EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 2013/0026

BETWEEN:

(1) KENNETH KRYS
(2) JOHN GREENWOOD
(As Joint Liquidators of Value Discovery Partners, LP)

Claimants

and

(1) NEW WORLD VALUE FUND LIMITED
(2) KBC PARTNERS LP, by its General Partner, Salford Capital Partner Inc.
(3) SCI PARTNERS LP, by its General Partner, Salford Capital Partner Inc.
(4) SALFORD CAPITAL PARTNERS INC.

Defendants

Appearances: Mr Paul Webster QC and Ms Nadine Whyte for the Claimants
Mr Matthew Collings QC, Mr Ciaran Keller and Mr Brian Lacy for the first Defendant
Mr Ian Mill QC for the second to fourth Defendants

JUDGMENT

(2013: 17, 27 June)

(Construction of Articles of Partnership – whether Partners' Interests vested or subject to a contingency now impossible of fulfillment)

[1] **Bannister J [Ag]:** This is an application made by the Joint Liquidators of a limited partnership formed on 27 September 2004 under the Partnership Act, 1996 and named Value Discovery Partners LP ('the Partnership,' 'VDP'). The Partnership terminated in accordance with its Articles of Partnership on 1 July

2012. As at that date, none of its assets had been sold. On 23 October 2012 Articles of Dissolution were registered with the Financial Services Commission appointing the Applicants, Mr Kenneth Krys and Mr John Greenwood, as Joint Liquidators. The appointment was ratified and confirmed on 2 November 2012. There is no dispute that the Joint Liquidators are validly in office as such.

[2] The application is designed to resolve a dispute that has arisen between certain members of the Partnership. They are the first Defendant, New World Value Fund Limited ('NWVF'), which is defined in the Articles of Partnership as the Principal Limited Partner, on the one hand, and the two Special Limited Partners, the second Defendant, KBC Partners LC, described as Special Limited Partner I ('KBC'), and the third Defendant, SCI Partners LP, described as Special Limited Partner II ('SCI). NWVF, KBC and SCI are the only limited partner members of the Partnership. The only other member of the Partnership is the fourth Defendant, Salford Capital Partners Inc ('Salford'). Salford is the General Partner, with extensive, not to say exclusive, management powers. KBC and SCI represent the interests of individuals working for Salford. It seems that these persons, under the supervision of Mr Eugene Jaffe ('Mr Jaffe'), who owns Salford, had provided management services to NWVF during the period in which it had held the assets for itself and before they were transferred to VDP to become assets of the Partnership. I shall refer to the second to fourth Defendants as 'the Salford Defendants.'

[3] Although I shall have to set out the details of the dispute in more detail later in this judgment, it is sufficient at this point to say that it concerns the entitlements of the parties in dispute to the assets of the Partnership in its liquidation. Briefly, NWVF contends that in the events which have happened KBC and SCI are entitled to a return of their capital (US$100 each) and nothing else. KBC and SCI, on the other hand, claim that they are entitled in addition to 24% (in the case of KBC) and 6% (in the case of SCI) of gains and profits accumulated since the inception of the Partnership (so called 'carried interest'). The amount at stake is considerable. It appears from the evidence that in October 2012 Citigroup Global Markets Limited estimated VDP's assets as worth over US$1.3

billion (compared with their value of some US$320 million when the Partnership was funded).

[4] Determination of the issue raised by the application requires a detailed examination of various provisions in the Articles of Partnership, but before I do that I must set out some of the background matters relied upon by the parties as *matrix,* to be taken into account in ascertaining the meaning of the words used in the Articles. While both Mr Matthew Collings QC, who appeared together with Mr Ciaran Keller and Mr Brian Lacy for NWVF, and Mr Ian Mill QC, who appeared for the Salford Defendants, referred at some length to recent authority upon the proper approach to contractual construction so far as they are concerned with *matrix,*[1] I found little in the extensive evidence which has been filed which was properly admissible as such. What I did find is set out in the next paragraph.

Relevant background

[5] It appears that the assets of the Partnership were contributed by NWVF[2] alone and that they had previously been managed on behalf of NWVF by (broadly speaking) the individuals involved in Salford. KBC and SCI contributed US$100 each. The business assets consisted of mineral water businesses in the Ukraine, Georgia and the Russian Federation (the shares in the holding company of which have been distributed *in specie* by the Joint Liquidators to NWVF) and dairy, confectionary and bottled water businesses in the Balkans. Those ultimately interested in those assets were Mr Badri Partakatsishvili and Mr Boris Berezovsky[3] (both now deceased) and it appears that the assets were put into VDP with the object, at least in part, of distancing those individuals from them in order to minimize the potential for friction with the Russian Government.

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[1] the word seems to have fallen out of fashion somewhat, but it is convenient shorthand for the matters identified as proper to be taken into account in, eg, **ICS v West Bromwich Building Society** [1998] WLR 896 at 912, 913; **Oceanbulk Shipping and Trading SA v TMT Asia Ltd** [2011] 1 AC 662; **Rainy Sky SA v Kookmin Bank** [2011] 1 WLR 2900; **Al Sanea v Saad Investments Co Ltd** [2012 EWCA Civ 313 at 31(i)

[2] a total of US$320 million between 17 March 2005 and 21 July 2006, of which it is to be inferred that an injection on 17 March 2005 of US$272,748,678.90 was the value of the businesses when they were transferred from NWVF to VDP

[3] it appears that the interests of Mr Berezovsky have either been abandoned or have accrued to the estate of Mr Partakatsishvili

[6] Evidence was put in by Mr Jaffe to the effect that the management fee payable to Salford was low by industry standards. The Salford Defendants rely upon this as showing that carried interest was part of their remuneration and thus to be treated as vested (subject only to the achievement of the relevant level of profits) rather than contingent, but I do not think that the fact, if true, that the management fee was low by industry standards can be prayed in aid in construing the Articles of Partnership. Similar considerations apply to NWVF's assertion that the 30% of profits payable to KBC and SCI was high by industry standards. The only question is what was agreed, as gathered from the Articles of Partnership and relevant background materials.

[7] Mr Mill referred me to **Golden Key Ltd**[4] in support of a submission that I should bear in mind, as an aid to construction, the objectively ascertained 'aim' of the transaction. I did not find that submission particularly helpful in context. The 'aim' of the particular transaction (the formation of the Partnership) is set out at length in clause 1.2 of the Articles of Partnership[5], headed 'Purpose.' The 'Purpose' is expressed to be to carry on business with the principal objective of providing the Limited Partners with a high rate of return. I do not think, in the light of that, that the Court needs to concern itself with ascertaining any other 'aim,' objective or otherwise. Mr Mill is entitled, of course, to rely upon the expressed aim as illuminating the other provisions of the Articles of Partnership, but that is something else.

[8] With those now conventional preliminaries disposed of, I can turn to the matter in issue.

The Articles of Partnership

[9] The overall scheme of the Partnership, as gathered from its Articles of Partnership,[6] which are governed by BVI law, was as follows.

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[4] [2009] EWCA Civ 636 at paragraph 27

[5] although described as Articles of Partnership, all cross references in the document are to 'Clauses'

[6] Salford's Articles of Partnership had been twice amended – once on 15 February 2005 and again on 31 July 2006. It was the latest version which was before the Court

[10] The term of the Partnership was to continue until 1 July 2008,[7] but could be continued pursuant to Clause 11.2. Under Clause 11.2.1 Salford could extend the term of its own motion for one year 'in order to permit an orderly liquidation of the Partnership Assets.' Alternatively, Salford and the Limited Partners together could agree to extend for an initial two years.[8] In that event, Salford could extend of its own motion for a further year to 1 July 2011, again in order to permit an orderly liquidation of the assets.[9] If Salford had extended of its own motion in the manner described in Clause 11.2.1, and if it was of the view that 'due to market conditions for the sale of certain investments' an orderly liquidation of the Partnership assets was not possible by the then termination date and provided that it had complied with certain notification requirements and after discussion with the Limited Partners, Salford could, 'acting reasonably and in good faith,' extend the date of termination by such time, as was needed to complete the orderly liquidation of the assets, 'but in no event more than four years' (sic).[10] It appears that the parties have interpreted the provision to require that the Partnership must determine by not later than 1 July 2012 in any event. While that might be open to question, it is how that parties have acted. The evidence is that all extensions after 1 July 2008 were effected pursuant to Clauses 11.2.1 or 11.2.3.

[11] Clause 3.4 provides that capital contributions shall, unless otherwise agreed, be repaid only 'on the termination or liquidation' of the Partnership.

[12] Clause 4 vests the power of management exclusively in Salford. Clause 4.3 provides for the establishment of an investment committee. Clause 4.7 introduces the concept of 'Strategies.' This is a fancy term for a group of investments having common characteristics, and a list contained in Schedule 2 to the Articles defines the Strategies as 'Water,' 'Balkan food and beverage' and the omnibus 'Other.'

[13] Clause 6 contains provision for audited partnership accounts. It was the obligation of Salford to prepare accounts of the

[7] Clause 1.5
[8] Clause 11.2.2
[9] Clause 11.2.1
[10] Clause 11.2.3

Partnership for each Accounting Period.[11] Clause 6.2 provides for the setting up of (at least) a Capital Commitment Account, to which the partner's Commitment[12] was to be 'credited;' a Capital Account, to which the partner's actual capital contribution was to be credited and, conversely, amounts repaid pursuant to Clause 8.1[13] were to be debited; an Income Account, to which Net Income[14] and Capital Gains were to be credited and Net Losses and Capital Losses were correspondingly to be debited; and an Interim Investment Account, to which income from temporarily held investments which had been allocated to each Limited Partner pursuant to Clause 7.1.6 was to be credited. Clause 7.1.6 provides that all Interim Investment Income was to be allocated to NWVF. NWVF had the option to have such credits treated as Capital Contributions, in which case they were debited from the Interim Investment Account and (presumably, although that is not made explicit) credited to its Capital Account.

[14] Clause 7 is headed 'Allocations of Profit and Losses between Partners.' Clause 7.1 is sub-headed 'The Management Fee, Interim Investment Income and Carried Interest Accounts.' Clause 7.1 provides that Salford

> 'shall be entitled to receive and, as the first deduction against Net Income and Capital Gains, there shall be allocated to [Salford] . . .the Management fee in respect of each Accounting Period . . .'

Clause 7.1.2 provides that the Management Fee shall be 2% per annum of the weighted average of Total Commitments (up to a limit of US$300 million) for the relevant Accounting Period. If, however, the term of the Partnership had been extended pursuant to clause 11.2.1 in order to permit an orderly liquidation of the Partnership's assets,[15] or under clause 11.2.3 (but not under clause 11.2.2) then the Management Fee would reduce to 0.4%

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[11] defined as successive periods ending on each successive 31 December, with the final Accounting Period ending on the termination date (1 July 2012).

[12] defined as the amount which the Partner had bound itself to contribute

[13] see paragraph [22] below

[14] whether in respect of the Partnership as a whole, of any Strategy, or generated by any after acquired Investments. 'Investments' are all partnership investments other than temporary holding ('interim') investments

[15] see paragraph [10] above

of the weighted average of (in the events which happened) US$300 million. The upshot is that if the partnership term was extended by agreement (under Clause 11.2.2) then the Management Fee would remain at 2%. Only if Salford extended for the purposes of orderly liquidation was the Management Fee to be reduced. In the events which have happened, the Management Fee from 1 July 2008 onwards will have been 0.4%.[16]

[15] Clause 7.1.5 provided that the Management Fee was to have priority over all other payments out, something confirmed by Clause 8.1(a).

[16] Clause 7.1.7 deals with Net Income, Net Losses, Capital Gains and Capital Losses arising from Carried Interest Accounts. Carried Interest Accounts are defined by clause 8.3.1. These are separate bank accounts, to be opened in respect of each Strategy, into which 30% of the Net Investment Return[17] received upon the sale of any Investment after 1 July 2007, or of any Net Return producing Capital Proceeds in excess of US$20 million, was to be paid. This figure was to be reduced by any payments of Investment Income received after 1 July 2007 and previously paid into the relevant Carried Interest Account under Clause 8.3.2, which required 30% of such income to be paid into the relevant Carried Interest Account. Clause 8.2.6 provided an exception to the requirements of Clause 8.3.2. Clause 8.2.6 dealt with what was to happen if the term of the Partnership was extended beyond 1 July 2008 pursuant to Clause 11.2.3 (extensions sought by Salford in cases where market conditions make sale of particular investments impossible before a termination date already extended by Salford pursuant to clause 11.2.1). Under Clause 8.2.6, where the term is so extended, then the Annual Rate of Return[18] in respect of all Investments remaining unsold as at 1 July 2008[19] is to be calculated as at 1

[16] see paragraph [10] above

[17] the difference between the relevant invested capital (acquisition cost plus current capitalized costs)and gross return (capital proceeds plus or minus current income or losses)

[18] the annualized time adjusted return (compounded on an annual basis) in respect of the Partnership, any Strategy or any particular non interim investment, calculated by comparing Net Investment Return (see footnote 16) and Invested Capital attributable to the Partnership, Strategy or Investment

[19] in the present case, the income from the entirety of the Partnership assets

July 2008 and, if that Annual Rate of Return is a positive number, then Investment Income[20] received after 1 July 2008 is to be distributed 90% to NWVF, 8% to KBC and 2% to SCI until those distributions have reduced NWVF's Capital Account to nil; and thereafter to KBC as to 24%, SCI as to 6% and the balance to NWVF. If the Annual Rate of Return calculated as at 1 July 2008 is not a positive number, then all Investment Income received after 1 July 2008 goes to NWVF to the exclusion of the Special Limited Partners.

[17] Carried Interest Accounts, therefore, are bank accounts into which a portion of the receipts of the Partnership received down to 1 July 2008 are to be paid. Clause 8.3.3 provided that except for distributions or transfers which for present purposes are immaterial, the only distributions or transfers that might be made from Carried Interest Accounts are distributions to the Limited Partners pursuant to Clause 8.1(d), (e), (f) or (g) (in that order) or Clauses 8.2.3 or 8.2.4. I shall deal with those sub-clauses below.

[18] To return to Clause 7.1.7, that provides that Net Income, Net Losses, Capital Gains and Capital Losses 'arising from' a Carried Interest Account is to be allocated to the Partner or Partners to whom the original amount deposited in the Carried Interest Account is distributable in accordance with Clause 8.3. The provision appears to be circular in form but the general meaning is clear. The reference to gains and losses in the context of Carried Interest Accounts is attributable to the ability of Salford to invest and borrow amounts standing to the credit of a Carried Interest Account.

[19] Clause 7.2 is headed 'Allocation of Remaining Income and Gains' – essentially, income and gains other than Interim Investment Income and income not applied in payment of Salford's Management Fee. Clause 7.2 is important and I should set it out in full:

> 7.2.1 Except as provided in Clause 7.1, all Net Income, Net Losses, Capital Gains and Capital Losses of the Partnership shall be allocated between the Partners only following the sale of all investments

[20] the gross amount of any dividend, interest or similar income received in respect of the Partnership, Strategy or particular investment

of the partnership or at such other time as may be agreed by the General Partner and the Limited Partners.

7.2.2 Subject to Clause 7.1, if following the sale of all Investments of the Partnership the Annual Rate of Return of the Partnership exceeds 0%, then cumulative Net Income, Net Losses, Capital Gains and Capital Losses of the Partnership shall be allocated between the Partners by allocating the portion of each such amount equal to the Senior Carried Interest multiplied by such amount to the Special Limited Partner I, the portion of each such amount equal to the Strategy Carried Interest multiplied by such amount to the Special Limited Partner II, and the balance of such amount to the Principal Limited Partner.

7.2.3 Subject to Clause 7.1, if following the sale of all Investments of the Partnership the Annual Rate of Return of the partnership is 0% or less and the Annual Rate of Return of at least one Strategy exceeds 0%, then the cumulative Net Income, Net Losses, Capital Gains and Capital Losses of each Strategy shall be allocated between the Partners as follows:

(a) for each Strategy for which the Annual Rate of Return exceeds 0%, such amounts shall be allocated between the Partners by allocating the portion of each such amount equal to the Strategy Carried Interest multiplied by such amount to the Special Limited Partner II, and the balance of such amounts to the Principal Limited Partner; and

(b) for all other Strategies, 100% to the Principal Limited Partner.

7.2.4 Subject to Clause 7.1, if neither Clause 7.2.2, nor Clause 7.2.3 applies, then Net Income, Net

Losses, Capital Gains and Capital Losses of the Partnership shall be allocated 100% to the Principal Limited Partner.'

[20] It will be noticed that the Annual Rate of Return referred to in Clause 7.2.2 is the Annual Rate of Return *of the Partnership* ascertained after all its Investments have been sold. If, following such sale, the Annual Rate of Return is a positive number, then cumulative Net Income is allocated 70% to NWVF, 24% to KBC and 6% to SCI. Cumulative Net Losses, Net Capital Gains and Net Capital Losses are similarly allocated. Clause 7.2.3 applies only where the Annual Rate of Return of the Partnership as a whole, calculated after sale of all of its Investments, is not a positive number, but where the Annual Rate of Return of one or more Strategies is a positive number. In that case, the cumulative income, etc, of the Strateg[ies] to which the positive Annual Rate of Return is referable is to be allocated 6% to SCI and the balance to NWVF. The income, etc, of those Strategies which do not show a positive Annual Rate of Return is to be allocated to NWVF.

[21] It will be noticed that Clause 7.2.4 is not introduced by the words *'if, following the sale of all the investments of the Partnership.'* That is a feature of the drafting upon which Mr Collings QC relies strongly and to which I will have to return later.

[22] Having dealt with allocation, the Articles of Partnership proceed to deal with distribution. Clause 8.1 deals with the priority of distributions. It provides that subject to Clauses 8.2,[21] 8.3[22] and 8.7,[23] Net Income, Capital Proceeds and other assets of the Partnership shall be distributed according to a fixed order of priority. 'Capital Proceeds' are defined and include (1) any actual proceeds from the disposal or part disposal of an Investment which Salford determines to be in the nature of capital, less expenses associated with the disposal, whether available for distribution or already distributed and (2) the Value of any Investments distributed in kind. The definition also contains a provision that the Value of 'such' unsold Investments shall be

[21] which deals with the timing of distributions

[22] which concerns Carried Interest Accounts and which I have already mentioned

[23] which permits Salford to draw cash for its Management Fee and other partnership outgoings

taken into account in determining the Annual Rate of Return and ends by defining the Capital Proceeds of the Partnership as the sum of the Capital Proceeds attributable to each Investment of the Partnership (with a corresponding definition for the Capital Proceeds of a Strategy).

[23] The order of priority set out in Clause 8.1 is as follows:

> 8.1 Priority of Distributions
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> Subject to Clauses 8.2, 8.3, and 8.7, Net Income, Capital Proceeds and other assets of the Partnership shall be distributed in the following order of priority (after payment of the expenses and liabilities of the Partnership):
>
> (a) first, in payment of the Management Fee (less any amounts already drawn in respect of the Management Fee under Clause 8.7);
>
> (b) second, to the Principal Limited Partner in amounts allocated to it pursuant to Clause 7.1.6 and not characterized as Capital Contributions;[24]
>
> (c) third, to the Principal Limited Partner in repayment of its Capital Contributions;
>
> (d) fourth, to Special Limited Partner I and Special Limited Partner II in repayment in repayment of their Capital Contribution pro rata to the amount of their respective Capital Contributions;
>
> (e) fifth, if Clause 7.2.2 has been applied, then to the Partners in the net positive amounts allocated to them pursuant to such Clause;
>
> (f) sixth, if Clause 7.2.3 has been applied, then to the Partners in the net positive amounts allocated to them pursuant to such Clause;

[24] i.e. Interim Investment Income which NWVF has not elected to capitalise

(g) seventh, if Clause 7.2.4 has been applied, then to the Partners in the net positive amounts allocated to them pursuant to such Clause;

(h) eighth, if Clause 7.1.7 has been applied, then to the Partners in the net positive amounts allocated to them pursuant to such Clause.

The amounts distributable to a Partner under sub-clauses (c), (d), (e), (f) and (g) above shall be decreased, in descending order, by amounts previously distributed to such Partner pursuant to Clauses 8.2.2, 8.2.3, 8.2.4, 8.2.5, 8.2.6 and 8.3

Something has clearly gone wrong in the drafting of Clause 8.1(g), since NWVF alone is entitled to receive an allocation under Clause 7.2.4.

[24] Clause 8.2 deals with the timing of distributions. Clause 8.2.1 provides that Salford, acting reasonably and in good faith, may make distributions under sub-clauses 8.1(a) to (d) inclusive at any time, but only in the order of priority there set out. Distributions in respect of sub-clauses 8.1 (e) to (h) inclusive are to be made 'at the end of the term of the Partnership' unless otherwise unanimously[25] agreed. Using general language, therefore, capital could be returned at any time, while profits had to wait until the end of the term, unless otherwise agreed.

[25] Clauses 8.2.3, 8.2.4 and 8.2.6 deal with interim (i.e. pre-actual termination date) distributions. Clauses 8.2.3 and 8.2.4 permit interim distributions to SCI of up to 6% of profits and gains, subject to the financial position pertaining to any particular Strategy. In short, such a distribution may be made to SCI if (a) all the assets of a particular Strategy representing at least 30% of invested capital have been sold and (b) the Annual Rate of return on all other remaining assets is 20% or more; or, alternatively, if a particular Strategy retains some assets but those that have been sold represent 50% of invested capital and the Annual Rate of Return on unsold assets is 20% or more.[26] There is no parallel

[25] Clause 8.2.2

[26] the true construction of these provisions is not free from doubt, but the foregoing seems to me to be preferred

provision for the benefit of KBC. Clause 8.2.6 I have already covered.[27]

[26] Clause 8.6 is important for present purposes. It provides that prior to the final liquidation of the partnership (i.e. during the original term and any Clause 11.2 extensions) Salford shall make all clause 8 distributions in cash. Upon 'the final liquidation' of the Partnership, however, the liquidating trustee (Salford, in the absence, as has in fact happened, of any other appointee) has the right to make distributions in the form of non-marketable securities. I take that to be a reference to the shares in the various entities going to make up the several Strategies, although the point was not argued at the hearing.

[27] Clause 11.5. deals with the Liquidation of Partners' Interests. Clause 11.5.3 provides that following termination Salford is to act as liquidating trustee, although if, on termination, it turns out that the Annual Rate of Return on Investments (sold and unsold) is not a positive number, then the Partners are to meet to discuss the appropriate person to act as liquidating trustee.

[28] Clause 11.5.3 provides that upon 'termination or liquidation' of the Partnership, its business shall cease. In my judgment, that means that upon the earlier to happen of those events the Partnership becomes a closed fund.

[29] Clause 11.5.4 provides that upon termination of the Partnership, the liquidating trustee may sell any or all of the Partnership Assets or may distribute them, or some of them, *in specie*. If those distributions are in the form of marketable securities, then Clause 7.3.8 (which in terms applies only to distributions covered by Clause 8.6[28]) provides for their value upon a deemed realization to be used for the purposes of computing Capital Gains, Capital Losses and Capital Proceeds.

[30] That concludes a brief summary, so far as relevant for present purposes, of the principal provisions of the Articles of Partnership.

Overview

[27] paragraph [16] above

[28] i.e. post-termination distributions *in specie*

[31] These provisions are as dense as they are complex. It may be helpful, while avoiding, so far as possible, pre-judging the parties' submissions, to attempt a general guide map of the structure of the Partnership as it may be gathered from the Articles of Partnership.

[32] The Partnership was clearly intended to be for a determinate, though extendible term. Its purpose was to maximize wealth. Except in certain limited circumstances, no distributions of profits and gains were to take place until the expiry of the term of the Partnership, although earlier returns of capital were permitted.

[33] There were, however, exceptions to that. Distributions of Carried Interest were payable to SCI if the conditions of Clauses 8.2.3 or 8.2.4 were satisfied. In each case and provided that the Annual Rate of Return on unsold assets met the required minimum, distributions of Carried Interest up to SCI's maximum of 6% were permitted.[29] It is to be noted that the figure of 6% is derived solely from the Definition section of the Articles of Partnership. Each of those entitlements operates and can operate only when there remain unsold assets of the Partnership and on the assumption that SCI's Partnership entitlement is 6% - without there having been a sale of all of the assets of the Partnership and allocation under Clause 7.2.

[34] Similarly, under Clause 8.2.6 and provided that the Annual Rate of Return as at 1 July 2008 was a positive number, income was distributable to the Limited Partners during the contractual terms of the Partnership as extended and in the shares there set out.[30] That entitlement operates and can only operate where assets of the Partnership remain unsold. It assumes that the entitlements of KBC and SCI (once NWVF's capital has been returned) are 24% and 6% respectively, without any allocation pursuant to Clause 7.2 having taken place.

[35] Upon the final expiry of the contractual term of the Partnership ('the Termination Date' or, as the case might be, 'the Extended Termination Date') the assets of the partnership which had not been sold before termination were to be sold or distributed *in specie* and valued pursuant to Clause 7.3.8. The gains and

[29] see paragraph [25] above
[30] See paragraph

losses of the Partnership were then to be allocated to the accounts of each Partner in accordance with the provisions of Clause 7.2. and distributed (so far as that had not already been done) pursuant to a scheme of distribution laid down in Clause 8.

The parties' submissions

[36] Mr Collings starts by stressing, independently of the true construction of the Articles of Partnership, that the underlying purpose of the Partnership was to achieve a sale of all its assets within the initial term or any extension. I do not accept that submission. The purpose of the Partnership is expressly set out in clause 1.2. It makes no mention of sale. Indeed, an express power of sale is not even conferred upon Salford by Clause 4, although the many references in the Articles of Partnership to sales being made show that it clearly had such a power.

[37] It is true to say, however, that the reduction in the rate of the Management Fee after 1 July 2008 if extensions had been demanded by Salford under Clauses 11.2.1 and/or 11.2.3, together with the fact that Clauses 11.2.1 and 11.2.3 permitted extensions of the term for the purposes only of orderly liquidation or in a climate inimical to the sale of a particular asset, are some indication that it was the expectation of the parties that the assets would have been sold prior to termination. The point cannot be pressed too far, however. The reduction in Salford's Management Fee occurred only when the term of the Partnership was extended unilaterally by Salford under Clause 11.2.1 or Clause 11.2.3. It had no application to a consensual extension under Clause 11.2.2. Further, while Clause 11.2.1 extensions were obtainable to permit 'orderly liquidation,' that is not identical to sale, and the extension obtainable under Clause 11.2.3 is granted where orderly liquidation is being hindered by market conditions affecting the sale of 'certain' Investments. On the other hand, the Liquidating Trustee's power under Clause 11.5.4 to effect sales as well as distributions *in specie* show that the parties envisaged that there might have been no sales at all by the end of the Partnership term.

[38] The real question is whether Mr Collings' is right when he submits that the Special Limited Partners never acquired a vested entitlement to Carried Interest. He says that in the liquidation

currently under way the Joint Liquidators are required by Clause 11.5.4 to distribute the assets on the basis set out in Clause 8; that the Special Limited Partners are not entitled to more than a return of capital unless either of Clauses 8.1(e) or 8.1(f) apply; that neither clause applies because no allocations are permissible under Clause 7.2 until after all the Partnership Investments have been sold (Clause 7.2.1); that that has not happened and cannot now happen, so that the Special Limited Partners are not entitled to any allocations under either of Clauses 7.2.2 or 7.2.3, with the consequence that they are not entitled to distributions pursuant to Clause 8.1(e) or 8.1(f). In any event, he submits that it is now too late for any distributions to be made under Clauses 8.1(e) to (h), because Clause 8.2.1 requires that they are to be made at the end of the Partnership Term, and that date is now past.

[39] I can deal straight away with that final submission (which, if correct, would mean that nobody, including NWVF, would be entitled to any distributions in the winding up of VDP). If it were right, then liquidation would be pointless – there being nothing to liquidate and nothing to be distributed under clause 11.5.4, which itself provides that distributions in the winding up are to be made in accordance with Clause 8 itself – something which Mr Collings says became impossible after 1 July 2012. In the context of the Articles taken as a whole the words 'at the end of the term,' where they appear in Clause 8.2.1 obviously mean 'once the term has expired', or 'not before the end of the term,' just as the words 'Upon termination of the Partnership' where they occur at the beginning of Clause 11.5.4 do not mean that the entirety of the liquidation must be carried out during the course of 1 July 2012, but mean that the liquidation is not to commence until that point is reached.

[40] More formidable are Mr Collings' submissions on the combination of Clauses 7.2 and 8.1.

[41] Clause 7.2, although stating in terms that allocations cannot be made until after the sale of all of the Partnership Investments, does not prescribe a time *before which* that is to be done. Once the point on Clause 8.2.1 has been got out of the way, the necessary allocations can be done at any time after 'sale.'

[42] The real issue, therefore, is whether in circumstances where it is not possible to sell all of the Partnership Investments, as it now is, because of the distribution *in specie* that has been made to NWVF, it has ceased to be possible to allocate interests under clause 7.2. If it has and if Mr Collings QC is right when he submits that without the making of such allocation, no Partner acquires any entitlement to participate in the fund constituted in the course of the Partnership's liquidation, then no-one gets anything. NWVF's interest under Clause 7.2.4 is an allocation as much as are the allocations provided for under Clauses 7.2.2 and 7.2.3. If one fails, all fail.

[43] In my judgment, the solution to Mr Collings' conundrum lies in appreciating that Clause 7.2 is a clause about the *allocation* of 'Income and Gains.' It does not define entitlement. Unlike Clause 7.1.1, providing for Salford's Management Fee,[31] where entitlement and allocation are carefully distinguished, the *entitlement* of the Limited partners is no-where specifically addressed as such in the Operative Provisions[32] of the Articles of Partnership. It follows, rather, from the definitions of Senior Carried Interest and Strategy Carried Interest set out in the Definitions section of the Articles. Those definitions have the same structure. That for Senior Carried Interest is as follows:

> '24.0%, as applied to determine certain amounts allocable *or distributable* to [KBC[hereunder'

[44] In my judgment Clause 7.2 is a book keeping provision which has nothing to do with entitlement. The idea that it should be incapable of application in cases where it is decided to distribute assets *in specie* is, in my view, unsustainable. 'Sale', where it occurs in Clause 7.2, must be read as including distribution *in specie* under the Articles of Partnership (itself, like all redemptions, involving a species of sale). Clauses 8.6 and 7.3.8 cater for distributions to be taken into account in the calculations called for by Clause 7.2.

[45] Mr Collings rightly warned against the temptation not to give plain words (such as 'sale') their plain meaning. I agree with that, but it is a well established principle of construction that in context words

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[31] See paragraph [14] above

[32] pages 9 to 42

may have extended meanings if to give them their strict meaning would be to produce a result which the parties cannot have intended. There is no good reason, to be derived from the background or from the intention of the Articles of Partnership, so as can be elicited from their wording and structure, why the Special Limited Partners' interests should be contingent not only upon the achievement of a positive Annual Rate of Return, but upon accidents of timing without any commercial logic, or upon the hazard that assets may have to be realized by one method permitted by the Articles rather than by another. Still less is there any sensible commercial reason why the interests of the Special Limited Partners in post-1 July 2008 income, or of SCI in Preliminary Carried Interest, should be conditional upon there not having been a sale of all the assets of the Partnership, while their interests in the underlying fund require all the assets to have been sold before their interests can arise.

[46] It seems to me that, subject to satisfaction of the overriding contingency that either the Partnership as a whole or one or more Strategies as a whole must have shown a positive Annual Rate of Return, the interests of the Special Limited Partners are vested. They are not further contingent upon a sale, in the trader's sense of that word, of all of the Partnership Assets, still less upon such a sale having taken place before the end of the Partnership term. That this is so can be seen most clearly from the provisions of Clauses 8.2.3, 8.2.4[33] and 8.2.6.[34] If the Limited Partners could acquire no interest in gains and profits otherwise than after sale of all the assets of the Partnership before 1 July 2012, it would be extraordinary that they should have acquired a vested[35] entitlement to Preliminary Carried Interest or to post-1 July 2008 income in the shares there specified. Each of the entitlements under Clauses 8.2.3, 8.2.4 and 8.2.6 is predicated upon the existence of unsold assets.

[47] In my judgment and for these reasons, the Special Limited Partners' interests are contingent only upon the achievement of a positive Annual Rate of Return.

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[33] see paragraph [33] above

[34] see paragraph [34] above

[35] conditionally only upon there having been a positive Annual Rate of Return as at 1 July 2008

[48] The third question raised in the fixed date claim form was hardly debated at the hearing. In my judgment, there are no grounds for holding that the Special Limited Partners are not entitled to participate in any distribution made *in specie* and I hold that they are.

Conclusion

[49] In my judgment, therefore, the answers to the questions posed by the fixed date claim form are that:

> (1) The Special Limited Partners are entitled, in the events which have happened and without more, to Senior Carried Interest and Strategy Carried Interest (as defined in VDP's Articles of Partnership);
>
> (2) The Special Limited Partners are not otherwise entitled to any distribution from the assets of VDP; and
>
> (3) The Special Limited Partners are entitled to participate in any distribution made *in specie*.

Commercial Court Judge
27 June 2013