



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

CAUSE FSD NO. 273 OF 2021 (DDJ)

**IN THE MATTER OF KUWAIT LBO FUND L.P. (IN VOLUNTARY LIQUIDATION)
AND IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP ACT (2021 REVISION)**

IN OPEN COURT

Appearances: Mr Adrian Davey and Mr James Eldridge of Maples and Calder (Cayman) LLP on behalf of the Public Institution for Social Security for the State of Kuwait

There was no appearance by or on behalf of First Services International

Before: The Hon. Justice David Doyle

Heard: 29 October 2021

Ex tempore Judgment

Delivered: 29 October 2021

Draft Transcript of Judgment

Circulated: 8 November 2021

Transcript of Judgment

Approved: 9 November 2021

HEADNOTE

Sections 36(3)(g) and 36(13) of the Exempted Limited Partnership Act (2021 Revision)– declaration in respect of the validity of the appointment of voluntary liquidators – non-party indemnity costs order

JUDGMENT



Introduction

1. The Public Institution for Social Security for the State of Kuwait (the "Petitioner") seeks "a direction and/or a declaration pursuant to s.36(3)(g) of the [Exempted Limited Partnership Act (2021 Revision)] that the Appointment Resolution was validly passed, and that Alexander Lawson and Christopher Kennedy each of Alvarez and Marsal Cayman Islands Limited... were and are duly appointed as voluntary liquidators of the Fund, namely Kuwait LBO Fund L.P."

The Appointment Resolution

2. The Appointment Resolution reads follows:

"KUWAIT LBO FUND, L.P. (the "Fund")

WRITTEN RESOLUTION OF THE MAJORITY IN INTEREST OF THE LIMITED PARTNERS

WHEREAS *the Fund, which was previously known as Noor Kuwait LBO Fund, L.P., is a Cayman Islands exempted limited partnership, the terms of which are governed by its Amended and Restated Limited Partnership Agreement dated September 2007 (the "LPA"). Save where otherwise indicated defined terms in this resolution have the same meaning as in the LPA.*

WHEREAS *the general partner of the Partnership is Kuwait LBO Fund GP (the "General Partner").*

WHEREAS *the term of the Fund has ended pursuant to clause 2.4 of the LPA, at which time the liquidation of the Fund commenced pursuant to clause 9.1(a) of the LPA (and section 35(1)(a) of the Exempted Limited Partnership Law (2018 Revision)), with the General Partner having been appointed to act as liquidator pursuant to clause 9.2 of the LPA.*

WHEREAS *the Public Institution for Social Security ("PIFSS") is a Limited Partner of the Fund, holding more than 50% in Interest of the Limited Partners of the Fund.*

WHEREAS *the General Partner (a) currently has no directors; (b) currently has no registered office (in breach of the Companies Law (2020 Revision)); (c) has been designated*



by the Cayman Islands Registrar of Companies as being due to be struck off the register; and (d) has been unable or unwilling to progress the liquidation of the Fund.

WHEREAS in premise of the above the General Partner is unavailable to act as liquidator of the Fund.

WHEREAS in premise of the above PIFSS is entitled pursuant to clause 9.2(a) of the LPA to designate and appoint alternative liquidators to the Fund.

IT IS RESOLVED THAT:

Mr Alexander Lawson and Mr Christopher Kennedy of Alvarez and Marsal be and hereby are duly appointed as Liquidators of the Fund, with the power to act jointly and severally.

For and on behalf of The Public Institution for Social Security

Name: Meshal Alothman

Title: Director General

Dated: September 14, 2020"

The Petitioner's legal status

3. The Petitioner is stated to be an entity established under Kuwaiti law with, among other things, the ability to enter into contracts and bring legal proceedings in its own name. Kawaley J in *Adamas Asia Strategic Opportunity Fund Limited (in voluntary liquidation)* (FSD; unreported judgment 23 July 2019) described the Petitioner as "a Kuwaiti public institution responsible for implementing a social security scheme".

Section 36(3)(g) of the ELP Act

4. Section 36(3)(g) of the Exempted Limited Partnership Act (2021 Revision) (the "ELP Act") provides as follows:

"Except to the extent that the provisions are not consistent with this Act, and in the event of any inconsistencies, this Act shall prevail, and subject to any express provisions of this Act to the contrary, the provisions of Part V of the Companies Act (2021 Revision) and the Companies Winding Up Rules, 2018 shall apply to the winding up of an exempted limited partnership and for this purpose... on application by a partner, creditor or liquidator, the



court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable."

Declaratory judgments

5. In addition to this jurisdiction, the Court also has a discretionary power to grant a declaration as to the legal rights of the parties. The Court should take into account justice to all parties and whether the declaration would serve a useful purpose.

6. Mr Adrian Davey, who appeared on behalf of the Petitioner, helpfully drew the Court's attention to section 11(2) of the Grand Court Act (2015 Revision) which provides that:

"Without prejudice to subsection (1), the Court shall have and shall be deemed always to have had power to make binding declarations of right in any matter whether any consequential relief is or could be claimed or not."

7. Order 15 rule 16 of the Grand Court Rules provides that the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

8. Mr Davey brought to the Court's attention the judgment of Mangatal J in *Woods v. Thompson and Saxon Motor and General Insurance Company Limited* 2016 (2) CILR 1. Mangatal J in that judgment referred to various English authorities which included a reference to Neuberger J's (as he then was) well known judgment in *Financial Services Authority v. Rourke (trading as J E Rourke & Co)* [2002] CP Rep 14. It will be recalled that Neuberger J said that when considering whether to grant a declaration, the Court should take into account what was just for both parties, whether the declaration would serve a useful purpose and whether there were special reasons why the Court should not grant a declaration.

9. There is also reference at page 21 of Mangatal J's judgment to the dissenting judgment of Aikens LJ in *Rolls-Royce plc v. Unite the Union* [2010] 1 WLR 318 containing a summary of the principles derived from earlier cases and I can, for present purposes, limit my reference to the first three:

"(1) The power of the court to grant declaratory relief is discretionary.

(2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.



(3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question."

10. In this case, for reasons which follow, I am satisfied that the directions sought under section 36(3)(g) of the ELP Act and the declaration sought would serve a useful purpose; i.e. bringing clarity to the appointment of Alexander Lawson and Christopher Kennedy as voluntary liquidators (the "JVLs") of Kuwait LBO Fund L.P (the "Fund") and placing the validity of their appointment beyond dispute, and I can see no reason as to why the directions and declaration requested should not be made.

Service and notice of intention to apply for indemnity costs

11. I need to record the position in connection with service of the papers filed with the Court. The evidence reveals that the Petitioner is one of only two limited partners of the Fund. The other limited partner is First Services International ("FSI"), a company incorporated in the Cayman Islands. The Petitioner invested US\$25,000,000 into the Fund and FSI invested US\$9,000,000. The Petitioner holds approximately 73.5% of the limited partnership interest in the Fund and FSI holds the remainder.
12. The general partner of the Fund was Kuwait LBO Fund GP Limited (the "GP"), a Cayman Islands exempted limited company. It appears that the GP was struck off the Cayman Islands Companies Register on 30 October 2020. The evidence also reveals that the directors of the GP resigned on 17 December 2019.
13. I am satisfied that FSI has been duly served and has been given notice of these proceedings and this hearing. FSI has been given an opportunity to participate.
14. Maples and Calder (Cayman) LLP ("Maples"), attorneys for the Petitioner, by email dated 20 September 2021 to Ahmed Al Saleh and Ali El-Hakim of FSI provided copies of the petition, the affidavit of Meshal Alothman and a Notice of Hearing confirming that the matter would be heard today, 29 October 2021 at 10.00 a.m. Cayman Islands' time.
15. At paragraph 3 of the prayer of the petition, it is made clear that the Petitioner is seeking an order that FSI pay the Petitioner's costs on the indemnity basis. FSI has not appeared or caused an appearance to be entered today on its behalf.



16. By further email dated 5 October 2021 from Maples to FSI it was confirmed, for the avoidance of any doubt, that Maples were instructed to proceed with seeking the orders in the petition at the hearing on 29 October 2021 and it was expressly and fairly highlighted that "*this includes seeking an order for costs against [FSI]*".
17. By email dated 25 October 2021 a copy of the Petitioner's skeleton argument was sent to FSI and by email dated 26 October 2021 a copy of the affidavit and exhibit of Christopher Kennedy dated 25 October 2021 was sent to FSI. This produced a somewhat strange email dated 28 October 2021 at 1.10 a.m. from Ahmed Al Saleh, at the email address used to send the documents that I have just referred to. Ahmed Al Saleh describes himself as '*Director, First Services International, Majority Shareholder - Kuwait LBO Fund GP Ltd.*' I have read that email carefully a number of times and unfortunately it fails to engage constructively in respect of the issues raised in the petition. What it does confirm, however, is that Ahmed Al Saleh of FSI is well aware of these proceedings and this hearing today.

The petition and the evidence in support with no evidence in opposition

18. I have considered the petition and the evidence in support. No evidence has been filed in opposition, although I have considered the email from Ahmed Al Saleh of FSI dated 28 October 2021. No one has appeared before the Court today to argue that the relief requested by the Petitioner should not be granted.

The skeleton argument and oral submissions

19. I have also considered the helpful skeleton argument and the oral submissions presented to the Court on behalf of the Petitioner. I am grateful to Mr Adrian Davey and Mr James Eldridge of Maples for their assistance to the Court. It is most appreciated.

Determination of the petition

20. I now turn to my determination of the petition and the reasons for that determination.

The provisions of the LPA

21. Clause 2.4 of the Amended and Restated Limited Partnership Agreement dated September 2007 (the "LPA") reads as follows:



"The Partnership shall continue until the tenth anniversary of the Initial Closing Date, unless: (a) extended at the discretion of the General Partner for up to two consecutive additional one year periods from and after such date; or (b) terminated in accordance with the terms of this Agreement."

22. Clause 1.1 of the LPA defines the "Initial Closing Date" as *"30 September 2007 or such earlier or later date as determined by the General Partner."* The original term expired on 30 September 2017, but was extended by the GP twice for one year periods, such that the term of the Fund finally expired on 30 September 2019. The one year extensions are contained in letters dated 19 October 2017 and 7 November 2018.
23. Clause 9.1 of the LPA provides at (a) *"The Partnership shall be dissolved upon the first to occur of the following: (i) upon the end of the term of the Partnership, as provided in Clause 2.4"*. The end of the term of the Partnership was 30 September 2019.
24. Clause 9.2(a) of the LPA provides:

"Upon dissolution of the Partnership, the property and business of the Partnership shall be liquidated within a reasonable period of time by the General Partner, or, in the event of the unavailability of the General Partner, by a person designated by more than 50% in Interest of the Limited Partners..."
25. Under Clause 9.2(b) of the LPA:

"As soon as practicable after the effective date of dissolution of the Partnership, whether by expiration of its full term or otherwise, but in any event within one year after dissolution of the Partnership, after allocating all Net Profit, Net Loss and any other items of income, gain, loss or deduction required by this Agreement, the Partnership's assets (except for amounts reserved pursuant to Clause 9.3) shall be applied and distributed in the following manner and order of priority..."
26. This should have been done by the GP at the very latest before the end of September 2020.



The “unavailability” of the GP

27. A dispute appears to have arisen between the GP and Kuwait LBO MGT Ltd, the Manager, and a falling out between certain principals of the GP and the Manager, being FSI on the one hand, and Mr Farouq Hamad Sultan Al Essa ("Mr Sultan") on the other, which resulted in the GP being left unable to act on behalf of the Fund or at all. As a result of the deadlock which arose, the GP and the Manager were struck off the Register of Companies in the Cayman Islands on 30 October 2020.
28. The directors of the GP who were both appointed by FSI appear to have resigned on 17 December 2019. I have considered the evidence in connection with the resignation of the directors of the GP. A document entitled "*Director Inspection Report*" with Instruction Number 2160223 with Date of Inspection 11 September 2020 in respect of Kuwait LBO Fund GP Ltd with file 172469 specified and after the word "*Directors*" it is stated "*No Director information Available.*" A search report dated at the bottom 10 September 2020 in respect of Kuwait LBO Fund GP Ltd referred to "*Status: STRIKE OFF PENDING.*" It had a status date of 30 October 2020 and added "*THIS REPORT DOES NOT CONFIRM THE ENTITY IS IN GOOD STANDING.*"
29. On 28 June 2020, Walkers (Dubai) LLP, acting as Caymans Islands' legal counsel for Mr Sultan, wrote to provide:
- "... an update on [Mr Sultan's] efforts to facilitate the wind down of the Fund" adding "... the Fund Entities remain in a precarious position as a result of the GP no longer having any directors following the resignation of the directors appointed by First Services on 17 December 2019. As a result of the steps taken by First Services, the GP has been in breach of its articles of association for a continuous period of five months and the GP's registered officer provider ... has resigned, and the GP currently has no registered office in the Cayman Islands. ... it is now inevitable that the Registrar of Companies will take steps to strike the GP from the Register of Companies in the Caymans Islands, which would effectively incapacitate the Fund Entities. ... the GP of the Fund is effectively incapacitated as a result of the steps taken by First Services, and therefore unable to deal with the Fund Assets."*
30. The lack of directors left the GP effectively paralysed or, in the words of Clause 9.2 of the LPA, resulted in the "*unavailability of the General Partner*". The Petitioner holds "*... more than 50% in interest of Limited Partners*". Indeed, greatly in excess of that figure. In the circumstances that had arisen, through no fault of the Petitioner, the Petitioner was entitled in my judgment to take



action in respect of the liquidation of the Partnership. It appeared that the GP was unavailable to do so. In such circumstances the Petitioner was justified pursuant to Clause 9.2(a) of the LPA in taking action to ensure that the *"... property and business of the Partnership shall be liquidated ..."*

31. In my judgment, at the time of the Appointment Resolution, there existed in the words of Clause 9.2(a) of the LPA *"the event of the unavailability of the General Partner"*. The GP was a company. A company makes itself *"available"* and acts through its directors. Without directors, a company is unable to act. It is *"unavailable"* to act.
32. In my judgment the circumstances that existed on 14 September 2020, the date of the Appointment Resolution, amounted to *"the event of the unavailability of the General Partner"* under Clause 9.2(a) of the LPA. In such circumstances the Petitioner being the legal entity *"designated by more than 50% in Interest of Limited Partners"* was entitled to take steps to liquidate the Partnership by way of the appointment of liquidators. The Appointment Resolution was in such circumstances a valid resolution.
33. I find as a fact on the evidence presented to this Court that from at least September 2020 the GP was unavailable to proceed with the liquidation of the Fund in view of the fact that there was a deadlock within the GP and it had no directors to act on its behalf.

The validity of the Appointment Resolution

34. In my judgment the appointment of the JVLs pursuant to the Appointment Resolution was a valid appointment pursuant to Clause 9.2(a) of the LPA.

The changing positions of FSI

35. The actions and statements of FSI have caused the difficulty which this Court has been asked to determine. FSI has in the past raised concerns in respect of the validity of the appointment of the JVLs pursuant to the Appointment Resolution. FSI on 17 September 2020 took, presumably without the benefit of legal advice, the somewhat curious position that *"... legally speaking, the fact that the GP has no Directors or Registered Office, it doesn't mean nor can it be interpreted that he is "unavailable" to undertake the liquidation process ..."*.
36. I again emphasise that a corporate entity cannot function or be *"available"* to undertake a liquidation process unless it has directors. As I stated, a corporate entity acts through its directors. Without



directors it cannot act; it is unavailable to undertake actions. Moreover the GP was struck off on 30 October 2020 confirming its unavailability to conduct the liquidation process.

37. FSI has blown hot and cold. On 11 November 2020, FSI appeared to engage in positive communications and appeared to accept the validity of the JVLs' appointment and expressed their desire to work with the JVLs in realising the Fund's assets. However on 25 November 2020 Mr Al Saleh on behalf of FSI wrote to the Petitioner again disputing the validity of the Appointment Resolution. Then on 13 December 2020 Mr Al Saleh on behalf of FSI referred to discussions with representatives of Alvarez and Marsal, including Christopher Kennedy, indicating that

"... these discussions are being conducted in a very professional and business like and mutually respectful manner, as we are well aware of the capabilities and skills of Alvariz [sic] and Marsal who have a worldwide independent and highly professional reputation. We are also confident that they will culminate in a mutual and good resolution."

38. Mr Al Saleh also accepts that the Petitioner is a "... respected and highly reputable Kuwaiti Institution" and FSI are "... confident that any misunderstanding ... can be directly resolved in a friendly and amicable matter (sic) ...".

39. On 7 January 2021 Dr El-Hakim of FSI sent an email to the JVLs indicating that FSI was

"... pleased to approve the JVLs as the independent fiduciaries [sic] liquidators for the voluntary liquidation of the Kuwait LBO Fund. We very much hope that this will help the JVLs to go forward and swiftly with the liquidation process, and look forward to working with you and providing you with our full support in discharging your duties as an independent fiduciaries."

40. Unfortunately, FSI's stance changed again on 21 January 2021 when Dr El-Hakim of FSI, having noted the JVLs' strategy analysis and funding requirements, completed a volte-face and stated "FSI have come to the conclusion that they don't believe such engagement will serve its best interest in the Fund". FSI was then asked to confirm that it still accepted that the JVLs were validly appointed, but Dr El-Hakim on behalf of FSI responded unhelpfully referring to "... desperate attempts to intentionally misinterpret or rather put words into my mouth".

41. FSI then subsequently purported to take action to lead to the liquidation of the Fund without the involvement of the JVLs. FSI sought to create a competing liquidation process. I note the evidence



(in particular the demands against Mr Sultan) which appears to suggest that FSI has been holding itself out as entitled to act on behalf of the Fund.

42. I note also the considerable work that the JVLs have undertaken and the current position of the liquidation and that an agreement in connection with the funding of the liquidation has been arrived at with the Petitioner.

The necessity for judicial relief to be granted

43. In my judgment, due to the various and changing positions of FSI, it is necessary and appropriate for this Court to intervene and to provide the judicial relief requested by the Petitioner. I agree that it is important that there are no lingering doubts as to the true identity and status of the liquidators of the Fund. I am satisfied that the JVLs are the lawful JVLs of the Fund and were duly appointed on 14 September 2020 pursuant to a written resolution of the majority in interest of the Fund.

The position as to costs

44. I am also satisfied that FSI should pay the Petitioner's costs of the petition on the indemnity basis. FSI's utterly unreasonable conduct was outside the norm. It was notified that it was at risk as to costs and it has presented no opposition to such relief being granted.

Indemnity costs

45. Pursuant to Order 62 rule 4(11) of the Grand Court Rules, the Court may make an Order for costs to be taxed on the indemnity basis if it is satisfied that the paying party has conducted the proceedings improperly, unreasonably or negligently. I will turn in a moment to the Court's jurisdiction to grant costs against non-parties, but in respect of an Order for costs on the indemnity basis I make the following comments.
46. In my judgment FSI has to a high degree conducted itself in respect of the Appointment Resolution and these proceedings improperly and unreasonably. Its improper and unreasonable conduct has necessitated these proceedings. Its utterly wrongful and unreasonable challenge to the Appointment Resolution deserves condemnation in indemnity costs. Moreover, it has failed to reasonably and constructively engage in these proceedings. It has failed to appear today or to make its position clear. FSI's conduct was not merely wrong or misguided; it was unreasonable and improper to a high degree. FSI's conduct deserves a mark of judicial disapproval.



47. In respect of indemnity costs, Mr Davey has helpfully brought the Court's attention to two authorities. Firstly, a judgment of Parker J in *In the Matter of an Application of BDO Cayman Limited concerning Argyle Funds SPC Inc (in official liquidation)* 2018 (1) CILR 187. The second authority is an English first instance authority of Baker J in *Skatteforvaltningen (Danish Customs and Tax Administration) v Solo Capital Partners LLP (in special administration) and others* [2021] EWHC 1222 (Comm) where, at paragraph 9, Baker J stated:

"If a correct perspective is kept upon what assessing costs on the indemnity basis does, and the reason why, therefore, it is ordered, I respectfully question whether it is true today that an indemnity costs order necessarily carries stigma. Where such an order is made, the reasons for it may include or imply criticism of the paying party's conduct or that of its legal representatives. If that is the case, it will be the expressing of those reasons by the court that carries "at least some stigma", as Tomlinson J put it, for the party or legal representatives criticised. But such criticism is not a pre-requisite, and the proper focus is upon the second half of what Tomlinson J said, namely that the purpose of ordering assessment on the indemnity basis is to give a fairer result for the party entitled to costs."

Costs against non-parties

48. I now consider the Court's jurisdiction to consider orders for costs against non-parties. The note to the commentary in the old English White Book, dating from 1999, in respect of orders for the payment of costs by a non-party, makes reference to the judgment of Balcombe LJ in *Symphony Group PLC v Hodgson* [1993] 4 All ER 143 and I note that reference.
49. Under section 24(1) of the Judicature Act (2021 Revision) costs are in the discretion of the Court. Under section 24(3) the Court has full power to determine by whom and to what extent the costs are to be paid. This is a very wide discretionary power. There is jurisdiction to make an order for costs against a non-party and normally subject to that non-party being given notice of the intention to seek costs against such non-party. In this case FSI have been given proper notice of the intention to seek indemnity costs against it and it is appropriate for the reasons stated in this judgment to grant indemnity costs against it.
50. As long ago as 3 December 1998 in *Banco Economico S.A. and Allied Leasing and Finance Corporation* 1998 CILR 333, Graham J applied *Symphony Group* and confirmed in effect that under

section 24 the Court had jurisdiction to make a costs order against a non-party but would only do so in exceptional circumstances.

51. I am aware that in *Travelers Insurance Company Limited v XYZ* [2019] UKSC 48 the word "exceptional" was criticised as being unhelpful, as it did not provide adequate certainty. I also note counsel's reference to *Re Aurum Marketing Ltd (in liquidation)* [2002] 2 BCLC 645.

The alternative relief requested

52. For the sake of completeness, I should add that if I had not been persuaded that the Appointment Resolution was validly passed and that the JVLs had been duly appointed, I would have granted the alternative relief requested and appointed Alexander Lawson and Christopher Kennedy as JVLs of the Fund pursuant to section 36(3)(g) and section 36(13) of the ELP Act. It is plainly just and equitable that they be appointed. They are professional and independent liquidators and FSI was right to recognise this in its email dated 13 December 2020. FSI's inexplicable and utterly unreasonable change of stance in this respect has wasted much time and money and it is right that it is ordered to pay the costs of the Petitioner on the indemnity basis.

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT