

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

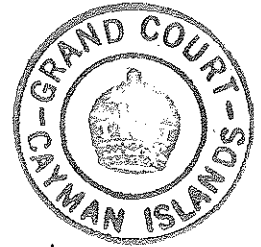
CAUSE NO: FSD 73 OF 2013 (AJJ)

The Hon Mr Justice Andrew J. Jones QC

In Chambers on 3rd (by telephone) and 23rd July 2013

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

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



Appearances: Ms Kirsten Houghton of Campbells for Oriental Financial Holding Corporation

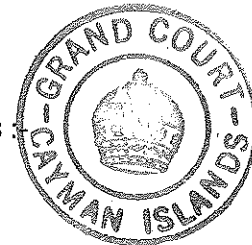
Ms Anna Peccarino of Travers Thorp Alberga for Cybernaut Capital Management Ltd

Mr Matthew Crawford and Mr. Luke Stockdale of Maples and Calder for the Petitioners

RULING

Introduction

1. Cybernaut Growth Fund, L.P. ("the Partnership") was registered as an exempted limited partnership on 20th May 2008 under the Exempted Limited Partnership Law (2007 Revision) ("the Law"). On 4th June 2013 five of the limited partners (who collectively own 49.96% of the partnership interest) presented a winding up petition against the Partnership pursuant to section 15(4) of the Law. The petition is opposed by the general partner, Cybernaut Capital Management Limited ("the GP") and Oriental Financial Holding Corporation ("Oriental") which is the only other limited partner. The GP and Oriental are related parties and together own 50.04% of the partnership interest. By summonses issued on 20th June (as amended on 25th June) the GP and Oriental seek to have the petition struck out as an abuse of the process on the grounds that (i) it has been presented in breach of a valid and binding arbitration agreement, (ii) an alternative remedy, namely arbitration, is available to the Petitioners who are acting unreasonably by not pursuing it and (iii) on a true construction of the limited partnership agreement, the Petitioners have contracted out of their right to present a winding up petition or apply to the Court for the appointment of an independent liquidator. Alternatively, they seek a stay of the petition pending the outcome of an arbitration which was commenced in New York pursuant to the rules of the American Arbitration Association shortly after the presentation of the winding up petition..



2. The relevant provisions of the limited partnership agreement ("LPA") are as follows:

1. DEFINITIONS

1.1 In this Agreement the following expressions shall have the following meanings:

"Cause" means (a) any act of gross negligence, reckless disregard, willful misconduct or bad faith by the General Partner, (b) a material breach of any applicable law, statute, rule or regulation by the General Partner, or (c) the filing or entering into a proceeding of bankruptcy, insolvency, administration, involuntary reorganisation or similar proceedings in respect of the General Partner;

"Special Majority Limited Partner Consent" means the written consent consisting of one or more documents in the like form each signed or approved in writing, by facsimile or by electronic mail by Investors (excluding any defaulting Investor and the General Partner whether in its capacity as such or as general partner of any Additional Partnership or as a Limited Partner or as a limited partner in any Additional Partnership) whose aggregate Commitments represent at least 75 per cent of the Fund Commitments;

8 TERMINATION AND LIQUIDATION

8.1 Termination

(a) The death, bankruptcy, insolvency, dissolution or liquidation of a Limited Partner, the transfer of any Limited Partner's interest in the Partnership to a Substitute Limited Partner, the increase of an existing Limited Partner's Commitment or the admission of a new Limited Partner shall not operate to terminate the Partnership and the estate or trustee in bankruptcy or receiver or liquidator of a deceased, bankrupt or insolvent Limited Partner shall not have the right to withdraw such Limited Partner's Commitment prior to the termination of the Partnership.

(b) Subject as provided in Clause 8.2 and the Partnership Law, the Partnership shall terminate on the earlier of the Termination Date or the happening of any of the following events:-

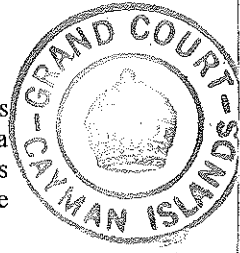
(i) the election of the Limited Partners by a Special Majority Limited Partner Consent by giving to the General Partner not less than 60 days' written notice following the occurrence of an event of Cause and a failure by the General Partner to remedy such event within 60 days from the date of such occurrence to the reasonable satisfaction of the Limited Partners. The General Partner shall give prompt notice to the Limited Partners of the commencement of any proceedings which are brought against the General Partner for any of the aforementioned matters and, upon their conclusion, of the outcome of all such proceedings;

(ii) the agreement of the General Partner and all of the Limited Partners;...

8.3 Liquidation of the Interests of Partners

(a) The General Partner shall not be personally liable for the return of the Capital Contributions of the Limited Partners without prejudice to Clauses 5.3 and 6.8.

(b) Upon termination of the Partnership, no further business shall be conducted except for such action as shall be necessary for the orderly winding-up of the affairs of the Partnership and the distribution of the Partnership Assets amongst the Partners. The



General Partner shall act as liquidating trustee provided however that if the Partnership is terminated for a reason set forth in Clause 8.1(b)(i), the Limited Partners may by a Special Majority Limited Partner Consent designate some other party or parties to act as a liquidating trustee or trustees and to receive such remuneration for so acting as the Limited Partners shall agree.

- (c) Upon termination of the Partnership, the liquidating trustee or trustees shall use all reasonable efforts to sell within a 12-month period any or all of the Partnership Assets on the best terms available but, if unsuccessful, it may distribute all or any of the Partnership Assets in specie on the basis and in accordance with the value established pursuant to Clause 6.7, whether or not the same are Listed. The liquidating trustee or trustees shall cause the Partnership to pay all debts, obligations and liabilities of the Partnership and/or to make appropriate reserves and retention in respect of the same (including any contingent liabilities) and to pay all costs of liquidation and the remaining proceeds and assets shall be allocated and distributed amongst the Partners on the basis set out in Clause 6.5(a), provided however that if, upon termination of the Partnership, the proportion which the Capital Contributions of the Founder Investor bears to the aggregate Capital Contributions of all the Limited Partners shall be greater than the proportion which the Founder Investor's Commitments bears to the Partnership Commitments, the General Partner shall adjust on a pro rata basis the distributions of liquidation proceeds to be made to the Limited Partners pursuant to this Clause 8.3(c) so as to ensure that the proportion which the Capital Contributions of the Founder Investor bears to the aggregate Capital Contributions of all the Limited Partners is equal to the proportion which the Founder Investor's Commitments bears to the Partnership Commitments, and if the amount of liquidation proceeds to be distributed pursuant to this Clause 8.3(c) shall be insufficient to achieve such equalisation, each Limited Partner shall pay to the Founder Investor its pro rata share of such shortfall.

10 MISCELLANEOUS

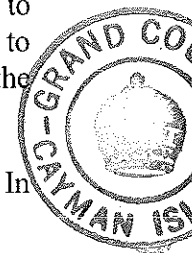
10.11 Governing law and Arbitration

- (a) This Agreement and the rights of the parties hereto shall be governed by and construed in accordance with the laws of the Cayman Islands.
- (b) Any dispute arising out of or relating to this Agreement, or the breach thereof, shall be formally resolved by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction. The arbitration will be conducted in the English language in the city of New York, New York, in accordance with the United States Arbitration Act. There shall be three arbitrators, named in accordance with such rules.

Have the Petitioners contracted out of their statutory right to present a winding up petition?

3. The GP/Oriental submit that Clause 8 of the LPA constitutes a comprehensive code relating to the liquidation and termination of the Partnership and that, on its true construction, the parties must be taken to have contracted out of their right to make any application to the Court under section 15 (4) of the Law. In my view this argument is untenable. Clause 8.1(b) of the LPA states that the Partnership shall terminate on the earlier of the Termination Date (which has not yet arisen) or the happening of certain events. Clause 8.3(b) then goes on to say that the GP shall act as "liquidating trustee" which means that it will act as voluntary liquidator. Clause 8.3(c)

comprises a very general statement of the liquidating trustee's functions in a way which is consistent with the functions of a liquidator appointed by the Court. However, Clause 8.1(b) commences with the words "Subject as provided inthe Partnership Law" which is defined to mean the Exempted Limited Partnership Law (2007 Revision) as further revised from time to time. This must mean that the LPA is subject to the Law. I find it impossible to construe the words "subject as provided in" to mean "notwithstanding the provisions of the Law".



4. A similar argument was advanced in *TNT N.V. v. Logispring GP L.P.* [2009] CILR 456. In delivering the judgment of the Court of Appeal, Vos JA said (at paragraph 27) –

"27. The parties must be presumed to have known that the [Law] included s.7(5) and to have known that s.7(5) allowed for an application by a partner. Had the parties intended to exclude the statutory right of a partner to apply to appoint a liquidator, they would, as it seems to us, have wanted to make it clear that, so far from being 'pursuant' to s.7(5), the proviso was specifically excluding part of that section. They could have been expected to have used the words 'notwithstanding the [Law],' rather than 'pursuant to the [Law]'. "

This analysis applies equally in the present case.

5. Having reached the conclusion that the parties to the LPA have not contracted out of the provision of sections 7(5) and 15 of the Law, it is not necessary for me to determine whether it is possible, as a matter of law, to do so. This point was left open by the Court of Appeal in the *TNT* case and I shall not address it.

Is the dispute between the parties capable of being arbitrated?

6. The GP and Oriental seek a stay of the winding up petition pursuant to section 4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision),¹ which provides as follows :-

"4. If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, 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 null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

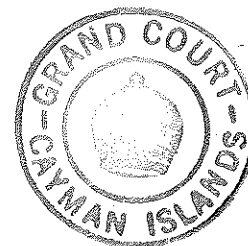
7. I think it is common ground that it is for this court to determine whether there is any rule of public policy or statutory provision which renders the arbitration agreement, or some particular matter within its scope, null and void, inoperative or incapable of being performed. (See *Fulham Football Club (1987) Ltd v. Richards* [2012] Ch. 333, per Patten LJ at paragraph 36). Counsel for the Petitioners challenges the strike out and stay applications, inter alia, on the basis that the only relief sought in their petition is a winding up order and the appointment of a qualified insolvency practitioner as liquidator. As a matter of principle, I think that this type of dispute is non-arbitrable for two inter-related reasons. Firstly, a winding up order (whether relating to a company or an exempted limited partnership) is an order *in rem* which is capable of affecting

¹ In their written submissions counsel mistakenly referred to section 4 of the Arbitration Law 2012. They subsequently agreed that the applicable provision is section 4 of the 1997 Law. There is no material difference between these two provisions.

third parties. Because the source of an arbitral tribunal's power is contractual, its scope is necessarily limited to making orders which will be binding only upon the contracting parties. Secondly, any dispute about who should be appointed as liquidator of a company or exempted limited partnership is a matter involving the public interest, especially if it is carrying on a regulated business. The shareholders of a solvent company and the partners of a solvent exempted limited partnership are given a free hand to appoint whomsoever they please as voluntary liquidator. If a company or partnership is or may be insolvent, or the liquidation is brought under the supervision of the Court for whatever reason, a qualified insolvency practitioner must be appointed in place of the shareholders/partners' chosen liquidator. There is a public interest in ensuring that all businesses are properly liquidated in the interests of all their stakeholders. The appointment of a liquidator in these circumstances is therefore a public process which is not suitable for determination in private by an arbitral tribunal, even where all the shareholders/partners are themselves parties to an arbitration agreement in terms wide enough to encompass a dispute about the appointment or removal of a voluntary liquidator. I regard winding up orders, supervision orders and orders for the appointment/removal of liquidators as class remedies, which in turn leads me to the conclusion that such proceedings fall within the exclusive jurisdiction of the Court.

8. Counsel for the Oriental relies upon the dicta of Patten LJ in *Fulham Football Club* in support of the proposition that I should stay the petition pending a resolution of the underlying allegations pleaded in support of the proposition that the Petitioners have justifiably lost confidence and trust in the GP. The *Fulham Football Club* case involved an "unfair prejudice claim" under section 994 of the English Companies Act 2006. The judge granted a stay of the petition on the ground that members of companies and companies themselves could agree to refer to arbitration disputes which would otherwise support unfair prejudice petitions, provided that the award sought was not in a category which was limited by considerations of public policy. The Court of Appeal upheld this decision. It held that "the question in each case was whether the dispute engaged third party rights or represented an attempt to delegate to arbitrators a matter of public interest which could not be determined within the limitations of a private contractual process." The court went on to find that an unfair prejudice petition under section 994 was not a claim for a class remedy. The stay was upheld because the petitioner was not seeking a winding up order and a claim alleging unfair prejudice consisting of a breach of an agreement or some other unconscionable behaviour was capable of being decided by an arbitrator. This case is different. The *only* remedy sought by the Petitioners is a winding up order and the appointment of qualified insolvency practitioners as official liquidators.
9. Nevertheless, counsel for the Oriental finds some support in Patten LJ's judgment for the proposition that the winding up petition should be stayed pending the arbitration of the underlying allegations which she characterises as a series of breach of contract claims. He made the following observation at paragraph 83 :-

..... "I have already set out my own reasons for preferring the view that disputes of this kind which do not involve the making of any winding up order are capable of being arbitrated. Although not necessary for the resolution of this



appeal, I also take the view, as Austin J did in the *ACD Tridon* case², that the same probably goes for a similar dispute which is used to ground a petition under section 122(1)(g)³ to wind up the company on just and equitable grounds. In those cases the arbitration agreement would operate as an agreement not to present a winding up petition unless and until the underlying dispute had been determined in the arbitration. The agreement could not arrogate to the arbitrator the question of whether a winding up order should be made. That would remain a matter for the court in any subsequent proceedings. But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding up proceedings to take place or whether the complainant should be limited to some lesser remedy. It would only be in circumstances where the arbitrator concluded that winding up proceedings would be justified that a shareholder would then be entitled to present a petition under section 122(1)(g). In these circumstances the court could be invited to lift any stay imposed on proceedings imposed under section 9(4).⁴ In much the same way, it would, I think, be open to an arbitrator who considered that the proper solution to a dispute between a shareholder and the company was to give directions for the conduct of the company's affairs to authorise the shareholder to seek such relief from the court under section 994.⁵ But such cases are likely to be rare in practice...."

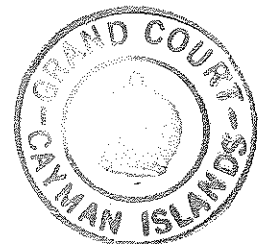
10. Ms Peccarino's argument is that most of the facts and matters pleaded in support of the allegation that the Petitioners have justifiably lost confidence and trust in the GP constitute allegations or include allegations of breach of contract. Paragraphs 31-58 of the petition, dealing with the failure to make distributions, constitutes an alleged breach of Clause 6.6(a) of the LPA. Paragraphs 59-76, relating to the failure to produce audited financial statements and quarterly reports, constitutes an alleged breach of Clause 9(a) and (b). The GP's alleged failure to devote necessary time and attention to the partnership, its failure to establish a board of advisers and its failure to convene partnership meetings all constitute alleged breaches of the LPA. Clearly, breach of contract claims of this sort are capable of being arbitrated as between the Petitioners and their GP, but I think that it is artificial and unrealistic to characterise the matter in dispute in this way. This case is not about claims for breaches of contract. It is about the identity of the liquidator. The parties are all agreed that the Partnership should be wound up. The real issue is whether it should be wound up by the GP or a qualified insolvency practitioner appointed by the Court. In circumstances where the limited partners are said to have lost confidence and trust in their GP, the distinction is crucial. The GP, acting in accordance with its powers under the LPA, is in a position to wind up the Partnership without any involvement or oversight on the part of the limited partners. Apart from a continuing contractual obligation to provide them with quarterly reports and annual accounts, the liquidation process can (and the Petitioners say, almost certainly will) be undertaken by the GP without any reference to them. If a winding up order is made, independent qualified insolvency practitioners will be appointed as official liquidators and Part V of the Companies Law will come in to play, which means that the liquidation will be a transparent process in which all the partners will have a statutory right to participate in various ways.
11. It seems to me that the possible approach suggested by Patten LJ probably only has any practical application in two circumstances. If a winding up petition includes a matter which constitutes a discreet *inter partes* claim falling within the scope of an arbitration agreement, then it could be

² The decision of the New South Wales Supreme Court in *ACD Tridon v. Tridon Australia* [2002] NSWSC 896.

³ This section is the English equivalent of section 92(e) of the Companies Law (2012 Revision).

⁴ This section is the English equivalent of section 4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision).

⁵ This section deals with unfair prejudice claims, for which there is no direct equivalent in the Companies Law.

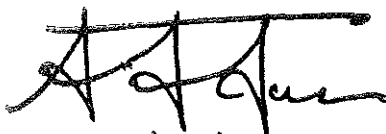


hived off for decision by the arbitral tribunal. Alternatively, if the petition includes matters which could properly be tried as preliminary issues, then I think that those issues could be determined by an arbitrator rather than the Court. However, this is not such a case. The only relief sought by the Petitioners is a winding up order and the appointment of an independent liquidator. They are not claiming damages for breach of contract or injunctions to restrain future breaches. It is not open to me to delegate the trial of the petition to an arbitral tribunal on the basis that I will then decide whether to make a winding up order in the light of the arbitrators' findings and recommendations.

Conclusions

12. Having come to the conclusions that the Petitioners have not contracted out of sections 7(5) and 15 of the Law and that the issue raised on the winding up petition is not arbitrable, I can deal with the rest of the application quite shortly. The presentation of the petition does not constitute a breach of the arbitration clause. If, on its true construction, the arbitration clause extends to a disputed application for a winding up order and/or appointment of independent liquidators, it is null and void, inoperative and incapable of being performed. It follows that the GP and Oriental are not entitled to a stay of the proceedings. It also follows that there is no alternative remedy available to the Petitioners.
13. Finally, I should add that counsel for the Petitioners made the point that section 4 of the Foreign Arbitral Awards Enforcement Law (1997 Revision) and section 9 of the Arbitration Law, 2012 apply only as between the parties to an arbitration agreement. A non-party has no right to apply for a stay of legal proceedings under either of these statutory provisions. He says that the winding up petition is presented against the Partnership; that the Partnership is not itself party to the LPA; and that the GP and Oriental are not parties to the winding up petition. The fact that the winding up petition is being treated, for the purposes of costs, as an *inter partes* proceeding between the GP/Oriental and the Petitioners does not lead to the conclusion that they are parties to the petition. Whilst recognising that this submission has some merit, I did not find it necessary to make any decision in respect of it.
14. The summonses of both the GP and Oriental are dismissed. Having heard counsel on the question of costs, I decided to reserve costs pending the outcome of the petition.

DATED this 23rd day of July 2013



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

