THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 137 OF 2012

BETWEEN:

(1) ARTEMIS TRUSTEES LIMITED AS TRUSTEE OF THE NEW HORIZON TRUST
(2) VLADIMIR ASHUROV
(3) ARTEMIS TRUSTEES LIMITED AS TRUSTEE OF THE GATITO VENTURES TRUST
(4) ATREMIS TRUSTEES LIMITED AS TRUSTEE OF THE BAILEY TREE TRUST
(5) ARTEMIS TRUSTEES LIMITED AS TRUSTEE OF THE ARCTURUS TRUST
(6) MILICA RAKOVIC

Claimants/Respondents

and

(1) KBC PARTNERS L.P.
(2) SCI PARTNERS L.P.
(3) SALFORD CAPITAL PARTNERS INC.
(4) EUGENE JAFFE
(5) GIORGI BEDINEISHVILI

Defendants/Applicants

Appearances: Mr. Ian Mill QC for the Applicants, the first to third Defendants
Mr. Jonathan Russen QC for the Respondents, the Claimants

2013: 21 February, 12 March

JUDGMENT

(Stay of proceedings under s 6(2) Arbitration Ordinance (Cap 6) – claim for winding up and dissolution of and appointment of liquidators to first and second Defendants ('Defendants') – Defendants limited partnerships formed under Part VI Partnership Act 1976 ('the Act') – Defendants' Articles of Limited Partnership containing similar arbitration clauses under LCIA Rules - Claimants relying upon ss 37 and 108 of the Act – whether dispute within scope of arbitration agreements - whether LCIA arbitrators have power to dissolve limited partnership – whether LCIA arbitrators

have power to appoint liquidators to limited partnership – In the **Matter of Wine Inns**[1] and **Stillman v Attorney General**[2] considered)

[1] **Bannister J [Ag]:** This is an application made by the first three Defendants to these proceedings, in which the Claimants seek the winding up and dissolution of the first and second Defendants (respectively 'KBC' and 'SCI,' together 'the Partnerships') and the appointment of a liquidator over each of them, for the grant of a stay in favour of arbitration.

The parties

[2] Each of KBC and SCI are limited partnerships formed under Part VI of the Partnership Act, 1976 ('the Act'). Each of the Claimants is a limited partner of one or other of the Partnerships. Each Partnership has other limited partners who are not party to these proceedings. The third Defendant ('Salford') is a BVI incorporated company which is said to be wholly owned by the fourth Defendant ('Mr. Jaffe'). Its directors are Mr. Jaffe and the fifth Defendant ('Mr. Bedineishvili'). Salford is the general partner of each of the Partnerships. Each of the Partnerships and Salford has been served here in the BVI. They have acknowledged service, admitting no part of the claim and indicating an intention to defend. Neither Mr. Jaffe nor Mr. Bedineishvili has been served. If this application fails and the claim is not stayed, the Claimants have expressed their intention to apply for permission to serve each of them out of the jurisdiction. In what follows I shall refer to the first to third Defendants simply as 'the Defendants.'

[3] The Claimants hold their limited partnerships pursuant to consultancy agreements into which they have entered with Salford ('the Consultancy Agreements'), which are incorporated into the Articles of Limited Partnership of each of KBC and SCI ('the Articles') and which prevail in case of any inconsistency between them.

[4] Each of KBC and SCI is a special limited partner in a third BVI established limited partnership, Value Discovery Partners ('VDP'). Salford is also the general partner of VDP. VDP holds a number of trading interests in the CIS and Balkans. They are of considerable value, although their precise value is a matter of dispute. The Claimants and the other limited partners in the Partnerships are entitled to what are described as 'Carried Interests' (as I understand it, income distributions) derived from the underlying businesses owned by VDP and passed up through the chain which I have attempted to describe above.

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[1] [2000] NICA 15 (30 June 2000)
[2] BVIHCV(COM) 2011/96 (9 June 2011), at paragraph [22]

[5] On 23 October 2012 Salford put VDP into what is described in the statement of claim as 'solvent voluntary liquidation.' That event seems to have prompted the present proceedings.

The claim

[6] There are two limbs to the claim for the appointment of liquidators. First, it is said that each of the Partnerships has 'terminated' in accordance with its Articles. Broadly speaking, termination, in the case of KBC and SCI, must be followed by the discharge of all the liabilities of the Partnership and distribution of the surplus, after payment of the costs of dissolution, to the limited partners and the general partner in proportion to their entitlements to Carried Interest. There are no provisions in the Articles of KBC or SCI for realization of assets or indeed for any other of the incidents which might be expected to follow dissolution of a partnership, no doubt because those Partnerships were nothing more than limited partners in VDP, the asset holding partnership. VDP's Articles, as might be expected, contain more elaborate provisions dealing with liquidation. On the basis, which I understand not to be common ground, that the Partnerships have terminated within the meaning of their respective Articles, it is said that it is just and equitable that a liquidator be appointed to wind down the Partnerships' affairs.

[7] The other allegations are of mismanagement on the part of Mr. Jaffe/Salford of the affairs of the group of partnerships, in particular mismanagement of VDP, to the consequential detriment of the Claimants' indirect interests in VDP. It is not necessary for the purposes of this judgment for me to go into any detail about those allegations, except to say that they are said to have involved breaches of fiduciary duty, acts prejudicially affecting the carrying on of the business of the Partnerships, and conduct making it unreasonable for the Partnerships to carry on in partnership with Salford. I should mention, however, that the appointment of a liquidator to VDP is itself alleged to have been an act of mismanagement and in breach of the Articles of each of KBC and SCI and, secondly, that many other of the allegations are said to have involved breaches of the Articles of the Partnerships and/or of the Consultancy Agreements.

The application for a stay

[8] The Consultancy Agreements (which are subject to BVI law) contain, at clause 13.2 and 13.2.1, provisions in the following form:

> "13.2 The parties agree to resolve any dispute, claim or counterclaim arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, or the legal relationships established by this Agreement, by arbitration conducted in accordance

with this Clause 13.2 and the Rules of the London Court of International Arbitration current at the time when the arbitration proceedings are commenced ("the LCIA Rules"), which Rules are deemed to be incorporated by reference into this Clause (save in so far as the LCIA Rules are inconsistent with the express terms of this Agreement or as expressly varied below). References to Articles below shall be references to Articles in the LCIA Rules and terms used in this Clause 13.2 that are defined in the LCIA Rules shall have the same meaning as in the LCIA Rules. With respect to an arbitration under this Clause 13.2:

13.2.1 The parties agree to fast-track the arbitration so that it is concluded as is reasonably practicable, and in any event within 60 (sixty) calendar days commencing with the appointment of the Arbitral Tribunal and expiring on the date that the Arbitral Tribunal's award ("the Award") is made ("the 60 Day period").

[9] The Articles of KBC and SCI each contain a provision to the following effect:

"Any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, or the legal relationships established by this Agreement, shall be referred to and finally resolved by arbitration under the Rules of the London Court or International Arbitration, which Rules are deemed to be incorporated by reference into this clause."

[10] It was not suggested that for present purposes there was any material distinction to be made between the two clauses and discussion focused on the terms of the arbitration clause in the Articles. I shall do the same in this judgment.

[11] The Defendants rely upon subsection 6(2) of the Arbitration Ordinance 1976 (Cap 6) ('the Ordinance'), which provides as follows:

"6(2) If any party to an arbitration agreement, other than a domestic 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 and 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."

[12] It is not in dispute that none of the arbitration clauses set out above is a domestic arbitration agreement within the meaning of section 2 of the Ordinance.

[13] It was not disputed that if and to the extent that the dispute constituted by the challenged[3] allegations in the statement of claim falls within the scope of the arbitration clauses, and unless the arbitration agreements are themselves null, void, inoperative or incapable of being performed, the Court has no discretion in the matter, but must stay the claim (or part of the claim).

The scope of the arbitration provisions

[14] Mr. Russen QC, appearing for the Claimants, submitted that the claim made in the statement of claim does not fall within the scope of the arbitration provision. He says that there is no dispute 'arising out of or connected with' the partnership Articles. The claim, he says, is for the dissolution of the Partnerships under section 37 of the Act. The allegations relied upon are not matters upon which the Claimants seek a final resolution. They are not interested in seeking compensation or any other form of relief in relation to these alleged happenings. Mr. Russen QC accepts, of course, that if this matter goes to trial, he will have to prove a sufficient number of them in order to qualify for the relief which is sought, but he says that the object of the exercise is not to resolve issues arising out of or in connection with the Articles but to put an end to the parties' relationship by way of order of the Court. The enumerated complaints are merely the evidence upon which the Claimants will seek to justify the making of such an order.

[15] In support of this submission he relies upon a decision of the Court of Appeal in Northern Ireland, **In the Matter of Wine Inns Ltd.**[4] That was a case where a member of the company had petitioned for its winding up on just and equitable grounds, with an alternative claim for unfair prejudice relief. A shareholders agreement contained an arbitration provision in the following terms:

> "WHENEVER any doubt, difference or dispute shall arise between the Shareholders or any of them or between any of them and the personal representatives of any other Shareholder affecting this Agreement or the construction hereof or any clause or thing herein contained or any other thing in any wise relating to or concerning the business of the Company or

[3] by non admission and indication of an intention to defend
[4] [2000] NICA 15 (30 June 2000)

the rights, duties or liabilities of any Shareholder hereunder the matter in difference shall be referred to a single arbitrator..."

[16] The Northern Ireland Court of Appeal assumed that an arbitrator would have no power to make an order winding up the company or granting unfair prejudice relief. The decision, however, was based primarily upon the scope of the arbitration provision. The Court of Appeal held (a) that there were only two issues between the parties – (1) whether it was just and equitable that the company should be wound up and (2) whether the company's affairs had been conducted in such a way that the petitioner was entitled to relief upon the unfair prejudice basis – and (b) that neither of those issues came within the scope of the provision. Tracking the language of the arbitration clause, the Court of Appeal held that neither of those two issues constituted a doubt, difference or dispute affecting the shareholders agreement, or the construction of any of its terms. Nor did the issues identified by the Court of Appeal relate to or concern the business of the company or affect the rights, duties or liabilities of any shareholder under the agreement, which did not purport to govern the situation where a winding up or unfair prejudice remedy was being sought. Finally, the Court of Appeal held that it could not suppose that the parties can have intended to refer to arbitration a matter in respect of which the arbitrator would have no power to grant any of the relief sought in the proceedings.

[17] While it is well established that an arbitrator cannot make an award winding up a limited company, it is the law here[5] and in England and Wales[6] that he may grant relief in unfair prejudice proceedings – although if the arbitrator concludes that winding up is the appropriate remedy for the prejudice complained of, it will be necessary for application to be made to the Court for it to make the actual order. So that the decision is to some extent weakened for present purposes by that fact.

[18] In my judgment, however, the reduction by the Northern Ireland Court of Appeal of the dispute between the parties to the single[7] question whether the relevant provisions of the Insolvency (Northern Ireland) Order 1989 were engaged was an impermissible approach to the construction of the arbitration clause. The question whether or not particular relief should be awarded by an arbitrator (assuming that he has the power to award it) can never answer the logically prior question what is the scope of the arbitration agreement itself, because the arbitration agreement defines the scope of the disputes which fall within its terms, not the nature of the entitlement which a party may turn out to have established at the conclusion of the arbitral process. By defining the inquiry by reference

[5] **Zanotti v Interlog Finance Corp. BVIHCV 2009/0394 (8 February 2010)**

[6] **Fulham Football Club (1987) Ltd v Richards [2011] EWCA Civ 855**

[7] **although the Court of Appeal held that there was a separate question (or 'issue') under each of the separate provisions invoked, there was in truth, on this analysis, only one question (or 'issue'), which was whether the claimant was entitled to the relief claimed**

to remedy, rather than subject matter, the Northern Ireland Court of Appeal ensured that the dispute before them, whatever its nature, would be bound to fall outside the scope of the arbitration agreement.

[19] In my judgment the right question in the present case is whether the disputed claim to have the Partnerships dissolved and wound up is a 'dispute arising out of or in connection with [the Articles of KBC and/or SCI].' It seems to me to be obvious that it is. The parties are bound together contractually by the Articles of the two Partnerships. The Claimants wish them to be unbound. The Defendants disagree. This is a dispute in connection with the Articles of the respective Partnerships.

[20] Mr. Russen QC argues that if the arbitration agreements are construed as enabling an arbitrator to determine whether or not the Partnerships should be dissolved and, if so, to make an award dissolving them, the result will be that the Claimants are to be taken to have given up their right to approach the Court for a decree of dissolution under section 65(1)(c) of the Act. So, he argues, by reference to the reasoning in **In the Matter of Wine Inns**,[8] the parties cannot have intended that the arbitration clauses covered issues of dissolution/no dissolution.

[21] That seems to me to be a back to front approach to the question of construction. All arbitration agreements by their nature give up rights to approach the Court. The fact that a right may be conferred by statute does not by itself mean that it may not be relinquished in favour of arbitration if that is what the arbitration agreement provides for – see **Zanotti**[9] and **Fulham Football Club**.[10]

[22] In my judgment, therefore, the claim is within the scope of the arbitration provisions which apply in the present case.

Arbitrability

[23] Mr. Russen QC submits that, unless the general partner(s) invoke the procedure laid down in section 105 of the Act (which I will mention in a moment), only the Court has the power to dissolve/wind up a limited partnership constituted under Part VI of the Act. It follows, he says, that the dispute about whether the Partnerships should be wound up is not arbitrable.

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[8] (supra)
[9] (supra)
[10] (supra)

[24] This submission requires an examination of the statutory material governing the establishment and dissolution of limited partnerships under the Act. Parts I to V of the Act deal with the constitution of general (i.e. unlimited[11]) partnerships; the liabilities of their partners to outsiders and to each other; and their dissolution. A limited partnership is defined by section 47(1) of the Act as a partnership formed by two or more persons under Part VI which has one or more general partners and one or more limited partners. A limited partner is defined by section 2 of the Act as a partner who takes no part in the control of the partnership business and whose liability is limited by the provisions of the Act. A general partner is defined as a partner other than a limited partner. Section 62(1) provides, in short, that a limited partner has no liability for the obligations of the partnership unless he deals with third parties in such a way that they are encouraged to believe that he is a general partner. Section 64 provides that a general partner is in the same position as a partner in a partnership governed by Parts I to V of the Act, although his authority to effect certain specified transactions is limited in the absence of the unanimous written consent of the limited partners.

[25] Sections 53 and 54 of the Act, when read together with certain other of the provisions of the Act, set out the requirements for the formation of a limited partnership. They require the execution of Articles of limited partnership, the maintaining of a registered office,[12] the appointment of a registered agent,[13] and the filing of particulars with the Registrar of Corporate Affairs. The Registrar registers the limited partnership in a register maintained for that purpose and issues a certificate of limited partnership, which operates as *prima facie* evidence that the requirements of the Act have been complied with. Failure to register in accordance with these requirements means that the partnership shall be deemed to be a general partnership with every partner deemed to be a general partner.[14]

[26] Section 80 provides for the service of documents upon a limited partnership, by either sending, etc, the document to the registered office or to the registered agent.

[27] Subsection 65(1)(c) provides that, subject to any limitation set forth in the articles, a limited partner shall have the same right as a general partner to apply to the Court for an order that the partnership be dissolved and wound up. In other words, a limited partner has the same right as a partner in a general partnership (i.e. a partnership falling within Parts I to V of the Act[15]) to seek a dissolution from the Court whenever the circumstances set out in section 37 of the Act are fulfilled. Section 108 makes clear that on such an application the Court may make such orders and give such directions as it thinks just and

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[11] section 2 of the Act
[12] this by section 82
[13] this by section 84(1)
[14] section 56
[15] see section 2 of the Act

equitable in all the circumstances. There is, in other words, no statutory scheme for the winding up of a partnership, general or limited, by the Court.

[28] Section 105 deals with the procedure for winding up and dissolution otherwise than by order of the Court. There is no need for present purposes for me to set out these provisions in detail, other than to mention that the Act envisages that the process will be instigated by the general, rather than the limited partners and that the process of winding up will be carried out by a liquidator appointed, presumably, by the general partner(s). If on dissolution (other than a dissolution by the Court) it appears that the limited partnership is insolvent, the general partners or liquidator (if the view is reached after his appointment) must notify the Registrar, whereupon the winding up and dissolution must proceed in accordance with the provisions of the Companies Act,[16] whose provisions are to be applied *mutatis mutandis* to the winding up and dissolution of the limited partnership. The Insolvency Act 2003, as amended, permits the Executive Council to make rules governing the position of insolvent limited partnerships. I was not informed at the hearing whether any such rules have been made. After I had settled the first draft of this judgment, however, I was informed by letter from Appleby, acting for the Claimants, that at the time of writing no such regulations have been made. In any event, the existence of the power to make such rules can have no bearing on the question whether a limited partnership is to be treated as having a separate identity, if only because an equivalent power is available in the case of insolvent estates.[17]

[29] Taking all this material together, it seems to me to be impossible to extract from it any indication that a limited partnership formed under Part VI has any separate existence apart from those of its constituent members. It is true to say that the rules about registered offices, registered agents, registration and service of documents might suggest an intention to treat the limited partnership in certain particulars as if it had a separate existence, but the critical words are 'as if.' Had it been the intention of the legislature to incorporate limited partnerships formed under Part VI, the legislature would surely have used language apt to produce that result. In my judgment, a limited partnership formed under Part VI is no more than a species of general partnership. That is perhaps shown most clearly by (a) the application generally of Parts I to V of the Act to partnerships formed under Part VI and (b), most vividly, by the deeming provision in section 56. The fact that a purported limited partnership which does not comply with the provisions of section 53 is simply to be treated thenceforth as a general partnership shows clearly that Part VI is designed to provide limited liability to certain members of a partnership, not to create a separate corporate entity. An award dissolving a limited

[16] Cap 285
[17] Insolvency Act, 2003, section 500

partnership would take effect by doing no more than dissolving, progressively,[18] the contractual and equitable bonds which bind its members. There is no difficulty in such an award being made by an arbitrator, any more than there is in an arbitrator making any other arbitral award affecting a contractual or equitable relationship.

[30] I therefore see no need to qualify what I said on this aspect of the matter in **Stillman v Attorney General.**[19]

[31] The long standing objection to arbitrators purporting to wind up limited companies is not based only, however, on the inability of a private individual to dissolve an entity which is entirely the creature of statute. It is based at least as firmly in the inability of a private individual, acting as an arbitrator, to make awards binding persons other than the parties to the arbitration. An appointment of liquidators to a company within the meaning of the Insolvency Act, 2003 by the Court immediately affects the rights of third parties. I do not consider that by making an award dissolving a limited partnership an arbitrator would be purporting to do any such thing. The dissolution of a partnership, general or limited, like a members' voluntary winding up, leaves the rights of creditors and others unaffected. They remain free to pursue liable partners singly or collectively unless and until those partners are themselves brought within a statutory insolvency regime. It is true that on the dissolution of a limited partnership which turns out to be insolvent (other than a dissolution by the Court) section 107 of the Act will, or in present circumstances may,[20] impose an insolvency regime upon it. But an award of dissolution by an arbitrator does not of itself have any such effect, even if the limited partnership is insolvent. Imposition of an insolvency regime would flow, not from the award of dissolution, but from the obligation of the general partner(s) to notify the Registrar of the insolvency. Even if the consequences of the notification are that third parties will become affected in their rights, as to which I say nothing, those consequences will not have been the result of the award of dissolution, but of the operation of the Act itself in the circumstances of a dissolution which turns out to be insolvent.

Conclusion

[32] In my judgment, a limited partnership has no identity separate from the identities of its constituent members. Dissolution and/or winding up of a limited partnership, whether solvent or insolvent, has no effect on the rights and interests of third parties. There is therefore no legal obstacle to the making by an arbitrator of an award of dissolution/winding up in respect of a limited partnership constituted under Part VI of the

[18] because the bonds will subsist for the limited purpose of completing the winding up of the partnership
[19] BVIHCV(COM) 2011/96 (9 June 2011), at paragraph [22]
[20] I say 'may' because the current effect of section 107 is obscure

1976 Act. The dispute raised in the present proceedings falls within the scope of the arbitration agreements in the Articles and Consultancy Agreements. There being no reason for treating the arbitration agreements in the present case as null, void, inoperative or incapable of being performed, I am accordingly bound by section 6(2) of the Arbitration Ordinance to stay the present proceedings.

Commercial Court Judge
12 March 2013