why is venue proper in *this district*?

Check one:

☑ Debtor's principal place of business or principal assets in the United States are in this district.

☐ Debtor does not have a place of business or assets in the United States, but the following action or proceeding in a federal or state court is pending against the debtor in this district:

_____.

☐ If neither box is checked, venue is consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the foreign representative, because:

_____.

13. Signature of foreign representative(s)

I request relief in accordance with chapter 15 of title 11, United States Code.

I am the foreign representative of a debtor in a foreign proceeding, the debtor is eligible for the relief sought in this petition, and I am authorized to file this petition.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct,

✘ /s/ Michael Green — Michael Green
Signature of foreign representative — Printed name

Executed on 12/20/2023
MM / DD / YYYY

✘ _____ — _____
Signature of foreign representative — Printed name

Executed on _____
MM / DD / YYYY

14. Signature of attorney

✘ /s/ John A. Pintarelli — Date 12/20/2023
Signature of Attorney for foreign representative — MM / DD / YYYY

John A. Pintarelli
Printed name

Pillsbury Winthrop Shaw Pittman LLP
Firm name

31 West 52nd Street
Number Street

New York — NY — 10019
City — State — ZIP Code

(212) 858-1000 — john.pintarelli@pillsburylaw.com
Contact phone — Email address

4481123 — NY
Bar number — State

ITEM NO. 125

JA-11

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: ECM Straits Fund I, LP (In Official Liquidation), Debtor in a Foreign Proceeding.[1]	Chapter 15 Case No. 23-12044 (MG)

ORDER GRANTING RECOGNITION AND RELIEF IN AID OF A FOREIGN MAIN PROCEEDING PURSUANT TO SECTIONS 1504, 1509, 1515, 1517, 1520, AND 1521 OF THE BANKRUPTCY CODE

Michael Green, Michael Penner and Matthew Becker, duly appointed joint official liquidators ("Petitioners" or "Liquidators") of ECM Straits Fund I, LP (in Official Liquidation) ("ECM" or "Debtor"), an exempted limited partnership in official liquidation in the Cayman Islands (the "Cayman Proceeding"), which was brought under the supervision of the Grand Court of the Cayman Islands (the "Grand Court") by an order dated November 24, 2022 (cause no. FSD 230 of 2022) (the "Supervision Order"), by its undersigned United States counsel, Pillsbury Winthrop Shaw Pittman LLP having filed the Official Form Petition and the *Verified Petition for Recognition of Foreign Insolvency Proceeding and Application for Additional Relief under Chapter 15 of the Bankruptcy Code, and Memorandum of Law In Support Thereof* (the "Verified Petition" and, together with the Official Form Petition, the "Petition") and the accompanying Green Declaration, Sherwood Declaration and Pintarelli Declaration, seeking relief pursuant to chapter 15 of the Bankruptcy Code; and upon due consideration of the Petition, Green Declaration, Sherwood Declaration and Pintarelli Declaration, together with all exhibits thereto, in support of the Petition; and a hearing having been held on January 29, 2024 to consider the Petition, at which the Green Declaration, Sherwood Declaration and Pintarelli Declaration were received into

[1] The Debtor's company registration number is 73064. The Debtor's registered office is c/o Deloitte & Touche LLP, 8th Floor, 60 Nexus Way, Camana Bay, PO Box 1787, Grand Cayman KY1-1109, Cayman Islands.

evidence; and appropriate and timely notice of the filing of the Petition and the Hearing thereon having been given by the Liquidators pursuant to section 1514 of the Bankruptcy Code; and such notice having been adequate and sufficient for all purposes; and no other or further notice being necessary or required; and no objections or other responses having been filed; and all interested parties having had an opportunity to be heard at the Hearing; and after due deliberation and sufficient cause appearing therefore, the Court makes the following facts and conclusions of law:

A. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and 11. U.S.C. §§ 109 and 1501 and the *Amending Standing Order of Reference* from the United States District Court for the Southern District of New York dated February 1, 2012.

B. Venue of this proceeding is proper in this judicial district pursuant to 28 U.S.C. § 1410 (2) because ECM possesses assets within this district, and the Court may enter a final order consistent with Article III of the United States Constitution.

C. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(P).

D. The Liquidators are the "foreign representatives" of ECM within the meaning of 11 U.S.C. § 101(24).

E. The chapter 15 cases of ECM was properly commenced pursuant to 11 U.S.C. §§ 1504, 1509 and 1515.

F. The Liquidators have satisfied the requirements of 11 U.S.C. § 1515 and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure.

G. The Cayman Proceeding is a foreign proceeding within the meaning of 11 U.S.C. § 101(23).

H. The Cayman Proceeding is entitled to recognition by this Court pursuant to 11 U.S.C. § 1517.

I. The Cayman Proceeding is pending in the Cayman Islands, the country where ECM's center of main interests is located and, accordingly, the Cayman Proceeding is a foreign main proceeding pursuant to 11 U.S.C. § 1502(4) and is entitled to recognition as a foreign main proceeding pursuant to 11 U.S.C. § 1517(b)(1).

J. The Liquidators are entitled to all of the relief afforded under 11 U.S.C. § 1520 and the additional relief provided for herein pursuant to 11 U.S.C. § 1521.

K. The relief granted hereby is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, and warranted pursuant to 11 U.S.C. §§ 1507, 1517, 1520 and 1521.

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The Petition is granted as set forth herein.

2. The Cayman Proceeding is hereby recognized as a foreign main proceeding pursuant to 11 U.S.C. § 1517(a) and (b)(1).

3. The relief and protection afforded under 11 U.S.C. § 1520 is hereby granted, including the application of the automatic stay under section 362 of the Bankruptcy Code to ECM and its property in the territorial jurisdiction of the United States; ***provided***, that nothing herein modifies or limits the exceptions to the automatic stay that are set forth in section 362 or elsewhere in the Bankruptcy Code. Accordingly, extent to the extent permitted by section 362 or elsewhere in the Bankruptcy Code, all persons and entities are stayed from:

(a) executing against ECM's property or assets;

(b) taking or continuing any act to obtain possession of, or exercise control over, the Liquidators (with respect to ECM), ECM, or any of ECM's property or assets;

(c) taking or continuing any act to create, perfect or enforce a lien or other security interest, set-off or other claim against the Liquidators (with respect to ECM), ECM, or any of ECM's property or assets as of the date of the

filing of the Petition, or otherwise seeking the issuance of or issuing any restraining notice or other process or encumbrance with respect to ECM or any of ECM's property or assets; and

(d) transferring, relinquishing or disposing of any property of the Funds to any person or entity other than the Liquidators.

4. The Liquidators or any third person acting pursuant to the Liquidators' instructions or agreement may transfer funds or property belonging to ECM into or out of the United States of America in accordance with their respective obligations to ECM or under the Cayman Liquidation; ***provided, however***, that the Liquidators shall file and serve notice at least 14 calendar days prior to a transfer of funds or property out of the United States (which notice shall describe the property being transferred) to provide an opportunity for parties in interest to object to such a transfer or to seek a stay of such a transfer if such parties in interest believe there are grounds for such relief. Such notice shall be served on all parties who are generally entitled to receive notices in these proceedings pursuant to Bankruptcy Rule 2002 and, in addition, on any person who has or has asserted an interest in such property.

5. The Liquidators are hereby authorized to issue subpoenas in accordance with applicable procedural rules for the examination of witnesses and/or the production of documents within the territorial jurisdiction of the United States concerning the assets, affairs, rights, obligations or liabilities of ECM and (to the extent relevant) ECM's affiliates, including subpoenas to intermediary banks that process U.S. dollar denominated wire transfers and maintain records of such transfers; ***provided***, that any subpoenas served pursuant to the authority set forth in this paragraph shall be without prejudice to the recipients' rights to object in accordance with the applicable procedural rules.

6. The Liquidators are hereby authorized to take possession and to seek turnover of any and all documents, records, filings, or other information, however stored, that belongs to ECM

and that is found in the territorial jurisdiction of the United States.

7. The Liquidators are authorized to operate the business of ECM that is the subject of the Cayman Proceeding and may exercise the powers of a trustee under and to the extent provided by 11 U.S.C. §§ 1520 and 1521.

8. The administration or realization of all or part of the assets of ECM within the territorial jurisdiction of the United States of America is hereby entrusted to the Liquidators and the Liquidators are hereby established as the exclusive representatives of ECM in the United States of America.

9. This Court shall retain jurisdiction with respect to the enforcement, amendment or modification of this Order, any request for additional relief or any adversary proceeding brought in and through this chapter 15 case, and any request by an entity for relief from the provisions of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Court.

10. Notwithstanding Bankruptcy Rule 7062, made applicable to this chapter 15 case by Bankruptcy Rule 1018, the terms and conditions of this Order shall be effective and enforceable immediately upon its entry, and this Order shall become final and appealable.

IT IS SO ORDERED.

Dated: January 30, 2024
New York, New York

/s/ Martin Glenn
MARTIN GLENN
Chief United States Bankruptcy Judge

ITEM NO. 126

JA-12

PILLSBURY WINTHROP SHAW PITTMAN LLP
31 West 52nd Street
New York, NY 10019-6131
Telephone: 212-858-1000
Facsimile: 212-858-1500
John A. Pintarelli
Rahman Connelly

Attorneys for Petitioners Michael Green, Michael Penner and Matthew Becker, in their capacities as Joint Official Liquidators of ECM Straits Fund I, LP (In Official Liquidation)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: ECM Straits Fund I, LP (In Official Liquidation), Debtor in a Foreign Proceeding.[1]	Case No. 23-12044 (MG) Chapter 15

DECLARATION OF PETER SHERWOOD IN SUPPORT OF CHAPTER 15 PETITION FOR RECOGNITION AS FOREIGN MAIN PROCEEDING

I, Peter Sherwood of Carey Olsen Cayman Limited, George Town, Grand Cayman, KY1-1001, Cayman Islands, do hereby declare, under penalty of perjury under the laws of the United States of America, that the following is true and correct to the best of my knowledge and belief:

I. Introduction

1. I am an attorney and a partner in the dispute resolution and litigation group of Carey Olsen Cayman Limited ("**Carey Olsen**") of Willow House, Cricket Square, George Town, Grand Cayman, Cayman Islands.

[1] The Debtor's company registration number is 73064. The Debtor's registered office is c/o Deloitte & Touche LLP, 8th Floor, 60 Nexus Way, Camana Bay, PO Box 1787, Grand Cayman KY1-1109, Cayman Islands.

2. Carey Olsen acts as Cayman Islands legal counsel to Michel Green, Michael Penner and Matthew Becker, in their capacities as joint official liquidators (the "**Petitioners**" or "**Liquidators**")[2] of each of:

a. ECM Straits Fund I, LP ("**ECM**" or the **"Partnership"**);

b. ECM Straits Fund UGP I, Ltd. ("**UGP**"); and

c. TransAsia E-Commerce Inc. ("**TEC**"),

(together, the "**Debtors**").

3. ECM is an exempted limited partnership formed under the laws of the Cayman Islands, and is currently in official liquidation pursuant to an order of the Grand Court of the Cayman Islands (the "**Grand Court**") in Cause Number FSD 230 of 2022.

4. UGP and TEC are exempted limited companies incorporated under the laws of the Cayman Islands, and each is currently in official liquidation pursuant to orders of the Grand Court in Cause Numbers FSD 148 of 2023 and FSD 149 of 2023, respectively.

5. Prior to the appointment of the Liquidators to ECM on November 24, 2022, Carey Olsen acted for the sole limited partner of ECM, Malaysia Venture Capital Management Berhad ("**MAVCAP**") (as I discuss further below).

6. Carey Olsen is a leading full service offshore law firm established in 1898 with offices in the Cayman Islands, British Virgin Islands, Bermuda, Guernsey, Jersey, London, Cape Town, Hong Kong and Singapore. Carey Olsen's clients include global and local financial institutions, investment funds, private equity houses, multinational corporations, public organizations, sovereign wealth funds, high net worth individuals, family offices, directors, trustees and private clients.

---

[2] Mr Penner is an official liquidator of ECM only, and not of UGP or TEC. In this affidavit, I use the term "**Liquidators**" to refer to the relevant official liquidators as the context demands.

7. I qualified as a solicitor in England and Wales in 2008, was admitted as an attorney in the Cayman Islands in 2015 and have been a member of Carey Olsen's Dispute Resolution and Litigation team since 2015. Prior to joining Carey Olsen, I worked for leading international firms in London and in Sydney, working on contentious and non-contentious insolvencies and restructurings. I have acted for insolvency practitioners and creditors in complex financial services firms and brokers insolvencies, and have advised creditors and debtors on large, cross-border restructurings. I also have banking and commercial litigation experience. I therefore have over 15 years' experience practicing law, including more than 8 years practicing Cayman Islands law. I currently reside in the Cayman Islands where my legal practice focuses on all aspects of insolvency litigation, general banking and commercial litigation and non-contentious insolvency and restructurings. I am a member of the Cayman Islands Legal Practitioners Association, and INSOL International through its local chapter in the Cayman Islands.

8. I have acted for provisional and official liquidators of numerous Cayman Islands companies and frequently appear as an advocate before the Grand Court in liquidation proceedings.

9. I submit this declaration in support of the petitions seeking the U.S. Bankruptcy Court's recognition of the liquidations in the Cayman Islands of each of ECM, UGP and TEC as a "foreign main proceeding" under 11 U.S.C. § 1517(b)(1) and of the Liquidators as the "foreign representatives" for each of the Debtors under 11 U.S.C. § 101(24). The Liquidators have asked me to explain the substantive Cayman Islands law and procedural rules relevant to liquidation proceedings in respect of Cayman Islands companies and exempted limited partnerships and, more particularly, the Debtors.

10. I am competent to testify and, except as otherwise indicated, all facts set forth in this declaration are based on my personal experience and knowledge, and my review of relevant documents, including the sworn declarations of Michael Green and John A. Pintarelli. To the extent that statements in this declaration are of my own legal opinion, they represent my views and understanding, as a practicing Cayman Islands attorney, of Cayman Islands laws. This declaration covers complicated topics at a reasonably high level: should it assist the Court for me to expand upon any aspect of this declaration, I am happy to do so.

II. Sources of Cayman Islands Law and the Legislative Framework

11. The Cayman Islands is a British Overseas Territory and a distinct legal jurisdiction. The law of the Cayman Islands derives from several sources but in general is based upon English and British Commonwealth common law, equity, local legislation enacted by the Legislative Assembly of the Cayman Islands or its predecessors, and occasionally, from statutes of England and Wales to the extent they are expressly extended to the Cayman Islands. Subject to any modifications imposed by local legislation or regulation, the Courts of the Cayman Islands generally adopt positions that are consistent with English and British Commonwealth common law and equity.

12. The Courts of the Cayman Islands administer justice in accordance with local statutes, subordinate legislation, statutes passed by the parliament of the United Kingdom that have been expressly extended to the Cayman Islands, orders of His Majesty's Judicial Committee of the Privy Council (the **"Privy Council"**) applicable in the Cayman Islands, and principles of common law.

13. The Grand Court has jurisdiction in respect of, *inter alia*, the winding up of companies incorporated, and exempted limited partnerships registered, in the Cayman Islands.[3] One of the divisions of the Grand Court is the Financial Services Division (the "**FSD**") which deals with, among other things, proceedings involving the winding up of companies, with appeals lying to the Cayman Islands Court of Appeal (the "**Court of Appeal**"). Subject to certain restrictions, there is a right of second appeal to the Judicial Committee of the Privy Council in London.

14. The doctrine of judicial precedent applies in the Cayman Islands. The structure of the court system is hierarchical, with the courts being bound by the *rationes decidendi* of decisions of the courts above. The *rationes decidendi* of decisions of the Privy Council are therefore binding on the Court of Appeal and the Grand Court. The *rationes decidendi* of decisions of the Court of Appeal are similarly binding on the Grand Court. The Grand Court will generally follow the *rationes decidendi* of its previous decisions, unless satisfied that they are clearly wrong.

15. There is a comparatively small (but increasing) body of reported case law in the Cayman Islands, contained in the Cayman Islands Law Reports. In the absence of binding Cayman Islands case law, the Cayman Islands Courts will look to English authorities, which are highly persuasive, but not binding. As a general rule, the Cayman Islands Courts follow English authorities to the extent that they are not inconsistent with either Cayman Islands statutory provisions or Cayman Islands authorities, and to the extent that they do not relate to English statutory provisions which have no equivalent in the Cayman Islands. Decisions of courts in other Commonwealth jurisdictions are also of persuasive but not binding authority.

[3] Companies Act s. 92; ELP Act, s. 36(3).

III. Background

16. ECM was formed and operated under the Exempted Limited Partnership Act (as amended from time to time) (the "**ELP Act**") pursuant to an Initial Exempted Limited Partnership Agreement (the "**Partnership Agreement**"), originally dated November 6, 2013, but subsequently amended and restated on November 25, 2013, and filed with the Registrar of Exempted Limited Partnerships of the Cayman Islands.

17. A Cayman Islands exempted limited partnership must consist of one or more general partners and one or more limited partners. The business of the partnership is conducted by the general partner(s), who is liable for all of the partnerships debts and liabilities in the event that the assets of the exempted limited partnership are inadequate[4]. As the name suggests, limited partners are not generally liable for the debts or obligations of the exempted limited partnership and accordingly must not take part in the conduct of the business of the partnership[5]. Limited partners are essentially passive investors.

18. As is the case for Cayman Islands exempted companies, the term "exempted" refers to the fact that under the ELP Act the partnership is prohibited from undertaking business with the public in the Cayman Islands except insofar as may be necessary in furtherance of its business carried on outside the Cayman Islands.[6] (However, exempted limited partnerships and exempted companies may effect and conclude contracts in the Cayman Islands and exercise in the Cayman Islands all of the powers necessary for the carrying on of its business outside the Cayman Islands or winding it up, meaning that it may employ staff or agents in the Cayman Islands. Exempted

[4] See ELP Act, s.4(2).

[5] See ELP Act s14(1).

[6] See ELP Act s. 4(1) and Companies Act s. 165.

limited partnerships and exempted companies must also maintain a registered office in the Cayman Islands in furtherance of its business outside the Cayman Islands).

19. The general partner of ECM is ECM Straits Fund GP I, LP (the "**ECM GP**"), which is itself a Cayman Islands exempted limited partnership. The general partner of ECM GP, in turn, is UGP.

UGP

20. UGP is an exempted limited company incorporated under the Companies Act and operated pursuant to a Memorandum and Articles of Association dated November 6, 2013, that was filed with the Registrar of Companies of the Cayman Islands.

21. At all material times, UGP's directors were Mr. Arshad Ahmed ("**Mr. Ahmed**"), Mr. Abrar Hussain ("**Mr. Hussain**") and Mr. Amiruddin Azahar ("**Mr. Azahar**") (in such capacity, the "**Directors**").

TEC

22. TEC is also an exempted limited company incorporated under the Companies Act and operated pursuant to a Memorandum and Articles of Association dated January 19, 2015, that was filed with the Registrar of Companies of the Cayman Islands.

23. TEC is a wholly owned subsidiary of Partnership[7]. Mr. Ahmed is the sole officer and director of TEC.

24. Prior to entry the appointments of the Liquidators (as discussed below), the registered office address for each of ECM, UGP and TEC was Maples Corporate Services Limited, PO Box 309, Ugland House, Grand Cayman, Cayman Islands KY1-1104. Following the respective

[7] ECM is the registered holder of all of the shares in TEC. However, pursuant to section 16(1) the ELP Act, all of ECM's assets are deemed to be held by the ECM GP on trust for ECM (and, in turn, all of the assets of the ECM GP are deemed to be held by the UGP on trust).

appointments, the registered office addresses were changed to c/o Deloitte & Touche LLP, Citrus Grove Building, PO Box 1781, Grand Cayman KY1-1109, Cayman Islands.

IV. Liquidation in the Cayman Islands

25. The principal Cayman Islands legislation, rules and regulations which govern the liquidation of Cayman Islands companies and exempted limited partnerships are:

a. Part V of the *Companies Act (2023 Revision)* (the **"Companies Act**"), which is the primary legislation which deals with winding up of companies in the Cayman Islands;

b. the *Companies (Winding Up) Rules* ("**CWR**"). The CWR is subsidiary legislation containing rules which are issued from time to time by the Insolvency Rules Committee. Part V of the Companies Act together with the CWR govern the conduct of liquidation proceedings pending before the Grand Court, including ECM's liquidation proceedings;

c. the Exempted Limited Partnership Act (2021 Revision) (the "**ELP Act**"), which is the primary legislation governing exempted limited partnerships. Section 36(3) of the ELP Act applies certain provisions of the Companies Act and the CWR to exempted limited partnerships; and

d. the Insolvency Practitioners Regulations 2018 (the "**Regulations**"). The Regulations deal with (a) who is eligible to be appointed as an official liquidator of a company being wound up by order of the Grand Court; and (b) the official liquidators' remuneration.

26. True copies of each of the ELP Act, Part V of the Companies Act, the CWR and the Regulations are attached hereto as **Exhibits A, B, C and D**, respectively.

27. There are two main forms of liquidation procedure in the Cayman Islands, each of which are applicable to both companies and exempted limited partnerships[8]. In each case, the procedure is "terminal" in the sense that it is designed to finally wind up the company's affairs under the stewardship of the liquidators, and then to bring the existence of the company or exempted limited partnership to an end:

a. Official liquidation is a court-supervised process which is commenced by order of the Grand Court. One or more licensed insolvency practitioners are appointed as official liquidators, and their primary duty will be to collect in the company's assets and distribute them to stakeholders in accordance with the statutory order of priority. The official liquidators will also investigate and report on the affairs of the company, and may bring claims on the company's behalf.

b. Voluntary liquidation is a streamlined procedure for winding down the affairs of the company / exempted limited partnership outside the supervision of the Grand Court. The process is conducted by one or more voluntary liquidators, who do not need to be licensed insolvency practitioners or independent (in fact it is common for directors and other persons involved in the management of the company / exempted limited partnership to perform the role). It is therefore not suitable for insolvent situations.

[8] In addition, an official liquidator may be appointed provisionally (known as provisional liquidation). However, while provisional liquidation often precedes official liquidation, the purpose is usually to prevent mismanagement, the dissipation of assets or prejudice to shareholders pending the hearing of the petition to appoint official liquidators.

28. I address the official liquidation of Cayman Islands companies and exempted limited partnerships in more detail below.

Official liquidation of Cayman Islands companies

29. An official liquidation is judicial in nature, in the sense that: (a) it is initiated by an order of the Grand Court; (b) throughout the liquidation process the official liquidators report to and are supervised by the Grand Court; and (c) the liquidation is brought to a close and the company dissolved by an order of the Grand Court.

30. A company may be placed into official liquidation by order of the Grand Court on the petition of either the company itself, any creditor, any shareholder or the Cayman Islands Monetary Authority (if the company's business is regulated by it) [9]. The most common grounds for the making of a winding up order are that the company is insolvent, or that it is otherwise "just and equitable" that the company is wound up[10].

31. In addition, in certain circumstances, a voluntary liquidation may, by order of the Grand Court, be brought under the supervision of the Grand Court whereupon it proceeds as an "official liquidation". For example, a company in voluntary liquidation may be placed in official liquidation on the application of the voluntary liquidator or any contributory (shareholder) or creditor on the grounds that —

a. the company is or is likely to become insolvent; or

b. the supervision of the Court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors.[11]

[9] See s. 94 of the Companies Act.

[10] See s. 92 of the Companies Act.

[11] See Companies Act s. 131

32. Official liquidation is not a "debtor in possession" process. Once appointed, the official liquidators take full control of the company and its assets (again, subject to the supervision of the Grand Court).[12] The powers of the directors, who previously controlled the company, are suspended by the appointment of official liquidators. The official liquidators' powers are a function of two things:

a. Schedule 3 of the Companies Act,[13] which contains two parts. Part I of Schedule 3 sets out liquidators' powers exercisable with the sanction of the Grand Court. Part II of Schedule 3 sets out the liquidators' powers exercisable without the sanction of the Grand Court.

b. The order of the Grand Court appointing them. This order authorise the liquidators to exercise certain of the powers contained in Part I of Schedule 3 of the Companies Act from the outset of the liquidation.

33. As noted above, official liquidation is a "terminal" process, in the sense that it is designed to finally wind up the company's affairs under the stewardship of the independent official liquidators, and then to bring the existence of the company to an end. In essence, that process involves the official liquidators:[14]

a. Identifying, safeguarding, collecting, and realizing[15] the company's assets (which may also include pursuing litigation for the benefit of the estate, which depending on the nature of the claim sometimes will take the form of a claim

[12] CWR O.18 r.1(2)

[13] See also s. 110(2) of the Companies Act.

[14] See Companies Act s.110 "Functions and powers of official liquidators".

[15] Where appropriate (and depending on the circumstances, with the permission of the Grand Court) the liquidators may also distribute the assets in kind (CWR O.18 r.5).

by the company and sometimes will be a claim by the official liquidators themselves).[16]

b. Identifying the company's creditors and resolving any disputes as to the existence or quantum of creditor claims. Appeals from the official liquidators' decision to admit or reject proofs of debt are made to the Grand Court.

c. Distributing the assets to the company's creditors, and to the extent of any surplus, to its contributories (or shareholders) in accordance with their rights and the laws of the Cayman Islands.

d. Finally, once the above steps are complete such that the affairs of the company are fully wound up, obtaining an order from the Grand Court that the company be dissolved.[17]

34. Official liquidators are officers of the Grand Court.[18] Throughout the official liquidation process, the Liquidators are subject to the supervision of the Grand Court.[19] In practice this means:

a. the exercise of a number of the liquidators' powers (including, among others, the power to sell the company's assets and the power to pursue legal proceedings) require an order of the Grand Court.[20] The application for such an order is known as a "*sanction application*". Similarly, if a stakeholder is dissatisfied with any action (or inaction) on the part of the liquidator, that

[16] Companies Act s.110(1)(a)

[17] Companies Act s.152. It is not possible to reverse a winding up order, other than on appeal (and there is no appeal in the case of these Liquidation Proceedings). There is provision for an official liquidation to be "stayed" upon order of the Grand Court (Companies Act s.111(1)), although in practice that is exceedingly rare.

[18] Companies Act s. 108(2); CWR O.18 r. 1(1)

[19] Companies Act s.110(3)

[20] Companies Act s.110(2) and (3)

stakeholder may make a sanction application for an order of the Grand Court directing the official liquidator to exercise or refrain from exercising any powers in a particular way.[21] CWR Order 11 sets out the procedure for sanction applications. The Grand Court has broad powers to give directions in connection with the hearing of a sanction application (both pursuant to CWR O.11 and its inherent jurisdiction), so as to ensure that it is dealt with as fairly and efficiently as possible.

b. Appeals from the official liquidators' decision to admit or reject proofs of debt are made to the Grand Court.

c. Official liquidators are required to prepare reports and accounts with respect to their conduct of the liquidation and the state of the company's affairs, and to deliver those to the Grand Court and stakeholders.[22]

d. The Grand Court must approve the official liquidators' remuneration, in accordance with the procedures set out in the Regulations.[23]

e. Although very rarely exercised in practice, the Grand Court retains a residual discretion to remove and replace official liquidators, upon the application of a stakeholder.[24]

35. To be eligible for appointment as an official liquidator, the proposed appointee(s)[25] must comply with the provision of the Regulations, which include requirements as to (a)

[21] CWR O.11 r.1(2)

[22] CWR O.10 r.1(1), r.1(2)(e), O.10 r.2, O.10 r.2 and see also Companies Act s.114(1)

[23] See in particular Regulations 10(1) and 13

[24] Companies Acts. 107

[25] As is permitted by s.106 of the *Companies Act,* it is the usual practice of the Grand Court to appoint two official liquidators, who are then given the power to act jointly and severally (hence "joint official liquidators" or "JOLs"). Typically, as in the case in these Liquidation Proceedings, the Liquidators are members of the same firm. One

professional qualifications (in essence, official liquidators are highly experienced and qualified accountants, with particular expertise acting as insolvency practitioners)[26]; (b) residency[27]; (c) insurance[28]; and (d) independence[29]. The prospective appointee(s) must swear an affidavit to the effect that they comply with these provisions of the Regulations, such that they are eligible to take the appointment.[30] Any relevant stakeholder may attend the hearing of the winding up petition (which hearing is held in open court) and may seek to challenge the appointment of the nominated liquidators, including on the basis of an alleged lack of independence. This does occur from time to time, and the Grand Court has previously refused to appoint particular liquidators due to even a perceived lack of independence.[31] No such challenge was made in respect of these Liquidators in the case of any of the orders appointing them.

36. The official liquidators' duty and power to get in the company's property can also involve investigating the company's affairs and prosecuting litigation on behalf of the company, whether in the Cayman Islands or elsewhere in the world. However, the sanction of the Grand Court is required to bring such legal proceedings.[32] I note that Winding Up Order expressly gives the Liquidators the power to "*pursue applications and/or proceedings in any other jurisdiction for recognition of the liquidation and/or their appointment and to obtain such assistance as is necessary to perform their duties*."

---

reason for appointing two liquidators is that it helps ensure that important decisions in the liquidation can still be made when one liquidator is unavailable, on vacation, etc.

[26] Regulations r.4

[27] Regulations r.5

[28] Regulations r.7

[29] Regulations r.6

[30] CWR O.3 r.4(1)

[31] See, for example, *Re Hadar Fund Ltd* (Unreported, FSD 94 of 2013 (AJJ), 13 August 2013) (attached at Exhibit E) where the Grand Court declined to appoint nominees from PricewaterhouseCoopers as official liquidators because of the appearance of a conflict, such that they could not "properly be regarded as independent as regards that company" as is required by Reg 6(1)

[32] Companies Act s. 110(2), Sch. 3 Part I (1).

37. Another important aspect of the JOLs' role is to identify the relevant stakeholders in the liquidation. To that ends, toward the outset of the official liquidation, liquidators are required to make a summary determination as to whether the company should be regarded as solvent, insolvent or of "doubtful solvency".[33] That determination is significant insofar as it then determines who are treated as the stakeholders in the liquidation - that is, whether it is the shareholders (in the case of a solvent liquidation), the creditors (in the case of an insolvent liquidation) or both (where the company is of doubtful solvency). This in turn affects, among other things, who is entitled to receive the liquidators' reports,[34] who is convened to meetings held in the liquidation,[35] and how the liquidation committee shall be comprised (if there is one[36]). It is also relevant to whether or not the liquidators must call for proofs of debt: unless there are disputed debts, that only happens when the company is insolvent or of doubtful solvency, and when the company is solvent the liquidators should continue to pay the company's debts in the ordinary course of business.[37] Liquidators are required to keep that solvency determination under review during the liquidation, and may change that determination if new circumstances warrant it.[38]

38. A general principle underlying the Cayman Islands' insolvency regime is that creditors and shareholders are treated on a *pari passu* basis, subject to certain exceptions.[39]

39. In my experience, Cayman Islands liquidation proceedings are fair and equitable, insofar as all creditors and stakeholders have the opportunity to be heard by the Grand Court and

[33] CWR O.8 r.1
[34] CWR O.1 Or. 1(2)
[35] CWR O.8 r. 1(4) -(6).
[36] CWR O.9 r.1.
[37] CWR O.16 r.1
[38] CWR O.8 r.2
[39] Section 140 (1) of the Companies Act.

no creditors will be prejudiced on the sole basis that they are based overseas. All creditors are treated equally, regardless of where they are domiciled.

40. Section 97(1) of the Companies Act provides in relevant part (as applicable to exempted limited partnerships) that upon the making of a winding up order against an exempted limited partnership, no suit, action, or other proceedings, including criminal proceedings, shall be proceeded with or commenced against the exempted limited partnership except with leave of the Grand Court[40] and subject to such terms as the Grand Court may impose. This automatic stay serves to, *inter alia*, facilitate the liquidators' ability to deal with the claims of creditors and the interests of partners collectively and comprehensively. The litigation stay does not have extra-territorial effect unless it is recognized or otherwise given effect to by the foreign court.

Liquidation of Cayman Islands exempted limited partnerships

41. An exempted limited partnership formed under the laws of the Cayman Islands may enter voluntary liquidation (a) at the time or upon the occurrence of any event specified in the partnership agreement; or (b) unless otherwise specified in the partnership agreement, upon the passing of a resolution of all the general partners and a two-thirds majority of limited partners.[41]

42. The voluntary liquidation of an exempted limited partnership is conducted in accordance with the provisions of the partnership agreement, and the role of voluntary liquidator is conducted by the general partner or other person appointed pursuant to the partnership agreement, unless the court otherwise orders on the application of any partner, creditor or liquidator of the exempted limited partnership pursuant to Section 36(3)(g) of the ELP Act[42].

[40] Companies Act s.97

[41] See ELP Act s. 36(1).

[42] See ELP Act s.36(13).

43. The official liquidation of exempted limited partnerships largely replicates the statutory regime for the official liquidation of companies, although this has been the subject of conflicting decisions by the Grand Court in recent years (as I discuss further below).

44. In general terms, section 36(3) of the ELP Act makes Part V of the Companies Act and the CWR applicable to the winding up of an exempted limited partnership. For this purpose, Part V is construed so that:

a. references to "company" are to be read as including exempted limited partnerships;

b. references to "contributories" (ie shareholders) are applicable to limited partners; and

c. references to "directors" are applicable to the general partner(s).

45. However, section 36(3) expressly provides that to the extent that any provisions of Part V and the CWR are not consistent with the ELP Act, the provisions of the ELP Act prevail. Further, with limited exceptions, Part V and the CWR does not apply to the voluntary liquidation of exempted limited partnerships.

46. Prior to the decision of the Grand Court in *Re Padma Fund LP*[43], it was uncontroversial that section 36(3) of the ELP Act in effect provided that exempted limited partnerships were placed into official liquidation under Part V of the Companies Act as if they were companies, with the modifying provisions referred to above[44]. However, in *Padma*, Justice Parker dismissed a winding up petition presented against Padma by two creditors on the grounds

[43] [Unreported, FSD 201 of 2021 (RPJ), 8 October 2021], attached hereto as Exhibit F.

[44] See eg *Re Xio Diamond LP* (unreported, FSD 256 of 2019 (IKJ), 30 April 2020), attached hereto as Exhibit G.

that, upon his construction of the terms and effect of the ELP Act, an exempted limited partnership (like Padma) could not properly be a respondent to such a proceeding.

47. I represented the unsuccessful petitioners in *Padma*, and in my respectful opinion the case was wrongly decided. Subsequent decisions by the Grand Court have declined to follow the Judge's reasoning in *Padma* and have ordered the official liquidation of exempted limited partnerships under Part V of the Companies Act, as applied by section 36(3) of the ELP Act[45]. Nevertheless, the decision in *Padma* was not appealed and the subsequent decisions to which I refer related to petitions to place an exempted limited partnership into official liquidation brought by limited partners, and not by a creditor (as was the case in *Padma*). Accordingly, *Padma* remains good law in the Cayman Islands as regards creditor petitions to wind up exempted limited partnerships.

48. In any case, the controversy surrounding the *Padma* decision and creditor petitions to wind up exempted limited partnerships is not applicable to the official liquidation of ECM. ECM entered official liquidation via a different route (as discussed further below).

V. The appointment of the Liquidators to ECM

49. On October 20, 2022, the sole limited partner, MAVCAP, filed an application with the Grand Court seeking orders to bring the voluntary liquidation of ECM under the Grand Court's supervision. The petition was heard on November 24, 2022. I appeared at that hearing as counsel to the proposed Liquidators.

50. MAVCAP's application was made in circumstances where the 8-year term provided for the operation of ECM in the Partnership Agreement had expired. Accordingly, pursuant to section 36(1) of the ELP Act and the Partnership Agreement, ECM had automatically entered

[45] See eg *Re Formation Group (Cayman) Fund I LP* (unreported, FSD 366 of 2021 (IKJ), 21 April 2022), attached hereto as Exhibit H.

voluntary liquidation with its general partner, the ECM GP, responsible for winding up ECM's affairs as its voluntary liquidator.

51. However, little progress in winding up ECM's affairs had been made and it became apparent to MAVCAP that the individuals with ultimate authority, Mr Hussain, Mr Ahmed and Mr Azahar (i.e. the directors of the UGP), had effectively abandoned the ECM structure. The registered office provider for each of ECM, the ECM GP, the UGP and other entities within the group (including TEC) had resigned (which is usually a sign that the registered office fees have not been paid and/or other statutory obligations are not being complied with) and the entities were liable to be struck off.

52. Accordingly, at the hearing of MAVCAP's application on 24 November 2022 (at which I represented MAVCAP), the Honorable Justice Parker, a Judge of the Grand Court, made a declaration that MAVCAP had entered voluntary liquidation on 25 November 2021, and made orders and directions (among others) that:

a. The winding up of ECM shall continue under the jurisdiction of the Court pursuant to section 36(3)(g) of the ELP Act;

b. The Liquidators be appointed as joint official liquidators of ECM (with the power to act jointly and severally);

c. The Liquidators would be authorised to exercise certain powers without further sanction of the Court; and

d. The Liquidators' powers are exercisable to the exclusion of the ECM GP, which shall have no authority or power to act in relation to ECM other than at the direction and/or with the consent of the Liquidators.

53. The Supervision Order was a novel form of order that had not previously been made by the Grand Court, but has since been followed on a number of occasions[46]. This is therefore now an established route for the voluntary liquidation of an exempted limited partnership to be moved into official liquidation under the supervision of the Grand Court in a manner that is analogous to the statutory procedure for a supervision order to be made with respect to the voluntary liquidation of a company under Part V of the Companies Act (which does not apply to the voluntary liquidations of exempted limited partnerships, as discussed above).

54. The Liquidators are therefore empowered by the terms of the Supervision Order, to carry out the official liquidation of ECM in essentially the same manner as the official liquidation of a company is conducted under Part V of the Companies Act, as described in paragraphs 29 to 38 above. Among other things, the Liquidators have the power to:

a. take possession of, collect and enter the property of the Partnership and for that purpose to take all such proceedings as the Liquidators consider necessary;

b. do all acts and execute, in the name and on behalf of the Partnership, all deeds, receipts and other documents;

c. investigate, generally, the promotion, business, dealings and affairs of the Partnership and to make such report, if any, to the Court as the Liquidators think fit;

d. control and otherwise deal with all existing bank accounts in the name of the Partnership and to open new bank accounts in the name of the Partnership;

[46] See eg the order in *Re Kuwait LBO Fund, LP* dated 5 October 2023, attached hereto as Exhibit I.

e. pursue applications and/or proceedings in any other jurisdiction for recognition of the liquidation and/or their appointment and to obtain such assistance as is necessary to perform their duties;

f. convene meetings of creditors and limited partners;

g. do all other things incidental to the exercise of their powers; and

h. apply to the Grand Court for further orders and directions as to the exercise of their powers.

55. The Liquidators made the initial determination that ECM is of doubtful solvency. This would have meant that while creditors' claims rank ahead of limited partners in the liquidation waterfall, the Liquidators would have been required to consider the interests of both creditors and limited partners because it is possible, but not certain, that creditors will be paid in full. However, I understand that the Liquidators subsequently changed their determination to 'solvent' because MAVCAP had agreed to provide funding to cover the costs and expenses of the liquidation. (However, this funding is itself a liability of the liquidation estate, and so ranks ahead of any return to MAVCAP as limited partner).

56. For the avoidance of doubt, while the Liquidators are only aware that ECM has a single limited partner, MAVCAP, the Liquidators do not act for the interests of any single creditor or limited partner, but rather are required to act in good faith and in the best interests of the stakeholders as a whole). They are required to treat the creditors and limited partners in a fair and even-handed manner, including by seeking to giving effect to their substantive legal rights under Cayman Islands law.

V. The appointment of the Liquidators to UGP and TEC

57. Following the resignation of the registered office provider for ECM, UGP and TEC each of UGP and TEC were struck off the register of companies on January 31, 2022.

58. On May 30, 2023, the Liquidators, in their capacities as joint official liquidators of ECM, filed a petition with the Grand Court seeking the restoration and official liquidation of each of UGP and TEC and the appointment of the Liquidators[47] as joint official liquidators of those companies.

59. The petition with respect to UGP was made on behalf of ECM in its capacity as a contingent creditor of UGP (on the basis that UGP is liable for the debts of GP, which is liable for the debts of the Partnership, making UGP a contingent creditor of the Partnership for an unknown amount).

60. The petition with respect to TEC was made on behalf of ECM in its capacity as the sole registered shareholder of TEC.

61. In the case of both TEC and UGP, a winding up order was sought on the ground that it was just and equitable for the company to be wound up because (among other things):

a. the companies had been abandoned by their management, leading to their strike-off;

b. the directors of UGP had failed to provide the information requested by the JOLs which would enable it to determine the current status of the Partnership's assets;

[47] Mr Green and Mr Becker only.

c. official liquidation was necessary in order for there to be an investigation into the affairs of the companies, and in order to compel co-operation from the directors (including by securing overseas recognition and assistance).

62. The petitions were heard together on September 26, 2023. I appeared at that hearing as counsel for the Liquidators (in their capacity as petitioners on behalf of ECM). At the hearing, the Honorable Justice Parker, a Judge of the Grand Court, ordered that UGP and TEC be restored, placed into official liquidation and that Mr Green and Mr Becker be appointed as the companies' joint official liquidators (the "**Winding Up Orders**").

63. Upon the making of the Winding Up Orders, the powers of the directors automatically ceased and the power to act in the name of the companies vested in the Liquidators in accordance with the Companies Act (as described in paragraphs 29 to 38 above).

64. The Liquidators have made the initial determination that each of UGP and TEC is of doubtful solvency.

65. My understanding is that the official liquidations of ECM, UGP and TEC have each been mainly conducted in the Cayman Islands. While the Liquidators' powers may be exercised by any one of the Liquidators jointly and severally, it has been my experience that Mr. Green has taken primary responsibility for the conduct of the liquidations and is therefore responsible for managing ECM, TEC and UGP on a day-to-day basis. Mr. Green is domiciled and resident in the Cayman Islands (as is Mr. Penner).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: December 20, 2023
Grand Cayman, Cayman Islands

/s/ *Peter Sherwood*
Peter Sherwood

CAYMAN ISLANDS



EXEMPTED LIMITED PARTNERSHIP ACT

(2021 Revision)

Supplement No. 3 published with Legislation Gazette No. 9 of 29th January, 2021

.

PUBLISHING DETAILS

Law 5 of 2014 consolidated with Laws 10 of 2017, 31 of 2020 and as amended by Law 56 of 2020.

Revised under the authority of the *Law Revision Act (2020 Revision)*.

Originally enacted —

Law 5 of 2014-11th April, 2014
Law 10 of 2017-27th March, 2017
Law 31 of 2020-1st July, 2020
Law 56 of 2020-7th December, 2020.

Consolidated and revised this 31st day of December, 2020.

CAYMAN ISLANDS

EXEMPTED LIMITED PARTNERSHIP ACT

(2021 Revision)

Arrangement of Sections

Section		Page
1.	Short title	5
2.	Interpretation	5
3.	Saving of rules of equity and common law	7
4.	Constitution	8
5.	When licence not required	9
6.	Name and registered office	9
7.	Establishment	10
8.	Registrar	10
9.	Registration	10
10.	Changes in registered particulars	11
11.	Failure to file statement	12
12.	Copies of certificates	12
13.	Express fees	12
14.	Modification of general law	13
15.	Agreement may specify delegation of authority	13
16.	Property	13
17.	Rights, property and proceeds to vest in incoming partner	14
18.	Transactions with the exempted limited partnership	14
19.	General partner to act in good faith	14
20.	Liability of limited partner	15
21.	Accounts	16
22.	Information regarding condition of partnership	17
23.	Differences decided by general partner	17
24.	Establishment, regulation of boards, committees	18
25.	Failure to perform	18

Case 23-12044-mg Doc 4-1 Filed 12/21/23 Entered 12/21/23 18:14:14 Exhibit A
-Cayman Islands ELP Act 2021 Revision Pg 4 of 44

26. Agreement as to benefits 19
27. Execution considered valid 19
28. Power of attorney 20
29. Register of limited partnership interests 20
30. Maintenance of records 21
31. Registration of security interests 21
32. Transfer of partnership interests 22
33. Proceedings 24
34. Return of contributions 25
35. Manner in which partnership may not be dissolved 25
36. Dissolution 26
37. Registrar may strike off register 29
38. Tax undertaking 30
39. Annual return 31
40. Re-registration 31
41. De-registration pursuant to partnership agreement 32
42. Registration of foreign limited partnerships 32
43. De-registration for continuation in another jurisdiction 35
44. Certificate of de-registration 37
45. Notice of de-registration 38
46. Certificate of good standing 39
47. Electronic business 39
48. Regulations 39
49. Recovery of penalties 39
50. *Repeal* of the Exempted Limited Partnership Law (2013 Revision) and savings 40

ENDNOTES **41**

Table of Legislation history: 41

CAYMAN ISLANDS

EXEMPTED LIMITED PARTNERSHIP ACT

(2021 Revision)

Short title

1. This Act may be cited as the *Exempted Limited Partnership Act (2021 Revision)*.

Interpretation

2. In this Act —

"**certified translator**" means a person whose interpretation or translation competence has been tested and approved by a professional association or governmental body or any other person determined by the Registrar;

"**commitment**" means cash, property, services rendered or other assets which a partner agrees to contribute to the capital of an exempted limited partnership in its capacity as partner but does not include any moneys agreed to be lent to an exempted limited partnership;

"**Companies Law**" means the *Companies Act (2021 Revision)*;

"**contribution**" means cash, property, services or other assets which a partner contributes to the capital of an exempted limited partnership in its capacity as partner but does not include any moneys lent by a partner to an exempted limited partnership;

"**court**" means the Grand Court;

"**dual foreign name**" means an additional name in any language not utilising the Roman alphabet, utilising any letters, characters, script, accents and other diacritical marks, and which does not have to be a translation or transliteration of the name in the Roman alphabet;

"**exempted limited partnership**" means —

(a) a partnership formed and registered under section 9(1); or

(b) a partnership that before the commencement of the *Exempted Limited Partnership Law, 2014 (Law 5 of 2014)* was formed and registered under the **repealed** *Exempted Limited Partnership Law (2013 Revision)*;

"**general partner**" means a person who is named as such in the statement filed pursuant to section 9 or 10(2) and if more than one shall mean each general partner, unless this Act otherwise provides;

"**general partnership interest**" means the partnership interest of a general partner in that person's capacity as such;

"**insolvency of the exempted limited partnership**" means that the general partner is unable to pay the debts and obligations of the exempted limited partnership, otherwise than in respect of liabilities to partners on account of their partnership interests, in the ordinary course of business as they fall due out of the assets of the exempted limited partnership, without recourse to the separate assets of the general partner not contributed or committed to the exempted limited partnership and "**insolvent**" shall be construed accordingly;

"**limited partner**" means a person who has become a limited partner in accordance with section 4(2) or otherwise pursuant to section 32;

"**limited partnership interest**" means the partnership interest of a limited partner in that person's capacity as such;

"**majority of limited partners**" means a majority or number of limited partners, or class or category of limited partners, or other persons, whether parties to the partnership agreement or otherwise including the general partner, required by or specified, either generally or in respect of a particular matter, in the partnership agreement and calculated in the manner specified in the partnership agreement, but if no such majority or manner is specified in the partnership agreement any required majority of the limited partners shall be a simple majority of the limited partners calculated by reference to the value of the contributions of the limited partners at the time of determination;

"**overseas company**" means a company, body corporate or corporate entity existing under the law of a jurisdiction outside of the Islands;

"**part**" means, in relation to a partnership interest, a proportionate part of that partnership interest, comprising both the rights, and the obligations under the partnership agreement and this Act but without prejudice to the liability of a general partner under section 4(2);

"**partner**" means a limited partner or a general partner;

"**partnership agreement**" means any agreement of the partners which provides for the establishment of, and regulates the affairs of, an exempted limited

partnership, the conduct of its business and the rights and obligations of the partners amongst themselves;

"**partnership interest**" means the interest of a partner in an exempted limited partnership in respect of profit, capital and voting or other rights, benefits or obligations to which that partner is entitled or subject pursuant to the partnership agreement or this Act;

"**Partnership Law**" means the *Partnership Act (2013 Revision);*

"**public in the Islands**" excludes any exempted or ordinary non-resident company registered under the *Companies Act (2021 Revision)*, a foreign company registered pursuant to Part IX of the *Companies Act (2021 Revision)*, a foreign limited partnership registered under section 42, any company acting as general partner of a partnership registered under section 9(1) or any director or officer of the same acting in that capacity or the trustee of any trust registered or capable of registration under section 74 of the *Trusts Act (2021 Revision)* acting in that capacity;

"**qualifying general partner**" means a general partner of an exempted limited partnership that satisfies paragraph (a), (b), (c) or (d) of section 4(4);

"**registered office provider**" means in relation to an exempted limited partnership the person who provides the registered office for that exempted limited partnership;

"**Registrar**" means the Registrar of Exempted Limited Partnerships appointed in accordance with section 8;

"**security interest**" means a legal mortgage, an equitable mortgage, charge or other form of security interest granted with respect to a partnership interest or part thereof whether or not governed by the laws of the Islands;

"**signature**" includes a facsimile of a signature however reproduced and a digital signature;

"**special economic zone business**" means any type of business authorised to be carried on in a special economic zone pursuant to any Law in force in the Islands; and

"**translated name**" means a translation or transliteration of an exempted limited partnership's dual foreign name into the English language provided by either a person licensed to provide the exempted limited partnership's registered office in the Islands or a certified translator, together with a statement as to the foreign language in which the dual foreign name is written.

Saving of rules of equity and common law

3. The rules of equity and of common law applicable to partnerships as modified by the *Partnership Act (2013 Revision)* but excluding sections 31, 45 to 54 and 56 to 57 shall apply to an exempted limited partnership, except where they are inconsistent with the express provisions of this Act.

Constitution

4. (1) An exempted limited partnership may be formed for any lawful purpose to be carried out and undertaken either in or from within the Islands or elsewhere upon the terms, with the rights and powers, and subject to the conditions, limitations, restrictions and liabilities mentioned in this Act but an exempted limited partnership shall not undertake business with the public in the Islands other than so far as may be necessary for the carrying on of the business of that exempted limited partnership exterior to the Islands.

(2) An exempted limited partnership shall consist of one or more persons called general partners who shall, in the event that the assets of the exempted limited partnership are inadequate, be liable for all debts and obligations of the exempted limited partnership, and one or more persons called limited partners who shall not be liable for the debts or obligations of the exempted limited partnership save as provided in the partnership agreement and to the extent specified in sections 20(1) and 34(1), but a general partner, without derogation from that general partner's position as such, may, in addition, take an interest as a limited partner in the exempted limited partnership.

(3) A body corporate, with or without limited liability, and a partnership whether in the name of the partnership and whether or not an exempted limited partnership, may be a general or limited partner of an exempted limited partnership.

(4) Any one or more of the limited partners and general partners of an exempted limited partnership may be resident, domiciled, established, incorporated or registered under the laws of the Islands or outside of the Islands but at least one general partner shall —

(a) if an individual, be resident in the Islands;

(b) if a company, be registered under the *Companies Act (2021 Revision)* or registered pursuant to Part IX of the *Companies Act (2021 Revision)*;

(c) if a partnership, be registered pursuant to section 9(1) or 42, as applicable; or

(d) if any other person, be registered under any other Law or regulation as may be prescribed.

(5) A limited partner, or person with analogous status, of a partnership which is the general partner of an exempted limited partnership shall not, by virtue of that fact alone, be taken to be a general partner of the exempted limited partnership.

(6) A limited partner of an exempted limited partnership shall not cease to have the benefit of limited liability by reason only of the partnership ceasing to have a qualifying general partner.

When licence not required

5. A person who acts as a general partner of an exempted limited partnership is not, by virtue solely of so acting, required to be licensed under the *Local Companies (Control) Act (2019 Revision)* and shall not require a trust company licence under the *Banks and Trust Companies Act (2021 Revision)*, a mutual fund administrator's licence under the *Mutual Funds Act (2021 Revision)*, a licence under the *Companies Management Act (2021 Revision)* or a licence under the *Trade and Business Licensing Act (2021 Revision)*.

Name and registered office

6. (1) Every exempted limited partnership shall have a name which —

(a) shall include the words "Limited Partnership" or the letters "L.P." or "LP";

(b) may include the name of any general partner or limited partner or any derivation thereof; and

(c) in the case of an exempted limited partnership carrying on special economic zone business, shall include the words "special economic zone" or the letters "SEZ",

in each case which may be preceded by or followed with a dual or foreign name, but no exempted limited partnership shall have a name or translated name which, because it is identical or similar to the name of any other entity or it falsely suggests the patronage of or a connection with some person or authority or it suggests that the exempted limited partnership is licensed whether in the Islands or elsewhere to carry on any type or class of business when it is not in fact so licensed or because of any other reason, is calculated or likely to mislead.

(2) Every exempted limited partnership shall have a registered office situated in the Islands for the service of process and to which all notices and communications may be addressed.

(3) The registered office of an exempted limited partnership shall be the same as the address of a person licensed by the Authority under the *Banks and Trust Companies Act (2021 Revision)*, the *Companies Management Act (2021 Revision)* or the *Mutual Funds Act (2021 Revision)* except where the registered office was at a different address immediately prior to the date of commencement of this Act and remains at that address on or after the date of commencement of this Act.

(4) For the purpose of subsection (3) the Authority means the Cayman Islands Monetary Authority established under section 5(1) of the *Monetary Authority Act (2020 Revision)*, and includes a person acting under the Authority's authorisation.

Case 23-12044-mg Doc 4-1 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit A
-Cayman Islands ELP Act 2021 Revision Pg 10 of 44

Establishment

7. A partnership, limited or otherwise, shall not be an exempted limited partnership unless registered as such under section 9(1).

Registrar

8. The Registrar of Companies appointed under the *Companies Act (2021 Revision)* shall be the Registrar of Exempted Limited Partnerships.

Registration

9. (1) The registration of an exempted limited partnership shall be effected by payment to the Registrar of a registration fee of an amount that the Cabinet shall, from time to time, by regulation prescribe and by filing with the Registrar a statement signed, subject to section 11, by or on behalf of a general partner containing —

(a) the name or dual foreign name and translated name of the exempted limited partnership;

(b) the general nature of the business of the exempted limited partnership;

(c) the address in the Islands of the registered office of the exempted limited partnership;

(d) the term, if any, for which the exempted limited partnership is entered into or, if for unlimited duration, a statement to that effect and the date of its commencement;

(e) the full name and address of the general partner and, if more than one of each of them, specifying each of them as a general partner and

(i) in the case of a corporate general partner, there shall be filed with the statement a certificate of incorporation and a certificate of good standing (or similar documents under the laws of the jurisdiction of incorporation) or a certificate of registration and a certificate of good standing under Part IX of the *Companies Act (2021 Revision)*;

(ii) in the case of a general partner which is a partnership registered under this Act, there shall be filed with the statement a certificate of registration and a certificate of good standing or certified copies thereof; and

(iii) in the case of a general partner who is an individual there shall be filed with the statement photographic evidence of that person's identity and evidence of that person's residential address in the Islands; and

(f) a declaration that the exempted limited partnership shall not undertake business with the public in the Islands other than so far as may be necessary for the carrying on of the business of that exempted limited partnership exterior to the Islands.

(2) The Registrar shall maintain a record of each exempted limited partnership registered under this Act and all the statements filed in relation to the exempted limited partnership, which records and statements shall be kept open to public inspection during all usual business hours.

(3) An exempted limited partnership's dual foreign name shall only be entered on the record if its translated name conforms with the provisions of section 6(1).

(4) If the exempted limited partnership does not conform with section 6(1) then the dual foreign name and the translated name shall not be entered on the record.

(5) The Registrar shall issue a certificate of registration under the Registrar's hand and seal of office as soon as the registration of the statement pursuant to subsection (1) has been effected.

(6) A limited partner of an exempted limited partnership formed after the 15th July, 1991 shall not have the benefit of limited liability until the date indicated on the certificate referred to in subsection (5) issued by the Registrar, and a partnership registered in accordance with section 40(1) shall obtain the benefit of limited liability under this Act with effect from that date but subject to section 40(2).

(7) A certificate issued under subsection (5) shall be conclusive evidence that compliance has been made with all the requirements of this Act in respect of the formation and registration of an exempted limited partnership but subject to section 40(2).

(8) Notwithstanding subsections (1) and (5), the Registrar may refuse to accept the registration of an exempted limited partnership and refuse to issue a certificate of registration in any case where, in the Registrar's opinion, the name or translated name of the proposed exempted limited partnership is in contravention of section 6(1).

Changes in registered particulars

10. (1) Without prejudice to subsection (2), if, during the continuance of an exempted limited partnership, any change is made or occurs in any matter specified in paragraphs (a) to (e) of section 9(1), a statement signed, subject to section 11, by a general partner specifying the nature of the change shall, within sixty days of the change, be filed with the Registrar.

(2) A statement signed in accordance with subsection (1) in respect of any arrangement or transaction consequent upon which any person will be removed, replaced or admitted as a general partner in any exempted limited partnership, shall, within fifteen days of the arrangement or transaction, be filed with the Registrar and, until the statement is so filed, the arrangement or transaction shall, for the purposes of this Act and the partnership agreement, not be effective to remove, replace or admit that person as a general partner of the exempt limited partnership and with respect to a replacement or admitted general partner

Case 23-12044-mg Doc 4-1 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit A
-Cayman Islands ELP Act 2021 Revision Pg 12 of 44

the documentation required by subsection 9(1)(e)(i), (ii) or (iii) of this Act shall be provided as the case may require.

(3) Save with the written consent of any person thereby affected, no arrangement or transaction shall take effect to the extent that it seeks to relieve or discharge a general partner from the obligations of a general partner with regard to any debt or obligation of the exempted limited partnership to a person incurred before the arrangement or transaction takes effect.

(4) If default is made in compliance with this section, each general partner in default shall incur a penalty of two hundred dollars for each day that the default continues which penalty shall be a debt due to the Registrar and the general partner shall indemnify any person who thereby suffers any loss.

(5) The name or translated name of an exempted limited partnership shall not be changed so as to contravene section 6(1) and the Registrar may refuse to accept a statement under subsection (1) which, in the Registrar's opinion, seeks to effect such a change.

Failure to file statement

11. If a person required by section 9(1), section 10(1) or (2) or section 36, or by the partnership agreement to execute and file a statement or notice fails to do so, any other partner, and any assignee of a partnership interest who is or may be affected by the failure or refusal may petition the court to direct a person the court sees fit to sign the statement and file the same on behalf of the person in default.

Copies of certificates

12. (1) Any person may require a certified copy of the certificate of registration, a certificate of good standing or a copy of or extract from any registered statement filed in relation to the exempted limited partnership to be certified as a true copy by the Registrar on payment of a fee the Cabinet may by regulation prescribe.

(2) A certificate of registration, a certificate of good standing or a copy of or extract from a registered statement filed with the Registrar issued under this Act, if certified by the Registrar to be a true copy, shall be received in evidence in all legal proceedings.

Express fees

13. (1) The Registrar, on receipt of —

(a) an application for registration under section 9 or section 42; or

(b) an application for any certificate, other than a certificate under section 9(5), which the Registrar is authorised to provide under this Act,

which is accompanied by an express fee of an amount specified in subsection (2), shall complete the transaction for which the application has been made by —

(i) the end of the working day, where the application and all fees are received by 12 noon; or

(ii) 12 noon on the following working day, where the application and all fees are received after 12 noon.

(2) The express fee referred to in subsection (1) is —

(a) four hundred dollars for an application referred to in paragraph (a) of subsection (1); and

(b) one hundred dollars for an application referred to in paragraph (b) of subsection (1).

Modification of general law

14. (1) A limited partner shall not take part in the conduct of the business of an exempted limited partnership in its capacity as a limited partner.

(2) All letters, contracts, deeds, instruments or documents whatsoever shall be entered into by or on behalf of the general partner (or any agent or delegate of the general partner) on behalf of the exempted limited partnership.

Agreement may specify delegation of authority

15. Where an exempted limited partnership has more than one general partner and this Act gives an authority, consent or power but not an obligation or liability, to the general partner, the partnership agreement may specify which general partner is entitled to exercise that authority, consent or power to the exclusion of any other general partner.

Property

16. (1) Any rights or property of every description of the exempted limited partnership, including all choses in action and any right to make capital calls and receive the proceeds thereof that is conveyed to or vested in or held on behalf of any one or more of the general partners or which is conveyed into or vested in the name of the exempted limited partnership shall be held or deemed to be held by the general partner and if more than one then by the general partners jointly, upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement.

(2) Any debt or obligation incurred by a general partner in the conduct of the business of an exempted limited partnership shall be a debt or obligation of the exempted limited partnership.

(3) The assets of an exempted limited partnership, or any class of assets, may be the subject of a floating charge, whether or not the partners of the exempted limited partnership, or any of them, are companies, overseas companies or bodies corporate.

Case 23-12044-mg Doc 4-1 Filed 12/20/23 Entered 12/20/23 18:14:34 Exhibit A
Case 1:24-cv-00495-JJM Document 2-2 Filed 05/12/24 Page 33 of 38 PageID #:
-Cayman Islands ELP Act 2021 Revision Pg 14 of 44

Rights, property and proceeds to vest in incoming partner

17. (1) On the admission or substitution of any general partner or general partners, in this subsection referred to as an "incoming general partner", in accordance with the terms of the partnership agreement and this Act, all rights or property of every description of the exempted limited partnership, including all choses in action and any right to make capital calls and receive the proceeds thereof, held or deemed to be held by the general partner or general partners in accordance with the foregoing subsection, in this subsection referred to as the "existing general partners", shall vest without the requirement for further formalities in the incoming general partner and any continuing existing general partners and shall be held by it or them in accordance with this Act.

(2) On the withdrawal of a general partner in accordance with the terms of the partnership agreement and this Act —

(a) all rights or property of every description of the exempted limited partnership, including all choses in action and any right to make capital calls and receive the proceeds thereof, shall vest without the requirement for further actions or formalities in the remaining general partner or general partners and shall be held by it or them in accordance with this Act; and

(b) subject to section 10(3), the remaining general partner or general partners shall be liable for and the property of the exempted limited partnership held by them in accordance with this Act shall be subject to all mortgages, charges or security interests and all contracts, obligations, claims, debts and liabilities of the exempted limited partnership.

Transactions with the exempted limited partnership

18. Subject to any express or implied term of the partnership agreement to the contrary and to the duty imposed upon a general partner by section 19(1), a partner may lend money to, borrow from and transact other business with the exempted limited partnership so that an asset, debt or obligation of the exempted limited partnership shall thereby be created and with or without interest or security as the general partner shall determine, and shall have the same rights and obligations with respect thereto as a person who is not a partner, but the obligations of the exempted limited partnership to repay a debt to a general partner shall, at all times, be subordinated to the claims of secured and unsecured creditors of the exempted limited partnership.

General partner to act in good faith

19. (1) A general partner shall act at all times in good faith and, subject to any express provisions of the partnership agreement to the contrary, in the interests of the exempted limited partnership.

(2) Subject to any express provisions of the partnership agreement to the contrary, a limited partner of an exempted limited partnership in that capacity does not

owe any fiduciary duty in exercising any of its rights or authorities or otherwise in performing any of its obligations under the partnership agreement to the exempted limited partnership or any other partner.

Liability of limited partner

20. (1) If a limited partner takes part in the conduct of the business of an exempted limited partnership in its dealings with persons who are not partners, that limited partner shall be liable, in the event of the insolvency of the exempted limited partnership, for all debts and obligations of that exempted limited partnership incurred during the period that that limited partner participates in the conduct of the business as though that limited partner were, for that period, a general partner, but that limited partner shall be liable only to a person who transacts business with the exempted limited partnership during the period with actual knowledge of that limited partner's participation and who then reasonably believed the limited partner to be a general partner.

(2) A limited partner does not take part in the conduct of the business of an exempted limited partnership within the meaning of this section by —

(a) holding an office or interest in, or having a contractual relationship with, a general partner or being a contractor for or an agent or employee of the exempted limited partnership or of a general partner or acting as a director, officer or shareholder of a corporate general partner;

(b) consulting with and advising a general partner or consenting or withholding consent to any action proposed, in the manner contemplated by the partnership agreement, with respect to the business of the exempted limited partnership;

(c) investigating, reviewing, approving or being advised as to the accounts or business affairs of the exempted limited partnership or exercising any right conferred by this Act;

(d) acting as surety or guarantor for the exempted limited partnership either generally or in respect of specific obligations;

(e) approving or disapproving an amendment to the partnership agreement;

(f) calling, requesting, attending or participating in any meeting of the partners;

(g) taking any action that results in the winding up or the dissolution of the exempted limited partnership;

(h) taking any action required or permitted by the partnership agreement or by law to bring, pursue, settle or terminate any action or proceedings brought pursuant to section 33(2);

(i) appointing a person to serve on any board or committee of the exempted limited partnership, a general partner or a limited partner or removing a person therefrom;

(j) serving on any board or committee of the exempted limited partnership, a general partner, the limited partners or the partners, or by appointing, electing or otherwise participating in the choice of a representative or any other person to serve on any board or committee, or by acting as a member of any board or committee either directly or by or through any representative or other person, including giving advice or consenting, or refusing to consent, to any action proposed by the general partner on behalf of the exempted limited partnership and exercising any powers or authorities or performing any obligations as a member of that board or committee in the manner contemplated by the partnership agreement;

(k) serving on the board of directors or a committee of, consulting with or advising or being an officer, director, shareholder, partner, member, manager, trustee, agent or employee of, or by being a fiduciary or contractor for, any person in which the exempted limited partnership has an interest or any person providing management, consultation, custody or other services or other products for, to or on behalf of, or otherwise having a business or other relationship with, the exempted limited partnership or a general partner of the exempted limited partnership; or

(l) voting as a limited partner on —

(i) the winding up and dissolution of the exempted limited partnership;

(ii) the purchase, sale, exchange, lease, mortgage, pledge or other acquisition or transfer of any asset by or of the exempted limited partnership;

(iii) the incurrence or renewal of indebtedness by the exempted limited partnership;

(iv) a change in the nature of the business of the exempted limited partnership;

(v) the admission, removal or withdrawal of a general or limited partner and the continuation of business of the exempted limited partnership thereafter; or

(vi) transactions in which one or more of the general partners have an actual or potential conflict of interest with one or more of the limited partners.

(3) Subsection (2) shall not import any implication that the possession or exercise of any other power by a limited partner will necessarily constitute the taking part by that limited partner in the business of the exempted limited partnership.

Accounts

21. (1) A general partner shall keep or cause to be kept proper books of account including, where applicable, material underlying documentation including contracts and invoices, with respect to —

(a) all sums of money received and expended by the exempted limited partnership and matters in respect of which the receipt of expenditure takes place;

(b) all sales and purchases of goods by the exempted limited partnership; and

(c) the assets and liabilities of the exempted limited partnership.

(2) For the purposes of subsection (1), proper books of account shall not be deemed to be kept if there are not kept such books as are necessary to give a true and fair view of the business and financial condition of the exempted limited partnership and to explain its transactions.

(3) Where the general partner keeps the books of account described in subsection (1) at any place other than at the registered office of the exempted limited partnership or at any other place within the Islands, the general partner shall, upon service of an order or notice by the Tax Information Authority pursuant to the *Tax Information Authority Act (2021 Revision)*, make available, in electronic form or any other medium, at its registered office copies of its books of account, or any part or parts thereof, as are specified in the order or notice.

(4) A general partner shall cause all books of account required to be kept under subsection (1) to be retained for a minimum period of five years from the date on which they are prepared.

(5) A person who, being a general partner, knowingly and wilfully contravenes subsection (1) or (4) shall be subject to a penalty of five thousand dollars.

(6) A person who, being a general partner, defaults in complying with an order or notice under subsection (3) without reasonable excuse, shall incur a penalty of five thousand dollars and a further penalty of one hundred dollars for every day during which the non-compliance continues.

Information regarding condition of partnership

22. Subject to any express or implied term of the partnership agreement, each limited partner may demand and shall receive from a general partner true and full information regarding the state of the business and financial condition of the exempted limited partnership.

Differences decided by general partner

23. Any difference arising as to matters connected with the business of the exempted limited partnership shall be decided by the general partner, and, if more than one, by a majority of the general partners as is provided in the partnership agreement.

Case 23-12044-mg Doc 4-1 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit A
-Cayman Islands ELP Act 2021 Revision Pg 18 of 44

Establishment, regulation of boards, committees

24. (1) Where a partnership agreement contains provisions for the establishment and regulation of any boards or committees of an exempted limited partnership, its partners or any class or category of those partners, or representatives of any of the partners, including —

(a) the establishment and constitution of boards or committees;

(b) the manner and terms of appointment and removal of the members of boards or committees;

(c) the powers, rights, authorities, obligations and duties of the members of boards or committees;

(d) the regulation of the proceedings of boards or committees; and

(e) the rights of the members and former members of boards or committees to exculpation or to be indemnified out of the assets of the exempted limited partnership,

then, subject to the express provisions of the partnership agreement, any person duly appointed to be a member of any board or committee in accordance with those provisions shall be deemed to have notice of and shall have the benefit of those provisions which shall not be unenforceable by any person in that person's own right by reason only that the person is not a party to the partnership agreement.

(2) Subject to any express provisions of the partnership agreement to the contrary, a member of any board or committee referred to in subsection (1) does not owe any fiduciary duty in exercising any of its rights or authorities, or otherwise in performing any of its obligations, as a member of the board or committee to the exempted limited partnership or any partner.

Failure to perform

25. (1) If a partnership agreement provides that where a partner fails to perform any of its obligations under, or otherwise breaches the provisions of, the partnership agreement that partner may be subject to or suffer remedies for, or consequences of, the failure or breach specified in the partnership agreement or otherwise applicable under any law then those remedies or consequences shall not be unenforceable solely on the basis that they are penal in nature.

(2) The remedies or consequences under subsection (1) may include but are not limited to any one or more of the following —

(a) reducing, eliminating or forfeiting the defaulting partner's partnership interest in the exempted limited partnership or any rights of the defaulting partner under the partnership agreement;

(b) subordinating the defaulting partner's partnership interest to the interests of non-defaulting partners;

(c) effecting a forced sale or forfeiture of the defaulting partner's partnership interest;

(d) arranging for the lending by other partners or other persons to the defaulting partner of the amount necessary to meet the defaulting partner's commitment;

(e) providing for the fixing of the value of the defaulting partner's partnership interest by appraisal or by formula and the redemption or sale of the defaulting partner's partnership interest at that value; or

(f) exercising any other remedy or consequence specified in the partnership agreement or available under any applicable laws.

(3) Subject to the general partner's duty under section 19(1), a general partner shall not be liable for its decision to impose or for imposing any remedies or consequences upon any partner, or for its decision not to do so and references in this subsection to a partnership interest shall for the avoidance of doubt also be construed as including any part thereof.

Agreement as to benefits

26. A person who has executed the partnership agreement of an exempted limited partnership or who is named or otherwise identified, including as a class, in the partnership agreement shall not be deemed to be or otherwise construed as a partner of the exempted limited partnership if —

(a) that person has executed the partnership agreement solely in order to take the benefit of a provision of, or assume an obligation under, the partnership agreement otherwise than as a partner; or

(b) where, on a proper construction of the partnership agreement, the parties did not intend the person to be a partner of the exempted limited partnership.

Execution considered valid

27. (1) Any partnership agreement, any agreement pursuant to which any person agrees to make any commitment or contribution to an exempted limited partnership as a partner and any agreement, contract, deed, instrument including any instrument under seal or document entered into by or on behalf of the general partner for itself in the case of the partnership agreement or otherwise on behalf of the exempted limited partnership is executed validly by the parties thereto where it is executed in any manner contemplated by the parties thereto, including, without limitation —

(a) where the complete agreement, contract, deed, instrument or document is executed; or

(b) where any signature or execution page to the agreement, contract, deed, instrument or document is executed, whether or not the agreement,

Case 23-12044-mg Doc 4-1 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit A
-Cayman Islands ELP Act 2021 Revision Pg 20 of 44

contract, deed, instrument or document is at the time in its final form, and which is attached by, or on behalf of, the relevant party to, or otherwise with the relevant party's express or implied authority to, the agreement, contract, deed, instrument or document,

if the agreement, contract, deed, instrument or document is executed in conformity with this Act or any other Law of the Islands applicable to execution of the agreement, contract, deed, instrument or document.

(2) Subsection (1) shall apply to agreements, contracts, deeds, instruments including instruments under seal or other documents regardless of whether they were made before, on or after the commencement of this subsection and no agreement, contract, deed, instrument, including instruments under seal, or other document made before the commencement of this subsection shall be invalid if it satisfies the requirements of subsection (1).

Power of attorney

28. (1) For the purposes of the *Powers of Attorney Act (1996 Revision)* and section 8 of the *Property (Miscellaneous Provisions) Act (2017 Revision)* where a partnership agreement purports to create or grant a power of attorney, including an irrevocable power of attorney, that power shall be deemed validly to have been executed as a deed and if required duly witnessed on execution of the partnership agreement by or on behalf of the donor of the power or on adherence thereto by the donor of the power pursuant to section 32 without demonstration or satisfaction of any further formalities regarding its execution.

(2) Subsection (1) applies equally to every partnership agreement entered into prior to as well as after the commencement of this Act.

Register of limited partnership interests

29. (1) Subject to subsection (2) the general partner shall maintain or cause to be maintained in the country or territory that the general partner may determine a register of limited partners which shall contain the name and address of each person who is a limited partner of the exempted limited partnership, the date on which a person became a limited partner and the date on which a person ceased to be a limited partner, and the register shall be updated within twenty-one days of the date of any change in the particulars therein.

(2) The general partner shall maintain or cause to be maintained at the registered office of the exempted limited partnership a record of the address at which the register of limited partners is maintained, which record shall be updated within twenty-one days of the date of any change in the particulars therein.

(3) The register of limited partners and the record of the address at which the register of limited partners is maintained shall be open to inspection during all usual business hours in the place where the register or record is maintained by —

(a) subject to any express or implied term of the partnership agreement, all partners; and

(b) any other person with the consent of the general partner.

(4) The register of limited partners shall be *prima facie* evidence of the matters which are directed by this Act to be inserted therein.

(5) Where the register of limited partners is kept at a place other than the registered office of the exempted limited partnership, the general partner shall make available at the registered office, in electronic form or any other medium, the register of limited partners upon service of an order or notice by the Tax Information Authority pursuant to the *Tax Information Authority Act* (*2021 Revision*).

(6) A person who, being a general partner, defaults in complying with subsection (1) or (2), commits an offence and is liable on summary conviction to a fine of ten thousand dollars for each day that the default continues and shall indemnify any person who thereby suffers any loss.

(7) A person who, being a general partner, defaults in complying with an order or notice under subsection (5) without reasonable excuse, shall incur a penalty of five hundred dollars and a further penalty of one hundred dollars for every day during which that non-compliance continues.

Maintenance of records

30. (1) The general partner shall maintain or cause to be maintained in any country or territory that the general partner may determine, a record of the amount and date of the contribution or contributions of each limited partner and the amount and date of any payment representing a return of the whole or any part of the contribution of any limited partner, which record shall be updated within twenty-one days of the date of any change in the particulars therein.

(2) Subsections (4), (5), (6) and (7) of section 29 shall apply to the records required to be maintained pursuant to this section.

(3) The records maintained pursuant to this section shall be open to inspection during all usual business hours in the place where the records are maintained by any person with the consent of the general partner.

Registration of security interests

31. (1) The general partner shall maintain or cause to be maintained at the registered office, a register of security interests in which shall be registered each security interest in relation to which a valid notice has been served in accordance with section 32(9).

(2) The register of security interests under subsection (1) shall contain the identity of the grantor and grantee, the partnership interest or part thereof subject to the

Case 23-12044-mg Doc 4-1 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit A
Case 1:23-cv-11195-JLH Document 2-2 Filed 12/20/23 Page 14 of 38 PageID #:
-Cayman Islands ELP Act 2021 Revision Pg 22 of 44

security interest and the date on which notice of the security interest was validly served in accordance with section 32(9).

(3) The register described in subsection (1) may be inspected by any person during all usual business hours.

(4) Any security interest over the whole or any part of a limited partnership interest shall have priority according to the time that the written notice is validly served at the registered office of the exempted limited partnership in accordance with section 32(9).

(5) If default is made by a general partner in the maintenance of the register described in subsection (1), each general partner in default shall incur a penalty of twenty-five dollars for each day that the default continues.

Transfer of partnership interests

32. (1) A partnership interest is transferable in whole or in part in accordance with the provisions of the partnership agreement and this section.

(2) Subject to the partnership agreement, a person may become a partner of an exempted limited partnership either by executing and delivering the partnership agreement or any supplement thereto or counterpart thereof together with the general partner, by acceding to the partnership agreement in accordance with its terms or upon the transfer of all or part of a partnership interest in accordance with this section, each of which is for this section referred to as an "admission", and in each case without the consent of the limited partners.

(3) Where the requirements for or conditions to an admission contained in the partnership agreement have been complied with in accordance with their terms or, to the extent permitted by the partnership agreement, waived, any person, however admitted, shall without the requirement for any further actions or formalities, be deemed to have adhered to and agreed to be bound by the terms and conditions of the partnership agreement and shall have the rights and be subject to the obligations contained in the partnership agreement and this Act as if the person and all existing partners had together duly executed and delivered the partnership agreement.

(4) The provisions of subsection (3) shall apply to every transfer or purported transfer of a partnership interest in whole or in part and each admission of a person as a partner of an exempted limited partnership prior to, as well as after, the commencement of this Act.

(5) Section 6 of the *Property (Miscellaneous Provisions) Act (2017 Revision)* shall not apply to partnership interests.

(6) Subject to the partnership agreement, no limited partner may —

(a) transfer; or

(b) grant any security interest in,

the whole or any part of that person's limited partnership interest except with the written consent of the general partner given prior to, or simultaneously with, the transfer or grant.

(7) Subject to the partnership agreement and this Act, a general partner may transfer or grant a security interest in the whole or any part of that person's general partnership interest with the written consent of any other general partner given prior to, or simultaneously with, the transfer or grant.

(8) Subject to the partnership agreement —

(a) the transferee of a general partnership interest or part thereof shall be admitted as a general partner in place of and subject to section 10(2) to the exclusion of, or in addition to, as the case may be, the transferor in respect of the general partnership interest or part thereof transferred but —

(i) the transferee shall not be liable for any obligation of the exempted limited partnership incurred before the transferee is so admitted unless otherwise agreed in writing by the transferor and the transferee; and

(ii) the transferor shall remain liable for any obligation of the exempted limited partnership incurred before the transferor ceased to be a general partner unless otherwise agreed in writing by the transferor, the transferee and the person to whom the obligation is owed; and

(b) the transferee of a limited partnership interest or part thereof shall be admitted as a limited partner, wholly or partly, as the case may be, in place of and to the exclusion of the transferor in respect of the limited partnership interest or part thereof transferred but, unless otherwise agreed in writing by the transferor, the transferee and the general partner, the transferee shall not assume any liability of the transferor pursuant to section 20(1) or section 34(1) and no transfer shall relieve the transferor of any liability under those subsections.

(9) Written notice of the grant of a security interest over the whole or any part of a limited partnership interest shall be given by the grantor or the grantee to the exempted limited partnership at its registered office.

(10) A notice under subsection (9) is not validly given unless it specifies the agreement pursuant to which the security interest is granted including the date thereof and the parties thereto, the identity of the grantor and grantee of the security interest, and the partnership interest or part thereof that is subject to that security interest.

(11) Nothing in this section shall prevent a partner from assigning or otherwise disposing of, whether absolutely or by way of security in any manner permitted by law, any right, debt or other chose in action arising under a partnership agreement but no assignment or other disposition may, subject to the partnership agreement, be made without the consent of the general partner or, in the case of

an assignment or disposition by a general partner, the consent of any other general partner given prior to, or simultaneously with, the assignment or disposition.

(12) A partnership agreement may provide that, as against any other partner, any assignment or other disposition by a partner of any right, debt or other chose in action arising under a partnership agreement shall confer economic rights only and for the purposes of this section "**economic rights**" are —

(a) any rights to make and enforce capital calls, to receive the proceeds thereof and to enforce payment of, and receive any sums payable to the partner including the rights on the winding up and dissolution of the exempted limited partnership;

(b) the right to receive a share of profits of the exempted limited partnership or a share of the property on its winding up and dissolution;

(c) the right to an account for the purpose of ascertaining the amount or share of any of the foregoing; and

(d) any other rights that are expressly stated in the partnership agreement to be assignable.

(13) Any consent of a general partner required by this section may, subject to any express provision of the partnership agreement to the contrary, be withheld in the general partner's sole discretion.

(14) Any notice of any assignment or other disposition referred to in subsection (11) that may be required or permitted to be given to any one or more of the other general partners of an exempted limited partnership shall, notwithstanding any other rule of law or equity, be deemed to have been so given if given to the exempted limited partnership.

Proceedings

33. (1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.

(2) If the court considers it just and equitable any person or a general partner shall have the right to join in or otherwise institute proceedings against any one or more of the limited partners who may be liable under section 20(1) or to enforce the return of the contribution, if any, required by section 34(1).

(3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings.

(4) If any action taken pursuant to subsection (3) is successful, in whole or in part, as a result of a judgment, compromise or settlement of any action, the court may

award any limited partner bringing any action reasonable expenses, including attorney's fees, from any recovery in any action or from an exempted limited partnership.

Return of contributions

34. (1) If a limited partner receives a payment representing a return of any part of that person's contribution or is released from any outstanding obligation in respect of that person's commitment and at the time that the payment was made or the release effected —

(a) the exempted limited partnership is insolvent including where the payment or release causes the insolvency; and

(b) the limited partner has actual knowledge of the insolvency of the exempted limited partnership,

then for a period of six months commencing on the date of that payment or release but not thereafter, the limited partner shall be liable to the exempted limited partnership for the amount of the payment or the due performance of the released obligation in respect of that person's commitment in each case to the extent that the repayment or performance of the released obligation is necessary to discharge a debt or obligation of the exempted limited partnership incurred during the period that the contribution or commitment represented an asset of the exempted limited partnership.

(2) Any amount required to be repaid pursuant to this section shall, unless the partnership agreement specifies otherwise, bear simple interest at the rate of ten per cent per annum, calculated on a daily basis.

(3) The partnership agreement may specify —

(a) that no interest shall apply;

(b) that a different rate of interest, including a compound rate shall apply; or

(c) a different basis for calculating interest payable.

Manner in which partnership may not be dissolved

35. Subject to any express or implied term of the partnership agreement to the contrary —

(a) an exempted limited partnership shall not be dissolved nor the partnership agreement terminated by —

(i) changes in, additions to or substitutions of any one or more of the partners;

(ii) the transfer of the whole or part of the partnership interest of a limited partner;

(iii) the death, bankruptcy, dissolution, removal, withdrawal or winding up of a limited partner or a limited partner's withdrawal or

redemption of, or repurchase by the partnership of, any limited partnership interest;

(iv) the incapacity of a limited partner;

(v) any one or more of the limited partners granting a mortgage, charge or other form of security interest over the whole or part of that peson's partnership interest;

(vi) the sale, exchange, lease, mortgage, pledge or other transfer of any of the assets of the exempted limited partnership; or

(vii) a de-registration of the exempted limited partnership pursuant to section 41 or 43; and

(b) a limited partner shall not be entitled to wind up and dissolve the partnership by notice.

Dissolution

36. (1) An exempted limited partnership shall be voluntarily wound up in accordance with the provisions of the partnership agreement —

(a) at the time or upon the occurrence of any event specified in the partnership agreement; or

(b) unless otherwise specified in the partnership agreement, upon the passing of a resolution of all the general partners and a two-thirds majority of limited partners.

(2) Upon the completion of the winding up of an exempted limited partnership, the general partner or other person appointed as liquidator in accordance with the provisions of subsection (12) shall file a notice of dissolution with the Registrar and subject to section 37, an exempted limited partnership shall not be dissolved by an act of the partners or otherwise until a notice of dissolution signed by a general partner or liquidator has been filed with the Registrar.

(3) Except to the extent that the provisions are not consistent with this Act, and in the event of any inconsistencies, this Act shall prevail, and subject to any express provisions of this Act to the contrary, the provisions of Part V of the *Companies Act (2021 Revision)* and the *Companies Winding Up Rules, 2018* shall apply to the winding up of an exempted limited partnership and for this purpose —

(a) references in Part V to a company shall include references to an exempted limited partnership;

(b) the limited partners shall be treated as if they were shareholders of a company and references to contributories in Part V shall be construed accordingly, except that the application of the provisions shall not cause a limited partner to be subject to any greater liability than that limited partner

would otherwise bear under this Act, but for the application of this paragraph;

(c) references in Part V to a director or officer of a company shall include references to the general partner of an exempted limited partnership;

(d) except for sections 123, excluding subsection (1)(b) and (c), 129, 140, 145, and 147 of the *Companies Act (2021 Revision)*, Part V shall not apply to a voluntary dissolution and winding up under subsection (1);

(e) in the case of a voluntary winding-up of an exempted limited partnership under subsection (1) where the partnership was registered under section 9 prior to 11th May 2009, the necessary time period for compliance with the requirements of section 123 (1) of the *Companies Act (2021 Revision)* shall be at least twenty-eight days prior to the final distribution of the assets of the exempted limited partnership to partners rather than within twenty-eight days of the commencement of its voluntary winding-up;

(f) the Insolvency Rules Committee established pursuant to the *Companies Act (2021 Revision)* shall have the power to make rules and prescribe forms for the purpose of giving effect to this section or its interpretation; and

(g) on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable.

(4) Notwithstanding that any order or direction has been made pursuant to subsection (3)(g) or that the winding up of an exempted limited partnership has commenced, a creditor who has security over the whole or part of the assets of the exempted limited partnership is entitled to enforce that person's security without the leave of the court and without reference to the general partner or any liquidator appointed to wind up the exempted limited partnership.

(5) Where a liquidator sells assets on behalf of a secured creditor of an exempted limited partnership, the liquidator is entitled to deduct from the proceeds of sale a reasonable sum by way of remuneration.

(6) Where an exempted limited partnership is being wound up and a liquidator is appointed, the Registrar shall within 28 days of the appointment be notified of the name and business address of the liquidator.

(7) The general partner or its legal representative shall promptly serve notice on all limited partners informing the limited partners of —

(a) the death;

(b) the commencement of liquidation, bankruptcy or dissolution proceedings; or

(c) the withdrawal, removal or making of a winding up or dissolution order,

in relation to the sole or last remaining qualifying general partner and in this section each event is referred to an "event of withdrawal".

(8) If default is made in compliance with this section, each general partner or its legal representative, in default shall incur a penalty of twenty-five dollars for each day that the default continues, which penalty shall be a debt due to the Registrar.

(9) Unless the partnership agreement provides otherwise, if a new qualifying general partner is not elected within ninety days after the service of notice of an event of withdrawal in accordance with subsection (7), in this section referred to as "the automatic wind up date", the exempted limited partnership shall be wound up in accordance with the partnership agreement or the orders or directions the court may make or give in accordance with subsection (3)(g).

(10) The winding up of an exempted limited partnership shall be deemed to commence upon the earlier to occur of any of the following —

(a) the passing of a resolution for winding up;

(b) subject to subsection (9), the automatic wind up date;

(c) the expiry of the period fixed for the duration of the exempted limited partnership by the partnership agreement;

(d) the occurrence of an event provided by the partnership agreement upon which the exempted limited partnership is to be wound up; or

(e) where a winding up order has been made, the presentation of the petition for winding up.

(11) In the event that an exempted limited partnership is required to be wound up in accordance with the provisions of subsection (9) then the date of commencement of winding up shall be the date falling ninety days after the service of notice of an event of withdrawal.

(12) If a majority of limited partners specified in the partnership agreement as being entitled to vote to elect a new general partner in accordance with the terms of the partnership agreement elects one or more new qualifying general partners by the automatic winding up date —

(a) the exempted limited partnership shall not be required to be wound up and dissolved; and

(b) the business of the exempted limited partnership may be resumed and continued as provided for in the partnership agreement or any subsequent agreement.

(13) Following the commencement of the winding up of an exempted limited partnership its affairs shall be wound up by the general partner or other person appointed pursuant to the partnership agreement unless the court otherwise orders on the application of any partner, creditor or liquidator of the exempted limited partnership pursuant to subsection (3)(g).

Registrar may strike off register

37. (1) Where the Registrar has reasonable cause to believe that an exempted limited partnership is not carrying on business or is not in operation, the Registrar may strike the exempted limited partnership off the register and the exempted limited partnership shall thereupon be dissolved.

(2) A request on behalf of the general partner to strike the exempted limited partnership off the register shall be accompanied by a fee in the amount prescribed by the Cabinet by regulation.

(3) Where an exempted limited partnership is being wound up, and the Registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the exempted limited partnership are fully wound up, the Registrar may strike the exempted limited partnership off the register and the exempted limited partnership shall thereupon be dissolved without the need for a notice of dissolution to be filed pursuant to section 36(2).

(4) The Registrar shall immediately publish a notice in the Gazette to the effect that the exempted limited partnership in question has been struck off the register, the date on which it has been struck off and the reason therefor.

(5) A general partner, limited partner or creditor who objects to an exempted limited partnership being struck off the register pursuant to this section, on the grounds that the exempted limited partnership was at the time it was struck off the register carrying on business, in operation or otherwise, may make an application to the court for the name of the exempted limited partnership to be restored to the register.

(6) An application under subsection (5) shall be made —

(a) within two years of the date upon which the name of the exempted limited partnership was struck off the register; or

(b) within a period that the Cabinet may by order allow but which shall not exceed ten years of the date upon which the name of the exempted limited partnership was struck off the register.

(7) The court, if satisfied that the exempted limited partnership was, at the time that it was struck off the register, carrying on business, in operation or otherwise, may order that the name of the exempted limited partnership be restored to the register upon —

(a) payment by the applicant of a reinstatement fee;

(b) payment by the applicant of any other accrued outstanding fees; and

(c) any other terms and conditions which the court considers just.

(8) The reinstatement fee referred to in subsection (7) shall be the same as the fee paid by the exempted limited partnership upon initial registration.

(9) Where an order is made under subsection (7) the exempted limited partnership is deemed to have continued in existence as if it had not been struck off.

(10) The court may, in addition or subsequent to, an order made under subsection (7), by order give directions and make provision for, as far as possible, placing the exempted limited partnership and all other persons affected from the name of the exempted limited partnership being struck off the register, in the same position as if the name of the exempted limited partnership had not been struck off the register.

(11) The striking off the register of any exempted limited partnership under this Act shall not affect the liability, if any, of any general partner or limited partner of the exempted limited partnership, and the liability shall continue and may be enforced as if the exempted limited partnership had at all times continued to be in existence.

(12) An act performed or thing done by the Registrar under this section shall not attract any liability.

Tax undertaking

38. (1) The Financial Secretary may, on application by a general partner, give an undertaking in respect of any exempted limited partnership that a law which is hereafter enacted in the Islands imposing any tax to be levied on profits or income or gains or appreciations shall not apply to the exempted limited partnership or to any partner thereof in respect of the operations or assets of the exempted limited partnership or the partnership interest of a partner therein.

(2) Any undertaking given under subsection (1) may provide, in addition, that the aforesaid taxes and any tax in the nature of estate duty or inheritance tax shall not be payable in respect of the obligations of the exempted limited partnership or the interests of the partners therein.

(3) Any undertaking as aforesaid may be for a period not exceeding fifty years from the date of the approval of the application and may be in the form determined by the Financial Secretary.

(4) The Financial Secretary shall prepare and present to the Cabinet, a report of all applications made and granted pursuant to this section on a monthly basis.

(5) The first report due to be prepared pursuant to subsection (4) shall be presented to the Cabinet on the date specified by the Cabinet by Order.

Annual return

39. (1) An exempted limited partnership shall, in January in every year, file with the Registrar a return signed by or on behalf of a general partner certifying that the exempted limited partnership has, during the prior calendar year, complied with section 10(1) and that there has been no breach of the declaration given in accordance with paragraph (f) of section 9(1) and pay to the Registrar an annual fee of the amount that the Cabinet shall, from time to time, by regulation prescribe.

(2) The annual fee payable and the return due to be filed under subsection (1) shall be tendered at the same time.

(3) An exempted limited partnership which fails to comply with subsection (1) shall —

(a) where the annual fee is paid or the return is filed between 1st April and 30th June, incur a penalty of 33.33% of the annual fee;

(b) where the annual fee and penalties are paid or the return is filed between 1st July and 30th September, incur a penalty 66.67% of the annual fee; and

(c) where the annual fee and penalties are paid or the return is filed between 1st October and 31st December, incur a penalty 100% of the annual fee.

(4) A penalty specified in subsection (3) shall be a debt due to the Registrar.

Re-registration

40. (1) Any partnership registered under the *Limited Partnership Law (Revised)* prior to its **repeal** or sections 45 to 54 and 56 to 57 of the *Partnership Act (2013 Revision)* or any Law amending or replacing the same shall not be affected by this Act but shall continue to be governed by that law.

(2) A partnership described in subsection (1) and any partnership established under the laws of a jurisdiction other than the Islands, in this section referred to as a "registered partnership", may, at any time, upon —

(a) effecting the amendments to the partnership agreement as shall be necessary to comply with this Act, if any;

(b) paying a fee of the amount that the Cabinet may by regulation prescribe; and

(c) filing the statement required by section 9(1),

be registered under this Act and, with effect from the date indicated on the certificate of registration issued by the Registrar pursuant to section 9(5), shall be governed exclusively thereafter as an exempted limited partnership in accordance with this Act.

(3) With effect from the date indicated on the certificate of registration described in subsection (2), the exempted limited partnership and the partnership interests of

Case 23-12044-mg Doc 4-1 Filed 12/20/23 Entered 12/20/23 18:15:14 Exhibit A
-Cayman Islands ELP Act 2021 Revision Pg 32 of 44

the parties therein and their rights and liabilities, as against any person who is not a partner, shall cease to be governed by the **repealed** *Limited Partnership Law (Revised)*, or sections 45 to 54 and 56 to 57 of the *Partnership Act (2013 Revision)* or the laws of any other jurisdiction, as the case may be, save in respect of any act or omission occurring before that date which shall continue to be governed by the law of the other jurisdiction.

(4) Without prejudice to the foregoing generality such registration shall not operate to —

(a) create a new legal entity;

(b) affect the property previously acquired by or on behalf of the exempted limited partnership;

(c) affect any act or thing done prior to registration or the rights, powers, authorities, functions or obligations of the exempted limited partnership, any partner or any other person prior thereto; or

(d) render defective any legal proceedings by or against the exempted limited partnership or any partner or any other person,

and any legal proceedings that could have been continued or commenced by or against the exempted limited partnership or any partner or any other person before its registration hereunder may, notwithstanding registration, be continued or commenced after registration and in respect of which the law of the other jurisdiction shall be of application.

(5) With effect from the date indicated on the certificate of registration described in subsection (2), all property of every description, including all choses in action and any right to make capital calls of the registrant partnership shall be the property of the exempted limited partnership to be held in accordance with section 16(1).

De-registration pursuant to partnership agreement

41. A general partner of an exempted limited partnership may at any time terminate the registration of an applicant partnership as an exempted limited partnership, if termination of registration is permitted under the terms of the partnership agreement, by filing a written notice of termination of registration with the Registrar together with written confirmation that the action is authorised by the partnership agreement.

Registration of foreign limited partnerships

42. (1) In this section —

"**foreign limited partnership**" means a limited partnership or limited liability partnership established in a recognised jurisdiction outside the Islands.

"**recognised jurisdiction**" is one that is prescribed as such by the Cabinet in regulations made under this Act; and

"**relevant authority**" means the national, state or local government authority, registry or other body in the recognised jurisdiction that is responsible for forming or establishing the foreign limited partnership.

(2) Subject to subsection (3), a foreign limited partnership may apply to be registered pursuant to this section in order to act as the general partner of an exempted limited partnership.

(3) A foreign limited partnership may be registered by the Registrar upon payment to the Registrar of a registration fee of the amount the Cabinet by regulation, prescribes and by filing with the Registrar certified copies of —

(a) its certificate of formation in its jurisdiction of establishment or the equivalent document issued by the relevant authority as evidence of its formation; and

(b) a certificate of good standing issued by the relevant authority.

(4) If the certificate of good standing required under subsection (3)(b) is unavailable from the relevant authority, then the foreign limited partnership is required to file with the Registrar, a declaration signed by a person authorised to act on behalf of the foreign limited partnership stating that the foreign limited partnership is in good standing with the relevant authority.

(5) Neither certificate of good standing under subsection (3)(b) nor the declaration under subsection (4) shall be dated earlier than one month prior to the date of its delivery to the Registrar, and shall be accompanied by a statement signed by or on behalf of the foreign limited partnership specifying —

(a) the name, dual foreign name and the translated name, if applicable, of the foreign limited partnership;

(b) the jurisdiction in which it is established;

(c) whether the foreign limited partnership is deemed to be a separate legal person under the laws of the jurisdiction in which it is established and, if so, the full name and address of any managing member or other person, if not identified in paragraph (f), who immediately controls or directs the affairs of the foreign limited partnership;

(d) the address of its registered office in its jurisdiction of formation or establishment;

(e) the names and addresses of some one or more than one person resident in the Islands authorised to accept on its behalf service of process and any notices required to be served on it; and

(f) the full name and address of any general partners of the foreign limited partnership, if applicable.

(6) A foreign limited partnership shall, in January of each year, pay to the revenues of the Islands an annual fee in the amount and in the manner the Cabinet by regulation, prescribes.

(7) A foreign limited partnership that defaults in paying the annual fee specified in subsection (6) shall incur a penalty of —

(a) 33.33% of the annual fee specified in subsection (6) if the fee and penalty are paid between the 1st April and the 30th June;

(b) 66.67% of the annual fee specified in subsection (6) if the fee and penalty are paid between the 1st July and the 30th September; and

(c) 100% of the annual fee specified in subsection (6) if the fee and penalty are paid between the 1st October and the 31st December.

(8) A penalty specified in subsection (7) is a debt due to the Registrar.

(9) Upon compliance with subsections (3), (4) and (5) the Registrar shall issue a certificate of registration under the Registrar's hand and seal of office to the foreign limited partnership.

(10) A certificate of registration of a foreign limited partnership issued under subsection (9) is conclusive evidence that compliance has been made with all requirements of this Act in respect of registration.

(11) If any change is made in any details contained in the statement filed under subsection (5), a statement signed by or on behalf of the foreign limited partnership specifying the nature of the change shall, within sixty days of the change, be filed with the Registrar.

(12) If default is made in compliance with subsection (11), each foreign limited partnership shall incur a penalty of two hundred dollars for each day that the default continues which shall be a debt due to the Registrar and the foreign partnership shall indemnify any person who thereby suffers any loss.

(13) Any process or notice required to be served on a foreign limited partnership is sufficiently served if addressed to any person whose name has been delivered to the Registrar under subsection (5) and left at or sent by post to the address which has been so delivered.

(14) A document may be served on the foreign limited partnership by leaving it at or sending it by post to any place of business established by the foreign limited partnership in the Islands.

(15) An instrument executed by or on behalf of a foreign limited partnership outside the Islands is, and is to be treated as, a deed or instrument under seal —

(a) if it is —

(i) sealed; or

(ii) expressed to be, or is expressed to be executed as, or otherwise makes clear on its face it is intended to be, a deed; and

(b) if it is executed in conformity with any requirement imposed by —

(i) the laws of the jurisdiction in which the foreign limited partnership was established; and

(ii) its partnership agreement or equivalent governing document.

(16) An instrument executed in accordance with subsection (15) meets any requirement of any law that the instrument is, and is to be treated as, a deed or instrument executed under seal.

(17) The execution of an instrument in accordance with subsection (15)(a) and the fact that it was executed in accordance with subsection (15)(b) may be proved by the affidavit or solemn declaration of a witness to the execution of the instrument sworn or made before a notary public or any other person qualified to administer oaths in any jurisdiction.

(18) If any foreign limited partnership ceases to be a general partner of an exempted limited partnership it shall forthwith notify the Registrar and from the date on which notice is given, the obligation of the foreign limited partnership to deliver any document to the Registrar ceases.

(19) Notwithstanding subsection (18) if the Registrar is satisfied by any other means that a foreign limited partnership has ceased to be a general partner of an exempted limited partnership the Registrar may close the file of the foreign limited partnership and thereupon the obligation of the foreign limited partnership to deliver any document to the Registrar ceases.

(20) A general partner of a foreign limited partnership shall not be deemed to have established a place of business in the Islands or commenced carrying on business in the Islands pursuant to Part IX of the *Companies Act (2021 Revision)* by virtue solely of so acting.

De-registration for continuation in another jurisdiction

43. (1) A general partner on behalf of an exempted limited partnership which proposes to be registered by way of continuation as a partnership, body corporate or any other form of entity under the laws of any jurisdiction outside the Islands, in this section referred to as an "applicant", may apply to the Registrar for the exempted limited partnership, in this section referred to as the "applicant partnership", to be de-registered in the Islands.

(2) The Registrar shall de-register an applicant partnership if —

(a) the applicant proposes to register the applicant partnership by way of continuation in a jurisdiction which permits or does not prohibit the transfer of the applicant partnership in the manner provided in this section referred to as a "relevant jurisdiction";

(b) the applicant has paid to the Registrar a fee equal to three times the annual fee that would have been payable pursuant to section 39(1) in the January immediately preceding the application for de-registration;

(c) the applicant has filed with the Registrar notice of any —

(i) change in the name or dual foreign name;

(ii) change in the applicant partnership; and

(iii) change in its proposed registered office or agent for service of process in the relevant jurisdiction;

(d) no petition or other similar proceeding has been filed and remains outstanding or order made or resolution adopted to wind up, dissolve or liquidate the applicant partnership in any jurisdiction and no time or event has occurred upon which the applicant partnership is to be wound up;

(e) no receiver, trustee or administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the applicant partnership, its affairs or its property or any part thereof;

(f) no scheme, order, compromise or other similar arrangement has been entered into or made whereby the rights of creditors of the applicant partnership are and continue to be suspended or restricted;

(g) the applicant partnership is not insolvent;

(h) an application for de-registration is *bona fide* and not intended to defraud creditors or the limited partners of the applicant partnership;

(i) the applicant has delivered to the Registrar an undertaking signed by an authorised signatory of the applicant that notice of the transfer has been or will be given within twenty-one days to the secured creditors of the applicant partnership;

(j) any consent or approval to the transfer required by any contract or undertaking entered into or given by the applicant partnership has been obtained, released or waived, as the case may be;

(k) the transfer is permitted by and has been approved in accordance with the partnership agreement of the applicant partnership;

(l) the laws of the relevant jurisdiction with respect to transfer have been or will be complied with;

(m) the applicant partnership, if licensed or registered under the *Banks and Trust Companies Act (2021 Revision)*, the *Companies Management Act (2021Revision)*, the *Insurance Act, 2010 [Law 32 of 2010]*, the *Mutual Funds Act (2021 Revision)*, *the Private Funds Act (2021 Revision)* or the *Securities Investment Business Act (2020 Revision)*, has obtained consent of the Cayman Islands Monetary Authority to the transfer;

(n) the applicant partnership will upon registration under the laws of the relevant jurisdiction continue as a partnership, body corporate or other form of entity;

(o) the applicant partnership is in good standing with the registrar and all outstanding fees due to be paid in relation to the applicant partnership to the Registrar are paid; and

(p) the Registrar is not aware of any other reason why it would be against the public interest to de-register the applicant partnership.

(3) Paragraphs (d), (e), (f), (g), (h), (j), (k), (l) and (n) of subsection (2) may be satisfied by filing with the Registrar a voluntary declaration or affidavit of an authorised signatory of the applicant to the effect that, having made due enquiry, the Registrar is of the opinion that the requirements of those paragraphs have been met.

(4) A declaration or affidavit under subsection (3) shall include a statement of the assets and liabilities of the applicant partnership.

(5) The statement under subsection (4) shall be based on an assessment of the assets and liabilities of the applicant partnership as at the date of the declaration or affidavit or the date as close as is practicable to the foregoing date.

(6) An authorised signatory of the applicant, who makes a declaration or affidavit under subsection (3) without reasonable grounds commits an offence and is liable on summary conviction to a fine of fifteen thousand dollars and to imprisonment for five years.

(7) The Registrar may, upon request from an applicant, where the Registrar is satisfied that the applicant has complied with subsection (2), de-register the applicant partnership.

(8) Section 41 does not apply to an applicant partnership under this section.

Certificate of de-registration

44. (1) Upon the termination of registration of a partnership under section 41, the Registrar shall issue a certificate under the Registrar's hand and seal of office that the registration of the partnership as an exempted limited partnership has been terminated and specifying the date of termination; and shall enter in the register of exempted limited partnerships the date of termination of the registration of the partnership under section 41.

(2) Upon de-registration of an applicant partnership under section 43, the Registrar shall issue a certificate under the Registrar's hand and seal of office that the applicant partnership has satisfied the de-registration requirements under section 43 and been de-registered as an exempted limited partnership and specifying the date of de-registration and shall enter in the register of exempted limited partnerships the date of de-registration of the applicant partnership under section 43.

(3) From the commencement of the date of termination of registration under section 41 or de-registration under section 43 the applicant partnership shall

cease to be an exempted limited partnership for all purposes under this Act and in the case of de-registration under section 43 shall continue as a partnership, body corporate or other entity under the laws of the relevant jurisdiction.

(4) From the commencement of the date of termination of registration of a partnership under section 41 the applicant partnership becomes a general partnership under the *Partnership Act (2013 Revision)* and in the case of an applicant partnership de-registered under section 43, the applicant partnership de-registered shall not by virtue of that de-registration alone cease to be a partnership, body corporate or other entity under the laws of the relevant jurisdiction.

(5) This section shall not operate, in relation to an applicant partnership de-registered under section 43 and continued as a partnership under the laws of the relevant jurisdiction —

(a) to create a new legal entity unless otherwise provided by the laws of the relevant jurisdiction;

(b) to prejudice or affect the identity or continuity of the applicant partnership as previously constituted unless otherwise provided by the laws of the relevant jurisdiction;

(c) to affect the property of any applicant partnership;

(d) to affect any appointment made, resolution passed or any other act or thing done in relation to the applicant partnership pursuant to a power conferred by the partnership agreement of the applicant partnership or by the laws of the Islands;

(e) except to the extent provided by or pursuant to section 43 and this section, to affect the rights, powers, authorities, functions and liabilities or obligations of the applicant partnership or any other person unless otherwise provided by the laws of the relevant jurisdiction; or

(f) to render defective any legal proceedings by or against the applicant partnership, and any legal proceedings that could have been continued or commenced by or against the applicant partnership before its de-registration under this Act may, notwithstanding the de-registration, be continued or commenced by or against the applicant partnership after de-registration.

Notice of de-registration

45. The Registrar shall give notice in the Gazette of the termination of registration of a partnership under section 41 or the de-registration of an applicant partnership under section 43 and, in the case of de-registration under section 43, the jurisdiction under the laws of which the applicant partnership has been registered by way of continuation and the name of the applicant partnership, if changed.

Certificate of good standing

46. (1) The Registrar may on application made by —

(a) an exempted limited partnership; or

(b) a foreign limited partnership registered under section 42,

issue a certificate of good standing to the exempted limited partnership or the foreign limited partnership that is in good standing in accordance with subsection (2).

(2) A certificate of good standing is evidence of the fact that the exempted limited partnership is in good standing on the date that the certificate of good standing is issued.

(3) An exempted limited partnership is deemed to be in good standing if all fees and penalties under this Act have been paid and the Registrar has no knowledge that the exempted limited partnership is in default under this Act.

Electronic business

47. Nothing in this Act shall prohibit an exempted limited partnership from offering, by electronic means, and subsequently supplying, real or personal property, services or information from a place of business in the Islands or through an internet service provider or other electronic service provider located in the Islands.

Regulations

48. The Cabinet may make Regulations in respect of exempted limited partnerships prescribing —

(a) the duties to be performed by the Registrar for the purposes of this Act;

(b) the forms to be used for the purposes of this Act;

(c) the fees payable to the Registrar in respect of filings or certifications or otherwise pursuant to this Act; and

(d) generally, the conduct and regulation of registration under this Act and any matters incidental thereto.

Recovery of penalties

49. (1) Notwithstanding any provision of this Act which prescribes a specific *per diem* penalty in respect of a default of any obligation to make a filing, to serve a notice or to maintain a record set out in this Act the Registrar may, in any case where the aggregate *per diem* penalty has exceeded the amount of one thousand dollars and the Registrar is satisfied that the failure is not due to wilful default, accept payment of a penalty of one thousand dollars in lieu thereof.

(2) Without prejudice to the powers exercisable by the Registrar under this Act, all sums that the Registrar is entitled to recover by way of fees or penalties are

recoverable either summarily as a civil debt, or as a simple contract debt, in any court of competent jurisdiction.

Repeal of the Exempted Limited Partnership Law (2013 Revision) and savings

50. (1) The *Exempted Limited Partnership Law (2013 Revision)* is **repealed**.

(2) The **repeal** of the *Exempted Partnership Law (2013 Revision)* shall not affect any exempted limited partnership registered under the **repealed** *Exempted Limited Partnership Law (2013 Revision)* and a provision in any document referring to the **repealed** *Exempted Limited Partnership Law (2013 Revision)* or its revision shall, so far as may be necessary for preserving its effect, be construed as referring to the corresponding provision in this Act.

Publication in consolidated and revised form authorised by the Cabinet this 5th day of January, 2021.

Kim Bullings
Clerk of the Cabinet

ENDNOTES

Table of Legislation history:

SL #	Law #	Legislation	Commencement	Gazette
	56/2020	Citation of Acts of Parliament Act, 2020	3-Dec-2020	LG89/2020/s1
	31/2020	Exempted Limited Partnership (Amendment)Law, 2020	7-Jul-2020	LG49/2020/s7
		Exempted Limited Partnership Law (2018 Revision)	16-Mar-2018	GE22/2018/s15
	10/2017	Exempted Limited Partnership (Amendment) Law, 2017	5-Jun-2017	G12/2017/s7
	5/2014	Exempted Limited Partnership Law, 2014	2-Jul-2014	GE48/2014/s1

(Price: $8.80)

CAYMAN ISLANDS



COMPANIES ACT

(2023 Revision)

Supplement No. 3 published with Legislation Gazette No. 1 dated 12th January, 2023.

Case 1:24-cv-00495-JLH Document 1-2 Filed 12/20/23 Page 2 of 39 PageID #: 491
Companies Act

(4) In this section —

"**dissenting shareholder**" includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer that person's shares to the transferee company, in accordance with the scheme or contract.

PART V - Company Restructuring and Winding up of Companies and Associations

Preliminary

Definitions

89. In this Part —

"**company**" includes a foreign company in respect of which the Court has made a winding up order;

"**contributory**" means —

(a) every person liable by virtue of section 49 to contribute to the assets of a company in the event that it is wound up under this Law; and

(b) every holder of fully paid up shares of a company;

"**controller**" means a person appointed by the Authority pursuant to the regulatory laws to take control of a company;

"**document**" includes any device by means of which information is recorded or stored;

"**foreign company**" means any body corporate incorporated outside the Islands;

"**foreign practitioner**" means a person who is qualified under the law of a foreign country to perform functions equivalent to those performed by official liquidators under this Law or by trustees in bankruptcy under the *Bankruptcy Act (1997 Revision)*;

"**limited partnership**" means an ordinary limited partnership registered in accordance with section 49 of the *Partnership Act (2013 Revision)* or an exempted limited partnership registered in accordance with section 9 of the *Exempted Limited Partnership Act (2021 Revision)*;

"**official liquidator**" means the liquidator of a company which is being wound up by order of the Court or under the supervision of the Court and includes a provisional liquidator;

"**prescribed**" means prescribed by the Insolvency Rules Committee;

Case 1:24-cv-00495-JLH Document 1-2 Filed 12/20/23 Page 3 of 39 PageID #: 99
Companies Act

"**professional service provider**" means a person who contracts to provide general managerial or administrative services to a company on an annual or continuing basis;

"**qualified insolvency practitioner**" means a person holding the qualifications specified in the regulations made by the Insolvency Rules Committee under section 155 or such other qualifications as the Court considers appropriate for the conduct of the winding up of a company;

"**Rules**" mean rules prescribed by the Insolvency Rules Committee;

"**shadow director**" means, in relation to a company, any person in accordance with whose directions or instructions the directors of the company are accustomed to act, but the person is not deemed to be a shadow director by reason only that the directors act on advice given by that person in a professional capacity; and

"**winding up order**" includes an order that a voluntary winding up continue under the supervision of the Court and references to a company being wound up by the Court includes a company which is being wound up under the supervision of the Court.

Alternative modes of winding up

90. A company may be wound up —

(a) compulsorily by order of the Court;

(b) voluntarily —

(i) by virtue of a special resolution;

(ii) because the period, if any, fixed for the duration of the company by its articles of association has expired; or

(iii) because the event, if any, has occurred, on the occurrence of which its articles of association provide that the company shall be wound up; or

(c) under the supervision of the Court.

Jurisdiction of the Court

91. The Court has jurisdiction to make winding up orders in respect of —

(a) an existing company;

(b) a company incorporated and registered under this Law;

(c) a body incorporated under any other law; and

(d) a foreign company which —

(i) has property located in the Islands;

(ii) is carrying on business in the Islands;

(iii) is the general partner of a limited partnership; or

(iv) is registered under Part IX.

Company Restructuring

Interpretation of "company"

91A. For the purposes of sections 91B, 91C, 91D, 91E, 91F, 91G, 91H, 91I and 91J, "**company**" means —

(a) any company liable to be wound up under section 91; or

(b) any other entity or partnership to which the provisions of this Part apply in respect of the entity's or partnership's winding up.

Appointment of a restructuring officer

91B.(1) A company may present a petition to the Court for the appointment of a restructuring officer on the grounds that the company —

(a) is or is likely to become unable to pay its debts within the meaning of section 93; and

(b) intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to this Law, the law of a foreign country or by way of a consensual restructuring.

(2) A petition under subsection (1) may be presented by a company acting by its directors, without a resolution of its members or an express power in its articles of association.

(3) The Court may, on hearing a petition under subsection (1) —

(a) make an order appointing a restructuring officer;

(b) adjourn the hearing conditionally or unconditionally;

(c) dismiss the petition; or

(d) make any other order as the Court thinks fit, except an order placing the company into official liquidation, which the Court may only make in accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94.

(4) A restructuring officer appointed by the Court under subsection (3)(a) shall have the powers and carry out only such functions as the Court may confer on the restructuring officer in the order appointing the restructuring officer, including the power to act on behalf of the company.

(5) Where the Court makes an order under subsection (3)(a), the Court shall set out in the order —

(a) the manner and time within which the restructuring officer shall give notice of the restructuring officer's appointment to —

Case 24-00495-JAD Doc 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Page 5 of 39
Case 1:24-cv-00495-JJM-PAS Document 1-2 Filed 12/20/23 Page 73 of 338 PageID #: 494
Companies Act Pg 5 of 39

(i) the company's creditors, including any contingent or prospective creditors;

(ii) the company's contributories; and

(iii) the Authority, in respect of any company which is carrying on regulated business;

(b) the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors; and

(c) any other conditions to be imposed on the board of directors that the Court considers appropriate, in relation to the exercise by the board of directors of its powers and functions.

(6) Where a company which is carrying on a regulated business presents a petition under subsection (1), the directors of the company shall, immediately after presenting the petition, serve notice of the petition on the Authority.

(7) A director who fails to comply with subsection (6) commits an offence and is liable to a fine of ten thousand dollars.

Appointment of an interim restructuring officer

91C.(1) A company may, where it is in the interests of the company to do so, make an *ex parte* application to the Court for the appointment of a restructuring officer on an interim basis pending the hearing of the petition under section 91B(1).

(2) An application under subsection (1) may be presented by a company acting by its directors without a resolution of its members or an express power in its articles of association.

(3) The Court may, on hearing an application under subsection (1), appoint a restructuring officer on an interim basis, on such terms and conditions as the Court thinks fit.

(4) A restructuring officer appointed on an interim basis by the Court under subsection (3) shall have the powers and carry out only such functions as the Court may confer on that restructuring officer in the order appointing the restructuring officer, including the power to act on behalf of the company.

(5) Where the Court makes an order under subsection (3), the Court shall set out in the order —

(a) the manner and time within which the restructuring officer shall give notice of the restructuring officer's appointment to —

(i) the company's creditors, including any contingent or prospective creditors;

(ii) the company's contributories; and

(iii) the Authority, in respect of any company which is carrying on regulated business;

(b) the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors; and

(c) any other conditions to be imposed on the board of directors that the Court considers appropriate, in relation to the exercise by the board of directors of its powers and functions.

(6) Where a company which is carrying on a regulated business makes an application under subsection (1), the directors of the company shall, immediately after making the application, serve notice of the application on the Authority.

(7) A director who fails to comply with subsection (6), commits an offence and is liable to a fine of ten thousand dollars.

Restructuring officer

91D. (1) A restructuring officer appointed under section 91B or 91C shall be a qualified insolvency practitioner.

(2) Where two or more persons are appointed as restructuring officers under section 91B or 91C, they shall be authorised to act jointly and severally, unless their powers are expressly limited by an order of the Court.

(3) A restructuring officer appointed under section 91B or 91C is an officer of the Court.

(4) Notwithstanding subsection (1), where the Court has appointed a qualified insolvency practitioner to act as a restructuring officer, the Court may appoint a foreign practitioner to act as a restructuring officer in addition to the qualified insolvency practitioner.

(5) A foreign practitioner appointed by the Court to act as a restructuring officer shall not act as the sole restructuring officer of a company.

(6) The remuneration of a restructuring officer appointed under section 91B or 91C shall, on the application of the restructuring officer, be fixed by the Court from time to time in accordance with section 109.

(7) A restructuring officer, a creditor of the company, including a contingent or prospective creditor, or a contributory of the company may apply to the Court to determine any question arising in the course of carrying out the restructuring officer's functions.

Variation or discharge of the order appointing a restructuring

91E. (1) At any time after the appointment of a restructuring officer by the Court under section 91B or 91C —

Case 1:24-cv-00495-JLH Document 1-2 Filed 12/20/23 Entered 12/20/23 18:14:47 Exhibit B Page 75 of 336 PageID #: 496
Companies Act
Case 23-12446-mng Doc 1-2 Filed 12/20/23 Page 7 of 39

(a) the company acting by its directors;

(b) a restructuring officer appointed under section 91B or 91C;

(c) a creditor of the company, including a contingent or prospective creditor;

(d) a contributory of the company; or

(e) the Authority, in respect of any company which is carrying on a regulated business, may apply by way of summons to the Court for the variation or discharge of the order appointing the restructuring officer.

(2) An application under subsection (1)(a) may be presented by a company acting by its directors without a resolution of its members or an express power in its articles of association.

(3) The Court may, on hearing an application under subsection (1) —

(a) vary the order appointing the restructuring officer;

(b) discharge or continue the order appointing the restructuring officer;

(c) adjourn the hearing conditionally or unconditionally;

(d) dismiss the application; or

(e) make any other order as the Court thinks fit, except an order placing the company into official liquidation, which the Court may only make in accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94.

Removal and replacement of restructuring officers

91F. (1) A restructuring officer may be removed from office and replaced by an alternative restructuring officer by order of the Court made on the application of —

(a) the company acting by its directors;

(b) a creditor of the company, including a contingent or prospective creditor;

(c) a contributory of the company; or

(d) the Authority, in respect of any company which is carrying on a regulated business.

(2) An application under subsection (1)(a) may be presented by a company acting by its directors without a resolution of its members or an express power in its articles of association.

(3) A restructuring officer who has been removed and replaced pursuant to subsection (1) shall prepare a report and accounts for the restructuring officer replacing the removed restructuring officer, within twenty-one days of the date of removal and replacement.

Case 23-12044-mg Doc 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Pg 8 of 39
Companies Act

Stay of proceedings

91G.(1) At any time —

(a) after the presentation of a petition for the appointment of a restructuring officer under section 91B, but before an order for the appointment of a restructuring officer is made, and when the petition has not been withdrawn or dismissed; and

(b) when an order for the appointment of a restructuring officer is made, until the order appointing the restructuring officer has been discharged,

no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company, no resolution shall be passed for the company to be wound up and no winding up petition may be presented against the company, except with the leave of the Court and subject to such terms as the Court may impose.

(2) Where at any time referred to in subsection (1), there are criminal proceedings pending against the company in a summary court, the Court, the Court of Appeal or the Privy Council —

(a) the company acting by its directors;

(b) a creditor of the company, including a contingent or prospective creditor;

(c) a contributory of the company; or

(d) the Authority, in respect of any company which is carrying on regulated business,

may apply to the court in which the proceedings are pending for a stay of the proceedings and the court to which the application is made, may stay the proceedings on such terms as it thinks fit.

(3) In this section —

(a) references to a suit, action or other proceedings include a suit, action or other proceedings in a foreign country; and

(b) references to other proceedings include any court supervised insolvency or restructuring proceedings against the company.

Enforcement of creditors' security

91H. Notwithstanding the presentation of a petition for the appointment of a restructuring officer or the appointment of a restructuring officer by the Court under section 91B or 91C, a creditor who has security over the whole or part of the assets of the company is entitled to enforce the creditor's security without the leave of the Court and without reference to the restructuring officer appointed under section 91B or 91C.

Case 23-11024-mg Doc 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Pg 9 of 39
Companies Act

Power to compromise with creditors and members within restructuring officer proceeding

91I. (1) Where a restructuring officer is appointed to a company and a compromise or arrangement is proposed between the company and its creditors or any class of them, or the company and its members or any class of them, the Court may, on the application of the restructuring officer, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.

(2) If a majority in number representing seventy-five per cent in value of the creditors or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, as the case may be, and also on the company.

(3) If seventy-five per cent in value of the members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the members or class of members, as the case may be, and also on the company.

(4) An order made under subsection (2) or (3) shall have no effect until a copy of the order has been delivered to the Registrar for registration, and a copy of every such order shall be annexed to every copy of the memorandum of association of the company issued after the order has been made, or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(5) If a company makes default in complying with subsection (4), the company and every officer of the company who is in default shall be liable to a fine of two dollars for each copy in respect of which default is made.

(6) In this section, "**arrangement**" includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods.

Case 24-11024-mg Doc 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Pg 10 of 39
Companies Act 1999 Pg 10 of 39

Provisions for facilitating reconstruction and amalgamation of companies

91J. (1) Where an application is made to the Court under section 91I for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are specified in that section, and it is shown to the Court that the compromise or arrangement has been proposed for the purpose of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as "**a transferor company**") is to be transferred to another company (in this section referred to as "**the transferee company**") the Court, may either by the order sanctioning the compromise or arrangement or by any subsequent order make provision for —

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d) the dissolution, without winding up, of any transferor company;

(e) the provisions to be made for any person who within such time and in such manner as the Court directs dissents from the compromise or arrangement; and

(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation is fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and any such property shall, if the order so directs, be freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

(3) Where an order is made under this section, every company in relation to which the order is made shall cause a copy thereof to be delivered to the Registrar for registration within seven days after the making of the order, and if default is made in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.

(4) In this section —

"**property**" includes property, rights and powers of every description;

Case 1:24-cv-00495-JLH Document 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Part V Page 11 of 39
Companies Act

"**liabilities**" includes duties; and

"**transferee company**" means any company or body corporate established in the Islands or in any other jurisdiction.

Winding up by the Court

Circumstances in which a company may be wound up by the Court

92. A company may be wound up by the Court if —

(a) the company has passed a special resolution requiring the company to be wound up by the Court;

(b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(c) the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be wound up;

(d) the company is unable to pay its debts; or

(e) the Court is of opinion that it is just and equitable that the company should be wound up.

Definition of inability to pay debts

93. A company shall be deemed to be unable to pay its debts if —

(a) a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under that person's hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor;

(b) execution of other process issued on a judgment, decree or order obtained in the Court in favour of any creditor at law or in equity in any proceedings instituted by such creditor against the company, is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

Application for winding up

94. (1) An application to the Court for the winding up of a company shall be by petition presented either by —

(a) the company;

Case 24-11244-mg Doc 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Pg 12 of 39
Companies Act

(b) any creditor or creditors (including any contingent or prospective creditor or creditors);

(c) any contributory or contributories; or

(d) subject to subsection (4), the Authority pursuant to the regulatory laws.

(2) Where expressly provided for in the articles of association of a company, the directors of a company incorporated before the commencement of this amending Act have the authority to —

(a) present a winding up petition; or

(b) where a winding up petition has been presented, apply for the appointment of a provisional liquidator, on behalf of the company without the sanction of a resolution passed at a general meeting.

(2A) Subject to subsection (2B), the directors of a company incorporated after the commencement of this amending Act may present a winding up petition on behalf of the company on the grounds that the company is unable to pay its debts within the meaning of section 93 or where a winding up petition has been presented, applyon behalf of the company, for the appointment of a provisional liquidator.

(2B) The articles of association of a company may expressly remove or modify the directors' authority to present a winding up petition or apply for the appointment of a provisional liquidator on the company's behalf.

(3) A contributory is not entitled to present a winding up petition unless either —

(a) the shares in respect of which that person is a contributory, or some of them, are partly paid; or

(b) the shares in respect of which that person is a contributory, or some of them, either were —

(i) originally allotted to that person, or have been held by that person, and registered in that person's name for a period of at least six months immediately preceding the presentation of the winding up petition; or

(ii) have devolved on that person through the death of a former holder.

(4) A winding up petition may be presented by the Authority in respect of any company which is carrying on a regulated business in the Islands upon the grounds that it is not duly licensed or registered to do so under the regulatory laws or for any other reason as provided under the regulatory laws or any other law.

Powers of the Court

95. (1) Upon hearing the winding up petition the Court may —

(a) dismiss the petition;

Case 1:24-cv-00495-JLH Document 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Page 13 of 39
Case 24-10244-mng Doc 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Pg 13 of 39
Case 24-10244-mng Doc 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Page 81 of 336 PageID #:
Companies Act

(b) adjourn the hearing conditionally or unconditionally;

(c) make a provisional order; or

(d) any other order that it thinks fit,

but the Court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or that the company has no assets.

(2) The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company.

(3) If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely —

(a) an order regulating the conduct of the company's affairs in the future;

(b) an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;

(c) an order authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or

(d) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly.

(4) Where an alternative order under subsection (3) requires the company not to make any, or any specified, alteration in the memorandum or articles of association, the company does not have power, without the leave of the Court, to make any such alteration in breach of that requirement.

(5) Any alteration in a company's memorandum or articles of association made by virtue of an alternative order under subsection (3) is of the same effect as if duly made by resolution of the company, and the provisions of this Law shall apply to the memorandum or articles of association as so altered accordingly.

(6) A copy of an alternative order made under subsection (3) altering, or giving leave to alter, a company's memorandum or articles of association shall be filed by the company with the Registrar within fourteen days of the making of the order.

Power to stay or restrain proceedings

96. At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may —

Case 1:24-cv-00495-JJM-PAS Document 1-2 Filed 12/20/23 Page 14 of 39 PageID #:
Companies Act 2023 Pg 14 of 39

(a) where any action or proceeding against the company, including a criminal proceeding, is pending in a summary court, the Court, the Court of Appeal or the Privy Council, apply to the court in which the action or proceeding is pending for a stay of proceedings therein; and

(b) where any action or proceeding is pending against the company in a foreign court, apply to the Court for an injunction to restrain further proceedings therein,

and the court to which application is made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

Avoidance of attachments and stay of proceedings

97. (1) When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose.

(1A) Where a winding up order is made or a provisional liquidator is appointed in respect of a company, and there are criminal proceedings pending against the company in a summary court, the Court, the Court of Appeal or the Privy Council —

(a) the company;

(b) a creditor of the company;

(c) a contributory of the company; or

(d) subject to section 94(4), the Authority, in respect of any company which is carrying on regulated business, may apply to the court in which the proceedings are pending for a stay of the proceedings and the court to which the application is made, may stay the proceedings on such terms as it thinks fit.

(2) When a winding up order has been made, any attachment, distress or execution put in force against the estate or effects of the company after the commencement of the winding up is void.

Notice of winding up order

98. When a winding up order is made, the liquidator shall —

(a) file a copy of the winding up order with the Registrar; and

(b) publish notice of the winding up in the Gazette and any newspaper in which the winding up petition was advertised.

Case 1:24-cv-00495-JLH Document 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Part V Page 15 of 39
Companies Act

Avoidance of property dispositions, etc.

99. 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.

Commencement of winding up by the Court

100. (1) If, before the presentation of a petition for the winding up of a company by the Court —

(a) a resolution has been passed by the company for voluntary winding up;

(b) the period, if any, fixed for the duration of the company by the articles of association has expired;

(c) the event upon the occurrence of which it is provided by the articles of association that the company is to be wound up has occurred; or

(d) a restructuring officer has been appointed pursuant to section 91B or 91C and the order appointing the restructuring officer has not been discharged,

the winding up of the company is deemed to have commenced at the time of passing of the relevant resolution or the expiry of the relevant period or the occurrence of the relevant event or the date of the presentation of the petition to appoint a restructuring officer pursuant to section 91B.

(2) In any other circumstance not specified in subsection (1), the winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up.

Company's statement of affairs

101. (1) Where the Court has made a winding up order or appointed a provisional liquidator, the liquidator may require some or all of the persons mentioned in subsection (3) to prepare and submit to that person a statement in the prescribed form as to the affairs of the company.

(2) The statement shall be verified by an affidavit sworn by the persons required to submit it and shall show —

(a) particulars of the company's assets and liabilities, including contingent and prospective liabilities;

(b) the names and addresses of any persons having possession of the company's assets;

(c) the assets of the company held by those persons;

(d) the names and addresses of the company's creditors;

(e) the securities held by those creditors;

(f) the dates when the securities were respectively given; and

(g) such further or other information that the liquidator may require.

(3) The persons referred to in subsection (1) are —

(a) persons who are or have been directors or officers of the company;

(b) persons who are or have been professional service providers to the company; and

(c) persons who are or have been employees of the company, during the period of one year immediately preceding the relevant date.

(4) Where any persons are required under this section to submit a statement of affairs to the liquidator, they shall do so, subject to subsection (5), before the end of the period of twenty-one days beginning with the day after that on which the prescribed notice of the requirement is given to them by the liquidator.

(5) The liquidator may release a person from an obligation imposed on that person under subsection (1) or, when giving the notice mentioned in subsection (4) or subsequently, the liquidator may extend the time for compliance; and if the liquidator refuses to extend the time for compliance, the Court may do so.

(6) In this section —

"**relevant date**" means —

(a) in a case where a provisional liquidator is appointed, the date of that person's appointment; and

(b) in any other case, the commencement of the winding up.

(7) A person who, without reasonable excuse, fails to comply with any obligation imposed under this section commits an offence and is liable on conviction to a fine of ten thousand dollars.

Investigation by liquidator

102. (1) Where a winding up order is made by the Court, the liquidator shall be empowered to investigate —

(a) if the company has failed, the causes of the failure; and

(b) generally, the promotion, business, dealings and affairs of the company,

and to make such report, if any, to the Court as that person thinks fit.

(2) Subject to obtaining the directions of the Court, the liquidator shall have power to —

(a) assist the Authority and the Royal Cayman Islands Police Service to investigate the conduct of persons referred to in section 101(3); and

(b) institute and conduct a criminal prosecution of persons referred to in section 101(3).

(3) Subject to obtaining the prior approval of the company's creditors, if it is insolvent, or its contributories, if it is solvent, the directions given under

Case 1:24-cv-00495-JLH Document 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Page 17 of 39
Case 24-11244-mng Doc 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Page 85 of 336 PageID #:
Companies Act 2006 Pg 17 of 39

subsection (2) may include a direction that the whole or part of the costs of investigation and prosecution be paid out of the assets of the company.

Duty to co-operate and the private examination of relevant persons

103. (1) This section applies to any person who, whether resident in the Islands or elsewhere —

(a) has made or concurred with the statement of affairs;

(b) is or has been a director or officer of the company;

(c) is or was a professional service provider to the company;

(d) has acted as a controller, advisor or liquidator of the company or receiver or manager of its property;

(e) not being a person falling within paragraphs (a) to (c), is or has been concerned or has taken part in the promotion, or management of the company,

and such person is referred to in this section as the "**relevant person**".

(2) It is the duty of every relevant person to co-operate with the official liquidator.

(3) While a company is being wound up, the official liquidator may at any time before its dissolution apply to the Court for an order —

(a) for the examination of any relevant person; or

(b) that a relevant person transfer or deliver up to the liquidator any property or documents belonging to the company.

(4) Unless the Court otherwise orders, the official liquidator shall make an application under subsection (3) if that person is requested in accordance with the rules to do so by one-half, in value, of the company's creditors or contributories.

(5) On an application made under subsection (3)(a), the Court may order that a relevant person —

(a) swear an affidavit in answer to written interrogatories;

(b) attend for oral examination by the official liquidator at a specified time and place, or

(c) do both things specified in paragraphs (a) and (b).

(6) The Court may direct that any creditor or contributory of the company be permitted by the official liquidator to participate in an oral examination.

(7) The Court shall have jurisdiction —

(a) to make an order under this section against a relevant person resident outside the Islands; and

Case 24-10244-mg Doc 4-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Pg 18 of 39
Companies Act

(b) to issue a letter of request for the purpose of seeking the assistance of a foreign court in obtaining the evidence of a relevant person resident outside the jurisdiction.

Official Liquidators

Appointment and powers of provisional liquidator

104. (1) Subject to this section and any rules made under section 155, the Court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally.

(2) An application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company or, subject to subsection (6), the Authority, on the grounds that —

(a) there is a *prima facie* case for making a winding up order; and

(b) the appointment of a provisional liquidator is necessary in order to —

(i) prevent the dissipation or misuse of the company's assets;

(ii) prevent the oppression of minority shareholders; or

(iii) prevent mismanagement or misconduct on the part of the company's directors.

(3) An application for the appointment of a provisional liquidator may be made under subsection (1) by the company and on such an application the Court may appoint a provisional liquidator if it considers it appropriate to do so.

(4) A provisional liquidator shall carry out only such functions as the Court may confer on that person and that person's powers may be limited by the order appointing that person.

(5) The remuneration of the provisional liquidator shall be fixed by the Court from time to time on that person's application and the Court shall in fixing such remuneration act in accordance with rules made under section 155.

(6) An application for the appointment of a provisional liquidator may be presented by the Authority on the grounds under subsection (2), in respect of any company which is carrying on a regulated business in the Islands upon the grounds that it is not duly licensed or registered to do so under the regulatory laws or for any other reason as provided under the regulatory laws or any other law regardless of whether or not the Authority presented the winding up petition.

Case 1:24-cv-00495-JLH Document 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Page 19 of 39
Case 24-10244-mng Doc 211 Filed 12/22/23 Page 87 of 336 PageID #:
Companies Act 2008 Pg 19 of 39

Appointment of official liquidator

105. (1) For the purpose of conducting the proceedings in winding up a company and assisting the Court therein, there may be appointed one or more than one person to be called an official liquidator or official liquidators; and the Court may appoint to such office such person as it thinks fit, and if more persons than one are appointed to such office, the Court shall declare whether any act hereby required or authorised to be done by the official liquidator is to be done by all or any or more of such persons.

(2) The Court may also determine whether any and what security is to be given by an official liquidator on that person's appointment; and if no official liquidator is appointed, or during any vacancy in such office, all the property of the company shall be in the custody of the Court.

(3) The liquidator shall, within twenty-eight days of the date upon which the winding up order is made, summon —

(a) a meeting of the company's creditors if the order was made on the grounds that the company is insolvent; or

(b) a meeting of the company's contributories if the order was made on grounds other than insolvency,

for the purposes of resolving any other matters which the liquidator puts before the meeting.

(4) The Court may make an order dispensing with the need to summon a meeting under this section or extending the time within which it shall be summoned.

Appointment of joint liquidators

106. When two or more persons are appointed to the office of liquidator, either provisionally or as official liquidators, they shall be authorised to act jointly and severally, unless their powers are expressly limited by order of the Court.

Removal of official liquidators

107. An official liquidator may be removed from office by order of the Court made on the application of a creditor or contributory of the company.

Qualifications of official liquidators

108. (1) A foreign practitioner may be appointed to act jointly with a qualified insolvency practitioner.

(2) Official liquidators are officers of the Court.

Remuneration of official liquidators and restructuring officers

109. (1) The expenses properly incurred in the winding up, including the remuneration of the liquidator, are , subject to subsection (2), payable out of the company's assets in priority to all other claims.

Case 24-10440-mg Doc 4-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Pg 20 of 39
Companies Act 2009

(2) Where a company is wound up, the expenses properly incurred in any petition for a restructuring officer and during the term of appointment of the restructuring officer appointed —

(a) under section 91B(3)(a); or

(b) on an interim basis under section 91C(3), including the remuneration of the restructuring officer, are payable out of the company's assets in priority to all other claims.

(3) There shall be paid to a restructuring officer, including a restructuring officer appointed on an interim basis, and the official liquidator, such remuneration, by way of percentage or otherwise, that the Court may direct acting in accordance with rules made under section 155.

(4) If more than one restructuring officer, including a restructuring officer appointed on an interim basis, is appointed by the Court under section 91B or 91C, the remuneration paid under subsection (3) shall be distributed among the restructuring officers in such proportions as the Court may direct.

(5) If more than one official liquidator is appointed by the Court when a company is wound up, the remuneration paid under subsection (3) shall be distributed among the official liquidators in such proportions as the Court may direct.

Function and powers of official liquidators

110. (1) It is the function of an official liquidator —

(a) to collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it; and

(b) to report to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up.

(2) The official liquidator may —

(a) with the sanction of the Court, exercise any of the powers specified in Part I of Schedule 3; and

(b) with or without that sanction, exercise any of the general powers specified in Part II of Schedule 3.

(3) The exercise by the liquidator of the powers conferred by this section is subject to the control of the Court, and subject to subsection (5), any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of such powers (hereinafter referred to as a "sanction application").

(4) In the case of —

(a) a solvent company, a sanction application may only be made by a contributory and the creditors shall have no right to be heard;

(b) an insolvent company, a sanction application may only be made by a creditor and the contributories shall have no right to be heard; and

Case 24-10244-mg Doc 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Pg 21 of 39
Case 1:24-cv-00495-JJM-PAS Document 1-2 Filed 12/22/23 Page 89 of 336 PageID #: 501

(c) a company whose solvency is doubtful, a sanction application may be made by both contributories and creditors and both contributories and creditors shall have a right to be heard.

(5) For the purposes of exercising the powers specified under paragraph 3 of Part 1 of Schedule 3, a person shall be treated as related to a company if the person —

(a) has acted for the company as a professional service provider;

(b) is or was a shareholder or director of the company or of any other company in the same group as the company;

(c) has a direct or indirect beneficial interest in the shares of the company; or

(d) is a creditor or debtor of the company.

.

General Powers of the Court

Power to stay winding up

111. (1) The Court may at any time after an order for winding up, on the application either of the liquidator or any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in the winding up ought to be stayed, make an order staying the proceedings either all together or for a limited time, on such terms and conditions as the Court thinks fit.

(2) The Court may at any time after the liquidation has commenced under section 116(c), but before the final meeting has been held as provided for in section 127, on the application of the liquidator accompanied by —

(a) a special resolution stating that the company will not be wound up and setting out the reasons for such decision;

(b) proof of a recall notice published in the Gazette; and

(c) such other documents as the Court may consider necessary,

make an order to recall the liquidation, place the company into active status and place the company back into good standing as it was prior to the commencement of liquidation under section 116(c), on such terms and conditions as the Court thinks fit.

(3) A company shall, within seven days of the making of an order under this section, forward a copy of the order to the Registrar who shall enter it in the records relating to the company.

Settlement of list of contributories

112. (1) The liquidator shall settle a list of contributories, if any, for which purpose that person shall have power to adjust the rights of contributories amongst themselves.

Case 24-11244-mg Doc 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Pg 22 of 39
Companies Act

(2) In the case of a solvent liquidation of a company which has issued redeemable shares at prices based upon its net asset value from time to time, the liquidator shall have power to settle and, if necessary rectify the company's register of members, thereby adjusting the rights of members amongst themselves.

(3) A contributory who is dissatisfied with the liquidator's determination may appeal to the Court against such determination.

Power to make calls

113. (1) The Court may, at any time after making a winding up order, and either before or after it has ascertained the sufficiency of the company's assets, make calls on all or any of the contributories for the time being settled on the list of the contributories —

(a) to the extent of their liability, for the payment of any money which the Court considers necessary to satisfy the company's debts and liabilities and the expenses of winding up; and

(b) to the adjustment of the rights of the contributories among themselves,

and make an order for payment of any call so made.

(2) In making a call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay it.

Inspection of documents by creditors, etc.

114. (1) At any time after making a winding up order the Court may make such orders as it thinks fit for —

(a) the inspection of the company's documents by creditors and contributories; and

(b) the preparation of reports by the official liquidator and the provision of such reports to the company's creditors and contributories.

(2) A contributory shall be entitled to make an application under this section notwithstanding that the company is or may be insolvent and the Court shall not refuse to make an order upon the application of a contributory merely by reason of the fact that the company is or may be insolvent.

Meetings to ascertain wishes of creditors or contributories

115. (1) The Court shall, as to all matters relating to the winding up, have regard to wishes of the creditors or contributories and for that purpose it may direct reports to be prepared by the official liquidator and meetings of creditors or contributories to be summoned.

(2) If it considers it necessary to do so, the Court may direct that separate meetings be held of different classes of creditors or contributories.

Case 24-11244-mg Doc 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Pg 23 of 39
Companies Act

(3) Subject to Rules made under section 155, meetings may be requisitioned by creditors, if the company is insolvent, or by contributories if the company is solvent.

(4) The votes of creditors and contributories shall be counted by reference to —

(a) the value of their debts, in the case of creditors;

(b) the number of votes, in the case of contributories whose shares carry voting rights under the articles of association of the company; and

(c) the par value of all the shares held, in the case of contributories whose shares do not carry votes under the articles of association of the company and, where there are no par value shares, the net asset value of the company shown.

Voluntary Winding up

Circumstances in which a company may be wound up voluntarily

116. A company incorporated and registered under this Law or an existing company may be wound up voluntarily —

(a) when the period, if any, fixed for the duration of the company by its memorandum or articles of association expires;

(b) if the event, if any, occurs, on the occurrence of which the memorandum or articles of association provide that the company is to be wound up;

(c) if the company resolves by special resolution that it be wound up voluntarily; or

(d) if the company in general meeting resolves by ordinary resolution that it be wound up voluntarily because it is unable to pay its debts.

Commencement of winding up

117. (1) A voluntary winding up is deemed to commence —

(a) at the time of the passing of the resolution for winding up; or

(b) on the expiry of the period or the occurrence of the event specified in the company's memorandum or articles of association,

notwithstanding that a supervision order is subsequently made by the Court.

(2) Subject to any contrary provision in its memorandum or articles of association, the voluntary winding up of an exempted limited duration company is taken to have commenced upon the expiry of a period of ninety days starting on —

(a) the death, insanity, bankruptcy, dissolution, withdrawal, retirement or resignation of a member of the company;

Case 1:24-cv-00495-JLH Document 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Part V Companies Act 2013 Pg 24 of 39

(b) the redemption, repurchase or cancellation of all the shares of a member of the company; or

(c) the occurrence of any event which, under the memorandum or articles of association of the company, terminates the membership of a member of the company,

unless there remain at least two members of the company and the company is continued in existence by the unanimous resolution of the remaining members pursuant to amended memorandum and articles of association adopted during that period of ninety days.

Effect on business and status of the company

118. (1) In the case of a voluntary winding up, the company shall from the commencement of its winding up cease to carry on its business except so far as it may be beneficial for its winding up.

(2) Notwithstanding anything to the contrary contained in the company's articles of association, its corporate state and powers shall continue until the company is dissolved.

Appointment of voluntary liquidator

119. (1) One or more liquidators shall be appointed for the purpose of winding up the company's affairs and distributing its assets.

(2) When the winding up has commenced in accordance with the company's memorandum or articles of association upon the termination of a fixed period or the occurrence of an event —

(a) the persons designated as liquidators in the memorandum or articles of association shall become such liquidators automatically from the commencement of the winding up; or

(b) if no such person is designated in the memorandum or articles of association or the person designated is unable or unwilling to act, the directors shall convene a general meeting of the company for the purpose of appointing a liquidator.

(3) Except in the case of a person designated as liquidator in the company's memorandum or articles of association, the appointment of a voluntary liquidator shall take effect upon the filing of that person's consent to act with the Registrar.

(4) If a vacancy occurs by death, resignation or otherwise in the office of voluntary liquidator appointed by the company —

(a) the company in a general meeting may fill the vacancy; or

(b) the Court may fill the vacancy on the application of any contributory or creditor.

Case 1:24-cv-00495-JLH Document 1-2 Filed 12/20/23 Page 25 of 39 PageID #: 25
Companies Act

(5) On the appointment of a voluntary liquidator all the powers of the directors cease, except so far as the company in a general meeting or the liquidator sanctions their continuance.

(6) When two or more persons are appointed as voluntary liquidators jointly, they shall be authorised to act jointly and severally unless their powers are expressly limited by the resolution or articles of association under which they are appointed.

Qualifications of voluntary liquidators

120. Any person, including a director or officer of the company, may be appointed as its voluntary liquidator.

Removal of voluntary liquidators

121. (1) A voluntary liquidator may be removed from office by a resolution of the company in a general meeting convened especially for that purpose.

(2) A general meeting of the company for the purpose of considering a resolution to remove its voluntary liquidator may be convened by any shareholder or shareholders holding not less than one fifth of the company's issued share capital.

(3) Whether or not a general meeting has been convened in accordance with subsection (2), any contributory may apply to the Court for an order that a voluntary liquidator be removed from office on the grounds that that person is not a fit and proper person to hold office.

Resignation of voluntary liquidator

122. (1) Where two or more persons are appointed as joint voluntary liquidators, they may resign by filing a notice of resignation with the Registrar, so long as at least one of them continues in office.

(2) Except as provided in subsection (1), a voluntary liquidator wishing to resign shall —

(a) prepare a report and accounts; and

(b) convene a general meeting of the company for the purpose of accepting that person's resignation and releasing that person from the performance of any further duties, and shall cease to hold office with effect from the date upon which the resolution is passed.

(3) In the event that the company fails to pass a resolution accepting that person's resignation, the voluntary liquidator may apply to the Court for an order that that person be released from the performance of any further duties.

Case 24-10244-mg Doc 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Pg 26 of 39
Companies Act 2015

Notice of voluntary winding up

123. (1) Within twenty-eight days of the commencement of a voluntary winding up, the liquidator or, in the absence of any liquidator, the directors shall —

(a) file notice of the winding up with the Registrar;

(b) file the liquidator's consent to act with the Registrar;

(c) file the director's declaration of solvency with the Registrar (if the supervision of the court is not sought);

(d) in the case of a company carrying on a regulated business, serve notice of the winding up upon the Authority; and

(e) publish notice of the winding up in the Gazette.

(2) A director or liquidator who fails to comply with this section commits an offence and is liable to a fine of ten thousand dollars.

Application for supervision order

124. (1) Where a company is being wound up voluntarily its liquidator shall apply to the Court for an order that the liquidation continue under the supervision of the Court unless, within twenty-eight days of the commencement of the liquidation, the directors have signed a declaration of solvency in the prescribed form in accordance with subsection (2).

(2) A declaration of solvency means a declaration or affidavit in the prescribed form to the effect that a full enquiry into the company's affairs has been made and that to the best of the directors' knowledge and belief the company will be able to pay its debts in full together with interest at the prescribed rate, within such period, not exceeding twelve months from the commencement of the winding up, as may be specified in the declaration.

(3) A person who knowingly makes a declaration under this section without having reasonable grounds for the opinion that the company will be able to pay its debts in full, together with interest at the prescribed rate, within the period specified commits an offence and is liable on summary conviction to a fine of ten thousand dollars and to imprisonment for two years.

Avoidance of share transfers

125. Any transfer of shares, not being a transfer with the sanction of the liquidator, and any alteration in the status of the company's members made after the commencement of a voluntary winding up is void.

Case 1:24-cv-00495-JJM-PAS Document 1-2 Filed 12/20/23 Page 27 of 39 PageID #: 27
Companies Act 2016

General meeting at year's end

126. (1) In the event of a voluntary winding up continuing for more than one year, the liquidators shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and at the end of each succeeding year and such meetings shall be held within three months of each anniversary of the commencement of the liquidation.

(2) At each meeting the liquidator shall lay before the meeting a report and account of that person's acts and dealings and the conduct of the winding up during the preceding year.

(3) A liquidator who fails to comply with this section commits an offence and is liable on conviction to a fine of ten thousand dollars.

Final meeting prior to dissolution

127. (1) As soon as the company's affairs are fully wound up, the liquidator shall make a report and an account of the winding up showing how it has been conducted and how the company's property has been disposed of and thereupon shall call a general meeting of the company for the purpose of laying before it the account and giving an explanation for it.

(2) At least twenty-one days before the meeting the liquidator shall send a notice specifying the time, place and object of the meeting to each contributory in any manner authorised by the company's articles of association and published in the Gazette.

(3) The liquidator shall, no later than seven days after the meeting, make a return to the Registrar in the prescribed form specifying —

(a) the date upon which the meeting was held; and

(b) if a quorum was present, particulars of the resolutions, if any, passed at the meeting.

(4) A liquidator who fails to call a general meeting of the company as required by subsection (1) or fails to make a return as required by subsection (3) commits an offence and is liable on conviction to a fine of ten thousand dollars.

Effect of winding up on share capital of company limited by guarantee

128. Where a company limited by guarantee and having a capital divided into shares is being wound up voluntarily, any share capital that may not have been called upon shall be deemed to be an asset of the company, and to be a specialty debt due from each member to the company to the extent of any sums that may be unpaid on any shares held by that person, and payable at such time as may be appointed by the liquidator.

Case 1:24-cv-00495-JLH Document 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Page 96 of 336 PageID #:
Companies Act 17 Pg 28 of 39

Reference of questions to Court

129. (1) The voluntary liquidator or any contributory may apply to the Court to determine any question arising in the voluntary winding up of a company or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up under the supervision of the Court.

(2) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partly to the application on such terms and conditions as it thinks fit, or make such other order on the application as it thinks just.

(3) The voluntary liquidator shall, within seven days of the making of an order under this section, forward a copy of the order to the Registrar who shall enter it in that person's records relating to the company.

Expenses of voluntary winding up

130. (1) The expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims.

(2) The rate and amount of the liquidator's remuneration shall be fixed and payment authorised by resolution of the company.

(3) Each report and account laid before the company in general meetings by its liquidator shall contain all such information, including the rate at which the liquidator's remuneration is calculated and particulars of the work done, as may be necessary to enable the members to determine what expenses have been properly incurred and what remuneration is properly payable to the liquidator.

(4) If the company fails to approve the liquidator's remuneration and expenses or the liquidator is dissatisfied with the decision of the company, that person may apply to the Court which shall fix the rate and amount of that person's remuneration and expenses.

Winding up subject to the supervision of the Court

Application for supervision order

131. When a resolution has been passed by a company to wind up voluntarily, the liquidator or any contributory or creditor may apply to the Court for an order for the continuation of the winding up under the supervision of the Court, notwithstanding that the declaration of solvency has been made in accordance with section 124, on the grounds that —

(a) the company is or is likely to become insolvent; or

Case 1:24-cv-00495-JLH Document 1-2 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit B Pg 29 of 39
Companies Act 2018

(b) the supervision of the Court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors.

Appointment of official liquidator

132. (1) When making a supervision order the Court —

(a) shall appoint one or more qualified insolvency practitioners; and

(b) may, in addition, appoint one or more foreign practitioners,

as liquidator or liquidators of the company and section 105 shall apply as if the Court had made a winding up order.

(2) Unless a voluntary liquidator is appointed as an official liquidator, that person shall prepare a final report and accounts within twenty-eight days from the date of the supervision order.

Effect of supervision order

133. A supervision order shall take effect for all purposes as if it was an order that the company be wound up by the Court except that —

(a) the liquidation commenced in accordance with section 117; and

(b) the prior actions of the voluntary liquidator shall be valid and binding upon the company and its official liquidator.

Offences of fraud, etc.

Fraud, etc. in anticipation of winding up

134. (1) Where a company is ordered to be wound up by the Court, or passes a resolution for voluntary winding up, any person, who is or was an officer, professional service provider, voluntary liquidator, restructuring officer or controller of the company and who, within the twelve months immediately preceding the commencement of the winding up, has —

(a) concealed any part of the company's property to the value of ten thousand dollars or more or concealed any debt due to or from the company;

(b) removed any part of the company's property to the value of ten thousand dollars or more;

(c) concealed, destroyed, mutilated or falsified any documents affecting or relating to the company's property or affairs;

(d) made any false entry in any documents affecting or relating to the company's property or affairs;

(e) parted with, altered or made any omission in any document affecting or relating to the company's property or affairs; or

Case 1:24-cv-00495-JJM-PAS Document 1-2 Filed 12/20/23 Page 30 of 39 PageID #: 101
Companies Act 2019 Pg 30 of 39

(f) pawned, pledged or disposed of any property of the company which has been obtained on credit and has not been paid for (unless the pawning, pledging or disposal was in the ordinary way of the company's business),

with intent to defraud the company's creditors or contributories commits an offence and is liable on conviction to a fine and to imprisonment for five years.

(2) In this section —

"**officer**" includes a shadow director.

Transactions in fraud of creditors

135. Where a company is ordered to be wound up by the Court or passes a resolution for voluntary winding up, any officer, restructuring officer, controller or professional service provider of the company who —

(a) has made or caused to be made any gift or transfer of, or charge on, or has caused or connived at the levying of any execution against, the company's property; or

(b) has concealed or removed any part of the company's property,

with intent to defraud the company's creditors or contributories commits an offence and is liable on conviction to a fine and to imprisonment for five years.

Misconduct in course of winding up

136. (1) Where a company is being wound up, whether by the Court or voluntarily, a person who is or was a director, officer, restructuring officer, controller or professional service provider of the company and who —

(a) does not to the best of that person's knowledge and belief fully and truly discover to the liquidator —

(i) all the company's property (except such part as has been disposed of in the ordinary way of the company's business);

(ii) the date on which and manner in which the company's property or any part thereof property was disposed of, if it was disposed of;

(iii) the persons to whom any property was transferred, if it was disposed of; or

(iv) the consideration paid for any property which was disposed of;

(b) does not deliver up to the liquidator or does not deliver up in accordance with the directions of the liquidator any of the company's property which is in that person's custody or under that person's control, and which that person is required by law to deliver up;

(c) does not deliver up to the liquidator or does not deliver up, in accordance with the directions of the liquidator, all documents in that person's custody

Case 1:24-cv-00495-JLH Document 1-2 Filed 12/20/23 Page 99 of 338 PageID #:
Companies Act 2020 Pg 31 of 39

or under that person's control which belong to the company and which that person is required by law to deliver up;

(d) knows or believes that a false debt has been proved by any person in the winding up and fails to inform the liquidator of such knowledge or belief as soon as practicable;

(e) prevents the production of any document affecting or relating to the company's property or affairs; or

(f) destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the company,

with intent to defraud the company's creditors or contributories commits an offence and is liable on conviction to a fine of twenty five thousand dollars or to imprisonment for a term of five years, or to both.

(2) In this section —

"**officer**" includes a shadow director.

Material omissions from statement relating to company's affairs

137. (1) Where a company is being wound up, whether by the Court or voluntarily, a person who is or was a director, an officer, a manager, restructuring officer, controller or a professional service provider of the company, commits an offence if that person makes any material omission in any statement relating to the company's affairs, with intent to defraud the company's creditors or contributories.

(2) A person who commits an offence under subsection (1) is liable on conviction to a fine of twenty-five thousand dollars or to imprisonment for a term of five years, or to both.

(3) In this section —

"**officer**" includes a shadow director.

General provisions

Getting in the company's property

138. (1) Where any person has in that person's possession any property or documents to which the company appears to be entitled, the Court may require that person to pay, transfer or deliver such property or documents to the official liquidator.

(2) Where the official liquidator seizes or disposes of any property which that person reasonably believed belonged to the company, that person shall not be personally liable for any loss or damage caused to its true owner except in so far as such loss or damage is caused by that person's own negligence.

Provable debts

139. (1) All debts payable on a contingency and all claims against the company whether present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company and the official liquidator shall make a just estimate so far as is possible of the value of all such debts or claims as may be subject to any contingency or sound only in damages or which for some other reason do not bear a certain value.

(2) Foreign taxes, fines and penalties shall be admissible to proof against the company only if and to the extent that a judgment in respect of the same would be enforceable against the company pursuant to the *Foreign Judgments Reciprocal Enforcement Act (1996 Revision)* or any laws permitting the enforcement of foreign taxes, fines and penalties.

Distribution of the company's property

140. (1) Subject to subsection (2), the property of the company shall be applied in satisfaction of its liabilities *pari passu* and subject thereto shall be distributed amongst the members according to their rights and interests in the company.

(2) The collection in and application of the property of the company referred to in subsection (1) is without prejudice to and after taking into account and giving effect to the rights of preferred and secured creditors and to any agreement between the company and any creditors that the claims of such creditors shall be subordinated or otherwise deferred to the claims of any other creditors and to any contractual rights of set-off or netting of claims between the company and any person or persons (including without limitation any bilateral or any multi-lateral set-off or netting arrangements between the company and any person or persons) and subject to any agreement between the company and any person or persons to waive or limit the same.

(3) In the absence of any contractual right of set-off or non set-off, an account shall be taken of what is due from each party to the other in respect of their mutual dealings, and the sums due from one party shall be set-off against the sums due from the other.

(4) Sums due from the company to another party shall not be included in the account taken under subsection (3) if that other party had notice at the time they became due that a petition for the winding up of the company was pending.

(5) Only the balance, if any, of the account taken under subsection (3) shall be provable in the liquidation or, as the case may be, payable to the liquidator as part of the assets.

Preferential debts

141. (1) In the case of an insolvent company, the debts described in Schedule 2 shall be paid in priority to all other debts.

Case 24-11264-mg Doc 4-2 Filed 12/30/23 Entered 05/21/23 18:14:14 Exhibit B Part V
Companies Act 2022 Pg 33 of 39

(2) The preferential debts shall —

(a) rank equally amongst themselves and be paid in full unless the assets available, after having exercised any rights of set-off or netting of claims, are insufficient to meet them in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures secured by, or holders of any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

Secured creditors

142. (1) Notwithstanding that a winding up order has been made, a creditor who has security over the whole or part of the assets of a company is entitled to enforce that person's security without the leave of the Court and without reference to the liquidator.

(2) Where the liquidator sells assets on behalf of a secured creditor, that person is entitled to deduct from the proceeds of sale a sum by way of remuneration equivalent to that which is or would be payable under section 109.

Preferential charge on goods distrained

143. In the event of a landlord or other person entitled to receive rent distraining or having distrained on any goods or effects of the company within three months preceding the date of the winding up order, the debts to which priority is given by section 141 shall be a first charge on the goods or effects so distrained on or the proceeds of sale thereof.

Effect of execution or attachment

144. (1) Where a creditor has issued execution against the goods or land of a company or has attached any debt due to it, and the company is subsequently wound up, that person is not entitled to retain the benefit of the execution or attachment against the liquidator unless that person has completed the execution or attachment before the commencement of the winding up.

(2) Notwithstanding subsection (1) —

(a) where a creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which that person had notice is substituted for the purpose of subsection (1) for the date of commencement of the winding up;

(b) a person who purchases in good faith under a sale by the bailiff any goods of a company on which execution has been levied in all cases acquires a good title to them against the liquidator; and

(c) the rights conferred by subsection (1) on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court thinks fit.

(3) For the purposes of this Law —

(a) an execution against goods is completed by seizure and sale;

(b) an execution against securities is completed upon making a charging order absolute;

(c) an attachment of a debt is completed by receipt of the debt; and

(d) an execution against land is completed by the registration of a charging order.

Voidable preference

145. (1) Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts within the meaning of section 93 with a view to giving such creditor a preference over the other creditors shall be voidable upon the application of the company's liquidator if made, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation.

(2) A payment made as aforesaid to a related party of the company shall be deemed to have been made with a view to giving such creditor a preference.

(3) For the purposes of this section a creditor shall be treated as a "related party" if it has the ability to control the company or exercise significant influence over the company in making financial and operating decisions.

Avoidance of dispositions made at an undervalue

146. (1) In this section and section 147 —

(a) "**disposition**" has the meaning ascribed in Part VI of the *Trusts Act (2021 Revision)*;

(b) "**intent to defraud**" means an intention to wilfully defeat an obligation owed to a creditor;

(c) "**obligation**" means an obligation or liability (which includes a contingent liability) which existed on or prior to the date of the relevant disposition;

(d) "**transferee**" means the person to whom a relevant disposition is made and shall include any successor in title; and

(e) "**undervalue**" in relation to a disposition of a company's property means —

(i) the provision of no consideration for the disposition; or

Case 24-12064-mg Doc 4-2 Filed 12/20/23 Entered 05/21/23 18:14:14 Exhibit B Part V
Companies Act 2024 Pg 35 of 39

(ii) a consideration for the disposition the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition.

(2) Every disposition of property made at an undervalue by or on behalf of a company with intent to defraud its creditors shall be voidable at the instance of its official liquidator.

(3) The burden of establishing an intent to defraud for the purposes of this section shall be upon the official liquidator.

(4) No action or proceedings shall be commenced by an official liquidator under this section more than six years after the date of the relevant disposition.

(5) In the event that any disposition is set aside under this section, then if the Court is satisfied that the transferee has not acted in bad faith —

(a) the transferee shall have a first and paramount charge over the property, the subject of the disposition, of an amount equal to the entire costs properly incurred by the transferee in the defence of the action or proceedings; and

(b) the relevant disposition shall be set aside subject to the proper fees, costs, pre-existing rights, claims and interests of the transferee (and of any predecessor transferee who has not acted in bad faith).

Fraudulent trading

147. (1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose the liquidator may apply to the Court for a declaration under this section.

(2) The Court may declare that any persons who were knowingly parties to the carrying on of the business in the manner mentioned in subsection (1) are liable to make such contributions, if any, to the company's assets as the Court thinks proper.

Supply of utilities

148. (1) If a request is made by or with the concurrence of the liquidator (including a provisional liquidator) or a restructuring officer for the giving, after the effective date, of any of the supplies mentioned in subsection (2), the supplier —

(a) may make it a condition of the giving of the supply that the liquidator (including a provisional liquidator) or restructuring officer personally guarantees the payment of any charges in respect of the supply; but

(b) shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply,

that any outstanding charges in respect of a supply given to the company before the effective date are paid.

(2) The supplies referred to in subsection (1) are —

(a) a supply of electricity;

(b) a supply of water; and

(c) a supply of telecommunication services.

(3) In this section —

"**effective date**" means —

(a) the date on which the provisional liquidator was appointed;

(b) the date on which the winding up order was made; or

(c) the date on which the restructuring officer was appointed.

Interest on debts

149. (1) Subject to subsection (5), in a winding up interest is payable in accordance with this section on any debt proved in the winding up, including so much of any such debt as represents interest on the remainder of the debt.

(2) Any surplus remaining after the payment of the debts proved in a winding up shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the period during which they have been outstanding since the company went into liquidation.

(3) All interest under this section ranks equally, whether or not the debts on which it is payable ranked equally.

(4) The rate of interest payable under this section in respect of any debt is the greater of —

(a) the rate applicable to the currency of the liquidation prescribed from time to time by the *Judgment Debts (Rates of Interest) Rules (2021 Revision)* made under section 34 of the *Judicature Act (2021 Revision)*; and

(b) the rate applicable to that debt apart from the winding up.

(5) No interest shall be payable if the liquidation is concluded in less than six months or the accrued amount is less than five hundred dollars.

Currency of the liquidation

150. (1) In the case of a solvent liquidation, a company's creditors are entitled to receive payment of their debts in the currency of the obligation.

(2) In the case of an insolvent liquidation, a company's liabilities shall be translated into the functional currency of the company at the exchange rates ruling —

(a) on the date of the commencement of the voluntary liquidation; or

(b) on the day upon which the winding up order is made.

Case 24-11264-mg Doc 4-2 Filed 12/30/23 Entered 12/30/23 18:14:14 Exhibit B Part V
Companies Act 2022 Pg 37 of 39

(3) For the purposes of this section the functional currency of a company is the currency of the primary economic environment in which it operated as at the commencement of the liquidation.

Dissolution of a Company

Dissolution following voluntary winding up

151. (1) The Registrar shall, within three days of receiving a liquidator's return under section 127(3), register such return.

(2) Upon the expiration of three months from the registration of the return the company is deemed to be dissolved.

(3) Notwithstanding subsection (2), the Court may, on the application of the liquidator or any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect to such date as the Court thinks fit.

(4) An application under this section shall not be made after the company is deemed to have been dissolved.

(5) An order of the Court made under this section shall be registered with the Registrar within seven days of the date upon which it was made.

Dissolution following winding up by the Court

152. (1) When the affairs of the company have been completely wound up, the Court shall make an order that the company be dissolved from the date of that order or such other date as the Court thinks fit, and the company shall be dissolved accordingly.

(2) The effect of an order for dissolution in respect of a segregated portfolio is that its creditors' claims against the company shall be extinguished, notwithstanding that the company has not been liquidated and dissolved.

(3) The official liquidator shall file the order for dissolution with the Registrar.

(4) An official liquidator who fails to file the order for dissolution with the Registrar within fourteen days from the date, upon which it was perfected, commits an offence and is liable on summary conviction to a penalty of ten dollars for every day during which that person is so in default.

Unclaimed dividends and undistributed assets

153. (1) Any unclaimed dividends or undistributed assets in the possession or control of the liquidator or former liquidator of a company shall be held by that person as trustee upon trust for the benefit of the contributories or creditors to whom such funds are owed.

(2) At the end of one year after the dissolution of the company, the former liquidator shall transfer any funds or other assets held on trust by that person to the Minister charged with responsibility for Finance who shall manage them in accordance with Part VIII of the *Public Management and Finance Act (2020 Revision)*.

Insolvency rules and regulations

Insolvency Rules Committee

154. (1) There shall be established an Insolvency Rules Committee comprising —

(a) the Chief Justice or other judge nominated by the Chief Justice in that person's place who shall be chairperson;

(b) the Attorney General or that person's nominee;

(c) two attorneys-at-law appointed by the Chief Justice on the recommendation of the Cayman Islands Legal Practitioners Association;

(d) a qualified insolvency practitioner appointed by the Chief Justice upon the recommendation of the Cayman Islands Institute of Professional Accountants;

(e) a person appointed by the Chief Justice who, in that person's opinion, demonstrates a wide knowledge of law, finance, financial regulation or insolvency practice; and

(f) a qualified insolvency practitioner appointed by the Chief Justice on the recommendation of the Recovery and Insolvency Specialists Association.

(2) The quorum of the Insolvency Rules Committee shall be the chairperson and three other members of the Committee; and the chairperson shall have a casting vote.

Powers of the Insolvency Rules Committee

155. (1) The Insolvency Rules Committee shall have power —

(a) to make rules and prescribe forms for the purpose of giving effect to Parts IV, V and XVI;

(b) to prescribe court fees to be paid in connection with —

(i) applications under Part IV;

(ii) winding up proceedings under Part V; and

(iii) applications under Part XVI; and

(c) to make rules for the purpose of specifying —

(i) the qualifications which must be held by a person appointed to the office of official liquidator;

Case 24-11264-mg Doc 4-2 Filed 12/30/23 Entered 05/21/23 18:14:14 Exhibit B Part V
Companies Act 2028 Pg 39 of 39

(ii) persons who are disqualified from holding office as official liquidator either generally or in relation to a particular company which is not in liquidation before the court;

(iii) the nature and scope of professional indemnity insurance, if any, required to be held by persons appointed to the office of official liquidators; and

(iv) the nature and scope of security bonds, if any, required to be posted by persons appointed to the office of official liquidator.

(2) The Insolvency Rules Committee, after consultation with the Authority and with any organisation representing insolvency practitioners in the Islands, shall make rules prescribing the rates of fees which may be charged by an official liquidator.

PART VI - Removal of Defunct Companies

Company not operating may be struck off register

156. (1) Where the Registrar has reasonable cause to believe that a company is not carrying on business or is not in operation, that person may strike the company off the register and the company shall thereupon be dissolved.

(2) A request on behalf of the company to strike the company off the register shall be accompanied by a fee of seventy-five dollars.

Striking off for failure to pay fine

156A.Where an administrative fine imposed in accordance with Part XVIIB remains unpaid for ninety days after imposition of the fine, the Registrar may strike the company off the register and the company shall thereupon be dissolved.

Company being wound up may be struck off register for want of liquidator, etc.

157. Where a company is being wound up, and the Registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the company are fully wound up, that person may strike the company off the register and the company shall thereupon be dissolved.

Registrar to publish fact of company being struck off register

158. The Registrar shall immediately publish a Government Notice to the effect that the company in question has been struck off the register, the date on which it has been struck off and the reason therefor. Such notice shall be gazetted.

CAYMAN ISLANDS



Companies Act

(2023 Revision)

COMPANIES WINDING UP RULES

(2023 Consolidation)

Supplement No. 4 published with Legislation Gazette No. 1 dated 12th January, 2023.

PUBLISHING DETAILS

The Companies Winding Up Rules, 2018 made by the Insolvency Rules Committee on 27th November, 2017 as amended by the Citation of Acts of Parliament Act, 2020 [Act 56 of 2020].

Consolidated with —

Companies Winding Up (Amendment) Rules 2022-29th July, 2022.

Consolidated this 31st day of December, 2022.

CAYMAN ISLANDS

Companies Act

(2023 Revision)

COMPANIES WINDING UP RULES

(2023 Consolidation)

Arrangement of Rules

Section		Page
1.	Citation	15
2.	*Revocation* of the *Companies Winding Up Rules 2008* and Amendments	15
3.	Commencement of the *Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2018*	15
4.	*Revocation* of the *Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2008*	16
5.	Commencement of the *Insolvency Practitioners' Regulations, 2018*	16
6.	*Revocation* of the *Insolvency Practitioners' Regulations, 2008*	16
ORDER 1		**17**
CITATION, APPLICATION AND COMMENCEMENT		**17**
1.	Citation (O.1, r.1)	17
2.	Application (O.1, r.2)	17
3.	Commencement and transitional provisions (O.1, r.3)	17
4.	Application of Grand Court Rules etc. (O.1, r.4)	18
5.	Definitions (O.1, r.5)	18
6.	Construction of references to the Law, Orders, Rules and Regulations (O.1, r.6)	19
7.	Prescribed Forms (O.1, r.7)	19
ORDER 1A		**20**
RESTRUCTURING MORATORIUM		**20**
1.	Presentation, Filing and Advertisement of Petition (O.1A, r.1)	20
2.	Form and Content of Company Petition (O.1A, r.2)	20
3.	Notice of Appearance (O.1A, r.3)	22

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 4 of 128

4. Application for the Appointment of an Interim Restructuring Officer by Summons (O.1A, r.4) 23
5. Concurrent Petitions (O.1A, r.5) 23
6. Order for the Appointment of a Restructuring Officer (O.1A, r.6) 24
7. Filing, Service and Registration of Order (O.1A, r.7) 25
8. Obligation to Report to Creditors, Contributories and the Authority (O.1A, r.8) 25
9. Variation or Discharge of Order (O.1A, r.9) 26
10. Application of the *Insolvency Practitioners' Regulations (as amended and revised)* and Independence (O.1A, r.10) 26
11. Resignation of Restructuring Officers (O.1A, r.11) 27
12. Death of Restructuring Officers (O.1A, r.12) 28
13. Application for the Removal and Replacement of a Restructuring Officer (O.1A, r.13) 29
14. Restructuring Officer's Legal Counsel (O.1A, r.14) 30
15. International Protocols (O.1A, r.15) 30
16. General Provisions (O.1A, r.16) 30
17. Schemes of Arrangement under section 91I of the Law (O.1A, r.17) 31
18. Definitions (O.1A, r.18) 31
10. 31

ORDER 2 **32**

STATUTORY DEMAND **32**

1. Introduction (O. 2, r. 1) 32
2. Form and Content of Statutory Demand (O. 2, r. 2) 32
3. Service of Statutory Demand (O. 2, r. 3) 33

ORDER 3 **34**

WINDING-UP PETITIONS AND ORDERS **34**

PART I: GENERAL PROVISIONS **34**

1. Presentation and Filing of Petition (O. 3, r. 1) 34
2. Form and Content of Petition (O. 3, r. 2) 34
3. Verification of Petition (O. 3, r. 3) 35
4. Nominated Official Liquidator's Consent to Act (O. 3, r. 4) 35

PART II: CREDITOR'S PETITION **36**

5. Presentation and Service of Creditor's Petition (O. 3, r. 5) 36
6. Advertisement of Creditor's Petition (O. 3, r. 6) 36
7. Leave for Petition to be Withdrawn (O. 3, r. 7) 37
8. Notice of Appearance (O. 3, r. 8) 37
9. Evidence in Opposition to Petition (O. 3, r. 9) 38
10. Substitution of Petitioner (O. 3, r. 10) 38

PART III: CONTRIBUTORY'S PETITION **39**

11. Presentation and Service of a Contributory's Petition (O. 3, r. 11) 39
12. Summons for Directions (O. 3, r. 12) 39
13. Hearing of Contributory's Petition (O. 3, r. 13) 40

PART IV: AUTHORITY'S PETITION **40**

14. Service of Authority's Petition (O. 3, r. 14) 40
15. Summons for Directions (O. 3, r. 15) 40
16. Hearing of Authority's Petition (O. 3, r. 16) 41

PART V: COMPANY'S PETITION **41**

17. Presentation and Service of Company's Petition (O. 3, r. 17) 41

18. Advertisement of Company's Petition (O. 3, r. 18) 42
19. Leave for Petition to be Withdrawn (O. 3, r. 19) 42
20. Notice of Appearance (O. 3, r. 20) 43
21. Substitution of Petitioner (O. 3, r. 21) 44
22. Form, Content and Effect of Winding Up Orders (O. 3, r. 22) 44
23. Filing, Service and Registration of Winding Up Orders (O. 3, r. 23) 45

ORDER 4 **46**

APPLICATION FOR APPOINTMENT OF PROVISIONAL LIQUIDATOR **46**

PART I: APPLICATION BY CREDITOR OR CONTRIBUTORY **46**

1. Application by Summons (O.4, r.1) 46
2. Supporting Affidavits (O.4, r.2) 46
3. Security (O.4, r.3) 46
4. Order for the Appointment of Provisional Liquidator (O.4, r.4) 46
5. Variation or Discharge of Order (O.4, r.5) 47

PART II: APPLICATION BY THE COMPANY **47**

6. Application by Summons (O.4, r.6) 47
7. Order for the Appointment of Provisional Liquidator (O.4, r.7) 48
8. Filing, Service and Registration of Order (O. 4, r. 8) 48
9. Variation or Discharge of Order (O.4, r.9) 48

ORDER 5 **50**

APPOINTMENT, RESIGNATION, DEATH AND REMOVAL OF OFFICIAL LIQUIDATORS **50**

1. Introduction (O.5, r.1) 50
2. Order for Appointment of Official Liquidator (O.5, r.2) 50
3. Notice of Appointment to be Advertised (O.5, r.3) 50
4. Resignation of Official Liquidator (O.5, r.4) 51
5. Death of Official Liquidator (O.5, r.5) 52
6. Application for Removal and Appointment of New Official Liquidator (O.5, r.6) 52

ORDER 6 **54**

COMPANY'S STATEMENT OF AFFAIRS **54**

1. Notice Requiring Submission of Statement of Affairs (O.6, r.1) 54
2. Form and content of Statement of Affairs (O.6, r.2) 54
3. Time for Delivering Statement of Affairs (O.6, r.3) 55
4. Expenses of Preparing a Statement of Affairs (O.6, r.4) 55
5. Disclosure of Statement of Affairs (O.6, r.5) 55

ORDER 7 **56**

ORDER FOR EXAMINATION **56**

1. Application for Order for Examination (O.7, r.1) 56
2. Order for Examination (O.7, r.2) 57
3. Procedure upon an Oral Examination (O.7, r.3) 57

ORDER 8 **59**

MEETINGS OF CREDITORS AND CONTRIBUTORIES **59**

1. Meetings Convened by Official Liquidator (O.8, r.1) 59
2. First Meeting and Subsequent Meetings (O.8, r.2) 60

Case 23-20044-rdd Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:34 Exhibit C
Winding up rules 2023 Consolidation Pg 6 of 128

3. Requisitioned Meetings (O.8, r.3) 60
4. Notice and Advertisement of Meetings (O.8, r.4) 61
5. Venue (O.8, r.5) 61
6. Proceedings at Meetings (O.8, r.6) 62
7. Entitlement to Vote at Creditors' Meeting (O.8, r.7) 62
8. Entitlement to Vote at Contributories' Meeting (O.8, r.8) 63
9. Voting on Resolutions (O.8, r.9) 63
10. Recording of Proceedings (O.8, r.10) 64

ORDER 9 65

LIQUIDATION COMMITTEES 65

1. Establishment of Liquidation Committee (O.9, r.1) 65
2. Membership of Liquidation Committee (O.9, r.2) 65
3. Reconstitution of the Liquidation Committee (O.9, r.3) 66
4. Official Liquidator's Duty to Report (O.9, r.4) 67
5. Proceedings of Liquidation Committee (O.9, r.5) 68
6. Counsel to the Liquidation Committee (O.9, r.6) 69
7. Travel and Other Expenses of Committee Members (O.9, r.7) 69
8. Resignation and Removal of Committee Members (O.9, r.8) 69
9. Applications to the Court (O.9, r.9) 70

ORDER 10 71

OFFICIAL LIQUIDATOR'S REPORTS AND ACCOUNTS 71

1. Official Liquidator's Reporting Obligations (O.10, r.1) 71
2. Form and Content of Liquidators' Reports and Accounts (O.10, r.2) 71
3. Publication of Reports and Accounts (O.10, r.3) 73

ORDER 11 74

SANCTION APPLICATIONS 74

1. Introduction (O.11, r.1) 74
2. Service of Sanction Applications (O.11, r.2) 74
3. Hearing of Sanction Applications (O.11, r.3) 75
4. Evidence for Use in Sanction Applications (O.11, r.4) 75

ORDER 12 77

SETTLING LIST OF CONTRIBUTORIES 77

1. Introduction (O.12, r.1) 77
2. Rectification of the Register of Members (O.12, r.2) 77
3. Notification of Rectification (O.12, r.3) 78
4. Appeal Against Rectification (O.12, r.4) 79

ORDER 13 80

VOLUNTARY (SOLVENT) LIQUIDATIONS 80

1. Introduction (O.13, r.1) 80
2. Notice of Voluntary Winding Up (O.13, r.2) 80
3. Appointment of Voluntary Liquidator (O.13, r.3) 81
4. Resignation of Voluntary Liquidator (O.13, r.4) 81
5. Death of Voluntary Liquidator (O.13, r.5) 82

6. Removal of Voluntary Liquidator (O.13, r.6) 82
7. Voluntary Liquidator's Reporting Obligations (O.13, r.7) 83
8. Form and Content of Reports and Accounts (O.13, r.8) 83
9. Voluntary Liquidator's Remuneration (O.13, r.9) 84
10. Applications to Court (O.13, r.10) 84
11. General Meetings of the Company (O.13, r.11) 86
12. Voluntary Liquidator's Final Return (O.13, r.12) 86

ORDER 14 88

DIRECTOR'S DECLARATION OF SOLVENCY 88

1. Form and Content of Declaration of Solvency (O.14, r.1) 88
2. Delivery and Registration of Declaration of Solvency (O.14, r.2) 88

ORDER 15 89

APPLICATION FOR SUPERVISION ORDER 89

1. Introduction (O.15, r.1) 89
2. Application under section 124 (O.15, r.2) 89
3. Application under section 131 (O.15, r.3) 90
4. Supporting Affidavits (O.15, r.4) 90
5. Hearing of section 124 Petition (O.15, r.5) 91
6. Release of Voluntary Liquidator (O.15, r.6) 92
7. Delivery of Company's Books and Records (O.15, r.7) 92
8. Supervision Order (O.15, r.8) 92

ORDER 16 93

PROOF OF DEBTS IN OFFICIAL LIQUIDATION 93

PART I: PROCEDURE FOR PROVING 93

1. Introduction (O.16, r.1) 93
2. Form and Content of Proof (O.16, r.2) 93
3. Supply of proof of debt forms (O.16, r.3) 94
4. Cost of proving (O.16, r.4) 94
5. Withdrawal and variation of proof (O.16, r.5) 94
6. Admission and rejection of proof (O.16, r.6) 94
7. Admission without proof of debt (O.16, r.7) 95
8. Inspection of Proofs of Debts (O. 16, r. 8) 95

PART II: QUANTIFICATION OF CLAIM 95

9. Enforcement of Subordination, Set-Off (or Non Set-Off) and Netting Agreements (O.16, r.9) 95
10. Mutual credit and set-off (O.16, r.10) 96
11. Pre-liquidation Interest on Debts (O.16, r.11) 96
12. Post-liquidation Interest on Debts (O.16, r.12) 96
13. Determination of the currency of the liquidation (O.16, r.13) 97
14. Payments of a periodical nature (O.16, r.14) 97
15. Debts payable at a future date (O.16, r.15) 98
16. Contingent claims (O.16, r.16) 98

PART III: APPEAL AGAINST REJECTION OF PROOF 98

17. Introduction (O.16, r.17) 98
18. Application to Court (O.16, r.18) 99
19. [No order] (O.16, r.19) 99

Case 23-20044-rlg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:54 Exhibit C
Case 2:22-cv-00495-DJH Document 28-1 Filed 05/12/22 Page 115 of 238 PageID #:
Winding up rules 2023 5036 Consolidation Pg 8 of 128

PART IV: EXPUNGING ADMITTED CLAIMS **99**
20. Introduction (O.16, r.20) 99
21. Application to Court (O.16, r.21) 99

ORDER 17 **101**
SECURED CREDITORS **101**
1. Introduction (O.17, r.1) 101
2. Redemption of security by the liquidator (O.17, r.2) 101
3. Valuation of security (O.17, r.3) 102
4. Realisation of security (O.17, r.4) 102

ORDER 18 **103**
COLLECTION AND DISTRIBUTION OF COMPANY'S ASSETS BY ITS OFFICIAL LIQUIDATOR **103**
1. Powers of Official Liquidator (O.18, r.1) 103
2. Manner of Distributing the Assets (O. 18, r. 2) 103
3. Debts of Insolvent Company to Rank Equally (O.18, r.3) 103
4. Calculation of Dividend (O.18, r.4) 103
5. Distribution of Assets in Specie (O.18, r.5) 104
6. Interim Distribution to Creditors (O.18, r.6) 105
7. Final Distribution to Creditors (O.18, r.7) 105
8. Payment of Dividends (O.18, r.8) 106
9. Assignment of Right to Receive a Dividend (O.18, r.9) 106

ORDER 19 **107**
CALLS ON CONTRIBUTORIES AND TRANSFERS OF SHARES **107**
PART I: CALLS ON CONTRIBUTORIES **107**
1. Calls by Official Liquidator (O.19, r.1) 107
2. Making and Enforcement of Calls (O.19, r.2) 107
3. Appeal against Calls (O.19, r.3) 107
PART II: TRANSFERS OF SHARES **108**
4. Application for Validation Order (O.19, r.4) 108
5. Supporting Documentation (O.19, r.5) 108

ORDER 20 **109**
ORDER OF PAYMENT OF EXPENSES OUT OF THE ASSETS **109**
1. General Rule as to Priority (O.20, r.1) 109
2. Disallowance of Expenses and Disbursements (O.20, r.2) 110

ORDER 21 **111**
INTERNATIONAL PROTOCOLS **111**
1. Application and definitions (O.21, r.1) 111
2. Consideration of international protocols (O.21, r.2) 111
3. Scope of international protocols (O.21, r.3) 112

ORDER 22 **113**
ORDER FOR DISSOLUTION **113**
1. Application to Court (O.22, r.1) 113

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 9 of 128

2. Order for Dissolution (O.22, r.2) 113

ORDER 23 **114**

UNCLAIMED DIVIDENDS AND UNDISTRIBUTED ASSETS **114**

1. Introduction (O.23, r.1) 114
2. Establishment of Trust Account (O.23, r.2) 114
3. Transfer of Undistributed Assets (O.23, r.3) 114
4. Payment out of Trust Account and Transfer of Undistributed Assets (O.23, r.4) 114
5. Former Liquidator's Trustee Fee and Expenses (O.23, r.5) 115
6. Transfer to the Financial Secretary (O.23, r.6) 115

ORDER 24 **116**

APPLICATIONS TO COURT UNDER PART V OF THE LAW **116**

PART I: GENERAL PROVISIONS **116**

1. Originating Applications (O.24, r.1) 116
2. Applications in Existing Proceedings (O.24, r.2) 116
3. Hearings (O.24, r.3) 116
4. Court Files (O.24, r.4) 116
5. Orders made in Liquidation Proceedings (O.24, r.5) 117
6. Order for Documents to be Sealed (O.24, r.6) 117

PART II: COSTS IN LIQUIDATION PROCEEDINGS **117**

7. Interpretation (O.24, r.7) 117
8. General Rules as to Costs (O.24, r.8) 118
9. Costs of Sanction Applications (O.24, r.9) 119
10. Costs of Appeals (O.24, r.10) 119
11. Taxation of Costs and Appeals (O.24, r.11) 120

ORDER 25 **121**

OFFICIAL LIQUIDATOR'S LAWYERS **121**

1. Appointment of Lawyers (O.25, r.1) 121
2. Lawyer's Fees (O.25, r.2) 121
3. Procedure for Taxation of Lawyer's Fees (O.25, r.3) 122
4. Subsequent Procedure on Taxation (O.25, r.4) 122
5. Criteria Applicable on Taxation (O.25, r.5) 123

ORDER 26 **124**

LIQUIDATION FILES, COMPANY'S BOOKS AND RECORDS AND COURT FILES **124**

1. Introduction (O.26, r.1) 124
2. Liquidation Files (O.26, r.2) 124
3. Company's Books and Records (O.26, r.3) 125
4. Rights of access to the Court File (O.26, r.4) 125

APPENDIX **127**

PRESCRIBED FORMS (O.1, R.7) **127**

CWR Form No 1 **129**

Statutory Demand under section 93 of the Companies Act (O. 2, r. 2) **129**

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Case 1:24-cv-00495-DLI Document 1-2 Filed 05/12/23 Page 117 of 238 PageID #:
Winding up rules 2023 Consolidation Pg 10 of 128

CWR Form No. 2 **131**
Winding Up Petition (O.3, r.2) **131**
CWR FORM No. 2A **133**
Petition for the Appointment of a Restructuring Officer (O.1A, r.2) **133**
CWR FORM No. 2B **135**
***Ex Parte* Summons for Appointment of Interim Restructuring Officer (O.1A, r.4)** **135**
CWR FORM No. 3 **137**
Advertisement of Winding Up Petition (O.3, r.6) **137**
CWR FORM No. 3A **138**
Advertisement of Petition to Appoint Restructuring Officer (O.1A, r.1(3)) **138**
CWR FORM No. 4 **139**
Notice of Appearance (O.3, r.8) **139**
CWR FORM No. 4A **140**
Notice of Appearance (O.1A, r.3) **140**
CWR FORM No. 5 **141**
Summons for Directions (O.3, r.11) **141**
CWR FORM No. 6 **143**
Winding Up Order (O.3, r.16) **143**
CWR FORM No. 7 **145**
Order for Appointment of Provisional Liquidator upon the application of a creditor or contributory (O.4, r.4) **145**
CWR FORM No. 8 **147**
Order for Appointment of Provisional Liquidator upon the application of the Company (O.4, r.7) **147**
CWR FORM No. 8A **149**
Order for the Appointment of a Restructuring Officer (O.1A, r.6) **149**
CWR FORM No. 8B **151**
***Ex Parte* Order for the Appointment of an Interim Restructuring Officer (O.1A, r.6)** **151**
CWR FORM No. 9 **153**
Notice of Appointment of Official Liquidator (O. 5, r. 3) **153**
CWR FORM No. 10 **154**
Notice requiring submission of a statement of affairs (O. 6, r. 1) **154**

Case 1:24-cv-00495-LJL-JW Document 1-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C - Page 118 of 238 PageID #:
Winding up rules 2023 Consolidation Pg 11 of 128

CWR FORM No. 11 **155**

Notice requiring a person to state whether that person concurs with a statement of affairs (O. 6, r. 1) **155**

CWR FORM No. 12 **157**

Order for Examination (O.7, r.2) **157**

CWR FORM No. 13 **160**

Official Liquidator's certificate (Solvency/Insolvency) (O.8, r.1) **160**

CWR FORM No. 14 **161**

Official Liquidator's Revised Certificate (Solvency/Insolvency) (O.8, r.1) **161**

CWR FORM No. 15 **162**

Official Liquidator's Certificate (Composition of Liquidation Committee) (O.9, r.1) **162**

CWR FORM No. 16 **163**

Summons (Sanction Application) (O.11, r.1) **163**

CWR FORM No. 16A **164**

Remuneration Approval Summons (O.1A, r.10(3)) **164**

CWR FORM No. 16B **166**

Summons for the Variation or Discharge of Order Appointing Restructuring Officers (O.1A, r.9(1)) **166**

CWR FORM No. 16C **168**

Removal and Replacement Summons (O.1A, r.13(1)) **168**

CWR FORM No. 16D **170**

Summons for the Variation or Discharge of Order Appointing Provisional Liquidators (O.4, r.9(3)) **170**

CWR FORM No. 17 **172**

Notice of Rectification of Register of Members (O.12, r.3) **172**

CWR FORM No. 18 **173**

Summons (Appeal against Rectification of the Register of Members) (O.12, r.4) **173**

CWR FORM No. 19 **175**

Notice of Voluntary Winding Up (O.13, r.2) **175**

CWR FORM No. 20 **176**

Voluntary Liquidator's Consent to Act (O.13, r.2) **176**

CWR FORM No. 21 **177**

Declaration of Solvency (O.14, r.1) **177**

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 12 of 128

CWR FORM No. 22 **178**
Advertisement (Application for Supervision Order) (O.15, r.5) **178**
CWR FORM No. 23 **179**
Supervision Order (O.15, r.8) **179**
CWR FORM No. 24 **181**
Proof of Debt (standard form) (O.16, r.2) **181**
CWR FORM No. 25 **182**
Notice of Admission of Proof of Debt (O.16, r.6) **182**
CWR FORM No. 26 **183**
Notice of Rejection of Proof of Debt (O.16, r.6) **183**
CWR FORM No. 27 **184**
Notice of Admission (Bank deposit claims) (O.16, r.7) **184**
CWR FORM No. 28 **185**
Official Liquidator's Certificate (Currency of Liquidation (O.16, r.13) **185**
CWR FORM No. 29 **186**
Notice (Contingent claims) (O.16, r.16) **186**
CWR FORM No. 30 **187**
Summons (Appeal against rejection of proof of debt) (O.16, r.18) **187**
CWR FORM No. 31 **188**
Summons (Application to expunge a proof of debt) (O.16, r.21) **188**
CWR FORM No. 32 **190**
Notice of Intention to Declare Interim Dividend (O.18, r.6) **190**
CWR FORM No. 33 **191**
Notice of Intention to Declare Final Dividend (O.18, r.7) **191**
CWR FORM No. 34 **192**
Notice of Final Dividend (O.18, r.7) **192**
CWR FORM No. 35 **193**
Notice of Call (O.19, r.2) **193**
CWR FORM No. 36 **194**
Order for Dissolution (O.21, r.2) **194**
CWR FORM No. 37 **196**
Voluntary Liquidator's Final Return to the Registrar **196**

ENDNOTES **199**

Table of Companies Winding Up Rules history:.....199

CAYMAN ISLANDS

Companies Act

(2023 Revision)

COMPANIES WINDING UP RULES

(2023 Consolidation)

In the exercise of the powers conferred by Section 155 of the *Companies Act (as amended and revised)* the Insolvency Rules Committee makes the following Rules —

Citation

1. These Rules may be cited as the *Companies Winding Up Rules (2023 Consolidation)*.

Revocation of the *Companies Winding Up Rules 2008* and Amendments

2. The *Companies Winding Up Rules 2008*, the *Companies Winding Up (Amendment) Rules, 2010*, the *Companies Winding Up (Amendment) Rules, 2013* and the *Companies Winding Up (Amendment) Rules 2016* are hereby *revoked* and replaced by the *Companies Winding Up Rules (as amended and revised)* attached as a Schedule hereto.

Commencement of the *Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2018*

3. The *Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2018* shall come into operation on the 1st day of February 2018.

Case 23-20044-rlg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:34 Exhibit C
Winding up rules 2023 Consolidation Pg 16 of 128

Revocation of the *Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2008*

4. The *Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2008 [SL 9 of 2008]* are hereby ***revoked*** and replaced by the *Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2018 [SL 92 of 2017]*.

Commencement of the *Insolvency Practitioners' Regulations, 2018*

5. The *Insolvency Practitioners' Regulations, 2018 [SL 93 of 2017]* come in operation on 1st day of February 2018.

Revocation of the *Insolvency Practitioners' Regulations, 2008*

6. The *Insolvency Practitioners' Regulations, 2008*, the *Insolvency Practitioners' (Amendment) Regulations, 2010*, and the *Insolvency Practitioners' (Amendment) Regulations, 2013* are hereby **revoked** and replaced by the *Insolvency Practitioners' Regulations, 2018 (as amended and revised)*.

MADE by the Insolvency Rules Committee on the 27th day of November 2017

The Honourable Andrew Jones QC, Judge

The Honourable Sam Bulgin QC, Attorney General

Colin McKie QC, Legal Practitioner

Hector Robinson QC, Legal Practitioner

Simon Conway, Qualified Insolvency Practitioner

Jude Scott CPA

Amended by the Insolvency Rules Committee on the 29th day of July 2022

The Honourable Nicholas Segal, Chairperson

The Honourable Samuel Bulgin QC, Attorney General

Colin McKie QC, Legal Practitioner

Colette Wilkins QC, Legal Practitioner

Eleanor Fisher, Insolvency Practitioner

Jude Scott

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:44 Exhibit C
Winding up rules 2023 Consolidation Pg 17 of 128

ORDER 1

CITATION, APPLICATION AND COMMENCEMENT

Citation (O.1, r.1)

1. (1) These Rules may be cited as the *Companies Winding Up Rules (2023 Consolidation)*.

(2) An individual Rule may be cited using the abbreviation "CWR".

Application (O.1, r.2)

2. (1) These Rules shall apply to —

(a) every winding up petition presented on or after the commencement date;

(b) every other application made under Part V of the *Companies Act (as amended and revised)* on or after the commencement date;

(c) every application made on or after the commencement date in a winding up proceeding which was pending on that date;

(d) any step taken or required to be taken after the commencement date in any winding up proceeding which was pending on that date; and

(e) any step taken or required to be taken on or after the commencement date in any voluntary liquidation which was in progress on that date, except that a voluntary liquidator shall not be required to apply for a supervision order under section 124 of the Law in respect of a voluntary liquidation which commenced prior to the commencement date.

(2) The *English Insolvency Rules 1986 (SI.1986/1925)* shall cease to have any application with effect from 1 March 2009.

Commencement and transitional provisions (O.1, r.3)

3. (1) The *Companies Winding Up Rules, 2018 [SL 92 of 2017]* shall, as stated in the Commencement Order, come into force on the 1st February, 2018, referred to in these Rules as the "**commencement date**".

(2) No application, order or direction made under Part V of the *Companies Act (as amended and revised)* before the commencement date shall be treated as a non-compliance with these Rules provided that it complied with the rules, practice directions or procedure then in force.

(3) No action taken by a liquidator, creditor or contributory in a compulsory liquidation or voluntary liquidation before the commencement date shall be treated as a non- compliance with these Rules provided that it complied with the rules, practice directions or procedure then in force.

Application of Grand Court Rules etc. (O.1, r.4)

4. (1) Every petition, summons, order or other document required to be served by these Rules, shall be served in accordance with GCR Orders 10 and 65, unless some other method of service is expressly required or permitted by these Rules. Where any such petition, summons, order or other document is required to be served out of the jurisdiction then GCR O. 11 shall apply to these Rules.

(1A) GCR Order 2 shall apply to these Rules mutatis mutandis.

(1B) Where any Rule requires a liquidator to publish any notice in any newspaper the Court may dispense with that requirement if it is satisfied that (i) the expense of publishing the notice in a newspaper would be disproportionate and/or (ii) it would be unlikely to serve any useful purpose

(2) Every affidavit or other document filed in the Court office shall comply with the requirements of GCR Orders 41 and 66.

(3) Every order or direction made in a winding up proceeding shall comply with the requirements of GCR Order 42.

(3A) GCR Order 20 shall apply mutatis mutandis with respect to any amendment to any document filed in the Court office.

(4) All funds required to be paid into or out of Court in connection with any winding up proceedings shall be lodged, paid, invested and dealt with in accordance with GCR Order 92.

Definitions (O.1, r.5)

5. (1) The words and expressions defined by section 89(1) of the Law shall have the same meaning when used in these Rules.

(2) The words and expressions defined by section 2 of the Law shall have the same meaning when used in these Rules.

(3) The words and expressions defined by GCR Order 1, rule 7 shall have the same meaning when used in these Rules.

(4) In these Rules, unless the context otherwise requires —

"**Authority**" means the Cayman Islands Monetary Authority established under section 5(1) of the *Monetary Authority Act (as amended and revised)* and includes a person acting under the Authority's authorisation;

"**court reporter**" means any person who is professionally engaged in the business of transcribing and reporting court proceedings, whether or not such person is employed by the Court;

"**dollars**" or "**$**" means United States dollars and any reference to a dollar or $ amount in these Rules shall mean that amount in United States dollars or an equivalent amount in the currency of the liquidation;

"**Registrar**" means the Registrar of the Financial Services Division of the Court; and

"**Registrar of Companies**" means the registrar of companies appointed under section 3 of the Law and includes, where appropriate, the deputy registrar of companies.

Construction of references to the Law, Orders, Rules and Regulations (O.1, r.6)

6. (1) References to "**the Law**" means the *Companies Act (as amended and revised).*

(2) Any reference in these Rules to a specified Order or Rule is a reference to that Order or Rule of these Rules.

(3) Any reference to a "**Regulation**" is a reference to the *Insolvency Practitioners' Regulations (as amended and revised).*

Prescribed Forms (O.1, r.7)

7. (1) The forms contained in the Appendix to these Rules shall be used where applicable, with such variations as the circumstances of the particular case require.

(2) The forms contained in the *English Insolvency Rules 1986 (UKSI.1986/1925)* shall cease to have any application with effect from 1 March 2009.

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Case 1:24-cv-00495-UNA Document 1-2 Filed 05/13/24 Page 127 of 238 PageID #:
Winding up rules 2023 Consolidation Pg 20 of 128

ORDER 1A

RESTRUCTURING MORATORIUM

Presentation, Filing and Advertisement of Petition (O.1A, r.1)

1. (1) A petition by the company for the appointment of a restructuring officer pursuant to section 91B of the Law shall be presented by filing it in Court in accordance with GCR Order 9.

(2) The petitioner shall pay the filing fee prescribed in the First Schedule of the Court Fees Rules.

(3) Unless the Court otherwise directs, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having a circulation in the Islands. An advertisement published in accordance with this Rule shall be in CWR Form No. 3A.

(4) In addition, unless the Court otherwise directs, if the company is carrying on business outside the Islands, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having circulation in a country (or countries) in which it is most likely to come to the attention of the company's creditors (including any contingent or prospective creditors) and contributories (in which case the advertisement must be published in the official language of such country or countries).

(5) The advertisements shall be made to appear not more than 7 business days after the petition for the appointment of a restructuring officer is filed in Court and not less than 7 business days before the hearing date.

(6) Unless the Court otherwise directs, the petition for the appointment of a restructuring officer will be heard within 21 days of the petition being filed in Court.

(7) An office copy of every petition presented under this Rule shall be placed on the Register of Writs and other Originating Process maintained by the Registrar pursuant to GCR Order 63, rule 8.

(8) Every petition under this Rule shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers.

Form and Content of Company Petition (O.1A, r.2)

2. (1) Every petition for the appointment of a restructuring officer shall be in CWR Form No 2A and shall contain:

(a) particulars of the company's incorporation;

(b) a description of the company's business including a statement about the countries in which it carries on business;

(c) if the company is a foreign company, particulars of the matters contained in section 91(d) of the Law;

(d) a concise statement of the grounds upon which the appointment of the restructuring officer is sought;

(e) the name and address of the person or persons whom the petitioner nominates for appointment as restructuring officer; and

(f) a statement that the company acting either by the directors or the restructuring officer intends to present a compromise or arrangement to its creditors (or classes thereof) either pursuant to the Law, the law of a foreign country or by way of a consensual restructuring.

(2) The company's petition shall be supported by an affidavit sworn by or on the authority of the company's board of directors containing:

(a) confirmation that the statements in the petition are true to the best of the deponent's knowledge, information and belief;

(b) a statement that, having made due enquiry and taken appropriate advice, the company's board of directors believes that the company is or is likely to become unable to pay its debts within the meaning of section 93 of the Law and the reasons for their stated belief;

(c) a statement of the company's financial position, specifying to the best of the directors' belief details of the company's assets and liabilities, including contingent and prospective liabilities and an explanation of how the company will be funded in the event and during the period of the restructuring officer's appointment;

(d) details of the security, if any, held by the creditors of the company; and

(e) a statement of the reasons why the company's directors believe that the appointment of a restructuring officer and the moratorium would be in the best interests of the company and, in appropriate circumstances, its creditors (or classes thereof).

(3) The company's petition shall also be supported by an affidavit sworn by the person or persons nominated for the appointment as restructuring officer and containing the matters specified in Order 3, rule 4 (save that "restructuring officer" shall be substituted for "official liquidator" and the reference to the independence requirements in Regulation 6 shall be read as a reference to the independence requirements as set out in Order 1A, rule 10).

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 22 of 128

Notice of Appearance (O.1A, r.3)

3. (1) Every person who intends to appear and be heard on the hearing of a petition for the appointment of a restructuring officer shall give 3 days' notice of that person's intention in accordance with the requirements of this Rule.

(2) The notice shall be in CWR Form No 4A and shall specify:

(a) the name, address and other contact details of the person giving notice and that person's attorneys;

(b) whether that person intends to support or oppose the appointment of a restructuring officer;

(c) if the party is a creditor, the amount and nature of that person's debt;

(d) if the party is a contributory, the amount of shares held in the company; and

(e) in the event that a restructuring officer is to be appointed, whether that person intends to support or oppose the appointment as restructuring officer of the person(s) nominated by the petitioner.

(3) If a party intends to oppose the appointment of the petitioner's nominee, that party must:

(a) nominate an alternative qualified insolvency practitioner who is willing to act as restructuring officer if so appointed by the Court;

(b) file a supporting affidavit in accordance with Order 3, rule 4 (save that "restructuring officer" shall be substituted for "official liquidator" and the reference to the independence requirements in Regulation 6 shall be read as a reference to the independence requirements as set out in Order 1A, rule 10);

(c) serve that party's notice of appearance and supporting affidavit upon:

(i) the company;

(ii) the petitioner's attorneys; and

(iii) in the event that the company is carrying on a regulated business, the Authority, not less than 3 days before the hearing date.

(4) Where the Authority has given notice of appearance under this Rule, this notice shall specify:

(a) what, if any, regulatory action has been taken by the Authority against the company;

(b) whether it supports or opposes the petition; and

(c) in the event that a restructuring officer is to be appointed, whether it intends to support or oppose the appointment as restructuring officer of the person(s) nominated by the petitioner.

Application for the Appointment of an Interim Restructuring Officer by Summons (O.1A, r.4)

4. (1) An application by the company for the appointment of an interim restructuring officer pursuant to section 91C of the Law shall be made by summons. Every summons shall be in the form of CWR Form No 2B.

(2) The summons shall be supported by an affidavit sworn by or on the authority of the company's board of directors containing a statement of the reasons why the board of directors believes that the appointment of an interim restructuring officer on an *ex parte* basis pending the hearing of the petition is in the best interests of the company and, in appropriate circumstances, its creditors (or classes thereof).

Concurrent Petitions (O.1A, r.5)

5. (1) An application for leave to present a winding up petition in respect of a company to which section 91G of the Law applies shall be made by summons and heard by the judge assigned to the proceedings commenced under section 91B of the Law.

(2) If leave is granted to present a winding up petition pursuant to section 91G of the Law, the winding up petition will be assigned to the same judge assigned to the proceedings commenced under section 91B of the Law.

(3) In circumstances where leave to present a winding up petition has been granted pursuant to section 91G of the Law and the petition for the appointment of a restructuring officer has not been heard, the Court may hear the winding up petition and the petition for the appointment of a restructuring officer at the same time.

(4) In circumstances other than those specified in Order 1A, rule 5(3), the Registrar shall fix a date for the hearing of the winding up petition in consultation with the judge assigned to the proceedings commenced under section 91B of the Law.

(5) Where a petition for the appointment of a restructuring officer has been presented and a restructuring officer (or an interim restructuring officer) has not been appointed under section 91B or 91C of the Law, the company shall give notice to the company's creditors (including any contingent or prospective creditors), contributories and, where the company is carrying on a regulated business, the Authority, that a winding up petition has been presented (subject to any directions made by the Court), in whatever manner appears to the directors to be most expedient for the purpose of bringing the petition to the notice of such parties.

(6) In circumstances other than those specified in Order 1A, rule 5(5), the restructuring officer (or interim restructuring officer) as applicable, shall give notice to the company's creditors (including any contingent or prospective creditors), contributories and, where the company is carrying on a regulated

business, the Authority, that a winding up petition has been presented (subject to any directions made by the Court), in whatever manner appears to the restructuring officer to be most expedient for the purpose of bringing the petition to the notice of such parties.

(7) In circumstances where a petition for the appointment of a restructuring officer has been presented or a restructuring officer (or an interim restructuring officer) has been appointed pursuant to section 91B or 91C of the Law, the Court may give directions as to the manner in which the winding up petition is to be advertised or dispense with the requirement to advertise the winding up petition.

Order for the Appointment of a Restructuring Officer (O.1A, r.6)

6. (1) Every order for the appointment of a restructuring officer made on the application of the company pursuant to section 91B of the Law shall be in CWR Form No 8A.

(2) The order shall state:

(a) the full name, address and contact details of the restructuring officer;

(b) the powers and functions of the restructuring officer; and

(c) the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors in relation to the exercise of its powers.

(3) The Court may also make orders and directions in respect of the following matters:

(a) the preparation by the restructuring officer of reports about the financial condition of the company and such other subjects as the Court thinks fit and the service or publication of such reports;

(b) the entry into an international protocol with any foreign officeholder;

(c) the convening of meetings of the company's creditors and members;

(d) the preparation of a compromise or arrangement in respect of the company's indebtedness in accordance with section 91I of the Law or any other proposal in respect of the company's indebtedness in accordance with section 91B(1)(b) of the Law;

(e) the preparation of a compromise or arrangement in accordance with section 86 of the Law;

(f) the validation of dispositions made by or to be made by the company;

(g) setting a date for a further hearing at which the restructuring officer will update the Court and allow the Court to assess the progress made in formulating a compromise or arrangement;

(h) that the remuneration and expenses of a restructuring officer be paid out of the assets of the company in any event;

(i) provision for the payment of liabilities incurred and falling due during the period in which the restructuring officer is in office; and

(j) such other matters as the Court thinks fit.

(4) This Rule applies to the appointment of an interim restructuring officer pursuant to section 91C of the Law and every order for the appointment of an interim restructuring officer shall be in CWR Form No 8B.

Filing, Service and Registration of Order (O.1A, r.7)

7. (1) A restructuring officer (or interim restructuring officer) shall register the order with the Registrar of Companies within 7 business days after the order is made.

(2) A restructuring officer shall send notice of the order to the Government Information Services for publication in the next edition of the Gazette within 7 business days after the order is made.

(3) A restructuring officer shall give notice of that restructuring officer's appointment to the company's creditors, (including any contingent or prospective creditors), contributories and, where the company is carrying on a regulated business, the Authority, as directed by the Court.

(4) A restructuring officer shall provide a copy of the order, upon request, to any person who is a creditor (including any contingent or prospective creditor or creditors) or contributory of the company or, in respect of a person claiming to be a creditor (whether contingent, prospective or otherwise), who provides reasonable evidence that that person is or may be a creditor of the company.

Obligation to Report to Creditors, Contributories and the Authority (O.1A, r.8)

8. (1) Unless the Court orders otherwise, the restructuring officer shall send a report to every creditor (including any contingent or prospective creditor) and contributory of the company of whose address the restructuring is aware and, in respect of a company carrying on a regulated business, the Authority, within 28 days of that restructuring officer's appointment.

(2) The report must (subject to any order of the Court to the contrary, including an order permitting the restructuring officer to refrain from disclosing confidential information on the basis that such disclosure could be damaging to the company or be in breach of confidentiality obligations binding on the company or the restructuring officer) include details of:

(a) the steps taken in the restructuring and the further steps intended to be taken in the restructuring generally;

(b) the financial position of the company at the latest practicable date;

(c) the work done by or on behalf of the restructuring officer and the amount of remuneration claimed by that restructuring officer;

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:34 Exhibit C
Case 1:24-cv-00495-UNA Document 1-2 Filed 05/13/24 Page 131 of 328 PageID #:
Winding up rules 2023 Consolidation Pg 26 of 128

(d) such other information which is required in order to provide the contributories and creditors (and, where the company is carrying on a regulated business, the Authority)with a proper understanding of the company's affairs, financial position and proposed restructuring; and

(e) such other matters as the Court may direct.

Variation or Discharge of Order (O.1A, r.9)

9. (1) An application for the variation or discharge of the order appointing a restructuring officer pursuant to section 91E of the Law shall be made by summons in CWR Form No 16B, supported by an affidavit setting out the grounds on which the application is made and the evidence in support, and shall be served on the company and the restructuring officer.

(2) The restructuring officer shall give notice of an application under this Rule to the company's creditors (including any contingent or prospective creditors) and contributories (subject to any directions made by the Court), in whatever manner appears to the restructuring officer to be most expedient for the purpose of bringing the application to the notice of such creditors and contributories.

(3) Where the company in respect of which the restructuring officer has been appointed is carrying on a regulated business, the restructuring officer shall give notice of an application under this Rule to the Authority by delivering it to the Authority immediately upon it coming to the restructuring officer's attention.

(4) An order under this Rule may make provision for the costs, expenses and remuneration of the restructuring officer and the liabilities of the company incurred between the date of the appointment of the restructuring officer and discharge or variation of the order.

(5) An order under this Rule shall be filed, served and registered in accordance with Rule 7 of this Order.

Application of the *Insolvency Practitioners' Regulations (as amended and revised)* and Independence (O.1A, r.10)

10. (1) Subject to section 91D of the Law and unless the context otherwise requires or the Court orders otherwise, the provisions of the *Insolvency Practitioners' Regulations (as amended and revised)* shall apply *mutatis mutandis* to restructuring officers (save that the Independence Requirement in Regulation 6 shall not apply, Regulations 12 and 13 shall not apply and "restructuring officer" shall be substituted for "official liquidator").

(2) The remuneration of a restructuring officer shall be approved on an application to the Court by the restructuring officer for approval of the restructuring officer’s remuneration.

(3) An application by a restructuring officer for approval of the restructuring officer’s remuneration shall be made by summons in CWR Form No 16A and

be supported by an affidavit setting out the grounds in support of the restructuring officer's remuneration. The application may be made *ex parte* and determined on paper but the Court may order that the application be served on creditors, including prospective and contingent creditors, and/or on members in such manner as the Court thinks fit.

(4) Where the remuneration of a restructuring officer has been approved by creditors and/or members by approval of the compromise or arrangement, there is a rebuttable presumption that the remuneration of the restructuring officer is fair and reasonable.

(5) A qualified insolvency practitioner (as defined in the *Insolvency Practitioners' Regulations (as amended and revised)*) shall not be appointed by the Court as a restructuring officer unless that person can properly be regarded as independent as regards the company.

(6) A qualified insolvency practitioner may be regarded as independent notwithstanding that that person (or the firm of which that person is a partner or employee, or the company of which that person is a director or employee) has previously provided advice to the company as financial advisor or otherwise. However, a qualified insolvency practitioner shall not be regarded as independent if, within a period of 3 years immediately preceding the petition to appoint a restructuring officer being filed with the Court, that person (or the firm of which that person is a partner or employee, or the company of which that person is a director or employee) has acted in relation to the company as its auditor.

(7) Where the Court orders that a company be wound up at any time after a petition to appoint a restructuring officer has been presented, a qualified insolvency practitioner may be regarded as independent to act as liquidator notwithstanding that that person (or the firm of which that person is a partner or employee, or the company of which that person is a director or employee) has previously been nominated or appointed as a restructuring officer.

Resignation of Restructuring Officers (O.1A, r.11)

11. (1) A restructuring officer who wishes to resign shall:

(a) prepare a report which contains the information set out in Order 1A, rule 8;

(b) give notice of resignation to the company's creditors (including any contingent and prospective creditors), contributories and, if the company is carrying on a regulated business, the Authority; and

(c) apply to the Court for an order that the restructuring officer be released from the performance of any further duties.

(2) An application to the Court under this Rule shall be served on:

(a) such creditors (including contingent and prospective creditors) and contributories as the Court thinks fit; and

(b) if the company is carrying out a regulated business, the Authority.

(3) It shall be the responsibility of the company to nominate a qualified insolvency practitioner whom the Court can appoint in succession to the resigning restructuring officer and every person so nominated shall swear an affidavit which complies with the requirements of Order 3, rule 4 (save that "restructuring officer" shall be substituted for "official liquidator" and the reference to the independence requirements in Regulation 6 shall be read as a reference to the independence requirements as set out in Order 1A, rule 10).

(4) If two or more qualified insolvency practitioners have been appointed as joint restructuring officers, provided that at least one qualified insolvency practitioner remains in office, one or more of them may resign by giving notice to the Court without the need to prepare any report (unless required to do so either by the Court or the continuing restructuring officer). The company may apply to the Court for the appointment of a successor.

(5) If a qualified insolvency practitioner has been appointed jointly with a foreign practitioner, the foreign practitioner may resign by giving notice to the Court without the need to prepare any report (unless required to do so either by the Court or the continuing restructuring officer). The company may apply to the Court for the appointment of a successor.

(6) If a restructuring officer, wishing to resign, is acting in the restructuring officer's capacity as a partner or employee of a firm, the Court may make an order that:

(a) the restructuring officer be released from the performance of any further duties; and

(b) another partner or employee of the same firm be appointed as successor restructuring officer,

without the need for any report to be prepared.

Death of Restructuring Officers (O.1A, r.12)

12. (1) Where a restructuring officer dies in office, it is the duty of that person's personal representative to give notice of the restructuring officer's death (including the date of death) to the company and the Court.

(2) Alternatively, if a restructuring officer was a partner or employee of a firm, the restructuring officer's firm may give notice of the restructuring officer's death.

(3) Following the death of a restructuring officer (where that person was acting as sole restructuring officer or jointly with a foreign practitioner), the company shall, within 7 days of the notification of the restructuring officer's death, apply to the Court for an order appointing a new restructuring officer, failing which

the firm of which the deceased restructuring officer was a partner or employee may apply to the Court for an order appointing a new restructuring officer.

(4) If the deceased restructuring officer was appointed jointly with a qualified insolvency practitioner, the survivor shall continue to act as sole restructuring officer unless and until the Court, on the company's application, appoints an additional restructuring officer.

Application for the Removal and Replacement of a Restructuring Officer (O.1A, r.13)

13. (1) An application for an order that a restructuring officer be removed and replaced pursuant to section 91F of the Law shall be made by summons in CWR Form No. 16C (referred to in this Rule as a "removal and replacement summons").

(2) A removal and replacement summons shall be served upon:

(a) the restructuring officer that it relates to;

(b) if it is not the applicant, the company; and

(c) such other creditors and contributories as the Court may direct.

(3) A removal and replacement summons shall be supported by an affidavit containing all the facts and matters relied upon.

(4) A removal and replacement summons must also nominate a qualified insolvency practitioner whom the Court can appoint in succession to the removed restructuring officer and every person so nominated must swear an affidavit which complies with the requirements of Order 3, rule 4 (save that "restructuring officer" shall be substituted for "official liquidator" and the reference to the independence requirements in Regulation 6 shall be read as a reference to the independence requirements as set out in Order 1A, rule 10).

(5) The restructuring officer and company shall be entitled to at least 14 days' notice of a removal and replacement summons.

(6) A restructuring officer who is replaced by order of the Court shall:

(a) forthwith deliver to the restructuring officer’s successor a copy of the restructuring officer’s files relating to the company's restructuring; and

(b) within 21 days prepare a report for delivery to the restructuring officer’s successor which contains the information set out in Order 1A, rule 8.

(7) An order under this Rule may make provision for the costs, expenses and remuneration of the restructuring officer and the liabilities of the company incurred between the date of the appointment of the restructuring officer and the date that the restructuring officer is replaced.

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 30 of 128

Restructuring Officer's Legal Counsel (O.1A, r.14)

14. Unless the context otherwise requires or the Court orders otherwise, the principles set out in Order 25 shall apply in respect of the restructuring officer's legal counsel.

International Protocols (O.1A, r.15)

15. (1) Unless the context otherwise requires, Order 21 applies to this Rule (save that "restructuring officer" shall be substituted for "official liquidator", "a company in respect of which a restructuring officer has been appointed" shall be substituted for "**a company in liquidation**" and "**a company in respect of which a restructuring officer has been appointed**" means a company to which a restructuring officer has been appointed pursuant to section 91B or section 91C of the Law).

(2) It shall be the duty of the restructuring officer to consider whether or not it is appropriate to enter into an international protocol with any foreign officeholder.

(3) The purpose of an international protocol is to promote an orderly restructuring of the company and to avoid duplication of work and conflict between the restructuring officer and the foreign officeholder.

(4) An international protocol agreed between the restructuring officer and a foreign officeholder shall take effect and become binding upon them only if and when it is approved by both the Court and the foreign court or authority.

General Provisions (O.1A, r.16)

16. (1) Every petition shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers.

(2) Every summons shall be heard in chambers unless:

(a) the Court directs that it should be advertised, in which case it must be heard in open court; or

(b) the Court directs that it should be heard in open court.

(3) A Court file shall be established in respect of each proceeding for the appointment of a restructuring officer in accordance with GCR Order 63, rule 2.

(4) The Registrar shall not permit the creation of more than one Court file (or the allocation of more than one cause number) in respect of a company the subject of a proceeding under section 91B of the Law.

(5) The Registrar shall not permit any Court file (and associated cause number) to relate to more than one company the subject of a proceeding under section 91B of the Law.

(6) Every order made in proceedings commenced under section 91B or 91C of the Law, whether in open Court or in chambers, shall be placed on the Register of

Judgments maintained by the Registrar under GCR Order 63, rule 7, and shall be open to public inspection upon payment of the prescribed fee.

(7) The Court may direct that the whole or part of any report, order, affidavit or other document (except the petition or restructuring order) which has been filed or is required to be filed pursuant to these Rules, shall be sealed and kept confidential for a specific period or until the happening of a specified event, on the same grounds as set out in Order 24, rule 6 of these Rules.

(8) The restructuring officer, any liquidator and any creditor or contributory may apply to the Court for a direction that a sealed document be unsealed on the same grounds as set out in Order 24, rule 6 of these Rules.

(9) Unless the Court orders otherwise, the costs incurred by a party in relation to:

(a) a petition to appoint restructuring officers pursuant to section 91B of the Law or an application to appoint an interim restructuring officer pursuant to section 91C of the Law;

(b) an application to vary or discharge the order appointing a restructuring officer pursuant to section 91E of the Law; and/or

(c) an application for the removal and replacement of a restructuring officer pursuant to section 91F of the Law,

shall be paid out of the assets of the company to which the petition or application relates

Schemes of Arrangement under section 91I of the Law (O.1A, r.17)

17. (1) GCR O.102, r.20 and any practice directions issued in relation to GCR O.102, r.20 shall apply to a compromise or arrangement proposed pursuant to section 91I of the Law.

Definitions (O.1A, r.18)

18. (1) For the purpose of Order 1A "**company**" means any:

(a) company liable to be wound up under section 91 of the Law; or

(b) other entity or partnership to which the provisions of Part V of the Law apply in respect of the entity's or partnership's winding up.

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:34 Exhibit C
Case 1:24-cv-00495-DLI Document 2-2 Filed 05/12/23 Page 139 of 328 PageID #:
Winding up rules 2023 Consolidation Pg 32 of 128

ORDER 2

STATUTORY DEMAND

Introduction (O. 2, r. 1)

1. (1) A demand for payment of a debt made by a creditor in accordance with section 93(a) of the Law is referred to in these Rules as a "**statutory demand**".

Form and Content of Statutory Demand (O. 2, r. 2)

2. (1) A statutory demand shall be in CWR Form No1.

(2) A statutory demand must be signed by —

(a) the creditor; or

(b) if the creditor is a firm, any partner of the firm; or

(c) if the creditor is a body corporate, any director or officer who is duly authorised to make the demand.

(3) A statutory demand must state the amount, the date on which the debt fell due, the currency of the debt and the consideration for it.

(4) If the amount claimed includes —

(a) any charge by way of interest not previously notified to the company as included in its liability; or

(b) any other charge accruing from time to time,

the statutory demand must state the grounds upon which the company is liable to pay such interest or charges and contain particulars of the way in which such interest or charges are calculated.

(5) A statutory demand must contain the creditor's address and, if it is signed by anyone other than the creditor themselves, the contact details of the partner, director or officer who signed it on behalf of the creditor.

(6) A statutory demand must include a statement that if payment is not made within 21 days of the date upon which it was served on the company, the company will be deemed to be insolvent and a winding up petition may be presented against the company in accordance with section 92(d) of the Law.

(7) A statutory demand must contain information about ways in which the company may make payment, including details of a bank account to which the amount owing may be wire transferred.

Service of Statutory Demand (O. 2, r. 3)

3. (1) The original hard copy of a statutory demand must be delivered by hand to the company's registered office.

(2) Transmission of a copy by facsimile or e-mail shall not, by itself, be sufficient to constitute good service for the purposes of the Law.

(3) There is no requirement that a copy of a statutory demand must be drawn to the attention of the company's directors by the creditor.

(4) A statutory demand shall not be invalidated by reason only of the fact that a company's professional service providers have failed to draw it to the attention of the directors or failed to take any other appropriate steps on behalf of the company in response to the receipt of the statutory demand.

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Case 1:24-cv-00495-DLI Document 1-2 Filed 02/12/24 Page 141 of 328 PageID #:
Winding up rules 2023 Consolidation Pg 34 of 128

ORDER 3

WINDING-UP PETITIONS AND ORDERS

PART I: GENERAL PROVISIONS

Presentation and Filing of Petition (O. 3, r. 1)

1. (1) A winding up petition shall be presented by filing it in Court in accordance with GCR Order 9.

(2) The petitioner shall pay the filing fee prescribed in the First Schedule of the Court Fees Rules.

Form and Content of Petition (O. 3, r. 2)

2. (1) Subject to any directions given under Rule 12(1)(a) and (b), every winding up petition shall be in CWR Form No 2.

(2) Every winding up petition shall comply with the requirements of GCR Order 9 and shall contain —

(a) particulars of the company's incorporation;

(b) a description of the company's business, including a statement about the countries in which it carries on its business;

(c) if the company is a foreign company, particulars of the matters contained in section 91(d) of the Law;

(d) a concise statement of the grounds upon which the winding up order is sought; and

(e) the name and address of the qualified insolvency practitioner (and any foreign practitioner) whom the petitioner nominates for appointment as official liquidator.

(3) A winding up petition that has been served may be amended only with the leave of the Court.

(4) If the Court orders a contributory-petitioner to file and serve points of claim then the points of claim and every subsequent pleading shall comply with the requirements of GCR Order 18, rules 4 to 18.

(5) GCR Order 18, rule 19(1) and (2) shall apply to any pleading and to any petition as though it were a pleading.

Verification of Petition (O. 3, r. 3)

3. (1) The petition shall be verified by an affidavit that the statements in the petition are true, or are true to the best of the deponent's knowledge, information and belief.

(2) A creditors' petition in respect of debts due to two or more different creditors must be separately verified by or on behalf of each creditor.

(3) The verifying affidavit shall be sworn by —

(a) the petitioner; or

(b) a director, officer or agent of the petitioner who has been concerned in and has personal knowledge of the matters giving rise to the petition.

Nominated Official Liquidator's Consent to Act (O. 3, r. 4)

4. (1) Every petition shall be supported by an affidavit sworn by the person or persons nominated for appointment as official liquidator stating that —

(a) that person is a qualified insolvency practitioner and meets the residency requirement contained in Regulation 5;

(b) having made due enquiry, that person believes that that person and that person's firm meet the independence requirement contained in Regulation 6;

(c) that person and/or that person's firm are in compliance with the insurance requirement contained in Regulation 7; and

(d) that person is willing to act as official liquidator if so appointed by the Court.

(2) If the petition seeks an order for the appointment of a qualified insolvency practitioner jointly with a foreign practitioner, it shall be supported by an affidavit sworn by the foreign practitioner stating —

(a) that person's professional qualifications;

(b) the country in which that person is qualified to perform functions equivalent to those performed by official liquidators under the Law or by trustees under the *Bankruptcy Act (as amended and revised)*;

(c) that person's professional experience;

(d) that person will have the benefit of professional indemnity insurance in respect of that person's acts and omissions done in that person's capacity as an official liquidator of the company meeting the requirements of Regulation 7;

(e) if that person has been appointed by a foreign court or authority as a liquidator, trustee, receiver or administrator of the company or a related party of the company, full particulars of such appointment; and

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:34 Exhibit C
Case 1:24-cv-00495-DLI Document 1-2 Filed 05/12/23 Page 141 of 338 PageID #:
Winding up rules 2023 Consolidation Pg 36 of 128

(f) that, having made due enquiry, that person and that person's firm meet independence requirement contained in Regulation 6.

PART II: CREDITOR'S PETITION

Presentation and Service of Creditor's Petition (O. 3, r. 5)

5. (1) Prior to presenting a creditor's petition, the petitioner's attorney must apply in writing (by letter or e-mail) to the Registrar to have the proceeding assigned to a Judge and to fix a hearing date.

(2) A creditor's petition shall not be filed unless and until the proceeding has been assigned to a Judge and a hearing date has been fixed and endorsed on the petition or stated in a notice of hearing filed simultaneously with the petition.

(3) Every creditor's petition, together with the verifying and supporting affidavits and notice of hearing (if the hearing date is not endorsed upon the petition itself), shall be served upon the company by delivering them to the company's registered office immediately after the petition has been presented.

(4) In the event that the company is carrying on a regulated business, copies of the petition and affidavits shall also be served upon the Authority immediately after the petition has been presented.

(5) An affidavit of service shall be filed within 7 days of the presentation of every creditor's petition.

Advertisement of Creditor's Petition (O. 3, r. 6)

6. (1) Unless the Court otherwise directs, every creditor's petition shall be advertised once in a newspaper having a circulation in the Islands.

(2) In addition, unless the Court otherwise directs, if the company is carrying on business outside the Islands, every creditor's petition shall be advertised once in a newspaper having a circulation in the country or countries in which it is most likely to come to the attention of the company's creditors, in which case the advertisement must be published in the official language of such country.

(3) The advertisements shall be made to appear not less than 7 business days after service of the petition upon the company and not less than 7 business days before the hearing date.

(4) An advertisement published in accordance with this Rule shall be in CWR Form No 3 and shall contain —

(a) the title of the petition, including the name of the company;

(b) the registered office of the company;

(c) the name, address and other contact details of the petitioner and the petitioner's attorneys;

Case 23-12044-BLS Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:44 Exhibit C
Page 144 of 338 PageID #:
Winding up rules 2023 Consolidation Pg 37 of 128

(d) the name and address of the qualified insolvency practitioner(s) and any foreign practitioner nominated for appointment as official liquidators;

(e) the hearing date;

(f) a statement that copies of the petition and affidavits may be obtained, free of charge, from the petitioner's attorneys; and

(g) a statement that any creditor intending to appear and be heard on the petition shall give at least 3 days' notice to the petitioner's attorneys.

Leave for Petition to be Withdrawn (O. 3, r. 7)

7. (1) An application for leave to withdraw a creditor's petition may be made by *ex parte* summons.

(2) The Court shall grant leave for a creditor's petition to be withdrawn on such terms as have been agreed between the petitioner and the company if it is satisfied that —

(a) the petition has not been advertised;

(b) no notice of intention to appear and be heard on the petition (whether in support or opposition) has been received from any creditor or, where the company is licensed to carry on a regulated business, the Authority; and

(c) the company consents to an order being made under this Rule.

(3) If a creditor's petition has been advertised, any application for leave to withdraw the petition must be made at the advertised hearing and in any such case the Court will consider making an order for substitution in accordance with Rule 10.

Notice of Appearance (O. 3, r. 8)

8. (1) Every person who intends to appear and be heard on the hearing of a petition shall give at least 3 days' notice of that person’s intention to the petitioner's attorneys.

(2) The notice shall be in CWR Form No 4 and shall specify —

(a) the name, address and other contact details of the person giving notice and that person’s attorneys;

(b) whether that person intends to support or oppose the petition;

(c) the amount and nature of that person’s debt; and

(d) in the event that a winding up order is made, whether that person intends to support or oppose the appointment as official liquidator of the person(s) nominated by the petitioner.

(3) If a creditor intends to oppose the appointment of the petitioner's nominee, that creditor must —

(a) nominate an alternative qualified insolvency practitioner who is willing to act as official liquidator if so appointed by the Court;

(b) file a supporting affidavit in accordance with Rule 4; and

(c) serve that creditor's notice of appearance and supporting affidavit upon —

(i) the company;

(ii) the petitioner's attorneys; and

(iii) in the event that the company is carrying on a regulated business, the Authority,

not less than 3 days before the hearing date.

(4) If a creditor's petition is presented against a company which is licensed to carry on a regulated business, the Authority may appear and be heard provided that it has given at least 3 days' notice of its intention to appear to the company and to the petitioner's attorneys.

(5) The Authority's notice of appearance under this Rule shall specify –

(a) what, if any, regulatory action has been taken by the Authority against the company;

(b) whether it supports or opposes the petition;

(c) in the event that a winding up order is made, whether it intends to support or oppose the appointment as official liquidator of the person(s) nominated by the petitioner.

Evidence in Opposition to Petition (O. 3, r. 9)

9. (1) If the company intends to oppose the petition, its affidavit in opposition must be filed and served upon the petitioner within 14 days from the date upon which the petition was served upon the company.

(2) The petitioner may serve a notice, at least 3 days prior to the hearing date, requiring that any deponent attend the hearing for cross-examination.

Substitution of Petitioner (O. 3, r. 10)

10. (1) This Rule applies where a creditor petitions and is subsequently found not to have been entitled to do so or where the petitioner —

(a) fails to advertise that person's petition;

(b) consents to that person's petition being withdrawn;

(c) fails to appear on the hearing of that person's petition;

(d) allows that person's petition to be adjourned or dismissed; or

(e) appears, but does not apply for an order in terms of the prayer of that person's petition.

(2) The Court may, on such terms as it thinks just, substitute as petitioner any creditor who in its opinion would have a right to present a petition and who is desirous of doing so.

(3) Where the Court exercises its discretion to substitute a creditor as petitioner, the petition of the substituted petitioner will be deemed to have been filed on the date of the original petition.

PART III: CONTRIBUTORY'S PETITION

Presentation and Service of a Contributory's Petition (O. 3, r. 11)

11. (1) Upon the presentation of a contributory's petition, the petitioner must at the same time issue a summons for directions in respect of the matters contained in Rule 12.

(2) Prior to presenting a contributory's petition and issuing the summons for directions in respect of it, the petitioner's attorney must apply in writing (by letter or e-mail) to the Registrar to have the proceeding assigned to a Judge and to fix a date for hearing the summons for directions.

(3) Every contributory's petition and the summons for directions relating to it shall be served immediately after having been presented/issued upon –

(a) the company, by delivering it to the company's registered office; and

(b) every member of the company whom the petitioner has named or intends to name as a respondent to the petition, who may be served out of the jurisdiction without the leave of the Court.

Summons for Directions (O. 3, r. 12)

12. (1) Upon hearing the summons for directions, the Court shall give such directions as it thinks appropriate in respect of the followings matters —

(a) whether or not the company is properly able to participate in the proceeding or should be treated merely as the subject-matter of the proceeding;

(b) whether the proceeding should be treated as a proceeding against the company or as an inter partes proceeding between one or more members of the company as petitioners and the other member or members of the company as respondents;

(c) service of the petition upon persons other than the company (as may be appropriate having regard to the directions give under paragraphs (a) and (b) of this Rule);

(d) whether, and if so by what means, the petition is to be advertised;

(e) whether the petitioner should serve any further particulars of that person's claim;

(f) service of a defence by the company or the respondents (as may be appropriate in the light of the directions given under paragraphs (a) and (b) of this Rule);

(g) the manner in which evidence is to be given;

(h) if evidence is directed to be given by affidavit, directions relating to cross-examination of the deponents;

(i) discovery and inspection of documents;

(j) oral discovery; and

(k) such other procedural matters as the Court thinks fit.

(2) A summons for directions under this Rule shall be in CWR Form No. 5.

Hearing of Contributory's Petition (O. 3, r. 13)

13. (1) An order fixing a date for the trial of a contributory's petition may be made upon the hearing of the summons for directions.

(2) If it is not appropriate for the Court to fix a trial date upon hearing the summons for directions, the petitioner shall apply subsequently to the Registrar.

PART IV: AUTHORITY'S PETITION

Service of Authority's Petition (O. 3, r. 14)

14. (1) Prior to presenting a petition, the Authority's attorney must apply in writing (by letter or e-mail) to the Registrar to have the proceeding assigned to a Judge and to fix a date for hearing the summons for directions.

(2) Every petition presented by the Authority, together with the verifying and supporting affidavits and summons for directions, shall be served upon the company by delivering them to its registered office immediately after the petition has been presented.

(3) An affidavit of service shall be filed within 7 days of the presentation of every Authority's petition.

Summons for Directions (O. 3, r. 15)

15. (1) Upon the presentation of a petition by the Authority, the Authority must at the same time issue a summons for directions in respect of the matters contained in this Rule.

(2) Upon hearing the summons for directions, the Court shall either –

(a) make a winding up order, if the Court is satisfied that the company consents or does not object to an order being made; or

(b) fix a hearing date and make such directions as the Court thinks appropriate in respect of the following matters —

(i) whether the petition should be served upon the company's members, directors or professional service providers;

(ii) the manner in which evidence is to be given;

(iii) if evidence is to be given by affidavit, directions relating to cross-examination of the deponents;

(iv) if the Authority has appointed a controller, whether such controller should produce any documents belonging to the company or attend for cross-examination on that controller's report or prepare any further report; and

(v) such other procedural matters as the Court thinks fit.

(3) A petition presented by the Authority shall not be advertised unless the Court otherwise directs.

Hearing of Authority's Petition (O. 3, r. 16)

16. (1) Unless a winding up order is made pursuant to Rule 15(2)(a), the hearing of every petition presented by the Authority shall take place in open court.

(2) Any member, director or professional service provider of the company may appear and be heard on the petition, whether or not the Court has directed that such person be served.

(3) Every member, director or professional service provider of the company who intends to appear and be heard on the hearing of the petition shall give 3 days' notice of that person's intention to the Authority's attorneys.

(4) No other person may appear and be heard without the leave of the Court.

PART V: COMPANY'S PETITION

Presentation and Service of Company's Petition (O. 3, r. 17)

17. (1) Prior to presenting a company's petition, the company's attorney must apply in writing (by letter or e-mail) to the Registrar to have the proceeding assigned to a Judge and to fix a hearing date.

(2) In the event that the company is carrying on a regulated business, copies of the petition and affidavits shall be served upon the Authority immediately after the petition has been presented.

(3) Where the company is carrying on regulated business, an affidavit of service shall be filed within 7 days of the presentation of the company's petition.

Advertisement of Company's Petition (O. 3, r. 18)

18. (1) Unless the Court otherwise directs, every company's petition shall be advertised once in a newspaper having a circulation in the Islands.

(2) In addition, unless the Court otherwise directs, if the company is carrying on business outside the Islands, every company's petition shall be advertised once in a newspaper having a circulation in the country or countries in which it is most likely to come to the attention of the company's creditors, in which case the advertisement must be published in the official language of such country.

(3) The advertisements shall be made to appear not less than 7 business days before the hearing date.

(4) An advertisement published in accordance with this Rule shall be in CWR Form No 3A and shall contain —

(a) the title of the petition, including the name of the company;

(b) the registered office and other contact details of the company;

(c) the name, address and other contact details of the company's attorneys;

(d) the name and address of the qualified insolvency practitioner(s) and any foreign practitioner nominated for appointment as official liquidators;

(e) the hearing date;

(f) a statement that copies of the petition and affidavits may be obtained, free of charge, from the company's attorneys; and

(g) a statement that any creditor or shareholder intending to appear and be heard on the petition shall give at least 3 days' notice to the company's attorneys.

Leave for Petition to be Withdrawn (O. 3, r. 19)

19. (1) An application for leave to withdraw a company's petition may be made by *ex parte* summons.

(2) The Court shall grant leave for a company's petition to be withdrawn if it is satisfied that —

(a) the petition has not been advertised; and

(b) no notice of intention to appear and be heard on the petition (whether in support or opposition) has been received from any creditor or, where the company is licensed to carry on a regulated business, the Authority.

(3) If a company's petition has been advertised, any application for leave to withdraw the petition must be made at the advertised hearing and in any such

Case 23-12044-BLS Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:04 Exhibit C
Winding up rules 2023 Consolidation Pg 43 of 128

case the Court will consider making an order for substitution in accordance with Rule 21.

Notice of Appearance (O. 3, r. 20)

20. (1) Every person who intends to appear and be heard on the hearing of a petition shall give at least 3 days' notice of that person's intention to the company's attorneys.

(2) The notice shall be in CWR Form No 4 and shall specify —

(a) the name, address and other contact details of the person giving notice and that person's attorneys;

(b) whether that person intends to support or oppose the petition;

(c) the amount and nature of that person's debt; and

(d) in the event that a winding up order is made, whether that person intends to support or oppose the appointment as official liquidator of the person(s) nominated by the petitioner.

(3) If a creditor intends to oppose the appointment of the company's nominee, that person must —

(a) nominate an alternative qualified insolvency practitioner who is willing to act as official liquidator if so appointed by the Court;

(b) file a supporting affidavit in accordance with Rule 4; and

(c) serve that person's notice of appearance and supporting affidavit upon —

(i) the company;

(ii) the company's attorneys; and

(iii) in the event that the company is carrying on a regulated business, the Authority,

not less than 3 days before the hearing date.

(4) If the company in respect of which the petition is presented is licensed to carry on a regulated business, the Authority may appear and be heard provided that it has given at least 3 days' notice of its intention to appear to the company and to the company's attorneys.

(5) The Authority's notice of appearance under this Rule shall specify —

(a) what, if any, regulatory action has been taken by the Authority against the company;

(b) whether it supports or opposes the petition;

(c) in the event that a winding up order is made, whether it intends to support or oppose the appointment as official liquidator of the person(s) nominated by the petitioner.

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Case 1:24-cv-00495-DLI Document 2-2 Filed 05/12/23 Page 151 of 338 PageID #:
Winding up rules 2023 Consolidation Pg 44 of 128

(6) If the Authority intends to oppose the appointment of the company's nominee, it must —

(a) nominate an alternative qualified insolvency practitioner who is willing to act as official liquidator if so appointed by the Court;

(b) file a supporting affidavit in accordance with Rule 4; and

(c) serve its notice of appearance and supporting affidavit upon —

(i) the company; and

(ii) the company's attorneys,

not less than 3 days before the hearing date.

Substitution of Petitioner (O. 3, r. 21)

21. (1) This Rule applies where a company petitions and is subsequently found not to have been entitled to do so or where the company —

(a) fails to advertise its petition;

(b) withdraws its petition;

(c) fails to appear on the hearing of its petition;

(d) seeks to adjourn its petition or seeks that it be dismissed; or

(e) appears, but does not apply for an order in terms of the prayer of its petition.

(2) The Court may, on such terms as it thinks just, substitute as petitioner any creditor, contributory or the Authority who in its opinion would have a right to present a petition and who is desirous of doing so.

(3) Where the Court exercises its discretion to substitute the company as petitioner, the petition of the substituted petitioner will be deemed to have been filed on the date of the original petition.

Form, Content and Effect of Winding Up Orders (O. 3, r. 22)

22. (1) Every winding up order shall be in CWR Form No 6.

(2) Every winding up order shall state the full name, address and contact details of the official liquidator.

(3) Every winding up order shall state which of the powers contained in Part I of Schedule 3 of the Law (if any) are given to the official liquidator.

(4) On the appointment of an official liquidator all the powers of the directors cease, save that directors retain residual powers to allow them to initiate an appeal against the winding-up order.

Filing, Service and Registration of Winding Up Orders (O. 3, r. 23)

23. (1) Every winding up order shall be drawn up and filed in accordance with GCR Order 42, rule 5.

(2) The petitioner shall be responsible for ensuring that the winding up order is drawn up and filed immediately after the hearing.

(3) The petitioner shall serve copies of the winding up order upon —

(a) the company at its registered office;

(b) every person who appeared and was heard at the hearing;

(c) the official liquidator; and

(d) the Authority, if the company is or was licensed to carry on a regulated business,

within 2 business days after the order is made.

(4) The official liquidator shall within 7 business days after the order is made —

(a) file the order with the Registrar of Companies;

(b) send notice of the order to the Government Information Service for publication in the next edition of the Gazette; and

(c) send copies of the order to every person who appears to that official liquidator to have been a director or professional service provider of the company at the time the winding up petition was presented.

(5) When a winding up order is made in respect of a foreign company, the official liquidator shall also send copies of the order to —

(a) the foreign authority responsible for its incorporation;

(b) any foreign court or authority which has made an order that the company or any branch thereof be reorganised or liquidated or wound up; and

(c) any person or authority who is performing functions in respect of the company in any foreign country equivalent to those performed by an official liquidator.

ORDER 4

APPLICATION FOR APPOINTMENT OF PROVISIONAL LIQUIDATOR

PART I: APPLICATION BY CREDITOR OR CONTRIBUTORY

Application by Summons (O.4, r.1)

1. (1) An application by a creditor or contributory for the appointment of a provisional liquidator on one or more of the grounds contained in section 104(2) of the Act shall be made by summons on notice to the company.

(2) The company shall be entitled to at least 4 clear days' notice of the application unless the Court is satisfied that there is some exceptional circumstance which justifies the application being made *ex parte*.

(3) An application under this Rule may be heard in chambers.

Supporting Affidavits (O.4, r.2)

2. (1) The application shall be supported by an affidavit or affidavits containing all the evidence upon which the applicant relies, to which all the documents intended to be relied upon must be exhibited.

(2) If the applicant seeks an order that someone other than the person nominated in the petition as official liquidator be appointed as provisional liquidator,the applicant must file an affidavit complying with the requirements of Order 3, rule 4.

Security (O.4, r.3)

3. (1) The applicant shall give an undertaking to the Court to pay —

(a) any damage suffered by the company by reason of the appointment of the provisional liquidator; and

(b) the remuneration and expenses of the provisional liquidator, in the event that the winding up petition is ultimately withdrawn or dismissed.

(2) The Court may require the applicant to give security for the applicant’s undertaking in such manner as the Court thinks fit.

Order for the Appointment of Provisional Liquidator (O.4, r.4)

4. (1) Every order for the appointment of a provisional liquidator made on the application of a creditor or contributory pursuant to section 104(2) of the Act shall be in CWR Form No 7.

(2) The order shall state the full name, address and contact details of the provisional liquidator.

(3) The order shall specify the powers conferred upon the provisional liquidator, any limitations upon the specified powers and the powers, if any, remaining with the company's directors.

(4) Every order for the appointment of a provisional liquidator shall be filed, served and registered in accordance with the requirements of Order 3, rule 23 (and references therein to "the petitioner" and "the official liquidator" shall be read as references to the applicant and the provisional liquidator respectively).

Variation or Discharge of Order (O.4, r.5)

5. (1) An order for the appointment of a provisional liquidator may be varied or discharged upon the application of —

(a) the person on whose application the order was made;

(b) the petitioner, if the petitioner was not the person on whose application the order was made;

(c) in the case of a creditor's petition, any other creditor;

(d) in the case of a contributory's petition, any other contributory; or

(e) the company, acting by its directors.

(2) A provisional liquidator shall be entitled to apply to the Court for directions, including a direction which constitutes a variation of the order by which the provisional liquidator was appointed.

(3) An application under this Rule shall be made by summons, supported by an affidavit, and shall be served upon the provisional liquidator and every person who was entitled to be served with the original order in accordance with Rule 4(4).

(4) An order under this Rule shall be filed, served and registered in accordance with Rule 4(4).

PART II: APPLICATION BY THE COMPANY

Application by Summons (O.4, r.6)

6. (1) Whenever a winding up petition is presented, the company may apply by summons for an order for the appointment of a provisional liquidator pursuant to section 104(3) of the Act.

(2) An application under this Rule may be made *ex parte*.

(3) The company's summons shall be supported by an affidavit sworn by or on the authority of the company's board of directors containing a statement of the

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:54 Exhibit C
Case 1:24-cv-00495-DLI Document 2-2 Filed 05/12/23 Page 154 of 328 PageID #:
Winding up rules 2023 Consolidation Pg 48 of 128

reasons why the company's board of directors believes that the appointment of a provisional liquidator would be in the best interests of the company.

(4) If the company seeks an order that someone other than the person nominated in the petition as official liquidator be appointed as provisional liquidator, the company must file an affidavit complying with the requirements of Order 3, rule 4.

Order for the Appointment of Provisional Liquidator (O.4, r.7)

7. (1) Every order for the appointment of a provisional liquidator made on the application of the company pursuant to section 104(3) of the Act shall be in CWR Form No 7A.

(2) The order shall state the full name, address and contact details of the provisional liquidator.

(3) The order shall specify the powers conferred upon the provisional liquidator, any limitations upon the specified powers and the powers, if any, remaining with the company's directors

Filing, Service and Registration of Order (O. 4, r. 8)

8. (1) The provisional liquidator shall register the order with the Registrar of Companies within 7 business days after the order is made.

(2) The provisional liquidator shall send notice of the order to the Government Information Services for publication in the next edition of the Gazette within 7 business days after the order is made.

(3) The provisional liquidator shall give notice of that provisional liquidator's appointment to the company's creditors (including any contingent or prospective creditors) and contributories as directed by the Court or in whatever manner appears to that provisional liquidator to be the most expedient.

(4) The provisional liquidator shall provide a copy of the order, upon request, to any person who is a creditor (including any contingent or prospective creditor or creditors) or contributory of the company or, in respect of a person claiming to be a creditor (whether contingent, prospective or otherwise), who provides reasonable evidence that that person is or may be a creditor or contributory of the company.

(5) Where the company to which a provisional liquidator has been appointed is carrying out a regulated business, the provisional liquidator shall give notice of the provisional liquidator's appointment to the Authority as directed by the Court.

Variation or Discharge of Order (O.4, r.9)

9. (1) An order for the appointment of a provisional liquidator may be varied or discharged upon the application of:

(a) the company acting by its directors;

(b) in the case of a creditor's petition, any other creditor;

(c) in the case of a contributory's petition, any other contributory; or

(d) where the company is carrying out regulated business, the Authority.

(2) A provisional liquidator shall be entitled to apply to the Court for directions, including a direction which constitutes a variation of the order by which the provisional liquidator was appointed.

(3) An application under this Rule shall be made by summons in CWR Form No. 16D, supported by an affidavit, and shall be served upon the provisional liquidator and every person who was entitled to be served with the original order in accordance with Order 4, rule 8.

(4) An order under this Rule shall be filed, served and registered in accordance with Order 4, rule 8.

.

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 50 of 128

ORDER 5

APPOINTMENT, RESIGNATION, DEATH AND REMOVAL OF OFFICIAL LIQUIDATORS

Introduction (O.5, r.1)

1. (1) A liquidator of a company appointed by the Court is referred to as an "official liquidator" and is treated as an officer of the court.

(2) The Court will not make a winding up order or a supervision order without at the same time making an order for the appointment of one or more qualified insolvency practitioners as official liquidator of the company.

(3) The Court may appoint a foreign practitioner and a qualified insolvency practitioner to act as joint official liquidators of a company, but a foreign practitioner cannot be appointed as sole official liquidator of a company.

(4) In this Order, references to "**official liquidator**" includes a foreign practitioner unless the context otherwise requires.

Order for Appointment of Official Liquidator (O.5, r.2)

2. (1) The Court will not appoint any person as official liquidator unless and until that person has sworn an affidavit which complies with the requirements Order 3, rule 4.

(2) An order for the appointment of an official liquidator shall not take effect unless and until the order has been drawn up and filed in accordance with GCR Order 42.

(3) An order for the appointment of an official liquidator must state –

(a) the full name of each liquidator;

(b) the full postal address and physical address of each liquidator; and

(c) all relevant contact details including telephone numbers and e-mail addresses.

Notice of Appointment to be Advertised (O.5, r.3)

3. (1) The official liquidator shall, within 28 days of the official liquidator's appointment, give notice of it to all the creditors and contributories of the company of whom the official liquidator is aware.

(2) Notice under this Rule shall be given —

(a) to creditors in whatever manner is considered by the official liquidator to be most effective and economic; and

(b) to contributories in whatever manner is authorised by the company's articles of association or considered by the official liquidator to be more effective and economic.

(3) Unless the Court otherwise directs, the official liquidator shall within 28 days of the official liquidator's appointment, publish notice of the official liquidator's appointment —

(a) in the Gazette; and

(b) in whatever newspaper(s) the winding up petition or supervision petition was advertised.

(4) The notice of appointment shall be in CWR Form No. 9.

Resignation of Official Liquidator (O.5, r.4)

4. (1) An official liquidator who wishes to resign shall —

(a) prepare a report and accounts in accordance with Order 10, rule 2;

(b) give notice of resignation to the company's liquidation committee; and

(c) apply to the Court for an order that the official liquidator be released from the performance of any further duties.

(2) An application to the Court under this Rule shall be served on –

(a) each member of the liquidation committee; or

(b) counsel to the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and

(c) such other creditors or contributories as the Court may direct.

(3) It shall be the responsibility of the liquidation committee to nominate a qualified insolvency practitioner whom the Court can appoint in succession to the resigning liquidator and every person so nominated shall swear an affidavit which complies with the requirements of Order 3, rule 4.

(4) If two or more qualified insolvency practitioners have been appointed as joint official liquidators, one or more of them may resign by giving notice to each member of the liquidation committee without the need to prepare any report and accounts (unless required to do so either by the liquidation committee or the continuing liquidator) or apply to the Court for the appointment of a successor, provided that at least one qualified insolvency practitioner remains in office.

(5) If a qualified insolvency practitioner has been appointed jointly with a foreign practitioner, the foreign practitioner may resign by giving notice to each member of the liquidation committee without the need to prepare and any report and accounts (unless required to do so either by the liquidation committee or by the continuing liquidator) or apply to the Court for the appointment of a successor.

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:34 Exhibit C
Case 1:24-cv-00495-LJL Document 82-1 Filed 05/17/24 Page 151 of 338 PageID #:
Winding up rules 2023 Consolidation Pg 52 of 128

(6) If an official liquidator wishing to resign is acting in the official liquidator's capacity as a partner or employee of a firm, the Court may make an order that —

(a) the official liquidator be released from the performance of any further duties; and

(b) another partner or employee of the same firm be appointed as successor liquidator,

without the need for any report and accounts to be prepared.

Death of Official Liquidator (O.5, r.5)

5. (1) Where the official liquidator dies in office, it is the duty of the official liquidator's personal representative to give notice of the official liquidator's death (including the date of death) to each member of the liquidation committee and to the Registrar of Companies.

(2) Alternatively, if the official liquidator was a partner or employee of a firm, the official liquidator's firm may give notice of the official liquidator's death.

(3) Following the death of the official liquidator (where the official liquidator was acting as sole liquidator or jointly with a foreign practitioner), the liquidation committee shall, within 28 days of the notification of the official liquidator's death, apply to the Court for an order appointing a new liquidator, failing which any creditor or contributory of the company or the firm of which the deceased liquidator was a partner or employee may apply to the Court for an order appointing a new liquidator.

(4) If the deceased liquidator was appointed jointly with a qualified insolvency practitioner, the survivor shall continue to act as sole liquidator unless and until the Court appoints an additional liquidator.

Application for Removal and Appointment of New Official Liquidator (O.5, r.6)

6. (1) An application by a creditor or contributory for an order that the official liquidator be removed shall be made by summons (referred to in this Rule as a "removal summons").

(2) A removal summons shall be served upon —

(a) the official liquidator; and

(b) each member of the liquidation committee; or

(c) counsel for the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and

(d) such other creditors or contributories as a Court may direct.

(3) A removal summons shall be supported by an affidavit containing all the facts and matters relied upon.

Case 23-12044-BLS Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:04 Exhibit C
Winding up rules 2023 Consolidation Pg 53 of 128

(4) A removal summons must also nominate a qualified insolvency practitioner whom the Court can appoint in succession to the removed liquidator and every person so nominated must swear an affidavit which complies with the requirements of Order 3, rule 4.

(5) The official liquidator shall be entitled to at least 14 days' notice of a removal summons.

(6) An official liquidator who is removed by order of the Court shall —

(a) forthwith deliver to the official liquidator's successor the company's books and records and a copy of the official liquidator's liquidation files (maintained in accordance with Order 26, rule 2); and

(b) within 28 days prepare a report and accounts for which purpose the official liquidator shall be allowed unrestricted access to the company's books and records.

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 54 of 128

ORDER 6

COMPANY'S STATEMENT OF AFFAIRS

Notice Requiring Submission of Statement of Affairs (O.6, r.1)

1. (1) A notice under section 101 shall be in CWR Form No 10 (requiring a relevant person to make a statement of affairs) or CWR Form No 11 (requiring a relevant person to state whether or not that person concurs with a statement of affairs prepared by someone else).

(2) A person to whom a notice under this Rule is addressed is referred to in this Order as "**a deponent**".

(3) A notice under this Rule must inform the deponent of —

(a) the name and address of every other deponent upon whom the official liquidator has served or intends to serve a notice under this Rule;

(b) the time within which the statement of affairs must be delivered;

(c) the manner in which the deponent will be provided with access to the company's books and records;

(d) the fact the deponent may apply to the official liquidator for reimbursement of expenses reasonably and properly incurred in complying with the notice; and

(e) the effect of section 101(7).

(4) The notice must be served upon the deponent personally, together with the documents referred to in Rule 2.

Form and content of Statement of Affairs (O.6, r.2)

2. (1) The statement of affairs shall be prepared in the form prescribed by the official liquidator having regard to the nature of the company's business.

(2) The official liquidator shall provide the deponent with —

(a) a draft or template which clearly identifies the information to be included in the statement of affairs and explains the form in which it is to be prepared; and

(b) guidance notes for the assistance of the deponent.

(3) Every statement of affairs must be exhibited to an affidavit by which the deponent swears that —

(a) the deponent made all such enquiries and reviewed all such documents which the deponent considered reasonably necessary to enable the deponent to make a complete and accurate statement of affairs; and

(b) the content of the deponent's statement of affairs is complete and accurate to the best of the deponent's knowledge and belief.

(4) The official liquidator may at any time require a deponent to submit in writing further information for the purpose of amplifying, modifying or explaining any matter contained in or omitted from the deponent's statement of affairs.

Time for Delivering Statement of Affairs (O.6, r.3)

3. (1) A statement of affairs shall be delivered to the official liquidator within 21 days after receipt of the notice or such longer period as may be stated in the notice.

(2) The official liquidator may extend the deponent's time for complying with the notice.

(3) The official liquidator may release a deponent from the deponent's obligation to prepare a statement of affairs, either unconditionally or on terms that the deponent swears an affidavit stating that the deponent concurs with the statement of affairs prepared by someone else.

Expenses of Preparing a Statement of Affairs (O.6, r.4)

4. (1) The official liquidator may pay the expenses reasonably and properly incurred by a deponent in connection with the preparation of a statement of affairs out of the assets of the company as an expense of the liquidation.

(2) Any deponent who is dissatisfied with the official liquidator's refusal to reimburse all or part of the expenses claimed by the deponent shall be entitled to apply to the Court for a direction that such expenses be paid.

Disclosure of Statement of Affairs (O.6, r.5)

5. (1) Every statement of affairs shall be filed with the Court.

(2) The official liquidator shall provide a copy of every statement of affairs and any concurring affidavits to the liquidation committee and, upon request, to any creditor or contributory of the company.

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:34 Exhibit C
Winding up rules 2023 Consolidation Pg 56 of 128

ORDER 7

ORDER FOR EXAMINATION

Application for Order for Examination (O.7, r.1)

1. (1) An application under section 103(3)(a) and/or (b) of the Law shall be made by an *ex parte* summons supported by an affidavit sworn by the official liquidator stating —

(a) the official liquidator's grounds for believing that the person(s) against whom an order is sought (referred to in this Order as "the examinee") are relevant persons within the meaning of section 103(1) of the Law;

(b) if the application seeks an order for the delivery up of documents or other property belonging to the company, the official liquidator's grounds for believing that the examinee has such documents or property in the official liquidator's possession, custody or control;

(c) if the application seeks an order that an examinee answer interrogatories and/or attend for an oral examination, the nature and scope of the intended examination and the official liquidator's grounds for believing that the examinee is or ought to be in possession of relevant information.

(2) In the case of an application against a professional service provider which is a firm or corporation, the summons may be issued –

(a) against such firm or corporation itself ; and/or

(b) against any individual partners, directors or employees of such firm or corporation

and it shall be the duty of the professional service provider to identify to the official liquidator those of its partners, directors or employees who have or ought to have knowledge of the company's affairs acquired in the course of performing work on behalf the professional service provider.

(3) In the case of an application made upon the requisition of creditors or contributories of the company, the official liquidator's supporting affidavit shall —

(a) identify the requisitionists and state the total amount of their debts or the total number of their shares, as the case may be;

(b) state whether or not their debts have been admitted to proof;

(c) exhibit a copy of the requisition (which should contain a statement of the requisitionists' grounds for the application); and

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:44 Exhibit C
Winding up rules 2023 Consolidation Pg 57 of 128

(d) express the official liquidator's opinion about the reasonableness and usefulness of the proposed order.

Order for Examination (O.7, r.2)

2. (1) An order under this Rule shall be in CWR Form No 12.

(2) An order for the delivery up of documents may be made in respect of specific documents or generally in respect of all documents belonging to the company which are in the examinee's possession, custody or control.

(3) In the case of an order that the examinee answer written interrogatories, the order shall require that the answers be contained in or verified by affidavit which shall be delivered to the official liquidator within 28 days after service of the order or at such other time as may be agreed between the examinee and the official liquidator.

(4) In the case of an order for oral examination, the order shall —

(a) contain a statement which discloses to the examinee the matters about which the examinee will be examined;

(b) specify the time and place of the examination; and

(c) specify the maximum duration of the examination.

(5) An order for an oral examination must be served upon the examinee not less than 14 days before the date of the examination.

(6) The Court may order that the examinee pay the whole or part of the costs of an oral examination on the ground that it was made necessary by reason of a breach by the examinee of the examinee's duty to co-operate with the official liquidator.

(7) An examinee may, within 7 days of the date upon which the order is served upon that examinee, apply to the Court for the order to be set aside on the ground that the examinee is or was not a relevant person.

Procedure upon an Oral Examination (O.7, r.3)

3. (1) The examination may be conducted by —

(a) the official liquidator;

(b) a qualified insolvency practitioner or other person acting with the authority of the official liquidator; or

(c) an attorney instructed by the official liquidator.

(2) The examination shall take place in private at the time and place specified in the order or at such other time and place as may be agreed between the examinee and the official liquidator.

(3) If the examinee is out of the jurisdiction, the examination may be conducted in the form of a video conference.

(4) The examinee shall be entitled to have the examinee's attorney present at the examination, but such attorney shall not be entitled to participate in the examination by putting questions to the examinee unless permitted to do so by the official liquidator.

(5) The examinee shall take all such steps as may be reasonably necessary to be informed of the matters about which that examinee is to be examined and the official liquidator may adjourn the examination for this purpose.

(6) The examinee shall be given an opportunity to review all the documents intended to be put to the examinee in advance of the examination, for which purpose the official liquidator may —

(a) provide the examinee with copies; and/or

(b) require the examinee to review the originals at the official liquidator's office.

(7) The examination shall be conducted in the form of questions and answers. The examination shall be recorded by a court reporter. The court reporter shall prepare a transcription of the examination and certify it as a complete and accurate transcription.

(8) The court reporter shall record the names and addresses of all the persons present and the times(s) at which the examination commenced and finished.

(9) The examination shall be carried out under oath.

(10) The documents referred to during the examination must be identified but need not be exhibited to the transcript unless the official liquidator requires that some or all of them be exhibited.

(11) The examinee shall answer all the questions put to the examinee (subject to any claim of self-incrimination or legal professional privilege) which are within the examinee's knowledge or means of knowledge regarding any matter within the scope of the order and is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge.

(12) Where an examinee objects to answering any questions put to that examinee, that examinee must state the grounds of the examinee's objection and the official liquidator may apply to the Court for an order that the question be answered. Any such application shall be made on notice to the Respondent.

(13) If the Court determines that the examinee had no valid ground of objection, it may order the examinee to submit to a further examination and pay the costs occasioned by the examinee's objection.

Case 23-12044-BLS Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 59 of 128

ORDER 8

MEETINGS OF CREDITORS AND CONTRIBUTORIES

Meetings Convened by Official Liquidator (O.8, r.1)

1. (1) For the purpose of convening meetings and establishing a liquidation committee, the official liquidator shall summarily determine whether, in the official liquidator's opinion, the company should be regarded as being —

(a) solvent;

(b) insolvent; or

(c) of doubtful solvency,

and the official liquidator's determination shall be final and binding upon the company's creditors and contributories for the purposes of this Order and Order 9 unless and until it is changed by the official liquidator in accordance with this Rule.

(2) If and when the official liquidator considers that the official liquidator's initial determination about the company's solvency may no longer be justified, the official liquidator shall re-consider the matter and may change the official liquidator's determination if the official liquidator considers that it is appropriate to do so and the official liquidator's changed determination shall also be final and binding upon the company's creditors and contributories for the purposes of this Order and Order 9.

(3) The official liquidator's initial determination under this Rule shall be certified in CWR Form No 13 and filed in Court within 28 days of the date on which the winding up order is made and any subsequent change in the official liquidator's determination shall be certified in CWR Form No 14 and filed in Court immediately after it is made.

(4) If, and so long as the official liquidator determines that the company should be regarded as insolvent, the official liquidator shall convene meetings of its creditors only.

(5) If, and so long as the official liquidator determines that the company is solvent, the official liquidator shall convene meetings of its contributories only.

(6) If, and so long as the official liquidator determines that the company is of doubtful solvency, the official liquidator shall convene meetings of both creditors and contributories and such meetings shall be held on the same day, either concurrently or consecutively.

(7) A meeting is deemed to have been convened on the day upon which the official liquidator gives notice of it and it shall not be invalidated if, for whatever reason,

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 60 of 128

the official liquidator inadvertently fails to give notice to any creditor or contributory.

(8) References in this Order to —

(a) "**a meeting or meetings**" shall mean a creditors' meeting or a contributories' meeting or both, depending upon the determination made by the company's official liquidator in accordance with this Rule;

(b) "**a creditors' meeting**" shall mean a meeting of creditors convened when the official liquidator has certified that, in the official liquidator's opinion, the company should be regarded as insolvent; and

(c) "**a contributories' meeting**" shall mean a meeting of contributories convened when the official liquidator has certified that, in the official liquidator's opinion, the company should be regarded as solvent.

First Meeting and Subsequent Meetings (O.8, r.2)

2. (1) Unless the Court otherwise directs, the official liquidator shall convene a first meeting within 28 days of the date upon which the winding up order is made.

(2) The first meeting shall be convened for the purpose of electing a liquidation committee and dealing with such other matters or resolutions as the official liquidator thinks fit or the Court may direct.

(3) Thereafter, the official liquidator shall convene meetings whenever —

(a) the official liquidator considers that it is appropriate to do so; or

(b) the Court directs the official liquidator to do so; or

(c) the official liquidator receives a valid requisition under Rule 3; and

(d) in any event, not less than once a year.

Requisitioned Meetings (O.8, r.3)

3. (1) A creditors' meeting may be requisitioned by any one or more creditors whose debts are valued in total at $500,000 or 5% of the company's total unsecured liabilities, whichever is the lesser.

(2) A contributories' meeting may be requisitioned by one or more contributories who together are entitled to cast at least 5% of the votes capable of being cast at a contributories' meeting.

(3) A requisition must be made in writing, signed by each of the requisitionists, and must specify the full terms of each resolution intended to be put to the meeting.

(4) A requisition must be delivered to the official liquidator.

(5) If the official liquidator is satisfied that the requisitionists are entitled to requisition a meeting in accordance with this Rule, the official liquidator shall convene the meeting within 21 days of the date upon which the requisition was received.

(6) If a meeting is requisitioned (whether by creditors or contributories) in respect of a company at a time when the official liquidator has determined it to be of doubtful solvency, the official liquidator shall convene meetings of both creditors and contributories to be held on the same day, either concurrently or consecutively.

Notice and Advertisement of Meetings (O.8, r.4)

4. (1) Notice of a creditors' meeting shall be given to —

(a) every person who appears to the official liquidator to be a creditor; and

(b) every person who has submitted a proof of debt which has not been rejected.

(2) Notice of a contributories' meeting shall be given to —

(a) every person who appears to the official liquidator to be a contributory; and

(b) every person recorded as a member in the company's register of members.

(3) In addition to giving notice in accordance with Rule 4(1), a creditors' meeting shall be advertised —

(a) on any website established by the official liquidator; and/or

(b) in one or more newspapers having circulations in a country or countries in which the company appears most likely to have creditors and any such advertisement shall be published at least 14 days prior to the date of the creditors' meeting.

(4) The official liquidator shall give 21 days' notice of a creditors' meeting and such notice may be —

(a) sent by pre-paid post; or

(b) transmitted by facsimile or e-mail.

(5) The official liquidator shall give notice of a contributories' meeting in whatever manner may be required or authorised by the company's articles of association.

(6) The official liquidator may dispense with notice of a creditors' meeting with the unanimous consent of the creditors.

Venue (O.8, r.5)

5. (1) Meetings convened under this Order may be held at the official liquidator's office or at any other convenient place, either in the Islands or any other country.

(2) A meeting may take the form of a telephone conference call in which case –

(a) all notices and advertisements of the meeting must specify the dial in number and codes or provide a contact number and e-mail address to which creditors or contributories may apply to obtain the dial-in number and codes; and

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:04 Exhibit C
Case 1:24-cv-00495-LJL Document 1-2 Filed 05/17/24 Page 169 of 328 PageID #:
Winding up rules 2023 Consolidation Pg 62 of 128

(b) any person intending to participate in the meeting must send written notice of that person's intention to do so to the official liquidator at least 3 days prior to the date of the meeting unless the official liquidator agrees to dispense with notice.

Proceedings at Meetings (O.8, r.6)

6. (1) The chairperson of the meeting shall be —

(a) the official liquidator;

(b) a qualified insolvency practitioner or other person who is authorised to act on the official liquidator's behalf; or

(c) an attorney-at-law instructed by the official liquidator to act on the official liquidator's behalf.

(2) The chairperson may adjourn the meeting to such time and place as seems to the chairperson to be appropriate in the circumstances.

(3) The chairperson may suspend a meeting from time to time for periods not exceeding two hours.

(4) The official liquidator shall be responsible for taking the minutes of the meeting.

(5) A meeting is not competent to act in the absence of a quorum for any purpose except for the purpose of being adjourned or suspended.

(6) The quorum for a creditors' meeting is at least 3 creditors or all of the creditors if there are less than 3 in number.

(7) The quorum for a contributories' meeting is whatever number is specified in the company's articles of association as the quorum for a general meeting of the company.

(8) References to creditors and contributories are to those present at the meeting in person or by proxy.

Entitlement to Vote at Creditors' Meeting (O.8, r.7)

7. (1) A person is entitled to vote as a creditor if —

(a) that person has lodged a proof of debt by the date specified in the notice convening the meeting and such proof has been admitted for voting purposes; or

(b) that person appears to the official liquidator to be recorded in the company's books and records as a member of any class of creditors entitled (pursuant to Order 16, rule 7) to vote without need to lodge a proof of debt.

(2) A creditor may not vote in respect of a claim for an unliquidated amount or any debt whose value is not ascertained except where the chairperson agrees to put

an estimated minimum value upon it for the purpose of entitlement to vote and admits that creditor's proof for that purpose.

(3) A secured creditor is entitled to vote only in respect of the balance of that secured creditor's debt, after taking account of the value of that secured creditor's security.

Entitlement to Vote at Contributories' Meeting (O.8, r.8)

8. (1) A person is entitled to vote as a contributory if —

(a) that person is recorded as a member of the company in its register of members; or

(b) the official liquidator is satisfied that that person is liable to contribute to the assets of the company.

(2) When a custodian or clearing house is recorded as a member of the company in its register of members, such custodian or clearing house may appoint two representatives to act on its behalf for the purpose of addressing the meeting and voting shares both for and against a resolution in accordance with the instructions received from its clients.

Voting on Resolutions (O.8, r.9)

9. (1) At a creditors' meeting, a resolution is passed when a majority (in value) of those present and voting, in person or by proxy, have voted in favour of the resolution.

(2) At a contributories' meeting, a resolution is passed when a majority in value (determined in accordance with Rule 9(3)) of those present and voting, in person or by proxy, have voted in favour of the resolution.

(3) At a contributories' meeting, the number of votes attributed to each contributory shall be —

(a) In the case of contributories holding voting shares, the number of votes attributed to them under the company's articles of association; or

(b) In the case of contributories holding non-voting shares, their voting rights shall be based upon the par value of the shares held; or

(c) If there are no par value shares, the contributories' voting rights shall be determined in accordance with the net asset value of the company; and

(d) Any shares (whether voting or non-voting) which do not carry the right to participate in any distribution shall have no vote.

(4) If the official liquidator has determined (in accordance with Rule 1) that the company should be regarded as of doubtful solvency, a resolution is passed when a majority (in value) of creditors and a majority of contributories (by value determined in accordance with Rule 9(3)) have both voted in favour of the resolution.

Recording of Proceedings (O.8, r.10)

10. (1) The official liquidator shall be responsible for taking the minutes of every meeting, whether or not the official liquidator is acting as chairperson of the meeting.

(2) The official liquidator shall also be responsible for making up a list of all those present or participating in the meeting, including a statement of the capacity in which they were acting.

(3) The minutes of the meeting shall include a record of every resolution passed and shall be signed by the chairperson of the meeting.

(4) The minutes of every meeting shall be kept by the official liquidator as part of the records of the liquidation.

(5) A copy of the minutes of every meeting shall be circulated to the creditors and contributories (in whatever manner is considered by the official liquidator to be most effective and economic) within 28 days of the date on which the meeting was held.

ORDER 9

LIQUIDATION COMMITTEES

Establishment of Liquidation Committee (O.9, r.1)

1. (1) Unless the Court otherwise directs, a liquidation committee shall be established in respect of every company which is being wound up by the Court.

(2) The provisions of this Order shall also apply to a liquidation committee required to be established pursuant to an order made under Order 4, rule 7(3)(f).

(3) The liquidation committee shall comprise not less than three nor more than five creditors (if the official liquidator has determined that the company should be regarded as insolvent) or contributories (if the official liquidator has determined that the company should be regarded as solvent).

(4) The liquidation committee of an insolvent company shall be elected at the first meeting of creditors convened in accordance with Order 8, rule 2.

(5) The liquidation committee of a solvent company shall be elected at the first meeting of the contributories convened in accordance with Order 8, rule 2.

(6) In the case of a company determined by its official liquidator to be of doubtful solvency, the liquidation committee shall comprise not less than three nor more than six members, of whom a majority shall be creditors elected at a meeting of creditors and at least one of whom shall be a contributory elected at a meeting of contributories.

(7) After the liquidation committee has been established, the official liquidator may, with the consent of a majority of the remaining members of the committee, appoint a creditor or contributory (as the case may be) to fill any vacancy

(8) The liquidation committee does not come into being, and accordingly cannot act, until the official liquidator has issued a certificate in CWR Form No 15 of its due constitution, which shall state the name, address and contact details of each member.

(9) The official liquidator's certificate shall be filed in Court.

Membership of Liquidation Committee (O.9, r.2)

2. (1) A liquidation committee cannot be established unless and until it has the minimum number of members required by Rule 1.

(2) Any creditor of the company (other than one whose debt is fully secured) is eligible to be a member of a liquidation committee, so long as —

(a) that person has lodged a proof of that person’s debt; and

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:34 Exhibit C
Case 1:24-cv-00495-DLI Document 1-2 Filed 05/12/23 Page 171 of 238 PageID #:
Winding up rules 2023 Consolidation Pg 66 of 128

(b) that person's proof has neither been wholly disallowed for voting purposes nor wholly rejected for purposes of distribution or dividend.

(3) If some or all of the shares of a company are registered in the name of a custodian or clearing house, a beneficial owner of the shares may be elected as a member of the liquidation committee provided that the custodian or clearing house certifies in writing that it is holding the shares (the number of which must be specified) as custodian or nominee on behalf of such person.

(4) A corporate member of the liquidation committee must be represented by an individual who is duly authorised in writing by a letter sent to the official liquidator at least 2 days before any meeting in which that individual intends to participate unless the official liquidator agrees to dispense with notice.

(5) No person shall on the same committee —

(a) be a member as both a creditor and a contributory;

(b) act at one and the same time as representative of more than one committee-member; or

(c) act both as member of the committee and representative of another committee- member.

(6) If an individual member of the liquidation committee becomes bankrupt, that member's trustee in bankruptcy shall be recognised as a member of the committee in that member's place.

(7) If a corporate member of the liquidation committee is put into liquidation under this Law or made the subject of a bankruptcy or reorganisation proceeding under the law of a foreign country, it shall continue to be a member of the committee if and so long as its official liquidator, trustee, receiver or administrator or other appointee consents to act as its representative.

Reconstitution of the Liquidation Committee (O.9, r.3)

3. (1) If, during the course of the liquidation, the official liquidator changes the official liquidator's certification of the company's solvency or insolvency (as the case may be), the official liquidator shall take the following steps to reconstitute the liquidation committee.

(2) If the company is certified to be solvent, any creditor members of its liquidation committee shall automatically cease to be members and the official liquidator shall convene a meeting of contributories for the purpose of electing new members from amongst the company's contributories.

(3) If the company is certified to be insolvent, any contributory members of its liquidation committee shall automatically cease to be members and the official liquidator shall convene a meeting of creditors for the purpose of electing new members from amongst the company's creditors.

(4) Nothing in this rule shall prevent the official liquidator from convening a meeting in anticipation of changing the official liquidator's certification of the company's solvency or insolvency (as the case may be).

Official Liquidator's Duty to Report (O.9, r.4)

4. (1) It is the duty of the official liquidator to report to the members of the liquidation committee all such matters as appear to the official liquidator to be, or as the members have indicated to the official liquidator as being of concern to them with respect to the winding up.

(2) The official liquidator need not comply with a request for information where it appears to the official liquidator that —

(a) the request is frivolous or unreasonable;

(b) the cost of complying would be excessive, having regard to the relative importance of the information; or

(c) there are not sufficient assets to enable the official liquidator to comply.

(3) The official liquidator shall communicate information to members of the liquidation committee in whatever way may be agreed between them, including —

(a) orally by telephone;

(b) in writing, transmitted by facsimile or e-mail; or

(c) by accessing a website.

(4) The official liquidator shall provide each member of the liquidation committee with a written report and accounts and convene a first meeting within 3 months of the committee's establishment and thereafter the official liquidator shall convene a meeting —

(a) on such dates or at such intervals as may be resolved by the committee; or

(b) if so requested in writing by any two members of the committee; and

(c) in any event, not less than once every six months.

(5) A "meeting" of the liquidation committee may take the form of –

(a) a physical meeting at the official liquidator's office or such other place as may be resolved upon by the committee, in which case the official liquidator must give at least 10 business days' notice of the meeting and any member who cannot attend in person must be allowed to participate by telephone; or

(b) a telephone conference call, in which case the official liquidator must give at least 5 business days' notice of meeting.

(6) A liquidation committee may, by unanimous consent, agree to hold a meeting on short notice.

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:54 Exhibit C
Case 1:24-cv-00495-LJL Document 1-2 Filed 05/22/24 Page 175 of 328 PageID #:
Winding up rules 2023 Consolidation Pg 68 of 128

Proceedings of Liquidation Committee (O.9, r.5)

5. (1) The official liquidator shall attend every meeting of the liquidation committee, either in person or by a duly authorised representative who must be a partner or employee of the official liquidator's firm having experience in insolvency matters.

(2) The quorum for a meeting of the liquidation committee shall be the official liquidator (or the official liquidator's representative) and at least two members.

(3) The chairperson of the meeting shall be the official liquidator (or the official liquidator's representative) unless the members resolve that one of their number should act as chairperson.

(4) The chairperson at any meeting may call upon a person claiming to act as a committee-member's representative to produce that person's letter of authority and may exclude that person if it appears that that person's authority is defective.

(5) The official liquidator shall prepare an agenda for each meeting including —

(a) all the matters which the official liquidator intends to put before the meeting;

(b) any matter which a committee-member intends to put before the meeting; and

(c) any resolutions which the official liquidator or any committee member intends to put to a vote.

(6) The official liquidator shall be responsible for taking the minutes of the meeting, a draft of which shall be prepared and circulated to all the members within 14 days after the meeting.

(7) Each committee member shall have one vote and a resolution is passed when a majority of members present or represented (either in person or by telephone) have voted in favour of it.

(8) If the liquidation committee comprises both creditors and contributories, a resolution is passed only when a majority of the creditor members and a majority of contributory members present or represented (either in person or by telephone) have voted in favour of it.

(9) Whenever the official liquidator considers that it would be impractical or unnecessary to convene a meeting of the liquidation committee for the purpose of considering any resolution, the official liquidator may send a copy of it to each member, inviting them to deal with it as a written resolution, and it shall be treated as passed if every member of the committee signs it within such period or by such deadline as may be specified by the official liquidator.

(10) The official liquidator (or the official liquidator's representative) may, among other grounds, where a meeting of the liquidation committee is not quorate, decide that a meeting of the liquidation committee should be adjourned. In such

circumstances, the adjourned meeting will be reconvened at a time and date set by the official liquidator (or the official liquidator's representative).

Counsel to the Liquidation Committee (O.9, r.6)

6. (1) The liquidation committee may resolve to appoint an attorney to give legal advice to the committee, either generally or in respect of any specific matter arising in connection with the liquidation.

(2) The attorney appointed in accordance with this Rule is referred to as "counsel to the liquidation committee".

(3) The legal fees and expenses reasonably and properly incurred by the liquidation committee shall be paid out of the assets of the company as an expense of the liquidation.

(4) If the official liquidator or any committee member considers that the amount of the fees and expenses charged by counsel to the liquidation committee is excessive, the official liquidator may require that such fees and expenses be taxed on the indemnity basis in accordance with Order 25.

(5) Conversely, if counsel to the liquidation committee considers that the amount which the official liquidator offers to pay is inadequate, counsel may require that counsel's bill of costs be taxed on the indemnity basis in accordance with Order 25.

(6) Counsel to the liquidation committee shall be entitled to be paid out of the assets of the company as an expense of the liquidation the amount(s) stated in the costs certificate and the official liquidator shall have no authority to pay more than that amount.

Travel and Other Expenses of Committee Members (O.9, r.7)

7. (1) Travelling expenses and/or telephone charges reasonably and properly incurred by committee members or their representatives in attending meetings of the liquidation committee shall be reimbursed by the official liquidator out of the assets of the company.

(2) No other expenses incurred by any committee member in connection with the liquidation shall be reimbursed unless such expense was incurred —

(a) pursuant to a resolution of the liquidation committee; and

(b) with the prior approval of the liquidator.

Resignation and Removal of Committee Members (O.9, r.8)

8. (1) A committee member may resign by notice in writing delivered to the official liquidator.

(2) A creditor's membership of the liquidation committee is automatically terminated if that creditor ceases to be a creditor by reason of the fact that —

(a) that creditor's proof of debt has been wholly rejected; or

(b) that creditor's claim has been paid in full.

(3) A contributory's membership of the liquidation committee is automatically terminated if —

(a) that person ceases to be a registered member of the company; or

(b) the custodian or clearing house withdraws the certificate issued pursuant to Rule 1(2).

(4) Any person's membership of the liquidation committee is automatically terminated if that person (or that person's representative) fails to attend three successive committee meetings either in person or by telephone.

(5) Any member of the liquidation committee may be removed by a resolution passed at a meeting of which the member in question has been given at least 14 days' prior notice (referred to in this Rule as a "removal resolution").

(6) A removal resolution may be proposed by the official liquidator or any committee member.

(7) It shall not be necessary to give any reasons for proposing a removal resolution, nor shall the liquidation committee or the official liquidator be required to give the former member any reasons for passing a removal resolution.

Applications to the Court (O.9, r.9)

9. (1) Any application required to be made to the Court under this Order may be made in writing by a letter addressed to the assigned Judge.

(2) A letter to the assigned Judge shall be supported by an affidavit.

Case 23-12044-BLS Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:34 Exhibit C
Winding up rules 2023 Consolidation Pg 71 of 128

ORDER 10

OFFICIAL LIQUIDATOR'S REPORTS AND ACCOUNTS

Official Liquidator's Reporting Obligations (O.10, r.1)

1. (1) The official liquidator shall prepare reports and accounts with respect to the official liquidator's conduct of the liquidation and the state of the company's affairs.

(2) It is the duty of an official liquidator to report to —

(a) the liquidation committee in compliance with the requirements of Order 9, rule 3;

(b) the contributories, in the event that the official liquidator has determined (pursuant to Order 8, rule 1) that the company should be regarded as solvent; or

(c) the creditors, in the event that the official liquidator has determined (pursuant to Order 8, rule 1) that the company should be regarded as insolvent; or

(d) the contributories and creditors, if and for so long as the official liquidator has determined that the company should be regarded as being of doubtful solvency; and

(e) the Court.

(2) Whenever the official liquidator convenes a meeting pursuant to Order 8, rule 2, the official liquidator shall send a report and accounts to every person entitled to receive notice of the meeting.

(3) Whenever the official liquidator convenes a meeting in response to a requisition made pursuant to Order 8, rule 3, the official liquidator may send a report and/or accounts to every person entitled to receive notice of the meeting.

(4) The official liquidator of an insolvent company has no continuing duty to report to the contributories, but the official liquidator shall provide copies of the official liquidator's reports and accounts to any contributory upon request.

Form and Content of Liquidators' Reports and Accounts (O.10, r.2)

2. (1) Every official liquidator's report shall provide a description and analysis of —

(a) the steps taken and, in the case of an interim report, the further steps intended to be taken in the liquidation generally; or

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:04 Exhibit C
Winding up rules 2023 Consolidation Pg 72 of 128

(b) a discrete matter which, in the opinion of the official liquidator is or ought to be of particular concern to the company's creditors and/or contributories;

(c) a discrete matter upon which the official liquidator seeks a direction of the Court;

(d) a discrete matter which, by its nature, ought to be kept confidential.

(2) The official liquidator shall report upon —

(a) the steps taken in the liquidation since the date of the winding up order or the date of the official liquidator's previous report;

(b) the matters which are relevant to any resolutions intended to be put to the next meeting of contributories or creditors ;

(c) any matters upon which the official liquidator is asked to report by the liquidation committee;

(d) any matters upon which the official liquidator is directed to report by the Court;

(e) any matters upon which the official liquidator seeks a direction of the Court; and

(f) any other matters which, in the opinion of the official liquidator, are or ought to be of concern to the contributories or creditors of the company.

(3) Except in the case of a report expressed to relate to a discrete matter, every official liquidator's report and accounts shall provide the company's creditors and/or contributories with the information necessary (when read with previous reports) to enable them to make an informed decision about the company's financial condition and their prospects of recovery, to the extent that it is reasonably possible to do so.

(4) The official liquidator's accounts shall be presented in the currency of the liquidation and shall include details of —

(a) the nature and estimated realisable value of the company's assets;

(b) any security over the company's assets;

(c) the nature and amount of the company's liabilities, including future and contingent liabilities;

(d) the nature and amount of the company's income;

(e) the expenses of the liquidation;

(f) the amount of liquidator's remuneration approved by the Court;

(g) the work done by or on behalf of the official liquidator and the amount of remuneration claimed by the official liquidator;

(h) the distributions made to creditors and contributories; and

(i) such other information which is required in order to provide the contributories or creditors with a proper understanding of the company's affairs and financial position.

Publication of Reports and Accounts (O.10, r.3)

3. (1) Every official liquidator's report and accounts shall be filed in Court.

(2) Except as provided in sub-rule (3), every official liquidator's report and accounts shall be sent to the company's creditors by pre-paid post or transmitted to them by facsimile or e-mail and shall be sent to contributories in whatever manner may be required or authorised by the company's articles of association.

(3) In the case of a report expressed to relate to a discrete matter, the Court may direct that it should be kept confidential for a specific period or until the occurrence of a specified event.

(4) In the case of a company which carried on a regulated business or was put into liquidation upon the petition of the Authority, the official liquidator shall send a copy of every report and accounts to the Authority.

(5) In addition, the official liquidator may post the official liquidator's reports and accounts (or a summarised version) on a website established for this purpose.

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Case 1:24-cv-00495-DLI Document 2-2 Filed 05/12/23 Page 181 of 328 PageID #:
Winding up rules 2023 Consolidation Pg 74 of 128

ORDER 11

SANCTION APPLICATIONS

Introduction (O.11, r.1)

1. (1) Any application to Court made by —

(a) the official liquidator for a order sanctioning the official liquidator's exercise or proposed exercise of any power conferred upon the official liquidator by Part I of the Third Schedule of the Law or otherwise; or

(b) a creditor or contributory for an order directing the official liquidator to exercise or refrain from exercising any of the official liquidator's powers in a particular way,

is referred to in these Rules as a "**sanction application**".

(2) Sanction applications shall be made by summons in CWR Form No 16.

Service of Sanction Applications (O.11, r.2)

2. (1) Every sanction application made by the official liquidator shall be served on —

(a) each member of the liquidation committee ; or

(b) counsel to the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and

(c) such other creditors or contributories as the Court may direct.

(2) Every sanction application made by the liquidation committee shall be served on —

(a) the official liquidator; and

(b) such creditors or contributories as the Court may direct.

(3) Every sanction application made by a creditor or contributory (other than the liquidation committee) shall be served on —

(a) the official liquidator; and

(b) each member of the liquidation committee; or

(c) counsel to the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and

(d) such other creditors or contributories as the Court may direct.

(4) A sanction application shall not be heard on less than 4 clear days' notice.

(5) The Court may direct that the hearing of a sanction application be advertised.

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:24 Exhibit C
Winding up rules 2023 Consolidation Pg 75 of 128

Hearing of Sanction Applications (O.11, r.3)

3. (1) Sanction applications shall be heard in chambers unless —

(a) the Court has directed that the application be advertised, in which case it must be heard in open court; or

(b) the Court directs, for some special reason, that it should be heard in open court.

(2) It shall be the duty of the official liquidator to attend and be prepared to assist the Court in respect of any sanction application made by the liquidation committee or any creditor or contributory.

(3) The Court may direct that, when a sanction application gives rise to an issue in respect of the substantive rights as between the company and any creditor or contributory or any class thereof, it shall be adjudicated as an inter partes proceeding as between shareholders, creditors or any class of shareholders or creditors (as the case may be), for which purpose the Court may —

(a) make a representation order; and/or

(b) direct that the official liquidator's role shall be limited in such way as the the Court thinks fit; or

(c) direct that the official liquidator shall take no further part in the proceeding.

(4) In addition to those who are entitled to be served in accordance with Rule 2, the Court may allow the following classes of persons to be heard —

(a) any other creditor, if the company is insolvent;

(b) any other contributory, if the company is solvent;

(c) any other creditor or contributory, if the official liquidator has determined that the company should be regarded as of doubtful solvency.

Evidence for Use in Sanction Applications (O.11, r.4)

4. (1) When a sanction application is made by the official liquidator —

(a) that person may rely upon affidavit evidence; and/or

(b) that person may rely upon the whole or part of any report or reports which have been filed in Court, whether or not such reports were prepared specifically for the purpose of the application.

(2) When a sanction application is made by the liquidation committee or any creditor or contributory —

(a) the application must be supported by an affidavit containing full particulars of the grounds upon which the application is made; and

(b) it shall be the duty of the official liquidator to swear an affidavit in reply or make a report which states whether the official liquidator —

(i) supports the application; or

(ii) opposes the application, in which case the official liquidator's affidavit or report must contain the evidence and analysis upon which the official liquidator relies in opposition to the application; or

(iii) adopts a neutral position, in which case the official liquidator's affidavit or report must contain any evidence, not already before the Court, which the official liquidator considers to be relevant to the Court's decision.

(3) An affidavit sworn by the official liquidator may contain statements of the official liquidator's opinions.

ORDER 12

SETTLING LIST OF CONTRIBUTORIES

Introduction (O.12, r.1)

1. (1) The official liquidator is required by section 112 of the Law to settle a list of contributories for the purposes of —

(a) identifying those members who are liable to contribute to the assets of the company and ascertaining the amount of their respective contributions; and

(b) identifying those members who are entitled to participate in the distribution of surplus assets available after the company's creditors have been paid in full and ascertaining the amount of their respective entitlements.

(2) The official liquidator need not settle any list for the purpose stated in Rule 1(1)(a) unless the company was incorporated on the basis that its members' liability is unlimited or is limited by guarantee or it appears to the official liquidator that the company has issued partly paid shares.

(3) The official liquidator shall not settle any list for the purpose stated in Rule 1(1)(b) unless and until the official liquidator is satisfied that the company is or will become solvent.

Rectification of the Register of Members (O.12, r.2)

2. (1) The official liquidator shall exercise the official liquidator's power to rectify the company's register of members under section 112(2) if the official liquidator is satisfied that —

(a) the company is or will become solvent;

(b) the company has from time to time issued redeemable shares at prices based upon a mis-stated net asset value which is not binding upon the company and its members by reason of fraud or default, with the result that the company has issued an excessive or inadequate number of shares in consideration for the prices paid by one or more subscribers; and/or

(c) the company has redeemed shares at prices based upon a mis-stated net asset value which is not binding upon the company and its members by reason of fraud or default, with the result that the company has paid out excessive or inadequate amounts to former members in consideration for the redemption of their shares.

(2) Subject to paragraph (3), for the purposes of rectifying the register of members in accordance with this Rule, the official liquidator shall determine the true net asset value of the company as at each relevant redemption date.

(3) The true net asset value of the company shall be determined in accordance with the accounting principles specified for this purpose in its articles of association or, if none are specified, in accordance with whatever generally accepted accounting principles are adopted by the official liquidator.

(4) The register of members, when rectified by the official liquidator in accordance with section 112(2) of the Law, shall state, as at each relevant redemption date —

(a) the identity of each subscriber, the amount of money subscribed and the number of shares which ought to have been issued to the subscriber (applying the true net asset value per share);

(b) the identity of each member who redeemed shares, the number of shares redeemed and the amount of redemption proceeds which ought to have been paid to the member (applying the true net asset value per share);

(c) the identity of the company's members and the number of shares which ought to have been held by each member, had the subscriptions and redemptions been done at the true net asset value per share,

and the company's share register shall be rectified accordingly.

(5) If the official liquidator considers that it will be impractical or not cost effective to rectify the company's register of members in accordance with paragraphs (2) and (3) of this Rule, the official liquidator shall nevertheless rectify the register in such manner which is both cost effective and fair and equitable as between the shareholders.

Notification of Rectification (O.12, r.3)

3. (1) When the official liquidator rectifies the register of members of a company in accordance with Rule 2, a notice of rectification in CWR Form No. 17 and a copy of the rectified register of members shall be filed in Court and served upon every person who is or was a member of the company at any relevant time.

(2) The official liquidator's notice shall be served together with an explanatory report which shall —

(a) state the grounds upon which the official liquidator exercised the official liquidator’s powers;

(b) explain how the official liquidator's determination of the company's true net asset value differs from that published from time to time by authority of the company's directors;

(c) contain the rectified register of members; and

(d) explain the methodology adopted by the official liquidator for the purpose of rectifying the register of members.

Appeal Against Rectification (O.12, r.4)

4. (1) Any member or former member of the company who is dissatisfied with the official liquidator's decision to exercise the official liquidator's powers under section 112(2) of the Law and/or the manner in which the official liquidator has rectified the register of members may appeal to the Court.

(2) An appeal under this Rule shall take the form of a sanction application made by summons in CWR Form No. 18.

(3) Every summons under this Rule shall be served on the official liquidator within 90 days of the date upon which the rectification notice is filed in Court and, unless the Court otherwise directs, the official liquidator shall serve the summons upon every member or former member identified in the rectified register.

(4) If the appeal is put on the basis that the official liquidator was not properly entitled to exercise the official liquidator's power under section 112(2), it must be supported by an affidavit containing all the facts and matters upon which the appellant relies.

(5) If the appeal is put on the basis that the official liquidator was admittedly entitled to exercise the official liquidator's power, but the official liquidator exercised it in a manner in which no liquidator could reasonably have exercised it in all the circumstances, it must be supported by an expert report which addresses the valuation and/or methodology issues raised in the summons.

(6) It shall be the duty of the official liquidator to swear an affidavit in reply or make a report which states whether the official liquidator —

(a) supports any aspect of the appeal;

(b) opposes the appeal, in which case the official liquidator's affidavit or report must contain the evidence, analysis and statements of opinion upon which the official liquidator relies in opposition to the appeal;

(c) adopts a neutral position, in which case the official liquidator's affidavit or report must contain any evidence, analysis or opinion, not already before the Court, which the official liquidator considers to be relevant to the Court's decision.

(7) Order 11, rule 2(5) and rule 3 shall apply to an appeal under this Rule as they apply to a sanction application.appeal to the Court.

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Case 1:24-cv-00495-DLI Document 2-2 Filed 05/12/23 Page 187 of 328 PageID #:
Winding up rules 2023 Consolidation Pg 80 of 128

ORDER 13

VOLUNTARY (SOLVENT) LIQUIDATIONS

Introduction (O.13, r.1)

1. (1) The liquidation of a company is referred to as a "**voluntary liquidation**" or "**voluntary winding up**" if it was commenced in accordance with one or other of the methods stated in section 116 of the Law.

(2) The liquidator appointed by the company in accordance with section 119 of the law is referred to as the "**voluntary liquidator**" unless and until the liquidator is appointed as an official liquidator pursuant to a supervision order.

(3) The liquidation of a company which has commenced voluntarily may continue as a voluntary liquidation if, and only if, a declaration of solvency has been made by all its directors and filed with the Registrar of Companies in accordance with Order 14.

(4) If the company's directors have failed to make a declaration of solvency within 28 days from the commencement of the liquidation, the voluntary liquidator must apply to the Court for a supervision order within 7 days thereafter.

Notice of Voluntary Winding Up (O.13, r.2)

2. (1) Within 28 days of the commencement of a voluntary liquidation, the voluntary liquidator or, in the absence of any liquidator, the directors shall —

(a) file with the Registrar of Companies a notice of the winding up in CWR Form No 19;

(b) file with the Registrar of Companies the voluntary liquidator's consent to act in CWR Form No 20;

(c) in the case of a company carrying on a regulated business, send to the Authority copies of the notices and any declaration registered with the Registrar of Companies pursuant to paragraphs (a), (b) and (c) of this sub-rule; and

(d) publish notice of the voluntary winding up (in CWR Form No 19) in the Gazette.

(2) Within 28 days of the commencement of a voluntary liquidation, the voluntary liquidator shall file with the Registrar of Companies the directors' declaration(s) of solvency or, in the absence of any declaration of solvency, a notice in CWR Form No 22 stating that a supervision petition has been presented to the Court.

(3) The voluntary liquidator shall provide copies of the documents specified in sub-rules (1) and (2) on request to any member or creditor of the company and any

person who was a director or professional service provider of the company immediately prior to the commencement of the liquidation.

Appointment of Voluntary Liquidator (O.13, r.3)

3. (1) A voluntary liquidator —

(a) may be appointed by a resolution of the company; or

(b) assume office automatically pursuant to section 119(2)(a).

(2) The appointment of a voluntary liquidator by resolution of the company shall not take effect unless and until a consent to act in CWR Form No 20 has been signed by the person appointed and filed with the Registrar of Companies.

(3) If two or more persons have been appointed as voluntary liquidators jointly, the consent to act must be signed by all of them.

(4) If two or more persons have been appointed as voluntary liquidators with power to act either jointly or severally, any one whose consent to act has been filed with the Registrar of Companies may act alone unless and until the others have consented to act.

(5) If, for whatever reason, the office of voluntary liquidator is vacant and the directors fail to convene a general meeting or the members fail to pass a resolution appointing a voluntary liquidator, any contributory or creditor of the company may apply to the Court for an order appointing a voluntary liquidator.

(6) Upon the appointment of a voluntary liquidator becoming effective in accordance with sub-rule (2), the powers of the directors shall cease automatically except to the extent that

(a) any power has been expressly reserved to the directors by a resolution passed at a general meeting of the company; or

(b) the voluntary liquidator has delegated any power to the directors or otherwise sanctioned the continuance of any power of the directors.

(7) Except to the extent that any power has been reserved to the directors, a voluntary liquidator shall have all the powers of an official liquidator (as stated in the Third Schedule to the Law) and may exercise those powers without the sanction of a resolution of the company's members.

Resignation of Voluntary Liquidator (O.13, r.4)

4. (1) A voluntary liquidator who wishes to resign shall —

(a) prepare a report and accounts complying with the requirements of Rule 8; and

(b) convene a general meeting of the company for the purpose of approving the voluntary liquidator's report and accounts, accepting the voluntary

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:04 Exhibit C
Case 1:24-cv-00495-DLI Document 2-2 Filed 05/12/23 Page 184 of 328 PageID #:
Winding up rules 2023 Consolidation Pg 82 of 128

liquidator's resignation, releasing the voluntary liquidator from the performance of any further duties and appointing a successor.

(2) In the event that the company fails to pass any resolution (either because there is no quorum or the resolution is voted upon but not passed), the voluntary liquidator may apply to the Court for an order that the voluntary liquidator be released from the performance of any further duties.

(3) Where two or more persons have been appointed as joint voluntary liquidators (whether empowered to act only jointly or jointly and severally) one may resign by filing a notice of resignation with the Registrar of Companies (without the need to prepare any report and accounts) and the remaining liquidator(s) shall continue in office, whether or not the outgoing liquidator is replaced.

Death of Voluntary Liquidator (O.13, r.5)

5. (1) Where the voluntary liquidator dies in office, it is the duty of the voluntary liquidator's personal representative to give notice of the voluntary liquidator's death (including the date of death) to the company's directors and to the Registrar of Companies.

(2) Alternatively, if the voluntary liquidator was a partner or employee of a firm, the voluntary liquidator's firm may give notice of the voluntary liquidator's death.

(3) Following the death of the voluntary liquidator (where the voluntary liquidator was acting as sole liquidator), the directors shall, within 28 days of the notification of the voluntary liquidator's death, convene a meeting of the company for the purpose of appointing a new liquidator, failing which any director or member of the company may apply to the Court for an order appointing a new liquidator.

(4) If a deceased liquidator was appointed jointly, the survivor shall continue to act as sole liquidator unless and until the company resolves to appoint an additional person to act jointly with the survivor liquidator.

Removal of Voluntary Liquidator (O.13, r.6)

6. (1) A voluntary liquidator may be removed from office by an ordinary resolution passed at a general meeting of the company convened especially for the purpose by any member or members holding not less than one fifth of the company's issued share capital or entitled to not less than one fifth of the votes if the company does not have a share capital.

(2) The voluntary liquidator shall be entitled to receive notice of any meeting convened in accordance with sub-rule (1).

(3) At a meeting convened in accordance with sub-rule (1) the company shall also consider and resolve upon —

Case 23-12044-BLS Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:04 Exhibit C
Winding up rules 2023 Consolidation Pg 83 of 128

(a) whether the outgoing voluntary liquidator should be released from the performance of any further duties without the need to prepare and distribute any further report or accounts; and

(b) the appointment of a successor liquidator.

(4) If the company fails to pass a resolution that the outgoing voluntary liquidator be released from the performance of any further duties, the voluntary liquidator shall prepare a report and accounts within 28 days from the date of the voluntary liquidator's removal and may apply to the Court for an order that the voluntary liquidator be released from the performance of any further duties.

Voluntary Liquidator's Reporting Obligations (O.13, r.7)

7. (1) The voluntary liquidator shall prepare reports and accounts with respect to the voluntary liquidator's conduct of the liquidation and the state of the company's affairs.

(2) In addition to preparing annual reports and accounts (in compliance with section 126) and the final report and accounts (in compliance with section 127), the voluntary liquidator shall prepare and send to the company's members such other reports and accounts as the voluntary liquidator considers appropriate.

(3) The voluntary liquidator's reports and accounts shall be sent to the company's members (by whatever means is authorised by its articles of association) together with notice of a general meeting convened for the purpose of considering and, if thought fit, approving such report and accounts.

(4) The voluntary liquidator shall, on request, send copies of the voluntary liquidator's reports and accounts to any creditor of the company whose debt has not been paid in full.

Form and Content of Reports and Accounts (O.13, r.8)

8. (1) The voluntary liquidator's report shall constitute a narrative description and analysis of the steps taken and, the case of an interim report, the further steps intended to be taken in the liquidation.

(2) The voluntary liquidator's report and accounts shall provide the company's members with all the information necessary to enable them to make an informed decision about the company's financial condition.

(3) The voluntary liquidator's accounts shall be presented in the company's functional currency and include details of —

(a) the nature of the company's assets;

(b) any security over the company's assets;

(c) the amount realised upon sale of the company's assets and the estimated realisable value of any unsold assets;

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Case 1:24-cv-00495-LJL Document 1-2 Filed 01/22/24 Page 191 of 328 PageID #:
Winding up rules 2023 Consolidation Pg 84 of 128

(d) the nature of the company's liabilities including contingent liabilities, the amounts paid in satisfaction of the liabilities and the amount remaining unpaid;

(e) the nature and amount of the company's income;

(f) the expenses of the liquidation;

(g) the amount of the liquidator's remuneration; and

(h) the amount distributed and the amount available for distribution to members.

Voluntary Liquidator's Remuneration (O.13, r.9)

9. (1) The basis of the voluntary liquidator's remuneration and the amount of the voluntary liquidator's remuneration shall be authorised by resolution of the company.

(2) The company may resolve to remunerate the voluntary liquidator on the basis of —

(a) an hourly rate (or scale of rates) for the time reasonably and properly devoted to the liquidation;

(b) a fixed sum;

(c) a commission or percentage of the assets distributed or realised; or

(d) a combination of these methods.

(3) The voluntary liquidator shall not be entitled to receive payment of any remuneration out of the company's assets without the prior approval of a resolution passed at a general meeting of the company except that —

(a) the amount of remuneration specified in the voluntary liquidator's final report and accounts may be paid if the final general meeting has been duly convened but no member attends and votes either in person or by proxy; and

(b) any remuneration may be paid with the Court's approval.

Applications to Court (O.13, r.10)

10. (1) Every originating application made to the Court by a voluntary liquidator or any contributory or creditor of a company in voluntary liquidation, whether pursuant to Part V of the Law and/or pursuant to this Order, shall be made by petition.

(2) A petition by which the voluntary liquidator or any contributory seeks an order for directions pursuant to section 129 shall be served —

(a) in the case of a liquidator's petition, upon every member of the company unless the Court directs otherwise or directs that the petition be advertised;

(b) in the case of a contributory's petition, upon the voluntary liquidator who shall serve it upon every member unless the Court directs otherwise or directs that the petition be advertised.

(3) A petition by a liquidator or former liquidator for that liquidator's release (under Rules 4 or 6) shall be served upon —

(a) the successor liquidator; and

(b) the members of the liquidation committee (if any);

(c) every member of the company, unless the Court directs otherwise.

(4) A petition pursuant to section 121(3) for an order that a voluntary liquidator be removed from office shall contain full particulars of all the facts and matters relied upon in support of the allegation that the voluntary liquidator is not a fit and proper person to hold such office and shall be served upon —

(a) the voluntary liquidator; and

(b) the liquidation committee (if any);

(c) every member of the company, unless the Court directs otherwise.

(5) A petition pursuant to section 119(4)(b) and Rule 3(5) for an order appointing a voluntary liquidator (when the office has been left vacant) need not be served on any members of the company.

(6) Every petition under this Rule must be supported by an affidavit unless all the facts and matters relied upon in support of the petition are contained in a liquidator's report.

(7) Every petition under paragraphs (4) or (5) must be supported by an affidavit sworn by the person nominated for appointment as voluntary liquidator stating that —

(a) that person is a qualified insolvency practitioner;

(b) having made due enquiry, that person believes that that person and that person's firm meet the criteria for independence contained in Regulation 6;

(c) that person and/or that person's firm are in compliance with the requirements of Regulation 7 relating to insurance; and

(d) that person is willing to act as official liquidator if so appointed by the Court.

(e) Any petition under this Rule may be heard in chambers unless the Court has directed that it be advertised, in which case it must be heard in open court.

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:34 Exhibit C
Winding up rules 2023 Consolidation Pg 86 of 128

General Meetings of the Company (O.13, r.11)

11. (1) In accordance with section 126 of the Law, in the event of a voluntary winding up continuing for more than one year, the voluntary liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and at the end of each succeeding year thereafter for the purpose of considering and, if thought fit —

(a) approving the voluntary liquidator's interim report and accounts;

(b) approving the voluntary liquidator's remuneration for the period up to the date of the voluntary liquidator's interim accounts; and

(c) resolving upon any other matters upon which the voluntary liquidator considers that it is necessary or appropriate for the company to resolve.

(2) Notice of every general meeting of the company convened by its voluntary liquidator shall be given in accordance with its articles of association, except that —

(a) every notice of a general meeting must be accompanied by the voluntary liquidator's report and accounts;

(b) at least 21 days' notice must be given of the final general meeting; and

(c) notice of the final general meeting shall be published in the Gazette.

(3) Notice of a general meeting convened by the voluntary liquidator may be given by any method authorised by the company's articles of association.

Voluntary Liquidator's Final Return (O.13, r.12)

12. (1) As soon as the company's affairs are fully wound up, the voluntary liquidator shall convene a final meeting of the company for the purpose of considering and, if thought fit —

(a) approving the voluntary liquidator's final report and accounts (including the provisions for any unpaid expenses);

(b) approving the voluntary liquidator's remuneration (including provision for work still to be done);

(c) resolving upon the retention and destruction of the company's books and records;

(d) resolving upon the method of dealing with the proceeds of any dividend cheques which remain uncleared for more than six months,

referred to in this Rule as "**the final resolutions**".

(2) In the event that —

(a) the final resolutions are passed; or

(b) no quorum is present (in person or by proxy),

the voluntary liquidator shall file a Final Return with the Registrar in CWR Form No 37 with the result that the company is deemed to be dissolved after the expiry of three months from the date upon which the Final Return is registered.

(3) In the event that a quorum is present at the final general meeting of the company and the final resolutions are not passed, the liquidation shall continue.

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:54 Exhibit C
Winding up rules 2023 Consolidation Pg 88 of 128

ORDER 14

DIRECTOR'S DECLARATION OF SOLVENCY

Form and Content of Declaration of Solvency (O.14, r.1)

1. (1) A declaration of solvency shall be in CWR Form No 21 and signed by each person who was a director of the company on the date on which its voluntary winding up was commenced.

(2) A declaration of solvency shall state the full name and address of each director by whom it is signed and the date upon which that person was appointed as a director.

(3) The voluntary liquidator may assist the company's directors to make the enquiries necessary to enable them to prepare and sign a declaration of solvency, for which purpose the voluntary liquidator shall provide them with access to all the company's books and records.

(4) The voluntary liquidator may pay to the company's directors the expenses reasonably and properly incurred by them in preparing a declaration of solvency

Delivery and Registration of Declaration of Solvency (O.14, r.2)

2. (1) In order to comply with the requirements of sections 123(1) and 124(1) of the Law, a declaration of solvency, duly signed by all the directors, must be delivered to the voluntary liquidator and filed with the Registrar of Companies within 28 days of the date upon which the voluntary liquidation is deemed to have commenced under section 117(1) of the Law.

(2) A declaration of solvency which has been transmitted to the voluntary liquidator electronically shall comply with the requirements of this Rule.

(3) If, having received a declaration of solvency, the voluntary liquidator fails to file it with the Registrar of Companies, any director may do so.

Case 23-12044-BLS Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 89 of 128

ORDER 15

APPLICATION FOR SUPERVISION ORDER

Introduction (O.15, r.1)

1. (1) An application for a supervision order must be made by a company's voluntary liquidator in accordance with section 124 of the Law if its directors fail to make and deliver their declaration of solvency to the voluntary liquidator within 28 days of the commencement of the liquidation.

(2) Notwithstanding that a declaration of solvency has been duly made in accordance with section 124 of the Law, the voluntary liquidator or any contributory or any creditor may apply to the Court for a supervision order on the grounds contained in section 131 of the Law.

Application under section 124 (O.15, r.2)

2. (1) The requirement to apply for a supervision order under section 124 of the Law shall apply only if the voluntary liquidation was commenced on or after 1 March 2009.

(2) An application for a supervision order under section 124 shall be made by petition.

(3) A petition under this Rule shall contain —

(a) particulars of the company's incorporation;

(b) particulars of the method by which the company was put into voluntary liquidation;

(c) particulars of the persons who are or were directors of the company on the date on which its voluntary liquidation commenced;

(d) a statement that the voluntary liquidator did not receive, within 28 days of the commencement of the liquidation, a declaration of solvency in the prescribed form signed by all of the company's directors; and

(e) if the voluntary liquidator is a qualified insolvency practitioner, a statement that the voluntary liquidator consents to being appointed as official liquidator; or

(f) if the voluntary liquidator is not a qualified insolvency practitioner or is unable to comply with the independence requirements of the Regulations or is unwilling to be appointed as official liquidator, the name and address of a qualified insolvency practitioner nominated for appointment as official liquidator.

(4) Every petition under this Rule must be presented within 35 days of the date upon which the liquidation is deemed to have commenced under section 117(1) of the Law.

(5) Unless the voluntary liquidator is a qualified insolvency practitioner who is willing and properly able to accept appointment as official liquidator, the voluntary liquidator must give notice of the petition to the company's members by whatever means is provided in its articles of association for giving notice of a general meeting of the company.

Application under section 131 (O.15, r.3)

3. (1) An application by a voluntary liquidator, contributory or creditor for a supervision order to be made under section 131 shall be made by petition.

(2) A petition under this Rule shall contain full particulars of the grounds upon which it is presented.

(3) Upon the presentation of a petition under this Rule, the petitioner must at the same time issue a summons for directions in respect of the matters contained in this Rule.

(4) Upon hearing the summons for directions, the Court shall either —

(a) make a supervision order, if the Court is satisfied that the company's members consent or do not object to an order being made; or

(b) fix a hearing date and make such directions as the Court thinks appropriate in respect of the following matters —

(i) whether the petition should be served and, if so, upon whom it should be served;

(ii) whether the petition should be advertised and, if so, in what manner it should be advertised;

(iii) the manner in which further evidence is to be given; and

(iv) such other procedural matters as the Court thinks fit.

(5) A petition under this Rule may be presented at any time.

Supporting Affidavits (O.15, r.4)

4. (1) The petition shall be verified by an affidavit that the statements in the petition are true, or are true to the best of the deponent's knowledge, information and belief.

(2) An affidavit verifying a petition under Rule 2 shall be sworn by the voluntary liquidator personally.

(3) An affidavit verifying a petition under Rule 3 shall be sworn by —

(a) the petitioner; or

(b) the voluntary liquidator; or

(c) any director, officer or agent of the petitioner who has been concerned in and has personal knowledge of the matters giving rise to the petition.

(4) Unless the voluntary liquidator is a qualified insolvency practitioner who is willing and properly able to accept appointment as official liquidator, a petition under Rule 2 or Rule 3 must also be supported by an affidavit sworn by the person or persons nominated for appointment as official liquidator and containing the information required by Order 3, rule 4.

Hearing of section 124 Petition (O.15, r.5)

5. (1) If the voluntary liquidator is a qualified insolvency practitioner who has sworn an affidavit verifying that the voluntary liquidator is willing and properly able to accept appointment as official liquidator, a Judge may make a supervision order under section 124 of the Law without the need for any hearing if the Judge is satisfied that —

(a) notice of the petition has been given to the company's creditors and, if it appears to the voluntary liquidator that the company may in fact be solvent, to its shareholders; and

(b) there is no reason to believe that any creditor or, if applicable, any shareholder objects to the appointment of the voluntary liquidator as official liquidator.

(2) In any other case, the voluntary liquidator shall apply to fix a date for hearing the petition in open court and –

(a) give notice of the hearing of the petition to the company's creditors and, if applicable, to its shareholders in whatever manner is likely to bring it to their attention; and

(b) advertise the hearing of the petition once in a newspaper having a circulation within the Islands and, if the company is carrying on business outside the Islands, once in a newspaper having a circulation in a country in which the company appears most likely to have creditors, in which case the advertisement shall be published in the official language of such country.

(3) An advertisement under this Rule shall be in CWR Form No. 22.

(4) Any member or creditor of the company may appear on the petition and be heard upon the question of who should be appointed as official liquidator provided that that member or creditor has given notice of their intention to do so and has complied with the requirements of Order 3, rule 8(3).

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 92 of 128

Release of Voluntary Liquidator (O.15, r.6)

6. (1) Unless a voluntary liquidator is appointed as official liquidator, the voluntary liquidator shall cease to hold office automatically upon the making of a supervision order.

(2) When a voluntary liquidator ceases to hold office in accordance with this Rule, the voluntary liquidator shall prepare a final report and accounts for the period from the commencement of the voluntary liquidation until the date of the supervision order.

(3) The voluntary liquidator shall deliver the voluntary liquidator's final report and accounts to the official liquidator within 28 days of the date upon which the supervision order was made and the official liquidator shall —

(a) file the report and accounts in Court; and

(b) publish the report and accounts to the company's members and creditors in such manner as the official liquidator thinks fit.

(4) Having delivered the voluntary liquidator's final report and accounts, the voluntary liquidator may apply (but shall not be obliged to apply) to the Court for an order that the voluntary liquidator's accounts (including the amount of the voluntary liquidator's remuneration) be approved and that the voluntary liquidator be released from the performance of any further duties.

Delivery of Company's Books and Records (O.15, r.7)

7. (1) A voluntary liquidator who ceases to hold office upon the making of a supervision order shall forthwith deliver to the voluntary liquidator's successor the company's books and a copy of the voluntary liquidator's liquidation files (maintained in accordance with Order 26, rule 2).

(2) The official liquidator shall allow the voluntary liquidator to have unrestricted access to the company's books and records for the purpose of preparing the voluntary liquidator's report in compliance with Order 13, rule 8.

Supervision Order (O.15, r.8)

8. (1) A supervision order shall be in CWR Form No 23.

(2) The requirements of Order 3, rules 22 and 23 shall apply to supervision orders as they apply to winding up orders.

(3) On the making of a supervision order all the powers of the directors cease, save that directors retain residual powers to allow them to initiate an appeal against the supervision order.

ORDER 16

PROOF OF DEBTS IN OFFICIAL LIQUIDATION

PART I: PROCEDURE FOR PROVING

Introduction (O.16, r.1)

1. (1) Where a solvent company is being wound up by the Court, the official liquidator shall pay the debts owing to its creditors in the ordinary course and in the currency of the obligation as if the company were still carrying on business.

(2) Where a company which is insolvent or of doubtful solvency is being wound up by the Court, a person claiming to be a creditor of the company and wishing to recover that person's debt must (subject to Rule 7) submit that person's claim in writing to the official liquidator and is referred to as "proving" for that person's debt and the document by which that person seeks to establish that person's claim is referred to as that person's "proof" or "proof of debt".

(3) The official liquidator of a solvent company which is being wound up by the Court may require a creditor to submit a proof of debt if there is a doubt or dispute about the existence of the debt or the amount owing to the creditor.

(4) It is the duty of the official liquidator to adjudicate the creditors' claims, for which purpose the official liquidator acts in a quasi-judicial capacity.

Form and Content of Proof (O.16, r.2)

2. (1) A proof of debt shall be in CWR Form No 24 or such other form or forms as the official liquidator may prescribe having regard to the nature of the claims against the company.

(2) The official liquidator may prescribe different forms of proof of debt for use by different classes of creditor.

(3) The following matters shall be stated in a creditor's proof of debt —

(a) the creditor's name and address;

(b) the total amount of the creditor's claim as at the date on which the company went into liquidation;

(c) whether or not the claim includes interest and, if so, the basis upon which the creditor claims to be entitled to interest;

(d) particulars of how and when the debt was incurred by the company; and

(e) particulars of the security held by the creditor, the value which the creditor puts on the security and the basis of the creditor's valuation.

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Case 1:24-cv-00495-DLI Document 1-2 Filed 05/12/23 Page 201 of 328 PageID #:
Winding up rules 2023 Consolidation Pg 94 of 128

(4) Copies of all the documents evidencing the existence and amount of the debt must be annexed to the proof of debt.

(5) The official liquidator may require the creditor to submit further and better particulars of the creditor's claim, including additional supporting documents.

(6) The person signing the proof of debt (other than the creditor themselves) must state that person's name, contact details and the basis upon which that person is authorised to act on behalf of the creditor.

(7) The official liquidator may require that a proof of debt be verified by affidavit.

Supply of proof of debt forms (O.16, r.3)

3. (1) Subject to Rule 7, proof of debt forms shall be sent by the official liquidator to every person who appears to the official liquidator to be a creditor of the company.

(2) Subject to Rule 7, proof of debt forms shall be sent to every person to whom the official liquidator sends notice of the first meeting of creditors in accordance with Order 8, rule 4.

Cost of proving (O.16, r.4)

4. (1) Every creditor bears that creditor's costs of proving that creditor's own debt, including the cost of responding to the official liquidator's requirement that the creditor provide further and better particulars of the creditor's claim.

(2) Nothing in this Rule shall prevent a creditor from claiming the creditor's costs of proving pursuant to the terms of a contract which is enforceable against the company.

(3) The official liquidator's cost of adjudicating the proofs of debt is paid out of the assets as an expense of the liquidation.

Withdrawal and variation of proof (O.16, r.5)

5. A creditor's proof may at any time, by agreement between that creditor and the liquidator, be withdrawn or varied as to the amount claimed.

Admission and rejection of proof (O.16, r.6)

6. (1) A proof may be admitted for dividend either for the whole amount claimed by the creditor, or for part of that amount.

(2) Where the official liquidator has admitted a creditor's proof in full, the official liquidator shall notify the creditor of this fact in CWR Form No 25.

(3) Where the official liquidator has rejected the creditor's proof or admitted it only in part, the official liquidator shall notify the creditor in CWR Form No 26, including —

(a) a statement of the official liquidator's reasons for rejecting the whole or part of the claim; and

(b) a statement of the creditor's right to apply to the Court for the official liquidator's decision to be reversed or varied.

Admission without proof of debt (O.16, r.7)

7. (1) This Rule applies to a company which has carried on a deposit taking business as a licensed bank.

(2) All of the company's depositors to whom periodic statements of account were sent by the company shall be admitted to proof in respect of the amounts recorded due to them without requiring them to lodge proofs of debt unless the official liquidator has reason to believe that the company's deposit taking records are unreliable.

(3) Where the official liquidator has admitted a depositor to proof without requiring that depositor to submit a proof of debt, the official liquidator shall send notice in CWR Form No 27 informing the depositor of this fact.

Inspection of Proofs of Debts (O. 16, r. 8)

8. (1) Subject to sub-rule (2), any proof of debt (including the supporting documentation, any further and better particulars and any correspondence relating to its adjudication) may be inspected by or on behalf of —

(a) any creditor whose proof of debt has been admitted in whole or in part; or

(b) any contributory of the company.

(2) In the case of a creditor to whom the company owes a duty of confidentiality, the official liquidator shall not allow the creditor's proof of debt to be inspected by another creditor or contributory without first —

(a) obtaining the creditor's written consent; or

(b) obtaining a direction of the Court pursuant to section 4 of the *Confidential Information Disclosure Act (as amended and revised).*

PART II: QUANTIFICATION OF CLAIM

Enforcement of Subordination, Set-Off (or Non Set-Off) and Netting Agreements (O.16, r.9)

9. (1) Any agreement made between the company and a creditor prior to the commencement of the winding up that the claims of such creditor be subordinated or otherwise deferred to the claims of any other creditors (referred to in this Order as a "**subordination agreement**") are binding on the company in liquidation and shall be enforced by the official liquidator.

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:34 Exhibit C
Case 1:24-cv-00495-LJL Document 28-2 Filed 05/17/24 Page 203 of 328 PageID #:
Winding up rules 2023 Consolidation Pg 96 of 128

(2) Any contractual right of set-off or non set-off or netting arrangement agreed between the company and any creditor prior to the commencement of the liquidation (including both bilateral and multi-lateral set-off or netting arrangements) (referred to in this Order as a "set-off agreement", "non set-off agreement" and "netting agreement") are binding upon the company in liquidation and shall be enforced by the official liquidator.

Mutual credit and set-off (O.16, r.10)

10. (1) This Rule applies where, before the commencement of the liquidation, the company has not concluded any set-off, non set-off or netting agreement with the creditor.

(2) If there have been mutual credits, mutual debts or other mutual dealings (other than a set-off or non set-off or netting agreement) between the company and the creditor, an account shall be taken of what is due from each party to the other in respect of the mutual dealings, and the sums due from one party shall be set off against the sums due from the other.

(3) Sums due from the company to another party shall not be included in the account taken under sub-rule (2) if that other party had actual notice at the time they became due that a winding up petition had been presented and was pending against the company.

(4) Only the balance (if any) of the account is provable in the liquidation. Alternatively, (as the case may be) the amount shall be paid to the official liquidator.

Pre-liquidation Interest on Debts (O.16, r.11)

11. (1) A creditor who has a contractual right to claim interest against an insolvent company may prove for the amount of the interest accrued up to the date of the commencement of the liquidation.

(2) A creditor having a contractual right to interest as against an insolvent company shall not be entitled to prove for any interest accrued after the commencement of the liquidation.

Post-liquidation Interest on Debts (O.16, r.12)

12. (1) This Rule applies to every official liquidation of a company which lasts more than six months.

(2) Any surplus remaining after payment of the debts proved in the liquidation shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the period during which they have been outstanding since the commencement of the liquidation pursuant to section 149 of the Law.

(3) The rate of interest payable under this Rule is the greater of —

(a) the contractual rate; or

(b) the prescribed rate under the *Judgment Debts (Rates of Interest) Rules (as amended and revised)*.

(4) The liquidator shall not pay interest under this Rule to any creditor whose claim to interest would amount to less than $500.

Determination of the currency of the liquidation (O.16, r.13)

13. (1) In the case of a solvent liquidation, the creditors are entitled and the official liquidator is required to pay the company's debts in the currency of the obligation.

(2) In the case of an insolvent liquidation, a company's liabilities shall be translated into the functional currency of the company (referred to in this Rule as the "**currency of the liquidation**") at the mid-market exchange rates prevailing —

(a) on the date of the commencement of the voluntary liquidation; or

(b) the date on which the winding up order was made, (referred to in this Rule as the "applicable exchange rate").

(3) The official liquidator shall determine the currency of the liquidation in accordance with section 150(3) of the Law within 28 days of the date of the official liquidator's appointment and the official liquidator's determination shall be final and binding upon the company's creditors for all purposes.

(4) The official liquidator's determination shall be certified in CWR Form No 28 and the certificate shall be filed in Court.

(5) When a creditor proves for that creditor's debt in a currency other than the currency of the liquidation, the amount claimed shall be translated into the currency of the liquidation at the applicable exchange rate.

(6) A creditor shall not be entitled to claim against an insolvent company in liquidation any compensation for exchange losses resulting from changes in the market exchange rate occurring during the period between the date on which the winding up order was made and the date on which the dividend is paid.

Payments of a periodical nature (O.16, r.14)

14. (1) In the case of rent and other payments of a periodical nature, the creditor may prove for any unpaid amount accrued up to the date when the winding up order is made.

(2) Unless the official liquidator continues to pay the rent or other payments accruing due after the date on which the winding up order is made as an expense of the liquidation, the creditor's claim in respect of amounts accruing after the date on which the winding up order is made shall be limited to a claim for damages for breach of contract.

(3) In calculating the amount of damages, the official liquidator shall assume that the creditor has taken all such steps as may be reasonable to mitigate that

creditor's loss and shall apply a discount for accelerated payment using the rate of interest prescribed by the *Judgment Debts (Rates of Interest) Rules (as amended and revised)*.

Debts payable at a future date (O.16, r.15)

15. (1) A creditor may prove for a debt of which payment was not yet due on the date when the company went into liquidation.

(2) If the dividend becomes payable before the date on which the debt would have fallen due, the amount of the dividend shall be discounted for accelerated payment using the rate of interest prescribed by the *Judgment Debts (Rates of Interest) Rules (as amended and revised)*.

Contingent claims (O.16, r.16)

16. (1) The official liquidator shall estimate the value of any debt which, by reason of its being subject to any contingency or for any other reason, does not bear a certain value.

(2) The official liquidator may revise any estimate previously made, if the official liquidator thinks fit by reference to any change of circumstances or to information becoming available to the official liquidator.

(3) Where the official liquidator has put an estimate upon a contingent claim or a debt the amount of which is subject to a contingency, the official liquidator shall notify the creditor of this fact in CWR Form No 29, stating —

(a) the basis upon which this estimate has been made;

(b) the fact that the creditor may submit a varied proof of debt, having regard to changed circumstances;

(c) the fact that the official liquidator may vary the official liquidator's estimate, having regard to changed circumstances; and

(d) the official liquidator's agreement to extend generally the creditor's time for applying to the Court pursuant to Rule 18.

PART III: APPEAL AGAINST REJECTION OF PROOF

Introduction (O.16, r.17)

17. If a creditor is dissatisfied with the official liquidator's decision with respect to the creditor's proof (including any decision on the question of priority), the creditor may appeal to the Court for the decision to be reversed or varied.

Application to Court (O.16, r.18)

18. (1) An appeal to the Court under Rule 17 shall be made within 21 days of the date upon which the creditor received the official liquidator's notification under Rule 6.

(2) Every appeal under this Rule shall be made by summons in CWR Form No 30 and shall be served on the official liquidator.

(3) Every appeal under this Rule shall be supported by an affidavit and Order 11, rule 4(2) shall apply.

(4) Order 11, rule 3 shall apply to the hearing of every appeal under this Rule.

(5) An appeal under this Rule shall be treated as a *de novo* adjudication of the creditor's proof and the creditor may rely upon additional evidence in support of the creditor's claim, notwithstanding that the creditor failed to make such evidence available to the official liquidator.

[No order] (O.16, r.19)

19. [No order]

PART IV: EXPUNGING ADMITTED CLAIMS

Introduction (O.16, r.20)

20. (1) The Court may expunge a proof which has been admitted or reduce the amount in respect of which it has been admitted.

(2) The official liquidator may apply to expunge a proof on the ground that it appears, on the basis of information not available to the official liquidator at the time of the official liquidator's adjudication of the proof, that it ought not to have been admitted or ought to have been admitted for a lesser amount.

(3) A contributory or creditor who is dissatisfied with the official liquidator's decision to admit the whole or part of a creditor's proof for an amount exceeding $100,000 (or its equivalent in the currency of the liquidation) or 5% of the company's total liabilities (whichever is the less) may apply to expunge the proof on the ground that it should not have been admitted.

Application to Court (O.16, r.21)

21. (1) An application to expunge a proof of debt shall be made by summons in CWR Form No 31 and shall be served on the creditor and, if made under Rule 20(3) of this Order, shall also be served on the official liquidator.

(2) An application under this Rule must be made promptly and, in any event, not later than the date upon which a dividend has been paid in respect of it.

(3) Every application under this Rule shall be supported by an affidavit and Order 11, rule 4(2) shall apply.

Case 23-12044-BLS Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 101 of 128

ORDER 17

SECURED CREDITORS

Introduction (O.17, r.1)

1. (1) A creditor who has security over the whole or part of the assets of a company is entitled to enforce that creditor's security without the leave of the Court and without reference to its liquidator.

(2) A secured creditor whose debt is more than the value of that secured creditor's security may prove in the liquidation for the unsecured balance.

(3) A proof of debt submitted by a secured creditor shall state particulars of the security held by the creditor and the value which the secured creditor puts on the security.

(4) A secured creditor may, with the agreement of the liquidator or the leave of the Court, alter the value which the secured creditor has put on the secured creditor's security in the secured creditor's proof of debt.

(5) If a secured creditor omits to disclose their security in their proof of debt, that secured creditor shall surrender their security for the general benefit of creditors, unless the Court relieves that secured creditor from the effect of this Rule on the ground that that secured creditor's omission was inadvertent or the result of an honest mistake.

Redemption of security by the liquidator (O.17, r.2)

2. (1) The liquidator may at any time give notice to a creditor whose debt is secured that the liquidator proposes, at the expiration of 28 days from the date of the notice, to redeem the security at the value put upon it in the creditor's proof.

(2) The creditor then has 21 days in which (if the creditor so wishes) to apply to the Court for leave to alter the value of the creditor's security.

(3) If the liquidator redeems the security, the costs incurred in doing so are payable out of the assets of the company as an expense of the liquidation.

(4) A secured creditor may at any time give notice to the liquidator requiring the liquidator to elect whether or not the liquidator will exercise the liquidator's right to redeem the security at the value put on it in the creditor's proof of debt and the liquidator shall make the liquidator's election within 90 days, failing which the liquidator shall lose the liquidator's right to redeem the security.

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:04 Exhibit C-
Winding up rules 2023 Consolidation Pg 102 of 128

Valuation of security (O.17, r.3)

3. (1) If the liquidator is dissatisfied with the value which a secured creditor has put on the secured creditor's security, the liquidator may require that the property comprised in the security be offered for sale.

(2) The method and terms of sale shall be such as may be agreed between the liquidator and the creditor or, failing agreement, as may be directed by the Court.

(3) In the event that the method of sale is by auction, the creditor shall be entitled to bid and the liquidator shall be entitled to bid on behalf of the company.

Realisation of security (O.17, r.4)

4. (1) If a secured creditor who has submitted a proof of debt and valued that secured creditor's security subsequently realises it, the net proceeds of sale shall be substituted for the value previously put on the security by the creditor in that creditor's proof of debt.

(2) The creditor shall be entitled to prove for the balance of that creditor's debt.

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:04 Exhibit C
Winding up rules 2023 Consolidation Pg 103 of 128

ORDER 18

COLLECTION AND DISTRIBUTION OF COMPANY'S ASSETS BY ITS OFFICIAL LIQUIDATOR

Powers of Official Liquidator (O.18, r.1)

1. (1) The official liquidator is an officer of the Court.

(2) The official liquidator is empowered, as agent of the company, to collect, take possession, retain, manage and realise the company's property.

Manner of Distributing the Assets (O. 18, r. 2)

2. (1) When the official liquidator has sufficient funds in hand for the purpose the official liquidator shall, subject to the retention of such sums as may be necessary for the expenses of the winding up, declare and distribute dividends among the creditors in respect of the debts which they have respectively proved.

(2) The official liquidator shall give notice of the official liquidator's intention to declare and distribute a dividend.

(3) Where the official liquidator has declared a dividend, the official liquidator shall give 21 days' notice of it to the creditors, stating how the dividend is proposed to be distributed. The notice shall contain such particulars with respect to the company, and its assets and affairs, as will enable the creditors to comprehend the calculation of the amount of the dividend and the manner of its distribution.

Debts of Insolvent Company to Rank Equally (O.18, r.3)

3. Debts other than preferential debts rank equally between themselves in the winding up and, after the preferential debts, shall be paid in full unless the assets are insufficient for meeting them, in which case they shall abate in equal proportions between themselves.

Calculation of Dividend (O.18, r.4)

4. (1) In the calculation and distribution of a dividend the official liquidator shall make provision for —

(a) any debts which appear to the official liquidator to be due to persons who, for whatever reason, may not have had sufficient time in which to tender and establish their proofs;

(b) any debts which are the subject of claims which have not yet been determined;

(c) disputed proofs and claims; and

(d) expenses of the liquidation which are anticipated but not yet incurred.

(2) A creditor who has not proved that creditor's debt before the declaration of any dividend is not entitled to disturb, by reason that that creditor has not participated in it, the distribution of that dividend or any other dividend declared before that creditor's debt was proved, but when that creditor has proved that debt, that creditor is entitled to be paid out of any money available for the payment of any further dividend.

(3) No action lies against an official liquidator for a dividend, but if an official liquidator has improperly refused to pay a dividend, the Court may order the official liquidator to pay it with interest at the prescribed rate.

Distribution of Assets in Specie (O.18, r.5)

5. (1) The official liquidator has power to divide the whole or part of the company's property in its existing form, according to its estimated value, amongst the company's creditors or members.

(2) In the case of an insolvent company, the official liquidator may apply to the Court for a direction authorising the official liquidator to divide the whole or part of the company's assets amongst the creditors on the grounds that —

(a) the property in question cannot be readily or advantageously sold; or

(b) there is some other special reason why it would be advantageous to creditors for the property in question to be distributed in specie.

(3) In the case of a solvent company, the official liquidator may divide the whole or part of the company's property (after having paid its debts in full) amongst the members in the following manner —

(a) in accordance with any specific provision in this regard contained in the company's articles of association; or

(b) in the absence of any relevant provision in the company's articles of association, with the authority of an ordinary resolution passed by the company's members; or

(c) in accordance with a direction of the Court made upon the application of any member or the voluntary liquidator.

(4) Property of a company which comprises a cause of action or other contingent asset which is incapable of being readily realised, may be distributed to creditors or members by means of transferring it to a new company, established for the purpose, and whose shares will be issued to the creditors or members in proportion to their respective rights against the company.

Interim Distribution to Creditors (O.18, r.6)

6. (1) As soon as the official liquidator determines that the official liquidator has realised sufficient assets to be able to pay a dividend, the official liquidator shall give notice of the official liquidator's intention to declare an interim or final dividend, as the case may be.

(2) A notice of intention to declare an interim dividend shall be in CWR Form No. 32 and shall —

(a) fix a date (being not less than 30 days from the date of publication of the notice) by which proofs of debt must be lodged with the official liquidator; and

(b) state that any creditor who lodges that creditor's proof of debt after the date specified in the notice will be excluded from the interim distribution but will not be excluded from any subsequent interim distribution or from the final distribution.

Final Distribution to Creditors (O.18, r.7)

7. (1) When the official liquidator has —

(a) realised all the company's assets, or so much of the assets as can, in the official liquidator's opinion, be realised without needlessly protracting the liquidation; and

(b) divided any unrealised assets amongst the creditors in specie, if and to the extent that it was practical to do so,

the official liquidator shall give notice of the official liquidator's intention to declare a final dividend in CWR Form 33.

(2) The notice of intention to declare a final dividend shall —

(a) fix the date (being not less than 60 days from date of publication of the notice) by which proofs must be lodged with the official liquidator (referred to as "the final date for proving"); and

(b) state that any proof of debt lodged after the final date for proving may be excluded from the final dividend.

(3) Within 14 days from the final date for proving, the official liquidator shall deal with every creditor's proof (to the extent that the official liquidator has not already done so) by admitting it, rejecting it (in whole or in part) or by making a provision for it.

(4) The official liquidator may, but shall not be obliged, to deal with any proof of debt received after the final date for proving.

(5) Having dealt with every creditor's proof, the official liquidator shall give notice of final dividend in Form 34 to all creditors who have proved their debts.

(6) Every notice of final dividend shall specify —

(a) the amount realised from the sale of the company's assets;

(b) the value attributed to any assets distributed in specie;

(c) the amount of the expenses of the liquidation;

(d) the amount of any provisions made for unpaid claims;

(e) the amount of any funds retained for specific purposes;

(f) the total amount of any interim distributions; and

(g) the amount to be distributed and the overall rate of dividend.

(7) A dividend may be distributed simultaneously with the notice declaring it.

Payment of Dividends (O.18, r.8)

8. (1) Dividends shall only be paid in the currency of the liquidation.

(2) Dividends shall be paid by cheque or by such other method as the official liquidator may agree with individual creditors.

(3) Dividend cheques shall be sent to creditors by post, or by such other method as the official liquidator may agree with individual creditors.

Assignment of Right to Receive a Dividend (O.18, r.9)

9. (1) A creditor or member may assign that creditor's or member's right to receive a dividend or instruct the official liquidator to pay that creditor's or member's dividend to some other person.

(2) If a creditor entitled to receive a dividend has given notice of assignment to the official liquidator, the official liquidator shall pay the dividend to the assignee.

(3) If a creditor entitled to receive a dividend has given written instructions to the official liquidator that the dividend be paid to some other person, the official liquidator shall pay it in accordance with those instructions.

Case 23-12044-BLS Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 107 of 128

ORDER 19

CALLS ON CONTRIBUTORIES AND TRANSFERS OF SHARES

PART I: CALLS ON CONTRIBUTORIES

Calls by Official Liquidator (O.19, r.1)

1. (1) The power contained in section 113 of the Law to make calls on contributories shall be exercised by the official liquidator with the sanction of the Court.

(2) A sanction application under this Rule shall be made in accordance with the provisions of Order 11.

Making and Enforcement of Calls (O.19, r.2)

2. (1) Notice of the call shall be given in Form 35 to each of the contributories concerned and shall specify the amount or balance due from each of the contributories.

(2) A call shall be payable immediately upon service on the contributory concerned.

(3) A call shall be enforceable against the contributory concerned in the same manner as a judgment or order of the Court.

Appeal against Calls (O.19, r.3)

3. (1) If a person against whom a call is made is dissatisfied either with the decision that that person is a contributory or with the amount of the call made against that person, that person may appeal to the Court for the decision to be reversed or varied.

(2) An appeal under this Rule shall be made with within 21 days of the date upon which the contributory received notice of the call.

(3) The provisions of Order 16, rules 19 and 20 shall apply to appeals under this Rule (as if references to "**creditors**" and "**proofs**" are read as referring to "**contributories**" and "**calls**").

(4) An appeal under this Rule shall be permitted only on terms that the full amount of the call is paid into Court within 7 days after service of the contributory's summons.

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:54 Exhibit C
Winding up rules 2023 Consolidation Pg 108 of 128

PART II: TRANSFERS OF SHARES

Application for Validation Order (O.19, r.4)

4. (1) An application pursuant to Section 99 of the Law for an order validating the transfer or proposed transfer of any shares of a company may be made by its liquidator or by the transferor or transferee of the shares in question.

(2) Provided that —

(a) the shares in question are fully paid; and

(b) the liquidator does not object to the transfer,

the application shall be made by letter addressed to the Judge to whom the proceeding is assigned.

(3) In any other case the application shall be made by summons and, if made by the transferor or transferee, the summons must be served on the liquidator.

Supporting Documentation (O.19, r.5)

5. (1) An application made by letter pursuant to rule 4(2) shall be supported by —

(a) an affidavit confirming that the shares are fully paid and that the liquidator has no objection to the transfer; and

(b) a draft of the order sought by the applicant

(2) An application required to be made by summons shall be supported by an affidavit, sworn by or on behalf of the applicant, which contains a full explanation of the reasons for the transfer and the applicant's response to the liquidator's objections.

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 109 of 128

ORDER 20

ORDER OF PAYMENT OF EXPENSES OUT OF THE ASSETS

General Rule as to Priority (O.20, r.1)

1. (1) The expenses of the liquidation and the expenses properly incurred during the appointment of the restructuring officer are payable out of the assets of the company in the following order of priority:

(a) the costs of the petitioner and of any person appearing on the petition whose costs are allowed by the Court;

(b) the costs incurred by the petitioner or other person required to secure an undertaking given pursuant to Order 4, rule 3;

(c) the costs incurred by any restructuring officer (including a restructuring officer appointed on an interim basis), provisional and/or official liquidator in procuring professional indemnity insurance and/or a security bond pursuant to an order made under Regulation 7;

(d) the expenses and disbursements properly incurred by or during the term of appointment of any restructuring officer (including a restructuring officer appointed on an interim basis);

(e) the remuneration of any restructuring officer (including a restructuring officer appointed on an interim basis);

(f) the expenses and disbursements properly incurred by any provisional liquidator;

(g) the remuneration of any provisional liquidator;

(h) the expenses and disbursements properly incurred by the official liquidator, including any expenses properly payable to any person who is required to make a statement of affairs;

(i) the expenses and disbursements properly incurred by the liquidation committee;

(j) any order for costs made by the Court in favour of any creditor or contributory in the winding up proceedings or in favour of any other person in proceedings to which the company is a party; and

(k) the remuneration of the official liquidator.

(2) In the case of a liquidation which commences voluntarily and is subsequently brought under the supervision of the Court:

(a) the expenses and disbursements properly incurred by the voluntary liquidator;

(b) the costs of making an application for the supervision order, whether such costs are incurred by the voluntary liquidator or any creditor or contributory of the company; and

(c) the remuneration of the voluntary liquidator,

shall rank equally with the expenses and disbursements incurred by the official liquidator, but in priority to the remuneration of the official liquidator.

Disallowance of Expenses and Disbursements (O.20, r.2)

2. (1) Nothing in this Order shall prevent the Court from making an order that any expense or disbursement incurred by a restructuring officer or liquidator shall be borne by that restructuring officer or liquidator personally on the ground that it was not incurred properly.

(2) Nothing in this Order shall prevent the Court, in any proceedings by or against the company, from making an order in favour of any other party that that party's costs be paid by the restructuring officer or liquidator personally.

ORDER 21

INTERNATIONAL PROTOCOLS

Application and definitions (O.21, r.1)

1. (1) In this Order "**company in liquidation**" means a company which is incorporated under the Law and is the subject of an official liquidation under Part V.

(2) This Order has no application to foreign companies which are the subject of an official liquidation under Part V.

(3) This Order applies —

(a) when a company in liquidation is the subject of a concurrent bankruptcy proceeding under the law of a foreign country; or

(b) when the assets of a company in liquidation located in a foreign country are the subject of a bankruptcy proceeding or receivership under the law of that country.

(4) In this Order —

(a) "**foreign officeholder**" means a person appointed by a foreign court or other authority to exercise powers similar to those of an official liquidator in respect of a company or to exercise powers similar to those of a receiver in respect of assets of a company;

(b) "**foreign court or authority**" means the foreign court or foreign governmental authority which has appointed and exercises supervisory jurisdiction over a foreign officeholder;

(c) "**international protocol**" means an agreement made in respect of a company in liquidation between an official liquidator and a foreign officeholder with the approval of the Court and of the foreign court or authority.

Consideration of international protocols (O.21, r.2)

2. (1) It shall be the duty of the official liquidator of a company in liquidation to consider whether or not it is appropriate to enter into an international protocol with any foreign officeholder.

(2) The purpose of an international protocol is to promote the orderly administration of the estate of a company in liquidation and avoid duplication of work and conflict between the official liquidator and the foreign officeholder.

(3) An international protocol agreed between the official liquidator and a foreign officeholder of a company in liquidation shall take effect and become binding

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 112 of 128

upon them only if and when it is approved by both the Court and the foreign court or authority.

Scope of international protocols (O.21, r.3)

3. (1) An international protocol may define and allocate responsibilities between the official liquidator and foreign officeholder (by reference to geographical location or otherwise) in respect of —

(a) the formulation and promotion of restructuring proposals, including a scheme of arrangement pursuant to section 86 of the Law;

(b) the preservation of assets located outside the Islands;

(c) the realisation of assets located outside the Islands;

(d) the pursuit of causes of action against debtors or other persons outside the Islands;

(e) procedures for the exchange of information between the official liquidator and foreign officeholder;

(f) procedures for reporting to and communicating with the liquidation committee and with creditors and/or contributories;

(g) procedures for co-ordinating sanction applications made to the Court and to the foreign court or authority;

(h) administrative procedures relating to the adjudication of proofs of debt and consequential appeals or expungement applications;

(i) procedures relating to the payment of claims; and

(j) procedures relating to the remission of funds between the official liquidator and foreign officeholder.

(2) An international protocol may establish procedures for the review, approval and payment of —

(a) the remuneration of the official liquidator and foreign officeholders;

(b) the fees of counsel to the official liquidator and lawyers engaged by the foreign officeholder; and

(c) other expenses incurred by the official liquidator and/or foreign officeholder.

(3) Any provision contained in international protocol which is contrary to the provisions of the Law or purports to exclude the jurisdiction of the Court in respect of the company in liquidation shall be void and of no effect.

Case 23-12044-BLS Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:04 Exhibit C
Winding up rules 2023 Consolidation Pg 113 of 128

ORDER 22

ORDER FOR DISSOLUTION

Application to Court (O.22, r.1)

1. (1) As soon as the affairs of the company have been completely wound up the official liquidator shall —

(a) publish the official liquidator's final report and accounts in accordance with Order 10, rule 3;

(b) apply to the Court for an order under section 152 that the company be dissolved.

(2) The official liquidator's final report and accounts shall contain —

(a) notice of the date upon which the official liquidator's application for an order for dissolution will be heard by the Court; and

(b) a statement of the fact that any creditor (in the case of an insolvent company) or member (in the case of a solvent company) may appear and be heard on the application.

(3) The official liquidator shall publish a notice of the hearing of the application in one or more newspapers circulating in a country or countries in which the company appears most likely to have creditors and any such notice shall be published at least 14 days prior to the date of the hearing.

Order for Dissolution (O.22, r.2)

2. (1) An order for dissolution shall be in CWR Form 36.

(2) An order for dissolution shall take effect upon the date upon which it is made or such later date specified in the order.

(3) The official liquidator shall file the order for dissolution with the Registrar of Companies within 14 days from the date upon which the order is perfected.

(4) An order for dissolution shall include supplementary directions relating to —

(a) the retention of the whole or part of the liquidation files for longer than the minimum period of 3 years specified in Order 25, rule 1;

(b) the retention, storage and destruction of the company's books and records pursuant to Order 25, rule 2:

(c) the terms upon which the official liquidator will be remunerated for acting as trustee of any unclaimed dividends or undistributed assets under section 153; and

(d) such other consequential matters as the Court thinks fit.

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 114 of 128

ORDER 23

UNCLAIMED DIVIDENDS AND UNDISTRIBUTED ASSETS

Introduction (O.23, r.1)

1. Following the dissolution of a company, whether pursuant to section 151 or an order for dissolution made under section 152, the former liquidator shall be trustee of any unclaimed dividends or undistributed assets of the company which remain in the former liquidator's possession or control for the benefit of the contributories or creditors to whom such funds are owed.

Establishment of Trust Account (O.23, r.2)

2. (1) The liquidator shall establish an interest bearing bank account in the liquidator's own name as "trustee of the creditors or members of [*name of company*], dissolved" (referred to as "the liquidator's trust account").

(2) Any funds representing unclaimed dividends or uncleared dividend cheques shall be transferred to the liquidator's trust account.

(3) The former liquidator shall administer the funds credited to the liquidator's trust account as trustee for the benefit of the creditors and/or contributories to whom the funds are owed.

Transfer of Undistributed Assets (O.23, r.3)

3. (1) Title to any assets of the company which ought to have been distributed in specie pursuant to Order 18, rule 4 but remain in the possession or control of the liquidator, shall be transferred into the liquidator's own name "as trustee of the creditors or members of [*name of company*], dissolved".

(2) The former liquidator shall hold and administer such assets as trustee for the benefit of the creditors or contributories who are entitled to receive such assets.

Payment out of Trust Account and Transfer of Undistributed Assets (O.23, r.4)

4. (1) The former liquidator shall advertise for claims and take such other steps as appear to the former liquidator to be reasonable to locate and identify claimants.

(2) The former liquidator shall be responsible for dealing with all claims and shall be authorised to make payment or transfer title to those persons who appear to the former liquidator to have been entitled to receive payment or title as unpaid creditors or members of the company prior to its dissolution.

(3) In any case of doubt or difficulty the former liquidator shall be entitled to apply to the Court for directions pursuant to section 48 of the *Trusts Act (as amended and revised).*

Case 23-12044-BLS Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:24 Exhibit C
Winding up rules 2023 Consolidation Pg 115 of 128

Former Liquidator's Trustee Fee and Expenses (O.23, r.5)

5. (1) The former liquidator shall be entitled to be paid a reasonable fee for acting as trustee pursuant to section 153, the basis and amount of which shall be fixed by order of the Court.

(2) The trustee fee may comprise —

(a) a fixed fee or scale of fixed fees; and/or

(b) a percentage fee, calculated upon the value of the assets under administration and/or the amount distributed by the trustee.

(3) The former liquidator shall be entitled to be reimbursed out of the assets under administration in respect of the costs and expenses reasonably and properly incurred by the former liquidator for the purpose of advertising, administering claims and preparing the former liquidator's accounts.

Transfer to the Financial Secretary (O.23, r.6)

6. (1) Any money or assets remaining in the hands of the former liquidator as trustee at the end of one year from the date upon which the company was dissolved shall be transferred to the Financial Secretary who shall be responsible for administering the same pursuant to Part VIII of the *Public Management and Finance Act (as amended and revised)*.

(2) The former liquidator shall prepare a report and accounts of the former liquidator's administration which shall contain particulars of —

(a) the amount of money and the nature and estimated value of the assets received into trust;

(b) the claims received and the manner in which they were resolved;

(c) the amount of money paid out to claimants;

(d) the assets transferred to claimants;

(e) the amount of the former liquidator's fees and expenses;

(f) the net amount of money and remaining assets transferred to the Financial Secretary.

(3) The former liquidator shall deliver the former liquidator's report and accounts to the Financial Secretary, together with all the books and records which, in the opinion of the former liquidator, will be required by the Financial Secretary in order to deal with future claims and otherwise discharge the Financial Secretary's duties under Part VII of the *Public Management and Finance Act (as amended and revised)*.

Case 3:22-cv-00495-DJH-RSE Document 1-3 Filed 12/20/23 Page 123 of 128 PageID #: 123
Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:34 Exhibit C
Winding up rules 2023 Consolidation Pg 116 of 128

ORDER 24

APPLICATIONS TO COURT UNDER PART V OF THE LAW

PART I: GENERAL PROVISIONS

Originating Applications (O.24, r.1)

1. (1) Every originating application under Part V of the Law shall be made by petition.

(2) The general provisions of GCR Order 9, and GCR Order 18, rule 19 and Order 20, rule 7 shall apply to every petition presented under these Rules.

(3) Unless a specific form of petition is prescribed by these Rules, GCR Form No 7 shall be treated as the generally applicable form.

(4) A petition under this Rule cannot relate to more than one company.

(5) The Court may hear two or more petitions at the same time, but it shall not make any order for two or more petitions to be consolidated.

(6) An office copy of every petition presented under these Rules shall be placed on the Register of Writs and other Originating Process maintained by the Registrar pursuant to GCR Order 63, rule 8.

Applications in Existing Proceedings (O.24, r.2)

2. (1) Every application or appeal to the Court made in connection with a proceeding which is already pending before the Court shall be made by summons.

(2) The general provisions of GCR Order 32 shall apply to every summons issued under these Rules.

Hearings (O.24, r.3)

3. (1) Every petition shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers.

(2) Every summons shall be heard in chambers unless —

(a) the Court has directed that it should be advertised, in which case it must be heard in open court; or

(b) the Court directs that it should be heard in open court.

Court Files (O.24, r.4)

4. (1) A Court file shall be established in respect of each winding up proceeding in accordance with GCR Order 63, rule 2.

(2) The Registrar shall not permit the creation of more than one Court file (or the allocation of more than one cause number) in respect of a liquidation proceeding or company in liquidation.

(3) The Registrar shall not permit any Court file (and associated cause number) to relate to more than one company in liquidation.

Orders made in Liquidation Proceedings (O.24, r.5)

5. Every order made in a liquidation proceeding, whether made in open court or in chambers, shall be placed on the Register of Judgments maintained by the Registrar under GCR Order 63, rule 7 and shall be open to public inspection upon payment of the prescribed fee.

Order for Documents to be Sealed (O.24, r.6)

6. (1) The Court may direct that the whole or part of any report, order, affidavit or other document, except the petition, winding up order or supervision order, which has been filed or is required to be filed pursuant to these Rules, shall be sealed and kept confidential for a specific period or until the happening of a specified event, on the grounds that —

(a) the information in question is of a confidential nature and will not come into the public domain unless and until the document containing such information is filed in Court; and

(b) the publication or immediate publication of the information contained in the document will harm the economic interests of the creditors or contributories of the company.

(2) The liquidator and any creditor or contributory may apply to the Court for a direction that a sealed document be unsealed on the grounds that —

(a) the information contained in it is no longer confidential;

(b) the reasons for sealing the document no longer exist or have expired; or

(c) publication of the information is not or is no longer harmful to the economic interests of creditors or contributories.

PART II: COSTS IN LIQUIDATION PROCEEDINGS

Interpretation (O.24, r.7)

7. (1) "**Costs**" shall mean the reasonable legal fees and expenses incurred by a person in conducting or participating in a liquidation proceeding in an economical, expeditious and proper manner.

(2) "**Liquidation proceeding**" shall mean —

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:54 Exhibit C
Winding up rules 2023 Consolidation Pg 118 of 128

(a) any petition presented under Part V of the Law;

(b) any application to Court made in a proceeding commenced under Part V of the Law ; and

(c) any appeal against an order made on a petition or in any proceeding under Part V of the Law.

(3) Words and expressions defined in GCR Order 62, rule 3 shall have the same meaning when used in Part II of this Order.

General Rules as to Costs (O.24, r.8)

8. (1) The general rule is that the costs incurred by a person who successfully presents a creditor's winding up petition under Order 3, Part II or creditor's petition for a supervision order under Order 15, rule 3 should have that person's costs paid out of the assets of the company, such costs to be taxed on an indemnity basis unless agreed with the official liquidator.

(2) In the case of a contributory's winding up petition under Order 3, Part III, the general rules are that —

(a) if the Court has directed that the company itself is properly able to participate in the proceeding, the general rule is that the costs of a successful petitioner be paid out of the assets of the company; or

(b) if the Court has directed that the winding up petition be treated as an inter partes proceeding between one or more members of the other members or members of the company as respondents, the general rule is that none of the costs should be paid out of the assets of the company and the unsuccessful parties should pay the costs of the successful party, such costs to be taxed on the standard basis unless agreed.

(2A) An order for security for costs may only be made if the petitioner is a nominal petitioner who has presented the petition for the benefit of another person and who would be unable to pay the costs of the company or other respondent, as the case may be, if ordered to do so.

(3) In the case of an Authority's petition under Order 3, Part IV, the general rule is that —

(a) the Authority's costs of successfully presenting a petition should be paid out of the assets of the company, such costs to be taxed on the indemnity basis if not agreed with the official liquidator; or

(b) the company's costs of successfully resisting the petition should be paid by the Authority, such costs to be taxed on the indemnity basis if not agreed.

(4) The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional and special circumstances which justify making some other order or no order for costs.

Costs of Sanction Applications (O.24, r.9)

9. (1) This Rule applies to every sanction application under Order 11, including any application for the approval of the official liquidator's remuneration.

(2) The official liquidator's costs of making a sanction application shall be paid out of the assets of the company unless the Court is satisfied that —

(a) the application ought not to have been made because the directions sought by the official liquidator were unnecessary and served no useful purpose;

(b) the directions sought by the official liquidator were wholly unreasonable; or

(c) the official liquidator has misled the Court or otherwise acted improperly in connection with the application.

(3) The liquidation committee's costs of participating in a sanction application shall be paid out of the assets of the of the company unless the Court is satisfied that —

(a) the liquidation committee's participation in the application served no useful purpose or constituted an unreasonable duplication of the costs incurred by the official liquidator;

(b) the position adopted by the liquidation committee was wholly unreasonable; or

(c) the liquidation committee has misled the Court or otherwise acted improperly in connection with the application

(4) In the case of a sanction application which is made or opposed by a creditor or contributory, the general rule is that —

(a) that creditor's or contributory's costs of successfully making or opposing the application should be paid out of the assets of the company, such costs to be taxed on an indemnity basis if not agreed with the official liquidator; and

(b) no order for costs should be made against a creditor or contributory whose application or opposition is unsuccessful, unless the Court is satisfied that that creditor's or contributory's position was wholly unreasonable or that creditor or contributory is guilty of having misled the Court or otherwise acting improperly in connection with the application.

(5) The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional circumstances and special reasons which justify making some other order or not order for costs.

Costs of Appeals (O.24, r.10)

10. (1) This Rule applies to appeals by contributories under Order 12, rule 4 and appeals by creditors under Order 16, Part III.

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 120 of 128

(2) The general rule is that the official liquidator's costs should be paid out of the assets of the company in any event.

(3) The general rule is that the appellant's costs should follow the event, such that —

(a) if the appellant succeeds, the Court shall order that the appellant's costs be paid out of the assets of the company as an expense of the liquidation;

(b) if the appellant is unsuccessful, the Court will order the appellant to pay the official liquidator's costs,

(c) such costs to be taxed on the standard basis unless agreed.

(4) In deciding how to exercise its discretion under sub-rule (3) the Court shall have regard to the manner in which the appellant originally sought to prove the appellant's claim (and, in particular, any failure to provide to the official liquidator with the whole of the evidence relied upon in support of the appellant's appeal to the Court) and the reasons why the Court reversed or varied or upheld the official liquidator's decision.

(5) On an appeal to the Grand Court an appellant shall not be required to provide security for costs in any appeal to which this Rule applies.

Taxation of Costs and Appeals (O.24, r.11)

11. (1) In the event that an order for costs made in a liquidation proceeding is required to be taxed, it shall be taxed by the taxing officer in accordance with the provisions of GCR Order 62, Parts IV, V and VI except that Rules 14 and 15 shall not apply.

(2) The Guidelines issued by the Grand Court Rules Committee pursuant to GCR Order 62, rule 16(3) shall apply to every taxation under this Order.

(3) Any party who is dissatisfied with the amount of any costs certificate may apply to a Judge to review the taxing officer's decision in accordance with the provisions of GCR Order 62, Part VII.

Case 23-12044-BLS Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 121 of 128

ORDER 25

OFFICIAL LIQUIDATOR'S LAWYERS

Appointment of Lawyers (O.25, r.1)

1. (1) Subject to obtaining the Court's sanction pursuant to paragraph 11 of Part I of the Third Schedule to the Law, the official liquidator may retain attorneys and/or foreign lawyers (whether or not temporarily admitted as attorneys) only on terms of engagement which comply with the requirements of this Rule.

(2) The terms upon which lawyers are engaged by the official liquidator must be stated in writing and shall be signed by both parties.

(3) Every engagement letter or retainer agreement shall contain particulars of the basis upon which the lawyers will be remunerated, including, if applicable, a statement of the agreed hourly rates.

(4) The official liquidator shall not retain (whether directly or indirectly) any foreign lawyer unless the foreign lawyer (being a sole practitioner) or the firm of which the foreign lawyer is a partner or employee has signed an engagement letter or retainer agreement which expressly states that —

(a) the contract is government by Cayman Islands law;

(b) the lawyer/law firm submits to the exclusive jurisdiction of the Court for all purposes in connection with the engagement;

(c) the lawyer/law firm understands and agrees that the amount of fees payable by the official liquidator is subject to taxation in accordance with this Order;

(d) the lawyer/law firm shall have no right to exercise any lien over their files as against the official liquidator

(5) The official liquidator has no authority to engage any lawyers on terms which are inconsistent with the requirements of this Rule and any term of an engagement letter or retainer agreement which is inconsistent with the requirements of this Rule shall be void and of no effect.

(6) Nothing in this rule shall affect the validity or effectiveness of any engagement letter or retainer agreement made prior to 1 March 2013.

Lawyer's Fees (O.25, r.2)

2. (1) All lawyers engaged by the official liquidator shall be remunerated on a time spent basis (at agreed hourly rates which are stated in the engagement letter) unless the Court has sanctioned some other basis of remuneration.

Case 23-12044-mg Doc 14-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C
Winding up rules 2023 Consolidation Pg 122 of 128

(2) If the official liquidator or the liquidation committee consider that the amount of fees and expenses charged by the official liquidator's lawyer is excessive, the official liquidator may require that such fees and expenses be taxed on the indemnity basis by the taxing officer.

(3) Conversely, if the lawyer considers that the amount which the official liquidator offers to pay is inadequate, the lawyer may require that the lawyer's bill of costs be taxed on the indemnity basis by the taxing officer.

(4) The lawyer shall be entitled to be paid out of the assets of the company as an expense of the liquidation the amount(s) stated in the costs certificate and the official liquidator shall have no authority to pay more than that amount.

Procedure for Taxation of Lawyer's Fees (O.25, r.3)

3. (1) A taxation under this Order shall be governed by and conducted in accordance with GCR Order 62.

(2) The lawyer shall prepare a bill of costs in GCR Form 314 and serve it on the official liquidator.

(3) The official liquidator shall state the extent to which the official liquidator disagrees with the amount charged and/or the scope of the work done by completing column 4 and returning the completed bill of costs to the lawyer within 21 days or such other period as may be agreed.

(4) In addition to completing column 4, the official liquidator may also serve a written statement of the official liquidator's objections to the amount charged.

(5) Proceedings for taxation of the bill of costs shall be commenced (by either party) by lodging the following documents with the taxing officer —

(a) an application for taxation in GCR Form 301;

(b) the bill of costs, completed in accordance with this Rule;

(c) any written statement of objections by the official liquidator;

(d) any written reply by the lawyer; and

(e) a copy of the engagement letter or retainer agreement.

Subsequent Procedure on Taxation (O.25, r.4)

4. (1) A taxation shall be inquisitorial in nature.

(2) The taxing officer shall enquire into the bill of costs and determine the amount to be paid in accordance with Rule 4 for which purpose the taxing officer shall obtain such written explanations from the official liquidator and/or the lawyer as may be appropriate to enable the taxing officer to make such determination fairly.

(3) The taxation shall be conducted in accordance with the Guidelines issued from time to time by the Grand Court Rules Committee pursuant to GCR Order 62, rule 16(3), insofar as such Guidelines relate to taxation on the indemnity basis.

(4) The taxing officer may require the lawyer to produce —

(a) the lawyer's time records;

(b) the lawyer's files and any other documents reflecting the work done; and

(c) invoices in respect of any disbursements included in the bill of costs.

(5) The taxing officer shall not give reasons for any of the taxing officer's decisions.

(6) The taxing officer shall send an office copy of the taxing officer's costs certificate to the official liquidator and to the lawyer.

Criteria Applicable on Taxation (O.25, r.5)

5. (1) The lawyer is entitled to be fairly remunerated in accordance with the terms of the lawyer's engagement letter for all work reasonably and properly done on the instructions of the official liquidator.

(2) In determining whether the remuneration claimed is fair, the taxing officer shall have regard to all the relevant circumstances, including —

(a) the difficulty or novelty of the issues involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by the attorneys engaged;

(c) the number and importance of the relevant documents (however brief) prepared or perused;

(d) the overall size of the estate;

(e) the amount of money or value attributable to the issues involved; and

(f) the overall importance to the liquidation of the issues involved.

(3) In determining whether the work done by the lawyer was reasonably and properly done, the taxing officer shall have regard to all the relevant circumstances, including —

(a) the duties of the official liquidator;

(b) the instructions given by the official liquidator; and

(c) any relevant directions given by the Court.

(4) Work done by the lawyer shall be presumed not to have been done reasonably and properly if the work done or advice given caused or contributed to a breach of duty on the part of the official liquidator.

Case 23-12044-mg Doc 4-3 Filed 12/20/23 Entered 12/20/23 18:14:14 Exhibit C-
Winding up rules 2023 Consolidation Pg 124 of 128

ORDER 26

LIQUIDATION FILES, COMPANY'S BOOKS AND RECORDS AND COURT FILES

Introduction (O.26, r.1)

1. (1) This Order applies to all liquidations.

(2) References in this Order to "**official liquidations**" shall include supervised liquidations.

(3) References to this Order to the "**liquidator**" shall include both an official liquidator and a voluntary liquidator.

Liquidation Files (O.26, r.2)

2. (1) It shall be the duty of every liquidator to create and maintain a complete record of all the work done and steps taken in connection with the liquidation (referred to in this Order as "**the liquidation files**").

(2) The liquidation files shall include —

(a) a duplicate of the Court file;

(b) minutes of the meetings of creditors and/or contributories;

(c) minutes of the meetings of the liquidation committee;

(d) liquidator's reports;

(e) liquidator's accounts;

(f) proofs of debt and records relating to their adjudication;

(g) records relating to the collection and realisation of the assets;

(h) records relating to the liquidation bank accounts;

(i) liquidator's correspondence; and

(j) notices sent or published by the liquidator.

(3) The liquidator shall retain the liquidation files in safe custody for at least 3 years following the dissolution of the company.

(4) In the event that the official liquidator resigns, dies or is removed from office, the official liquidator, or that person’s personal representative, shall forthwith deliver the official liquidator’s liquidation files to the official liquidator’s successor (although the official liquidator shall be entitled to make and retain a copy at the official liquidator’s own expense).

Company's Books and Records (O.26, r.3)

3. (1) It shall be the duty of the official liquidator to take possession or control of all the company's books and records, including those maintained in electronic form.

(2) The liquidator shall keep the company's books and records in safe custody unless and until the liquidator is authorised or directed to destroy them in accordance with the order of the Court (in the case of a compulsory liquidation) or in accordance with a resolution of the company (in the case of a voluntary liquidation).

(3) The Court may direct (in the case of a compulsory liquidation) or the company may resolve (in the case of a voluntary liquidation) that particular classes of books and records of the company be destroyed prior to the conclusion of the liquidation on the ground that they are redundant and of no relevance to the liquidation.

(4) Upon making an order for dissolution (in the case of a compulsory liquidation), the Court shall give directions in respect of the preservation, storage and destruction of the company's remaining books and records.

(5) Notice of the final general meeting (in the case of a voluntary liquidation) shall include a resolution in respect of the preservation, storage and destruction of the company's books and records and, in the event that there is no quorum, the resolution is deemed to have been passed.

(6) The cost of post-dissolution storage and destruction of a company's books and records shall be an expense of the liquidation for which provision must be made in the official liquidator's final accounts.

Rights of access to the Court File (O.26, r.4)

4. (1) The following persons shall have the right to inspect the Court file in respect of a liquidation proceeding and take copies of filed documents —

(a) the liquidator;

(b) any former liquidator or controller of the company;

(c) any person who was a director or professional service provider of the company immediately before the commencement of the liquidation;

(d) the Authority, in the case of a company which carried on a regulated business; and

(e) any person stating themselves in writing to be a creditor or contributory of the company.

(2) The right of inspection conferred upon a person under this Rule may be exercised on that person’s behalf by an attorney or other person properly authorised to act for that person.

(3) Any other person may inspect the Court file by special leave of the Court.

(4) The right of inspection conferred by this Rule is not exercisable in respect of any documents (except the petition and Court orders) or parts of any documents which the Court has directed to be sealed pursuant to Order 23, rule 6.

(5) If, in the case of a person applying to inspect the Court file, the Registrar is not satisfied as to the propriety of the application, the Registrar may refuse to allow it, in which case such person may then apply forthwith and *ex parte* to a Judge who may refuse the inspection, allow it or allow it on such terms as the Judge thinks fit.

APPENDIX

PRESCRIBED FORMS (O.1, R.7)

INDEX

1.	Statutory Demand under section 93	(O. 2, r. 2)
2.	Winding Up Petition	(O. 3, r. 2)
2A.	Petition for the Appointment of a Restructuring Officer	(O.1A, r.2)
2B.	*Ex Parte* Summons for Appointment of Interim Restructuring Officer	(O.1A, r.4)
3.	Advertisement of Winding Up Petition	(O. 3, r. 6)
3A.	Advertisement of Petition to Appoint Restructuring Officer	(O.1A, r.1(3))
4.	Notice of Appearance	(O. 3, r. 8)
4A.	Notice of Appearance	(O.1A, r.3)
5.	Summons for Directions	(O. 3, r. 11)
6.	Winding Up Order	(O. 3, r. 22)
7.	Order for appointment of Provisional Liquidator pursuant to s. 104(2)	(O. 4, r. 4)
8.	Order for appointment of Provisional Liquidator pursuant to s. 104(3)	(O. 4, r. 7)
8A.	Order for the Appointment of a Restructuring Officer	(O.1A, r.6)
8B.	*Ex Parte* Order for the Appointment of an Interim Restructuring Officer	(O.1A, r.6)
9.	Notice of Appointment of Official Liquidator	(O. 5, r. 3)
10.	Notice under Section 101	(O. 6, r. 1)
11.	Notice under Section 101	(O. 6, r. 1)
12.	Order for Examination	(O. 7, r. 2)
13.	Official Liquidator's Certificate (Solvency/Insolvency)	(O. 8, r. 1)
14.	Official Liquidator's Revised Certificate (Solvency/Insolvency)	(O. 8, r. 1)
15.	Official Liquidators Certificate (Composition of Liquidation Committee)	(O. 9, r. 1)
16.	Summons (Sanction Application)	(O. 11, r. 1)
16A.	Remuneration Approval Summons	(O.1A, r.10(3))
16B.	Summons for the Variation or Discharge of Order Appointing Restructuring Officers	(O.1A, r.9(1))
16C.	Removal and Replacement Summons	(O.1A, r.13(1))
16D.	Summons for the Variation or Discharge of Order Appointing Provisional Liquidators	
17.	Notice of Rectification of Register of Members	(O. 12, r. 3)
18.	Summons (Appeal against Rectification)	(O. 12, r. 4)
19.	Notice of Voluntary Winding Up	(O. 13, r. 2)
20.	Voluntary Liquidator's Consent to Act	(O. 13, r. 2)
21.	Declaration of Solvency	(O. 14, r. 1)
22.	Advertisement of Voluntary Winding Up	(O. 15, r. 5)
23.	Supervision Order	(O. 15, r. 8)
24.	Proof of Debt	(O. 16, r. 2)
25.	Notice of Admission of Proof of Debt	(O. 16, r. 6)

Case 3:23-cv-00495-DJH-3 Document 1-3 Filed 12/20/23 Entered 12/20/23 18:14:54 Exhibit C - Page 235 of 238 PageID #: 5156

26.	Notice of Rejection of Proof of Debt	(O. 16, r. 6)
27.	Notice of Admission of Deposit Claims	(O. 16, r. 7)
28.	Official Liquidator's Certificate (Currency of Liquidation)	(O. 16, r. 13)
29.	Notice (Contingent Claims)	(O. 16, r. 16)
30.	Summons (Appeal against rejection of proof of debt)	(O. 16, r. 18)
31.	Summons (Application to expunge a proof of debt)	(O. 16, r. 21)
32.	Notice of Intention to Declare Interim Dividend	(O. 18, r. 6)
33.	Notice of Intention to Declare Final Dividend	(O. 18, r.7)
34.	Notice of Final Dividend	(O. 18, r. 7)
35.	Notice of Call	(O. 19, r. 2)
36.	Order for Dissolution	(O. 22, r. 2)
37.	Voluntary Liquidator's Final Return to the Registrar	(O. 13, r. 12)

EXHIBIT D

(Insolvency Practitioners Regulations)

CAYMAN ISLANDS



Companies Act

(2023 Revision)

INSOLVENCY PRACTITIONERS' REGULATIONS

(2023 Consolidation)

Supplement No. 2 published with Legislation Gazette No. 4 dated 24th January, 2023.

PUBLISHING DETAILS

The Insolvency Practitioners' Regulations, 2018 made by the Insolvency Rules Committee on 27th November, 2017 as amended by the Citation of Acts of Parliament Act, 2020 [Act 56 of 2020].

Consolidated with —

Insolvency Practitioners' (Amendment) Regulations, 2022-22nd July, 2022.

Consolidated this 31st day of December, 2022

CAYMAN ISLANDS

Companies Act

(2023 Revision)

INSOLVENCY PRACTITIONERS' REGULATIONS

(2023 Consolidation)

Arrangement of Regulations

Section		Page
PART I: INTRODUCTION		**5**
1.	Citation	5
2.	Commencement and Application	5
3.	Definitions	6
PART II: APPOINTMENT OF OFFICIAL LIQUIDATORS		**6**
4.	Professional Qualification	6
5.	Residency Requirement	7
6.	Independence Requirement	7
7.	Insurance Requirement	7
8.	Foreign practitioners	8
9.	Commencement and Transitional Provisions	8
PART III: OFFICIAL LIQUIDATOR'S REMUNERATION		**8**
10.	Introduction	8
11.	Basis of Remuneration	9
12.	Consideration of Remuneration by the Liquidation Committee	9
13.	Application to the Court	10
PART IV: RATES OF REMUNERATION		**10**
14.	Introduction	10
15.	Terms of Remuneration Agreements	11
16.	Transitional Provision	12

Case 1:24-cv-00495-JLH-SRF Document 1-4 Filed 12/28/23 Entered 05/12/26 Page 240 of 338 PageID #: 23-12044-mg Doc 4-4 Filed 12/28/23 Entered 05/12/26 23:14:40 Exhibit D - IP Regulations 5161 Pg 5 of 21

SCHEDULE **15**

PRESCRIBED RATES OF REMUNERATION FOR OFFICIAL LIQUIDATORS **15**

Part A: Scale of hourly rates (expressed in US$) **15**

Part B: Scale of Percentage Rates of Distributions or Realisations and Recoveries **16**

ENDNOTES **19**

Table of Insolvency Practitioners' Regulations history: 19

CAYMAN ISLANDS

Companies Act

(2023 Revision)

INSOLVENCY PRACTITIONERS' REGULATIONS

(2023 Consolidation)

PART I: INTRODUCTION

Citation

1. These Regulations may be cited as the *Insolvency Practitioners' Regulations (2023 Consolidation)*.

Commencement and Application

2. (1) These Regulations shall come into force on the date stated in the commencement order, referred to in these Regulations as the "commencement date". No application, order or direction made under Part V of the *Companies Act (as amended and revised)* before the commencement date shall be treated as a non-compliance with these Regulations provided that it complied with the rules, practice directions or procedure then in force. No action taken by a liquidator, creditor or contributory in a compulsory liquidation or voluntary liquidation before the commencement date shall be treated as a non-compliance with these Regulations provided that it complied with the rules, practice directions or procedure then in force.

(2) Part II of these Regulations shall apply to every appointment of an official liquidator made by the Court on or after the commencement date (irrespective of the date on which the liquidation commenced).

Case 1:24-cv-00495-JLH-SRF Document 1-4 Filed 12/28/23 Entered 05/12/26 Page 242 of 338 PageID #: 23-12044-mg Doc 4-4 Filed 12/28/23 Entered 05/12/26 19:14:41 Exhibit D Pg 7 of 21
Regulation 5163

(3) Part III of these Regulations shall apply to every application made to the Court by an official liquidator on or after the commencement date for an order approving payment of the official liquidator's remuneration out of the assets of a company in provisional or compulsory liquidation (including a liquidation under the supervision of the Court).

(4) Part IV of these Regulations shall apply to remuneration earned for work done on or after the commencement date.

Definitions

3. (1) The words and expressions defined by Section 89 of *the Companies Act (as amended and revised)* and the *Companies Winding Up Rules (as amended and revised)* shall have the same meaning when used in these Regulations.

(2) The expression "**qualified insolvency practitioner**" means a person who is qualified in accordance with Regulation 4 to accept appointment by the Court as an official liquidator of a company.

PART II: APPOINTMENT OF OFFICIAL LIQUIDATORS

Professional Qualification

4. (1) A person shall be qualified to accept appointment by the Court as official liquidator of any company only if —

(a) that person is licensed to act as an insolvency practitioner in a relevant country; or

(b) that person is qualified as a professional accountant by an approved institute, is in good standing with such institute, has a minimum of five (5) years' relevant experience and is credited with not less than 2,500 chargeable hours of relevant work.

(c) [*spent*].

(2) For the purposes of paragraph (1)(a) of this Regulation the relevant countries are —

(a) England and Wales;

(b) Scotland;

(c) Northern Ireland;

(d) The Republic of Ireland;

(e) Australia;

(f) New Zealand; and

(g) Canada.

(3) For the purposes of paragraph (1)(b) of this Regulation, "approved institute" means an institute, society, association or other body approved by the Council of the Cayman Islands Institute of Professional Accountants pursuant to the *Accountants Act (2020 Revision)*.

(4) The expressions "relevant experience" and "relevant work" shall have the same meaning as in Part A of the Schedule to these Regulations.

Residency Requirement

5. (1) A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of any company unless —

(a) that person is resident in the Islands; and

(b) that person, or the firm of which that person is a partner or employee, or the company of which that person is a director or employee, holds a trade and business licence which authorises that person or that person's firm to carry on business as professional insolvency practitioners.

Independence Requirement

6. (1) A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of a company unless that person can be properly regarded as independent as regards that company.

(2) A qualified insolvency practitioner shall not be regarded as independent if, within a period of 3 years immediately preceding the commencement of the liquidation, that person, or the firm of which that person is a partner or employee, or the company of which that person is a director or employee, has acted in relation to the company as its auditor.

Insurance Requirement

7. (1) A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of any company unless that person and the firm of which that person is a partner or employee or the company of which that person is a director or an employee, has professional indemnity insurance (up to a limit of at least US$10 million in respect of each and every claim and at least US$20 million in the aggregate, with a deductible of not more than US$1 million) applicable to the negligent performance or non-performance of the qualified insolvency practitioner's duties as an official liquidator generally.

(2) Nothing in these Regulations shall prevent the Court from making an order in respect of a particular company that its official liquidator shall —

(a) procure professional indemnity insurance covering the official liquidator in respect of the negligent performance or non-performance of the official liquidator's duties to the company with a limit of coverage in excess of

Case 1:24-cv-00495-JLH Document 4-4 Filed 12/28/23 Entered 05/12/26 12:14:44 Exhibit D - IP Regulations 5165 Pg 9 of 21

US$10 million in respect of each and every claim or with an aggregate limit in excess of US$20 million; or

(b) procure the issue of a security bond to cover acts of fraud or dishonesty committed by the official liquidator or any of the official liquidator's staff, in which case the premium shall be paid out of the assets of the company as an expense of the liquidation.

(3) [*spent*].

Foreign practitioners

8. (1) A foreign practitioner who meets the independence and insurance requirements of Regulations 6 and 7 may be appointed by the Court as an official liquidator of a company jointly with a qualified insolvency practitioner (but not as sole official liquidator).

(2) A foreign practitioner need not meet the residency requirement of Regulation 5.

Commencement and Transitional Provisions

9. (1) The appointment by the Court of any person as official liquidator of a company made prior to the commencement date shall not be invalidated by reason of the fact that the appointee is not a qualified insolvency practitioner and does not meet the residency, independence or insurance requirements contained in these Regulations.

PART III: OFFICIAL LIQUIDATOR'S REMUNERATION

Introduction

10. (1) Subject to paragraph (2), an official liquidator is not entitled to receive any remuneration out of the assets of a company in provisional or official liquidation (including a liquidation under the supervision of the Court) without the prior approval of the Court.

(2) An official liquidator may receive a payment on account, the amount of which shall not exceed eighty percent of the remuneration sought in the report and accounts prepared in accordance with Regulation 12(2).

(3) In the event that the amount of remuneration approved by the Court is less than the amount paid on account, the official liquidator shall forthwith repay the balance to the company.

(4) For the purposes of Parts III and IV of the Regulations the expression "official liquidator" is used to include the firm or company of which the official liquidator is a partner, director or employee and references to "remuneration" mean the remuneration payable to such firm or company.

Basis of Remuneration

11. (1) An official liquidator may be remunerated on the basis of —

(a) the time spent by the official liquidator and the official liquidator's staff upon the affairs of the liquidation; or

(b) a percentage of the amount distributed to creditors and members of the company; or

(c) a percentage of the amount realised upon the sale of the company's assets (net after deduction of the direct costs of sale); or

(d) a fixed fee; or

(e) a combination of some or all of the above.

(2) An official liquidator shall not delegate work to any related firm or any other firm of insolvency practitioners, except on terms that such firm will be remunerated only in accordance with the terms of a remuneration agreement which complies with the requirements of these Regulations and has been approved by the Court.

Consideration of Remuneration by the Liquidation Committee

12. (1) An official liquidator may not make an application to the Court under Regulation 13 without first —

(a) seeking the liquidation committee's approval of the basis of the official liquidator's remuneration and the amount of the remuneration for which the official liquidator intends to seek the Court's approval; or, if there is no liquidation committee

(b) convening a meeting of creditors and/or contributories in accordance with CWR Order 8 at which the official liquidator proposes a resolution approving the basis of the official liquidator's remuneration and the amount of the remuneration for which the official liquidator intends to seek the Court's approval; or

(c) complying with the requirements of any international protocol (in so far as it relates to the official liquidator's remuneration) which has been approved by both the Court and a foreign court.

(2) The official liquidator shall prepare a report and accounts containing all the information reasonably required to enable a creditor or contributory to make an informed decision about the reasonableness of the proposed basis of remuneration and amount for which the official liquidator intends to seek the Court's approval.

(3) If the official liquidator seeks to be remunerated on a time spent basis, the official liquidator's report and accounts shall provide full particulars of the work done; the staff engaged; and the hourly rates applicable to each grade of staff.

Case 1:20-cv-00495-JJM-PAS Document 28-4 Filed 12/28/23 Page 11 of 21 PageID #: 516

(4) The official liquidator's report and accounts shall be provided to the liquidation committee or, if there is no committee, sent to the creditors and/or contributories with notice of the meeting.

Application to the Court

13. (1) An application by an official liquidator for approval of the official liquidator's remuneration shall be made by summons in CWR Form No 16A and shall be served on —

(a) each member of the liquidation committee; or

(b) counsel to the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally.

(2) An application under this Regulation may be made *ex parte* if there is no duly constituted liquidation committee in existence.

(3) An application under this Regulation shall be supported by —

(a) the report and accounts provided to the liquidation committee or meeting of creditors and/or contributories (as the case may be);

(b) an affidavit stating the outcome of the liquidation committee's consideration or the outcome of the creditors' and/or contributories' meetings; and

(c) a copy of the remuneration agreement or a copy of the document(s) which evidence the terms of the remuneration agreement.

(4) Where an official liquidator is to be remunerated on the basis of Regulation 11(1)(b) or Regulation 11(1)(c) of these Regulations, the official liquidator must apply to the Court for approval of the basis of remuneration within the later of —

(a) 6 months from the date a liquidation committee is established; or

(b) 9 months from the date of the commencement of the liquidation.

PART IV: RATES OF REMUNERATION

Introduction

14. (1) It is the responsibility of the liquidation committee and the official liquidator to negotiate and agree the basis upon which the official liquidator and the official liquidator's firm will be remunerated and the applicable scale of hourly rates, percentage rates or fixed fees, as may be the case (referred to in these Regulations as a "remuneration agreement").

(2) Subject to paragraph (3) of this Regulation, the terms of every remuneration agreement shall comply with the requirements of these Regulations.

(3) Any remuneration agreement made and approved by the Court prior to the commencement date shall continue to be valid and enforceable notwithstanding any non-compliance with these Regulations, unless and until the Court orders or approves its replacement or amendment.

Terms of Remuneration Agreements

15. (1) In the event that an official liquidator agrees to be remunerated upon a time spent basis, it shall be a term of the remuneration that —

(a) the official liquidator and the official liquidator's firm shall not be obliged to accept less than the minimum hourly rates, for the relevant dates, as prescribed in Part A of the Schedule hereto; and

(b) the liquidation committee shall not be authorised to agree to pay more than the maximum hourly rates, for the relevant dates, as prescribed in Part A of the Schedule hereto; and

(c) the agreed scale of hourly rates shall apply, in the first instance, to the period from the date of the winding up order until 31st December and, thereafter, the scale of hourly rates shall be reviewed and re-negotiated annually with the effect from 1st January each year

(2) In the event that the official liquidator agrees to be remunerated on the basis of a percentage of distributions, it shall be a term of the remuneration agreement that the official liquidator and the official liquidator's firm shall be paid —

(a) a percentage of the net amount available for distribution to creditors after payment of the expenses of the liquidation (other than the official liquidator's remuneration) if the company is insolvent;

(b) if the company is solvent, an additional percentage of the net amount available for distribution to members after payment of the expenses of the liquidation (other than the official liquidator's remuneration); and

(c) the percentage rate shall not exceed the maximum prescribed in Part B of the Schedule

(3) In the event that the official liquidator agrees to be remunerated on the basis of a percentage of realisations, it shall be a term of the remuneration agreement that the official liquidator and the official liquidator's firm shall be paid —

(a) a percentage of the amount realised upon sale of the company's assets, net after deduction of the direct costs of sale; and

(b) a percentage of the gross amounts recovered from the company's debtors and contingent debtors; and

(c) the percentage rate shall not exceed the maximum prescribed in Part B of the Schedule.

Case 1:24-mc-00495-JLT-SKO Document 1-4 Filed 12/20/23 Page 13 of 21

(4) In the event that —

(a) the official liquidator and the liquidation committee fail to agree upon the terms of a remuneration agreement; or

(b) in the absence of any liquidation committee, a resolution approving the official liquidator's proposed remuneration agreement is not passed at a creditors' meeting and/or contributories' meeting, the official liquidator shall apply to the Court pursuant to Regulation 13 for an order approving the official liquidator's proposed remuneration agreement.

(5) When it is agreed that two or more jointly appointed official liquidators are to be remunerated on a time spent basis, their remuneration agreement may provide that different scales of hourly rates shall apply to each of them.

(6) (a) When an official liquidator agrees to be remunerated on a time spent basis, the scale of hourly rates may be denominated in US dollars or the currency of the liquidation or the currency in which the official liquidator's firm normally does business.

(b) For the purposes of determining whether agreed hourly rates denominated in a currency other than US dollars comply with the scale of hourly rates prescribed in the Schedule to the Regulations, (i) the rates initially agreed shall be translated into US dollars at the exchange rate prevailing on the date of the commencement of the liquidation and (ii) thereafter, the rates shall be reviewed (by translating them into US dollars at the exchange rate prevailing on the 1st January or the first business day of each year) and if, as a result of changes in the applicable exchange rate occurring since the commencement of the liquidation or the previous review, the agreed hourly rates are found to be less than the minimum or more than the maximum prescribed rates, the rates applicable for the following year shall be adjusted as may be necessary to comply with the prescribed rates.

(7) When an official liquidator agrees to be remunerated on the basis of a percentage of realisations, the amount of the official liquidator's remuneration will be determined and paid in the currency or currencies in which the assets are realised.

(8) When an official liquidator agrees to be remunerated on the basis of a percentage of distributions, the official liquidator's remuneration will be determined and paid in the currency of the liquidation.

Transitional Provision

16. With effect from the 1st September, 2022, the "**Commencement Date**" of the *Insolvency Practitioners' (Amendment) Regulations, 2022 [SL 32 of 2022]*, the prescribed minimum and maximum hourly rates of remuneration for work performed:

(1) on or after the Commencement Date shall be those set out in the Schedule hereto in the table entitled "II - With effect from 1st September 2022"; and

(2) before the Commencement Date shall be those set out in the Schedule hereto in the table entitled "I - With effect from 1st January 2013".

Made by the Insolvency Rules Committee on the 27th day of November 2017

The Honourable Justice Andrew J. Jones QC
The Honourable Sam Bulgin QC, Attorney-General
Colin McKie QC, Legal Practitioner
Hector Robinson QC, Legal Practitioner
Simon Conway, Insolvency Practitioner
Jude Scott CPA, Public Accountant

Amended by the Insolvency Rules Committee on 22nd July, 2022.
The Honourable Nicholas Segal, Chairperson
The Honourable Samuel Bulgin KC, Attorney General
Colin McKie KC, Legal Practitioner
Colette Wilkins KC, Legal Practitioner
Eleanor Fisher, Insolvency Practitioner
Jude Scott

Case 1:24-mc-00495-JLR Document 1-4 Filed 05/22/24 Page 15 of 21 PageID #: 5171
Regulations

SCHEDULE

PRESCRIBED RATES OF REMUNERATION FOR OFFICIAL LIQUIDATORS

Part A: Scale of hourly rates (expressed in US$)

I - With effect from 1st January 2013

	Grade of Staff	Minimum	Maximum
1.	Official Liquidator and any Partner	$500	$945
2.	Consultant	$290	$945
3.	Director or Principal	$445	$715
4.	Senior Manager	$370	$600
5.	Manager or Assistant Manager	$290	$500
6.	Senior or Senior Accountant	$210	$365
7.	Administrator	$50	$210

II - With effect from 1st September 2022

	Grade of Staff	Minimum	Maximum
1.	Official Liquidator and any Partner	$570	$1075
2.	Consultant	$330	$1075
3.	Director or Principal	$510	$815
4.	Senior Manager	$420	$680
5.	Manager or Assistant Manager	$330	$570
6.	Senior or Senior Accountant	$240	$415
7.	Administrator	$60	$240

For the purposes of this scale of hourly rates, the grades of staff shall be defined as follows —

"**Partner**" means a qualified insolvency practitioner who is or is held out as a partner of a firm or shareholder and director of a company carrying on business as professional insolvency practitioners;

"**Consultant**" means a person having professional qualifications (other than qualification as an insolvency practitioner) and/or technical expertise and/or particular experience relevant to matters arising in a liquidation;

"**Director**" or "**Principal**" means a qualified insolvency practitioner who is credited with not less than 3,500 chargeable hours of relevant work done since that person's qualification;

Case 1:20-cv-00495-LLK-4 Document 2-8 Filed 12/28/23 Entered 05/12/26 Page 252 of 338 PageID #: 23-12044-mg Doc 4-4 Filed 12/28/23 Entered 05/12/26 19:14:54 Exhibit D Pg 17 of 21

"**Senior Manager**" means either (i) a qualified insolvency practitioner who is credited with not less than 2,500 chargeable hours of relevant work done since that person's qualification or (ii) an unqualified practitioner, having a minimum of ten (10) years' relevant experience who is credited with not less than 5,000 hours of relevant work over this period

"**Manager**" or "**Assistant Manager**" means either (i) a professional accountant, having a minimum of three (3) years' experience who is credited with not less than 1,500 chargeable hours of relevant work over this period or (ii) an unqualified practitioner, having not less than six (6) years' experience who is credited with not less than 3,000 chargeable hours of relevant work over this period;

"**Senior**" or "**Senior Accountant**" means either (i) a professional accountant, who is credited with not less than 1,000 chargeable hours of relevant work or (ii) an unqualified practitioner, having a minimum of three (3) years' relevant experience, who is credited with not less than 2,000 chargeable hours of relevant work over this period;

"**Administrator**" means (i) an unqualified person, having a minimum of one (1) year's relevant experience who is credited with not less than 500 hours of relevant work over this period; or (ii) a trainee who is credited with not less than 250 hours of relevant work; or (iii) a qualified accountant who is not credited with any hours of relevant work done since that person's qualification; and

the expressions "**relevant experience**" and "**relevant work**" shall mean work done in connection with (i) the restructuring or liquidation of businesses, whether solvent or insolvent; (ii) the investigation of the affairs of any business; or (iii) a forensic accounting exercise, including in each case work done outside the Islands.

Part B: Scale of Percentage Rates of Distributions or Realisations and Recoveries

	Distribution to unsecured creditor(s) (US$)	**Maximum %**
1.	Distribution to members (US$)	10%
2.	Up to $1 million	7½%
3.	$1 - $10 million	5%
4.	$10 – 100 million	2½%
	Excess of $100 million	

	Distribution to members (US$)	**Maximum %**
1.	Up to $1 million	10%
2.	$1 - $10 million	7½%

3.	$10 – 100 million	5%
4.	Excess of $100 million	2½%

	Realisations and Recoveries (US$)	**Maximum %**
1.	Up to $1 million	10%
2.	$1 - $10 million	7½%
3.	$10 – 100 million	5%
4.	Excess of $100 million	2½%

Case 23-12044-mg Doc 4-4 Filed 12/28/23 Entered 12/28/23 19:14:54 Exhibit D - IP Regulations Pg 19 of 21

Publication in consolidated form authorised by the Cabinet this 10th day of January, 2023.

Kim Bullings
Clerk of the Cabinet

ENDNOTES

Table of Insolvency Practitioners' Regulations history:

SL #	Added or replaced Regulations #	Added or replaced tables #	Legislation	Commence-ment	Gazette
32/2022	S.15(1), s.17	Part A – Table II	Insolvency Practitioners' (Amendment) Regulations, 2022	1-Sep-2022	LG29/2022/s3
91/2017			Companies Winding Up Rules, 2017 (Part (s.5))	1-Feb-2018	GE103/2017/s1
93/2017			Insolvency Practitioners' Regulations, 2018	1-Feb-2018	GE103/2017/s3

Case 1:24-cv-00495-JLH Document 4-4 Filed 12/28/23 Entered 05/12/26 Page 256 of 338 PageID #: 517

(Price: $4.00)

EXHIBIT E

(*Re Hadar Fund Ltd*)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

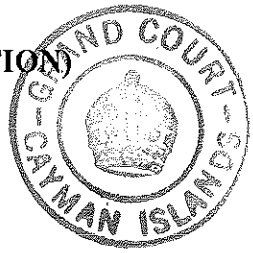
CAUSE NO: FSD 94 OF 2013 (AJJ)

The Hon Mr. Justice Andrew Jones QC
In Open Court, 9th and 13th August 2013

IN THE MATTER OF THE COMPANIES LAW (2012 REVISION) (AS AMENDED)

AND

IN THE MATTER OF HADAR FUND LTD. (IN VOLUNTARY LIQUIDATION)



Appearances:

Mr. Matthew Goucke of Walkers for the joint voluntary liquidators of Hadar Fund Ltd. as petitioners;

Mr. Stephen Moverley-Smith QC instructed by Mr. Jayson Wood of Harneys Westwood & Riegels for Ametista Patrimonial (Mauritius) Ltd, PNT Capital Advisors and Blue Pearl Advisors Limited;

Mr. Rocco Cecere of Mourant Ozannes for Mr. Simon Graham, the former director of Hadar Fund Ltd.;

Mr. Mark Goodman of Campbells for Hadar Investment Advisers Ltd, the former investment manager of Hadar Fund Ltd.

REASONS

Introduction

1. This is a supervision petition presented by Messrs Walker and Stokoe of PwC Corporate Finance & Recovery (Cayman) Limited ("PwC Cayman") in their capacity as joint voluntary liquidators of Hadar Fund Ltd. ("the Fund") which was put into liquidation on 31 May 2013. Its sole director decided not to sign a declaration of solvency with the result that the Fund is

deemed to be insolvent and Messrs Walker and Stokoe are required by section 124(1) of the Companies Law (2012 Revision) as amended to present a petition for an order that the liquidation be brought under the supervision of the Court. One of the fundamental principles underlying the corporate insolvency regime introduced by the Companies (Amendment) Law 2007 is that the liquidation of all insolvent companies must be conducted by qualified insolvency practitioners acting under the supervision of the Court. It follows that I am bound to make a supervision order in respect of the Fund. The only issues arising for decision are (1) who should be appointed as official liquidators and (2) what, if any, directions should be given to the official liquidators.

2. Messrs Walker and Stokoe have nominated themselves for appointment as official liquidators, which they are perfectly entitled to do, provided that they can be properly regarded as independent as regards the Fund, in accordance with regulation 6 of the Insolvency Practitioners' Regulations 2008 (as amended). Having read the Court file shortly after the matter was assigned to me, I formed the view that this was not an appropriate case in which to make a supervision order and appoint official liquidators "on the papers" and I therefore fixed a hearing date and directed that copies of the supervision petition, supporting affidavits and my order for directions be served on the redeemed shareholders and/or the ultimate investors and/or the investment manager and/or its beneficial owners (as defined in Mr Stokoe's first affidavit) and any other person who appears to the voluntary liquidators to be a creditor or contingent creditor of the Fund. I directed that any person wishing to appear at the hearing and oppose the appointment of Messrs Walker and Stokoe as official liquidators must nominate alternative candidates and file and serve their affidavits (complying with the requirement of CWR Order 3, rule 4) no later than 2 August 2013.

3. In the event three related companies served notice of their intention to oppose the appointment of Messrs Walker and Stokoe on the ground that they do not meet the independence requirement of regulation 6. Two of the objectors are Ametista Patrimonial (Mauritius) Ltd and PNT Capital Advisors, which indirectly own 50% of the issued share capital of Hadar Investment Advisers Ltd ("HIA"), the Fund's investment manager. The other objector is Blue Pearl Advisors Ltd ("BPA") which is a party to the distribution agreement made with the Fund (the significance of which is described in paragraph 8 below). These objectors claim to be creditors of the Fund. It is sufficient to say that for present purposes their *locus standi* has not been challenged. The ultimate beneficial owners of these companies are Mr Sanjit Talukdar and Mr Marc Giebels von Bekestein. Mr Talukdar has sworn an affidavit which sets out in detail the reasons why they consider that PwC Cayman (and therefore Messrs Walker and Stokoe) do not meet the independence requirement. They have nominated Ms Tammy Fu and Mr Gordon MacRae of Zolfo Cooper (Cayman) Limited for appointment as official liquidators. Ms Tammy Fu swore an affidavit in compliance with the rules and it is not disputed that she and Mr MacRae are qualified insolvency practitioners

GRAND COURT - CAYMAN ISLANDS

who do meet the general residence and insurance requirements and can be properly regarded as independent as regards the Fund.

4. No other candidates have been nominated. It appears that the only other stakeholders who have an actual, potential or contingent claim or economic interest in the Fund's remaining assets are (a) the four redeemed shareholders (referred to as the "Former Shareholders") and their three ultimate beneficial owners (referred to as "the Investors"), (b) HIA itself and (c) Mr. Pavel Sukhoruchkin and Mr Pavel Novoselov ("the Pavels") who are the ultimate beneficial owners of 50% of the shares of HIA. Mr Talukdar's evidence is that the Pavels set up a private office for the Investors and act as their investment managers, presumably through one or more corporate vehicles.

5. The Former Shareholders have not instructed counsel to appear on the hearing of this petition. Initially, on 24 July 2013, they wrote four identical letters to Messrs Walker and Stokoe stating that they were satisfied with the "approach and work carried out to date" and expressed concern about the cost implications of appointing anyone else as official liquidators. Then, on 8 August, they wrote four further identical letters in response to the assertion that PwC Cayman are not independent. Whilst these letters do positively support the appointment of Messrs Walker and Stokoe, they do not address the client relationships which are said to impair their independence. The Former Shareholders appear to expect Messrs Walker and Stoke to make the case for them, which is not an appropriate approach. The stakeholders should make and plead their own case. In the circumstances of this petition, the voluntary liquidators are expected to adopt a neutral position, having sworn an affidavit which sets out all the relevant factual circumstances in an even-handed way for the benefit of the Court and all the stakeholders. It would be improper for voluntary liquidators to adopt the role of advocates on behalf of those stakeholders who support their appointment as official liquidators and against those stakeholders who support other candidates.

6. HIA, acting by its independent directors, instructed counsel to appear and adopt a neutral position. Mr Michael Pearson, one of HIA's newly appointed independent directors, swore an affidavit in which he helpfully explained the circumstances in which he and his colleague made the decision to put the Fund into liquidation. The only other party to appear by counsel was Mr Simon Graham, who was the sole director of the Fund at the time it was put into liquidation. It was his decision not to sign a declaration of solvency which necessitated the presentation of the supervision petition. Mr Graham did not swear any affidavit, although I was referred to certain paragraphs of a witness statement which he signed on 17 June 2013 in connection with the related English proceedings. I think it fair to say that his counsel had a watching brief – he adopted a neutral position. No one else appeared at the hearing. It follows that there was no stakeholder present in person or by counsel who supported the appointment of Messrs Walker and Stokoe as official liquidators. However, I have taken into account the letters received by the Court from the Former Shareholders.

GRAND COURT - CAYMAN ISLANDS

Factual background

7. The Fund was incorporated on 8 May 2008 as an open ended investment fund for which purpose it is registered under the Mutual Funds Law, but the evidence tends to suggest that it has never actually carried on business as a mutual fund, at least in a conventional way. It is part of a highly complex structure of companies used to hold investments for three Russian businessmen, namely Messrs Vigit Alekperov, Leonid Fedun and Alexander Djaparidze, who are said to be close business associates. I shall refer to them collectively as the "Investors". Mr Talukdar's affidavit says that Mr Alekperov and Mr Fedun are respectively the president and vice president of Lukoil, one of Russia's largest oil companies. Mr Djaparidze is the chief executive officer of Eurasia Drilling Company Limited which used to be part of the Lukoil group and is now one of its largest customers. In the light of this evidence, I think that it is fair to describe the Investors as business associates who must be well known to each other. They are acting in concert in relation to the liquidation and the related litigation. In paragraph 27 of his affidavit Mr Talukdar describes the Fund as "a vehicle for [the Investors] which they could (and did) use to carry out unusual or bespoke transactions". The Fund was apparently managed by HIA pursuant to the terms of an investment management agreement made on 20 June 2008 (the "Investment Management Agreement"). Deutsche Bank (Cayman) Limited was appointed as administrator and custodian and appears to have played no role in the events surrounding the Fund's liquidation. The Fund's share capital comprises a nominal number of management shares (which carry all the votes) and redeemable participating shares (which represent all the economic interest). The management shares are held by HIA and the participating shares were initially issued to three companies, each ultimately owned by one of the three Investors.

8. HIA, the Fund's investment manager, is beneficially owned by (a) Mr Talukdar and Mr Bekestein and (b) the Pavels. Through various companies, they each have a 25% interest in HIA, whose sole source of income is (or was) fees payable by the Fund which would be borne ultimately by the Investors. The Pavels are former employees of Lukoil. They left that employment in 2004 to set up a private office to provide investment advisory and management services for the Investors. The Investment Management Agreement provided for HIA to be paid an annual management fee equivalent to 5% of NAV payable monthly and a performance fee of 20% of net profits (including unrealised gains) payable semi-annually. As beneficial owners of HIA, Messrs Talukdar and Bekestein and the Pavels benefitted from this fee income equally. Mr Talukdar's evidence is that prior to May 2011 the Fund's total AUM was about US$100 million. He says that in May 2011 a company called Cloudburst Orange Limited ("Cloudburst") (which is ultimately owned by Mr Djaparidze) subscribed for shares in the Fund in consideration for the transfer of global depository receipts (having a market value of US$1.1 billion) in Eurasia Drilling Company Limited which is listed on the London Stock Exchange. The commercial rationale for this transaction is not something which I need to consider. Its relevance is that it increased HIA's management fee income

GRAND COURT CAYMAN ISLANDS

from around US$5 million *per annum* to US$5 million *per month*. On 21 December 2010, apparently in anticipation of the Cloudburst investment, the Fund and HIA entered into a Distribution Agreement with BPA, a company wholly owned by Messrs Talukdar and Bekestein (the Distribution Agreement"). According to Mr Talukdar's evidence, the purpose of the Distribution Agreement was to vary the economic effect of the Investment Management Agreement by providing for 66% of the fee income attributable to the Cloudburst investment to flow through to the benefit of Messrs Talukdar and Bekestein only. The Pavels have commenced an action in the English High Court in which they claim that the Distribution Agreement was a mechanism for fraudulently depriving HIA (and indirectly themselves) of part of its management fee income.

9. One might have expected that Messrs Talukdar and Bekestein and the Pavels would be the directors of the Fund and HIA, whereas in fact the directors of both companies are employees of professional corporate services providers. The Fund's directors were Mr Simon Graham and Mr Scott Dakers, although Mr Dakers had resigned by the time the Fund was put into liquidation. HIA's directors were Mr Simon Graham, Ms. Irina Gizikova and Mr Ben Frith. Mr Graham is an employee (and minority shareholder) of Lancaster Trustees Limited and Ms Gizikova is an employee of Lancaster Trustees (Cyprus) Limited and a former employee of Lukoil. These companies are part of a group which is majority owned and controlled by the Pavels and I infer that Messrs Graham and Gizikova represent the Pavels' interests. Mr Dakers is an employee of Ogier Fiduciary Services (Cayman) Limited and the associated law firm, Ogier, was retained as attorneys to both the Fund and HIA. Mr Frith represented the interests of Messrs Talukdar and Bekestein on the board of HIA until his removal on 13 February 2013. I infer from these business relationships that the Pavels were in a position to exercise control over the boards of directors of both HIA and the Fund.

10. The Cloudburst investment led to an irreparable breakdown in the business relationship between Messrs Talukdar and Bekestein and the Pavels. It is not necessary for the purposes of resolving the narrow issue before this Court to make any observation about the reasons why this happened. Suffice it to say that it has lead to complex litigation (both pending and threatened) in which serious allegations of fraud and wrongdoing are being made by and against both sides. When one looks through the complex corporate structure, it is perfectly clear that the underlying protagonists in this litigation are the Pavels and the Investors on one side and Messrs Talukdar and Bekestein on the other side. The principal subject-matter of this litigation is Messrs Talukdar and Bekestein's claim for damages representing their share of the fee income which they say was generated or should have been generated from the Fund through HIA.

11. The events leading up to the liquidation of the Fund appear to have commenced in November 2012 when Mr Graham and Ms Gizikova (then being a majority of HIA's board of directors) resolved to waive payment of fees of about US$5.2 million then owed by the Fund to HIA; to reduce HIA's management fee from 5% of NAV (equating to about US$60 million per

GRAND COURT - CAYMAN ISLANDS

annum) to a flat fee of US$100,000 per annum; and to waive payment of performance fees. This is said to have been done without notifying Mr Frith, the third member of the board who represented the interests of Messrs Talukdar and Bekestein. He was removed from the board on 13 February 2013. In March 2013 the directors of the Fund (Mr Graham and Mr Dakers) resolved to allow all the participating shares to be redeemed immediately, notwithstanding that its offering document stipulated a three year rolling lock-up period and a 95 day notice requirement. Finally, on 10 April 2013 the Fund notified BPA that the Distribution Agreement was terminated immediately by reason of the redemption of the participating shares. For all practical purposes, these steps terminated the "business" of HIA and the Fund and terminated Messrs Talukdar and Bekestein's participation (both retrospectively and prospectively) in whatever fee income might otherwise have been generated from managing the Investor's assets. They responded by consulting English lawyers who served a detailed letter of claim dated 19 April 2013 in which it is alleged that these actions were done in furtherance of an unlawful conspiracy amongst, inter alia, the Pavels, Mr Graham, Ms Gizikova and Mr Dakers to deprive them of their economic interest in the fees payable by the Fund to HIA and BPA. The Fund itself is alleged to be party to this conspiracy. The Pavels pre-empted this threatened action by commencing their own action in the English High Court in which it is alleged that the Distribution Agreement is a mechanism for defrauding the Pavels of part of their economic interest in the fees which would otherwise have been paid by the Fund to HIA. In the course of ruling upon an application to discharge an injunction, the judge obs erved that the Fund appears to have a cause of action in respect of a secret commission of US$4.4 million paid to BPA in connection with what is described as the Telnic investment. Whilst various causes of action may exist by and against both the Fund and HIA, I am inclined to regard these companies and the fee income generated through them as the subject-matter of the litigation, both pending and threatened.

The decision to put the Fund into voluntary liquidation

12. It is against this background that I turn to consider the circumstances in which the Fund was put into voluntary liquidation and Messrs Walker and Stokoe of PwC Cayman were appointed as liquidators. Power to put the Fund into liquidation rested with HIA as holder of the voting shares. Rather than have Mr Graham and Ms Gizikova sign the special resolution, it was decided (without reference to Messrs Talukdar and Bekestein) that an independent board of directors would be put in place for this purpose. The first step was to instruct Campbells as attorneys for HIA in place of Ogier. This was done on or about 22 March 2013, again without reference to Messrs Talukdar and Bekestein. Campbells were instructed to identify a local Cayman Islands professional service provider who could act as directors of HIA in place of Mr Graham and Ms Gizikova. They recommended Fund Fiduciary Partners and on 18 April 2013 the principals of that firm, Mr Michael Pearson and Mr Christopher Rowland, were appointed as directors of HIA. They are both qualified insolvency practitioners and former employees/directors of Deloitte, who are eminently well qualified to

GRAND COURT - CAYMAN ISLANDS

perform the task allotted to them. Mr Pearson has sworn an affidavit in which he describes the circumstances in which they were appointed. He says that his firm is independent in the sense that it has never previously had any involvement with any of the relevant players, although he does not describe what pre-engagement due diligence was conducted.

13. On 26 April 2013, within a week of their appointment, Messrs Pearson and Rowland received a letter from Ogier, who continued to act as attorneys for the Fund, asking them to put it into voluntary liquidation and appoint Messrs Stokoe and Walker of PwC Cayman as liquidators. This letter concluded by stating -

> "For the above reasons, the Directors hereby request HIA consider whether it would be willing to exercise its rights as holder of 100 per cent of the Management Shares in the Fund to place the Fund into voluntary liquidation and to appoint Ian Stokoe and David Walker of PricewaterhouseCoopers as voluntary liquidator of the Fund. We enclose a draft Management Shareholder resolution for your consideration."

Mr Pearson says in his affidavit that they "approached the proposed voluntary liquidation of the Fund with great circumspection". They considered the matter over the next month, during which time Mr Pearson discussed the issues directly with Messrs Talukdar and Bekestein who argued that the Fund should not be put into liquidation. On 24 May 2013 Campbells wrote to the solicitors acting for Messrs Talukdar and Bekestein to inform them that Messrs Pearson and Rowland had decided to put the Fund into liquidation. They gave their reasons for having reached this decision. Having waited and received no response to this letter, they proceeded to sign the written resolution on 31 May 2013.

14. According to Mr Pearson's affidavit, the focus of the debate during May was whether or not the Fund should be put into liquidation. He says (at paragraph 22) –

> "Given the value of the sums involved and the complex disputes between the ultimate beneficial owners and various other entities owned and controlled by them, we considered that this was an appropriate appointment for a 'big-four' accounting practice with experience of complex and high-value liquidations. Accordingly, we considered the nomination of PWC entirely appropriate, believing they would, as a matter of course, conduct a conflict check and satisfy themselves that they were sufficiently independent before accepting the appointment as voluntary liquidators. We were obviously not aware at the time the resolution was passed of the matters complained of by Mr Talukdar in the final sentence of paragraph 42(b) of his affidavit."

The final part of paragraph 42(b) says that –

> "We were not consulted at all about the identity of the proposed liquidators. HIA's New Directors appointed [the Voluntary Liquidators], who work for PwC's Cayman branch. Mr Graham [the Fund's sole director] subsequently admitted, in the course of the English Proceedings, that PwC are advisers to the Pavels."

GRAND COURT - CAYMAN ISLANDS

Since Messrs Talukdar and Bekestein knew that the proposed liquidators were PwC Cayman, I infer that they agreed that it would be appropriate to appoint one of the "big-four" firms and had no reason to object to PwC Cayman at the time of their telephone conversation with Mr Pearson on 17 May 2013, otherwise they would have raised the point. Mr Pearson makes no reference in his affidavit to having discussed the matter with PwC Cayman at all and Mr Stokoe confirmed that they only had a brief conversation in which the subject was mentioned.

15. I draw the following conclusions from this evidence. PwC Cayman were asked to act as liquidators by Ogier, who must have taken instructions from Mr Graham. He was acting as a director of the Fund in his capacity as an employee of one or more of the Lancaster group companies, which are majority owned by the Pavels and are presumably the vehicle through which they act for the Investors and/or companies owned by them. Mr Graham represented the interests of the Pavels and the Investors and it is reasonable to infer that he selected PwC Cayman with their concurrence. There is no evidence from which to infer that Ogier selected PwC Cayman on their own initiative without reference to their client. Mr Pearson did not apply his mind to the choice of liquidators. In reaching this conclusion, I do not imply any criticism of him. He focused on whether or not the Fund should be put into liquidation. He had no reason to focus on the identity of the liquidators. He had no reason to suppose that PwC Cayman might not be regarded as independent. I conclude that the decision to appoint Messrs Walker and Stokoe of PwC Cayman must have been made by Mr Graham with the concurrence of the Pavels and the Investors.

16. Mr Stokoe carried out his firm's client pre-engagement procedures in the usual way, based upon the information and list of names provided to him by Ogier. He was provided with the names that appear in the structure chart although this document itself was created later. As I understand it, he and Mr Walker accepted the appointment on the basis that no PwC firm had any professional relationship with any of the individuals and companies identified to them as having any involvement in the matter. It transpired only later, after they had been appointed as voluntary liquidators, that both the Pavels and two of the Investors are PwC clients, in the sense that member firms within the PwC network are currently doing advisory work for companies which are ultimately owned by them. For reasons of client confidentiality, Mr Stokoe has not disclosed any details about these client relationships. Suffice it to say that his evidence, which I accept, can be summarised as follows. PwC Cayman does not and never has had any client relationship with the Investors or the Pavels or any company owned by any of them. The names of PwC corporate clients in question do not appear on the structure chart prepared for the purposes of this liquidation. Having made enquiry and on the basis of the information now available to him, it appears to Mr Stokoe that these PwC clients have nothing to do with this liquidation or the related litigation (except that they are owned or controlled by the Pavels and/or two of the Investors). The PwC firms do not have access to each other's client files. However, in the absence of any evidence from Ogier or Mr Graham

GRAND COURT CAYMAN ISLANDS

or the Pavels or the Investors, a fair minded stakeholder might reasonably infer that PwC Cayman was selected *because* of the existing client relationship with other firms in the PwC network. I do have the letters dated 8 August 2013 from the Former Shareholders, which are ultimately owned by the Investors. They ignore the point. Nothing is said about the pre-existing client relationships or the reasons why Ogier was instructed to nominate PwC Cayman. I draw an adverse inference from the fact that none of those involved in making the decision have given evidence to explain why PwC Cayman was selected; why the existing client relationships which I have described were not drawn to the attention of Mr Stokoe for the purposes of his conflict check; and why Messrs Pearson and Rowland were not left to make their own choice of liquidator.

The applicable legal principles

17. Regulation 6(1) provides that "A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of a company unless he can properly be regarded as independent as regards that company." Whether or not a firm of insolvency practitioners can be regarded as independent as regards any particular company in liquidation depends upon the existence or non-existence of professional or economic relationships which are regarded by the Court as creating a situation in which the appearance of complete impartiality is compromised. Appearances matter. The fact that Messrs Walker and Stokoe are honest, capable professionals who have been appointed as official liquidators on many occasions and whose actions and judgment calls have been sanctioned by this Court on a regular basis is beside the point. It is not good enough to say that these particular individuals can be relied upon to perform their duties properly.

18. Whether or not any particular kind of professional or economic relationships will lead to the conclusion that an insolvency practitioner can or cannot be properly regard as independent must depend upon the factual circumstances of each case which will vary in an infinite variety of ways. The Court must first identify the relationship and determine whether it is capable of impairing the appearance of independence. If the answer is yes, the Court must then consider whether its existence is sufficiently material in the factual circumstances of the liquidation in question that a fair minded stakeholder would reasonably object to the appointment of the nominee in question. In practice the Court is usually called upon to resolve these issues in cases where the nominated insolvency practitioners are members of firms which have multi-disciplinary practices including audit work and consultancy work. They are most difficult to resolve in cases, such as the present one, where the nominated practitioners are members of a Cayman Islands firm which is part of one of the large international networks of which the "big four" – Deloitte, Ernst & Young, KPMG and PricewaterhouseCoopers – are not the only ones represented in this country.

GRAND COURT CAYMAN ISLANDS

Conclusions

19. In this case it is accepted that PwC Cayman does not itself have any pre-existing professional relationship with any of the stakeholders. However, it is well established in this Court that the existence of a professional relationship between a stakeholder and some other PwC firm is capable of leading to the conclusion that the Cayman firm cannot be regarded as independent. The fact that one or more PwC firms are currently doing advisory work for companies owned by or associated with the Pavels and two of the Investors is such a relationship. The question is whether or not these client relationships are material in the circumstances of this liquidation and I must answer this question on the basis of the evidence before the Court. The mere fact that Messrs Walker and Stokoe have considered the matter and come to their own conclusion that it is not material is relevant evidence which I have taken into account, but it cannot be conclusive. The two Investors (and their companies) and the Pavels have had the opportunity to file written evidence which explains the nature and extent of the professional relationships in question, but have chosen not to do so.

20. I have come to the conclusion that these client relationships are material, in that a fair minded stakeholder would reasonably object to the appointment of PwC Cayman. I have come to this conclusion for the following reasons. First, the Fund is an important part of the subject-matter of litigation between two groups of protagonists who are making allegations of fraud each other. I have directed that the official liquidators be authorised to participate in this litigation. There are no stakeholders other than the members of these two opposing groups. The fact that members of one opposing group are PwC clients is a reasonable basis upon which a fair minded stakeholder could reasonably object to PwC Cayman's involvement as liquidators. The conclusion would be different if this was a fund with a hundred shareholders and a handful of them turn out to be PwC clients. Second, Messrs Walker and Stokoe's nomination as official liquidators results from the fact that they were appointed as voluntary liquidators. The evidence leads me to conclude that this appointment was in fact made with the concurrence of the Investors/Pavels, who did not disclose the client relationships with the other PwC firm(s) either to Messrs Pearson and Rowland or to Messrs Walker and Stokoe. The evidence reflects that Messrs Pearson and Rowland did make an independent, reasoned decision to put the Fund into liquidation. However, they did not make any independent decision about the selection of official liquidators. They appointed PwC Cayman because they were asked to do so by Ogier. Third, the outcome of the liquidation of the Fund appears to depend entirely upon the outcome of the litigation between the two protagonist groups. For these reasons it seems to me that the client relationship between the Investors/Pavels and the PwC network must be regarded as material. In the absence of any evidence from the stakeholders (who could have explained their relationships with the foreign PwC firms and the reasons why PwC Cayman was chosen as liquidators of the Fund), Mr Stokoe's evidence that the names of the actual client companies are not mentioned on the structure chart and

GRAND COURT CAYMAN ISLANDS

therefore appear to have no relevance to the liquidation or the litigation is not sufficient to displace my conclusion that the relationship is material.

21. Having concluded that Messrs Walker and Stokoe (and PwC Cayman) cannot be regarded as independent as regards the Fund, regulation 6 mandates that the Court *shall* not appoint them as official liquidators. The fact that they have done an enormous amount of work over a two month period in their capacity as voluntary liquidators is irrelevant. Since there is no objection to the only other candidates, I therefore appoint Messrs Tammy Fu and Gordon MacRae of Zolfo Cooper (Cayman) Limited as joint official liquidators of the Fund.

22. The supervision petition includes a prayer for directions authorising the official liquidators to participate (in such manner as they consider necessary) in the existing proceeding pending before the English High Court and in connection with the proceedings threatened in the letter of claim served on behalf of the various companies ultimately owned by Messrs Talukdar and Bekestein. Counsel agreed that I should give such directions in any event, irrespective of the identity of the official liquidators. It seemed to me plainly obvious that the official liquidators should have power to participate in both the pending and threatened proceedings. Exactly how they exercise the power is not a matter for consideration today. I anticipate that it will be the subject of a sanction application in due course.

Dated this 13th day of August 2013

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

GRAND COURT - CAYMAN ISLANDS

EXHIBIT F

(*Re Padma Fund LP)*

GRAND COURT FINANCIAL SERVICES DIVISION CAYMAN ISLANDS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 201 OF 2021 (RPJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF PADMA FUND L.P.

IN OPEN COURT

Appearances:	**Mr. Liam Faulkner of Campbells LLP on behalf of Padma Fund LP**
	Mr. Peter Sherwood and Mr Tim Baildam of Carey Olsen on behalf of the Petitioners
	Mr. Tony Heaver-Wren of Appleby on behalf CCP Henderson Capital Limited
Before:	**The Hon. Justice Parker**
Heard:	**14 September 2021**
Draft Judgment Circulated:	**5 October 2021**
Judgment Delivered:	**8 October 2021**

HEADNOTE

Winding up petition – s 2(d) Companies Act (202 Revision) s 3 (3) of Exempted Limited Partnership Act (202 Revision) jurisdiction on a creditor's petition s of Companies Act applicability of Part of Companies Law s 33( ) of Exempted Limited Partnership Act – s 3 of Exempted Limited Partnership Act and s 3 of Partnership Act (20 3 Revision) proceedings may be commenced by petition of creditor against general partner only, not the exempted limited partnership

JUDGMENT

Introduction

1. The Petition of San Miguel Holdings Corp ("SMHC") and Atlantic Aurum Investments B.V. ("AAIBV", and SMHC, together the "Petitioners") presented on 19 July 2021 seeks orders for the winding up of Padma Fund L.P. (the "Partnership").

2. The Petitioners seek an order that the Partnership be wound up pursuant to section 92(d) of the Companies Act (2021 Revision) (the "Companies Act"), as applied by section 36(3) of the Exempted Limited Partnership Act (2021 Revision) (the "ELP Act"), on the basis that the Partnership is unable to pay its debts.

3. Parallax Capital Management (the "General Partner") acts on behalf of the Partnership. The General Partner is the sole general partner of the Partnership.

4. The Partnership, acting by its General Partner, opposes the Petition on the following grounds:

   (1) the Petition is procedurally defective and the Court has no jurisdiction to make the orders sought by the Petition;

   (2) the Statutory Demand relied upon to evidence insolvency is defective and invalid;

   (3) the Petition debt is disputed bona fide on substantial grounds;

   (4) the Partnership (acting by its General Partner) has a cross-claim exceeding the amount of the alleged petition debt;

   (5) the Petition has been presented for a collateral and improper purpose and is an abuse of process.

5. Mr Liam Faulkner who appeared on behalf of the Partnership argues that if he succeeds on the jurisdiction argument (ground (1) above) then the Petition must be dismissed. Mr Peter Sherwood who appeared on behalf of the Petitioners did not dispute this, but argued that all five arguments in opposition were each without merit. Mr Tony Heaver-Wren who appeared for CCP Henderson Capital Limited opposes the making of the winding up order, but took no position on the jurisdiction argument.

Background[1]

6. In summary, the Partnership (acting by its General Partner) is a minority shareholder of AAIBV. SMHC is the only other shareholder in AAIBV, which is a joint venture vehicle. Disputes have arisen in respect of the joint ventures which are the subject of ongoing

[1] *Park 1*

arbitration proceedings. The Petitioners have presented a winding up petition in respect of a costs award arising out of one of the arbitrations. The Partnership says its assets exceed its liabilities and it has a cross claim against the Petitioners in the arbitration which exceeds the petition debt.

7. The Partnership says the Petition has been presented for a collateral and improper purpose and for strategic reasons in the ongoing arbitration. It says that the intention and effect of the Petition, if a winding up order is made, would be to displace the General Partner, who has the institutional knowledge and expertise concerning the Partnership's affairs and the ongoing litigation against the Petitioners, and put the conduct of the litigation in the hands of court appointed liquidators nominated by the Petitioners who have none of that institutional knowledge and expertise.

The jurisdiction argument

8. Mr Faulkner submits that the Petition is procedurally defective and the Court has no jurisdiction to make the orders sought by the Petition. He relies on the statutory framework applicable to an exempted limited partnership. He also argues that section 91 of the Companies Act does not apply to exempted limited partnerships.

9. This leads to the result that the remedy of a creditor of an exempted limited partnership, such as the Petitioners, is to commence proceedings against the general partner. It is the general partner who (a) has the authority to enter into agreements and contracts on behalf of the Partnership; (b) holds the assets of the Partnership on a statutory trust; and (c) has unlimited liability in respect of the Partnership's liabilities.

10. A petition presented against the general partner would need to be served on the general partner and advertised in accordance with the Companies Winding Up Rules, 2018. Essentially, in Mr Faulkner's submission, the wrong procedure has been used and the court therefore has no jurisdiction to make the orders sought. The correct course of action, where adequate grounds exist, is for a creditor to present a winding up petition against the general partner.

11. Mr Sherwood for the Petitioners submits that the decision of Kawaley J in *XIO Diamond*[2] would have to be departed from for this argument to succeed. This is a high bar. In any event the court would have to reach a tortured and a wrong construction of section 36(3) of the ELP Act so as to conclude that it does not mean what Kawaley J said it did.

12. He added that the practice of attorneys in the Cayman Islands who are experts in "Funds work", which involves Cayman Islands exempted limited partnerships, is that section 91 of the Companies Act applies to exempted limited partnerships by virtue of section 36(3) of the ELP Act. He provided an annex to his written submissions listing the cases decided in the Grand Court pursuant to winding up petitions issued against the exempted limited partnership, not the general partner. He argued that the Partnership's argument was novel and without merit.

Decision on jurisdiction

Approach

13. The Petitioners have presented the winding up Petition against the Partnership. The onus is on the Petitioners to satisfy the Court that it has the jurisdiction to make the orders sought by the Petition.

14. Section 18(1) of the Grand Court Law (2015 Revision) provides that:

> "*Subject to this or any other law, the jurisdiction of the Court shall be exercised in accordance with any Rules made under this Law.*"

15. The Court's jurisdiction is to be exercised in accordance with the Rules, with the corollary that English practice may apply where no other provision is made.

16. Both Mr Faulkner and Mr Sherwood agreed that the scope of the Court's jurisdiction under section 91 of the Companies Act and section 36 of the ELP Act is a matter of statutory interpretation.

17. The principles of statutory interpretation are well established and were succinctly summarised by the Privy Council in *Shanda Games Ltd v Maso Capital* where Lady Arden said at §[27]:

[2] (unreported, 30 April 2020, FSD 256 of 2019 (IKJ)))



> "the court has to ascertain the intention of the legislature from the words it has used in their context, and also in the light of any material which demonstrates the mischief that it was concerned to redress by the statutory provision."

Analysis

18. The Partnership is an exempted limited partnership which was registered in the Cayman Islands on 8 September 2008.

19. Section 2 of the ELP Act in material part defines an "**exempted limited partnership**" as a partnership formed and registered under section 9(1) of the ELP Act.

20. The formation, operation and termination of exempted limited partnerships in the Cayman Islands is governed by the ELP Act and by certain provisions of the Partnership Act (2013 Revision) (the "Partnership Act"), as well as by certain principles of common law and the provisions of the limited partnership agreement entered into between the parties.

21. Section 3 of the Partnership Act states that a partnership is "*the relation which subsists between two or more persons carrying on a business in common with a view to profit*." This concept survives from English law dating back to the late 19th century.

22. Section 4(2) of the ELP Act provides that to be an exempted limited partnership, the partnership must consist of:

    (i) at least one person, called the general partner who, in the event that the assets of the exempted limited partnership are inadequate, is liable for all of the debts and obligations of the exempted limited partnership; and

    (ii) at least one person, called the limited partner, who shall not be liable for the debts or obligations of the exempted limited partnership in excess of the capital contributed by that person to the exempted limited partnership, save as provided for in the partnership agreement or otherwise in the limited circumstances specified in sections 20(1) and 34(1) of the ELP Act.

23. This is a modification of section 10 of the Partnership Act which provides that:



> "*Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner…"*

24. It is also a modification of section 13 of the Partnership Act which provides:

> *"Every partner of a general partnership is liable jointly with this co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under section (liability of the firm for wrongs) or 2 (misapplication of money or property)*."

25. An exempted limited partnership is not an entity with separate legal personality and cannot own property in its own right.

26. Pursuant to section 16(1) of the ELP Act, any rights or property of every description of an exempted limited partnership shall be held or deemed to be held by the general partner upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement.

27. The business carried on by an exempted limited partnership is conducted by its general partner who has the authority to enter into all letters, contracts, deeds, instruments or documents whatsoever on behalf of the exempted limited partnership: section 14(2) of the ELP Act.

28. By contrast, section 14(1) of the ELP Act prohibits a limited partner from conducting business on behalf of the exempted limited partnership in its capacity as a limited partner.

29. The key and controlling role the general partner plays in an exempted limited partnership is therefore made clear by the ELP Act.

30. That role extends to insolvency situations. Section 2 of the ELP Act provides that in the ELP Act:

> "***Insolvency of the exempted limited partnership**" means that the general partner is unable to pay the debts and obligations of the exempted limited partnership, otherwise than in respect of liabilities to partners on account of their partnership interests, in the ordinary course of business as they fall due out of the assets of the exempted limited partnership, without recourse to the separate assets of the general partner not contributed or committed to the exempted limited partnership and **"insolvent**" shall be construed accordingly;"*

31. The defined term "insolvency of the exempted limited partnership" is used in section 20(1) and 34(1)(b) of the ELP Act only and the defined term "insolvent" used in sections 34(1)(a) and 43(2)(g) only. There is therefore a distinct definition of insolvency applicable to exempted limited partnerships.

32. Against that backdrop section 33(1) of the ELP Act states that:

> "*Proceedings*
>
> *( )* *Subject to subsection (3),* ***legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only,*** *and a limited partner shall not be a party to or named in the proceedings."*
>
> *…*
>
> *(3)* *A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without causes, failed or refused to institute proceedings."(my emphasis)*

33. I reject Mr Sherwood's submission that because the clause does not say in terms one cannot issue proceedings against an exempted limited partnership that the Petitioners are permitted to do so.

34. As to interpretation Mr Sherwood submitted that the clause would have to say:

> *"You may not issue proceedings against an exempted limited partnership or against a limited partner ou may only commence them against the general partner".*

35. There is however no provision within the ELP Act or the Partnership Act which provides that legal proceedings may be instituted against an exempted limited partnership in the name of the partnership. This is because it is through the general partner that its debts and obligations are enforced. Section 33(1) of the ELP Act says in terms proceedings may be instituted against the general partner(s) only.

36. Mr Sherwood relied on Order 81, rule 12 of the Grand Court Rules, 1995 (Revised Edition) which provides that any action by or against an exempted limited partnership may be commenced in the name of the firm. However in my view that does not assist Mr Sherwood because the applicable statutes must take precedence over procedural rules, and the particular rule does not in my view deal with the court's winding up jurisdiction.

37. Section 2 of the Companies Act defines a "**company**" as, except where the context excludes exempted companies, a company formed and registered under the Companies Act or an existing company.

38. Section 89 provides that in Part V of the Companies Act: a "**company**" includes a foreign company in respect of which the Court has made a winding up order.

39. Neither of these two definitions include an exempted limited partnership because it is not a company.

40. Section 89 provides that in Part V of the Companies Act: a "**limited partnership"** means an ordinary limited partnership registered in accordance with section 49 of the Partnership Act (2013 Revision) or an exempted limited partnership registered in accordance with section 9 of the ELP Act (2021 Revision).

41. Section 91 of the Companies Act provides :

> "*Jurisdiction of the Court*
>
> *The Court has jurisdiction to make winding up orders in respect of –*
>
> *(a) an existing company*
>
> *(b) a company incorporated and registered under this Act*
>
> *(c) a body incorporated under any other law and*
>
> *(d) a foreign company which –*
>
> *...*
>
> *(iii)* ***is the general partner of a limited partnership****" (my emphasis)*

42. The defined term "limited partnership" is used only once in Part V of the Companies Act – in section 91(d)(iii) which gives the Court jurisdiction to wind up a foreign company which acts as the general partner of a limited partnership. It is therefore clear that the court has jurisdiction to make a winding up order in respect of a general partner of the limited partnership.

43. I accept Mr Faulkner's submission, having set out these provisions, that if the intention of the legislature were for the Court to have jurisdiction to wind up an exempted limited partnership

under section 91 of the Companies Act then this would have been expressly provided for in section 91. The entities over which the court has jurisdiction were clearly delineated in section 91.

44. However, Mr Sherwood relies on section 36(3)(a) of the ELP Act to argue that reference in section 91 of the Companies Act to a company is deemed to be a reference to an exempted limited partnership. By the Petition, the Petitioners plead that section 92(d) of the Companies Act applies to an exempted limited partnership by virtue of section 36(3) of the ELP Act.

45. This is an important point which has not, I am informed by Mr Faulkner, been fully considered by this court in light of all the relevant statutory provisions.

46. Section 36 of the ELP Act was introduced into Cayman law when the Exempted Limited Partnership (Amendment) Law, 2009 came into force on 11 May 2009, as section 15(3) of the Exempted Limited Partnership Law (2007 Revision). I am informed by Mr Faulkner that there was no equivalent provision in the repealed Exempted Limited Partnership Law (2007 Revision) prior to that amendment.

47. Section 36(3) of the ELP Act states:

> "***Except to the extent that the provisions are not consistent with this Act, and in the event of any inconsistencies, this Act shall prevail, and subject to any express provisions of this Act to the contrary,*** *the provisions of Part of the Companies Act (202 Revision) and the Companies Winding Up Rules, 20 shall apply to the winding up of an exempted limited partnership and for this purpose…"(my emphasis)*

48. It seems to me that this provision does not give a freestanding right for a creditor to present a winding-up petition against an exempted limited partnership[3].

49. I also find that there is no jurisdiction for the court to make a winding-up order against an exempted limited partnership on a creditor's winding up petition. I have reached this conclusion for the following reasons.

50. The prefatory words of section 36(3) are clear that Part V of the Companies Act only applies to an exempted limited partnership if and to the extent that the provisions are not inconsistent

[3] *XIO Diamond supra at § 26*

with the ELP Act, and in the event of any inconsistencies, the ELP Act is to prevail, and Part V is subject to any express provisions of the ELP Act to the contrary.

51. The presentation of a creditor's petition against an exempted limited partnership seems to me to be inconsistent with (and is contrary to) the provisions of section 33(1) of the ELP Act.

52. An exempted limited partnership can be wound up and the partnership dissolved in one of two scenarios:

(1) voluntarily in accordance with the provisions of the partnership agreement pursuant to section 36(1) of the ELP Act; or

(2) by the Court pursuant to section 35 of the Partnership Act, which applies by virtue of section 3 of the ELP Act (see below).

53. Section 36(1) of the ELP Act contains provisions for the voluntary winding up and dissolution of an exempted limited partnership upon the occurrence of two events: (a) at the time or upon the occurrence of any event specified in the partnership agreement; or (b) unless otherwise specified in the partnership agreement, upon the passing of a resolution of all the general partners and a two-thirds majority of limited partners.

54. Section 3 of the ELP Act provides that the rules of equity and of common law applicable to partnerships as modified by the Partnership Act (but excluding sections 31, 45 to 54 and 56 to 57) shall apply to an exempted limited partnership, except where they are inconsistent with the express provisions of the ELP Act.

55. Section 35 of the Partnership Act contains five grounds on which a court may order the dissolution of a partnership on application by a partner and includes, at sub-section 35(d), when the business of the partnership can only be carried on at a loss and, by sub-section 35(e), whenever in any case circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.

56. Section 35 of the Partnership Act is in substantially the same terms as section 35 of the English Partnership Act 1890. It was introduced into Cayman Islands law by section 36 of the Partnership Law, 1983.

57. From this chronology, at the time of introducing the ELP Act into law, it is to be reasonably inferred that the legislature chose not to dis-apply or modify section 35 of the Partnership Act.

Application

58. When considering section 36(3) of the ELP Act, following the Privy Council in *Shanda* the Court is required to identify "*the mischief that it was concerned to redress by the statutory provision*"

59. I accept Mr Faulkner's submission that the intention of the legislature could not have been to enable a partner of an exempted limited partnership to apply to wind up and dissolve an exempted limited partnership on just and equitable grounds pursuant to section 92(e) of the Companies Act as the jurisdiction to do so already existed under section 35(e) of the Partnership Act.

60. As the remedy already existed, there was no "mischief" to redress. Indeed, I accept Mr Faulkner's submission that the Court's jurisdiction to dissolve an exempted limited partnership on the application of a partner under section 3 of the ELP Act and section 35 of the Partnership Act appears to be broader than under section 92 of the Companies Act. I accept his submission that it could not have been the intention of the legislature to narrow the Court's jurisdiction by replacing section 35 of the Partnership Act (which specifically applies to partnerships) with section 92 of the Companies Act.

61. I seems to me that from a proper analysis of the above statutory provisions that the Court's jurisdiction to wind up an exempted limited partnership on the application of a partner on the grounds that it is just and equitable to do so arises by virtue of section 3 of the ELP Act and section 35(e) of the Partnership Act only.

62. This is relevant for when one examines the decision in *XIO Diamond LP* below as, unlike the present case, it concerned an analysis of the situation which applied on the application to wind up by a limited partner.

63. I have considered whether there was "mischief" which the legislature sought to address by introducing section 36(3) of the ELP Act to enable a creditor to present a winding up petition against an exempted limited partnership, as in the present case.

64. I have concluded that no mischief existed as the creditor was (and remains) entitled to enforce any debt against the general partner which, unlike the exempted limited partnership, has a legal personality.

65. In any event, the provisions of Part V of the Companies Act referenced in section 36(3) of the ELP Act are subject to section 33(1) of the ELP Act which expressly states that legal proceedings against an exempted limited partnership may be instituted against a general partner only.

66. It seems to me therefore that the legislative purpose of introducing section 36(3) was to apply the applicable provisions of Part V of the Companies Act and the Companies Winding Up Rules, 2018 *following* the commencement of the winding up in order to facilitate the orderly winding up of the partnership's affairs.

67. This analysis accords with the commercial position and the legal liabilities which arise on the insolvency of a partnership where the business of the partnership is conducted by the general partner, the assets of the partnership are held by the general partner on a statutory trust and the general partner is personally liable for the debts of the partnership.

68. Pursuant to section 2 of the ELP Act, the partnership is deemed to be insolvent when the general partner is unable to pay the debts and obligations of the exempted limited partnership in the ordinary course of business as they fall due out of the assets of the exempted limited partnership, without recourse to the separate assets of the general partner not contributed or committed to the exempted limited partnership.

69. In that scenario the general partner remains personally liable for the partnership's debts and therefore the remedy of any creditor when the partnership is insolvent is to commence proceedings against the general partner. This is consistent with section 33(1) of the ELP Act.

70. The winding up procedure as it relates to exempted limited partnerships also fits with this analysis. When an exempted limited partnership is being wound up, either voluntarily under section 36(1) of the ELP Act or by order of the court pursuant to section 35 of the Partnership Act, the general partner is deemed to be the liquidating trustee of the partnership unless the court orders otherwise.

71. The role of the liquidating trustee is to conduct the orderly winding up of the partnership's affairs by collecting in and realising its assets, paying its liabilities, and distributing any surplus to the partners in accordance with their contractual rights under the limited partnership agreement. In the event of a shortfall, the general partner remains personally liable for the shortfall.

72. I accept Mr Faulkner's analysis that it follows that the remedy of any creditor of an exempted limited partnership is to commence proceedings against the general partner. In the event that a winding up order is made against the general partner, any liquidator appointed will continue to hold the assets of the exempted limited partnership on a statutory trust to be distributed to the creditors of the exempted limited partnership in accordance with the statutory scheme. In the event of a shortfall in the partnership assets, the liquidating trustee has a claim against the separate assets (if any) of the general partner and such claim would constitute an unsecured claim in any liquidation of the general partner which ranks *pari passu* with the claims of other creditors of the same class who have an unsecured claim against the general assets of the general partner.

73. It is also illustrative to look at the position in England. There is no statutory equivalent in the Cayman Islands to Part IV of the Insolvent Partnerships Order 1994 (the "IPO") which is in force in England.

74. The IPO modifies Part V of the Insolvency Act 1986 to extend the jurisdiction of the English Court to wind up a partnership as an unregistered company in certain scenarios. An "unregistered company" is defined by the Insolvency Act 1986, s.124 A to include: "*any association and any company, with the exception of a company registered under the Companies Act 200 in any part of the United Kingdom*".

75. Pursuant to sections 7 and 8 of the IPO, the procedure for a creditor to petition for the winding up of a limited partnership can be implemented either with concurrent actions against one or more current or former partners or against the partnership alone. The English Court's jurisdiction to make the winding up order arises under the IPO. I note that a statutory equivalent has not been introduced in the Cayman Islands.

The decision of the Court in *XIO Diamond*

76. It is necessary to examine this case in a little detail. It concerned a just and equitable winding up petition presented by the sole limited partner against the exempted limited partnership.

77. Kawaley J held at §[23] that section 36 of the ELP Act applies to voluntary liquidations *after* their commencement and, at §[26], that section 36(3) of the ELP Act does not confer a freestanding judicial power to make a winding up order. I respectfully agree.

78. However the learned Judge made certain other findings (the 'other findings') which Mr Sherwood relies upon:

(1) At §[28] he held that Part V of the Companies Act applies to exempted limited partnerships where an official liquidation is sought by a limited partner;

(2) At §[30] he held that:

(i) section 94 of the Companies Act applies to exempted limited partnerships, and expressly confers the right to petition for a winding up on the grounds set out in section 92 of the Companies Act; and

(ii) section 95 of the Companies Act applies to exempted limited partnerships and expressly empowers the Court to appoint official liquidators.

(3) At §[31] he held that section 36(3) of the ELP Act provides access to the winding up jurisdiction of Part V of the Companies Act.

79. It is important to note that it appears that Kawaley J was not taken to and did not consider section 33(1) of the ELP Act or section 3 of the ELP Act and section 35 of the Partnership Act. No inconsistency seems to have been pointed out or raised.

80. The parties proceeded on the basis that there was an agreed basis for the limited partner to petition to wind the partnership up on just and equitable grounds. Indeed Mr Faulkner who was counsel in the case submitted that a winding up order would have been made in any event, but the jurisdictional gateway should have been section 3 of the ELP Act and section 35 of the Partnership Act. Mr Faulkner submitted that it was wrong to interpret the decision to

mean that a creditor can use Part V of the Companies Act in relation to an exempted limited partnership to present a petition to wind it up.

81. Mr Faulkner informed me that none of the decisions concerning the application of section 36(3) of the ELP Act, since it came into force on 11 May 2009, have considered section 33(1) or section 3 of the ELP Act and section 35 of the Partnership Act, including the in the case of *Rhone Holdings LP*,[4] which also concerned an application by a limited partner to wind up an exempted limited partnership on just and equitable grounds. It was common ground in that case that the Part V jurisdiction existed to properly bring a winding up petition against the exempted limited partnership.

82. It is to be noted that the applicable provisions of section 3 of the ELP Act and section 35(e) of the Partnership Act expressly gives the Court jurisdiction to dissolve an exempted limited partnership on the application of a limited partner where it is just and equitable to do so. Section 36(3) is expressly subject to section 3 of the ELP Act.

83. Upon a winding up order being made pursuant to those provisions, the commencement date of the winding up would be the presentation of the petition by the limited partner pursuant to section 36(10)(e) of the ELP Act and, following such commencement, the Court may make any order and give directions for the winding up and dissolution of the exempted limited partnership as may be just and equitable under section 36(3)(g) of the ELP Act. Sub-section 36(2) of the ELP Act governs the winding up regime of an exempted limited partnership that is being wound up pursuant to either section 36(1) of the ELP Act or section 35 of the Partnership Act.

84. I respectfully differ from Kawaley J's 'other findings'. I bear in mind that a decision of another Judge of this court should be followed unless I am convinced it is wrong[5] and special care must be taken in circumstances where the Judge heard argument by experienced lawyers and wrote a fully reasoned judgment[6]. I would add that I hesitate long and hard before differing from a Judge so eminent and experienced in this field.

85. However having been taken to the statutory framework in some detail by Mr Faulkner I am regrettably bound to do so. I note in this context that not only was Kawaley J not taken to the relevant provisions of the ELP Act and the Partnership Act set out above, but also in *XIO*

[4] (Unreported 16 September 2015)
[5] *China Shanshui [2015 (2) CILR 255] §64*
[6] *Simamba v Health [2019 (2) CILR 213] §§68-71*

Diamond the general partner did not oppose a winding up order being made on the just and equitable ground of loss of substratum (but opposed the loss of trust and confidence ground) and in that sense the petition was unopposed in substance.

86. His decision is also distinguishable (as is the *Rhone* case) on the basis that the position of a limited partner to dissolve a partnership is distinct from those of a creditor, like the Petitioners in this case, who are outsiders to the Partnership.

87. I have concluded that the court in *XIO Diamond* was in error to state that the jurisdictional basis for winding up the exempted limited partnership was section 36(3) of the ELP Act and Part V of the Companies Act.

88. Mr Faulkner accepted the line of authority relating to the jurisdiction by which the Court can order the winding up of an exempted limited partnership on the application of a partner. He accepted that the Court has jurisdiction, but submitted that that jurisdiction arises by virtue of section 3 of the ELP Act and section 35 of the Partnership Act (which is broader in scope than section 92 of the Companies Act). I agree with this analysis. The proper jurisdictional basis was section 3 of the ELP Act and section 35(e) of the Partnership Act, which it appears the court was not referred to.

Summary

89. It is clear in my view from a review of the statutory provisions engaged, that the Companies Act is not of general application to an exempted limited partnership. To the extent that its provisions apply, they apply (i) only to the extent that the provisions are not inconsistent with the ELP Act and in the event of any inconsistencies the ELP Act is to prevail and (ii) subject to any express provisions of the ELP Act to the contrary.

90. The scope of the Court's jurisdiction to make a winding up order under the Companies Act is set out in section 91, and this provision does not on its terms expressly extend to an exempted limited partnership.

91. This seems to me to be consistent with an exempted limited partnership not being an entity with separate legal personality; the partnership is simply the relation which subsists between the general partner(s) and the limited partner(s) by virtue of section 3 of the Partnership Act.

92. My conclusion is that the court has no jurisdiction over a creditor's winding up petition against an exempted limited partnership.

93. The creditor has an available statutory alternative remedy which is to commence proceedings against the general partner, which accords with the commercial and legal position.

It follows that the Petition is dismissed.

GRAND COURT
FINANCIAL SERVICES DIVISION
CAYMAN ISLANDS

THE HON. JUSTICE PARKER
JUDGE OF THE GRAND COURT

EXHIBIT G

(*Re Xio Diamond LP*)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 256 OF 2019 (IKJ)

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP LAW (2018 REVISION)

AND

IN THE MATTER OF XIO DIAMOND LP

IN OPEN COURT (VIDEOCONFERENCE)

Appearances:

Mr Lachlan Greig and Mr Paul Smith, Harneys, for China Life Trustees Limited (the "Petitioner")

Mr Liam Faulkner, Campbells, on behalf of XiO Diamond LP (the "Partnership")

Before:	The Hon. Justice Kawaley
Heard:	27 March 2020
Date of decision:	27 March 2020
Draft Ruling Circulated:	27 April 2020
Ruling Delivered:	30 April 2020

REASONS FOR DECISION

GRAND COURT CIV-01 CAYMAN ISLANDS

Index

Just and equitable winding-up petition-adequacy of pleading-amendment-loss of substratum-whether jurisdiction to wind-up exists under section 36(3) as read with section 36(13) of the Exempted Limited Partnership Law (2018 Revision)-sections 92, 94 Companies Law (2020 Revision) - Order 1 rule 4, Order 3 rule 2 Companies Winding Up Rules, 2018-Grand Court Rules Orders 9 rule 2 and Order 20 rule 8(1)

Background

1. The Petition herein is dated December 23, 2019 and was presented on or before December 27, 2019[1]. The Petitioner primarily sought an Order that the "*Partnership be wound up according to the Law.*" The "Law" was defined by reference to the Exempted Limited Partnership Law (2018 Revision) (the "ELP Law"). It petitioned as the sole limited partner and economic stakeholder in the Partnership. The central basis for the Petition was that the main business purpose of the Partnership was to hold and dispose of "Portfolio Investments"; this function had allegedly been fulfilled. It was alleged that the distribution to which the Petitioner was entitled could not take place because of an injunction granted in confidential proceedings against the General Partner, XIO Diamond GP Limited (the "GP") and its sole director. Accordingly, a winding-up was said to be required so that independent liquidators could make the relevant distribution and wind-up the Partnership.

2. The principal ground initially relied upon was the typically contentious 'loss of trust and confidence' ground. At the hearing of the Petition on March 27, 2020, the only ground for winding-up relied upon by the Petitioner was the alternative 'loss of substratum' ground. The Partnership's position was that it would not oppose a winding-up on this ground if a *prima facie* case was made out; but it submitted that on the face of the Petition no legally sustainable basis for winding-up had been pleaded. As a matter of law, it was argued, reliance was wrongly placed by the Petitioner on, *inter alia*, section 36 (3) (g) of the ELP Law. The only available statutory jurisdiction was under section 92(e) of the Companies Law (2020 Revision) (the "Law"), the Partnership argued.

3. At the conclusion of the hearing I made the following interlocutory Order:



[1] I do not decide the disputed issue what the presentation date was.

> *"1. The Petitioner is granted leave to amend the Petition pursuant to section 95(1)(d) of the Companies Law (2020 Revision) and CWR Order 3, Rule 2(3) as read with GCR Order 20, Rule 5 and/or Rule 8:*
>
> *a) by adding after paragraph 21 a new paragraph 21A:*
>
> *'21A. Further and/or alternatively, the Petitioner seeks an Order that the Partnership be wound up under sections 92(e) and 94 (1)(c) of the Companies Law as read with section 36(3) of the Exempted Limited Partnership Law" ; and*
>
> b) *by deleting the words "the Law" and replacing them with "applicable law" at the end of paragraph 1 of the Prayer to the Petition…."*

4. I also granted a final Order which provided, *inter alia*:

> *"1. The Partnership be wound up in accordance with sections 92(e) and 94(1)(c) of the Companies Law (2020 Revision) as read with section 36(3) of the Exempted Limited Partnership Law (2018 Revision).*
>
> 2. *Luke Almond of Borrelli Walsh (Cayman) Limited, Strathvale House, 3rd Floor, 90 North Church Street, Grand Cayman KY1-1204, Cayman Islands and Cosimo Borrelli of Borrelli Walsh Limited of Level 17, Tower 1, Admiralty Centre, 18 Harcourt Road, Hong Kong be appointed as joint official liquidators (the "**Liquidators**") of the Partnership."*

5. I reserved the costs of both the amendment application and the Petition. I now give reasons for these decisions.

The Petition

6. At the hearing, it being agreed that the loss of trust and confidence case would not be pursued, the only centrally relevant aspects of the Petition were the following pleas:

GRAND COURT CIV-01 CAYMAN ISLANDS

"12. Sections 9.2 and 9.3 of the LPA deal with the process for winding-up the Partnership and the final distribution of the Partnership's assets. Section 9.2 provides:

'Upon the occurrence of an Event of Dissolution, the Partnership shall be wound up and dissolved. The General Partner, or if there is no general partner, a liquidator appointed by a Majority in Interest of the Limited Partners, shall proceed with the Dissolution Sale and the Final Distribution.'...

13. ...The Transaction [completed on 16 December 2019] will lead to the automatic winding up of the Partnership pursuant to the terms of the LPA, as well as pursuant to sections 36(1)(a) and 36(10)(d) of the Exempted Limited Partnership Law (2018 Revision) (the Law)...

19. The Petitioner is the sole Limited Partner of the Partnership and is entitled to petition for the winding up of the Partnership pursuant to section 36(3)(g) of the Law and, pursuant to section 36(13) of the Law, to seek an order that the affairs of the Partnership be wound up by a person appointed by the Court other than XIO Diamond GP...

YOUR PETITIONER THEREFORE HUMBLY PRAYS THAT:

1. The Partnership be wound up in accordance with the Law."

7. It was also agreed that although reliance was placed on the existence of those provisions of the LPA relating to automatic winding-up, the Petitioner's original argument that the voluntary winding-up had already commenced would not be pursued.

The Petitioner's submissions

8. The first legal submission advanced in the Petitioner's Skeleton Argument was the following:

GRAND COURT CIV-01 CAYMAN ISLANDS

> *"28. The Petitioner petitions for the winding up of the Partnership pursuant to section 36(3)(g) of the Exempted Limited Partnership Law (2018 Revision) (the ELP Law):*
>
> > *Except to the extent that the provisions are not consistent with this Law, and in the event of any inconsistencies, this Law shall prevail, and subject to any express provisions of this Law to the contrary, the provisions of Part V of the Companies Law and the Companies Winding Up Rules 2018 shall apply to the winding up of an exempted limited partnership and for this purpose –*
> >
> > *(g) on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable.*
>
> *29. The circumstances in which it will be just and equitable to order a winding up are not closed to particular categories – those words are general and the circumstances in which it may be just and equitable to order a winding up are diverse (French at [8.158 -8.159] citing (among other authorities) Lord Wilberforce's judgment in Ebrahami v Westbourne Galleries Ltd [1973] AC 360).*
>
> *30. The Petitioner says that it is just and equitable that the Partnership be wound up in the following circumstances (whether taken alone or together).*"

9. This submission retains the pleaded reliance on section 36(3)(g) of the ELP, but also mentions for the first time the winding-up jurisdiction on the just and equitable ground under Part V of the Law. The Petitioner goes on to submit:

> *"33. The Petitioner and the General Partner disagree as to whether the voluntary liquidation of the Partnership has been triggered pursuant to the Article 9.1 of the LPA. The Petitioner submits that is not an issue the Court needs to determine on this petition. Assuming that the General Partner's position is the correct one…the position would be the same: the Injunction prevents the General Partner from winding up the Partnership.*
>
> *34. The loss or failure of a company's substratum is one of the well-recognised illustrative categories of case where a Court may wind up a company on the just and equitable basis (French at [8.260]). The Court may conclude that a*

GRAND COURT CIV-01 CAYMAN ISLANDS

company's substratum is gone if the company was formed to pursue a specific business that has come to an end (French at [8.262] citing Re Amalgamated Syndicate [1897] 2 Ch 600).

35. In Re Amalgamated Syndicate, the company was formed to provide facilities for the Queen's Diamond Jubilee. After the Jubilee, a shareholder successfully sought the winding up of the company on the just and equitable basis in circumstances where the primary purpose of the company had been achieved and the company's directors did not intend to return the remaining capital to the shareholders. The Petitioner says that it is in an analogous position to the petitioning shareholder in Re Amalgamated Syndicate: the Partnership has achieved its purpose but the General Partner is not in a position to take the steps necessary to wind up the affairs of the Partnership. It would therefore be just and equitable for the Court to order the winding up of the Partnership. Absent such an order, the only (albeit unpalatable) option for the Petitioner would be to do a deal with the General Partner and attempt to obtain a variation of the Injunction."

10. This submission supports an entirely new un-pleaded statutory basis for winding-up. The Petitioner's Skeleton proceeds to set out the pleaded loss of confidence ground in terms which make it explicit that reliance was indeed placed on section 36(3)(g) of the ELP Law as read with Part V of the Law. Section 36(13), pleaded in paragraph 21 of the Petition as the statutory basis for appointing liquidators, receives no mention in the Plaintiff's Skeleton.

11. The Skeleton Argument of the Partnership, *inter alia*, challenged the pleaded reliance on the ELP Law head on:

"41 The Petition does not seek relief pursuant to section 92(e) of the Companies Law for the Partnership to be wound up on the just and equitable basis. The relief sought is confined to sections 36(13) and 36(3) (g) of the ELP Law. As an Event of Dissolution has not occurred, those provisions are not engaged and the Petition must be dismissed.

42 The Petitioner's application is analogous to an application for a supervision order by a shareholder of a company in voluntary liquidation. In the same way that the Court does not have jurisdiction to make a supervision order under section 131 of the Companies Law in respect of a company which is not in voluntary liquidation, the Court does not have the jurisdiction to grant the relief sought in the Petition.

GRAND COURT CIV-01 CAYMAN ISLANDS

43 There is no precedent or jurisdiction for the Court to make an order to wind up an exempted limited partnership which is not in voluntary liquidation other than pursuant to section 92 of the Companies Law. By way of example:

43.1 In re Cybernaut Growth Fund LP (unreported, FSD 73/2013, 11 September 2013) the Court ordered that an exempted limited partnership be wound up on the just and equitable basis pursuant to section 92(e) of the Companies Law.

43.2 In re Rhone Holdings LP (unreported, FSD 119/2015, 28 September 2015) limited partners of the exempted limited partnership petitioned to wind up the partnership pursuant to section 92(e) of the Companies Law. The petition was dismissed on its merits but it was procedurally sound.

44 If the Court agrees that the Partnership has not commenced voluntary liquidation and that the Court does not have jurisdiction to grant the relief sought in the Petition pursuant to sections to sections 36(13) and 36(3)(g) of the ELP Law, the Petition must be struck out and it is not necessary for the Court to consider any of the other issues in dispute. The Partnership therefore invites the Court to determine this issue as a preliminary point."

12. In answer to the Court, Mr Faulkner indicated that this jurisdictional point had been raised in correspondence and in the First Affirmation of Athene Li. In that Affirmation, Ms Li deposed:

"*47. As an Event of Dissolution has not occurred, China Life is not entitled to the relief it seeks pursuant to section 36(10)(d) and section 36(13) of the ELP Law, each of which is premised on an Event of Dissolution having occurred within the meaning of the LPA.*"

13. This appeared to me to express the jurisdictional challenge in a somewhat narrower way than was advanced in argument at the hearing of the Petition when it was agreed that the Petitioner would not seek to establish that an Event of Dissolution had already occurred. The proposition that a winding-up order could only be granted under Part V of the Law if a voluntary liquidation had not already commenced was at best implied rather than expressly articulated.

GRAND COURT
CIV-01
CAYMAN ISLANDS

14. In his oral submissions, the Partnership's counsel argued in opening the preliminary point that the Petitioner had failed to plead a viable statutory basis for winding-up. Reliance was placed on the requirements of Companies Winding Up Rules ("CWR") Order 3 and Grand Court Rules ("GCR") Order 9 rule 2 as read with Form 7. He submitted that the Petition was presented pursuant to sections 36(13) and 36(3)(g) of the ELP Law and the critical question was: did these statutory provisions create a freestanding basis for winding-up on the just and equitable ground? Clearly not, Mr Faulkner contended. This was because section 36(3)(g) was designed to provide relief within the context of a voluntary winding-up under the ELP Law; Part V of the Law was generally dis-applied as regards voluntary windings-up under section 36(1) by section 36(3)(d). This central proposition was also supported by reference to the fact that the only other provision which mentioned subsection (3)(g) was subsection (13).

15. It was submitted that the Petition should be dismissed with costs. I put to Mr Faulkner that if his submissions were correct, the defects in the pleading were capable of being cured by amendment. He responded that as the Petitioner had alternative remedies, exceptional circumstances were required to permit an amendment.

16. I asked Mr Greig before he began his response whether he would seek leave to amend if required. He replied that the Court had a discretionary power to amend and that he would seek leave to amend if necessary. However, he indicated that the Petitioner's primary position was that the necessary jurisdiction existed under the Petition as pleaded. Section 36 (3) had been relied upon, and that incorporated the Law.

17. The Petitioner's counsel contended that the authorities relied upon by the Partnership were not material to the issue at hand. He insisted that section 36(3) (g) did create a freestanding jurisdictional basis for a winding-up order. In *Re Cybernaut Growth Fund LP* FSD 73 of 2013 (AJJ), Judgment dated September 12, 2013 (unreported), the jurisdictional point at issue in the present case was not argued. Mr Greig submitted the same was true of *Re Rhone Holdings Limited* FSD 119/2015 (IMJ), Judgment dated September 16, 2015 (unreported).

18. As regards the merits of the loss of substratum argument, Mr Greig submitted that the Partnership's purpose had been met. There was no viable prospect of concluding the distribution process. It would be just and equitable for the Court to wind it up in the circumstances bearing in mind that the Petitioner was the sole economic stakeholder.

19. Mr Faulkner in reply indicated that he left the merits of the loss of substratum ground to the Court. However, he submitted that the relevant test required the Petitioner to demonstrate that achieving its commercial object had become "*impossible*": *Re Harbinger Class PE Holdings (Cayman) Ltd.* [2015 (2) CILR Note 6].

GRAND COURT
CIV-01
CAYMAN ISLANDS

Findings: did jurisdiction exist to wind-up the Partnership on just and equitable grounds (and appoint official liquidators) on a freestanding basis under section 36 (3) (d) as read with section 36(13) of the ELP Law?

20. Whether this Court had power to wind-up the Partnership under section 36 of the ELP Law on a freestanding statutory basis was ultimately a short point of statutory construction. I found Mr Faulkner's analysis of section 36 to be compelling. The main features of section 36 may be summarised as follows:

(a) provision is made for voluntary winding-up and dissolution in accordance with the partnership agreement on the occurrence of certain events (subsections (1)-(2));

(b) provision is made for winding-up exempted limited partnerships under Part V of the Law and the CWR, subject to the primacy of the ELP Law. How Part V of the Law applies to partnerships is spelt out; it does not generally apply to a voluntary liquidation under section 36(1). The Court is given the power to make directions for the winding-up of a partnership on the application of a partner, liquidator or creditor (subsection (3));

(c) provision is made in relation to secured creditors (subsections (4)-(5));

(d) provision is made for notices and various 'administrative' matters (subsections (6)-(9));

(e) provision is made for the date when a liquidation commences (subsection (10)-(11));

(f) an exception to automatic winding-up is provided for (subsection (12));

(g) provision is made for the general partner to conduct the winding-up unless the Court otherwise orders (subsection (13)).

21. The Petitioner, seemingly seeking to benefit from an earlier commencement of the liquidation date than the making of a winding-up order, contended that the following two provisions conferred jurisdiction to wind-up and appoint official liquidators. Firstly, section 36(3) which provides as follows:

GRAND COURT CIV-01 CAYMAN ISLANDS

"*(3) Except to the extent that the provisions are not consistent with this Law, and in the event of any inconsistencies, this Law shall prevail, and subject to any express provisions of this Law to the contrary, the provisions of Part V of the Companies Law and the Companies Winding Up Rules 2018 shall apply to the winding up of an exempted limited partnership and for this purpose -*

(a) references in Part V to a company shall include references to an exempted limited partnership;

(b) the limited partners shall be treated as if they were shareholders of a company and references to contributories in Part V shall be construed accordingly, except that the application of the provisions shall not cause a limited partner to be subject to any greater liability than he would otherwise bear under this Law, but for the application of this paragraph;

(c) references in Part V to a director or officer of a company shall include references to the general partner of an exempted limited partnership;

(d) except for sections 123, excluding subsection (1)(b) and (c), 129, 140, 145, and 147 of the Companies Law, Part V shall not apply to a voluntary dissolution and winding up under subsection (1);

(e) in the case of a voluntary winding-up of an exempted limited partnership under subsection (1) where the partnership was registered under section 9 prior to 11th May 2009, the necessary time period for compliance with the requirements of section 123 (1) of the Companies Law shall be at least twenty-eight days prior to the final distribution of the assets of the exempted limited partnership to partners rather than within twenty-eight days of the commencement of its voluntary winding-up;

(f) the Insolvency Rules Committee established pursuant to the Companies Law shall have the power to make rules and prescribe forms for the purpose of giving effect to this section or its interpretation; and

(g)on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable." [emphasis added]

GRAND COURT
CIV-01
CAYMAN ISLANDS

22. I accept entirely that the literal meaning of the words of section 36(3)(g) (given emphasis above) potentially embraces the construction contended for by the Petitioner. The prefatory words of section 36(3) state that Part V of the Law applies, subject to the ELP Law, and subsection (3)(g) provides that a partner may apply for an order or directions for the winding-up of an exempted limited partnership "*as may be just and equitable*". However, this meaning suggests a somewhat unusual and indirect access route being given to an official liquidation under Part V of the Law. The Partnership relied heavily on the fact that the only other reference in the ELP Law to section 36(3)(g) was to be found in the following subsection of section 36 itself:

> "*(13) Following the commencement of the winding up of an exempted limited partnership its affairs shall be wound up by the general partner or other person appointed pursuant to the partnership agreement unless the court otherwise orders on the application of any partner, creditor or liquidator of the exempted limited partnership pursuant to subsection (3)(g).*" [emphasis added]

23. This subsection does not in and of itself suggest that the only order that can be made under section 36(3)(g) is an order appointing someone other than the general partner as the liquidator. Rather, it is a strong pointer to the fact that section 36 of the ELP Law most substantively and directly applies to voluntary liquidations after their "*commencement*". Subsections (1)-(2) begin by addressing voluntary liquidations in accordance with the partnership agreement; subsection (13) concludes by formulating the general rule that the general partner shall ordinarily conduct the winding-up. The jurisdiction conferred on the Court by section 36(3)(d) is identified as a remedy to deal with cases where the general partner cannot, for whatever reasons, conduct the winding-up, after it has started.

24. This sits uncomfortably with the idea of construing section 36(13) as conferring the power to appoint official liquidators upon the making of a winding-up order on a limited partner's petition presented under section 36(3)(g). The purpose of section 36(13) appears to be to formulate a general rule applicable to who winds-up an exempted limited partnership voluntarily and to provide an exception to that general rule. A winding-up commences on the following dates according to section 36:

> "*(10) The winding up of an exempted limited partnership shall be deemed to commence upon the earlier to occur of any of the following -*
>
> *(a) the passing of a resolution for winding up;*

GRAND COURT CIV-01 CAYMAN ISLANDS

(b) subject to subsection (9), the automatic wind up date;

(c) the expiry of the period fixed for the duration of the exempted limited partnership by the partnership agreement;

(d) the occurrence of an event provided by the partnership agreement upon which the exempted limited partnership is to be wound up; or

(e) where a winding up order has been made, the presentation of the petition for winding up."

25. The general rule created by section 36(13) logically applies in all instances when a voluntary winding-up has commenced on a date specified in any of subsections (a) to (d) of section 36(10). Where no voluntary winding-up has commenced independently of the making of a winding-up order, it is not easy to see how the question of appointing someone in place of the general partner arises. Section 36(3)(g) itself, carefully read, is not expressed in terms suggesting that a freestanding jurisdiction to present a winding-up petition is being created. Rather, as Mr Faulkner rightly submitted, subsection (3)(g) is expressed (read in the wider context of section 36 as a whole) in terms consistent with creating a supervisory jurisdiction over voluntary winding-ups:

> "*(g)on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable.*"

26. It is difficult to construe this subsection as conferring a freestanding litigation right to present a winding-up petition and a freestanding judicial power to make a winding-up order for a more important reason. Section 36(3) by its terms simply provides that Part V of the Law shall, with modifications, apply to exempted limited partnerships. A straightforward way of construing such a legislative statement of intent is that unless such a result is expressly or by necessary implication precluded by the ELP Law:

(a) matters which are governed by the Law apply to exempted limited partnerships under the Law; and

(b) matters which are governed by the ELP Law apply to exempted limited partnerships under the ELP Law.



27. Or, to put it another way, if section 36(3)(g) was intended to create a freestanding jurisdiction to petition for a winding-up order, it is difficult to see why such a legislative purpose was not explicitly expressed. Instead, the section crucially provides as follows:

> "*(3) Except to the extent that the provisions are not consistent with this Law, and in the event of any inconsistencies, this Law shall prevail, and subject to any express provisions of this Law to the contrary, the provisions of Part V of the Companies Law and the Companies Winding Up Rules 2018 shall apply to the winding up of an exempted limited partnership and for this purpose -*
>
> *(a) references in Part V to a company shall include references to an exempted limited partnership;*
> *(b) the limited partners shall be treated as if they were shareholders of a company and references to contributories in Part V shall be construed accordingly, except that the application of the provisions shall not cause a limited partner to be subject to any greater liability than he would otherwise bear under this Law, but for the application of this paragraph;*
> *(c) references in Part V to a director or officer of a company shall include references to the general partner of an exempted limited partnership;*
> (d) *except for sections 123, excluding subsection (1)(b) and (c), 129, 140, 145, and 147 of the Companies Law, Part V shall not apply to a voluntary dissolution and winding up under subsection (1);...*" [emphasis added].

28. So although section 36(3) provides that Part V applies to exempted limited partnerships, Part V does not (save for a few exceptions) apply to winding-ups under section 36(1) of the ELP Law. This is a powerful indicator that section 36 as a whole applies to voluntary windings-up in accordance with a partnership agreement, and that section 36(3) enables access to the winding-up regime under Part V of the Law where an official liquidation is sought. The sections of the Law in Part V which do apply to windings-up under section 36(1) of the ELP Law (by virtue of section 36(3(d)) are the following:

(a) most of section 123 ("*Notice of voluntary winding up*");

(b) section 140 ("*Distribution of a company's property*");

GRAND COURT CIV-01 CAYMAN ISLANDS

(c) section 145 ("*Voidable preference*"); and

(d) section 147 ("*Fraudulent trading*").

29. In my judgment, section 36(3)(g) of the ELP Law is analogous to the following provision applicable to voluntary liquidations under Part V of the Law which does not apply to section 36(1) windings-up:

> "*Reference of questions to Court*
>
> *129. (1) The voluntary liquidator or any contributory may apply to the Court to determine any question arising in the voluntary winding up of a company or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up under the supervision of the Court.*
>
> *(2) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partly to the application on such terms and conditions as it thinks fit, or make such other order on the application as it thinks just.*"

30. Section 94 of the Law applies to exempted limited partnerships, and expressly confers the right to petition for a winding-up order on the grounds set out in section 92. Section 95 of the Law, which also applies to exempted limited partnerships, expressly empowers the Court to appoint official liquidators. It makes no sense for section 36 (3) to be construed as simultaneously applying these provisions of the Law to exempted limited partnerships and simultaneously creating an equivalent overlapping regime under the ELP Law. It is presumably for these reasons that this point of construction has not been argued in other cases. It has simply been accepted that one presents a petition under Part V of the Law if one wants to compulsorily wind-up an exempted limited partnership through an order of the Court. Thus:

(a) in *Re Cybernaut Growth Fund LP* FSD 73 of 2013 (AJJ), Judgment dated September 12, 2013 (unreported), it is unclear from the judgment on what statutory basis the just and equitable winding-up order was made, as Mr Greig rightly pointed out. However the Petition was placed before the Court and it crucially provided:

GRAND COURT
CIV-01
CAYMAN ISLANDS

> *"129. The Petitioners present this Petition in accordance with section 15(4) of the Exempted Limited Partnership Law and section 92(e) of the Companies Law"*;

(b) section 15(4) of the 2012 Revision of the ELP Law was the predecessor provision of what is now section 36(3) of the ELP Law. The *Cybernaut* Petition concluded with a prayer for the following primary relief:

> *"The Partnership be wound up in accordance with section 15(4) of the ELP Law and section 92(e) of the Companies Law (2012 Revision)"*;

(c) in *Re Rhone Holdings Limited* FSD 119/2015 (IMJ), Judgment dated September 16, 2015 (unreported), it was effectively common ground that the petition to wind-up the exempted limited partnership was properly made under Part V of the Law. The petition was struck-out by Mangatal J under section 95(2) of the Law on the grounds of a contractual prohibition on presenting the petition.

31. These cases, I accept entirely, do not decide the point at issue in the present case as Mr Greig argued. But they do demonstrate that the proposition that section 36(3) of the ELP provides access to the winding-up jurisdiction in Part V of the Law rather than creating a freestanding winding-up jurisdiction has been accepted as being uncontroversial in at least two previous cases before this Court. That provides further forensic support for the conclusion that I would in any event have reached. Namely, that section 36 of the ELP Law does not create a freestanding statutory basis for winding-up an exempted limited partnership.

Findings: the Petition is liable to be dismissed

32. The Petition was liable to be struck-out or dismissed because it did not plead a legally sustainable basis for obtaining a winding-up order. CWR Order 3 rule 2 provides as follows:

> *"(2) Every winding up petition shall comply with the requirements of GCR Order 9 and shall contain:-*
> ...

GRAND COURT CIV-01 CAYMAN ISLANDS

(d) a concise statement of the grounds upon which the winding up order is sought..."

33. GCR Order 9 rule 2 pertinently provides as follows:

"*(1) Every petition (except an election petition) shall be in Form No. 7 of Appendix I and shall include a concise statement of the nature of the claim made or the relief or remedy required in the proceedings begun by the petition.*"

34. By necessary implication, every petition must disclose a reasonable cause of action in the sense of identifying a legally sustainable basis for obtaining a winding-up order. Although GCR Order 18 rule 19 does not appear to apply to winding-up proceedings, the Court's inherent jurisdiction to strike-out a petition which is an abuse of process because, *inter alia*, it is bound to fail cannot be doubted. This jurisdiction is either preserved or given independent statutory force by section 95 of the Law which provides as follows:

"*(1) Upon hearing the winding up petition the Court may —*

(a) dismiss the petition;

(b) adjourn the hearing conditionally or unconditionally;

(c) make a provisional order; or

(d) any other order that it thinks fit,

but the Court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or that the company has no assets." [Emphasis added]

35. On a proper analysis the need to deploy the power to strike-out did not arise because the jurisdictional point was not raised at the interlocutory stage as a means of circumventing the need for a "trial". In *Re Rhone Holdings Limited,* the petition was struck-out on abuse of process grounds at the interlocutory stage. Mangatal J held:

"*56. ... In my judgment the word 'shall' in s. 95(2) provides for a mandatory meaning. Once the Court finds that the Petitioner is contractually bound not*

GRAND COURT CIV-01 CAYMAN ISLANDS

to present a petition, then save for the type of circumstance such as the existence of an interested creditor who wishes to be substituted, then the Petition must be dismissed. It would otherwise be an exercise in futility to simply adjourn the Petition rather than striking it out.

57. It was for these reasons that I made the decision and order striking out the Petition."

36. Since the jurisdictional point was taken in this case at the hearing of the Petition, albeit as a preliminary point, the legal issue correctly raised by Mr Faulkner for the Partnership was whether the Petition should be dismissed (or was liable to be dismissed). The Petition clearly was liable to dismissed because it did not disclose a reasonable cause of action and/or failed to plead a legally sustainable ground for winding-up.

Findings: the amendment of the Petition

37. GCR Order 1 rule 4 provides:

"*(3A) GCR Order 20 shall apply mutatis mutandis with respect to any amendment to any document filed in the Court office.*"

38. GCR Order 20 provides as follows:

"*(5) (1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct...*

(8) (1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

39. The usual governing principle in relation to applications to amend is that "*generally amendments will be allowed to reflect the true issues between the parties*": *Worldwide Corporation Ltd-v-GPT Ltd & Anor* [1998] EWCA Civ 1894 (Waller LJ).

GRAND COURT CIV-01 CAYMAN ISLANDS

40. The "*real question in controversy between the parties*" by the date of the hearing of the Petition, was whether or not it was just and equitable that the Partnership should be wound-up on loss of substratum grounds. The Partnership indicated that it would not oppose a winding-up on those grounds if the Court was satisfied that they were made out. The only objection validly raised and positively asserted by the Partnership was that the Petition was defectively pleaded in that reliance was placed on the wrong statutory gateway for obtaining the relief sought. There was no suggestion that the proposed the amendment would require an adjournment because the 'new case' would take the Partnership by surprise. On the contrary, the new case was preferable to the Partnership because it cast no aspersions on the conduct of the GP's principal, Ms Li.

41. This was a world away from a late amendment necessitating an adjournment to enable the parties to address the new case necessitating a more restrictive approach. I accordingly granted the Petitioner leave to amend to, most significantly, expressly rely on sections 92(e) and 94 (2) (c) of the Law.

Findings: whether the loss of substratum case was made out

42. The loss of substratum ground for a just and equitable winding-up is, where made out, a strong one. According to *French* (at paragraph 8.196):

> "*If the substratum of the company has gone, winding up will usually be ordered despite the opposition of a majority of members.*"

43. In my judgment what facts support a finding that a company's substratum has been lost is not a question which requires the Court to fit the facts relied upon by the Petitioner into a neat pre-determined category. In French, '*Applications to Wind Up Companies*', Third Edition, at paragraph 8.260, the learned author describes the ground in the following way:

> "*It is just and equitable for the court to order the winding up of a company if 'that which the company was formed to do can no longer be done' or if the company has ceased to carry on its business and the carrying on of the business has become, in a practical sense, impossible…*" [emphasis added]

44. Mr Greig rightly submitted that the umbrella just and equitable ground relied upon is a jurisdiction which applies to an infinite variety of facts. He relied in this regard on a passage in *French* which cited Lord Wilberforce's judgment in *Ebrahami v Westbourne Galleries Ltd* [1973] AC 360. Lord Wilberforce most pertinently opined as follows about the English provision from which section 92(e) is derived:

> "*…there has been a tendency to create categories or headings under which cases must be brought. This is wrong. Illustrations may be used, but general*

GRAND COURT CIV-01 CAYMAN ISLANDS

words should remain general and not be reduced to the sum of particular instances."

45. If a flexible approach should be taken to the just and equitable jurisdiction, where a petitioner for illustrative purposes relies upon a recognised category of case, the legal focus must properly be on whether the facts justify winding-up, not whether they match the facts of previous cases based on broadly similar grounds. If 'impossibility' of carrying on the business is a requirement of establishing the loss of substratum ground, then it must be impossibility "*in a practical sense*" as *French* suggests. This is a broader and more practical consideration than whether the Partnership is automatically liable to be wound-up under the terms of the LPA.

46. The Petitioner submitted in its Skeleton Argument:

> "*34…The Court may conclude that a company's substratum is gone if the company was formed to pursue a specific business that has come to an end (French at [8.262] citing Re Amalgamated Syndicate [1897] 2 Ch 600).*
>
> *35. In Re Amalgamated Syndicate, the company was formed to provide facilities for the Queen's Diamond Jubilee. After the Jubilee, a shareholder successfully sought the winding up of the company on the just and equitable basis in circumstances where the primary purpose of the company had been achieved and the company's directors did not intend to return the remaining capital to the shareholders. The Petitioner says that it is in an analogous position to the petitioning shareholder in Re Amalgamated Syndicate: the Partnership has achieved its purpose but the General Partner is not in a position to take the steps necessary to wind up the affairs of the Partnership. It would therefore be just and equitable for the Court to order the winding up of the Partnership. Absent such an order, the only (albeit unpalatable) option for the Petitioner would be to do a deal with the General Partner and attempt to obtain a variation of the Injunction.*"

47. The critical facts are that the GP is prevented from (1) making the distribution to which the Petitioner is admittedly entitled and (2) winding-up the Partnership because it is subject to an injunction granted in proceedings unconnected with the Petitioner. The only remaining "business" wholly or substantially involves those two steps. I found that these facts established:

(a) that the Partnership in a practical sense has ceased to carry on business and could not carry on; and

(b) that it was just and equitable for the Partnership to be wound-up at the instance of its sole economic stakeholder. I was satisfied that the GP lacked standing to suggest that no relief should be granted because there were alternative remedies that the Petitioner should pursue. I regarded the position of the GP as analogous to that of the holder of a sole management share of a fund company in relation to a sole participating

GRAND COURT CIV-01 CAYMAN ISLANDS

shareholder in the context of how a solvent fund should be wound-up. As the Cayman Island Court of Appeal observed in *Re Asia Private Credit Fund Limited; Re Adamas Strategic Opportunity Fund Limited*, CICA Nos. 17 and 76 of 2019, Judgment dated 8 November 2019 (Sir Richard Field JA) (unreported):

"97…*Where, however, the company is an investment fund and the company is solvent so that all creditors will be paid, as is the case in these two appeals, the Managers with the entitlement to put the fund into the voluntary liquidation will have no financial stake in the winding up and the question arises as to the extent to which the Court in considering the requirements of paragraph (b) can and should have regard to the fact that the Participating Shareholders* [are] *the sole stakeholders in the winding up.*"

Summary

48. For the above reasons on March 27, 2020 I ordered that the Partnership should be wound-up.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

GRAND COURT CIV-01 CAYMAN ISLANDS

EXHIBIT H

(*Re Formation Group (Cayman) Fund I LP*)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO FSD OF 1 IK

IN THE MATTER OF THE PARTNERSHIP ACT 1 REVISION AND THE E EMPTED LIMITED PARTNERSHIP ACT 1 REVISION AND THE COMPANIES ACT 1 REVISION

AND IN THE MATTER OF FORMATION GROUP CAYMAN FUND I, L.P.

BETWEEN

1 COUNTRY GARDEN HONG KONG DEVELOPMENT COMPANY LIMITED
FAIRCHARM GLOBAL LIMITED
DRAKESVILLE INVESTMENT LIMITED
FORTUNE BRIDGE CHINA LIMITED
5 YOUSU HONG KONG LIMITED
PERFECT ONE VENTURES LIMITED

Petitioners

AND

FORMATION GROUP CAYMAN FUND I, L.P.

Respondent

IN CHAMBERS

Appearances	**Mr Peter Sherwood and Mr Nigel Smith, Carey Olsen, for the Petitioners**
	Mr Hamid Khanbhai, Campbells, for Formation Group GP I, LLC as general partner of the Respondent (the "GP")
Before	**The Hon. ustice Kawaley**
Heard	**1 March**
Draft udgment Circulated	**11 April**
udgment Delivered	**1 April**

HEADNOTE

Petition by limited partners to dissolve or wind-up an exempted limited partnership-strike-out application by general partner-whether winding-up proceedings can validly be brought against an exempted limited partnership in its own name as opposed to against the general partner-statutory interpretation-Exempted Limited Partnership Act (2021 Revision), sections 3, 4, 33(1), 36(3)- Companies Act (2021 Revision), section 92(e)

UDGMENT

Introduction

1. By their Petition dated December 15, 2021, the Petitioners (who contributed approximately 70% of the Respondent's capital contributions) claiming to be contingent creditors of the Respondent sought the following principal relief, namely an Order that:

> "*1. The Partnership be dissolved or wound up in accordance with Section 3 of the ELP Act and Section 35(e) of the Partnership Act or, in the alternative, Section 36(3) of the ELP Act and Section 92(e) of the Companies Act…*"

2. The GP applied by Summons dated January 14, 2022 for the following principal relief, namely an Order that:

> "*1. The Winding Up Petition dated 15 December 2021 be struck out, on the basis that it has been presented against the Respondent rather than against the GP…*"

3. Although Mr Khanbhai for the GP sought to delicately avoid directly engaging with this underlying conflict, the present strike-out application focussed on a standing point which reflects conflicting approaches by different judges of the Grand Court. Mostly recently, in *Re Padma Fund LP* (FSD 201 of 2021 (RPJ), 8 October 2021), Parker J held that there was no jurisdiction to wind-up an

exempted limited partnership ("ELP") under the Companies Act. I took the contrary view, consistent with earlier decisions of this Court, in *Re XIO Diamond LP* (FSD 256 of 2019 (IKJ), 30 April 2020, which Parker J in *Padma* concluded was wrongly decided. Although Mr Sherwood for the Petitioners was keen for obvious forensic reasons to reduce the strike-out argument to a choice between following my own decision and Justice Parker's conflicting decision, the present application cannot be approached in such a binary fashion. The arguments canvassed in *XiO* were not precisely the same as those advanced in *Padma*, and the submissions in the present case are not precisely the same as those advanced in either of the two previous conflicting decisions.

4. Interpreting bespoke legislative instruments such as the Exempted Limited Partnership Act (the "ELP Act") without the benefit of nourishment from persuasive authorities from larger common law jurisdictions is often a challenging endeavour. Through an incremental process in which different judges confront different legal points and similar legal points framed in somewhat different ways, a consensus gradually emerges as to the meaning of the most important statutory provisions. In this context, in my judgment, each judge is entitled to be more willing than might be appropriate in more settled areas of law to depart from previous decisions, even his or her own.

The GP's case for striking out

5. By way of overview, Mr Khanbhai submitted:

> *"5. The correct jurisdictional gateway, i.e. between the Companies Jurisdiction and the Partnerships Jurisdiction, is not a question that arises on the Strike Out Application.*
>
> 6. *The Strike Out Application turns only on one discrete point. Who is the proper respondent to a petition seeking the relief sought by the Petitioners?*
>
> 7. *The Petition has been filed against Formation Group (Cayman) Fund I, L.P. (the 'Fund'). The respondent to the Petition is not a legal entity. The Petitioners should have named the GP in its capacity as general partner of the Fund, as the respondent to the Petition. As a result, the Petition is defective and falls to be struck out. That is the end of the matter*."

6. The GP's counsel's central thesis was set out in his Skeleton Argument as follows:

> *"13. An exempted limited partnership is a creature of statute, comprising at least one general partner and one limited partner. It has no legal personality. It cannot own property in its own right. Its business is carried on by its general partner: section 14 of the ELP Act. Further:*
>
> *(a) It is the general partner that holds assets of the partnership on trust for the partnership, in accordance with the partnership deed: section 16(1) of the ELP Act.*
>
> *(b) On the admission or substitution of a general partner, the assets of the exempted limited partnership vest in the new general partner by operation of law: section 17 of the ELP Act.*
>
> *(c) It is also the general partner that incurs debts or obligations on behalf of the partnership: section 16(2) of the ELP Act.*
>
> *14. Section 33 of the ELP Act provides expressly in relation to 'Proceedings'. Section 33(1) provides that: "Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings" (emphasis added)*
>
> *15. Subsection (3) relates to derivative actions brought by limited partners and so is not relevant for present purposes.*
>
> *16. Winding up proceedings (Companies Jurisdiction) or proceedings for a decree of dissolution (Partnerships Jurisdiction) are 'legal proceedings… against an exempted limited partnership' within the meaning of section 33(1).*
>
> *17. It follows that the Petition should have named the GP as the Respondent.*
>
> *18. Proceedings which appear to be duly issued but fail to comply with a statutory requirement are a nullity which is incurable: the third of three classes of nullity referred to by Upjohn LJ in Re Pritchard [1963] Ch 502 at page 5242 Finnegan v Cementation [1953] 1 QB 688.*
>
> *19. The consequence of failing to comply with section 33(1) of the ELP Act, when filing the Petition, is that the proceedings are a nullity which is incurable (as opposed to an irregularity which might be capable of being cured).*

20. *In Padma Fund FSD 201 of 2021 (unrep. 8 October 2021), Parker J was considering a winding up petition presented against an exempted limited partnership. He had to consider two separate issues:*

(a) First, in the case of a petition presented against an exempted limited partnership, who was the proper respondent to the petition? In particular, was it the general partner or was it the fund?

(b) Second, on such a petition what is the appropriate jurisdictional gateway, the Companies Jurisdiction or the Partnership Jurisdiction?

21. *It is only the first issue (proper respondent) that arises on this Strike Out Application. Padma is the only Cayman Islands decision on that first issue. XiO Diamond LP (unrep.30 April 2020, FSD 256 of 2019 (IKJ)), for example, is an authority that deals with the second point but not the first.*

22. *On the proper respondent issue, Parker J held at paragraphs 35 and 36 of Padma that section 33(1) of the ELP Act is determinative of who should be the respondent when the originating process is intended to invoke the court's winding up jurisdiction in relation to an exempted limited partnership:*

"35. There is … no provision within the ELP Act or the Partnership Act which provides that legal proceedings may be instituted against an exempted limited partnership in the name of the partnership. This is because it is through the general partner that its debts and obligations are enforced. Section 33(1) of the ELP says in terms proceedings may be instituted against the general partner(s) only.

36. Mr Sherwood relies on Order 81, rule 12 of the Grand Court Rules, 1995 (Revised Edition) which provides that any action by or against an exempted limited partnership may be commenced in the name of the firm. However in my view that does not assist Mr Sherwood because the applicable statutes must take precedence over procedural rules, and the particular rule does not in my view deal with the court's winding up jurisdiction."

7. In short, the GP invites this Court to follow its earlier decision in *Padma* and to hold that the ELP Act only permits legal proceedings to be brought against a general partner of an ELP and not against the ELP itself. While it seems clearly right that the GP has only directly based its strike-out application on the section 33(1) of the ELP Act point, it seems difficult as a matter of preliminary analysis to see how the construction of section 33(1) which was applied by Justice

Parker in *Padma* can be properly assessed by entirely divorcing the construction analysis from the wider legal context in which it is embedded.

The Petitioners' primary response

8. The Petitioners' Skeleton Argument firstly made it clear that they were primarily relying upon the winding-up jurisdiction under the Companies Act:

> "*3. The petition is for a winding up order under the Companies Act 2021 ('Companies Act'), as applied to ELPs by section 36(3) of the Exempted Limited Partnership Act (2021 Revision) ('ELPA') or, in the alternative, an order for dissolution under the Partnership Act (2013 Revision) ('Partnership Act'). The petition has been presented in this way due to recent conflicting decisions of this Court.*"

9. Secondly, in defining the issues, Mr Sherwood effectively submitted that the true legal question was the broader question of whether an ELP could be wound-up at all, with the question of whether proceedings could be brought against an ELP being merely one element of that broader jurisdictional question:

> "*7. The petitioners say - consistent with a long line of Grand Court decisions including Re XIO Diamond LP (FSD 256 of 2019 (IKJ), 30 April 2020)7 - that limited partners may petition for the winding up of an ELP under Part V of the Companies Act, and that the Fund is the correct respondent to the petition. The only outlier is the recent decision in Re Padma Fund LP (FSD 201 of 2021 (RPJ), 8 October 2021), in which Parker J determined that Re XIO (and implicitly earlier decisions) was wrongly decided.*
>
> *8. Until Re Padma, there was never any jurisprudential doubt that, procedurally, a just and equitable petition was correctly issued by a limited partner against an ELP (and not the general partner) pursuant to section 36(3) of the ELPA, which imports the winding up jurisdiction and procedure in Part V of the Companies Act…*
>
> *11. The case concerned a creditor's petition on insolvency grounds against an ELP. Despite this, Parker J made wider observations on the source of the Grand Court's jurisdiction to wind up an ELP on just and equitable grounds. This included, at paragraph 61, the observation that the Grand*

Court's jurisdiction to wind up an ELP by a limited partner on just and equitable grounds arises under section 3 of the ELPA and section 35(e) of the Partnership Act 'only'. His Lordship went on to consider this Court's decision in Re XIO at 76-88, respectfully concluding that it was decided in error at paragraph 87.

12. The ratio in Re Padma is to be found at paragraphs 72, 92 and 93, and it is limited to a finding that a creditor of an ELP must commence its petition against the general partner and not the ELP. This decision was based on two primary findings: (a) First, because the general partner is responsible for the debts of the ELP; (b) Secondly, because section 33(1) of the ELPA absolutely prohibits proceedings being issued against the ELP itself.

13. It is not necessary for this Court to determine the correctness of the ratio in Re Padma as it relates to creditor petitions. But this Court may feel compelled to do so in light of Parker J's heavy if not singular reliance on (respectfully) an incorrect interpretation of section 33(1) of the ELP Act which led to His Lordship's obiter comments regarding just and equitable petitions. His Lordship's interpretation of section 33(1) is also relied on by the Fund in its strike out application."

10. As to the merits of the legal point, it was further argued most pertinently as follows:

"*16. First, it is accepted that section 33(1) states that: "legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only…" [our emphasis in bold]. However, the literal wording of a statute must be read in its context and the surrounding words and scheme of the legislation must be used as an aid to a purposive reading of the relevant provision.*

17. Section 33(1) immediately goes on to provide further guidance as to the true scope of the subsection by saying "... and a limited partner shall not be a party to or named in the proceedings". Those words cannot be read in isolation to those that preceded them. The mischief at which section 33(1) is aimed is merely to reverse the general rule which applies to ordinary partnerships where any partner may be named as a defendant in proceedings relating to the liabilities of the partnership. Those are the 'legal proceedings' at which section 33(1) is aimed and certainly not collective proceedings for winding up.

18. Subsections (2) and (3) provide exceptions to the general rule stated in subsection (1) and therefore serve as additional context. Subsection (2) confirms that limited partners may become defendants in cases where they have taken part in the management of the ELP (section 20(1)) or because they have received distributions subject to clawback (section 34(1)). Subsection (3) confirms when limited partners may issue

proceedings derivatively. These subsections place subsection (1) in context.

19. *Accordingly, section 33 as a whole is aimed at setting the parameters for proceedings to be issued by or against limited partners in respect of the ELP. It does not in terms prevent proceedings being issued against an ELP.*

20. *Second, the interpretation of section 33(1) must be read consistently with the express provisions of section 36(3), which are specific to winding up (and not 'legal proceedings' generally, as that term is used in section 33(1)). The provisions of section 36(3) are not remotely ambiguous. Part V of the Companies Act is imported into the ELPA for winding up purposes. Accordingly, contrary to Parker J's finding at paragraph 43 of Re Padma, there is no need in section 91 of the Companies Act specifically to confer jurisdiction on the Court to wind up ELPs. This is because section 36(3)(a) specifically treats references to 'company' to 'exempted limited partnerships' for the purposes of section 91 and elsewhere in Part V12.*

21. *Third, to the extent it is necessary, assistance in discerning the legislature's intentions can be found in the Explanatory Memorandum for the Bill which brought in (the forerunner of) section 36(3) of the ELPA and the Official Hansard Report for the second reading of the same, which are set out in the Annex to this skeleton argument.*

22. *These clearly show that the Legislative Assembly's intention was to apply the winding up provisions of Part V of the Companies Act to ELPs. The legislation was enacted because the existing provisions 'fell far short of a meaningful dissolution framework for exempted limited partnerships'. This is in direct contrast to the conclusion reached at paragraph 60 of Re Padma (where the Court did not have the benefit of these materials) that there was no 'mischief' for the legislation to redress because that dissolution framework already existed."*

11. These submissions provoked two initial reactions. Firstly, construing section 33(1) of the ELP Act was a difficult point of statutory interpretation. Secondly, it seemed impossible to engage in a meaningful process of statutory construction of that provision without also making sense of other relevant provisions in the same statute, namely the provisions relating to winding-up under the Companies Act.

12. The Petitioners advanced alternative arguments as to how, if their primary arguments were rejected, the standing problem could be cured by amendment. I indicated in the course of the

hearing, based on the GP's compelling contrary submissions, that this alternative case seemed hopeless. I will address this subsidiary issue briefly below.

Legal findings

The statutory provisions

13. The first key statutory provision is section 33 of the ELP Act:

> "*(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.*
>
> *(2) If the court considers it just and equitable any person or a general partner shall have the right to join in or otherwise institute proceedings against any one or more of the limited partners who may be liable under section 20(1) or to enforce the return of the contribution, if any, required by section 34(1).*
>
> *(3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings.*
>
> *(4) If any action taken pursuant to subsection (3) is successful, in whole or in part, as a result of a judgment, compromise or settlement of any action, the court may award any limited partner bringing any action reasonable expenses, including attorney's fees, from any recovery in any action or from an exempted limited partnership.*"

14. The most obvious literal meaning of section 33(1) is that it creates a general rule immunizing limited partners from being sued in respect of an ELP's affairs and conferring the primary right to sue and be sued in respect of an ELP's affairs on the general partner(s).An exception to this general rule is then set out in section 33(3), which Mr Khanbhai aptly described as "derivative claims". Section 33 does not in terms prohibit proceedings against an ELP altogether. Whether such a prohibition should be inferred accordingly requires further contextual statutory analysis.

15. Mr Khanbhai submitted that "*may*" in section 33(1) is mandatory. He placed reliance on the following provisions of section 4 of the ELP Act:

> "*(2) An exempted limited partnership shall consist of one or more persons called general partners who shall, in the event that the assets of the exempted limited partnership are inadequate, be liable for all debts and obligations of the exempted limited partnership, and one or more persons called limited partners who shall not be liable for the debts or obligations of the exempted limited partnership save as provided in the partnership agreement and to the extent specified in sections 20(1) and 34(1), but a general partner, without derogation from that general partner's position as such, may, in addition, take an interest as a limited partner in the exempted limited partnership.*"

16. This does provide some potential support for the proposition that a general partner is, as section 33(1) arguably implies, the only proper party to sue in respect of partnership debts. However, carefully read, it does not meaningfully advance the thesis at all. Rather, section 4(2) is only explicitly defining two central characteristics of an ELP:

(a) as a general rule, limited partners have no liabilities in respect of ELP debts; and

(b) as a general rule, general partners "*shall, in the event that the assets of the exempted limited partnership are inadequate, be liable for all debts and obligations of the exempted limited partnership*".

17. The statutory language clearly envisages that an ELP will have its own "*assets…debts and obligations*" and that a general partner will only be liable in the event that the ELP's assets are "*inadequate*" to meet its liabilities. In brief, this implies that an ELP has some degree of legal personality as one would expect drawing upon the more longstanding traditional partnership construct. Section 4(2) is ultimately neutral in terms of shedding light on how section 33(1) should be construed, but provides some general support for the proposition that as far as winding-up is concerned, an ELP does have its own pot of assets and liabilities which are capable of being wound-up separate and apart from the general partner(s). Mr Sherwood's oral submissions to this effect were quite powerful in conceptual and practical terms.

18. The most important other provisions in the ELP Act for present purposes are the following provisions of section 36:

> *"(3) Except to the extent that the provisions are not consistent with this Act, and in the event of any inconsistencies, this Act shall prevail, and subject to any express provisions of this Act to the contrary, the provisions of Part V of the Companies Act (2021 Revision) and the Companies Winding Up Rules, 2018 shall apply to the winding up of an exempted limited partnership and for this purpose —*
>
> *(a) references in Part V to a company shall include references to an exempted limited partnership;*
>
> *(b) the limited partners shall be treated as if they were shareholders of a company and references to contributories in Part V shall be construed accordingly, except that the application of the provisions shall not cause a limited partner to be subject to any greater liability than that limited partner would otherwise bear under this Act, but for the application of this paragraph;*
>
> *(c) references in Part V to a director or officer of a company shall include references to the general partner of an exempted limited partnership;*
>
> *(d) except for sections 123, excluding subsection (1)(b) and (c), 129, 140, 145, and 147 of the Companies Act (2021 Revision), Part V shall not apply to a voluntary dissolution and winding up under subsection (1);*
>
> *(e) in the case of a voluntary winding-up of an exempted limited partnership under subsection (1) where the partnership was registered under section 9 prior to 11th May 2009, the necessary time period for compliance with the requirements of section 123 (1) of the Companies Act (2021 Revision) shall be at least twenty-eight days prior to the final distribution of the assets of the exempted limited partnership to partners rather than within twenty-eight days of the commencement of its voluntary winding-up;*
>
> *(f) the Insolvency Rules Committee established pursuant to the Companies Act (2021 Revision) shall have the power to make rules and prescribe forms for the purpose of giving effect to this section or its interpretation; and*

> *(g) on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable."*

19. These provisions read in a straightforward and uncomplicated manner appear at first blush to be quite clear and unambiguous. They provide most significantly as follows:

(a) "*Part V of the Companies Act (2021 Revision) and the Companies Winding Up Rules, 2018 shall apply to the winding up of an exempted limited partnership*", subject to specified modifications;

(b) the word "company" shall be read as "exempted limited partnership";

(c) the word "contributories" shall be read as "limited partners";

(d) the word "director" includes "general partner"; and

(e) subject to specified exceptions, Part V of the Companies Act does not apply to voluntary dissolutions under section 36(1) of the ELP Act.

20. Section 36(3) appears to provide in explicit terms that an ELP may be wound-up under Part V of the Companies Act and the Companies Winding Up Rules and that, minor modifications apart, references in Part V to "company" apply to an ELP and references to a "contributory" apply to a limited partner. By necessary implication, a limited partner may petition to wind-up an ELP on the same grounds as would be available to a contributory in relation to a company.

Preliminary view on the proper construction of sections 1 and of the ELP Act

21. Taking a preliminary view without regard to any judicial or other authority, it would seemingly require equally clear statutory language in some other part of the ELP Act to justify the conclusion that although section 36(3) provides that an ELP can be wound-up by the Court in the same manner as a company, there is an exception to this general rule to the effect that the general partner and not

the ELP itself must be the respondent to the winding-up petition. Section 33(1) does expressly provide that (a) proceedings against an ELP can only be brought against a general and not against a limited partner, and (b) proceedings on behalf of an ELP can only generally be brought by a general partner. But section 33(1) does not with any real clarity suggest or imply that a limited partner may not present a winding-up petition against an ELP, the seemingly clear contrary terms of section 36(3) notwithstanding.

22. One point seems clear beyond serious argument having regard to the most elementary rules of statutory construction. It makes no sense at all to seek to determine a question of standing to present a petition under Part V of the Companies Act, as applied to an ELP by section 36(3) of the ELP Act, by ignoring section 36(3) and focussing solely on section 33(1). Mr Khanbhai's beguiling invitation to the Court to adopt such a blinkered approach seemed indicative of the fact that section 36(3) is the 'Achilles heel' of the GP's standing analysis.

23. Mr Sherwood aptly relied upon the following principles of statutory interpretation. In *Shanda Games Ltd v Maso Capital Investments Ltd* [2020 (2) CILR 293] (UKPC), Lady Arden (delivering the advice of the Judicial Committee) opined as follows:

> "*27 The Board considers that, when and to the extent that any issue …is to be ascertained by statutory interpretation [i]n that situation, the court has to ascertain the intention of the legislature from the words it has used in their context, and also in the light of any material which demonstrates the mischief that it was concerned to redress by the statutory provision.*" [Emphasis added]

24. This preliminary view must accordingly be tested by reference to both the relevant authorities and any material relating to the legislative history of the statutory provisions which elucidates their purpose or, in more classical terms, the mischief they were designed to remediate.

The pre Padma authorities' implicit support for the view that an ELP could be wound up under Part V of the Companies Act

25. Authorities in which it was assumed that a winding-up petition could be presented against an ELP, with no attempt being made to dispute the assumption, can for obvious reasons be mentioned briefly:

(a) *Re Cybernaut Growth Fund LP*, FSD 73 of 2013 (AJJ), Judgment dated September 12, 2013 (unreported): the petition was presented against the ELP by limited partners complaining of mismanagement by the general partner. Following a contested hearing at which Richard Hacker QC appeared for the general partner, a winding-up order was made against the ELP under the then Companies Law. No point was taken that an ELP could not be wound-up or that a petition could not be presented against solely against an ELP (although it appears that the GP and another entity involved in the management of the partnership were joined as respondents to the petition at the directions stage);

(b) *Re Rhone Holdings LP*, FSD 119/2016 (IMJ), Judgment dated September 16, 2016 (unreported): the petition was presented against the ELP and sought its winding-up. The general partners, for whom Mr Tom Lowe QC appeared, successfully applied to strike-out the petition but did not rely on a lack of standing ground or the argument that an ELP could not be wound-up. The Court of Appeal refused leave to appeal against Ingrid Mangatal J's decision and expressly confirmed that the ELP Act provided for the winding-up of an ELP under the Companies Act: *Re Rhone Holdings LP* [2016 CILR (1) 273];

(c) *Re XiO Diamond LP*, FSD 256 of 2019 (IKJ), Judgment dated April 30, 2020 (unreported): a winding-up petition was presented against an ELP and was opposed by counsel appearing for the ELP. The respondent ELP contended that there was no jurisdiction to wind-up under section 36(3)(g) and that jurisdiction did exist to wind-up under section 92 (e) of the Companies Act which relief it would not oppose. The petition was amended to seek this relief and I ordered that: "*1. The Partnership be wound up in*

accordance with sections 92(e) and 94(1)(c) of the Companies Law (2020 Revision) as read with section 36(3) of the Exempted Limited Partnership Law (2018 Revision)";

(d) *Re Duet Real Estate Partners I LP*, FSD 22 of 2020 (IKJ), Judgment dated (unreported) June 9, 2020: a winding-up petition was presented against an ELP and served at its registered office. It was expressly directed that the ELP "*is properly able to participate in the proceedings*". Although the petition was unopposed, I ordered that the ELP "*be wound up in accordance with section 92(c) of the Companies Law and section 36(3) of the ELP Law*".

26. Mr Sherwood referred to other cases where winding-up orders were made against ELPs without considered judgments being delivered. These cases may be said to provide at best strong, indirect support for the Petitioners' construction of section 33(1) as read with section 36(3) of the ELP Act, consistent with the thesis propounded in '*The Wisdom of Crowds: Why the Many are Smarter than the Few and How Collective Wisdom shapes Business, Economies, Societies and Nations*'[1]. The cases demonstrate a fairly broad consensus that section 36(3) means what it says when it purports to confer jurisdiction on this court to wind up an ELP under the Companies Act. This is of course by no means conclusive; there was once a broad and now discredited general consensus that the earth was flat. But when distinguished commercial silks are briefed to oppose a winding-up petition (as happened in *Re Cybernaut Growth Fund LP* and *Re Rhone Holdings LP*) and fail to raise the standing point raised by the GP in the present case, this strongly suggests that the point now being raised (and first raised in *Padma*) must be a point which is either counterintuitive or less than obvious at least. It is noteworthy that although section 33(1) was not expressly considered in *Re XiO Diamond LP*, counsel for the ELP in that case (a) formally appeared for the ELP and (b) positively asserted that jurisdiction to wind-up existed under the Companies Law (as it was then).

27. It is important to reiterate that what was assumed to reflect the correct legal position in these past cases without direct consideration of the point raised for consideration in relation to the present

[1] James Surowiecki (Doubleday/Anchor: 2004).

Petition does little more than to cause me to approach the presenting standing point with a healthy degree of scepticism. The construction of section 33(1) of the ELP Act as it applies to winding-up petitions presented pursuant to section 36(3) must be determined on its merits as this is an issue that the previous decisions never directly addressed. It is not unknown for legal points which have not been taken at first instance for several years to be belatedly taken and upheld at the highest appellate level[2].

Re Padma

28. In *Re Padma Fund LP*, FSD 201 of 2021 (RPJ), the petitioners sought the winding-up of an ELP under section 92(d) of the Companies Act (2021 Revision) as creditors. The GP on behalf of the ELP contended the Court had no jurisdiction to make the order sought. Justice Raj Parker agreed. Mr Sherwood, who also appeared for the petitioners in that case, was unable to persuade the Judge that *Re XiO Diamond Fund LP* was correctly decided. In the present case, he sought to distinguish *Re Padma* as limited to the context of creditors' petitions but sensibly acknowledged that the findings recorded potentially applied to the winding-up remedy generally. The pivotal finding made in Padma was the following:

> "*35. There is however no provision within the ELP Act or the Partnership Act which provides that legal proceedings may be instituted against an exempted limited partnership in the name of the partnership. This is because it is through the general partner that its debts and obligations are enforced. Section 33(1) of the ELP Act says in terms proceedings may be instituted against the general partner(s) only.*" [Emphasis added]

29. It is that pivotal preliminary finding which then founds the following key conclusory finding that an ELP cannot be wound-up at all under the Companies Act:

> "*47. Section 36(3) of the ELP Act states: '**Except to the extent that the provisions are not consistent with this Act, and in the event of any***

[2] *Re Saad Investments Company Ltd* [2014] UKPC 34: the Judicial Committee held that the jurisdiction to wind-up overseas companies (which had been assumed to exist in Bermuda since 2000 based on a judgment in case where there was an unopposed winding petition) did not properly exist.

> ***inconsistencies, this Act shall prevail, and subject to any express provisions of this Act to the contrary****, the provisions of Part V of the Companies Act (2021 Revision) and the Companies Winding Up Rules, 2018 shall apply to the winding up of an exempted limited partnership and for this purpose…' (my emphasis) 48. It seems to me that this provision does not give a freestanding right for a creditor to present a winding-up petition against an exempted limited partnership.*"

30. This conclusion was buttressed by proper regard being had to the legislative purpose of section 36(3):

> "*61. It seems to me that from a proper analysis of the above statutory provisions that the Court's jurisdiction to wind up an exempted limited partnership on the application of a partner on the grounds that it is just and equitable to do so arises by virtue of section 3 of the ELP Act and section 35(e) of the Partnership Act only.*
>
> *62. This is relevant for when one examines the decision in XIO Diamond LP below as, unlike the present case, it concerned an analysis of the situation which applied on the application to wind up by a limited partner.*
>
> *63. I have considered whether there was "mischief" which the legislature sought to address by introducing section 36(3) of the ELP Act to enable a creditor to present a winding up petition against an exempted limited partnership, as in the present case.*
>
> *64. I have concluded that no mischief existed as the creditor was (and remains) entitled to enforce any debt against the general partner which, unlike the exempted limited partnership, has a legal personality.*
>
> *65. In any event, the provisions of Part V of the Companies Act referenced in section 36(3) of the ELP Act are subject to section 33(1) of the ELP Act which expressly states that legal proceedings against an exempted limited partnership may be instituted against a general partner only.*
>
> *66. It seems to me therefore that the legislative purpose of introducing section 36(3) was to apply the applicable provisions of Part V of the Companies Act and the Companies Winding Up Rules, 2018 following the commencement of the winding up in order to facilitate the orderly winding up of the partnership's affairs.*
>
> *67. This analysis accords with the commercial position and the legal liabilities which arise on the insolvency of a partnership where the business of the partnership is conducted by the general partner, the*

assets of the partnership are held by the general partner on a statutory trust and the general partner is personally liable for the debts of the partnership.

68. *Pursuant to section 2 of the ELP Act, the partnership is deemed to be insolvent when the general partner is unable to pay the debts and obligations of the exempted limited partnership in the ordinary course of business as they fall due out of the assets of the exempted limited partnership, without recourse to the separate assets of the general partner not contributed or committed to the exempted limited partnership.*

69. *In that scenario the general partner remains personally liable for the partnership's debts and therefore the remedy of any creditor when the partnership is insolvent is to commence proceedings against the general partner. This is consistent with section 33(1) of the ELP Act.*

70. *The winding up procedure as it relates to exempted limited partnerships also fits with this analysis. When an exempted limited partnership is being wound up, either voluntarily under section 36(1) of the ELP Act or by order of the court pursuant to section 35 of the Partnership Act, the general partner is deemed to be the liquidating trustee of the partnership unless the court orders otherwise.*"

31. As a matter of first impression, when *Re Padma* was initially decided, I felt that Parker J's well-reasoned Judgment articulated a sound and novel basis for concluding that my own contrary previous decisions, particularly *Re XiO Diamond Fund LP*, had been wrongly decided. This preliminary view entailed accepting:

(a) the hypothesis set out at paragraph 35 of *Re Padma* that there was "*no provision within the ELP Act or the Partnership Act which provides that legal proceedings may be instituted against an exempted limited partnership in the name of the partnership*"; and

(b) the hypothesis set out at paragraphs 61-70 of Re *Padma* that the legislative purpose of section 36(3) was not to provide a wide gateway to winding-up ELPs in the same manner as companies.

32. The merits of the GP's present strike-out application turn on an assessment of the validity of these two pivotal propositions.

The legislative purpose of section of the ELP Act

33. Parker J was clearly right in his statutory construction exercise to have regard to the "*mischief*" the relevant provisions sought to address, although I prefer the modern terminology of seeking to ascertain the 'legislative purpose' of new or uncertain provisions. As Professor Burrows (as he then was)[3] has opined extra-judicially:

> "*…it is tolerably clear today that our judges have moved from an old literal to a modern and contextual approach…the modern approach has subsumed many of the old so-called 'canons of interpretation…they have lost primacy with the demise of literalism and have tended to be swallowed up by the modern contextual and purposive approach…when we talk of 'purpose', we are looking at the policy behind the statute or statutory provision. Identifying the policy is not dependent on identifying any person's intentions…Indeed to expose the practical irrelevance of the legislator's intention, it may be helpful to focus on the purpose rather than the legislator, and an advantage of such a switch of focus is that it helps to clarify that what ultimately matters is the judicial analysis, at the time a dispute arises, of what the statute means…*"

34. Mr Sherwood, still bearing the scars of his unsuccessful battle in *Re Padma*, provided me with more guidance as to the legislative purpose underpinning section 36(3) of the ELP Act in light of its now evident pertinence. Annexed to his Skeleton Argument were the following important submissions about the legislative history of section 36(3):

> "***ANNEX – LEGISLATIVE HISTORY OF THE RELEVANT SECTIONS OF THE ELPA***
>
> ***Section 36(3) of the ELPA***.
>
> *1. Section 36(3) of the ELPA was originally enacted (as section 15(4)) by the Exempted Limited Partnership (Amendment) Law, 2009 (the '2009 Amendment').*

[3] Andrew Burrows, '*Thinking About Statutes: Interpretation, Interaction and Improvement*' (Cambridge University Press: Cambridge, 2018), The Hamlyn Lectures, pages 7-8, 19-20.

2. *Prior to the 2009 Amendment, the relevant dissolution provision (being section 15(2) of the Exempted Limited Partnership Law (2007) Revision) provided only:*

'On application by a partner or a creditor, the court may decree dissolution of an exempted limited partnership, and may make such orders and give such directions for the winding up of its affairs as may be just and equitable.'

3. *That language unambiguously intended to provide a procedure for the winding up of exempted limited partnerships, rather than a supplementary provision to the existing procedure for partnerships, being section 15(1) of the Partnership Act (2002 Revision), which was in effect at the time the Exempted Limited Partnership Law (2007 Revision) was legislated:*

'On application by a partner the court may decree a dissolution of the partnership in any of the following cases… whenever in any case circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.'

4. *It is in that context that the new section 15(4) (now 36(3)) was enacted. The Exempted Limited Partnership (Amendment) Bill, 2009 (the '2009 Bill') states precisely what was the intention of the Legislative Assembly (as it was then) in legislating new dissolution provisions in its Memorandum of Objects and Reasons:*

'Clause 10 of the Bill repeals and replaces the provisions governing the winding up and dissolution of an exempted limited partnership. They are brought, so far as is possible, in line with the provisions of the Companies Law (2007 Revision) as amended by the Companies (Amendment) Law 2007.'

5. *The Official Hansard Report for the second reading of the 2009 Bill is also instructive (emphasis added):*

'Clause 10 upgrades section 15 of the principal Law in relation to winding-up and dissolution of exempted limited partnerships. Industry has advised, and government has agreed, that in the current climate the existing section 15 fell far short of a meaningful dissolution framework for exempted limited partnerships. The revised and improved section 15 was developed in close consultation with the Cayman Islands Society of Professional Accountants (CISPA). The provisions in clause 10 take the benefit as far as possible of the provisions for winding up and dissolution in the new (2007) Part V of the Companies Law, and cross-refer to those provisions to the extent sensible. The ultimate, longer-term objective is to

> *have a self-contained framework for winding up and dissolution within the Exempted Limited Partnership Law itself (that is, without cross-referral), but in the interim, clause 10 is a significant and necessary improvement that addresses a current gap in the Law in the immediate term.* "

35. In my judgment, the quoted extracts from the legislative history of section 36(3), which were not considered by this Court in *Re Padma*, provide compelling support for the preliminary view that section 36(3) means what it says when it provides that an ELP may be wound-up in the same manner as a company under Part V of the Companies Act. It was seeking to move further away from the traditional Partnership Act constraints on dissolution and to embrace, according to the Memorandum and Objects of the Bill "*so far as is possible*", the more flexible winding-up mechanisms applicable to companies. The following explanation given to the Legislative Assembly on the Second Reading of the Bill, combined with the quoted averments in the Memorandum and Objects, puts the legislative purpose of the then new provisions clear beyond serious argument:

> "*…The provisions in clause 10 take the benefit as far as possible of the provisions for winding up and dissolution in the new (2007) Part V of the Companies Law, and cross-refer to those provisions to the extent sensible…*"

The proper construction of section 1

36. Having regard to the legislative history of section 36(3), it is clear that this statutory provision may indeed simply be interpreted according to its literal terms. The conceptual underpinnings for the pivotal finding in *Re Padma* as to the effect of section 33(1) of the ELP Act on the ability to wind-up limited partnerships melt away. The finding that there was "*no provision within the ELP Act or the Partnership Act which provides that legal proceedings may be instituted against an exempted limited partnership in the name of the partnership*" is clearly unsupportable because section 36(3) does expressly provide just that. Section 36(3) most importantly provides:

> "*(3) Part V of the Companies Act (2021 Revision) and the Companies Winding Up Rules, 2018 shall apply to the winding up of an exempted limited partnership…(a) references in Part V to a company shall include references to an exempted limited partnership…*"

37. Accordingly, and ultimately very simply, section 36(3) expressly provides that a winding-up petition may be presented against an ELP in the same manner as in relation to a company and this special provision overrides the general terms of section 33(1). The fact that an ELP generally has no separate legal personality is entirely beside the point when Parliament has expressly extended the company winding-up regime to such entities. I therefore confirm the preliminary interpretative view I set out above.

38. As already noted above, making sense of such bespoke investment vehicles as ELPs and the statutory provisions which define them is difficult because of the absence of persuasive authority. It is doubly difficult in the absence of judicial experience of how such winding-ups actually play out in practice. However, I ultimately accept Mr Sherwood's oral submissions that it is entirely logical for the business of an ELP to be wound up separate and apart from its general partner which may have other entirely separate business concerns.

39. It is true that a general partner is ultimately responsible for an ELP's debts, but this responsibility is only triggered when the ELP's assets are insufficient to meet those debts. The need to call upon a general partner may not be apparent until the winding-up of an ELP which is cash-flow insolvent is incomplete. When an ELP is being wound-up on just and equitable grounds and is solvent, the rationale for naming the general partner as respondent to a petition is indecipherable altogether. The idea of an ELP being wound-up is consistent with the statutory scheme, because section 4(2) makes it clear that such legal entities have their own assets and liabilities distinct from the general partners who manage them and the limited partners which invest in them.

40. Nor can it be said to be anathema in light of the general partnership law position for an ELP to be a party to legal proceedings for any purposes at all. A traditional partnership can sue and be sued under the firm name under GCR Order 81 rule 1. Mr Sherwood was keen to point out that Parker J himself had recently joined an ELP to proceedings initially commenced against its general partner: *Kuwait Ports Authority v Port Link GP Ltd* (unreported, 25 November 2021, FSD 236 OF 2020 (RPJ). However, he also pointed out that GCR Order 81 rules 12-15 also contemplate that an ELP may be sued in the firm name:

"***Actions by and against firms within jurisdiction (O.81, r.12)***

12. Any actions by or against an ordinary limited partnership or exempted limited partnership may be commenced in the name of the firm.

13. Service of writ (O.81, r.13)

13. Where an action is commenced against a firm, whether sued in the firm name or in the name of the general partner, the writ shall be served —

(a) in the case of an ordinary limited partnership, by delivering the writ to its registered principal place of business; and

(b) in the case of an exempted limited partnership, by delivering the writ to its registered office.

14. Acknowledgment of service in action against firm (O.81, r.14)

14. Where an ordinary limited partnership or exempted limited partnership is sued in its firm name, service may not be acknowledged in the name of the firm but only by the general partner thereof in the general partner's own name, but the action shall nevertheless continue in the name of the firm.

15. Enforcing judgment or order against firm (O.81, r.15)

15. (1) Where a judgment is given or order made against a firm, execution to enforce the judgment or order may be issued against any property of the firm within the jurisdiction.

(2) Where a judgment is given or order made against a firm, execution to enforce the judgment or order may be issued against any person who —

(a) acknowledged service of the writ in the action as a general partner; or

(b) is registered as a general partner of the firm; or

(c) was admitted in any pleading to be a general partner of the firm; or

(d) was adjudged to be a general partner of the firm pursuant to Section 52(2) of the Partnership Act (as amended and revised), or Section 14 of the Exempted Limited

Partnership Act (as amended and revised), as the case may be.

(3) Except as provided by paragraph (2), where a judgment is given or order made against a firm, execution to enforce the judgment or order shall not be issued against any person who is registered as a limited partner."

41. Mr Khanbhai correctly submitted that rules of court cannot be used as an aid to construing primary legislation. However, the fact that the Rules Committee, like the various judges and lawyers in the previous winding-up cases, clearly assumed that the ELP Act permitted ELPs to be sued is not entirely without forensic effect. The starting assumption ought to be that the Rules Committee did not misconstrue their rule-making powers in relation to ELPs[4]. My preliminary view of section 33(1) was that it did not in terms impose a mandatory requirement that all suits against an ELP must be brought against the general partner of an ELP. Section 33(1) says, it bears remembering:

"*(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.*"

42. Although this conclusion is strictly *obiter*, I find no reason to depart from my preliminary view (which is confirmed in an indirect sense by GCR Order 81 rules 12-15), that the legislative purpose of section 33(1) is primarily to reinforce the legal status of limited partners as not ordinarily liable to be sued (or entitled to sue) in respect of ELP liabilities and rights. This legislative purpose combined with the statutory language of the relevant provision in its wider statutory context strongly suggests that the "may" in section 33(1) is permissive and that there is no general or usual mandatory rule that proceedings cannot be issued against an ELP in its own name. The legislative history of section 33(1) itself does not undermine these provisional conclusions.

43. ELPs were created by the Exempted Limited Partnership Law 1991. Section 13(1) is substantially the same as section 33(1) today. The Memorandum of Objects and Reasons simply states: "*Clause 13 deals with the means of bringing proceedings against such a partnership.*" The section was not materially changed by the Exempted Limited Partnership Law 2007 or 2009.

[4] Section 19(1) of the Grand Court Law provides that the Rules Committee shall consist of the Chief Justice, the Attorney General and two legal practitioners.

44. The central basis for my conclusion that an ELP may be the respondent to a winding-up petition is that, however section 33(1) falls to be construed, section 36(3) expressly permits a petition being presented in such a manner. As Mr Sherwood rightly contended, even if section 33(3) imposes a mandatory general requirement to sue the general partner, relying on section 36(3) is justified by the following rule of statutory interpretation articulated by Lord Sales in *Day v Governor of the Cayman Islands* [2022] UKPC 6 (and applied to my mind in a somewhat novel way in that case) as follows:

> "*30…This means that the principle of interpretation encapsulated in the Latin maxims 'lex specialis derogat legi generali' (the specific law prevails over the general) and 'generalia specialibus non derogant' (general provisions should not undermine the intended effect of provisions specifically drafted to deal with the particular case), which is a principle of coherent interpretation of legal instruments of any character, is applicable."*

45. Despite Mr Khanbhai's able arguments to the contrary, I am bound to find that, with the greatest of respect to Justice Parker, *Re Padma* was wrong in finding that section 33(1) as read with section 36(3) of the ELP Act does not permit the presentation of a winding-up petition against an ELP alone because only the general partner may be sued. This conclusion was admittedly consistent with the implicit assumptions made in previous decision, including two of my own. However, the scales were tipped heavily in favour of the ultimate conclusion by the legislative history of section 36(3) which was placed before me and which Justice Parker did not have the benefit of considering. This additional material in my view helps to explain why in the earlier cases (and when the Rules Committee made Order 81 rules 12-15 of the Grand Court Rules) it was clearly assumed that ELPs could be wound-up under Part V of the Companies Act.

Alternative findings application to amend

46. The Petitioners submitted (to my mind with little coherence or conviction) that any standing defect could be cured by amendment. The GP contended that if the Petition was liable to be struck-out because it was impermissibly presented against the ELP, the consequences of this were fatal and could not be cured by amendment. Mr Khanbhai advanced the following cogent submissions in this regard:

> *"28. The proceedings being a nullity, there can be no cure. The originating process has no more effect to commence the proceedings than a dog licence (as Lord Millett said in Strachan v The Gleaner, borrowing the language of Danckwerts LJ in Re Pritchard).*
>
> *29. Further and in any event, there is no power to permit substitution of the respondent to a winding up petition.*
>
> *(a) The CWR applies, irrespective of the jurisdictional gateway: see section 36(3) of the ELP Act. The CWR expressly provide in relation to amendment of a petition (CWR Order 3 rule 2(3)). The CWR expressly provide in relation to substitution of the petitioner. There is no express rule in the CWR about correcting the name of or changing the respondent to a petition. There would have been one if that was contemplated.*
>
> *(b) The analogous rule in the GCR (viz. GCR O.15 r.6), which relates to correcting the name of a party, does not apply in proceedings governed by the CWR."*

47. In my judgment it is indeed inconsistent with the statutory winding-up regime to substitute the respondent to a petition. The GP's counsel identified one simple yet fundamental legal conundrum which would arise if this were done: what would the date of the commencement of the proceedings be? Accordingly, if I had found that the Petition was liable to be struck-out, I would have further found that naming the wrong respondent was fatal and could not be cured by amendment.

Disposition of strike out application

48. I accordingly find that that the GP's strike-out Summons must be dismissed. I will hear counsel, if required, as to:

(a) costs;
(b) the terms of the Order to be drawn up to give effect to the present Judgment; and
(c) directions in relation to the further conduct of the Petition.



THE HON. MR USTICE IAN RC KAWALEY
UDGE OF THE GRAND COURT

EXHIBIT I

(*Re Kuwait LBO Fund, LP*)



COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD NO. 131 OF 2023 (DDJ)

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP ACT (2021) REVISION)

AND IN THE MATTER OF KUWAIT LBO FUND, L.P. (IN VOLUNTARY LIQUIDATION)

BEFORE THE HON JUSTICE DAVID DOYLE

IN OPEN COURT

ORDER

UPON the application of Alexander Lawson and Christopher Kennedy, both of Alvarez & Marsal Cayman Islands Limited (the "**Petitioners**"), in their capacity as joint voluntary liquidators of Kuwait LBO Fund, L.P. (In Voluntary Liquidation) (the "**Partnership**") by their Petition dated 18 May 2023 (the "**Petition**")

AND UPON reading the First Affidavit of Christopher Kennedy sworn on 12 May 2023, the First Affidavit of Barry Lynch sworn on 16 May 2023, the First Affidavit of Ahmed Fawzi Al Saleh sworn on 12 July 2023, the Second Affidavit of Christopher Kennedy sworn on 29 September 2023 and the First Affidavit of Norberto Ayala Rodriguez sworn on 4 October 2023, and the exhibits thereto

AND UPON hearing counsel for the Petitioners and counsel for First Services International

IT IS ORDERED that:

1 The winding up of the Partnership be continued under the supervision of the Court pursuant to section 36(3)(g) of the Exempted Limited Partnership Act (the "**ELP Act**").

2 Christopher Kennedy and Barry Lynch, both of Alvarez & Marsal Cayman Islands Limited, Flagship Building, PO Box 2507, 142 Seafarers Way, George Town, Grand Cayman KY1-1104, Cayman Islands,

This ORDER is filed by Campbells LLP, attorneys for the Petitioners, whose address for service is Willow House, Cricket Square, Grand Cayman, KY1-9010, Cayman Islands

2829119-1

be appointed as the joint official liquidators of the Partnership (the "**Liquidators**").

3 The Liquidators shall not be required to give security for their appointment.

4 The Liquidators shall have the power to act jointly and severally in their capacity as joint official liquidators of the Partnership.

5 All rights or property of every description of the Partnership, including all choses in action, held or deemed to be held by Kuwait LBO Fund GP Ltd as the general partner of the Partnership (the "**General Partner**"), shall vest without the requirement for further formalities in the Liquidators and shall be held by the Liquidators in accordance with the ELP Act.

6 The Liquidators shall be authorised to seek recognition of the liquidation and/or their appointment in any jurisdiction which the Liquidators consider necessary, together with such relief as they may consider necessary for the proper exercise of their functions and powers in that jurisdiction.

7 The Liquidators shall be authorized to take such steps as may be necessary or appropriate to take possession, custody and control of the assets, books and records of the Partnership.

8 The Liquidators shall be at liberty to appoint such counsel, attorneys and professional advisors, whether in the Cayman Islands or elsewhere, as they may consider necessary to advise and assist them in the performance of their duties in accordance with Order 25 of the Companies Winding Up Rules (2023 Consolidation).

9 No disposition of the property of the Partnership by or with the authority of the Liquidators in carrying out their duties and functions and the exercise of their powers under any Order granted pursuant to the Petition shall be voided by virtue of Section 99 of the Companies Act.

10 Subject to Section 109 of the Companies Act and the Insolvency Practitioners' Regulations (2023 Consolidation), the Liquidators shall be authorised to render and pay invoices out of the assets of the Partnership for their own remuneration.

11 The Liquidators shall be at liberty to meet all disbursements reasonably incurred in connection with

the performance of their duties and, for the avoidance of doubt, all such payments shall be made as and when they fall due out of the assets of the Partnership as an expense of the liquidation.

12 The Liquidators' powers are exercisable to the exclusion of the General Partner and the General Partner shall have no authority or power to act in relation to the Partnership.

13 Unless otherwise ordered, any application to Court made by the Liquidators for an order sanctioning the exercise or proposed exercise of any power conferred upon them by Part I of the Third Schedule of the Companies Act (2023 Revision)(as amended) shall be served on the Partnership's limited partners giving not less than 4 clear days' notice of the hearing thereof and the Partnership's limited partners shall have liberty to attend.

14 The Liquidators shall issue a report to the Partnership's limited partners on the conduct of the liquidation and the state of the Partnership's affairs not less than once every six months.

15 The Liquidators and any partner or creditor of the Partnership shall have liberty to apply generally under section 36(3)(g) of the ELP Act.

16 The Petitioners' costs of and incidental to the Petition shall be paid forthwith out of the assets of the Partnership as an expense of the liquidation.

DATED this 5 day of October 2023

FILED this 5 day of October 2023

David Doyle

THE HONOURABLE JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT

This ORDER is filed by Campbells LLP, attorneys for the Petitioners, whose address for service is Willow House, Cricket Square, Grand Cayman, KY1-9010, Cayman Islands
2829119-1

ITEM NO. 127

JA-13

Fill in this information to identify the case:
United States Bankruptcy Court for the:
Southern District of New York
Case number (*If known*). _____ Chapter 15

☐ Check if this is an amended filing

Official Form 401

Chapter 15 Petition for Recognition of a Foreign Proceeding 12/15

If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write debtor's name and case number (if known).

1. Debtor's name Platinum Partners Value Arbitrage Fund L.P.

2. Debtor's unique identifier

For non-individual debtors:

☑ Federal Employer Identification Number (EIN) 1 4 -1 8 6 1 9 5 4

☐ Other _____. Describe identifier _____.

For individual debtors:

☐ Social Security number: xxx – xx– ____ ____ ____ ____

☐ Individual Taxpayer Identification number (ITIN): 9 xx – xx – ____ ____ ____ ____

☐ Other _____. Describe identifier _____.

3. Name of foreign representative(s) Matthew James Wright and Christopher Barnett Kennedy

4. Foreign proceeding in which appointment of the foreign representative(s) occurred Fin. Servs. Div. of Grand Ct. of Cayman Is. (cause no. FSD 131 of 2016 (AJJ))

5. Nature of the foreign proceeding

Check one:

☐ Foreign main proceeding
☐ Foreign nonmain proceeding
☑ Foreign main proceeding, or in the alternative foreign nonmain proceeding

6. Evidence of the foreign proceeding

☑ A certified copy, translated into English, of the decision commencing the foreign proceeding and appointing the foreign representative is attached.

☐ A certificate, translated into English, from the foreign court, affirming the existence of the foreign proceeding and of the appointment of the foreign representative, is attached.

☐ Other evidence of the existence of the foreign proceeding and of the appointment of the foreign representative is described below, and relevant documentation, translated into English, is attached.

_____

_____

7. Is this the only foreign proceeding with respect to the debtor known to the foreign representative(s)?

☐ No. (Attach a statement identifying each country in which a foreign proceeding by, regarding, or against the debtor is pending.)

☑ *Yes*

JA-13

Debtor Platinum Partners Value Arbitrage Fund L.P. (Name) Case number (if known)

8. Others entitled to notice

Attach a list containing the names and addresses of:

(i) all persons or bodies authorized to administer foreign proceedings of the debtor,

(ii) all parties to litigation pending in the United States in which the debtor is a party at the time of filing of this petition, and

(iii) all entities against whom provisional relief is being sought under § 1519 of the Bankruptcy Code.

9. Addresses

Country where the debtor has the center of its main interests:

Cayman Islands

Debtor's registered office:

C/o Intertrust Corp. Servs. (Cayman) Ltd.
190 Elgin Avenue, George Town
Number Street

KY1-9005
P.O. Box

Grand Cayman
City State/Province/Region ZIP/Postal Code

Cayman Islands
Country

Individual debtor's habitual residence:

Number Street

P O Box

City State/Province/Region ZIP/Postal Code

Country

Address of foreign representative(s):

RHSW (Cayman) Limited
2nd Fl., Windward 1, Regatta Office Park
Number Street

897, KY1-1103
P.O. Box

Grand Cayman
City State/Province/Region ZIP/Postal Code

Cayman Islands
Country

10. Debtor's website (URL) http://www.platinumlp.com

11. Type of debtor

Check one:

☑ Non-individual (*check one*):

☐ Corporation. Attach a corporate ownership statement containing the information described in Fed. R. Bankr. P. 7007.1.

☑ Partnership

☐ Other. Specify:

☐ Individual

Debtor Platinum Partners Value Arbitrage Fund L.P. Case number (if known)

12. Why is venue proper in *this district*?

Check one:

☐ Debtor's principal place of business or principal assets in the United States are in this district.

☐ Debtor does not have a place of business or assets in the United States, but the following action or proceeding in a federal or state court is pending against the debtor in this district:

☑ If neither box is checked, venue is consistent with the interests of justice and the convenience of the parties, having regard to the relief sought by the foreign representative, because:
Debtor conducts business and possess assets within the District.

13. Signature of foreign representative(s)

I request relief in accordance with chapter 15 of title 11, United States Code.

I am the foreign representative of a debtor in a foreign proceeding, the debtor is eligible for the relief sought in this petition, and I am authorized to file this petition.

I have examined the information in this petition and have a reasonable belief that the information is true and correct.

I declare under penalty of perjury that the foregoing is true and correct,

X _____ Matthew James Wright
Signature of foreign representative Printed name

Executed on 10 16 2016
MM / DD / YYYY

X _____ Christopher Barnett Kennedy
Signature of foreign representative Printed name

Executed on 10 / 16 / 2016
MM / DD / YYYY

14. Signature of attorney

X _____ Date 10/14/2016
Signature of Attorney for foreign representative MM / DD / YYYY

Warren Gluck
Printed name
Holland & Knight LLP
Firm name
31 W. 52nd St., 13th Floor
Number Street
New York NY 10019
City State ZIP Code

(212) 513-3200 warren.gluck@hklaw.com
Contact phone Email address

4701421 NY
Bar number State

HOLLAND & KNIGHT LLP
Warren E. Gluck, Esq.
Barbra R. Parlin, Esq.
Arthur E. Rosenberg, Esq.
31 West 52nd Street
New York, New York 10019
Telephone: (212) 513-3200
Facsimile: (212) 385-9010

Counsel for the Liquidators of the Funds

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 15
PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (IN PROVISIONAL LIQUIDATION),[1] *et al.*,	:	Case No. 16-_____ (___)
	:	(Joint Administration Requested)
Debtors in Foreign Proceedings.	:	

VERIFIED PETITION FOR RECOGNITION OF FOREIGN INSOLVENCY PROCEEDINGS AND APPLICATION FOR ADDITIONAL RELIEF PURSUANT TO SECTIONS 1504, 1509, 1515, 1517, 1520 AND 1521 OF THE BANKRUPTCY CODE

Matthew James Wright and Christopher Barnett Kennedy, duly appointed joint provisional liquidators ("**Petitioners**" or "**Liquidators**") of Platinum Partners Value Arbitrage Fund L.P. (in Provisional Liquidation) ("**Master Fund**") and the duly appointed joint official liquidators of Platinum

[1] The last four digits of the United States Tax Identification Number, or similar foreign identification number, as applicable, follow in parentheses: Platinum Partners Value Arbitrage Fund L.P. (in Provisional Liquidation) (1954) and Platinum Partners Value Arbitrage Fund (International) Ltd. (in Official Liquidation) (2356). The registered office of the International Fund is c/o The R&H Trust Co. Ltd., Windward 1, Regatta Office Park, P.O. Box 897, Grand Cayman KY1-1103, Cayman Islands. The Master Fund's registered address is c/o Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman, KY1-9005, Cayman Islands.

Partners Value Arbitrage Fund (International) Ltd. (in Official Liquidation) ("**International Fund**" and together with Master Fund, the "**Funds**"), both Funds in liquidation by way of the Financial Services Division of the Grand Court of the Cayman Islands (the "**Grand Court**") (cause nos. FSD 131 of 2016 (AJJ) (Master Fund) and 118 of 2016 (AJJ) (International Fund)) as a result of the Grand Court's orders made pursuant to petitions for the winding up of the Funds presented under, as applicable, sections 92 and 104 of the Companies Law of the Cayman Islands (2016 Revision) (the "**Companies Law**")[2] and section 36 of the Exempted Limited Partnership Law, 2014 ("**ELP Law**")[3] , by its undersigned United States counsel, Holland & Knight LLP, respectfully submit the Official Form Petitions, this Verified Petition (together, the "**Petition**"), the accompanying Declaration of Christopher Barnett Kennedy executed on October 18, 2016 (the "**Kennedy Declaration**"), the Declaration of Stephen Leontsinis, executed on October 17, 2016 (the "**Leontsinis Declaration**"), and the Declaration of Warren E. Gluck, executed on October 17, 2016 (the "**Gluck Declaration**" and, together with the Kennedy Declaration and the Leontsinis Declaration, the "**Declarations**"), for entry of an Order pursuant to Chapter 15 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the "**Bankruptcy Code**"):

(i) recognizing the Cayman Liquidations as foreign main proceedings, or in the alternative, foreign nonmain proceedings, pursuant to chapter 15 of the Bankruptcy Code, and Petitioners as the Funds' foreign representatives under sections 1509 and 1517 of the Bankruptcy Code; and

(ii) granting relief pursuant to sections 1520 and 1521 of the Bankruptcy Code.

[2] Excerpts of the relevant provisions of the Companies Law are attached as Exhibit A to the Leontsinis Declaration.

[3] Excerpts of the relevant provisions of the ELP Law are attached as Exhibit B to the Leontsinis Declaration.

PRELIMINARY STATEMENT

1. The purpose of Chapter 15 of the Bankruptcy Code is to provide effective mechanisms for dealing with cases of cross-border insolvency, with the express objectives of cooperation between United States courts, trustees, examiners, debtors and debtors in possession and the courts and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; the protection and maximization of the debtor's assets; and the facilitation of the rescue of financially troubled businesses. *See, e.g., In re Suntech Power Holdings Co., Ltd.,* 520 B.R. 399, 413 (Bankr. S.D.N.Y. 2014); 11 U.S.C. § 1501(a)(1)-(5)). To that end, the Liquidators request recognition of the Cayman Liquidations as foreign main proceedings primarily to obtain this Court's assistance in enforcing the stay of proceedings and actions against the Funds and property of their estates as ordered by the Grand Court through the Liquidation Orders. Recognition of the Cayman Liquidations as foreign main proceedings would confer upon the Funds the protection of sections 362 and 1520 of the Bankruptcy Code, thereby preventing any one creditor from gaining an advantage over similarly situated creditors or otherwise interfering with the Cayman Liquidations and implementation of orders of the Grand Court.

2. Both Funds are in liquidation pursuant to the orders of the Grand Court (cause nos. FSD 131 of 2016 (AJJ) (Master Fund) and 118 of 2016 (AJJ) (International Fund)) (the "**Liquidation Orders**"). The Liquidation Orders were issued pursuant to sections 92 and 104 of the Companies Law, of the Cayman Islands (2016 Revision) in relation to the International Fund and Master Fund, respectively. Together, the Master Fund and the International Fund liquidations are referred to herein as the Cayman Liquidations (the "**Cayman Liquidations**").

3. As this Petition, the accompanying Declarations and the exhibits thereto demonstrate, the Cayman Liquidations should be recognized as foreign main proceedings. In the event that the Cayman Liquidations are recognized as foreign nonmain proceedings, this Court has the discretion to order the protections and relief it deems appropriate pursuant to sections 1507 and 1521 of the Bankruptcy Code - including the requested stay of the continuation of actions or proceedings against the Funds' assets. 11 U.S.C. § 1521(a).

4. The Liquidators seek precisely the type of relief that chapter 15 was designed to provide, and the Cayman Liquidations and this Petition meet all the requirements for recognition and the requested relief. In particular, the Liquidators were appointed by the Grand Court to administer the Funds' assets, liabilities, and any ongoing business occurring in connection with the court-ordered Cayman Liquidations of the Funds pursuant to the Companies Law, a law relating to insolvency or adjustment of debt. *Kennedy Declaration*, ¶ 8.

5. Likewise, the Cayman Liquidations are collective judicial proceedings as referenced in 15 U.S.C. § 101(23), subject to the oversight and control of the Grand Court, encompassing all creditors and stakeholders of the Funds, which are pending in the Cayman Islands, the country in which both the International Fund and the Master Fund were formed, maintain registered offices, maintain their center of main interests ("**COMI**"), and where the Liquidators are engaged in substantial, non-transient, ongoing economic activity involving the wind-down and liquidation of the Funds' businesses and affairs. *Kennedy Declaration*, ¶¶ 46-72.

6. Pursuant to section 1516(c) of the Bankruptcy Code, the Cayman Islands are presumed to be the Funds' COMI because the Funds were incorporated there and maintain their registered office there. *Kennedy Declaration*, ¶ 46. This Petition and the accompanying Declarations further demonstrate that the Funds' counterparties and creditors had clear and actual knowledge that each of

the Funds was a Cayman Islands entity. *Kennedy Declaration*, ¶ 51. Since the commencement of the Cayman Liquidations, the Cayman Islands are the obvious and demonstrable "nerve center" of the Funds' ongoing liquidation and the Liquidators have conducted and overseen the conducting of substantial negotiations, transactions and litigation and the business of the Funds as going concerns from the Cayman Islands. Hence, the Cayman Liquidations are "foreign main proceedings" within the meaning of sections 101(23), 1502(4), 1516(c), and 1517(b)(1) of the Bankruptcy Code.

7. This and other Courts have recognized similar liquidation proceedings of Cayman Island entities as foreign main proceedings. *See, e.g., In re Suntech Power Holdings Co., Ltd.,* 520 B.R. 399 (Bankr. S.D.N.Y. 2014) (commencement of provisional Cayman Islands proceedings, together with subsequent activities of liquidators, had the effect of transferring holding company's COMI to Cayman); *In re Millard*, 501 B.R. 644, 647 (Bankr. S.D.N.Y. 2013); *In re AJW Offshore Ltd.*, No. 13-70078, (Bankr. E.D.N.Y. Feb. 5, 2013); *In re Bancredit Cayman Ltd. (in Liquidation)*, No. 06-11026 (SMB) (Bankr. S.D.N.Y. June 16, 2006); *In re LDK Solar Co., Ltd.*, No. 14-12387 (PJW) (Bankr. D. Del. Nov. 21, 2014) (recognizing Cayman Islands liquidation as foreign main proceeding); *In re Saad Invs. Fin. Co. (No. 5) Ltd.*, No. 09-13985 (KG) (Bankr. D. Del. Dec. 17, 2009) (same); *see also In re Niton Fund SPC*, 15-13252 (SMB) (Bankr. S.D.N.Y.) (Wright/Kennedy as Liquidators); *In re Madison Niche Assets Fund, Ltd., et. al.,* 16-10043 (KJC) (Bankr. D. Del.) (Wright/Kennedy as Liquidators); *In re Richcourt Euro Strategies Inc., et. al,* 15-12273 (REG) (Bankr. S.D.N.Y) (Wright as Liquidator).

8. For all of these reasons and as will be shown below, the Liquidators respectfully submit that: (i) the Cayman Liquidations are foreign main proceedings within the meaning of sections 101(23) and 1502(4) of the Bankruptcy Code; (ii) the Liquidators are the duly appointed foreign representatives of the Funds within the meaning of section 101(24); (iii) the Liquidators and the Petition comply with

all the requirements of section 1515 and Bankruptcy Rule 1007(a)(4); and (iv) recognition of the Cayman Liquidations would not be contrary to public policy under Bankruptcy Code section 1506.

9. Under the circumstances, this Court can and should enter an order recognizing the Cayman Liquidations as foreign main proceedings under section 1517(b)(l), or in the alternative, as foreign nonmain proceedings under section 1517(b)(2) of the Bankruptcy Code, and granting additional relief as set forth in section 1521 of the Bankruptcy Code.

JURISDICTION AND VENUE

10. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and sections 109 and 1501 of the Bankruptcy Code.

11. Venue of this proceeding is proper in this District pursuant to 28 U.S.C. § 1410 because the Funds conduct business and possess assets within the District.

12. This is a core proceeding under 28 U.S.C. § 157(b)(2)(P), and the Court may enter a final order consistent with Article III of the United States Constitution.

13. The statutory predicates for the relief requested herein are sections 105(a), 362, 1504, 1507, 1509, 1515, 1517, 1520, and 1521 of the Bankruptcy Code.

FACTUAL BACKGROUND

I. The Funds' Pre-Liquidation Business

14. On October 25, 2002, the International Fund was incorporated as an exempted limited company under the laws of the Cayman Islands. *Kennedy Declaration*, ¶ 9. The Master Fund was formed pursuant to a Second Amended and Restated Limited Partnership Agreement, dated July 1, 2008, registered with the Cayman Islands Registrar of Exempted Limited Partnerships. *Leontsinis Declaration*, ¶ 11.

15. The Master Fund was registered with and regulated by the Cayman Islands Monetary Authority ("**CIMA**") as a master fund. The International Fund was registered with and regulated by CIMA as a mutual fund. Both Funds' CIMA licenses were terminated following their entry into liquidation. *Leontsinis Declaration*, ¶ 12.

16. Following the International Fund's entry into liquidation, its registered address was changed from c/o Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman, KY1-9005, Cayman Islands to c/o The R&H Trust Co. Ltd., Windward 1, Regatta Office Park, PO Box 897, Grand Cayman KY1-1103, Cayman Islands. The Master Fund's registered address is c/o Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman, KY1-9005, Cayman Islands. *Leontsinis Declaration*, ¶ 13.

17. The Funds belong to a group of companies (the "**Platinum Group**") that was ultimately controlled and managed by Platinum Management (NY), LLC ("**Platinum Management**"). *Kennedy Declaration*, ¶ 9.

18. By the International Funds' offering documents, namely, a Confidential Private Offering Memorandum dated in or about April 2015 (the "**Offering Memorandum**"), the International Fund carries on business as an investment fund. The International Fund invests all of its investable capital in Platinum Partners Value Arbitrage Intermediate Fund Ltd., an exempted, limited liability company incorporated in the Cayman Islands on April 9, 2010 (the **"Intermediate Fund"**). Under the laws of the Cayman Islands, the shares of a Cayman Islands company constitutes the personal property of the holder of those shares. As the International Fund is domiciled in the Cayman Islands, the *lex situs* of the shares held by the International Fund in the Intermediate Fund, is the Cayman Islands. Consequently, virtually all of the assets of the International Fund are located in the Cayman Islands. *Leontsinis Declaration*, ¶ 13.

19. The Intermediate Fund invests all of its investable capital in, and is a limited partner of, the Master Fund. The Master Fund invests all its investable capital in certain assets and holding companies as described below. *Leontsinis Declaration*, ¶ 14.

20. In addition to the Intermediate Fund, one additional fund acts as a feeder fund into and a limited partner of the Master Fund. This entity is registered in Delaware and is known as Platinum Partners Value Arbitrage Fund (USA) L.P., which feeds directly into the Master Fund. *Leontsinis Declaration*, ¶ 15.

21. The Liquidators understand that the assets of the International Fund consist solely of its share of the Intermediate Fund, and the assets of Intermediate Fund consist solely of its share of the Master Fund. As such, the financial position of the International Fund is dependent upon the performance of the Master Fund and, in turn, the value of the assets in which the Master Fund holds interests. The assets of the Master Fund, as valued by Platinum Management as of June 30, 2016 consist of, in part[4]:

(a) investments in securities, debt and other investment assets with a value of approximately $915,000,000;

(b) securities purchased under agreements to resell with a value of approximately $46,000,000;

(c) unrealised appreciation on open derivative contracts with a value of approximately $6,900,000;

(d) amounts due from brokers with a value of approximately $49,700,000;

(e) interest receivable in the amount of approximately $23,000,000;

[4] While our review of the Master Funds' assets is ongoing, the Liquidators do caveat the asset values described herein in the following principal respect. The Master Fund holds the majority of its assets via wholly-owned subsidiaries and other vehicles. In connection with the Liquidators' fundraising efforts, some of these assets, held via wholly-owned subsidiaries of the Master Fund, were considered for sale. During this process, it has become clear that many of the Master Funds' subsidiaries and those subsidiaries' assets are themselves subject to various loan and encumbrance agreements that have the effect of substantially diminishing underlying or operational assets' value from the perspective of the Master Fund level.

(f) a potential asset in respect of the purchase of notes under a Put Agreement with a value of $30,000,000;

(g) notes receivable with a value of approximately $16,000,000;

(h) participation interest with a value of approximately $3,000,000;

(i) claims receivable with a value of approximately $2,000,000;

(j) cash in the approximate amount of $68,500; and

(k) prepayments of approximately $1,000,000.

Kennedy Declaration, ¶ 17.

22. According to unaudited information provided to the Liquidators, the Master Fund's liabilities as of May 31, 2016 totaled approximately $382,000,000 and principally comprise:

(a) a number of structured financial liabilities in the approximate combined principal and interest amount of $94,378,544 owed to:

(i) Heartland Bank, a United States bank based in Arkansas; and

(ii) the holders of a series of promissory notes issued by the Master Fund, some of whom were former investors in certain of the Master Fund's feeder funds and who hold the promissory notes in settlement of historic redemption requests submitted to such feeder funds and, indirectly, to the Master Fund;

(b) a potential liability to New Mountain Finance Corporation ("**New Mountain**") in the amount claimed by New Mountain of approximately $31,800,000 (as at May 18, 2016 and subject to daily accruing interest claimed for the period thereafter) regarding payments which New Mountain claims are due from the Master Fund in respect to a securities purchase and put agreement dated November 7, 2014;

(c) indirect liabilities to certain of its ultimate redemption creditors in respect of:

(i) unpaid redemptions and withdrawals in the approximate amount of $66,711,212; and

(ii) audit holdback amounts in the amount of $9,910,029;

(d) the following management fee liabilities to the Intermediate Fund and the Onshore Fund:

(i) $4,716,731 due to the Intermediate Fund; and

(ii) $2,683,160 due to the Onshore Fund;

(e) accrued expenses and liabilities in the approximate amount of $6,449,468;

(f) an amount payable to the general partner of the Master Fund of $4,291,275;

(g) accrued trader fees of $13,073,209;

(h) amounts due to the holders of minority interests in the Master Fund's subsidiary companies of $1,813,251;

(i) liabilities of approximately $106,824,701 representing the amount the Master Fund expects to be required to cover in respect of short sale contracts entered into by the Master Fund; and

(j) unrealised depreciation on derivative contracts of approximately $15,742,077.

Kennedy Declaration, ¶ 18.

23. The investigations by the Liquidators have revealed additional liabilities of the Funds not made known to them upon their appointment. For example, on March 21, 2016, the Master Fund entered into a Master Guaranty Agreement ("**Master Guaranty")** in favor of, among others, BAM Administrative Services LLC, pursuant to which the Master Fund guaranteed the repayment of certain debts owed by each of (i) Golden Gate Oil LLC (a company into which the Master Fund invests); and (ii) Montsant Partners LLC (a wholly-owned subsidiary of the Master Fund). The terms of the Master Guaranty also provide that, if the Master Fund is considered to be 'insolvent' for the purposes of the Master Guarantee, BAM Administrative Services LLC may exercise the option to deem all amounts guaranteed by the Master Guaranty to be due and payable. BAM Administrative Services LLC has filed a proof of debt in connection with the Cayman Liquidations in the amount of $79,146,350.65. *Kennedy Declaration*, ¶ 19.

24. The Master Fund, together with its wholly-owned subsidiary, DMRJ Group, LLC, entered into a Forbearance and Security Agreement (the "**Forbearance Agreement**") with Epocs Real Estate Partnership, Ltd. ("**Epocs**") and West Loop South LLC ("**West Loop**") dated July 5, 2016, in connection with loans made by Epocs and West Loop to the Master Fund. The terms of the Forbearance Agreement permitted Epocs and West Loop to collect on their claims in the event of an insolvency proceeding against the Master Fund. To that end, Epocs and West Loop have filed claims against the Master Fund in connection with the Cayman Liquidations in the amount of $2,596,619.91 and $4,955,040.61, respectively. *Kennedy Declaration*, ¶ 20.

II. The Cayman Liquidations

25. Parris Investments Limited is a previous investor and shareholder in the International Fund ("**Parris**"). In or about August 2015, Parris purchased 556.9018 L-shares in the International Fund ("**Parris Shares**"). *Leontsinis Declaration*, ¶ 17.

26. On October 21, 2015, an article was published in Bloomberg News raising a number of concerns regarding the Funds, including: (a) a third party broker doing business with the Funds that was sanctioned by regulators for running a scheme to profit from imminent deaths of terminally ill patients; (b) one of the Master Fund's largest investments, an oil company, being charged over the death of three workers killed in an explosion; (c) a former principal of an energy company in which the Funds had a significant stake in, being arrested for tax evasion; and (d) the Master Fund's portfolio being comprised primarily of hard to value, illiquid assets. *Kennedy Declaration*, ¶ 22.

27. On October 27, 2015, Parris submitted a request to the International Fund for the full redemption of the Parris Shares, the redemption date of which was December 31, 2015 ("**Redemption Request**"). The Redemption Request was approved by the International Fund via its administrator and,

consequently, under the terms of the Offering Memorandum, 90% of the payment of Parris' redemption proceeds was due on January 30, 2016. *Leontsinis Declaration*, ¶ 17.

28. On July 28, 2016, Parris, citing, among other things, the International Fund's failure to honor the Redemption Request, filed a creditor's petition seeking the liquidation and winding up of the International Fund by the Grand Court and the appointment of the Liquidators as Joint Official Liquidators of the International Fund pursuant to Section 92 the Companies Law ("**International Petition**"). *Leontsinis Declaration*, ¶ 18.

29. As required by the Companies Law and the CWR (defined below), Parris placed notice of the filing of the International Petition and its request for appointment of the Liquidators in the *Cayman Times* and *The Financial Times* which was published on August 15, 2016. *Leontsinis Declaration*, ¶ 19.

30. On August 23, 2016, the Master Fund, through its general partner, Platinum Management (NY) LLC, presented a petition (the "**Master Petition**", and collectively with the International Petition, the "**Liquidation Petitions**," attached as Exhibit A to the Kennedy Declaration) to the Grand Court under section 92 of the Companies Law, made applicable to the Master Fund by way of Section 36 of the ELP Law, seeking, among other orders, orders that provided for: the liquidation of the Master Fund to commence under the authority of the Grand Court; the appointment of Messers. Wright and Kennedy as the Liquidators of the Funds; and the granting of certain powers to the Petitioners in their capacities as the Liquidators of the Funds, as described in the Liquidation Petitions and as discussed in greater detail below. *Leontsinis Declaration*, ¶ 20.

31. Simultaneously with the presentation of the Master Petition, the general partner of the Master Fund issued an *ex parte* summons to appoint the Liquidators as Joint Provisional Liquidators of the Master Fund in accordance with section 104 of the Companies Law, pending adjudication of the

Master Petition (the "**Provisional Summons**," attached as Exhibit B to the Kennedy Declaration). *Leontsinis Declaration*, ¶ 21.

32. Also on August 23, 2016, the Grand Court issued a Winding Up Order for the International Fund on the terms requested through the International Petition ("**International Order**"). *Leontsinis Declaration*, ¶ 22.

33. On August 29, 2016, the Grand Court issued an Order for the Master Fund to be placed into provisional liquidation pending the determination of the Master Petition which is due to be heard on October, 27 2016 and appointed the Liquidators as Joint Provisional Liquidators of the Master Fund. ("**Master Order**," attached together with the International Order as Exhibit C to the Kennedy Declaration). *Leontsinis Declaration*, ¶ 23.

34. The general partner of the Master Fund reached the conclusion to voluntarily wind up the Master Fund based upon their analysis of all relevant factors, including the evidence of the following deteriorating financial conditions:

A. The shift in the concentration of the Master Fund's assets to illiquid private equity style investments, which has caused an imbalance between liquid and illiquid assets. In that regard:

(i) Historically, the Master Fund's investment portfolio had been balanced between liquid and illiquid asset classes. However, in recent years the Master Fund has built up a large concentration of illiquid, private equity style investments, which are mostly in the oil and gas sectors (which sector comprises approximately 40% of the Master Fund's investments). This has caused an imbalance in the Master Fund between liquid and private equity style investments, which historically were balanced on an approximate 50/50 basis; and

(ii) The shift in the constitution of the Master Fund's investment portfolio assets to a large holding of illiquid assets has been primarily due to the successful appreciation of assets that caused the private equity style illiquid investments to occupy a larger position in the Master Fund and volatility in the markets whereby the Master Fund drew down its exposure in the liquid trading strategies and therefore was unable to restore such liquid trading strategies and delayed monetization events;

B. A global decline in oil prices which has negatively affected the Master Fund's assets which operate in the oil and gas sector;

C. A delay in the availability of audited financial statements due to the esoteric nature of many of the investment assets of the Master Fund, the ongoing investigations by United States regulatory agencies and the fact that the Master Fund's Administrator has not been in a position to assist due to its remaining a creditor of the Master Fund in respect of unpaid professional services fees;

D. Delayed monetization events in relation to the Master Fund's investment assets which has delayed a rebalancing of the Master Fund's liquidity position;

E. A large amount of investor redemptions remaining unpaid past their due date, such as Parris;

F. The necessary borrowing of funds by the Master Fund to fund certain of its investment assets; and

G. The filing by Parris of a petition with the Grand Court seeking the winding up of the International Fund.

Kennedy Declaration, ¶ 30.

III. The Cayman Liquidations and Cayman Islands Insolvency Law

35. The substantive law relating to the winding up of companies incorporated in the Cayman Islands is contained in Part V of the Companies Law. *Leontsinis Declaration*, ¶ 28. The provisions of Part V apply to companies formed and registered under the Companies Law or its predecessors, including companies that are formed as exempted companies and limited partnerships. *Leontsinis Declaration*, ¶ 28. By virtue of section 36 of the ELP Law, the provisions of Part V of the Companies Law and the CWR (defined below) apply to the winding up of an exempted limited partnership with the exception of certain irrelevant sections. *Leontsinis Declaration* ¶ 28.

36. The statutory provisions governing the liquidation of Cayman Islands companies are set out in Part V of the Companies Law, which is supplemented by the Companies Winding Up Rules 2008 (as revised) ("**CWR**"), the Insolvency Practitioners Regulations 2008 (as revised) (the

"**IPR**") the Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2008 (as revised) and the Grand Court Rules 1995 (as revised) (the "**GCR**"). *Leontsinis Declaration*, ¶ 28.

37. A Cayman Islands company may be wound up: (a) voluntarily, following the passing of a special resolution of its shareholder(s)[5] or pursuant to a mandatory term in its constitutional documents[6]; (b) compulsorily, by order of the Grand Court;[7] or (c) under the supervision of the Grand Court.[8] *Leontsinis Declaration*, ¶ 29.

38. The Companies Law provides that a Cayman Islands company may be placed into provisional liquidation if the Court finds there is a *prima facie* case for making a winding up order, and the appointment of provisional liquidators is necessary to prevent the dissipation or misuse of the company's assets, to prevent the oppression of minority shareholders or to prevent the mismanagement or misconduct on the part of the company's directors.[9] *Leontsinis Declaration*, ¶ 31.

39. In the case of both of the Funds, they entered into liquidation as a result of their inability to pay their respective debts as they fell due, following the presentation of the Master Petition by the Master Fund and the presentation of the International Petition by Parris (an undisputed creditor of the International Fund). *Leontsinis Declaration*, ¶ 33.

40. The Liquidators are fiduciaries and officers of the Grand Court. As Official Liquidators of the International Fund, the Liquidators' duties pursuant to section 110 of the Companies Law are to: (a) collect, realise and distribute the assets of the Funds to its creditors and if there is a surplus, to equity holders, and (b) report to the Funds' creditors and other stakeholders upon the affairs of the Funds and

[5] Section 90(b)(i) of the Companies Law.
[6] Section 90(b)(ii) of the Companies Law.
[7] Section 90(a) of the Companies Law.
[8] Section 90(c) of the Companies Law.
[9] Section 104(2) of the Companies Law..

the manner in which they are being wound up.[10] As Provisional Liquidators of the Master Fund their duties (a) are to prevent the dissipation of and to generally protect the assets of the Master Fund for the benefit of all of its stockholders, and (b) report to the Grand Court and the Master Funds' creditors and other stakeholders upon the affairs of the Master Fund *Leontsinis Declaration*, ¶ 37.

41. Except as otherwise ordered by the Grand Court, Schedule 3 to the Companies Law sets out the powers that the Liquidators may exercise with and without the supervision of the Grand Court. *Leontsinis Declaration*, ¶¶ 38.

42. Generally, the Liquidators are authorized and empowered to take the following actions, subject to the Grand Court's supervision:

- Power to bring or defend any action or other legal proceeding in the name and on behalf of the company.
- Power to carry on the business of the company so far as may be necessary for its beneficial winding up.
- Power to dispose of any property of the company to a person who is or was related to the company.
- Power to pay any class of creditors in full.
- Power to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or for which the company may be rendered liable.
- Power to compromise on such terms as may be agreed all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting, or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company.

[10] Section 110 of the Companies Law.

- Power to deal with all questions in any way relating to or affecting the assets or the winding up of the company, to take any security for the discharge of any such call, debt, liability or claim and to give a complete discharge in respect of it.

- The power to sell any of the company's property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels.

- The power to raise or borrow money and grant securities therefor over the property of the company, the power to engage staff (whether or not as employees of the company) to assist them in the performance of their functions.

- The power to engage attorneys and other professionally qualified persons to assist them in the performance of their functions.

Leontsinis Declaration, ¶ 38 (citing Companies Law, section 110, Schedule 3, Part I).

43. Schedule 3, Part II of section 110 of the Companies Law further provides that the Liquidators are permitted to exercise the following powers without the Grand Court's sanction:

- The power to take possession of, collect and enter the property of the company and for that purpose to take all such proceedings as the Liquidators consider necessary.

- The power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company seal.

- The power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against the Funds' estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent and rateably with the other separate creditors.

- The power to draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with the respect of the company's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business.

- The power to promote a scheme of arrangement pursuant to section 86.

- The power to convene meetings of creditors and contributories.

- The power to do all other things incidental to the exercise of their powers.

Leontsinis Declaration, ¶ 39 (citing Companies Law, section 110, Schedule 3, Part II).

44. Under the Companies Law, the Liquidators are also empowered to investigate (i) the causes for the failure of the Funds' business, as well as (ii) generally, the promotion, business, dealings and affairs of the Funds. *Leontsinis Declaration*, ¶ 40 (citing Companies Law, section 102).

45. A key principle underlying the Companies Law and the Cayman Liquidations is that the claims of investors and creditors within the same class are treated on a *pari passu* basis. *Leontsinis Declaration*, ¶ 34 (citing Companies Law, section 140).

46. Cayman liquidation proceedings are fair and equitable. All creditors have an opportunity to be heard by the Grand Court and no creditor will be prejudiced because it is foreign-based. *Leontsinis Declaration*, ¶ 36.

47. Section 97(1) of the Companies Law provides that upon the entry of a winding up order or appointment of a provisional liquidator, no suit or other proceeding may be commenced or continued against the company except with leave of the Grand Court and subject to such terms as that Court might impose. This automatic stay mirrors the stay imposed in U.S. bankruptcy proceedings and serves to promote the Liquidators' ability to deal with claims and creditors collectively and comprehensively. *Leontsinis Declaration*, ¶ 35.

IV. Events Leading Up to the Chapter 15 Petitions and the Funds' Activities in the Cayman Islands

48. The Funds were formed as exempted limited companies under the laws of the Cayman Islands and maintained their registered office in the Cayman Islands. *Leontsinis Declaration*, ¶¶ 11, 13.

49. An "exempted" company under the Companies Law is prohibited from undertaking business in the Cayman Islands except in furtherance of its business carried on outside the Cayman

Islands.[11] Specifically, it may effect and conclude contracts in the Cayman Islands and exercise in the Cayman Islands all of its powers necessary for the carrying on of its business outside the Cayman Islands, meaning that it may employ staff or agents in the Cayman Islands and have offices in the Cayman Islands in furtherance of its business outside the Cayman Islands, which the Funds have always had. *Leontsinis Declaration*, ¶ 45.

50. Although upon their incorporation the Funds were restricted from carrying on business within the Cayman Islands, this did not mean that the Funds had no presence there. For example, the Funds' registered offices prior to the commencement of the liquidations were located at c/o Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman, KY1-9005, where the Funds' annual filings with the Registrar of Companies were made. *Leontsinis Declaration*, ¶ 13. Under the law of the Cayman Islands, situs of the shares of a Cayman Islands company is the place of its incorporation, *i.e.* the Cayman Islands. *Leontsinis Declaration*, ¶ 13. In addition, the Funds were regulated by CIMA from its headquarters in the Cayman Islands and registered as funds with CIMA. *Leontsinis Declaration*, ¶ 12.

51. The restriction on the carrying on of an "exempted" company's business inside the Cayman Islands also does not apply after a company commences liquidation in the Cayman Islands. *Leontsinis Declaration*, ¶ 45.

52. In addition, it is a requirement of Cayman Islands law that at least one official liquidator be resident in the Cayman Islands. In this case, both Liquidators are residents of the Cayman Islands, as required by the IPR. *Leontsinis Declaration*, ¶ 46.

---

[11] Requirements are such that the operation of the proposed company must be "... *conducted mainly outside the* [Cayman] *Islands*." *See* sections 163 and 165 of the Companies Law. Exempted companies are also required to file an annual return with the Registrar of Companies to this effect, along with its annual fees, pursuant to section 168(b) of the Companies Law.

53. Upon the entry of the Liquidation Orders, the Liquidators took the various steps required under the Companies Law and the CWR, including the publication of statutory notices and the convening of meetings of creditors of the Funds. At the first meeting of the creditors of the Funds, liquidation committees, comprised by nominated representatives of the Funds' investors, were elected (the "**Liquidation Committees**"). The Liquidation Committees continue in their role of assisting the Liquidators; they are both aware of this chapter 15 petition. *Kennedy Declaration*, ¶¶ 39-41.

54. Since their appointment, the Liquidators have overseen and directed all activities related to the Funds from the Cayman Islands. A significant proportion of the work to date relating to the Cayman Liquidations has been conducted in the Cayman Islands, and all of the work is supervised by the Liquidators and ultimately subject to the orders of the Grand Court. *Kennedy Declaration*, ¶ 53.

55. Moreover, while the Funds were operating, they issued and received voluminous documentation, and in all such documentation, each of the Funds is referred to and addressed as a Cayman Islands company. Based upon partner meetings, statutory demands and resolutions to wind up the Funds, and the liquidation of the Funds themselves, all of which focused on the Cayman Islands, it is clear that all relevant creditors, stakeholders, and shareholders regard the Funds to be Cayman Islands entities. *Kennedy Declaration*, ¶ 51.

56. Initially, the Liquidators caused the requisite notices and filings to be filed, published, and served in the Cayman Islands, and in regards to the International Fund, arranged for the transfer of the Funds' books and records to the new registered offices of the Funds in the Cayman Islands. *Kennedy Declaration*, ¶ 54.

57. The Liquidators have also taken emergency steps to protect and realize the Funds' assets, including emergency meetings with creditors and financial counterparties, all from the Cayman Islands. *Kennedy Declaration*, ¶ 37.

58. The Liquidators have also engaged in substantial formal and informal communications with the Funds' former principals and all relevant stakeholders, including meetings with creditors, toward arriving at a consensus for liquidation strategy and handling the day-to-day operations of the Funds' operating assets. All such communications have been presided over from the Cayman Islands. *Kennedy Declaration*, ¶ 55.

59. The liquidations of the Funds has been unusual in three main respects. First, there is an unusual level of ongoing business activity in respect of the Funds and their directly-owned subsidiaries. Control and direction of this substantial business has been assumed by the Liquidators. The Funds' subsidiaries, Platinum Management, and all of the Funds' counterparties have dealt directly with the Liquidators across myriad business, financial and legal issues that have arisen in the short time since our appointment. *Kennedy Declaration*, ¶¶ 33-34.

60. Second, the Funds are experiencing severe and substantial liquidity problems that threaten to result in devaluation of the Funds' assets and/or assets held by wholly owned subsidiaries of the Funds. In order to stabilize and protect these assets, the Liquidators have engaged in near-daily negotiations with (i) third party funds and investors; and (ii) insider shareholders and creditors, with the goals of obtaining financing or facilitating short-term asset sales as a means of raising additional capital. All of these entities and persons have looked to the Liquidators as the sole persons with authority to deal and conduct business on behalf of the Funds. To date, much of the Liquidators work has consisted of either (a) emergency "triage" in respect of ongoing threats to the value of the Funds' assets; (b) meeting with the Funds' most significant creditors, investors, counterparties and stakeholders; (c) defending against litigation; and (d) reporting to and seeking the sanction of the Cayman Court and Liquidation Committees. *Kennedy Declaration*, ¶ 35.

61. Third, the liquidations of the Funds are atypical due to the ongoing investigations into the actions of the Funds' prior management by the United States Department of Justice ("**DOJ**") and the United States Securities and Exchange Commission ("**SEC**"). In this regard, since the outset of the Cayman Liquidations, the Liquidators have been in direct contact with the SEC and the United States Attorneys' Office for the Eastern District of New York in respect of current and contemplated actions by the Liquidators. While the urgent "triage" work associated with protecting the Funds' assets from devaluation and otherwise engaging with the Funds' investors, creditors and potential lenders has consumed most of the Liquidators' time to date, the Liquidators have already begun examining the allegations of asset overvaluation and will execute a detailed investigation in respect of the causes of the Funds' insolvency, the value of the Funds' assets, and any claims that the Funds' may have in respect of the same. *Kennedy Declaration*, ¶ 38.

62. The Liquidators, both personally and via their United States legal counsel, Holland & Knight LLP, have engaged in telephone and email correspondence with the SEC and DOJ since their appointment and are fully cooperating with these U.S. federal agencies. *Kennedy Declaration*, ¶ 59.

63. In particular, the Liquidators have communicated with the SEC and DOJ concerning (i) the potential sale of the Implant Sciences Corporation ("**Implant Sciences**") notes to Platinum "insiders" and (ii) the potential investment to be made by the Master Fund in Northstar Offshore Group LLC ("**Northstar**") so as to avoid the continuation of its involuntary bankruptcy (discussed below). *Kennedy Declaration*, ¶ 60.

64. The SEC has requested various materials concerning these topics, which have been furnished to the SEC by the Liquidators. *Kennedy Declaration*, ¶ 62.

65. In addition to the ongoing government investigations, two items were flagged as critical because of their urgency or the potential for serious asset devaluation.

66. One item that the Liquidators and their counsel immediately began to address was the status of certain swap transactions with a value of more than $80 million. The Funds' counterparties in respect of these swap transactions are major U.S. financial institutions, and the circumstances surrounding these swap transactions were urgent from the outset of the Liquidators' appointment. The Liquidators and their counsel have spent dozens of hours working with these financial institutions toward unwinding these swaps. *Kennedy Declaration*, ¶ 63.

67. Second, and from the perspective of asset devaluation, perhaps the most significant and immediate threat concerned the Funds' lack of liquidity that is necessary to support the Funds' investments. One of these investments is Northstar Offshore Group LLC. A substantial amount of Northstar's equity and a substantial amount of Northstar's debt is held by a subsidiary of the Master Fund and the Master Fund itself, respectively. It has been estimated that the Funds' Northstar holdings comprise approximately 22% of the Funds' total assets. *Kennedy Declaration*, ¶ 64.

68. Northstar was, at the time of the Liquidators' appointment, as well as currently, the subject of a contested involuntary bankruptcy proceedings in the Southern District of Texas, Case No. 16-34028 ("**Northstar Bankruptcy**"). *Kennedy Declaration*, ¶ 65.

69. The Liquidators have formed the initial view that that a Northstar Bankruptcy would likely result in both a significant devaluation of the Master Funds' assets and may result in a significant creditor claim against the Master Fund because the Master Fund has guaranteed the "plugging and abandonment" liabilities associated with Northstar's oil and gas wells. *Kennedy Declaration*, ¶ 66.

70. Under the circumstances, the Liquidators have been in continuous negotiations with Northstar's management, creditors, relevant parties, and have been in contact with potential lenders, asset purchasers and other capital sources in an attempt to arrange additional financing for Northstar, in the form of a loan or an equity investment. *Kennedy Declaration*, ¶ 67.

71. The Liquidators further made an application for directions to the Cayman Court on September 27, 2016 concerning the urgent Northstar situation (see affidavits of Kennedy and Wright, attached as Exhibit D to the Kennedy Declaration). At a September 30, 2016 hearing, the Cayman Court suggested that the JPLs should consider whether it would be appropriate for one of them to personally appear at the hearing before this Court scheduled for October 5, 2016. The Cayman Court further suggested that the JPLs should consider requesting an adjournment of the status hearing in order to allow Northstar to provide the JPLs and the Cayman Court with a reorganization plan, in order for it to properly determine whether or not Northstar could continue as a going concern. The Cayman Court was not prepared to sanction the JPLs' further investment in Northstar without first considering that reorganization plan and granted the JPLs leave to reapply on short notice for sanction of the investment as soon as they were in position to place the appropriate evidence before the Cayman Court. *Kennedy Declaration*, ¶ 68.

72. In addition to that stated above, the Liquidators have engaged and overseen the following specific and general matters on their own and through and with the assistance of Cayman and U.S. counsel, commencing the process within days of the Liquidation Orders:

- Overseeing the administrative and investment management operations of the Master Fund and the International Fund;
- Gaining access to and control over all electronic files of the Funds;
- Meeting and communicating with Bart Schwartz of Guidepost Solutions. Since their appointment, the Liquidators have opened and maintained an ongoing dialogue with Guidepost and continue to share information and cooperate in their respective roles as far as possible. Upon the appointment of the Liquidators, Guidepost's role with respect to the Master Fund has been limited to it acting as a representative of the Onshore Fund and maintaining a dialogue with respect to the wider Platinum group of companies which are currently not in liquidation in the Cayman Islands or bankruptcy proceedings in the United States;

- Engaging in significant and substantial negotiations and meetings with Beechwood in respect of a collateral account held by Master Fund wholly owned subsidiary, approximately $11 million in proceeds due to the Master Fund from Beechwood in relation to the Agera transaction, and the nature and substance of other transactions between Beechwood and the Funds;

- Working with the Master Fund's counterparties – major financial institutions – toward unwinding of $80 million in swap contracts;

- Litigating against Twosons Corporation, which has filed a lawsuit in the Supreme Court of the State of New York styled Twosons Corp. v. Platinum Partners Value Arbitrage Fund, L.P., Index No. 654865-2015. In this litigation, Twosons alleges breach of an 18 September 2014 promissory note with a current face value of approximately $6 Million, that contains a security provision. In connection with this litigation, Twosons has sought the issuance of a temporary restraining order freezing the Master Fund's assets.

- Monitoring litigation involving a wholly-owned subsidiary of the Master Fund, Meserole, LLC, which is engaged in offensive litigation in relation to the dilution of its interest in a fund that owns debt and equity in respect of the company Airdye, LLC. The Master Fund is a nominal party to the various claims in arbitration that are currently pending before the American Arbitration Association and JAMS.

- Negotiating with New Mountain, a significant participant in the Cayman Liquidations, in respect of litigation in which New Mountain is plaintiff and the Master Fund is the defendant, which case is pending in the New York State Supreme Court for New York County, Index No. 651186/2016, which plaintiff has agreed to participate in the Cayman Liquidations and is serving on the Master Fund Liquidation Committee;

- Supervising and coordinating the Funds' substantial creditor and equity interests, held via a wholly owned subsidiary, in respect of the just-filed Implant Sciences bankruptcy petition, including participating as a creditor in the IMX Acquisition Bankruptcy. The Master Fund, via its wholly owned subsidiaries including but not limited to DMRJ Group, LLC ("**DMRJ**"), holds equity and debt of positions in Implant Sciences Corporation. The notes associated with the Implant Sciences Corporation debt were the subject of an application for directions. Implant Sciences Corporation has filed a Chapter 11 petition styled In re IMX Acquisition Corp., et al., 16-12238 (D.Del) and DMRJ has appeared in that proceeding as a party in interest.

- Holding ongoing discussions with all of the major creditors of and equity holders in the Funds;

- Forming and working with the Liquidation Committees, under the authority and upon the instructions and approval of the Grand Court of the Cayman Islands. The Liquidators have met with the Liquidation Committees on two occasions subsequent to formation (September

30, 2016 and October 7, 2016) and met with the Master Fund Committee on October 14, 2016 to discuss urgent funding matters and to provide updates in relation to several of the Master Fund's assets. The Liquidators have had, and continue to have, an active and open dialogue with the Master Committee and will continue to use it as a sounding board as the liquidation progresses

- Holding the official meetings of the Creditors and Investors of the International Fund (September 23, 2016) and the Master Fund (September 28, 2016) from the Cayman Islands and New York, with one Liquidator in each location and with telephone access to all creditors and investors of the applicable Fund;

- Working with prior Funds' counsel and opposing counsel in connection with two pending arbitrations being held in the United States;

- Working to sell promissory notes owned by a subsidiary of the Master Fund and issued by Implant Sciences;

- Holding discussions and coordinating with the Funds' prior counsel regarding the ongoing investigations of the Funds by the SEC;

- Engaging in correspondence and conferences with the SEC concerning the status of the Liquidations, the Liquidators, and the Northstar situation and other matters;

- Meeting, holding discussions and coordinating with the Funds' prior counsel regarding the ongoing investigations of the Funds by the U.S. Attorney for the Southern and Eastern Districts of New York; and

- Issuing the first comprehensive report by the Joint Provisional Liquidators of the Master Fund on October 13, 2016, which report details the activities of the Liquidators and the assets and liabilities of the Master Fund as well its wholly owned subsidiaries in substantially greater detail that this petition. A copy of this report can be furnished to the Court *in camera* upon request.

Kennedy Declaration, ¶ 70.

73. As the Liquidators' investigation continues, the relationships of the Funds, their operations, and potential claims against third parties are becoming clearer. Potential claims will be overseen, managed and resolved (by litigation or negotiation) by the Liquidators from the Cayman Islands, subject to oversight by the Grand Court. *Kennedy Declaration*, ¶ 71.

74. As a result, not only is the management of the Funds being conducted by the Liquidators from within the Cayman Islands, but the key aspects of the Funds' management are subject to the orders and jurisdiction of the Grand Court. *Leontsinis Declaration*, ¶ 48.

RELIEF SOUGHT

75. By this Verified Petition, the Liquidators seek the following relief:

- Recognition of the Cayman Liquidations as foreign main proceedings, or in the alternative, foreign nonmain proceedings, pursuant to Chapter 15 of the Bankruptcy Code, and Petitioners as the Funds' foreign representatives under sections 1509 and 1517 of the Bankruptcy Code; and
- Relief pursuant to sections 1520 and 1521 of the Bankruptcy Code.

BASIS FOR RECOGNITION

76. Section 1517 of the Bankruptcy Code mandates entry of an order recognizing a "foreign proceeding" if it appears that recognition will not undermine U.S. public policy and: "(1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign non-main proceeding within the meaning of section 1502; (2) the foreign representative applying for recognition is a person or body; and (3) the petition meets the requirements of section 1515." 11 U.S.C. § 1517(a).

77. Each of those requirements is met here, and entry of an order substantially in the form attached hereto as **Exhibit A** will significantly aid the Liquidators' efforts to administer the Funds' assets and liabilities, and ensure a fair and equitable treatment of and greater distributions to the Funds' creditors and interest holders.

I. The Cayman Liquidations Are Foreign Proceedings and the Liquidators Are Foreign Representatives.

78. Section 101(23) of the Bankruptcy Code defines a foreign proceeding as:

> a collective judicial or administrative proceeding in a foreign country,

> including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

11 U.S.C. § 101(23). This definition incorporates the term foreign representative, which the Bankruptcy Code in turn defines as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24). The Liquidators and the Cayman Liquidations undoubtedly satisfy each of these requirements.

79. First, the Cayman Liquidations are judicial proceedings in a foreign country, the Cayman Islands, subject to the control and supervision of the Grand Court. *Leontsinis Declaration*, ¶ 42. All claims against the Funds may be submitted in the Cayman Liquidations and all claimants have the right to access the Grand Court and appeal decisions of the Liquidators. *Kennedy Declaration*, ¶ 52.

80. Second, the Cayman Liquidations are being conducted by the Liquidators, who were appointed by the Grand Court pursuant to the Companies Law as joint liquidators to oversee the winding up of the Funds according to the provisions of the Companies Law. *Leontsinis Declaration*, ¶ 44. As such, each of the Liquidators is a "person authorized in a foreign proceeding to administer the reorganization or the liquidation of [the Funds'] assets or affairs," within the meaning of section 101(24).

81. Third, the relevant portions of the Companies Law and related rules that govern the Cayman Liquidations specifically relate to proceedings in the Cayman Islands concerning "insolvency or adjustment of debt." 11 U.S.C. § 101(23); *Leontsinis Declaration*, ¶ 28.

82. Finally, the Cayman Liquidations are "collective … proceeding[s]" because they "consider[] the rights and obligations of all creditors." *See, e.g., In re Ashapura Minechem Ltd.*, No.

11-14668 (JMP) (Bankr. S.D.N.Y. Nov. 22, 2011) (quoting *In re Betcorp Ltd.*, 400 B.R. 266, 281 (Bankr. D. Nev. 2009)); *In re Gold & Honey, Ltd.*, 410 B.R. 357, 370 (Bankr. E.D.N.Y. 2009) (citations omitted). Pursuant to the Liquidation Orders and the Companies Law, the Cayman Liquidations and the Liquidators' management of the Funds' assets and affairs are subject to the supervision and control of the Grand Court. *Leontsinis Declaration*, ¶ 48. In addition to the urgent business discussed above, the Liquidators currently are in the process of assessing claims from all of the Funds' creditors and collecting claims against current and contingent debtors in respect of the Funds, have met with the Funds' stakeholders, are well engaged in the process of liquidating the Funds' illiquid assets and hard assets, and have been working in a cooperative manner with federal investigations of the Funds. *Kennedy Declaration*, ¶¶ 56-71.

83. As discussed above, numerous courts in this and other districts have found that official liquidation proceedings brought pursuant to the Companies Law qualify as a "foreign proceeding," and that joint liquidators appointed and overseen by the Grand Court qualify as a "foreign representative" for purposes of section 101(23) and (24). *See, e.g., In re LDK Solar Co., Ltd.*, No. 14-12387 (PJW) (Bankr. D. Del. Nov. 21, 2014) (recognizing Cayman Islands liquidation as foreign main proceeding); *In re Saad Invs. Fin. Co. (No. 5) Ltd.*, No. 09-13985 (KG) (Bankr. D. Del. Dec. 17, 2009) (same); *In re Suntech Power Holdings Co., Ltd.*, 520 B.R. 399 (Bankr. S.D.N.Y. 2014) (commencement of provisional Cayman proceedings, together with subsequent activities of liquidators had the effect of transferring holding company's COMI to Cayman); *In re Millard*, 501 B.R. 644, 647 (Bankr. S.D.N.Y. 2013) (individual bankruptcies before Cayman Grand Court); *In re AJW Offshore Ltd.*, Case No. 13-70078, (Bankr. E.D.N.Y. Feb. 5, 2013); *In re Bancredit Cayman Ltd. (in Liquidation)*, No. 06-11026 (SMB) (Bankr. S.D.N.Y. Nov. 2, 2007).

84. In addition, courts have found that provisional liquidation proceedings brought pursuant to the Companies Law qualify as a "foreign proceeding." *See, e.g.*, *In re Suntech Power Holdings Co., Ltd.,* 520 B.R. 399 (Bankr. S.D.N.Y. 2014); *In re Vitro S.A.B. de CV*, 701 F.3d 1031 (5th Cir. 2012).

85. For the foregoing reasons, the Cayman Liquidations are "foreign proceedings" within the meaning of section 1517(a)(1) of the Bankruptcy Code.

II. The Cayman Liquidations are Foreign Main Proceedings.

86. The Cayman Liquidations are "foreign main proceedings" within the meaning of section 1502(4) of the Bankruptcy Code because the Funds' COMI is in the Cayman Islands. *Kennedy Declaration*, ¶¶ 46-72. The Bankruptcy Code defines a "foreign main proceeding" as "a foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502(4). A foreign proceeding "shall be recognized" as a foreign main proceeding if it is pending where the debtor has its COMI. *See* 11 U.S.C. § 1517(b)(1).

87. Although the Bankruptcy Code does not define "center of main interests," pursuant to section 1516(c) of the Bankruptcy Code, in the absence of evidence to the contrary, the debtor's registered office, which in this case is the Cayman Islands, is presumed to be its COMI. 11 U.S.C. §1516(c). *See also In re ABC Learning Centres Ltd.*, 445 B.R. 318, 333 (Bankr. D. Del. 2010) (holding that debtor's registered jurisdiction was its COMI where debtor established the section 1516 presumption, and no evidence was presented rebutting that presumption).

88. Here, the registered offices of both of the Funds are in the Cayman Islands, and have been since the time of formation of both of the Funds. *Kennedy Declaration*, ¶ 11. Further, there is no contrary evidence to rebut the resulting presumption that the Cayman Islands is the Funds' COMI.

89. As discussed in detail above, although the Funds were formed as "exempt" companies, they nevertheless maintained their registered offices in the Cayman Islands even before the

commencement of the Cayman Liquidations, and their documents and other correspondence made it clear that each of the Funds was a Cayman Islands company registered with CIMA. *Kennedy Declaration*, ¶¶ 10-11.

90. In any case, a foreign debtor's COMI is determined at the time the Chapter 15 petition is filed. *In re Fairfield Sentry Ltd.,* 714 F.3d 127, 137 (2d Cir. 2013) ("a debtor's COMI should be determined based on its activities at or around the time the Chapter 15 petition is filed, as the statutory text suggests."); *In re Millennium Global Emerging Credit Master Fund Limited,* 458 B.R. 63 (Bankr. S.D.N.Y. 2011) (describing same COMI test in respect of similar Bermuda fund structure). Where, as here, a debtor has engaged in substantial restructuring efforts and related activities prior to the filing of the Chapter 15 petition, courts will consider such activities in the determination of the debtor's COMI. *Fairfield Sentry Ltd.*, 714 F.3d at 137.

91. On this basis, numerous similar offshore funds and structures have been recognized by courts in various jurisdictions as foreign main proceedings pursuant to Chapter 15. *See, e.g., In re Niton Fund SPC*, 15-13252 (SMB) (Bankr. S.D.N.Y.) (Wright/Kennedy as Liquidators); *In re Madison Niche Assets Fund, Ltd., et. al.,* 16-10043 (KJC) (Bankr. D. Del.) (Wright/Kennedy as Liquidators); *In re Richcourt Euro Strategies Inc., et. al,* 15-12273 (REG) (Bankr. S.D.N.Y) (Wright as Liquidator); *In re Tranen Capital Alternative Investment Fund Ltd.,* No. 15-12620 (Bankr. S.D.N.Y. Oct. 29, 2015) (recognizing liquidation of British Virgin Island Fund structure as a foreign main proceeding); *In re Lawndale Group S.A.,* No. 15-11352 (SCC) (Bankr. S.D.N.Y. July 6, 2015) (recognizing liquidation of British Virgin Islands entity as foreign main proceeding); *In re Pioneer Freight Futures*, No. 13-12324 (Bankr. S.D.N.Y. Aug. 23, 2013) (recognizing British Virgin Islands liquidation proceeding as foreign main proceeding); *In re Farenco Shipping Co. Ltd.,* No. 11-14138 (REG) (Bankr. S.D.N.Y Feb. 24, 2012) (same); *see also In re British American Isle of Venice (BVI), Ltd.*, 441 B.R. 713 (Bankr.

S.D. Fla. 2010) (recognition of offshore funds as foreign main proceedings); *In re Grand Prix Assocs., Inc.*, No. 09-16545 (DHS), (Bankr. D.N.J. May 18, 2009) (same); *In re Saad Invs. Fin. Co. (No. 5) Ltd.*, No. 09-13985 (KG) (Bankr. D. Del. Dec. 17, 2009) (Cayman fund).

92. In addition to the presumption provided under section 1516, courts consider any relevant factors, including: (i) the location of the debtor's assets; (ii) the location of the debtor's books and records; (iii) the location of the majority of the debtor's creditors; (iv) the commercial expectations and knowledge of the debtor's creditors; and (v) the location of those who actually manage the debtor. *See, e.g., In re Suntech Power Holdings Co., Ltd.*, 520 B.R. at 416; *In re Grand Prix Assocs.*, No. 09-16545, 2009 WL 1410519, at *22 (Bankr. D.N.J. May 18, 2009). These factors, however, are not dispositive or exclusive, and none of the factors are required. *See In re Fairfield Sentry Ltd.*, 714 F.3d at 137-38. Further, courts have also looked to whether a Chapter 15 debtor's COMI would have been readily ascertainable to parties in interest, such as the debtor's creditors. *See Grand Prix Assocs.*, 2009 WL 1410519, at *6.

93. Applying the foregoing factors to this case, there is no doubt that the Funds' COMI is the Cayman Islands. Substantial assets of the Funds are located in and overseen from the Cayman Islands and the Liquidators are operating and overseeing the winding up and liquidation of the Funds, including negotiating various transactions and overseeing several pending litigations from the Cayman Islands, as discussed above. *Kennedy Declaration*, ¶ 70. The Liquidators are investigating the Funds' intangible rights in the form of potential claims, liabilities, and regulatory violations, which is and will continue to be controlled and coordinated by the Liquidators from the Cayman Islands. *Kennedy Declaration*, ¶ 53. Based on the documentation issued both by and to the Funds, the partner and corporate meetings, statutory demands and resolutions to wind up the Funds, shareholder meetings and the Funds' liquidations, all of which focused on the Cayman Islands, it is clear that all relevant

creditors, stakeholders, and shareholders regard the Funds to be Cayman Islands companies and that all relevant persons, entities, investors, creditors and counter-parties regard the Cayman Islands to be the "nerve center" of the Funds. *Kennedy Declaration*, ¶ 51.

94. Since the commencement of the Cayman Liquidations, substantially all activities associated therewith have been conducted and/or overseen by the Liquidators from the Cayman Islands, including the ongoing operation of the Funds' assets and activities as a going concern. Among other things, the Liquidators have overseen and filed all necessary notices and displaced the prior management of the Funds and assumed their duties, are engaged in the process of investigating and assessing the claims of the Funds and their creditors and interest holders, and of gathering information about the operation and management of the Funds' businesses before the Cayman Liquidations, and are engaged in discussions with creditors and interest holders. *Kennedy Declaration*, ¶¶ 56-71.

95. The *Suntech* opinion issued by this Court is instructive. In *Suntech*, the Court held that the activities of a Cayman provisional liquidator were sufficient to establish the Cayman Islands as the debtor's COMI, even though the debtor's principal place of business prior to foreign liquidation was in China. *In re Suntech Power Holdings Co., Ltd.,* 520 B.R. at 419.

96. A primary factor in this Court's COMI analysis for *Suntech* was the provisional liquidator's active involvement in managing the debtor fund's subsidiaries. As set forth above, the Liquidators have been continuously working on managing the Master Fund's subsidiaries. In *Suntech*, day to day operations of the debtor fund was left to a board of directors, while the Liquidators in this case have absolute management control over the Funds subject to the supervision of the Grand Court. *In re Suntech Power Holdings Co., Ltd.,* 520 B.R. at 417.

97. As set forth in detail in paragraphs 53-75 above, as well as in the accompanying Kennedy Declaration, It is respectfully submitted that the level of liquidation and ongoing business

activity in this case substantially exceeds what this Court and other Courts have previously found sufficient to establish COMI.

98. Under the circumstances, the Liquidators submit that there is ample evidence and precedent to support recognition of the Cayman Liquidations as foreign main proceedings.

III. Alternatively, the Cayman Liquidations Should Be Recognized as Foreign Non-Main Proceedings.

99. As set forth above, the Cayman Liquidations meet the requirements of a "foreign main proceeding" pursuant to section 1502 of the Bankruptcy Code. Nevertheless, should the Court determine that the Cayman Liquidations should not be recognized as foreign main proceedings, the Liquidators submit that, in the alternative, the Cayman Liquidations should be recognized as foreign nonmain proceedings under sections 1517(b)(2) and 1502(5) of the Bankruptcy Code.

100. Section 1502(5) of the Bankruptcy Code defines a foreign nonmain proceeding as "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment." 11 U.S.C. § 1502(5). In turn, "establishment" is defined by section 1502(2) as being "any place of operations where the debtor carries out nontransitory economic activity." 11 U.S.C. § 1502(2). The "establishment" requirement is satisfied by the local conduct of business. *See In re Fairfield Sentry Ltd.*, No. 10-13164, 2011 WL 4357421 at *10 n.8 (S.D.N.Y. Sept. 16, 2011) ("This Court agrees with the Bankruptcy Court that if main recognition were not granted, non-main recognition of Sentry's BVI Proceeding would be appropriate because Sentry has an establishment in the BVI for the conduct of nontransitory economic activity, i.e. a local place of business.").

101. The Liquidators respectfully submit that, at a minimum, their activities in the Cayman Islands constitute non-transitory economic activity. *Kennedy Declaration*, ¶ 46. The Liquidators are continuing the remaining business of the Funds as part of the winding-up of the Funds' affairs from the

Liquidators' offices in the Cayman Islands. *Kennedy Declaration*, ¶ 52. There is no foreign or domestic insolvency proceeding other than the Cayman Liquidation. *Kennedy Declaration*, ¶ 73.

102. As such, there can be no dispute that the Cayman Liquidations are legitimate insolvency proceedings. Under the circumstances, and given that the Funds' ongoing business activities are being conducted from the Cayman Islands, at a minimum this Court should recognize the Cayman Liquidations as foreign nonmain proceedings pursuant to Chapter 15 and further, to grant the Liquidators the discretionary relief requested.

IV. The Cayman Liquidations Meet All Other Requirements for Recognition.

103. In addition to being foreign main (or nonmain) proceedings brought by duly appointed foreign representatives, the Cayman Liquidations meet all other requirements for recognition under section 1515 of the Bankruptcy Code. The Petition is accompanied by certified copies of the Liquidation Orders issued by the Grand Court, which evidence the commencement of the Cayman Liquidations and the appointment of the Liquidators as joint liquidators of the Funds. The Petition also is accompanied by a declaration that contains a statement identifying all foreign proceedings with respect to the Funds that are known to the Liquidators. *See* 11 U.S.C. §§ 1515(b), (c); *see also Kennedy Declaration*, ¶ 73.

104. The Petition likewise is accompanied by a declaration containing the information required by Bankruptcy Rule 1007, including the disclosures required by Bankruptcy Rule 7007.1, a statement indicating that there are no other persons or entities known to the Liquidators that are authorized to administer foreign proceedings with respect to the Funds, and a list of all parties to litigation with the Funds in the United States. *See Kennedy Declaration*, ¶ 74, Exhibit E. All documents supporting the Petition are in English. *See* 11 U.S.C. § 1515(d).

105. For all of these reasons, this Court can and should find that all of the requirements for recognition of the Cayman Liquidations as foreign main proceedings under Chapter 15 have been satisfied.

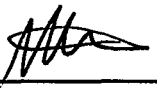
[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

CONCLUSION

WHEREFORE, the Liquidators respectfully request that this Court enter an Order, substantially in the form of **Exhibit A** to this Petition, granting the relief requested herein and such other and further relief as may be just and proper.

Dated: October 17, 2016
New York, New York

HOLLAND & KNIGHT LLP



Warren E. Gluck, Esq.
Barbra R. Parlin, Esq.
Arthur E. Rosenberg, Esq.
31 West 52nd Street
New York, New York 10019
Telephone: (212) 513-3200
Facsimile: (212) 385-9010

Counsel for the Liquidators of the Funds

VERIFICATION

Pursuant to 28 U.S.C. § 1746, Christopher Barnett Kennedy declares as follows:

My colleague Matthew James Wright and I are the duly appointed joint provisional Liquidators (the "**Liquidators**") of Platinum Partners Value Arbitrage Fund L.P. (in Provisional Liquidation) and duly appointed joint official liquidators of Platinum Partners Value Arbitrage Fund (International) Ltd. (in Official Liquidation), both of which are in liquidation by way of the Financial Services Division of the Grand Court of the Cayman Islands (the "**Grand Court**") cause nos. FSD 131 of 2016 (AJJ) (re the Master Fund) and 118 of 2016 (AJJ) (re the International Fund)) as a result of the Grand Court's orders made pursuant to certain petitions for the Grand Court's supervision under section 92 of the Companies Law of the Cayman Islands (2013 Revision). I have full authority to verify the foregoing *Verified Petition for Recognition of Foreign Insolvency Proceedings and Application for Additional Relief, Pursuant to Sections 1504, 1509, 1515, 1517, 1520 and 1521 of the Bankruptcy Code* (the "**Verified Petition**"). I have read the Verified Petition, am informed, and believe that the allegations contained therein are true and accurate to the best of my knowledge, information, and belief.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 18th day of October, 2016, in Grand Cayman Cayman Islands

Christopher Barnett Kennedy
Provisional Liquidator Platinum Partners Value Arbitrage Fund L.P. (in Provisional Liquidation) and Official Liquidator Platinum Partners Value Arbitrage Fund (International) Ltd. (in Official Liquidation)

Exhibit A

Proposed Order

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 15
PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (IN PROVISIONAL LIQUIDATION),[1] *et al.*,	:	Case No. 16-_____ (___)
	:	(Jointly Administered)
Debtors in Foreign Proceedings.	:	

ORDER GRANTING RECOGNITION AND RELIEF IN AID OF A FOREIGN MAIN PROCEEDING PURSUANT TO SECTIONS 1504, 1509, 1515, 1517, 1520 AND 1521 OF THE BANKRUPTCY CODE

Matthew James Wright and Christopher Barnett Kennedy, duly appointed joint provisional liquidators ("**Petitioners**" or "**Liquidators**") of Platinum Partners Value Arbitrage Fund L.P. (in Provisional Liquidation) ("**Master Fund**") and the duly appointed joint official liquidators of Platinum Partners Value Arbitrage Fund (International) Ltd. (in Official Liquidation) ("**International Fund**" and together with Master Fund, the "**Funds**"), both Funds in liquidation by way of the Financial Services Division of the Grand Court of the Cayman Islands (the "**Grand Court**") (cause nos. FSD 131 of 2016 (AJJ) (Master Fund) and 118 of 2016 (AJJ) (International Fund)) as a result of the Grand Court's orders (the "**Liquidation Orders**") made pursuant to petitions for the winding up of the Funds under, as applicable, sections 92 and 104 of the Companies Law of the Cayman Islands (2016 Revision) (the "**Companies Law**") and

[1] The last four digits of the United States Tax Identification Number, or similar foreign identification number, as applicable, follow in parentheses: Platinum Partners Value Arbitrage Fund L.P. (in Provisional Liquidation) (1954) and Platinum Partners Value Arbitrage Fund (International) Ltd. (in Official Liquidation) (2356). The registered office of the International Fund is c/o The R&H Trust Co. Ltd., Windward 1, Regatta Office Park, P.O. Box 897, Grand Cayman KY1-1103, Cayman Islands. The Master Fund's registered address is c/o Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman, KY1-9005, Cayman Islands.

section 36 of the Exempted Limited Partnership Law, 2014 ("**ELP Law**") (collectively, the "**Cayman Liquidations**"), by its United States counsel, Holland & Knight LLP, filed Official Form Petitions, the *Verified Petition for Recognition of Foreign Insolvency Proceedings and Application for Additional Relief, Pursuant to Sections 1504, 1509, 1515, 1517, 1520 and 1521 of the Bankruptcy Code* (the "**Verified Petition**,"[2] and, together with the Official Form Petitions, the "**Petition**"), and the accompanying Kennedy Declaration, Leontsinis Declaration, and Gluck Declaration, seeking relief pursuant to chapter 15 of the Bankruptcy Code; and upon due consideration of the Petition, Kennedy Declaration, Leontsinis Declaration and the Gluck Declaration, together with all exhibits thereto, in support of the Petition, and a hearing having been held on _____, 2016 the evidence put on the record at the Hearing; and appropriate and timely notice of the filing of the Petition and the Hearing thereon having been given by the Liquidators, pursuant to section 1514 of the Bankruptcy Code; and such notice having been adequate and sufficient for all purposes; and no other or further notice being necessary or required; and no objections or other responses having been filed that have not been overruled, withdrawn or otherwise resolved; and all interested parties having had an opportunity to be heard at the Hearing; and after due deliberation and sufficient cause appearing therefore, the Court makes the following findings of fact and conclusions of law:

A. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and 11 U.S.C. §§ 109 and 1501 and the *Amended Standing Order of Reference* from the United States District Court for the Southern District of New York dated February 1, 2012.

[2] Capitalized terms used, but not otherwise defined herein shall have the meanings given to them in the Verified Petition.

B. Venue of this proceeding is proper in this judicial district pursuant to 28 U.S.C. § 1410 (2) because there is an action pending against the Funds within this judicial district, and the Court may enter a final order consistent with Article III of the United States Constitution.

C. This is a core proceeding under 28 U.S.C. § 157(b)(2)(P).

D. The Liquidators are the "foreign representatives" of the Funds pursuant to 11 U.S.C. § 101(24).

E. The chapter 15 cases of the Funds were properly commenced pursuant to 11 U.S.C. §§ 1504, 1509 and 1515.

F. The Liquidators have satisfied the requirements of 11 U.S.C. § 1515 and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure.

G. The Cayman Liquidations are "foreign proceedings" pursuant to 11 U.S.C. § 101(23).

H. The Cayman Liquidations are entitled to recognition by this Court pursuant to 11 U.S.C. § 1517.

I. The Cayman Liquidations are pending in the Cayman Islands, the country where the Funds' center of main interests is located, and accordingly the Cayman Liquidations are foreign main proceedings pursuant to 11 U.S.C. § 1502(4), and are entitled to recognition as foreign main proceedings pursuant to 11 U.S.C. § 1517(b)(1).

J. The Liquidators are entitled to all of the relief provided under 11 U.S.C. § 1520 and 1521 without limitation.

K. The relief granted hereby is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, and warranted pursuant to 11 U.S.C. §§ 1507, 1517, 1520 and 1521.

NOW, THEREFORE, IT IS HEREBY

1. **ORDERED**, that the Petition is granted as set forth herein;

2. **ORDERED**, that the Cayman Liquidations are recognized as foreign main proceedings pursuant to 11 U.S.C. §§ 1517(a) and (b)(1);

3. **ORDERED**, that all persons and entities (other than the Liquidators and their expressly authorized representatives and agents) are hereby enjoined, except as provided in 11 U.S.C. §§ 555 through 557, 559 through 562, 1520 and 1521 or as modified herein, from:

(1) executing against the Funds' property or assets;

(2) taking or continuing any act to obtain possession of, or exercise control over, the Liquidators (with respect to the Funds), the Funds, or any of the Funds' property or assets;

(3) taking or continuing any act to create, perfect or enforce a lien or other security interest, set-off or other claim against the Liquidators (with respect to the Funds), the Funds or any of the Funds' property or assets as of the date of the filing of the Petition, or otherwise seeking the issuance of or issuing any restraining notice or other process or encumbrance with respect to the Funds or any of the Funds' property or assets; and

(4) transferring, relinquishing or disposing of any property of the Funds to any person or entity other than the Liquidators;

and it is further

4. **ORDERED**, that 11 U.S.C. § 1520(a) shall be effective with respect to the Cayman Liquidations; and it is further

5. **ORDERED**, that 11 U.S.C. § 1521(a)(1-3) shall be effective with respect to the Cayman Liquidations and/or the stay, as provided for by Section 97(1) of the Companies Law, shall be effective in the United States of America pursuant to 11 U.S.C. § 1507; and it is further

6. **ORDERED**, that the Liquidators or any third person acting pursuant to the Liquidators' instructions or agreement may transfer funds or property belonging to the Funds

into or out of the United States of America in accordance with their respective obligations to the Funds or under the Cayman Liquidations; and it is further

7. **ORDERED**, that the Liquidators are hereby authorized to examine witnesses, take evidence, and seek the production of documents within the territorial jurisdiction of the United States concerning the assets, affairs, rights, obligations or liabilities of the Funds, the Funds affiliates and the Funds' subsidiaries by:

a. issuing discovery requests to intermediary banks that process U.S. dollar-denominated wire transfers and maintain records of such transfers;

b. upon written request, obtaining turnover of any and all documents, records, filings, or other information, however stored, including but not limited to emails that are property of, concern or were made or issued on behalf of the Funds, from any person or entity subject to this Court's jurisdiction; and

c. upon service of this order, prohibiting all persons and entities subject to the jurisdiction of this Court from destroying, secreting, altering, deleting or otherwise disposing of any electronic data, documents, records, filings, or other information, however stored, concerning or relating to the assets, affairs, rights, obligations or liabilities of the Funds; and it is further

8. **ORDERED**, that the Liquidators are authorized to operate the business of the Funds that is the subject of Cayman Liquidations and may exercise the powers of a trustee under and to the extent provided by 11 U.S.C. §§ 1520 and 1521; and it is further

9. **ORDERED**, that the Liquidators are hereby granted authority to assert claims of the Funds against parties that are subject to jurisdiction in the United States of America; and it is further

10. **ORDERED**, that the administration or realization of all or part of the assets of the Funds within the territorial jurisdiction of the United States of America is hereby entrusted to the Liquidators and the Liquidators are hereby established as the exclusive representatives of the Funds in the United States of America; and it is further

11. **ORDERED**, that this Court retains jurisdiction with respect to the enforcement, amendment or modification of this Order, any requests for additional relief or any adversary proceeding brought in and through these chapter 15 cases, and any request by an entity for relief from the provisions of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Court; and it is further

12. **ORDERED**, that, notwithstanding Bankruptcy Rule 7062, made applicable to these chapter 15 cases by Bankruptcy Rule 1018, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry, and upon its entry, this Order shall become final and appealable.

Dated:

_____, 2016

_____
United States Bankruptcy Judge
Southern District of New York

ITEM NO. 128

JA-14

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 15
PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (IN PROVISIONAL LIQUIDATION),[1] *et al.*,	:	Case No. 16-12925 (SCC)
	:	(Jointly Administered)
Debtors in Foreign Proceedings.	:	

ORDER GRANTING RECOGNITION AND RELIEF IN AID OF A FOREIGN MAIN PROCEEDING PURSUANT TO SECTIONS 1504, 1509, 1515, 1517, 1520 AND 1521 OF THE BANKRUPTCY CODE

Matthew James Wright and Christopher Barnett Kennedy, duly appointed joint official liquidators ("**Petitioners**" or "**Liquidators**") of Platinum Partners Value Arbitrage Fund L.P. (in Provisional Liquidation) ("**Master Fund**") and the duly appointed joint official liquidators of Platinum Partners Value Arbitrage Fund (International) Ltd. (in Official Liquidation) ("**International Fund**" and together with Master Fund, the "**Funds**"), both Funds in liquidation by way of the Financial Services Division of the Grand Court of the Cayman Islands (the "**Grand Court**") (cause nos. FSD 131 of 2016 (AJJ) (Master Fund) and 118 of 2016 (AJJ) (International Fund)) as a result of the Grand Court's orders (the "**Liquidation Orders**") made pursuant to petitions for the winding up of the Funds under, as applicable, sections 92 and 104 of the Companies Law of the Cayman Islands (2016 Revision) (the "**Companies Law**") and section

[1] The last four digits of the United States Tax Identification Number, or similar foreign identification number, as applicable, follow in parentheses: Platinum Partners Value Arbitrage Fund L.P. (in Provisional Liquidation) (1954) and Platinum Partners Value Arbitrage Fund (International) Ltd. (in Official Liquidation) (2356). The registered office of the International Fund is c/o The R&H Trust Co. Ltd., Windward 1, Regatta Office Park, P.O. Box 897, Grand Cayman KY1-1103, Cayman Islands. The Master Fund's registered address is c/o Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman, KY1-9005, Cayman Islands.

36 of the Exempted Limited Partnership Law, 2014 ("**ELP Law**") (collectively, the "**Cayman Liquidations**"), by its United States counsel, Holland & Knight LLP, filed Official Form Petitions, the *Verified Petition for Recognition of Foreign Insolvency Proceedings and Application for Additional Relief, Pursuant to Sections 1504, 1509, 1515, 1517, 1520 and 1521 of the Bankruptcy Code* (the "**Verified Petition**,"[2] and, together with the Official Form Petitions, the "**Petition**"), and the accompanying Kennedy Declaration, Leontsinis Declaration, and Gluck Declaration, seeking relief pursuant to chapter 15 of the Bankruptcy Code; and upon due consideration of the Petition, Kennedy Declaration, Leontsinis Declaration and the Gluck Declaration, together with all exhibits thereto, in support of the Petition, and hearing no objections thereto, and a hearing having been held on November 21, 2016 the evidence put on the record at the Hearing; and appropriate and timely notice of the filing of the Petition and the Hearing thereon having been given by the Liquidators, pursuant to section 1514 of the Bankruptcy Code; and such notice having been adequate and sufficient for all purposes; and having been updated pursuant to Section 1518 of the Bankruptcy Code, and no other or further notice being necessary or required; and no objections or other responses having been filed that have not been overruled, withdrawn or otherwise resolved; and all interested parties having had an opportunity to be heard at the Hearing; and after due deliberation and sufficient cause appearing therefore, the Court makes the following findings of fact and conclusions of law:

A. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and 11 U.S.C. §§ 109 and 1501 and the *Amended Standing Order of Reference* from the United States District Court for the Southern District of New York dated February 1, 2012.

[2] Capitalized terms used, but not otherwise defined herein shall have the meanings given to them in the Verified Petition.

B. Venue of this proceeding is proper in this judicial district pursuant to 28 U.S.C. § 1410 (2) because there is an action pending against the Funds within this judicial district, and the Court may enter a final order consistent with Article III of the United States Constitution.

C. This is a core proceeding under 28 U.S.C. § 157(b)(2)(P).

D. The Liquidators are the "foreign representatives" of the Funds pursuant to 11 U.S.C. § 101(24).

E. The chapter 15 cases of the Funds were properly commenced pursuant to 11 U.S.C. §§ 1504, 1509 and 1515.

F. The Liquidators have satisfied the requirements of 11 U.S.C. § 1515 and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure.

G. The Cayman Liquidations are "foreign proceedings" pursuant to 11 U.S.C. § 101(23).

H. The Cayman Liquidations are entitled to recognition by this Court pursuant to 11 U.S.C. § 1517.

I. The Cayman Liquidations are pending in the Cayman Islands, the country where the Funds' center of main interests is located, and accordingly the Cayman Liquidations are foreign main proceedings pursuant to 11 U.S.C. § 1502(4), and are entitled to recognition as foreign main proceedings pursuant to 11 U.S.C. § 1517(b)(1).

J. The Liquidators are entitled to all of the relief provided under 11 U.S.C. § 1520 and 1521 without limitation.

K. The relief granted hereby is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, and warranted pursuant to 11 U.S.C. §§ 1507, 1517, 1520 and 1521.

NOW, THEREFORE, IT IS HEREBY

1. **ORDERED**, that the Petition is granted as set forth herein;

2. **ORDERED**, that the Cayman Liquidations are recognized as foreign main proceedings pursuant to 11 U.S.C. §§ 1517(a) and (b)(1);

3. **ORDERED**, that all persons and entities (other than the Liquidators and their expressly authorized representatives and agents) are hereby enjoined, except as provided in 11 U.S.C. §§ 555 through 557, 559 through 562, 1520 and 1521 or as modified herein, from:

(1) executing against the Funds' property or assets;

(2) taking or continuing any act to obtain possession of, or exercise control over, the Liquidators (with respect to the Funds), the Funds, or any of the Funds' property or assets;

(3) taking or continuing any act to create, perfect or enforce a lien or other security interest, set-off or other claim against the Liquidators (with respect to the Funds), the Funds or any of the Funds' property or assets as of the date of the filing of the Petition, or otherwise seeking the issuance of or issuing any restraining notice or other process or encumbrance with respect to the Funds or any of the Funds' property or assets; and

(4) transferring, relinquishing or disposing of any property of the Funds to any person or entity other than the Liquidators;

and it is further

4. **ORDERED**, that 11 U.S.C. § 1520(a) shall be effective with respect to the Cayman Liquidations; and it is further

5. **ORDERED**, that 11 U.S.C. § 1521(a)(1-3) shall be effective with respect to the Cayman Liquidations and/or the stay, as provided for by Section 97(1) of the Companies Law, shall be effective in the United States of America pursuant to 11 U.S.C. § 1507; and it is further

6. **ORDERED**, that the Liquidators or any third person acting pursuant to the Liquidators' instructions or agreement may transfer funds or property belonging to the Funds

into or out of the United States of America in accordance with their respective obligations to the Funds or under the Cayman Liquidations; and it is further

7. **ORDERED**, that the Liquidators are hereby authorized to examine witnesses, take evidence, and seek the production of documents within the territorial jurisdiction of the United States concerning the assets, affairs, rights, obligations or liabilities of the Funds, the Funds affiliates and the Funds' subsidiaries by:

a. issuing discovery requests to intermediary banks that process U.S. dollar-denominated wire transfers and maintain records of such transfers;

b. upon written request, obtaining turnover of any and all documents, records, filings, or other information, however stored, including but not limited to emails that are property of, concern or were made or issued on behalf of the Funds, from any person or entity subject to this Court's jurisdiction; and

c. upon service of this order, prohibiting all persons and entities subject to the jurisdiction of this Court from destroying, secreting, altering, deleting or otherwise disposing of any electronic data, documents, records, filings, or other information, however stored, concerning or relating to the assets, affairs, rights, obligations or liabilities of the Funds; and it is further

8. **ORDERED**, that the Liquidators are authorized to operate the business of the Funds that is the subject of Cayman Liquidations and may exercise the powers of a trustee under and to the extent provided by 11 U.S.C. §§ 1520 and 1521; and it is further

9. **ORDERED**, that the Liquidators are hereby granted authority to assert claims of the Funds against parties that are subject to jurisdiction in the United States of America; and it is further

10. **ORDERED**, that the administration or realization of all or part of the assets of the Funds within the territorial jurisdiction of the United States of America is hereby entrusted to the Liquidators and the Liquidators are hereby established as the exclusive representatives of the Funds in the United States of America; and it is further

11. **ORDERED**, that this Court retains jurisdiction with respect to the enforcement, amendment or modification of this Order, any requests for additional relief or any adversary proceeding brought in and through these chapter 15 cases, and any request by an entity for relief from the provisions of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Court; and it is further

12. **ORDERED**, that, notwithstanding Bankruptcy Rule 7062, made applicable to these chapter 15 cases by Bankruptcy Rule 1018, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry, and upon its entry, this Order shall become final and appealable.

Dated:

November 22, 2016
New York, New York

/S/ Shelley C. Chapman
Honorable Shelley C. Chapman
United States Bankruptcy Judge

ITEM NO. 129

JA-15

HOLLAND & KNIGHT LLP
Warren E. Gluck, Esq.
Barbra R. Parlin, Esq.
Arthur E. Rosenberg, Esq.
31 West 52nd Street
New York, New York 10019
Telephone: (212) 513-3200
Facsimile: (212) 385-9010

Counsel for the Liquidators of the Funds

IN THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 15
PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (IN PROVISIONAL LIQUIDATION),[1] *et al.*,	:	Case No. 16-_____ (___)
	:	(Joint Administration Requested)
Debtors in Foreign Proceedings.	:	

DECLARATION OF WARREN E. GLUCK IN SUPPORT OF RECOGNITION OF FOREIGN INSOLVENCY PROCEEDINGS PURSUANT TO CHAPTER 15 OF THE BANKRUPTCY CODE

I, Warren E. Gluck, under penalty of perjury, declare as follows:

1. I am an attorney with the law firm of Holland & Knight LLP, counsel for Matthew James Wright and Christopher Barnett Kennedy, duly appointed joint provisional liquidators ("**Petitioners**" or "**Liquidators**") of Platinum Partners Value Arbitrage Fund L.P. (in

[1] The last four digits of the United States Tax Identification Number, or similar foreign identification number, as applicable, follow in parentheses: Platinum Partners Value Arbitrage Fund L.P. (in Provisional Liquidation) (1954) and Platinum Partners Value Arbitrage Fund (International) Ltd. (in Official Liquidation) (2356). The registered office of the International Fund is c/o The R&H Trust Co. Ltd., Windward 1, Regatta Office Park, P.O. Box 897, Grand Cayman KY1-1103, Cayman Islands. The Master Fund's registered address is c/o Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town, Grand Cayman, KY1-9005, Cayman Islands.

Provisional Liquidation) ("**Master Fund**") and the duly appointed joint official liquidators of Platinum Partners Value Arbitrage Fund (International) Ltd. (in Official Liquidation) ("**International Fund**" and together with Master Fund, the "**Funds**"), both Funds in liquidation by way of the Financial Services Division of the Grand Court of the Cayman Islands (the "**Grand Court**") (cause nos. FSD 131 of 2016 (AJJ) (re the Master Fund) and 118 of 2016 (AJJ) (re the International Fund)) as a result of the Grand Court's orders (the "**Liquidation Orders**") made pursuant to petitions for the winding up of the Funds under, as applicable, sections 92 and 104 of the Companies Law of the Cayman Islands (2016 Revision) (the "**Companies Law**")[2] and section 36 of the Exempted Limited Partnership Law, 2014 ("**ELP Law**")[3] (collectively, the "**Cayman Liquidations**"). I am duly admitted to practice before the United States District Court for the Southern District of New York.

2. I respectfully submit this declaration in support of the Liquidators' Official Form Petitions and Verified Petition (together, the "**Petition**"), requesting entry of an order pursuant to chapter 15 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the "**Bankruptcy Code**").

3. Attached hereto as Exhibit A is the order recognizing as a main proceeding a Cayman Islands company liquidation in the case of *In re Bancredit Cayman Ltd. (in Liquidation)*, No. 06-11026 (SMB) (Bankr. S.D.N.Y. June 16, 2006).

4. Attached hereto as Exhibit B is a bench decision granting a petition for recognition of a foreign main proceeding and explaining the nature of collective proceedings for purposes of chapter 15 of the Bankruptcy Code (*i.e.*, that they consider the rights and obligations

[2] Excerpts of the relevant provisions of the Companies Law are attached as Exhibit A to the Leontsinis Declaration.
[3] Excerpts of the relevant provisions of the ELP Law are attached as Exhibit B to the Leontsinis Declaration.

of all creditors) in the case of *In re Ashapura Minechem Ltd.*, No. 11-14668 (JMP) (Bankr. S.D.N.Y. Nov. 22, 2011).

5. Attached as Exhibit C is the order recognizing as a foreign main proceeding the British Virgin Islands winding up and liquidation of an offshore fund similar in structure to the Funds in the case of *In re Tranen Capital Alternative Investment Fund Ltd.*, No. 15-12620 (Bankr. S.D.N.Y. Oct. 29, 2015).

6. Attached as Exhibit D is the order recognizing as a foreign main proceeding the British Virgin Islands liquidation of a similar offshore structure in the case of *In re Lawndale Group S.A.,* No. 15-11352 (SCC) (Bankr. S.D.N.Y. July 6, 2015).

7. Attached as Exhibit E is the order recognizing as a foreign main proceeding the British Virgin Islands liquidation of a similar offshore structure in the case of *In re Pioneer Freight Futures*, No. 13-12324 (Bankr. S.D.N.Y. Aug. 23, 2013).

8. Attached as Exhibit F is the order granting recognition of the British Virgin Islands liquidation of a similar offshore structure as a foreign main proceeding in the case of *In re Farenco Shipping Co. Ltd.,* No. 11-14138 (REG) (Bankr. S.D.N.Y Feb. 24, 2012).

9. Attached hereto as Exhibit G is the order recognizing as a main proceeding a Cayman Islands company liquidation in the case of *In re LDK Solar Co., Ltd.*, No. 14-12387 (PJW) (Bankr. D. Del. Nov. 21, 2014).

10. Attached hereto as Exhibit H is the order recognizing as a main proceeding a Cayman Islands company liquidation in the case of *In re Saad Invs. Fin. Co. (No. 5) Ltd.*, No. 09-13985 (KG) (Bankr. D. Del. Dec. 17, 2009).

11. Attached hereto as Exhibit I is the order recognizing as a main proceeding a liquidation of two affiliated Cayman Islands companies in the case of *In re Madison Niche*

Assets Fund, Ltd. (in official liquidation) et al., No. 16-10043 (KJC) (Bankr. D. Del. March 1, 2016).

12. Attached hereto as Exhibit J is the order recognizing as a main proceeding a Cayman Islands company liquidation in the case of *In re AJW Offshore Ltd.*, No. 13-70078, (Bankr. E.D.N.Y. Feb. 5, 2013).

13. Attached as Exhibit K is the order granting recognition of the British Virgin Islands liquidation of a similar offshore fund as a foreign main proceeding in the case of *In re Grand Prix Assocs., Inc.,* No. 09-16545 (DHS) (Bankr. D.N.J. May 18, 2009).

I declare under penalty of perjury that the foregoing is true and correct.

Dated: New York, New York
October 17, 2016

Warren E. Gluck

EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	
BANCREDIT CAYMAN LIMITED (IN LIQUIDATION)	Chapter 15
Debtor,	Case No. 06-11026 (SMB)

ORDER (1) GRANTING RECOGNITION OF FOREIGN MAIN PROCEEDING PURSUANT TO 11 U.S.C. § 1517; (2) GRANTING RELIEF AS OF RIGHT PURSUANT TO 11 U.S.C. § 1520; (3) GRANTING RELATED RELIEF; AND (4) SCHEDULING CONTINUED HEARING WITH RESPECT TO CERTAIN RELIEF REQUESTED UNDER 11 U.S.C. § 1521

Upon the Application and Verified Petition filed May 10, 2006 (the "Chapter 15 Petition") seeking recognition and related relief pursuant to Chapter 15 of title 11 of the United States Code (the "Bankruptcy Code"), of a foreign proceeding pending under cause number 171 of 2004 in the Grand Court of the Cayman Islands (the "Foreign Proceeding"), by Richard Fogerty and G. James Cleaver ("Petitioners"), as Joint Official Liquidators of Bancredit Cayman Limited (in Liquidation) ("Bancredit"); and due and timely notice of the filing of the Chapter 15 Petition and the hearing thereon having been given by Petitioners to the United States Trustee, any creditors in the United States, and to all parties to U.S. litigations in which Bancredit is a party (and their counsel, if known) by U.S. mail, and to the members of the Creditors Committee[1] by hand delivery, and to all other creditors by publication on the official Website at http://www.bancreditcayman-liquidation.ky/, in accord with this Court's Order approving notice provisions, entered May 12, 2006; and the Court having considered the Chapter 15 Petition and the exhibits attached thereto, and the Affidavit of Richard Fogerty and Affidavit of Aristotelis

[1] Capitalized terms not otherwise defined herein have the meaning given in the Chapter 15 Petition.

Galatopoulos; and a limited objection having been filed by GFN Corporation, Ltd. and its affiliates; and upon the record of the initial hearing held before this Court on June 15, 2006; and after due deliberation and sufficient cause appearing therefore, the Court makes the following findings of fact and conclusions of law:

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and 11 U.S.C. §§ 109 and 1501.

2. Venue of this proceeding is proper in this judicial district pursuant to 28 U.S.C. § 1410.

3. This is a core proceeding under 28 U.S.C. § 157(b)(2)(P).

4. The Petitioners are persons pursuant to 11 U.S.C. § 101(41) and are the duly appointed foreign representatives of Bancredit pursuant to 11 U.S.C. § 101(24).

5. The Chapter 15 case was properly commenced pursuant to 11 U.S.C. §§ 1504, 1509, and 1515.

6. Petitioners have met the requirements of 11 U.S.C. § 1515(b), §1515(c), and Rule 1007(a)(4) of the Interim Federal Rules of Bankruptcy Procedure.

7. The Foreign Proceeding pending under cause number 171 of 2004 in the Grand Court of the Cayman Islands, and the provisions made thereunder for the protection, administration and distribution of assets pursuant to the Liquidation Order, is a foreign proceeding pursuant to 11 U.S.C. § 101(23).

8. The Foreign Proceeding is entitled to recognition by this Court pursuant to 11 U.S.C. § 1517.

9. The Foreign Proceeding is pending in the country where the center of main interests of Bancredit is located and accordingly the Foreign Proceeding is a foreign main

proceeding pursuant to 11 U.S.C. § 1502(4), and is entitled to recognition as a foreign main proceeding pursuant to 11 U.S.C. § 1517(b)(1).

10. The Petitioners are entitled to the relief provided pursuant to 11 U.S.C. § 1520 and related relief to the extent set forth in this Order.

NOW, THEREFORE, IT IS HEREBY:

ORDERED, that the Foreign Proceeding is granted recognition pursuant to 11 U.S.C. § 1517(a); and it is further

ORDERED, that the Foreign Proceeding is granted recognition as a foreign main proceeding pursuant to 11 U.S.C. § 1517(b)(1); and it is further

ORDERED, that the Petitioners are granted the relief provided pursuant to 11 U.S.C. § 1520; and it is further

ORDERED, that Petitioners are authorized to continue the Remington Lawsuit and the Morales Lawsuit within the United States in furtherance of their activities as JOLs, and it is further

ORDERED, that Petitioners are authorized to operate the business of Bancredit that is the subject of the Foreign Proceeding and may exercise the powers of a trustee under and to the extent provided by 11 U.S.C. § 1520; and it is further

ORDERED, that this hearing shall be continued until **June 27, 2006 at 10:00 a.m.**, for consideration of that portion of the Chapter 15 Petition which requests certain relief pursuant to 11 U.S.C. § 1521 and the GFN Objection thereto; and it is further

ORDERED, that this Court shall retain jurisdiction with respect to the enforcement, amendment or modification of this Order; and it is further

ORDERED, that a copy of this Order, conformed to be true and correct, shall be served:

(a) by United States mail, first class postage prepaid, on or before **June 16, 2006**, upon the Debtor, all administrators in foreign proceedings of the Debtor, the Office of the United States Trustee, any creditors in the United States, and upon all parties to lawsuits currently pending in the United States to which Bancredit is a party (and their counsel, if known); and

(b) by international courier to an agent in the Dominican Republic that will deliver by hand to each of the members of the Committee of Creditors; and

(c) by posting on the official Website: http://www.bancreditcayman-liquidation.ky/ on or before **June 21, 2006**; and it is further

ORDERED, that such service shall be good and sufficient service and adequate notice for all purposes.

Dated: New York, New York
June 15, 2006

/s/ STUART M. BERNSTEIN
STUART M. BERNSTEIN
CHIEF UNITED STATES BANKRUPTCY JUDGE

Issued at: 3:45 p.m.

EXHIBIT B

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	Chapter 15
ASHAPURA MINECHEM LTD.,	)	Case No. 11-14668 (JMP)
Debtor in a Foreign Proceeding.	)	

BENCH DECISION GRANTING PETITION FOR RECOGNITION OF FOREIGN PROCEEDING[1]

APPEARANCES:

BAKER & MCKENZIE
Attorneys for Foreign Representative Ashapura Minechem Ltd.
1114 Avenue of the Americas
New York NY 10036
By: Ira A. Reid (argued)
Kathryn M. Ryan

EATON & VAN WINKLE LLP
Attorneys for Respondent Armada (Singapore) Pte Limited
3 Park Avenue
New York, NY 10016-2078
By: Robert K. Gross (argued)
Edward W. Floyd

FREEHILL HOGAN & MAHER, LLP
Attorneys for Respondent Eitzen Bulk A/S
80 Pine Street
New York, NY 10005
By: Michael E. Unger (argued)
Lawrence J. Kahn

[1] This is a slightly revised version of a bench ruling that was read into the record at a hearing held on November 21, 2011 – one business day following an evidentiary hearing that took place on November 18, 2011. This memorandum decision constitutes findings of fact and conclusions of law with respect to this contested Petition for Recognition. The Court has expedited its ruling on the petition in order to comply with the directive contained in Section 1517 of the Bankruptcy Code which provides that "a petition for recognition of a foreign proceeding shall be decided upon at the earliest possible time." 11 U.S.C. § 1517(c).

JAMES M. PECK
UNITED STATES BANKRUPTCY JUDGE:

The chapter 15 petition filed on October 4, 2011 by Chetan Shah ("Mr. Shah") in his capacity as foreign representative seeks recognition as a foreign main proceeding of an insolvency proceeding voluntarily commenced in India on May 31, 2011 by Ashapora Minechem Ltd. ("Ashapura"). Ashapura is a mining and industrial business headquartered in Mumbai, India. It is a public company whose shares are listed on the Bombay Stock Exchange. Mr. Shah is managing director of Ashapura, one of the company's most influential shareholders and an individual who has personally guaranteed obligations owed by Ashapura to its lenders. Mr. Shah has an undisguised personal economic motivation to protect his investment and personal exposure although it is not clear at this early stage of Ashapura's chapter 15 case whether that motivation may also conflict with his responsibilities as foreign representative.

The proceeding in India is pending before the Board for Industrial and Financial Reconstruction (the "BIFR"), an agency authorized to function as an administrative tribunal under the Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA"). There is no dispute that if this Court were to grant the petition for recognition it would be appropriate for Ashapura's proceeding under SICA (the "SICA Proceeding") to be recognized as a foreign main proceeding within the meaning of Section 1502(4) of the Bankruptcy Code. Ashapura is incorporated under the Indian Companies Act, its principal assets are in India, and it has its registered office in Mumbai. *See* 11 U.SC. § 1516(c). That India is the center of main interest for Ashapura is one of the few issues relating to recognition that is not in controversy.

The version of the SICA statute currently applicable to this SICA Proceeding has been repealed, but implementing legislation for a new and improved statute to replace it has not yet

been formally enacted. The unusual procedural posture presented is of a foreign insolvency case that is being administered in its home jurisdiction under the authority of an insolvency regime that appears to have been rejected by the Indian legislature as fundamentally flawed and inadequate but that is still functioning for the time being as a residual and apparently legitimate means, but not the only means, to obtain relief for companies like Ashapura that are in financial distress.

The anomaly here is that the foreign insolvency law applicable to this case is suspect and has been openly criticized as deficient and subject to abuse by thoughtful observers of Indian commercial law. These criticisms have led to repeal of the very same statute that governs Ashapura's SICA Proceeding. This largely discredited law will continue in force until the Indian legislature takes the necessary action to formally enable the new version of SICA to become effective. The reason for the delay in implementing the new law has not been adequately explained and is a curiosity that adds uncertainty to the current proceeding. Despite that uncertainty, there is no doubt that the SICA law in its original form is still being followed in India and, on its face, constitutes a law that relates to insolvency or adjustment of debt within the meaning of Section 101(23).

Mr. Shah's petition has been controverted vigorously by two of Ashapura's largest creditors, Armada (Singapore) Pte Limited ("Armada") and Eitzen Bulk A/S ("Eitzen") (collectively the "Objectors"). The Objectors have questioned Mr. Shah's motives, alleged conflict of interest and lack of good faith and have asserted that SICA does not satisfy the definition of a foreign proceeding in Section 101(23) as "a collective judicial or administrative proceeding…." 11 U.S.C. § 101(23). Armada also argues that the affairs of Ashapura are not subject to control or supervision within the meaning of that section.

Armada and Eitzen are shipping companies engaged in the international shipment of cargo. The Objectors are based respectively in Singapore and Denmark. Each has obtained judgments against Ashapora arising out of separate arbitration awards that were entered in their favor against Ashapura in London. The arbitrations sought substantial damages resulting from alleged breaches by Ashapura of certain maritime contracts relating to shipments of bauxite from India to foreign ports. For reasons that have been neither fully developed nor explained on the current record, Ashapora made the decision not to defend these arbitrations on grounds that the contracts should be treated as void under the doctrine of force majeure. Regardless of the merits of that legal position, Ashapura's conscious choice to ignore the arbitrations and not to defend them has proven to be a strategic error of colossal proportions.

The consequences of ignoring the arbitrations have been disastrous. The foreign debtor is exposed to judgments that together total more than $100 million and is involved in an ongoing fight with the Objectors in multiple tribunals, all in an effort to avoid the consequences of its own failure to deal with the arbitrations in a commercially reasonable manner or to engage the Objectors in good faith negotiations to resolve issues arising out of the underlying maritime contracts. Whether this results from arrogance, ignorance or simply a lack of good judgment on the part of Mr. Shah and his advisors is not clear. What does seem clear is that Ashapura unwisely adopted arbitration strategies that have resulted in massive judgments against the company that threaten its viability, and it now finds itself in the midst of a terribly nasty cross border fight for strategic advantage and ultimately for its own corporate survival.

The arbitration awards were converted into judgments against Ashapura in the United States and the Objectors are in the process of doing everything in their power to locate assets and collect on these judgments. For its part, Ashapora is trying hard to escape its obligations under these judgments that it belatedly asserts are substantially overstated in amount due to the failure

of the arbitration awards to reflect appropriate reductions based on the alleged obligation to mitigate damages. For purposes of the contested petition for recognition, the Court does not address the ability of Ashapura to now challenge the quantum of these judgments in the SICA Proceeding. Suffice it to say that the Objectors assert that the current chapter 15 case is the latest example of Ashapura's coordinated efforts to frustrate their rights as judgment creditors and is another indication that Mr. Shah and Ashapura are not acting in good faith.

An order recognizing a foreign proceeding shall be entered if the proceeding is a foreign main or nonmain proceeding, the foreign representative is a person or body and the petition meets the requirements of Section 1515 concerning the petition and accompanying documents. The test does not call for the exercise of much discretion by the bankruptcy court. However, the decision to grant recognition is expressly subject to Section 1506, the public policy exception. This section provides that "[n]othing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States." 11 U.S.C. § 1506.

Therefore, the questions to be decided are: (1) whether Mr. Shah's petition satisfies the statutory standards for recognition under chapter 15; and (2) whether the Objectors have established that recognition should not be granted on grounds that to do so would be manifestly contrary to the public policy of the United States.

The evidentiary record of the hearing held on November 18, 2011 primarily consists of the testimony of an Indian attorney at law named Mayur Bhatt who traveled to New York to testify on behalf of the foreign debtor and various exhibits offered by the foreign debtor and the Objectors. Mr. Bhatt has experience in handling SICA cases before the BIFR and is counsel for Ashapura in the SICA Proceeding. Mr. Bhatt acknowledged that the SICA statute does not by its literal terms provide a formal mechanism for participation by unsecured creditors, but he did

note that in practice unsecured creditors were given a voice, in the discretion of the BIFR, could receive distributions under an arrangement with creditors and had the ability to appeal adverse determinations made by the BIFR and to have their appeals heard within the Indian judicial system. Although the appellate process admittedly is time consuming, the availability of appellate review and the ability of creditors to participate before the BIFR demonstrate that systemically SICA functions as a collective process that allows for creditor participation. Furthermore, Ashapora offered exhibit "Debtor 2", a written summary of proceedings held before the BIFR on July 25, 2011. This exhibit lists the names of creditors, including Eitzen, that attended the hearing held on that date and supports the testimony of Mr. Bhatt concerning the participation of unsecured creditors in SICA cases. The fact that unsecured creditors are not as involved as they would be in a chapter 11 case in the United States does not mean that the SICA proceeding in India is not a collective administrative proceeding as defined in Section 101(23).

A proceeding is collective in nature pursuant to 11 U.S.C. § 101(23) if it "considers the rights and obligations of all creditors." *In re Betacorp* Ltd., 400 B.R. 266, 281 (Bankr. D. Nev. 2009)*; see also In re Gold & Honey, Ltd.*, 410 B.R. 357, 369 (Bankr. E.D.N.Y. 2009). Such a collective proceeding "is in contrast, for example, to a receivership remedy instigated at the request, and for the benefit, of a single secured creditor." *Betacorp*, 400 B.R. at 281. "The word 'collective' contemplates both the consideration and eventual treatment of claims of various types of creditors, as well as the possibility that creditors may take part in the foreign action." *In re British Am. Ins. Co. Ltd.*, 425 B.R. 884, 902 (Bankr. S.D. Fla. 2010). While notice to creditors, including unsecured creditors, may play a role in the court's analysis of whether a proceeding is collective, in determining whether a particular proceeding is collective, "it is appropriate to consider both the law governing the foreign action and the parameters of the

particular proceeding …." *Id.* at 902 (finding that a foreign proceeding alleged to be for the sole benefit of a single class of creditors was a collective proceeding, despite no notice to general unsecured creditors of the appointment of the judicial manager or of actions brought before the court, where all policyholders and creditors would receive notice at the winding up phase and the relevant foreign law allowed parties, including creditors, to be heard in the judicial management process); *see also In re ABC Learning Centres Ltd.*, Case No. 10-11711, 2010 Bankr. LEXIS 4091, *20-23 (Bankr. D. Del. Nov. 16, 2010) (finding unpersuasive objection of party that Australian proceeding was not collective in nature because U.S. creditors did not have adequate notice where notice was proper under Australian law, party had actual notice of the second secured creditor's meeting and the ability to seek redress from the Australian court).

The Court's finding that the SICA proceeding is collective in nature is consistent with this case authority and with the position expressed by the United Nations Commission on International Trade Law – UNCITRAL. "The notion of a 'collective' insolvency proceeding is based on the ability of a single insolvency representative to control the realization of assets for the purposes of pro rata distribution among all creditors (subject to domestic statutory priorities), as opposed to a proceeding designed to assist a particular creditor to obtain payment or a process designed for some purpose other than to address the insolvency of the debtor." U.N. Comm'n on Int'l Law, The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective [pre-release] (July 2011) at 19, http://www.uncitral.org/pdf/english/texts/insolven/pre-judicial-perspective.pdf.

The Objectors called no witnesses, although they did cross examine Mr. Bhatt and did offer various exhibits into evidence that were downloaded from various internet sites. These documents appear calculated to emphasize the repeal of the SICA statute and highlight various criticisms of the law, but these exhibits failed to show that the process itself was not collective.

More importantly, none of the evidence offered by the Objectors succeeded in proving the key point in dispute – namely that it would be manifestly contrary to the public policy of the United States to recognize the petition. Counsel for Armada acknowledged during his argument that the Objectors had the burden of proof on this issue. The Court finds that they failed to carry their burden. As a result, the public policy exception does not apply as a basis to refuse the grant of an otherwise appropriate petition for recognition.

Chapter 15 promotes predictability and reliability "by establishing a simple, objective eligibility requirement for recognition...." *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008). While "recognition under Section 1517 is not to be rubber stamped by the courts … the process of recognition of a foreign proceeding is a simple single step process incorporating the definitions in Sections 1502 and 101(23) and (24) to determine recognition as either a main or nonmain proceeding or nonrecognition." *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 126 (Bankr. S.D.N.Y. 2007) (citations omitted).

This Court must make an independent determination as to whether the SICA proceeding meets the definitional requirements of Sections 1502 and 1517 of the Bankruptcy Code, but "the determination is a formulaic one." *Id.*; *see also In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333 (S.D.N.Y. 2008) (explaining that recognition "turns on the strict application of objective criteria" (citing 11 U.S.C. § 1517)) (additional citation omitted), *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) (citations omitted) (noting that "recognition of [a] foreign proceeding turns on the objective criteria under §1517 …"), *In re Atlas Shipping A/S*, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009) (citations omitted) (same), *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 45 (Bankr. S.D.N.Y. 2008) (explaining that §1517 "sets forth the requirements for an order

granting recognition, and sets forth a statutory directive that … when those requirements have been satisfied, a recognition order *shall* be entered").

Here the petition for recognition appears designed to obtain the benefits of the automatic stay that comes into effect upon recognition. *See* 11 U.S.C. 1520(a)(1). The evident purpose is to stay the Objectors from taking any further steps to enforce their judgments in the United States to the potential detriment of Ashapora. This has been an objective of the foreign representative from the outset of the case when he first sought a temporary restraining order against the Objectors. The Court issued a TRO and scheduled a hearing for October 17, 2011 on the request for a preliminary injunction and entered a further Order continuing the hearing to October 24, 2011. The motion for a Preliminary Injunction was denied due to a failure of proof without prejudice to Ashapura's right to seek injunctive relief at some future time. No such motion was ever filed. In the interim and in the absence of any stay (and to the apparent dismay of Eitzen), Armada succeeded in obtaining approximately $687,356 from a garnishee in Illinois. In the case of Armada, the automatic stay is being imposed under Section 1520(a)(1) too late to preserve the status quo at least as to that asset.

As for Eitzen, it continues to pursue remedies against Bank of India as part of its ongoing efforts to collect on its judgment against Ashapora. The automatic stay, upon recognition, will apply to those efforts.

Based on the record of the recognition hearing that took place on November 18, the Court grants the petition but does so with the admonition that periodic status conferences shall be held, approximately once every 60 days, regarding the progress of the SICA Proceeding and without prejudice to the rights of the Objectors or other affected creditors to show that the SICA Proceeding, in actual practice, are prejudicing the rights of the Objectors and of other unsecured creditors similarly situated to the Objectors.

The Court reserves the right under Section 1517(d) to grant relief from the automatic stay to the Objectors for cause shown or to take other appropriate action, including modification or termination of recognition, in the interests of justice. The Court also strongly encourages the parties to stop posturing and to start talking to each other in a manner that may lead to a compromise of the Objectors' claims. The Court notes that both sides have a great deal to gain by meeting and conferring, perhaps with a mediator, in an effort to bring these long simmering disputes to a mutually acceptable resolution.

Dated: New York, New York
November 22, 2011

s/ James M. Peck
Honorable James M. Peck
United States Bankruptcy Judge

EXHIBIT C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	
	)	Chapter 15
TRANEN CAPITAL ALTERNATIVE INVESTMENT FUND LTD. (IN LIQUIDATION)	)	Case No. 15-12620
	)	
Debtor in a Foreign Proceeding.	)	
	)	

ORDER RECOGNIZING FOREIGN MAIN PROCEEDING AND GRANTING ADDITIONAL RELIEF

This Court has held a hearing to consider the official form and verified petitions, filed on September 24, 2015 (together, the "***Petition***") by Hadley J. Chilton and John J. Greenwood of Baker Tilly (BVI) Limited, in their capacities as Joint Liquidators (together, the "***Petitioners***") for Tranen Capital Alternative Investment Fund Ltd. (in liquidation) (the "***Debtor***"), to recognize the winding up and liquidation of the Debtor (the "***BVI Proceeding***") in the Eastern Caribbean Supreme Court in the High Court of Justice in the British Virgin Islands (the "***BVI Court***") as a foreign main proceeding under section 1517 of title 11 of the United States Code (the "***Bankruptcy Code***") and granting certain additional relief under section 1521 of the Bankruptcy Code; due and proper notice of such hearing have been provided; and after due deliberation and sufficient cause appearing therefor, this Court makes the following findings of fact and conclusions of law:

A. This Court has jurisdiction over this matter under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(P). Venue is proper in this district under 28 U.S.C. § 1410.

B. The Petitioners are "persons," as such term is defined in 11 U.S.C. § 101(41).

C. The Debtor is eligible to be a debtor under 11 U.S.C. § 109(a).

D. The Petitioners are the Debtor's "foreign representative," as such term is defined in 11 U.S.C. § 101(24).

E. This chapter 15 case was properly commenced under 11 U.S.C. §§ 1504 and 1515.

F. The Petitioners have satisfied the requirements of 11 U.S.C. § 1515 and Fed. R. Bankr. P. 1007(a)(4).

G. The BVI Proceeding is a "foreign proceeding," as such term is defined in 11 U.S.C. § 101(23).

H. The BVI Proceeding is entitled to recognition by this Court under 11 U.S.C. § 1517(a).

I. The BVI Proceeding is pending in the country where the Debtor's center of main interests is located, is a "foreign main proceeding," as such term is defined in 11 U.S.C. § 1502(4), and is entitled to recognition as a "foreign main proceeding" under 11 U.S.C. § 1517(b)(1).

J. The Petitioners are entitled to all the relief provided pursuant to 11 U.S.C. § 1520, without limitation.

K. The Petitioners are entitled to all relief expressly set forth in 11 U.S.C. §§ 1521(a)–(b).

L. The relief granted hereby is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, and warranted under 11 U.S.C. §§ 1517, 1520, and 1521.

Accordingly, it is hereby **ORDERED**:

1. The BVI Proceeding is granted recognition as a foreign main proceeding under 11 U.S.C. §§ 1517(a) and 1517(b)(l).

2. All relief afforded a foreign main proceeding under 11 U.S.C. § 1520 is granted.

3. In accordance with 11 U.S.C. § 1520(a)(1), 11 U.S.C. §§ 361 and 362 apply to the Debtor and its property that is currently within or may be brought into the territorial jurisdiction of the United States.

4. The Petitioners are authorized to file notices of this case, the applicability of 11 U.S.C. §§ 361 and 362, and any other such notices the Petitioners deem necessary in any of the pending Litigation or any other proceeding.

5. The Petitioners are authorized to operate the Debtor's business and exercise the powers of a trustee to the extent provided by 11 U.S.C. § 1520(a)(3), including, for the avoidance of doubt, drawing down on the Debtor's United States bank, securities, deposit, and similar accounts and making distributions in the BVI Proceeding.

6. In accordance with 11 U.S.C. § 1521(a), all persons and entities, other than the Petitioners and their representatives and agents, are hereby enjoined from: (a) commencing or continuing an action or proceeding concerning the Debtor's assets, rights, obligations, or liabilities; (b) executing against any of the Debtor's assets; (c) taking or continuing any act to create, perfect, or enforce a lien or other security interest, setoff, or other claim against the Debtor or its property; (d) transferring, relinquishing, or disposing of any property of the Debtor to any person or entity other than the Petitioners; or (e) declaring or considering the commencement of the BVI Proceeding or the Debtor's chapter 15 case a default under any agreement, contract, or arrangement.

7. In accordance with section 1521(a)(4) and the Federal Rules of Bankruptcy Procedure (the "***F.R.B.P.***"), the Petitioners are authorized to conduct the examination of witnesses (including any and all parties or person subject to examination under F.R.B.P. 2004), the taking of evidence, or the delivery of information concerning the Debtor's assets, affairs, rights, obligations, or liabilities.

8. In accordance with 11 U.S.C. §§ 1521(a)(5) and (b), the administration, realization, and distribution of the Debtor's assets located within the territorial jurisdiction of the United States are entrusted to the Petitioners, and the Petitioners are hereby established as the exclusive representatives of the Debtor in the United States.

9. No action taken by the Petitioners, the Debtor, or their representatives in connection with this chapter 15 case or any adversary proceeding filed by or against the them shall be deemed to constitute a waiver of the rights or benefits afforded such persons under 11 U.S.C. §§ 306 and 1510.

10. A copy of this order shall be served, within five business days of entry of this order, by fax, e-mail, regular mail, or overnight courier upon all of the Debtor's known creditors and investors, the Office of the United States Trustee, and such other entities as the Court may direct. Service in accordance with this Order shall constitute adequate and sufficient notice of the terms hereof.

11. This Court shall retain jurisdiction with respect to the enforcement or interpretation of this Order and any request by any person or entity for relief from the provisions hereof.

Dated: October 29, 2015
New York, New York

/s/ Sean H. Lane
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT D

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 15
LAWNDALE GROUP S.A.,	:	Case No. 15-11352 (SCC)
Debtor in a Foreign Proceeding.	:	

ORDER GRANTING RECOGNITION AND RELIEF IN AID OF A FOREIGN MAIN PROCEEDING PURSUANT TO 11 U.S.C. §§ 105(a), 1504, 1507, 1509, 1515, 1517, 1520 AND 1521 OF THE BANKRUPTCY CODE

1. A hearing having been held before the United States Bankruptcy Court of the Southern District of New York on July 6, 2015 (the "**Hearing**"), to consider the Verified Petition and Official Form Petition (collectively, with all exhibits thereto, the "**Petition**") of John David Ayres, the duly appointed liquidator and foreign representative ("**Petitioner**" or "**Liquidator**") of Lawndale Group S.A. ("**Lawndale**" or the "**Foreign Debtor**"), a company undergoing liquidation before the Commercial Division of the High Court of Justice, British Virgin Islands (the "**BVI Court**"), claim number 2013/0165 (the "**BVI Liquidation**"), pursuant to the Insolvency Act of 2003 of the British Virgin Islands (the "**2003 Act**"), for entry of an Order pursuant to chapter 15 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the "**Bankruptcy Code**"): (i) recognizing the BVI Liquidation of Lawndale as a foreign main proceeding, or in the alternative, a foreign non-main proceeding, pursuant to chapter 15 of the Bankruptcy Code, and the Petitioner as Lawndale's foreign representative under sections 1509 and 1517 of the Bankruptcy Code; (ii) granting automatic relief pursuant to section 1520 of the Bankruptcy Code; (iii) granting other and additional relief pursuant to Sections 1507 and 1521(a)

and (b) of the Bankruptcy Code, including authorizing Petitioner to examine witnesses, take evidence, and seek the production of documents concerning the assets, affairs, rights, obligations or liabilities of Lawndale; and (iv) granting authority to assert claims against parties that are subject to jurisdiction in the United States, including but not limited to claims predicated upon schemes to commit fraudulent conveyances, alter ego, or veil-piercing claims; and upon the Court's review and consideration of the Petition, and the accompanying Declarations of John Ayres, executed on May 19, 2015 (the "**Ayres Declaration**"), the Declaration of Robert Christie, executed on May 18, 2015 (the "**Christie Declaration**"), and the Declaration of Michael J. Frevola, executed on May 21, 2015 (the "**Frevola Declaration**"), together with all exhibits thereto, in support of the Petition, and the evidence put on the record at the Hearing; and appropriate and timely notice of the filing of the Petition and the hearing thereon having been given by the Petitioner, pursuant to section 1514 of the Bankruptcy Code; and such notice having been adequate and sufficient for all purposes; and no other or further notice being necessary or required; and no objections or other responses having been filed; and all interested parties having had an opportunity to be heard at the Hearing; and after due deliberation and sufficient cause appearing therefore, the Court makes the following findings of fact and conclusions of law:

A. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and 11 U.S.C. §§ 109 and 1501.

B. Venue of this proceeding is proper in this judicial district pursuant to 28 U.S.C. § 1410 (3) because Lawndale has property in the United States and within this judicial district.

C. This is a core proceeding under 28 U.S.C. § 157(b)(2)(P).

D. Petitioner is the "foreign representative" of Lawndale pursuant to 11 U.S.C. § 101(24).

E. This chapter 15 case was properly commenced pursuant to 11 U.S.C. §§ 1504, 1509, and 1515.

F. Petitioner has satisfied the requirements of 11 U.S.C. § 1515 and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure.

G. The BVI Liquidation is a "foreign proceeding" pursuant to 11 U.S.C. § 101(23).

H. The BVI Liquidation is entitled to recognition by this Court pursuant to 11 U.S.C. § 1517.

I. The BVI Liquidation is pending in the British Virgin Islands, the country where Lawndale's center of main interests is located, and accordingly the BVI Liquidation is a "foreign main proceeding" pursuant to 11 U.S.C. § 1502(4), and is entitled to recognition as a foreign main proceeding pursuant to 11 U.S.C. § 1517(b)(1).

J. The Liquidator is entitled to all the relief provided pursuant to 11 U.S.C. 1520, without limitation.

K. The Liquidator is entitled to all the relief pursuant to 11 U.S.C. §1521 ordered by this Court.

L. The Liquidator is entitled to relief pursuant to 11 U.S.C. §§ 1507 and 1521, as ordered by this Court.

M. The relief granted hereby is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, and warranted pursuant to 11 U.S.C. §§ 1507, 1517, 1520, and 1521.

NOW, THEREFORE, IT IS HEREBY

1. **ORDERED**, that the BVI Liquidation is granted recognition pursuant to 11 U.S.C. § 1517(a); and it is further

2. **ORDERED**, that the BVI Liquidation is hereby recognized as a foreign main proceeding pursuant to 11 U.S.C. § 1517(b)(1); and it is further

3. **ORDERED**, that all persons and entities (other than Petitioner or his expressly authorized representatives and agents) are hereby enjoined, except as provided in 11 U.S.C. §§ 555 through 557, 559 through 562, 1520 and 1521 or as modified herein, from:

(1) executing against Lawndale's property or assets within the territorial jurisdiction of the United States;

(2) taking or continuing any act to obtain possession of, or exercise control over, Petitioner (with respect to Lawndale), Lawndale or any of its property or assets within the territorial jurisdiction of the United;

(3) taking or continuing any act to create, perfect or enforce a lien or other security interest, set-off or other claim against Petitioner (with respect to Lawndale), Lawndale or any of its property or assets within the territorial jurisdiction of the United States as of the date of the filing of the Petition, or otherwise seeking the issuance of or issuing any restraining notice or other process or encumbrance with respect to Lawndale or any of its property or assets;

(4) transferring, relinquishing or disposing of any property of Lawndale to any person or entity other than Petitioner;

and it is further

4. **ORDERED**, that 11 U.S.C. § 1520(a) shall be effective with respect to the BVI Liquidation; and it is further

5. **ORDERED** that Petitioner or any third person acting pursuant to Petitioner's instructions or agreement may transfer funds or property belonging to Lawndale into or out of the United States in accordance with their respective obligations to Lawndale or under the BVI Liquidation; and it is further

6. **ORDERED**, that Petitioner is authorized to operate the business of Lawndale that is the subject of BVI Liquidation and may exercise the powers of a trustee under and to the extent provided by 11 U.S.C. §§ 1520 and 1521; and it is further

7. **ORDERED**, that Petitioner is hereby authorized to examine witnesses, take evidence, and seek the production of documents concerning the assets, affairs, rights, obligations or liabilities of Lawndale by:

a. issuing discovery requests regarding the affairs of Lawndale, the United States Counterparties (as defined in the Petition), and the Related Persons and Entities (as defined in the Petition), as all such information is required in the BVI Liquidation;

b. issuing discovery requests to intermediary or correspondent banks located in the Southern District of New York that process United States Dollar wire transfers and maintain records of such transfers to ascertain the location and movement of Lawndale's assets prior to and immediately after the commencement of the BVI Liquidation;

c. Upon written request served by the Foreign Debtor, through its counsel Holland & Knight LLP, obtaining turnover of any and all documents, records, filings, or other information belonging to Lawndale, however stored, including but not limited to emails, from any person or entity subject to this Court's jurisdiction, including but not limited to Lawndale's former legal advisors and Lawndale's related entities; and

d. Upon written request served by the Foreign Debtor, through its counsel Holland & Knight LLP, enjoining all persons and entities subject to the jurisdiction of this

Court from destroying, secreting, altering, deleting or otherwise disposing of any documents, records, filings, or other information, however stored, concerning or relating to the affairs of Lawndale; and it is further

8. **ORDERED**, that Lawndale is granted authority to assert claims against parties that are subject to jurisdiction in the United States, including but not limited to claims predicated upon fraudulent conveyance or veil-piercing.

9. **ORDERED**, that the administration or realization of all or part of the assets of Lawndale within the territorial jurisdiction of the United States is hereby entrusted to Petitioner and Petitioner is hereby established as the exclusive representative of Lawndale in the United States; and it is further

10. **ORDERED**, that this Court retains jurisdiction with respect to the enforcement, amendment or modification of this Order, any requests for additional relief or any adversary proceeding brought in and through this chapter 15 case, and any request by an entity for relief from the provisions of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Court; and it is further

11. **ORDERED**, that a copy of this Order shall be served by United States mail, first-class postage prepaid, by overnight courier, by electronic mail, or by hand delivery where practicable, upon all known creditors and all other parties against whom relief is sought (or their counsel or registered agent for service of process), including any such parties (or counsel) that have addresses outside the United States; and it is further

12. **ORDERED**, that notice of the Petition in the form attached as Exhibit B thereto shall be served upon all known creditors and all other parties against whom relief is sought (or

their counsel or registered agent for service of process), including any such parties (or counsel) that have addresses outside the United States; and it is further

13. **ORDERED**, that such service shall be good and sufficient service and adequate notice for all purposes.

Dated: New York, New York
July 6, 2015

/S/ Shelley C. Chapman
United States Bankruptcy Judge
Southern District of New York

EXHIBIT E

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
PIONEER FREIGHT FUTURES COMPANY LIMITED,	:	Chapter 15
Debtor in a Foreign Proceeding.	:	Case No. 13-12324 (JMP)

ORDER GRANTING RECOGNITION OF A FOREIGN MAIN PROCEEDING AND RELATED RELIEF

This matter came before the Court upon the verified petition of Mark Richard Byers and Mark McDonald, in their capacity as joint liquidators (the "Petitioners") of Pioneer Freight Futures Company Limited (the "Company") and as duly authorized foreign representatives as defined by section 101(24) of title 11 of the United States Code (the "Bankruptcy Code") in the above-captioned case, for the entry of an order granting recognition of a foreign main proceeding (the "Verified Petition"). The Court has reviewed and considered, among other things, (i) the Verified Petition and its accompanying memorandum of law, (ii) the statement of Mark Richard Byers, in his capacity as Joint Liquidator of the Company, made pursuant to section 1515 of the Bankruptcy Code, (iii) the declaration of Scott Cruickshank, foreign counsel to the Petitioners and (iv) the arguments and testimony presented at the hearing held on August 22, 2013. Based on the foregoing, the Court finds and concludes as follows:

1. The Petitioners have demonstrated that:

   (a) the Company is subject to a foreign proceeding within the meaning of section 101(23) of the Bankruptcy Code;

   (b) the Company is subject to a foreign main proceeding within the meaning of section 1502(4) of the Bankruptcy Code;

(c) the Petitioners, as joint liquidators of the Company, are foreign representatives, as defined by section 101(24) of the Bankruptcy Code;

(d) the above-captioned Chapter 15 case was properly commenced pursuant to sections 1504 and 1515 of the Bankruptcy Code; and

(e) the Chapter 15 Petition satisfies the requirement of section 1515 of the Bankruptcy Code.

2. The relief requested is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States and warranted pursuant to sections 1520 of the Bankruptcy Code.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1410.

NOW, THEREFORE, IT IS HEREBY:

ORDERED, that the Company's liquidation proceeding pending before the Commercial Division of the High Court of Justice, British Virgin Islands, Eastern Caribbean Supreme Court (the "BVI Proceeding") is granted recognition pursuant to section 1517(a) of the Bankruptcy Code; and it is further

ORDERED, that the BVI Proceeding is granted recognition as a foreign main proceeding pursuant to section 1517(b)(1) of the Bankruptcy Code; and it is further

ORDERED, that all relief afforded to a foreign main proceeding, a foreign debtor subject to such foreign main proceeding and the foreign representatives of such a foreign debtor automatically upon recognition pursuant to section 1520 of the Bankruptcy Code is granted to the BVI Proceeding, the Company and the Petitioners respectively, including, without limitation, the protections afforded by section 362 of the Bankruptcy Code; and it is further

ORDERED, that this Court shall retain jurisdiction with respect to the enforcement, amendment or modification of this Order, and requests for any additional relief in this

Chapter 15 case and all adversary proceedings in connection herewith properly commenced and within the jurisdiction of this Court; and it is further

ORDERED, that this Order shall be served by overnight mail on or before August 27, 2013, upon (a) the Company and (b) the U.S. Trustee; and it is further

ORDERED, that service in accordance with this Order shall be deemed good and sufficient service and adequate notice for all purposes.

Dated: New York, New York
August 23, 2013

/s/ James M. Peck

Honorable James M. Peck
United States Bankruptcy Judge

EXHIBIT F

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 15
FARENCO SHIPPING CO. LTD.,	:	Case No. 11-14138 (REG)
Debtor in a Foreign Proceeding.	:	

ORDER RECOGNIZING FOREIGN PROCEEDING AND GRANTING FURTHER RELIEF

Whereas on August 31, 2011, Nicholas Francis James Carter, duly appointed liquidator and foreign representative ("**Petitioner**" or "**Liquidator**") of Farenco Shipping Co. Ltd. ("**Farenco BVI**" or the "**Foreign Debtor**")), a company undergoing liquidation before the Commercial Division of the High Court of Justice (the "**BVI Court**"), case number 2011/0051 (the "BVI Liquidation"), pursuant to the Insolvency Act of 2003 of the British Virgin Islands (the "**2003 Act**"), submitted a Verified Petition and Official Form Petition (collectively, the "**Petition**") for entry of an Order pursuant to chapter 15 of title 11 of the United States Code, 11 U.S.C. 101 *et seq.* (the "Bankruptcy Code"):

(i) recognizing the BVI Liquidation of Farenco BVI as a foreign main proceeding, or in the alternative, a foreign non-main proceeding pursuant to chapter 15 of the Bankruptcy Code;

(ii) granting automatic relief pursuant to section 1520 of the Bankruptcy Code; (iii) granting other and additional relief pursuant to sections 1507 and 1521(a) and (b) of the Bankruptcy Code; and

Whereas on September 7, 2011, this Court signed an order provisionally recognizing the BVI Liquidation of Farenco BVI as a foreign main proceeding, granting relief pursuant to

sections 1519 and 1520 of the Bankruptcy Code; and (iii) granting other and additional provisional relief pursuant to sections 1507 and 1521(a) and (b) of the Bankruptcy Code; and

Whereas no creditor or other party in interest has expressed objection to the recognition of the Farenco BVI Liquidation as a foreign main proceeding, and Petitioner has accordingly submitted this order to the Court on presentment; and

Upon the Court's review and consideration of the Petition, and the accompanying Declarations of Nicholas Francis James Carter executed on August 29, 2011; Ray Ng executed on August 31, 2011 and of James H. Power executed on August 31, 2011, together with all exhibits thereto, in support of the Petition, and the evidence put on the record at the Hearing; and appropriate and timely notice of the filing of the Petition and the hearing thereon having been given by Petitioner, pursuant to section 1514 of the Bankruptcy Code; and such notice having been adequate and sufficient for all purposes; and no other or further notice being necessary or required; and no objections or other responses having been filed that have not been overruled, withdrawn or otherwise resolved; and after due deliberation and sufficient cause appearing therefore, the Court makes the following findings of fact and conclusions of law:

A. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and 11 U.S.C. §§ 109 and 1501.

B. Venue of this proceeding is proper in this judicial district pursuant to 28 U.S.C. § 1410.

C. This is a core proceeding under 28 U.S.C. §§ 157(b)(2)(P).

D. Petitioner is "person" pursuant to 11 U.S.C. § 101(41) and is the "foreign representative" of Farenco BVI pursuant to 11 U.S.C. § 101(24).

E. This chapter 15 case was properly commenced pursuant to 11 U.S.C. §§ 1504, 1509, and 1515.

F. Petitioner has satisfied the requirements of 11 U.S.C. § 1515 and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure.

G. The BVI Liquidation is a "foreign proceeding" pursuant to 11 U.S.C. § 101(2).

H. The BVI Liquidation is entitled to recognition by this Court pursuant to 11 U.S.C. § 1517.

I. The BVI Liquidation is pending in the British Virgin Islands, the country where Farenco BVI's center of main interests is located, and accordingly the BVI Liquidation is a "foreign main proceeding" pursuant to 11 U.S.C. § 1502(4), and is entitled to recognition as a foreign main proceeding pursuant to 11 U.S.C. § 1517(b)(1).

J. Petitioner is entitled to all the relief provided pursuant to 11 U.S.C. § 1520 without limitation.

K. Petitioner is entitled to relief pursuant to 11 U.S.C. §§ 1507 and 1521 as ordered by this Court.

L. The relief granted hereby is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, and warranted pursuant to 11 U.S.C. §§ 1507, 1517, 1520, and 1521.

NOW, THEREFORE, IT IS HEREBY

1. **ORDERED**, that the BVI Liquidation is granted recognition pursuant to 11 U.S.C. § 1517(a); and it is further

2. **ORDERED**, that the BVI Liquidation is hereby recognized as a foreign main proceeding pursuant to 11 U.S.C. § 1517(b)(1); and it is further

3. **ORDERED**, that all persons and entities (other than Petitioner or its expressly authorized representative(s) and agent(s)) are hereby enjoined, except as provided in 11 U.S.C. §§ 555 through 557, 559 through 562, 1520 and 1521 or as modified herein, from:

A. executing against Farenco BVI's property or assets;

B. taking or continuing any act to obtain possession of, or exercise control over, Petitioner (with respect to Farenco BVI), Farenco BVI or any of its property or assets;

C. taking or continuing any act to create, perfect or enforce a lien or other security interest, set-off or other claim against Petitioner (with respect to Farenco BVI), Farenco BVI or any of its property or assets, or otherwise seeking the issuance of or issuing any restraining notice or other process or encumbrance with respect to Farenco BVI or any of its property or assets;

D. transferring, relinquishing or disposing of any property of Farenco BVI to any person or entity other than Petitioner;

E. destroying, secreting, altering, deleting or otherwise disposing of any documents, records, filings, or other information, however stored, concerning or relating to the affairs of Farenco BVI;

and it is further

4. **ORDERED**, that 11 U.S.C. § 1520(a) shall be effective with respect to the BVI Liquidation; and it is further

5. **ORDERED** that Petitioner or any third person acting pursuant to Petitioner's instructions or agreement may transfer funds or property belonging to Farenco BVI into or out of the United States in accordance with their respective obligations to Farenco BVI or under the BVI Liquidation; and it is further

6. **ORDERED** that Petitioner is authorized to operate, if applicable, and wind up the affairs and the business of Farenco BVI that is the subject of BVI Liquidation and may exercise the powers of a trustee under and to the extent provided by 11 U.S.C. § 1520; and it is further

7. **ORDERED** that the relief set forth in the TRO dated September 1, 2011 shall continue unless otherwise ordered by this Court; and it is further

8. **ORDERED** that Petitioner is hereby authorized, on an expedited basis, to examine witnesses, take evidence, seek production of documents, serve requests to admit and deliver information to the BVI Court concerning the assets, affairs, rights, obligations or liabilities of Farenco BVI. This relief shall include:

i. Obtaining discovery from and/or in relation to the affairs of Farenco Shipping Pte Ltd. (Singapore) and Farenco Transportation Co. Ltd. and their associates as all such information is required in the BVI Liquidation under the law of the United States; and

ii. Obtaining discovery from intermediary banks in New York that process U.S. dollar wire transfers to ascertain the location and movement of Farenco BVI assets prior to and at anytime after the commencement of the liquidation of Farenco BVI; and

iii. Obtaining discovery, on an expedited basis, from Farenco BVI's former U.S. counsel including, but not limited to, copies of attorney files and suitable reproductions of any and all documents, records, filings, or other information, however stored, including but not limited to emails; and

iv. Obtaining discovery from any person or entity subject to this Court's jurisdiction that may possess or have access to information concerning Farenco BVI's business and trading operations, bank accounts, officers and directors, any of Farenco BVI's related-companies, email accounts, or any other information that could assist the Liquidator in identify assets, records, books, documents, and/or creditors of the Foreign Debtor; and it is further

9. **ORDERED** that the administration or realization of all or part of the tangible and intangible assets of Farenco BVI subject to the jurisdiction of the United States is hereby entrusted to Petitioner and Petitioner is hereby established as the exclusive representative of Farenco BVI in the United States; and it is further

10. **ORDERED** that Farenco Shipping Pte Ltd. and Farenco Transportation Co. Ltd., their agents and counsel are enjoined from "de-registering" as foreign business corporations or relinquishing their authorization to do business in the State of New York; and it is further

11. **ORDERED** that:

a. the relief set forth in the TRO dated September 1, 2011 shall continue unless otherwise ordered by this Court;

b. Petitioner or any third person acting pursuant to Petitioner's instructions or agreement may transfer funds or property belonging to Farenco BVI into or out of the United States in accordance with their respective obligations to Farenco BVI or under the BVI Liquidation;

c. Petitioner is authorized to operate, if applicable, and wind up the affairs and the business of Farenco BVI that is the subject of BVI Liquidation and may exercise the powers of a trustee under and to the extent provided by 11 U.S.C. § 1520; and it is further

12. **ORDERED** that pursuant to 11 U.S.C. 1509, Petitioner may bring claims on behalf of Farenco BVI and/or the Liquidator; and it is further

13. **ORDERED** that a copy of this Order shall be served by electronic mail or by hand delivery, upon all of former U.S.-based counsel for Farenco BVI in the U.S. Actions, and by hand to Farenco Shipping Pte. Ltd.'s and Farenco Transportation Co. Ltd.'s registered agent in New York; and by international registered mail to all known creditor(s); and it is further

14. **ORDERED** that such service shall be good and sufficient service and adequate notice; and it is further

15. **ORDERED**, that the Petition and supporting papers shall also be made available by Petitioner upon request to Holland & Knight LLP, 31 West 52nd Street, New York, New York 10019 (Attn.: James Power, Esq.), as counsel to Petitioner; and it is further

16. **ORDERED** that this Court retains jurisdiction with respect to the enforcement, amendment or modification of this Order, any requests for additional relief or any adversary

proceeding brought in and through this chapter 15 case, and any request by an entity for relief from the provisions of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Court;

Dated: New York, New York
February ***24***, 2012

s/ Robert E. Gerber
United States Bankruptcy Judge
Southern District of New York

#10530978_v2

EXHIBIT G

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 15
LDK SOLAR CO., LTD. (IN PROVISIONAL LIQUIDATION),[1]	Case No. 14-12387 (PJW)
Debtor in a Foreign Proceeding.	**Re: Docket Nos. 2, 3, 4, 5, 19, 20 & 21**

ORDER (I) RECOGNIZING THE CAYMAN PROCEEDING OF LDK SOLAR CO., LTD. AS A FOREIGN MAIN PROCEEDING AND (II) GRANTING RELATED RELIEF

Upon the Motion[2] of Eleanor Fisher and Tammy Fu of Zolfo Cooper (Cayman) Limited, in their capacity as foreign representative (in such capacity, the "Foreign Representatives") of LDK Solar CO., Ltd. (the "LDK Parent") for entry of (i) the Provisional Order enforcing the terms of the Cayman Court's *Order Appointing Provisional Liquidators* dated February 27, 2014 on an interim basis in the United States and granting certain other provisional related relief and (ii) a final order, after notice and a hearing, granting recognition of the Cayman Proceeding as a foreign main proceeding or, in the alternative, as a foreign nonmain proceeding and enforcing the terms of the Cayman Order on a permanent basis in the United States; and upon consideration of the Motion and all pleadings related thereto; and the Provisional Order having been entered on October 22, 2014 [Docket No. 20] after due notice and a hearing; and upon consideration of the Motion and all pleadings related thereto, including (i) the *Memorandum of Law in Support of (I) Chapter 15 Petition of LDK Solar CO., Ltd. (in Provisional Liquidation) and (II) Motion for (A) Provisional Relief, (B) Recognition of the*

[1] The last four digits of the Cayman Islands registration number of LDK Solar CO., Ltd (in provisional liquidation) are 6736. The mailing address for LDK Solar CO., Ltd. (in provisional liquidation) is: Zolfo Cooper (Cayman) Limited as Joint Provisional Liquidators, Attn: Eleanor Fisher & Tammy Fu, P.O. Box 1102 GT, 4th Floor, Building 3, Cayman Financial Centre, Grand Cayman KY1-1002, Cayman Islands.

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

Cayman Proceeding as a Foreign Main Proceeding or, in the Alternative, as a Foreign Nonmain Proceeding and (C) Certain Related Relief (the "Memorandum of Law"), (b) the *Declaration of Tammy Fu in Support of (I) Chapter 15 Petition of LDK Solar CO., Ltd. (In Provisional Liquidation) and (II) Motion of the Foreign Representatives For (A) Provisional Relief, (B) Recognition of the Cayman Proceeding as a Foreign Main Proceeding or, in the Alternative, as a Foreign Nonmain Proceeding, and (C) Certain Related Relief* (the "JPL Declaration") and (c) the *Declaration of Jonathan Guy Manning in Support of (A) Chapter 15 Petition of LDK Solar CO., Ltd. (In Provisional Liquidation) For Recognition of Foreign Main Proceeding, and (B) Motion For (I) Provisional Relief, (II) Recognition of the Cayman Proceeding as a Foreign Main Proceeding and (III) Certain Related Relief* (the "Manning Declaration"); and the Court finding that: (a) the Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334, (b) venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409, (c) this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), and (d) notice of the Motion was due and proper under the circumstances and no further or other notice need be given; and hearings having been held to consider the relief requested in the Motion on October 22, 2014 and November 21, 2014 and upon the record of the hearings and all of the proceedings had before the Court; and the Court having found and determined that the relief sought in the Motion is consistent with the purpose of chapter 15 of the Bankruptcy Code and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and it appearing that the relief requested in the Motion is in the best interest of LDK Parent, its estate, its creditors and other parties in interest; and after due deliberation and sufficient cause appearing therefor, the Court additionally finds and concludes that:

A. The Foreign Representatives are each a person within the meaning of section 101(41) of the Bankruptcy Code and is the duly appointed foreign representative of LDK Parent within the meaning of section 101(24) of the Bankruptcy Code.

B. LDK Parent's Chapter 15 Case was properly commenced pursuant to sections 1504 and 1515 of the Bankruptcy Code.

C. The Chapter 15 Petition filed by LDK Parent on the Petition Date, as supplemented by the record in this Chapter 15 Case, meets each of the requirements of section 1515 of the Bankruptcy Code and Bankruptcy Rule 1007(a)(4) (subject to certain relief requested in the concurrently filed *Motion of Foreign Representatives For an Order (I) Specifying the Form and Manner of Service of Notice, (II) Scheduling the Recognition Hearing, (III) Shortening Certain Deadlines Provided Under the Bankruptcy Code and the Bankruptcy Rules and (IV) Granting Related Relief* (the "Notice Motion")).

D. The Cayman Proceeding is a foreign proceeding within the meaning of section 101(23) of the Bankruptcy Code.

E. The Cayman Proceeding is entitled to recognition by this Court pursuant to section 1517(a) of the Bankruptcy Code.

F. The Cayman Proceeding is pending in the Cayman Islands, which is the location of LDK Parent's center of main interests, and, as such, is a foreign main proceeding pursuant to section 1502(4) of the Bankruptcy Code and is entitled to recognition as a foreign main proceeding pursuant to section 1517(b)(1) of the Bankruptcy Code.

G. The Foreign Representatives and LDK Parent are entitled to all the relief provided pursuant to section 1520 of the Bankruptcy Code.

H. The Foreign Representatives are entitled to the relief expressly set forth in 11 U.S.C. §§ 1521(a) and (b) that is granted hereby.

I. The relief granted hereby is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, warranted pursuant to sections 105(a), 1507(a), 1509(b)(2)-(3), 1520, 1521 and 1525 of the Bankruptcy Code, and will not cause any hardship to any parties in interest that is not outweighed by the benefits of granting relief.

J. Absent the relief granted hereby, LDK Parent may be subject to the prosecution of judicial, quasi-judicial, arbitration, administrative or regulatory actions or proceedings against LDK Parent or their property, thereby interfering with and causing harm to, LDK Parent, its creditors, and other parties in interest in the Cayman Proceeding and, as a result, LDK Parent, its creditors and such other parties in interest would suffer irreparable injury for which there is no adequate remedy at law.

K. Absent the requested relief, the efforts of LDK Parent, the Cayman Court and the Foreign Representatives in conducting the Cayman Proceeding and effecting the proposed global restructuring of LDK Parent may be thwarted by the actions of certain creditors, a result inimical to the purposes of chapter 15 as reflected in section 1501(a) of the Bankruptcy Code.

L. Each of the injunctions contained in this Order (i) is within the Court's jurisdiction, (ii) confers material benefits on, and is in the best interests of, LDK Parent and its creditors, including without limitation the creditors in the Cayman Proceeding, and (iii) is important to the overall objectives of the Cayman Proceeding.

M. The interest of the public will be served by this Court's granting of the relief requested by the Foreign Representatives.

NOW, THEREFORE, IT IS HEREBY:

ORDERED, that the Motion is GRANTED as set forth herein; and it is further

ORDERED, that the Cayman Proceeding is hereby recognized as a foreign main proceeding pursuant to section 1517 of the Bankruptcy Code; and it is further

ORDERED, that all provisions of section 1520 of the Bankruptcy Code apply in this Chapter 15 Case, including, without limitation, the stay under section 362 of the Bankruptcy Code throughout the duration of this Chapter 15 Case or until otherwise ordered by this Court; and it is further

ORDERED, that the Cayman Order (and any amendments or extensions thereof as may be granted from time to time by the Cayman Court) is hereby enforced on a final basis and given full force and effect in the United States; and it is further

ORDERED, that the relief granted in the Provisional Order of this Court shall continue in full force and effect; and it is further

ORDERED, that, subject to sections 1520 and 1521 of the Bankruptcy Code, the Cayman Order, and the transactions consummated or to be consummated thereunder, shall be granted comity and given full force and effect in the United States to the same extent they are given effect in the Cayman Islands, and each is binding on all creditors of LDK Parent and any of their successors and assigns; provided, however, that nothing in this Order shall be deemed to modify section 1521(d) of the Bankruptcy Code; and it is further

ORDERED, that all entities (as that term is defined in section 101 (15) of the Bankruptcy Code), other than the Foreign Representatives and their expressly authorized representatives and agents, are hereby enjoined from:

a) execution against any of LDK Parents' assets;

b) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, arbitral, or other action or proceeding, or to recover a claim, including without limitation any and all unpaid judgments, settlements, or otherwise against LDK Parent in the United States;

c) taking or continuing any act to create, perfect, or enforce a lien or other security interest, set-off, or other claim against LDK Parent or any of their property;

d) transferring, relinquishing, or disposing of any property of LDK Parent to any entity (as that term is defined in section 101(15) of the Bankruptcy Code) other than the Foreign Representative;

e) commencing or continuing an individual action or proceeding concerning LDK Parent's assets, rights, obligations, or liabilities to the extent they have not been stayed pursuant to section 1520(a) of the Bankruptcy Code; and

f) terminating contracts or otherwise accelerating obligations thereunder; *provided*, in each case, that such injunction shall be effective solely within the territorial jurisdiction of the United States;

and it is further

ORDERED, that nothing in this Order shall affect or impair the rights and protections of the Chapter 11 Debtors, including the automatic stay protections under section 362 of the Bankruptcy Code in the Chapter 11 Cases; and it is further

ORDERED, that notice of entry of this Order, shall be served in accordance with this Court's *Order (I) Specifying the Form and Manner of Service of Notice, (II) Scheduling the Recognition Hearing and (III) Shortening Certain Deadlines Provided Under the Bankruptcy Code and the Bankruptcy Rules and (IV) Granting Related Relief*, dated October 22, 2014 (the

"Notice Order"). Service in accordance with the Notice Order constitutes adequate and sufficient service and notice;

ORDERED, that the terms and conditions of this Order shall be immediately effective and enforceable upon its entry; and it is further

ORDERED, that the Foreign Representatives and LDK Parent are not subject to any stay in the implementation, enforcement or realization of the relief granted in this Order;

ORDERED, that the Foreign Representatives and LDK Parent are authorized and empowered to take all actions necessary to implement the relief granted in this Order; and it is further

ORDERED, that the Foreign Representatives, LDK Parent, and/or each of their successors, representatives, advisors, or counsel shall be entitled to the protections contained in sections 306 and 1510 of the Bankruptcy Code; and it is further

ORDERED, that this Court shall retain jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Dated: November 21, 2014
Wilmington, Delaware

PETER J. WALSH
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT H

ORIGINAL

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 15
Saad Investments Finance Company (No.5) Limited	)	Case No. 09-13985 (KG)
Debtor in a Foreign Proceeding	)	**Ref. Nos. 2, 3, and 4**

REVISED ORDER RECOGNIZING FOREIGN PROCEEDING

Upon the petition for recognition (the "Petition") filed under chapter 15 ("Chapter 15") of title 11 of the United States Code (the "Bankruptcy Code") by Messrs. Nicolas Paul Matthews and Geoffrey Eugene Varga (together, the "Petitioners"), in their respective capacities as foreign representatives of Saad Investments Finance Company (No.5) Limited (the "Debtor"), commencing this Chapter 15 case (this "Chapter 15 Case") in respect of the proceeding commenced in the Grand Court of the Cayman Islands as Cause No. 390 of 2009 (the "Cayman Proceeding"); and the Court having considered and reviewed (a) the Petition, (b) the Memorandum of Law in Support of Chapter 15 Petition for Recognition of Foreign Proceeding Pursuant to 11 U.S.C. §§ 1504, 1509, 1515, 1517 and 1520, (c) the Declaration of Nicolas Paul Matthews in Support of Chapter 15 Petition for Recognition of Foreign Proceeding Pursuant to 11 U.S.C. §§ 1504, 1509, 1515, 1517 and 1520, and (d) the Declaration of Sarah Dobbyn in Support of Chapter 15 Petition for Recognition of Foreign Proceeding Pursuant to 11 U.S.C. §§ 1504, 1509, 1515, 1517 and 1520; and the Court having entered the Temporary Restraining Order and Order Scheduling Hearing for Preliminary Injunction on November 12, 2009 (Docket No. 11), the Order on Motion to File Documents Containing Commercially Sensitive Information Under Seal on November 13, 2009 (Docket No. 15) and the Order Granting

Preliminary Injunction on November 18, 2009 (Docket No. 26); and adequate and sufficient service and notice of the Petition having been given to all interested parties; and upon the record of the statements made by counsel for the Petitioners and counsel for interested parties; and based on the foregoing; and after due deliberation and sufficient cause appearing therefor, the Court finds and concludes as follows:

A. this Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and 11 U.S.C. § 1501.

B. this matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(P).

C. venue in this district is proper pursuant to 28 U.S.C. § 1410(1).

D. the Petitioners are persons within the meaning of sections 101(41) and 1517(a)(2) of the Bankruptcy Code and are the duly appointed foreign representatives of the Debtor within the meaning of section 101(24) of the Bankruptcy Code.

E. the Chapter 15 Case was properly commenced pursuant to sections 1504 and 1515 of the Bankruptcy Code.

F. the Petition meets the requirements of section 1515 of the Bankruptcy Code.

G. the Petitioners have met the requirements set forth in Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedures (the "Bankruptcy Rules").

H. the Cayman Proceeding is a foreign proceeding within the meaning of sections 101(23) of the Bankruptcy Code.

I. the Debtor has its center of main interests in the Cayman Islands.

J. the Cayman Proceeding is entitled to recognition as a foreign main proceeding within the meaning of section 1502(4) of the Bankruptcy Code and pursuant to sections 1517(a)(1) and 1517(b)(1) of the Bankruptcy Code.

K. recognition of the Cayman Proceeding as a foreign main proceeding is necessary and appropriate, in the interest of public and international comity, consistent with the public policy of the United States and the objectives of Chapter 15 set forth in section 1501 of the Bankruptcy Code, and will not cause hardship to third parties in litigation, if any, or any other parties-in-interest that is not outweighed by the benefits of granting the relief set forth herein.

NOW THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Cayman Proceeding is recognized as a foreign proceeding pursuant to section 1517(a) of the Bankruptcy Code.

2. The Cayman Proceeding is recognized as a foreign main proceeding pursuant to section 1517(b)(1) of the Bankruptcy Code.

3. All provisions of section 1520 of the Bankruptcy Code apply in this Chapter 15 Case, including, without limitation, the automatic stay under section 362 of the Bankruptcy Code with respect to the Debtor and any property of the Debtor that is within the territorial jurisdiction of the United States. For the avoidance of doubt, all persons and entities (including, without limitation, those persons and entities listed on Exhibit A hereto) are hereby enjoined from:

(a) commencing or continuing any judicial, administrative, or other action or proceeding in the United States against the Foreign Representatives, the Debtor or the Debtor's property or assets;

(b) enforcing, against the Foreign Representatives, the Debtor or the Debtor's property or assets in the United States, any judicial, quasi-judicial, administrative or regulatory judgment, assessment or order or arbitration award against the Debtor or the Debtor's property or assets;

(c) taking any action to obtain possession of the Debtor's property or assets in the United States or to exercise control over the Debtor's property or assets in the United States (including, without limitation, taking any action relating to an existing or future capital call in respect of any of the Funds in the United States that would (1) diminish the Debtor's interest in such Fund, (2) impose penalty interest, (3) seek to collect any amounts outstanding, (4) seek to force the sale of the Debtor's interest in such Fund, or (5) otherwise adversely affect the Debtor's rights or interests relating to such Fund), except as otherwise expressly authorized by the Foreign Representatives in writing;

(d) taking any action to create, perfect or enforce any lien against the Debtor's property or assets in the United States;

(e) taking any action to collect, assess or recover a claim against the Debtor in the United States or in respect of the Debtor's property or assets in the United States; or

(f) transferring, encumbering or otherwise disposing of any property or assets of the Debtor in the United States.

4. The administration and/or realization of the Debtor's assets located within the jurisdiction of the United States are hereby entrusted to the Foreign Representatives. Until further Order of this Court, the Foreign Representatives are hereby established as the exclusive representatives of the Debtor in the United States with the exclusive authority to administer the Debtor's assets and affairs in the United States including, without limitation, to sell or dispose of the Debtor's interests in its assets, to collect distributions relating to the Debtor's interest in any of its assets (including upon the maturity of such interest), and to make or not make any capital calls relating to the Debtor's assets, all of which actions and decisions by the Foreign Representatives being in the ordinary course of the Debtor's business and consistent with the "Winding Up Order" entered in the Cayman Proceeding.

5. Notwithstanding anything contained herein, this Order shall be without prejudice to (i) the right of Lightyear Fund II, L.P. ("Lightyear") to pursue an adjudication of the merits of the issues raised in the limited objection that it filed in this case (Docket No. 29) (the "Lightyear Limited Objection") and (ii) the Debtor's right to contest the same. Subject to further order of this Court, and to the extent that the Lightyear Limited Objection is not otherwise resolved consensually between Lightyear and the Petitioners, the Court shall hold a hearing on the merits of issues raised in the Lightyear Limited Objection at 3:00 p.m. (prevailing Eastern time) on January 6, 2010.

6. No action taken by the Petitioners or any of their successors, agents, representatives, advisors or counsel, in preparing, disseminating, applying for, implementing or otherwise acting in furtherance of, or in connection with, the Cayman Proceeding, this Chapter 15 Case, this Order or any other order made in this Chapter 15 Case, or any adversary proceeding herein, or any further proceeding commenced hereunder, shall be deemed to constitute a waiver of the immunity afforded such person under sections 306 and 1510 of the Bankruptcy Code.

7. Notwithstanding any provision in the Bankruptcy Rules to the contrary, (a) this Order shall be effective immediately and shall be final and enforceable upon its entry, (b) the Petitioners are not subject to any stay in the implementation, enforcement, effectuation or realization of the relief granted in this Order, and (c) the Petitioners are authorized and empowered, and may in their discretion and without further delay, take any action and perform any act necessary to implement, effectuate and realize the terms of this Order.

8. This Court shall retain jurisdiction with respect to any matters, claims, rights or disputes arising from or related to the Petition or the implementation, enforcement, amendment or modification of this Order, any requests for additional relief or any adversary proceeding brought in and through this Chapter 15 Case, and any request by an entity for relief from the provision of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Court.

Dated: Wilmington, Delaware
December 17, 2009

The Honorable Kevin Gross
UNITED STATES BANKRUPTCY JUDGE

Exhibit A

1.	**Saad Investments Company Limited (in Official Liquidation)** c/o Grant Thornton Specialist Services (Cayman) Limited Commerce House, 2nd Floor 7 Dr. Roy's Drive P.O. Box 1370 Grand Cayman, KY1-1108 Cayman Islands Attn: Hugh Dickson, Mark Byers and Steve Akers, in their capacity as the Joint Official Liquidators of Saad Investments Finance Company Limited (in Official Liquidation) - and - c/o Walkers Walker House, 87 Mary Street George Town, Grand Cayman KY1-9001 Cayman Islands Attn: Colette Wilkins
2.	**Barclays Bank PLC** 1 Churchill Place, London E14 5HP, United Kingdom

3.	**Mr. Maan Abdulwaheed Al Sanea** c/o Saad Trading and Contracting Co. P.O. Box 3250 Al Khobar, 31952 Kingdom of Saudi Arabia - and - c/o Gibson, Dunn & Crutcher, LLP 200 Park Avenue, 47th Floor New York, NY 10116-0193 Attn: Robert F. Serio, Esq., Gabriel Herrmann, Esq. - and - c/o Appleby Clifton House 75 Fort Street PO Box 190 Grand Cayman KY1-1104 Cayman Islands Attn: Jeremy Walton
4.	**Awal Bank BSC** Entrance 3, Level 1 The Manana Center Government Avenue Kingdom of Bahrain - and - c/o Charles Russell, LLP (External Administrator of Awal Bank, BSC) 5 Fleet Place London EC4M 7RD United Kingdom - and - c/o Quinn Emanuel Urquhart Oliver & Hedges, LLP 51 Madison Avenue, 22nd Floor New York, NY 10010 Attn: Daniel L. Brockett, Esq., Christine H. Chung, Esq.

5.	**Ahmed Hamad Al Gosaibi & Brothers Co.** P.O. Box 106 Al Khobar 31952 Kingdon of Saudi Arabia - and - c/o Solomon Blum Heymann & Stich, LLP 40 Wall Street New York, NY 10005 Attn: David P. Stich, Esq. - and - c/o Baach Robinson & Lewis, PLLC 1201 F. Street, NW Suite 500 Washington, DC 20004 Attn: Bruce R. Grace, Esq., Elizabeth Marvin, Esq., Katherine Toomey, Esq. - and - c/o Mourant du Feu & Jeune Harbour Centre 42 North Church Street, PO Box 1348 George Town, Grand Cayman KY1 1108 Cayman Islands Attn: Simon Hayden

6.	**MashreqBank PSC** P.O. Box 1250, Near Al Ghurair City, Deira Dubai, United Arab Emirates - and - 50 Broadway, Suite 1500 New York, NY 10004 - and - c/o Cleary Gottlieb Steen & Hamilton LLP One Liberty Plaza New York, NY 10006 Attn: David E. Brodsky, Esq., Carmine D. Boccuzzi, Jr., Esq.
7.	Filed Under Seal
8.	Filed Under Seal
9.	Filed Under Seal
10.	Filed Under Seal
11.	Filed Under Seal
12.	Filed Under Seal
13.	Filed Under Seal
14.	Filed Under Seal
15.	Filed Under Seal
16.	Filed Under Seal
17.	Filed Under Seal
18.	Filed Under Seal
19.	Filed Under Seal
20.	Filed Under Seal
21.	Filed Under Seal
22.	Filed Under Seal
23.	Filed Under Seal
24.	Filed Under Seal
25.	Filed Under Seal
26.	Filed Under Seal

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 15
Saad Investments Finance Company (No.5) Limited	Case No. 09-13985 (KG)
Debtor in a Foreign Proceeding.	**Related Docket Nos. 2, 3 and 4**

REVISED ORDER RECOGNIZING FOREIGN PROCEEDING

CONFIDENTIAL

FILED UNDER SEAL PURSUANT TO AN ORDER DATED NOVEMBER 13, 2009 (DOCKET NO. 15), GOVERNING THE FILING OF DOCUMENTS UNDER SEAL

THIS ENVELOPE IS NOT TO BE OPENED NOR THE CONTENTS THEREOF DISPLAYED OR REVEALED EXCEPT BY COURT ORDER.

Dated: December 17, 2009
Wilmington, Delaware

LANDIS RATH & COBB LLP
Adam G. Landis (No. 3047)
Kerri K. Mumford (No. 4186)
919 Market Street, Suite 1800
Wilmington, DE 19801
Telephone: (302) 467-4400
Facsimile: (302) 467-4450

- and -

SCHULTE ROTH & ZABEL LLP
Brian D. Pfeiffer (BDP-2550)
Karen S. Park (KP-1104)
919 Third Avenue
New York, NY 10022
Telephone: (212) 756-2000
Facsimile: (212) 593-5955

Counsel to the Petitioners

EXHIBIT I

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	:	Chapter 15
MADISON NICHE ASSETS FUND, LTD. (IN OFFICIAL LIQUIDATION)[1], *et al.*,	:	Case No. 16-010043 (KJC)
	:	(Jointly Administered)
Debtors in Foreign Proceedings.	:	**Ref. Docket Nos. 2, 24, 25, and 34**

ORDER GRANTING RECOGNITION AND RELIEF IN AID OF A FOREIGN MAIN PROCEEDING PURSUANT TO SECTIONS 1504, 1509, 1515, 1517, 1520 AND 1521 OF THE BANKRUPTCY CODE

Matthew James Wright and Christopher Barnett Kennedy, duly appointed joint official liquidators and authorized foreign representatives ("**Official Liquidators**") of Madison Niche Opportunities Fund, Ltd. (in Official Liquidation) ("**Opportunities Fund**") and Madison Niche Assets Fund, Ltd. (in Official Liquidation) ("**Assets Fund**" and together with Opportunities Fund, the "**Funds**"), both Funds in liquidation under the supervision of the Financial Services Division of the Grand Court of the Cayman Islands (the "**Grand Court**") (cause nos. FSD 0035 of 2015 (ASQC) (re the Assets Fund) and 0036 of 2015 (ASQC) (re the Opportunities Fund)) as a result of the Grand Court's orders (the "**Supervision Orders**") made pursuant to the Official Liquidators' petitions for the Grand Court's supervision under section 131 of the Companies Law of the Cayman Islands (2013 Revision) (the "**Companies Law**")[2] (the "**Cayman**

[1] The last four digits of the United States Tax Identification Number, or similar foreign identification number, as applicable, follow in parentheses: Madison Niche Assets Fund, Ltd. (in Official Liquidation) (1425) and Madison Niche Opportunities Fund, Ltd. (in Official Liquidation) (0084). The Funds' registered office is 2nd Floor, Windward 1, Regatta Office Park, P.O. Box 897, Grand Cayman, KY1-1103.

[2] Excerpts of the relevant provisions of the Companies Law are attached as Exhibit A to the Gowrie Declaration.

Liquidations") by its United States counsel, Holland & Knight LLP and Young Conaway Stargatt & Taylor, LLP, filed an Official Form Petition, the *Verified Petition for Recognition of Foreign Insolvency Proceedings and Application for Additional Relief, Pursuant to Sections 1504, 1509, 1515, 1517, 1520 and 1521 of the Bankruptcy Code* (the "**Verified Petition**,"[3] [D.I. 2] and, together with the Official Form Petition, the "**Petition**"), and the accompanying Christopher Barnett Kennedy Declaration dated January 8, 2016 [D.I. 5], Barnaby Gowrie Declaration dated January 8, 2016 [D.I. 4], and Warren Gluck Declaration dated January 8, 2016 [D.I. 3], seeking relief pursuant to chapter 15 of the Bankruptcy Code.

TMC Consulting Services, LLC ("**TMC**") filed an objection to the Petition ("**Objection**") dated February 5, 2016 [D.I. 24]. The Official Liquidators and TMC subsequently reached an agreement whereby TMC withdrew its objection in accordance with terms set forth in this order.

On February 24, 2016, a hearing was held concerning the relief sought in the Petition ("**Hearing**"). At the Hearing, the following declarations (the "**Declarations**") were admitted into evidence: (i) *Declaration of Christopher Barnett Kennedy in Support of Chapter 15 Petitions for Recognition as Foreign Main Proceedings* dated January 8, 2016 [D.I. 5]; (ii) *Declaration of Barnaby Gowrie in Support of Chapter 15 Petitions of Debtors in Foreign Proceedings for Recognition as Foreign Main Proceedings* dated January 8, 2016 [D.I. 4]; (iii) *Declaration of Warren E. Gluck in Support of Recognition of Foreign Insolvency Proceedings Pursuant to Chapter 15 of the Bankruptcy Code* dated January 8, 2016 [D.I. 3]; (iv) *Declaration of David Lionette* dated February 5, 2016 [D.I. 24-1]; (v) *Reply Declaration of Christopher Barnett Kennedy in Further Support of Chapter 15 Petitions for Recognition as Foreign Main*

[3] Capitalized terms used, but not otherwise defined herein shall have the meanings given to them in the Verified Petition.

Proceedings dated February 18, 2016 [D.I. 26]; (vi) *Reply Declaration of Barnaby Gowrie in Support of Chapter 15 Petitions of Debtors in Foreign Proceedings for Recognition as Foreign Main Proceedings* dated February 18, 2016 [D.I. 27]; and (vii) *Declaration of Warren E. Gluck in Support of Recognition of Foreign Insolvency Proceedings Pursuant to Chapter 15 of the Bankruptcy Code* dated February 19, 2016 [D.I. 28].

Upon due consideration of the Petition and Declarations and appropriate and timely notice of the filing of the Petition and the Hearing thereon having been given by the Official Liquidators, pursuant to section 1514 of the Bankruptcy Code; and such notice having been adequate and sufficient for all purposes; and no other or further notice being necessary or required; and no objections or other responses having been filed that have not been overruled, withdrawn or otherwise resolved; and all interested parties having had an opportunity to be heard at the Hearing; and after due deliberation and sufficient cause appearing therefore, the Court makes the following findings of fact and conclusions of law:

A. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and 11 U.S.C. §§ 109 and 1501 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware dated February 29, 2012.

B. Venue of this proceeding is proper in this judicial district pursuant to 28 U.S.C. § 1410 (2) because there is an action pending against the Funds within this judicial district, and the Court may enter a final order consistent with Article III of the United States Constitution.

C. This is a core proceeding under 28 U.S.C. § 157(b)(2)(P).

D. The Official Liquidators are the "foreign representatives" of the Funds pursuant to 11 U.S.C. § 101(24).

E. The chapter 15 cases of the Funds were properly commenced pursuant to 11 U.S.C. §§ 1504, 1509 and 1515.

F. The Official Liquidators have satisfied the requirements of 11 U.S.C. § 1515 and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure.

G. The Cayman Liquidations are "foreign proceedings" pursuant to 11 U.S.C. § 101(23).

H. The Cayman Liquidations are entitled to recognition by this Court pursuant to 11 U.S.C. § 1517.

I. The Cayman Liquidations are pending in the Cayman Islands, the country where the Funds' center of main interests is located, and accordingly the Cayman Liquidations are foreign main proceedings pursuant to 11 U.S.C. § 1502(4), and are entitled to recognition as foreign main proceedings pursuant to 11 U.S.C. § 1517(b)(1).

J. The Official Liquidators are entitled to all of the relief provided under 11 U.S.C. § 1520 and 1521 without limitation, except as specifically provided for in this Order.

K. The relief granted hereby is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, and warranted pursuant to 11 U.S.C. §§ 1507, 1517, 1520 and 1521.

NOW, THEREFORE, IT IS HEREBY

1. **ORDERED**, that the Petition is granted as set forth herein;

2. **ORDERED**, that the Cayman Liquidations are recognized as foreign main proceedings pursuant to 11 U.S.C. §§ 1517(a) and (b)(1); and it is further

3. **ORDERED** that the Official Liquidators and each of them are recognized as the Foreign Representatives of the Funds within the meaning of 11 U.S.C.§ 101 (24); and it is further

4. **ORDERED**, that all persons and entities (other than the Official Liquidators and their expressly authorized representatives and agents) are hereby enjoined, except as provided in 11 U.S.C. §§ 555 through 557, 559 through 562, 1520 and 1521 or as modified herein, from:

(1) executing against the Funds' property or assets;

(2) taking or continuing any act to obtain possession of, or exercise control over, the Official Liquidators (with respect to the Funds), the Funds, or any of the Funds' property or assets;

(3) taking or continuing any act to create, perfect or enforce a lien or other security interest, set-off or other claim against the Official Liquidator (with respect to the Funds), the Funds or any of the Funds' property or assets as of the date of the filing of the Petition, or otherwise seeking the issuance of or issuing any restraining notice or other process or encumbrance with respect to the Funds or any of the Funds' property or assets; and

(4) transferring, relinquishing or disposing of any property of the Funds to any person or entity other than the Official Liquidators;

and it is further

5. **ORDERED**, that 11 U.S.C. § 1520(a) shall be effective with respect to the Cayman Liquidations, except that solely the litigation *TMC Consulting Services, LLC v. Matthew Wright et al., C.A.* No.: N15C-11-132 (EMD) (Del. Sup. Ct.) (the "**TMC Litigation**") shall not be stayed pursuant to section 1520(a) or any other provision of the Bankruptcy Code or this Order; and it is further

6. **ORDERED**, that TMC is hereby granted relief from the automatic stay imposed under 11 U.S.C. §§ 362 and 1520(a) with respect to the TMC Litigation, however, paragraph 4(1)-(4) shall remain in effect with respect to the TMC Litigation; and it is further

7. **ORDERED**, that the parties shall work to ensure that scheduling of the TMC Litigation reasonably accommodates the circumstances associated with litigation involving companies undergoing Official Liquidation in the Cayman Islands; and it is further

8. **ORDERED,** that the Official Liquidators will not object to any application made to the Grand Court by TMC to lift any stay that may be applicable to the TMC Litigation under the Supervision Orders and relevant laws of the Cayman Islands (**"Cayman Stay"**), and the confirmation of such non-objection will be sent, within two (2) business days of TMC's request, via letter from the Official Liquidators' Cayman Islands counsel, Walkers, to TMC's Cayman Islands counsel Conyers Dill & Pearman; and it is further

9. **ORDERED** that the Official Liquidators have agreed not to request, and hereby waive, any sanction or penalty in respect of any violation by TMC of the Cayman Stay; and it is further

10. **ORDERED** that in the event an application by TMC to the Grand Court to lift the Cayman Stay is denied by the Grand Court (**"Cayman Stay Denial Order"**), the Official Liquidators do not waive any rights whatsoever to seek recognition and enforcement of the Cayman Stay Denial Order in this Court or the Delaware Superior Court and TMC does not waive any right to contest such recognition or enforcement; and it is further

11. **ORDERED** the Official Liquidators and TMC shall not be deemed to have waived or relinquished any right, duty, obligation or argument not specifically and explicitly provided for herein; and it is further

12. **ORDERED,** that, except for the TMC Litigation and as set forth in paragraphs 4-8 above, 11 U.S.C. § 1521(a)(1-3) shall be effective with respect to the Cayman Liquidations and/or the stay, as provided for by Section 97(1) of the Companies Law, shall be effective in the United States pursuant to 11 U.S.C. § 1507; and it is further

13. **ORDERED**, that the Official Liquidators are authorized to operate the business of the Funds that are the subject of Cayman Liquidations and may exercise the powers of a trustee under and to the extent provided by 11 U.S.C. §§ 1520 and 1521; and it is further

14. **ORDERED**, that the Official Liquidators are hereby granted authority to assert claims of the Funds against parties that are subject to jurisdiction in the United States; and it is further

15. **ORDERED**, that the administration or realization of all or part of the assets of the Funds within the territorial jurisdiction of the United States is hereby entrusted to the Official Liquidators and the Official Liquidators are hereby established as the exclusive representatives of the Funds in the United States; and it is further

16. **ORDERED**, that the Official Liquidators are hereby granted authority to engage in discovery in respect of United States-located documents and witnesses pursuant to 11 U.S.C. § 1521(a)(4) in respect of the assets, affairs and liabilities of the Funds; and it is further

17. **ORDERED**, that this Court retains jurisdiction with respect to the enforcement, amendment or modification of this Order, any requests for additional relief or any adversary proceeding brought in and through these chapter 15 cases, and any request by an entity for relief from the provisions of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Court; and it is further

18. **ORDERED**, that, notwithstanding Rule 7062 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**"), made applicable to these chapter 15 cases by Bankruptcy Rule 1018, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry, and upon its entry, this Order shall become final.

Dated: March 1, 2016

The Honorable Kevin J. Carey
United States Bankruptcy Judge

EXHIBIT J

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

In re:	Chapter 15
AJW OFFSHORE, LTD., *et al.*,	Case No. 13-70078-ast 13-70082-ast 13-70085-ast 13-70087-ast
Debtors in Foreign Proceedings.	(Jointly Administered)

ORDER GRANTING RECOGNITION OF A FOREIGN MAIN PROCEEDING

Petitioners Ian Stokoe and David Walker, both of PwC Corporate Finance & Recovery (Cayman) Limited (the "Petitioners"), in their capacity as duly appointed foreign representatives, as defined in section 101(24) of title 11 of the United States Code (the "Bankruptcy Code"), of AJW Offshore Ltd., AJW Master Fund, Ltd., AJW Offshore II, Ltd., and AJW Master Fund II, Ltd. (collectively the "Offshore Funds"), debtors in foreign proceedings (the "Cayman Islands Proceedings"), as defined in Bankruptcy Code section 101(23), pending before the Grand Court of the Cayman Islands, Financial Services Division (the "Cayman Islands Grand Court"), by and through their attorneys Reid Collins & Tsai LLP, having filed (a) the Official Form B1 Chapter 15 petitions for each of the Offshore Funds commencing these Chapter 15 cases (the "Petitions"); (b) the Verified Petition of Foreign Representatives Ian Stokoe and David Walker in Support of Applications for Recognition of Foreign Main Proceedings Pursuant to 11 U.S.C. § 1517 and Additional Relief (the "Verified Petition") along with the exhibits thereto; (c) the Declaration of Ian Stokoe (the "Stokoe Declaration") along with the exhibits thereto; (d) the Declaration of Christopher Russell (the "Russell Declaration"), and (e) the Memorandum of Law

in Support of Verified Petition, and (f) further pleadings supplementing and responding to Objections to the requested relief (the "Memorandum of Law," together with the Verified Petition, Stokoe Declaration, Russell Declaration, and other pleadings the "Chapter 15 Pleadings"); and the Court having reviewed and considered the Chapter 15 Pleadings; and the Court having reviewed, considered and overruled all objections thereto; and due and timely notice of the filing of the Chapter 15 Pleadings having been given; and after due deliberation and sufficient cause appearing therefore, the Court makes the following findings of fact and conclusions of law:

a. This Court has jurisdiction over these Chapter 15 cases of the Offshore Funds pursuant to 28 U.S.C. §§ 157 and 1334 and the Standing Order of Reference in effect in the Eastern District of New York dated August 28, 1986, as amended on December 5, 2012.

b. Venue of these Chapter 15 cases is proper in this judicial district pursuant to 28 U.S.C. § 1410.

c. The consideration of the Chapter 15 Pleadings and the relief requested therein is a core proceeding under 28 U.S.C. § 157(b)(2)(P).

d. These Chapter 15 cases were properly commenced in compliance with and pursuant to sections 1504 and 1515 of the Bankruptcy Code.

e. The Chapter 15 Pleadings meet the requirements of section 1515 of the Bankruptcy Code and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules").

f. The Cayman Islands Proceedings are entitled to recognition by this Court pursuant to section 1517 of the Bankruptcy Code.

g. The Cayman Islands Proceedings are foreign proceedings within the meaning of section 101(23) of the Bankruptcy Code.

h. The Cayman Islands Proceedings are pending in the Cayman Islands, which is the location of the Offshore Funds' "center of main interests," and as such the Cayman Islands Proceedings are entitled to recognition as foreign main proceedings pursuant to sections 1502(4) and 1517(b)(1) of the Bankruptcy Code.

i. Petitioners are "persons" within the definition of section 101(41) of the Bankruptcy Code and are the duly appointed "foreign representatives" of the Offshore Funds within the meaning of section 101(24) of the Bankruptcy Code, and, as such, are entitled to directly petition the Court for recognition of the Cayman Islands Proceedings under section 1509 of the Bankruptcy Code.

j. Petitioners are entitled to all relief provided pursuant to section 1520 of the Bankruptcy Code without limitation.

k. Petitioners are entitled to relief provided pursuant to section 108 of the Bankruptcy Code.

l. The relief granted hereby is necessary and appropriate to effectuate the purposes of Chapter 15 of the Bankruptcy Code, is in the interests of public policy and international comity, is not manifestly contrary to the public policy of the United States, and is warranted pursuant to section 1520 of the Bankruptcy Code.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Cayman Islands Proceedings are granted recognition as foreign main proceedings, as defined in section 1502(4) of the Bankruptcy Code, pursuant to section 1517 of the Bankruptcy Code.

2. All relief afforded a foreign main proceeding automatically upon recognition pursuant to section 1520 of the Bankruptcy Code is granted.

3. Petitioners are and shall be recognized as the foreign representatives of the Offshore Funds for which they were duly appointed as Joint Official Liquidators in the Cayman Islands Proceedings.

4. Petitioners are authorized to operate the Offshore Funds' businesses and may exercise the powers of a trustee under and to the extent provided by sections 363 and 552 of the Bankruptcy Code.

5. The protections of sections 361 and 362 of the Bankruptcy Code shall apply to the Offshore Funds and their assets in the United States.

6. The statutory tolling and extensions provided for in section 108 of the Bankruptcy Code apply for the Offshore Funds from the date of this Order, without prejudice to Petitioners' request for section 108's statutory tolling and extension provisions to apply *nunc pro tunc* to the date of the filing of the Verified Petition, January 7, 2013.

7. Consistent with this Order, Petitioners are authorized to recover property of the Offshore Funds' estates, commence or continue any action within the United States in furtherance of their activities as the foreign representatives of the Offshore Funds and take any actions necessary to effectuate the relief granted pursuant to the Order and all other relief provided by section 1509(b).

8. Service of this Order shall be made by United States mail, first-class postage prepaid on or before **February 7, 2013**, upon (i) the Debtor, in accordance with the laws of the Cayman Islands (ii) the U.S. Trustee, (iii) the U.S. Securities and Exchange Commission, (iv) any official liquidating committee or other committee appointed in the Cayman Islands

Proceedings of the Offshore Funds, (v) all persons or bodies authorized to administer the foreign proceedings of the Offshore Funds, (vi) Corey Ribotsky; and (vii) all parties to litigation pending in the United States in which the Offshore Funds are a party at the time of the filing of the petition at their last known addresses or, in the case of Corey Ribotsky, by email.

9. Petitioners shall publish this Order on the Offshore Funds' public website: http://www.ajw-group-liquidation.com/, on or before **February 7, 2013**, and will further cause emails to be sent to the Offshore Funds' registered stakeholders and the members of the Offshore Funds' liquidation committee, alerting them that this Order is available on such website.

10. Such service shall be good and sufficient service and adequate notice of this Order for all purposes; proof of such service shall be filed on or before **February 14, 2013**.

11. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry. This Order shall be entered in the lead case of AJW Offshore, Ltd., 13-70078-ast, and, in accordance with this Court's Order Directing Joint Administration of Cases Under Chapter 15 of the Bankruptcy Code entered January 11, 2013 [dkt item 13], shall be immediately effective as to each of the Offshore Funds.

12. This Court shall retain jurisdiction with respect to the enforcement, amendment or modification of this Order, any requests for additional relief or any adversary proceeding brought in and through these Chapter 15 cases, and any request by any person or entity for relief from the provisions of this Order.

Dated: February 5, 2013
Central Islip, New York

Alan S. Trust
United States Bankruptcy Judge

EXHIBIT K

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

Caption in Compliance with D.N.J. LBR 9004-2(c)
COLE, SCHOTZ, MEISEL, FORMAN & LEONARD, P.A.
A Professional Corporation
Court Plaza North
25 Main Street
P.O. Box 800
Hackensack, NJ 07602-0800
Michael D. Sirota, Esq.
Warren A. Usatine, Esq.
(201) 489-3000
(201) 489-1536 Facsimile

MOSES & SINGER LLP
The Chrysler Building
405 Lexington Avenue
New York, NY 10174
(212) 554-7800
Alan Kolod, Esq.
Mark N. Parry, Esq.
Declan M. Butvick, Esq.

Co-counsel for Petitioner Plaza Management Overseas S.A., in its capacity as the foreign representative

In re:

GRAND PRIX ASSOCIATES INC., *et al.*,

Debtors in Foreign Proceedings.

FILED
JAMES J. WALDRON, CLERK
MAY 18 2009
U.S. BANKRUPTCY COURT
NEWARK, N.J.
BY DEPUTY

Judge: Hon. Donald H. Steckroth

Chapter 15

(Jointly Administered)

Case No. 09-16545 (DHS)

ORDER GRANTING RECOGNITION OF FOREIGN MAIN PROCEEDING AND RELATED RELIEF PURSUANT TO SECTIONS 363, 1515, 1517, 1520, 1521, 1525 AND 1527 OF THE BANKRUPTCY CODE

The relief set forth on the following pages, numbered two (2) through eleven (11), is hereby ORDERED.

May 18, 2009

D. Steckroth
USBJ

A hearing having been held before the United States Bankruptcy Court of the District of New Jersey (the "Court") on May 18, 2009 (the "Hearing") to consider the Amended Verified Joint Petition for Recognition of a Foreign Proceeding Pursuant to 11 U.S.C. §§ 1515, 1517, 1520, 1521, 1525 and 1527 (the "Amended Verified Joint Petition," collectively with the individual petitions filed on behalf of each foreign debtor[1], the "Petitions"), seeking recognition of the foreign proceeding (the "BVI Action"), pending in the Eastern Caribbean Supreme Court, High Court of Justice, British Virgin Islands (the "BVI Court"), as a foreign main proceeding pursuant to sections 1515 and 1517 of title 11 of the United States Code (the "Bankruptcy Code"), filed by Plaza Management Overseas S.A. (the "Petitioner"), as duly authorized foreign representative for the BVI Debtors; and upon the Court's review and consideration of the Petitions, the Declaration of Tom Meganck As Director Of The Foreign Representative Of The Petitioner Pursuant To Section 1515(c) Of The Bankruptcy Code And Bankruptcy Rule 1007(a)(4), dated March 18, 2009, the Master Settlement Agreement (as defined in the Amended Verified Joint Petition),[2] the Transaction Agreement, and the evidence put on the record at the Hearing; and appropriate and timely notice of the filing of the Petitions and the hearing thereon having been given by Petitioner,

---

[1] The foreign debtors are: Grand Prix Associates Inc., a business company organized under the laws of British Virgin Islands ("GPAI"); Bundora Associates Inc., a business company organized under the laws of British Virgin Islands ("BAI"); Bundora Investments Limited, a company organized under the laws of Malta ("BIL"); Bundora Investments N.V., a company organized under the laws of Belgium ("BINV"); Ruby Investment Sp. z.o.o., a company organized under the laws of Poland ("RI"); Bundora Corp., a company organized under the laws of the State of Delaware ("BC"); Lockhart Overseas Investments Corp., a business company organized under the laws of British Virgin Islands ("LOIC"); Lockhart Limited, a company organized under the laws of Malta ("LL"); Naven Investments Sp. z.o.o., a company organized under the laws of Poland ("NI"); Lockhart Corp. I, a company organized under the laws of the State of Delaware ("LC-I"); Shelby Overseas Invest & Trade Ltd., a business company organized under the laws of British Virgin Islands ("SOIT") (collectively, the "BVI Debtors").

[2] Unless otherwise provided, all defined terms not defined herein shall have the meaning ascribed to them in the Master Settlement Agreement.

pursuant to section 1514 of the Bankruptcy Code; and such notice having been adequate and sufficient for all purposes; and no other or further notice being necessary or required; and no objections or other responses having been filed that have not been overruled, withdrawn or otherwise resolved; and all interested parties having had an opportunity to be heard at the Hearing; and upon the consent of the CS SP Parties (as defined in the Amended Verified Joint Petition); and after due deliberation and sufficient cause appearing therefore, the Court, subject to decretal paragraph 14 hereof, makes the following findings of fact and conclusions of law:

(a) This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and sections 109 and 1501 of the Bankruptcy Code.

(b) Venue of this proceeding is proper in this judicial district pursuant to 28 U.S.C. § 1410 because the BVI Debtors' principal assets in the United States are located in this District.

(c) This is a core proceeding under 28 U.S.C. § 157(b)(2)(P).

(d) The Petitioner is a "person" pursuant to section 101(41) of the Bankruptcy Code.

(e) The Petitioner is the duly appointed "foreign representative" of the BVI Debtors pursuant to section 101(24) of the Bankruptcy Code.

(f) These chapter 15 cases were properly commenced pursuant to sections 1504, 1509, and 1515 of the Bankruptcy Code.

(g) The Petitioner has satisfied the requirements of section 1515 of the Bankruptcy Code and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure.

(h) Pursuant to the BVI Business Companies Act, the BVI Action is currently pending in the BVI Court, and the provisions made thereunder for the protection, administration and distribution of assets, is a "foreign proceeding" pursuant to section 101(23) of the Bankruptcy Code.

(i) The BVI Action is entitled to recognition by this Court pursuant to section 1517 of the Bankruptcy Code.

(j) The BVI Action is pending in the country where the center of main interests of the BVI Debtors is located, and accordingly the BVI Action is a "foreign main proceeding" pursuant to section 1502(4) of the Bankruptcy Code, and is entitled to recognition as a foreign main proceeding pursuant to section 1517(b)(1) of the Bankruptcy Code.

(k) The Petitioner is entitled to all the relief provided pursuant to section 1520 of the Bankruptcy Code.

(l) The Petitioner is further entitled to the relief set forth in sections 1521(a) and (b) of the Bankruptcy Code.

(m) The transfer of the stock of Dickson Invest & Trade Ltd. ("Dickson") from Blackthorne Properties, Inc. ("Blackthorne") to BAI and, following such transfer, the transfer of certain LP Interests from Dickson to certain of the BVI Debtors and the assumption of the obligations appurtenant to such LP Interests by the BVI Debtors, as authorized and required herein, are necessary in order to implement the Master Settlement Agreement and to preserve the value of the BVI Debtors' interests in the LP Interests, and are in the best interests of the BVI Debtors and their estates and all parties in interest. The

execution and performance of the Master Settlement Agreement are essential grounds for the entry of this Order and granting recognition to the BVI Action.

(n) The payment of all outstanding capital calls by the BVI Debtors, as authorized and required herein, are necessary in order to implement the Master Settlement Agreement and to preserve the value of the BVI Debtors' interests in the LP Interests and are in the best interests of the BVI Debtors and their estates and all parties in interest.

(o) The relief granted hereby is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, and warranted pursuant to sections 363, 1515, 1517, 1520, 1521, 1525 and 1527 of the Bankruptcy Code.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. The BVI Action is granted recognition pursuant to section 1517(a) of the Bankruptcy Code.

2. The BVI Action is granted recognition as a foreign main proceeding pursuant to section 1517(b)(1) of the Bankruptcy Code.

3. Except as otherwise provided in sections 1520 and 1521 of the Bankruptcy Code, and subject to decretal paragraphs 4, 5, 6, 7, 8, 9, 10 and 11 hereof, all persons and entities are hereby enjoined from:

(a) executing against the BVI Debtors' assets;

(b) taking or continuing any act to obtain possession of, or exercise control over, the Petitioner (with respect to the BVI Debtors), the BVI Debtors or any of their property;

(c) taking or continuing any act to create, perfect or enforce a lien or other security interest, set-off or other claim against the Petitioner (with respect to the BVI Debtors), the BVI Debtors or any of their property;

(d) transferring, relinquishing, selling, encumbering or disposing of any property of the BVI Debtors, wherever located, to any person or entity other than the Petitioner;

(e) commencing or continuing any proceedings, including, without limitation, arbitration, mediation or any judicial, quasi-judicial, administrative or regulatory action, appeal, proceeding or process whatsoever (collectively, "Proceedings") against the Petitioner (with respect to the BVI Debtors), the BVI Debtors or any of their property and seeking discovery of any nature against the Petitioner (with respect to the BVI Debtors) or the BVI Debtors;

(f) enforcing any judicial, quasi-judicial, administrative or regulatory judgment, assessment or order or arbitration award and commencing or continuing any act or any action or other Proceedings to create, perfect or enforce any lien, set-off or other claim against the Petitioner (with respect to the BVI Debtors), the BVI Debtors or any of their property;

(g) invoking, enforcing or relying on the benefits of any statute, rule or requirement of federal, state or local law or regulation requiring the Petitioner (with respect to the BVI Debtors) or the BVI Debtors to establish or post security in the form of a bond, letter of credit or otherwise as a condition of prosecuting or defending any Proceedings,

and such statute, rule or requirement will be rendered null and void for the purposes of such Proceedings; and

(h) declaring the filing of the Petitions and these chapter 15 cases a default or event of default under any agreement, contract or arrangement.

4. Pursuant to section 1520(a) of the Bankruptcy Code, all persons and entities are hereby enjoined and restrained from taking any actions or steps inconsistent with the BVI Action, the terms of the Master Settlement Agreement, and the terms of the Transaction Agreement, including, *inter alia*, as set forth herein. Notwithstanding anything to the contrary herein, neither this Order, the Master Settlement Agreement or the Transaction Agreement shall be deemed to modify the partnership agreements (including the transfer provisions) of any limited partnership or their affiliates that have issued LP interests held by the BVI Debtors or Dickson.

5. The Petitioner is authorized to operate the businesses of the BVI Debtors that are the subject of the BVI Action and may exercise the powers of a trustee under and to the extent provided by sections 1520 and 1521.

6. Subject to the Master Settlement Agreement, the administration or realization of all or part of the assets of the BVI Debtors within the territorial jurisdiction of the United States shall be entrusted to the Petitioner and the Petitioner is hereby established as the exclusive representative of the BVI Debtors in the United States.

7. The BVI Action shall be granted comity and given full force and effect.

8. No action taken by the Petitioner, the BVI Debtors or each of their successors, agents, representatives, advisors or counsel, in preparing, disseminating, applying for, implementing or otherwise acting in furtherance of or in connection with the BVI Action, this

Order, or these chapter 15 cases, or any adversary proceeding herein, or any further proceeding commenced hereunder, shall be deemed to constitute a waiver of the immunity afforded such persons under 11 U.S.C. §§ 306 and 1510.

9. Pursuant to sections 1520 and 1521, the right to sell, transfer, encumber or otherwise dispose, or realize on, of any assets of the Blackthorne Parties and the BVI Debtors (including the stock of the Plaza Parties and of Dickson) wherever located is prohibited, except for any such sale, transfer, encumbrance, disposition or realization required or authorized pursuant to the Master Settlement Agreement and the Transaction Agreement (including, specifically, the transfer of the stock of Dickson to BAI, the transfers of LP Interests from Dickson to any BVI Debtor, and payment by any BVI Debtor of capital calls and interest, fees. legal expenses and other charges to the limited partnerships and their affiliates that have issued the LP Interests).

10. Pursuant to sections 1520 and 1521 of the Bankruptcy Code, BAI is authorized and required to accept the transfer of the stock of Dickson, and the limited partnerships that have issued LP Interests held by Dickson are authorized to transfer such LP Interests to the BVI Debtors in accordance with section 2.5(b) of the Master Settlement Agreement, and the BVI Debtors are authorized and required to accept such transfers, along with any appurtenant obligations. The parties to the Master Settlement Agreement and the limited partnerships (or other entities) that have issued any LP Interests held by Dickson are further authorized, and the parties to the Master Settlement Agreement are required, to perform any sale, transfer, encumbrance, disposition or realization required or authorized pursuant to the Master Settlement Agreement and the Transaction Agreement (including, for the avoidance of doubt, payment by any BVI Debtor to such limited partnerships and their affiliates of capital calls

and interest, fees, legal expenses and other charges prior to the transfer of LP Interests from Dickson to the BVI Debtors).

11. Pursuant to sections 1520 and 1521 of the Bankruptcy Code, the limited partnerships that have issued the LP Interests may not exercise any of their remedies against the BVI Debtors, except that, notwithstanding anything to the contrary herein, such partnerships (i) may make and accept payment of capital calls (including reasonable interest, fees, legal expenses and other charges) on the limited partners in their funds that may be delivered to and be effective against the BVI Debtors, and (ii) shall apply any distributions payable to any BVI Debtor with an unsatisfied capital call, before distribution of any amount to such BVI Debtor, to the satisfaction of such call plus any applicable fees, expenses and other charges and accrued interest at the rate provided for in the respective limited partnership agreement, subject to Plaza's and the BVI Debtors' right to contest such interest rate before the Bankruptcy Court.

12. The limited partnerships that have issued the LP Interests to the BVI Debtors may seek relief from this Order, for cause shown, by filing a motion on not less than ten (10) business days notice to (i) Moses & Singer LLP, The Chrysler Building, 405 Lexington Avenue, New York, New York 10174-1299 (Attention: Alan Kolod, Esq., Mark N. Parry, Esq. and Declan M. Butvick, Esq.) and Cole, Schotz, Meisel, Forman & Leonard, P.A., Court Plaza North, 25 Main Street, Hackensack, New Jersey 07601 (Attention: Michael D. Sirota, Esq. and Warren A. Usatine, Esq.) (the "United States Counsel"), United States Counsel to Petitioner, (ii) the United States Trustee, and (iii) counsel for the CS SP Parties, and any such request shall be the subject matter of a hearing scheduled by the Court and any party in interest may file objections and be heard by the Court. Nothing in this paragraph shall

preclude the limited partnerships from seeking emergency relief, for cause shown, from this Court on less than 10 days notice.

13. This Court shall exercise jurisdiction over all the parties to the Master Settlement Agreement.

14. Upon the occurrence of a Termination Event under the Master Settlement Agreement, or if there are unpaid capital calls (and interest, fees, legal expenses and other charges) and the Approval Order (as defined in the Master Settlement Agreement) has not been entered by September 15, 2009, this Order shall be vacated and shall become null and void, *nunc pro tunc*, as of the date immediately prior to execution of the Master Settlement Agreement. In such event, the Provisional Relief Order filed April 6, 2009, shall be reinstated, subject to further proceedings before this Court. Any party to the Master Settlement Agreement may file a certification with the Court upon occurrence of a Termination Event.

15. Notwithstanding paragraph 14 of this Order, upon the occurrence of a Termination Event (in accordance with section 5.1 of the Master Settlement Agreement), or if there are unpaid capital calls (and interest, fees, legal expenses and other charges) and the Approval Order (as defined in the Master Settlement Agreement) has not been entered by September 15, 2009, all parties shall be restored, *ipso facto*, to their rights, positions and obligations as of the date immediately prior to execution of the Master Settlement Agreement and all transfers made by Blackthorne and Dickson under the Master Settlement Agreement and this Order shall be reversed and shall be deemed to have been null and void *ab initio* and the limited partnerships are hereby authorized and required to reverse any such transfers of limited partnership interests.

(Page 13)
Debtors: GRAND PRIX ASSOCIATES INC., *et al.*
Case No. 09-16545 (DHS)
Caption of Order: ORDER GRANTING RECOGNITION OF FOREIGN MAIN PROCEEDING AND RELATED RELIEF PURSUANT TO SECTIONS 363, 1515, 1517, 1520, 1521, 1525 AND 1527 OF THE BANKRUPTCY CODE

16. This Order is without prejudice to the rights of all parties-in-interest, all of which are hereby reserved, to object to the entry of the Approval Order (as defined in the Master Settlement Agreement).

17. A copy of this Order, conformed to be true and correct, shall be served by United States mail, first class postage prepaid, on or before May 26, 2009, upon all of the BVI Debtors' known creditors, the parties to the Master Settlement Agreement, the Office of the United States Trustee, and any other party that has filed and served a notice of appearance in these cases, and that such service shall be good and sufficient service and adequate notice for all purposes.

ITEM NO. 130

JA-16

FILED UNDER SEAL

EXHIBIT E

FILED UNDER SEAL

[2022 (1) CILR 594]

IN THE MATTER OF FORMATION GROUP (CAYMAN) FUND I L.P.

COUNTRY GARDEN (HONG KONG) DEVELOPMENT COMPANY LIMITED and FIVE OTHERS v. FORMATION GROUP (CAYMAN) FUND I L.P.

GRAND CT. (Kawaley, J.) April 21st, 2022

Partnership — exempted limited partnership — winding up — pursuant to Exempted Limited Partnership Act (2021 Revision), s.36(3), winding-up petition may be presented against exempted limited partnership

The petitioners sought an order that a partnership be dissolved or wound up.

The petitioners, who contributed approximately 70% of the respondent's capital contributions, sought an order that the respondent be dissolved or wound up in accordance with s.3 of the Exempted Limited Partnership Act (2021 Revision) and s.35(e) of the Partnership Act or, in the alternative, s.36(3) of the Exempted Limited Partnership Act and s.92(e) of the Companies Act (2021 Revision).

The general partner applied for an order that the winding-up petition be struck out on the basis that it was presented against the respondent rather than against the general partner. The general partner submitted that (a) the strike-out application turned on the question of who was the proper respondent to the petition; (b) the respondent was not a legal entity; (c) the Exempted Limited Partnership Act only permitted legal proceedings to be brought against a general partner of an exempted limited partnership not against the exempted limited partnership itself—s.33(1) of the Act provided that "… legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more general partners only, and a limited partner shall not be a party to or named in the proceedings"; (d) winding-up proceedings or proceedings for a decree of dissolution were legal proceedings against an exempted limited partnership, within the meaning of s.33(1); and (e) the consequence of failing to comply with s.33(1) by naming the general partner as the respondent was that the proceedings were a nullity which was incurable.

In response, the petitioners submitted that (a) they were primarily relying on the winding-up jurisdiction under the Companies Act, as applied

to exempted limited partnerships by s.36(3) of the Exempted Limited Partnership Act; (b) the true legal question was the broader one of whether an exempted limited partnership could be wound up at all, with the question of whether proceedings could be brought against an exempted limited partnership being merely one element of that broader question; (c) limited partners could petition for the winding up of an exempted limited partnership under Part V of the Companies Act and the respondent was the correct respondent to the petition; (d) s.33 of the Exempted Limited Partnership Act was merely aimed at reversing the general rule which applied to ordinary partnerships where any partner could be named as a defendant in proceedings relating to the liabilities of the partnership, it did not prevent proceedings being issued against an exempted limited partnership; and (e) s.33(1) had to be read consistently with s.36(3), which was specific to winding up and provided "… Part V of the Companies Act (2021 Revision) and the Companies Winding Up Rules, 2018 shall apply to the winding up of an exempted limited partnership and for this purpose—(a) references in Part V to a company shall include references to an exempted limited partnership …"

Held, dismissing the summons:

(1) Section 33 of the Exempted Limited Partnership Act did not prohibit proceedings against an exempted limited partnership. The legislative purpose of s.33(1) was primarily to reinforce the legal status of limited partners as not ordinarily liable to be sued (or entitled to sue) in respect of exempted limited partnership liabilities and rights. This legislative purpose and the language of the provision in its wider statutory context strongly suggested that "may" in s.33(1) was permissive and that there was no general or usual mandatory rule that proceedings could not be issued against an exempted limited partnership in its own name. In any event, s.36(3) of the Act expressly provided that a winding-up petition could be presented against an exempted limited partnership in the same manner as in relation to a company and this special provision overrode the general terms of s.33(1). The fact that an exempted limited partnership generally had no separate legal personality was beside the point when the legislature had expressly extended the company winding-up regime to such entities. The court accepted the submission that it was entirely logical for the business of an exempted limited partnership to be wound up separately and apart from its general partner which might have other separate business concerns. It was true that a general partner was ultimately responsible for an exempted limited partnership's debts, but this responsibility was only triggered when the exempted limited partnership's assets were insufficient to meet those debts. The idea of an exempted limited partnership being wound up was consistent with the statutory scheme because s.4(2) made it clear that such legal entities had their own assets and liabilities distinct from the general partners which managed them and the limited partners which invested in them (paras. 36–45).

(2) If the petition had been liable to be struck out because it was impermissibly presented against the exempted limited partnership, that defect could not have been cured by amendment. It was inconsistent with the statutory winding-up regime to substitute a respondent to a petition (paras. 46–47).

Cases cited:

(1) *Cybernaut Growth Fund L.P., In re*, Cause No. FSD 73 of 2013, Grand Ct., September 12th, 2013, unreported, referred to.
(2) *Day* v. *Governor*, 2022 (1) CILR 447, considered.
(3) *Duet Real Estate Partners 1 L.P., In re*, 2020 (2) CILR 290, referred to.
(4) *Kuwait Ports Auth.* v. *Port Link GP Ltd.*, 2022 (1) CILR 12, referred to.
(5) *Padma Fund L.P., In re*, 2021 (2) CILR 556, not followed.
(6) *PricewaterhouseCoopers* v. *Saad Invs. Co. Ltd.*, [2014] UKPC 35; [2014] 1 W.L.R. 4482; [2014] 2 BCLC 583, referred to.
(7) *Rhone Holdings L.P., In re*, 2016 (1) CILR 273; further proceedings, Cause No. FSD 119 of 2016, Grand Ct., September 16th, 2016, unreported, considered.
(8) *Shanda Games Ltd.* v. *Maso Capital Invs. Ltd.*, 2020 (1) CILR 293, considered.
(9) *XiO Diamond L.P., In re*, 2020 (2) CILR 270, considered.

Legislation construed:

Exempted Limited Partnership Act (2021 Revision), s.4: The relevant terms of this section are set out at para. 15.
s.33: The relevant terms of this section are set out at para. 13.
s.36: The relevant terms of this section are set out at para. 18.

Grand Court Rules (2022 Consolidation), O.81, rr. 12–15: The relevant terms of these rules are set out at para. 40.

P. Sherwood and *N. Smith* for the petitioners;
H. Khanbhai for Formation Group GP I L.P. as general partner of the respondent ("the GP").

1 **KALAWEY, J.:**

Introduction

By their petition dated December 15th, 2021, the petitioners (who contributed approximately 70% of the respondent's capital contributions) claiming to be contingent creditors of the respondent sought the following principal relief, namely an order that:

"1. The Partnership be dissolved or wound up in accordance with Section 3 of the ELP Act and Section 35(e) of the Partnership Act or,

in the alternative, Section 36(3) of the ELP Act and Section 92(e) of the Companies Act …"

2 The GP applied by summons dated January 14th, 2022 for the following principal relief, namely an order that:

"1. The Winding Up Petition dated 15 December 2021 be struck out, on the basis that it has been presented against the Respondent rather than against the GP …"

3 Although Mr. Khanbhai for the GP sought to delicately avoid directly engaging with this underlying conflict, the present strike-out application focused on a standing point which reflects conflicting approaches by different judges of the Grand Court. Mostly recently, in *In re Padma Fund L.P.* (5), Parker, J. held that there was no jurisdiction to wind up an exempted limited partnership ("ELP") under the Companies Act. I took the contrary view, consistent with earlier decisions of this court, in *In re XiO Diamond L.P.* (9), which Parker, J. in *Padma* concluded was wrongly decided. Although Mr. Sherwood for the petitioners was keen for obvious forensic reasons to reduce the strike-out argument to a choice between following my own decision and Parker, J.'s conflicting decision, the present application cannot be approached in such a binary fashion. The arguments canvassed in *XiO* were not precisely the same as those advanced in *Padma*, and the submissions in the present case are not precisely the same as those advanced in either of the two previous conflicting decisions.

4 Interpreting bespoke legislative instruments such as the Exempted Limited Partnership Act ("the ELP Act") without the benefit of nourishment from persuasive authorities from larger common law jurisdictions is often a challenging endeavour. Through an incremental process in which different judges confront different legal points and similar legal points framed in somewhat different ways, a consensus gradually emerges as to the meaning of the most important statutory provisions. In this context, in my judgment, each judge is entitled to be more willing than might be appropriate in more settled areas of law to depart from previous decisions, even his or her own.

The GP's case for striking out

5 By way of overview, Mr. Khanbhai submitted:

"5. The correct jurisdictional gateway, i.e. between the Companies Jurisdiction and the Partnerships Jurisdiction, is not a question that arises on the Strike Out Application.

6. The Strike Out Application turns only on one discrete point. Who is the proper respondent to a petition seeking the relief sought by the Petitioners?

7. The Petition has been filed against Formation Group (Cayman) Fund I, L.P. (the 'Fund'). The respondent to the Petition is not a legal entity. The Petitioners should have named the GP in its capacity as general partner of the Fund, as the respondent to the Petition. As a result, the Petition is defective and falls to be struck out. That is the end of the matter."

6 The GP's counsel's central thesis was set out in his skeleton argument as follows:

"13. An exempted limited partnership is a creature of statute, comprising at least one general partner and one limited partner. It has no legal personality. It cannot own property in its own right. Its business is carried on by its general partner: section 14 of the ELP Act. Further:

(a) It is the general partner that holds assets of the partnership on trust for the partnership, in accordance with the partnership deed: section 16(1) of the ELP Act.

(b) On the admission or substitution of a general partner, the assets of the exempted limited partnership vest in the new general partner by operation of law: section 17 of the ELP Act.

(c) It is also the general partner that incurs debts or obligations on behalf of the partnership: section 16(2) of the ELP Act.

14. Section 33 of the ELP Act provides expressly in relation to 'Proceedings'. Section 33(1) provides that: 'Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings'.

15. Subsection (3) relates to derivative actions brought by limited partners and so is not relevant for present purposes.

16. Winding up proceedings (Companies Jurisdiction) or proceedings for a decree of dissolution (Partnerships Jurisdiction) are 'legal proceedings … against an exempted limited partnership' within the meaning of section 33(1).

17. It follows that the Petition should have named the GP as the Respondent.

18. Proceedings which appear to be duly issued but fail to comply with a statutory requirement are a nullity which is incurable: the third of three classes of nullity referred to by Upjohn LJ in Re Pritchard

[1963] Ch 502 at page 5242 Finnegan v Cementation [1953] 1 QB 688.

19. The consequence of failing to comply with section 33(1) of the ELP Act, when filing the Petition, is that the proceedings are a nullity which is incurable (as opposed to an irregularity which might be capable of being cured).

20. In Padma Fund FSD 201 of 2021 (unrep. 8 October 2021), Parker J was considering a winding up petition presented against an exempted limited partnership. He had to consider two separate issues:

(a) First, in the case of a petition presented against an exempted limited partnership, who was the proper respondent to the petition? In particular, was it the general partner or was it the fund?

(b) Second, on such a petition what is the appropriate jurisdictional gateway, the Companies Jurisdiction or the Partnership Jurisdiction?

21. It is only the first issue (proper respondent) that arises on this Strike Out Application. Padma is the only Cayman Islands decision on that first issue. XiO Diamond LP (unrep. 30 April 2020, FSD 256 of 2019 (IKJ)), for example, is an authority that deals with the second point but not the first.

22. On the proper respondent issue, Parker J held at paragraphs 35 and 36 of Padma that section 33(1) of the ELP Act is determinative of who should be the respondent when the originating process is intended to invoke the court's winding up jurisdiction in relation to an exempted limited partnership:

> '35. There is … no provision within the ELP Act or the Partnership Act which provides that legal proceedings may be instituted against an exempted limited partnership in the name of the partnership. This is because it is through the general partner that its debts and obligations are enforced. Section 33(1) of the ELP says in terms proceedings may be instituted against the general partner(s) only.
>
> 36. Mr Sherwood relies on Order 81, rule 12 of the Grand Court Rules, 1995 (Revised Edition) which provides that any action by or against an exempted limited partnership may be commenced in the name of the firm. However in my view that does not assist Mr Sherwood because the applicable statutes must take precedence over procedural rules, and the particular rule does not in my view deal with the court's winding up jurisdiction.'"

7 In short, the GP invites this court to follow its earlier decision in *Padma (5)* and to hold that the ELP Act only permits legal proceedings to be brought against a general partner of an ELP and not against the ELP itself. While it seems clearly right that the GP has only directly based its strike-out application on the s.33(1) of the ELP Act point, it seems difficult as a matter of preliminary analysis to see how the construction of s.33(1) which was applied by Parker, J. in *Padma* can be properly assessed by entirely divorcing the construction analysis from the wider legal context in which it is embedded.

The petitioners' primary response

8 The petitioners' skeleton argument first made it clear that they were primarily relying upon the winding-up jurisdiction under the Companies Act:

> "3. The petition is for a winding up order under the Companies Act 2021 ('Companies Act'), as applied to ELPs by section 36(3) of the Exempted Limited Partnership Act (2021 Revision) ('ELPA') or, in the alternative, an order for dissolution under the Partnership Act (2013 Revision) ('Partnership Act'). The petition has been presented in this way due to recent conflicting decisions of this Court."

9 Secondly, in defining the issues, Mr. Sherwood effectively submitted that the true legal question was the broader question of whether an ELP could be wound up at all, with the question of whether proceedings could be brought against an ELP being merely one element of that broader jurisdictional question:

> "7. The petitioners say—consistent with a long line of Grand Court decisions including Re XIO Diamond LP (FSD 256 of 2019 (IKJ), 30 April 2020)—that limited partners may petition for the winding up of an ELP under Part V of the Companies Act, and that the Fund is the correct respondent to the petition. The only outlier is the recent decision in Re Padma Fund LP (FSD 201 of 2021 (RPJ), 8 October 2021), in which Parker J determined that Re XIO (and implicitly earlier decisions) was wrongly decided.
>
> 8. Until Re Padma, there was never any jurisprudential doubt that, procedurally, a just and equitable petition was correctly issued by a limited partner against an ELP (and not the general partner) pursuant to section 36(3) of the ELPA, which imports the winding up jurisdiction and procedure in Part V of the Companies Act …
>
> 11. The case concerned a creditor's petition on insolvency grounds against an ELP. Despite this, Parker J made wider observations on the source of the Grand Court's jurisdiction to wind up an ELP on just and equitable grounds. This included, at paragraph 61, the observation

that the Grand Court's jurisdiction to wind up an ELP by a limited partner on just and equitable grounds arises under section 3 of the ELPA and section 35(e) of the Partnership Act 'only'. His Lordship went on to consider this Court's decision in Re XIO at 76–88, respectfully concluding that it was decided in error at paragraph 87.

12. The ratio in Re Padma is to be found at paragraphs 72, 92 and 93, and it is limited to a finding that a creditor of an ELP must commence its petition against the general partner and not the ELP. This decision was based on two primary findings: (a) First, because the general partner is responsible for the debts of the ELP; (b) Secondly, because section 33(1) of the ELPA absolutely prohibits proceedings being issued against the ELP itself.

13. It is not necessary for this Court to determine the correctness of the ratio in Re Padma as it relates to creditor petitions. But this Court may feel compelled to do so in light of Parker J's heavy if not singular reliance on (respectfully) an incorrect interpretation of section 33(1) of the ELP Act which led to His Lordship's obiter comments regarding just and equitable petitions. His Lordship's interpretation of section 33(1) is also relied on by the Fund in its strike out application."

10 As to the merits of the legal point, it was further argued most pertinently as follows:

"16. First, it is accepted that section 33(1) states that: 'legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only …' However, the literal wording of a statute must be read in its context and the surrounding words and scheme of the legislation must be used as an aid to a purposive reading of the relevant provision.

17. Section 33(1) immediately goes on to provide further guidance as to the true scope of the subsection by saying '… and a limited partner shall not be a party to or named in the proceedings'. Those words cannot be read in isolation to those that preceded them. The mischief at which section 33(1) is aimed is merely to reverse the general rule which applies to ordinary partnerships where any partner may be named as a defendant in proceedings relating to the liabilities of the partnership. Those are the 'legal proceedings' at which section 33(1) is aimed and certainly not collective proceedings for winding up.

18. Subsections (2) and (3) provide exceptions to the general rule stated in subsection (1) and therefore serve as additional context. Subsection (2) confirms that limited partners may become defendants in cases where they have taken part in the management of the ELP (section 20(1)) or because they have received distributions subject to

clawback (section 34(1)). Subsection (3) confirms when limited partners may issue proceedings derivatively. These subsections place subsection (1) in context.

19. Accordingly, section 33 as a whole is aimed at setting the parameters for proceedings to be issued by or against limited partners in respect of the ELP. It does not in terms prevent proceedings being issued against an ELP.

20. Second, the interpretation of section 33(1) must be read consistently with the express provisions of section 36(3), which are specific to winding up (and not 'legal proceedings' generally, as that term is used in section 33(1)). The provisions of section 36(3) are not remotely ambiguous. Part V of the Companies Act is imported into the ELPA for winding up purposes. Accordingly, contrary to Parker J's finding at paragraph 43 of Re Padma, there is no need in section 91 of the Companies Act specifically to confer jurisdiction on the Court to wind up ELPs. This is because section 36(3)(a) specifically treats references to 'company' to 'exempted limited partnerships' for the purposes of section 91 and elsewhere in Part V12.

21. Third, to the extent it is necessary, assistance in discerning the legislature's intentions can be found in the Explanatory Memorandum for the Bill which brought in (the forerunner of) section 36(3) of the ELPA and the Official Hansard Report for the second reading of the same, which are set out in the Annex to this skeleton argument.

22. These clearly show that the Legislative Assembly's intention was to apply the winding up provisions of Part V of the Companies Act to ELPs. The legislation was enacted because the existing provisions 'fell far short of a meaningful dissolution framework for exempted limited partnerships'. This is in direct contrast to the conclusion reached at paragraph 60 of Re Padma (where the Court did not have the benefit of these materials) that there was no 'mischief' for the legislation to redress because that dissolution framework already existed."

11 These submissions provoked two initial reactions. First, construing s.33(1) of the ELP Act was a difficult point of statutory interpretation. Secondly, it seemed impossible to engage in a meaningful process of statutory construction of that provision without also making sense of other relevant provisions in the same statute, namely the provisions relating to winding up under the Companies Act.

12 The petitioners advanced alternative arguments as to how, if their primary arguments were rejected, the standing problem could be cured by amendment. I indicated in the course of the hearing, based on the GP's

compelling contrary submissions, that this alternative case seemed hopeless. I will address this subsidiary issue briefly below.

Legal findings

The statutory provisions

13 The first key statutory provision is s.33 of the ELP Act:

> "**33**. (1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.
>
> (2) If the court considers it just and equitable any person or a general partner shall have the right to join in or otherwise institute proceedings against any one or more of the limited partners who may be liable under section 20(1) or to enforce the return of the contribution, if any, required by section 34(1).
>
> (3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings.
>
> (4) If any action taken pursuant to subsection (3) is successful, in whole or in part, as a result of a judgment, compromise or settlement of any action, the court may award any limited partner bringing any action reasonable expenses, including attorney's fees, from any recovery in any action or from an exempted limited partnership."

14 The most obvious literal meaning of s.33(1) is that it creates a general rule immunizing limited partners from being sued in respect of an ELP's affairs and conferring the primary right to sue and be sued in respect of an ELP's affairs on the general partner(s). An exception to this general rule is then set out in s.33(3), which Mr. Khanbhai aptly described as "derivative claims." Section 33 does not in terms prohibit proceedings against an ELP altogether. Whether such a prohibition should be inferred accordingly requires further contextual statutory analysis.

15 Mr. Khanbhai submitted that "may" in s.33(1) is mandatory. He placed reliance on the following provisions of s.4 of the ELP Act:

> "(2) An exempted limited partnership shall consist of one or more persons called general partners who shall, in the event that the assets of the exempted limited partnership are inadequate, be liable for all debts and obligations of the exempted limited partnership, and one or more persons called limited partners who shall not be liable for the debts or obligations of the exempted limited partnership save as provided in the partnership agreement and to the extent specified in

> sections 20(1) and 34(1), but a general partner, without derogation from that general partner's position as such, may, in addition, take an interest as a limited partner in the exempted limited partnership."

16 This does provide some potential support for the proposition that a general partner is, as s.33(1) arguably implies, the only proper party to sue in respect of partnership debts. However, carefully read, it does not meaningfully advance the thesis at all. Rather, s.4(2) is only explicitly defining two central characteristics of an ELP:

(a) as a general rule, limited partners have no liabilities in respect of ELP debts; and

(b) as a general rule, general partners "shall, in the event that the assets of the exempted limited partnership are inadequate, be liable for all debts and obligations of the exempted limited partnership."

17 The statutory language clearly envisages that an ELP will have its own "assets … debts and obligations" and that a general partner will only be liable in the event that the ELP's assets are "inadequate" to meet its liabilities. In brief, this implies that an ELP has some degree of legal personality as one would expect drawing upon the more longstanding traditional partnership construct. Section 4(2) is ultimately neutral in terms of shedding light on how s.33(1) should be construed, but provides some general support for the proposition that as far as winding up is concerned, an ELP does have its own pot of assets and liabilities which are capable of being wound up separate and apart from the general partner(s). Mr. Sherwood's oral submissions to this effect were quite powerful in conceptual and practical terms.

18 The most important other provisions in the ELP Act for present purposes are the following provisions of s.36:

> "(3) Except to the extent that the provisions are not consistent with this Act, and in the event of any inconsistencies, this Act shall prevail, and subject to any express provisions of this Act to the contrary, the provisions of Part V of the Companies Act (2021 Revision) and the Companies Winding Up Rules, 2018 shall apply to the winding up of an exempted limited partnership and for this purpose—
>
> (a) references in Part V to a company shall include references to an exempted limited partnership;
>
> (b) the limited partners shall be treated as if they were shareholders of a company and references to contributories in Part V shall be construed accordingly, except that the application of the provisions shall not cause a limited partner to be subject to any greater liability than that limited partner

would otherwise bear under this Act, but for the application of this paragraph;

(c) references in Part V to a director or officer of a company shall include references to the general partner of an exempted limited partnership;

(d) except for sections 123, excluding subsection (1)(b) and (c), 129, 140, 145, and 147 of the Companies Act (2021 Revision), Part V shall not apply to a voluntary dissolution and winding up under subsection (1);

(e) in the case of a voluntary winding-up of an exempted limited partnership under subsection (1) where the partnership was registered under section 9 prior to 11th May 2009, the necessary time period for compliance with the requirements of section 123 (1) of the Companies Act (2021 Revision) shall be at least twenty-eight days prior to the final distribution of the assets of the exempted limited partnership to partners rather than within twenty-eight days of the commencement of its voluntary winding-up;

(f) the Insolvency Rules Committee established pursuant to the Companies Act (2021 Revision)shall have the power to make rules and prescribe forms for the purpose of giving effect to this section or its interpretation; and

(g) on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable."

19 These provisions read in a straightforward and uncomplicated manner appear at first blush to be quite clear and unambiguous. They provide most significantly as follows:

(a) "Part V of the Companies Act (2021 Revision) and the Companies Winding Up Rules, 2018 shall apply to the winding up of an exempted limited partnership," subject to specified modifications;

(b) the word "company" shall be read as "exempted limited partnership";

(c) the word "contributories" shall be read as "limited partners";

(d) the word "director" includes "general partner"; and

(e) subject to specified exceptions, Part V of the Companies Act does not apply to voluntary dissolutions under s.36(1) of the ELP Act.

20 Section 36(3) appears to provide in explicit terms that an ELP may be wound up under Part V of the Companies Act and the Companies Winding

Up Rules and that, minor modifications apart, references in Part V to "company" apply to an ELP and references to a "contributory" apply to a limited partner. By necessary implication, a limited partner may petition to wind up an ELP on the same grounds as would be available to a contributory in relation to a company.

Preliminary view on the proper construction of s.33(1) and s.36(3) of the ELP Act

21 Taking a preliminary view without regard to any judicial or other authority, it would seemingly require equally clear statutory language in some other part of the ELP Act to justify the conclusion that although s.36(3) provides that an ELP can be wound up by the court in the same manner as a company, there is an exception to this general rule to the effect that the general partner and not the ELP itself must be the respondent to the winding-up petition. Section 33(1) does expressly provide that (a) proceedings against an ELP can only be brought against a general and not against a limited partner, and (b) proceedings on behalf of an ELP can only generally be brought by a general partner. But s.33(1) does not with any real clarity suggest or imply that a limited partner may not present a winding-up petition against an ELP, the seemingly clear contrary terms of s.36(3) notwithstanding.

22 One point seems clear beyond serious argument having regard to the most elementary rules of statutory construction. It makes no sense at all to seek to determine a question of standing to present a petition under Part V of the Companies Act, as applied to an ELP by s.36(3) of the ELP Act, by ignoring s.36(3) and focusing solely on s.33(1). Mr. Khanbhai's beguiling invitation to the court to adopt such a blinkered approach seemed indicative of the fact that s.36(3) is the "Achilles heel" of the GP's standing analysis.

23 Mr. Sherwood aptly relied upon the following principles of statutory interpretation. In *Shanda Games Ltd.* v. *Maso Capital Invs. Ltd.* (8), Lady Arden (delivering the advice of the Judicial Committee) opined as follows (2020 (1) CILR 293, at para. 27):

> "27 The Board considers that, when and to the extent that any issue … is to be ascertained by statutory interpretation [i]n that situation, *the court has to ascertain the intention of the legislature from the words it has used in their context, and also in the light of any material which demonstrates the mischief that it was concerned to redress by the statutory provision.*" [Emphasis added.]

24 This preliminary view must accordingly be tested by reference to both the relevant authorities and any material relating to the legislative history of the statutory provisions which elucidates their purpose or, in more classical terms, the mischief they were designed to remediate.

The pre-Padma authorities' implicit support for the view that an ELP could be wound up under Part V of the Companies Act

25 Authorities in which it was assumed that a winding-up petition could be presented against an ELP, with no attempt being made to dispute the assumption, can for obvious reasons be mentioned briefly:

(a) *Re Cybernaut Growth Fund L.P.* (1): the petition was presented against the ELP by limited partners complaining of mismanagement by the general partner. Following a contested hearing at which Richard Hacker, Q.C. appeared for the general partner, a winding-up order was made against the ELP under the then Companies Law. No point was taken that an ELP could not be wound up or that a petition could not be presented against solely against an ELP (although it appears that the GP and another entity involved in the management of the partnership were joined as respondents to the petition at the directions stage);

(b) *In re Rhone Holdings LP* (7) (unreported): the petition was presented against the ELP and sought its winding up. The general partners, for whom Mr. Tom Lowe, Q.C. appeared, successfully applied to strike out the petition but did not rely on a lack of standing ground or the argument that an ELP could not be wound up. The Court of Appeal refused leave to appeal against Ingrid Mangatal, J.'s decision and expressly confirmed that the ELP Act provided for the winding up of an ELP under the Companies Act: *In re Rhone Holdings LP* (2016 (1) CILR 273);

(c) *In re XiO Diamond L.P.* (9): a winding-up petition was presented against an ELP and was opposed by counsel appearing for the ELP. The respondent ELP contended that there was no jurisdiction to wind up under s.36(3)(g) and that jurisdiction did exist to wind up under s.92(e) of the Companies Act which relief it would not oppose. The petition was amended to seek this relief and I ordered that (2020 (2) CILR 270, at para. 4):

> "1. The Partnership be wound up in accordance with sections 92(e) and 94(1)(c) of the Companies Law (2020 Revision) as read with section 36(3) of the Exempted Limited Partnership Law (2018 Revision)."

(d) *In re Duet Real Estate Partners 1 L.P.* (3): a winding-up petition was presented against an ELP and served at its registered office. It was expressly directed that the ELP (2020 (2) CILR 390, at para. 1) "is properly able to participate in the proceeding." Although the petition was unopposed, I ordered that the ELP (*ibid.*, at para. 5) "be wound up in accordance with section 92(c) of the Companies Law and section 36(3) of the ELP Law."

26 Mr. Sherwood referred to other cases where winding-up orders were made against ELPs without considered judgments being delivered. These

cases may be said to provide at best strong, indirect support for the petitioners' construction of s.33(1) as read with s.36(3) of the ELP Act, consistent with the thesis propounded in Surowiecki, *The Wisdom of Crowds: Why the Many are Smarter than the Few and How Collective Wisdom shapes Business, Economies, Societies and Nations* (2004). The cases demonstrate a fairly broad consensus that s.36(3) means what it says when it purports to confer jurisdiction on this court to wind up an ELP under the Companies Act. This is of course by no means conclusive; there was once a broad and now discredited general consensus that the Earth was flat. But when distinguished commercial silks are briefed to oppose a winding-up petition (as happened in *In re Cybernaut Growth Fund L.P.* (1) and *In re Rhone Holdings L.P.* (7)) and fail to raise the standing point raised by the GP in the present case, this strongly suggests that the point now being raised (and first raised in *Padma* (5)) must be a point which is either counterintuitive or less than obvious at least. It is noteworthy that although s.33(1) was not expressly considered in *Re XiO Diamond L.P.* (9), counsel for the ELP in that case (a) formally appeared for the ELP, and (b) positively asserted that jurisdiction to wind up existed under the Companies Law (as it was then).

27 It is important to reiterate that what was assumed to reflect the correct legal position in these past cases without direct consideration of the point raised for consideration in relation to the present petition does little more than to cause me to approach the presenting standing point with a healthy degree of scepticism. The construction of s.33(1) of the ELP Act as it applies to winding-up petitions presented pursuant to s.36(3) must be determined on its merits as this is an issue that the previous decisions never directly addressed. It is not unknown for legal points which have not been taken at first instance for several years to be belatedly taken and upheld at the highest appellate level.[1]

In re Padma

28 In *In re Padma Fund L.P.* (5), the petitioners sought the winding up of an ELP under s.92(d) of the Companies Act (2021 Revision) as creditors. The GP on behalf of the ELP contended the court had no jurisdiction to make the order sought. Justice Raj Parker agreed. Mr. Sherwood, who also appeared for the petitioners in that case, was unable to persuade the judge that *In re XiO Diamond Fund L.P.* was correctly decided. In the present case, he sought to distinguish *Padma* as limited to the context of creditors' petitions but sensibly acknowledged that the findings recorded potentially

1 *PricewaterhouseCoopers* v. *Saad Invs. Co. Ltd.* (6): the Judicial Committee held that the jurisdiction to wind up overseas companies (which had been assumed to exist in Bermuda since 2000 based on a judgment in a case where there was an unopposed winding petition) did not properly exist.

applied to the winding-up remedy generally. The pivotal finding made in *Padma* was the following (2021 (2) CILR 556, at para. 35):

> "35 *There is however no provision within the ELP Act or the Partnership Act which provides that legal proceedings may be instituted against an exempted limited partnership in the name of the partnership.* This is because it is through the general partner that its debts and obligations are enforced. Section 33(1) of the ELP Act says in terms proceedings may be instituted against the general partner(s) only." [Emphasis added.]

29 It is that pivotal preliminary finding which then founds the following key conclusory finding that an ELP cannot be wound up at all under the Companies Act (*ibid.*, at paras. 47–48):

> "47 Section 36(3) of the ELP Act states:
>
> '*Except to the extent that the provisions are not consistent with this Act, and in the event of any inconsistencies, this Act shall prevail, and subject to any express provisions of this Act to the contrary*, the provisions of Part V of the Companies Act (2021 Revision) and the Companies Winding Up Rules, 2018 shall apply to the winding up of an exempted limited partnership and for this purpose …' [Emphasis added.]
>
> 48 It seems to me that this provision does not give a freestanding right for a creditor to present a winding-up petition against an exempted limited partnership (*XiO Diamond* (5))."

30 This conclusion was buttressed by proper regard being had to the legislative purpose of s.36(3) (*ibid.*, at paras. 61–70):

> "61 I seems to me that from a proper analysis of the above statutory provisions that the court's jurisdiction to wind up an exempted limited partnership on the application of a partner on the grounds that it is just and equitable to do so arises by virtue of s.3 of the ELP Act and s.35(e) of the Partnership Act only.
>
> 62 This is relevant for when one examines the decision in *XiO Diamond LP* … below as, unlike the present case, it concerned an analysis of the situation which applied on the application to wind up by a limited partner.
>
> 63 I have considered whether there was 'mischief' which the legislature sought to address by introducing s.36(3) of the ELP Act to enable a creditor to present a winding up petition against an exempted limited partnership, as in the present case.
>
> 64 I have concluded that no mischief existed as the creditor was (and remains) entitled to enforce any debt against the general partner

which, unlike the exempted limited partnership, has a legal personality.

65 In any event, the provisions of Part V of the Companies Act referenced in s.36(3) of the ELP Act are subject to s.33(1) of the ELP Act which expressly states that legal proceedings against an exempted limited partnership may be instituted against a general partner only.

66 It seems to me therefore that the legislative purpose of introducing s.36(3) was to apply the applicable provisions of Part V of the Companies Act and the Companies Winding Up Rules, 2018 *following* the commencement of the winding up in order to facilitate the orderly winding up of the partnership's affairs.

67 This analysis accords with the commercial position and the legal liabilities which arise on the insolvency of a partnership where the business of the partnership is conducted by the general partner, the assets of the partnership are held by the general partner on a statutory trust and the general partner is personally liable for the debts of the partnership.

68 Pursuant to s.2 of the ELP Act, the partnership is deemed to be insolvent when the general partner is unable to pay the debts and obligations of the exempted limited partnership in the ordinary course of business as they fall due out of the assets of the exempted limited partnership, without recourse to the separate assets of the general partner not contributed or committed to the exempted limited partnership.

69 In that scenario the general partner remains personally liable for the partnership's debts and therefore the remedy of any creditor when the partnership is insolvent is to commence proceedings against the general partner. This is consistent with s.33(1) of the ELP Act.

70 The winding up procedure as it relates to exempted limited partnerships also fits with this analysis. When an exempted limited partnership is being wound up, either voluntarily under s.36(1) of the ELP Act or by order of the court pursuant to s.35 of the Partnership Act, the general partner is deemed to be the liquidating trustee of the partnership unless the court orders otherwise." [Emphasis in original.]

31 As a matter of first impression, when *Padma* was initially decided, I felt that Parker, J.'s well-reasoned judgment articulated a sound and novel basis for concluding that my own contrary previous decisions, particularly *In re XiO Diamond Fund LP*, had been wrongly decided. This preliminary view entailed accepting:

(a) the hypothesis set out in *Padma* (*ibid.*, at para. 35) that there was "no provision within the ELP Act or the Partnership Act which provides that

legal proceedings may be instituted against an exempted limited partnership in the name of the partnership"; and

(b) the hypothesis set out in *Padma* (*ibid.*, at paras. 61–70) that the legislative purpose of s.36(3) was not to provide a wide gateway to winding up ELPs in the same manner as companies.

32 The merits of the GP's present strike-out application turn on an assessment of the validity of these two pivotal propositions.

The legislative purpose of s.36(3) of the ELP Act

33 Parker, J. was clearly right in his statutory construction exercise to have regard to the "mischief" the relevant provisions sought to address, although I prefer the modern terminology of seeking to ascertain the "legislative purpose" of new or uncertain provisions. As Professor Burrows (as he then was) has opined extra-judicially, "Thinking about statutes: interpretation, interaction and improvement," *The Hamlyn Lectures*, at 5–8, 19–20 (2018):

> "… [I]t is tolerably clear today that our judges have moved from an old literal to a modern and contextual approach … the modern approach has subsumed many of the old so-called 'canons of interpretation … they have lost primacy with the demise of literalism and have tended to be swallowed up by the modern contextual and purposive approach … When we talk of 'purpose', we are looking at the policy behind the statute or statutory provision. Identifying the policy is not dependent on identifying any person's intentions … Indeed to expose the practical irrelevance of the legislator's intention, it may be helpful to focus on the statute, rather than the legislator … [and] an advantage of such a switch of focus is that it helps to clarify that what ultimately matters is the judicial analysis, at the time a dispute arises, of what the statute means …"

34 Mr. Sherwood, still bearing the scars of his unsuccessful battle in *Padma* (5), provided me with more guidance as to the legislative purpose underpinning s.36(3) of the ELP Act in light of its now evident pertinence. Annexed to his skeleton argument were the following important submissions about the legislative history of s.36(3):

> "**ANNEX—LEGISLATIVE HISTORY OF THE RELEVANT SECTIONS OF THE ELPA**
>
> **Section 36(3) of the ELPA.**
>
> 1. Section 36(3) of the ELPA was originally enacted (as section 15(4)) by the Exempted Limited Partnership (Amendment) Law, 2009 (the '2009 Amendment').

2. Prior to the 2009 Amendment, the relevant dissolution provision (being section 15(2) of the Exempted Limited Partnership Law (2007) Revision) provided only:

> 'On application by a partner or a creditor, the court may decree dissolution of an exempted limited partnership, and may make such orders and give such directions for the winding up of its affairs as may be just and equitable.'

3. That language unambiguously intended to provide a procedure for the winding up of exempted limited partnerships, rather than a supplementary provision to the existing procedure for partnerships, being section 15(1) of the Partnership Act (2002 Revision), which was in effect at the time the Exempted Limited Partnership Law (2007 Revision) was legislated:

> 'On application by a partner the court may decree a dissolution of the partnership in any of the following cases … whenever in any case circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.'

4. It is in that context that the new section 15(4) (now 36(3)) was enacted. The Exempted Limited Partnership (Amendment) Bill, 2009 (the '2009 Bill') states precisely what was the intention of the Legislative Assembly (as it was then) in legislating new dissolution provisions in its Memorandum of Objects and Reasons:

> 'Clause 10 of the Bill repeals and replaces the provisions governing the winding up and dissolution of an exempted limited partnership. They are brought, so far as is possible, in line with the provisions of the Companies Law (2007 Revision) as amended by the Companies (Amendment) Law 2007.'

5. The Official Hansard Report for the second reading of the 2009 Bill is also instructive (emphasis added):

> 'Clause 10 upgrades section 15 of the principal Law in relation to winding-up and dissolution of exempted limited partnerships. Industry has advised, and government has agreed, that in the current climate *the existing section 15 fell far short of a meaningful dissolution framework for exempted limited partnerships.* The revised and improved section 15 was developed in close consultation with the Cayman Islands Society of Professional Accountants (CISPA). The provisions in clause 10 take the benefit as far as possible of the provisions for winding up and dissolution in the new (2007) Part V of the Companies Law, and cross-refer to those provisions to the extent

> sensible. The ultimate, longer-term objective is to have a self-contained framework for winding up and dissolution within the Exempted Limited Partnership Law itself (that is, without cross-referral), but in the interim, *clause 10 is a significant and necessary improvement that addresses a current gap in the Law in the immediate term.*'"

35 In my judgment, the quoted extracts from the legislative history of s.36(3), which were not considered by this court in *In re Padma*, provide compelling support for the preliminary view that s.36(3) means what it says when it provides that an ELP may be wound up in the same manner as a company under Part V of the Companies Act. It was seeking to move further away from the traditional Partnership Act constraints on dissolution and to embrace, according to the Memorandum and Objects of the Bill "so far as is possible," the more flexible winding-up mechanisms applicable to companies. The following explanation given to the Legislative Assembly on the second reading of the Bill, combined with the quoted averments in the Memorandum and Objects, puts the legislative purpose of the then new provisions clear beyond serious argument:

> "… The provisions in clause 10 take the benefit as far as possible of the provisions for winding up and dissolution in the new (2007) Part V of the Companies Law, and cross-refer to those provisions to the extent sensible …"

The proper construction of s.33(1)

36 Having regard to the legislative history of s.36(3), it is clear that this statutory provision may indeed simply be interpreted according to its literal terms. The conceptual underpinnings for the pivotal finding in *In re Padma* as to the effect of s.33(1) of the ELP Act on the ability to wind up limited partnerships melt away. The finding that there was (*ibid.*, at para. 35) "no provision within the ELP Act or the Partnership Act which provides that legal proceedings may be instituted against an exempted limited partnership in the name of the partnership" is clearly unsupportable because s.36(3) does expressly provide just that. Section 36(3) most importantly provides:

> "… Part V of the Companies Act (2021 Revision) and the Companies Winding Up Rules, 2018 shall apply to the winding up of an exempted limited partnership and for this purpose—
>
> (a) references in Part V to a company shall include references to an exempted limited partnership …"

37 Accordingly, and ultimately very simply, s.36(3) expressly provides that a winding-up petition may be presented against an ELP in the same manner as in relation to a company and this special provision overrides the

general terms of s.33(1). The fact that an ELP generally has no separate legal personality is entirely beside the point when Parliament has expressly extended the company winding-up regime to such entities. I therefore confirm the preliminary interpretative view I set out above.

38 As already noted above, making sense of such bespoke investment vehicles as ELPs and the statutory provisions which define them is difficult because of the absence of persuasive authority. It is doubly difficult in the absence of judicial experience of how such winding ups actually play out in practice. However, I ultimately accept Mr. Sherwood's oral submissions that it is entirely logical for the business of an ELP to be wound up separate and apart from its general partner which may have other entirely separate business concerns.

39 It is true that a general partner is ultimately responsible for an ELP's debts, but this responsibility is only triggered when the ELP's assets are insufficient to meet those debts. The need to call upon a general partner may not be apparent until the winding up of an ELP which is cash-flow insolvent is incomplete. When an ELP is being wound up on just and equitable grounds and is solvent, the rationale for naming the general partner as respondent to a petition is indecipherable altogether. The idea of an ELP being wound up is consistent with the statutory scheme, because s.4(2) makes it clear that such legal entities have their own assets and liabilities distinct from the general partners who manage them and the limited partners which invest in them.

40 Nor can it be said to be anathema in light of the general partnership law position for an ELP to be a party to legal proceedings for any purposes at all. A traditional partnership can sue and be sued under the firm name under GCR O.81, r.1. Mr. Sherwood was keen to point out that Parker, J. himself had recently joined an ELP to proceedings initially commenced against its general partner: *Kuwait Ports Auth.* v. *Port Link GP Ltd.* (4). However, he also pointed out that GCR O.81, rr. 12–15 also contemplate that an ELP may be sued in the firm name:

> "**Actions by and against firms within jurisdiction (O.81, r.12)**
>
> **12**. Any actions by or against an ordinary limited partnership or exempted limited partnership may be commenced in the name of the firm.
>
> **Service of writ (O.81, r.13)**
>
> **13**. Where an action is commenced against a firm, whether sued in the firm name or in the name of the general partner, the writ shall be served—
>
> (a) in the case of an ordinary limited partnership, by delivering the writ to its registered principal place of business; and

(b) in the case of an exempted limited partnership, by delivering the writ to its registered office.

Acknowledgment of service in action against firm (O.81, r.14)

14. Where an ordinary limited partnership or exempted limited partnership is sued in its firm name, service may not be acknowledged in the name of the firm but only by the general partner thereof in the general partner's own name, but the action shall nevertheless continue in the name of the firm.

Enforcing judgment or order against firm (O.81, r.15)

15. (1) Where a judgment is given or order made against a firm, execution to enforce the judgment or order may be issued against any property of the firm within the jurisdiction.

(2) Where a judgment is given or order made against a firm, execution to enforce the judgment or order may be issued against any person who—

(a) acknowledged service of the writ in the action as a general partner; or

(b) is registered as a general partner of the firm; or

(c) was admitted in any pleading to be a general partner of the firm; or

(d) was adjudged to be a general partner of the firm pursuant to Section 52(2) of the Partnership Act (as amended and revised), or Section 14 of the Exempted Limited Partnership Act (as amended and revised), as the case may be.

(3) Except as provided by paragraph (2), where a judgment is given or order made against a firm, execution to enforce the judgment or order shall not be issued against any person who is registered as a limited partner."

41 Mr. Khanbhai correctly submitted that rules of court cannot be used as an aid to construing primary legislation. However, the fact that the Rules Committee, like the various judges and lawyers in the previous winding-up cases, clearly assumed that the ELP Act permitted ELPs to be sued is not entirely without forensic effect. The starting assumption ought to be that the Rules Committee did not misconstrue their rule-making powers in relation to ELPs.[2] My preliminary view of s.33(1) was that it did not in terms impose a mandatory requirement that all suits against an ELP must

2 Section 19(1) of the Grand Court Law provides that the Rules Committee shall consist of the Chief Justice, the Attorney General and two legal practitioners.

be brought against the general partner of an ELP. Section 33(1) says, it bears remembering:

> "**33**. (1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings."

42 Although this conclusion is strictly *obiter*, I find no reason to depart from my preliminary view (which is confirmed in an indirect sense by GCR O.81 rr. 12–15), that the legislative purpose of s.33(1) is primarily to reinforce the legal status of limited partners as not ordinarily liable to be sued (or entitled to sue) in respect of ELP liabilities and rights. This legislative purpose combined with the statutory language of the relevant provision in its wider statutory context strongly suggests that the "may" in s.33(1) is permissive and that there is no general or usual mandatory rule that proceedings cannot be issued against an ELP in its own name. The legislative history of s.33(1) itself does not undermine these provisional conclusions.

43 ELPs were created by the Exempted Limited Partnership Law 1991. Section 13(1) is substantially the same as s.33(1) today. The Memorandum of Objects and Reasons simply states: "Clause 13 deals with the means of bringing proceedings against such a partnership." The section was not materially changed by the Exempted Limited Partnership Law 2007 or 2009.

44 The central basis for my conclusion that an ELP may be the respondent to a winding-up petition is that, however s.33(1) falls to be construed, s.36(3) expressly permits a petition being presented in such a manner. As Mr. Sherwood rightly contended, even if s.33(3) imposes a mandatory general requirement to sue the general partner, relying on s.36(3) is justified by the following rule of statutory interpretation articulated by Lord Sales in *Day* v. *Governor* (2) (and applied to my mind in a somewhat novel way in that case) as follows (2022 (1) CILR 447, at para. 30):

> "This means that the principle of interpretation encapsulated in the Latin maxims 'lex specialis derogat legi generali' (the specific law prevails over the general) and 'generalia specialibus non derogant' (general provisions should not undermine the intended effect of provisions specifically drafted to deal with the particular case), which is a principle of coherent interpretation of legal instruments of any character, is applicable."

45 Despite Mr. Khanbhai's able arguments to the contrary, I am bound to find that, with the greatest of respect to Justice Parker, *In re Padma* (5) was wrong in finding that s.33(1) as read with s.36(3) of the ELP Act does

not permit the presentation of a winding-up petition against an ELP alone because only the general partner may be sued. This conclusion was admittedly consistent with the implicit assumptions made in previous decision, including two of my own. However, the scales were tipped heavily in favour of the ultimate conclusion by the legislative history of s.36(3) which was placed before me and which Justice Parker did not have the benefit of considering. This additional material in my view helps to explain why in the earlier cases (and when the Rules Committee made O.81, rr. 12–15 of the Grand Court Rules) it was clearly assumed that ELPs could be wound up under Part V of the Companies Act.

Alternative findings: application to amend

46 The petitioners submitted (to my mind with little coherence or conviction) that any standing defect could be cured by amendment. The GP contended that if the petition was liable to be struck out because it was impermissibly presented against the ELP, the consequences of this were fatal and could not be cured by amendment. Mr. Khanbhai advanced the following cogent submissions in this regard:

> "28. The proceedings being a nullity, there can be no cure. The originating process has no more effect to commence the proceedings than a dog licence (as Lord Millett said in Strachan v The Gleaner, borrowing the language of Danckwerts LJ in Re Pritchard).
>
> 29. Further and in any event, there is no power to permit substitution of the respondent to a winding up petition.
>
> (a) The CWR applies, irrespective of the jurisdictional gateway: see section 36(3) of the ELP Act. The CWR expressly provide in relation to amendment of a petition (CWR Order 3 rule 2(3)). The CWR expressly provide in relation to substitution of the petitioner. There is no express rule in the CWR about correcting the name of or changing the respondent to a petition. There would have been one if that was contemplated.
>
> (b) The analogous rule in the GCR (viz. GCR O.15 r.6), which relates to correcting the name of a party, does not apply in proceedings governed by the CWR."

47 In my judgment it is indeed inconsistent with the statutory winding-up regime to substitute the respondent to a petition. The GP's counsel identified one simple yet fundamental legal conundrum which would arise if this were done: what would the date of the commencement of the proceedings be? Accordingly, if I had found that the petition was liable to be struck out, I would have further found that naming the wrong respondent was fatal and could not be cured by amendment.

Disposition of strike-out application

48 I accordingly find that that the GP's strike-out summons must be dismissed. I will hear counsel, if required, as to:

(a) costs;

(b) the terms of the order to be drawn up to give effect to the present judgment; and

(c) directions in relation to the further conduct of the petition.

Summons dismissed.

Attorneys: *Carey Olsen* for the petitioners; *Campbells* for the respondent.

ITEM NO. 131

JA-17

CAYMAN ISLANDS



Supplement No. 1 published with Extraordinary Gazette No. 98 of 15th October, 2012.

EXEMPTED LIMITED PARTNERSHIP LAW

(2012 REVISION)

Law 11 of 1991 consolidated with Law 7 of 2000 (part), 26 of 2001, 23 of 2002, 14 of 2006, 13 of 2009, 39 of 2010, 28 of 2011 and as amended by the Cayman Islands (Constitution) (Amendment) Order 2003 (U.K.S.I. 2003 No. 1515).

Revised under the authority of the Law Revision Law (1999 Revision).

Originally enacted-

Law11 of 1991-27th June, 1991
Law 7 of 2000- 20th July, 2000
Law 26 of 2001-26th September, 2001
Law 23 of 2002-5th December, 2002
Law 14 of 2006-1st June, 2006
Law 13 of 2009-11th May, 2009
Law 39 of 2010-15th September, 2010
Law 28 of 2011-18th November, 2011.

Originally made-

U.K. Order-12th June, 2003.

Consolidated and revised this 31st day of July, 2012.

Note (not forming part of the Law): This revision replaces the 2011 Revision which should now be discarded.

EXEMPTED LIMITED PARTNERSHIP LAW

(2012 Revision)

ARRANGEMENT OF SECTIONS

1. Short title
2. Definitions
3. Savings of rules of equity and common law
4. Constitution
5. Establishment
6. Name and registered office
7. Modification of general law
8. Registrar
9. Registration
10. Changes in registered particulars
11. Register of limited partnership interests
12. Accounts
13. Proceedings
14. Return of contributions
15. Dissolution
16. Inspection
17. Tax undertaking
18. Regulations
19. Annual return
20. Transactions with the exempted limited partnership
21. Re-registration
22. Express fees
23. When licence not required
24. Electronic business
25. Recovery of Penalties
26. De-registration

EXEMPTED LIMITED PARTNERSHIP LAW

(2012 Revision)

Short title

1. This Law may be cited as the Exempted Limited Partnership Law (2012 Revision).

Definitions

2. In this Law-

2012 Revision

"Companies Law" means the Companies Law (2012 Revision);

"contribution" means cash, property or other assets which a partner contributes or agrees to contribute to the capital of an exempted limited partnership (but shall not include any moneys lent by a partner to an exempted limited partnership);

"court" means the Grand Court;

"exempted limited partnership" means a limited partnership registered under section 9 (1);

"general partner" means a person who is named as such in the statement filed pursuant to section 9, and if more than one shall mean each general partner;

"Governor" means Governor in Cabinet;

"insolvency of the exempted limited partnership" means that the general partner is unable to pay the debts and obligations of the exempted limited partnership (otherwise than in respect of liabilities to partners on account of their partnership interest) in the ordinary course of business as they fall due out of the assets of the exempted limited partnership (without recourse to the separate assets of the general partner not contributed to the exempted limited partnership);

"limited partner" means a person who has become a limited partner in accordance with section 4(2), and if more than one shall mean each limited partner;

"majority of partners" means such voting majority as is specified in the partnership agreement or if not so specified, a simple majority of the partners calculated by reference to capital contributions;

"mortgage" means a legal mortgage by way of assignment and an equitable mortgage, charge or other form of security interest;

"partner" means a limited partner or a general partner;

"partnership agreement" means any agreement of the partners which provides for the establishment of, and regulates the affairs of, an exempted limited partnership, the conduct of its business and the rights and obligations of the partners amongst themselves;

"partnership interest" means the interest of a partner in an exempted limited partnership in respect of profit, capital and voting or other rights, benefits or obligations to which he is entitled or subject pursuant to the partnership agreement or this Law;

"public in the Islands" excludes any exempted or ordinary non-resident company registered under the Companies Law, a foreign company registered pursuant to Part IX of the Companies Law, any such company acting as general partner of a partnership registered under section 9(1) or any director or officer of the same acting in such capacity or the trustee of any trust registered or capable of registration under section 74 of the Trusts Law (2011 Revision) acting in such capacity;

2011 Revision

"Registrar" means the Registrar of Exempted Limited Partnerships appointed under section 8; and

"special economic zone business" means any type of business authorized to be carried on in a special economic zone pursuant to any Law in force in the Islands.

Saving of rules of equity and common law
2011 Revision

3. The rules of equity and of common law applicable to partnerships as modified by the Partnership Law (2011 Revision) (but excluding sections 45 to 54 and 56 to 57 thereof) shall apply to an exempted limited partnership, except insofar as they are inconsistent with the express provisions of this Law.

Constitution

4. (1) An exempted limited partnership may be formed for any lawful purpose or purposes to be carried out and undertaken either in or from within the Islands or elsewhere upon the terms, with the rights and powers, and subject to the conditions, limitations, restrictions and liabilities herein mentioned:

Provided that such exempted limited partnership shall not undertake business with the public in the Islands other than so far as may be necessary for the carrying on of the business of that exempted limited partnership exterior to the Islands.

(2) An exempted limited partnership shall consist of one or more persons called general partners who shall, in the event that the assets of the exempted limited partnership are inadequate, be liable for all debts and obligations of the exempted limited partnership, and one or more persons called limited partners who shall not be liable for the debts or obligations of the exempted limited partnership save as provided in the partnership agreement and to the extent specified in sections 7(2) and 14(2), and provided also that a general partner, without derogation from his position as such, may take in such exempted limited partnership, in addition, an interest as a limited partner.

(3) A general partner shall act at all times in good faith in the interests of the exempted limited partnership.

(4) A body corporate, with or without limited liability, and a partnership (whether in the name of such partnership and whether or not an exempted limited partnership) may be a general or limited partner.

(5) Any one or more of the limited partners and general partners of an exempted limited partnership may be resident, domiciled, established, incorporated or registered under the laws of the Islands or outside of the Islands:

Provided that at least one general partner shall-

(a) if an individual, be resident in the Islands;
(b) if a company, be registered under the Companies Law or registered pursuant to Part IX of the Companies Law; or
(c) if a partnership, be registered pursuant to section 9(1).

(6) A limited partner of a partnership which is the general partner of an exempted limited partnership shall not, by virtue of that fact alone, be taken to be a general partner of such exempted limited partnership.

Establishment

5. No partnership, limited or otherwise, shall be an exempted limited partnership unless registered as such under section 9(1).

Name and registered office

6. (1) Every exempted limited partnership shall have a name which -
(a) shall include the words “Limited Partnership” or the letters “L.P.” or “LP”;
(b) may include the name of any general partner or limited partner or any derivation thereof; and
(c) in the case of an exempted limited partnership carrying on special economic zone business, shall include the words “special economic zone” or the letters “SEZ”,

but no exempted limited partnership shall have a name which, because it is identical or similar to the name of any other entity or it falsely suggests the patronage of or a connection with some person or authority or it suggests that the exempted limited partnership is licensed whether in the Islands or elsewhere to carry on any type or class of business when it is not in fact so licensed or because of any other reason, is calculated or likely to mislead.

(2) *Repealed by section 4 of Law 13 of 2009.*

(3) *Repealed by section 4 of Law 13 of 2009.*

(4) Every exempted limited partnership shall have a registered office situate in the Islands for the service of process and to which all notices and communications may be addressed.

Modification of general law

7. (1) A limited partner shall not take part in the conduct of the business of an exempted limited partnership, and all letters, contracts, deeds, instruments or documents whatsoever shall be entered into by or on behalf of the general partner on behalf of the exempted limited partnership.

(2) If a limited partner takes part in the conduct of the business of an exempted limited partnership in its dealings with persons who are not partners, that limited partner shall be liable, in the event of the insolvency of the exempted limited partnership, for all debts and obligations of that exempted limited partnership incurred during the period that he so participates in the conduct of the business as though he were, for such period, a general partner, provided always that he shall be rendered liable pursuant to the foregoing provision only to a person who transacts business with the exempted limited partnership during such period with actual knowledge of such participation and who then reasonably believed such limited partner to be a general partner.

(3) A limited partner does not take part in the conduct of the business of an exempted limited partnership within the meaning of this section by-

(a) holding an office or interest in, or having a contractual relationship with, a general partner or being a contractor for or an agent or employee of the exempted limited partnership or of a general partner or acting as a director, officer or shareholder of a corporate general partner;

(b) consulting with and advising a general partner or consenting or withholding consent to any action proposed, in the manner contemplated by the partnership agreement, with respect to the business of the exempted limited partnership;

(c) investigating, reviewing, approving or being advised as to the accounts or business affairs of the exempted limited partnership or exercising any right conferred by this Law;

(d) acting as surety or guarantor for the exempted limited partnership either generally or in respect of specific obligations;

(e) approving or disapproving an amendment to the partnership agreement; or

(ea) calling, requesting, attending or participating in any meeting of the partners;

(eb) taking any action that results in the winding up or the dissolution of the exempted limited partnership;

(ec) taking any action required or permitted by the partnership agreement or by law to bring, pursue, settle or terminate any action or proceedings brought pursuant to section 13(2); or

(ed) appointing a person to serve on any board or committee of the exempted limited partnership, a general partner or a limited partner or removing a person therefrom; or

(f) voting as a limited partner on-

(i) the dissolution and winding up of the exempted limited partnership;

(ii) the purchase, sale, exchange, lease, mortgage, pledge or other acquisition or transfer of any asset or assets by or of the exempted limited partnership;

(iii) the incurrence or renewal of indebtedness by the exempted limited partnership;

(iv) a change in the nature of the business of the exempted limited partnership;

(v) the admission, removal or withdrawal of a general or limited partner and the continuation of business of the exempted limited partnership thereafter; or

(vi) transactions in which one or more of the general partners have an actual or potential conflict of interest with one or more of the limited partners.

(4) Subsection (3) shall not import any implication that the possession or exercise of any other power by a limited partner will necessarily constitute the taking part by such limited partner in the business of the exempted limited partnership.

(5) In the event of the dissolution of an exempted limited partnership its affairs shall be wound up by the general partner or such other person as may be appointed pursuant to the partnership agreement unless the court otherwise orders on the application of any partner or creditor of the exempted limited partnership pursuant to section 15(4)(f).

(6) Subject to any express or implied term of the partnership agreement to the contrary-

(a) an exempted limited partnership shall not be dissolved by -

(i) changes in, additions to or substitutions of any one or more of the partners;

(ii) the assignment of the whole or part of the partnership interest of a limited partner;

(iii) the death, bankruptcy, dissolution, removal, withdrawal or winding up of a limited partner or a partner's withdrawal or redemption of, or repurchase by the partnership of, any partnership interest;

(iv) the incapacity of a limited partner;

(v) any one or more of the limited partners granting a mortgage, charge or other form of security interest over the whole or part of his partnership interest;

(vi) the sale, exchange, lease, mortgage, pledge or other transfer of any of the assets of the exempted limited partnership; or

(vii) a de-registration of the exempted limited partnership pursuant to section 26;

(b) any difference arising as to matters connected with the business of the exempted limited partnership shall be decided by the general partner, and, if more than one, by such majority of the general partners, as is provided in the partnership agreement;

(c) a person may, with the consent of the general partner, and if by assignment, in accordance with paragraph (a) of subsection (7), become a limited partner without the consent of the existing limited partners; and

(d) a limited partner shall not be entitled to dissolve the partnership by notice.

(7) (a) Upon assignment of a limited partnership interest in whole or in part either absolutely or by way of mortgage, in accordance with the terms of the partnership agreement, an assignee shall, to the extent of such assignment, become a limited partner with the rights and subject to the obligations of the assignor (and, subject to paragraph (aa), wholly or partly in place of and to the exclusion of the assignor as the case may be) in accordance with the partnership agreement and this Law in respect of the partnership interest or part thereof assigned.

(aa) An assignee referred to in paragraph (a) shall not assume any liability of the assignor arising pursuant to subsection (2) or section 14(1), and no such assignment shall relieve the assignor of any liability arising under such subsections.

(b) Subject to paragraphs (a) and (aa), a limited partner may mortgage the whole or any part of his partnership interest and the mortgagee shall serve written notice at the address of the registered office of the exempted limited partnership of such mortgage together with a copy thereof and signed by the mortgagor and the mortgagee and pay such fee, if any, as may be provided in the partnership agreement. The general partner shall maintain or cause to be maintained at the registered office, a register of mortgages indicating the identity of the mortgagor and mortgagee, the date of creation of the mortgage, the partnership interest or part thereof subject thereto and the date of receipt of such notice.

(c) The register described in paragraph (b) shall be open to inspection by any person during all usual business hours. Any mortgage of the whole or any part of a partnership interest shall have priority

according to the date of service of written notice at the registered office described in paragraph (b).

(d) If default is made by a general partner in the maintenance of the register described in paragraph (b), each general partner in default shall upon summary conviction incur a penalty of twenty-five dollars for each day that such default continues.

(8) Any property of the exempted limited partnership that is conveyed to or vested in or held on behalf of any one or more of the general partners or which is conveyed into or vested in the name of the exempted limited partnership shall be held or deemed to be held by the general partner, and if more than one then by the general partners jointly, upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement.

(9) Any debt or obligation incurred by a general partner in the conduct of the business of an exempted limited partnership shall be a debt or obligation of the exempted limited partnership.

Registrar
2012 Revision

8. The Registrar of Companies appointed under the Companies Law (2012 Revision) shall be the Registrar of Exempted Limited Partnerships.

Registration

9. (1) The registration of an exempted limited partnership shall be effected by payment to the Registrar of a registration fee of such amount as the Governor shall, from time to time, by regulation prescribe and by filing with the Registrar a statement signed, subject to subsection (6), by or on behalf of a general partner containing -

(a) the name of the exempted limited partnership;

(b) the general nature of the business of the exempted limited partnership;

(c) the address in the Islands of the registered office of the exempted limited partnership;

(d) the term, if any, for which the exempted limited partnership is entered into or, if for unlimited duration, a statement to that effect and the date of its commencement;

(e) the full name and address of the general partner and, if more than one of each of them, specifying each of them as a general partner and, in the case of a corporate general partner, there shall be filed with the statement a certificate of incorporation and a certificate of good standing (or similar documents under the laws of the jurisdiction of incorporation) or a certificate of registration and a certificate of good standing under Part IX of the Companies Law (2012 Revision) and, in the case of a partnership registered under this section, there shall be filed with the statement a certificate of

2012 Revision

registration and a certificate of good standing or certified copies thereof; and

(f) a declaration that the exempted limited partnership shall not undertake business with the public in the Islands other than so far as may be necessary for the carrying on of the business of that exempted limited partnership exterior to the Islands.

(2) The Registrar shall maintain a record of each exempted limited partnership registered under this Law and all the statements filed in relation to such exempted limited partnership, which records and statements shall be kept open to public inspection during all usual business hours.

(3) The Registrar shall issue a certificate of registration under his hand and seal of office as soon as the registration of the statement pursuant to subsection (1) has been effected.

(4) No limited partner of an exempted limited partnership formed after the 15th July, 1991 shall have the benefit of limited liability until the date indicated on the certificate referred to in subsection (3) issued by the Registrar, and a partnership registered in accordance with section 21(1) shall obtain the benefit of limited liability under this Law with effect from such date but subject always to section 21(2).

(5) A certificate issued under subsection (3) shall be conclusive evidence that compliance has been made with all the requirements of this Law in respect of the formation and registration of an exempted limited partnership but subject always to section 21(2).

(6) If a person required by subsection (1) or section 10(1) or (2) to execute and file a statement fails to do so, any other partner, and any assignee of a partnership interest, who is or may be affected by the failure or refusal, may petition the court to direct such person as the court sees fit to sign the statement and file the same on behalf of the person in default.

(7) Notwithstanding subsections (1) and (3), the Registrar may refuse to accept the registration of an exempted limited partnership and refuse to issue a certificate of such registration in any case where, in his opinion, the name of the proposed exempted limited partnership is in contravention of the proviso to section 6 (1).

Changes in registered particulars

10. (1) Without prejudice to subsection (2), if, during the continuance of an exempted limited partnership, any change is made or occurs in any matter specified in paragraphs (a) to (e) of the statement filed under section 9(1), a statement signed, subject to section 9(6), by a general partner specifying the

nature of the change shall, within sixty days of such change, be filed with the Registrar.

(2) A statement signed in accordance with subsection (1) in respect of any arrangement or transaction consequent upon which any person will cease to be a general partner in any exempted limited partnership, shall, within fifteen days of such arrangement or transaction, be filed with the Registrar and, until such statement is so filed, the arrangement or transaction shall, for the purposes of this Law and the partnership agreement, be deemed to be of no effect.

(3) Save with the written consent of any person thereby affected, no arrangement or transaction shall take effect to the extent that it seeks to relieve or discharge a general partner from the obligations of a general partner with regard to any debt or obligation of the exempted limited partnership to a person incurred before such arrangement or transaction takes effect.

(4) If default is made in compliance with this section, each general partner in default shall incur a penalty of twenty-five dollars for each day that such default continues, which penalty shall be a debt due to the Registrar and such general partner shall indemnify any person who thereby suffers any loss.

(5) The name of an exempted limited partnership shall not be changed so as to contravene the proviso to section 6(1), and the Registrar may refuse to accept a statement under subsection (1) which, in his opinion, seeks to effect such a change.

Register of limited partnership interests

11. (1) The general partner shall maintain or cause to be maintained at the registered office of the exempted limited partnership a register which shall contain the name and address, amount and date of the contribution or contributions of each partner and the amount and date of any payment representing a return of any part of the contribution of any partner, which register shall be updated within twenty-one business days of any change in the particulars therein.

(2) The register described in subsection (1) shall be open to inspection during all usual business hours by all partners or by any other person with the consent of the general partner.

(3) The register described in subsection (1) shall be *prima facie* evidence of the matters which are, by subsection (1), directed to be inserted therein.

(4) A person who, being a general partner, defaults in complying with subsection (1), commits an offence and is liable on summary conviction to a fine of twenty-five dollars for each day that such default continues and shall indemnify any person who thereby suffers any loss.

Accounts

12. (1) Subject to any express or implied term of the partnership agreement, each limited partner may demand and shall receive from a general partner true and full information regarding the state of the business and financial condition of the exempted limited partnership.

(2) A general partner shall keep or cause to be kept proper books of account including, where applicable, material underlying documentation including contracts and invoices, with respect to -

(a) all sums of money received and expended by the exempted limited partnership and matters in respect of which the receipt of expenditure takes place;
(b) all sales and purchases of goods by the exempted limited partnership; and
(c) the assets and liabilities of the exempted limited partnership.

(3) For the purposes of subsection (2), proper books of account shall not be deemed to be kept if there are not kept such books as are necessary to give a true and fair view of the business and financial condition of the exempted limited partnership and to explain its transactions.

(4) A general partner shall cause all books of account required to be kept under subsection (2) to be retained for a minimum period of five years from the date on which they are prepared.

(5) A general partner who knowingly and willfully contravenes subsection (2) or (4) shall be subject to a penalty of five thousand dollars.

Proceedings

13. (1) Subject to subsection (2), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and no limited partner shall be a party to or named in such proceedings:

Provided that if the court deems it just and equitable any person or a general partner shall have the right to join in or otherwise institute proceedings against any one or more of the limited partners who may be liable under section 7(2) or to enforce the return of the contribution, if any, required by section 14(1).

(2) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without good cause, refused to institute such proceedings.

Return of contributions

14. (1) A limited partner who receives a payment representing a return of any part of his contribution to the partnership within six months before an insolvency of the exempted limited partnership shall be liable to repay such payment with simple interest at the rate of ten per cent per annum (calculated on a daily basis)

or otherwise as may be specified in the partnership agreement to the extent that such contribution or part thereof is necessary to discharge a debt or obligation of the exempted limited partnership incurred during the period that the contribution represented an asset of the exempted limited partnership.

(2) *Repealed by section 9(a) of Law 13 of 2009.*

(3) In this section-

"receive" includes the release of any obligation forming part of the capital contribution and, in this context, liabilities to make repayments pursuant to subsection (2) shall be read to refer to due performance of such obligations.

(4) Where an exempted limited partnership is voluntarily wound up and dissolved under section 15(1) the period of six months referred to in subsection (1) shall be calculated from -

(a) the time of the passing of a resolution for winding up;
(b) the time or the occurrence of the event specified in the partnership agreement; or
(c) the insolvency of the exempted limited partnership,

whichever is the earlier.

Dissolution

15. (1) An exempted limited partnership shall be wound up at the time or upon the occurrence of any event specified in the partnership agreement and dissolved in accordance with the terms thereof.

(2) The exempted limited partnership shall continue until wound up and dissolved by resolution of all the general partners and a two-thirds majority of partners, unless otherwise specified in the partnership agreement.

(3) An exempted limited partnership shall not be dissolved by an act of the partners or otherwise until a notice of dissolution signed by a general partner or liquidator has been filed with the Registrar on completion of the winding up of the partnership.

2012 Revision

(4) Except to the extent that such provisions are not consistent with this Law (and in the event of any inconsistencies, this Law shall prevail) and subject to any express provisions of this Law to the contrary, the provisions of Part V of the Companies Law (2012 Revision) and the Companies Winding Up Rules 2010 shall apply to the winding up and dissolution of an exempted limited partnership, and for which purpose -

(a) references in Part V to a company shall include references to an exempted limited partnership;

(b) the limited partners shall be treated as if they were shareholders of a company and references to 'contributories' in Part V shall be construed accordingly, except that the application of such provisions shall not cause a limited partner to be subject to any greater liability than he would otherwise bear under this Law, but for the application of this paragraph;

(c) references in Part V to a director or officer of a company shall include references to the general partner of an exempted limited partnership;

(d) except for sections 123 (excluding paragraphs (b) and (c)), 140, 145, and 146 thereof, Part V shall not apply to a voluntary dissolution and winding up under subsection (1);

(e) the Insolvency Rules Committee established pursuant to the Companies Law (2012 Revision) shall have the power to make rules and prescribe forms for the purpose of giving effect to this section or its interpretation; and

(f) on application by a partner or a creditor, the court may make such orders and give such directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable.

(5) Subject to any express or implied term of the partnership agreement to the contrary, and subject to subsection (6), an exempted limited partnership shall be immediately dissolved on the date (the "automatic dissolution date") falling ninety days after the date of the service of a notice by the general partner (or its legal representative) on all the limited partners informing the limited partners of -

(a) the death;

(b) the commencement of liquidation or bankruptcy proceedings; or

(c) the withdrawal, removal or making of a winding up or dissolution order,

in relation to the sole or last remaining general partner (or such other date or event as may be specified in the partnership agreement).

(6) If a majority of partners specified in the partnership agreement as being entitled to vote to elect a new general partner in accordance with the terms of the partnership agreement (or, if no such majority is specified in the partnership agreement, a simple majority of the partners) elects one or more new general partners before the automatic dissolution date, the business of the exempted limited partnership may be resumed and continued as provided for in the partnership agreement or any subsequent agreement.

(7) Unless the partnership agreement provides otherwise, if a new general partner is not elected by the automatic dissolution date the exempted limited partnership shall be wound up and dissolved in accordance with the partnership

agreement or such orders or directions as the court may make or give in accordance with subsection (4).

Inspection

16. (1) Any person may require a certified copy of the certificate of registration, a certificate of good standing or a copy of or extract from any registered statement filed in relation to the exempted limited partnership to be certified as a true copy by the Registrar on payment of such fees as the Governor may, from time to time, by regulation prescribe.

(2) A certificate of registration, a certificate of good standing or a copy of or extract from a registered statement filed with the Registrar issued under this Law, if certified by the Registrar to be a true copy, shall be received in evidence in all legal proceedings.

Tax undertaking

17. (1) The Governor may, on application by a general partner, give an undertaking in respect of any exempted limited partnership that no law which is hereafter enacted in the Islands imposing any tax to be levied on profits or income or gains or appreciations shall apply to such exempted limited partnership or to any partner thereof in respect of the operations or assets of such exempted limited partnership or the partnership interest of a partner therein.

(2) Any undertaking given under subsection (1) may provide, in addition, that the aforesaid taxes and any tax in the nature of estate duty or inheritance tax shall not be payable in respect of the obligations of the exempted limited partnership or the interests of the partners therein.

(3) Any such undertaking as aforesaid may be for a period not exceeding fifty years from the date of the approval of the application and may be in such form as the Governor shall determine.

Regulations

18. The Governor may, from time to time, make regulations in respect of exempted limited partnerships prescribing-

(a) the duties to be performed by the Registrar for the purposes of this Law;
(b) the forms to be used for the purposes of this Law;
(c) the fees payable to the Registrar in respect of filings or certifications or otherwise pursuant to this Law; and
(d) generally, the conduct and regulation of registration under this Law and any matters incidental thereto.

Annual return

19. (1) An exempted limited partnership shall, on or before the 31st day of January in every year, file with the Registrar a return signed by or on behalf of a general partner certifying that the exempted partnership has, during the prior calendar year, complied with section 10(1) and that there has been no breach of the declaration given in accordance with paragraph (f) of section 9(1) and pay to

the Registrar an annual fee of such amount as the Governor shall, from time to time, by regulation prescribe.

(2) An exempted limited partnership which fails to comply with subsection (1) shall-

(a) where the annual fee is paid in the second quarter of the calendar year, incur a penalty of 33.33% of the annual fee;
(b) where the annual fee is paid in the third quarter of the calendar year, incur a penalty of 66.67% of the annual fee; and
(c) where the annual fee is paid in the fourth quarter of the calendar year, incur a penalty of 100% of the annual fee.

(3) The penalties specified in subsection (2) shall be a debt due to the Registrar.

Transactions with the exempted limited partnership

20. Subject to any express or implied term of the partnership agreement to the contrary and to the duty imposed upon a general partner by section 4(3), a partner may lend money to, borrow from and transact other business with the exempted limited partnership (so that an asset, debt or obligation of the exempted limited partnership shall thereby be created) and with or without interest or security as the general partner shall determine, and shall have the same rights and obligations with respect thereto as a person who is not a partner, provided that the obligations of the exempted limited partnership to repay a debt to a general partner shall, at all times, be subordinated to the claims of secured and unsecured creditors of the exempted limited partnership.

Re-registration 2011 Revision

21. (1) Any partnership registered under the repealed Limited Partnership Law (Revised) or sections 45 to 54 and 56 to 57 of the Partnership Law (2011 Revision) or any law amending or re-enacting the same shall not be affected by this Law but shall continue to be governed by such law, as the case may be. Any such partnership and any partnership established under the laws of a jurisdiction other than the Islands may, at any time, upon effecting such amendments to the partnership agreement as shall be necessary to comply with this Law, if any, and upon paying a fee of such amount as the Governor may, from time to time, by regulation prescribe and upon filing the statement required by section 9(1), be registered under this Law and, with effect from the date indicated on the certificate of registration issued by the Registrar pursuant to section 9(3), shall be governed exclusively thereafter as an exempted limited partnership in accordance with this Law.

(2) With effect from the date indicated on the certificate of registration described in subsection (1), the exempted limited partnership and the partnership interests of the parties therein and their rights and liabilities, as against any person who is not a partner, shall cease to be governed by the repealed Limited

Partnership Law (Revised), or sections 45 to 54 and 56 to 57 of the Partnership Law (2011 Revision) or the laws of such other jurisdiction, as the case may be, save in respect of any act or omission occurring before such date which shall continue to be governed by such law or the laws of such other jurisdiction, and provided always without prejudice to the foregoing generality that such registration shall not operate to-

(a) create a new legal entity;
(b) affect the property previously acquired by or on behalf of the exempted limited partnership;
(c) affect any act or thing done prior to such registration or the rights, powers, authorities, functions or obligations of the exempted limited partnership, any partner or any other person prior thereto;
(d) render defective any legal proceedings by or against the exempted limited partnership or any partner or any other person, and any legal proceedings that could have been continued or commenced by or against the exempted limited partnership or any partner or any other person before its registration hereunder may, notwithstanding such registration, be continued or commenced after such registration and in respect of which such law or the laws of such other jurisdiction shall be of application.

Express fees

22. (1) The Registrar, on receipt of-

(a) an application for registration under section 9: or
(b) an application for any certificate, other than a certificate under section 9(3), which he is authorised to provide under this Law,

which is accompanied by an express fee of an amount specified in subsection (2), shall complete the transaction for which the application has been made by-

(i) the end of the working day, where the application and all fees are received by 12 noon; or
(ii) 12 noon on the following working day, where the application and all fees are received after 12 noon.

(2) The express fee referred to in subsection (1) is-

(a) for an application referred to in paragraph (a) of subsection (1) - $400; and
(b) for an application referred to in paragraph (b) of subsection (1) - $25.

When licence not required

2007 Revision
2009 Revision

23. A person who acts as a general partner of an exempted limited partnership shall not, by virtue solely of so acting, require to be licensed under the Local Companies (Control) Law (2007 Revision) and shall not require a trust company licence under the Banks and Trust Companies Law (2009 Revision).

Electronic business

24. Nothing in this Law shall prohibit an exempted limited partnership from offering, by electronic means, and subsequently supplying, real or personal property, services or information from a place of business in the Islands or through an internet service provider or other electronic service provider located in the Islands.

Recovery of penalties

25. (1) Notwithstanding any provision of this Law which prescribes a specific *per diem* penalty in respect of a default of any obligation to make a filing or to maintain a record set out in this Law, it shall be lawful for the Registrar, in any case where the aggregate *per diem* penalty has exceeded the amount of five hundred dollars and he is satisfied that the failure is not due to wilful default, to, at any time, accept payment of a penalty in the amount of five hundred dollars in lieu thereof.

(2) Without prejudice to the powers exercisable by the Registrar under this Law, all sums that he is entitled to recover by way of fees or penalties are recoverable either summarily as a civil debt, or as a simple contract debt, in any court of competent jurisdiction.

De-registration

26. A general partner of an exempted limited partnership may at any time de-register the partnership, if such de-registration is permitted under the terms of the partnership agreement, by filing a written notice of de-registration with the Registrar together with written confirmation that such action is authorised by the partnership agreement.

Publication in consolidated and revised form authorised by the Governor in Cabinet this 18th day of September, 2012.

Kim Bullings
Clerk of Cabinet

(Price $ 4.00)

ITEM NO. 132

JA-18

CAYMAN ISLANDS

EXEMPTED LIMITED PARTNERSHIP ACT

(2025 Revision)

Supplement No. 3 published with Legislation Gazette No. 7 of 30th January, 2025.

.

PUBLISHING DETAILS

Law 5 of 2014 consolidated with Laws 10 of 2017, 31 of 2020, Act 13 of 2024 and as amended by Act 56 of 2020.

Revised under the authority of the *Law Revision Act (2020 Revision)*.

Originally enacted —

Law 5 of 2014-11th April, 2014
Law 10 of 2017-27th March, 2017
Law 31 of 2020-1st July, 2020
Act 56 of 2020-7th December, 2020
Act 13 of 2024-11th December, 2024.

Consolidated and revised this 1st day of January, 2025.

Note (not forming part of this Act): This revision replaces the 2021 Revision which should now be discarded.

CAYMAN ISLANDS

EXEMPTED LIMITED PARTNERSHIP ACT

(2025 Revision)

Arrangement of Sections

Section		Page
1.	Short title	5
2.	Interpretation	5
3.	Saving of rules of equity and common law	7
4.	Constitution	8
5.	When licence not required	9
5A.	Name reservation	9
6.	Name and registered office	9
7.	Establishment	10
8.	Registrar	10
9.	Registration	10
10.	Changes in registered particulars	12
11.	Failure to file statement	12
12.	Copies of certificates	12
12A.	Fees for administrative services	13
13.	Express fees	13
14.	Modification of general law	13
15.	Agreement may specify delegation of authority	14
16.	Property	14
17.	Rights, property and proceeds to vest in incoming partner	14
18.	Transactions with the exempted limited partnership	15
19.	General partner to act in good faith	15
20.	Liability of limited partner	16
21.	Accounts	17
22.	Information regarding condition of partnership	18
23.	Differences decided by general partner	18

24. Establishment, regulation of boards, committees 18
25. Failure to perform 19
26. Agreement as to benefits 20
27. Execution considered valid 20
28. Power of attorney 21
29. Register of limited partnership interests 21
30. Maintenance of records 22
31. Registration of security interests 22
32. Transfer of partnership interests 23
33. Proceedings 25
34. Return of contributions 26
35. Manner in which partnership may not be dissolved 26
36. Dissolution 27
37. Registrar may strike off register 30
38. Tax undertaking 31
39. Annual return 32
40. Re-registration 32
41. De-registration pursuant to partnership agreement 33
42. Registration of foreign limited partnerships 33
43. De-registration for continuation in another jurisdiction 36
44. Certificate of de-registration 38
45. Notice of de-registration 40
46. Certificate of good standing 40
47. Electronic business 40
48. Regulations 40
49. Recovery of penalties 41
50. *Repeal* of the Exempted Limited Partnership Law (2013 Revision) and savings 41
51. Validation of the Exempted Limited Partnership Regulations, 2014 41
52. Validation of payment and collection of fees 42
53. Orders or determinations by court not affected 43

ENDNOTES **45**

Table of Legislation history: 45

CAYMAN ISLANDS

EXEMPTED LIMITED PARTNERSHIP ACT

(2025 Revision)

Short title

1. This Act may be cited as the *Exempted Limited Partnership Act (2025 Revision)*.

Interpretation

2. In this Act —

"**certified translator**" means a person whose interpretation or translation competence has been tested and approved by a professional association or governmental body or any other person determined by the Registrar;

"**commitment**" means cash, property, services rendered or other assets which a partner agrees to contribute to the capital of an exempted limited partnership in its capacity as partner but does not include any moneys agreed to be lent to an exempted limited partnership;

"**Companies Act**" means the *Companies Act (2025 Revision)*;

"**contribution**" means cash, property, services or other assets which a partner contributes to the capital of an exempted limited partnership in its capacity as partner but does not include any moneys lent by a partner to an exempted limited partnership;

"**court**" means the Grand Court;

"**dual foreign name**" means an additional name in any language not utilising the Roman alphabet, utilising any letters, characters, script, accents and other diacritical marks, and which does not have to be a translation or transliteration of the name in the Roman alphabet;

"**exempted limited partnership**" means —

(a) a partnership formed and registered under section 9(1); or

(b) a partnership that before the commencement of the *Exempted Limited Partnership Law, 2014 (Law 5 of 2014)* was formed and registered under the **repealed** *Exempted Limited Partnership Law (2013 Revision)*;

"**general partner**" means a person who is named as such in the statement filed pursuant to section 9 or 10(2) and if more than one shall mean each general partner, unless this Act otherwise provides;

"**general partnership interest**" means the partnership interest of a general partner in that person's capacity as such;

"**insolvency of the exempted limited partnership**" means that the general partner is unable to pay the debts and obligations of the exempted limited partnership, otherwise than in respect of liabilities to partners on account of their partnership interests, in the ordinary course of business as they fall due out of the assets of the exempted limited partnership, without recourse to the separate assets of the general partner not contributed or committed to the exempted limited partnership and "**insolvent**" shall be construed accordingly;

"**limited partner**" means a person who has become a limited partner in accordance with section 4(2) or otherwise pursuant to section 32;

"**limited partnership interest**" means the partnership interest of a limited partner in that person's capacity as such;

"**majority of limited partners**" means a majority or number of limited partners, or class or category of limited partners, or other persons, whether parties to the partnership agreement or otherwise including the general partner, required by or specified, either generally or in respect of a particular matter, in the partnership agreement and calculated in the manner specified in the partnership agreement, but if no such majority or manner is specified in the partnership agreement any required majority of the limited partners shall be a simple majority of the limited partners calculated by reference to the value of the contributions of the limited partners at the time of determination;

"**overseas company**" means a company, body corporate or corporate entity existing under the law of a jurisdiction outside of the Islands;

"**part**" means, in relation to a partnership interest, a proportionate part of that partnership interest, comprising both the rights, and the obligations under the partnership agreement and this Act but without prejudice to the liability of a general partner under section 4(2);

"**partner**" means a limited partner or a general partner;

"**partnership agreement**" means any agreement of the partners which provides for the establishment of, and regulates the affairs of, an exempted limited

partnership, the conduct of its business and the rights and obligations of the partners amongst themselves;

"**partnership interest**" means the interest of a partner in an exempted limited partnership in respect of profit, capital and voting or other rights, benefits or obligations to which that partner is entitled or subject pursuant to the partnership agreement or this Act;

"**public in the Islands**" excludes any exempted or ordinary non-resident company registered under the *Companies Act (2025 Revision)*, a foreign company registered pursuant to Part 9 of the *Companies Act (2025 Revision)*, a foreign limited partnership registered under section 42, any company acting as general partner of a partnership registered under section 9(1) or any director or officer of the same acting in that capacity or the trustee of any trust registered or capable of registration under section 74 of the *Trusts Act (2021 Revision)* acting in that capacity;

"**qualifying general partner**" means a general partner of an exempted limited partnership that satisfies paragraph (a), (b), (c) or (d) of section 4(4);

"**registered office provider**" means in relation to an exempted limited partnership the person who provides the registered office for that exempted limited partnership;

"**Registrar**" means the Registrar of Exempted Limited Partnerships appointed in accordance with section 8;

"**security interest**" means a legal mortgage, an equitable mortgage, charge or other form of security interest granted with respect to a partnership interest or part thereof whether or not governed by the laws of the Islands;

"**signature**" includes a facsimile of a signature however reproduced and a digital signature;

"**special economic zone business**" means any type of business authorised to be carried on in a special economic zone pursuant to any Law in force in the Islands; and

"**translated name**" means a translation or transliteration of an exempted limited partnership's dual foreign name into the English language provided by either a person licensed to provide the exempted limited partnership's registered office in the Islands or a certified translator, together with a statement as to the foreign language in which the dual foreign name is written.

Saving of rules of equity and common law

3. The rules of equity and of common law applicable to partnerships as modified by the *Partnership Act (2025 Revision)* but excluding sections 31, 45 to 54 and 56 to 57 shall apply to an exempted limited partnership, except where they are inconsistent with the express provisions of this Act.

Constitution

4. (1) An exempted limited partnership may be formed for any lawful purpose to be carried out and undertaken either in or from within the Islands or elsewhere upon the terms, with the rights and powers, and subject to the conditions, limitations, restrictions and liabilities mentioned in this Act but an exempted limited partnership shall not undertake business with the public in the Islands other than so far as may be necessary for the carrying on of the business of that exempted limited partnership exterior to the Islands.

(2) An exempted limited partnership shall consist of one or more persons called general partners who shall, in the event that the assets of the exempted limited partnership are inadequate, be liable for all debts and obligations of the exempted limited partnership, and one or more persons called limited partners who shall not be liable for the debts or obligations of the exempted limited partnership save as provided in the partnership agreement and to the extent specified in sections 20(1) and 34(1), but a general partner, without derogation from that general partner's position as such, may, in addition, take an interest as a limited partner in the exempted limited partnership.

(3) A body corporate, with or without limited liability, and a partnership whether in the name of the partnership and whether or not an exempted limited partnership, may be a general or limited partner of an exempted limited partnership.

(4) Any one or more of the limited partners and general partners of an exempted limited partnership may be resident, domiciled, established, incorporated or registered under the laws of the Islands or outside of the Islands but at least one general partner shall —

(a) if an individual, be resident in the Islands;

(b) if a company, be registered under the *Companies Act (2025 Revision)* or registered pursuant to Part 9 of the *Companies Act (2025 Revision)*;

(c) if a partnership, be registered pursuant to section 9(1) or 42, as applicable; or

(d) if any other person, be registered under any other Law or regulation as may be prescribed.

(5) A limited partner, or person with analogous status, of a partnership which is the general partner of an exempted limited partnership shall not, by virtue of that fact alone, be taken to be a general partner of the exempted limited partnership.

(6) A limited partner of an exempted limited partnership shall not cease to have the benefit of limited liability by reason only of the partnership ceasing to have a qualifying general partner.

When licence not required

5. A person who acts as a general partner of an exempted limited partnership is not, by virtue solely of so acting, required to be licensed under the *Local Companies (Control) Act (2025 Revision)* and shall not require a trust company licence under the *Banks and Trust Companies Act (2025 Revision)*, a mutual fund administrator's licence under the *Mutual Funds Act (2025 Revision)*, a licence under the *Companies Management Act (2025 Revision)* or a licence under the *Trade and Business Licensing Act (2021 Revision)*.

Name reservation

5A. (1) A person ("applicant") may apply to reserve a specified name by —

(a) filing with the Registrar (including by permitted electronic means) an application executed by the applicant specifying the name to be reserved and the name and address of the applicant; and

(b) paying the prescribed application fee.

(2) If, on an application made under subsection (1), the Registrar finds that the name is available for use by an exempted limited partnership or a foreign limited partnership, the Registrar may reserve the name for exclusive use by the applicant for a period of up to four months.

(3) On or before the expiry of the period for name reservation under subsection (2), the applicant may make further successive applications pursuant to subsection (2) to reserve the specified name.

Name and registered office

6. (1) Every exempted limited partnership shall have a name which —

(a) shall include the words "Limited Partnership" or the letters "L.P." or "LP";

(b) may include the name of any general partner or limited partner or any derivation thereof; and

(c) in the case of an exempted limited partnership carrying on special economic zone business, shall include the words "special economic zone" or the letters "SEZ",

in each case which may be preceded by or followed with a dual or foreign name, but no exempted limited partnership shall have a name or translated name which, because it is identical or similar to the name of any other entity or it falsely suggests the patronage of or a connection with some person or authority or it suggests that the exempted limited partnership is licensed whether in the Islands or elsewhere to carry on any type or class of business when it is not in fact so licensed or because of any other reason, is calculated or likely to mislead.

(2) Every exempted limited partnership shall have a registered office situated in the Islands for the service of process and to which all notices and communications may be addressed.

(3) The registered office of an exempted limited partnership shall be the same as the address of a person licensed by the Authority under the *Banks and Trust Companies Act (2025 Revision)*, the *Companies Management Act (2025 Revision)* or the *Mutual Funds Act (2025 Revision)* except where the registered office was at a different address immediately prior to the date of commencement of this Act and remains at that address on or after the date of commencement of this Act.

(4) For the purpose of subsection (3) the Authority means the Cayman Islands Monetary Authority established under section 5(1) of the *Monetary Authority Act (2020 Revision)*, and includes a person acting under the Authority's authorisation.

Establishment

7. A partnership, limited or otherwise, shall not be an exempted limited partnership unless registered as such under section 9(1).

Registrar

8. The Registrar of Companies appointed under the *Companies Act (2025 Revision)* shall be the Registrar of Exempted Limited Partnerships.

Registration

9. (1) The registration of an exempted limited partnership shall be effected by payment to the Registrar of a registration fee of an amount that the Cabinet shall, from time to time, by regulation prescribe and by filing with the Registrar a statement signed, subject to section 11, by or on behalf of a general partner containing —

(a) the name or dual foreign name and translated name of the exempted limited partnership;

(b) the general nature of the business of the exempted limited partnership;

(c) the address in the Islands of the registered office of the exempted limited partnership;

(d) the term, if any, for which the exempted limited partnership is entered into or, if for unlimited duration, a statement to that effect and the date of its commencement;

(e) the full name and address of the general partner and, if more than one of each of them, specifying each of them as a general partner and

(i) in the case of a corporate general partner, there shall be filed with the statement a certificate of incorporation and a certificate of good standing (or similar documents under the laws of the jurisdiction of

incorporation) or a certificate of registration and a certificate of good standing under Part 9 of the *Companies Act (2025 Revision)*;

(ii) in the case of a general partner which is a partnership registered under this Act, there shall be filed with the statement a certificate of registration and a certificate of good standing or certified copies thereof; and

(iii) in the case of a general partner who is an individual there shall be filed with the statement photographic evidence of that person's identity and evidence of that person's residential address in the Islands; and

(f) a declaration that the exempted limited partnership shall not undertake business with the public in the Islands other than so far as may be necessary for the carrying on of the business of that exempted limited partnership exterior to the Islands.

(2) The Registrar shall maintain a record of each exempted limited partnership registered under this Act and all the statements filed in relation to the exempted limited partnership, which records and statements shall be kept open to public inspection during all usual business hours.

(3) An exempted limited partnership's dual foreign name shall only be entered on the record if its translated name conforms with the provisions of section 6(1).

(4) If the exempted limited partnership does not conform with section 6(1) then the dual foreign name and the translated name shall not be entered on the record.

(5) The Registrar shall issue a certificate of registration under the Registrar's hand and seal of office as soon as the registration of the statement pursuant to subsection (1) has been effected.

(6) A limited partner of an exempted limited partnership formed after the 15th July, 1991 shall not have the benefit of limited liability until the date indicated on the certificate referred to in subsection (5) issued by the Registrar, and a partnership registered in accordance with section 40(1) shall obtain the benefit of limited liability under this Act with effect from that date but subject to section 40(2).

(7) A certificate issued under subsection (5) shall be conclusive evidence that compliance has been made with all the requirements of this Act in respect of the formation and registration of an exempted limited partnership but subject to section 40(2).

(8) Notwithstanding subsections (1) and (5), the Registrar may refuse to accept the registration of an exempted limited partnership and refuse to issue a certificate of registration in any case where, in the Registrar's opinion, the name or translated name of the proposed exempted limited partnership is in contravention of section 6(1).

Changes in registered particulars

10. (1) Without prejudice to subsection (2), if, during the continuance of an exempted limited partnership, any change is made or occurs in any matter specified in paragraphs (a) to (e) of section 9(1), a statement signed, subject to section 11, by a general partner specifying the nature of the change shall, within sixty days of the change, be filed with the Registrar.

(2) A statement signed in accordance with subsection (1) in respect of any arrangement or transaction consequent upon which any person will be removed, replaced or admitted as a general partner in any exempted limited partnership, shall, within fifteen days of the arrangement or transaction, be filed with the Registrar and, until the statement is so filed, the arrangement or transaction shall, for the purposes of this Act and the partnership agreement, not be effective to remove, replace or admit that person as a general partner of the exempt limited partnership and with respect to a replacement or admitted general partner the documentation required by subsection 9(1)(e)(i), (ii) or (iii) of this Act shall be provided as the case may require.

(3) Save with the written consent of any person thereby affected, no arrangement or transaction shall take effect to the extent that it seeks to relieve or discharge a general partner from the obligations of a general partner with regard to any debt or obligation of the exempted limited partnership to a person incurred before the arrangement or transaction takes effect.

(4) If default is made in compliance with this section, each general partner in default shall incur a penalty of two hundred dollars for each day that the default continues which penalty shall be a debt due to the Registrar and the general partner shall indemnify any person who thereby suffers any loss.

(5) The name or translated name of an exempted limited partnership shall not be changed so as to contravene section 6(1) and the Registrar may refuse to accept a statement under subsection (1) which, in the Registrar's opinion, seeks to effect such a change.

Failure to file statement

11. If a person required by section 9(1), section 10(1) or (2) or section 36, or by the partnership agreement to execute and file a statement or notice fails to do so, any other partner, and any assignee of a partnership interest who is or may be affected by the failure or refusal may petition the court to direct a person the court sees fit to sign the statement and file the same on behalf of the person in default.

Copies of certificates

12. (1) Any person may require a certified copy of the certificate of registration, a certificate of good standing or a copy of or extract from any registered statement filed in relation to the exempted limited partnership to be certified as a true copy by the Registrar on payment of a fee the Cabinet may by regulation prescribe.

(2) A certificate of registration, a certificate of good standing or a copy of or extract from a registered statement filed with the Registrar issued under this Act, if certified by the Registrar to be a true copy, shall be received in evidence in all legal proceedings.

Fees for administrative services

12A. A person shall pay to the Registrar the prescribed fee for the provision by the Registrar of any administrative services as may be prescribed.

Express fees

13. (1) The Registrar, on receipt of —

(a) an application for registration under section 9 or 42;

(b) an application for any certificate, other than a certificate under section 9(5) or 42(9), which the Registrar is authorised to provide under this Act;

(c) the filing of a notice of termination of registration and written confirmation that the action is authorised by the partnership agreement, for de-registration under section 41;

(d) an application for de-registration under section 43; or

(e) any relevant information for a transaction under subsection (2),

which is accompanied by the prescribed fees and the prescribed express fee, shall complete the relevant transaction by —

(i) the end of the working day, where the application, filing or relevant information and all fees are received by 12 noon; or

(ii) 12 noon on the following working day, where the application, filing or relevant information and all fees are received after 12 noon.

(2) For the purposes of subsection (1)(e), the transactions are —

(a) the filing of any document with the Registrar (other than the filing of any document made as part of an application);

(b) certifications by the Registrar;

(c) the issuance or making of copies by the Registrar;

(d) the issuance of certificates by the Registrar, including customised certificates; or

(e) the issuance of letters by the Registrar, including customised letters.

Modification of general law

14. (1) A limited partner shall not take part in the conduct of the business of an exempted limited partnership in its capacity as a limited partner.

(2) All letters, contracts, deeds, instruments or documents whatsoever shall be entered into by or on behalf of the general partner (or any agent or delegate of the general partner) on behalf of the exempted limited partnership.

Agreement may specify delegation of authority

15. Where an exempted limited partnership has more than one general partner and this Act gives an authority, consent or power but not an obligation or liability, to the general partner, the partnership agreement may specify which general partner is entitled to exercise that authority, consent or power to the exclusion of any other general partner.

Property

16. (1) Any rights or property of every description of the exempted limited partnership, including all choses in action and any right to make capital calls and receive the proceeds thereof that is conveyed to or vested in or held on behalf of any one or more of the general partners or which is conveyed into or vested in the name of the exempted limited partnership shall be held or deemed to be held by the general partner and if more than one then by the general partners jointly, upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement.

(2) Any debt or obligation incurred by a general partner in the conduct of the business of an exempted limited partnership shall be a debt or obligation of the exempted limited partnership.

(3) The assets of an exempted limited partnership, or any class of assets, may be the subject of a floating charge, whether or not the partners of the exempted limited partnership, or any of them, are companies, overseas companies or bodies corporate.

Rights, property and proceeds to vest in incoming partner

17. (1) On the admission or substitution of any general partner or general partners, in this subsection referred to as an "incoming general partner", in accordance with the terms of the partnership agreement and this Act, all rights or property of every description of the exempted limited partnership, including all choses in action and any right to make capital calls and receive the proceeds thereof, held or deemed to be held by the general partner or general partners in accordance with the foregoing subsection, in this subsection referred to as the "existing general partners", shall vest without the requirement for further formalities in the incoming general partner and any continuing existing general partners and shall be held by it or them in accordance with this Act.

(2) On the withdrawal of a general partner in accordance with the terms of the partnership agreement and this Act —

(a) all rights or property of every description of the exempted limited partnership, including all choses in action and any right to make capital calls and receive the proceeds thereof, shall vest without the requirement for further actions or formalities in the remaining general partner or general partners and shall be held by it or them in accordance with this Act; and

(b) subject to section 10(3), the remaining general partner or general partners shall be liable for and the property of the exempted limited partnership held by them in accordance with this Act shall be subject to all mortgages, charges or security interests and all contracts, obligations, claims, debts and liabilities of the exempted limited partnership.

Transactions with the exempted limited partnership

18. Subject to any express or implied term of the partnership agreement to the contrary and to the duty imposed upon a general partner by section 19(1), a partner may lend money to, borrow from and transact other business with the exempted limited partnership so that an asset, debt or obligation of the exempted limited partnership shall thereby be created and with or without interest or security as the general partner shall determine, and shall have the same rights and obligations with respect thereto as a person who is not a partner, but the obligations of the exempted limited partnership to repay a debt to a general partner shall, at all times, be subordinated to the claims of secured and unsecured creditors of the exempted limited partnership.

General partner to act in good faith

19. (1) A general partner shall act at all times in good faith and, subject to any express provisions of the partnership agreement to the contrary, in the interests of the exempted limited partnership.

(2) Subject to any express provisions of the partnership agreement to the contrary, a limited partner of an exempted limited partnership in that capacity does not owe any fiduciary duty in exercising any of its rights or authorities or otherwise in performing any of its obligations under the partnership agreement to the exempted limited partnership or any other partner.

Liability of limited partner

20. (1) If a limited partner takes part in the conduct of the business of an exempted limited partnership in its dealings with persons who are not partners, that limited partner shall be liable, in the event of the insolvency of the exempted limited partnership, for all debts and obligations of that exempted limited partnership incurred during the period that that limited partner participates in the conduct of the business as though that limited partner were, for that period, a general partner, but that limited partner shall be liable only to a person who transacts business with the exempted limited partnership during the period with actual knowledge of that limited partner's participation and who then reasonably believed the limited partner to be a general partner.

(2) A limited partner does not take part in the conduct of the business of an exempted limited partnership within the meaning of this section by —

(a) holding an office or interest in, or having a contractual relationship with, a general partner or being a contractor for or an agent or employee of the exempted limited partnership or of a general partner or acting as a director, officer or shareholder of a corporate general partner;

(b) consulting with and advising a general partner or consenting or withholding consent to any action proposed, in the manner contemplated by the partnership agreement, with respect to the business of the exempted limited partnership;

(c) investigating, reviewing, approving or being advised as to the accounts or business affairs of the exempted limited partnership or exercising any right conferred by this Act;

(d) acting as surety or guarantor for the exempted limited partnership either generally or in respect of specific obligations;

(e) approving or disapproving an amendment to the partnership agreement;

(f) calling, requesting, attending or participating in any meeting of the partners;

(g) taking any action that results in the winding up or the dissolution of the exempted limited partnership;

(h) taking any action required or permitted by the partnership agreement or by law to bring, pursue, settle or terminate any action or proceedings brought pursuant to section 33(2);

(i) appointing a person to serve on any board or committee of the exempted limited partnership, a general partner or a limited partner or removing a person therefrom;

(j) serving on any board or committee of the exempted limited partnership, a general partner, the limited partners or the partners, or by appointing, electing or otherwise participating in the choice of a representative or any

other person to serve on any board or committee, or by acting as a member of any board or committee either directly or by or through any representative or other person, including giving advice or consenting, or refusing to consent, to any action proposed by the general partner on behalf of the exempted limited partnership and exercising any powers or authorities or performing any obligations as a member of that board or committee in the manner contemplated by the partnership agreement;

(k) serving on the board of directors or a committee of, consulting with or advising or being an officer, director, shareholder, partner, member, manager, trustee, agent or employee of, or by being a fiduciary or contractor for, any person in which the exempted limited partnership has an interest or any person providing management, consultation, custody or other services or other products for, to or on behalf of, or otherwise having a business or other relationship with, the exempted limited partnership or a general partner of the exempted limited partnership; or

(l) voting as a limited partner on —

(i) the winding up and dissolution of the exempted limited partnership;

(ii) the purchase, sale, exchange, lease, mortgage, pledge or other acquisition or transfer of any asset by or of the exempted limited partnership;

(iii) the incurrence or renewal of indebtedness by the exempted limited partnership;

(iv) a change in the nature of the business of the exempted limited partnership;

(v) the admission, removal or withdrawal of a general or limited partner and the continuation of business of the exempted limited partnership thereafter; or

(vi) transactions in which one or more of the general partners have an actual or potential conflict of interest with one or more of the limited partners.

(3) Subsection (2) shall not import any implication that the possession or exercise of any other power by a limited partner will necessarily constitute the taking part by that limited partner in the business of the exempted limited partnership.

Accounts

21. (1) A general partner shall keep or cause to be kept proper books of account including, where applicable, material underlying documentation including contracts and invoices, with respect to —

(a) all sums of money received and expended by the exempted limited partnership and matters in respect of which the receipt of expenditure takes place;

(b) all sales and purchases of goods by the exempted limited partnership; and

(c) the assets and liabilities of the exempted limited partnership.

(2) For the purposes of subsection (1), proper books of account shall not be deemed to be kept if there are not kept such books as are necessary to give a true and fair view of the business and financial condition of the exempted limited partnership and to explain its transactions.

(3) Where the general partner keeps the books of account described in subsection (1) at any place other than at the registered office of the exempted limited partnership or at any other place within the Islands, the general partner shall, upon service of an order or notice by the Tax Information Authority pursuant to the *Tax Information Authority Act (2021 Revision)*, make available, in electronic form or any other medium, at its registered office copies of its books of account, or any part or parts thereof, as are specified in the order or notice.

(4) A general partner shall cause all books of account required to be kept under subsection (1) to be retained for a minimum period of five years from the date on which they are prepared.

(5) A person who, being a general partner, knowingly and wilfully contravenes subsection (1) or (4) shall be subject to a penalty of five thousand dollars.

(6) A person who, being a general partner, defaults in complying with an order or notice under subsection (3) without reasonable excuse, shall incur a penalty of five thousand dollars and a further penalty of one hundred dollars for every day during which the non-compliance continues.

Information regarding condition of partnership

22. Subject to any express or implied term of the partnership agreement, each limited partner may demand and shall receive from a general partner true and full information regarding the state of the business and financial condition of the exempted limited partnership.

Differences decided by general partner

23. Any difference arising as to matters connected with the business of the exempted limited partnership shall be decided by the general partner, and, if more than one, by a majority of the general partners as is provided in the partnership agreement.

Establishment, regulation of boards, committees

24. (1) Where a partnership agreement contains provisions for the establishment and regulation of any boards or committees of an exempted limited partnership, its partners or any class or category of those partners, or representatives of any of the partners, including —

(a) the establishment and constitution of boards or committees;

(b) the manner and terms of appointment and removal of the members of boards or committees;

(c) the powers, rights, authorities, obligations and duties of the members of boards or committees;

(d) the regulation of the proceedings of boards or committees; and

(e) the rights of the members and former members of boards or committees to exculpation or to be indemnified out of the assets of the exempted limited partnership,

then, subject to the express provisions of the partnership agreement, any person duly appointed to be a member of any board or committee in accordance with those provisions shall be deemed to have notice of and shall have the benefit of those provisions which shall not be unenforceable by any person in that person's own right by reason only that the person is not a party to the partnership agreement.

(2) Subject to any express provisions of the partnership agreement to the contrary, a member of any board or committee referred to in subsection (1) does not owe any fiduciary duty in exercising any of its rights or authorities, or otherwise in performing any of its obligations, as a member of the board or committee to the exempted limited partnership or any partner.

Failure to perform

25. (1) If a partnership agreement provides that where a partner fails to perform any of its obligations under, or otherwise breaches the provisions of, the partnership agreement that partner may be subject to or suffer remedies for, or consequences of, the failure or breach specified in the partnership agreement or otherwise applicable under any law then those remedies or consequences shall not be unenforceable solely on the basis that they are penal in nature.

(2) The remedies or consequences under subsection (1) may include but are not limited to any one or more of the following —

(a) reducing, eliminating or forfeiting the defaulting partner's partnership interest in the exempted limited partnership or any rights of the defaulting partner under the partnership agreement;

(b) subordinating the defaulting partner's partnership interest to the interests of non-defaulting partners;

(c) effecting a forced sale or forfeiture of the defaulting partner's partnership interest;

(d) arranging for the lending by other partners or other persons to the defaulting partner of the amount necessary to meet the defaulting partner's commitment;

(e) providing for the fixing of the value of the defaulting partner's partnership interest by appraisal or by formula and the redemption or sale of the defaulting partner's partnership interest at that value; or

(f) exercising any other remedy or consequence specified in the partnership agreement or available under any applicable laws.

(3) Subject to the general partner's duty under section 19(1), a general partner shall not be liable for its decision to impose or for imposing any remedies or consequences upon any partner, or for its decision not to do so and references in this subsection to a partnership interest shall for the avoidance of doubt also be construed as including any part thereof.

Agreement as to benefits

26. A person who has executed the partnership agreement of an exempted limited partnership or who is named or otherwise identified, including as a class, in the partnership agreement shall not be deemed to be or otherwise construed as a partner of the exempted limited partnership if —

(a) that person has executed the partnership agreement solely in order to take the benefit of a provision of, or assume an obligation under, the partnership agreement otherwise than as a partner; or

(b) where, on a proper construction of the partnership agreement, the parties did not intend the person to be a partner of the exempted limited partnership.

Execution considered valid

27. (1) Any partnership agreement, any agreement pursuant to which any person agrees to make any commitment or contribution to an exempted limited partnership as a partner and any agreement, contract, deed, instrument including any instrument under seal or document entered into by or on behalf of the general partner for itself in the case of the partnership agreement or otherwise on behalf of the exempted limited partnership is executed validly by the parties thereto where it is executed in any manner contemplated by the parties thereto, including, without limitation —

(a) where the complete agreement, contract, deed, instrument or document is executed; or

(b) where any signature or execution page to the agreement, contract, deed, instrument or document is executed, whether or not the agreement, contract, deed, instrument or document is at the time in its final form, and which is attached by, or on behalf of, the relevant party to, or otherwise with the relevant party's express or implied authority to, the agreement, contract, deed, instrument or document,

if the agreement, contract, deed, instrument or document is executed in conformity with this Act or any other Law of the Islands applicable to execution of the agreement, contract, deed, instrument or document.

(2) Subsection (1) shall apply to agreements, contracts, deeds, instruments including instruments under seal or other documents regardless of whether they were made before, on or after the commencement of this subsection and no agreement, contract, deed, instrument, including instruments under seal, or other document made before the commencement of this subsection shall be invalid if it satisfies the requirements of subsection (1).

Power of attorney

28. (1) For the purposes of the *Powers of Attorney Act (1996 Revision)* and section 8 of the *Property (Miscellaneous Provisions) Act (2017 Revision)* where a partnership agreement purports to create or grant a power of attorney, including an irrevocable power of attorney, that power shall be deemed validly to have been executed as a deed and if required duly witnessed on execution of the partnership agreement by or on behalf of the donor of the power or on adherence thereto by the donor of the power pursuant to section 32 without demonstration or satisfaction of any further formalities regarding its execution.

(2) Subsection (1) applies equally to every partnership agreement entered into prior to as well as after the commencement of this Act.

Register of limited partnership interests

29. (1) Subject to subsection (2) the general partner shall maintain or cause to be maintained in the country or territory that the general partner may determine a register of limited partners which shall contain the name and address of each person who is a limited partner of the exempted limited partnership, the date on which a person became a limited partner and the date on which a person ceased to be a limited partner, and the register shall be updated within twenty-one days of the date of any change in the particulars therein.

(2) The general partner shall maintain or cause to be maintained at the registered office of the exempted limited partnership a record of the address at which the register of limited partners is maintained, which record shall be updated within twenty-one days of the date of any change in the particulars therein.

(3) The register of limited partners and the record of the address at which the register of limited partners is maintained shall be open to inspection during all usual business hours in the place where the register or record is maintained by —

(a) subject to any express or implied term of the partnership agreement, all partners; and

(b) any other person with the consent of the general partner.

(4) The register of limited partners shall be *prima facie* evidence of the matters which are directed by this Act to be inserted therein.

(5) Where the register of limited partners is kept at a place other than the registered office of the exempted limited partnership, the general partner shall make available at the registered office, in electronic form or any other medium, the register of limited partners upon service of an order or notice by the Tax Information Authority pursuant to the *Tax Information Authority Act* (*2021 Revision*).

(6) A person who, being a general partner, defaults in complying with subsection (1) or (2), commits an offence and is liable on summary conviction to a fine of ten thousand dollars for each day that the default continues and shall indemnify any person who thereby suffers any loss.

(7) A person who, being a general partner, defaults in complying with an order or notice under subsection (5) without reasonable excuse, shall incur a penalty of five hundred dollars and a further penalty of one hundred dollars for every day during which that non-compliance continues.

Maintenance of records

30. (1) The general partner shall maintain or cause to be maintained in any country or territory that the general partner may determine, a record of the amount and date of the contribution or contributions of each limited partner and the amount and date of any payment representing a return of the whole or any part of the contribution of any limited partner, which record shall be updated within twenty-one days of the date of any change in the particulars therein.

(2) Subsections (4), (5), (6) and (7) of section 29 shall apply to the records required to be maintained pursuant to this section.

(3) The records maintained pursuant to this section shall be open to inspection during all usual business hours in the place where the records are maintained by any person with the consent of the general partner.

Registration of security interests

31. (1) The general partner shall maintain or cause to be maintained at the registered office, a register of security interests in which shall be registered each security interest in relation to which a valid notice has been served in accordance with section 32(9).

(2) The register of security interests under subsection (1) shall contain the identity of the grantor and grantee, the partnership interest or part thereof subject to the security interest and the date on which notice of the security interest was validly served in accordance with section 32(9).

(3) The register described in subsection (1) may be inspected by any person during all usual business hours.

(4) Any security interest over the whole or any part of a limited partnership interest shall have priority according to the time that the written notice is validly served at the registered office of the exempted limited partnership in accordance with section 32(9).

(5) If default is made by a general partner in the maintenance of the register described in subsection (1), each general partner in default shall incur a penalty of twenty-five dollars for each day that the default continues.

Transfer of partnership interests

32. (1) A partnership interest is transferable in whole or in part in accordance with the provisions of the partnership agreement and this section.

(2) Subject to the partnership agreement, a person may become a partner of an exempted limited partnership either by executing and delivering the partnership agreement or any supplement thereto or counterpart thereof together with the general partner, by acceding to the partnership agreement in accordance with its terms or upon the transfer of all or part of a partnership interest in accordance with this section, each of which is for this section referred to as an "**admission**", and in each case without the consent of the limited partners.

(3) Where the requirements for or conditions to an admission contained in the partnership agreement have been complied with in accordance with their terms or, to the extent permitted by the partnership agreement, waived, any person, however admitted, shall without the requirement for any further actions or formalities, be deemed to have adhered to and agreed to be bound by the terms and conditions of the partnership agreement and shall have the rights and be subject to the obligations contained in the partnership agreement and this Act as if the person and all existing partners had together duly executed and delivered the partnership agreement.

(4) The provisions of subsection (3) shall apply to every transfer or purported transfer of a partnership interest in whole or in part and each admission of a person as a partner of an exempted limited partnership prior to, as well as after, the commencement of this Act.

(5) Section 6 of the *Property (Miscellaneous Provisions) Act (2022 Revision)* shall not apply to partnership interests.

(6) Subject to the partnership agreement, no limited partner may —

(a) transfer; or

(b) grant any security interest in,

the whole or any part of that person's limited partnership interest except with the written consent of the general partner given prior to, or simultaneously with, the transfer or grant.

(7) Subject to the partnership agreement and this Act, a general partner may transfer or grant a security interest in the whole or any part of that person's general partnership interest with the written consent of any other general partner given prior to, or simultaneously with, the transfer or grant.

(8) Subject to the partnership agreement —

(a) the transferee of a general partnership interest or part thereof shall be admitted as a general partner in place of and subject to section 10(2) to the exclusion of, or in addition to, as the case may be, the transferor in respect of the general partnership interest or part thereof transferred but —

(i) the transferee shall not be liable for any obligation of the exempted limited partnership incurred before the transferee is so admitted unless otherwise agreed in writing by the transferor and the transferee; and

(ii) the transferor shall remain liable for any obligation of the exempted limited partnership incurred before the transferor ceased to be a general partner unless otherwise agreed in writing by the transferor, the transferee and the person to whom the obligation is owed; and

(b) the transferee of a limited partnership interest or part thereof shall be admitted as a limited partner, wholly or partly, as the case may be, in place of and to the exclusion of the transferor in respect of the limited partnership interest or part thereof transferred but, unless otherwise agreed in writing by the transferor, the transferee and the general partner, the transferee shall not assume any liability of the transferor pursuant to section 20(1) or section 34(1) and no transfer shall relieve the transferor of any liability under those subsections.

(9) Written notice of the grant of a security interest over the whole or any part of a limited partnership interest shall be given by the grantor or the grantee to the exempted limited partnership at its registered office.

(10) A notice under subsection (9) is not validly given unless it specifies the agreement pursuant to which the security interest is granted including the date thereof and the parties thereto, the identity of the grantor and grantee of the security interest, and the partnership interest or part thereof that is subject to that security interest.

(11) Nothing in this section shall prevent a partner from assigning or otherwise disposing of, whether absolutely or by way of security in any manner permitted by law, any right, debt or other chose in action arising under a partnership agreement but no assignment or other disposition may, subject to the partnership agreement, be made without the consent of the general partner or, in the case of an assignment or disposition by a general partner, the consent of any other general partner given prior to, or simultaneously with, the assignment or disposition.

(12) A partnership agreement may provide that, as against any other partner, any assignment or other disposition by a partner of any right, debt or other chose in action arising under a partnership agreement shall confer economic rights only and for the purposes of this section "**economic rights**" are —

(a) any rights to make and enforce capital calls, to receive the proceeds thereof and to enforce payment of, and receive any sums payable to the partner including the rights on the winding up and dissolution of the exempted limited partnership;

(b) the right to receive a share of profits of the exempted limited partnership or a share of the property on its winding up and dissolution;

(c) the right to an account for the purpose of ascertaining the amount or share of any of the foregoing; and

(d) any other rights that are expressly stated in the partnership agreement to be assignable.

(13) Any consent of a general partner required by this section may, subject to any express provision of the partnership agreement to the contrary, be withheld in the general partner's sole discretion.

(14) Any notice of any assignment or other disposition referred to in subsection (11) that may be required or permitted to be given to any one or more of the other general partners of an exempted limited partnership shall, notwithstanding any other rule of law or equity, be deemed to have been so given if given to the exempted limited partnership.

Proceedings

33. (1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.

(2) If the court considers it just and equitable any person or a general partner shall have the right to join in or otherwise institute proceedings against any one or more of the limited partners who may be liable under section 20(1) or to enforce the return of the contribution, if any, required by section 34(1).

(3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings.

(4) If any action taken pursuant to subsection (3) is successful, in whole or in part, as a result of a judgment, compromise or settlement of any action, the court may award any limited partner bringing any action reasonable expenses, including attorney's fees, from any recovery in any action or from an exempted limited partnership.

Return of contributions

34. (1) If a limited partner receives a payment representing a return of any part of that person's contribution or is released from any outstanding obligation in respect of that person's commitment and at the time that the payment was made or the release effected —

(a) the exempted limited partnership is insolvent including where the payment or release causes the insolvency; and

(b) the limited partner has actual knowledge of the insolvency of the exempted limited partnership,

then for a period of six months commencing on the date of that payment or release but not thereafter, the limited partner shall be liable to the exempted limited partnership for the amount of the payment or the due performance of the released obligation in respect of that person's commitment in each case to the extent that the repayment or performance of the released obligation is necessary to discharge a debt or obligation of the exempted limited partnership incurred during the period that the contribution or commitment represented an asset of the exempted limited partnership.

(2) Any amount required to be repaid pursuant to this section shall, unless the partnership agreement specifies otherwise, bear simple interest at the rate of ten per cent per annum, calculated on a daily basis.

(3) The partnership agreement may specify —

(a) that no interest shall apply;

(b) that a different rate of interest, including a compound rate shall apply; or

(c) a different basis for calculating interest payable.

Manner in which partnership may not be dissolved

35. Subject to any express or implied term of the partnership agreement to the contrary —

(a) an exempted limited partnership shall not be dissolved nor the partnership agreement terminated by —

(i) changes in, additions to or substitutions of any one or more of the partners;

(ii) the transfer of the whole or part of the partnership interest of a limited partner;

(iii) the death, bankruptcy, dissolution, removal, withdrawal or winding up of a limited partner or a limited partner's withdrawal or redemption of, or repurchase by the partnership of, any limited partnership interest;

(iv) the incapacity of a limited partner;

(v) any one or more of the limited partners granting a mortgage, charge or other form of security interest over the whole or part of that person's partnership interest;

(vi) the sale, exchange, lease, mortgage, pledge or other transfer of any of the assets of the exempted limited partnership; or

(vii) a de-registration of the exempted limited partnership pursuant to section 41 or 43; and

(b) a limited partner shall not be entitled to wind up and dissolve the partnership by notice.

Dissolution

36. (1) An exempted limited partnership shall be voluntarily wound up in accordance with the provisions of the partnership agreement —

(a) at the time or upon the occurrence of any event specified in the partnership agreement; or

(b) unless otherwise specified in the partnership agreement, upon the passing of a resolution of all the general partners and a two-thirds majority of limited partners.

(2) On the completion of the winding up of an exempted limited partnership, the general partner or other person appointed as liquidator in accordance with subsection (12) shall —

(a) file a notice of dissolution with the Registrar; and

(b) submit to the Registrar the prescribed fee,

and subject to section 37, an exempted limited partnership shall not be dissolved by an act of the partners or otherwise until a notice of dissolution signed by a general partner or liquidator has been filed with the Registrar and the prescribed fee has been submitted to the Registrar.

(3) Except to the extent that the provisions are not consistent with this Act, and in the event of any inconsistencies, this Act shall prevail, and subject to any express provisions of this Act to the contrary, the provisions of Part 5 of the *Companies Act (2025 Revision)* and the *Companies Winding Up Rules (2023 Consolidation)* shall apply to the winding up of an exempted limited partnership and for this purpose —

(a) references in Part 5 to a company shall include references to an exempted limited partnership;

(b) the limited partners shall be treated as if they were shareholders of a company and references to contributories in Part 5 shall be construed accordingly, except that the application of the provisions shall not cause a limited partner to be subject to any greater liability than that limited partner

would otherwise bear under this Act, but for the application of this paragraph;

(c) references in Part 5 to a director or officer of a company shall include references to the general partner of an exempted limited partnership;

(d) except for sections 123, excluding subsection (1)(b) and (c), 129, 140, 145, and 147 of the *Companies Act (2025 Revision)*, Part 5 shall not apply to a voluntary dissolution and winding up under subsection (1);

(e) in the case of a voluntary winding-up of an exempted limited partnership under subsection (1) where the partnership was registered under section 9 prior to 11th May 2009, the necessary time period for compliance with the requirements of section 123 (1) of the *Companies Act (2025 Revision)* shall be at least twenty-eight days prior to the final distribution of the assets of the exempted limited partnership to partners rather than within twenty-eight days of the commencement of its voluntary winding-up;

(f) the Insolvency Rules Committee established pursuant to the *Companies Act (2025 Revision)* shall have the power to make rules and prescribe forms for the purpose of giving effect to this section or its interpretation; and

(g) on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable.

(4) Notwithstanding that any order or direction has been made pursuant to subsection (3)(g) or that the winding up of an exempted limited partnership has commenced, a creditor who has security over the whole or part of the assets of the exempted limited partnership is entitled to enforce that person's security without the leave of the court and without reference to the general partner or any liquidator appointed to wind up the exempted limited partnership.

(5) Where a liquidator sells assets on behalf of a secured creditor of an exempted limited partnership, the liquidator is entitled to deduct from the proceeds of sale a reasonable sum by way of remuneration.

(6) Where an exempted limited partnership is being wound up and a liquidator is appointed, the Registrar shall within 28 days of the appointment be notified of the name and business address of the liquidator.

(7) The general partner or its legal representative shall promptly serve notice on all limited partners informing the limited partners of —

(a) the death;

(b) the commencement of liquidation, bankruptcy or dissolution proceedings; or

(c) the withdrawal, removal or making of a winding up or dissolution order,

in relation to the sole or last remaining qualifying general partner and in this section each event is referred to an "**event of withdrawal**".

(8) If default is made in compliance with this section, each general partner or its legal representative, in default shall incur a penalty of twenty-five dollars for each day that the default continues, which penalty shall be a debt due to the Registrar.

(9) Unless the partnership agreement provides otherwise, if a new qualifying general partner is not elected within ninety days after the service of notice of an event of withdrawal in accordance with subsection (7), in this section referred to as "**the automatic wind up date**", the exempted limited partnership shall be wound up in accordance with the partnership agreement or the orders or directions the court may make or give in accordance with subsection (3)(g).

(10) The winding up of an exempted limited partnership shall be deemed to commence upon the earlier to occur of any of the following —

(a) the passing of a resolution for winding up;

(b) subject to subsection (9), the automatic wind up date;

(c) the expiry of the period fixed for the duration of the exempted limited partnership by the partnership agreement;

(d) the occurrence of an event provided by the partnership agreement upon which the exempted limited partnership is to be wound up; or

(e) where a winding up order has been made, the presentation of the petition for winding up.

(11) In the event that an exempted limited partnership is required to be wound up in accordance with the provisions of subsection (9) then the date of commencement of winding up shall be the date falling ninety days after the service of notice of an event of withdrawal.

(12) If a majority of limited partners specified in the partnership agreement as being entitled to vote to elect a new general partner in accordance with the terms of the partnership agreement elects one or more new qualifying general partners by the automatic winding up date —

(a) the exempted limited partnership shall not be required to be wound up and dissolved; and

(b) the business of the exempted limited partnership may be resumed and continued as provided for in the partnership agreement or any subsequent agreement.

(13) Following the commencement of the winding up of an exempted limited partnership its affairs shall be wound up by the general partner or other person appointed pursuant to the partnership agreement unless the court otherwise orders on the application of any partner, creditor or liquidator of the exempted limited partnership pursuant to subsection (3)(g).

Registrar may strike off register

37. (1) Where the Registrar has reasonable cause to believe that an exempted limited partnership is not carrying on business or is not in operation, the Registrar may strike the exempted limited partnership off the register and the exempted limited partnership shall thereupon be dissolved.

(2) A request on behalf of the general partner to strike the exempted limited partnership off the register shall be accompanied by a fee in the amount prescribed by the Cabinet by regulation.

(3) Where an exempted limited partnership is being wound up, and the Registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the exempted limited partnership are fully wound up, the Registrar may strike the exempted limited partnership off the register and the exempted limited partnership shall thereupon be dissolved without the need for a notice of dissolution to be filed pursuant to section 36(2).

(4) The Registrar shall immediately publish a notice in the Gazette to the effect that the exempted limited partnership in question has been struck off the register, the date on which it has been struck off and the reason therefor.

(5) A general partner, limited partner or creditor who objects to an exempted limited partnership being struck off the register pursuant to this section, on the grounds that the exempted limited partnership was at the time it was struck off the register carrying on business, in operation or otherwise, may make an application to the court for the name of the exempted limited partnership to be restored to the register.

(6) An application under subsection (5) shall be made —

(a) within two years of the date upon which the name of the exempted limited partnership was struck off the register; or

(b) within a period that the Cabinet may by order allow but which shall not exceed ten years of the date upon which the name of the exempted limited partnership was struck off the register.

(7) The court, if satisfied that the exempted limited partnership was, at the time that it was struck off the register, carrying on business, in operation or otherwise, may order that the name of the exempted limited partnership be restored to the register upon —

(a) payment by the applicant of a reinstatement fee;

(b) payment by the applicant of any other accrued outstanding fees; and

(c) any other terms and conditions which the court considers just.

(8) The reinstatement fee referred to in subsection (7) shall be the same as the fee paid by the exempted limited partnership upon initial registration.

(9) Where an order is made under subsection (7) the exempted limited partnership is deemed to have continued in existence as if it had not been struck off.

(10) The court may, in addition or subsequent to, an order made under subsection (7), by order give directions and make provision for, as far as possible, placing the exempted limited partnership and all other persons affected from the name of the exempted limited partnership being struck off the register, in the same position as if the name of the exempted limited partnership had not been struck off the register.

(11) The striking off the register of any exempted limited partnership under this Act shall not affect the liability, if any, of any general partner or limited partner of the exempted limited partnership, and the liability shall continue and may be enforced as if the exempted limited partnership had at all times continued to be in existence.

(12) An act performed or thing done by the Registrar under this section shall not attract any liability.

Tax undertaking

38. (1) The Financial Secretary may, on application by a general partner, give an undertaking in respect of any exempted limited partnership that a law which is hereafter enacted in the Islands imposing any tax to be levied on profits or income or gains or appreciations shall not apply to the exempted limited partnership or to any partner thereof in respect of the operations or assets of the exempted limited partnership or the partnership interest of a partner therein.

(2) Any undertaking given under subsection (1) may provide, in addition, that the aforesaid taxes and any tax in the nature of estate duty or inheritance tax shall not be payable in respect of the obligations of the exempted limited partnership or the interests of the partners therein.

(3) Any undertaking as aforesaid may be for a period not exceeding fifty years from the date of the approval of the application and may be in the form determined by the Financial Secretary.

(4) The Financial Secretary shall prepare and present to the Cabinet, a report of all applications made and granted pursuant to this section on a monthly basis.

(5) The first report due to be prepared pursuant to subsection (4) shall be presented to the Cabinet on the date specified by the Cabinet by Order.

Annual return

39. (1) An exempted limited partnership shall, in January in every year, file with the Registrar a return signed by or on behalf of a general partner certifying that the exempted limited partnership has, during the prior calendar year, complied with section 10(1) and that there has been no breach of the declaration given in accordance with paragraph (f) of section 9(1) and pay to the Registrar an annual fee of the amount that the Cabinet shall, from time to time, by regulation prescribe.

(2) The annual fee payable and the return due to be filed under subsection (1) shall be tendered at the same time.

(3) An exempted limited partnership which fails to comply with subsection (1) shall —

(a) where the annual fee is paid or the return is filed between 1st April and 30th June, incur a penalty of 33.33% of the annual fee;

(b) where the annual fee and penalties are paid or the return is filed between 1st July and 30th September, incur a penalty 66.67% of the annual fee; and

(c) where the annual fee and penalties are paid or the return is filed between 1st October and 31st December, incur a penalty 100% of the annual fee.

(4) A penalty specified in subsection (3) shall be a debt due to the Registrar.

Re-registration

40. (1) Any partnership registered under the *Limited Partnership Law (Revised)* prior to its **repeal** or sections 45 to 54 and 56 to 57 of the *Partnership Act (2025 Revision)* or any Law amending or replacing the same shall not be affected by this Act but shall continue to be governed by that law.

(2) A partnership described in subsection (1) and any partnership established under the laws of a jurisdiction other than the Islands, in this section referred to as a "**registered partnership**", may, at any time, upon —

(a) effecting the amendments to the partnership agreement as shall be necessary to comply with this Act, if any;

(b) paying a fee of the amount that the Cabinet may by regulation prescribe; and

(c) filing the statement required by section 9(1),

be registered under this Act and, with effect from the date indicated on the certificate of registration issued by the Registrar pursuant to section 9(5), shall be governed exclusively thereafter as an exempted limited partnership in accordance with this Act.

(3) With effect from the date indicated on the certificate of registration described in subsection (2), the exempted limited partnership and the partnership interests of

the parties therein and their rights and liabilities, as against any person who is not a partner, shall cease to be governed by the **repealed** *Limited Partnership Law (Revised)*, or sections 45 to 54 and 56 to 57 of the *Partnership Act (2025 Revision)* or the laws of any other jurisdiction, as the case may be, save in respect of any act or omission occurring before that date which shall continue to be governed by the law of the other jurisdiction.

(4) Without prejudice to the foregoing generality such registration shall not operate to —

(a) create a new legal entity;

(b) affect the property previously acquired by or on behalf of the exempted limited partnership;

(c) affect any act or thing done prior to registration or the rights, powers, authorities, functions or obligations of the exempted limited partnership, any partner or any other person prior thereto; or

(d) render defective any legal proceedings by or against the exempted limited partnership or any partner or any other person,

and any legal proceedings that could have been continued or commenced by or against the exempted limited partnership or any partner or any other person before its registration hereunder may, notwithstanding registration, be continued or commenced after registration and in respect of which the law of the other jurisdiction shall be of application.

(5) With effect from the date indicated on the certificate of registration described in subsection (2), all property of every description, including all choses in action and any right to make capital calls of the registrant partnership shall be the property of the exempted limited partnership to be held in accordance with section 16(1).

De-registration pursuant to partnership agreement

41. A general partner of an exempted limited partnership may at any time terminate the registration of an applicant partnership as an exempted limited partnership, if termination of registration is permitted under the terms of the partnership agreement, by filing a written notice of termination of registration with the Registrar together with written confirmation that the action is authorised by the partnership agreement, accompanied by the prescribed fee.

Registration of foreign limited partnerships

42. (1) In this section —

"**foreign limited partnership**" means a limited partnership or limited liability partnership established in a recognised jurisdiction outside the Islands.

"**recognised jurisdiction**" is one that is prescribed as such by the Cabinet in regulations made under this Act; and

"**relevant authority**" means the national, state or local government authority, registry or other body in the recognised jurisdiction that is responsible for forming or establishing the foreign limited partnership.

(2) Subject to subsection (3), a foreign limited partnership may apply to be registered pursuant to this section in order to act as the general partner of an exempted limited partnership.

(3) A foreign limited partnership may be registered by the Registrar upon payment to the Registrar of a registration fee of the amount the Cabinet by regulation, prescribes and by filing with the Registrar certified copies of —

(a) its certificate of formation in its jurisdiction of establishment or the equivalent document issued by the relevant authority as evidence of its formation; and

(b) a certificate of good standing issued by the relevant authority.

(4) If the certificate of good standing required under subsection (3)(b) is unavailable from the relevant authority, then the foreign limited partnership is required to file with the Registrar, a declaration signed by a person authorised to act on behalf of the foreign limited partnership stating that the foreign limited partnership is in good standing with the relevant authority.

(5) Neither certificate of good standing under subsection (3)(b) nor the declaration under subsection (4) shall be dated earlier than one month prior to the date of its delivery to the Registrar, and shall be accompanied by a statement signed by or on behalf of the foreign limited partnership specifying —

(a) the name, dual foreign name and the translated name, if applicable, of the foreign limited partnership;

(b) the jurisdiction in which it is established;

(c) whether the foreign limited partnership is deemed to be a separate legal person under the laws of the jurisdiction in which it is established and, if so, the full name and address of any managing member or other person, if not identified in paragraph (f), who immediately controls or directs the affairs of the foreign limited partnership;

(d) the address of its registered office in its jurisdiction of formation or establishment;

(e) the names and addresses of some one or more than one person resident in the Islands authorised to accept on its behalf service of process and any notices required to be served on it; and

(f) the full name and address of any general partners of the foreign limited partnership, if applicable.

(6) A foreign limited partnership shall, in January of each year, pay to the revenues of the Islands an annual fee in the amount and in the manner the Cabinet by regulation, prescribes.

(7) A foreign limited partnership that defaults in paying the annual fee specified in subsection (6) shall incur a penalty of —

(a) 33.33% of the annual fee specified in subsection (6) if the fee and penalty are paid between the 1st April and the 30th June;

(b) 66.67% of the annual fee specified in subsection (6) if the fee and penalty are paid between the 1st July and the 30th September; and

(c) 100% of the annual fee specified in subsection (6) if the fee and penalty are paid between the 1st October and the 31st December.

(8) A penalty specified in subsection (7) is a debt due to the Registrar.

(9) Upon compliance with subsections (3), (4) and (5) the Registrar shall issue a certificate of registration under the Registrar's hand and seal of office to the foreign limited partnership.

(10) A certificate of registration of a foreign limited partnership issued under subsection (9) is conclusive evidence that compliance has been made with all requirements of this Act in respect of registration.

(11) If any change is made in any details contained in the statement filed under subsection (5), a statement signed by or on behalf of the foreign limited partnership specifying the nature of the change shall, within sixty days of the change, be filed with the Registrar.

(12) If default is made in compliance with subsection (11), each foreign limited partnership shall incur a penalty of two hundred dollars for each day that the default continues which shall be a debt due to the Registrar and the foreign partnership shall indemnify any person who thereby suffers any loss.

(13) Any process or notice required to be served on a foreign limited partnership is sufficiently served if addressed to any person whose name has been delivered to the Registrar under subsection (5) and left at or sent by post to the address which has been so delivered.

(14) A document may be served on the foreign limited partnership by leaving it at or sending it by post to any place of business established by the foreign limited partnership in the Islands.

(15) An instrument executed by or on behalf of a foreign limited partnership outside the Islands is, and is to be treated as, a deed or instrument under seal —

(a) if it is —

(i) sealed; or

(ii) expressed to be, or is expressed to be executed as, or otherwise makes clear on its face it is intended to be, a deed; and

(b) if it is executed in conformity with any requirement imposed by —

(i) the laws of the jurisdiction in which the foreign limited partnership was established; and

(ii) its partnership agreement or equivalent governing document.

(16) An instrument executed in accordance with subsection (15) meets any requirement of any law that the instrument is, and is to be treated as, a deed or instrument executed under seal.

(17) The execution of an instrument in accordance with subsection (15)(a) and the fact that it was executed in accordance with subsection (15)(b) may be proved by the affidavit or solemn declaration of a witness to the execution of the instrument sworn or made before a notary public or any other person qualified to administer oaths in any jurisdiction.

(18) If a foreign limited partnership ceases to be a general partner of an exempted limited partnership, it shall as soon as reasonably practicable —

(a) file a notice to that effect with the Registrar; and

(b) submit to the Registrar the prescribed fee,

and from the date on which the notice and the prescribed fee are submitted to the Registrar, the obligation of the foreign limited partnership to deliver any document to the Registrar ceases.

(19) Notwithstanding subsection (18) if the Registrar is satisfied by any other means that a foreign limited partnership has ceased to be a general partner of an exempted limited partnership the Registrar may close the file of the foreign limited partnership and thereupon the obligation of the foreign limited partnership to deliver any document to the Registrar ceases.

(20) A general partner of a foreign limited partnership shall not be deemed to have established a place of business in the Islands or commenced carrying on business in the Islands pursuant to Part 9 of the *Companies Act (2025 Revision)* by virtue solely of so acting.

De-registration for continuation in another jurisdiction

43. (1) A general partner on behalf of an exempted limited partnership which proposes to be registered by way of continuation as a partnership, body corporate or any other form of entity under the laws of any jurisdiction outside the Islands, in this section referred to as an "**applicant**", may apply to the Registrar for the exempted limited partnership, in this section referred to as the "**applicant partnership**", to be de-registered in the Islands.

(2) The Registrar shall de-register an applicant partnership if —

(a) the applicant proposes to register the applicant partnership by way of continuation in a jurisdiction which permits or does not prohibit the transfer of the applicant partnership in the manner provided in this section referred to as a "**relevant jurisdiction**";

(b) the applicant has paid to the Registrar a fee equal to three times the annual fee that would have been payable pursuant to section 39(1) in the January immediately preceding the application for de-registration;

(c) the applicant has filed with the Registrar notice of any —

(i) change in the name or dual foreign name;

(ii) change in the applicant partnership; and

(iii) change in its proposed registered office or agent for service of process in the relevant jurisdiction;

(d) no petition or other similar proceeding has been filed and remains outstanding or order made or resolution adopted to wind up, dissolve or liquidate the applicant partnership in any jurisdiction and no time or event has occurred upon which the applicant partnership is to be wound up;

(e) no receiver, trustee or administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the applicant partnership, its affairs or its property or any part thereof;

(f) no scheme, order, compromise or other similar arrangement has been entered into or made whereby the rights of creditors of the applicant partnership are and continue to be suspended or restricted;

(g) the applicant partnership is not insolvent;

(h) an application for de-registration is *bona fide* and not intended to defraud creditors or the limited partners of the applicant partnership;

(i) the applicant has delivered to the Registrar an undertaking signed by an authorised signatory of the applicant that notice of the transfer has been or will be given within twenty-one days to the secured creditors of the applicant partnership;

(j) any consent or approval to the transfer required by any contract or undertaking entered into or given by the applicant partnership has been obtained, released or waived, as the case may be;

(k) the transfer is permitted by and has been approved in accordance with the partnership agreement of the applicant partnership;

(l) the laws of the relevant jurisdiction with respect to transfer have been or will be complied with;

(m) the applicant partnership, if licensed or registered under the *Banks and Trust Companies Act (2025 Revision)*, the *Companies Management Act (2025 Revision)*, the *Insurance Act, 2010 [Law 32 of 2010]*, the *Mutual Funds Act (2025 Revision)*, *the Private Funds Act (2025 Revision)* or the *Securities Investment Business Act (2020 Revision)*, has obtained consent of the Cayman Islands Monetary Authority to the transfer;

(n) the applicant partnership will upon registration under the laws of the relevant jurisdiction continue as a partnership, body corporate or other form of entity;

(o) the applicant partnership is in good standing with the registrar and all outstanding fees due to be paid in relation to the applicant partnership to the Registrar are paid; and

(p) the Registrar is not aware of any other reason why it would be against the public interest to de-register the applicant partnership.

(3) Paragraphs (d), (e), (f), (g), (h), (j), (k), (l) and (n) of subsection (2) may be satisfied by filing with the Registrar a voluntary declaration or affidavit of an authorised signatory of the applicant to the effect that, having made due enquiry, the Registrar is of the opinion that the requirements of those paragraphs have been met.

(4) A declaration or affidavit under subsection (3) shall include a statement of the assets and liabilities of the applicant partnership.

(5) The statement under subsection (4) shall be based on an assessment of the assets and liabilities of the applicant partnership as at the date of the declaration or affidavit or the date as close as is practicable to the foregoing date.

(6) An authorised signatory of the applicant, who makes a declaration or affidavit under subsection (3) without reasonable grounds commits an offence and is liable on summary conviction to a fine of fifteen thousand dollars and to imprisonment for five years.

(7) The Registrar may, upon request from an applicant, where the Registrar is satisfied that the applicant has complied with subsection (2), de-register the applicant partnership.

(8) Section 41 does not apply to an applicant partnership under this section.

Certificate of de-registration

44. (1) Upon the termination of registration of a partnership under section 41, the Registrar shall issue a certificate under the Registrar's hand and seal of office that the registration of the partnership as an exempted limited partnership has been terminated and specifying the date of termination; and shall enter in the register of exempted limited partnerships the date of termination of the registration of the partnership under section 41.

(2) Upon de-registration of an applicant partnership under section 43, the Registrar shall issue a certificate under the Registrar's hand and seal of office that the applicant partnership has satisfied the de-registration requirements under section 43 and been de-registered as an exempted limited partnership and specifying the date of de-registration and shall enter in the register of exempted

limited partnerships the date of de-registration of the applicant partnership under section 43.

(3) From the commencement of the date of termination of registration under section 41 or de-registration under section 43 the applicant partnership shall cease to be an exempted limited partnership for all purposes under this Act and in the case of de-registration under section 43 shall continue as a partnership, body corporate or other entity under the laws of the relevant jurisdiction.

(4) From the commencement of the date of termination of registration of a partnership under section 41 the applicant partnership becomes a general partnership under the *Partnership Act (2025 Revision)* and in the case of an applicant partnership de-registered under section 43, the applicant partnership de-registered shall not by virtue of that de-registration alone cease to be a partnership, body corporate or other entity under the laws of the relevant jurisdiction.

(5) This section shall not operate, in relation to an applicant partnership de-registered under section 43 and continued as a partnership under the laws of the relevant jurisdiction —

(a) to create a new legal entity unless otherwise provided by the laws of the relevant jurisdiction;

(b) to prejudice or affect the identity or continuity of the applicant partnership as previously constituted unless otherwise provided by the laws of the relevant jurisdiction;

(c) to affect the property of any applicant partnership;

(d) to affect any appointment made, resolution passed or any other act or thing done in relation to the applicant partnership pursuant to a power conferred by the partnership agreement of the applicant partnership or by the laws of the Islands;

(e) except to the extent provided by or pursuant to section 43 and this section, to affect the rights, powers, authorities, functions and liabilities or obligations of the applicant partnership or any other person unless otherwise provided by the laws of the relevant jurisdiction; or

(f) to render defective any legal proceedings by or against the applicant partnership, and any legal proceedings that could have been continued or commenced by or against the applicant partnership before its de-registration under this Act may, notwithstanding the de-registration, be continued or commenced by or against the applicant partnership after de-registration.

Notice of de-registration

45. The Registrar shall give notice in the Gazette of the termination of registration of a partnership under section 41 or the de-registration of an applicant partnership under section 43 and, in the case of de-registration under section 43, the jurisdiction under the laws of which the applicant partnership has been registered by way of continuation and the name of the applicant partnership, if changed.

Certificate of good standing

46. (1) The Registrar may on application made by —

(a) an exempted limited partnership; or

(b) a foreign limited partnership registered under section 42,

issue a certificate of good standing to the exempted limited partnership or the foreign limited partnership that is in good standing in accordance with subsection (2).

(2) A certificate of good standing is evidence of the fact that the exempted limited partnership is in good standing on the date that the certificate of good standing is issued.

(3) An exempted limited partnership is deemed to be in good standing if all fees and penalties under this Act have been paid and the Registrar has no knowledge that the exempted limited partnership is in default under this Act.

Electronic business

47. Nothing in this Act shall prohibit an exempted limited partnership from offering, by electronic means, and subsequently supplying, real or personal property, services or information from a place of business in the Islands or through an internet service provider or other electronic service provider located in the Islands.

Regulations

48. (1) The Cabinet may make Regulations in respect of exempted limited partnerships and foreign limited partnerships prescribing —

(a) the duties to be performed by the Registrar for the purposes of this Act;

(b) the forms to be used for the purposes of this Act;

(c) the fees payable to the Registrar in respect of filings, certifications, administrative services or otherwise pursuant to this Act; and

(d) generally, the conduct and regulation of registration under this Act and any matters incidental thereto.

(2) Regulations made under this Act may —

(a) make different provision in relation to different cases or circumstances;

(b) apply in respect of particular persons or particular cases or particular classes of persons or particular classes of cases and define a class by reference to any circumstances whatsoever; and

(c) contain such transitional, consequential, incidental or supplementary provisions as appear to the Cabinet to be necessary or expedient for the purposes of the regulations.

(3) Regulations made under this Act may create an offence punishable by a fine not exceeding fifteen thousand dollars.

(4) Fees prescribed for the purpose of this Act need bear no relationship to the cost of providing any service.

Recovery of penalties

49. (1) Notwithstanding any provision of this Act which prescribes a specific *per diem* penalty in respect of a default of any obligation to make a filing, to serve a notice or to maintain a record set out in this Act the Registrar may, in any case where the aggregate *per diem* penalty has exceeded the amount of one thousand dollars and the Registrar is satisfied that the failure is not due to wilful default, accept payment of a penalty of one thousand dollars in lieu thereof.

(2) Without prejudice to the powers exercisable by the Registrar under this Act, all sums that the Registrar is entitled to recover by way of fees or penalties are recoverable either summarily as a civil debt, or as a simple contract debt, in any court of competent jurisdiction.

Repeal **of the Exempted Limited Partnership Law (2013 Revision) and savings**

50. (1) The *Exempted Limited Partnership Law (2013 Revision)* is **repealed**.

(2) The **repeal** of the *Exempted Partnership Law (2013 Revision)* shall not affect any exempted limited partnership registered under the **repealed** *Exempted Limited Partnership Law (2013 Revision)* and a provision in any document referring to the **repealed** *Exempted Limited Partnership Law (2013 Revision)* or its revision shall, so far as may be necessary for preserving its effect, be construed as referring to the corresponding provision in this Act.

Validation of the Exempted Limited Partnership Regulations, 2014

51. (1) The purpose of this section is to remedy certain defects in the *Exempted Limited Partnership Regulations, 2014* which were purported to be made in accordance with section 48 of the *Exempted Limited Partnership Act, 2014*.

(2) Section 48 of the *Exempted Limited Partnership Act, 2014* provided for the making of regulations by the Cabinet in respect of exempted limited partnerships but the *Exempted Limited Partnership Regulations, 2014* also provided for foreign limited partnerships.

(3) The defect under subsection (2) makes regulations 2, 5 and 6 and Schedules 1, 4 and 5 of the *Exempted Limited Partnership Regulations, 2014* inconsistent with the *Exempted Limited Partnership Act, 2014* to the extent that those regulations and Schedules provided for matters concerning foreign limited partnerships without statutory authority.

(4) Notwithstanding the inconsistency referred to in subsection (3), during the specified period —

(a) the fees paid without statutory authority to the Registrar in respect of foreign limited partnerships; and

(b) any forms for a translation certificate submitted in respect of foreign limited partnerships,

are validated and deemed to have been paid or submitted, as applicable, in accordance with the *Exempted Limited Partnership Act, 2014*.

(5) For the purposes of this section —

(a) "**specified period**" means the period commencing on 2nd July, 2014, which is the date of the commencement of the *Exempted Limited Partnership Act, 2014*, and ending on 1st January, 2025, the commencement date of the *Exempted Limited Partnership (Amendment and Validation) Act, 2024 [Act 13 of 2024]*; and

(b) references to the *Exempted Limited Partnership Act, 2014* and the *Exempted Limited Partnership Regulations, 2014* include any amended or revised versions of that Act and those Regulations, prior to 1st January, 2025, the commencement date of the *Exempted Limited Partnership (Amendment and Validation) Act, 2024 [Act 13 of 2024]*.

Validation of payment and collection of fees

52. The payment of fees to, and the charging and collection of fees by, the Registrar without statutory authority for any service provided by the Registrar prior to 1st January, 2025, the commencement date of the *Exempted Limited Partnership (Amendment and Validation) Act, 2024 [Act 13 of 2024]* are —

(a) validated; and

(b) taken to have been lawfully charged by, paid to and collected by the Registrar,

as if the Registrar was empowered under the *Exempted Limited Partnership Act (2021 Revision)* as amended by *Exempted Limited Partnership (Amendment and Validation) Act, 2024 [Act 13 of 2024]* to charge and collect those fees.

Orders or determinations by court not affected

53. The *Exempted Limited Partnership (Amendment and Validation) Act, 2024 [Act 13 of 2024]* does not affect any order or determination made by a court with respect to fees charged by, paid to and collected by the Registrar without statutory authority for any service provided by the Registrar prior to 1-Jan-2020, the commencement date of the *Exempted Limited Partnership (Amendment and Validation) Act, 2024 [Act 13 of 2024]*.

Publication in consolidated and revised form authorised by the Cabinet this 21st day of January, 2025.

Kim Bullings
Clerk of the Cabinet

ENDNOTES

Table of Legislation history:

SL #	Act/Law #	Legislation	Commencement	Gazette
51/2024		Exempted Limited Partnership (Amendment and Validation) Act, 2024 (Commencement) Order, 2024	19-Dec-2024	LG47/2024/s17
	13/2024	Exempted Limited Partnership (Amendment and Validation) Act, 2024	1-Jan-2024	LG47/2024/s4
		Exempted Limited Partnership Law (2021 Revision)	29-Jan-2021	LG9/2021/S3
	56/2020	Citation of Acts of Parliament Act, 2020	3-Dec-2020	LG89/2020/s1
	31/2020	Exempted Limited Partnership (Amendment)Law, 2020	7-Jul-2020	LG49/2020/s7
		Exempted Limited Partnership Law (2018 Revision)	16-Mar-2018	GE22/2018/s15
	10/2017	Exempted Limited Partnership (Amendment) Law, 2017	5-Jun-2017	G12/2017/s7
	5/2014	Exempted Limited Partnership Law, 2014	2-Jul-2014	GE48/2014/s1

(Price: $9.60)

ITEM NO. 133

JA-19

CAYMAN ISLANDS



COMPANIES ACT

(2025 Revision)

Supplement No. 3 published with Legislation Gazette No. 6 dated 28th January, 2025.

PUBLISHING DETAILS

Cap. 22 [Law 3 of 1961 and 12 of 1962] of the 1963 Revised Edition of the Laws consolidated with Laws 12 of 1962, 9 of 1966, 1 of 1971, 7 of 1973, 24 of 1974, 25 of 1975, 19 of 1977, 16 of 1978, 6 of 1980, 21 of 1981, 34 of 1983, 2 of 1984, 22 of 1984, 15 of 1985, 38 of 1985, 24 of 1987, 14 of 1988, 14 of 1989, 10 of 1990, 3 of 1991, 23 of 1991 (part), 11 of 1992, 3 of 1993, 23 of 1993, 33 of 1993, 2 of 1994, 8 of 1994, 14 of 1996, 26 of 1997, 4 of 1998, 6 of 1998, 20 of 1998 (part), 5 of 1999, 7 of 2000 (part), 5 of 2001, 10 of 2001, 29 of 2001, 46 of 2001, 22 of 2002, 26 of 2002, 28 of 2003, 13 of 2006, 15 of 2007, 12 of 2009, 33 of 2009, 37 of 2010, 16 of 2011, 29 of 2011, 6 of 2012, 14 of 2012, 29 of 2012, 1 of 2013, 6 of 2013, 14 of 2015, 3 of 2016, 2 of 2017, 42 of 2017, 37 of 2018, 46 of 2018, 10 of 2019, 4 of 2020, 19 of 2020 and Acts 56 of 2020, 60 of 2020, 6 of 2021, 15 of 2023, 11 of 2024 and the Companies (Amendment of Schedule) Order, 2011, Schedule 4 of the Companies Law Departmental Notice, 2015, Schedule 4 of the Companies Law Departmental Notice, 2017, the Companies (Amendment of Section 254) Regulations, 2022, the Companies (Amendment of Schedule 4) Order, 2023, the Companies (Amendment of Schedule 5) Order, 2023 and the Companies (Amendment of Schedule 5) Order, 2024.

Revised under the authority of the *Law Revision Act (2020 Revision).*

Originally enacted —

Cap. 22-1st January, 1964	Law 10 of 2001-25th May, 2001
Law 9 of 1966-14th March, 1966	Law 29 of 2001-26th September, 2001
Law 1 of 1971-15th December, 1970	Law 46 of 2001-14th January, 2002
Law 7 of 1973-28th June, 1973	Law 22 of 2002-5th December, 2002
Law 24 of 1974-22nd November, 1974	Law 26 of 2002-5th December, 2002
Law 25 of 1975-9th December, 1975	Law 28 of 2003-3rd December, 2003
Law 19 of 1977-10th November, 1977	Law 13 of 2006-1st June, 2006
Law 16 of 1978-8th September, 1978	Law 15 of 2007-17th September, 2007
Law 6 of 1980-17th March, 1980	Law 12 of 2009-20th March, 2009
Law 21 of 1981-13th October, 1981	Law 33 of 2009-2nd December, 2009
Law 34 of 1983-24th November, 1983	Law 37 of 2010-15th September, 2010
Law 2 of 1984-28th February, 1984	Law 16 of 2011-11th April, 2011
Law 22 of 1984-7th September, 1984	Law 29 of 2011-18th November, 2011
Law 15 of 1985-24th May, 1985	Law 6 of 2012-29th August, 2012
Law 38 of 1985-19th December, 1985	Law 14 of 2012-31st August, 2012
Law 24 of 1987-17th November, 1987	Law 29 of 2012-19th November, 2012
Law 14 of 1988-9th September, 1988	Law 1 of 2013-10th January, 2013

Law 14 of 1989-5th September, 1989
Law 10 of 1990-18th July, 1990
Law 3 of 1991-21st February, 1991
Law 23 of 1991-12th December, 1991
Law 11 of 1992-13th July, 1992
Law 3 of 1993-26th March, 1993
Law 23 of 1993-29th September, 1993
Law 33 of 1993-29th November, 1993
Law 2 of 1994-9th March, 1994
Law 8 of 1994-23rd September, 1994
Law 14 of 1996-5th September, 1996
Law 26 of 1997-9th March, 1998
Law 4 of 1998-4th March, 1998
Law 6 of 1998-9th March, 1998
Law 20 of 1998-15th February, 1999
Law 5 of 1999-14th April, 1999
Law 7 of 2000- 20th July, 2000
Law 5 of 2001-20th April, 2001
Law 6 of 2013-15th March, 2013
Law 14 of 2015-12th August, 2015
Law 3 of 2016-6th May, 2016
Law 2 of 2017-27th February, 2017
Law 42 of 2017-16th November, 2017
Law 37 of 2018-22nd November, 2018
Law 46 of 2018-17th December, 2018
Law 10 of 2019-26th July, 2019
Law 4 of 2020-31st January, 2020
Law 19 of 2020-20th May, 2020
Act 56 of 2020-7th December, 2020
Act 60 of 2020-16th December, 2020
Act 6 of 2021-8th December, 2021
Act 15 of 2023-23rd November, 2023
Act 11 of 2024-11th December, 2024

Consolidated and revised this 1st day of January, 2025.

Note (not forming part of this Act): This revision replaces the 2023 Revision which should now be discarded.

CAYMAN ISLANDS

COMPANIES ACT

(2025 Revision)

Arrangement of Sections

Section Page

PART 1 - Preliminary

1. Short title 15
2. Definitions and interpretation 15
3. Registrar 18
4. Signature of Registrar 18

PART 2 - Constitution and Incorporation of Companies and Associations - Memorandum of Association

5. Mode of forming company 19
6. Mode of limiting liability of members 19
7. Memorandum of association 19
8. Company limited by shares 20
9. Company limited by guarantee 20
10. Memorandum of association may be altered 21
11. Address of registered office may be changed 21
12. Signature and effect of memorandum of association 21
13. Power of company limited by shares to alter its share capital 21
14. Special resolution for reduction of share capital 23
15. Application to court for confirming order, objections by creditors 24
16. Order confirming reduction and powers of Court on making such order 25
17. Registration of order and minute of reduction 25
18. Liability of members in respect of reduced shares 26
19. Penalty for concealment of names of creditors 26

Case 1:26-cv-00511-LSC Document 25-7 Filed 05/08/26 Page 7 of 197 PageID #: 5514

20. Articles prescribing regulations for companies 27
21. Regulations required in case of unlimited company or company limited by guarantee 27
22. Adoption and application of Table A in Schedule 1 27
23. Printing, stamping and signature of articles....27
24. Alteration of articles by special resolution 27
25. Adoption and effect of articles of association 28
General Provisions **28**
26. Registration 28
26A. Registrar to provide information 29
27. Consequences of incorporation 30
28. Lack of capacity or power; *ultra vires* 30
29. Copies of memorandum and articles to be given to members 31
29A. Name reservation 31
30. Restrictions on registration of certain names 31
31. Change of name 32
32. Company with power to issue bearer shares not to hold land in the Islands 33

PART 3 - Distribution of Capital and Liability of Members of Companies and Associations

Distribution of Capital **34**
33. Share or interest in company to be personalty 34
34. Share premium account....35
35. Power to issue shares at a discount....36
36. Power of company to pay commissions 36
37. Redemption and purchase of shares 37
37A. Treasury shares....41
37B. Surrender of shares....43
38. Definition of member....44
39. Transfer by personal representative....44
40. Register of members 44
40A. Branch registers of members....45
40B. Transfer and registration of shares in respect of a company with listed shares 46
41. Annual list of members and return of capital, shares, calls, etc. 47
42. Penalty on company not making return 48
43. Certificate of shares or stock 48
44. Inspection of register 49
45. Notice of increase of capital and of members to be given to Registrar 50
46. Remedy for improper entry or omission of entry in register 50
47. Notice to Registrar of rectification of register....51
48. Register to be evidence 51
Liability of Members **51**
49. Liability of present and past members of company....51

Case 1:26-cv-00511-LTS Document 1-7 Filed 01/08/26 Page 8 of 197 PageID #: 5515

PART 4 - Management and Administration of Companies and Associations - Provisions for Protection of Creditors

50. Registered office of company 52
51. Notice of situation of registered office 52
52. Publication of name by a limited company 53
53. Penalties on non-publication of name 53
54. Register of mortgages 53
55. Filing deadline for updated list of directors etc. 54
55A. Registrar to make list of directors available for inspection 55
56. Penalty for failing to notify of changes to the register of directors and officers 55
57. Meetings 55
Provisions for Protection of Members **56**
58. General meetings 56
59. Accounts and audits 56
60. Definition of special resolution 57
61. Provisions where no regulations as to meetings 58
62. Recording of special resolutions 58
63. Copies of special resolutions 58
64. Appointment of inspectors to report on affairs of companies 58
65. Powers of inspectors 59
66. Report of inspectors 59
67. Inspection by resolution of the company 59
68. Inspectors' report admissible as evidence 59
Notices **59**
69. Returns, etc., to Registrar 59
70. Service of notices on company 60
71. Postal service 60
72. Authentication of summons, notice, etc. 60
73. Minutes of proceedings 60
74. Security for costs in actions brought by limited companies 60
75. Declaration in action against members 61
Arbitration **61**
76. Power of companies to refer matters to arbitration 61
General Penalty **61**
77. General penalty; application of fines 61
Unlimited Liability of Directors and Managers **61**
78. Unlimited liability of directors and managers 61
79. Modification of section 49 61
Association not for Profit **62**
80. Circumstances in which a company may be registered without "limited" in its name 62
80A. Application for designation under section 80 64
80B. Obligations for companies designated under section 80 64
80C. Examination by the Registrar 64
80D. *Repealed* 65
80E. Penalty for breach of section 80B 65
Contracts **66**
81. Contracts and other instruments 66
82. Bills of exchange and promissory notes 68

Case 1:26-cv-00511-LTS Document 2-7 Filed 01/23/26 Page 9 of 197 PageID #: 5516

83. Execution of deeds, etc., by attorney 68
84. Power of company to have official seal for use abroad 68
85. Authentication of documents 69
Arrangements and Reconstructions **69**
86. Power to compromise with creditors and members 69
87. Provisions for facilitating reconstruction and amalgamation of companies 70
88. Power to acquire shares of dissentient shareholders 71

PART 5 - Company Restructuring and Winding up of Companies and Associations

Preliminary **72**
89. Definitions 72
90. Alternative modes of winding up 73
91. Jurisdiction of the Court 73
Company Restructuring **74**
91A. Interpretation of "company" 74
91B. Appointment of a restructuring officer 74
91C. Appointment of an interim restructuring officer 75
91D. Restructuring officer 76
91E. Variation or discharge of the order appointing a restructuring 76
91F. Removal and replacement of restructuring officers 77
91G. Stay of proceedings 78
91H. Enforcement of creditors' security 78
91I. Power to compromise with creditors and members within restructuring officer proceeding 79
91J. Provisions for facilitating reconstruction and amalgamation of companies 80
Winding up by the Court **81**
92. Circumstances in which a company may be wound up by the Court 81
93. Definition of inability to pay debts 81
94. Application for winding up 81
95. Powers of the Court 82
96. Power to stay or restrain proceedings 84
97. Avoidance of attachments and stay of proceedings 84
98. Notice of winding up order 84
99. Avoidance of property dispositions, etc. 85
100. Commencement of winding up by the Court 85
101. Company's statement of affairs 85
102. Investigation by liquidator 86
103. Duty to co-operate and the private examination of relevant persons 87
Official Liquidators **88**
104. Appointment and powers of provisional liquidator 88
105. Appointment of official liquidator 89
106. Appointment of joint liquidators 89
107. Removal of official liquidators 89
108. Qualifications of official liquidators 89
109. Remuneration of official liquidators and restructuring officers 89
110. Function and powers of official liquidators 90

General Powers of the Court **91**
111. Power to stay winding up 91
112. Settlement of list of contributories 91
113. Power to make calls 92
114. Inspection of documents by creditors, etc. 92
115. Meetings to ascertain wishes of creditors or contributories 92
Voluntary Winding up **93**
116. Circumstances in which a company may be wound up voluntarily 93
117. Commencement of winding up 93
118. Effect on business and status of the company 94
119. Appointment of voluntary liquidator 94
120. Qualifications of voluntary liquidators 95
121. Removal of voluntary liquidators 95
122. Resignation of voluntary liquidator 95
123. Notice of voluntary winding up 96
124. Application for supervision order 96
125. Avoidance of share transfers 96
126. General meeting at year's end 97
127. Final meeting prior to dissolution 97
128. Effect of winding up on share capital of company limited by guarantee 97
129. Reference of questions to Court 98
130. Expenses of voluntary winding up 98
Winding up subject to the supervision of the Court **98**
131. Application for supervision order 98
132. Appointment of official liquidator 99
133. Effect of supervision order 99
Offences of fraud, etc. **99**
134. Fraud, etc. in anticipation of winding up 99
135. Transactions in fraud of creditors 100
136. Misconduct in course of winding up 100
137. Material omissions from statement relating to company's affairs 101
General provisions **101**
138. Getting in the company's property 101
139. Provable debts 102
140. Distribution of the company's property 102
141. Preferential debts 102
142. Secured creditors 103
143. Preferential charge on goods distrained 103
144. Effect of execution or attachment 103
145. Voidable preference 104
146. Avoidance of dispositions made at an undervalue 104
147. Fraudulent trading 105
148. Supply of utilities 105
149. Interest on debts 106
150. Currency of the liquidation 106
Dissolution of a Company **107**
151. Dissolution following voluntary winding up 107
152. Dissolution following winding up by the Court 107
153. Unclaimed dividends and undistributed assets 107

Case 1:26-cv-00251-LSC Document 3-7 Filed 05/02/26 Page 11 of 197 PageID #: 5518

Insolvency rules and regulations **108**
154. Insolvency Rules Committee 108
155. Powers of the Insolvency Rules Committee 108

PART 6 - Removal of Defunct Companies

156. Company not operating may be struck off register 109
156A. Striking off for failure to pay fine 109
157. Company being wound up may be struck off register for want of liquidator, etc. 109
158. Registrar to publish fact of company being struck off register 109
159. Company, member or creditor may apply to court for company to be reinstated 110
160. Liability of members of company to remain 110
161. Registrar not liable for any act performed under this Part 110
162. Vesting of property 111

PART 7 - Exempted Companies

163. What companies may apply to be registered as exempted companies 111
164. Registration of exempted companies 111
165. Declaration by proposed company 111
166. Shares shall be non-negotiable 111
167. *Repealed* 111
168. Annual return 111
169. Annual fee 112
170. Failure to comply with section 168 or 169 112
171. Registrar to give notice 112
172. False statement in declaration 112
173. Penalty for false declaration 113
174. Prohibited enterprises 113
175. Prohibited sale of securities 113
176. Penalty for carrying on business contrary to this Part 113
177. Electronic business by exempted companies 114

PART 8 - Exempted Limited Duration Companies

178. Exempted company may apply to be registered as an exempted limited duration company 114
179. Registration as an exempted limited duration company 114
180. Contents of articles of association 115
181. Cancellation of registration 115
182. Electronic business by exempted limited duration companies 116

PART 8A - Special Economic Zone Companies

182A. Exempted company may apply to be registered as a special economic zone company 116
182B. Registration as a special economic zone company 117
182C. Cancellation of registration 117

Case 1:26-cv-00251-LTS-HBP Document 1-2 Filed 01/08/26 Page 12 of 197 PageID #: 5519

PART 9 - Overseas Companies

183. Definition of foreign company....118
184. Documents, etc., to be delivered to Registrar by foreign companies....118
185. Power of certain foreign companies to hold land....119
186. Registration of foreign companies....120
187. Return to be delivered to Registrar where documents etc., altered....120
188. Obligation to state name of foreign company, whether limited, and country where formed or incorporated....120
189. Service on foreign company to which this Part applies....121
190. Deeds, etc., of overseas companies....121
191. Execution of deeds, etc....122
192. Removing company's name from register....122
193. Penalties for failing to comply with this Part....122
194. Definitions in this Part....122
195. Power of Registrar to prohibit sale....123

PART 10 - Application of this Act to Companies Formed or Registered in the Islands

196. Application to existing companies....123
197. Date of incorporation....124
198. Articles of association remain....124

PART 11 - General

199. Fees in lieu of other provisions....124
199A. Fees for administrative services....124
200. Express fees....125
200A. Certificate of good standing....125

PART 12 - Transfer by Way of Continuation

201. Application for continuation....126
202. Registration under this Part....128
203. Amendment, etc., of charter documents....130
204. Effect of registration under this Part on companies registered under Part 9....130
205. Notice of registration, etc., to be given in Gazette....131
206. Deregistration of exempted companies including companies registered under this Part....131
207. Certification of deregistration, etc....132
208. Application of Part 9 to deregistered companies....133
209. Notice of deregistration, etc., to be given in the Gazette....133

PART 13 – Re-registration as a Means of an Ordinary Non-resident Company Becoming Exempted

210. Ordinary non-resident company may be re-registered as exempted company....133
211. Effect of re-registration of ordinary non-resident company as an exempted company....134

Case 1:26-cv-00251-LTS Document 1-7 Filed 01/12/26 Page 13 of 197 PageID #: 5520

PART 14 - Segregated Portfolio Companies

212. Definitions in this Part 135
213. Applications for registration 135
214. Conversions of existing companies 136
215. Designation 137
216. Segregated portfolios 137
217. Shares and dividends 138
218. Company to act on behalf of portfolios 138
219. Assets 139
220. Segregated portfolio assets 140
221. Segregation of liabilities 140
222. General liabilities and assets 141
223. Winding-up of company 141
224. Receivership orders 141
225. Applications for receivership orders 142
226. Administration of receivership orders 143
227. Discharge of receivership orders 143
228. Remuneration of receiver 144
228A. Termination and re-instatement 144

Part 15 – Prohibition on Bearer Shares

229. Issue of bearer shares prohibited 144
230. *Repealed* 145
231. *Repealed* 145
231A. *Repealed* 145

PART 16 - Merger and Consolidation

232. Definitions in this Part 145
233. Merger and consolidation 146
234. Delay of effective date 149
235. Termination or amendment 149
236. Effect of merger or consolidation 150
237. Merger or consolidation with overseas company 150
238. Rights of dissenters 154
239. Limitation on rights of dissenters 156
239A. Prohibition on being a segregated portfolio company 157

PART 17 - International Co-operation

240. Definitions in this Part 157
241. Ancillary orders 157
242. Criteria upon which the Court's discretion shall be exercised 158
243. Publication of foreign bankruptcy proceedings 158

Case 1:26-cv-00251-LTS-BCM Document 1-5 Filed 01/12/26 Page 14 of 197 PageID #: 5521

PART 17A – *REPEALED*

244-281.Repealed....158

PART 17B – *REPEALED*

281A-H.Repealed....159

PART 18 - Miscellaneous

282. Amendment of schedules....159
283. Regulations....159
284. Validation of payment and collection of fees....159
285. Orders or determinations by court not affected....160

SCHEDULE 1 **161**

Table A **161**

Regulations for Management of a Company Limited by Shares **161**

Preliminary....161
Shares....161
Lien 162
Calls on Shares....163
Transfer and Transmission of Shares....163
Forfeiture of Shares....165
Alteration of Capital....166
General Meetings....167
Notice of General Meetings....167
Proceedings at General Meetings....168
Votes of Members....169
Corporations Acting by Representatives at Meetings....170
Directors....170
Powers and Duties of Directors....170
The Seal....171
Disqualification of Directors....171
Rotation of Directors....172
Proceedings of Directors....173
Dividends and Reserve....173
Accounts....174
Audit 175
Notices....175

SCHEDULE 1A **177**

Required Particulars **177**

SCHEDULE 2 **178**

Categories of Preferred Debts **178**

Category 1: Debts due to employees....178
Category 2: Debts due to bank depositors....178
Category 3: Taxes due to the Government....180

SCHEDULE 3 **181**
Powers of Liquidators **181**
PART 1 181
Powers exercisable with sanction **181**
PART 2 182
Powers exercisable without sanction **182**

SCHEDULE 4 **183**
APPROVED STOCK EXCHANGES **183**

SCHEDULE 5 **186**
FEES **186**
PART 1 186
PART 1A 186
PART 1B 187
PART 2 187
PART 3 187
PART 3A 188
PART 4 188
PART 5 189
PART 6 189
PART 6A 189
PART 7 190
PART 8 190
PART 9 191

ENDNOTES **193**
Table of Legislation history: 193

CAYMAN ISLANDS

COMPANIES ACT

(2025 Revision)

PART 1 - Preliminary

Short title

1. This Act may be cited as the *Companies Act (2025 Revision)*.

Definitions and interpretation

2. (1) In this Act —

"**Authority**" means the Cayman Islands Monetary Authority established under section 5(1) of the *Monetary Authority Act (2020 Revision)* and includes a person acting under the Authority's authorisation;

"**bearer share**" means a share in the capital of any company incorporated in the Islands which —

(a) is represented by a certificate that does not record the owner's name; and

(b) is transferable by delivery of the certificate;

"**Cayman Islands exempted limited partnership**" means an exempted limited partnership registered in accordance with section 9 of the *Exempted Limited Partnership Act (2021 Revision)*;

"**Cayman Islands Stock Exchange**" means the Cayman Islands Stock Exchange Company incorporated under section 4 of the *Stock Exchange Company Act (2014 Revision)*;

"**certified translator**" means a person whose interpretation or translation competence has been tested and approved by a professional association or governmental body or any other person determined by the Registrar;

"**Court**" means the Grand Court of the Cayman Islands;

"**company**" except where the context excludes exempted companies, means a company formed and registered under this Act or an existing company;

"**currency**" includes the ECU and any unit of account used at any time by the European Monetary Fund;

"**dual foreign name**" means an additional name in any language not utilising the Roman alphabet, utilising any letters, characters, script, accents and other diacritical marks, and which does not have to be a translation or transliteration of the name in the Roman alphabet;

"**ECU**" or "**European Currency Unit**" means the former currency basket, which was replaced by the euro on 1st January, 1999, that was, from time to time, used as the unit of account of the European Community as defined in *European Council Regulation No. 3320/94*;

"**euro**" means the common currency of participating member states of the European Union that adopt a single currency in accordance with the Treaty as defined in *European Council Regulation No. 974/98*;

"**exempted company**" means a company registered as an exempted company under section 164;

"**exempted limited duration company**" means an exempted company registered as an exempted limited duration company under section 179;

"**existing company**" means a company which, prior to the 1st December, 1961, has been incorporated and its memorandum of association recorded in the Islands pursuant to the laws relating to companies then in force in the Islands;

"**Insolvency Rules Committee**" means the committee established in accordance with section 154;

"**Judge**" means a Judge of the Grand Court;

"**name**", when relating to the name of a company, means a name in the Roman alphabet or Arabic numerals;

"**non-resident company**" bears the meaning ascribed to that term in section 2(1) of the *Local Companies (Control) Act (2019 Revision)*;

"**officer**" in relation to a company, includes a manager or secretary;

"**overseas company**" means a company, body corporate or corporate entity existing under the laws of a jurisdiction outside the Islands;

"**public notice**" means a public notice (whether in digital form or not) affixed by the Registrar at such place as may be determined, from time to time, by the Registrar;

"**Registrar**" means the Registrar of Companies appointed under section 3 and includes, where appropriate, the Deputy Registrar of Companies;

"**regulated business**" means a business which is required to be licensed under one or other of the regulatory laws;

"**regulatory laws**" means any one or more of the following —

(a) *Banks and Trust Companies Act (2025 Revision)*;

(b) *Building Societies Act (2020 Revision)*;

(c) *Companies Management Act (2025 Revision)*;

(d) *Cooperative Societies Act (2020 Revision)*;

(e) *Insurance Act, 2010* [*Law 32 of 2010*];

(f) *Money Services Act (2020 Revision)*;

(g) *Mutual Funds Act (2025 Revision)*;

(h) *Securities Investment Business Act (2020 Revision)*;

(i) *Development Bank Act (2018 Revision);*

(j) *Directors Registration and Licensing Act, 2014*; and

(k) *Private Funds Act (2021 Revision),*

and any other laws that may be prescribed by the Cabinet by regulations made under section 46 of the *Monetary Authority Act (2020 Revision)*;

"**special resolution**" means a special resolution as defined in section 60;

"**special economic zone business**" means any type of business authorised to be carried on in a special economic zone pursuant to any Law in force in the Islands;

"**special economic zone company**" means an exempted company that is registered as such under section 182A;

"**translated name**" means a translation or transliteration of an exempted company's dual foreign name into the English language provided by either a person licensed to provide such company's registered office in the Cayman Islands or a certified translator (together with a statement in the prescribed form as to the foreign language in which such dual foreign name is written); and

"**Treaty**" means the Treaty on European Union signed in Maastricht on 7th February, 1992, as amended by the Treaty of Amsterdam amending the Treaty on European Union, signed in Amsterdam on 2nd October, 1997, the Treaty of Nice and the Convention on the Future of Europe, signed in Nice on 26th February, 2001 and the Treaty of Lisbon amending the Treaty on European Union, signed in Lisbon on 13th December, 2007.

(2) Where, in this Act, it is provided that a company and every officer of the company who is in default shall be liable to a default fine, the company and

every such officer shall, for every day during which the default, refusal or contravention continues, be liable to a fine of ten dollars.

(3) In this Act, where it provides that an officer of a company who is in default shall be liable to a default fine, the expression "**officer who is in default**" means any officer of the company who knowingly and wilfully authorises or permits the default, refusal or contravention mentioned in the enactment.

(4) For the purposes of this Act "**paid up**" or "**fully paid**" means, in the case of shares with a nominal or par value, paid up or fully paid as to nominal or par value only and, in the case of shares without nominal or par value, means paid up or fully paid up as to the issue price.

(5) For the purposes of this Act "**carry on business in the Islands**" shall be construed in accordance with the *Local Companies Control Act (2019 Revision)*.

Registrar

3. (1) The Governor shall, by instrument under the Public Seal, appoint a Registrar and a Deputy Registrar of Companies for the purposes of this Act, and the Deputy Registrar may, in the absence of the Registrar, act as Registrar for all purposes of this Act.

(2) Without divesting the Registrar of any of that person's powers or duties the Minister charged with responsibility for Financial Services may authorise by name any officer in the Registrar's department to exercise and perform any of such powers and duties under the direction and control of the Registrar and may, at any time, vary or revoke such authorisation.

Signature of Registrar

4. (1) Any document purporting to bear the signature of the Registrar or of an officer authorised in accordance with section 3(2) shall be deemed, until the contrary is proved, to have been duly given, made or issued by the authority of the Registrar.

(2) In subsection (1) —

"**signature**" includes a facsimile of a signature however reproduced and a digital signature.

PART 2 - Constitution and Incorporation of Companies and Associations - Memorandum of Association

Mode of forming company

5. Any one or more persons associated for any lawful purpose may, by subscribing their names to a memorandum of association, and otherwise complying with this Act in respect of registration, form an incorporated company, with or without limited liability.

Mode of limiting liability of members

6. The liability of the members of a company formed under this Act may, according to the memorandum of association, be limited either to the amount, if any, unpaid on the shares respectively held by them, or to such amount as the members may respectively undertake by the memorandum of association to contribute to the assets of the company in the event of its being wound up.

Memorandum of association

7. (1) The memorandum of association shall, subject to subsections (2), (3) and (4) and to sections 8 and 9, contain —

(a) the name of the proposed company which in the case of an exempted company, may be preceded by or followed with a dual foreign name, with the addition, in the case of any company not being an exempted company or a company formed on the principle of having no limit placed on the liability of its members, in this Act referred to as an "unlimited company", of the word "Limited" or the abbreviation "Ltd." as the last word in such name; and

(b) the part of the Islands in which the registered office of the company is proposed to be situate.

(2) No subscriber shall take less than one share.

(3) Each subscriber of the memorandum of association shall write opposite to that subscriber's name the number of shares that person takes.

(4) The memorandum of association may specify objects for which the proposed company is to be established and may provide that the business of the company shall be restricted to the furtherance of the specified objects. If no objects are specified or if objects are specified but the business of the company is not restricted to the furtherance of those objects, then the company shall have full power and the authority to carry out any object not prohibited by this or any other Law.

Company limited by shares

8. (1) Subject to subsection (2), where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, in this Act referred to as a company limited by shares, the memorandum of association shall also contain —

(a) a declaration that the liability of its members is limited; and

(b) the amount of capital with which it proposes to be registered, divided into shares of a certain fixed amount to be also therein specified:

Provided that the capital with which an exempted company proposes to be registered may be divided into shares without nominal or par value in which case the memorandum of association shall contain the amount of the aggregate consideration for which such shares may be issued:

Provided further that no exempted company shall divide its capital into both shares of a fixed amount and shares without nominal or par value.

(2) Where the capital of such a company is divided into shares of more than one class, the memorandum of association may contain a declaration that in a winding up of the company the liability of members holding the shares of a particular class shall be unlimited.

(3) The capital, fixed amount of shares and aggregate consideration referred to in subsection (1) may be expressed, and subscribed for, in any one or more currencies.

(4) No authorisation or issue, or purported authorisation or issue, by an exempted company of any share without nominal or par value shall, if that company has its capital divided into such shares only, be invalid only by reason of the fact it was authorised or issued, or purportedly authorised or issued, prior to the 20th November, 1989.

Company limited by guarantee

9. (1) Subject to subsection (2), where a company is formed on the principle of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, (in this Act referred to as a company limited by guarantee), the memorandum of association shall also contain a declaration that each member undertakes to contribute to the assets of the company, in the event of the same being wound up during the time that that person is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which that person ceases to be a member, and of the costs, charges and expenses of the winding up of the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specific amount to be therein named.

(2) Where such a company has more than one class of member, the memorandum of association may contain a declaration that in a winding up of the company the amount of the undertaking of the members of a particular class shall be unlimited.

(3) A company limited by guarantee may have a share capital.

Memorandum of association may be altered

10. Subject to section 13, a company may, by special resolution, alter its memorandum of association with respect to any objects, powers or other matters specified therein.

Address of registered office may be changed

11. (1) A company may, by resolution of the directors, change the address of the registered office of the company to another address in the Islands, and shall, within thirty days from the date on which the resolution is made, file with the Registrar a certified copy of the resolution of the directors authorising the change together with the prescribed amendment fee.

(2) Until subsection (1) is complied with, the company shall not be deemed to have complied with this Act with respect to having a registered office.

Signature and effect of memorandum of association

12. The memorandum of association shall be signed by each subscriber in the presence of and be attested by at least one witness. It shall, when registered, bind the company and the members thereof to the same extent as if each member had subscribed that person's name and affixed that person's seal thereto and there were in the memorandum contained on the part of that person, that person's heirs, executors and administrators, a covenant to observe all the conditions of such memorandum, subject to this Act, and all monies payable by any member to the company under such memorandum shall be deemed to be a debt due from such member to the company.

Power of company limited by shares to alter its share capital

13. (1) A company limited by shares or a company limited by guarantee and having a share capital, if so authorised by its articles, may alter the conditions of its memorandum to —

(a) increase its share capital by new shares of such amount as it thinks expedient:

Provided that an exempted company having no shares of a fixed amount may increase its share capital by such number of shares without nominal or par value, or may increase the aggregate consideration for which such shares may be issued, as it thinks expedient;

(b) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;

(c) convert all or any of its paid-up shares into stock, and reconvert that stock into paid-up shares of any denomination;

(d) subdivide its shares or any of them, into shares of an amount smaller than that fixed by the memorandum, so, however, that in the subdivision the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in case of the share from which the reduced share is derived; and

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled or, in the case of shares without nominal or par value, diminish the number of shares into which its capital is divided.

(1A) Paragraphs (b), (c) and (d) shall have no application to shares without nominal or par value.

(2) The powers conferred by subsection (1) may not be exercised except by a resolution of the members of the company.

(3) If a currency in which any of the capital of a company limited by shares or by guarantee is replaced by the euro, the provisions of the company's memorandum of association and articles of association shall automatically be altered so as to re-denominate in euros the capital that is denominated in the replaced currency, at the conversion rate specified in, or otherwise calculated in accordance with, the relevant regulations adopted by the Council of the European Union, and the company, by resolution of the directors, may —

(a) take such action to round up or down the euro nominal or par value of each share in the company or the euro guarantee amount to such multiple of the euro as the directors may deem appropriate;

(b) notwithstanding the requirement for a special resolution in section 31, if the name of the company includes a reference to a currency replaced by the euro, or an abbreviation thereof —

(i) alter the name of the company to delete the reference or to substitute the reference with a reference to the euro or an abbreviation thereof; and

(ii) add such further distinguishing wording as the directors consider appropriate; and

(c) if the memorandum of association or articles of association of the company include a reference or references to a currency replaced by the euro, alter any or all such references in either or both of the memorandum of association and the articles of association by substituting such references with references to the euro or an abbreviation thereof.

(4) A company may, by resolution of the directors, reverse or vary the re-denomination of currency or any other action taken under subsection (3).

(5) A copy of any resolution passed under subsection (3) or (4) shall be forwarded to the Registrar within fifteen days and shall be recorded by that person.

(6) A cancellation of shares or a rounding down of the nominal or par value of shares under this section shall not be deemed to be a reduction of share capital within the meaning of this Act.

(7) If any action is taken by the company under paragraph (a) of subsection (3) to —

(a) round up the euro nominal or par value of any issued share in the company, then an amount equal to the increase in nominal or par value of that share shall be transferred from the share premium account or from the profit and loss account (as the directors shall, in their discretion, determine) and shall thereafter be deemed to be and treated as paid up share capital of the company; or

(b) round down the euro nominal or par value of any issued share in the company, then an amount equal to the decrease in the nominal or par value of that share shall be transferred from the paid up share capital of the company to the share premium account and shall thereafter be deemed to be and treated as share premium for the purposes of this Act.

Special resolution for reduction of share capital

14. (1) Subject to section 37 and to confirmation by the Court, a company limited by shares or a company limited by guarantee and having a share capital may, if so authorised by its articles, by special resolution reduce its share capital in any way, and in particular (but without prejudice to the generality of the foregoing power) may —

(a) extinguish or reduce the liability on any of its shares in respect of share capital not paid up;

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost or unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability of any of its shares, pay off any paid-up share capital which is in excess of the needs of the company,

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under subsection (1) is, in this Act, referred to as "a resolution for reducing share capital".

Application to court for confirming order, objections by creditors

15. (1) Where a company has passed a resolution for reducing share capital, it may apply by petition to the Court for an order confirming the reduction.

(2) Where the proposed reduction of share capital involves either diminution of liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital, and, in any other case, if the Court so directs, subject to subsection (3), the following shall have effect —

(a) every creditor of the company who at the date fixed by the Court is entitled to any debt or claim which, if that date were the commencement of the winding up of the company, would be admissible in proof against the company, shall be entitled to object to the reduction;

(b) the Court shall settle a list of creditors so entitled to object, and for that purpose shall ascertain as far as possible without requiring an application from any creditor, the names of those creditors and the nature and amount of their debts or claims, and may publish notices fixing a day or period on or within which creditors not entered on the list are to claim to be so entered or are to be excluded from the right of objecting to the reduction; and

(c) where a creditor entered on the list whose debt or claim is not discharged or has not determined does not consent to the reduction, the Court may, if it thinks fit, dispense with the consent of that creditor, on the company securing payment of that person's debt or claim by appropriating as the Court may direct, the following amount —

(i) if the company admits the full amount of the debt or claim, or, though not admitting it, is willing to provide for it, then the full amount of the debt or claim; or

(ii) if the company does not admit and is not willing to provide for the full amount of the debt or claim, or, if the amount is contingent or not ascertained, then an amount fixed by the Court after the like enquiry and adjudication as if the company were being wound up by the Court.

(3) Where a proposed reduction of share capital involves either the diminution of any liability in respect of unpaid share capital or the payment to any shareholder of any paid-up share capital the Court may, if having regard to any special circumstances of the case it thinks proper so to do, direct that subsection (2) shall not apply as regards any class or any classes of creditors.

Case 1:26-cv-00251-LTS Document 2-7 Filed 01/02/26 Page 26 of 197 PageID #: 5533

Order confirming reduction and powers of Court on making such order

16. (1) The Court, if satisfied with respect to every creditor of the company who under section 15 is entitled to object to the reduction, that either that person's consent to the reduction has been obtained or that person's debt or claim has been discharged or has determined, or has been secured, may make an order confirming the reduction on such terms and conditions as it thinks fit.

(2) Where the Court makes any such order, it may —

(a) if for any special reason it thinks proper so to do, direct that the company shall, during such period, commencing on or at any time after the date of the order, as is specified in the order, add to its name as the last word thereof the words "and reduced"; and

(b) require the company to publish as the Court directs the reasons for reduction or such other information in regard thereto as the Court may think expedient with a view to giving proper information to the public, and, if the court thinks fit, the causes which led to the reduction.

(3) Where a company is ordered to add to its name the words "and reduced", those words shall, until the expiration of the period specified in the order, be deemed to be part of the name of the company.

Registration of order and minute of reduction

17. (1) The Registrar, on delivery to that person of a copy of an order of the Court confirming the reduction of the share capital of a company, and of a minute approved by the Court, showing, with respect to the share capital of the company as altered by the order, the amount of the share capital, the number of shares into which it is to be divided and the amount of each share, and the amount, if any, at the date of the registration of the order and minute deemed to be paid up on each share, shall register the order and minute.

(2) On the registration of the order and minute, and not earlier, the resolution for reducing share capital as confirmed by the order so registered shall take effect.

(3) Notice of the registration shall be published in such manner as the Court may direct.

(4) The Registrar shall certify under that person's hand the registration of the order and minute, and that person's certificate shall be conclusive evidence that all the requirements of this Act with respect to reduction of share capital have been complied with, and that the share capital of the company is such as is stated in the minute.

(5) The minute, when registered, shall be deemed to be substituted for the corresponding part of the memorandum, and shall be valid and alterable as if it had been originally contained therein.

Liability of members in respect of reduced shares

18. (1) In the case of a reduction of share capital, a member of the company, past or present, shall not be liable in respect of any share to any call or contribution exceeding in amount the difference, if any, between the amount of the share as fixed by the minute and the amount paid or the reduced amount, if any, which is to be deemed to have been paid on the shares, as the case may be:

Provided that, if any, creditor entitled in respect of any debt or claim to object to the reduction of share capital is, by reason of that person's ignorance of the proceedings for reduction or of their nature and effect with respect to that person's claim, not entered on the list of creditors, and after the reduction the company is unable, within the meaning of this Act with respect to winding up by the Court, to pay the amount of that person's debt or claim, then —

(a) every person who was a member of the company at the date of the registration of the order for reduction and minute shall be liable to contribute for the payment of that debt or claim an amount not exceeding the amount which that person would have been liable to contribute if the company had commenced to be wound up on the day before the said date; and

(b) if the company is wound up, the Court, on the application of any such creditor and proof of that person's ignorance as aforesaid, may if it thinks fit, settle accordingly a list of persons so liable to contribute, and make and enforce calls and orders on the contributories in a winding up.

(2) Nothing in this section shall affect the rights of the contributories among themselves.

Penalty for concealment of names of creditors

19. A person who, being a director, manager, secretary or other officer of the company —

(a) wilfully conceals the name of any creditor entitled to object to the reduction;

(b) wilfully misrepresents the nature or amount of the debt or claim of any creditor; or

(c) aids, abets or is privy to any such concealment or misrepresentation as aforesaid,

commits an offence and is liable on summary conviction to a fine of five thousand dollars or to imprisonment for a term of one year, or to both.

Case 1:26-cv-00251-LTS-SDG Document 1-2 Filed 01/12/26 Page 28 of 197 PageID #: 5535

Articles prescribing regulations for companies

20. There may, in the case of a company limited by shares, and there shall, in the case of a company limited by guarantee or unlimited, be registered with the memorandum, articles of association signed by the subscribers to the memorandum and prescribing regulations for the company.

Regulations required in case of unlimited company or company limited by guarantee

21. (1) In the case of an unlimited company the articles must state the number of members with which the company proposes to be registered and, if the company has a share capital, the amount of share capital with which the company proposes to be registered.

(2) In the case of a company limited by guarantee, the articles must state the number of members with which the company proposes to be registered.

Adoption and application of Table A in Schedule 1

22. (1) Articles of association may adopt all or any of the regulations contained in Table A in Schedule 1.

(2) In the case of a company limited by shares and registered after the 1st December, 1961, if articles are not registered or, if articles are registered, insofar as the articles do not exclude or modify the regulations contained in Table A in Schedule 1, those regulations shall, so far as applicable, be the regulations of the company in the same manner and to the same extent as if they were contained in duly registered articles.

Printing, stamping and signature of articles

23. Articles shall —

(a) be divided into paragraphs numbered consecutively;

(b) bear the same stamp as if they were contained in a deed; and

(c) save as otherwise provided in section 25(2), be signed by each subscriber of the memorandum of association or each existing member, as the case may be, in the presence of at least one witness who shall attest the signature, and that attestation shall be sufficient.

Alteration of articles by special resolution

24. (1) Subject to this Act and to the conditions contained in its memorandum, a company may, by special resolution, alter or add to its articles.

(2) Any alteration or addition so made in the articles shall, subject to this Act, be as valid as if originally contained therein, and be subject in like manner to alteration by special resolution.

Case 1:26-cv-00251-LTS Document 1-2 Filed 01/02/26 Page 29 of 197 PageID #: 5536

Adoption and effect of articles of association

25. (1) If the memorandum of association is accompanied by articles of association the articles shall be signed by each subscriber to the memorandum in the presence of and be attested by at least one witness.

(2) If the memorandum of association is not accompanied by articles of association, the company may, subject to the conditions contained in the memorandum of association, adopt articles of association which shall be signed by each existing member of the company in the presence of and be attested by at least one witness, or may, by passing a special resolution under section 60, adopt articles of association.

(3) When registered the said articles of association shall bind the company and the members thereof to the same extent as if each member had subscribed that person's name and affixed that person's seal thereto, and there were in such articles contained a covenant on the part of that person, that person's heirs, executors and administrators to conform to all the regulations contained in such articles subject to this Act; and all monies payable by any member to the company in pursuance of the conditions or regulations shall be deemed to be a debt due from such member to the company.

General Provisions

Registration

26. (1) The memorandum of association and the articles of association, if any, shall be delivered in duplicate to the Registrar who shall file and retain the original thereof and shall return the duplicate thereof endorsed with a memorandum of registration and a memorandum of the particulars set out in subsection (2).

(2) Each memorandum of association and the articles of association, if any, shall be numbered and filed consecutively and shall be endorsed with the date of the month and year of such filing.

(3) A register of companies shall be kept by the Registrar in which shall be entered the particulars set out in Schedule 1A and, save for the particulars set out in paragraph (i) of Schedule 1A, such particulars shall be annexed to the memorandum of association and articles of association, if any, insofar as they are not included therein.

(3A) The Registrar shall make the register under subsection (3) available for inspection by any person on payment of the fee specified in Part 1A of Schedule 5 and the inspection shall be subject to such conditions as the Registrar may impose.

(3B) The Cabinet may amend Schedule 1A by Order.

(4) Upon the filing of a memorandum of association under this section, there shall be paid to the Registrar the fees specified in Part 1 of Schedule 5.

Registrar to provide information

26A. (1) The Registrar shall, upon request in writing by an entity under subsection (2), provide any information required to discharge any function or exercise any power, under the following Acts —

(a) the *Anti-Corruption Act (2019 Revision);*

(b) the *Monetary Authority Act (2020 Revision)*;

(c) the *Proceeds of Crime Act (2025 Revision);*

(d) the *Tax Information Authority Act (2021 Revision);*

(2) For the purposes of subsection (1), the following entities may request information from the Registrar —

(a) the Anti-Corruption Commission established under section 3 of *the Anti-Corruption Act (2019 Revision)*;

(b) the Authority;

(ba) the Customs and Border Control Service established under section 3 of the *Customs and Border Control Act (2024 Revision)*;

(c) the Financial Crimes Unit of the Royal Cayman Islands Police Service;

(d) the Financial Reporting Authority, as defined under section 2 of the *Proceeds of Crime Act (2025 Revision);*

(e) the Tax Information Authority, designated under section 4 of the *Tax Information Authority Act (2021 Revision)*; or

(f) a competent authority as defined under section 2(1) of the *Proceeds of Crime Act (2025 Revision)*.

(3) Where a request for information is made under subsection (1), the information shall be provided within forty-eight hours of receipt of the request.

(4) The recipient of any information provided by the Registrar under this section shall —

(a) use the information for the purpose for which it was provided;

(b) retain the information for as long as is necessary to carry out the purpose for which it was provided; and

(c) not disclose the information for any purpose other than the purpose for which it was provided, without the consent of the Registrar.

Consequences of incorporation

27. (1) Upon the filing of the memorandum of association a company shall be deemed to be registered, and the Registrar shall issue a certificate under that person's hand and seal of office that the company is incorporated with effect from the date of the registration of the memorandum of association and, in the case of a limited company, that the company is limited.

(2) From the date of incorporation, the subscribers of the memorandum of association, together with such other persons as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum of association, capable forthwith of exercising all the functions of a natural person of full capacity irrespective of any question of corporate benefit, and having perpetual succession with power to hold lands but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is provided in this Act. This subsection applies to companies incorporated before, on or after the 18th January, 1988.

(3) A certificate of incorporation of a company issued under this Act shall be conclusive evidence that compliance has been made with all the requirements of this Act in respect of incorporation and registration.

(4) Every copy of a memorandum or articles of association filed and registered in accordance with this Act or any extract therefrom certified under the hand and seal of office of the Registrar as a true copy shall be received in evidence in any court of the Islands without further proof.

Lack of capacity or power; *ultra vires*

28. (1) No act of a company and no disposition of real or personal property to or by a company shall be invalid by reason only of the fact that the company was without capacity or power to perform the act or to dispose of or receive the property, but the lack of capacity or power may be asserted —

(a) in proceedings by a member or a director against the company to prohibit the performance of any act, or the disposition of real or personal property by or to the company; and

(b) in proceedings by the company, whether acting directly or through a liquidator or other legal representative or through members of the company in a representative capacity, against the incumbent or former officers or directors of the company for loss or damage through their unauthorised act.

(2) This section applies to companies incorporated before, on or after the 18th day of January, 1988.

Copies of memorandum and articles to be given to members

29. A copy of the memorandum of association having annexed thereto the articles of association, if any, shall be forwarded to every member, at that person's request, on payment of such reasonable sum, not exceeding one dollar for each copy as may be fixed by any rule of the company, and in the absence of any such rule, such copy shall be given gratuitously; and whichever company makes default in forwarding a copy of the memorandum of association and articles of association, if any, to a member in pursuance of this section, commits an offence and is liable, for each default, to a penalty of two dollars.

Name reservation

29A. (1) A person ("applicant") may apply to reserve a specified name by —

(a) filing with the Registrar (including by permitted electronic means) an application executed by the applicant specifying the name to be reserved and the name and address of the applicant; and

(b) paying the prescribed application fee.

(2) If, on an application made under subsection (1), the Registrar finds that the name is available for use by a company, the Registrar may reserve the name for exclusive use by the applicant for a period of up to four months.

(3) On or before the expiry of the period for name reservation under subsection (2), the applicant may make further successive applications pursuant to subsection (2) to reserve the specified name.

Restrictions on registration of certain names

30. (1) No company shall be registered by a name which —

(a) is identical with a name by which a company in existence is already registered or any translated name entered on the register of companies, or so nearly resembles such name or translated name so as to be calculated to deceive, except where the company in existence is in the course of being dissolved and signified its consent in such manner as the Registrar requires;

(b) contains the words "Chamber of Commerce" unless the company is a company which is to be registered under a licence granted by the Registrar under section 80 without the addition of the word "Limited" or the abbreviation "Ltd." to its name; or

(c) contains the words "building society".

(2) Except with the consent of the Registrar, no company shall be registered by a name which —

(a) contains the words "royal", "imperial" or "empire" or in the opinion of the Registrar suggests, or is calculated to suggest the patronage of His Majesty

or of any member of the Royal Family or connection with His Majesty's Government or any department thereof in the United Kingdom or elsewhere;

(b) contains the words "municipal" or "chartered" or any words which in the opinion of the Registrar suggest, or are calculated to suggest, connection with any public board or other local authority or with any society or body incorporated by Royal Charter;

(c) contains the words "co-operative", "assurance", "bank", "insurance", or any similar word which in the opinion of the Registrar connotes any of such activities or any derivative of any of such four words or of such similar words, whether in English or in any other language, or in the opinion of the Registrar suggests or is calculated to suggest any of such activities; or

(d) contains the word "gaming" or "lottery" or any similar word which in the opinion of the Registrar connotes any such activity or any derivative of such words or of such similar word, whether in English or in any other language, or in the opinion of the Registrar suggests or is calculated to suggest any such activity.

(3) A company that is not an exempted limited duration company shall not be registered by a name which includes at its end "Limited Duration Company" or "LDC".

(3A) A company that is not a special economic zone company shall not be registered by a name which includes the words "Special Economic Zone Company" or the letters "SEZC".

(4) The provisions of the regulatory laws shall apply to any translated name as if it were the name of the company and a company shall not have a translated name which is a name —

(a) prohibited under any regulatory laws; or

(b) which requires approval or permission under any regulatory laws unless such approval or permission as is necessary for the use of such name under the relevant regulatory laws has first been obtained.

(5) A company's dual foreign name shall only be entered on the register of companies if its translated name conforms with the provisions of this section and if it does not so conform then such dual foreign name and such translated name shall not be entered on the register of companies.

Change of name

31. (1) Any company may, by special resolution, change its name and, in the case of an exempted company, may adopt a dual foreign name or change its dual foreign name, if any, and any dual foreign name shall precede or follow its name.

(2) Where a company changes its name or its dual foreign name, the Registrar, on receiving the special resolution authorising the same and, in the case of a company changing its dual foreign name, receiving its translated name together with the fees provided under section 199(1), and on being satisfied that the change of name conforms with section 30, shall enter the new name and, if applicable, the new translated name on the register in place of the former name and lodge the special resolution for record and shall issue a certificate of incorporation altered to meet the circumstances of the case.

(3) If, through inadvertence or otherwise, a company on its first registration or on its registration by a new name or new translated name is registered by a name or a translated name which in any way contravenes section 30 or which, in the opinion of the Registrar, is misleading or undesirable, then the company may, with the sanction of the Registrar, change its name or its translated name as the case may be and shall, if the Registrar so directs, change its name or translated name within six weeks of the date of such direction or within such longer period as the Registrar may think fit.

(4) A company which defaults in complying with a direction under subsection (3) is liable to a fine of ten dollars for every day during which the default continues.

Company with power to issue bearer shares not to hold land in the Islands

32. (1) A company which is empowered by any law or by its articles of association to issue bearer shares, certificates or coupons, has no power to hold land in the Islands:

Provided that the Minister charged with responsibility for Financial Services may, at that Minister's discretion, in the case of an exempt company so empowered that has never issued bearer shares, certificates or coupons, exempt that company in writing from subsection (1) for as long as it does not issue bearer shares, certificates or coupons.

(2) If a company is in breach of subsection (1), section 185(2), (3) and (4) shall apply, *mutatis mutandis*, to the company as if it were a foreign company which had failed to comply with Part 9.

(3) In this section —

"**hold land**" means to be the proprietor of a legal or beneficial interest in or claim to, or over immovable property whether freehold or leasehold and includes being the proprietor of a legal or beneficial interest in the equity capital of a company which holds land; and

"**equity capital**" with respect to a company includes shares, stock and scrip whether registered, inscribed or bearer which (other than by way of a fixed and predetermined right to interest and repayment of subscribed capital at par) entitles the owner to any variable right of participation in the profits of the

company whether by way of dividend, bonus or conversion, or to share in the distribution of the assets of the company upon a winding up.

PART 3 - Distribution of Capital and Liability of Members of Companies and Associations

Distribution of Capital

Share or interest in company to be personalty

33. (1) A share or other interest of a member in a company —

(a) is personal estate and not of the nature of real estate; and

(b) is capable of being transferred if —

(i) a transfer is expressly or impliedly permitted by the regulations of the company; and

(ii) any restriction or condition on the transfer of the shares or interest set out in the regulations of the company is observed.

(2) The shares in a company having a capital divided into shares must each be distinguished by an appropriate number except that if, at any time —

(a) all the issued shares in the company; or

(b) all the issued shares in the company of a particular class,

are fully paid up and rank *pari passu* for all purposes, none of those shares need thereafter have a distinguishing number so long as it remains fully paid up and ranks *pari passu* for all purposes with all the shares in the company or all the shares of the particular class of shares, as the case may be, for the time being issued and fully paid up.

(3) A company limited by shares, or a company limited by guarantee and having a share capital, if so authorised by its articles, may issue fractions of a share and, unless and to the extent otherwise provided in its articles, a fraction of a share shall be subject to and carry the corresponding fraction of liabilities (whether with respect to nominal or par value, premium, contribution, calls or otherwise howsoever), limitations, preferences, privileges, qualifications, restrictions, rights and other attributes of a whole share of the same class of shares; and in this Act the expression "**share**" includes a fraction of a share and no issue or purported issue of a fraction of a share shall be invalid by reason only of the fact that it was issued or purportedly issued prior to the 30th September, 1985.

(4) The nominal or par value of a share may be expressed in an amount which is a fraction or a percentage of the lowest available unit of legal tender of the currency in which the capital of the company is expressed.

Share premium account

34. (1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of the value of the premiums on those shares shall be transferred to an account called "the share premium account". Where a company issues shares without nominal or par value, the consideration received shall be paid up share capital of the company.

(2) The share premium account may be applied by the company subject to the provisions, if any, of its memorandum or articles of association in such manner as the company may, from time to time, determine including, but without limitation —

(a) paying distributions or dividends to members;

(b) paying up unissued shares of the company to be issued to members as fully paid bonus shares;

(c) any manner provided in section 37;

(d) writing off the preliminary expenses of the company; and

(e) writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company.

Provided that no distribution or dividend may be paid to members out of the share premium account unless, immediately following the date on which the distribution or dividend is proposed to be paid, the company shall be able to pay its debts as they fall due in the ordinary course of business; and the company and any director or manager thereof who knowingly and wilfully authorises or permits any distribution or dividend to be paid in contravention of the foregoing provision commits an offence and is liable on summary conviction to a fine of fifteen thousand dollars and to imprisonment for five years.

(3) Where a company had, before the 18th day of January, 1988, issued any shares at a premium, this section shall apply as if the shares had been issued after such date.

(4) At the option of the company, subsection (1) shall not apply to premiums on shares of a company allotted in pursuance of any arrangement in consideration for the acquisition or cancellation of shares in any other company, whether a company within the meaning of this Act or not, and issued at a premium.

(5) At the option of the company, an amount corresponding to any amount representing the premiums or part of the premiums on shares issued by a company which, by virtue of subsection (4), is not included in such company's share premium account may also be disregarded in determining the amount at which any shares or other consideration provided for the shares issued is to be included in such company's balance sheet.

(6) For the purposes of subsection (4) —

"**arrangement**" means any agreement, scheme or arrangement, whether of reconstruction, merger, consolidation, take-over, acquisition, purchase or otherwise whereby the allotting company acquires a controlling interest in the company whose shares it acquires or cancels.

(7) The relief allowed by subsections (4) and (5) shall apply even if the issue of shares took place prior to the 18th day of January, 1988.

Power to issue shares at a discount

35. (1) Subject as provided in this section, it shall be lawful for a company to issue, at a discount, shares in the company of a class already issued:

Provided that —

(a) the issue of the shares at a discount has been authorised by resolution of the company, and has been sanctioned by the Court;

(b) the resolution specify the maximum rate of discount at which the shares are to be issued;

(c) not less than one year, at the date of the issue, has elapsed since the date on which the company was entitled to commence business; and

(d) the shares to be issued at a discount are issued within one month after the date on which the issue is sanctioned by the Court or within such extended time as the Court may allow.

(2) Where a company has passed a resolution authorising the issue of shares at a discount, it may apply to the Court for an order sanctioning the issue, and on any such application the Court, if, having regard to all the circumstances of the case, it thinks proper so to do, may make an order sanctioning the issue on such terms and conditions as it thinks fit.

(3) Every prospectus relating to the issue of the shares must contain particulars of the discount allowed on the issue of the shares or of so much of that discount as had not been written off at the date of the issue of the prospectus and if default is made in complying with this subsection, the company and every officer of the company who is in default is liable to a default fine.

(4) This section does not apply to shares issued, or proposed to be issued, without nominal or par value.

Power of company to pay commissions

36. (1) A company has the power, and shall be deemed always to have had the power, to pay a commission to any person in consideration of that person subscribing or agreeing to subscribe (whether absolutely or conditionally) for any shares in the company, or procuring or agreeing to procure subscriptions (whether absolute or conditional) for any shares in the company, if the payment of the commission is authorised by the articles of association of the company.

(2) Nothing in subsection (1) affects the power of a company to pay such brokerage as has previously been lawful.

(3) A vendor to, or promoter of, or other person who receives payment in money or shares from a company has, and is deemed always to have had, power to apply any part of the money or shares so received in payment of any commission, the payment of which, if made directly by the company, would have been lawful under subsection (1).

Redemption and purchase of shares

37. (1) Subject to this section, a company limited by shares or limited by guarantee and having a share capital may, if authorised to do so by its articles of association, issue shares which are to be redeemed or are liable to be redeemed at the option of the company or the shareholder and, for the avoidance of doubt, it shall be lawful for the rights attaching to any shares to be varied, subject to the provisions of the company's articles of association, so as to provide that such shares are to be or are liable to be so redeemed.

(2) Subject to this section, a company limited by shares or limited by guarantee and having a share capital may, if authorised to do so by its articles of association, purchase its own shares, including any redeemable shares.

(3) (a) No share may be redeemed or purchased unless it is fully paid.

(b) A company may not redeem or purchase any of its shares if, as a result of the redemption or purchase, there would no longer be any issued shares of the company other than shares held as treasury shares.

(c) Redemption or purchase of shares may be effected in such manner and upon such terms as may be authorised by or pursuant to the company's articles of association.

(d) If the articles of association do not authorise the manner and terms of the purchase, a company shall not purchase any of its own shares unless the manner and terms of purchase have first been authorised by a resolution of the company.

(da) For the avoidance of doubt —

(i) a company's articles of association; or

(ii) a resolution of the company,

may authorise the company's directors to determine the manner or any of the terms of, any such redemption or purchase not being inconsistent with such articles of association or resolution and subject to such restrictions (if any) as may be provided therein.

(e) The premium, if any, payable on redemption or purchase must have been provided for —

(i) out of either or both of the profits of the company or the company's share premium account, before or at the time the shares are redeemed or purchased; or

(ii) in the manner provided for in subsection (5).

(f) Shares may be redeemed or purchased out of profits of the company, out of the share premium account or out of the proceeds of a fresh issue of shares made for the purposes of the redemption or purchase or in the manner provided for in subsection (5).

(g) Subject to section 37A, shares redeemed or purchased under this section shall be treated as cancelled on redemption or purchase, and the amount of the company's issued share capital shall be diminished by the nominal value of those shares accordingly; but the redemption or purchase of shares by a company is not to be taken as reducing the amount of the company's authorised share capital.

(h) Without prejudice to paragraph (g), where a company is about to redeem or purchase shares, it has power to issue shares up to the nominal value of the shares to be redeemed or purchased as if those shares had never been issued:

Provided that where new shares are issued before the redemption or purchase of the old shares the new shares shall not, so far as relates to fees payable on or accompanying the filing of any return or list, be deemed to have been issued in pursuance of this subsection if the old shares are redeemed or purchased within one month after the issue of the new shares.

(4) (a) Where, under this section, shares of a company are redeemed or purchased wholly out of either or both of the company's profits or share premium account, the amount by which the company's issued share capital is diminished in accordance with paragraph (g) of subsection (3) on cancellation of the shares redeemed or purchased shall be transferred to a reserve called the "capital redemption reserve" and the share premium account or company's profits, as the case may be, shall be adjusted accordingly.

(b) If the shares are redeemed or purchased wholly or partly out of the proceeds of a fresh issue and the aggregate amount of those proceeds is less than the aggregate nominal value of the shares redeemed or purchased, the amount of the difference shall be transferred to the capital redemption reserve.

(c) Paragraph (b) does not apply if the proceeds of the fresh issue are applied by the company in making a redemption or purchase of its own shares in addition to a payment out of capital under subsection (5).

(d) The provisions of this Act relating to the reduction of a company's share capital apply as if the capital redemption reserve were paid-up share capital

of the company, except that the reserve may be applied by the company in paying up its unissued shares to be allotted to members of the company as fully paid bonus shares.

(5) (a) Subject to this section, a company limited by shares or limited by guarantee and having a share capital may, if so authorised by its articles of association, make a payment in respect of the redemption or purchase of its own shares otherwise than out of its profits, share premium account, or the proceeds of a fresh issue of shares.

(b) References in subsections (6) to (9) to payment out of capital are, subject to paragraph (f), references to any payment so made, whether or not it would be regarded apart from this subsection as a payment out of capital.

(c) The amount of any payment which may be made by a company out of capital in respect of the redemption or purchase of its own shares is such an amount as, taken together with —

(i) any profits and share premium of the company being applied for purposes of the redemption or purchase; and

(ii) the proceeds of any fresh issue of shares made for the purpose of the redemption or purchase, is equal to the price of redemption or purchase, and the payment out of capital permitted under this paragraph is referred to in subsections (6) to (9) as the capital payment for the shares.

Nothing in this paragraph shall be taken to imply that a company shall be obliged to exhaust any profits and share premium before making any capital payment.

(d) Subject to paragraph (f), if the capital payment for shares redeemed or purchased and cancelled is less than their nominal amount, the amount of the difference shall be transferred to the company's capital redemption reserve.

(e) Subject to paragraph (f), if the capital payment is greater than the nominal amount of the shares redeemed or purchased the amount of any capital redemption reserve or fully paid share capital of the company may be reduced by a sum not exceeding, or by sums not in the aggregate exceeding, the amount by which the capital payment exceeds the nominal amount of the shares.

(f) Where the proceeds of a fresh issue are applied by a company in making any redemption or purchase of its own shares in addition to a payment out of capital under this subsection, the references in paragraphs (d) and (e) to the capital payment are to be read as referring to the aggregate of that payment and those proceeds.

(6) (a) A payment out of capital by a company for the redemption or purchase of

its own shares is not lawful unless immediately following the date on which the payment out of capital is proposed to be made the company shall be able to pay its debts as they fall due in the ordinary course of business.

(b) The company and any director or manager thereof who knowingly and wilfully authorises or permits any payment out of capital to effect any redemption or purchase of any share in contravention of paragraph (a) commits an offence and is liable on summary conviction to a fine of fifteen thousand dollars and to imprisonment for five years.

(7) (a) Where a company is being wound up and, at the commencement of the winding up, any of its shares which are or are liable to be redeemed have not been redeemed or which the company has agreed to purchase have not been purchased, the terms of redemption or purchase may be enforced against the company, and when shares are redeemed or purchased under this subsection they shall be treated as cancelled.

Provided that this paragraph shall not apply if —

(i) the terms of redemption or purchase provided for the redemption or purchase to take place at a date later than the date of the commencement of the winding up; or

(ii) during the period beginning with the date on which the redemption or purchase was to have taken place and ending with the commencement of the winding up the company could not, at any time, have lawfully made a distribution equal in value to the price at which the shares were to have been redeemed or purchased.

(b) There shall be paid in priority to any amount which the company is liable by virtue of paragraph (a) to pay in respect of any shares —

(i) all other debts and liabilities of the company (other than any due to members in their character as such); and

(ii) if other shares carry rights whether as to capital or as to income which are preferred to the rights as to capital attaching to the first mentioned shares, any amount due in satisfaction of those preferred rights,

but subject to that, any such amount shall be paid in priority to any amounts due to members in satisfaction of their rights (whether as to capital or income) as members.

(8) (a) Any redeemable preference shares issued by a company before the 18th day of January, 1988, are subject to redemption in accordance with this section.

(b) Any capital redemption reserve fund established by a company before the 18th day of January, 1988, is to be known as the company's capital redemption reserve and to be treated as if it had been established for the

Case 1:26-cv-00251-LTS-SDG Document 1-2 Filed 01/08/26 Page 42 of 197 PageID #: 5549

purposes of subsection (4), and accordingly, a reference in any law, the articles of association of any company or any other instrument to a company's capital redemption reserve fund is to be construed as a reference to the company's capital redemption reserve.

(9) This section shall apply to shares without nominal or par value, and shall, in relation to such shares, be read and construed as if —

(a) in subsection (3) —

(i) for the words "the nominal value of" appearing in paragraph (g), there were substituted the words "an amount equal to the consideration received for"; and

(ii) for the words "nominal value" appearing in paragraph (h), there was substituted the word "number";

(b) in subsection (4) for the words "aggregate nominal value of" appearing in paragraph (b), there were substituted the words "aggregate consideration received for"; and

(c) in subsection (5) —

(i) for the words "their nominal amount" appearing in paragraph (d), there were substituted the words "the consideration received for such shares"; and

(ii) for the words "nominal amount of" appearing in paragraph (e), there were substituted the words "consideration received for".

Treasury shares

37A.(1) Shares that have been purchased or redeemed by a company or surrendered to the company pursuant to sections 37 or 37B shall not be treated as cancelled pursuant to sections 37(3)(g) or 37B(2) but shall be classified as treasury shares and sections 37(4), 37(5)(d) and 37B(2) shall not apply to such shares at the time of such purchase, redemption or surrender, if —

(a) the memorandum and articles of association of the company do not prohibit it from holding treasury shares;

(b) the relevant provisions of the memorandum and articles of association (if any) are complied with; and

(c) the company is authorised in accordance with the company's articles of association or by a resolution of the directors to hold such shares in the name of the company as treasury shares prior to the purchase, redemption or surrender of such shares.

(2) Shares held by a company pursuant to subsection (1) shall continue to be classified as treasury shares until such shares are either cancelled or transferred pursuant to subsection (3).

(3) A company that holds treasury shares may at any time —

(a) cancel the shares in accordance with the provisions of the company's articles of association or (in the absence of any applicable provisions in the company's articles of association) by a resolution of the directors, and if so cancelled the amount of the company's issued share capital shall be diminished by the nominal or par value of those shares accordingly but the company's authorised share capital shall not be reduced and sections 37(4), 37(5)(d) and 37B(2) shall apply as if the shares had been purchased, redeemed or surrendered as at the date of cancellation; or

(b) transfer the shares to any person, whether or not for valuable consideration (including at a discount to the nominal or par value of such shares).

(4) A sum equal to the consideration (if any) received by the company pursuant to the transfer of a treasury share made in accordance with subsection (3)(b) (such consideration referred to as the "transfer consideration") shall be applied in the following manner —

(a) to the extent that any payment out of capital was made with respect to the purchase or redemption of the share being transferred, there shall be credited to the company's share capital an amount equal to the lesser of —

(i) the amount of such payment out of capital; and

(ii) the transfer consideration received in respect of such share;

(b) subject to subsection (5), to the extent that any payment out of share premium was made with respect to the purchase or redemption of the share being transferred, there shall be credited to the company's share premium an amount equal to the lesser of —

(i) the amount of such payment out of share premium; and

(ii) the balance of the transfer consideration received in respect of such share after applying subsection (4)(a); and

(c) subject to subsection (5), the balance of the transfer consideration received in respect of such share after applying subsection (4)(a) and (b) shall be credited to the company's profit and loss account.

(5) Notwithstanding the provisions of subsection (4)(b) and (c) but subject to subsection (4)(a), so long as the company shall be able to pay its debts as they fall due in the ordinary course of business immediately following the transfer of a treasury share in accordance with subsection (3)(b), the directors may by resolution determine that all or any part of the transfer consideration received shall be transferred to the company's profit and loss account, share premium account or share capital (or any combination of the foregoing) in such proportions as the directors may (in their sole and absolute discretion but subject to any express contrary provision in the articles of association of the company) determine.

(6) Notwithstanding subsection (7)(b), a treasury share may be transferred by the company and the provisions of this Act and (subject to any specific provisions with respect to the transfer of treasury shares) the memorandum and articles that apply to the transfer of shares shall apply to the transfer of treasury shares.

(7) For so long as a company holds treasury shares —

(a) the company shall be entered in the register of members as holding those shares;

(b) notwithstanding paragraph (a) —

(i) the company shall not be treated as a member for any purpose and shall not exercise any right in respect of the treasury shares, and any purported exercise of such a right shall be void; and

(ii) a treasury share shall not be voted, directly or indirectly, at any meeting of the company and shall not be counted issued shares at any given time, whether for the purposes of the company's articles of association or this Act; and

(c) no dividend may be declared or paid, and no other distribution (whether in cash or otherwise) of the company's assets (including any distribution of assets to members on a winding up) may be made to the company, in respect of a treasury share.

(8) Nothing in subsection (7) prevents an allotment of shares as fully paid bonus shares in respect of a treasury share and shares allotted as fully paid bonus shares in respect of a treasury share shall be treated as treasury shares.

Surrender of shares

37B. (1) Subject to any express provisions of the company's memorandum or articles of association to the contrary, a company may accept the surrender for no consideration of any fully paid share (including a redeemable share) unless, as a result of the surrender, there would no longer be any issued shares of the company other than shares held as treasury shares.

(2) Subject to section 37A, any shares surrendered under subsection (1) shall be treated as cancelled on surrender, and the amount of the company's issued share capital shall be diminished by the nominal value of those shares accordingly; but the surrender of shares by a member is not to be taken as reducing the amount of the company's authorised share capital.

(3) This section is without prejudice to any right or power of a company arising under this Act or otherwise to accept the surrender of a share (not being a fully paid share) in lieu of forfeiture.

Definition of member

38. The subscribers of the memorandum of association of any company shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned, and every other person who has agreed to become a member of a company and whose name is entered on the register of members, shall be deemed to be a member of the company.

Transfer by personal representative

39. Any transfer of the share or other interest of a deceased member of a company made by that person's personal representative, shall, notwithstanding that such personal representative may not themselves be a member, be of the same validity as if that person had been a member at the time of the execution of the instrument of transfer.

Register of members

40. (1) Every company shall cause to be kept in writing, a register of its members and there shall be entered therein —

(a) the names and addresses of the members of the company, with the addition of, in the case of a company having a capital divided into shares, a statement of the shares held by each member, and the statement shall —

(i) distinguish each share by its number (so long as the share has a number);

(ii) confirm the amount paid, or agreed to be considered as paid on the shares of each member;

(iii) confirm the number and category of shares held by each member; and

(iv) confirm whether each relevant category of shares held by a member carries voting rights under the articles of association of the company, and if so, whether such voting rights are conditional;

(b) the date on which the name of any person was entered on the register as a member; and

(c) the date on which any person ceased to be a member.

(2) Any company making default in complying with this section shall incur a penalty of five thousand dollars; and every director or manager of the company who knowingly and wilfully authorises or permits such default shall incur the like penalty.

(3) For the purpose of subsection (1), "**voting rights**" means, —

(a) rights conferred on shareholders, including the right to appoint or remove directors, in respect of their shares or, in the case of an entity not having a

share capital, on members, to vote at general meetings of the entity on all or substantially all matters; and

(b) in relation to a legal entity that does not have general meetings at which matters are decided by the exercise of voting rights, the rights conferred upon shareholders or members, as applicable, that are equivalent to those of a person entitled to exercise voting rights in a company.

(4) A voting right is conditional where the voting right arises only in certain circumstances.

Branch registers of members

40A.(1) An exempted company may cause to be kept in any country or territory one or more branch registers of such category or categories of members as the exempted company may determine from time to time.

(2) A branch register is deemed to be part of the exempted company's register of members.

(3) Subject to subsection (6), a branch register shall be kept in the same manner in which a principal register is by this Act required or permitted to be kept.

(4) The exempted company shall cause to be kept at the place where the exempted company's principal register is kept a duplicate of any branch register duly entered up from time to time.

(5) If default is made in complying with subsection (4) within twenty-one days after —

(a) establishing a branch register; or

(b) making changes to the details recorded in a branch register,

the exempted company and every officer of the exempted company who is in default is liable to a penalty of five thousand dollars; and every director or manager of the company who knowingly and wilfully authorises or permits such default shall incur the like penalty.

(6) Subject to subsection (4) with respect to a duplicate of any branch register —

(a) the shares registered in a branch register shall be distinguished from those registered in the principal register; and

(b) no transaction with respect to any shares registered in a branch register shall, during the continuance of that registration, be registered in any other register.

(7) An exempted company may discontinue keeping any branch register, and thereupon all entries in that branch register shall be transferred to some other branch register kept by the exempted company or to the principal register.

(8) For the avoidance of doubt a listed share register maintained under section 40B(3) shall not constitute a branch register for the purposes of this section.

(9) In this section —

"**branch register**" means a branch register referred to in subsection (1); and

"**principal register**" means a company's register of members.

Transfer and registration of shares in respect of a company with listed shares

40B. (1) Title to listed shares of a company may, if so authorised by such company's articles of association, or (in the absence of any applicable provisions in the company's articles of association) by a special resolution of such company, be evidenced and transferred in accordance with the laws applicable to and the rules and regulations of the relevant approved stock exchange that are or shall be applicable to such listed shares as referred to or specified in such articles of association or special resolution.

(2) For the purposes of subsection (1), the laws applicable to an approved stock exchange include, without limitation, the laws of the jurisdiction under which such approved stock exchange is established in so far as they would apply to an entity established under such laws which has listed shares on such approved stock exchange.

(3) Any register of members maintained by a company in respect of its listed shares may be kept by recording the particulars required by section 40 in a form otherwise than legible if such recording otherwise complies with the laws applicable to and the rules and regulations of the relevant approved stock exchange referred to in subsection (1).

(4) To the extent the listed shares register is kept in a form otherwise than legible it must be capable of being reproduced in a legible form.

(5) A company which maintains a listed shares register must also maintain, in respect of any shares which are not listed shares, a separate register of members in accordance with section 40.

(6) References in any enactment or instrument to a company's register of members shall, unless the context otherwise requires, be construed in relation to a company which maintains any listed shares register as referring to each of such company's listed shares register and, if any, its non-listed shares register.

(7) For the purposes of this section —

"**approved stock exchange**" means a stock exchange listed in Schedule 4;

"**listed shares**" means shares which are traded or listed on an approved stock exchange;

"**listed shares register**" means the register of members required to be maintained by a company in respect of its listed shares pursuant to subsection (3); and

"**non-listed shares register**" means the register of members maintained by a company pursuant to subsection (5).

(8) For the purpose of this section —

(a) references to title to shares include any legal or equitable interest in shares; and

(b) references to a transfer of title include a transfer by way of security.

Annual list of members and return of capital, shares, calls, etc.

41. (1) Every company, other than an exempted company that does not hold a licence to carry on business in the Islands to which section 174 refers, having a capital divided into shares shall make a list of all persons who, on the fourteenth day following the date on which the ordinary general meeting, or if there is more than one ordinary general meeting in each year, the first of such ordinary general meetings, is held, are members of the company; and such lists shall state the names and addresses of all the members therein mentioned, and the number of shares held by each of them, and shall contain a summary specifying the —

(a) amount of the capital of the company and the number of shares into which it is divided;

(b) number of shares taken from the commencement of the company up to the date of the summary;

(c) amount of calls made on each share;

(d) total amount of calls received:

(e) total amount of calls unpaid;

(f) total number of shares forfeited;

(g) names and addresses of the persons who have ceased to be members since the last list was made, and the number of shares held by each of them;

(h) names and addresses of directors and officers of the company and the position or office that they hold; and

(i) nature of the business,

and this list and summary shall be contained in a separate part of the register of the company and shall be completed within seven days after such fourteenth day as is mentioned in this section, and a copy shall be forwarded to the Registrar in January of each year after the year of its incorporation.

(2) Every company, other than an exempted company, shall, in January of each year after the year of its registration, pay to the Registrar the annual fee specified in Part 2 of Schedule 5.

(3) Each such annual fee shall be tendered with the list and summary required under subsection (1). A company which has failed to forward to the Registrar any copy required to be forwarded in any January shall be deemed not to have made any default in complying with this section relating to the time within which such copy is required to be forwarded if the company forwards the copy either —

(a) within such further period, if any, as the Registrar, acting in that person's discretion may, by notice, addressed to the company specify; or

(b) within the period of twelve months next following such month of January,

whichever is the shorter, together with the fee payable under subsection (2) and the penalty specified in section 42.

Penalty on company not making return

42. Any company, not being an exempted company, which defaults in forwarding to the Registrar such lists of members or summary or the payment of any fee specified in section 41(1) and (2) shall incur a penalty of —

(a) 33.33% of the annual fee specified in section 41 if the documents are submitted or the fee and penalty are paid between the 1st April and the 30th June;

(b) 66.67% of the annual fee specified in section 41 if the documents are submitted or the fee and penalty are paid between the 1st July and the 30th September; and

(c) 100% of the annual fee specified in section 41 if the documents are submitted or the fee and penalty are paid between the 1st October and the 31st December,

and every director and manager of the company who knowingly and wilfully authorises or permits such default shall incur the like penalty.

Certificate of shares or stock

43. A certificate —

(a) specifying the shares or stock held by a member of a company; and

(b) purportedly signed by a person (including by facsimile or other mechanically affixed signature) with the express or implied authority of that company,

is admissible in evidence as proof of the title of that member to those shares or that stock.

Inspection of register

44. (1) The register of members, commencing from the date of the registration of the company, shall be kept at the registered office of the company or, in the case of an exempted company, at any other place within or outside the Islands except that, in the case of an exempted company that holds a licence to carry on business in the Islands under any applicable law, the register of members shall be kept at its registered office within the Islands.

(2) Except in the case of an exempted company that does not hold a licence to carry on business in the Islands under any applicable law and when closed as hereinafter provided the register of members shall, during business hours, subject to such reasonable restrictions as the company in general meeting may impose, so that no less than two hours in each day be appointed for inspection, be open to the inspection of any member *gratis* and to the inspection of any other person on payment of ten dollars or such less sum as the company may specify for each inspection; and every such member or other person may receive a copy of such register or any part thereof, or of such list or summary of members, on payment of one dollar for every page required to be copied.

(3) If such inspection or copy is refused, the company shall incur for each refusal a penalty of five hundred dollars; and every director and manager of the company who knowingly authorises or permits such refusal shall incur the like penalty; and in addition to the above penalty, a Judge sitting in chambers may, by order, compel an immediate inspection of the register.

(4) A company, including an exempted company, shall make available at the registered office, in electronic form or any other medium, such register, including any branch register in the case of an exempted company, as may be required of it upon service of an order or notice by the Tax Information Authority pursuant to the *Tax Information Authority Act (2021 Revision)*; and if the company fails to comply with the order or notice without reasonable excuse, the company shall incur a penalty of five hundred dollars and a further penalty of one hundred dollars for every day during which such non-compliance continues.

Notice of increase of capital and of members to be given to Registrar

45. (1) Where a company has a capital divided into shares, whether such shares have or have not been converted into stock, notice of any increase in such capital beyond the registered capital, and where a company has not a capital divided into shares, notice of any increase in the number of members beyond the registered number shall be given to the Registrar, in the case of an increase of capital, within thirty days from the date of the passing of the resolution by which such increase has been authorised; and, in the case of an increase of members, within thirty days from the time at which such increase of members has been resolved on or has taken place; and the Registrar shall forthwith record the amount of such increase of capital or members.

(2) The fees payable on an increase of capital shall be as specified in Part 3 of Schedule 5.

(3) If such notice is not given within the period aforesaid the company in default shall incur a penalty of ten dollars for every day during which such neglect to give notice continues, and every director and officer of the company who knowingly and wilfully authorises or permits such default shall incur a like penalty.

Remedy for improper entry or omission of entry in register

46. If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved or any member of the company or the company itself may, by motion to the Court, apply for an order that the register be rectified; and the Court may either refuse such application with or without costs to be paid by the applicant or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application or petition, and any damages the party aggrieved may have sustained. The Court may, in any proceeding under this section, decide any question relating to the title of any person who is a party to such proceeding to have that person's name entered in or omitted from the register, whether such question arises

between two or more members or alleged members, or between any members or alleged members and the company, and generally, the Court may, in any such proceeding, decide any question that it may be necessary or expedient to decide for the rectification of the register:

Provided that the Court may direct an issue to be tried, on which any question of law may be raised.

Notice to Registrar of rectification of register

47. Whenever any order has been made rectifying the register, in the case of a company required by this Act to send a list of its members to the Registrar, the Court shall, by its order, direct that due notice of such rectification be given to the Registrar.

Register to be evidence

48. The register of members shall be *prima facie* evidence of any matters by this Act directed or authorised to be inserted therein.

Liability of Members

Liability of present and past members of company

49. In the event of a company being wound up every present and past member of such company shall be liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges and expenses of the winding up and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves:

Provided that —

(a) a past member shall not be liable to contribute to the assets of the company if that person has ceased to be a member for a period of one year or upwards prior to the commencement of the winding up;

(b) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after the time at which that person ceased to be a member;

(c) a past member shall not be liable to contribute to the assets of the company unless it appears to the Court that the existing members are unable to satisfy the contributions required to be made by them under this Act;

(d) in case of a company limited by shares, no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect of which that person is liable as a present or past member except where such member or past member holds or held shares of a class which are expressly stated in the memorandum of association to carry unlimited liability, as provided in section 8(2);

(e) in the case of a company limited by guarantee, no contribution shall be required from any member exceeding the amount of the undertaking entered into on that person's behalf by the memorandum of association, except where the amount of the undertaking of such member is unlimited, as provided in section 9(2);

(f) nothing in this Act shall invalidate any provisions contained in any policy of insurance or other contract whereby the liability of individual members

upon any such policy or contract is restricted, or whereby the funds of the company are alone made liable in respect of such policy or contract; and

(g) no sum due to any member of a company in that person's character of a member by way of dividends, profits or otherwise, shall be deemed to be a debt of the company, payable to such member in a case of competition between that person and any other creditor not being a member of the company; but any such sum may be taken into account for the purposes of the final adjustment of the rights of the contributions amongst themselves.

PART 4 - Management and Administration of Companies and Associations - Provisions for Protection of Creditors

Registered office of company

50. (1) Every company shall have a registered office in the Islands to which all communications and notices may be addressed and any company which carries on business without having such an office, shall incur a penalty of ten dollars for every day during which business is so carried on.

(2) In the case of an exempted company or a non-resident company, the address of the registered office referred to in subsection (1) shall be the same as the address of the person licensed by the Authority who provides company management services for the exempted company or non-resident company except where the registered office was located at a different address in the Islands immediately prior to the 10th January, 2013, the date of commencement of this provision by the *Companies (Amendment) Act, 2012 [Law 6 of 2012]*, and remains at such address on or after the date of commencement of this provision.

Notice of situation of registered office

51. (1) Notice of the situation of such registered office shall be given to the Registrar and recorded by that person and shall be published by Public Notice. Until such notice is given and published, the company shall not be deemed to have complied with this Act with respect to having a registered office.

(2) Any member of the public shall be entitled to be informed by the Registrar, on request, of the location of the registered office of any company or exempted company registered under this Act.

Publication of name by a limited company

52. Every company, whether limited by shares or by guarantee, shall paint or affix, and shall keep painted or affixed, its name on the outside of every office or place in which the business of the company is carried on, or in any corridor, passage or hallway adjacent or proximate thereto, in a conspicuous position, in letters easily legible, and shall have its name in legible characters on any seal it uses, and shall have its name set out in legible characters in all notices, advertisements and other official publications of such company, and in all bills of exchange, promissory notes, endorsements, cheques and orders for money or goods purporting to be signed by or on behalf of such company, and in all bills of parcels, invoices, receipts and letters of credit of the company and its name may be followed with or preceded by, at the discretion of the company, its dual foreign name or its translated name, if any, or both.

Penalties on non-publication of name

53. Any company which does not paint or affix, and keep painted or affixed, its name in manner directed by this Act is liable to a penalty of ten dollars for not so painting or affixing its name, and for every day during which such name is not so kept painted or affixed, and every director and manager of the company who knowingly and wilfully authorises or permits such default shall be liable to the like penalty; and any director, manager or officer of such company, or any person on its behalf, who uses or authorises the use of any seal purporting to be a seal of the company, whereon its name is not so engraven as aforesaid, or issues or authorises the issue of any notice, advertisement or other official publication of such company, or signs or authorises to be signed on behalf of such company any bills of exchange, promissory note, endorsement, cheque or order for money or goods, or issues or authorises to be issued any bill of parcels, invoice, receipt or letter of credit of the company, wherein its name is not set out in the manner aforesaid, is liable to a penalty of one hundred dollars, and shall further be personally liable to the holder of any such bill of exchange, promissory note, cheque, or order for money or goods for the amount thereof, unless the same is duly paid by the company.

Register of mortgages

54. (1) Every limited company shall keep at its registered office in writing on one or more sheets, whether bound or unbound, a register of all mortgages and charges specifically affecting property of the company, and shall enter in such register in respect of each mortgage or charge a short description of the property mortgaged or charged, the amount of charge created and the names of the mortgagees or persons entitled to such charge.

(2) If any property of the company is mortgaged or charged without such entry as aforesaid being made, every director, manager or other officer of the company who knowingly and wilfully authorises or permits the omission of such entry, shall incur a penalty of one hundred dollars.

(3) The register of mortgages required by subsection (1) shall be open to inspection by any creditor or member of the company at all reasonable times; and if such inspection is refused, any officer of the company refusing the same, and every director and manager of the company authorising or knowingly and wilfully permitting such refusal shall incur a penalty of four dollars for every day during which such refusal continues; and in addition to the above penalty, the Judge sitting in chambers may, by order, compel an immediate inspection of the register.

Filing deadline for updated list of directors etc.

55. (1) Every company shall keep at its registered office a register containing the names and addresses of its directors, including alternate directors, and officers, and shall —

(a) send a copy of such register to the Registrar within sixty days of the first appointment of any director or officer of the company; and

(b) notify the Registrar of any change in such directors or officers including a change of the name of such directors or officers, within thirty days of any such change.

(2) For the purposes of subsection (1) a person shall be registered by a company as an alternate director if that person is —

(a) appointed by a director of the company to exercise all the powers and perform all the responsibilities of that director;

(b) entitled to receive notice of meetings of the board of directors of the company;

(c) entitled to sign or execute written resolutions of the board of directors of the company; and

(d) considered in all respects to be a director of the company.

(3) Subsection (2) does not apply to a person —

(a) appointed by a director to exercise limited powers or to fulfil limited responsibilities;

(b) appointed for a specified period that is less than ninety days;

(c) appointed to attend a particular meeting or series of meetings or adjournments;

(d) appointed to consider and, if approved, sign a particular written resolution or series of written resolutions of the board of directors of the company;

(e) who is a director of the company; or

(f) who at the time of that person's appointment, is the alternate of another director of the company.

Registrar to make list of directors available for inspection

55A. (1) The Registrar shall maintain a list of the names of the current directors, and where applicable, the current alternate directors of a company.

(2) The Registrar shall make available, the list of the names of the current directors of a company and where applicable, the current alternate directors of a company under subsection (1), for inspection by any person, on payment of the fee specified in Part 6A of Schedule 5, for each inspection, and subject to such conditions as the Registrar may impose.

(3) For the purposes of subsection (1), an alternate director is a person who is registered by a company as an alternate director under section 55.

Penalty for failing to notify of changes to the register of directors and officers

56. (1) A company that breaches the provisions of section 55 shall incur a penalty of five hundred dollars.

(2) Notwithstanding subsection (1), if a company is in breach of section 55(1)(b) —

(a) in respect of more than one change in directors or officers and —

(i) the changes occurred within a thirty day period; and

(ii) the Registrar is notified of the changes on the same day;

the applicable penalty for the breach shall be that specified in subsection (1), irrespective of the number of changes notified to the Registrar; and

(b) in respect of directors or officers of five or more companies, the applicable aggregate penalty in respect of the companies to which the breach relates shall not exceed the sum of two thousand five hundred dollars, which shall be equally apportioned between and paid by, such companies.

(3) In addition to the penalty under subsection (1), where the Registrar is satisfied that a breach of section 55 has been knowingly and wilfully authorised or permitted —

(a) every company to which the breach relates shall incur a penalty of one thousand dollars; and

(b) every director and officer of the company to which the breach relates shall incur a penalty of one hundred dollars and a further penalty of one hundred dollars for every day during which the default continues.

Meetings

57. Subject to the memorandum and articles of association of the company, a meeting of —

(a) members;

(b) a class of members;

Case 1:26-cv-00251-LTS Document 2-7 Filed 01/02/26 Page 57 of 197 PageID #: 5564

(c) the board of directors; or

(d) any committee of the directors,

may be validly convened and business conducted, as provided by the articles of association, with only one such member or director being present in person or otherwise as may be provided by the articles of association.

Provisions for Protection of Members

General meetings

58. A general meeting of every company, other than an exempted company, shall be held at least once in every year.

Accounts and audits

59. (1) Every company shall cause to be kept proper books of account including, where applicable, material underlying documentation including contracts and invoices with respect to —

(a) all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place;

(b) all sales and purchases of goods by the company; and

(c) the assets and liabilities of the company.

(2) For the purposes of subsection (1), proper books of account shall not be deemed to be kept with respect to the matters aforesaid if there are not kept such books as are necessary to give a true and fair view of the state of the company's affairs and to explain its transactions.

(2A) A company which keeps its books of account at any place other than at its registered office or at any other place within the Islands shall, upon service of an order or notice by the Tax Information Authority pursuant to the *Tax Information Authority Act (2021 Revision)*, make available, in electronic form or any other medium, at its registered office copies of its books of account, or any part or parts thereof, as are specified in such order or notice; and if the company fails to comply with the order or notice without reasonable excuse, the company shall incur a penalty of five hundred dollars and a further penalty of one hundred dollars for every day during which such non-compliance continues.

(2B) A company which keeps its books of account outside of the Islands shall, in the form and manner prescribed, provide to its registered office, annually or with such other frequency and within such time as may be prescribed, information regarding its books of account; and, if a company fails to comply with this subsection without reasonable excuse, the company shall incur a penalty of five hundred dollars and a further penalty of one hundred dollars for every day during which such non-compliance continues.

(2C) Subsection (2B) shall not apply to a company that complies with a requirement under any regulatory law to file information regarding its accounts to the Authority.

(3) A company shall cause all books of account required to be kept under subsection (1) to be retained for a minimum period of five years from the date on which they are prepared.

(4) A company that knowingly and wilfully contravenes subsection (1) or (3) shall be subject to a penalty of five thousand dollars.

Definition of special resolution

60. (1) A resolution is a special resolution when —

(a) it has been passed by a majority of at least two-thirds of such members as, being entitled to do so, vote in person or, where proxies are allowed, by proxy at a general meeting of which notice specifying the intention to propose the resolution as a special resolution has been duly given, except that a company may in its articles of association specify that the required majority shall be a number greater than two-thirds, and may additionally so provide that any such majority (being not less than two-thirds) may differ as between matters required to be approved by a special resolution; or

(b) if so authorised by its articles of association, it has been approved in writing by all of the members entitled to vote at a general meeting of the company in one or more instruments each signed by one or more of the members aforesaid, and the effective date of the special resolution so adopted shall be the date on which the instrument or the last of such instruments, if more than one, is executed.

(2) At any meeting mentioned in this section, unless a poll is demanded by at least one member, a declaration of the chairperson that the resolution has been carried shall be conclusive evidence of the fact, without proof of the number or proportion of votes recorded in favour of or against the same.

(3) Notice of any meeting shall, for the purposes of this section, be deemed to be duly given and the meeting to be duly held, whenever such notice is given and the meeting held in manner prescribed by the regulations of the company.

(4) In computing the majority under this section when a poll is demanded, regard shall be had to the number of votes to which each member is entitled by the regulations of the company.

Case 1:26-cv-00251-LSC Document 3-7 Filed 05/02/26 Page 59 of 197 PageID #: 5566

Provisions where no regulations as to meetings

61. In default of any regulations as to voting, every member shall have one vote, and in default of any regulations as to summoning general meetings, a meeting shall be held to be duly summoned of which five days' notice has been served on every member; and in default of any regulations as to the persons to summon meetings, three members shall be competent to summon the same; and in default of any regulations as to who is to be chairperson of such meeting, it shall be competent for any person elected by the members present to preside.

Recording of special resolutions

62. A copy of any special resolution passed by any company under this Act shall be forwarded within fifteen days to the Registrar and shall be recorded by that person.

Copies of special resolutions

63. (1) Where articles of association have been registered, a copy of every special resolution for the time being in force shall be annexed to or embodied in, every copy of the articles of association that may be issued after the passing of such resolution.

(2) Where no articles of association have been registered, a copy of any special resolution shall be forwarded in print to any member requesting the same, on payment of ten cents or such less sum as the company may direct.

(3) Any company which fails to comply with this section shall incur a penalty of two dollars for each copy in respect of which such default is made; and every director and manager of the company who shall knowingly and wilfully authorise or permit such default shall incur the like penalty.

Appointment of inspectors to report on affairs of companies

64. The Court may appoint one or more than one competent inspectors to examine into the affairs of any company and to report thereon in such manner as the Court may direct —

(a) in case of a banking company having a capital divided into shares, upon the application of members holding not less than one-third of the shares of the company for the time being issued;

(b) in the case of any other company having a capital divided into shares, upon application of members holding not less than one-fifth of the shares of the company for the time being issued; and

(c) in the case of a company not having a capital divided into shares, upon the application of members being in number not less than one-fifth of the total number of persons for the time being entered on the register of the company as members.

Powers of inspectors

65. It shall be the duty of all officers and agents of the company to produce for examination by an inspector all books and documents in their custody or power; any inspector may examine upon oath the officers and agents of the company in relation to its business, and may administer such oath accordingly; and any officer or agent who refuses or neglects to produce any book or document hereby directed to be produced, or to answer any question relating to the affairs of the company, shall incur a penalty not exceeding forty dollars in respect of each such offence.

Report of inspectors

66. (1) Upon the conclusion of the examination, the inspectors shall report their opinions to the Court.

(2) Such report shall be filed by the Clerk of the Court, but shall not, unless the Court so directs, be open to public inspection.

(3) All expenses of and incidental to any such examination and report shall be defrayed by the members upon whose application the inspectors were appointed, unless the Court shall direct the same to be paid out of the assets of the company, which it is hereby authorised to do.

Inspection by resolution of the company

67. Any company as aforesaid may, by special resolution, appoint inspectors for the purpose of examining into the affairs of such company; and inspectors so appointed shall have the same powers and perform the same duties as inspectors appointed by the Court, except that instead of making their report to the Court, they shall make the same in such manner and to such persons as the company by resolution of its members directs, and the officers and agents of the company shall incur the same penalties in case of any refusal or neglect to produce any book or document hereby required to be produced to such inspectors or answer any question, as they would have incurred if such inspectors had been appointed by the Court.

Inspectors' report admissible as evidence

68. The report of any inspectors appointed under this Act, or any copy thereof certified and signed by the inspectors, shall be admissible in any legal proceeding as evidence of the opinion of the inspectors in relation to any matter contained in such report.

Notices

Returns, etc., to Registrar

69. Any list, return, notice or information required by this Act to be made, given or supplied to the Registrar shall be authenticated by the signature of the secretary or manager or one of the directors of the company.

Service of notices on company

70. Any writ, notice, order or other document required to be served upon the company may be served by leaving the same, or sending it through the post in a prepaid letter, addressed to the company at its registered office.

Postal service

71. Any document to be served by post on the company shall be posted in such time as to admit of its being delivered in the due course of delivery within the period, if any, prescribed for the service thereof; and in proving service of such document, it shall be sufficient to prove that such document was properly directed, and that it was put as a prepaid letter into the post office.

Authentication of summons, notice, etc.

72. Any summons, notice, order or proceeding requiring authentication by the company may be signed by a director, secretary or other authorised officer of the company, and may be in writing or print or partly in writing and partly in print.

Minutes of proceedings

73. (1) Every company shall cause minutes of all resolutions and proceedings of its members, whether at general meetings or otherwise, and of its directors or managers (where there are directors or managers), whether at meetings or otherwise, to be duly kept in writing.

(2) Any minute of a general meeting of the company or a meeting of the directors or managers, if purporting to be signed by the chairperson of the meeting, or by the chairperson of the next succeeding meeting, shall be received as evidence of the proceedings at that meeting; and until the contrary is proved, every general meeting of the company or meeting of the directors or managers in respect of the proceedings of which minutes have been so made, shall be deemed to have been duly held and convened and all resolutions passed thereat, or proceedings had, to have been duly passed and had, and all appointments of directors, managers or liquidators shall be deemed to be valid, and all acts done by such directors, managers and liquidators shall be valid, notwithstanding any defect that may afterwards be discovered in their appointments or qualifications.

Security for costs in actions brought by limited companies

74. Where a company is plaintiff in any action, suit or other legal proceeding, any Judge having jurisdiction in the matter, if that person is satisfied that there is reason to believe that if the defendant is successful in that person's defence the assets of the company will be insufficient to pay that person's costs, may require sufficient security to be given for such costs, and may stay all proceedings until such security is given.

Declaration in action against members

75. In any action or suit brought by the company against any member to recover any call or other monies due from such member in that person's character of member, it shall not be necessary to set forth the special matter, but it shall be sufficient to allege that the defendant is a member of the company and is indebted to the company in respect of a call made or other monies due whereby a right of action has accrued to the company.

Arbitration

Power of companies to refer matters to arbitration

76. Any company may, from time to time, by writing, agree to refer and may refer to arbitration any existing or future difference, question or other matter whatsoever in dispute between itself and any other company or person; and the companies, parties to the arbitration, may delegate to the person or persons to whom the reference is made power to settle any terms or to determine any matter capable of being lawfully settled or determined by the companies themselves or by the directors or other managing body of such companies.

General Penalty

General penalty; application of fines

77. (1) Where a duty is imposed by this Act on any company, director or officer of any company and no special penalty or fine has been provided for the breach of such duty, then any such company director or officer responsible for such breach commits an offence and is liable on conviction to a fine of five thousand dollars.

(2) All fines shall be recovered in a summary way and shall be applied in aid of the general revenue of the Islands.

Unlimited Liability of Directors and Managers

Unlimited liability of directors and managers

78. The liability of the directors, managers or the managing director of a company may, if so provided by the memorandum of association, be unlimited.

Modification of section 49

79. In the event of a company being wound up, section 49 as respects the contribution to be required from any director or manager whose liability is unlimited by virtue of section 78 shall have effect subject to the following modifications —

(a) subject as hereinafter contained, any such director, managing director or manager whether past or present shall, in addition to that person's liability, if any, to contribute as an ordinary member, be liable to contribute as if that person were at the date of the commencement of such winding up a member of an unlimited company;

(b) no contribution required from any past director or manager who has ceased to hold such office for a period of one year or upwards prior to the commencement of such winding up, shall exceed the amount, if any, which that person is liable to contribute as an ordinary member of the company;

(c) no contribution required from any past director or manager in respect of any debt or liability of the company contracted after the time at which that person ceased to hold such office shall exceed the amount, if any, which that person is liable to contribute as an ordinary member of the company; and

(d) subject to the regulations of the company, no contribution required from any director or manager shall exceed the amount, if any, which that person is liable to contribute as an ordinary member, unless the Court thinks it necessary to require such contribution in order to satisfy the debts and liabilities of the company and the costs, charges and expenses of the winding up.

Association not for Profit

Circumstances in which a company may be registered without "limited" in its name

80. (1) A company registered under this Act or an association applying to be registered under this Act, may in accordance with section 80A, apply to the Registrar to be designated as a company to which this section applies if the company or association —

(a) was formed or is to be formed primarily for the promotion of charitable, philanthropic, religious, cultural, educational, social or fraternal purposes or objects, including, for the avoidance of doubt, a group of persons sharing a common profession or interest which, to the satisfaction of the Registrar, qualifies the company or association for registration under this section; and

(b) has applied or intends to apply the profits, if any, or other income of the company or association primarily for the promotion of charitable, philanthropic, religious, cultural, educational, social or fraternal purposes or objects, including, for the avoidance of doubt, a group of persons sharing a common profession or interest which, to the satisfaction of the

Registrar, qualifies the company or association for registration under this section.

(2) The Registrar shall only approve an application for designation under this section if the memorandum and articles of association of a company registered under this Act or an association being registered under this Act and applying for designation, contain language to the effect that —

(a) the assets, profits, if any, and other income of the company or association applying for designation, shall be applied exclusively in the furtherance of the objects of the company or association; and

(b) no portion of the assets and income of the company or association shall be distributed as profit or dividend directly or indirectly to the controllers, shareholders, owners or members of the company or association, unless such distribution is intended for the legitimate purpose of compensating a person for services to further the objects of the company or association or to pay the liabilities incurred on behalf of the company or association.

(3) Pursuant to an application made under subsection (1), the Registrar may direct that a company registered under this Act or that an association being registered under this Act, be registered with limited liability without the addition of the word "Limited" or the abbreviation "Ltd." to the company's name and that upon registration shall enjoy all the privileges and be subject to all the obligations by this Act imposed on companies, except the obligations under this Act requiring a company —

(a) to use the word "Limited" or the abbreviation "Ltd." as any part of its name;

(b) to send a list of its members to the Registrar;

(c) to comply with the provisions of sections 51 or 55 or pay any fees pursuant to section 199; or

(d) to pay the fees prescribed by sections 26, 41 and 169.

(4) The Registrar may impose any conditions that the Registrar thinks fit to impose on a company designated under this section and shall cause the conditions imposed to be inserted or endorsed on the memorandum or articles of association of the company or association being registered.

(5) Where a company designated under this section is to be dissolved, the person who owns, controls or directs that company shall ensure that any assets of the company remaining after the satisfaction of all debts and liabilities of the company shall be transferred to another company registered under this section or a non-profit organisation registered under the *Non-Profit Organisations Act (2020 Revision)* which has similar objects.

(6) For the purpose of this section "**non-profit organisation**" has the same meaning as that assigned to these words in the *Non-Profit Organisations Act (2020 Revision).*

Application for designation under section 80

80A.(1) An application for designation as a company under section 80 may be made to the Registrar by a company or an association to which section 80 refers and shall be —

(a) made in the form specified by the Registrar; and

(b) accompanied by the non-refundable application fee prescribed in Part 3A.

(2) A company making an application under subsection (1) shall, at the time of making the application, file with the Registrar a list of the persons who own, control or direct the company.

Obligations for companies designated under section 80

80B.A company designated pursuant to section 80 that is not registered pursuant to the *Non-Profit Organisations Act (2020 Revision)* shall —

(a) file with the Registrar, in the form specified by the Registrar, an annual return confirming the objects and activities of the company;

(b) in the manner specified by the Registrar, notify the Registrar of any change in —

(i) the objects or activities of the company; or

(ii) the address of the registered office or the location of the company,

within thirty days of the date of the change;

(c) maintain the proper books of account for a minimum period of five years;

(d) comply with any conditions imposed by the Registrar upon registration;

(e) establish and maintain internal controls and systems appropriate for the company to identify conduct which may involve the financing of terrorism;

(f) notify the Registrar, in the manner specified by the Registrar, of any change in the person who owns, controls or directs the company, within thirty days of the date of the change; and

(g) pay the fee prescribed in Part 3A for any changes for which the Registrar is required to be notified pursuant to this section.

Examination by the Registrar

80C.To facilitate the monitoring of compliance with section 80B(b) and (c) —

(a) the Registrar may examine all books of account and documents, for a company designated under section 80; and

(b) it shall be the duty of an officer of a company designated under section 80 to produce for examination by the Registrar, all books of account and documents, for the company for which the officer is responsible, that are in the officer's custody or power.

Repealed

80D. **Repealed** by section 2 of the *Companies (Amendment) Act, 2023 [Act 15 of 2023]*.

Penalty for breach of section 80B

80E. (1) The Registrar —

(a) may impose a penalty of five hundred dollars on a company designated under section 80, if the company breaches the provisions of section 80B; and

(b) shall within ten days of the date of the imposition of the penalty, inform the company upon which the penalty has been imposed, of the reasons for the imposition of the penalty.

(2) A company, upon which a penalty is imposed pursuant to subsection (1), which disputes the imposition of the penalty may appeal to the Court for review of the Registrar's decision to impose the penalty.

(3) A dispute in relation to the penalty imposed pursuant to subsection (1) shall not be in respect of the amount of the penalty imposed and is limited to a dispute in relation to the grounds upon which the penalty is imposed.

(4) Notwithstanding subsection (1), if a company is in breach of section 80B —

(a) in respect of more than one change in the person who owns, controls or directs a company and —

(i) the changes occurred within a sixty day period; and

(ii) the Registrar is notified of the changes on the same day,

the applicable penalty for the breach shall be that specified in subsection (1), irrespective of the number of changes notified to the Registrar; and

(b) in respect of a person who owns, controls or directs five or more companies, the applicable aggregate penalty in respect of the companies to which the breach relates shall not exceed the sum of two thousand five hundred dollars, which shall be equally apportioned between and paid by such companies.

(5) In addition to the penalty under subsection (1), where the Registrar is satisfied that a breach of section 80B has been knowingly and wilfully authorised or permitted —

(a) every company to which the breach relates shall incur a penalty of one thousand dollars; and

Case 1:26-cv-00251-LTS-BCM Document 25-7 Filed 01/02/26 Page 67 of 197 PageID #: 5574

(b) every person who owns, controls or directs the company to which the breach relates shall incur a penalty of one thousand dollars and a further penalty of one hundred dollars for every day during which the default continues.

Contracts

Contracts and other instruments

81. (1) Contracts, deeds, instruments under seal or other instruments on behalf of any company may be made as follows —

(a) a contract or other instrument which, if made between individuals, would by law be required to be in writing, and to be made by deed or under seal, and a deed or instrument under seal may be made by instrument —

(i) sealed with any seal of the company; or

(ii) which is executed on behalf of the company by any person acting under the express or implied authority of the company and which is either expressed to be executed as, or otherwise makes clear on its face it is intended to be, a deed or instrument under seal;

(b) any contract or other instrument which, if made between private persons, would be by law required to be in writing and signed by the parties to be charged therewith may be made on behalf of the company in writing, signed by any person acting under the express or implied authority of the company; and

(c) any contract which, if made between private persons, would by law be valid although made by parol only and not reduced into writing, may be made by parol on behalf of the company by any person acting under the express or implied authority of the company.

(2) Where a contract or other transaction purports to be made by a company or by a person on its behalf at a time when the company has not been registered, then subject to any agreement to the contrary, the contract or other transaction has effect as one entered into by the person purporting to act on behalf of the company and, subject to subsection (3), that person is personally liable on the contract or other transaction.

(3) A contract or other transaction purported to be entered into by a company prior to its registration or by a person on behalf of the company prior to its registration may be ratified by the company after its registration and thereupon the company shall become bound by and entitled to the benefit thereof from the date of registration, and the person so entering into such contract or other transaction shall be deemed to have been duly authorised to act on behalf of the company and shall cease to be personally liable on the contract or other transaction.

(4) Any contract, deed or other instrument made according to this section may be varied or discharged in the same manner as it is authorised by this section to be made.

(5) All contracts, deeds or other instruments made according to this section shall be effectual in law and shall be binding upon the company and its successors and all other parties thereto, their heirs, executors or administrators, as the case may be.

(6) A contract or other instrument to be governed by the laws of the Islands which is executed by an overseas company is, and is to be treated as, a deed or instrument under seal if it is —

(a) executed in conformity with subsection (1)(a); and

(b) executed in conformity with the requirements imposed by —

(i) the laws of the jurisdiction in which the overseas company was formed or incorporated; and

(ii) its memorandum or articles of association or other constitutional documents (howsoever called).

(7) A contract or other instrument executed in accordance with subsection (6) meets any requirement of any law of the Islands that the contract or instrument is, and is to be treated as, a deed or instrument executed under seal.

(8) A contract, deed or instrument is executed validly as a contract, deed or instrument under seal where it is executed in any manner contemplated by the parties thereto, including, without limitation —

(a) where the complete contract, deed or instrument is executed; or

(b) where any signature or execution page to the contract, deed or instrument is executed (whether or not the contract, deed or instrument is at such time in final form) which is attached by, or on behalf of, the relevant party to, or otherwise with the relevant party's express or implied authority to, the contract, deed or instrument,

provided always that the contract, deed or instrument is executed in conformity with subsection (1)(a) or (b), or subsection (6), as the case may be.

(9) Subsections (1), (4), (5), (6), (7) and (8) shall apply to contracts, deeds, instruments under seal or other instruments regardless of whether they were made before, on or after 27th April, 2011, the date of commencement of this subsection by the *Companies (Amendment) Act, 2011 [Law 16 of 2011]*, and no contract, deed, instrument under seal or other instrument made before the commencement of this subsection shall be invalid by reason only of any provision of subsections (1), (4), (5), (6), (7) and (8).

Bills of exchange and promissory notes

82. A bill of exchange or promissory note shall be deemed to have been made, accepted or endorsed on behalf of a company if made, accepted or endorsed in the name of, or by or on behalf or on account of, the company by any person acting under its authority.

Execution of deeds, etc., by attorney

83. (1) A company may appoint and empower a person either generally or in respect of a specified matter to execute deeds or instruments under seal on its behalf.

(2) Any appointment under subsection (1) need not be made by deed or instrument under seal, but any person so appointed otherwise than by deed or instrument under seal shall not constitute the donee of a power under the *Powers of Attorney Act (1996 Revision)* (but without prejudice to the authority otherwise conferred upon them by the company).

(3) A deed or instrument under seal signed by a person on behalf of a company pursuant to the authority conferred pursuant to subsection (1) shall bind the company and have effect as if it were executed as such by the company.

Power of company to have official seal for use abroad

84. (1) A company may maintain a common seal, which shall bear the name of the company in legible characters, which may, at the discretion of the company, be followed with or preceded by its dual foreign name or its translated name, if any, or both at such place as the company may, from time to time, determine and in default of any such determination, at its registered office, and may, if so authorised by its articles of association, maintain a duplicate seal or seals, each of which shall be a facsimile of its common seal at such place or places throughout the world as it may authorise and any such duplicate seal may, but shall not be obliged to, bear on its face the name of any country, territory, district, or place where it is to be used.

(2) A deed or instrument under seal to which any such duplicate seal is duly affixed shall bind the company as if it had been sealed with the common seal of the company.

(3) A company having any such duplicate seal may authorise any person appointed for the purpose to affix the duplicate seal to any deed or other document to which the company is party.

(4) The authority of any such agent shall, as between the company and any person dealing with the agent, continue during the period, if any, specified in the instrument conferring the authority, or if no period is so specified, then until notice of the revocation or determination of the authority of the agent has been given to such person.

(5) The person affixing any such duplicate seal shall, by writing under that person's hand, certify on the deed or other instrument to which the seal is affixed the date on which it is affixed.

Authentication of documents

85. A document or proceeding requiring authentication by a company may be signed by a director, secretary or other authorised officer of the company.

Arrangements and Reconstructions

Power to compromise with creditors and members

86. (1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them, or between the company and its members or any class of them, the Court may, on the application of the company or of any creditor or member of the company, or of a restructuring officer appointed in respect of the company, or where a company is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.

(2) If a majority in number representing seventy-five per cent in value of the creditors or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, as the case may be, and also on the company or, where a company is in the course of being wound up, on the liquidator and contributories of the company.

(2A) If seventy-five per cent in value of the members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the members or class of members, as the case may be, and also on the company or, where a company is in the course of being wound up, on the liquidator and contributories of the company.

(3) An order made under subsection (2) or (2A) shall have no effect until a copy of the order has been delivered to the Registrar for registration, and a copy of every such order shall be annexed to every copy of the memorandum of association of the company issued after the order has been made, or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(4) If a company makes default in complying with subsection (3), the company and every officer of the company who is in default shall be liable to a fine of two dollars for each copy in respect of which default is made.

(5) In this section the expression "**company**" means any company liable to be wound up under this Act and the expression "**arrangement**" includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods.

Provisions for facilitating reconstruction and amalgamation of companies

87. (1) Where an application is made to the Court under section 86 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are specified in that section, and it is shown to the Court that the compromise or arrangement has been proposed for the purpose of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as "a transferor company") is to be transferred to another company (in this section referred to as "the transferee company") the Court, may either by the order sanctioning the compromise or arrangement or by any subsequent order make provision for —

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d) the dissolution, without winding up, of any transferor company;

(e) the provisions to be made for any person who within such time and in such manner as the Court directs dissents from the compromise or arrangement; and

(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation is fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and any such property shall, if the order so directs, be freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect

(3) Where an order is made under this section, every company in relation to which the order is made shall cause a copy thereof to be delivered to the Registrar for

registration within seven days after the making of the order, and if default is made in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.

(4) In this section —

"**property**" includes property, rights and powers of every description;

"**liabilities**" includes duties; and

"**transferee company**" means any company or body corporate established in the Islands or in any other jurisdiction.

Power to acquire shares of dissentient shareholders

88. (1) Where a scheme or contract involving the transfer of shares or any class of shares in a company (in this section referred to as "the transferor company") to another company, whether a company within the meaning of this Act or not (in this section referred to as "the transferee company") has, within four months after the making of the offer in that behalf by the transferee company, been approved by the holders of not less than ninety per cent in value of the shares affected, the transferee company may, at any time within two months after the expiration of the said four months, give notice in the prescribed manner to any dissenting shareholder that it desires to acquire that person's shares, and where such notice is given the transferee company shall, unless on an application made by the dissenting shareholder within one month from the date on which the notice was given, the Court thinks fit to order otherwise, be entitled and bound to acquire those shares on the terms on which under the scheme or contract the shares of the approving shareholders are to be transferred to the transferee company.

(2) Where a notice has been given by the transferee company under this section and the Court has not, on an application made by the dissenting shareholder, ordered to the contrary, the transferee company shall, on the expiration of one month from the date on which the notice has been given or, if an application to the Court by the dissenting shareholder is then pending, after that application has been disposed of, transmit a copy of the notice to the transferor company and pay or transfer to the transferor company the amount or other consideration representing the price payable by the transferee company for the shares which by virtue of this section that company is entitled to acquire, and the transferor company shall thereupon register the transferee company as the holder of those shares.

(3) Any sums received by the transferor company under this section shall be paid into a separate bank account, and any such sums and any other consideration so received shall be held by that company on trust for the several persons entitled to the shares in respect of which the said sum or other consideration were respectively received.

(4) In this section —

"**dissenting shareholder**" includes a shareholder who has not assented to the scheme or contract and any shareholder who has failed or refused to transfer that person's shares to the transferee company, in accordance with the scheme or contract.

PART 5 - Company Restructuring and Winding up of Companies and Associations

Preliminary

Definitions

89. In this Part —

"**company**" includes a foreign company in respect of which the Court has made a winding up order;

"**contributory**" means —

(a) every person liable by virtue of section 49 to contribute to the assets of a company in the event that it is wound up under this Act; and

(b) every holder of fully paid up shares of a company;

"**controller**" means a person appointed by the Authority pursuant to the regulatory laws to take control of a company;

"**document**" includes any device by means of which information is recorded or stored;

"**foreign company**" means any body corporate incorporated outside the Islands;

"**foreign practitioner**" means a person who is qualified under the law of a foreign country to perform functions equivalent to those performed by official liquidators under this Act or by trustees in bankruptcy under the *Bankruptcy Act (1997 Revision)*;

"**limited partnership**" means an ordinary limited partnership registered in accordance with section 49 of the *Partnership Act (2024 Revision)* or an exempted limited partnership registered in accordance with section 9 of the *Exempted Limited Partnership Act (2021 Revision)*;

"**official liquidator**" means the liquidator of a company which is being wound up by order of the Court or under the supervision of the Court and includes a provisional liquidator;

"**prescribed**" means prescribed by the Insolvency Rules Committee;

"**professional service provider**" means a person who contracts to provide general managerial or administrative services to a company on an annual or continuing basis;

"**qualified insolvency practitioner**" means a person holding the qualifications specified in the regulations made by the Insolvency Rules Committee under section 155 or such other qualifications as the Court considers appropriate for the conduct of the winding up of a company;

"**Rules**" mean rules prescribed by the Insolvency Rules Committee;

"**shadow director**" means, in relation to a company, any person in accordance with whose directions or instructions the directors of the company are accustomed to act, but the person is not deemed to be a shadow director by reason only that the directors act on advice given by that person in a professional capacity; and

"**winding up order**" includes an order that a voluntary winding up continue under the supervision of the Court and references to a company being wound up by the Court includes a company which is being wound up under the supervision of the Court.

Alternative modes of winding up

90. A company may be wound up —

(a) compulsorily by order of the Court;

(b) voluntarily —

(i) by virtue of a special resolution;

(ii) because the period, if any, fixed for the duration of the company by its articles of association has expired; or

(iii) because the event, if any, has occurred, on the occurrence of which its articles of association provide that the company shall be wound up; or

(c) under the supervision of the Court.

Jurisdiction of the Court

91. The Court has jurisdiction to make winding up orders in respect of —

(a) an existing company;

(b) a company incorporated and registered under this Act;

(c) a body incorporated under any other law; and

(d) a foreign company which —

(i) has property located in the Islands;

(ii) is carrying on business in the Islands;

(iii) is the general partner of a limited partnership; or

(iv) is registered under Part 9.

Company Restructuring

Interpretation of "company"

91A. For the purposes of sections 91B, 91C, 91D, 91E, 91F, 91G, 91H, 91I and 91J, "**company**" means —

(a) any company liable to be wound up under section 91; or

(b) any other entity or partnership to which the provisions of this Part apply in respect of the entity's or partnership's winding up.

Appointment of a restructuring officer

91B.(1) A company may present a petition to the Court for the appointment of a restructuring officer on the grounds that the company —

(a) is or is likely to become unable to pay its debts within the meaning of section 93; and

(b) intends to present a compromise or arrangement to its creditors (or classes thereof) either, pursuant to this Act, the law of a foreign country or by way of a consensual restructuring.

(2) A petition under subsection (1) may be presented by a company acting by its directors, without a resolution of its members or an express power in its articles of association.

(3) The Court may, on hearing a petition under subsection (1) —

(a) make an order appointing a restructuring officer;

(b) adjourn the hearing conditionally or unconditionally;

(c) dismiss the petition; or

(d) make any other order as the Court thinks fit, except an order placing the company into official liquidation, which the Court may only make in accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94.

(4) A restructuring officer appointed by the Court under subsection (3)(a) shall have the powers and carry out only such functions as the Court may confer on the restructuring officer in the order appointing the restructuring officer, including the power to act on behalf of the company.

(5) Where the Court makes an order under subsection (3)(a), the Court shall set out in the order —

(a) the manner and time within which the restructuring officer shall give notice of the restructuring officer's appointment to —

(i) the company's creditors, including any contingent or prospective creditors;

(ii) the company's contributories; and

(iii) the Authority, in respect of any company which is carrying on regulated business;

(b) the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors; and

(c) any other conditions to be imposed on the board of directors that the Court considers appropriate, in relation to the exercise by the board of directors of its powers and functions.

(6) Where a company which is carrying on a regulated business presents a petition under subsection (1), the directors of the company shall, immediately after presenting the petition, serve notice of the petition on the Authority.

(7) A director who fails to comply with subsection (6) commits an offence and is liable to a fine of ten thousand dollars.

Appointment of an interim restructuring officer

91C.(1) A company may, where it is in the interests of the company to do so, make an *ex parte* application to the Court for the appointment of a restructuring officer on an interim basis pending the hearing of the petition under section 91B(1).

(2) An application under subsection (1) may be presented by a company acting by its directors without a resolution of its members or an express power in its articles of association.

(3) The Court may, on hearing an application under subsection (1), appoint a restructuring officer on an interim basis, on such terms and conditions as the Court thinks fit.

(4) A restructuring officer appointed on an interim basis by the Court under subsection (3) shall have the powers and carry out only such functions as the Court may confer on that restructuring officer in the order appointing the restructuring officer, including the power to act on behalf of the company.

(5) Where the Court makes an order under subsection (3), the Court shall set out in the order —

(a) the manner and time within which the restructuring officer shall give notice of the restructuring officer's appointment to —

(i) the company's creditors, including any contingent or prospective creditors;

(ii) the company's contributories; and

(iii) the Authority, in respect of any company which is carrying on regulated business;

(b) the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors; and

(c) any other conditions to be imposed on the board of directors that the Court considers appropriate, in relation to the exercise by the board of directors of its powers and functions.

(6) Where a company which is carrying on a regulated business makes an application under subsection (1), the directors of the company shall, immediately after making the application, serve notice of the application on the Authority.

(7) A director who fails to comply with subsection (6), commits an offence and is liable to a fine of ten thousand dollars.

Restructuring officer

91D. (1) A restructuring officer appointed under section 91B or 91C shall be a qualified insolvency practitioner.

(2) Where two or more persons are appointed as restructuring officers under section 91B or 91C, they shall be authorised to act jointly and severally, unless their powers are expressly limited by an order of the Court.

(3) A restructuring officer appointed under section 91B or 91C is an officer of the Court.

(4) Notwithstanding subsection (1), where the Court has appointed a qualified insolvency practitioner to act as a restructuring officer, the Court may appoint a foreign practitioner to act as a restructuring officer in addition to the qualified insolvency practitioner.

(5) A foreign practitioner appointed by the Court to act as a restructuring officer shall not act as the sole restructuring officer of a company.

(6) The remuneration of a restructuring officer appointed under section 91B or 91C shall, on the application of the restructuring officer, be fixed by the Court from time to time in accordance with section 109.

(7) A restructuring officer, a creditor of the company, including a contingent or prospective creditor, or a contributory of the company may apply to the Court to determine any question arising in the course of carrying out the restructuring officer's functions.

Variation or discharge of the order appointing a restructuring

91E. (1) At any time after the appointment of a restructuring officer by the Court under section 91B or 91C —

(a) the company acting by its directors;

(b) a restructuring officer appointed under section 91B or 91C;

(c) a creditor of the company, including a contingent or prospective creditor;

(d) a contributory of the company; or

(e) the Authority, in respect of any company which is carrying on a regulated business,

may apply by way of summons to the Court for the variation or discharge of the order appointing the restructuring officer.

(2) An application under subsection (1)(a) may be presented by a company acting by its directors without a resolution of its members or an express power in its articles of association.

(3) The Court may, on hearing an application under subsection (1) —

(a) vary the order appointing the restructuring officer;

(b) discharge or continue the order appointing the restructuring officer;

(c) adjourn the hearing conditionally or unconditionally;

(d) dismiss the application; or

(e) make any other order as the Court thinks fit, except an order placing the company into official liquidation, which the Court may only make in accordance with sections 92 and 95 if a winding up petition has been presented in accordance with sections 91G and 94.

Removal and replacement of restructuring officers

91F. (1) A restructuring officer may be removed from office and replaced by an alternative restructuring officer by order of the Court made on the application of —

(a) the company acting by its directors;

(b) a creditor of the company, including a contingent or prospective creditor;

(c) a contributory of the company; or

(d) the Authority, in respect of any company which is carrying on a regulated business.

(2) An application under subsection (1)(a) may be presented by a company acting by its directors without a resolution of its members or an express power in its articles of association.

(3) A restructuring officer who has been removed and replaced pursuant to subsection (1) shall prepare a report and accounts for the restructuring officer replacing the removed restructuring officer, within twenty-one days of the date of removal and replacement.

Stay of proceedings

91G.(1) At any time —

(a) after the presentation of a petition for the appointment of a restructuring officer under section 91B, but before an order for the appointment of a restructuring officer is made, and when the petition has not been withdrawn or dismissed; and

(b) when an order for the appointment of a restructuring officer is made, until the order appointing the restructuring officer has been discharged,

no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company, no resolution shall be passed for the company to be wound up and no winding up petition may be presented against the company, except with the leave of the Court and subject to such terms as the Court may impose.

(2) Where at any time referred to in subsection (1), there are criminal proceedings pending against the company in a summary court, the Court, the Court of Appeal or the Privy Council —

(a) the company acting by its directors;

(b) a creditor of the company, including a contingent or prospective creditor;

(c) a contributory of the company; or

(d) the Authority, in respect of any company which is carrying on regulated business,

may apply to the court in which the proceedings are pending for a stay of the proceedings and the court to which the application is made, may stay the proceedings on such terms as it thinks fit.

(3) In this section —

(a) references to a suit, action or other proceedings include a suit, action or other proceedings in a foreign country; and

(b) references to other proceedings include any court supervised insolvency or restructuring proceedings against the company.

Enforcement of creditors' security

91H. Notwithstanding the presentation of a petition for the appointment of a restructuring officer or the appointment of a restructuring officer by the Court under section 91B or 91C, a creditor who has security over the whole or part of the assets of the company is entitled to enforce the creditor's security without the leave of the Court and without reference to the restructuring officer appointed under section 91B or 91C.

Power to compromise with creditors and members within restructuring officer proceeding

91I. (1) Where a restructuring officer is appointed to a company and a compromise or arrangement is proposed between the company and its creditors or any class of them, or the company and its members or any class of them, the Court may, on the application of the restructuring officer, order a meeting of the creditors or class of creditors, or of the members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs.

(2) If a majority in number representing seventy-five per cent in value of the creditors or class of creditors, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors, as the case may be, and also on the company.

(3) If seventy-five per cent in value of the members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the members or class of members, as the case may be, and also on the company.

(4) An order made under subsection (2) or (3) shall have no effect until a copy of the order has been delivered to the Registrar for registration, and a copy of every such order shall be annexed to every copy of the memorandum of association of the company issued after the order has been made, or, in the case of a company not having a memorandum, of every copy so issued of the instrument constituting or defining the constitution of the company.

(5) If a company makes default in complying with subsection (4), the company and every officer of the company who is in default shall be liable to a fine of two dollars for each copy in respect of which default is made.

(6) In this section, "**arrangement**" includes a reorganisation of the share capital of the company by the consolidation of shares of different classes or by the division of shares into shares of different classes or by both those methods.

Provisions for facilitating reconstruction and amalgamation of companies

91J. (1) Where an application is made to the Court under section 91I for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are specified in that section, and it is shown to the Court that the compromise or arrangement has been proposed for the purpose of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as "**a transferor company**") is to be transferred to another company (in this section referred to as "**the transferee company**") the Court, may either by the order sanctioning the compromise or arrangement or by any subsequent order make provision for —

(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;

(b) the allotting or appropriation by the transferee company of any shares, debentures, policies, or other like interests in that company which under the compromise or arrangement are to be allotted or appropriated by that company to or for any person;

(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;

(d) the dissolution, without winding up, of any transferor company;

(e) the provisions to be made for any person who within such time and in such manner as the Court directs dissents from the compromise or arrangement; and

(f) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation is fully and effectively carried out.

(2) Where an order under this section provides for the transfer of property or liabilities, that property shall, by virtue of the order, be transferred to and vest in, and those liabilities shall, by virtue of the order, be transferred to and become the liabilities of, the transferee company, and any such property shall, if the order so directs, be freed from any charge which is, by virtue of the compromise or arrangement, to cease to have effect.

(3) Where an order is made under this section, every company in relation to which the order is made shall cause a copy thereof to be delivered to the Registrar for registration within seven days after the making of the order, and if default is made in complying with this subsection, the company and every officer of the company who is in default shall be liable to a default fine.

(4) In this section —

"**property**" includes property, rights and powers of every description;

Case 1:26-cv-00251-LTS-LSC Document 1-2 Filed 01/02/26 Page 82 of 197 PageID #: 5589

"**liabilities**" includes duties; and

"**transferee company**" means any company or body corporate established in the Islands or in any other jurisdiction.

Winding up by the Court

Circumstances in which a company may be wound up by the Court

92. A company may be wound up by the Court if —

(a) the company has passed a special resolution requiring the company to be wound up by the Court;

(b) the company does not commence its business within a year from its incorporation, or suspends its business for a whole year;

(c) the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be wound up;

(d) the company is unable to pay its debts; or

(e) the Court is of opinion that it is just and equitable that the company should be wound up.

Definition of inability to pay debts

93. A company shall be deemed to be unable to pay its debts if —

(a) a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under that person's hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor;

(b) execution of other process issued on a judgment, decree or order obtained in the Court in favour of any creditor at law or in equity in any proceedings instituted by such creditor against the company, is returned unsatisfied in whole or in part; or

(c) it is proved to the satisfaction of the Court that the company is unable to pay its debts.

Application for winding up

94. (1) An application to the Court for the winding up of a company shall be by petition presented either by —

(a) the company;

(b) any creditor or creditors (including any contingent or prospective creditor or creditors);

(c) any contributory or contributories; or

(d) subject to subsection (4), the Authority pursuant to the regulatory laws.

(2) Where expressly provided for in the articles of association of a company, the directors of a company incorporated before the 31st August, 2022, the commencement date of *the Companies (Amendment) Act, 2021 [Act 6 of 2021]* have the authority to —

(a) present a winding up petition; or

(b) where a winding up petition has been presented, apply for the appointment of a provisional liquidator, on behalf of the company without the sanction of a resolution passed at a general meeting.

(2A) Subject to subsection (2B), the directors of a company incorporated after the 31st August, 2022, the commencement date of the *Companies (Amendment) Act, 2021 [Act 6 of 2021]* may present a winding up petition on behalf of the company on the grounds that the company is unable to pay its debts within the meaning of section 93 or where a winding up petition has been presented, apply on behalf of the company, for the appointment of a provisional liquidator.

(2B) The articles of association of a company may expressly remove or modify the directors' authority to present a winding up petition or apply for the appointment of a provisional liquidator on the company's behalf.

(3) A contributory is not entitled to present a winding up petition unless either —

(a) the shares in respect of which that person is a contributory, or some of them, are partly paid; or

(b) the shares in respect of which that person is a contributory, or some of them, either were —

(i) originally allotted to that person, or have been held by that person, and registered in that person's name for a period of at least six months immediately preceding the presentation of the winding up petition; or

(ii) have devolved on that person through the death of a former holder.

(4) A winding up petition may be presented by the Authority in respect of any company which is carrying on a regulated business in the Islands upon the grounds that it is not duly licensed or registered to do so under the regulatory laws or for any other reason as provided under the regulatory laws or any other law.

Powers of the Court

95. (1) Upon hearing the winding up petition the Court may —

(a) dismiss the petition;

(b) adjourn the hearing conditionally or unconditionally;

(c) make a provisional order; or

(d) any other order that it thinks fit,

but the Court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or that the company has no assets.

(2) The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company.

(3) If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely —

(a) an order regulating the conduct of the company's affairs in the future;

(b) an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;

(c) an order authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or

(d) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly.

(4) Where an alternative order under subsection (3) requires the company not to make any, or any specified, alteration in the memorandum or articles of association, the company does not have power, without the leave of the Court, to make any such alteration in breach of that requirement.

(5) Any alteration in a company's memorandum or articles of association made by virtue of an alternative order under subsection (3) is of the same effect as if duly made by resolution of the company, and the provisions of this Act shall apply to the memorandum or articles of association as so altered accordingly.

(6) A copy of an alternative order made under subsection (3) altering, or giving leave to alter, a company's memorandum or articles of association shall be filed by the company with the Registrar within fourteen days of the making of the order.

Power to stay or restrain proceedings

96. At any time after the presentation of a winding up petition and before a winding up order has been made, the company or any creditor or contributory may —

(a) where any action or proceeding against the company, including a criminal proceeding, is pending in a summary court, the Court, the Court of Appeal or the Privy Council, apply to the court in which the action or proceeding is pending for a stay of proceedings therein; and

(b) where any action or proceeding is pending against the company in a foreign court, apply to the Court for an injunction to restrain further proceedings therein,

and the court to which application is made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit.

Avoidance of attachments and stay of proceedings

97. (1) When a winding up order is made or a provisional liquidator is appointed, no suit, action or other proceedings, other than criminal proceedings, shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court may impose.

(1A) Where a winding up order is made or a provisional liquidator is appointed in respect of a company, and there are criminal proceedings pending against the company in a summary court, the Court, the Court of Appeal or the Privy Council —

(a) the company;

(b) a creditor of the company;

(c) a contributory of the company; or

(d) subject to section 94(4), the Authority, in respect of any company which is carrying on regulated business, may apply to the court in which the proceedings are pending for a stay of the proceedings and the court to which the application is made, may stay the proceedings on such terms as it thinks fit.

(2) When a winding up order has been made, any attachment, distress or execution put in force against the estate or effects of the company after the commencement of the winding up is void.

Notice of winding up order

98. When a winding up order is made, the liquidator shall —

(a) file a copy of the winding up order with the Registrar; and

(b) publish notice of the winding up in the Gazette and any newspaper in which the winding up petition was advertised.

Avoidance of property dispositions, etc.

99. 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.

Commencement of winding up by the Court

100. (1) If, before the presentation of a petition for the winding up of a company by the Court —

(a) a resolution has been passed by the company for voluntary winding up;

(b) the period, if any, fixed for the duration of the company by the articles of association has expired;

(c) the event upon the occurrence of which it is provided by the articles of association that the company is to be wound up has occurred; or

(d) a restructuring officer has been appointed pursuant to section 91B or 91C and the order appointing the restructuring officer has not been discharged,

the winding up of the company is deemed to have commenced at the time of passing of the relevant resolution or the expiry of the relevant period or the occurrence of the relevant event or the date of the presentation of the petition to appoint a restructuring officer pursuant to section 91B.

(2) In any other circumstance not specified in subsection (1), the winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up.

Company's statement of affairs

101. (1) Where the Court has made a winding up order or appointed a provisional liquidator, the liquidator may require some or all of the persons mentioned in subsection (3) to prepare and submit to that person a statement in the prescribed form as to the affairs of the company.

(2) The statement shall be verified by an affidavit sworn by the persons required to submit it and shall show —

(a) particulars of the company's assets and liabilities, including contingent and prospective liabilities;

(b) the names and addresses of any persons having possession of the company's assets;

(c) the assets of the company held by those persons;

(d) the names and addresses of the company's creditors;

(e) the securities held by those creditors;

(f) the dates when the securities were respectively given; and

(g) such further or other information that the liquidator may require.

Case 1:26-cv-00251-LTS Document 25-7 Filed 05/02/26 Page 87 of 197 PageID #: 5594

(3) The persons referred to in subsection (1) are —

(a) persons who are or have been directors or officers of the company;

(b) persons who are or have been professional service providers to the company; and

(c) persons who are or have been employees of the company, during the period of one year immediately preceding the relevant date.

(4) Where any persons are required under this section to submit a statement of affairs to the liquidator, they shall do so, subject to subsection (5), before the end of the period of twenty-one days beginning with the day after that on which the prescribed notice of the requirement is given to them by the liquidator.

(5) The liquidator may release a person from an obligation imposed on that person under subsection (1) or, when giving the notice mentioned in subsection (4) or subsequently, the liquidator may extend the time for compliance; and if the liquidator refuses to extend the time for compliance, the Court may do so.

(6) In this section —

"**relevant date**" means —

(a) in a case where a provisional liquidator is appointed, the date of that person's appointment; and

(b) in any other case, the commencement of the winding up.

(7) A person who, without reasonable excuse, fails to comply with any obligation imposed under this section commits an offence and is liable on conviction to a fine of ten thousand dollars.

Investigation by liquidator

102. (1) Where a winding up order is made by the Court, the liquidator shall be empowered to investigate —

(a) if the company has failed, the causes of the failure; and

(b) generally, the promotion, business, dealings and affairs of the company,

and to make such report, if any, to the Court as that person thinks fit.

(2) Subject to obtaining the directions of the Court, the liquidator shall have power to —

(a) assist the Authority and the Royal Cayman Islands Police Service to investigate the conduct of persons referred to in section 101(3); and

(b) institute and conduct a criminal prosecution of persons referred to in section 101(3).

(3) Subject to obtaining the prior approval of the company's creditors, if it is insolvent, or its contributories, if it is solvent, the directions given under

subsection (2) may include a direction that the whole or part of the costs of investigation and prosecution be paid out of the assets of the company.

Duty to co-operate and the private examination of relevant persons

103. (1) This section applies to any person who, whether resident in the Islands or elsewhere —

(a) has made or concurred with the statement of affairs;

(b) is or has been a director or officer of the company;

(c) is or was a professional service provider to the company;

(d) has acted as a controller, advisor or liquidator of the company or receiver or manager of its property;

(e) not being a person falling within paragraphs (a) to (c), is or has been concerned or has taken part in the promotion, or management of the company,

and such person is referred to in this section as the "**relevant person**".

(2) It is the duty of every relevant person to co-operate with the official liquidator.

(3) While a company is being wound up, the official liquidator may at any time before its dissolution apply to the Court for an order —

(a) for the examination of any relevant person; or

(b) that a relevant person transfer or deliver up to the liquidator any property or documents belonging to the company.

(4) Unless the Court otherwise orders, the official liquidator shall make an application under subsection (3) if that person is requested in accordance with the rules to do so by one-half, in value, of the company's creditors or contributories.

(5) On an application made under subsection (3)(a), the Court may order that a relevant person —

(a) swear an affidavit in answer to written interrogatories;

(b) attend for oral examination by the official liquidator at a specified time and place, or

(c) do both things specified in paragraphs (a) and (b).

(6) The Court may direct that any creditor or contributory of the company be permitted by the official liquidator to participate in an oral examination.

(7) The Court shall have jurisdiction —

(a) to make an order under this section against a relevant person resident outside the Islands; and

(b) to issue a letter of request for the purpose of seeking the assistance of a foreign court in obtaining the evidence of a relevant person resident outside the jurisdiction.

Official Liquidators

Appointment and powers of provisional liquidator

104. (1) Subject to this section and any rules made under section 155, the Court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally.

(2) An application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company or, subject to subsection (6), the Authority, on the grounds that —

(a) there is a *prima facie* case for making a winding up order; and

(b) the appointment of a provisional liquidator is necessary in order to —

(i) prevent the dissipation or misuse of the company's assets;

(ii) prevent the oppression of minority shareholders; or

(iii) prevent mismanagement or misconduct on the part of the company's directors.

(3) An application for the appointment of a provisional liquidator may be made under subsection (1) by the company and on such an application the Court may appoint a provisional liquidator if it considers it appropriate to do so.

(4) A provisional liquidator shall carry out only such functions as the Court may confer on that person and that person's powers may be limited by the order appointing that person.

(5) The remuneration of the provisional liquidator shall be fixed by the Court from time to time on that person's application and the Court shall in fixing such remuneration act in accordance with rules made under section 155.

(6) An application for the appointment of a provisional liquidator may be presented by the Authority on the grounds under subsection (2), in respect of any company which is carrying on a regulated business in the Islands upon the grounds that it is not duly licensed or registered to do so under the regulatory laws or for any other reason as provided under the regulatory laws or any other law regardless of whether or not the Authority presented the winding up petition.

Appointment of official liquidator

105. (1) For the purpose of conducting the proceedings in winding up a company and assisting the Court therein, there may be appointed one or more than one person to be called an official liquidator or official liquidators; and the Court may appoint to such office such person as it thinks fit, and if more persons than one are appointed to such office, the Court shall declare whether any act hereby required or authorised to be done by the official liquidator is to be done by all or any or more of such persons.

(2) The Court may also determine whether any and what security is to be given by an official liquidator on that person's appointment; and if no official liquidator is appointed, or during any vacancy in such office, all the property of the company shall be in the custody of the Court.

(3) The liquidator shall, within twenty-eight days of the date upon which the winding up order is made, summon —

(a) a meeting of the company's creditors if the order was made on the grounds that the company is insolvent; or

(b) a meeting of the company's contributories if the order was made on grounds other than insolvency,

for the purposes of resolving any other matters which the liquidator puts before the meeting.

(4) The Court may make an order dispensing with the need to summon a meeting under this section or extending the time within which it shall be summoned.

Appointment of joint liquidators

106. When two or more persons are appointed to the office of liquidator, either provisionally or as official liquidators, they shall be authorised to act jointly and severally, unless their powers are expressly limited by order of the Court.

Removal of official liquidators

107. An official liquidator may be removed from office by order of the Court made on the application of a creditor or contributory of the company.

Qualifications of official liquidators

108. (1) A foreign practitioner may be appointed to act jointly with a qualified insolvency practitioner.

(2) Official liquidators are officers of the Court.

Remuneration of official liquidators and restructuring officers

109. (1) The expenses properly incurred in the winding up, including the remuneration of the liquidator, are , subject to subsection (2), payable out of the company's assets in priority to all other claims.

(2) Where a company is wound up, the expenses properly incurred in any petition for a restructuring officer and during the term of appointment of the restructuring officer appointed —

(a) under section 91B(3)(a); or

(b) on an interim basis under section 91C(3), including the remuneration of the restructuring officer, are payable out of the company's assets in priority to all other claims.

(3) There shall be paid to a restructuring officer, including a restructuring officer appointed on an interim basis, and the official liquidator, such remuneration, by way of percentage or otherwise, that the Court may direct acting in accordance with rules made under section 155.

(4) If more than one restructuring officer, including a restructuring officer appointed on an interim basis, is appointed by the Court under section 91B or 91C, the remuneration paid under subsection (3) shall be distributed among the restructuring officers in such proportions as the Court may direct.

(5) If more than one official liquidator is appointed by the Court when a company is wound up, the remuneration paid under subsection (3) shall be distributed among the official liquidators in such proportions as the Court may direct.

Function and powers of official liquidators

110. (1) It is the function of an official liquidator —

(a) to collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it; and

(b) to report to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up.

(2) The official liquidator may —

(a) with the sanction of the Court, exercise any of the powers specified in Part I of Schedule 3; and

(b) with or without that sanction, exercise any of the general powers specified in Part 2 of Schedule 3.

(3) The exercise by the liquidator of the powers conferred by this section is subject to the control of the Court, and subject to subsection (5), any creditor or contributory may apply to the Court with respect to the exercise or proposed exercise of such powers (hereinafter referred to as a "sanction application").

(4) In the case of —

(a) a solvent company, a sanction application may only be made by a contributory and the creditors shall have no right to be heard;

(b) an insolvent company, a sanction application may only be made by a creditor and the contributories shall have no right to be heard; and

(c) a company whose solvency is doubtful, a sanction application may be made by both contributories and creditors and both contributories and creditors shall have a right to be heard.

(5) For the purposes of exercising the powers specified under paragraph 3 of Part 1 of Schedule 3, a person shall be treated as related to a company if the person —

(a) has acted for the company as a professional service provider;

(b) is or was a shareholder or director of the company or of any other company in the same group as the company;

(c) has a direct or indirect beneficial interest in the shares of the company; or

(d) is a creditor or debtor of the company.

.

General Powers of the Court

Power to stay winding up

111. (1) The Court may at any time after an order for winding up, on the application either of the liquidator or any creditor or contributory, and on proof to the satisfaction of the Court that all proceedings in the winding up ought to be stayed, make an order staying the proceedings either all together or for a limited time, on such terms and conditions as the Court thinks fit.

(2) The Court may at any time after the liquidation has commenced under section 116(c), but before the final meeting has been held as provided for in section 127, on the application of the liquidator accompanied by —

(a) a special resolution stating that the company will not be wound up and setting out the reasons for such decision;

(b) proof of a recall notice published in the Gazette; and

(c) such other documents as the Court may consider necessary,

make an order to recall the liquidation, place the company into active status and place the company back into good standing as it was prior to the commencement of liquidation under section 116(c), on such terms and conditions as the Court thinks fit.

(3) A company shall, within seven days of the making of an order under this section, forward a copy of the order to the Registrar who shall enter it in the records relating to the company.

Settlement of list of contributories

112. (1) The liquidator shall settle a list of contributories, if any, for which purpose that person shall have power to adjust the rights of contributories amongst themselves.

(2) In the case of a solvent liquidation of a company which has issued redeemable shares at prices based upon its net asset value from time to time, the liquidator shall have power to settle and, if necessary rectify the company's register of members, thereby adjusting the rights of members amongst themselves.

(3) A contributory who is dissatisfied with the liquidator's determination may appeal to the Court against such determination.

Power to make calls

113. (1) The Court may, at any time after making a winding up order, and either before or after it has ascertained the sufficiency of the company's assets, make calls on all or any of the contributories for the time being settled on the list of the contributories —

(a) to the extent of their liability, for the payment of any money which the Court considers necessary to satisfy the company's debts and liabilities and the expenses of winding up; and

(b) to the adjustment of the rights of the contributories among themselves,

and make an order for payment of any call so made.

(2) In making a call the Court may take into consideration the probability that some of the contributories may partly or wholly fail to pay it.

Inspection of documents by creditors, etc.

114. (1) At any time after making a winding up order the Court may make such orders as it thinks fit for —

(a) the inspection of the company's documents by creditors and contributories; and

(b) the preparation of reports by the official liquidator and the provision of such reports to the company's creditors and contributories.

(2) A contributory shall be entitled to make an application under this section notwithstanding that the company is or may be insolvent and the Court shall not refuse to make an order upon the application of a contributory merely by reason of the fact that the company is or may be insolvent.

Meetings to ascertain wishes of creditors or contributories

115. (1) The Court shall, as to all matters relating to the winding up, have regard to wishes of the creditors or contributories and for that purpose it may direct reports to be prepared by the official liquidator and meetings of creditors or contributories to be summoned.

(2) If it considers it necessary to do so, the Court may direct that separate meetings be held of different classes of creditors or contributories.

(3) Subject to Rules made under section 155, meetings may be requisitioned by creditors, if the company is insolvent, or by contributories if the company is solvent.

(4) The votes of creditors and contributories shall be counted by reference to —

(a) the value of their debts, in the case of creditors;

(b) the number of votes, in the case of contributories whose shares carry voting rights under the articles of association of the company; and

(c) the par value of all the shares held, in the case of contributories whose shares do not carry votes under the articles of association of the company and, where there are no par value shares, the net asset value of the company shown.

Voluntary Winding up

Circumstances in which a company may be wound up voluntarily

116. A company incorporated and registered under this Act or an existing company may be wound up voluntarily —

(a) when the period, if any, fixed for the duration of the company by its memorandum or articles of association expires;

(b) if the event, if any, occurs, on the occurrence of which the memorandum or articles of association provide that the company is to be wound up;

(c) if the company resolves by special resolution that it be wound up voluntarily; or

(d) if the company in general meeting resolves by ordinary resolution that it be wound up voluntarily because it is unable to pay its debts.

Commencement of winding up

117. (1) A voluntary winding up is deemed to commence —

(a) at the time of the passing of the resolution for winding up; or

(b) on the expiry of the period or the occurrence of the event specified in the company's memorandum or articles of association,

notwithstanding that a supervision order is subsequently made by the Court.

(2) Subject to any contrary provision in its memorandum or articles of association, the voluntary winding up of an exempted limited duration company is taken to have commenced upon the expiry of a period of ninety days starting on —

(a) the death, insanity, bankruptcy, dissolution, withdrawal, retirement or resignation of a member of the company;

(b) the redemption, repurchase or cancellation of all the shares of a member of the company; or

(c) the occurrence of any event which, under the memorandum or articles of association of the company, terminates the membership of a member of the company,

unless there remain at least two members of the company and the company is continued in existence by the unanimous resolution of the remaining members pursuant to amended memorandum and articles of association adopted during that period of ninety days.

Effect on business and status of the company

118. (1) In the case of a voluntary winding up, the company shall from the commencement of its winding up cease to carry on its business except so far as it may be beneficial for its winding up.

(2) Notwithstanding anything to the contrary contained in the company's articles of association, its corporate state and powers shall continue until the company is dissolved.

Appointment of voluntary liquidator

119. (1) One or more liquidators shall be appointed for the purpose of winding up the company's affairs and distributing its assets.

(2) When the winding up has commenced in accordance with the company's memorandum or articles of association upon the termination of a fixed period or the occurrence of an event —

(a) the persons designated as liquidators in the memorandum or articles of association shall become such liquidators automatically from the commencement of the winding up; or

(b) if no such person is designated in the memorandum or articles of association or the person designated is unable or unwilling to act, the directors shall convene a general meeting of the company for the purpose of appointing a liquidator.

(3) Except in the case of a person designated as liquidator in the company's memorandum or articles of association, the appointment of a voluntary liquidator shall take effect upon the filing of that person's consent to act with the Registrar.

(4) If a vacancy occurs by death, resignation or otherwise in the office of voluntary liquidator appointed by the company —

(a) the company in a general meeting may fill the vacancy; or

(b) the Court may fill the vacancy on the application of any contributory or creditor.

(5) On the appointment of a voluntary liquidator all the powers of the directors cease, except so far as the company in a general meeting or the liquidator sanctions their continuance.

(6) When two or more persons are appointed as voluntary liquidators jointly, they shall be authorised to act jointly and severally unless their powers are expressly limited by the resolution or articles of association under which they are appointed.

Qualifications of voluntary liquidators

120. Any person, including a director or officer of the company, may be appointed as its voluntary liquidator.

Removal of voluntary liquidators

121. (1) A voluntary liquidator may be removed from office by a resolution of the company in a general meeting convened especially for that purpose.

(2) A general meeting of the company for the purpose of considering a resolution to remove its voluntary liquidator may be convened by any shareholder or shareholders holding not less than one fifth of the company's issued share capital.

(3) Whether or not a general meeting has been convened in accordance with subsection (2), any contributory may apply to the Court for an order that a voluntary liquidator be removed from office on the grounds that that person is not a fit and proper person to hold office.

Resignation of voluntary liquidator

122. (1) Where two or more persons are appointed as joint voluntary liquidators, they may resign by filing a notice of resignation with the Registrar, so long as at least one of them continues in office.

(2) Except as provided in subsection (1), a voluntary liquidator wishing to resign shall —

(a) prepare a report and accounts; and

(b) convene a general meeting of the company for the purpose of accepting that person's resignation and releasing that person from the performance of any further duties, and shall cease to hold office with effect from the date upon which the resolution is passed.

(3) In the event that the company fails to pass a resolution accepting that person's resignation, the voluntary liquidator may apply to the Court for an order that that person be released from the performance of any further duties.

Case 1:26-cv-00251-LTS-LSC Document 2-7 Filed 01/12/26 Page 97 of 197 PageID #: 5604

Notice of voluntary winding up

123. (1) Within twenty-eight days of the commencement of a voluntary winding up, the liquidator or, in the absence of any liquidator, the directors shall —

(a) file notice of the winding up with the Registrar;

(b) file the liquidator's consent to act with the Registrar;

(c) file the director's declaration of solvency with the Registrar (if the supervision of the court is not sought);

(d) in the case of a company carrying on a regulated business, serve notice of the winding up upon the Authority; and

(e) publish notice of the winding up in the Gazette.

(2) A director or liquidator who fails to comply with this section commits an offence and is liable to a fine of ten thousand dollars.

Application for supervision order

124. (1) Where a company is being wound up voluntarily its liquidator shall apply to the Court for an order that the liquidation continue under the supervision of the Court unless, within twenty-eight days of the commencement of the liquidation, the directors have signed a declaration of solvency in the prescribed form in accordance with subsection (2).

(2) A declaration of solvency means a declaration or affidavit in the prescribed form to the effect that a full enquiry into the company's affairs has been made and that to the best of the directors' knowledge and belief the company will be able to pay its debts in full together with interest at the prescribed rate, within such period, not exceeding twelve months from the commencement of the winding up, as may be specified in the declaration.

(3) A person who knowingly makes a declaration under this section without having reasonable grounds for the opinion that the company will be able to pay its debts in full, together with interest at the prescribed rate, within the period specified commits an offence and is liable on summary conviction to a fine of ten thousand dollars and to imprisonment for two years.

Avoidance of share transfers

125. Any transfer of shares, not being a transfer with the sanction of the liquidator, and any alteration in the status of the company's members made after the commencement of a voluntary winding up is void.

General meeting at year's end

126. (1) In the event of a voluntary winding up continuing for more than one year, the liquidators shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and at the end of each succeeding year and such meetings shall be held within three months of each anniversary of the commencement of the liquidation.

(2) At each meeting the liquidator shall lay before the meeting a report and account of that person's acts and dealings and the conduct of the winding up during the preceding year.

(3) A liquidator who fails to comply with this section commits an offence and is liable on conviction to a fine of ten thousand dollars.

Final meeting prior to dissolution

127. (1) As soon as the company's affairs are fully wound up, the liquidator shall make a report and an account of the winding up showing how it has been conducted and how the company's property has been disposed of and thereupon shall call a general meeting of the company for the purpose of laying before it the account and giving an explanation for it.

(2) At least twenty-one days before the meeting the liquidator shall send a notice specifying the time, place and object of the meeting to each contributory in any manner authorised by the company's articles of association and published in the Gazette.

(3) The liquidator shall, no later than seven days after the meeting, make a return to the Registrar in the prescribed form specifying —

(a) the date upon which the meeting was held; and

(b) if a quorum was present, particulars of the resolutions, if any, passed at the meeting.

(4) A liquidator who fails to call a general meeting of the company as required by subsection (1) or fails to make a return as required by subsection (3) commits an offence and is liable on conviction to a fine of ten thousand dollars.

Effect of winding up on share capital of company limited by guarantee

128. Where a company limited by guarantee and having a capital divided into shares is being wound up voluntarily, any share capital that may not have been called upon shall be deemed to be an asset of the company, and to be a specialty debt due from each member to the company to the extent of any sums that may be unpaid on any shares held by that person, and payable at such time as may be appointed by the liquidator.

Case 1:26-cv-00251-LTS-SDG Document 1-5 Filed 01/12/26 Page 99 of 197 PageID #: 5606

Reference of questions to Court

129. (1) The voluntary liquidator or any contributory may apply to the Court to determine any question arising in the voluntary winding up of a company or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up under the supervision of the Court.

(2) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partly to the application on such terms and conditions as it thinks fit, or make such other order on the application as it thinks just.

(3) The voluntary liquidator shall, within seven days of the making of an order under this section, forward a copy of the order to the Registrar who shall enter it in that person's records relating to the company.

Expenses of voluntary winding up

130. (1) The expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims.

(2) The rate and amount of the liquidator's remuneration shall be fixed and payment authorised by resolution of the company.

(3) Each report and account laid before the company in general meetings by its liquidator shall contain all such information, including the rate at which the liquidator's remuneration is calculated and particulars of the work done, as may be necessary to enable the members to determine what expenses have been properly incurred and what remuneration is properly payable to the liquidator.

(4) If the company fails to approve the liquidator's remuneration and expenses or the liquidator is dissatisfied with the decision of the company, that person may apply to the Court which shall fix the rate and amount of that person's remuneration and expenses.

Winding up subject to the supervision of the Court

Application for supervision order

131. When a resolution has been passed by a company to wind up voluntarily, the liquidator or any contributory or creditor may apply to the Court for an order for the continuation of the winding up under the supervision of the Court, notwithstanding that the declaration of solvency has been made in accordance with section 124, on the grounds that —

(a) the company is or is likely to become insolvent; or

Case 1:26-cv-00425-LJV-JJM Document 1-7 Filed 04/02/26 Page 100 of 197 PageID #: 5607

(b) the supervision of the Court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors.

Appointment of official liquidator

132. (1) When making a supervision order the Court —

(a) shall appoint one or more qualified insolvency practitioners; and

(b) may, in addition, appoint one or more foreign practitioners,

as liquidator or liquidators of the company and section 105 shall apply as if the Court had made a winding up order.

(2) Unless a voluntary liquidator is appointed as an official liquidator, that person shall prepare a final report and accounts within twenty-eight days from the date of the supervision order.

Effect of supervision order

133. A supervision order shall take effect for all purposes as if it was an order that the company be wound up by the Court except that —

(a) the liquidation commenced in accordance with section 117; and

(b) the prior actions of the voluntary liquidator shall be valid and binding upon the company and its official liquidator.

Offences of fraud, etc.

Fraud, etc. in anticipation of winding up

134. (1) Where a company is ordered to be wound up by the Court, or passes a resolution for voluntary winding up, any person, who is or was an officer, professional service provider, voluntary liquidator, restructuring officer or controller of the company and who, within the twelve months immediately preceding the commencement of the winding up, has —

(a) concealed any part of the company's property to the value of ten thousand dollars or more or concealed any debt due to or from the company;

(b) removed any part of the company's property to the value of ten thousand dollars or more;

(c) concealed, destroyed, mutilated or falsified any documents affecting or relating to the company's property or affairs;

(d) made any false entry in any documents affecting or relating to the company's property or affairs;

(e) parted with, altered or made any omission in any document affecting or relating to the company's property or affairs; or

Case 1:26-cv-00425-LTS-SSC Document 1-2 Filed 01/12/26 Page 101 of 197 PageID #: 5608

(f) pawned, pledged or disposed of any property of the company which has been obtained on credit and has not been paid for (unless the pawning, pledging or disposal was in the ordinary way of the company's business),

with intent to defraud the company's creditors or contributories commits an offence and is liable on conviction to a fine and to imprisonment for five years.

(2) In this section —

"**officer**" includes a shadow director.

Transactions in fraud of creditors

135. Where a company is ordered to be wound up by the Court or passes a resolution for voluntary winding up, any officer, restructuring officer, controller or professional service provider of the company who —

(a) has made or caused to be made any gift or transfer of, or charge on, or has caused or connived at the levying of any execution against, the company's property; or

(b) has concealed or removed any part of the company's property,

with intent to defraud the company's creditors or contributories commits an offence and is liable on conviction to a fine and to imprisonment for five years.

Misconduct in course of winding up

136. (1) Where a company is being wound up, whether by the Court or voluntarily, a person who is or was a director, officer, restructuring officer, controller or professional service provider of the company and who —

(a) does not to the best of that person's knowledge and belief fully and truly discover to the liquidator —

(i) all the company's property (except such part as has been disposed of in the ordinary way of the company's business);

(ii) the date on which and manner in which the company's property or any part thereof property was disposed of, if it was disposed of;

(iii) the persons to whom any property was transferred, if it was disposed of; or

(iv) the consideration paid for any property which was disposed of;

(b) does not deliver up to the liquidator or does not deliver up in accordance with the directions of the liquidator any of the company's property which is in that person's custody or under that person's control, and which that person is required by law to deliver up;

(c) does not deliver up to the liquidator or does not deliver up, in accordance with the directions of the liquidator, all documents in that person's custody

or under that person's control which belong to the company and which that person is required by law to deliver up;

(d) knows or believes that a false debt has been proved by any person in the winding up and fails to inform the liquidator of such knowledge or belief as soon as practicable;

(e) prevents the production of any document affecting or relating to the company's property or affairs; or

(f) destroys, mutilates, alters or falsifies any books, papers or securities, or makes or is privy to the making of any false or fraudulent entry in any register, book of account or document belonging to the company,

with intent to defraud the company's creditors or contributories commits an offence and is liable on conviction to a fine of twenty five thousand dollars or to imprisonment for a term of five years, or to both.

(2) In this section —

"**officer**" includes a shadow director.

Material omissions from statement relating to company's affairs

137. (1) Where a company is being wound up, whether by the Court or voluntarily, a person who is or was a director, an officer, a manager, restructuring officer, controller or a professional service provider of the company, commits an offence if that person makes any material omission in any statement relating to the company's affairs, with intent to defraud the company's creditors or contributories.

(2) A person who commits an offence under subsection (1) is liable on conviction to a fine of twenty-five thousand dollars or to imprisonment for a term of five years, or to both.

(3) In this section —

"**officer**" includes a shadow director.

General provisions

Getting in the company's property

138. (1) Where any person has in that person's possession any property or documents to which the company appears to be entitled, the Court may require that person to pay, transfer or deliver such property or documents to the official liquidator.

(2) Where the official liquidator seizes or disposes of any property which that person reasonably believed belonged to the company, that person shall not be personally liable for any loss or damage caused to its true owner except in so far as such loss or damage is caused by that person's own negligence.

Case 1:26-cv-00455-LY-SS Document 1-7 Filed 05/02/26 Page 103 of 197 PageID #: 5610

Provable debts

139. (1) All debts payable on a contingency and all claims against the company whether present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company and the official liquidator shall make a just estimate so far as is possible of the value of all such debts or claims as may be subject to any contingency or sound only in damages or which for some other reason do not bear a certain value.

(2) Foreign taxes, fines and penalties shall be admissible to proof against the company only if and to the extent that a judgment in respect of the same would be enforceable against the company pursuant to the *Foreign Judgments Reciprocal Enforcement Act (1996 Revision)* or any laws permitting the enforcement of foreign taxes, fines and penalties.

Distribution of the company's property

140. (1) Subject to subsection (2), the property of the company shall be applied in satisfaction of its liabilities *pari passu* and subject thereto shall be distributed amongst the members according to their rights and interests in the company.

(2) The collection in and application of the property of the company referred to in subsection (1) is without prejudice to and after taking into account and giving effect to the rights of preferred and secured creditors and to any agreement between the company and any creditors that the claims of such creditors shall be subordinated or otherwise deferred to the claims of any other creditors and to any contractual rights of set-off or netting of claims between the company and any person or persons (including without limitation any bilateral or any multi-lateral set-off or netting arrangements between the company and any person or persons) and subject to any agreement between the company and any person or persons to waive or limit the same.

(3) In the absence of any contractual right of set-off or non set-off, an account shall be taken of what is due from each party to the other in respect of their mutual dealings, and the sums due from one party shall be set-off against the sums due from the other.

(4) Sums due from the company to another party shall not be included in the account taken under subsection (3) if that other party had notice at the time they became due that a petition for the winding up of the company was pending.

(5) Only the balance, if any, of the account taken under subsection (3) shall be provable in the liquidation or, as the case may be, payable to the liquidator as part of the assets.

Preferential debts

141. (1) In the case of an insolvent company, the debts described in Schedule 2 shall be paid in priority to all other debts.

Case 1:26-cv-00455-LY-SS Document 1-7 Filed 05/08/26 Page 104 of 197 PageID #: 5611

(2) The preferential debts shall —

(a) rank equally amongst themselves and be paid in full unless the assets available, after having exercised any rights of set-off or netting of claims, are insufficient to meet them in which case they shall abate in equal proportions; and

(b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures secured by, or holders of any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

Secured creditors

142. (1) Notwithstanding that a winding up order has been made, a creditor who has security over the whole or part of the assets of a company is entitled to enforce that person's security without the leave of the Court and without reference to the liquidator.

(2) Where the liquidator sells assets on behalf of a secured creditor, that person is entitled to deduct from the proceeds of sale a sum by way of remuneration equivalent to that which is or would be payable under section 109.

Preferential charge on goods distrained

143. In the event of a landlord or other person entitled to receive rent distraining or having distrained on any goods or effects of the company within three months preceding the date of the winding up order, the debts to which priority is given by section 141 shall be a first charge on the goods or effects so distrained on or the proceeds of sale thereof.

Effect of execution or attachment

144. (1) Where a creditor has issued execution against the goods or land of a company or has attached any debt due to it, and the company is subsequently wound up, that person is not entitled to retain the benefit of the execution or attachment against the liquidator unless that person has completed the execution or attachment before the commencement of the winding up.

(2) Notwithstanding subsection (1) —

(a) where a creditor has had notice of a meeting having been called at which a resolution for voluntary winding up is to be proposed, the date on which that person had notice is substituted for the purpose of subsection (1) for the date of commencement of the winding up;

(b) a person who purchases in good faith under a sale by the bailiff any goods of a company on which execution has been levied in all cases acquires a good title to them against the liquidator; and

(c) the rights conferred by subsection (1) on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court thinks fit.

(3) For the purposes of this Act —

(a) an execution against goods is completed by seizure and sale;

(b) an execution against securities is completed upon making a charging order absolute;

(c) an attachment of a debt is completed by receipt of the debt; and

(d) an execution against land is completed by the registration of a charging order.

Voidable preference

145. (1) Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts within the meaning of section 93 with a view to giving such creditor a preference over the other creditors shall be voidable upon the application of the company's liquidator if made, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation.

(2) A payment made as aforesaid to a related party of the company shall be deemed to have been made with a view to giving such creditor a preference.

(3) For the purposes of this section a creditor shall be treated as a "related party" if it has the ability to control the company or exercise significant influence over the company in making financial and operating decisions.

Avoidance of dispositions made at an undervalue

146. (1) In this section and section 147 —

(a) "**disposition**" has the meaning ascribed in Part VI of the *Trusts Act (2021 Revision)*;

(b) "**intent to defraud**" means an intention to wilfully defeat an obligation owed to a creditor;

(c) "**obligation**" means an obligation or liability (which includes a contingent liability) which existed on or prior to the date of the relevant disposition;

(d) "**transferee**" means the person to whom a relevant disposition is made and shall include any successor in title; and

(e) "**undervalue**" in relation to a disposition of a company's property means —

(i) the provision of no consideration for the disposition; or

Case 1:26-cv-00495-LLA-SCC Document 1-7 Filed 01/08/26 Page 106 of 197 PageID #: 5613

(ii) a consideration for the disposition the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition.

(2) Every disposition of property made at an undervalue by or on behalf of a company with intent to defraud its creditors shall be voidable at the instance of its official liquidator.

(3) The burden of establishing an intent to defraud for the purposes of this section shall be upon the official liquidator.

(4) No action or proceedings shall be commenced by an official liquidator under this section more than six years after the date of the relevant disposition.

(5) In the event that any disposition is set aside under this section, then if the Court is satisfied that the transferee has not acted in bad faith —

(a) the transferee shall have a first and paramount charge over the property, the subject of the disposition, of an amount equal to the entire costs properly incurred by the transferee in the defence of the action or proceedings; and

(b) the relevant disposition shall be set aside subject to the proper fees, costs, pre-existing rights, claims and interests of the transferee (and of any predecessor transferee who has not acted in bad faith).

Fraudulent trading

147. (1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose the liquidator may apply to the Court for a declaration under this section.

(2) The Court may declare that any persons who were knowingly parties to the carrying on of the business in the manner mentioned in subsection (1) are liable to make such contributions, if any, to the company's assets as the Court thinks proper.

Supply of utilities

148. (1) If a request is made by or with the concurrence of the liquidator (including a provisional liquidator) or a restructuring officer for the giving, after the effective date, of any of the supplies mentioned in subsection (2), the supplier —

(a) may make it a condition of the giving of the supply that the liquidator (including a provisional liquidator) or restructuring officer personally guarantees the payment of any charges in respect of the supply; but

(b) shall not make it a condition of the giving of the supply, or do anything which has the effect of making it a condition of the giving of the supply,

that any outstanding charges in respect of a supply given to the company before the effective date are paid.

(2) The supplies referred to in subsection (1) are —

(a) a supply of electricity;

(b) a supply of water; and

(c) a supply of telecommunication services.

(3) In this section —

"**effective date**" means —

(a) the date on which the provisional liquidator was appointed;

(b) the date on which the winding up order was made; or

(c) the date on which the restructuring officer was appointed.

Interest on debts

149. (1) Subject to subsection (5), in a winding up interest is payable in accordance with this section on any debt proved in the winding up, including so much of any such debt as represents interest on the remainder of the debt.

(2) Any surplus remaining after the payment of the debts proved in a winding up shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the period during which they have been outstanding since the company went into liquidation.

(3) All interest under this section ranks equally, whether or not the debts on which it is payable ranked equally.

(4) The rate of interest payable under this section in respect of any debt is the greater of —

(a) the rate applicable to the currency of the liquidation prescribed from time to time by the *Judgment Debts (Rates of Interest) Rules (2021 Revision)* made under section 34 of the *Judicature Act (2021 Revision)*; and

(b) the rate applicable to that debt apart from the winding up.

(5) No interest shall be payable if the liquidation is concluded in less than six months or the accrued amount is less than five hundred dollars.

Currency of the liquidation

150. (1) In the case of a solvent liquidation, a company's creditors are entitled to receive payment of their debts in the currency of the obligation.

(2) In the case of an insolvent liquidation, a company's liabilities shall be translated into the functional currency of the company at the exchange rates ruling —

(a) on the date of the commencement of the voluntary liquidation; or

(b) on the day upon which the winding up order is made.

Case 1:26-cv-00425-LTS-SSC Document 1-7 Filed 01/12/26 Page 108 of 197 PageID #: 5615

(3) For the purposes of this section the functional currency of a company is the currency of the primary economic environment in which it operated as at the commencement of the liquidation.

Dissolution of a Company

Dissolution following voluntary winding up

151. (1) The Registrar shall, within three days of receiving a liquidator's return under section 127(3), register such return.

(2) Upon the expiration of three months from the registration of the return the company is deemed to be dissolved.

(3) Notwithstanding subsection (2), the Court may, on the application of the liquidator or any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect to such date as the Court thinks fit.

(4) An application under this section shall not be made after the company is deemed to have been dissolved.

(5) An order of the Court made under this section shall be registered with the Registrar within seven days of the date upon which it was made.

Dissolution following winding up by the Court

152. (1) When the affairs of the company have been completely wound up, the Court shall make an order that the company be dissolved from the date of that order or such other date as the Court thinks fit, and the company shall be dissolved accordingly.

(2) The effect of an order for dissolution in respect of a segregated portfolio is that its creditors' claims against the company shall be extinguished, notwithstanding that the company has not been liquidated and dissolved.

(3) The official liquidator shall file the order for dissolution with the Registrar.

(4) An official liquidator who fails to file the order for dissolution with the Registrar within fourteen days from the date, upon which it was perfected, commits an offence and is liable on summary conviction to a penalty of ten dollars for every day during which that person is so in default.

Unclaimed dividends and undistributed assets

153. (1) Any unclaimed dividends or undistributed assets in the possession or control of the liquidator or former liquidator of a company shall be held by that person as trustee upon trust for the benefit of the contributories or creditors to whom such funds are owed.

Case 1:26-cv-00495-LTS Document 1-7 Filed 01/12/26 Page 109 of 197 PageID #: 5616

(2) At the end of one year after the dissolution of the company, the former liquidator shall transfer any funds or other assets held on trust by that person to the Minister charged with responsibility for Finance who shall manage them in accordance with Part VIII of the *Public Management and Finance Act (2020 Revision)*.

Insolvency rules and regulations

Insolvency Rules Committee

154. (1) There shall be established an Insolvency Rules Committee comprising —

(a) the Chief Justice or other judge nominated by the Chief Justice in that person's place who shall be chairperson;

(b) the Attorney General or that person's nominee;

(c) two attorneys-at-law appointed by the Chief Justice on the recommendation of the Cayman Islands Legal Practitioners Association;

(d) a qualified insolvency practitioner appointed by the Chief Justice upon the recommendation of the Cayman Islands Institute of Professional Accountants;

(e) a person appointed by the Chief Justice who, in that person's opinion, demonstrates a wide knowledge of law, finance, financial regulation or insolvency practice; and

(f) a qualified insolvency practitioner appointed by the Chief Justice on the recommendation of the Recovery and Insolvency Specialists Association.

(2) The quorum of the Insolvency Rules Committee shall be the chairperson and three other members of the Committee; and the chairperson shall have a casting vote.

Powers of the Insolvency Rules Committee

155. (1) The Insolvency Rules Committee shall have power —

(a) to make rules and prescribe forms for the purpose of giving effect to Parts 4, 5 and 16;

(b) to prescribe court fees to be paid in connection with —

(i) applications under Part 4;

(ii) winding up proceedings under Part 5; and

(iii) applications under Part 16; and

(c) to make rules for the purpose of specifying —

(i) the qualifications which must be held by a person appointed to the office of official liquidator;

Case 1:26-cv-00425-LTS-SDG Document 1-5 Filed 01/12/26 Page 110 of 197 PageID #: 5617

(ii) persons who are disqualified from holding office as official liquidator either generally or in relation to a particular company which is not in liquidation before the court;

(iii) the nature and scope of professional indemnity insurance, if any, required to be held by persons appointed to the office of official liquidators; and

(iv) the nature and scope of security bonds, if any, required to be posted by persons appointed to the office of official liquidator.

(2) The Insolvency Rules Committee, after consultation with the Authority and with any organisation representing insolvency practitioners in the Islands, shall make rules prescribing the rates of fees which may be charged by an official liquidator.

PART 6 - Removal of Defunct Companies

Company not operating may be struck off register

156. (1) Where the Registrar has reasonable cause to believe that a company is not carrying on business or is not in operation, that person may strike the company off the register and the company shall thereupon be dissolved.

(2) A request on behalf of the company to strike the company off the register shall be accompanied by a fee of seventy-five dollars.

Striking off for failure to pay fine

156A.Where an administrative fine imposed in accordance with section 26 of the *Beneficial Ownership Transparency Act, 2023 [Act 13 of 2023]* remains unpaid for ninety days after imposition of the fine, the Registrar may strike the company off the register and the company shall thereupon be dissolved.

Company being wound up may be struck off register for want of liquidator, etc.

157. Where a company is being wound up, and the Registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the company are fully wound up, that person may strike the company off the register and the company shall thereupon be dissolved.

Registrar to publish fact of company being struck off register

158. The Registrar shall immediately publish a Government Notice to the effect that the company in question has been struck off the register, the date on which it has been struck off and the reason therefor. Such notice shall be gazetted.

Company, member or creditor may apply to court for company to be reinstated

159. (1) If a company or any member or creditor of a company feels aggrieved by the company having been struck off the register in accordance with this Act, the company, member or creditor may apply to the Court to have the company restored to the register.

(2) An application referred to in subsection (1) shall be made by the company or any member or creditor of the company —

(a) within two years after the date on which the company was struck off the register; or

(b) where the Cabinet allows, after the two-year period referred to in paragraph (a) but not more than ten years after the date on which the company was struck off the register.

(3) Upon an application under subsection (1), if the Court is satisfied that —

(a) the company was, at the time of the striking off, carrying on business or in operation, or otherwise; and

(b) it is just that the company be restored to the register,

the Court may order that the name of the company be restored to the register on payment by the company of a reinstatement fee equivalent to two times the original incorporation or registration fee, and on terms and conditions as to the Court may seem just.

(4) Where the Court orders that the name of the company is to be restored to the register under subsection (3) —

(a) the company is deemed to have continued in existence as if its name had not been struck off the register; and

(b) the Court, by the same or any subsequent order, may give directions and make provisions as seem just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off the register.

Liability of members of company to remain

160. The striking off the register of any company under this Act shall not affect the liability, if any, of any director, manager, officer or member of the company, and such liability shall continue and may be enforced as if the company had not been dissolved.

Registrar not liable for any act performed under this Part

161. No liability shall attach for any act performed or thing done by the Registrar under this Part.

Case 1:26-cv-00425-LJV-JJM Document 1-5 Filed 04/02/26 Page 112 of 197 PageID #: 5619

Vesting of property

162. Any property vested in or belonging to any company struck off the register under this Act shall thereupon vest in the Minister charged with responsibility for Finance and shall be subject to disposition by the Cabinet, or to retention for the benefit of the Islands.

PART 7 - Exempted Companies

What companies may apply to be registered as exempted companies

163. Any proposed company applying for registration under this Act, the objects of which are to be carried out mainly outside the Islands or pursuant to a licence to carry on business in the Islands to which section 174 refers, may apply to be registered as an exempted company.

Registration of exempted companies

164. On being satisfied that section 165 has been complied with, the Registrar shall register the company as an exempted company.

Declaration by proposed company

165. A proposed exempted company applying for registration as an exempted company shall submit to the Registrar a declaration signed by a subscriber to the effect that the operation of the proposed exempted company will be conducted mainly outside the Islands or pursuant to a licence to carry on business in the Islands to which section 174 refers.

Shares shall be non-negotiable

166. The shares of an exempted company shall be non-negotiable and shall be transferred only on the books of the company.

Repealed

167. **Repealed** by section 3 of the *Companies (Amendment) Act, 2016 [Law 3 of 2016]*.

Annual return

168. In January of each year after the year of its registration each exempted company that does not hold a licence to carry on business in the Islands to which section 174 refers shall furnish to the Registrar a return which shall be in the form of a declaration that —

(a) since the previous return or since registration, as the case may be, there has been no alteration in the memorandum of association, other than an alteration in the name of the company effected in accordance with section 31 or an alteration already reported in accordance with section 10;

Case 1:26-cv-00495-LTS Document 1-5 Filed 01/12/26 Page 113 of 197 PageID #: 5620

(aa) states the nature of the business;

(b) the operations of the exempted company since the last return or since registration of the exempted company, as the case may be, have been mainly outside the Islands; and

(c) section 174 has been and is being complied with.

Annual fee

169. (1) Every exempted company shall, in January of each year after the year of its registration, pay to the revenues of the Islands the annual fee specified in Part 4 of Schedule 5.

(2) Each such annual fee referred to in subsection (1) shall be tendered with the return required by section 168.

(3) An exempted company which defaults in submitting its annual return under section 168 or the fee specified in subsection (1) shall incur a penalty of —

(a) 33.33% of the annual fee specified in subsection (1) if the return is submitted or the fee and penalty are paid between the 1st April and the 30th June;

(b) 66.67% of the annual fee specified in subsection (1) if the return is submitted or the fee and penalty are paid between the 1st July and the 30th September; and

(c) 100% of the annual fee specified in subsection (1) if the return is submitted or the fee and penalty are paid between the 1st October and the 31st December.

Failure to comply with section 168 or 169

170. Any exempted company which fails to comply with section 168 or 169 shall be deemed to be a defunct company and shall thereupon be dealt with as such under Part 6 but without prejudice to its being registered again as though it were being registered for the first time.

Registrar to give notice

171. Before taking action under section 170, the Registrar shall give one month's notice to the defaulting company and, if the default is made good before the expiry of such notice, sections 168 and 169 shall be deemed to have been complied with.

False statement in declaration

172. If any declaration under section 165 or 168 contains any wilful false statement or misrepresentation the company shall, on proof thereof, be liable to be immediately dissolved and removed from the register and in such case any fee tendered under section 26(4) or 169 shall be forfeited to the Minister charged with responsibility for Finance for credit to the general revenue.

Penalty for false declaration

173. Every director and officer of a company who knowingly makes or permits the making of any such declaration knowing it to be false commits an offence and is liable on summary conviction to a fine of five thousand dollars and to imprisonment for a term of one year, or to both.

Prohibited enterprises

174. (1) An exempted company shall not carry on a trade or business in the Islands with any person, except in furtherance of the business of the exempted company carried on outside of the Islands, unless that exempted company holds a licence to carry on business in the Islands under any applicable law.

(2) Nothing in this section shall be construed so as to prevent an exempted company effecting and concluding contracts in the Islands and exercising in the Islands all its powers necessary for the carrying on of its business outside the Islands.

(3) An exempted company that holds a licence to carry on business in the Islands under any applicable law, shall from the date of issue of such licence, continue for all purposes as if incorporated and registered as an ordinary resident company under and subject to this Act the provisions of which shall apply to the company and to persons and matters associated with the company as if the company were incorporated and registered under this Act except as provided in section 7(1)(a), 8(1) and (4), 13(1)(a), 26(3), 30(3), 31(1), 41(2), 42, 50(2), 166, 169, 175 or 252(2).

Prohibited sale of securities

175. An exempted company that is not listed on the Cayman Islands Stock Exchange is prohibited from making any invitation to the public in the Islands to subscribe for any of its securities.

Penalty for carrying on business contrary to this Part

176. If an exempted company carries on any business in the Islands in contravention of this Part then, without prejudice to any other proceedings that may be taken in respect of the contravention, the exempted company and every director, provisional director and officer of the exempted company who is responsible for the contravention commits an offence and is liable on summary conviction to a fine of one hundred dollars for every day during which the contravention occurs or continues, and the exempted company shall be liable to be immediately dissolved and removed from the register.

Electronic business by exempted companies

177. Nothing in this Act shall prohibit an exempted company from offering, by electronic means, and subsequently supplying, real or personal property, services or information from a place of business in the Islands or through an internet service provider or other electronic service provider located in the Islands.

PART 8 - Exempted Limited Duration Companies

Exempted company may apply to be registered as an exempted limited duration company

178. (1) An exempted company may, at any time, apply to the Registrar to be registered as an exempted limited duration company.

(2) An application may also be made under subsection (1) at the same time as an application is made —

(a) to register a proposed company as an exempted company;

(b) to re-register an ordinary non-resident company as an exempted company; or

(c) to register a company by way of continuation as an exempted company.

(3) An application under subsection (1) shall, in addition to any other fee that may be payable, be accompanied by an application fee of two hundred dollars.

Registration as an exempted limited duration company

179. (1) The Registrar shall register as an exempted limited duration company an exempted company that has made application under section 178 if —

(a) the company has at least two subscribers or two members;

(b) where the company was not already registered as a company prior to the application —

(i) the memorandum of association of the company limits the duration of the company to a period of thirty years or less; and

(ii) the name of the company includes at its end "Limited Duration Company" or "LDC"; and

(c) where the company was already registered as a company prior to the application —

(i) the Registrar has been supplied, where the duration of the company is not already limited to a period of thirty years or less with a certified copy of a special resolution of the company altering its memorandum of association to limit the duration of the company to a period of thirty years or less; and

(ii) the Registrar has been supplied, in accordance with section 31, with a copy of a special resolution of the company changing its name to a name that includes at its end "Limited Duration Company" or "LDC".

(2) On registering an exempted company as an exempted limited duration company the Registrar shall —

(a) in the case of a company referred to in paragraph (b) of subsection (1), certify in the certificate of incorporation issued in accordance with section 27(3) or the certificate of registration by way of continuation issued in accordance with section 201(1) that the company is registered as an exempted limited duration company; and

(b) in the case of a company referred to in paragraph (c) of subsection (1), certify in the certificate of incorporation issued in accordance with section 31(2) that the company is registered as an exempted limited duration company stating the date of such registration.

(3) A special resolution passed for the purpose of paragraph (c)(ii) of subsection (1) has no effect until the company is registered as an exempted limited duration company.

Contents of articles of association

180. (1) The articles of association of an exempted limited duration company may provide that the transfer of any share or other interest of a member of the company requires the unanimous resolution of all the other members.

(2) The articles of association of an exempted limited duration company may provide that the management of the company is vested in the members of the company either equally per capita or in proportion to their share or other ownership interest in the company or in such other manner as may be specified in the articles of association.

(3) Where the articles of association of an exempted limited duration company contain the provision referred to in subsection (2), the members of the company are to be considered to be the directors of the company but with power, if so provided by the articles of association, to delegate the management to a board of directors.

Cancellation of registration

181. (1) A company ceases to be an exempted limited duration company if —

(a) the Registrar issues a certificate under section 207 on deregistration of the company;

(b) the Registrar issues a certificate of incorporation in accordance with section 31(2) which records a change of name for the company that does not include at its end "Limited Duration Company" or "LDC"; or

(c) the company passes a special resolution in accordance with section 10 to alter its memorandum of association to provide for a period of duration of the company that exceeds or is capable of exceeding thirty years,

and in the case of paragraph (b) or (c), the company pays a deregistration fee of four hundred dollars.

(2) On a company ceasing to be an exempted limited duration company —

(a) the Registrar shall, where the company has ceased to be an exempted limited duration company by virtue of paragraph (b) or (c) of subsection (1), issue to the company a certificate of incorporation altered to meet the circumstances of the case; and

(b) in all cases the certificate issued by virtue of section 179(2) ceases to have effect.

(3) A special resolution passed for the purpose of paragraph (c) of subsection (1) has no effect until a certificate of incorporation is issued by the Registrar under paragraph (a) of subsection (2).

Electronic business by exempted limited duration companies

182. Nothing in this Act shall prohibit an exempted limited duration company from offering, by electronic means, and subsequently supplying, real or personal property, services or information from a place of business in the Islands or through an internet service provider or other electronic service provider located in the Islands.

PART 8A - Special Economic Zone Companies

Exempted company may apply to be registered as a special economic zone company

182A.(1) An exempted company that does not hold a licence to carry on business in the Islands to which section 174 refers may, at any time, apply to the Registrar to be registered as a special economic zone company.

(2) An application may also be made under subsection (1) at the same time as an application is made —

(a) to register a proposed company as an exempted company;

(b) to re-register an ordinary non-resident company as an exempted company; or

(c) to register a company by way of continuation as an exempted company.

(3) An application under subsection (1) shall be accompanied by a fee which shall be equal to the lowest band of the annual fee payable by an exempted company under section 169(1) as specified in paragraph (a) of Part 4 of Schedule 5.

Case 1:26-cv-00425-LJV-JJM Document 1-5 Filed 04/03/26 Page 118 of 197 PageID #: 5625

Registration as a special economic zone company

182B.(1) The Registrar shall register as a special economic zone company an exempted company that has made application under section 182A if —

(a) where the company was not already registered as a company prior to the application —

(i) the memorandum of association of the company specifies that the business of the company includes special economic zone business; and

(ii) the name of the company includes the words "Special Economic Zone Company" or the letters "SEZC"; and

(b) where the company was already registered as a company prior to the application —

(i) the Registrar has been supplied, in accordance with section 62, with a copy of a special resolution of the company altering its memorandum of association to carry on special economic zone business; and

(ii) the Registrar has been supplied, in accordance with sections 31 and 62, with a copy of a special resolution of the company changing its name to a name that includes the words "Special Economic Zone Company" or the letters "SEZC".

(2) On registering an exempted company as a special economic zone company the Registrar shall —

(a) in the case of a company referred to in subsection (1)(a), certify in the certificate of incorporation issued in accordance with section 27(1) or the certificate of registration by way of continuation issued pursuant to section 201(1) that the company is registered as a special economic zone company; and

(b) in the case of a company referred to in subsection (1)(b), issue a certificate stating that the company is registered as a special economic zone company and stating the date of such registration.

(3) A special resolution passed for the purpose of subsection (1)(b)(ii) has no effect until the company is registered as a special economic zone company.

Cancellation of registration

182C.(1) A company ceases to be a special economic zone company if —

(a) the Registrar issues a certificate under section 207 on deregistration of the company; or

(b) the Registrar issues a certificate of incorporation —

Case 1:26-cv-00425-LTS Document 1-7 Filed 01/12/26 Page 119 of 197 PageID #: 5626

(i) in accordance with section 31(2) which records a change of name for the company that does not include the words "Special Economic Zone Company" or the letters "SEZC"; and

(ii) altered to meet the circumstances of the case, where the company passes a special resolution in accordance with section 10 to alter its memorandum of association to exclude the carrying on of special economic zone business,

and in the case of paragraph (b), the company pays a deregistration fee of four hundred dollars.

(2) On a company ceasing to be a special economic zone company the certificate issued by virtue of section 182B(2) ceases to have effect.

PART 9 - Overseas Companies

Definition of foreign company

183. In this Part, a foreign company means an overseas company which, after the 1st December, 1961, establishes a place of business or commences carrying on business (which expressions in this Part include, without limiting their generality, the sale by or on behalf of an overseas company of its shares or debentures and offering, by electronic means, and subsequently supplying, real or personal property, services or information from a place of business in the Islands or through an internet service provider or other electronic service provider located in the Islands) within the Islands, and all overseas companies which before the 1st December, 1961 established a place of business or carried on business as aforesaid within the Islands at the 1st December, 1961.

Documents, etc., to be delivered to Registrar by foreign companies

184. (1) Every foreign company shall, within one month after becoming a foreign company as defined in section 183, deliver to the Registrar for registration the following —

(a) a certified copy of the foreign company's certificate of formation or incorporation, or the equivalent document issued by the relevant authority as evidence of its formation or incorporation;

(b) a certificate of good standing issued by the relevant authority (or a certified copy thereof), or, if the relevant authority does not issue such certificates of good standing, a declaration signed by a director of the foreign company that the foreign company is in good standing with the relevant authority, in either case, dated no earlier than one month prior to the date of its delivery to the Registrar;

(c) a certified copy of any charter, bye-laws or memorandum or articles of association or other constitutional document (howsoever called) of the foreign company that is required to be filed with the relevant authority under the laws of the relevant jurisdiction in connection with the incorporation or formation of the foreign company;

(d) a list of its directors, containing such particulars with respect to the directors as are by this Act required to be contained with respect to directors in the register of the directors of a company; and

(e) the names and addresses of some one or more than one person resident in the Islands authorised to accept on its behalf service of process and any notices required to be served on it,

and shall pay to the Registrar the fee specified in Part 5 of Schedule 5.

(2) Every foreign company shall, in January of each year pay to the revenues of the Islands the annual fee specified in Part 5 of Schedule 5.

(3) A foreign company which defaults in paying the annual fee specified in subsection (2) shall incur a penalty of —

(a) 33.33% of the annual fee specified in subsection (2) if the fee and penalty are paid between the 1st April and the 30th June;

(b) 66.67% of the annual fee specified in subsection (2) if the fee and penalty are paid between the 1st July and the 30th September; and

(c) 100% of the annual fee specified in subsection (2) if the fee and penalty are paid between the 1st October and the 31st December.

Power of certain foreign companies to hold land

185. (1) An overseas company shall not have power to hold land in the Islands except where it is a foreign company which has delivered to the Registrar documents, particulars and fees specified in section 184.

(2) If an overseas company which is not a foreign company holds land in the Islands or if a foreign company ceases to carry on, or have a place of business in the Islands or ceases to be a foreign company or fails to comply with this Part, the Cabinet may, whenever it appears to it to be necessary in the public interest, order the overseas company to transfer any lands held by, vested in or belonging to it to a person capable of holding such lands and of being registered as proprietor thereof under the *Registered Land Act (2018 Revision)*.

(3) If an overseas company fails to comply with an order under subsection (2), the Registrar may apply to the Court for an order that the land shall vest in the Minister charged with responsibility for Finance for the benefit of the Islands and be subject to the disposition of the Cabinet, and the Court may order accordingly.

Case 1:26-cv-00425-LTS Document 1-7 Filed 01/16/26 Page 121 of 197 PageID #: 5628

(4) An order under subsection (2), and any order or proceedings required by the Court to be served in respect of an application under subsection (3) shall be served by personal service on a person, if any, whose name and address has been delivered by the company to the Registrar under paragraph (e) of section 184(1):

Provided that, in the event any such order or proceedings may not be served by such personal service, it or they may be served by —

(a) personal service on the attorney holding a power of attorney whereunder that person is authorised to accept service of orders and proceedings of the Court;

(b) sending it by registered post to the overseas company at its usual or last known postal address in the Islands;

(c) leaving it at the last known place of business of the overseas company in the Islands;

(d) publication in three consecutive issues of the Gazette;

(e) publication in three consecutive issues of a newspaper published and circulating in the Islands; or

(f) displaying it in a prominent position on the lands and causing it to be kept so displayed for one month.

(5) In this section —

"**hold land**" bears the meaning ascribed to that expression in section 32(3).

Registration of foreign companies

186. (1) Upon compliance with section 184, the Registrar shall issue a certificate under that person's hand and seal of office that the foreign company is registered under this Act.

(2) A certificate of registration of a foreign company issued under subsection (1) shall be conclusive evidence that compliance has been made with all requirements of this Act in respect of registration.

Return to be delivered to Registrar where documents etc., altered

187. If, in the case of any foreign company, an alteration is made in or to any document or other information filed with the Registrar pursuant to section 184(1) (other than a document referred to in section 184(1)(b)) the foreign company shall, within thirty days after the date of such alteration, deliver to the Registrar for registration a return containing the particulars of the alteration.

Obligation to state name of foreign company, whether limited, and country where formed or incorporated

188. Every foreign company shall —

(a) in every prospectus inviting subscriptions for its shares or debentures in the Islands state the country in which the foreign company is formed or incorporated;

(b) conspicuously exhibit on every place where it carries on business in the Islands the name of the foreign company and the country in which the foreign company is formed or incorporated;

(c) cause the name of the foreign company and of the country in which it is formed or incorporated to be stated in legible characters on all bill heads, letter paper, notices, advertisements and other official publications; and

(d) if the liability of the members of the foreign company is limited, cause notice of that fact to be stated in every such prospectus as aforesaid and on all bill heads, letter paper, notices, advertisements and other official publications in the Islands, and to be affixed on every place where it carries on its business in the Islands.

Service on foreign company to which this Part applies

189. Any process or notice required to be served on a foreign company shall be sufficiently served if addressed to any person whose name has been delivered to the Registrar under sections 184 or 187 and left at or sent by post to the address which has been so delivered:

Provided that —

(a) where any such foreign company makes default in delivering to the Registrar the name and address of a person resident in the Islands who is authorised to accept on behalf of the foreign company service of process or notices; or

(b) if, at any time, all the persons whose names and addresses have been so delivered are dead or have ceased so to reside, or refuse to accept service on behalf of the company, or for any reason cannot be served,

a document may be served on the foreign company by leaving it at or sending it by post to any place of business established by the foreign company in the Islands.

Deeds, etc., of overseas companies

190. The execution of a contract or other instrument in accordance with section 81(6)(a) and the fact that it was executed in accordance with a requirement referred to in section 81(6)(b) may be proved by the affidavit or solemn declaration of a witness to the execution of the contract or other instrument sworn or made before a notary public or any other person qualified to administer oaths in any jurisdiction.

Case 1:26-cv-00425-LJV-JJM Document 1-2 Filed 01/02/26 Page 123 of 197 PageID #: 5630

Execution of deeds, etc.

191. (1) An overseas company may appoint and empower a person either generally or in respect of a specified matter, to execute deeds or instruments under seal on its behalf.

(2) Any appointment under subsection (1) need not be made by deed or instrument under seal, but any person so appointed otherwise than by deed or instrument under seal shall not constitute the donee of a power under the *Powers of Attorney Act (1996 Revision)* (but without prejudice to the authority otherwise conferred upon them by the overseas company).

(3) A deed or instrument under seal, signed by a person on behalf of an overseas company pursuant to authority conferred pursuant to subsection (1), shall be binding on that overseas company and shall have effect as if it were executed as such by the overseas company.

Removing company's name from register

192. If any foreign company ceases to carry on or have a place of business in the Islands it shall forthwith give notice of the fact to the Registrar and, as from the date on which notice is so given, the obligation of the foreign company to deliver any document to the Registrar shall cease:

Provided that where the Registrar is satisfied by any other means that the foreign company has ceased to carry on or have a place of business in the Islands it shall be lawful for the Registrar to close the file of the foreign company and thereupon the obligation of the foreign company to deliver any document to the Registrar shall cease.

Penalties for failing to comply with this Part

193. Whenever any foreign company fails to comply with any of the foregoing provisions of this Part, it and every officer or agent of it, commits an offence and is liable to a fine of one hundred dollars or, in the case of a continuing offence, a further fine of ten dollars for every day during which the default continues.

Definitions in this Part

194. (1) In this Part —

"**certified copies**" includes copies (whether in the form of an electronic record or otherwise) certified as true copies of the originals by —

(a) the relevant authority;

(b) a notary public in the relevant jurisdiction or in the Islands; or

(c) a person qualified to practise law in the relevant jurisdiction or in the Islands, or

(d) any other person acceptable to the Registrar;

"**director**" in relation to a foreign company, means any director, officer, member or other person (howsoever called) in whom the management of the foreign company is vested;

"**electronic record**" has the same meaning as in Part I of the *Electronic Transactions Act (2003 Revision)*;

"**excluded share transfer or share registration office**" means a share transfer or share registration office provided within the Islands by a person licensed or registered to do so under the regulatory laws;

"**place of business**" includes a share transfer or share registration office (except an excluded share transfer or share registration office);

"**relevant authority**" in respect of a foreign company, means the national, state or local government authority, registry or other body in the relevant jurisdiction that is responsible for forming or incorporating the foreign company; and

"**relevant jurisdiction**" means the jurisdiction in which the foreign company has been formed or incorporated.

(2) In this Part, an overseas company shall not be deemed to have established or to have commenced carrying on business within the Islands solely by reason of having an excluded share transfer or share registration office.

Power of Registrar to prohibit sale

195. The Registrar may, at any time and from time to time, prohibit the sale of any shares or debentures of any foreign company in the Islands or any invitation in the Islands to subscribe for any shares or debentures of a foreign company, and in the event of any violation by a foreign company of such prohibition the foreign company and each of its directors and officers is liable on summary conviction to a fine of one thousand dollars and, in default of payment by any director or officer, to imprisonment for three months.

PART 10 - Application of this Act to Companies Formed or Registered in the Islands

Application to existing companies

196. In the application of this Act to existing companies, it shall apply in the same manner in the case of —

(a) a limited company, other than a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by shares;

(b) a company limited by guarantee, as if the company had been formed and registered under this Act as a company limited by guarantee; and

Case 1:26-cv-00045-LJS Document 1-7 Filed 01/02/26 Page 125 of 197 PageID #: 5632

(c) a company other than a limited company, as if the company had been formed and registered under this Act as an unlimited company.

Date of incorporation

197. A reference, express or implied, to the date of incorporation of an existing company shall be, where appropriate, construed as a reference to the date on which the company was incorporated and recorded under the laws relating to companies then in force in the Islands.

Articles of association remain

198. The articles of association of an existing company shall, so far as the same are not contrary to any express provisions of this Act, remain in force until altered or rescinded.

PART 11 - General

Fees in lieu of other provisions

199. (1) Wherever this Act provides for or requires the filing of any document, notice or return with the Registrar or the issue of any certificate or the Registrar provides a copy of any document in respect of which no fee is elsewhere specifically provided, the fees specified in Part 6 of Schedule 5 shall be payable.

(2) The Registrar may, in that person's discretion, extend the time within which any thing is required to be done by this Act, whether the time prescribed therefor has expired or not.

(3) Notwithstanding any provision of this Act which prescribes a specific *per diem* penalty in respect of a default of any obligation to make a filing or to maintain a record set out in this Act, it shall be lawful for the Registrar, in any case where the aggregate *per diem* penalty has exceeded the amount of five hundred dollars and that person is satisfied that the failure is not due to wilful default, to at any time, accept payment of a penalty in the amount of five hundred dollars in lieu thereof.

(4) Without prejudice to the powers exercisable by the Registrar under this Act, all sums that that person is entitled to recover by way of fees or penalties are recoverable either summarily as a civil debt, or as a simple contract debt, in any court of competent jurisdiction.

Fees for administrative services

199A. A person shall pay to the Registrar the fee specified in Part 8 of Schedule 5 for the provision by the Registrar of the corresponding administrative service set out in Part 8 of that Schedule.

Case 1:26-cv-00425-LJV-JJM Document 1-57 Filed 04/03/26 Page 126 of 197 PageID #: 5633

Express fees

200. (1) The Registrar, on receipt of —

(a) an application for registration under section 26, 184 or 201;

(b) an application for re-registration under section 178, 182A, 210 or 214;

(c) an application for registration of a change of name under section 31;

(d) an application for a merger or consolidation under section 233 or 237;

(e) the required information and relevant deregistration fee in accordance with section 181(1)(b) or (c) or 182C(1)(b);

(f) an application for deregistration under section 206;

(g) an application for any other certificate which the Registrar is authorised to provide under this Act; or

(h) any relevant information for a transaction under subsection (2),

which is accompanied by the prescribed fees and the prescribed express fee, shall complete the relevant transaction by —

(i) the end of the working day, where the application or relevant information and all fees are received by 12 noon; or

(ii) 12 noon on the following working day, where the application or relevant information and all fees are received after 12 noon.

(2) For the purposes of subsection (1)(h), the transactions are —

(a) the filing of any document with the Registrar (other than the filing of any document made as part of an application);

(b) certifications by the Registrar;

(c) the issuance or making of copies by the Registrar;

(d) the issuance of certificates by the Registrar, including customised certificates; or

(e) the issuance of letters by the Registrar, including customised letters.

Certificate of good standing

200A.(1) The Registrar may on application made by a company issue a certificate of good standing to a company that is in good standing in accordance with subsection (2).

(2) A certificate of good standing is evidence of the fact that the company is in good standing on the date that the certificate of good standing is issued.

(3) A company shall be deemed to be in good standing if all fees and penalties under this Act have been paid and the Registrar has no knowledge that the company is in default under this Act.

Case 1:26-cv-00495-LJV-JJM Document 1-7 Filed 05/08/26 Page 127 of 197 PageID #: 5634

PART 12 - Transfer by Way of Continuation

Application for continuation

201. (1) A body corporate incorporated, registered or existing with limited liability and a share capital under the laws of any jurisdiction outside the Islands (which body corporate is in this Part referred to as a "registrant") may apply to the Registrar to be registered by way of continuation as an exempted company limited by shares under this Act.

(2) The Registrar shall register a registrant if —

(a) the registrant is incorporated, registered or existing in a jurisdiction whose laws permit or do not prohibit the transfer of the registrant in the manner hereinafter provided in this Part (hereinafter in this section referred to as "a relevant jurisdiction");

(b) the registrant has paid to the Registrar a fee equal to the fee payable on the registration of an exempted company under section 26;

(c) the registrant has delivered to the Registrar the documents listed in paragraphs (a) to (d) of section184(1) (in this Part referred to as "the charter documents");

(d) the name of the registrant is acceptable to the Registrar under section 30 or the registrant has undertaken to change the name to an acceptable name within sixty days of registration;

(e) the registrant has filed with the Registrar notice of the address of its proposed registered office in the Islands;

(f) the registrant has filed with the Registrar a declaration signed by a director of the registrant that the operations of the registrant will be conducted mainly outside the Islands;

(g) no petition or other similar proceeding has been filed and remains outstanding or order made or resolution adopted to wind up or liquidate the registrant in any jurisdiction;

(h) no receiver, trustee, administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the registrant, its affairs or its property or any part thereof;

(i) no scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the registrant are and continue to be suspended or restricted;

(j) the registrant is able to pay its debts as they fall due;

(k) the application for registration is *bona fide* and not intended to defraud existing creditors of the registrant;

(l) the registrant has delivered to the Registrar an undertaking signed by a director of the registrant that notice of the transfer has been or will be given within twenty-one days to the secured creditors of the registrant;

(m) any consent or approval to the transfer required by any contract or undertaking entered into or given by the registrant has been obtained, released or waived, as the case may be;

(n) the transfer is permitted by and has been approved in accordance with the charter documents of the registrant;

(o) the laws of the relevant jurisdiction with respect to transfer have been or will be complied with;

(p) the registrant is constituted in a form or substantially a form which could have been incorporated as an exempted company limited by shares under this Act;

(q) the registrant will, upon registration hereunder, cease to be incorporated, registered or exist under the laws of the relevant jurisdiction;

(r) the registrant, if it is (or will when registered by way of continuation be) prohibited from carrying on its business in or from within the Islands unless licensed under any law, has applied for and obtained the requisite licence; and

(s) the Registrar is not aware of any other reason why it would be against the public interest to register the registrant.

(3) Paragraphs (g), (h), (i), (j), (k), (m), (n), (o) and (q) of subsection (2) shall be satisfied by filing with the Registrar a declaration or affidavit of a director of the registrant to the effect that, having made due enquiry, that person is of the opinion that the requirements of those paragraphs have been met, and which declaration or affidavit shall include a statement of the assets and liabilities of the registrant made up to the latest practicable date before making the declaration or affidavit.

(4) A person who, being a director, makes a declaration or affidavit under subsection (3) without reasonable grounds therefor commits an offence and is liable on summary conviction to a fine of fifteen thousand dollars and to imprisonment for five years.

(5) Without prejudice to Part 9, a registrant may apply to be provisionally registered by way of continuation as an exempted company limited by shares under this Act.

(6) The Registrar shall provisionally register a registrant if —

(a) the registrant complies with the requirements of paragraphs (a), (c), (e), (f), (g), (h), (i), (j) and (p) of subsection (2); and

(b) the registrant has paid to the Registrar a fee of one thousand five hundred dollars.

(7) Paragraphs (g), (h), (i), (j) and (p) of subsection (2) shall be satisfied by filing with the Registrar a declaration or affidavit of a director of the registrant to the effect that, having made due enquiry, that person is of the opinion that the requirements of those paragraphs have been met, and subsection (4) shall, *mutatis mutandis* apply with respect to such declaration or affidavit.

(8) The Registrar shall register a registrant which is provisionally registered under this Part upon the requirements of paragraphs (b), (d), (k), (l), (m), (n), (o), (q), (r) and (s) of subsection (2) being met, as to which subsection (3) shall, *mutatis mutandis*, apply where relevant.

(9) A registrant which is provisionally registered shall —

(a) within sixty days after registration, deliver, to the Registrar details of any changes in the information required by paragraphs (c) and (e) of subsection (2);

(b) file with the Registrar in January of each year following provisional registration, a declaration or affidavit in the form described in subsection (7); and

(c) pay to the Registrar in January of each year following provisional registration, a fee of one thousand dollars.

(10) A registrant which is provisionally registered and which fails to comply with paragraphs (b) and (c) of subsection (9) by 30th June in such year shall cease to be provisionally registered but without prejudice to being provisionally registered anew hereunder upon complying with the requirements of this Part.

Registration under this Part

202. (1) Upon registration of a registrant under this Part, the Registrar shall issue a certificate under that person's hand and seal of office that the registrant is registered by way of continuation as an exempted company and specifying the date of such registration, and section 27(3) shall apply, *mutatis mutandis*, to such certificate.

(2) The Registrar shall enter in the register of companies the date of registration of the registrant and, to the extent possible with respect to the registrant, particulars of the matters specified.

(3) From the date of registration of the registrant it shall continue as a body corporate for all purposes as if incorporated and registered as an exempted company under and subject to this Act the provisions of which shall apply to the company and to persons and matters associated therewith as if such company were so incorporated and registered and such company shall have, but without limitation to the generality of the foregoing —

(a) the capacity to perform all the functions of an exempted company;

(b) the capacity to sue and to be sued;

(c) perpetual succession; and

(d) the power to acquire, hold and dispose of property,

and the members of the company shall have such liability to contribute to the assets of the company in the event of its being wound up under this Act as is provided therein:

Provided always that section 201 and this section shall not operate —

(e) to create a new legal entity;

(f) to prejudice or affect the identity or continuity of the registrant as previously constituted;

(g) to affect the property of the registrant;

(h) to affect any appointment made, resolution passed or any other act or thing done in relation to the registrant pursuant to a power conferred by any of the charter documents of the registrant or by the laws of the jurisdiction under which the registrant was previously incorporated, registered or existing;

(i) except to the extent provided by or pursuant to this Part, to affect the rights, powers, authorities, functions and liabilities or obligations of the registrant or any other person; or

(j) to render defective any legal proceedings by or against the registrant and any legal proceedings that could have been continued or commenced by or against the registrant before its registration hereunder may, notwithstanding the registration, be continued or commenced by or against the registrant after registration.

(4) Upon provisional registration of a registrant under this Part the Registrar shall issue a certificate under that person's hand and seal of office that the registrant is provisionally registered by way of continuation as an exempted company and specifying the date of such provisional registration.

(5) The Registrar shall enter in a register maintained for the purpose the date of provisional registration and name of the registrant.

(6) If a registrant which is provisionally registered under this Part is registered pursuant to section 201(2) it shall automatically cease to be provisionally registered and the Registrar shall cancel such provisional registration.

(7) Subsection (3) shall not apply to a registrant which is provisionally registered unless and until it is registered under section 201(2), and nothing in this section shall be construed as enabling a registrant which is provisionally registered to carry on business within the Islands unless it complies with the requirements of Part 9.

Amendment, etc., of charter documents

203. (1) A registrant shall, within ninety days of registration by special resolution passed in accordance with this Act, make such amendments, alterations, modifications, variations, deletions and additions (in this section referred to as "changes"), if any, to its charter documents as are necessary to ensure that they comply with the requirements of this Act as they relate to an exempted company.

(2) Within ninety days of registration, the registrant —

(a) may, instead of passing a special resolution making the changes required by subsection (1); or

(b) shall, whether or not it has passed such a special resolution making, or purporting to make, such changes, if the Registrar so directs,

apply to the Court for an order approving such changes and the Court, if satisfied that the changes (with such modifications, if any, as it considers appropriate) are necessary to ensure that the charter documents of the registrant comply with the requirements of this Act, may approve them accordingly and make such consequential orders as it thinks fit. Changes, when so approved, shall take effect as if they formed part of the charter documents.

(3) A copy of the special resolution passed under subsection (1) or of the order of the Court made under subsection (2) shall be filed with and registered by the Registrar whose certificate of registration thereof shall be conclusive evidence that the charter documents comply with the requirements of this Act.

(4) After registration of the registrant and until such time as the charter documents of the registrant are changed to comply with the requirements of this Act or to the extent they cannot be changed so to comply, this Act shall prevail.

(5) The provisions of the charter documents of a registrant which would, if the company had been incorporated under this Act, have been required by this Act to be included in its memorandum of association shall be deemed to be the registered memorandum of association of the company and the provisions of the charter documents that do not by virtue of the foregoing constitute the registered memorandum of association shall be deemed to be the registered articles of association of the company, and the company and its members shall be bound thereby accordingly.

Effect of registration under this Part on companies registered under Part 9

204. Where a registrant is also registered as a foreign company under Part 9 it shall, upon registration under Part 12, automatically cease to be registered under Part 9 and the Registrar shall cancel such registration.

Case 1:26-cv-00425-LTS-SN Document 1-7 Filed 01/16/26 Page 132 of 197 PageID #: 5639

Notice of registration, etc., to be given in Gazette

205. The Registrar shall forthwith give notice in the Gazette of the registration of a registrant under this Part, the jurisdiction under whose laws the registrant was previously incorporated, registered or existing and the previous name of the registrant if different from the current name.

Deregistration of exempted companies including companies registered under this Part

206. (1) An exempted company incorporated and registered with limited liability and a share capital under this Act, including a company registered by way of continuation under this Part, which proposes to be registered by way of continuation as a body corporate limited by shares under the laws of any jurisdiction outside the Islands (hereinafter called an "applicant") may apply to the Registrar to be deregistered in the Islands.

(2) The Registrar shall so deregister an applicant if —

(a) the applicant proposes to be registered by way of continuation in a jurisdiction which permits or does not prohibit the transfer of the applicant in the manner provided in this part (hereinafter in this section referred to as "a relevant jurisdiction");

(b) the applicant has paid to the Registrar a fee equal to three times the annual fee that would have been payable pursuant to section 169 in the January immediately preceding the application for deregistration by an exempt company having the same registered capital as the applicant on the date of that application;

(c) the applicant has filed with the Registrar notice of any proposed change in its name and of its proposed registered office or agent for service of process in the relevant jurisdiction;

(d) no petition or other similar proceeding has been filed and remains outstanding or order made or resolution adopted to wind up or liquidate the applicant in any jurisdiction;

(e) no receiver, trustee or administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the applicant, its affairs or its property or any part thereof;

(f) no scheme, order, compromise or other similar arrangement has been entered into or made whereby the rights of creditors of the applicant are and continue to be suspended or restricted;

(g) the applicant is able to pay its debts as they fall due;

(h) the application for deregistration is *bona fide* and not intended to defraud creditors of the applicant;

(i) the applicant has delivered to the Registrar an undertaking signed by a director that notice of the transfer has been or will be given within twenty-one days to the secured creditors of the applicant;

(j) any consent or approval to the transfer required by any contract or undertaking entered into or given by the applicant has been obtained, released or waived, as the case may be;

(k) the transfer is permitted by and has been approved in accordance with the memorandum and articles of association of the applicant;

(l) the laws of the relevant jurisdiction with respect to transfer have been or will be complied with;

(m) the applicant, if licensed under the *Banks and Trust Companies Act (2021 Revision)*, or the *Insurance Act, 2010 [Law 32 of 2010]* or, if so previously licensed and in respect of which such licence shall have been suspended or revoked and not reinstated, has obtained consent of the Authority to the transfer;

(n) the applicant will upon registration under the laws of the relevant jurisdiction continue as a body corporate limited by shares; and

(o) the Registrar is not aware of any other reason why it would be against the public interest to deregister the applicant.

(3) Paragraphs (d), (e), (f), (g), (h), (j), (k), (l) and (n) of subsection (2) shall be satisfied by filing with the Registrar a declaration or affidavit of a director of the applicant to the effect that, having made due enquiry, that person is of the opinion that the requirements of those paragraphs have been met and which declaration or affidavit shall include a statement of the assets and liabilities of the applicant made up to the latest practicable date before the making of the declaration or affidavit.

(4) A person who, being a director, makes a declaration or affidavit under subsection (3) without reasonable grounds therefor commits an offence and is liable on summary conviction to a fine of fifteen thousand dollars and to imprisonment for five years.

Certification of deregistration, etc.

207. (1) Upon deregistration of an applicant under this Part, the Registrar shall issue a certificate under that person's hand and seal of office that the applicant has been deregistered as an exempted company and specifying the date of such deregistration.

(2) The Registrar shall enter in the register of companies the date of deregistration of the applicant.

(3) From the commencement of the date of deregistration the applicant shall cease to be a company for all purposes under this Act and shall continue as a company under the laws of the relevant jurisdiction:

Provided always that this shall not operate —

(a) to create a new legal entity;

(b) to prejudice or affect the identity or continuity of the applicant as previously constituted;

(c) to affect the property of the applicant;

(d) to affect any appointment made, resolution passed or any other act or thing done in relation to the applicant pursuant to a power conferred by the memorandum and articles of association of the applicant or by the laws of the Islands;

(e) except to the extent provided by or pursuant to this Part to affect the rights, powers, authorities, functions and liabilities or obligations of the applicant or any other person; or

(f) to render defective any legal proceedings by or against the applicant, and any legal proceedings that could have been continued or commenced by or against the applicant before its deregistration hereunder may, notwithstanding the deregistration, be continued or commenced by or against the applicant after deregistration.

Application of Part 9 to deregistered companies

208. Part 9 shall, where relevant, apply to any company which is deregistered under this Part.

Notice of deregistration, etc., to be given in the Gazette

209. The Registrar shall forthwith give notice in the Gazette of the deregistration of an applicant under this Part, the jurisdiction under the laws of which the applicant has been registered by way of continuation and name of the applicant, if changed.

PART 13 – Re-registration as a Means of an Ordinary Non-resident Company Becoming Exempted

Ordinary non-resident company may be re-registered as exempted company

210. (1) Subject to this section and section 211, an ordinary non-resident company may be re-registered as an exempted company if —

(a) the company passes a special resolution that it should be so re-registered; and

Case 1:26-cv-00425-LTS Document 1-7 Filed 01/08/26 Page 135 of 197 PageID #: 5642

(b) an application for re-registration is delivered to the Registrar together with the necessary documents.

(2) Such special resolution shall —

(a) make such alterations in the company's memorandum of association as are necessary to bring it in substance and in form into conformity with the requirements of this Act with respect to the memorandum of association of an exempted company; and

(b) make such alterations in the company's articles of association as are requisite in the circumstances.

(3) Such application shall be signed by a director of the company, and accompanied by —

(a) a copy of the memorandum and articles as altered by the special resolution; and

(b) a declaration by a director of the company that the operation of the company will be conducted mainly outside the Islands.

(4) A special resolution that an ordinary non-resident company be re-registered as an exempted company may change the company's name to any name by which an exempted company could be registered.

(5) The application shall be accompanied by a re-registration fee equal to the fee payable on the registration of an exempted company under section 26.

Effect of re-registration of ordinary non-resident company as an exempted company

211. (1) If, on an application under section 210, the Registrar is satisfied that an ordinary non-resident company may be re-registered under that section as an exempted company, that person shall —

(a) retain the application and other documents delivered to that person under the section; and

(b) issue to the company a certificate of re-registration stating that the company has been re-registered as an exempted company.

(2) Upon the issue to a company of a certificate of re-registration under this section —

(a) the company, by virtue of the issue of that certificate, becomes an exempted company; and

(b) any alterations in the memorandum and articles set out in the special resolution take effect accordingly:

Provided that the foregoing shall not operate —

(i) to create a new legal entity;

(ii) to prejudice or affect the identity or continuity of the company;

Case 1:26-cv-00425-LTS-SS Document 1-2 Filed 01/12/26 Page 136 of 197 PageID #: 5643

(iii) to affect the property of the company;

(iv) to affect any appointment made, resolution passed or any other act or thing done in relation to the company pursuant to a power conferred by the memorandum and the articles of association of the company or by the laws of the Islands;

(v) to affect the rights, powers, authorities, functions and liabilities or obligations of the company or any other person; or

(vi) to render defective any legal proceedings by or against the company, and legal proceedings that could have been continued or commenced by or against the company before its re-registration hereunder may, notwithstanding the re-registration, be continued or commenced by or against the company after re-registration.

(3) The certificate of re-registration is conclusive evidence —

(a) that the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with; and

(b) that the company is an exempted company.

PART 14 - Segregated Portfolio Companies

Definitions in this Part

212. In this Part —

"**receiver**" means the person specified in a receivership order for the purposes specified in section 224(3);

"**receivership order**" means an order made under section 224(1);

"**segregated portfolio company**" means an exempted company which is registered under section 213(1);

"**segregated portfolio shares**" means shares issued under section 217(1);

"**segregated portfolio share capital**" means the proceeds of the issue of segregated portfolio shares; and

"**segregated portfolio share dividend**" means a dividend paid under section 217(3).

Applications for registration

213. (1) Subject to subsection (2) and section 214, any exempted company may apply to the Registrar to be registered as a segregated portfolio company.

(2) Nothing in this Part shall derogate from the Authority's powers to determine, where relevant, whether a segregated portfolio company is suitable to be licensed under the regulatory laws.

(3) An application may also be made under subsection (1) at the same time as application is made —

(a) to re-register an ordinary non-resident company as an exempted company;

(b) to register a company by way of continuation as an exempted company; or

(c) to register as an exempted limited duration company.

(4) An application under subsection (1) shall, in addition to any other fee that may be payable, be accompanied by the fee specified in Part 7 of Schedule 5.

(5) A segregated portfolio company shall, on paying the annual fee payable under section 169, pay the additional fee specified in Part 7 of Schedule 5 and the additional annual fee specified in Part 7 of Schedule 5 in respect of each segregated portfolio it has created (other than those in respect of which notice of termination has been given under subsection (6)), both of which shall be tendered in accordance with section 169(2).

(6) At the same time as it tenders the fees in accordance with subsection (5) a segregated portfolio company shall furnish to the Registrar a notice containing the names of each segregated portfolio it has created (other than those in respect of which notice of termination has been given hereunder in a prior year) and indicating those which have been terminated under section 228A since the date of the last notice under this subsection.

(7) A segregated portfolio company which fails to furnish the notice in accordance with subsection (6) shall incur a penalty of ten dollars for every day after 31st March of each year during which the notice is not filed.

Conversions of existing companies

214. (1) Where an exempted company has been registered prior to an application under section 213(1) the company shall —

(a) file with the Registrar a declaration made by at least two directors setting out an accurate statement —

(i) of the assets and liabilities of the company as at a date within three months prior to the date of the declaration;

(ii) of any transaction or event which, as at the date of the declaration, has occurred or is expected to occur between the date of the statement of assets and liabilities prepared pursuant to subparagraph (i) and the date of registration of the company as a segregated portfolio company which, if it had occurred before the date of the declaration, would have caused material changes to the assets and liabilities disclosed in the declaration;

(iii) that the segregated portfolio company intends to operate, and the assets and liabilities which the company proposes to transfer to each of those segregated portfolios;

Case 1:26-cv-00045-LTS Document 1-7 Filed 01/02/26 Page 138 of 197 PageID #: 5645

(iv) that, on registration as a segregated portfolio company, the company and each segregated portfolio will be solvent;

(v) that each creditor of the company has consented in writing to the transfer of assets and liabilities into segregated portfolios or alternatively that adequate notice has been given in accordance with subsection (2) to all creditors of the company and that ninety-five per cent by value of the creditors have consented to that transfer of assets and liabilities into segregated portfolios;

(b) pass a special resolution authorising the transfer of assets and liabilities into segregated portfolios and attach a copy of such resolution to the declaration in subparagraph (a); and

(c) where the company is licensed by the Authority under the regulatory laws, obtain the written consent of the Authority and attach a copy of such consent to the declaration referred to in paragraph (a).

(2) For the purposes of subsection (1)(a)(v), adequate notice is given if notice in writing is sent to each creditor having a claim against the company exceeding one thousand dollars.

(3) A director who makes a declaration under subsection (1)(a) without reasonable grounds or who knowingly makes a false declaration commits an offence and is liable on summary conviction to a fine of five thousand dollars or to imprisonment for one year.

(4) For the avoidance of doubt, the provisions of the *Fraudulent Dispositions Act (1996 Revision)* shall not apply to an initial transfer of assets and liabilities into segregated portfolios pursuant to an application under section 213(1).

Designation

215. A segregated portfolio company shall include in its name the letters "SPC" or the words "Segregated Portfolio Company".

Segregated portfolios

216. (1) A segregated portfolio company may create one or more segregated portfolios in order to segregate the assets and liabilities of the segregated portfolio company held within or on behalf of a segregated portfolio from the assets and liabilities of the segregated portfolio company held within or on behalf of any other segregated portfolio of the segregated portfolio company or the assets and liabilities of the segregated portfolio company which are not held within or on behalf of any segregated portfolio of the segregated portfolio company.

(2) A segregated portfolio company shall be a single legal entity and any segregated portfolio of or within a segregated portfolio company shall not constitute a legal entity separate from the segregated portfolio company.

(3) Each segregated portfolio shall be separately identified or designated and shall include in such identification or designation the words "Segregated Portfolio" or "SP" or "S.P.".

Shares and dividends

217. (1) A segregated portfolio company may create and issue shares in one or more classes or series (including different classes or series relating to the same segregated portfolio), the proceeds of the issue of which shall be included in the segregated portfolio assets of and accounted for in the segregated portfolio in respect of which the segregated portfolio shares are issued.

(2) The proceeds of the issue of shares, other than segregated portfolio shares, shall be included in the segregated portfolio company's general assets.

(3) A segregated portfolio company may pay a dividend or other distribution in respect of segregated portfolio shares of any class or series and whether or not a dividend is declared on any other class or series of segregated portfolio shares or any other shares.

(4) Segregated portfolio dividends or other distributions shall be paid on segregated portfolio shares by reference only to the accounts of and to and out of the segregated portfolio assets and liabilities of the segregated portfolio in respect of which the segregated portfolio shares were issued and otherwise in accordance with the rights of such shares.

Company to act on behalf of portfolios

218. (1) Any act, matter, deed, agreement, contract, instrument under seal or other instrument or arrangement which is to be binding on or to enure to the benefit of a segregated portfolio shall be executed by the segregated portfolio company on behalf of such segregated portfolio which shall be identified or specified, and such execution shall specify that it is in the name of, or by, or for the account of, such segregated portfolio.

(2) If a segregated portfolio company is in breach of subsection (1) the directors shall, forthwith upon becoming aware of the breach —

(a) make any necessary enquiries to determine the correct segregated portfolio to which the relevant act, matter, deed, agreement, contract, instrument under seal or other instrument or arrangement should be attributed;

(b) make the correct attribution; and

(c) notify in writing all persons who are party to the act, matter, deed, agreement, contract, instrument under seal or other instrument or arrangement that was executed, or who may be adversely affected by any such attribution, of that attribution and the parties' rights under subsection (3).

(3) Any person notified under subsection (2)(c) (or who should have been so notified) who objects to an attribution by the directors under subsection (2) may, within thirty days of receiving written notice under that subsection in the case of persons who received such notice, apply to the Court by petition for a re-attribution; and the Court may, upon hearing the petition and taking account of the intention of the parties and such other factors as are deemed relevant by it, order that the act, matter, deed, agreement, contract, instrument under seal or other instrument or arrangement be deemed to be attributable to a particular segregated portfolio or portfolios or to the general assets (if applicable in particular proportions or on a particular basis) and may make such ancillary orders as may be just and equitable in the case.

(4) Any indemnity given by a segregated portfolio company in favour of a director in respect of a liability incurred by such director on behalf of a segregated portfolio shall only be enforceable against the assets of the segregated portfolio in respect of which such liability arose.

Assets

219. (1) The assets of a segregated portfolio company shall be either segregated portfolio assets or general assets.

(2) The segregated portfolio assets comprise the assets of the segregated portfolio company held within or on behalf of the segregated portfolios of the company.

(3) The general assets of a segregated portfolio company comprise the assets of the company which are not segregated portfolio assets.

(4) The assets of a segregated portfolio comprise —

(a) assets representing the share capital and reserves attributable to the segregated portfolio; and

(b) all other assets attributable to or held within the segregated portfolio.

(5) In subsection (4) —

"**reserves**" includes profits, retained earnings, capital reserves and share premiums.

(6) It shall be the duty of the directors of a segregated portfolio company to establish and maintain (or cause to be established and maintained) procedures —

(a) to segregate, and keep segregated, portfolio assets separate and separately identifiable from general assets;

(b) to segregate, and keep segregated, portfolio assets of each segregated portfolio separate and separately identifiable from segregated portfolio assets of any other segregated portfolio; and

(c) to ensure that assets and liabilities are not transferred between segregated portfolios or between a segregated portfolio and the general assets otherwise than at full value.

Segregated portfolio assets

220. Segregated portfolio assets —

(a) shall only be available and used to meet liabilities to the creditors of the segregated portfolio company and holders of segregated portfolio shares who are creditors or holders of segregated portfolio shares in respect of that segregated portfolio and who shall thereby be entitled to have recourse to the segregated portfolio assets attributable to that segregated portfolio for such purposes; and

(b) shall not be available or used to meet liabilities to, and shall be absolutely protected from, the creditors of the segregated portfolio company and holders of segregated portfolio shares who are not creditors or holders of segregated portfolio shares in respect of that segregated portfolio, and who accordingly shall not be entitled to have recourse to the segregated portfolio assets attributable to that segregated portfolio.

Segregation of liabilities

221. (1) Where a liability of a segregated portfolio company to a person arises from a matter, or is otherwise imposed, in respect of or attributable to a particular segregated portfolio —

(a) such liability shall extend only to, and that person shall, in respect of that liability, be entitled to have recourse only to —

(i) firstly, the segregated portfolio assets attributable to such segregated portfolio; and

(ii) secondly, unless specifically prohibited by the articles of association, the segregated portfolio company's general assets, to the extent that the segregated portfolio assets attributable to such segregated portfolio are insufficient to satisfy the liability, and to the extent that the segregated portfolio company's general assets exceed any minimum capital amounts lawfully required by a regulatory body in the Islands; and

(b) such liability shall not extend to, and that person shall not, in respect of that liability, be entitled to have recourse to the segregated portfolio assets attributable to any other segregated portfolio.

(2) Where a liability of a segregated portfolio company to a person arises or is imposed otherwise than from a matter in respect of a particular segregated portfolio or portfolios, such liability shall extend only to, and that person shall, in respect of that liability, be entitled to have recourse only to, the company's general assets.

Case 1:26-cv-00495-LJV-JJM Document 1-7 Filed 05/08/26 Page 142 of 197 PageID #: 5649

General liabilities and assets

222. (1) Liabilities of a segregated portfolio company not attributable to any of its segregated portfolios shall be discharged from the company's general assets.

(2) Income, receipts and other property or rights of or acquired by a segregated portfolio company not otherwise attributable to any segregated portfolio shall be applied to and comprised in the company's general assets.

Winding-up of company

223. (1) Notwithstanding any statutory provision or rule of law to the contrary, in the winding-up of a segregated portfolio company, the liquidator —

(a) shall deal with the company's assets only in accordance with the procedures set out in section 219(6); and

(b) in discharge of the claims of creditors of the segregated portfolio company and holders of segregated portfolio shares, shall apply the segregated portfolio company's assets to those entitled to have recourse thereto under this Part.

(2) Section 140 shall be modified so that it shall apply in relation to protected segregated portfolio companies in accordance with this Part and, in the event of any conflict between this Part and section 140, this Part shall prevail.

Receivership orders

224. (1) Subject to subsections (2) to (5), if in relation to a segregated portfolio company, the Court is satisfied —

(a) that the segregated portfolio assets attributable to a particular segregated portfolio of the company (when account is taken of the company's general assets, unless there are no creditors in respect of that segregated portfolio entitled to have recourse to the company's general assets) are or are likely to be insufficient to discharge the claims of creditors in respect of that segregated portfolio; and

(b) that the making of an order under this section would achieve the purposes set out in subsection (3),

the Court may make a receivership order under this section in respect of that segregated portfolio.

(2) A receivership order may be made in respect of one or more segregated portfolios.

(3) A receivership order shall direct that the business and segregated portfolio assets of or attributable to a segregated portfolio shall be managed by a receiver specified in the order for the purposes of —

(a) the orderly closing down of the business of or attributable to the segregated portfolio; and

(b) the distribution of the segregated portfolio assets attributable to the segregated portfolio to those entitled to have recourse thereto.

(4) A receivership order —

(a) may not be made if the segregated portfolio company is in winding up; and

(b) shall cease to be of effect upon commencement of the winding up of the segregated portfolio company, but without prejudice to prior acts of the receiver or that person's agents.

(5) No resolution for the voluntary winding up of a segregated portfolio company of which any segregated portfolio is subject to a receivership order shall be effective without leave of the Court.

Applications for receivership orders

225. (1) An application for a receivership order in respect of a segregated portfolio of a segregated portfolio company may be made by —

(a) the company;

(b) the directors of the company;

(c) any creditor of the company in respect of that segregated portfolio;

(d) any holder of segregated portfolio shares in respect of that segregated portfolio; or

(e) in respect of a company licensed under the regulatory laws, the Cayman Islands Monetary Authority where the segregated portfolio company is regulated by the Authority.

(2) The Court, on hearing an application —

(a) for a receivership order; or

(b) for leave, pursuant to section 224(5), for a resolution for voluntary winding up,

may make an interim order or adjourn the hearing, conditionally or unconditionally.

(3) Notice of an application to the Court for a receivership order in respect of a segregated portfolio of a segregated portfolio company shall be served upon —

(a) the company;

(b) in respect of a company licensed under the regulatory laws, the Cayman Islands Monetary Authority; and

(c) such other persons, if any, as the Court may direct,

each of whom shall be given an opportunity of making representations to the Court before the order is made.

Administration of receivership orders

226. (1) The receiver of a segregated portfolio —

(a) may do all such things as may be necessary for the purposes set out in section 224(3); and

(b) shall have all the functions and powers of the directors in respect of the business and segregated portfolio assets of or attributable to the segregated portfolio.

(2) The receiver may, at any time, apply to the Court —

(a) for directions as to the extent or exercise of any function or power;

(b) for the receivership order to be discharged or varied; or

(c) for an order as to any matter acting in the course of that person's receivership.

(3) In exercising that person's functions and powers the receiver shall be deemed to act as the agent of the segregated portfolio company, and shall not incur personal liability except to the extent that that person is fraudulent, reckless, negligent, or acts in bad faith.

(4) Any person dealing with the receiver in good faith is not concerned to enquire whether the receiver is acting within that person's powers.

(5) When an application has been made for, and during the period of operation of, a receivership order, no suit, action or other proceedings shall be instituted against the segregated portfolio company in relation to the segregated portfolio in respect of which the receivership order was made except by leave of the Court, which may be conditional or unconditional.

(6) During the period of operation of a receivership order —

(a) the functions and powers of the directors shall cease in respect of the business of or attributable to, and the segregated portfolio assets of or attributable to, the segregated portfolio in respect of which the order was made; and

(b) the receiver of the segregated portfolio shall be entitled to be present at all meetings of the segregated portfolio company and to vote at such meetings, as if that person were a director of the segregated portfolio company, in respect of the general assets of the company, unless there are no creditors in respect of that segregated portfolio entitled to have recourse to the company's general assets.

Discharge of receivership orders

227. (1) The Court shall not discharge a receivership order unless it appears to the Court that the purpose for which the order was made has been achieved, substantially achieved or is incapable of achievement.

(2) The Court, on hearing an application for the discharge or variation of a receivership order, may make any interim order or adjourn the hearing, conditionally or unconditionally.

(3) Upon the Court discharging a receivership order in respect of a segregated portfolio of a segregated portfolio company on the ground that the purpose for which the order was made has been achieved or substantially achieved, the Court may direct that any payment made by the receiver to any creditor of the company in respect of that segregated portfolio shall be deemed full satisfaction of the liabilities of the company to that creditor in respect of that segregated portfolio, and the creditor's claims against the company in respect of that segregated portfolio shall be thereby deemed extinguished.

Remuneration of receiver

228. The remuneration of a receiver and any expenses properly incurred by that person shall be payable, in priority to all other claims, from the segregated portfolio assets attributable to the segregated portfolio in respect of which the receiver was appointed but not from any other assets of the segregated portfolio company.

Termination and re-instatement

228A.(1) Where a segregated portfolio has no segregated portfolio assets or liabilities of the segregated portfolio company attributable to it, the segregated portfolio company may by resolution of its directors (or such other authority as may be provided for in, and subject to the provisions of, its articles of association) terminate such segregated portfolio.

(2) A segregated portfolio company may by resolution of its directors (or such other authority as may be provided for in, and subject to the provisions of, its articles of association) reinstate a segregated portfolio which has been terminated under subsection (1).

Part 15 – Prohibition on Bearer Shares

Issue of bearer shares prohibited

229. (1) Notwithstanding any provision in this Act to the contrary, a company incorporated under this Act shall not issue bearer shares.

(2) In relation to a company which has been struck off the companies register, subsection (1) applies to that company if the company is reinstated.

(3) An order of the Court shall not permit a company which has been struck off the companies register to be reinstated with bearer shares in issue.

(4) Bearer shares issued prior to the commencement of the *Companies (Amendment) (No. 3) Act, 2020 [Act 60 of 2020]* or issued contrary to subsection (1) shall be void.

Repealed

230. **Repealed** by section 5 of the *Companies (Amendment) (No. 3) Act, 2020 [Act 60 of 2020]*.

Repealed

231. **Repealed** by section 5 of the *Companies (Amendment) (No. 3) Act, 2020 [Act 60 of 2020]*.

Repealed

231A. **Repealed** by section 5 of the *Companies (Amendment) (No. 3) Act, 2020 [Act 60 of 2020]*.

PART 16 - Merger and Consolidation

Definitions in this Part

232. In this Part —

"**consolidated company**" means the new company that results from the consolidation of two or more constituent companies;

"**consolidation**" means the combination of two or more constituent companies into a consolidated company and the vesting of the undertaking, property and liabilities of such companies in the consolidated company;

"**constituent company**" means a company that is participating in a merger or consolidation with one or more other companies;

"**merger**" means the merging of two or more constituent companies and the vesting of their undertaking, property and liabilities in one of such companies as the surviving company;

"**parent company**" means, with respect to another company, a company that holds issued shares that together represent at least ninety per cent of the votes at a general meeting of that other company;

"**subsidiary company**" means, with respect to another company, a company of which that other company is the parent company; and

"**surviving company**" means the sole remaining constituent company into which one or more other constituent companies are merged.

Case 1:26-cv-00425-LTS Document 1-5 Filed 01/16/26 Page 147 of 197 PageID #: 5654

Merger and consolidation

233. (1) Without prejudice to sections 86 and 87, but subject to section 239A, two or more companies limited by shares and incorporated under this Act, may, subject to any express provisions to the contrary in the memorandum and articles of association of any of such companies, merge or consolidate in accordance with subsections (3) to (15).

(2) Nothing in this Part shall derogate from the Authority's powers in relation to any constituent company that is a licensee under the regulatory laws and that proposes to participate in a merger or consolidation, or from a constituent company's obligations under the regulatory laws.

(3) The directors of each constituent company that proposes to participate in a merger or consolidation shall on behalf of the constituent company of which they are directors approve a written plan of merger or consolidation.

(4) The plan referred to in subsection (3) shall give particulars of the following matters —

(a) the name of each constituent company and the name of the surviving or consolidated company;

(b) the registered office of each constituent company;

(c) in respect of each constituent company, the designation and number of each class of shares;

(d) the date on which it is intended that the merger or consolidation is to take effect, if it is intended to take effect in accordance with section 234, and not in accordance with subsection (13);

(e) the terms and conditions of the proposed merger or consolidation, including where applicable, the manner and basis of converting shares in each constituent company into shares in the consolidated or surviving company or into other property as provided in subsection (5);

(f) the rights and restrictions attaching to the shares in the consolidated or surviving company;

(g) in respect of a merger, any proposed amendments to the memorandum of association and articles of association of the surviving company, or if none are proposed, a statement that the memorandum of association and articles of association of the surviving company immediately prior to merger shall be its memorandum of association and articles of association after the merger;

(h) in respect of a consolidation, the proposed new memorandum of association and articles of association of the consolidated company;

(i) any amount or benefit paid or payable to any director of a constituent company, a consolidated company or a surviving company consequent upon the merger or consolidation;

(j) the name and address of any secured creditor of a constituent company and of the nature of the secured interest held; and

(k) the names and addresses of the directors of the surviving or consolidated company.

(5) Some or all of the shares whether of different classes or of the same class in each constituent company may be converted into or exchanged for different types of property (consisting of shares, debt obligations or other securities in the surviving company or consolidated company or any other corporate entity, or money or other property, or a combination thereof) as provided in the plan of merger or consolidation.

(6) A plan of merger or consolidation shall be authorised by each constituent company by way of —

(a) a special resolution of the members of each such constituent company; and

(b) such other authorisation, if any, as may be specified in such constituent company's articles of association.

(7) Notwithstanding subsection (6)(a), if a parent company incorporated under this Act is seeking to merge with one or more of its subsidiary companies incorporated under this Act, a special resolution under that subsection of the members of such constituent companies is not required if a copy of the plan of merger is given to every member of each subsidiary company to be merged unless that member agrees otherwise.

(8) The consent of each holder of a fixed or floating security interest of a constituent company in a proposed merger or consolidation shall be obtained but if such secured creditor does not grant that person's consent then the Court may upon application of the constituent company that has issued the security waive the requirement for such consent upon such terms as to security to be issued by the consolidated or surviving company or otherwise as the Court considers reasonable.

(9) After obtaining any authorisations and consents under subsections (6) and (8), the plan of merger or consolidation shall be signed by a director on behalf of each constituent company and filed with the Registrar together with, in relation to each constituent company —

(a) a certificate of good standing;

(b) a director's declaration that the constituent company is, and the consolidated or surviving company will be, immediately after merger or consolidation, able to pay its debts as they fall due;

(c) a director's declaration that the merger or consolidation is *bona fide* and not intended to defraud unsecured creditors of the constituent companies;

(d) a director's declaration that —

(i) no petition or other similar proceeding has been filed and remains outstanding, and that no order has been made or resolution adopted to wind up the company in any jurisdiction;

(ii) no receiver, trustee, administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the constituent company, its affairs, or its property or any part thereof; and

(iii) no scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the constituent company are, and continue to be, suspended or restricted;

(e) a director's declaration of the assets and liabilities of the constituent company made up to the latest practicable date before the making of the declaration;

(f) in the case of a constituent company that is not a surviving company, a director's declaration that the constituent company has retired from any fiduciary office held or will do so immediately prior to merger or consolidation;

(g) an undertaking that a copy of the certificate of merger or consolidation under subsection (11) will be given to the members and creditors of the constituent company and that notification of the merger or consolidation will be published in the Gazette; and

(h) a director's declaration, where relevant, that the constituent company has complied with any applicable requirements under the regulatory laws.

(10) A director's declaration under subsection (9) shall be in writing, signed by, and shall include the full name and address of, the director making the declaration.

(11) Upon payment of the applicable fees under this Act and upon the Registrar being satisfied that the requirements of subsection (9) in respect of the merger or consolidation have been complied with and that the name of the consolidated company complies with section 30, the Registrar shall register the plan of merger or consolidation including any new or amended memorandum and articles of association and issue a certificate of merger or consolidation under that person's hand and seal of office, and in the case of a consolidation section 27 shall apply in relation to the consolidated company.

(12) A certificate of merger or consolidation issued by the Registrar shall be *prima facie* evidence of compliance with all requirements of this Act in respect of the merger or consolidation.

(13) Subject to section 234, a merger or consolidation shall be effective on the date the plan of merger or consolidation is registered by the Registrar.

(14) A person who, being a director, makes a false declaration under subsection (9) commits an offence and is liable on summary conviction to a fine of twenty thousand dollars or to imprisonment for five years, or both.

(15) In any proceedings for an offence under subsection (14) it shall be a defence for the person charged to prove that that person took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by that person or any person under that person's control.

(16) Any director's declaration pursuant to this section may be given in the form of a declaration or an affidavit, as the director may determine.

Delay of effective date

234. A plan of merger or consolidation may provide that such merger or consolidation shall not become effective until a specified date or until the date of the occurrence of a specified event subsequent to the date on which the plan of merger or consolidation is registered by the Registrar, but such date shall not be a date later than the ninetieth day after the date of such registration.

Termination or amendment

235. (1) A plan of merger or consolidation may contain a provision that at any time prior to the date that the plan becomes effective it may be —

(a) terminated by the directors of any constituent company; or

(b) amended by the directors of the constituent companies to —

(i) change the name of the consolidated company;

(ii) change the effective date of the merger or consolidation, provided that the new effective date complies with section 234; and

(iii) effect any other changes to the plan as the plan may expressly authorise the directors to effect in their discretion.

(2) If the plan of merger or consolidation is terminated or amended after it has been filed with the Registrar but before it has become effective, notice of termination or amendment of the plan shall be filed with the Registrar, and shall have effect on the date of registration by the Registrar after that person has satisfied that person's self in accordance with section 233(11).

(3) A copy of the notice under subsection (2) shall be sent to any person entitled to vote on, consent to or be notified of the plan of merger or consolidation in accordance with section 233.

(4) The notice of termination or amendment filed in accordance with subsection (2) shall identify the plan of merger or consolidation that is to be terminated or amended and shall state that the plan has been terminated or state the amendments made and in the former case, the Registrar shall issue a certificate of termination.

Effect of merger or consolidation

236. (1) As soon as a merger or consolidation becomes effective —

(a) in the case of a consolidation, the new memorandum of association and articles of association filed with the plan of consolidation shall immediately become the memorandum of association and articles of association of the consolidated company;

(b) the rights, the property of every description including choses in action, and the business, undertaking, goodwill, benefits, immunities and privileges of each of the constituent companies, shall immediately vest in the surviving or consolidated company; and

(c) subject to any specific arrangements entered into by the relevant parties, the surviving or consolidated company shall be liable for and subject, in the same manner as the constituent companies, to all mortgages, charges or security interests, and all contracts, obligations, claims, debts, and liabilities of each of the constituent companies.

(2) Where a merger or consolidation occurs —

(a) an existing claim, cause or proceeding, whether civil (including arbitration) or criminal pending at the time of the merger or consolidation by or against a constituent company, shall not be abated or discontinued by the merger or consolidation but shall be continued by or against the surviving or consolidated company; and

(b) a conviction, judgment, ruling, order or claim, due or to become due, against a constituent company, shall not be released or impaired by the merger or consolidation, but shall apply to the surviving or consolidated company instead of to the constituent company.

(3) Upon a merger or consolidation becoming effective, the Registrar shall strike off the register —

(a) a constituent company that is not the surviving company in a merger; or

(b) a constituent company that participates in a consolidation,

and section 158 shall apply.

(4) The cessation of a constituent company that participates in a consolidation or that is not the surviving company in a merger shall not be a winding up within Part 5.

Merger or consolidation with overseas company

237. (1) Subject to section 239A, one or more companies incorporated under this Act may merge or consolidate with one or more overseas companies in accordance with subsections (2) to (18).

(2) Where the surviving or consolidated company is to be a company existing under this Act, in addition to compliance by each constituent company incorporated under this Act with section 233(3) to (10) the Registrar is required to be satisfied in respect of any constituent overseas company that —

(a) the merger or consolidation is permitted or not prohibited by the constitutional documents of the constituent overseas company and by the laws of the jurisdiction in which the constituent overseas company is existing, and that those laws and any requirements of those constitutional documents have been or will be complied with;

(b) no petition or other similar proceeding has been filed and remains outstanding, and no order has been made or resolution adopted to wind up or liquidate the constituent overseas company in the jurisdiction in which the constituent overseas company is existing;

(c) no receiver, trustee, administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the constituent overseas company, its affairs or its property or any part thereof;

(d) no scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the constituent overseas company are and continue to be suspended or restricted;

(e) the constituent overseas company is able to pay its debts as they fall due and the merger or consolidation is *bona fide* and not intended to defraud unsecured creditors of the constituent overseas company;

(f) in respect of the transfer of any security interest granted by the constituent overseas company to the surviving or consolidated company —

(i) consent or approval to the transfer has been obtained, released or waived;

(ii) the transfer is permitted by and has been approved in accordance with the constitutional documents of the constituent overseas company; and

(iii) the laws of the jurisdiction of the constituent overseas company with respect to the transfer have been or will be complied with;

(g) the constituent overseas company will, upon the merger or consolidation becoming effective, cease to be incorporated, registered or exist under the laws of the relevant foreign jurisdiction; and

(h) there is no other reason why it would be against the public interest to permit the merger or consolidation.

(3) Subsection (2)(a) to (g) shall be satisfied by filing with the Registrar a declaration of a director of the surviving or consolidated company to the effect

that, having made due enquiry, that person is of the opinion that the requirements of those paragraphs have been met; and —

(a) the declaration shall include a statement of the assets and liabilities of the constituent overseas company made up to the latest practicable date before making the declaration; and

(b) a director of the surviving or consolidated company shall be deemed to have made due enquiry for the purposes of subsection (2)(a) to (g) and this subsection if such director has obtained from a director of the constituent overseas company a declaration that the requirements of subsection 2(a) to (g) have been met with respect to such constituent overseas company.

(4) A person who, being a director, makes a false declaration under subsection (3) commits an offence and is liable on summary conviction to a fine of twenty thousand dollars or to imprisonment for five years, or both.

(5) In any proceedings for an offence under subsection (4), it shall be a defence for the person charged to prove that that person took all reasonable precautions and exercised all due diligence to avoid the commission of such an offence by that person or any person under that person's control.

(6) Where the surviving or consolidated company is to be established under this Act, upon payment of the applicable fees under this Act and upon the Registrar being satisfied that the requirements of subsection (2) in respect of the merger or consolidation have been complied with and that the name of the consolidated company complies with section 30, the Registrar shall register the plan of merger or consolidation including any new or amended memorandum and articles of association and issue a certificate of merger or consolidation under that person's hand and seal of office, and in the case of a consolidation section 27 shall apply in relation to the consolidated company.

(7) Where the surviving or consolidated company is to be an overseas company the Registrar is required to be satisfied, in addition to compliance with section 233(2) to (10) (excluding section 233(9)(g)), by each constituent company incorporated under this Act, that —

(a) the merger or consolidation is permitted or not prohibited by the constitutional documents of the constituent overseas company and by the laws of the jurisdiction in which the constituent overseas company is existing, and that those laws and any requirements of those constitutional documents have been or will be complied with;

(b) no petition or other similar proceeding has been filed and remains outstanding, and no order has been made or resolution adopted to wind up or liquidate the constituent overseas company in any jurisdiction;

(c) no receiver, trustee, administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the surviving company, its affairs or its property or any part thereof;

(d) no scheme, order, compromise or other similar arrangement has been entered into or made in any jurisdiction whereby the rights of creditors of the surviving company are suspended or restricted; and

(e) there are no reasons why it would be against the public interest to allow the merger or consolidation.

(8) Subsection (7)(a) to (d) shall be satisfied by filing with the Registrar a declaration of a director of each constituent company incorporated under this Act to the effect that, having made due enquiry, that person is of the opinion that the requirements of those paragraphs have been met; and a director of each constituent company incorporated under this Act shall be deemed to have made due enquiry for the purposes of subsection (7)(a) to (d) and this subsection (8) if such director has obtained from a director of the constituent overseas company a declaration that the requirements of subsection (7)(a) to (d) have been met with respect to such constituent overseas company.

(9) A person who, being a director, makes a false declaration under subsection (8) commits an offence and is liable on conviction to a fine of twenty thousand dollars or to imprisonment for five years, or both.

(10) Where the surviving or consolidated company is to be an overseas company, the surviving or consolidated overseas company shall file with the Registrar —

(a) an undertaking that it will promptly pay to the dissenting members of a constituent company incorporated under this Act the amount, if any, to which they are entitled under section 238; and

(b) such evidence of the merger or consolidation from the jurisdiction of the surviving or consolidated overseas company as the Registrar considers acceptable, such evidence to include the effective date of the merger or consolidation.

(11) The effect of a merger or consolidation where the surviving or consolidated company is to be an overseas company under this section is the same as in the case of a merger or consolidation under this Part if the surviving or consolidated company is incorporated or established under this Act, and all of the relevant provisions of this Part apply, except insofar as the laws of the jurisdiction of the surviving or consolidated overseas company otherwise provide.

(12) For the purposes of this section —

(a) any references in section 233 to the shares of any constituent company shall be deemed to include references to any other equity interests in such constituent company;

(b) any references in section 233 to memoranda and articles of association shall be deemed to include references to the equivalent organisational documents of an overseas company; and

Case 1:26-cv-00455-LTS-SN Document 1-7 Filed 01/16/26 Page 155 of 197 PageID #: 5662

(c) any reference in section 233 or this section to a director of a company shall be deemed to include a reference to any officer, member or other person (howsoever called) in whom the management of an overseas company is vested.

(13) Where the surviving or consolidated company is to be an overseas company, upon payment of the applicable fees under this Act and upon the Registrar being satisfied that the requirements of subsections (7) and (10) have been complied with the Registrar shall, where the overseas company is the surviving or consolidated company, strike off constituent companies incorporated pursuant to this Act from the register and issue a certificate of strike off by way of merger or consolidation with an overseas company; and section 158 shall apply to the constituent companies so struck off.

(14) A certificate of strike off by way of merger or consolidation with an overseas company issued by the Registrar shall be *prima facie* evidence of compliance with all requirements of this Act in respect of such merger or consolidation.

(15) Subject to section 234, a merger or consolidation shall be effective on the date the plan of merger or consolidation is registered by the Registrar.

(16) The issuance of a certificate of merger or consolidation relating to the merger or consolidation of an overseas company registered under Part 9 shall be deemed to constitute notice to the Registrar pursuant to section 192.

(17) Any declaration of a director pursuant to this section may be given in the form of a declaration or an affidavit, as the director may determine.

(18) The Registrar shall submit a copy of the certificate of strike off by way of merger or consolidation issued under subsection (13) to the Authority.

Rights of dissenters

238. (1) A member of a constituent company incorporated under this Act shall be entitled to payment of the fair value of that person's shares upon dissenting from a merger or consolidation.

(2) A member who desires to exercise that person's entitlement under subsection (1) shall give to the constituent company, before the vote on the merger or consolidation, written objection to the action.

(3) An objection under subsection (2) shall include a statement that the member proposes to demand payment for that person's shares if the merger or consolidation is authorised by the vote.

(4) Within twenty days immediately following the date on which the vote of members giving authorisation for the merger or consolidation is made, the constituent company shall give written notice of the authorisation to each member who made a written objection.

(5) A member who elects to dissent shall, within twenty days immediately following the date on which the notice referred to in subsection (4) is given, give to the constituent company a written notice of that person's decision to dissent, stating —

(a) that person's name and address;

(b) the number and classes of shares in respect of which that person dissents; and

(c) a demand for payment of the fair value of that person's shares.

(6) A member who dissents shall do so in respect of all shares that that person holds in the constituent company.

(7) Upon the giving of a notice of dissent under subsection (5), the member to whom the notice relates shall cease to have any of the rights of a member except the right to be paid the fair value of that person's shares and the rights referred to in subsections (12) and (16).

(8) Within seven days immediately following the date of the expiration of the period specified in subsection (5), or within seven days immediately following the date on which the plan of merger or consolidation is filed, whichever is later, the constituent company, the surviving company or the consolidated company shall make a written offer to each dissenting member to purchase that person's shares at a specified price that the company determines to be their fair value; and if, within thirty days immediately following the date on which the offer is made, the company making the offer and the dissenting member agree upon the price to be paid for that person's shares, the company shall pay to the member the amount in money forthwith.

(9) If the company and a dissenting member fail, within the period specified in subsection (8), to agree on the price to be paid for the shares owned by the member, within twenty days immediately following the date on which the period expires —

(a) the company shall (and any dissenting member may) file a petition with the Court for a determination of the fair value of the shares of all dissenting members; and

(b) the petition by the company shall be accompanied by a verified list containing the names and addresses of all members who have filed a notice under subsection (5) and with whom agreements as to the fair value of their shares have not been reached by the company.

(10) A copy of any petition filed under subsection (9)(a) shall be served on the other party; and where a dissenting member has so filed, the company shall within ten days after such service file the verified list referred to in subsection (9)(b).

(11) At the hearing of a petition, the Court shall determine the fair value of the shares of such dissenting members as it finds are involved, together with a fair rate of

interest, if any, to be paid by the company upon the amount determined to be the fair value.

(12) Any member whose name appears on the list filed by the company under subsection (9)(b) or (10) and who the Court finds are involved may participate fully in all proceedings until the determination of fair value is reached.

(13) The order of the Court resulting from proceeding on the petition shall be enforceable in such manner as other orders of the Court are enforced, whether the company is incorporated under the laws of the Islands or not.

(14) The costs of the proceeding may be determined by the Court and taxed upon the parties as the Court deems equitable in the circumstances; and upon application of a member, the Court may order all or a portion of the expenses incurred by any member in connection with the proceeding, including reasonable attorneys' fees and the fees and expenses of experts, to be charged *pro rata* against the value of all the shares which are the subject of the proceeding.

(15) Shares acquired by the company pursuant to this section shall be cancelled and, if they are shares of a surviving company, they shall be available for re-issue.

(16) The enforcement by a member of that person's entitlement under this section shall exclude the enforcement by the member of any right to which that person might otherwise be entitled by virtue of that person holding shares, except that this section shall not exclude the right of the member to institute proceedings to obtain relief on the ground that the merger or consolidation is void or unlawful.

Limitation on rights of dissenters

239. (1) No rights under section 238 shall be available in respect of the shares of any class for which an open market exists on a recognised stock exchange or recognised interdealer quotation system at the expiry date of the period allowed for written notice of an election to dissent under section 238(5), but this section shall not apply if the holders thereof are required by the terms of a plan of merger or consolidation pursuant to section 233 or 237 to accept for such shares anything except —

(a) shares of a surviving or consolidated company, or depository receipts in respect thereof;

(b) shares of any other company, or depository receipts in respect thereof, which shares or depository receipts at the effective date of the merger or consolidation, are either listed on a national securities exchange or designated as a national market system security on a recognised interdealer quotation system or held of record by more than two thousand holders;

(c) cash in lieu of fractional shares or fractional depository receipts described in paragraphs (a) and (b); or

Case 1:26-cv-00425-LTS Document 1-7 Filed 01/12/26 Page 158 of 197 PageID #: 5665

(d) any combination of the shares, depository receipts and cash in lieu of fractional shares or fractional depository receipts described in paragraphs (a), (b) and (c).

(2) **Repealed** by section 11 of the *Companies (Amendment) (No. 2) Act, 2018 [Law 46 of 2018]*.

Prohibition on being a segregated portfolio company

239A. No constituent company incorporated under this Act or any consolidated company existing under this Act may be a segregated portfolio company.

PART 17 - International Co-operation

Definitions in this Part

240. In this Part —

"**debtor**" means a foreign corporation or other foreign legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established;

"**foreign bankruptcy proceeding**" includes proceedings for the purpose of reorganising or rehabilitating an insolvent debtor; and

"**foreign representative**" means a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding.

Ancillary orders

241. (1) Upon the application of a foreign representative the Court may make orders ancillary to a foreign bankruptcy proceeding for the purposes of —

(a) recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;

(b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;

(c) staying the enforcement of any judgment against a debtor;

(d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and

(e) ordering the turnover to a foreign representative of any property belonging to a debtor.

(2) An ancillary order may only be made under subsection (1)(d) against —

(a) the debtor itself; or

(b) a person who was or is a relevant person as defined in section 103(1).

Criteria upon which the Court's discretion shall be exercised

242. (1) In determining whether to make an ancillary order under section 241, the Court shall be guided by matters which will best assure an economic and expeditious administration of the debtor's estate, consistent with —

(a) the just treatment of all holders of claims against or interests in a debtor's estate wherever they may be domiciled;

(b) the protection of claim holders in the Islands against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;

(c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor's estate;

(d) the distribution of the debtor's estate amongst creditors substantially in accordance with the order prescribed by Part 5;

(e) the recognition and enforcement of security interests created by the debtor;

(f) the non-enforcement of foreign taxes, fines and penalties; and

(g) comity.

(2) In the case of a debtor which is registered under Part 9, the Court shall not make an ancillary order under section 241 without also considering whether it should make a winding up order under Part 5 in respect of its local branch.

Publication of foreign bankruptcy proceedings

243. (1) Where a company incorporated under Part 2 or registered under Part 9 is made the subject of a foreign bankruptcy proceeding, notice of this fact shall be filed with the Registrar and published in the Gazette.

(2) The notice shall contain the prescribed particulars and shall be filed by the company's liquidator or, if no liquidator has been appointed under this Act, by its directors within fourteen days of the date upon which the foreign bankruptcy proceeding commenced.

(3) A liquidator or a director who fails to comply with this section commits an offence and is liable on summary conviction to a fine of ten thousand dollars.

PART 17A – *REPEALED*

Repealed

244-281. **Repealed** by section 4 of the *Companies (Amendment) Act, 2023 [Act 15 of 2023]*.

Case 1:26-cv-00495-LJV-JJM Document 1-5 Filed 05/08/26 Page 160 of 197 PageID #: 5667

PART 17B – *REPEALED*

Repealed

281A-H. **Repealed** by section 4 of the *Companies (Amendment) Act, 2023 [Act 15 of 2023]*.

PART 18 - Miscellaneous

Amendment of schedules

282. The Cabinet may by Order amend Schedule 4 or Schedule 5.

Regulations

283. (1) The Cabinet may make regulations prescribing all matters that are required or permitted under this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act, including regulations to prescribe any fees payable under this Act.

(2) Regulations made under this Act may —

(a) make different provision in relation to different cases or circumstances;

(b) apply in respect of particular persons or particular cases or particular classes of persons or particular classes of cases and define a class by reference to any circumstances whatsoever; and

(c) contain such transitional, consequential, incidental or supplementary provisions as appear to the Cabinet to be necessary or expedient for the purposes of the regulations.

(3) Regulations made under this Act may create an offence punishable by a fine not exceeding twenty thousand dollars.

(4) Fees prescribed for the purpose of this Act need bear no relationship to the cost of providing any service.

Validation of payment and collection of fees

284. The payment of fees to, and the charging and collection of fees by, the Registrar without statutory authority for any service provided by the Registrar prior to the commencement of the *Companies (Amendment and Validation) Act, 2024 [Act 11 of 2024]* are —

(a) validated; and

(b) taken to have been lawfully charged by, paid to and collected by the Registrar,

as if the Registrar was empowered under the *Companies Act (2023 Revision)* as amended by the *Companies (Amendment and Validation) Act, 2024 [Act 11 of 2024]* to charge and collect those fees.

Orders or determinations by court not affected

285. *The Companies (Amendment and Validation) Act, 2024 [Act?? of 2024]* does not affect any order or determination made by a court with respect to fees charged by, paid to and collected by the Registrar without statutory authority for any service provided by the Registrar prior to 1st January, 2020, the commencement date of the *Companies (Amendment and Validation) Act, 2024 [Act 11 of 2024]*.

Case 1:26-cv-00425-LLA-SCC Document 1-2 Filed 01/02/26 Page 162 of 197 PageID #: 5669

SCHEDULE 1

(section 22(1))

Table A

Regulations for Management of a Company Limited by Shares

Preliminary

1. (1) In these regulations —

"**principal Act**" means the *Companies Act (2025 Revision).*

(2) Where any provision of the principal Act is referred to, the reference is to that provision as modified by any law for the time being in force.

(3) Unless the context otherwise requires, expressions defined in the principal Act or any statutory modification thereof in force at the date at which these regulations become binding on the company, shall have the meanings so defined.

Shares

2. Subject to the provisions, if any, in that behalf of the memorandum of association, and without prejudice to any special rights previously conferred on the holders of existing shares, any share may be issued with such preferred, deferred or other special rights, or such restrictions, whether in regard to dividend, voting, return of share capital or otherwise as the company may, from time to time, by special resolution determine, and any preference share may, with the sanction of a special resolution, be issued on the terms that it is, or at the option of the company is liable, to be redeemed.

3. If, at any time, the share capital is divided into different classes of shares, the rights attached to any class (unless otherwise provided by the terms of issue of the shares of that class) may be varied with the consent in writing of the holders of seventy-five per cent of the issued shares of that class or with the sanction of a special resolution passed at a separate general meeting of the holders of the shares of the class. To every such separate general meeting the provisions of these regulations relating to general meetings shall, *mutatis mutandis*, apply, but so that the necessary quorum shall be two persons at least holding or representing by proxy one-third of the issued shares of the class and that any holder of shares of the class present in person or by proxy may demand a poll.

4. Every person whose name is entered as a member in the register of members shall, without payment, be entitled to a certificate of the company specifying the share or shares held by that person and the amount paid up thereon:

   Provided that in respect of a share or shares held jointly by several persons the company shall not be bound to issue more than one certificate, and delivery of a certificate for a share to one of several joint holders shall be sufficient delivery to all.

5. If a share certificate is defaced, lost or destroyed it may be renewed on payment of such fee, if any, not exceeding twenty cents and on such terms, if any, as to evidence and indemnity, as the directors think fit.

Lien

6. The company shall have a lien on every share (not being a fully paid share) for all moneys (whether presently payable or not) called or payable at a fixed time in respect of that share, and the company shall also have a lien on all shares (other than fully paid shares) standing registered in the name of a single person for all moneys presently payable by that person or that person's estate to the company; but the directors may, at any time, declare any share to be wholly or in part exempt from this regulation. The company's lien, if any, on a share shall extend to all dividends payable thereon.

7. The company may sell, in such manner as the directors think fit, any shares in which the company has a lien, but no sale shall be made unless some amount in respect of which the lien exists is presently payable nor until the expiration of fourteen days after a notice in writing, stating and demanding payment of such part of the amount in respect of which the lien exists as is presently payable, has been given to the registered holder for the time being of the share, or the persons entitled thereto by reason of that person's death or bankruptcy.

8. For giving effect to any such sale the directors may authorise some person to transfer the shares sold to the purchaser thereof. The purchaser shall be registered as the holder of the shares comprised in any such transfer and that person shall not be bound to see to the application of the purchase money, nor shall that person's title to the shares be affected by any irregularity or invalidity in the proceedings in reference to the sale.

9. The proceeds of the sale shall be received by the company and applied in payment of such part of the amount in respect of which the lien exists as is presently payable, and the residue shall (subject to a like lien for sums not presently payable as existed upon the shares prior to the sale) be paid to the person entitled to the shares at the date of the sale.

Calls on Shares

10. The directors may, from time to time, make calls upon the members in respect of any moneys unpaid on their shares provided that no call shall exceed twenty-five per cent of the nominal amount of the share, or be payable earlier than one month from the last call; and each member shall (subject to receiving at least fourteen days' notice specifying the time or times of payment) pay to the company at the time or times so specified the amount called on that person's shares.

11. The joint holders of a share shall be jointly and severally liable to pay calls in respect thereof.

12. If a sum called in respect of a share is not paid before or on the day appointed for payment thereof, the person from whom the sum is due shall pay interest upon the sum at the rate of six per cent per annum from the day appointed for the payment thereof to the time of the actual payment but the directors shall be at liberty to waive payment of that interest wholly or in part.

13. The provisions of these regulations as to the liability of joint holders and as to payment of interest shall apply in the case of non-payment of any sum which, by the terms of issue of a share, becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had become payable by virtue of a call duly made and notified.

14. The directors may make arrangements on the issue of shares for a difference between the holders in the amount of calls to be paid and in the times of payment.

15. The directors may, if they think fit, receive from any member willing to advance the same all or any part of the moneys uncalled and unpaid upon any shares held by that person; and upon all or any of the moneys so advanced may (until the same would, but for such advance, become presently payable) pay interest at such rate (not exceeding, without the sanction of the company in general meeting, six per cent) as may be agreed upon between the member paying the sum in advance and the directors.

Transfer and Transmission of Shares

16. The instrument of transfer of any share shall be executed by or on behalf of the transferor and transferee, and the transferor shall be deemed to remain a holder of the share until the name of the transferee is entered in the register of members in respect thereof.

17. Shares shall be transferred in the following form, or in any usual or common form approved by the directors —

I, A.B., of in consideration of the sum of $ paid to me by C.D., of (hereinafter called "the said transferee") do hereby transfer to the said transferee the share (or shares) numbered in the undertaking

called the Company Limited, to hold unto the said transferee, subject to the several conditions on which I hold the same; and I, the said transferee, do hereby agree to take the said share (or shares) subject to the conditions aforesaid.

As witnessed our hands the day of , 20 .

Witness to the signatures of, etc.

18. The directors may decline to register any transfer of shares, not being fully paid shares, to a person of whom they do not approve, and may also decline to register any transfer of shares on which the company has a lien. The directors may also suspend the registration of transfers during the fourteen days immediately preceding the ordinary general meeting in each year. The directors may decline to recognise any instrument of transfer unless —

(a) a fee not exceeding fifty cents is paid to the company in respect thereof; and

(b) the instrument of transfer is accompanied by the certificate of the shares to which it relates and such other evidence as the directors may reasonably require to show the right of the transferor to make the transfer:

Provided that if the directors refuse to register a transfer of any shares, they shall, within two months after the date on which the transfer was lodged with the company, send to the transferee notice of the refusal.

19. The legal personal representative of a deceased sole holder of a share shall be the only person recognised by the company as having any title to the share. In the case of a share registered in the names of two or more holders, the survivors, survivor or the legal personal representatives of the deceased survivor, shall be the only person recognised by the company as having any title to the share.

20. Any person becoming entitled to a share in consequence of the death or bankruptcy of a member shall, upon such evidence being produced as may from time to time be properly required by the directors, have the right either to be registered as a member in respect of the share or, instead of being registered, to make such transfer of the share as the deceased or bankrupt person could have made; but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by the deceased or bankrupt person before the death or bankruptcy.

21. A person becoming entitled to a share by reason of the death or bankruptcy of the holder shall be entitled to the same dividends and other advantages to which that person would be entitled if that person were the registered holder of the share, except that that person shall not, before being registered as a member in respect of the share, be entitled in respect of it to exercise any right conferred by membership in relation to meetings of the company.

Case 1:26-cv-00425-LJV-JJM Document 1-7 Filed 04/02/26 Page 166 of 197 PageID #: 5673

Forfeiture of Shares

22. If a member fails to pay any call or instalment of a call on the day appointed for payment thereof, the directors may, at any time thereafter during such time as any part of such call or instalment remains unpaid, serve a notice on that person requiring payment of so much of the call or instalment as is unpaid, together with any interest which may have accrued.

23. Such notice shall name a further day (not earlier than the expiration of fourteen days from the date of the notice) on or before which the payment required by the notice is to be made, and shall state that, in the event of non-payment at or before the time appointed, the shares in respect of which the call was made will be liable to be forfeited.

24. If the requirements of such notice are not complied with, any share in respect of which the notice has been given may at any time thereafter, before the payment required by the notice has been made, be forfeited by a resolution of the directors to that effect.

25. A forfeited share may be sold or otherwise disposed of on such terms and in such manner as the directors think fit, and at any time before a sale or disposition the forfeiture may be cancelled on such terms as the directors think fit.

26. A person whose shares have been forfeited shall cease to be a member in respect of the forfeited shares, but shall, notwithstanding, remain liable to pay to the company all moneys which at the date of forfeiture were payable by that person to the company in respect of the shares, but that person's liability shall cease if and when the company receives payment in full of the nominal amount of the shares.

27. A statutory declaration in writing that the declarant is a director of the company, and that a share in the company has been duly forfeited on a date stated in the declaration, shall be conclusive evidence of the facts therein stated as against all persons claiming to be entitled to the share. The company may receive the consideration, if any, given for the share on any sale or disposition thereof and may execute a transfer of the share in favour of the person to whom the share is sold or disposed of and that person shall thereupon be registered as the holder of the share, and shall not be bound to see to the application of the purchase money, if any, nor shall that person's title to the share be affected by any irregularity or invalidity in the proceedings in reference to the forfeiture, sale or disposal of the share.

28. The provisions of these regulations as to forfeiture shall apply in the case of non-payment of any sum which by the terms of issue of a share becomes payable at a fixed time, whether on account of the amount of the share, or by way of premium, as if the same had been payable by virtue of a call duly made and notified.

29. The company may, by ordinary resolution, convert any paid-up shares into stock, and reconvert any stock into paid-up shares of any denomination.

30. The holders of stock may transfer the same, or any part thereof, in the same manner and subject to the same regulations as and subject to which the shares from which the stock arose might prior to conversion have been transferred, or as near thereto as circumstances admit; but the directors may, from time to time, fix the minimum amount of stock transferable and restrict or forbid the transfer of fractions of that minimum, but the minimum shall not exceed the nominal amount of the shares from which the stock arose.

31. The holders of stock shall, according to the amount of the stock held by them, have the same rights, privileges and advantages as regards dividends, voting at meetings of the company and other matters as if they held the shares from which the stock arose, but no such privilege or advantage (except participation in the dividends and profits of the company) shall be conferred by any such aliquot part of stock as would not, if existing shares, have conferred that privilege or advantage.

32. Such of the regulations of the company as are applicable to paid-up shares shall apply to stock, and the words "share" and "shareholder" therein shall include "stock" and "stockholder".

Alteration of Capital

33. The company may, from time to time by ordinary resolution, increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe.

34. Subject to any direction to the contrary that may be given by the company in general meeting, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on receipt of an intimation from the person to whom the offer is made that that person declines to accept the shares offered, the directors may dispose of those shares in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article.

35. The new shares shall be subject to the same provisions with reference to the payment of calls, lien, transfer, transmission, forfeiture and otherwise as the shares in the original share capital.

36. The company may, by ordinary resolution —

    (a) consolidate and divide all or any of its share capital into shares of larger amount than its existing shares;

(b) sub-divide its existing shares, or any of them, into shares of smaller amounts than is fixed by the memorandum of association, subject nevertheless to section 13 of the principal Act; and

(c) cancel any shares which, at the date of the passing of the resolution, have not been taken or agreed to be taken by any person.

37. The company may, by special resolution, reduce its share capital and any capital redemption reserve fund in any manner and with, and subject to, any incident authorised and consent required by law.

General Meetings

38. A general meeting shall be held once in every calendar year at such time (not being more than fifteen months after the holding of the last preceding general meeting) and place as may be resolved by the company in general meeting, or in default, at such time in the third month following that in which the anniversary of the company's incorporation occurs, and at such place as the directors shall appoint. In default of a general meeting being so held, a general meeting shall be held in the month next following, and may be convened by any two members in the same manner as nearly as possible as that in which meetings are to be convened by the directors.

39. Such general meetings shall be called ordinary general meetings; all other general meetings shall be called extraordinary general meetings.

40. The directors may, whenever they think fit, convene an extraordinary general meeting. If, at any time, there are not in the Island sufficient directors capable of acting to form a quorum, any director or any two members of the company may convene an extraordinary general meeting in the same manner as nearly as possible as that in which meetings may be convened by the directors.

Notice of General Meetings

41. Subject to section 60 of the principal Act relating to special resolutions, at least seven days' notice (exclusive of the day on which the notice is served or deemed to be served, but inclusive of the day for which notice is given) specifying the place, day and hour of meeting and, in case of special business, the general nature of that business shall be given in manner hereinafter provided, or in such other manner, if any, as may be prescribed by the company in general meetings, to such persons as are, under the regulations of the company, entitled to receive such notices from the company; but with the consent of all the members entitled to receive notice of some particular meeting, that meeting may be convened by such shorter notice and in such manner as those members may think fit.

42. The accidental omission to give notice of a meeting to, or the non-receipt of a notice of a meeting by any member shall not invalidate the proceedings at any meeting.

Proceedings at General Meetings

43. All business shall be deemed special that is transacted at any extraordinary meeting, and also all that is transacted at an ordinary meeting, with the exception of sanctioning a dividend, consideration of the accounts, balance sheets and the ordinary report of the directors and auditors, election of directors and other officers in the place of those retiring by rotation, and fixing of the remuneration of the auditors.

44. No business shall be transacted at any general meeting unless a quorum of members is present at the time when the meeting proceeds to business; save as herein otherwise provided, three members personally present shall be a quorum.

45. If, within half an hour from the time appointed for the meeting, a quorum is not present, the meeting, if convened upon the requisition of members, shall be dissolved; in any other case it shall stand adjourned to the same day in the next week, at the same time and place, and if at the adjourned meeting a quorum is not present within half an hour from the time appointed for the meeting the members present shall be a quorum.

46. The chairperson, if any, of the board of directors shall preside as chairperson at every general meeting of the company.

47. If there is no such chairperson, or if at any meeting that person is not present within fifteen minutes after the time appointed for holding the meeting or is unwilling to act as chairperson, the members present shall choose one of their number to be chairperson.

48. The chairperson may, with the consent of any meeting at which a quorum is present (and shall if so directed by the meeting), adjourn the meeting from time to time and from place to place, but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place. When a meeting is adjourned for ten days or more, notice of the adjourned meeting shall be given as in the case of an original meeting. Save as aforesaid it shall not be necessary to give any notice of an adjournment or of the business to be transacted at an adjourned meeting.

49. At any general meeting a resolution put to the vote of the meeting shall be decided on a show of hands, unless a poll is (before or on the declaration of the result of the show of hands) demanded by at least three members present in person or by proxy entitled to vote or by one member or two members together holding not less than fifteen per cent of the paid up capital of the company, and, unless a poll is so demanded, a declaration by the chairperson that a resolution has, on a show of hands, been carried, carried unanimously, carried by a particular majority or lost, and an entry to that effect in the book of the proceedings of the company, shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of, or against, that resolution.

Case 1:26-cv-00425-LJV-JJM Document 1-7 Filed 04/02/26 Page 170 of 197 PageID #: 5677

50. If a poll is duly demanded it shall be taken in such manner as the chairperson directs, and the result of the poll shall be deemed to be the resolution of the meeting at which the poll was demanded.

51. In the case of an equality of votes, whether on a show of hands or on a poll, the chairperson of the meeting at which the poll is demanded shall be entitled to a second or casting vote.

52. A poll demanded on the election of a chairperson or on a question of adjournment shall be taken forthwith; a poll demanded on any other question shall be taken at such time as the chairperson of the meeting directs.

Votes of Members

53. On a show of hands every member present in person shall have one vote. On a poll every member shall have one vote for each share of which that person is the holder.

54. In the case of joint holders the vote of the senior who tenders a vote, whether in person or by proxy, shall be accepted to the exclusion of the votes of the other joint holders, and for this purpose seniority shall be determined by the order in which the names stand in the register of members.

55. A member of unsound mind, or in respect of whom an order has been made by any court having jurisdiction in lunacy, may vote, whether on a show of hands or on a poll, by that person's committee or other person in the nature of a committee appointed by that court, and any such committee or other person may, on a poll, vote by proxy.

56. No member shall be entitled to vote at any general meeting unless all calls or other sums presently payable by that person in respect of shares in the company have been paid.

57. On a poll votes may be given either personally or by proxy.

58. The instrument appointing a proxy shall be in writing under the hand of the appointor or that person's attorney duly authorised in writing or, if the appointor is a corporation, either under seal or under the hand of an officer or attorney duly authorised. A proxy need not be a member of the company.

59. The instrument appointing a proxy and the power of attorney or other authority, if any, under which it is signed, or a notarially certified copy of that power or authority shall be deposited at the registered office of the company not less than forty-eight hours before the time for holding the meeting or adjourned meeting at which the person named in the instrument proposes to vote, and in default the instrument of proxy shall not be treated as valid.

60. An instrument appointing a proxy may be in the following form or any other form approved by the directors —

Company Limited

I, , of being a member of the

Company Limited hereby appoint of

as my proxy, to vote for me and on my behalf at the (ordinary or extraordinary, as the case may be) general meeting of the company to be held on the day of , 20 , and at any adjournment thereof.

Signed this day of , 20 .

61. The instrument appointing a proxy shall be deemed to confer authority to demand or join in demanding a poll.

Corporations Acting by Representatives at Meetings

62. Any corporation which is a member of the company may, by resolution of its directors or other governing body, authorise such person as it thinks fit to act as its representative at any meeting of the company or of any class of members of the company, and the person so authorised shall be entitled to exercise the same powers on behalf of the corporation which that person represents as that corporation could exercise if it were an individual member of the company.

Directors

63. The number of the directors and the names of the first directors shall be determined in writing by a majority of the subscribers of the memorandum of association.

64. The remuneration of the directors shall, from time to time, be determined by the company in general meeting.

65. The qualification of a director shall be the holding of at least one share in the company.

Powers and Duties of Directors

66. The business of the company shall be managed by the directors, who may pay all expenses incurred in setting up and registering the company and may exercise all such powers of the company as are not, by the principal Act or these articles, required to be exercised by the company in general meeting, subject nevertheless, to any regulation of these articles, to the principal Act and to such regulations, being not inconsistent with the aforesaid regulations or principal Act, as may be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if that regulation had not been made.

67. The directors may, from time to time, appoint one or more of their body to the office of managing director or manager for such term and at such remuneration (whether by way of salary, commission or participation in profits, or partly in one way and partly in another) as they may think fit and a director so appointed shall not, while holding that office, be subject to retirement by rotation, or taken into account in determining the rotation or retirement of directors; but that person's appointment shall be subject to determination *ipso facto* if that person ceases from any cause to be a director, or if the company in general meeting resolves that that person's tenure of the office of managing director or manager be determined.

68. The amount for the time being remaining undischarged of moneys borrowed or raised by the directors for the purposes of the company (otherwise than by the issue of share capital) shall not, at any time, exceed the issued share capital of the company without the sanction of the company in general meeting.

69. The directors shall cause minutes to be made in books provided for the purpose —

(a) of all appointments of officers made by the directors;

(b) of the names of the directors present at each meeting of the directors and of any committee of the directors; and

(c) of all resolutions and proceedings at all meetings of the company, and of the directors and of committees of directors,

and every director present at any meeting of directors or committee of directors shall sign that person's name in a book to be kept for that purpose.

The Seal

70. Any seal of the company shall not be affixed to any instrument except by the authority of a resolution of a board of directors, and in the presence of a director and of the secretary or such other person as the directors may appoint for the purpose; and that director and the secretary or other person as aforesaid shall sign every instrument to which any seal of the company is so affixed in their presence.

Disqualification of Directors

71. The office of director shall be vacated, if the director —

(a) without the consent of the company in general meeting holds any other office of profit under the company except that of managing director or manager;

(b) becomes bankrupt;

(c) is found to be or becomes of unsound mind;

(d) resigns that person's office by notice in writing to the company; or

(e) is directly or indirectly interested in any contract with the company or participates in the profits of any contract with the company:

Provided however, that a director shall not vacate that person's office by reason of that person being a member of any corporation which has entered into contract with or done any work for the company if that person has declared the nature of that person's interest at the first meeting of the directors of the company held after that person became interested in the contract, but the director shall not vote in respect of any such contract or work or any matter arising thereout, and if that person does so vote that person's vote shall not be counted.

Rotation of Directors

72. At the first ordinary general meeting of the company the whole of the directors shall retire from office, and at the ordinary general meeting in every subsequent year one-third of the directors for the time being, or, if their number is not three or a multiple of three, then the number nearest one-third, shall retire from office.

73. The directors to retire in every year shall be those who have been longest in office since their last election but as between persons who became directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.

74. A retiring director shall be eligible for re-election.

75. The company at the general meeting at which a director retires in manner aforesaid may fill the vacated office by electing a person thereto and in default the retiring director shall be deemed to have been re-elected unless at such meeting it is resolved not to fill such vacated office.

76. The company may, from time to time in general meeting, increase or reduce the number of directors, and may also determine in what rotation the increased or reduced number is to go out of office.

77. Any casual vacancy occurring in the board of directors may be filled by the directors, but the person so chosen shall be subject to retirement at the same time as if that person had become a director on the day on which the director in whose place that person is appointed was last elected a director.

78. The directors shall have power, at any time and from time to time, to appoint a person as an additional director, who shall retire from office at the next following ordinary general meeting, but shall be eligible for election by the company at that meeting as an additional director.

79. The company may, by special resolution, remove a director before the expiration of that person's period in office, and may, by an ordinary resolution, appoint another person in that person's stead. The person so appointed shall be subject to retirement at the same time as if that person had become a director on the day on which the director in whose place that person is appointed was last elected a director.

Case 1:26-cv-00425-LJV-JJM Document 1-7 Filed 04/02/26 Page 174 of 197 PageID #: 5681

Proceedings of Directors

80. The directors may meet together for the despatch of business, adjourn and otherwise regulate their meetings, as they think fit. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairperson shall have a second or casting vote. A director may, and the secretary on the requisition of a director shall, at any time, summon a meeting of the directors.

81. The quorum necessary for the transaction of the business of the directors may be fixed by the directors, and unless so fixed shall, when the number of directors exceeds three, be three, and when the number of directors does not exceed three, be two.

82. The continuing directors may act notwithstanding any vacancy in their body, but, if and so long as their number is reduced below the number fixed by or pursuant to the regulations of the company as the necessary quorum of directors, the continuing directors may act for the purpose of increasing the number of directors to that number, or of summoning a general meeting of the company, but for no other purpose.

83. The directors may elect a chairperson of their meetings and determine the period for which that person is to hold office; but if no such chairperson is elected, or if at any meeting the chairperson is not present within five minutes after the time appointed for holding the same, the directors present may choose one of their number to be chairperson of the meeting.

84. The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall, in the exercise of the powers so delegated, conform to any regulations that may be imposed on it by the directors.

85. A committee may elect a chairperson of its meetings; if no such chairperson is elected, or if at any meeting the chairperson is not present within five minutes after the time appointed for holding the same, the members present may choose one of their number to be chairperson of the meeting.

86. A committee may meet and adjourn as it thinks proper. Questions arising at any meeting shall be determined by a majority of votes of the members present and, in case of an equality of votes, the chairperson shall have a second or casting vote.

87. All acts done by any meeting of the directors or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director.

Dividends and Reserve

88. The company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by directors.

89. The directors may, from time to time, pay to the members such interim dividends as appear to the directors to be justified by the profits of the company.

90. No dividends shall be paid otherwise than out of profits.

91. Subject to the rights of persons, if any, entitled to shares with special rights as to dividends, all dividends shall be declared and paid according to the amounts paid on the shares, but if and so long as nothing is paid up on any of the shares in the company, dividends may be declared and paid according to the amounts of the shares. No amount paid on a share in advance of calls shall, while carrying interest, be treated for the purposes of this article as paid on the share.

92. The directors may, before recommending any dividend, set aside out of the profits of the company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies or for equalising dividends or for any other purpose to which the profits of the company may be properly applied, and pending such application may, at the like discretion, either be employed in the business of the company or be invested in such investments (other than shares of the company) as the directors may, from time to time, think fit.

93. If several persons are registered as joint holders of any share, any of them may give effectual receipts for any dividend or other moneys payable on or in respect of the share.

94. Any dividend may be paid by cheque or warrant sent through the post to the registered address of the member or person entitled thereto or in the case of joint holders to any one of such joint holders at that person's registered address or to such person and such address as the member or person entitled or such joint holders, as the case may be, may direct. Every such cheque or warrant shall be made payable to the order of the person to whom it is sent or to the order of such other person as the member or person entitled or such joint holders, as the case may be, may direct.

95. No dividend shall bear interest against the company.

Accounts

96. The directors shall cause proper books of account to be kept with respect to —

    (a) all sums of money received and expended by the company, and the matters in respect of which the receipt and expenditure takes place; and

    (b) all sales and purchases of goods by the company and the assets and liabilities of the company.

97. The books of account shall be kept at the registered office of the company, or at such other place or places as the directors think fit, and shall always be open to the inspection of the directors.

98. The directors shall, from time to time, determine whether and to what extent, at what times and places and under what conditions or regulations the accounts and books of the company or any of them shall be open to the inspection of members not being directors, and no member (not being a director) shall have any right of inspecting any account, book or document of the company except as conferred by law or authorised by the directors or by the company in general meeting.

99. At the ordinary general meeting in every year the directors shall cause to be prepared and shall lay before the company a profit and loss account and a balance sheet for the period since the preceding account or, (in the case of the first ordinary general meeting) since the commencement of business by the company, made up to a date not more than six months before such meeting.

100. A copy of every balance sheet (including every document required by law to be annexed thereto) which is to be laid before the company in general meeting together with a copy of the auditor's report shall, not less than seven days before the date of the meeting, be sent to all persons entitled to receive notices of general meetings of the company.

Audit

101. The accounts relating to the company's affairs shall be audited in such manner as may be determined from time to time by the company in general meeting or, failing any such determination, by the directors.

Notices

102. (1) A notice may be given by the company to any member either personally or by sending it by post to that person to that person's registered address, or (if that person has no registered address in the Islands) to the address, if any, in the Islands supplied by that person to the company for the giving of notices to that person.

(2) Where a notice is sent by post, service of the notice shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the notice, and to have been effected in the case of a notice of a meeting at the expiration of twenty-four hours after the letter containing the same is posted, and in any other case at the time at which the letter would be delivered in the ordinary course of post.

103. If a member has no registered address in the Islands and has not supplied to the company an address in the Islands for the giving of notices to that person, a notice addressed to that person and advertised in a daily newspaper circulating in the Islands shall be deemed to be duly given on that person at noon on the day following the day on which the newspaper is circulated and the advertisement appeared therein.

104. A notice may be given by the company to the joint holders of a share by giving the notice to the joint holder named first in the register of members in respect of the share.

105. A notice may be given by the company to the persons entitled to a share in consequence of the death or bankruptcy of a member by sending it through the post in a prepaid envelope addressed to them by name, by the title of representatives of the deceased or trustee of the bankrupt or by any like description, at the address, if any, within the Islands, supplied for the purpose by the persons claiming to be so entitled, or (until such an address has been so supplied), by giving the notice in any manner in which the same might have been given if the death or bankruptcy had not occurred.

106. Notice of every general meeting shall be given in some manner hereinbefore authorised to —

(a) every member except those members who (having no registered address in the Islands) have not supplied to the company an address in the Islands for the giving of notices to them; and

(b) every person entitled to a share in consequence of the death or bankruptcy of a member who, but for that person's death or bankruptcy, would be entitled to receive notice of the meeting.

No other person shall be entitled to receive notices of general meetings.

Case 1:26-cv-00425-LTS Document 1-7 Filed 01/12/26 Page 178 of 197 PageID #: 5685

SCHEDULE 1A

(section 26(3))

Required Particulars

The required particulars are —

(a) the name of the company and, in the case of an exempted company, the exempted company's dual foreign name (if any) together with its translated name;

(b) the part of the Islands in which the registered office of the company is proposed to be situate;

(c) the amount of capital of the company and, in the case of a company having its share capital divided into shares of a nominal or par value, the number of shares into which it is divided and the fixed amounts thereof;

(d) the names and addresses of the subscribers to the memorandum and the number of shares taken by each subscriber;

(e) the date of execution of the memorandum of association;

(f) the date of filing of the memorandum of association;

(g) the number assigned to the company;

(h) in the case of a company limited by guarantee or a company that has no limit placed on the liability of its members —

(i) a statement that the company is limited by guarantee or is unlimited, as the case may be; and

(ii) the omission of any of the particulars specified in this Schedule which are irrelevant or inappropriate;

(i) the nature of the business; and

(j) the date of the end of the company's financial year.

SCHEDULE 2

(section 141)

Categories of Preferred Debts

Category 1: Debts due to employees

1. Any sum due by the company to an employee, whether employed in the Islands or elsewhere, in respect of —

   (a) salaries;

   (b) wages; and

   (c) gratuities,

   accrued due during the four months immediately preceding the commencement of the liquidation.

2. Any sum due and payable by the company on behalf of an employee in respect of medical health insurance premiums or pension fund contributions.

3. Where a contract of employment has been terminated as a consequence of the company going into liquidation, any sum due by the company to any former employee in respect of:

   (a) severance pay; and

   (b) earned vacation leave.

4. Any sum payable to a workman in respect of compensation pursuant to the *Workmen's Compensation Act (1996 Revision).*

5. An employee may claim in the liquidation as an ordinary creditor in respect of any other sum due to that person pursuant to or by virtue of the breach of that person's contract of employment or any tortious claim against the company.

6. The words and expressions used in paragraphs 1 and 2 have the meanings ascribed to them by the *Labour Act (2021 Revision).*

Category 2: Debts due to bank depositors

1. Any sum due to eligible depositors who have deposits with a company which —

   (a) is incorporated in the Islands; and

   (b) held an "A" licence issued under the *Banks and Trust Companies Act (2025 Revision),*

   and which does not exceed the deposit limit.

2. The following depositors are not eligible depositors —

(a) a person who holds or is considered to hold a deposit after the presentation of the petition for the winding up of the bank or the commencement of the voluntary winding up of the bank (except in the case of the death of the owner of the deposit); and

(b) the following persons making deposits as —

(i) a person licensed under section 6(1) of the *Banks and Trust Companies Act (2025 Revision)*;

(ii) a person authorised, licensed or recognised as a bank or deposit holder in a country or territory outside the Islands;

(iii) a person who, in the opinion of the Court, has any responsibility for, or may have profited, or may profit, directly or indirectly, from the winding up;

(iv) a person who was, at the date of presentation of the petition for the winding up of the bank or the commencement of the voluntary winding up of the bank, a director, controller or manager of the bank or who, in the opinion of the court exercised such functions;

(v) a person who is the legal or beneficial owner of five percent or more of the shares of all classes issued by the bank; or

(vi) a company or corporation, whether or not incorporated in the Islands, which is, at the date of the presentation of the petition for the winding up of the bank or the commencement of the voluntary winding up of the bank, a parent, subsidiary or fellow subsidiary of the bank, or which is in common ownership with the bank.

3. The deposit limit is twenty thousand dollars in respect of each eligible depositor or its equivalent in any foreign currency for which purpose the applicable exchange rate shall be that determined by the Court in accordance with section 150.

4. For the purpose of calculating the amount of eligible deposits —

(a) separate deposits in the same legal or beneficial ownership shall be aggregated and treated as one deposit;

(b) the ownership of a deposit in joint names shall be deemed to be divided equally between the joint depositors;

(c) the ownership of a deposit in the name of a partnership shall be deemed to be divided equally among the partners;

(d) a deposit which is a client account, and which is designated as such, shall be treated as a separate deposit, made by the client of the depositor, of amounts corresponding to the amount to which such client is entitled; and

(e) the amount of each eligible deposit shall be reduced by the amount of any liability of the depositor to the bank in respect of which a right of set-off

existed at the date of the presentation of the petition for the winding up of the bank, or the commencement of the voluntary winding up of the bank.

Category 3: Taxes due to the Government

1. Sums due in respect of duty and penalties payable under the *Customs and Border Control Act (2024 Revision).*
2. Sums due in respect of fees payable under this Act.
3. Sums due in respect of duty and penalties payable under the *Stamp Duty Act (2019 Revision).*
4. Sums due in respect of licence fees payable under the regulatory laws.
5. Sums due in respect of taxes payable under the *Tourist Accommodation (Taxation) Act (2013 Revision).*

Case 1:26-cv-00455-LJV-JJM Document 1-7 Filed 05/08/26 Page 182 of 197 PageID #: 5689

SCHEDULE 3

Powers of Liquidators

(section 110)

PART 1

Powers exercisable with sanction

1. Power to bring or defend any action or other legal proceeding in the name and on behalf of the company.
2. Power to carry on the business of the company so far as may be necessary for its beneficial winding up.
3. Power to dispose of any property of the company to a person who is or was related to the company.
4. Power to pay any class of creditors in full.
5. Power to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim (present or future, certain or contingent, ascertained or sounding only in damages) against the company or for which the company may be rendered liable.
6. Power to compromise on such terms as may be agreed all debts and liabilities capable of resulting in debts, and all claims (present or future, certain or contingent, ascertained or sounding only in damages) subsisting, or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company.
7. Power to deal with all questions in any way relating to or affecting the assets or the winding up of the company, to take any security for the discharge of any such call, debt, liability or claim and to give a complete discharge in respect of it.
8. The power to sell any of the company's property by public auction or private contract with power to transfer the whole of it to any person or to sell the same in parcels.
9. The power to raise or borrow money and grant securities therefor over the property of the company.
10. The power to engage staff (whether or not as employees of the company) to assist that person in the performance of that person's functions.
11. The power to engage attorneys and other professionally qualified persons to assist that person in the performance of that person's functions.

PART 2

Powers exercisable without sanction

1. The power to take possession of, collect and get in the property of the company and for that purpose to take all such proceedings as that person considers necessary.
2. The power to do all acts and execute, in the name and on behalf of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company seal.
3. The power to prove, rank and claim in the bankruptcy, insolvency or sequestration of any contributory for any balance against that person's estate, and to receive dividends in the bankruptcy, insolvency or sequestration in respect of that balance, as a separate debt due from the bankrupt or insolvent and rateably with the other separate creditors.
4. The power to draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company, with the same effect with the respect of the company's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business.
5. The power to promote a scheme of arrangement pursuant to section 86.
6. The power to convene meetings of creditors and contributories.
7. The power to do all other things incidental to the exercise of that person's powers.

SCHEDULE 4

(section 40B)

APPROVED STOCK EXCHANGES

The following are approved stock exchanges —

1. Amman Stock Exchange
2. Athens Stock Exchange
3. Australian Securities Exchange
4. B3 S.A.
5. BATS Global Markets
6. Bermuda Stock Exchange
7. BOAG Borsen AG
8. Bolsa de Barcelona
9. Bolsa de Bilbao
10. Bolsa de Madrid
11. Bolsa de Valencia
12. Bolsa de Comercio de Buenos Aires
13. Bolsa de Comercio de Santiago
14. Bolsa de Valores de Caracas
15. Bolsa de Valores de Lima
16. Bolsa de Valores de Colombia
17. Bolsa Mexicana de Valores (Mexican Stock Exchange)
18. Bolsas y Mercados Espanoles
19. Borsa Istanbul
20. Borsa Italiana
21. Borse Berlin
22. Borse Frankfurt
23. Borse Munchen
24. Borse Stuttgart
25. BSE Limited
26. Bucharest Stock Exchange
27. Budapest Stock Exchange

Case 1:26-cv-00425-LJV-JJM Document 1-7 Filed 04/03/26 Page 185 of 197 PageID #: 5692

28. Bursa Malaysia (including the Main Market and the ACE Market)
29. Chicago Board Options Exchange
30. CME Group
31. Colombo Stock Exchange
32. Cyprus Stock Exchange
33. Deutsche Borse
34. Dusseldorf Stock Exchange
35. Eurex
36. Euronext Brussels
37. Euronext Dublin
38. Euronext Lisbon
39. Euronext NV
40. Euronext Oslo Bor
41. Euronext Paris
42. Fukuoka Stock Exchange
43. Hong Kong Exchange and Clearing (HKEX) (including Growth Enterprise Market (GEM))
44. Indonesia Stock Exchange
45. Intercontinental Exchange
46. International Securities Exchange
47. Johannesburg Stock Exchange
48. Korea Exchange (including KOSPI and KOSDAQ Market Divisions)
49. London Stock Exchange (including AIM)
50. Luxembourg Stock Exchange
51. Malta Stock Exchange
52. Montreal Exchange
53. Nagoya Stock Exchange
54. Nasdaq
55. Nasdaq Copenhagen (formerly known as Copenhagen Stock Exchange)
56. Nasdaq Dubai
57. Nasdaq Helsinki
58. Nasdaq Iceland
59. Nasdaq OMX Nordic

60. Nasdaq PHLX
61. Nasdaq Riga
62. Nasdaq Stockholm
63. Nasdaq Tallinn
64. Nasdaq Vilnius
65. National Stock Exchange of Australia
66. National Stock Exchange of India
67. New York Stock Exchange (NYSE)
68. New Zealand Stock Exchange
69. NYSE American
70. NYSE Arca
71. NYSE Chicago
72. NYSE Euronext
73. Osaka Exchange
74. Philippine Stock Exchange
75. Prague Stock Exchange
76. Saudi Exchange (Tadawul)
77. Shanghai Stock Exchange
78. Shenzhen Stock Exchange
79. Singapore Exchange (including Catalist)
80. SIX Swiss Exchange
81. Stock Exchange of Mauritius
82. Taipei Exchange
83. Taiwan Stock Exchange
84. The Egyptian Exchange
85. The Stock Exchange of Thailand
86. Tokyo Stock Exchange
87. Toronto Stock Exchange (including TSX Venture Exchange)
88. Warsaw Stock Exchange
89. Wiener Borse AG (Vienna Stock Exchange)
90. Any stock exchange that the Registrar may from time to time designate as an approved stock exchange by way of notice published in the *Gazette*.

Case 1:26-cv-00425-LTS Document 1-7 Filed 01/08/26 Page 187 of 197 PageID #: 5694

SCHEDULE 5

FEES

(sections 26(3A), 26(4), 41(2), 45(2), 55A(2), 80A, 80B, 169(1), 184(2), 199(1), 213(4) and 213(5))

PART 1

(section 26(4))

The fees payable upon the filing of a memorandum of association under section 26 are as follows —

(a) in respect of a non-resident company —

(i) with no registered capital, or a registered capital not exceeding $42,000, a fee of $675; and

(ii) with a registered capital exceeding $42,000, a fee of $915;

(b) in respect of an exempted company except a special economic zone company —

(i) with no registered capital, or a registered capital not exceeding $42,000, a fee of $700;

(ii) with a registered capital exceeding $42,000, but not exceeding $820,000 a fee of $1,000;

(iii) with a registered capital exceeding $820,000 but not exceeding $1,640,000, a fee of $1,984; and

(iv) with a registered capital exceeding $1,640,000, a fee of $2,568;

(ba) in respect of a special economic zone company a fee equal to the lowest band of the fee payable upon filing of a memorandum of articles of association by an exempted company as set out in paragraph (b)(i); and

(c) in respect of any other company —

(i) with no registered capital or a registered capital not exceeding $42,000, a fee of $300; and

(ii) with a registered capital exceeding $42,000, a fee of $500.

PART 1A

(Section 26(3A))

The fee payable for the inspection of the register under section 26(3A) is $50.

Case 1:26-cv-00425-LTS-SDA Document 1-7 Filed 01/16/26 Page 188 of 197 PageID #: 5695

PART 1B

(Section 29A)

The fee payable for an application to reserve a specified name under section 29A is as follows —

(a) in respect of an application for a name reservation for one week, $40;

(b) in respect of an application for a name reservation for one month, $60;

(c) in respect of an application for a name reservation for two months, $80; and

(d) in respect of an application for a name reservation for three months, $120; and

(e) in respect of an application for a name reservation for four months, $160.

PART 2

(section 41(2))

The fees payable by a company, other than an exempted company, in January of each year after the year of its registration, to the Registrar under section 41(2) are as follows —

(a) in the case of a non-resident company —

(i) with no registered capital, or a registered capital not exceeding $42,000, an annual fee of $900; and

(ii) with a registered capital exceeding $42,000, an annual fee of $1,140; and

(b) in the case of any other company —

(i) with no registered capital, or a registered capital not exceeding $42,000, an annual fee of $300; and

(ii) with a registered capital exceeding $42,000, an annual fee of $500.

PART 3

(section 45(1))

The fees payable under section 45(2) on an increase of capital shall be in the case of —

(a) an exempted company which has a capital divided into shares, $500;

(b) an exempted company which has not a capital divided into shares, $500;

Case 1:26-cv-00251-LTS Document 1-7 Filed 01/08/26 Page 189 of 197 PageID #: 5696

(c) a company other than an exempted company which has a capital divided into shares, $500; and

(d) a company which has not a capital divided into shares, $500.

PART 3A

(sections 80A and 80B)

1. The non-refundable application fee payable under section 80A is $300.

2. The fee payable under section 80B on filing a change to —

(a) the objects or activities of a company;

(b) the address of the registered office or the location of a company; or

(c) the information to be submitted to the Registrar pursuant to section 80B(f), is $25.

PART 4

(section 169(1))

1. The annual fee payable by an exempted company except a special economic zone company, in January of each year after the year of its registration, to the revenues of the Islands under section 169(1) is as follows —

(a) in the case of an exempted company with no registered capital, or a registered capital not exceeding $42,000, an annual fee of $925;

(b) in the case of an exempted company with a registered capital exceeding $42,000 but not exceeding $820,000, an annual fee of $1,225;

(c) in the case of an exempted company with a registered capital exceeding $820,000 but not exceeding $1,640,000, an annual fee of $2,209; and

(d) in the case of an exempted company with a registered capital exceeding $1,640,000, an annual fee of $2,793.

2. The annual fee payable by a special economic zone company, in the January of each year of its registration to the revenues of the Islands under section 169(1) is a fee equal to the lowest band of the annual fee by an exempted company as set out in paragraph 1(a).

Case 1:26-cv-00425-LTS Document 1-3 Filed 01/12/26 Page 190 of 197 PageID #: 5697

PART 5

(section 184(2))

1. The fee payable by a foreign company under section 184(1) is $1,500.
2. The annual fee payable by a foreign company under section 184(2) is $1,650.

PART 6

(section 199(1))

The fee payable under section 199(1) wherever this Act provides for or requires the filing of any document, notice or return with the Registrar or the issue of any certificate or the Registrar provides a copy of any document in respect of which no fee is elsewhere specifically provided is as follows —

(a)	filing any resolution, notice, return or any other document;	$100
(b)	issuing any certificate;	$150
(c)	providing a copy of any document (per folio of 72 words);	$150
(d)	general search fee;	$30
(e)	where —	
	(i) filing a plan of merger or consolidation per constituent entity;	$1,000
	(ii) the surviving or consolidated company is a foreign company, each constituent company other than the surviving company pays a fee equal to three times the annual fee that would have been payable pursuant to section 169 in the January immediatelypreceding the filing of the plan of merger or consolidation by an exempt company having the same registered capital as the constituent company on the date of filing of the plan of merger or consolidation;	
(f)	filing an application in respect of a dual foreign name.	$200
(g)	any filing in respect of a liquidation	$200

PART 6A

(section 55A(2))

1. The fee payable under section 55A(2) for each inspection of the list of the current directors of a company, and where applicable, the current alternate directors of a company is $50.

Case 1:26-cv-00425-LTS Document 1-7 Filed 01/12/26 Page 191 of 197 PageID #: 5698

PART 7

(section 213(4) and (5))

1. The fee payable under section 213(4) to accompany an application under section 213(1) is $500.

2. The fees payable by a segregated portfolio company under section 213(5) are —

   (a) an additional fee of $2,000; and

   (b) an additional annual fee of $400 in respect of each segregated portfolio up to a maximum of $6,000.

Note as to savings and transitional provisions:

Section 8 of the Companies (Amendment) Act, 2007 [Law 15 of 2007] hereinafter called "the 2007 Act" provides that —

1. All proceedings in respect of offences committed or alleged to have been committed against any enactment repealed by the 2007 Act may be commenced or continued as if the 2007 Act had not come into force.

2. Every proceeding commenced under such a repealed enactment may be continued and completed —

   (a) if the proceeding has been wholly or partly heard, as if the enactments repealed by the 2007 Act were still in force; and

   (b) in other cases, as if the proceeding had been commenced under the 2007 Act.

3. Where, apart from this section, anything done under or for the purposes of the Law before the coming into force of the 2007 Act would cease to have effect by virtue of the repeal of any enactment in force before the coming into force of the 2007 Act it shall have effect as if it had been done under and for the purposes of the corresponding provisions of the 2007 Act.

PART 8

(section 199(A))

Item Number	Description of administrative service	Fee
1.	Refund processing fee	$50
2.	Pre-clearance applications for mergers or consolidations under section 233	$400
3.	Fee for each application for correction of errors in documents filed with the Registrar under the Act	$125
4.	Customised certificate requested by a company	$500

Item Number	Description of administrative service	Fee
5.	Customised letter requested by a company	$500
6.	Certification	$150

PART 9

(section 200)

Item Number	Description of administrative service	Fee
1.	Application for registration under section 26, 184 or 201	$500
2.	Application for re-registration under section 178, 182A, 210 or 214	$500
3.	Application for the registration of a change of name under section 31	$150
4.	Deregistration in accordance with section 181(1)(b) or (c) or 182C(1)(b)	$500
5.	Application for deregistration under section 206	$500
6.	Application for a merger or consolidation under section 233 or 237	$500
7.	Application for any other certificate which the Registrar is authorised to provide under this Act	$150
8.	Filing of any document (other than the filing of any document made as part of an application)	$150
9.	Certification	$150
10.	Issuing or making a copy	$150
11.	Customised certificate requested by a company	$150
12.	Customised letter requested by a company	$150

Publication in consolidated and revised form authorised by the Cabinet this 21st day of January, 2025.

Kim Bullings
Clerk of the Cabinet

ENDNOTES

Table of Legislation history:

SL #	Act/Law #	Legislation	Commencement	Gazette
50/2024		Companies (Amendment and Validation) Act, 2024 (Commencement) Order, 2024	19-Dec-2024	LG47/2024/s16
	11/2024	Companies (Amendment and Validation) Act, 2024	1-Jan-2025	LG47/2024/s2
37/2024		Companies (Amendment of Schedule 5) Order, 2024	1-Jan-2025	LG36/2024/s1
17/2024		Companies (Amendment) Act, 2023 (Commencement) Order, 2024	31-Jul-2024	LG26/2024/s2
	15/2023	Companies (Amendment) Act, 2023	31-Jul-2024	LG41/2023/s3
27/2023		Companies (Amendment of Schedule 5) Order, 2023	1-Jan-2024	LG38/2023/s1
16/2023		Companies (Amendment of Schedule 4) Order, 2023	19-Jul-2023	LG20/2023/s1
		Companies Act (2023 Revision)	12-Jan-2023	LG1/2023/S1
28/2022		Companies (Amendment) Act, 2021 (Commencement) Order, 2022	29-Jul-2022	LG27/2022/s1
19/2022		Companies (Amendment of Section 254) Regulations, 2022	10-Jun-2022	LG21/2022/s1
	6/2021	Companies (Amendment) Act, 2021	31-Aug-2022	LG72/2021/s3
		Companies Act (2022 Revision)	14-Jan-2022	LG2/2022/s5
9/2021		Companies (Amendment) (No. 3) Act, 2020 (Commencement) Order, 2021	20-Jan-2021	LG5/2021/s6
	60/2020	Companies (Amendment) (No. 3) Act, 2020	1-Mar-2021	LG1/2021/s4
	56/2020	Citation of Acts of Parliament Act, 2020	3-Dec-2020	LG89/2020/s1
		Companies Act (2021 Revision)	12-Jan-2021	LG4/2021/s8
	56/2020	Citation of Acts of Parliament Act, 2020	3-Dec-2020	LG89/2020/s1
115/2020		Companies (Amendment) (No. 2) Law, 2020 (Commencement) (No. 2) Order, 2020	20-Aug-2020	LG60/2020/s2
78/2020		Companies (Amendment) (No. 2) Law, 2020 (Commencement) Order, 2020	9-Jun-2020	LG44/2020/s1
	19/2020	Companies (Amendment) (No. 2) Law, 2020	1-Oct-2020	LG39/2020/s3
27/2020		Companies (Amendment) Law, 2020 (Commencement) (No. 2) Order, 2020	27-Mar-2020	LG22/2020/s1
11/2020		Companies (Amendment) Law, 2020 (Commencement) Order, 2020	18-Feb-2020	LG11/2020/s1
	4/2020	Companies (Amendment) Law, 2020	15-May-2020	LG10/2020s1
		Companies Law (2020 Revision)	9-Jan-2020	LG4/2020/s8
34/2019		Companies (Amendment) Law, 2019 (Commencement of	19-Sep-2019	LG34/2019/s1

SL #	Act/Law #	Legislation	Commencement	Gazette
		Section 5) Order, 2019		
	10/2019	Companies (Amendment) Law, 2019	19-Sep-2019	LG28/2019/s1
	46/2018	Companies (Amendment) (No. 2) Law, 2018	1-Jan-2019	GE98/2018/s3
6/2019		Companies (Amendment) Law, 2017 (Commencement) Order, 2019	1-Feb-2019	GE9/2019/s2
	37/2018	Companies (Amendment) Law, 2018	1-Mar-2019	GE97/2018/s12
62/2017		Schedule 4 of the Companies Law Departmental Notice, 2017	26-Jul-2017	GE61/2017/p3
62/2015		Schedule 4 of the Companies Law Departmental Notice, 2015	13-Feb-2015	GE12/2015/p28
		Companies Law (2018 Revision)	16-Mar-2018	GE22/2018 s6
94/2017		Companies (Amendment) (No.2) Law, 2017 (Commencement) Order, 2017	13-Dec-2017	GE105/2017/s1
	42/2017	Companies (Amendment) (No. 2) Law, 2017	13-Dec-2017	GE100/2017/s2
21/2017		Companies (Amendment) Law, 2017 (Commencement) Order, 2017	21-Apr-2017	GE34/2017s2
	2/2017	Companies (Amendment) Law, 2017	1-Jul-2017	GE31/2017/s1
		Companies Law (2016 Revision)	2-Sep-16	GE68/2016/s5
E5/2013		*ERRATUM*: Companies Law (2016 Revision)		GE93/2013/p42
	3/2016	Companies (Amendment) Law, 2016	13-May-2016	GE36/2016/s1
43/2015		Companies (Amendment) Law, 2015 (Commencement) Order, 2015	21-Oct-2015	GR82/2015/s1
	14/2015	Companies (Amendment) Law, 2015	2-Nov-2015	GE73/2015/s1
		Companies Law (2013 Revision)	11-Oct-2013	GE82/2013/s6
	6/2013	Companies (Amendment) (No. 2) Law, 2013	6-May-2013	G9/2013/s2
	1/2013	Companies (Amendment) Law, 2013	10-Jan-2013	GE8/2013/s1
	29/2012	Companies (Amendment) (No. 3) Law, 2012	11-Dec-2012	GE123/2012/s4
	14/2012	Companies (Amendment) (No.2) Law, 2012	5-Oct-2012	GE94/2012/s1
	6/2012	Companies (Amendment) Law, 2012	10-Jan-2013	GE4/2013/s6
3/2012		Companies (Amendment of Schedule) Order, 2011	31-Jan-2012	GE10/2012/s2
		Companies Law (2012 Revision)	8-Oct-2012	G21/2012/s4
	29/2011	Companies (Amendment) (No.2) Law, 2011	12-Dec-2011	GE108/2011/s2
		Companies Law (2011 Revision)	24-Oct-2011	G21/2011/s4
	16/2011	Companies (Amendment) Law, 2011	27-Apr-2011	GE/32/2011/s3
	37/2010	Companies (Amendment) Law, 2010	28-Sep-2010	GE59/2010/s1
		Companies Law (2010 Revision)	19-Jul-2010	G15/2010/s1
	33/2009	Companies (Amendment) (No.2) Law, 2009	1-Jan-2010	GE91/2009/s4

SL #	Act/Law #	Legislation	Commencement	Gazette
		Companies Law (2009 Revision)	31-Aug-2009	G18/2009/s2
	12/2009	Companies (Amendment) Law, 2009	11-May20-2009	G10/2009/s4
5/2009		Companies (Amendment) Law, 2007 (Commencement) Order, 2009	22-Jan-2009	GE5/2009/s1
	15/2007	Companies (Amendment) Law, 2007	1-Mar-2009	G23/2007/s4
		Companies Law (2007 Revision)	9-Jul-2007	G14/2007/s6
	13/2006	Companies (Amendment) Law, 2006	1-Jul-2006	GE14/2006/s5
		Companies Law (2004 Revision)	26-Jul-2004	G15/2007/s4
	28/2003	Companies (Amendment) (Disposition of Property) Law, 2003	27-Jun-2004	G2/2004/s6
	26/2002	Companies (Amendment) (No.2) Law, 2002	3-Feb-2002	GE2/2002/s6
	22/2002	Companies (Amendment) Law, 2002	28-Jan-2003	GE/2003/s2
	46/2001	Companies (Amendment) (Segregated Portfolio Companies) Law, 2001	19-Mar-2002	GE13/2002/s3
		Companies Law (2002 Revision)	2-Jul-2002	GE13/2002/s1
	29/2001	Companies (Amendment) Law, 2001	12-Dec-2001	GE30/2001/s7
	10/2001	Companies (Amendment) (Fees) Law, 2001	1-Jun-2001	GE11/2001/s14
		Companies Law (2001 Second Revision)	30-Apr-2001	GE8/2001/s2
	5/2001	Companies (Amendment) (Control of Bearer Shares) Law, 2001	26-Apr-2001	GE7/2001/s5
		Companies Law (2001 Revision)	26-Mar-2001	G7/2001/s2
	7/2000	Electronic Transactions Law, 2000 (part)	11-Sep-2000	G19/2000/s2
		Companies Law (2000 Revision)	8-May-2000	G10/2000/s1
	5/1999	Companies (Amendment) (Euro) Law, 1999	7-Jun-1999	G12/1999/s3
	20/1998	Finance Law, 1998 (part)	16-Nov-1998	G7/1999/s10
		Companies Law (1998 Revision)	3-Aug-1998	G16/1998/s2
	6/1998	Companies (Amendment) (Segregated Portfolio Companies) Law	11-May-1998	G10/1998/s4
	4/1998	Companies (Amendment) (Exempted Companies) Law, 1998	14-Apr-1998	G8/1998/s4
	26/1997	Companies (Amendment) (Protection of Depositors) Law, 1997	10-Mar-1998	G16/1998/s16
	14/1996	Companies Law (1995 Revision) (Amendment) (Authorised Signatures) Law	25-Nov-1996	G25/1996/s4
		Companies Law (1995 Revision)	21-Aug-1995	G17/1995/s1
	8/1994	Companies (Amendment) (No.2) Law, 1994	15-Nov-1994	G23/1994/s4
	2/1994	Companies (Amendment) Law, 1994	28-Mar-1994	GE/1994/s2
	33/1993	Companies (Amendment) (No.3) Law, 1993	14-Dec-1993	GE/1993/s10

SL #	Act/Law #	Legislation	Commencement	Gazette
	23/1993	Companies (Amendment) (No.2) Law, 1993	13-Dec-1993	GE25/1993/s2
	3/1993	Companies (Amendment) Law, 1993	18-May-1993	GE10/1993/s7
	11/1992	Companies (Amendment) Law, 1992	2-Sep-1992	GE/1992/s1
	23/1991	The Fees (Miscellaneous Amendment) Law, 1991 (part)	15-Jan-1992	GE/1991/s1
	3/1991	Companies (Amendment) Law, 1991	6-May-1991	G9/1991/s6
	10/1990	Companies (Amendment) Law, 1990	21-Sep-1990	GE/1990/s3
	14/1989	Companies (Amendment) Law, 1989	20-Nov-1989	G24/1989/s8
	14/1988	Companies (Amendment) Law, 1988	13-Mar-1989	G6/1988/s4
	24/1987	Companies (Amendment) Law, 1987	18-Jan-1988	G2/1988/s1
	38/1985	Companies (Amendment) (No.2) Law, 1985	6-Jan-1986	G1/1986/s6
	15/1985	Companies (Amendment) Law, 1985	30-Sep-1985	G14/1985/s7
	22/1984	Companies (Amendment) (No.2) Law, 1984	29-Oct-1984	G22/1984/s5
	2/1984	Companies (Amendment) Law, 1984	30-Apr-1984	G9/1984/s7
	34/1983	Companies (Amendment) Law, 1983	1-Jan-1984	G9/1984/s11
	21/1981	Companies (Amendment) Law, 1981	1-Jan-1982	G23/1981/s3
	6/1980	Companies (Amendment) Law, 1980	19-May-1980	G10/1980/s6
	16/1978	Companies (Amendment) Law, 1978	25-Sep-1978	G20/1987/s1
	19/1977	Companies (Amendment) Law, 1977	21-Nov-1977	G24/1977/s2
	25/1975	Companies (Amendment) Law, 1975	1-Jan-1976	G26/1975/s11
	24/1974	Companies (Amendment) Law, 1974	1-Jan-1975	G1/1975/s6
	7/1973	Companies (Amendment) Law, 1973	2-Aug-1973	GN128/1973
	1/1971	Companies (Amendment) Law, 1970	8-Jan-1971	GN 2 of 1971
	9/1966	Companies (Amendment) Law, 1966	1-Aug-1966	GN 79 of 1996
	Cap 22	Companies Law	1-Jan-1964	Laws of the CI (Vol I – p.283)

(Price: $39.20)

ITEM NO. 134

JA-20

Digitally signed by Advance Performance Exponents
Date: 2023.10.04 08:46:00
Reason: Apex Certified
Location: Apex

IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No. 0014 of 2022
(Grand Court Cause No. FSD 0157 of 2021 (DDJ))

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP ACT (2021 REVISION) AND IN THE MATTER OF AQUAPOINT L.P.

BETWEEN

AQUAPOINT L.P.

Appellant

-and-

XIAOHU FAN

Respondent

Before: **The Rt. Hon. Sir John Goldring, (President)**
The Hon. Sir Richard Field, Justice of Appeal
The Hon. Sir Michael Birt, Justice of Appeal

Appearances: **Tom Smith KC and Rupert Bell of Walkers on behalf of the Appellant**

Ben Valentin KC and Bhavesh Patel of Travers Thorp Alberga on behalf of the Respondent

Date of hearing: **1 May 2023**

Date circulated: **22 September 2023**

Judgment delivered: **4 October 2023**

JUDGMENT

Field JA

Introduction

1. This is an appeal from the order of Justice Doyle ("the judge") dated 13 June 2022 winding up the appellant exempted limited partnership ("ALP") on the just and equitable basis on four

separate grounds. The order was preceded by a judgment dated 10 June 2022 ("the Judgment").

2. ALP was formed on 16 February 2017 under the Exempted Limited Partnership Act ("the ELPA"). The petitioner seeking the winding up order was the respondent Dr Xiaohu Fan ("Dr Fan") who became a limited partner in ALP having executed on 25 May 2017 a subscription agreement ("the Subscription Agreement), an Amended and Restated Limited Partnership Agreement ("the LPA") and an acknowledgement agreement ("the Acknowledgement"). The judge referred to this suite of agreements as "the 2017 Agreement" and I shall do likewise.

3. The sole asset owned by ALP was and remains its holding of 30,320,000 ordinary shares of US$0.0001 each in Legend Biotech Corporation ("Legend Cayman"), a Cayman Islands exempted limited company listed on NASDAQ. This holding represented 15.6% of Legend Cayman's issued shares in 2017.

4. Legend Cayman is the parent company in a group of companies ("the Legend Group") which carry on business developing novel cell therapies for oncology. The Legend Group's principal operations and employees are located in Nanjing and Zhenjiang in the PRC.

5. At all material times the general partner of ALP ("the GP") was and remains GenScript Corporation ("GenScript"), a Delaware corporation registered in the Cayman Islands under Part IX of the Companies Act. From the start, Genscript was and remains under the control of its majority shareholder, Dr Fangliang Zhang ("Dr Zhang").

6. In addition to Dr Fan, the other limited partners of ALP are the Ye Wang Family Trust and GenScript. The respective percentage shares of the three limited partners in ALP's sole asset are 65.96%, 32.98% and 1.06%. The interest held by the Ye Wang Family Trust is the result of a transfer by Ms Ye Wang of her original interest of 32.98%. Dr Fan's 65.96% interest equates to 19,999,072 ordinary shares in Legend Cayman.

7. It was in July 2002 that Dr Zhang, Dr Larry Wang and Ms Ye Wang ("Ms Wang") founded the GenScript Group of companies which subsequently became subsidiaries of Legend Cayman. In 2014 the GenScript Group decided to form a subsidiary company named "Legend" to develop novel biological drugs and they invited Dr Fan, who was working within the GenScript Group doing important research on cell therapy, immunology and cell biology, to

be involved in this venture. Dr Fan accepted the invitation and was appointed Chief Scientific Officer of the new project.

8. In November 2014, GenScript incorporated Nanjing Legend Biotechnology Co Ltd ("Legend Nanjing") in the PRC with a view to it issuing an IPO. In order to incentivise Dr Fan, Legend Nanjing, acting by Dr Zhang, entered into an agreement with him dated 1 January 2016 ("the 2016 Agreement") under which Legend Nanjing agreed to grant Dr Fan a 10% holding of the shares in Legend Nanjing (10,000,000 shares) on terms that he pay RMB 100,000 annually for five years and that, prior to Legend Nanjing's IPO, he could not transfer these shares or create any security interest over them without Legend Nanjing's approval.

9. Since late 2014, Dr Fan had been significantly involved in critical developments of a number of therapies for the treatment of myeloma. In March 2016, he was responsible for the invention of citacabtageneautoleucel (Cilta-cel), a ground-breaking investigational B-cell maturation antigen directed chimeric antigen receptor T cell (CAR-T) therapy.

10. Subsequently, it was decided that instead of proceeding with an IPO by Legend Nanjing, the listing vehicle should be Legend Cayman which would proceed with an IPO on NASDAQ. In conjunction with this change of strategy, Dr Zhang set out to persuade Dr Fan: (a) to enter into an arrangement based on the establishment of a Cayman Islands exempted limited partnership ("ELP") which would hold approximately 15% of Legend Cayman's shares and whose limited partners would be Dr Fan, Ms Wang and GenScript; and (b) to accept that the 2016 Agreement would terminate when he became a limited partner in the ELP.

11. The implementation of Dr Zhang's plan to persuade Dr Fan to become a limited partner in a Cayman ELP began around mid to late July 2016. (Earlier, on 7 June 2016, Ms Wang had sent Dr Fan a draft agreement in Chinese for the establishment of an PRC partnership but nothing came of this). By mid to late July 2016, there had been good progress in the first dosing of Cilta-cel. The persuasion of Dr Fan was largely delegated to Ms Wang, who was a director of GenScript, acting on Dr Zhang's instructions, although Dr Zhang also played a direct role. Thus, it was Ms Wang who sent to Dr Fan the developing and the final versions of the LPA for signature and the Subscription Agreement and the Acknowledgement by which Dr Fan acknowledged that the 2016 Agreement contained only "general provisions and principles" and would terminate upon his becoming a limited partner in ALP. It was principally Ms Wang,

reflecting the views of Dr Zhang, who dealt with Dr Fan's questions and comments on the documents she sent him.

12. When Dr Fan was approached with Dr Zhang's new strategy, his chief concern was that he should still be entitled after the IPO to be registered as the owner of 10% of the shares in the listing entity, as he had been under the 2016 Agreement in respect of 10% of the shares in Legend Nanjing. He made this very clear on several occasions to Ms Wang and Dr Zhang who both assured him that the 2016 Agreement would be "rolled over" into the arrangement involving a Cayman ELP. Dr Fan relied on these assurances when signing the 2017 Agreement: he would not have signed the constituent agreements if the assurances had not been given. His interest in the partnership under the 2017 Agreement was the equivalent of 10% of the shares in Legend Cayman which was the same percentage he was promised in respect of the shares in Legend Nanjing. In the light of these matters the judge held that Dr Fan had a legitimate expectation and reasonable understanding that 6 months after the Legend Cayman IPO he would be entitled to have access to 10% of the shares in Legend Cayman[1].

13. Legend Cayman was listed on NASDAQ on 5 June 2020, at which time GenScript and Dr Zhang owned 169,680,000 and 34,234,267 Legend Cayman shares respectively, which holdings constituted 76.9% and 15.2% of the company's issued share capital.

14. On 12 October 2017, Dr Fan paid RMB 2,500,000 in respect of the 10% of the Legend Cayman shares he had been assured would be registered in his name and available for disposition six months after the Legend Cayman IPO. He was then reimbursed RMB 2 million over a four-year period. RMB 2,500,000 was the sum that was payable under the 2016 Agreement.

15. Following the end of the 6 month lock in period, Dr Fan informed Ms Wang and Dr Zhang that he wanted access to 10% of the Legend Cayman shares held by ALP. He first suggested that ALP be dissolved to achieve this and was invited to serve a written request that his Legend Cayman shares be sold subject to the GP exercising its discretion accordingly. He then proposed that 2 million Legend Cayman ADS shares (equivalent to 20 million ordinary shares) be sold as an interim measure whilst the differences between him and Dr Zhang and Ms Wang were sorted out. At a meeting on 26 February 2021, Dr Zhang refused Dr Fan's sales plan, mentioning that maybe Dr Fan would be able to sell about 30,000 Legend Cayman

[1] It was a term of the Legend Cayman IPO that the shares in Legend Cayman were to be the subject of a 6 month lock up period.

ADS shares raising about US$ 1 million, which would have meant that it would have taken over 300 years for Dr Fan's total shares to be sold. Dr Zhang's declared reason for this response was that the company needed to raise funds and Dr Fan's sales plan would "crash the stock price". Dr Fan then asked Dr Zhang on 5 March 2021 for an offer to allow the sale of a reasonable amount of his shares to which Dr Zhang responded the same day, stating that the Legend Cayman management team and board were only prepared to sell 200,000 ADS shares producing around $US 4.5 million and this was a final offer. This offer Dr Fan accepted, but no steps were taken by the GP to implement it. Instead, Dr Zhang let Dr Fan know that he had been instructed not to sell the shares. Following a chasing letter from Dr Fan's attorneys, Travers Thorp Alberga ("TTA"), ALP's then attorneys, Dentons, stated in a letter dated 21 May 2021 that Dr Fan had not adopted the correct methodology for attempting to transfer his interest in the partnership and added that he could not be allowed to sell 10% of the Legend Cayman shares on account of the impact this would have on the share price. Five days later, by a letter dated 26 May 2021, Dentons, on behalf of ALP, offered to release 5% of the Legend Cayman shares held under Dr Fan's interest in the partnership followed by 3.5% every year thereafter but Dr Fan rejected this offer.

16. The winding up petition was due to come on for trial on 17 September 2021 but the hearing was adjourned at very short notice to accommodate an application by ALP for the petition to be struck out on the ground that it was an abuse of the process. That application was dismissed with detailed reasons by the judge on 26 October 2021 ("the strike out judgment") and on the same day Dr Fan served an Amended Petition that began to be heard on 26 January 2022. However, at the end of the first day, the GP applied for another adjournment, this time because its Cayman Islands' registration as a foreign company had been terminated on the grounds that it had failed to maintain a registered office and its registration in the Cayman Islands. The application was granted with indemnity costs against the GP and the hearing of the Amended Petition re-commenced on 20 April 2022, over six months after the date it had first came on for trial before the Grand Court.

17. On 11 March 2022, Dr Fan resigned from his position in Legend Cayman shortly after learning that he was no longer described on the company's website as a "Co-Founder" of the company.

The judgment below

The judge's four distinct grounds for winding up ALP

18. The distinct grounds that the judge found justified an order for the winding up of ALP on just and equitable grounds were:

(1) **Frustration of Dr Fan's legitimate expectation that the GP would transfer 10% of the shares in Legend Cayman shares into his name as the beneficial owner thereof**: see para [167] of the Judgment**:**

> "Dr Fan had a legitimate and reasonable understanding outside the 2017 Agreement. The legitimate expectations and reasonable understanding was that 6 months after the IPO he would be entitled to have access to 10% of the shares in Legend Cayman. The legitimate expectation and understanding was created and encouraged by Dr Zhang and Ms Wang on Dr Zhang's behalf. The legitimate expectation and understanding has been unreasonably frustrated by the Partnership, the GP and Dr Zhang".

(2) Irretrievable breakdown in the relationship between Dr Fan and Dr Zhang that had begun as one of mutual trust and confidence.

Paras [182] – [184] of the Judgment read:

> "It is plain to me that at the early stage when Dr Fan joined up with Dr Zhang that their relationship was one of mutual trust and confidence but that relationship has now irretrievably broken down and, on an objective analysis, Dr Fan has lost trust and confidence in Dr Zhang, the GP and the Partnership. Dr Fan's relatively recent resignation was not, in my judgment, a tactical ploy. It is plain that Dr Fan could not work in the environment created by Dr Zhang. Dr Zhang has attempted to belittle Dr Fan's role and contribution. Dr Zhang has preferred his own interests over the interests of Dr Fan. The GP, for reasons best known to itself, filed evidence that made reference to Dr Fan and an insider dealing incident. It had no relevance to the issues before the court for determination. It was not referred to in the comprehensive legal submissions before the court but the filing of it is a further indication of the lack of trust and confidence between the parties". [182]

"The GP agreed via Dr Zhang's communication of 5 March 2021 to permit 200,000 shares to be sold, but then reneged even on this meagre offering. There is significant hostility and lack of trust between the parties. Dr Fan has now resigned. That must have been a very difficult decision for him. Mutual trust and confidence no longer exists. This situation cannot continue indefinitely. The Partnership and the GP have already dragged these proceedings out for far too long". [183]
"This is not a case of a dissatisfied investor, having been treated fairly, simply wanting an early exit and a return on his investment outwith the terms of the agreements he signed up to and the relevant constitutional documents. In my judgment there is plainly "something more" in this case and fairness requires equitable considerations to trump the strict rights and obligations of the parties pursuant to the contractual and constitutional documents". [184]

(3) The justifiable loss of trust and confidence in the management of the Partnership judged to the requisite objective standards in the circumstances of this case.

See para [166] and para [10(12)] of the judge's judgment refusing ALP's application to strike out the winding up petition ("the strike out judgment") referred to in the Judgment at [158]:

"Dr Fan has proved a justifiable loss of trust and confidence in the management of the Partnership by the GP judged to the requisite objective standards in the circumstances of this case. Moreover, in my judgment the affairs of the Partnership have been conducted by the GP (with Dr Zhang being in the driving seat in that respect] in a manner which is oppressive and in breach of Dr Fan's legitimate expectation and understanding." [166]

"It is well established that a company can be wound up on the just an equitable ground if it is established that there has been a justifiable loss of confidence in management, for example, on account of serious misconduct or serious mismanagement of the affairs of the company by the management or the majority owners (paragraph 22 Martin JA in *Tianrui*). For a loss of confidence ground to succeed it has to be a justifiable loss of confidence in the conduct and management of the company's affairs and not a subjective loss of confidence arising from dissatisfaction about the conduct of the domestic policy of the company (*RCB Thai v Asia Fund* 1996 CILR 9 at pages 22-23 per Smellie J, as he then was). This loss or lack of confidence must be grounded on the conduct of management, not in regard to their private lives or affairs, but in regard to the company's business; lack of probity in the conduct of the companies affairs may make it just and equitable that the company be wound up (Lord Shaw, in the Judicial Committee of the Privy Council in *Loch v Blackwood Ltd* [1924] AC 783 at 788." [10 (12)]

(4) The GP's conflict of interest and breach of the fiduciary duty to act in good faith.

See [171] – [179], especially [171] and [179] of the Judgment which read:

> "There is considerable strength in Dr Fan's point that the GP has been acting in breach of its fiduciary duties in particular its duty to act in good faith and in the best interests of the Partnership. Dr Zhang is in control of the GP. Dr Zhang is hopelessly conflicted. He is the beneficial owner of shares in Legend Cayman. He also has control of the Partnership's shares in Legend Cayman. The GP (through the actions of Dr Zhang) is not acting in the best interests of the Partnership. The clearest example of this is the GP's approach when it receives a request from Dr Fan for his portion of the shares to be transferred to him. A general partner acting in good faith and in the best interests of the Partnership would primarily have regard to the position of the limited partners and yet remarkably there is no evidence of the GP consulting Ms Wang and seeking her views. I also note that Ms Wang as a limited partner has not opposed the making of a winding up order". [171]
>
> "The conflicted position of the GP (under the control of Dr Zhang) and its preference of the interests of Dr Zhang, Legend Cayman and the Legend Biotech group as a whole over and above the interests of Dr Fan a limited partner (holding almost 70%) persuades me that the position of the GP is unsustainable and the Partnership must be brought to an end in the best interests of the limited partners. Dr Fan applies for a winding up order and this has not been opposed by Ms Wang, the only other limited partner". [179]

19. In respect of all four of the above grounds for winding up ALP, the judge held that there was no reasonable alternative remedy to a winding up order. In his view, Dr Fan was entitled to the shares represented by his interest in the limited partnership and only a winding up order would give him his shares.

Jurisdiction

20. Referring to the decisions of Parker J in *Padma Fund LP* (unreported FSD judgment 8 October 2021 and Kawaley J in *Formation Group (Cayman) Fund I* (unreported FSD judgment 21 April 2022)[2], the judge noted that there is an unresolved issue as to whether the jurisdiction of the Court to hear a petition presented by a limited partner to wind up a limited partnership on just and equitable grounds is derived from section 35 of the Partnership Act, pursuant to section 3 of the ELPA, and/or Part V of the Companies Act pursuant to section 36 (3) of the ELPA. In light of the fact that it was common ground that the Court had jurisdiction under one or other or both of those statutory provisions, the judge decided it was unnecessary to pronounce on the issue, observing that "it may require a judgment of the Court of Appeal

[2] See also *In the Matter Rhone Holdings LP* [2016 (1) 273] [CICA] and the judgment of Kawaley J in *In the Matter of XIO Diamond LP* (unreported, 30 April, FSD 256 of 2019.

or the Privy Council or legislation to finally determine and put these knotty jurisdictional issue to bed".

21. For my part, I would have been disposed to this Court deciding the issue if we had received written and oral submissions on the point. However, perhaps unsurprisingly, neither side advanced any submissions before us on the point and in these circumstances it would plainly be inappropriate to decide the question.

The legal principles relied on by the judge

22. The judge proceeded on the basis[3] that the success of Dr Fan's winding up petition depended on its factual basis being within the reach of those situations where the context was not an out and out conventional partnership but was sufficiently akin to that relationship in accordance with the indicia identified by Lord Wilberforce in *Ebrahimi v Westbourne Galleries* [1973] AC 360 to justify a winding up on just and equitable grounds.

23. It will be recalled that in *Ebrahimi*, the appellant Mr Shokrollah Ebrahimi and Mr Asher Nazar had carried on the business as dealers in Persian carpets as partners equally sharing management and profits for a number of years. In 1945, however, the business was taken over by the respondent company with Mr Ebrahami and Mr Asher Nazar each becoming directors and holding 500 shares. Soon after the formation of the company, Mr Asher Nazar's son, George Nazar, was appointed a director and Mr Ebrahimi and Mr Asher Nazar each transferred to him 100 shares. The profits of the company were distributed as directors' remuneration. About ten years later, the Nazars, father and son, secured the passing of an ordinary resolution effective by virtue of section 184 of the Companies Act 1948 ("the 1948 Act") removing Mr Ebrahami from the office of director. Mr Ebrahami presented a petition under section 222 (f) of the 1948 Act that the company be wound up on the ground that it was just and equitable so to do.

24. Although they have frequently been cited in numerous subsequent cases I think it appropriate to set out the key passages in Lord Wilberforce's judgment that followed his review of numerous English, Scottish and some Commonwealth decisions.

[3] See [10 (11)] and [10 (12) of the strike out judgment referred to in [158] of the Judgment.

"My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words " just and equitable " and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way. It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence—this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping " members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company —so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere." [emphasis added]

"It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to " quasi-partnerships " or " in substance partnerships " may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words " just and equitable " sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."

25. In paragraph [159] of the Judgment the judge referred approvingly to the decision of the Hong Kong Court of Final Appeal in *Re Yung Kee Holdings Ltd* [2015] 6 HKC 644 where, following *Ebrahimi,* the court proceeded on the basis that considerations of a personal character arising between individuals might make it unjust, or inequitable to insist on legal rights, or to exercise them in a particular way which might come in the form of a mutual understanding and there could be situations in which equity might find sufficient unfairness or breaches of good faith so as to attract relief but the discretion had to be exercised in a principled manner.

26. In paragraphs [160- 161], the judge said:

> [160] "Lord Wilberforce in *Ebrahimi* wisely stated that it "would be impossible and wholly undesirable to define the circumstances in which these considerations may arise". Lord Wilberforce referred to relationships being sometimes adequately and exhaustively laid down in the relevant constitutional documents adding: "The superimposition of equitable considerations requires something more", typically including an element of a personal relationship involving mutual confidence and/or an agreement or understanding over and above what is specified in the constitutional documents".
>
> [161] "… I agree that when courts at the first instance are considering whether there is "something more" they must conduct such exercise in a principled way and with full regard to the desirability of legal certainty especially in matters of commerce. They should not however sacrifice justice, equity and fairness on the altar of legal certainty".

The judge's findings of fact

27. The judge conducted a detailed review of the evidence which consisted of affidavits and oral testimony from, inter alios, Dr Fan, Dr Zhang and Ms Wang, a large number of emails and WeChat messages between these three witnesses, and other documents including the Subscription Agreement, the LPA, the Acknowledgement and the 2016 Agreement. There is no appeal from any of his significant findings of fact[4] (as distinct from the legal significance he found them to have).

[4] ALP submitted that the judge erred in stating that there was no evidence of the GP consulting Ms Wang and seeking her views on Dr Fan's request to have access to his 10% of the shares in Legend Cayman. Support for this submission was said to be the fact that Ms Wang rejected a request Dr Fan sent to her seeking the transfer of Legend Cayman shares. In my view, this submission lacks merit given the evidence that throughout Ms Wang was essentially acting as Dr Zhang's conduit who was the GP's controlling shareholder.

28. In paragraph [168] the judge set out 13 "obvious examples" of the "ample evidence" that supported his finding expressed in [167]. Since the judge's findings of fact are of great importance in this appeal, I proceed to set out some of these examples, occasionally together with the relevant text of the emails referred to:

(1) The evidence of Dr Fan which he preferred to the evidence of Dr Zhang and Ms Wang where his evidence differed from that given by those two witnesses.

(2) The evidence of Ms Wang was that they intended to honour what Dr Zhang had promised by way of the 2016 Agreement and Dr Zhang seemed to accept this.

(3) I do not accept Dr Zhang's evidence that where he was referring … to "your stock" he was referring to "some stock in the limited partnership". The references to "your stock" were, I find, to the shares in the company which was the subject of the IPO. [The email in question dated 15 June 2017 reads: "A good leader should take care of the employees first. If their employees are not successful, the leader cannot possibly be successful. Since it has taken a long time [to] take care of your stock, can we spend some time to take care of your employees first?"]

(4) Dr Fan's uncontradicted legitimate expectation and understanding is plain from his email to Ms Wang (cc Dr Zhang) dated 26 September 2016 ["Recently Frank told me that you are helping roll over the share purchase plan to Legend Cayman …] and his reference to "roll over the share purchase plan to Legend Cayman."

(5) Dr Zhang in his WeChat with Dr Fan on 19 February 2017 referred to "After all, it is the company, not you, that proposed your shareholdings in Legend first, correct?...the new investment agreement is executed only to make things clearer.."

(6) Ms Wang in her WeChat with Dr Fan on 3 June 2017 openly confirmed the position: "The best news for you is that your stake in Nanjing Legend will be turned into shares in Cayman Legend. The entity to be listed will definitely be Cayman Legend and can't be Nanjing Legend by any means. This_is what really matters."

(7) Ms Wang also recognised that Dr Fan had a 10% share in her email dated 7 June

2017. ["Attached please find the Legend subscription agreement. Please keep it confidential. Your percentage of share may not be straightforward stated as 10% in this document. I will forward another email from the attorney explaining how it was set up. The document hasn't been completed yet, mainly they have to determine if RMB can be accepted in this document. Do let me know first if you have any question."]

(8) Dr Fan's legitimate expectation and understanding was further confirmed by Ms Wang by way of a WeChat exchange on 8 June 2021. Ms Wang confirmed that the 2017 Agreement "is not to change any material personal interest of yours. It's only intended to make the original he intended to make the original agreement legitimate and to create scope for future development." I find that the reference to the "original agreement" in that context was the 2016 Agreement. I also find that Ms Wang was at pains to provide reassurance to Dr Fan that his "material personal" interests would not be changed by way of the 2017 Agreement.

(9) Dr Zhang in effect confirmed this again by his email to Dr Fan on 14 of June 2017 and the reference to "your stock".

(10) Furthermore when Dr Fan in his email dated 17 February 2021 to Dr Zhang and Ms Wang refers to "my shares in Legend" neither of them sought to contradict him.

29. In addition to the factual findings stated in the paragraphs of the Judgment referred to in paragraph [18] above, I draw attention to the following:

(A) The findings in paras [169] – [170].

(a) Dr Fan in entering into the 2017 Agreement trusted Dr Zhang and Ms Wang to do the right thing and to honour the roll over of Dr Fan's Legend Nanjing shares to Legend Cayman shares. Dr Zhang and the GP have betrayed that trust and it can easily be seen how Dr Fan legitimately and reasonably believes, after his significant contribution to the increasing value of Legend Cayman, that he has been badly let down by the GP and those that control the GP. Dr Fan has been unfairly treated. It was not mere "wishful thinking" by Dr Fan. It was a reasonable and legitimate

expectation that he would get the Legend Shares after the IPO, whatever was stated in the 2017 Agreement. [169]

(b) It is only fair, just and equitable that he shares in the benefits now rather than having to wait 300 years (as originally in effect suggested by the GP) or 26 years (as subsequently in effect suggested by the GP) to obtain his shares. The GP's consideration of and reactions to Dr Fan's reasonable requests for the shares shows the GP in a bad light. Such is indicative of the GP's breach of its fiduciary duties and its failure to act in the best interests of the Partnership and its limited partners. Dr Fan had nearly a 70% interest. He should have been treated with respect and fairness. He was not so treated. He was left with no reasonable alternative but to file the petition. [170]

(B) The following WeChat message from Ms Wang to Dr Fan on 8 June 2017 very shortly before Dr Fan signed the LPA

> "The agreement is not to change any material personal interest of your's. It's only to make the original agreement legitimate, and to create scope for future development." [124]:

ALP's/GP's case on appeal

30. The principal case advanced on behalf of ALP by the GP is that the judge erred in holding that the facts on which Dr Fan's petition is founded fell within Lord Wilberforce's indicia of those relationships which are sufficiently related to conventional partnership to justify a winding up on just and equitable grounds. Two distinct submissions were advanced by Mr Smith KC under this broad rubric:

(i) In the light of the Subscription Agreement, the LPA and the ELPA, ALP lacks any of the characteristics that, pursuant to *Ebrahimi*, are necessary for the relationship between ALP (acting by the GP) and Dr Fan to constitute the type of "quasi-partnership" or other relationship sufficiently akin to partnership required for it to be open to the Court to wind up ALP on the just and equitable ground.

(ii) The LPA, which was specifically negotiated and agreed over a quite a lengthy period of time, and the Subscription Agreement preclude resort to the just and equitable winding up ground since those agreements are and were intended to be an exhaustive statement of the parties' rights and obligations and specifically deal with the limited partner's rights to withdraw or transfer his/her/its interest in the partnership and to a distribution. Accordingly, the judge erred in proceeding on the basis of his finding that Dr Fan had a legitimate expectation that 10% of the Legend Cayman shares would be transferred into his ownership conditioned the rights and obligations of the GP under the LPA.

31. In support of these submissions, Mr Smith drew attention to the following differences between a partnership under the Partnership Act and an ELP under the ELPA that were adverted to by this Court in *Kuwait Ports Authority et al v Port Link GP Ltd et al* at [24] [unreported 20 January 2023]:

(i) Limited partners of an ELP are not liable for the debts of the ELP (see section 4 (2) of the ELPA) whereas the General Partner is liable for the debts and obligations of the ELP.

(ii) Limited partners are prohibited from having any active involvement in the business of the ELP which is carried on by the General Partner who enters into all contracts by and on behalf the ELP.

(iii) Section 19 (1) of the ELPA imposes an express duty of good faith on the General Partner of an ELP requiring the General Partner to act in the best interests of the ELP.

(iv) Whereas in an ordinary partnership, mutual and reciprocal rights and obligations are owed to each other by partners, section 19(2) of the ELPA provides that unless the partnership agreement provides to the contrary, a limited partner owes no fiduciary duty either to the ELP or to other partners.

32. Mr Smith submitted that it followed from (ii) and (iv) that, unlike in the usual quasi-partnership type of case, Dr Fan as a limited partner had no expectation that he would participate in ALP's business which in any event consisted of simply acting as a vehicle to

hold shares in Legend Cayman. There was also nothing in the LPA that provided that Dr Fan owed a fiduciary duty to the ELP, the General Partner or to other limited partners. Thus, there was no mutuality of obligations of good faith between Dr Fan *quo ad* Ms Wang in her capacity as a limited partner or *quo ad* the GP, acting by Dr Zhang and/or Ms Wang as directors thereof, which was one of the classic indicia of a quasi-partnership. Indeed, despite the word "partnership" in the name "exempted limited partnership" given by the ELPA to an entity formed under section 9 thereof, such an entity lacked any of Lord Wilberforce's indicia of a relationship akin to conventional partnership and thus no just and equitable winding up petition to wind it up based on such a relationship could ever succeed.

33. Mr Smith took us to section 32(3) ELPA that provides in relevant part that "where the requirements for all conditions to an admission contained in the partnership agreement have been complied with in accordance with the terms… any person however admitted shall … be deemed to have adhered to and agreed to be bound by the terms and conditions of the partnership agreement and shall have the rights and be subject to the obligations contained in the partnership agreement, and this Act …"

34. Mr Smith also referred us to the following provisions in the LPA and the Subscription Agreement:

The LPA

(i) Clause 3.1, that sets out the limited liability of a limited partner and Clause 3.2 that sets out five broadly drawn limitations on the authority of limited partners including a lack of authority to take part in the conduct, administration, control, management or conduct of the partnership business;

(ii) Clause 6.2 of the LPA, that provides that for a subscriber to become a limited partner he, she or it must execute an effective deed of adherence to the LPA;

(iii) Clause 7.1, that provides that the limited partners are to have capital accounts in respect of their interests in the partnership and Clause 7 .7 that provides that no limited partner will be permitted to withdraw from the partnership or to withdraw any part of his, her or its capital account save with the General Partner's prior consent which consent may be given or withheld for any reason or no reason at all in

the sole absolute discretion of the General Partner;

(iv) Clause 9: "At the time or times determined by the General Partner, the General Partner shall cause the Partnership to distribute any assets of the Partnership that it does not, in its discretion, consider to be necessary to the operation of the Partnership. Any distribution pursuant to this Clause 9 shall be made to the Partners pro rata in accordance with the Partners' respective interests determined by reference to their Capital Contribution from time to time."

(v) Clause 12. 2, that states that it was not anticipated that meetings of the partners will be held;

(vi) Clause 12.11 -- the Entire Agreement Clause - that provides: "This Agreement, together with the other documents required to be delivered pursuant hereto, constitutes the entire agreement between the parties to this Agreement with respect to the subject matter of this Agreement, and cancels and supersedes any prior understandings and agreements between the parties with respect to such subject matter. There are no representations, warranties, terms, conditions, undertakings, or collateral agreements, express, implied or statutory, between the parties with respect to the subject matter of this Agreement, other than those expressly set forth in this Agreement, and/or the other documents required to be delivered pursuant to such agreements".

The Subscription Agreement

(i) Paragraph 4 of the introduction to the agreement

EACH ACQUIROR OF A PARTNERSHIP INTEREST MUST BE PREPARED TO BEAR THE ECONOMIC RISK OF INVESTMENT THEREIN FOR AN INDEFINITE PERIOD OF TIME. THE SUBSCRIBERS ARE ENCOURAGED TO SEEK INDEPENDENT LEGAL, ACCOUNTING, INVESTMENT AND TAX ADVICE REGARDING THEIR INDIVIDUAL CIRCUMSTANCES AND FINANCIAL OBJECTIVES IN DETERMINING WHETHER TO SUBSCRIBE FOR AN INTEREST IN THE PARTNERSHIP

(ii) Clause 3 (e): "… the subscriber agrees to comply with the terms of the Partnership Agreement …"

(iii) Clause 5: "To induce the Partnership to accept this subscription, the Subscriber hereby makes the following representations, warranties and covenants to the General Partner, the Partnership and ...":

> "The Subscriber further understands the Interest is transferable only with the consent of the General Partner." [5 (b)]
>
> "The Subscriber … will not sell, transfer, distribute or otherwise dispose of the Interest without the consent of the General Partner, which may be granted or withheld in its sole discretion …" [5 (c)]
>
> "… in formulating a decision to invest in the Partnership, the Subscriber has not relied or acted on the basis of any representation or other information purported to be given on behalf of the Partnership or the General Partner except as set forth in the Partnership Agreement (it being understood that no person has been authorised by the Partnership or the General Partner to furnish any such representation or other information)." [5 (e)]

(iv) Clause 7: The Subscriber hereby represents and warrants to the General Partner …

> "the Subscriber has reviewed and understands the Partnership Agreement and this Subscription Agreement …" (b)
>
> "the Subscriber acknowledges and agrees that, except as set forth in the Partnership Agreement, this Subscription Agreement or an additional written document (executed by a director or officer of the General Partner) which clearly and explicitly indicates that the Subscriber is entitled to rely thereon, the Subscriber has neither received, nor is entitled to rely upon, any representations or warranties from the Partnership, the General Partner, or any partner, member, director, officer, employee or agent thereof". (c)
>
> "the Subscriber is aware that except as provided in the Partnership Agreement, the Subscriber will have no right to withdraw from the Partnership or to receive distributions in liquidation of the Partnership Interest". (d)
>
> "the Subscriber is not relying on the Partnership, the General Partner, or any of their partners, members, directors, officers, employees agents or representatives for legal, accounting, investment or tax advice, and the Subscriber has sought independent legal, accounting, investment and tax advice to the extent the Subscriber has deemed necessary or appropriate in connection with the Subscriber's decision to subscribe for the Partnership Interest."(g)

> When referring hereafter to 'the entire agreement clauses', I include clause 12.11 of the LPA, clauses 5(e) and 7(c) of the Subscription Agreement and similar provisions in the Acknowledgement.

35. Mr Smith pointed out that the disclosed documents showed there were occasions when Dr Fan commented on and suggested amendments to certain provisions in the drafts of the LPA sent to him from the beginning of February 2017. (The first draft he received in early February 2017 can be ignored since this related to a PRC partnership). In respect of later drafts of the LPA, Dr Fan's suggestions included an observation that clause 7.8 (dealing with when a limited partner can be required to withdraw his interest) was too harsh and his provision of a marked-up version of the LPA showed proposed changes in red, including changes to clause 7.8. Some of Dr Fan's proposed amendments were accepted and some not. Mr Smith also relied on Dr Fan's acceptance in his oral evidence that he paid attention to detail and that he had read and signed the Subscription Agreement and had read the LPA.

36. Mr Smith made a number of submissions founded on the italicised words in the following passage that begins at p. 379B in Lord Wilberforce's judgment in *Ebrahimi.*

> The words [just and equitable] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, *there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The just and equitable provision does not, as the respondents suggest entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable a court to subject the exercise of legal rights to equitable considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.*

37. In Mr Smith's submission, Lord Wilberforce was here concerned with a case where the rights, expectations and obligations are not set out in the documents of the company. Mr Ebrahami and Mr Nazar *père* had not concluded any agreement as to the circumstances in which the former might be removed as a director. Whereas, if the arrangements and relationships between the parties are set out (submerged) in the constitutional and/or contractual documents, this is sufficient and exhaustive and does not allow for the intervention of equitable considerations derived from the words "just and equitable". In short, the agreements "occupied the field". It follows that the just and equitable jurisdiction

is not available in the instant case in light of the detailed provisions in the LPA and the Subscription Agreement, particularly those that declare that the GP has a sole and absolute discretion as to the transfer or withdrawal of a limited partner's interest and distributions and the entire agreement clauses. What Dr Fan is attempting to do, contended Mr Smith, is impermissibly to circumvent the clear meaning of the 2017 Agreement, by seeking to bring his case within the scope of Lord Wilberforce's judgment in *Ebrahimi*, when the proper course was for him to establish by an action in contract that he is not bound by those provisions in the 2017 Agreements that constitute very substantial obstacles in establishing his "frustration of a legitimate expectation" case. Indeed, to permit Dr Fan to challenge the effect of the 2017 Agreements by petitioning for a winding up on just and equitable grounds rather than bringing proceedings in contract would set a very undesirable precedent as it would open the door to an investor avoiding the effects of a relevant agreement governing his investment by establishing that its terms do not properly reflect his own subjective expectation at the time of entering into the agreement.

38. Mr Smith further relied on a number of passages in the judgments in the following "unfair prejudice" cases[5] : *O'Neill v Phillips* [1999] 1WLR 1092; *Re Coroin Ltd* (No 2) [2012] EWHC 2343 (Ch); and *Cool Seas (Seafoods) Ltd v Interfish Ltd et al* [2018] EWHC 2038 (Ch).

O'Neill

Lord Hoffmann at p. 1102 B –

> "6. *Legitimate expectations*
>
> In *In re Saul D. Harrison & Sons Plc.* [1995] 1 B.C.L.C. 14, 19, I used the term "legitimate expectation," borrowed from public law, as a label for the "correlative right" to which a relationship between company members may give rise in a case when, on equitable principles, it would be regarded as unfair for a majority to exercise a power conferred upon them by the articles to the prejudice of another member. I gave as an example the standard case in which shareholders have entered into association upon the understanding that each of them who has ventured his capital will also participate in the management of the company. In such a case it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms. The aggrieved member

[5] Brought in *O'Neill* under s.459(1) of the Companies Act 1985 as amended by the Companies Act 1989 and in *Coroin* and *Cool Seas* under s. 994 of the Companies Act 2006

could be said to have had a "legitimate expectation" that he would be able to participate in the management or withdraw from the company. It was probably a mistake to use this term, as it usually is when one introduces a new label to describe a concept which is already sufficiently defined in other terms. In saying that it was "correlative" to the equitable restraint, I meant that it could exist only when equitable principles of the kind I have been describing would make it unfair for a party to exercise rights under the articles. It is a consequence, not a cause, of the equitable restraint. The concept a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application. That is what seems to have happened in this case".

Coroin

Richards J (as he then was)

[635] "For part of his case, however, Mr McKillen relies also on legitimate expectations of participation in the management of the company. In my judgment, this is not sustainable. The importance of the passage from the speech of Lord Wilberforce in *In re Ebrahimi Ltd* cited by Lord Hoffmann in *O'Neill v Phillips* is that it indicates the circumstances in which reliance may be placed on equitable considerations (Lord Hoffmann deprecates the use of the expression 'legitimate expectations', regretting that he introduced it into this area of the law: see p.1102) as giving rise to a possible case of unfair prejudice. It is very important to note that in that passage, having identified that the structure of a company is defined by company law and the articles of association, Lord Wilberforce observed that;

> *"In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small."*

Equitable considerations, affecting the manner in which legal rights can be exercised, will arise only in those cases where there exist considerations of a personal character between the shareholders which makes it unjust or inequitable to insist on legal rights or to exercise them in a particular way. Typically that will be in the case of a company formed by a small number of individuals on the basis of participation by all or some of them in the management of the company."

[636] "In my judgment, there is no room for equitable considerations of this kind in the present case. The company was formed by a group of highly sophisticated and experienced business people and investors with a view to the purchase of a well-known group of hotels for a price running into many hundreds of millions of pounds and to retaining and managing some of those hotels. There was little prior relationship between many of the investors and some were unknown to each other until a few days before the company was formed. More importantly, articles of association and a shareholders agreement were negotiated and drafted, containing lengthy and complex provisions governing their relations with each other and with the company. I find it hard to imagine a case where it would be more inappropriate to

overlay on those arrangements equitable considerations of the sort discussed by Lord Wilberforce and Lord Hoffmann."

[637] "This part of Mr McKillen's case arises in relation to his allegation that he has been unfairly prejudiced by exclusion from participation in management. His right to participate in the management of the company is defined by his right as the holder of a particular class of shares to appoint a director to the board of the company. He exercised that right by appointing himself and by appointing Mr Cunningham as his alternate. There has been no interference with that right and no interference with the rights of either Mr McKillen, or in his absence, Mr Cunningham to attend board meetings. On the contrary, they, but mainly Mr Cunningham, have attended all or most of the board meetings held since the purchase of Misland by the Barclay interests. It is clear from the evidence that Mr McKillen and Mr Cunningham have been in no respect inhibited from exercising their rights as directors and from arguing their position. Mr McKillen submits that he has been put in a position of being a permanent minority because directors appointed by the Barclay interests and by Mr Quinlan formed a majority. But there is clearly nothing in the articles or the shareholders' agreement which entitles directors to more than the votes at board meetings conferred on them by the shareholders' agreement. Nor do the articles or the shareholders agreement prohibit particular groups of shareholders from co-operating with each other unless they have done so in a way which triggers the pre-emption provisions or which constitutes in some way a breach of the obligations of good faith to which I shall later return. The fact that the directors appointed by the Barclay interests and Mr Quinlan may take a position different to that of Mr McKillen does not involve any exclusion of Mr Quinlan or any unfairness unless the position which they take is taken in breach of their duties as directors."

Cool Seas

Rose J (as she then was)

[126] "Applying the principles from those authorities[6] to the present case I am fully satisfied that there was no legitimate expectation that Mr Anderson and Colin Anderson would continue as directors once they ceased to be employed by the company for whatever reason. The relationship between all the participants in the transaction in January 2014 and thereafter was as set out in the contractual documents and there are no overlying equitable considerations applicable here. The factors I have taken into account when arriving at that conclusion are as follows."

[127] "First, there was no previous personal relationship, such as a partnership or family connection, between these parties. Prior to 2013, the only business dealings between Fresh Catch (on the one hand) and Interfish and Altaire (on the other hand) had been a short business relationship for around a year in the 1990s when Interfish placed a large order with Fresh Catch for mackerel fillets..."

[6] *Re Saul D Harrison & Sons*; *Ebrahimi; O'Neill; Fisher v Cadman et al* [2005] EWHC 377 (Ch); *Grace v Biagiolo et al* [2005] EWCA (Civ) 1222.

> [128] "… I accept Mr Colam's evidence was that he viewed the relationship between Interfish and Cool Seas as a commercial relationship on terms that had been negotiated and agreed between them in detailed contractual documents which were developed with the benefit of professional advice. I do not believe that Mr Anderson can have formed any different view."
>
> [129] "Secondly, this is not a case where the constitution of the company is an off-the-shelf draft which is not revised to reflect the underlying agreement between the parties as to how the business would be run. On the contrary the agreements entered into on 2 January 2014 were bespoke agreements carefully drafted by each side's solicitors, going through several drafts following the signature of the initial Heads of Terms."

39. Turning to the judge's second ground for winding up ALP on just and equitable grounds – the irretrievable breakdown in the relationship between Dr Fan and Dr Zhang – Mr Smith contended that this ground required it being established that the relationship between the individuals involved was that of a "quasi partnership" of the sort contemplated in *Ebrahimi* and the judge had erred in proceeding on the basis that this requirement had been met. For the first part of this contention Mr Smith relied on *Lau v Chu* [2020 UKPC 24 at [14] – [17] where Lord Briggs distinguished between "functional deadlock" in the management of a company and an "irretrievable break down in trust and confidence" between the participating members where the company is a "quasi partnership".

40. Turning to the second part of his contention, Mr Smith relied on the submissions based on *Ebrahimi* he advanced when contesting the judge's first ground for winding up ALP – frustration of a legitimate expectation. In particular, Mr Smith laid stress on the fact that Dr Fan was simply a limited partner with no role in the conduct of the business of the partnership so that it would have made no difference to the management and administration of the partnership if the two doctors never met or spoke to each other. In this regard, Dr Fan's situation was to be contrasted with that in the well-known case of *In Re Yenidje Tobacco Company Ltd* [1916] 2 Ch 426 where it was held that it was just and equitable to wind up a private company formed by two traders in tobacco products who held equal shareholdings and constituted the board of directors and had become so hostile that neither spoke to the other. In Lord Cozens-Hardy MR's view, the court was "bound to say that circumstances which would justify the winding up of a partnership between these two by action are circumstances which should induce the Court to exercise its jurisdiction under the just and equitable clause to wind up the company".

41. In regard to the judge's third ground for winding up ALP – justifiable loss of trust and confidence in the management of the partnership – Mr Smith first summarised uncontroversially the law applicable to this ground by reference to paragraph [22] in Martin JA's judgment in *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* [2019(1) CILR 481:

> "It is well established that a company may be wound up on the just and equitable ground if it is established that there has been a justifiable loss of confidence in the management, for example on account of serious misconduct or serious mismanagement of the affairs of the company by the directors or the majority shareholders: Loch v John Blackwood Ltd ([1924] AC at 788)".

42. Mr Smith then went on to submit that the judge had failed properly to apply the test inherent in this statement of the law because he did not identify in paragraph [166] the material on which he was relying for his conclusion. What the judge should have done was to identify the relevant material before the court calling into question the conduct and management of the affairs of the partnership and then to have determined on the basis of that material whether Dr Fan had justifiably lost trust and confidence in the management of the partnership on account of serious misconduct or serious mismanagement of the partnership's affairs. If the judge had proceeded as he ought to have done, he would have been bound to find that there was no material from which he could conclude that this third ground for winding up ALP was sustainable.

43. Mr Smith further argued that, even if it be permissible to look at findings made by the judge in paragraphs other than [166], the common thread of these is that they are all premised on Dr Fan's case that he had a legitimate expectation and understanding arising from a relationship akin to partnership as contemplated by Lord Wilberforce in *Ebrahimi,* which case is misconceived for the reasons he (Mr Smith) had already advanced. In short, the GP should not be condemned and found guilty of serious misconduct and mismanagement for acting in accordance with the 2017 Agreement.

44. Mr Smith then turned to the judge's fourth ground for winding up ALP – the GP's conflict of interest and breach of the fiduciary duty to act in good faith. He submitted that if the judge reached his conclusion that the GP failed to act in good faith because it frustrated Dr Fan's legitimate expectation by refusing his request to have transferred to him 10% of the Legend Cayman shares, the judge erred because his legitimate expectation finding was

misconceived for the reasons he (Mr Smith) had earlier advanced. This left the question whether the GP's decision to decline to approve Dr Fan's request for the transfer of 10% of the Legend Cayman shares was outwith the discretion conferred by Clauses 7.7 and 9 of the LPA.

45. Arguing that the section 19 ELPA good faith duty was owed to the partnership as a whole and not to an individual limited partner apart from any other such partners, Mr Smith contended that it was open to the GP to take into account the wider interest of the partnership in Legend Cayman continuing to thrive and not have regard simply to the interest of Dr Fan as a limited partner, and this is what the GP did. The evidence provided in Dr Zhang's second affidavit showed that the reason the GP declined to grant the approval sought by Dr Fan was that, although Cayman Legend had great potential and had achieved a high initial capitalisation, it was spending so much capital on activities such as research and clinical trials that it was loss making and needed to raise fresh capital from the market on a regular basis which would be jeopardised if a large block of shares became available at the same time. In Dr Zhang's view, "if Dr Fan's request to sell $ 56 million worth of stock to the public had been granted, Legend [Cayman] would not have been able to raise $300 million in May 2021, impacting Legend's survival. Therefore, approval and control of inside selling is vital for Legend to survive …".

46. Mr Smith also argued that Dr Fan was clearly aware of the role of Dr Zhang at the time he entered into the 2017 Agreement and thereby consented to and/or waived any conflict of interest which did exist by reason of Clause 10 of the Subscription Agreement:

> "The Subscriber further acknowledges and is aware that the General Partner, its directors or any of its associates may invest in, directly or indirectly, or manage or advise other collective investment schemes or accounts which invest in assets which may also be purchased or sold by the Partnership".

47. Finally, Mr Smith contended that there was an adequate alternative remedy open to Dr Fan, namely a direct claim against the GP for breach of the section 19 good faith duty. In support of this submission, Mr Smith referred to [64] of the judgment of this Court in *Kuwait Ports Authority*[7]. We were also referred to [23] of the judgment of this Court in *Tianrui* where Martin JA stated that it is well settled that a winding up petition will not succeed if there

[7] "In summary, for the reasons we have given, we dismiss the GP's appeal against the judge's refusal to strike out the plaintiffs' direct claims against the GP. The consequence is that the plaintiffs may bring their direct claim against the GP".

exists an adequate alternative remedy which the petitioner has unreasonably failed to pursue. Mr Smith submitted that the court hearing a breach of the section 19 duty case would have available a more flexible range of remedies to meet the situation as it sees fit, than the court hearing a winding up petition which was effectively a "nuclear" all or nothing option.

Dr Fan's case in response

48. The overall submission made on behalf of Dr Fan by Mr Valentin KC was that the judge's winding up order was validly made for the reasons the judge gave in both of his judgments. The judge did not err in finding that the relationship between Dr Fan and Dr Zhang was a close and personal one akin to the relationship that exists between partners of the sort identified by Lord Wilberforce in *Ebrahimi* both at the time when: (i) before ALP was constituted, Dr Fan was assured by Dr Zhang and his delegate, Ms Wang, that 6 months after the IPO he would be given access to the Legend Cayman shares represented by his interest in the partnership that was the equivalent of 10% of Legend Cayman's issued capital; and (ii) when, after the establishment of ALP, Dr Fan's request that those shares be transferred into his ownership was repeatedly refused by Dr Zhang on behalf of the GP, at which time the GP was also under the duty to act at all times in good faith in the interest of the exempted partnership imposed by section 19 (1) ELPA and under an equitable duty to avoid a conflict between Dr Zhang's interest in Cayman Legend's share capital and Dr Fan's interest in obtaining his shares.

49. Mr Valentin drew support for this submission from the following passages, amongst others, in Lord Wilberforce's judgment:

(1) "No doubt, in order to present a petition [the petitioner] must qualify as a shareholder, but I see no reason for preventing him from relying upon any circumstances of justice or equity which affect him in his relations with the company or, in a case such as the present, with other shareholders." [p.375A]

(2) "It would be impossible, and wholly undesirable, to define the circumstances in which these considerations [of a personal character arising between one individual and another, which may make it unjust, or inequitable to insist on legal rights, or to exercise them in a particular way], may arise." [p.379 C/D & E]

(3) Elements (i) and (iii) referred to on p. 379E-G that may require equitable considerations, namely: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence, an element that will often be found where a pre-existing partnership has been converted into a limited company; (iii) a restriction upon the transfer of the member's interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

50. Mr Valentin challenged Mr Smith's contention that no petition to wind up an exempted limited partnership established in conformity with section 9 ELPA based on an alleged relationship between the petitioning limited partner and another limited partner and/or the GP of the sort identified by Lord Wilberforce, could ever be properly granted. Mr Valentin submitted that Mr Smith could not escape from the fact that an exempted limited partnership was a partnership, albeit of a particular kind, and section 36 ELPA expressly provides that "on application by a *partner*, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable". [emphasis supplied]

51. Mr Valentin also challenged Mr Smith's reliance[8] on the penultimate and ultimate sentences of the passage set out in paragraph [36] above. In Mr Valentin's submission, in these sentences Lord Wilberforce was not positively adopting the submission that the phrase "just and equitable" does not operate so as to entitle one party to disregard the obligation he assumes by entering a company, nor the court dispensing him from it; rather, he was dismissing the argument advanced by junior counsel for the respondent that is reported at p.369C-D:

> "The words of section 222 *(f)* are ex facie unlimited in scope. There are five considerations which should be borne in mind in construing it. (1) … (2) … (3) It is an accepted principle of our law that pacta sunt servanda, and when one is construing even words as wide as " just and equitable " that principle should be borne in mind; it would follow that, certainly in the absence of bad faith, the majority of the shareholders should not be punished for carrying out a power which, as well as being in the Act, is part of the express contract between the parties. (4) …"

52. Turning to Mr Smith's submission that the 2017 Agreement occupied the field and thereby left no room for the application of just and equitable principles, Mr Valentin submitted as follows.

[8] See para [37] above.

(i) Mr Smith's submission is inconsistent with the *Ebrahimi* decision where the company had the contractual right under the articles and the statutory right to remove Mr Ebrahimi from his office as a director but nonetheless equity intervened to wind up the company.

(ii) Dr Fan's complaint is not that the entirety of the provisions of the 2017 Agreement that established the partnership are void or voidable on grounds of misrepresentation, mistake or *non est factum*. Instead, given the assurances conveyed to Dr Fan that after the IPO 10% of the shares in Legend Cayman would be his to sell, the GP should be held to that assurance, this being something within the power of the GP under Clause 7.7[9].

(iii) Lord Wilberforce's observation at p.380B-E that, even where there is a statutory power to remove a director and the articles provide for other removal powers, *the just and equitable provision nevertheless comes to [the director's] assistance if he can point to, and prove, some special underlying obligation of his fellow members in good faith, or confidence…"* supports Dr Fan's case.

(iv) The decisions in *O'Neill, Coroin* and *Cool Seas* are all distinguishable from the instant case since in none of the former was there an assurance made outside the pertinent agreements that a power would be exercised in a particular way in favour of shareholder which was not honoured by the assurer.

(v) ALP is not entitled to rely on the entire contract clause in the ELP or Clause 7(c) in the Subscription Agreement because to do so would be contrary to general considerations of equity arising from the relationship between Dr Fan and Dr Zhang in light of the assurance given and also because reliance on this provision would be: (i) a breach of the section 19 ELPA good faith duty; and (ii) an implied duty to act in good faith; see *Familymart China Holding Co. Ltd. v Ting Chuan (Cayman Islands) Holding Corporation* [CICA Appeals 7 & 8 of 2019, unreported, 23 April 2020]

[9] When making his oral submissions Mr Valentin rightly accepted that Clause 7.7 rather than clause 9 was the power that best suited his argument.

53. *Familymart* was a case involving a petition to wind up a joint venture company ("the Company") on, inter alia, the just and equitable ground that an "understanding" as to how part of the business was to be operated had been abandoned after several years by the majority shareholder. The Company had been incorporated pursuant to Foundation Agreements which were amended from time to time leading, inter alia, to a Shareholders Agreement ("the SHA"), clause 20.2 of which provided: "without prejudice to any other provisions under this Agreement, this Agreement … upon the Effective Date, constitute (sic) the entire agreement and supersedes all prior agreements and *understandings*, both written and oral, among the Parties with respect to the subject matters hereof." [emphasis added]. The lead judgment was delivered by Sir Alan Moses JA with the concurrence of Rix and Martin JAA. The Court of Appeal reversed the decision of the judge below that reliance in the petition on the "understanding" should be struck out by reason of clause 20.2. In para 37 of his judgment Moses JA said:

> "Even where parties to a commercial joint venture agreement include an entire agreement clause, as in the instant case, an obligation to act in good faith may be imposed. (**See Ross v Waverley Commercial** [2004] BCLC 545] and **Sheikh Tahnoon Al Nehayan v Kent** [2018] EWHC 333 (Com)."

The Court of Appeal also reversed Kawaley J's order staying the petition on the ground that the dispute was governed by an arbitration agreement contained in the SHA. On 20 September 2023 the Privy Council set aside the Court of Appeal's order on the sole ground that the dispute was indeed covered by the arbitration agreement[10].

54. When dealing with the second just and equitable ground upheld by the judge – irretrievable breakdown in the relationship between Dr Fan and Dr Zhang that had begun as one of mutual trust and confidence – Mr Valentin accepted that this ground depended on the establishment of a relationship akin to partnership of the sort envisaged by Lord Wilberforce and submitted that the judge correctly stated the law in paragraphs [182] – [183] of the Judgment and paragraphs [74] – [75] in the strike out judgment which the judge correctly applied to the relevant facts in reaching his conclusion that this ground was established.

55. Turning to the judge's third winding up ground – justifiable loss of trust and confidence in the management of the partnership – Mr Valentin submitted that the judge's statement of the applicable law in [10(12)] of the strike out judgment was impeccable. The establishment of

[10] [2023] UKPC 33

this ground did not depend upon there being a relationship between Dr Fan and Dr Zhang that was akin to partnership in accordance with criteria set in *Ebrahimi*. Responding to Mr Smith's contention that there was no material from which to conclude that there had been an objectively verifiable loss of confidence in the GP, Mr Valentin identified the following findings made by the judge:

(i) "*in my judgment the affairs of the Partnership have been conducted by the GP (with Dr Zhang in the driving seat in that respect) in a manner which is oppressive and in breach of Dr. Fan's legitimate expectation and understanding*"[166]. Mr Valentin submitted that this is a reference to the judge's (correct) findings at [167] that Dr Zhang had created and encouraged Dr. Fan to believe that six months after the IPO, he would be entitled to have access to 10% of the Legend Cayman shares, but that expectation and understanding had then been unreasonably frustrated by the Partnership, the GP and Dr. Zhang. The "oppression" of Dr. Fan consisted in the failure by the GP (represented by Dr. Zhang) to honour what Dr. Zhang had promised Dr Fan in respect of the Legend Cayman shares. It also includes the attempts of Dr Zhang to belittle Dr Fan's role and contribution referred to by the judge in [182] and [154]).

(ii) *"Dr. Fan in entering into the 2017 Agreement trusted Dr. Zhang and Ms Wang to do the right thing and to honour the roll over of Dr. Fan's Legend Nanjing shares to Legend Cayman. Dr. Zhang and the GP have betrayed that trust and it can easily be seen how Dr Fan legitimately and reasonably believes, after his significant contribution to the increasing value of Legend Cayman, that he has been badly let down by the GP and those that control the GP. Dr Fan has been unfairly treated."* [169]

(iii) "*The GP's consideration of and reactions to Dr Fan's reasonable requests for the shares shows the GP in a bad light. Such is indicative of the GP's breach of its fiduciary duties and its failure to act in the best interests of the Partnership and its limited partners. Dr. Fan had nearly a 70% interest. He should have been treated with respect and fairness. He was not so treated. He was left with no reasonable alternative but to file the petition*." [170]

56. In regard to the judge's fourth winding up ground – the GP's conflict of interest and breach of the fiduciary duty to act in good faith – Mr Valentin disputed Mr Smith's contentions that: (a) the GP was entitled to be regarded as acting in the overall interest of the partnership consistently with the section 19 (1) good faith duty and in accordance with the 2017 Agreement in declining to allow Dr Fan to have access to 10% of the Legend Cayman's issued shares at a time when the company needed to raise capital to fund its clinical trials and research; and (b) there was in any event no conflict between the interests of the partnership, Legend Cayman and Dr Zhang, all of whom had an interest in protecting and enhancing the value of Legend Cayman. Mr Valentin argued that in considering what is in the interest of the partnership viz the limited partners, the GP must ignore its and its majority shareholder's interest in Legend Cayman, and this the GP, acting by Dr Zhang, manifestly

failed to do as the judge was fully entitled to find in [178]. Further, even if the sole interest of Dr Zhang and Legend Cayman was in protecting and enhancing the value of Legend Cayman (a proposition not supported by the evidence), it does not follow that this was Dr Fan's interest (or sole interest). It is also to the point that Ms Wang did not oppose Dr Fan's petition.

57. Mr Valentin, next turned to Mr Smith's contention that by Clause 10 of the Subscription Agreement[11], Dr Fan had consented to or waived any conflict of interest that the GP (through Dr Zhang) might have had. In Mr Valentin's submission, the judge had plainly been correct to hold in [178] that there was nothing in Clause 10 that could come to the rescue of the GP in this case.

58. Finally, Mr Valentin challenged Mr Smith's contention that a more suitable and reasonable remedy than a winding up petition for Dr Fan to take was a claim for breach of the section 19 (1) good faith duty against the GP wherein the court would have available a more flexible range of remedies to meet the situation as it saw fit. Mr Valentin submitted that Dr Fan wanted the shares in Legend Cayman he had been promised and a winding up petition was by far the most straightforward way of achieving this objective.

59. In support of this submission, Mr Valentin relied on paragraphs 36 and 37 of Martin JA's judgment in *Tianrui*. In that case the appellant ("Tianrui") presented a petition to wind up the respondent ("the Company") on the just and equitable basis on the ground, inter alia, that two of the other three significant shareholders of the Company, ACC and CNBM, had acted unfairly and/or oppressively towards Tianrui and/or that the affairs of the Company had been conducted with a lack of probity and Tianrui had justifiably lost confidence in the management of the Company. At first instance, Mangatal J struck the petition out on the ground that the Tianrui had available alternative remedies which could be reasonably pursued. Paragraphs 36 and 37 of Martin JA's judgment read:

> 36. "If the allegations set out in the petition are true, it seems to us clear that they are capable of establishing that it would be just and equitable to wind up the company. Put simply, Tianrui's position as evinced by its petition is that it cannot be expected to remain in association with CNBM and ACC in light of their conduct towards it. None of the remedies identified by the judge deals with that underlying complaint".

[11] "The Subscriber acknowledges and is aware that the General Partner, its directors or any of its associates may invest in, directly or indirectly, or manage or advise other collective investment schemes or accounts which invest in assets which may also be purchased or sold to the Partnership".

> 37. "The company suggests that if the underlying complaint is as we have identified, Tianrui can bring its association with CNBM and ACC, and with the company, to an end by selling its shares on the Hong Kong stock exchange. It accepts that Tianrui could only sell the shareholding it now has, and that a 21.40% shareholding might fetch proportionately less than the 28.16% shareholding that Tianrui originally had, since its former shareholding enabled Tianrui to block special resolutions; but the company says that the effect of selling would be to crystallize a claim for damages which could then be pursued by means of an action for conspiracy. In our view, these assertions epitomize what is wrong with the company's position. If the actions of the company, prompted by directors appointed at the instance of a majority of its shareholders, have resulted in a justifiable loss of confidence in the management of the company, Tianrui has a statutory right to petition for the winding up of the company on the just and equitable ground. It cannot be deprived of that right merely because the company can point to other remedies which, alone or in combination, might arguably go all or some of the way to compensating Tianrui for what has occurred. In our judgment, Tianrui may legitimately take the view that it prefers the company to be wound up to having to pursue piecemeal a series of actions, by litigation or otherwise, or by a combination of litigation and other steps, that might be capable of redressing some, or even all, of its concerns."

Discussion and decision

The first winding up ground

60. Upon signing the 2016 Agreement Dr Fan had an unconditional and unqualified contractual right to have transferred into his ownership 10% of the issued shares in Legend Nanjing after completion of the company's contemplated IPO, regardless of the effect on the value of the company's shares if he chose to sell his 10% shareholding. As a consequence of the assurances he received from Dr Zhang and Ms Wang that he would have the exact equivalent of his entitlement under the 2016 Agreement in respect of shares in Legend Cayman's shares ("the assurances"), Dr Fan signed the 2017 Agreement (the LPA, the Subscription Agreement and the Acknowledgement) on 9 June 2017. Dr Zhang and Ms Wang were directors of Genscript and Dr Zhang held the majority of the shares in that company. ALP was established on 16 February 2017 with Genscript as its General Partner. The assurances began to be given from about mid-June 2016 and continued on and off until shortly before Dr Fan executed the 2017 Agreement. As recorded above, in her email to Dr Fan dated 3 June 2017 Ms Wang stated: "The best news for you is that your stake in Nanjing Legend will be turned into shares in Cayman Legend". This was followed by her WeChat message of 8 June 2017: "This agreement is not to change any material interest of your's. It's only intended to make the original agreement legitimate, and to create scope for future development." As Dr Zhang and Ms Wang must have realised, Dr Fan accepted their assurances without seeking independent legal advice because he trusted them having worked closely with them for

Genscript since 2014. As the judge found at [169], he relied on them to honour the assurances whatever was stated in the 2017 Agreement.

61. In my opinion, the repudiation by the GP (Genscript) of the assurances it gave to Dr Fan through Dr Zhang and Ms Wang is an egregious act of bad faith and the judge was right for the reasons that follow to order the winding up of ALP on the ground that the GP had frustrated Dr Fan's legitimate expectation that the GP would transfer to him 10% of the issued shares in Legend Cayman following the IPO and the end of the ensuing six month lockdown period.

62. ALP is very different from a conventional partnership under the Partnership Act for the reasons identified by Mr Smith. Nonetheless, under the law of the Cayman Islands it is a partnership, albeit an exempted limited partnership, and a partner therein has a statutory right under section 36 (3) (g) to petition for its winding up on the ground that it is just and equitable to do so.

63. As recorded above, Dr Fan received the assurances both before and after Genscript had become the General Partner of ALP. The assurances were not included in the 2017 Agreement and were intended to induce Dr Fan to become a limited partner of ALP and succeeded in doing so as a result of Dr Fan having a close and trusting relationship with the assurers. Honouring the assurances depended on the necessary action being taken by the GP which alone had authority (acting by Dr Zhang) to conduct the business of ALP. Furthermore, as envisaged at (iii) of the indicia for the existence of 'something more' for the superimposition of equitable considerations in the passage from *Ebrahimi* quoted at paragraph [24] above, Dr Fan could not exit from ALP without the consent of the GP. It follows in my judgment that, as the judge held, the relationship between Dr Fan and Dr Zhang was sufficiently akin to partnership of the sort contemplated by Lord Wilberforce in *Ebrahimi* for the assurances to be of a character arising between one individual and another that made it inequitable for the GP to insist on a claimed entitlement to refuse to agree to Dr Fan's request to have 10% of the Legend Cayman shares transferred to him.[12]

64. I reject Mr Smith's submission that the GP had a duty to do what it considered to be in the best interests of the partnership which was that they were best served by refusing Dr Fan's

[12] Cf *Ebrahimi* at p.379D

request for else the fortunes of Legend Cayman and ALP's interest in the company would be adversely affected. As stated above, Dr Fan had an unqualified right under the 2016 Agreement to own, and sell if he chose to do so, 10% of the shares in Legend Nanjing post the IPO, regardless of the effect that this might have on the value of Legend Cayman's shares; and the assurances he was given were that he would have the equivalent right in respect of the Legend Cayman shares. ALP (effectively the limited partners) should therefore have taken the consequences resulting from the honouring of the assurances for the value of Legend shares, those assurances having been given by Dr Zhang of the GP (also a limited partner) and Ms Wang, a limited partner.

65. As will be apparent from [64], I am not persuaded by Mr Smith's submission that the terms of the 2017 Agreement, including in particular Clause 7.7 and the entire agreement clauses, preclude a winding up on just and equitable grounds. As Mr Valentin submitted, the decisions in *O'Neill, Coroin* and *Cool Seas* are all distinguishable from the case in hand and, as Mr Valentin noted, Dr Fan's petition is consistent with the 2017 Agreement since the GP had power under Clause 7.7 of the LPA to honour the assurances by acceding to Dr Fan's request for the transfer of 10% of the Legend Cayman shares. In my view, the case falls squarely within the emphasised passage in *Ebrahimi* quoted at paragraph [24] above. The existence of the assurances made it unjust and inequitable for the GP to exercise the power conferred on it by clause 7.7 in a particular way, i.e. by refusing consent to the withdrawal rather than consenting. I would also point out that the assurances were not merely Dr Fan's own subjective expectation at the time of concluding the 2017 Agreement, as suggested by Mr Smith[13], but were objectively found by the judge to have been repeatedly given, from which finding there is no appeal.

66. So far as the entire agreement clauses are concerned, I am of the view that reliance thereon in the circumstances of this case would be inconsistent with the free-standing duty to act in good faith which I find to be engaged in respect to the assurances, the honouring of which is a matter that I find affected the conscience of the GP; see *Familymart* at [37] (quoted at paragraph [53] above) and the following passage in the judgment of Smith J in *In re Wondoflex Textiles Pty Ltd* [1951] VLR 458, cited with strong approval[14] by Lord Wilberforce) in *Ibrahimi* at 378E-H:

[13] See paragraph [37] above
[14] "The whole judgment is of value."

> " It is also true, I think, that, generally speaking, a petition for winding up, based upon the partnership analogy, cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles: .. . To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him: . . . But this, I think, is subject to an important qualification. Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up. *Indeed, it may be said that one purpose of [the just and equitable provision] is to enable the court to relieve a party from his bargain in such cases."* [emphasis supplied].

67. I am also of the view that to rely on the entire agreement clauses would be a breach by the GP of the section 19 (1) EPLA duty of good faith. The duty is owed to "the exempted limited partnership" which must mean the limited partners, which include Dr Fan and, in my opinion the other limited partners, the GP, Ms Wang and later the Ye Wang Family Trust -- would surely have no standing to dissent because the GP and Ms Wang gave and repudiated the assurances. If I am wrong about this, the free-standing duty of good faith that I have held in [66] to apply to the assurances will be unaffected.

68. In my judgment, the judge did not err in holding that proceedings by Dr Fan for breach of the section 19 (1) duty to act fairly would not be a more reasonable remedy than his winding up petition. As the judge observed, Dr Fan is seeking the transfer into his ownership from the shares held by ALP the equivalent of 10% of Legend Cayman's issued shares which will be the result if his winding up petition succeeds, and this represents a much more straightforward proceeding than a claim under section 19(1) ELPA.

<u>The second winding up ground</u>

69. Mr Smith's challenge to this winding up ground is founded on Lord Briggs' statement in *Lau v Chu* at [15]: that: "where the company is a corporate quasi-partnership, an irretrievable breakdown in trust and confidence between *participating* members may justify a just and equitable winding up" [emphasis added].

70. I have already held that by reason of Dr Fan having been induced to become a limited partner of ALP by the assurances given by the GP (acting by Dr Zhang and Ms Wang) and the

existence of (iii) of the indicia indicated in *Ebrahimi*, the relationship between Dr Fan and the GP was sufficiently akin to a partnership to engage the applicability of the just and equitable winding up ground consistently with Lord Wilberforce's judgment in *Ebrahimi*, as the judge found.

71. I turn to consider whether it is necessary for the establishment of this second ground that, in addition to there being a relationship akin to partnership consistent with *Ebrahimi*, the petitioner has to have been a participant in the running of the business. In paragraph [9] of *Lau v Chu*, Lord Briggs observed that the jurisdiction to wind up a BVI company on the just and equitable ground was entirely statutory following the similar jurisdiction in UK with the result that the UK case-law was the primary source of authority for the scope of the jurisdiction. He then went on to say in [17] that where the company is *a corporate quasi-partnership* a winding up on just and equitable grounds "is the response of equity to a state of affairs between individuals *who agreed to work together* on the basis of mutual trust and confidence where that trust and confidence has completely gone." [emphasis supplied]. In light of the fact that the judge and the parties in the proceedings below also took the approach that the UK case-law was the primary source of authority for the scope of the just and equitable jurisdiction in the case of a Cayman Islands ELP, with the judge stating in [158] that he had had regard to *Lau v Chu*, I find I find myself constrained to conclude that in respect of this second winding up ground, Dr Fan had to establish that he was a participant in running the business of ALP which was a condition that on the evidence he was never going to be able satisfy. As Mr Smith was at pains to point out, Dr Fan was never going to be involved in running the business of the partnership by reason of the effect of section 14 (1) & (2)) ELPA. It follows in my view that Mr Smith's challenge to the judge's second winding up ground succeeds and in consequence this ground should be set aside.

<u>The third winding up ground</u>

72. It is important to appreciate that the establishment of this just and equitable ground is not dependent on there being a relationship akin to partnership in accordance with Lord Wilberforce's judgment in *Ebrahimi*.

73. I am not persuaded by the submissions Mr Smith advanced in seeking to have this winding up ground overturned. On a fair reading of the Judgment, it is clear in my view that in finding this ground was established, the judge proceeded on the basis of his findings in paragraphs

[166], [167], [169] and [182] that the GP's failure to honour the assurances which it was obliged to do in good faith amounted to misconduct in the management and affairs of the partnership. For the reasons I have given in upholding the judge's first winding up ground, I am also satisfied that the judge was entitled to make this finding and to conclude that by reason of this misconduct on the part of the GP, Dr Fan had justifiably lost trust and confidence in the management of the affairs of the partnership to the requisite objective standards.

The fourth winding up ground

74. In my view, the judge's conclusion in paragraph [178] of the Judgment that the wording of Clause 10 of the Subscription Agreement does not mean that Dr Fan consented to or waived any conflict of interest to which the GP was subject is unassailable.

75. I am also of the opinion that the judge was entitled to conclude that the GP (acting by Dr Zhang) was in breach of the fiduciary duties to act in good faith and avoid a conflict of interest. However, this conclusion is dependent on the judge's finding that the GP frustrated Dr Fan's legitimate expectation that the GP would transfer into his ownership 10% of the Legend Cayman shares contrary to the good faith duty it owed in regard to the assurances. Thus, if Mr Smith's submission that the judge's first ground for winding up ALP should be set aside, on the ground say that the terms of the 2017 Agreement preclude the first winding up ground, the GP would have been entitled to conclude that the interests of the partnership would be better served if Dr Fan were not permitted to sell his claimed 10% of Legend Cayman shares. It follows that in substance the first and the fourth winding up grounds are duplicitous, but I do not think that this is a reason for setting the fourth ground aside.

Conclusion

76. For the reasons given above I would uphold the first, third and fourth grounds of the judge's decision for winding up ALP and reject the second ground. It follows that the appeal against the judge's winding up order is dismissed.

A closing observation

77. No doubt for sound and sensible reasons which I do not for a moment criticise, the hearings below and on appeal in this litigation were conducted on the basis that the English and Welsh and Commonwealth jurisprudence (including decisions of the Privy Council) was applicable to petitions to wind up on just and equitable grounds a Cayman Islands ELP, the new kid on the block, pursuant to section 36 (3) (g) ELPA, notwithstanding the marked differences between an ELP and a partnership governed by the Partnership Act and a company incorporated under the Companies Act. For my part, I would have been very interested to have heard a "further and in the alternative" case that the expression "just and equitable" in section 36 (3) (g) ELPA was to be construed in an expansive and flexible way, taking full account of the special nature of an ELP and less account of the overseas jurisprudence.

Birt JA

78. I agree.

Goldring JA (President)

79. I also agree.

ITEM NO. 135

JA-21

[2023 (1) CILR 50]

KUWAIT PORTS AUTHORITY, PUBLIC INSTITUTION FOR SOCIAL SECURITY and THE PORT FUND L.P. v. PORT LINK GP LIMITED, WILLIAMS, WELLSPRING CAPITAL GROUP INCORPORATED and KGL INVESTMENT COMPANY ASIA

C.A. (Field, Birt and Beatson, JJ.A.) January 20th, 2023

Partnership — exempted limited partnership — derivative action by limited partners — derivative action by limited partner against general partner struck out where exempted limited partnership had no claim against general partner and limited partner had adequate alternative remedy, namely direct claim against general partner for breach of duty

Partnership — exempted limited partnership — derivative action by limited partners — derivative action by limited partner against shareholder of general partner and others not struck out — general partner alleged to be involved in wrongdoing had conflict of interest in relation to whether to institute proceedings

The plaintiffs/respondents brought claims concerning an exempted limited partnership.

The first and second plaintiffs were Kuwaiti state-owned enterprises financed by Kuwaiti public funds. They were two of the eleven limited partners in an exempted limited partnership, The Port Fund L.P. ("TPF"). The first and second plaintiffs had invested US$125m. in TPF, which was almost two-thirds of the total investment. The first defendant/appellant, a Cayman Islands exempted limited company, was the general partner of TPF ("D1" or "the GP"). The second defendant/appellant ("D2") was the sole shareholder of Port Link Holdings USA Inc., which was the sole shareholder of the GP. D2 was the CEO, CFO, President, Vice-President, Treasurer and Secretary of the third defendant/appellant ("D3"), a company incorporated in the United States. D2 was also closely involved in the management of the fourth defendant/appellant ("D4"), a Cayman Islands incorporated company, now in voluntary liquidation, which had provided administrative support to TPF.

The plaintiffs pleaded that in breach of statutory, contractual, common law and fiduciary duties owed by the GP to TPF and the limited partners and pursuant to a conspiracy to injure TPF and the limited partners by

unlawful means, the GP had made very substantial payments using TPF moneys that were not for the benefit of TPF and the limited partners. The plaintiffs alleged that the defendants' wrongdoing had caused TPF and its limited partners losses in excess of US$100m. The plaintiffs claimed to be entitled to bring their claims against the GP alleging systematic unlawful conduct in relation to the assets and affairs of TPF on their own behalf, but in the alternative they also advanced the claims as derivative claims on behalf of TPF. Similarly, the plaintiffs' primary case was that they were entitled to bring claims against D2 and D3 on their own behalf, but they also sought to advance like claims as derivative claims on behalf of TPF. The plaintiffs' claims against D4 were advanced solely on the derivative basis.

The plaintiffs' direct claims against D2 and D3 were for relief under the Fraudulent Dispositions Act (1996 Revision). They claimed that those defendants culpably participated in the improper payments made by the GP and/or dishonestly received such payments or the traceable proceeds thereof. They claimed that D3 was party to an unlawful means conspiracy, dishonestly assisted in a breach of trust/duty by the GP, knowingly procured a breach of the contractual obligations the GP owed to the limited partners and was liable in knowing receipt. The plaintiffs claimed that D2 conspired and dishonestly assisted in the GP's breaches of duty and was in breach of the fiduciary duties to TPF and the GP.

The derivative claims were brought pursuant to s.33(3) of the Exempted Limited Partnership Act ("the ELPA") on the basis that the GP had without cause failed or refused to initiate the proceedings and there was no real prospect of it doing so. Section 33 provided:

"(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.

…

(3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings."

The GP's current directors claimed to have conducted an extensive investigation into the alleged wrongdoing and to have concluded that there was not cause to bring the claims advanced by the plaintiffs as derivative claims. The plaintiffs submitted that the current directors, although not implicated in the defendants' alleged wrongdoing, were not independent and had not investigated matters properly.

The GP applied to strike out the direct and derivative claims against it. It accepted that the pleaded allegations were arguable but contended in relation to the direct claims that it was impermissible for two of eleven limited partners to claim damages from the GP to be paid directly to themselves except by seeking partnership accounts that would require the joinder of the other limited partners. D2–D4 applied to strike out the

Case 1:26-cv-00251-LTS Document 25-2 Filed 05/12/26 Page 4 of 80 PageID #: 5747

derivative claims against them. D2 and D3 did not apply to strike out the direct claims against them but they did not admit that the plaintiffs had standing to bring the claims and maintained that they should have been pursued by way of a partnership account as against the GP.

In the Grand Court, the judge rejected the submission that direct claims by a limited partner could only be vindicated by the taking of partnership accounts. The judge accepted the plaintiffs' submission that the claims advanced were principally direct claims vested in the individual limited partners rather than in TPF and that the taking of partnership accounts was not the only procedural route available to the plaintiffs.

The GP submitted that (a) the application of the partnership accounts rule/principle to limited partnerships was not inconsistent with the provisions of the ELPA and therefore was not disapplied by s.3; (b) the GP relied on authorities which held that claims by partners *inter se* could only be brought in the context of the taking of partnership accounts; (c) there were sound practical reasons for the application of the partnership account rule/principle to Cayman Islands exempted limited partnerships; (d) the judge's holding that the property of an exempted limited partnership was held "on trust for each of the limited partners" was a misreading of s.16(1) of the ELPA which provided that the rights and property of an exempted limited partnership, including all choses in action, were held "by the general partners jointly, upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement."

The plaintiffs submitted that (a) the reasons given by the judge for concluding that the partnership rule/principle was disapplied by s.3 of the Act and was inconsistent with the scheme of the ELPA were correct; (b) the authorities relied on by the GP emphasized the reciprocity of personal obligation and trust and the mutuality of personal liability in an ordinary partnership, which was absent in a limited partnership; (c) the plaintiffs relied on authority to show that in a partnership dispute it was not always necessary to have a claim for a partnership account at the outset; and (d) because an exempted limited partnership had no separate legal personality, the only sensible construction of s.16(1) of the ELPA was that the general partner of an exempted limited partnership held its assets on trust for all the limited partners. The judge was correct so to hold. Because the general partner owed fiduciary duties to all the limited partners, any breaches of those duties must be enforceable by the limited partners themselves. Where there was a claim against the general partner itself, it could not be only the general partner who could institute proceedings.

The Grand Court did not strike out the plaintiffs' claims. The judge rejected the defendants' submission that, when considering s.33(3), the court had to apply principles derived from cases dealing with derivative claims in other contexts. The judge considered s.33(3) to be *sui generis*. On appeal, the defendants submitted that the judge erred in stating that the principles applicable in other contexts, such as trusts and companies, were not applicable in relation to the statutory test. The plaintiffs submitted that the judge was correct to hold that s.33(3) "occupies the field" and that there

was no scope or reason to import any "special circumstances" test or other common law or equitable principles that applied to derivative claims in respect of other entities or structures. The GP submitted that, regardless of whether the test in s.33(3) was otherwise met, the derivative claim against the GP should be struck out because, on the judge's finding, TPF had suffered no loss or damage and therefore had no claim of its own to bring. The judge held that s.33(3) required a finding as to whether the GP had failed or refused to institute the proceedings without cause, not the directors at the relevant time. The judge concluded that there was a good arguable case that the GP had a relevant inhibition because it was conflicted in relation to the plaintiffs' claims. Its decision not to bring the claims against D2–D4 was made unsafe by the facts giving rise to its conflict of interest. (The Grand Court judgment is reported at 2022 (1) CILR 12.)

Held, judgment as follows:

(1) The GP's appeal against the refusal of the judge to strike out the plaintiffs' direct claims against it would be dismissed. The differences between ordinary partnerships and exempted limited partnerships meant that it was not appropriate to require that a direct claim by a limited partner against the general partner must always be initially brought by way of a claim for partnership accounts and that it was not necessary to protect the positions of the creditors and other limited partners by requiring this. The scheme of the ELPA with the absence of reciprocity and mutuality of rights and obligations was inconsistent with requiring claims by a limited partner to be brought by taking partnership accounts in proceedings to which all the limited partners were party. The court accepted the submission that because an exempted limited partnership had no separate legal personality the only sensible construction of the words in ELPA s.16(1) was that the general partner of an exempted limited partnership held its assets on trust for all the limited partners. Because a trust also had no separate legal personality, thus making the position similar to the statutory trust created by ELPA s.16(1), the court regarded the position of a claim by a beneficiary of a trust against the trustee as important. The beneficiary of a subsisting trust including a discretionary trust was entitled to bring a claim against the trustee to recover loss suffered by the trustee's breach of trust, but the remedy was for an order to restore to the trust what ought to have been there. The partnership accounts rule/principle was inconsistent with the ELPA and the judge was correct in his conclusion. In proceedings against the GP, a limited partner could recover for loss suffered by the breach of the statutory trust but the remedy would be the restoration of the exempted limited partnership's fund thus compensating the direct losses suffered by all the limited partners. This remedy prevented a limited partner claimant from benefitting alone from any recovery either at the expense of the other limited partners or of the exempted limited partnership's creditors. The problem of multiplicity of actions could be dealt with by robust case management. The court's rejection of the submission that the direct claims were defective in not at the outset joining all partners and seeking

partnership accounts did not mean that the court could not direct that there be such a procedure at a later stage as part of its case management powers if that proved necessary (paras. 53–64).

(2) If D2 and D3 had applied to strike out the plaintiffs' direct claims against them, the court's preliminary view was that the objections raised to the plaintiffs' standing to bring the claims were unfounded. The question was whether, if D2 and D3 were held liable to the plaintiffs for breach of their statutory, equitable and other obligations, it was open to the court to order that those defendants restored the fund rather than paid the plaintiffs. The court's preliminary view was that the plaintiffs had a good arguable case that, where third parties were liable for breaches such as those claimed against D2 and D3, the court could order those defendants to restore the fund rather than pay the plaintiffs and thus avoid the risk of prejudice to other limited partners or creditors. As in the case of a claim against the general partner, the starting point was the position of a claim by a beneficiary of a trust. It was clear that the interest of a beneficiary of a discretionary trust was enforceable against a third party who received trust property which the trustee did not have authority to transfer and the third party knew enough to make it unconscionable to retain the asset for his own benefit. The beneficiary's only right would be to have the asset or its proceeds reinstated to the trustee. Given the analogy between a non-partnership trust, an exempted limited partnership with no separate legal personality and the statutory trust imposed by s.16(1) of the ELPA, it was possible to order third parties such as D2 and D3 to restore the fund where the claim against them succeeded. The analogy rested on the fact that, in cases of knowingly assisting a trustee in a fraudulent and dishonest disposition of trust property, although the third party was not in fact a trustee, he was made liable in equity as if he were a trustee. This reflected the fact that it was the fund which had suffered the loss and an order to restore was the only way in which all beneficiaries' rights could be protected. For these reasons, had D2 and D3 applied to strike out the plaintiffs' direct claims against them, the court's preliminary view was that the objections raised to the plaintiffs' standing to bring the claims were unfounded. It would be for the court hearing the claims to decide whether they were made out on the merits and whether, in the circumstances of this case, an order to restore the fund should be made and, given that the GP would be implicated in the wrongdoing, steps such as placing the assets in escrow, the appointment of a receiver or the taking of partnership accounts were necessary (paras. 65–72).

(3) The legislature had prescribed in s.33(3) of the ELPA when a derivative action could be brought in respect of an exempted limited partnership, *i.e.* "if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings." Where the legislature established a statutory test for bringing a derivative action in respect of an exempted limited partnership, the courts were duty bound to apply that statutory test. The test could not be replaced by

common law and equitable principles developed in other contexts even if, in the absence of a statutory test, the courts would no doubt have applied those principles to an exempted limited partnership. Nor could those principles form an additional threshold beyond the statutory test. The statutory test was in general and imprecise terms and left open how the test should be applied in practice. However, the expression "without cause" must carry the implication of "good" cause. The court was entitled to have regard to and could derive assistance from the developed principles in other contexts. In particular, given the existence of the statutory trust imposed by s.16(1) of the ELPA, the court was likely to derive assistance from considering whether special circumstances (as established in the contexts of trusts and English limited partnerships) existed. If special circumstances existed, this was likely to assist the court in deciding whether a general partner's decision not to institute proceedings was "without cause." However, the court emphasized that its duty was to apply the statutory test of "without cause"; it was not sufficient simply to consider whether there were special circumstances and, if so, then to allow a claim under s.33(3). If the court decided that the facts would satisfy the special circumstances test, it must nevertheless go on and consider whether they therefore satisfied the "without cause" test in s.33(3). Conversely, the facts of a case might enable the court to find that the general partner's decision was "without cause" without consideration of whether there were special circumstances. The two tests were not to be equated although it was envisaged that consideration of whether there were special circumstances was likely in most cases to be of considerable assistance in determining whether the decision was "without cause" (paras. 94–99).

(4) The court summarized its conclusions in relation to s.33(3): (i) There was no requirement for leave to bring derivative proceedings under s.33(3). A limited partner could simply institute such proceedings. (ii) A limited partner must however plead the facts and matters relied upon as showing that he could bring himself within the requirements of the subsection because this formed an essential part of his cause of action. (iii) If a defendant wished to raise an issue as to the standing of a limited partner to bring such derivative proceedings, he should do so by means of a strike out application or seek the trial of a preliminary issue. (iv) Whichever route was chosen did not affect the test that had to be applied in deciding whether s.33(3) was complied with and whether a limited partner should be permitted to continue with the derivative claim. (v) The decision of the court on such an application or preliminary issue was determinative (subject to appeal). If the court held that the derivative claim could be continued, the limited partner thereafter had the necessary standing to pursue the claim. It was not an issue which was deferred until or revisited at trial (save possibly in the context of costs at the end of the trial). (vi) The court should not conduct a mini trial as to whether the requirements of s.33(3) were satisfied. The court had to reach its decision on the basis of the material before it, which would be more limited than it would be following discovery and trial. (vii) At the hearing, the onus was on the

Case 1:26-cv-20251-JLK Document 1-2 Filed 01/16/26 Page 8 of 80 PageID #: 5751

limited partner to satisfy the court that the requirements of s.33(3) were met. Reference to "onus" was not to be mistaken as a reference to a "burden" in the sense of having to show something on the balance of probabilities. (viii) The essential task for the court at such a hearing was to determine whether the limited partner had failed or refused to bring the relevant proceedings without cause. (ix) In determining this issue, the court was likely to be assisted by consideration of whether special circumstances (as developed in cases concerning trusts, limited partnerships and other entities) existed, but the court's task remained one of applying the statutory test set out in s.33(3). (x) Whilst reference to a "good arguable case" might be a helpful indicator of the level of comfort which the court should have when deciding whether the requirements of s.33(3) were met, the court's task was essentially an evaluative one having regard to the facts as they appeared to the court at that stage of the proceedings from the material before the court and the need to avoid injustice balanced with the need to respect the fact that a derivative action was an exception to the general principle in the ELPA that management (including decisions as to litigation) of an exempted limited partnership was for the general partner not the limited partners. The court should consider, *inter alia*, the strength of the evidence that the general partner had failed or refused to institute proceedings without cause, the strength of the underlying claim that was sought to be brought and the likelihood and nature of any injustice if the derivative claim was not permitted. (xi) The court should reach its decision as to standing by reference to the facts as they appeared at the date of the hearing of the strike out or preliminary issue. (xii) Even where the requirements of s.33(3) were met, the court had a discretion as to whether to permit a derivative claim to continue. One of the factors which was likely to be relevant in exercising that discretion was whether the plaintiff had an alternative remedy (para. 140).

(5) The GP's appeal against the refusal of the judge to strike out the plaintiffs' derivative claims against it would be allowed and the claims would be struck out. A derivative action allowed a party to bring a claim in the name of and on behalf of a second party against a third party. It followed that the second party must have a claim against the third party before the first party could be permitted to bring such a claim derivatively. Section 33(3) presupposed that there was a claim to be brought by the GP on behalf of the partnership. If, as the judge held, the partnership had no claim against the GP, there could be no failure by the GP to bring such a claim without cause. Even if this were wrong, the derivative claim against the GP would not be permitted because the plaintiffs as limited partners had an adequate alternative remedy. A limited partner had the right to claim against a general partner for breach of duty on the part of the general partner. In the event of such a claim succeeding, the appropriate remedy would almost certainly not be an award of equitable compensation to the particular limited partners who had sued but instead an order that the general partner restore the trust fund. In these circumstances, exactly the same would be achieved by a direct claim as would be the case in a

derivative action. In the event of the plaintiffs succeeding in their direct claim, the estate of TPF would be made whole by payment from the GP pursuant to an order for restoration of the trust fund. Success in a derivative action would have the same result. Accordingly, there was simply no need for a derivative action; it would add nothing to the direct claims brought by the limited partners coupled with an order for restoration of the trust fund in the event of such claims succeeding. Therefore, as a matter of discretion, the derivative claim against the GP should not be permitted (paras. 141–151).

(6) The appeals of D2, D3 and D4 against the refusal of the judge to strike out the plaintiffs' derivative claims against them would be dismissed. The GP had a conflict of interest in relation to whether to institute proceedings against D2–D4. On the plaintiffs' case, D1 as the GP was deeply involved in all the alleged wrongdoing, as was D2. D1 had to decide whether to institute proceedings against D2–D4 in circumstances where (i) the essential wrongdoing giving rise to the claims against D2–D4 was that of D1 itself in making the various payments and where it was said to be part of the unlawful means conspiracy to injure TPF involving D2 and D3; (ii) the contemplated proceedings would have to be brought against the beneficial owner of the GP and against two companies in which D2 was deeply and closely involved, namely D3 and D4; and (iii) D1 would also have to consider whether (as general partner) it should sue itself (in its own right) as a co-conspirator in the alleged unlawful means conspiracy. On the face of it, by reason of the obvious and serious conflict of interest, D1 was under an inhibition which would amount to special circumstances in the context of a trust or limited partnership and this inhibition also meant that the failure by D1 to bring proceedings against D2–D4 was without cause for the purposes of s.33(3). The defendants' submissions that this was not the position because (i) the current directors of D1 were wholly independent and were not in office at the time of the alleged wrongdoing on the part of D1, and (ii) the independence of the current directors was fortified by the fact that D2 had given an undertaking that the shareholder of the GP would not exercise any powers so as to remove the current directors or interfere in any way in the exercise of their functions did not overcome the inhibition. In relation to the first point, the judge was correct to focus on the entity which was the general partner rather than the directors for the time being of that entity. Section 33(3) referred to the "general partner" having failed or refused to bring proceedings without cause. The general partner was the legal entity D1. D1 was subject to the conflicts of interest and thus could not be seen to be in a position to take a fair and independent decision about the potential litigation. New directors were not in the same position as a liquidator, who was appointed by and subject to the supervision of the court and therefore clearly independent of the company, its directors and shareholders. The current directors owed a fiduciary duty to act in the best interests of D1. The defendants submitted that because D1 owed fiduciary duties to act in the best interests of the partnership, the current directors therefore had a duty to act in the best

interests of TPF. However, there was certainly the potential for conflict between acting in the best interests of TPF (which might include taking action against D1 as a co-conspirator) and acting in the best interests of D1 (which might be said to include the avoidance of being sued). The undertaking given by D2 was insufficient to overcome the inhibition from which D1 as general partner suffered. The plaintiffs, who alleged that there had been serious wrongdoing by the defendants which had cost TPF over US$100m., would have a justified lack of confidence that a fair and independent decision was taken by D1 as to whether to seek recompense from any one or more of the defendants, even following the appointment of the current directors. There was no doubt that D1 suffered from an inhibition which led to the conclusion that, subject to the exercise of any discretion, it was appropriate for the plaintiffs to bring derivative claims on behalf of TPF pursuant to s.33(3) against D2–D4. As to discretion, the defendants submitted that because the plaintiffs were bringing direct claims against D2 and D3, they had an alternative remedy in respect of those two defendants and there was no need for them to bring a derivative action. However, D2–D4 expressly reserved the right to challenge the plaintiffs' standing to bring such claims. It would be inconsistent with the overriding objective and highly undesirable to run the risk of the court eventually finding against D2 and D3 on the underlying merits of the claims but also finding that the plaintiffs did not have standing for the direct claims or that it could not make an order for restoration of the trust fund in the absence of a derivative claim on behalf of TPF. There was sufficient uncertainty about whether the plaintiffs had direct claims against D2 and D3 or whether the court could order restoration of the trust fund on the success of such claims that, as a matter of discretion, it was just and fair to allow the derivative claims to proceed alongside the direct claims so that they were all heard at the same time. If, following a trial, the direct claims were upheld and the court also held that it could order restoration of the trust fund as a remedy for such claims, there would be no need to make any award on the derivative claims; if, on the other hand, the direct claims were found not to be maintainable or restoration of the trust fund could not be ordered, the derivative claims would be necessary to provide a remedy, assuming that the underlying allegations against the defendants were upheld (paras. 158–170).

(7) The GP's appeal against the refusal of the judge to order the plaintiffs to provide security for costs would be dismissed. The judge erred in proceeding on the basis that there was a presumption arising from comity and common sense that security for costs should not be awarded against the plaintiffs, although each case would be decided on its own facts. When dealing with a security for costs application against a foreign state or foreign state agency that enjoyed good standing in the international community, the court should treat this as a factor in favour of such a plaintiff to be weighed with all the other factors when the court exercised its discretion. The judge also erred in stating that a foreign plaintiff did not have to establish that it had fixed and permanent property within the

jurisdiction. Evidence that a foreign plaintiff had valuable property within the jurisdiction would obviously be of relevance but the significance of this evidence would depend on all the facts of the case, including any evidence as to the permanency of the property and its freedom from encumbrances (or the lack of such evidence) and other evidence tending to show that the plaintiff could be trusted to honour an adverse costs order. The judge's errors played such a significant role in the exercise of his discretion that his decision must be set aside. In the circumstances it was open to the court to exercise the discretion conferred by GCR O.23, r.1(1). The court proceeded on the assumption that the defendants were correct that there would be very real difficulties in enforcing in Kuwait costs orders made against the plaintiffs if their claims against the defendants were dismissed. Although it was a necessary condition for the ordering of security for costs that there was a real risk that an adverse costs order would not be enforced against a foreign plaintiff in his/its home jurisdiction, this was not a sufficient condition for ordering security for costs whatever the other circumstances of the case. Instead, it was open to the court, if there was sufficient evidence to support such a conclusion, to find that there was no real risk that the plaintiff would not honour an adverse costs order and to decline to order security for costs. The present case was such a case. The plaintiffs were agencies of a foreign state, Kuwait, which was of good standing in the international community and enjoyed diplomatic relations with HM Government. Further, a formal letter had been sent to the judge on behalf of the State of Kuwait, among others, confirming that the plaintiffs were wholly owned by the State of Kuwait and attaching letters by the plaintiffs confirming that they would comply with any final and binding costs orders made against them in the proceedings. The letters amounted to a representation intended to be relied on by the Grand Court that the plaintiffs would honour any final and binding costs orders made against them. The letters provided strong support for the conclusion that there was no real risk that such costs orders would not be paid. Further support for this conclusion came from the evidence as to the financial resources of the plaintiffs, which showed that they could be expected to have the ready funds to pay an adverse costs award (paras. 188–217).

Cases cited:

(1) *Ahmad Hamad Algosaibi & Bros. Co.* v. *Saad Invs. Co. Ltd.*, 2017 (2) CILR 602, referred to.
(2) *Autumn Hldgs. Asset Inc.* v. *Renova Resources Private Equity Ltd.*, 2017 (2) CILR 136, referred to.
(3) *Banco Economico S.A.* v. *Allied Leasing & Fin. Corp.*, 1998 CILR 102, considered.
(4) *Barnes* v. *Addy* (1873–74), 9 Ch. App. 244, referred to.
(5) *Barrett* v. *Duckett*, [1995] 1 BCLC 243; [1995] BCC 362, considered.
(6) *Chief Commr. of Stamp Duties* v. *Buckle*, [1998] HCA 4; (1998), 192 CLR 226; 38 NSWLR 574; 151 ALR 1, considered.

Case 1:26-cv-20251-RNS Document 12-2 Filed 01/26/26 Page 12 of 80 PageID #: 5755

(7) *Commr. of State Revenue* v. *Rojoda Pty. Ltd.*, [2020] HCA 7; (2020), 268 CLR 281; 94 ALJR 423; 376 ALR 378, considered.
(8) *Costa Rica (Rep.)* v. *Erlanger* (1876), 3 Ch. D. 62, referred to.
(9) *Cybervest Fund, In re*, 2006 CILR 80, followed.
(10) *Elliott v. Cayman Islands Health Serv. Auth.*, 2007 CILR 163, referred to.
(11) *Foss* v. *Harbottle* (1843), 2 Hare 461; 67 E.R. 189, referred to.
(12) *Golstein* v. *Bishop*, [2013] EWHC 881 (Ch); [2014] 1 Ch. 131; [2013] 3 W.L.R. 572; on appeal, [2014] EWCA Civ 10; [2014] 1 Ch. 455; [2014] 2 W.L.R. 1448; [2014] 3 All E.R. 397, considered.
(13) *Henderson PFI Secondary Fund II LLP* v. *Henderson Equity Partners (GP) Ltd.*, [2012] EWHC 3259 (Comm); [2013] 1 Q.B. 934; [2013] 2 W.L.R. 1297; [2013] 3 All E.R. 887; [2012] 2 CLC 905, followed.
(14) *Hugh Stevenson & Sons* v. *Akt. für Cartonnagen-Industrie*, [1918] A.C. 239, referred to.
(15) *Hughes* v. *Colin Richards & Co.*, [2004] EWCA Civ 266; [2004] PNLR 35, referred to.
(16) *Hurst* v. *Bryk*, [2000] UKHL 19; [2002] 1 A.C. 185; [2000] 2 All E.R. 193, referred to.
(17) *Iesini* v. *Westrip Holdings Ltd.*, [2009] EWHC 2526 (Ch); [2010] BCC 420, considered.
(18) *Kleanthous* v. *Paphitis*, [2011] EWHC 2287 (Ch), referred to.
(19) *Knight & Tabernacle, &c., Socy., In re* (1892), 2 Q.B. 613; 62 L.J.Q.B. 33, considered.
(20) *Leyvand* v. *Barasch*, [2000] WL 191256, considered.
(21) *Meyer* v. *Faber (No. 2)*, [1923] 2 Ch. 421, referred to.
(22) *Ministère de la Culture &c. de France* v. *Lielb*, [1981] 1 WLUK 253, considered.
(23) *Ministry of Foreign Affairs (Italy)* v. *Simeone*, [2016] QDC 160, referred to.
(24) *Ninemia Maritime Corp.* v. *Trave Schiffahrts G.m.b.H. und Co. K.G., The Niedersachsen*, [1984] 1 All E.R. 398; [1983] 2 Lloyd's Rep. 600; [1983] Com. L.R. 234, considered.
(25) *PJSC Tatneft* v. *Bogolyubov*, [2019] Costs L.R. 977, referred to.
(26) *Papua New Guinea* v. *Sandline*, [1998] QDC 298, referred to.
(27) *Pisante* v. *Logothetis*, [2020] EWHC 3332 (Comm), referred to.
(28) *Prudential Assur. Co. Ltd.* v. *Newman Indus. Ltd.*, [1982] Ch. 204; [1982] 2 W.L.R. 31; [1982] 1 All E.R. 354, followed.
(29) *Public Trustee* v. *Elder*, [1926] 1 Ch. 776, referred to.
(30) *Roberts* v. *Gill & Co. Solicitors*, [2010] UKSC 22; [2011] 1 A.C. 240; [2010] 2 W.L.R. 1227; [2010] PNLR 30; [2010] WTLR 1223, considered.
(31) *St. John's Trust Co. (PVT) Ltd.* v. *Medlands (PTC) Ltd.*, [2021] CA (Bda) 20 Civ, Bermuda C.A., December 12th, 2021, followed.
(32) *Scully Royalty Ltd. v. Raiffeisen Bank Intl. Ltd.*, 2022 (1) CILR 118, referred to.

(33) *Selangor United Rubber Estates Ltd.* v. *Craddock (No. 3)*, [1968] 1 W.L.R. 1555; [1968] 2 All E.R. 1073, referred to.
(34) *Sierra Leone Govt.* v. *Davenport*, [2003] EWHC 1913 (Ch); [2003] All E.R. (D.) 183; 2003 WL 21047383, referred to.
(35) *Smith* v. *Croft (No. 2)*, [1988] Ch. 114; [1987] 3 All E.R. 909; 1987 PCC 209; [1987] 1 FTLR 319, considered.
(36) *Soar* v. *Ashwell*, [1893] 2 Q.B. 390, referred to.
(37) *SPhinX Group, In re*, 2010 (1) CILR 234, referred to.
(38) *Target Hldgs. Ltd.* v. *Redferns*, [1996] A.C. 421; [1995] 3 W.L.R. 352; [1995] 3 All E.R. 785; [1995] CLC 1052; [1995] N.P.C. 136; [1995] 3 LRC 162, considered.
(39) *Tasarruf Mevduati Sigorta Fonu* v. *Wisteria Bay Ltd.*, 2006 CILR 351, considered.
(40) *Top Jet Enterprises Ltd.* v. *Sino Jet Holding Ltd.*, 2018 (1) CILR 18, referred to.
(41) *Waddington Ltd.* v. *Chan Chun Hoo Thomas*, [2008] HKCFA 63; (2008), 11 HKCFAR 370; [2009] 4 HKC 381; [2008] HKCU 1381; [2009] 2 BCLC 82, considered.

Legislation construed:
Exempted Limited Partnership Act (2021 Revision), s.3: The relevant terms of this section are set out at para. 34, fn. 7.
s.16(1): The relevant terms of this subsection are set out at para. 19.
s.32(12): The relevant terms of this subsection are set out at para. 36, fn. 9.
s.33: The relevant terms of this section are set out at para. 20.

Grand Court Rules 1995, O.23, r.1(1): The relevant terms of this subrule are set out at para. 176.
C. Stanley, K.C., P. Tyers-Smith and *T. Wright* for the first appellant;
G. Chapman, K.C., A. Pullinger and *H. Shaw* for the second to fourth appellants;
D. Allison, K.C., J. Fox, O. Green and *H. Clark* for the respondents.

1 **FIELD, J.A.:**

Introduction

This is the judgment of the court to which each member has contributed.

2 There are two appeals before the court. The first is brought by all the appellants from the order made by Parker, J. ("the judge") dismissing their summonses to strike out certain claims in the amended statement of claim[1] ("the ASOC") ("the strike out appeal," reported at 2022 (1) CILR 12). The second appeal is brought by the first appellant against the dismissal of its

1 The defendants' application to strike out those paragraphs of the ASOC that pleaded the criminal convictions in Kuwait of a Ms. Lazareva and a Mr. Dashti was not opposed and the judge so ordered.

Case 1:26-cv-20255-JAL Document 12-2 Entered on FLSD Docket 01/26/2026 Page 14 of 80 PageID #: 5757

summons for security for costs ("the SFC appeal"). Hereinafter, we refer to the appellants as "the defendants" or "D1," "D2," "D3" and "D4" and to the respondents as "the plaintiffs."

The strike out appeal

3 This appeal raises important issues concerned with: (a) the nature of a Cayman Islands exempted limited partnership ("ELP") established under the Exempted Limited Partnership Act (2021 Revision) ("the ELPA"); (b) whether a limited partner of an ELP can sue, independently of any of the other limited partners, alleged wrongdoers, including the ELP's general partner, who are alleged to have been parties to the wrongful misappropriation of the ELP's assets held on trust by the general partner and, if so, what is the appropriate remedy to be granted by the court; and (c) the circumstances in which a limited partner can bring a derivative action under s.33(3) of the ELPA in the name of the ELP against the general partner for breaches of contractual, statutory and fiduciary duty.

4 The ELP in question is The Port Fund L.P. ("TPF") which was registered on March 21st, 2007. It was established as a vehicle for investments in port-related assets around the world. It has one general partner and eleven limited partners including the two plaintiffs, the Kuwait Ports Authority ("KPA"), which it is alleged has invested US$85m. giving it at least a 41% interest in TPF and the Public Institution for Social Security ("PIFSS"), which it is alleged invested US$40m. (giving it a 23.77% interest in TPF). The total invested in TPF by the limited partners was US$188,152,000.

5 The first defendant, Port Link GP Ltd. ("the GP" or "D1"), is a Cayman Islands exempted limited company incorporated on March 8th, 2007. It was appointed the general partner of TPF pursuant to a limited partnership agreement ("the LPA") made on March 21st, 2007 between it and the original limited partners of TPF. The whole of the GP's share capital is held by Port Link Holdings USA Inc. ("PLH"), a Delaware company; and the whole of PLH's share capital is held by the second defendant ("Mr. Williams"). Mr. Williams is also CEO, CFO, President, Vice President, Treasurer and Secretary of the third defendant, Wellspring Capital Group Inc. ("Wellspring"), a company incorporated in the US State of Georgia. Wellspring is owned by the Mark E. Williams Living Trust, the trustees of which are Mr. Williams, his wife, Laura Williams, and his brother, Dylan Williams.

6 TPF's sponsor and placement agent was KGL Investment Co. KSCC, a Kuwaiti company ("KGLI Kuwait"). From September 2007 until 2008, Mr. Williams was KGLI Kuwait's Vice President and he was its Investment Director from 2009 to 2011. He was also a member of TPF's Investment Committee in the years 2009–2013.

7 Pursuant to an agreement with the GP dated June 28th, 2007 ("the IMA"), KGL Investment Cayman Ltd. was appointed TPF's investment manager. In July 2018, KGL Investment Cayman Ltd. changed its name to Emerging Markets PE Management Ltd. ("EMPEML"). The ultimate beneficial owner of EMPEML as at the date of the IMA and until around January 2018 was KGLI Kuwait, which is the 100% shareholder of the fourth defendant ("KGLI Asia"). KGLI Asia is said by the defendants to have provided administrative support to TPF between December 2017 and August 2020 pursuant to an agreement for the provision of such services dated December 1st, 2017 ("the ASA").

8 Briefly put, the plaintiffs plead in the ASOC that assets of TPF worth hundreds of millions of US dollars held on trust by the GP have been misappropriated as part of an unlawful means conspiracy and/or dishonest breaches of trust and fiduciary duty and that each of the defendants has wrongfully participated in some or all of these defalcations, in some cases having knowingly received some or all of the proceeds thereof. Amongst the allegations made against the defendants is a claim that the GP made substantial improper payments using TPF moneys that were not for the benefit of TPF.

9 Two of the other limited partners in TPF, Gulf Investment Corp. ("GIC") and General Retirement and Social Insurance Authority of Qatar ("GRSIA"), who between them it is alleged invested 15.14% of the total alleged investment in TPF, have brought claims against the second and third defendants in the US State of Georgia alleging that those parties are guilty of dishonesty, deliberate breaches of fiduciary and unlawful means conspiracy. GIC and GRSIA have consented to a stay of their claims in the courts of Georgia pending determination of the instant proceedings which they support.

10 The two current directors of the GP ("the FFP directors") are individuals recruited from FFP (Directors) Ltd. Mr. Andrew Childe ("Mr. Childe") was appointed on January 29th, 2020 and Mr. Richard Lewis ("Mr. Lewis") on October 28th, 2020, replacing Mr. Christopher Rowland ("Mr. Rowland") who had been appointed at the same time as was Mr. Childe.

11 The FFP directors have no connection to any of the wrongdoing alleged in the ASOC and describe themselves as "independent directors." In his third affidavit, Mr. Lewis states that, fully cognisant of their fiduciary duties, they have conducted an intensive, forensic investigation into the actions of the GP and the former management team of TPF for the benefit of all the limited partners and not just the plaintiffs. The stated results of the FFP directors' forensic investigation are set out in a series of memoranda issued to the limited partners in an update to the limited partners dated May 29th, 2021, save for their investigations into the DIFC

Case 1:24-cv-00951-LY-SS Document 25-2 Filed 05/10/24 Page 16 of 80 PageID #: 5759

proceedings claim and the Lazareva lobbying campaign which are respectively dealt with in paras. 300–345 and 346–399 of Mr. Lewis's third affidavit. In their view, there is currently no cause to bring the derivative claims and even if TPF had meritorious claims, it would be necessary to consider whether the claims were worth pursuing on a cost/benefit analysis and, if so, whether TPF was in a position to pursue them or could raise funding to do so, and whether it would be in the best interests of TPF to do so.

12 The plaintiffs plead individual direct claims against the defendants for losses each has suffered as a limited partner in TPF by reason of the defendants' actionable involvement in the wrongful misappropriation of assets held on trust by the GP. Relying on s.33(3) ELPA, they also plead derivative claims against the GP and the other defendants on behalf of TPF in respect of the aforesaid alleged misappropriation of assets.

The direct claims and the applications to strike them out

13 We first consider the direct claims brought against the GP (D1), Mr. Williams (D2), and Wellspring (D3). It is not necessary to consider the plaintiffs' claims against KGLI Asia (D4) for their losses from payments made to that entity under the ASA because the plaintiffs' counsel, Mr. Allison, K.C., accepted that there is no direct claim against D4 (see respondents' skeleton, para. 48).

14 The plaintiffs plead that in breach of the statutory, contractual, common law and fiduciary duties owed by the GP to TPF and the limited partners and pursuant to a conspiracy to injure TPF and the limited partners by unlawful means, the GP made very substantial payments using TPF moneys that were not for the benefit of TPF and the limited partners. These payments were allegedly made to the following five recipients and/or for the following purposes: (i) Apache Asia Ltd. and its related Macau entity, Apache Asia Ltda. ("Apache") which received US$58,528,399 from the GP, of which US$45,850,000 was purportedly for services under an advisory agreement and US$14,550,000 was directed to be paid to KGLI Kuwait; (ii) Wilfredo Placino who received US$2,920,000 purportedly by way of "advisor fees"; (iii) lawyers and lobbyists acting for Ms. Marsha Lazareva (a director of the GP from March 8th, 2007 to May 24th, 2018), and Mr. Saeed Dashti (a director of the GP from April 16th, 2007 to May 24th, 2018); (iv) a group of Kuwaiti service providers, allegedly for services rendered, of which US$14,070,000 was paid to Golden Shahin General & Trading Contracting Co. ("Golden Shahin"), which is part of a group of companies associated with KGLI Kuwait and Mr. Dashti; and (v) Wellspring, which received US$59,990,461.30 ("the Wellspring payment") by way of a payment alleged to be due under a judgment given

in proceedings brought by EMPEML against the GP and TPF in the Dubai International Finance Centre Court ("the DIFCC").

15 The alleged background to (v) is that on November 15th, 2017, US$496,429,767 (representing part of the net proceeds resulting from the sale by the GP of a TPF asset in the Philippines called "Clark City") were transferred to the GP's account with Noor Bank PJSC ("Noor Bank"). The same day, Noor Bank made a suspicious transaction report to the Financial Intelligence Function of the UAE which issued a report to the Dubai Public Prosecutor who successfully moved to freeze the transferred money, an order that remained in place until February 2019. On July 9th, 2018, EMPEML commenced proceedings ("the DIFC proceedings") against the GP and TPF in the DIFCC of First Instance claiming unpaid carry in the sum of US$45,462,000, compound interest on the unpaid carry sum, and unpaid management fees of US$8,106,386 with compound interest thereon at 8% pa. The GP acknowledged service of the claim, submitted to the jurisdiction of the DIFCC and admitted the claim in the sum of US$56,808,005. The DIFCC then entered judgment ordering the GP and TPF to pay US$56,999,978 and, at the request of EMPEML, the GP transferred US$59,990,461.30 to Wellspring in satisfaction of the judgment. The plaintiffs claim, *inter alia*, that this payment was made by the GP in wilful and negligent breach of trust in that EMPEML had no entitlement to the claimed management fees having assigned its rights therein to KGLI Kuwait; there was no contractual right to interest; it was wrong to submit to the jurisdiction of the DIFCC when the law of the Cayman Islands governed the relationship between the GP and EMPEML; and the IMA contained an exclusive jurisdiction clause in favour of the courts of the Cayman Islands. The plaintiffs also allege that the payment made in satisfaction of the DIFCC judgment was made on the advice of the same legal counsel who, to the GP's knowledge, was also advising EMPEML with respect to its entitlement.

16 The plaintiffs' direct claims against D1 and D3 are for relief under the Fraudulent Dispositions Act (1996 Revision) (see ASOC, paras. 179 and 189). They claim that these defendants culpably participated in the aforementioned improper payments made by the GP that are related in paras. 14 and 15 above and/or dishonestly received such payments or the traceable proceeds thereof. They maintain that Wellspring was party to an unlawful means conspiracy, dishonestly assisted in a breach of trust/duty by the GP, knowingly procured a breach of the contractual obligations the GP owes the limited partners, and is liable in knowing receipt for the Wellspring payment, holding the Wellspring payment or its traceable proceeds on constructive trust for TPF. The plaintiffs also claim that Mr. Williams conspired and dishonestly assisted in the GP's breaches of duty and was in breach of his fiduciary duties to TPF and the GP by orchestrating the DIFC proceedings and the Wellspring payment.

17 The GP applied to strike out the direct and the derivative claims against it but not on the ground that they lacked merit. Instead, it accepted that the pleaded allegations were arguable, but contended in relation to the direct claims that it is impermissible for two members of a class of eleven limited partners to claim damages from the GP to be paid directly to themselves except by seeking partnership accounts that would require the joinder of the other limited partners.

18 D2–D4 applied to strike out the derivative claims against them but D2 and D3 did not apply to strike out the direct claims against them. They have not appealed the judge's decision, but do not admit that the plaintiffs have standing to bring the direct claims that they face. Like D1, they maintain that these claims "ought to be pursued by way of a partnership account as against the GP."

The general rule as to who may bring proceedings by or against an ELP

19 Section 16 ELPA provides that all rights or property of an ELP shall be held on trust by the GP as an asset of the ELP and s.33 contains the general rule as to who can bring proceedings by or against an ELP. Section 16(1) reads:

> "Any rights or property of every description of the exempted limited partnership, including all choses in action … shall be held or deemed to be held by the general partner and if more than one then by the general partners jointly, *upon trust as an asset of the exempted limited partnership* in accordance with the terms of the partnership agreement." [Emphasis added.]

20 The material provisions of s.33 are:

> "(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.
>
> (2) If the court considers it just and equitable any person or a general partner shall have the right to join in or otherwise institute proceedings against any one or more of the limited partners who may be liable under section 20(1) or to enforce the return of the contribution, if any, required by section 34(1).
>
> (3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings."

21 It is important to note that, as recognized in paras. 2 and 6 of D2–D4's skeleton argument for the appeal, the effect of ELPA s.33 is that "ordinarily, actions *for and on behalf of an ELP* must by statute be brought by the general partner of that ELP" and "*a claim belonging to a limited partnership must be brought by the GP acting for and on behalf of the ELP*." [Emphasis added.] Sections 33(1) and (3) thus apply only to claims brought by or on behalf of an ELP, that is to derivative claims. They therefore do not apply to direct claims brought by a limited partner in respect of its own right of action against the GP and others.

The judge's decision on the direct claims

22 The judge dealt with direct claims by a limited partner at 2022 (1) CILR 12, paras. 61–65. Before doing so (*ibid.*, at paras. 46–60) he helpfully considered and analysed the characteristics of an ELP, how it differs from an ordinary partnership and a company, and the statutory regime established by the ELPA.

23 He stated (*ibid.*, at paras. 46–47) that the rights and obligations of the limited partners and the general partner (or partners) *inter se* are regulated by the ELPA, the express provisions of which are to prevail where they are inconsistent with the rules of equity and of common law applicable to partnerships as modified by the Partnership Act (2013 Revision). He also referred (*ibid.*, at para. 46) to the provision in s.3 of the ELPA that absent such inconsistency those rules "shall apply to an exempted limited partnership."

(a) *Characteristics of an ELP that differ from those of an ordinary partnership*

24 The judge identified the following characteristics of ELPs which he considered to be important points of distinction from an ordinary partnership, and which create different rights and obligations between the partners to those in an ordinary partnership (*ibid.*, at paras. 46–53):

(1) By ss. 4(2) and 20 of the ELPA, the limited partners in an ELP have limited liability whereas the general partner is liable for all debts and obligations of the ELP (para. 48).

(2) By s.14 of the ELPA limited partners have no active involvement in the business in their capacity as limited partners. The business is carried out by the general partner who enters into all contracts by or on behalf of the ELP (paras. 49 and 52).

(3) Section 19(1) of the ELPA imposes an express duty of good faith on the general partner of an ELP requiring the general partner to act in the interests of the ELP (para. 50).[2]

---

2 The judge did not mention, but must have been aware, that this statutory duty is subject to any express provisions to the contrary in the partnership agreement.

Case 1:26-cv-00295-LTS Document 12-2 Filed 01/12/26 Page 20 of 80 PageID #: 5763

(4) Whereas in an ordinary partnership, mutual and reciprocal rights and obligations are owed to each other by partners, s.19(2) of the ELPA provides that, unless the partnership agreement provides to the contrary, a limited partner owes no fiduciary duty either to the ELP or to other partners (para. 51).

(b) ***Characteristics of an ELP that differ from those of a company***

25 The judge stated (*ibid.*, at paras. 54–55) that the fundamental legal distinction is that an ELP has no separate legal personality and exists only as its constituent partners and cannot own property in its own right. He stated that the consequence of the ELP not having a separate legal personality is that its general partner holds its rights and property, including choses in action, on trust for each of the partners. Because a limited partnership has no legal personality, the partnership as a whole is not able to enforce the general partner's obligations as trustee.

26 The judge then identified other characteristics of ELPs which he considered to be important points of distinction from those of companies:

(1) The general partner of an ELP owes its duties to all of the individual limited partners whereas the board of directors of a company only owe duties to the company (as the legal entity) and not to its shareholders (paras. 56–57).

(2) Because in the case of a company directors' duties are owed to the company, any breach by them is generally only actionable by or on behalf of the company and not by shareholders, although there are important exceptions where the wrongdoer directors are in control of the company (paras. 57–59).

(3) By s.33(1) of the ELPA, the general partner in an ELP is the only entity who can institute proceedings *on behalf of the partnership*, whereas in the case of a company there are exceptions to the rule in *Foss* v. *Harbottle* (11) where the wrongful directors are in control of the company. The judge stated that (2022 (1) CILR 12, at para. 60):[3]

> "If the limited partners have claims against the GP, it is in practice unworkable for it to bring proceedings against itself for breach of duty. If the GP is the arbiter of whether to bring claims against itself that clearly gives rise to a conflict of interest."

3 In para. 60, the judge does not mention s.33(3) of the ELPA which, as we have seen, permits a limited partner to bring a derivative action: "an action on behalf of an [ELP] if any one or more of the general partners with authority to do so have, without cause, failed or refused to do so."

(c) ***Direct claims by a limited partner***

27 The judge accepted the submissions of counsel for the plaintiffs, Mr. Allison, K.C., based on the characteristics of an ELP which differ from those of an ordinary partnership and a company, in particular that an ELP has no separate legal personality and that a limited partner does not owe fiduciary duties to the ELP or to the other limited partners. He stated that (*ibid.*, at paras. 61–62):

> "[T]he logical consequence of the aforesaid analysis of the nature and characteristics of an ELP is that the GP's obligations must be capable of enforcement by each of the partners to whom it owes duties individually. That is to be contrasted with the situation where directors of a company hold the company's assets and are treated as trustees because they owe fiduciary duties to the company. In that situation they hold the assets for the company, rather than the shareholders.
>
> 62 … [T]he GP of an ELP owes fiduciary duties to each of the limited partners and any breaches are therefore enforceable by the limited partners themselves."

28 The judge then stated (*ibid.*, at para. 63):

> "It follows that where an ELP is alleged to have suffered loss, as in this case, that is the loss of each of the limited partners. There is no distinct or separate loss in respect of 'the partnership' (TPF), which as an entity does not exist at law. The limited partners in enforcing their individual claims do not owe duties to each other: …"[4]

29 He concluded that (*ibid.*, at para. 64):

> "[T]he direct claims in respect of the individual partners' losses are vested in the limited *partners* alone, and are not claims that can be brought on behalf of TPF derivatively, except in the circumstances permitted by s.33(3) of the ELPA where the limited partners who wish to obtain redress for TPF are in effect put in the place of the GP, and bring claims on behalf of TPF."

30 The judge rejected the submission on behalf of the GP and the other defendants that s.16(1) of the ELPA and cll. 3.1 and 3.3 of the LPA prevented such direct claims because the limited partners cannot usurp the function of the GP, who is the only authorized agent of the partnership, here TPF, able to sue. He stated (*ibid.*, at para. 76) that: "the practical difficulty with that submission is that in practice the GP could obviously

---

4 The last sentence, stating that, in enforcing their individual claims, limited partners do not owe duties to each other, contains a footnote referring to s.19(2) of the ELPA, on which see para. 24(4) above.

not sue itself and suffers from the conflict of interest" that arises if the GP is the arbiter of whether to bring claims against itself which clearly gives rise to a conflict of interest (see *ibid.*, at para. 60).

(d) ***The Henderson case***

31 The judge considered (*ibid.*, at paras. 66–78) the decision of Cooke, J. in the English Commercial Court in *Henderson PFI Secondary Fund II LLP* v. *Henderson Equity Partners (GP) Ltd.* (13) (hereafter "*Henderson*"). That case concerned the similar but by no means identical UK statutory regime in the Limited Partnerships Act 1907 under which such partnerships also have no legal existence independent of their constituent partners. The focus of *Henderson* was whether limited partners were entitled to pursue derivative claims on behalf of the partnership, and, if so, the consequence of doing so.[5] We therefore primarily consider it when giving our conclusion and reasons about the derivative claim against D1 at paras. 147–148 below. But in considering entitlement to pursue a derivative claim, Cooke, J. also considered whether a limited partner could sue the general partner for "its own loss on its own claim" under the limited partnership agreement ([2012] EWHC 3259 (Comm), at para. 32). He stated that it could because it "has its own contractual or fiduciary claim for its own loss" (*ibid.*, at para. 28).

32 In the present case, the judge stated that Cooke, J. held that:

(i) "each limited partner could in its own individual capacity sue … the general partner, for its own losses in respect of liabilities under the limited partnership agreement" (2022 (1) CILR 12, at para. 69);

(ii) "any claim brought by each limited partner as an individual contractual or fiduciary claim would not involve management of the partnership business" (*ibid.*, at para. 72); and

(iii) "the partnership which consisted of the limited partners and the general partner together, had no form of joint right or claim against the general partner" (*ibid.*, at para. 72).

(e) ***Must direct claims by a limited partner be by seeking an order for partnership accounts?***

33 The judge considered the GP's submission that direct claims by a limited partner can *only* be vindicated by the taking of partnership accounts (*ibid.*, at para. 79ff.). He rejected it and accepted the plaintiffs' submission that the claims advanced were principally direct claims vested in the individual limited partners rather than in TPF (the ELP itself) and that the

5 *I.e.* whether the pursuit of derivative claims constituted taking part in the management of the business of the partnership so that, under s.6(1) of the 1907 Act, claimants doing so would forfeit their limited liability.

taking of partnership accounts was not the only procedural route available to the plaintiffs (*ibid.*, at paras. 86–87).[6]

34 The judge took into account the distinct characteristics of an ELP and the provisions of the ELPA (*ibid.*, at paras. 80–81). He considered that the English authorities on ordinary partnerships which Ms. Stanley submitted were "pellucidly clear" in requiring rights and obligations between partners only to be procedurally adjudicated by the taking of partnership accounts had no direct application to Cayman Islands' ELPs. His reasons were that, unlike ordinary partnerships, under a Cayman Islands' ELP:

(i) there are no reciprocal fiduciary obligations or reciprocal duties between the limited partners unless the LPA provides otherwise (*ibid.*, at para. 84);

(ii) the absence of reciprocal fiduciary obligations between the limited partners means that the joinder of all partners to any proceedings so that the necessary accounting for any monetary claims required by *Public Trustee* v. *Elder* (29) ([1926] 1 Ch. at 789) does not apply to a Cayman Islands' ELP (2022 (1) CILR 12, at para. 82, fn. 18);

(iii) the general partner owes fiduciary and contractual duties directly to the limited partners and those duties are enforceable directly by the limited partners (*ibid.*, at para. 83);

(iv) each limited partner is not, as is the case in an ordinary partnership, jointly and several liable for the partnership's liabilities; referring to ss. 3,[7] 4(3), 16(1) and 19(2) of the ELPA, the judge stated that "The rules of equity and common law applicable to ordinary partnerships are in this respect inconsistent with express provisions of the ELP …" (*ibid.*, at para. 85);

(v) claims against the general partner for a breach of the statutory, equitable, common law or contractual duties owed to the limited partners are vested in the limited partners themselves and may be brought directly (*ibid.*, at para. 87).

The questions before us and the submissions

35 We have stated that D2 and D3 did not apply to strike out the direct claims against them but do not accept that the plaintiffs have standing to bring such claims against them and, although D2 and D3 were not partners, maintain that their direct claims "ought to be pursued by way of a partnership account as against the GP." The result was that the focus of the submissions before us was on the judge's rejection of the application to

---

6 His summary of the GP's submissions is at para. 32(i)–(ii).

7 "The rules of equity and of common law applicable to partnerships as modified by the Partnership Act (2013 Revision) but excluding ss. 31, 45–54 and 56–57 shall apply to an exempted limited partnership, except where they are inconsistent with the express provisions of this Act."

Case 1:24-cv-00951-LTS Document 25-2 Filed 05/10/24 Page 24 of 80 PageID #: 5767

strike out the direct claims against the GP. Little was said specifically about the direct claims against D2 and D3. Ms. Stanley for D1, accepted in substance, that there are direct claims against the GP. But, supported by Mr. Chapman, she submitted that the judge erred in two respects. The first was his finding that the rule/principle that claims by partners *inter se* can only be brought by the taking of partnership accounts does not apply to a limited partnership. She maintained that the judge erred in holding (*ibid.*, at para. 85) that the application of the rule/principle is inconsistent with the express provisions of the ELPA and that it has therefore been disapplied by s.3 of the ELPA. She submitted that his second error was in holding (*ibid.*, at para. 55) that the GP holds the property of the ELP "on trust for each of the partners." That, she submitted, was a clear misreading of ELPA s.16(1). However, she accepted that before the dissolution of a partnership, although there is jurisdiction to obtain a partnership account, "it is an exceptional jurisdiction to allow an account pre-dissolution."

36 On behalf of the plaintiffs, Mr. Allison submitted that the partnership accounts rule/principle does not apply to ELPs in this jurisdiction, in the same way that it does not apply to limited partnerships in England and Wales.[8] This, he maintained, is because the element of reciprocity of fiduciary duties in an ordinary partnership is absent in an ELP. Moreover, in an ordinary partnership, but not an ELP, all the partners have unlimited liability for the partnership's liabilities, and (subject to contrary agreement) are entitled to take part in the management of the partnership business. Mr. Allison further argued that to apply the rule/principle would be inconsistent with ELPA s.32(12)(c)[9] which makes it clear that partners in an ELP have a right to an account. Here the pleaded claims against the GP and D2 and D3 include claims for accounts and equitable compensation for the plaintiffs' individual losses. Mr. Allison submitted that they are entitled to bring these against the GP because of the GP's position as a fiduciary and statutory trustee and its overarching duty to account. Although less clearly stated, it appears that the basis for the plaintiffs' entitlement to bring direct claims against D2 and D3 is their knowing receipt of TPF's property or moneys which the GP transferred to them in breach of its statutory, equitable and other obligations, and their participation in a conspiracy to cause loss to the plaintiffs by unlawful means. During Ms. Stanley's oral submissions there was some debate as to whether, in a claim by a limited partner against the GP or against a third party, the court could order that the remedy against an unsuccessful defendant should be the restoration of

---

8 In fact the Limited Partnership Act 2007 applies throughout the UK.

9 "A partnership agreement may provide that, as against any other partner, any assignment or other disposition by a partner of any right, debt or other chose in action arising under a partnership agreement shall confer economic rights only and for the purposes of this section 'economic rights' are … The right to an account for the purpose of ascertaining the amount of share of any of the foregoing …"

the trust fund by analogy with the position where a claim is brought by the beneficiary of a trust: *Target Hldgs. Ltd.* v. *Redferns* (38) (hereafter "*Target* v. *Redferns*"). Ms. Stanley accepted that this was possible in a claim against the GP but did not accept that it was possible in a claim against a third party such as D2 and D3. She stated that the obvious way for a limited partner to make a claim against a third party would not be by a direct claim but, using the trust analogy, by a claim on behalf of the trust. That appears to be a submission that the claim must be a derivative claim and thus subject to the requirements of ELPA s.33(3). Mr. Chapman's written submissions on behalf of D2 and D3, to which we have referred, are to the same effect.

37 In principle, two main questions arise in respect of the direct claims although, in the light of the way the appeal has proceeded, the second does not in fact arise. The first question is whether a direct claim by a limited partner against the general partner must be made by claiming partnership accounts in proceedings to which all the partners are parties as it must in an ordinary partnership. Can a limited partner claim an account against a general partner for breach of fiduciary or other duty without at the outset joining the other partners and, if the breach is established, may a limited partner obtain an order that the general partner restore the fund?

38 The second question is whether the ELP itself, although not a legal entity, also has a claim against the GP or a third party such as D2 and D3 for breach of their fiduciary and other obligations. The judge stated (2022 (1) CILR 12, at para. 63) (set out at para. 29 above) that there is no distinct or separate loss in respect of "the partnership" which does not exist in law as an entity. When dealing with the derivative claims later in this judgment, we state that, for the reasons we give at para. 145 below, we are not to be taken as agreeing that the judge was correct in concluding that the partnership has no claim against the GP. However, absent a respondents' notice in respect of the judge's finding or any submission by the plaintiffs that the judge was wrong, the question is not properly before us. But since it is accepted that a limited partner may have a direct claim against the GP for breach of its fiduciary and other duties, albeit only in the context of partnership accounts, uncertainty as to whether TPF itself also has a claim *qua* ELP does not affect our resolution of the dispute about the plaintiffs' direct claims.

39 There were three limbs to Ms. Stanley's submissions. The first was that the application of the partnership accounts rule/principle to limited partnerships is not inconsistent with the provisions of the ELPA and therefore is not disapplied by s.3. She accepted that there are obvious examples of inconsistency between the rules of equity and common law that apply to ordinary partnerships and the provisions of the ELPA governing limited partnerships. She gave three examples. The first is the disapplication by ELPA ss. 4(2) and 16(2) of the rule that in ordinary

partnerships each partner is liable jointly and severally with the other partners for all partnership liabilities. The second is s.32(11)'s provision that in limited partnerships the rule that a partner cannot assign its partnership interest to a third party without the consent of the other partners does not apply. The third is that, in the case of limited partnerships, the rule in ordinary partnerships that certain events cause a dissolution of the partnership does not apply to the events specified in ELPA s.35(a)(i)–(vi). But she submitted that none of these "shed light on the fundamental question at issue on Grounds 2 and 3, namely whether limited partners are entitled to bring direct claims against the GP." It would appear this may require some reformulation in the light of her acceptance during her oral submissions in response to questions by Birt, J.A. that in a claim by a limited partner against the GP the court could order that the defendant restore the fund and that it is exceptional to obtain partnership accounts whilst the partnership is continuing.

40 As to the meaning of "inconsistent," Ms. Stanley relied on *In re Knight & Tabernacle, &c., Socy.* (19) ([1891] 2 Q.B. at 69). That case concerned a statutory provision that its provisions were to apply except where those provisions were inconsistent with those of another statute. She submitted that this approach applied where, as in the case of s.3 of the ELPA, the question is whether non-statutory rules and principles are inconsistent with the express provisions of a statute and that the partnership accounts rule/principle is not inconsistent with these provisions in the sense used in *Re Knight & Tabernacle.* That case stated that to be "inconsistent," the rule/principle must be so at variance with the machinery and procedure indicated by the statute that, if it is applied, the statute would not work. Ms. Stanley argued that this shows that "inconsistent" means "irreconcilable" rather than "different from," and that there is no such irreconcilability between the partnership accounts rule/principle and the provisions of the ELPA.

41 Ms. Stanley also referred to the judge's statement (2022 (1) CILR 12, at para. 86) that there is "no good reason why the taking of partnership accounts should be the only procedural route available to the plaintiffs to obtain redress under the ELPA." She submitted that the judge thus "accepted that partnership accounts *were* a means of redress available" which showed that there is no irreconcilability or inconsistency between the partnership accounts rule/principle and the provisions of the ELPA.

42 Mr. Allison's response to these submissions was that the reasons given by the judge (*ibid.*, at paras. 82–85) (summarized at para. 34 above) for concluding that the partnership rule/principle was disapplied by ELPA s.3 and is inconsistent with the scheme of the ELPA were correct. As to the scheme of the ELPA, he also submitted that the inconsistency is shown *inter alia* by s.16(1) which makes the GP trustee of an ELP's assets, and

by s.32(11) which permits the assignment of a limited partner's interest without the consent of the other partners, and s.32(12)(c) which gives a limited partner the right to claim an account.

43 The second limb of Ms. Stanley's submissions were the authorities which hold that claims by partners *inter se* can *only* be brought in the context of the taking of partnership accounts. She referred to the statements in *Meyer* v. *Faber (No. 2)* (21) ([1923] 2 Ch. at 439) and *Hurst* v. *Bryk* (16) ([2002] 1 A.C. at 194) respectively that in an action against a co-partner "the only relief which the plaintiff could obtain would be an account" and that "the amount owing to a partner by his fellow partners is recoverable only by the taking of an account in equity after the partnership has been dissolved." Mr. Allison's response was that the cases relied on by Ms. Stanley emphasize the reciprocity of personal obligation and trust and the mutuality of personal liability in an ordinary partnership, and Cooke, J. in *Henderson* (13) ([2012] EWHC 3259 (Comm), at para. 28) emphasized the absence of this in a limited partnership.

44 The third limb of Ms. Stanley's submissions were considerations of "practicality and policy." She maintained that there were sound practical reasons for the application of the partnership account rule/principle to Cayman Islands ELPs. The rule/principle ensures that the creditors of the partnership are paid first before the partners (as they should be) and that all the limited partners will be bound by the outcome. It, she argued, prevents a multiplicity of proceedings with resulting chaos by providing a mechanism for the orderly winding up of the affairs of the ELP.

45 Ms. Stanley submitted that if the partnership accounts rule/principle does not apply "the limited partners would have to bear the additional burden of the costs of the GP dealing with a multiplicity of proceedings, rather than one." There was, she argued, no prejudice to the partners of an ELP by the application of the rule/principle because "claims can all be dealt with in the managed process of the taking of partnership accounts." She relied on the statements in *Public Trustee* v. *Elder* (29) ([1926] Ch. at 784) that all partners needed to be joined "to avoid multiplicity of actions," in *Hugh Stevenson & Sons* v. *Akt. für Cartonnagen-Industrie* (14) ([1918] A.C. at 247) that partners "cannot sue each other excepting for the balance of the account taken in accordance with the principles which the courts of equity apply in working out the results of dissolution," and on "Partnerships, Limited Partnerships and LLPs," 29(1) *Atkins Court Forms*, at para. 15.

46 In his oral submissions, Mr. Allison relied on *Golstein* v. *Bishop* (12) to show that in a partnership dispute it is not always necessary to have a claim for a partnership account at the outset. Mr. Christopher Nugee, Q.C., sitting as a Deputy High Court judge, stated ([2013] EWHC 881 (Ch), at paras. 2 and 24) that factual matters and the merits of the claim in that case, which included a claim for damages for breach of the partnership

agreement,[10] would be determined but that dissolution accounts would be taken at a later stage. In the Court of Appeal, Briggs, L.J., with whom Kay and Sullivan, L.JJ. agreed, recognized that there are remedies other than the taking of a partnership account that might be available for breaches of duty in an ordinary partnership (see [2014] EWCA Civ 10, at para. 11). Ms. Stanley submitted that *Golstein* v. *Bishop* was distinguishable for two reasons. The first was that the point before us did not arise in that case because the parties had agreed to this being dealt with by way of preliminary issue. Secondly, the substance of the partnership rule/principle was satisfied in that case because there were only two partners, and they were both before the court. Notwithstanding the force of those points, the case shows that, even in the case of an ordinary partnership, there is room for flexibility.

47 As to misreading ELPA s.16(1), its material provisions are set out at para. 19 above. It expressly provides that the rights and property of an ELP, including all choses in action are held "***by the general partners jointly, upon trust as an asset of the exempted limited partnership*** in accordance with the terms of the partnership agreement." [Emphasis added.] Ms. Stanley compared its wording with the judge's holding (2022 (1) CILR 12, at para. 55) that the property of an ELP is held "***on*** trust for each of the limited partners." [Emphasis added.]

48 She submitted that the judge's holding was clearly a misreading of s.16(1). The legislature has directed that the assets are those of "the partnership." Thus, giving full recognition to the fact that whilst an ELP has no independent legal personality, it provided for there to be a first call on the assets by the creditors of limited partnerships and that the limited partners stand behind those creditors. She argued that s.16(1) is consistent with the preservation of the operation of the partnership accounts rule/principle which enables the court to identify the assets of the ELP which are "actually available" for distribution to limited partners after the creditors had been paid.

49 Drawing on the analogy of the position under a non-partnership trust, she also relied on the statements in the decisions of the High Court of Australia in *Chief Commr. of Stamp Duties* v. *Buckle* (6) and *Commr. of State Revenue* v. *Rojoda* (7). In *Buckle's* case the High Court stated ([1998] HCA 4, at para. 48) that:

> "The entitlement of the beneficiaries is confined to so much of those assets as is available after the liabilities in question had been discharged or provision has been made for them."

---

10 The Chancery Report omits paras. 178–214 of the judgment which deal with the claim for damages for breach of the partnership agreement but those paragraphs are included in the neutral citation version available on the BAILII website.

In *Rojoda*, the High Court stated that ([2020] HCA 7, at para. 33):

> "unlike a beneficiary of a fixed trust, it was well established that a partner's interest was not an interest in, or in relation to, any specific asset other than an entitlement to the partner's share of the net proceeds from the sale of each asset at the completion of winding up. In other words, the only right that the partners have, both before and after dissolution, in relation to each asset is a right to the account and distribution after sale of the proceeds of that asset—'not to an individual proportion of a specific article, but to an account: the property to be made the most of, and divided.'"

50 In *Buckle's* case, the High Court also stated ([1998] HCA 4, at para. 47) that in aid of the right of a trustee to reimbursement or exoneration for liabilities properly incurred by the trustee in the administration of the trust, "the trustee cannot be compelled to surrender the trust property to the beneficiaries until the claim has been satisfied." It stated that (*ibid.*, at para. 48), until such reimbursement or exoneration, "it is impossible to say what the trust fund is."

51 Mr. Allison submitted that because an ELP has no separate legal personality the only sensible construction of the words in ELPA s.16(1) is that the general partner of an ELP holds its assets on trust for all the limited partners. The judge was correct so to hold. Because the general partner owes fiduciary duties to all the limited partners, any breaches of those duties must be enforceable by the limited partners themselves. Where there is a claim against the general partner itself it cannot be only the general partner who can institute proceedings. The absence of separate legal personality means that, legally, it is the ELP's constituent limited partners who suffer loss directly and the general partner's fiduciary obligations "must be capable of enforcement by the other partners (just as the obligations of any other trustee are enforceable at the suit of the beneficiaries)."

Conclusions on the direct claims

52 We first consider the direct claims brought by the plaintiffs against the GP and then consider the direct claims brought against D2 and D3.

(a) *Direct claims by a limited partner against the GP*

53 There is considerable force in the considerations of "practicality and policy" relied on by Ms. Stanley and the need to protect the positions of the creditors of an ELP and of the other limited partners. But we have concluded that the differences between ordinary partnerships and ELPs mean that it is not appropriate to require that a direct claim by a limited partner against the GP must always be initially brought by way of a claim for partnership accounts and that it is not necessary to protect the positions

of the creditors and of the other limited partners by requiring this. We have so concluded for the following reasons.

54 First, we have borne in mind two related factors based on the wording of the ELPA. One is the inconsistency of the proposition that such a claim must be by way of partnership accounts with the right given to a limited partner under ELPA s.32(12)(c) to claim "an account." The legislature addressed the question and used the word "account" but not the term "partnership account." We agree with Mr. Allison's submission that it is difficult to see a principled justification for refusing a limited partner a claim to "an account" but permitting such a partner to claim "a partnership account" although there are no mutual and reciprocal rights and obligations between limited partners or fiduciary duties. The other is that ELPA s.16(1) provides that the general partner holds or is deemed to hold "[a]ny rights or property of every description of the exempted limited partnership, including all choses in action … *upon trust as an asset of the exempted limited partnership* in accordance with the terms of the partnership agreement." [Emphasis added.] That in substance (see para. 56 below), provides that the assets of an ELP are held by the general partner on a statutory trust for the limited partners.

55 Secondly, an ELP does not have the mutuality and reciprocity of obligations that are the hallmark of an ordinary partnership. This is because ELPA s.19(2) provides that, absent express provision in the partnership agreement, the limited partners owe no fiduciary duties. The statements in the cases relied on by Ms. Stanley requiring the claim to be brought by way of a partnership account emphasize the reciprocity and mutuality that exists between conventional partners.

56 We turn to Ms. Stanley's submissions based on s.3 of the ELPA that, absent inconsistency with the rules of equity and of common law applicable to partnerships, those rules "shall apply to an exempted limited partnership" and *Re Knight & Tabernacle* (19). We bear in mind the modern purposive approach to statutory interpretation. We consider that, as well as provisions such as ss. 16(1), 19(2) and 32(12)(c), the scheme of the ELPA with the absence of reciprocity and mutuality of rights and obligations is inconsistent with requiring claims by a limited partner to be brought by taking partnership accounts in proceedings to which all the limited partners are party. We accept Mr. Allison's submission that because an ELP has no separate legal personality the only sensible construction of the words in ELPA s.16(1) is that the GP of an ELP holds its assets on trust for all the limited partners. On its own, the judge's use of the phrase "on trust for each of the partners" (2022 (1) CILR 12, at para. 55) may leave some uncertainty as to whether he meant to treat the entitlement of each of the partners as totally individuated, but (*ibid.*, at 61) what he said was

"capable of enforcement by each of the partners to whom [the GP] owes duties individually."

57 Because a trust also has no separate legal personality, thus making the position similar to the statutory trust created by ELPA s.16(1), we also regard the position of a claim by a beneficiary of a trust against the trustee as important. The beneficiary of a subsisting trust including a discretionary trust is entitled to bring a claim against the trustee to recover loss suffered by the trustee's breach of trust, but the remedy is for an order to restore to the trust what ought to have been there: see *Target* v. *Redferns* (38); *Lewin on Trusts*, 20th ed., para. 21–046 (2020) and *Snell's Equity*, 34th ed., paras. 2–003 – 2–004, and 21–046 (2022).

58 In *Target* v. *Redferns* ([1996] A.C. at 436D–E), Lord Browne-Wilkinson stated that the rule developed by equity reflected the fact that while each beneficiary had the right to claim, "no one beneficiary was entitled to the trust property" and there was a "need to compensate all beneficiaries for the breach." He had earlier stated (*ibid.*, at 434C–D) that an order to restore was "the only way in which *all* beneficiaries' rights [could] be protected" [Emphasis added]. The remedy thus ensured that all the beneficiaries' rights were protected and that the beneficiary who issued the proceedings did not steal a march on the others and scoop the pool. There is no inconsistency between such an order and what was stated in *Chief Commrs. of Stamp Duties* v. *Buckle* (6) and *Rojoda* (7) because all that is ordered at that stage is restoration of the fund. Should there be a claim against the ELP, it can then be determined. There is also no inconsistency between such an order and what was said by the High Court of Australia in *Rojoda* about the nature of the partnership trust in an ordinary partnership and the difference between that and that of the beneficiary of a fixed trust because ordering restoration of the fund does not give an individual limited partner an interest in any specific asset.

59 We consider that this approach and remedy is equally applicable in the case of the statutory trust created by s.16(1) ELPA. We have had regard to the two factors based on the wording of the ELPA referred to at paras. 54 and 55 above; the inconsistency of the proposition that such a claim must be by way of a partnership account with the right expressly given to a limited partner under ELPA s.32(12)(c) to claim "an account" and the absence in an ELP of the mutuality and reciprocity of obligations that is the hallmark of an ordinary partnership. Whilst, as Ms. Stanley submitted at paras. 20–25 of her reply skeleton by reference to *Rojoda*, assets held by a partner of an ordinary partnership are also held on trust for the partnership, these factors lead to the conclusion that the partnership accounts rule/principle is inconsistent with the ELPA and the judge was correct in his conclusion. Mr. Allison accepted that it was likely that the plaintiffs could not have as a remedy equitable compensation payable directly to them because that took no account of the other limited partners

and of the ELP's creditors. We have concluded that in proceedings against the GP, a limited partner can recover for loss suffered by the breach of the statutory trust but that the remedy would be the restoration of the ELP's fund thus compensating the direct losses suffered by all the constituent limited partners. We discuss further aspects of ordering the restoration of the fund and its doctrinal underpinning when considering the plaintiffs' direct claims against D2 and D3. The important point is that while the individual partners, like the beneficiaries of a discretionary trust, have a direct claim, if established, the remedy for that claim reflects the fact that no one partner is entitled to all of the fund.

60 This remedy prevents a limited partner claimant from benefitting alone from any recovery either at the expense of the other limited partners or of the ELP's creditors. It thus directly meets the "stealing a march" and "scooping the pool" elements of the practical and policy reasons relied on by Ms. Stanley, the substantive elements of her case for requiring a claim by a limited partner against the GP to be by way of partnership accounts from the outset. As we have stated, *Golstein* v. *Bishop* (12) shows that even in the case of an ordinary partnership there is room for flexibility and that a trial of the merits of the claim may be held before taking a partnership account. It suggests that where there is no prejudice either to the creditors of the partnership or to other third parties it is possible to have a trial of the merits of a claim brought by a partner before a partnership account is taken.

61 We consider that the problem of multiplicity of actions and what Mr. Chapman referred to as an "ungated litigation superhighway" can be dealt with by robust case management. Later claims brought in a single jurisdiction can be stayed or consolidated and ordered to be heard together. Where claims are brought in more than one jurisdiction, stays or anti-suit injunctions can also be used to avoid the problems identified by Ms. Stanley and Mr. Chapman.

62 Mr. Allison's description (see skeleton, at para. 89) of the insistence on the joinder of all the limited partners from the outset as "unedifyingly formalistic" may put it too highly. We, however, consider that insistence that a claim for partnership accounts always be made at the outset reflects an entirely technical procedural approach. In her responses to questions by the court, Ms. Stanley at one stage suggested that the plaintiffs in effect should start again and now seek the taking of partnership accounts and that this either be by the court now directing further pleadings or an inquiry to identify what is being alleged by the limited partners. She argued that the taking of partnership accounts occurs "in a much more court managed process than a fraud trial where anything goes …"

63 Our rejection of the submission that the direct claims are defective in not at the outset joining all partners and seeking partnership accounts does not mean that the court cannot direct that there be such a procedure at a

later stage as part of its case management powers if that proves necessary. If, after the merits of the plaintiffs' claims against the GP have been determined, it appears that an order to restore the fund should be made but that, given the GP's wrongdoing, steps such as placing the assets in escrow, appointing a receiver, or taking partnership accounts are necessary, the court can make appropriate directions. Alternatively, if the plaintiffs so apply, we would allow them now to add a prayer for the taking of partnership accounts to their pleading, but that such accounting should take place only after the resolution of the issues in their current claims and only if, at that time, it appears necessary.

64 In summary, for the reasons we have given, we dismiss the GP's appeal against the judge's refusal to strike out the plaintiffs' direct claims against the GP. The consequence is that the plaintiffs may bring their direct claim against the GP. We wish to make it clear that, in the event of success, the likely remedy would be an order to restore the trust fund rather than equitable compensation payable directly to the relevant limited partner.

(b) ***Direct claims by a limited partner against third parties such as D2 and D3***

65 We have stated that there was no application by D2 and D3 to strike out the direct claims against them on the merits but they submit that the plaintiffs do not have standing to bring the direct claims against them and ought to have brought the claims against the GP seeking the taking of partnership accounts.

66 The question is whether, if D2 and D3 are held liable to the plaintiffs for breach of their statutory, equitable and other obligations, it is open to the court to order that those defendants restore the fund rather than pay the plaintiffs. If the court is not able to order this, there will be a risk of prejudice to the creditors of the ELP and/or to the other limited partners in the ways we have discussed in the context of claims against the GP but concluded it did not exist in that context. Indeed, since different limited partners may bring claims against different third parties, there may be a multiplicity of both plaintiffs and defendants and the risk of chaos referred to by Ms. Stanley and Mr. Chapman might well be greater. That risk would be avoided by a derivative action where the requirements of s.33(3), discussed at paras. 94–98 below, are satisfied.

67 Ms. Stanley submitted that it is not possible to order D2 and D3 to restore the fund and that the only way that TPF would be entitled to anything is if the plaintiffs' claims are made on its behalf and are thus derivative claims. During an exchange primarily about the claims against the GP, it was put to Mr. Allison that against the other defendants he might not be able to get an order restoring the trust. His response was "arguably

Case 1:24-cv-00951-LY-SH Document 25-2 Filed 05/10/24 Page 34 of 80 PageID #: 5777

not" but it is not altogether clear whether the exchanges related to the direct or the derivative claims against D2 and D3.

68 Since D2 and D3 did not apply to strike out the direct claims against them, strictly the question of whether it is possible for the court to order D2 and D3 to restore the fund is one which falls for determination after the merits of the claims against them have been determined. Although we did not hear full argument on this question, in the light of the points that were made, we consider it appropriate to give our preliminary view on the question. We consider that the plaintiffs have a good arguable case that, where third parties are liable for breaches such as those claimed against D2 and D3, the court may order those defendants to restore the fund rather than pay the plaintiffs and thus avoid the risk of prejudice to other limited partners or creditors.

69 As in the case of a claim against the general partner, the starting point is the position of a claim by a beneficiary of a trust. It is clear that the interest of the beneficiary of a discretionary trust is enforceable against a third party who received trust property which the trustee did not have authority to transfer and the third party knew enough to make it unconscionable to retain the asset for his own benefit: see *Lewin on Trusts*, 20th ed., para. 21–046, at 901 (2020), and *Snell's Equity*, 34th ed., paras. 2–003 – 2–004, at 22–23, and para. 21–046, at 650 (2022).

70 *Snell* also states (*op. cit.*, para. 21–045, at 650) that "the beneficiary's only right would be to have the asset or its proceeds reinstated to the trustee" (to the same effect, see para. 22–005, at 655–656, and para. 30–015, at 845–846). The reason given is that the beneficiary "could not compel the third party to transfer the asset directly to himself since this would give him a greater equitable right against the third party than he had against the trustee …" In para. 2–004, at 22–23 of *Snell*, it is stated that "the third party's duty is to restore the trust asset to the properly appointed trustee" and that this would happen "if the original trust involved continuing duties to manage a fund and if the beneficiary did not have the entire beneficial interest in the trust asset." Nolan, "Equitable Property" (2006) 122 LQR 232, at 242–243 states that the cases on the rights of a beneficiary against the recipients of misapplied trust assets all acknowledge that a recipient is bound to restore the assets and their proceeds to the relevant trustees, or else transfer them at the direction of a beneficiary or beneficiaries who, being absolutely entitled to the assets in equity, may terminate the trust and direct such a transfer. He states (*op. cit.*, at 255) that the cases provide a doctrinal basis for actions to restore the integrity of a pool of assets held in trust, should it be depleted without authority.

71 That doctrinal basis explains why, given the analogy between a non-partnership trust, an ELP with no separate legal personality, and the

statutory trust imposed by s.16(1) of the ELPA, it is possible to order third parties such as D2 and D3 to restore the fund where the claim against them succeeds. The analogy rests on the fact that, in cases of knowingly assisting a trustee in a fraudulent and dishonest disposition of the trust property, although the third party is not in fact a trustee, he is made liable in equity "as if he were" a trustee: *Selangor United Rubber Estates Ltd.* v. *Craddock* (33) ([1968] 1 W.L.R. at 1580 and 1582), citing Lord Esher, M.R. in *Soar* v. *Ashwell* (36) ([1893] 2 Q.B. at 394–395), and Lord Selborne, L.C. in *Barnes* v. *Addy* (4) (9 Ch. App. at 251). This reflects the fact that it is the fund which has suffered the loss and, in the words of Lord Browne-Wilkinson in *Target* v. *Redferns* (38), an order to restore is "the only way in which *all* beneficiaries' rights" could be protected ([1996] A.C. at 434).

72 For these reasons, had D2 and D3 applied to strike out the plaintiffs' direct claims against them, our preliminary view is that the objections raised to the plaintiffs' standing to bring the claims are unfounded. The consequence is that the plaintiffs may bring these claims against D2 and D3. It will be for the court hearing the claims to decide whether they are in fact made out on the merits and, if they are, whether, in the circumstances of this case, an order to restore the fund should be made and, given that the GP would be implicated in the wrongdoing, steps such as placing the assets in escrow, the appointment of a receiver, or the taking of partnership accounts are necessary.

The derivative claims

73 We turn to consider the derivative claims brought against D1 and D2–4. This is the first occasion on which one or more limited partners of a Cayman Islands ELP have sought to bring a derivative claim pursuant to s.33(3) ELPA and accordingly we shall proceed to review the approach adopted by the judge and consider if we can provide any guidance for the future.

74 We begin with a brief discussion of derivative claims generally before turning to consider the interpretation of s.33(3). We shall then consider a number of specific matters of principle raised by the parties before turning to apply our conclusions on the law to the facts of this case.

(a) *Derivative claims in general*

75 The general rule is that the only person who can bring an action against another who has caused injury or damage is the person who has suffered that injury or damage. As the Court of Appeal put it in the leading case of *Prudential Assur. Co. Ltd.* v. *Newman Indus. Ltd.* (28) ([1982] 1 Ch. at 210):

> "A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover

Case 1:26-cv-00251-LTS Document 12-2 Filed 01/12/26 Page 36 of 80 PageID #: 5779

damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the rule in *Foss v Harbottle* (1843) 2 Hare 461 when applied to corporations, but it has a wider scope and is fundamental to any rational system of jurisprudence."

76 The court went on to outline an exception to the rule in *Foss* v. *Harbottle* (11) in the following terms (*ibid.*, at 211):

"There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders' action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue."

77 A further helpful general description of a derivative claim in the context of companies is to be found in the judgment of Lewison, J. in *Iesini* v. *Westrip Hldgs. Ltd.* (17) ([2009] EWHC 2526 (Ch), at para. 73):

"I should begin by saying a little about derivative claims generally. In the first place the new code has replaced the common law derivative action. A derivative claim may 'only' be brought under the [Companies Act 2006]. As section 260 (1) makes clear a derivative claim is one in which the cause of action is vested in the company, but where the claim is brought by a member of the company. This reflects the old law in which a derivative action was an exception to the general principle (known as the rule in *Foss v Harbottle* … that where an injury is done to a company only the company may bring proceedings to redress the wrong. Allied to this principle was the principle that whether a company should bring proceedings to redress a wrong was a matter that was to be decided by the company internally; that is to say by its board of directors, or by a majority of its shareholders if dissatisfied by the board's decision. The court would not second guess a decision made by the company in accordance with its own constitution. The exception to these principles was necessitated where the company's own constitution could not be properly operated. If the wrongdoers were in control of the company (because they were a majority of the shareholders) they would not in practice vote in favour of taking proceedings against themselves, even though the taking of proceedings would be in the company's best interests …"

78 Derivative claims are not restricted to companies. They can also be brought, for example, in connection with trusts and limited partnerships.

79 In relation to trusts, it is well-established that, although in general terms the only person who may bring an action against a third party on behalf of a trust is the trustee, a beneficiary can, in special circumstances, bring a derivative action so as to stand in the place of the trustee. In *Roberts* v. *Gill & Co. Solicitors* (30), Lord Collins of Mapesbury summarized the position as follows ([2011] 1 A.C. 240, at para. 46):

> "The cases go back to the 18th century, and many of them were reviewed in *Hayim v Citibank NA* [1987] AC 730. The special circumstances which were identified in the earliest authorities as justifying a beneficiary's action were fraud on the part of the trustee, or collusion between the trustee and the third party, or the insolvency of the trustee, but it has always been clear that these are merely examples of special circumstances, and that the underlying question is whether the circumstances are sufficiently special to make it just for the beneficiary to have the remedy …"

80 To like effect is the observation of Lord Walker of Gestingthorpe (*ibid.*, at para. 110) (omitting references):

> "There is ample authority, comprehensively reviewed in the judgment of Lord Collins JSC, as to the need for special circumstances before the court will countenance a derivative action. Such actions are now relatively common in cases concerned with mismanaged companies, and in many jurisdictions actions by or on behalf of minority shareholders are now regulated by a statutory code … Derivative actions by beneficiaries under inter vivos trusts or wills are less common … But in all these cases the unifying factor—what has to be special about the circumstances—is that the derivative action is needed to avoid injustice …"

81 A helpful summary of the position in relation to trusts under the law of England and Wales is to be found in *Lewin on Trusts*, 20th ed., at paras. 47–006 and 47–008, at 1024–1026:

> "47–006. However, as an alternative to proceedings brought in the name of trustees, a beneficiary may, sometimes, bring an action in his name on behalf of the trust against a third party. The fact that the action is brought in the name of the beneficiary rather than the name of the trustee does not alter its character. The action is a derivative action in which the beneficiary stands in the place of the trustees and sues in right of the trust, and does not enforce duties owed to him rather than the trustees; a beneficiary can be in no better position than trustees carrying out their duties in a proper manner …

> 47–008. A beneficiary can bring a derivative action only in special circumstances, *for example circumstances which tend to disable the trustees from suing (as where their acts and conduct with reference to the trust fund are impeached), or circumstances rendering it difficult or inconvenient for the trustees to sue, as where there is a conflict between their interest and duty.* Special circumstances are not confined to circumstances of these kinds. The guiding principle is that there must be exceptional circumstances, which embrace a failure, excusable or inexcusable, by the trustees in the performance of a duty to the beneficiaries to protect the trust estate, or to protect the interests of the beneficiaries in the trust estate. The special circumstances relied on must have something to do with the willingness or ability of the trustee or alleged trustees to bring the action." [Emphasis added]

As can be seen from the emphasized passage, circumstances where the trustees are inhibited from suing because their own conduct in relation to the trust is impeached or they are under a conflict of interest are leading examples of "special circumstances."

82 Turning to English limited partnerships, the question of whether and, if so, in what circumstances a limited partner can bring a derivative claim on behalf of the limited partnership arose in *Henderson* (13) referred to above in para. 31. As we have already stated, although by no means identical, there are similarities between an English limited partnership and an ELP. In particular, neither is a separate legal entity and, as in an ELP, the limited partners in an English limited partnership may not take part in the management of the partnership business which is to be left in the exclusive hands of the general partner. Thus, in the ordinary way, a limited partner cannot sue a third party in the name of the limited partnership; such action can only be taken by the general partner.

83 In *Henderson*, a majority of limited partners instituted derivative proceedings on behalf of the partnership against the general partner and the manager of the partnership (who had been appointed as manager by the general partner on behalf of the partnership). The manager was a sister company of the general partner. The claims sought compensation in respect of various alleged breaches of duty by both the general partner and the manager. It was directed that a preliminary issue should be tried as to whether the claimants could bring derivative claims on behalf of the partnership against the general partner and the manager, and it was this issue which came before Cooke, J.

84 For reasons discussed below, Cooke, J. held that the limited partners could not bring a derivative claim against the general partner. However, having referred to *Roberts* v. *Gill* (30) and to the equivalent passage in the 18th edition of *Lewin* (2007) to that referred to at para. 81 above, he held that special circumstances existed which enabled the derivative claim to be

brought against the manager. The special circumstances were that the general partner had an irremediable conflict of interest because it was a sister company of the manager and was therefore not in a position to be seen fairly to determine whether to sue the manager. Cooke, J. therefore allowed the derivative claim against the manager to proceed, but went on to hold that, under the relevant provision of the English statute, the limited partners would lose their limited liability as a consequence.

85 In summary, Cooke, J. applied the "special circumstances" test concerning trusts (as summarized in *Lewin*) to limited partnerships.

86 Although the ability to bring a derivative action in respect of a company is now governed by statute in England and by the Grand Court Rules in this jurisdiction, the principles governing such claims were developed as a matter of common law. Similarly, the requirement of special circumstances in connection with trusts and limited partnerships has been developed entirely by the courts.

87 The position is different in relation to ELPs because of the terms of s.33(3) of the Act and accordingly we turn next to consider the correct interpretation of that provision.

Interpretation of s.33(3) of the ELPA

88 Unlike in the case of trusts or English limited partnerships, the legislature has prescribed in s.33 ELPA when a derivative action may be brought in respect of an ELP. For convenience we repeat the relevant provisions of s.33 at this stage:

> "(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.
>
> (2) …
>
> (3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings."

As can be seen, the key requirement is that the general partner must have "without cause, failed or refused to institute proceedings."

89 Before the Grand Court, the defendants argued that, when considering s.33(3), the court had to apply principles derived from cases dealing with derivative claims in other contexts. The judge rejected this submission. His conclusion is expressed in his judgment (2022 (1) CILR 12, at paras. 98–101):

Case 1:24-cv-00295-LTS Document 25-2 Filed 05/10/24 Page 40 of 80 PageID #: 5783

> "98 The terms of s.33(3) ELPA which allows a limited partner in an ELP to bring proceedings on behalf of the ELP if the general partner has *without cause failed or refused* to do so has no language requiring permission or special circumstances. In my view the principles taken from the common law or equity for bringing derivative claims whether as regards companies, trusts, limited partnerships or associations are not applicable.
>
> 99 In my judgment s.33(3) is *sui generis* and is not subject to the rules relating to permission or for special circumstances for derivative actions in other contexts. I accept Mr. Allison, Q.C.'s submission that to this extent it can be said to 'occupy the field' in the Cayman Islands with respect to ELPs and there is no room for a case-by-case judge led formulation of a common law or equitable test.
>
> 100 I have, in coming to this view, had regard to the principles Ms. Stanley, Q.C. and Mr. Chapman, Q.C. referred me to relating to cases which dealt with failures or refusals to bring claims in other contexts, for example where the board of the company or the trustee had the relevant inhibition which prevented a decision to bring claims. Whilst these principles provide helpful guidance, the company and trusts law cases to which I was referred do not directly apply to the position in this case which involves the application of a specific statutory test for Cayman Islands ELPs.
>
> 101 I note, however, that the common thread running through those cases is that where the authorized decision maker is inhibited, the court may permit, in the interests of justice, derivative claims." [Emphasis in original.]

90 On appeal, the defendants have argued that the judge fell into error in stating (*ibid.*, at paras. 98 and 99) that the principles applicable in other contexts, such as trusts and companies, are not applicable in relation to the statutory test. At para. 68 of her skeleton argument, Ms. Stanley submitted that "without cause" should be interpreted by reference to the well-established tests applied in all other derivative actions. Similarly, at para. 8 of his skeleton argument, Mr. Chapman submitted that the statutory gateway prescribed by s.33 did not oust the ordinary rules of common law and equity. On the contrary, it provided a *further* statutory hurdle or threshold that had to be met, together with those imposed by the common law and equity, before a derivative claim would be permitted. He submitted that this was a fundamental error in the judge's approach.

91 Conversely, in his skeleton argument, Mr. Allison submitted at paras. 124 and 125 that the judge was correct to hold that s.33(3) "occupies the field" and that there was no scope or reason to import any "special circumstances" test or other common law or equitable principles that apply

to derivative claims in respect of other entities or structures. There was no reason to imply any requirements for derivative claims beyond those explicitly mentioned in s.33(3).

92 It seems to us that, during the course of the hearing, both sides rather modified their submissions and were eventually not very far apart in relation to the proper construction of s.33(3). Thus Mr. Chapman (who by agreement with Ms. Stanley presented the main argument on the derivative claims on behalf of all the defendants) conceded that, to the extent that his written submissions had suggested that one imported wholesale the common law and equitable principles on derivative claims, this might go too far. He accepted that one had to apply the statutory test set out in s.33(3), but submitted that this test was consistent with the established principles and that one derived assistance from those principles when construing and applying the statutory test.

93 Similarly, Mr. Allison accepted that, when applying the statutory test and determining whether the failure by the general partner to institute proceedings was "without cause," one could have regard to the principles established in other contexts, such as whether special circumstances existed.

94 In our judgment, in circumstances where the legislature has established a statutory criterion for bringing a derivative action in respect of an ELP, the courts are duty bound to apply that statutory test. The test cannot be replaced by common law and equitable principles developed in other contexts even if, in the absence of a statutory test, the courts would no doubt have applied those principles to an ELP. Nor can those principles form an additional threshold beyond the statutory test, as submitted by Mr. Chapman in his skeleton argument referred to at para. 90 above.

95 The statutory test is in general and imprecise terms and leaves open how the test should be applied in practice. However, we think that the expression "without cause" must carry the implication of "good" cause. The legislature cannot have intended that a decision for *any* cause, no matter how inhibited or conflicted the decision-maker, would be sufficient to prevent a derivative action. This is so notwithstanding the fact that, as originally enacted, the legislation referred to "good cause" whereas, in its current form, the word "good" is omitted. No guidance as to the reason for this change is to be found in the legislative materials produced in relation to the revision of the statute and we cannot attribute any significance to the change.

96 In these circumstances, we are of the view that the court is entitled to have regard to and may derive assistance from the developed principles in other contexts. In particular, given the existence of the statutory trust imposed by s.16(1) of the ELPA (namely that the general partner holds the property of the ELP "upon trust as an asset of the exempted limited

Case 1:24-cv-00951-LY-SH Document 25-2 Filed 05/10/24 Page 42 of 80 PageID #: 5785

partnership in accordance with the terms of the partnership agreement"), the court is likely to derive assistance from considering whether special circumstances (as established in the contexts of trusts and English limited partnerships) exist.

97 If special circumstances exist, this is likely to assist the court in deciding whether a general partner's decision not to institute proceedings is "without cause." Indeed, in opening his oral submissions on appeal, Mr. Allison (rightly in our view) accepted that, if a general partner were under a relevant inhibition or conflict of interest—concepts which emerge strongly from consideration of special circumstances as stated in the emphasized passage from para. 47–008 of *Lewin* quoted at para. 81 above—his decision would necessarily and unavoidably be "without cause."

98 We emphasize, however, that the court's duty is to apply the statutory test of "without cause"; it is not sufficient simply to consider whether there are special circumstances and, if so, then to allow a claim under s.33(3). Consideration of whether there are special circumstances, if it assists at all, is simply a step on the road to determining the statutory test. If the court decides that the facts would satisfy the special circumstances test, it must nevertheless go on and consider whether they therefore satisfy the "without cause" test in s.33(3). Conversely, we do not rule out the possibility of a case in which the facts enable the court to find that the general partner's decision is "without cause" without consideration of whether there are special circumstances. The two tests are not to be equated, although we envisage that consideration of whether there are special circumstances is likely in most cases to be of considerable assistance in determining whether the decision is "without cause." Indeed, it was common ground before us that a decision by a decision-maker which is made under a relevant inhibition will be a decision "without cause."

99 Although there is some ambiguity and possible inconsistency between paras. 98 and 99 of the judge's judgment on the one hand and para. 100 on the other, we do not see the judge's decision on this aspect as being essentially any different from our own. Paragraphs 98 and 99, when read in context, simply state that the court's duty is to apply the statutory test, not the common law and equitable principles, but para. 100 goes on to explain that, although they are not directly applicable, these principles provide helpful guidance. The fact that such helpful guidance may be obtained is emphasized by the fact that, when he goes on to consider the application of the statutory test to the facts of this case, the judge concentrates exclusively on the fact that, in his view, the GP was subject to an inhibition because of its conflict of interest. Inhibition is not a word which appears in s.33 but, as the judge correctly states at para. 101 of his judgment, it is a concept which is a common thread in the cases which

allows the court to permit derivative claims in other contexts in the interests of justice.

100 Having expressed our view as to the correct interpretation of s.33(3), we turn next to consider a number of supplementary points which were argued before us in relation to the statutory test.

Procedure for determining the statutory test

101 Unlike in the case of companies, there is no requirement under s.33 for a limited partner to seek leave from the court to bring derivative proceedings under s.33(3). It follows that a limited partner is free to commence derivative proceedings without leave.

102 In this respect, the position is the same as derivative claims in respect of companies prior to the introduction by statute and/or rules of court of a requirement for leave and is the same as it remains in respect of trusts and English limited partnerships. But, despite the historical lack of a requirement for leave in respect of companies, it was established as long ago as 1982 in *Prudential* (28) that the question of whether a plaintiff should be permitted to bring a derivative action on behalf of a company should be determined at an early stage rather than left until trial. In *Prudential,* the defendant applied by summons to have heard as a preliminary issue whether the plaintiff was entitled to maintain the derivative action. The judge dismissed the summons on the ground that it was more convenient to decide the issue after the action had been heard. The Court of Appeal was very critical of this decision saying ([1982] Ch. at 221):

> "First, as we have already said, we have no doubt whatever that Vinelott J. erred in dismissing the summons of May 10, 1979. He ought to have determined as a preliminary issue whether the plaintiffs were entitled to sue on behalf of Newman by bringing a derivative action. It cannot have been right to have subjected the company to a 30-day action (as it was then estimated to be) in order to enable him to decide whether the plaintiffs were entitled in law to subject the company to a 30-day action. Such an approach defeats the whole purpose of the rule in *Foss v. Harbottle* and sanctions the very mischief that the rule is designed to prevent."

103 Following *Prudential*, it has been the practice that a plaintiff's standing to bring a derivative action is determined at an early stage in the proceedings rather than the issue being left to trial, with all the disadvantages which that course would bring as described in *Prudential.* Where there is a leave requirement (*e.g.* for companies) the issue is dealt with on the application for leave. Where there is no requirement to obtain leave, the matter is traditionally dealt with on an application by the defendant to strike out the proceedings on the ground of a lack of standing

on the part of the plaintiff or by the court ordering, at the request of the defendant, the trial of a preliminary issue as to whether the plaintiff has the necessary standing to bring a derivative action.

104 The practice was conveniently summarized by Chadwick, P. in this court in the case of *Autumn Hldgs. Asset Inc.* v. *Renova Resources Private Equity Ltd.* (2) (2017 (2) CILR 136, at para. 26), where he quoted with approval from the judgment of Ribeiro, P.J. in the Hong Kong Final Court of Appeal in the case of *Waddington Ltd.* v. *Chan Chun Hoo Thomas* (41) where that learned judge said ([2009] 2 BCLC 82, at paras. 13–14):

> "[13] … Procedurally, there is no requirement at common law for a person seeking to sue derivatively first to obtain the leave of the court …
>
> [14] The time honoured practice at common law is for the plaintiff to issue proceedings 'on behalf of himself and the other shareholders other than the defendants', naming the company on whose behalf the proceedings are brought as one of the defendants. A challenge to the plaintiff's locus generally takes the form of an application by the relevant defendants to strike out the claim or to have the court determine as a preliminary issue that the plaintiff has no locus to sue on the company's behalf."

105 In our judgment, this is also the appropriate procedure to be followed in relation to proceedings brought under s.33(3). The subsection is clear that a limited partner may only *bring* a derivative claim if the general partner has refused or failed to do so without cause. It is therefore necessary for the court to decide at an early stage of the proceedings whether the limited partner can indeed bring himself within s.33(3) and therefore "bring" the claim. For the reasons set out so graphically in *Prudential* (28), this is not a matter which should normally be left until trial. We agree therefore that a defendant wishing to challenge the right of a limited partner to have instituted proceedings on behalf of an ELP pursuant to s.33(3) should do so either by applying to strike out the proceedings on the ground of a lack of standing (as was done in this case) or by applying for the court to direct the trial of a preliminary issue as to the limited partner's ability to bring himself within subs. (3).

106 The question then arises as to the approach which the court should adopt on such an application. In the first place, it is clear that the outcome cannot depend on which of the two courses a defendant chooses to follow. The court's approach must therefore be the same whether there is a strike out application or the trial of a preliminary issue.

107 The judge held that, as this was a strike out application, the normal approach on such an application should be adopted, with the result that the defendants had to show that it was certain that, at trial, the plaintiffs would

fail to bring themselves within the terms of s.33(3); see *Hughes* v. *Colin Richards & Co.* (15), cited with approval in *In re SPhinX Group* (37) (2010 (1) CILR 234, at para. 37). The burden lay upon the defendants to show this and there was no burden on the plaintiffs to show that they came within s.33(3). If there was an arguable case that at trial the plaintiffs would be able to satisfy the requirements of that subsection, that was sufficient to enable the case to proceed.[11] It would only be at trial that it would be finally resolved whether the plaintiffs had brought themselves within s.33(3).[12] Although at times the judge used slightly inconsistent language about his approach,[13] we are satisfied that he essentially applied the test we have just described and which he spelt out at 2022 (1) CILR 12, para. 33. Mr. Allison submitted that the judge had followed the right approach.

108 Mr. Chapman, on the other hand, submitted that this was the wrong approach. In his submission, the onus lay upon the plaintiffs to satisfy the court that they came within s.33(3), *i.e.* that the GP had refused or failed to institute proceedings without cause.

109 In other contexts, the onus lies upon a plaintiff to satisfy the court that he should be permitted to bring a derivative action. Thus in *Prudential* (28), after the passage cited above, the Court of Appeal went on to say ([1982] 1 Ch. at 221–222):

> "… [W]e do not think that the right to bring a derivative action should be decided as a preliminary issue upon the hypothesis that all the allegations in the statement of claim of 'fraud' and 'control' are facts, as they would be on the trial of a preliminary point of law. In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a prima facie case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v. Harbottle.*"

This approach has been followed in this jurisdiction in relation to companies; see *Top Jet Enterprises Ltd.* v. *Sino Jet Holding Ltd.* (40) (2018 (1) CILR 18, at para. 29, *per* Segal, J.).

110 It is not entirely clear what standard the Court of Appeal in *Prudential* was intending to set by referring to a plaintiff "at least" being required to establish a "prima facie" case that he falls within the exception to the rule in *Foss* v. *Harbottle* (11). Some assistance can be derived from

---

11 2022 (1) CILR 12, paras. 33, 119, 123.
12 2022 (1) CILR 12, paras. 33(ii), 138.
13 Thus at 2022 (1) CILR 12, para. 102 the judge refers to "good arguable case" and paras. 106 and 136 might be said to suggest that he was in fact making a clear finding that D1 had failed without cause to bring proceedings rather than that it was simply arguable.

the subsequent judgment of Knox, J. in *Smith* v. *Croft (No. 2)* (35) ([1988] Ch. at 138–139), approved in *Top Jet* (2018 (1) CILR 18, at para. 30) as follows:

> "My conclusion is that it is the question stated by the Court of Appeal that has to be decided as a preliminary matter, that it is a special form of procedure concerned with giving sensible operation to the rule in *Foss v Harbottle* … and which is concerned with avoiding the Scylla and Charybdis, on the hand of having a preliminary issue which effectively requires one to try the whole action where the rules serves no useful purpose, and on the other side of the strait, of assuming that everything the plaintiffs allege is necessarily correct as a matter of fact, which is of course the technique the court adopts when it has was called a strict demurrer. The Court of Appeal has laid down a halfway house for this very special type of case, one in which the legal issues in this particular case are sufficiently well defined for the parties to be able to argue them."

In other words, the approach should be a halfway house between a strike out application and a full trial.

111 When pressed during the hearing as to what he thought the Court of Appeal meant by a *prima facie* case, Mr. Allison suggested that it meant a good arguable case and that was in fact an expression the judge used at para. 102 of his judgment, despite his references (see para. 107 above) to mere arguability being the test. This court recently had occasion to consider what was meant by the expression "good arguable case" in *Scully Royalty Ltd.* v. *Raiffeisen Bank Intl. Ltd.* (32) (2022 (1) CILR 118, at paras. 47–52). In particular, the court approved the observation of Mustill, J. in *Ninemia Maritime Corp.* v. *Trave Schiffahrts G.m.b.H. und Co., The Niedersachsen* (24) ([1983] 2 Lloyd's Rep. at 605) where he said:

> "I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success."

112 During the hearing, the court invited counsel to ascertain whether recent English decisions in relation to derivative actions offered any assistance as to the standard to be applied when considering whether the grounds for permitting a derivative action had been made out. However, counsel's researches were unable to come up with anything of significant assistance.

113 Mr. Chapman referred us to the decision of the English Court of Appeal in *Barrett* v. *Duckett* (5), which was decided before the requirement for leave in relation to companies was introduced by statute. This was a case where B & D each held a 50% shareholding in a company. B instituted

a derivative action against D and others on behalf of the company alleging wrongdoing by D and others, D being the sole director of the company. The defendants applied to strike out the claim on the basis that it was not a proper case for a derivative action. In the course of his judgment, Peter Gibson, L.J. sought ([1995] 1 BCLC at 249) to summarize the principles in relation to derivative actions concerning companies in the following terms (omitting passages not relevant for our purposes):

> "The general principles governing actions in respect of wrongs done to a company or irregularities in the conduct of its affairs are not in dispute:
>
> 1. The proper plaintiff is prima facie the company.
>
> 2. …
>
> 3. There are however recognised exceptions, one of which is where the wrongdoer has control which is or would be exercised to prevent a proper action being brought against the wrongdoer: in such a case the shareholder may bring a derivative action (his rights being derived from the company) on behalf of the company.
>
> 4. When a challenge is made to the right claimed by a shareholder to bring a derivative action on behalf of the company, it is the duty of the court to decide as a preliminary issue the question whether or not the plaintiff should be allowed to sue in that capacity.
>
> 5. In taking that decision it is not enough for the court to say that there is no plain and obvious case for striking out; it is for the shareholder to establish to the satisfaction of the court that he should be allowed to sue on behalf of the company.
>
> 6. …"

114 Mr. Chapman relied in particular on the second part of 5 above, namely that it is for the shareholder to establish to the satisfaction of the court that he should be allowed to sue on behalf of the company. He submitted not simply that this places the onus on the shareholder, which we accept, but that it means that the shareholder must establish his ability to sue on the balance of probabilities. He says that *Barrett* changed the test set out in *Prudential* (28), with its reference to a *prima facie* case.

115 We are unable to place such weight on the decision in *Barrett*. Peter Gibson, L.J. was simply recording general principles, which were not in dispute. We do not think that it assists on how a shareholder satisfies the court that he should be allowed to sue on behalf the company. What is made clear, however, in the first part of 5 above is that the court should not apply the normal strike out test. It is therefore inconsistent with the approach which the judge adopted in the present case.

116 It is perhaps of note that the relevant provisions of the English Companies Act set out a number of factors which the court should consider when deciding whether it should allow a derivative action, but the matter is ultimately left to the court as a matter of evaluation. In our judgment, that approach is consistent with the observation of Lord Collins ("the underlying question is whether the circumstances are sufficiently special to make it just for the beneficiary to have the remedy") and Lord Walker ("the unifying factor—what has to be special about the circumstances—is that the derivative action is needed to avoid injustice") in *Roberts* v. *Gill* (30) quoted above in relation to special circumstances.

117 It is clear that, whether the matter is being considered on a strike out application or on the trial of a preliminary issue, the court should not hold a mini trial in order to decide whether the criterion in s.33(3) is met. However, it should, as in the present case, permit the parties to adduce affidavit evidence on the topic. Ultimately, the court must then reach a view on the material provided to it.

118 Whilst reference to a "good arguable case" may in some cases be a helpful criterion, in our judgment the task is ultimately an evaluative one. The court must decide, on the basis of the material before it, whether the likelihood of the general partner having failed or refused to institute proceedings without cause is sufficient to lead the court to conclude that a derivative action should be permitted in the interests of justice. In reaching this evaluative conclusion, the court will no doubt have regard, *inter alia*, to the strength of the evidence that the general partner has failed or refused to institute proceedings without cause, the strength of the underlying claim which is sought to be brought and the likelihood and nature of any injustice if the derivative claim is not permitted.

119 For these reasons, we respectfully disagree with the judge that, because this was a strike out application, the burden was on the defendants and he only had to consider whether it was merely arguable that the plaintiffs met the statutory criterion in s.33(3). That was to set the bar too low. It follows that, as Mr. Chapman submitted, he erred in this respect.

120 However, we have before us the same affidavit evidence that was before the judge and accordingly we propose to reach our own decision, applying the approach we have just described.

Timing

121 As occurred in this case, and as will invariably be the position, given that there is no requirement for leave before commencing an action in reliance on s.33(3), the hearing of a strike-out application or a preliminary issue as to whether the claim falls within s.33(3) will take place at some point after the action is begun. The question then arises as to whether the

court should assess compliance with s.33(3) by reference to the facts at the time of commencement of the action or as at the date of the hearing of the strike out or preliminary issue.

122 The judge held (2022 (1) CILR 12, at paras. 127–128) that the question of whether the general partner had failed or refused to bring a claim without cause was to be judged on the relevant facts as they were at the time the proceedings were commenced.

123 The plaintiffs support the judge's decision. They point out that the words "failed or refused" in s.33(3) are in the past tense, which suggests that the relevant failure or refusal must have taken place before the date of institution of the derivative claim.

124 We do not agree with the judge's decision on this point, essentially for the reasons advanced by Mr. Chapman. The plaintiffs' approach would require the court to ignore anything that has happened between the institution of the proceedings and the hearing of the relevant strike out application/preliminary issue. This could lead to highly unsatisfactory results. Thus, suppose that, after the institution of the proceedings, a new general partner was appointed with completely separate ownership, so there was no longer any question of an inhibition or conflict of interest. Suppose further that the new general partner has reviewed the alleged claim and decided in good faith on commercial grounds to maintain the decision of the former general partner not to institute proceedings against the alleged wrongdoer.

125 In our judgment, the legislature cannot have intended that the court should allow a derivative claim to proceed in circumstances where, as at the date of the hearing of the strike out or preliminary issue, the requirements of s.33(3) are not met because, for example, any inhibition of the general partner has disappeared. In our judgment, the natural meaning of s.33(3) is that the court should consider the issue of whether the requirements of the subsection are met by reference to the facts as they are at the time of the hearing of the strike out or preliminary issue. Mr. Allison submitted that the court could surmount any difficulty which his construction of s.33(3) might cause by taking any change of circumstances into account when considering whether to exercise its discretion to allow the derivative claim to proceed. However, we do not see that as a satisfactory solution, nor is it in our view consistent with the natural meaning of s.33(3).

126 Whilst by no means determinative—because the legislation is not the same—we note that in England and Wales, in the context of derivative actions for companies, the court does take into account events which have occurred between the institution of the proceedings and the hearing before the court as to whether the derivative action should be allowed to proceed: see, for example, the decision of Newey, J. in *Kleanthous* v. *Paphitis* (18), where the judge placed great weight on the fact that, since the institution

of the proceedings, the company had appointed a special committee of independent directors which had decided that the company should not bring or continue the claim which the plaintiff was seeking to bring derivatively.

127 In our judgment therefore, a judge hearing a strike out application or preliminary issue in relation to an ELP should consider whether the test in s.33(3) is met by reference to the facts as they appear at the time of the relevant hearing.

Pleading

128 In relation to the derivative claim against D1, para. 25 of the ASOC pleads:

> "In the alternative, if and to the extent that the claims set out in this Statement of Claim (or any of them) are properly regarded as and/or must be brought as derivative claims on behalf of TPF, the Plaintiffs will contend that Port Link has without cause failed to initiate proceedings on behalf of TPF against itself (and there is no real prospect of it doing so) such that the requirements of section 33(3) of the Exempted Limited Partnership Act (2020 Revision) (the 'ELP Act') are satisfied, such that the Plaintiffs should be permitted to prosecute the relevant claims on behalf of and in the name of TPF."

129 In relation to the derivative claims against D2, D3 and D4, para. 25B of the ASOC pleads:

> "The balance of the claims against Mr Williams and Wellspring and the claim against KGLI Asia are brought by the Plaintiffs as derivative claims on behalf of TPF in circumstances where Port Link has without cause failed to initiate proceedings on behalf of TPF against those parties and there is no real prospect of it doing so. Not only did Port Link fail to commence such claims; as described in paragraph 4 above, it deliberately withheld from the Limited Partners the information upon which the claims are based. In the premises, the requirements of section 33(3) of the ELP Act are satisfied such that the Plaintiffs should be permitted to prosecute these claims on behalf of and in the name of TPF."

130 The judge held (2022 (1) CILR 12, at para. 127) that para. 25B of the ASOC was sufficient to enable the defendants to understand the gist of the case, which had also been factually set out in the detailed evidence filed in the strike out applications.

131 That conclusion was criticized by Mr. Chapman. He submitted that it was necessary for a limited partner to plead the facts and matters relied upon as allowing the limited partner to bring a derivative claim pursuant to

s.33(3) and that the particulars in this case were wholly inadequate to serve that purpose. Thus, there was no pleading of the facts and matters relied upon to show that D1 as general partner was under an inhibition or suffered from a conflict of interest.

132 Mr. Allison, on the other hand, submitted that the facts and matters relied upon emerged with sufficient clarity from the detailed allegations of wrongdoing against D1 and the other defendants set out in the ASOC.

133 In our judgment, the ASOC was inadequately pleaded in this respect. In *Roberts* v. *Gill* (30), Lord Walker, in relation to a derivative claim on the grounds of special circumstances concerning an estate or trust, said this (2011] 1 A.C. 240, at para. 103):

> "So while he need not obtain prior leave from the court, he must plead the special circumstances entitling him to the court's indulgence. Those special circumstances are part of his cause of action."

134 In our judgment, the position is analogous in cases brought pursuant to s.33(3). There is no requirement for leave but a limited partner may only bring a claim where the general partner has failed or refused to bring proceedings without cause. The failure or refusal without cause is part of the cause of action brought by the limited partner and must therefore be pleaded. In our judgment, it is not sufficient simply to plead the wording of s.33(3) as was done by the plaintiffs in this case. A limited partner must plead the facts and matters relied upon as showing that he comes within the provisions of s.33(3).

135 What is relied upon by the plaintiffs in this case is that D1 as general partner is under a clear inhibition arising from its conflict of interest. The facts and matters relied upon as showing that this was so should therefore have been pleaded. Accordingly, we differ from the judge's assessment that the pleading was adequate. However, we are satisfied that no prejudice has been caused to the defendants by this failure. As the judge correctly stated, the points of issue emerge very clearly from the evidence filed during the strike out applications and it is clear that the defendants knew the case which they had to meet. We therefore decline to decide this case on a technical pleading point, although we emphasize, for the future, that simply pleading that a claim is brought pursuant to s.33(3) is not sufficient and that a plaintiff must plead the facts and matters relied upon as showing that he falls within the subsection.

Need for a request to sue

136 It is common ground that the plaintiffs in this case did not request or demand that D1 as general partner bring proceedings against D2–D4. Mr. Chapman submits that there must be such a request before a general partner

can be said to have failed or refused to bring such proceedings. We agree that the word "refused" implies the existence of a request. However, this is not so in relation to the word "failed." A general partner can be said to have "failed" to bring proceedings if he simply has not brought such proceedings.

137 Whilst it will often be the case that, before instituting derivative proceedings under s.33(3), a limited partner will have requested the general partner to institute the relevant proceedings, it is not a necessary pre-condition that he has done so. In this case, it is perfectly apparent from the evidence that D1 has not brought the relevant proceedings and has no intention of doing so. As outlined earlier, it has reached a decision not to institute proceedings even following the change in the board of directors by the appointment of the FFP directors. The requirement of s.33(3) that the general partner has failed to bring proceedings on behalf of TPF has obviously been satisfied.

Discretion

138 It is well established in other contexts that the court has a discretion whether or not to allow a derivative claim even where the relevant ground for the bringing of such an action (*e.g.* an exception to the rule in *Foss* v. *Harbottle* (11) in the case of companies and "special circumstances" in the case of trusts or limited partnerships) is met. Although there is no reference to the existence of a discretion in s.33(3) itself, the judge considered that he had such a discretion and it was common ground before us that there is such a discretion.

139 Thus, even if it be satisfied that a plaintiff can bring himself within s.33(3), the court may in its discretion decide that he should not be permitted to continue the derivative claim. One relevant factor in the exercise of this discretion is likely to be whether the plaintiff has an alternative remedy, so that a derivative action is not required in order to avoid injustice.

Summary

140 Pulling the threads of the above discussion together, we would attempt to summarize our conclusions in relation to s.33(3) as follows:

(i) There is no requirement for leave to bring derivative proceedings under s.33(3). A limited partner may simply institute such proceedings.

(ii) A limited partner must however plead the facts and matters relied upon as showing that he can bring himself within the requirements of the subsection because this forms an essential part of his cause of action.

(iii) If a defendant wishes to raise an issue as to the standing of a limited partner to bring such derivative proceedings, he should do so by means of a strike out application or seek the trial of a preliminary issue.

(iv) Whichever of these routes is chosen does not affect the test which has to be applied in deciding whether s.33(3) is complied with and whether a limited partner should be permitted to continue with the derivative claim.

(v) The decision of the court on such an application or preliminary issue is determinative (subject to appeal). If the court holds that the derivative claim may be continued, the limited partner thereafter has the necessary standing to pursue the claim. It is not an issue which is deferred until or revisited at trial (save possibly in the context of costs at the end of the trial).

(vi) The court should not conduct a mini trial as to whether the requirements of s.33(3) are satisfied. The court has to reach its decision on the basis of the material before it, which will be more limited than it will be following discovery and trial.

(vii) At the hearing, the onus is on the limited partner to satisfy the court that the requirements of s.33(3) are met. Reference to "onus" is not to be mistaken as a reference to a "burden" in the sense of having to show something on the balance of probabilities.

(viii) The essential task for the court at such a hearing is to determine whether the limited partner has brought himself within the terms of s.33(3), namely that the general partner has failed or refused to bring the relevant proceedings without cause.

(ix) In determining this issue, the court is likely to be assisted by consideration of whether special circumstances (as developed in cases concerning trusts, limited partnerships and other entities) exist, but the court's task remains one of applying the statutory test set out in s.33(3).

(x) Whilst reference to a "good arguable case" may be a helpful indicator of the level of comfort which the court should have when deciding whether the requirements of s.33(3) are met, the court's task is essentially an evaluative one having regard to the facts as they appear to the court at that stage of the proceedings from the material before the court and the need to avoid injustice balanced with the need to respect the fact that a derivative action is an exception to the general principle in the ELPA that management (including decisions as to litigation) of an ELP is for the general partner, not the limited partners. As stated at para. 118 above, the court should consider, *inter alia*, the strength of the evidence that the general partner has failed or refused to institute proceedings without cause, the strength of the underlying claim which is sought to be brought and the likelihood and nature of any injustice if the derivative claim is not permitted.

Case 1:26-cv-20251-RNS Document 1-2 Filed 01/16/26 Page 54 of 80 PageID #: 5797

(xi) The court should reach its decision as to standing by reference to the facts as they appear at the date of the hearing of the strike out or preliminary issue.

(xii) Even where the requirements of s.33(3) are met, the court has a discretion as to whether to permit a derivative claim to continue. One of the factors which is likely to be relevant in exercising that discretion is whether the plaintiff has an alternative remedy.

Application to the facts

(a) ***The claim against D1***

141 It is to be recalled that, as described at para. 75 above, a derivative action allows a party to bring a claim in the name of and on behalf of a second party against a third party for loss and damage caused to the second party. It follows that the second party must have a claim against the third party before the first party can be permitted to bring such a claim derivatively.

142 Ms. Stanley submits that, regardless of whether the test in s.33(3) is otherwise met (*i.e.* that D1 is subject to an inhibition which makes its decision in relation to potential proceedings one which is without cause), there is a more fundamental reason why the derivative claim against D1 should be struck out, namely that, on the judge's finding, the ELP has suffered no loss or damage and therefore has no claim of its own to bring.

143 The judge said (2022 (1) CILR 12, at para. 63):

> "It follows that where an ELP is alleged to have suffered loss, as in this case, that is the loss of each of the limited partners. There is no distinct or separate loss in respect of 'the partnership' (TPF), which as an entity does not exist at law."

144 To similar effect is the decision of Cooke, J. in *Henderson* (13) in relation to limited partnerships ([2012] EWHC 3259 (Comm), at paras. 28–32). Thus at para. 28 he said:

> "The Partnership, unlike a limited company, does not possess a corporate legal personality. Like an ordinary partnership under the Partnership Act, 'the Partnership' is simply a convenient way of referring to the body of partners as a whole. In my judgment therefore, no difficulty arises for a Limited Partner's claim against the General Partner, regardless of whether or not removal and substitution of the General Partner is possible. The claim to be made against the General Partner is that of the individual Limited Partners and is not a Partnership Asset. Each Limited Partner has its own contractual or fiduciary claim for its own loss, where the inter-relationship with the General Partner is governed by the RPA. *The Partnership, which*

consists of the Limited Partners and the General Partner together has no form of joint right or claim against the General Partner, as the claimants suggest." [Emphasis added.]

145 We are not to be taken as agreeing that this is correct. As already stated, s.16(1) of the Act provides that the general partner will hold the assets of the ELP upon trust. In the case of a trust, whilst a beneficiary undoubtedly has a direct claim against the trustee for breach of trust, the appropriate remedy (as discussed above by reference to *Target* v. *Redferns* (38)) is for an order that the trustee restore the trust fund to what it would have been had the breach not been committed. Such a claim may be brought by one or more beneficiaries, but a successor trustee will often bring such a claim against a former trustee for breach of trust on behalf of the trust as a whole and will hold any sums recovered from the former trustee upon the terms of the trust. Thus, even though like an ELP, a trust is not a separate legal entity, it can properly be said that the trust as well as a beneficiary has a claim against a trustee for breach of trust and that such a claim can be considered as an asset of the trust. It seems to us strongly arguable that the position is the same in relation to an ELP, particularly given that the general partner is also a trustee.

146 However, there has been no respondents' notice in respect of the above finding of the judge and indeed the plaintiffs have not sought to argue that the judge was wrong in this respect. What they say is that the judge was correct in what he said (2022 (1) CILR 12, at para. 64) where, immediately following the passage quoted above in para. 143 above from para. 63, he said:

"64 I therefore find that the direct claims in respect of the individual partners' losses are vested in the limited *partners* alone, and are not claims that can be brought on behalf of TPF derivatively, except in the circumstances permitted by s.33(3) of the ELPA where the limited partners who wish to obtain redress for TPF are in effect put in the place of the GP, and bring claims on behalf of TPF." [Emphasis in original.]

147 With respect to the learned judge we cannot accept that s.33(3) permits a claim in such circumstances. The subsection presupposes that there is a claim to be brought by the general partner on behalf of the partnership. If, as the judge held, the partnership has no claim against the general partner, there can be no failure by the general partner to bring such a claim without cause.

148 Even if we are wrong on this point, there is a second reason for not permitting the derivative claim against D1 as a matter of discretion; that is because the plaintiffs as limited partners have an adequate alternative remedy.

149 As we have held earlier in this judgment, a limited partner has the right to claim against a general partner for breach of duty on the part of the general partner. In the event of such a claim succeeding, the appropriate remedy will almost certainly not be an award of equitable compensation to the particular limited partners who have sued (thereby potentially causing difficulties in relation to those who have not also joined in the action and in respect of creditors of the ELP), but instead an order that the general partner restore the trust fund as outlined in *Target* v. *Redferns*.

150 In these circumstances, exactly the same will be achieved by a direct claim as would be the case in a derivative action. In the event of the plaintiffs succeeding in their direct claim, the estate of the ELP will be made whole by payment from the general partner pursuant to an order for restoration of the trust fund. Success in a derivative action would have the same result. Accordingly, there is simply no need for a derivative action; it would add nothing to the direct claims brought by the limited partners coupled with an order for restoration of the trust fund in the event of such claims succeeding. Indeed, during oral argument, Mr. Allison accepted that, if the plaintiffs have a valid direct claim against D1 for which restoration of the trust fund can be awarded, there would be no need for the derivative action. In those circumstances, we conclude that, as a matter of discretion, the derivative claim against D1 should not be permitted.

151 Accordingly, for both of the above reasons, we strike out the derivative claim of the plaintiffs against D1.

(b) ***The claims against D2–D4***

152 We have described the claims brought against the various defendants at paras. 13–16 above. The relevant features for present purposes can be summarized as follows:

(i) The plaintiffs invested some 65% of the total amount invested in TPF.

(ii) Other limited partners, who invested 15.14%, have instituted broadly similar claims against D2 and D3 in the State of Georgia, USA. Thus a total of 80.3% by value of limited partners are litigating on the basis of alleged serious wrongdoing on the part of the GP.

(iii) Of the remaining 19.7% (by value), 14% are associated with the GP.

(iv) The plaintiffs allege that D1 as the general partner has been guilty of wrongdoing which has caused TPF loss said to be well in excess of US$100m.

(v) The claims against D1 essentially allege that, in breach of its fiduciary, contractual and other duties, it acted contrary to the interests of TPF and the limited partners by making substantial payments, using TPF's moneys, that were not for the benefit of TPF and/or the limited partners.

Amongst these is the alleged sham settlement of the DIFC proceedings brought against it in the DIFCC as a result of which the Wellspring payment of US$59,990,461.30 was paid to D3. The ASOC alleges that D1 conspired with, amongst others, D2 (Mr. Williams) and D3 (Wellspring) to cause loss to TPF and/or the limited partners by unlawful means in relation to the DIFC proceedings and the Wellspring payment.

(vi) The claims against D2 are that he orchestrated the DIFC proceedings and the Wellspring payment and was accordingly party to the above conspiracy. It is further alleged that he dishonestly assisted in D1's breach of trust/fiduciary duty, knowingly procured D1 to breach its contractual duties and was in breach of fiduciary duties he owed to TPF and/or D1.

(vii) The claims against D3 are for knowing receipt of the Wellspring payment, conspiracy in relation to the Wellspring payment and the DIFC proceedings and for repayment of the Wellspring payment pursuant to s.4 of the Fraudulent Dispositions Act (1996 Revision).

(viii) The claim against D4 is for knowing receipt in respect of a number of payments said to have been made to it in breach of trust and/or fiduciary duty by D1 as general partner.

153 The judge held (2022 (1) CILR 12, at para. 106) that s.33(3) required a finding as to whether the GP (*i.e.* the relevant corporate entity) has failed or refused to institute the proceedings without cause, not the directors at the relevant time. He concluded (*ibid.*, at para. 102) that there was a good arguable case that D1 had and still has a relevant inhibition because it is conflicted in relation to the plaintiffs' claims. Its decision not to bring the claims against D2–D4 was infected and made unsafe by the facts giving rise to its conflict of interest.

154 The underlying facts in relation to the inhibition were not disputed before us and would appear to be as follows:

(i) Mr. Williams, D2, is the sole shareholder of PLH, a Delaware company, which in turn is the sole shareholder of D1. Thus Mr. Williams is the sole ultimate beneficial owner of the general partner of TPF. He was the investment director of TPF's sponsor and placement agent from 2009–2011 and a member of the Investment Committee of TPF from 2009–2013.

(ii) On January 23rd, 2020, he was appointed as the authorized representative of D1 in relation to proceedings against D1 by certain limited partners (including the first plaintiff) pursuant to s.22 of the ELPA seeking disclosure of full information regarding the state of the business and financial condition of TPF. The resolution conferred full authority on Mr. Williams to take all necessary actions in relation to the s.22 proceedings. The application of the limited partners under s.22 was opposed by D1 at a time when the FFP directors were in post and eventually Parker, J. ruled against D1 and ordered it to make disclosure. Thereafter, D1 sought to

Case 1:24-cv-00295-LTS Document 125-2 Filed 05/10/26 Page 58 of 80 PageID #: 5801

appeal that decision but the appeal was eventually compromised and D1 agreed to provide the necessary information.

(iii) Mr. Williams is the CEO, CFO, President, Vice-President, Treasurer and Secretary of D3, Wellspring. The company is owned by the Mark E. Williams Living Trust, of which Mr. Williams, his wife and brother are the trustees. The ASOC pleads that it is to be inferred that the beneficiaries are also Mr. Williams' family.

(iv) D4, KGLI Asia is a company incorporated in the Cayman Islands and Mr. Williams was its CEO from January 1st, 2012.

155 As can be seen therefore, Mr. Williams is the ultimate beneficial owner of the GP and has very close connections with Wellspring and KGLI Asia.

156 In considering whether D1 as the general partner would be under an inhibition in relation to the taking of proceedings against D2–D4, it is useful to refer to the case of *Henderson* (13). The facts of that case are summarized at paras. 83–84 above. Certain limited partners of an English limited partnership sought to bring a derivative action against, *inter alia*, the manager, who had been appointed by the general partner and was a sister company of the general partner.

157 Cooke, J. held ([2012] EWHC 3259 (Comm), at para. 59) that as a result the general partner had an irreconcilable conflict of interest in relation to whether to institute proceedings against the manager and this constituted "special circumstances" which therefore justified the limited partners being able to bring a derivative claim. In coming to that conclusion, he held that (i) the ability (which was not straightforward) under the limited partnership agreement for the limited partners to remove and replace the general partner, and (ii) the ability of the limited partners to sue the general partner for wrongly failing to institute proceedings against the manager, were not satisfactory alternative remedies so as to refuse the limited partners the ability to bring a derivative claim.

158 We respectfully agree with the decision of Cooke, J. in *Henderson.* In our judgment there is a similar conflict of interest in the present case. On the plaintiffs' case, D1 as the general partner was deeply involved in all the alleged wrongdoing, as was Mr. Williams. D1 has to decide whether to institute proceedings against D2–D4 in circumstances where:

(i) The essential wrongdoing giving rise to the claims against D2–D4 was that of D1 itself in making the various payments and where it is said to be part of the unlawful means conspiracy to injure TPF involving Mr. Williams and Wellspring.

(ii) The contemplated proceedings would have to be brought against the beneficial owner of the GP and against two companies in which Mr.

Williams is deeply and closely involved, namely Wellspring and KGLI Asia.

(iii) D1 would also have to consider whether (as general partner) it should sue itself (in its own right) as a co-conspirator in the alleged unlawful means conspiracy.

159 On the face of it, by reason of the obvious and serious conflict of interest, D1 is under an inhibition which would amount to special circumstances in the context of a trust or limited partnership and this inhibition also means that the failure by D1 to bring proceedings against D2–D4 is without cause for the purposes of s.33(3).

160 However, the defendants say that this is not the position for two associated reasons. First, they point out that the present directors of D1, namely the FFP directors, are wholly independent and were not in office at the time of the alleged wrongdoing on the part of D1. They do not therefore suffer from any conflict of interest. They are in a position to bring an independent and impartial view to bear on whether claims should be brought against D2–D4 and in this respect are in the same position as a liquidator of a company who has to decide whether to bring a claim against former directors or other parties for injury caused to a company. The defendants point out that, as summarized in the third affidavit of Mr. Lewis, the FFP directors have reviewed the position thoroughly with the benefit of legal advice and have concluded that the interests of TPF are best served by not instituting any claims against D2–D4 for the reasons there set out.

161 It is clear, submit the defendants, that the court must give great weight to the commercial judgment of those who have responsibility for the management of the relevant entity under the constitutive documents; see for example the observation of the Lewison, J. in *Iesini* (17) quoted at para. 77 above.

162 Secondly, they submit that the independence of the FFP directors is fortified by the fact that Mr. Williams has given an undertaking that the shareholder of the GP will not exercise any powers so as to remove the FFP directors or interfere in any way in the exercise of their functions. Thus, submit the defendants, the FFP directors are, and are seen to be, free to act independently.

163 In our judgment, these submissions do not overcome the inhibition referred to earlier. In relation to the first point, the judge was in our view correct to focus on the entity which is the general partner rather than the directors for the time being of that entity. Section 33(3) refers to the "general partner" having failed or refused to bring proceedings without cause. The general partner is the legal entity D1. D1 is subject to the conflicts of interest we have summarized above and thus cannot be seen to be in a position to take a fair and independent decision about the potential

litigation. New directors are not in the same position as a liquidator, who is appointed by and subject to the supervision of the court and therefore clearly is and is seen to be independent of the company, its directors and shareholders. The FFP directors owe a fiduciary duty to act in the best interests of D1. The defendants submitted that because D1 owes fiduciary duties to act in the best interests of the partnership, the FFP directors therefore have a duty to act in the best interests of TPF. However, there is certainly the potential for conflict between acting in the best interests of TPF (which might include taking action against D1 as a co-conspirator) and acting in the best interests of D1 (which might be said to include the avoidance of being sued).

164 In connection with the undertaking, we were referred to the case of *St. John's Trust Co. (PVT) Ltd.* v. *Medlands (PTC) Ltd.* (31) ("*B Trust*"), a decision of the Court of Appeal of Bermuda. That was a case which involved a number of issues but for present purposes it is sufficient to say that one of the issues before that court was whether it would be appropriate to reappoint St. John's Trust Co. (PVT) Ltd. ("SJTC") as trustee of the B Trust. SJTC was wholly owned by a company, Cabarita, which was in turn wholly owned by a Mr. T. Mr. T was said to have misappropriated funds from the B Trust and there were ongoing proceedings against him in this respect.

165 Mr. T had appointed two independent directors of SJTC and, before the Bermuda Court of Appeal, he proffered an undertaking not to interfere with the appointment of these two individuals. Despite this, the Bermuda Court of Appeal held ([2021] CA (Bda) 20 Civ, at para. 62) that it was clearly not appropriate for SJTC to be trustee. It would be contrary to the interests of the beneficiaries for Mr. T to have any control or influence over the B Trust. This would be possible, despite his undertaking, by reason of his ownership of Cabarita which owned SJTC. The undertaking did not meet the fundamental issue of Mr. T's potential influence.

166 Mr. Chapman sought to distinguish *B Trust* on three grounds. First, he pointed out that Mr. Williams is only an *indirect* beneficial owner of D1, but that was also the case in *B Trust* as Mr. T owned Cabarita which owned SJTC. Secondly, he referred to the undertaking by Mr. Williams not to interfere. However, an undertaking was also given by Mr. T in *B Trust* and this did not persuade the Bermuda Court of Appeal that his potential influence was thereby negated. Thirdly, he submitted that *B Trust* was concerned with whether there might be interference in the future by Mr. T whereas the present case was concerned with a decision (namely not to issue proceedings) which had already been taken. However, we do not see that this is a significant point of difference. The fact is that the decision as to whether to institute proceedings on behalf of TPF involved consideration by the GP of whether to sue itself as an alleged co-conspirator and whether

to sue its beneficial owner and two closely linked companies in circumstances where the claims were said to arise on the basis of the wrongdoing of the GP and its beneficial owner.

167 We find the reasoning of the Court of Appeal of Bermuda to be persuasive. In our judgment, the undertaking given by Mr. Williams is insufficient to overcome the inhibition from which D1 as general partner suffers. If one stands back and considers how it would appear to the plaintiffs (who allege that there has been serious wrongdoing by D1–D4 which has cost TPF over US$100m.) for the decision as to whether to seek recompense from any one or more of D1–D4 to be left in the hands of D1, they would have no confidence that a fair and independent decision had been taken, even following the appointment of the FFP directors. In our judgment, they would be justified in this lack of confidence. There is no doubt in our view that D1 was and is suffering from an inhibition which leads to the conclusion that, subject to the exercise of any discretion, it is appropriate for the plaintiffs to bring derivative claims on behalf of TPF pursuant to s.33(3) against D2–D4.

168 Given our decision to uphold the judge's conclusion that it is the position of D1 as the general partner which must be considered in relation to any inhibition rather than the position of the directors from time to time, it is not necessary for us to address his finding about the position of the FFP directors. Suffice it to say that, if we had found it necessary to do so, we would have considered that the judge was entitled to reach the conclusions which he did in this respect.

169 As to discretion, the defendants submit that, because the plaintiffs are bringing direct claims against D2 and D3, they have an alternative remedy in respect of those two defendants and there is no need for them to bring a derivative action. They point out that they have not sought to strike out the direct claims against D2 and D3. That is so, but it is of note that footnote 10 at para. 15 of the skeleton argument of D2–D4 states:

> "For the avoidance of doubt, [D2–D4] do not admit that the Respondents, in particular KPA, have standing to bring the direct claims, and expressly reserve the right to challenge the Respondents' standing to bring such claims, including on the basis of a lack of authority in the case of KPA."

170 As stated at para. 67 above, Ms. Stanley asserted in oral argument that the only way to get the proceeds of any successful claim against D2 and D3 into TPF is by way of a derivative claim. Furthermore, despite the defendants' explanation, submitted in response to the draft of this judgment, that footnote 10 was only intended to cover the KPA lack of authority point and the partnership accounting point, the fact remains that the footnote expressly reserves the right to challenge the plaintiffs' standing to bring the direct claims in general terms and the KPA point is

merely mentioned by way of inclusion as a ground of challenge. We bear in mind the overriding objective and, in our view, it would be inconsistent with that objective and highly undesirable to run the risk of the court eventually finding against D2 and D3 on the underlying merits of the claims but finding that the plaintiffs did not have standing for the direct claims or that it could not make an order for restoration of the trust fund in the absence of a derivative claim on behalf of TPF. The existence of an alternative remedy is a matter to be taken into account when determining whether to allow a derivative claim to proceed although its existence is not conclusive of the matter; see *Henderson* (13) ([2012] EWHC 3259 (Comm), at para. 39). In our judgment, whilst we have expressed certain preliminary views at paras. 65–72 above, in the light of the above matters there is sufficient uncertainty about whether the plaintiffs have direct claims against D2 and D3 or whether the court could order restoration of the trust fund on the success of such claims that, as a matter of discretion, it is just and fair to allow the derivative claims to proceed alongside the direct claims so that they are all heard at the same time. If, following a trial, the direct claims are upheld and the court also holds that it can order restoration of the trust fund as a remedy for such claims, then there will be no need to make any award on the derivative claims; if on the other hand the direct claims are found not to be maintainable or restoration of the trust fund cannot be ordered, the derivative claims will be necessary to provide a remedy, assuming that the underlying allegations against the defendants are upheld.

171 We add by way of postscript, that both sides sought to raise arguments based on the position of the Cayman Islands as a leading centre for the establishment of investment funds. Thus the defendants argued that, by setting the bar for derivative actions too low, the judge had rendered it less likely that promoters of investment funds in the form of ELPs would choose the Cayman Islands as the location of their funds because of the comparatively easy exposure to derivative claims.

172 Conversely, the plaintiffs argued that it was important for the reputation of the Cayman Islands as a centre for investment funds that persons who have invested in ELPs should have a remedy when the general partner is alleged to have been guilty of wrongdoing and that a derivative action is the only remedy in such circumstances. It should not therefore be too difficult to bring such an action.

173 Whilst noting these arguments, we have not decided this case by reference to the arguments' respective merits, which are more matters for the legislature. We have confined ourselves to construing s.33(3) in the light of the words used against the background of the law on derivative claims generally.

Summary of conclusions reached on the derivative claims

174 In respect of D1, for the reasons which we have given above, we allow the appeal to the extent of striking out the plaintiffs' derivative claims against it.

175 In relation to the derivative claims against D2–D4, we dismiss the appeals brought by these defendants, with the consequence that the plaintiffs may bring those claims under s.33(3).

The SFC appeal

176 At the hearing below, the GP (D1) applied for security of costs ("SFC") in the sum of US$5,536,025.50 and the sum sought by D2–D4 was US$2,720,000. It is and was common ground that the plaintiffs are both Kuwait state-owned enterprises ordinarily resident out of the jurisdiction and accordingly the judge had jurisdiction to exercise the discretion conferred on the court by GCR O.23 r.1(1), which reads in relevant part:

> "Where, on the application of a defendant to an action or other proceedings it appears to the Court—
>
> (a) that the plaintiff is ordinarily resident out of the jurisdiction …
>
> then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just."

177 Briefly summarized, the defendants' case was that there were substantial obstacles to the enforcement in Kuwait of an adverse costs order since there was no treaty between Kuwait and the Cayman Islands for the mutual enforcement of judgments and as a matter of Kuwaiti law even a judgment of the Kuwaiti courts was incapable of enforcement against the plaintiffs because they were state entities.

178 In dismissing the SFC applications, the judge began by setting out the legal principles he found to be applicable. He then analysed the principles and applied them to the case before him and then proceeded to give the reasons for his decision. The key elements of this part of his judgment can be summarized as follows:

The applicable principles

179 (i) There is no presumption that the court will ordinarily require a foreign plaintiff to give SFC; rather the discretion "is to be exercised on a case-by-case basis, as the rule states, having regard to all the circumstances

of the case"; see *In re Cybervest Fund* (9) (2006 CILR 80, at para. 24, *per* Smellie, C.J.) (para. 149).

(ii) The court should follow the guidance on the interpretation of O.23 r.1(1) provided by the following passage in the judgment of Smellie, C.J. in *Tasarruf Mevduati Sigorta Fonu* v. *Wisteria Bay Ltd.* (39) (2006 CILR 351, at para. 14) (para. 150):

> "There is no hard and fast rule that every foreign plaintiff must be required to put up security. The matter is one, as already stated, of discretion to be exercised in every case. All the circumstances will be considered including the means and ability of the plaintiff to pay and even, in an appropriate case, the relative strength or weakness of the case for each side provided those factors are clearly discernable from the evidence. See, for these propositions, the leading case of *Sir Lindsay Parkinson & Co. Ltd.* v. *Triplan Ltd.* …"

(iii) The court's discretion must be exercised impartially and must not be exercised discriminately; see *e.g. Ahmad Hamad Algosaibi & Bros. Co. Ltd.* v. *Saad Invs. Co. Ltd.* (1) (2017 (2) CILR 602, at para. 21) (para. 151).

(iv) The merits of the case will only be relevant if: (i) either party can clearly demonstrate a strong probability of success, or (ii) the court is considering a summary judgment application at the same time (para. 152).

Analysis and application of the principles to this case

(v) In this case, the merits could not be properly determined at this stage (para. 153).

(vi) The issue to be decided was whether the defendants had shown there are objectively justified grounds for concluding that there are obstacles or burdens to the enforcement of a costs order against the plaintiffs, such that there is a real risk of non-enforcement and whether, if there are such real risks, it is just in the circumstances to order security and if so, on what terms (para. 154). (This proposition, like principle (iii) above, is based on *AHAB* v. *Saad*, where Smellie, C.J. stated (2017 (2) CILR 602, at paras. 15–16):

> "… the focal concern of the modern case law is not to ensure that a plaintiff is seldom required to provide security or that orders for security are only exceptionally made but to ensure that such orders are not imposed in an arbitrary or discriminatory manner. Accordingly, the making of such orders against a non-resident plaintiff would be appropriate, and may now be justified, not simply on the discriminatory basis of the plaintiff's foreign status but because real risks of unenforceability are shown 'on objectively justified

> grounds' to exist: *per* Gloster, L.J. in her *dictum* cited above from *Bestfort* …, applying the *dictum* of Mance, L.J. from *Nasser* …
>
> 16 This approach dictated by the modern cases is aimed at addressing not only basic tenets of fairness but more particularly, the requirements of the Constitutional Bill of Rights where, in s.16, it is mandated that 'government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution'—the most directly operative here being that right to a fair and public trial guaranteed by s.7 which states that 'Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.'"

(vii) Where the plaintiff is a foreign government or state agency, there is a presumption that SFC should not be awarded, although each case will turn on its own facts. The presumption arises from comity and common sense and may be displaced by the evidence; see *Tasarruf* (39) (2006 CILR 351, at para. 22) (para. 156).

(viii) As Smellie, C.J. observed in *Tasarruf*, the only modern reported case in which SFC had been ordered against a foreign government was *Sierra Leone Govt.* v. *Davenport* (34) where the circumstances were exceptional in that Sierra Leone had recently emerged from a civil war (para. 157).

(ix) PIFSS (the second plaintiff) was the subject of the SFC application determined in *Cybervest* (9), where PIFSS was petitioning as a shareholder for the winding up of a Cayman incorporated investment fund. In giving judgment in this case, Smellie, C.J. noted that PIFSS had "immensely valuable assets to be regarded as being within the jurisdiction" and so if PIFSS failed to pay an order for costs it would be open to the applicant to seek recourse. The SFC application was dismissed on the grounds that: (a) PIFSS's very valuable shareholding in the fund was to be treated as assets within the jurisdiction; and (b) PIFSS was (2006 CILR 80, at para. 27):

> "a state agency of a foreign government of undoubted resources and enjoying a high reputation in the global financial and commercial community. This is relevant insofar as it would tend to negate any concern that the plaintiff would be unlikely to obey an order for costs made in favour of the respondent."

(x) Security will not be required of a foreign plaintiff who has substantial assets within the jurisdiction: see *Cybervest* (*ibid.*, at para. 25) (para. 160).

(xi) Where any liability for costs on the plaintiffs' part will inevitably be joint and several, security will not be required if at least one plaintiff has substantial assets within the jurisdiction (para. 160).

(xii) A foreign plaintiff does not have the burden of establishing that it has fixed and permanent property within the jurisdiction (para. 161). See the following extract from the judgment of Lightman, J. in *Leyvand* v. *Amnon Barasch* (20) ([2000] WL 191256, at para. 6):

> "The common sense principle applies that the existence of assets within the jurisdiction, their fixity and performance, are among a number of potentially relevant factors, their importance depending on the particular facts of the case. The Court will not infer the existence of a real risk that assets within this country will be dissipated or shipped abroad to avoid their being available to satisfy a judgement for costs unless there is a reason to question the probity of the claimant: there is no such reason in this case. If there is a reason to question the claimant's probity, the character of his property within the jurisdiction is relevant in assessing the risk: the risk may be greater if the property is cash or immediately realisable or transportable, and less if fixed and permanent."

(xiii) Undertakings given by a plaintiff that it will not raise any of the potential defences in their home jurisdiction should an award of costs be made against it would be very persuasive evidence in any court in the plaintiff's home jurisdiction (para. 162). See Sanderson, Ag. J. in *Elliott* v. *Cayman Islands Health Serv. Auth.* (10) (2007 CILR 163, at para. 18).

The judge's reasons why, on the application of the foregoing principles, the SFC application would be refused

(xiv) The plaintiffs are both wholly owned by, and are the agents of, the State of Kuwait. There is therefore on the decided cases a rebuttable presumption that security for costs should not be ordered (see *Tasarruf* (39) (2006 CILR 351, at para. 23)). This presumption has not been rebutted on the evidence adduced. The plaintiffs appeared to have ready access to funds and would be able to satisfy any adverse costs order in a timely manner (paras. 164–166).

(xv) KPA is an internationally recognized commercial organization and relies on its international reputation to do business. Its profit for the financial year 2020–2021 was KWD56,450,000 (about US$187,522,553 based on the exchange rate on August 9th, 2021). The Director General of KPA has confirmed that it has sufficient resources to meet any costs order made against it in these proceedings, and will comply with any such costs orders in a timely fashion, a position that has been reconfirmed by the Kuwaiti Department for Legal Advice and Legislation ("DLAL"). In addition, KPA has provided a written undertaking to this effect to the court on May 27th, 2021 (paras. 167–169).

(xvi) PIFSS is a public institution which administers Kuwait's pension fund for all Kuwaiti citizens in the workforce, both in public and private sectors. It operates independently from the State of Kuwait and has its own budget and board of directors. It has a global investment asset portfolio worth approximately US$133.7bn. (as at March 31st, 2021). Its profit for the period March 2020 to December was US$18.9bn. An officer in PIFSS's Compliance and Government Department had confirmed that PIFSS had sufficient resources to meet any costs order made in these proceedings and will comply with any such orders in a timely fashion. PIFSS has provided a written undertaking to this effect to the court. In addition, PIFSS has been party to several sets of proceedings before the Cayman Islands courts and has never failed to comply with any costs order (paras. 170–172).

(xvii) It would be clearly detrimental to PIFSS's ongoing commercial reputation and business to be in breach of an order of the Cayman Islands courts (para. 173).

(xviii) Accordingly, after a careful consideration of the evidence, the presumption against ordering security against agents of a foreign state has not been rebutted. Accordingly, it would not be just to grant the SFC applications against the plaintiffs (para. 174).

(xix) It is well established that security will not be ordered against a foreign plaintiff who has substantial assets within the jurisdiction (see *Cybervest* (9)) and PIFSS is such a plaintiff by reason of its interest valued at €35,074,942 as a March 31st, 2021 in the Jermyn Street Commercial Real Estate Fund ("the Jermyn Street Fund"), of which PIFSS is a limited partner (paras. 175–176).

(xx) There is no reason to doubt the probity of PIFSS, which is an agent of the State of Kuwait and familiar with conducting international litigation (including in the Cayman Islands) (para. 177).

(xxi) There is no reason to conclude that PIFSS's interest in the Jermyn Street Fund is encumbered, or not amenable to enforcement if necessary, and no reason to conclude that PIFSS would dispose of or otherwise encumber its interest to attempt to defeat an order as to costs (para. 177).

(xxii) Accordingly, since PIFSS has sufficient assets within the jurisdiction to cover any costs order that is made against the plaintiffs (in respect of which they would be jointly and severally liable), and in circumstances where both plaintiffs have given written undertakings to the court, it would not be just to require the plaintiffs to pay security for costs (even if they were not agents of the State of Kuwait) (para. 178).

(xxiii) In light of the correspondence between Campbells (for D2–D4) and Ogier (for the plaintiffs) there was no basis to form the view that PIFSS would seek to frustrate the enforcement of a cost order against it by

Case 1:24-cv-00951-LTS Document 25-2 Filed 05/10/24 Page 68 of 80 PageID #: 5811

disposing of its interest in the Jermyn Street Fund, even if it were able to do so (para. 179).

(xxiv) The enforceability of Cayman Islands judgments in Kuwait does not therefore arise for determination (para. 189).

The case advanced by the GP (D1)

180 (i) By reason of the errors made by the judge in reaching his decision to refuse to order SFC, his decision should be set aside and the SFC summons remitted to another judge of the Grand Court or alternatively the judge himself.

(ii) Although the discretion under GCR O.23, r.1(a) is at large, it can only be properly exercised when *all* of the circumstances are taken into account, and this the judge failed to do because he did not consider the obstacles of enforcement in Kuwait. Instead, he appears to have been satisfied that the plaintiffs could and would pay adverse costs order without question and the defendants had not proved otherwise.

(iii) The judge erred in principle in proceeding on the basis that there was a presumption that a foreign government or state agency will not be ordered to provide security for costs unless the applicant "rebuts" the presumption. The authorities the judge relied for the presumption—*Cybervest* (9) and *Tasarruf* (39)—laid down no such principle. Instead, Smellie, C.J. in the former case decided it on the basis that the court had a wide discretion which fell to be exercised on a case-by-case basis and in the latter case, Smellie, C.J. highlighted that it was all a matter of discretion taking into account all the circumstances. The true ratio was that the court does not apply the rules for SFC differently depending on whether the plaintiff is a state or an individual but on the basis that all plaintiffs who seek to engage the court's jurisdiction must play by the same rules. This, after all, is the position in England (see *Sierra Leone (Govt.)* v. *Davenport* (34)) and in Australia (see *e.g. Papua New Guinea* v. *Sandline* (26) ([1998] QDC 298, *per* Andrews, J.) and *Ministry of Foreign Affairs (Italy)* v. *Simeone* (23)).

(iv) Where there is joint and several liability between plaintiffs for costs and one of them is in the jurisdiction, it is the practice not to make a SFC order against the plaintiff who is resident outside the jurisdiction if it is inevitably to be inferred by the court that there will be joint liability for costs between the plaintiffs. Assuming that this practice can apply to a situation where both plaintiffs are outside the jurisdiction but one has substantial assets within the jurisdiction, D1 submits that there were no sufficient grounds for the judge to have concluded that the plaintiffs would be jointly and severally liable for the costs. Indeed, D1 pleads a defence against KPA that it commenced and carried on its claims against them

without due authority, and ratification of these acts is not possible under Kuwaiti law.

(v) The judge erred in taking into account the confirmation from the Director General of KPA, Mr. Al-Sabah, which was related to Mr. Florent, who in turn related it in para. 18 of his third affidavit, that KPA had sufficient resources to meet a costs order made against it in these proceedings, and would comply with any such costs order in a timely fashion. Mr. Florent's third affidavit was sworn on August 27th, 2021 but Mr. Al Sabah had been suspended from the position of Director General of KPA by the Minister of Commerce and Industry on October 24th, 2021 pending investigations of "violations" attributed to him. The expert evidence before the judge was that during his suspension Mr. Al-Sabah was not authorized to represent KPA in any capacity or exercise any powers on behalf of KPA.

(vi) The judge erred in treating the letters he called "undertakings" to pay an adverse costs order as if they were indeed "undertakings" when they were merely "comfort letters" since they contained the words, "Without prejudice to the exercise of KPA's legal rights" and stated "*we confirm* that KPA will comply with any final and binding costs orders …" Even if the letters had contained express undertakings on behalf of the plaintiffs to pay an adverse costs order, the judge should have considered whether there remained a significant risk that such a costs order would not be paid and gone on to find that there was such a risk because the undertaking could only be enforced by committal or sequestration proceedings in the jurisdiction and such an order would not be enforceable in any other court. Nor was it clear that the comfort letters would be enforced by the courts of Kuwait.

(vii) The judge erred in placing reliance on the evidence given in Mr. Florent's third affidavit to the effect that PIFSS had never failed to comply with any costs order made in proceedings before the courts of the Cayman Islands when there was no evidence that any adverse costs order had ever been made against PIFSS in any Cayman Island proceedings. What the judge should have done was to require production of examples of Cayman Islands costs orders that had been honoured by PIFSS.

(viii) The judge made the following errors in giving the weight he did to PIFSS's assets within the jurisdiction:

(a) He stated that the plaintiff does not have the burden of establishing that it has fixed and permanent property within the jurisdiction when that burden in fact lay upon the plaintiffs and he should have taken note of the fact that PIFSS's interest in the Jermyn Street Fund was not of a fixed or permanent nature but was in the nature of a receivable in the event that a distribution were to be made and/or the Fund were wound up.

(b) He was wrong to consider whether there was any reason to doubt the probity of PIFSS when the question to be considered was whether there was a real risk that the assets in the jurisdiction may not be available if and when a case of enforcement arises; see Butcher, J. in *PJSC Tatneft* v. *Bogolyubov* (25) ([2019] Costs L.R. 977, at para. 49) and Henshaw, J. in *Pisante* v. *Logothetis* (27) ([2020] EWHC 3332 (Comm), at paras. 65–66).

Discussion and decision

181 We deal first with D1's submission that the judge erred in proceeding on the basis there was a presumption that a foreign government or state agency will not be ordered to provide security for costs unless the applicant "rebuts" the presumption.

182 The principal authority relied on by the judge for the aforesaid presumption was *Tasarruf* (39). Here, as related in Smellie, C.J.'s judgment (2006 CILR 351, at paras. 2–3), in that case, the plaintiff was a Turkish state entity authorized by statute to recover deficiencies in the accounts of insolvent banks by, among other things, the seizure and sale of the assets of their managers, shareholders or auditors. This authorization was given as part of a regulatory scheme to protect depositors against bank failure. In March 2004, the plaintiff seized in Turkish waters two motor yachts registered in the Cayman Islands Shipping Registry in the names of the corporate defendants. These yachts were said to belong to the controlling shareholders of a leading Turkish bank now in the administration of the plaintiff. In December 2004, the plaintiff brought an action in the Grand Court to prevent the completion of registration of mortgages for amounts in excess of their total value, granted against each vessel in favour of the third defendant in person.

183 On the question whether the plaintiff should be ordered to provide SFC, in *Tasarruf* the Chief Justice said that the fundamental question was whether an agency of a friendly foreign state, enjoying good standing in the international community and which has invoked the jurisdiction of this court, should be required to put up security for a defendant's costs of the action (*ibid.*, at para. 14). In earlier times there had been a practice that a foreign plaintiff should be ordered to provide SFC[14] but given the changes to the Rules since then and the discretionary nature of the exercise requiring the court to consider all the circumstances, a modern and different approach where the plaintiff is a foreign state, was discernible from the judgments in *Banco Economico S.A.* v. *Allied Leasing & Fin. Corp.* (3) and *Ministère de la Culture &c. de France* v. *Lielb* (22) ([1981] 1 WLUK 253, at paras. 16–18). This modern principle (*ibid.*, at para. 22) was—

14 See *e.g. Costa Rica (Republic)* v. *Erlanger* (8).

"that where the plaintiff is the government (or a state agency) of a foreign state enjoying good standing in the international community (in particular from this court's point of view, enjoying diplomatic relations with H.M. Government) it should be assumed as a matter of comity and common sense, in the absence of anything to the contrary, that it will honour its obligations for costs made against it. Nonetheless, as the question remains one to be decided on a case by case basis in the discretion of the court, an order for security for costs could undoubtedly be made against a foreign state in appropriate circumstances."

184 In *Banco Economico S.A.* v. *Allied Leasing & Fin. Corp.* (3), the plaintiff, a Brazilian bank, itself in liquidation and under the control of a liquidator appointed by the Brazilian Government, petitioned for the winding up of the respondent. Mr. Justice Smellie (as he then was) was of the *prima facie* view that there was merit in the petition (1998 CILR at 112–113) and he concluded:

"that the proper balance is struck when account is taken of the consideration that the petitioner is now under the control of a liquidator who is appointed by the Brazilian Government. Even in the ordinary case, the fact of insolvency will not by itself dictate an order for security. When the entity is a large bank, as the petitioner is, any such presumption becomes even less appropriate as grounds for ordering security for costs: see *Dartmouth Harbour Commrs.* v. *Mayor of Dartmouth Hardness* … and the notes in 1 *The Supreme Court Practice 1997*, para. 23/1–3/13, at 412.

Although Ms. Collins (who argued the aspect of the matter for the petitioner) had no instructions to give an undertaking as to costs, I have nothing at all before me to support any suggestion that the Brazilian Government would not ensure that its obligations for costs (to be incurred if its appointed officer proves unsuccessful before this court) would not be honoured. In the interest of comity, I would consider that any presumptions would arise in favour of such obligations being met and not the other way around. The rule in the *Dartmouth Harbour Commrs.* case applies, *a fortiori*, to the present circumstances."

185 As related at para. 179 (ix) above, *Cybervest* (9) concerned a petition to wind up a fund incorporated in the Cayman Islands presented by PIFSS which faced a SFC application. In his judgment, Smellie, C.J. said (2006 CILR 80, at paras. 22–24):

"The wording of [O.23, r.1(1)] plainly reveals the wide discretion to be exercised in the making of an order.

> 23 The wording does not admit any judicial policy that would mandate the making of an order simply because the plaintiff is a foreign plaintiff; the requirement that the plaintiff is ordinarily resident outside the jurisdiction is simply a pre-condition to the making of an order under the particular O.23, r.1(1)(a). It is a precondition just like those stipulated in (b)–(d), the other sub-rules, which are aimed at plaintiffs who may not ordinarily reside out of the jurisdiction …
>
> 24 … I would simply add that discretion is to be exercised on a case-by-case basis, as the rule states, having regard to all the circumstances of the case."

186 After noting the significant fact that PIFSS had immensely valuable assets (its shares in the fund PIFSS was seeking to have wound up) that were to be regarded as being within the jurisdiction, Smellie, C.J. went on to say (*ibid.*, at para. 27):

> "Another circumstance, of some weight, is the fact that the petitioner is a state agency of a foreign government of undoubted resources and enjoying a high reputation in the global financial and commercial community. This is relevant insofar as it would tend to negate any concern that the plaintiff would be unlikely to obey an order for costs made in favour of the respondent. To my mind, it also addresses the concern raised by Mr. Farrow, that efforts to enforce an order in Kuwait, if it ever came to that, could be met with a plea of state immunity."

187 The judge supported his statement in his judgment (2022 (1) CILR 12, at para. 165) that there was a rebuttable presumption that SFC should not be ordered by reason of the plaintiffs being the agent of, and wholly owned by, the State of Kuwait by footnote 28 which reads "*TMSF* v. *Wisteria Bay Ltd.* … (2006 CILR 351, at para. 23)." However, it is clear that the paragraph of the judgment in *Tasarruf* (39) to which the judge intended to refer was para. 22 which reads:

> "Taken together, there is a common practical principle to be discerned from these last cited three cases which is that where the plaintiff is the government (or a state agency) of a foreign state enjoying good standing in the international community (in particular from this court's point of view, enjoying diplomatic relations with H.M. Government) *it should be assumed* as a matter of comity and common sense, *in the absence of anything to the contrary*, that it will honour its obligations for costs made against it. Nonetheless, as the question remains one to be decided on a case by case basis in the discretion of the court, an order for security for costs could undoubtedly be made

against a foreign state in appropriate circumstances." [Emphasis added.]

188 It was no doubt in light of the emphasized words in this passage that the judge expressed himself as he did in para. 165 of his judgment. In our view, with respect to the judge, the Chief Justice is not to be taken here as laying down a principle based on a presumption that was to prevail unless it was rebutted. We say this having regard to the words used in the following sentence in the quoted passage that stress that the court is exercising a broad discretion on a case-by-case basis. It follows, in our opinion, that the judge erred in law in proceeding as he did on the basis that there was a presumption arising from comity and common sense that security for costs should not be awarded against the plaintiffs, although each case will be decided on its own facts.

189 In our opinion, the approach of the court when dealing with an SFC application against a foreign state or foreign state agency that enjoys good standing in the international community should be that it can treat this as a factor in favour of such of a plaintiff to go into the scales but on the basis that it is just one amongst all the other factors that must be weighed by the court when exercising the discretion conferred upon it.

190 We also accept Ms. Stanley's submission that the judge erred in stating that a foreign plaintiff does not have the burden of establishing that it has fixed and permanent property within the jurisdiction. The judge supported this statement by citing Lightman, J.'s *dictum* in *Leyvand* v. *Barasch* (20) that the court will not infer a real risk that assets within the jurisdiction will be dissipated or moved abroad in the absence of a question over the plaintiff's probity. Whilst the judge clearly intended this statement to apply to a situation where the evidence showed that a foreign plaintiff had property within the jurisdiction but there was nothing or very little about the property's permanency or freedom from encumbrances, we find it to have been too broadly expressed. Evidence that a foreign plaintiff has valuable property within the jurisdiction will obviously be of relevance but the significance of this evidence will depend on all the facts of the case, including any evidence as to the permanency of the property and its freedom from encumbrances (or the lack of such evidence) and other evidence tending to show that the plaintiff can be trusted to honour an adverse costs order. We also respectfully disagree with Lightman, J.'s *dictum* in *Leyland* v. *Barasch.* In our view, the approach adopted by Butcher, J. in *PJSC Tatneft* v. *Bogolyubov* (25) ([2019] Costs L.R. 977, at para. 49) and Henshaw, J. in *Pisante* v. *Logothetis* (27) ([2020] EWHC 3332 (Comm), at para. 65): "the question is not whether a lack of probity has been shown, but whether there is a real risk that the assets in a Contracting State may no longer be available if and when an asset enforcement arises," is to be preferred.

Case 1:24-cv-00295-LTS Document 25-2 Filed 05/10/24 Page 74 of 80 PageID #: 5817

191 We turn to Ms. Stanley's submission challenging the finding by the judge (2022 (1) CILR 12, at para. 178) that, if the plaintiffs' claims against the defendants all fail, there will be a costs order in respect of which KPA and PIFSS will be jointly and severally liable, the latter having substantial assets within the jurisdiction. Ms. Stanley's submission is based on the contention now pleaded in para. 12 of D1's defence that KPA's claim is a nullity because it was not authorized by the Chairman of KPA, who, as a matter of Kuwaiti law (having regard to KPA's constitution) is the only officer of KPA who can authorize the bringing of claims by the company and who has no authority to delegate this power or to ratify an earlier unauthorized issue of proceedings.

192 D1's defence and counterclaim to KPA's claim was served and filed on January 31st, 2022, over three months after the hearing below. In her skeleton argument for this appeal, Ms. Stanley submits that:

> "As recorded in the evidence [the fourth affidavit of Mr. Lewis] and then set out in the GP's Defence at [12], there is a major factual dispute in this case as between KPA and the Appellants as to whether these proceedings have been commenced and continued on behalf of KPA with its authority (there being no power under Kuwaiti law to ratify proceedings if brought without authority.)"

193 Attention was first drawn to the significance of the plaintiffs being joint and several debtors under an adverse costs order in para. 20 of Mr. Florent's third affidavit, dated August 27th, 2021, where he deposed that he had alerted PIFSS to the possibility that, owing to the joint and several nature of costs orders in the Cayman Islands, it was possible that PIFSS would be required to satisfy any costs order that may be made in these proceedings in full from its own resources.

194 In paras. 42–47 of his fourth affidavit, dated September 17th, 2021, Mr. Lewis deposed that the FFP directors had been sent an opinion of Mr. Omar Al Qahtani of the Turkey office of Al Tamimi & Co. ("the Al Tamimi opinion") stating that only the Chairman of KPA had authority to approve the issuance of proceedings by KPA and this authority was not capable of being delegated; nor could an unauthorized issuance of proceedings be ratified by the KPA's Chairman. Reference was also made to the suspension of Mr. Al Sabah on August 24th, 2021 from his position as Director General KPA.

195 Curious as to how this lack of authority contention was deployed below, the court has perused the skeleton arguments relied on before the judge and the transcript of the oral submissions advanced below by Ms. Stanley for D1, Mr. Chapman for D2–D3 and Mr. Allison for the plaintiffs.

196 In para. 245 of his skeleton argument for the hearing below, Mr. Allison contended that PIFSS had sufficient assets within the jurisdiction

to cover any costs order that might be made against the plaintiffs in respect of which they would be jointly and severally liable.

197 Mr. Chapman did not contend in either his skeleton argument or his oral opening submissions that one of the consequences of the Tamimi opinion was that it was not inevitable that if the plaintiffs' claims were dismissed they would both be jointly and severally liable for the costs of the proceedings.

198 Ms. Stanley also did not contend in her skeleton argument or in her opening or closing submissions that, in light of the Tamimi opinion, KPA's claim was a nullity so that it could not be said that it was inevitable that if KPA's and PIFSS's respective claims were dismissed, the plaintiffs would be jointly and severally liable for the costs of the proceedings. Instead, she contended that the effect of the Tamimi opinion was that it undermined the plaintiffs' contention that an adverse costs order would be enforceable in Kuwait and undermined KPA's reliance on assurances given by KPA's Director General, Mr. Al Sabah, both before and after he was suspended from that office, that KPA would honour any costs order made against it.

199 In his oral submissions in reply, Mr. Allison observed that the defendants had not taken the point that it was only one of the plaintiffs, PIFSS, that had assets within the jurisdiction and contended that, even if it had been taken, as Mr. Florent explained in para. 30 of his third affidavit, PIFSS was well aware of the joint and several nature of costs orders so that it may have to pay the whole sum from its own resources. Mr. Allison also submitted that the "lack of authority issue" was not a live issue in the proceedings before the court because there had been no application to strike out KPA's claim on that basis or to seek the determination of a preliminary issue.

200 In the course of his reply submissions made ahead of Ms. Stanley's reply submissions, Mr. Chapman accepted that, if the plaintiffs' claims were dismissed, the likely costs order would be a joint and several one, subject to the possibility that PIFSS might well argue that joint and several liability should not apply if KPA's claim was found to have been brought without authority.

201 Whilst Ms. Stanley had expressly adopted Mr. Chapman's opening oral submissions when she made her own opening oral submissions, she did not adopt the same course when she delivered her oral closing submissions, in the course of which she said she was going to deal just with the Al Tamimi/authority/suspension point and the point she wished to make was not the lack of authority to commence KPA's proceedings but the suspension of Mr. Al Sabah as Director General of KPA and the resulting loss of his authority to provide information to Mr. Florent upon which Mr. Florent had purported to rely in advancing KPA's case.

202 In our judgment, since the point now taken by D1[15] as to the impact of the lack of authority contention on what the judge said (2022 (1) CILR 12, at para. 178) was not taken on behalf of D1 below, when it plainly could have been, it is not open to D1 to take the point in this appeal in support of D1's case that the judge's decision refusing the defendants' SFC applications should be set aside.

203 In our judgment, the errors of the judge identified in paras. 188 and 190 above played such a significant role in the exercise of his discretion (see *e.g.* paras. 155, 165, 166 and 176) that his decision must be set aside.

204 In these circumstances, it is open to us to exercise the discretion conferred by GCR O.23, r.1(1) and since we have before us all the evidence and the parties' skeleton arguments that were before the judge and the transcript of the oral submissions the judge heard on the SFC issue, we propose to decide whether SFC should or should not be ordered against each of the plaintiffs.

205 We proceed on the assumption that the defendants are correct in their submission that there would be very real difficulties indeed in enforcing in Kuwait costs orders made against the plaintiffs if their claims against the defendants are dismissed.

206 Although it is a necessary condition for the ordering of SFC that there is a real risk that an adverse costs order would not be enforced against the postulated foreign plaintiff in his/its home jurisdiction, this is not a sufficient condition for ordering SFC whatever the other circumstances of the case. Instead, it is open to the court, if there is sufficient evidence to support such a conclusion, to find that there is no real risk that the plaintiff will not honour an adverse costs order and for this reason to decline to order SFC. In our judgment, this is such a case having regard to the following matters.

207 As is common ground, the plaintiffs are agencies of a foreign state, Kuwait, which is of good standing in the international community and enjoys diplomatic relations with HM Government. Further, as related above, an instrumentality of the State of Kuwait, the DLAL, acting by the Head of its International Arbitration and Litigation Sector, sent a formal letter to the judge on behalf not only of KPA and PIFSS but also the State of Kuwait that reads in relevant part:

> "Dear Sirs.
>
> Cause No. FSD 236 of 2020 (RPJ)—(1) Kuwait Ports Authority and (2) The Public institution for Social Security v (1) Port Link GP Ltd.,

15 See para. 180(iv) above.

(2) Mark Eric Williams, (3) Wellspring Capital Group, Inc and (4) KGL Investment Company Asia (the 'Proceedings')

I am the Head of the International Arbitration and Litigation Sector for the Department of Legal Advice and Legislation (the 'Department') of the State of Kuwait.

One of the responsibilities of the Department is to act as legal adviser to the State of Kuwait as well as to certain State entities and/or incarnations of the State. In particular, the Department currently advises and represents each of the Kuwait Ports Authority ('KPA') and The Public Institution for Social Security ('PIFSS') in connection with the Proceedings.

I hereby confirm, on behalf of the Department, that KPA and PIFSS are wholly owned by the State of Kuwait and bring to your attention the attached letters, duly signed by authorised representatives of KPA and PIFSS confirming that they will comply with any final and binding costs orders made against them in the Proceedings ('Costs Orders').

We respectfully request, on behalf of KPA and PIFSS [and the State of Kuwait][16] that the Grand Court take these letters into consideration in determining whether or not KPA and/or PIFSS should be required to provide security for costs in the Proceedings."

208 The letters (also addressed to the judge) that were sent with the DLAL letter on behalf of PIFSS and KPA were in common form. In relevant part, they read:

"Dear Sirs

We refer to the abovementioned Proceedings before the Grand Court of the Cayman Islands, in which Kuwait Ports Authority ('KPA') [PIFSS] is a Plaintiff.

Without prejudice to the exercise of KPA's [PIFSS's] legal rights, including without limitation its right to appeal, or to seek leave to appeal, any decision of the Grand Court, we confirm that KPA will comply with any final and binding costs order(s) made against KPA in the course of the Proceedings ('Costs Orders').

Yours faithfully"

209 The KPA letter is signed by Mr. Al Sabah in his capacity as KPA's Director General. The letter is dated May 27th, 2021, which was at least

16 The brackets do not signify that the words they contain were not part of the original letter: they were.

Case 1:26-cv-20251-RNS Document 12-22 Filed 01/26/26 Page 78 of 80 PageID #: 5821

two months before Mr. Al Sabah was suspended from this office on August 24th, 2021.

210 Ms. Stanley criticizes the judge for placing the reliance he did on these letters. Focusing on the words, "Without prejudice to the exercise of KPA's [PIFSS's] legal rights, including without limitation to its right to appeal, or to seek leave to appeal, any decision of the Grand Court," she submits that the letters were merely "comfort letters" and further contends that the judge should have found there remained a significant risk that an adverse costs order would not be paid because the confirmation expressed in the letters could only be enforced by committal or sequestration proceedings in the jurisdiction and such an order would not be enforceable in any other court; nor was it clear that the comfort letters would be enforced by the courts of Kuwait.

211 We do not accept these criticisms. In our judgment, the three letters amount to a representation intended to be relied on by the Grand Court that the plaintiffs would honour any final and binding costs order made against them and we regard the letters as providing strong support for the conclusion that there is no real risk that such costs orders would not be paid. We say this because we have no doubt that the State of Kuwait and its agencies, KPA and PIFSS, would suffer very significant reputational damage if the plaintiffs were to depart from the confirmations given in the letters. Also, further support for this "no real risk" conclusion comes from the evidence as to the financial resources of the plaintiffs that shows that each could be expected to have the ready funds to honour an adverse costs award.

212 As related by the judge, the unchallenged evidence is that PIFSS, which administers independently Kuwait's pension fund for all Kuwaiti citizens in the workforce, had a global investment asset portfolio worth approximately US$133.7bn. as at March 31st, 2021 and earned a profit for the period March 2020 to December 2020 of US$18.9bn. Included in these assets is its investment in the Jermyn Street Fund, a Cayman Islands ELP, which was valued at €35,074,942 as at March 31st, 2021. It is true that PIFSS is likely to be entitled to redeem this investment under the partnership agreement and to do so without publicity but there are no reasons to think that PIFSS would set about redeeming its investment and transferring the proceeds out of the jurisdiction to avoid having to satisfy a costs order: accordingly its existence provides reassurance that PIFSS is going to have amply sufficient resources over at least the next five to six years to meet an adverse costs order should its claims against the defendants be dismissed.

213 When setting out KPA's financial details that are recorded in para. 179(xv) above when relating his reasons why the SFC applications should be dismissed, the judge was relying on the evidence given in Mr. Florent's

third affidavit which was based in part on information that had come from Mr. Al Sabah. Ms. Stanley submits that this evidence was and is inadmissible because it is hearsay and Mr. Florent's third affidavit was sworn on August 27th, 2021 after Mr. Al Sabah was suspended on August 24th, 2021. We are not impressed by this submission. Even assuming that the information from Mr. Al Sabah was provided to Mr. Florent after Mr. Al Sabah had been suspended (which we think unlikely), Mr. Al Sabah would have been in a position to provide reliable figures showing that KPA's profit for the financial year 2020–2021 was KWD56,450,000, the equivalent to c.US$187,522,553 (based on a foreign exchange currency conversion of KWD1: US$3.32 as at August 9th, 2021). Further, Mr. Florent exhibits a public announcement made by KPA on April 4th, 2021 that KPA's profit for the financial year 2020–2021 was KWD56,450,000.

214 Apart from its interest in the assets held on trust for it and TPF by the GP, KPA has no assets within the jurisdiction but it is clear to us from the level of profit earned by KPA for the year 2020–2021 that it is extremely likely to have ample resources to honour an adverse costs order over the next five to six years.

215 It was argued below by the defendants that the plaintiffs could not be trusted to honour an adverse costs order on two particular grounds: the attempts by the Attorney General of Kuwait to obtain the moneys that had been paid into the account held at the Noor Bank that were part of the proceeds from the sale of Clark City, TPF's asset in the Philippines; and the manner in which the defendants had conducted the proceedings, including the bringing of proceedings against Walkers, the defendants' previous attorneys, the bringing of derivative claims for proceeds that would be paid to the plaintiffs and the plaintiffs' alleged refusal to compromise the SFC issue. These contentions are not advanced by Ms. Stanley. Had they been, they would have found no favour with the court.

216 For the reasons given in paras. 205–215 above, we find that there is no real risk that the plaintiffs will not honour their confirmations that they will pay any final and binding costs order made against them and accordingly we order that the plaintiffs should not be ordered to provide security for costs.

217 It follows that D1's appeal against the judge's refusal to order SFC must be and is dismissed.

Summary of conclusions

218 We would summarize our conclusions as follows:

(i) D1's appeal against the refusal of the judge to strike out the plaintiffs' direct claims against D1 is dismissed.

(ii) D1's appeal against the refusal of the judge to strike out the plaintiffs' derivative claims against D1 is allowed and the claims are struck out.

(iii) The appeals of D2, D3 and D4 against the refusal of the judge to strike out the plaintiffs' derivative claims against them are dismissed.

(iv) The appeal of D1 against the refusal of the judge to order the plaintiffs to provide security for costs is dismissed.

219 Our preliminary view as to costs is:

(i) There should be no order as to costs in respect of D1's strike out appeal. Although D1 succeeded in having the derivative claim against it struck out, it did not succeed on its argument that the plaintiffs' claims were misconceived because they were not in the form of an application for partnership accounts.

(ii) D2, D3 and D4 should pay the costs of their strike out appeals.

(iii) D1 should pay the costs of its SFC appeal.

(iv) The parties are at liberty to contend for different costs orders than those set out in (i)–(iii) but they must serve (concise) written submissions in support thereof within 10 days of the issuance of this judgment.

220 **BIRT, J.A.:** I agree.

221 **BEATSON, J.A.:** I also agree.

Judgment accordingly.

Attorneys: *Kobre & Kim* for the first appellant; *Campbells LLP* for the second to fourth appellants; *Ogier* for the respondents.

ITEM NO. 136

JA-22

EXHIBIT B-32

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD 157 of 2021 (DDJ)

BETWEEN

XIAOHU FAN

Petitioner

AND

AQUAPOINT L.P.

Respondent

Appearances:	**Ben Valentin QC and Bhavesh Patel of Travers Thorp Alberga for Xiaohu Fan** **James Corbett QC and Michael Wingrave of Dentons for GenScript Corporation the general partner for and on behalf of AquaPoint L.P.**
Before:	**Hon. Justice David Doyle**
Heard:	**26 January, 20-21 April 2022 with an additional affidavit sworn on 7 May 2022 being adduced with leave of the court granted on 23 May 2022**
Draft Judgment Circulated:	**2 June 2022**
Judgment Delivered:	**10 June 2022**

HEADNOTE

Partnership wound up on the just and equitable ground on the basis of frustration of legitimate expectation and understanding, irretrievable breakdown because of lack of trust and confidence and conflict of interest of general partner

Index

Headings	**Paragraphs**
Introduction	1 - 12
Summary	13 - 14
The Evidence	15
Evidence provided by way of affidavits and oral testimony	
• Dr Fan's first affidavit	16 - 19
• Dr Fan's second affidavit	20 - 31
• Dr Fan's third affidavit	32 - 49
• Dr Fan's fourth affidavit	50 - 53
• Dr Fan's fifth affidavit	54 - 57
• Ms Wang's affidavit	58 - 64
• Dr Zhang's first affidavit	65
• Dr Zhang's second affidavit	66 - 78
• Dr Zhang's third affidavit	79 - 80
• Dr Meng's affidavit	81
• Dr Zhu's affidavit	82
• Dr Wu's affidavit	83
• Ms Qian's affidavit	84
• Mr Murphy's affidavit	85 - 86

• Cross-examination of Dr Fan • Re-examination of Dr Fan • Cross-examination of Ms Wang • Re-examination of Ms Wang • Cross-examination of Dr Zhang • Re-examination of Dr Zhang	87 88 89 90 91 92 - 93
Evidence provided by way of documents and communications	94 - 151
The Assessment of the Evidence • Dr Fan • Dr Zhang • Ms Wang	152 153 154 155
The Law • Jurisdiction • Just and Equitable • ELPA	156 157 158 - 162 163
The Submissions	164
Determination • Justifiable loss of trust and confidence • Frustration of legitimate expectation and reasonable understanding • Fiduciary duties and conflicts of interest • GP's cavalier attitude towards compliance with the laws of the Cayman Islands • Discontinued criminal investigation in China • Relationship has irretrievably broken down • The LPA and the ELPA • No reasonable alternative remedy	165 166 167 - 170 171 - 179 180 181 182 - 184 185 186 - 187



The Order	188
Ancilliaries	189 - 190

JUDGMENT

Introduction

1. Xiaohu Fan ("Dr Fan") is a man of science and was not a man of significant business experience prior to the events with which this case is concerned. He specialises in the research and advancement of cell therapy, immunology and cell biology.

2. In late 2014 Fangliang Zhang ("Dr Zhang") and Ye Wang ("Ms Wang"), who had founded what was called the GenScript group, wished to create a subsidiary company to develop novel biological drugs. Dr Zhang invited Dr Fan to become involved in the new business in order to develop novel cell therapies for oncological and other purposes.

3. There is some dispute as to the exact involvement of Dr Fan and whether he was a co-founder of the new venture and de facto Chief Executive Officer but it is common ground that he became Chief Scientific Officer and made a "significant contribution."

4. Dr Zhang astutely recognised that Dr Fan could play a key role in significantly adding to the value of the business and wished to encourage him to remain within the business with the incentive of financial rewards. In early 2015 Dr Zhang proposed that Dr Fan should invest in Nanjing Legend Biotechnology Co Ltd ("Legend Nanjing") a company established in the People's Republic of China. This led to the entering into of what was described throughout the hearing as the "2016 Agreement" and is dealt with in further detail below. Put very briefly under the 2016 Agreement Dr Fan was to be granted 10,000,000 shares in Legend Nanjing (representing 10% of the shares) and prior to the initial public offering ("IPO") without the approval of Legend Nanjing he was not permitted to transfer or sell any of his shares.

5. Between late 2014 and May 2016 Dr Fan was significantly involved in critical developments and inventions of a number of important therapies including the breakthrough therapy for the treatment of multiple myeloma patients, ciltacabtageneautoleucel (Cilta-cel), an investigational B-cell maturation antigen directed chimeric antigen receptor T cell (CAR-T) therapy (the "CAR-T Invention"). This was clearly a ground-breaking therapy and Dr Fan's role in the CAR-T Invention was significant.

6. It was subsequently decided that rather than using Legend Nanjing, Legend Biotech Corporation ("Legend Cayman" of the "Company" as appropriate), a Cayman Islands registered exempted limited company, would be used as the listing vehicle. Legend Cayman was subsequently listed on the NASDAQ (referred to with its associated companies and subsidiaries as the "Legend Group" being a group of biotech companies that specialise in the discovery and development of novel cell therapies for oncology and other indications). The listing documents indicated that existing shareholders could not dispose of their shares until after the period of 180 days following the listing.

7. At some point it appears that Dr Zhang decided that Dr Fan should be persuaded (via communications from himself and Ms Wang) to enter into a new incentive/investment agreement and this should be facilitated by way of an exempted limited partnership formed under the laws of the Cayman Islands.

8. AquaPoint L.P. (the "Partnership") was created in the Cayman Islands as an exempted limited partnership on 16 February 2017 under the Exempted Limited Partnership Act (the "ELPA"). The general partner of the Partnership is GenScript Corporation, a Delaware company (the "GP") which it is common ground is and was at all material times under the control of Dr Zhang. There are only two limited partners namely Dr Fan (69.95%) and Ms Wang (30.05%). Dr Zhang also has beneficial ownership of a number of shares in Legend Cayman.

9. The parties then entered into what was described throughout the hearing as the "2017 Agreement". This comprised a package of three documents namely the Subscription Agreement, the amended and restated exempted limited partnership agreement (the "LPA") and the Acknowledgement which are all referred to in further detail below.

10. The IPO took place in June 2020. Subsequent to the IPO Dr Fan asked for his 10% stake in Legend Cayman (the "Legend Shares"), but he has not received any despite repeated demands.

11. It was in these circumstances that Dr Fan presented a petition for the winding up of the Partnership on the just and equitable ground.

12. This case has had a somewhat protracted history. The winding up petition was presented in June 2021 with a summons for directions dated 10 June 2021. Directions were made by consent on 19 July 2021 with a three day trial set for 26 October 2021. Shortly before the trial the Partnership on 17 September 2021 applied for the petition to be struck out. Further directions were made by consent on 24 September 2021 vacating the trial dates for the petition and setting down the strike out application to be heard on 26 October 2021. On 26 October 2021 I made an order dismissing the strike out application and listed the trial of the petition for three days commencing on 26 January 2022. I delivered my reasons for dismissing the strike out application on 23 November 2021. This judgment should be read in conjunction with that judgment. The trial of the petition eventually commenced on 26 January 2022 but towards the end of the first day the GP applied for an adjournment on the ground in effect that it no longer validly existed in law in the Cayman Islands as its registration as a foreign company had been "ceased by the Cayman Islands Registry on 6 January 2022". The hearing was adjourned with an indemnity costs order being made against the GP. On 16 February 2022 an order was made that the adjourned trial of the petition recommence at 8am on 20 April 2022 for two days. It was further ordered that in

the event that the GP was not restored by 4pm on 28 March 2022 the Partnership be wound up. The GP was restored. The adjourned trial recommenced on 20 April 2022 and concluded on 21 April 2022. On 23 May 2022, having received confirmation of no objection from Dr Fan, I granted leave for the GP to adduce the third affidavit of Dr Zhang sworn on 7 May 2022 which basically confirmed that a criminal investigation in China, involving Dr Zhang, had been discontinued.

Summary

13. I apologise for the length of this judgment but felt it necessary, in the particular circumstances of this case, to set out the evidence in some considerable detail in the hope that this would enable the parties and other readers of the judgment to better understand the evidential base of the decisions I have arrived at. Those decisions and the reasons for them are set out in the determination section of this judgment which runs to less than 10 pages.

14. I can summarise my main decision in one line. It is just and equitable to bring an end to the Partnership.

The Evidence

15. The evidence before the court is contained in various affidavits and some oral evidence from Dr Fan, Ms Wang and Dr Zhang. There is also various communications and documentary evidence that impacts on the issues to be decided in this case.

The Evidence given by way of affidavits and oral testimony

Dr Fan's first affidavit

16. Dr Fan in his first affidavit states that he is the co-founder of the Legend Group and served as its de facto CEO from early 2015 until 2018 in addition to serving as its Chief Scientific Officer "from the inception". He says Dr Zhang is "one of the ultimate owners and the director of" the GP. Dr Fan refers to the 2016 Agreement.

17. Dr Fan says that in early 2017 he was informed by Ms Wang that "Legend, the Cayman entity, rather than Legend Nanjing would be the listing vehicle. Ms Wang informed me that the 2016 Agreement was not a formal contract and was inadequate to accomplish its purpose, and that it was in my best interest to sign a subscription agreement and become a limited partner in the Partnership. I was informed that I would be granted the right to subscribe for 65.96% of the interest in the Partnership in exchange for the payment of RMB 2,500,000, which would entitle me to own 10% of Legend shares through the Partnership, which was substantially the same as what I was entitled to under the 2016 Agreement. In connection with the execution of the subscription agreement, I was asked to sign a Confirmation Letter to confirm that the 2016 Agreement would terminate upon the signing of the subscription agreement."

18. Dr Fan says:

> "I relied on the representations made to me by Sally Wang and trusted Frank Zhang to be acting in good faith, and did not have any legal advice with regard to the signing of the Confirmation Letter and the subscription agreement. I always understood that the terms under the subscription agreement and the Limited Partnership Agreement were similar to those under the 2016 Agreement, and I would be able to freely access and dispose of the Legend shares once the IPO had



happened. I therefore entered into the subscription agreement dated 25 May 2017 … and agreed to the terms of the Limited Partnership Agreement which was amended and restated on 25 May 2017 … I would not have done so had I understood that the representations were false and that I was being taken advantage of."

19. Dr Fan says that Dr Zhang "holds shares in Legend [Cayman] and Genscript through the GP. By holding the Legend shares owned by the limited partners via the Partnership, he is able to indirectly exercise voting control over such Legend shares, further strengthening his control of Legend, which I believe is a conflict of interest as it means the Partnership acts in Frank Zhang's interests, not the Partnership's or the partners."

Dr Fan's second affidavit

20. In his second affidavit Dr Fan states:

> "I do not intend on selling all or any substantial portion of the shares that I own in Legend after the in specie transfer to me."

And:

> "The Partnership was without a registered office since around April 2021 until very recently …" (his second affidavit was sworn on 6 October 2021).

21. Dr Fan states:

> "In early 2017, I was informed by Sally Wang, who was the Chief Operating Officer at Genscript at the time, that Legend, the Cayman entity, rather than Legend

Nanjing would be the listing vehicle. Ms Wang informed me that the 2016 Agreement was not a formal contract and was inadequate to accomplish its purpose, and that it was in my best interest to sign a subscription agreement and become a limited partner in the Partnership. I was informed that I would be granted the right to subscribe for 65.96% of the interest in the Partnership in exchange for the payment of RMB 2,500,000, which would entitle me to own 10% of Legend shares through the Partnership, which reflected my entitlement under the 2016 Agreement. In connection with the execution of the subscription agreement, I was asked to sign a Confirmation Letter to confirm that the 2016 Agreement would terminate upon the signing of the subscription agreement …"

22. Dr Fan states that he relied on the representations made to him by Ms Wang and trusted Dr Zhang to be acting in good faith. Dr Fan adds:

"Frank Zhang had told me that the 2016 Agreement needed to be replaced, and he knew I did not have any legal advice with respect to the signing of the Confirmation Letter and the subscription agreement. I was given to understand by Frank Zhang and Sally Wang that the terms under the subscription agreement and the LPA were substantially the same to those under the 2016 Agreement. I was also told that I would be able to freely access and dispose of the Legend shares once the IPO had happened. I therefore entered into the subscription agreement dated 25 May 2017 and agreed to the terms of the LPA which was amended and restated on 25 May 2017. I would not have done so had I understood that the representations were false."

23. Dr Fan says that in order to obtain the 10% share interest in Legend Cayman he made a payment of RMB 2,500,000 on 12 October 2017 and:



> "As was always the intention, I was then reimbursed RMB 2 million over a four-year period such that my 10% shareholding in Legend reflect the same agreement as had been contemplated in the 2016 Agreement. This was further confirmed by Sally Wang in an email dated 23 June 2016 …. that the shares under the 2016 Agreement would fully vest if the purchase price was paid in full."

24. Dr Fan states:

> "My understanding has always been that I was to receive 10% of the shares of the listed Legend entity as co-founder, and Frank Zhang confirmed the same through a series of WeChat messages with me …"

25. Dr Fan states:

> "Following the IPO in June 2020 there was a 6-month lockup period applicable to the Legend shares. I always operated on the understanding that six months after the IPO, I would be able to deal freely with my shares and that they would be transferred into my personal name."

26. Dr Fan refers to his attempts to obtain a transfer of the shares into his name and in respect of the GP's concern that if Dr Fan sold his shares in Legend Cayman this would have a negative impact on the share price and states:

> "I have made it clear to the GP that I do not intend selling the majority of my Legend shares, and have even made an offer to undertake only to sell a small number within certain periods following the transfer."

27. Dr Fan says that "the GP offered to agree to sell 30,000 of my ADS shares in any given year, which would mean that it would take over 300 years for my total shares of over 10,000,000 ADS shares to be sold."

28. Dr Fan say that Dr Zhang "subsequently agreed to a partial sale of some of my shares, then reneging on that agreement". Dr Fan refers to the GP arranging for individuals at "Legend to change press announcements so that any reference to me being a founder of Legend be removed." Dr Fan says that during "a telephone conversation on 23 April 2021, Dr Zhang threatened that if I was to commence legal proceedings, it would result in the termination of my employment or even loss of my entitled shares."

29. Dr Fan refers to the criminal investigation involving Dr Zhang and says that "as a respected specialist in clinical research, I have no intention of being associated or involved in any criminal investigation into Dr Zhang. I therefore wish to remove myself from the Partnership by having my shares transferred to me."

30. On the conflict point Dr Fan says:

> "[31]. Frank Zhang holds shares in Legend through the GP. I also understand he has an interest in Legend via his ownership of other entities. By holding the Legend shares owned by the limited partners via the Partnership, he is able indirectly to exercise voting control over such Legend shares. In other words, he is able to leverage my shares to strengthen his control of Legend. I believe that his own interest in doing so is in conflict with his duty, on behalf of the GP, to me as a partner. There was no consultation with the limited partners on how the assets of the Partnership were to be managed or when Legend shares might be sold. Instead, Dr Zhang has been able to influence Legend at a level greater than he would if his own economic interest in it were held separately. This clear conflict of interest is another reason that I wish to have my shares transferred to me in specie. Until that

point, I am unable to receive dividends from them without the GP authorizing any dividend being distributed by the Partnership (which, for the avoidance of doubt, has never happened).

[32] Sally Wang and Frank Zhang informed me in 2016 that there was an apparent need to restructure ownership to be in the form of the Partnership due to the apparent inadequacy of the 2016 Agreement. I now believe that their true purpose in creating the Partnership was to allow Frank Zhang to exercise control over shares in Legend without having any economic interest in those shares. The GP has not, despite being asked, explained why the Partnership was set up or what its purpose is."

31. Dr Fan says that the Partnership was without a registered office between April to September 2021 following the resignation of its previous registered agent Walkers Corporate Services and the fact that the GP took so long to ensure the Partnership had a registered office in compliance with Cayman law is a matter of further concern to Dr Fan as a limited partner.

Dr Fan's third affidavit

32. The following are extracts from Dr Fan's third affidavit sworn on 3 December 2021:

"In the end of 2014, Genscript group wanted to seed a subsidiary company named "Legend" to develop novel biological drugs of some kind that were undecided. I was invited by Frank Zhang to lead that arm of the business, which was put under the "Project Legend" banner. I thereby co-founded the Legend Group to specialize and develop its business in the discovery and development of novel cell therapies for oncology and other indications…"

33. Dr Fan says that from the outset "I was entrusted by Genscript to lead the set up and growth of the Legend business and, in particular, to focus on development important therapies … My official title was and is Chief Scientific Officer of Legend and I have been listed as co-founder of Legend on Legend's website as well as in Legend's registration statements filed with the US Securities and Exchange Commission."

34. Dr Fan refers his "role as Leader of the Legend project" and the requests to him by Dr Zhang to invest in Legend and adds "my understanding was always that I was to receive 10% of the Legend business regardless of the specific entity whose shares were being issued."

35. Dr Fan says:

> "Sometime between 10 July 2015 and 18 August 2015, following further discussions with Frank Zhang, we agreed that (i) Legend Nanjing would start with a registered capital of RMB 25,000,000, and (ii) I would invest a total of RMB 500,000 (RMB 100,000 each year for 5 years) in exchange for 10% of Legend Nanjing. There was documentation in an agreement which was signed by me and Frank Zhang on 18 August 2015 but was dated 1 January 2016 … (the "2016 Agreement")."

36. Dr Fan says that "During 2016, the Legend business achieved good progress in its first patient dosing of Cilta-cel which I invented in March 2016 … The product I developed is still currently the main asset of the Legend group which is now the largest biotech company in Asia Pacific and one of the world's top companies in the field of cell and gene therapy".

37. Dr Fan says that in mid-2016 he had emails with Ms Wang and she "confirmed that the shares would fully vest once the purchase price was paid in full, and I confirmed that I

would pay RMB 2.5 million to subscribe for 10% of the shares in Legend Nanjing (which was at the time the entity envisaged to be listed)."

38. Dr Fan says that in mid to late 2016 Ms Wang and Dr Zhang told him that there was a need to restructure into some kind of partnership to facilitate the IPO of the Legend Group. At some stage a decision was made to list Legend Cayman on NASDAQ rather than listing Legend Nanjing on a Chinese stock exchange and that triggered the restructuring. Dr Fan says he "did not fully understand the reasons for a change in structure that Ms Wang was proposing but raised queries that I thought were appropriate at the time."

39. Dr Fan says that Ms Wang informed him that the 2016 Agreement "was not a very formal contract and may not be adequate to accomplish its purpose, and that it was in my best interest to sign a more formal subscription agreement and become a limited partner in the Partnership."

40. Dr Fan says that he was informed that he would be granted the right to subscribe for 65.96% of the interest in the Partnership in exchange for the payment of RMB 2,500,000 which he understood would entitle him to "effectively own 10% of Legend Cayman shares through the Partnership essentially the same as to what" he was entitled to under the 2016 Agreement.

41. Dr Fan says:

> "I relied on the representations made to me by Sally Wang and trusted Frank Zhang to be acting in good faith. Frank Zhang had told me that the 2016 Agreement needed to be formalized and replaced, and he knew I did not have any legal advice with respect to the signing of the Confirmation Letter and the subscription agreement. I was given to understand by Frank Zhang and Sally Wang that the terms under the subscription agreement and the LPA were substantially the same



to those under the 2016 Agreement. I was also told that I would be able to freely access and dispose of the Legend shares once the IPO had happened."

42. Dr Fan said that he raised his queries in respect of the draft LPA in early 2017 and he says he had a phone call with Ms Wang when he discussed his concerns and she gave him assurances and made representations. Dr Fan also had WeChat conversations with Ms Wang and Dr Zhang. Dr Fan entered into the 2017 Agreement "on the basis of the representations given to me by Sally Wang and Frank Zhang. I would not have done so had I understood that the representations were false and that I was being taken advantage of. My understanding was always that these were agreements that reflected the 2016 Agreement but with more technical and legal terms."

43. Dr Fan says:

> "In any event, following the signature of those documents, and in order to obtain my 10% share interest in Legend, I made payment of RMB 2,500,000 on 12 October 2017. As was always the intention, I was then reimbursed RMB 2 million over a four-year period such that my 10% shareholding in Legend Cayman reflected the same agreement as had been contemplated in the 2016 Agreement. This was further confirmed by Sally Wang in an email dated 23 June 2016 …. that the shares under the 2016 Agreement would fully vest if the purchase price was paid in full, and the specific percentages that were envisaged at the time is reflected in Sally's emails to me of 7 June 2017 'Percentage', where my 10% stake in Legend Cayman is confirmed despite the Subscription Agreement not being 'straight-forwardly stated as 10%'."

44. Dr Fan refers to the growth of the Legend Group between 2017 and 2020:



> "The group was growing and becoming financially stronger and I was integral to the growth of the Legend Group and worked hard and diligently to ensure its success, and I was happy to do so because I was always under the impression that the success of the group would result in my own financial benefit via my 10% ownership stake."

45. Dr Fan describes the listing of Legend Cayman on NASDAQ in June 2020 as "the culmination of years of hard work". Dr Fan says he understood after the 6-month lock up period that he would be able to deal freely with his shares and he believed they would be transferred into his personal name "automatically". Dr Fan made various requests for the shares and says:

> "the GP ultimately made two offers to allow the sale of some of Legend Cayman shares with the proceeds distributed to me. However, the first offer would have taken over 300 years for all of my shares in Legend Cayman to fully transfer to me so that I could enjoy the economics of the Legend Cayman shares, and would not allow me to control the voting of the Legend shares … The second 'deal' was to a partial sale of some of my shares, which was initially agreed upon until Frank Zhang then reneged on that agreement."

46. Dr Fan says:

> "The GP has suggested that it is fearful of my selling of the shares in Legend Cayman which could have a negative impact upon Legend's share price. However, I have made it clear to the GP that I do not intend selling the majority of my Legend Cayman shares and have even made an offer to undertake only to sell a small number within certain periods following the transfer."

47. Dr Fan refers to the criminal investigation and the involvement of Dr Zhang which "had a drastic impact on Legend Cayman's stock price" and "increased my concerns over the ability of the GP to properly manage the affairs of the Partnership." Dr Fan says as a respected specialist in cancer drug research and clinical development he did not wish to be "associated or involved in any of the criminal investigation into Dr Zhang. I therefore wish to remove myself from the Partnership by having my shares transferred to him."

48. Dr Fan says he has also lost faith and trust in the GP's ability to manage the Partnership because:

(1) references to him being a co-founder of Legend have been removed;

(2) in a telephone conversation on 23 April 2021 Dr Zhang threatened that if Dr Fan commenced legal proceedings that would "result in the termination of my employment or even loss of all my initial shares";

(3) the Partnership was without a registered office for a period of at least 5 months between April to September 2021; and

(4) the GP failed to pay annual fees and was struck off the Cayman register.

49. Dr Fan deals with the conflict of interest point as follows:

> "Frank Zhang controls shares in Legend Cayman through the GP. I also understand he has an interest in Legend Cayman via his ownership of other entities. By holding the Legend Cayman shares owned by the limited partners via the Partnership, he is able indirectly to exercise voting control over such Legend Cayman shares. In other words, he is able to leverage my shares to strengthen his control of Legend Cayman. I believe that his own interest in doing so is in conflict with his duty, on behalf of

the GP, to me as a partner. There was no consultation with the limited partners on how the assets of the Partnership were to be managed or when Legend Cayman shares might be sold. Instead, Dr Zhang has been able to influence Legend Cayman at a level greater than he would if his own economic interest in it were held separately. This clear conflict of interest is another reason that I wish to have my shares transferred to me in specie. Until that point, I am unable to receive dividends from them without the GP authorizing any dividend being distributed by the Partnership (which, for the avoidance of doubt, has never happened, despite distributions being permissible.)"

Dr Fan's fourth affidavit

50. Dr Fan in his fourth affidavit maintains the significance of his contribution to Cayman Legend and denies that the credit for the success of Legend's CAR-T business can be taken by Dr Zhang and Dr Chou. Dr Fan recognises the important role Dr Zhang had in germinating the idea of starting a drug development arm with the GenScript group and setting up the Legend project. Dr Fan maintains that he was "co-founder" in addition to the Chief Scientific Officer of Legend. Dr Fan feels that Dr Zhang has tried to undermine his experience and expertise.

51. Dr Fan says that he did not invite a lawyer to review the position prior to the execution of the 2017 Agreement "because of the assurances given to me by Sally Wang and Frank Zhang."

52. Dr Fan says that he simply wishes to have his shares in Cayman Legend transferred to him personally something which he says he "was entitled to under 2016 Agreement. As a co-founder and the Chief Scientific Officer of the Legend Group, and the key inventor of the Cital-cel drug, I care deeply about the success of Legend and do not intend to do anything



to harm the company. Any suggestion that I am going to set about selling off all my shares at once as soon as I get hold of them and thereby causing the company's stock price to dip is unfounded." Dr Fan confirms that he has "every intention on (sic) complying with any and all insider trading policies at Legend." Dr Fan says:

> "There is no legitimate reason why my Shares should not now be transferred to my personal name. The General Partner is effectively saying that I should be forever locked up in the AquaPoint arrangement, without giving any reason for that to be either necessary or desirable."

53. Dr Fan refers to the risk of being "denied of all of the fruits I have toiled for over the years" and adds:

> "Owning Legend Shares indirectly through AquaPoint means nothing if the only way to have any benefit from those shares is dependent on the actions of the GP in whom I have lost all faith and confidence based on its actions."

Dr Fan's fifth affidavit

54. Dr Fan in his fifth affidavit (sworn on 7 April 2022) says that it was brought to the court's attention during the course of the first day of the trial on 26 January 2022 that the GP had been de-registered as a foreign company under the Cayman Companies Act and the GP had no standing and was unable to represent the Partnership which led to the adjournment of the trial. Dr Fan says whilst he understands that the GP has managed to reinstate itself by registering in Cayman "the facts that led to the de-registration provide further evidence of the manner in which the Partnership is being mismanaged and the lack of probity that is being demonstrated by the GP." Dr Fan adds that "in letting its own registration by the

Registrar lapse, the GP placed the Partnership into a position where it was in breach of Cayman law." Dr Fan adds:

> "The GP's conduct in allowing the above to take place was incompatible with standards of competence and professionalism that a limited partner is entitled to expect from a general partner acting bona fide in the best interests of the Partnership. This episode, which has resulted in the delay to trial following what was already a delayed trial after the GP's belated and unsuccessful attempt to strike out the Petition, is a further example of why I have lost all faith and confidence in the GP's ability to properly manage and conduct the Partnership."

55. Dr Fan adds:

> "I tendered my resignation to Legend on 11 March 2022, right after I found the secret removing of my "co-founder" title from Legend's official website. Whilst I have been honoured to be part of the success of the Legend group and am proud of the progress made in the field of cell and gene therapy, I felt compelled to end my time with the organization because I could no longer endure the long-term and systematic oppression from Frank Zhang and those in favour with him, including the aforementioned removal of my role as co-founder. The manner in which this dispute has been conducted by the GP and the attempts to discredit my reputation and misuse the legal process to damage my name all underline and demonstrate the fundamental breakdown which is the subject of the Petition, and which made my role within Legend untenable and my time at Legend over the past two years very challenging. It was a very difficult decision for me as I have co-founded the company and invented the only drug of the company that has received FDA approval."

56. Dr Fan says he still believes in the prospects of the new drug and of Legend as a whole and has "no intention of selling off any significant portion of my Shares once they are transferred to me. My resignation is driven by the circumstances mentioned above and is by no means a reflection of loss of confidence in Legend."

57. Dr Fan says that the "GP and the Partnership continue to operate in a manner which is unfair and improper" and that he has had to "borrow money in order to pay for the current litigation" and the actions by the GP and Dr Zhang have had the effect of making it difficult to assert his rights.

Ms Wang's affidavit

58. Ms Wang in her affidavit sworn on 20 December 2021 states that she is authorised to make the affidavit on behalf of the GP. She states that she has held a number of positions across the GenScript group of companies, is the President of GenScript Biotech Corporation and has a beneficial interest in the Partnership. Ms Wang covers the following points, amongst others:

> "The management team of GenScript Biotech Corporation learned that stock options are generally considered by employees to have less, or no, inherent immediate value than being granted shares."

59. Ms Wang refers to consideration of providing employees "with incentives where a business unit was likely to proceed to listing. The preferred option, which was adopted across a number of business units, including Legend, was the general partnership/limited partnership approach."

60. Ms Wang says that she was asked by Dr Zhang to take the lead on exploring the best way to put in place incentive schemes for employees "who make and will make significant contribution to the growth of GenScript Group and its subsidiaries, including Legend."

61. Ms Wang says in mid-2016 "I began to have discussions with Dr Fan about admitting him to AquaPoint LP in order that he would have an interest, albeit an indirect one, in Legend."

62. Ms Wang says Walkers were engaged to help and a copy of a draft LPA was "forwarded to Dr Fan for review and comments. I recall that it took a relatively long period of time before Dr Fan came back with questions, comments and suggested revisions."

63. Ms Wang said she had had no involvement with the 2016 Agreement. Ms Wang says Dr Fan was "initially reluctant to move from one arrangement to the other" and adds:

> "Dr Fan made it clear to me that he wished to hold the shares in Legend instead of an interest in a partnership that held the shares of Legend and that it was not reasonable to offer him an interest in the AquaPoint partnership rather than access to Legend shares directly… During our discussions, I did not tell Dr Fan that he would at any point have direct access to shares after the public offering as this would not be an option available to him. I recall explaining that he would obtain ownership in AquaPoint and thus indirectly benefit from Legends' shares."

64. Ms Wang refers to discussions with Dr Fan recording that Dr Fan:

> "asked me whether we intended to honor what Dr Zhang had promised him, which I understood to be a reference to being provided with the 2016 Agreement. I replied that the lengthy negotiations we had been having were aimed at doing just that."

Ms Wang denies the suggestions that she misled or coerced Dr Fan into signing the LPA.

Dr Zhang's first affidavit

65. Dr Zhang in his first affidavit refers to the exit route under the LPA.

Dr Zhang's second affidavit

66. Dr Zhang in his second affidavit says he resigned various GenScript positions to place "company before the person and resigning was in the best interest of the GenScript Group due to legal proceedings in China."

67. Dr Zhang says the concept of what eventually became Legend was his idea, following his attendance at a conference in which CAR-T was discussed. Dr Zhang says in February 2014 he engaged Dr Chuan-Chu Chou to work on the CAR-T project and it was only after the project was well underway that Dr Fan became involved. Dr Chou recommended Dr Fan be a team leader for CAR-T and in March 2015 Dr Fan first began participating in the CAR-T project. Dr Zhang says he led the new project at the beginning. Dr Zhang adds:

> "Dr Fan constantly asked us to promote him. We first promoted him from Director to Vice President, and later to Chief Scientific Officer. We also recognized Dr Fan as a co-founder in public relations materials for Legend because he was one of the most senior scientists and team leaders … Dr Fan was never the CEO of Legend, either in title or responsibilities … At times, we were concerned about his lack of leadership and noticed he puts his own interests above the interests of our company. One example of when we expressed concern about his leadership appear in an email

exchange I had with him in June 2017 concerning incentives for the team beneath him."

68. Dr Zhang says in 2015 he "communicated with Dr Fan to offer him an opportunity to invest in Legend Nanjing … we eventually offered what we has (sic) been called in this case the 2016 Agreement … The incentive plan gives the team rights to 10% of the total share capital of Legend Nanjing."

69. Dr Zhang refers to the lead up to the 2017 Agreement and says: "Sally Wang was the person with the primary responsibility for discussing the new incentive plan with Dr Fan. She handled the majority of the negotiations with Dr Fan on the subject … The discussions with Dr Fan took much longer than expected." Dr Zhang says that Ms Wang "kept me reasonably informed of the status of her conversations with him."

70. Dr Zhang says: "I never told Dr Fan (or Sally Wang) that a limited partner would be free to dispose of his interest six months after the IPO or at any time after the IPO."

71. Dr Zhang says:

> "58. In February 2021, Dr Fan got in touch with me and asked me for permission to sell about 2 million shares of Legend stock (about $56 M value) to the public market. After receiving his request, I then communicated Dr Fan's request to Legend executives, and we mutually decided that Dr Fan's request was unreasonable especially as Legend was in the process of raising capital. Such a big sale to the public market will result in dramatically driving down Legend's stock price and would damage our company since we were in the middle of raising funds from investors. If the stock price goes down, it will cause investors to lose confidence. In order to partially satisfy his demands, after communicating with Legend executives, we

agreed we would offer Dr Fan the opportunity to sell shares and obtain $4 to $5 million. This would make him an immediate multi-millionaire."

72. Dr Zhang says that he was shocked and disappointed to receive a letter from Dr Fan's lawyers dated 22 April 2021 with the threat of legal proceedings. He says he reached out to Dr Fan to make sure that he had in fact authorised the letter. Dr Zhang says that he made no threats to fire him but told him "if he was intent on filing a lawsuit, we would defend ourselves to the best of our ability." Dr Zhang refers to Dr Fan apparently recording one of Dr Zhang's conversations with him and adds:

> "We then decided to freeze the approval to sell shares because we believed the whole situation should be reviewed with both inside and outside counsel."

73. Dr Zhang says that he discussed the decision to authorise shares of $4 – 5 million in stock "with, amongst others, the Legend Chief Executive Officer."

74. Dr Zhang at paragraph 64 of his second affidavit states:

> "I have no personal animus against Dr Fan. His work has been of benefit first to the GenScript Group and now to Legend. His request was simply one that we did not believe was in the best interest of the GenScript Group in general or Legend specifically, and I explained to him why."

75. In the very next paragraph (65), Dr Zhang states:

> "I, as a representative of the general partner, have no conflict of interest in the case."

76. Dr Zhang refers to the need to keep control of the voting rights attached to the shares otherwise the company "would become extremely difficult to govern" and there would be the spectre of "shareholder activism". Dr Zhang says that "Dr Fan released inside information and caused us problems with the Hong Kong stock exchange. It can hardly be surprising that the general partner and Legend are wary of placing a large volume of Legend stock in to Dr Fan's hands as he requests, and this is one of the purposes (sic) which AquaPoint was created. Such a course of action would be a substantial risk in all the circumstances and one that does not appear to be balanced by the benefits to be gained by one individual."

77. In respect of the criminal investigation concerning GenScript, Dr Zhang says that "No charges have ever been laid against the company or against me." When the investigation was announced and Dr Zhang was detained the proper course was, he adds, for him to "step down as Chairman and Chief Executive Officer or Legend Biotech and Chairman of GenScript." Dr Zhang says that he was released without charge.

78. Dr Zhang refers to the difficulties with the Partnership "lacking a registered office for a period of time" as Walkers resigned as registered office provider and adds that there was "nothing sinister or improper." in that.

Dr Zhang's third affidavit

79. Dr Zhang in his third affidavit sworn on 7 May 2022 and adduced pursuant to leave given on 23 May 2022 says that on 28 April 2022 he received a "telephone communication from the Zhenjiang Municipal People's Procuratorate concerned the investigation commenced against GenScript Biotech Co Ltd and myself by the Zhenjiang Customs Anti-Smuggling Sub-Bureau in September 2020." Dr Zhang says:

"I was informed that the investigation had been concluded and it had been determined not to charge me or GenScript Biotech Co Ltd with any crime arising out of that investigation."

80. Dr Zhang refers to a statement dated 30 April 2022 from his lawyers (Allbright Law Offices):

"Accordingly, the criminal procedure for this case has been concluded, and Dr Zhang Fangliang is not guilty and will have no criminal liability with respect to the case."

Mr Meng's affidavit

81. Jiange "Robin" Meng ("Mr Meng") in his affidavit says that he has been involved with the GenScript group of companies for over 11 years and, in late 2020, stepped into the Chairman's role when Dr Zhang stepped down. Mr Meng refers to various payments to Dr Fan and says that he was aware that Dr Fan received RMB 1,900,000 in bonus over 2017, 2018 and 2020:

"I recall that the original amount was RMB 2,000,000 but RMB 100,000 was deducted from his bonus because of an inside information disclosure breach that Dr Fan committed."

Dr Zhu's affidavit

82. Dr Li Zhu ("Dr Zhu"), who occupies the position of Chief Strategy Officer at GenScript Biotech Corporation, says that Dr Fan did "not work on CAR-T alone" and that "the reality is that he is the leader of a team, each member of which has contributed to its achievements" and "Dr Fan was not the CEO of Legend."

Dr Wu's affidavit

83. Dr Sheng "Shawn" Wu, VP of GenScript Biotech Corporation, and says that:

> "Dr Fan suffered a loss of part of his bonus in one year for making an unauthorised disclosure of insider information at a conference."

Ms Qian's affidavit

84. Yan "Elaine" Qian, Head of Human Resources of Legend Nanjing, refers to a bundle of documents and suggests that they usually advise employees "to seek their own individual advisors" in respect of "incentive agreements".

Mr Murphy's affidavit

85. Richard Murphy ("Mr Murphy") Senior Manager of FFP (Corporate Services) Limited ("FFP") in an affidavit sworn on 4 February 2022 says that FFP have agreed to act as the new registered agent for the GP, identified in the Order of 26 January 2022, subject to the provision of complete and adequate know your customer documentation.

86. Mr Murphy says that the GP had until 6 January 2022 been registered as a foreign company in the Cayman Islands but "consequent upon resignation of the former registered office of [the GP] the Register of Companies removed [the GP] from the register of companies on 6 January 2022 … [and] [the GP] ceased to fulfil the formal requirements to be a 'qualifying general partner' …". FFP has agreed to "process the reinstatement and registration [the GP] with the Registrar of Companies." Mr Murphy "expected that [the GP] will be reinstated administratively within a few days of the provision of the requested material and fees to the General Registry."

Cross-examination of Dr Fan

87. Dr Fan during his cross-examination gave the following evidence on material matters:

(1) he is a person who pays attention to detail;

(2) he did not get answers to all the questions he asked before signing up to the LPA;

(3) he was working long hours and was under pressure to sign the LPA. He signed it but felt it was unfair;

(4) Dr Fan appeared to find it difficult to directly answer the question "when one person deals with another, then they should each stand by their word? Yes or no?" with his initial response being "Not if there's not a fair deal." Dr Fan says "I keep my promise always";

(5) Dr Fan accepted that as Chief Scientific Officer he was the leader of the team but added "I'm the major scientist for sure, in the early stages of Legend especially for the invention of a Cilta-cel. I'm the sole, I would say I am more than 90% of the contributions, my team won't doubt about it";

(6) "I founded a company in Japan back in 2001." Dr Fan seemed to have difficulty in answering directly and concisely the question as to whether he had "significant business experience" by 2015;

(7) Dr Fan says it was a "bargaining strategy" to say in his 10 July 2015 7:45 email to Dr Zhang that he would think about it with his wife as to whether or not he would participate;

(8) Dr Fan says "I think Dr Zhang means "allowance" to me because he wanted me to invest, but obviously I don't have that fund to invest to 10% investment of that investment. The company …. he promised to give allowance to deduct or reimburse the extra money I need to pay";

(9) Dr Fan believed that Dr Zhang had more business experience than he had;

(10) Dr Fan accepts that he signed the 2016 Agreement of his "own will"; "It's not a perfect agreement but overall I'm confident I can accept the terms … No other person signed a similar deal."

(11) Dr Fan says that the 2017 Agreement was effectively the same as the 2016 Agreement in giving him "a right to shares in Legend". It changed from Legend Nanjing to Legend Cayman but Dr Fan's understanding was that it was still 10% of the shares. Dr Fan says that his understanding was that whatever the 2017 Agreement says it gave him a direct right to shares in Cayman Legend once the IPO has taken place;

(12) Dr Fan accepts that his team were involved in the invention of Cilta-cel: "I lead the team to develop";

(13) Dr Fan said in a phone call with Ms Wang that the 2016 Agreement was a formal one: "Then, I clearly remember, she was amused. She said, "Really? You think the 2016 Agreement is a formal one?";

(14) it was put to Dr Fan that there was nothing in the build up to the 2017 Agreement to stop him asking a lawyer for assistance and Dr Fan responded:

> "I have a lot of work to do. I am very busy, and I trusted Frank and Sally during that time."

(15) Dr Fan was referred to his email to Ms Wang dated 26 September 2016 at 4:46 where he had stated "Recently Frank told me you're helping roll over the share purchase plan to Legend Cayman" and it was put to him that it was clear to him that there was " a move away from any direct shareholding in Legend." Dr Fan responded "No.";

(16) it was Dr Fan's understanding that after the IPO "everything will be released". Dr Fan said he did not know that the incentive was not going to be "directly in shares in Legend";

(17) Dr Fan did not agree that he had a free choice of remaining with the 2016 Agreement or moving to the 2017 Agreement;

(18) Dr Fan appeared to have difficulty in giving a yes or no answer to the question "In the end you decided not to stick with the 2016 Agreement, but to go with the 2017 Agreement.";

(19) Dr Fan accepted that he was given drafts of the LPA and the Subscription Agreement for his consideration and that he made a number of comments and suggested amendments but added:

> "I never imagined that what I hold, what the share I hold in the Partnership is not Legend … My understanding is, even indirectly holding, it's my share" … "I try to not irritate them … so I always using my wife as an excuse to comfort them … My understanding … was I'm holding Legend share, even inside the Partnership, and after IPO it will release";

(20) Dr Fan agreed that he had read and signed the Subscription Agreement. He also agreed that he read the LPA. Dr Fan stated that in 2017 he was 46 years old. It was

put to him that he should at least take some responsibility for his own actions. Dr Fan said he was a scientist and he was relying on Dr Zhang and Ms Wang in respect of the 2017 Agreement and he was in a weak position "it's overwhelming";

(21) it was put to Dr Fan that his evidence that although the 2017 Agreement provided he pay RMB 2.5 million in fact he did not pay more than 500,000. Mr Corbett stated 100,000 "was withheld from you for a reason that perhaps doesn't matter anymore". Dr Fan said it was "arranged by Frank and Sally …. Sally told me that a lawyer can't write down the actual arrangement in the formal legal terms. They will reimburse me later, year by year, and that's happened: I think both sides are avoiding to say that because it secret arrangement during that time".

Re-examination of Dr Fan

88. In re-examination Dr Fan said no one else in his team was offered a 10% stake in Legend Nanjing;

Cross-examination of Ms Wang

89. Ms Wang during her cross-examination gave the following evidence on material matters:

(1) Ms Wang said in respect of the 2016 Agreement so long as he met the requirements "it gave him direct access to Legend Nanjing shares";

(2) Ms Wang denied that it was her task to persuade Dr Fan to move from the 2016 Agreement to the new arrangement:

"My task is not to persuade him. To be honest, the Company has no obligation to move Dr Fan from the 2016 Agreement to the new Partnership Agreement. So my task was actually to set up investment platform to award, or keep the key talents.";

(3) Ms Wang accepted that there were only two limited partners in the Partnership namely Dr Fan (69.95%) and herself (30.05%) with Legend Cayman as of 20 April 2022 having a market capitalisation of just over US$6 billion and the Partnership holds 30,320,000 ordinary shares in Legend Cayman at a value of about $593 million;

(4) Ms Wang accepts that she is "a co-founder of the GenScript Group" and agrees that she is giving evidence on behalf of the GP (of which she is a director) and she says that she is not taking any sides but just giving evidence "to the extent that I have been involved in the negotiation process with Dr Fan."

(5) Ms Wang accepts that the GP has a duty to "act in good faith in the interests of the limited partnership", a "fiduciary duty";

(6) Ms Wang had no hesitation in accepting that "Dr Fan led the team that developed the CAR-T breakthrough" and she recognized "he was a successful member or key employee"; "Dr Fan led the effort of making significant progress on the CAR-T programme…Dr Fan led the effort and made a significant breakthrough in that area". Ms Wang agreed that Dr Fan was the only person who got an agreement (the 2016 Agreement) conferring a 10% shareholding on him and "it was his importance and the work he was doing that led to this breakthrough that merited reflecting that contribution with a shareholding in the business" but added that "in 2017 was only limited to Nanjing Legend."

(7) it was put to Ms Wang that the reference by her to the "original agreement" in her WeChat message to Dr Fan on 8 June 2017 was to the 2016 Agreement. Ms Wang hesitated, took a few minutes to look at the whole of the message and then said: "I don't get enough context to guess what the original agreement I was referring to in this message". Mr Valentin asked her what she thought the candidates might be. Ms Wang responded:

> "It could be first, of course, the 2016 Agreement and also the agreement I sent him initially in mid of June. That was our first proposal for a partnership set up in China". Dr Fan's communication dated 2 June 2017 was put to Ms Wang and she was asked when he refers to "original agreement" that must be to the 2016 Agreement:
>
> > "I believe the agreement was cancelled in the 2016 Agreement. That's the only agreement that was cancelled.";

(8) it was put to Ms Wang that what she was conveying to Dr Fan in her 8 June 2017 message was that the "stake be held under the 2016 Agreement in Legend Nanjing, whatever ownership interest he had under the 2016 Agreement, would be converted or turned into an interest in the Cayman Legend entity." Ms Wang responded:

> "That's actually what the agreement did."

(9) Ms Wang agreed that Dr Zhang trusted her to negotiate or put the arrangements with Dr Fan into existence;

(10) Ms Wang says that Dr Fan "made his own decision" and the discussions "took quite a long time"; "He had the option to stay within the 2016 Agreement";

(11) Ms Wang agreed that the concept that she was helping with was "through this new structure, to roll over the share purchase that Dr Fan had in the Nanjing entity into the new Cayman entity."; "The concept, I think, is still to ensure Dr Fan can get the benefit of the success and growth of Legend";

(12) Ms Wang was referred to the 15 June 2016 email from Dr Fan and her response and says in respect of the "original agreement" reference she believes he was referring to the partnership agreement she sent to him on 6 June "I'm not referring to the 2016 Agreement";

(13) on the conflict of interest point Ms Wang accepted that Dr Zhang with her and one other co-founded the GP and Dr Zhang "owns a significant part of GenScript Corporation" and that Dr Zhang controlled the GP. Ms Wang also accepted that Dr Zhang has an indirect holding in Cayman Legend (15.2%). It was put to Ms Wang that when Dr Zhang is wearing his GP hat "he has to put out of his mind the interests of Legend Cayman, the interests of GenScript, his own personal interest as a shareholder. He has to think about the Partnership, doesn't he?" Ms Wang replied "That's correct";

(14) Ms Wang was asked how could Dr Zhang do that, "isn't there obviously a conflict in the way he acts as the GP representative in that situation?". Ms Wang responded "That's a very good question" and added: "we have certain kinds of mechanism to governance, to make sure when we are acting in differing roles, we are doing what we are supposed to do."

(15) Ms Wang was asked what purpose the Partnership served and was asked to confirm that Dr Fan is the only one incentivised which she duly did. Ms Wang says she believes Dr Zhang's concern "is if we sell too many shares at a very short period of time, of course, that's going to be a big concern for the stability of the share price for both Legend Cayman and its parent company, GenScript.";

(16) Ms Wang says she did not have the impression that during the discussions about the "2017 arrangements" that Dr Fan trusted her because every time she spoke to him it took him a few days before he came back "with a lot of questions … we actually discuss on the same question over and over again and again. If he trusted me, that's not the way."

Re-examination of Ms Wang

90. In re-examination the email of 23 June was put to Ms Wang and she said that the reference to original agreement coming after RMB 2.5 million was not to the 2016 Agreement but to the partnership agreement she sent to Dr Fan on 6 June that was "a partnership agreement in Chinese". Ms Wang said the purpose of the platform was not just to incentivise "one employee":

> "It's to have a kind of controlled exit mechanism to make sure the share price won't be significantly impacted from one big, large sale, which is also good for all the shareholders' interest, including the Partnership."

Cross-examination of Dr Zhang

91. Dr Zhang during his cross-examination gave the following evidence on material matters:

(1) Dr Zhang was asked what role Dr Fan played in the development of the CAR-T project and his answer (through the interpreter) was as follows:

> "So, our firm started the CAR-T project at the beginning of 2014. At the beginning, Dr Cho planned the project … Dr Fan joined the firm in 2014 … and in March 2015 he joined this new CAR-T project. Later on, Dr Cho left the CAR-T and Dr Fan started to lead the CAR-T project in September of 2015 and therefore, he also played an important role in the CAR-T project";

Dr Zhang accepted that Dr Fan led the team that discovered the CAR-T breakthrough and that "Dr Fan made a significant contribution to the success of" Legend Cayman. Dr Zhang, despite the content of his affidavit evidence, did not accept that he had tried to diminish the role of Dr Fan in his affidavit evidence;

(2) Dr Zhang said the 10% stake in Legend Nanjing was not just to Dr Fan but to Dr Fan and his team. Dr Zhang criticised Dr Fan for putting himself above his team: "He worries about himself on top of their needs";

(3) Dr Zhang, somewhat unconvincingly, said that where he uses references to "your stock" in a communication dated 14 June 2017 "what I mean is that he has some stock in the limited partnership";

(4) Dr Zhang said that the 2016 Agreement was dated and signed on 1 January 2016 and was not signed in August 2015;

(5) Dr Zhang agreed that the 2016 Agreement prevented Dr Fan from selling any shares prior to the IPO;

(6) Dr Zhang agreed that the purpose of the 2016 Agreement was to incentivise Dr Fan to stay so that the CAR-T project could succeed with his involvement and the success of the project played "a very significant" "an important" role to do a future IPO. Dr Zhang was asked "you couldn't afford to lose Dr Fan, could you?" and responded somewhat evasively "We don't want to lose any talent, not just him." Dr Zhang did however accept if Dr Fan had left in 2016 the progress of the CAR-T project "would have been affected." Dr Zhang however seemed to have difficulty in unhesitatingly accepting the value and significant role of Dr Fan. It was put to Dr Zhang that he granted Dr Fan a 10% shareholding in Legend Nanjing "because you needed him to stay" and, despite the fact that there was no evidence before the court of any claims by any members of Dr Fan's team, he replied:

> "I would like to repeat one more time, this was for his team and not just for him, one person.";

(7) Dr Zhang was referred to exchanges of messages with Dr Fan on 19 February 2017 and his comment "How can you question your partners" and seemed to accept that he was trying to reassure Dr Fan that he would honour the 2016 Agreement:

> "Yes, we will, we will honour 2016 Agreement."

Dr Zhang agreed to Ms Wang's evidence that the "aim was to ensure that the new arrangement honoured what Dr Zhang had promised Dr Fan":

> "Yes, but the 2017 Agreement is a totally different agreement to the 2016 [Agreement]."

Dr Zhang said Dr Fan had a choice to stay with the 2016 Agreement or move to the 2017 Agreement.

Dr Zhang said that "Dr Fan would enjoy the same benefits whether the subject matter of the agreement was shares in Legend Nanjing or shares in Legend Cayman". Dr Zhang did not agree that a shareholding in Legend Nanjing would be worth considerably less than a shareholding in Legend Cayman if an IPO took place;

(8) it was put to Dr Zhang that the shares that the Partnership holds in Legend Cayman on 19 April 2022 were worth approximately US$590 million and he was asked what were the shares in Legend Nanjing worth and Dr Zhang said he did not know their exact worth. Dr Zhang accepted that on 19 April 2022 the market capitalisation of Legend Cayman was just over US$ 6 billion. Dr Zhang gave "a rough number" for the value of Legend Nanjing at "maybe $4 billion, you know, but my CFO will know the answer better. The exact number." Dr Zhang agreed that Legend Nanjing was not listed;

(9) Dr Zhang openly accepted that he co-founded the GP and that he "substantially" owns it and at the time of the IPO had control over the GP and he still does. Dr Zhang agrees that he has an interest in Cayman Legend shares. Dr Zhang agrees that he personally controls the GP and he personally controls the shares in Legend Cayman that are held by the Partnership;

(10) Dr Zhang said that employees who own shares have to get approval before they sell shares and, without referring to any evidence in support, added "even after they leave the Company they still have to follow the Company's policies" as "if he or she has the freedom to sell them at any time, that would cause great damage to the Company. It is essentially like suicide for the firm";

(11) Dr Zhang was asked what detriment to the Company's business had to do with the interests of the Partnership and illuminatingly replied:

> "So my rule in the Partnership is, we always want to keep the stock price stable. If the stock price stable, it's good for the Company, it's good for the partners, the limited partners, the LP. My role as the GP of AquaPoint, I have an obligation to the LP …. When we sell shares … there were damages in interest of another LP. If Dr Fan sells shares … he will damage the interests of Ms Sally Wang and also damage Legend Biotech, damage the investors and all the employees. So, that's just not right … we want this company to succeed, we don't want to damage this company … I can control with key stakeholder in the Company and the top management, so we make a consensus decision … the long term benefits of the Company".

(12) Dr Zhang accepted that the Company agreed to a 180 day lock-up period but after the lock-up again insisted that the "employee when they sell off their shares, they need to get the Company's approval.";

(13) Dr Zhang agreed that he was a representative of the GP and he understood that it was the GP's "duty to act at all times in good faith and in the interests of the limited partnership." Dr Zhang was asked when he takes account of the interests of the Partnership what he is taking account of and responded as follows:

> "I take account of the individual LP, I take account of the Company as a whole, the Legend Biotech as a whole, because those two things cannot be separated from each other and this LP. Dr Fan … in … selling the shares should be bound by the Company policy … if the Company does well, the LP does well … It's damaging the other LP, then damaging the whole company."

(14) In a remarkably frank and illuminating exchange Mr Valentin put the following to Dr Zhang:

> "If both limited partners came to the GP and said, "We would like our shares to be transferred to us" wouldn't you have to agree with them in that situation?"

Dr Zhang, without hesitation, responded:

> "I will working for their interest, and I will working for also the Company's interest, in that mission. I am working for the LP's interest, the Company's interest, together.";

(15) it was put to Dr Zhang that he was confusing the interests of the limited partners with the interests of the Company in which he holds shares: "You're blending the two together, aren't you". To which Dr Zhang replied "You are blending them together, you know."

(16) it was put to Dr Zhang that he had not approved any of Dr Fan's requests to distribute shares to him and Dr Zhang responded:

"I give approval $4 to $5 million of his share, his partner share, his partner's share to sell, but he filed a lawsuit, immediately. So that was, and then I consulted with our internal legal counsel and our internal legal counsel asked to put a hold on the shares.";

(17) it was put to Dr Zhang that he knew that when Dr Fan entered into the 2017 arrangement he had not got independent legal advice. Dr Zhang responded.



> "He was very, very smart guy and he has done business before and I don't know whether he got a lawyer or not.";

(18) it was directly put to Dr Zhang that the respect in which the 2016 Agreement and the 2017 Agreement were the same was that "Dr Fan was led to believe, by you and Sally Wang, that he would get his 10% of shares once the IPO was complete and he entered into the 2017 arrangements on the basis of those assurances, that nothing materially would change between the two arrangements." Dr Zhang sought the assistance of the interpreter and through the interpreter protested as follows:

> "This is absurd. We have never told him that he would directly hold 10% of shares of Legend. We have also never told him that after IPO, that he can directly access those shares. He, himself, also knows that the 2017 Agreement is different from the 2016 Agreement. In the 2016 Agreement, there were only two pages but in the 2017 Agreement, there were at least 40 pages. Dr Fan is a very good scientist and he also has business experience. Nobody misled him and he knew about it.";

(19) Dr Zhang was asked about the difficulties with the lack of registered office and the registration issue. He accepted that mistakes had been made and he took responsibility for the mistakes: "I should have thought about it more closely."

Re-examination of Dr Zhang

92. In re-examination Dr Zhang said that clause 10 of the Subscription Agreement dealt with the position as to "what happens if conflicts of interest arise". Dr Zhang said that when the decision was made about distribution to Dr Fan of some shares Dr Zhang was not the only person who was involved in that decision:



> "When Dr Fan want to sell partners shares, so that fact, mentioned to Biotech, so, I conferred with Legend Biotech executives and the board members, and also GenScript Corp."

93. Dr Zhang referred to the $4 to $5 million possibility. Dr Zhang denied that it was the GP's intention to keep the "shares in the Partnership forever."

Evidence provided by way of documents and communications

94. I now turn to the evidence provided by way of documents and communications.

95. An email dated 3 April 2015 from Dr Zhang to Jingwei and Qian Yan:

> "Can you set up a temporary structure using Project Legend name? Frank Fan will be the project leader and he will report to me directly."

96. The 2016 Agreement was contained in a document entitled "Nanjing Legend Biotechnology Co. Ltd. Share Incentive Plan" dated "7 January 1, 2016". Under a clause headed "Eligibility" it was indicated that eligible would be Nanjing Legend Biotechnology Co. Ltd's management personnel as approved by the board of directors. It is further indicated that "The total planned investment of the Company shall be RMB25, 000,000, and the total share capital of the Company shall be 100,000,000 shares with a par value of RMP 0.25 each." In respect of the numbers of shares:

> "It is intended to grant 10,000,000 shares of the Company to the Participants as from June 1, 2016 under this Plan (total share capital of the Company: 100,000,000 shares), representing 10% of the existing shares of the Company."

Four conditions are specified in Clause 2 (d) including "Making investment of RMB 100,000 in the Company annually for five (5) years from January 1, 2016."

Clause 2(e) provides:

"Prior to the Company's IPO, without the approval of the Company, no Participant shall transfer any of his/her shares to others …"

There is another version of this document which refers to "Equity Incentive Plan" rather than "Share Incentive Plan" and the word "Participant" rather than "Participants" is used.

97. By email dated 23 March 2016 Dr Zhang congratulates Dr Fan and his team on the "good progress" that has been made.

98. There is an email dated 6 June 2016 from Ms Wang to Dr Fan which counsel said attached what was referred to as a proposed draft "Chinese Partnership" which led to nowhere and was not executed. There were many blanks in the document and no figures or names were included. It seemed to contemplate establishing a limited partnership under the provisions of the Partnership Law of the People's Republic of China.

99. Extracts from email Dr Fan to Ms Wang copied to Dr Zhang 15 June 2016 at 10:54 a.m.:

> "Hi Sally & Frank
>
> Thank you very much for your sincere communication last week. I understand that the company has undergone some changes compared with last year. But I fully appreciate that you and Frank really want to help me become a formal partner, and I really appreciate your trust and recognition of my past work …

I don't have experience in investing …. I can only try my best to raise the 500K RMB that I committed to last year. The other 2 million RMB is really difficult …. I hope you can help me here, and provide me in advance the amount of the original promised bonus … I definitely will work hard to make the Legend achieve great things and take off!"

100. Email Ms Wang to Dr Fan 15 June 13:25:

"Could you please come to my office at 10:30 tomorrow morning to discuss the following matters."

101. Email Ms Wang to Dr Fan 23 June 2016 14:22 re "Share Purchase Plan":

"As for the share purchase plan we talked about last time, since the group has recently completed its contribution to the capital increase of Legend, and it is better to complete the capital increase and the equity investment plans simultaneously or at a similar time, so please let me know your decision not later than June 25. If I fail to receive your reply before that time, you will be considered as giving up the right to purchase shares in such capital increase.

The RMB 2.5 million equity incentive under the original agreement can be determined as vested in advance by way of subscription. If you would like early vesting, please let me know the specific number of shares.

If you wish to participate in the equity investment plan, please be prepared for the payment shortly …"

102. Dr Fan thanks Ms Wang for the "reminder" by email dated 23 June 2016 14:43 and adds:

"After careful consideration, my wife and I decide to try to raise such funds shortly to participate in this capital increase equity investment plan and share the risks and

benefits of starting the business of Legend. We will pay RMB 2.5 million to subscribe for 10% of the shares. Thank you and Frank for giving me this opportunity." (My underlining)

103. On 25 August 2016 Dr Fan sent Ms Wang a chaser and asked if it was "possible to change the lock-up period of the restricted shares held by me as a limited partner from 5 years to 4 years" in view of the time which had lapsed since the 2016 Agreement had been signed (which on Dr Fan's case was 18 August 2015).

104. Ms Wang in her email dated 26 August 2016 refers to "some policy obstacles with the government in China in taking forward limited partnerships." Dr Fan responded on the same day: "Understood. Thank you for your detailed explanation. I hope the issue can be resolved soon."

105. Dr Fan later that day sent an email to Ms Wang with the question: "Is it possible to establish the partnership in Hong Kong, or even the Cayman Islands or the British Virgin Islands to address the equity investment issue?" Dr Fan also added:

> "I would like to know the legal effect of the agreement I signed with Frank last year … My anxiety is that I don't wish to hold on my hands any agreements I totally do not understand."

And added:

> "Legend R & D and clinical achievements are amazing and will have a huge impact. Now it is coming into the public vision soon, so I hope you and Frank can help me get the shares that are legally protected as soon as possible …"

106. Ms Wang responded on 29 August 2016 referring to the problems in China, indicating it was difficult to have a "specific timetable" and suggesting that Dr Fan talk to Dr Zhang who was in Nanjing.

There then follows an email from Dr Fan to Ms Wang (cc Dr Zhang) dated 26 September 2016:

> "Recently Frank [Dr Zhang] told me that you are helping roll over the share purchase plan to Legend Cayman. For me, it is a good thing to operate in the red chip structure at the Cayman level, as I hold a Canadian passport …" (my underlining)

107. Ms Wang responded by email dated 28 September 2016 indicating that they were "actively facilitating this matter, but it is difficult to give you a specific schedule … we will definitely proceed with this matter, and there are no substantial obstacles at this stage …"

108. Email dated 21 November 2016 subject "name for an investment fund" Ms Wang to Dr Fan:

> "We are going to set up a Limited Partnership Fund in the Cayman Island (sic) for the purpose of investing in Legend by key personnel. We need a name for the fund. Any suggestions?"

109. Dr Fan responded on 22 November 2016 and on 23 November 2016 Ms Wang emailed Dr Zhang (cc Dr Fan) suggesting a number of names including "AquaPoint".

110. On 19 February 2017 9:46 PM Dr Fan sent an email to Ms Wang (cc Dr Zhang) stating:

> "Thank you for your long-term hard work to get the partnership project to proceed to this far. I briefly read it and find it is comparable to the previous Chinese version of the agreement. My main concern is that throughout the partnership agreement,

I fail to see any reasonable legal protection of the interest of the limited partner. Especially the Clause 7.8 is too harsh to the limited partner …

If the whole Clause 7.87 remain in the agreement, we prefer to say with the original agreement which at least reasonably protect my earning of Legend shares based on an annual basis even it also has some vague conditions …. If an agreement make the limited partners wishes the general partner's goodwill all the time for keeping their own "investment", it is meaningless to encourage the limited partner's peace of mind and confidence. By the way, I believe given the key role and contribution of mind into Legend Biotech so far, I deserve to be granted generously at least 10% of unconditional share …?

111. WeChats 19 February 2017:

Dr Fan:

"Frank, another two to three months have passed with the so-called investment plan. And Sally has never contacted me regarding the progress or any issue, or even replied to me on WeChat… how come execution is so inconceivably poor with this particular lawyer? I trust you act in good faith, but there're problems with her attitude and execution. Do you and Sally see me as a partner for Legend at all? Or"

Dr Zhang:

"Xiaohu: It's totally understandable and right for you to follow up this issue, but you question too much, don't you think so? As you may know if you check GenScript's statements, the company has offered almost 25% of its shares to employees, and sets aside a lot of its shares to retain staff members each year after the IPO. After all, it is the company, not you, that proposed your shareholding in Legend first, correct? Also, the company has previously (sic) signed an agreement



with you to this end, the new investment agreement is executed only to make things clearer. Although it's clearer, it's still merely a file, if you don't trust the agreement previously signed by the company, how can you possibly trust the new one? Do you think Legend will grow into a big company if you, one of the main leaders of Legend, always question your partners? Frank." (my underlining)

Dr Fan:

> "Frank, you know I'm short-tempered … I don't mean to be impatient but just want to keep on top of progress … it's not that I don't trust you and Sally, I didn't expect it's so complicated …"

112. On 20 February 2017 2:27am Ms Wang sent an email to Dr Fan (cc Dr Zhang) indicating that the Partnership "the fund for investing Legend was finally incorporated on Feb 16th". Ms Wang attaches the "ARLPA agreement" and asks Dr Fan to review it "and let me know if you have any question" and "Once the ARLPA is finalised, we will move on the subscription agreement …. Since this is our first time to set up such a fund, we don't have any previous experience for reference to understand how much time the whole process will take. The only thing we can do is to push it forward as soon as we can."

113. On 16 March 2017 Dr Fan sends Ms Wang an email:

> "Sorry for taking so long to get back to you. It took me lots of time to convince my wife that this ELP initiative may serve our interest than the previously signed incentive plan in which I can directly access the share of Legend Biotech. Please find attached a revised agreement which we may accept.
> We really appreciated your efforts on this ELP plan are expecting a full agreement with schedule 1 to be available."

Schedule 1 was to include details of capital commitment and contributions. The tracked changes to the draft, amongst other issues, suggested amendments to paragraph 6.6 under the heading "Transfer of Limited Partner Interest" and paragraph 7.8 "mandatory withdrawals".

114. Ms Wang appeared to have forwarded these comments and suggested amendments to Walkers by email 21 March 2017. Some of the changes were accepted and some were rejected.

115. On 27 March 2017 Ms Wang sent an email to Dr Fan attaching a revised draft of an "Amended and Restated Exempted Limited Partnership Agreement by AquaPoint L.P." prepared by Walkers adding:

> "Please give me a call after you review it. I can explain to you the opinion from the attorney."

116. On 28 March 2017 Ms Wang sent an email to Walkers asking for another change suggested by the "employee" in respect of item 7.8 which they thought was reasonable.

117. In the bundle (at page 533) is a document dated "May 25, 2017" entitled "SUBSCRIPTION DOCUMENTS AquaPoint L.P. a Cayman Islands Exempted Limited Partnership" and on the following page (which is signed by Dr Fan) "Subscription Amount: RMB 2,500,000" there is in bold a warning that:

> "EACH ACQUIROR OF A PARTNERSHIP INTEREST MUST BE PREPARED TO BEAR THE ECONOMIC RISK OF INVESTMENT THEREIN FOR AN INDEFINITE PERIOD OF TIME. THE SUBSCRIBERS ARE ENCOURAGED TO SEEK INDEPENDENT LEGAL, ACCOUNTING, INVESTMENT AND TAX ADVICE REGARDING THEIR INDIVIDUAL CIRCUMSTANCES AND

FINANCIAL OBJECTIVES IN DETERMINING WHETHER TO SUBSCRIBE FOR AN INTERST IN THE PARTNERSHIP."

Dr Fan is the Subscriber and at paragraph 5 of the Subscription Agreement (which appears to have been signed on page 11 by Dr Fan) Dr Fan gives various representations, warranties and covenants. At paragraph 5(b) Dr Fan states he has "no intention of distributing or reselling any portion" of his Partnership Interest and "understands the Interest is transferable only with the consent of the General Partner." At paragraph 5(c) Dr Fan agrees that he will not sell or otherwise dispose of "the Interest without the consent of the General Partner, which may be granted or withheld in its sole discretion." Paragraph 5 (e) reads:

> "(e) in formulating a decision to invest in the Partnership, the Subscriber has not relied or acted on the basis of any representation or other information purported to be given on behalf of the Partnership or the General Partner except as set forth in the Partnership Agreement (it being understood that no person has been authorised by the Partnership or the General Partner to furnish any such representation or other information); and
>
> (f) the Subscriber recognises that there is not now any public market for the Interests and that such a market is not expected to develop; accordingly, it may not be possible for the Subscriber readily to liquidate the Subscriber's investment in the Partnership."

At paragraph 7(b) Dr Fan represents and warrants that he "has reviewed and understands the Partnership Agreement and this Subscription Agreement". At paragraph 7(c) it is provided that Dr Fan has not received, nor is entitled to rely upon, any representations by the Partnership, the General Partner or any agent thereof. At paragraph 7(d):



"the Subscriber is aware that except as provided in the Partnership Agreement, the Subscriber will have no right to withdraw from the Partnership or to receive distributions in liquidation of the Partnership Interest"

Paragraph 7(g)

"the Subscriber is not relying on the Partnership, the General Partner or any of their partners, members, directors, officers, employees agents or representatives for legal accounting, investment or tax advice, and the Subscriber has sought independent legal, accounting, investment and tax advice to the extent the Subscriber has deemed necessary or appropriate in connection with the Subscriber's decision to subscribe for Partnership Interest."

Paragraph 10 concerns conflict of interest and provides:

"The Subscriber acknowledges and is aware that the General Partner or its directors may from time to time provide investment management or advisory service or be otherwise involved in other collective investment schemes established by parties other than the Partnership whether or not such schemes have similar objectives to those of the Partnership. It is, therefore, possible that the General Partner or its directors or any of them may, in the course of business, have potential conflicts of interest with the Partnership and the Subscriber will not hold the General Partner or its directors liable to any damage suffered by the Subscriber arising therefrom.

The Subscriber further acknowledges and is aware that the General Partner, its directors or any of its associates may invest in, directly or indirectly, or manage or advise other collective investment schemes or accounts which invest in assets which may also be purchased or sold by the Partnership. Neither the General

Partner, its directors nor any of its affiliates nor any of its associates is under any obligation to offer investment opportunities of which any of them becomes aware to the Partnership or to account to the Partnership (or share with the Partnership or inform the Partnership) any such transaction or any benefit received by any of them from any such transaction."

118. The LPA is dated "May 25 2017". Clause 6.6 concerns the "Transfer of Limited Partner Interest" and was set out in full in my judgment delivered on 23 November 2021. Clause 9 concerns distributions and provides:

> "At the time or times determined by the General Partner, the General Partner shall cause the Partnership to distribute any assets of the Partnership that it does not, in its discretion, consider to be necessary to the operation of the Partnership. Any distribution pursuant to this Clause 9 shall be made to the Partners pro rata in accordance with the Partners' respective interests determined by reference to their Capital Contribution from time to time."

119. There is a WeChat message:

28 May 2017 Frank Fan to Ms Wang:

"I have signed it, and will send it right away."

120. On 1 June 2017 Ms Wang sent Dr Fan an email:

> "Our attorney requests one more document to be signed before the new investment documents can be fully executed. Please find it attached. Basically it will stop the previous contract."

The document attached was entitled "Acknowledgement" (sometimes referred to as the "Confirmation Letter" in Dr Fan's evidence) and Dr Fan acknowledged that the "Original

Share Incentive plan" only contained "general provisions and principles." Dr Fan agrees it is terminated on the execution of the LPA and that he will not claim any rights "in accordance with any provisions of the Original Share Incentive Plan." It is common ground that the Acknowledgement was executed.

121. On 2 June 2017 Frank Fan in a WeChat message to Ms Wang raises concerns in respect of the 25 May 2017 date and asks what the difference is between the "Partnership Agreement" and the "Restated Partnership Agreement" adding:

> "I don't quite get certain parts of the agreement …"

In an apparent reference to the Acknowledgement by WeChat message 2 June 2017 to Ms Wang, Dr Fan says: "Now under this agreement, all the shares in Legend previously awarded to me are cancelled … So could the lawyer take my concerns into consideration, and carefully revise the provisions of the agreement to duly protect my interests under the original agreement under such circumstances or under other unforeseeable extreme conditions. If so I'll sign it without any hesitation. Otherwise, I hope to sign a new agreement that is duly revised based on the original agreement."

122. There then follows further WeChat messages:

3 June 2017

Ms Wang:

> "…the risk you mentioned does not exist … They aren't going to divest Legend … <u>The best news for you is that your stake in Nanjing Legend will be turned into shares in Cayman Legend</u>. The entity to be listed will definitely be Cayman Legend, and can't be Nanjing Legend by any means. This is what really matters." (my underlining)

3 June 2017:

Dr Fan

> "Is the AquaPoint investment only a capital increase? How much does my modest investment account for the total equity in Legend?"

3 June 2017 Ms Wang:

> "It'll hit CNY 25 million after the capital increase as set out in the original agreement. You will hold a 10% stake in AquaPoint."

3 June 2017 Dr Fan:

> "… I just want to get a full understanding of the partnership program, and details concerning me …"

Ms Wang:

> "No problem. The one that has already been signed is about the establishment of AquaPoint. It was prepared by the Cayman lawyer. AquaPoint investment in Legend involves a listed company … The shareholding ratio that you're concerned about is clearly specified in it."

123. Email 7 June 2017 from Ms Wang to Dr Fan:

> "Attached please find the Legend subscription agreement. Please keep it confidential. Your percentage of share may not be straightforward stated as 10% in this document. I will forward another email from the attorney explaining how it was set up. The document hasn't been completed yet, mainly they have to determine if RMB can be accepted in this document. Do let me know first if you have any question." (my underlining)

124. Further WeChat messages on 8 June 2021 Dr Fan:

> "…The original plan is that I contribute CNY 2.5 million, of which CNY 2 million will be paid by the company as allowance over the five years … Then will it soon

become even worse for me than the original deal? … Can you find time to talk and explain to me? Thanks. Or rather, I misunderstand. Please advise, thanks."

Ms Wang:

"It's always been CNY 25 million. The allowances remain the same, only that no such clause will be included in this agreement. The 10 million refers to the number of shares."

Dr Fan:

"OK. Got it"

Ms Wang:

"The total investment in the company is CNY 25 million"

Dr Fan:

"I understand now, thanks."

Ms Wang:

"The valuation is conducted based on this. This agreement is not to change any material personal interest of your's. It's only intended to make the original agreement legitimate, and to create scope for future development. You made headlines in the past couple of days. Won widespread international recognition! Chinese cancer immunotherapy achieved breakthrough …" (my underlining)

125. Email 8 June 2017 8:39 PM from Ms Wang to Dr Fan:

"If you don't have any further concern, please signed the attached document and return one original copy to me at your earliest convenience so that we can move forward."

126. Email 8 June 107 9:32 PM from Ms Wang to Dr Fan:

> "Make sure you use the version I sent today since it has some changes and also with dates filled in. I will try my best to push it faster. At the same time, let's hope everything goes smoothly."

127. Dr Fan returns the signed Acknowledgement by email to Ms Wang dated 9 June 2017 10:21 AM and that appears to have completed the execution of the three documents which comprised the 2017 Agreement, namely (1) the Subscription Agreement, (2) the LPA and (3) the Acknowledgement.

128. By email dated 14 June 2017 subject "Option award" Dr Zhang requests Dr Fan to send to him a list of key employees who need to be awarded options. Dr Fan responds on 15 June 2017 specifying twelve names with his name first on the list and adds:

> "However, I do suggest the first option plan to cover all Legend employees."

129. Dr Zhang responded on 14 June 2017:

> "A good leader should take care of their employees first. If their employees are not successful, the leader cannot possibly be successful.
> Since it has taken a long time take care of <u>your stock</u>, can we spend some time to take care of your employees first?" (my underlining)

130. WeChat message 11 January 2020 Dr Fan to Ms Wang in respect of a questionnaire: "Does the aqurapoint (sic) fund have any voting power on Legend Cayman? and further, do I need to list all my share as "no voting power" and "no investment power"?"

131. In the registration statement filed by Legend Cayman 13 May 2020 with the Securities and Exchange Commission in Washington page 207 there is reference to "Lock-up Agreements" and an agreement that the shares shall not be sold or otherwise disposed of until 180 days after the date of the prospectus.

132. The principal shareholders are specified on page 176 and include:

(1) GenScript Biotech Corporation Number of Ordinary Shares Beneficially Owned 169,680,000; Percentage of Shares Beneficially Owned Before Offering 76.9%;

(2) AquaPoint L.P 30,320,000; 13.7%; and

(3) Dr Zhang 34,234,267; 15.2%.

133. By email dated "01/06/2021" subject "Request the dissolve of AP partnership" Dr Fan wished Ms Wang a happy new year and added:

> "As the lock up period for the holding of the shares in Legend Biotech Corporation ("Legend") by AquaPoint L.P. (the "Partnership") has expired, I would like to discuss with you the status of the Partnership.
>
> As you know, I had agreed to have my shares in Legend to be held through the Partnership. Now that the IPO of Legend has taken place successfully and the lock up period has expired, I do not see any reason for me to continue to hold the shares through the Partnership … I understand that you are now exercising the powers of Genscript Corporation, the general partner, and that you could therefore take the appropriate steps to implement this dissolution and distribution of the shares … I hope you can appreciate the importance of this matter for me and the reason why I want to have it resolved quickly and amicably."

Dr Fan sent a chaser on 18 January 2021 and Ms Wang responded that day as follows:

> "There is one thing I have to clarify that I'm not authorised to exercise the power of GenScript Corporation, meaning that I can pass your request and collect information needed but I'm not the person to make the decision."

134. Dr Fan on the same day raised the following question:

> "Could you please further clarify who can fully represent the GP of AP partnership for now and how to efficiently communicate with the GP in the future for the interest of the LP?"

135. Ms Wang responds on 20 January 2021:

> "We have considered your request and the proposal stated in your email and consulted Cayman legal advice in this.
>
> Pursuant to the amended and restated exempted limited partnership agreement (the "LPA" of AquaPoint L.P. (the "Partnership") may be wound up voluntarily upon certain Winding Up Event (as defined in the LPA). Based on your circumstances described, this does not fall within any of the Winding Up Event stated, and we also do not consider it a viable option to wind up the Partnership as this would involve the interest of the other limited partners.
>
> We propose that the Partnership will consider and assist in the sale of shares in Legend Biotech Corporation ("Legend") upon your written request and prior notice. After receiving such notice, the General Partner will exercise its discretion

to approve and determine the amount of shares to sell and the manner of such mechanism to facilitate the sale and distribution upon your request. Please be advised that all such sales has to follow regulations.

Please let us know your plans on selling.

Thank you."

136. Dr Fan replies on "2021-02-03" and sets out the reasons for his view that it would be appropriate for the Partnership to be dissolved and its assets distributed to the limited partners in accordance with their partnership interests. Dr Fan states:

"Given that I am a key found of Legend Biotech and continue to serve as the Chief Scientific Officer, I believe my request to be very reasonable. I simply wish to hold my shares in Legend directly myself, particularly now that the lockup period has expired for a while.

We have worked together for a number years and have always sought the growth and benefit of Legend. I do not wish for this matter to become contentious or litigious and believe that it is in our mutual best interest as well as the best interest of Legend to have this resolved amicably as soon as possible so that we can move on and focus our efforts on advancing the research and development of Legend and bring the company to a new level.

In any event, I would like to request that up to 2,000,000 Legend ADR shares be sold in one year and the proceeds distributed to me while we sort out our differences regarding the Partnership. I will send you a rule 10b5-1 plan in a separate email to get the process started. Please note that this request is an interim request and does not in any way compromise my position above."

Dr Fan sends the draft sales plan on 9 February 2021 with chasers on 11 and 20 February 2021. Ms Wang asks him to contact Dr Zhang "directly".

137. GenScript Biotech Corporation on 9 February 2021 provided an announcement to the Stock Exchange of Hong Kong entitled "Update on the Investigation". It referred to announcements dated 21 September and 22 November 2020. The Board reported that Dr Zhang, the former chairman and chief executive officer of the Company and the former Chairman of the board of directors and chief executive officer of Legend Biotech was released on bail on 9 February 2021. To the best of the Company's knowledge it is stated that "no formal charge has been made against Dr Zhang."

138. By email dated 17 February 2021 Dr Fan communicates with Dr Zhang and Ms Wang regarding "the sales plan of my shares in Legend" (my underlining) and noting that "it is great that now you are more accessible" but if Dr Zhang wanted to delegate his authority to Ms Wang he should confirm that he'll set up a 1:1 meeting with her and send all future communications to her. Ms Wang responded on 19 February 2021 asking Dr Fan to contact Dr Zhang directly.

139. There appears in the bundle a note from Dr Fan of a call on 19 February 2021 with Dr Zhang suggesting a 1:1 meeting rather than communicating via email. Dr Fan's note of the meeting on 26 February at Dr Zhang's office says that Dr Zhang refused the sales plan "and only mentioned maybe let me sale 1 million $ amount (about 30k ADR) in one year. His reason is that Legend need to raise fund this year and my sales plan will crash the stock price …" I decided to communicate with him via instant messaging (WeChat) in Chinese which we used to interact efficiently."

140. Dr Fan sent an email dated 5 March 2021 to Dr Zhang subject "Request of discussing sale plan of Frank Fan's security" Importance: High:

"Since we very briefly discussed my stock sales plan last time on the 1:1 appointment, I haven't heard back from you …

It has been extremely difficult to access you since Sept 2020 and I was very happy that you become more reachable after you was granted a parole. However, obviously, my application of the 10b-5-1 sales plan encounter unexpected difficulties. I was ever very optimistic to my very first time stock sales in improving my life style after enduring so many years of low salary pay given the key leader position I am holding in field of global cell therapy since 2017.

Again, since I never expected such difficulties in the communication of approval as well as the surprisingly still very restricted position even after IPO of Legend Biotech, I did initiate a few personal financial plan which now will highly likely giving me trouble down the road, given the trade window (Mar 22-24) will be missed soon if I still fail to win your cooperation.

So, please, please do response to my requests in writing (either by WeChat, phone messaging or email) and give me your offer ASAP of a reasonable amount of my stocks you allow me to sell so the trade window can be catch. Otherwise I will be in big trouble in personal financing. I also modified the 10b-5-1 plan and further reduced the asked sales amount to merely up to 1 million ADR. I attached the modified 10b-5-1 document for your approval. If you are still not satisfied with my current bargain please do offer me ASAP a maximum number which you think is reasonable and fair.

I really appreciate your consideration and looking forward to a prompt reply with these."

141. Dr Zhang (signing off as "Frank Zhang, Ph.D. Former Chairman of GenScript Biotech") responded on 5 March 2021:

> "I have talked to Legend Management team and board. Since they are in the process of raising capitals, they feel very uncomfortable that one of the major shareholder will sell stocks. They intend not to grant stock selling. After many rounds of discussions, here is the amount of share they will allow you to sell:
> ADS: 200,000 shares.
> That will give you around $4-5 M USD.
> This is the final offer. We hope that you understand the effort and current situation. So many of our employees are working very hard to get over the crisis, and your stock in Legend will become more valuable after the crisis."

142. Dr Fan responded on 5 March 2021 thanking Dr Zhang for the offer and accepting it. He asked who the contact person will be. Dr Zhang responded on 5 March 2021 "For the procedures, Sally will appoint a person for you to contact".

143. By email dated 10 March 2021 from Ms Wang to Dr Zhang (cc Dr Fan) the following question was asked:

> "Can you please advise how many ADS you approved to sell?"

144. By letter dated 22 April 2021 from Travers Thorp Alberga ("TTA"), the attorneys representing Dr Fan, to the Partnership and the GP. TTA stated that Dr Fan was "the scientific founder of the Legend group." Reference was made to the 2016 Agreement and the 2017 Agreement and a demand was made that the GP transfer to Dr Fan the shares held by the Partnership in Legend Cayman. It was stated that Dr Fan is "a limited partner holding 65.96% of the partnership interests."

145. There follows various WeChat conversation records between Emma Dong and Dr Fan in respect of progress of the selling of the shares including the following exchange:



"23 April 2021 at 15:13, Emma Dong

Hi Dr Fan! Today Frank [Dr Zhang] said let's delay the AquaPoint trade, and he needs to consider other things, but he didn't give any details. How about this, you will discuss with him, and I continue the preparation work as formal for now.

23 April 2021 at 15:22, Frank Fan [Dr Fan]. "Noted, he is punishing me."

146. In a document entitled "Apr. 23, B1 recording" the following appears (upon which Dr Zhang and Dr Fan were not cross-examined):

Frank Zhang:
Let's help you, OK? You can think about it again. Once you file a lawsuit, the nature of the matter will change …. First you asked to sell shares and the company has agreed. If now you intend to file a lawsuit, I'm not sure whether it will affect your sale.)

Frank Fan:
What do you mean? You have already approved.

Frank Zhang:
That is to say, you aim at me … I can't intervene in how the legal department deals with these matters right now … I can only advise you as a friend and a former co-worker. But you have brought things to a deadlock. If you still decide to file a lawsuit against me and the company, everyone will suffer a bad end, right? ….

Frank Zhang:

….If you really file a lawsuit, that will definitely become a fight between the two sides …. In a lawsuit, each side will try every mean to find reasons to defend itself.

Frank Fan:

That's completely different from what you just said. You didn't listen to my explanation at all. You said that I didn't have the right. You implied that I would be fired if I file a lawsuit, right? I would lose my job and be taken back my shares because I violate the AquaPoint agreement.

Frank Zhang:

Xiaho, you have the right to file a lawsuit, and you even have your right to kill a person. Do you understand? ….

Frank Zhang:

All decisions are risky, right? Once you make a decision, such as going to kill a person today, you have the right to kill. But what would happen after killing? You have to think about it, right?

Frank Fan:

At least it's not like what you just said – you're going to fire me once I file a lawsuit. Not that attitude, right?

Frank Zhang:

No, not at all.

Frank Fan:

Thank you for changing your attitude …

Frank Zhang:

> …. It's possible that you will win the lawsuit and get your voting rights, and you can sell your shares as many as you want. In other words, I have also got that right to sell my shares at any time, but how many can I sell? …

Frank Fan:

> … I hope that you will not interfere with the sale as you have approved …

Frank Zhang:

> Xiaohu, I have no right to do that, OK? … The legal department here doesn't report to me. And I can only approve the matters that others want me to approve. If they don't want me to approve, I can only do accordingly.

Frank Fan:

> Really? What do you mean? You are still the GP of Aqua Point. I hope …

Frank Zhang:

> I'm the GP, but the GP is also under control by others.

Frank Fan:

> OK. I'm just talking about your rights as a GP.

Frank Zhang:

> It's still about control. If I was told not to allow you to sell shares, then of course I need to obey the order.

Frank Fan:

As far as I know, you are still the actual controller of GenScript. You have all the rights. No one will interfere with your rights. If the 200,000 shares that have been approved for me to sell cannot be sold, it must be your own decision, not that others can influence you. So I hope you can keep your promise and fulfil your promise. You have approved it!

Frank Zhang:

I can't … I can't promise you that, okay? …

Frank Fan:

… But don't threaten my job and don't threaten to take back my equity. I don't think you have such right, even based on Aqua Point's.

Frank Zhang:

Yes, I don't have such right. You are right. Alright …

Frank Fan:

… I am an employee, but I am also one founder of Legend. I have made so many contributions to the company. Did I get enough recognition and affirmation for my contributions? … You can know your rights and I will understand mine. Shall we still resolve this issue friendly through lawyers?

Frank Zhang:

Yes, we can solve this issue through lawyers."

147. TTA sent a further letter dated 26 April 2021 referring to the discussions between Dr Zhang and Dr Fan and Dr Zhang's instruction to Emma Dong to suspend the sale of shares by the Partnership. TTA said this supported Dr Fan's position that the Partnership should be dissolved. TTA sent a chaser on 12 May 2021 enclosing a copy of the draft petition. Dentons, acting for the GP, responded on 21 May 2021 indicating that the 2016 Agreement was rescinded by the 2017 Agreement and referred to the other signed documentation. Dentons stated that Dr Fan had not adopted the correct methodology for attempting to transfer his interest in the Partnership. Dentons added:

> "There are perfectly good reasons for not wishing to allow Dr Fan to have the ability to directly sell 10% of the shares of the Company on the open market with their corresponding voting rights. The most obvious reason is that impact on share price would result from flooding the market with that proportion of shares, which would operate to the manifest disadvantage not only of the Partnership but also the Company and its shareholders. It cannot be suggested that avoiding such a result is anything other on the part of the GP than acting in full accordance with its duties to the Partnership."

148. By letter dated 26 May 2021 from Dentons to TTA the following was stated:

> "Our client is willing to release to your client 5% of the proportion of Legend shares held under his interest in the Partnership within 21 days of settlement, followed by 3.5% every year thereafter. This offer is conditional upon both parties bearing their own costs and is open for acceptance for a period of 14 days.
>
> We are sure your client will recognise that selling even the above number of shares in Legend on the market each year would present a substantial risk to the share price of the company and potentially disadvantage other shareholders. Naturally,

our client wishes to avoid unnecessary prejudice to the shareholders of Legend in general."

149. Dentons wrote further on 12 August 2021 asking if Dr Fan "will attempt an LPA compliant exit within the next 7 days."

150. TTA by letter dated 17 December 2021 suggested that the GP "transfer all of the proportionate shares in Legend Cayman attributable to our client's interest in the Partnership to our client and our client's name shall be placed onto the register of members of Legend Cayman. For the avoidance of doubt, should your client accept this offer of settlement, our client will be receiving, on our undertaking, 20,000,000 ordinary shares, or 10,000,000 ADS shares in Legend Cayman." and following the transfer the winding up petition would be withdrawn.

151. I bear in mind the point well made by Lord Briggs in *Lungowe v Vedanta* [2019] 2 WLR 1051 at paragraph 66 in respect of the potential for distortion involved in the translation of the evidence.

The Assessment of the Evidence

152. The contemporaneous documents and communications are of great assistance in my assessment of the evidence and the findings of the material facts in this case.

Dr Fan

153. As regards the oral evidence where there was any conflict on material points between the evidence of Dr Zhang and Dr Fan I generally preferred the evidence of Dr Fan. It is correct that Dr Fan did not always answer questions concisely and directly and frequently went off on a tangent. However, his evidence on the main factual issues in dispute had the ring of

truth about it and was largely supported by the contemporaneous communications between him and Dr Zhang and Ms Wang. He understandably had very strong feelings in respect of the unfair, unjust and inequitable way in which he had been treated. I do not think his evidence can be dismissed on the basis that he unduly exaggerated his contribution and his desire for the shares was just the "wishful thinking" of someone who plainly had a significant stake in the outcome of the hearing. Dr Fan's evidence is largely consistent with the contemporaneous communications put before the court. His evidence is largely internally consistent and also consistent with what he has said on other occasions. The inherent probabilities based on the evidence as a whole point to Dr Fan's evidence on the main issues in dispute being true. His evidence on the material points was largely unshaken by way of a lengthy cross-examination. It is unnecessary for me to determine the factual dispute as to whether Dr Fan was a co-founder and the de facto CEO. It was common ground that, at the very least, Dr Fan made a "significant contribution" and I so find.

Dr Zhang

154. Even taking into account language difficulties, the unreliability of human memory, the involvement of translators and an interpreter and difficulties with evidence being given via video link rather than in person I found, as will be plain from my findings below in the determination section of this judgment, Dr Zhang's evidence on various material points unsatisfactory and difficult to accept. His reluctance to openly acknowledge, without prompting, the very significant contribution of Dr Fan did not reflect upon him well. Dr Zhang's efforts to belittle Dr Fan were also unimpressive and tainted his evidence generally. He was however very open on the conflict of interest point and I shall refer to this in further detail below.

Ms Wang

155. Insofar as Ms Wang was concerned she came across as a very intelligent and astute person of business. She answered the majority of the questions in a direct and carefully considered manner. Her loyalties however were plainly towards Dr Zhang and supporting his position. It is likely that the GP called her in the knowledge that she was "on side". Her evidence on the "original agreement" exchanges seemed difficult to justify although Mr Corbett did his best to do so in his closing submissions. It is surprising that she did not express any views as to her position as a limited partner and her wishes in that respect. I gained the impression that she did not want to say anything that may displease Dr Zhang or the GP. Where her evidence on material disputed facts conflicted with Dr Fan's evidence, I preferred the evidence of Dr Fan.

The Law

156. There was no serious dispute as to the applicable law which was in effect one of the few areas of common ground between the parties. There was, however, a significant dispute as to the application of the relevant law to the facts and circumstances of this case.

Jurisdiction

157. Fortunately it is common ground between the parties that the court has jurisdiction to wind up the Partnership if it is just and equitable to do so and I accept that this court has such jurisdiction. It is unnecessary for me to enter the interesting debate at first instance as to the precise nature of the jurisdiction (see for example Parker J in *Padma Fund LP* unreported FSD judgment 8 October 2021; and Kawaley J in *Formation Group (Cayman) Fund I, LP* unreported FSD judgment 21 April 2022). It may require a judgment of the Court of Appeal, or the Privy Council or legislation to finally determine and put those

knotty jurisdictional issues to bed. Counsel in the case before me agreed that the court has jurisdiction to dissolve or wind up an exempted limited partnership. The debate at first instance is whether such jurisdiction arises pursuant to section 35 (e) of the Partnership Act as applied by section 3 of the ELPA or pursuant to section 92(e) of the Companies Act as applied by section 36(3) of the ELPA. Under section 35 (e) of the Partnership Act on application by a partner the court may decree a dissolution of the partnership "whenever in any case circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved". Section 92 (e) of the Companies Act provides that a company may be wound up by the court if "the Court is of the opinion that it is just and equitable that the company should be wound up." It is not in dispute between the parties that the court has jurisdiction and the main issue before the court is whether it is "just and equitable" that the Partnership be "wound up"/"dissolved".

Just and Equitable

158. Counsel referred to my brief summary of the law in respect of the just and equitable ground at paragraph 10 (11) and (12) of my judgment delivered on 23 November 2021 dismissing the application of the GP that the winding up petition be struck out and I do not repeat such summary here but have full regard to it and also to paragraphs 71 and 72 of such judgment and *Lau & Chu* [2020] I WLR 4656 (JCPC).

159. Ma CJ and Lord Millett NPJ delivering the leading judgment of the well regarded Hong Kong Court of Final Appeal in *Re Yung Kee Holdings Ltd* [2015] 6 HKC 644 applied the well-known authority *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 and held that considerations of a personal character arising between individuals might make it unjust, or inequitable to insist on legal rights, or to exercise them in a particular way. This might come in the form of a mutual understanding and there might be situations in which equity might find sufficient unfairness or breaches of good faith so as to attract relief granted by

the court. The jurisdiction to wind up on the just and equitable ground is a wide jurisdiction but it must be exercised in a principled manner. The relevant constitutional documents provide for the way in which the relevant entity should be run and normally govern the relations between the various stakeholders. However in certain circumstances equity will intervene by reference to notions of good faith "meaning that in certain circumstances equity would restrain the exercise of strict legal rights." (paragraph 44). There may be situations in which equity may find sufficient unfairness or breaches of good faith so as to attract relief being granted by the court but "this does not mean that a judge can do whatever he or she happens to regard as fair" (paragraph 45). The law needs to be as clear and as defined as possible so everyone knows as much as possible where they stand.

160. Lord Wilberforce in *Ebrahimi* wisely stated that it "would be impossible and wholly undesirable to define the circumstances in which these considerations may arise". Lord Wilberforce referred to relationships being sometimes adequately and exhaustively laid down in the relevant constitutional documents adding: "The superimposition of equitable considerations requires something more", typically including an element of a personal relationship involving mutual confidence and/or an agreement or understanding over and above what is specified in the constitutional documents.

161. Ribeiro PJ, Tang PJ and Fok PJ agreed with Ma CJ and Lord Millett NPJ. I agree that when courts at the first instance are considering whether there is "something more" they must conduct such exercise in a principled way and with full regard to the desirability of legal certainty especially in matters of commerce. They should not however sacrifice justice, equity and fairness on the altar of legal certainty.

162. The judgment of Moses JA in *FamilyMart China Holding Co. Ltd. v Ting Chuan (Cayman Islands) Holding Corporation* (23 April 2020) is also of assistance. I note that the Board granted permission to appeal on 29 September 2021 and the judgment of the Judicial

Committee of the Privy Council is awaited with interest. The general just and equitable and conflict of interests principles and their application in partnership cases however appeared to be common ground between the parties.

ELPA

163. I have also considered the ELPA and statutory context and caselaw within which exempted limited partnerships exist and operate under the laws of the Cayman Islands. I have noted the judgment of Parker J in *Kuwait Ports Authority v Port Link GP Ltd* (FSD unreported judgment 25 November 2021) which is also subject to a pending appeal and the judgment of the Court of Appeal is awaited with interest.

The submissions

164. I do not lengthen this already too lengthy judgment by setting out all the submissions, both in writing and orally, put before the court. They form part of the court record and I have full regard to them all. It should be obvious from the determination section of this judgment which submissions I have accepted and which submissions I have rejected.

Determination

165. When I conducted an initial, somewhat superficial, survey of the papers in this case some preliminary thoughts were that Dr Fan may be strictly bound by the 2017 Agreement he had signed up to and he may have to take the consequences of his failure to take legal advice. However, having now heard oral evidence and submissions and on mature and considered reflection, I am persuaded that there is "something more" and equitable considerations lead me to conclude that it is just and equitable that the Partnership be brought to an end. As will be seen below, I have concluded that there is plenty "more" in *Ebrahimi* terms.

Justifiable loss of trust and confidence

166. Dr Fan has proved a justifiable loss of trust and confidence in the management of the Partnership by the GP judged to the requisite objective standards in the circumstances of this case. Moreover, in my judgment the affairs of the Partnership have been conducted by the GP (with Dr Zhang being in the driving seat in that respect) in a manner which is oppressive and in breach of Dr Fan's legitimate expectation and understanding.

Frustration of legitimate expectation and reasonable understanding

167. Dr Fan had a legitimate expectation and reasonable understanding outside the 2017 Agreement. The legitimate expectation and reasonable understanding was that 6 months after the IPO he would be entitled to have access to 10% of the shares in Legend Cayman. The legitimate expectation and understanding was created and encouraged by Dr Zhang and Ms Wang on Dr Zhang's behalf. That legitimate expectation and understanding has been unreasonably frustrated by the Partnership, the GP and Dr Zhang.

168. There is ample supportive evidence before this court in this respect. I highlight some of the more obvious examples below:

(1) the affidavit and oral evidence of Dr Fan which I accept on this legitimate expectation/understanding issue;

(2) I do not accept that the references to the "original agreement" in the various communications were references to some agreement other than the 2016 Agreement. I find that the references to "original agreement" were in fact to the 2016 Agreement or at the very least this was Dr Fan's reasonable understanding. Even if I am wrong in this respect there is plenty of other evidence over and above

communications which rely on the "original agreement" reference to justify Dr Fan's reasonable understanding and legitimate expectation;

(3) the evidence of Ms Wang was that they intended to honour what Dr Zhang had promised by way of the 2016 Agreement and Dr Zhang seemed to accept this;

(4) the various email and WeChat messages are supportive of the legitimate expectation/understanding;

(5) I do not accept Dr Zhang's evidence that where he was referring Dr Zhang to "your stock" he was referring to "some stock in the limited partnership". The references to "your stock" were, I find, to the shares in the company which was the subject of the IPO;

(6) Dr Fan's uncontradicted legitimate expectation and understanding is plain from his email to Ms Wang (cc Dr Zhang) dated 26 September 2016 and his reference to "roll over the share purchase plan to Legend Cayman.";

(7) Dr Zhang in his WeChat with Dr Fan on 19 February 2017 referred to "After all, it is the company, not you, that proposed your shareholdings in Legend first, correct?...the new investment agreement is executed only to make things clearer..";

(8) Ms Wang in her WeChat with Dr Fan on 3 June 2017 openly confirmed the position:

"The best news for you is that your stake in Nanjing Legend will be turned into shares in Cayman Legend. The entity to be listed will definitely be Cayman Legend and can't be Nanjing Legend by any means. This is what really matters.";

(9) Ms Wang also recognised that Dr Fan had a 10% share in her email dated 7 June 2017;

(10) Dr Fan's legitimate expectation and understanding was further confirmed by Ms Wang by way of a WeChat exchange on 8 June 2021. Ms Wang confirmed that the 2017 Agreement "is not to change any material personal interest of yours. It's only intended to make the original he intended to make the original agreement legitimate and to create scope for future development." I find that the reference to the "original agreement" in that context was the 2016 Agreement. I also find that Ms Wang was at pains to provide reassurance to Dr Fan that his "material personal" interests would not be changed by way of the 2017 Agreement;

(11) Dr Zhang in effect confirmed this again by his email to Dr Fan on 14 of June 2017 and the reference to "your stock";

(12) furthermore when Dr Fan in his email dated 17 February 2021 to Dr Zhang and Ms Wang refers to "my shares in Legend" neither of them sought to contradict him; and

(13) Dr Zhang in his email dated 5 March 2017 to Dr Fan referred to "your stock in Legend."

169. Dr Fan in entering into the 2017 Agreement trusted Dr Zhang and Ms Wang to do the right thing and to honour the roll over of Dr Fan's Legend Nanjing shares to Legend Cayman

shares. Dr Zhang and the GP have betrayed that trust and it can easily be seen how Dr Fan legitimately and reasonably believes, after his significant contribution to the increasing value of Legend Cayman, that he has been badly let down by the GP and those that control the GP. Dr Fan has been unfairly treated. It was not mere "wishful thinking" by Dr Fan. It was a reasonable and legitimate expectation that he would get the Legend Shares after the IPO, whatever was stated in the 2017 Agreement.

170. Mr Corbett criticised Dr Fan for hunting down a goldmine but it was, I find on the evidence, a goldmine largely created by the efforts of Dr Fan. It is only fair, just and equitable that he shares in the benefits now rather than having to wait 300 years (as originally in effect suggested by the GP) or 26 years (as subsequently in effect suggested by the GP) to obtain his shares. The GP's consideration of and reactions to Dr Fan's reasonable requests for the shares shows the GP in a bad light. Such is indicative of the GP's breach of its fiduciary duties and its failure to act in the best interests of the Partnership and its limited partners. Dr Fan had nearly a 70% interest. He should have been treated with respect and fairness. He was not so treated. He was left with no reasonable alternative but to file the petition.

Fiduciary duties and conflicts of interest

171. There is considerable strength in Dr Fan's point that the GP has been acting in breach of its fiduciary duties in particular its duty to act in good faith and in the best interests of the Partnership. Dr Zhang is in control of the GP. Dr Zhang is hopelessly conflicted. He is the beneficial owner of shares in Legend Cayman. He also has control of the Partnership's shares in Legend Cayman. The GP (through the actions of Dr Zhang) is not acting in the best interests of the Partnership. The clearest example of this is the GP's approach when it receives a request from Dr Fan for his portion of the shares to be transferred to him. A general partner acting in good faith and in the best interests of the Partnership would primarily have regard to the position of the limited partners and yet remarkably there is no



evidence of the GP consulting Ms Wang and seeking her views. I also note that Ms Wang as a limited partner has not opposed the making of a winding up order.

172. It was put to Ms Wang, who came across as a very intelligent witness well aware of fiduciary duties and the need to properly manage conflicts of interests, that when Dr Zhang is wearing his GP hat "he has to put out of his mind the interests of Legend Cayman, the interests of GenScript, his own personal interest as a shareholder. He has to think about the Partnership doesn't he?" Ms Wang, in a well-considered answer, properly replied "That's correct". Ms Wang was asked how Dr Zhang could do that, "isn't there obviously a conflict in the way he acts as the GP representative in that situation?" Ms Wang responded "That's a very good question" and indeed it was. Ms Wang had no real answer to the question, although she sought refuge in vague generalisations that they had a "governance mechanism" to cover that. There was no evidence before the court as to the "governance mechanism" or as to compliance with it. Dr Zhang was hopelessly conflicted but even during cross examination refused to accept this obvious conflict. Dr Zhang said:

> "I take account of the individual LP. I take account of the Company as a whole, the Legend Biotech as a whole, because those two things cannot be separated from each other and this LP."

173. Dr Zhang was asked what if both limited partners had asked for their shares to be transferred to them? Dr Zhang, with extraordinary frankness, responded:

> "I will working for their interest, and I will working for also the Company's interest in that mission. I am working for the LP interest, the Company's interest together."

174. It was fairly put to Dr Zhang that he was confusing the interests of the limited partners with the interests of the Company in which he holds shares and that he was blending the two

together and all that Dr Zhang could come up with in response, no doubt on the basis that the best form of defence is to attack, was "You are blending them together, you know".

175. In re-examination Dr Zhang said when Dr Fan wanted to sell the "partners shares" Dr Zhang "mentioned to Biotech, so, I conferred with Legend Biotech executives and the board members, and also GenScript Corp"

176. Dr Zhang, at paragraph 58 of his second affidavit refers to the approach in February 2021 from Dr Fan for permission to sell about 2 million shares of "Legend stock (about $56M value)". Dr Zhang says he was in contact with "Legend executives" and they in effect decided against it because it would be bad for Legend Cayman. They decided to offer Dr Fan "the opportunity to sell shares and obtain $4 to $5 million." It is plain from the evidence that Dr Zhang was putting his own personal interests and the interests of Legend Cayman above the interests of Dr Fan. The GP (with its strings being pulled by Dr Zhang) was more concerned over the interests of Legend Cayman and Dr Zhang than the interests of Dr Fan a limited partner with a nearly 70% interest in the Partnership.

177. In my judgment Dr Zhang was hopelessly conflicted and he has caused the GP not to act in the best interests of the limited partners.

178. I was totally unpersuaded by Mr Corbett's valiant efforts to salvage something from this adverse conflict point by way of reliance on paragraph 10 of the Subscription Agreement. There is nothing in paragraph 10 that can come to the rescue of the GP in this case.

179. The conflicted position of the GP (under the control of Dr Zhang) and its preference of the interests of Dr Zhang, Legend Cayman and the Legend Biotech group as a whole over and above the interests of Dr Fan a limited partner (holding almost 70%) persuades me that the position of the GP is unsustainable and the Partnership must be brought to an end in the

best interests of the limited partners. Dr Fan applies for a winding up order and this has not been opposed by Ms Wang, the only other limited partner.

GP's cavalier attitude towards compliance with the laws of the Cayman Islands

180. Also of concern is the GP's somewhat cavalier attitude towards compliance with important local legal requirements in the Cayman Islands in respect of the maintenance of a registered office and the registration of the GP in the Cayman Islands. The latter led to the adjournment of the hearing on 26 January 2022 with indemnity costs against the GP. In respect of these serious failings Dr Zhang has in effect now held his hands up and openly accepted responsibility and that much is in his favour. However these failings are another reason which leads me to conclude that the GP has not conducted itself in a responsible way and such supports the making of a winding up order. I should, in fairness, make it plain that taken on their own these administrative failings (albeit serious), in the circumstances of this case, would not have led me to wind the Partnership up. I do not however intend to belittle the importance of proper compliance with local requirements in respect of the maintenance of a registered office and the registration of foreign companies.

Discontinued criminal investigation in China

181. In respect of the recently discontinued criminal investigation involving Dr Zhang, I can see why, from at least a reputational perspective, Dr Fan would be concerned over being associated with someone who was the subject of a criminal investigation in China. This on its own however would not be sufficient to justify the making of a winding up order.

Relationship has irretrievably broken down

182. It is plain to me that at the early stage when Dr Fan joined up with Dr Zhang that their relationship was one of mutual trust and confidence but that relationship has now irretrievably broken down and, on an objective analysis, Dr Fan has lost trust and confidence in Dr Zhang, the GP and the Partnership. Dr Fan's relatively recent resignation was not, in my judgment, a tactical ploy. It is plain that Dr Fan could not work in the environment created by Dr Zhang. Dr Zhang has attempted to belittle Dr Fan's role and contribution. Dr Zhang has preferred his own interests over the interests of Dr Fan. The GP, for reasons best known to itself, filed evidence that made reference to Dr Fan and an insider dealing incident. It had no relevance to the issues before the court for determination. It was not referred to in the comprehensive legal submissions before the court but the filing of it is a further indication of the lack of trust and confidence between the parties.

183. The GP agreed via Dr Zhang's communication of 5 March 2021 to permit 200,000 shares to be sold, but then reneged even on this meagre offering. There is significant hostility and lack of trust between the parties. Dr Fan has now resigned. That must have been a very difficult decision for him. Mutual trust and confidence no longer exists. This situation cannot continue indefinitely. The Partnership and the GP have already dragged these proceedings out for far too long.

184. This is not a case of a dissatisfied investor, having been treated fairly, simply wanting an early exit and a return on his investment outwith the terms of the agreements he signed up to and the relevant constitutional documents. In my judgment there is plainly "something more" in this case and fairness requires equitable considerations to trump the strict rights and obligations of the parties pursuant to the contractual and constitutional documents.

The LPA and the ELPA

185. I have considered possible arguments that if the GP is simply doing what it is entitled to do under the LPA and the ELPA how can it, in such circumstances, be just and equitable to wind up a solvent Partnership? I think the short answer to that is that the law expressly permits a partnership to be brought to an end on the just and equitable basis so the "equitable considerations" referred to in the case law are imported and plainly relevant in respect of the winding up of the Partnership.

No reasonable alternative remedy

186. In respect of the argument that there is a reasonable alternative remedy I dismiss that essentially for the reasons stated in my judgment delivered on 23 November 2021. Dr Fan is entitled to the shares and only a winding up order will give him his shares.

187. Having considered the evidence, submissions and the relevant law, I have reached the conclusion that Dr Fan has established that it is just and equitable to put an end to the Partnership.

The Order

188. I make an order substantially in terms of the prayer for relief in the petition but without blanket authorisation with respect to the powers specified in Schedule 3 of Part I of the Companies Act. The Part II powers are exercisable without sanction. If further powers are required they can be separately applied for. The relief I grant is as follows:

(1) The Partnership be wound up;

(2) Martin Trott of R & H Restructuring (Cayman) Limited and Kan Lap Kee also known as Terry Kan of Shinewing Specialist Advisory Services Limited be and are appointed as joint official liquidators of the Partnership (the "JOLs");

(3) the JOLs shall not be required to give security for their appointment;

(4) the JOLs shall have power to act jointly and severally in their capacity as liquidators of the Partnership;

(5) the JOLs are authorised to take such action as may be necessary or desirable to obtain recognition of their appointment in any relevant jurisdiction and to make applications to the courts of such jurisdictions for that purpose;

(6) the JOLs are authorised to exercise all the powers set out in Part II of the Third Schedule to the Companies Act;

(7) no disposition of the Partnership's property by or with the authority of the JOLs in carrying out their duties and functions and the exercise of their powers under this Order shall be voided by virtue of section 99 of the Companies Act;

(8) the JOLs shall be at liberty to appoint attorneys, counsel and professional advisers, whether in the Cayman Islands or elsewhere, as they may consider necessary to advise and assist them in the performance of their duties;

(9) the JOLs are authorised to render and pay invoices out of the assets of the Partnership for their own remuneration and the JOLs be at liberty to meet all disbursements reasonably incurred in connection with the performance of their duties; and

(10) liberty to apply.

Ancilliaries

189. Any ancillary applications (such as applications for costs) be filed within 14 days after the delivery of this judgment (with concise written submissions in support) and any concise written submissions in reply to be filed within 14 days thereafter. I intend to deal with any such applications on the papers.

190. Counsel to file a draft order reflecting the above for my approval and signature as soon as possible and in any event within 7 days of the delivery of this judgment.

David Doyle

_____

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT

ITEM NO. 137

JA-23

EXHIBIT B-34

Digitally signed by Advance Performance Exponents
Date: 2023.10.04 12:46:46 -04:00
Reason: ADX Certified
Location: Apex

IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No. 0014 of 2022
(Grand Court Cause No. FSD 0157 of 2021 (DDJ))

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP ACT (2021 REVISION) AND IN THE MATTER OF AQUAPOINT L.P.

BETWEEN

AQUAPOINT L.P.

Appellant

-and-

XIAOHU FAN

Respondent

Before: **The Rt. Hon. Sir John Goldring, (President)**
The Hon. Sir Richard Field, Justice of Appeal
The Hon. Sir Michael Birt, Justice of Appeal

Appearances: **Tom Smith KC and Rupert Bell of Walkers on behalf of the Appellant**

Ben Valentin KC and Bhavesh Patel of Travers Thorp Alberga on behalf of the Respondent

Date of hearing: **1 May 2023**

Date circulated: **22 September 2023**

Judgment delivered: **4 October 2023**

JUDGMENT

Field JA

Introduction

1. This is an appeal from the order of Justice Doyle ("the judge") dated 13 June 2022 winding up the appellant exempted limited partnership ("ALP") on the just and equitable basis on four

separate grounds. The order was preceded by a judgment dated 10 June 2022 ("the Judgment").

2. ALP was formed on 16 February 2017 under the Exempted Limited Partnership Act ("the ELPA"). The petitioner seeking the winding up order was the respondent Dr Xiaohu Fan ("Dr Fan") who became a limited partner in ALP having executed on 25 May 2017 a subscription agreement ("the Subscription Agreement), an Amended and Restated Limited Partnership Agreement ("the LPA") and an acknowledgement agreement ("the Acknowledgement"). The judge referred to this suite of agreements as "the 2017 Agreement" and I shall do likewise.

3. The sole asset owned by ALP was and remains its holding of 30,320,000 ordinary shares of US$0.0001 each in Legend Biotech Corporation ("Legend Cayman"), a Cayman Islands exempted limited company listed on NASDAQ. This holding represented 15.6% of Legend Cayman's issued shares in 2017.

4. Legend Cayman is the parent company in a group of companies ("the Legend Group") which carry on business developing novel cell therapies for oncology. The Legend Group's principal operations and employees are located in Nanjing and Zhenjiang in the PRC.

5. At all material times the general partner of ALP ("the GP") was and remains GenScript Corporation ("GenScript"), a Delaware corporation registered in the Cayman Islands under Part IX of the Companies Act. From the start, Genscript was and remains under the control of its majority shareholder, Dr Fangliang Zhang ("Dr Zhang").

6. In addition to Dr Fan, the other limited partners of ALP are the Ye Wang Family Trust and GenScript. The respective percentage shares of the three limited partners in ALP's sole asset are 65.96%, 32.98% and 1.06%. The interest held by the Ye Wang Family Trust is the result of a transfer by Ms Ye Wang of her original interest of 32.98%. Dr Fan's 65.96% interest equates to 19,999,072 ordinary shares in Legend Cayman.

7. It was in July 2002 that Dr Zhang, Dr Larry Wang and Ms Ye Wang ("Ms Wang") founded the GenScript Group of companies which subsequently became subsidiaries of Legend Cayman. In 2014 the GenScript Group decided to form a subsidiary company named "Legend" to develop novel biological drugs and they invited Dr Fan, who was working within the GenScript Group doing important research on cell therapy, immunology and cell biology, to

be involved in this venture. Dr Fan accepted the invitation and was appointed Chief Scientific Officer of the new project.

8. In November 2014, GenScript incorporated Nanjing Legend Biotechnology Co Ltd ("Legend Nanjing") in the PRC with a view to it issuing an IPO. In order to incentivise Dr Fan, Legend Nanjing, acting by Dr Zhang, entered into an agreement with him dated 1 January 2016 ("the 2016 Agreement") under which Legend Nanjing agreed to grant Dr Fan a 10% holding of the shares in Legend Nanjing (10,000,000 shares) on terms that he pay RMB 100,000 annually for five years and that, prior to Legend Nanjing's IPO, he could not transfer these shares or create any security interest over them without Legend Nanjing's approval.

9. Since late 2014, Dr Fan had been significantly involved in critical developments of a number of therapies for the treatment of myeloma. In March 2016, he was responsible for the invention of citacabtageneautoleucel (Cilta-cel), a ground-breaking investigational B-cell maturation antigen directed chimeric antigen receptor T cell (CAR-T) therapy.

10. Subsequently, it was decided that instead of proceeding with an IPO by Legend Nanjing, the listing vehicle should be Legend Cayman which would proceed with an IPO on NASDAQ. In conjunction with this change of strategy, Dr Zhang set out to persuade Dr Fan: (a) to enter into an arrangement based on the establishment of a Cayman Islands exempted limited partnership ("ELP") which would hold approximately 15% of Legend Cayman's shares and whose limited partners would be Dr Fan, Ms Wang and GenScript; and (b) to accept that the 2016 Agreement would terminate when he became a limited partner in the ELP.

11. The implementation of Dr Zhang's plan to persuade Dr Fan to become a limited partner in a Cayman ELP began around mid to late July 2016. (Earlier, on 7 June 2016, Ms Wang had sent Dr Fan a draft agreement in Chinese for the establishment of an PRC partnership but nothing came of this). By mid to late July 2016, there had been good progress in the first dosing of Cilta-cel. The persuasion of Dr Fan was largely delegated to Ms Wang, who was a director of GenScript, acting on Dr Zhang's instructions, although Dr Zhang also played a direct role. Thus, it was Ms Wang who sent to Dr Fan the developing and the final versions of the LPA for signature and the Subscription Agreement and the Acknowledgement by which Dr Fan acknowledged that the 2016 Agreement contained only "general provisions and principles" and would terminate upon his becoming a limited partner in ALP. It was principally Ms Wang,

reflecting the views of Dr Zhang, who dealt with Dr Fan's questions and comments on the documents she sent him.

12. When Dr Fan was approached with Dr Zhang's new strategy, his chief concern was that he should still be entitled after the IPO to be registered as the owner of 10% of the shares in the listing entity, as he had been under the 2016 Agreement in respect of 10% of the shares in Legend Nanjing. He made this very clear on several occasions to Ms Wang and Dr Zhang who both assured him that the 2016 Agreement would be "rolled over" into the arrangement involving a Cayman ELP. Dr Fan relied on these assurances when signing the 2017 Agreement: he would not have signed the constituent agreements if the assurances had not been given. His interest in the partnership under the 2017 Agreement was the equivalent of 10% of the shares in Legend Cayman which was the same percentage he was promised in respect of the shares in Legend Nanjing. In the light of these matters the judge held that Dr Fan had a legitimate expectation and reasonable understanding that 6 months after the Legend Cayman IPO he would be entitled to have access to 10% of the shares in Legend Cayman[1].

13. Legend Cayman was listed on NASDAQ on 5 June 2020, at which time GenScript and Dr Zhang owned 169,680,000 and 34,234,267 Legend Cayman shares respectively, which holdings constituted 76.9% and 15.2% of the company's issued share capital.

14. On 12 October 2017, Dr Fan paid RMB 2,500,000 in respect of the 10% of the Legend Cayman shares he had been assured would be registered in his name and available for disposition six months after the Legend Cayman IPO. He was then reimbursed RMB 2 million over a four-year period. RMB 2,500,000 was the sum that was payable under the 2016 Agreement.

15. Following the end of the 6 month lock in period, Dr Fan informed Ms Wang and Dr Zhang that he wanted access to 10% of the Legend Cayman shares held by ALP. He first suggested that ALP be dissolved to achieve this and was invited to serve a written request that his Legend Cayman shares be sold subject to the GP exercising its discretion accordingly. He then proposed that 2 million Legend Cayman ADS shares (equivalent to 20 million ordinary shares) be sold as an interim measure whilst the differences between him and Dr Zhang and Ms Wang were sorted out. At a meeting on 26 February 2021, Dr Zhang refused Dr Fan's sales plan, mentioning that maybe Dr Fan would be able to sell about 30,000 Legend Cayman

[1] It was a term of the Legend Cayman IPO that the shares in Legend Cayman were to be the subject of a 6 month lock up period.

ADS shares raising about US$ 1 million, which would have meant that it would have taken over 300 years for Dr Fan's total shares to be sold. Dr Zhang's declared reason for this response was that the company needed to raise funds and Dr Fan's sales plan would "crash the stock price". Dr Fan then asked Dr Zhang on 5 March 2021 for an offer to allow the sale of a reasonable amount of his shares to which Dr Zhang responded the same day, stating that the Legend Cayman management team and board were only prepared to sell 200,000 ADS shares producing around $US 4.5 million and this was a final offer. This offer Dr Fan accepted, but no steps were taken by the GP to implement it. Instead, Dr Zhang let Dr Fan know that he had been instructed not to sell the shares. Following a chasing letter from Dr Fan's attorneys, Travers Thorp Alberga ("TTA"), ALP's then attorneys, Dentons, stated in a letter dated 21 May 2021 that Dr Fan had not adopted the correct methodology for attempting to transfer his interest in the partnership and added that he could not be allowed to sell 10% of the Legend Cayman shares on account of the impact this would have on the share price. Five days later, by a letter dated 26 May 2021, Dentons, on behalf of ALP, offered to release 5% of the Legend Cayman shares held under Dr Fan's interest in the partnership followed by 3.5% every year thereafter but Dr Fan rejected this offer.

16. The winding up petition was due to come on for trial on 17 September 2021 but the hearing was adjourned at very short notice to accommodate an application by ALP for the petition to be struck out on the ground that it was an abuse of the process. That application was dismissed with detailed reasons by the judge on 26 October 2021 ("the strike out judgment") and on the same day Dr Fan served an Amended Petition that began to be heard on 26 January 2022. However, at the end of the first day, the GP applied for another adjournment, this time because its Cayman Islands' registration as a foreign company had been terminated on the grounds that it had failed to maintain a registered office and its registration in the Cayman Islands. The application was granted with indemnity costs against the GP and the hearing of the Amended Petition re-commenced on 20 April 2022, over six months after the date it had first came on for trial before the Grand Court.

17. On 11 March 2022, Dr Fan resigned from his position in Legend Cayman shortly after learning that he was no longer described on the company's website as a "Co-Founder" of the company.

The judgment below

The judge's four distinct grounds for winding up ALP

18. The distinct grounds that the judge found justified an order for the winding up of ALP on just and equitable grounds were:

(1) **Frustration of Dr Fan's legitimate expectation that the GP would transfer 10% of the shares in Legend Cayman shares into his name as the beneficial owner thereof**: see para [167] of the Judgment**:**

> "Dr Fan had a legitimate and reasonable understanding outside the 2017 Agreement. The legitimate expectations and reasonable understanding was that 6 months after the IPO he would be entitled to have access to 10% of the shares in Legend Cayman. The legitimate expectation and understanding was created and encouraged by Dr Zhang and Ms Wang on Dr Zhang's behalf. The legitimate expectation and understanding has been unreasonably frustrated by the Partnership, the GP and Dr Zhang".

(2) Irretrievable breakdown in the relationship between Dr Fan and Dr Zhang that had begun as one of mutual trust and confidence.

Paras [182] – [184] of the Judgment read:

> "It is plain to me that at the early stage when Dr Fan joined up with Dr Zhang that their relationship was one of mutual trust and confidence but that relationship has now irretrievably broken down and, on an objective analysis, Dr Fan has lost trust and confidence in Dr Zhang, the GP and the Partnership. Dr Fan's relatively recent resignation was not, in my judgment, a tactical ploy. It is plain that Dr Fan could not work in the environment created by Dr Zhang. Dr Zhang has attempted to belittle Dr Fan's role and contribution. Dr Zhang has preferred his own interests over the interests of Dr Fan. The GP, for reasons best known to itself, filed evidence that made reference to Dr Fan and an insider dealing incident. It had no relevance to the issues before the court for determination. It was not referred to in the comprehensive legal submissions before the court but the filing of it is a further indication of the lack of trust and confidence between the parties". [182]

"The GP agreed via Dr Zhang's communication of 5 March 2021 to permit 200,000 shares to be sold, but then reneged even on this meagre offering. There is significant hostility and lack of trust between the parties. Dr Fan has now resigned. That must have been a very difficult decision for him. Mutual trust and confidence no longer exists. This situation cannot continue indefinitely. The Partnership and the GP have already dragged these proceedings out for far too long". [183]
"This is not a case of a dissatisfied investor, having been treated fairly, simply wanting an early exit and a return on his investment outwith the terms of the agreements he signed up to and the relevant constitutional documents. In my judgment there is plainly "something more" in this case and fairness requires equitable considerations to trump the strict rights and obligations of the parties pursuant to the contractual and constitutional documents". [184]

(3) The justifiable loss of trust and confidence in the management of the Partnership judged to the requisite objective standards in the circumstances of this case.

See para [166] and para [10(12)] of the judge's judgment refusing ALP's application to strike out the winding up petition ("the strike out judgment") referred to in the Judgment at [158]:

"Dr Fan has proved a justifiable loss of trust and confidence in the management of the Partnership by the GP judged to the requisite objective standards in the circumstances of this case. Moreover, in my judgment the affairs of the Partnership have been conducted by the GP (with Dr Zhang being in the driving seat in that respect] in a manner which is oppressive and in breach of Dr Fan's legitimate expectation and understanding." [166]

"It is well established that a company can be wound up on the just an equitable ground if it is established that there has been a justifiable loss of confidence in management, for example, on account of serious misconduct or serious mismanagement of the affairs of the company by the management or the majority owners (paragraph 22 Martin JA in *Tianrui*). For a loss of confidence ground to succeed it has to be a justifiable loss of confidence in the conduct and management of the company's affairs and not a subjective loss of confidence arising from dissatisfaction about the conduct of the domestic policy of the company (*RCB Thai v Asia Fund* 1996 CILR 9 at pages 22-23 per Smellie J, as he then was). This loss or lack of confidence must be grounded on the conduct of management, not in regard to their private lives or affairs, but in regard to the company's business; lack of probity in the conduct of the companies affairs may make it just and equitable that the company be wound up (Lord Shaw, in the Judicial Committee of the Privy Council in *Loch v Blackwood Ltd* [1924] AC 783 at 788." [10 (12)]

(4) The GP's conflict of interest and breach of the fiduciary duty to act in good faith.

See [171] – [179], especially [171] and [179] of the Judgment which read:

> "There is considerable strength in Dr Fan's point that the GP has been acting in breach of its fiduciary duties in particular its duty to act in good faith and in the best interests of the Partnership. Dr Zhang is in control of the GP. Dr Zhang is hopelessly conflicted. He is the beneficial owner of shares in Legend Cayman. He also has control of the Partnership's shares in Legend Cayman. The GP (through the actions of Dr Zhang) is not acting in the best interests of the Partnership. The clearest example of this is the GP's approach when it receives a request from Dr Fan for his portion of the shares to be transferred to him. A general partner acting in good faith and in the best interests of the Partnership would primarily have regard to the position of the limited partners and yet remarkably there is no evidence of the GP consulting Ms Wang and seeking her views. I also note that Ms Wang as a limited partner has not opposed the making of a winding up order". [171]
>
> "The conflicted position of the GP (under the control of Dr Zhang) and its preference of the interests of Dr Zhang, Legend Cayman and the Legend Biotech group as a whole over and above the interests of Dr Fan a limited partner (holding almost 70%) persuades me that the position of the GP is unsustainable and the Partnership must be brought to an end in the best interests of the limited partners. Dr Fan applies for a winding up order and this has not been opposed by Ms Wang, the only other limited partner". [179]

19. In respect of all four of the above grounds for winding up ALP, the judge held that there was no reasonable alternative remedy to a winding up order. In his view, Dr Fan was entitled to the shares represented by his interest in the limited partnership and only a winding up order would give him his shares.

Jurisdiction

20. Referring to the decisions of Parker J in *Padma Fund LP* (unreported FSD judgment 8 October 2021 and Kawaley J in *Formation Group (Cayman) Fund I* (unreported FSD judgment 21 April 2022)[2], the judge noted that there is an unresolved issue as to whether the jurisdiction of the Court to hear a petition presented by a limited partner to wind up a limited partnership on just and equitable grounds is derived from section 35 of the Partnership Act, pursuant to section 3 of the ELPA, and/or Part V of the Companies Act pursuant to section 36 (3) of the ELPA. In light of the fact that it was common ground that the Court had jurisdiction under one or other or both of those statutory provisions, the judge decided it was unnecessary to pronounce on the issue, observing that "it may require a judgment of the Court of Appeal

[2] See also *In the Matter Rhone Holdings LP* [2016 (1) 273] [CICA] and the judgment of Kawaley J in *In the Matter of XIO Diamond LP* (unreported, 30 April, FSD 256 of 2019.

or the Privy Council or legislation to finally determine and put these knotty jurisdictional issue to bed".

21. For my part, I would have been disposed to this Court deciding the issue if we had received written and oral submissions on the point. However, perhaps unsurprisingly, neither side advanced any submissions before us on the point and in these circumstances it would plainly be inappropriate to decide the question.

The legal principles relied on by the judge

22. The judge proceeded on the basis[3] that the success of Dr Fan's winding up petition depended on its factual basis being within the reach of those situations where the context was not an out and out conventional partnership but was sufficiently akin to that relationship in accordance with the indicia identified by Lord Wilberforce in *Ebrahimi v Westbourne Galleries* [1973] AC 360 to justify a winding up on just and equitable grounds.

23. It will be recalled that in *Ebrahimi*, the appellant Mr Shokrollah Ebrahimi and Mr Asher Nazar had carried on the business as dealers in Persian carpets as partners equally sharing management and profits for a number of years. In 1945, however, the business was taken over by the respondent company with Mr Ebrahami and Mr Asher Nazar each becoming directors and holding 500 shares. Soon after the formation of the company, Mr Asher Nazar's son, George Nazar, was appointed a director and Mr Ebrahimi and Mr Asher Nazar each transferred to him 100 shares. The profits of the company were distributed as directors' remuneration. About ten years later, the Nazars, father and son, secured the passing of an ordinary resolution effective by virtue of section 184 of the Companies Act 1948 ("the 1948 Act") removing Mr Ebrahami from the office of director. Mr Ebrahami presented a petition under section 222 (f) of the 1948 Act that the company be wound up on the ground that it was just and equitable so to do.

24. Although they have frequently been cited in numerous subsequent cases I think it appropriate to set out the key passages in Lord Wilberforce's judgment that followed his review of numerous English, Scottish and some Commonwealth decisions.

[3] See [10 (11)] and [10 (12) of the strike out judgment referred to in [158] of the Judgment.

"My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words " just and equitable " and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way. It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence—this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping " members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company —so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere." [emphasis added]

"It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to " quasi-partnerships " or " in substance partnerships " may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words " just and equitable " sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."

25. In paragraph [159] of the Judgment the judge referred approvingly to the decision of the Hong Kong Court of Final Appeal in *Re Yung Kee Holdings Ltd* [2015] 6 HKC 644 where, following *Ebrahimi,* the court proceeded on the basis that considerations of a personal character arising between individuals might make it unjust, or inequitable to insist on legal rights, or to exercise them in a particular way which might come in the form of a mutual understanding and there could be situations in which equity might find sufficient unfairness or breaches of good faith so as to attract relief but the discretion had to be exercised in a principled manner.

26. In paragraphs [160- 161], the judge said:

> [160] "Lord Wilberforce in *Ebrahimi* wisely stated that it "would be impossible and wholly undesirable to define the circumstances in which these considerations may arise". Lord Wilberforce referred to relationships being sometimes adequately and exhaustively laid down in the relevant constitutional documents adding: "The superimposition of equitable considerations requires something more", typically including an element of a personal relationship involving mutual confidence and/or an agreement or understanding over and above what is specified in the constitutional documents".
>
> [161] "… I agree that when courts at the first instance are considering whether there is "something more" they must conduct such exercise in a principled way and with full regard to the desirability of legal certainty especially in matters of commerce. They should not however sacrifice justice, equity and fairness on the altar of legal certainty".

The judge's findings of fact

27. The judge conducted a detailed review of the evidence which consisted of affidavits and oral testimony from, inter alios, Dr Fan, Dr Zhang and Ms Wang, a large number of emails and WeChat messages between these three witnesses, and other documents including the Subscription Agreement, the LPA, the Acknowledgement and the 2016 Agreement. There is no appeal from any of his significant findings of fact[4] (as distinct from the legal significance he found them to have).

[4] ALP submitted that the judge erred in stating that there was no evidence of the GP consulting Ms Wang and seeking her views on Dr Fan's request to have access to his 10% of the shares in Legend Cayman. Support for this submission was said to be the fact that Ms Wang rejected a request Dr Fan sent to her seeking the transfer of Legend Cayman shares. In my view, this submission lacks merit given the evidence that throughout Ms Wang was essentially acting as Dr Zhang's conduit who was the GP's controlling shareholder.

28. In paragraph [168] the judge set out 13 "obvious examples" of the "ample evidence" that supported his finding expressed in [167]. Since the judge's findings of fact are of great importance in this appeal, I proceed to set out some of these examples, occasionally together with the relevant text of the emails referred to:

(1) The evidence of Dr Fan which he preferred to the evidence of Dr Zhang and Ms Wang where his evidence differed from that given by those two witnesses.

(2) The evidence of Ms Wang was that they intended to honour what Dr Zhang had promised by way of the 2016 Agreement and Dr Zhang seemed to accept this.

(3) I do not accept Dr Zhang's evidence that where he was referring … to "your stock" he was referring to "some stock in the limited partnership". The references to "your stock" were, I find, to the shares in the company which was the subject of the IPO. [The email in question dated 15 June 2017 reads: "A good leader should take care of the employees first. If their employees are not successful, the leader cannot possibly be successful. Since it has taken a long time [to] take care of your stock, can we spend some time to take care of your employees first?"]

(4) Dr Fan's uncontradicted legitimate expectation and understanding is plain from his email to Ms Wang (cc Dr Zhang) dated 26 September 2016 ["Recently Frank told me that you are helping roll over the share purchase plan to Legend Cayman …] and his reference to "roll over the share purchase plan to Legend Cayman."

(5) Dr Zhang in his WeChat with Dr Fan on 19 February 2017 referred to "After all, it is the company, not you, that proposed your shareholdings in Legend first, correct?...the new investment agreement is executed only to make things clearer.."

(6) Ms Wang in her WeChat with Dr Fan on 3 June 2017 openly confirmed the position: "The best news for you is that your stake in Nanjing Legend will be turned into shares in Cayman Legend. The entity to be listed will definitely be Cayman Legend and can't be Nanjing Legend by any means. This_is what really matters."

(7) Ms Wang also recognised that Dr Fan had a 10% share in her email dated 7 June

2017. ["Attached please find the Legend subscription agreement. Please keep it confidential. Your percentage of share may not be straightforward stated as 10% in this document. I will forward another email from the attorney explaining how it was set up. The document hasn't been completed yet, mainly they have to determine if RMB can be accepted in this document. Do let me know first if you have any question."]

(8) Dr Fan's legitimate expectation and understanding was further confirmed by Ms Wang by way of a WeChat exchange on 8 June 2021. Ms Wang confirmed that the 2017 Agreement "is not to change any material personal interest of yours. It's only intended to make the original he intended to make the original agreement legitimate and to create scope for future development." I find that the reference to the "original agreement" in that context was the 2016 Agreement. I also find that Ms Wang was at pains to provide reassurance to Dr Fan that his "material personal" interests would not be changed by way of the 2017 Agreement.

(9) Dr Zhang in effect confirmed this again by his email to Dr Fan on 14 of June 2017 and the reference to "your stock".

(10) Furthermore when Dr Fan in his email dated 17 February 2021 to Dr Zhang and Ms Wang refers to "my shares in Legend" neither of them sought to contradict him.

29. In addition to the factual findings stated in the paragraphs of the Judgment referred to in paragraph [18] above, I draw attention to the following:

(A) The findings in paras [169] – [170].

(a) Dr Fan in entering into the 2017 Agreement trusted Dr Zhang and Ms Wang to do the right thing and to honour the roll over of Dr Fan's Legend Nanjing shares to Legend Cayman shares. Dr Zhang and the GP have betrayed that trust and it can easily be seen how Dr Fan legitimately and reasonably believes, after his significant contribution to the increasing value of Legend Cayman, that he has been badly let down by the GP and those that control the GP. Dr Fan has been unfairly treated. It was not mere "wishful thinking" by Dr Fan. It was a reasonable and legitimate

expectation that he would get the Legend Shares after the IPO, whatever was stated in the 2017 Agreement. [169]

(b) It is only fair, just and equitable that he shares in the benefits now rather than having to wait 300 years (as originally in effect suggested by the GP) or 26 years (as subsequently in effect suggested by the GP) to obtain his shares. The GP's consideration of and reactions to Dr Fan's reasonable requests for the shares shows the GP in a bad light. Such is indicative of the GP's breach of its fiduciary duties and its failure to act in the best interests of the Partnership and its limited partners. Dr Fan had nearly a 70% interest. He should have been treated with respect and fairness. He was not so treated. He was left with no reasonable alternative but to file the petition. [170]

(B) The following WeChat message from Ms Wang to Dr Fan on 8 June 2017 very shortly before Dr Fan signed the LPA

> "The agreement is not to change any material personal interest of your's. It's only to make the original agreement legitimate, and to create scope for future development." [124]:

ALP's/GP's case on appeal

30. The principal case advanced on behalf of ALP by the GP is that the judge erred in holding that the facts on which Dr Fan's petition is founded fell within Lord Wilberforce's indicia of those relationships which are sufficiently related to conventional partnership to justify a winding up on just and equitable grounds. Two distinct submissions were advanced by Mr Smith KC under this broad rubric:

(i) In the light of the Subscription Agreement, the LPA and the ELPA, ALP lacks any of the characteristics that, pursuant to *Ebrahimi*, are necessary for the relationship between ALP (acting by the GP) and Dr Fan to constitute the type of "quasi-partnership" or other relationship sufficiently akin to partnership required for it to be open to the Court to wind up ALP on the just and equitable ground.

(ii) The LPA, which was specifically negotiated and agreed over a quite a lengthy period of time, and the Subscription Agreement preclude resort to the just and equitable winding up ground since those agreements are and were intended to be an exhaustive statement of the parties' rights and obligations and specifically deal with the limited partner's rights to withdraw or transfer his/her/its interest in the partnership and to a distribution. Accordingly, the judge erred in proceeding on the basis of his finding that Dr Fan had a legitimate expectation that 10% of the Legend Cayman shares would be transferred into his ownership conditioned the rights and obligations of the GP under the LPA.

31. In support of these submissions, Mr Smith drew attention to the following differences between a partnership under the Partnership Act and an ELP under the ELPA that were adverted to by this Court in *Kuwait Ports Authority et al v Port Link GP Ltd et al* at [24] [unreported 20 January 2023]:

(i) Limited partners of an ELP are not liable for the debts of the ELP (see section 4 (2) of the ELPA) whereas the General Partner is liable for the debts and obligations of the ELP.

(ii) Limited partners are prohibited from having any active involvement in the business of the ELP which is carried on by the General Partner who enters into all contracts by and on behalf the ELP.

(iii) Section 19 (1) of the ELPA imposes an express duty of good faith on the General Partner of an ELP requiring the General Partner to act in the best interests of the ELP.

(iv) Whereas in an ordinary partnership, mutual and reciprocal rights and obligations are owed to each other by partners, section 19(2) of the ELPA provides that unless the partnership agreement provides to the contrary, a limited partner owes no fiduciary duty either to the ELP or to other partners.

32. Mr Smith submitted that it followed from (ii) and (iv) that, unlike in the usual quasi-partnership type of case, Dr Fan as a limited partner had no expectation that he would participate in ALP's business which in any event consisted of simply acting as a vehicle to

hold shares in Legend Cayman. There was also nothing in the LPA that provided that Dr Fan owed a fiduciary duty to the ELP, the General Partner or to other limited partners. Thus, there was no mutuality of obligations of good faith between Dr Fan *quo ad* Ms Wang in her capacity as a limited partner or *quo ad* the GP, acting by Dr Zhang and/or Ms Wang as directors thereof, which was one of the classic indicia of a quasi-partnership. Indeed, despite the word "partnership" in the name "exempted limited partnership" given by the ELPA to an entity formed under section 9 thereof, such an entity lacked any of Lord Wilberforce's indicia of a relationship akin to conventional partnership and thus no just and equitable winding up petition to wind it up based on such a relationship could ever succeed.

33. Mr Smith took us to section 32(3) ELPA that provides in relevant part that "where the requirements for all conditions to an admission contained in the partnership agreement have been complied with in accordance with the terms… any person however admitted shall … be deemed to have adhered to and agreed to be bound by the terms and conditions of the partnership agreement and shall have the rights and be subject to the obligations contained in the partnership agreement, and this Act …"

34. Mr Smith also referred us to the following provisions in the LPA and the Subscription Agreement:

The LPA

(i) Clause 3.1, that sets out the limited liability of a limited partner and Clause 3.2 that sets out five broadly drawn limitations on the authority of limited partners including a lack of authority to take part in the conduct, administration, control, management or conduct of the partnership business;

(ii) Clause 6.2 of the LPA, that provides that for a subscriber to become a limited partner he, she or it must execute an effective deed of adherence to the LPA;

(iii) Clause 7.1, that provides that the limited partners are to have capital accounts in respect of their interests in the partnership and Clause 7 .7 that provides that no limited partner will be permitted to withdraw from the partnership or to withdraw any part of his, her or its capital account save with the General Partner's prior consent which consent may be given or withheld for any reason or no reason at all in

the sole absolute discretion of the General Partner;

(iv) Clause 9: "At the time or times determined by the General Partner, the General Partner shall cause the Partnership to distribute any assets of the Partnership that it does not, in its discretion, consider to be necessary to the operation of the Partnership. Any distribution pursuant to this Clause 9 shall be made to the Partners pro rata in accordance with the Partners' respective interests determined by reference to their Capital Contribution from time to time."

(v) Clause 12. 2, that states that it was not anticipated that meetings of the partners will be held;

(vi) Clause 12.11 -- the Entire Agreement Clause - that provides: "This Agreement, together with the other documents required to be delivered pursuant hereto, constitutes the entire agreement between the parties to this Agreement with respect to the subject matter of this Agreement, and cancels and supersedes any prior understandings and agreements between the parties with respect to such subject matter. There are no representations, warranties, terms, conditions, undertakings, or collateral agreements, express, implied or statutory, between the parties with respect to the subject matter of this Agreement, other than those expressly set forth in this Agreement, and/or the other documents required to be delivered pursuant to such agreements".

The Subscription Agreement

(i) Paragraph 4 of the introduction to the agreement

EACH ACQUIROR OF A PARTNERSHIP INTEREST MUST BE PREPARED TO BEAR THE ECONOMIC RISK OF INVESTMENT THEREIN FOR AN INDEFINITE PERIOD OF TIME. THE SUBSCRIBERS ARE ENCOURAGED TO SEEK INDEPENDENT LEGAL, ACCOUNTING, INVESTMENT AND TAX ADVICE REGARDING THEIR INDIVIDUAL CIRCUMSTANCES AND FINANCIAL OBJECTIVES IN DETERMINING WHETHER TO SUBSCRIBE FOR AN INTEREST IN THE PARTNERSHIP

(ii) Clause 3 (e): "… the subscriber agrees to comply with the terms of the Partnership Agreement …"

(iii) Clause 5: "To induce the Partnership to accept this subscription, the Subscriber hereby makes the following representations, warranties and covenants to the General Partner, the Partnership and ...":

> "The Subscriber further understands the Interest is transferable only with the consent of the General Partner." [5 (b)]
>
> "The Subscriber … will not sell, transfer, distribute or otherwise dispose of the Interest without the consent of the General Partner, which may be granted or withheld in its sole discretion …" [5 (c)]
>
> "… in formulating a decision to invest in the Partnership, the Subscriber has not relied or acted on the basis of any representation or other information purported to be given on behalf of the Partnership or the General Partner except as set forth in the Partnership Agreement (it being understood that no person has been authorised by the Partnership or the General Partner to furnish any such representation or other information)." [5 (e)]

(iv) Clause 7: The Subscriber hereby represents and warrants to the General Partner …

> "the Subscriber has reviewed and understands the Partnership Agreement and this Subscription Agreement …" (b)
>
> "the Subscriber acknowledges and agrees that, except as set forth in the Partnership Agreement, this Subscription Agreement or an additional written document (executed by a director or officer of the General Partner) which clearly and explicitly indicates that the Subscriber is entitled to rely thereon, the Subscriber has neither received, nor is entitled to rely upon, any representations or warranties from the Partnership, the General Partner, or any partner, member, director, officer, employee or agent thereof". (c)
>
> "the Subscriber is aware that except as provided in the Partnership Agreement, the Subscriber will have no right to withdraw from the Partnership or to receive distributions in liquidation of the Partnership Interest". (d)
>
> "the Subscriber is not relying on the Partnership, the General Partner, or any of their partners, members, directors, officers, employees agents or representatives for legal, accounting, investment or tax advice, and the Subscriber has sought independent legal, accounting, investment and tax advice to the extent the Subscriber has deemed necessary or appropriate in connection with the Subscriber's decision to subscribe for the Partnership Interest."(g)

> When referring hereafter to 'the entire agreement clauses', I include clause 12.11 of the LPA, clauses 5(e) and 7(c) of the Subscription Agreement and similar provisions in the Acknowledgement.

35. Mr Smith pointed out that the disclosed documents showed there were occasions when Dr Fan commented on and suggested amendments to certain provisions in the drafts of the LPA sent to him from the beginning of February 2017. (The first draft he received in early February 2017 can be ignored since this related to a PRC partnership). In respect of later drafts of the LPA, Dr Fan's suggestions included an observation that clause 7.8 (dealing with when a limited partner can be required to withdraw his interest) was too harsh and his provision of a marked-up version of the LPA showed proposed changes in red, including changes to clause 7.8. Some of Dr Fan's proposed amendments were accepted and some not. Mr Smith also relied on Dr Fan's acceptance in his oral evidence that he paid attention to detail and that he had read and signed the Subscription Agreement and had read the LPA.

36. Mr Smith made a number of submissions founded on the italicised words in the following passage that begins at p. 379B in Lord Wilberforce's judgment in *Ebrahimi.*

> The words [just and equitable] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, *there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The just and equitable provision does not, as the respondents suggest entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable a court to subject the exercise of legal rights to equitable considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.*

37. In Mr Smith's submission, Lord Wilberforce was here concerned with a case where the rights, expectations and obligations are not set out in the documents of the company. Mr Ebrahami and Mr Nazar *père* had not concluded any agreement as to the circumstances in which the former might be removed as a director. Whereas, if the arrangements and relationships between the parties are set out (submerged) in the constitutional and/or contractual documents, this is sufficient and exhaustive and does not allow for the intervention of equitable considerations derived from the words "just and equitable". In short, the agreements "occupied the field". It follows that the just and equitable jurisdiction

is not available in the instant case in light of the detailed provisions in the LPA and the Subscription Agreement, particularly those that declare that the GP has a sole and absolute discretion as to the transfer or withdrawal of a limited partner's interest and distributions and the entire agreement clauses. What Dr Fan is attempting to do, contended Mr Smith, is impermissibly to circumvent the clear meaning of the 2017 Agreement, by seeking to bring his case within the scope of Lord Wilberforce's judgment in *Ebrahimi*, when the proper course was for him to establish by an action in contract that he is not bound by those provisions in the 2017 Agreements that constitute very substantial obstacles in establishing his "frustration of a legitimate expectation" case. Indeed, to permit Dr Fan to challenge the effect of the 2017 Agreements by petitioning for a winding up on just and equitable grounds rather than bringing proceedings in contract would set a very undesirable precedent as it would open the door to an investor avoiding the effects of a relevant agreement governing his investment by establishing that its terms do not properly reflect his own subjective expectation at the time of entering into the agreement.

38. Mr Smith further relied on a number of passages in the judgments in the following "unfair prejudice" cases[5] : *O'Neill v Phillips* [1999] 1WLR 1092; *Re Coroin Ltd* (No 2) [2012] EWHC 2343 (Ch); and *Cool Seas (Seafoods) Ltd v Interfish Ltd et al* [2018] EWHC 2038 (Ch).

O'Neill

Lord Hoffmann at p. 1102 B –

> "6. *Legitimate expectations*
>
> In *In re Saul D. Harrison & Sons Pic.* [1995] 1 B.C.L.C. 14, 19, I used the term "legitimate expectation," borrowed from public law, as a label for the "correlative right" to which a relationship between company members may give rise in a case when, on equitable principles, it would be regarded as unfair for a majority to exercise a power conferred upon them by the articles to the prejudice of another member. I gave as an example the standard case in which shareholders have entered into association upon the understanding that each of them who has ventured his capital will also participate in the management of the company. In such a case it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms. The aggrieved member

[5] Brought in *O'Neill* under s.459(1) of the Companies Act 1985 as amended by the Companies Act 1989 and in *Coroin* and *Cool Seas* under s. 994 of the Companies Act 2006

could be said to have had a "legitimate expectation" that he would be able to participate in the management or withdraw from the company. It was probably a mistake to use this term, as it usually is when one introduces a new label to describe a concept which is already sufficiently defined in other terms. In saying that it was "correlative" to the equitable restraint, I meant that it could exist only when equitable principles of the kind I have been describing would make it unfair for a party to exercise rights under the articles. It is a consequence, not a cause, of the equitable restraint. The concept a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application. That is what seems to have happened in this case".

Coroin

Richards J (as he then was)

[635] "For part of his case, however, Mr McKillen relies also on legitimate expectations of participation in the management of the company. In my judgment, this is not sustainable. The importance of the passage from the speech of Lord Wilberforce in *In re Ebrahimi Ltd* cited by Lord Hoffmann in *O'Neill v Phillips* is that it indicates the circumstances in which reliance may be placed on equitable considerations (Lord Hoffmann deprecates the use of the expression 'legitimate expectations', regretting that he introduced it into this area of the law: see p.1102) as giving rise to a possible case of unfair prejudice. It is very important to note that in that passage, having identified that the structure of a company is defined by company law and the articles of association, Lord Wilberforce observed that;

> *"In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small."*

Equitable considerations, affecting the manner in which legal rights can be exercised, will arise only in those cases where there exist considerations of a personal character between the shareholders which makes it unjust or inequitable to insist on legal rights or to exercise them in a particular way. Typically that will be in the case of a company formed by a small number of individuals on the basis of participation by all or some of them in the management of the company."

[636] "In my judgment, there is no room for equitable considerations of this kind in the present case. The company was formed by a group of highly sophisticated and experienced business people and investors with a view to the purchase of a well-known group of hotels for a price running into many hundreds of millions of pounds and to retaining and managing some of those hotels. There was little prior relationship between many of the investors and some were unknown to each other until a few days before the company was formed. More importantly, articles of association and a shareholders agreement were negotiated and drafted, containing lengthy and complex provisions governing their relations with each other and with the company. I find it hard to imagine a case where it would be more inappropriate to

overlay on those arrangements equitable considerations of the sort discussed by Lord Wilberforce and Lord Hoffmann."

[637] "This part of Mr McKillen's case arises in relation to his allegation that he has been unfairly prejudiced by exclusion from participation in management. His right to participate in the management of the company is defined by his right as the holder of a particular class of shares to appoint a director to the board of the company. He exercised that right by appointing himself and by appointing Mr Cunningham as his alternate. There has been no interference with that right and no interference with the rights of either Mr McKillen, or in his absence, Mr Cunningham to attend board meetings. On the contrary, they, but mainly Mr Cunningham, have attended all or most of the board meetings held since the purchase of Misland by the Barclay interests. It is clear from the evidence that Mr McKillen and Mr Cunningham have been in no respect inhibited from exercising their rights as directors and from arguing their position. Mr McKillen submits that he has been put in a position of being a permanent minority because directors appointed by the Barclay interests and by Mr Quinlan formed a majority. But there is clearly nothing in the articles or the shareholders' agreement which entitles directors to more than the votes at board meetings conferred on them by the shareholders' agreement. Nor do the articles or the shareholders agreement prohibit particular groups of shareholders from co-operating with each other unless they have done so in a way which triggers the pre-emption provisions or which constitutes in some way a breach of the obligations of good faith to which I shall later return. The fact that the directors appointed by the Barclay interests and Mr Quinlan may take a position different to that of Mr McKillen does not involve any exclusion of Mr Quinlan or any unfairness unless the position which they take is taken in breach of their duties as directors."

Cool Seas

Rose J (as she then was)

[126] "Applying the principles from those authorities[6] to the present case I am fully satisfied that there was no legitimate expectation that Mr Anderson and Colin Anderson would continue as directors once they ceased to be employed by the company for whatever reason. The relationship between all the participants in the transaction in January 2014 and thereafter was as set out in the contractual documents and there are no overlying equitable considerations applicable here. The factors I have taken into account when arriving at that conclusion are as follows."

[127] "First, there was no previous personal relationship, such as a partnership or family connection, between these parties. Prior to 2013, the only business dealings between Fresh Catch (on the one hand) and Interfish and Altaire (on the other hand) had been a short business relationship for around a year in the 1990s when Interfish placed a large order with Fresh Catch for mackerel fillets..."

[6] *Re Saul D Harrison & Sons*; *Ebrahimi; O'Neill; Fisher v Cadman et al* [2005] EWHC 377 (Ch); *Grace v Biagiolo et al* [2005] EWCA (Civ) 1222.

> [128] "… I accept Mr Colam's evidence was that he viewed the relationship between Interfish and Cool Seas as a commercial relationship on terms that had been negotiated and agreed between them in detailed contractual documents which were developed with the benefit of professional advice. I do not believe that Mr Anderson can have formed any different view."
>
> [129] "Secondly, this is not a case where the constitution of the company is an off-the-shelf draft which is not revised to reflect the underlying agreement between the parties as to how the business would be run. On the contrary the agreements entered into on 2 January 2014 were bespoke agreements carefully drafted by each side's solicitors, going through several drafts following the signature of the initial Heads of Terms."

39. Turning to the judge's second ground for winding up ALP on just and equitable grounds – the irretrievable breakdown in the relationship between Dr Fan and Dr Zhang – Mr Smith contended that this ground required it being established that the relationship between the individuals involved was that of a "quasi partnership" of the sort contemplated in *Ebrahimi* and the judge had erred in proceeding on the basis that this requirement had been met. For the first part of this contention Mr Smith relied on *Lau v Chu* [2020 UKPC 24 at [14] – [17] where Lord Briggs distinguished between "functional deadlock" in the management of a company and an "irretrievable break down in trust and confidence" between the participating members where the company is a "quasi partnership".

40. Turning to the second part of his contention, Mr Smith relied on the submissions based on *Ebrahimi* he advanced when contesting the judge's first ground for winding up ALP – frustration of a legitimate expectation. In particular, Mr Smith laid stress on the fact that Dr Fan was simply a limited partner with no role in the conduct of the business of the partnership so that it would have made no difference to the management and administration of the partnership if the two doctors never met or spoke to each other. In this regard, Dr Fan's situation was to be contrasted with that in the well-known case of *In Re Yenidje Tobacco Company Ltd* [1916] 2 Ch 426 where it was held that it was just and equitable to wind up a private company formed by two traders in tobacco products who held equal shareholdings and constituted the board of directors and had become so hostile that neither spoke to the other. In Lord Cozens-Hardy MR's view, the court was "bound to say that circumstances which would justify the winding up of a partnership between these two by action are circumstances which should induce the Court to exercise its jurisdiction under the just and equitable clause to wind up the company".

41. In regard to the judge's third ground for winding up ALP – justifiable loss of trust and confidence in the management of the partnership – Mr Smith first summarised uncontroversially the law applicable to this ground by reference to paragraph [22] in Martin JA's judgment in *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* [2019(1) CILR 481:

> "It is well established that a company may be wound up on the just and equitable ground if it is established that there has been a justifiable loss of confidence in the management, for example on account of serious misconduct or serious mismanagement of the affairs of the company by the directors or the majority shareholders: Loch v John Blackwood Ltd ([1924] AC at 788)".

42. Mr Smith then went on to submit that the judge had failed properly to apply the test inherent in this statement of the law because he did not identify in paragraph [166] the material on which he was relying for his conclusion. What the judge should have done was to identify the relevant material before the court calling into question the conduct and management of the affairs of the partnership and then to have determined on the basis of that material whether Dr Fan had justifiably lost trust and confidence in the management of the partnership on account of serious misconduct or serious mismanagement of the partnership's affairs. If the judge had proceeded as he ought to have done, he would have been bound to find that there was no material from which he could conclude that this third ground for winding up ALP was sustainable.

43. Mr Smith further argued that, even if it be permissible to look at findings made by the judge in paragraphs other than [166], the common thread of these is that they are all premised on Dr Fan's case that he had a legitimate expectation and understanding arising from a relationship akin to partnership as contemplated by Lord Wilberforce in *Ebrahimi,* which case is misconceived for the reasons he (Mr Smith) had already advanced. In short, the GP should not be condemned and found guilty of serious misconduct and mismanagement for acting in accordance with the 2017 Agreement.

44. Mr Smith then turned to the judge's fourth ground for winding up ALP – the GP's conflict of interest and breach of the fiduciary duty to act in good faith. He submitted that if the judge reached his conclusion that the GP failed to act in good faith because it frustrated Dr Fan's legitimate expectation by refusing his request to have transferred to him 10% of the Legend Cayman shares, the judge erred because his legitimate expectation finding was

misconceived for the reasons he (Mr Smith) had earlier advanced. This left the question whether the GP's decision to decline to approve Dr Fan's request for the transfer of 10% of the Legend Cayman shares was outwith the discretion conferred by Clauses 7.7 and 9 of the LPA.

45. Arguing that the section 19 ELPA good faith duty was owed to the partnership as a whole and not to an individual limited partner apart from any other such partners, Mr Smith contended that it was open to the GP to take into account the wider interest of the partnership in Legend Cayman continuing to thrive and not have regard simply to the interest of Dr Fan as a limited partner, and this is what the GP did. The evidence provided in Dr Zhang's second affidavit showed that the reason the GP declined to grant the approval sought by Dr Fan was that, although Cayman Legend had great potential and had achieved a high initial capitalisation, it was spending so much capital on activities such as research and clinical trials that it was loss making and needed to raise fresh capital from the market on a regular basis which would be jeopardised if a large block of shares became available at the same time. In Dr Zhang's view, "if Dr Fan's request to sell $ 56 million worth of stock to the public had been granted, Legend [Cayman] would not have been able to raise $300 million in May 2021, impacting Legend's survival. Therefore, approval and control of inside selling is vital for Legend to survive …".

46. Mr Smith also argued that Dr Fan was clearly aware of the role of Dr Zhang at the time he entered into the 2017 Agreement and thereby consented to and/or waived any conflict of interest which did exist by reason of Clause 10 of the Subscription Agreement:

> "The Subscriber further acknowledges and is aware that the General Partner, its directors or any of its associates may invest in, directly or indirectly, or manage or advise other collective investment schemes or accounts which invest in assets which may also be purchased or sold by the Partnership".

47. Finally, Mr Smith contended that there was an adequate alternative remedy open to Dr Fan, namely a direct claim against the GP for breach of the section 19 good faith duty. In support of this submission, Mr Smith referred to [64] of the judgment of this Court in *Kuwait Ports Authority*[7]. We were also referred to [23] of the judgment of this Court in *Tianrui* where Martin JA stated that it is well settled that a winding up petition will not succeed if there

[7] "In summary, for the reasons we have given, we dismiss the GP's appeal against the judge's refusal to strike out the plaintiffs' direct claims against the GP. The consequence is that the plaintiffs may bring their direct claim against the GP".

exists an adequate alternative remedy which the petitioner has unreasonably failed to pursue. Mr Smith submitted that the court hearing a breach of the section 19 duty case would have available a more flexible range of remedies to meet the situation as it sees fit, than the court hearing a winding up petition which was effectively a "nuclear" all or nothing option.

Dr Fan's case in response

48. The overall submission made on behalf of Dr Fan by Mr Valentin KC was that the judge's winding up order was validly made for the reasons the judge gave in both of his judgments. The judge did not err in finding that the relationship between Dr Fan and Dr Zhang was a close and personal one akin to the relationship that exists between partners of the sort identified by Lord Wilberforce in *Ebrahimi* both at the time when: (i) before ALP was constituted, Dr Fan was assured by Dr Zhang and his delegate, Ms Wang, that 6 months after the IPO he would be given access to the Legend Cayman shares represented by his interest in the partnership that was the equivalent of 10% of Legend Cayman's issued capital; and (ii) when, after the establishment of ALP, Dr Fan's request that those shares be transferred into his ownership was repeatedly refused by Dr Zhang on behalf of the GP, at which time the GP was also under the duty to act at all times in good faith in the interest of the exempted partnership imposed by section 19 (1) ELPA and under an equitable duty to avoid a conflict between Dr Zhang's interest in Cayman Legend's share capital and Dr Fan's interest in obtaining his shares.

49. Mr Valentin drew support for this submission from the following passages, amongst others, in Lord Wilberforce's judgment:

(1) "No doubt, in order to present a petition [the petitioner] must qualify as a shareholder, but I see no reason for preventing him from relying upon any circumstances of justice or equity which affect him in his relations with the company or, in a case such as the present, with other shareholders." [p.375A]

(2) "It would be impossible, and wholly undesirable, to define the circumstances in which these considerations [of a personal character arising between one individual and another, which may make it unjust, or inequitable to insist on legal rights, or to exercise them in a particular way], may arise." [p.379 C/D & E]

(3) Elements (i) and (iii) referred to on p. 379E-G that may require equitable considerations, namely: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence, an element that will often be found where a pre-existing partnership has been converted into a limited company; (iii) a restriction upon the transfer of the member's interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

50. Mr Valentin challenged Mr Smith's contention that no petition to wind up an exempted limited partnership established in conformity with section 9 ELPA based on an alleged relationship between the petitioning limited partner and another limited partner and/or the GP of the sort identified by Lord Wilberforce, could ever be properly granted. Mr Valentin submitted that Mr Smith could not escape from the fact that an exempted limited partnership was a partnership, albeit of a particular kind, and section 36 ELPA expressly provides that "on application by a *partner*, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable". [emphasis supplied]

51. Mr Valentin also challenged Mr Smith's reliance[8] on the penultimate and ultimate sentences of the passage set out in paragraph [36] above. In Mr Valentin's submission, in these sentences Lord Wilberforce was not positively adopting the submission that the phrase "just and equitable" does not operate so as to entitle one party to disregard the obligation he assumes by entering a company, nor the court dispensing him from it; rather, he was dismissing the argument advanced by junior counsel for the respondent that is reported at p.369C-D:

> "The words of section 222 *(f)* are ex facie unlimited in scope. There are five considerations which should be borne in mind in construing it. (1) … (2) … (3) It is an accepted principle of our law that pacta sunt servanda, and when one is construing even words as wide as " just and equitable " that principle should be borne in mind; it would follow that, certainly in the absence of bad faith, the majority of the shareholders should not be punished for carrying out a power which, as well as being in the Act, is part of the express contract between the parties. (4) …"

52. Turning to Mr Smith's submission that the 2017 Agreement occupied the field and thereby left no room for the application of just and equitable principles, Mr Valentin submitted as follows.

[8] See para [37] above.

(i) Mr Smith's submission is inconsistent with the *Ebrahimi* decision where the company had the contractual right under the articles and the statutory right to remove Mr Ebrahimi from his office as a director but nonetheless equity intervened to wind up the company.

(ii) Dr Fan's complaint is not that the entirety of the provisions of the 2017 Agreement that established the partnership are void or voidable on grounds of misrepresentation, mistake or *non est factum*. Instead, given the assurances conveyed to Dr Fan that after the IPO 10% of the shares in Legend Cayman would be his to sell, the GP should be held to that assurance, this being something within the power of the GP under Clause 7.7[9].

(iii) Lord Wilberforce's observation at p.380B-E that, even where there is a statutory power to remove a director and the articles provide for other removal powers, *the just and equitable provision nevertheless comes to [the director's] assistance if he can point to, and prove, some special underlying obligation of his fellow members in good faith, or confidence…"* supports Dr Fan's case.

(iv) The decisions in *O'Neill, Coroin* and *Cool Seas* are all distinguishable from the instant case since in none of the former was there an assurance made outside the pertinent agreements that a power would be exercised in a particular way in favour of shareholder which was not honoured by the assurer.

(v) ALP is not entitled to rely on the entire contract clause in the ELP or Clause 7(c) in the Subscription Agreement because to do so would be contrary to general considerations of equity arising from the relationship between Dr Fan and Dr Zhang in light of the assurance given and also because reliance on this provision would be: (i) a breach of the section 19 ELPA good faith duty; and (ii) an implied duty to act in good faith; see *Familymart China Holding Co. Ltd. v Ting Chuan (Cayman Islands) Holding Corporation* [CICA Appeals 7 & 8 of 2019, unreported, 23 April 2020]

[9] When making his oral submissions Mr Valentin rightly accepted that Clause 7.7 rather than clause 9 was the power that best suited his argument.

53. *Familymart* was a case involving a petition to wind up a joint venture company ("the Company") on, inter alia, the just and equitable ground that an "understanding" as to how part of the business was to be operated had been abandoned after several years by the majority shareholder. The Company had been incorporated pursuant to Foundation Agreements which were amended from time to time leading, inter alia, to a Shareholders Agreement ("the SHA"), clause 20.2 of which provided: "without prejudice to any other provisions under this Agreement, this Agreement … upon the Effective Date, constitute (sic) the entire agreement and supersedes all prior agreements and *understandings*, both written and oral, among the Parties with respect to the subject matters hereof." [emphasis added]. The lead judgment was delivered by Sir Alan Moses JA with the concurrence of Rix and Martin JAA. The Court of Appeal reversed the decision of the judge below that reliance in the petition on the "understanding" should be struck out by reason of clause 20.2. In para 37 of his judgment Moses JA said:

> "Even where parties to a commercial joint venture agreement include an entire agreement clause, as in the instant case, an obligation to act in good faith may be imposed. (**See Ross v Waverley Commercial** [2004] BCLC 545] and **Sheikh Tahnoon Al Nehayan v Kent** [2018] EWHC 333 (Com)."

The Court of Appeal also reversed Kawaley J's order staying the petition on the ground that the dispute was governed by an arbitration agreement contained in the SHA. On 20 September 2023 the Privy Council set aside the Court of Appeal's order on the sole ground that the dispute was indeed covered by the arbitration agreement[10].

54. When dealing with the second just and equitable ground upheld by the judge – irretrievable breakdown in the relationship between Dr Fan and Dr Zhang that had begun as one of mutual trust and confidence – Mr Valentin accepted that this ground depended on the establishment of a relationship akin to partnership of the sort envisaged by Lord Wilberforce and submitted that the judge correctly stated the law in paragraphs [182] – [183] of the Judgment and paragraphs [74] – [75] in the strike out judgment which the judge correctly applied to the relevant facts in reaching his conclusion that this ground was established.

55. Turning to the judge's third winding up ground – justifiable loss of trust and confidence in the management of the partnership – Mr Valentin submitted that the judge's statement of the applicable law in [10(12)] of the strike out judgment was impeccable. The establishment of

[10] [2023] UKPC 33

this ground did not depend upon there being a relationship between Dr Fan and Dr Zhang that was akin to partnership in accordance with criteria set in *Ebrahimi*. Responding to Mr Smith's contention that there was no material from which to conclude that there had been an objectively verifiable loss of confidence in the GP, Mr Valentin identified the following findings made by the judge:

(i) "*in my judgment the affairs of the Partnership have been conducted by the GP (with Dr Zhang in the driving seat in that respect) in a manner which is oppressive and in breach of Dr. Fan's legitimate expectation and understanding*"[166]. Mr Valentin submitted that this is a reference to the judge's (correct) findings at [167] that Dr Zhang had created and encouraged Dr. Fan to believe that six months after the IPO, he would be entitled to have access to 10% of the Legend Cayman shares, but that expectation and understanding had then been unreasonably frustrated by the Partnership, the GP and Dr. Zhang. The "oppression" of Dr. Fan consisted in the failure by the GP (represented by Dr. Zhang) to honour what Dr. Zhang had promised Dr Fan in respect of the Legend Cayman shares. It also includes the attempts of Dr Zhang to belittle Dr Fan's role and contribution referred to by the judge in [182] and [154]).

(ii) *"Dr. Fan in entering into the 2017 Agreement trusted Dr. Zhang and Ms Wang to do the right thing and to honour the roll over of Dr. Fan's Legend Nanjing shares to Legend Cayman. Dr. Zhang and the GP have betrayed that trust and it can easily be seen how Dr Fan legitimately and reasonably believes, after his significant contribution to the increasing value of Legend Cayman, that he has been badly let down by the GP and those that control the GP. Dr Fan has been unfairly treated."* [169]

(iii) "*The GP's consideration of and reactions to Dr Fan's reasonable requests for the shares shows the GP in a bad light. Such is indicative of the GP's breach of its fiduciary duties and its failure to act in the best interests of the Partnership and its limited partners. Dr. Fan had nearly a 70% interest. He should have been treated with respect and fairness. He was not so treated. He was left with no reasonable alternative but to file the petition*." [170]

56. In regard to the judge's fourth winding up ground – the GP's conflict of interest and breach of the fiduciary duty to act in good faith – Mr Valentin disputed Mr Smith's contentions that: (a) the GP was entitled to be regarded as acting in the overall interest of the partnership consistently with the section 19 (1) good faith duty and in accordance with the 2017 Agreement in declining to allow Dr Fan to have access to 10% of the Legend Cayman's issued shares at a time when the company needed to raise capital to fund its clinical trials and research; and (b) there was in any event no conflict between the interests of the partnership, Legend Cayman and Dr Zhang, all of whom had an interest in protecting and enhancing the value of Legend Cayman. Mr Valentin argued that in considering what is in the interest of the partnership viz the limited partners, the GP must ignore its and its majority shareholder's interest in Legend Cayman, and this the GP, acting by Dr Zhang, manifestly

failed to do as the judge was fully entitled to find in [178]. Further, even if the sole interest of Dr Zhang and Legend Cayman was in protecting and enhancing the value of Legend Cayman (a proposition not supported by the evidence), it does not follow that this was Dr Fan's interest (or sole interest). It is also to the point that Ms Wang did not oppose Dr Fan's petition.

57. Mr Valentin, next turned to Mr Smith's contention that by Clause 10 of the Subscription Agreement[11], Dr Fan had consented to or waived any conflict of interest that the GP (through Dr Zhang) might have had. In Mr Valentin's submission, the judge had plainly been correct to hold in [178] that there was nothing in Clause 10 that could come to the rescue of the GP in this case.

58. Finally, Mr Valentin challenged Mr Smith's contention that a more suitable and reasonable remedy than a winding up petition for Dr Fan to take was a claim for breach of the section 19 (1) good faith duty against the GP wherein the court would have available a more flexible range of remedies to meet the situation as it saw fit. Mr Valentin submitted that Dr Fan wanted the shares in Legend Cayman he had been promised and a winding up petition was by far the most straightforward way of achieving this objective.

59. In support of this submission, Mr Valentin relied on paragraphs 36 and 37 of Martin JA's judgment in *Tianrui*. In that case the appellant ("Tianrui") presented a petition to wind up the respondent ("the Company") on the just and equitable basis on the ground, inter alia, that two of the other three significant shareholders of the Company, ACC and CNBM, had acted unfairly and/or oppressively towards Tianrui and/or that the affairs of the Company had been conducted with a lack of probity and Tianrui had justifiably lost confidence in the management of the Company. At first instance, Mangatal J struck the petition out on the ground that the Tianrui had available alternative remedies which could be reasonably pursued. Paragraphs 36 and 37 of Martin JA's judgment read:

> 36. "If the allegations set out in the petition are true, it seems to us clear that they are capable of establishing that it would be just and equitable to wind up the company. Put simply, Tianrui's position as evinced by its petition is that it cannot be expected to remain in association with CNBM and ACC in light of their conduct towards it. None of the remedies identified by the judge deals with that underlying complaint".

[11] "The Subscriber acknowledges and is aware that the General Partner, its directors or any of its associates may invest in, directly or indirectly, or manage or advise other collective investment schemes or accounts which invest in assets which may also be purchased or sold to the Partnership".

37. "The company suggests that if the underlying complaint is as we have identified, Tianrui can bring its association with CNBM and ACC, and with the company, to an end by selling its shares on the Hong Kong stock exchange. It accepts that Tianrui could only sell the shareholding it now has, and that a 21.40% shareholding might fetch proportionately less than the 28.16% shareholding that Tianrui originally had, since its former shareholding enabled Tianrui to block special resolutions; but the company says that the effect of selling would be to crystallize a claim for damages which could then be pursued by means of an action for conspiracy. In our view, these assertions epitomize what is wrong with the company's position. If the actions of the company, prompted by directors appointed at the instance of a majority of its shareholders, have resulted in a justifiable loss of confidence in the management of the company, Tianrui has a statutory right to petition for the winding up of the company on the just and equitable ground. It cannot be deprived of that right merely because the company can point to other remedies which, alone or in combination, might arguably go all or some of the way to compensating Tianrui for what has occurred. In our judgment, Tianrui may legitimately take the view that it prefers the company to be wound up to having to pursue piecemeal a series of actions, by litigation or otherwise, or by a combination of litigation and other steps, that might be capable of redressing some, or even all, of its concerns."

Discussion and decision

The first winding up ground

60. Upon signing the 2016 Agreement Dr Fan had an unconditional and unqualified contractual right to have transferred into his ownership 10% of the issued shares in Legend Nanjing after completion of the company's contemplated IPO, regardless of the effect on the value of the company's shares if he chose to sell his 10% shareholding. As a consequence of the assurances he received from Dr Zhang and Ms Wang that he would have the exact equivalent of his entitlement under the 2016 Agreement in respect of shares in Legend Cayman's shares ("the assurances"), Dr Fan signed the 2017 Agreement (the LPA, the Subscription Agreement and the Acknowledgement) on 9 June 2017. Dr Zhang and Ms Wang were directors of Genscript and Dr Zhang held the majority of the shares in that company. ALP was established on 16 February 2017 with Genscript as its General Partner. The assurances began to be given from about mid-June 2016 and continued on and off until shortly before Dr Fan executed the 2017 Agreement. As recorded above, in her email to Dr Fan dated 3 June 2017 Ms Wang stated: "The best news for you is that your stake in Nanjing Legend will be turned into shares in Cayman Legend". This was followed by her WeChat message of 8 June 2017: "This agreement is not to change any material interest of your's. It's only intended to make the original agreement legitimate, and to create scope for future development." As Dr Zhang and Ms Wang must have realised, Dr Fan accepted their assurances without seeking independent legal advice because he trusted them having worked closely with them for

Genscript since 2014. As the judge found at [169], he relied on them to honour the assurances whatever was stated in the 2017 Agreement.

61. In my opinion, the repudiation by the GP (Genscript) of the assurances it gave to Dr Fan through Dr Zhang and Ms Wang is an egregious act of bad faith and the judge was right for the reasons that follow to order the winding up of ALP on the ground that the GP had frustrated Dr Fan's legitimate expectation that the GP would transfer to him 10% of the issued shares in Legend Cayman following the IPO and the end of the ensuing six month lockdown period.

62. ALP is very different from a conventional partnership under the Partnership Act for the reasons identified by Mr Smith. Nonetheless, under the law of the Cayman Islands it is a partnership, albeit an exempted limited partnership, and a partner therein has a statutory right under section 36 (3) (g) to petition for its winding up on the ground that it is just and equitable to do so.

63. As recorded above, Dr Fan received the assurances both before and after Genscript had become the General Partner of ALP. The assurances were not included in the 2017 Agreement and were intended to induce Dr Fan to become a limited partner of ALP and succeeded in doing so as a result of Dr Fan having a close and trusting relationship with the assurers. Honouring the assurances depended on the necessary action being taken by the GP which alone had authority (acting by Dr Zhang) to conduct the business of ALP. Furthermore, as envisaged at (iii) of the indicia for the existence of 'something more' for the superimposition of equitable considerations in the passage from *Ebrahimi* quoted at paragraph [24] above, Dr Fan could not exit from ALP without the consent of the GP. It follows in my judgment that, as the judge held, the relationship between Dr Fan and Dr Zhang was sufficiently akin to partnership of the sort contemplated by Lord Wilberforce in *Ebrahimi* for the assurances to be of a character arising between one individual and another that made it inequitable for the GP to insist on a claimed entitlement to refuse to agree to Dr Fan's request to have 10% of the Legend Cayman shares transferred to him.[12]

64. I reject Mr Smith's submission that the GP had a duty to do what it considered to be in the best interests of the partnership which was that they were best served by refusing Dr Fan's

[12] Cf *Ebrahimi* at p.379D

request for else the fortunes of Legend Cayman and ALP's interest in the company would be adversely affected. As stated above, Dr Fan had an unqualified right under the 2016 Agreement to own, and sell if he chose to do so, 10% of the shares in Legend Nanjing post the IPO, regardless of the effect that this might have on the value of Legend Cayman's shares; and the assurances he was given were that he would have the equivalent right in respect of the Legend Cayman shares. ALP (effectively the limited partners) should therefore have taken the consequences resulting from the honouring of the assurances for the value of Legend shares, those assurances having been given by Dr Zhang of the GP (also a limited partner) and Ms Wang, a limited partner.

65. As will be apparent from [64], I am not persuaded by Mr Smith's submission that the terms of the 2017 Agreement, including in particular Clause 7.7 and the entire agreement clauses, preclude a winding up on just and equitable grounds. As Mr Valentin submitted, the decisions in *O'Neill, Coroin* and *Cool Seas* are all distinguishable from the case in hand and, as Mr Valentin noted, Dr Fan's petition is consistent with the 2017 Agreement since the GP had power under Clause 7.7 of the LPA to honour the assurances by acceding to Dr Fan's request for the transfer of 10% of the Legend Cayman shares. In my view, the case falls squarely within the emphasised passage in *Ebrahimi* quoted at paragraph [24] above. The existence of the assurances made it unjust and inequitable for the GP to exercise the power conferred on it by clause 7.7 in a particular way, i.e. by refusing consent to the withdrawal rather than consenting. I would also point out that the assurances were not merely Dr Fan's own subjective expectation at the time of concluding the 2017 Agreement, as suggested by Mr Smith[13], but were objectively found by the judge to have been repeatedly given, from which finding there is no appeal.

66. So far as the entire agreement clauses are concerned, I am of the view that reliance thereon in the circumstances of this case would be inconsistent with the free-standing duty to act in good faith which I find to be engaged in respect to the assurances, the honouring of which is a matter that I find affected the conscience of the GP; see *Familymart* at [37] (quoted at paragraph [53] above) and the following passage in the judgment of Smith J in *In re Wondoflex Textiles Pty Ltd* [1951] VLR 458, cited with strong approval[14] by Lord Wilberforce) in *Ibrahimi* at 378E-H:

[13] See paragraph [37] above
[14] "The whole judgment is of value."

> " It is also true, I think, that, generally speaking, a petition for winding up, based upon the partnership analogy, cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles: .. . To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him: . . . But this, I think, is subject to an important qualification. Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up. *Indeed, it may be said that one purpose of [the just and equitable provision] is to enable the court to relieve a party from his bargain in such cases."* [emphasis supplied].

67. I am also of the view that to rely on the entire agreement clauses would be a breach by the GP of the section 19 (1) EPLA duty of good faith. The duty is owed to "the exempted limited partnership" which must mean the limited partners, which include Dr Fan and, in my opinion the other limited partners, the GP, Ms Wang and later the Ye Wang Family Trust -- would surely have no standing to dissent because the GP and Ms Wang gave and repudiated the assurances. If I am wrong about this, the free-standing duty of good faith that I have held in [66] to apply to the assurances will be unaffected.

68. In my judgment, the judge did not err in holding that proceedings by Dr Fan for breach of the section 19 (1) duty to act fairly would not be a more reasonable remedy than his winding up petition. As the judge observed, Dr Fan is seeking the transfer into his ownership from the shares held by ALP the equivalent of 10% of Legend Cayman's issued shares which will be the result if his winding up petition succeeds, and this represents a much more straightforward proceeding than a claim under section 19(1) ELPA.

<u>The second winding up ground</u>

69. Mr Smith's challenge to this winding up ground is founded on Lord Briggs' statement in *Lau v Chu* at [15]: that: "where the company is a corporate quasi-partnership, an irretrievable breakdown in trust and confidence between *participating* members may justify a just and equitable winding up" [emphasis added].

70. I have already held that by reason of Dr Fan having been induced to become a limited partner of ALP by the assurances given by the GP (acting by Dr Zhang and Ms Wang) and the

existence of (iii) of the indicia indicated in *Ebrahimi*, the relationship between Dr Fan and the GP was sufficiently akin to a partnership to engage the applicability of the just and equitable winding up ground consistently with Lord Wilberforce's judgment in *Ebrahimi*, as the judge found.

71. I turn to consider whether it is necessary for the establishment of this second ground that, in addition to there being a relationship akin to partnership consistent with *Ebrahimi*, the petitioner has to have been a participant in the running of the business. In paragraph [9] of *Lau v Chu*, Lord Briggs observed that the jurisdiction to wind up a BVI company on the just and equitable ground was entirely statutory following the similar jurisdiction in UK with the result that the UK case-law was the primary source of authority for the scope of the jurisdiction. He then went on to say in [17] that where the company is *a corporate quasi-partnership* a winding up on just and equitable grounds "is the response of equity to a state of affairs between individuals *who agreed to work together* on the basis of mutual trust and confidence where that trust and confidence has completely gone." [emphasis supplied]. In light of the fact that the judge and the parties in the proceedings below also took the approach that the UK case-law was the primary source of authority for the scope of the just and equitable jurisdiction in the case of a Cayman Islands ELP, with the judge stating in [158] that he had had regard to *Lau v Chu*, I find I find myself constrained to conclude that in respect of this second winding up ground, Dr Fan had to establish that he was a participant in running the business of ALP which was a condition that on the evidence he was never going to be able satisfy. As Mr Smith was at pains to point out, Dr Fan was never going to be involved in running the business of the partnership by reason of the effect of section 14 (1) & (2)) ELPA. It follows in my view that Mr Smith's challenge to the judge's second winding up ground succeeds and in consequence this ground should be set aside.

<u>The third winding up ground</u>

72. It is important to appreciate that the establishment of this just and equitable ground is not dependent on there being a relationship akin to partnership in accordance with Lord Wilberforce's judgment in *Ebrahimi*.

73. I am not persuaded by the submissions Mr Smith advanced in seeking to have this winding up ground overturned. On a fair reading of the Judgment, it is clear in my view that in finding this ground was established, the judge proceeded on the basis of his findings in paragraphs

[166], [167], [169] and [182] that the GP's failure to honour the assurances which it was obliged to do in good faith amounted to misconduct in the management and affairs of the partnership. For the reasons I have given in upholding the judge's first winding up ground, I am also satisfied that the judge was entitled to make this finding and to conclude that by reason of this misconduct on the part of the GP, Dr Fan had justifiably lost trust and confidence in the management of the affairs of the partnership to the requisite objective standards.

The fourth winding up ground

74. In my view, the judge's conclusion in paragraph [178] of the Judgment that the wording of Clause 10 of the Subscription Agreement does not mean that Dr Fan consented to or waived any conflict of interest to which the GP was subject is unassailable.

75. I am also of the opinion that the judge was entitled to conclude that the GP (acting by Dr Zhang) was in breach of the fiduciary duties to act in good faith and avoid a conflict of interest. However, this conclusion is dependent on the judge's finding that the GP frustrated Dr Fan's legitimate expectation that the GP would transfer into his ownership 10% of the Legend Cayman shares contrary to the good faith duty it owed in regard to the assurances. Thus, if Mr Smith's submission that the judge's first ground for winding up ALP should be set aside, on the ground say that the terms of the 2017 Agreement preclude the first winding up ground, the GP would have been entitled to conclude that the interests of the partnership would be better served if Dr Fan were not permitted to sell his claimed 10% of Legend Cayman shares. It follows that in substance the first and the fourth winding up grounds are duplicitous, but I do not think that this is a reason for setting the fourth ground aside.

Conclusion

76. For the reasons given above I would uphold the first, third and fourth grounds of the judge's decision for winding up ALP and reject the second ground. It follows that the appeal against the judge's winding up order is dismissed.

A closing observation

77. No doubt for sound and sensible reasons which I do not for a moment criticise, the hearings below and on appeal in this litigation were conducted on the basis that the English and Welsh and Commonwealth jurisprudence (including decisions of the Privy Council) was applicable to petitions to wind up on just and equitable grounds a Cayman Islands ELP, the new kid on the block, pursuant to section 36 (3) (g) ELPA, notwithstanding the marked differences between an ELP and a partnership governed by the Partnership Act and a company incorporated under the Companies Act. For my part, I would have been very interested to have heard a "further and in the alternative" case that the expression "just and equitable" in section 36 (3) (g) ELPA was to be construed in an expansive and flexible way, taking full account of the special nature of an ELP and less account of the overseas jurisprudence.

Birt JA

78. I agree.

Goldring JA (President)

79. I also agree.

ITEM NO. 138

JA-24

21/1/10

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION
The Hon. Mr Justice Andrew J. Jones QC
Tuesday 19th January 2009 2010

CAUSE NO. FSD 15 of 2009 (AJJ)

IN THE MATTER OF SECTION 92 OF THE COMPANIES LAW (2009 REVISION)

AND IN THE MATTER OF BELMONT ASSET BASED LENDING LTD

Appearances: Mr Simon Dickson of Mourant du Feu & Jeune for the Petitioner
Mr Sam Dawson of Solomon Harris for the Fund



JUDGMENT

1. This is a petition presented pursuant to section 94(e) of the Companies Law (2009 Revision) for an order that Belmont Asset Based Lending Ltd ("the Fund") be wound up compulsorily and that Messrs Wight and Sybersma of Deloitte be appointed as joint official liquidators.

FACTUAL BACKGROUND

2. The Fund was incorporated on 24th October 2003 as an open ended investment fund and was registered with the Cayman Islands Monetary Authority pursuant to section 4(3)(c) of the Mutual Funds Law. It was promoted by Harcourt Investment Consulting AG ("Harcourt") which is part of the Vontobel Banking Group, headquartered in Zurich, Switzerland. Harcourt acts as the Fund's investment adviser and Alternative Investment Solutions Limited, a wholly owned subsidiary of Harcourt, acts as its investment manager. The Fund's board of directors comprises three individuals who are all employees either of Harcourt or other Vontobel group companies. A nominal 100 voting shares have been issued to the Investment Manager. The Fund's investors have subscribed for redeemable

JA-24

participating shares which do not carry any voting rights. The result of this structure is that the Fund is wholly controlled by Harcourt. The holders of the redeemable participating shares, who own the whole economic interest in the Fund, are not entitled to requisition an extraordinary general meeting for the purposes of passing a special resolution to put the Fund into voluntary litigation. Only Harcourt has power to put the Fund into voluntary liquidation, but it has declined to do so for reasons which have not been explained to the Court.

3. The Fund's administrator is Citco Fund Services (Europe) BV, which is wholly independent of the Vontobel group. Its custodian and bankers are also members of the Citco group. The Administrator does not now have any representation on the Fund's board of directors.

4. The Petitioner is Bear Sterns Alternative Assets International Ltd ("Bear Sterns") which operated as a division of the Bear Sterns investment bank and is now part of the JP Morgan Chase Group. Bear Sterns is registered as owner of approximately 1.18 million redeemable participating shares in the Fund which were valued at approximately $104 million, based upon the NAV figures issued by the Fund for 30th September 2008. On 19th September Bear Sterns submitted a redemption request in respect of that number of shares which would have a value of $8,800,000 as at 30th September 2008.

5. The investment objective of the Fund, as stated in Section 3 of its offering document (entitled *Confidential Information Memorandum*), is to provide long term capital appreciation to shareholders by investing in a diversified portfolio of asset-based lending and related strategies. As a result of events occurring in September 2008 it is accepted by all those involved in the management of the Fund that it is no longer in a position to pursue its investment objective and that is not now viable as a mutual fund. This situation came about as a result of two factors, namely the general market conditions which caused a severe credit crunch and the effects of a fraud committed by Mr Tom Petters. Allegations of fraud against him were first made public in September 2008 and he has recently been convicted by a US District Court in Minnesota of carrying out what was described as a "multi billion dollar Ponzi scheme". The value of various investments made by the Fund in entities which were managed by or related in some way to Petters Company Inc have been written off or substantially written down in value. Harcourt concluded that investments in Lancelot Investors Fund Ltd and Palm Beach Offshore II (which represented 14.57% of the Fund's recorded assets) should be written off. An investment in Stewardship Credit Arbitrage Fund (representing 4.79% of the Fund's recorded assets) was written down by 61% and investments in other funds (representing 7.9% of its recorded assets) became unrealisable because those funds suspended redemptions.

6. The combination of the credit crunch and the Petters fraud had a serious adverse impact upon the Fund. As a consequence, on 27th October 2008 the Fund's board of directors passed a series of written resolutions by which they (a) recommended that the Investment Manager (as owner of the voting shares) pass a special resolution placing the Fund into voluntary liquidation and (b) declared a suspension of the calculation of NAV and consequential suspension of redemptions and subscriptions. The copy of these written resolutions exhibited (at page148) to Mr Edouard Tijou's affidavit is signed by only one of the three directors, but I was told by counsel that duplicates of the resolutions were in fact signed by all three directors. On 31st October the Fund's Administrator sent a circular letter to the shareholders informing them of the Board's decision. The Administrator stated "the Directors have deemed that the continued operation of the [Fund] is no longer viable and that steps should be taken to realise the [Fund's] portfolio and to place [the Fund] into voluntary liquidation". Since two of these directors are themselves employees of Harcourt and the third is an employee of another Vontobel group company, the shareholders were entitled to assume that the directors' recommendations were in reality decisions which would be implemented immediately.

7. For reasons which have not been explained, Harcourt changed its mind and has not in fact taken the steps necessary to put the Fund into voluntary liquidation pursuant to the Companies Law. Instead, Harcourt set about the task of realising the assets and making distributions to shareholders without having put the Fund into liquidation and appointing a liquidator. Bear Sterns become dissatisfied with the way in which the informal liquidation process was being conducted and on 26th November 2009 presented a petition for an order the Fund be wound up compulsorily by order of the Court and that qualified insolvency practitioners be appointed as official liquidators. It is not in dispute that the Fund is solvent on a balance sheet test. Nor is it in dispute that the Fund is no longer viable as a mutual fund.

BEAR STEARN'S WINDING UP PETITION

8. By its petition Bear Stearns contended that the Fund should be wound up on the "just and equitable" ground for three reasons, namely that (a) having suspended NAV, the Fund's management were acting in a manner which was contrary to its articles of association and therefore in breach of the legal bargain between the company and its shareholders; (b) Harcourt is acting in breach of duty and has lost the confidence of shareholders; and (c) there has been a "loss of substratum", meaning that the purpose for which the Fund was established can no longer be carried out and that it has ceased to be viable as a mutual fund.

9. The Petition was listed for directions on 18th December 2009 in accordance CWR Order 3, rule 11. Having determined that the Petition should be treated as a proceeding *against* the Fund, as opposed to treating it as a proceeding between shareholders in which the Fund itself is merely the subject-matter of the proceeding, I directed that one of the Fund's directors, Mrs Margaret Thompson, should send to every other shareholder and every known creditor copies of the winding up petition, the verifying affidavit, the supporting affidavits sworn by the qualified insolvency practitioners nominated for appointment as official liquidators and any explanatory statement made by Harcourt. Given that the petition contained allegations of breach of duty against Harcourt, this was the classic case in which the independent directors should have determined the Fund's response to the winding up petition in the interests of its investors. It is established best practice for mutual funds incorporated in the Cayman Islands to have a board of directors which includes at least some persons, if not a majority, who are independent of the investment manager and administrator. In this case the Fund has no independent directors at all. Two out of three members of the board are employees of Harcourt and the third, Mrs Margaret Thompson, cannot be regarded as independent because she is an employee of Vontobel Bank Cayman Ltd which is a wholly owned subsidiary of the same group as Harcourt. Why Harcourt failed to comply with industry standards in this respect was not explained. The task of communicating with the shareholders and making a recommendation about the merits of the petition therefore fell upon Mrs Thompson on the basis that she was *relatively* independent in that she was not employed by Harcourt and the allegations of breach of duty were not made against her directly.

10. On 4th January 2010 Mrs Thompson duly sent the petition and other documents to all shareholders and known creditors, together with a covering letter in which she refuted the first two grounds asserted in the petition, but accepted that there has been a "loss of substratum". She advised that the Board of Directors would not oppose the petition on behalf of the Fund and recommended that the other shareholders should not oppose it. In the event, no shareholders gave notice of intention to oppose (or support) the petition and it came on for hearing unopposed. Counsel for Bear Stearns informed me that his client had agreed to withdraw the first two grounds (set out in paragraphs 45-65 of the petition) and argued that it was "just and equitable" for a winding up order to be made solely on the ground that the Fund has suffered a "loss of substratum" and ceased to be viable as a mutual fund. I made an order allowing the petition to be amended by deleting paragraphs 45-65. On this basis the Fund's directors did not oppose the making of a winding up order.

11. A winding up order is a discretionary remedy. By issuing a winding up petition the shareholder or creditor is invoking class rights, with the result that all those in the class are entitled to be heard, for which purpose winding up petitions are normally required to be advertised. A winding up order is "binding upon all the world". It takes effect for the benefit of and is binding upon all shareholders and creditors (including contingent creditors and claimants), whether or not they have had actual notice of the petition. It follows that it is not open to a petitioner and the company (acting by its board of directors) to ask the Court to make a winding up order "by consent". Notwithstanding the agreement between the Fund and Bear Stearns, I must still satisfy myself that this is a proper case in which to make a winding up order on the basis of the facts pleaded in the petition, as now amended.

THE JUST AND EQUITABLE GROUND

12. The issue is whether a finding of "loss of substratum" is, by itself, sufficient to justify the Court in making a winding up order on the just and equitable ground under section 94(e) of the Companies Law (2009 Revision).

13. The expressions "loss of substratum" or "failure of substratum" are derived from English case law dating back to a decision of the Court of Appeal in *Re Suburban Hotel Co* (1867) L.R. 2 Ch. App. 737 at 750. Whilst it may be helpful for the Court to categorise circumstances in which it will be considered just and equitable for a company to be compulsorily wound up, I question whether it is sensible to adopt terminology invented in the context of England's nineteenth century economy. A company was said to have "lost its substratum" if the purpose for which it was formed can no longer be carried out (per Kekewich J. in *Re Bristol Joint Stock Bank* (1890) 44 Ch.D a703 at 712); or if the company has practically ceased to carry on business because it has become impractical to do so (per James LJ in *Re Diamond Fuel Co* (1879) 13 Ch.D 400, at 408); or if the company was formed to pursue a specific business opportunity which is no longer available to it (*Re Haven Gold Mining Co.* (1882) 20 Ch.D 151). To translate these statements into a modern context, it can be said that it is just and equitable to make a winding up order in respect of an open ended corporate mutual fund if the circumstances are such that it has become impractical, if not actually impossible, to carry on its investment business in accordance with the reasonable expectations of its participating shareholders, based upon representations contained in its offering document. If such a company, organised as an open ended mutual fund, has ceased to be viable for whatever reason, the Court will draw the inference that it is just and equitable for a winding up order to be made.

14. This principle has been applied most recently by this Court in *Re Philadelphia Alternative Asset Fund Limited* (Cause 440/2005). This case concerned a solvent company which had ceased to be viable as an open ended mutual fund because its management had fraudulently overstated its NAV and a US District Court had appointed a receiver on the application of the Commodity Futures Trading Commission. Henderson J. said "In cases where the substratum of a company is gone, winding up will usually be ordered despite the opposition of even a majority of members". A winding up order was made.

15. The Supreme Court of Bermuda has recently adopted exactly the same approach in applying a similar "just and equitable" provision contained in the Bermuda Companies Act, 1981 which has essentially the same legislative history as the equivalent Cayman Islands provision. In *Re Stewardship Credit Arbitrage Fund Ltd* (2008: No.2006) the court was asked to make a provisional winding up order in respect of an open ended mutual fund which, as it happens, was also a victim of the Petters fraud. It is actually one of the companies in which the Fund invested. Bell J. said " ..the critical complaint to my mind is ... that the substratum of the Company has gone. From the time of the 9th June directors' meeting, the Company has effectively ceased to carry on business, and in practical terms, I have no doubt that the prospect of its carrying on its business in any real way in future has long since disappeared". A provisional winding up order was made.

16. Wherever it is proved that a company established as an open ended mutual fund is no longer viable as such, for whatever reason, the Court will ordinarily conclude that it is just and equitable to make a winding up order. This situation may come about for any number of reasons and not necessarily as a result of any breach of duty, negligence or even bad judgment on the part of the fund's investment managers or administrators. In the present case, the Fund's inability to meet redemption requests and the sudden collapse of its NAV occurred in September and October 2008 as a result of the combined effects of the Petters fraud and an unprecedented credit crunch. There is no suggestion that the Fund's difficulties were caused by any fault on the part of Harcourt. The allegations made against Harcourt (and now withdrawn) related to their attempts to liquidate the Fund following suspension of NAV, not the manner in which they had invested and managed the Fund's assets prior to the events of September 2008. There are sound policy reasons for making a winding up order in respect of non-viable mutual funds, in spite of the fact that this situation has arisen without fault on the part of its management.

17. Typically, mutual funds are established in the Cayman Islands by foreign financial services companies which then act as investment manager or adviser pursuant to a contract, the terms of which will be summarised in the offering document. The skill set required of a

successful investment manager is wholly different from that required of professional liquidators. Investment management agreements are invariably made on the assumption that the fund is a going concern and that the investment manager will be responsible for making investment decisions and managing investments, with the result that its terms may be inappropriate to the situation in which the fund is being liquidated. Typically, the investment managers are remunerated on the basis of a percentage of NAV, often coupled with performance fees calculated as a percentage of realised gains. This basis of remuneration will become inappropriate if the fund ceases to be viable and the investment manager ceases to perform at least some of the functions contemplated by the investment management agreement and instead attempts to adopt a liquidation role. Investment management agreements rarely, if ever, contemplate the scenario in which the service provider's role changes from that of investment manager into that of liquidator.

18. An investor's decision to subscribe for shares will be based upon the reputation and past performance of the investment manager. So long as a fund's assets are being invested and managed in accordance with investment criteria and guidelines set out in the offering documents, shareholders cannot and do not expect to have any say in the investment decisions. The position changes if the fund ceases to be viable with the result that the calculation of NAV is suspended and the principal or only function left for management is to realise the assets for the benefit of creditors and shareholders. This exercise may involve an investigation and pursuit of claims against the investment manager and other professional services providers which can only be undertaken by profession independent liquidators. Even if a fund is solvent on a balance sheet test and there is no apparent cause of complaint against any of its service providers, its investors should still not be deprived of the advantages of having the task performed by professional independent liquidators. Nor should they be deprived of the protections provided by the Companies Winding Up Rules, simply because the investment manager (who may not have been at fault) chooses to undertake the task itself.

CONCLUSION

19. For these reasons I am satisfied that it is just and equitable to make a winding up order in respect of the Fund simply on the basis that it is no longer viable as an open ended mutual fund and notwithstanding that the allegations of breach of duty made against its investment manager have been withdrawn.

20. I am satisfied that Messrs Wight and Sybersma, partners in the Cayman Islands firm of Deloitte, are qualified insolvency practitioners who meet the requirements of the Insolvency

Practitioners' Regulations in relation to the Fund. I therefore make an order that they be appointed joint official liquidators.

21. Since there never was any allegation of incompetence, negligence or bad judgment against Harcourt in respect of their management of the Fund's assets prior to the events of September 2008 and the allegations made in respect of their attempts to liquidate the Fund have been withdrawn, I authorise the official liquidators to engage the services of Harcourt as advisers if they consider it appropriate to do so.

22. Otherwise, I make a winding up order in the usual terms.

Dated 21st day of January 2010

The Hon Mr Justice Andrew J. Jones QC

GRAND COURT - CAYMAN ISLANDS

ITEM NO. 139

JA-25



Michaelmas Term
[2025] UKPC 56
Privy Council Appeal No 0007 of 2024

JUDGMENT

Aquapoint LP (in Official Liquidation) (Appellant) *v* Xiaohu Fan (Respondent) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Sales
Lord Leggatt
Lord Burrows
Lord Richards
Dame Janice Pereira

JUDGMENT GIVEN ON
27 November 2025

Heard on 31 March 2025

Appellant
Tom Smith KC
Chris Keefe
Peter Burgess
Geoffrey Sykes
(Instructed by Walkers (Cayman) LLP and Blake Morgan LLP (London))

Respondent
Ben Valentin KC
Bhavesh Patel
(Instructed by Seladore Legal Limited and Travers Thorp Alberga (Cayman Islands))

LORD RICHARDS:

Introduction

1. This is an appeal against an order made to wind up AquaPoint LP ("Aquapoint") on the grounds that it was just and equitable to do so. The appeal raises issues as to the circumstances in which the exercise of legal rights may be subject to equitable constraints.

2. Aquapoint is an exempted limited partnership ("ELP") formed in the Cayman Islands under the Exempted Limited Partnership Act ("the ELP Act"). The ELP Act requires an ELP to consist of one or more general partners and one or more limited partners. The general partner has full responsibility for the management and conduct of the ELP's business and is liable for the ELP's debts in the event of a shortfall in its assets. A limited partner must not take part in the management of the ELP and is not liable for its debts and obligations except as may be provided by the partnership agreement.

3. Aquapoint has one general partner and three limited partners. The general partner is GenScript Corporation ("Genscript"), incorporated under the laws of Delaware. Genscript is and has at all material times been controlled by Dr Fangliang (Frank) Zhang. The petitioner, Dr Xiaohu (Frank) Fan, is one of the limited partners, with a 65.96% interest in Aquapoint. The other limited partners are Ms Ye (Sally) Wang, with a 32.98% interest (now held in a family trust), and Genscript, with a 1.06% interest.

4. Aquapoint was established in 2017 to hold approximately 15% of the shares in Legend Biotech Corporation ("Legend Cayman"), a company incorporated in the Cayman Islands and formed by Genscript. It was established in preparation for an initial public offering ("IPO") and listing of the shares of Legend Cayman on the NASDAQ stock exchange in New York. The IPO and listing occurred in 2020. Dr Fan's interest as a limited partner in Aquapoint equates to nearly 20 million shares in Legend Cayman, which is approximately 10% of its share capital ("the 10% shareholding").

5. The essence of Dr Fan's case is that, in order to induce him to become a limited partner in Aquapoint, Genscript (acting by Dr Zhang and Ms Wang) gave him assurances that he would be able to withdraw the 10% shareholding from Aquapoint six months after the IPO, but that, in breach of those assurances, Genscript prevented him from doing so by exercising its power as general partner under the partnership agreement to refuse its consent to the withdrawal. The trial judge found that the assurances had been given so as to induce Dr Fan to become a limited partner in Aquapoint. Those findings were not challenged on appeal.

6. The essence of Aquapoint's case is that, by refusing its consent to Dr Fan's request, Genscript was simply exercising its legal power under the partnership agreement and that the prior assurances given to Dr Fan provided no basis on which the court could conclude that it was just and equitable to wind up Aquapoint.

7. At first instance, in a judgment dated 10 June 2022 Doyle J accepted Dr Fan's case and ordered Aquapoint to be wound up. For the reasons given in a judgment dated 4 October 2023 (Civil Appeal No 14 of 2022), the Court of Appeal (Goldring P, Field and Birt JJA) dismissed Aquapoint's appeal. Aquapoint appeals to the Board.

Facts

8. Genscript was founded in 2002 by Dr Zhang and others, including Ms Wang. The Genscript group operates in the biological and medical research sector. Its principal operations are in Nanjing and Zhenjiang in the People's Republic of China ("the PRC").

9. Dr Fan is a research scientist who carried out important work on cell therapy, immunology and cell biology as an employee of the Genscript group.

10. In 2014, Genscript launched a new project to develop novel cell therapies for the treatment of cancer and other purposes. Dr Fan accepted appointment as the project's chief scientific officer and, in that capacity, he was closely involved in the development of various therapies. In March 2016, he was with others responsible for the invention of a ground-breaking therapy for the treatment of multiple myeloma patients. It is common ground that he made a significant contribution to the success of the business.

11. In November 2014, Genscript formed Nanjing Legend Biotechnology Co Ltd ("Legend Nanjing") in the PRC as the vehicle for the new project and with a view to an IPO and listing of its shares.

12. As Doyle J recorded in his judgment at para 4, "Dr Zhang astutely recognised that Dr Fan could play a key role in significantly adding to the value of the business and wished to encourage him to remain within the business with the incentive of financial rewards". On 1 January 2016, Legend Nanjing, acting by Dr Zhang, and Dr Fan entered into an agreement ("the 2016 Agreement") under which Legend Nanjing agreed to grant Dr Fan a 10% shareholding in Legend Nanjing on terms that, prior to Legend Nanjing's IPO, he would not transfer the shares or create any security interest over them without Legend Nanjing's approval.

13. Later in 2016, Genscript established Legend Cayman as the intended listed vehicle for the Legend business. Genscript, acting by Dr Zhang and Ms Wang, proposed to Dr Fan that the 2016 Agreement should be terminated and that Dr Fan should become a limited partner in an ELP which would hold approximately 15% of the shares in Legend Cayman. Discussions and communications to this end began in July 2016.

14. Critical to the issues in this appeal are the assurances given to Dr Fan during these discussions. The assurances and their context were summarised by Field JA in his judgment (with which Sir John Goldring P and Birt JA agreed) at para 12:

> "When Dr Fan was approached with Dr Zhang's new strategy, his chief concern was that he should still be entitled after the IPO to be registered as the owner of 10% of the shares in the listing entity, as he had been under the 2016 Agreement in respect of 10% of the shares in Legend Nanjing. He made this very clear on several occasions to Ms Wang and Dr Zhang who both assured him that the 2016 Agreement would be 'rolled over' into the arrangement involving a Cayman ELP. Dr Fan relied on these assurances when signing the 2017 Agreement: he would not have signed the constituent agreements if the assurances had not been given. His interest in the partnership under the 2017 Agreement was the equivalent of 10% of the shares in Legend Cayman which was the same percentage he was promised in respect of the shares in Legend Nanjing. In the light of these matters the judge held that Dr Fan had a legitimate expectation and reasonable understanding that 6 months after the Legend Cayman IPO he would be entitled to have access to 10% of the shares in Legend Cayman."

15. The discussions were successfully concluded in May 2017. Aquapoint had been formed pursuant to an initial partnership agreement made on 16 February 2017 between Genscript as the general partner and a nominee company as the initial limited partner. On 25 May 2017, Dr Fan entered into a subscription agreement, pursuant to which he subscribed for a partnership interest in Aquapoint (representing 65.96% of the partnership interests) ("the Subscription Agreement"). Also on 25 May 2017, Genscript as general partner and Ms Wang and Dr Fan as newly admitted limited partners entered into an amended and restated limited partnership agreement ("the LPA"), and the initial limited partner withdrew from the partnership. On 9 June 2017, Dr Fan entered into a written acknowledgement of the termination of the 2016 Agreement. These agreements and acknowledgement are together referred to as "the 2017 Agreement" in this judgment and in the judgments of the courts below.

16. The assurances previously given to Dr Fan were repeated in early June 2017. For example, in WeChat exchanges with Dr Fan, Ms Wang said "The best news for you is that your stake in Nanjing Legend will be turned into shares in Cayman Legend" and "This agreement is not to change any material personal interests of yours. It's only intended to make the original agreement legitimate, and to create scope for future development".

17. The sole asset of Aquapoint was, in 2017, and remained, at the date of the Court of Appeal's judgment, its holding of 30,320,000 ordinary shares in Legend Biotech, representing 15.6% of its issued share capital in 2017.

18. In October 2017, Dr Fan paid RMB 2.5 million, the sum fixed by the 2016 Agreement, in respect of his underlying interest in 10% of the shares of Legend Cayman, of which RMB 2 million was reimbursed to him over a four-year period.

19. The shares of Legend Cayman were listed on the NASDAQ exchange on 5 June 2020. The listing documents stated that the existing shareholders of Legend Cayman, which of course included Aquapoint, agreed not to dispose of their shares in the six months after the listing.

20. The lock-up period following the listing expired in December 2020. What then happened is summarised by Field JA in para 15 of his judgment:

> "Following the end of the 6 month lock in period, Dr Fan informed Ms Wang and Dr Zhang that he wanted access to 10% of the Legend Cayman shares held by [Aquapoint]. He first suggested that ALP be dissolved to achieve this and was invited to serve a written request that his Legend Cayman shares be sold subject to the [general partner] exercising its discretion accordingly. He then proposed that 2 million Legend Cayman ADS [American Depositary Receipt] shares (equivalent to 20 million ordinary shares) be sold as an interim measure whilst the differences between him and Dr Zhang and Ms Wang were sorted out. At a meeting on 26 February 2021, Dr Zhang refused Dr Fan's sales plan, mentioning that maybe Dr Fan would be able to sell about 30,000 Legend Cayman ADS shares raising about US$ 1 million, which would have meant that it would have taken over 300 years for Dr Fan's total shares to be sold. Dr Zhang's declared reason for this response was that the company needed to raise funds and Dr Fan's sales plan would 'crash the stock price'. Dr Fan then asked Dr Zhang on 5 March 2021 for an offer to allow the sale of a reasonable amount of

> his shares to which Dr Zhang responded the same day, stating that the Legend Cayman management team and board were only prepared to sell 200,000 ADS shares producing around $US4.5 million and this was a final offer. This offer Dr Fan accepted, but no steps were taken by [Genscript] to implement it. Instead, Dr Zhang let Dr Fan know that he had been instructed not to sell the shares. Following a chasing letter from Dr Fan's attorneys, Travers Thorp Alberga ('TTA'), [Aquapoint's] then attorneys, Dentons, stated in a letter dated 21 May 2021 that Dr Fan had not adopted the correct methodology for attempting to transfer his interest in the partnership and added that he could not be allowed to sell 10% of the Legend Cayman shares on account of the impact this would have on the share price. Five days later, by a letter dated 26 May 2021, Dentons, on behalf of [Aquapoint], offered to release 5% of the Legend Cayman shares held under Dr Fan's interest in the partnership followed by 3.5% every year thereafter but Dr Fan rejected this offer."

21. On 9 June 2021, Dr Fan presented his petition to wind up Aquapoint.

The 2017 Agreement

22. The legal relations between the partners in Aquapoint are governed by the 2017 Agreement (principally, the LPA) and by the ELP Act.

23. By clause 2 of the LPA, the parties acknowledged that Aquapoint was formed as an ELP and that "[e]xcept as otherwise expressly provided for herein, the rights and obligations of the Partners shall be as provided for in the [ELP Act]". The limitations on the liability and authority of the limited partners are set out in clause 3, while clause 4.1 gives to Genscript as the general partner "full power and authority to conduct, administer, manage, control and operate the Partnership Business".

24. Clause 7.1 provides for a capital account to be established in the partnership accounts for each partner's capital interest. Each capital account was to be initially equal to the relevant partner's capital contribution. The contributions agreed under the terms of the LPA were RMB 2.5 million for Dr Fan, RMB 1.25 million for Ms Wang and RMB 40,000 for Genscript, in each case to be paid in cash on or before 29 December 2017.

25. Clause 7.7 (headed "No Right of Withdrawal") is of central importance in this appeal. It provides:

> "No Limited Partner will be permitted to withdraw from the Partnership, or to withdraw any part of its Capital Account, save with the prior consent of the General Partner, which consent may be given or withheld for any reason (or no reason at all) in the sole and absolute discretion of the General Partner."

26. Clause 9 provides for the General Partner to distribute any partnership assets which it does not, in its discretion, consider to be necessary to the operation of the partnership, at the time or times determined by the General Partner. Any distribution is to be made to the partners pro rata to their respective interests as determined by reference to their capital contribution.

27. Clause 12.11 is an entire agreement clause which provides, among other things, that the LPA "cancels and supersedes any prior understandings and agreements between the parties with respect to such subject matter." It goes on to provide that:

> "There are no representations, warranties, terms, conditions, undertakings or collateral agreements, express, implied or statutory, between the parties with respect to the subject matter of this Agreement other than those expressly set forth in this Agreement and/or the other documents required to be delivered pursuant to such agreements."

28. By the Subscription Agreement, Dr Fan agreed to pay RMB 2.5 million to Aquapoint as a capital contribution and agreed to be bound by all the terms and provisions of the LPA.

29. Clause 5 of the Subscription Agreement provides:

> "To induce the Partnership to accept this subscription, the Subscriber hereby makes the following representations, warranties and covenants to the General Partner, the Partnership and counsel to the Partnership: […]
>
> (e) in formulating a decision to invest in the Partnership, the Subscriber has not relied or acted on the basis of any representation or other information purported to be given on behalf of the Partnership or the General Partner except as set forth in the Partnership Agreement (it being understood that no person has been authorised by the Partnership or the General

> Partner to furnish any such representation or other information)."

30. Clause 7 of the Subscription Agreement provides:

> "The Subscriber hereby represents and warrants to the General Partner and the Partnership as follows: […]
>
> (b) the Subscriber has reviewed and understands the Partnership Agreement and this Subscription Agreement […]
>
> (c) the Subscriber acknowledges and agrees that, except as set forth in the Partnership Agreement, this Subscription Agreement or an additional written document (executed by a director or officer of the General Partner) which clearly and explicitly indicates that the Subscriber is entitled to rely thereon, the Subscriber has neither received, nor is entitled to rely upon, any representations or warranties from the Partnership, the General Partner, or any partner, member, director, officer, employee or agent thereof […]
>
> (d) the Subscriber is aware that except as provided in the Partnership Agreement, the Subscriber will have no right to withdraw from the Partnership or to receive distributions in liquidation of the Partnership Interest […]."

31. By clause 7(g), Dr Fan also represents and warrants that he had sought independent legal and other advice to the extent that he deemed necessary or appropriate. He did not in fact seek legal advice because, as Doyle J found, he trusted Dr Zhang and Ms Wang.

The ELP Act

32. The ELP Act has been amended and republished in revised form a number of times since its enactment. The 2021 revision applies to the present proceedings. An ELP may be formed for any lawful purpose to be undertaken in or from within the Cayman Islands

or elsewhere, but it may not undertake business with the public in the Islands save as necessary for its business outside the Islands (section 4(1)).

33. An ELP does not have separate legal personality but is a form of partnership. To constitute an ELP, it must be registered with the Registrar of Companies. As earlier noted (see para 2 above), an ELP must include at least one general partner and at least one limited partner. A general partner is liable for all the debts and liabilities of an ELP to the extent of any deficit of assets and is responsible for the conduct and management of the business of the ELP, while a limited partner is normally liable only to the extent provided in the partnership agreement (section 4(2)). A limited partner is not permitted to take part in the conduct of the business and loses its limited liability status if it does so (sections 14(1) and 20(1)).

34. Section 3 of the ELP Act provides:

> "The rules of equity and of common law applicable to partnerships as modified by the Partnership Act (2013 Revision) but excluding sections 31, 45 to 54 and 56 to 57 shall apply to an exempted limited partnership, except where they are inconsistent with the express provisions of this Act."

35. Section 19 provides:

> "(1) A general partner shall act at all times in good faith and, subject to any express provisions of the partnership agreement to the contrary, in the interests of the exempted limited partnership.
>
> (2) Subject to any express provisions of the partnership agreement to the contrary, a limited partner of an exempted limited partnership in that capacity does not owe any fiduciary duty in exercising any of its rights or authorities or otherwise in performing any of its obligations under the partnership agreement to the exempted limited partnership or any other partner".

36. Section 36 makes provision for the winding-up of an ELP, to which the provisions in the Companies Act and the Companies Winding Up Rules apply with modifications necessary for the different status of an ELP and subject to any special rules that may be made by the insolvency rules committee. A limited partner is treated as if it were a shareholder and a general partner is treated as if it were a director.

37. Of particular relevance to this appeal is section 36(3)(g) which provides:

> "(3) …the provisions of Part 5 of the Companies Act …shall apply to the winding up of an exempted limited partnership and for this purpose – […]
>
> (g) on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable."

38. Part 5 of the Companies Act contains the provisions for the winding up of companies. Section 92(e) provides that a company may be wound up by the court if "(e) the Court is of the opinion that it is just and equitable that the company should be wound up".

The judgments below

39. The facts on which Dr Fan relied for his case that it was just and equitable to wind up Aquapoint were essentially those summarised above. He had been assured by Dr Zhang and Ms Wang on behalf of Genscript that he would be entitled to receive a 10% shareholding in Legend Cayman, notwithstanding the termination of the 2016 Agreement and the formation of Aquapoint. He had relied on these assurances in entering into the 2017 Agreement, but Genscript had then used its legal power under the LPA to prevent him from withdrawing from Aquapoint and receiving the 10% shareholding in Legend Cayman. His case was that it was those facts, seen in their context, which made it just and equitable to wind up Aquapoint. Having heard oral evidence from Dr Fan, Dr Zhang and Ms Wang, Doyle J found that the assurances alleged by Dr Fan had been given and that he relied on them in entering into the 2017 Agreement and becoming a limited partner in Aquapoint. There was no appeal against those findings.

40. As identified by the Court of Appeal, there were four grounds on which Doyle J held that it was just and equitable to wind up Aquapoint.

41. The first ground was that, as a consequence of the assurances which Dr Fan received from Dr Zhang and Ms Wang which induced him to agree to the termination of the 2016 Agreement and to enter into the 2017 Agreement and become a limited partner in Aquapoint, "the relationship between Dr Fan and Dr Zhang was sufficiently akin to partnership of the sort contemplated by Lord Wilberforce in [*Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 ("*Westbourne Galleries*")] for the assurances to be of a character arising between one individual and another that made it inequitable for

[Genscript] to insist on a claimed entitlement to refuse to agree to Dr Fan's request to have 10% of the Legend Cayman shares transferred to him" (para 63 of Field JA's judgment). The Court of Appeal upheld this ground. Reliance by Genscript on the entire agreement clause in the LPA and the provisions of the Subscription Agreement whereby Dr Fan agreed that he was not relying on any representations to become a limited partner in Aquapoint was "inconsistent with the free-standing duty to act in good faith which I find to be engaged in respect to the assurances, the honouring of which is a matter that I find affected the conscience of [Genscript]" (para 66 of Field JA's judgment).

42. The second ground, which the Court of Appeal did not uphold, was that the relationship between the partners was one of mutual trust and confidence which, as a result of Genscript's refusal to consent to Dr Fan's withdrawal, had irretrievably broken down. Giving the judgment of the Board in *Lau v Chu* [2020] UKPC 24, [2020] 1 WLR 4656, Lord Briggs said at para 15 that "where the company is a corporate quasi-partnership, an irretrievable breakdown in trust and confidence between *participating* members may justify a just and equitable winding up" (emphasis added). Dr Fan was a limited partner in Aquapoint who was therefore prohibited from taking part in the conduct of its business. Relying on what Lord Briggs had said, Field JA said at para 71 "I find myself constrained to conclude that in respect of this second winding up ground, Dr Fan had to establish that he was a participant in running the business of [Aquapoint] which was a condition that on the evidence he was never going to be able to satisfy".

43. The third ground, which was upheld by the Court of Appeal, was that Dr Fan had justifiably lost trust and confidence in the conduct and management of Aquapoint's affairs as a result of Genscript's failure to honour the assurances given to Dr Fan.

44. The fourth ground, also upheld by the Court of Appeal, was that Genscript was in breach of its duty to act in good faith and to avoid conflicts of interest when it refused its consent to Dr Fan's withdrawal from Aquapoint. While agreeing with Doyle J's conclusion on this ground, Field JA pointed out at para 75 of his judgment that "this conclusion is dependent on the judge's finding that [Genscript] frustrated Dr Fan's legitimate expectation that [Genscript] would transfer into his ownership 10% of the Legend Cayman shares contrary to the good faith duty it owed in regard to the assurances" so that in substance and form the first and fourth grounds duplicated each other.

Jurisdiction to wind up an ELP on the just and equitable ground

45. While it is not in doubt that the court has jurisdiction to wind up an ELP on the ground that it is just and equitable to do so, there appears to have been some uncertainty as to the statutory provision under which this power arises. Doyle J noted at para 157 of his judgment that there had been a debate in cases at first instance as to whether the jurisdiction arose under section 35(e) of the Partnership Act, as applied by section 3 of

the ELP Act, or under section 92(e) of the Companies Act, as applied by section 36(3) of the ELP Act. As it was common ground that the court had jurisdiction to wind up an ELP if it was just and equitable to do so, he considered that it was unnecessary to enter into the debate. The Court of Appeal considered it inappropriate to decide the issue in the absence of submissions on it.

46. The Board has likewise received no submissions on this point, which is of no significance to the parties given their common position that the court has power to wind up an ELP on the grounds that it is just and equitable to do so. It is perhaps less than satisfactory that a court should make orders while being uncertain of the source of its power to do so. While acknowledging that it has received no submissions on the point, the Board's present view is that the power arises simply under section 36(3)(g) of the ELP. An ELP is a special form of partnership created by the ELP Act. The primary source of legal provision for the nature and attributes of an ELP, and the court's jurisdiction in relation to an ELP, is the ELP Act. Section 36(3)(g) provides in terms that "on an application by a partner …, the court may make orders …for the winding up and dissolution of an exempted limited partnership as may be just and equitable". There would not seem to be any need to look further for the court's jurisdiction to wind up an ELP on the just and equitable ground.

47. As regards the principles to be applied in deciding whether it is just and equitable to order the winding up of an ELP, the submissions of both parties before the courts below, and before the Board, have been made on the basis that the principles developed in relation to the winding up of companies by UK and Commonwealth courts, including the Board, apply. In a "closing observation" at the end of his judgment, Field JA drew attention to the marked differences between an ordinary partnership governed by the Partnership Act, an ELP, and a company incorporated under the Companies Act. He said that he would have been interested to hear argument as to whether "just and equitable" in section 36(3)(g) of the ELP Act "was to be construed in an expansive and flexible way, taking full account of the special nature of an ELP and less account of the overseas jurisprudence".

48. Neither party took up this invitation before the Board and both proceeded, as they had below, to argue the case on the basis of the principles established in the authorities as regards the winding up of companies. Field JA was right to draw attention to the special characteristics of an ELP, which differentiate it from both an ordinary partnership and a registered company. Unlike partners in an ordinary partnership, limited partners in that capacity do not owe fiduciary duties (section 20(2)) and a general partner's duty to act in the interests of the ELP is subject to any express provisions of the partnership agreement to the contrary. The nature of a limited partner's interest has a good deal in common with that of a shareholder in a company, but nonetheless an ELP is not a separate legal person and the property and rights of an ELP are held on trust "as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement", such that limited partners have a proprietary interest in the partnership assets.

49. Like the Court of Appeal, the Board will apply the principles applicable to the jurisdiction to wind up a company on the just and equitable ground. On the facts of this case, it does not appear to the Board to be wrong to do so. Given the status of an ELP as a type of partnership, as opposed to a registered company, it appears to the Board to be highly unlikely that the principles would be less generous to a petitioning partner in an ELP than to a petitioning shareholder of a company.

Winding up a company on the just and equitable ground: general principles

50. Companies registered under companies legislation are creatures of statute and so the power to bring them to an end by winding up and the circumstances in which this can be achieved are necessarily matters for statutory provision. In the United Kingdom, the power of the court to wind up a company on the grounds that it is just and equitable to do so has been included in legislation since the mid-19th century, starting with the Joint Stock Companies Winding Up Act 1848. It has likewise appeared, and continues to do so, in many other jurisdictions, including the Cayman Islands. There has likewise developed a uniformity of approach to the interpretation and application of this power.

51. The analysis of the just and equitable ground for winding up by Lord Wilberforce in his speech in *Westbourne Galleries*, a decision of the House of Lords, has proved to be of central and enduring importance. Lord Wilberforce's approach was endorsed by the House of Lords in *O'Neill v Phillips* [1999] 1 WLR 1092 and applied to petitions for relief in respect of unfairly prejudicial conduct in the affairs of a company under what is now section 994 of the Companies Act 2006.

52. It is appropriate to quote extensively from Lord Wilberforce's speech but before doing so, it is helpful to set out a passage from the judgment of Smith J in the Australian case of *In re Wondoflex Textiles Pty Ltd* [1951] VLR 458 at 467, which Lord Wilberforce quoted:

> "It is also true, I think, that, generally speaking, a petition for winding up, based upon the partnership analogy, cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles: ... To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him: . . . But this, I think, is subject to an important qualification. Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not in excess of power will not

> necessarily be an answer to a claim for winding up. Indeed, it may be said that one purpose of [the just and equitable provision] is to enable the court to relieve a party from his bargain in such cases."

53. In *Westbourne Galleries*, Lord Wilberforce said at pp 374H: "there has been a tendency to create categories or headings under which cases must be brought if the clause [ie the power to wind up a company on the just and equitable ground] is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances".

54. Having reviewed earlier authorities, none of which was a decision of the House of Lords, Lord Wilberforce said at p 378 that those cases amount to "a considerable body of authority in favour of the use of the just and equitable provision in a wide variety of situations, including those of expulsion from office" (that being the principal ground on which the petitioner relied in *Westbourne Galleries*) and then said at pp 379-380 in a celebrated passage:

> "My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence—this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company—so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.
>
> It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to 'quasi-partnerships' or 'in substance partnerships' may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words 'just and equitable' sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."

55. In *O'Neill v Phillips*, Lord Hoffmann giving the only reasoned speech drew a direct parallel between the concept of unfair prejudice in a company context and Lord Wilberforce's approach to the just and equitable ground for winding-up. The parallel was

"in the principles upon which [the court] decides that the conduct is unjust, inequitable or unfair" (p 1100).

56. Lord Hoffmann said at p 1098 that Parliament had chosen fairness as the criterion for relief "to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable". At the same time, this was not an unfettered power but one which must be used having regard to the particular context and background, which had two features identified by Lord Hoffmann at pp 1098-1099:

> "First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."

57. There are a number of important points of direct relevance to the present appeal which emerge from the speeches of Lord Wilberforce and Lord Hoffmann:

(i) The choice of "just and equitable" as a ground for a winding-up order is a deliberate choice to introduce equitable principles into what is an essentially statutory scheme.

(ii) It was natural for Parliament to introduce these principles, given that company law was a development from the law of partnership under which dissolution would be ordered where it was just and equitable to do so.

(iii) The application of equitable principles is not subject to a scheme of categories into which a particular case must fall. As Lord Scarman said in the context of the power to grant injunctions, "the width and flexibility of equity are not to be undermined by categorisation": *Castanho v Brown & Root (UK) Ltd* [1981] AC 557 at 573, quoted in *Wolverhampton City Council v London Gypsies and Travellers* [2024] AC 983 at para 21. Lord Wilberforce could not have been clearer on this: "It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise" (p 379E).

(iv) In particular, the relevant circumstances are not restricted to cases where the parties have previously been in partnership or where the arrangement between the parties is in effect a partnership in corporate form (a so-called "quasi-partnership"). Consistently with what he said in the passage quoted in sub-para (iii) above, Lord Wilberforce was careful to say in the same paragraph, when identifying three particular characteristics which might bring equitable considerations into play, that they were typical, not exclusive.

(v) The role of equity is more general. It is, as it always is, to enable the court "to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way".

(vi) At the same time, the commercial context and the fact that the parties have become shareholders in a company, governed by the companies legislation and by the articles of association by which they agree to be bound, means that in the great majority of cases the legislation, articles and any other agreements binding the shareholders will be a sufficient and exhaustive statement of their rights and expectations. As Lord Hoffmann said in *O'Neill v Phillips* at pp 1098-1099: "a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted".

The present appeal

58. As earlier stated, Field JA identified four distinct grounds on which Doyle J had found that it was just and equitable to wind up Aquapoint. In truth, however, they boil down to one ground: in the light of the assurances given to Dr Fan to induce him to give

up his rights as regards shares in Legend Nanjing and to become a limited partner in Aquapoint, Genscript was not entitled to exercise its power under the LPA to refuse consent to Dr Fan's request for the shares in Legend Cayman attributable to his interest in Aquapoint.

59. The attempt to separate this single ground into four separate grounds reflects the tendency of practitioners and courts to try to slot cases into categories, despite Lord Wilberforce's warning not to do so. Different catchphrases are used for this purpose – "quasi-partnership", "legitimate expectations", "a loss of mutual trust and confidence". Correctly understood and applied, these phrases may have some value but they must not disguise that, in cases like the present, the court's task is to conclude whether, on the facts and circumstances of the particular case (which do not involve breaches of the law or the articles of association or other contracts, when different considerations apply), there exist "considerations…of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way" (*Westbourne Galleries* at p 379 per Lord Wilberforce).

60. The broad submission of Aquapoint is that where parties have expressly regulated their relationship in relation to the matter about which complaint is made, it is the contract which governs the relationship and any complaint must be adjudicated in accordance with the law of contract. It is not suggested by Dr Fan that there was any invalidity or flaw in the 2017 Agreement or specifically in clause 7.7 of the LPA. Assuming the contract to be valid and enforceable, it is not the proper role of the just and equitable winding up jurisdiction to ameliorate or change the effect of the contract. The decisions of the courts below to the contrary are wrong as a matter of principle and are unsupported by the authorities. Aquapoint notes that countless parties across all jurisdictions hold investments or business operations through a company or partnership in which the participants' relationships are governed by carefully drafted articles of association, shareholders' agreements and partnership agreements. It submits that the reasoning of the courts below would undermine the certainty essential to the operation of such arrangements in a commercial context by enabling a party to seek to rely on some other matter as giving rise to alleged unfairness and as justifying a winding up order, even though no remedy was available under the law of contract. In particular, it submitted that it would undermine the attraction of establishing and investing in ELPs, contrary to the interests of the Cayman Islands' economy.

61. As the judgment of Lord Wilberforce in *Westbourne Galleries* at p 379C and of Lord Hoffmann in *O'Neill v Phillips* at pp 1098-1099 make clear, this broad submission is correct in the great majority of cases. However, contrary to the dire predictions advanced on behalf of Aquapoint, the decisions of the courts below do not pose a widespread threat to certainty in the establishment and operation of commercial concerns. A similar submission by the respondents in *Westbourne Galleries* did not deter Lord Wilberforce and the other members of the House of Lords: see [1973] AC 360 at 369D. In particular, whether or not the facts of this case justify the winding up of Aquapoint,

those facts are very unusual and similar facts are highly unlikely to arise in the case of the vast majority of ELPs.

62. As Lord Hoffmann said in *O'Neill v Phillips* and as Lord Wilberforce explained in *Westbourne Galleries*, Aquapoint's broad submission is not invariably correct. The articles of association in the latter case permitted the shareholders by a majority vote to remove a director. That was a valid provision, and it was not suggested that the majority shareholders had acted in breach of their rights under the articles in removing Mr Ebrahimi as a director or that any remedy lay against them or the company under the law of contract. Nonetheless, the particular circumstances of the personal relationship between the shareholders meant that the exercise of that undoubted legal right was subject to equitable restraints.

63. Mr Smith KC on behalf of Aquapoint sought to distinguish the relevant article in *Westbourne Galleries* from clause 7.7 of the LPA on the grounds that the latter expressly provided that the prior consent of Genscript was required to a withdrawal from the partnership which could be withheld for any reason (or no reason) in Genscript's sole and absolute discretion, whereas in *Westbourne Galleries* the articles simply provided that a director could be removed from office by an ordinary resolution of the shareholders. He submitted that the articles of association in *Westbourne Galleries* did not deal with the unspoken understanding that Mr Ebrahimi would remain a director involved in the management of the company, whereas the LPA in the present case was inconsistent with any understanding that Dr Fan would be entitled to withdraw a 10% shareholding in Legend Cayman from Aquapoint.

64. The Board does not accept this suggested distinction. The right of a shareholder to cast a vote on a resolution, including a resolution to remove a director, is a personal right which is not generally subject to any restriction. The exercise of a shareholder's right to vote is, as a matter of law, in the sole and absolute discretion of the shareholder and it may be exercised for any reason or for no reason. There is no need to spell this out in the articles. By contrast, clause 7.7 conferred a power on Genscript which it was required by section 19 of the ELP Act to exercise in good faith and, subject to any express provisions of the LPA, in the interests of Aquapoint. Section 19 permits a relaxation of a general partner's fiduciary obligations but only as expressly provided in the partnership agreement. The relaxation as regards Genscript's power to give or withhold consent to a withdrawal of a partner was therefore required to be expressly stated in the LPA. The effect of clause 7.7 was not, as Mr Smith submitted, to distinguish it from a shareholder's right to vote to remove a director but to put the power under clause 7.7, to some extent, on the same footing as a shareholder's right to vote by freeing it from a restriction otherwise imposed by section 19.

65. It follows that the Board does not accept Mr Smith's associated submission that where a contractual provision "covers the field", there is no room for the imposition of

equitable considerations. If covering the field meant that, in the light of all the relevant circumstances, there was no room for any equitable considerations, the submission would be unexceptionable. But Mr Smith had a narrower meaning in mind, one which confined the inquiry to the construction of the contractual provisions. As the Board has already noted, the terms of the contractual provisions will be a highly relevant factor, but they cannot alone demonstrate that there is no room for equitable considerations, as *Westbourne Galleries* shows.

66. Aquapoint submitted that the approach taken in *Westbourne Galleries* was not applicable to the present case because, on a true analysis, it stands as authority for the proposition that, in the case of a quasi-partnership company, where the understanding or expectations that give rise to the petitioner's complaint are not dealt with in the company's constitutional documents, the exercise by a party of a right under the constitution may be subject to equitable restraint to give effect to the undocumented understanding or expectation. However, where the parties have negotiated a tailor-made contract governing their relations in the company, the just and equitable winding up jurisdiction does not permit the court to disregard the parties' agreement.

67. This submission seeks to draw two distinctions between the present case and the principles stated by Lord Wilberforce. First, it is said that the principles apply only in the case of a "quasi-partnership company". This point is addressed below.

68. Secondly, the parties in *Westbourne Galleries* had adopted standard form Table A articles without any apparent negotiation, whereas the LPA is a tailor-made agreement which was negotiated over several months by the parties. Mr Smith stressed that not only does clause 7.7 of the LPA specifically deal with the withdrawal of a limited partner but clause 12.11 of the LPA and clauses 5 and 7 of the Subscription Agreement ("the entire agreement clauses") clearly provide that the LPA and associated documents constitute the entire agreement between parties with respect to the subject matter of the LPA, that they cancel and supersede any prior understandings and agreements and that the parties have not relied on any representations, warranties or undertakings, express or implied, outside the terms of the agreements. The Board accepts that this is a relevant factor when considering whether equitable principles come into play, but it cannot be a decisive factor. On the facts of a particular case, it may be correct to conclude that the negotiation of a specific agreement did not exclude equitable considerations.

69. Aquapoint relied on a number of authorities which illustrate the importance of specifically negotiated and detailed agreements between the parties in deciding whether there was any room for the existence (or continued existence) of equitable considerations applicable to the exercise of legal powers, whether arising under those agreements or otherwise.

70. In particular, Mr Smith relied on *In re Virginia Solution SPC Ltd* (CICA (Civil) Appeal No 4 of 2022) (unreported) 28 July 2023 ("*Re Virginia Solution*"), a decision of the Court of Appeal of the Cayman Islands (Sir John Goldring P, Martin and Moses JJA). Virginia Solution SPC Ltd ("Virginia Solution") was a Cayman Islands company with two shareholders, Augusta Healthcare Inc ("Augusta") and Valley Health System ("Valley"), both of which were described in the judgment of Martin JA as "regional community health systems operating in the State of Virginia in the United States". They, together with three other healthcare providers based in Virginia, established Virginia Solution in 2004 to provide insurance cover for the shareholders. The principles governing the operation of Virginia Solution were discussed and developed by the five shareholders over the next few years. In 2009, the parties agreed a participation agreement, a dividend policy and revised articles of association ("the 2009 documents"). From 2014, the only shareholders were Augusta and Valley and thereafter a series of amendments to the participation agreement were made. By the end of 2016, the retained profits of Virginia Solution amounted to over US$24 million. Augusta and Valley disagreed as to the amount of dividends that should be paid in 2017. Attempts to resolve these differences failed and in January 2020 Valley presented a petition to wind up Virginia Solution on the just and equitable ground on the basis that Augusta had refused to agree to the payment of dividends in accordance with the dividend policy.

71. In refusing to agree the payment of dividends on the basis of the dividend policy, Augusta was not acting in breach of any legal obligation. The issue was therefore whether, on the facts, there existed equitable considerations affecting the exercise of its legal rights. The trial judge found that at inception the relationship between the shareholders was a "quasi-partnership" in the sense that the exercise of legal rights was subject to equitable considerations. The Court of Appeal held that she was entitled to make that finding, although as Martin JA observed at para 45 the circumstances of the company and its shareholders did not come close to the paradigm case for the intervention of equitable principles. However, the Court of Appeal held that the position changed in 2008-2009 when the founding members decided to record the basis of their participation in the 2009 documents. Martin JA said at para 46:

> "The context of those documents was the impending arrival of a new member; and the inevitable inference is that the existing members recognised that the informal arrangements which had previously governed their participation could not safely continue, even if the new member or subsequent members agreed to subscribe to the underlying ethos adopted by the founding members."

72. Martin JA identified the participation agreement as the key document. It was expressed to prevail in the case of conflict with the articles, and it contained an arbitration clause and an entire agreement clause. It provided that the declaration of dividends was to be the province of the board of directors. He said at para 48 that "it defined

comprehensively the obligations of the members and the company and provided a remedy for any failure to meet those obligations …there was no scope for the superimposition of equitable considerations".

73. There are numerous other cases in which the existence of particular contractual arrangements have been held to be inconsistent with the possibility of equitable considerations either arising at all or continuing in place: see, for example, *Third v North East Ice & Cold Storage Co Ltd* [1998] BCC 242, *In re Coroin Ltd* [2012] EWHC 2343 (Ch), [2013] 2 BCLC 583, *In re Migration Solutions Holdings Ltd* [2016] EWHC 523 (Ch) and *Cool Seas (Seafoods) Ltd v Interfish Ltd* [2018] EWHC 2038 (Ch).

74. The Board regards it as important to acknowledge and repeat that, in a corporate context, equitable considerations as regards the exercise of legal rights will not generally apply, but nonetheless whether they do apply and the relevance of contractual arrangements between the parties are to be decided on the facts and circumstances of the case.

75. The critical fact in the present case is that the very arrangements on which Aquapoint relies to say that there is no room for equitable considerations – the 2017 Agreement – were entered into by the parties on the basis of the assurances given by Dr Zhang and Ms Wang that Dr Fan's unqualified entitlement to receive a 10% shareholding in the Legend vehicle (Legend Cayman in place of Legend Nanjing) would not be affected by the terms of the 2017 Agreement. That was the agreed basis on which the parties entered into the 2017 Agreement. It is wholly inconsistent with the facts, as found by the judge, to suggest that, by virtue of the terms of the 2017 Agreement including the entire agreement clauses, Dr Fan and the other parties were agreeing that Dr Fan's entitlement to a 10% shareholding was cancelled and that Genscript was entitled to refuse consent to his withdrawal from Aquapoint without regard to the assurances which he had been given. It may well be that, as a matter of contract law, the entire agreement clauses prevented Dr Fan from placing reliance on the assurances – the Board is not concerned to decide that question but will assume that it is correct – but that does not oust the jurisdiction of the court to make a winding up order on the just and equitable ground if the circumstances of the case are such as to bring equitable considerations into play. Contractual provisions of this sort are highly relevant to the issue whether those considerations do come into play, but they are not decisive.

76. It is relevant to mention that no new partners were admitted to Aquapoint after the 2017 Agreement was made and, although it made provision for the admission of new partners, there is no evidence that the admission of new partners was contemplated, in contrast to the position in *Re Virginia Solution*. The admission of new partners without knowledge of the assurances given by Dr Zhang and Ms Wang would clearly be a relevant factor, although not always decisive: see, for example, *In re Edwardian Group Ltd* [2018]

EWHC 1715, [2019] 1 BCLC 171 at para 157, and at paras 133-134 (commenting on *Fisher v Cadman* [2005] EWHC 377 (Ch), [2006] 1 BCLC 499).

77. Turning to the "quasi-partnership" issue raised by Mr Smith as a basis for his submission that the approach in *Westbourne Galleries* does not apply to the present case, this raises a central issue as to the circumstances in which the exercise of legal rights may be subject to equitable considerations for the purposes of the winding up jurisdiction.

78. Mr Smith submitted that *Westbourne Galleries* requires the court to find that a quasi-partnership exists among the participants, which in turn requires the court to find that the three indicia (or something close to them) identified by Lord Wilberforce at p 379F-G (quoted in para 54 above) are present. Of those indicia, Mr Smith submitted that only the third (restrictions on the transfer of members' interests) was present. That, he correctly submitted, could not be sufficient on its own to bring equitable considerations into play, because very large numbers of private companies have such restrictions with no basis for suggesting that they constitute "quasi-partnerships".

79. The fundamental flaw, in the Board's view, with Mr Smith's submission is his treatment of a finding of a "quasi-partnership" as essential to the application of equitable considerations to the exercise of legal rights. The Board has noted above in para 57 that Lord Wilberforce was careful not to restrict the application of equitable considerations to "quasi-partnerships".

80. It is in the Board's view a misreading of Lord Wilberforce's speech to treat the existence of a "quasi-partnership" as essential to the application of equitable considerations to the exercise of legal rights. On the contrary, it is clear from his speech that he gave the indicia of a quasi-partnership as examples, albeit common ones, of the circumstances in which equitable considerations will be applied.

81. The fundamental principle that Lord Wilberforce was applying was that the just and equitable provision enables the court "as equity always does" to subject the exercise of legal rights to considerations "of a personal character arising between one individual and another". This requires a close examination of the relationship between the individuals which led to or provides the context for their association as shareholders (or as partners in an ELP).

82. On the facts of the present case, the Board considers that Doyle J was fully entitled to conclude that the relationship between Dr Fan, Dr Zhang and Ms Wang was a personal relationship of a type that brings equitable considerations into play, and that the Court of Appeal was right to uphold his decision. Dr Fan was a highly respected research scientist who had worked for some years at a senior level in the Genscript group, itself controlled by Dr Zhang. From that sprang the Legend project in which Dr Fan was to (and did) play

a key role on the basis of an agreement with Genscript that he would be entitled to a 10% shareholding in the listed Legend company. When Dr Zhang wanted to use Legend Cayman in place of Legend Nanjing as the corporate vehicle for the listing of Legend shares, he and Ms Wang gave the assurances to Dr Fan.

83. It is understandable that parties, in formulating their cases in petitions for a winding up order on the just and equitable ground, have tended to focus their attention on the features which may go to make a "quasi-partnership". It is in such cases that the application of equitable considerations will most commonly arise. But "quasi-partnership" is itself a term of somewhat uncertain scope, and it is certainly not a term of art. In particular, the vice in focusing solely on "quasi-partnerships" is that it leads wrongly to the view that equitable considerations can only apply in those cases where it was agreed or understood that the petitioner would participate in the conduct of the business and that a winding up order is appropriate only where the petitioner has been excluded from participation in the business. Courts have made it clear over the years since *Westbourne Galleries* (see, for example, *Fisher v Cadman* at para 84) that this view is erroneous but the point has not always been heeded.

84. In the present case, it is unnecessary to decide whether the relationship between the general and limited partners of Aquapoint had the characteristics typical of a "quasi-partnership", but it appears to the Board that it did not have those characteristics. It was simply a passive vehicle for holding shares in Legend Cayman and there was, for example, no agreement or understanding that any partner other than Genscript would participate in the conduct of the business, such as it was. A restriction on the transfer of partners' interests could not by itself suffice. But, as emphasised above, a finding of a "quasi-partnership" is an example, not a definition, of the circumstances in which equitable considerations may come into play.

Availability of alternative remedies

85. It is well established that the court may, and usually will, refuse to make a winding up order on a shareholder's petition where one or more alternative remedies are available to the petitioner and the petitioner is acting unreasonably in not pursuing them.

86. Aquapoint submit that there are two alternative remedies available to Dr Fan.

87. First, it is said that Dr Fan could issue proceedings for breach of contract. This is a surprising submission, in view of Aquapoint's fundamental position that there has been no breach of contract. Aquapoint may well be, indeed probably is, right about that. It follows that such proceedings are not a reasonable alternative remedy.

88. Second, it is said that Dr Fan could bring a derivative action on behalf of Aquapoint against Genscript for breach of its duty of good faith under section 19(1) of the ELP Act. A derivative action would at best bring a remedy for Aquapoint (although it is not clear what that remedy would be), not for Dr Fan, and it could not therefore be an adequate remedy for Dr Fan personally. It is true, as confirmed by the Board's decision in *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* [2024] UKPC 36, [2025] AC 709, that if Aquapoint were a company and Dr Fan were a shareholder in it, he could bring a personal claim against Aquapoint. The same may well be true in relation to an ELP (although the proceedings would have to be brought against the general partner: see section 33(1) of the ELP Act). But Dr Fan would need to establish that Genscript had not acted in good faith within the meaning of section 19(1), which is directed to the fiduciary duty owed by a general partner to the ELP, that is, the partners as a whole, rather than to any individual partner in respect of assurances given to that partner personally. It is not clear that it would be established, but it is not necessary to a successful petition for winding up on the just and equitable ground.

89. The Board is accordingly satisfied that there were no alternative remedies reasonably available to Dr Fan.

Conclusion

90. For the reasons given above, the Board will humbly advise His Majesty that this appeal should be dismissed.

ITEM NO. 140

JA-26

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 22 OF 2024 (IKJ)

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP ACT (2021 REVISION)

AND IN THE MATTER OF ONE THOUSAND & ONE VOICES AFRICA FUND I, L.P. (IN VOLUNTARY LIQUIDATION)

BETWEEN:

AFRICA INVESTMENTS, LLC

Petitioner

-and-

ONE THOUSAND & ONE VOICES AFRICA FUND I INVESTORS, LTD., AS GENERAL PARTNER FOR AND ON BEHALF OF ONE THOUSAND & ONE VOICES AFRICA FUND I INVESTORS, L.P., AS GENERAL PARTNER FOR AND ON BEHALF OF ONE THOUSAND & ONE VOICES AFRICA FUND I, L.P. (IN VOLUNTARY LIQUIDATION)

Respondent

IN COURT

Before: The Hon. Justice Kawaley

Appearances:

Mr David Allison KC of Counsel with Mr Rupert Bell, Ms Siobhan Sheridan and Mr Sam Hall of Walkers (Cayman) LLP, for the Petitioner

Mr Phillip Marshall KC of Counsel with Mr Ben Hobden and Ms Rhiannon Zanetic of Harneys (Cayman) LLP, for the Respondent

Heard: 11 April 2024 and on the papers

Date of decision: 2 May 2024

Draft Reasons circulated: 7 May 2024

Reasons delivered: 9 May 2024

INDEX

Final order appointing voluntary liquidators summarily-abuse of process by respondent between initial inter partes hearing of petition and adjourned hearing-requirements of substantive justice justifying summary determination of part-heard petition-Exempted Limited Partnership Act (2021 Revision), section 36 (13)-Grand Court Rules (2023 Revision), Preamble, paragraphs 1, 4

REASONS FOR DECISION

Introductory

1. Under the terms of the Limited Partnership Agreement relating to One Thousand and One Voices Africa Fund I, L.P. (the "LPA"), the Respondent as General Partner (the "GP") became the Liquidating Agent when the Limited Partnership (the "LP") entered into voluntary liquidation on 27 November 2023. The overwhelming majority of the limited partners requested the GP to appoint independent voluntary liquidators. It declined. Accordingly, the Petition herein dated 25 January 2024 was presented supported by an aggregate of 97% of the economic stakeholders in the LP.

2. It is or ought to be trite law that the GP's role as manager of the LP is broadly analogous to that of the managing shareholder in an investment fund constituted as a limited company. Once a voluntary liquidation commences on a solvent basis, the liquidation process must be conducted having regard to the interests of the limited partners as economic stakeholders. Their reasonable wishes ought ordinarily to be accommodated.

3. It was easy to understand the GP wishing to avoid the Court replacing the GP with independent voluntary liquidators based on positive findings of misconduct on its part. It was impossible to understand why the GP could legitimately insist on remaining in office over the wishes of 97% of

the stakeholders. Had seriously arguable grounds for opposing the Petition on its merits existed, the GP would surely not have occupied the hearing initially designated for the Petition itself with an intellectually teasing, but ultimately meritless, jurisdictional challenge.

4. Be that as it may, perhaps anticipating that the Court might well be inclined to summarily reject the jurisdictional challenge and the merits of the GP's grounds of opposition, at the end of the 11 April 2024 hearing, the GP's Leading Counsel skilfully interwove elements of his client's merits arguments, into his oral jurisdictional submissions. This *hors d'oeuvre* did little to whet my appetite for the main course of the merits submissions. However, I reserved judgment to consider the more intricate jurisdictional question and heard limited argument on the Petitioner's oral application for interim injunctive relief, since it had hoped that a final order would have been made at the end of that hearing. I declined to grant such interim relief at that stage.

5. Having reserved judgment to consider the jurisdiction question, the Petitioner renewed its application for a freezing injunction over the LP's assets on the papers. Despite the GP's protestations that no risk of dissipation existed, I considered that the balance of convenience lay clearly in favour of granting the injunctive relief sought, effectively on an *ex parte* basis, with liberty to the GP to apply to vary or set aside the 15 April 2024 Order (the "Freezing Order"). It was discomfiting that the GP seemed more determined to deploy a litigation strategy, which put off the 'evil day' when the Court would decide the Petition on its merits, than it was to seek to allay the concerns of the economic stakeholders. Moreover, I had recently been given cause to regret declining to grant urgent ex parte relief in reliance upon a respondent's assurances that there was no justifiable risk of dissipation: *Fortunate Drift Limited -v-Canterbury Securities, Ltd.*, FSD 227/2018 (IKJ), Judgment dated 14 September 2023 (unreported).

6. I delivered my jurisdictional ruling on 24 April 2024 (the "Jurisdictional Ruling"). I set out (at paragraphs 29-34) my strong provisional views that, without resolving the allegations of misconduct against the GP, the case for appointing independent voluntary liquidators seemed compelling due to a demonstrable loss of confidence in the GP on the part of 97% of the relevant stakeholders. I suggested a possible compromise (at paragraph 33), but ultimately granted leave to the GP to apply to seek to persuade the Court (either on the papers or orally) that arguable grounds for opposing the Petition still existed.

7. Needless to say that Jurisdictional Ruling was not an invitation to the GP to, in effect, manufacture entirely new grounds for opposing the Petition. Nonetheless, I received the following communication from the GP's attorneys on 1 May 2024 (while I was overseas on annual leave):

> "*We write further to His Lordship's judgment of 24 April and in particular paragraph 36 of the same. We had previously indicated that we believed that our client would seek an oral hearing to demonstrate that the substantive order sought by the Petitioner should not be granted. We hereby confirm that the General Partner does indeed request that such an oral hearing take place and we will liaise with Walkers and the Court as to its listing.*
>
> *Separately, we note that the General Partner has taken steps pursuant to the LPA to remove the Petitioner and issued proceedings in New York seeking declarative relief on a number of issues. This raises the issue of the standing of the Petitioner which will need to be addressed at the substantive oral hearing.*"

8. I did not initially properly consider the implications of this communication and invited counsel to submit dates to avoid for a hearing. The following day, the Petitioner's counsel forwarded a copy of a complaint filed by the GP against the Petitioner in the United States District Court for the Southern District of New York (the "Complaint") and invited the Court to summarily grant the primary relief it sought on the Petition. It was readily apparent that the GP's abuse of the opportunity afforded to it to advance an improbable opposition to the relief sought by the Petitioner had created irrefutable grounds for summarily granting that relief.

9. Accordingly, on 2 May 2024 I made the following summary ruling:

> "***SUMMARY RULING***
>
> *1. In this case, the Petitioner supported by the overwhelming majority of economic stakeholders in an exempted limited partnership in voluntary liquidation, seeks to replace the GP as the Liquidating Agent. The GP, seemingly unable to face the commercial reality of the ordinary legal consequences which flow from the loss of confidence which has obviously occurred, raised a technical jurisdictional challenge to the Petition.*
>
> *2. In rejecting this challenge in a Ruling dated 24 April 2024, I observed:*
>
> *'34. In summary, at this juncture, the likelihood that this Court can find a rational basis for declining to grant the relief sought by the Petitioner seems quite fanciful in all the circumstances of the present case.'*

3. The Petitioner, which had hoped to obtain a final order on the first return date of the Petition, sought interim injunctive relief pending the hearing of the Petition on the merits. On 15 April 2024 I granted that relief on a de facto ex parte basis because, in an unrelated matter, I had recently wrongly assumed that a party contesting an injunction application would not undermine the efficacy of any order that might not be granted. On balance, I was not prepared to give the GP the benefit of the doubt, having regard to my provisional views of the merits of the Petition set out in the Ruling on Jurisdiction and my concerns that the very fact that the Petition was being opposed by the GP was indicative of a detachment from commercial and legal reality.

4. The 15 April 2024 Injunction Order was clearly designed to preserve the status quo pending the final hearing of the Petition. It explicitly mandated the preservation of assets; it implicitly mandated that no other steps be taken to prejudice the Limited Partners' interests pending the determination of the Petition on its merits. On 1 May 2024, the GP's attorneys requested a hearing of the Petition and indicated that the GP had recently:

(a) purportedly removed the Petitioner from the partnership;

(b) now wished to contest the Petitioner's standing on these grounds.

5. The GP has also filed a Complaint in the US District Court (SDNY) seeking to challenge the legality of the Petitioner's attempts in these proceedings to 'remove' the GP. These actions are a flagrant collateral attack on this Court's jurisdictional Ruling and contrary to spirit of the Injunction Order. As the Petitioner's counsel points out, it would alternatively have status as a creditor. In my judgment the GP's conduct provides irrefutable grounds for the Court preventing any further abuse of its processes and summarily granting the Order the Petitioner seeks as of today's date.

6. Fuller reasons can be provided in due course if required.

KAWALEY J, 2 May 2024." (the "Summary Ruling")

10. An Order was sealed later that day appointing Alexander Lawson and Christopher Kennedy of Alvarez & Marsal Cayman Islands Limited as the persons responsible for winding-up the affairs of the LP.

11. On 3 May 2024, the GP's attorneys indicated that they wished to seek leave to appeal and to apply for a stay pending appeal on an urgent basis. I accordingly decided that it was appropriate to give fuller reasons for my decision to make what was obviously a final Order, which could be appealed as of right, without waiting for counsel's request.

12. These are the fuller reasons for my Summary Ruling of 2 May 2024 to make a final Order on the Petitioner's application for the appointment of alternative independent voluntary liquidators in place of the GP, pursuant to section 36 (13) of the Exempted Limited Partnership Act (2021 Revision) (the "Act").

The jurisdictional requirements under section 36 (13) of the Act

13. Section 36 of the Act provides as follows:

> "*(13) Following the commencement of the winding up of an exempted limited partnership its affairs shall be wound up by the general partner or other person appointed pursuant to the partnership agreement unless the court otherwise orders on the application of any partner, creditor or liquidator of the exempted limited partnership pursuant to subsection (3)(g).*"

14. Section 36 (3) (g) provides:

> "*(g) on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable.*"

15. In the Jurisdictional Ruling, I noted that:

> "*7. In Malaysia Capital Management Berhad-v-ECM Straits Fund I LP et al, FSD 230 of 2022 (RPJ), Judgment dated 20 December 2022 (unreported), Parker J granted the application of a limited partner to appoint liquidators in place of the general partner which had been struck-off the register and was unable to act. The application under section 36 (13) as read with section 36 (3) (g) was unopposed, but the Court clearly had the benefit of careful argument including reference to the general legislative purpose of section 36 based on extracts from Hansard. Justice Parker (at paragraph 36) accepted the following submission as to the legislative purpose of section 36 (13):*

> *'(a) there is a clear need for a mechanism for a voluntary liquidation to be brought under the supervision of the Court in cases where it is discovered that there is a need for independent, qualified Court-appointed liquidators to take control (such as in cases of insolvency, malfeasance, or where it is otherwise more effective or efficient);[…]*"

16. Parker J's cogent analysis obviously applies, beyond the narrow confines of applications to place a voluntary liquidation under this Court's supervision, to any applications arising out of circumstances where alternative liquidators need to be appointed. I rejected the GP's contention that section 36 (13) only applied to fill gaps in the contractually agreed liquidation mechanism.

17. Against that background, under the rubric of setting out my provisional views on how the relevant statutory jurisdiction should be exercised, I stated:

> "*31. Section 36(13) of the Act confers an unfettered discretion on the Court. There are no statutory conditions to satisfy as in the case of applications for a Supervision Order under section131 (b) of the Companies Act, as in Re Asia Private Credit Fund [2020 (1) CILR 134]. The need to evaluate whether the jurisdictional requirements for appointing Official Liquidators have been met do not arise in relation to an application to give effect to the majority stakeholders' wishes as to whom the voluntary liquidators of the ELP should be. The very fact that the GP does not apparently accept the fundamental principle that in a liquidation the wishes of the majority stakeholders prevail (assuming the opposition to the Petition is maintained) appears to demonstrate the need for a fresh appointment.*"

18. In the course of the hearing, Mr Allison KC submitted that the term "just and equitable" in section 36 (3) (g) of the Act connoted a broad and generous statutory discretion. I agreed. This Court's established practice is to follow its previous decisions unless they are shown to be wrong. The GP's Supplemental Skeleton Argument expressly dealt with the Petitioner's alternative case that if the pleaded misconduct was disputed, this Court could grant the relief sought on a wider basis. The main thrust of those submissions was the proposition that this Court did not have a general supervisory supervision over the LP, thus displacing the general company law principle that the economic stakeholders' wishes as to who should liquidate an investment vehicle are generally given considerable deference.

19. The GP's submissions, and Mr Marshall's admittedly only preliminary oral argument, failed to identify any seriously arguable basis on which the Court could properly prefer the wishes of 3% of the stakeholders, and the incumbent Liquidating Agent against whom unsubstantiated charges of misconduct had been levied, to the views of the 97%. Demonstrating that the Court was not compelled to give effect to the wishes of the majority was not the same as identifying an arguable basis for the Court declining to do so.

20. Accordingly, I was satisfied when I made the Summary Ruling that this Court enjoyed a broad supervisory jurisdiction over the LP after its voluntary liquidation commenced, which could properly be exercised having regard for the best interests of the majority of the limited partners, being the relevant economic stakeholders. Absent countervailing legal policy considerations, the starting assumption in most commercial legal contexts is that it is for the stakeholders, not the Court, to determine where their best commercial interests lie.

21. The winding-up of investment funds constituted by limited companies provides a useful contextual analogy, the force of which Mr Marshall KC vainly sought to minimise at the initial hearing of the Petition. The typical fund company consists of one or more management shareholders and one or more participating shareholders who have no right to participate in the management of the fund company. That longstanding Caymanian corporate approach may well have inspired the substantially similar exempted limited partnership structure whereby limited partners invest and have no power to manage whilst general partners manage. The management shareholder is usually given the right to place the fund into a solvent voluntary liquidation, but it is well recognised that once the normal business of the fund is at an end, the management shareholder's managerial function fades away and the wishes of the real economic stakeholders ordinarily hold sway.

22. In *Re Asia Private Credit Fund* [2020 (1) CILR 134] Field JA held (at paragraph 99):

> "*…the relationship between those holding the management shares in a fund and those holding the participating shares radically changes when the fund is contemplating the cessation of business and a voluntary winding up. The exclusive power conferred on the manager to resolve to wind up the company is conferred not for their benefit but for the benefit of the participating shareholders who, under the articles, have the predominant financial interest in the proposed winding up. Accordingly, the starting assumption should be that where the majority of the participating shareholders nominates a suitable voluntary liquidator, their wishes should be acceded to by the holder of the management or founder shares…*"

23. This principle is not a narrow company law principle but is simply one expression of the wider principle of commercial law, that those who have invested their property in a venture should ordinarily be free to determine where their best interests lie. It will generally apply with equal force in the field of exempted limited partnerships as it does in the company law field. It might well be possible for this general principle to be displaced by express provisions in a limited partnership agreement conferring on the general partner absolute power in the voluntary liquidation phase, but such an improbable commercial bargain was not struck in the LPA in the present case.

24. This general principle may perhaps best be viewed as being derived from the notion of the sanctity of property rights. A similar principle is routinely articulated by courts in the context of approving solvent or insolvent schemes of arrangement. As long as the statutory requirements are met, with a majority in number representing three quarters in value of the relevant stakeholder class approving the proposed arrangement, this Court will follow the same approach taken by other common law courts. As Marcus Smith J put it in *Re Telford Homes Limited* [2019] EWHC 2944 (Ch) (at paragraph 4):

> "*Essentially, a scheme will be sanctioned where the provisions of the applicable statutory regime have been complied with….and the arrangement is such that an intelligent and honest person, a member of the class concerned, acting win respect of his or her interests, might reasonably approve. The court in such circumstances, will accord due respect to the commercial sense of those involved in the scheme and will not seek to second guess unduly the approach of such persons.*"

25. Where the overwhelming majority of the limited partners of an exempted limited partnership seek the appointment of a voluntary liquidator because they have lost confidence in the incumbent contractually agreed liquidator, this Court should likewise ordinarily give "*due respect to the commercial sense of those involved*".

26. Mr Marshall KC rightly argued that this could not properly be the invariable inflexible position. One obvious generic situation in which the views of the majority could properly be disregarded is if they are themselves the target of credible allegations of wrongdoing and are seeking to abuse their ownership powers to evade investigation. The Petitioner's Skeleton Argument provided

another helpful analogy in this regard from the company law sphere, *Fakhry v Pagden* [2021] BCC 46 (David Richards LJ, as he then was, at paragraphs 94-95).

The need for the Summary Ruling

27. In light of the governing legal principles summarised above, the Court was entitled at the first return date of the Petition to be somewhat mystified as to why the GP felt it could possibly be properly open to the Court to refuse to appoint independent voluntary liquidators as requested by 97% of the relevant stakeholders. It was understandable that the GP should wish to oppose the Order sought being granted based on disputed allegations of wrongdoing, but the Petitioner readily accepted that it was willing to forego a time-consuming and expensive investigation. Apart from the improbable (and subsequently rejected) contention that the Court had no jurisdiction to replace the GP as Liquidating Agent under section 36 (13) of the Act as read with the LPA, no coherent principled case seemed to be advanced.

28. It was not disputed that there had been an unusually frequent changing of the auditor guard, although criticisms of the suitability of the incumbent firm were contested. However, the combination of allegations of financial mismanagement and auditors resigning was in my experience a familiar red flag. It was the sort of factor which, together with others, is frequently relied upon to justify appointing provisional liquidators in place of the impugned incumbent management. Nor was it disputed that the SEC was investigating; it was merely contended that no adverse findings had been recorded. This was a second, similar, red flag.

29. Another strand of the GP's defence was that its Mr Jordaan and the Petitioner's Mr Coors had fallen out for reasons unrelated to the complaints set out in the Petition. The GP asserted that Mr Coors was a very wealthy man and had effectively used his status to sway smaller investors into supporting his personal campaign against the GP. The striking feature of this line of this argument was that it tacitly admitted that there was a breakdown in trust and confidence between the key players. It seemed inherently improbable, in fact incredible, to imply that the true position was that there was no objectively valid basis for any concerns about the GP's fitness to manage the liquidation whatsoever. Indeed, it was easy to summarily conclude that the concerns about the recent turnover of auditors and the mere fact that the SEC had initiated an investigation in 2021, which had not very rapidly vindicated the GP, provided an objectively valid basis for concerns on the part of a non-partisan investor.

30. Moreover, the degree of loss of confidence which would justify giving deference to the wishes of the majority for independent professional voluntary liquidators was not as high as would be required to justify replacing independent professional incumbents. The GP was not an independent professional liquidator at all. It had been managing the LP and had now admittedly fallen out with one of the largest investors. The mere fact of this undisputed falling out provided compelling grounds for the relief the Petitioner sought. Even if Mr Coors had had a "hissy fit" over something inconsequential that Mr Jordaan had done and levied exaggerated complaints of misconduct against the GP's principal, it was reasonable for Mr Coors to harbour genuine doubts that the recipient of his ire could be trusted to fairly wind-up the LP's affairs.

31. Although the analogy between an employer and an employee is only relevant in a figurative sense, in my judgment Mr Coors (as the principal of one of the LP's largest investors) was at the winding-up stage entitled to effectively say to the GP, like the demanding 'boss' in '*The Apprentice*' television series: "*You're fired!*"

32. Another strand to Mr Jordaan's evidence in support of the GP's opposition to the Petition was the plausible notion that he had unique contacts with the underlying investment vehicles in various parts of Africa which were important to an effective liquidation process. This seemed inherently credible. In addition, it was impossible to avoid being impressed by the business concept which married wealth creation with social development in an admirable way. However, the appointment of independent liquidators did not mean that Mr Jordaan's continuing involvement in the liquidation process would necessarily be brought to a complete end. It is standard operating practice for professional liquidators to assess how best to extract and/or preserve value from a liquidation process and engagement with former managers frequently occurs. I sought to encourage consideration of such collaboration in the Jurisdictional Ruling (at paragraph 33).

33. The very fact that the GP wished to remain in office over the wishes of the overwhelming majority of the investors was a powerful indicator that he did not apprehend the fundamental characteristics and requirements of a liquidator's representative role. It thus seemed fanciful to anticipate that the Court could ultimately be persuaded to decline to appoint the professional liquidators that 97% of the investors sought to have appointed.

34. By the date of the Jurisdictional Ruling, the following factors strongly supported appointing independent voluntary liquidators:

(a) the Petitioner complained about the LP's financial management based in part on the fact that there had been five different auditors since 2019;

(b) the GP was said to be subject to an ongoing SEC investigation into allegedly fraudulent conduct;

(c) the Petitioner complained that an asset appeared to have been sold to a party connected to the GP between the date of the filing and the hearing of the Petition; and

(d) having rejected the GP's jurisdictional challenge, it was difficult to identify any arguable grounds for the Court to leave the GP in charge of the LP's voluntary liquidation over the objections of 97% of the relevant economic stakeholders who had on any view lost confidence in the incumbent Liquidating Agent.

35. The Freezing Order was designed most narrowly to preserve the LP's assets pending the final determination of the Petition. More broadly, realistically read in conjunction with my subsequent provisional conclusions on 24 April 2024 that the chances of the GP not being replaced seemed "*fanciful*", the Freezing Order was designed to preserve the status quo until the Petition was finally determined. Two reasonable responses were open to the GP following the delivery of the Jurisdictional Ruling:

(a) appealing the Jurisdictional Ruling and seeking a stay or adjournment of the Petition pending appeal; or

(b) accepting the Jurisdictional Ruling and submitting to the Court's jurisdiction on the merits of the Petition. This option necessarily required the GP to persuade the Court that the Petitioner's concerns about its alleged mismanagement were entirely baseless and it could properly be trusted to properly manage the liquidation process.

36. Bizarrely, the GP elected to submit to the jurisdiction of the Court but, rather than seeking to demonstrate its liquidation credentials, elected instead to demonstrate beyond sensible argument that it was manifestly unfit for such office. The GP achieved this surprising 'feat' by confirming to the Court on 1 May 2024 that by way of response to the Jurisdictional Ruling:

(a) it wished to contest the Petition on its merits;

(b) it had recently removed the Petitioner as a Limited Partner and proposed to challenge its standing to prosecute the Petition on these grounds; and

(c) it had also filed the Complaint in New York. Admittedly the Complaint was filed before the GP informed the Court it wished to contest the merits of the Petition.

37. The Petitioner's attorneys, on 1 May 2024, responded to the GP's attorneys' 1 May 2024 email with a robust criticism of these actions, which were characterised as "*outrageous*", and concluded as follows:

> "*In the circumstances, our client respectfully requests that His Lordship put an end to the General Partner's reckless behaviour immediately. We respectfully submit that the situation is urgent and the General Partner is now clearly out of control by taking steps in its own self-interest no matter what the damage to limited partners. We attach a draft Order that we would invite His Lordship to make 'on the papers' that would result in the immediate appointment of the nominated representatives of Alvarez & Marsal to the exclusion of the General Partner. We are available to attend at an urgent hearing if His Lordship is not minded to make the draft Order 'on the papers', or for us to be heard in respect of the terms of the draft Order.*" [Emphasis added]

38. Brief exchanges the next day did not materially change the overall picture. The following course of conduct amounted to an obvious and serious abuse of the process of the Court:

(a) the GP initially opposed the Petition on the grounds the Court had no jurisdiction to remove it from office, and alternatively sought to persuade the Court to give directions for a full contested hearing with oral evidence and cross-examination (Skeleton Argument dated 5 April 2024, 50 + pages);

(b) the GP next opposed the Petition, in response to the Petitioner's modified case, on the grounds that the Court had no jurisdiction to appoint alternative voluntary liquidators (Supplementary Skeleton Argument dated 10 April 2024, 17 pages);

(c) after the Court had resolved the jurisdiction issue against the GP and indicated that it was difficult to identify any meritorious grounds for refusing the relief sought by the Petition, the GP:

(1) purported to remove the Petitioner as a Limited Partner, and

(2) informed the Court that it proposed to contest the standing of the Petitioner to further prosecute the Petition.

39. Without further analysis, it was impossible to believe that a voluntary liquidator, which is the respondent to an application to replace it with independent liquidators because of concerns about the incumbent's probity, could validly deprive the petitioning limited partner of its status as such. More fundamentally, it is a misuse of the processes of the Court for a litigant to manipulate the legal and factual landscape to its advantage in the midst of pending proceedings. Discovering fresh evidence, which either previously existed or is based on the post-litigation conduct of one's opponent is not improper. Creating new grounds for opposing a pending proceeding by taking steps designed to deprive the claimant of standing will generally be an abuse of process.

40. The GP's purported deprivation of the Petitioner's standing to petition, after the Court had already recorded strong provisional views as to the substantive merits of the Petition and invited the GP to consider whether it wished to further oppose the Petition, was manifestly abusive. The proper advancement of the proceedings required the GP to either:

(a) challenge the Jurisdictional Ruling by way of appeal; or

(b) having decided to fully submit to this Court's jurisdiction, to either: (1) advance arguable grounds for opposing the Petition on its merits; or (2) contest the relief to be granted and/or not oppose the Petition any further.

41. The Petitioner's constitutional fair hearing rights guaranteed not only access to the Court, but a fair hearing in a reasonable time. The GP's own fair hearing rights cannot be exercised in a way which undermines a fair trial overall. Manufacturing a new standing ground sought to both deprive the Petitioner of access to this Court and, to the extent that the attempt to do so was bound to fail, would potentially delay the Petitioner's access to substantive justice in a reasonable time by delaying the final adjudication of the Petition. Moreover, these tactical stratagems were being deployed in circumstances where the Court had found a risk of dissipation of assets existed when making the Freezing Order. Had the GP been the respondent to a winding-up petition, the Court could simply

have appointed provisional liquidators in response to obvious concerns that the Freezing Order provided insufficient protection for the LP's assets.

42. The purported removal of the Petitioner as a limited partner was accompanied by the commencement of proceedings in New York, which were inconsistent with the GP's submission to the jurisdiction of this Court. It sought declarations that, *inter alia,* only the New York Court could validly appoint another liquidator. The Complaint, *inter alia*, alleged:

> "*…notwithstanding the parties' clear contractual agreement that any action or proceeding relating in any way to the LPA* ***shall*** *be brought and enforced in this Court or the courts of the State of New York, Defendant Africa Investments filed a petition in the Cayman Islands to surreptitiously circumvent the clear venue provision and, in doing so, strategically avoid the jurisdiction of the American judicial system that the parties agreed was the exclusive judicial forum. As a result of these actions, and other action to the detriment of the Fund, on April 30, 2024, Defendant Africa Investments was removed as a Limited Partner pursuant to the removal provisions of the LPA. Id. at § 11.2. Accordingly, Plaintiffs seek a declaratory judgment as to the rights and obligations of the parties under the LPA related to the dispute between the parties…*"

43. In the Complaint, filed on 30 April 2024, just over a week after the Jurisdictional Ruling, the GP positively asserts that it has removed the Petitioner as a limited partner because it presented the Petition before this Court. It is impossible to see how it could be contended in good faith that the Petition was in breach of an exclusive jurisdiction clause in the LPA. That point did not form part of the GP's jurisdictional challenge before this Court; if it was articulated at all, the point was not pursued in oral argument. This was unsurprising because it flew in the face of the express terms of the Act. Further, this contention was entirely inconsistent with the Jurisdictional Ruling's findings that this Court had a general supervisory jurisdiction over voluntary liquidations of exempted limited partnerships under the Act.

44. The Complaint clearly launched a collateral attack on this Court's 15 April 2024 Order and the Jurisdictional Ruling as it sought to establish that the New York Court had sole jurisdiction to grant the relief this Court had already determined this Court had jurisdiction to grant. This Court's decision was reached following: (1) an *inter partes* hearing in which the GP participated and had not sought leave to appeal; and (2) a hearing in which the GP did not invite the Court to determine the exclusive jurisdiction clause point. This was a further abuse of process, seemingly designed to

provide another basis for postponing the final determination of the Petition, which the Court had already indicated it considered there appeared to be no valid defence to.

45. How did these developments impact on the need to evaluate whether the Court should proceed to list the Petition for further hearing or to summarily grant the primary relief the Petitioner sought? In short, they demonstrated that the GP had effectively abandoned any serious attempt to persuade the Court that the views of 97% of the LP's investors that the GP was unsuitable to continue as Liquidating Agent should be ignored. No reasonable voluntary liquidator, respectful of the commercial interests it was primarily required to uphold and of the rule of law, would behave in such an improper and unreasonable manner.

46. In explaining my provisional views as to why the wishes of the Petitioner and its supporters were likely to be acceded to, I noted:

> "*32. Unfortunately, the opposition to the present Petition has an all too familiar ring. The best way for a manager who has lost the confidence of the investors to demonstrate their probity is to step aside, demonstrating confidence that their impugned management of the fund will be vindicated by independent scrutiny. Instead, the importance of their continuing at the helm is apparently given priority over the wishes of the investors, and the recalcitrant manager claims to know better than the investors where their best commercial interests lie. Regrettably, whatever unique expertise the scorned manager truly possesses, the distinct impression is created that the determination to cling to office is motivated by self-interest at best or the desire to forestall independent investigation into suspect dealings at worst.*"

47. The GP's response to these provisional views was not to seek to contest the Petition on its merits by demonstrating that the Court's concerns were misplaced. Instead, it merely fortified the Court's existing concerns about its desperation to cling to power by any means, fair or foul, to a crescendo which called for decisive and summary judicial action. The Preamble to the Grand Court Rules (2023 Revision) confers a positive obligation on this Court to have regard to the overarching goals of ensuring the efficacy of the relevant substantive law and the normal advancement of proceedings in an economical, expeditious and proportionate manner having regard to the need to avoid wasting the Court's finite resources (paragraph 1). Supplementary case management powers include deciding what issues require full examination and which are appropriate for summary determination, together with taking the initiative to make orders of the Court's own motion (paragraph 4). This panoply of procedural powers were deployed in making the Summary Ruling.

48. In brief, the GP by its abuse of this Court's processes surrendered the right to any further opportunity to oppose the obviously meritorious Petition. Postponing the decision to grant the relief sought by the Petitioner would have undermined the substantive legal imperatives to safeguard the majority investors' investment, one of the main purposes of the statutory jurisdiction which I exercised, while causing unjustifiable delay and a wastage of costs.

Conclusion

49. For these reasons, on 2 May 2024 I granted an Order appointing Alexander Lawson and Christopher Kennedy of Alvarez & Marsal Cayman Islands Limited as the persons responsible for winding-up the affairs of the LP, under section 36 (13) of the Act.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT

ITEM NO. 141

JA-27



Michaelmas Term
[2024] UKPC 32
Privy Council Appeal No 0045 of 2023

JUDGMENT

Kuwait Ports Authority and another (Respondents) *v* Mark Eric Williams and 2 others (Appellants) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Reed
Lord Hodge
Lord Hamblen
Lord Leggatt
Lady Simler

JUDGMENT GIVEN ON
28 October 2024

Heard on 20 June 2024

Appellants
Graham Chapman KC
Andrew Pullinger
Harry Shaw
(Instructed by Campbells LLP and Sinclair Gibson LLP)

Respondents
David Allison KC
Dan McCourt Fritz KC
Rachael Reynolds KC
(Instructed by Ogier (Cayman) LLP and Baker & McKenzie LLP (London))

LORD HAMBLEN:

Introduction

1. The Cayman Islands Exempted Limited Partnership Act (2021 Revision) (the "Act") provides for the establishment of exempted limited partnerships (an "ELP"). A limited partner in an ELP enjoys limited liability but is precluded from participating in the conduct of the business of the ELP, which is carried out exclusively by a general partner.

2. This appeal concerns the circumstances in which a limited partner can bring a derivative action on behalf of the ELP for injury or damage done to the ELP. This is governed by section 33(3) of the Act which provides that such an action may be brought if the general partner has "without cause, failed or refused to institute proceedings".

3. This is the first case in which this issue has been considered. In its decision the Court of Appeal of the Cayman Islands (Sir Richard Field, Sir Michael Birt and Sir Jack Beatson JJA) provided general guidance as to the approach to be adopted to derivative actions brought pursuant to section 33(3) of the Act and concluded that the general partner in this case did refuse or fail to institute proceedings "without cause" and that as a matter of discretion it was appropriate to allow the respondents' derivative claims to be brought. The appellants contend that the Court of Appeal was wrong so to conclude. The respondents cross-appeal is in respect of one aspect of the general guidance provided, namely at what point in time the section 33(3) test falls to be assessed.

Factual background

4. The Port Fund LP (the "Fund") is a Cayman Islands ELP which invested in port-related assets around the world. It was established in 2007 by KGL Investment Company KSCC ("KGLI Kuwait") which acted as the Fund's sponsor and placement agent and was also one of the limited partners in the Fund. The Fund has one general partner and eleven limited partners including KGLI Kuwait and the two respondents, Kuwait Ports Authority ("KPA") and The Public Institution for Social Security ("PIFSS"). The limited partners invested a total of US$188,152,000, approximately 65% of which was invested by the respondents.

5. The general partner of the Fund is Port Link GP Ltd, a Cayman Islands exempted limited company (the "General Partner"). It was appointed as the sole general partner from 21 March 2007 onwards pursuant to identical limited partnership agreements between itself and the limited partners.

6. The first appellant ("Mr Williams") is the ultimate beneficial owner of the General Partner and has very close connections with the second appellant, Wellspring Capital Group Inc ("Wellspring"), and the third appellant, KGL Investment Company Asia ("KGLI Asia"). In summary:

(1) Mr Williams was a vice president of KGLI Kuwait from September 2007 until 2008 and its investment director from 2009 until 2011. Mr Williams was also a member of the Investment Committee of the Fund from 2009 until 2013.

(2) Mr Williams is the sole shareholder and director of Port Link Holdings USA Inc ("Port Link Holdings"), which since July 2018 has owned the entirety of the issued share capital of the General Partner.

(3) On 23 January 2020 Mr Williams was appointed as the authorised representative of the General Partner in relation to proceedings against it by KPA seeking information regarding the condition of the Fund pursuant to section 22 of the Act ("the section 22 proceedings"). The resolution conferred full authority on Mr Williams to take all necessary actions in relation to those proceedings.

(4) Mr Williams is also the chief executive, chief financial officer, president, vice president, treasurer and secretary of Wellspring. Wellspring is owned by the Mark E Williams Living Trust, the trustees of which are Mr Williams, his wife and his brother.

(5) Mr Williams has been the chief executive officer of KGLI Asia since 1 January 2012. KGLI Asia is owned by KGLI Kuwait. KGLI Asia is said by the appellants to have provided administrative support to the Fund between December 2017 and August 2020 pursuant to an administrative services agreement dated 1 December 2017. KGLI Asia has been in voluntary liquidation since 20 December 2020.

7. The respondents began raising concerns with the General Partner concerning the management of the Fund from October 2016. On 29 January 2020, KPA commenced the section 22 proceedings against the General Partner seeking disclosure of certain documents to which it claimed to be entitled.

8. Also on 29 January 2020, after Mr Williams was appointed as the authorised representative of the General Partner, certain professional directors from FFP (Directors) Ltd (the "FFP Directors") were appointed as directors of the General Partner by Abdulghfoor Alwadhi ("Mr Alwadhi") and Mr Williams. They initially acted alongside Mr Alwadhi, who was a director of the General Partner from 2010 until he resigned on

28 March 2021. Mr Alwadhi was the sole appointed director from 24 May 2018 until 29 January 2020, which was when much of the wrongdoing alleged by the respondents took place. The FFP Directors have no connection to such wrongdoing and describe themselves as "independent directors". They remained in office until they resigned on 15 February 2023.

9. KPA's application in the section 22 proceedings was opposed by the General Partner at a time when the FFP Directors were in post, but KPA obtained an order requiring the General Partner to disclose various documents in August 2020. The General Partner sought to appeal that order but that appeal was compromised and the General Partner agreed to provide various documents to the respondents pursuant to a consent order made in November 2020.

The proceedings

10. On 14 October 2020, the current proceedings were commenced in the Grand Court of the Cayman Islands (the "Grand Court") by the respondents against the General Partner only.

11. On 12 February 2021, the respondents' statement of claim was amended and re-filed joining the appellants as the second to fourth defendants respectively. The respondents advance both direct and derivative claims on behalf of the Fund against Mr Williams and Wellspring, and derivative claims only against KGLI Asia. The respondents allege that the assets of the Fund, which are held on statutory trust by the General Partner, have been misappropriated as part of an unlawful means conspiracy and/or due to dishonest and/or negligent breaches of trust and fiduciary duty, in which each of the appellants have wrongfully participated, in some cases having knowingly received some or all of the proceeds.

12. So far as relevant, the claims made by the respondents may be summarised as follows (see para 152 of the Court of Appeal judgment):

(1) The respondents allege that the General Partner has been guilty of wrongdoing which has caused the Fund loss said to be well in excess of US $100m.

(2) The claims against the General Partner allege that, in breach of its fiduciary, contractual and other duties, it acted contrary to the interests of the Fund and the limited partners by making substantial payments, using the Fund's monies, that were not for the benefit of the Fund and/or the limited partners. Amongst these is the alleged sham settlement of proceedings brought against it in the Dubai International Finance Centre Court (the "DIFCC proceedings") as a result of which

US $59,990,461.30 (the "Wellspring Payment") was paid to Wellspring. It is alleged that the General Partner conspired with, amongst others, Mr Williams and Wellspring to cause loss to the Fund and/or the limited partners by unlawful means in relation to the DIFCC proceedings and the Wellspring Payment.

(3) The claims against Mr Williams are that he orchestrated the DIFCC proceedings and the Wellspring Payment and was accordingly party to the above conspiracy. It is further alleged that he dishonestly assisted in the General Partner's breach of trust/fiduciary duty, knowingly procured the General Partner to breach its contractual duties and was in breach of fiduciary duties he owed to the Fund and/or the General Partner.

(4) The claims against Wellspring are for knowing receipt of the Wellspring Payment, conspiracy in relation to the Wellspring Payment and the DIFCC Proceedings and for repayment of the Wellspring Payment.

(5) The claim against KGLI Asia is for knowing receipt in respect of a number of payments said to have been made to it in breach of trust and/or fiduciary duty by the General Partner.

13. The appellants deny the claims against them, counterclaim against the respondents, alleging that the proceedings are an abuse of process commenced for an improper collateral purpose, and crossclaim against the General Partner in respect of alleged underpayments and rights to indemnification. No application has been made to strike out the respondents' claims on their merits or for reverse summary judgment. The claims must therefore be treated as having a real prospect of success.

14. The FFP Directors stated in sworn evidence that, for the purpose of determining whether there was cause for the derivative claims to be pursued by the Fund as required by section 33(3) of the Act, they conducted an intensive, forensic investigation into the actions of the General Partner and the former management team of the Fund. The stated results of the FFP Directors' investigations are set out in various memoranda dated from 28 May 2021 and in the third affidavit of Richard Lewis (one of the FFP Directors) dated 4 June 2021. These set out that, in the General Partner's view (acting by the FFP Directors), there was currently no cause to bring the derivative claims against the General Partner or the appellants, and that even if such claims did have merit, the General Partner would need to undertake a cost/benefit analysis of whether it was in the best interests of the Fund to pursue them and, if so, whether the Fund was in a position to pursue them or could raise funding to do so.

15. On 7 June 2021, the General Partner and the appellants applied to the Grand Court to strike out the derivative claims against them, on the grounds that such claims failed to

satisfy the statutory test under section 33(3) of the Act. Those applications were heard by Parker J between 13-19 October 2021. On 25 November 2021, the Grand Court handed down its judgment granting part of the General Partner's summons on discrete points that did not result in any claims against it being struck out and dismissing the appellants' application.

16. The Grand Court's order was appealed by both the General Partner and the appellants. That appeal was heard by the Court of Appeal on 25 and 26 May 2022 and its judgment was handed down on 20 January 2023. It dismissed the strike out appeal save in relation to the derivative claims made against the General Partner.

17. On or around 15 February 2023, the FFP Directors resigned as the General Partner was apparently unable to pay their professional fees. The respondents thereafter applied (i) to be joined as defendants to the appellants' crossclaim against the General Partner and (ii) for receivers to be appointed in respect of the General Partner.

18. On 2 May 2023, the General Partner was placed into voluntary liquidation by resolution of its sole shareholder, Port Link Holdings, that is ultimately beneficially owned by Mr Williams.

19. By an order dated 1 June 2023, Parker J ordered the appointment of receivers in respect of the General Partner for the express purpose of conducting all litigation on behalf of the General Partner and the Fund (the "Receivers").

20. By an order dated 2 June 2023, Parker J ordered that the respondents be joined as defendants to the appellants' crossclaim against the General Partner in the proceedings. An appeal from this order was dismissed by the Court of Appeal on 15 August 2024.

21. The joint voluntary liquidators of the General Partner applied, in accordance with their statutory obligation to do so, to convert the voluntary liquidation of the General Partner into an official liquidation. This application was dismissed by Parker J on 18 September 2023 and the Receivers were permitted to continue managing the litigation commenced by and against the General Partner and the Fund. The Receivers therefore have conduct on behalf of the General Partner and the Fund of all litigation to which the General Partner or Fund are parties (save for the respondents' derivative claims). The Receivers have decided that the General Partner is not to appeal the Court of Appeal’s decision.

The legal framework

The Act

22. Section 3 provides that the rules of equity and of common law applicable to partnerships as modified by the Partnership Act (2013 Revision) but excluding certain sections shall apply to ELPs, except where they are inconsistent with the express provisions of the Act.

23. Under section 4, ELPs are to consist of general partners and limited partners. General partners are liable for the debts and obligations of the ELP whilst limited partners generally have no such liability.

24. Section 14 provides that all contracts, letters, deeds, instruments or other documents are to be entered into by the general partner on behalf of the ELP and that the limited partners are not to take part in the conduct of the ELP's business.

25. Under section 16, any rights or property of the ELP, including choses in action, are held by the general partner upon trust as an asset of the ELP. The Act thereby creates a statutory trust.

26. Section 19 provides that the general partner is to act at all times in good faith. Subject to any express provisions to the contrary in the partnership agreement, the general partner is to act in the interests of the ELP and limited partners owe no fiduciary duties to the ELP or the other limited partners.

27. Proceedings involving an ELP are governed by section 33 which provides:

> "(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.
>
> (2) If the court considers it just and equitable any person or a general partner shall have the right to join in or otherwise institute proceedings against any one or more of the limited partners who may be liable under section 20(1) or to enforce the return of the contribution, if any, required by section 34(1).

> (3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings.
>
> (4) If any action taken pursuant to subsection (3) is successful, in whole or in part, as a result of a judgment, compromise or settlement of any action, the court may award any limited partner bringing any action reasonable expenses, including attorney's fees, from any recovery in any action or from an exempted limited partnership."

Relevant case law

28. Although there is no prior case law concerning section 33 of the Act, the Court of Appeal recognised that some assistance may be derived from common law and equitable principles developed in relation to the bringing of derivative claims in the context of trusts and limited partnerships, particularly given the statutory trust imposed by section 16 of the Act (paras 101 and 140(ix)).

29. The relevant principles in relation to trusts are summarised in *Lewin on Trusts (20th Edition)* at paras 47-006 and 47-008:

> "47-006. However, as an alternative to proceedings brought in the name of trustees, a beneficiary may, sometimes, bring an action in his name on behalf of the trust against a third party. The fact that the action is brought in the name of a beneficiary rather than the name of the trustees does not alter its character. The action is a derivative action in which the beneficiary stands in the place of the trustees and sues in right of the trust, and does not enforce duties owed to him rather than to the trustees; a beneficiary can be in no better position than trustees carrying out their duties in a proper manner…
>
> 47-008. A beneficiary can bring a derivative action only in special circumstances, for example circumstances which tend to disable the trustees from suing (as where their acts and conduct with reference to the trust fund are impeached), or circumstances rendering it difficult or inconvenient for the trustees to sue, as where there is a conflict between their interest and duty. Special circumstances are not confined to circumstances of these kinds. The guiding principle is that there

> must be exceptional circumstances, which embrace a failure, excusable or inexcusable, by the trustees in the performance of a duty to the beneficiaries to protect the trust estate, or to protect the interest of the beneficiaries in the trust estate. The special circumstances relied on must have something to do with the willingness or ability of the trustee or alleged trustees to bring the action."

30. The fact that the special circumstances must have "something to do with the willingness or ability of the trustee or alleged trustees to bring the action" provides a clear link to the focus in section 33(3) on the justification for the failure or refusal of the general partner to institute proceedings.

31. Recent leading cases on the requirement for special circumstances include *Hayim v Citibank NA* [1987] AC 730 and *Roberts v Gill & Co* [2010] UKSC 22; [2011] 1 AC 240. In the latter case Lord Collins of Mapesbury provided the following summary of the law at para 46:

> "The cases go back to the 18th century, and many of them were reviewed in *Hayim v Citibank NA* [1987] AC 730. The special circumstances which were identified in the earliest authorities as justifying a beneficiary's action were fraud on the part of the trustee, or collusion between the trustee and the third party, or the insolvency of the trustee, but it has always been clear that these are merely examples of special circumstances, and that the underlying question is whether the circumstances are sufficiently special to make it just for the beneficiary to have the remedy…."

Lord Walker of Gestingthorpe (at para 110) stated that "what has to be special about the circumstances – is that the derivative action is needed to avoid injustice…."

32. The determination of whether there are circumstances which are special therefore involves a consideration of what the interests of justice require – see *In re Field, decd* [1971] 1 WLR 555 at 561 per Goff J, cited with approval by Lord Collins in *Roberts v Gill* at 258D-F: see also *Nurcombe v Nurcombe* [1985] 1 WLR 370 at 378D-H per Browne-Wilkinson LJ.

33. In *Certain Limited Partners in Henderson PFI Secondary Fund II LLP (a firm) v Henderson PFI Secondary Fund II LP (a firm)* [2012] EWHC 3259 (Comm); [2013] QB 934 ("Henderson") Cooke J held that that the special circumstances test also applied to the bringing of a derivative claim by a limited partner on behalf of an English limited

partnership. As with an ELP, a limited partnership established under the Limited Partnerships Act 1907 is not a separate legal entity and limited partners have no role in the management of the partnership business, which is exclusively carried out by the general partner. There is, however, no provision equivalent to section 33 of the Act.

34. The Board agrees with the Court of Appeal that the special circumstances test and case law are relevant to the interpretation and application of section 33. If there are special circumstances which mean that a derivative action is needed to avoid injustice then the failure or refusal of the general partner to institute proceedings may well be without cause. Conversely, if there are no such circumstances then the failure or refusal to do so may well be justifiable and therefore with cause.

35. Graham Chapman KC for the appellants submitted that the case law relating to the bringing of derivative claims on behalf of a company is also of assistance and in particular the fraud on the minority exception to the rule in *Foss v Harbottle* (1843) 2 Hare 461, 67 ER 189 that the proper plaintiff for a wrong done to a company is the company itself. There are, however, a number of important distinctions between ELPs and companies which mean that little assistance can be derived from such case law. In particular:

(1) An ELP has no separate legal personality.

(2) A company's articles of association constitute a contract between the company and its members, but no contractual relationship exists between an ELP and its constituent partners. The rights and obligations of the partners in an ELP are governed by a contract between the partners and a statutory trust.

(3) The directors of a company owe fiduciary duties to the company alone and not to the company's shareholders, whilst the general partner of an ELP owes fiduciary duties to all the ELP's limited partners.

(4) The directors of a company are treated as trustees in respect of the company's assets which are under their control, holding them for the company rather than for its shareholders. In contrast, the general partner of an ELP holds the ELP's assets on trust for all the limited partners.

(5) When a wrong is done to a company, it is the company, not its shareholders, that suffers loss. When a wrong is done to an ELP, its constituent partners suffer loss directly: the ELP itself does not suffer any loss that is separate or distinct from the partners' loss.

(6) A majority of shareholders in a company generally have a range of rights and powers, including the power to remove or replace directors and to pass a special resolution requiring a company to bring legal proceedings. A majority of limited partners in an ELP do not have an equivalent power; faced with a general partner who refuses to bring proceedings on behalf of an ELP without cause, their only recourse is to bring a derivative claim.

(7) The fraud on the minority exception concerns control over the bringing of proceedings by the majority shareholders. No such issue arises as between limited partners. As this case illustrates, the majority of limited partners may be seeking to bring the derivative claim.

The Court of Appeal judgment

36. At para 140 of its judgment the Court of Appeal gave general guidance in respect of derivative proceedings under section 33(3) of the Act. This guidance will be considered further below, but it includes the following summary of the nature of the court's task in deciding whether the requirements of section 33(3) have been complied with:

> "(viii) The essential task for the court at such a hearing is to determine whether the limited partner has brought himself within the terms of section 33(3), namely that the general partner has failed or refused to bring the relevant proceedings without cause.
>
> (ix) In determining this issue, the court is likely to be assisted by consideration of whether special circumstances (as developed in cases concerning trusts, limited partnerships and other entities) exist, but the court's task remains one of applying the statutory test set out in section 33(3).
>
> (x) Whilst reference to a 'good arguable case' may be a helpful indicator of the level of comfort which the court should have when deciding whether the requirements of section 33(3) are met, the court's task is essentially an evaluative one having regard to the facts as they appear to the court at that stage of the proceedings from the material before the court and the need to avoid injustice balanced with the need to respect the fact that a derivative action is an exception to the general principle in the [Act] that management (including decisions as to litigation) of an ELP is for the general partner, not the limited partners. …

> the court should consider, inter alia, the strength of the evidence that the general partner has failed or refused to institute proceedings without cause, the strength of the underlying claim which is sought to be brought and the likelihood and nature of any injustice if the derivative claim is not permitted.
>
> (xi) The court should reach its decision as to standing by reference to the facts as they appear at the date of the hearing of the strike out or preliminary issue.
>
> (xii) Even where the requirements of section 33(3) are met, the court has a discretion as to whether to permit a derivative claim to continue. One of the factors which is likely to be relevant in exercising that discretion is whether the plaintiff has an alternative remedy."

37. In relation to the interpretation of section 33(3), the Court of Appeal held that the expression "without cause" must carry the implication of "good" cause**,** noting that the legislature cannot have intended that a decision for any cause, no matter how inhibited or conflicted the decision maker might be, would be sufficient to prevent the bringing of a derivative action under section 33(3) (para 95). The Court of Appeal further held that the relevant inhibition or conflict of interest is that of the general partner itself, as opposed to that of its directors from time to time (para 168).

38. On the facts, the Court of Appeal held that the section 33(3) test was satisfied as the General Partner was under a relevant inhibition when it determined (acting by the FFP Directors) that there was cause not to bring the derivative claims against the appellants. The Court of Appeal observed that, on the respondents' case, the General Partner was deeply involved in the alleged wrongdoing, as was Mr Williams, and that the General Partner had to decide whether to institute proceedings against the appellants, in circumstances where (para 158):

> (1) The essential wrongdoing giving rise to the claims against the appellants was that of the General Partner itself in making various payments and where the General Partner was part of the unlawful means conspiracy to injure the Fund involving Mr Williams and Wellspring.
>
> (2) The contemplated proceedings would have to be brought against Mr Williams, the ultimate beneficial owner of the General Partner and against two companies with which he is deeply and closely involved, namely Wellspring and KGLI Asia.

(3) The General Partner would also have to consider whether (as general partner) it should sue itself (in its own right) as a co-conspirator in the alleged unlawful means conspiracy.

39. The Court of Appeal found (para 159) that this amounted to an "obvious and serious conflict of interest" by reason of which the General Partner was under an inhibition which would amount to special circumstances in the context of a trust or limited partnership and which also meant that the failure by the General Partner to bring proceedings was without cause. In so finding the Court of Appeal was upholding the Grand Court's conclusion to the same effect.

40. As to discretion, it was submitted that because the respondents have direct claims against the first and second appellants they have an alternative remedy against them and so there is no need to bring a derivative claim. The Court of Appeal concluded, however, that it was appropriate to allow the claim to continue in circumstances where there was uncertainty around whether the respondents had direct claims against the first and second appellants and whether the court could order restoration of the trust fund on the success of such direct claims in the absence of a derivative claim on behalf of the Fund (para 170). Both the direct and derivative claims against the first and second appellants were therefore permitted to continue.

The appeal

41. The appellants contend that the Court of Appeal erred in the interpretation of section 33(3) and/or the exercise of its discretion by:

(1) Finding that the General Partner was subject to a relevant inhibition precluding it from making a valid determination as to whether to bring the derivative claims.

(2) Failing to give due regard to the commercial judgment of the General Partner (acting by the FFP Directors) that the derivative claims should not be pursued.

(3) Allowing the respondents to continue the derivative claims in circumstances where the General Partner had validly determined with "cause" that the derivative claims should not be pursued.

(4) Establishing a test which allows a limited partner to bring or continue a derivative claim simply by impugning the conduct of the general partner so as to

> give rise (on the basis of the Court of Appeal's findings) to a perceived potential conflict of interest that inevitably renders any decision not to bring such claims as one "without cause".

(1) Did the Court of Appeal err in finding that the General Partner was subject to a relevant inhibition precluding it from making a valid determination as to whether to bring the derivative claims?

42. The appellants accept that a failure to bring proceedings may be without cause where the decision making is subject to a relevant inhibition.

43. The appellants also accept that an actual conflict of interest would be a relevant inhibition (see para 90 of their written case).

44. A conflict of interest is a clear example of special circumstances justifying the bringing of a derivative claim. This is one of the examples given in *Lewin* at para 47-008. It was also the basis upon which Cooke J held that special circumstances existed in *Henderson.* In that case a derivative claim was allowed to be brought by the limited partners for alleged wrongdoing by the management company appointed by the general partner, which was a sister company of the general partner. Cooke J held that this sister company relationship gave rise to an "irreconcilable conflict of interest" and that the partnership's prospects of obtaining redress against the management company were "virtually eliminated" (para 57).

45. Mr Chapman submitted that there was no relevant conflict of interest in this case as the Court of Appeal had merely held that there was a potential conflict of interest rather than an actual conflict of interest and there was no finding, as in *Henderson,* as to the impact of that conflict on the prospects of obtaining redress.

46. In the Board's view, it is clear that the Court of Appeal correctly held that there was an actual conflict of interest and indeed an equivalent conflict of interest to that found to be established in *Henderson.* As the Court of Appeal stated (emphasis added):

> "158. We respectfully agree with the decision of Cooke J in *Henderson*. In our judgment there *is* a similar conflict of interest in the present case. On the plaintiffs' case, D1 as the general partner was deeply involved in all the alleged wrongdoing as was Mr Williams. …

> 159. On the face of it, *by reason of the obvious and serious conflict of interest*, D1 *is* under an inhibition which would amount to special circumstances in the context of a trust or limited partnership and this inhibition also means that the failure by D1 to bring proceedings against D2 – D4 is without cause for the purposes of section 33(3).
>
> …
>
> 163. … [the General Partner] *is* subject to the conflicts of interest we have summarised above…
>
> …
>
> 167. … There is no doubt in our view that [the General Partner] *was and is* suffering from an inhibition … ."

47. It is correct that the Court of Appeal refers (at para 163) to the fact that the General Partner "cannot be seen to be in a position to take a fair and independent decision about the potential litigation", but that (and other like comments) is a description of the consequence of the conflict of interest rather than of its nature.

48. If the General Partner's decision whether or not to institute proceedings is subject to the conflict of interest which the Court of Appeal identified then the decision is inhibited thereby – it is not necessary or appropriate to go on to consider how it in fact affected the decision.

49. Further, in concluding that there was an actual conflict of interest the Court of Appeal was upholding the like finding made by the Grand Court:

> "104. The [General Partner] is a defendant to litigation where it is accused of serious wrongdoing: wilful default, liability under the Fraudulent Dispositions Act, and conspiracy with the other defendants are alleged.
>
> 105. A large number of the claims against [the appellants] are premised on a breach of duty by the [General Partner]. For example the allegation of knowing receipt is based upon a breach of duty by the [General Partner]. In the circumstances

> the [General Partner] cannot be expected to be the arbiter of whether to bring a claim against another defendant that is premised on its own breach of duty. It is in my view incapable of exercising an impartial decision-making function."

50. The Board agrees with the reasoning and conclusion of the Court of Appeal and the Grand Court.

(2) Did the Court of Appeal err in failing to give due regard to the commercial judgment of the General Partner (acting by the FFP Directors) that the derivative claims should not be pursued?

51. The appellants contend that the General Partner's decision not to bring the claims which are now brought derivatively was the product of a careful and thorough investigation and, ultimately, the considered exercise of commercial judgment by the General Partner acting by its independent FFP Directors. They reasonably concluded that the claims were not of sufficient merit to justify the bringing of proceedings. They appropriately also took into account how such claims might be funded and that the bringing of such proceedings might give rise to claims against the Fund, as it has done. This commercial decision is one with which the court should not interfere.

52. For a number of reasons, the fact that a commercial decision was taken by the FFP Directors does not avoid the conflict of interest which the Court of Appeal found there to be or the resulting inhibition on decision making.

53. First, as both the Grand Court and the Court of Appeal held, it is the position of the General Partner, not its directors, which must be considered. This is made clear by section 33 in general, which focuses on the "general partner", and by section 33(3) in particular, which refers to the "general partner" having failed or refused to bring proceedings without cause.

54. If, as the Court of Appeal held, the General Partner was subject to a disqualifying conflict of interest in making the decision whether or not to bring proceedings then that is not affected by the identity or independence of its directors. The conflict and the inhibition remain regardless of the identity of the directors from time to time.

55. Nor is this conclusion affected by the possibility adverted to by the Court of Appeal (at para 163) that different considerations might arise if liquidators were appointed by the court. It is not necessary to decide whether or not this is correct but, as the Court of Appeal observed, liquidators are not in the same position as directors as they are subject to the supervision of the court.

56. Secondly, even if it is appropriate to have regard to the position of the FFP Directors, they too were subject to a disqualifying conflict of interest and, moreover, one which they seemingly did not recognise. That conflict arises because the FFP Directors owed a duty to act in the best interests of the General Partner. Where there is a conflict between the interests of the General Partner and the Fund then that duty puts the FFP Directors in a conflicted position. The fact that the General Partner has a duty to act in the best interests of the Fund does not avoid that conflict; indeed, it highlights it.

57. As the Grand Court held, the FFP Directors were "seriously inhibited from making impartial decisions" regarding the bringing of proceedings because "they owe their duties primarily to the [General Partner] and it is obviously not in the [General Partner's] interests to be sued" (para 110). The Court of Appeal similarly recognised the conflict "between acting in the best interests of [the Fund] (which might include taking action against [the General Partner] as a co-conspirator) and acting in the best interests of [the General Partner] (which might be said to include the avoidance of being sued)" (para 163).

58. Thirdly, in any event the Grand Court further found that there was a "prima facie case that [the FFP Directors] are unable to assess the claims properly in an independent and objective way, notwithstanding Mr Lewis' extensive evidence" (para 110) and a "prima facie case that [the FFP Directors] have been guided (until recently) in their investigations by information provided by those who were under investigation themselves, and by their legal advisers, who were also conflicted" (para 111). This led the Grand Court to reach the following conclusion on the evidence:

> "121. Based on the available evidence, I have formed the view that there is a relevant inhibition which prevents the FFP Directors' decision making process being fair, because the decisions not to pursue the claims are insufficiently distinct from the wrongdoing upon which the claims are founded. …"

59. Mr Chapman submitted that this conclusion was undermined by the fact that the Grand Court had wrongly evaluated the evidence on the basis that it was only necessary to show a "prima facie" case. However, notwithstanding the different approach which the Court of Appeal held to be appropriate, it endorsed the Grand Court's conclusion, stating as follows:

> "168. Given our decision to uphold the judge's conclusion that it is the position of [the first defendant] as the general partner which must be considered in relation to any inhibition rather than the position of the directors from time to time, it is not necessary for us to address his finding about the position of the

> FFP Directors. Suffice it to say that, if we had found it necessary to do so, we would have considered that the judge was entitled to reach the conclusions which he did in this respect."

60. That endorsement of the Grand Court's conclusion necessarily includes the findings upon which that conclusion was based, as summarised above. Those findings are not open to challenge on this appeal.

(3) Did the Court of Appeal err in allowing the respondents to continue the derivative claims in circumstances where the General Partner had validly determined with "cause" that the derivative claims should not be pursued?

61. The basis upon which the appellants contend that the Court of Appeal so erred is that the FFP Directors had determined that the claims should not be pursued. All the reasons set out above as to why that decision was and remained conflicted and so was not made with "cause" equally apply to the exercise of any discretion to allow a derivative claim. This issue does, however, raise the question of whether there is such a discretion and, if so, its juridical basis. This question was raised by the Board at the hearing and, since the parties had not come to court prepared to deal with the issue, they were invited to address it by making written submissions.

62. Having had the benefit of those submissions, the Board concludes that there is no proper basis for the two stage approach adopted by the Court of Appeal whereby the court considers first if the section 33(3) test of whether there has been a refusal or failure to institute proceedings without cause is satisfied, and secondly whether as a matter of discretion the derivative claim should be permitted. Given that this two stage approach was common ground before the Court of Appeal, its appropriateness was not an issue which it addressed.

63. Section 33 does not refer to the court having any discretion, nor does it lay down any requirement for the court to grant permission or leave for the derivative proceedings to be brought. The sole statutory criterion is whether the requirements of section 33(3) are met. Although the subsection states that the limited partner "may" bring derivative proceedings where the test is satisfied, this relates to what the limited partner may do, not what the court may allow the limited partner to do. It is inconsistent with that statutory scheme to import a separate requirement that the bringing of derivative proceedings is additionally subject to the exercise of the court's discretion.

64. As explained above, however, the special circumstances test is relevant to the interpretation and application of section 33(3) and that involves a consideration of what the interests of justice require. This allows the court to take into account factors which

might otherwise be regarded as relevant to the exercise of a discretion ("discretionary considerations") as part of its evaluative determination of whether the requirements of section 33(3) are met. This would include, for example, whether there is an alternative remedy available, or whether the derivative claim is being brought for an ulterior motive, or views expressed by other limited partners.

65. Indeed, this is implicitly recognised in the Court of Appeal's description of how the court should approach the determination of whether the requirements of section 33(3) are met in para 140(x) of its judgment. It there refers to the court's task being an "evaluative one" which involves balancing "the need to avoid injustice" with "the need to respect the fact that a derivative action is an exception to the general principle" that decisions as to litigation are for the general partner. It also refers to the need to consider "the likelihood and nature of any injustice if the derivative claim is not permitted". Such an approach allows the court to have regard to discretionary considerations.

66. The Court of Appeal was therefore correct to have regard to discretionary considerations in reaching its conclusion, albeit that this should have been as part of its determination that the requirements of section 33(3) were met rather than as a separate step in a two stage approach. For the reasons stated in para 61 above, there was no error in its treatment of such factors.

(4) Did the Court of Appeal err by establishing a test which allows a limited partner to bring or continue a derivative claim simply by impugning the conduct of the general partner so as to give rise (on the basis of the Court of Appeal's findings) to a perceived potential conflict of interest that inevitably renders any decision not to bring such claims as one "without cause"?

67. As already stated, the Court of Appeal did not hold that there was "a perceived potential conflict of interest" but rather an actual conflict of interest and one which was, moreover, "obvious and serious".

68. Mr Chapman nevertheless submitted that the Court of Appeal's interpretation of section 33(3) set the bar too low and would be likely to lead to an undesirable proliferation of derivative claims in relation to ELPs.

69. As the Court of Appeal observed (para 173), such arguments do not bear on the proper interpretation of section 33(3) and are more matters for the legislature.

70. In any event, the Board would not accept that the bar has been set low. The Court of Appeal's decision is only likely to apply to a conflict of interest on the part of the general partner in the case of a claim against persons closely associated with the general

partner, or a claim in which the general partner is implicated, and which is seriously arguable.

71. Mr Chapman further submitted that the effect of the Court of Appeal's decision is that once a general partner is conflicted it is always likely to be conflicted and that the only way to avoid such a conflict is going to be the replacement of the general partner. Further, in the present case, due to the terms of the partnership agreement, that would lead to dissolution of the ELP.

72. Conflicts of interest may, however, take many different forms and be of varying levels of seriousness. In many cases, it may be possible to remove and resolve the conflict without there being any need to replace the general partner. This case may be different because of the "obvious and serious" nature of the conflict of interest, if there is substance in the allegations in the respondents' claims. As to the potential difficulties arising from the terms of the partnership agreement, this is not inherent in the operation of the Act; it is the consequence of the partnership terms agreed.

The cross-appeal

73. The respondents' position is that the Court of Appeal was correct as to the meaning, effect and application of section 33(3), save that, by their cross-appeal, the respondents submit that the Court of Appeal erred when it held that the point at which the section 33(3) test is to be assessed is the date of the strike out hearing, rather than, as the Judge held, at the time the derivative claim was commenced (the "Timing Issue").

74. On the Timing Issue the Court of Appeal held that the Judge's approach would require the court to ignore anything that had happened between the institution of proceedings and the hearing, which could lead to highly unsatisfactory results. It gave the example of the appointment of a new general partner which removed any question of inhibition or conflict of interest. It concluded that "the legislature cannot have intended that the court should allow a derivative claim to proceed in circumstances where, as at the date of the hearing of the strike out or preliminary issue, the requirements of section 33(3) are not met …" (para 125).

75. The respondents criticise that decision and rely in particular on the fact that the words "failed or refused" in section 33(3) are in the past tense, which suggests that the relevant failure or refusal must have taken place before the date of institution of the derivative claim.

76. In the Board's view the Court of Appeal reached the correct conclusion for a number of reasons.

77. First, although section 33(3) uses the past tense when it refers to whether the general partners "have, without cause, failed or refused to institute proceedings", that can refer to a failure or refusal to do so which began before the derivative action was commenced and continues up until the time of the court's determination. Similarly, although section 33(3) states that a limited partner may "bring" an action, which would most obviously refer to the commencement of the action, it can also refer to commencing and maintaining an action.

78. Secondly, this interpretation of section 33(3) is supported by pragmatic considerations and the fact that the nature of the evaluative decision which the court is called upon to make under section 33(3) is one which requires regard to be had to all relevant circumstances at the time of the decision. In particular, any consideration of what the interests of justice require can only properly be made on the basis of what justice currently requires, as opposed to what it may in the past have required.

79. As the Court of Appeal held, it would be highly unsatisfactory if the court could not have regard to how circumstances may have changed since the initiation of the proceedings, including, for example, the removal of the inhibition or conflict that was the basis for contending that the refusal or failure to institute proceedings was without cause.

80. Other examples given by the appellants of potentially important developments post-dating the initiation of proceedings include: (i) the insolvency of the derivative defendants; (ii) the defendants being denied insurance coverage for the claimed loss; (iii) determinative documents arising on discovery; (iv) adverse interlocutory findings during the course of proceedings; and (v) the costs of proceedings exceeding the value of the claim.

81. The respondents recognised the force of this point and acknowledged that it should be possible for the court to take into account later developments. They contended that the court could do so in the exercise of its discretion. On their approach there are two stages. The first stage is whether the requirements of section 33(3) are met, which is to be determined on the basis of the facts as at the time of the initiation of the proceedings. The second stage is the exercise of the court's discretion to allow the proceedings to be brought, which is to be determined on the basis of all facts as known at the time of the hearing before the court. However, for the reasons set out above, there is no two stage process; there is a single evaluative decision to be made which will include consideration of discretionary considerations. Unless that decision is made on the basis of the facts as they appear to the court at the hearing, it will not be possible to take into account changing circumstances, notwithstanding the respondents' acknowledgment of the need to do so.

82. Thirdly, the authorities on special circumstances show that that is an issue which goes to the cause of action being asserted and is required to be pleaded and proved. So,

for example, in *Roberts v Gill* Lord Walker stated that "special circumstances are part of his cause of action" which must be pleaded (para 103, p 272F) and that special circumstances are one of the "building blocks" and "essential facts … which must be pleaded and proved (if not admitted) in order to establish the cause of action" (para 108, p 274B-C).

83. This is borne out by the majority decision in *Roberts v Gill* that the amendment to add a derivative claim involved a new cause of action being brought after the expiry of the relevant limitation period. In that case the claimant commenced proceedings against two firms of solicitors who had advised the former personal representatives of his grandmother's estate. This claim was brought in his personal capacity as a beneficiary of the estate. After the limitation period had expired, he applied to amend to bring a derivative claim on behalf of the estate. The application was dismissed by the deputy judge on the grounds that no special circumstances existed. Although the Court of Appeal held that special circumstances did exist, it dismissed the appeal on the grounds that the amendment required the addition of a new party, the administrator of the estate, and that this was not permissible under CPR r 19.5(3)(b) (now CPR r 19.6(3)(b)) as such addition was not necessary in order to pursue the personal claim originally made. The House of Lords allowed the appeal against the Court of Appeal's decision as to the existence of special circumstances, but the majority (Lord Rodger of Earlsferry, Lord Walker and Lord Collins) also held that the Court of Appeal was correct to hold that the application did not meet the requirements of rule 19.5. Integral to that decision was their conclusion that the bringing of a derivative claim involved a new cause of action, as the capacity in which the party is suing is part of the cause of action. As Lord Collins stated at para 41:

> "The [derivative] claim is a claim involving a new cause of action since the capacity in which [the claimant] makes the claim is an essential part of the claim".

84. This decision implies that, at common law, the special circumstances justifying a derivative claim must, if disputed, be proved in order for the claim to succeed. If that is so, then it follows that, at common law, the special circumstances must continue to exist at the date of determination. Reading "bring" as meaning "commence and maintain" therefore has the consequence that the statutory regime is similar in this respect to the common law relating to derivative claims. That this is likely to have been intended is supported by the general preservation of common law rules except where inconsistent with express provisions (section 3 of the Act), and the link between the special circumstance mentioned in section 33(3) and the common law, to which attention has already been drawn (see paras 30−34 above).

The guidance

85. As referred to above, in its judgment the Court of Appeal gave general guidance as to how applications under section 33 should be approached and determined. The parties did not take issue with this guidance, save in relation to the Timing Issue. For the reasons explained above, the Board considers that the Court of Appeal erred in stating that the court has a discretion as to whether to permit a derivative action to continue even where the requirements of section 33(3) are met. There is a single evaluative decision to be made as to whether the statutory requirements are met, but that decision allows for account to be taken of discretionary considerations. For the same reason, it is not strictly correct to refer to the court permitting or allowing derivative proceedings to be brought. There is no permission or leave requirement. Subject to those clarifications, the Board endorses the guidance given by the Court of Appeal, in the amended form set out below:

(1) There is no requirement for leave to bring derivative proceedings under section 33(3). A limited partner may simply institute such proceedings.

(2) A limited partner must however plead the facts and matters relied upon as showing that it can bring itself within the requirements of the subsection.

(3) If a defendant wishes to raise an issue as to whether the requirements of the subsection are met, it should do so by means of a strike out application or seek the trial of a preliminary issue.

(4) Whichever of these routes is chosen does not affect the test which has to be applied in deciding whether section 33(3) is complied with.

(5) The decision of the court on such an application or preliminary issue is determinative (subject to appeal). If the court holds that the derivative claim may be continued, the limited partner may pursue the claim. It is not an issue which is deferred until or revisited at trial (save possibly in the context of costs at the end of the trial).

(6) The court should not conduct a mini trial as to whether the requirements of section 33(3) are satisfied. The court has to reach its decision on the basis of the material before it, which will be more limited than it will be following discovery and trial.

(7) At the hearing, the onus is on the limited partner to satisfy the court that the requirements of section 33(3) are met. Reference to ‘onus’ is not to be mistaken as

a reference to a 'burden' in the sense of having to show something on the balance of probabilities.

(8) The essential task for the court at such a hearing is to determine whether the limited partner has brought itself within the terms of section 33(3), namely that the general partner has failed or refused to bring the relevant proceedings without cause.

(9) In determining this issue, the court is likely to be assisted by consideration of whether special circumstances (as developed in cases concerning trusts, limited partnerships and other entities) exist, but the court's task remains one of applying the statutory test set out in section 33(3).

(10) Whilst reference to a good arguable case may be a helpful indicator of the level of comfort which the court should have when deciding whether the requirements of section 33(3) are met, the court's task is essentially an evaluative one having regard to the facts as they appear to the court at that stage of the proceedings from the material before the court. Regard should be had to the need to avoid injustice balanced with the need to respect the fact that a derivative action is an exception to the general principle in the Act that management (including decisions as to litigation) of an ELP is for the general partner, not the limited partners. The court should consider, inter alia, the strength of the evidence that the general partner has failed or refused to institute proceedings without cause, the strength of the underlying claim which is sought to be brought and the likelihood and nature of any injustice if the derivative claim does not proceed. This will allow for account to be taken of discretionary considerations, such as whether the plaintiff has an alternative remedy.

(11) The court should reach its decision by reference to the facts as they appear at the date of the hearing of the strike out or preliminary issue.

Conclusion

86. For the reasons set out above the Board will humbly advise His Majesty that the appeal and the cross-appeal should be dismissed.

ITEM NO. 142

JA-28

[2020 (2) CILR Note 6]

GULF INVESTMENT CORPORATION, GENERAL RETIREMENT AND SOCIAL INSURANCE AUTHORITY and KUWAIT PORTS AUTHORITY v. THE PORT FUND L.P. and PORT LINK GP LIMITED

GRAND CT. (Parker, J.) June 16th, 2020

Partnership — exempted limited partnership — information regarding condition of partnership

The plaintiffs were the limited partners in the first defendant ("the fund"), a Cayman Islands limited partnership. The second defendant was the general partner. The plaintiffs sought disclosure of true and full information regarding the business and financial condition of the fund under s.22 of the Exempted Limited Partnership Law (2018 Revision). Section 22 provided: "Subject to any express or implied term of the partnership agreement, each limited partner may demand and shall receive from a general partner true and full information regarding the state of the business and financial condition of the exempted limited partnership."

The plaintiffs submitted that, although they had good cause for concern about the management of the fund which had led them to seek extensive documents and information, it was not necessary for them to prove any wrongdoing on the part of the fund or the general partner, or even a reasonable suspicion of wrongdoing. The court was not therefore required or invited to reach any findings of fact on these questions. There was no requirement under s.22 of the Law for a limited partner to even identify the reasons why it sought information.

The defendants submitted that the fund's limited partnership agreement ("LPA") set out the parties' agreement as to the rights to the provision of information. It set out carefully delineated rights to information and corresponding duties to provide information with appropriate safeguards and restrictions in relation to confidentiality. Section 22 of the Law set out a general principle that a limited partner was entitled to information about the state of business and financial condition of a partnership, but the general principle was subject to what the partnership parties actually agreed in the LPA. The limited partners' rights to receive information were not unlimited and unfettered and it was not unreasonable to undertake that they would only use the information for the purpose of informing themselves about the affairs of the fund.

Held: On a plain and natural reading of s.22, it provided the plaintiffs with an entitlement to demand and receive true and full information regarding the business and financial affairs of the partnership (*Dorsey Ventures Ltd. v. XiO GP Ltd.*, 2019 (1) CILR 249, followed). This made logical common sense as they were partners in the business and its financial affairs were managed on their behalf. They had, in effect, paid for all of the activity undertaken on their behalf pursuant to which they required true and full information. Section 22 was a very wide unqualified provision and included all books and records maintained by the general partner pursuant to the statutory obligation imposed on it by s.21. However it was wider than s.21, as it required information to be provided, not just documents, and the information needed to be "true and full," not "true and fair" as under s.21 which dealt only with books and records of account. Section 22 occupied the field. The court accepted the plaintiffs' submissions that there was no requirement for a limited partner to provide reasons for its demand. The plaintiffs' claim would only fail if there was a proper basis for contending that any of the categories of information demanded fell outside the operation of s.22 of the Law. That would only be in cases where it was clear that the information sought did not relate to the business and financial affairs of the partnership. The plaintiffs accepted that they could not require or use information to harm the fund. The fund was in exit mode. They sought the information to, among other things, consider claims against third parties which would realize assets for the fund. Unless the provisions of the LPA modified or cut down the wide and otherwise unqualified obligation in s.22 of the Law, it should be applied. Clause 7.1 obliged the general partner to keep appropriate records and books of account and afforded each partner the right to access and to receive copies under such reasonable conditions and restrictions as the general partner might prescribe. Therefore, the general partner could impose conditions and restrictions for access and the provision of copies as a matter of the practicalities of complying with the obligation. The reasonable conditions and restrictions extended only to practicalities. Clause 7.1 did not provide the general partner with a separate and distinct right to require the kind of condition that was sought in the present case by way of an undertaking as to use. Such a right would need to be expressed in clear and unambiguous terms. There was no provision in the LPA as to the use of information provided except cl. 7.3 which imposed duties of confidentiality on the plaintiffs. There was no basis for requiring the plaintiffs to agree to any further or other restrictions or conditions on use of information to be provided.

Attorneys: *Travers Thorp Alberga* for the plaintiffs; *Ogier* for the Kuwait Ports Authority; *Walkers* for the defendants.

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No. FSD 235 of 2019 (RPJ)
Cause No. FSD 13 of 2020 (RPJ)

IN THE MATTERS OF THE APPLICATIONS FOR INFORMATION UNDER SECTION 22 OF THE EXEMPTED LIMITED PARTNERSHIP LAW (2018 REVISION)

B E T W E E N

(1) GULF INVESTMENT CORPORATION
(2) GENERAL RETIREMENT AND SOCIAL INSURANCE AUTHORITY
Plaintiffs in FSD 235 of 2019
(3) KUWAIT PORTS AUTHORITY
Plaintiff in FSD 13 of 2020

-and-

(1) THE PORT FUND L.P.
(2) PORT LINK GP LTD.

Defendants in both causes

IN OPEN COURT VIA ZOOM

APPEARANCES: Ms Felicity Toube QC of South Square appearing for the Plaintiffs in FSD 235 OF 2019, GIC and GRSIA, instructed by Anna Peccarino of Travers Thorp Alberga.

Mr David Allison QC of South Square appearing for The Kuwait Ports Authority in FSD 13 of 2020 instructed by Jennifer Fox, Rachael Reynolds and Ilona Groark of Ogier.

Mr Tom Smith QC of South Square appearing for the Defendants in both causes, instructed by Barnaby Gowrie, Chris Keefe and Blake Egelton of Walkers.

BEFORE:	THE HON. RAJ PARKER
HEARD:	5 and 6 May 2020
Draft Ruling: Circulated	9 June 2020
Ruling: Delivered	16 June 2020

Headnote

Exempted limited partnership-ss 16, 19, 21 and 22 Exempted limited Partnership Law (2018 Revision)-true and full information concerning the state of business and financial condition of the Fund-motives and intentions of limited partners seeking information-construction of Limited Partnership Agreement-section 3 (1) (j) Confidential Information Disclosure Law (2016 Revision)-legal privilege -working papers

Introduction

1. The Plaintiffs (GIC, GRSIA, and KPA) respectively are limited partners in the First Defendant, the Port Fund L.P. (the Port Fund or the Fund), a Cayman Islands Limited partnership.

2. GIC is a Kuwait-based supranational corporation owned by the governments of the six member states of the Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the UAE). GRSIA is a state owned enterprise responsible for administering the Qatari social security system. KPA is a state-owned enterprise responsible for administering Kuwait's commercial ports.

3. This was a contested application for disclosure of true and full information regarding the business and financial condition of the Port Fund under section 22 of the Exempted Limited Partnership Law (2018 Revision) (ELPL).

4. The Port Fund was set up in 2007 as a Cayman Islands exempted limited partnership for investments in port related assets around the world. The general partner in the Port Fund is the Second Defendant, Port Link GP Ltd. (the General Partner).

5. In January 2020 Christopher Rowland and Andrew Childe of FFP were appointed as directors of the General Partner[1] and they form the majority of the board of directors, with the third director being a Kuwaiti-based individual, Mr Alawadhi who has been on the board since 2010. The FFP directors have been guiding the response of the Fund to these proceedings. Ms Felicity Toube QC appeared for GIC and GRSIA. Mr David Allison QC appeared for KPA. Mr Tom Smith QC appeared for the Defendants.

6. Each of the Plaintiffs invested substantial monies into the Port Fund. KPA invested the largest amount which equalled at least 45% of the total commitments in the Fund. The total capital contributions into the Port Fund between 2007 and 2013 were US$188 million and together the Plaintiffs hold a majority ownership stake consisting of 61% of the total commitments.

7. KPA also has the support of the Kuwait Public Institution for Social Security (PIFSS) which brings the support of investors to approximately 80% of total commitments of the Fund. In fact if one disregards the limited partners said by the Plaintiffs to be connected to the Port Fund namely KGL Investment Company KSCC (KGLI) and Petrolink Holding Company KSCC (Petrolink)[2] the relief sought in this case is supported by limited partners whose investments amount to 95% of the total investments in the Fund.

8. Emerging Markets PE Management Ltd (formerly known as KGL Investment Cayman Ltd) acted as the Investment Manager of the Fund (the Investment Manager).

9. The term of the Fund has expired and it has been in wind down for over five years, exiting its investments. As such there are no ongoing investment activities.[3]

10. The Fund made a number of investments. The most significant return was received from an investment in Clark Global City, a major Greenfield airport infrastructure site in the Philippines. The Fund sold the project to third party. Pursuant to a Share Purchase Agreement dated 31 July 2017 and a Settlement Agreement dated 5 February 2019 (both agreements being governed by the laws of the Cayman Islands) a sum of US$496,429,777 was wired from the third party to the Fund's bank account in the name of the General Partner with the Noor Bank in Dubai on 14 November 2017. Noor Bank immediately froze this sum at the request of the Dubai authorities. The freezing of the funds is described in disclosure letters dated 27 February 2020 and 26 March 2020 provided by the Fund to the Plaintiffs.

---

[1] They are experienced restructuring professionals, office holders, and directors

[2] KGLI acted as the sponsor and placement agent of the Port Fund, was the controlling shareholder of the Investment Manager during the conduct of the investments of the Fund, Marsha Lazareva (ML) is the vice-chairman and CEO of KGLI and a former director of both the General Partner and the Investment Manager and Saeed Dashti (SD) was the chairman of the KGL group of companies and a director of the General Partner. ML was (at least at one time) also a director of Petrolink which is a subsidiary of KGLI.

[3] See Al Sabah 1 § 15 and 2 §19

Criminal proceedings in Kuwait

11. The court has been referred to evidence relating to ongoing criminal proceedings in Kuwait concerning ML and SD who held management positions at the General Partner and who dealt with the service providers managing the Fund's investments. On 11 November 2019 they were each convicted by a Kuwaiti court and sentenced to imprisonment for 15 years in connection with misappropriation of public funds. An appeal is apparently pending. They were also both convicted on 20 January 2020 in connection with embezzlement from KPA accounts with ML being sentenced to 7 years' imprisonment and SD to 10 years' imprisonment. Again, an appeal is apparently pending.

12. The court has also been referred to evidence of substantial payments made by the Fund to public relations and lobbying firms in the United States and elsewhere in support of the cases of ML and SD and to Baker Tilly which provided a report to assist the defence of the criminal proceedings. The FFP directors consider that there are questions which cause them concern about the Kuwaiti proceedings. These are raised by the Baker Tilly report and a Petition and Case Update provided to the UN working group on Arbitrary Detention, which they have reviewed.

13. The background to the freezing of the funds relating to Clark Global City is said to lie in the criminal investigations against SD and ML. It appears that the Kuwaiti government, acting by its Attorney General approached the Dubai government and sought the transfer a portion of the funds to KPA and PIFSS. The Fund submitted that the amount requested to be transferred was in excess of the entitlements of those investors. The matter was then escalated and was the subject of correspondence passing between the Prime Minister of Kuwait and the Ruler of Dubai to transfer lesser amounts to KPA and PIFSS. The FFP directors understand that it was made very clear to the Fund by the Dubai authorities that unless the Kuwait government's request was met to pay KPA and PIFSS, the Fund would not obtain the balance of the monies. The Fund submitted that it took the decision that it was in the best interests of investors to comply and obtained the release of the monies which the FFP directors consider resulted in KPA receiving more than its legal entitlement. The FFP directors consider that it may be necessary to pursue recourse against KPA in due course. In any event the full sum of US$496,429.777 was distributed by the Fund in February to April 2019.

The issues between the parties

14. The Plaintiffs have demanded from the Defendants *'true and full information regarding the state of the business and financial condition'* of the Fund and have identified a number of specific categories of information that they require.

15. The reasons why KPA seeks the information are summarised at Al Sabah 2 at § 20 and are set out in Schedule 1 thereto which contains a helpful analysis of the requests made, the response given and any comments from KPA together with references to the Defendants' evidence and disclosure letter. In addition a draft order was

submitted shortly prior to the hearing which identified the specific information demanded.

16. The Defendants take issue with a number of these requests on the basis that they are outside the scope of the originating summonses issued by GIC and KPA, are new and are not verified by affidavit evidence.

17. As I made clear at the hearing, the court is not going to embark on a line by line analysis of which requests should be met, if at all, and by when. Instead the court will determine the legal issues that have arisen between the parties in order that the points of principle can then inform the parties approach to the provision of the requested materials. If the parties cannot agree any particular items there will of course be liberty to seek further guidance from the court.

18. There are extensive allegations and counter allegations in the evidence submitted to the court[4] concerning the propriety of the conduct of various entities and individuals involved in dealings with assets belonging to the Fund and alleged irregularities. The court is not in a position to determine those matters and is not asked to do so.

19. The relevant dealings all preceded the appointment of the FFP directors who have relatively recently been appointed and have conducted some investigations into these matters. The relevance of this is that it forms the basis of the FFP directors' concern that without safeguards, the information that is demanded by the Plaintiffs might be misused for collateral purposes, including for use against service providers to the Fund and the requests might themselves be motivated by purposes other than to find out detailed information about the business and financial condition of the Fund.

20. It is accepted by Mr Smith QC that as limited partners in the Fund, the Plaintiffs are entitled to information about the Fund, but he says that the FFP directors are right to scrutinise the requests very carefully to be sure that they fall within the legal entitlements of the limited partners. They say they have requested what they say are reasonable safeguards and restrictions to be put in place in order that they and the Fund do not become embroiled in the contentious matters and criminal proceedings that have arisen in Kuwait and elsewhere, or in what is said to be a campaign waged against ML and SD and service providers to the Fund.

21. The Plaintiffs on the other hand are concerned that the financial affairs of the Fund have not been managed in an appropriate way by the General Partner and require information concerning the management of the investments made and the application of monies received by the Fund on the realisation of its investments. They argue that the concerns of the FFP directors are irrelevant to the Fund's obligation to provide the information demanded and that the safeguards and restrictions required by the General Partner are not necessary, reasonable or legitimate. They argue that

[4] El -Jeaan 1 26 November 2019, El-Jeaan 2 21 January 2020, El-Jeaan 3 24 April 2020; Al Sabah 1 27 January 2020, Al Sabah 2 24 April 2020; Childe 1, 9 April 2020, Childe 2 1 May 2020, Alawahdi 1, 9 April 2020.

any motive that the Plaintiffs may have is irrelevant to their right to demand true and full information which has been outstanding for a period of more than a year.

22. They base their right to this information on section 22 of the *Exempted Limited Partnership Law (2018 Revision)* (ELPL).

The legal framework

23. It is agreed that the Fund is subject to the provisions of the ELPL.

24. An exempted limited partnership consists of a general partner and one or more limited partners: section 4 (2). A limited partner is prohibited from taking part in the conduct of the business of the partnership: section 14(1). It is the general partner that enters into all the communications, contract, deeds and instruments on behalf of the limited partnership: section 14(2).

25. It is agreed that the general partner in this case carried out the obligations and duties necessary for the business of the Fund on behalf of the limited partners.

26. Any rights or property of every description (including all choses in action) and any right to make capital calls or receive the proceeds thereof that is conveyed to vested in or held on behalf of the general partner(s) or in the name of the exempted limited partnership is held by the general partner(s) on trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement: section 16(1).

27. Any debt or obligation incurred by a general partner(s) in the conduct of the business of an exempted limited partnership is a debt or obligation of the exempted limited partnership: section 16 (2).

28. Section 21 of the ELPL deals with the maintenance of books of account for the partnership:

> *"(1) A general partner shall keep or cause to be kept proper books of account including, where applicable, material underlying documentation including contracts and invoices, with respect to-*
>
> *a) all sums of money received and expended by the exempted limited partnership and matters in respect of which the receipt of expenditure takes place;*
>
> *b) all sales and purchases of goods by the exempted limited partnership; and*
>
> *c) the assets and liabilities of the exempted limited partnership.*

(2) *For the purposes of subsection (1), proper books of account shall not be deemed to be kept if there are not kept such books as are necessary to give a true and fair view of the business and financial condition of the exempted limited partnership and to explain its transactions.*

29. Section 22 provides that:

"Subject to any express or implied term of the partnership agreement, each limited partner may demand and shall receive from a general partner true and full information regarding the state of the business and financial condition of the exempted limited partnership".

30. The contractual rights and obligations of the general partner and the limited partners are set out in the Fund's Limited Partnership Agreement dated 22 March 2007 (as amended and restated on 24 July 2008) (LPA).

31. Clause 3.3 of the LPA provides:

"Limited Partners shall have no right to, and shall not, take part in the management or control of the Partnership's business or act for or bind the Partnership provided that the Limited Partners shall have all of the rights, powers and privileges granted to the Limited Partners in this Agreement and, where not inconsistent with the terms of this Agreement, under the Partnership Law."

32. Clause 7.1 of the LPA provides:

"Appropriate records and books of account of the Partnership shall be kept by the Partnership at the principal place of business of the General Partner, and each Partner shall have access to the records and books of account and the right to receive copies thereof under such reasonable conditions and restrictions as the General Partner may prescribe".

33. Clause 7.2(a) provides that audited accounts shall be prepared, and mailed to each limited partner *"As soon as reasonably practicable after the end of each Fiscal Year (but in any event no later than 90 calendar days thereafter)".*

34. Clause 7.3 (Confidentiality) provides as follows:

"Each of the Partners shall, and shall direct those of its directors, officers, partners, members, employees, attorneys, accountants, consultants and advisers (the "Representatives") who have access to Confidential Information to, keep confidential and not disclose any Confidential Information without the express consent, in the case of Confidential Information acquired from the Partnership, of the Partnership... 'Confidential Information' shall mean any information, including the identity of any Partner, that a Partner may acquire from the Partnership, any Portfolio Company or Subsidiary thereof..."

The parties' submissions on the law

35. Ms Toube QC, supported by Mr Allison QC, submitted that whilst the Plaintiffs have good cause for concern about the management of the Fund which have led the Plaintiffs to seek extensive documents and information, it is not necessary for the Plaintiffs to prove any wrongdoing on the part of the Fund or the General Partner, or even that they have a reasonable suspicion of wrongdoing. It is for that reason that the court is not required or invited to reach any findings of fact on these questions, which can only be relevant background to explain the reason why the applications have been made.

36. Moreover, she submitted that there is no requirement under section 22 ELPL for a limited partner to even identify the reasons why it wishes to demand and receive true and full information.

37. The one reported Cayman Islands case on section 22 ELPL is the recent decision of Mangatal J in *Dorsey Ventures* 2019 (1) CILR 249.

38. The limited partner in *Dorsey* demanded information from the general partner which included a detailed breakdown of the nature of and justification for various transactions along with supporting documents such as bank statements contracts and invoices (see paragraph 13).[5]

39. The general partner in *Dorsey* argued that the Amended Limited Partnership Agreement (LPA) in that case expressly conferred on the limited partner the rights to receive audited accounts and unaudited quarterly accounts from the general partner (see paragraph 25) and so it was argued the parties had impliedly excluded any more general right to information which might otherwise exist under section 22 ELPL (see paragraph 27).

40. This argument was rejected by the Judge. At paragraph 36 of the Judgment, Mangatal J held that there was nothing in the wording of the LPA which was inconsistent with an overriding general right to information under section 22 ELPL.

41. In particular the fact that a clause (15.3) in the LPA required the provision of the accounts to the limited partners could not be said to modify the obligation under section 22:

> *"The fact that the Amended LPA at clause 15.3 provides for and addresses the subject of the furnishing of accounts is not the same thing as the topic dealt with under section 22 of the ELP, which is the limited partner's right to demand and receive from a general partner true and full information regarding the state of the business and the financial condition of the exempted limited partnership. The right to demand and receive true*

[5] It included a requirement to disclose supporting documentation for 224 line items of transactions.

and full information, in my view is wide, and encompasses more than accounts, audited or unaudited."- (Paragraph 37).

42. Mangatal J also made reference to section 21 ELPL which contains the obligation of the general partner to keep material underlying documentation, including contracts and invoices with respect to all sums of money received and expended by the exempted limited partnership.

43. She observed at paragraph 38:

"Section 21 of the ELP provides for the keeping of detailed accounts and information and documentation. It seems obvious to me, that, in relation to the Amended LPA [the general partner] is bound expressly to keep books of account in accordance with the ELP. Unless the amended LPA said expressly that the limited partner is not entitled to true and full information, then the limited partner has the right under the governing law, the ELP, to such information".

44. She held that there was no basis for the implication of a term that the limited partners' right to demand information under section 22 should be excluded (see paragraphs 39-43).

45. She therefore ordered the general partner to provide the information sought, which included documents which did not already exist and had to be created to provide breakdowns into specified categories and schedules relating to certain costs and expenses in order to comply with section 22.

46. Ms Toube QC referred to the more limited rights of inspection of a partnership's books under English law where there is no equivalent to the section 22 provision. Ms Toube QC submitted that even in the more circumscribed English law regime, a partner's statutory right to inspect the partnership books is absolute and his motives are irrelevant: see *Lindley and Banks on Partnership 20th edition paragraph 22.16* where it is said that the court has no discretion to refuse appropriate relief because the statutory right of inspection is an absolute one and the motives and indeed bona fides of the partners seeking to exercise it will be irrelevant.

47. Ms Toube QC also relied on *Inversiones [2012] Bus LR 1136* where a dissatisfied investor sought to obtain various documents from the general partner of the limited partnership. The general partner and investment manager submitted:

".. the present application is a blatant attempt to trawl through [the general partner's] and [investment manager's] day-to-day operational documents with a view to enabling [the limited partner] and their appointed forensic accountants to prepare a claim against [the investment manager], and that the mounting of litigation is not a legitimate purpose for which to seek the inspection of documents or the provision of information".

48. This was rejected at paragraph 26 by Norris J:

"In my judgment the question of motive or purpose is irrelevant to the exercise of a statutory right of access to the partnership books. I accept the proposition (stated in Lindley & Banks on Partnership para 22.16) that because the statutory right of inspection is expressed in unqualified terms the motives and bona fides of the partner seeking to exercise it will be irrelevant".

49. At paragraph 27 Norris J observed by reference to *Trego [1896] AC 7* that even if a limited partner were to seek to access the documents for an unlawful purpose, this did not entitle the partnership to restrict access to the information.

50. Ms Toube QC pointed out that the Cayman Islands position is even stronger because, by virtue of section 19(2) of the ELPL, unlike the position in England, it is stated that:

"Subject to any express provisions of the partnership agreement to the contrary, a limited partner of an exempted limited partnership in that capacity does not owe any fiduciary duty in exercising any of its rights or authorities or otherwise in performing any of its obligations under the partnership agreement to the exempted limited partnership or any other partner."

51. It follows from this decision, the Plaintiffs say, that as a matter of statutory interpretation there is an entitlement to demand and receive all of the books and records maintained by the general partner pursuant to the statutory obligation imposed on it under section 21, and there is no proper basis for the General Partner to contend that any of the categories of information and documentation fall outside the operation of section 22 ELPL, as interpreted in the *Dorsey* case. They submit that I should follow the *Dorsey* case unless it was shown to be plainly wrong.

52. Mr Tom Smith QC for the Defendants submitted that in the case of a limited partnership, it is the LPA which contains the agreement between the parties as to how the limited partnership is to be constituted and managed. Thus, in the case of rights to the provision of information, in the first instance it is the terms of the LPA which sets out what the parties agreed and their respective rights and obligations in this regard.

53. In the present case, clauses 7.1 to 7.3 of the LPA set out carefully delineated rights to information and corresponding duties to provide information with the inclusion of appropriate safeguards and restrictions in relation to confidentiality.

54. He submitted that the provisions of the LPA do not exclude the application of section 22 ELPL. Section 22 ELPL sets out the general principle that a limited partner is entitled to information about the state of business and financial condition of the partnership but this general principle is subject to what the partnership parties actually agree in the LPA. In the present case, clauses 7.1 and 7.3 contain the parties' agreement as to how that principle is to be satisfied in relation to the Fund.

55. He skilfully dealt with *Dorsey* on the basis that although Mangatal J appeared to consider that section 22 gave rise to an overriding general right to information beyond what was provided under the terms of the LPA, that decision (whilst it may have been right on the facts of that case) should be seen to be a decision where the LPA itself only provided for limited partners to have limited rights to information, that is to say, only to receive annual audited accounts plus a quarterly report including unaudited accounts. The LPA did not require production of books and records (see paragraph 33) which is unlike the present case where it does. The decision was 'probably right', Mr Smith QC submitted because section 22 ELPL may have a role to play where the terms of the LPA did not satisfy the requirement to provide true and full information.

56. He argued that in the present case clauses 7.1 to 7.3 taken together do provide a comprehensive scheme for the provision of information and 'occupy the field'. There is no room or basis for resort to be had to section 22 ELPL itself.

57. Moreover, he argued that clause 7.1 explicitly sets out the parties' agreement relating to the provision of records and books of account and is subject to "*such reasonable conditions and restrictions as the general partner may prescribe*". He says it would be odd if that explicit restriction could be evaded and ignored by limited partners simply seeking to have resort to the general terms of section 22 ELPL without regard to what had been agreed in the LPA.

58. He also relied on *Inversiones* for the proposition that the test as to what the limited partners were entitled to receive was a 'functional' one which depends on the facts of the case (see paragraph 23(K)).

59. The General Partner acting by the FFP directors is concerned that information provided to the Plaintiffs might be misused, including being used for purposes other than informing themselves about the affairs of the Fund. The Defendants argue that the confidentiality restriction at clause 7.3 of the LPA would be very difficult to police and enforce, particularly given the location of the parties and the conduct would take place abroad.

60. Mr Rowland and Mr Childe are experienced office holders and constitute the majority on the board of the General Partner. They have carefully considered the limited partners' demands against the wider background and context. Mr Smith QC therefore contended that the General Partner seeks to impose, in the exercise of its discretion afforded to it by the LPA, reasonable restrictions and conditions on the provision of information and documentation so that each of the Plaintiffs undertake to this court that without the consent of the General Partner or further order they will use the information and documentation provided only for the purpose of informing themselves about the affairs of the Fund and not for any other purpose.

61. Mr Smith QC submitted that in doing so the FFP directors seek to achieve a balance.

He says that the limited partners' rights to receive information are not unlimited and unfettered and it is not unreasonable to undertake that they will only use the information for the purposes of informing themselves about the affairs of the Fund.

62. Mr Smith QC argues that there will be no prejudice in the Plaintiffs having to provide such an undertaking.

63. In support of his construction of the relevant provisions of the LPA and his 'occupy the field' argument he relies upon the *Interpretation of Contracts Sixth Edition* by Sir Kim Lewison at page 378:

"Where a contract contains general provisions and specific provisions, the specific provisions will be given greater weight than the general provisions where the facts to which the contract is to be applied fall within the scope of the specific provisions".

64. He also referred to an extract from Hansard dated 10 April 2014 where the second reading of the Exempted Limited Partnership Bill 2014 was said to meet the key objective of:

"..The market led demand that the law does not unduly restrict the ability of partners to determine for themselves by agreement their rights and obligations as between themselves", among other objectives.

65. Finally, as far as clause 7.2 is concerned, the Fund's 2017 Accounts, which have been audited and finalised, are in the process of being provided and the 2018 and 2019 Accounts should be provided sequentially within the next month or two.

66. Ms Toube QC, supported by Mr Allison QC, resists the undertaking on the basis that there is no warrant for it. They argued that Mr Smith QC's analysis of how the provisions fit together is wrong and his construction of section 7.1 is also wrong.

67. They argue that the restrictions which are prescribed in clause 7.1 simply deal with the practical side of *providing* the information and give no right to allow the General Partner to impose conditions or restrictions on *use* and do not require an undertaking in that regard. Use should in effect be unfettered, save that the limited partner would not be able to use material provided in order to harm the partnership.

68. As to prejudice to the Plaintiffs of the undertaking sought by the Defendants, they argue that to have to seek the consent of the General Partner and then the court is an unnecessary hurdle and would cause further delay and disputes. They submit that the General Partner should not be permitted to 're-write' the contract whereby they agreed to provide information consistent with the statutory right conferred by section 22 ELPL. There is no balancing of interests to be done by the General Partner as between the limited partners and the third parties which it is seeking to protect because the Plaintiffs contend that the General Partner owes no duties to the third parties but only to the limited partners.

69. They submit that Mr Smith QC's reliance on *Hansard* is misplaced because the relevant Law was created years before the extract was relied upon and the reliance on Lewison bolsters the Plaintiffs' case rather than the Defendants.

70. Mr Smith QC had also contended for the General Partner that there were certain categories of documents and information falling within the application which are subject to confidentiality obligations under contracts entered into with third parties. An application has therefore been made pursuant to section 4 of the Confidential Information Disclosure Law (2016 Revision) (CIDL) for relief to enable the General Partner to provide these materials.

71. The Plaintiffs argue that this application is unnecessary. In the event that the court makes an order for the provision of the information requested, it is clear from the terms of section 3(1)(j) of CIDL that "*disclosure of confidential information in accordance with or pursuant to a right or duty created by any law... shall not constitute a breach of the duty of confidence and shall not be actionable at the suit of any person.*"

72. They rely on the analysis of Kawaley J in *re XYZ Ltd (unreported) 12 February 2019*, in which he rejected any suggestion that there was a need to seek directions under section 4(2) of CIDL in circumstances where the parties are able to demonstrate that they complied with a court order to produce confidential information. They submit that the court should not concern itself with the CIDL application as any order in favour of the Plaintiffs pursuant to section 22 ELPL will address any concerns. Moreover, there is in any event a real issue as to whether section 4 of CIDL applies as it is restricted to circumstances in which a person is 'giving evidence in proceedings' which is not the situation in the present case.

73. To complete the scope of the submissions there are also issues relating to legal privilege raised by the General Partner to avoid the provision of certain categories of information and certain working papers are refused for certain other categories of information sought.

Analysis

74. The proper meaning, application and effect of section22 ELPL is important to the outcome of this application. If the court decides that section 22 ELPL is a free standing, unqualified, provision expressed in mandatory terms, then the only basis for resisting the requests would be if the General Partner could establish that the statutory obligation has been cut down or modified by the express terms of the LPA. On the other hand if the LPA 'occupies the field' in the way suggested by Mr Smith QC, then that will govern the provision of information on the basis of the interpretation of the LPA agreed by the parties and there is no room for resort to be had to section 22 ELPL.

75. In addition, the question of what, if any, restrictions (by way of the undertaking sought) should be imposed as a result of the FFP directors' concerns arise, as do the issues with confidentiality, legal privilege and working papers.

76. As I indicated at the hearing, although I heard submissions on the detailed requests made, I will give my decisions on the questions posed on this application as a matter of principle following which the parties should be in a position to agree the application of those principles to the numerous categories of documents in dispute and in due course agree an Order.

Decision on the legal issues

The ELPL

77. My interpretation of sections 16, 19, 21 and 22 of the ELPL and the way they apply in this case is as follows.

78. Section 16 makes clear that all rights and property of the Fund are held by the general partner on trust as an asset of the Fund in accordance with the terms of the LPA.

> *Any rights or property of every description of the exempted limited partnership, including all choses in action and any right to make capital calls and receive the proceeds thereof that is conveyed to or vested in or held on behalf of any one or more of the general partners or which is conveyed into or vested in the name of the exempted limited partnership shall be held or deemed to be held by the general partner and if more than one then by the general partners jointly, upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement. (section 16(1))*
>
> *Any debt or obligation incurred by a general partner in the conduct of the business of an exempted limited partnership shall be a debt or obligation of the exempted limited partnership. (section 16(2))*

79. It is clear that section 19 (1) of the ELPL provides a one-way obligation for the General Partner to act in good faith at all times in the interests of the partnership subject to any express provision of the LPA to the contrary.

> *"A general partner shall act at all times in good faith and, subject to any express provisions of the partnership agreement to the contrary, in the interests of the exempted limited partnership".*

80. I say 'one- way' because there is express recognition in section 19 (2) that a limited partner does not owe any fiduciary duty in exercising any of its rights under the LPA to any other partner.

"Subject to any express provisions of the partnership agreement to the contrary, a limited partner of an exempted limited partnership in that capacity does not owe any fiduciary duty in exercising any of its rights or authorities or otherwise in performing any of its obligations under the partnership agreement to the exempted limited partnership or any other partner."

81. Section 21 (1), imposes an obligation on the General Partner to keep proper books of account and material underlying documentation, including contracts and invoices, concerning money received and expended, sales and purchases and assets and liabilities of the partnership. I follow Mangatal J's reasoning in *Dorsey* in this regard.

82. Section 21 (2) deems that proper books of account will not be kept if these are not sufficient to give a true and fair view of the business and financial condition of the partnership and to explain its transactions.

83. Section 22 is a different obligation from section 21. It is in its terms broader and requires provision of more than accounting information:

> *"Subject to any express or implied term of the partnership agreement, each limited partner may demand and shall receive from a general partner true and full information regarding the state of the business and financial condition of the exempted limited partnership."*

84. Again, I follow Mangatal J's reasoning in *Dorsey* on this. On a plain and natural reading of section 22 it provides the Plaintiffs with an entitlement to demand and receive true and full information regarding the business and financial affairs of the partnership.

85. This makes logical commercial sense as they are partners in the business and its financial affairs are managed on their behalf. They have in effect paid for all of the activity undertaken on their behalf pursuant to which they require true and full information.

86. It is a very wide unqualified provision and will include all of the books and records maintained by the General Partner pursuant to the statutory obligation imposed on it under section 21. However it is wider than section 21 as it requires information to be provided, not just documents, and the information needs to be 'true and full', not 'true and fair' as is the case under section 21, which only deals with books and records of account.

87. To adopt Mr Smith QC's phrase, section 22 'occupies the field', not clause 7.1 of the LPA which is limited, as is section 21, to keeping and providing proper books and records of account.

What do the Plaintiffs have to show and are their intentions relevant?

88. I accept the Plaintiffs' submissions that there is no requirement for a limited partner to provide its reasons for the demand. It is only if there is a proper basis for contending that any of the categories of information demanded fall outside the operation of section 22 ELPL that the Plaintiffs claim would fail. That would only be in cases where it is clear that the information sought did not relate to the business and financial affairs of the partnership, which is a very wide target to aim at.

89. Reliance on *Hansard* and *Lewison* does not assist the Defendants in this case. As to *Hansard* it is clear the provision which is now section 22 ELPL was introduced into Cayman law before the extract relied upon. It existed previously in the former section 12.

90. As to *Lewison*, I do not accept Mr Smith QC's submission because we are not dealing with a general confidentiality provision on use which is not to take precedence over a specific provision on use. On a proper construction of the LPA there is no restriction on use in relation to information provided relating to the books and records and accounting material, so the argument does not apply.

91. In any event the sentence, "*Such Confidential Information may be used by a Partner only in connection with Partnership matters*" in clause 7.3 is what the limited partners intend to do and does not restrict them in the way the Defendants contend.

92. I accept the Plaintiffs' submissions that any irregularities in the management of the Fund by the General Partner are also strictly irrelevant to the Plaintiffs' statutory rights to the information they demand. The backdrop of the suggested wrongdoing in Mr Al-Sabah's evidence is of no relevance to their entitlement. I note that the disputed evidence of Mr Childe at paragraphs 74 - 100 of his First Affidavit in FSD 235 of 2019 denies any suggestion that anything irregular or unlawful has occurred in the administration of the Fund, (although of course he is unable to any give first-hand evidence and relies on Mr Alwadhi[6]), but it is not necessary to consider that evidence for the purpose of this exercise.

93. Similarly the evidence given by Mr Childe at paragraphs 19, 20, 28 to 32 and 45 to 52 of the same affidavit which deals with various collateral or ulterior motives alleged against the Plaintiffs for bringing this application are of no relevance: see paragraph 26 *Inversiones* per Norris J.

94. The Plaintiffs accept they cannot require or use information to harm the Fund. The Fund is in exit mode. They seek the information in order to, among other things, consider exercising claims against third parties which would realise assets for the Fund.

---

[6] Objection is taken to this evidence by Mr Allison QC on the basis that it does not comply with GCR O.41, r.5 and Mr Childe has no first hand knowledge of what he says. It is not necessary to resolve this point.

The LPA

95. Unless the provisions of the LPA modify or cut down the wide and otherwise unqualified obligation in section 22 ELPL, it should be applied and the concerns of the FFP directors are irrelevant.

96. In this regard, I follow the reasoning of Norris J in *Inversiones* [at paragraphs 25 and 26].

97. As to Clause 7.1 of the LPA, this obliges the General Partner to keep appropriate records and books of account and affords each partner the right to have access and the right to receive copies under such reasonable conditions and restrictions as the General Partner may prescribe. This provision is consistent with section 21 of the ELPL.

98. It is distinct from and does not qualify section 22 ELPL, which is on its terms a wider statutory obligation to provide true and full information regarding the state of the business and financial condition of the partnership:

> *"7.1 Appropriate records and books of account of the Partnership shall be kept by the Partnership at the principal place of business of the General Partner, and each Partner* ***shall have access*** *to the records and books of account* ***and the right to receive copies thereof under such reasonable conditions and restrictions as the General Partner may prescribe***". [my emphasis]

99. Giving those words their ordinary and natural meaning, it seems to me that the General Partner can impose conditions and restrictions for *access* and the *provision* of copies as a matter of the practicalities of complying with the obligation. That is, what the ordinary meaning of '*have access*' and '*the right to receive copies*' means. It does not mean use of the material accessed, copied and received. That is also consistent with giving effect to the word '*under*' in conjunction with such reasonable conditions and restrictions as may be prescribed. This is all in the context, as can be seen from the opening words of clause 7.1, of the right of partners to gain access to and obtain copies of the books and records of account at the place of business of the General Partner. The reasonable conditions and restrictions extend only to practicalities.

100. It does not seem to me to provide the General Partner with a separate and distinct right to require the kind of condition that is sought in this case by way of an undertaking on *use*. Such a right would need to be expressed in clear and unambiguous terms.

101. In fact there is no provision as to the *use* of information provided in the LPA except as provided for in clause 7.3 which imposes duties of confidentiality on the Plaintiffs in respect of a very wide range of information:

"Each of the Partners shall, and shall direct those of its directors, officers, partners, members, employees, attorneys, accountants, consultants and advisers (the "Representatives") who have access to Confidential Information to, ***keep confidential and not disclose*** *any Confidential Information* ***without the express consent, in the case of Confidential Information acquired from the Partnership, of the Partnership,*** *or, in the case of Confidential Information acquired from another Partner, such other Partner, unless (a)* ***such disclosure shall be required by applicable law governmental rule or regulation, court order, administrative or arbitral proceeding or by any bank regulatory authority having jurisdiction over such Limited Partner, (b) such disclosure is reasonably required in connection with any litigation against or involving the Partnership or any Partner .***

Such Confidential Information may be used by a Partner only in connection with Partnership matters*; provided, that this sentence shall not prohibit any Partner from making other passive investments without disclosing to third parties such Confidential Information.* ***'Confidential Information' shall mean any information, including the identity of any Partner, that a Partner may acquire from the Partnership, any Portfolio Company or Subsidiary thereof*** *or, as a consequence of being a Partner in the Partnership, from another Partner other than information that (i) is already available through publicly available sources of information (other than as a result of disclosure by such Partner) (ii) was available to a Partner on a non confidential basis prior to its disclosure to such Partner by the Partnership or (iii) becomes available to a Partner on a non confidential basis from third party ...."* [my emphasis]

102. That represents the extent of the regime agreed by the parties in the LPA as to the *use* of information once provided. I do not consider that there is any basis for requiring the Plaintiffs to agree to any further or other restrictions or conditions on use of information to be provided.

Working papers and legal privilege

103. There is no condition in the ELPL or the LPA relating to working papers or material which is covered by legal privilege. As a matter of Cayman law, a general partner cannot assert privilege against a limited partner unless the legal advice itself concerns a dispute with a limited partner: *Re Torchlight (unreported McMillan J 26 February 2016).* Where a general partner seeks legal advice for the benefit of the partnership, rather than for its own benefit in litigation against the other partners, the general partner will not be entitled to assert privilege against the limited partner [paragraphs 40-42].

104. As to working papers, there is nothing in section 22 ELPL (or the LPA) that suggest that there is any limitation to be placed on the information that is required to be provided if it is to satisfy the 'true and full' requirement.

CIDL

105. No separate CIDL order under section 4 is required because the Order in the present case for the General Partner to provide the information demanded will provide sufficient protection under section 3(1)(j). I follow Kawaley J's reasoning in *re XYZ* in this regard.

106. The court was told by Mr Smith QC that the 2017 accounts as audited were provided shortly before the hearing and they contain a lot of information about matters which have been the subject of questions from the limited partners. The audited 2018 and 2019 accounts were to follow in the next few weeks. The sooner this can be achieved the better.

THE HON. RAJ PARKER
JUDGE OF THE GRAND COURT

ITEM NO. 143

JA-29

McPHERSON & KEAY THE LAW OF COMPANY LIQUIDATION

FIFTH EDITION

ANDREW R. KEAY
LLB (Adelaide); MDiv (Hons) (Denver); LLM; PhD (Queensland)
Professor of Corporate and Commercial Law
Centre for Business Law and Practice
School of Law
University of Leeds
Barrister, Kings Chambers (Manchester, Leeds and Birmingham) and 9 Stone Buildings, Lincoln's Inn
Legal Practitioner of the High Court of Australia

SWEET & MAXWELL
THOMSON REUTERS

assets according to a statutory scheme[78]; the creditors in a sense give up their rights to enforce their claims for a share in the assets of the company as administered by the liquidator.

D. Dispositions of property[79]

1. Compulsory winding up

7-009 Although the company's ownership of its property is in no way affected by winding up, its powers of dealing with that property are severely restricted. Section 127 avoids any disposition of property of the company[80] made after the commencement of winding up, unless the court otherwise orders. Section 129, which was discussed earlier in the chapter, is critical to the operation of s.127. The commencement date will, most often, be the date of the presentation of the petition to wind up, but in some cases it can be earlier than that. For example, if a resolution to wind up was passed before the presentation of the petition then the commencement date will be, assuming that a winding-up order is eventually made, the date of the resolution,[81] thereby making the interim period during which dispositions may be set aside longer.

The section addresses cases where assets legally owned by a company in winding up are disposed of. The section is necessary to enable the company to recover them, by treating the disposition as void.[82] The provision covered the case where the company's property was held by a director or an agent and the director or agent disposes of the property to some third party.[83]

Section 127 is only a relatively brief provision but it has spawned a large number of cases. As with many issues of liquidation law, I am not able to deal with all of the cases and can only deal with some issues in passing. The book majors on the leading cases and the appellate decisions.

Section 127 is the liquidation equivalent of bankruptcy's s.284, but we must note the observation in the judgment in *Re Flint*[84] that the two sections are in different terms and so one cannot approach s.127 with the assumption that it is designed to achieve the same outcome as s.284 and vice versa. One cannot, necessarily, apply a case decided under one section to the other section.[85] However, some cases dealing with one section will be relevant to the other section.

7-010 While s.127 is most relevant when it comes to insolvent companies, it is not limited to insolvent companies. "Property" is defined widely in s.436[86] as including

---

78 *Re Lines Bros Ltd* [1983] Ch. 1 at 14.

79 For further discussion, see Walters, "Void Dispositions in Compulsory Winding up" in J. Armour and H. Bennett (eds), *Vulnerable Transactions in Corporate Insolvency* (Oxford: Hart Publishing, 2003), pp.331 et seq.

80 Compare *Re Branston & Gothard Ltd* [1999] B.P.I.R. 466. In this case, the court held that the property disposed of was not the company's and, therefore, the disposition could not fall foul of s.127.

81 1986 Act s.129(1).

82 *Akers v Samba Financial Group* [2017] UKSC 6; [2017] 1 B.C.L.C. 151 at [53].

83 *Akers v Samba Financial Group* [2017] UKSC 6; [2017] 1 B.C.L.C. 151 at [53].

84 *Re Flint* [1993] Ch. 319 (a case involving a transfer of a husband's interest in matrimonial home to wife pursuant to an order under the Matrimonial Causes Act 1973 s.24).

85 *Pettit v Novakovic* [2007] B.P.I.R. 1643; [2007] B.C.C. 462.

86 *Akers v Samba Financial Group* [2017] UKSC 6; [2017] 1 B.C.L.C. 151.

> "money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property".

It is said that s.127 is one of a group of provisions the purpose of which is to ensure that the assets are divided rateably among the creditors.[87] According to Lord Cairns, the particular object of one of the precursors of s.127 was to

> "prevent during the period which must elapse before a petition is heard the improper alienation and dissipation of the property of a company *in extremis*".[88]

The section, as indicated by Lord Cairns' word, is probably better characterised merely as a provision which takes away from the company the right to dispose of its own property.[89] This retained property will be used to pay off creditors, but the distribution may not be rateable as liquidation expenses have to be paid and preferential creditors and others might be able to have priority to payment. Nevertheless, a subsidiary purpose of the section might be seen as ensuring that the scheme of distribution provided for under legislation is maintained.

7-011 Moving to the actual wording of the section, "void" in the context of s.127 does not mean "voidable" but means, according to the majority of the New South Wales Court of Appeal in *National Acceptance Corp Pty Ltd v Benson*[90] (when considering the then Australian counterpart of s.127, namely s.368 of the Companies Act 1981), void for all purposes related to or incidental to the administration of the winding up.[91] Although not referring to the New South Wales case, the view espoused in that case has been accepted as correct in England, in the case of *Mond v Hammond and Suddards*.[92] The disposition rendered void is void at the time it took place.[93] It has been held that the Crown was not affected by the operation of a precursor of s.127.[94] It has also been held that the avoidance of a disposition cannot retrospectively cause a sale of property to constitute conversion.[95] The avoidance also cannot make a person to whom property has been sold a constructive trustee for the proceeds of the sale.[96] A payment by the company within the period regulated by s.127 is not void if it was made with the purpose of providing the

---

87 *Re Liverpool Civil Service Association* (1874) 9 Ch. App. 511; *Re Civil Service & General Store Ltd* (1887) 58 L.T. 220 at 221; *Re J. Leslie Engineers Co Ltd* [1976] 1 W.L.R. 292 at 304; *Re Airfreight Express (UK) Ltd (in liq)* [2005] B.P.I.R. 250.

88 *Re Wiltshire Iron Co* (1868) 3 Ch. App. 443 at 447. See also *Coutts & Co v Stock* [2000] B.C.C. 247; *Re Pacific Coast Fisheries Pty Ltd* (1980) 5 A.C.L.R. 354.

89 Mokal, "What Liquidation Does For Secured Creditors, And What It Does For You" (2008) 71 M.L.R. 699 at 722.

90 *National Acceptance Corp Pty Ltd v Benson* (1988) 12 N.S.W.L.R. 213; (1988) 6 A.C.L.C. 685.

91 *National Acceptance Corp Pty Ltd v Benson* (1988) 12 N.S.W.L.R. 213 at 220; (1988) 6 A.C.L.C. 685 at 689 per Priestley JA (with whom Clark JA agreed). The other member of the Court, Kirby P (as he then was), took a wider view and saw "void" as meaning no legal effect for any purpose against the world, just as if the transaction never occurred (at 214; 686). This has been effectively approved of in several decisions handed down in England: *Re Leslie Engineers Co Ltd* [1976] 1 W.L.R. 292 at 298; *Mond v Hammond and Suddards* [1996] 2 B.C.L.C. 470 at 474; *Re Airfreight Express (UK) Ltd (in liq)* [2005] B.P.I.R. 250 at 253.

92 *Mond v Hammond and Suddards* [1996] 2 B.C.L.C. 470 at 474.

93 *National Acceptance Corp Pty Ltd v Benson* (1988) 12 N.S.W.L.R. 213 at 221; (1988) 6 A.C.L.C. 685 at 691.

94 *Re Freight Transfer Pty Ltd* [1974] 1 N.S.W.L.R. 214.

95 *Shirlaw v Lewis* (1993) 11 A.C.L.C. 430.

96 *Shirlaw v Lewis* (1993) 11 A.C.L.C. 430.

company with profits.[97] Also, if a receiver disposes of assets subject to the charge under which he or she is operating, s.127 does not apply to the disposal.[98] The provision does not in itself provide the liquidator with any cause of action against the directors of the company which has made the disposition.[99]

If a disposition of company property is void under s.127, who is entitled to the recovered property if a secured creditor has a charge over the company's assets? The South Australian case of *Campbell v Michael Mount PPB*[100] dealt with the situation where a company made a payment to a creditor after the petition to wind it up had been presented. Under Australian law as it stood at the time (it has since changed), the payment was void under the counterpart of s.127. When the court ordered the company to be wound up, the floating charge of a secured creditor crystallised and a receiver was appointed by the secured creditor. The creditor who received the payment paid the amount to the receiver and when sued by the liquidator for the payment the creditor argued that the payment to the receiver discharged the creditor's liability. At first instance, in the Supreme Court of South Australia, it was held that the right of action to recover the payment was property of the company subject to the charge of the secured creditor, and that the receiver had the power to give a valid discharge of the creditor's obligation to repay the money. The liquidator appealed successfully to the Full Court of the Supreme Court. A majority of the Court (Doyle CJ and Matheson J) took the view that once money had been paid by a company, it ceased to be the property of the company, and the company ceased to have any rights to the money.[101] Avoidance did not re-vest title to the money in the company.[102] When the money was recovered it was not property of the company to which the charge of a secured creditor attached; the claim in this case did not involve an assertion by the secured creditor that there had been a disposition of property by the company which infringed the creditor's security.[103] The majority held that the same principles that applied to the avoidance of preferences applied to dispositions made void under the equivalent of s.127.[104] As a consequence, any property recovered belongs to the liquidator for the unsecured creditors unless the property was regarded as specific and identifiable.[105] In the case at hand the court said that the payment made to the secured creditor was a payment to which the liquidator had a right.

However, in England the opposite approach was adopted by HH Judge Kolbert

---

97 *Adelaide Truss & Frame Pty Ltd (in liq) v Bianco Hire Services Pty Ltd* (1993) 11 A.C.L.C. 192. In this case, the payment was made after the presentation of the petition to wind up and before the making of the winding-up order. It is submitted that the court may well have come to a different conclusion if the company had made the payment after the winding-up order.

98 *Wiley v Commonwealth of Australia* (1995) 13 A.C.L.C. 1556; and affirmed on appeal ((1996)14 A.C.L.C. 863).

99 *Phillips v McGregor-Paterson* [2009] EWHC 2385 (Ch); [2010] B.P.I.R. 239 at [35].

100 *Campbell v Michael Mount PPB* (1995) 13 A.C.L.C. 506. On appeal (1996) 14 A.C.L.C. 218.

101 *Campbell v Michael Mount PPB* (1996) 14 A.C.L.C. 218 at 222–223.

102 Doyle CJ said that where money is concerned it is not possible to analyse the issue as if payment had never been made (at 223). The position is different where property the subject of the security has been disposed of (see also *NA Kratzmann Pty Ltd v Tucker* (1968) 123 C.L.R. 295 at 301-301).

103 *Campbell v Michael Mount PPB* (1996) 14 A.C.L.C. 218 at 225.

104 *Campbell v Michael Mount PPB* (1996) 14 A.C.L.C. 218 at 223 and 224. See the discussion of preferences in Ch.11 below.

105 *Campbell v Michael Mount PPB* (1996) 14 A.C.L.C. 218 at 223; and applying the High Court decision of *NA Kratzmann Pty Ltd v Tucker* (1968) 123 C.L.R. 295.

(sitting as a High Court judge) in *Mond v Hammond Suddards*.[106] In this case the company which was in liquidation, R Ltd, had created a floating charge in favour of B. A petition was brought against R Ltd by H and, prior to the making of a winding-up order, R Ltd paid the amount owed to H by way of two payments. The liquidator of R Ltd, when appointed, claimed the sum paid to H on the basis that the payments by the company to H were void under s.127. H came to a compromise with the liquidator and paid him £4,500. B appointed administrative receivers and they claimed the sum paid to the liquidator because the payments made to H were dispositions of company property, and the payment of the compromise amount represented company property to which they were entitled on the behalf of their appointor. As with *Campbell v Michael Mount PPB*, the central issue seemed to be: are the unsecured creditors or the debenture holder entitled to any funds recovered under s.127? HH Judge Kolbert pointed out that the payments made by the company to H were not set aside under s.127 and the liquidator did not get the money as part of a s.127 recovery, rather they came as part of a compromise.[107] The judge rejected the contention of H that the administrative receivers had no standing to bring an action to have a disposition declared void.[108] Unlike the South Australian Full Court, the learned judge distinguished the case before him from the case where a preference is recovered.[109] Judge Kolbert said that as the payments by the company to H were void the moneys always were that of the company and were accordingly subject to the charge. He ordered that the payment made to the liquidator be handed to the receivers.

7-012 Where a company disposes of property in the ordinary course of business, it ceases to be property subject to the charge and becomes the property of the disponee. Professor James O'Donovan has submitted, with some force, it is contended, that it is only where there is a disposition outside of the ordinary course of business and where the disponee is unable to claim to be a bona fide purchaser for value without notice that the chargeholder should be entitled to the property disposed of.[110] With respect, *Mond v Hammond Suddards* should be distinguished from *Campbell v Michael Mount PPB* on the facts on one of two bases. First, in the former case, H could not be regarded as a bona fide purchaser for value without notice as it presented the relevant winding-up petition. It is submitted that if H had not done so, and could not be said to have known about the winding-up petition, any sum recovered should not have been available to the secured creditor. Secondly, as Judge Kolbert himself pointed out,[111] in the case before him, there was no recovery pursuant to s.127; what occurred was a compromise and the administrative receivers were merely seeking to recover the fruit of the compromise. It may, of course, be said that the compromise only occurred because the liquidator sought to invoke s.127.

If a receiver disposes of company property that is subject to a charge, the action

---

106 *Mond v Hammond Suddards* [1996] 2 B.C.L.C. 470.

107 *Mond v Hammond Suddards* [1996] 2 B.C.L.C. 470 at 472–473.

108 *Mond v Hammond Suddards* [1996] 2 B.C.L.C. 470 at 473.

109 *Mond v Hammond Suddards* [1996] 2 B.C.L.C. 470 at 475. Judge Kolbert refrained from following *Re Yagerphone Ltd* [1935] Ch. 392, where the court said that moneys recovered on the basis of avoidance of a preference were not to go to a creditor under a charge as the moneys were held by the liquidator for the unsecured creditors. Judge Kolbert in fact distinguished *Re Yagerphone Ltd* (at 475).

110 "Who Should Benefit from the Recovery of Void Dispositions under s.468 of the Corporations Law" (1995) 13 *Company & Securities Law Journal* 460, 461.

111 *Mond v Hammond Suddards* [1996] 2 B.C.L.C. 470 at 473.

of the receiver would not be avoided under s.127 as there is not a disposition within the meaning of the provision.[112]

Of course, while s.127 states that a disposition is void, it is usually of no import unless proceedings are taken in the court to obtain a declaration that the disposition is in fact void. Is anyone other than the liquidator able to take these proceedings? According to the decision in *Campbell v Michael Mount PPB*,[113] the answer appears to be "no", although others are not stopped from relying on the avoidance effect of s.127.[114] But in *Mond v Hammond Suddards*, Judge Kolbert said that s.127 "imposes no limit on who is able to bring proceedings to have a disposition made after commencement of winding-up order declared void …".[115] However, there does not appear to be any other English authority which adopts such a wide view. In *Power v Brown*,[116] Gabriel Moss QC (sitting as a deputy judge of the High Court) said in that in an appropriate case s.284 (the bankruptcy equivalent of s.127) could be relied on by parties other than the bankruptcy trustee.[117] It might be said that if Judge Kolbert was not correct, then a disposition which was made within the relevant time might not be recovered if the liquidator was inactive. However, that fails to acknowledge that a secured creditor could apply under s.168(5) to ask a court to review the liquidator's failure to take action.

7-013 Before moving on to look at the constituent parts of s.127, it is to be noted that s.127(2) provides an exception to the application of the provision just discussed. This subsection was introduced by the Enterprise Act 2002. It covers the kind of case highlighted by *Re J Smiths Haulage Ltd*,[118] where an administrator was appointed subsequent to the presentation of a petition to wind up and disposed of company property without knowledge of the petition. It was said that such a disposition was not void under s.127 as the effect of the administrator's appointment was, according to para.40 of Sch.B1 of the Act, to suspend the petition and this was subject to s.127(2).

There are, essentially, three elements to s.127:

- there was a disposition of property;
- the disposition occurred after the commencement of the winding up; and
- the court has not made an order that the disposition is not void.

These elements together with other important issues relevant to s.127 are discussed below.

7-014 **(a) Disposition of property** It follows from what has been said of the purpose of this provision that the words "disposition of property" in s.127 are to be given a wide meaning.[119] Recently HH Judge Matthews (sitting as a High Court judge) in

---

[112] *Re French's Wine Bar Ltd* (1987) 3 B.C.C. 173 at 177; and approving *Re Margart Pty Ltd (in liq)*; sub nom. *Hamilton v Westpac Banking Corp* (1984) 2 A.C.L.C. 709.

[113] *Campbell v Michael Mount PPB* (1996) 14 A.C.L.C. 218.

[114] *Campbell v Michael Mount PPB* (1996) 14 A.C.L.C. 218 at 227.

[115] *Mond v Hammond Suddards* [1996] 2 B.C.L.C. 470 at 473.

[116] *Power v Brown* [2009] EWHC 9 (Ch).

[117] *Power v Brown* [2009] EWHC 9 (Ch) at [20]–[21]. The learned deputy judge said that the validation provision in s.127 or s.284 can deal with any unjust use of the provision (at [20]).

[118] *Re J Smiths Haulage Ltd* [2007] B.C.C. 135.

[119] *Re Dittmer Gold Mines Ltd (No.3)* [1954] St.R.Qd 275 at 282; *Sheahan v The Workers' Rehabilitation and Compensation Corp* (1991) 9 A.C.L.C. 735. The words "disposition of property" extend to the disposition of an equitable interest in land: *Re Selmar Pty Ltd* [1978] V.R. 531. The expres-

Officeserve Technologies Ltd v Anthony-Mike[120] said that disposition of property covers the "destruction, or at least the *reduction* in value, of a property right belonging to the company, causing an immediate and equivalent *accrual* in value to another person …".[121] His Lordship in fact interpreted disposition of property quite broadly in his judgment, and he stated that he felt in some decisions the expression had been overly restricted in its perceived scope.[122] The expression has been held specifically to cover sale,[123] encumbrance,[124] transfer, and alienation[125] of a company's property, the surrender of a lease or the giving up of contractual rights,[126] release of contractual rights,[127] the cancellation of a charge on property,[128] as well as payments of money by the company,[129] though it does not extend to a disposition of property belonging to a third party[130] except to the extent that such a disposition affects an interest possessed therein by the company itself.[131] Nor does it extend to the passing of a resolution increasing the authorised share capital and the consequential allotment of shares,[132] the completion of a specifically enforceable contract[133] or the forfeiture of a joint venturer's interest in a joint venture to the other joint venturers.[134] HH Judge Matthews has said that it does not cover "mere efluxion of time of a wasting asset, such as a lease. Nor is it apt to cover deliberate consumption or waste by the company of its assets".[135] The South Australian Supreme Court has held that a payment into court is not a disposition, despite the fact that the company does not retain any legal interest in the money. A disposition

---

sion does not cover the abandonment of an alleged claim for damages (*Re Mal Bower's Macquarie Electrical Centre Pty Ltd (in liq)* [1974] 1 N.S.W.L.R. 254; *Mosaic Oil NL v Angari Pty Ltd* (1990) 8 A.C.L.C. 780).

120 *Officeserve Technologies Ltd v Anthony-Mike* [2017] EWHC 906 (Ch).

121 *Officeserve Technologies Ltd v Anthony-Mike* [2017] EWHC 906 (Ch) at [90].

122 The judge's comments on s.127 were obiter in the case.

123 *Re Wiltshire Iron Co* (1868) 3 Ch. App. 443; but not mere contract: at 447; *Re Oriental Bank Corp* (1885) 28 Ch. D. 634 at 638, except where the contract itself effects a disposition of an equitable interest: *Re Selmar Pty Ltd* [1978] V.R. 531.

124 *Re International Life Assurance Society, Gibbs & West's Case* (1870) 10 Eq. 312; *Re Park, Ward & Co* [1926] Ch.828; *Re Steane's (Bournemouth) Ltd* [1950] 1 All E.R. 21 (debenture); *Re Dittmer Gold Mines Ltd (No.3)* [1954] St.R.Qd 275 (mortgage); *Jardio Holdings Pty Ltd v Dorcon Construction Pty Ltd* (1984) 2 A.C.L.C. 574 (equitable mortgage over the whole of the company's assets and undertaking).

125 *Loteka Pty Ltd (in liq)* (1989) 7 A.C.L.C. 998 at 1001.

126 *Akers v Samba Financial Group* [2017] UKSC 6; [2017] 1 B.C.L.C. 151 at [74].

127 *Officeserve Technologies Ltd v Anthony-Mike* [2017] EWHC 906 (Ch) at [98].

128 *Officeserve Technologies Ltd v Anthony-MIke* [2017] EWHC 906 (Ch) at [99].

129 *Re Liverpool Civil Service Association* (1874) 9 Ch. App. 511. This includes a payment to a person as part of a settlement of all obligations owed by the person to the company or owed to the person by the company: *Officeserve Technologies Ltd v Anthony-Mike* [2017] EWHC 906 (Ch).

130 *Re Norman King & Co* [1960] S.R. (N.S.W.) 98. Compare also *Re Toocooya Investments Pty Ltd* (1978) 3 A.C.L.R. 252; *Re Wyvern Development Ltd* [1974] 1 W.L.R. 1097.

131 *Re Norman King & Co* [1960] S.R. (N.S.W.) 98. Compare also *Re Toocooya Investments Pty Ltd* (1978) 3 A.C.L.R. 252; *Re Wyvern Development Ltd* [1974] 1 W.L.R. 1097, it need hardly be said that the section does not prohibit either dispositions or payments made to the company: *Re Barnard's Banking Co* (1867) 3 Ch. App. 106; *Mersey Steel & Iron Co v Naylor Benzon & Co* (1882) 9 Q.B.D. 434 at 440.

132 *Re Fostoria-Fannon (Aust.) Pty Ltd* (1979) A.C.L.C. 32,277.

133 *Re French's (Wine Bar) Ltd* [1987] B.C.L.C. 499.

134 *Mosaic Oil NL v Angari Pty Ltd* (1990) 8 A.C.L.C. 780.

135 *Officeserve Technologies Ltd v Anthony-Mike* [2017] EWHC 906 (Ch) at [98].

will only exist where the company has a beneficial interest in the money at the time of payment out.[136]

The word "disposition" does not extend to the process by which a person with a beneficial interest in the property of a company, such as a bank with a fixed and floating charge over its assets, obtains that property, or the proceeds of the sale of that property[137]; therefore there is no disposition when the company only holds the legal interest in property but the beneficial ownership is vested elsewhere. Nor does it cover its process of realisation after crystallisation of the charge. In *Re French's Wine Bar Ltd*,[138] Vinelott J held that s.127 did not apply in relation to an unconditional contract entered into before and completed after the commencement of winding up. But s.127 does extend to dispositions which are effected pursuant to a court order.[139] Furthermore, a company's assumption of liabilities is not within s.127 as it is not a disposition of property.[140]

The disposition, to be covered by s.127, may be made by the company or a third party or made directly or indirectly, but any bona fide purchaser for value without notice of the winding-up proceedings would not be liable.[141]

7-015 In the Australian decision of *Re Mal Bower's Macquarie Electrical Centre Pty Ltd (in liq)*,[142] Street CJ said that he thought that the word "disposition" originated from the Scottish law term, dispone, used to refer to transferring or alienating property.[143] Although in the recent case of *Officeserve Technologies Ltd v Anthony-Mike*[144] HH Judge Matthews had problems with this explanation. The judge said that it was

> "not clear from his judgment [that of Street CJ] why he thought that. There was (for example) no tracing back of the statutory provision to a Scottish statute, or even a Scottish case. It is well known that Scottish and English law are very different. Even if company law is (more or less) the same on either side of the border, it is clear that Scottish insolvency law is not the same as English insolvency law. There is no obvious reason why the word 'disposition' in a technical English statute dealing with insolvency should be referred back to a technical term of Scottish law dealing with the conveyancing of Scottish land".[145]

"Disposition" connotes, according to Street CJ[146] both a disponor and a disponee. This was something that was affirmed by Lord Neuberger in the UK Supreme Court decision in *Akers v Samba Financial Group*.[147] For there to be a disposition within s.127, there must be some change which takes out of the company at least the

---

136 *Pilmer v HIH Casualty Insurance Ltd* (2004) 90 S.A.S.R. 465.
137 *Re French's Wine Bar Ltd* (1987) 3 B.C.C. 173 at 177; and approving *Re Margart Pty Ltd (in liq)*; sub nom. *Hamilton v Westpac Banking Corp* (1984) 2 A.C.L.C. 709.
138 *Re French's Wine Bar Ltd* (1987) 3 B.C.C. 173.
139 In *Re Flint (a bankrupt)* [1992] 2 W.L.R. 537. The same view was expressed in relation to bankruptcy: *Treharne and Sand v Forrester* [2003] EWHC 2784 (Ch); [2004] B.P.I.R. 338.
140 *Coutts & Co v Stock* [2000] B.C.C. 247; [2000] 1 B.C.L.C. 183.
141 See *Re J. Leslie Engineers Co Ltd* [1976] 1 W.L.R. 292; [1976] 2 All E.R. 85. Also, see *Akers v Samba Financial Group* [2017] UKSC 6; [2017] A.C. 424; [2017] 2 W.L.R. 713.
142 *Re Mal Bower's Macquarie Electrical Centre Pty Ltd (in liq)* (1974) 1 N.S.W.L.R. 254 at 258.
143 *Re Mal Bower's Macquarie Electrical Centre Pty Ltd (in liq)* (1974) 1 N.S.W.L.R. 254 at 257.
144 *Officeserve Technologies Ltd v Anthony-Mike* [2017] EWHC 1920 (Ch).
145 *Officeserve Technologies Ltd v Anthony-Mike* [2017] EWHC 1920 (Ch) at [73].
146 *Re Mal Bower's Macquarie Electrical Centre Pty Ltd (in liq)* (1974) 1 N.S.W.L.R. 254 at 258.
147 *Akers v Samba Financial Group* [2017] UKSC 6; [2017] 1 B.C.L.C. 151 at [65].

7-023 The Court of Appeal in *Re Gray's Inn Construction Co Ltd*[220] said that if no application is made by a bank for a validation order pursuant to s.127 following the presentation of a petition against one of the bank's corporate customers, then the bank could, itself, freeze the account of the company and require all subsequent dealings to be dealt with on a separate account.[221] According to Buckley LJ:

> "It [the bank] can require personal assurances from the directors of the company that no payments out of the new account will be made in discharge of pre-liquidation debts and that all payments out of the new account shall be in respect of liabilities incurred in the ordinary course of business subsequent to the presentation of the petition. It can institute checks upon the profitability of the company's trading as it thinks fit. All that happens between the customer and the banker is an adjustment of entries in the statement recording the account between them."[222]

However, a bank may not wish to take this course of action as it runs the risk of being liable to the liquidator in relation to any loss made by the company in trading during the interim period between the presentation of the petition and the making of a winding-up order.[223]

Of course, given the decision of the Court of Appeal in *Bank of Ireland v Hollicourt (Contracts) Ltd*, orders under s.127 may not be necessary in order to validate payments made by the bank in honouring cheques drawn on the company's account in favour of a third party.[224] This is because it has been said that the bank is acting merely as an agent or intermediary of its customer, namely the company, and in making the payment is adhering to the instructions of the customer. In *Re Barn Crown Ltd HH* Judge Rich QC said:

> "If the account is already in credit, no disposition of the property of the customer takes place in favour of the bank. The amount standing to the credit of a customer's account is increased in return for the surrender of the cheque which becomes a voucher for payment. It is the drawer of the cheque whose property is disposed of."[225]

7-024 However, it is well to note that Mummery LJ in *Bank of Ireland v Hollicourt (Contracts) Ltd (in liq)*[226] approved of the practice of securing a validation order, and so it would be wise for banks to continue that practice where possible.

7-025 **(b) Duration of incapacity** The duration of the incapacity extends from the commencement of the winding up to the termination of winding up, whether by stay[227] or otherwise. The liquidator is, of course, not affected by s.127 when he or she makes dispositions.[228]

7-026 **(c) Remedies** Despite use of the word "void", there is some doubt whether the

---

220 *Re Gray's Inn Construction Co Ltd* [1980] 1 W.L.R. 711; [1980] 1 All E.R. 814.
221 See the comments of Harman J in *Re McGuinness Bros (UK) Ltd* (1987) 3 B.C.C. 571 at 574.
222 *Re Gray's Inn Construction Co Ltd* [1980] 1 W.L.R. 711 at 720; [1980] 1 All E.R. 814 at 821.
223 See *Re McGuinness Bros (UK) Ltd* (1987) 3 B.C.C. 571 where the bank was obliged to repay to the liquidator all of the amounts paid into the bank account and then dissipated.
224 Compare *Re Gray's Inn Construction Co Ltd* [1980] 1 W.L.R. 711 at 716; [1980] 1 All E.R. 814 at 818; *Hollicourt (Contracts) Ltd (in liq) v Bank of Ireland* [2000] 1 W.L.R. 895; [2000] B.C.C. 237.
225 *Re Barn Crown Ltd* [1994] B.C.C. 381 at 388–389.
226 *Bank of Ireland v Hollicourt (Contracts) Ltd (in liq)* [2000] 2 W.L.R. 290 at 293.
227 *Krextile Holdings Pty Ltd v Widdows* [1974] V.R. 689.
228 *Krextile Holdings Pty Ltd v Widdows* [1974] V.R. 689 at 696. See also *Re Timberland Ltd; Commissioner for Corporate Affairs v Harvey* (1979) 4 A.C.L.R. 259.

operation of s.127 depends upon an election by the liquidator,[229] or operates automatically on winding up. If the latter approach is correct, the subject property is recoverable *in specie* and may be traced on equitable principles.[230] It is submitted that the basis for the latter approach is stronger. It will be remembered that "void" means void for all purposes related to or incidental to the administration of the winding up and any disposition rendered void is void at the time it took place. It has only been in relation to preference provisions where "void" has been interpreted as meaning "voidable" that the election by the liquidator has been seen as the critical action.

(d) Validation of dispositions It has been said that the purpose of the provision is to preserve the pari passu principle of distribution in the period in which a winding-up petition is pending.[231] This has been criticised by some commentators,[232] with, it is respectfully submitted, some not insubstantial arguments. But while there is this criticism, the courts have not wavered in their focus on pari passu, as is discussed in Ch.13. In fact a recent Court of Appeal decision, *Express Electrical Distributors Ltd v Beavis*[233] that dealt with s.127 and validating orders, seems to support the existing jurisprudence and emphasises the centrality of pari passu. **7-027**

Even if one takes the purpose of the section as just mentioned, the provision is far broader in scope than is necessary for achieving this purpose alone and will render void all post-petition dispositions, including not only dispositions which are harmful to the company but also those relating to genuine transactions, those transactions entered into in the ordinary course of the company's business,[234] payments into and out of the company's bank account and transactions which might be said to provide a significant benefit to the company through an increase in its net assets. So as to avoid the prejudicial consequences of s.127, it is essential that a validating order is obtained, for the prohibition imposed by s.127 is not absolute; the court has a discretionary[235] power, exercisable on application by a person having a discernible interest in the matter,[236] to declare that dispositions shall not be

---

[229] Compare *Re Freight Transfer Pty Ltd* [1974] 1 N.S.W.L.R. 214.

[230] *Re J. Leslie Engineers Co Ltd* [1976] 1 W.L.R. 292 at 297; [1976] 2 All E.R. 85 at 89.

[231] *Re Wiltshire Iron Co* (1868) 3 Ch. App. 443 at 447. A similar statement was made in *Coutts & Co v Stock* [2000] 1 B.C.L.C. 183 at 186; and was approved by the Court of Appeal in *Bank of Ireland Ltd v Hollicourt (Contracts) Ltd* [2001] 2 W.L.R. 294 at 296; also see *Re Tain Construction Ltd* [2003] EWHC 1737 (Ch); [2004] B.C.C. 11; [2003] 2 B.C.L.C. 374 at [4], [14]; *Officeserve Technologies Ltd* [2017] EWHC 906 (Ch) at [10].

[232] Notably, in this context, see Ho, "Pari passu distribution and post-petition disposition: a rationalisation of Re Tain Construction" (2003) 19 I. L. & P. 155.

[233] *Express Electrical Distributors Ltd v Beavis* [2016] EWCA Civ 765; [2016] B.P.I.R. 1386.

[234] See, Collins and Galatopoulos, "Out of the ordinary: the meaning of 'ordinary course of business' and retrospective validation of post-petition dispositions" (2011) 5 *Journal of International Banking and Financial Law* 287.

[235] *Re Steane's (Bournemouth) Ltd* [1950] 1 All E.R. 21 at 24–25. There are many factors which a court can consider in making its decision. As to the factors which the court takes into account in exercising its discretion, see *Re Tellsa Furniture Pty Ltd* (1985) 9 A.C.L.R. 869; *Thomas v Commonwealth Bank of Australia* (1994) 12 A.C.L.C. 1059; (1994) 15 A.C.S.R. 529; *Thomas v Hatzipetros* (1997) 15 A.C.L.C. 1224.

[236] *Re Argentum Reductions (UK) Ltd* [1975] 1 W.L.R. 186; compare also *Burton & Deakin Ltd* [1977] 1 W.L.R. 390. A liquidator has power to seek a declaration from the court on the validity of dispositions made by a company after the commencement of winding up: *Craddock v Hoptner* (1986) 4 A.C.L.C. 421.

void.[237] In the seminal case on s.127,[238] Lord Cairns said, after pointing out that s.127 is designed to stop dissipation of the company's property, that where a company is trading if transactions in the ordinary course of business and entered into bona fide were not permitted then the persons interested in the assets of the company could be prejudiced.[239] Naturally the onus is on the applicant for an order that the disposition is not void to show why a validating order should be made.[240] The section itself gives no indication of how the powers, which are completely unfettered, are to be exercised, but there is a considerable body of judicial authority on the subject. There are cases that suggest courts will examine the bona fides of the parties and their intentions,[241] although, as is discussed shortly, recent case law tends to attenuate the view that bona fides and intentions and even knowledge are as important as the cases in the past have suggested.

It has been submitted in the past that it was generally understood that transactions occurring before the giving of notice of the petition would normally be validated.[242] It would appear that an order may have retrospective effect, but the courts will be mindful of the difficulties that that might have for a liquidator.[243]

An order will only be made where there was no serious risk to the creditors or where the court was satisfied that the company's position and hence the position of the creditors would be improved by the transaction being validated.[244] The courts may make an order where full value was not obtained pursuant to the transaction, although they will not do so if the transaction contravenes the policy behind the provision.[245]

If at all possible and practicable, it is preferable that an application be made to seek validation of a transaction prospectively as a court's discretion is less likely to be exercised favourably where validation is sought retrospectively, particularly where there is any period of unexplained delay. Nevertheless, it has been said that a court should be cautious to ensure that prospective applications do not pre-empt the work of a liquidator and should not ordinarily grant a validating order where the subsequent making of a winding-up order is inevitable.[246]

Section 127 does not state who can apply for a validation order. It is submitted that it can include the company, the liquidator or any interested party, usually the beneficiary of the dealing that is to be validated. Who is allowed to apply will depend on the circumstances.[247]

A disposition is only able to be validated where title has passed to the company

---

[237] Given the legal and practical problems which may arise if the court attempted to remake the bargain between the parties, the court is reluctant to validate particular parts of a transaction: *Jardio Holdings Pty Ltd v Dorcon Construction Pty Ltd* (1984) 2 A.C.L.C. 574.

[238] *Re Wiltshire Iron Co* (1868) 3 Ch. App. 443.

[239] *Re Wiltshire Iron Co* (1868) 3 Ch. App. 443 at 446.

[240] *Rushcutters Court Pty Ltd (No.2)* (1978) A.C.L.C. 29,965.

[241] *Re Clifton Place Garage Ltd* [1970] Ch. 477.

[242] Sealy, "Company liquidations: when should post-petition banking transactions be avoided?" *C.C.H. Company Law Newsletter*, Issue 57, 11 July 2000.

[243] *Re Square 3 Ltd* [2006] All E.R. (D) 280 (May).

[244] *RC Brewery Ltd v Revenue and Customs Commissioners* [2013] EWHC 1184 (Ch).

[245] *Wilson v SMC Properties Ltd* [2016] EWHC 444 (Ch); [2016] B.P.I.R. 1074.

[246] *Re Bransfield Engineering Ltd* (1985) 1 B.C.C. 99,409 at 99, 411. When hearing an application for a validation of a transaction ex post, it is not appropriate for a court on every occasion to consider what the position would have been had a prospective application been made: *Wilson v SMC Properties Ltd* [2016] EWHC 444 (Ch); [2016] B.P.I.R. 1074.

[247] In *Re Argentum Reductions (UK) Ltd* [1975] 1 W.L.R. 186, a shareholder of the company was allowed to apply (at 191). Megarry J said that a validation order might be of concern to shareholders

prior to the making of a winding-up order. So, if a contract is executory at the time of the winding-up order no validation order can be made.[248]

7-028 *(i) Application before winding up* The great disadvantage of s.127 is that it has the practical consequence of depriving the directors[249] and, indeed, all persons[250] other than the liquidator, of power to deal with company assets after a petition for a winding-up order had been presented. Since neither the company, nor any person dealing with it, could be sure that the petition would be dismissed or, if it succeeded, that a disposition of property made by the company would be validated by the courts, the effect has been to discourage transactions with the company for as long as this state of uncertainty existed. This in turn tends to make the company's position deteriorate even more rapidly. While unusual, a court is able to make a validating order prior to the making of a winding-up order. Although in *Re Miles Aircraft Ltd*,[251] the court refused to make a validation order prior to the time when a winding up order was made, subsequent cases have not followed that point of view. In *Re A. I. Levy (Holdings) Ltd*.[252] a landlord agreed not to forfeit a lease for non-payment of rent arrears by a tenant company and allowed the company to sell the lease for the benefit of creditors provided that the rent arrears were paid in full. A validating order was made before winding up so as to enable the company to assign the lease notwithstanding the fact that the landlord was paid ahead of other creditors. Buckley J was satisfied that there was jurisdiction to make such an order and considered that the test in such cases was whether the transaction in question was one which must benefit the unsecured creditors if in due course a winding-up order was made on the petition pending.[253] The present position that validation orders may be made prior to winding-up is laudable as it serves to protect people dealing with the company, many of whom are acting without any knowledge of the initiation of winding-up proceedings. Also, as far as the company is concerned, orders made before a winding-up order can be significant in the company's attempt to continue to trade and, if the company is eventually wound up, the completion of transactions may enhance the dividends to be received by creditors who are proving in the winding up. Naturally a person may be unwilling to deal with a company when he or she knows that a winding-up petition has been presented unless a prospective validation order has been made.

There are suggestions in some of the cases that it is likely that dispositions in the ordinary course of business, that are carried out in good faith,[254] will readily be permitted under this provision,[255] unless there is any ground to suggest that what

---

in that transactions to be validated might affect the value of the shares of the shareholders (at 190).

248 *Re Wiltshire Iron Co* (1868) 3 Ch. App. 443; *Re Oriental Bank Corp* (1884) 28 Ch. D. 634. For helpful practical assistance, one can have regard to *Practice Note: Validation Orders (Sections 127 and 284 of the Insolvency Act 1986)* [2007] B.P.I.R. 94; [2007] B.C.C. 91.

249 Directors who disregard s.127 lay themselves open to proceedings for misfeasance: *Re Neath Harbour Smelting & Rolling Works* (1887) 56 L.T. 727; *Couve v J. Pierre Couve Ltd* (1933) 49 C.L.R. 486.

250 See *Re Dittmer Gold Mines Ltd (No.3)* [1954] St.R.Qd 275.

251 *Re Miles Aircraft Ltd* [1948] Ch. 188.

252 *Re A. I. Levy (Holdings) Ltd* [1964] Ch. 19.

253 This was accepted by Mervyn Davies J in *Sugar Properties (Derisley Wood) Ltd* (1987) 3 B.C.C. 88.

254 See *Re Operator Control Cabs Ltd* [1970] 3 All E.R. 657 (note).

255 *Re Wiltshire Iron Co* (1868) 3 Ch. App. 443; *Re Gray's Inn Construction Co Ltd* [1980] 1 W.L.R. 711; [1980] 1 All E.R. 814. Note the cautionary words of Nourse J (as he was then) in *Re Bransfield*

prejudicial manner, an alternative request for a winding-up order may be included.[363] If this latter action is taken then s.127 will apply and this may well paralyse a solvent successful company and be detrimental to all concerned. A Practice Direction[364] has indicated that it is undesirable for a winding-up prayer to be included in a s.994 petition, but if such a prayer is included then the petitioner is required to state whether he or she consents to or opposes a validation order under s.127 in the standard form, as attached to the Practice Direction. If the petitioner is willing to consent then it is normal for the registrar to make a validation order without further action needing to be taken. In *Re A Company (No.007523 of 1986)*[365] and decided before the Practice Direction mentioned above, the petitioner opposed the making of a validation order. Mervyn Davies J said that significant weight should be given to the views of the directors as a petition should not be permitted to stultify the business of the company where such business would benefit all those interested in the value of the company's assets. Notwithstanding this, his Lordship refused the application for a validation order as there was evidence that the company was insolvent and the making of further dispositions would dissipate the assets of the company.

4. Voluntary winding up

7-041 Much of the inconvenience and difficulty caused by s.127 arises from the fact that the commencement of the winding up is artificially antedated to the moment of presentation of the petition for a winding-up order, an event which may have occurred a considerable time before the order was actually made. In voluntary liquidation, the commencement of winding up is simultaneous and identical with the act[366] which gives rise to it, and therefore there is no interim period during which the assets of the company can be disposed of, and doubtless this is why it was thought unnecessary to include in voluntary winding up a prohibition similar to that in s.127. The only time when s.127 is relevant to voluntary liquidation is where voluntary liquidation is succeeded by compulsory liquidation. In such a case the commencement of winding up is deemed to be the date of the resolution to wind up.

As a liquidator assumes control of the property of a company as soon as it passes a resolution to wind up, the danger of a dissipation of assets is not likely and so there is no express statutory provision proscribing the making of dispositions after the beginning of winding up. But if the principal object of s.127 is to preserve the assets of the company for the purpose of rateable division among its creditors, then it must be admitted that sometimes there is a need for a similar prohibition in the case of voluntary winding up of an insolvent company. Even after a liquidator has been appointed, it is possible, for example, that some person dehors the company who has acquired the right to deal with company property[367] may attempt to dispose of it in a manner which is inconsistent with the principle of rateable division. It is submitted, however, that despite the absence of an express provision like that in

---

[363] This is usually on the just and equitable ground.

[364] *No.1 of 1990* [1990] 1 W.L.R. 490; [1990] B.C.C. 292.

[365] *Re A Company (No.007523 of 1986)* [1987] B.C.L.C. 200.

[366] That is, usually, the passing of the resolution to wind up: s.86.

[367] e.g. a person with a power of attorney, as in *Re Dittmer Gold Mines Ltd (No.3)* [1954] St. R. Qd 275; or a garnishor who obtains payment of the company's debt from a garnisheed debtor of the company after commencement of winding up. But note the decision in *Akers v Samba Financial Group* [2017] UKSC 6; [2017] 1 B.C.L.C. 151 that indicates that a trustee could pass the legal title to a third party and this would not be a disposition within s.127.

s.127, such dispositions when made after the commencement of winding up will nevertheless be held invalid—either because of straightforward inconsistency with the principle itself,[368] or because winding up deprives the company of the beneficial interest in its property and puts it beyond the power of anyone to deal with its assets otherwise than in accordance with the manner prescribed by the Act.[369]

Any disposition by a director after the commencement of winding up is not binding on the company, unless the director is authorised,[370] as the directors' powers will cease on the appointment of the liquidator. If the company loses out because of any post-appointment disposition made by the directors, such as being unable to recover the money or property from a third party, then the directors can be proceeded against on the basis of misfeasance.[371]

7-042 One problem that can exist is where a petition is presented against the company and then there is a resolution passed to wind up voluntarily. In such a situation it must be borne in mind that any dispositions made after the presentation of the petition are at risk if a winding up is in fact made eventually.[372]

5. The human rights' dimension

7-043 In closing we must consider the fact that it may be argued that s.127 is incompatible with rights set out in the European Convention on Human Rights. It may be said that the provision infringes two rights of a company. First, the company's right to property under art.1. Secondly, there has been a determination of the company's civil rights without a fair hearing, and therefore a breach of art.6.[373] Also, the company is required to expend money to obtain a validation order if it wishes for a disposition to have effect.[374] Learned commentators have asserted that the counter argument is that the company's right to property is only temporary, and the action of s.127 does not determine the company's rights as it only operates until either a winding-up order is made or the petition is dismissed. In any event the company can apply for a validation order in relation to any disposition.[375] The "bottom line" is whether or not the impact of s.127 is disproportionate. If it is not then it is not going to be regarded as incompatible with the Human Rights Act. It is submitted that s.127 is not disproportionate and it should prevail as it is a critical provision as far as creditors are concerned, ensuring that property of the company is not dissipated while the petitioning creditor is waiting for the processes of the court to take their course.

---

368 As expressed in 1986 Act s.107.

369 See *Re Oriental Inland Steam Co* (1874) 9 Ch. App. 557. *I.R.C. v Olive Mill Ltd* [1963] 1 W.L.R. 712. The cases extend this principle to voluntary winding up.

370 See 1986 Act ss.91(2), 103.

371 See *Re Washington Diamond Mining Co* [1893] 3 Ch. 95 where directors were held liable for the giving of a preference. In this case, the actions of the directors were less reprehensible than directors disposing of property after winding up commences.

372 This situation cannot theoretically occur in Australia because after the presentation of a petition a company cannot wind up voluntarily without the leave of the court: Corporations Law s.490.

373 Simmons and Smith, "The Human Rights Act 1998: the practical impact on insolvency" (2000) 16 I.L. & P. 167, 168.

374 Editorial (2000) 16 I.L. & P. 165.

375 Editorial (2000) 16 I.L. & P. 165.

which all of the proceeds would go to the assignee, the creditors getting a benefit in the form of the price which the assignee will have paid to obtain the claim.

The Australian High Court in *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd*[546] accepted the fact some years ago that litigation funding is a reality of commercial life in Australia, and this has been recognised in the English courts, certainly since *Arkin v Borchard*,[547] and the use of it has risen increasingly.[548] Perhaps more importantly, the UK legislature has come to the same acceptance by introducing the legislation referred to above, even if rather belatedly. It is notable that Statements of Practice that are issued by the Insolvency Service countenance the need for office-holders to seek funding from third parties.

G. Duty to preserve assets

1. General

9-076 Pending realisation and distribution of the assets, the liquidator must do all in his or her power to protect and preserve the assets of the company,[549] and not jeopardise them, for example, by insuring property where it is prudent to do so and by defending any actions brought against the company, though not to the extent of becoming over-litigious and resisting proceedings against which the company has no real defence.[550] In addition, the liquidator must preserve the goodwill of the company's business, if necessary, by carrying on that business during the winding up.

If a company holds assets as a trustee, the liquidator is obliged to take reasonable steps to protect the assets.[551]

2. Carrying on business

9-077 Very often the goodwill of the business which the company is engaged in conducting is one of its more valuable assets, and since it would rapidly deteriorate if trading activities were brought to a sudden halt, the liquidator is empowered by para.5 of Sch.4 to carry on the business of the company in so far as this is necessary for the beneficial winding up of the business. The liquidator must have reasonable grounds for believing that carrying on the business is beneficial or else he or she may be held personally liable for any loss sustained.[552] The power confines a liquidator to acts relating to the business of the company as it existed when the company entered liquidation.[553]

In carrying on business the liquidator may find it necessary to exercise some of

---

[546] *Campbell's Cash and Carry Pty Ltd v Fostif Pty Ltd* [2006] HCA 41; (2006) 229 A.L.R. 58.

[547] *Arkin v Borchard* [2005] EWCA Civ 655.

[548] Jay, "Funding insolvency litigation: a new dawn" (2015) CRI 183, 184.

[549] *Cleve v Financial Corp* (1873) 16 Eq. 363 at 381; *National Trust Co v Trust & Guarantee Co* (1912) 5 D.L.R. 459 at 465.

[550] *General Share Trust Co v Wetley Brick Co* (1881) 22 Ch. D. 260; *Re Wyvern Developments Ltd* [1974] 1 W.L.R. 1097 at 1103.

[551] *Re Crest Realty Pty Ltd (No.2)* [1977] 1 N.S.W.L.R 664; (1977) 2 A.C.L.R. 502; *Porter v Miller Street Pty Ltd* [2008] FCAFC 77.

[552] See *Re Centralcrest Engineering Ltd* [2000] B.C.C. 727 where a liquidator was held liable for misfeasance in circumstances, where, inter alia, she allowed the continuation of trading when it was clear that she should have realised the assets quickly. The company liabilities grew considerably due to the continuation of trading.

[553] *Re Crouch* [2007] NSWSC 1055; (2007) 214 F.L.R. 244 at [23].

H. Duty to realise assets

9-080 The whole object of winding up is, of course, to liquidate the assets so that the proceeds can be applied in satisfaction of the liabilities of the company and the surplus, if any, distributed among the shareholders. The duty of realising the assets of the company rests on the liquidator, who is authorised by para.6 of Sch.4 to sell or otherwise dispose of all or any part of the property of the company[576] and in doing so to execute in the name, on behalf, and under the seal of the company, any necessary deeds, receipts, and other documents.[577] The liquidator may be required by the purchaser to give assurances of title to property sold,[578] and, where there is a sale of the whole of the property en bloc, the liquidator is bound to put the purchaser into a position where the transfer of realty can be obtained and personalty is delivered and to assign all choses in action so as to divest the company completely of its title thereto.[579] Where, as frequently happens, property of the company is burdened by mortgages or charges or otherwise subject to securities, the liquidator is entitled to deduct a reasonable sum to meet the cost of realisation[580] before applying the proceeds in paying the principal debt and any outstanding interest to the secured creditor.[581]

Property may be sold in any manner whatsoever. Liquidators may sell by tender, by private contract or by public auction. It may be necessary for the liquidator to take advice on what would be the best way to sell items of property. It will nearly always be advisable for liquidators to take advice on what the value of the property to be sold is so that they ensure that property is not sold below value. Of course as a liquidator is not able to choose to withhold property from being sold and because buyers will often be aware that property is part of the estate of a company which is in liquidation, it must be expected that property may not be worth what it would be if sold by a going concern. The terms of sale are a matter for the discretion of the liquidator, but risks ought not to be taken and will seldom be justified in selling except for cash or on security.[582] Subject to this, the liquidator's fundamental duty is to realise the assets of the company in the most efficient way and to obtain the highest possible price for the assets, and, while the winding up should not be unnecessarily protracted,[583] it may sometimes be proper, in the interests of augment-

---

576 The power to transfer is implied in the power to sell: *Re Ebsworth & Tidy's Contract* (1889) 42 Ch. D. 23 at 33 per North J, at 43 per Lord Esher MR. The transfer is a transfer by the company not by the liquidator personally: *Style & Mantle Ltd v Prices Tailors Ltd* 1934 S.C. 548 at 553 and 554.

577 1986 Act Sch.4 para.7.

578 *Style & Mantle Ltd v Prices Tailors Ltd*, 1934 S.C. 548, but it is done on behalf of the company.

579 *Stern, N.O. v Standard Trading Co 1955* (3) S.A. 423.

580 But not the costs of preservation: *Re Regent's Canal Ironworks Co* (1875) 3 Ch. D. 411.

581 *Re Marine Mansions Co* (1867) 4 Eq. 601; *Lathom v Greenwich Ferry Co* (1892) 36 Sol. Jo. 789; *Re Universal Distributing Co* (1933) 48 C.L.R. 171 at 174; *Buchler v Talbot* [2004] UKHL 9; [2004] 2 A.C. 298; [2004] 2 W.L.R. 582; [2004] 1 B.C.L.C. 281; *Stewart v Atco Controls Pty Ltd* [2014] HCA 15.

582 *Re Marine Mansions Co* (1867) 4 Eq. 601; *Lathom v Greenwich Ferry Co* (1892) 36 Sol. Jo. 789; *Re Universal Distributing Co* (1933) 48 C.L.R. 171 at 174; *Buchler v Talbot* [2004] UKHL 9; [2004] 2 A.C. 298; [2004] 2 W.L.R. 582; [2004] 1 B.C.L.C. 281.

583 See *Re Oriental Bank Corp* (1887) 56 L.T. 868 per Chitty J.

ing the assets, to sell on terms that payment be deferred,[584] or to lease the property and postpone selling it until conditions are more propitious.[585]

Circumstances in which the liquidator will be justified in purchasing property with a view to its resale must indeed be rare, but they arose in the case of *Re Bairnsdale Food Products Ltd*,[586] where an option to purchase premises leased to the company became exercisable during the winding up and was immediately followed by an offer from a third party to buy the subject property on most favourable terms. It was held that, in accepting both these offers, the liquidator had not exceeded his powers, since the double transaction which had been entered into did not in substance differ from a simple sale of the right conferred by the option. "If," said Fullagar J,

> "the liquidator could buy and sell the subject matter of that right so as to realize for the company the value of that right [and if] he made the purchase only for the purpose of resale … he was really doing no more than selling the assets of the company".[587]

9-081 Liquidators in both compulsory and voluntary winding up must note that if they dispose of any company property to a person who is connected with the company, notice must be given by the liquidator to the liquidation committee.[588]

I. Duty to settle a list of contributories

9-082 An important aspect of the liquidator's tasks is to determine which of the company's members are contributories of the company. These are persons who are liable to contribute to the assets of the company on a winding up.[589] The court has the duty to settle a list of contributories[590] and this power is delegated to liquidators in compulsory liquidations.[591] Also, under s.165(4)(a) the liquidator in a voluntary liquidation is given the power of the court to settle a list of contributories. It is appropriate to note that the court is entitled to dispense with a list of contributories in circumstances where it is not necessary to make calls on, or adjust the rights of, contributories.[592] This would occur where all shares are fully paid up, but in other situations dispensing with a list will depend on the facts and should only be done after due reflection.[593] The duty to settle a list is discussed in depth in Ch.10.

---

584 *Re Mineral Securities Aust. Ltd* [1973] 2 N.S.W.L.R. 207.
585 *Re Premier Permanent Building Society* (1890) 16 V.L.R. 643; *Re Federal Bank of Australia* (1895) 6 B.C. (N.S.W.) 3; *Re GA Listing & Maintenance Pty Ltd* (1994) 15 A.C.S.R. 308.
586 *Re Bairnsdale Food Products Ltd* [1948] V.L.R. 264.
587 *Re Bairnsdale Food Products Ltd* [1948] V.L.R. 264 at 268.
588 1986 Act ss.165(6), 167(2)(a).
589 1986 Act s.79.
590 1986 Act s.148(1).
591 2016 Rules r.7.79.
592 1986 Act s.148(2). Although there is no corresponding provision which relates to voluntary winding up, one assumes that as a voluntary liquidator has the power of the court as far as settling a list, he or she would also have the power, in the appropriate case, to dispense with settling a list.
593 *Re Phoenix Oil and Transport Co Ltd* [1958] Ch. 565.

(iv) Contracts Contracts not determined by the liquidation of the company may be disclaimed by the liquidator in the course of the winding up only where they are unprofitable. Disclaimer occurs sometimes where the contract is of a kind which imposes continuing obligations,[849] the effect being to bring the company's liabilities to an end, leaving the other party with a right of proving for damages in the winding up.[850] As noted earlier, a contract cannot be disclaimed merely because the property that is the subject of the contract can be sold by a liquidator more readily and at a higher price if a contract was not in place, as this will not in itself mean that the contract is unprofitable.[851] **9-106**

K. Duty to distribute to creditors

After paying off expenses of the liquidation and other priority claims that are set out in r.6.42 for creditors' voluntary liquidations and r.7.108 in compulsory liquidations, the liquidator has a duty to distribute what remains, if anything, to the creditors. This distribution must be in accordance with the Act and will entail the payment of some creditors, such as the payment of employees within statutory limits, in priority to general creditors.[852] This duty is not able to be delegated to anyone else.[853] **9-107**

L. Duty to distribute surplus assets

When all the assets of the company have been got in and realised, and all the debts and liabilities, including the costs of winding up, have been paid or provided for, which will not occur where a company was insolvent, the liquidator may proceed to distribute any surplus among the members of the company.[854] Their rights of sharing in the distribution may be prescribed in the memorandum or articles of association, but subject to these, the principle is one of equality.[855] In order to carry this into effect, it may be necessary for the liquidator to adjust the rights of the contributories inter se by making calls on those who have paid less on their shares than their fellow members in order to ensure that losses are evenly distributed among all the members of the company.[856] Once this stage has been reached the liquidator is virtually a bare trustee for the members,[857] who can call upon the liquidator to distribute the remaining assets either in their liquidated form or in specie.[858] Any amounts in the hands of the liquidator which have remained unclaimed or not distributed after dissolution or the liquidator's earlier vacation of office, and which represent unclaimed or undistributed assets of the company, are to be paid immediately to the Insolvency Service Account kept with the Bank of England[859] and anyone who believes that they are entitled to a sum of money may apply to the Department of Business, Energy and Industrial Strategy for payment. **9-108**

---

849 Compare *Re Premier Products Ltd* [1965] N.Z.L.R. 50.
850 See 1986 Act s.178(6).
851 *Re Blue Sennar Air Pty Ltd (in liq)* [2016] NSWSC 772.
852 This is discussed in detail in Ch.13 below.
853 *Cavanagh v Conway* [2015] NIQB 69.
854 See *Ayerst v C&K (Construction) Ltd* [1976] A.C. 167 HL at 177.
855 1986 Act s.107 and 2016 Rules r.14.12(1)–(2).
856 See below at paras 10-002–10-003.
857 *Miller & Maund Ltd v Commissioner of Stamp Duties* [1959] Tas. S.R. 94.
858 See *March v Martin* [1880] W.N. 111; *Re English & Foreign Credit Co* (1884) 1 T.L.R. 1.
859 Insolvency Regulations 1994 reg.18.

If, unusually, a company which is being wound up in insolvency and by way of compulsory liquidation, has a surplus, then s.154 provides that the court will distribute any surplus to those entitled to it. The liquidator is not permitted to make a distribution. He or she may only distribute it after obtaining special leave from the court.[860] The liquidator must apply to the court for an order under r.7.117. A list of persons to whom it is intended to return capital must accompany the application.[861] If an order is made then the liquidator is sent a sealed copy of the order[862] and the liquidator is to follow the procedures set out in r.7.118.

M. Duty to bring about dissolution

9-109 The final step in the winding up is to procure the dissolution of the company.[863] This occurs after the liquidator has completed the winding up, made the final distributions to creditors (in insolvent liquidations) and distributions representing surplus assets to members of the company in solvent liquidations. The procedure for doing so under the legislation pre-dating the Act used to vary according to whether the company had been wound up compulsorily or voluntarily. This is no longer the case. This topic is discussed in depth in Ch.17 below.

IV. SUPERVISION AND CONTROL OF LIQUIDATORS

9-110 It is clear that, in essence, liquidators, as experienced professionals, are trusted to act reasonably, carefully and properly, and as a consequence they have a good deal of freedom to conduct a winding up in accordance with their discretion. Notwithstanding that, the Act does make some provision for supervision and control over liquidators.

The creditors and contributories are able to exercise some measure of direct control over liquidators in the performance of their duties through the medium of decision procedures and meetings which it is their duty to seek or call from time to time.[864] Apart from this, however, it is primarily to the court and the Secretary of State that the creditors and contributories must look for effective protection against misconduct or errors on the part of liquidators. Liquidators may seek the decisions of creditors and contributories to ascertain their views[865] but they are not bound to follow those views. However, it would be normal for liquidators to give weight to the opinion of the majority of the creditors unless either the creditors were influenced unduly by extraneous considerations or where special circumstances existed.[866] According to Snowden J in *Re Longmeade Ltd*:

> "[I]f *all* the persons having an interest in the insolvent company are fully informed and of the same view, then it seems to me that the liquidator would ordinarily be obliged to give effect to that view. That follows from the fact that liquidation is a statutory scheme

---

860 For an Australian case where this occurred, see *Re DS Millard & Son Pty Ltd* (1997) 15 A.C.L.C. 808; (1997) 24 A.C.S.R. 71.

861 2016 Rules r.7.117(2). Also, see r.7.117(3).

862 2016 Rules r.7.117(4).

863 See Ch.17 below.

864 See 1986 Act s.168(1)–(2).

865 See 1986 Act s.195.

866 *Re Longmeade Ltd* [2016] EWHC 356 (Ch); [2016] B.P.I.R. 666 at [51]. This case related to whether there should be a commencement of proceedings in order to benefit the company.

ITEM NO. 144

JA-30

EXHIBIT EE

[2023] UKPC 33
Privy Council Appeal No 0055 of 2020

JUDGMENT

FamilyMart China Holding Co Ltd (Respondent) *v* Ting Chuan (Cayman Islands) Holding Corporation (Appellant)

On appeal from the Court of Appeal of the Cayman Islands

before

Lord Reed
Lord Hodge
Lord Lloyd-Jones
Lord Briggs
Lord Kitchin

JUDGMENT GIVEN ON
20 September 2023

Heard on 15 and 16 November 2022

Appellant
Charles Kimmins KC
Mac Imrie KC
Paul Smith
Ryan Hallett
Mark Tushingham

(Instructed by Charles Russell Speechlys LLP (London), Maples and Calder (Cayman) LLP and Sidley Austin (Hong Kong))

Respondent
Tom Lowe KC
Hilary Stonefrost
Gemma Lardner
Corey Byrne
(Instructed by Sharpe Pritchard LLP and Ogier (Cayman) LLP)

LORD HODGE:

1. This appeal raises the question whether an agreement to settle disputes arising out of a shareholders' agreement by arbitration may prevent a party to that agreement from pursuing a petition to wind up the company whose management is the focus of those disputes. The other side of the coin is whether an application to the Grand Court to wind up that company on the just and equitable ground makes all matters which are the subject matter of those court proceedings non-arbitrable, thereby rendering inoperative the agreement to resolve such disputes by arbitration.

2. Ting Chuan (Cayman Islands) Holding Corporation ("Ting Chuan") and FamilyMart China Holding Co Ltd ("FMCH") are the shareholders of China CVS (Cayman Islands) Holding Corp ("the Company") which is the company that is subject to the winding up proceedings. Ting Chuan owns 59.65% and FMCH 40.35% of the issued shares in the Company.

3. The relationship between Ting Chuan and FMCH so far as is relevant is governed by a shareholders' agreement dated 11 May 2011 ("the SHA"), pursuant to which four of the Company's seven directors are nominated by Ting Chuan (referred to as "the majority directors") and three are nominated by FMCH (referred to as "the minority directors"). FMCH alleges that there was an understanding between it and Ting Chuan as to how the Company would operate its business.

4. The Company through nine subsidiaries operates a very substantial convenience store business in the People's Republic of China ("PRC") under the brand name "FamilyMart". As at 31 December 2021 the business had an annual turnover in excess of US $1.32 billion. The Company was licensed to operate through its subsidiaries the FamilyMart brand in the PRC in return for a royalty of 1 per cent on all revenues. The Company is solvent and operates as a going concern. As explained below, nobody intends to wind up the business, but establishing the grounds for winding up the Company on the just and equitable ground is a necessary step in the company law of the Cayman Islands in order to obtain a court order for the buy-out of the shareholding in the Company of the majority shareholder (here, Ting Chuan).

1. Factual background

5. FMCH is a Japanese company whose owners are two enterprises, Taiwan FamilyMart Co Ltd and FamilyMart Co Ltd (referred to as "the FM parties"), one of which has had considerable success in the convenience store business in Japan and elsewhere in Asia for over 40 years under the brand name "FamilyMart". The owner of Ting Chuan is Ting Hsin (Cayman Islands) Holding Corporation ("Ting Hsin") which was until 2006 the majority shareholder of the Company. Ting Chuan and Ting Hsin are

part of a group of companies founded by the Wei family which includes entities related to or associated with Ting Chuan or Ting Hsin (referred to as "the Ting Hsin Group").

6. Members of the Ting Hsin Group have experience in the food industry but lacked expertise in the convenience store business. To make up for that lack of expertise they required the assistance of staff provided by the FM parties to act as departmental heads with a view to transferring those responsibilities to Ting Hsin's own staff at a later date. FMCH believes that the Ting Hsin Group is owned and controlled by the majority directors who are members of the Wei family, and their family members.

7. FMCH presented a petition to wind up the Company to the Grand Court on 12 October 2018. In that petition FMCH alleges that the Company was incorporated as a joint venture vehicle to develop and conduct a convenience store business in the PRC. The Ting Hsin Group sought by the joint venture to combine the FamilyMart brand and the expertise of the FM parties with the infrastructure which the Ting Hsin Group had established in the PRC. Relations between Ting Chuan and FMCH became strained because FMCH believed and believes that since about 2012 the majority directors of the Company have diverted profits of the Company to members of the Ting Hsin Group which are suppliers of the Company, being food factories and the suppliers of logistics and information processing services to the Company, and have prevented the minority directors from gaining access to information relating to the Company's business, including the identity of those related party suppliers. FMCH asserts that, by so acting, Ting Chuan acted in breach of an understanding that the contracting of such services would be transparent and disclosed by the Ting Hsin Group to the FM parties and would be on a footing that the terms were fair and reasonable.

8. In its petition FMCH alleges that Ting Chuan and/or Ting Hsin have caused, permitted and/or procured the majority directors to act in breach of their duties to the Company. FMCH alleges (i) that it has lost trust and confidence in the conduct and management of the Company's affairs as a result of that lack of probity and (ii) that its relationship with Ting Chuan has irretrievably broken down. FMCH avers that it is just and equitable that the Company be wound up. In the alternative, and this is the real aim of its application, FMCH seeks an order from the Grand Court that Ting Chuan be required to sell its majority stake in the Company to FMCH at a value to be determined by the Court, if not agreed.

9. Ting Chuan, relying on the arbitration agreement in the SHA, applied to strike out the winding up petition or, alternatively, for an order dismissing or staying the petition under section 4 of the Foreign Arbitral Awards Enforcement Act (1997 Revision) ("FAAEA") or under the inherent jurisdiction of the court until the disputes which underlay the petition had been arbitrated. By the Citation of Acts of Parliament Act 2020 legislation which previously was referred to as a "Law" is now referred to as an "Act". The Board adopts that nomenclature in this judgment.

10. The Grand Court (Kawaley J) in an order dated 25 February 2019 granted Ting Chuan's application to stay the winding up proceedings for arbitration under section 4 of the FAAEA. By order dated 14 July 2020, Kawaley J, in an exercise of his powers under the Companies Winding up Rules O.3 r 12(1)(a), (b) and (d), allowed the Company to defend the proceedings if so advised, and ordered that the petition be treated as an inter partes proceeding and that the advertisement of the petition be dispensed with.

11. As discussed more fully below, the Court of Appeal by order dated 27 July 2020 set aside Kawaley J's order of 25 February 2019 and refused to grant a stay of the winding up petition. Ting Chuan has obtained the permission of the Board to appeal against that decision.

2. The arbitration agreement

12. Section 20.3(a) of the SHA provides that it is governed by the laws of the Cayman Islands. The SHA contains the arbitration agreement (section 20.3(b)) which, so far as relevant, provides:

> "Any and all disputes in connection with or arising out of this Agreement shall, insofar as is possible, first be settled amicably by the Parties hereto. … If the Parties cannot come to an amicable settlement within twenty (20) days of the onset of any dispute, *any and all disputes in connection with or arising out of this Agreement [shall be] submitted for arbitration* in accordance with and finally settled under the Rules of Arbitration of the International Chamber of commerce [sic] in effect at the time of the arbitration, except as may be modified herein or by mutual agreement of the Parties. The arbitration shall be confidential and conducted in the Chinese language. The Parties agree that the arbitration shall take place in Beijing, PRC. The award of the arbitration tribunal shall be final and binding upon the disputing Parties, and the prevailing Party may apply to a court of competent jurisdiction for enforcement of such award. …" (Emphasis added)

13. FMCH initially argued that the dispute between it and Ting Chuan did not fall within the scope of the arbitration agreement, but it abandoned that contention in the course of the hearing before the Court of Appeal. It is now a matter of agreement that the dispute falls within the scope of the arbitration agreement. The central dispute between the parties is now whether FMCH's petition in the Grand Court for the winding

up of the Company has made the matters raised in that petition not susceptible to arbitration.

3. The relevant statutory provisions

14. The Companies Act (2022 Revision) provides in section 90 that a company may be wound up compulsorily by order of the Court. Section 92 provides that a company may be wound up by the Court on various grounds including if "(e) *the Court is of opinion* that it is just and equitable that the company should be wound up" (Emphasis added).

15. Section 95, which sets out the powers of the court, provides in subsection (2):

> "The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company."

Subsection (3) provides for several remedies, including the remedy which FMCH is seeking by its presentation of the winding up petition. It provides so far as relevant:

> "If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely – …
>
> (d) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly."

This provision was introduced into the Companies Act by the Companies (Amendment) Act 2007. As is well known, the Cayman Islands has not provided in its company law for a self-standing petition (separate from a winding up petition) by a member of a company for a remedy where the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to the interests of members. Such a remedy was introduced into United Kingdom company law by section 75 of the Companies Act 1980 and is now contained in sections 994-996 of the Companies Act 2006.

16. The Cayman Islands has separate legislation governing foreign arbitrations and domestic arbitrations. The FAAEA addresses foreign arbitrations and gives effect to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("the New York Convention"). Section 4 of the FAAEA, which gives effect to article II of the New York Convention, provides:

> "If any party to an arbitration agreement … commences any legal proceedings in any court against any other party to the agreement … in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is … inoperative …, shall make an order staying the proceedings."

Domestic arbitration agreements in the Cayman Islands are governed by the Arbitration Act 2012, which is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006) and the English Arbitration Act 1996.

4. The judgments of the courts below

17. Kawaley J in his judgment of 25 February 2019 observed (para 17) that the petition had been drafted in a "somewhat obtuse way" to sidestep the argument that the complaints arose in relation to the SHA and were caught by the very broad arbitration agreement. He held (para 61) that it was "clear beyond sensible argument" that the allegations in the petition related to the subject matter of the SHA. He rejected FMCH's submission that the underlying disputes were not arbitrable because only the court can grant a winding up order, holding that there was a fundamental difference between the resolution of the underlying disputes and the grant by the court of statutory relief (para 66). He attached no significance to the fact that neither the Company nor the majority directors were parties to the SHA because the genuine dispute was between the minority shareholder and the majority shareholder (para 67). He granted a mandatory stay of the winding up petition under section 4 of the FAAEA.

18. The Court of Appeal (Rix, Martin and Moses JJA), in a judgment dated 23 April 2020, overturned Kawaley J's decision, holding that the court had exclusive jurisdiction to determine whether a company should be wound up on the just and equitable ground and that, as a result, the underlying disputes were not susceptible to arbitration, notwithstanding that they fell within the scope of the arbitration agreement contained in the SHA. In so deciding, the Court of Appeal discussed as a key authority the judgments of Patten, Longmore and Rix LJJ in the Court of Appeal of England and Wales in

Fulham Football Club (1987) Ltd v Richards [2011] EWCA Civ 855; [2012] Ch 333 ("*Fulham*"), in which the court granted a stay of an unfair prejudice petition under section 994 of the Companies Act 2006 to enable the parties to resolve their underlying dispute by arbitration. The Cayman Islands Court of Appeal, in the leading judgment by Moses JA, also considered other cases, including the judgment of Harris J in the Hong Kong High Court in *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759 ("*Quiksilver*"), in which the judge stayed a petition seeking a winding up on the just and equitable ground to enable the substantive dispute between the parties, which was within the scope of an arbitration agreement, to be determined by arbitration; and a judgment of the Federal Court of Australia in *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164 ("*WDR Delaware*"), which followed the *Quiksilver* judgment by granting a stay for arbitration of a petition on the grounds of oppressive or unfairly prejudicial behaviour in which a winding up order was only one of several available remedies. The rationale of those cases was that an essentially private dispute between shareholders, in which discrete issues could be identified, should be resolved, in accordance with the parties' agreement, by arbitration.

19. Moses JA distinguished those cases, holding that under section 92 of the Companies Act the court's consideration of whether it is just and equitable that a company should be wound up is a threshold question and not a question of relief. Section 92 was the sole gateway to obtaining alternative relief under section 95(3): *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* [2019] CILR 481 ("*Tianrui*"). *Tianrui* did not involve a conflict between an arbitration agreement and a petition to wind up a company but its reasoning was central to the Court of Appeal's reasoning. *Fulham* was to be distinguished on the basis that in that case there was no need to prove conduct that would justify winding up the company. By contrast in the context of an application to wind up a company on the just and equitable ground, Moses JA summarised the question in these terms (para 98):

> "In cases where there is an arbitration agreement the scope of which embraces disputes of fact which are also raised in the petition, the question of a stay to arbitration turns on whether it is possible to submit such disputes to arbitration without trespassing upon the exclusive jurisdiction of the court to make a winding up order."

He stated that in *Fulham* and the cases which had followed it, the courts had identified discrete, substantive issues which did not invoke the exclusive jurisdiction of the court. But where a petitioner was invoking a statutory right to bring the petition and the underlying issues were central and inextricably connected to the question whether the company should be wound up on the just and equitable ground, it was difficult to identify discrete issues outside the exclusive jurisdiction of the court.

20. Moses JA held that in determining the threshold question the court did not have to determine only questions of primary fact but had to evaluate all the circumstances of the case. The court had to decide whether the conduct of the majority directors and the breakdown of the relationship between the shareholders justified the winding up of the Company. If matters were hived off to arbitration, there would be a risk of inconsistent decisions where there was first a decision by an arbitrator and then a further decision by the court which took into account the arbitrator's award where some of the parties to the petition would not be bound by the arbitrator's award. This outcome could be avoided only if the parties had agreed not to present a winding up petition. No such agreement was expressly stated in the SHA and none could be implied. As a result, section 95(2) of the Companies Act did not apply.

21. Moses JA held that because neither the majority directors nor the Company were parties to the SHA and thereby to the arbitration agreement, it was not permissible to apply the mandatory provisions of section 4 of the FAAEA to the petition in its entirety and because the allegations against Ting Chuan could not be separated from the threshold issue, section 4 could not operate pro tanto. The arbitration agreement was therefore inoperative. Finally, there was no basis for the court to grant a discretionary stay in the exercise of its powers of case management.

5. The parties' positions in this appeal

22. Ting Chuan submits that the Court of Appeal erred in refusing to grant a stay of the winding up petition to allow disputes under the SHA to be determined by arbitration. Ting Chuan asserts that (i) it and FMCH are parties to an arbitration agreement, (ii) FMCH has commenced legal proceedings against it, (iii) those legal proceedings are in respect of matters agreed to be referred to arbitration, and (iv) therefore it is entitled to a mandatory stay unless the Board is satisfied that the relevant matters are non-arbitrable.

23. Ting Chuan identifies the matters which it argues are arbitrable and entitle it to a mandatory stay under the FAAEA. It argues that the petition for winding up contains five matters, the first four of which should be determined by arbitration. The five matters are:

> (1) Whether FMCH has lost trust and confidence in Ting Chuan and in the conduct and management of the Company's affairs. Ting Chuan particularises this matter into three sub-headings: (i) whether the majority directors owe various duties to the Company, (ii) whether the majority directors have breached those duties or engaged in misconduct, and (iii) whether Ting Chuan caused, permitted or procured the majority directors to act in breach of their duties or to engage in the alleged misconduct.

(2) Whether the fundamental relationship between FMCH and Ting Chuan has irretrievably broken down. In particular: (i) whether an understanding was reached between the shareholders by 2003 and, if so, what were the terms of that understanding, (ii) was the understanding superseded at any point in time after 2003, for example by reason of the conclusion of the SHA, and (iii) whether Ting Chuan acted contrary to that understanding after 2012.

(3) Whether it is just and equitable that the Company should be wound up.

(4) Whether FMCH should be granted the alternative relief, which it prefers, under section 95(3)(d) of the Companies Act, namely an order requiring Ting Chuan to sell its shares in the Company to FMCH, and, if so, what is the value of those shares.

(5) Whether, if such alternative relief is not appropriate, an order winding up the Company should be made and whether the persons identified by FMCH should be appointed as joint official liquidators.

In the alternative, Ting Chuan argues that the first two matters listed above are arbitrable, that there should be a mandatory stay of the winding up petition pro tanto under the FAAEA, and that the Board should grant a discretionary stay of matters (3) to (5) above.

24. FMCH invites the Board to uphold the judgment of the Court of Appeal. It characterises the principal question raised in the appeal as being whether and, if so, in what respect and to what extent a petition to wind up a Cayman Islands registered company on the just and equitable ground is arbitrable. It argues that the legislation does not allow a private arbitral tribunal to make the critical threshold decision that it is just and equitable that a company should be wound up. It advances two principal reasons for that view. First, it submits that the proceedings are inherently unsuited to arbitration, and, secondly, it argues that the legislature has recognised that there is a public interest in the judicial determination of winding up petitions in open court, which excludes the use of private arbitration to any extent in the process. It points out that a court in deciding whether it is just and equitable that a company be wound up has regard to all the facts as they exist at the date of the hearing and exercises its discretion at that date. The proceedings must be conducted expeditiously because section 99 of the Companies Act may render void dispositions of property and other transactions made after the presentation of the petition. By contrast, the reference to arbitration of matters encompassed by the winding up application might require multiple and successive arbitrations which would not bind all of the parties to the winding up petition. This cannot have been what a rational businessperson would have contemplated. The winding up petition has been stayed since 2018 while the parties, on Ting Chuan's

insistence, engaged in a very expensive arbitration before the ICC International Court of Arbitration which lasted three and a half years dealing with claims which Ting Chuan advanced, unsuccessfully, against FMCH.

6. The structure of The Board's analysis

25. In addressing those submissions, the Board first considers by way of background the uncontested view that, as a general rule, the law of the Cayman Islands, like English law and the laws of many other jurisdictions, respects the right of parties to agree to have their disputes determined by a private arbitral tribunal. Secondly, the Board addresses the interpretation of section 4 of the FAAEA, and in particular the meaning of (i) "legal proceedings", (ii) "matters", and (iii) "the arbitration agreement is … inoperative". The Board, thirdly, considers whether the petition for winding up on the just and equitable ground is an unum quid, excluding any possibility of arbitration, or whether there should be a partial stay under the FAAEA so that matters within the scope of the arbitration agreement can and should be hived off for arbitration. Fourthly, the Board considers the application for a discretionary stay of the winding up petition; and, finally, the Board briefly addresses a submission relating to section 95(2) of the Companies Act.

7. Background: the approach to arbitration agreements

26. It is common ground in this case that the disputes between Ting Chuan and FMCH, which are articulated in the winding up petition, fall within the scope of the arbitration agreement. No question therefore arises as to the interpretation of the arbitration agreement itself. Case law in England and Wales, and the Cayman Islands, which adopts a liberal interpretation of an arbitration agreement, is not directly in issue. Nonetheless, such case law on interpretation is indicative of the respect which the courts of many jurisdictions give to the autonomy of parties to choose how they wish their disputes to be resolved. In *Enka Insaat ve Sanayi AS v OOO "Insurance Co Chubb"* [2020] UKSC 38; [2020] 1 WLR 4117, ("*Enka Insaat*") Lord Hamblen and Lord Leggatt, giving the leading judgment of the court, stated (para 107):

> "In *Fiona Trust & Holding Corpn v Privalov* [[2007] UKHL 40;] [2007] Bus LR 1719, the House of Lords affirmed the principle that 'the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal' (see para 13, per Lord Hoffmann).

> Contrary to a submission made on behalf of Chubb Russia, this is not a parochial approach but one which, as the House of Lords noted in the *Fiona Trust* case, has been recognised by (amongst other foreign courts) the German Federal Supreme Court (Bundesgerichtshof), the Federal Court of Australia and the United States Supreme Court and, as stated by Lord Hope at para 31, 'is now firmly embedded as part of the law of international commerce'. In his monumental work on *International Commercial Arbitration,* 2nd ed (2014), p 1403 Gary Born summarises the position as follows:
>
> 'In a substantial majority of all jurisdictions, national law provides that international arbitration agreements should be interpreted in light of a "pro-arbitration" presumption. Derived from the policies of leading international arbitration conventions and national arbitration legislation, and from the parties' likely objectives, this type of presumption provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims. That is particularly true where an arbitration clause encompasses some of the parties' disputes and the question is whether it also applies to related disputes, so that all such controversies can be resolved in a single proceeding (rather than in multiple proceedings in different forums).'"

The Court of Appeal of the Cayman Islands has adopted a similarly expansive approach to the interpretation of arbitration agreements in order to give effect to the reasonable commercial expectations of the parties: *McAlpine Ltd v Butterfield Bank (Cayman) Ltd* (Appeal No 30 of 2019) (unreported) 21 November 2019 at paras 30-31.

27. The legislature of the Cayman Islands in enacting statutory rules for its domestic arbitration in the Arbitration Act 2012 stated the principles on which the Act was founded and by which its provisions should be construed: section 3(3). Those principles are:

> "(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial arbitral tribunal without undue delay or undue expense;
>
> (b) *the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest*; and

> (c) in matters governed by this Law the court should not intervene except as provided in this Law." (Emphasis added)

Those principles are articulated in substantially the same terms in section 1 of the Arbitration Act 1996 in England and Wales and in section 1 of the Arbitration (Scotland) Act 2010. The respect which they show to the autonomy of the parties is not a new phenomenon. In England and Wales, the courts until the later nineteenth century often took the view that a contract to oust the jurisdiction of the courts was against public policy and would not enforce such a contract. This approach was altered by legislation in the Common Law Procedure Act 1854, section 11 and in section 4 of the Arbitration Act 1889. Such a judicial approach to arbitration agreements did not exist in Scotland as the House of Lords explained in *A Sanderson & Son v Armour & Co Ltd* 1922 SC (HL) 117, in which Lord Dunedin expressed the matter pithily (p126): "[i]f the parties have contracted to arbitrate, to arbitration they must go." More recently, similar statements have been made about English law: in *Nori Holding Ltd v PJSC Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm); [2019] Bus LR 146, at para 66, Males J stated: "[w]here parties agree to arbitrate, it is the policy of the law that they should be held to their bargain." See also Mustill & Boyd, *Commercial Arbitration,* 2nd ed, Companion Vol (2001) p 75.

28. Ting Chuan prays in aid section 26 of the Arbitration Act 2012 which provides:

> "(1) Any dispute that parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law of the Islands, such a dispute is not capable of determination by arbitration.
>
> (2) The fact that any other law confers jurisdiction in respect of any matter on the court but does not refer to the determination of that matter by arbitration, does not mean that a dispute about that matter is incapable of determination by arbitration."

In the Board's view FMCH is correct in its submission that the 2012 Act, which is concerned only with arbitrations where the seat of the arbitration is in the Islands (section 3(1)), is not of itself a valid tool for interpreting the FAAEA, which was enacted at an earlier date and is concerned only with arbitrations with a foreign seat. Nonetheless, the section is consistent with a position in relation to international arbitration which has extensive support internationally. See for example, in England and Wales, *Wealands v CLC Contractors Ltd* [2000] 1 All ER (Comm) 30 ("*Wealands*"), Mance LJ paras 17, 18 and 21; *Bridgehouse (Bradford No 2) Ltd v BAE Systems plc*

[2020] EWCA Civ 759; [2020] Bus LR 2025, Newey LJ paras 56-57; and *Fulham*, Patten LJ paras 27-33; in Singapore, *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57; [2016] 1 SLR 373 ("*Tomolugen*"), Sundaresh Menon CJ paras 75-76; in Australia, *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 ("*Tridon*"), Austin J paras 192-194, *WDR Delaware* Foster J para 147; in Hong Kong *Quiksilver*, Harris J para 14. The Board observes a similar approach in the jurisprudence of the Supreme Court of the United States: see, for example, *Green Tree Financial Corp-Alabama v Randolph* (2000) 531 US 79, Rehnquist CJ at p 90. It is important in cases which arise out of domestic legislative provisions implementing the New York Convention to have regard to jurisprudence in other contracting states to promote legal certainty in the jurisprudence relating to international arbitration.

29. The Board therefore accepts Ting Chuan's submission that effect should be given to the arbitration agreement unless the agreement is contrary to the public policy of the Islands or there is a rule of law or statutory provision which renders the matters within the scope of the arbitration agreement incapable of resolution by arbitration.

8. The interpretation of section 4 of the FAAEA

30. Section 4 of the FAAEA (para 16 above) implements article II(3) of the New York Convention which provides:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

31. Many countries which are contracting states to the New York Convention have implemented provisions like section 4 of the FAAEA in accordance with their obligations under the New York Convention. In *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21 ("*Gol Linhas*") the Board, in a judgment delivered by Lord Hamblen and Lord Leggatt, addressed the correct approach to the interpretation of the FAAEA. In para 21 of its judgment the Board referred to the judgment of the UK Supreme Court in *Enka Insaat* at para 126 in which it observed that more than 160 states had signed the New York Convention and stated:

> "The essential aim of the Convention was to establish a single uniform set of international legal standards for the recognition and enforcement of arbitration agreements and awards. Its

> success is reflected in the fact that … the New York Convention has been implemented through national legislation in virtually all contracting states." (Citations omitted)

The Board went on to observe (para 74) that the meaning of a Cayman Islands statute is a question to be decided by applying the law of the Cayman Islands but that the international origin of the provision necessitated a particular approach to its interpretation. The Board stated (para 75):

> "As with any statute which incorporates into domestic law the text of an international treaty, the interpretation and application of the statutory language must take account of its origin in an international instrument intended to have an international currency. That entails that, as Lord Macmillan put it in *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 350, in the interests of uniformity the words should not be given a local interpretation controlled by what he called 'domestic precedents of antecedent date', but rather should be construed 'on broad principles of general acceptation'; see also *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 152 (Lord Wilberforce); *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 281-282 (Lord Diplock). This principle is just as relevant in determining the scope of application of rules incorporating an international convention as it is in interpreting their linguistic meaning."

It is appropriate therefore to consider the jurisprudence of several countries as guides to the interpretation of section 4 of the FAAEA in so far as they have statutory provisions which are worded in a similar way to the Cayman Islands provision.

32. The Board has set out the relevant text of section 4 of the FAAEA in paragraph 16 above. Several questions of interpretation arise. They are (i) the meaning of "legal proceedings" commenced by a party to an arbitration agreement, (ii) the meaning of any "matter" which the parties have agreed to refer to arbitration, (iii) whether a stay of legal proceedings can be a partial stay, and (iv) the meaning of "inoperative" in the phrase "the court, unless satisfied that the arbitration agreement is ... inoperative… shall make an order staying the proceedings".

(a) The meaning of "legal proceedings"

33. It was not contentious and the Board sees no reason to question that "legal proceedings" in section 4 of the FAAEA can include a petition to wind up a company of which the parties to an arbitration agreement are members. In *Fulham* (para 33) the Court of Appeal of England and Wales treated as legal proceedings under section 9(1) of the Arbitration Act 1996 a petition under section 994 of the Companies Act 2006 alleging that a company's affairs had been conducted in a manner which was unfair to the petitioner as one of its members. In *Quiksilver*, Harris J in the Court of First Instance in Hong Kong dealt with a petition for the winding up of a solvent company on the just and equitable ground. The relevant provision of the Arbitration Ordinance (differing from those of the Cayman Islands and England and Wales) spoke of "a court before which an action is brought" having the power to refer the parties to the petition to an arbitration. He observed that winding up proceedings were not an action and distinguished the case of *Fulham* on that ground; but, as the parties did not dispute that the court had a discretionary power to stay the petition, the difference in wording between the Hong Kong provisions and the English provisions did not have a material impact on the matter which he had to decide (paras 20-21).

(b) The meaning and ascertainment of "matter"

34. There is now considerable jurisprudence in several countries which casts light on the meaning of a "matter" in domestic legislation implementing the New York Convention.

35. In *Fulham* Patten LJ, giving the leading judgment of the Court of Appeal of England and Wales, treated as "matters" falling within the arbitration clause of the rules of the Football Association Premier League Ltd ("the FAPL") the allegation that there had been unfair prejudice to Fulham Football Club (1987) Ltd ("the Club") in the conduct of the affairs of the FAPL and the remedies, which the Club sought, of an order restraining the chairman of the FAPL from participating in future player transfer negotiations and an order that he cease to be chairman of the FAPL. In para 33 Patten LJ observed that it was common ground that an arbitrator could make the orders which the Club sought. In substance, the subject matter of the Club's petition under section 994 of the Companies Act 2006 was treated as a matter to be referred to arbitration and the section 994 petition was stayed. The principal question which was in dispute in that case was whether the matters were arbitrable; a similar question arises in this appeal which the Board addresses below.

36. In *Lombard North Central plc v GATX Corporation* [2012] EWHC 1067 (Comm); [2013] Bus LR 68 ("*Lombard North Central*") Andrew Smith J in the High Court of England and Wales addressed an application under section 9 of the Arbitration Act 1996 for a stay of legal proceedings for arbitration. The arbitration agreement was contained in an agreement for the financing of train vehicles which provided for the establishment of a joint venture by the claimants and another company. The arbitration

agreement covered disputes which arose relating to the joint venture. The claimants sought declaratory relief in the High Court concerning the meaning of a clause in the agreement which provided for the establishment of the joint venture. The defendants applied for a stay of those proceedings. The case involved a dispute as to the scope of the arbitration agreement, a subject with which the Board is not concerned in this appeal, and the meaning of section 9 of the 1996 Act. In his judgment Andrew Smith J focussed on the words "in respect of" a matter rather than the word "matter" in section 9. What he said is nonetheless important with regard to the meaning of "matter" as his statements on the subject in paras 13-17 of his judgment have been relied on in the English cases which the Board discusses below.

37. In his discussion in those paragraphs Andrew Smith J, first, recognised that section 9 empowers the court to grant a stay of part of legal proceedings, where those proceedings were in respect of a referred matter and other matters. He held that the express words of section 9(1) permitted such a stay as they referred to a stay of the proceedings "so far as they concern that matter". Secondly, he stated that the court determines whether the proceedings relate to a referred matter by having regard to the nature of the claim or claims rather than relying only on the formulations in the claim form and any pleadings. In so doing, the court should consider what questions will foreseeably arise for determination in the proceedings, and whether they include, or would foreseeably include, referred matters. Such foreseeable questions would, in the Board's view, include matters raised in defences yet to be pleaded. Thirdly, he held that a party to an arbitration agreement is entitled to a stay unless he could have no real or proper purpose for seeking the stay. Fourthly, the risk of proceedings both before the courts and an arbitral tribunal is inherent in an arbitration agreement which refers only certain disputes to arbitration. Referring to the speech of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, at 353, he stated that that is the price of respecting the parties' agreement and the risk that they are to be taken to have chosen to take. Fifthly, he stated that a defendant would not necessarily be entitled to stay the legal proceedings where the referred matter was peripheral to the proceedings as a whole. The proceedings could be partly stayed to allow the referred matter to be determined by arbitration while the proceedings could otherwise proceed.

38. In *Quiksilver* the Court of First Instance in Hong Kong addressed an application to stay or dismiss petitions by a shareholder to wind up two solvent joint venture companies on the just and equitable ground. The shareholders of the companies had entered into a detailed joint venture agreement which contained an arbitration clause and a buy-sell procedure as a means of resolving disputes by enabling one party to buy out the shares of the other. After difficulties had arisen in the buy-sell procedure, Quiksilver Greater China Ltd presented the winding up petitions. The other shareholder, Glorious Sun Overseas Co Ltd, invoked the arbitration agreement and sought a stay of the winding up petitions pending the outcome of the arbitration. Before the judge, the principal disputes between the parties were whether the winding up petitions amounted to class actions and whether a shareholder had an inalienable right of access to the court to seek the winding up of a company rather than any question of statutory interpretation

as to what would amount to a "matter" to be sent to arbitration. Because, as mentioned above, the Hong Kong legislation referred to an "action" rather than "legal proceedings" the Hong Kong equivalent to section 4 of the FAAEA was not in play and the judge was addressing a discretionary stay rather than a mandatory stay under the Hong Kong legislation. Harris J recognised, and it was common ground between the parties, that an arbitrator could not make a winding up order which affected third parties but he held that the precise relief sought in the winding up petitions was not critical. He stated (para 22) that the correct approach is "to identify the substance of the dispute between the parties and ask whether or not that dispute is covered by the arbitration agreement." Harris J analysed the substantive dispute between the parties to be the basis on which the joint venture was to end, being either a buy-out by Glorious Sun or a winding up at the instance of Quiksilver. That commercial dispute was arbitrable and, if Quiksilver were to prevail in the arbitration, the stay of the winding up petitions could be lifted and the court would not need to re-hear the substantive arguments, which would have been determined in the arbitration.

39. In *Tomolugen* the Court of Appeal of Singapore addressed an application under section 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") by Lionsgate Holdings Pte Ltd ("Lionsgate") for a mandatory stay for arbitration of court proceedings raised by a minority shareholder, Silica Investors Ltd ("Silica"), under section 216 of the Companies Act (Cap 50, 2006 Rev Ed) for relief for oppressive or unfairly prejudicial conduct. The defendants in the court proceedings were the company, the shareholders of the company, including Lionsgate, and the directors and former directors of the company and related companies. Lionsgate, which was the wholly owned subsidiary of Tomolugen Holdings Ltd, the majority shareholder in the company, had sold shares in the company to Silica in a share sale agreement which contained an arbitration clause. Lionsgate argued that part of the dispute in the court action fell within the arbitration clause of the share sale agreement and to that extent the legal proceedings should be the subject of a mandatory stay. It, and the other defendants, sought a discretionary case management stay of the remainder of the legal proceedings, pending the outcome of the arbitration. Much of the judgment of the Court of Appeal, delivered by Sundaresh Menon CJ, concerned the question of arbitrability, which the Board considers below in this appeal. But the judgment also contained an important discussion of the concept of a "matter".

40. The Court of Appeal (paras 15-19) analysed the allegations made in the section 216 application under four broad categories (1) the share issuance allegation, (2) the management participation allegation, (3) the guarantees allegation, and (4) the asset exploitation allegation.

41. It will assist the understanding of the judgment if the Board quotes the relevant provision (section 6) of the IAA which provides:

> "(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to *stay the proceedings so far as the proceedings relate to that matter.*
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings *so far as the proceedings relate to the matter*, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed." (Emphasis added)

42. Between paras 108 and 122 of the court's judgment Sundaresh Menon CJ addressed the question whether a "matter" should be interpreted broadly by identifying the essential dispute or the main issue, as Silica urged, or more granularly, as Lionsgate submitted. He stated (para 108) that establishing whether the dispute pertained to a matter that is subject to the arbitration agreement involves two stages:

> "(a) the court must first determine what the matter or matters are in the court proceedings; and
>
> (b) it must then ascertain whether the matter(s) fall within the scope of the arbitration clause on its true construction."

At the first stage, the court proceedings which are sought to be stayed may involve more than a single matter. In addressing the differing submissions of the parties, Sundaresh Menon CJ stated (para 113) that the starting point of the analysis was the language of section 6 of the IAA. Section 6 of the IAA mandates a stay only "so far as" the court proceedings relate to the matter or matters which are the subject of the arbitration agreement. This, he stated, militates against taking "an excessively broad view of what constitutes a 'matter' or treating it as a synonym for the court proceedings as a whole". He continued (para 113):

> "In our judgment, when the court considers whether any 'matter' is covered by an arbitration clause, it should undertake a practical and common-sense enquiry in relation to

> any reasonably substantial issue that is not merely peripherally or tangentially connected to the dispute in the court proceedings. The court should not characterise the matter(s) in either an overly broad or an unduly narrow and pedantic manner. In *most* cases, the matter would encompass the claims made in the proceedings. But, that is not an absolute or inflexible rule." (Emphasis in the original)

43. In support of this view Sundaresh Menon CJ then addressed jurisprudence from Australia (*Tridon*), the British Virgin Islands (*Ennio Zanotti v Interlog Finance Corp* Claim No BVIHCV 2009/0394 (8 February 2010)) and England (*Lombard North Central*) before concluding at para 122:

> "We therefore consider that a 'matter', for the purposes of s 6 of the IAA, should not be construed in either an overly broad or an unduly narrow way. On the specific facts of this case, each of the four categories of allegations made in the Suit raises substantial issues that are neither peripheral nor tangential to Silica Investors' claim for relief under s 216 of the Companies Act. We accordingly find that each category is a separate 'matter' for the purposes of Lionsgate's stay application under s 6 of the IAA."

44. Thereafter, the court analysed the arbitration clause to determine which of the categories of allegation (para 40 above) fell within the scope of the arbitration agreement. It was not in dispute that the third and fourth categories did not, and the court therefore focused on the first two categories. In each category the court examined the substance of the controversy and concluded that the share issuance allegation was not within the scope of the arbitration agreement but that the management participation allegation was.

45. In *WDR Delaware* Foster J in the Federal Court of Australia addressed an application for a stay under section 7(2) of the International Arbitration Act 1974 and article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration which has the force of law in Australia. Hydrox Ltd was a joint venture company. The legal proceedings in question were for (i) a declaration that the affairs of Hydrox Ltd had been conducted in a manner oppressive to, unfairly prejudicial to or unfairly discriminatory against WDR, and (ii) an order for the winding up of Hydrox Ltd. It was common ground that the disputes between the shareholders were within the scope of the arbitration clause in the joint venture agreement. The principal dispute before Foster J was whether some or all of the claims in the court proceedings were arbitrable and, if so, whether the whole or only part of the court proceedings should be stayed.

46. The relevant statutory provisions were as follows. Section 7(2) of the International Arbitration Act 1974 provided:

> "Subject to this Part, where:
>
> (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
>
> (b) the proceedings involve the *determination of a matter that*, in pursuance of the agreement, *is capable of settlement by arbitration*;
>
> on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings *or so much of the proceedings as involves the determination of that matter*, as the case may be, and refer the parties to arbitration in respect of that matter." (Emphasis added)

Article 8(1) of the Model Law provides:

> "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

47. Foster J set out his analysis of how the court identifies the matters which are the subject of the legal proceedings between paras 102 and 123 of his judgment. In summary, he reasoned: (i) that the nature and extent of the matters are ordinarily to be ascertained from the pleadings and from the underlying subject matter upon which the pleadings, including any defence, are based; the task is to ascertain the substantive questions in dispute, (ii) multiple matters may exist within the one court proceeding; (iii) a matter is something more than a mere issue or question that might fall for decision in the court proceedings or in the arbitral proceedings, (iv) a matter may or may not comprise the whole subject matter of any given proceeding, and (v) the court must first identify the matter or matters to be determined in the court proceeding before asking whether those matters fall within the scope of the arbitration agreement, and, if so, whether they are arbitrable.

48. In support of his third proposition, that a matter is something more than a mere issue or question which might fall for determination in proceedings, Foster J cited the judgment of the High Court of Australia in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 ("*Tanning")*. That case was concerned principally with section 7(2) and (4) of the Arbitration (Foreign Awards and Agreements) Act 1974 (renamed in 1989 the International Arbitration Act 1974, as considered in *WDR Delaware*) and the question whether a liquidator was a person "claiming through" the company in liquidation, which was a party to an arbitration agreement, and therefore entitled to a stay of legal proceedings for arbitration. The High Court held that the liquidator, who had rejected a creditor's proof of debt for goods allegedly sold under a licence agreement which contained an arbitration clause, was a person claiming through the company under section 7(4) and was entitled to a stay under section 7(2). Deane and Gaudron JJ in a joint dissenting judgment discussed the meaning of the word "matter" in section 7(2) at pp 351-352. They observed that "matter" was not defined in the 1974 Act but that, in any context, it was "a word of wide import" and stated:

> "In the context of s. 7(2), the expression 'matter … capable of settlement by arbitration' may, but does not necessarily, mean the whole matter in controversy in the court proceedings. So too, it may, but does not necessarily encompass all the claims within the scope of the controversy in the court proceedings. Even so, the expression 'matter … capable of settlement by arbitration' indicates something more than a mere issue which might fall for decision in the court proceedings or might fall for decision in arbitral proceedings if they were instituted. … It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy."

Deane and Gaudron JJ went on (p 353) to reject the argument that section 7(2) did not apply to proof of debt proceedings, stating that the operation of the section is not confined to proceedings in which the parties seek the same relief as might be sought in arbitration proceedings.

49. In *Sodzawiczny v Ruhan* [2018] EWHC 1908 (Comm); [2018] Bus LR 2419 ("*Sodzawiczny*") Popplewell J in the High Court of England and Wales addressed an application for a stay of legal proceedings under section 9 of the Arbitration Act 1996 which refers to proceedings having been brought "in respect of a matter which … is to be referred to arbitration." The basis on which the defendants sought a stay of proceedings was that their defence to legal proceedings against them fell within the scope of the parties' arbitration agreement. The claimant opposed the stay, arguing that section 9 was not engaged if the claim itself did not fall within the arbitration agreement.

50. Popplewell J recorded that it was common ground that section 9 of the 1996 Act allowed a stay for arbitration of one or more matters within the legal proceedings while leaving other matters to be pursued in court. It was also common ground that there were two stages in the court's inquiry under section 9: first the court must determine what the matter or matters are in respect of which the court proceedings have been brought; and, secondly, the court must then determine in respect of each such matter whether it falls within the scope of the arbitration agreement (paras 35-36).

51. The material difference between the parties was as to the meaning of "matter". The claimant's counsel submitted that "matter" in section 9 was to be equated with a claim or cause of action and the fact that a defence is raised which falls within an arbitration agreement does not engage section 9. The defendants' counsel argued that "matter" meant an issue and that the court had to search for issues which were the subject matter of the arbitration agreement. Popplewell J referred to various authorities, including *Lombard North Central* and *Tomolugen*. He observed that the thing which parties referred to arbitration was a dispute or difference, words which were in this context synonymous. A dispute could be constituted in general terms, or it might be well defined before legal proceedings were commenced. A cause of action might involve several issues and sub-issues, some of which might be arbitrable and some not, and a commercial action often might involve several causes of action. Defences to a claim might involve a completely different set of facts and legal principles from those involved in the claim itself.

52. Popplewell J rejected the claimant's argument that section 9 was not concerned with a defence but only with a claim. He set out in para 43 what he considered to be the principled approach to what constitutes a "matter". He stated:

> "The court should treat as a 'matter' in respect of which the proceedings are brought any issue which is capable of constituting a dispute or difference which may fall within the scope of an arbitration agreement."

53. He continued his analysis in that paragraph by stating, secondly, that where the issues had not been fully identified in the legal proceedings by the time the court addressed the application for a stay, the court should seek to identify the issues which it was reasonably foreseeable might arise. He stated, thirdly, that the court should stay the proceedings to the extent of any issue which falls within the scope of an arbitration agreement. The search, he said, "is not for the main issue or issues, or what are the most substantial issues, but for any and all issues which may be the subject matter of an arbitration agreement". This applied to any dispute with which the court proceedings were, or would foreseeably be, concerned. Fourthly, section 9 was concerned with substance and not form, and the court should look at the nature and substance of the claim and the issues to which it gave rise and not simply the formulation in the

pleadings. The same approach should be adopted to identified or foreseeable defences. In para 44 of his judgment Popplewell J recognised that this approach could lead to a fragmentation of proceedings but opined that this was the result of the sanctity of the parties' arbitration contract and the requirement in section 9 that the court uphold the parties' bargain. The risk of fragmentation could be reduced either by an expansive construction of the arbitration agreement or by the court's use of its case management powers to stay proceedings in so far as they fall outside the scope of the arbitration agreement.

54. In *Republic of Mozambique (acting through its Attorney General) v Credit Suisse International* [2021] EWCA Civ 329; [2022] 1 All ER Comm 235 ("*Mozambique*") the Court of Appeal of England and Wales addressed the meaning of "matter" in section 9 of the 1996 Act. Carr LJ, in a judgment with which Singh and Henderson LJJ agreed, stated:

> "63. A 'matter' is not the same as a cause of action; it includes any issue capable of constituting a dispute under the relevant arbitration agreement. And a mandatory stay under s. 9(4) can be applied pro tanto (as reflected in the words 'so far as they concern that matter' in s. 9(1)).
>
> 64. There are two stages of inquiry for a court (although there may be overlapping considerations): first, to identify the 'matters' in respect of which the proceedings are brought; secondly, to assess whether those matters are 'matters' which the parties have agreed are 'to be referred to arbitration'. That is to be resolved by reference to the scope of the relevant arbitration agreement properly construed in context...."

55. Carr LJ then stated that the relevant principles were summarised in the judgment of Popplewell J in paras 43 and 44 of his judgment in *Sodzawiczny* and quoted in full those paragraphs, which the Board has summarised in paras 52 and 53 above. She stated (para 66) that the position identified by Popplewell J was consistent with and followed the earlier decision of the Singapore Court of Appeal in *Tomolugen* which the Board has discussed in paras 39-44 above. Carr LJ summarised the position under the title "Discussion and analysis" at paras 70-72 of her judgment stating:

> "70. It is trite law that an arbitration agreement is a contractual agreement to which statute dictates that mandatory effect must be given in so far as it applies: *Sodzawiczny* at para 44. The application of s. 9 can give rise to particular

> difficulties both as a matter of analysis and procedure, but the sanctity of the parties' agreement takes priority.
>
> 71. Thus, whether or not there is futility in practical terms of any stay is immaterial. Equally, the fact that there may be (on the facts of this case particularly acute) unwelcome case management complications if all or parts of claims are stayed is irrelevant. These are complexities which flow from s. 9 and ones which will often arise in multi-party, multi-issue litigation such as this.
>
> 72. I also accept that there is a two-stage test (although the considerations that arise may overlap and it may be convenient to consider the questions together): first to identify the matter and secondly to decide if that matter is one that the parties have agreed can only be arbitrated. Further, the court looks to substance and not form, adopting a practical and common-sense approach. It should guard against placing undue weight on what may be nuanced emphases or artificial characterisations adopted for tactical or other purposes. This is of course not to say that the parties' pleaded position is to be ignored, but rather to emphasise that the search is for the reality of the dispute."

56. The Supreme Court of the United Kingdom has reviewed the decision of the Court of Appeal in *Mozambique* in a judgment handed down on the same day as this judgment is promulgated. The approach of that court to the question of what is a "matter" and how the court ascertains what is a "matter" is consistent with the approach which the Board adopts on this appeal in the following paragraphs.

57. From this brief review of international authorities the Board considers that there is now a general consensus among leading arbitration jurisdictions in the common law world that the domestic courts of countries that are signatories of the New York Convention respect and give priority to the autonomy of the parties to arbitration agreements. The statutory provisions of those countries provide for a mandatory stay of legal proceedings at the request of a party to an arbitration agreement when a matter in those proceedings is referrable to arbitration. There is also a broad consensus on how to approach the determination of matters which must be referred to arbitration.

58. The court in considering such an application adopts a two-stage process. First, the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and, secondly, the court must determine

in relation to each such matter whether it falls within the scope of the arbitration agreement. (See *Tomolugen*, para 42 above; *WDR Delaware*, para 47 above and *Sodzawiczny*, para 50 above).

59. The court must ascertain the substance of the dispute or disputes between the parties. This involves looking at the claimant's pleadings but not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration. It involves also a consideration of the defences, if any, which may be skeletal as the defendant seeks a reference to arbitration, and the court should also take into account all reasonably foreseeable defences to the claim or part of the claim. (See *Lombard North Central*, para 37 above; *Quiksilver*, para 38 above, *Tomolugen*, para 42 above, *WDR Delaware*, para 47 above; and *Sodzawiczny*, para 53 above).

60. Secondly, while article II(3) of the New York Convention, which requires that the court refer a matter to arbitration, is silent as to the stay of the court proceedings, legislation implementing this provision of the New York Convention has generally made express provision for a stay pro tanto. Examples include section 9 of the Arbitration Act 1996 in England and Wales, section 10 of the Arbitration (Scotland) Act 2010 in Scotland, section 7 of the International Arbitration Act 1974 in Australia, and section 6 of the IAA in Singapore. In the Cayman Islands section 4 of the FAAEA speaks of "staying the proceedings" and makes no reference to the possibility of a stay pro tanto. Nonetheless, the context is a domestic statute implementing an international convention, in which broad and generally accepted principles should be adopted in interpreting such a statute: see *Gol Linhas* which the Board discussed in para 31 above. In *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed. 2020) the authors state at section 9.3: "Unless the contrary intention appears, the legislature is presumed to intend an enactment to be read in light of the principle that the greater includes the less." This principle is derived from Roman law ("non debet cui plus licet, quod minus est non licere": Corpus Juris Civilis, Digest 17.21 (Ulpian)). In the Board's view in this context the greater includes the lesser. Counsel did not argue otherwise in this appeal. Accordingly, the Board considers that section 4 of the FAAEA allows a pro tanto stay of legal proceedings.

61. Thirdly, in the Board's view, a "matter" is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute. If the "matter" is not an essential element of the claim or of a relevant defence, it is not a matter in respect of which the legal proceedings are brought. The Board agrees with the statement of Sundaresh Menon CJ in para 113 of *Tomolugen* that a "matter" requiring a stay does not extend to an issue that is peripheral or tangential to the subject matter of the legal proceedings. The Board agrees with Foster J's third proposition in *WDR Delaware* that a "matter" is something more than a mere issue or question that might fall for decision in the court proceedings or in the arbitral proceedings.

62. A focus on the substantial nature and relevance of a referred matter to the legal proceedings is consistent with international jurisprudence, including *Lombard North Central*, *Quiksilver*, and *Tomolugen*. It is also consistent with the Australian jurisprudence in *Tanning* and *WDR Delaware*. In those cases, the judicial formulation was influenced by the statutory wording of section 7(2) of the International Arbitration Act 1974 which refers to a matter "capable of settlement by arbitration". But there is no material difference between that formulation and the other judicial formulae as a stay of legal proceedings should be granted only in respect of a dispute which falls within an arbitration agreement and is capable of settlement by arbitration.

63. The judgment of Popplewell J in *Sodzawiczny* is in part consistent with this approach but the passages in his summary of the law in para 43 of his judgment which suggest that a "matter" is any issue which is capable of constituting a dispute or difference within the scope of an arbitration agreement cannot be accepted without qualification in the light of the wider case law discussed above. Popplewell J referred to *Lombard North Central* and *Tomolugen* as the background to his analysis. Those judgments contain further qualifications which are not expressly articulated in his summary, although he may have taken them as read. In para 43 he spoke of a "matter" as "any issue which is capable of constituting a dispute or difference" within the scope of the arbitration agreement and as covering "all issues which may be the subject of the arbitration agreement". These formulae expressly draw on the judgment of Andrew Smith J in *Lombard North Central.* But no mention is made of Andrew Smith J's concern about the abusive application for a stay which the Board discusses in para 64 below nor of his recognition that peripheral matters may not merit a stay of the legal proceedings. The emphasis in *Tomolugen* on the evaluation of the matter as being of reasonable substance and not peripheral to the legal proceedings is not reflected in the relevant paragraph of the *Sodzawiczny* judgment.

64. No judicial formula encapsulating the meaning of "matter" should be treated as if it were a statutory text. A court facing an application for a stay under section 4 of the FAAEA should approach the question in a practical and common-sense way. The court must respect the agreement of the parties to arbitrate their disputes. An agreement to arbitrate a dispute is an agreement not to resolve that dispute in court proceedings. Thus, any substantial matter in the legal proceedings, which is relevant to the claim or foreseeable defence, and which is within the scope of the arbitration agreement, will give rise to a mandatory stay of the legal proceedings pro tanto on the application of one of the parties. There is considerable authority to support the view that the procedural complexity caused by a reference to arbitration does not of itself render a matter non-arbitrable: see, for example, *Wealands*, Mance LJ para 26, *Fulham*, Patten LJ para 25, *Tomolugen*, Sundaresh Menon CJ para 105. That does not mean that procedural complexity is irrelevant in all circumstances because the court, when addressing an application to stay legal proceedings to enable the determination of a dispute by arbitration, should be careful to prevent an abuse of process. The Board agrees with Andrew Smith J in *Lombard North Central* (para 37 above) that the court could refuse an otherwise mandatory stay if the applicant has no real or proper purpose for seeking

the stay. That could include not only an application for a stay in relation to issues that were peripheral to the legal proceedings but also an application that amounted to an abuse of process. In this regard the Board respectfully disagrees with the statement of the Court of Appeal in England and Wales in para 71 of the judgment in *Mozambique* (para 55 above) that the practical futility of a stay will in all circumstances be irrelevant. There may be circumstances in which a party seeks a stay for an improper purpose and it would be contrary to justice if the court could not act to prevent an abuse of process. For example, if matters (1) and (2) were referred to arbitration and an arbitral tribunal were to determine those matters in FMCH's favour and FMCH acted promptly to remove a stay on the legal proceedings before the Grand Court, the court would be entitled to look with some care at any application for a stay for a further arbitration.

65. Fourthly, the exercise involving a judicial evaluation of the substance and relevance of the "matter" entails a matter of judgment and the application of common sense. It is not a mechanistic exercise. It is not sufficient merely to identify that an issue is capable of constituting a dispute or difference within the scope of an arbitration agreement without carrying out an evaluation of whether the issue is reasonably substantial and whether it is relevant to the outcome of the legal proceedings of which a party seeks a stay. In so far as the summary of the law in para 43 of *Sodzawiczny* suggests otherwise, it is in error.

66. The approach to the word "matter" in section 4 of the FAAEA set out in paras 59-65 above may involve the fragmentation of the parties' disputes with some matters being determined by an arbitral panel and other matters being resolved by the court. Such fragmentation may on occasion be inconvenient to one or more of the parties to the court proceedings. Rational businesspeople may as a general rule prefer that their disputes are determined in the same forum: see Lord Hoffmann in *Fiona Trust & Holding Corpn v Privalov* [2007] UKHL 40; [2007] Bus LR 1719 ("*Fiona Trust*"), paras 5-8. An arbitration agreement may be interpreted generously to achieve that end if the court can ascertain that as the parties' commercial purpose and the wording of the agreement can bear that meaning. But, where, on a proper interpretation of the arbitration agreement, the parties have contracted to refer to arbitration disputes which do not extend to all the matters raised in the legal proceedings, giving effect to the parties' contract will involve fragmentation of the disputes. The disadvantages caused by such fragmentation can be mitigated by effective case management by both the court and the arbitral panel.

67. In the light of the case law discussed above, the Board considers that the obiter comments of Carswell LCJ in the Northern Ireland Court of Appeal in *In re Wine Inns Ltd* [2000] NIJB 343, 358-359, should not be followed. He stated that the just and equitable winding up petition or the application for relief against the conduct of the management of a company in an unfairly prejudicial manner in that case, which related to allegations of the breakdown of trust and confidence in a quasi-partnership, each

raised an indivisible issue and not a series of discrete disputes or matters. That is not consistent with the case law which the Board has discussed above.

68. As discussed below, the meaning of "matter" is relevant to the question of whether an arbitration agreement is operative. The Board now turns to that question.

(c) The meaning of "the arbitration agreement is … inoperative"

69. As set out in para 30 above, article II(3) of the New York Convention, which is enacted in domestic law by section 4 of the FAAEA, provides exceptions to the obligation of a court of a contracting state to refer a matter to arbitration if the arbitration agreement is "null and void, inoperative or incapable of being performed." Section 4 uses the same words in defining the exceptions. In this case, the questions whether the subject matter of the dispute between the parties is indivisible or whether the remedies sought are arbitrable would not, in the Board's view, fall within the exception that the agreement was null and void or the exception that that agreement was incapable of being performed. The Board is concerned with the exception that the agreement is inoperative. The essence of the dispute between the parties on this appeal turns on this question. It is whether the arbitration agreement is inoperative or, in other words, the matters at issue between the parties are incapable of being settled by arbitration or the remedies sought are unavailable to an arbitral tribunal.

70. On the authorities there are two broad circumstances in which an arbitration agreement may be inoperative. The first is where certain types of dispute are excluded by statute or public policy from determination by an arbitral tribunal. The second is where the award of certain remedies is beyond the jurisdiction which the parties can confer through their agreement on an arbitral tribunal. The Board refers to the first type as "subject matter non-arbitrability" and to the second as "remedial non-arbitrability".

71. Subject matter non-arbitrability can arise where the state intervenes by statute to preserve a right of access to the courts. Examples of such in English law in the field of employment and discrimination can be found in section 203 of the Employment Rights Act 1996 and section 144(1) of the Equality Act 2010, which, subject to specified exceptions, prevent parties by agreement from contracting out of an employee's right to have access to an employment tribunal, or in the latter Act the courts. Subject matter non-arbitrability may also arise as a result of public policy considerations. In the Singaporean case of *Larsen Oil and Gas Pte Ltd v Petropod Ltd* [2011] 3 SLR 414, ("*Larsen*") V K Rajah JA, delivering the judgment of the Singapore Court of Appeal, at para 44 recognised two grounds for excluding from arbitration a dispute which fell within the scope of an arbitration agreement. The first was where the legislature had precluded the use of arbitration to determine the particular type of dispute and the second was where "there is an inherent conflict between arbitration and the public

policy considerations involved in that particular type of dispute". *Larsen* was concerned with claims by the liquidator of an insolvent company for the avoidance of unfair preferences and payments made with an intention to defraud a creditor which arose only on the onset of insolvency and could be pursued by the liquidator of the insolvent company for the benefit of the company's creditors. The court refused the application by Larsen, the recipient of the alleged preference, to stay the legal proceedings for arbitration of the dispute on grounds of public policy, namely that it would affect the substantive rights of the company's creditors and undermine the policy aims of the insolvency regime.

72. The underlying concept of subject-matter non-arbitrability is that there are certain matters which in the public interest should be reserved to the courts or other public tribunals for determination. But there is no agreement internationally as to the kinds of subject matter or dispute which fall within subject matter non-arbitrability. In the 2001 Companion Volume to their book on Commercial Arbitration Lord Mustill and Stewart Boyd stated (p 71):

> "Since different states have their own traditions and precepts, differing radically from state to state, on matters of politics, economics, morality and the like, it is not surprising that equally radical divergences can be found when each state identifies the matters which are regarded as too important to be left to private dispute resolution."

73. A similar statement can be found in Born, *International Commercial Arbitration*, 3rd ed (2021) Vol I, p 1029, para 6.01 in which the author states:

> "Although the better view is that the [New York] Convention imposes international limits on Contracting States' applications of the nonarbitrability doctrine… the types of claims that are nonarbitrable differ from nation to nation. Among other things, typical examples of nonarbitrable subjects in different jurisdictions include selected categories of disputes involving criminal matters; domestic relations and succession; bankruptcy; trade sanctions; certain competition claims; consumer claims; labor or employment grievances; and certain intellectual property matters. Over the past several decades, the scope of the non-arbitrability doctrine has materially diminished in most developed jurisdictions.
>
> As these examples suggest, the types of disputes which are nonarbitrable nonetheless almost always arise from a common

> set of considerations. The nonarbitrability doctrine rests on the notion that some matters so pervasively involve either 'public' rights and concerns, or interests of third parties, that agreements to resolve such disputes by 'private' arbitration should not be given effect." (Footnotes omitted)

74. It would be wrong, however, to overstate the differences of approach in the commercial sphere between jurisdictions which share the same common law heritage. In the Board's view, the jurisprudence of the courts of other common law jurisdictions in this sphere can provide the generally accepted principles for the commercial law of the Cayman Islands. It is also relevant to bear in mind, when considering these commentaries, the relatively granular meaning of "matter" in the FAAEA, which the Board discussed in paras 61-63 above, when addressing the question whether a matter is excluded from arbitral determination by subject matter non-arbitrability.

75. The second circumstance in which an arbitration agreement may be inoperative, ie where there is remedial non-arbitrability, is concerned with the circumstance in which the parties have the power to refer matters to arbitration but cannot confer on the arbitral tribunal the power to give certain remedies. In the common law world there appears to be a general consensus that an arbitration agreement cannot confer on an arbitral tribunal the power to make an order to wind up a registered company on the application of a creditor where the company is insolvent and there is strong authority in support of such an exclusion when the application is by a contributory where the company is solvent. This is because the power to wind up a company lies within the exclusive jurisdiction of the courts, which alone have the discretion as to whether to make such an order. See in English law, *Fulham* at paras 76 and 83, in Hong Kong, *Quiksilver* para 14, in Singapore, *Tomolugen* para 83 (in relation to a creditor's application), in Australia, *WDR Delaware* para 26. In *Quiksilver* and *WDR Delaware* the inability of an arbitral tribunal to make a winding up order was common ground; it is also common ground between the parties on this appeal.

76. There is a general consensus that an arbitral tribunal has the power to grant inter partes remedies, such as ordering a share buy-out in proceedings for relief for unfairly prejudicial conduct in the management of a company under section 994 of the Companies Act 2006 in the United Kingdom and similar legislation in other jurisdictions. See *Fulham*, Patten LJ at paras 77-78, Longmore LJ at paras 96 and 99; *Tomolugen*, Sundaresh Menon CJ at paras 88-89 and 103; *WDR Delaware*, Foster J at para 147 quoting para 194 of *Tridon.* Although the court is given the power by statute to make such orders, an arbitral tribunal may also grant such a remedy because third parties, who are not involved in the dispute, do not have a legal interest in the dispute and there is no public element in a dispute of that nature.

77. Similarly, in an application to wind up a company on the just and equitable ground there may be matters in dispute between the parties, such as allegations of breaches of a shareholders' agreement, which can be referred to an arbitral tribunal for a determination, which is binding on the parties, notwithstanding that only a court can make a winding up order: *Fulham*, Patten LJ at para 76; *Quiksilver*, Harris J at paras 14, 21-22; *Tomolugen*, Sundaresh Menon CJ at paras 96-103; *WDR Delaware*, Foster J at paras 161-164. The researches by the appellants' counsel demonstrate that a similar approach can be found in case law in Quebec, Canada (*Capital JPEG Inc v Corporation Zone B4 Ltd* [2019] QCCS 2986) in relation to mediation, Cyprus *(In re Kissonerga Development Co Ltd* (Application no 7/20) (unreported) 9 July 2020 which was an interim decision, Jersey (*Consolidated Resources Armenia v Global Gold Consolidated Resources Ltd* [2015] JCA 061 ("*Consolidated Resources*"), and Zambia (*Vedanta Resources Holdings Ltd v ZCCM Investment Holdings plc* [2020] ZMCA 104). See also in Hong Kong *China Europe International Business School v Chengwei Evergreen Capital LP* [2021] HKCFI 3513 ("*China Europe*"). Counsel did not address these cases in any detail, but they are consistent with the main cases which the Board has discussed above and support a conclusion that there is substantial agreement among common law jurisdictions as to the correct approach.

78. In *WDR Delaware* Foster J summarised his conclusion on this matter at para 164:

> "With the exception of that part of the present proceeding which involves the Court forming an opinion as to whether the plaintiffs are entitled to a winding up order, the questions of fact and law which mark out the substantive controversy between the parties in this proceeding are all matters which are capable of resolution by arbitration. Any award or awards which determine those matters will be taken into account when the Court comes to consider whether a winding up order should be made. If, at the end of the arbitral process, the award or awards do not address satisfactorily or comprehensively all of the grounds relied upon by the plaintiffs in support of their claims for relief made in the present proceeding, then it will be open to them to supplement or explain the terms of the relevant award or awards by evidence. The process by which that would be done is the everyday process of applying the law of evidence."

The Board agrees as a general rule with this approach to discrete matters which involve inter partes disputes in the context of a winding up application. Matters, such as whether one party has breached its obligations under a shareholders' agreement or whether equitable rights arising out of the relationship between the parties have been flouted, are arbitrable in the context of an application to wind up a company on the just and

equitable ground and the arbitration agreement is not inoperative because the arbitral tribunal cannot make a winding up order.

9. The application of the FAAEA to the facts of this case

79. The first matter which the Board must address is the interpretation of the Companies Act. As stated in para 14 above, section 92 of that Act sets out the grounds on which the court may wind up a company including the ground which is relevant in this appeal, ie that the court is of the opinion that it is just and equitable that the company should be wound up. Section 95 of that Act sets out the powers of the court, which include the power to make a winding up order or on a contributory's petition on the just and equitable ground, an alternative order providing, among other things, for the purchase of the shares of any members of the company by other members of the company.

80. The Board agrees with Moses JA that the court's consideration under section 92 of the Act whether it is just and equitable that the company should be wound up is a threshold question which is to be answered before a petitioner can get access to any of the remedies available under section 95. That is clear from a straightforward reading of the wording of the Act. The Board also accepts, as Moses JA held, that the court has exclusive jurisdiction to make a winding up order. A winding up order is an order in rem which only a court can make. It is beyond the jurisdiction of an arbitral tribunal as parties cannot confer such a power on an arbitral tribunal by private agreement. An arbitral agreement that purported to confer such a power would be inoperative to that extent.

81. Further, in deciding whether to make a winding up order on the just and equitable ground, the court conducts a wide-ranging enquiry into and evaluation of the facts. The court takes the decision whether it is just and equitable to wind up a company with regard to all the relevant circumstances at the date of the hearing: *Lau v Chu* [2020] UKPC 24; [2020] 1 WLR 4656 ("*Lau v Chu*"), para 43 per Lord Briggs, giving the judgment of the Board. A decision by an arbitral tribunal on whether it was just and equitable to wind up the company by reference to the circumstances which existed on an earlier date could not determine the issue which the court has to consider. Such a decision would be an ineffective legal judgment. The Board therefore respectfully disagrees with the obiter suggestion by Patten LJ in *Fulham* at para 83 (and its endorsement by Sundaresh Menon CJ in *Tomolugen* at para 100) that an arbitrator could make a ruling on whether it would be appropriate for a complainant to initiate winding up proceedings or be limited to some lesser remedy. A ruling by an arbitral tribunal that it was of the view that it was just and equitable that a company be wound up would be ineffective; it could not bind the parties in a hearing before the court and, given the interests of third parties in a possible winding up of the company, it could not bind the court. In deciding on the appropriate remedy under section 95 the court takes into

account the interests of third parties, including the company's directors and employees, and businesses which have dealings with the company, who will be affected if a winding up order is made. See, by way of analogy, *Fulham* para 46; *In re Neath Rugby Ltd* [2009] EWCA Civ 291, [2010] BCC 597, para 84; and *In re Asia Television Ltd* [2015] 1 HKLRD 607, paras 55-58.

82. The parties were therefore correct in their agreement that an arbitral tribunal does not have the power to decide the fifth matter listed in para 23 above, ie whether a winding up order should be made and whether the persons identified by FMCH should be appointed joint liquidators of the Company. Further, for the reasons set out above, the Board agrees with Mr Thomas Lowe, counsel for FMCH, that an arbitral tribunal does not have power to make a ruling on matters (3) and (4), ie whether it is just and equitable that the company should be wound up or whether the remedy of a share buy-out should be granted under section 95 of the Companies Act.

83. That leaves the first and second matters set out in para 23 above. The first is whether FMCH has lost trust and confidence in Ting Chuan and in the conduct and management of the Company's affairs. FMCH allege that Ting Chuan caused, permitted or procured the majority directors, whom it appointed, to act in breach of their duties to the Company and to engage in misconduct in the management of the Company's affairs. The second is whether the fundamental relationship between FMCH and Ting Chuan has irretrievably broken down as a result of Ting Chuan's having acted contrary to the understanding between the parties as to how the business of the Company would be operated. Those two matters raise questions of mixed fact and law.

84. Moses JA further reasoned that, as the majority directors and the Company were not parties to the SHA and to the arbitration agreement which it contained, and as the allegations made against Ting Chuan could not be separated from the threshold issue of whether the court was of the opinion that it was just and equitable that the Company be wound up, the arbitration agreement was inoperative. His conclusion has been summarised in a first instance decision of the High Court of England and Wales in these terms:

> "Where … a necessary precursor to any form of relief is a decision by the court that it would be just and equitable to wind up the company, then bifurcation will not be possible."

See *Riverrock Securities Ltd v International Bank of St Petersburg* [2020] EWHC 2483 (Comm); [2021] 2 All ER (Comm) 1121, para 68 per Foxton J. See also *NDK Ltd v HUO Holding Ltd* [2022] EWHC 1682 (Comm); [2022] Bus LR 761, para 64 in which Foxton J recorded the proposition from *Riverrock* as common ground between the

parties. The issue before the Board in relation to matters (1) and (2) is whether that statement is correct.

85. Mr Lowe advanced several submissions as to why the Court of Appeal had decided this case correctly. On the question of statutory interpretation, he argued that the Companies Act made it clear that no private arbitral tribunal could make the critical decision whether it is just and equitable to wind up the Company. The Board agrees for the reasons discussed above but that argument goes only to matters (3) and (4).

86. Mr Lowe can derive no support from the judgment of the Court of Appeal of England and Wales in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575; [2015] Ch 589 ("*Salford Estates*"). That case concerned a winding up petition on the ground that the company was unable to pay its debts under section 122(1)(f) of the Insolvency Act 1986. The petitioner cited several debts in its petition as evidence of the company's inability to pay its debts, only some of which arose out of the transaction to which the arbitration agreement applied. Sir Terence Etherton C opined that in those circumstances there was no basis for a mandatory stay of the winding up proceedings under section 9 of the Arbitration Act 1996 (para 34). He then expressed the view (para 35) that it seemed "highly improbable" that Parliament intended section 9 of the 1996 Act to confer on a debtor the right to a non-discretionary order "striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts". In the Board's view, whether or not this view is correct, it has no bearing on a petition in which a member of a company seeks a winding up order on the just and equitable ground.

87. Mr Lowe also advanced an argument that the Cayman Islands was unique among Commonwealth countries in not introducing either a remedy for oppression, such as the former section 210 of the Companies Act 1948 in the United Kingdom, or a remedy for unfairly prejudicial conduct in the management of the company, such as that which has been available in the United Kingdom since 1980 and is now contained in sections 994-996 of the Companies Act 2006, which was separate from an application to wind up the company. He inferred from the legislature's decision not to introduce such remedies as separate proceedings from a winding up petition that the legislature had evinced an intention that disputes between shareholders concerning the conduct of the management of Cayman Islands companies were to be conducted in open court in the public interest. He pointed out that the Cayman Islands is a very significant jurisdiction for the incorporation of companies which operate in other jurisdictions or internationally and that there was a public interest in maintaining the confidence of incorporators in the competence of the Cayman Islands courts in resolving shareholder disputes. He submitted that, while the Cayman Islands had ambitions to host international arbitrations, it was not a significant centre for such proceedings in contrast to its role as one of the largest offshore incorporation centres. The problems with this argument are, first, that neither party produced or suggested that there were any pre-legislative materials which explained why the Cayman Islands legislature had not

introduced free-standing remedies for oppression and unfair prejudice. The submission therefore is simply speculation. Secondly, in any event, on the basis that matters (3)-(5) are to be determined exclusively by the courts, there will be court proceedings in public in which the critical decisions are made and the factual basis on which those decisions are made will be manifest. The Board is not persuaded that there is a public interest in making the Cayman Islands an outlier in relation to the treatment of international arbitration.

88. FMCH further submitted that winding up was intended to be a quick and efficient process. The presentation of a winding up petition offered protections to the petitioner as section 99 of the Companies Act serves to maintain the status quo by nullifying retrospectively on the making of a winding up order any disposition of the company's property or transfer of shares or alteration in the status of its members after the commencement of the winding up, unless the court orders otherwise. The Court of Appeal of the Cayman Islands clarified the purpose of this provision in *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* [2020] CILR 417. A prolonged process involving an arbitration in relation to matters (1) and (2) followed by a court process to determine matters (3)-(5) would not achieve the speedy resolution of the disputes and would leave hanging over the Company the possibility of the retrospective nullification of transactions under section 99. Mr Lowe pointed out that the parties had already been involved in a lengthy arbitration at the instance of Ting Chuan which had been very expensive and had taken over three and a half years to complete.

89. This is an argument relating to public policy. Mr Lowe further submitted that the complexity and delay involved in a bifurcation of the proceedings between an arbitral tribunal and the court would frustrate the expectations of reasonable businesspeople. In the Board's view the reference to such expectations is a relevant consideration principally in the interpretation of an arbitration agreement, viz Lord Hoffmann in *Fiona Trust*, rather than a distinct ground of public policy. In any event, there is no necessity that an arbitration of matters (1) and (2) would involve undue delay if the arbitral tribunal exercises robust case management in fulfilment of their task in reaching a speedy resolution of an arbitrated dispute. The Board is not persuaded that the determination of matters (1) and (2) by an arbitral tribunal is excluded on grounds of public policy because of the risk of some delay. In invoking the jurisdiction of the Court on the just and equitable ground FMCH is seeking a statutory remedy of an equitable nature: *In re Westbourne Galleries Ltd; Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379 per Lord Wilberforce; *Lau v Chu*, para 64 per Lord Briggs. The clean hands doctrine applies. Further, in the Board's view, in the exercise of this equitable jurisdiction the court must have regard to a party's contractual obligations, which may include an agreement to refer to arbitration disputes which fall within the scope of the relevant arbitration agreement.

90. There is no substance in the submission that a sword of Damocles is hanging over the Company through the operation of the avoidance provisions of section 99 of the Companies Act. As Mr Charles Kimmins KC pointed out on behalf of Ting Chuan, Kawaley J issued a consent order on 16 November 2018 which prevents payments made for the purpose of paying debts and expenses of the Company in the ordinary course of its business after the date of presentation of the winding up petition from being avoided under section 99 of the Companies Act.

91. The Board is not persuaded that an agreement to refer to arbitration disputes arising out of the SHA amounts to a contractual prohibition on initiating a petition to wind up a company. The Board discusses this matter below when it considers section 95(2) of the Companies Act. The submission that an arbitration would deny a party the protections of section 99 of the Companies Act is misconceived both because the arbitration agreement does not prevent the presentation of a winding up petition and because the parties have chosen to limit the application of section 99 in this case.

92. A further submission by FMCH in support of the argument that the just and equitable jurisdiction was indivisible was that the court alone could decide the facts in conducting the broad enquiry which was required when deciding whether it was just and equitable that a company should be wound up. Mr Lowe went so far as to suggest that the court needed to hear and test all the evidence. When questioned by the court he conceded, correctly, that there was nothing to stop the parties presenting the court with a statement of agreed facts. In the Board's view, such a statement could include, in principle, that FMCH had lost trust and confidence in Ting Chuan and that the fundamental relationship between those parties had broken down. A party could admit such facts, if it wished. As the court in exercising its jurisdiction under section 92 of the Companies Act would be bound by such an agreed statement or admission as between the parties, there is no reason in principle why the court should not be bound in a question between Ting Chuan and FMCH by the determination of an arbitral tribunal, which would set out its reasoning and its findings of fact.

93. The Board recalls that Kawaley J in his order of 14 July 2020 ordered that the petition be treated as an inter partes proceeding between those parties. See para 10 above. A finding by the arbitral tribunal on matters (1) and (2) would be binding on the parties under article 35(6) of the ICC Rules of Arbitration which provides:

> "Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

There is therefore no danger of duplication of effort or inconsistent findings in relation to matters (1) and (2).

94. Finally, FMCH submits that section 4 of the FAAEA requires a stay only in respect of a matter which is capable of settlement by arbitration. It submits that a matter must be a determination of a right or liability and not merely a declaration. It prays in aid a statement by Deane and Gaudron JJ in their joint judgment in the High Court of Australia in *Tanning* at 351 in which they interpreted the meaning of "matter" in the Australian legislation, which includes the words "capable of settlement by arbitration" in this way:

> "It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy."

FMCH referred also to a more recent joint judgment of Kiefel CJ and Gageler, Nettle and Gordon JJ in the High Court of Australia in *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514, para 68 in which, paraphrasing the judgment of Deane and Gaudron JJ in *Tanning*, they stated that it was sufficient that the defence puts in issue "among other things, some right or liability which is susceptible of settlement under the arbitration agreement as a discrete controversy". But the Board notes that the meaning of the judgment in *Tanning* was not a matter of controversy in that appeal.

95. The Board does not accept this submission, which is that an arbitrable matter must be a dispute which leads to the determination by an arbitral tribunal of a right or a liability, if by that FMCH means that the arbitral panel must have the jurisdiction to make an award such as an order for payment to enforce the right or require a party to fulfil its obligation. The Board does not interpret the judgment of Deane and Gaudron JJ as excluding the possibility of the determination of a dispute or controversy by means of a declaration, where the dispute is a matter of substance. See paras 59-62 above.

96. Matters (1) and (2) are controversies relating to legal or equitable rights which are of substance. They are matters which lie at the heart of the legal proceedings in the Cayman Islands for an order under section 95 of the Companies Act. A declaration, for example, that Ting Chuan had breached FMCH's equitable rights and that their relationship had irretrievably broken down would be highly relevant to FMCH's application for a just and equitable winding up of the Company or in the alternative a share buy-out. They are also matters which the parties accept fall within the scope of the arbitration agreement.

97. For the reasons set out above, the Board concludes that matters (1) and (2) which it has set out in para 23 above are "matters" in terms of section 4 of the FAAEA for which a stay pro tanto of the winding up proceedings is mandated.

10. The application for a case management stay of the winding up proceedings

98. Ting Chuan seeks a discretionary stay of the winding up proceedings so far as they are formally directed against parties other than itself. Kawaley J in para 75 of his judgment opined that section 95(1)(d) of the Companies Act, which provides that the court may make "any other order that it thinks fit" gave him the power to do so. The Court of Appeal between paras 138 and 141 of Moses JA's judgment discussed the court's power to grant a discretionary case management stay but considered that there was no room to exercise such discretion as the petition to wind up the Company on the just and equitable ground involves an indivisible factual evaluation.

99. As the winding up process is intended to be conducted with expedition, the court will, as a general rule, rarely wish to grant a stay of such proceedings. But a stay for arbitration is a special case. Where the shareholders of a company are engaged in an inter partes dispute which is within the scope of a binding arbitration agreement and an essential precursor to the determination of a winding up petition on the just and equitable ground, there are strong grounds for granting such a stay. In *Salford Estates* the Court of Appeal of England and Wales held that the court's discretionary power under section 122(1) of the Insolvency Act 1986 ("A company *may* be wound up by the court if …") had to be exercised consistently with the parties' agreement as to the proper forum for resolving their disputes and in accordance with the legislative policy of the Arbitration Act 1996. The case concerned a disputed debt alleged to arise under a lease and the lessor presented a petition seeking the winding up of the tenant. Sir Terence Etherton MR, giving the judgment of the court, stated (para 39) that section 122(1) of the Insolvency Act 1986 conferred on the court a discretionary power to wind up a company. He said that it was "entirely appropriate" that the court should, "save in wholly exceptional circumstances", grant a discretionary stay as that was consistent with the pro-arbitration policy of the 1996 Act.

100. The statutory provisions under which the Cayman Islands courts are operating in this case are contained in the FAAEA. The FAAEA does not contain provisions stating the well-known principles that parties are free to agree how their disputes are resolved subject only to such safeguards as are necessary in the public interest, and restricting the intervention of the court, such as are found in section 1 of the 1996 Act, on which the Court of Appeal of England and Wales relied in *Salford Estates*, and in section 3(3) of the Arbitration Act 2012 in the Cayman Islands, which relates to domestic arbitrations. Nonetheless, such principles are wholly consistent with the wide international consensus in favour of a pro-arbitration policy in relation to international arbitrations governed by the New York Convention, which provides in article II(1):

> "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

101. Thus, in *Tomolugen* the Court of Appeal in Singapore in an unfair prejudice petition granted a mandatory stay under section 6 of the IAA of one of the matters which fell within the scope of the arbitration agreement and granted a discretionary case management stay of the other matters which did not: see Sundaresh Menon CJ at paras 187-190. In *WDR Delaware*, a case involving a winding up petition arising out of allegations of oppressive conduct, Foster J granted a stay of the whole of the winding up petition although only certain matters were arbitrable. Similarly, in *Consolidated Resources* the Court of Appeal in Jersey granted a mandatory stay of the matters within the scope of the arbitration agreement and, using the court's inherent jurisdiction, a discretionary stay of the remaining claims in the proceedings for unfair prejudice and winding up (para 159). In *China Europe*, Linda Chan J in the Court of First Instance in Hong Kong granted a discretionary stay for arbitration of a winding up petition on the just and equitable ground, where the disputes between the shareholders which grounded the petition fell within the scope of an arbitration agreement. It will be recalled that in Hong Kong section 20 of the Arbitration Ordinance, which provided for a mandatory stay, referred to an "action" and did not extend to a winding up petition; *Quiksilver* para 20.

102. The Board is inclined to think, in agreement with Kawaley J and Sir Terence Etherton MR, that in the Cayman Islands as in England and Wales there is a statutory basis for the grant of a stay of a winding up petition. The Board therefore does not need to determine whether and to what extent a discretion exists under the court's case management powers apart from statute. In *In re Nanfong International Investments Ltd* [2018] CILR 321 ("*Nanfong*") the Cayman Islands Court of Appeal adopted a restrictive approach to the grant of a discretionary stay, applying the principles set out by Lord Bingham of Cornhill CJ in *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 ("*Reichhold*"). Moses JA adopted the same approach in this case, holding at para 138 that a stay will be granted only in rare and compelling circumstances. The Board observes that in *Reichhold* and *Nanfong* the basis on which a stay was sought did not involve an assertion that all or some of the matters in the legal proceedings fell within the scope of a binding arbitration agreement. While it is not necessary for the Board to decide this matter, it questions the proposition that a discretionary case management stay of winding up proceedings on the just and equitable ground where a substantial part of the dispute between the parties or some of the parties to the petition falls within the scope of a binding arbitration agreement should be granted only in rare and compelling circumstances. Such a conclusion appears to be inconsistent with the support which the courts give to arbitration and the trend of case law internationally.

103. The determination of matters (1) and (2) will be an essential precursor to the court's formation of its opinion whether it is just and equitable to wind up the Company, which in turn is the threshold for giving a remedy under section 95 of the Companies Act (ie matters (3)-(5)). The Board is satisfied that it is appropriate to grant such a stay.

11. Section 95(2) of the Companies Act

104. It will be recalled that section 95(2) states that the court shall dismiss or adjourn a hearing of a winding up petition if the petitioner is contractually bound not to present a petition against the company. In this case there is no contract binding FMCH not to present a winding up petition. The arbitration agreement in the SHA requires certain matters to be determined by arbitration but is silent as to the presentation of a winding up petition against the Company. The Board is satisfied that the contractual obligation on the parties to determine those matters by arbitration entails an obligation not to have those matters determined by a court. That obligation is enforced by the court's grant of a stay of the winding up petition pro tanto. It does not amount to a contractual prohibition against the initiation of winding up proceedings. Section 95(2) is therefore not relevant to the dispute between the parties and the Board will say no more about it.

12. Conclusion

105. Matters (1) and (2) are substantive disputes between FMCH and Ting Chuan which provide the factual basis for the winding up petition on the just and equitable ground. Those matters fall within the scope of the parties' arbitration agreement and must be determined by an arbitral tribunal unless the parties waive their right to arbitration. There must therefore be a mandatory stay of the winding up petition in relation to matters (1) and (2) under section 4 of the FAAEA and a discretionary stay in relation to matters (3)-(5). In relation to the Company, which is the other party to the winding up petition, the Board is satisfied that there should be a stay of the winding up petition. The determination of matters (1) and (2) is the precursor to the determination of the petition which Kawaley J in his order dated 14 July 2020 has ordered be treated as an inter partes proceeding between FMCH and Ting Chuan.

106. The Board will humbly advise His Majesty that this appeal should be allowed.

ITEM NO. 145

JA-31

EXHIBIT V

[2010 (2) CILR 154]

IN THE MATTER OF FREERIDER LIMITED

Grand Court, Financial Services Division

(Foster, J.)

16 September 2010

Companies—compulsory winding up—dispositions and transfers during winding up—validation by court—grant of security over all company's assets may be within "ordinary course of company's business" for purpose of consent validation order but depends on context—relevant considerations include but not limited to (a) circumstances of case; (b) how objective observer would regard; and (c) prior practices, focusing on businesses in ordinary operation and not abnormal financial difficulties—not to qualify if for purpose of funding one shareholder's litigation against another or merely because non-fraudulent and within company's objects

Companies—compulsory winding up—dispositions and transfers during winding up—validation by court—grant of security over all company's assets usually to be prospectively validated by court, though may retrospectively validate—relevant considerations include but not limited to whether (a) within directors' powers; (b) directors believed it necessary; (c) in good faith; (d) backed by good reasons; and (e) irregularities in company's affairs—court to avoid prejudice to unsecured creditors

The company was in official liquidation in the Grand Court.

The company was a part of a corporate structure for the exploitation of an invention of Mr. Heinen, and was a quasi-partnership between himself and Mr. Le Comte with each of them holding 50% of the voting shares. Its principal assets were intellectual property rights in the invention. Mr. Le Comte was of the view that the company's assets were highly valuable, and had good commercial prospects. They entered into a shareholder agreement, one of the terms of which was that "All votes [are] to be carried in favour of, and/or all actions to be taken and documents and instruments [are] to be executed in accordance with, the recommendation with regard thereto made by Mr. Le Comte in his sole discretion." Over time, the relationship between the two broke down, and the company experienced significant financial difficulties. Legal proceedings between them were commenced in New York and the Netherlands, and, in March 2009, Mr. Heinen applied to the Grand Court to wind up the company. Subsequently, in June 2009, Mr. Le Comte proposed that the company obtain a validation order to enable it to carry on its general business, notwithstanding the existence of the winding-up petition. Mr. Heinen

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 4 of 31 PageID #: 6120

formally consented to the validation order, the terms of which permitted "payments and other dispositions of property made by the company in the ordinary course of its business for proper value," and requested details of the transactions that Mr. Le Comte sought to validate. No such details were ever provided. In August and December 2009, Mr. Le Comte, purporting to act on behalf of the company, entered into two promissory notes with 733 Properties, a company which was part of the Durst Organization in New York. One of the heads of the Durst Organization was Mr. Durst, a personal friend of Mr. Le Comte's. In entering into the notes, both 733 Properties and the Durst Organization relied on Mr. Le Comte's attorneys' opinion, some of the assumptions underlying which Mr. Durst knew to be under challenge. The notes, which were in substantially identical terms, each provided (a) for a credit line of up to US$1m., to be repaid with interest, to be made available to the company; (b) for the grant by the company of security over all of its assets; and (c) that the institution against the company of any liquidation proceeding, which remained undismissed for 90 days, would amount to default, rendering the note immediately due and payable and allowing 733 Properties to exercise its rights pursuant to the security. Correspondence between Mr. Durst and Mr. Le Comte indicated that they had previously discussed the proposal to grant the security, with the aim of preventing Mr. Heinen from gaining control over the company's assets, and that the proposal and subsequent grant had been concealed from Mr. Heinen. Nonetheless, Mr. Le Comte and his wife provided to the Durst Organization personal guarantees of the company's obligations under the notes. Mr. Le Comte and Mr. Heinen both agreed that the company was solvent on a balance sheet test at this time, although the reason Mr. Le Comte gave for entering into the notes was that the company was unable to pay its debts as they fell due.

The Grand Court (Foster, Ag. J.) directed (in proceedings reported at *2009 CILR 604*) that, since the winding-up petition was in reality a dispute between Mr. Le Comte and Mr. Heinen, the petition be heard *inter partes* between them, with the company not able to participate. In May 2010, the Grand Court (Foster, J.) ordered the winding up of the company on the just and equitable ground (in proceedings reported at *2010 (1) CILR 486*), finding that Mr. Le Comte had been guilty of a lack of probity in his management of the company's affairs. This had the effect, pursuant to s.99 of the Companies Law (2010 Revision), that any disposition of the company's property made after the presentation of the winding-up petition in March 2009 would be void unless validated by the court. Liquidators were appointed in respect of the company. The company's bank statements showed that a significant amount of the sums drawn down under the notes were used by Mr. Le Comte to settle the accounts of the attorneys acting on his instructions in the winding-up proceedings. Shortly thereafter, 733 Properties gave notice that the winding-up order constituted a default, that all sums and obligations to it had become due, and that it intended to exercise its rights pursuant to the security. 733 Properties subsequently assigned its rights to its subsidiary, the GCF Group.

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 5 of 31 PageID #: 6121

The liquidators applied for a declaration that the purported grant of the security over all the company's assets was void under s.99 of the Companies Law (2010 Revision). They submitted that the grant of the security was not within the terms of the validation order, since it (a) had been for the inappropriate purpose of funding Mr. Le Comte's litigation against Mr. Heinen; (b) was not part of the ordinary operation of the business, but rather a response to abnormal financial difficulties, with major consequences; (c) was not analogous to the loans that the company had previously taken from Mr. Le Comte himself or the proposed third-party financing he had discussed with Mr. Heinen; (d) was concealed from Mr. Heinen, when, under the terms of the shareholders' agreement between himself and Mr. Le Comte, he should have been consulted and the matter put to a vote; (e) was disproportionate to the amount of borrowing enabled by the notes, given Mr. Le Comte's high valuation of the company; (f) inappropriately provided for an immediate default upon the execution of the notes; (g) had the collateral purpose of giving the Durst Organization a priority claim over the assets and thereby preventing Mr. Heinen from gaining control; and (h) was therefore not in the ordinary course of the company's business. They further submitted that it should not now be retrospectively validated, since (i) granting the security was not in the interests of the company, nor could a reasonable and honest director have believed it to be; (j) there had been irregularities in the company's affairs in that Mr. Le Comte was guilty of a lack of probity; (k) retrospective validation at this time would frustrate the official liquidators' taking control of the assets; and (l) declaring the grant of the security void would not be unfair to 733 Properties or the Durst Organization, since it was their decision to rely on Mr. Le Comte's attorneys' opinion, some of the assumptions underlying which Mr. Durst knew to be under challenge.

The GCF Group submitted in reply that the grant of the security was within the terms of the validation order and should not be declared void under s.99 of the Companies Law, since (a) the company's articles of association provided that the company's objects were unrestricted; (b) the company had relied on loans from Mr. Le Comte in the past; (c) Mr. Heinen and Mr. Le Comte had previously discussed proposals to obtain third party financing; (d) meeting the costs of the ongoing litigation through borrowing money had become an existing practice of the company; (e) by virtue of the shareholders' agreement between them, Mr. Le Comte was not required to inform Mr. Heinen of the proposed grant; (f) the existence of the winding-up petition, of which the Durst Group was already aware, was not intended to qualify as a default; (g) the fact that Mr. Le Comte and his wife had provided personal guarantees of the company's obligations under the notes was inconsistent with the inference of a collateral purpose; and consequently (h) the grant of the security was in "the ordinary course of the company's business." In the alternative, GCF applied for an order retrospectively validating the grant of the security, submitting that (i) the court had an unfettered jurisdiction to validate dispositions, including retrospectively; (j) the company was

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 6 of 31 PageID #: 6122

solvent at the relevant time, and therefore the validation of the grant of the security should not be seen as prejudicial to unsecured creditors; and (k) declaring the grant of the security void would be unfair to 733 Properties and the Durst Organization.

The court considered (a) the test for whether a company's actions came within "the ordinary course of business"; and (b) when it would exercise its discretion to validate a disposition of a company's property so that the disposition would not be void under s.99 of the Companies Law.

Held, declaring the purported grant of the security void:

(1) The court would declare the grant of the security to be void under s.99 of the Companies Law (2010 Revision). Since it was established law that a grant of security over a company's assets was a disposition of its property, in order to determine whether it was within the terms of the validation order the question was whether it was made in "the ordinary course of the company's business." In answering this, the relevant considerations included the circumstances in which the grant occurred, whether an objective observer would consider it as having occurred in the ordinary course of business, and the prior practices of the company. The focus needed to be on the ordinary operational activities of businesses, and not responses to abnormal financial difficulties. However, not all these factors would be applicable in every case, no single factor would be conclusive, and the list was not exclusive. A disposition could be in the ordinary course of business despite being unprecedented, and conversely, a disposition would not automatically qualify simply because it was non-fraudulent and within the objects of the company's articles of association. A grant of security over all of a company's assets during winding up could fall within the ordinary course of a company's business, but the court needed to consider all the circumstances. Moreover, the grant of such security should usually be the subject of a prospective validation application to the court, in order that all the potential consequences could be properly analyzed (paras. 13–17).

(2) The grant of the security was outside the ordinary course of the company's business in a number of ways. First, the purpose of obtaining money in return for security was to finance Mr. Le Comte's litigation against Mr. Heinen, of which the company was merely the subject-matter, and it would not be in the ordinary course of any company's business to borrow money to fund litigation by one shareholder against another. Secondly, it was a response to abnormal financial difficulties, and not within the ordinary operational activities of the company. Neither the loans the company had previously taken from Mr. Le Comte himself nor the proposed third-party financing he had discussed with Mr. Heinen before their relationship broke down were analogous to granting security over all the company's assets, which was a highly unusual step with major consequences. Thirdly, Mr. Le Comte had deliberately concealed from Mr. Heinen the grant of the security, when the shareholders' agreement required Mr. Le Comte to consult with Mr. Heinen, and arguably to put the

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 7 of 31 PageID #: 6123

matter to a vote. Fourthly, the extent of the security was disproportionate to the amount of borrowing enabled by the notes, given Mr. Le Comte's much higher valuation of the company. It was also surprising that—on a usual construction without reference to the parties' intentions, as required by Cayman law—the notes provided for an immediate default upon their execution. Fifthly, there was clear evidence that Mr. Le Comte's grant of the security had the collateral purpose of giving the Durst Organization a priority claim, thereby preventing Mr. Heinen from gaining control of the assets. In the circumstances, the grant of the security was clearly not in the ordinary course of the company's business and therefore fell outside the terms of the consent validation order (para. 31; paras. 42–49).

(3) Moreover, the court would not retrospectively validate the grant of security over all of the company's assets. The grant of such security should usually be the subject of a prospective validation application to the court, in order that all the potential consequences could be properly analyzed. Nonetheless, the court had an unfettered discretion whether to validate any particular disposition, including doing so retrospectively, so that it would not be void under s.99 of the Companies Law. In determining whether to exercise this discretion, the relevant considerations would be: whether the disposition was within the directors' powers; whether the directors believed it to be necessary or in the interests of the company; whether it was made in good faith; whether there were good reasons for it; and whether there had been irregularities in the affairs of the company. Not all of these factors would always be applicable, nor was it an exclusive list—every case would turn on its own circumstances. The court's principal concern would be to avoid prejudice to the body of unsecured creditors as a whole. If the company were solvent, the usual assumption would be that the disposition would not be prejudicial to the creditors as it should not affect their repayment, although even this would not be conclusive if, as here, the winding-up petition were based on grounds other than insolvency (para. 25; paras. 51–59).

(4) In these circumstances, it was unclear whether the company was solvent at the time of the grant of the security. It appeared that, although it was solvent on a balance sheet test, it was not solvent in that it was unable to pay its debts as they fell due. However, even if it were solvent when the grant of the security was proposed, the court would not have validated the grant of the security at that time. As the court had already concluded, the grant was not in the ordinary course of the company's business, and there was no evidence suggesting that the reasons for granting it were in the interests of the company or could have been held by a reasonable and honest director. Rather, it appeared to be purely in Mr. Le Comte's personal interests. Irregularities in the affairs of the company had also been shown, in that Mr. Le Comte had been guilty of a lack of probity and had granted the security to achieve a collateral purpose. Even if the court would have validated it at the time of its proposal, it would not now do so retrospectively, since, the company having entered official liquidation,

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 8 of 31 PageID #: 6124

validation of the grant of the security would frustrate the official liquidators' taking control of the assets. Nor would this be unfair to 733 Properties or the Durst Organization, since it was their decision to rely on Mr. Le Comte's attorneys' opinion, some of the assumptions underlying which Mr. Durst knew to be under challenge. The grant of the security would therefore not be validated retrospectively, and would be void under s.99 of the Companies Law (paras. 61–67).

Cases cited:

(1) *Ashborder BV v. Green Gas Power Ltd.*, [2005] 1 BCLC 623; [2005] BCC 634; [2004] EWHC 1517 (Ch), applied.

(2) *Burton & Deakin Ltd., In re*, [1977] 1 W.L.R. 390; [1977] 1 All E.R. 631, referred to.

(3) *Countrywide Banking Corp. Ltd. v. Dean*, [1998] A.C. 338; [1998] 2 W.L.R. 441; [1998] 3 LRC 107; [1998] 1 BCLC 306; [1998] BCC 105, applied.

(4) *Crossmore Elec. & Civil Engr. Ltd., In re* (1988), 5 BCC 37; [1989] BCLC 137, referred to.

(5) *Cybervest Fund, In re*, 2006 CILR 80, *dicta* of Smellie, C.J. applied.

(6) *Denney v. John Hudson & Co. Ltd.*, [1992] BCLC 901; [1992] BCC 503, referred to.

(7) *Fairway Graphics Ltd., Re*, [1991] BCLC 468, referred to.

(8) *Fortuna Dev. Corp., In re*, 2004–05 CILR 533, *dicta* of Henderson, J. applied.

(9) *Gray's Inn Constr. Co. Ltd., In re*, [1980] 1 W.L.R. 711; [1980] 1 All E.R. 814, *dictum* of Buckley, L.J. applied.

(10) *Mal Bower's Macquarie Elec. Centre Pty. Ltd., Re*, [1974] 1 N.S.W.L.R. 254, referred to.

(11) *Scotiabank (C.I.) Ltd. v. Treasure Island Resort (Cayman) Ltd.*, 2004–05 CILR 423, referred to.

(12) *Steane's (Bournemouth) Ltd., Re*, [1950] 1 All E.R. 21, applied.

(13) *Tellsa Furniture Pty. Ltd., Re* (1985), 81 FLR 185; 9 ACLR 869, applied.

Legislation construed:

Companies Law (2010 Revision), s.99: The relevant terms of this section are set out at para. 4.

s.100(2): The relevant terms of this sub-section are set out at para. 4.

s.142(1): The relevant terms of this sub-section are set out at para. 37.

A.A. Galatopoulos and *Ms. R.A. Collins* for the liquidators;

J.G. Manning and *A.J. Walters* for the GCF Group;

G. Halkerston and *Ms. K. Brown* for Mr. Heinen;

A. Turner and *Ms. R. Lawrence* for Mr. Le Comte.

1. **FOSTER, J.:** This is the ruling on the application of the joint official liquidators ("the JOLs") of Freerider Ltd. ("the company," and in official

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 9 of 31 PageID #: 6125

liquidation) by summons dated August 30th, 2010 seeking a declaration that the security over all the assets of the company purportedly granted under two convertible revolving secured promissory notes and security agreements, respectively dated August 17th, 2009 ("the first note") and December 3rd, 2009 ("the second note," and together, "the notes") in favour of 733 Properties Inc. and subsequently assigned to its subsidiary, GCF Group LLC, is not within the terms of a validation order made by consent on June 29th, 2009 ("the consent validation order"), not having been granted in the ordinary course of the company's business for proper value, and is therefore void under s.99 of the Companies Law (2010 Revision) ("the Law"). The ruling also relates to the summons of GCF, also dated August 30th, 2010, seeking an order that, if the court finds that the security is not within the terms of the consent validation order, the grant of the security should now be retrospectively validated and accordingly not be void pursuant to s.99 of the Law.

General background

2. The company was ordered to be wound up on just and equitable grounds on May 13th, 2010 on the petition of Mr. Heinen, who is one of the two voting shareholders, which was vigorously opposed by the only other voting shareholder, Mr. Le Comte. Mr. Le Comte subsequently appealed to the Court of Appeal against the winding-up order, but his appeal was refused on August 24th, 2010. In a previous ruling dated November 11th, 2009, the court had directed pursuant to O.3, r.11(2) of the Companies Winding Up Rules 2008 that the company itself should not be able to participate in the winding-up proceedings, as it was merely the subject-matter of the proceedings, which should be treated as *inter partes* proceedings between Mr. Heinen and Mr. Le Comte.

3. The background to the dispute between Mr. Heinen and Mr. Le Comte concerning the company is fully set out in the reasons for the winding-up order dated May 13th, 2010, and I do not consider it necessary to rehearse that background.

The consent validation order

4. Section 99 of the Law provides:

"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."

Section 100(2) of the Law provides:

"In any other circumstance not specified in subsection (1) [none of which are applicable here], the winding up of a company by the

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 10 of 31 PageID #: 6126

Court is deemed to commence at the time of the presentation of the petition for winding up."

Both s.99 and s.100(2) are intended to protect the unsecured creditors of the company once winding-up proceedings have commenced. The companies law in the United Kingdom, Australia, Canada and most other Commonwealth common law jurisdictions has been to the same effect since the 19th century.

5. On June 22nd, 2009, the attorneys then representing the company on Mr. Le Comte's instructions, Turner & Roulstone, wrote to Mr. Heinen's attorneys, Appleby, proposing that the parties should agree to a validation order to enable the company to carry on its general business notwithstanding the presentation of the winding-up petition, thus avoiding the consequences of s.99 of the Law. Turner & Roulstone requested an urgent response. The following day, June 23rd, 2009, Appleby responded stating that they were taking instructions in relation to the proposed validation order and in the meantime requested details of the transactions which it was sought to validate. By reply email on June 24th, Turner & Roulstone responded, again requesting that Mr. Heinen's attorneys revert to them on the proposed orders without delay. Their email then said:

"*The company needs to have the ability to conduct its general business* and this type of order is given as of right where a just and equitable petition has been issued. There is no obligation on the company to provide specific details of the transactions which it wishes to conduct." [Emphasis supplied.]

6. By reply letter dated June 29th, 2009, Appleby confirmed that their client, Mr. Heinen, was prepared to agree to the terms of the "draft consent order validating payments and other dispositions of property made by the company in the ordinary course of its business for proper value pending the determination of the petition." Appleby went on to contend that their client was entitled to details of all such transactions and requested confirmation by return that such details would be provided. It seems that no response to that request was ever received.

7. The consent validation order, being a consent order, was dealt with administratively and signed by the clerk of court. There was no hearing by or involvement of the court. The consent validation order provided as follows:

"It is hereby ordered by consent that, notwithstanding the presentation of the petition against Freerider Ltd. ("the company"):

(1) payments made into or out of the bank accounts of the company in the ordinary course of business of the company; and

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 11 of 31 PageID #: 6127

(2) dispositions of the property of the company made in the ordinary course of its business for proper value;

between the date of presentation of the petition and the date of judgment on the petition or further order in the meantime shall not be void by virtue of the provisions of s.99 of the Companies (Amendment) Law 2007 [now s.99 of the Law] in the event of an order for the winding up of the company being made on the said petition."

It is para. 2 of the consent validation order which is now in issue.

Procedure

8. I should note that Mr. Heinen had previously issued a summons, dated June 16th, 2010, subsequently amended on July 15th, 2010, by which he himself sought a declaration that the notes and the security were both void pursuant to s.99 of the Law. This summons as amended therefore predated the JOLs' summons, which is the subject of this ruling. Both counsel for GCF and counsel for Mr. Le Comte raised an issue as to Mr. Heinen's *locus* to make such an application, contending that the JOLs were the only appropriate parties to seek a declaration under s.99 of the Law. As the JOLs have since done that (albeit that their application relates only to the grant of the security and not to the promissory notes as such), I declined to hear Mr. Heinen's amended summons or the related arguments on the question of Mr. Heinen's *locus* in the course of hearing the JOLs' summons. However, I indicated that I would deal with any issues arising out of Mr. Heinen's amended summons, if necessary, at some future date. Nonetheless, since Mr. Heinen and Mr. Le Comte are both contributories and were respectively the petitioner and the respondent in the winding-up proceedings, I did agree to hear and did hear submissions on behalf of Mr. Heinen in support of the JOLs' summons and in opposition to GCF's summons and submission on behalf of Mr. Le Comte in opposition to the JOLs' summons and in support of GCF's summons.

9. I should also note that counsel for Mr. Heinen indicated that he wished to argue that the grant of the security was not anyway a disposition of the property of the company because, he contended, Mr. Le Comte had no authority to enter into the notes and to grant the security on behalf of the company. Since, at a previous directions hearing on August 27th, 2010, I had already directed that the sole issue for determination at the hearing before me in the event that the JOLs issued a summons would be whether the grant of the security was made in the ordinary course of the company's business in terms of the consent validation order, I declined to allow Mr. Heinen's counsel to make his proposed argument at the hearing of the JOLs' summons. However, I accepted that Mr. Heinen's counsel was entitled to consider his position in light of this ruling and, if he considered

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 12 of 31 PageID #: 6128

it necessary and appropriate, to make an application in that regard at some future date.

The disposition in issue

10. The affidavit evidence establishes that Mr. Le Comte, purporting to act on behalf of the company, as the borrower and 733 Properties as the lender entered into the first note on August 17th, 2009, approximately two months after the date of the consent validation order. 733 Properties is a company which is part of the Durst Organization of New York, which carries on business principally as an owner, builder and manager of commercial and residential real estate in New York. The Durst Organization is headed by Mr. Jonathan Durst and a cousin of his. Mr. Durst's wife is a close personal friend of Mr. Le Comte's wife. According to Mr. Durst's affidavit, he has been a friend of Mr. Le Comte and his family for almost 20 years, principally through the friendship of their respective wives and children. Mr. Le Comte's evidence confirms this.

11. The first note relates to a sum of up to US$1m. together with interest. The second note relates to a further sum of up to US$1m. together with interest. The notes are otherwise in substantially identical terms and by cl. 3 in each case provide for the grant by the company of security (referred to in the notes as "collateral") over all of the company's assets, wherever located, including all intellectual property rights and any claims against third parties. The notes also provide (cl. 2) *inter alia* that the institution against the company of any liquidation proceeding which remains undismissed for 90 days is an event of default as a result of which the note in each case becomes automatically and immediately due and payable and 733 Properties has the right to exercise its rights under the note with regard *inter alia* to the security.

12. On May 21st, 2010 (just over a week after the winding-up order of May 13th, 2010 was made), 733 Properties gave formal notice that the winding-up order constituted a default under the notes and that all sums and obligations under the notes were then due and payable and that 733 Properties intended to exercise its rights and remedies under the notes, including all its rights to proceed against the "collateral" (*i.e.* the security). Since then, there has been an ongoing disagreement between 733 Properties (and its subsequent assignee, GCF) and the JOLs and Mr. Heinen over the right of the JOLs or 733 Properties, now GCF, to possession and control of the assets of the company, including the right to control the litigation instigated by Mr. Le Comte in the name of the company in New York and the Netherlands. Subsequently, as I understand it, by consent of the parties, including the JOLs, the legal proceedings in New York were stayed by the court until November 30th, 2010 to enable determination of the validity of the purported grant of the security by the company, which is, of course, a matter of Cayman law, by this court.

Case 1:26-cv-00495-JLH FILED UNDER SEAL Document 8-30 Filed 05/12/26 Page 13 of 31 PageID #: 6129

The relevant law on the ordinary course of business

13. Section 99 of the Law applies when there is a disposition of a company's property after the commencement of a winding up and the court has not made an order that the disposition concerned is not thereby void. It was accepted by all parties that the expression "disposition of property" in this context encompasses encumbrances granted over a company's property, such as the security in this case. That is clearly established by authority and not in doubt. Furthermore, as the petition for winding up the company was presented (*i.e.* filed with the court and initiated) on March 6th, 2009 and a winding-up order has since been made, the winding up of the company is deemed, pursuant to s.100(2) of the Law, to have commenced on March 6th, 2009. Accordingly, the security was clearly granted after the commencement of the winding up. There is again no doubt about that and there was no dispute in that regard either between the parties.

14. The court has not made any order specifically validating the granting of the security. The only validation order made is the consent validation order which validates dispositions made by the company "in the ordinary course of its business for proper value." The phrase "in the ordinary course of business" has been considered by various Commonwealth courts on a number of occasions and in a number of contexts, the circumstances of all of which are inevitably different. However, the opinion of the Privy Council in *Countrywide Banking Corp. Ltd.* v. *Dean* (3), which is of course binding on this court, is in my opinion the appropriate authority for determination of the meaning of that expression in Cayman law. The Privy Council made reference to several decisions in other courts, but ultimately declined to adopt any particular formulation of the phrase. It said ([1998] A.C. at 349):

"There are difficulties in drawing upon formulations in different words of statutory tests and treating them as applicable in all circumstances. Such difficulties are increased where those formulations originate in different legal or factual contexts. This is particularly so where the test is essentially one of fact in any event. For these reasons, as presently informed by the argument in this case, their Lordships do not adopt any particular formulation. Nor is it necessary for this case to make any comprehensive statement, suitable for all cases, of the criteria for determining when a transaction is to be held to have taken place in the ordinary course of business for the purpose of [the English legislation under consideration].

. . .

Plainly the transaction must be examined in the actual setting in which it took place. That defines the circumstances in which it is to

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 14 of 31 PageID #: 6130

be determined whether it was in the ordinary course of business. The determination then is to be made objectively by reference to the standard of what amounts to the ordinary course of business. As was said by Fisher, J. in the *Modern Terrazzo Ltd.* case, 10 October 1997, the transaction must be such that it would be viewed by an objective observer as having taken place in the ordinary course of business. While there is to be reference to business practices in the commercial world in general, the focus must still be the ordinary operational activities of businesses as going concerns, not responses to abnormal financial difficulties. Their Lordships respectfully agree with the judge's conclusion by reference to the policy of the section:

'Whether a payment should be regarded as commercially routine at a day to day trading and operating level will turn at least in part upon a comparison with the practices of the commercial community in general. But equally, the way in which the particular company has acted in the past, and its dealings with the particular creditor, would seem pertinent. That the payment was simply a repetition of past patterns of behaviour would make it more difficult to argue that it represented special assistance to an insider or the result of special enforcement measures or a situation in which the subject creditor ought to have investigated before extending credit. So at a policy level there is something to be said for the view that relevant considerations should extend to the prior practices of the particular company.'"

15. It was submitted on behalf of the JOLs, in my opinion correctly, that the opinion of the Privy Council makes it clear that there are no comprehensive criteria for what constitutes "in the ordinary course of business." It is essentially a matter of fact in the light of the particular circumstances in each case. Nonetheless, certain key points were made clear, namely:

(a) the transaction must be examined in the circumstances in which it occurred;

(b) the transaction must be such that an objective observer would view it as having taken place in the ordinary course of business;

(c) the focus of the enquiry must be on the ordinary operational activities of businesses, not responses to abnormal financial difficulties; and

(d) prior practices of the company will be a relevant consideration.

16. Of course, the Privy Council made it clear that none of these points is necessarily applicable in every case, they are not conclusive and are not intended to be comprehensive or exclusive. They are simply guidelines.

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 15 of 31 PageID #: 6131

There was no substantial disagreement between the parties about this analysis, although their respective interpretation of the circumstances of the granting of the security differed considerably, and consequently their proposed application of these guidelines to such circumstances also differed.

17. I also found assistance from the judgment in the English case of *Ashborder BV* v. *Green Gas Power Ltd.* (1), which was a case involving interpretation of the phrase "in the ordinary course of business" in the context of a floating charge over assets of a company which had borrowed funds from lenders in the Enron group. The judge (Etherton, J., now a judge of the English Court of Appeal), in concluding that certain agreements fell outside the scope of the ordinary course of the business of the company concerned, held that the words of the phrase were ordinary words of the English language which had to be given the meaning which ordinary business people would be expected to give them against the factual and commercial background in which the agreements concerned were made. He said that a transaction could be in the ordinary course of business even if it were exceptional or unprecedented, but that a transaction was not to be regarded as in the ordinary course of a company's business merely because it was not fraudulent and was within the company's objects in its memorandum of association. He said that meaning must be given to the word "ordinary" in the phrase. He then held that, in the circumstances of that case, the transactions were not in the ordinary course of the company's business by reason *inter alia* of the non-disclosure to all the directors of the material terms of the agreements and because of his concerns about concealment of the transactions. He also relied on the fact that the company was in abnormal financial difficulty at the time and the agreements were entered into as an exceptional abnormal response to that. These factors were, in the view of the judge, sufficiently unusual features to take the transactions out of the scope of the company's ordinary course of business.

The circumstances of the grant of the security

18. There was no contemporaneous documentary evidence before me to indicate when discussions between Mr. Le Comte and Mr. Durst concerning the proposed first note started. The first available email communication is dated April 6th, 2009. It is from Mr. Le Comte to Mr. Durst under the heading "Freerider—Durst Convertible Secured Promissory Note" and, among other matters (as to which I shall comment further below), attached a proposed agreement. In the email, Mr. Le Comte said he had "tried to capture the spirit of our conversations in order to protect your interests as best I could." Clearly therefore, there had been previous conversations between Mr. Le Comte and Mr. Durst about the proposed loan, as to which there was no evidence before me. Clearly, Mr. Le Comte

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 16 of 31 PageID #: 6132

was also endeavouring to protect the interests of the Dursts. There then followed a series of email exchanges between Mr. Le Comte and Mr. Durst, which culminated with the execution of the first note dated August 17th, 2009.

19. It is clear from this correspondence that the proposed and subsequent grant of the security was intentionally concealed by Mr. Le Comte from his co-director and contributory, Mr. Heinen, and that Mr. Durst was expressly told that this would be the case. In fact Mr. Heinen was not made aware of the existence of either of the notes and the grant of the security until after 733 Properties told the JOLs of them subsequent to the winding-up order. Mr. Le Comte sought to justify this to Mr. Durst at the time, and again in his affidavit evidence produced at the hearing before me, on the basis that his purported grant of the security on behalf of the company fell within his exclusive domain and overriding authority pursuant to the first shareholder agreement dated July 19th, 2003 between him and Mr. Heinen ("the shareholder agreement"). I should add that it was also argued before me that Mr. Heinen would anyway have had a conflict of interest with regard to the grant of the security since the borrowing secured thereby was, it was contended, to be used to meet the company's past and ongoing legal costs of the various litigation against him. Mr. Le Comte's position was that significant sums were and would in future be owed to attorneys in New York, the Netherlands and the Cayman Islands by, on his case, the company, which the company urgently needed and would in future need to settle in order to progress the litigation, and that Mr. Heinen, as the principal opposing party in such litigation, would have had a conflict of interest in being involved in the decision as to whether the company should grant the security in respect of borrowing from the Dursts for such purposes.

20. It appears from the email correspondence between Mr. Le Comte and Mr. Durst that Mr. Le Comte's request was that the company should be given access to a credit line for sums up to US$1m. pursuant to each note, and this appears to be what in practice occurred. GCF claims that Mr. Le Comte, purportedly on behalf of the company, drew down a total principal sum of US$1,550,000 under the notes and that, as at May 31st, 2010, interest amounting to US$38,836.77 had accrued on that sum.

21. Mr. Le Comte provided no evidence as to how the various sums drawn down under the notes were in fact used. His affidavit evidence was that they were used to settle outstanding debts of the company due principally to the attorneys acting in the litigation in New York, the Netherlands and in this country, and to fund the ongoing costs of such litigation. However, no evidence to support that general assertion was produced. Evidence from certain of the company's bank statements showed that a significant portion of the sums drawn down was used by Mr.

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 17 of 31 PageID #: 6133

Le Comte to settle the accounts of the Cayman attorneys, Turner & Roulstone, acting on his instructions in the winding-up proceedings.

Analysis and comment

22. It seems to me that, in order to determine whether the grant of the security was in the ordinary course of the company's business, I must first consider what the business of the company was. As explained in the reasons for the winding-up order dated May 13th, 2010, the company was established to enable payments generated by the commercial exploitation of the intellectual property in TheWheel and associated technology to be made to an entity in a tax-free jurisdiction and also so that the intellectual property rights concerned could be held outside the Dutch company, e-Traction Europe BV, which actually carries out the physical work on and development of TheWheel and associated technology (see *2010 (1) CILR 486, at paras. 14* and *69*). Accordingly, the company's business essentially consists of the holding and control of the intellectual property rights in TheWheel and other related technology.

23. It was submitted on behalf of GCF that the company's memorandum of association provides that the company's objects are unrestricted and that, accordingly, the grant of the security was within the company's objects. I was also referred to art. 95 of the company's articles of association, which provides that—

"the directors may exercise all the powers of the company to borrow money or to mortgage or charge its undertaking, property and uncalled capital or any part thereof, to issue debentures, debenture stock and other securities whenever money is borrowed or as security for any debt, liability or obligations of the company or of any third party."

It was contended that, accordingly, the provision of the security pursuant to the notes was within the company's objects and within the powers of its directors.

24. It was further submitted that, since the company has been reliant from time to time in the past on loans from Mr. Le Comte to meet its day to day operating expenses, borrowing money was within the ordinary course of the company's business. It was said that the grant of security as a condition of borrowing is clearly a usual practice of the business community in general.

25. It is, of course, the grant of the security over all of the company's assets and rights which is in issue, not the borrowing of money. The grant of such security obviously impacts adversely upon the position of unsecured creditors and is clearly an important and significant transaction. The principal purpose of the statutory scheme applicable to winding up is

FILED UNDER SEAL

to protect unsecured creditors and their entitlement to eventual *pari passu* distribution in a winding up and to enable the winding up of the company in an orderly manner by officers of the court. This is the principal reason why, in my opinion, a proposal by the directors of a company to grant security over all of its assets and rights after winding-up proceedings have been initiated would and should normally be the subject of a prospective validation application to the court so that the benefit to the company, which the directors contend derives from such secured borrowing, may be properly and fully analyzed and fairly balanced against the rights and interests of unsecured creditors in advance of any such security being granted. No doubt the court, in doing so, would have regard to the views of unsecured creditors, but an overall approach, having regard to all the circumstances, will be taken.

26. In fact, the company has never previously granted security of any kind in respect of its borrowings, which have always been from Mr. Le Comte as a shareholder and investor in the company. Both he and Mr. Heinen are on record as having said on several occasions that they consider the intellectual property rights currently held by the company to be of very substantial value having regard to the considerable financial potential from exploitation of TheWheel and associated technology. Those rights are also the company's only asset of any significance. Mr. Le Comte also estimated the realizations from the litigation, particularly in New York, if successful, would be very significant. In such circumstances, to grant security over all of the company's assets and rights, including all of the intellectual property rights it holds, was, as I have said, clearly a very significant and important step, particularly having regard to the fact that such security was granted pursuant to the first note in respect of a loan of up to US$1m., a relatively small amount in proportion to Mr. Le Comte's own opinion of the very high value of the company's assets and rights.

27. It was also contended on behalf of Mr. Le Comte that, since the company has been carrying on litigation over the past three years (albeit procured by him), meeting the costs of such litigation through borrowing has been a prior practice and become part of the ordinary course of the company's business. I shall comment on that suggestion later in this ruling.

28. As I have already mentioned, in deliberately not informing his co-director, Mr. Heinen, of the proposed grant of the security, Mr. Le Comte relied on the provisions of the shareholder agreement and in particular s.1, as he did in his unsuccessful opposition to the winding up of the company. In the present context, Mr. Le Comte contends that the effect of the shareholder agreement is that he has the sole right to determine all management issues of the company of a non-technical nature and that accordingly it was solely up to him whether or not the company should enter into the notes and grant the security. In his view, Mr. Heinen was not

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 19 of 31 PageID #: 6135

entitled to any say in the matter. However, in my opinion, apart from the fact that, as Mr. Le Comte was well aware at the time, it is anyway contended by Mr. Heinen that the shareholder agreement is not valid, that is not quite what the shareholder agreement provides. Section 1(2) provides, with regard to business and other non-technical issues:

"All votes [are] to be carried in favour of, and/or all actions to be taken and documents and instruments [are] to be executed in accordance with, the recommendation with regard thereto made by Mr. Le Comte in his sole discretion."

29. This clearly, at the least, requires there to be a recommendation with regard to the proposed action by Mr. Le Comte provided to Mr. Heinen, and, arguably, also a vote. The section does not, in my view, simply entitle Mr. Le Comte to ignore Mr. Heinen entirely and to make decisions and take actions unilaterally in respect of the company without at least informing his co-director (described in the shareholders agreement, as he and Mr. Le Comte both are, as a "manager" of the business). Mr. Le Comte, of course, alleges that he had removed Mr. Heinen as a director of the company. However, he was well aware that that was strongly disputed and that Mr. Heinen had refused to resign. Mr. Le Comte was aware of all this when he claimed to Mr. Durst that he had the sole right to procure the company to grant the security and that he did not intend to inform Mr. Heinen of what he proposed. Nor do I consider that the fact that he considered Mr. Heinen would have had a conflict of interest meant that he was not required to inform Mr. Heinen of his proposed action on behalf of the company.

30. A further point which was the subject of argument before me related to the provisions regarding default in the notes. It was submitted by counsel for the JOLs and counsel for Mr. Heinen that the wording of cl. 2(a)(iii) of each of the notes meant that, upon execution, the notes would become automatically and immediately due and payable because liquidation proceedings against the company had at the date of execution been commenced and remained undismissed for 90 days. This would have brought about an immediate acceleration of liability under the notes and the obligation of the company to pay an increased interest rate and legal and other expenses. There was affidavit evidence from the New York attorney representing the Durst Group in which he commented on that submission. He stated that the language in cl. 2(a)(iii) of each note is merely *pro forma*, that it was not contemplated that the existence of the winding-up petition, of which he and the company's New York attorneys were well aware, would qualify as a default and that he did not believe the company would have executed the notes if it had believed there was already an existing default.

31. The notes are, of course, governed by New York law, although the

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 20 of 31 PageID #: 6136

law in this country is that foreign law is presumed to be the same as Cayman law in the absence of expert evidence of the relevant foreign law. No such expert evidence on the law of New York relating to the construction and interpretation of legal documents such as the notes was made available to me. Under Cayman law, it is well established that such documents are to be construed and interpreted solely upon the basis of their wording and that evidence of preliminary negotiations, of the subjective intentions of the parties and those connected to them and of subsequent actions is not relevant or admissible as an aid to their construction. There is no evidence before me as to whether or not that also represents the law of New York, but, on a construction of cl. 2(a)(iii) in accordance with Cayman law, the submissions on behalf of the JOLs and Mr. Heinen in this regard are, in my opinion, clearly correct. It seems to me, to put it at its lowest, that the construction and effect of documentation which the directors of a company subject to winding-up proceedings propose to enter into, allegedly in the best interests of the company, such as the notes and the associated security, should and would properly be the subject of scrutiny by the court in considering whether or not a disposition pursuant to such documentation should be validated.

32. I have already made passing reference to some of the email communications between Mr. Le Comte and Mr. Durst but in my view they warrant further analysis and comment. I should say that the general tone of this series of emails is informal and friendly and makes it clear that there is considerable family friendship between Mr. Le Comte and his family on the one hand and Mr. Durst and his family on the other. There do appear to me to be gaps in the correspondences produced to me. As I have said, it is also clear from the correspondence that there were meetings and discussions between Mr. Le Comte and Mr. Durst, the content of which were either not recorded or such records were not produced and which was not disclosed nor explained in the affidavit evidence.

33. The first email produced, dated April 6th, 2009, from Mr. Le Comte to Mr. Durst, to which I have already referred in part, commences as follows:

"All went according to plan in Luxembourg, though not without noteworthy incidents. [Mr. Heinen] has been set up for the next round without knowing and/or realizing it.

The 'pearls of wisdom' have meanwhile materialized. Please find attached a proposed agreement . . ."

I consider it reasonable to assume that Mr. Durst understood what Mr. Le Comte was talking about. There is no evidence or suggestion otherwise.

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 21 of 31 PageID #: 6137

34. In a subsequent email, dated May 29th, 2009, Mr. Le Comte informed Mr. Durst that it was—

"imperative that a parallel research and development production facility be created in the United States. A successful participation in this project would represent an enormous economic opportunity for the combined companies.

[Mr. Le Comte then referred to a pilot program for a people-mover system at Frankfurt Airport.]

Let's talk about this at your leisure. Incidentally, I did speak with your friend Tedd and gave him my best advice based on my assessment of the financial feasibility of his project . . ."

Again, it is not entirely clear what Mr. Le Comte is referring to by "the combined companies," but Mr. Durst must have known.

35. The reference to Mr. Durst's friend Tedd is to a contact he had provided to Mr. Le Comte who was interested in the possibility of using the technology associated with TheWheel. Mr. Heinen emphatically denied in his affidavit evidence that he had ever agreed that there should be a research and development facility in the US and he gave various credible reasons why he would never have agreed to that. It was submitted that this email was indicative of Mr. Le Comte's alleged plan to take over the intellectual property rights in TheWheel and associated technology entirely. It also seems that he may have been discussing doing so jointly with the Dursts.

36. On June 5th, 2009, Mr. Le Comte emailed Mr. Marx at the Durst Organization, with a copy to Mr. Durst, attaching a copy of the original draft agreement. He said:

"I have since come to the conclusion that a specific lien on the intellectual property and/or certain rights thereto should be added to ensure the ability to have a priority claim in recovering the debt, which should also serve in signalling to the 'opposition' that the actions being contemplated by them at this time are unlikely to allow them to gain control over the principal company assets (e-Traction Europe BV and the intellectual property) . . ."

A subsequent email from Mr. Le Comte to Mr. Durst, dated June 15th, 2009, makes it clear that there was also a conversation between them the same day as Mr. Le Comte's June 5th email.

37. Section 142(1) of the Companies Law (2009 Revision) (now s.142(1) of the 2010 Revision) provides:

"Notwithstanding that a winding up order has been made, a creditor who has security over the whole or part of the assets of a company is

FILED UNDER SEAL

entitled to enforce his security without the leave of the Court and without reference to the liquidator."

The evidence shows that Mr. Le Comte, Mr. Durst and their respective New York lawyers were well aware of this provision.

38. In my view, the inference from the email correspondence between Mr. Le Comte and Mr. Durst to which I have referred above, taken with Mr. Le Comte's deliberate action in not informing Mr. Heinen of his proposal to grant the security and the other circumstances at the time, is that Mr. Le Comte's intention, at least in part, was that the priority claim effected by the grant of the security to his friends the Dursts' company would prevent Mr. Heinen, through an official liquidator appointed on a winding up pursuant to Mr. Heinen's petition, from taking control of the assets of the company, particularly the intellectual property rights.

39. It was argued on behalf of GCF that the fact that Mr. Le Comte provided the Dursts with joint personal guarantees by himself and his wife of the company's obligations under the notes is inconsistent with this inference. Having regard to the particular circumstances of this matter, I do not agree. As I have already said, Mr. Le Comte was clearly of the firm view that the assets of the company "make it a very valuable company" with "enormous commercial prospects and valuable assets," and is on record as emphasizing that view on several occasions, including to Mr. Durst (see for example the email dated July 20th, 2009). He said that it was "simply inconceivable that in three years, when the loan comes due, [the company] would be worth less than the maximum amount of the credit line." If, as Mr. Le Comte believed, it was inconceivable that the company would be unable to repay the sums drawn down under the notes, the risk to him in providing the unsecured joint guarantees was negligible. In my judgment, the provision of the joint guarantees does not detract from the inference from the email correspondence, and from the other circumstances which I have already mentioned, that Mr. Le Comte's offer to add the security to the proposed borrowing arrangements was intended, at least in part, to prevent a liquidator appointed by this court from taking possession and control of the company's assets. He wished to ensure that, in the event of a winding up, the company's assets would be under the possession and control of his friends the Dursts.

40. Mr. Le Comte's deliberate concealment of the proposed and actual grant of the security is, in my opinion, entirely consistent with this analysis. Although by the time of the consent validation order on June 29th, 2009, discussions and negotiations between Mr. Le Comte and Mr. Durst with regard to the proposed borrowing and the grant of the security were well underway, no mention of the proposed transaction, and particularly the grant of the security, was made by Mr. Le Comte's Cayman attorneys, Turner & Roulstone, in their correspondence proposing the

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 23 of 31 PageID #: 6139

consent validation order to Mr. Heinen's Cayman attorneys, Appleby. The explanation of the proposed validation order in Turner & Roulstone's email dated June 24th, 2009 that "the company needs to have the ability to conduct its general business" was, in the circumstances, disingenuous to say the least. Despite requests from Appleby for details of the transactions in question, no such information was provided, and no indication of the proposed grant of the security was given. I am also concerned that no mention of the grant of the security was made to the court at any time prior to or during the hearing of the winding-up petition in April 2010. Given the extent and effect of the purported grant of the security, it was clearly likely to be a significant factor in the court's consideration of whether a winding-up order should be made and official liquidators appointed to take possession and control of the company's assets. In my opinion the existence of the security should have been disclosed.

Conclusions on the "ordinary course of business" issue

41. Etherton, J. pointed out in *Ashborder BV* v. *Green Gas Power Ltd.* (1) that there may be circumstances in which the grant of security over all the assets of a company may be held to fall within the scope of the ordinary course of that company's business. Equally, however, even if *prima facie* such a grant may be considered to fall within the scope of that phrase, there may nonetheless be such unusual features surrounding such a disposition that it will nonetheless fall outside the scope of the ordinary course of the company's business.

42. In the present case I do not consider the grant of the security, which extended to all of the assets of the company, which Mr. Le Comte himself expressly considered to be of enormous commercial value, to have been in the ordinary course of the company's business at all. I have already explained the nature of the company's business. In my opinion, the fact that Mr. Le Comte has procured the company to engage in litigation with his co-director and contributory in New York, the Netherlands and Luxembourg over the past three years or so in no sense means that litigation is a business of the company. Certainly, the litigation in this court leading up to the winding-up order was not properly litigation by the company anyway: it was litigation between Mr. Le Comte and Mr. Heinen personally. It was essentially and obviously a dispute between Mr. Le Comte and Mr. Heinen, as quasi-partners in the business, the subject of which was the company. Furthermore, it was very clearly not the ordinary business of the company, or of any company, to borrow money to fund litigation by one shareholder against another. Even the litigation in New York and the Netherlands, in which Mr. Le Comte has procured the company to engage, is principally litigation against an equal shareholder/contributory of the company. In my opinion that does not fall within the realm of what an objective observer would consider to be within the

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 24 of 31 PageID #: 6140

ordinary course of the company's business. Borrowing for that purpose, and the grant of security over the assets of the company to enable such borrowing, is no different.

43. The transaction between Mr. Le Comte and the Dursts was, on Mr. Le Comte's own case, a response to abnormal financial difficulties and not within the ordinary operational activities of the company. It was in no sense a routine or typical transaction for the company. I am not persuaded by the argument that the prior practices of the company in taking loans from Mr. Le Comte, a shareholder and investor in the company, were in any sense akin to the dispositions involving the grant of the security. Even if it is correct that in the past, before the deadlock between them arose, Mr. Le Comte and Mr. Heinen together made attempts to obtain third-party financing for the company and that such financing would probably have involved the company being required to give security for such financing, there is no evidence at all with regard to the type or extent of any borrowing or of any security which may have been discussed. Furthermore, there is no obvious evidence that at that time any such borrowing was proposed to be used for the purposes of litigation by the company, still less litigation between the two principals of the company, and clearly that was not the case. In my opinion the only prior practice of the company in this respect has been the unsecured funding of the company from time to time by Mr. Le Comte as a shareholder and investor. That is entirely different from the grant of security over all the assets of the company in support of limited borrowing from friends of Mr. Le Comte. It is not something the company ordinarily would do. It was clearly a highly significant and unusual step for the company, and one with major potential consequences. I am of the opinion that, quite apart from the unusual features surrounding the transaction, the grant of the security pursuant to the first note, repeated pursuant to the second note, was clearly not within the ordinary course of the company's business.

44. I am also of the opinion that the unusual circumstances surrounding the purported grant of the security by the company through Mr. Le Comte take the grant out of the scope of the ordinary course of the company's business in any event. Not only were the proposals and discussions concerning the grant of the security made without the knowledge of the only other director at a time when all involved with the transaction knew that the winding-up petition had been initiated, but there was also a deliberate decision to conceal the proposal. Furthermore, Mr. Durst had been expressly told that there was another director who had refused to resign and that he was not to be informed about the proposed notes. The actual grant of the security was also subsequently and deliberately concealed from Mr. Heinen, not only in his capacity as a director of the company but also as a contributory and as the petitioner for the winding

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 25 of 31 PageID #: 6141

up, until after the winding-up order had been made. It was also concealed from this court.

45. I have already commented on the surprising terms of the notes, which on a usual construction meant that there was an immediate default as soon as they were executed. In the circumstances, such a provision was not clearly in the best interests of the company, notwithstanding that in the event and with hindsight notice of default was not given until after the winding-up order was made.

46. A further significant feature of the security which I consider takes it outside the scope of the ordinary business of the company is its extent, which seems to me disproportionate to the amount of borrowing, which, pursuant to the first note, was up to US$1m. There does not appear to have been any discussion about the appropriate security or its nature or extent, simply the offer of security over all the company's assets by Mr. Le Comte. This in itself seems surprising and unusual to me.

47. In my opinion, it is also relevant that the whole transaction involving the grant of the security was with longstanding friends of Mr. Le Comte and his wife. Even if the affidavit evidence of Mr. Durst that the Dursts "would certainly not have made the loans to Freerider without having the security which it obtained under the notes" is accepted, he does say that he does "not recall specifically when or how the question of security was raised in our discussions." The fact of the matter is that it was Mr. Le Comte who voluntarily proposed that the security should be added to the proposed agreement with the Dursts to ensure they had a priority claim in order that, from Mr. Le Comte's perspective, the winding-up proceedings would not allow "the opposition" to gain control over the principal assets of the company.

48. Quite apart from the ostensible purpose of the borrowing in respect of which the security was purportedly granted by the company and the misuse by Mr. Le Comte, again purportedly on behalf of the company, of at least a portion of that borrowing for his own purposes (and this court has already ordered Mr. Le Comte to refund to the company those monies which he procured the company to pay to his Cayman attorneys for representing his interests in his dispute with Mr. Heinen about the winding up of the company on the grounds that such use was misfeasance by Mr. Le Comte as a director), there is, as I have already explained, clear evidence that there was a collateral purpose in Mr. Le Comte offering and purportedly granting the security on behalf of the company. In my opinion, that is a sufficiently unusual feature of this transaction of itself which takes the grant of the security out of the ordinary course of the company's business. However, there are anyway the other unusual features which I have discussed which also render the circumstances surrounding

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 26 of 31 PageID #: 6142

grant of the security sufficiently extraordinary as to mean that it was clearly not in the ordinary course of the company's business.

49. In my judgment, when all the circumstances surrounding the purported grant of the security are considered, it cannot reasonably be said that it was in the ordinary course of the company's business. Accordingly, I make the declaration which the JOLs seek: that the grant of the security is not within the terms of the consent validation order dated June 29th, 2009.

Retrospective validation

50. In light of my conclusion that the grant of the security was not made in the ordinary course of the company's business, it is void pursuant to s.99 of the Law "unless the Court otherwise orders." In that case, GCF, by its summons dated August 30th, 2010, now seeks an order by way of retrospective validation of the grant of the security.

The relevant law on validation

51. Neither s.99 of the Law nor any other statutory provisions prescribe the circumstances in which the court may validate any particular disposition so that it is not void under the section. The court has an unfettered discretion whether to validate any disposition in its particular circumstances. The equivalent position in England was stated in *Re Steane's (Bournemouth) Ltd.* (12) ([1950] 1 All E.R. at 25):

"The legislature, by omitting to indicate any particular principles which should govern the exercise of the discretion vested in the court, must be deemed to have left it entirely at large, and controlled only by the general principles which apply to every kind of judicial discretion."

52. That was confirmed in the English Court of Appeal by Buckley, L.J. in *In re Gray's Inn Constr. Co. Ltd.* (9), who added ([1980] 1 W.L.R. at 717): ". . . [T]he discretion must, in my opinion, be exercised in the context of the liquidation provisions of the [UK companies legislation, which is generally equivalent to the Law]." Accordingly, the statutory scheme on winding up pursuant to the Law is clearly relevant. I have already summarized the purpose of s.99, which is part of that scheme, earlier in this ruling, as being to preserve the assets of a company in winding up for the protection of its creditors (see confirmation of this by Smellie, C.J. in *Scotiabank (C.I.) Ltd. v. Treasure Island Resort (Cayman) Ltd. (11) (2004–05 CILR 423, at para. 11*)).

53. Guidance on the matters to be taken into account by the court in considering validation was addressed by Henderson, J. in *In re Fortuna Dev. Corp. (8)*, as approved by Smellie, C.J. in *In re Cybervest Fund (5)*.

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 27 of 31 PageID #: 6143

In the *Cybervest* case, Smellie, C.J. agreed with and adopted a summary of the guidelines set out in the *Fortuna* case, which in turn derived from statements of "broad guidelines" in an English case, *In re Burton & Deakin Ltd.* (2). In the *Fortuna* case, it was said (*2004–05 CILR 533, at para. 5*):

"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 . . . Secondly, the evidence must show that the directors believe the disposition is necessary or expedient in the interests of the company . . . 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."

54. Smellie, C.J. went on in the *Cybervest* case to add (*2006 CILR 80, at para. 29*):

"There is another consideration to add to this list, in light of the concerns raised in this 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."

55. Of course these guidelines are neither exclusive nor necessarily applicable to every case in which the court may or may not validate a disposition of a company's property when the company is subject to winding-up proceedings. Every case will turn on its own particular circumstances.

56. It also appears that different considerations may apply depending on whether the company concerned is solvent or insolvent. Solvency in this context has been said to mean that the court is satisfied by credible evidence that the company is able to pay its debts as they fall due (see *Re Fairway Graphics Ltd.* (7) ([1991] BCLC at 468–469)). As I will explain later, it does not appear to me that the company was solvent in that sense at the relevant time.

57. The usual assumption in a case where the company is solvent is that the particular disposition would not be prejudicial to the creditors as it should not affect their debts being repaid (see *Fortuna (8)*). However, even if a company is solvent, that is not necessarily conclusive where the winding-up petition is based on grounds other than insolvency, such as the just and equitable ground (see *Cybervest (5)*), as in the present case.

58. If it cannot be established that the company concerned is solvent, then the principal concern of the court in considering an application for a

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 28 of 31 PageID #: 6144

validation order will be to seek to avoid prejudice to the interests of unsecured creditors of the company (see *Denney* v. *John Hudson & Co. Ltd.* (6)). Occasionally, in appropriate circumstances, the court has sanctioned the grant of a charge over a company's property as security for a loan to enable the company to continue its business as a going concern so that it can be can be sold as such, but in exercising its broad discretion the court must determine the question having regard to all the circumstances in each case. In the present case, I have, of course, already determined that the grant of security was not in the ordinary course of the company's business. It is, however, also clear that payments by a company (and by extension, security granted in respect of borrowing to fund such payments) in respect of disputes which are essentially between shareholders of the company would not be validated (see *In re Crossmore Elec. & Civil Engr. Ltd.* (4)).

59. It was submitted on behalf of GCF that it would be unfair to it (and the Dursts) if the grant of the security were not now validated. However, the purpose of s.99 of the Law is to minimize hardship to the general body of creditors as a whole: prejudice suffered by one particular creditor—in this case GCF/the Dursts—if the disposition is not validated is to be given relatively little weight (see *Re Tellsa Furniture Pty Ltd.* (13)). Of course, the nature and extent of any hardship suffered by the recipient of the disposition in issue will depend entirely on the facts and circumstances surrounding the disposition. As was said in the same case (*ibid.*), quoting from *Re Mal Bower's Macquarie Elec. Centre Pty. Ltd.* (10) (1 N.S.W.L.R. at 258)—

"the legislative intention, as disclosed by the terms of [the equivalent of s.99 of the Law] is such as to require an investigation of what happened to the property, that is to say, what was the disposition, and then to enable the liquidator to recover it upon the basis that the disposition was void. It is recovery from the disponee that forms the basic legislative purpose of [the equivalent section]."

Analysis and comment on the retrospective validation application

60. It is clear that the onus is on GCF to establish that a retrospective validation order should now be made in all the circumstances. The first note, pursuant to which the security was purportedly granted (it was in practical terms re-affirmed pursuant to the second note) was signed as of August 17th, 2009, a year before GCF made its application for validation thereof.

61. It is unclear whether the company was solvent at the relevant time, which in my view is at the time of the purported grant of the security pursuant to the first note. As I have already mentioned, both Mr. Le Comte and Mr. Heinen are firmly of the view that the company was and is solvent

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 29 of 31 PageID #: 6145

on a balance sheet test. However, the very reason why, according to Mr. Le Comte, he procured the company to borrow from the Dursts was because the company was unable to pay its debts as they fell due. The JOLs have certified that the company is of doubtful solvency but that seems to be because they have had little or no access to the company's records and have accordingly been unable to reach a conclusion either way. The position appears to be that, at the time of the grant of security, the company may have been solvent on a balance sheet test but insolvent in being unable to pay its debts as they fell due.

62. However, assuming, in GCF's and Mr. Le Comte's favour for the sake of argument, that the company was solvent at the relevant time, then the test approved by Smellie, C.J. in *Cybervest (5)* should be applied to the circumstances surrounding the grant of the security, which I have already outlined in determining that the grant of the security was not within the ordinary course of the company's business. I do not think it necessary for me to repeat my summary of and comment on those circumstances.

63. There was no "body of evidence" presented to me to satisfy me that the reasons for the grant of the security were ones that an honest and intelligent director could reasonably have held. Indeed, apart from Mr. Le Comte's general comments in his affidavit evidence that the purpose of the borrowing, which was secured by the purported grant of the security, was largely to pay the legal costs of the litigation in New York, the Netherlands and this country, there was, as I have already mentioned, no detailed information provided by him as to precisely how the funds borrowed from the Dursts' company had been utilized, nor was there any evidence to justify the submission on his behalf that such borrowing was in the best interests of the company. For example, there was no expert opinion evidence as to the merits of the litigation in New York from the company's perspective in order to justify further expenditure on the litigation at that time, namely when the company was the subject of winding-up proceedings. The evidence, and the inference I have drawn from it, is that the money borrowed from 733 Properties/the Dursts was used not only to settle outstanding invoices but also in order to enable the litigation to progress. There was no explanation, still less professional opinion, as to why, for example, the legal proceedings in New York, and perhaps in the Netherlands, could not have been stayed on the company's application pending the determination of the winding-up proceedings, rather than the company spending more money on the litigation in such circumstances. There was no evidence, other than the bare assertions of Mr. Le Comte, that continuing to spend money on the litigation was in the best interests of the company at that time, rather than it being in his personal interests. The evidence, in my opinion, very much supported the latter interpretation.

64. I should also mention the consideration specifically referred to in

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 30 of 31 PageID #: 6146

Cybervest, namely whether irregularities in the conduct of the affairs of the company can be shown. The court has already concluded that the members of the company have justifiably lost confidence in Mr. Le Comte based on a lack of probity in his conduct of the affairs of the business, including the company (see *2010 (1) CILR 486, at para. 72*) and I have already explained why I infer a collateral purpose on the part of Mr. Le Comte in offering and then purporting to grant the security to his friends' company. No authority has been submitted to me to the effect that the court has ever made a validation order, still less a retrospective one, in such circumstances.

65. It seems to me, having regard to the circumstances surrounding the grant of the security, most improbable that it would have been validated at or about the time of its proposed grant a year ago. Even if I am wrong about that, it does not follow that the grant of the security should now be validated retrospectively. The circumstances are now clearly different in that a winding-up order has since been made and the JOLs, who are officers of this court subject to this court's supervision, have been appointed to fulfil their statutory duties under the Law. The uncertainty with regard to the outcome of the winding-up proceedings which may have existed at the time when the security was purportedly granted now no longer exists. The grant of the security, which at the time may have possibly frustrated any official liquidators who might have been appointed in taking possession and control of the company's assets, now would definitely have that effect.

66. As far as 733 Properties and the Dursts are concerned, it was their decision to rely on an opinion by Mr. Le Comte's own attorneys, Turner & Roulstone, several of whose important assumptions were under challenge by Mr. Heinen, of which, at least in some respects, Mr. Durst was aware. For example, Turner & Roulstone did not point out the risks involved in not informing Mr. Heinen of the proposed transaction in light of the fact that Mr. Heinen had refused to resign as a director of the company. They did not point out the risk of the grant of the security, once it became known, being challenged and the risk of it being held by a court that it had not been granted in the ordinary course of the business of the company. They did not point out the risk involved in relying on the shareholder agreement which was under challenge and anyway open to other possible interpretation, or indeed the risks generally arising from the fact that Mr. Le Comte was involved in hostile litigation with Mr. Heinen in several jurisdictions which he was not inevitably bound to win in all respects. Furthermore, as I have already said, it seems to me reasonable to infer that Mr. Durst understood that Mr. Le Comte had offered the security at least in part for tactical collateral reasons of his own relating to his dispute with Mr. Heinen and also related to his suggestions concerning his future control and development of the company's intellectual property rights,

FILED UNDER SEAL
Case 1:26-cv-00495-JLH Document 8-30 Filed 05/12/26 Page 31 of 31 PageID #: 6147

involving a proposal for a research and development facility in the US, perhaps even as a possible venture with the Dursts.

Conclusion on the retrospective validation application

67. Having regard to all the circumstances surrounding the grant of the security and in light of my analysis and comments above, in the exercise of my discretion I refuse the application of GCF for retrospective validation. I am satisfied that the grant of the security would probably not have been validated prospectively if an application for validation had been made prior to its grant, as in my opinion it should have been, and I do not consider that it should now be validated retrospectively. Indeed it seems to me that there are good additional reasons, as I have outlined above, why that should not be done. I therefore refuse the application by GCF by their summons dated August 30th, 2010 and declare the grant of the security to be void under s.99 of the Law. In the circumstances I will reserve the question of costs for further submissions from counsel in due course.

Declaration accordingly.

Maples & Calder for the liquidators; *Campbells* for the GCF Group; *Appleby* for Mr. Heinen; *Turner & Roulstone* for Mr. Le Comte.

ITEM NO. 146

JA-32

CAYMAN ISLANDS

INTERPRETATION LAW

(CAP. 70)

(1995 Revision)

Supplement No. 5 published with Gazette No. 6 of 20th March, 1995.

PUBLISHING DETAILS

Consolidated with Laws 8 of 1975 (part), 10 of 1975 (part), 15 of 1983, 6 of 1985, 1 of 1987 and 20 of 1990 (part).

Revised under the authority of the Law Revision Law (19 of 1975).

Originally enacted-

Cap. 70 (as Law 17 of 1963)-12th December, 1963
Law 8 of 1975-3rd September, 1975
Law 10 of 1975-3rd September, 1975
Law 15 of 1983-21st June, 1983
Law 6 of 1985-25th March, 1985
Law 1 of 1987-25th February, 1987
Law 20 of 1990-6th September, 1990.

Consolidated and revised this 7th day of February, 1995.

CAYMAN ISLANDS

INTERPRETATION LAW

(1995 Revision)

Arrangement of Sections

Section		Page
Preliminary		**7**
1.	Short title	7
2.	Definition	7
General principles of interpretation		**7**
3.	Interpretation of terms applicable generally	7
4.	General interpretation of gender and number	12
5.	References to public officers by title of office	12
6.	References to the Crown	12
7.	References to time means standard time; power to declare standard time	12
8.	Computation of time	12
9.	Provisions where no time prescribed	13
10.	Measurement of distances	13
11.	References to the number of a line	13
12.	Definitions subject to context and to apply to regulations, etc.	13
Commencement and citation of Laws		**13**
13.	Authenticated copy and assent to Bills	13
14.	Notification of assent to be published	14
15.	Commencement of Law on publication of assent, etc.	14
16.	Moment when Law or regulations comes into operation	14
17.	Laws to be public Laws and judicially noticed	14
18.	Sections to be substantive enactments	14
19.	Mode of citing Laws	15
20.	References in Laws	15

21. Collective titles....15
22. Words to be included in citation of portion of Law. 16

Provisions as to repeals **16**
23. Repeal of a repealing enactment 16
24. Repeal and substitution 16
25. Effect of repeal 16
26. Effect of repeal and re-enactment of regulation making section 17

Provisions as to regulations **17**
27. Provisions as to making of regulations 17
28. Definitions for legislative purposes....18
29. Commencement and proof of regulations 18
30. Acts done under regulations deemed done under Law 18

Provisions as to powers **19**
31. Exercise of powers between passing and commencement of Law 19
32. Construction of provisions as to exercise of powers, etc. 19
33. Power to appoint includes power to suspend or dismiss 19
34. Power to fill vacancy temporarily....19
35. Power to make overlapping appointments 20
36. Power to appoint chairman 20
37. Power to appoint by official designation 20
38. Construction of enabling words....20
39. Powers of Governor to delegate authority 21

Provisions as to Imperial Acts and Orders in Council **21**
40. English Laws in force in the Islands 21
41. Reference in Law to provision of Imperial Act 21
42. Imperial Acts, etc., to be read with necessary modifications....21

Provisions as to penalties **21**
43. Statement of penalty means maximum penalty....21
44. Penalty at foot of section indicates maximum penalty for contravention of section 22
45. Payment of portion of penalty by direction of Governor 22
46. Disposal of forfeits 22
47. Imposition of penalty not to bar civil action....22

Provisions as to offences **22**
48. Provision as to offences under two or more Laws 22
49. Attempt to commit an offence to be deemed an offence....23
50. Remission of penalties....23

Miscellaneous **23**
51. Change in title of public office, etc....23
52. Appointment to statutory public office 23
53. Meaning of service by post. 24
54. Signification of orders of Governor....24

55. Power of majority 24
56. Division of Law into Parts 24
57. Construction of preamble and Schedules to Law 24
58. Deviations in forms 24
59. Construction of amending Law with amended Law 24
60. Reprint of amended Laws 25
61. Notification of enactment and sale of regulations, etc. 25
62. Evidence of signature of Governor 25
63. Saving of rights of the Crown 25
64. Law binding on Crown 25

CAYMAN ISLANDS

INTERPRETATION LAW

(1995 Revision)

ENACTED by the Legislature of the Cayman Islands.

Preliminary

Short title

1. This Law may be cited as the *Interpretation Law* (*1995 Revision*).

Definition

2. In this Law —

"**Law**" means any Law and any regulations made thereunder, and any prerogative Order of the Sovereign in Council applicable exclusively to the Islands, whether enacted before or after the commencement of this Law.

General principles of interpretation

Interpretation of terms applicable generally

3. (1) In this Law and in all Orders in Council, Laws, proclamations, regulations, rules, bye-laws, orders, directions, notices, forms and other instruments of a public character relating to the Islands, now in force or hereafter to be made, the following words and expressions shall have the meanings hereby assigned to them respectively, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided —

"**Act**" used with reference to legislation includes an Act of the Imperial Parliament;

"**act**" used with reference to an offence or civil wrong, includes a series of acts, and words which refer to acts done extend to illegal omissions;

"**affidavit**" includes any document in relation to which an affirmation or declaration has been made by any person allowed by law to affirm or to declare instead of swearing;

"**British possession**" means any British Dependent Territory, Colony or protectorate, or any protected state, or any territory in respect of which a Mandate is being exercised by Her Majesty's Government in the United Kingdom or the Government of any part of Her Majesty's dominions;

"**Christian name**" means any name prefixed to a surname, whether received in Christian baptism or otherwise;

"**coin**" means any coin legally current in the Islands;

"**commencement**", used with reference to a Law, means the time at which the Law comes into operation;

"**common law**" means the common law of England;

"**constable**" means any officer, sub-officer or member of the Royal Cayman Islands Police Force;

"**consul**" or "**consular officer**" includes Consul-General, Consul, Vice-Consul, Consular Agent and any person for the time being authorised to discharge the duties of a Consul-General, Consul or Vice-Consul;

"**contravene**", in relation to any requirement or condition prescribed in any Law, or in any permit, licence or other authority granted under any law, includes a failure to comply with that requirement or condition;

"**court**" means any court of the Islands of competent jurisdiction;

"**court of summary jurisdiction**" means a court established by section 3 of the *Summary Jurisdiction Law* [*Law 10 of 1975*];

"**Crown Agents**" means the persons for the time being acting as Crown Agents for Overseas Governments and Administrations in England, or any of them;

"**Dependent Territory**" or "**Colony**", used with reference to any place other than the Islands, includes a British Protectorate or protected state and any territory under British mandate;

"**financial year**" means the twelve months ending the 31st December in any year;

"**Gazette**" means a Government Notice;

"**gazetted**" means published by Government Notice;

"**Government**" means the Government of the Islands;

"**Governor**" means the person for the time being holding the office of Governor of the Islands, and includes any person for the time being lawfully performing the functions of that office under section 1 of Schedule 2 to the *Cayman Islands (Constitution) Orders 1972 to 1993* [U.K.S.I.'S 1972/1101; 1984/126;1987/2199, 1992/226 and 1993/3143], and to the extent to which a Deputy appointed under section 4 of Schedule 2 to the *Cayman Islands (Constitution) Orders 1972 to 1993* is authorised to act, that Deputy;

"**Governor in Council**" means the Governor acting in accordance with the advice of the Executive Council of the Islands;

"**Grand Court**" means the Grand Court constituted under section 49H of Schedule 2 to the *Cayman Islands (Constitution) Orders 1972 to 1993*;

"**His Majesty**", "**Her Majesty**", "**the King**", "**the Queen**" or "**the Crown**" means His Majesty the King or Her Majesty the Queen, the Sovereign for the time being of Great Britain and Northern Ireland and the British dominions beyond the seas, and includes the predecessors and the heirs and successors of such King or Queen;

"**house**" includes every messuage, part of a messuage, house, part of a house, building or other construction, whether wholly or in part above or below the surface of the ground, inhabited or occupied either by day or by night by man, whether beneficially or otherwise, or intended to be so inhabited or occupied;

"**Imperial Act**" means an Act passed by the Imperial Parliament and assented to by Her Majesty;

"**Imperial Parliament**" or "**Parliament**" means the Parliament of the United Kingdom;

"**the Islands**" means the Cayman Islands;

"**a Justice**" or "**a Justice of the Peace**" means a person appointed by the Governor to be a justice of the peace for the Islands;

"**land**" and "**premises**" includes all tenements or hereditaments, and also all messuages, houses, buildings or other constructions, whether the property of Her Majesty, her heirs or successors, or of any corporation or private individual, except where there are words to exclude houses and other buildings;

"**Law**" includes any Order in Council;

"**Magistrate**" has the meaning assigned to it in the *Summary Jurisdiction Law* [*Law 10 of 1975*];

"**oath**" includes affirmation or declaration in the case of persons by law allowed to affirm or declare instead of swearing;

"**to occupy**" includes, in addition to its ordinary signification, to use, inhabit, possess or enjoy the premises in respect whereof that verb is used, otherwise

than as a mere servant and for the mere purpose of the care, custody and charge thereof;

"**Order in Council**" means any prerogative Order of the Sovereign in Council applicable exclusively to the Islands;

"**person**" includes any corporation, either aggregate or sole, and any club, society, association or other body, of one or more persons;

"**prescribed**" means prescribed by the Law in which the word occurs or by any regulations made thereunder, and, in relation to any regulations, where no other authority is empowered in that behalf in the Law, prescribed by the Governor in Council;

"**proclamation**" means a proclamation of the Governor under the Public Seal;

"**property**" includes money, goods, things in action, land and every description of property, whether real or personal; also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property as above defined;

"**public general holiday**" means any day which under the provisions of any Law for the time being in force is, is declared to be or is proclaimed as a public general holiday;

"**public place**" includes every public highway, street, road, square, court, alley, lane, bridleway, footway, parade, wharf, jetty, quay, bridge, public garden or open space and every theatre, place of public entertainment of any kind or other place of general resort, admission to which is obtained by payment, or to which the public have access;

"**recorded**", used with reference to a document, means recorded under the provisions of the Law applicable to the recording of such document;

"**Public Seal**" means the Public Seal of the Islands;

"**registered**", used with reference to a document, means recorded under the provisions of the Law applicable to the registration of such document;

"**regulations**" include rules, bye-laws, proclamations, orders, schemes, notifications, directions, notices and forms;

"**rules of court**" when used in relation to any court, means rules made by the authority having for the time being power to makes rules or orders regulating the practice and procedure of such court;

"**sell**" includes exchange and barter;

"**Secretary of State**" means one of Her Majesty's Principal Secretaries of State for the time being;

"**ship**" means every description of vessel used in navigation not exclusively propelled by oars;

"**sign**", with reference to a person who is unable to write his name, includes "**mark**";

"**Statute**" includes an Act of the Imperial Parliament;

"**street**" or "**road**" includes any public highway, street, road, thoroughfare, square, court, alley, lane, bridleway, footway, parade, passage, or open place used or frequented by the public, or to which the public have or are permitted to have access;

"**summarily**", "**in a summary manner**" or "**on summary conviction**" means respectively before a court of summary jurisdiction;

"**swear**" includes to affirm or to declare in the case of any person allowed by law to affirm or to declare instead of swearing;

"**United Kingdom**" means Great Britain and Northern Ireland;

"**vessel**" includes any ship, boat, lighter or other floating craft used for transport by water;

"**voluntary declaration**" or "**statutory declaration**" if made —

(a) in the Islands means a declaration made under the *Voluntary Declarations Law* (Revised – *1978 Revision*);

(b) in the United Kingdom or any British possession beyond the Islands means a declaration made before a justice of the peace, notary public or other person having authority therein under any law for the time being in force to take or receive a declaration; and

(c) in any other place, means a declaration made before a British Consul or Vice-Consul, or before any person having authority under any Act of Parliament for the time being in force to take or receive a declaration;

"**will**" includes codicil;

"**writing**" includes printing, lithography, typewriting, photography and other modes of representing or reproducing words or figures in visible form; and

"**year**" and "**month**" mean respectively a year or a month reckoned according to the British calendar.

(2) Every local law of the Islands shall be carried out and applied according to the plain reading, and not according to any private construction, and any private construction influencing a decision in any case shall be deemed a sufficient cause for appeal or new trial or counter prosecution.

(3) It is hereby declared that the Cayman Islands are comprised of Grand Cayman, Cayman Brac and Little Cayman; and any reference in any Law, enactment or other instrument of a public nature to the Islands or any of them shall be a reference to them or it by name, and by no other designation.

General interpretation of gender and number

4. In this Law and in all Laws and other instruments of a public character relating to the Islands now in force or hereafter to be made, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided —

(a) words importing the masculine gender include females; and

(b) words in the singular include the plural, and words in the plural include the singular.

References to public officers by title of office

5. A reference in any Law to any public officer by the usual title of his office shall, if there be such an office customarily in the Islands and unless the contrary intention appears, be read and construed as referring to the person for the time being holding or carrying out the duties of that office in the Islands.

References to the Crown

6. In any Law references to the Sovereign reigning at the time of the passing of the Law or to the Crown shall, unless the contrary appears, be construed as references to the Sovereign for the time being.

References to time means standard time; power to declare standard time

7. Whenever any expression of time occurs in any Law, deed or other legal instrument, the time referred to shall, unless it is otherwise expressly provided, be held to signify the standard time adopted for the Islands; and for such purpose the Governor in Council may by order declare the standard time for the Islands.

Computation of time

8. In computing time for the purpose of any Law, unless the contrary intention appears —

(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done;

(b) if the last day of the period is Sunday or a public general holiday (which days are in this section referred to as excluded days) the period shall include the next following day, not being an excluded day;

(c) when any act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day; and

(d) when an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.

Provisions where no time prescribed

9. Where no time is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed, and as often as the prescribed occasion arises.

Measurement of distances

10. In the measurement of any distance for the purpose of any Law, that distance shall, unless the contrary intention appears, be measured in a straight line on a horizontal plane.

References to the number of a line

11. A reference in any Law to the number of a line of any section of any Law means such line in the latest official printed copy of such Law at the time of the passing of the Law containing such reference.

Definitions subject to context and to apply to regulations, etc.

12. (1) Where expressions are defined in any Law, such expressions shall have the meanings assigned to them, unless there is anything in the subject or context repugnant to, or inconsistent with, such meaning.

(2) Where expressions defined in any Law are used in any regulations or instrument made under such Law such expressions shall have the respective meanings assigned to them by the Law, unless there is anything in the subject or context repugnant to, or inconsistent with, such meaning.

(3) Where a word is defined in a Law or any regulations, other parts of speech and grammatical variations of that word, and cognate expressions, shall have corresponding meanings in that Law or those regulations.

Commencement and citation of Laws

Authenticated copy and assent to Bills

13. (1) A copy of every Bill which may hereafter be passed by the Legislature of the Islands shall immediately after it is so passed be printed by any person authorised by the Governor, on vellum or some durable paper and shall, if such be the case, be authenticated by the Clerk of the Legislative Assembly as being a true and correct copy of the Bill which passed.

(2) Where —

(a) the Governor assents to any Bill so passed, his assent shall be made on the authenticated copy; or

(b) Her Majesty assents to any Bill so passed, a notification of Her assent shall be made on the authenticated copy,

and in either case one authenticated copy shall then be forwarded to the Clerk of the Legislative Assembly, to the Secretary of State and to the authorised printer as aforesaid for the purposes of record.

Notification of assent to be published

14. In the case of every Bill which may hereafter be passed in the Islands, the Governor shall, on assenting thereto, or on to receiving official intimation that the Bill has been duly assented to, cause a notification of such assent to be gazetted.

Commencement of Law on publication of assent, etc.

15. (l) Every Law shall, unless it is otherwise therein expressly provided, come into operation on the day of the publication of the notification of assent.

(2) The date on which a Law comes into operation, whether under the provisions of this section or according to the express provisions contained in the Law, shall be written on the original of the Law and on all copies thereof in some convenient place.

Moment when Law or regulations comes into operation

16. Where any Law, part of a Law or any regulations made thereunder came or comes into operation on a particular day, it shall be deemed to have come or shall come into operation immediately on the expiration of the day next preceding such day.

Laws to be public Laws and judicially noticed

17. Every Law (which expression in this section does not include regulations) shall be a public Law and shall be judicially noticed as such, unless the contrary is expressly provided by the Law.

Sections to be substantive enactments

18. Every section of any Law shall have effect as a substantive enactment without introductory words.

Mode of citing Laws

19. When any Law is referred to, it shall be sufficient for all purposes to cite such Law either by the short title (if any) by which it is made citable, or by the year in which it was made and its number among the Laws of that year, or in the case of a revised edition of the Laws issued under any Law providing for the issue of a revised edition, by its short title or its chapter number; and the reference may in all cases be made according to the copies of Laws printed in England or by any person authorised to print copies by the Governor.

References in Laws

20. (1) A reference in a Law by number or letter to a Part, section, subsection, paragraph, sub-paragraph or other division of another Law or enactment shall be construed as a reference to such Part, section, subsection, paragraph, sub-paragraph or other division of such other Law or enactment as printed by authority of Law.

(2) Where in a Law reference is made to a Part, division, section, schedule or form without anything in the context to indicate that a reference to a Part, division, section, schedule or form of some other Law is intended, the reference shall be construed as a reference to a Part, division, section, schedule or form of the Law in which the reference is made.

(3) Where in a section of a Law reference is made to a subsection, paragraph, sub-paragraph or other division without anything in the context to indicate that a reference to a subsection, paragraph, sub-paragraph or other division of some other section or provision is intended, the reference shall be construed as a reference to a subsection, paragraph, sub-paragraph or other division of the section in which the reference is made.

(4) Where in a schedule or Part of a schedule to a Law reference is made to a paragraph, sub-paragraph or other division without anything in the context to indicate that a reference to a paragraph, sub-paragraph or other division of some other provision is intended, the reference shall be construed as a reference to the paragraph, sub-paragraph or other division of the schedule or the Part of the schedule to which the reference is made.

(5) Where in a Law reference is made to any regulations, without anything in the context to indicate that a reference to regulations made under some other Law is intended, the reference shall be construed as a reference to regulations made under the Law in which the reference occurs.

Collective titles

21. If it is provided that any Law may, as to the whole or any part thereof, be cited —

(a) with any other Law to form a group of Laws; or

(b) with any group of Laws,

that group shall be construed as including that Law or part, and the collective title of the group shall state the year of the first Law in the group and the year of last Law in the group; and as often as any subsequent Law is added to that group the year in which the subsequent Law is passed shall be substituted for the last year of the group.

Words to be included in citation of portion of Law.

22. In any Law a description or citation of a portion of another Law shall, unless the contrary intention appears, be construed as including the word, section or other part mentioned or referred to as forming the beginning and as forming the end of the portion comprised in the description or citation.

Provisions as to repeals

Repeal of a repealing enactment

23. Where a Law, whether before or after the commencement of this Law, repeals a repealing enactment, it shall not be construed as reviving any enactment previously repealed, unless words are added reviving that enactment.

Repeal and substitution

24. Where a Law repeals wholly or partially any former Law and substitutes provisions for the Law repealed, the repealed Law shall remain in force until the substituted provisions come into operation.

Effect of repeal

25. (1) Where any Law repeals and re-enacts, with or without modification, any provision of any Law in force, reference in any other Law to the provision so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted.

(2) Where any Law repeals any other enactment, then, unless the contrary intention appears, the repeal shall not —

(a) revive anything not in force or existing at the time at which the repeal takes effect;

(b) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed;

(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed;

(d) affect any penalty, fine, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, fine, forfeiture or

punishment as aforesaid; and any such investigation, legal proceedings or remedy may be instituted, continued, or enforced, and any such penalty, fine, forfeiture or punishment may be imposed as if the repealing Law had not been passed.

Effect of repeal and re-enactment of regulation making section

26. Where any section conferring a power to make regulations is repealed (whether before or after the coming into operation of this Law) and other provisions, which include a power to make regulations, are substituted therefor, but the Law of which such section formed a part is not itself repealed, then all regulations made under the repealed section and in force at the time of such repeal, shall continue good and valid as if made under substituted provisions insofar as they are not inconsistent with the Law as amended.

Provisions as to regulations

Provisions as to making of regulations

27. Where a Law confers power on any authority to make or issue regulations, the following provisions shall, unless the contrary intention appears, have effect with reference to the making, issue and operation of such regulations —

(a) a regulation may, at any time, be amended, varied, suspended, rescinded or revoked by the same authority and in the same manner by and in which it was made;

(b) the regulations may provide in respect of a breach of any of the provisions thereof that the offender shall, unless the Law otherwise provides, be liable to such fine not exceeding one thousand dollars, or to such term of imprisonment with hard labour not exceeding twelve months, or to both such fine and imprisonment, as may be therein prescribed;

(c) where any Law confers power on any authority to make regulations for any general purpose, and also for any special purposes incidental thereto, the enumeration of the special purposes shall not be deemed to derogate from the generality of the powers conferred with reference to the general purpose;

(d) no regulation shall be inconsistent with the provisions of any Law;

(e) any breach of any regulation may, unless the Law otherwise provides, be prosecuted in a summary manner; and

(f) any reference in any regulation to "the Law" shall be read and construed as meaning the Law conferring the power to make or issue such regulations.

Definitions for legislative purposes

28. (l) In this section the expression "**statutory period**" means, in relation to any regulations, a period of twenty-one days beginning on the day on which the regulations were laid before the Legislative Assembly and reckoned without regard to —

(a) any period during which the Legislative Assembly is dissolved or prorogued;

(b) any period during which the Legislative Assembly is adjourned for more than six days; or

(c) whether the days are comprised —

(i) in one or more than one Session of the Legislative Assembly; or

(ii) partly in a Session of the Legislative Assembly which is dissolved and partly in a Session of the succeeding Legislative Assembly.

(2) The expression "**subject to affirmative resolution**" when used in relation to any regulations shall mean that those regulations are not to come into operation unless and until affirmed by a resolution of the Legislative Assembly.

(3) The expression "**subject to negative resolution**" when used in relation to any regulations shall mean that those regulations, as soon as may be after they are made, are to be laid before the Legislative Assembly, and if the Legislative Assembly within the statutory period next after any such regulations have been so laid resolves that the regulations be annulled, the regulations shall be void as from the date of the resolution, but without prejudice to the validity of anything done thereunder or to the making of new regulations.

Commencement and proof of regulations

29. (l) All regulations made under any Law or other lawful authority and having legislative effect shall be published in the *Gazette* and unless it be otherwise provided shall take effect and come into operation as law on the date of such publication.

(2) The production of a copy of the *Gazette* containing any regulations shall be *prima facie* evidence in all courts and for all purposes of the due making and tenor of such regulations.

Acts done under regulations deemed done under Law

30. An act shall be deemed to be done under a Law by virtue of the powers conferred by a Law or in pursuance or execution of the powers of, or under the authority of, a Law if it is done under or by virtue of or in pursuance of any regulation made or issued under any power contained in such Law.

Provisions as to powers

Exercise of powers between passing and commencement of Law

31. Where any Law is not to come into operation immediately on the passing thereof, and confers powers to make any appointment, or to make, grant or issue any regulations or instruments, or to do any other thing for the purpose of the Law, that power may, unless the contrary intention appears, be exercised at any time after the passing of the Law, so far as may be necessary or expedient for the purpose of bringing the Law into operation at the date of the commencement thereof, subject to the restriction that any regulations or instrument made, granted or issued under the power shall not, unless the contrary intention appears in the Law, or the regulations or instruments are necessary for bringing the Law into operation, have any effect until the Law comes into operation.

Construction of provisions as to exercise of powers, etc.

32. (1) Where any Law confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires.

(2) Where any Law confers a power or imposes a duty on the holder of an office as such, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed by the holder for the time being of the office or by a person appointed to act for him.

Power to appoint includes power to suspend or dismiss

33. Where by or under any Law a power to make any appointment is conferred, then, unless the contrary intention appears, the authority having power to make the appointment shall also have power to remove, suspend, re-appoint or reinstate any person appointed in exercise of the power.

Power to fill vacancy temporarily

34. Where, by or under any Law, any powers are conferred or any duties are imposed upon a public officer, the Governor may direct, if from any cause the office of such public officer is vacant or if during any period, owing to absence or inability to act from illness or any other cause, such public officer is unable to exercise the powers or perform the duties of his office, that such powers shall be had and may be exercised and such duties shall be performed by the person named by, or by the public officer holding the office designated by, the Governor; and thereupon such person or public officer, during any such period, shall have and may exercise such powers and shall perform such duties, subject to such conditions, exceptions and qualifications as the Governor may direct.

Power to make overlapping appointments

35. Where the provisions of any Law either expressly or by implication limit the number of persons who may at any time be appointed to or hold an office, such provisions shall not, if any substantive holder of the office is on leave of absence pending relinquishment of office, prevent the substantive appointment of another person to such office or the discharge by such other person of the functions of the office; and, if such an appointment is made the fact that temporarily there is more than one holder of such office shall not prevent both the period of leave of the retiring holder of the office and the period of service of his successor during such leave from being treated as pensionable service for the purposes of any Law permitting the grant of retiring benefits in respect of service in such office.

Power to appoint chairman

36. Where, under any Law, power is given to the Governor in Council, to the Governor or to any public officer or body to appoint any board, tribunal, commission, committee or similar body, it shall be lawful for the Governor in Council, the Governor or such public officer or body, in the absence of any provision to the contrary, to appoint a chairman of such board, tribunal, commission, committee or similar body.

Power to appoint by official designation

37. Where, by or under any Law, the Governor in Council, the Governor or any public officer or body is empowered to appoint or name a person to be a member of any board, tribunal, commission, committee or similar body, or to have and exercise any powers or perform any duties, the Governor in Council, the Governor or such public officer or body may either appoint a person by name or direct the person for the time being holding the office designated by the Governor in Council, the Governor or such public officer or body to be a member of such board, tribunal, commission, committee or similar body or to have and exercise such powers and perform such duties; and thereupon, or from the date specified by the Governor in Council, the Governor or such public officer or body, the person appointed by name or the person for the time being holding such office shall be a member of such board, tribunal, commission, committee or similar body, or shall have and may exercise such powers and perform such duties accordingly.

Construction of enabling words

38. Where, in any Law, power is given to any person to do or enforce the doing of any act or thing, all such powers shall be understood to be also given as are reasonably necessary to enable the person to do or enforce the doing of the act or thing.

Powers of Governor to delegate authority

39. When, by any Law, the Governor is empowered to exercise any powers or perform any duties, he may, unless by law expressly prohibited from so doing, depute any person by name, or the person for the time being holding the office designated by him, to exercise such powers or perform such duties on his behalf, subject to such conditions, exceptions and qualifications as the Governor may direct; and thereupon, or from the date specified by the Governor, the person so deputed shall have and exercise such powers and perform such duties subject as aforesaid:

Provided that nothing herein contained shall authorise the Governor to depute any person to hear any appeal or to make regulations under the power in that behalf conferred upon him by any Law.

Provisions as to Imperial Acts and Orders in Council

English Laws in force in the Islands

40. All such laws and Statutes of England as were, prior to the commencement of 1 George II Cap. 1, esteemed, introduced, used, accepted or received as laws in the Islands shall continue to be laws in the Islands save in so far as any such laws or Statutes have been, or may be, repealed or amended by any Law of the Islands.

Reference in Law to provision of Imperial Act

41. Where, in any Law, reference is made to any provision of an Imperial Act or Order in Council and that provision is subsequently repealed and re-enacted without substantial modification, the reference in such Law to the provision of the Act or Order in Council so repealed shall, if the context so requires and unless the contrary intention appears, be construed as a reference to the provision so re-enacted.

Imperial Acts, etc., to be read with necessary modifications

42. Whenever any Imperial Act is extended or applied to the Islands, such Act shall be read with such formal alterations as to names, localities, courts, officers, persons, moneys, penalties and otherwise as may be to make it applicable to the circumstances.

Provisions as to penalties

Statement of penalty means maximum penalty

43. Where any fine or penalty is imposed by or under the authority of any Law it shall be implied that the amount of such fine or penalty is the maximum amount; and where by any Law any person may be sentenced to any term of imprisonment it shall be implied that such term of imprisonment is the maximum term.

Penalty at foot of section indicates maximum penalty for contravention of section

44. Where in any Law any fine, penalty or term of imprisonment is set out at the foot of any section it shall indicate that any contravention of the section, whether by act or omission, shall be an offence against that Law and shall, unless the contrary intention appears, be punishable by a fine, penalty or term of imprisonment not exceeding the amount or term stated.

Payment of portion of penalty by direction of Governor

45. Subject to the express provisions of any Law, where any fine or penalty is imposed by or under the authority of any Law, every such fine or penalty shall be payable into the general revenues of the Islands, but the Governor in Council may direct the payment to any aggrieved person, or to any person whose information or evidence has led to the conviction of the offender or to the recovery of the fine or penalty, of such proportion of the fine or penalty as he may think fit.

Disposal of forfeits

46. (1) Where, under any Law, any animal or thing is adjudged by any court or other authority to be forfeited, it shall, unless the contrary is otherwise provided or unless it is expressed by law to be forfeited to any person, be forfeited to the Crown, and the net proceeds thereof, if it is ordered by competent authority to be sold, shall be paid into the general revenues of the Islands, unless other provision is made.

(2) Nothing in this section shall affect any provision in any Law whereby any portion of any fine or forfeit or of the proceeds of any forfeit is expressed to be recoverable by any person or may be granted by any authority to any person.

Imposition of penalty not to bar civil action

47. The imposition of a penalty or fine by any Law, in the absence of express provision to the contrary, shall not relieve any person from liability to answer for damages to a person injured.

Provisions as to offences

Provision as to offences under two or more Laws

48. Where any act or omission constitutes an offence under two or more Laws, or both under a Law and under the common law, the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of those Laws or under the common law, but shall not be liable to be punished twice for the same offence.

Attempt to commit an offence to be deemed an offence

49. A provision which constitutes an offence shall, unless the contrary intention appears, be deemed to provide also that an attempt to commit such offence shall be an offence against such provision, punishable as if the offence itself had been committed.

Remission of penalties

50. It shall be lawful for the Governor in the name of Her Majesty to remit in whole or in part any sum of money which under any Law may be imposed as a penalty, fine or forfeiture on a convicted offender, although such money may be in whole or in part payable to some person other than the Crown, and to extend the Royal mercy to any person who may be imprisoned for non-payment of any sum of money so imposed, although such sum may be in whole or in part payable to some person other than the Crown.

Miscellaneous

Change in title of public office, etc.

51. Whenever any change in title of any public office or department, branch, agency or organ of Government occurs, the Governor, if occasion requires, may by notice in the Gazette declare that such change of title shall take effect from a date specified in such notice, and, with effect from such date, any reference in any Law to the former title of such office or department, branch, agency or organ of Government shall be read and construed as a reference to that office or department, branch, agency or organ of Government by such new title as the Governor may declare in such notice.

Appointment to statutory public office

52. Notwithstanding the provisions of this or any other Law, where provision is made in a law for a public officer to be appointed to an office under that Law which involves the exercise of functions, powers or duties pursuant to any Law or regulations and where no such appointment of such person has been made under that Law prior to the date when an appointment was made to such public office, the person appointed to such public office shall, for the purposes of any such Law or regulations, be deemed to have been appointed under that Law on the date when he was appointed to such public office.

Meaning of service by post.

53. Where any Law authorises or requires any document to be served by post, whether the expression "serve", "give", "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

Signification of orders of Governor

54. Where power is given to the Governor or Governor in Council to make regulations, it shall be sufficient, unless it is otherwise expressed, for such regulations to be signified under the hand of the Clerk of the Executive Council:

Provided that any proclamation, warrant, or other instrument issued under the Public Seal shall be issued under the hand of the Governor himself.

Power of majority

55. Save as is otherwise expressly provided by any Law, whenever any act or thing is required to be done by more than two persons, a majority of them may do it.

Division of Law into Parts

56. Where any Law is divided into Parts, Titles or other divisions, the fact and particulars of such division shall with or without express mention thereof in any Law, be taken notice of in all courts and for all other purposes whatsoever.

Construction of preamble and Schedules to Law

57. (1) The preamble of any Law may be referred to for assistance in explaining the scope and object of the Law.

(2) Every Schedule or Table to any Law, or part of any Law, shall, together with any notes thereto, be construed and have effect as part of the Law.

Deviations in forms

58. Whenever forms are prescribed in any Law, slight deviations therefrom, not affecting the substance or calculated to mislead, shall not invalidate them.

Construction of amending Law with amended Law

59. Where one Law amends another Law the amending Law shall, so far as it is consistent with the tenor thereof, and unless the contrary intention appears, be construed as one with the amended Law.

Reprint of amended Laws

60. When any Law is amended it shall be lawful for any person with the authority of the Governor to print copies of the Law with all the necessary additions, omissions, substitutions and amendments effected by the amending Law or Laws and such copies shall be deemed to be authentic copies of the Law so amended.

Notification of enactment and sale of regulations, etc.

61. Where any regulation or other instrument of a public character is required either expressly or by implication to be published or notified in the *Gazette*, a Government Notice that such regulation or other instrument has been made and of the place where copies thereof can be purchased or perused shall be sufficient compliance with such requirement.

Evidence of signature of Governor

62. Whenever the *fiat* of the Governor is necessary before any prosecution or action is commenced, any document purporting to bear the *fiat* of the Governor shall be received as *prima facie* evidence in any proceeding without proof being given that the signature to such *fiat* is that of the Governor.

Saving of rights of the Crown

63. No Law shall in any manner whatsoever affect the right of the Crown, unless it is therein expressly stated, or unless it appears by necessary implication, that the Crown is bound thereby.

Law binding on Crown

64. This Law shall be binding on the Crown.

Publication in consolidated and revised form authorised by the Governor in Council this 7th day of February, 1995.

Carmena H. Parsons
Acting Clerk of Executive Council

ITEM NO. 147

JA-33

CAYMAN ISLANDS

Companies Act

(2023 Revision)

COMPANIES WINDING UP RULES

(2023 Consolidation)

Supplement No. 4 published with Legislation Gazette No. 1 dated 12th January, 2023.

PUBLISHING DETAILS

The Companies Winding Up Rules, 2018 made by the Insolvency Rules Committee on 27th November, 2017 as amended by the Citation of Acts of Parliament Act, 2020 [Act 56 of 2020].

Consolidated with —

Companies Winding Up (Amendment) Rules 2022-29th July, 2022.

Consolidated this 31st day of December, 2022.

CAYMAN ISLANDS

Companies Act

(2023 Revision)

COMPANIES WINDING UP RULES

(2023 Consolidation)

Arrangement of Rules

Section Page

1. Citation 15
2. *Revocation* of the *Companies Winding Up Rules 2008* and Amendments....15
3. Commencement of the *Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2018* 15
4. *Revocation* of the *Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2008* 16
5. Commencement of the *Insolvency Practitioners' Regulations, 2018*....16
6. *Revocation* of the *Insolvency Practitioners' Regulations, 2008*....16

ORDER 1 17

CITATION, APPLICATION AND COMMENCEMENT 17

1. Citation (O.1, r.1) 17
2. Application (O.1, r.2)....17
3. Commencement and transitional provisions (O.1, r.3)....17
4. Application of Grand Court Rules etc. (O.1, r.4) 18
5. Definitions (O.1, r.5)....18
6. Construction of references to the Law, Orders, Rules and Regulations (O.1, r.6)....19
7. Prescribed Forms (O.1, r.7) 19

ORDER 1A 20

RESTRUCTURING MORATORIUM 20

1. Presentation, Filing and Advertisement of Petition (O.1A, r.1)....20
2. Form and Content of Company Petition (O.1A, r.2)....20
3. Notice of Appearance (O.1A, r.3)....22

4. Application for the Appointment of an Interim Restructuring Officer by Summons (O.1A, r.4) 23
5. Concurrent Petitions (O.1A, r.5) 23
6. Order for the Appointment of a Restructuring Officer (O.1A, r.6) 24
7. Filing, Service and Registration of Order (O.1A, r.7) 25
8. Obligation to Report to Creditors, Contributories and the Authority (O.1A, r.8) 25
9. Variation or Discharge of Order (O.1A, r.9) 26
10. Application of the *Insolvency Practitioners' Regulations (as amended and revised)* and Independence (O.1A, r.10) 26
11. Resignation of Restructuring Officers (O.1A, r.11) 27
12. Death of Restructuring Officers (O.1A, r.12) 28
13. Application for the Removal and Replacement of a Restructuring Officer (O.1A, r.13) 29
14. Restructuring Officer's Legal Counsel (O.1A, r.14) 30
15. International Protocols (O.1A, r.15) 30
16. General Provisions (O.1A, r.16) 30
17. Schemes of Arrangement under section 91I of the Law (O.1A, r.17) 31
18. Definitions (O.1A, r.18) 31
10. 31

ORDER 2 32

STATUTORY DEMAND 32

1. Introduction (O. 2, r. 1) 32
2. Form and Content of Statutory Demand (O. 2, r. 2) 32
3. Service of Statutory Demand (O. 2, r. 3) 33

ORDER 3 34

WINDING-UP PETITIONS AND ORDERS 34

PART I: GENERAL PROVISIONS 34

1. Presentation and Filing of Petition (O. 3, r. 1) 34
2. Form and Content of Petition (O. 3, r. 2) 34
3. Verification of Petition (O. 3, r. 3) 35
4. Nominated Official Liquidator's Consent to Act (O. 3, r. 4) 35

PART II: CREDITOR'S PETITION 36

5. Presentation and Service of Creditor's Petition (O. 3, r. 5) 36
6. Advertisement of Creditor's Petition (O. 3, r. 6) 36
7. Leave for Petition to be Withdrawn (O. 3, r. 7) 37
8. Notice of Appearance (O. 3, r. 8) 37
9. Evidence in Opposition to Petition (O. 3, r. 9) 38
10. Substitution of Petitioner (O. 3, r. 10) 38

PART III: CONTRIBUTORY'S PETITION 39

11. Presentation and Service of a Contributory's Petition (O. 3, r. 11) 39
12. Summons for Directions (O. 3, r. 12) 39
13. Hearing of Contributory's Petition (O. 3, r. 13) 40

PART IV: AUTHORITY'S PETITION 40

14. Service of Authority's Petition (O. 3, r. 14) 40
15. Summons for Directions (O. 3, r. 15) 40
16. Hearing of Authority's Petition (O. 3, r. 16) 41

PART V: COMPANY'S PETITION 41

17. Presentation and Service of Company's Petition (O. 3, r. 17) 41

18. Advertisement of Company's Petition (O. 3, r. 18) 42
19. Leave for Petition to be Withdrawn (O. 3, r. 19) 42
20. Notice of Appearance (O. 3, r. 20) 43
21. Substitution of Petitioner (O. 3, r. 21) 44
22. Form, Content and Effect of Winding Up Orders (O. 3, r. 22) 44
23. Filing, Service and Registration of Winding Up Orders (O. 3, r. 23) 45

ORDER 4 **46**

APPLICATION FOR APPOINTMENT OF PROVISIONAL LIQUIDATOR **46**

PART I: APPLICATION BY CREDITOR OR CONTRIBUTORY **46**

1. Application by Summons (O.4, r.1) 46
2. Supporting Affidavits (O.4, r.2) 46
3. Security (O.4, r.3) 46
4. Order for the Appointment of Provisional Liquidator (O.4, r.4) 46
5. Variation or Discharge of Order (O.4, r.5) 47

PART II: APPLICATION BY THE COMPANY **47**

6. Application by Summons (O.4, r.6) 47
7. Order for the Appointment of Provisional Liquidator (O.4, r.7) 48
8. Filing, Service and Registration of Order (O. 4, r. 8) 48
9. Variation or Discharge of Order (O.4, r.9) 48

ORDER 5 **50**

APPOINTMENT, RESIGNATION, DEATH AND REMOVAL OF OFFICIAL LIQUIDATORS **50**

1. Introduction (O.5, r.1) 50
2. Order for Appointment of Official Liquidator (O.5, r.2) 50
3. Notice of Appointment to be Advertised (O.5, r.3) 50
4. Resignation of Official Liquidator (O.5, r.4) 51
5. Death of Official Liquidator (O.5, r.5) 52
6. Application for Removal and Appointment of New Official Liquidator (O.5, r.6) 52

ORDER 6 **54**

COMPANY'S STATEMENT OF AFFAIRS **54**

1. Notice Requiring Submission of Statement of Affairs (O.6, r.1) 54
2. Form and content of Statement of Affairs (O.6, r.2) 54
3. Time for Delivering Statement of Affairs (O.6, r.3) 55
4. Expenses of Preparing a Statement of Affairs (O.6, r.4) 55
5. Disclosure of Statement of Affairs (O.6, r.5) 55

ORDER 7 **56**

ORDER FOR EXAMINATION **56**

1. Application for Order for Examination (O.7, r.1) 56
2. Order for Examination (O.7, r.2) 57
3. Procedure upon an Oral Examination (O.7, r.3) 57

ORDER 8 **59**

MEETINGS OF CREDITORS AND CONTRIBUTORIES **59**

1. Meetings Convened by Official Liquidator (O.8, r.1) 59
2. First Meeting and Subsequent Meetings (O.8, r.2) 60

3. Requisitioned Meetings (O.8, r.3) 60
4. Notice and Advertisement of Meetings (O.8, r.4) 61
5. Venue (O.8, r.5) 61
6. Proceedings at Meetings (O.8, r.6) 62
7. Entitlement to Vote at Creditors' Meeting (O.8, r.7) 62
8. Entitlement to Vote at Contributories' Meeting (O.8, r.8) 63
9. Voting on Resolutions (O.8, r.9) 63
10. Recording of Proceedings (O.8, r.10) 64

ORDER 9 65

LIQUIDATION COMMITTEES 65

1. Establishment of Liquidation Committee (O.9, r.1) 65
2. Membership of Liquidation Committee (O.9, r.2) 65
3. Reconstitution of the Liquidation Committee (O.9, r.3) 66
4. Official Liquidator's Duty to Report (O.9, r.4) 67
5. Proceedings of Liquidation Committee (O.9, r.5) 68
6. Counsel to the Liquidation Committee (O.9, r.6) 69
7. Travel and Other Expenses of Committee Members (O.9, r.7) 69
8. Resignation and Removal of Committee Members (O.9, r.8) 69
9. Applications to the Court (O.9, r.9) 70

ORDER 10 71

OFFICIAL LIQUIDATOR'S REPORTS AND ACCOUNTS 71

1. Official Liquidator's Reporting Obligations (O.10, r.1) 71
2. Form and Content of Liquidators' Reports and Accounts (O.10, r.2) 71
3. Publication of Reports and Accounts (O.10, r.3) 73

ORDER 11 74

SANCTION APPLICATIONS 74

1. Introduction (O.11, r.1) 74
2. Service of Sanction Applications (O.11, r.2) 74
3. Hearing of Sanction Applications (O.11, r.3) 75
4. Evidence for Use in Sanction Applications (O.11, r.4) 75

ORDER 12 77

SETTLING LIST OF CONTRIBUTORIES 77

1. Introduction (O.12, r.1) 77
2. Rectification of the Register of Members (O.12, r.2) 77
3. Notification of Rectification (O.12, r.3) 78
4. Appeal Against Rectification (O.12, r.4) 79

ORDER 13 80

VOLUNTARY (SOLVENT) LIQUIDATIONS 80

1. Introduction (O.13, r.1) 80
2. Notice of Voluntary Winding Up (O.13, r.2) 80
3. Appointment of Voluntary Liquidator (O.13, r.3) 81
4. Resignation of Voluntary Liquidator (O.13, r.4) 81
5. Death of Voluntary Liquidator (O.13, r.5) 82

6. Removal of Voluntary Liquidator (O.13, r.6) 82
7. Voluntary Liquidator's Reporting Obligations (O.13, r.7) 83
8. Form and Content of Reports and Accounts (O.13, r.8) 83
9. Voluntary Liquidator's Remuneration (O.13, r.9) 84
10. Applications to Court (O.13, r.10) 84
11. General Meetings of the Company (O.13, r.11) 86
12. Voluntary Liquidator's Final Return (O.13, r.12) 86

ORDER 14 88

DIRECTOR'S DECLARATION OF SOLVENCY 88

1. Form and Content of Declaration of Solvency (O.14, r.1) 88
2. Delivery and Registration of Declaration of Solvency (O.14, r.2) 88

ORDER 15 89

APPLICATION FOR SUPERVISION ORDER 89

1. Introduction (O.15, r.1) 89
2. Application under section 124 (O.15, r.2) 89
3. Application under section 131 (O.15, r.3) 90
4. Supporting Affidavits (O.15, r.4) 90
5. Hearing of section 124 Petition (O.15, r.5) 91
6. Release of Voluntary Liquidator (O.15, r.6) 92
7. Delivery of Company's Books and Records (O.15, r.7) 92
8. Supervision Order (O.15, r.8) 92

ORDER 16 93

PROOF OF DEBTS IN OFFICIAL LIQUIDATION 93

PART I: PROCEDURE FOR PROVING 93

1. Introduction (O.16, r.1) 93
2. Form and Content of Proof (O.16, r.2) 93
3. Supply of proof of debt forms (O.16, r.3) 94
4. Cost of proving (O.16, r.4) 94
5. Withdrawal and variation of proof (O.16, r.5) 94
6. Admission and rejection of proof (O.16, r.6) 94
7. Admission without proof of debt (O.16, r.7) 95
8. Inspection of Proofs of Debts (O. 16, r. 8) 95

PART II: QUANTIFICATION OF CLAIM 95

9. Enforcement of Subordination, Set-Off (or Non Set-Off) and Netting Agreements (O.16, r.9) 95
10. Mutual credit and set-off (O.16, r.10) 96
11. Pre-liquidation Interest on Debts (O.16, r.11) 96
12. Post-liquidation Interest on Debts (O.16, r.12) 96
13. Determination of the currency of the liquidation (O.16, r.13) 97
14. Payments of a periodical nature (O.16, r.14) 97
15. Debts payable at a future date (O.16, r.15) 98
16. Contingent claims (O.16, r.16) 98

PART III: APPEAL AGAINST REJECTION OF PROOF 98

17. Introduction (O.16, r.17) 98
18. Application to Court (O.16, r.18) 99
19. [No order] (O.16, r.19) 99

PART IV: EXPUNGING ADMITTED CLAIMS **99**
20. Introduction (O.16, r.20) 99
21. Application to Court (O.16, r.21) 99

ORDER 17 **101**
SECURED CREDITORS **101**
1. Introduction (O.17, r.1) 101
2. Redemption of security by the liquidator (O.17, r.2) 101
3. Valuation of security (O.17, r.3) 102
4. Realisation of security (O.17, r.4) 102

ORDER 18 **103**
COLLECTION AND DISTRIBUTION OF COMPANY'S ASSETS BY ITS OFFICIAL LIQUIDATOR **103**
1. Powers of Official Liquidator (O.18, r.1) 103
2. Manner of Distributing the Assets (O. 18, r. 2) 103
3. Debts of Insolvent Company to Rank Equally (O.18, r.3) 103
4. Calculation of Dividend (O.18, r.4) 103
5. Distribution of Assets in Specie (O.18, r.5) 104
6. Interim Distribution to Creditors (O.18, r.6) 105
7. Final Distribution to Creditors (O.18, r.7) 105
8. Payment of Dividends (O.18, r.8) 106
9. Assignment of Right to Receive a Dividend (O.18, r.9) 106

ORDER 19 **107**
CALLS ON CONTRIBUTORIES AND TRANSFERS OF SHARES **107**
PART I: CALLS ON CONTRIBUTORIES **107**
1. Calls by Official Liquidator (O.19, r.1) 107
2. Making and Enforcement of Calls (O.19, r.2) 107
3. Appeal against Calls (O.19, r.3) 107
PART II: TRANSFERS OF SHARES **108**
4. Application for Validation Order (O.19, r.4) 108
5. Supporting Documentation (O.19, r.5) 108

ORDER 20 **109**
ORDER OF PAYMENT OF EXPENSES OUT OF THE ASSETS **109**
1. General Rule as to Priority (O.20, r.1) 109
2. Disallowance of Expenses and Disbursements (O.20, r.2) 110

ORDER 21 **111**
INTERNATIONAL PROTOCOLS **111**
1. Application and definitions (O.21, r.1) 111
2. Consideration of international protocols (O.21, r.2) 111
3. Scope of international protocols (O.21, r.3) 112

ORDER 22 **113**
ORDER FOR DISSOLUTION **113**
1. Application to Court (O.22, r.1) 113

2. Order for Dissolution (O.22, r.2) 113

ORDER 23 **114**

UNCLAIMED DIVIDENDS AND UNDISTRIBUTED ASSETS **114**

1. Introduction (O.23, r.1) 114
2. Establishment of Trust Account (O.23, r.2) 114
3. Transfer of Undistributed Assets (O.23, r.3) 114
4. Payment out of Trust Account and Transfer of Undistributed Assets (O.23, r.4) 114
5. Former Liquidator's Trustee Fee and Expenses (O.23, r.5) 115
6. Transfer to the Financial Secretary (O.23, r.6) 115

ORDER 24 **116**

APPLICATIONS TO COURT UNDER PART V OF THE LAW **116**

PART I: GENERAL PROVISIONS **116**

1. Originating Applications (O.24, r.1) 116
2. Applications in Existing Proceedings (O.24, r.2) 116
3. Hearings (O.24, r.3) 116
4. Court Files (O.24, r.4) 116
5. Orders made in Liquidation Proceedings (O.24, r.5) 117
6. Order for Documents to be Sealed (O.24, r.6) 117

PART II: COSTS IN LIQUIDATION PROCEEDINGS **117**

7. Interpretation (O.24, r.7) 117
8. General Rules as to Costs (O.24, r.8) 118
9. Costs of Sanction Applications (O.24, r.9) 119
10. Costs of Appeals (O.24, r.10) 119
11. Taxation of Costs and Appeals (O.24, r.11) 120

ORDER 25 **121**

OFFICIAL LIQUIDATOR'S LAWYERS **121**

1. Appointment of Lawyers (O.25, r.1) 121
2. Lawyer’s Fees (O.25, r.2) 121
3. Procedure for Taxation of Lawyer’s Fees (O.25, r.3) 122
4. Subsequent Procedure on Taxation (O.25, r.4) 122
5. Criteria Applicable on Taxation (O.25, r.5) 123

ORDER 26 **124**

LIQUIDATION FILES, COMPANY'S BOOKS AND RECORDS AND COURT FILES **124**

1. Introduction (O.26, r.1) 124
2. Liquidation Files (O.26, r.2) 124
3. Company's Books and Records (O.26, r.3) 125
4. Rights of access to the Court File (O.26, r.4) 125

APPENDIX **127**

PRESCRIBED FORMS (O.1, R.7) **127**

CWR Form No 1 **129**

Statutory Demand under section 93 of the Companies Act (O. 2, r. 2) **129**

CWR Form No. 2 **131**
Winding Up Petition (O.3, r.2) **131**
CWR FORM No. 2A **133**
Petition for the Appointment of a Restructuring Officer (O.1A, r.2) **133**
CWR FORM No. 2B **135**
***Ex Parte* Summons for Appointment of Interim Restructuring Officer (O.1A, r.4)** **135**
CWR FORM No. 3 **137**
Advertisement of Winding Up Petition (O.3, r.6) **137**
CWR FORM No. 3A **138**
Advertisement of Petition to Appoint Restructuring Officer (O.1A, r.1(3)) **138**
CWR FORM No. 4 **139**
Notice of Appearance (O.3, r.8) **139**
CWR FORM No. 4A **140**
Notice of Appearance (O.1A, r.3) **140**
CWR FORM No. 5 **141**
Summons for Directions (O.3, r.11) **141**
CWR FORM No. 6 **143**
Winding Up Order (O.3, r.16) **143**
CWR FORM No. 7 **145**
Order for Appointment of Provisional Liquidator upon the application of a creditor or contributory (O.4, r.4) **145**
CWR FORM No. 8 **147**
Order for Appointment of Provisional Liquidator upon the application of the Company (O.4, r.7) **147**
CWR FORM No. 8A **149**
Order for the Appointment of a Restructuring Officer (O.1A, r.6) **149**
CWR FORM No. 8B **151**
***Ex Parte* Order for the Appointment of an Interim Restructuring Officer (O.1A, r.6)** **151**
CWR FORM No. 9 **153**
Notice of Appointment of Official Liquidator (O. 5, r. 3) **153**
CWR FORM No. 10 **154**
Notice requiring submission of a statement of affairs (O. 6, r. 1) **154**

CWR FORM No. 11 **155**

Notice requiring a person to state whether that person concurs with a statement of affairs (O. 6, r. 1) **155**

CWR FORM No. 12 **157**

Order for Examination (O.7, r.2) **157**

CWR FORM No. 13 **160**

Official Liquidator's certificate (Solvency/Insolvency) (O.8, r.1) **160**

CWR FORM No. 14 **161**

Official Liquidator's Revised Certificate (Solvency/Insolvency) (O.8, r.1) **161**

CWR FORM No. 15 **162**

Official Liquidator's Certificate (Composition of Liquidation Committee) (O.9, r.1) **162**

CWR FORM No. 16 **163**

Summons (Sanction Application) (O.11, r.1) **163**

CWR FORM No. 16A **164**

Remuneration Approval Summons (O.1A, r.10(3)) **164**

CWR FORM No. 16B **166**

Summons for the Variation or Discharge of Order Appointing Restructuring Officers (O.1A, r.9(1)) **166**

CWR FORM No. 16C **168**

Removal and Replacement Summons (O.1A, r.13(1)) **168**

CWR FORM No. 16D **170**

Summons for the Variation or Discharge of Order Appointing Provisional Liquidators (O.4, r.9(3)) **170**

CWR FORM No. 17 **172**

Notice of Rectification of Register of Members (O.12, r.3) **172**

CWR FORM No. 18 **173**

Summons (Appeal against Rectification of the Register of Members) (O.12, r.4) **173**

CWR FORM No. 19 **175**

Notice of Voluntary Winding Up (O.13, r.2) **175**

CWR FORM No. 20 **176**

Voluntary Liquidator's Consent to Act (O.13, r.2) **176**

CWR FORM No. 21 **177**

Declaration of Solvency (O.14, r.1) **177**

CWR FORM No. 22 **178**
Advertisement (Application for Supervision Order) (O.15, r.5) **178**
CWR FORM No. 23 **179**
Supervision Order (O.15, r.8) **179**
CWR FORM No. 24 **181**
Proof of Debt (standard form) (O.16, r.2) **181**
CWR FORM No. 25 **182**
Notice of Admission of Proof of Debt (O.16, r.6) **182**
CWR FORM No. 26 **183**
Notice of Rejection of Proof of Debt (O.16, r.6) **183**
CWR FORM No. 27 **184**
Notice of Admission (Bank deposit claims) (O.16, r.7) **184**
CWR FORM No. 28 **185**
Official Liquidator's Certificate (Currency of Liquidation (O.16, r.13) **185**
CWR FORM No. 29 **186**
Notice (Contingent claims) (O.16, r.16) **186**
CWR FORM No. 30 **187**
Summons (Appeal against rejection of proof of debt) (O.16, r.18) **187**
CWR FORM No. 31 **188**
Summons (Application to expunge a proof of debt) (O.16, r.21) **188**
CWR FORM No. 32 **190**
Notice of Intention to Declare Interim Dividend (O.18, r.6) **190**
CWR FORM No. 33 **191**
Notice of Intention to Declare Final Dividend (O.18, r.7) **191**
CWR FORM No. 34 **192**
Notice of Final Dividend (O.18, r.7) **192**
CWR FORM No. 35 **193**
Notice of Call (O.19, r.2) **193**
CWR FORM No. 36 **194**
Order for Dissolution (O.21, r.2) **194**
CWR FORM No. 37 **196**
Voluntary Liquidator's Final Return to the Registrar **196**

ENDNOTES **199**

Table of Companies Winding Up Rules history:.....199

CAYMAN ISLANDS

Companies Act

(2023 Revision)

COMPANIES WINDING UP RULES

(2023 Consolidation)

In the exercise of the powers conferred by Section 155 of the *Companies Act (as amended and revised)* the Insolvency Rules Committee makes the following Rules —

Citation

1. These Rules may be cited as the *Companies Winding Up Rules (2023 Consolidation)*.

Revocation of the *Companies Winding Up Rules 2008* and Amendments

2. The *Companies Winding Up Rules 2008*, the *Companies Winding Up (Amendment) Rules, 2010*, the *Companies Winding Up (Amendment) Rules, 2013* and the *Companies Winding Up (Amendment) Rules 2016* are hereby *revoked* and replaced by the *Companies Winding Up Rules (as amended and revised)* attached as a Schedule hereto.

Commencement of the *Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2018*

3. The *Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2018* shall come into operation on the 1st day of February 2018.

Revocation* of the *Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2008

4. The *Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2008 [SL 9 of 2008]* are hereby ***revoked*** and replaced by the *Foreign Bankruptcy Proceedings (International Cooperation) Rules, 2018 [SL 92 of 2017]*.

Commencement of the *Insolvency Practitioners' Regulations, 2018*

5. The *Insolvency Practitioners' Regulations, 2018 [SL 93 of 2017]* come in operation on 1st day of February 2018.

Revocation* of the *Insolvency Practitioners' Regulations, 2008

6. The *Insolvency Practitioners' Regulations, 2008*, the *Insolvency Practitioners' (Amendment) Regulations, 2010*, and the *Insolvency Practitioners' (Amendment) Regulations, 2013* are hereby **revoked** and replaced by the *Insolvency Practitioners' Regulations, 2018 (as amended and revised)*.

MADE by the Insolvency Rules Committee on the 27th day of November 2017

The Honourable Andrew Jones QC, Judge

The Honourable Sam Bulgin QC, Attorney General

Colin McKie QC, Legal Practitioner

Hector Robinson QC, Legal Practitioner

Simon Conway, Qualified Insolvency Practitioner

Jude Scott CPA

Amended by the Insolvency Rules Committee on the 29th day of July 2022

The Honourable Nicholas Segal, Chairperson

The Honourable Samuel Bulgin QC, Attorney General

Colin McKie QC, Legal Practitioner

Colette Wilkins QC, Legal Practitioner

Eleanor Fisher, Insolvency Practitioner

Jude Scott

ORDER 1

CITATION, APPLICATION AND COMMENCEMENT

Citation (O.1, r.1)

1. (1) These Rules may be cited as the *Companies Winding Up Rules (2023 Consolidation)*.

(2) An individual Rule may be cited using the abbreviation "CWR".

Application (O.1, r.2)

2. (1) These Rules shall apply to —

(a) every winding up petition presented on or after the commencement date;

(b) every other application made under Part V of the *Companies Act (as amended and revised)* on or after the commencement date;

(c) every application made on or after the commencement date in a winding up proceeding which was pending on that date;

(d) any step taken or required to be taken after the commencement date in any winding up proceeding which was pending on that date; and

(e) any step taken or required to be taken on or after the commencement date in any voluntary liquidation which was in progress on that date, except that a voluntary liquidator shall not be required to apply for a supervision order under section 124 of the Law in respect of a voluntary liquidation which commenced prior to the commencement date.

(2) The *English Insolvency Rules 1986 (SI.1986/1925)* shall cease to have any application with effect from 1 March 2009.

Commencement and transitional provisions (O.1, r.3)

3. (1) The *Companies Winding Up Rules, 2018 [SL 92 of 2017]* shall, as stated in the Commencement Order, come into force on the 1st February, 2018, referred to in these Rules as the "**commencement date**".

(2) No application, order or direction made under Part V of the *Companies Act (as amended and revised)* before the commencement date shall be treated as a non-compliance with these Rules provided that it complied with the rules, practice directions or procedure then in force.

(3) No action taken by a liquidator, creditor or contributory in a compulsory liquidation or voluntary liquidation before the commencement date shall be treated as a non- compliance with these Rules provided that it complied with the rules, practice directions or procedure then in force.

Application of Grand Court Rules etc. (O.1, r.4)

4. (1) Every petition, summons, order or other document required to be served by these Rules, shall be served in accordance with GCR Orders 10 and 65, unless some other method of service is expressly required or permitted by these Rules. Where any such petition, summons, order or other document is required to be served out of the jurisdiction then GCR O. 11 shall apply to these Rules.

(1A) GCR Order 2 shall apply to these Rules mutatis mutandis.

(1B) Where any Rule requires a liquidator to publish any notice in any newspaper the Court may dispense with that requirement if it is satisfied that (i) the expense of publishing the notice in a newspaper would be disproportionate and/or (ii) it would be unlikely to serve any useful purpose

(2) Every affidavit or other document filed in the Court office shall comply with the requirements of GCR Orders 41 and 66.

(3) Every order or direction made in a winding up proceeding shall comply with the requirements of GCR Order 42.

(3A) GCR Order 20 shall apply mutatis mutandis with respect to any amendment to any document filed in the Court office.

(4) All funds required to be paid into or out of Court in connection with any winding up proceedings shall be lodged, paid, invested and dealt with in accordance with GCR Order 92.

Definitions (O.1, r.5)

5. (1) The words and expressions defined by section 89(1) of the Law shall have the same meaning when used in these Rules.

(2) The words and expressions defined by section 2 of the Law shall have the same meaning when used in these Rules.

(3) The words and expressions defined by GCR Order 1, rule 7 shall have the same meaning when used in these Rules.

(4) In these Rules, unless the context otherwise requires —

"**Authority**" means the Cayman Islands Monetary Authority established under section 5(1) of the *Monetary Authority Act (as amended and revised)* and includes a person acting under the Authority's authorisation;

"**court reporter**" means any person who is professionally engaged in the business of transcribing and reporting court proceedings, whether or not such person is employed by the Court;

"**dollars**" or "**$**" means United States dollars and any reference to a dollar or $ amount in these Rules shall mean that amount in United States dollars or an equivalent amount in the currency of the liquidation;

"**Registrar**" means the Registrar of the Financial Services Division of the Court; and

"**Registrar of Companies**" means the registrar of companies appointed under section 3 of the Law and includes, where appropriate, the deputy registrar of companies.

Construction of references to the Law, Orders, Rules and Regulations (O.1, r.6)

6. (1) References to "**the Law**" means the *Companies Act (as amended and revised).*

(2) Any reference in these Rules to a specified Order or Rule is a reference to that Order or Rule of these Rules.

(3) Any reference to a "**Regulation**" is a reference to the *Insolvency Practitioners' Regulations (as amended and revised).*

Prescribed Forms (O.1, r.7)

7. (1) The forms contained in the Appendix to these Rules shall be used where applicable, with such variations as the circumstances of the particular case require.

(2) The forms contained in the *English Insolvency Rules 1986 (UKSI.1986/1925)* shall cease to have any application with effect from 1 March 2009.

ORDER 1A

RESTRUCTURING MORATORIUM

Presentation, Filing and Advertisement of Petition (O.1A, r.1)

1. (1) A petition by the company for the appointment of a restructuring officer pursuant to section 91B of the Law shall be presented by filing it in Court in accordance with GCR Order 9.

(2) The petitioner shall pay the filing fee prescribed in the First Schedule of the Court Fees Rules.

(3) Unless the Court otherwise directs, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having a circulation in the Islands. An advertisement published in accordance with this Rule shall be in CWR Form No. 3A.

(4) In addition, unless the Court otherwise directs, if the company is carrying on business outside the Islands, every petition for the appointment of a restructuring officer shall be advertised once in a newspaper having circulation in a country (or countries) in which it is most likely to come to the attention of the company's creditors (including any contingent or prospective creditors) and contributories (in which case the advertisement must be published in the official language of such country or countries).

(5) The advertisements shall be made to appear not more than 7 business days after the petition for the appointment of a restructuring officer is filed in Court and not less than 7 business days before the hearing date.

(6) Unless the Court otherwise directs, the petition for the appointment of a restructuring officer will be heard within 21 days of the petition being filed in Court.

(7) An office copy of every petition presented under this Rule shall be placed on the Register of Writs and other Originating Process maintained by the Registrar pursuant to GCR Order 63, rule 8.

(8) Every petition under this Rule shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers.

Form and Content of Company Petition (O.1A, r.2)

2. (1) Every petition for the appointment of a restructuring officer shall be in CWR Form No 2A and shall contain:

(a) particulars of the company's incorporation;

(b) a description of the company's business including a statement about the countries in which it carries on business;

(c) if the company is a foreign company, particulars of the matters contained in section 91(d) of the Law;

(d) a concise statement of the grounds upon which the appointment of the restructuring officer is sought;

(e) the name and address of the person or persons whom the petitioner nominates for appointment as restructuring officer; and

(f) a statement that the company acting either by the directors or the restructuring officer intends to present a compromise or arrangement to its creditors (or classes thereof) either pursuant to the Law, the law of a foreign country or by way of a consensual restructuring.

(2) The company's petition shall be supported by an affidavit sworn by or on the authority of the company's board of directors containing:

(a) confirmation that the statements in the petition are true to the best of the deponent's knowledge, information and belief;

(b) a statement that, having made due enquiry and taken appropriate advice, the company's board of directors believes that the company is or is likely to become unable to pay its debts within the meaning of section 93 of the Law and the reasons for their stated belief;

(c) a statement of the company's financial position, specifying to the best of the directors' belief details of the company's assets and liabilities, including contingent and prospective liabilities and an explanation of how the company will be funded in the event and during the period of the restructuring officer's appointment;

(d) details of the security, if any, held by the creditors of the company; and

(e) a statement of the reasons why the company's directors believe that the appointment of a restructuring officer and the moratorium would be in the best interests of the company and, in appropriate circumstances, its creditors (or classes thereof).

(3) The company's petition shall also be supported by an affidavit sworn by the person or persons nominated for the appointment as restructuring officer and containing the matters specified in Order 3, rule 4 (save that "restructuring officer" shall be substituted for "official liquidator" and the reference to the independence requirements in Regulation 6 shall be read as a reference to the independence requirements as set out in Order 1A, rule 10).

Notice of Appearance (O.1A, r.3)

3. (1) Every person who intends to appear and be heard on the hearing of a petition for the appointment of a restructuring officer shall give 3 days' notice of that person's intention in accordance with the requirements of this Rule.

(2) The notice shall be in CWR Form No 4A and shall specify:

(a) the name, address and other contact details of the person giving notice and that person's attorneys;

(b) whether that person intends to support or oppose the appointment of a restructuring officer;

(c) if the party is a creditor, the amount and nature of that person's debt;

(d) if the party is a contributory, the amount of shares held in the company; and

(e) in the event that a restructuring officer is to be appointed, whether that person intends to support or oppose the appointment as restructuring officer of the person(s) nominated by the petitioner.

(3) If a party intends to oppose the appointment of the petitioner's nominee, that party must:

(a) nominate an alternative qualified insolvency practitioner who is willing to act as restructuring officer if so appointed by the Court;

(b) file a supporting affidavit in accordance with Order 3, rule 4 (save that "restructuring officer" shall be substituted for "official liquidator" and the reference to the independence requirements in Regulation 6 shall be read as a reference to the independence requirements as set out in Order 1A, rule 10);

(c) serve that party's notice of appearance and supporting affidavit upon:

(i) the company;

(ii) the petitioner's attorneys; and

(iii) in the event that the company is carrying on a regulated business, the Authority, not less than 3 days before the hearing date.

(4) Where the Authority has given notice of appearance under this Rule, this notice shall specify:

(a) what, if any, regulatory action has been taken by the Authority against the company;

(b) whether it supports or opposes the petition; and

(c) in the event that a restructuring officer is to be appointed, whether it intends to support or oppose the appointment as restructuring officer of the person(s) nominated by the petitioner.

Application for the Appointment of an Interim Restructuring Officer by Summons (O.1A, r.4)

4. (1) An application by the company for the appointment of an interim restructuring officer pursuant to section 91C of the Law shall be made by summons. Every summons shall be in the form of CWR Form No 2B.

(2) The summons shall be supported by an affidavit sworn by or on the authority of the company's board of directors containing a statement of the reasons why the board of directors believes that the appointment of an interim restructuring officer on an *ex parte* basis pending the hearing of the petition is in the best interests of the company and, in appropriate circumstances, its creditors (or classes thereof).

Concurrent Petitions (O.1A, r.5)

5. (1) An application for leave to present a winding up petition in respect of a company to which section 91G of the Law applies shall be made by summons and heard by the judge assigned to the proceedings commenced under section 91B of the Law.

(2) If leave is granted to present a winding up petition pursuant to section 91G of the Law, the winding up petition will be assigned to the same judge assigned to the proceedings commenced under section 91B of the Law.

(3) In circumstances where leave to present a winding up petition has been granted pursuant to section 91G of the Law and the petition for the appointment of a restructuring officer has not been heard, the Court may hear the winding up petition and the petition for the appointment of a restructuring officer at the same time.

(4) In circumstances other than those specified in Order 1A, rule 5(3), the Registrar shall fix a date for the hearing of the winding up petition in consultation with the judge assigned to the proceedings commenced under section 91B of the Law.

(5) Where a petition for the appointment of a restructuring officer has been presented and a restructuring officer (or an interim restructuring officer) has not been appointed under section 91B or 91C of the Law, the company shall give notice to the company's creditors (including any contingent or prospective creditors), contributories and, where the company is carrying on a regulated business, the Authority, that a winding up petition has been presented (subject to any directions made by the Court), in whatever manner appears to the directors to be most expedient for the purpose of bringing the petition to the notice of such parties.

(6) In circumstances other than those specified in Order 1A, rule 5(5), the restructuring officer (or interim restructuring officer) as applicable, shall give notice to the company's creditors (including any contingent or prospective creditors), contributories and, where the company is carrying on a regulated

business, the Authority, that a winding up petition has been presented (subject to any directions made by the Court), in whatever manner appears to the restructuring officer to be most expedient for the purpose of bringing the petition to the notice of such parties.

(7) In circumstances where a petition for the appointment of a restructuring officer has been presented or a restructuring officer (or an interim restructuring officer) has been appointed pursuant to section 91B or 91C of the Law, the Court may give directions as to the manner in which the winding up petition is to be advertised or dispense with the requirement to advertise the winding up petition.

Order for the Appointment of a Restructuring Officer (O.1A, r.6)

6. (1) Every order for the appointment of a restructuring officer made on the application of the company pursuant to section 91B of the Law shall be in CWR Form No 8A.

(2) The order shall state:

(a) the full name, address and contact details of the restructuring officer;

(b) the powers and functions of the restructuring officer; and

(c) the manner and extent to which the powers and functions of the restructuring officer shall affect and modify the powers and functions of the board of directors in relation to the exercise of its powers.

(3) The Court may also make orders and directions in respect of the following matters:

(a) the preparation by the restructuring officer of reports about the financial condition of the company and such other subjects as the Court thinks fit and the service or publication of such reports;

(b) the entry into an international protocol with any foreign officeholder;

(c) the convening of meetings of the company's creditors and members;

(d) the preparation of a compromise or arrangement in respect of the company's indebtedness in accordance with section 91I of the Law or any other proposal in respect of the company's indebtedness in accordance with section 91B(1)(b) of the Law;

(e) the preparation of a compromise or arrangement in accordance with section 86 of the Law;

(f) the validation of dispositions made by or to be made by the company;

(g) setting a date for a further hearing at which the restructuring officer will update the Court and allow the Court to assess the progress made in formulating a compromise or arrangement;

(h) that the remuneration and expenses of a restructuring officer be paid out of the assets of the company in any event;

(i) provision for the payment of liabilities incurred and falling due during the period in which the restructuring officer is in office; and

(j) such other matters as the Court thinks fit.

(4) This Rule applies to the appointment of an interim restructuring officer pursuant to section 91C of the Law and every order for the appointment of an interim restructuring officer shall be in CWR Form No 8B.

Filing, Service and Registration of Order (O.1A, r.7)

7. (1) A restructuring officer (or interim restructuring officer) shall register the order with the Registrar of Companies within 7 business days after the order is made.

(2) A restructuring officer shall send notice of the order to the Government Information Services for publication in the next edition of the Gazette within 7 business days after the order is made.

(3) A restructuring officer shall give notice of that restructuring officer's appointment to the company's creditors, (including any contingent or prospective creditors), contributories and, where the company is carrying on a regulated business, the Authority, as directed by the Court.

(4) A restructuring officer shall provide a copy of the order, upon request, to any person who is a creditor (including any contingent or prospective creditor or creditors) or contributory of the company or, in respect of a person claiming to be a creditor (whether contingent, prospective or otherwise), who provides reasonable evidence that that person is or may be a creditor of the company.

Obligation to Report to Creditors, Contributories and the Authority (O.1A, r.8)

8. (1) Unless the Court orders otherwise, the restructuring officer shall send a report to every creditor (including any contingent or prospective creditor) and contributory of the company of whose address the restructuring is aware and, in respect of a company carrying on a regulated business, the Authority, within 28 days of that restructuring officer's appointment.

(2) The report must (subject to any order of the Court to the contrary, including an order permitting the restructuring officer to refrain from disclosing confidential information on the basis that such disclosure could be damaging to the company or be in breach of confidentiality obligations binding on the company or the restructuring officer) include details of:

(a) the steps taken in the restructuring and the further steps intended to be taken in the restructuring generally;

(b) the financial position of the company at the latest practicable date;

(c) the work done by or on behalf of the restructuring officer and the amount of remuneration claimed by that restructuring officer;

(d) such other information which is required in order to provide the contributories and creditors (and, where the company is carrying on a regulated business, the Authority)with a proper understanding of the company's affairs, financial position and proposed restructuring; and

(e) such other matters as the Court may direct.

Variation or Discharge of Order (O.1A, r.9)

9. (1) An application for the variation or discharge of the order appointing a restructuring officer pursuant to section 91E of the Law shall be made by summons in CWR Form No 16B, supported by an affidavit setting out the grounds on which the application is made and the evidence in support, and shall be served on the company and the restructuring officer.

(2) The restructuring officer shall give notice of an application under this Rule to the company's creditors (including any contingent or prospective creditors) and contributories (subject to any directions made by the Court), in whatever manner appears to the restructuring officer to be most expedient for the purpose of bringing the application to the notice of such creditors and contributories.

(3) Where the company in respect of which the restructuring officer has been appointed is carrying on a regulated business, the restructuring officer shall give notice of an application under this Rule to the Authority by delivering it to the Authority immediately upon it coming to the restructuring officer's attention.

(4) An order under this Rule may make provision for the costs, expenses and remuneration of the restructuring officer and the liabilities of the company incurred between the date of the appointment of the restructuring officer and discharge or variation of the order.

(5) An order under this Rule shall be filed, served and registered in accordance with Rule 7 of this Order.

Application of the *Insolvency Practitioners' Regulations (as amended and revised)* and Independence (O.1A, r.10)

10. (1) Subject to section 91D of the Law and unless the context otherwise requires or the Court orders otherwise, the provisions of the *Insolvency Practitioners' Regulations (as amended and revised)* shall apply *mutatis mutandis* to restructuring officers (save that the Independence Requirement in Regulation 6 shall not apply, Regulations 12 and 13 shall not apply and "restructuring officer" shall be substituted for "official liquidator").

(2) The remuneration of a restructuring officer shall be approved on an application to the Court by the restructuring officer for approval of the restructuring officer’s remuneration.

(3) An application by a restructuring officer for approval of the restructuring officer’s remuneration shall be made by summons in CWR Form No 16A and

be supported by an affidavit setting out the grounds in support of the restructuring officer's remuneration. The application may be made *ex parte* and determined on paper but the Court may order that the application be served on creditors, including prospective and contingent creditors, and/or on members in such manner as the Court thinks fit.

(4) Where the remuneration of a restructuring officer has been approved by creditors and/or members by approval of the compromise or arrangement, there is a rebuttable presumption that the remuneration of the restructuring officer is fair and reasonable.

(5) A qualified insolvency practitioner (as defined in the *Insolvency Practitioners' Regulations (as amended and revised)*) shall not be appointed by the Court as a restructuring officer unless that person can properly be regarded as independent as regards the company.

(6) A qualified insolvency practitioner may be regarded as independent notwithstanding that that person (or the firm of which that person is a partner or employee, or the company of which that person is a director or employee) has previously provided advice to the company as financial advisor or otherwise. However, a qualified insolvency practitioner shall not be regarded as independent if, within a period of 3 years immediately preceding the petition to appoint a restructuring officer being filed with the Court, that person (or the firm of which that person is a partner or employee, or the company of which that person is a director or employee) has acted in relation to the company as its auditor.

(7) Where the Court orders that a company be wound up at any time after a petition to appoint a restructuring officer has been presented, a qualified insolvency practitioner may be regarded as independent to act as liquidator notwithstanding that that person (or the firm of which that person is a partner or employee, or the company of which that person is a director or employee) has previously been nominated or appointed as a restructuring officer.

Resignation of Restructuring Officers (O.1A, r.11)

11. (1) A restructuring officer who wishes to resign shall:

(a) prepare a report which contains the information set out in Order 1A, rule 8;

(b) give notice of resignation to the company's creditors (including any contingent and prospective creditors), contributories and, if the company is carrying on a regulated business, the Authority; and

(c) apply to the Court for an order that the restructuring officer be released from the performance of any further duties.

(2) An application to the Court under this Rule shall be served on:

(a) such creditors (including contingent and prospective creditors) and contributories as the Court thinks fit; and

(b) if the company is carrying out a regulated business, the Authority.

(3) It shall be the responsibility of the company to nominate a qualified insolvency practitioner whom the Court can appoint in succession to the resigning restructuring officer and every person so nominated shall swear an affidavit which complies with the requirements of Order 3, rule 4 (save that "restructuring officer" shall be substituted for "official liquidator" and the reference to the independence requirements in Regulation 6 shall be read as a reference to the independence requirements as set out in Order 1A, rule 10).

(4) If two or more qualified insolvency practitioners have been appointed as joint restructuring officers, provided that at least one qualified insolvency practitioner remains in office, one or more of them may resign by giving notice to the Court without the need to prepare any report (unless required to do so either by the Court or the continuing restructuring officer). The company may apply to the Court for the appointment of a successor.

(5) If a qualified insolvency practitioner has been appointed jointly with a foreign practitioner, the foreign practitioner may resign by giving notice to the Court without the need to prepare any report (unless required to do so either by the Court or the continuing restructuring officer). The company may apply to the Court for the appointment of a successor.

(6) If a restructuring officer, wishing to resign, is acting in the restructuring officer's capacity as a partner or employee of a firm, the Court may make an order that:

(a) the restructuring officer be released from the performance of any further duties; and

(b) another partner or employee of the same firm be appointed as successor restructuring officer,

without the need for any report to be prepared.

Death of Restructuring Officers (O.1A, r.12)

12. (1) Where a restructuring officer dies in office, it is the duty of that person's personal representative to give notice of the restructuring officer's death (including the date of death) to the company and the Court.

(2) Alternatively, if a restructuring officer was a partner or employee of a firm, the restructuring officer's firm may give notice of the restructuring officer's death.

(3) Following the death of a restructuring officer (where that person was acting as sole restructuring officer or jointly with a foreign practitioner), the company shall, within 7 days of the notification of the restructuring officer's death, apply to the Court for an order appointing a new restructuring officer, failing which

the firm of which the deceased restructuring officer was a partner or employee may apply to the Court for an order appointing a new restructuring officer.

(4) If the deceased restructuring officer was appointed jointly with a qualified insolvency practitioner, the survivor shall continue to act as sole restructuring officer unless and until the Court, on the company's application, appoints an additional restructuring officer.

Application for the Removal and Replacement of a Restructuring Officer (O.1A, r.13)

13. (1) An application for an order that a restructuring officer be removed and replaced pursuant to section 91F of the Law shall be made by summons in CWR Form No. 16C (referred to in this Rule as a "removal and replacement summons").

(2) A removal and replacement summons shall be served upon:

(a) the restructuring officer that it relates to;

(b) if it is not the applicant, the company; and

(c) such other creditors and contributories as the Court may direct.

(3) A removal and replacement summons shall be supported by an affidavit containing all the facts and matters relied upon.

(4) A removal and replacement summons must also nominate a qualified insolvency practitioner whom the Court can appoint in succession to the removed restructuring officer and every person so nominated must swear an affidavit which complies with the requirements of Order 3, rule 4 (save that "restructuring officer" shall be substituted for "official liquidator" and the reference to the independence requirements in Regulation 6 shall be read as a reference to the independence requirements as set out in Order 1A, rule 10).

(5) The restructuring officer and company shall be entitled to at least 14 days' notice of a removal and replacement summons.

(6) A restructuring officer who is replaced by order of the Court shall:

(a) forthwith deliver to the restructuring officer’s successor a copy of the restructuring officer’s files relating to the company's restructuring; and

(b) within 21 days prepare a report for delivery to the restructuring officer’s successor which contains the information set out in Order 1A, rule 8.

(7) An order under this Rule may make provision for the costs, expenses and remuneration of the restructuring officer and the liabilities of the company incurred between the date of the appointment of the restructuring officer and the date that the restructuring officer is replaced.

Restructuring Officer's Legal Counsel (O.1A, r.14)

14. Unless the context otherwise requires or the Court orders otherwise, the principles set out in Order 25 shall apply in respect of the restructuring officer's legal counsel.

International Protocols (O.1A, r.15)

15. (1) Unless the context otherwise requires, Order 21 applies to this Rule (save that "restructuring officer" shall be substituted for "official liquidator", "a company in respect of which a restructuring officer has been appointed" shall be substituted for "**a company in liquidation**" and "**a company in respect of which a restructuring officer has been appointed**" means a company to which a restructuring officer has been appointed pursuant to section 91B or section 91C of the Law).

(2) It shall be the duty of the restructuring officer to consider whether or not it is appropriate to enter into an international protocol with any foreign officeholder.

(3) The purpose of an international protocol is to promote an orderly restructuring of the company and to avoid duplication of work and conflict between the restructuring officer and the foreign officeholder.

(4) An international protocol agreed between the restructuring officer and a foreign officeholder shall take effect and become binding upon them only if and when it is approved by both the Court and the foreign court or authority.

General Provisions (O.1A, r.16)

16. (1) Every petition shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers.

(2) Every summons shall be heard in chambers unless:

(a) the Court directs that it should be advertised, in which case it must be heard in open court; or

(b) the Court directs that it should be heard in open court.

(3) A Court file shall be established in respect of each proceeding for the appointment of a restructuring officer in accordance with GCR Order 63, rule 2.

(4) The Registrar shall not permit the creation of more than one Court file (or the allocation of more than one cause number) in respect of a company the subject of a proceeding under section 91B of the Law.

(5) The Registrar shall not permit any Court file (and associated cause number) to relate to more than one company the subject of a proceeding under section 91B of the Law.

(6) Every order made in proceedings commenced under section 91B or 91C of the Law, whether in open Court or in chambers, shall be placed on the Register of

Judgments maintained by the Registrar under GCR Order 63, rule 7, and shall be open to public inspection upon payment of the prescribed fee.

(7) The Court may direct that the whole or part of any report, order, affidavit or other document (except the petition or restructuring order) which has been filed or is required to be filed pursuant to these Rules, shall be sealed and kept confidential for a specific period or until the happening of a specified event, on the same grounds as set out in Order 24, rule 6 of these Rules.

(8) The restructuring officer, any liquidator and any creditor or contributory may apply to the Court for a direction that a sealed document be unsealed on the same grounds as set out in Order 24, rule 6 of these Rules.

(9) Unless the Court orders otherwise, the costs incurred by a party in relation to:

(a) a petition to appoint restructuring officers pursuant to section 91B of the Law or an application to appoint an interim restructuring officer pursuant to section 91C of the Law;

(b) an application to vary or discharge the order appointing a restructuring officer pursuant to section 91E of the Law; and/or

(c) an application for the removal and replacement of a restructuring officer pursuant to section 91F of the Law,

shall be paid out of the assets of the company to which the petition or application relates

Schemes of Arrangement under section 91I of the Law (O.1A, r.17)

17. (1) GCR O.102, r.20 and any practice directions issued in relation to GCR O.102, r.20 shall apply to a compromise or arrangement proposed pursuant to section 91I of the Law.

Definitions (O.1A, r.18)

18. (1) For the purpose of Order 1A "**company**" means any:

(a) company liable to be wound up under section 91 of the Law; or

(b) other entity or partnership to which the provisions of Part V of the Law apply in respect of the entity's or partnership's winding up.

ORDER 2

STATUTORY DEMAND

Introduction (O. 2, r. 1)

1. (1) A demand for payment of a debt made by a creditor in accordance with section 93(a) of the Law is referred to in these Rules as a "**statutory demand**".

Form and Content of Statutory Demand (O. 2, r. 2)

2. (1) A statutory demand shall be in CWR Form No1.

(2) A statutory demand must be signed by —

(a) the creditor; or

(b) if the creditor is a firm, any partner of the firm; or

(c) if the creditor is a body corporate, any director or officer who is duly authorised to make the demand.

(3) A statutory demand must state the amount, the date on which the debt fell due, the currency of the debt and the consideration for it.

(4) If the amount claimed includes —

(a) any charge by way of interest not previously notified to the company as included in its liability; or

(b) any other charge accruing from time to time,

the statutory demand must state the grounds upon which the company is liable to pay such interest or charges and contain particulars of the way in which such interest or charges are calculated.

(5) A statutory demand must contain the creditor's address and, if it is signed by anyone other than the creditor themselves, the contact details of the partner, director or officer who signed it on behalf of the creditor.

(6) A statutory demand must include a statement that if payment is not made within 21 days of the date upon which it was served on the company, the company will be deemed to be insolvent and a winding up petition may be presented against the company in accordance with section 92(d) of the Law.

(7) A statutory demand must contain information about ways in which the company may make payment, including details of a bank account to which the amount owing may be wire transferred.

Service of Statutory Demand (O. 2, r. 3)

3. (1) The original hard copy of a statutory demand must be delivered by hand to the company's registered office.

(2) Transmission of a copy by facsimile or e-mail shall not, by itself, be sufficient to constitute good service for the purposes of the Law.

(3) There is no requirement that a copy of a statutory demand must be drawn to the attention of the company's directors by the creditor.

(4) A statutory demand shall not be invalidated by reason only of the fact that a company's professional service providers have failed to draw it to the attention of the directors or failed to take any other appropriate steps on behalf of the company in response to the receipt of the statutory demand.

ORDER 3

WINDING-UP PETITIONS AND ORDERS

PART I: GENERAL PROVISIONS

Presentation and Filing of Petition (O. 3, r. 1)

1. (1) A winding up petition shall be presented by filing it in Court in accordance with GCR Order 9.

(2) The petitioner shall pay the filing fee prescribed in the First Schedule of the Court Fees Rules.

Form and Content of Petition (O. 3, r. 2)

2. (1) Subject to any directions given under Rule 12(1)(a) and (b), every winding up petition shall be in CWR Form No 2.

(2) Every winding up petition shall comply with the requirements of GCR Order 9 and shall contain —

(a) particulars of the company's incorporation;

(b) a description of the company's business, including a statement about the countries in which it carries on its business;

(c) if the company is a foreign company, particulars of the matters contained in section 91(d) of the Law;

(d) a concise statement of the grounds upon which the winding up order is sought; and

(e) the name and address of the qualified insolvency practitioner (and any foreign practitioner) whom the petitioner nominates for appointment as official liquidator.

(3) A winding up petition that has been served may be amended only with the leave of the Court.

(4) If the Court orders a contributory-petitioner to file and serve points of claim then the points of claim and every subsequent pleading shall comply with the requirements of GCR Order 18, rules 4 to 18.

(5) GCR Order 18, rule 19(1) and (2) shall apply to any pleading and to any petition as though it were a pleading.

Verification of Petition (O. 3, r. 3)

3. (1) The petition shall be verified by an affidavit that the statements in the petition are true, or are true to the best of the deponent's knowledge, information and belief.

(2) A creditors' petition in respect of debts due to two or more different creditors must be separately verified by or on behalf of each creditor.

(3) The verifying affidavit shall be sworn by —

(a) the petitioner; or

(b) a director, officer or agent of the petitioner who has been concerned in and has personal knowledge of the matters giving rise to the petition.

Nominated Official Liquidator's Consent to Act (O. 3, r. 4)

4. (1) Every petition shall be supported by an affidavit sworn by the person or persons nominated for appointment as official liquidator stating that —

(a) that person is a qualified insolvency practitioner and meets the residency requirement contained in Regulation 5;

(b) having made due enquiry, that person believes that that person and that person's firm meet the independence requirement contained in Regulation 6;

(c) that person and/or that person's firm are in compliance with the insurance requirement contained in Regulation 7; and

(d) that person is willing to act as official liquidator if so appointed by the Court.

(2) If the petition seeks an order for the appointment of a qualified insolvency practitioner jointly with a foreign practitioner, it shall be supported by an affidavit sworn by the foreign practitioner stating —

(a) that person's professional qualifications;

(b) the country in which that person is qualified to perform functions equivalent to those performed by official liquidators under the Law or by trustees under the *Bankruptcy Act (as amended and revised)*;

(c) that person's professional experience;

(d) that person will have the benefit of professional indemnity insurance in respect of that person's acts and omissions done in that person's capacity as an official liquidator of the company meeting the requirements of Regulation 7;

(e) if that person has been appointed by a foreign court or authority as a liquidator, trustee, receiver or administrator of the company or a related party of the company, full particulars of such appointment; and

(f) that, having made due enquiry, that person and that person's firm meet independence requirement contained in Regulation 6.

PART II: CREDITOR'S PETITION

Presentation and Service of Creditor's Petition (O. 3, r. 5)

5. (1) Prior to presenting a creditor's petition, the petitioner's attorney must apply in writing (by letter or e-mail) to the Registrar to have the proceeding assigned to a Judge and to fix a hearing date.

(2) A creditor's petition shall not be filed unless and until the proceeding has been assigned to a Judge and a hearing date has been fixed and endorsed on the petition or stated in a notice of hearing filed simultaneously with the petition.

(3) Every creditor's petition, together with the verifying and supporting affidavits and notice of hearing (if the hearing date is not endorsed upon the petition itself), shall be served upon the company by delivering them to the company's registered office immediately after the petition has been presented.

(4) In the event that the company is carrying on a regulated business, copies of the petition and affidavits shall also be served upon the Authority immediately after the petition has been presented.

(5) An affidavit of service shall be filed within 7 days of the presentation of every creditor's petition.

Advertisement of Creditor's Petition (O. 3, r. 6)

6. (1) Unless the Court otherwise directs, every creditor's petition shall be advertised once in a newspaper having a circulation in the Islands.

(2) In addition, unless the Court otherwise directs, if the company is carrying on business outside the Islands, every creditor's petition shall be advertised once in a newspaper having a circulation in the country or countries in which it is most likely to come to the attention of the company's creditors, in which case the advertisement must be published in the official language of such country.

(3) The advertisements shall be made to appear not less than 7 business days after service of the petition upon the company and not less than 7 business days before the hearing date.

(4) An advertisement published in accordance with this Rule shall be in CWR Form No 3 and shall contain —

(a) the title of the petition, including the name of the company;

(b) the registered office of the company;

(c) the name, address and other contact details of the petitioner and the petitioner's attorneys;

(d) the name and address of the qualified insolvency practitioner(s) and any foreign practitioner nominated for appointment as official liquidators;

(e) the hearing date;

(f) a statement that copies of the petition and affidavits may be obtained, free of charge, from the petitioner's attorneys; and

(g) a statement that any creditor intending to appear and be heard on the petition shall give at least 3 days' notice to the petitioner's attorneys.

Leave for Petition to be Withdrawn (O. 3, r. 7)

7. (1) An application for leave to withdraw a creditor's petition may be made by *ex parte* summons.

(2) The Court shall grant leave for a creditor's petition to be withdrawn on such terms as have been agreed between the petitioner and the company if it is satisfied that —

(a) the petition has not been advertised;

(b) no notice of intention to appear and be heard on the petition (whether in support or opposition) has been received from any creditor or, where the company is licensed to carry on a regulated business, the Authority; and

(c) the company consents to an order being made under this Rule.

(3) If a creditor's petition has been advertised, any application for leave to withdraw the petition must be made at the advertised hearing and in any such case the Court will consider making an order for substitution in accordance with Rule 10.

Notice of Appearance (O. 3, r. 8)

8. (1) Every person who intends to appear and be heard on the hearing of a petition shall give at least 3 days' notice of that person’s intention to the petitioner's attorneys.

(2) The notice shall be in CWR Form No 4 and shall specify —

(a) the name, address and other contact details of the person giving notice and that person’s attorneys;

(b) whether that person intends to support or oppose the petition;

(c) the amount and nature of that person’s debt; and

(d) in the event that a winding up order is made, whether that person intends to support or oppose the appointment as official liquidator of the person(s) nominated by the petitioner.

(3) If a creditor intends to oppose the appointment of the petitioner's nominee, that creditor must —

(a) nominate an alternative qualified insolvency practitioner who is willing to act as official liquidator if so appointed by the Court;

(b) file a supporting affidavit in accordance with Rule 4; and

(c) serve that creditor's notice of appearance and supporting affidavit upon —

(i) the company;

(ii) the petitioner's attorneys; and

(iii) in the event that the company is carrying on a regulated business, the Authority,

not less than 3 days before the hearing date.

(4) If a creditor's petition is presented against a company which is licensed to carry on a regulated business, the Authority may appear and be heard provided that it has given at least 3 days' notice of its intention to appear to the company and to the petitioner's attorneys.

(5) The Authority's notice of appearance under this Rule shall specify –

(a) what, if any, regulatory action has been taken by the Authority against the company;

(b) whether it supports or opposes the petition;

(c) in the event that a winding up order is made, whether it intends to support or oppose the appointment as official liquidator of the person(s) nominated by the petitioner.

Evidence in Opposition to Petition (O. 3, r. 9)

9. (1) If the company intends to oppose the petition, its affidavit in opposition must be filed and served upon the petitioner within 14 days from the date upon which the petition was served upon the company.

(2) The petitioner may serve a notice, at least 3 days prior to the hearing date, requiring that any deponent attend the hearing for cross-examination.

Substitution of Petitioner (O. 3, r. 10)

10. (1) This Rule applies where a creditor petitions and is subsequently found not to have been entitled to do so or where the petitioner —

(a) fails to advertise that person's petition;

(b) consents to that person's petition being withdrawn;

(c) fails to appear on the hearing of that person's petition;

(d) allows that person's petition to be adjourned or dismissed; or

(e) appears, but does not apply for an order in terms of the prayer of that person's petition.

(2) The Court may, on such terms as it thinks just, substitute as petitioner any creditor who in its opinion would have a right to present a petition and who is desirous of doing so.

(3) Where the Court exercises its discretion to substitute a creditor as petitioner, the petition of the substituted petitioner will be deemed to have been filed on the date of the original petition.

PART III: CONTRIBUTORY'S PETITION

Presentation and Service of a Contributory's Petition (O. 3, r. 11)

11. (1) Upon the presentation of a contributory's petition, the petitioner must at the same time issue a summons for directions in respect of the matters contained in Rule 12.

(2) Prior to presenting a contributory's petition and issuing the summons for directions in respect of it, the petitioner's attorney must apply in writing (by letter or e-mail) to the Registrar to have the proceeding assigned to a Judge and to fix a date for hearing the summons for directions.

(3) Every contributory's petition and the summons for directions relating to it shall be served immediately after having been presented/issued upon –

(a) the company, by delivering it to the company's registered office; and

(b) every member of the company whom the petitioner has named or intends to name as a respondent to the petition, who may be served out of the jurisdiction without the leave of the Court.

Summons for Directions (O. 3, r. 12)

12. (1) Upon hearing the summons for directions, the Court shall give such directions as it thinks appropriate in respect of the followings matters —

(a) whether or not the company is properly able to participate in the proceeding or should be treated merely as the subject-matter of the proceeding;

(b) whether the proceeding should be treated as a proceeding against the company or as an inter partes proceeding between one or more members of the company as petitioners and the other member or members of the company as respondents;

(c) service of the petition upon persons other than the company (as may be appropriate having regard to the directions give under paragraphs (a) and (b) of this Rule);

(d) whether, and if so by what means, the petition is to be advertised;

(e) whether the petitioner should serve any further particulars of that person's claim;

(f) service of a defence by the company or the respondents (as may be appropriate in the light of the directions given under paragraphs (a) and (b) of this Rule);

(g) the manner in which evidence is to be given;

(h) if evidence is directed to be given by affidavit, directions relating to cross-examination of the deponents;

(i) discovery and inspection of documents;

(j) oral discovery; and

(k) such other procedural matters as the Court thinks fit.

(2) A summons for directions under this Rule shall be in CWR Form No. 5.

Hearing of Contributory's Petition (O. 3, r. 13)

13. (1) An order fixing a date for the trial of a contributory's petition may be made upon the hearing of the summons for directions.

(2) If it is not appropriate for the Court to fix a trial date upon hearing the summons for directions, the petitioner shall apply subsequently to the Registrar.

PART IV: AUTHORITY'S PETITION

Service of Authority's Petition (O. 3, r. 14)

14. (1) Prior to presenting a petition, the Authority's attorney must apply in writing (by letter or e-mail) to the Registrar to have the proceeding assigned to a Judge and to fix a date for hearing the summons for directions.

(2) Every petition presented by the Authority, together with the verifying and supporting affidavits and summons for directions, shall be served upon the company by delivering them to its registered office immediately after the petition has been presented.

(3) An affidavit of service shall be filed within 7 days of the presentation of every Authority's petition.

Summons for Directions (O. 3, r. 15)

15. (1) Upon the presentation of a petition by the Authority, the Authority must at the same time issue a summons for directions in respect of the matters contained in this Rule.

(2) Upon hearing the summons for directions, the Court shall either –

(a) make a winding up order, if the Court is satisfied that the company consents or does not object to an order being made; or

(b) fix a hearing date and make such directions as the Court thinks appropriate in respect of the following matters —

(i) whether the petition should be served upon the company's members, directors or professional service providers;

(ii) the manner in which evidence is to be given;

(iii) if evidence is to be given by affidavit, directions relating to cross-examination of the deponents;

(iv) if the Authority has appointed a controller, whether such controller should produce any documents belonging to the company or attend for cross-examination on that controller's report or prepare any further report; and

(v) such other procedural matters as the Court thinks fit.

(3) A petition presented by the Authority shall not be advertised unless the Court otherwise directs.

Hearing of Authority's Petition (O. 3, r. 16)

16. (1) Unless a winding up order is made pursuant to Rule 15(2)(a), the hearing of every petition presented by the Authority shall take place in open court.

(2) Any member, director or professional service provider of the company may appear and be heard on the petition, whether or not the Court has directed that such person be served.

(3) Every member, director or professional service provider of the company who intends to appear and be heard on the hearing of the petition shall give 3 days' notice of that person's intention to the Authority's attorneys.

(4) No other person may appear and be heard without the leave of the Court.

PART V: COMPANY'S PETITION

Presentation and Service of Company's Petition (O. 3, r. 17)

17. (1) Prior to presenting a company's petition, the company's attorney must apply in writing (by letter or e-mail) to the Registrar to have the proceeding assigned to a Judge and to fix a hearing date.

(2) In the event that the company is carrying on a regulated business, copies of the petition and affidavits shall be served upon the Authority immediately after the petition has been presented.

(3) Where the company is carrying on regulated business, an affidavit of service shall be filed within 7 days of the presentation of the company's petition.

Advertisement of Company's Petition (O. 3, r. 18)

18. (1) Unless the Court otherwise directs, every company's petition shall be advertised once in a newspaper having a circulation in the Islands.

(2) In addition, unless the Court otherwise directs, if the company is carrying on business outside the Islands, every company's petition shall be advertised once in a newspaper having a circulation in the country or countries in which it is most likely to come to the attention of the company's creditors, in which case the advertisement must be published in the official language of such country.

(3) The advertisements shall be made to appear not less than 7 business days before the hearing date.

(4) An advertisement published in accordance with this Rule shall be in CWR Form No 3A and shall contain —

(a) the title of the petition, including the name of the company;

(b) the registered office and other contact details of the company;

(c) the name, address and other contact details of the company's attorneys;

(d) the name and address of the qualified insolvency practitioner(s) and any foreign practitioner nominated for appointment as official liquidators;

(e) the hearing date;

(f) a statement that copies of the petition and affidavits may be obtained, free of charge, from the company's attorneys; and

(g) a statement that any creditor or shareholder intending to appear and be heard on the petition shall give at least 3 days' notice to the company's attorneys.

Leave for Petition to be Withdrawn (O. 3, r. 19)

19. (1) An application for leave to withdraw a company's petition may be made by *ex parte* summons.

(2) The Court shall grant leave for a company's petition to be withdrawn if it is satisfied that —

(a) the petition has not been advertised; and

(b) no notice of intention to appear and be heard on the petition (whether in support or opposition) has been received from any creditor or, where the company is licensed to carry on a regulated business, the Authority.

(3) If a company's petition has been advertised, any application for leave to withdraw the petition must be made at the advertised hearing and in any such

case the Court will consider making an order for substitution in accordance with Rule 21.

Notice of Appearance (O. 3, r. 20)

20. (1) Every person who intends to appear and be heard on the hearing of a petition shall give at least 3 days' notice of that person's intention to the company's attorneys.

(2) The notice shall be in CWR Form No 4 and shall specify —

(a) the name, address and other contact details of the person giving notice and that person's attorneys;

(b) whether that person intends to support or oppose the petition;

(c) the amount and nature of that person's debt; and

(d) in the event that a winding up order is made, whether that person intends to support or oppose the appointment as official liquidator of the person(s) nominated by the petitioner.

(3) If a creditor intends to oppose the appointment of the company's nominee, that person must —

(a) nominate an alternative qualified insolvency practitioner who is willing to act as official liquidator if so appointed by the Court;

(b) file a supporting affidavit in accordance with Rule 4; and

(c) serve that person's notice of appearance and supporting affidavit upon —

(i) the company;

(ii) the company's attorneys; and

(iii) in the event that the company is carrying on a regulated business, the Authority,

not less than 3 days before the hearing date.

(4) If the company in respect of which the petition is presented is licensed to carry on a regulated business, the Authority may appear and be heard provided that it has given at least 3 days' notice of its intention to appear to the company and to the company's attorneys.

(5) The Authority's notice of appearance under this Rule shall specify —

(a) what, if any, regulatory action has been taken by the Authority against the company;

(b) whether it supports or opposes the petition;

(c) in the event that a winding up order is made, whether it intends to support or oppose the appointment as official liquidator of the person(s) nominated by the petitioner.

(6) If the Authority intends to oppose the appointment of the company's nominee, it must —

(a) nominate an alternative qualified insolvency practitioner who is willing to act as official liquidator if so appointed by the Court;

(b) file a supporting affidavit in accordance with Rule 4; and

(c) serve its notice of appearance and supporting affidavit upon —

(i) the company; and

(ii) the company's attorneys,

not less than 3 days before the hearing date.

Substitution of Petitioner (O. 3, r. 21)

21. (1) This Rule applies where a company petitions and is subsequently found not to have been entitled to do so or where the company —

(a) fails to advertise its petition;

(b) withdraws its petition;

(c) fails to appear on the hearing of its petition;

(d) seeks to adjourn its petition or seeks that it be dismissed; or

(e) appears, but does not apply for an order in terms of the prayer of its petition.

(2) The Court may, on such terms as it thinks just, substitute as petitioner any creditor, contributory or the Authority who in its opinion would have a right to present a petition and who is desirous of doing so.

(3) Where the Court exercises its discretion to substitute the company as petitioner, the petition of the substituted petitioner will be deemed to have been filed on the date of the original petition.

Form, Content and Effect of Winding Up Orders (O. 3, r. 22)

22. (1) Every winding up order shall be in CWR Form No 6.

(2) Every winding up order shall state the full name, address and contact details of the official liquidator.

(3) Every winding up order shall state which of the powers contained in Part I of Schedule 3 of the Law (if any) are given to the official liquidator.

(4) On the appointment of an official liquidator all the powers of the directors cease, save that directors retain residual powers to allow them to initiate an appeal against the winding-up order.

Filing, Service and Registration of Winding Up Orders (O. 3, r. 23)

23. (1) Every winding up order shall be drawn up and filed in accordance with GCR Order 42, rule 5.

(2) The petitioner shall be responsible for ensuring that the winding up order is drawn up and filed immediately after the hearing.

(3) The petitioner shall serve copies of the winding up order upon —

(a) the company at its registered office;

(b) every person who appeared and was heard at the hearing;

(c) the official liquidator; and

(d) the Authority, if the company is or was licensed to carry on a regulated business,

within 2 business days after the order is made.

(4) The official liquidator shall within 7 business days after the order is made —

(a) file the order with the Registrar of Companies;

(b) send notice of the order to the Government Information Service for publication in the next edition of the Gazette; and

(c) send copies of the order to every person who appears to that official liquidator to have been a director or professional service provider of the company at the time the winding up petition was presented.

(5) When a winding up order is made in respect of a foreign company, the official liquidator shall also send copies of the order to —

(a) the foreign authority responsible for its incorporation;

(b) any foreign court or authority which has made an order that the company or any branch thereof be reorganised or liquidated or wound up; and

(c) any person or authority who is performing functions in respect of the company in any foreign country equivalent to those performed by an official liquidator.

ORDER 4

APPLICATION FOR APPOINTMENT OF PROVISIONAL LIQUIDATOR

PART I: APPLICATION BY CREDITOR OR CONTRIBUTORY

Application by Summons (O.4, r.1)

1. (1) An application by a creditor or contributory for the appointment of a provisional liquidator on one or more of the grounds contained in section 104(2) of the Act shall be made by summons on notice to the company.

(2) The company shall be entitled to at least 4 clear days' notice of the application unless the Court is satisfied that there is some exceptional circumstance which justifies the application being made *ex parte*.

(3) An application under this Rule may be heard in chambers.

Supporting Affidavits (O.4, r.2)

2. (1) The application shall be supported by an affidavit or affidavits containing all the evidence upon which the applicant relies, to which all the documents intended to be relied upon must be exhibited.

(2) If the applicant seeks an order that someone other than the person nominated in the petition as official liquidator be appointed as provisional liquidator,the applicant must file an affidavit complying with the requirements of Order 3, rule 4.

Security (O.4, r.3)

3. (1) The applicant shall give an undertaking to the Court to pay —

(a) any damage suffered by the company by reason of the appointment of the provisional liquidator; and

(b) the remuneration and expenses of the provisional liquidator, in the event that the winding up petition is ultimately withdrawn or dismissed.

(2) The Court may require the applicant to give security for the applicant’s undertaking in such manner as the Court thinks fit.

Order for the Appointment of Provisional Liquidator (O.4, r.4)

4. (1) Every order for the appointment of a provisional liquidator made on the application of a creditor or contributory pursuant to section 104(2) of the Act shall be in CWR Form No 7.

(2) The order shall state the full name, address and contact details of the provisional liquidator.

(3) The order shall specify the powers conferred upon the provisional liquidator, any limitations upon the specified powers and the powers, if any, remaining with the company's directors.

(4) Every order for the appointment of a provisional liquidator shall be filed, served and registered in accordance with the requirements of Order 3, rule 23 (and references therein to "the petitioner" and "the official liquidator" shall be read as references to the applicant and the provisional liquidator respectively).

Variation or Discharge of Order (O.4, r.5)

5. (1) An order for the appointment of a provisional liquidator may be varied or discharged upon the application of —

(a) the person on whose application the order was made;

(b) the petitioner, if the petitioner was not the person on whose application the order was made;

(c) in the case of a creditor's petition, any other creditor;

(d) in the case of a contributory's petition, any other contributory; or

(e) the company, acting by its directors.

(2) A provisional liquidator shall be entitled to apply to the Court for directions, including a direction which constitutes a variation of the order by which the provisional liquidator was appointed.

(3) An application under this Rule shall be made by summons, supported by an affidavit, and shall be served upon the provisional liquidator and every person who was entitled to be served with the original order in accordance with Rule 4(4).

(4) An order under this Rule shall be filed, served and registered in accordance with Rule 4(4).

PART II: APPLICATION BY THE COMPANY

Application by Summons (O.4, r.6)

6. (1) Whenever a winding up petition is presented, the company may apply by summons for an order for the appointment of a provisional liquidator pursuant to section 104(3) of the Act.

(2) An application under this Rule may be made *ex parte*.

(3) The company's summons shall be supported by an affidavit sworn by or on the authority of the company's board of directors containing a statement of the

reasons why the company's board of directors believes that the appointment of a provisional liquidator would be in the best interests of the company.

(4) If the company seeks an order that someone other than the person nominated in the petition as official liquidator be appointed as provisional liquidator, the company must file an affidavit complying with the requirements of Order 3, rule 4.

Order for the Appointment of Provisional Liquidator (O.4, r.7)

7. (1) Every order for the appointment of a provisional liquidator made on the application of the company pursuant to section 104(3) of the Act shall be in CWR Form No 7A.

(2) The order shall state the full name, address and contact details of the provisional liquidator.

(3) The order shall specify the powers conferred upon the provisional liquidator, any limitations upon the specified powers and the powers, if any, remaining with the company's directors

Filing, Service and Registration of Order (O. 4, r. 8)

8. (1) The provisional liquidator shall register the order with the Registrar of Companies within 7 business days after the order is made.

(2) The provisional liquidator shall send notice of the order to the Government Information Services for publication in the next edition of the Gazette within 7 business days after the order is made.

(3) The provisional liquidator shall give notice of that provisional liquidator's appointment to the company's creditors (including any contingent or prospective creditors) and contributories as directed by the Court or in whatever manner appears to that provisional liquidator to be the most expedient.

(4) The provisional liquidator shall provide a copy of the order, upon request, to any person who is a creditor (including any contingent or prospective creditor or creditors) or contributory of the company or, in respect of a person claiming to be a creditor (whether contingent, prospective or otherwise), who provides reasonable evidence that that person is or may be a creditor or contributory of the company.

(5) Where the company to which a provisional liquidator has been appointed is carrying out a regulated business, the provisional liquidator shall give notice of the provisional liquidator's appointment to the Authority as directed by the Court.

Variation or Discharge of Order (O.4, r.9)

9. (1) An order for the appointment of a provisional liquidator may be varied or discharged upon the application of:

(a) the company acting by its directors;

(b) in the case of a creditor's petition, any other creditor;

(c) in the case of a contributory's petition, any other contributory; or

(d) where the company is carrying out regulated business, the Authority.

(2) A provisional liquidator shall be entitled to apply to the Court for directions, including a direction which constitutes a variation of the order by which the provisional liquidator was appointed.

(3) An application under this Rule shall be made by summons in CWR Form No. 16D, supported by an affidavit, and shall be served upon the provisional liquidator and every person who was entitled to be served with the original order in accordance with Order 4, rule 8.

(4) An order under this Rule shall be filed, served and registered in accordance with Order 4, rule 8.

.

ORDER 5

APPOINTMENT, RESIGNATION, DEATH AND REMOVAL OF OFFICIAL LIQUIDATORS

Introduction (O.5, r.1)

1. (1) A liquidator of a company appointed by the Court is referred to as an "official liquidator" and is treated as an officer of the court.

(2) The Court will not make a winding up order or a supervision order without at the same time making an order for the appointment of one or more qualified insolvency practitioners as official liquidator of the company.

(3) The Court may appoint a foreign practitioner and a qualified insolvency practitioner to act as joint official liquidators of a company, but a foreign practitioner cannot be appointed as sole official liquidator of a company.

(4) In this Order, references to "**official liquidator**" includes a foreign practitioner unless the context otherwise requires.

Order for Appointment of Official Liquidator (O.5, r.2)

2. (1) The Court will not appoint any person as official liquidator unless and until that person has sworn an affidavit which complies with the requirements Order 3, rule 4.

(2) An order for the appointment of an official liquidator shall not take effect unless and until the order has been drawn up and filed in accordance with GCR Order 42.

(3) An order for the appointment of an official liquidator must state –

(a) the full name of each liquidator;

(b) the full postal address and physical address of each liquidator; and

(c) all relevant contact details including telephone numbers and e-mail addresses.

Notice of Appointment to be Advertised (O.5, r.3)

3. (1) The official liquidator shall, within 28 days of the official liquidator's appointment, give notice of it to all the creditors and contributories of the company of whom the official liquidator is aware.

(2) Notice under this Rule shall be given —

(a) to creditors in whatever manner is considered by the official liquidator to be most effective and economic; and

(b) to contributories in whatever manner is authorised by the company's articles of association or considered by the official liquidator to be more effective and economic.

(3) Unless the Court otherwise directs, the official liquidator shall within 28 days of the official liquidator's appointment, publish notice of the official liquidator's appointment —

(a) in the Gazette; and

(b) in whatever newspaper(s) the winding up petition or supervision petition was advertised.

(4) The notice of appointment shall be in CWR Form No. 9.

Resignation of Official Liquidator (O.5, r.4)

4. (1) An official liquidator who wishes to resign shall —

(a) prepare a report and accounts in accordance with Order 10, rule 2;

(b) give notice of resignation to the company's liquidation committee; and

(c) apply to the Court for an order that the official liquidator be released from the performance of any further duties.

(2) An application to the Court under this Rule shall be served on –

(a) each member of the liquidation committee; or

(b) counsel to the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and

(c) such other creditors or contributories as the Court may direct.

(3) It shall be the responsibility of the liquidation committee to nominate a qualified insolvency practitioner whom the Court can appoint in succession to the resigning liquidator and every person so nominated shall swear an affidavit which complies with the requirements of Order 3, rule 4.

(4) If two or more qualified insolvency practitioners have been appointed as joint official liquidators, one or more of them may resign by giving notice to each member of the liquidation committee without the need to prepare any report and accounts (unless required to do so either by the liquidation committee or the continuing liquidator) or apply to the Court for the appointment of a successor, provided that at least one qualified insolvency practitioner remains in office.

(5) If a qualified insolvency practitioner has been appointed jointly with a foreign practitioner, the foreign practitioner may resign by giving notice to each member of the liquidation committee without the need to prepare and any report and accounts (unless required to do so either by the liquidation committee or by the continuing liquidator) or apply to the Court for the appointment of a successor.

(6) If an official liquidator wishing to resign is acting in the official liquidator's capacity as a partner or employee of a firm, the Court may make an order that —

(a) the official liquidator be released from the performance of any further duties; and

(b) another partner or employee of the same firm be appointed as successor liquidator,

without the need for any report and accounts to be prepared.

Death of Official Liquidator (O.5, r.5)

5. (1) Where the official liquidator dies in office, it is the duty of the official liquidator's personal representative to give notice of the official liquidator's death (including the date of death) to each member of the liquidation committee and to the Registrar of Companies.

(2) Alternatively, if the official liquidator was a partner or employee of a firm, the official liquidator's firm may give notice of the official liquidator's death.

(3) Following the death of the official liquidator (where the official liquidator was acting as sole liquidator or jointly with a foreign practitioner), the liquidation committee shall, within 28 days of the notification of the official liquidator's death, apply to the Court for an order appointing a new liquidator, failing which any creditor or contributory of the company or the firm of which the deceased liquidator was a partner or employee may apply to the Court for an order appointing a new liquidator.

(4) If the deceased liquidator was appointed jointly with a qualified insolvency practitioner, the survivor shall continue to act as sole liquidator unless and until the Court appoints an additional liquidator.

Application for Removal and Appointment of New Official Liquidator (O.5, r.6)

6. (1) An application by a creditor or contributory for an order that the official liquidator be removed shall be made by summons (referred to in this Rule as a "removal summons").

(2) A removal summons shall be served upon —

(a) the official liquidator; and

(b) each member of the liquidation committee; or

(c) counsel for the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and

(d) such other creditors or contributories as a Court may direct.

(3) A removal summons shall be supported by an affidavit containing all the facts and matters relied upon.

(4) A removal summons must also nominate a qualified insolvency practitioner whom the Court can appoint in succession to the removed liquidator and every person so nominated must swear an affidavit which complies with the requirements of Order 3, rule 4.

(5) The official liquidator shall be entitled to at least 14 days' notice of a removal summons.

(6) An official liquidator who is removed by order of the Court shall —

(a) forthwith deliver to the official liquidator's successor the company's books and records and a copy of the official liquidator's liquidation files (maintained in accordance with Order 26, rule 2); and

(b) within 28 days prepare a report and accounts for which purpose the official liquidator shall be allowed unrestricted access to the company's books and records.

ORDER 6

COMPANY'S STATEMENT OF AFFAIRS

Notice Requiring Submission of Statement of Affairs (O.6, r.1)

1. (1) A notice under section 101 shall be in CWR Form No 10 (requiring a relevant person to make a statement of affairs) or CWR Form No 11 (requiring a relevant person to state whether or not that person concurs with a statement of affairs prepared by someone else).

(2) A person to whom a notice under this Rule is addressed is referred to in this Order as "**a deponent**".

(3) A notice under this Rule must inform the deponent of —

(a) the name and address of every other deponent upon whom the official liquidator has served or intends to serve a notice under this Rule;

(b) the time within which the statement of affairs must be delivered;

(c) the manner in which the deponent will be provided with access to the company's books and records;

(d) the fact the deponent may apply to the official liquidator for reimbursement of expenses reasonably and properly incurred in complying with the notice; and

(e) the effect of section 101(7).

(4) The notice must be served upon the deponent personally, together with the documents referred to in Rule 2.

Form and content of Statement of Affairs (O.6, r.2)

2. (1) The statement of affairs shall be prepared in the form prescribed by the official liquidator having regard to the nature of the company's business.

(2) The official liquidator shall provide the deponent with —

(a) a draft or template which clearly identifies the information to be included in the statement of affairs and explains the form in which it is to be prepared; and

(b) guidance notes for the assistance of the deponent.

(3) Every statement of affairs must be exhibited to an affidavit by which the deponent swears that —

(a) the deponent made all such enquiries and reviewed all such documents which the deponent considered reasonably necessary to enable the deponent to make a complete and accurate statement of affairs; and

(b) the content of the deponent's statement of affairs is complete and accurate to the best of the deponent's knowledge and belief.

(4) The official liquidator may at any time require a deponent to submit in writing further information for the purpose of amplifying, modifying or explaining any matter contained in or omitted from the deponent's statement of affairs.

Time for Delivering Statement of Affairs (O.6, r.3)

3. (1) A statement of affairs shall be delivered to the official liquidator within 21 days after receipt of the notice or such longer period as may be stated in the notice.

(2) The official liquidator may extend the deponent's time for complying with the notice.

(3) The official liquidator may release a deponent from the deponent's obligation to prepare a statement of affairs, either unconditionally or on terms that the deponent swears an affidavit stating that the deponent concurs with the statement of affairs prepared by someone else.

Expenses of Preparing a Statement of Affairs (O.6, r.4)

4. (1) The official liquidator may pay the expenses reasonably and properly incurred by a deponent in connection with the preparation of a statement of affairs out of the assets of the company as an expense of the liquidation.

(2) Any deponent who is dissatisfied with the official liquidator's refusal to reimburse all or part of the expenses claimed by the deponent shall be entitled to apply to the Court for a direction that such expenses be paid.

Disclosure of Statement of Affairs (O.6, r.5)

5. (1) Every statement of affairs shall be filed with the Court.

(2) The official liquidator shall provide a copy of every statement of affairs and any concurring affidavits to the liquidation committee and, upon request, to any creditor or contributory of the company.

ORDER 7

ORDER FOR EXAMINATION

Application for Order for Examination (O.7, r.1)

1. (1) An application under section 103(3)(a) and/or (b) of the Law shall be made by an *ex parte* summons supported by an affidavit sworn by the official liquidator stating —

(a) the official liquidator's grounds for believing that the person(s) against whom an order is sought (referred to in this Order as "the examinee") are relevant persons within the meaning of section 103(1) of the Law;

(b) if the application seeks an order for the delivery up of documents or other property belonging to the company, the official liquidator's grounds for believing that the examinee has such documents or property in the official liquidator's possession, custody or control;

(c) if the application seeks an order that an examinee answer interrogatories and/or attend for an oral examination, the nature and scope of the intended examination and the official liquidator's grounds for believing that the examinee is or ought to be in possession of relevant information.

(2) In the case of an application against a professional service provider which is a firm or corporation, the summons may be issued –

(a) against such firm or corporation itself ; and/or

(b) against any individual partners, directors or employees of such firm or corporation

and it shall be the duty of the professional service provider to identify to the official liquidator those of its partners, directors or employees who have or ought to have knowledge of the company's affairs acquired in the course of performing work on behalf the professional service provider.

(3) In the case of an application made upon the requisition of creditors or contributories of the company, the official liquidator's supporting affidavit shall —

(a) identify the requisitionists and state the total amount of their debts or the total number of their shares, as the case may be;

(b) state whether or not their debts have been admitted to proof;

(c) exhibit a copy of the requisition (which should contain a statement of the requisitionists' grounds for the application); and

(d) express the official liquidator's opinion about the reasonableness and usefulness of the proposed order.

Order for Examination (O.7, r.2)

2. (1) An order under this Rule shall be in CWR Form No 12.

(2) An order for the delivery up of documents may be made in respect of specific documents or generally in respect of all documents belonging to the company which are in the examinee's possession, custody or control.

(3) In the case of an order that the examinee answer written interrogatories, the order shall require that the answers be contained in or verified by affidavit which shall be delivered to the official liquidator within 28 days after service of the order or at such other time as may be agreed between the examinee and the official liquidator.

(4) In the case of an order for oral examination, the order shall —

(a) contain a statement which discloses to the examinee the matters about which the examinee will be examined;

(b) specify the time and place of the examination; and

(c) specify the maximum duration of the examination.

(5) An order for an oral examination must be served upon the examinee not less than 14 days before the date of the examination.

(6) The Court may order that the examinee pay the whole or part of the costs of an oral examination on the ground that it was made necessary by reason of a breach by the examinee of the examinee's duty to co-operate with the official liquidator.

(7) An examinee may, within 7 days of the date upon which the order is served upon that examinee, apply to the Court for the order to be set aside on the ground that the examinee is or was not a relevant person.

Procedure upon an Oral Examination (O.7, r.3)

3. (1) The examination may be conducted by —

(a) the official liquidator;

(b) a qualified insolvency practitioner or other person acting with the authority of the official liquidator; or

(c) an attorney instructed by the official liquidator.

(2) The examination shall take place in private at the time and place specified in the order or at such other time and place as may be agreed between the examinee and the official liquidator.

(3) If the examinee is out of the jurisdiction, the examination may be conducted in the form of a video conference.

(4) The examinee shall be entitled to have the examinee's attorney present at the examination, but such attorney shall not be entitled to participate in the examination by putting questions to the examinee unless permitted to do so by the official liquidator.

(5) The examinee shall take all such steps as may be reasonably necessary to be informed of the matters about which that examinee is to be examined and the official liquidator may adjourn the examination for this purpose.

(6) The examinee shall be given an opportunity to review all the documents intended to be put to the examinee in advance of the examination, for which purpose the official liquidator may —

(a) provide the examinee with copies; and/or

(b) require the examinee to review the originals at the official liquidator's office.

(7) The examination shall be conducted in the form of questions and answers. The examination shall be recorded by a court reporter. The court reporter shall prepare a transcription of the examination and certify it as a complete and accurate transcription.

(8) The court reporter shall record the names and addresses of all the persons present and the times(s) at which the examination commenced and finished.

(9) The examination shall be carried out under oath.

(10) The documents referred to during the examination must be identified but need not be exhibited to the transcript unless the official liquidator requires that some or all of them be exhibited.

(11) The examinee shall answer all the questions put to the examinee (subject to any claim of self-incrimination or legal professional privilege) which are within the examinee's knowledge or means of knowledge regarding any matter within the scope of the order and is compellable to give the names and addresses of all persons who reasonably might be expected to have knowledge.

(12) Where an examinee objects to answering any questions put to that examinee, that examinee must state the grounds of the examinee's objection and the official liquidator may apply to the Court for an order that the question be answered. Any such application shall be made on notice to the Respondent.

(13) If the Court determines that the examinee had no valid ground of objection, it may order the examinee to submit to a further examination and pay the costs occasioned by the examinee's objection.

ORDER 8

MEETINGS OF CREDITORS AND CONTRIBUTORIES

Meetings Convened by Official Liquidator (O.8, r.1)

1. (1) For the purpose of convening meetings and establishing a liquidation committee, the official liquidator shall summarily determine whether, in the official liquidator's opinion, the company should be regarded as being —

(a) solvent;

(b) insolvent; or

(c) of doubtful solvency,

and the official liquidator's determination shall be final and binding upon the company's creditors and contributories for the purposes of this Order and Order 9 unless and until it is changed by the official liquidator in accordance with this Rule.

(2) If and when the official liquidator considers that the official liquidator's initial determination about the company's solvency may no longer be justified, the official liquidator shall re-consider the matter and may change the official liquidator's determination if the official liquidator considers that it is appropriate to do so and the official liquidator's changed determination shall also be final and binding upon the company's creditors and contributories for the purposes of this Order and Order 9.

(3) The official liquidator's initial determination under this Rule shall be certified in CWR Form No 13 and filed in Court within 28 days of the date on which the winding up order is made and any subsequent change in the official liquidator's determination shall be certified in CWR Form No 14 and filed in Court immediately after it is made.

(4) If, and so long as the official liquidator determines that the company should be regarded as insolvent, the official liquidator shall convene meetings of its creditors only.

(5) If, and so long as the official liquidator determines that the company is solvent, the official liquidator shall convene meetings of its contributories only.

(6) If, and so long as the official liquidator determines that the company is of doubtful solvency, the official liquidator shall convene meetings of both creditors and contributories and such meetings shall be held on the same day, either concurrently or consecutively.

(7) A meeting is deemed to have been convened on the day upon which the official liquidator gives notice of it and it shall not be invalidated if, for whatever reason,

the official liquidator inadvertently fails to give notice to any creditor or contributory.

(8) References in this Order to —

(a) "**a meeting or meetings**" shall mean a creditors' meeting or a contributories' meeting or both, depending upon the determination made by the company's official liquidator in accordance with this Rule;

(b) "**a creditors' meeting**" shall mean a meeting of creditors convened when the official liquidator has certified that, in the official liquidator's opinion, the company should be regarded as insolvent; and

(c) "**a contributories' meeting**" shall mean a meeting of contributories convened when the official liquidator has certified that, in the official liquidator's opinion, the company should be regarded as solvent.

First Meeting and Subsequent Meetings (O.8, r.2)

2. (1) Unless the Court otherwise directs, the official liquidator shall convene a first meeting within 28 days of the date upon which the winding up order is made.

(2) The first meeting shall be convened for the purpose of electing a liquidation committee and dealing with such other matters or resolutions as the official liquidator thinks fit or the Court may direct.

(3) Thereafter, the official liquidator shall convene meetings whenever —

(a) the official liquidator considers that it is appropriate to do so; or

(b) the Court directs the official liquidator to do so; or

(c) the official liquidator receives a valid requisition under Rule 3; and

(d) in any event, not less than once a year.

Requisitioned Meetings (O.8, r.3)

3. (1) A creditors' meeting may be requisitioned by any one or more creditors whose debts are valued in total at $500,000 or 5% of the company's total unsecured liabilities, whichever is the lesser.

(2) A contributories' meeting may be requisitioned by one or more contributories who together are entitled to cast at least 5% of the votes capable of being cast at a contributories' meeting.

(3) A requisition must be made in writing, signed by each of the requisitionists, and must specify the full terms of each resolution intended to be put to the meeting.

(4) A requisition must be delivered to the official liquidator.

(5) If the official liquidator is satisfied that the requisitionists are entitled to requisition a meeting in accordance with this Rule, the official liquidator shall convene the meeting within 21 days of the date upon which the requisition was received.

(6) If a meeting is requisitioned (whether by creditors or contributories) in respect of a company at a time when the official liquidator has determined it to be of doubtful solvency, the official liquidator shall convene meetings of both creditors and contributories to be held on the same day, either concurrently or consecutively.

Notice and Advertisement of Meetings (O.8, r.4)

4. (1) Notice of a creditors' meeting shall be given to —

(a) every person who appears to the official liquidator to be a creditor; and

(b) every person who has submitted a proof of debt which has not been rejected.

(2) Notice of a contributories' meeting shall be given to —

(a) every person who appears to the official liquidator to be a contributory; and

(b) every person recorded as a member in the company's register of members.

(3) In addition to giving notice in accordance with Rule 4(1), a creditors' meeting shall be advertised —

(a) on any website established by the official liquidator; and/or

(b) in one or more newspapers having circulations in a country or countries in which the company appears most likely to have creditors and any such advertisement shall be published at least 14 days prior to the date of the creditors' meeting.

(4) The official liquidator shall give 21 days' notice of a creditors' meeting and such notice may be —

(a) sent by pre-paid post; or

(b) transmitted by facsimile or e-mail.

(5) The official liquidator shall give notice of a contributories' meeting in whatever manner may be required or authorised by the company's articles of association.

(6) The official liquidator may dispense with notice of a creditors' meeting with the unanimous consent of the creditors.

Venue (O.8, r.5)

5. (1) Meetings convened under this Order may be held at the official liquidator's office or at any other convenient place, either in the Islands or any other country.

(2) A meeting may take the form of a telephone conference call in which case –

(a) all notices and advertisements of the meeting must specify the dial in number and codes or provide a contact number and e-mail address to which creditors or contributories may apply to obtain the dial-in number and codes; and

(b) any person intending to participate in the meeting must send written notice of that person's intention to do so to the official liquidator at least 3 days prior to the date of the meeting unless the official liquidator agrees to dispense with notice.

Proceedings at Meetings (O.8, r.6)

6. (1) The chairperson of the meeting shall be —

(a) the official liquidator;

(b) a qualified insolvency practitioner or other person who is authorised to act on the official liquidator's behalf; or

(c) an attorney-at-law instructed by the official liquidator to act on the official liquidator's behalf.

(2) The chairperson may adjourn the meeting to such time and place as seems to the chairperson to be appropriate in the circumstances.

(3) The chairperson may suspend a meeting from time to time for periods not exceeding two hours.

(4) The official liquidator shall be responsible for taking the minutes of the meeting.

(5) A meeting is not competent to act in the absence of a quorum for any purpose except for the purpose of being adjourned or suspended.

(6) The quorum for a creditors' meeting is at least 3 creditors or all of the creditors if there are less than 3 in number.

(7) The quorum for a contributories' meeting is whatever number is specified in the company's articles of association as the quorum for a general meeting of the company.

(8) References to creditors and contributories are to those present at the meeting in person or by proxy.

Entitlement to Vote at Creditors' Meeting (O.8, r.7)

7. (1) A person is entitled to vote as a creditor if —

(a) that person has lodged a proof of debt by the date specified in the notice convening the meeting and such proof has been admitted for voting purposes; or

(b) that person appears to the official liquidator to be recorded in the company's books and records as a member of any class of creditors entitled (pursuant to Order 16, rule 7) to vote without need to lodge a proof of debt.

(2) A creditor may not vote in respect of a claim for an unliquidated amount or any debt whose value is not ascertained except where the chairperson agrees to put

an estimated minimum value upon it for the purpose of entitlement to vote and admits that creditor's proof for that purpose.

(3) A secured creditor is entitled to vote only in respect of the balance of that secured creditor's debt, after taking account of the value of that secured creditor's security.

Entitlement to Vote at Contributories' Meeting (O.8, r.8)

8. (1) A person is entitled to vote as a contributory if —

(a) that person is recorded as a member of the company in its register of members; or

(b) the official liquidator is satisfied that that person is liable to contribute to the assets of the company.

(2) When a custodian or clearing house is recorded as a member of the company in its register of members, such custodian or clearing house may appoint two representatives to act on its behalf for the purpose of addressing the meeting and voting shares both for and against a resolution in accordance with the instructions received from its clients.

Voting on Resolutions (O.8, r.9)

9. (1) At a creditors' meeting, a resolution is passed when a majority (in value) of those present and voting, in person or by proxy, have voted in favour of the resolution.

(2) At a contributories' meeting, a resolution is passed when a majority in value (determined in accordance with Rule 9(3)) of those present and voting, in person or by proxy, have voted in favour of the resolution.

(3) At a contributories' meeting, the number of votes attributed to each contributory shall be —

(a) In the case of contributories holding voting shares, the number of votes attributed to them under the company's articles of association; or

(b) In the case of contributories holding non-voting shares, their voting rights shall be based upon the par value of the shares held; or

(c) If there are no par value shares, the contributories' voting rights shall be determined in accordance with the net asset value of the company; and

(d) Any shares (whether voting or non-voting) which do not carry the right to participate in any distribution shall have no vote.

(4) If the official liquidator has determined (in accordance with Rule 1) that the company should be regarded as of doubtful solvency, a resolution is passed when a majority (in value) of creditors and a majority of contributories (by value determined in accordance with Rule 9(3)) have both voted in favour of the resolution.

Recording of Proceedings (O.8, r.10)

10. (1) The official liquidator shall be responsible for taking the minutes of every meeting, whether or not the official liquidator is acting as chairperson of the meeting.

(2) The official liquidator shall also be responsible for making up a list of all those present or participating in the meeting, including a statement of the capacity in which they were acting.

(3) The minutes of the meeting shall include a record of every resolution passed and shall be signed by the chairperson of the meeting.

(4) The minutes of every meeting shall be kept by the official liquidator as part of the records of the liquidation.

(5) A copy of the minutes of every meeting shall be circulated to the creditors and contributories (in whatever manner is considered by the official liquidator to be most effective and economic) within 28 days of the date on which the meeting was held.

ORDER 9

LIQUIDATION COMMITTEES

Establishment of Liquidation Committee (O.9, r.1)

1. (1) Unless the Court otherwise directs, a liquidation committee shall be established in respect of every company which is being wound up by the Court.

(2) The provisions of this Order shall also apply to a liquidation committee required to be established pursuant to an order made under Order 4, rule 7(3)(f).

(3) The liquidation committee shall comprise not less than three nor more than five creditors (if the official liquidator has determined that the company should be regarded as insolvent) or contributories (if the official liquidator has determined that the company should be regarded as solvent).

(4) The liquidation committee of an insolvent company shall be elected at the first meeting of creditors convened in accordance with Order 8, rule 2.

(5) The liquidation committee of a solvent company shall be elected at the first meeting of the contributories convened in accordance with Order 8, rule 2.

(6) In the case of a company determined by its official liquidator to be of doubtful solvency, the liquidation committee shall comprise not less than three nor more than six members, of whom a majority shall be creditors elected at a meeting of creditors and at least one of whom shall be a contributory elected at a meeting of contributories.

(7) After the liquidation committee has been established, the official liquidator may, with the consent of a majority of the remaining members of the committee, appoint a creditor or contributory (as the case may be) to fill any vacancy

(8) The liquidation committee does not come into being, and accordingly cannot act, until the official liquidator has issued a certificate in CWR Form No 15 of its due constitution, which shall state the name, address and contact details of each member.

(9) The official liquidator's certificate shall be filed in Court.

Membership of Liquidation Committee (O.9, r.2)

2. (1) A liquidation committee cannot be established unless and until it has the minimum number of members required by Rule 1.

(2) Any creditor of the company (other than one whose debt is fully secured) is eligible to be a member of a liquidation committee, so long as —

(a) that person has lodged a proof of that person’s debt; and

(b) that person's proof has neither been wholly disallowed for voting purposes nor wholly rejected for purposes of distribution or dividend.

(3) If some or all of the shares of a company are registered in the name of a custodian or clearing house, a beneficial owner of the shares may be elected as a member of the liquidation committee provided that the custodian or clearing house certifies in writing that it is holding the shares (the number of which must be specified) as custodian or nominee on behalf of such person.

(4) A corporate member of the liquidation committee must be represented by an individual who is duly authorised in writing by a letter sent to the official liquidator at least 2 days before any meeting in which that individual intends to participate unless the official liquidator agrees to dispense with notice.

(5) No person shall on the same committee —

(a) be a member as both a creditor and a contributory;

(b) act at one and the same time as representative of more than one committee-member; or

(c) act both as member of the committee and representative of another committee- member.

(6) If an individual member of the liquidation committee becomes bankrupt, that member's trustee in bankruptcy shall be recognised as a member of the committee in that member's place.

(7) If a corporate member of the liquidation committee is put into liquidation under this Law or made the subject of a bankruptcy or reorganisation proceeding under the law of a foreign country, it shall continue to be a member of the committee if and so long as its official liquidator, trustee, receiver or administrator or other appointee consents to act as its representative.

Reconstitution of the Liquidation Committee (O.9, r.3)

3. (1) If, during the course of the liquidation, the official liquidator changes the official liquidator's certification of the company's solvency or insolvency (as the case may be), the official liquidator shall take the following steps to reconstitute the liquidation committee.

(2) If the company is certified to be solvent, any creditor members of its liquidation committee shall automatically cease to be members and the official liquidator shall convene a meeting of contributories for the purpose of electing new members from amongst the company's contributories.

(3) If the company is certified to be insolvent, any contributory members of its liquidation committee shall automatically cease to be members and the official liquidator shall convene a meeting of creditors for the purpose of electing new members from amongst the company's creditors.

(4) Nothing in this rule shall prevent the official liquidator from convening a meeting in anticipation of changing the official liquidator's certification of the company's solvency or insolvency (as the case may be).

Official Liquidator's Duty to Report (O.9, r.4)

4. (1) It is the duty of the official liquidator to report to the members of the liquidation committee all such matters as appear to the official liquidator to be, or as the members have indicated to the official liquidator as being of concern to them with respect to the winding up.

(2) The official liquidator need not comply with a request for information where it appears to the official liquidator that —

(a) the request is frivolous or unreasonable;

(b) the cost of complying would be excessive, having regard to the relative importance of the information; or

(c) there are not sufficient assets to enable the official liquidator to comply.

(3) The official liquidator shall communicate information to members of the liquidation committee in whatever way may be agreed between them, including —

(a) orally by telephone;

(b) in writing, transmitted by facsimile or e-mail; or

(c) by accessing a website.

(4) The official liquidator shall provide each member of the liquidation committee with a written report and accounts and convene a first meeting within 3 months of the committee's establishment and thereafter the official liquidator shall convene a meeting —

(a) on such dates or at such intervals as may be resolved by the committee; or

(b) if so requested in writing by any two members of the committee; and

(c) in any event, not less than once every six months.

(5) A "meeting" of the liquidation committee may take the form of –

(a) a physical meeting at the official liquidator's office or such other place as may be resolved upon by the committee, in which case the official liquidator must give at least 10 business days' notice of the meeting and any member who cannot attend in person must be allowed to participate by telephone; or

(b) a telephone conference call, in which case the official liquidator must give at least 5 business days' notice of meeting.

(6) A liquidation committee may, by unanimous consent, agree to hold a meeting on short notice.

Proceedings of Liquidation Committee (O.9, r.5)

5. (1) The official liquidator shall attend every meeting of the liquidation committee, either in person or by a duly authorised representative who must be a partner or employee of the official liquidator's firm having experience in insolvency matters.

(2) The quorum for a meeting of the liquidation committee shall be the official liquidator (or the official liquidator's representative) and at least two members.

(3) The chairperson of the meeting shall be the official liquidator (or the official liquidator's representative) unless the members resolve that one of their number should act as chairperson.

(4) The chairperson at any meeting may call upon a person claiming to act as a committee-member's representative to produce that person's letter of authority and may exclude that person if it appears that that person's authority is defective.

(5) The official liquidator shall prepare an agenda for each meeting including —

(a) all the matters which the official liquidator intends to put before the meeting;

(b) any matter which a committee-member intends to put before the meeting; and

(c) any resolutions which the official liquidator or any committee member intends to put to a vote.

(6) The official liquidator shall be responsible for taking the minutes of the meeting, a draft of which shall be prepared and circulated to all the members within 14 days after the meeting.

(7) Each committee member shall have one vote and a resolution is passed when a majority of members present or represented (either in person or by telephone) have voted in favour of it.

(8) If the liquidation committee comprises both creditors and contributories, a resolution is passed only when a majority of the creditor members and a majority of contributory members present or represented (either in person or by telephone) have voted in favour of it.

(9) Whenever the official liquidator considers that it would be impractical or unnecessary to convene a meeting of the liquidation committee for the purpose of considering any resolution, the official liquidator may send a copy of it to each member, inviting them to deal with it as a written resolution, and it shall be treated as passed if every member of the committee signs it within such period or by such deadline as may be specified by the official liquidator.

(10) The official liquidator (or the official liquidator's representative) may, among other grounds, where a meeting of the liquidation committee is not quorate, decide that a meeting of the liquidation committee should be adjourned. In such

circumstances, the adjourned meeting will be reconvened at a time and date set by the official liquidator (or the official liquidator's representative).

Counsel to the Liquidation Committee (O.9, r.6)

6. (1) The liquidation committee may resolve to appoint an attorney to give legal advice to the committee, either generally or in respect of any specific matter arising in connection with the liquidation.

(2) The attorney appointed in accordance with this Rule is referred to as "counsel to the liquidation committee".

(3) The legal fees and expenses reasonably and properly incurred by the liquidation committee shall be paid out of the assets of the company as an expense of the liquidation.

(4) If the official liquidator or any committee member considers that the amount of the fees and expenses charged by counsel to the liquidation committee is excessive, the official liquidator may require that such fees and expenses be taxed on the indemnity basis in accordance with Order 25.

(5) Conversely, if counsel to the liquidation committee considers that the amount which the official liquidator offers to pay is inadequate, counsel may require that counsel's bill of costs be taxed on the indemnity basis in accordance with Order 25.

(6) Counsel to the liquidation committee shall be entitled to be paid out of the assets of the company as an expense of the liquidation the amount(s) stated in the costs certificate and the official liquidator shall have no authority to pay more than that amount.

Travel and Other Expenses of Committee Members (O.9, r.7)

7. (1) Travelling expenses and/or telephone charges reasonably and properly incurred by committee members or their representatives in attending meetings of the liquidation committee shall be reimbursed by the official liquidator out of the assets of the company.

(2) No other expenses incurred by any committee member in connection with the liquidation shall be reimbursed unless such expense was incurred —

(a) pursuant to a resolution of the liquidation committee; and

(b) with the prior approval of the liquidator.

Resignation and Removal of Committee Members (O.9, r.8)

8. (1) A committee member may resign by notice in writing delivered to the official liquidator.

(2) A creditor's membership of the liquidation committee is automatically terminated if that creditor ceases to be a creditor by reason of the fact that —

(a) that creditor's proof of debt has been wholly rejected; or

(b) that creditor's claim has been paid in full.

(3) A contributory's membership of the liquidation committee is automatically terminated if —

(a) that person ceases to be a registered member of the company; or

(b) the custodian or clearing house withdraws the certificate issued pursuant to Rule 1(2).

(4) Any person's membership of the liquidation committee is automatically terminated if that person (or that person's representative) fails to attend three successive committee meetings either in person or by telephone.

(5) Any member of the liquidation committee may be removed by a resolution passed at a meeting of which the member in question has been given at least 14 days' prior notice (referred to in this Rule as a "removal resolution").

(6) A removal resolution may be proposed by the official liquidator or any committee member.

(7) It shall not be necessary to give any reasons for proposing a removal resolution, nor shall the liquidation committee or the official liquidator be required to give the former member any reasons for passing a removal resolution.

Applications to the Court (O.9, r.9)

9. (1) Any application required to be made to the Court under this Order may be made in writing by a letter addressed to the assigned Judge.

(2) A letter to the assigned Judge shall be supported by an affidavit.

ORDER 10

OFFICIAL LIQUIDATOR'S REPORTS AND ACCOUNTS

Official Liquidator's Reporting Obligations (O.10, r.1)

1. (1) The official liquidator shall prepare reports and accounts with respect to the official liquidator's conduct of the liquidation and the state of the company's affairs.

(2) It is the duty of an official liquidator to report to —

(a) the liquidation committee in compliance with the requirements of Order 9, rule 3;

(b) the contributories, in the event that the official liquidator has determined (pursuant to Order 8, rule 1) that the company should be regarded as solvent; or

(c) the creditors, in the event that the official liquidator has determined (pursuant to Order 8, rule 1) that the company should be regarded as insolvent; or

(d) the contributories and creditors, if and for so long as the official liquidator has determined that the company should be regarded as being of doubtful solvency; and

(e) the Court.

(2) Whenever the official liquidator convenes a meeting pursuant to Order 8, rule 2, the official liquidator shall send a report and accounts to every person entitled to receive notice of the meeting.

(3) Whenever the official liquidator convenes a meeting in response to a requisition made pursuant to Order 8, rule 3, the official liquidator may send a report and/or accounts to every person entitled to receive notice of the meeting.

(4) The official liquidator of an insolvent company has no continuing duty to report to the contributories, but the official liquidator shall provide copies of the official liquidator's reports and accounts to any contributory upon request.

Form and Content of Liquidators' Reports and Accounts (O.10, r.2)

2. (1) Every official liquidator's report shall provide a description and analysis of —

(a) the steps taken and, in the case of an interim report, the further steps intended to be taken in the liquidation generally; or

(b) a discrete matter which, in the opinion of the official liquidator is or ought to be of particular concern to the company's creditors and/or contributories;

(c) a discrete matter upon which the official liquidator seeks a direction of the Court;

(d) a discrete matter which, by its nature, ought to be kept confidential.

(2) The official liquidator shall report upon —

(a) the steps taken in the liquidation since the date of the winding up order or the date of the official liquidator's previous report;

(b) the matters which are relevant to any resolutions intended to be put to the next meeting of contributories or creditors ;

(c) any matters upon which the official liquidator is asked to report by the liquidation committee;

(d) any matters upon which the official liquidator is directed to report by the Court;

(e) any matters upon which the official liquidator seeks a direction of the Court; and

(f) any other matters which, in the opinion of the official liquidator, are or ought to be of concern to the contributories or creditors of the company.

(3) Except in the case of a report expressed to relate to a discrete matter, every official liquidator's report and accounts shall provide the company's creditors and/or contributories with the information necessary (when read with previous reports) to enable them to make an informed decision about the company's financial condition and their prospects of recovery, to the extent that it is reasonably possible to do so.

(4) The official liquidator's accounts shall be presented in the currency of the liquidation and shall include details of —

(a) the nature and estimated realisable value of the company's assets;

(b) any security over the company's assets;

(c) the nature and amount of the company's liabilities, including future and contingent liabilities;

(d) the nature and amount of the company's income;

(e) the expenses of the liquidation;

(f) the amount of liquidator's remuneration approved by the Court;

(g) the work done by or on behalf of the official liquidator and the amount of remuneration claimed by the official liquidator;

(h) the distributions made to creditors and contributories; and

(i) such other information which is required in order to provide the contributories or creditors with a proper understanding of the company's affairs and financial position.

Publication of Reports and Accounts (O.10, r.3)

3. (1) Every official liquidator's report and accounts shall be filed in Court.

(2) Except as provided in sub-rule (3), every official liquidator's report and accounts shall be sent to the company's creditors by pre-paid post or transmitted to them by facsimile or e-mail and shall be sent to contributories in whatever manner may be required or authorised by the company's articles of association.

(3) In the case of a report expressed to relate to a discrete matter, the Court may direct that it should be kept confidential for a specific period or until the occurrence of a specified event.

(4) In the case of a company which carried on a regulated business or was put into liquidation upon the petition of the Authority, the official liquidator shall send a copy of every report and accounts to the Authority.

(5) In addition, the official liquidator may post the official liquidator's reports and accounts (or a summarised version) on a website established for this purpose.

ORDER 11

SANCTION APPLICATIONS

Introduction (O.11, r.1)

1. (1) Any application to Court made by —

(a) the official liquidator for a order sanctioning the official liquidator's exercise or proposed exercise of any power conferred upon the official liquidator by Part I of the Third Schedule of the Law or otherwise; or

(b) a creditor or contributory for an order directing the official liquidator to exercise or refrain from exercising any of the official liquidator's powers in a particular way,

is referred to in these Rules as a "**sanction application**".

(2) Sanction applications shall be made by summons in CWR Form No 16.

Service of Sanction Applications (O.11, r.2)

2. (1) Every sanction application made by the official liquidator shall be served on —

(a) each member of the liquidation committee ; or

(b) counsel to the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and

(c) such other creditors or contributories as the Court may direct.

(2) Every sanction application made by the liquidation committee shall be served on —

(a) the official liquidator; and

(b) such creditors or contributories as the Court may direct.

(3) Every sanction application made by a creditor or contributory (other than the liquidation committee) shall be served on —

(a) the official liquidator; and

(b) each member of the liquidation committee; or

(c) counsel to the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and

(d) such other creditors or contributories as the Court may direct.

(4) A sanction application shall not be heard on less than 4 clear days' notice.

(5) The Court may direct that the hearing of a sanction application be advertised.

Hearing of Sanction Applications (O.11, r.3)

3. (1) Sanction applications shall be heard in chambers unless —

(a) the Court has directed that the application be advertised, in which case it must be heard in open court; or

(b) the Court directs, for some special reason, that it should be heard in open court.

(2) It shall be the duty of the official liquidator to attend and be prepared to assist the Court in respect of any sanction application made by the liquidation committee or any creditor or contributory.

(3) The Court may direct that, when a sanction application gives rise to an issue in respect of the substantive rights as between the company and any creditor or contributory or any class thereof, it shall be adjudicated as an inter partes proceeding as between shareholders, creditors or any class of shareholders or creditors (as the case may be), for which purpose the Court may —

(a) make a representation order; and/or

(b) direct that the official liquidator's role shall be limited in such way as the the Court thinks fit; or

(c) direct that the official liquidator shall take no further part in the proceeding.

(4) In addition to those who are entitled to be served in accordance with Rule 2, the Court may allow the following classes of persons to be heard —

(a) any other creditor, if the company is insolvent;

(b) any other contributory, if the company is solvent;

(c) any other creditor or contributory, if the official liquidator has determined that the company should be regarded as of doubtful solvency.

Evidence for Use in Sanction Applications (O.11, r.4)

4. (1) When a sanction application is made by the official liquidator —

(a) that person may rely upon affidavit evidence; and/or

(b) that person may rely upon the whole or part of any report or reports which have been filed in Court, whether or not such reports were prepared specifically for the purpose of the application.

(2) When a sanction application is made by the liquidation committee or any creditor or contributory —

(a) the application must be supported by an affidavit containing full particulars of the grounds upon which the application is made; and

(b) it shall be the duty of the official liquidator to swear an affidavit in reply or make a report which states whether the official liquidator —

(i) supports the application; or

(ii) opposes the application, in which case the official liquidator's affidavit or report must contain the evidence and analysis upon which the official liquidator relies in opposition to the application; or

(iii) adopts a neutral position, in which case the official liquidator's affidavit or report must contain any evidence, not already before the Court, which the official liquidator considers to be relevant to the Court's decision.

(3) An affidavit sworn by the official liquidator may contain statements of the official liquidator's opinions.

ORDER 12

SETTLING LIST OF CONTRIBUTORIES

Introduction (O.12, r.1)

1. (1) The official liquidator is required by section 112 of the Law to settle a list of contributories for the purposes of —

(a) identifying those members who are liable to contribute to the assets of the company and ascertaining the amount of their respective contributions; and

(b) identifying those members who are entitled to participate in the distribution of surplus assets available after the company's creditors have been paid in full and ascertaining the amount of their respective entitlements.

(2) The official liquidator need not settle any list for the purpose stated in Rule 1(1)(a) unless the company was incorporated on the basis that its members' liability is unlimited or is limited by guarantee or it appears to the official liquidator that the company has issued partly paid shares.

(3) The official liquidator shall not settle any list for the purpose stated in Rule 1(1)(b) unless and until the official liquidator is satisfied that the company is or will become solvent.

Rectification of the Register of Members (O.12, r.2)

2. (1) The official liquidator shall exercise the official liquidator's power to rectify the company's register of members under section 112(2) if the official liquidator is satisfied that —

(a) the company is or will become solvent;

(b) the company has from time to time issued redeemable shares at prices based upon a mis-stated net asset value which is not binding upon the company and its members by reason of fraud or default, with the result that the company has issued an excessive or inadequate number of shares in consideration for the prices paid by one or more subscribers; and/or

(c) the company has redeemed shares at prices based upon a mis-stated net asset value which is not binding upon the company and its members by reason of fraud or default, with the result that the company has paid out excessive or inadequate amounts to former members in consideration for the redemption of their shares.

(2) Subject to paragraph (3), for the purposes of rectifying the register of members in accordance with this Rule, the official liquidator shall determine the true net asset value of the company as at each relevant redemption date.

(3) The true net asset value of the company shall be determined in accordance with the accounting principles specified for this purpose in its articles of association or, if none are specified, in accordance with whatever generally accepted accounting principles are adopted by the official liquidator.

(4) The register of members, when rectified by the official liquidator in accordance with section 112(2) of the Law, shall state, as at each relevant redemption date —

(a) the identity of each subscriber, the amount of money subscribed and the number of shares which ought to have been issued to the subscriber (applying the true net asset value per share);

(b) the identity of each member who redeemed shares, the number of shares redeemed and the amount of redemption proceeds which ought to have been paid to the member (applying the true net asset value per share);

(c) the identity of the company's members and the number of shares which ought to have been held by each member, had the subscriptions and redemptions been done at the true net asset value per share,

and the company's share register shall be rectified accordingly.

(5) If the official liquidator considers that it will be impractical or not cost effective to rectify the company's register of members in accordance with paragraphs (2) and (3) of this Rule, the official liquidator shall nevertheless rectify the register in such manner which is both cost effective and fair and equitable as between the shareholders.

Notification of Rectification (O.12, r.3)

3. (1) When the official liquidator rectifies the register of members of a company in accordance with Rule 2, a notice of rectification in CWR Form No. 17 and a copy of the rectified register of members shall be filed in Court and served upon every person who is or was a member of the company at any relevant time.

(2) The official liquidator's notice shall be served together with an explanatory report which shall —

(a) state the grounds upon which the official liquidator exercised the official liquidator’s powers;

(b) explain how the official liquidator's determination of the company's true net asset value differs from that published from time to time by authority of the company's directors;

(c) contain the rectified register of members; and

(d) explain the methodology adopted by the official liquidator for the purpose of rectifying the register of members.

Appeal Against Rectification (O.12, r.4)

4. (1) Any member or former member of the company who is dissatisfied with the official liquidator's decision to exercise the official liquidator's powers under section 112(2) of the Law and/or the manner in which the official liquidator has rectified the register of members may appeal to the Court.

(2) An appeal under this Rule shall take the form of a sanction application made by summons in CWR Form No. 18.

(3) Every summons under this Rule shall be served on the official liquidator within 90 days of the date upon which the rectification notice is filed in Court and, unless the Court otherwise directs, the official liquidator shall serve the summons upon every member or former member identified in the rectified register.

(4) If the appeal is put on the basis that the official liquidator was not properly entitled to exercise the official liquidator's power under section 112(2), it must be supported by an affidavit containing all the facts and matters upon which the appellant relies.

(5) If the appeal is put on the basis that the official liquidator was admittedly entitled to exercise the official liquidator's power, but the official liquidator exercised it in a manner in which no liquidator could reasonably have exercised it in all the circumstances, it must be supported by an expert report which addresses the valuation and/or methodology issues raised in the summons.

(6) It shall be the duty of the official liquidator to swear an affidavit in reply or make a report which states whether the official liquidator —

(a) supports any aspect of the appeal;

(b) opposes the appeal, in which case the official liquidator's affidavit or report must contain the evidence, analysis and statements of opinion upon which the official liquidator relies in opposition to the appeal;

(c) adopts a neutral position, in which case the official liquidator's affidavit or report must contain any evidence, analysis or opinion, not already before the Court, which the official liquidator considers to be relevant to the Court's decision.

(7) Order 11, rule 2(5) and rule 3 shall apply to an appeal under this Rule as they apply to a sanction application.appeal to the Court.

ORDER 13

VOLUNTARY (SOLVENT) LIQUIDATIONS

Introduction (O.13, r.1)

1. (1) The liquidation of a company is referred to as a "**voluntary liquidation**" or "**voluntary winding up**" if it was commenced in accordance with one or other of the methods stated in section 116 of the Law.

(2) The liquidator appointed by the company in accordance with section 119 of the law is referred to as the "**voluntary liquidator**" unless and until the liquidator is appointed as an official liquidator pursuant to a supervision order.

(3) The liquidation of a company which has commenced voluntarily may continue as a voluntary liquidation if, and only if, a declaration of solvency has been made by all its directors and filed with the Registrar of Companies in accordance with Order 14.

(4) If the company's directors have failed to make a declaration of solvency within 28 days from the commencement of the liquidation, the voluntary liquidator must apply to the Court for a supervision order within 7 days thereafter.

Notice of Voluntary Winding Up (O.13, r.2)

2. (1) Within 28 days of the commencement of a voluntary liquidation, the voluntary liquidator or, in the absence of any liquidator, the directors shall —

(a) file with the Registrar of Companies a notice of the winding up in CWR Form No 19;

(b) file with the Registrar of Companies the voluntary liquidator's consent to act in CWR Form No 20;

(c) in the case of a company carrying on a regulated business, send to the Authority copies of the notices and any declaration registered with the Registrar of Companies pursuant to paragraphs (a), (b) and (c) of this sub-rule; and

(d) publish notice of the voluntary winding up (in CWR Form No 19) in the Gazette.

(2) Within 28 days of the commencement of a voluntary liquidation, the voluntary liquidator shall file with the Registrar of Companies the directors' declaration(s) of solvency or, in the absence of any declaration of solvency, a notice in CWR Form No 22 stating that a supervision petition has been presented to the Court.

(3) The voluntary liquidator shall provide copies of the documents specified in sub-rules (1) and (2) on request to any member or creditor of the company and any

person who was a director or professional service provider of the company immediately prior to the commencement of the liquidation.

Appointment of Voluntary Liquidator (O.13, r.3)

3. (1) A voluntary liquidator —

(a) may be appointed by a resolution of the company; or

(b) assume office automatically pursuant to section 119(2)(a).

(2) The appointment of a voluntary liquidator by resolution of the company shall not take effect unless and until a consent to act in CWR Form No 20 has been signed by the person appointed and filed with the Registrar of Companies.

(3) If two or more persons have been appointed as voluntary liquidators jointly, the consent to act must be signed by all of them.

(4) If two or more persons have been appointed as voluntary liquidators with power to act either jointly or severally, any one whose consent to act has been filed with the Registrar of Companies may act alone unless and until the others have consented to act.

(5) If, for whatever reason, the office of voluntary liquidator is vacant and the directors fail to convene a general meeting or the members fail to pass a resolution appointing a voluntary liquidator, any contributory or creditor of the company may apply to the Court for an order appointing a voluntary liquidator.

(6) Upon the appointment of a voluntary liquidator becoming effective in accordance with sub-rule (2), the powers of the directors shall cease automatically except to the extent that

(a) any power has been expressly reserved to the directors by a resolution passed at a general meeting of the company; or

(b) the voluntary liquidator has delegated any power to the directors or otherwise sanctioned the continuance of any power of the directors.

(7) Except to the extent that any power has been reserved to the directors, a voluntary liquidator shall have all the powers of an official liquidator (as stated in the Third Schedule to the Law) and may exercise those powers without the sanction of a resolution of the company's members.

Resignation of Voluntary Liquidator (O.13, r.4)

4. (1) A voluntary liquidator who wishes to resign shall —

(a) prepare a report and accounts complying with the requirements of Rule 8; and

(b) convene a general meeting of the company for the purpose of approving the voluntary liquidator's report and accounts, accepting the voluntary

liquidator's resignation, releasing the voluntary liquidator from the performance of any further duties and appointing a successor.

(2) In the event that the company fails to pass any resolution (either because there is no quorum or the resolution is voted upon but not passed), the voluntary liquidator may apply to the Court for an order that the voluntary liquidator be released from the performance of any further duties.

(3) Where two or more persons have been appointed as joint voluntary liquidators (whether empowered to act only jointly or jointly and severally) one may resign by filing a notice of resignation with the Registrar of Companies (without the need to prepare any report and accounts) and the remaining liquidator(s) shall continue in office, whether or not the outgoing liquidator is replaced.

Death of Voluntary Liquidator (O.13, r.5)

5. (1) Where the voluntary liquidator dies in office, it is the duty of the voluntary liquidator's personal representative to give notice of the voluntary liquidator's death (including the date of death) to the company's directors and to the Registrar of Companies.

(2) Alternatively, if the voluntary liquidator was a partner or employee of a firm, the voluntary liquidator's firm may give notice of the voluntary liquidator's death.

(3) Following the death of the voluntary liquidator (where the voluntary liquidator was acting as sole liquidator), the directors shall, within 28 days of the notification of the voluntary liquidator's death, convene a meeting of the company for the purpose of appointing a new liquidator, failing which any director or member of the company may apply to the Court for an order appointing a new liquidator.

(4) If a deceased liquidator was appointed jointly, the survivor shall continue to act as sole liquidator unless and until the company resolves to appoint an additional person to act jointly with the survivor liquidator.

Removal of Voluntary Liquidator (O.13, r.6)

6. (1) A voluntary liquidator may be removed from office by an ordinary resolution passed at a general meeting of the company convened especially for the purpose by any member or members holding not less than one fifth of the company's issued share capital or entitled to not less than one fifth of the votes if the company does not have a share capital.

(2) The voluntary liquidator shall be entitled to receive notice of any meeting convened in accordance with sub-rule (1).

(3) At a meeting convened in accordance with sub-rule (1) the company shall also consider and resolve upon —

(a) whether the outgoing voluntary liquidator should be released from the performance of any further duties without the need to prepare and distribute any further report or accounts; and

(b) the appointment of a successor liquidator.

(4) If the company fails to pass a resolution that the outgoing voluntary liquidator be released from the performance of any further duties, the voluntary liquidator shall prepare a report and accounts within 28 days from the date of the voluntary liquidator's removal and may apply to the Court for an order that the voluntary liquidator be released from the performance of any further duties.

Voluntary Liquidator's Reporting Obligations (O.13, r.7)

7. (1) The voluntary liquidator shall prepare reports and accounts with respect to the voluntary liquidator's conduct of the liquidation and the state of the company's affairs.

(2) In addition to preparing annual reports and accounts (in compliance with section 126) and the final report and accounts (in compliance with section 127), the voluntary liquidator shall prepare and send to the company's members such other reports and accounts as the voluntary liquidator considers appropriate.

(3) The voluntary liquidator's reports and accounts shall be sent to the company's members (by whatever means is authorised by its articles of association) together with notice of a general meeting convened for the purpose of considering and, if thought fit, approving such report and accounts.

(4) The voluntary liquidator shall, on request, send copies of the voluntary liquidator's reports and accounts to any creditor of the company whose debt has not been paid in full.

Form and Content of Reports and Accounts (O.13, r.8)

8. (1) The voluntary liquidator's report shall constitute a narrative description and analysis of the steps taken and, the case of an interim report, the further steps intended to be taken in the liquidation.

(2) The voluntary liquidator's report and accounts shall provide the company's members with all the information necessary to enable them to make an informed decision about the company's financial condition.

(3) The voluntary liquidator's accounts shall be presented in the company's functional currency and include details of —

(a) the nature of the company's assets;

(b) any security over the company's assets;

(c) the amount realised upon sale of the company's assets and the estimated realisable value of any unsold assets;

(d) the nature of the company's liabilities including contingent liabilities, the amounts paid in satisfaction of the liabilities and the amount remaining unpaid;

(e) the nature and amount of the company's income;

(f) the expenses of the liquidation;

(g) the amount of the liquidator's remuneration; and

(h) the amount distributed and the amount available for distribution to members.

Voluntary Liquidator's Remuneration (O.13, r.9)

9. (1) The basis of the voluntary liquidator's remuneration and the amount of the voluntary liquidator's remuneration shall be authorised by resolution of the company.

(2) The company may resolve to remunerate the voluntary liquidator on the basis of —

(a) an hourly rate (or scale of rates) for the time reasonably and properly devoted to the liquidation;

(b) a fixed sum;

(c) a commission or percentage of the assets distributed or realised; or

(d) a combination of these methods.

(3) The voluntary liquidator shall not be entitled to receive payment of any remuneration out of the company's assets without the prior approval of a resolution passed at a general meeting of the company except that —

(a) the amount of remuneration specified in the voluntary liquidator's final report and accounts may be paid if the final general meeting has been duly convened but no member attends and votes either in person or by proxy; and

(b) any remuneration may be paid with the Court's approval.

Applications to Court (O.13, r.10)

10. (1) Every originating application made to the Court by a voluntary liquidator or any contributory or creditor of a company in voluntary liquidation, whether pursuant to Part V of the Law and/or pursuant to this Order, shall be made by petition.

(2) A petition by which the voluntary liquidator or any contributory seeks an order for directions pursuant to section 129 shall be served —

(a) in the case of a liquidator's petition, upon every member of the company unless the Court directs otherwise or directs that the petition be advertised;

(b) in the case of a contributory's petition, upon the voluntary liquidator who shall serve it upon every member unless the Court directs otherwise or directs that the petition be advertised.

(3) A petition by a liquidator or former liquidator for that liquidator's release (under Rules 4 or 6) shall be served upon —

(a) the successor liquidator; and

(b) the members of the liquidation committee (if any);

(c) every member of the company, unless the Court directs otherwise.

(4) A petition pursuant to section 121(3) for an order that a voluntary liquidator be removed from office shall contain full particulars of all the facts and matters relied upon in support of the allegation that the voluntary liquidator is not a fit and proper person to hold such office and shall be served upon —

(a) the voluntary liquidator; and

(b) the liquidation committee (if any);

(c) every member of the company, unless the Court directs otherwise.

(5) A petition pursuant to section 119(4)(b) and Rule 3(5) for an order appointing a voluntary liquidator (when the office has been left vacant) need not be served on any members of the company.

(6) Every petition under this Rule must be supported by an affidavit unless all the facts and matters relied upon in support of the petition are contained in a liquidator's report.

(7) Every petition under paragraphs (4) or (5) must be supported by an affidavit sworn by the person nominated for appointment as voluntary liquidator stating that —

(a) that person is a qualified insolvency practitioner;

(b) having made due enquiry, that person believes that that person and that person's firm meet the criteria for independence contained in Regulation 6;

(c) that person and/or that person's firm are in compliance with the requirements of Regulation 7 relating to insurance; and

(d) that person is willing to act as official liquidator if so appointed by the Court.

(e) Any petition under this Rule may be heard in chambers unless the Court has directed that it be advertised, in which case it must be heard in open court.

General Meetings of the Company (O.13, r.11)

11. (1) In accordance with section 126 of the Law, in the event of a voluntary winding up continuing for more than one year, the voluntary liquidator shall summon a general meeting of the company at the end of the first year from the commencement of the winding up and at the end of each succeeding year thereafter for the purpose of considering and, if thought fit —

(a) approving the voluntary liquidator's interim report and accounts;

(b) approving the voluntary liquidator's remuneration for the period up to the date of the voluntary liquidator's interim accounts; and

(c) resolving upon any other matters upon which the voluntary liquidator considers that it is necessary or appropriate for the company to resolve.

(2) Notice of every general meeting of the company convened by its voluntary liquidator shall be given in accordance with its articles of association, except that —

(a) every notice of a general meeting must be accompanied by the voluntary liquidator's report and accounts;

(b) at least 21 days' notice must be given of the final general meeting; and

(c) notice of the final general meeting shall be published in the Gazette.

(3) Notice of a general meeting convened by the voluntary liquidator may be given by any method authorised by the company's articles of association.

Voluntary Liquidator's Final Return (O.13, r.12)

12. (1) As soon as the company's affairs are fully wound up, the voluntary liquidator shall convene a final meeting of the company for the purpose of considering and, if thought fit —

(a) approving the voluntary liquidator's final report and accounts (including the provisions for any unpaid expenses);

(b) approving the voluntary liquidator's remuneration (including provision for work still to be done);

(c) resolving upon the retention and destruction of the company's books and records;

(d) resolving upon the method of dealing with the proceeds of any dividend cheques which remain uncleared for more than six months,

referred to in this Rule as "**the final resolutions**".

(2) In the event that —

(a) the final resolutions are passed; or

(b) no quorum is present (in person or by proxy),

the voluntary liquidator shall file a Final Return with the Registrar in CWR Form No 37 with the result that the company is deemed to be dissolved after the expiry of three months from the date upon which the Final Return is registered.

(3) In the event that a quorum is present at the final general meeting of the company and the final resolutions are not passed, the liquidation shall continue.

ORDER 14

DIRECTOR'S DECLARATION OF SOLVENCY

Form and Content of Declaration of Solvency (O.14, r.1)

1. (1) A declaration of solvency shall be in CWR Form No 21 and signed by each person who was a director of the company on the date on which its voluntary winding up was commenced.

(2) A declaration of solvency shall state the full name and address of each director by whom it is signed and the date upon which that person was appointed as a director.

(3) The voluntary liquidator may assist the company's directors to make the enquiries necessary to enable them to prepare and sign a declaration of solvency, for which purpose the voluntary liquidator shall provide them with access to all the company's books and records.

(4) The voluntary liquidator may pay to the company's directors the expenses reasonably and properly incurred by them in preparing a declaration of solvency

Delivery and Registration of Declaration of Solvency (O.14, r.2)

2. (1) In order to comply with the requirements of sections 123(1) and 124(1) of the Law, a declaration of solvency, duly signed by all the directors, must be delivered to the voluntary liquidator and filed with the Registrar of Companies within 28 days of the date upon which the voluntary liquidation is deemed to have commenced under section 117(1) of the Law.

(2) A declaration of solvency which has been transmitted to the voluntary liquidator electronically shall comply with the requirements of this Rule.

(3) If, having received a declaration of solvency, the voluntary liquidator fails to file it with the Registrar of Companies, any director may do so.

ORDER 15

APPLICATION FOR SUPERVISION ORDER

Introduction (O.15, r.1)

1. (1) An application for a supervision order must be made by a company's voluntary liquidator in accordance with section 124 of the Law if its directors fail to make and deliver their declaration of solvency to the voluntary liquidator within 28 days of the commencement of the liquidation.

(2) Notwithstanding that a declaration of solvency has been duly made in accordance with section 124 of the Law, the voluntary liquidator or any contributory or any creditor may apply to the Court for a supervision order on the grounds contained in section 131 of the Law.

Application under section 124 (O.15, r.2)

2. (1) The requirement to apply for a supervision order under section 124 of the Law shall apply only if the voluntary liquidation was commenced on or after 1 March 2009.

(2) An application for a supervision order under section 124 shall be made by petition.

(3) A petition under this Rule shall contain —

(a) particulars of the company's incorporation;

(b) particulars of the method by which the company was put into voluntary liquidation;

(c) particulars of the persons who are or were directors of the company on the date on which its voluntary liquidation commenced;

(d) a statement that the voluntary liquidator did not receive, within 28 days of the commencement of the liquidation, a declaration of solvency in the prescribed form signed by all of the company's directors; and

(e) if the voluntary liquidator is a qualified insolvency practitioner, a statement that the voluntary liquidator consents to being appointed as official liquidator; or

(f) if the voluntary liquidator is not a qualified insolvency practitioner or is unable to comply with the independence requirements of the Regulations or is unwilling to be appointed as official liquidator, the name and address of a qualified insolvency practitioner nominated for appointment as official liquidator.

(4) Every petition under this Rule must be presented within 35 days of the date upon which the liquidation is deemed to have commenced under section 117(1) of the Law.

(5) Unless the voluntary liquidator is a qualified insolvency practitioner who is willing and properly able to accept appointment as official liquidator, the voluntary liquidator must give notice of the petition to the company's members by whatever means is provided in its articles of association for giving notice of a general meeting of the company.

Application under section 131 (O.15, r.3)

3. (1) An application by a voluntary liquidator, contributory or creditor for a supervision order to be made under section 131 shall be made by petition.

(2) A petition under this Rule shall contain full particulars of the grounds upon which it is presented.

(3) Upon the presentation of a petition under this Rule, the petitioner must at the same time issue a summons for directions in respect of the matters contained in this Rule.

(4) Upon hearing the summons for directions, the Court shall either —

(a) make a supervision order, if the Court is satisfied that the company's members consent or do not object to an order being made; or

(b) fix a hearing date and make such directions as the Court thinks appropriate in respect of the following matters —

(i) whether the petition should be served and, if so, upon whom it should be served;

(ii) whether the petition should be advertised and, if so, in what manner it should be advertised;

(iii) the manner in which further evidence is to be given; and

(iv) such other procedural matters as the Court thinks fit.

(5) A petition under this Rule may be presented at any time.

Supporting Affidavits (O.15, r.4)

4. (1) The petition shall be verified by an affidavit that the statements in the petition are true, or are true to the best of the deponent's knowledge, information and belief.

(2) An affidavit verifying a petition under Rule 2 shall be sworn by the voluntary liquidator personally.

(3) An affidavit verifying a petition under Rule 3 shall be sworn by —

(a) the petitioner; or

(b) the voluntary liquidator; or

(c) any director, officer or agent of the petitioner who has been concerned in and has personal knowledge of the matters giving rise to the petition.

(4) Unless the voluntary liquidator is a qualified insolvency practitioner who is willing and properly able to accept appointment as official liquidator, a petition under Rule 2 or Rule 3 must also be supported by an affidavit sworn by the person or persons nominated for appointment as official liquidator and containing the information required by Order 3, rule 4.

Hearing of section 124 Petition (O.15, r.5)

5. (1) If the voluntary liquidator is a qualified insolvency practitioner who has sworn an affidavit verifying that the voluntary liquidator is willing and properly able to accept appointment as official liquidator, a Judge may make a supervision order under section 124 of the Law without the need for any hearing if the Judge is satisfied that —

(a) notice of the petition has been given to the company's creditors and, if it appears to the voluntary liquidator that the company may in fact be solvent, to its shareholders; and

(b) there is no reason to believe that any creditor or, if applicable, any shareholder objects to the appointment of the voluntary liquidator as official liquidator.

(2) In any other case, the voluntary liquidator shall apply to fix a date for hearing the petition in open court and –

(a) give notice of the hearing of the petition to the company's creditors and, if applicable, to its shareholders in whatever manner is likely to bring it to their attention; and

(b) advertise the hearing of the petition once in a newspaper having a circulation within the Islands and, if the company is carrying on business outside the Islands, once in a newspaper having a circulation in a country in which the company appears most likely to have creditors, in which case the advertisement shall be published in the official language of such country.

(3) An advertisement under this Rule shall be in CWR Form No. 22.

(4) Any member or creditor of the company may appear on the petition and be heard upon the question of who should be appointed as official liquidator provided that that member or creditor has given notice of their intention to do so and has complied with the requirements of Order 3, rule 8(3).

Release of Voluntary Liquidator (O.15, r.6)

6. (1) Unless a voluntary liquidator is appointed as official liquidator, the voluntary liquidator shall cease to hold office automatically upon the making of a supervision order.

(2) When a voluntary liquidator ceases to hold office in accordance with this Rule, the voluntary liquidator shall prepare a final report and accounts for the period from the commencement of the voluntary liquidation until the date of the supervision order.

(3) The voluntary liquidator shall deliver the voluntary liquidator's final report and accounts to the official liquidator within 28 days of the date upon which the supervision order was made and the official liquidator shall —

(a) file the report and accounts in Court; and

(b) publish the report and accounts to the company's members and creditors in such manner as the official liquidator thinks fit.

(4) Having delivered the voluntary liquidator's final report and accounts, the voluntary liquidator may apply (but shall not be obliged to apply) to the Court for an order that the voluntary liquidator's accounts (including the amount of the voluntary liquidator's remuneration) be approved and that the voluntary liquidator be released from the performance of any further duties.

Delivery of Company's Books and Records (O.15, r.7)

7. (1) A voluntary liquidator who ceases to hold office upon the making of a supervision order shall forthwith deliver to the voluntary liquidator's successor the company's books and a copy of the voluntary liquidator's liquidation files (maintained in accordance with Order 26, rule 2).

(2) The official liquidator shall allow the voluntary liquidator to have unrestricted access to the company's books and records for the purpose of preparing the voluntary liquidator's report in compliance with Order 13, rule 8.

Supervision Order (O.15, r.8)

8. (1) A supervision order shall be in CWR Form No 23.

(2) The requirements of Order 3, rules 22 and 23 shall apply to supervision orders as they apply to winding up orders.

(3) On the making of a supervision order all the powers of the directors cease, save that directors retain residual powers to allow them to initiate an appeal against the supervision order.

ORDER 16

PROOF OF DEBTS IN OFFICIAL LIQUIDATION

PART I: PROCEDURE FOR PROVING

Introduction (O.16, r.1)

1. (1) Where a solvent company is being wound up by the Court, the official liquidator shall pay the debts owing to its creditors in the ordinary course and in the currency of the obligation as if the company were still carrying on business.

(2) Where a company which is insolvent or of doubtful solvency is being wound up by the Court, a person claiming to be a creditor of the company and wishing to recover that person's debt must (subject to Rule 7) submit that person's claim in writing to the official liquidator and is referred to as "proving" for that person's debt and the document by which that person seeks to establish that person's claim is referred to as that person's "proof" or "proof of debt".

(3) The official liquidator of a solvent company which is being wound up by the Court may require a creditor to submit a proof of debt if there is a doubt or dispute about the existence of the debt or the amount owing to the creditor.

(4) It is the duty of the official liquidator to adjudicate the creditors' claims, for which purpose the official liquidator acts in a quasi-judicial capacity.

Form and Content of Proof (O.16, r.2)

2. (1) A proof of debt shall be in CWR Form No 24 or such other form or forms as the official liquidator may prescribe having regard to the nature of the claims against the company.

(2) The official liquidator may prescribe different forms of proof of debt for use by different classes of creditor.

(3) The following matters shall be stated in a creditor's proof of debt —

(a) the creditor's name and address;

(b) the total amount of the creditor's claim as at the date on which the company went into liquidation;

(c) whether or not the claim includes interest and, if so, the basis upon which the creditor claims to be entitled to interest;

(d) particulars of how and when the debt was incurred by the company; and

(e) particulars of the security held by the creditor, the value which the creditor puts on the security and the basis of the creditor's valuation.

(4) Copies of all the documents evidencing the existence and amount of the debt must be annexed to the proof of debt.

(5) The official liquidator may require the creditor to submit further and better particulars of the creditor's claim, including additional supporting documents.

(6) The person signing the proof of debt (other than the creditor themselves) must state that person's name, contact details and the basis upon which that person is authorised to act on behalf of the creditor.

(7) The official liquidator may require that a proof of debt be verified by affidavit.

Supply of proof of debt forms (O.16, r.3)

3. (1) Subject to Rule 7, proof of debt forms shall be sent by the official liquidator to every person who appears to the official liquidator to be a creditor of the company.

(2) Subject to Rule 7, proof of debt forms shall be sent to every person to whom the official liquidator sends notice of the first meeting of creditors in accordance with Order 8, rule 4.

Cost of proving (O.16, r.4)

4. (1) Every creditor bears that creditor's costs of proving that creditor's own debt, including the cost of responding to the official liquidator's requirement that the creditor provide further and better particulars of the creditor's claim.

(2) Nothing in this Rule shall prevent a creditor from claiming the creditor's costs of proving pursuant to the terms of a contract which is enforceable against the company.

(3) The official liquidator's cost of adjudicating the proofs of debt is paid out of the assets as an expense of the liquidation.

Withdrawal and variation of proof (O.16, r.5)

5. A creditor's proof may at any time, by agreement between that creditor and the liquidator, be withdrawn or varied as to the amount claimed.

Admission and rejection of proof (O.16, r.6)

6. (1) A proof may be admitted for dividend either for the whole amount claimed by the creditor, or for part of that amount.

(2) Where the official liquidator has admitted a creditor's proof in full, the official liquidator shall notify the creditor of this fact in CWR Form No 25.

(3) Where the official liquidator has rejected the creditor's proof or admitted it only in part, the official liquidator shall notify the creditor in CWR Form No 26, including —

(a) a statement of the official liquidator's reasons for rejecting the whole or part of the claim; and

(b) a statement of the creditor's right to apply to the Court for the official liquidator's decision to be reversed or varied.

Admission without proof of debt (O.16, r.7)

7. (1) This Rule applies to a company which has carried on a deposit taking business as a licensed bank.

(2) All of the company's depositors to whom periodic statements of account were sent by the company shall be admitted to proof in respect of the amounts recorded due to them without requiring them to lodge proofs of debt unless the official liquidator has reason to believe that the company's deposit taking records are unreliable.

(3) Where the official liquidator has admitted a depositor to proof without requiring that depositor to submit a proof of debt, the official liquidator shall send notice in CWR Form No 27 informing the depositor of this fact.

Inspection of Proofs of Debts (O. 16, r. 8)

8. (1) Subject to sub-rule (2), any proof of debt (including the supporting documentation, any further and better particulars and any correspondence relating to its adjudication) may be inspected by or on behalf of —

(a) any creditor whose proof of debt has been admitted in whole or in part; or

(b) any contributory of the company.

(2) In the case of a creditor to whom the company owes a duty of confidentiality, the official liquidator shall not allow the creditor's proof of debt to be inspected by another creditor or contributory without first —

(a) obtaining the creditor's written consent; or

(b) obtaining a direction of the Court pursuant to section 4 of the *Confidential Information Disclosure Act (as amended and revised).*

PART II: QUANTIFICATION OF CLAIM

Enforcement of Subordination, Set-Off (or Non Set-Off) and Netting Agreements (O.16, r.9)

9. (1) Any agreement made between the company and a creditor prior to the commencement of the winding up that the claims of such creditor be subordinated or otherwise deferred to the claims of any other creditors (referred to in this Order as a "**subordination agreement**") are binding on the company in liquidation and shall be enforced by the official liquidator.

(2) Any contractual right of set-off or non set-off or netting arrangement agreed between the company and any creditor prior to the commencement of the liquidation (including both bilateral and multi-lateral set-off or netting arrangements) (referred to in this Order as a "set-off agreement", "non set-off agreement" and "netting agreement") are binding upon the company in liquidation and shall be enforced by the official liquidator.

Mutual credit and set-off (O.16, r.10)

10. (1) This Rule applies where, before the commencement of the liquidation, the company has not concluded any set-off, non set-off or netting agreement with the creditor.

(2) If there have been mutual credits, mutual debts or other mutual dealings (other than a set-off or non set-off or netting agreement) between the company and the creditor, an account shall be taken of what is due from each party to the other in respect of the mutual dealings, and the sums due from one party shall be set off against the sums due from the other.

(3) Sums due from the company to another party shall not be included in the account taken under sub-rule (2) if that other party had actual notice at the time they became due that a winding up petition had been presented and was pending against the company.

(4) Only the balance (if any) of the account is provable in the liquidation. Alternatively, (as the case may be) the amount shall be paid to the official liquidator.

Pre-liquidation Interest on Debts (O.16, r.11)

11. (1) A creditor who has a contractual right to claim interest against an insolvent company may prove for the amount of the interest accrued up to the date of the commencement of the liquidation.

(2) A creditor having a contractual right to interest as against an insolvent company shall not be entitled to prove for any interest accrued after the commencement of the liquidation.

Post-liquidation Interest on Debts (O.16, r.12)

12. (1) This Rule applies to every official liquidation of a company which lasts more than six months.

(2) Any surplus remaining after payment of the debts proved in the liquidation shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the period during which they have been outstanding since the commencement of the liquidation pursuant to section 149 of the Law.

(3) The rate of interest payable under this Rule is the greater of —

(a) the contractual rate; or

(b) the prescribed rate under the *Judgment Debts (Rates of Interest) Rules (as amended and revised)*.

(4) The liquidator shall not pay interest under this Rule to any creditor whose claim to interest would amount to less than $500.

Determination of the currency of the liquidation (O.16, r.13)

13. (1) In the case of a solvent liquidation, the creditors are entitled and the official liquidator is required to pay the company's debts in the currency of the obligation.

(2) In the case of an insolvent liquidation, a company's liabilities shall be translated into the functional currency of the company (referred to in this Rule as the "**currency of the liquidation**") at the mid-market exchange rates prevailing —

(a) on the date of the commencement of the voluntary liquidation; or

(b) the date on which the winding up order was made, (referred to in this Rule as the "applicable exchange rate").

(3) The official liquidator shall determine the currency of the liquidation in accordance with section 150(3) of the Law within 28 days of the date of the official liquidator's appointment and the official liquidator's determination shall be final and binding upon the company's creditors for all purposes.

(4) The official liquidator's determination shall be certified in CWR Form No 28 and the certificate shall be filed in Court.

(5) When a creditor proves for that creditor's debt in a currency other than the currency of the liquidation, the amount claimed shall be translated into the currency of the liquidation at the applicable exchange rate.

(6) A creditor shall not be entitled to claim against an insolvent company in liquidation any compensation for exchange losses resulting from changes in the market exchange rate occurring during the period between the date on which the winding up order was made and the date on which the dividend is paid.

Payments of a periodical nature (O.16, r.14)

14. (1) In the case of rent and other payments of a periodical nature, the creditor may prove for any unpaid amount accrued up to the date when the winding up order is made.

(2) Unless the official liquidator continues to pay the rent or other payments accruing due after the date on which the winding up order is made as an expense of the liquidation, the creditor's claim in respect of amounts accruing after the date on which the winding up order is made shall be limited to a claim for damages for breach of contract.

(3) In calculating the amount of damages, the official liquidator shall assume that the creditor has taken all such steps as may be reasonable to mitigate that

creditor's loss and shall apply a discount for accelerated payment using the rate of interest prescribed by the *Judgment Debts (Rates of Interest) Rules (as amended and revised)*.

Debts payable at a future date (O.16, r.15)

15. (1) A creditor may prove for a debt of which payment was not yet due on the date when the company went into liquidation.

(2) If the dividend becomes payable before the date on which the debt would have fallen due, the amount of the dividend shall be discounted for accelerated payment using the rate of interest prescribed by the *Judgment Debts (Rates of Interest) Rules (as amended and revised)*.

Contingent claims (O.16, r.16)

16. (1) The official liquidator shall estimate the value of any debt which, by reason of its being subject to any contingency or for any other reason, does not bear a certain value.

(2) The official liquidator may revise any estimate previously made, if the official liquidator thinks fit by reference to any change of circumstances or to information becoming available to the official liquidator.

(3) Where the official liquidator has put an estimate upon a contingent claim or a debt the amount of which is subject to a contingency, the official liquidator shall notify the creditor of this fact in CWR Form No 29, stating —

(a) the basis upon which this estimate has been made;

(b) the fact that the creditor may submit a varied proof of debt, having regard to changed circumstances;

(c) the fact that the official liquidator may vary the official liquidator's estimate, having regard to changed circumstances; and

(d) the official liquidator's agreement to extend generally the creditor's time for applying to the Court pursuant to Rule 18.

PART III: APPEAL AGAINST REJECTION OF PROOF

Introduction (O.16, r.17)

17. If a creditor is dissatisfied with the official liquidator's decision with respect to the creditor's proof (including any decision on the question of priority), the creditor may appeal to the Court for the decision to be reversed or varied.

Application to Court (O.16, r.18)

18. (1) An appeal to the Court under Rule 17 shall be made within 21 days of the date upon which the creditor received the official liquidator's notification under Rule 6.

(2) Every appeal under this Rule shall be made by summons in CWR Form No 30 and shall be served on the official liquidator.

(3) Every appeal under this Rule shall be supported by an affidavit and Order 11, rule 4(2) shall apply.

(4) Order 11, rule 3 shall apply to the hearing of every appeal under this Rule.

(5) An appeal under this Rule shall be treated as a *de novo* adjudication of the creditor's proof and the creditor may rely upon additional evidence in support of the creditor's claim, notwithstanding that the creditor failed to make such evidence available to the official liquidator.

[No order] (O.16, r.19)

19. [No order]

PART IV: EXPUNGING ADMITTED CLAIMS

Introduction (O.16, r.20)

20. (1) The Court may expunge a proof which has been admitted or reduce the amount in respect of which it has been admitted.

(2) The official liquidator may apply to expunge a proof on the ground that it appears, on the basis of information not available to the official liquidator at the time of the official liquidator's adjudication of the proof, that it ought not to have been admitted or ought to have been admitted for a lesser amount.

(3) A contributory or creditor who is dissatisfied with the official liquidator's decision to admit the whole or part of a creditor's proof for an amount exceeding $100,000 (or its equivalent in the currency of the liquidation) or 5% of the company's total liabilities (whichever is the less) may apply to expunge the proof on the ground that it should not have been admitted.

Application to Court (O.16, r.21)

21. (1) An application to expunge a proof of debt shall be made by summons in CWR Form No 31 and shall be served on the creditor and, if made under Rule 20(3) of this Order, shall also be served on the official liquidator.

(2) An application under this Rule must be made promptly and, in any event, not later than the date upon which a dividend has been paid in respect of it.

(3) Every application under this Rule shall be supported by an affidavit and Order 11, rule 4(2) shall apply.

ORDER 17

SECURED CREDITORS

Introduction (O.17, r.1)

1. (1) A creditor who has security over the whole or part of the assets of a company is entitled to enforce that creditor's security without the leave of the Court and without reference to its liquidator.

(2) A secured creditor whose debt is more than the value of that secured creditor's security may prove in the liquidation for the unsecured balance.

(3) A proof of debt submitted by a secured creditor shall state particulars of the security held by the creditor and the value which the secured creditor puts on the security.

(4) A secured creditor may, with the agreement of the liquidator or the leave of the Court, alter the value which the secured creditor has put on the secured creditor's security in the secured creditor's proof of debt.

(5) If a secured creditor omits to disclose their security in their proof of debt, that secured creditor shall surrender their security for the general benefit of creditors, unless the Court relieves that secured creditor from the effect of this Rule on the ground that that secured creditor's omission was inadvertent or the result of an honest mistake.

Redemption of security by the liquidator (O.17, r.2)

2. (1) The liquidator may at any time give notice to a creditor whose debt is secured that the liquidator proposes, at the expiration of 28 days from the date of the notice, to redeem the security at the value put upon it in the creditor's proof.

(2) The creditor then has 21 days in which (if the creditor so wishes) to apply to the Court for leave to alter the value of the creditor's security.

(3) If the liquidator redeems the security, the costs incurred in doing so are payable out of the assets of the company as an expense of the liquidation.

(4) A secured creditor may at any time give notice to the liquidator requiring the liquidator to elect whether or not the liquidator will exercise the liquidator's right to redeem the security at the value put on it in the creditor's proof of debt and the liquidator shall make the liquidator's election within 90 days, failing which the liquidator shall lose the liquidator's right to redeem the security.

Valuation of security (O.17, r.3)

3. (1) If the liquidator is dissatisfied with the value which a secured creditor has put on the secured creditor's security, the liquidator may require that the property comprised in the security be offered for sale.

(2) The method and terms of sale shall be such as may be agreed between the liquidator and the creditor or, failing agreement, as may be directed by the Court.

(3) In the event that the method of sale is by auction, the creditor shall be entitled to bid and the liquidator shall be entitled to bid on behalf of the company.

Realisation of security (O.17, r.4)

4. (1) If a secured creditor who has submitted a proof of debt and valued that secured creditor's security subsequently realises it, the net proceeds of sale shall be substituted for the value previously put on the security by the creditor in that creditor's proof of debt.

(2) The creditor shall be entitled to prove for the balance of that creditor's debt.

ORDER 18

COLLECTION AND DISTRIBUTION OF COMPANY'S ASSETS BY ITS OFFICIAL LIQUIDATOR

Powers of Official Liquidator (O.18, r.1)

1. (1) The official liquidator is an officer of the Court.

(2) The official liquidator is empowered, as agent of the company, to collect, take possession, retain, manage and realise the company's property.

Manner of Distributing the Assets (O. 18, r. 2)

2. (1) When the official liquidator has sufficient funds in hand for the purpose the official liquidator shall, subject to the retention of such sums as may be necessary for the expenses of the winding up, declare and distribute dividends among the creditors in respect of the debts which they have respectively proved.

(2) The official liquidator shall give notice of the official liquidator's intention to declare and distribute a dividend.

(3) Where the official liquidator has declared a dividend, the official liquidator shall give 21 days' notice of it to the creditors, stating how the dividend is proposed to be distributed. The notice shall contain such particulars with respect to the company, and its assets and affairs, as will enable the creditors to comprehend the calculation of the amount of the dividend and the manner of its distribution.

Debts of Insolvent Company to Rank Equally (O.18, r.3)

3. Debts other than preferential debts rank equally between themselves in the winding up and, after the preferential debts, shall be paid in full unless the assets are insufficient for meeting them, in which case they shall abate in equal proportions between themselves.

Calculation of Dividend (O.18, r.4)

4. (1) In the calculation and distribution of a dividend the official liquidator shall make provision for —

(a) any debts which appear to the official liquidator to be due to persons who, for whatever reason, may not have had sufficient time in which to tender and establish their proofs;

(b) any debts which are the subject of claims which have not yet been determined;

(c) disputed proofs and claims; and

(d) expenses of the liquidation which are anticipated but not yet incurred.

(2) A creditor who has not proved that creditor's debt before the declaration of any dividend is not entitled to disturb, by reason that that creditor has not participated in it, the distribution of that dividend or any other dividend declared before that creditor's debt was proved, but when that creditor has proved that debt, that creditor is entitled to be paid out of any money available for the payment of any further dividend.

(3) No action lies against an official liquidator for a dividend, but if an official liquidator has improperly refused to pay a dividend, the Court may order the official liquidator to pay it with interest at the prescribed rate.

Distribution of Assets in Specie (O.18, r.5)

5. (1) The official liquidator has power to divide the whole or part of the company's property in its existing form, according to its estimated value, amongst the company's creditors or members.

(2) In the case of an insolvent company, the official liquidator may apply to the Court for a direction authorising the official liquidator to divide the whole or part of the company's assets amongst the creditors on the grounds that —

(a) the property in question cannot be readily or advantageously sold; or

(b) there is some other special reason why it would be advantageous to creditors for the property in question to be distributed in specie.

(3) In the case of a solvent company, the official liquidator may divide the whole or part of the company's property (after having paid its debts in full) amongst the members in the following manner —

(a) in accordance with any specific provision in this regard contained in the company's articles of association; or

(b) in the absence of any relevant provision in the company's articles of association, with the authority of an ordinary resolution passed by the company's members; or

(c) in accordance with a direction of the Court made upon the application of any member or the voluntary liquidator.

(4) Property of a company which comprises a cause of action or other contingent asset which is incapable of being readily realised, may be distributed to creditors or members by means of transferring it to a new company, established for the purpose, and whose shares will be issued to the creditors or members in proportion to their respective rights against the company.

Interim Distribution to Creditors (O.18, r.6)

6. (1) As soon as the official liquidator determines that the official liquidator has realised sufficient assets to be able to pay a dividend, the official liquidator shall give notice of the official liquidator's intention to declare an interim or final dividend, as the case may be.

(2) A notice of intention to declare an interim dividend shall be in CWR Form No. 32 and shall —

(a) fix a date (being not less than 30 days from the date of publication of the notice) by which proofs of debt must be lodged with the official liquidator; and

(b) state that any creditor who lodges that creditor's proof of debt after the date specified in the notice will be excluded from the interim distribution but will not be excluded from any subsequent interim distribution or from the final distribution.

Final Distribution to Creditors (O.18, r.7)

7. (1) When the official liquidator has —

(a) realised all the company's assets, or so much of the assets as can, in the official liquidator's opinion, be realised without needlessly protracting the liquidation; and

(b) divided any unrealised assets amongst the creditors in specie, if and to the extent that it was practical to do so,

the official liquidator shall give notice of the official liquidator's intention to declare a final dividend in CWR Form 33.

(2) The notice of intention to declare a final dividend shall —

(a) fix the date (being not less than 60 days from date of publication of the notice) by which proofs must be lodged with the official liquidator (referred to as "the final date for proving"); and

(b) state that any proof of debt lodged after the final date for proving may be excluded from the final dividend.

(3) Within 14 days from the final date for proving, the official liquidator shall deal with every creditor's proof (to the extent that the official liquidator has not already done so) by admitting it, rejecting it (in whole or in part) or by making a provision for it.

(4) The official liquidator may, but shall not be obliged, to deal with any proof of debt received after the final date for proving.

(5) Having dealt with every creditor's proof, the official liquidator shall give notice of final dividend in Form 34 to all creditors who have proved their debts.

(6) Every notice of final dividend shall specify —

(a) the amount realised from the sale of the company's assets;

(b) the value attributed to any assets distributed in specie;

(c) the amount of the expenses of the liquidation;

(d) the amount of any provisions made for unpaid claims;

(e) the amount of any funds retained for specific purposes;

(f) the total amount of any interim distributions; and

(g) the amount to be distributed and the overall rate of dividend.

(7) A dividend may be distributed simultaneously with the notice declaring it.

Payment of Dividends (O.18, r.8)

8. (1) Dividends shall only be paid in the currency of the liquidation.

(2) Dividends shall be paid by cheque or by such other method as the official liquidator may agree with individual creditors.

(3) Dividend cheques shall be sent to creditors by post, or by such other method as the official liquidator may agree with individual creditors.

Assignment of Right to Receive a Dividend (O.18, r.9)

9. (1) A creditor or member may assign that creditor's or member's right to receive a dividend or instruct the official liquidator to pay that creditor's or member's dividend to some other person.

(2) If a creditor entitled to receive a dividend has given notice of assignment to the official liquidator, the official liquidator shall pay the dividend to the assignee.

(3) If a creditor entitled to receive a dividend has given written instructions to the official liquidator that the dividend be paid to some other person, the official liquidator shall pay it in accordance with those instructions.

ORDER 19

CALLS ON CONTRIBUTORIES AND TRANSFERS OF SHARES

PART I: CALLS ON CONTRIBUTORIES

Calls by Official Liquidator (O.19, r.1)

1. (1) The power contained in section 113 of the Law to make calls on contributories shall be exercised by the official liquidator with the sanction of the Court.

(2) A sanction application under this Rule shall be made in accordance with the provisions of Order 11.

Making and Enforcement of Calls (O.19, r.2)

2. (1) Notice of the call shall be given in Form 35 to each of the contributories concerned and shall specify the amount or balance due from each of the contributories.

(2) A call shall be payable immediately upon service on the contributory concerned.

(3) A call shall be enforceable against the contributory concerned in the same manner as a judgment or order of the Court.

Appeal against Calls (O.19, r.3)

3. (1) If a person against whom a call is made is dissatisfied either with the decision that that person is a contributory or with the amount of the call made against that person, that person may appeal to the Court for the decision to be reversed or varied.

(2) An appeal under this Rule shall be made with within 21 days of the date upon which the contributory received notice of the call.

(3) The provisions of Order 16, rules 19 and 20 shall apply to appeals under this Rule (as if references to "**creditors**" and "**proofs**" are read as referring to "**contributories**" and "**calls**").

(4) An appeal under this Rule shall be permitted only on terms that the full amount of the call is paid into Court within 7 days after service of the contributory's summons.

PART II: TRANSFERS OF SHARES

Application for Validation Order (O.19, r.4)

4. (1) An application pursuant to Section 99 of the Law for an order validating the transfer or proposed transfer of any shares of a company may be made by its liquidator or by the transferor or transferee of the shares in question.

(2) Provided that —

(a) the shares in question are fully paid; and

(b) the liquidator does not object to the transfer,

the application shall be made by letter addressed to the Judge to whom the proceeding is assigned.

(3) In any other case the application shall be made by summons and, if made by the transferor or transferee, the summons must be served on the liquidator.

Supporting Documentation (O.19, r.5)

5. (1) An application made by letter pursuant to rule 4(2) shall be supported by —

(a) an affidavit confirming that the shares are fully paid and that the liquidator has no objection to the transfer; and

(b) a draft of the order sought by the applicant

(2) An application required to be made by summons shall be supported by an affidavit, sworn by or on behalf of the applicant, which contains a full explanation of the reasons for the transfer and the applicant's response to the liquidator's objections.

ORDER 20

ORDER OF PAYMENT OF EXPENSES OUT OF THE ASSETS

General Rule as to Priority (O.20, r.1)

1. (1) The expenses of the liquidation and the expenses properly incurred during the appointment of the restructuring officer are payable out of the assets of the company in the following order of priority:

(a) the costs of the petitioner and of any person appearing on the petition whose costs are allowed by the Court;

(b) the costs incurred by the petitioner or other person required to secure an undertaking given pursuant to Order 4, rule 3;

(c) the costs incurred by any restructuring officer (including a restructuring officer appointed on an interim basis), provisional and/or official liquidator in procuring professional indemnity insurance and/or a security bond pursuant to an order made under Regulation 7;

(d) the expenses and disbursements properly incurred by or during the term of appointment of any restructuring officer (including a restructuring officer appointed on an interim basis);

(e) the remuneration of any restructuring officer (including a restructuring officer appointed on an interim basis);

(f) the expenses and disbursements properly incurred by any provisional liquidator;

(g) the remuneration of any provisional liquidator;

(h) the expenses and disbursements properly incurred by the official liquidator, including any expenses properly payable to any person who is required to make a statement of affairs;

(i) the expenses and disbursements properly incurred by the liquidation committee;

(j) any order for costs made by the Court in favour of any creditor or contributory in the winding up proceedings or in favour of any other person in proceedings to which the company is a party; and

(k) the remuneration of the official liquidator.

(2) In the case of a liquidation which commences voluntarily and is subsequently brought under the supervision of the Court:

(a) the expenses and disbursements properly incurred by the voluntary liquidator;

(b) the costs of making an application for the supervision order, whether such costs are incurred by the voluntary liquidator or any creditor or contributory of the company; and

(c) the remuneration of the voluntary liquidator,

shall rank equally with the expenses and disbursements incurred by the official liquidator, but in priority to the remuneration of the official liquidator.

Disallowance of Expenses and Disbursements (O.20, r.2)

2. (1) Nothing in this Order shall prevent the Court from making an order that any expense or disbursement incurred by a restructuring officer or liquidator shall be borne by that restructuring officer or liquidator personally on the ground that it was not incurred properly.

(2) Nothing in this Order shall prevent the Court, in any proceedings by or against the company, from making an order in favour of any other party that that party's costs be paid by the restructuring officer or liquidator personally.

ORDER 21

INTERNATIONAL PROTOCOLS

Application and definitions (O.21, r.1)

1. (1) In this Order "**company in liquidation**" means a company which is incorporated under the Law and is the subject of an official liquidation under Part V.

(2) This Order has no application to foreign companies which are the subject of an official liquidation under Part V.

(3) This Order applies —

(a) when a company in liquidation is the subject of a concurrent bankruptcy proceeding under the law of a foreign country; or

(b) when the assets of a company in liquidation located in a foreign country are the subject of a bankruptcy proceeding or receivership under the law of that country.

(4) In this Order —

(a) "**foreign officeholder**" means a person appointed by a foreign court or other authority to exercise powers similar to those of an official liquidator in respect of a company or to exercise powers similar to those of a receiver in respect of assets of a company;

(b) "**foreign court or authority**" means the foreign court or foreign governmental authority which has appointed and exercises supervisory jurisdiction over a foreign officeholder;

(c) "**international protocol**" means an agreement made in respect of a company in liquidation between an official liquidator and a foreign officeholder with the approval of the Court and of the foreign court or authority.

Consideration of international protocols (O.21, r.2)

2. (1) It shall be the duty of the official liquidator of a company in liquidation to consider whether or not it is appropriate to enter into an international protocol with any foreign officeholder.

(2) The purpose of an international protocol is to promote the orderly administration of the estate of a company in liquidation and avoid duplication of work and conflict between the official liquidator and the foreign officeholder.

(3) An international protocol agreed between the official liquidator and a foreign officeholder of a company in liquidation shall take effect and become binding

upon them only if and when it is approved by both the Court and the foreign court or authority.

Scope of international protocols (O.21, r.3)

3. (1) An international protocol may define and allocate responsibilities between the official liquidator and foreign officeholder (by reference to geographical location or otherwise) in respect of —

(a) the formulation and promotion of restructuring proposals, including a scheme of arrangement pursuant to section 86 of the Law;

(b) the preservation of assets located outside the Islands;

(c) the realisation of assets located outside the Islands;

(d) the pursuit of causes of action against debtors or other persons outside the Islands;

(e) procedures for the exchange of information between the official liquidator and foreign officeholder;

(f) procedures for reporting to and communicating with the liquidation committee and with creditors and/or contributories;

(g) procedures for co-ordinating sanction applications made to the Court and to the foreign court or authority;

(h) administrative procedures relating to the adjudication of proofs of debt and consequential appeals or expungement applications;

(i) procedures relating to the payment of claims; and

(j) procedures relating to the remission of funds between the official liquidator and foreign officeholder.

(2) An international protocol may establish procedures for the review, approval and payment of —

(a) the remuneration of the official liquidator and foreign officeholders;

(b) the fees of counsel to the official liquidator and lawyers engaged by the foreign officeholder; and

(c) other expenses incurred by the official liquidator and/or foreign officeholder.

(3) Any provision contained in international protocol which is contrary to the provisions of the Law or purports to exclude the jurisdiction of the Court in respect of the company in liquidation shall be void and of no effect.

ORDER 22

ORDER FOR DISSOLUTION

Application to Court (O.22, r.1)

1. (1) As soon as the affairs of the company have been completely wound up the official liquidator shall —

(a) publish the official liquidator's final report and accounts in accordance with Order 10, rule 3;

(b) apply to the Court for an order under section 152 that the company be dissolved.

(2) The official liquidator's final report and accounts shall contain —

(a) notice of the date upon which the official liquidator's application for an order for dissolution will be heard by the Court; and

(b) a statement of the fact that any creditor (in the case of an insolvent company) or member (in the case of a solvent company) may appear and be heard on the application.

(3) The official liquidator shall publish a notice of the hearing of the application in one or more newspapers circulating in a country or countries in which the company appears most likely to have creditors and any such notice shall be published at least 14 days prior to the date of the hearing.

Order for Dissolution (O.22, r.2)

2. (1) An order for dissolution shall be in CWR Form 36.

(2) An order for dissolution shall take effect upon the date upon which it is made or such later date specified in the order.

(3) The official liquidator shall file the order for dissolution with the Registrar of Companies within 14 days from the date upon which the order is perfected.

(4) An order for dissolution shall include supplementary directions relating to —

(a) the retention of the whole or part of the liquidation files for longer than the minimum period of 3 years specified in Order 25, rule 1;

(b) the retention, storage and destruction of the company's books and records pursuant to Order 25, rule 2:

(c) the terms upon which the official liquidator will be remunerated for acting as trustee of any unclaimed dividends or undistributed assets under section 153; and

(d) such other consequential matters as the Court thinks fit.

ORDER 23

UNCLAIMED DIVIDENDS AND UNDISTRIBUTED ASSETS

Introduction (O.23, r.1)

1. Following the dissolution of a company, whether pursuant to section 151 or an order for dissolution made under section 152, the former liquidator shall be trustee of any unclaimed dividends or undistributed assets of the company which remain in the former liquidator's possession or control for the benefit of the contributories or creditors to whom such funds are owed.

Establishment of Trust Account (O.23, r.2)

2. (1) The liquidator shall establish an interest bearing bank account in the liquidator's own name as "trustee of the creditors or members of [*name of company*], dissolved" (referred to as "the liquidator's trust account").

(2) Any funds representing unclaimed dividends or uncleared dividend cheques shall be transferred to the liquidator's trust account.

(3) The former liquidator shall administer the funds credited to the liquidator's trust account as trustee for the benefit of the creditors and/or contributories to whom the funds are owed.

Transfer of Undistributed Assets (O.23, r.3)

3. (1) Title to any assets of the company which ought to have been distributed in specie pursuant to Order 18, rule 4 but remain in the possession or control of the liquidator, shall be transferred into the liquidator's own name "as trustee of the creditors or members of [*name of company*], dissolved".

(2) The former liquidator shall hold and administer such assets as trustee for the benefit of the creditors or contributories who are entitled to receive such assets.

Payment out of Trust Account and Transfer of Undistributed Assets (O.23, r.4)

4. (1) The former liquidator shall advertise for claims and take such other steps as appear to the former liquidator to be reasonable to locate and identify claimants.

(2) The former liquidator shall be responsible for dealing with all claims and shall be authorised to make payment or transfer title to those persons who appear to the former liquidator to have been entitled to receive payment or title as unpaid creditors or members of the company prior to its dissolution.

(3) In any case of doubt or difficulty the former liquidator shall be entitled to apply to the Court for directions pursuant to section 48 of the *Trusts Act (as amended and revised).*

Former Liquidator's Trustee Fee and Expenses (O.23, r.5)

5. (1) The former liquidator shall be entitled to be paid a reasonable fee for acting as trustee pursuant to section 153, the basis and amount of which shall be fixed by order of the Court.

(2) The trustee fee may comprise —

(a) a fixed fee or scale of fixed fees; and/or

(b) a percentage fee, calculated upon the value of the assets under administration and/or the amount distributed by the trustee.

(3) The former liquidator shall be entitled to be reimbursed out of the assets under administration in respect of the costs and expenses reasonably and properly incurred by the former liquidator for the purpose of advertising, administering claims and preparing the former liquidator's accounts.

Transfer to the Financial Secretary (O.23, r.6)

6. (1) Any money or assets remaining in the hands of the former liquidator as trustee at the end of one year from the date upon which the company was dissolved shall be transferred to the Financial Secretary who shall be responsible for administering the same pursuant to Part VIII of the *Public Management and Finance Act (as amended and revised)*.

(2) The former liquidator shall prepare a report and accounts of the former liquidator's administration which shall contain particulars of —

(a) the amount of money and the nature and estimated value of the assets received into trust;

(b) the claims received and the manner in which they were resolved;

(c) the amount of money paid out to claimants;

(d) the assets transferred to claimants;

(e) the amount of the former liquidator's fees and expenses;

(f) the net amount of money and remaining assets transferred to the Financial Secretary.

(3) The former liquidator shall deliver the former liquidator's report and accounts to the Financial Secretary, together with all the books and records which, in the opinion of the former liquidator, will be required by the Financial Secretary in order to deal with future claims and otherwise discharge the Financial Secretary's duties under Part VII of the *Public Management and Finance Act (as amended and revised)*.

ORDER 24

APPLICATIONS TO COURT UNDER PART V OF THE LAW

PART I: GENERAL PROVISIONS

Originating Applications (O.24, r.1)

1. (1) Every originating application under Part V of the Law shall be made by petition.

(2) The general provisions of GCR Order 9, and GCR Order 18, rule 19 and Order 20, rule 7 shall apply to every petition presented under these Rules.

(3) Unless a specific form of petition is prescribed by these Rules, GCR Form No 7 shall be treated as the generally applicable form.

(4) A petition under this Rule cannot relate to more than one company.

(5) The Court may hear two or more petitions at the same time, but it shall not make any order for two or more petitions to be consolidated.

(6) An office copy of every petition presented under these Rules shall be placed on the Register of Writs and other Originating Process maintained by the Registrar pursuant to GCR Order 63, rule 8.

Applications in Existing Proceedings (O.24, r.2)

2. (1) Every application or appeal to the Court made in connection with a proceeding which is already pending before the Court shall be made by summons.

(2) The general provisions of GCR Order 32 shall apply to every summons issued under these Rules.

Hearings (O.24, r.3)

3. (1) Every petition shall be heard in open court unless the Court directs, for some special reason, that it should be heard in chambers.

(2) Every summons shall be heard in chambers unless —

(a) the Court has directed that it should be advertised, in which case it must be heard in open court; or

(b) the Court directs that it should be heard in open court.

Court Files (O.24, r.4)

4. (1) A Court file shall be established in respect of each winding up proceeding in accordance with GCR Order 63, rule 2.

(2) The Registrar shall not permit the creation of more than one Court file (or the allocation of more than one cause number) in respect of a liquidation proceeding or company in liquidation.

(3) The Registrar shall not permit any Court file (and associated cause number) to relate to more than one company in liquidation.

Orders made in Liquidation Proceedings (O.24, r.5)

5. Every order made in a liquidation proceeding, whether made in open court or in chambers, shall be placed on the Register of Judgments maintained by the Registrar under GCR Order 63, rule 7 and shall be open to public inspection upon payment of the prescribed fee.

Order for Documents to be Sealed (O.24, r.6)

6. (1) The Court may direct that the whole or part of any report, order, affidavit or other document, except the petition, winding up order or supervision order, which has been filed or is required to be filed pursuant to these Rules, shall be sealed and kept confidential for a specific period or until the happening of a specified event, on the grounds that —

(a) the information in question is of a confidential nature and will not come into the public domain unless and until the document containing such information is filed in Court; and

(b) the publication or immediate publication of the information contained in the document will harm the economic interests of the creditors or contributories of the company.

(2) The liquidator and any creditor or contributory may apply to the Court for a direction that a sealed document be unsealed on the grounds that —

(a) the information contained in it is no longer confidential;

(b) the reasons for sealing the document no longer exist or have expired; or

(c) publication of the information is not or is no longer harmful to the economic interests of creditors or contributories.

PART II: COSTS IN LIQUIDATION PROCEEDINGS

Interpretation (O.24, r.7)

7. (1) "**Costs**" shall mean the reasonable legal fees and expenses incurred by a person in conducting or participating in a liquidation proceeding in an economical, expeditious and proper manner.

(2) "**Liquidation proceeding**" shall mean —

(a) any petition presented under Part V of the Law;

(b) any application to Court made in a proceeding commenced under Part V of the Law ; and

(c) any appeal against an order made on a petition or in any proceeding under Part V of the Law.

(3) Words and expressions defined in GCR Order 62, rule 3 shall have the same meaning when used in Part II of this Order.

General Rules as to Costs (O.24, r.8)

8. (1) The general rule is that the costs incurred by a person who successfully presents a creditor's winding up petition under Order 3, Part II or creditor's petition for a supervision order under Order 15, rule 3 should have that person's costs paid out of the assets of the company, such costs to be taxed on an indemnity basis unless agreed with the official liquidator.

(2) In the case of a contributory's winding up petition under Order 3, Part III, the general rules are that —

(a) if the Court has directed that the company itself is properly able to participate in the proceeding, the general rule is that the costs of a successful petitioner be paid out of the assets of the company; or

(b) if the Court has directed that the winding up petition be treated as an inter partes proceeding between one or more members of the other members or members of the company as respondents, the general rule is that none of the costs should be paid out of the assets of the company and the unsuccessful parties should pay the costs of the successful party, such costs to be taxed on the standard basis unless agreed.

(2A) An order for security for costs may only be made if the petitioner is a nominal petitioner who has presented the petition for the benefit of another person and who would be unable to pay the costs of the company or other respondent, as the case may be, if ordered to do so.

(3) In the case of an Authority's petition under Order 3, Part IV, the general rule is that —

(a) the Authority's costs of successfully presenting a petition should be paid out of the assets of the company, such costs to be taxed on the indemnity basis if not agreed with the official liquidator; or

(b) the company's costs of successfully resisting the petition should be paid by the Authority, such costs to be taxed on the indemnity basis if not agreed.

(4) The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional and special circumstances which justify making some other order or no order for costs.

Costs of Sanction Applications (O.24, r.9)

9. (1) This Rule applies to every sanction application under Order 11, including any application for the approval of the official liquidator's remuneration.

(2) The official liquidator's costs of making a sanction application shall be paid out of the assets of the company unless the Court is satisfied that —

(a) the application ought not to have been made because the directions sought by the official liquidator were unnecessary and served no useful purpose;

(b) the directions sought by the official liquidator were wholly unreasonable; or

(c) the official liquidator has misled the Court or otherwise acted improperly in connection with the application.

(3) The liquidation committee's costs of participating in a sanction application shall be paid out of the assets of the of the company unless the Court is satisfied that —

(a) the liquidation committee's participation in the application served no useful purpose or constituted an unreasonable duplication of the costs incurred by the official liquidator;

(b) the position adopted by the liquidation committee was wholly unreasonable; or

(c) the liquidation committee has misled the Court or otherwise acted improperly in connection with the application

(4) In the case of a sanction application which is made or opposed by a creditor or contributory, the general rule is that —

(a) that creditor’s or contributory’s costs of successfully making or opposing the application should be paid out of the assets of the company, such costs to be taxed on an indemnity basis if not agreed with the official liquidator; and

(b) no order for costs should be made against a creditor or contributory whose application or opposition is unsuccessful, unless the Court is satisfied that that creditor’s or contributory’s position was wholly unreasonable or that creditor or contributory is guilty of having misled the Court or otherwise acting improperly in connection with the application.

(5) The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional circumstances and special reasons which justify making some other order or not order for costs.

Costs of Appeals (O.24, r.10)

10. (1) This Rule applies to appeals by contributories under Order 12, rule 4 and appeals by creditors under Order 16, Part III.

(2) The general rule is that the official liquidator's costs should be paid out of the assets of the company in any event.

(3) The general rule is that the appellant's costs should follow the event, such that —

(a) if the appellant succeeds, the Court shall order that the appellant's costs be paid out of the assets of the company as an expense of the liquidation;

(b) if the appellant is unsuccessful, the Court will order the appellant to pay the official liquidator's costs,

(c) such costs to be taxed on the standard basis unless agreed.

(4) In deciding how to exercise its discretion under sub-rule (3) the Court shall have regard to the manner in which the appellant originally sought to prove the appellant's claim (and, in particular, any failure to provide to the official liquidator with the whole of the evidence relied upon in support of the appellant's appeal to the Court) and the reasons why the Court reversed or varied or upheld the official liquidator's decision.

(5) On an appeal to the Grand Court an appellant shall not be required to provide security for costs in any appeal to which this Rule applies.

Taxation of Costs and Appeals (O.24, r.11)

11. (1) In the event that an order for costs made in a liquidation proceeding is required to be taxed, it shall be taxed by the taxing officer in accordance with the provisions of GCR Order 62, Parts IV, V and VI except that Rules 14 and 15 shall not apply.

(2) The Guidelines issued by the Grand Court Rules Committee pursuant to GCR Order 62, rule 16(3) shall apply to every taxation under this Order.

(3) Any party who is dissatisfied with the amount of any costs certificate may apply to a Judge to review the taxing officer's decision in accordance with the provisions of GCR Order 62, Part VII.

ORDER 25

OFFICIAL LIQUIDATOR'S LAWYERS

Appointment of Lawyers (O.25, r.1)

1. (1) Subject to obtaining the Court's sanction pursuant to paragraph 11 of Part I of the Third Schedule to the Law, the official liquidator may retain attorneys and/or foreign lawyers (whether or not temporarily admitted as attorneys) only on terms of engagement which comply with the requirements of this Rule.

(2) The terms upon which lawyers are engaged by the official liquidator must be stated in writing and shall be signed by both parties.

(3) Every engagement letter or retainer agreement shall contain particulars of the basis upon which the lawyers will be remunerated, including, if applicable, a statement of the agreed hourly rates.

(4) The official liquidator shall not retain (whether directly or indirectly) any foreign lawyer unless the foreign lawyer (being a sole practitioner) or the firm of which the foreign lawyer is a partner or employee has signed an engagement letter or retainer agreement which expressly states that —

(a) the contract is government by Cayman Islands law;

(b) the lawyer/law firm submits to the exclusive jurisdiction of the Court for all purposes in connection with the engagement;

(c) the lawyer/law firm understands and agrees that the amount of fees payable by the official liquidator is subject to taxation in accordance with this Order;

(d) the lawyer/law firm shall have no right to exercise any lien over their files as against the official liquidator

(5) The official liquidator has no authority to engage any lawyers on terms which are inconsistent with the requirements of this Rule and any term of an engagement letter or retainer agreement which is inconsistent with the requirements of this Rule shall be void and of no effect.

(6) Nothing in this rule shall affect the validity or effectiveness of any engagement letter or retainer agreement made prior to 1 March 2013.

Lawyer's Fees (O.25, r.2)

2. (1) All lawyers engaged by the official liquidator shall be remunerated on a time spent basis (at agreed hourly rates which are stated in the engagement letter) unless the Court has sanctioned some other basis of remuneration.

(2) If the official liquidator or the liquidation committee consider that the amount of fees and expenses charged by the official liquidator's lawyer is excessive, the official liquidator may require that such fees and expenses be taxed on the indemnity basis by the taxing officer.

(3) Conversely, if the lawyer considers that the amount which the official liquidator offers to pay is inadequate, the lawyer may require that the lawyer's bill of costs be taxed on the indemnity basis by the taxing officer.

(4) The lawyer shall be entitled to be paid out of the assets of the company as an expense of the liquidation the amount(s) stated in the costs certificate and the official liquidator shall have no authority to pay more than that amount.

Procedure for Taxation of Lawyer's Fees (O.25, r.3)

3. (1) A taxation under this Order shall be governed by and conducted in accordance with GCR Order 62.

(2) The lawyer shall prepare a bill of costs in GCR Form 314 and serve it on the official liquidator.

(3) The official liquidator shall state the extent to which the official liquidator disagrees with the amount charged and/or the scope of the work done by completing column 4 and returning the completed bill of costs to the lawyer within 21 days or such other period as may be agreed.

(4) In addition to completing column 4, the official liquidator may also serve a written statement of the official liquidator's objections to the amount charged.

(5) Proceedings for taxation of the bill of costs shall be commenced (by either party) by lodging the following documents with the taxing officer —

(a) an application for taxation in GCR Form 301;

(b) the bill of costs, completed in accordance with this Rule;

(c) any written statement of objections by the official liquidator;

(d) any written reply by the lawyer; and

(e) a copy of the engagement letter or retainer agreement.

Subsequent Procedure on Taxation (O.25, r.4)

4. (1) A taxation shall be inquisitorial in nature.

(2) The taxing officer shall enquire into the bill of costs and determine the amount to be paid in accordance with Rule 4 for which purpose the taxing officer shall obtain such written explanations from the official liquidator and/or the lawyer as may be appropriate to enable the taxing officer to make such determination fairly.

(3) The taxation shall be conducted in accordance with the Guidelines issued from time to time by the Grand Court Rules Committee pursuant to GCR Order 62, rule 16(3), insofar as such Guidelines relate to taxation on the indemnity basis.

(4) The taxing officer may require the lawyer to produce —

(a) the lawyer's time records;

(b) the lawyer's files and any other documents reflecting the work done; and

(c) invoices in respect of any disbursements included in the bill of costs.

(5) The taxing officer shall not give reasons for any of the taxing officer's decisions.

(6) The taxing officer shall send an office copy of the taxing officer's costs certificate to the official liquidator and to the lawyer.

Criteria Applicable on Taxation (O.25, r.5)

5. (1) The lawyer is entitled to be fairly remunerated in accordance with the terms of the lawyer's engagement letter for all work reasonably and properly done on the instructions of the official liquidator.

(2) In determining whether the remuneration claimed is fair, the taxing officer shall have regard to all the relevant circumstances, including —

(a) the difficulty or novelty of the issues involved;

(b) the skill, specialised knowledge and responsibility required of, and the time and labour expended by the attorneys engaged;

(c) the number and importance of the relevant documents (however brief) prepared or perused;

(d) the overall size of the estate;

(e) the amount of money or value attributable to the issues involved; and

(f) the overall importance to the liquidation of the issues involved.

(3) In determining whether the work done by the lawyer was reasonably and properly done, the taxing officer shall have regard to all the relevant circumstances, including —

(a) the duties of the official liquidator;

(b) the instructions given by the official liquidator; and

(c) any relevant directions given by the Court.

(4) Work done by the lawyer shall be presumed not to have been done reasonably and properly if the work done or advice given caused or contributed to a breach of duty on the part of the official liquidator.

ORDER 26

LIQUIDATION FILES, COMPANY'S BOOKS AND RECORDS AND COURT FILES

Introduction (O.26, r.1)

1. (1) This Order applies to all liquidations.

(2) References in this Order to "**official liquidations**" shall include supervised liquidations.

(3) References to this Order to the "**liquidator**" shall include both an official liquidator and a voluntary liquidator.

Liquidation Files (O.26, r.2)

2. (1) It shall be the duty of every liquidator to create and maintain a complete record of all the work done and steps taken in connection with the liquidation (referred to in this Order as "**the liquidation files**").

(2) The liquidation files shall include —

(a) a duplicate of the Court file;

(b) minutes of the meetings of creditors and/or contributories;

(c) minutes of the meetings of the liquidation committee;

(d) liquidator's reports;

(e) liquidator's accounts;

(f) proofs of debt and records relating to their adjudication;

(g) records relating to the collection and realisation of the assets;

(h) records relating to the liquidation bank accounts;

(i) liquidator's correspondence; and

(j) notices sent or published by the liquidator.

(3) The liquidator shall retain the liquidation files in safe custody for at least 3 years following the dissolution of the company.

(4) In the event that the official liquidator resigns, dies or is removed from office, the official liquidator, or that person’s personal representative, shall forthwith deliver the official liquidator’s liquidation files to the official liquidator’s successor (although the official liquidator shall be entitled to make and retain a copy at the official liquidator’s own expense).

Company's Books and Records (O.26, r.3)

3. (1) It shall be the duty of the official liquidator to take possession or control of all the company's books and records, including those maintained in electronic form.

(2) The liquidator shall keep the company's books and records in safe custody unless and until the liquidator is authorised or directed to destroy them in accordance with the order of the Court (in the case of a compulsory liquidation) or in accordance with a resolution of the company (in the case of a voluntary liquidation).

(3) The Court may direct (in the case of a compulsory liquidation) or the company may resolve (in the case of a voluntary liquidation) that particular classes of books and records of the company be destroyed prior to the conclusion of the liquidation on the ground that they are redundant and of no relevance to the liquidation.

(4) Upon making an order for dissolution (in the case of a compulsory liquidation), the Court shall give directions in respect of the preservation, storage and destruction of the company's remaining books and records.

(5) Notice of the final general meeting (in the case of a voluntary liquidation) shall include a resolution in respect of the preservation, storage and destruction of the company's books and records and, in the event that there is no quorum, the resolution is deemed to have been passed.

(6) The cost of post-dissolution storage and destruction of a company's books and records shall be an expense of the liquidation for which provision must be made in the official liquidator's final accounts.

Rights of access to the Court File (O.26, r.4)

4. (1) The following persons shall have the right to inspect the Court file in respect of a liquidation proceeding and take copies of filed documents —

(a) the liquidator;

(b) any former liquidator or controller of the company;

(c) any person who was a director or professional service provider of the company immediately before the commencement of the liquidation;

(d) the Authority, in the case of a company which carried on a regulated business; and

(e) any person stating themselves in writing to be a creditor or contributory of the company.

(2) The right of inspection conferred upon a person under this Rule may be exercised on that person’s behalf by an attorney or other person properly authorised to act for that person.

(3) Any other person may inspect the Court file by special leave of the Court.

(4) The right of inspection conferred by this Rule is not exercisable in respect of any documents (except the petition and Court orders) or parts of any documents which the Court has directed to be sealed pursuant to Order 23, rule 6.

(5) If, in the case of a person applying to inspect the Court file, the Registrar is not satisfied as to the propriety of the application, the Registrar may refuse to allow it, in which case such person may then apply forthwith and *ex parte* to a Judge who may refuse the inspection, allow it or allow it on such terms as the Judge thinks fit.

APPENDIX

PRESCRIBED FORMS (O.1, R.7)

INDEX

1.	Statutory Demand under section 93	(O. 2, r. 2)
2.	Winding Up Petition	(O. 3, r. 2)
2A.	Petition for the Appointment of a Restructuring Officer	(O.1A, r.2)
2B.	*Ex Parte* Summons for Appointment of Interim Restructuring Officer	(O.1A, r.4)
3.	Advertisement of Winding Up Petition	(O. 3, r. 6)
3A.	Advertisement of Petition to Appoint Restructuring Officer	(O.1A, r.1(3))
4.	Notice of Appearance	(O. 3, r. 8)
4A.	Notice of Appearance	(O.1A, r.3)
5.	Summons for Directions	(O. 3, r. 11)
6.	Winding Up Order	(O. 3, r. 22)
7.	Order for appointment of Provisional Liquidator pursuant to s. 104(2)	(O. 4, r. 4)
8.	Order for appointment of Provisional Liquidator pursuant to s. 104(3)	(O. 4, r. 7)
8A.	Order for the Appointment of a Restructuring Officer	(O.1A, r.6)
8B.	*Ex Parte* Order for the Appointment of an Interim Restructuring Officer	(O.1A, r.6)
9.	Notice of Appointment of Official Liquidator	(O. 5, r. 3)
10.	Notice under Section 101	(O. 6, r. 1)
11.	Notice under Section 101	(O. 6, r. 1)
12.	Order for Examination	(O. 7, r. 2)
13.	Official Liquidator's Certificate (Solvency/Insolvency)	(O. 8, r. 1)
14.	Official Liquidator's Revised Certificate (Solvency/Insolvency)	(O. 8, r. 1)
15.	Official Liquidators Certificate (Composition of Liquidation Committee)	(O. 9, r. 1)
16.	Summons (Sanction Application)	(O. 11, r. 1)
16A.	Remuneration Approval Summons	(O.1A, r.10(3))
16B.	Summons for the Variation or Discharge of Order Appointing Restructuring Officers	(O.1A, r.9(1))
16C.	Removal and Replacement Summons	(O.1A, r.13(1))
16D.	Summons for the Variation or Discharge of Order Appointing Provisional Liquidators	
17.	Notice of Rectification of Register of Members	(O. 12, r. 3)
18.	Summons (Appeal against Rectification)	(O. 12, r. 4)
19.	Notice of Voluntary Winding Up	(O. 13, r. 2)
20.	Voluntary Liquidator's Consent to Act	(O. 13, r. 2)
21.	Declaration of Solvency	(O. 14, r. 1)
22.	Advertisement of Voluntary Winding Up	(O. 15, r. 5)
23.	Supervision Order	(O. 15, r. 8)
24.	Proof of Debt	(O. 16, r. 2)
25.	Notice of Admission of Proof of Debt	(O. 16, r. 6)

26.	Notice of Rejection of Proof of Debt	(O. 16, r. 6)
27.	Notice of Admission of Deposit Claims	(O. 16, r. 7)
28.	Official Liquidator's Certificate (Currency of Liquidation)	(O. 16, r. 13)
29.	Notice (Contingent Claims)	(O. 16, r. 16)
30.	Summons (Appeal against rejection of proof of debt)	(O. 16, r. 18)
31.	Summons (Application to expunge a proof of debt)	(O. 16, r. 21)
32.	Notice of Intention to Declare Interim Dividend	(O. 18, r. 6)
33.	Notice of Intention to Declare Final Dividend	(O. 18, r.7)
34.	Notice of Final Dividend	(O. 18, r. 7)
35.	Notice of Call	(O. 19, r. 2)
36.	Order for Dissolution	(O. 22, r. 2)
37.	Voluntary Liquidator's Final Return to the Registrar	(O. 13, r. 12)

CWR Form No 1

Statutory Demand under section 93 of the Companies Act (O. 2, r. 2)

THE COMPANIES ACT
STATUTORY DEMAND UNDER SECTION 93

To : [*State full name of debtor company*] (the "Company")

Address: [*State the address of the registered office of the debtor company*]

This demand is served on the Company by —

Name: [*state full name of the creditor*] (the "Creditor")

Address: [*State the address of the Creditor*]

The Creditor claims that the Company owes the sum of [*state the currency and principal amount of the debt*] and interest of [*if applicable, state the amount of interest accrued due as at the date of the statutory demand*] calculated up to and including the date of this demand, being a total indebtedness of [*state total amount*] particulars of which are stated overleaf.

The Creditor demands that the Company do pay this debt or secure or compound for it to the Creditor's satisfaction.

If payment of this debt is not made within twenty-one (21) days of the date upon which this statutory demand is served on the Company's registered office, the Company will be deemed to be insolvent and a winding up petition may be presented against the Company in accordance with section 92(d) of the Companies Act.

Dated this day of 20

_____
Signature

Title: *[State the name of the person signing and the basis upon which that person is authorised to do so on behalf of the Creditor]*

Address: *[State address and contact details of the person who signed the statutory demand on behalf of the Creditor]*

PARTICULARS OF THE DEBT

[*State in narrative form full details of the way in which the debt arose, including the consideration for it. For example, if the debt arose pursuant to a written contract, the contract documentation should be clearly identified. Documents evidencing the amount of the debt, such as statements of account or invoices, should be identified. If the demand includes interest, full particulars of the basis upon which interest is payable should be set out together with a calculation of the amount due. Relevant documents may be annexed, but the statutory demand itself must contain in narrative form a clear and concise statement of the amount due and the basis upon which the debt arose*.]

[*If the Creditor is the assignee of a debt, particulars of the assignment must be stated, including the date upon which notice of assignment was served upon the Company.*]

HOW TO COMPLY WITH THIS STATUTORY DEMAND

1. If the Company wishes to avoid a winding up petition being presented, the amount due must be paid within twenty-one (21) days.

2. Alternatively, it is open to the Company to seek to negotiate a settlement with the Creditor, failing which the amount due must be paid within twenty-one (21) days.

3. Payment may be made by transferring funds to the Creditor's account at [state full details of the Creditor's bank account and all necessary wire transfer instructions].

4. [*Set out any alternative methods of payment acceptable to the Creditor*.]

CWR Form No. 2

Winding Up Petition (O.3, r.2)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. OF 20

IN THE MATTER OF the Companies Act
AND IN THE MATTER OF [*state name of company*]
[*on contributory's petition*]

[BETWEEN] [Petitioner]

[AND] [Respondent(s)]]

WINDING UP PETITION

To the Grand Court

The humble petition of [*state name and address of petitioner*] shows that: —

1. [*Set out particulars of the company's incorporation including the date of its incorporation, registration number, details of any name changes and its current registered office.*]
2. [*If the company is a foreign company, state the basis upon which it is alleged the Court has jurisdiction to make a winding up order in respect of it.*]
3. [*Set out a description of the company's business to the extent that this is known to the petitioner, including a statement about the countries in which it carries on its business.*]
4. [*Set out a concise statement of the grounds upon which the petitioner claims to be entitled to a winding up order.*]
5. [*State the full name and address of the qualified insolvency practitioner (and any foreign practitioner) whom the petitioner is nominating for appointment as official liquidator.*]

Your Petitioner(s) therefore humbly pray(s) that: —

(1) The Company be wound up in accordance with the Companies Act.
(2) [State name and address of official liquidator] be appointed as official liquidator of the Company.
(3) [*Any other orders and directions*].

Dated the day of 20 .

_____
[*Signature of Petitioner's Attorney*]

NOTE: This petition is intended to be served on the Company and [*state name(s) and address(es) of any other persons upon whom it is intended to serve the petition*].

This Petition was presented by [*name of Petitioner or the Petitioner's Attorney*] whose address for service is [*state address within the jurisdiction*] [*Attorney for the Petitioner*].

NOTICE OF HEARING

TAKE NOTICE THAT the hearing of this petition will take place at the Law Courts, George Town, Grand Cayman, on [*state the hearing date*] at 10.00am.

Any correspondence or communication with the Court relating to the hearing of this petition should be addressed to the Registrar of the Financial Services Division of the Grand Court at PO Box 495, Grand Cayman, KY1-1106, telephone 345 949 4296.

CWR FORM No. 2A

Petition for the Appointment of a Restructuring Officer (O.1A, r.2)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD OF 20[ ] ( )

IN THE MATTER OF the Companies Act
AND IN THE MATTER OF [*state name of company*]

PETITION FOR APPOINTMENT OF RESTRUCTURING OFFICER

To the Grand Court

The humble petition of [***state name of company***] ***("Company")*** shows that:

1. [***Set out particulars of the Company's incorporation including the date of its incorporation, registration number, details of any name changes and its current registered office***.]
2. [***If the Company is a foreign company, state the basis upon which it is alleged the Court has jurisdiction to appoint restructuring officers in respect of it.]***
3. [***Set out a description of the Company's business, including a statement about the countries in which it carries on its business.***]
4. [***State the grounds upon which the appointment of restructuring officers is sought.***]
5. [***State that the directors intend to formulate, or assist restructuring officers to formulate, a compromise or arrangement with its creditors (or class thereof).***]
6. [***State the full name and address of the qualified insolvency practitioner(s) (and any foreignpractitioner) whom the Company is nominating for appointment as restructuring officer.***]

Your petitioner therefore humbly pray(s) that:

(1) [***State name and address of restructuring officer(s)***] be appointed as restructuring officers of the Company.
(2) [***Set out any other orders and directions***.]

AND your petitioner will ever pray etc.

Dated the day of 20[ ]

.

_____
[***Signature of Company's Attorney***]

[[***If the Company carries on a regulated business***][**NOTE:** This petition is intended to be served on the Authority]].

This petition was presented by the Company whose address for service is [***state address within the jurisdiction***] and whose attorney of record in the Cayman Islands is [***name and address of attorney***].

NOTICE OF HEARING

TAKE NOTICE THAT the hearing of this petition will take place at the Law Courts, George Town, Grand Cayman, on [***state the hearing date***] at [***state hearing time***].

Any correspondence or communication with the Court relating to the hearing of this petition should be addressed to the Registrar of the Financial Services Division of the Grand Court at PO Box 495, Grand Cayman, KY1-1106, telephone 345 949 4296

CWR FORM No. 2B

Ex Parte Summons for Appointment of Interim Restructuring Officer (O.1A, r.4)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD OF 20[ ] ( )

IN THE MATTER OF SECTION 91C OF THE Companies Act
AND IN THE MATTER OF [*state name of company*]

***EX PARTE* SUMMONS FOR APPOINTMENT OF INTERIM RESTRUCTURING OFFICER**

LET ALL PARTIES CONCERNED attend before the Mr(s) Justice [state name of assigned Judge] in Chambers at the Law Courts, George Town, Grand Cayman on [state date] at [state precise time] upon an application by [name of the company] ("Company") pursuant to section 91C of the Companies Act for the following orders:

1. [***State name and address of interim restructuring officer(s)***] be appointed as interim restructuring officer(s) of the Company (**"Interim Restructuring Officer(s)"**) pending the hearing of the petition for the appointment of restructuring officers of the Company dated [***insert date***].

2. The Interim Restructuring Officer(s) is/are hereby authorised [***set out the scope of the restructuring officer's authority in numbered sub-paragraphs***].

3. The Interim Restructuring Officer(s) is/are directed to:
   3.1 [***state powers of, and directions to, the Interim Restructuring Officer(s).***]

4. The Company's directors are hereby authorised [***set out the scope of the powers, which the directors are authorised to continue to exercise***].

5. The remuneration and expenses of the Interim Restructuring Officer(s) shall be paid out of the assets of the Company in any event.

6. [***Set out details regarding the provision for the payment of liabilities incurred and falling due during the period in which the Interim Restructuring Officer is in office.***]

7. Such further or other directions as the Court sees fit.

Dated this day of 20[ ].

_____

[***Signature of Company's Attorney***]

TO: [The Registrar of the Financial Services Division]

TIME ESTIMATE: The estimated length of the hearing of this summons is [***state time***].

This summons was issued by [***state name, address and contact details of the attorneys acting on behalf of the Petitioner***].

CWR FORM No. 3

Advertisement of Winding Up Petition (O.3, r.6)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. OF 20

IN THE MATTER OF the Companies Act
AND IN THE MATTER OF [*state name of company*]

TAKE NOTICE that a petition for an order that [*state name of company*] whose registered office is situated at [*state address*] (the "Company") be put into liquidation and wound up in accordance with the provisions of the Companies Act has been presented to the Grand Court of the Cayman Islands.

The petition was presented by [*state full name, address and contact details of the creditor*]. Copies of the petition and supporting affidavits may be obtained free of charge from the petitioner's attorneys [*state address and contact details*].

The Petition seeks an order that [*state full name, address and contact details of the qualified insolvency practitioner(s) nominated for appointment as official liquidator(s)*] be appointed as official liquidators of the Company.

AND FURTHER TAKE NOTICE that the hearing of the petition will take place on [*state date*] at the Law Courts, George Town, Grand Cayman at 10.00 am. Any creditor or shareholder of the Company may be heard on the questions whether or not a winding up order should be made and, if a winding up order is made, who should be appointed as official liquidator(s) of the Company. Any creditor or shareholder who opposes the appointment of [*state name of Petitioner's nominee*] must nominate an alternative qualified insolvency practitioner(s) who consents to act and has sworn an affidavit complying with the requirements of the Companies Winding Up Rules, Order 3, rule 4.

CWR FORM No. 3A

Advertisement of Petition to Appoint Restructuring Officer (O.1A, r.1(3))

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD OF 20[ ] ( )

IN THE MATTER OF the Companies Act
AND IN THE MATTER OF [*state name of company*]

TAKE NOTICE that [***state name of company***] whose registered office is situated at [***state address***] (the **"Company"**) has presented a petition to the Grand Court of the Cayman Islands for an order that restructuring officers be appointed to the Company.

Copies of the petition and supporting affidavits may be obtained free of charge from the Company's attorneys [***state address and contact details***].

The petition seeks an order that [***state full name, address and contact details of the qualified insolvency practitioner(s) nominated for appointment as restructuring officer(s)***] be appointed as the restructuring officer(s) of the Company on the grounds that the Company is or is likely to become unable to pay its debts and intends to present a compromise or arrangement to its creditors.

AND FURTHER TAKE NOTICE that the hearing of the petition will take place on [***state date***] at the Law Courts, George Town, Grand Cayman at [***state hearing time***]. Any creditor or shareholder of the Company may be heard on the question of whether or not an order appointing restructuring officers should be made and, if such an order is made, who should be appointed as restructuring officers(s) of the Company. Any creditor or shareholder who opposes the appointment of [***state name of Company's nominee***] must nominate [an] alternative qualified insolvency practitioner(s) who consent[s] to act and [has/have] sworn an affidavit complying with the requirements of the Companies Winding Up Rules, Order 1A, rule 3(3)(b).

CWR FORM No. 4

Notice of Appearance (O.3, r.8)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. OF 20

IN THE MATTER OF the Companies Act
AND IN THE MATTER OF [*state name of company*]

NOTICE OF APPEARANCE

TAKE NOTICE that that [*state name and address*] intends to appear on the hearing of the winding up petition to [*support/oppose*] the making of a winding up order *[and/or]* [*support/oppose*] the appointment of [*state names*] as official liquidator of the Company.

AND FURTHER TAKE NOTICE that [*state name*] is a [*creditor to whom the Company owes $] [the registered holder of_____ shares of the Company*].

Dated this day of 20 .

_____
[Attorney's signature]

This Notice is served by [*state name, address and contact details of the attorneys acting on behalf of the creditor or shareholder*]

CWR FORM No. 4A

Notice of Appearance (O.1A, r.3)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD OF 20[ ] ( )

IN THE MATTER OF the Companies Act
AND IN THE MATTER OF [*state name of company*]

NOTICE OF APPEARANCE

TAKE NOTICE that [***state name of company***] intends to appear on the hearing of the petition to [support/oppose] the appointment of a restructuring officer to [***state company name***] **("Company")** [and/or] [support/oppose] the appointment of [*state names*] as restructuring officer(s) of the Company.

AND FURTHER TAKE NOTICE that [*state name*] is a [creditor to whom the Company owes $_____] [the registered holder of _____ shares of the Company].

Dated this day of 20[ ].

_____
[***Attorney's signature***]

This notice is served by [***state name, address and contact details of the attorneys acting on behalf of the creditor or shareholder***.]

CWR FORM No. 5

Summons for Directions (O.3, r.11)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO. OF 20

IN THE MATTER OF the Companies Act

AND IN THE MATTER OF [*state name of company*]

[BETWEEN] Petitioner

[AND] Respondent(s)

SUMMONS FOR DIRECTIONS

LET THE PARTIES attend before the Mr(s) Justice [*state name of assigned Judge*] in Chambers at the Law Courts, George Town, Grand Cayman on [*state date*] at [*state precise time*] upon an application by the Petitioner for the following orders:

1. [*set out in numbered paragraphs the precise relief sought by reference to the matters contained in CWR Order 3, Rule 12(1).*]

2. Such further or other directions as the Court sees fit.

Dated this day of 20 .

_____

[*Signature of Applicant's Attorney*]

TO: The Registrar of the Financial Services Division

AND TO:

1. the Company
2. [*list the names and addresses of all the shareholders upon whom it is intended to serve the Summons for Directions.]*

TIME ESTIMATE: The estimated length of the hearing of this summons is [*state time*].

This Summons for Directions was issued by [*state name, address and contact details of the attorneys acting on behalf of the petitioner*].

CWR FORM No. 6

Winding Up Order (O.3, r.16)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO. OF 20

The Honourable Mr(s) Justice [ ]
In Open Court
[date]

IN THE MATTER OF the Companies Act

AND IN THE MATTER OF [*state name of company*]

[*on contributory's petition*]

[*BETWEEN*] [Petitioner]

[*AND*] [Respondent(s)]

WINDING UP ORDER

UPON the application of [*state name of petitioner*] upon its petition dated [*state date*] for an order that [*state name of Company*] (the "Company") be wound up.

AND UPON hearing counsel for the petitioner [*and the Company and any other persons who were heard*] AND UPON reading [*set out details of all the relevant affidavits*]

IT IS ORDERED that: —

1. The Company be wound up in accordance with the Companies Act.

2. [*state name and address*] be appointed official liquidator of the Company.

3. [*if any further directions are made at the hearing of the petition, these directions may be set out in the winding up order or in a separate order for directions*].

4. The petitioner's costs shall be paid out of the assets of the Company as an expense of the liquidation, such costs to be taxed if not agreed with the official liquidator(s).
5. [*any other orders for costs*].

Dated the day of 20
Filed the day of 20

The Honourable Mr(s) Justice [*name of assigned Judge*]
JUDGE OF THE GRAND COURT

This Order was filed by [*state name, address and contact details of the attorneys acting on behalf of the petitioner*].

CWR FORM No. 7

Order for Appointment of Provisional Liquidator upon the application of a creditor or contributory (O.4, r.4)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO. OF 20__

The Honourable Mr(s) Justice [ ]
In [*Chambers*] [*Open Court*]

[date]

IN THE MATTER OF the Companies Act

AND IN THE MATTER OF [*state name of company*]

[*on contributory's petition*]

[*BETWEEN*] [Petitioner]

[*AND*] [Respondent(s)]

ORDER FOR APPOINTMENT OF PROVISIONAL LIQUIDATOR

UPON the application of [*state name of petitioner/applicant*] upon its Summons dated [state date] for an order that [*state name of provisional liquidator*] be appointed provisional liquidator of [*name of company*] (the "Company").

AND UPON hearing counsel for the [*petitioner/applicant*] [*and the Company and any other persons who were heard*]

AND UPON reading the petition.

AND UPON reading [*set out details of all the relevant affidavits*]

AND UPON the [petitioner/applicant] undertaking by its counsel to pay any damage suffered by the Company as a result of this order and/or the appointment of the provisional liquidator in the event that the winding up petition is ultimately withdrawn or dismissed.

IT IS ORDERED that: —

1. [*state name and address*] be appointed provisional liquidator of the Company ("the Provisional Liquidator").

2. The Provisional Liquidator is hereby authorised [*set out the scope of the provisional liquidator's authority in numbered sub-paragraphs*].

3. The Provisional Liquidator is directed [*set out any specific directions in numbered sub- paragraphs*].

4. The Company's directors are hereby authorised [*set out the scope of the powers, if any, which the directors are authorised to exercise*].

5. The winding up petition shall be advertised [state countries or newspapers in which advertisements are to be published] no later than [*state date*].

6. The petition shall be heard on [*state date*] at 10.00am.

Dated the day of 20

Filed the day of 20

_____

The Honourable Mr(s) Justice [*name of assigned Judge*]
JUDGE OF THE GRAND COURT

This Order was filed by [*state name, address and contact details of the attorneys acting on behalf of the petitioner/applicant*].

CWR FORM No. 8

Order for Appointment of Provisional Liquidator upon the application of the Company (O.4, r.7)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD OF 20[ ] ( )

IN THE MATTER OF the Companies Act
AND IN THE MATTER OF [*state name of company*]

ORDER FOR APPOINTMENT OF PROVISIONAL LIQUIDATOR

UPON hearing counsel for [***name of company***] (the **"Company"**) upon its Summons dated [state date] for an order that [***state name of provisional liquidator***] be appointed provisional liquidator of the Company

[AND UPON hearing counsel for [***any other persons who were heard***]

AND UPON reading the petition

AND UPON reading [***set out details of all the relevant affidavits***].

IT IS ORDERED that:

1. [***state name and address***] be appointed provisional liquidator(s) of the Company (the ***"Provisional Liquidator(s)"***).
2. The Provisional Liquidator(s) [is/are] hereby authorised [set out the scope of the provisional liquidator's authority in numbered sub-paragraphs].
3. The Provisional Liquidator(s) [is/are] directed ***[set out any specific directions in numbered sub-paragraphs***].
4. The Company's directors are hereby authorised [***set out the scope of the powers, if any, which the directors are authorised to exercise***].
5. [The winding up petition shall be advertised ***[state countries or newspapers in which advertisements are to be published***] no later than [***state date***].]

6. The remuneration and expenses of the Provisional Liquidator(s) shall be paid out of the assets of the Company in any event.

7. [The petition shall be heard on [***state date***] at 10.00am.]

Dated the day of 20[ ].

Filed the day of 20[ ].

_____

The Honourable Mr/s Justice [***name of assigned Judge***]
JUDGE OF THE GRAND COURT

This Order was filed by [***state name, address and contact details of the attorneys acting on behalf of the petitioner/applicant***]

CWR FORM No. 8A

Order for the Appointment of a Restructuring Officer (O.1A, r.6)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD OF 20[ ] ( )

IN THE MATTER OF the Companies Act

AND IN THE MATTER OF [*state name of company*]

ORDER FOR APPOINTMENT OF RESTRUCTURING OFFICER

UPON the application of [***name of company***] (the **"Company"**) upon its petition for an order that ***[state name of restructuring officer(s)***] (the **"Restructuring Officer(s)"**) be appointed Restructuring Officer(s) (the **"Petition"**).

AND UPON reading the Petition.

AND UPON reading [***set out details of all the relevant affidavits***]

IT IS ORDERED that:

1. [***state name and address***] be appointed Restructuring Officer(s) of the Company.

2. The Restructuring Officer(s) [is/are] hereby authorised [***set out the scope of the restructuring officer's authority in numbered sub-paragraphs***].

3. The Restructuring Officer(s) [is/are] directed to:
   - 3.1 [***prepare a report about the financial condition of the Company***];
   - 3.2 [***serve and/or publish the report about the financial condition of the Company***];
   - 3.3 [***enter into an international protocol with a foreign officeholder***];
   - 3.4 ***[prepare/advise upon the preparation of a scheme of arrangement or in respect of any other proposal in respect of the Company's indebtedness***];
   - 3.5 [***convene a meeting of the Company's creditors and/or members***]; and
   - 3.6 [***other specific directions***].

4. The Company's directors are hereby authorised [***set out the scope of the powers which the directors are authorised to continue to exercise***].

5. [That notwithstanding the presentation of the Petition:
   5.1 payments made into or out of the bank accounts of the Company in the ordinary course of business of the Company; and
   5.2 dispositions of the property of the Company made in the ordinary course of business for proper value,
   between the date of the presentation of the Petition and further order in the meantime shall not be voided by the provisions of section 99 of the Companies Act in the event of an order for the winding up of the Company being made, provided that [***name of relevant bank***] shall be under no obligation to verify for itself whether any transaction through the Company's bank accounts is in the ordinary course of business or that it represents market value for the relevant transaction.

   [***If seeking validation of a particular transaction in addition to or instead of a general order, clearly state the order sought***].

6. [***Provision for the payment of liabilities incurred and falling due during the period in which the Restructuring Officer(s) is/are in office.***].

7. The remuneration and expenses of the Restructuring Officer shall be paid out of the assets of the Company in any event.

8. A case management conference be listed for hearing on [***insert date***] for the purpose of the Court assessing the progress made by the Restructuring Officer(s) with respect to any compromise or arrangement.

Dated the day of 20[ ].

Filed the day of 20[ ].

_____

The Honourable Mr/s Justice [***name of assigned Judge***]
JUDGE OF THE GRAND COURT

This Order was filed by [***state name, address and contact details of the attorneys acting on***

CWR FORM No. 8B

Ex Parte Order for the Appointment of an Interim Restructuring Officer (O.1A, r.6)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD OF 20[ ] ( )

IN THE MATTER OF the Companies Act

AND IN THE MATTER OF [*state name of company*]

***EX PARTE* ORDER FOR APPOINTMENT OF INTERIM RESTRUCTURING OFFICER**

UPON the application of [***name of company***] (the **"Company"**) upon its petition for an order that ***[state name of restructuring officer(s)***] (the **"Restructuring Officer(s)"**) be appointed Restructuring Officer(s).

AND UPON the application of the Company by way of *ex parte* summons seeking the appointment of the Restructuring Officer(s) on an interim basis pending the hearing of the petition ("Interim Restructuring Officer(s)")

AND UPON reading [***set out details of all the relevant affidavits***]

IT IS ORDERED that:

1. [***state name and address***] be appointed Interim Restructuring Officer(s) of the Company.

2. The Interim Restructuring Officer(s) [is/are] hereby authorised [***set out the scope of the Interim Restructuring Officer(s) authority in numbered sub-paragraphs***].

3. The Interim Restructuring Officer(s) [is/are] directed to:
   3.1 [***insert specific directions***]

4. The Company's directors are hereby authorised [***set out the scope of the powers, which the directors are authorised to continue to exercise***].

5. [***Provision for the payment of liabilities incurred and falling due during the period in which the Interim Restructuring Officer(s) is/are in in office***].

6. The remuneration and expenses of the Interim Restructuring Officer(s) shall be paid out of the assets of the Company in any event.

7. The petition be listed for hearing on [***insert date***].

Dated the day of 20[ ].

Filed the day of 20[ ].

_____
The Honourable Mr/s Justice [***name of assigned Judge***]
JUDGE OF THE GRAND COURT

This Order was filed by [***state name, address and contact details of the attorneys acting on behalf of the Company***]

CWR FORM No. 9

Notice of Appointment of Official Liquidator (O. 5, r. 3)

THE COMPANIES ACT

NOTICE OF APPOINTMENT OF OFFICIAL LIQUIDATOR

[*Name of company*] (In liquidation)

TAKE NOTICE that by order of the Grand Court made on [*state date*] [*state name of company*], registration number [ ] whose registered office is situated at [*state address*], was ordered to be wound up in accordance with the Companies Act.

AND FURTHER TAKE NOTICE that [state name and contact details] has been appointed as official liquidator of the Company.

Dated this day of 20 .

_____

[*Signature of official liquidator*]

CWR FORM No. 10

Notice requiring submission of a statement of affairs (O. 6, r. 1)

THE COMPANIES ACT
NOTICE UNDER SECTION 101
[*Name of company*] (In liquidation)

To: [*State full name and address of deponent*]

You are hereby required to make a Statement of Affairs in respect of the above-named Company. Take notice that –

1. Your Statement of Affairs should be prepared in the form of the draft enclosed herewith and must address all the matters reflected in the draft.
2. Guidance notes are enclosed for your assistance.
3. The Official Liquidator has also served notice under Section 101 of the Companies Act upon the persons listed on page [2] of this Notice.
4. You will be given access to the Company's books and records at the offices of the Official Liquidator at [*state relevant address*] during the hours of 8.30am to 5.00pm on weekdays.
5. You may apply to the Official Liquidator for reimbursement of any expenses reasonably and properly incurred in complying with this Notice.
6. Your Statement of Affairs must be completed, exhibited to a verifying affidavit and delivered to the Official Liquidator on *[state date*] or such later date as may be agreed in writing with the Official Liquidator.

And further take notice that if you fail, without reasonable excuse, to comply with this Notice, you are liable to be prosecuted and fined up to CI$10,000.

Dated this day of 20 .

_____
[*Signature of Official Liquidator*]

[*Full name, address and contact details of Official Liquidator*]

LIST OF PERSONS ON WHOM NOTICE UNDER SECTION 101 HAVE BEEN SERVED
[*List the full names and addresses of all the other individuals and/or service providers upon whom notices have been served.]*

CWR FORM No. 11

Notice requiring a person to state whether that person concurs with a statement of affairs (O. 6, r. 1)

THE COMPANIES ACT

NOTICE UNDER SECTION 101

[*Name of company*] (In liquidation)

To: [*State full name and address of deponent*]

You are hereby required to state whether or not you concur with the Statement of Affairs prepared and signed by [*state name(s) of relevant person(s)*] on [*state date*], a copy of which is served herewith.

Take notice that –

1. You are required to state whether or not you agree that the Statement of Affairs constitutes a true and accurate reflection of the Company's financial position.

2. You are required to make all such enquiries as may be necessary or appropriate to enable you to make an informed decision.

3. Guidance notes are enclosed for your assistance.

4. The Official Liquidator has also served notice under Section 101 of the Companies Act upon the persons listed on page [2] of this Notice.

5. You will be given access to the Company's books and records at the offices of the Official Liquidator at [*state relevant address*] during the hours of 8.30am to 5.00pm on weekdays.

6. You may apply to the Official Liquidator for reimbursement of any expenses reasonably and properly incurred in complying with this Notice.

7. If you concur with the Statement of Affairs, you must swear a verifying affidavit stating that you concur and your affidavit must be delivered to the Official Liquidator on [*state date*] or such later date as may be agreed in writing with the Official Liquidator.

8. If you do not concur with the Statement of Affairs, your reasons for not doing so must be stated in an affidavit which must be delivered to the Official Liquidator on [*state date*] or such later date as may be agreed in writing with the Official Liquidator.

And further take notice that if you fail, without reasonable excuse, to comply with this Notice, you are liable to be prosecuted and fined up to CI$10,000.

Dated this day of 20 .

_____

[*Signature of Official Liquidator*]

[*Full name, address and contact details of Official Liquidator*]

LIST OF PERSONS ON WHOM NOTICE UNDER SECTION 101 HAVE BEEN SERVED

[*List the full names and addresses of all the other individuals and/or service providers upon whom notices have been served.]*

CWR FORM No. 12

Order for Examination (O.7, r.2)

IN THE GRAND COURT OF THE CAYMANISLANDS

FINANCIAL SERVICES DIVISION

In [Open Court][Chambers]
[*date of order*]
The Honourable Mr(s) Justice [ ]

FSD CAUSE NO: OF 20

IN THE MATTER OF the Companies Act

AND IN THE MATTER OF [*state name of company*]

AND BETWEEN:	[*State name of official liquidator*]	Applicant
AND:	[*State name of examinee*]	Respondent

ORDER FOR TO DELIVER UP DOCUMENTS AND/OR FOR EXAMINATION

UPON the application of the official liquidator pursuant to section 103(3) of the Companies Act by the official liquidator's summons dated [*state date*] for an order that [*state name of the examinee*] (the "Examinee") deliver up documents to the official liquidator and/or be examined by the official liquidator.

AND UPON reading [*set out details of all the relevant affidavits*]

AND UPON hearing counsel for the parties

[AND UPON counsel for the official liquidator undertaking on the official liquidator's behalf [*set out undertakings*]]

IT IS ORDERED that: —

1. The Examinee shall deliver up to the official liquidator all of the documents specified in Schedule One to this order on or before [*state date*].

2. For the purpose of the [*examination][Interrogatories*] referred to in this Order, on or before [*state date*] the official liquidator shall provide to the Examinee copies of all of the documents specified in Schedule Two to this Order.

   [*If the official liquidator seeks an order that the Examinee swear an affidavit in answer to written interrogatories,* [The official liquidator shall, on or before [*state date*] serve on the Examinee written interrogatories in substantially the same form as annexed to this Order (the "Interrogatories")].]

3. The Examinee shall —

   [attend at [state address in the Cayman Islands] on [state date] at [state time] (or at such other place in the Cayman Islands and on such other date and time as may be agreed with the official liquidator) to be examined orally and on oath by or on behalf of the official liquidator about the matters described in Schedule Three to this order.]

   [on or before [*state date*] swear, and serve on the official liquidator, an affidavit in answer to the Interrogatories]

[*and if an oral examination is ordered* -]

4. The examination may be adjourned from time to time. Each session of the examination shall last no more than four (4) hours and the examination shall not last longer than [state time] in total without a further order of the Court.

5. The Examinee shall be entitled to have the Examinee's attorney present at the examination, but such attorney shall not be entitled to participate in the examination by putting questions to the examinee unless permitted to do so by the official liquidator.

6. The examination shall be conducted in the form of questions and answers. The examination shall be recorded by a court reporter. The court reporter shall prepare a transcription of the examination and certify it as a complete and accurate transcription.

7. The court reporter shall record the names and addresses of all the persons present and the times(s) at which the examination commenced and finished.

8. If the official liquidator requires a document referred to during the examination to be exhibited to the transcript then it shall be exhibited to the transcript.

[*and whether interrogatories or an examination is ordered* —]

9. The Examinee shall answer all the questions put to the examinee in the [*examination*] [*Interrogatories*] (subject to any claim of self-incrimination or legal professional privilege) which are within the Examinee's knowledge or means of knowledge regarding any matter within the scope of this Order. If required to do so by the official liquidator, the Examinee shall provide the names and addresses of any person who reasonably might be expected to have knowledge of any question put to the Examinee.

10. If the Examinee objects to answering any question put to the examinee, the examinee shall state the grounds of the examinee's objection. If the Examinee has objected to answering any question put to the examinee then the official liquidator may apply to the Court for an order that the Examinee answer the question. Any such application shall be made on notice to the Examinee on not less than [*number*] of days' notice.

11. [*further or other directions*]

Dated the day of 20

Filed the day of 20

_____

The Honourable Mr(s) Justice [*name of assigned Judge*]
JUDGE OF THE GRAND COURT

CWR FORM No. 13

Official Liquidator's certificate (Solvency/Insolvency) (O.8, r.1)

THE COMPANIES ACT

OFFICIAL LIQUIDATOR'S CERTIFICATE

[*Name of company*] (In liquidation)

Grand Court FSD Cause No: of 20 __

TAKE NOTICE that the Official Liquidator hereby certifies that the Official Liquidator has determined that the above- named Company should be treated as [*solvent, insolvent or of doubtful solvency, as the case may be*], for the purposes of section 110(4) of the Companies Act and CWR Orders 8 and 9.

AND FURTHER TAKE NOTICE that the Official Liquidator may change the Official Liquidator's determination from time to time in the light of changes of relevant circumstances and/or the Official Liquidator's assessment of the Company's financial position.

Dated this day of 20 .

_____

[*Signature of Official Liquidator*]

[*Full name, address and contact details of Official Liquidator*]

CWR FORM No. 14

Official Liquidator's Revised Certificate (Solvency/Insolvency) (O.8, r.1)

THE COMPANIES ACT

OFFICIAL LIQUIDATOR'S REVISED CERTIFICATE

[*Name of company*] (In liquidation)

Grand Court FSD Cause No: of 20

BY a certificate dated [*insert date*] and filed on [*insert date*] the Official Liquidator certified that the Official Liquidator had determined that the above-named Company should be treated as [*solvent, insolvent or of doubtful solvency, as the case may be*], for the purposes of section 110(4) of the Companies Act and CWR Orders 8 and 9.

TAKE NOTICE that the Official Liquidator has changed the Official Liquidator's determination and hereby certifies that the Official Liquidator has determined that the above-named Company should be treated as [*solvent, insolvent or of doubtful solvency, as the case may be*], for the purposes of section 110(4) of the Companies Act and CWR Orders 8 and 9 with effect from the date of this Notice.

AND FURTHER TAKE NOTICE that the Official Liquidator may change the Official Liquidator's determination again in the light of further changes of relevant circumstances and/or the Official Liquidator's assessment of the Company's financial position.

Dated this day of 20 .

_____

[*Signature of Official Liquidator*]

[*Full name, address and contact details of Official Liquidator*]

CWR FORM No. 15

Official Liquidator's Certificate (Composition of Liquidation Committee) (O.9, r.1)

THE COMPANIES ACT

OFFICIAL LIQUIDATOR'S CERTIFICATE

COMPOSITION OF LIQUIDATION COMMITTEE

[*Name of company*] (In liquidation)

Grand Court FSD Cause No: of 20

The Official Liquidator hereby certifies that a liquidation committee has been constituted on the basis that the Official Liquidator has determined the Company to be [*solvent, insolvent or of doubtful solvency, as the case may be*] for the purposes of section 110(4) of the Companies Act and CWR Order 9 and that the following [creditors or and contributories, as the case may be] have been appointed.

1. [*State name of individual*], representing [*state name of creditor or contributory as the case may be] of [state address and contact details*].

2. *[List each of the members*]

Dated this day of 20 .

_____

[*Signature of Official Liquidator*]
[*Full name, address and contact details of Official Liquidator*]

CWR FORM No. 16

Summons (Sanction Application) (O.11, r.1)

IN THE GRAND COURT O FTHE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO: OF 20

IN THE MATTER OF the Companies Act

AND IN THE MATTER OF [*state name of company*]

SUMMONS

LET all parties concerned attend before Mr(s) Justice [name of assigned Judge] in Chambers at the Law Courts, George Town, Grand Cayman on [state date] at [state precise time] upon an application by the official liquidator [or creditor/contributory as the case may be] for the following orders and directions: —

1. [set out in numbered paragraphs the relief sought].

2. [ ].

Dated this day of 20 .

_____

[*Signature of Applicant's Attorney*]

TO: The Registrar of the Financial Services Division

AND TO: [*state the names and addresses of each member of the liquidation committee*]

[*alternatively state the name and address of counsel to the liquidation committee, if counsel has been appointed with power to act generally*]

TIME ESTIMATE: The estimated length of the hearing of this summons is [*state time*].

This Summons was issued by [*state name, address and contact details of the attorneys acting on behalf of the official liquidator*].

CWR FORM No. 16A

Remuneration Approval Summons (O.1A, r.10(3))

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD OF 20[ ] ( )

IN THE MATTER OF THE Companies Act

AND IN THE MATTER OF [state name of company]

SUMMONS

LET THE parties attend before the [***state name of assigned Judge***] in Chambers at the Law Courts, George Town, Grand Cayman on [***state date***] at [***state precise time***] upon an application by [***identify restructuring officer(s)***], the restructuring officer(s) (the **"Restructuring Officer(s)"**) of [***identify company***] (the **"Company"**) for the following orders:

1. That the Restructuring Officer['s][s'] remuneration for the period from [***insert period commencement date***] to [***insert period completion date***] in the amount of [***insert amount***] be approved and paid out of the assets of the Company.

2. The Restructuring Officer['s][s'] costs arising out of, and incidental to, this summons shall be paid out of the assets of the Company.

3. Such further or other directions as the Court sees fit

Dated this day of 20[ ]

_____

[***Signature of Restructuring Officer***['s][s'] ***Attorney***]

TO: The Registrar of the Financial Services Division

AND TO: The Company's creditors and contributories

[***if the Company carries on a regulated business***] The Authority

TIME ESTIMATE: The estimated length of the hearing of this summons is [***state time***].

This summons was issued by [***state name, address and contact details of the attorneys acting on behalf of the Restructuring Officer(s)]***

CWR FORM No. 16B

Summons for the Variation or Discharge of Order Appointing Restructuring Officers (O.1A, r.9(1))

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD OF 20[ ] ( )

IN THE MATTER OF THE Companies Act

AND IN THE MATTER OF [state name of company]

SUMMONS

LET THE parties attend before the [***state name of assigned Judge***] in Chambers at the Law Courts, George Town, Grand Cayman on [***state date***] at [***state precise time***] upon an application by[***identify applicant***], [***identify nature of applicant's standing pursuant to s. 91E(1) of the Act***] of [***identify company***] (the "**Company**") for the following orders:

1. That the Order dated [***insert date***] appointing [***identify Restructuring Officer(s)***] as Restructuring Officer(s) of the Company **("Appointment Order")** be [***discharged or varied and, if varied, particularise the variations sought to the Appointment Order].***

2. [The Restructuring Officer['s][s'] costs, expenses and remuneration between the date of the Appointment Order and this Order shall be paid out of the assets of the Company.]

3. [The Company's liabilities incurred between the date of the Appointment Order and this order shall be paid out of the assets of the Company.]

4. Such further or other directions as the Court sees fit

Dated this day of 20[ ].

_____

[***Signature of Applicant's Attorney***]

[TO: The Registrar of the Financial Services Division

AND TO: [***if the applicant is a creditor or contributory of the Company***]

The Company

The Restructuring Officer

[***if the applicant is the Restructuring Officer(s)***]

The Company's creditors and contributories

[***if the applicant is the Company***]

The Company's creditors and contributories

The Restructuring Officer

[***if the Company carries on a regulated business***] The Authority]

TIME ESTIMATE: The estimated length of the hearing of this summons is [state time].

This summons was issued by [state name, address and contact details of the attorneys acting on behalf of the Applicant].

CWR FORM No. 16C

Removal and Replacement Summons (O.1A, r.13(1))

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD OF 20[ ] ( )

IN THE MATTER OF THE Companies Act

AND IN THE MATTER OF [state name of company]

SUMMONS

LET THE parties attend before the [***state name of assigned Judge***] in Chambers at the Law Courts, George Town, Grand Cayman on [***state date***] at [***state precise time***] upon an application by[***identify applicant***], [***identify nature of applicant's standing pursuant to s. 91F(1) of the Law***] of [***identify company***] (the **"Company"**) for the following orders:

1. That [*identify current Restructuring Officer(s)*], the current Restructuring Officer(s) of the Company ("**Previous Restructuring Officer(s)**") be removed as Restructuring Officer(s) and [*identify new Restructuring Officer(s)*] be appointed as the replacement Restructuring Officer(s) of the Company ("**Replacement Restructuring Officer(s)**").

2. That, save for paragraph 1 of the Order dated [*insert date*] appointing the Previous Restructuring Officer(s) ("**Appointment Order**"), the Appointment Order shall apply mutatis mutandis to the Replacement Restructuring Officer(s).

3. The Previous Restructuring Officer['s][s'] costs, expenses and remuneration between the date of their appointment and this Order shall be paid out of the assets of the Company.

4. [The Company's liabilities incurred between the date of the appointment of the Current Restructuring Officer(s) and this Order shall be paid out of the assets of the Company.]

5. Such further or other directions as the Court sees fit

Dated this day of 20[ ].

_____

[***Signature of Applicant's Attorney***]

[TO: The Registrar of the Financial Services Division

AND TO: [***if the applicant is a creditor or contributory of the Company***]

The Company

[***if the applicant is the Company***]

The Restructuring Officer

[***if the applicant is the Restructuring Officer(s)***]

[***if the Company carries on a regulated business***] The Authority]

TIME ESTIMATE: The estimated length of the hearing of this summons is [***state time***].

This summons was issued by [***state name, address and contact details of the attorneys acting on behalf of the Applicant***].

CWR FORM No. 16D

Summons for the Variation or Discharge of Order Appointing Provisional Liquidators (O.4, r.9(3))

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD OF 20[ ] ( )

IN THE MATTER OF THE Companies Act

AND IN THE MATTER OF [state name of company]

SUMMONS

LET THE parties attend before the [***state name of assigned Judge***] in Chambers at the Law Courts, George Town, Grand Cayman on [***state date***] at [***state precise time***] upon an application by [***identify applicant***], [***identify nature of applicant's standing in accordance with CWR O.4, r.9(1)(]***] of [***identify company***] (the **"Company"**) for the following orders:

1. That the Order dated [***insert date***] appointing [***identify provisional liquidator(s)***] as provisional liquidator(s) of the Company **("Appointment Order"**) be [***discharged or varied and, if varied, particularise the variations sought to the Appointment Order***].

2. [costs].

3. Such further or other directions as the Court sees fit

Dated this day of 20[ ].

_____

[***Signature of Applicant's Attorney***]

TO: The Registrar of the Financial Services Division

AND TO: [***if the applicant is a creditor or contributory of the Company***]

The Company

The Provisional Liquidator(s)

[if the applicant is the Company]

The Company's creditors and contributories

The Provisional Liquidator(s)

[***if the Company carries on a regulated business***] The Authority

TIME ESTIMATE: The estimated length of the hearing of this summons is [***state time***].

This summons was issued by [***state name, address and contact details of the attorneys acting on behalf of the Applicant***]

CWR FORM No. 17

Notice of Rectification of Register of Members (O.12, r.3)

THE COMPANIES ACT

NOTICE OF RECTIFICATION OF REGISTER OF MEMBERS

[*Name of company*] (In liquidation)

Grand Court FSD Cause No: of 20__

TAKE NOTICE that in the exercise of the powers contained in Section 112 of the Companies Act and CWR Order 12, the Official Liquidator of the above-named Company has rectified its register of members.

AND FURTHER TAKE NOTICE that the grounds upon which the Official Liquidator exercised the Official Liquidator's powers, the methodology adopted by the Official Liquidator for rectifying the register and an explanation of the way in which the rectified register differs from that created by authority of the directors is contained in the Report served herewith. Copies of the original register and the rectified register are contained in the Appendix to the Report.

AND FURTHER TAKE NOTICE that any member or former member of the above-named Company who is dissatisfied with the Official Liquidator's decision to exercise the Official Liquidator's powers to rectify the register and/or is dissatisfied in the manner in which the register has been rectified has a right of appeal to the Grand Court. An appeal must be made by summons in CWR Form No 18 which must be served upon the Official Liquidator within ninety (90) days from the date from which this Notice is filed.

Dated this day of 20 .

_____

[*Signature of Official Liquidator*]

[*Full name, address and contact details of Official Liquidator*]

CWR FORM No. 18

Summons (Appeal against Rectification of the Register of Members) (O.12, r.4)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO: OF 20

IN THE MATTER OF the Companies Act

AND IN THE MATTER OF [*state name of company*]

SUMMONS

LET the official liquidator attend before Mr(s) Justice [name of assigned Judge] in Chambers at the Law Courts, George Town, Grand Cayman on [state date] at [state precise time] upon an application by [state name and address of appellant] for an order that: —

1. The official liquidator's decision to exercise their powers to rectify the register of members be set aside on the grounds that [*summarise the grounds upon which it is said that the Official Liquidator was not entitled to exercise the Official Liquidator's powers*].

Alternatively

2. The Official Liquidator's rectification of the Company's register of members (as set out in the Official Liquidator's notice of rectification dated [*state date*]) be varied on the ground that the official liquidator exercised the Official Liquidator's powers in a manner in which no liquidator could reasonably have done in all the circumstances.

3. The grounds upon which the appellant relies are [*the grounds may be summarised in the summons or set out in the expert report served with the summons*].

4. The official liquidator ought to have rectified the Company's register of members in the following manner: —

   [*The alternative rectification contended for by the appellant may be set out in the summons or in an expert report served with the summons*]

And

5. The Court give directions as to the service of this summons.

6. [*an order that the appellant's costs of this summons be paid out of the assets of the company, such costs to be taxed if not agreed with the official liquidator*].

Dated this day of 20 .

_____
[*Signature of Appellant's Attorney*]

TO: The Registrar of the Financial Services Division

AND TO: The official liquidator

TIME ESTIMATE: The estimated length of the hearing of this summons is [*state time*].

This Summons was issued by [*state name, address and contact details of the attorneys acting on behalf of the appellant*].

CWR FORM No. 19

Notice of Voluntary Winding Up (O.13, r.2)

THE COMPANIES ACT

NOTICE OF VOLUNTARY WINDING UP

[*Name of company*] (In voluntary liquidation)

Registration No_____

To: The Registrar of Companies

TAKE NOTICE that the above-named Company was put into liquidation on *[state commencement date*] by a special resolution passed at an extraordinary meeting of the Company held on [*state date*] [*or as the case may be*].

AND FURTHER TAKE NOTICE that [*state name*] of [*state address and contact details*] has been appointed voluntary liquidator of the Company.

Dated this day of 20 .

_____

[*Signature of Voluntary Liquidator or Director as the case may be*]

[*Full name, address and contact details of any person other than the Voluntary Liquidator who files this form*]

CWR FORM No. 20

Voluntary Liquidator's Consent to Act (O.13, r.2)

THE COMPANIES ACT

VOLUNTARY LIQUIDATOR'S CONSENT TO ACT

[*Name of company*] (In voluntary liquidation)

Registration No_____

To: The Registrar of Companies

TAKE NOTICE that I/we, [*state name(s)*] of [*in the event that the person(s) named accepts appointment in the ordinary course of their business as a corporate manager or insolvency practitioner, state the name of that named person(s)'s firm*] of [*state address and contact details*] hereby consent to act as Voluntary Liquidator of the above-named Company with effect from the commencement of the liquidation [*or, if the appointment is made following the resignation, death or removal of the previous voluntary liquidator, the date upon which the appointment takes effect*].

Dated this day of 20 .

_____

[*Signature of Voluntary Liquidator*]

CWR FORM No. 21

Declaration of Solvency (O.14, r.1)

THE COMPANIES ACT

DECLARATION OF SOLVENCY

[*Name of company*] (In voluntary liquidation)

Registration No_____

I/we, [*state the name or names of the directors*], being a director of the Company do solemnly and sincerely declare that I/we have made a full inquiry into the affairs of the Company and that, having done so, we believe that the Company will be able to pay its debts in full, together with interest at the prescribed rate within a period of twelve (12) months from the commencement of the winding up [or state a shorter period].

1._____
[*Signature of Director*]
[*Full Name and Address of Director*] [*Date*]

2._____
[*Signature of Director*]
[*Full Name and Address of Director*] [*Date*]

3 etc.
[*The Declaration of Solvency must be signed by all the directors*]

A person who knowingly makes a declaration without having reasonable grounds for the opinion that the company will be able to pay its debts in full, together with interest at the prescribed rate, within the period specified commits an offence and is liable on summary conviction to a fine of ten thousand dollars and to imprisonment for two years.

CWR FORM No. 22

Advertisement (Application for Supervision Order) (O.15, r.5)

THE COMPANIES ACT

[*Name of company*] (In voluntary liquidation) (the "Company")

Grand Court FSD Cause No: OF 20

TAKE NOTICE that: —

1. The above-named company was put in to voluntary liquidation on *[state commencement date*] and [*state the name, address and contact details*] was appointed as voluntary liquidator of the Company (the "Voluntary Liquidator").

2. A petition has been presented to the Grand Court of the Cayman Islands, for an order that the liquidation continue under the supervision of the Grand Court and that [*the Voluntary Liquidator*] [*alternatively, state the name address and contact details of the qualified insolvency practitioner nominated for appointment*] be appointed as official liquidator of the Company.

3. The hearing of the petition will take place at the Law Courts, George Town, Grand Cayman on [*state date*] at [*state time*].

4. Any creditor or shareholder of the Company is entitled to appear at the hearing of the petition for the purpose of being heard upon the question of who should be appointed as official liquidator of the Company provided that that creditor or shareholder gives at least three (3) days' notice of that creditor's or shareholder's intention to do so to the Voluntary Liquidator. Any creditor or shareholder who opposes the appointment of [*state name of the petitioner's nominee*] must nominate an alternative qualified insolvency practitioner who consents to act and has sworn an affidavit complying with the requirements of the Companies Winding Up Rules, Order 3, rule 4.

Dated this day of 20 .

_____

[*Signature of Voluntary Liquidator*]

CWR FORM No. 23

Supervision Order (O.15, r.8)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO: OF 20__

IN THE MATTER OF the Companies Act

AND IN THE MATTER OF [*state name of company*]

The Honourable Mr(s) Justice [ ]

In [*Chambers*][*Open Court*]
[date]

SUPERVISION ORDER

UPON the application of [*state name and address of voluntary liquidator*] (the "Voluntary Liquidator") by the Voluntary Liquidator's petition for an order that the liquidation of [*state name of Company*] (the "Company") continue under the supervision of the Court.

AND UPON [*hearing counsel for the Voluntary Liquidator* [*and any persons who were heard*]][*the Court being satisfied that the application may be determined on the papers without an oral hearing*]

AND UPON reading the verifying affidavit sworn by the Voluntary Liquidator on [*state date*] [*and* [*set out details of all other relevant affidavits*]].

AND UPON the Court being satisfied that the Voluntary Liquidator is a qualified insolvency practitioner [*or, alternatively, upon reading the affidavit of the qualified insolvency practitioner nominated for appointment in place of the voluntary liquidator*].

IT IS ORDERED that: —

1. The liquidation of the Company be continued under the supervision of the Court.

2. [*state name and address*] be appointed official liquidator of the Company.

3. [*if any further directions are made at the hearing of the petition, these directions may be set out in the supervision order or in a separate order for directions*].

4. The Voluntary Liquidator's costs of this petition shall be paid out of the assets of the Company as an expense of the liquidation, such costs to be taxed if not agreed with the official liquidator.

Dated the day of 20

Filed the day of 20

_____

The Honourable Mr(s) Justice [*name of assigned Judge*]
JUDGE OF THE GRAND COURT

This Order was filed by [*state name, address and contact details of the attorneys acting on behalf of the Voluntary Liquidator*].

CWR FORM No. 24

Proof of Debt (standard form) (O.16, r.2)

THE COMPANIES ACT

PROOF OF DEBT

[*Name of company*] (In liquidation)

Grand Court FSD Cause No: of 20__

1	Creditor's Name	
2	Creditor's Address	
3	Amount of claim	
	Principal	
	Interest (if any)	
	Total	
4	Summarise the basis upon which the claim arises	
5	List of supporting documentation (copies of which must be attached)	
6	Summarise basis for interest claim	
7	Interest calculation	
8	Particulars of any security held including a list of the relevant documentation	
9	Value of the security and date of valuation	

Dated this day of 20

.

_____

[*Signature of Creditor*]

[*State the name of the person signing the proof of debt, the capacity in which that person is authorised to sign on behalf of the creditor and that person's contact details.]*

CWR FORM No. 25

Notice of Admission of Proof of Debt (O.16, r.6)

THE COMPANIES ACT

NOTICE OF ADMISSION OF PROOF OF DEBT

[*Name of company*] (In liquidation)

Grand Court FSD Cause No: of 20

TO: [*state Creditor's name and address*]

TAKE NOTICE that the Official Liquidator has adjudicated upon your proof of debt dated [*state date*] [*and if the proof has been amended state the date of the amended proof*] and hereby admits your claim for the full amount of [*state amount*].

Dated this day of 20___.

_____

[*Signature of Official Liquidator*]

[*State Official Liquidator's name, address and contact details*]

CWR FORM No. 26

Notice of Rejection of Proof of Debt (O.16, r.6)

THE COMPANIES ACT

NOTICE OF REJECTION OF PROOF OF DEBT

[*Name of company*] (In liquidation)

Grand Court FSD Cause No: of 20___

TO: [*state Creditor's name and address*]

TAKE NOTICE that the Official Liquidator has adjudicated upon your proof of debt dated [*state date*] [*and if the proof has been amended state the date of the amended proof*] and hereby rejects your claim in full [*or state the extent to which it is admitted and the state the extent to which it is rejected*].

AND FURTHER TAKE NOTICE that your claim was rejected [*or partially rejected as the case may be*] for the following reasons [which may be set out in this form or attached in a separate document].

AND FURTHER TAKE NOTICE that you have the right to appeal to a Judge of the Grand Court for an order that the Official Liquidator's decision be reversed or varied. Any appeal must be made by summons in CWR Form No 31 which must be served upon the Official Liquidator no later than twenty-one (21) days after receipt of this Notice.

Dated this day of 20___.

_____

[*Signature of Official Liquidator*]

[*State Official Liquidator's name, address and contact details*]

CWR FORM No. 27

Notice of Admission (Bank deposit claims) (O.16, r.7)

THE COMPANIES ACT

NOTICE OF ADMISSION OF DEPOSIT CLAIMS

[*Name of bank*] (In liquidation) (the "Bank")

Grand Court FSD Cause No: of 20

TO: [*state Depositor's name and address*]
Account Number: [*state full particulars of all bank account numbers*]

TAKE NOTICE that the amount of your deposit and interest accrued due as at [*state date*] recorded in the Bank's books and records is [*state amount*] and that the Official Liquidator has admitted you to proof in this amount.

[*If the amount for which the Depositor has admitted to proof is a net amount after having set off the sum due on a loan account, particulars of the amount of the loan must be set out in this Notice.*]

AND FURTHER TAKE NOTICE that if you consider that you should have been admitted to proof for an amount different from that stated in this Notice, you must contact the Official Liquidator immediately.

Dated this day of 20___.

_____
[*Signature of Official Liquidator*]

[*State Official Liquidator's name, address and contact details*]

CWR FORM No. 28

Official Liquidator's Certificate (Currency of Liquidation (O.16, r.13)

THE COMPANIES ACT

OFFICIAL LIQUIDATOR'S CERTIFICATE (CURRENCY OF THE LIQUIDATION)

[*Name of Company*] (In liquidation)

Grand Court FSD Cause No: of 20

TO: The Creditors of the Company

TAKE NOTICE that the Official Liquidator has determined in accordance with Section 150 of the Companies Act and

CWR Order 16, rule 13 that the currency of the liquidation of the above-named Company shall be [*state currency*].

Dated this day of 20 .

_____

[*Signature of Official Liquidator*]
[*State Official Liquidator's name, address and contact details*]

CWR FORM No. 29

Notice (Contingent claims) (O.16, r.16)

THE COMPANIES ACT

NOTICE (CONTINGENT CLAMS)

[*Name of company*] (In liquidation)

Grand Court FSD Cause No: of 20

TO: [*state Creditor's name and address*]

TAKE NOTICE that the Official Liquidator has adjudicated upon your proof of debt dated [*state date*] [*and if the proof has been amended state the date of the amended proof*] and put an estimate of [*state amount*] upon your contingent claim. The basis upon which the Official Liquidator made this estimate is as follows: - [*summarise the Official Liquidator's analysis in this form or in a separate document served with it*].

AND FURTHER TAKE NOTICE that your claim has accordingly been admitted to proof in the amount of [*state amount of Official Liquidator's estimate*].

AND FURTHER TAKE NOTICE that

1. You have the right to submit an amended proof of debt having regard to any material change of circumstances occurring after the date of your original proof of debt.

2. The Official Liquidator is also entitled to vary the Official Liquidator’s estimate of the value of your contingent claim in the light of any material change of circumstances occurring after the date of this Notice.

3. You have the right to appeal to a Judge of the Grand Court for an order that the Official Liquidator's decision be reversed or varied. Any appeal must be made by summons in CWR Form No 31 [which must be served upon the Official Liquidator no later than twenty-one (21) days after receipt of this Notice].
4. The Official Liquidator hereby extends your time for appealing against the Official Liquidator’s decision until [*state date*].

Dated this day of 20 .

[*Signature of Official Liquidator*]
[*State Official Liquidator's name, address and contact details*]

CWR FORM No. 30

Summons (Appeal against rejection of proof of debt) (O.16, r.18)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO: OF 20

IN THE MATTER OF the Companies Act

AND IN THE MATTER OF [*state name of company*]

SUMMONS

LET THE official liquidator attend before the Mr(s) Justice [*state name of assigned Judge*] in Chambers at the Law Courts, George Town, Grand Cayman on [*state date*] at [*state precise time*] upon an application by [identify appellant] (the "Appellant") for the following orders:

1. The rejection of the Appellant's proof of debt by notice dated [*insert date*] be set aside.

2. The Appellant's claim be admitted to proof in the sum of [*insert amount*].

3. An order that the Appellant's cost of this appeal be paid out of the assets of the Company as an expense of the liquidation, such costs to be taxed if not agreed with the official liquidator.

Dated this day of 20 .

_____

[*Signature of Appellant's Attorney*]

TO: The Registrar of the Financial Services Division

AND TO: The official liquidator

TIME ESTIMATE: The estimated length of the hearing of this summons is [*state time*].
This Summons was issued by [*state name, address and contact details of the attorneys acting on behalf of the appellant*].

CWR FORM No. 31

Summons (Application to expunge a proof of debt) (O.16, r.21)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO: OF 20

IN THE MATTER OF the Companies Act

AND IN THE MATTER OF [*state name of company*]

BETWEEN [*Official Liquidator/dissatisfied creditor/contributory*] Applicant

AND [*name of creditor*] Respondent

SUMMONS

LET [*name of respondent*] of [*state the address of the Respondent*] (the "Respondent") attend before the Mr(s) Justice [*state name of assigned Judge*] in Chambers at the Law Courts, George Town, Grand Cayman on [*state date*] at [*state precise time*] upon an application by [*identify either the official liquidator or a dissatisfied creditor/contributory]* for the following orders:

1. [Leave to serve this Summons on the Respondent out of the jurisdiction pursuant to GCR O. 11, r. 9.]
2. The admission of the Respondent's proof of debt by notice dated [insert date] be set aside.
3. The Respondent's claim be rejected [in whole or in part].
4. [An order for costs]

Dated this day of 20 .

_____

[*Signature of Official Liquidator's Attorney or Applicant's Attorney*]

TO: The Registrar of the Financial Services Division

AND TO: 1. [*name and address of the Respondent*]
2. [*the official liquidator, if the application is made a creditor or contributory*]

TIME ESTIMATE: The estimated length of the hearing of this summons is [*state time*].

This Summons was issued by *[state name, address and contact details of the attorneys acting on behalf of the official liquidator/applicant*].

CWR FORM No. 32

Notice of Intention to Declare Interim Dividend (O.18, r.6)

THE COMPANIES ACT

NOTICE OF INTENTION TO DECLARE INTERIM DIVIDEND)

[*Name of Company*] (In liquidation) (the "Company")

Grand Court FSD Cause No: of 20

TO: The Creditors of the Company

TAKE NOTICE that the Official Liquidator intends to declare an interim dividend.

Any Creditor wishing to participate in the interim dividend must lodge that Creditor's proof of debt with the Official Liquidator no later than [state date], failing which you will be excluded from the interim distribution but you will not be excluded from any subsequent distribution or the final distribution.

Dated this day of 20 .

_____

[*Signature of Official Liquidator*]
[*State Official Liquidator's name, address and contact details*]

CWR FORM No. 33

Notice of Intention to Declare Final Dividend (O.18, r.7)

THE COMPANIES ACT

NOTICE OF INTENTION TO DECLARE FINAL DIVIDEND)

[*Name of Company*] (In liquidation) (the "Company")

Grand Court FSD Cause No: of 20

TO: The Creditors of the Company

TAKE NOTICE that the Official Liquidator intends to declare a final dividend.

Any Creditor who has not already lodged that Creditor's proof of debt with the Official Liquidator must do so no later than [*state date*]. The Official Liquidator is not obliged to adjudicate upon any proof of debt received after this date with the result that your failure to lodge a proof of debt by the final date for proofing may result in you being excluded from the final distribution.

Dated this day of 20 .

_____

[*Signature of Official Liquidator*]
[*State Official Liquidator's name, address and contact details*]

CWR FORM No. 34

Notice of Final Dividend (O.18, r.7)

THE COMPANIES ACT

NOTICE OF FINAL DIVIDEND

[*Name of Company*] (In liquidation) (the "Company")

Grand Court FSD Cause No: of 20

TO: The Creditors of the Company

TAKE NOTICE that the Official Liquidator has declared a final dividend of [*state amount*] [*cents in the dollar*][*or otherwise according to currency of the liquidation*] calculated as follows –

Total amount of claims admitted to proof	$
Total Assets realised	$
Provisions	$
Expenses of the liquidation	$
Amount of interim distributions	$
Amount of final distribution	$

AND TAKE NOTICE that –

Amount for which you have been admitted to proof	$
Amount of interim distributions paid	$
Amount of final distribution	$

Dated this day of 20 .

_____

[*Signature of Official Liquidator*]

[*State Official Liquidator's name, address and contact details*]

CWR FORM No. 35

Notice of Call (O.19, r.2)

THE COMPANIES ACT

NOTICE OF CALL

[*Name of company*] (In liquidation) (the "Company")

Grand Court FSD Cause No: of 20

TO: [*state contributory's name and address*]

TAKE NOTICE that the Court by Order made on [state date] sanctioned a call of [state amount in cents/dollars or otherwise in the currency of the liquidation] per share on each [identify class of shares] share in the Company.

The total amount due from you in respect of the [*state number*] shares registered in your name is [*state total amount in dollars or other currency of the liquidation*]. You are required to pay this amount to the Official Liquidator forthwith. This notice of call takes effect in the same manner as a judgment or order of the Court and if you fail to pay, the Official Liquidator may levy execution against you.

AND FURTHER TAKE NOTICE that you have the right to appeal to a Judge of the Grand Court for an order that the Official Liquidator's decision that you are a contributory be reversed or that the amount of the call be varied. Any appeal must be made by summons which must be served upon the Official Liquidator no later than twenty-one (21) days after receipt of this Notice. The full amount of the call stated in this notice must be paid into Court within seven (7) days after service of your summons.

Dated this day of 20 .

_____

[*Signature of Official Liquidator*]
[*State Official Liquidator's name, address and contact details*]

CWR FORM No. 36

Order for Dissolution (O.21, r.2)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO: OF 20

AND IN THE MATTER OF [*state name of company*]

The Honourable Mr(s) Justice [ ]
In [*Chambers*][*Open Court*]
[date]

ORDER FOR DISSOLUTION

UPON the application of the Official Liquidator by the Official Liquidator's summons for an order that [*state name of Company*] (the "Company") be dissolved.

AND UPON hearing counsel for the Company [and any other persons who were heard]

AND UPON reading the official liquidator's final report and accounts dated [insert date] [and set out details of any relevant affidavits]

IT IS ORDERED that the Company be dissolved [either forthwith or on a specified future date]. AND IT IS FURTHER DIRECTED that: —

1. The official liquidators' liquidation file shall be preserved until [*specify date complying with the requirements of CWR Order 21, Rule 2*].

2. The Company's books and records shall be preserved by the official liquidator for at least [*number of years*] and shall be destroyed on or after [*state date*] [*different directions may be made in respect of identified classes of documents*].

3. [*Directions relating to unclaimed dividends*].

4. [*Any other directions*].

Dated the day of 20

Filed the day of 20

_____

The Honourable Mr(s) Justice [*name of assigned Judge*]
JUDGE OF THE GRAND COURT

This Order was filed by [*state name, address and contact details of the attorneys acting on behalf of the official liquidator*].

CWR FORM No. 37

Voluntary Liquidator's Final Return to the Registrar

THE COMPANIES ACT

VOLUNTARY LIQUIDATOR'S FINAL RETURN

[*Name of company*] (In voluntary liquidation) (the "Company")

Registration No _____

To: The Registrar of Companies

TAKE NOTICE that the Final General Meeting of the above-named Company was duly convened in accordance with Section 127(3) of the Law and held on [*state date*]

[EITHER]

[AND FURTHER TAKE NOTICE that a quorum was present (in person or by proxy) and that the final resolutions were passed with the result that the Company is deemed to be dissolved upon the expiration of three months from the date upon which this Final Return is registered.]

[OR]

[AND FURTHER TAKE NOTICE that a quorum was not present with the result that the Company is deemed to be dissolved upon the expiration of three months from the date upon which this Final Return is registered.]

Dated this day of 20 .

_____

[*Signature of Voluntary Liquidator*]

Publication in consolidated form authorised by the Cabinet this 10th day of January, 2023.

Kim Bullings
Clerk of the Cabinet

ENDNOTES

Table of Companies Winding Up Rules history:

SL #	Added or replaced Orders #	Added or replaced Forms #	Legislation	Commence-ment	Gazette
30/2022			Companies Winding Up (Amendment) Rules 2022 (Commencement) Order, 2022	4-Aug-2022	LG29/2022/s1
31/2022	1A, 4 & 20	2A, 2B, 3A, 4A, 8, 8A, 8B, 16A, 16B, 16C, 16D,	Companies Winding Up (Amendment) Rules 2022	31-Aug-2022	LG29/2022/s2
91/2017			Companies Winding Up Rules, 2018	1-Feb-2018	GE103/2017/s1

(Price: $40.00)

ITEM NO. 148

JA-34

CAYMAN ISLANDS

PARTNERSHIP ACT

(2025 Revision)

Supplement No. 4 published with Legislation Gazette No. 10 of 6th February, 2025.

JA-34

PUBLISHING DETAILS

Law 26 of 1983 consolidated with Laws 4 of 1984, 23 of 1986, 15 of 1987, 5 of 1990, 10 of 1994, 27 of 2001, 38 of 2010, 15 of 2012 and 2 of 2013, Act 19 of 2024 and as amended by Act 56 of 2020.

Revised under the authority of the *Law Revision Act (2020 Revision)*.

Originally enacted —

Law 26 of 1983-13th September, 1983
Law 4 of 1984-28th February, 1984
Law 23 of 1986-2nd December, 1986
Law 15 of 1987-29th April, 1987
Law 5 of 1990-20th February, 1990
Law 10 of 1994-23rd September, 1994
Law 27 of 2001-26th September, 2001
Law 38 of 2010-15th September, 2010
Law 15 of 2012-31st August, 2012
Law 2 of 2013-10th January, 2013
Act 56 of 2020-7th December, 2020
Act 19 of 2024-11th December, 2024.

Originally enacted —

SL 54 of 2024-17th December, 2024.

Consolidated and revised this 1st day January, 2025.

Note (not forming part of this Act): This revision replaces the 2024 Revision which should now be discarded.

CAYMAN ISLANDS

PARTNERSHIP ACT

(2025 Revision)

Arrangement of Sections

Section Page

PART 1 - Introductory

1. Short title 7
2. Interpretation 7

PART 2 - Nature of Partnership

3. Definition of partnership 8
4. Rules for determining existence of partnership 8
5. Meaning of firm 9

PART 3 - Relations of Partners to Persons Dealing With Them

6. Power of partner to bind the firm 9
7. Partners bound by acts on behalf of firm 9
8. Partner using credit of firm for private purposes 9
9. Effect of notice that firm will not be bound by acts of partner 10
10. Liability of partners 10
11. Liability of the firm for wrongs 10
12. Misapplication of money or property received for or in custody of the firm 10
13. Liability for wrongs joint and several 10
14. Improper employment of trust property for partnership purposes 10
15. Persons liable by "holding out" 11
16. Admission or representation of partner 11

17. Notice to acting partner to be notice to the firm 11
18. Liabilities of incoming and outgoing partners 11
19. Revocation of continuing guarantee by change in firm 12

PART 4 - Relations of Partners to One Another`

20. Variation by consent of terms of partnership 12
21. Partnership property 12
22. Property bought with partnership money 12
23. Procedure against partnership property for a partner's separate judgment debt 12
24. Rules as to interest and duties of partners subject to special agreement 13
25. Expulsion of partners 14
26. Retirement from partnership at will 14
27. Where partnership for term is continued over continuance on old terms presumed 14
28. Accounts 14
29. Accountability of partners for private profits 15
30. Duty of partner not to compete with firm 15
31. Rights of assignee of share in partnership 15

PART 5 - Dissolution of Partnership and Its Consequences

32. Dissolution by expiration or notice 16
33. Dissolution by bankruptcy, death or charge 16
34. Dissolution by illegality of partnership 16
35. Dissolution by the court 16
36. Rights of persons dealing with firm against apparent members of firm 17
37. Right of partners to notify dissolution 17
38. Continuing authority of partners for purposes of winding up 17
39. Rights of partners as to application of partnership property 18
40. Apportionment of premium where partnership prematurely dissolved 18
41. Rights where partnership dissolved for fraud or misrepresentation 18
42. Right of outgoing partner in certain cases to share profits made after dissolution 19
43. Retiring or deceased partner's share to be a debt 19
44. Rule for distribution of assets on final settlement of accounts 19

PART 6 - Limited Partnerships

45. Law to apply to limited partnerships 20
46. Definition and constitution of limited partnership 20
47. Registration of limited partnership 20
48. Registrar 21
49. Details required for registration 21
49A. Name convention 22
50. Annual fee 23
51. Changes in limited partnership 23
52. Modifications of general law 24
53. Advertisement in the Gazette 25
54. Inspection of statements 25
54A. Administrative services 25
55. Express fees 26

56. Regulations 26
57. Saving 27

PART 7 - Supplemental

58. Saving for rules of equity and common law 27
59. Validation of payment and collection of fees 27
60. Orders or determinations by court not affected 28

ENDNOTES **29**

Table of Legislation history: 29

CAYMAN ISLANDS

PARTNERSHIP ACT

(2025 Revision)

PART 1 - Introductory

Short title

1. This Act may be cited as the *Partnership Act (2025 Revision)*.

Interpretation

2. In this Act —

"**business**" includes every trade, occupation or profession;

"**court**" means the Grand Court;

"**general partner**", in relation to a limited partnership, means a partner who is not a limited partner as defined by section 46(2);

"**registered office provider**" means, in relation to a limited partnership registered under section 49, the person who provides the registered office for that limited partnership;

"**Registrar**" means the Registrar of Limited Partnerships appointed under section 48; and

"**regulatory laws**" has the meaning assigned by section 2(1) of the *Companies Act (2025 Revision)*.

PART 2 - Nature of Partnership

Definition of partnership

3. (1) Partnership is the relation which subsists between persons carrying on a business in common with a view to profit.

(2) The relation between members of any company or association which is —

(a) registered as a company under the *Companies Act* (*2025 Revision*) or any other law for the time being in force and relating to the registration of companies; or

(b) formed or incorporated by or in pursuance of any other law, letters patent or Royal Charter,

is not a partnership within the meaning of this Act.

Rules for determining existence of partnership

4. In determining whether a partnership does or does not exist, regard shall be had to the following rules —

(a) joint tenancy, tenancy in common, joint property, common property or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof;

(b) the sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived; and

(c) the receipt by a person of a share of the profits of a business is *prima facie* evidence that that person is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make that person a partner in the business; and in particular —

(i) the receipt by a person of a debt or other liquidated amount by instalments or otherwise not of the accruing profits of a business does not of itself make that person a partner in the business or liable as such;

(ii) a contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such;

(iii) a person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the

business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such;

(iv) the advance of money by way of loan to a person engaged or about to engage in any business on a contract in writing with that person, signed by or on behalf of all the parties thereto, that the lender shall receive a rate of interest varying with the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such; and

(v) a person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by that person of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such.

Meaning of firm

5. Persons who have entered into partnership with one another are for the purposes of this Act called collectively a firm, and the name under which their business is carried on is called the firm-name.

PART 3 - Relations of Partners to Persons Dealing With Them

Power of partner to bind the firm

6. Every partner is an agent of the firm and of the co-partners of the firm for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which that partner is a member bind the firm and the co-partners of the firm, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom that partner is dealing either knows that that partner has no authority, or does not know or believe the said partner to be a partner.

Partners bound by acts on behalf of firm

7. An act or instrument relating to the business of the firm done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorised, whether a partner or not, is binding on the firm and all the partners:

Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments.

Partner using credit of firm for private purposes

8. Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless that partner is in fact specially authorised by the other partners; but this section does not affect any personal liability incurred by an individual partner.

Effect of notice that firm will not be bound by acts of partner

9. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement.

Liability of partners

10. Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while that person is a partner; and after that person's death that person's estate is also severally liable in the due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject to the prior payment of that person's separate debts.

Liability of the firm for wrongs

11. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of that partner's co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act.

Misapplication of money or property received for or in custody of the firm

12. In the following cases —

(a) where one partner acting within the scope of that partner's apparent authority receives the money or property of a third person and misapplies it; and

(b) where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm,

the firm is liable to make good the loss.

Liability for wrongs joint and several

13. Every partner is liable jointly with that partner's co-partners and also severally for everything for which the firm while that person is a partner therein becomes liable under either section 11 or 12.

Improper employment of trust property for partnership purposes

14. If a partner, being a trustee, improperly employs trust property in the business or on the account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein:

Provided that this section shall not —

(a) affect any liability incurred by any partner by reason of that partner having notice of a breach of trust; or

(b) prevent trust money from being followed and recovered from the firm if still in its possession or under its control.

Persons liable by "holding out"

15. Everyone who by words spoken or written or by conduct represents themselves, or who knowingly suffers themselves to be represented, as a partner in a particular firm is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made:

Provided that where after a partner's death the partnership business is continued in the old firm's name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make that deceased partner's executors or administrators or that deceased partner's estate liable for any partnership debts contracted after that partner's death.

Admission or representation of partner

16. An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm.

Notice to acting partner to be notice to the firm

17. Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

Liabilities of incoming and outgoing partners

18. (1) A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before that person became a partner.

(2) A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before that partner's retirement.

(3) A retiring partner may be discharged from any existing liabilities by an agreement to that effect between themselves and the members of the firm as newly constituted and the creditors, and this agreement may be either expressed or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted.

Revocation of continuing guarantee by change in firm

19. A continuing guarantee given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guarantee was given.

PART 4 - Relations of Partners to One Another`

Variation by consent of terms of partnership

20. The mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either expressed or inferred from a course of dealing.

Partnership property

21. (1) All property and rights and interests in property originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are called in this Act partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement:

Provided that the legal estate or interest in any land which belongs to the partnership shall devolve according to the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

(2) Where co-owners of an estate or interest in any land, not being itself partnership property, are partners as to profits made by the use of that land, and purchase other land out of the profits to be used in like manner, the land so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land first mentioned at the date of the purchase.

Property bought with partnership money

22. Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm.

Procedure against partnership property for a partner's separate judgment debt

23. (1) A writ of execution shall not issue against any partnership property except on a judgment against the firm.

(2) A court may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may, by the same or a subsequent order, appoint a receiver of that partner's share of profits (whether already declared or accruing) and of any other money which may be coming to that partner in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favour of the judgment creditor by the partner, or which the circumstances of the case may require.

(3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same.

Rules as to interest and duties of partners subject to special agreement

24. The interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement express or implied between the partners, by the following rules —

(a) all the partners are entitled to share equally in the capital and profits of the business and must contribute equally towards the losses whether of capital or otherwise sustained by the firm;

(b) the firm must indemnify every partner in respect of payments made and personal liabilities incurred by that partner —

(i) in the ordinary and proper conduct of the business of the firm; or

(ii) in or about anything necessarily done for the preservation of the business or property of the firm;

(c) a partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which that person has agreed to subscribe, is entitled to interest at the rate of ten per centum per annum from the date of the payment or advance;

(d) a partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by that partner;

(e) every partner may take part in the management of the partnership business;

(f) no partner shall be entitled to remuneration for acting in the partnership business;

(g) no person may be introduced as a partner without the consent of all existing partners;

(h) any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners; and

(i) the partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one); and

every partner may, when that partner thinks fit, have access to and inspect and copy any of them.

Expulsion of partners

25. No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners.

Retirement from partnership at will

26. (1) Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of that partner's intention so to do to all the other partners.

(2) Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose.

Where partnership for term is continued over continuance on old terms presumed

27. (1) Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will.

(2) A continuance of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership.

(2A) In the case of a limited partnership registered under section 49, the general partner which keeps the books of account described in subsection 28(2) at any place other than at the registered office of the limited partnership or at any other place within the Islands shall, upon service of an order or notice by the Tax Information Authority pursuant to the *Tax Information Authority Act* (*2021 Revision*), make available, in electronic form or any other medium, at its registered office copies of its books of account, or any part or parts thereof, as are specified in such order or notice; and if the general partner fails to comply with the order or notice without reasonable excuse, the general partner shall incur a penalty of five hundred dollars and a further penalty of one hundred dollars for every day during which such non-compliance continues.

Accounts

28. (1) Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or the agents of any partner.

(2) A partner, other than a limited partner, shall keep or cause to be kept proper books of account including, where applicable, material underlying documentation including contracts and invoices, with respect to —

(a) all sums of money received and expended by the partnership and matters in respect of which the receipt of expenditure takes place;

(b) all sales and purchases of goods by the partnership; and

(c) the assets and liabilities of the partnership.

(3) For the purposes of subsection (2), proper books of account shall not be deemed to be kept if there are not kept such books as are necessary to give a true and fair view of the business and financial condition of the partnership and to explain its transactions.

(4) A partner, other than a limited partner, shall cause all books of account required to be kept under subsection (2) to be retained for a minimum period of five years from the date on which they are prepared.

(5) A partner who knowingly and willfully contravenes subsection (2) or (4) shall be subject to a penalty of five thousand dollars.

Accountability of partners for private profits

29. (1) Every partner must account to the firm for any benefit derived by that partner without the consent of the other partners from any transaction concerning the partnership, or from any use by that partner of the partnership property, name or business connection.

(2) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the executors.

Duty of partner not to compete with firm

30. If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, that partner must account for and pay over to the firm all profits made by the said partner in that business.

Rights of assignee of share in partnership

31. (1) An assignment by any partner of that partner's share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

(2) In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between themselves and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution.

PART 5 - Dissolution of Partnership and Its Consequences

Dissolution by expiration or notice

32. Subject to any agreement between the partners, a partnership is dissolved —

(a) if entered into for a fixed term, by the expiration of that term;

(b) if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking; or

(c) if entered into for an undefined time, by any partner giving notice to the other partner or partners of that partner's intention to dissolve the partnership:

Provided that in this case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice.

Dissolution by bankruptcy, death or charge

33. (1) Subject to any agreement between the partners, every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner.

(2) A partnership may, at the option of the other partners, be dissolved if any partner suffers that partner's share of the partnership property to be charged under this Act for that partner's separate debt.

Dissolution by illegality of partnership

34. A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the members of the firm to carry it on in partnership.

Dissolution by the court

35. On application by a partner the court may decree a dissolution of the partnership in any of the following cases —

(a) when a partner, other than the partner suing, becomes in any way permanently incapable of performing that partner's part of the partnership contract;

(b) when a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the court, regard being had to the nature of

the business, is calculated to affect prejudicially the carrying on of the business;

(c) when a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts themselves in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with that partner;

(d) when the business of the partnership can only be carried on at a loss; or

(e) whenever in any case circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.

Rights of persons dealing with firm against apparent members of firm

36. (1) Where a person deals with a firm after a change in its constitution that person is entitled to treat all apparent members of the old firm as still being members of the firm until that person has notice of the change.

(2) An advertisement in the Gazette shall be notice as to persons who had no dealings with the firm before the date of the dissolution or change so advertised.

(3) The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of such death, bankruptcy or retirement.

Right of partners to notify dissolution

37. On the dissolution of a partnership or retirement of a partner any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without that partner's or their concurrence.

Continuing authority of partners for purposes of winding up

38. After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise:

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has after the bankruptcy represented themselves or knowingly suffered themselves to be represented as a partner of the bankrupt.

Rights of partners as to application of partnership property

39. On the dissolution of a partnership every partner is entitled, as against the other partners in the firm and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or that partner's executors or administrators may, on the termination of the partnership, apply to the court to wind up the business and affairs of the firm.

Apportionment of premium where partnership prematurely dissolved

40. Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued, unless —

(a) the dissolution is, in the judgment of the court, wholly or chiefly due to the misconduct of the partner who paid the premium; or

(b) the partnership has been dissolved by an agreement containing no provision for a return of any part of the premium.

Rights where partnership dissolved for fraud or misrepresentation

41. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind, is, without prejudice to any other right, entitled —

(a) to a lien on, or right of retention of, the surplus of the partnership assets after satisfying the partnership liabilities, for any sum of money paid by that partner for the purchase of a share in the partnership and for any capital contributed by that partner;

(b) to stand in the place of the creditors of the firm for any payments made by that partner in respect of the partnership liabilities; and

(c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm.

Right of outgoing partner in certain cases to share profits made after dissolution

42. (1) Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or that partner's estate, then, in the absence of any agreement to the contrary, the outgoing partner or that partner's estate is entitled at that partner's option or at the option of that partner's executors or administrators to such share of the profits made since the dissolution as the court may find to be attributable to the use of that partner's share of the partnership assets, or to interest at the rate of ten per centum per annum on the amount of that partner's share of the partnership assets.

(2) Provided that where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner or the outgoing partner or that partner's estate(as the case may be) is not entitled to any further share of profits; but if the partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, that partner is liable to account under subsection (1).

Retiring or deceased partner's share to be a debt

43. Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the executors or administrators of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death.

Rule for distribution of assets on final settlement of accounts

44. In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed —

(a) losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly if necessary, by the partners individually in the proportion in which they were entitled to share profits; and

(b) the assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order —

(i) in paying the debts and liabilities of the firm to persons who are not partners therein;

(ii) in paying to each partner rateably what is due from the firm to that partner for advances as distinguished from capital;

(iii) in paying to each partner rateably what is due from the firm to that partner in respect of capital; and

(iv) the ultimate residue (if any) shall be divided among the partners in the proportion in which profits are divisible.

PART 6 - Limited Partnerships

Law to apply to limited partnerships

45. Subject to this Part, the preceding Parts shall apply to a limited partnership.

Definition and constitution of limited partnership

46. (1) A limited partnership may be established in the Islands for any lawful purpose or purposes, to be carried on either within the Islands or elsewhere by two or more persons upon the terms, with the rights and powers, and subject to the conditions, limitations, restrictions and liabilities herein mentioned.

(2) A limited partnership may consist of any number of persons but shall include —

(a) one or more persons called general partners, who shall be liable for all debts and obligations of the firm; and

(b) one or more persons called limited partners, who shall at the time of entering into such partnership contribute thereto in actual cash payments, a specific sum as capital and who shall not be liable for the debts or obligations of the firm beyond the amount so contributed.

(3) A limited partner shall not during the continuance of the partnership, either directly or indirectly, draw out or receive back any part of that limited partner‘s contribution in the shape of dividends, profits or otherwise, and if that limited partner does so that limited partner shall forthwith repay the same and until that limited partner does so that limited partner shall be liable for the debts and obligations of the firm up to the amount so drawn out or received back:

Provided that a limited partner may receive lawful interest annually on the sum contributed by that limited partner if the payment of such interest does not reduce the original amount of that limited partner’s capital.

(4) A body corporate may be a general or a limited partner.

Registration of limited partnership

47. A limited partnership shall be registered as such in accordance with section 49, and in default thereof, it shall be deemed to be a general partnership and every partner shall be deemed to be a general partner.

Registrar

48. The Registrar of Companies appointed under the *Companies Act* (*2025 Revision*) shall be the Registrar of Limited Partnerships.

Details required for registration

49. (1) The registration of a limited partnership shall be effected by filing with the Registrar a declaration under the *Voluntary Declarations Act (1998 Revision)* by all the general partners containing —

(a) the firm name;

(b) the general nature of the business;

(c) the registered office in the Islands;

(d) the full name of each of the partners and their respective places of residence;

(e) the term, if any, for which the partnership is entered into, and the date of its commencement;

(f) a statement that the partnership is limited, and the description of every limited partner as such;

(g) the amount of capital contributed by each limited partner; and

(h) a statement that the sum referred to in paragraph (g) to have been contributed by each of the limited partners has been actually and in good faith paid in cash.

(1A) Every limited partnership shall have a registered office situate in the Islands for the service of process and to which all notices and communications may be addressed but a limited partnership which, at 10th January, 2013, the date of commencement of the *Partnership (Amendment) Law, 2013 [Law 2 of 2013]*, is registered under this Part shall comply with this requirement within ninety days of that date.

(2) The Registrar shall maintain a record of all limited partnerships registered under this Act, and all the statements filed in relation to such partnerships, which records and statements shall be kept open to public inspection.

(3) A limited partnership shall be deemed not to have been formed until —

(a) the declaration in subsection (1) has been filed with the Registrar; and

(b) the information listed in the said declaration has been published in the Gazette.

(4) The Registrar shall, on payment to that Registrar of a registration fee of eight hundred and fifty dollars, issue a certificate of registration under that Registrar's hand and seal of office as soon as the registration of a limited partnership has been effected.

(5) A certificate issued under subsection (4) shall be conclusive evidence that compliance has been made with all the requirements of this Act in respect of registration.

Name convention

49A. (1) Subject to subsection (2), the name of a limited partnership shall end with —

(a) the words "Limited Partnership"; or

(b) the abbreviation "L.P." or "LP".

(2) A limited partnership shall not be registered by or have a name which —

(a) either —

(i) is identical to that by which —

(A) a limited partnership in existence and registered under this Act is already registered (except where the limited partnership in existence is in the course of being dissolved and has signified its consent in such manner as the Registrar may specify);

(B) a limited liability partnership in existence and registered under the *Limited Liability Partnership Act (2025 Revision)* is already registered (except where the limited liability partnership in existence is in the course of being dissolved and has signified its consent in such manner as the Registrar may specify); or

(C) an exempted limited partnership in existence and registered under the *Exempted Limited Partnership Act (2025 Revision)* is already registered (except where the exempted limited partnership in existence is in the course of being dissolved and has signified its consent in such manner as the Registrar may specify); or

(ii) in the opinion of the Registrar, so nearly resembles the name of a limited partnership, limited liability partnership or exempted limited partnership in existence and referred to under paragraph (a) as to be likely to mislead;

(b) contains any word that a company incorporated under the *Companies Act (2025 Revision)* would not be permitted to use in its name, with or without the consent of the Registrar of Companies; or

(c) in the opinion of the Registrar, suggests that the limited partnership is licensed, whether in the Islands or elsewhere, to carry on business that is subject to the regulatory laws of the Islands when it is not so licensed or, for any other reason, is likely to mislead as to whether it is so licensed.

(3) A person may apply to reserve a specified name by —

(a) filing with the Registrar (including by permitted electronic means) an application executed by the applicant specifying the name to be reserved and the name and address of the applicant; and

(b) paying the prescribed application fee,

and if the Registrar finds that the name is available for use by a limited partnership, the Registrar may reserve the name for a period of up to one hundred and twenty days for the exclusive use of the applicant.

(4) On or before the expiry of the period for name reservation under subsection (3), the applicant may make further successive applications, pursuant to subsection (3), to reserve the specified name.

Annual fee

50. (1) A limited partnership shall, on or before the 16th January in every year, pay to the Registrar an annual fee of four hundred and seventy-five dollars.

(2) If the annual fee is not paid by the due date, each of the partners commits an offence and is liable on conviction to a fine of one thousand dollars and to a further fine of one hundred dollars for each day during which the default continues.

Changes in limited partnership

51. (l) If, during the continuance of a limited partnership, any change is made or occurs in —

(a) the firm name;

(b) the general nature of the business;

(c) the registered office;

(d) the partners or the name of any partner;

(e) the term of the partnership;

(f) the sum contributed by any limited partner;

(g) the liability of any partner by reason of that partner's becoming a limited instead of a general partner or a general instead of a limited partner;

(h) the capital or shares thereof; or

(i) any other matter specified in the declaration filed under section 49(1),

a declaration under the *Voluntary Declarations Act* (*1998 Revision*) by all the general partners specifying the nature of the change, shall within seven days of such change be filed with the Registrar.

(2) If the declaration referred to in subsection (1) is not so filed, every partner shall thereafter and until it is filed be deemed to be a general partner.

(3) If default is made in compliance with the requirements of this section, each of the partners commits an offence and is liable on conviction to a fine of five hundred dollars and a further fine of fifty dollars for each day during which the default continues.

Modifications of general law

52. (1) A limited partner shall not take part in the management of the partnership business, and shall not have power or authority to transact the business of, and sign for and bind, the firm:

Provided that that limited partner may, at any time, inspect the books of the firm and examine into the state and progress of the partnership business, and may advise as with the partners thereon.

(2) A limited partner, in whatsoever capacity, who transacts any business in the name of or for the partnership business or if that limited partner's name is used in the firm name with that limited partner's privity or consent shall be deemed to be a general partner in respect of all debts and obligations of the firm incurred while that limited partner so takes part in the management.

(3) Legal proceedings relating to the business of the firm may be instituted by or against the general partners only, as if there were no limited partners.

(4) Notwithstanding section 33(1) and paragraph (a) of section 35 —

(a) a limited partnership shall not be dissolved by the death or bankruptcy of a limited partner; and

(b) the permanent incapacity of a limited partner in performing that limited partner's part of the partnership contract shall not be a ground for dissolution of the partnership by the court unless that limited partner's share cannot be otherwise ascertained and realised.

(5) In the event of the dissolution of a limited partnership its affairs shall, unless the court otherwise orders, be wound up by the general partners; and no limited partner shall, under any circumstances, be allowed to withdraw any part of that limited partner's capital, or to claim as a creditor, until the claims of all the other creditors of the partnership, and all charges thereon, have been fully paid or satisfied.

(6) A limited partnership shall not be dissolved by an act of the parties before the time specified in paragraph (e) of section 51(1), and not in any case until after a notice of dissolution has been filed with the Registrar and published in the Gazette.

(7) Notwithstanding anything in this Act to the contrary and subject to any agreement expressed or implied between the partners, in the case of a limited partnership —

(a) any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the general partners;

(b) a limited partner may, with the consent of the general partners, assign that limited partner's share in the partnership, and upon such an assignment the assignee shall become a limited partner with all the rights of the assignor;

(c) the other partners shall not be entitled to dissolve the partnership by reason of any limited partner suffering that limited partner's share to be charged for that limited partner's separate debt;

(d) a person may be introduced as a partner without the consent of the existing limited partners; and

(e) a limited partner shall not be entitled to dissolve the partnership by notice.

Advertisement in the Gazette

53. Notice of any arrangement or transaction under which any person will cease to be a general partner in any firm and become a limited partner in that firm or under which the share of a limited partner in a firm will be assigned to any person, shall be forthwith advertised in the Gazette, and until notice of the arrangement or transaction is so advertised, the arrangement or transaction shall, for the purposes of this Act, be deemed to be of no effect.

Inspection of statements

54. (1) Any person may inspect the statements filed by the Registrar, on payment of such fees as the Cabinet may prescribe; and any person may require a certificate of the registration of a limited partnership, or a copy of or extract from a registered statement, to be certified by the Registrar, on payment of such fees as the Cabinet may prescribe.

(2) A certificate of registration, or a copy of or extract from a statement registered under section 49 or 51, if duly certified by the Registrar to be a true copy shall be received in evidence in all legal proceedings.

Administrative services

54A. The Registrar, for a fee as may be prescribed, may provide —

(a) the processing of refunds;

(b) the correction of errors;

(c) certification;

(d) certificates;

(e) customized letters;

(f) customized certificates;

(g) filing of documents;

(h) copying; or

(i) any other administrative service as may be prescribed.

Express fees

55. (1) Notwithstanding the fees provided for in this Part, the Registrar may provide an expedited service for —

(a) registration;

(b) the delivery of an administrative service under section 54A; or

(c) the delivery of any other service as may be prescribed, for which the prescribed express fee shall be payable.

(2) The Registrar, on receipt of —

(a) an application for registration under section 49;

(b) a request for certification;

(c) an application for a certificate which the Registrar is authorized to provide;

(d) a filing of any document (other than where the filing is part of an application);

(e) a request for a customized certificate;

(f) a request for a customized letter; or

(g) a request for a copy of a record or document retained by the Registrar,

which is accompanied by the prescribed express fee shall complete the transaction for which the respective application, request or filing is made by —

(i) the end of the working day, where the respective application, request or filing and all fees are received by 12 noon; or

(ii) 12 noon on the following working day, where the respective application, request or filing and all fees are received after 12 noon.

Regulations

56. (1) The Cabinet may make regulations in respect of limited partnerships concerning —

(a) the fees payable to the Registrar under this Act including fees payable for —

(i) the filing of any document (other than where the filing is part of an application);

(ii) the processing of refunds;

(iii) the provision of photocopies of documents or the correction of typographical errors in respect of filings by limited partnerships (other than where the filing is part of an application);

(iv) the provision of customized letters;

(v) the issuance of certificates;

(vi) the issuance of customized certificates that contain information of multiple certificates combined in one certificate; and

(vii) any other administrative service provided by the Registrar;

(ab) express fees payable to the Registrar for the expedited delivery of any of the administrative services provided by the Registrar;

(b) the duties to be performed by the Registrar for the purposes of this Act;

(c) the forms to be used for the purposes of this Act; and

(d) generally, the conduct and regulation of registration under this Act and any matters incidental thereto.

(2) The Cabinet may make regulations prescribing all matters that are required or permitted by this Act to be prescribed, or are necessary or convenient to be prescribed for giving effect to the purposes of this Act.

Saving

57. (1) Insofar as any registration of a limited partnership effected under the **repealed** *Limited Partnerships Law (G10/1978/s1)* or its revision could have been effected under a corresponding provision of this Act it shall not be invalidated by the repeal of that Law but shall have effect as if effected under that corresponding provision.

(2) A provision in any document referring to the **repealed** *Limited Partnerships Law (G10/1978/s1)* or its revision, so far as may be necessary for preserving its effect, be construed as referring to the corresponding provision in this Act.

PART 7 - Supplemental

Saving for rules of equity and common law

58. The rules of equity and of common law applicable to partnerships shall continue in force, except so far as they are inconsistent with the express provisions of this Act.

Validation of payment and collection of fees

59. The payment of fees to, and the charging and collection of fees by, the Registrar without statutory authority for any service provided by the Registrar prior to 1st January, 2025, the commencement date of the *Partnership (Amendment and Validation) Act, 2024 [Act 19 of 2024]* are —

(a) validated; and

(b) taken to have been lawfully charged by, paid to and collected by the Registrar,

as if the Registrar was empowered under the *Partnership Act (2024 Revision)*, as amended by the *Partnership (Amendment and Validation) Act, 2024 [Act 19 of 2024]* to charge and collect those fees.

Orders or determinations by court not affected

60. The *Partnership (Amendment and Validation) Act, 2024 [Act 19 of 2024]* does not affect any order or determination made by a court with respect to fees charged by, paid to and collected by the Registrar without statutory authority for any service provided by the Registrar prior to 1st January, 2025, the commencement date of the *Partnership (Amendment and Validation) Act, 2024 [Act 19 of 2024]*.

Publication in consolidated and revised form authorised by the Cabinet this 21st day of January, 2025.

Kim Bullings
Clerk of Cabinet

ENDNOTES

Table of Legislation history:

SL #	Act/Law #	Legislation	Commencement	Gazette
54/2024		Partnership (Amendment and Validation) Act, 2024 (Commencement) Order, 2024	19-Dec-2024	LG47/2024/s20
	19/2024	Partnership (Amendment and Validation) Act, 2024	1-Jan-2025	LG47/2024/s10
		Partnership Law (2025 Revision)	13-Feb-2024	LG8/2024/s5
	56/2020	Citation of Acts of Parliament Act, 2020	3-Dec-2020	LG89/2020/s1
		Partnership Law (2013 Revision)	11-Oct-2013	GE82/2013/s18
	2/2013	Partnership (Amendment) Law, 2013	11-Jan-2013	GE8/2013/s2
	15/2012	Partnership (Amendment) Law, 2012	10-Jan-2013	GE4/2013/s3
		Partnership Law (2011 Revision)	7-Nov-2011	G23/2011/s10
	38/2010	Partnership (Amendment) Law, 2010	28-Sep-2010	GE59/2010/s2
		Partnership Law (2002 Revision)	18-Jun-2002	G12/2002/s11
	27/2001	Partnership (Amendment) Law, 2001	12-Dec-2001	GE30/2001/s5
		Partnership Law(1995 Revision)	1-May-1995	G9/1995/s5
	10/1994	Partnership (Amendment) Law, 1994	15-Nov-1994	G23/1994/s6
	5/1990	Partnership (Amendment) Law, 1990	18-Apr-1990	GE.18Apr/1990/s4
	15/1987	Partnership (Amendment) Law, 1987	22-Jun-1987	G13/1987/s13
	23/1986	Partnership (Amendment) Law, 1986	19-Jan-1987	G2/1987/s7
	4/1984	Partnership (Amendment) Law, 1984	30-Apr-1984	G9/1984/s9
	26/1983	Partnership Law, 1983	2-Apr-1984	G23/1983/s5

(Price: $5.60)

ITEM NO. 149

JA-35

CAYMAN ISLANDS

PRACTICE DIRECTION NO. 1 OF 2018

CAYMAN ISLANDS

PRACTICE DIRECTION No: 1 of 2018

Court-to-court Communications and cooperation in cross-border insolvency and restructuring cases

The Guidelines – what they cover and when they should be used.

1. This practice direction deals with the use and adoption in cases pending before the Grand Court of the Cayman Islands (Court) of published guidelines relating to court-to-court communications and cooperation in cross-border insolvency and restructuring proceedings.

2. There are two main sets of guidelines (Guidelines) for court-to-court communications and co-operation which might be adopted in this jurisdiction, with appropriate modifications. These are the American Law Institute/International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases and The Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters. Copies of the current versions of both sets of Guidelines are attached to this Practice Direction.

3. The Guidelines primarily cover the procedural rules that may be adopted and applied in particular cross-border cases for regulating the manner of communications between the courts involved, the appearance of counsel in each court, notification to parties in parallel proceedings, the acceptance as authentic of official documents or orders made in the foreign jurisdiction or court and joint hearings. They are to be applied either by being incorporated in a protocol between the respective

officeholders which protocol is then approved by the Court (and other courts involved as required) or by a separate order of the Court without a protocol (and orders of the other courts involved as required), in each case subject to such modifications as may be required in the circumstances.

4. The Guidelines are relevant where the insolvency or restructuring proceedings are being supervised by, or involve related applications to, courts in more than one jurisdiction. Such proceedings will include liquidation (including provisional and voluntary liquidation) and other insolvency or restructuring proceedings involving applications to court. Accordingly, the Guidelines will be relevant to schemes of arrangement relating to a company being supervised by the Court which also involve a parallel scheme (or debt adjustment proceeding) or ancillary proceedings in another jurisdiction (and may also be relevant in cases in which the Court has appointed a receiver or other officer of the Court and where the Cayman Islands Monetary Authority has appointed a controller pursuant to the Cayman Islands regulatory laws). The Guidelines can apply whether the officeholder is appointed by the Court or is appointed out of Court and whether the person is appointed in respect of a company (incorporated in the Cayman Islands or abroad) other legal entity (established in the Cayman Islands or abroad) or an individual.

5. Officeholders appointed in the Cayman Islands, companies subject to restructuring proceedings supervised by the Court and other interested parties involved in cross-border insolvency cases should consider, at the earliest opportunity, whether to incorporate some or all of the Guidelines with suitable modifications either into an international protocol to be approved by the Court or an order of the Court adopting the Guidelines.

Official liquidators of Cayman Islands companies

6. Official liquidators of Cayman Islands incorporated companies subject to an official liquidation under Part V of the Companies Law (2016 Revision) are already under a duty, pursuant to Order 21, r.2(1) of the Companies Winding Up Rules (CWRs), to consider whether or not it is appropriate to enter into an international protocol with any foreign officeholder (in a case in which the company in liquidation is subject to a concurrent bankruptcy proceeding under the law of a foreign country or has assets located in a foreign country which are the subject of a bankruptcy proceeding or receivership under the law of that country).

   The purpose of such a protocol is to promote the orderly administration of the estate of the company to avoid duplication of work and conflict between the official liquidator and the foreign officeholder (CWR 0.21, r.2(2)) and the protocol only takes effect when approved both by the Court and the foreign court (CWR 0.21, r.2(3)). The CWRs provide that the protocol may define and allocate responsibilities between the official liquidator and the foreign officeholder in respect of the various matters set out in CWR 0.21, r.3. These include procedures for the exchange of information between the officeholders; procedures for reporting to creditors and/or contributories and procedures for coordinating sanction applications made to the Grand Court and the foreign court.

   Consideration should be given by official liquidators to the incorporation of the Guidelines into the international protocol.

7. While Official liquidators of Cayman Islands incorporated companies are required to consider whether to enter into an international protocol which deals with the matters set out in CWR 0.21, r.3 they are not required to limit any protocol they enter into to such matters. The

protocol may, subject to the approval of the Court, cover other matters including court-to-court communications and cooperation as provided for in the Guidelines. In addition, even if official liquidators conclude that a protocol is not appropriate (or that it is not appropriate to incorporate the Guidelines into such a protocol) the Guidelines with suitable modifications may be adopted by an order of the Court which gives directions with respect to the procedures to be followed.

Other Cayman Islands officeholders

8. While it is only official liquidators of Cayman Islands incorporated companies subject to an official liquidation who have a duty under the CWR to consider entering into an international protocol, other Cayman Islands officeholders or companies subject to restructuring proceedings supervised by the Court may enter into a protocol incorporating the Guidelines or may apply for an order adopting the Guidelines and this Practice Direction will apply in such cases.

9. To the extent that Cayman Islands officeholders or companies subject to restructuring proceedings supervised by the Court are unclear as to the manner in which to use and apply the Guidelines in any particular case, they may apply to the Court at any early stage in the proceedings for directions.

Hon. Anthony Smellie
May 31, 2018

ITEM NO. 150

JA-36

[482] HARRISON *v.* TENNANT. *Jan.* 18, 19, 21, 28, 1856.

This Court will dissolve a partnership before the expiration of the term, where the circumstances have so changed, and the conduct of the parties is such, as to render it impossible to carry it on without injury to all the partners.

The Court dissolved a partnership entered into for a term of years, when, without any breach of the partnership articles, circumstances had so altered that it could not be carried on upon the footing originally contemplated, and the confidence mutually reposed having ceased, and given place to mistrust, so that it was apparent that the partnership could not go on without mutual injury.

A. and B., who had been partners for some time, entered into a new partnership with C. At the same time B. took all the assets of the old firm, and covenanted to indemnify A. from the liabilities. The Court held that the partnership between the three might be determined by the Court, for due cause, without setting aside the deed of indemnity, which might be the subject of another suit.

The bill, in this case, prayed for the dissolution of a partnership existing between Harrison and Finch (the Plaintiffs) and the Defendant Tennant, and for consequential accounts, under the following circumstances:—

In the year 1851 the Plaintiff Harrison, and Tennant, who had for twenty years previous carried on an old-established business as solicitors, took the Plaintiff Finch into partnership. The terms were regulated by an agreement dated the 8th of November 1851, by which Harrison, Tennant and Finch, "agreed to enter into co-partnership together, as attornies, solicitors and conveyancers, *for the term of twenty-*

one years, to commence on the 1st of January 1852." The agreement then regulated the shares and capital, and provided that Harrison and Tennant should devote only so much time and attention to the business as they, in their discretion, should think reasonable, but that Finch should devote his whole time, attention and energies thereto. If Harrison or Tennant should die in the life of Finch, the survivor was to be at liberty, without the consent of Finch, to introduce a lineal descendant into the firm. If **[483]** both Harrison and Tennant should die in the life of Finch, without having exercised that power, whereby the whole business should devolve on Finch, he was to pay to the widow or children of Tennant an annuity of £500 a year for the remainder of the twenty-one years. The articles then provided as follows:—"That Harrison and Tennant, or the survivor of them, shall have power to determine and make void these articles of partnership at any time, on giving notice in writing to that effect, the party receiving such notice to cease to be a partner," on receiving £500 for his profits for the current year, and his capital. "In case of any dispute between the said parties, the same to be referred to arbitration in the usual way. Any partner hereafter to be appointed acting in wilful breach of these articles or misconducting himself, to be liable to be dismissed in the usual way by the other partners, or partner if only one partner."

By an indenture of even date, and made between the same parties, it was agreed that Tennant should hold the estate of the preceding firms for his own benefit, and in consideration thereof, he covenanted to indemnify Harrison from all debts and liabilities of the preceding firms.

The partnership was accordingly carried on, but disputes arose between them, which gave rise to this suit, under the following circumstances:—The Earl of Jersey had been a client of the preceding firms from the year 1813 until 1845, when he retained other solicitors. The firm had sold the Britton Ferry estate for the earl, and the father of the Defendant Tennant (who was then a partner, but had died in 1832) principally attended to the earl's affairs. These were of great magnitude, and it was stated that about a million sterling had passed through his hands from first to last, for purchase-**[484]**-money, rents, &c., but no account had been settled during the whole time. Disagreements had arisen between the earl and the firm as to these extensive and complicated transactions, and in May 1845 Mr. Tennant delivered accounts of the sales, the general accounts and the bills of costs. These were not satisfactory, and after communications, explanations and controversy between the earl's solicitors and Tennant, the earl filed his bill in October 1852 against Harrison and Tennant, impeaching some sales made to the Defendant's father, and praying accounts. Counsel suggested a compromise, but Tennant refused to accede to this, and put in his answer, without the concurrence of his partners. Amongst other charges, the earl had complained of the amount of commission of £5 per cent. on the sales of the estate down to 1822, which exceeded £13,000, and was in addition to office bills. In answer to this, Tennant in his answer said that the charge had been made with the earl's concurrence, that it had been charged in an account book now in his possession, which he had frequently seen his father hand to the earl, who examined the same. Upon production of this book, however, the paper of which it was composed bore the water-mark of 1830. This matter being introduced by amendment, the Defendant adhered to the statement, but said that the book must be a copy made by his father of the original, but that he could not find it.

Again, the Defendant, in his original answer, in order to enhance the value of the services of his father, stated that the earl had been willing to sell the estate for £200,000, and that his father, by his judicious arrangements, had obtained £300,000 for part only, and in one of the books there was, in the writing of the firm, an entry of an offer by a gentleman of £200,000 for the whole estate, which **[485]** had been refused. It appeared that the first figure (20) had been written on an erasure, and from other sources it appeared that £350,000 had really been offered. There was another charge against the Defendant of having charged £7560, as received by his father for deposits on sales, when they had been received for reserved rents, and that he had made a claim for £16,000, which was not entered in the books, and one or two minor matters, which it is not necessary to state.

The earl had introduced these matters into his bill by amendment, but he did not

require any further answer. The Defendant insisted, however, on putting in a further answer. His partners interfered and wished it to be settled in consultation, whereupon the Defendant made himself the sole solicitor on the record in lieu of the firm, and put in his answer without further consulting his partners thereon.

The present bill, filed in May 1855, after detailing these matters of complaint, stated as follows:—"In addition to the several circumstances hereinbefore stated, the Plaintiffs have grave cause of complaint against the Defendant Tennant, in respect of the general character and conduct of the defence adopted by him, in and by his answer and further answer" to the bill, and in the said suit instituted against him by the Earl of Jersey, and they submit that his conduct "was and is inconsistent with his duty as a partner of the Plaintiffs in their profession," and, as evidence of such conduct, the Plaintiffs refer to the said several answers of the said Defendant to the said original and amended bills. That in consequence of the several matters the Plaintiffs were advised that they ought to effect a dissolution of their said co-partnership with Tennant.

[486] The bill prayed a dissolution of the partnership and for accounts.

It appeared that Harrison and Finch had, soon after instituting this suit, sent a circular to the clients of the firm, stating that they had instituted proceedings to dissolve the partnership in consequence of the "grave charges" made against Mr. Tennant in the suit of *Earl of Jersey* v. *Tennant*, and the manner in which he had met them, and trusting that this "would not impair the confidence hitherto reposed in them."

Mr. Lloyd and Mr. Fleming, for the Plaintiffs, argued that in the present state of circumstances and feelings, it was impossible that the partnership could continue to be carried on, and that the authorities embodied a general principle that a contract of partnership would not be continued to the injury of all concerned in it, when it was clear, from violent causes of dissension, that they could not work in harmony together.

They cited Collyer on Partnership (2d ed.) (page 193); *Baring* v. *Dix* (1 Cox, 213); *Waters* v. *Taylor* (2 Ves. & B. 299); *De Berenger* v. *Hammel* (7 Jarm. Conv. 26), and commented on the acts complained of.

Mr. Roupell and Mr. Shapter, for the Defendant. There must be some breach of the express or implied contract between partners to justify the Court in setting aside and terminating a partnership which the parties have expressly engaged to carry on for a fixed number of years. Here there is not even an allegation of any breach of the partnership articles, or of any misconduct in the manage-**[487]**-ment of the present partnership, nor is there any interruption of intercourse between the partners. As to Harrison, it was more his duty to have seen that the affairs of Lord Jersey were regularly entered than the Defendant, who did not become a partner until 1832; besides, the Defendant has engaged to indemnify Harrison, who, therefore, cannot be damnified by the result of that suit. The Plaintiffs have shewn an undue haste in filing the present bill, which is founded on charges made in another suit, which not only still remain unproved, but are positively denied on oath; the Defendant must be assumed to be innocent until judicially found to be guilty. The existence of charges in another suit, instituted by another party, cannot be a ground for dissolving this partnership; for if a decree were made for the Plaintiffs in this suit, it must be based on the unproved charges in the other.

They commented on and explained the several charges which were denied or explained, and insisted that the mere erroneous statements of ancient transactions, in which the Defendant's father, and not the Defendant, had been engaged, were not of the serious character to justify the rescinding of a partnership contract; besides which, they did not really affect the merits of the other suit. They argued that the conduct of the Plaintiffs was highly improper, in sending a circular to the clients of the firm, with the object of supplanting the Defendant, and depriving him of his clients, and they insisted that the law was not that a partnership was to be dissolved if it were impracticable for it to go on, where the difficulty arose from the conduct of the person seeking the dissolution. They argued that the partnership could not be dissolved without setting aside the contemporaneous deed of indemnity, and urged that Finch had purposely picked a quarrel with the Defendant, in order, upon the

[488] death of Harrison, who was now seventy-eight years of age, to secure to himself the whole of an old-established business.

They cited *Goodman* v. *Whitcomb* (1 Jac. & W. 589); *Marshall* v. *Colman* (2 Jac. & W. 266); *Wray* v. *Hutchinson* (2 Myl. & K. 235); *Smith* v. *Jeyes* (4 Beav. 503); *Hall* v. *Hall* (20 Beav. 139, and 3 M. & Gor. 79-86); *Ogilvie* v. *Gregory* (V.-C. Wood, 17 Jan. 1856).

THE MASTER OF THE ROLLS said he would consider the case before he called for a reply.

Jan. 28. THE MASTER OF THE ROLLS [Sir John Romilly]. The perusal, which I have had the opportunity of making very carefully since this case was heard, has convinced me that it is impossible for this partnership to continue.

There are two principles on which the Court will dissolve a partnership contract, both of which, to some extent, exist in the present case; they combine and co-operate together, and lead me to the conclusion to which I think it necessary to come. One is, the alteration of circumstances, subsequently to the entering into the partnership; and next, the conduct of the partners themselves.

I will, in the first instance, look at this case so far as Mr. Finch is concerned, because this is clear, that if there be no partnership so far as he is concerned, there can be none so far as regards Mr. Harrison; it must be put an end to altogether.

[489] With respect to the alteration of the circumstances, I have to consider, whether the partnership can be carried on as it was originally contemplated by the persons who contracted to become partners. The partnership contract was in November 1851, and the position of the parties, at that time, was as follows:—Mr. Harrison was of an advanced age, and Mr. Tennant was engaged in a contest with Lord Jersey, the character of which, as I infer from the evidence before me, had not been fully ascertained. Previous attempts had been made to compromise, and it might reasonably have been expected that this might have been settled. The letter of the 5th of December 1851, of Messrs. Frere & Co., to Mr. Tennant, which shewed the serious character of the contest, was subsequent to the entering into these articles of partnership, although previous to the commencement of the partnership, on the 1st of January 1852. These negociations came to nothing, and in October 1852 the bill of *Lord Jersey* v. *Tennant* was filed, which was certainly of a very serious character, and then, for the first time, Mr. Finch must have become acquainted with the full extent of the matters involved in that suit, though, no doubt, he had a general knowledge of them before, because he had, for ten years, been managing clerk to the firm, and must have known generally what was taking place; though Mr. Tennant says that Mr. Finch knew nothing about them. However, matters gradually became more serious, the answer was not put in until December 1853, so that it required upwards of two years to put in a sufficient and proper answer; this again shews the serious character of the suit. The anxiety of Mr. Harrison and Mr. Finch as to these matters is shewn by their consulting counsel, without the knowledge of Mr. Tennant, which is one of the matters he complains of. It became at once apparent that Mr. Tennant's whole time would be **[490]** necessarily occupied in preparing the defence, and thus withdrawn from the partnership. It has been urged, no doubt with great truth, that the partnership articles provided for this very thing, by stipulating that Mr. Harrison and Mr. Tennant should only be obliged to give such time and attendance to the affairs of the partnership as they might think fit; but still Mr. Finch, knowing the ability and anxiety with which Mr. Tennant had previously carried on this business for a great number of years, might reasonably have expected to receive very great assistance from him in carrying on the partnership business, though he had not a right positively to demand it, but the nature and continuance of this suit shewed but little prospect of his obtaining any, and any expectation so formed would undoubtedly have been fallacious. Now, undoubtedly, this alone would be nothing, but I mention it merely in the outset as a part of the substance, which combines with the rest of what I am going to state.

The suit of *Lord Jersey* v. *Tennant* became more serious, the bill was amended and the amendments undoubtedly contain matter which might reasonably have occasioned great and painful surprise to the partners of Mr. Tennant. The bill before me contains

six distinct charges against Mr. Tennant, but it is only necessary for me to refer, for instance, to the two most serious ones.

Mr. Tennant, in his answer to Lord Jersey's bill, states that he saw a particular book, which he describes, handed to Lord Jersey in June 1826, and that Lord Jersey admitted the propriety of an item contained in it, and that he authorized or made a payment of £5000 upon the strength of that admission and in consequence of the entry in that book. On the production of the **[491]** book itself, it appears that it could not have existed before the year 1830. Now, Mr. Tennant, in answer to this charge, says that it must have been a copy of this book which he saw shewn to Lord Jersey, but that he has not been able to find the original of that book; but no proof of its existence is given, nor any explanation why a copy should have been made of this book in particular.

The other instance is the alteration of an item in one of the books kept by Mr. Tennant, containing the accounts of the Earl of Jersey, by changing the two first figures of a sum, which appears now to be £200,000, but which, from the corresponding entry in another book, which I think is the office attendance book, it is pretty clear, must have been originally £350,000. This alteration is admitted by Mr. Tennant to have been made by him, he is unable to remember when it was made, or under what circumstances; but he has no doubt it was made for the purpose of making the book what he believed to be correct. It is contended, undoubtedly, that that alteration is of no moment, because, so far as the charge by the firm is made, the charge would be exactly the same whether the offer made for the estate was £200,000 or £350,000. On the other hand, it is contended that this is a matter of some moment, because, in the defence to the suit of the Earl of Jersey, Mr. Tennant enhances the value of the services of his father in this matter, by the fact that Lord Jersey was willing to have sold the property for a small sum, comparatively speaking, to that which it afterwards produced; and that if he was willing to have sold the property for £200,000 or £250,000, it is somewhat hard to take harsh proceedings against a solicitor who had sold a portion of the property for £450,000, and left the remainder of the property producing upwards **[492]** of £10,000 a year. I think it unnecessary to state these things further for the purpose of what I am about to mention.

Now these circumstances might, in my opinion, naturally alarm both Mr. Harrison and Mr. Finch, and accordingly they seem thereupon to have resolved that as this was a matter which, as it might involve the character of one of the partners of the firm in which they were materially interested, and thereby might affect them, it was important that the sole conduct of the defence of Mr. Tennant to the suit of *Earl Jersey* v. *Tennant* ought not to be exclusively entrusted to Mr. Tennant, but that they ought to be allowed to take a part in it; and they thereupon instructed Mr. Shapter not to settle the answer until he had had a consultation with Queen's Counsel. Upon this, Mr. Tennant, as he was entitled to do, being the Defendant upon the record, changed the solicitors, by making himself the sole solicitor on the record for himself, and he instructed Mr. Shapter to complete the answer, which he did immediately, on his own responsibility. There are, no doubt, many very good reasons given for that step; in the first place, the time for answering was very short, and it was a matter of great importance that it should be done very speedily.

In this state of things, the result appears to me to be that the confidence mutually reposed in each other, when the partnership was originally formed, must have ceased, and that it is now impossible that the business can be conducted as it was originally contemplated, and, although the parties to this suit being gentlemen, no outbreak of any sort has occurred between them, yet nevertheless the attempt to compel them to act as partners for the future would, as against them all, be **[493]** to compel them to inflict irreparable injury upon each other. Nay, I should infer from the evidence that the continuation of the partnership by itself is not desired by Mr. Tennant, but that what he resists is, the attempt to dissolve it, if such dissolution is to be based on his individual acts, or in respect of any alleged misconduct on his part. Now, I say, I draw this inference from the evidence which he gives, for he states that Mr. Finch was an artful and designing person, that he early formed an unfavourable opinion of

him, from the manner in which he endeavoured to wheedle himself into Mr. Tennant's good opinion, and to supplant Mr. Harrison, and this long before the partnership was formed; and that when he did enter into the partnership, it was at the request and at the earnest desire of Mr. Harrison, and that, on that ground alone, he admitted him into the partnership, and that he would never have consented even then to have done so, unless it had been under the express condition that he might reserve to himself the power of excluding Mr. Finch from the partnership at any time upon the decease of Mr. Harrison taking place.

Now it is not necessary, nor would it be proper with this view, to refer to what has since taken place, further than this, that it convinces me that the breach is irreparable on both sides, and confirms the view of the feelings and the want of confidence which must necessarily exist between these parties, rendering the conduct of the business together impossible. [His Honor next referred to a circular by Mr. Harrison and Mr. Finch to the clients, and expressed his strong disapproval of it.]

It is true, as has been very justly observed, that no party is entitled to act improperly, and then to say the **[494]** conduct of the partners, and their feelings towards each other, are such that the partnership can no longer be continued, and certainly this Court would not allow any person so to act, and thus to take advantage of his own wrong. But this is not that simple case, and the circumstances I have already referred to shew that the conduct on both sides has produced this state of things.

It is urged that the *animus* with which this suit is instituted is obvious, from the haste in which it has been instituted and hurried on, so as to obtain a priority over the suit of *The Earl of Jersey* v. *Tennant*, and that the Plaintiffs ought not to have assumed that the truth of the charges made by that bill, and which are repeated by the present, would be established in the case of *The Earl of Jersey* v. *Tennant*, but that they ought to have waited until, at the hearing of the cause, the truth or untruth of the charges had been determined; that this is, in truth, an attempt to prejudice Mr. Tennant in that suit, in which the solicitors of Lord Jersey are, in fact, concurring and assisting; and that everyone must be treated to be innocent until he is proved to be guilty. This, undoubtedly, was urged with great vigour and ability before me in the argument. I expressly state that I intend in the present case, and in the observations I am now making, neither to say nor to do anything which can, in the slightest degree, affect the suit of *The Earl of Jersey* v. *Tennant*, either directly or indirectly; and I shall certainly not express, even if I had formed, which I have abstained from doing, any opinion as to whether any degree of credit is justly attributable to the charges against that gentleman, the Defendant in this suit.

But it is reasonably obvious to anyone versed in the course which a cause of that nature takes in **[495]** this Court, that in all probability the validity or invalidity of the personal charges against Mr. Tennant will never be determined or possibly discussed in that suit. The Court will, in all probability, direct some account to be taken, with or without special directions, and except in the discussion of the items, and in taking the accounts, and then partially and incidentally, if at all, no matter of conduct can ever come into question. I repeat that I express no opinion whatever on these charges, and that I have not the means of accurately forming one; still I cannot but feel that these charges, and the circumstances connected with them, and the mode in which they are brought before me, may reasonably, to some minds, have produced that mistrust which exists in the present case between the parties, and which has led to the hostility of feeling on both sides, which, in my opinion, exists, and which, in my opinion, has made it impossible that this partnership could longer be continued, with advantage to any of the persons concerned.

It is asked, is Mr. Finch to have the benefit of the whole business? Is he to come in under the wing of Mr. Harrison, and on his early death or retirement, which is probable, he being a gentleman of an advanced age and infirm, to take the whole of the business of a great and distinguished firm to himself, and thus supplant the very persons to whom he owes everything in connection with this partnership. Now, undoubtedly, if my decree could lead to that result, I should pause considerably

before I attempted to do anything of that description, whatever might be the difficulties of the position in which I was placed; and I have endeavoured to state this argument as strongly as it was pressed upon me. But it is impossible for me to speculate that such would be the result of the decree I have **[496]** to make. I am not to suppose that the clients of a long and well-established firm, which has, for many years, been entirely dependent on the exertions of Mr. Tennant and his abilities alone, which is shewn by Mr. Finch's own letters, will abandon him in consequence of the dissensions between himself and his present partners, in which, in my opinion, it is impossible to say that either party is wholly free from blame.

It has been further observed that a deed was executed contemporaneously with the partnership articles, by which the assets of the old firm, together with its liabilities, were exclusively taken upon himself, by Mr. Tennant, that this was a part of the same transaction, and that this cannot be allowed to stand if the partnership be dissolved. Upon this part of the case I express no opinion; it does not and it cannot properly form part of the case before me. If, as its date would seem to infer, the fact be that this deed was a part of the same arrangement, it ought, if the partnership fall, to fall with it; but unless this matter be settled, by arrangement out of Court, it must be the subject of a separate suit. I cannot, in this suit, order that deed to be cancelled, nor can I make any declaration respecting it.

All that I can do and all that I profess to do is to say that in the existing state of circumstances, feelings and conduct of the partners, the partnership cannot be conducted without ruin to all the persons concerned in it, and that it ought to be dissolved.

I do not base my decision upon any particular reported case, but upon the principle that the circumstances under which the parties entered into the partnership have, by matters over which they have no control, **[497]** materially altered, that these altered circumstances have, combined with the conduct of the parties themselves, produced a mistrust which the Court cannot say is unreasonable; and that, taking all these things together, it is impossible that the partnership can be conducted upon the footing on which it was originally contemplated, without injury to all these persons concerned, and that taking all these matters together, it makes this a case in which, in my opinion, it is the duty of the Court to pronounce a decree for the dissolution of the partnership.

ITEM NO. 151

JA-37

[CHANCERY DIVISION.]

1963
March 4, 5.

Buckley J.

* INLAND REVENUE COMMISSIONERS *v.* OLIVE MILL LTD. (IN LIQUIDATION).

SAME *v.* OLIVE MILL SPINNERS LTD. (IN LIQUIDATION).

Revenue—Profits tax—Distribution charge—Holding company owning and holding trading company's share capital—Grouping notice by holding company—Trading company's profits taxable as holding company's profits—Voluntary winding up by both companies—Assessment to profits tax on both companies—Distribution charge on holding company—Whether chargeable accounting period ended by holding company's winding up was that company's last chargeable accounting period—Whether distribution charge justified—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *s.* 19 (2), (4) *—Finance Act*, 1938 (1 *&* 2 *Geo.* 6, *c.* 46), s. 42 (1), (3)*—Companies Act*, 1948 (11 *&* 12 *Geo.* 6, *c.* 38), *s.* 281.

Olive Mill Ltd. (the holding company) carried on the business of cotton spinning. In 1953 Olive Mill Spinners Ltd. (Spinners), in consideration of an issue to the holding company of shares in Spinners, acquired that business, the holding company becoming thenceforth an investment company. In 1956 the holding company, pursuant to section 22 of the Finance Act, 1922, gave a grouping notice whereunder Spinners' profits fell to be treated for tax purposes as the holding company's profits.[1] On December 12, 1957, after difficulties in the cotton-spinning trade, both companies were voluntarily wound up. Until then the holding company was chargeable to profits tax in respect of its own and of Spinners' profits. In January, 1958, the liquidator sold the holding company's investments except the shares in Spinners and also Spinners' mill and machinery but by agreement with the purchasers Spinners still processed yarn at the factory with its own employees. The liquidator last sold yarn in October 1958. For the chargeable accounting period January 27, 1957, to December 12, 1957, the holding company was assessed to £2,142 18s. 0d. profits tax and £30,644 distribution charge and appealed to the special commissioners against that assessment. The holding company contended that its functions were the same after December 12, 1957, as

[1] Finance Act, 1937, s. 19: "(2) "Subject as hereafter provided, the "trades and businesses to which this "section applies are all trades or "businesses of any description carried "on in the United Kingdom, or "carried on, whether personally or "through an agent, by persons "ordinarily resident in the United "Kingdom. . . . (4) Where the functions of a company or society incorporated by or under any enactment "consist wholly or mainly of the "holding of investments or other "property, the holding of the investments or property shall be deemed "for the purpose of this section to be "a business carried on by the company or society."

Finance Act, 1938, s. 42: "(1) For "the purposes of . . . section 22 of "the Finance Act, 1937, . . . a body "corporate shall be deemed to be a "subsidiary of another body corporate "if and so long as not less than three "quarters of its ordinary share capital "is owned by that other body corporate. . . . (3) . . . references to "ownership shall be construed as "references to beneficial ownership."

Companies Act, 1948, s. 281: "In "case of a voluntary winding up, the "company shall, from the commencement of the winding up, cease to "carry on its business, except so far "as may be required for the beneficial winding up thereof."

Case 1:26-cv-00495-JLH Document 8-36 Filed 05/12/26 Page 3 of 17 PageID #: 6424

1963

INLAND REVENUE COMRS. v. OLIVE MILL LTD. (IN LIQUIDATION).

they had been before that date, namely, the holding of investments, so that it continued to be chargeable to profits tax, i.e., to come within section 19 (4) of the Finance Act, 1937. The Crown contended that the period from January 27 to December 12, 1957, was the holding company's last chargeable accounting period. Were that so the distribution charge would have been justified. In 1958 and 1959 the liquidator, as liquidator of Spinners, made certain distributions to the holding company and also made certain distributions as liquidator of the holding company. The Inland Revenue Commissioners under their statutory powers determined that January 27, 1957, to December 12, 1957, should be an accounting period for the relevant purposes of the holding company. That company contended before the special commissioners that the period ending December 12, 1957, was not its last chargeable accounting period, because it remained chargeable to profits tax under section 19 (4). The Crown contended that its trade or business ceased at the latest on December 12, 1957, and that that date ended its last chargeable accounting period. The special commissioners found that its functions (the holding of investments) continued to be after the voluntary winding up of that date what they had been before it and that that chargeable accounting period was not the last. The Crown appealed. For the chargeable accounting period December 13, 1957, to January 25, 1958, Spinners were assessed to £193 16s. 0d. tax and £71 4s. 0d. distribution charge, on the footing that on December 12, 1957, the grouping notice ceased to operate. The special commissioners discharged the assessment.

The Crown appealed:—

Held, allowing both appeals: (1) that from the winding up the holding company's objective was not to hold investments to obtain a benefit, but to realise its assets and distribute the proceeds among creditors and members: and that the special commissioners had misdirected themselves in their view of the proper interpretation of section 19 (4) and had arrived at the wrong conclusions.

Inland Revenue Commissioners v. *Buxton Palace Hotel, Ltd.* (1948) 29 T.C. 329 and *Carpet Agencies Ltd.* v. *Inland Revenue Commissioners* (1958) 38 T.C. 223 considered.

Briggs (Henry), Son & Co. Ltd. v. *Inland Revenue Commissioners* [1960] 1 W.L.R. 532, 568; [1960] 1 All E.R. 800, C.A.; [1961] 1 W.L.R. 68; [1961] 1 All E.R. 220, H.L., followed.

(2) That on the passing of the winding-up resolution the grouping notice became inoperative, first, because the holding company's last accounting period then ended and secondly, because that company then ceased to be the beneficial owner within section 42 of the Finance Act, 1938, of the shares in Spinners.

In re Oriental Inland Steam Co. Ltd. (1874) L.R. 9 Ch. 557 followed.

CASES STATED by the Commissioners for the Special Purposes of the Income Tax Acts.

These were appeals by the Crown by way of cases stated against decisions by the Special Commissioners allowing appeals by two companies, Olive Mill Ltd. and Olive Mill Spinners Ltd., against assessments to profits tax and against distribution charges.

The facts in the case stated with regard to Olive Mill Ltd., so far as relevant, were as follows. On July 11 and 12, 1961, Olive Mill Ltd., hereinafter called "the holding company," appealed against an assessment to profits tax for the chargeable accounting

1963

INLAND REVENUE COMRS. v. OLIVE MILL LTD. (IN LIQUIDATION).

period January 27, 1957, to December 12, 1957, in the sum of £2,142 18s. 0d. (tax) and a distribution charge for that period in the sum of £30,644.

The question for determination was whether the said accounting period to December 12, 1957, was the last chargeable accounting period of the holding company (as the Crown alleged), in which case the distribution charge was admitted to be justified by virtue of various statutory enactments and particularly section 35 (1) of the Finance Act, 1947; or whether (as the holding company contended) its functions continued after December 12, 1957, to be what they were before that date, namely, the holding of investments, so that it continued after December 12, 1957, to be chargeable to profits tax.

The commissioners heard evidence from a director of the holding company and from the liquidator, and various letters and other documents were put in evidence.

On the evidence they found the following facts proved or admitted.

The holding company was incorporated on March 19, 1920, to carry on the business of cotton spinning.

In 1953 a reconstruction took place owing to the difficulties then prevalent in the cotton industry. A new company, Olive Mill Spinners Ltd. (hereinafter called "Spinners"), was formed and took over from the holding company the spinning business. The holding company thenceforth held all the shares in Spinners.

Both Spinners and the holding company were liable to profits tax, the former because it carried on the trade of cotton spinning and so was chargeable under section 19 (2) of the Finance Act, 1937, the latter because its functions consisted in holding investments or other property (i.e., the shares in Spinners and other investments) and so was chargeable under section 19 (4) of that Act.

A "grouping" notice in accordance with section 22 of the Finance Act, 1937, was given by the holding company with respect to the profits of its subsidiary Spinners, with the result that the profits or losses of Spinners fell to be treated as the profits or losses of the holding company for the chargeable accounting periods ended January 28, 1956, onwards.

The holding company and Spinners had common boards of directors, board meetings taking place consecutively on the same day. The board meetings of Spinners as the trading company were regarded as the important ones: the meetings of the holding company were usually little more than formal, except for the discussion of what investments to hold (other than the shares in Spinners). The accounts of both companies were normally made up to various dates at the end of January, i.e., the last Saturday in the month.

The holding company was a public company with numerous shareholders, and its shares were at the material times and up to

1963

INLAND REVENUE COMRS. v. OLIVE MILL LTD. (IN LIQUIDATION).

the date of the appeal hearing quoted on the Oldham Stock Exchange. The directors did not have a controlling interest.

After the reconstruction in 1953 the cotton trade and in particular the trade of Spinners recovered somewhat, but by 1957 things were bad again: Spinners' production of yarn was down; with the falling demand most of it had to be kept as stock; and its storage presented great difficulties.

In consequence of the difficulties that had arisen the directors in their dual capacity as directors of both the holding company and Spinners were minded to dispose of their assets to the best advantage before the anticipated losses in trading were incurred. They realised that they could either dispose of their mill, machinery, stock and other assets and distribute the proceeds in a liquidation, or they could recommend to their shareholders a sale of their shares in the company. It became apparent that prospective purchasers of the shares were not interested in the assets, but in the value to them of the " shell " of the company minus its assets. Various offers were received for the shares but not accepted, the first being in April, 1957. In September, 1957, the directors resolved to recommend a liquidation, but this was dropped in view of several other offers which were received.

The directors eventually called a meeting of members of the company for December 12, 1957, at which the various offers made were put before the meeting. They were, however, rejected, and a resolution was passed for the voluntary winding up of the holding company, that company's auditor being appointed liquidator. A similar resolution for the voluntary winding up of Spinners was passed on the same day, December 12, 1957, and he was appointed liquidator of that company also. The liquidator continued the efforts to dispose to the best advantage of the assets of Spinners, or of the shares of members of the holding company.

In January, 1958, the holding company's investments other than shares in Spinners, consisting of Government stock, were sold by the liquidator at prices less than their cost to the holding company. In the same month the liquidator sold Spinners' mill and machinery, but by agreement with the purchasers Spinners continued to process yarn at the factory with its own employees and to have the use of the offices and warehouse. The liquidator sold the stock of yarn as quickly as he could, retaining the salesmen for the purpose. The processing did not continue for long, but the last sale of yarn did not take place until October, 1958.

Further tentative offers to buy the holding company's shares were received early in 1958. None of them became effective.

On May 21, 1958, the liquidator of Spinners made a first distribution to the company as shareholder of 15s. 6d. per share, amounting to £124,000; and on March 17, 1959, a further distribution of 2s. 6d. per share amounting to £18,000. It was expected that a further distribution would be made. On May 21, 1958, the liquidator of the company made a first distribution of 2s. 6d. per share, amounting to £180,764, and on March 24, 1959,

1963

INLAND REVENUE COMRS. v. OLIVE MILL LTD. (IN LIQUIDATION).

a further payment of 3d. per share, amounting to £18,076. The period January 27, 1957, to December 12, 1957, was not a period for which the accounts of the company had been made up, but the Inland Revenue Commissioners, in accordance with section 20 (2) of the Finance Act, 1937, determined it to be an accounting period.

It was contended for the holding company that its function of holding investments continued after as before December 12, 1957, and that accordingly that date was not its last chargeable accounting period for the purposes of profits tax, and that the distribution charge was accordingly invalid. It was contended for the Inland Revenue Commissioners that the holding company's trade or business ceased at the latest on December 12, 1957, and that, accordingly, that date was the end of the last chargeable accounting period, and that the distribution charge was therefore in order. The Special Commissioners found that the functions of the holding company, namely, the holding of investments, continued to be the same before and after the resolution to wind up passed on December 12, 1957, and that, accordingly, the chargeable accounting period ending on December 12, 1957, was not the last chargeable accounting period of that company and that the appeal must succeed. Figures having been agreed on November 24, 1961, the Special Commissioners reduced the assessment to £611 9s. 2d. (tax) and discharged the distribution charge on December 12, 1961.

The facts in the case stated with regard to Olive Mill Spinners Ltd., so far as relevant, were as follows. On July 11 and 12, 1961, Olive Mill Spinners Ltd. (hereinafter called " Spinners "), appealed against an assessment to profits tax for the chargeable accounting period December 13, 1957, to January 25, 1958, in the sum of £193 16s. 0d. (tax) and a distribution charge for the same period in the sum of £71 4s. 0d. (tax). The relevant facts in the two cases were the same. The decision in the case of Spinners was agreed to be dependent on that in the holding company's case: if they decided (as they did) in that case that the period to December 12, 1957, was not the last chargeable accounting period of the holding company then by reason of the " grouping " notice the profits of Spinners continued to be treated as the profits of the holding company and the assessment under appeal made on Spinners fell to be discharged. In view of their decision in the holding company's case they discharged the assessment on Spinners. No argument took place on what was the position if their decision in the holding company's case were held to be incorrect, and they came to no conclusion on that question.

The Crown appealed.

Hilary Magnus Q.C., *E. B. Stamp* and *Alan Orr* for the Crown.

Roy Borneman Q.C. and *Peter Rees* for the holding company and Spinners.

Case 1:26-cv-00495-JLH Document 8-36 Filed 05/12/26 Page 7 of 17 PageID #: 6428

1963

INLAND REVENUE COMRS. v. OLIVE MILL LTD. (IN LIQUIDATION).

The following case, in addition to the cases referred to in the judgment, was cited in argument: *In re Farrow's Bank Ltd.*[2]

BUCKLEY J. These are two appeals from decisions of the Special Commissioners of Income Tax relating to assessments to the profits tax made on two companies, Olive Mill Ltd., the holding company, and Olive Mill Spinners Ltd., "Spinners"

Before 1953 the holding company had carried on the trade of cotton spinning. In 1953 Spinners was incorporated and acquired from the holding company its business of spinning cotton in consideration of an issue to the holding company of shares of Spinners credited as fully paid. From that time forward the holding company held shares in the capital of Spinners and also owned and held certain other investments. In fact, it became an investment company. Spinners continued to carry on the trade of spinning cotton.

That state of affairs continued until December 12, 1957, when both companies passed appropriate resolutions to go into members' voluntary winding up.

In the course of the year 1956 the holding company gave a grouping notice pursuant to section 22 of the Finance Act, 1937, as a result of which, so long as that notice remained effective, the profits of Spinners fell to be treated as the profits of the holding company for profits tax purposes. It is not disputed that until the date of the resolution to wind up the holding company was chargeable to profits tax in respect of both its own profits and of the profits of Spinners in consequence of the grouping notice. The major question in this case is whether as a result of the resolution to wind up the holding company the chargeable accounting period for profits tax purposes applicable to the holding company which was then current and which then came to an end was the last chargeable accounting period of that company, or whether the company remained chargeable to profits tax so that the period ended December 12, 1957, was not the last chargeable accounting period.

Section 19 (1) of the Finance Act, 1937, creates the charge to the profits tax in respect of each chargeable accounting period of the liable company. Subsection (2) provides: "(2) Subject as "hereafter provided, the trades and businesses to which this "section applies are all trades or businesses of any description "carried on in the United Kingdom, or carried on, whether per- "sonally or through an agent, by persons ordinarily resident in "the United Kingdom." Subsection (4) is in the following terms: "(4) Where the functions of a company or society incorporated by "or under any enactment consist wholly or mainly in the holding "of investments or other property, the holding of the investments "or property shall be deemed for the purpose of this section to "be a business carried on by the company or society."

[2] [1921] 2 Ch. 164; 37 T.L.R. 847, C.A.

1963

INLAND REVENUE COMRS. v. OLIVE MILL LTD. (IN LIQUIDATION).

Buckley J.

Whether in the absence of subsection (4) the business of an investment company would be held to be a trade or business within subsection (2) is perhaps now not very relevant because the section does in fact include subsection (4). Subsection (4) may perhaps have been included in the section ex majore cautela to make sure that the business of an investment company would be caught by the section; but as the section stands it is, I think, clear that the business of an investment company is chargeable if it falls within subsection (4) but not otherwise; in other words, the business of an investment company is not within subsection (2). That view was shared by Harman J., who in *Carpet Agencies Ltd.* v. *Commissioners of Inland Revenue*,[1] said: "This clearly means that, in the view of the legislature, in the "absence of the subsection" (Subsection (4)) "the mere holding "of investments or property would not constitute the carrying on "of a business."

Section 30 of the Finance Act, 1947, contains provisions which are relevant to this case, but which I need not read, relating to reliefs in respect of profits which are not distributed and distribution charges which fall to be made when retained profits are distributed in a later accounting period.

The holding company was assessed to the profits tax for the chargeable accounting period January 27, 1957, to December 12, 1957, in the sum of £2,142 18s. 0d., and a distribution charge for the same period in the sum of £30,644. The company appealed to the special commissioners against that assessment. The propriety of that assessment depends on the proper view of the question whether the accounting period ended December 12, 1957, was or was not the last chargeable accounting period of the company or whether, as the company contended before the Special Commissioners, its functions continued after December 12, 1957, to be what they were before that date, namely, the holding of investments, so that it continued after that date to be chargeable to the profits tax; that is to say, so that it continued after that date to fall within the terms of section 19 (4) of he Act of 1937.

Among the facts found by the Special Commissioners in their case stated in the holding company's appeal was that in the year 1957, in consequence of the difficulties that had then arisen in the cotton spinning trade, the directors of both companies were minded to dispose of their assets to the best advantage before losses, which they anticipated, might be incurred. Various courses of action were considered and investigated, but eventually the two companies were put into liquidation by the resolutions of December 12, 1957. The liquidator who then came into the saddle continued the efforts which the directors had theretofore been making to dispose of the assets of Spinners to the best advantage or to dispose of the shares of members of the

[1] (1958) 38 T.C. 223, 229.

Case 1:26-cv-00495-JLH Document 8-36 Filed 05/12/26 Page 9 of 17 PageID #: 6430

1963

INLAND REVENUE COMRS. v. OLIVE MILL LTD. (IN LIQUIDATION).

Buckley J.

holding company. The liquidator for a time continued to hold the shares of Spinners and also continued to hold the other investments of the holding company. Those other investments were sold in January, 1958, and in the same month the liquidator sold the mill and machinery which belonged to Spinners, but by arrangement with the purchasers he continued to process yarn which belonged to Spinners at the mill and to have the use of the offices and warehouse there. The yarn so processed was sold as occasion offered. The last sale of yarn did not take place until October, 1958. The secretary of the holding company was retained in the employment of that company until that date because, as the commissioners find, he had a very good knowledge of the cotton industry which, presumably, was of value to the liquidator.

During this period there were negotiations for the sale of the shares of the holding company on terms which contemplated that the liquidation might be stayed, but these came to nothing.

On May 21, 1958, the liquidator, as liquidator of Spinners, made a first distribution to the holding company as a shareholder in Spinners of a sum of £124,000, and on March 17, 1959, in the same capacity he made a further distribution to the holding company of £18,000. On those same dates as liquidator of the holding company he made a first distribution of sums amounting to £180,764, and on March 24, 1959, a further distribution amounting to £18,076. The Inland Revenue Commissioners under their statutory powers determined that the period from January 27, 1957, to December 12, 1957, should be an accounting period for the relevant purposes of the holding company.

The contention of the company before the special commissioners was that its function of holding investments continued after December 12, 1957, in the same way as it had existed before that date, and that accordingly the period ending on December 12, 1957, was not its last chargeable accounting period because it remained a company chargeable to profits tax under section 19 (4) of the Act of 1937. On the other hand, the Crown contended that the company's trade or business ceased for the relevant purposes on December 12, 1957, at the latest, and that that date was the end of the last chargeable accounting period.

In paragraph 6 of the case stated the special commissioners state: "We, the Commissioners who heard the appeal, found "that the functions of the company, namely, the holding of "investments, continued to be the same before and after the "resolution to wind up which was passed on December 12, 1957. "Accordingly, the chargeable accounting period ending on "December 12, 1957, was not the last chargeable accounting "period of the company and the appeal must succeed." It is from that conclusion that the Crown now seek to appeal.

As regards Spinners, an assessment was made for the chargeable accounting period from December 13, 1957, to January 25,

1963

INLAND REVENUE COMRS. v. OLIVE MILL LTD. (IN LIQUIDATION).

Buckley J.

1958, in the sum of £193 16s. 0d. (tax) and a distribution charge for the same period in the sum of £71 4s. 0d. That assessment was made on the footing that on December 12, 1957, the grouping notice which had been given by the holding company ceased to operate, so that from that date Spinners was chargeable in its own right to profits tax in respect of the profits earned as the result of the carrying on of Spinners' business by the liquidator in the manner that I have already indicated. The Spinners appealed against that assessment, and before the special commissioners the matter was dealt with on the footing that the result of that appeal depended on the decision in the appeal of the holding company; that is to say, on the footing that if it could be shown that the holding company remained chargeable to the profits tax, and that the functions of the holding company remained the same after December 12, 1957, as before, the grouping notice would continue in operation so that the profits of Spinners would be treated as the profits of the holding company and Spinners would not be separately assessable.

Before me a point of law has been taken which I will explain later which was not taken before the special commissioners or brought to their notice.

The position with regard to the holding company turns on the question whether on the true interpretation of section 19 of the Act of 1937 the functions of the holding company continued after December 12, 1957, to be wholly or mainly the holding of investments or other property, and in that connection I have been referred to various authorities. There are only two to which I shall need to refer in any detail, but there are earlier decisions which are relevant and are sufficiently cited in those authorities for it to be unnecessary for me to refer to them separately.

In *Carpet Agencies Ltd.* v. *Inland Revenue Commissioners*,[2] the relevant company carried on the trade of dealing in carpets until March 31, 1953. It then ceased to deal in carpets. At that time it held certain investments and other assets but had disposed of all its trading stock. The question which arose was whether after March 31, 1953, the company was still chargeable to the profits tax. It had ceased to carry on the trade of dealing in carpets and so had ceased to come within the terms of section 19 (2). Had it, however, brought itself within the terms of section 19 (4)? In the course of his judgment Harman J. referred, among other authorities, to the decision of Atkinson J. in *Inland Revenue Commissioners* v. *Buxton Palace Hotel Ltd.*[3] In that case Atkinson J. considered the construction of section 19 (4), in relation to a company the business of which had been carrying on an hotel, but that hotel had been requisitioned so that at the relevant time the company was merely in receipt of a compensation rent. Atkinson J. had to consider whether in those circumstances the company could be

[2] 38 T.C. 223.

[3] (1948) 29 T.C. 329.

Case 1:26-cv-00495-JLH Document 8-36 Filed 05/12/26 Page 11 of 17 PageID #: 6432

said to be a company the functions of which consisted wholly or mainly in holding investments or other property. Atkinson J. said,[4] "Now what is the meaning of the word 'functions'? "The dictionary definition (I think it is a very good one "for the purposes of this case) is: 'the activities appro- "'priate to any business'; so that it ought to read: 'Where "'the "activities appropriate to any business" . . . consist "'wholly or mainly in the holding of investments or other "'property.' So read, of course, it is plain that the words "would only apply to a company whose business could be so "described. The activities appropriate to this business of hotel "proprietors certainly did not consist wholly or mainly or at all "in the holding of investments or other property, but it is in "effect argued that the words should be read as equivalent to "'activities' simpliciter during the relevant period—what, in "fact, it is asked, during the relevant chargeable period were the "activities of the company? I do not accept that interpretation "of the word. I think that subsection (4) is aimed at companies "of a particular nature and quality, companies who set out to "make profit in the way indicated or who have changed their "business into one of that character."

Harman J. said that he entirely agreed with those observations and then he for himself said[5]: "It seems to me that in "order to get within section 19 (4) you must prove not merely "that the company is one that happens to hold some income- "bearing investments but that one of its functions, that is to say "one of its purposes, has always been or has been for a con- "siderable time the making of money by the holding of "investments." In a later case he somewhat modified that statement because he said that he did not think he was justified in saying that one had to find that it had always been or had been for a considerable time one of the purposes of the company. The question was whether at the relevant time it was one of the purposes of the company.

After that reference to the *Buxton Palace Hotel* case,[6] Harman J. went on thus[7]: "On the facts stated in this case, "which I need not repeat, the commissioners held that this was "not a company within section 19 (4) of the 1937 Act. With "that finding I find myself entirely in agreement. I am of the "opinion that the appellants never had but one business, the "business of carpet merchants. It is true it held some invest- "ments but those were wholly ancillary to its merchanting "business and were used in fact to finance that very business," and accordingly he reached the conclusion that on the true interpretation of section 19 (4) the company, Carpet Agencies Ltd., did not come with in the terms of that subsection.

The other case to which I must refer is *Briggs (Henry) Son &*

[4] 29 T.C. 329, 334.
[5] 38 T.C. 223, 230.
[6] 29 T.C. 329.
[7] 38 T.C. 223, 230.

1963

INLAND REVENUE COMRS. v. OLIVE MILL LTD. (IN LIQUIDATION).

Buckley J.

Co. Ltd. v. *Inland Revenue Commissioners*.[8] In this case the relevant company, Briggs Collieries Ltd., had owned coal mines and had engaged in the business of coal mining. As a result of the nationalisation of the coal industry those assets, that is to say, the mine and its coal mining business, had been compulsorily acquired and the company became entitled to receive compensation under the Coal Industry (Nationalisation) Act, 1946. On the nationalisation of its colliery interests the company considered various ways of employing its resources in different fields, but after 1948 it devoted itself to securing its compensation under the nationalisation provisions and ceased to seek for fresh business. Eventually it went into liquidation. The question there under consideration was whether during the period when the company was entitled to receive compensation but not carrying on any other kind of business it could be properly described as a company the functions of which consisted wholly or mainly in the holding of property.

Upjohn J., after referring to the passage from Atkinson J., which I have already read, reached this conclusion at the end of his judgment[9]: "A company whose business "is temporarily stopped by requisition does not satisfy that "test"—that is, Atkinson J.'s test—"nor does one which "has given up trading: see the cases I have mentioned. They "do not bind me, because in this field every case depends on "its own facts once the true meaning of the word 'functions' "has been determined; and in this case it is true to say that "Briggs never could re-enter into its colliery activities. Never- "theless, on ceasing to trade as a colliery company, a company "might do one of several things. It might decide to engage in "some other trading activity, in which case, in my judgment, it "would remain a trading company. It might decide to become "an investment trust company, in which case it seems to me "clear that it would engage in a new business of holding "property. If it does neither, but resolves to wind up, it does "not seem to me to gain any new character in the sense of "carrying on an activity of holding property as being appropriate "to its business. It really has no business. It seems to me it is "carrying out a residual function as a colliery company. It can "no longer trade as such; it can only receive its compensation "and die," and on those grounds he came to the conclusion that the company was not within section 19 (4).

I do not think that I need read any part of the judgment of the Court of Appeal. Once again Atkinson J.'s interpretation of the word "functions" is referred to without disapproval—indeed, with approval—and Upjohn J.'s decision was upheld. The case went to the House of Lords, and in the House of Lords Lord Reid said[10]: "The Court of Appeal and Upjohn J. reached that

[8] [1960] 1 W.L.R. 532; [1960] 1 All E.R. 800, C.A.; [1961] 1 W.L.R. 68; [1961] 1 All E.R. 220, H.L.

[9] (1959) 38 A.T.C. 180, 189.

[10] [1961] 1 W.L.R. 68, 72.

Case 1:26-cv-00495-JLH Document 8-36 Filed 05/12/26 Page 13 of 17 PageID #: 6434

" result by giving to the word ' functions ' a meaning which " is, to my mind, narrower than its ordinary meaning. I " do not at all dissent from their view but I would prefer " to lay more stress on the word ' holding.' It appears " to me that, in this context, the phrase ' the holding of invest- " ' ments or other property ' does not mean simply the owning " of investments or other property. The word ' holding ' often " involves the idea of retention permanently or for an indefinite " time, and I think that that is involved in the use of that word in " the context. I have said that the apparent purpose of sub- " section (4) is to bring within the scope of the charge companies " conducting something at least analogous to a trade or business. " From that point of view, there appears to me to be an essential " distinction between companies, whose function or purpose or " objective is to make profit by continuing to hold their assets in " the form of investments or property, and companies, which " are not trying to make profitable use of their assets, but whose " whole activities are directed to realising their assets as soon " as possible. In the former case, the company's activities are " of a business character. They will almost always involve some " degree of active management. Circumstances may for a time " require the company to remain quiescent, but it still has the " purpose of deriving profit from continuing to hold its assets in " the form of investments or property. But in the latter case " the function or purpose or objective of the company is not to " continue to hold investments or property, but to cease holding " its assets in that form as soon as they can be turned into " money." On those grounds he agreed with the view which had been taken by the lower courts.

Lord Morris of Borth-y-Gest, at the end of his speech said [11]: " It is to be observed that the subsection "—that is, subsection (4) of section 19—" does not provide that the mere ownership by " a company of investments or other property brings about the " result that such ownership is to be deemed to be a business " carried on by the company. There is only such a deeming if " the ' functions ' of the company consist wholly or mainly in " the ' holding ' of investments or other property. The con- " junction of the words ' functions ' and ' holding ' suggest to my " mind something more than a mere ownership of some property, " and certainly something more than an enforced or involuntary " ownership of rights to receive compensation money, which " ownership it is hoped will be terminated at the earliest possible " moment by the receipt of the money. The company did not " set out to acquire or to own investments or property, and just " as there was nothing intentional or purposeful in its acquisition " of its rights to compensation, so there was no intention or wish " to continue to own such rights but, on the contrary, there " was an eager wish for an early settlement followed by a

[11] [1961] 1 W.L.R. 68, 75.

1963

INLAND REVENUE COMRS. v. OLIVE MILL LTD. (IN LIQUIDATION).

Buckley J.

" dissolution. In those circumstances I cannot think that the " company was one of which it could aptly be said that its func- " tions consisted wholly or mainly in the holding of investments " or other property."

On those authorities Mr. Magnus for the Crown submits that on the true construction of section 19 (4) the word " functions " is synonymous with the words " purposes " or " objectives." Secondly, he submits that for a company to be within section 19 (4) it must be shown not merely that it holds investments or other property but also that its purpose is to continue to hold them in order to derive advantages therefrom. Thirdly, he says that it is impossible, as a matter of law, to attribute such a purpose to a company in liquidation, for on liquidation it ceases to become the beneficial owner of its assets, and the statutory duty of the liquidator is to realise those assets as soon as is convenient for the benefit of creditors and members of the company.

In that connection I was referred to the Companies Act, 1948, s. 281, which provides: " In case of a voluntary winding up, " the company shall, from the commencement of the winding up, " cease to carry on its business, except so far as may be required " for the beneficial winding up thereof." The commencement of the winding up in the case of a voluntary winding up is, of course, the date of the resolution.

On the other hand, Mr. Borneman, for the holding company, has drawn attention to the fact that in none of the cases to which I have referred was there any earlier history of the company being what I may call a " section 19 (4) " company. The question in those cases was, had the company in each case acquired the character of being a " section 19 (4) " company? He says that it is common ground that until the date of the winding up resolution the functions of the holding company were wholly or mainly the holding of investments or other property, and he says that there was no significant change in that state of affairs at the time of the resolution to wind up.

He has contended that the question what the functions of the company are is a question of fact, and he has submitted that the commissioners in paragraph 6 of the case stated have found the fact that the functions of the company continued to be the same before and after the resolution to wind up. That finding, I think, must be at least a finding of mixed fact and law, for the propriety of the finding must depend on the proper interpretation of section 19 (4) and the application of that section to the facts of this particular case.

In my judgment, it is not possible to say that this court is precluded from considering whether the special commissioners came to the right conclusion because they have framed that paragraph in the language that I have read.

Mr. Borneman submits that one must distinguish the functions of the liquidator relating to the realisation of the company's

Case 1:26-cv-00495-JLH Document 8-36 Filed 05/12/26 Page 15 of 17 PageID #: 6436

1963

INLAND REVENUE COMRS. v. OLIVE MILL LTD. (IN LIQUIDATION).

Buckley J.

assets and the application of the proceeds of such realisation from the functions of the company, and he submits, as I say, that the functions of the company were unaffected by the resolution to wind up.

Now, although the cases to which I have referred are certainly distinguishable from the present case on the facts, it appears to me that the decision of the House of Lords in the *Briggs* case [12] provides the answer to the present problem; for, from the moment of the passing of the resolution to wind up, it was no longer the objective of the company to continue to hold investments for the purpose of obtaining a benefit by doing so. From that moment the objective of the company became the realisation of its assets as soon as they could advantageously be realised and the distribution of the proceeds amongst creditors and members in accordance with their rights in a winding up. To borrow the language of Lord Reid, the function or purpose or objective of the company ceased to be to continue to hold investments or property and became the realisation of those assets or turning them into money. No doubt, in order that the assets might be realised in an orderly and advantageous manner it was right and proper that there should have been some period of time before the assets were in fact realised, but the objective of the company, from December 12, 1957, onwards was not, in my judgment, that of holding investments: its objective was to realise its investments.

In that connection it is important to bear in mind, I think, what Atkinson J. said. It is not merely the activities of the company that are relevant but the activities appropriate to its business, that is to say, appropriate to its objective. As I read his judgment in the light of the later decision of the House of Lords, that is really what he means when he uses the words "activities "appropriate to any business." He emphasises that activities simpliciter are not the test; it is necessary to see what are the activities appropriate to a business set on a particular course. From December 12, 1957, onwards, the course on which the company here was set was the realisation of its assets. No doubt it is quite true that if the liquidator had found that it would be advantageous for the members of the company to sell their shares to purchasers who might have wished to have the liquidation stayed, that course might have been adopted. That course was considered, although that idea came to no fruition. But that was not one of the liquidator's duties. The duties were those provided by the Companies Act, 1948, that is to say, to realise the assets and to distribute the proceeds among the creditors and members in accordance with their rights.

For these reasons I think that the special commissioners took a mistaken view of the proper interpretation to be put on section 19 (4) and misdirected themselves in that respect. I

[12] [1961] 1 W.L.R. 68.

1963

INLAND REVENUE COMRS. v. OLIVE MILL LTD. (IN LIQUIDATION).

Buckley J.

think the conclusions at which they arrived were wrong and that the appeal in the holding company's case succeeds.

The appeal in the Spinners' case depends on the question whether or not Spinners remained grouped with the holding company for the purpose of the Finance Act, 1937. The relevant sections for this purpose are section 22 of the Act of 1937, which, by subsection (1), enables a company of which another company is subsidiary to give a grouping notice in respect of the chargeable accounting period in which the notice is given, and that notice continues during all subsequent chargeable accounting periods throughout which the subsidiary company remains a subsidiary of the principal company. By section 42 of the Finance Act, 1938, the term "subsidiary company" is defined. Subsection (1) provides: "For the purposes of . . . section 22 of the Finance Act, "1937, . . . a body corporate shall be deemed to be a subsidiary "of another body corporate if and so long as not less than three "quarters of its ordinary share capital is owned by that other body "corporate," and subsection (3) provides that "references to "ownership shall be construed as references to beneficial owner-"ship." So that the test is whether the parent company is the beneficial owner of not less than three-quarters of the ordinary share capital of the subsidiary company. It seems to me that in fact the grouping notice ceased to be operative on December 12, 1957, on two grounds. First, on the view that I have taken on the holding company's appeal, the last accounting period of the holding company ended on that date and, therefore, that company was after that date no longer a company to which the relevant sections were applicable, and the grouping notice would on that ground have then ceased to operate so that Spinners would be assessable in its own right in respect of profits earned after that date.

The grouping notice, I think, also falls to the ground for the reason that the holding company on going into liquidation ceased to be the beneficial owner of the shares in Spinners within the meaning of the section that I have just read. In this connection I refer to the decision of the Court of Appeal in *In re Oriental Inland Steam Co. Ltd.*[13]. In that case James L.J. said[14]: "The English Act of Parliament has enacted that in the case of a "winding up the assets of the company so wound up are to "be collected and applied in discharge of its libilities. That "makes the property of the company clearly trust property. It "is property affected by the Act of Parliament with an obligation "to be dealt with by the proper officer in a particular way. Then "it has ceased to be beneficially the property of the company; and "being so, it has ceased to be liable to be seized by the execution "creditors of the company." Mellish L.J. expressed a similar view. He said[15]: "But, in my opinion, the beneficial interest is

[13] (1874) L.R. 9 Ch. 557.
[14] Ibid. 559.
[15] Ibid. 560.

1963

INLAND REVENUE COMRS. *v.* OLIVE MILL LTD. (IN LIQUIDATION).

Buckley J.

" clearly taken out of the company." It has not been suggested to me that there has been any subsequent decision indicating that the views of the Lords Justices are not still good law, and it therefore appears to me to be established by the authority of that case that, on the winding up resolution being passed, the beneficial interest in the Spinners' shares held by the holding company ceased to reside in the holding company. Consequently Spinners ceased to be a subsidiary of the holding company within the meaning of these statutory provisions.

For these reasons I think that the appeal of the Crown in the Spinners' case also succeeds and that the assessment on Spinners should be restored.

Solicitors: *Solicitor of Inland Revenue; Field, Roscoe & Co.*

K. R. A. H.

[COURT OF APPEAL.]

1963

May 13, 14, 15, 27.
Willmer, Danckwerts and Diplock L.JJ.

* *In re* BRITISH BASIC SLAG LTD.'S APPLICATION
BRITISH BASIC SLAG LTD. *v.* REGISTRAR OF RESTRICTIVE TRADING AGREEMENTS.

In re COLVILLES LTD.'S APPLICATION
COLVILLES LTD. AND OTHERS *v.* REGISTRAR OF RESTRICTIVE TRADING AGREEMENTS.

[1960 B. No. 4358.]
[1960 C. No. 3911.]

*Restrictive Practices—Registration—Agreements registrable—"Arrangement"—Common form agreement discussed by steel manufacturers—Identical agreements made with subsidiary—Agreements executed as result of each manufacturer's independent commercial judgment—Whether registrable "arrangement"—Subsidiary established by steel manufacturers to market fertilisers—Subsidiary required to purchase from manufacturers in proportionate quantities—Whether restriction imposed on subsidiary—**Restrictive Trade Practices Act,** 1956 (4 & 5 Eliz. 2, c. 68), s. 6 (1) (c) (e), (3).*

Basic slag, a by-product of steel manufacture, assumed on cooling a solid clinker form and could be made available as a fertiliser by very fine grinding. Several steel companies incorporated B. Ltd. as a common marketing organisation for the sale of their fertilisers (which term hereinafter includes basic slag). Each company took shares in it, appointed one nominee director to its board, and entered into ten-year agreements with it regulating the terms on which they supplied it with fertilisers. The membership of B. Ltd. changed from time to time but each of the new members made agreements with it substantially like the original agreements. As and when the agreements expired they were renewed.

The nominee directors considered the renewal of the agreements due to expire in May, 1954, at a number of board meetings in 1953 and 1954, when they instructed the secretary, and subsequently the solicitors, of B. Ltd. to prepare a draft common form agreement. After the draft agreement had been amended by the nominee

ITEM NO. 152

JA-38

[HOUSE OF LORDS]

EBRAHIMI . . . . . APPELLANT

AND

WESTBOURNE GALLERIES LTD. AND OTHERS . . RESPONDENTS

[On appeal from *In re* WESTBOURNE GALLERIES LTD.]

1972 March 8, 9, 13, 14; May 3

Lord Wilberforce, Viscount Dilhorne, Lord Pearson, Lord Cross of Chelsea and Lord Salmon

Company—Winding up—"Just and equitable" grounds for—Company formed by former partners—Subjection of legal rights to equitable considerations based on underlying personal relationship—Considerations applicable—Whether "just and equitable" ground confined to circumstances affecting shareholder in capacity as such—Whether confined to proved cases of mala fides—"Bona fide in the interests of the company"—"Quasi-partnership"—"In substance partnership"—Whether valid concepts—Companies Act 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 222 (*f*)

From about 1945 the appellant and N were partners in a business. In 1958 a private company was formed to take the business over. The appellant and N were its first directors. Under the articles of association the company in general meeting had an express power to remove a director by ordinary resolution. Soon afterwards, N's son G was made a director; by virtue of their shareholdings N and G had a majority of the votes in general meeting. The company made good profits all of which were distributed as directors' remuneration. No dividends were ever paid. In 1969, after disagreement between the appellant and N and G, an ordinary resolution was passed by the company in general meeting by the votes of N and G removing the appellant as director. The appellant petitioned for an order under section 210 of the Companies Act 1948 that N and G should purchase his shares in the company or sell their shares to him on such terms as the court should think fit, alternatively for an order under section 222 (*f*) [1] that the company be wound up. At the hearing, an assurance was given in evidence that the practice of not paying dividends would not be continued. Plowman J. refused to make an order under section 210 but held that N and G had done the appellant a wrong in that it had been an abuse of power and a breach of the good faith which partners owed to each other to exclude one of them from all participation in the business on which they had embarked on the basis that all should participate in its management, and that, accordingly, the appellant had made out a case for a winding up order under section 222 (*f*). The Court of Appeal allowed an appeal by the respondents, holding that in the case of a quasi-partnership company the exercise by a majority in general meeting of the power under the articles or section 184 of the Act of 1948 to remove a director from office and consequently to exclude him

[1] Companies Act 1948, s. 222: "A company may be wound up by the court if—. . . (*f*) the court is of the opinion that it is just and equitable that the company should be wound up."

from participation in the management and conduct of the business did not form a ground for holding that it was just and equitable that the company should be wound up unless it was shown that the power had not been exercised bona fide in the interests of the company or that the grounds for exercising the power were such that no reasonable man could think that the removal was in the interest of the company, and that, on the facts, the appellant had failed to show that his removal had not been justified and in the best interests of the company or that no man could have thought so.

On appeal by the appellant:—

Held, allowing the appeal, that a limited company was more than a mere legal entity and the rights, expectations and obligations of the individuals behind it inter se were not necessarily merged in its structure (post, p. 379B–C); that, while the "just and equitable" provision did not entitle a party to disregard the obligation which he assumed by entering a company, it enabled the court to subject the exercise of legal rights to equitable considerations of a personal character arising between individuals which might make it inequitable to insist on legal rights or to exercise them in a particular way (post, pp. 379D, 386H—387A); that, in the present case, the appellant and N had joined in the formation of the company on the basis that the character of the association, viz., inter alia, that the appellant was entitled to participate in the management, would, as a matter of personal relation and good faith, remain the same; and that, N having in effect repudiated that relationship and the appellant having lost his right to a share in the profits and being in that respect at the mercy of N and G and being unable to dispose of his interest without their consent, the proper course was to dissolve the association by winding up the company (post, pp. 380G, 381C–F, 386E—387A).

Symington v. *Symington's Quarries Ltd.* (1905) 8 F. (Ct. of Sess). 121; *In re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426, C.A.; *Loch* v. *John Blackwood Ltd.* [1924] A.C. 783, P.C.; *In re Straw Products Pty. Ltd.* [1942] V.L.R. 222; *In re Wondoflex Textiles Pty. Ltd.* [1951] V.L.R. 458 and *In re Lundie Brothers Ltd.* [1965] 1 W.L.R. 1051 approved.

Blisset v. *Daniel* (1853) 10 Hare 493 applied.

In re Cuthbert Cooper & Sons Ltd. [1937] Ch. 392 and dictum of Plowman J. in *In re Expanded Plugs Ltd.* [1966] 1 W.L.R. 514, 523 disapproved.

Per curiam. (1) It is wrong to create categories or headings under which cases must be brought if the "just and equitable" clause is to apply (post, p. 374H).

(2) Where the petitioner is a shareholder, the words are not confined to such circumstances as affect him in his capacity as such (post, pp. 375A–B, 385H—386A).

(3) Elements which give rise to the superimposition of equitable considerations may include one, or probably more, of the following: (i) an association formed or continued on the basis of a personal relationship involving mutual confidence; (ii) an agreement, or understanding, that all, or some, of the shareholders, shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company. The fact that the company is a small one, or a private company, is not enough (post, p. 379E–G).

(4) The expressions "quasi-partnership" or "in substance partnership" may be confusing, for a company, however

small, however domestic, is a company, not a partnership or even a quasi-partnership, and the members of it have accepted new obligations (post, pp. 379H—380B).

(5) The formula "bona fide in the interests of the company" should not become little more than an alibi for a refusal to consider the merits of the case; in a situation such as the present it seems to mean little more than "in the interests of the majority." To confine the application of the "just and equitable" clause to proved cases of mala fides would be to negative the generality of the words (post, pp. 381F–H, 386C–D).

Per Lord Cross of Chelsea. A petitioner who relies on the "just and equitable" clause must come to court with clean hands (post, p. 387G).

Decision of the Court of Appeal [1971] Ch. 799; [1971] 2 W.L.R. 618; [1971] 1 All E.R. 561 reversed.

The following cases are referred to in their Lordships' opinions:

Baird v. *Lees*, 1924 S.C. 83.
Blisset v. *Daniel* (1853) 10 Hare 493.
Bushell v. *Faith* [1970] A.C. 1099; [1970] 2 W.L.R. 272; [1970] 1 All E.R. 53, H.L.(E.).
Concrete Column Clamps Ltd., In re [1953] 4 D.L.R. 60.
Const v. *Harris* (1824) Tur. & Rus. 496.
Cooper (Cuthbert) & Sons Ltd., In re [1937] Ch. 392; [1937] 2 All E.R. 466.
Davis & Collett Ltd., In re [1935] Ch. 693.
Elder v. *Elder & Watson*, 1952 S.C. 49.
Expanded Plugs Ltd., In re [1966] 1 W.L.R. 514; [1966] 1 All E.R. 877.
Fildes Bros. Ltd., In re [1970] 1 W.L.R. 592; [1970] 1 All E.R. 923.
Forte (Charles) Investments Ltd. v. *Amanda* [1964] Ch. 240; [1963] 3 W.L.R. 662; [1963] 2 All E.R. 940, C.A.
K/9 Meat Supplies (Guildford) Ltd., In re [1966] 1 W.L.R. 1112; [1966] 3 All E.R. 320.
Leadenhall General Hardware Stores Ltd., In re (unreported), February 4, 1971, Brightman J.
Lewis v. *Haas*, 1970 S.L.T. (Notes) 67.
Loch v. *John Blackwood Ltd.* [1924] A.C. 783, P.C.
Lundie Brothers Ltd., In re [1965] 1 W.L.R. 1051; [1965] 2 All E.R. 692.
Modern Retreading Co. Ltd., In re [1962] E.A. 57.
Spackman, Ex parte (1849) 1 Mac. & G. 170.
Straw Products Pty. Ltd., In re [1942] V.L.R. 222.
Swaledale Cleaners Ltd., In re [1968] 1 W.L.R. 1710; [1968] 3 All E.R. 619, C.A.
Sydney and Whitney Pier Bus Service Ltd., In re [1944] 3 D.L.R. 468.
Symington v. *Symington's Quarries Ltd.* (1905) 8 F. 121.
Tench v. *Tench Bros. Ltd.* [1930] N.Z.L.R. 403.
Thomson v. *Drysdale*, 1925 S.C. 311.
Wondoflex Textiles Pty. Ltd., In re [1951] V.L.R. 458.
Yenidje Tobacco Co. Ltd., In re [1916] 2 Ch. 426, C.A.

The following additional cases were cited in argument:

Burland v. *Earle* [1902] A.C. 83, P.C.
Furriers' Alliance, In re (1906) 51 S.J. 172.
Goodman v. *Whitcomb* (1820) 1 J. & W. 589.

Langham Skating Rink Co., In re (1877) 5 Ch.D. 669, C.A.
North-West Transportation Co. Ltd. v. *Beatty* (1887) 12 App.Cas. 589, P.C.
Othery Construction Ltd., In re [1966] 1 W.L.R. 69; [1966] 1 All E.R. 145.
Rica Gold Washing Co., In re (1879) 11 Ch.D. 36, C.A.
Rowe v. *Wood* (1822) 2 J. & W. 553.
Shuttleworth v. *Cox Brothers & Co. (Maidenhead) Ltd.* [1927] 2 K.B. 9, C.A.
Witt v. *Corcoran* (1872) 21 W.R. 47.
Wood v. *Woad* (1874) L.R. 9 Ex. 190.

APPEAL from the Court of Appeal.

This was an appeal by Shokrollah Ebrahimi by leave of the Court of Appeal (Russell, Megaw and Buckley L.JJ.) from their decision on December 16, 1970, by which they allowed an appeal by the respondents, Westbourne Galleries Ltd. ("the company") and Asher Nazar Achoury ("Nazar") and George Alexander Nazar Achoury ("George Nazar"), directors of the company, from an order of Plowman J. on July 14, 1970 [1970] 1 W.L.R. 1378 by which, on a petition by the appellant, he wound up the respondent company.

By his petition, the appellant sought an order that Nazar and George Nazar should purchase his shares in the company, alternatively sell their shares in the company to him, on such terms as the court should think fit, alternatively that the company be wound up. Plowman J. refused to order a purchase of the appellant's shares but made an order winding up the company under section 222 (*f*) of the Companies Act 1948.

The Court of Appeal allowed an appeal by the respondents against that order.

The appellant appealed.

The facts are stated in the opinions of Lord Wilberforce and Lord Cross of Chelsea; further facts may be found in the judgments of Plowman J., at pp. 1380–1383, 1389–1390, and the Court of Appeal.

Raymond Walton Q.C. and *Hedley Marten* for the appellant. This appeal raises for the first time in this House the question of an incorporated partnership: does one apply the partnership rule or the strict company rule of majority? It is now established that the power of the court under section 222 (*f*) of the Companies Act 1948 is not in any way limited by the other paragraphs of the section.

The appellant submits: (1) In a partnership the utmost good faith is required from all the partners, particularly where the other partners have the right to expel a partner from the business. They may only do so after giving him the fullest notice of the charges against him and an opportunity to refute them. If it is a question of his conduct of which they are complaining, they must give him an opportunity of mending his ways. In the present case, no reasons were given for the appellant's removal. The Court of Appeal [1971] 1 Ch. 799, 810–812 said that there was nothing to back up Plowman J.'s finding of fact that there was no sufficient justification for his removal and that the onus of showing that the other partners had not behaved properly was on the person complaining of their acts. That

Case 1:26-cv-00495-JLH Document 8-37 Filed 05/12/26 Page 6 of 30 PageID 6444

was a wrong attribution of the onus. An " incorporated partnership " is still suffused with the duty of utmost good faith. (2) Exclusion from participation in the conduct of the business of the partnership is always a most serious breach of the partnership obligations. (3) Where the partners have used the machinery of the Companies Act for the conduct of their business organisation the same rules and duties apply as if the business had remained a partnership, so that even though under the general law and the construction of any power conferred to remove minority shareholders from participation in the firm that power may only be exercised bona fide. (4) To remove a working partner or a director from his directorship in a case such as the present, which means in practice to exclude him from participation in the bulk of the profits of the company, is a serious breach of the partnership obligations unless there is justification for such removal. (5) Plowman J. has rightly found as a fact that there was no sufficient justification. A winding up could hardly be inequitable where, if the company were a partnership, it would be wound up.

It is easy to recognise a partnership company when one sees it but difficult to formulate a test. The nub is: is it really a working partnership in the guise of a company? Alternatively, its essential character may be said to be that of a small company in which there is a relationship between the shareholders and the working directors, the basis being remuneration for work rather than investment. The company here has never paid a dividend, all the profits being paid out by way of salary. There is no factual dispute except, as a matter of emphasis, as to how far the appellant was ever really recognised as a partner.

If the House finds that this was a working partnership in the guise of a company it would be unduly restricted by matters of form if it did not take the view that the partnership rule of good faith applied. There is no suggestion that the Companies Act does not apply, but the whole of the obligations of everybody in the company is suffused by the obligations of that rule.

It is always a serious breach of partnership duties to exclude a partner from the management of the firm: see *Lindley on Partnership*, 13th ed. (1971), p. 331, supported by *Goodman* v. *Whitcomb* (1820) 1 J. & W. 589; *Rowe* v. *Wood* (1822) 2 J. & W. 553; and *Const* v. *Harris* (1824) Tur. & Rus. 496. Even a wholly unrestricted power of expulsion in a partnership agreement must be used fairly: see *Blisset* v. *Daniel* (1853) 10 Hare 493. The principle there was approved in, inter alia, *Wood* v. *Woad* (1874) L.R. 9 Ex. 190. If one starts with uberrimae fidei, natural justice is not far away.

Coming to the partnership company cases, Lord Dunedin in *Symington* v. *Symington's Quarries Ltd.* (1905) 8 F. 121, 129 enunciated the true and correct principle. It might have been possible to decide *In re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426 on the narrow ground that there was complete deadlock, but Lord Cozens-Hardy M.R. went out of his way to say that whether that was so or not the circumstances were such that the court should apply partnership law. Pickford L.J. agreed; Warrington L.J. perhaps took a narrower view, but he recognised clearly the application of the partnership concept. *In re Yenidje Tobacco Co. Ltd.* was approved by the Privy Council in *Loch* v. *John Blackwood Ltd.* [1924] A.C. 783, not

A strictly a partnership case. See, in particular, *per* Lord Skerrington in *Thomson* v. *Drysdale*, 1925 S.C. 311, 316, who uses the word "suffused" with the obligation of good faith, saying that the partner in question must avoid acting in such a way as to make it impossible for the other shareholder to co-operate with him. That can only be read into the Companies Act from the partnership aspect of the matter. The words of Simonds J. in *In re Cuthbert Cooper & Sons Ltd.* [1937] Ch. 392, 398 were in relation to
B the facts of the particular case, where the younger sons were not members of the company and therefore not within the partnership concept; even so, on the facts, the case has not commanded universal approbation: see *per* Danckwerts L.J. in *In re Swaledale Cleaners Ltd.* [1968] 1 W.L.R. 1710, 1716 and *In re Lundie Brothers Ltd.* [1965] 1 W.L.R. 1051.

With regard to what the Court of Appeal say in their judgment [1971]
C Ch. 799, 808B, it is difficult to think that ordinary partners converting their business into a limited company would be so suspicious of each other that they would provide for something so far from the thoughts of any of them as that one would seek to exclude the other from the management of the company. The vast majority of companies are incorporated without reference to a solicitor.

The appellant in the Court of Appeal was not really going as far as he
D is represented in the judgment [1971] Ch. 797, 810B as having submitted. What he intended to say throughout was that there were really two things: (1) the excluding partner must have reasonable grounds for exclusion; (2) his action must be bona fide, which is easy to establish if there are reasonable grounds. Continual complaints might in certain circumstances be a reason for exclusion, but there would have to be something more than that the
E business would get on better without the partner in question.

As to onus, one starts with *Blisset* v. *Daniel*, 10 Hare 493; see at p. 522, which puts it in the right place, as does also *Witt* v. *Corcoran* (1872) 21 W.R. 47; see also *In re Lundie Brothers Ltd.* [1965] 1 W.L.R. 1051, 1057. In *In re Expanded Plugs Ltd.* [1966] 1 W.L.R. 514, which was *not* a case of an attempt to exclude a partner from taking part in the business of the company but the contrary, Plowman J. said no more than that one must
F bring oneself, in either case, within the just and equitable principle.

The evidence shows that neither Nazar nor George Nazar thought of their relationship with the appellant in the partnership context at all but regarded him as a mere employee. Their actions followed naturally from their view of him as an employee, but were not bona fide in the context of good faith as partners.

G As to the propositions discussed by the Court of Appeal [1971] Ch. 799, 810–812, the test whether an action is bona fide in the interests of a company *as a whole* was evolved with regard to special resolutions to change articles: see *Buckley on the Companies Acts*, 13th ed. (1957), pp. 38–39. It does not mean in the interests of the company as distinct from the corporators, but in the interests of the corporators considered as a body.
H The test comes in for the purpose of dealing with the general principles of law and equity dealing with the limitation of the powers of all majorities. It is a pure company law test, not applicable to relationships between partners who owe each other the utmost good faith. The language of the

Court of Appeal at [1971] Ch. 799, 811F, comes perilously close to requiring fraud.

No doubt the same consequences as those for which the appellant contends for here in the case of a partnership company should apply in the case of a similar company where there was not actually a partnership before. One tests the partnership nature of a company by looking at the current circumstances of the company, and the previous history is irrelevant.

A. J. Balcombe Q.C. and *William Stubbs* for the respondents. The appellant is tied by his allegations in his petition. In this appeal he has gone beyond the facts found by Plowman J., and he is not entitled to do this. The respondents do not seek to do so.

A misapprehension underlies the appellant's approach to this appeal. There is a division between the owners of a company and the people who work in it. There is no such division in a partnership.

The respondents submit: (1) No shareholder in a company can get a winding up order unless his position as a shareholder is affected. (2) There are no special rules applicable to "quasi-partnership" companies (this point was not open to the respondents in the Court of Appeal). (3) Whether or not there is such a thing as a "quasi-partnership company," the removal of a director by itself never justifies a just and equitable winding up. "By itself" includes those consequences which necessarily flow, including the fact that the director no longer gets director's fees. (4) In any event, a person in the position of the appellant in this case must both allege and prove lack of bona fides. (5) The court will not substitute its own judgment for that of the shareholders of the company unless no reasonable man could have formed the view which the shareholders formed.

As to (1), see those classes of persons who are entitled to petition for a winding up order: Companies Act 1948, s. 224. It is notorious by its absence that a director has no such right. A contributory is only entitled to petition in right of his position as a contributory, and only if his position as a contributory is affected: see the proviso (a) to section 224 (1); *In re Expanded Plugs Ltd.* [1966] 1 W.L.R. 514 and *Elder* v. *Elder & Watson*, 1952 S.C. 49, parallel decisions under section 210. This is also the basis of the rule that a fully paid up shareholder petitioning for a winding up must allege and prove that there is a surplus of assets available. [Reference was made to *In re Rica Gold Washing Co.* (1879) 11 Ch.D. 36; *In re Othery Construction Ltd.* [1966] 1 W.L.R. 69; and *In re Lundie Brothers Ltd.* [1965] 1 W.L.R. 1051.]

As to (2), there is nothing in the Act of 1948 which talks about there being two types of company. This is odd, since the Registrar-General's figures show that there are some 519,000 private companies and only some 15,000 public companies; the great majority of companies would thus inferentially fall under the quasi-partnership head. When normal adult people choose to associate themselves together under one of the heads of company or partnership they do so with their eyes open. There are advantages and disadvantages either way. [Reference was made to the Partnership Act 1890, ss. 24 (5) and 25.] It is not right to say that there is some sort of association halfway between the two to which the rules of partnership as opposed to company law are applicable. One can on the just and

equitable ground take into account the domestic nature of a small company, but one cannot apply the *law* of partnership. This would be an unwarranted gloss on the Companies Act. One should simply look at the Companies Act and ask whether, in all the circumstances, it is just and equitable to wind the company up.

In re Yenidje Tobacco Co. Ltd. [1916] Ch. 426 was a case of deadlock and it would in any case have been just and equitable to wind up the company there. In the present case, difficulties of cooperation and so on can be solved simply by getting rid of the director involved. It is conceded that a lack of probity is always regarded as a ground for winding up.

The very difficulty in deciding what is a quasi-partnership supports the view that no such animal exists. One should consider the difficulty which Brightman J. found in *In re Leadenhall General Hardware Stores Ltd.* (unreported), February 4, 1971, of finding a suitable test for determining what was a quasi-partnership. One should have a reasonably certain test. The test which Brightman J. applied of whether the directors were working directors would produce astonishing results. Often there are sleeping partners in companies which would otherwise be partnership companies.

Although all the cases cited by the appellant refer to quasi-partnership principles, they can all be justified on the just and equitable principle without reference to partnership at all. *Symington* v. *Symington's Quarries Ltd.*, 8 F. 121 was decided on the just and equitable principle, alternatively the deadlock principle. *Loch* v. *John Blackwood Ltd.* [1924] A.C. 783 was a case of lack of probity. So was *Thomson* v. *Drysdale,* 1925 S.C. 311, decided under the *Loch* v. *John Blackwood* principle: see especially at p. 324, where reference is made to the fact that the partners go into a company knowing that there is power under the Companies Acts to remove directors. In *In re Cuthbert Cooper & Sons Ltd.* [1937] Ch. 392 no order was made and the petition was dismissed, so no great reliance can be placed on the case. The appellant says that *In re Cuthbert Cooper & Sons Ltd.* did not have the approval of Danckwerts L.J. in *In re Swaledale Cleaners Ltd.* [1968] 1 W.L.R. 1710, but see *Charles Forte Investments Ltd.* v. *Amanda* [1964] Ch. 240 where the Court of Appeal of which he was a member expressly followed it: Danckwerts L.J. must have forgotten that. The decision of Plowman J. in *In re Lundie Brothers Ltd.* [1965] 1 W.L.R. 1051 was wrong. He does not seem to have appreciated the problem, and seems to have assumed that a winding up order could be made under section 222 even where the director was not affected in his position qua shareholder. It is wrong to assume that because the appellant was removed as a director of the company he will also be prejudiced as a shareholder by not receiving dividend.

As to (3), a gloss should not be put on section 184 of the Act of 1948. In the vast majority of cases this section would not be taken literally at all. It would have been easy for Parliament to say that section 184 should not apply to exempt private companies (introduced by the Act of 1947, s. 54) if it had wanted to do that; the fact that it did not indicates that section 184 was intended to be of universal application.

On points (2) and (3), a further essential difference between a partnership and a company is that the proprietary interest in a company is transmis-

sible. A partnership is characterised by the fact that it is dissolved by the death or bankruptcy of any of the partners. This highlights the essential difference between a company and a partnership: that in a company the ownership and the management are separate.

If the members of a company join together in the context of the constitution of the company to remove a director under section 184 it is prima facie neither unfair nor inequitable that the power is exercised. If it got as far as being simply a desire to ruin the director in question one might get into the field where one would commit a legal wrong by deliberately harming him.

Further on (3), see *Bushell* v. *Faith* [1970] A.C. 1099, *per* Lord Upjohn, at p. 1108E. The converse question may be posed: is there an obligation. when a director retires by rotation according to the articles, to re-elect him? See *Lindley on Partnership*, at p. 331: an agreement not to continue him as director is perfectly competent within partnership law. See also *In re Cuthbert Cooper & Sons Ltd.* [1937] Ch. 392, 398: the bargain in the present case was that there should be the right to remove a director; see also *In re Expanded Plugs Ltd.* [1966] 1 W.L.R. 514, *per* Plowman J., at p. 522D. A shareholder can vote his shares as he wishes: *North-West Transportation Co. Ltd.* v. *Beatty* (1887) 12 App.Cas. 589 and *Burland* v. *Earle* [1902] A.C. 83; his motive is irrelevant unless it amounts to fraud or oppression, etc. Where, therefore, partners enter into an association on the basis of articles, the question of bona fides becomes irrelevant. *Lewis* v. *Haas*, 1970 S.L.T. (Notes) 67 stresses the point about association on the terms of the articles and also refers to the refusal to reappoint a director when he retires by rotation. [Reference was made to *Elder* v. *Elder & Watson*, 1952 S.C. 49.]

As to (4), see *Wood* v. *Woad*, L.R. 9 Ex. 190 and *In re Cuthbert Cooper & Sons Ltd.* [1937] Ch. 392. The point that, if it was not exercised in good faith, the removal might have been invalid has not been taken before. It was not taken in the petition, so it is neither alleged nor proved, and it must be proved, the onus being on the appellant. The right test is found in *In re Expanded Plugs Ltd.* [1966] 1 W.L.R. 514. Plowman J.'s finding of fact in the present case [1970] 1 W.L.R. 1378, 1389F, cannot be interfered with: see also the judgment of the Court of Appeal [1971] Ch. 799, 811G. In *Blisset* v. *Daniel*, 10 Hare 493 Page Wood V.-C. was not directing himself to the onus of proof. In *Witt* v. *Corcoran*, 21 W.R. 47 Bacon V.-C. was considering the case as if the defendant had to establish something; he was looking at it the wrong way round. Again, that was a partnership case and again the court was not being asked to deal with the question of onus of proof: see at p. 50. In *In re Cuthbert Cooper & Sons Ltd.* [1937] Ch. 392, *Wood* v. *Woad*, L.R. 9 Ex. 190 and *In re Expanded Plugs Ltd.* [1966] 1 W.L.R. 514 onus was in issue.

On (5), see *Shuttleworth* v. *Cox Brothers & Co. (Maidenhead) Ltd.* [1927] 2 K.B. 9, followed by the Court of Appeal in *Greenhalgh* v. *Arderne Cinemas Ltd.* [1951] Ch. 286 (not cited). The mere fact that there is a difference of opinion as to whether the removal is for the benefit of the company is not a ground for a just and equitable winding up. In *In re Yenidje Tobacco Co. Ltd.* [1916] Ch. 426 the machinery of the company

provided no way out of the deadlock; that distinguishes that case from the present. See also *In re Langham Skating Rink Co.* (1877) 5 Ch.D. 669 and *In re Furriers' Alliance* (1906) 51 S.J. 172.

This has been extremely expensive litigation. No dividend has been declared by the company for some years, and the company itself may have to pay a considerable sum by way of costs. The House might think that a good reason for not paying any dividend.

Stubbs following. The words of section 222 (*f*) are ex facie unlimited in scope. There are five considerations which should be borne in mind in construing it. (1) The court's jurisdiction under section 222 (*f*) has always been cautiously applied when invoked at the instance of a shareholder. (2) Particularly in view of the historical context in which section 184 of the Act was enacted it is inconceivable, reading section 184 in conjunction with section 222 (*f*), that the intention of the legislature can have been that a company like that in the present case should be wound up as a result of the exercise of the statutory power under section 184. (3) It is an accepted principle of our law that pacta sunt servanda, and when one is construing even words as wide as " just and equitable " that principle should be borne in mind; it would follow that, certainly in the absence of bad faith, the majority of the shareholders should not be punished for carrying out a power which, as well as being in the Act, is part of the express contract between the parties. (4) It is a basic principle of company law that where a general meeting acts in good faith the shareholder does not have any cause of action consequent upon that. (5) If this appeal should succeed the result on the commercial community will not merely be something which the legislature never intended but will have effects which will be disastrous.

As to (1), see *Buckley on the Companies Acts*, 13th ed., p. 454. The courts initially held that they should apply the ejusdem generis rule to 222. This is no longer the law; nevertheless, at the instance of the shareholder the jurisdiction has in practice been exercised under specific heads. The present case does not fall under any specific head.

As to (2), see the arguments for counsel for the respondent in *Bushell* v. *Faith* [1970] A.C. 1099, 1103, in substance accepted by Lord Upjohn, at p. 1108E. The loss of income suffered by a director removed from office is expressly provided for by section 184 (6). If the director wishes to protect himself against loss of income on removal from office, he will insist on a service agreement which gives him security of tenure. In such a case nothing in section 184 will take away the right to damages which he will have on removal from office.

As to (3), in the absence of agreement to the contrary the tenure of a director's office is determined by reference to the company's articles of association. The director may resign merely by giving notice in writing to the company, and in such event neither the company nor the other directors will have any legal ground for complaint. This is inconsistent with any suggestion that there is any breach of faith or duty or that it is unjust or inequitable if a director is removed under section 184 or not re-elected.

As to (4) this applies whether the company be small or large. There is no reported case to the contrary. The principle binds together many of the authorities cited, e.g., *Shuttleworth* v. *Cox Brothers & Co.* (*Maiden-*

head) *Ltd.* [1927] 2 K.B. 9 and *North-West Transportation Co. Ltd.* v. *Beatty,* 12 App.Cas. 589. The judgment of the Court of Appeal in the present case is in accordance with that long-standing principle and body of authority.

As to (5), this company is not particularly untypical. There are many thousands of small, three-, four-, five-men companies where the shareholders also constitute the board. It is a frequent occurrence in such companies that members of the board fall out. There may well be faults not only on one side, as Plowman J. said in the present case, but if the majority shareholders are not entitled to restore harmony to the board without raising the spectre of litigation this will have the most extraordinary result. Each time a director is removed or not re-elected there will be a winding up, or, at the very least, depending on how the House frames its opinions in the present case, every removal from office would be reviewed by the Companies Court in the context of a winding up petition. That would not only be contrary to the principle that the courts will not interfere with the bona fide decisions of business men but will be positively disastrous to many thousands of small companies. [Reference was made to *In re Leadenhall General Hardware Stores Ltd.* (unreported).]

Walton Q.C. in reply. That the appellant made life impossible for the second and third respondents is not what Plowman J. found: see especially [1970] 1 W.L.R. 1378, 1381B–D.

As to the respondents' submission (1), this does not mean that so long as the appellant holds shares in the company he cannot get a winding up order. The court must in all these matters be entitled to look at all the circumstances. It cannot do that against the settled pattern of distribution of the profits of the company and say that this is irrelevant. The respondents submitted that there were a large number of cases where it was decided that there should be no winding up where there was insolvency on the part of the shareholder. The answer to that is simply that it would be a pointless exercise. Of course, this contrasts with partnership, where there has to be a winding up because the partners are personally liable.

The parallel which the respondents sought to draw with section 210, where undoubtedly only the shareholder can petition, is not exact or proper because the language of section 210 is different: see *per* Lord Keith in *Elder* v. *Elder & Watson,* 1952 S.C. 49, 58–59. Under section 210 the shareholder is petitioning qua shareholder; under section 222 the petition is on a wider basis.

As to the respondents' submission (2), the distinction between owners and managers which does not occur in the case of a partnership is interesting and provides a clue to the nature of the "quasi-partnership company." It is the test which should be applied and is what Warrington L.J. meant in *In re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426. The appellant is not suggesting that any special principles are applicable to quasi-partnership companies, but when considering what is just and equitable in the context of a small domestic company the owners and managers of which are the same persons the court can find in the partnership concept a much better guide than that provided by the articles.

As the company in *In re Cuthbert Cooper & Sons Ltd.* [1937] Ch.

392 was a private company there had to be restrictions on transfers—one of the essential conditions of private companies—and on new members being allowed in. The court could not simply rely on the fact that new members were not allowed in for making a winding up order. The appellant only cited *In re Swaledale Cleaners Ltd.* [1968] 1 W.L.R. 1710 to show that *In re Cuthbert Cooper & Sons Ltd.* had not escaped without criticism; they were not saying that it had been overruled.

As to the respondents' submission (3), equally part of the contract was that there should be the power under section 122 (*f*) to wind the company up if it became just and equitable to do so. So far as voluntary resignation is concerned, shareholders are entitled to cast their votes as they think fit, but the court can look and see whether what they have done is not just and equitable so that a winding up order should be made. No doubt a director can resign, but if he does so it may be in circumstances which it would be just and equitable to have the company wound up. He could not successfully oppose the winding up of the company if his resignation resulted virtually in the repudiation of his obligation; he might, of course, want to resign as director but be prepared to continue his work. As to rotation, if nothing is done a director is automatically re-elected. There is therefore no onus on the other shareholders to do anything except refrain from opposing the re-election. As to *Bushell* v. *Faith* [1970] A.C. 1099 and the background to section 184 of the Act of 1948, a typical case to which section 184 was directed was the case where the director had little or no real interest in the company. It was that that was thought to be an injustice.

In re Expanded Plugs Ltd. [1966] 1 W.L.R. 514 was a very special case. It was *not* a case of expulsion. All the acts were for the benefit of the company. The case does not, however, get one very far at all: all that Plowman J. said has to be read against the background of the case: that there was no expulsion or serious breach of partnership obligation.

The appellant does not challenge such cases as *North-West Transportation Co. Ltd.* v. *Beatty,* 12 App.Cas. 589 or *Burland* v. *Earle* [1902] A.C. 83: they go not to the validity of the shareholder exercising his votes but to the consequences in law of the exercise; not to the validity of the resolution but to its consequences. The maxim is not that a person is presumed to know the law but that ignorance of the law is no excuse. *Lewis* v. *Haas,* 1970 S.L.T. (Notes) 67 is distinguishable in that there was there no question of expulsion.

As to the respondents' submission (4), a person must be presumed to intend the consequences of his own acts, and in the present case Nazar must be presumed to have intended the consequences of his acts in excluding the appellant from any share in the conduct of the business or taking an effective share in its profits. There is no doubt at all that the Nazars were determined to get the appellant out of the company. There was no good reason for removing him apart from that. What the Court of Appeal say [1971] Ch. 799, 811G is based on the test of what no reasonable man could have considered. It is important to note Plowman J.'s finding [1970] 1 W.L.R. 1378, 1389 that "the faults were not all on one side." If the faults had all been on the appellant's side he could not have obtained a

winding up order. There is no difference here between the interests of the company and the interests of the remaining shareholders. It is difficult really to see what bona fide in the interests of the company means in this context.

One must see what the findings of fact of Brightman J. in *In re Leadenhall General Hardware Stores Ltd.* (unreported) were to see the basis on which he was proceeding, right or wrong. He said that it was not a case where he ought to apply the quasi-partnership concept, so the case is not of great force. The appellant accepts, however, that one does not know from the transcript of the judgment without going into the evidence what was behind Brightman J.'s statement that the petitioner was appointed as manager. There, there was no previous partnership.

What the appellant had to allege and prove here were facts rendering the making of a winding up order just and equitable. He has done this by pointing to acts done to him and the serious financial consequences, those acts being done in the context of a small domestic company in which he and Nazar were working in equal partnership within the framework of a company. The suggestion that he must allege and prove lack of bona fides is misplaced. He must allege and prove the facts on which he relies. "Bona fide in the interests of the company," in relation to special resolutions, has a meaning in the context of a large company, but not in a case such as the present where "the company" for practical purposes means "the majority." The gravamen of the appellant's charge is the damage done to him. [Reference was made to *In re Lundie Brothers Ltd.* [1965] 1 W.L.R. 1051.] A variety of views were expressed in *Wood* v. *Woad,* L.R. 9 Ex. 190, but at least two judges thought that it was sufficient for the plaintiff to plead the facts on which he relied.

The respondents said that the Court of Appeal put a correct gloss on the facts here when they said [1971] Ch. 799, 811G that it could not be said that no reasonable men could have considered the appellant's removal justified. That cannot conceivably be the test, because: (a) it has always been put forward as the test for the validity of a special resolution: see *Shuttleworth* v. *Cox Brothers & Co. (Maidenhead) Ltd.* [1927] 2 K.B. 9. That being so, naturally the test is a very stringent one because the question is whether the resolution has been properly passed. The test is in no way directed to the consequences of the special resolution, and a petition based on the just and equitable principle is put forward on the basis of the *consequences* of what happens when the resolution is passed. It is not seen through the eyes of reasonable men, but from the point of view of the person affected. (b) The test ignores the question of where the blame lies. The Court of Appeal makes no differentiation on this question. The just and equitable test must make allowance for it. (c) The true test must depend on all the circumstances of the case, including the pacta sunt servanda principle and conduct of the parties generally.

As to the respondents' submission (5), that principle being directed to the validity of a special resolution, the court does not, indeed, substitute its own judgment. What the respondents are really trying to do under the guise of it is to do the reverse: to substitute the judgment of Nazar and George Nazar as to whether the appellant should be removed for the judg-

ment of the court as to whether it is just and equitable to wind up the company. The cases cited do not carry the matter any further. In *In re Langham Skating Rink Co.*, 5 Ch.D. 669 where the shareholders were apprehending insolvency—a different case from the present—all that the Court of Appeal decided was that the minority were not entitled to opt out. The basis of the petition in *In re Furriers' Alliance*, 51 S.J. 172 was absolute deadlock.

As to junior counsel's submission (1), the jurisdiction will be exercised whenever the court finds it just and equitable to do so. In *Symington* v. *Symington's Quarries Ltd.*, 8 F. 121 a winding up order *was* made.

As to (2), this is pure assertion without any logic to support it.

As to (3), all that pacta sunt servanda means is that if a person goes blindly into a private company the less the court safeguards him. It must be read in the light of section 222, which provides a longstop. Section 184 (6) covers the case where one has a service contract as managing director and so the service comes to an end before the end of the period for which it was initially fixed. That does not give the appellant here—who had no service contract—any rights at all.

As to (4), this was a wide proposition. *Shuttleworth* v. *Cox Brothers & Co. (Maidenhead) Ltd.* [1927] 2 K.B. 9 simply laid down a test with regard to the validity of a special resolution, and *North-West Transportation Co. Ltd.* v. *Beatty*, 12 App.Cas. 589 merely said that in ordinary circumstances if a contract which a director was seeking to foist on the company was fair then a resolution might be passed by the majority ratifying it.

As to (5), the proof of the pudding is in the eating. *In re Lundie Brothers Ltd.* [1965] 1 W.L.R. 1051 was decided in 1965. It was the first case in which the simple exclusion of a director as a working partner was held sufficient to justify a winding up. It stood until the present case. There was no flood of cases. Normally one side buys the other out at a fair price—a desirable practice which ought to be encouraged.

A winding up order can, if necessary, be stayed.

Balcombe Q.C. If the House were to consider reaching a decision of fact other than that found by Plowman J. it should first read the whole of the affidavits and the transcript of evidence. With regard to the suggestion that the appellant should be bought out, in practice such negotiations are common, and they took place here.

Their Lordships took time for consideration.

May 3. LORD WILBERFORCE. My Lords, the issue in this appeal is whether the respondent company Westbourne Galleries Ltd. should be wound up by the court on the petition of the appellant who is one of the three shareholders, the personal respondents being the other two. The company is a private company which carries on business as dealers in Persian and other carpets. It was formed in 1958 to take over a business founded by the second respondent (Mr. Nazar). It is a fact of cardinal importance that since about 1945 the business had been carried on by the appellant and Mr. Nazar as partners, equally sharing the management and the profits. When the company was formed, the signatories to its memorandum were the appellant and Mr. Nazar and they were

appointed its first directors. Of its issued share capital, 500 shares of £1 each were issued to each subscriber and it was found by the learned judge, after the point had been contested by Mr. Nazar, that Mr. Ebrahimi paid up his shares out of his own money. Soon after the company's formation the third respondent (Mr. George Nazar) was made a director, and each of the two original shareholders transferred to him 100 shares, so that at all material times Mr. Ebrahimi held 400 shares, Mr. Nazar 400 and Mr. George Nazar 200. The Nazars, father and son, thus had a majority of the votes in general meeting. Until the dispute all three gentlemen remained directors.

The company made good profits, all of which were distributed as directors' remuneration. No dividends have ever been paid, before or after the petition was presented.

On August 12, 1969, an ordinary resolution was passed by the company in general meeting, by the votes of Mr. Nazar and Mr. George Nazar, removing Mr. Ebrahimi from the office of director, a resolution which was effective in law by virtue of section 184 of the Companies Act 1948 and article 96 of Part I of Table A. Shortly afterwards the appellant presented his petition to the court.

This petition was based in the first place upon section 210 of the Companies Act 1948, the relief sought under this section being an order that Mr. Nazar and his son be ordered to purchase the appellant's shares in the company. In the alternative it sought an order for the winding up of the company. The petition contained allegations of oppression and misconduct against Mr. Nazar which were fully explored at the hearing before Plowman J. [1970] 1 W.L.R. 1378. The learned judge found that some were unfounded and others unproved and that such complaint as was made out did not amount to such a course of oppressive conduct as to justify an order under section 210. However, he made an order for the winding up of the company under the " just and equitable " provision. I shall later specify the grounds on which he did so. The appellant did not appeal against the rejection of his case under section 210 and this House is not concerned with it. The company and the individual respondents appealed against the order for winding up and this was set aside by the Court of Appeal. The appellant now seeks to have it restored.

My Lords, the petition was brought under section 222 (*f*) of the Companies Act 1948, which enables a winding up order to be made if " the court is of the opinion that it is just and equitable that the company should be wound up." This power has existed in our company law in unaltered form since the first major Act, the Companies Act 1862. Indeed, it antedates that statute since it existed in the Joint Stock Companies Winding up Act 1848. For some 50 years, following a pronouncement by Lord Cottenham L.C. [*Ex parte Spackman* (1849) 1 Mac. & G. 170, 174] in 1849, the words " just and equitable " were interpreted so as only to include matters ejusdem generis as the preceding clauses of the section, but there is now ample authority for discarding this limitation. There are two other restrictive interpretations which I mention to reject. First, there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular

instances. Secondly, it has been suggested, and urged upon us, that (assuming the petitioner is a shareholder and not a creditor) the words must be confined to such circumstances as affect him in his capacity as shareholder. I see no warrant for this either. No doubt, in order to present a petition, he must qualify as a shareholder, but I see no reason for preventing him from relying upon any circumstances of justice or equity which affect him in his relations with the company, or, in a case such as the present, with the other shareholders.

One other signpost is significant. The same words " just and equitable " appear in the Partnership Act 1892, section 25, as a ground for dissolution of a partnership and no doubt the considerations which they reflect formed part of the common law of partnership before its codification. The importance of this is to provide a bridge between cases under section 222 (*f*) of the Act of 1948 and the principles of equity developed in relation to partnerships.

The winding up order was made following a doctrine which has developed in the courts since the beginning of this century. As presented by the appellant, and in substance accepted by the learned judge, this was that in a case such as this the members of the company are in substance partners, or quasi-partners, and that a winding up may be ordered if such facts are shown as could justify a dissolution of partnership between them. The common use of the words " just and equitable " in the company and partnership law supports this approach. Your Lordships were invited by the respondents' counsel to restate the principle on which this provision ought to be used; it has not previously been considered by this House. The main line of his submission was to suggest that too great a use of the partnership analogy had been made; that a limited company, however small, essentially differs from a partnership; that in the case of a company, the rights of its members are governed by the articles of association which have contractual force; that the court has no power or at least ought not to dispense parties from observing their contracts; that, in particular, when one member has been excluded from the directorate, or management, under powers expressly conferred by the Companies Act and the articles, an order for winding up, whether on the partnership analogy or under the just and equitable provision, should not be made. Alternatively, it was argued that before the making of such an order could be considered the petitioner must show and prove that the exclusion was not made bona fide in the interests of the company.

My Lords, I must first make some examination of the authorities in order to see how far they support the respondents' propositions and, if they do not, how far they rest upon a principle of which this House should disapprove. I will say at once that, over a period of some 60 years, they show a considerable degree of consistency, and that such criticism as may be made relates rather to the application of accepted principle to the facts than to the statements of principles themselves.

The real starting point is the Scottish decision in *Symington* v. *Symington's Quarries Ltd.* (1905) 8 F. 121. There had been a partnership business carried on by two brothers who decided to transfer it to a private limited company. Each brother was to hold half the shares except for a small holding for a third brother to hold balance for voting. A resolution was passed in general meeting by the votes of one brother together

with other members having nominal interests that he should be sole director. The other two brothers petitioned for a winding up under the just and equitable provision and the court so ordered. The reasons for so doing, given by some of their Lordships of the First Division, are expressed in terms of lost substratum or deadlock—words clearly used in a general rather than a technical sense. The judgment of Lord M'Laren, which has proved to be the most influential as regards later cases, puts the ground more generally. He points out, at p. 130, that the company was not formed by appeal to the public: it was a domestic company, the only real partners being the three brothers:

> "In such a case it is quite obvious that all the reasons that apply to the dissolution of private companies, on the grounds of incompatibility between the views or methods of the partners, would be applicable in terms to the division amongst the shareholders of this company, . . . "

In England, the leading authority is the Court of Appeal's decision in *In re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426. This was a case of two equal director shareholders, with an arbitration provision in the articles, between whom a state of deadlock came into existence. It has often been argued, and was so in this House, that its authority is limited to true deadlock cases. I could, in any case, not be persuaded that the words " just and equitable " need or can be confined to such situations. But Lord Cozens-Hardy M.R. clearly puts his judgment on wider grounds. Whether there is deadlock or not, he says, at p. 432, the circumstances

> "are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed . . . "

Warrington L.J. adopts the same principle, treating deadlock as an example only of the reasons why it would be just and equitable to wind the company up.

In 1924, these authorities were reviewed, approved and extended overseas by the Judicial Committee of the Privy Council in an appeal from the West Indian Court of Appeal (Barbados), *Loch* v. *John Blackwood Ltd.* [1924] A.C. 783. The judgment of the Board delivered by Lord Shaw of Dunfermline clearly endorses, if not enlarges, the width to be given to the just and equitable clause. The case itself was one of a domestic company and was not one of deadlock. One of the directors had given grounds for loss of confidence in his probity and (a matter echoed in the present case) had shown that he regarded the business as his own. His Lordship quotes with approval from the judgments of Lord M'Laren in *Symington* v. *Symington's Quarries Ltd.*, 8 F. 121 and of Lord Cozens-Hardy M.R. in *In re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426.

I note in passing the Scottish case of *Thomson* v. *Drysdale*, 1925 S.C. 311 where a winding up was ordered under the just and equitable clause at the instance of a holder of one share against the only other shareholder who held 1,501 shares, clearly not a case of deadlock, and come to *In re Cuthbert Cooper & Sons Ltd.* [1937] Ch. 392, a case which your Lordships must consider. The respondents relied on this case which carries the authority

of Simonds J. as restricting the force of the just and equitable provision. The company was clearly a family company, the capital in which belonged to a father and his two elder sons. After the death of the father leaving his shares to his younger sons and appointing them his executors, his elder sons, exercising the powers given to directors by the articles, refused to register the executors as shareholders and dismissed them from employment. The executors' petition for winding up of the company was dismissed. My Lords, with respect for the eminent judge who decided it, I must doubt the correctness of this. Whether on the facts stated a case of justice and equity was made out is no doubt partly a question of fact on which, even though my own view is clear enough, I should respect the opinion of the trial judge; but, this matter apart, I am unable to agree as to the undue emphasis he puts on the contractual rights arising from the articles, over the equitable principles which might be derived from partnership law, for in the result the latter seem to have been entirely excluded in the former's favour. I think that the case should no longer be regarded as of authority.

There are three recent cases which I should mention since they have figured in the judgments below. *In re Lundie Brothers Ltd.* [1965] 1 W.L.R. 1051 was, like the present, a decision of Plowman J. This was a case where the petitioner, one of three shareholders and directors, was excluded from participation in the management and from directors' remuneration. Plowman J. applying partnership principles made a winding up order under the just and equitable clause. If that decision was right it assists the present appellant. The Court of Appeal in the present case disagreed with it and overruled it, in so far as it related to a winding up. The respondent argues that this was the first case where exclusion of a working director, valid under the articles, had been treated as a ground for winding up under the just and equitable clause and that as such it was an unjustifiable innovation.

In re Expanded Plugs Ltd. [1966] 1 W.L.R. 514 was, on the other hand, approved by the Court of Appeal in the present case. The case itself is a paradigm of obscure forensic tactics and, as such, of merely curious interest; its only importance lies in the statement, contained in the judgment, at p. 523, that since the relevant decisions were carried out within the framework of the articles the petitioner must show that they were not carried out bona fide in the interests of the company. I shall return, in so far as it limits the scope of the just and equitable provision, to this principle but I should say at once that I disagree with it.

In *In re K/9 Meat Supplies (Guildford) Ltd.* [1966] 1 W.L.R. 1112 there was a company of three shareholder/directors one of whom became bankrupt; the petitioner was his trustee in bankruptcy. It was contended that the company was a quasi-partnership and that since section 33 of the Partnership Act 1890 provides for dissolution on the bankruptcy of one of the partners a winding up order on this ground should be made. Pennycuick J. rejected this argument on the ground that, since the "partnership" had been transformed into a company and since the articles gave no automatic right to a winding up on bankruptcy, bankruptcy of one member was not a ground for winding up of itself. He then proceeded to consider whether the just and equitable provision should be applied. In my opinion, this procedure was correct and I need not express an opinion whether, on the facts, it was right to refuse an order.

Finally I should refer to the Scottish case of *Lewis* v. *Haas*, 1970 S.L.T. (Notes) 67 where the two main shareholder/directors each held 49 per cent. of the shares, the remaining 2 per cent. being held by a solicitor. Lord Fraser, in the Outer House, while accepting the principle that exclusion from management might be a ground for ordering a winding up, did not find the facts sufficient to support the use of the just and equitable clause.

This series of cases (and there are others: *In re Davis & Collett Ltd.* [1935] Ch. 693; *Baird* v. *Lees*, 1924 S.C. 83; *Elder* v. *Elder & Watson*, 1952 S.C. 49; *In re Swaledale Cleaners Ltd.* [1968] 1 W.L.R. 1710; *In re Fildes Bros. Ltd.* [1970] 1 W.L.R. 592; *In re Leadenhall General Hardware Stores Ltd.* (unreported), February 4, 1971), amounts to a considerable body of authority in favour of the use of the just and equitable provision in a wide variety of situations, including those of expulsion from office. The principle has found acceptance in a number of Commonwealth jurisdictions. Though these were not cited at the Bar I refer to some of them since they usefully illustrate the principle which has been held to underlie this jurisdiction and show it applicable to exclusion cases.

In *In re Straw Products Pty. Ltd.* [1942] V.L.R. 222 Mann C.J. said, at p. 223:

> " All that Hinds has done in the past in exercise of his control has been within his legal powers. The question is whether he has used those powers in such a way as to make it just and equitable that Robertson should be allowed by the court to retire from the partnership. The analogy of a partnership seems to me to clarify discussion."

In re Wondoflex Textiles Pty. Ltd. [1951] V.L.R. 458 was a case where again the company was held to resemble a partnership. The petitioner, owner of a quarter share, was removed from office as director by the governing director exercising powers under the articles. Thus the issue, and the argument, closely resembled those in the present case. The judgment of Smith J. contains the following passage, at p. 467:

> " It is also true, I think, that, generally speaking, a petition for winding up, based upon the partnership analogy, cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles: . . . To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him: . . . But this, I think, is subject to an important qualification. Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up. Indeed, it may be said that one purpose of [the just and equitable provision] is to enable the court to relieve a party from his bargain in such cases."

The whole judgment is of value. In New Zealand, the Court of Appeal has endorsed the potential application of the principle to exclusion cases: *Tench* v. *Tench Bros. Ltd.* [1930] N.Z.L.R. 403; see also *In re Modern*

Retreading Co. Ltd. [1962] E.A. 57, also a case of exclusion from management, and cf. *In re Sydney and Whitney Pier Bus Service Ltd.* [1944] 3 D.L.R. 468 and *In re Concrete Column Clamps Ltd.* [1953] 4 D.L.R. 60 (Quebec).

My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence—this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company—so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to "quasi-partnerships" or "in substance partnerships" may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words "just and equitable" sum these up in the law of partnership itself. And in

many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.

My Lords, this is an expulsion case, and I must briefly justify the application in such cases of the just and equitable clause. The question is, as always, whether it is equitable to allow one (or two) to make use of his legal rights to the prejudice of his associate(s). The law of companies recognises the right, in many ways, to remove a director from the board. Section 184 of the Companies Act 1948 confers this right upon the company in general meeting whatever the articles may say. Some articles may prescribe other methods: for example, a governing director may have the power to remove (compare *In re Wondoflex Textiles Pty. Ltd.* [1951] V.L.R. 458). And quite apart from removal powers, there are normally provisions for retirement of directors by rotation so that their re-election can be opposed and defeated by a majority, or even by a casting vote. In all these ways a particular director-member may find himself no longer a director, through removal, or non-re-election: this situation he must normally accept, unless he undertakes the burden of proving fraud or mala fides. The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved. And the principles on which he may do so are those worked out by the courts in partnership cases where there has been exclusion from management (see *Const* v. *Harris* (1824) Tur. & Rus. 496, 525) even where under the partnership agreement there is a power of expulsion (see *Blisset* v. *Daniel* (1853) 10 Hare 493; *Lindley on Partnership*, 13th ed. (1971), pp. 331, 595).

I come to the facts of this case. It is apparent enough that a potential basis for a winding up order under the just and equitable clause existed. The appellant after a long association in partnership, during which he had an equal share in the management, joined in the formation of the company. The inference must be indisputable that he, and Mr. Nazar, did so on the basis that the character of the association would, as a matter of personal relation and good faith, remain the same. He was removed from his directorship under a power valid in law. Did he establish a case which, if he had remained in a partnership with a term providing for expulsion, would have justified an order for dissolution? This was the essential question for the judge. Plowman J. dealt with the issue in a brief paragraph in which he said [1970] 1 W.L.R. 1378, 1389:

> ". . . while no doubt the petitioner was lawfully removed, in the sense that he ceased in law to be a director, it does not follow that in

A removing him the respondents did not do him a wrong. In my judgment, they did do him a wrong, in the sense that it was an abuse of power and a breach of the good faith which partners owe to each other to exclude one of them from all participation in the business upon which they have embarked on the basis that all should participate in its management. The main justification put forward for removing him was that he was perpetually complaining, but the faults were not B all on one side and, in my judgment, this is not sufficient justification. For these reasons, in my judgment, the petitioner, therefore, has made out a case for a winding up order."

Reading this in the context of the judgment as a whole, which had dealt with the specific complaints of one side against the other, I take it as a finding that the respondents were not entitled, in justice and equity, to C make use of their legal powers of expulsion and that, in accordance with the principles of such cases as *Blisset* v. *Daniel*, 10 Hare 493, the only just and equitable course was to dissolve the association. To my mind, two factors strongly support this. First, Mr. Nazar made it perfectly clear that he did not regard Mr. Ebrahimi as a partner, but did regard him as an employee. But there was no possible doubt as to Mr. Ebrahimi's status throughout, so that Mr. Nazar's refusal to recognise it amounted, in effect, D to a repudiation of the relationship. Secondly, Mr. Ebrahimi, through ceasing to be a director, lost his right to share in the profits through directors' remuneration, retaining only the chance of receiving dividends as a minority shareholder. It is true that an assurance was given in evidence that the previous practice (of not paying dividends) would not be continued, but the fact remains that Mr. Ebrahimi was thenceforth at the mercy E of the Messrs. Nazar as to what he should receive out of the profits and when. He was, moreover, unable to dispose of his interest without the consent of the Nazars. All these matters lead only to the conclusion that the right course was to dissolve the association by winding up.

I must deal with one final point which was much relied on by the Court of Appeal. It was said that the removal was, according to the evidence of Mr. Nazar, bona fide in the interests of the company; that Mr. Ebrahimi F had not shown the contrary; that he ought to do so or to demonstrate that no reasonable man could think that his removal was in the company's interest. This formula " bona fide in the interests of the company " is one that is relevant in certain contexts of company law and I do not doubt that in many cases decisions have to be left to majorities or directors to take which the courts must assume had this basis. It may, on the other hand, G become little more than an alibi for a refusal to consider the merits of the case, and in a situation such as this it seems to have little meaning other than " in the interests of the majority." Mr. Nazar may well have persuaded himself, quite genuinely, that the company would be better off without Mr. Ebrahimi, but if Mr. Ebrahimi disputed this, or thought the same with reference to Mr. Nazar, what prevails is simply the majority H view. To confine the application of the just and equitable clause to proved cases of mala fides would be to negative the generality of the words. It is because I do not accept this that I feel myself obliged to differ from the Court of Appeal.

I would allow the appeal and restore the judgment of Plowman J. I propose that the individual respondents pay the appellant's costs here and in the Court of Appeal.

VISCOUNT DILHORNE. My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Wilberforce. I agree with all he has said, and he has dealt with the matter so comprehensively that there is nothing I wish to add.

I agree that the appeal should be allowed and that the individual respondents should be ordered to pay the appellant's costs here and in the Court of Appeal.

LORD PEARSON. My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Wilberforce, and for the reasons given by him I would allow the appeal and restore the judgment of Plowman J.

I agree that the individual respondents should be ordered to pay the appellant's costs here and in the Court of Appeal.

LORD CROSS OF CHELSEA. My Lords, the "just and equitable" clause first appeared in section 5 of the Joint Stock Companies Winding Up Act 1848. Subsections (1) to (6) of that section gave the court jurisdiction to wind up a company in various circumstances indicative of insolvency; subsection (7) gave jurisdiction if the company had been dissolved or should have ceased to carry on business or should be carrying on business only for the purpose of winding up its affairs; and subsection (8) added: "or if any other matter or thing shall be shown which, in the opinion of the court, shall render it just and equitable that the company should be dissolved." The meaning of the subsection was considered by Lord Cottenham L.C. in 1849 in *Ex parte Spackman*, 1 Mac. & G. 170. In that case the company, which was a cattle insurance company, was not insolvent and was carrying on business; but the petitioners who held shares which were not fully paid up considered that its prospects were bad and that it might well become insolvent. The fact that some shareholders in a company take a pessimistic view of its prospects does not make it "just and equitable" to wind it up against the wishes of the majority who take a more optimistic view and it is not surprising that the petition was dismissed; but in the course of his judgment Lord Cottenham L.C. expressed an opinion as to the scope of the subsection which had for many years an unfortunate influence on the practice of the Companies Court. He said, at p. 174:

> "This clause, was, no doubt, thus worded in order to include all cases not before mentioned; but of course it cannot mean that it should be interpreted otherwise than in reference to matters ejusdem generis, as those in the previous clauses. There must be something in the management and conduct of the company which shows the court that it should be no longer allowed to continue, and that the concern ought to be wound up."

It is not in fact easy to see what precisely Lord Cottenham L.C. had in

mind—for there may well be matters arising in the management of a company's affairs which make it "just and equitable" that it should be wound up but which have no relation whatever either to insolvency or a cessation of business. Nevertheless, when the subsection reappeared as section 79 (5) of the Companies Act 1862 the courts, with Lord Cottenham L.C.'s words "ejusdem generis" in mind, for many years interpreted it very narrowly and only made orders under it if the substratum of the company had disappeared or it was a "bubble" company which had never had a genuine substratum at all. Towards the end of the century the idea that the "just and equitable" clause only covered situations which could be said to be somehow "ejusdem generis" with the situations envisaged in the preceding subsections was gradually given up, but even in recent times judges have displayed a certain unwillingness to take the words at their face value and to apply them to new situations, which may well be an unconscious reflection of the restrictive interpretation which was put on them for so many years. In the present century, when the subsection became in turn section 129 (6) of the Companies (Consolidation) Act 1908, section 168 (6) of the Companies Act 1929 and section 228 (*f*) of the Act of 1948, petitions brought under it have generally related to disputes between rival shareholders or groups of shareholders in private companies; and in many cases the parties to the dispute have stood to one another in a relationship analogous to that of partners in an unincorporated business. In some of the reported cases in which winding up orders have been made those who opposed the petition have been held by the court to have been guilty of a "lack of probity" in their dealings with the petitioners. Thus in *Loch* v. *John Blackwood Ltd.* [1924] A.C. 783 the managing director and majority shareholder was deliberately keeping the minority in ignorance of the company's financial position in order to acquire their shares at an undervalue, and in *In re Davis & Collett Ltd.* [1935] Ch. 693 the holder of half the shares had used his casting vote as chairman in order to bring in an additional director who would vote as he wished and then proceeded to oust the owner of the other half of the shares from any participation in the management of the company's business. But it is not a condition precedent to the making of an order under the subsection that the conduct of those who oppose its making should have been unjust or inequitable. This was made clear as early as 1905 by Lord M'Laren in his judgment in *Symington* v. *Symington's Quarries Ltd.*, 8 F. 121, 130. To the same effect is the judgment of Lord Cozens-Hardy M.R. in *In re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426, 431–432. It is sometimes said that the order in that case was made on the ground of "deadlock." That is not so. As Mr. Frank Russell K.C., who was counsel for the appellant, pointed out, although Mr. Rothman and Mr. Weinberg were not on speaking terms they communicated through third parties, the company's business was flourishing and the articles contained a provision for arbitration to which resort could be had in the event of their failing to agree on any point. The reason why the petitioner succeeded was that the court thought it right to make the order which it would have made had Mr. Rothman and Mr. Weinberg been carrying on business under articles of partnership which contained no provision for dissolution at the instance of either of them. People do not become partners unless they have confidence

in one another and it is of the essence of the relationship that mutual confidence is maintained. If neither has any longer confidence in the other so that they cannot work together in the way originally contemplated then the relationship should be ended—unless, indeed, the party who wishes to end it has been solely responsible for the situation which has arisen. The relationship between Mr. Rothman and Mr. Weinberg was not, of course, in form that of partners; they were equal shareholders in a limited company. But the court considered that it would be unduly fettered by matters of form if it did not deal with the situation as it would have dealt with it had the parties been partners in form as well as in substance.

The " just and equitable " clause is, as I see it, an equitable supplement to the common law of the company which is to be found in the memorandum and articles; but there are some reported decisions which I find difficult, if not impossible, to square with this view. The most notable of these is that of Simonds J. in *In re Cuthbert Cooper & Sons Ltd.* [1937] Ch. 392. The company there was a private company founded in 1913 to take over the business then being carried on by a father and his two elder sons. The capital was £10,000 divided into £1 shares of which 5,000 were held by the father and 2,500 each by the two sons. The three of them were the directors of the company. In 1930 the father died having appointed his three younger sons who were employed by the company his executors and having bequeathed them his shares equally. The articles gave the directors an absolute discretion to refuse to register as members any person to whom a member executed a transfer of shares or any person who became entitled to shares by transmission on the death of a member. Such a person had a right to receive any dividends declared on his shares and a right to share in the surplus assets on a winding up, but no right to attend meetings or to receive accounts. No share could be transferred either by a member or by a person entitled by transmission to a person not a member so long as a member was prepared to buy them at a price based on the average rate of dividends over the preceding three years. After the father's death the younger sons asked their brothers—now the sole directors—to register them as members but they refused to do so. Dividends were, however, declared and the younger sons—though not entitled to them as of right—received copies of the accounts. In 1936 dissensions arose. The younger sons were dismissed from their employment; the dividend payable for the year ending June 30, 1936, was reduced; and the directors refused to supply them with the balance sheet for that year. The directors offered to buy their brothers' shares but only at a price which, so the younger brothers alleged, was far below their real value. In view of the right of the directors to refuse to register transfers a sale to an outsider was not possible. In these circumstances the younger sons petitioned to have the company wound up. They complained not that they had no share in the management of the company but simply that they were not put on the register, the suggestion being that the directors were trying to force them to sell their half interest in the company at an undervalue by reducing the rate of dividend and refusing to let them see the accounts. In dismissing the petition the judge said that, although he must be guided by the principles applied by the court in deciding whether or

not to dissolve a partnership, even in a partnership case the court would be guided by the partnership articles which one must in this case assume to correspond—mutatis mutandis—with the articles of the company. He also said that he was not prepared to assume that the directors were not acting in good faith in refusing to register the executors as shareholders and he refused to order them to attend for cross-examination. In effect he simply applied the common law, as laid down in the company's constitution and told the petitioners that if they wished to impugn their brothers' good faith they must prove their case by bringing an action against them. One naturally hesitates to dissent from any decision of Lord Simonds; but I cannot help thinking that on this occasion he took too narrow a view. It is not right to say that in a partnership case the court is tied by the terms of the partnership articles, for it will decree a dissolution of a partnership for a fixed term if it is "just and equitable" to do so. Further, he appears to have taken no account of the fact that the petitioners had made out a prima facie case against their brothers. Of course, the directors might have been able to show that they had respectable reasons for refusing to register their brothers as members and were not in the least influenced by any wish to induce them to sell their shares to them at a price which might be less than their true value; but on the undisputed facts it was for them to establish their good faith. The proper way to deal with the case would, I venture to think, have been to say that if the directors did not wish to give evidence and submit to cross-examination the company would have to be wound up. It is to be observed that the judge himself said that he had found the case a difficult one and in *In re Swaledale Cleaners Ltd.* [1968] 1 W.L.R. 1710 Danckwerts L.J. expressed the view that it was wrongly decided. It is true that in the earlier case of *Charles Forte Investments Ltd.* v. *Amanda* [1964] Ch. 240 the Court of Appeal—of which Danckwerts L.J. and I myself were members—had accepted the *Cuthbert Cooper* decision as correct, but it was not in any way necessary for our decision in that case to approve it and I think that we were wrong to do so.

What the minority shareholder in cases of this sort really wants is not to have the company wound up—which may prove an unsatisfactory remedy—but to be paid a proper price for his shareholding. With this in mind Parliament provided by section 210 of the Companies Act 1948 that if a member of a company could show that the company's affairs were being conducted in a manner oppressive to some of the members including himself, that the facts proved would justify the making of a winding up order under the "just and equitable" clause but that to wind up the company would unfairly prejudice the "oppressed" members the court could (inter alia) make an order for the purchase of the shares of those members by other members or by the company. To give the court jurisdiction under this section the petitioner must show both that the conduct of the majority is "oppressive" and also that it affects him in his capacity as a shareholder. Mr. Ebrahimi was unable to establish either of these preconditions. But the jurisdiction to wind up under section 222 (*f*) continues to exist as an independent remedy and I have no doubt that the Court of Appeal was right in rejecting the submission of the respondents to the effect that a petitioner cannot obtain an order under that subsection

any more than under section 210 unless he can show that his position as a shareholder has been worsened by the action of which he complains. The facts of this case are set out in detail in the judgment of Plowman J. and I need not repeat them. The essence of the matter is that Mr. Nazar and Mr. Ebrahimi had been carrying on business as partners at will in equal shares; that the business was transferred to the company in which each had 40 per cent. of the capital and Nazar's son George the remaining 20 per cent.; that it was not contemplated that any dividends would be paid but was contemplated that the profits of the company should be distributed by way of director's fees; and that the result of Mr. Ebrahimi's removal from the directorship was that instead of his having a share in the management of the business and an income of some £3,000 a year he was excluded from the management and deprived of any share in the profits save such dividend as might be paid on his shares if the Nazars thought fit to declare a dividend. The Court of Appeal held that Mr. Ebrahimi could not obtain a winding up order under the "just and equitable" clause unless he could show that the Nazars had not exercised the power to remove him from his directorship "bona fide in the interests of the company" or that their grounds for exercising the power were such that no reasonable man could think that the removal was in the interest of the company. With all respect to them I cannot agree that this is an appropriate test to apply. If one assumes that the company is going to remain in existence it may very well be that a reasonable man would say that it was in the interest of the company that Mr. Ebrahimi should cease to be a director. "These two men," he might say, "are hopelessly at loggerheads. If the business is to prosper one or other must go and the company is likely to do better without Mr. Ebrahimi than without Mr. Nazar." But these considerations have not, to my mind, anything to do with the question whether in the circumstances it is right that the company should continue in existence if Mr. Ebrahimi wishes it to be wound up. The argument upon which counsel for the respondent chiefly relied in support of the decision of the Court of Appeal was quite different. Mr. Ebrahimi, he said, consented to the conversion of the partnership into a limited company. Even though he became, because George Nazar was taken in, only a minority shareholder he could have safeguarded his position by procuring the insertion in the articles of a provision "weighting" the voting power of his shares on any question touching his retention of office as director: see *Bushell* v. *Faith* [1970] A.C. 1099. He must, therefore, be taken to have accepted the risk that if he and Mr. Nazar fell out he would be at Mr. Nazar's mercy. There might be force in this argument if there was any evidence to show that the minds of the parties were directed to the point; but there is no such evidence and the probability is that no one gave a moment's thought to the change in relative strength of their respective positions brought about by the conversion of the partnership into a company. It was not suggested that Mr. Ebrahimi had been guilty of any misconduct such as would justify one partner in expelling another under an expulsion clause contained in partnership articles. All that happened was that without one being more to blame than the other the two could no longer work together in harmony. Had no company been formed Mr. Ebrahimi could have had the partner-

ship wound up and though Mr. Nazar and his son were entitled in law to oust him from his directorship and deprive him of his income they could only do so subject to Mr. Ebrahimi's right to obtain equitable relief in the form of a winding up order under section 222 (*f*). I would, therefore, allow the appeal.

In conclusion, I would refer briefly to three recent decisions under paragraph (*f*). *In re Lundie Brothers Ltd.* [1965] 1 W.L.R. 1051 was, like this, an "exclusion" case. Plowman J. was I think right in that case, as in this, to make a winding up order. In *In re K/9 Meat Supplies (Guildford) Ltd.* [1966] 1 W.L.R. 1112 the company had an issued share capital of 11,001 shares 3667 of which were held by each of three men who were the sole directors and each of whom took part in the running of the business. It was arranged between them that the profits should be divided equally by way of directors' fees. One of the three, a Mr. Darrington, got into financial difficulties. He resigned his directorship in January 1965, and in April was adjudicated bankrupt. Shortly afterwards the two remaining directors sold the business for £18,000 and placed the purchase price on deposit. They offered to buy Mr. Darrington's shares from his trustee in bankruptcy at par but the trustee, taking the view that Mr. Darrington ought to receive a third share of the purchase price, petitioned under section 222 (*f*). Pennycuick J. came with regret to the conclusion that he must dismiss the petition. He thought it deplorable that the two other quasi-partners should retain in their hands assets to which Mr. Darrington's creditors were in common fairness entitled but he held that as the three had elected to trade together through the medium of a company instead of as partners there was no ground on which he could properly make the order. In coming to this conclusion he was, I think, much influenced by *In re Cuthbert Cooper & Sons Ltd.* [1937] Ch. 392. I think that a winding up order should have been made since in the absence of any other explanation the inevitable inference was that the two remaining directors in resisting a winding up and distribution of the surplus assets among the shareholders were putting pressure on the trustee in bankruptcy to sell them Mr. Darrington's shares at an undervalue. The last case is the decision of Brightman J. in *In re Leadenhall General Hardware Stores Ltd* (unreported), February 4, 1971. His decision not to make a winding up order was, I think, justifiable—though I cannot agree with the reasons which he gave for it. If the respondents were telling the truth—and the judge held that they were—the almost inevitable inference was that the petitioner had been stealing the company's money. A petitioner who relies on the "just and equitable" clause must come to court with clean hands, and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish it to continue. But the judge dealt with the case on the footing that the respondents' loss of confidence in the petitioner might have been due to a tragic and inexplicable misunderstanding. If it was right in the light of the evidence to deal with this case on that basis then I would have thought that a winding up order should have been made.

I agree with the order proposed by my noble and learned friend Lord Wilberforce with regard to costs.

LORD SALMON. My Lords, I concur in the opinions of my noble and learned friends Lord Wilberforce and Lord Cross of Chelsea and I would accordingly allow the appeal.

I agree that the individual respondents should be ordered to pay the appellant's costs here and in the Court of Appeal.

Appeal allowed.
Second and third respondents to pay appellant's costs in House of Lords.
Legal aid taxation of appellant's costs in House of Lords.

Solicitors: *Arbeid & Co.; Davenport, Lyons & Co.*

M. G.

[HOUSE OF LORDS]

ROGERS . . . . . APPELLANT

AND

HOME SECRETARY . . . . . RESPONDENT

GAMING BOARD FOR GREAT BRITAIN . . . APPELLANT

AND

ROGERS . . . . . RESPONDENT

[On appeal from REG. *v.* LEWES JUSTICES, *Ex parte* SECRETARY OF STATE FOR HOME DEPARTMENT]

1972 April 11, 12, 13, 17; June 28

Lord Reid, Lord Morris of Borth-y-Gest, Lord Pearson, Lord Simon of Glaisdale and Lord Salmon.

Crown—Privilege—Objection to produce documents—Police letter to Gaming Board in answer to request for information—Whether matter of Crown privilege or public interest—Whether letters privileged or excluded from production
Gaming—Gaming Board—Information on applicant for licence—Objection to produce documents—Public duty—Gaming Act 1968 (*c.* 65), *s.* 10, *Sch.* 2, *para.* 4 (5) (6)

Applications made to the Gaming Board by R for certificates of consent in relation to five bingo clubs were refused. He commenced proceedings for criminal libel in respect of a letter written by the assistant chief constable of the county to the board in reply to their request for certain information about him. The Home Secretary applied for an order of certiorari to set aside two witness summonses directed to the chief constable and the secretary of the board to give evidence

ITEM NO. 153

JA-39

A

CASES

determined by the

CHANCERY DIVISION

B and the

COURT OF PROTECTION

and on appeal therefrom in the

C

COURT OF APPEAL

D [COURT OF APPEAL]

BRISTOL AND WEST BUILDING SOCIETY v. MOTHEW

1996 May 21, 22; July 24

Staughton, Millett and Otton L.JJ.

E *Solicitor—Negligence—Incorrect advice or information—Mortgage transaction—Solicitor acting for borrowers and lender—Solicitor negligently giving lender incorrect information—Lender suffering loss—Whether lender merely having to prove reliance on information—Whether necessary to show loss attributable to negligence—Whether breach of trust or fiduciary duty*

F In 1988 the defendant solicitor acted for a husband and wife in the purchase of a house for £73,000 and also for the plaintiff to whom the purchasers had applied for a loan of £59,000 to finance the purchase. The plaintiff offered to advance the money on the express condition that the balance of the purchase price was provided by the purchasers without resort to further borrowing, and it instructed the solicitor to report, prior to completion, any proposal that the purchasers might create a G second mortgage or otherwise borrow in order to finance part of the purchase price. The solicitor knew that the purchasers were arranging for an existing bank debt of £3,350 to be secured by a second charge on the new property but, due to an oversight, he stated in his report to the plaintiff that the balance of the purchase price was being provided by the purchasers without resort to further borrowing. The plaintiff advanced the loan and the purchase was completed. When the purchasers defaulted on H their mortgage repayments the plaintiff enforced its security and the house was sold at a loss. The plaintiff sought to recover the whole of its loss on the transaction from the solicitor, alleging breach of contract, negligence and breach of trust. The district judge gave the plaintiff summary judgment for damages to be

JA-39

assessed for breach of contract and negligence and for damages of £59,000 less the amount received on the sale of the property for breach of trust. The judge affirmed those decisions.

On appeal by the solicitor:—

Held, allowing the appeal, (1) that, where a client sued his solicitor for negligently giving him incorrect advice or information, the client did not have to show that he would not have acted as he did if he had been given the proper advice or correct information but merely that he had relied on the incorrect advice or information; that the evidence showed that the plaintiff had relied on the solicitor's report in advancing the loan and, therefore, the necessary causal link between the solicitor's negligence and the loan was proved; but that the plaintiff had still to establish what, if any, loss was attributable to the solicitor's negligence and, as there was an issue as to what loss was occasioned by the existence of the second charge and the purchasers' indebtedness to the bank, damages remained to be assessed (post, pp. 11D–E, F–H, 13B–C, 24E–F, 25E–F, 28A).

Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd. [1997] A.C. 191, H.L.(E.) and *Downs v. Chappell* [1997] 1 W.L.R. 426, C.A. applied.

(2) That the solicitor's conduct in providing the plaintiff with the wrong information, although a breach of duty, was neither dishonest nor intentional but due to an oversight and was unconnected to the fact that he was also acting for the purchasers; that, accordingly, his conduct and subsequent application of the money advanced by the plaintiff to complete the purchase was not a breach of trust or fiduciary duty; and that the order for damages for breach of trust would therefore be set aside (post, pp. 15H–16A, 19E, 20G, 22A–C, 24E–F, 25E–F, 26C–E, 28A).

Decision of Chadwick J. reversed.

The following cases are referred to in the judgments:

Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd. [1997] A.C. 191; [1996] 3 W.L.R. 87; [1996] 3 All E.R. 365, H.L.(E.)

Bristol and West Building Society v. May May & Merrimans [1996] 2 All E.R. 801

Clark Boyce v. Mouat [1994] 1 A.C. 428; [1993] 3 W.L.R. 1021; [1993] 4 All E.R. 268, P.C.

Commonwealth Bank of Australia v. Smith (1991) 102 A.L.R. 453

Coomber, In re; Coomber v. Coomber [1911] 1 Ch. 723, C.A.

Downs v. Chappell [1997] 1 W.L.R. 426; [1996] 3 All E.R. 344, C.A.

El Ajou v. Dollar Land Holdings Plc. [1993] 3 All E.R. 717

Girardet v. Crease & Co. (1987) 11 B.C.L.R. (2d) 361

Henderson v. Merrett Syndicates Ltd. [1995] 2 A.C. 145; [1994] 3 W.L.R. 761; [1994] 3 All E.R. 506, H.L.(E.)

Kelly v. Cooper [1993] A.C. 205; [1992] 3 W.L.R. 936, P.C.

LAC Minerals Ltd. v. International Corona Resources Ltd. (1989) 61 D.L.R. (4th) 14

Lewis v. Hillman (1852) 3 H.L.Cas. 607, H.L.(E.)

Lipkin Gorman v. Karpnale Ltd. [1991] 2 A.C. 548; [1991] 3 W.L.R. 10; [1992] 4 All E.R. 512, H.L.(E.)

Moody v. Cox and Hatt [1917] 2 Ch. 71, C.A.

Mortgage Express Ltd. v. Bowerman & Partners [1996] 2 All E.R. 836, C.A.

Nocton v. Lord Ashburton [1914] A.C. 932, H.L.(E.)

Permanent Building Society v. Wheeler (1994) 14 A.C.S.R. 109

Sykes v. Midland Bank Executor and Trustee Co. Ltd. [1971] 1 Q.B. 113; [1970] 3 W.L.R. 273; [1970] 2 All E.R. 471, C.A.
Target Holdings Ltd. v. Redferns [1996] A.C. 421; [1995] 3 W.L.R. 352; [1995] 3 All E.R. 785, H.L.(E.)
Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] A.C. 669; [1996] 2 W.L.R. 802; [1996] 2 All E.R. 961, H.L.(E.)

The following additional cases were cited in argument:

Alliance & Leicester Building Society v. Edgestop Ltd. (unreported), 18 January 1991, Hoffmann J.
Brickenden v. London Loan & Savings Co. [1934] 3 D.L.R. 465, P.C.
Canson Enterprises Ltd. v. Boughton & Co. (1991) 85 D.L.R. (4th) 129
Gemstone Corporation of Australia Ltd. v. Grasso (1994) 12 A.C.L.C. 653
Gray v. New Augarita Porcupine Mines Ltd. [1952] 3 D.L.R. 1
Sinclair v. Brougham [1914] A.C. 398, H.L.(E.)
Wan v. McDonald (1992) 105 A.L.R. 473
Witten-Hannah v. Davis [1995] 2 N.Z.L.R. 141

The following cases, although not cited, were referred to in the skeleton arguments:

Attorney-General for Hong Kong v. Reid [1994] 1 A.C. 324; [1993] 3 W.L.R. 1143; [1994] 1 All E.R. 1, P.C.
Bishopsgate Investment Management Ltd. v. Maxwell (No. 2) [1994] 1 All E.R. 261, C.A.
Chase Manhattan Bank N.A. v. Israel-British Bank (London) Ltd. [1981] Ch. 105; [1980] 2 W.L.R. 202; [1979] 3 All E.R. 1025
Dawson, decd., In re; Union Fidelity Trustee Co. Ltd. v. Perpetual Trustee Co. Ltd. [1966] 2 N.S.W.R. 211
Farrington v. Rowe McBride & Partners [1985] 1 N.Z.L.R. 83
McPherson v. Watt (1877) 3 App.Cas. 254, H.L.(Sc.)
Miller's Deed Trusts, In re (1978) 75 L.S.G. 454
Nelson v. Rye [1996] 1 W.L.R. 1378; [1996] 2 All E.R. 186
Nestlé v. National Westminster Bank Plc. [1993] 1 W.L.R. 1260; [1994] 1 All E.R. 118, C.A.

INTERLOCUTORY APPEAL from Chadwick J.

On 21 June 1995 Deputy District Judge Raskin granted the plaintiff, Bristol and West Building Society, summary judgment pursuant to R.S.C., Ord. 14 of its claims against the defendant solicitor, Anthony Paul Mothew (trading as Stapley & Co.), for damages to be assessed for breach of contract and negligence and damages for breach of trust. On 27 July 1995 Chadwick J. dismissed the defendant's appeal against that order.

Pursuant to leave granted by Nourse L.J. on 29 December 1995 and by a notice of appeal dated 5 January 1996 the defendant sought to set aside the orders and be granted unconditional leave to defend on the grounds that the judge had erred in holding (1) that money paid to the defendant by the plaintiff was impressed with a constructive trust in favour of the plaintiff; (2) that the money was paid to the defendant under a mistake of fact or had been induced by the defendant's misrepresentation, when no such allegations were made in the statement of claim; (3) that it was not necessary for the plaintiff to establish that it had sustained loss and damage as a result of the defendant's alleged breach of trust; (4) that

the defendant had no arguable defence to the claim for breach of trust based upon acquiescence or affirmation by the plaintiff; and (5) that the defendant had no arguable defence to the allegation that the plaintiff had sustained loss and damage as a result of the breach of contract and negligence.

By a respondent's notice dated 25 January 1996 the plaintiff contended that it was entitled to judgment for the sum claimed in respect of its claims for breach of contract and negligence.

The facts are stated in the judgment of Millett L.J.

Jonathan Sumption Q.C. and *Glenn Campbell* for the defendant. A breach of a solicitor's conveyancing duty which makes no difference to the lender's decision and has no impact on the value of the security cannot result in the solicitor becoming the underwriter of the transaction when the security is later sold at a loss: see *Target Holdings Ltd. v. Redferns* [1996] A.C. 421. Although a solicitor has a number of fiduciary obligations to his client, not every duty which is owed in the context of a fiduciary relationship is a fiduciary duty: see *Girardet v. Crease & Co.* (1987) 11 B.C.L.R. (2d) 361, 362; *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989) 61 D.L.R. (4th) 14, 28 and *In re Coomber; Coomber v. Coomber* [1911] 1 Ch. 723, 728. A solicitor's duty to report to his client the outcome of conveyancing and allied inquiries is the ordinary contractual duty of a professional to comply with his instructions and to do so with reasonable skill.

Brickenden v. London Loan & Savings Co. [1934] 3 D.L.R. 465 does not assist the plaintiff as it was concerned only with a breach by a fiduciary of his obligation to disclose to his principal his own personal interest in the transaction. [Reference was also made to *Nocton v. Lord Ashburton* [1914] A.C. 932.] The principle that relief is granted for such a breach, without regard to what the plaintiff would have done if disclosure had been made reflects the rule of equity that where a fiduciary has dealt personally with the plaintiff without full disclosure to him the latter's relief is not compensatory at all. He has, irrespective of his loss, an absolute right to set aside the transaction or to claim an account of profits. The compensation awarded to him is simply the financial equivalent of setting aside: see *Gray v. New Augarita Porcupine Mines Ltd.* [1952] 3 D.L.R. 1, 12–15. Compensation cannot be awarded for breach of a duty as to the manner in which work should be carried out: see *Permanent Building Society v. Wheeler* (1994) 14 A.C.S.R. 109, 164–165. [Reference was also made to *Canson Enterprises Ltd. v. Boughton & Co.* (1991) 85 D.L.R. (4th) 129; *Wan v. McDonald* (1992) 105 A.L.R. 473; *Witten-Hannah v. Davis* [1995] 2 N.Z.L.R. 141 and *Target Holdings Ltd. v. Redferns* [1996] A.C. 421.]

There is no distinction between a solicitor who breaches his duty by failing to report in accordance with his instructions before the mortgage advance cheque is received and a solicitor who fails to deal with the advance in accordance with his instructions after it is received. In neither case does the breach of duty have the effect of terminating the solicitor's retainer and his authority to complete the transaction. Equally, the argument that the solicitor held the advance as soon as it was received on

A a constructive trust to return it forthwith to the plaintiff cannot be supported. There cannot be a constructive trust inconsistent with the existing express trust to apply the loan moneys in completing the transaction, unless the solicitor's authority and obligation to complete the transaction are first brought to an end. [Reference was made to *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669; *Sinclair v. Brougham* [1914] A.C. 398 and *Lipkin Gorman* B *v. Karpnale Ltd.* [1991] 2 A.C. 548.]

If the plaintiff is to be awarded the amount of the advance money (less actual recoveries) it must be on the basis that that money has been misapplied. If the defendant had no authority to pay out the money to the vendor the payment was a breach of trust: see *Target Holdings Ltd. v. Redferns* [1996] A.C. 421 and *Alliance & Leicester Building Society v.* C *Edgestop Ltd.* (unreported), 18 January 1991.

The plaintiff's loss on the loan transaction is due to the default of the purchasers and the fact that the security was not sufficient to cover the loan when it came to be realised, neither of which is the responsibility of the solicitor. The loss is not due to the existence or non-disclosure of a second mortgage.

Nicholas Patten Q.C. and *Timothy Higginson* for the plaintiff. The D relationship between a solicitor and his client gives rise to fiduciary obligations on the part of the solicitor in the handling of his client's affairs. A failure to perform those obligations gives rise to a remedy in equity regardless of whether the acts complained of also constitute a breach of contract with a right to damages: see *Nocton v. Lord Ashburton* [1914] A.C. 932, 956–957. The underlying contractual relationship between E the parties cannot dictate or limit the scope of the concurrent fiduciary duties, as the defendant was expressly required to report any proposal for further borrowing before releasing the plaintiff's mortgage advance: see *Henderson v. Merrett Syndicates Ltd.* [1995] 2 A.C. 145, 205–206.

A solicitor who acts for both lender and borrower in the same transaction has an unrestricted obligation to each client to act in his own best interests, including an obligation to disclose to the lender information F about the borrower which is material to the transaction: see *Clark Boyce v. Mouat* [1994] 1 A.C. 428, 437. [Reference was also made to *Lewis v. Hillman* (1852) 3 H.L.Cas. 607; *Kelly v. Cooper* [1993] A.C. 205; *Moody v. Cox and Hatt* [1917] 2 Ch. 71 and *Bristol and West Building Society v. May May & Merrimans* [1996] 2 All E.R. 801, 817–818.]

The non-disclosure of the proposed further borrowing was a breach of G trust. In addition, the release of the advance by the defendant when he had failed to disclose the proposed further borrowing in breach of his express instructions was made without authority and was itself a breach of trust. The right of the plaintiff to recover its advance is unaffected by *Target Holdings Ltd. v. Redferns* [1996] A.C. 421 because the payment of the advance to the defendant (and therefore the creation of his agency to hold the money for the purpose of the intended transaction) was the direct H result of the reliance by the plaintiff upon the contents of the defendant's report on title. Therefore the defendant's ability to utilise the payment for the benefit of the borrowers in breach of trust was caused by the report on title.

Breaches of trust or fiduciary duty must cause the loss complained of but the test of causation is not the common law test. The inquiry is not to determine what position the plaintiff would have been in had the contract been performed but rather whether the loss would have been sustained but for the breach of trust. The non-disclosure in the report on title caused the loss because it induced the plaintiff to advance the funds in reliance on the report. To inquire as to what the plaintiff would have done had disclosure been made is to apply the common law test and is wrong in principle: see *Brickenden v. London Loan & Savings Co.* [1934] 3 D.L.R. 465, 469; *Gray v. New Augarita Porcupine Mines Ltd.* [1952] 3 D.L.R. 1, 15; *Commonwealth Bank of Australia v. Smith* (1991) 102 A.L.R. 453 and *Gemstone Corporation of Australia Ltd. v. Grasso* (1994) 12 A.C.L.C. 653.

Sumption Q.C. replied.

Cur. adv. vult.

July 24. The following judgments were handed down.

MILLETT L.J. This is an appeal brought by the defendant with the leave of the single Lord Justice from an order for summary judgment given initially by the district judge and affirmed (for different reasons) by Chadwick J. It raises important questions of principle in relation to a claim by a mortgagee to recover from the solicitor who was acting for both mortgagor and mortgagee the loss arising from the mortgagor's subsequent default.

The collapse in the property market which accompanied the recession at the beginning of the present decade caused mortgage lenders to suffer serious losses. Unable to recover their advances from the borrowers or by the enforcement of their security they have sought to recover them from the valuers or solicitors on whose valuations or advice they have relied. In some cases they have been the victims of a fraud to which the valuers and solicitors have been parties. In other cases, such as the present, they have been unable to accuse their solicitor of anything more serious than negligence. Believing that the common law rules of causation and remoteness of damage might not enable them to recover the whole amount of their loss they have turned to equity and alleged breach of trust or fiduciary duty. We have thus been concerned to decide just what is involved in these concepts.

The facts

The facts are not in dispute. The defendant is a solicitor. In August 1988 he acted for a Mr. and Mrs. Towers in the purchase of 17, Thameshill Avenue, Romford for £73,000. In accordance with the usual practice he also acted for the Bristol and West Building Society ("the society") to which the purchasers had applied for an advance of £59,000 in order to finance the purchase. (This was the Cheshunt Building Society, but its rights have since vested in the society.) In their application form the purchasers had stated that the balance of the purchase price of £14,000 was being provided by them personally and that they were not applying elsewhere for financial assistance towards the purchase price.

A The society offered to advance to the purchasers £59,000 on the security of a first mortgage of the property on the express condition that unless otherwise agreed in writing the balance of the purchase price was to be provided by the purchasers personally without resort to further borrowing and that no second mortgage or other loan was being arranged or contemplated in connection with the purchase. The defendant was provided with the offer of advance (but not with the purchasers' B application).

The society's standing instructions to solicitors acting for the society required them to report to the society prior to completion, inter alia:

> "(viii) Any proposal that the applicant may create a second mortgage or enter into a promissory note or otherwise borrow in order to finance part of the purchase price. (ix) Any incorrect information C given in the solicitor's instructions. (x) Any other matters which ought to be brought to the notice of the society . . ."

The solicitor was required to submit a report on title and request for advance cheque to the society at least five clear working days before the cheque was required. This was done on a form by which the solicitor was asked to confirm, inter alia, that the title was good and marketable and D might safely be accepted by the society, that to the best of his knowledge and belief the balance of the purchase money was being provided by the applicant personally without resort to further borrowing, and that the special conditions attached to the offer of advance had been, or would be, complied with.

Mr. and Mrs. Towers intended to provide the balance of the purchase E price from the net proceeds of sale of their existing property after discharging a subsisting mortgage. As it happens, they owed money to Barclays Bank which was secured by a second charge on that property. They arranged with the bank to allow a small part of the debt (£3,350) to remain outstanding after the sale of the existing property and to be secured by a second charge on the new property. The defendant was informed of these arrangements and gave an undertaking to the bank to F hold the title deeds to its order pending registration. Unfortunately, he either failed to appreciate that, although they related to old borrowing, they were a matter which he was required to report to the society, or he had forgotten or overlooked them when he made his report.

By his report dated 2 August 1988 the defendant confirmed that to the best of his knowledge and belief the balance of the purchase money was G being provided by the applicants personally without resort to further borrowing and that the special conditions attached to the offer of advance had been or would be complied with. He failed to disclose the fact that Mr. and Mrs. Towers were making arrangements for a second mortgage in connection with the purchase.

It is conceded by the defendant that his statements were untrue and that his failure to report the purchasers' arrangements for a second H mortgage was a breach of his instructions. The society alleges that the defendant acted negligently and in breach of contract, and this is admitted. There is no allegation of dishonesty or bad faith, and if any such allegation were made it would be strongly resisted. The society does not allege that

the defendant made the statements in question knowing them to be untrue. It alleges only that he "knew or ought to have known" that they were untrue, and this is consistent with oversight.

Following the receipt of the report the society forwarded a cheque for the amount of the advance to the defendant in readiness for completion on 30 August. Completion took place on that date when the mortgage advance was released to the vendor's solicitors as part of the purchase price for the property. Mr. and Mrs. Towers executed a first charge in favour of the society and a second charge in favour of the bank. On 25 November the defendant applied to the society for its consent to the registration of the second charge in favour of the bank. The society granted its consent on 10 March 1989. It does not appear that the society was aware of the date of the bank's charge (and so was aware that it constituted a breach of the conditions of the advance) when it gave its consent, but it is alleged that the society must have learnt of it shortly afterwards and nevertheless took no action.

The purchasers defaulted after making only small repayments and the society enforced its security. The property was sold on 6 February 1991 and realised net proceeds of a little under £53,000. The society claimed to recover the whole of its net loss on the transaction from the defendant, alleging breach of contract, negligence and breach of trust. As I have already indicated, breach of contract and negligence are admitted; breach of trust is denied.

It has always been the defendant's case that the society would not have been concerned by the purchasers' proposal to grant a second charge to the bank if this had been disclosed to it in August 1988, that it would still have proceeded with the transaction and that it would have suffered precisely the same loss in that event. It is alleged that, in the heady days of 1988, when the property market was at its height and mortgage lenders were falling over themselves to advance money to house purchasers, the society would not have been concerned by a proposal to grant a second charge to secure a relatively trivial indebtedness which did not even represent fresh borrowing; and it is contended that this is demonstrated by the lack of concern shown by the society when it was asked to give its consent to the registration of a second charge in March 1989. Despite the submissions of the society to the contrary, I am satisfied that, if legally relevant, these allegations raise a triable issue.

The course of the proceedings below

It was common ground below that no damages would be recoverable at common law for breach of contract or tort unless the society could show that it would not have proceeded with the transaction if it had been informed of the facts. The society, however, submitted that the position was different in equity. It alleged that the defendant had committed a breach of trust or fiduciary duty, and submitted that common law principles of causation and remoteness of damage have no application in such a case so that it was not necessary for the society to show that it would not have proceeded with the transaction if it had been informed of the facts.

A The district judge accepted these arguments. In respect of the common law claims for breach of contract and negligence she gave summary judgment for damages to be assessed. This was apparently on the basis that the judgment would leave it open to the defendant to contend that no loss was caused by the breach.

The district judge also gave summary judgment for the society for breach of trust for the sum of £59,000 less the sums received by the society B on the sale of the property, and this was affirmed by the judge, who was satisfied that there was no question or issue to be tried in the action and dismissed the appeal.

The course of the appeal

C In the course of the appeal the defendant submitted that, by consenting to the registration of the second charge, the society waived the breaches of which complaint is made; and that this raises a triable issue on liability which entitles him to unconditional leave to defend in relation to all the pleaded causes of action. In the absence of any evidence or reason to suppose that the society was aware of the date of the second charge when it gave its consent to its registration, I am not persuaded that there is a D triable issue on waiver, and I would not disturb the order below on this ground.

When the appeal was first argued before us it was still conceded by the society that it could not recover damages at common law for breach of contract or negligence unless it could show that it would not have proceeded with the mortgage advance if it had been informed of the facts. E The society, however, maintained that it could escape this principle because the defendant was also guilty of a breach of trust and that common law rules of causation and remoteness of damage have no application in such a case. The critical questions, therefore, appeared to be whether the defendant was guilty of a breach of trust or fiduciary duty and if so whether the society needed to prove that it would not still have proceeded with the transaction if it had been told of the facts.

F After we had reserved judgment on the appeal, however, the society informed us that it wished to resile from its concession. Relying on the recent decision of this court in *Downs v. Chappell* [1997] 1 W.L.R. 426, the society submitted that it was entitled to recover the whole of its net loss on the transaction by way of damages for negligence at common law without having to establish that it would not have proceeded with the G transaction if it had been informed of the facts. If correct, it submitted, this would be determinative of the case, and it would not be necessary for the society to rely on any breach of trust or fiduciary duty. Before the defendant's advisers could respond to this, speeches were delivered in the House of Lords in *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd.* [1997] A.C. 191. These were relevant to the common law position. For the reasons given by Staughton L.J., however, we decided that it was H not necessary to restore the appeal for further argument. This was because the assessment of damages at common law is still pending. They will have to be assessed in conformity with the decision of the House of Lords in *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd.* and not

with any gloss which, in the absence of argument, we may inadvertently have put upon that decision.

The claims at common law

The society has served a respondent's notice, in which it contends that it is entitled to judgment for the sum claimed, and not merely for damages to be assessed, in respect of its common law claims. If this is correct, then the society does not need to establish that the defendant was guilty of a breach of trust or fiduciary duty.

This question depends upon an alleged difference between the tests of causation and remoteness of damage at common law and in equity. In a case of the present kind, however, two different questions of causation are involved and it is necessary to distinguish between them. Where a plaintiff claims that he has suffered loss by entering into a transaction as a result of negligent advice or information provided by the defendant, the first question is whether the plaintiff can establish that the defendant's negligence caused him to enter into the transaction. If he cannot his claim must fail. But even if he can, it is not sufficient for him to establish that the transaction caused him loss. He must still show what (if any) part of his loss is attributable to the defendant's negligence. This is usually treated as a question of the measure of damages rather than causation, and for convenience I shall so treat it in this judgment, but it must be acknowledged that it involves questions of causation.

In *Downs v. Chappell* [1997] 1 W.L.R. 426 the plaintiffs bought a small business in reliance on trading figures contained in a letter from the vendor's accountants which was forwarded to them by the vendor. The vendor knew that the figures contained in the letter were false. The plaintiffs sued the vendor for deceit and the accountants for negligence. The judge accepted the plaintiffs' evidence that they would not have contracted to purchase the business without verification of the figures by the accountants. But he was not satisfied that they would not still have bought the business even if the correct figures had been supplied, and dismissed the action against both defendants.

This court allowed the plaintiffs' appeal against both defendants. Hobhouse L.J. gave the only reasoned judgment. In relation to the vendor, he pointed out that for a plaintiff to succeed in the tort of deceit it was necessary for him to prove (1) a fraudulent representation, (2) materiality and (3) inducement. All three elements had been proved. The judge had found that the representations did induce the plaintiffs to enter into the transaction: they would not have done so without them. This was sufficient proof of causation. Whether the plaintiffs would have entered into the transaction if they had been told the truth was irrelevant.

We are not concerned with this part of the decision, since the present case is not one of fraud. But Hobhouse L.J. held that the position was the same in relation to the accountants, who were charged with negligence only. Here the question was not inducement but reliance. The relevant question was simply whether the plaintiffs had entered into the contract in reliance upon the figures contained in the accountants' letter. The judge had answered that question in the affirmative: the plaintiffs would not have entered into the contract if they had not been provided with the

letter. The causal relationship between the accountants' negligence and the plaintiffs' purchase was established. It was not necessary to consider whether the plaintiffs would have purchased the business if they had been supplied with the correct figures.

In the present case the society's claim is not for misrepresentation. Accordingly, questions of inducement and materiality are not relevant. Its claim lies in negligence, and the relevant concept is reliance. In considering the issue of causation in an action for negligence brought by a client against his solicitor it appears from *Downs v. Chappell* that it is necessary to distinguish between two different kinds of case.

Where a client sues his solicitor for having negligently failed to give him proper advice, he must show what advice should have been given and (on a balance of probabilities) that if such advice had been given he would not have entered into the relevant transaction or would not have entered into it on the terms he did. The same applies where the client's complaint is that the solicitor failed in his duty to give him material information. In *Sykes v. Midland Bank Executor and Trustee Co. Ltd.* [1971] 1 Q.B. 113, which was concerned with a failure to give proper advice, the plaintiff was unable to establish this and his claim to damages for negligence failed. In *Mortgage Express Ltd. v. Bowerman & Partners* [1996] 2 All E.R. 836, which was concerned with a failure to convey information, the plaintiff was able to establish that if it had been given the information it would have withdrawn from the transaction and its claim succeeded.

Where, however, a client sues his solicitor for having negligently given him incorrect advice or for having negligently given him incorrect information, the position appears to be different. In such a case it is sufficient for the plaintiff to prove that he relied on the advice or information, that is to say, that he would not have acted as he did if he had not been given such advice or information. It is not necessary for him to prove that he would not have acted as he did if he had been given the proper advice or the correct information. This was the position in *Downs v. Chappell* [1997] 1 W.L.R. 426.

In the present case the society makes complaints of both kinds. It alleges that the defendant negligently and in breach of his instructions failed to report the purchasers' proposed arrangements with the bank prior to completion. This is a claim of the first kind, and if it were all the society would have to establish that if it had been informed of those arrangements it would not have proceeded with the mortgage advance. But the defendant went further than this. He did not merely fail to report the arrangements to the society; he expressly represented to the society that no such arrangements existed. That brings the case within the second category. It follows from the decision of this court in *Downs v. Chappell* that it is sufficient for the society to prove that it relied on the representations in the report. Although the judge spoke in terms of inducement, he plainly found reliance. The society's procedures were designed to ensure that no cheque would be issued in the absence of a satisfactory report from its solicitor.

In my judgment we are bound by the decision in *Downs v. Chappell* to hold that the necessary causal link between the defendant's negligence and the mortgage advance was proved.

Measure of damages

A

It does not, however, follow from the fact that the defendant's negligent statements caused the society to make the mortgage advance that the whole of the society's loss is attributable to his negligence. Having regard to the date of the advance, some part at least of the society's loss may well be attributable to the fall in property values which had occurred by the time that it was able to sell the property.

B

In *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd.* [1997] A.C. 191 the House of Lords ruled definitively on the correct measure of damages for the negligent provision of information on which the plaintiff relied in entering into a transaction from which loss resulted. The only speech was delivered by Lord Hoffmann. He distinguished between the measure of damages for (1) breach of a contractual warranty and (2) breach of a duty (whether contractual or tortious) to take care (i) to give proper advice and (ii) to provide accurate information.

C

In the case of breach of warranty, the comparison is between the plaintiff's position as a result of entering into the transaction and what it would have been if the facts had been as warranted. The measure of damages is the extent to which the plaintiff would have been better off if the information had been right. In the case of a breach of duty to take care the measure of damages is the extent to which the plaintiff is worse off because the information was wrong. Since he entered into the transaction in reliance on the advice or information given to him by the defendant, the starting point is to compare his position as a result of entering into the transaction with what it would have been if he had not entered into the transaction at all.

D

But that is only the starting point. Lord Hoffmann distinguished between a duty to advise someone as to what course of action he should take and a duty to provide information for the purpose of enabling someone else to decide upon his course of action. In the former case, the defendant is liable for all the foreseeable consequences of the action being taken. In the latter case, however, he is responsible only for the consequences of the information being wrong. The measure of damages is not necessarily the full amount of the loss which the plaintiff has suffered by having entered into the transaction but only that part if any of such loss as is properly attributable to the inaccuracy of the information. If the plaintiff would have suffered the same loss even if the facts had actually been as represented the defendant is not liable.

E

F

Accordingly, in this class of case the plaintiff must prove two things: first, that he has suffered loss; and, secondly, that the loss fell within the scope of the duty he was owed. In the present case the society must prove what (if any) loss was occasioned by the arrangements which the purchasers had made with the bank.

G

The society was told that Mr. and Mrs. Towers had no other indebtedness and that no second charge was contemplated. The existence of the second charge did not affect the society's security. The absence of any indebtedness to the bank would not have put money in the purchasers' pocket; it would merely have reduced their liabilities. Whether their liability to the bank affected their ability to make mortgage repayments to the society has yet to be established, but given the smallness of the liability

H

its effect on the purchasers' ability to meet their obligations to the society may have been negligible. It may even be, for example, that the purchasers made no payments at all to the bank at the relevant time, and if so it is difficult to see how any part of the loss suffered by the society can be attributable to the inaccuracy of the information supplied to it by the defendant. It would have occurred even if the information had been correct.

Conclusion

The society has proved the causal link between the defendant's negligence and the making of the mortgage advance but it has not yet established the amount of its loss (if any) which is properly attributable to the defendant's negligence. Damages remain to be assessed. We are bound by the decision of this court in *Downs v. Chappell* [1997] 1 W.L.R. 426 to hold that the society will not have to prove that it would not have made the mortgage advance if it had known the true facts; but it will be required to establish what it has lost as a result of the existence of the second charge and the purchasers' indebtedness to the bank. It can maintain the money judgment which it has obtained below only if it can invoke equitable principles.

The claims in equity

The judge's reasoning

The judge found that, in the events which happened, the defendant committed a breach of trust by applying the mortgage advance in the purchase of the property, that he was accordingly liable to restore the trust property, viz. the £59,000 with interest less receipts, that no question of damages at common law or of compensation for loss arose, and that it was irrelevant whether, had it been told of the position, the society might still have chosen to make the advance notwithstanding the arrangements which had been made with the bank. Accordingly the judge concluded that there was no question or issue to be tried in the action and gave summary judgment for the whole of the society's claim.

The judge's conclusion that the defendant had committed a breach of trust in applying the mortgage advance in the purchase of the property was based on the fact that he had obtained payment of the mortgage advance by misrepresentation. The judge said:

> "it seems to me beyond argument that [the defendant] received the cheque . . . for £59,000 as a direct result of the misleading report which he had supplied to the society on 2 August 1988. The money was paid to the defendant . . . as a result of a misrepresentation made to the society by the defendant. . . . *The effect, in my judgment, was that from the moment when [the] cheque for £59,000 was received by [the defendant] he held it upon a constructive trust to return it forthwith to the society, unless authorised by the society to retain, or dispose of, it after a full knowledge of the facts had been disclosed.*" (My emphasis.)

In the judge's opinion it necessarily followed that the defendant's subsequent application of the mortgage money in the purchase of the property constituted a breach of trust. He said:

> "In making that payment there is, in my view, no doubt that the defendant acted in breach of the trust which had been imposed upon him by the circumstances in which he had received the society's cheque. That trust required him to return the £59,000 to the society. Any payment of that £59,000 to a third party, albeit to the vendors of the property, was a breach of that trust."

The judge dismissed the submission that the society had to establish that it would not have made the advance if it had known the facts. He said:

> "But that point affords no defence to the [society]'s claim. It is nihil ad rem that if the true position had been disclosed to the society, the society might or might not have issued an amended offer of advance. Liability to repay arises in this case because [the defendant] received money from the society as a result of his own misrepresentation. He cannot be heard to say that he could retain that money against the society, or dispose of it to the vendors, because, in other circumstances, the society might have chosen to make the advance notwithstanding the borrowing from [the bank]."

The judge did not explain why the consequence of the defendant's misrepresentation was that he held the mortgage advance on a constructive trust for the society, or why the defendant's authority to apply the money in accordance with the society's instructions was determined, but he took the opportunity to do so when he revisited these questions a few months later in *Bristol and West Building Society v. May May & Merrimans* [1996] 2 All E.R. 801 after two county court judges had declined to follow his decision in the present case. The later case involved a number of transactions in which the same society had made mortgage advances and suffered loss when the borrowers defaulted which it sought to recover from the solicitors who had acted for both parties to the lending transactions. In some cases the solicitor knew nothing, prior to the receipt of the cheque for the mortgage advance, which ought to have led him to qualify his report, though he discovered the facts afterwards and before he disbursed the money on completion. In other cases the solicitor's breach of his instructions preceded his receipt of the mortgage advance, as it did in the present case.

The judge distinguished between the two groups of cases. In relation to the first group he reluctantly felt compelled by the decision in *Target Holdings Ltd. v. Redferns* [1996] A.C. 421 to conclude that, at least for the purpose of an application for summary judgment, it was necessary for the society to show that it would not have proceeded with the transaction if it had known the facts. In relation to the second group, however, where the society paid the cheque for the mortgage advance to the solicitor in response to a request based upon a warranty or representation which (as the judge put it) the solicitor "knew or must be taken to have known" to be misleading, he confirmed his previous decision in the present case. He held that the society was entitled to succeed in such cases whether or not it would have still made the advance if it had known the facts.

In the course of his judgment the judge explained how the constructive trust in question arose. It was, he said, because the solicitor had given misleading information to his client. This constituted a breach of fiduciary duty which enabled the court to impose a constructive trust on the property acquired as a result of the breach of duty. He said [1996] 2 All E.R. 801, 818:

> "where moneys have been received by the solicitor from the society following a request based upon a warranty or representation which he knew, or must be taken to have known, to be misleading in some material respect, equity will give a remedy in respect of any loss which the society may suffer as a result of its payment in reliance upon that request. That will be a remedy based upon breach of fiduciary duty and may, where necessary, take the form of the imposition of a constructive trust on those moneys to enforce the solicitor's obligation to return them to the society forthwith. The constructive trust imposed by equity to enforce the obligation to make immediate restitution overrides any express or implied trust which might otherwise arise out of any instructions given by [the society] when the money is paid to the solicitor. No reliance can be placed on . . . those instructions, because they are vitiated by the breach of duty by which they were obtained. . . . In the absence of some fresh instructions, given by the society after full disclosure of the matters in respect of which it has been misled, the only course properly open to the solicitor is to repay the moneys to the society with interest."

The judge evidently considered himself to be imposing a remedial constructive trust as the appropriate remedy for a prior breach of fiduciary duty.

The judge's references to the solicitor having made a representation which "he knew, or must be taken as having known" to be misleading is not an accurate description of the facts of the present case. It is not alleged that the defendant "knew or must be taken to have known" the facts, but only that he "knew or ought to have known" them, which is a very different matter. In explaining his decision in the present case the judge said that the defendant's misrepresentation could not be described as innocent because he "clearly had the knowledge which made the representation false:" see [1996] 2 All E.R. 801, 832. That confuses knowledge with the means of knowledge. On the society's pleaded case the defendant must be taken to have known the facts at one time but to have forgotten or overlooked them so that they were not present to his mind when he came to complete his report to the society.

It is not alleged that the defendant deliberately concealed the arrangements which the purchasers had made with their bank from the society or that he consciously intended to mislead it. Nothing in this judgment is intended to apply to such a case. My observations are confined to the case like the present where the provision of incorrect information by a solicitor to his client must be taken to have been due to an oversight. In such a case his breach of duty is unconscious; he will ex hypothesi be unaware of the fact that he has committed a breach of his

instructions; and if this means that his subsequent application of the mortgage money constitutes a breach of trust then it will be a breach of a trust of which he is unaware. I would not willingly treat such conduct as involving a breach of trust or misapplication of trust money unless compelled by authority to do so, and in my judgment neither principle nor authority compels such a conclusion.

Before us the defendant submits that, while he was guilty of negligence and breach of contract, he was not guilty of a breach of trust or fiduciary duty. It is convenient to take first the question of fiduciary duty, and then to consider the question of breach of trust.

Breach of fiduciary duty

Despite the warning given by Fletcher Moulton L.J. in *In re Coomber; Coomber v. Coomber* [1911] 1 Ch. 723, 728, this branch of the law has been bedevilled by unthinking resort to verbal formulae. It is therefore necessary to begin by defining one's terms. The expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. Unless the expression is so limited it is lacking in practical utility. In this sense it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty. I would endorse the observations of Southin J. in *Girardet v. Crease & Co.* (1987) 11 B.C.L.R. (2d) 361, 362:

> "The word 'fiduciary' is flung around now as if it applied to all breaches of duty by solicitors, directors of companies and so forth. . . . That a lawyer can commit a breach of the special duty [of a fiduciary] . . . by entering into a contract with the client without full disclosure . . . and so forth is clear. But to say that simple carelessness in giving advice is such a breach is a perversion of words."

These remarks were approved by La Forest J. in *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989) 61 D.L.R. (4th) 14, 28 where he said: "not every legal claim arising out of a relationship with fiduciary incidents will give rise to a claim for breach of fiduciary duty."

It is similarly inappropriate to apply the expression to the obligation of a trustee or other fiduciary to use proper skill and care in the discharge of his duties. If it is confined to cases where the fiduciary nature of the duty has special legal consequences, then the fact that the source of the duty is to be found in equity rather than the common law does not make it a fiduciary duty. The common law and equity each developed the duty of care, but they did so independently of each other and the standard of care required is not always the same. But they influenced each other, and today the substance of the resulting obligations is more significant than their particular historic origin. In *Henderson v. Merrett Syndicates Ltd.* [1995] 2 A.C. 145, 205 Lord Browne-Wilkinson said:

> "The liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of the general duty to act with care imposed by law on those who take it upon themselves to act for or advise others. Although the historical

development of the rules of law and equity have, in the past, caused different labels to be stuck on different manifestations of the duty, in truth the duty of care imposed on bailees, carriers, trustees, directors, agents and others is the same duty: it arises from the circumstances in which the defendants were acting, not from their status or description. It is the fact that they have all assumed responsibility for the property or affairs of others which renders them liable for the careless performance of what they have undertaken to do, not the description of the trade or position which they hold."

I respectfully agree, and endorse the comment of Ipp J. in *Permanent Building Society v. Wheeler* (1994) 14 A.C.S.R. 109, 157:

"It is essential to bear in mind that the existence of a fiduciary relationship does not mean that every duty owed by a fiduciary to the beneficiary is a fiduciary duty. In particular, a trustee's duty to exercise reasonable care, though equitable, is not specifically a fiduciary duty . . ."

Ipp J. explained, at p. 158:

"The director's duty to exercise care and skill has nothing to do with any position of disadvantage or vulnerability on the part of the company. It is not a duty that stems from the requirements of trust and confidence imposed on a fiduciary. In my opinion, that duty is not a fiduciary duty, although it is a duty actionable in the equitable jurisdiction of this court. . . . I consider that Hamilton owed P.B.S. a duty, both in law and in equity, to exercise reasonable care and skill, and P.B.S. was able to mount a claim against him for breach of the legal duty, and, in the alternative, breach of the equitable duty. For the reasons I have expressed, in my view the equitable duty is not to be equated with or termed a 'fiduciary' duty."

I agree. Historical support for this analysis may be found in Viscount Haldane L.C.'s speech in *Nocton v. Lord Ashburton* [1914] A.C. 932, 956. Discussing the old bill in Chancery for equitable compensation for breach of fiduciary duty, he said that he thought it probable that a demurrer for want of equity would always have lain to a bill which did no more than seek to enforce a claim for damages for negligence against a solicitor.

In my judgment this is not just a question of semantics. It goes to the very heart of the concept of breach of fiduciary duty and the availability of equitable remedies.

Although the remedy which equity makes available for breach of the equitable duty of skill and care is equitable compensation rather than damages, this is merely the product of history and in this context is in my opinion a distinction without a difference. Equitable compensation for breach of the duty of skill and care resembles common law damages in that it is awarded by way of compensation to the plaintiff for his loss. There is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy in such a case. It should not be confused with equitable compensation for breach of fiduciary duty, which may be awarded in lieu of rescission or specific restitution.

This leaves those duties which are special to fiduciaries and which attract those remedies which are peculiar to the equitable jurisdiction and are primarily restitutionary or restorative rather than compensatory. A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work *Fiduciary Obligations* (1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary.

(In this survey I have left out of account the situation where the fiduciary deals with his principal. In such a case he must prove affirmatively that the transaction is fair and that in the course of the negotiations he made full disclosure of all facts material to the transaction. Even inadvertent failure to disclose will entitle the principal to rescind the transaction. The rule is the same whether the fiduciary is acting on his own behalf or on behalf of another. The principle need not be further considered because it does not arise in the present case. The mortgage advance was negotiated directly between the society and the purchasers. The defendant had nothing to do with the negotiations. He was instructed by the society to carry out on its behalf a transaction which had already been agreed.)

The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.

In the present case it is clear that, if the defendant had been acting for the society alone, his admitted negligence would not have exposed him to a charge of breach of fiduciary duty. Before us counsel for the society accepted as much, but insisted that the fact that he also acted for the purchasers made all the difference. So it is necessary to ask: "Why did the fact that the defendant was acting for the purchasers as well as for the society convert the defendant's admitted breach of his duty of skill and care into a breach of fiduciary duty?" To answer this question it is necessary to identify the fiduciary obligation of which he is alleged to have been in breach.

It is at this point, in my judgment, that the society's argument runs into difficulty. A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal *may* conflict with his duty to the other: see *Clark*

Boyce v. Mouat [1994] 1 A.C. 428 and the cases there cited. This is sometimes described as "the double employment rule." Breach of the rule automatically constitutes a breach of fiduciary duty. But this is not something of which the society can complain. It knew that the defendant was acting for the purchasers when it instructed him. Indeed, that was the very reason why it chose the defendant to act for it. The potential conflict was of the society's own making: see *Finn*, *Fiduciary Obligations*, p. 254 and *Kelly v. Cooper* [1993] A.C. 205.

It was submitted on behalf of the society that this is irrelevant because the defendant misled the society. It did not know of the arrangements which the purchasers had made with their bank, and so could not be said to be "fully informed" for the purpose of absolving the defendant from the operation of the double employment rule. The submission is misconceived. The society knew all the facts relevant to its choice of solicitor. Its decision to forward the cheque for the mortgage advance to the defendant and to instruct him to proceed was based on false information, but its earlier decision to employ the defendant despite the potentially conflicting interest of his other clients was a fully informed decision.

That, of course, is not the end of the matter. Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other: see *Finn*, p. 48. I shall call this "the duty of good faith." But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal.

Conduct which is in breach of this duty need not be dishonest but it must be intentional. An unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care. This is because the principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer. I shall call this "the no inhibition principle." Unless the fiduciary is inhibited or believes (whether rightly or wrongly) that he is inhibited in the performance of his duties to one principal by reason of his employment by the other his failure to act is not attributable to the double employment.

Finally, the fiduciary must take care not to find himself in a position where there is an *actual* conflict of duty so that he cannot fulfil his obligations to one principal without failing in his obligations to the other: see *Moody v. Cox and Hatt* [1917] 2 Ch. 71; *Commonwealth Bank of Australia v. Smith* (1991) 102 A.L.R. 453. If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability. I shall call this "the actual conflict rule."

In the present case the judge evidently thought that the defendant was in breach of both the duty of good faith and the actual conflict rule. In *Bristol and West Building Society v. May May & Merrimans* [1996] 2 All E.R. 801, 817–818 he said:

> "there can be no doubt that the requirement of unconscionable conduct is present where a solicitor who is acting for both borrower and lender misrepresents to the lender some fact *which he knows, or must be taken to know,* will or may affect the lender's decision to proceed with the loan. In those circumstances the solicitor *is abusing his fiduciary relationship with one client, the lender, to obtain an advantage for his other client, the borrower.* It is as much 'against the dictates of conscience' for a solicitor *knowingly to prefer the interests of one client over those of another client* as it is for him to prefer his own interests over those of his client." (My emphasis.)

I respectfully agree; but no such allegation is made in the present case.

As to the actual conflict rule, the judge said, at p. 832:

> "First, in *Mothew,* the 'agent' was a fiduciary who had put himself in a position in which his duty to the lender *was* in conflict with the interests of his other client, the borrower." (My emphasis.)

I do not accept this. By instructing him to act for them, the purchasers must be taken to have authorised the defendant to complete the report without which the mortgage advance would not have been forthcoming; and to complete it truthfully. The defendant was required by the society to report on the purchasers' title as well as to confirm the absence of any further borrowing. The two stood in exactly the same case. The defendant would not have been in breach of his duty to the purchasers if he had disclosed the facts to the society any more than if he had reported a defect in their title.

This proposition can be tested by considering what the defendant's position would have been if he had acted for the purchasers and another solicitor had been instructed to act for the society. He would have been required to deduce the purchasers' title to the satisfaction of the society's solicitor, and to confirm to him that no further borrowing or second charge was in contemplation. His duty to the purchasers would have required him to ascertain the facts from them and to report them to the society. Unless they told him the facts and instructed him to lie to the society, instructions which he would be bound to refuse, his duty to the purchasers would not inhibit him in providing full and truthful information to the solicitor acting for the society.

In my judgment, the defendant was never in breach of the actual conflict rule. It is not alleged that he acted in bad faith or that he deliberately withheld information because he wrongly believed that his duty to the purchasers required him to do so. He was not guilty of a breach of fiduciary duty.

The judge relied on *Nocton v. Lord Ashburton* [1914] A.C. 932 and *Commonwealth Bank of Australia v. Smith*, 102 A.L.R. 453 to hold that a party who pays money to his solicitor in reliance on a representation *known* by the solicitor to be false has a remedy for breach of fiduciary

duty. Neither case is authority for the proposition (though its correctness is not in issue); certainly neither is authority for the proposition that a party who pays money to a solicitor in reliance on a representation which the solicitor *ought to have known* to be false has such a remedy.

In *Nocton v. Lord Ashburton* [1914] A.C. 932 a solicitor had an undisclosed personal interest in a transaction on which he gave his client advice which was to his own advantage and the disadvantage of his client. The plaintiff pleaded breach of the duty of good faith. In fact this was unnecessary; the existence of the defendant's undisclosed interest was enough: see *Lewis v. Hillman* (1852) 3 H.L.Cas. 607. The plaintiff was entitled to receive, and thought that he was receiving, the disinterested advice of a solicitor with no other interest in the transaction. *Commonwealth Bank of Australia v. Smith*, 102 A.L.R. 453 involved a breach of the actual conflict rule. The defendant, who was acting for both parties to a proposed transaction, placed himself in an impossible position by undertaking to advise one of them on the merits of the transaction.

In *Moody v. Cox and Hatt* [1917] 2 Ch. 71 a solicitor, who was acting for both vendor and purchaser, was in possession of valuations which showed that the property was not worth the price which the purchaser had agreed to pay. He did not disclose them to the purchaser, and claimed that his duty to the vendor precluded him from doing so. The purchaser was allowed to rescind. The case bears a superficial resemblance to the present but there are two crucial differences: (i) the vendor was under no obligation to disclose the valuations to the purchaser and did not wish his solicitor do so; and (ii) the vendor and the solicitor tacitly agreed to conceal the valuations from the purchaser. The solicitor was in breach of both the duty of good faith and the actual conflict rule; his defence fell foul of the no inhibition principle.

That was a case of deliberate concealment. Non-disclosure and concealment are two very different things. This has been a truism of the law from the time of Cicero (De Officiis, lib. 3, c. 12, 13 citing Diogenes of Babylon). It is even enshrined, like other such truisms, in a Latin tag: aliud est celare, aliud tacere.

The society placed much reliance on a dictum by Lord Jauncey of Tullichettle in *Clark Boyce v. Mouat* [1994] 1 A.C. 428, 437 where he said:

> "Another case of breach [of fiduciary duty] is where a solicitor acts for both parties to a transaction without disclosing this to one of them *or where having disclosed it he fails, unbeknown to one party, to disclose to that party material facts relative to the other party of which he is aware.*" (My emphasis.)

But I do not think that Lord Jauncey meant to include an inadvertent failure which owes nothing to the double employment. Where such failure is to the advantage of the other party, the court will jealously scrutinise the facts to ensure that there has been nothing more than inadvertence, but there can be no justification for treating an unconscious failure as demonstrating a want of fidelity.

In my judgment the distinction drawn by Ipp J. in *Permanent Building Society v. Wheeler*, 14 A.C.S.R. 109 is sound in principle and is decisive of the present case. On the society's pleaded case the fact that the defendant was acting for the purchasers played no part in his failure to report the true state of affairs to the society. It did not inhibit him from fulfilling his obligations to the society. It is consistent with its pleaded case that the defendant would have done so but for a negligent oversight. It would have been exactly the same if he had failed to notice and report the existence of a defect in the purchasers' title. To characterise either such failure as a breach of fiduciary duty because he was acting for both parties in a situation where that fact did not contribute to his failure is, in my opinion, to substitute a verbal formula for principle.

In my judgment the judge's conclusion that the defendant was in breach of fiduciary duty cannot be supported. It follows that it cannot be sustained as a ground for holding the defendant in breach of a constructive trust of the mortgage money.

Breach of trust

It is not disputed that from the time of its receipt by the defendant the mortgage money was trust money. It was client's money which belonged to the society and was properly paid into a client account. The defendant never claimed any beneficial interest in the money which remained throughout the property of the society in equity. The defendant held it in trust for the society but with the society's authority (and instructions) to apply it in the completion of the transaction of purchase and mortgage of the property. Those instructions were revocable but, unless previously revoked, the defendant was entitled and bound to act in accordance with them.

The society's instructions were not revoked before the defendant acted on them, and in my judgment there was no ground upon which the judge could properly conclude that his authority to apply the money in completing the transaction had determined.

If his judgment in the present case is considered without the benefit of his later explanation in *Bristol and West Building Society v. May May & Merrimans* [1996] 2 All E.R. 801, it would appear that the judge was of opinion that the defendant's authority to deal with the money was automatically vitiated by the fact that it (and the cheque itself) was obtained by misrepresentation. But that is contrary to principle. Misrepresentation makes a transaction voidable not void. It gives the representee the right to elect whether to rescind or affirm the transaction. The representor cannot anticipate his decision. Unless and until the representee elects to rescind the representor remains fully bound. The defendant's misrepresentations merely gave the society the right to elect to withdraw from the transaction on discovering the truth. Since its instructions to the defendant were revocable in any case, this did not materially alter the position so far as he was concerned, though it may have strengthened the society's position in relation to the purchasers.

The right to rescind for misrepresentation is an equity. Until it is exercised the beneficial interest in any property transferred in reliance on the representation remains vested in the transferee. In *El Ajou v. Dollar*

Land Holdings Plc. [1993] 3 All E.R. 717, 734 I suggested that on rescission the equitable title might revest in the representee retrospectively at least to the extent necessary to support an equitable tracing claim. I was concerned to circumvent the supposed rule that there must be a fiduciary relationship or retained beneficial interest before resort may be had to the equitable tracing rules. The rule would have been productive of the most extraordinary anomalies in that case, and its existence continually threatens to frustrate attempts to develop a coherent law of restitution. Until the equitable tracing rules are made available in support of the ordinary common law claim for money had and received some problems will remain incapable of sensible resolution.

But all that is by the way. Whether or not there is a retrospective vesting for tracing purposes it is clear that on rescission the equitable title does not revest retrospectively *so as to cause an application of trust money which was properly authorised when made to be afterwards treated as a breach of trust.* In *Lipkin Gorman v. Karpnale Ltd.* [1991] 2 A.C. 548 Lord Goff of Chieveley said, at p. 573:

> "Of course, 'tracing' or 'following' property into its product involves a decision by the owner of the original property to assert his title to the product in place of his original property. This is sometimes referred to as ratification. I myself would not so describe it, but it has, in my opinion, at least one feature in common with ratification, that it cannot be relied upon so as to render an innocent recipient a wrongdoer (cf. *Bolton Partners v. Lambert* (1889) 41 Ch.D. 295, 307, *per* Cotton L.J.: 'an act lawful at the time of its performance [cannot] be rendered unlawful, by the application of the doctrine of ratification.')"

In *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] A.C. 669 Lord Browne-Wilkinson expressly rejected the possibility that a recipient of trust money could be personally liable, regardless of fault, for any subsequent payment away of the moneys to third parties even though, at the date of such payment, he was ignorant of the existence of any trust. He said, at p. 705:

> "Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience, i.e. until he is aware that he is intended to hold the property for the benefit of others in the case of an express or implied trust, or, in the case of a constructive trust, of the factors which are alleged to affect his conscience."

Mutatis mutandis that passage is directly applicable in the present case. The defendant knew that he was a trustee of the money for the society; but he did not realise that he had misled the society and could not know that his authority to complete had determined (if indeed it had). He could not be bound to repay the money to the society so long as he was ignorant of the facts which had brought his authority to an end, for those are the facts which are alleged to affect his conscience and subject him to an obligation to return the money to the society.

Before us the society put forward a more sophisticated argument. The defendant's instructions, it pointed out, expressly required him to report the arrangements in question "to the society prior to completion." This, it was submitted, made it a condition of the defendant's authority to complete that he had complied with his obligation. Whether he knew it or not, he had no authority to complete. It was not necessary for the society to revoke his authority or withdraw from the transaction. I do not accept this. The society's standing instructions did not clearly make the defendant's authority to complete conditional on having complied with his instructions. Whether they did so or not is, of course, a question of construction, and it is possible that the society could adopt instructions which would have this effect. But it would in my judgment require very clear wording to produce so inconvenient and impractical a result. No solicitor could safely accept such instructions, for he could never be certain that he was entitled to complete.

In my judgment the defendant's authority to apply the mortgage money in the completion of the purchase was not conditional on his having first complied with his contractual obligations to the society, was not vitiated by the misrepresentations for which he was responsible but of which he was unaware, had not been revoked, and was effective to prevent his payment being a breach of trust. Given his state of knowledge (and, more importantly, that his authority had not been revoked), he had no choice but to complete.

Conclusion

In my judgment the defendant was not guilty of breach of trust or fiduciary duty. This makes it unnecessary to consider what the consequences of such a breach would have been. I would allow the appeal and set aside the money judgment. I would leave undisturbed the judgments for damages to be assessed for breach of contract and negligence, but make it clear that it does not follow that the society will establish any recoverable loss.

OTTON L.J. I have read with advantage the judgments of Staughton and Millett L.JJ. I agree with the analysis and reasoning regarding breach of trust and of fiduciary duty. I wish only to add a few words on the extant common law claims.

I am satisfied that there was sufficient evidence before the judge to establish negligence on the part of the defendant. There was the requisite proximity between the parties, and there was foreseeability of damage. Thus a duty of care arose. This duty included answering correctly such questions as were posed by the proposed lender and which it was reasonable for him to be required to answer. The answer sought was one of fact and not opinion. The fact sought could have been supplied accurately by information which was within his knowledge. If it was not at his fingertips the information was either on file or could easily have been obtained by direct inquiry of the intending purchaser. His breach of duty occurred when he conveyed the inaccurate information to the plaintiff. The duty was not simply a duty not to act carelessly; it was a duty not to inflict damage carelessly. Damage is the gist of the action.

A The more complex issues are whether the inaccurate information given was causative of damage, and if so what measure. To my mind it is not necessary to adopt a particular procedural path to find the answer. I appreciate that Lord Hoffmann suggests that it is first necessary to decide the kind of loss to which the plaintiff is entitled. This may be appropriate in most cases where negligence/causation is involved. From a practical point of view in some cases it may be more expedient to establish B the causal link between the negligent act or omission and the reliance by the plaintiff or the course of action which he was induced to take. The judge may find as a fact that there was no reliance or that the plaintiff would have behaved in the same or substantially the same manner if he had been given accurate information; in either event the negligence had no causative potency. That is the end of the matter. The chain is broken, C there is no loss at all and there is no need to consider or determine the kind of loss.

In other cases it may be appropriate to identify the type or particular head of damage claimed. This may identify damage which is too remote and for which no remedy lies (e.g. economic loss), and the claim in respect of it fails in limine. As I concur that the damages award must now be set aside the issue of the measure of damage, if any, is now at large. I regard D the evidence (in particular the hearsay evidence of Ms Samantha Bennett at paragraph 29 of Mr. Prees's affidavit) as falling short of resolving the issues of causation or damage. It does not (for example) address the possibility of a revised offer if the accurate and full position had been explained to the plaintiff.

I do not think it necessary to conclude whether there was a breach of E contract. This cause of action probably adds nothing to the case in negligence. It is unlikely that there is any practical difference between a breach of the duty of care and a breach of contract, or in the issues arising on causation, or the measure of damages. If there is any issue it can be determined by the trial judge. I also consider that there was no waiver.

For these reasons I consider that there are triable issues and they F should be determined by a judge at first instance.

I would therefore allow the appeal and remit the assessment of damages as proposed by Staughton L.J. and dismiss the respondent's notice.

STAUGHTON L.J. Mr. Mothew made his report to the Cheshunt G Building Society on 2 August 1988. In it he answered one of the questions asked as follows:

> "Q. Please confirm that (to the best of your knowledge and belief) the balance of the purchase money is being provided by the applicant(s) personally without resort to further borrowing. If not please give details. A. Confirmed."

H That was untrue. There were other aspects of the same error, but I need not go into them in detail. Although Mr. Mothew had the means of knowledge in his possession, which could have brought the error to his attention, it is not said that he acted fraudulently or in bad faith.

The ordinary remedy of a client who has received wrong information or advice from his solicitor is to claim damages for negligence, whether as a breach of contract or as a tort. For such a claim to give rise to substantial damages the building society would have to show that the breach of contract or negligence caused them loss. By their respondent's notice they seek to say that, if they had known the true facts, they would not have lent any money to Mr. and Mrs. Towers.

The judge regarded that point as immaterial, since the building society succeeded on other grounds. If it is material, in my opinion it raises a triable issue. According to Samantha Bennett of the society's advances department, the offer of advance would have immediately been withdrawn if the society had known that even £3,350 was being borrowed elsewhere. In the nature of things Mr. Mothew is unlikely to have evidence which directly controverts that statement. But there are grounds for supposing that it may be open to question. I would not give judgment under R.S.C., Ord. 14 on the basis that it is true. If it is critical, the case must go to trial, perhaps with the aid of interrogatories and discovery of documents.

However in this particular case the building society were not the sole clients of Mr. Mothew; he was also the solicitor acting for Mr. and Mrs. Towers. That is said to make all the difference, because Mr. Mothew then became under a fiduciary duty to the building society. And the argument is that for breach of fiduciary duty the remedy does not depend on causation or remoteness; all that is necessary is that the loss would not have occurred *but for* the breach of duty.

It seems to me wrong that a breach of contract or tort should become a breach of fiduciary duty in that way. I am glad to find that the authorities relied on by Millett L.J. show that it is wrong. In my judgment Mr. Mothew was in breach of a duty of care and nothing more. True he was in a situation where he owed duties to two clients, and those duties might conflict with each other. But he did not prefer the interest of one client to that of another; at most he was guilty of negligence which had that unintended effect.

Alternatively it is said that Mr. Mothew was in breach of trust because he paid away the trust fund contrary to his instructions. He did indeed hold the £59,000 in trust; it was not his own money. There was in my opinion an express or implied trust, and not (as the judge held) a constructive trust. But he did not pay it away contrary to the society's instructions. The cheque reached Mr. Mothew with a letter dated 23 August 1988, which in effect instructed him to use it for completion of the proposed purchase. That was what he did.

There being in my opinion no breach of fiduciary duty or breach of trust, it is unnecessary to consider what remedy such a breach might have afforded.

Thus far the appeal succeeds, but there remains judgment on the cause of action at common law for damages to be assessed. Mr. Sumption says that even that must go, since there is a triable issue as to waiver by the building society. The problem that he faces is that, although the building society readily agreed when they were asked to consent to the registration of the second charge, they are not shown to have known that the second

charge was contemplated and intended at the time of Mr. Mothew's report. There has been ample opportunity to produce evidence that they knew, if indeed they did. In my judgment there was no waiver.

When the argument before us was concluded on 21 May that was all that we had to decide. But we have since been asked to consider the judgment of Hobhouse L.J. in *Downs v. Chappell* [1997] 1 W.L.R. 426 and the speech of Lord Hoffmann in *Banque Bruxelles Lambert S.A. v. Eagle Star Insurance Co. Ltd.* [1997] A.C. 191. Such has been the volume of litigation on the topic of loss to lenders following negligent professional advice and the collapse of the property market that judges risk being overtaken by new authority.

The Court of Appeal in the *Banque Bruxelles* case began with a reference to the well known principle that damages should be as nearly as possible the sum which would put the plaintiff in the position in which he would have been if he had not been injured. That would lead to two possible answers in the present case. (1) If there had been no report from Mr. Mothew to the building society, the money would not have been lent; the society would still have their £59,000. There would have been no transaction, a phrase which I use not as a label for anything but as a description of the fact. (2) If Mr. Mothew had provided an accurate report to the building society, then they might have been content to proceed on the terms previously proposed, or they might have made a revised offer, or they might have proceeded as in (1) above. There is a triable issue as to that. Left to myself, I would have ruled that (2) was the appropriate situation for the judge to consider in assessing the damages. But I have to acknowledge that Hobhouse L.J. in *Downs v. Chappell* [1997] 1 W.L.R. 426, with the agreement of Butler-Sloss and Roch L.JJ., preferred method (1), both for fraudulent misrepresentation and for negligence.

Lord Hoffmann, in the *Banque Bruxelles* case [1997] A.C. 191, 211, as it seems to me, considered that either method was the wrong place to begin:

> "Before one can consider the principle on which one should calculate the damages to which a plaintiff is entitled as compensation for loss, it is necessary to decide for what kind of loss he is entitled to compensation."

There follows an exposition of the problem and the answer to it, as set out in the judgment of Millett L.J.

For my part I feel that we should not at this stage purport to instruct the judge who has to assess the damages by a paraphrase or interpretation of that decision, for a number of reasons. First, we have not heard argument on it, and our judgment is already long delayed by intervening material. I am told it would be impractical for us to have a further hearing before October. Secondly, the judge has yet to find the facts relating to the assessment of damages. Thirdly, the judge must be guided by what Lord Hoffmann has said and not by any gloss of ours.

I would allow the appeal and remit the assessment of damages, either to Chadwick J. or to another judge of the Chancery Division as the exigencies of business may require. The cross-appeal should be dismissed.

Appeal allowed.
Cross-appeal dismissed.

Solicitors: Wansbroughs Willey Hargrave; Osborne Clarke, Bristol.

[Reported by JILL SUTHERLAND, Barrister]

[COURT OF APPEAL]

TURNER v. STEVENAGE BOROUGH COUNCIL

1997 March 6 Staughton, Pill and Mummery L.JJ.

Arbitration—Arbitrator—Misconduct—Application to remove arbitrator—Lengthy correspondence and preliminary proceedings—Arbitrator proposing interim payment of fees and expenses—Payment by one party only—Subsequent return of payment—Whether misconduct—Whether arbitrator to be removed—Arbitration Act 1950 (14 & 15 Geo. 6, c. 27), s. 23

In February 1993 an arbitrator was appointed to conduct arbitration proceedings relating to a rent review between the council, as landlords of a shop, and the tenant. The arbitrator's terms of appointment contained no express provision for payment of interim fees or expenses. The parties contemplated that the arbitration would be concluded within about three months and the arbitrator stated that the award would be made by 30 June 1993. In May 1994, after lengthy correspondence and five preliminary hearings, the arbitration had still not concluded and the arbitrator wrote to both parties suggesting a timetable for the hearing and requesting payment by each party of half his interim fees and expenses. The tenant objected and asked whether, if payment were not made, the arbitrator would not hear the arbitration. The arbitrator replied that the first priority was to fix the hearing and to resolve the dispute, but that he hoped the parties would agree that it was reasonable that he should receive interim payment for time expended on the matter. The council paid the sum to the arbitrator, but three months later, after taking legal advice, he returned it. The tenant applied for the arbitrator to be removed for misconduct under section 23 of the Arbitration Act 1950[1] on the ground that he had no power to

[1] Arbitration Act 1950, s. 23: "(1) Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him."

ITEM NO. 154

JA-40

House of Lords

Hurst v Bryk and others

2000 Jan 13; March 30

Lord Browne-Wilkinson, Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Clyde and Lord Millett

Partnership — Dissolution — Effect — Agreement signed by partners prematurely dissolving partnership without consent of one partner — Partner treating agreement as repudiatory breach of partnership deed and accepting repudiation — Whether partner discharged from obligations under partnership deed — Whether partner obliged to contribute towards partnership liabilities — Partnership Act 1890 (53 & 54 Vict c 39), s 44[1]

The plaintiff and the 19 defendants became partners in a firm of solicitors in 1989. The partnership deed provided, inter alia, for retirement on giving not less than nine months' notice expiring on an accounting date, namely 31 May, but contained no provision as to what was to happen on the dissolution of the partnership. The firm did not prosper and in August 1990 all the partners save one, who initially intended to succeed to the other partners' shares and become sole proprietor, served retirement notices to take effect on 31 May 1991. By September 1990 the defendants decided that it would not be possible to maintain the partnership until May 1991 and sought an early termination despite the objection of the plaintiff. A dissolution agreement was signed by all the partners except the plaintiff agreeing to the cessation of the practice of the firm on 31 October 1990. The plaintiff indicated to the defendants that he regarded the dissolution agreement as a repudiation of the partnership agreement which he had no alternative but to accept and brought proceedings seeking, inter alia, a declaration that he was discharged from contributing towards the partnership liabilities accruing on or after 31 October 1990. The defendants counterclaimed for payment by the plaintiff of his share of the partnership liabilities. The judge found that the dissolution agreement was a repudiatory breach of the partnership agreement but dismissed the plaintiff's claim and declared that he was liable to pay his share of the partnership liabilities, including ongoing liabilities and losses yet to be realised. The Court of Appeal upheld that decision.

On appeal by the plaintiff—

Held, dismissing the appeal, that all partners were jointly liable for the debts of a firm incurred while they were partners; that, without agreement to the contrary, section 44 of the Partnership Act 1890 set out the rules governing the final settlement of the partnership accounts, including the requirement that where necessary losses should be paid by the partners individually in the proportion in which they were entitled to share profits, and applied to the winding up of every partnership after a dissolution whatever the ground of dissolution and regardless of the conduct of the parties; that, in any event, it would be wrong in principle to have regard to the parties' conduct when taking the dissolution account; that since an indemnity could only be obtained by agreement or by rescission of the partnership contract ab initio the contractual doctrine of repudiation was insufficient to provide the plaintiff with an indemnity against his liability for the firm's debts; that the plaintiff's liability to contribute to the accrued and accruing liabilities of the firm, and his partners' rights of contribution, arose from the fact that the liabilities were incurred or assumed by the firm when the plaintiff was a partner and those rights were not lost merely because of the plaintiff's partners' subsequent repudiation of the contract which the

[1] Partnership Act 1890, s 35(d): see post, p 195E.
S 44: see post, p 197D–E.

JA-40

plaintiff accepted; and that, accordingly, the plaintiff could not avoid his joint liability to creditors of the firm arising from past transactions entered into while he was a partner (post, pp 189B–E, 197B, F–198A, 199A, D–E, 200C, D, 201D).

Decision of the Court of Appeal [1999] Ch 1; [1998] 2 WLR 269; [1997] 2 All ER 283 affirmed.

The following cases are referred to in the opinion of Lord Millett:

Barber v Wolfe [1945] Ch 187; [1945] 1 All ER 399
Boston Deep Sea Fishing and Ice Co v Ansell (1888) 39 Ch D 339, CA
Colonial Bank v European Grain and Shipping Ltd [1989] AC 1056; [1989] 2 WLR 440; [1989] 1 All ER 545, HL(E)
Daley v Peoples Building Association (1901) 178 Mass 13
Dering v Earl of Winchelsea (1787) 1 Cox Eq 318
Freeman v Taylor (1831) 8 Bing 124
Green v Hertzog [1954] 1 WLR 1309, CA
Henty v Schröder (1879) 12 Ch D 666
Heyman v Darwins Ltd [1942] AC 356, HL(E)
Hitchman v Crouch Butler Savage Associates (1982) 80 LSGaz 550
Horsler v Zorro [1975] Ch 302; [1975] 2 WLR 183: [1975] 1 All ER 584
Johnson v Agnew [1980] AC 367; [1979] 2 WLR 487; [1979] 1 All ER 883, HL(E)
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457
Nitedals Taendstikfabrik v Bruster [1906] 2 Ch 671
Park Air Services Ltd, In re [2000] 2 AC 172; [1999] 2 WLR 396; [1999] 1 All ER 673, HL(E)
Richardson v Bank of England (1838) 4 My & Cr 165

The following additional cases were cited in argument:

Alghussein Establishment v Eton College [1988] 1 WLR 587; [1991] 1 All ER 267, HL(E)
Express Newspapers plc v News (UK) Ltd [1990] 1 WLR 1320; [1990] 3 All ER 376
Hardoon v Belilios [1901] AC 118, PC
Herbert Smith v Honour The Times, 4 March 1999
Kelly v Cooper [1993] AC 205; [1992] 3 WLR 936, PC
Lissenden v CAV Bosch Ltd [1940] AC 412; [1940] 1 All ER 425, HL(E)
Photo Production Ltd v Securicor Transport Ltd [1980] AC 827; [1980] 2 WLR 283; [1980] 1 All ER 556, HL(E)

APPEAL from the Court of Appeal.

This was an appeal by the plaintiff, Robert Alfred Hurst, by leave of the House of Lords (Lord Lloyd of Berwick, Lord Steyn and Lord Hope of Craighead) granted on 6 January 1998 from the decision of the Court of Appeal (Simon Brown and Peter Gibson LJJ; Hobhouse LJ dissenting) delivered on 4 February 1997 dismissing the plaintiff's appeal from a decision of Carnwath J given on 11 April 1995 by which he dismissed the plaintiff's action against the defendants Raymond Alexander Bryk, John Goodacre, Iain Michael Harris, Michael David Simmons, David Geoffrey Haywood, Jeffrey Lloyd Freeman, Ronald Bernhard Norman, Duncan George Harman-Wilson, Jonathan Phillip Lewis Goldberg, Margaret Heather Bennett, Kevin Derek Bichard, Derek Bluston, Robert Danny Charon, David Mark Wingate Moont, Peter Dan Neidle, Paul James Sherren, Peter William Smith and Nicholas James Treppass, seeking, inter alia, a declaration that, as a consequence of the defendants' repudiatory breach of a partnership deed between the plaintiff and the defendants dated 3 May 1989, the plaintiff was discharged from any obligation to contribute

towards the partnership liabilities as they stood on 31 October 1990 and as they subsequently accrued, alternatively as they accrued after 31 October 1990.

By the hearing of the appeal the plaintiff had concluded settlements with, or ceased proceedings against, the majority of the defendants and the appeal was pending against only the first, fourth, tenth, eleventh, twelfth, eighteenth and nineteenth defendants.

The facts are state in the opinion of Lord Millett.

Clive Freedman QC and *Charles Samek* for the plaintiff. The defendants' conclusion of the dissolution agreement on 31 October 1990 constituted a repudiatory breach of the partnership agreement. The breach was the same as if the plaintiff had been expelled from the partnership. There was no general dissolution of the partnership so the regime under the Partnership Act 1890 cannot apply. The case may turn on its peculiar facts rather than general principles. The plaintiff cannot be expected to contribute to such liabilities of the partnership, most significantly the lease on the King Street premises, as have accrued and continue to accrue subsequent to 31 October 1990.

The reasoning of Hobhouse LJ is correct and should be adopted. The partnership was a contractual partnership arising from a special contract and is governed by the law of contract as are the consequences of the wrongful renunciation of the contract by the defendants. The relevant principle of contract law is encapsulated in *Colonial Bank v European Grain and Shipping Ltd* [1989] AC 1056, 1098–1099. Consequently, as the obligation to pay rent after 31 October 1990 was conditional upon what thereafter occurred and thus had not accrued by that date, the plaintiff was discharged from such obligation on 31 October 1990 upon his acceptance of the repudiatory breach by his partners.

In so far as some of the partners were trustees of the lease for all the partners, the trust came about solely as the result of a special contract. That contract included an express clause for the recovery of the trustees' expenses. It was only on the basis of the partnership agreement that the plaintiff agreed to become a partner and thereby a cestui que trust of the trustees. Their claim for indemnity against the plaintiff did not survive the repudiatory breach of the contract and it would be inequitable for them to be able to assert rights in equity following their conduct: see *Hardoon v Belilios* [1901] AC 118.

The sole purpose of a clause relating to partnership premises is to enable the partners to use the premises during the currency of the partnership. The effect of the defendants' repudiatory conduct was to deprive the plaintiff of the ability to carry on the partnership business in accordance with the partnership agreement. Since there was no longer a partnership business there was no longer a need for partnership premises. There is no reason for a clause relating to partnership premises to survive a repudiatory breach of a partnership agreement: see *Bowstead on Agency*, 16th ed (1996), arts 62, 64, 65.

The property rights were not severable as the contract involved continuing mutual obligations which were interdependent. It is contrary to principle in contract law and in equity that the guilty parties should be able to enforce obligations which are interdependent with the contract against

the innocent party whilst they are unwilling to observe and perform the contract themselves. The defendants, having chosen to use the partnership assets for their own purposes, must bear the cost of doing so. They cannot approbate, by using the property as their own, and reprobate, by demanding a contribution from the plaintiff: see *Lissenden v CAV Bosch Ltd* [1940] AC 412; *Johnson v Agnew* [1980] AC 367; *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320; *Alghussein Establishment v Eton College* [1988] 1 WLR 587. The analogy with an arbitration clause (e g *Heyman v Darwins Ltd* [1942] AC 356) is inappropriate as an arbitration clause is separable from the main contract.

Philip Hoser for the first, fourth, tenth, eleventh and twelfth defendants. When a partnership comes to an end each of the partners is entitled to have its affairs wound up. This entitlement constitutes a fundamental incident of contracts of partnership. In the absence of agreement to the contrary, members of a partnership are liable to contribute to any shortfall or share any surplus in the proportions in which during the continuance of the partnership they shared profits: section 44 of the Partnership Act 1890.

As a general proposition, when a contract is brought to an end by one party's acceptance of another party's repudiatory breach, the primary contractual obligations of the party not in breach are discharged to the extent that they remain to be performed: see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 849. However, this does not apply when the party in breach has, prior to the termination of the contract, already accrued a right to have such primary obligations performed. Rights are not divested or discharged which have already been unconditionally acquired and rights which arise from partial execution of the contract remain unaffected. A partner's obligation to contribute to losses and right to receive profits accrue the moment a partnership begins to incur liabilities. Once a liability is incurred on behalf of the firm all the partners are obliged to contribute to the discharge of that liability. The termination of a partnership draws a line so that only liabilities incurred or assumed by the partnership before that date and those properly incurred thereafter in winding up the firm's affairs are liabilities to which the accrued obligation applies.

In any event, there was no repudiation of the partnership contract. It should be noted that there is no express authority that the doctrine of repudiation applies to partnerships apart from the decision of Harman J in *Hitchman v Crouch Butler Savage Associates* (1982) 80 LS Gaz 550. Further, or in the alternative, the moment a partner undertakes a liability to a third party on behalf of the partnership he acquires a right to contribution from all the other partners in respect of their proportionate share of the liability. Such right to contribution is not lost merely because he subsequently repudiates the contract and that repudiation is accepted: see *Herbert Smith v Honour* The Times, 4 March 1999.

Andrew Hochhauser QC for the nineteenth defendant. There was no effective appeal by the plaintiff to the Court of Appeal against the nineteenth defendant because the appeal against the nineteenth defendant had been stayed. Accordingly, it is not open to the plaintiff to seek relief against the nineteenth defendant from the House. Should the appeal against the nineteenth defendant not be struck out the arguments of the other

A defendants are adopted and, in addition, *Kelly v Cooper* [1993] AC 205 is relied upon.

Clive Freedman QC in reply. The nineteenth defendant made no objections to the plaintiff's application for leave to appeal to the House and participated in the drawing up of the agreed statement of facts and issues. He has, therefore, waived his right to make a procedural objection to the appeal.

B The eighteenth defendant did not appear and was not represented.

Their Lordships took time for consideration.

30 March.

C **LORD BROWNE-WILKINSON** My Lords, I have read the speech prepared by my noble and learned friend, Lord Millett. For the reasons which he gives, I, would dismiss the appeal.

LORD NICHOLLS OF BIRKENHEAD My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Millett. I agree that for the reasons he gives this appeal should be dismissed. I, too, prefer to keep open for another occasion the question whether a D partnership can be automatically dissolved by an innocent partner or partners treating the other partner's or partners' breach as repudiatory. That question does not call for decision in the present case.

LORD HOPE OF CRAIGHEAD My Lords, I have had the advantage of reading in draft the speech which has been prepared by my noble and learned E friend, Lord Millett. I agree with it, and for the reasons which he has given, I, too, would dismiss the appeal.

LORD CLYDE My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Millett, and I agree, for the reasons which he gives, that the appeal should be dismissed.

F **LORD MILLETT** My Lords, it sometimes happens that a partnership is dissolved following a fundamental breach of the partnership agreement by one or more of the partners. The question in this appeal is whether the innocent partner or partners are thereby discharged from all further liability to contribute to the debts and obligations of the partnership, whether accrued at the date of dissolution or accruing thereafter.

G *The facts*

Mr Hurst has been in practice as a solicitor since 1975. In 1986 he joined a firm of solicitors by the name of Malkin Cullis & Sumption ("MCS") as a salaried partner. The firm carried on practice from Inigo House, Covent Garden, London, WC2 ("Inigo House"). On 1 June 1989, following a merger with five of the partners of another firm by the name of Janners, H MCS changed its name to Malkin Janners. On the same day Mr Hurst joined the firm as an equity partner on the terms of a partnership deed dated 3 May 1989. There were 20 partners in all.

Shortly before this MCS had taken a 20 year lease of additional premises at 15 King Street ("King Street") at an annual rent of £95,000. The terms of

the lease had been negotiated towards the end of 1988, and the lease was taken in the names of four of the equity partners of MCS as trustees for the firm. Mr Hurst, who was not yet an equity partner, was not consulted on this transaction. Nothing, however, turns on this. Clause 3 of the partnership deed of 3 May 1989 (which replaced a clause in almost identical terms in the MCS partnership deed) was in the following terms:

> "3.1 The partnership business shall be carried on under the firm name of 'Malkin Janners' and the principal places of business shall be at Inigo House, 29 Bedford Street, Covent Garden, London WC2E 9RT and additionally or alternately at such other place or places as the partners may from time to time determine ('the partnership premises'). 3.2 The partnership premises shall be held by the partners as partnership property and the cost of all rent, rates, repairs and insurance and other outgoings and expenses relating thereto or to any other property acquired for the purpose of the partnership business shall be borne by the partnership. 3.3 The legal estate in all freehold or leasehold property acquired for the purpose of the partnership (including the leasehold property referred to in clause 3.1) shall be vested in the partners upon trust for sale or in some of the partners as trustees for all the partners and the net proceeds of sale and the rents and profits until sale shall form part of the partnership assets and the trustees shall be entitled to be indemnified by the partnership against the rent and all outgoings in respect of the said property and the costs and expenses of observing the covenants relating thereto."

Clause 3.3 merely set out in terms what would be the legal position in the absence of express agreement. Malkin Janners was not the same firm as MCS by a new name. It was a new partnership with new partners who included Mr Hurst. It took over King Street as well as Inigo House and assumed liability for the rent of both properties. By becoming a partner in Malkin Janners Mr Hurst acquired a beneficial interest in both leases and became jointly with his fellow partners liable for the rent.

By the spring of 1990 relations between the partners had deteriorated to such an extent that several of them were actively considering giving notice of retirement with a view to moving elsewhere. At a partners' meeting in July 1990 all five former Janners partners indicated their intention to serve notices of retirement. During August all the remaining partners except one served such notices to take effect on 31 May 1991. Mr Hurst was among those who served notice. Had these notices been allowed to take effect, the firm would have been dissolved on 31 May 1991.

It was clear that the firm had no future. By September most of the partners were in agreement that it would not be possible to continue the partnership until the following May. Steps were put in hand to bring about its earlier dissolution. Staff were given notice. On 4 October 1990 all Mr Hurst's fellow partners entered into an agreement ("the dissolution agreement") to dissolve the partnership on 31 October 1990. Under the terms of the dissolution agreement five of the partners would form a new firm under the name Malkins with effect from 1 November 1990; Malkins would carry on practice from Inigo House; Malkin Janners would assign Inigo House to Malkins; and any continuing liabilities in respect of King Street would remain the responsibility of the partners of Malkin Janners.

A Mr Hurst was invited to sign the dissolution agreement but refused to do so. The judge (Carnwath J) described his attitude as unrealistic. On 2 November 1990 Mr Hurst informed his partners that he regarded their conduct in entering into the dissolution agreement as a repudiatory breach of the partnership agreement which he had had no alternative but to accept with effect from 31 October 1990. He had already accepted an offer to become a partner of D J Freeman, and he joined that firm on 5 November 1990. Other partners moved to other firms.

B It is obvious that the partnership did not survive these events, and it is common ground that, if it was not dissolved with effect from 31 October 1990 (as Mr Hurst alleges) by his acceptance of his partners' repudiatory breach of contract, it was dissolved with effect from that date by mutual consent.

C A steering committee was formed to wind up the firm's affairs. Mr Hurst attended occasionally and received some of the papers, though not all of them. The partners in Malkins duly took over Inigo House and assumed responsibility for the tenants' obligations under the lease. They paid no premium for the lease because it was considered to have no value. There had been a substantial fall in property values since the rent for King Street had been negotiated at the end of 1988, and it proved impossible to dispose of

D the property or to sublet it except at a rent considerably below the rent payable to the landlord. It has been sublet but remains undisposed of to this day. There is a continuing liability for rent.

In other respects the winding up of the affairs of Malkin Janners was completed without difficulty. An interim dissolution account was prepared by the firm's accountants. It contained no entries in relation to Inigo House

E or King Street. It has still not been possible to produce a final account because of the continuing liability in respect of King Street. The interim account showed a small sum slightly in excess of £4,000 to be due to the firm from Mr Hurst.

Mr Hurst began these proceedings against his former partners in 1992. His main object was to avoid the continuing liability under the King Street lease. To this end he alleged that the partnership had been dissolved by his

F acceptance of his partners' repudiatory breach of contract and sought a declaration that he was thereby discharged from any obligation to contribute to the liabilities of the firm as they stood at 31 October 1990 or as they accrued thereafter. In addition he asked for a general partnership account to be taken by the court. The defendants counterclaimed for payment by Mr Hurst of his share of the partnership liabilities.

G In 1993 the landlord of King Street brought proceedings for arrears of rent against the four partners in whose name the lease had been taken. They in turn brought third party proceedings for contribution against their former partners including Mr Hurst. By his third party defence Mr Hurst denied liability on the grounds (i) that any trust which might have been created by clause 3 of the partnership deed had come to an end on 31 October 1990;

H (ii) that the claimants' right to contribution was entirely dependent on clause 3.3 of the partnership deed; and (iii) that he was discharged from all obligations under the partnership deed with effect from 1 November 1990 by reason of his acceptance of his partners' repudiatory breach of contract.

Although the defendants denied that their conduct in entering into the dissolution agreement constituted a repudiatory breach of the partnership

deed, the judge found that it did and his conclusion was unanimously upheld by the Court of Appeal. There has been no further appeal to your Lordships' House from this finding or from the underlying assumption in both courts below that it was this which brought about the dissolution of the partnership.

The judge exercised his discretion by refusing to order the taking of a general partnership account, and in this respect also the Court of Appeal unanimously upheld his decision. As the judge pointed out, it would be very unusual for the court to order a complete audit of the firm's accounts to be undertaken by an independent accountant. Where, as in the present case, detailed accounts had already been prepared by competent accountants, these would normally form the basis for any further accounts and inquiries. Any partner would have the right to surcharge and falsify the accounts, but the burden would be upon him to do so.

In the present case the only significant dispute concerned King Street and Inigo House. Mr Hurst challenged the terms on which Inigo House had been transferred to Malkins, but it was incumbent upon him to show that the lease had a value which was not realised by the disposal. He failed to do so. The judge found that the lease was regarded as burdensome and its acquisition by Malkins was a matter of intense negotiation with the other partners. There was no evidence that any group of partners obtained any special advantage at the expense of the others. There were a number of groups with different interests and the arrangements with Malkins were the result of hard bargaining between them. Mr Hurst adduced no valuation evidence, and the judge concluded that he would not be justified in ordering an account on the speculative chance that there might be some additional value in Inigo House, which had not been taken into account.

Mr Hurst's main contention was that his partners' repudiatory breach of the partnership agreement discharged him from all further obligations under the partnership deed. These included his obligation to contribute to the liabilities of the partnership which had accrued prior to its dissolution as well as to those which continued to accrue thereafter. The judge rejected both contentions. He held that partnership liabilities which arose prior to dissolution remained liabilities of the partnership as a whole notwithstanding the repudiatory breach of contract and consequent dissolution. Mr Hurst's responsibility for his share of those liabilities depended, not on the continuation of the partnership, but on the fact that he was a partner at the time they were incurred. The same principles, he reasoned, applied to the continuing liabilities accruing after dissolution which resulted from transactions entered into prior to dissolution. It made no difference that the partnership was brought to an end by repudiation rather than by agreement. Mr Hurst was, therefore, liable to contribute to the rent due in respect of King Street accruing after as well as before the dissolution of the partnership. The judge dismissed the action and granted a declaration on the counterclaim that Mr Hurst was liable to pay his share of the partnership liabilities, including continuing liabilities for rent. His decision was upheld by a majority of the Court of Appeal (Simon Brown and Peter Gibson LJJ, though for different reasons). Hobhouse LJ dissented.

Mr Hurst now appeals to your Lordships' House. He has succeeded in settling the dispute with 11 of the defendants. Another is believed to be insolvent. Accordingly only seven of the original defendants remain as

A respondents to the present appeal. These include the nineteenth defendant, a Mr Trepass, who has been separately represented before your Lordships.

Repudiatory breach of contract as an independent ground of dissolution

The consequences when a contract is brought to an end by the acceptance by one party to it of a repudiatory breach of contract by the other party are B well established. They were clearly stated by Dixon J in *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 476–477, where he said:

> "When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further C performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected."

This passage has been expressly approved by your Lordships' House: see D *Johnson v Agnew* [1980] AC 367, 396, per Lord Wilberforce, and *Colonial Bank v European Grain and Shipping Ltd* [1989] AC 1056, 1098–1099, per Lord Brandon of Oakbrook.

The doctrine of accepted repudiation is of general application in the law of contract, and there is no reason why it should not apply to an agreement to enter into partnership or to the contractual obligations which the partners mutually undertake to observe after the partnership has come to an end. But E I have considerable doubt that it can be employed to bring about the automatic dissolution of the partnership itself.

The use of the doctrine for this purpose would certainly be unhistorical. In its modern form it is of relatively recent origin. There appears to be no trace of it before *Freeman v Taylor* (1831) 8 Bing 124, and it was not fully understood until much later. Of course, it had long been recognised before F then that the refusal or inability of one party to perform his part of the bargain should immediately excuse the other party from performing or preparing to perform his part. As *Williston on Contracts*, 3rd ed (1957), vol 1 pointed out, the reason why the plaintiff must ordinarily have performed his contract in order to recover is that the mutual performances in a bilateral contract are given in exchange for one another, and if the exchange fails on one side the other party may likewise decline to perform. G Before the middle of the 19th century, however, the common law treated the innocent party as discharged from further performance, not because the other party had committed a breach of contract, but because he had failed to perform a condition precedent to the obligation of the innocent party. Even where what was relied on was a breach of contract, therefore, the critical question was whether the parties' contractual obligations were mutually H interdependent or independent. The question whether there has been a mutual discharge of reciprocal obligations can arise only in a bilateral context.

Where one party was in breach of contract, the voluntary exercise by the innocent party of the right to refuse to perform his part of the bargain was usually described as "bringing the contract to an end" or "rescinding" it,

with the result that he could not also claim damages for the breach. This fallacy was exposed by Bowen LJ in *Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339, 365 and by Holmes CJ in *Daley v Peoples Building Association* (1901) 178 Mass 13. But it persisted until modern times, particularly in the Chancery Division: see *Henty v Schröder* (1879) 12 Ch D 666 and the cases which followed it down to *Barber v Wolfe* [1945] Ch 187 and *Horsler v Zorro* [1975] Ch 302. It was not finally laid to rest until *Heyman v Darwins Ltd* [1942] AC 356 and (in relation to sales of land) *Johnson v Agnew* [1980] AC 367. The failure to distinguish between discharge by breach and rescission ab initio has led many courts astray and continues to do so.

It is impossible to say whether the modern contractual doctrine of accepted repudiation might have infiltrated the law of partnership if partnership had been treated as merely a particular species of contract enforceable in the common law courts. Disputes between partners and the dissolution and winding up of partnerships, however, have always fallen within the jurisdiction of the Court of Chancery. This is because, while partnership is a consensual arrangement based on agreement, it is more than a simple contract (to use the expression of Dixon J in *McDonald v Dennys Lascelles Ltd* 48 CLR 457, 476); it is a continuing personal as well as commercial relationship. Neither during the continuance of the relationship nor after its determination has any partner any cause of action at law to recover moneys due to him from his fellow partners. The amount owing to a partner by his fellow partners is recoverable only by the taking of an account in equity after the partnership has been dissolved: see *Richardson v Bank of England* (1838) 4 My & Cr 165; *Green v Hertzog* [1954] 1 WLR 1309. Only the Court of Chancery was equipped with the machinery necessary to enable such an account to be taken, and the basis upon which the account was taken reflected equitable principles. These could be modified by agreement, but they did not find their source in contract.

The basic principles of partnership law are set out in the Partnership Act 1890 which was drafted by Sir Frederick Pollock and is still in force today. It codified (though not exhaustively) the law of partnership and reflected the pre-existing principles of equity which had been developed by the Court of Chancery. These did not include the contractual doctrine of repudiation. It is noticeable that section 1 of the Act, which defines the concept of partnership makes no reference to contract. It defines partnership as "the relation which subsists between persons carrying on a business in common with a view of profit".

Given this history, it is not surprising to find that until recently there was no recorded case of the automatic dissolution of a partnership being brought about by the acceptance of a repudiatory breach of contract, and no indication that this is a ground of dissolution in the Partnership Act 1890 or (except to doubt it) in successive editions of *Lindley on Partnership* over a period of more than 100 years. Generations of Lord Chancellors in the 18th and 19th centuries would have failed to recognise the concept. Thereafter, if the judges of the Court of Chancery had recognised the concept at all, it is likely that they would have rejected the idea that the dissolution of a partnership at the instance of one partner, however wronged, and against the wishes of his fellow partners can be withdrawn from the discretion of the court and left to the unilateral decision of the innocent partner.

A Repudiation as a ground of dissolution first saw the light of day in *Hitchman v Crouch Butler Savage Associates* (1982) 80 LS Gaz 550, where Harman J treated as axiomatic the proposition that the doctrine of repudiatory breach applies to partnership agreements as it applies to other contracts. The question, however, is not whether the doctrine applies to the *contract* of partnership, but whether it operates to bring about the automatic dissolution of the partnership *relationship*.

B This is much more doubtful. In the first place, the Act expressly states the circumstances in which a partnership is dissolved (expiry of a fixed term or termination of the adventure or undertaking, notice, bankruptcy or death of any partner, supervening illegality or order of the court). It makes no mention of repudiatory breach of contract. It is true that a partnership may also be dissolved by mutual agreement, and it may be objected that this is not C mentioned either; but in fact it is catered for by section 19 taken in conjunction with section 32(a). This cannot be relied on to support the admission of an accepted repudiation as an automatic ground of dissolution. The theory that a repudiatory breach of contract is an offer to terminate the contract which can be accepted by the offeree, thereby bringing the contract to an end by mutual consent, is discredited. The contract is brought to an end by the exercise of a right conferred by law on the parties to the contract D from the outset, not by virtue of a new agreement between them.

The admission of a new ground of dissolution which is not mentioned in the Act and which would not have been recognised by the Court of Chancery is far from axiomatic. But the supposed ground also sits uneasily with section 35(d) of the Act. This gives the court a *discretionary* power to decree a dissolution of a partnership when a partner, other than the partner suing,

E

> "wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him."

It is difficult to envisage a case in which conduct of this description would not constitute a repudiatory breach of conduct which the party suing could F accept by bringing proceedings.

Even if this brought about the automatic dissolution of the partnership, it would not follow that paragraph (d) was altogether empty of content. It would not be needed where there are only two partners, but it would still be needed where there are more than two partners and there is at least one partner who is innocent of any wrongdoing and who does not accept the G repudiation. It would also arguably be needed even in a case like the present where there are numerous partners who fall into only two camps, those who are alleged to have committed a repudiatory breach and those who claim to have accepted it. What is there to bring the contract to an end as between the parties who are in the same camp? It is noticeable that the Act expressly provides that the death or bankruptcy of any partner operates to dissolve the partnership *as regards all the partners*. The contractual doctrine applies to H multiparty as well as to two party contracts, but it merely effects the mutual discharge of reciprocal obligations. It necessarily operates bilaterally as between each party in breach and each party accepting the breach as repudiatory by discharging them from their reciprocal obligations. It is difficult to see how it can operate to discharge the parties in the same camp,

whether guilty or innocent, from the obligations they owe each other. This can only be achieved by agreement.

This would lead to a very odd distinction between those (few) cases where dissolution was automatic and those cases where it was not. To my mind, however, the strongest argument against admitting repudiatory breach as a further ground for the automatic dissolution of a partnership is that, wherever applicable, it would circumvent the discretionary power of the court under section 35. Even where the plaintiff establishes conduct on the part of his fellow partners which comes within section 35(d), the court is not bound to order a dissolution. This reflects equitable principles, but is in sharp contrast to the approach of the common law.

By entering into the relationship of partnership, the parties submit themselves to the jurisdiction of the court of equity and the general principles developed by that court in the exercise of its equitable jurisdiction in respect of partnerships. There is much to be said for the view that they thereby renounce their right by unilateral action to bring about the automatic dissolution of their relationship by acceptance of a repudiatory breach of the partnership contract, and instead submit the question to the discretion of the court. For a similar principle in a different contractual context, see *Johnson v Agnew* [1980] AC 367, 399, per Lord Wilberforce.

The courts below, however, found that the dissolution of the partnership was brought about by the acceptance by Mr Hurst of his partners' repudiatory breach of contract and not by mutual agreement. That finding, and the assumption on which it is based, have not been challenged before your Lordships. In these circumstances I am content to proceed on the basis of the same assumption while reserving for future consideration the question whether it is correct.

Consequences of dissolution

When a partnership is dissolved, its affairs must be wound up. This is the responsibility of the partners themselves. There is no provision for it to be undertaken by an office holder, though any of the parties can apply to the court for the appointment of a receiver if this is necessary to preserve the partnership assets.

To enable the partners to wind up the affairs of the partnership, section 38 of the Act provides that after the dissolution of the firm the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution as far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the date of dissolution, but not otherwise. Thus each of Mr Hurst's fellow partners had authority to negotiate for the disposal of the partnership premises or to instruct the partnership accountants. They did not need his consent to dispose of Inigo House, though he had the right, as I have explained, to challenge the terms on which they disposed of it by surcharging the account. Likewise the firm's liability for the rent of King Street and its obligation to indemnify the persons (whether partners or not) in whose names the lease was vested will continue until the lease is disposed of and the affairs of the partnership are finally wound up.

In the latter connection it is to be observed that, both under the general law and under clause 3.3 of the partnership deed, the lessees of King Street are trustees for the firm and are entitled to be indemnified by the firm, that is

to say the partners jointly, and not by the individual partners. As Hobhouse LJ [1999] Ch 1, 26B pointed out, Mr Hurst's personal liability for the rent is indirect. Like any other liability of the firm it is a joint liability of the partners and, if paid by his fellow partners, is recoverable by them from him in the course of taking the dissolution account. The lessees' right as trustees to be indemnified by their beneficiaries for liabilities undertaken by them in the course of their trust establishes the firm's liability but says nothing about Mr Hurst's obligation to his fellow partners to contribute towards its discharge.

Partners are jointly and not severally liable for the debts of the firm incurred while they were partners (section 9 of the Act), and they are beneficially entitled to the assets of the firm remaining after the liabilities have been discharged. The winding up of a partnership involves the realisation of the firm's assets, the ascertainment and discharge of its liabilities, and the adjustment of accounts between the partners so that the profits can be distributed to them or the losses borne by them in the appropriate shares.

Section 44 of the Act sets out the rules which govern the final settlement of the partnership accounts. It is in the following terms:

> "In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed: (a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits: (b) The assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order: 1. In paying the debts and liabilities of the firm to persons who are not partners therein: 2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital: 3. In paying to each partner rateably what is due from the firm to him in respect of capital: 4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible."

The application of the section may be varied by agreement, but it is quite general in its terms. It applies to the winding up of every partnership after a dissolution whatever the ground of dissolution and regardless of the conduct of the parties. It applies where the partnership is ordered to be dissolved under section 35(d) of the Act in the same manner as it applies in any other case, and no distinction is drawn between the rights and obligations of the partner or partners whose wrongful conduct led to the dissolution and the other partners or partner who are innocent of any wrongdoing. It would lead to an impossible situation if section 44 applied where the partnership was dissolved by the court under section 35(d) but not where the partnership was automatically dissolved following a repudiatory breach of the partnership agreement.

It would, in any event, be wrong in principle to have regard to the parties' conduct when taking the dissolution account. This is clearly the case where the account is taken in order to determine their respective entitlements to the surplus assets. These are in the nature of rights of property, and no matter how badly a partner may have behaved towards his partners he is not to be

deprived of his accrued property rights. But the same must apply where there is a net deficit. It would take very clear words in the partnership agreement to require liabilities to be taken into account in ascertaining a partner's entitlement to the partnership assets to the extent of reducing his entitlement to nil but no further. The injustice of exonerating the innocent partner from his share of the firm's liabilities and throwing it upon the wrongdoers may not be apparent in the present case where there are 19 wrongdoers and only one innocent partner. But it would be very obvious in the converse (and probably more usual) case where there were 19 innocent partners and only one wrongdoer.

Mr Hurst contends that, by accepting his partners' repudiatory breach of contract, he was automatically discharged from his contractual obligation to contribute to the deficit, which must be borne exclusively by his fellow partners. One difficulty with this argument is that, when properly understood, Mr Hurst's obligation is not contractual but equitable. It is, I think, important to understand the part which section 44 plays in the winding up. The partners are jointly liable for all the debts of the firm. The firm's creditors are not concerned to enquire whose conduct has brought about the dissolution of the firm. However much an individual partner may have been wronged by his fellow partners, he remains jointly liable with them for the debts of the firm. Judgment may be taken against the firm and executed not only against partnership property but also against any individual partner. Section 44 is designed to ensure that, as between the partners themselves, any surplus is shared and any deficit is ultimately borne by the partners in the appropriate proportions. If a partner is obliged to pay more than his proper share of the firm's liabilities, section 44 entitles him to be reimbursed the excess through the taking of the dissolution account. In relation to the firm's liabilities it thus reflects the same equitable doctrine of contribution which applies between co-sureties and other co-obligors. That is a doctrine which is "bottomed and fixed on general principles of justice, and does not spring from contract; though contract may qualify it": per Eyre CB in *Dering v Earl of Winchelsea* (1787) 1 Cox Eq 318, 321.

Mr Hurst does not, as I understand his argument, dispute any of this. He contends that the contractual doctrine of repudiation operates at an earlier stage before section 44 or the equitable principles to which it gives effect come into play. He recognises that the contractual doctrine cannot affect his liability to third parties, but he claims that, as between himself and his fellow-partners, he is discharged from all further performance of those obligations which he undertook by becoming a partner, and these include the obligation to contribute to the firm's losses.

The difficulty with this argument is that it does not accurately reflect the contractual doctrine. As Hobhouse LJ recognised, the acceptance by one party of a repudiatory breach of contract by the other operates to discharge *both* parties from further performance of their contractual obligations. If Mr Hurst is discharged from the obligation he owes his fellow partners to contribute to the assets available to the creditors, then his fellow partners are likewise discharged from the corresponding obligation they owe him. Since the creditors are unaffected, they can still recover judgment against the firm and execute against any of the partners separately. Mr Hurst's argument does not lead to the conclusion that he can walk away from the firm's liabilities and thereby reduce the security available to the creditors, but to

the conclusion that the liability for the firm's debts must rest wherever the creditors choose to let it fall. The fact is that it is not enough for Mr Hurst to avoid his liability to contribute to the firm's assets to make up any shortfall; he needs an indemnity against his liability for the firm's debts. This can only be obtained by agreement or by rescinding the partnership contract ab initio. The contractual doctrine of repudiation is not sufficient.

It is no answer to say that, as the wronged party, Mr Hurst is entitled, as his fellow partners are not, to damages for the breach of contract which brought about the dissolution of the partnership. If he can show that he was thereby deprived of income which he has been unable to earn elsewhere, he is entitled to be compensated for his loss. But this cannot be measured by the contribution he must make to the accrued and continuing liabilities of the firm pending the completion of the winding up. His liability to contribute to these had accrued before any breach of the partnership agreement occurred and has in no sense been caused by his partners' breach of contract. He would have continued to be liable for the King Street rent if his partners had committed no breach of contract and the partnership had not been dissolved. To recover this head of damages he would have to show that the acquisition of King Street was a breach of the partnership deed, and he has not alleged this.

This is only another way of saying that, although both parties are discharged from further performance of their obligations, rights are not divested which have already been unconditionally acquired. Rights and obligations which arise by the partial execution of the contract continue unaffected. Mr Hurst's liability to contribute to the accrued and accruing liabilities of the firm, and his partners' rights of contribution, arise from the fact that the liabilities were incurred (or in the case of King Street assumed) by the firm when Mr Hurst was a partner. Once the firm had undertaken or assumed liability for the rent, each partner in the firm was entitled to have the liability taken into account in ascertaining his share of the firm's profits or losses both before and after dissolution, and that right was not lost merely because Mr Hurst's partners afterwards repudiated the contract and Mr Hurst accepted it.

Mr Hurst argues that the liability for rent is not unconditional, since it is consideration for the right to remain in possession. A tenant's liability for future rent is not a simple debt; its existence depends on counter-performance by the landlord: see *In re Park Air Services Ltd* [2000] 2 AC 172. The short answer to this is that Mr Hurst does not claim to be discharged from his liability to the landlord. He claims to be discharged from his liability to his fellow partners, and this is not conditional upon any future counter-performance by them.

This analysis can be tested by reference to the law of agency. Where an agent is in serious breach of his duty to his principal, the principal can refuse to pay commission and the agent loses his right to be indemnified *in respect of the transaction as to which the agent is in breach*. But the agent does not normally lose his rights to commission already earned and indemnity in respect of past transactions which were completed before the breach: see *Bowstead & Reynolds on Agency*, 16th ed (1996), pp 317–322, Article 62 and the cases there cited. It may be otherwise where the agent has been guilty of fraud or breach of fiduciary duty (but see *Nitedals Taendstikfabrik v Bruster* [1906] 2 Ch 671 for an example where

commission on some transactions was allowed); but there is no suggestion of either in the present case. The difference between the two cases is that in one the agency contract is discharged by breach and in the other it is set aside or rescinded ab initio.

In the course of argument a distinction was drawn between pre-cessation and post-cessation losses. This terminology can be misleading. Mr Hurst is not, of course, liable for the losses incurred by any other person or firm. He is not liable for the post-cessation rent of Inigo House, because this property has been disposed of and the rent is a liability of the firm which acquired it. It will be taken into account in ascertaining the profits or losses of that firm. But King Street has not been disposed of, and pending its disposal the rent is a continuing liability of Malkin Janners. Like the costs and expenses of the winding up, it falls to be taken into account in ascertaining the losses of that firm incurred during the winding up for which the former partners remain jointly liable. Section 38 of the Act continues the rights and obligations of the partners notwithstanding the dissolution as far as may be necessary to wind up the firm. Mr Hurst's liability to contribute his share of the rent continues unaffected by the dissolution unless he can demonstrate that it was unnecessary to retain King Street, a proposition which is contradicted by the evidence.

My Lords, Mr Hurst has been wronged and is entitled to damages if he can show that the dissolution of the firm has occasioned him loss which he would not otherwise have sustained. But he can neither avoid his joint liability to creditors of the firm arising from past transactions entered into while he was a partner nor, without rescinding the contract of partnership ab initio, throw his proportionate share of that liability onto his partners.

Mr Trepass

After the conclusion of the trial and while Mr Hurst's appeal to the Court of Appeal was pending Mr Trepass applied for a stay of the appeal against him on the ground that Mr Hurst had failed to comply with an earlier order for costs. That order has not been complied with to this day. Mr Hurst consented to the stay and an order was made staying the appeal against Mr Trepass and ordering Mr Hurst to pay the costs of the stay application.

Accordingly, when the appeal came on for hearing it was not effective against Mr Trepass, who had appeared in person at the trial but took no part in the appeal. The Court of Appeal dismissed the appeal but made no order in respect of Mr Trepass. Wishing to have his costs of the stay application taxed, and requiring a final order for this purpose, Mr Trepass wrote to the Court of Appeal and asked the court to include his name in the order. In his letter he stated that he understood that Mr Hurst's counsel had consented to the dismissal of the appeal against him. In the event the court merely amended the order to include an order for payment of Mr Trepass's costs, but it did not lift the stay on the proceedings against him and made no reference to him (or any of the other respondents) in the order dismissing the appeal.

In the respondents' case it is submitted that, as there has never been an effective appeal to the Court of Appeal as against Mr Trepass, Mr Hurst's appeal to your Lordships' House as against him is incompetent and should be struck out. This seems to be correct. Mr Trepass has never waived his right to be heard on the appeal to the Court of Appeal and the court did not

lift the stay on the proceedings against him or in terms dismiss the appeal against him, which could only be done by consent. It merely granted him an order for the payment of his costs so that they could be taxed. Although the order of the court dismissed the appeal without distinguishing between Mr Trepass and the other respondents, this must refer to the appeal which was before the court, and this did not include the appeal against Mr Trespass which had been stayed.

Mr Trepass asks for his costs to be taxed on an indemnity basis. Although I agree that as against Mr Trepass Mr Hurst's appeal should be struck out as incompetent I can see no sufficient reason for awarding Mr Trepass indemnity costs. He did not lodge a separate objection to Mr Hurst's application for leave to appeal to your Lordships' House, but contented himself with repeated assertions in correspondence with Mr Hurst's solicitors that the appeal was of no relevance to him because the proceedings against him had been stayed and were liable to be struck out. Having made no attempt to object to the grant of leave, he instructed his own counsel to sign the respondents' case on his behalf, and personally signed the agreed statement of facts and issues. He appeared before the Appellate Committee by separate counsel, and lodged a skeleton argument which dealt with the merits as well as the competency of the appeal. In the circumstances I think that he is entitled to his costs but taxed on the standard basis in the ordinary way.

Conclusion

I would dismiss the appeal as against all the respondents including Mr Trepass, with costs to be taxed on the standard basis.

Appeal dismissed with costs.

Solicitors: Robert A Hurst; Thomas Eggar Church Adams, Reigate; Howard Kennedy.

BLS