IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
VIRGIN ISLANDS
COMMERCIAL DIVISION

CLAIM NO: BVIHCM (COM) 2013/0026

In the matter of

Section 109 of the British Virgin Islands Partnership act, 2006

And in the matter of

Value Discovery Partners, LP (in liquidation)

And in the matter of

An application by the Joint Liquidators

Applicants:

(1) Kenneth Krys
(2) John Greenwood
(As Joint Liquidators of Value Discovery Partners, LP)

Respondents:

(1) New World Value Fund Limited
(2) KBC Partners LP, by its General Partner, Salford Capital Partners Inc.
(3) SCI Partners LP, by its General Partner, Salford Capital Partners Inc.
(4) Salford Capital Partners Inc.

Appearances: Ms Arabella di Iorio and Mr Brian Lacy for the Applicant first defendant
Mr Ian Mill QC for the Respondent second to fourth defendants
Ms Nadine Whyte for the Respondent claimants

2013: 11, 19 April

JUDGMENT

(Limited partnership – liquidators appointed for the purposes of winding up and dissolution – questions arising as to entitlements to distributions in the winding up – liquidators commencing proceedings against limited partners for resolution of those questions – articles of partnership embodying arbitration agreement between general and limited partners – first defendant limited partner applying for stay in favour of arbitration - whether liquidators bound by arbitration agreement – whether 'dispute'

within the meaning of the arbitration agreement – whether applicant debarred from seeking stay as having taken a step in the proceedings – section 6(2) of the Arbitration Ordinance 1976 considered - whether applicant stopped from seeking stay)

[1] **Bannister J [Ag]:** This is an application by the first defendant to these proceedings, New World Value Fund Limited ('NWVF') for a stay pursuant to section 6(2) of the Arbitration Act, 1976 (CAP 6) ('the Act') pending arbitration of what are alleged to be the matters in dispute between the parties to (and in) the claim. The application is opposed by the second to fourth defendants. The claimant Liquidators are neutral.

[2] The claim form was issued on 22 February 2013. The claimants are Mr Kenneth Krys and Mr John Greenwood in their capacity as Liquidators of a limited partnership called Value Discovery Partners LP ('the Liquidators', 'VDP'). NWVF is described as the principal limited partner of VDP, while the second and third defendants (who I will refer to as KBC and SCI respectively) are special limited partners of VDP. VDP's general partner is the fourth Defendant ('SCPI'). On 23 October 2012 a plan of dissolution for the winding up of VDP was submitted and registered, and the claimant Liquidators were appointed as liquidators for the purposes of the dissolution. For reasons which are not material to this application, those appointments were confirmed, with the same value date, by restated articles of dissolution executed in November 2012. There is no dispute about the validity of these appointments, or as to the fact that for the purpose of performing the duties set out in section 105 of the Partnership Act, 1996 ('the Partnership Act') in relation to the winding up and dissolution the Liquidators have all powers of the general partners, including, but not limited to, the powers set out in section 104 of that Act.

[3] VDP is effectively a holding entity for a number of trading interests in the CIS and Balkans. By the beginning of this year an issue had arisen between NWVF and the special limited partners, KBC and SCI, about their respective entitlements to distributions in the winding up of VDP. The issue turns on the true construction of VDP's Amended Articles of Partnership.

[4] On 22 January 2013 Jones Day, who were acting for the Liquidators, asked Ms Helen Brannigan, of Signature Litigation LLP, who were acting for NWVF, for her views as to how the issue should be determined. He suggested either a bilateral arbitration between NWVF and SCPI, as general partner, pursuant to the arbitration provisions contained in the Articles of Partnership of VDP, or a 'tripartite' Court process in the Courts of the BVI. On 25 January 2013 Brown Rudnick, the Solicitors for KBC and SCI, wrote to Jones Day, seeking an early resolution of the issue and proposing that an *ad hoc* arbitration be constituted to decide the issue, with a fall back that if the parties were unable to agree on setting up a tribunal within five working days the Liquidators should be free to seek the necessary directions from the Court. Jones Day forwarded the proposal to Ms Brannigan on the same day. On 30 January 2013 Jones Day pressed Ms Brannigan for her client's views as to how the issue should be resolved. They also asked her to set out her client's position on the issue.

[5] On 4 February 2013 Ms Brannigan replied that she considered it most appropriate for the issue to be resolved in proceedings to take place before the BVI Court rather than through arbitration. Her stated reasons for this preference were (a) the degree of agreement required in order to pursue the course proposed by Brown Rudnick and (b) the fact that Court proceedings would not be hampered by restraints on scope which would be imposed by any agreement to arbitrate. She did not respond to the request that she set out her client's position.

[6] On 8 February 2013 Ms Brannigan emailed Jones Day saying that she agreed that it was in the interests of all parties that the Liquidators should commence what she described as interpleader proceedings. It is common ground that this was merely a convenient way of describing BVI Court proceedings designed to resolve the entitlement issue. She went on to say that NWVF might counterclaim in such proceedings for a declaration concerning an issue surrounding the question of distribution *in specie*. She said that she thought the issues would require two to three days, rather than the single day proposed by Brown Rudnick, to resolve and that she had informally reserved 28, 29 and 30 May 2013 with the Commercial Court Registry here in the BVI. She suggested that local lawyers liaise to secure the dates.

[7] The Liquidators issued their fixed date claim form in the BVI on 22 February 2013, with a first hearing date of 1 May 2013. Although taking the form of a construction summons, the claim is essentially for directions as to how the Liquidators should effect distributions in the winding up. On 27 February 2013 Ms Brannigan wrote to Jones Day acknowledging receipt but saying that NWVF's preferred choice of leading Counsel was not available on 1 May 2013. She therefore asked for the date to be changed to one convenient to all parties. Brown Rudnick indicated that their Counsel could manage each of 1 and 14 May 2013, said that they were opposed to any adjournment and gave it as their view that since the question was purely one of construction it was not necessary that Counsel arguing it should have had any prior acquaintance with the case. Jones Day adopted the same position. On 5 March 2013 Ms Brannigan reiterated that the date need to change to accommodate NWVF's preferred leading Counsel.

[8] On 15 March 2013 Ms Brannigan indicated that in the light of the refusal of the other parties involved to move the 1 May 2013 date NWVF would shortly be writing to set out its position with a view to making an application to the BVI Court for an adjournment.

[9] On 18 March 2013 Maples & Calder, for NWVF, wrote to O'Neal Webster, for the Liquidators, objecting to a hearing on 1 May 2013 on the grounds: (a) that the date had been taken without consulting NWVF as to the availability on that date of its legal team; (b) that their leading Counsel of choice was unavailable on that day; and (c) that in their view the hearing would last more than one day. They ended by intimating that if a new date could not be agreed an application would be made for a hearing to refix the date.

[10] On 22 March 2013 Maples & Calder wrote to the Commercial Court office asking for a fifteen minute hearing to enable them to seek an order that the return date of 1 May 2013 be relisted to

come on over a three day period between either 18/20 June or 2/11 July 2013. On the same day the Court agreed to hear the application for re-listing at noon on 27 March 2003.

[12] On 26 March 2013 Maples & Calder wrote to the other parties saying, for the first time, that NWVF was of the view that the claim should be stayed in favour of arbitration. NWVF's application for a stay was issued at 9.38 am on 27 March 2013 and its application for an adjournment of the 1 May 2013 hearing came on at 10:30am on the same day. The 1 May 2013 hearing was adjourned.

[13] Section 6(2) of the Act provides as follows:

> "If any party to an arbitration agreement, other that 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 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."

It is common ground that the arbitration agreement relied upon by NWVF on this application is not a domestic arbitration agreement.

[14] The arbitration agreement relied upon by NWVF is to be found at Article 13.17.1 and 13.17.2 of VDP's Amended Articles of Partnership. Its material parts read as follows:

> "13.17.1. In the event of a dispute between the General Partner and one or more of the Limited Partners, including, without limitation, a dispute concerning a breach or alleged breach of these Articles or the inability of the General Partner to perform its management functions or a determination by the General Partner (a "Dispute"), the General Partner and the Limited Partners shall use their best endeavours to resolve such Dispute between themselves for 60 (sixty) days from date that such Dispute arises. 13.17.2. If the parties fail to resolve a Dispute within the time period set out in clause 13.17.1, such Dispute shall be referred to the London Court of International Arbitration ("LCIA") for final and binding resolution under its rules, which are deemed to be incorporated by reference into this clause 13.17.2. The arbitration

shall be conducted in the City of London, before 3 (three) arbitrators appointed in accordance with the LCIA Rules and the Language of the arbitration shall be English...."

[15] It will be seen that the arbitration agreement concerns only disputes between the general partner and one or more of the limited partners. There is clearly a dispute between the limited partners in this case about the entitlement to distributions. That dispute is not covered by Article 13.17. Mr Lacy, for NWVF, submits that there is also a dispute between the claimant Liquidators and the limited partners. He says that by refusing to distribute until the Court has decided upon who is entitled to receive them, the Liquidators are in dispute with the first to third defendants. I reject this submission. If a bank declines to comply with a demand for payment until satisfied as to the identity of the person making the demand, it is not engaged in any sort of dispute with that person. It is satisfying itself as to that person's entitlement. The position is no different here. A dispute involves the participants in the dispute asserting inconsistent rights or maintaining inconsistent opinions. The Liquidators are not asserting any rights or maintaining any opinions. They are not in dispute with anyone.

[16] In any case, the Liquidators are not party to the arbitration agreement. Mr Lacy seeks to get round this by submitting that they are to be treated as if they are. He says that pursuant to section 104 of the Partnership Act, all powers of the general partners are conferred upon the Liquidators. So, he submits, they are to be treated as is they were general partners in all respects, and subject to all the constraints by which SCPI is bound under the Amended Articles of Partnership, including the obligation to refer disputes between itself and the limited partners to arbitration. This submission fails for a number of reasons.

[17] It is not possible for a person to become party to and bound by an agreement made between strangers otherwise than by becoming the successor in title of one of the parties; or by acceding to it with the consent of all other parties; or, which may come to the same thing, by novation; or because a statute so provides. Nothing of the sort applies in the present case.

[18] Section 104 of the Partnership Act, conferring the powers in question, confers them expressly for the purpose of enabling them to perform their duties, imposed by section 105, in carrying out the winding up and dissolution of the partnership. This is consistent only with a situation where the Liquidators are not and are not to be treated as if they were general partners for all purposes.

[19] While a party succeeding to a right may be bound to observe the incidents to which the exercise of that right is subject, the Liquidators are not purporting, and have no standing , to exercise any rights (as opposed to powers) conferred upon any of the partners under VDP's Amended Articles of Partnership.

[20] If the Liquidators are to be treated as general partners of VDP, they would also have to be treated as personally liable for all of its debts. That would come as something of a surprise to Mr Krys and Mr Greenwood.

Conclusion on application of Article 13.17 to the facts

[21] There is no dispute between the Liquidators and NWVF and, if there was, it would not fall within Article 13.17, by which the Liquidators are not, and are not to be treated as, bound. NWVF is not, therefore, entitled to a stay of these proceedings pursuant to section 6(2) of the Act and this application fails accordingly.

Step in the action/estoppel

[22] It is not strictly necessary for me to deal with two further arguments put forward by Mr Mill QC on behalf of the KBC and SCI, but since some time was spent upon them I should perhaps at least indicate my *obiter* conclusions upon them.

[23] First, it was said that by asking the Court for a hearing in order to obtain a relisting of the 1 May 2013 hearing, NWVF was taking a step in the action and is thus precluded by the terms of section 6(2) of the act from obtaining a stay. A step in an action, for these purposes, has been described as something which evinces an election to have the dispute resolved in Court and, correspondingly, a waiver of any right to have the dispute referred to arbitration.[1] In the analogous context of submission to the jurisdiction, it has been said that in order to be relied upon as a waiver, the step must be such that it is consistent only with the fact that the party taking it accepts that the Court should be given jurisdiction. If the step can be explained as having been useful for some purpose other than the acceptance of jurisdiction, then it cannot be relied upon as a submission.[2]

[24] It seems to me that a party asking the Court to arrange a hearing at which it proposes to ask for the indulgence of an adjournment of a trial in order that it may be represented at the adjourned trial by Counsel of its choice takes a step in the action from which the only possible inference is that it is not interested in invoking the arbitration agreement but instead wishes the matter to be heard by the Court at a time and in the manner most advantageous to its own perceived interests.. Mr Lacy submitted that the step was also consistent with wishing to have the protection of a hearing at which NWVF could be represented by Counsel of its choice in case its stay application failed. It seems to me that this step as taken was consistent only with an acceptance that the matter should go forward to trial in the BVI. If one of the growing throng of informed but disinterested observers whose views are more and more frequently sought by judges in order to help them to make up their minds were asked (being an informed observer he would, of course, also be aware that NWVF had previously rejected an offer of arbitration in favour of a trial in the BVI) why he thought that NWVF had asked for the listing appointment, he must have answered that it had done so in order to ensure that it would be represented at a trial in the BVI by Counsel of its choice and not for any other reason.

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[1] **Eagle Star Insurance Co Ltd v Yuval Insurance Ltd** [1978] Ll L Rep 357 at 361 (LH column)
[2] **Global Multimedia International v ARA Media Services** [2006] EWHC 3612 (Ch) at para 27

[25] It seems to me, therefore, that on 22 March 2013 NWVF took a step in the proceedings within the meaning of section 6(2) of the Act and that it thereby precluded itself from thereafter obtaining a stay of them in favour of arbitration.

[26] Estoppel I can deal with quite shortly. In February of 2013 NWVF was asked for its preference as between arbitration on the one hand and proceedings in the BVI on the other. It gave reasoned objections for rejecting arbitration in favour of Court proceedings here. The other parties yielded to that expressed preference and the present proceedings were commenced in consequence. Expense has been incurred in and about them both by the Liquidators and by the second to fourth defendants. There can be no doubt that against this background NWVF is estopped from now changing tack and asking to have the matter arbitrated. Mr Lacy relied upon some words in a passage from Merkin on Arbitration Law[3] as authority for the proposition that the facts founding an estoppel must have occurred only after the person estopped has become party to the proceedings in which the stay is sought. In my judgment, the words relied upon by Mr Lacy are words identifying the person estopped; they do not define a *terminus ante quem* the estoppel is incapable of arising.

The 60 days point

[27] Article 13.17.1 of VDP's Amended Articles of Association requires the general and limited partners to use their best endeavours to resolve any dispute that has arisen between them for sixty days following the date when the dispute arises. Only if the parties fail within that period to achieve resolution is the dispute to be referred to arbitration. In the present case there has been no attempt at dispute resolution as envisaged by article 13.17.1. It is said, therefore, by Mr Mill QC on behalf of KBC and SCI, that a condition precedent to the reference has not been satisfied. I was referred to a number of decisions on the approach to provisions of this character, with most (if not all) coming down on the side of 'unenforceability' (in the sense that the provision in question was too uncertain to be workable as a condition precedent). Each turned on its own facts. Had a dispute within the meaning of article 13.17 arisen in this case, I would have been inclined to hold that the wording of article 13.17.1 was sufficiently certain to operate as a valid condition precedent. In the present case, however, and for the reasons given in paragraphs [15] to [20] of this judgment, there is no dispute between the general and limited partners; nothing to resolve pursuant to Article 13.17.1; and nothing to go to arbitration pursuant to Article 13.17.2. The sixty day point does not arise.

Commercial Court Judge
19 April 2013

[3] cited in **Patel v Patel** [2000] QB 551 at 558D