Neutral Citation Number: [2026] CICA (Civil) 3

IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA CIVIL APPEAL No. 0006 of 2025
(formerly FSD 0028 of 2025 (JAJ))

BETWEEN

(1) IGCF GENERAL PARTNER LIMITED

-AND-

(2) THE INFRASTRUCTURE AND GROWTH CAPITAL FUND L.P.

APPELLANTS

-AND-

WHITE CRYSTALS LIMITED

RESPONDENT

Before:	The Hon. Sir Michael Birt, Justice of Appeal The Right Hon. Sir Jack Beatson, Justice of Appeal The Right Hon. Sir Anthony Smellie, Justice of Appeal
Appearances:	Mr Graham Chapman, KC instructed by Mr Conal Keane, Mr Niall Dodd and Mr Alan Quigley of Dillon Eustace for the Appellants Mr Iain Quirk, KC instructed by Mr Jonathan Stroud and Ms Vered Mazin of Bedell Cristin for the Respondent
Heard:	16 October 2025
Draft circulated:	21 January 2026
Judgment delivered:	3 February 2026

JUDGMENT

Sir Michael Birt, JA

1. This is an appeal, with leave granted by Martin JA, by IGCF General Partner Limited ("the GP") and The Infrastructure and Growth Capital Fund L.P. ("the Fund") (together "the Appellants") against the decision of Asif J ("the Judge") on 23 May 2025 to stay proceedings instituted by the Appellants against White Crystals Limited ("WCL") in favour of an arbitration commenced on 5 February 2025 by WCL as claimant against the GP and Sage Venture Group Limited ("Sage"), a company owned and controlled by Shaheryar Arshad Chishty ("Mr Chishty"), as respondents.

2. The Judge gave brief reasons at the time of his decision but subsequently explained his detailed reasons in a judgment ("the Judgment") dated 14 October 2025.

Factual background

3. In what follows, I gratefully draw on the agreed background and chronology prepared by the parties and the Judge's helpful summary in the Judgment. The present proceedings form part of a complex web of litigation between the parties and their associates but I shall confine myself to what seems to me to be relevant for present purposes.

(i) The Fund

4. The Fund is an investment fund structured as an exempted limited partnership (an "ELP") under the Exempted Limited Partnership Act ("the ELPA"). The GP, a company incorporated in the Cayman Islands, is the general partner of the Fund. The investors in the Fund are limited partners and they hold the equity interests in the Fund. WCL, a company incorporated in the Cayman Islands, is a limited partner and made a capital contribution of some 0.5% of the total sum invested by the limited partners. It is controlled by the Al Jomaih family.

5. The Fund's governing document is the Amended and Restated Deed of Limited Partnership dated 30 September 2007 ("the LP Deed"). It provides for the term of the Fund to be ten years, with the GP

having discretion to extend the term by up to two years *"to facilitate the orderly winding up"* of the Fund. The twelve-year extended term of the Fund expired on 31 December 2018 and it is common ground that the Fund has been in voluntary liquidation since that date. Pursuant to the LP Deed, the GP is acting as liquidator of the Fund for the purposes of the winding up.

6. The Fund has still not been wound up. There are in particular two substantial assets remaining. The first is a claim against KPMG in Dubai, where the Fund has obtained judgment for approximately US$231m, but where KPMG has pursued a number of appeals so that the judgment is apparently not yet final and binding.

7. The second and most relevant asset for present purposes is an indirect controlling interest in K-Electric Limited ("KEL"). KEL is a company incorporated in Pakistan which is the sole or main provider of electricity to the residents of Karachi, which has a population of over twenty million people. It is accordingly a company of national importance in Pakistan. KEL is owned as to 66.4% by KES Power Limited ("KESP"), a Cayman Island company. Of the remaining shares, 24.36% is owned by the Government of Pakistan and the balance of 9.24% is publicly listed on the Pakistan Stock Exchange.

8. KESP is in turn owned as to 53.8% by another Cayman Island company, IGCF SPV 21 Limited ("SPV 21"), with the remainder being owned by two companies within the Al Jomaih group.

9. At the material time, SPV 21 was in turn wholly owned by IGCF SPV 26 Limited ("SPV 26") which was in turn owned by the GP in its capacity as general partner of the Fund. Thus, through these various intermediate companies, the Fund had a material interest in KEL. I shall continue to refer to SPV 26 by that name although it has since changed its name to K Power Holdings Limited.

10. The Fund was set up in 2006 by the Abraaj Group as an investment fund. The majority owner of the GP was Abraaj Investment Management Limited ("AIML") which was the investment manager for a number of the private equity funds and their related structures within the Abraaj Group.

11. The LP Deed contained a governing law and arbitration provision in the following terms:

> ***"11.6 Governing Law***
>
> ***This Deed and the rights and obligations of the parties hereto shall be governed by and construed in accordance with the laws of the Cayman Islands and the parties submit to the non-exclusive jurisdiction of the courts of the Cayman Islands….***
>
> ***11.8 Arbitration***
>
> ***Disputes shall be submitted to a panel of three arbitrators and the fees and expenses of such arbitrators shall be paid equally by the parties to the dispute. The arbitration proceedings shall be held in London, England and the arbitrators shall render their decision in writing, stating the reasons for their decision, within ninety (90) days after the notice or (sic) arbitration. The language in which such arbitration shall be conducted (and any decision which shall be rendered pursuant thereto) shall be English. Such arbitration proceedings shall follow the rules of the London Court of International Arbitration."***

(ii) Collapse of the Abraaj Group

12. In 2018, the Abraaj Group of companies collapsed amid allegations of fraud and mismanagement by Mr Arif Naqvi, who was the founder and CEO of the Abraaj Group, and his associates. AIML was subsequently placed in official liquidation. On 3 August 2022, Sage concluded a share and asset purchase agreement with the joint official liquidators of AIML ("the Sage transaction"). The assets which it purchased included a majority interest in the GP (and it has subsequently acquired the remaining shares from the other shareholders of the GP) and the sole voting share in SPV 21. The Sage transaction followed a process during the summer of 2022 under the auspices of the joint official liquidators. In the course of that process the joint official liquidators rejected a bid on behalf of the Al Jomaih family on the ground that it was too late as they had already agreed to sell to Sage. Completion of the Sage transaction occurred on 14 October 2022 following approval by a judge of the Grand Court. It follows that, from that date, the GP was ultimately controlled by Sage / Mr Chishty. The GP has been responsible for the management and winding up of the Fund since May 2020 following the termination of a management agreement between the GP and AIML.

13. Within a few days of Sage acquiring control of the GP on 14 October 2022, SPV 21 nominated Mr Chishty and another as directors of KEL. As a result, the two Al Jomaih companies who are minority shareholders in KESP (Al Jomaih Power Limited and Denham Investment Ltd) (together "the Original Shareholders") instituted proceedings in the High Court of Sindh in Karachi, Pakistan on 21 October 2022 and obtained an ex parte injunction restraining SPV 21 from nominating directors of KEL on the ground that the Sage transaction involved a change of control of SPV 21, which SPV 21 had permitted or enabled, contrary to the terms of the KESP shareholders' agreement. This generated an application to the Grand Court by SPV 21 for an anti-suit injunction against the Original Shareholders on the ground that their action in instituting proceedings in Pakistan was in breach of the exclusive jurisdiction provision in the KESP shareholders' agreement. On 30 January 2023, Segal J granted an interim anti-suit injunction, and on 20 July 2023 he gave final judgment confirming this injunction, which decision was upheld by this Court on 2 July 2024. The Original Shareholders have since instituted proceedings in this jurisdiction seeking relief in relation to KEL in similar terms to that granted by the Pakistan Court. On 9 June 2025, Asif J refused an application by the Original Shareholders for injunctive relief in similar terms to that granted by the Pakistan Court, which decision was upheld by this Court on 11 December 2025.

(iii) The first arbitration

14. On 26 May 2023, WCL applied to the GP pursuant to the LP Deed and section 22 of the ELPA to inspect the Fund's books and records. WCL followed up on 4 June 2023 with a detailed list of questions regarding the transaction with Sage and the background to it. The GP resisted providing a substantive response. In light of this, WCL commenced an arbitration against the GP on 21 June 2023 in accordance with the rules of the London Court of International Arbitration ("LCIA"). This arbitration was commenced pursuant to clause 11.8 of the LP Deed and sought a ruling on WCL's entitlement to documents and information ("the First Arbitration").

15. The GP participated in the First Arbitration to defend its position, but on 13 December 2023, the tribunal in the First Arbitration upheld WCL's complaints under the LP Deed and the ELPA and ordered that the GP should provide WCL with access to the documents and information that it sought within five days. It held that the concerns expressed by WCL about the conduct of the GP since Mr

Chishty had acquired control were sufficient to justify ordering the requested disclosure. The award of the tribunal included the following observations:

> ***"60. ….the Tribunal would hold that…[any] onus on WCL (to satisfy [the Tribunal] that it is seeking to exercise its clause 9.1 right for a purpose reasonably related to its interest as a limited partner)…is…satisfied by having drawn to the attention of the Tribunal from the documents in evidence in this arbitration a variety of matters of concern as to the conduct of the management and affairs of the [Fund] since the takeover of its control by companies controlled by Mr Chishty.***
>
> ***61. These matters are in summary as follows:***
>
> ***(a) <u>Concerns as to how Mr Chishty obtained via his various companies and is using control of the Fund</u>… [including] has procured the GP to enter into transactions that do not appear to be for the benefit of the Fund…. The GP under his control is now seeking to promote an amendment to the LP Deed which would potentially severely limit the access by the Limited Partners to information as to what the GP is and has been doing….***
>
> ***(b) <u>Concerns as to the AsiaPak loan facility</u>: This company is owned by Mr Chishty. It was disclosed by the GP in its annual report that….the GP had entered into a loan facility for up to $4 mil. with this company…to meet, so it was reported, the Fund's immediate cashflow problems, this notwithstanding that the Fund held at this time over $30 mil. in available assets (not including the proceeds from the sale of its Cnergyico shares in the sum of about £60 mil….)…. The interest rate…was a rate of 20% per annum if the loan was paid up before the end of the first year but increasing by steps each year to reach the alarming rate of 60% per annum (all compounded monthly) if not paid off until the end of the fourth year….***
>
> ***(c) <u>Concern as to how the proceeds of sale of the Cnergyico shares are held</u>…. it appears that since the takeover by Mr Chishty the money has been moved from bank to bank and has ended up in a bank account in the name of one of Mr Chishty's companies pursuant to some sort of 'escrow' arrangement….***

> ***62. In the view of the Tribunal these are all matters which do genuinely show why any Limited Partner in this [Fund] would be concerned that since the takeover Mr Chishty may have been exploiting his control of the Fund by his various companies for his own benefit and to the detriment of the Fund. Consequently they provide, to the extent that any onus of proof is placed upon them for this purpose, a good explanation as to why any Limited Partner would wish to examine the books and records of the Fund to see what had been going on and to satisfy themselves that the affairs of the [Fund] are being properly administered."***

16. The GP did not comply with the award. WCL brought proceedings in England and in the Cayman Islands to enforce the award. Cockerill J sitting in the Commercial Court made an enforcement order in England on 17 January 2024. In the Cayman Islands, Ramsay-Hale CJ granted permission on the papers on 5 January 2024 for WCL to enforce the award as a judgment. The GP applied to set aside that order and to impose additional confidentiality obligations on WCL and limitations on its use of the documents and information to be provided. On 2 February 2024, Ramsay-Hale CJ rejected the GP's position and upheld her decision to give WCL leave to enforce the award as a judgment without any additional constraints.

17. Following that decision, on 7 February 2024, the GP wrote to WCL indicating that it had uploaded documents to a data room and responding to a number of the information requests that WCL had previously made. However, WCL complained that the GP had failed properly to comply with the award and the enforcement orders.

18. In March 2024, the GP caused the share capital of SPV 26 to be reconstituted by creating a single A share to be issued to Sage or its affiliate and B shares to be issued to the limited partners. There was also a cash distribution to the limited partners. The A share has the same number of votes as all of the B shareholders taken together on an ordinary resolution and twice the number of votes as all the B shareholders taken together on a special resolution.

19. On 9 August 2024, WCL made a second request for documents and information, raising a number of new matters, which WCL alleged arose out of new information that it had obtained or concerned different aspects of the GP's and Sage's behaviour. The GP responded on 27 September 2024 and made a number of complaints about WCL's requests and wider conduct.

20. On 21 October 2024, the GP, with the agreement of the majority of limited partners, amended the LP Deed to limit the right to information of a limited partner to information concerning that particular limited partner. The amendment also purported to exclude a limited partner's right to demand information from the GP pursuant to section 22 of the ELPA. In addition, the amendment introduced a provision which enables the GP to forfeit the interests of a limited partner who, as determined in the sole opinion of the GP, acts contrary to the interests of the Fund or the other partners. WCL contends that this amendment was only able to be passed because Sage had acquired a substantial proportion of the limited partner interests.

(iv) The Second Arbitration and the current proceedings

21. On 5 February 2025, WCL and Islamic Development Bank ("IDB"), another limited partner in the Fund (having an interest of 2.5%), commenced a Second LCIA Arbitration against the GP and against Sage pursuant to the arbitration provision at clause 11.8 of the LP Deed ("the Second Arbitration"). It is this arbitration which has given rise to the current proceedings.

22. In the Second Arbitration, WCL and IDB claim that Mr Chishty and Sage have been causing the GP, which they now control, to manage the Fund in a way that benefits Mr Chishty's interests at the expense of the rest of the limited partners and have conspired with the GP to do so. WCL and IDB allege that these actions involve breaches of the LP Deed, breaches of fiduciary duty and breaches of trust by the GP. They also allege that the GP has not properly complied with the award in the First Arbitration and the enforcement orders made in England and in the Cayman Islands in respect of that arbitration.

23. On 18 February 2025, just under two weeks after the request for the Second Arbitration was filed, the GP and the Fund commenced the present proceedings. In very broad detail, they seek a declaration that the GP is not liable to WCL or to the Fund in respect of the claims made by WCL in the Second Arbitration and also seek various declarations that WCL itself has breached certain provisions of the ELPA and the LP Deed. Included in the relief sought is a mandatory order requiring WCL to terminate the Second Arbitration and two sets of legal proceedings it has initiated in Pakistan.

24. Following the institution of the present proceedings, WCL filed a summons requesting that they should be stayed in favour of the Second Arbitration, and the GP and the Fund filed a summons applying for an interim injunction to restrain WCL from pursuing the Second Arbitration pending determination of WCL's above summons.

25. The background to the various pieces of litigation and the arbitrations is that there is a strongly contested dispute between the parties arising out of the Sage transaction.

26. WCL contends that, since it acquired control of the GP in October 2022, Sage has procured that the GP has acted in the interests of Sage / Mr Chishty as opposed to the interests of the Fund and the limited partners and that it has taken a number of actions which have been to the prejudice of the Fund / limited partners in favour of Sage / Mr Chishty.

27. Conversely, the GP contends that, since their offer to purchase the Fund's assets was rejected in favour of the offer from Sage, the Al Jomaih interests, through the Original Shareholders and WCL, have sought to frustrate the Sage transaction by, for example, instituting proceedings in Pakistan in breach of the KESP shareholders' agreement, using WCL as a vehicle to make repeated oppressive, unreasonable and wide-ranging requests for information and documentation from the GP and now issuing the request for the Second Arbitration in furtherance of the Al Jomaih economic interests and in breach of the LP Deed and the ELPA.

28. In the Second Arbitration, WCL and IDB allege breaches of duty and breaches of trust by the GP, with Sage conspiring with the GP in relation to these breaches. They seek the following relief:

i) a declaration that the GP acted in breach of fiduciary duty or as part of a conspiracy with Sage in distributing the A share in SPV 26 to Sage and that this distribution was ultra vires. An order seeking the prohibition of any exercise by Sage of any rights under the A share is also sought;

ii) a declaration that the GP acted in breach of duty in making an accompanying cash distribution to the limited partners;

iii) a declaration that the GP entered into a loan with AsiaPak Investment Limited, an entity controlled by Mr Chishty, at an excessive interest rate and that there be an *'order for an account or enquiry to ascertain the losses to the Fund'* as a result of this loan and *'an order for payment by the GP of the amounts to be due on the taking of the account or enquiry'*;

iv) a declaration that the GP sold the Fund's investment in Cnergyico Mu Incorporated at a substantial undervalue and failed to deal with the sale proceeds properly;

v) orders requiring the GP to comply with the information request which was the subject of the First Arbitration;

vi) a declaration that the GP is in breach of its duty to wind up the Fund following the expiry of the extended term and an order requiring the GP to wind up the Fund in accordance with the obligation in the LP Deed; and

vii) a declaration that the GP has brought the present proceedings in breach of the LP Deed and an injunction restraining the GP from pursuing the present proceedings.

29. The GP objects to the Second Arbitration and commenced the present proceedings to prevent WCL from pursuing that arbitration. It asserts that WCL has breached section 14(1) of the ELPA by becoming involved in the conduct of the Fund's management and business in its capacity as a limited partner by instituting two proceedings in Pakistan on a derivative basis purportedly on behalf of the Fund, by instituting the Second Arbitration on a derivative basis and by making wide-ranging requests for information and documentation which are oppressive and made for an improper purpose. The relief sought in the proceedings is for:

i) A declaration that WCL has breached section 14(1) of the ELPA, which prohibits a limited partner from being involved in the conduct of an ELP's business;

ii) A declaration that WCL has breached section 33(1) and section 33(3) of the ELPA, which prohibit a limited partner from being a party to legal proceedings involving an ELP unless the general partner has failed to institute proceedings on behalf of the ELP without cause;

iii) A declaration that WCL has breached certain provisions in the LP Deed;

iv) A declaration as to the extent of WCL's right to information and documents concerning the Fund pursuant to section 22 of the ELPA;

v) A declaration that the GP is not liable to WCL or to the Fund in respect of the claims made by WCL in the Second Arbitration;

vi) A permanent injunction restraining WCL, inter alia, from pursuing the Second Arbitration;

vii) Damages and/or equitable compensation;

viii) Any appropriate further orders pursuant to section 129 of the Companies Act (2025 Revision) as applied by section 36(3)(d) of the ELPA.

The Judgment

30. The Judge considered a number of issues, some of which have not been renewed on appeal and accordingly I need not refer to them. As to the remaining issues, I would summarise his conclusions as follows:

(i) The Appellants contended that the claims made by WCL in the Second Arbitration were in reality derivative claims on behalf of the Fund; they sought recompense for the Fund and the relief sought would affect the interests of other limited partners. The Judge rejected this submission and held that WCL's claims in the Second Arbitration were direct claims by a limited partner against a general partner.

(ii) Having reviewed in some detail the general principles regarding the stay of legal proceedings in favour of arbitration and in particular the leading authority of *FamilyMart China Holding Co Limited v Ting Chuan (Cayman Islands) Holding Corporation* [2023] UKPC 33 in the Judicial Committee of the Privy Council, the Judge held that the claims in the present proceedings were within the scope of the arbitration agreement contained in the LP Deed and, subject to consideration of whether the fact that the Fund was in voluntary liquidation led to a different conclusion, should be stayed in favour of the Second Arbitration pursuant to section 4 of the Foreign Arbitral Awards Enforcement Act (1997 Revision) ("FAAEA").

(iii) The Appellants submitted before the Judge that the effect of section 36(3)(d) of the ELPA was to make section 129 of the Companies Act available where there was a voluntary winding up of an ELP and that section 129 allowed the liquidator or any contributory (or a limited partner in the context of an ELP) to apply to the court to determine *"any question arising in the voluntary winding up"*. The Judge accepted that this was so. The Appellants went on to argue that the fact that the Fund was in voluntary liquidation overrode the parties' agreement to refer their disputes to arbitration because the court had a broad supervisory jurisdiction under section 36(3)(g) of the LPA and section 129 and any questions regarding the Fund should be determined by the court by way of application under these sections. The Judge rejected this submission. He reasoned that the Fund was in a voluntary winding up as opposed to a court

ordered winding up. The court was not actively supervising any aspect of the voluntary liquidation of the Fund and, until the issue of the present proceedings after WCL had commenced the Second Arbitration, the court had not been asked by anyone to do so or to determine any question in the voluntary winding up.

(iv) The Judge was further not satisfied that the issues that WCL and IDB had raised in the Second Arbitration and the claims against them that the GP wished to pursue in the present proceedings as set out in the statement of claim were properly described as *"any question(s) arising in the voluntary winding up"*. They were not questions; they were full blown arguments between the parties. He held that the natural construction of the arbitration provision in the LP Deed was that it was intended to cover claims and cross-claims similar to those advanced by WCL and the GP and that this would continue to be the position even where the Fund was being wound up. Furthermore, the language of section 129 was permissive in that it used *"may"* rather than *"must"* and therefore did not exclude the continued availability of recourse to arbitration.

(v) That was not to say that the court was authorising the Second Arbitration to conduct the winding up of the Fund. Once the arbitration tribunal had made all relevant factual findings and granted any relief that was within its remit, the parties could bring the matter back to court to make any orders and grant any relief that was exclusively within the court's jurisdiction. He did not consider that the Second Arbitration would be trespassing on the jurisdiction of the court to supervise the voluntary winding up of the Fund if it was permitted to determine the substance of WCL's claims or those of the GP as set out in its statement of claim and the matter then returned to the Grand Court for it to make any necessary orders or grant relief concerning the winding up.

(vi) Finally, the Judge rejected a submission on behalf of the Appellants that the court should refuse to stay the proceedings because the Second Arbitration was an abuse of process as it was being brought for improper reasons in bad faith and was not pursuing a legitimate goal. The Judge held that there were numerous allegations and counter-allegations about which side was acting in bad faith and he was not in a position to determine on an interlocutory basis and on affidavit evidence whether this was so. It would risk impermissibly embarking on a mini trial. He therefore refused to refrain from ordering a stay of the proceedings on that ground.

Grounds of appeal

31. The Appellants make four overarching criticisms of the Judge's decision. First, as the Fund is in voluntary liquidation, they submit that the court cannot deny access to its supervisory jurisdiction under section 36(3)(g) of the ELPA and section 129 of the Companies Act. The jurisdiction to give directions and make orders under the above sections is non-arbitrable.

32. Secondly, as an alternative way of putting it, the arbitration agreement cannot on its true construction, cover a request for directions or determination of a question by a liquidator. The court's jurisdiction under the above sections cannot be ousted in favour of arbitration.

33. Thirdly, the claims in the Second Arbitration are properly classified as derivative claims. WCL, as a limited partner, does not have the authority to bring a derivative claim on behalf of the Fund and has not obtained any necessary approval. In any event, by analogy with company law, any derivative claim can no longer be brought once an ELP is in liquidation and has an appointed liquidator.

34. Fourthly, WCL is bringing the claims in the Second Arbitration in bad faith for improper reasons and it would therefore be an abuse of process to allow it to continue.

35. I think it is convenient to consider the various issues raised on this appeal under four headings:

(i) Are the claims in the Second Arbitration derivative claims?
(ii) Ignoring for the moment that the Fund is being wound up, should the proceedings be stayed in favour of the Second Arbitration?
(iii) Does the fact that the Fund is being wound up mean that the claims in the present proceedings and the Second Arbitration are non-arbitrable?
(iv) Should the application for a stay of the present proceedings be dismissed on the ground that bringing the Second Arbitration is an abuse of process?

(i) Are the claims in the Second Arbitration derivative claims?

36. In their skeleton argument, the Appellants submit that the claims in the Second Arbitration are derivative claims. They refer to well-established authority to the effect that, in company law, once a company goes into liquidation, derivative proceedings by a shareholder cannot be pursued; see for example *Ferguson v Wallbridge* [1935] 3 T.L.R. 66 per Lord Blanesburgh at 83; *Fargro Limited v Godfroy* [1986] 1 WLR 1134 per Walton J; *Barrett v Duckett* [1995] B.C.C. 362 per Peter Gibson

LJ in the Court of Appeal. They argue that, by analogy, the same principle applies in respect of an ELP which is in liquidation.

37. This raises the question of whether the claims in the Second Arbitration are indeed derivative claims as Mr Chapman submits. He contends that, if one looks at the relief sought in the Second Arbitration, it is clear that the claims seek accounts and enquiries to discover the alleged losses to the Fund as a whole and which seek to unwind transactions which affect all of the limited partners in the Fund. Such claims cannot be pursued in respect of WCL's interests or individual loss; they can only be pursued on a derivative basis and any relief that could be granted in respect of them would have to be on a derivative basis and affect and bind the Fund as a whole and all limited partners within it.

38. It is correct that WCL and IDB seek relief within the Second Arbitration which restores to the Fund the appropriate loss to the Fund caused by any breaches of duty or trust which are found to have been committed by the GP rather than compensation for losses suffered by WCL and IDB alone. For example, in relation to the AsiaPak loan, the relief sought is as follows:

> ***"251.2.1 a declaration that the AsiaPak Loan and amendments thereto were entered into in breach of the [GP's] duties;***
>
> ***251.2.2 an order for an account or enquiry to ascertain the losses to [the Fund] occasioned by the entry into the AsiaPak Loan and the amendments thereto;***
>
> ***251.2.3 an order for payment by [the GP] of the amounts to be due on the taking of the account or enquiry."***

Similar relief is sought in respect of the alleged breach of duty by the GP in connection with the Cnergyico share sale.

39. However, I cannot accept Mr Chapman's argument that this means that the claims are derivative claims. In my judgment the Judge was correct to hold that the claims in the Second Arbitration are direct individual claims by WCL and IDB.

40. The position was considered in some detail by this Court in *Kuwait Ports Authority v Port Link GP Limited* [2023] (1) CILR 50. In that case, the plaintiffs as limited partners of an ELP brought direct

claims against the general partner for alleged breaches of duty and other causes of action, but in the alternative advanced derivative claims on behalf of the partnership.

41. This Court noted that, pursuant to section 16(1) of the ELPA, a general partner of an ELP holds the assets on trust as an asset of the ELP. It further noted that in *Target Holdings Limited v Redferns* [1995] 3 All E R 785, the House of Lords considered the appropriate remedy for breach of trust. In his speech Lord Browne-Wilkinson said as follows at 793-794:

> ***"The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust instrument, if any, and the general law. Thus, in relation to a traditional trust where the fund is held in trust for a number of beneficiaries having different, usually successive, equitable interests, (e.g. A for life with remainder to B), the right of each beneficiary is to have the whole fund vested in the trustees so as to be available to satisfy his equitable interest when, and if, it falls into possession. Accordingly, in the case of a breach of such a trust involving the wrongful paying away of trust assets, the liability of the trustee is to restore to the trust fund, often called 'the trust estate', what ought to have been there.***
>
> ***The equitable rules of compensation for breach of trust have been largely developed in relation to such traditional trusts, where the only way in which all the beneficiaries' rights can be protected is to restore to the trust fund what ought to be there. In such a case the basic rule is that a trustee in breach of trust must restore or pay to the trust estate either the assets which have been lost to the estate by reason of the breach or compensation for such loss…. If specific restitution of the trust property is not possible, then the liability of the trustee is to pay sufficient compensation to the trust estate to put it back to what it would have been had the breach not been committed….***
>
> ***Hitherto I have been considering the rights of beneficiaries under traditional trusts where the trusts are still subsisting and therefore the right of each beneficiary, and his only right, is to have the trust fund reconstituted as it should be…."***

42. Drawing on this well-established principle in relation to trusts, this Court went on to say as follows in *Kuwait Ports Authority*:

"57. Because a trust also has no separate legal personality, thus making the position similar to the statutory trust created by ELPA s.16(1), we also regard the position of a claim by a beneficiary of a trust against the trustee as important. The beneficiary of a subsisting trust including a discretionary trust is entitled to bring a claim against the trustee to recover loss suffered by the trustee's breach of trust, but the remedy is for an order to restore to the trust what ought to have been there: see Target v Redferns; Lewin on Trusts, 20th ed., para 21-046 (2020) and Snell's Equity, 34th ed., paras 2-003 – 2-004 and 21-046 (2022).

58. In Target v Redferns…Lord Browne-Wilkinson stated that the rule developed by equity reflected the fact that while each beneficiary had the right to claim, 'no one beneficiary was entitled to the trust property' and there was a 'need to compensate all beneficiaries for the breach'. He had earlier stated (ibid at 434C-D) that an order to restore was 'the only way in which <u>all</u> beneficiaries' rights [could] be protected [emphasis added]. The remedy thus ensured that all the beneficiaries' rights were protected and the beneficiary who issued the proceedings did not steal a march on the others and scoop the pool…. [original emphasis]

59. We consider that this approach and remedy is equally applicable in the case of the statutory trust created by s.16(1) ELPA…. We have concluded that in proceedings against the GP, a limited partner can recover for loss suffered by the breach of the statutory trust but that the remedy would be the restoration of the ELP's fund thus compensating the direct losses suffered by all the constituent limited partners. We discuss further aspects of ordering the restoration of the fund and its doctrinal underpinning when considering the plaintiffs' direct claims against D2 and D3. The important point is that while the individual partners, like the beneficiaries of a discretionary trust, have a direct claim, if established, the remedy for that claim reflects the fact that no one partner is entitled to all of the fund.

60. This remedy prevents a limited partner claimant from benefitting alone from any recovery either at the expense of the other limited partners or of the ELP's creditors. It thus directly meets the 'stealing a march' and 'scooping the pool' elements of the practical and policy reasons relied upon by Ms Stanley, the substantive elements for the case for requiring a claim by a limited partner against the GP to be by way of partnership accounts from the

> ***outset. As we have stated, Golstein v Bishop shows that even in the case of an ordinary partnership there is room for flexibility and that a trial of the merits of the claim may be held before taking a partnership account. It suggests that where there is no prejudice either to the creditors of the partnership or to other parties it is possible to have a trial of the merits of a claim brought by a partner before a partnership account is taken.***
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> ….
>
> ***64. In summary, for the reasons we have given, we dismiss the GP's appeal against the judge's refusal to strike out the plaintiffs' direct claims against the GP. The consequence is that the plaintiffs may bring their direct claim against the GP. We wish to make it clear that, in the event of success, the likely remedy would be an order to restore the trust fund rather than equitable compensation payable directly to the relevant limited partner."***

43. In my judgment, this Court in *Kuwait Ports Authority* made it abundantly clear that a limited partner has a direct personal claim against a general partner for breach of the general partner's duties or other wrongdoing and that the remedy upon proof of liability is not a payment of equitable compensation direct to the limited partner but is an order for restoration of the trust fund.

44. It is true, as Mr Chapman submitted, that the Court indicated at [38] and [145] that an ELP might be able to claim against its general partner, with the consequence that if the requirements of section 33(3) are met, a limited partner could bring a derivative claim on the partnership's behalf. However, the court specifically did not decide the matter. It went on to say at [149] and [150] that in any event, a derivative claim would be unnecessary in circumstances where a limited partner has a direct claim followed by an order for restoration of the trust fund, as exactly the same would be achieved by a direct claim as would be the case in a derivative action.

45. The statement of case in the Second Arbitration specifically states that the claim is not a derivative claim. Thus paragraph 4 asserts:

> ***"The Claimants are Limited Partners in the IGCF Fund. They have brought this Arbitration in the interests of the entire IGCF Fund and to protect their own interests in the IGCF Fund, including by preventing the IGCF GP from acting in breach of the LP Deed***

and its duty to act in good faith at all times. In addition to protecting the value of the Claimants' interests in the IGCF Fund, this arbitration will also benefit all Limited Partners. For the avoidance of doubt, this arbitration is not brought on a derivative basis. The Claimants are not seeking to bring a claim on behalf of the Fund."

46. Although not specifically expressed as such, the relief sought in the Second Arbitration by WCL and IDB is in effect for the restoration of the trust fund. It seeks an account of the losses to the Fund as a result of the GP and Sage's wrongdoing and seeks the payment of compensation for such losses (see para 38 above).

47. In my judgment, this is a straightforward example of the sort of claim discussed in *Kuwait Ports Authority*, namely a direct personal claim by two limited partners for wrongdoing by the general partner (and another limited partner, Sage) with the remedy sought being restoration of the trust fund. It is not a derivative claim by WCL and IDB on behalf of the Fund.

(ii) Ignoring for the moment that the Fund is being wound up, should the proceedings be stayed in favour of the Second Arbitration?

(a) The applicable principles

48. Before considering this issue in relation to the facts of this case, it is necessary to recall the principles which have been developed as to when legal proceedings will be stayed in favour of arbitration. One starts with the statutory position as laid down by section 4 of the FAAEA which provides as follows:

"If any party to an arbitration agreement…commences any legal proceedings in any court against any other party to the agreement…in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

49. In terms of the approach to the construction of an arbitration agreement, the leading authority is the decision of the House of Lords in *Fiona Trust v Privalov* [2007] UKHL 40 and in particular the following observations of Lord Hoffmann:

> ***"5. …Arbitration is consensual. It depends upon the intention of the parties as expressed in their agreement. Only the agreement can tell you what kind of disputes they intended to submit to arbitration. But the meaning which parties intended to express by the words which they used will be affected by the commercial background and the reader's understanding of the purpose for which the agreement was made. Businessmen in particular are assumed to have entered into agreements to achieve some rational commercial purpose and an understanding of this purpose will influence the way in which one interprets their language.***
>
> ***6. In approaching the question of construction, it is therefore necessary to enquire into the purpose of the arbitration clause. As to this, I think there can be no doubt. The parties have entered into a relationship, an agreement or what is alleged to be an agreement or what appears on its face to be an agreement, which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.***
>
> ***7. If one accepts that this is the purpose of an arbitration clause, its construction must be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be submitted to arbitration and others were to be decided by national courts. Could they have intended that the question of whether the contract was repudiated should be decided by arbitration but the question of whether it was induced by misrepresentation should be decided by a court? If, as appears to be generally accepted, there is no rational basis upon which businessmen would be likely to wish to have questions of the validity or enforceability of the contract decided by one tribunal and questions about its performance decided by***

another, one would need to find very clear language before deciding that they must have had such an intention.

….

13. In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17:

"If any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so.""

Fiona Trust marked a sea change in the approach to the construction of arbitration agreements and has led to an emphasis on holding parties to an arbitration agreement to their bargain.

50. Despite the firm guidance in *Fiona Trust*, difficult questions can arise when an arbitration tribunal cannot make certain orders because they are orders which only a court may make. The leading authority in this area is the decision of the Privy Council in *FamilyMart China Holding Co Limited v Ting Chuan (Cayman Islands) Holding Corporation* [2023] UKPC 33. In that case, the plaintiff brought a petition to wind up the company on just and equitable grounds basing its application on a loss of trust and confidence and an irretrievable breakdown in the relationship between the two shareholders. The defendant applied for a stay of the proceedings on the ground that the shareholders' agreement contained a widely drawn arbitration clause. The application for a stay was opposed on the ground that only the court could order a winding up of the company. The Privy Council agreed that this was correct and that only the court could order that a company be wound up. However, it held that the issues of whether there had been a loss of trust and confidence and whether there had been an irretrievable breakdown in the relationship between the shareholders were matters which fell within the arbitration agreement and legal proceedings should be stayed for such matters to be resolved in arbitration. The matter would then be brought back to the court for the court to

determine whether, in the light of the findings by the arbitral tribunal, it would be just and equitable to wind up the company.

51. In the course of his judgment, Lord Hodge made a number of helpful observations which are relevant to the present proceedings:

> ***"57. From this brief review of international authorities the Board considers that there is now a general consensus among leading arbitration jurisdictions in the common law world that the domestic courts of countries that are signatories of the New York Convention respect and give priority to the autonomy of the parties to arbitration agreements. The statutory provision of those countries provide for a mandatory stay of legal proceedings at the request of a party to an arbitration agreement when a matter in those proceedings is referrable to arbitration. There is also a broad consensus on how to approach the determination of matters which must be referred to arbitration.***
>
> ***58. The court in considering such an application adopts a two-stage process. First, the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and, secondly, the court must determine in relation to each such matter whether it falls within the scope of the arbitration agreement…***
>
> ***59. The court must ascertain the substance of the dispute or disputes between the parties. This involves looking at the claimant's pleadings but not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration. It involves also a consideration of the defences, if any, which may be skeletal as the defendant seeks a reference to arbitration, and the court should also take into account all reasonably foreseeable defences to the claim or part of the claim.***
>
> …
>
> ***61. Thirdly, in the Board's view, a 'matter' is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute. If the 'matter' is not an essential element of the claim or of a relevant defence, it is not a matter in respect of which***

the legal proceedings are brought… a 'matter' requiring a stay does not extend to an issue that is peripheral or tangential to the subject matter of the legal proceedings…. a 'matter' is something more than a mere issue or question that might fall for decision in the court proceedings or in the arbitral proceedings.

….

64. No judicial formula encapsulating the meaning of 'matter' should be treated as if it were a statutory text. A court facing an application for a stay under section 4 of the FAAEA should approach the question in a practical and common-sense way. The court must respect the agreement of the parties to arbitrate their disputes. An agreement to arbitrate a dispute is an agreement not to resolve that dispute in court proceedings. Thus, any substantial matter in the legal proceedings, which is relevant to the claim or foreseeable defence, and which is within the scope of the arbitration agreement, will give rise to a mandatory stay of the legal proceedings pro tanto on the application of one of the parties. There is considerable authority to support the view that the procedural complexity caused by a reference to arbitration does not of itself render a matter non-arbitrable…. That does not mean that procedural complexity is irrelevant in all circumstances because the court, when addressing an application to stay legal proceedings to enable the determination of a dispute by arbitration, should be careful to prevent an abuse of process. The Board agrees… that the court could refuse an otherwise mandatory stay if the applicant has no real or proper purpose for seeking the stay. That could include not only an application for a stay in relation to issues that were peripheral to the legal proceedings but also an application that amounted to an abuse of process… There may be circumstances in which a party seeks a stay for an improper purpose and it would be contrary to justice if the court could not act to prevent an abuse of process.

….

66. The approach to the word 'matter' in section 4 of the FAAEA… may involve the fragmentation of the parties' disputes with some matters being determined by an arbitral panel and other matters being resolved by the court. Such fragmentation may on occasion be inconvenient to one or more of the parties to the court proceedings. Rational

businesspeople may as a general rule prefer that their disputes are determined in the same forum; see Lord Hoffmann in Fiona Trust…. An arbitration agreement may be interpreted generously to achieve that end if the court can ascertain that as the parties' commercial purpose and the wording of the agreement can bear that meaning. But, where, on a proper interpretation of the arbitration agreement, the parties have contracted to refer to arbitration disputes which do not extend to all the matters raised in the legal proceedings, giving effect to the parties' contract would involve fragmentation of the disputes. The disadvantages caused by such fragmentation can be mitigated by effective case management by both the court and the arbitral panel."

52. Lord Hodge then went on to consider when an arbitration agreement could be considered as *'inoperative'*. In that connection I would refer to the following extracts from his judgment:

"70. On the authorities there are two broad circumstances in which an arbitration agreement may be inoperative. The first is where certain types of dispute are excluded by statute or public policy from determination by an arbitral tribunal. The second is where the award of certain remedies is beyond the jurisdiction which the parties can confer through their agreement on an arbitral tribunal. The Board refers to the first type as 'subject matter non-arbitrability' and to the second as 'remedial non-arbitrability'.

71. Subject matter non-arbitrability can arise where the state intervenes by statute to preserve a right of access to the courts… Subject matter non-arbitrability may also arise as a result of public policy considerations. In the Singaporean case of Larsen Oil and Gas Pte Limited v Petropod Limited [2011] 3 SLR 414 ("Larsen") V K Rajah JA, delivering the judgment of the Singapore Court of Appeal, at para 44 recognised two grounds for excluding from arbitration a dispute which fell within the scope of an arbitration agreement. The first was where the legislator has precluded the use of arbitration to determine the particular type of dispute and the second was where 'there is an inherent conflict between arbitration and the public policy considerations involved in particular type of dispute'. Larsen was concerned with claims by the liquidator of an insolvent company for the avoidance of unfair preferences and payments made with an intention to defraud a creditor which arose only on the onset of insolvency and could be pursued by the liquidator of the insolvent company for the benefit of the company's creditors. The court refused the

application by Larsen, the recipient of the alleged preference, to stay the legal proceedings for arbitration of the dispute on grounds of public policy, namely that it would affect the substantive rights of the company's creditors and undermine the policy aims of the insolvency regime.

72. The underlying concept of subject matter non-arbitrability is that there are certain matters which in the public interest should be reserved to the courts or other public tribunals for determination.

…

75. The second circumstance in which an arbitration agreement may be inoperative, i.e. where there is a remedial non-arbitrability, is concerned with the circumstance in which the parties have the power to refer matters to arbitration but cannot confer on the arbitral tribunal the power to give certain remedies. In the common law world there appears to be a general consensus that an arbitration agreement cannot confer on an arbitral tribunal the power to make an order to wind up a registered company on the application of a creditor where the company is insolvent and there is strong authority in support of such an exclusion when the application is by a contributory where the company is solvent. This is because the power to wind up a company lies within the exclusive jurisdiction of the courts, which alone have the discretion as to whether to make such an order...

…

78. In WDR Delaware [a decision of the Federal Court of Australia, [2016] FCA 1164] Foster J summarised his conclusion on this matter at para 164:

> ***"With the exception of that part of the present proceeding which involves the court forming an opinion as to whether the plaintiffs are entitled to a winding up order, the questions of fact and law which mark out the substantive controversy between the parties in this proceeding are all matters which are capable of resolution by arbitration. Any award or awards which determine those matters will be taken into account when the Court comes to consider whether a winding up order should be made. If, at the end of***

> ***the arbitral process, the award or awards do not address satisfactorily or comprehensively all of the grounds relied upon by the plaintiffs in support of their claims for relief made in the present proceeding, then it will be open to them to supplement or explain the terms of the relevant award or awards by evidence. The process by which that would be done is the everyday process of applying the law of evidence."***
>
> ***The Board agrees as a general rule with this approach to discrete matters which involve inter-parties' disputes in the context of a winding up application. Matters, such as whether one party has breached its obligations under a shareholders' agreement or whether equitable rights arising out of the relationship between the parties have been flouted, are arbitrable in the context of an application to wind up a company on the just and equitable ground and the arbitration agreement is not inoperative because the arbitral tribunal cannot make a winding up order."***

53. I think it is helpful to refer to three other cases where the courts have had to consider issues of subject matter non-arbitrability and remedial non-arbitrability in the context of whether to stay legal proceedings for arbitration.

54. The case of *Bridgehouse (Bradford No 2 Limited) v BAE Systems Plc* [2021] 1 All ER (Comm) 442, [2020] EWCA Civ 759 was concerned with section 1028(3) of the Companies Act 2006 of the United Kingdom which provides:

> ***"The court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly may be) as if the company had not been dissolved or struck off the register."***

In other words, the sub-section is dealing with where a company has been struck off the register but then reinstated under section 1024 of the 2006 Act.

55. An issue arose in *Bridgehouse* as to whether an application to the court for relief under s.1028(3) should be stayed and referred to an arbitration panel pursuant to an arbitration agreement between the parties. The Court of Appeal upheld the decision of the High Court that (i) the arbitration

agreement applied to the claim for relief under s.1028(3) and (ii) the claim for relief was not one which was non-arbitrable.

56. In relation to the first issue, Newey LJ said at [39] and [40]:

> ***"39. Nor do I consider that the possibility of directions under s1028(3) of the 2006 Act affecting third parties lends any real support to Mr Lord's case. Very often, an application under s1028(3) will be of no significance to anyone but the immediate parties. If in a particular case third party interests are engaged, they may have implications for the relief that an arbitrator can grant. I do not think, however, that the fact that relief under s1028(3) can potentially have an impact on third parties indicates that disputes as to the application of s1028(3) do not fall within [the arbitration provision] at all.***
>
> ***40. ….The fact, moreover, that the present dispute relates to whether relief should be given pursuant to a statute does not mean that it does not also 'arise out of the provisions of' the Contract. Further, there is no question of the Contract 'mak[ing] it clear' that questions as to relief under s1028(3) were intended to be excluded from the arbitrator's jurisdiction, which suggests that cl 19.1(a) should be presumed to apply in accordance with the guidance given in the Fiona Trust case."***

57. As to the second issue, namely whether an application for relief under s1028(3) was non-arbitrable, Newey LJ began by outlining the position at [55] and [56] as follows:

> ***"55. When considering the arbitrability of applications for relief under s1028(3) of the 2006 Act, it is necessary to consider both whether the 2006 Act prohibits the reference to arbitration of such matters and whether arbitration is precluded by public policy considerations.***
>
> ***56. So far as the former is concerned, it is clear, I think, that the 2006 Act does not itself, either expressly or by implication, prohibit reference to arbitration of matters arising on an application for relief under s1028(3) of the 2006 Act. The fact that s1028(3) speaks of 'the court' granting relief does not carry that implication. Echoing Mance LJ in Wealands v CLC Contractors Limited, Longmore LJ pointed out in Fulham Football Club***

(1987) Limited v Richards that 'the fact that a statutory power, which a court would not have at common law apart from the statutory provision, is given to the court does not mean that an arbitrator, to whom a dispute is properly agreed to be referred, does not have a similar power'."

58. Turning to public policy considerations, Newey LJ said at [58] that certain matters, such as making a winding up order or restoring a company to the register were not susceptible to arbitration because they *"do not merely involve private disputes but status and potentially have implications far beyond the company and any particular counterparty"*.

59. He went on to consider whether the fact that an award might affect third parties meant that the dispute was non-arbitrable. He held that it did not. In this respect, he summarised the position at [61] in the following terms:

"It is true that applications for relief under ss1028(3) and 1032(3) of the 2006 Act can potentially have implications for third parties who could not be bound by the outcome of an arbitration… Be that as it may, however, the possibility of relief under s1028(3) or s1032(3) having an impact on third parties does not, as it seems to me, mean that applications for such relief are not susceptible to arbitration. As Patten LJ said in Fulham, 'The limitation which the contractual basis of arbitration necessarily imposes on the power of the arbitrator to make orders affecting non-parties is not necessarily determinative of whether the subject matter of the dispute is itself arbitrable', albeit that the potential for relief to impinge on third parties may 'impose limitations on the scope of relief obtainable in arbitrable proceedings'. In similar vein, Longmore LJ observed in Fulham that it is 'well settled that the fact that an arbitrator cannot give all the remedies which a court could does not afford any reason for treating an arbitration agreement as of no effect' and Sundaresh Menon CJ explained in Tomolugen Holdings Ltd v Silica Investors Ltd that '[t]he fact that the relief sought might be beyond the power of the tribunal to grant does not in and of itself make the subject matter of the dispute non-arbitrable."

60. I should add that in the extract from the judgment of Longmore LJ in *Fulham Football Club [1987] Ltd v Richards* [2011] EWCA Civ 855 at [103], quoted by Newey LJ in the above passage, Longmore LJ went on to add:

> ***"The inability to give a particular remedy is just an incident of the agreement which the parties have made as to the method by which their disputes are to be resolved."***

61. Reverting to the judgment of Newey LJ in *Bridgehouse*, he accepted at [63] that referring the matter to arbitration could produce procedural complexity and that it might be thought simpler to leave the court to deal with any relief but went on to say:

> ***"…If needs be, however, the Court proceedings could be stayed to allow for arbitration and, like Sundaresh Menon CJ in Tomolugen Holdings Ltd v Silica Investors Ltd, I do not consider that procedural complexity will of itself generally be capable of giving rise to non-arbitrability."***

62. In the same case, Males LJ also made relevant observations as follows on the issue of arbitrability at [73]-[74]:

> ***"In considering whether a dispute is arbitrable, the fact that the parties have agreed that it should be arbitrated is an important starting point. What that means is that they have agreed, not only that it should be arbitrated, but also that it should <u>not</u> be decided by a court. The law permits commercial parties to choose arbitration and should respect their choice unless there are compelling reasons not to do so. As I said in Nori Holding Limited v Public Joint-Stock Co Bank Otkritie Financial Corp [2018] EWHC 1343 (Comm)…***
>
> ***"Where parties agree to arbitrate, it is the policy of the law that they should be held to their bargain."***
>
> ***74. Compelling reasons to the contrary might be found in statutory provisions making clear that certain kinds of dispute are not capable of being determined by arbitration or in principles of public policy.."***

63. Males LJ concluded by saying at [79]:

> ***"As Mr Lord was unable to point to anything specific to this dispute which would render it incapable of being arbitrated, he was driven to submit that an application for relief under s1028(3) could never be arbitrated in any circumstances. While I would accept that there are some kinds of application which are incapable of being arbitrated, of which an application to wind up a company is an example, this should in my judgment be a conclusion of last resort. Even then it may be appropriate…for particular issues falling within the scope of an arbitration clause to be referred to arbitration before the court decides whether to make an order which only the court can make."***

64. In *NDK Ltd v HUO Holding Ltd* [2023] 1 All ER (Comm) 603, the shareholders of a company incorporated in Cyprus entered into a shareholders' agreement with an arbitration clause. The shareholders subsequently fell into dispute over whether certain pre-emption rights conferred under the agreement had been breached and the claimant began proceedings before the Cyprus court. The defendants commenced an arbitration pursuant to the arbitration clause and obtained an award which granted an anti-suit order in respect of the Cyprus proceedings. The claimant then challenged the arbitration award in the Commercial Court. One of the issues which came before Foxton J in the Commercial Court was whether the fact that the claimant had claimed relief in the Cyprus proceedings of a kind that could not be obtained from the arbitrators (in particular rectification of the register of members) meant that the matters raised in the Cyprus proceedings were not arbitrable. At [61] when dealing with the issue of whether the dispute fell within the arbitration provision, Foxton J said this:

> ***"61. The fact that NDK has claimed relief in court of a kind which could not be obtained from the arbitrators (in particular rectification of the register of members) does not have the result that the matters raised in the Cyprus Proceedings fall outside the LCIA Arbitration Agreement. In some cases, the inability to obtain relief of a particular kind from the parties' chosen tribunal is simply a 'practical consequence' of their choice: Fulham Football Club (1987) Ltd v Richards [2012] 1 All ER (Comm) 1148, [2012] Ch 333 at [40], [84] (Patten LJ), [103] (Longmore LJ)); RiverRock Securities Limited v International Bank of St Petersburg (joint stock co) [2021] 2 All ER (Comm) 1121, [2020] 2 Lloyds Rep 591 (at [59]-[62]). Where the availability of a particular form of statutory relief from the court cannot be (or has not been) precluded by an agreement to arbitrate the underlying dispute,***

then it is possible to adopt a bifurcated approach, in which the relevant facts are determined by the parties' chosen tribunal, and relief then sought from the court on the basis of the arbitrators' determination…"

65. In respect of the issue of arbitrability, Foxton J said this:

"70. Adopting the approach approved in the authorities at [61] above, the fact that the arbitration tribunal does not itself have power to grant part of the relief sought, by altering the terms of the register of members of a company so as to give effect to its determination, does not render the underlying dispute non-arbitrable, albeit it may require the successful party to bring court proceedings for the purpose of giving effect to the arbitrable determination in that context. I am not persuaded that characterising the issue of who should appear on the register of members as one of 'status' requires a different analysis. The issues of whether shares were sold by A to B, or whether C had a legal right to acquire the shares from A which took priority over any such sale, are essentially private and commercial disputes, with registration being a means of giving effect to valid transfers once the relevant entitlement has been established (and therefore essentially 'consequential' in nature…). This is very different from the question of whether a company (which may have enjoyed rights against or incurred liabilities to a wide variety of parties before its 'demise') should be restored to existence with which Newey LJ was dealing when referring to 'status' in Bridgehouse…."

66. In relation to third party interests which might be affected by an award, Foxton J said as follows:

"72. Further, where steps are taken to enforce or give effect to the arbitration award by way of a court order… it will be open to the court to refuse to do so if relevant third-party interests would be adversely affected. For example, where a third-party claims to be a bona fide purchaser for value from the vendor of shares which have been the subject of an order for specific performance by an arbitral tribunal in favour of another purchaser, the court could refuse to enter judgment in terms of that part of the relief sought….

73. However, the public interest prayed-in-aid in this case… is far removed from a conflicting claim by a third party to the same asset, or that which would arise when

enforcing a claim between the arbitrating parties would directly interfere with a third party's legal rights (for example an order to hand over a possession of a building in which third parties were living). Any public interest arising from third party access to and reliance on public records relating to an arbitrating party's affairs, the contents or accuracy of which would be impacted by an arbitral determination, is relatively weak by comparison. In my determination, it is in no way sufficient to outweigh the strong public interest in allowing commercial parties to refer their disputes to arbitration and holding them to their agreement to do so…"

67. Finally, in *Ren CI v Nebula (Cayman) Limited*, Grand Court, 16 February 2023, Doyle J adopted the observations of Foxton J referred to above as being equally applicable in this jurisdiction and held that the fact that the plaintiff's claim in the legal proceedings included a claim for rectification of the defendant company's register of members and directors (which could only be ordered by the court) did not mean that the underlying dispute did not fall within the arbitration agreement or was non-arbitrable.

(b) Application to the facts

68. With that summary of the relevant legal principles, I turn to consider the two key issues for this part of the judgment, namely whether the claims in the present proceedings fall within the arbitration provision at clause 11.8 of the LP Deed and, if so, whether the claims are nevertheless non-arbitrable.

69. In relation to the first issue, I have no hesitation in agreeing with the Judge that the matters arising in the present proceedings brought by the GP fall within clause 11.8 of the LP Deed requiring the parties to resort to arbitration. I do so for the following reasons:

(i) Clause 11.8 (as set out at para 11 above) is in wide terms. It refers simply to any *'dispute'* and states that this should be referred to arbitration. There is no definition clause which gives any narrower meaning to the word *'dispute'*, than its normal wide meaning.

(ii) The matters raised in the present proceedings are summarised at para 28 above which is in turn taken from the Judge's summary in the Judgment. It has not been suggested before us that this misstates the position in any way. All the matters relied upon by the GP relate to WCL's conduct as a limited partner and allege breaches by WCL of the LP Deed and/or ELPA. The

relief sought in the proceedings comprises declarations as to the various alleged breaches, a declaration as to WCL's right to information and documentation, an injunction restraining WCL from breaching the LP Deed and the ELPA and an injunction requiring WCL to terminate the Second Arbitration as well as two actions in Pakistan. These are all matters which fall within the meaning of a *'dispute'* between the parties to the LP Deed pursuant to clause 11.8.

(iii) The GP also seeks a negative declaration that it is not liable in respect of the claims brought by WCL in the Second Arbitration. As Mr Chapman accepted in argument, it is clear that the defence of WCL to the present proceedings will be to argue that the claims in the Second Arbitration are made out; thus the issues in the proceedings will essentially be the same issues as are before the Second Arbitration. On any view, all the claims brought by WCL and IDB in the Second Arbitration fall within clause 11.8 in that they constitute disputes between the parties to the LP Deed in connection with the manner in which the GP, as a party to the LP Deed, has performed its duties and obligations and whether Sage, as a fellow limited partner, has also been guilty of breaches of the LP Deed.

(iv) It is true that, as the Judge said at [85] of the Judgment, the GP has *'tagged on'* a prayer for any other order pursuant to s129 that the court thinks fit, but this does not alter the fact that the substantive matters raised in the statement of claim all fall within the arbitration provision at clause 11.8 of the LP Deed.

70. The question then is whether, ignoring for the moment the fact that the Fund is being wound up, the matters in the present proceedings, despite falling within clause 11.8, are non-arbitrable whether on the ground of subject matter non-arbitrability or remedial non-arbitrability. Mr Chapman submits that they are because the tribunal will not be empowered to make any order which would be binding on anyone other than the GP and the two limited partners involved, namely WCL and IDB. In particular, no other limited partner would be bound by any award of the tribunal. He submits therefore that staying the proceedings for arbitration would be futile.

71. In my judgment, the tribunal, in the event that it finds the claims proved, will be able to grant the relief sought. It can make declarations as to whether there have been breaches of trust, duty etc so as to establish a liability to pay compensation. It can also make the declaration and order referred to at para 28(vi) above. This would not be an order for the winding up of the Fund (which only the court could order); it would simply be an order that the GP comply with its contractual duty under the LP Deed. Furthermore, I see no reason why, in the event of it finding that the GP has been in breach of

any its duties, it should not assess the quantum of any loss to the Fund caused by such breach and make an award of equitable compensation against the GP so as to restore the trust fund. So, suppose it were to find that the GP had indeed sold Cnergyico at a substantial undervalue to the extent of £100,000, I see no reason why it should not order the GP to pay £100,000 into the Fund in order to put back into the Fund what ought to have been there.

72. However, I accept that only the GP and the two limited partners who are party to the Second Arbitration would be bound by the tribunal's findings and orders. It would in theory be open to any other limited partner to commence new proceedings and argue that the loss was in fact more than £100,000. I also accept that, as the Judge envisaged, it might be necessary for the parties, following an award by the tribunal, to come back before the court in order to seek relief which could not be ordered by the tribunal, e.g. an order for a partnership account following an order for the restoration of the trust fund.

73. However, the authorities which I have referred to above make clear that the fact that an arbitration tribunal cannot grant all the relief which may be sought does not mean that a matter does not fall within an arbitration provision or is non-arbitrable. It is clear that the authorities envisage that it will sometimes be the case that resolution of a dispute will be bifurcated, with some issues being decided in arbitration and other having to be decided by the court in the light of the decision in the arbitration.

74. Like the Judge, I do not consider that the matters referred to in the preceding paragraphs come anywhere near being sufficient to outweigh the strong public interest in holding parties to their bargain. In this case, the GP as well as WCL and IDB agreed that disputes should be submitted to arbitration rather than to the court and they should be held to their agreement unless there are compelling reasons not to do so. I agree with the Judge that there are no such compelling reasons in this case.

(iii) Does the fact that the Fund is being wound up alter the position?

75. This issue in fact constituted the main thrust of Mr Chapman's submissions. He referred to section 36(3)(d) and (g) of the ELPA together with section 129 of the Companies Act, which are in the following terms:

> ***"36(3) 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 5 of the Companies Act (2025 Revision)…shall apply to the winding up of an exempted limited partnership and for this purpose –

(a) references in Part 5 to a company shall include references to an exempted limited partnership.

……

(d) except for sections 123, excluding subsection (1)(b) and (c), 129, 140, 145, and 147 of the Companies Act (2025 Revision), Part 5 shall not apply to a voluntary dissolution and winding up under subsection (1)….

(g) 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."

As can be seen, section 129 of the Companies Act is applicable on a voluntary winding up of an ELP. Section 129 provides:

"129(1) A voluntary liquidator or any contributory may apply to the Court to determine any question arising in the voluntary winding up of a company or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up under the supervision of the Court.

(2) The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partly to the application on such terms and conditions as it thinks fit, or make such other order on the application as it thinks just…"

I shall refer to section 36(3)(g) and s129 as applied to ELPs as *"the Statutory Provisions"*.

76. Mr Chapman submitted, correctly, that whether under section 36(3)(g) or under section 129 (as applied by section 36(3)(d)) the court has a general supervisory jurisdiction in respect of a voluntary winding up of an ELP.

77. In this connection he referred to two judgments of Kawaley J in the case of *Re One Thousand And One Voices Africa Fund 1, LP (In Voluntary Liquidation)*. The issue in that case was whether, in the case of an ELP which was in voluntary winding up, the court had power to replace the general partner (who was acting as liquidator in accordance with the limited partnership agreement) with an alternative independent liquidator. Kawaley J held that the court had such a power and his decision was subsequently upheld by this Court on appeal. In passing, he described the effect of the legislative provisions as follows. In the first judgment dated 24 April 2024, he said at [23]:

> ***"23. This is, in my judgment, the clearest possible manifestation of a legislative intention that section 36(3)(g) is intended to confer on the Court a general power to supervise voluntary liquidations. It may properly be viewed as, in effect, a freestanding subsection within section 36 rather than a sub-paragraph of subsection (3), limited by that subsection's prefatory words…"***

78. He returned to the subject in the second judgment dated 9 May 2024 when he said at [20]:

> ***"Accordingly, I was satisfied when I made the Summary Ruling that this Court enjoyed a broad supervisory jurisdiction over the LP after its voluntary liquidation commenced, which could properly be exercised having regard for the best interests of the majority of the limited partners, being the relevant economic stakeholders…."***

Those judgments were affirmed by this Court: see [2025] CICA (Civ) 9.

79. Mr Chapman submitted that this broad supervisory jurisdiction applies to a voluntary winding up and cannot be ousted by parties agreeing to arbitration. The Statutory Provisions confer a right on a liquidator (in this case the GP) to seek a direction or resolution of a question in connection with the winding up of an ELP.

80. That was exactly what the GP had done in the present case. It had instituted the proceedings pursuant to the right conferred by the Statutory Provisions to resolve the questions raised in the pleadings.

81. There was, submitted Mr Chapman, a strong public interest in parties being able to obtain directions from the court when an ELP was being wound up and such questions affected third parties such as creditors, limited partners etc. It was not open to parties to oust the supervisory jurisdiction by agreeing to arbitrate. This was therefore a case of subject matter non-arbitrability, using Lord Hodge's description in *FamilyMart*.

82. In support of his argument, Mr Chapman referred to the judgment of the Singapore Court of Appeal in *Larsen Oil and Gas Pte Limited v Petropod Limited (In Liquidation)* [2011] 3 SLR 414.

83. The background to the dispute in that case was that Petropod had entered into a management agreement with Larsen which contract contained an arbitration clause. Petropod subsequently became insolvent and was placed in liquidation. The liquidators considered that certain payments to Larsen should be set aside pursuant to the relevant statutory provisions on the ground that they constituted unfair preferences or transactions at an undervalue. Larsen contended that this action by the liquidators should be stayed in favour of arbitration relying on the arbitration clause in the management agreement.

84. The Court of Appeal upheld the decision of the court below that the action by the liquidator should not be stayed. Mr Chapman referred us specifically to [19]-[21] and [44]-[46] of the judgment of Rajah JA. Having emphasised that, as was widely the case in leading commercial jurisdictions and was strongly supported by the academic community, arbitration clauses should be generously construed such that all manner of claims, whether common law or statutory, should be regarded as falling within their scope unless there was good reason to conclude otherwise, the court went on to discuss whether there was such good reason in that case and I would quote [44]-[46] as summarising its reasons for concluding that there was:

> ***"44. The concept of non-arbitrability is a cornerstone of the process of arbitration. It allows the courts to refuse to enforce an otherwise valid arbitration agreement on policy grounds. That said, we accept that there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dispute***

in question (as evidenced by the statute's text or legislative history), or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute.

45. A distinction should be drawn between disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that arise only upon the onset of insolvency due to the operation of the insolvency regime. Many of the statutory provisions in the insolvency regime are in place to recoup for the benefit of the company's creditors losses caused by the misfeasance and/or malfeasance of its former management. This is especially true of the avoidance and wrongful trading provisions. This objective could be compromised if a company's pre-insolvency management had the ability to restrict the avenues by which the company's creditors could enforce the very statutory remedies which were meant to protect them against the company's management. It is a not unimportant consideration that some of these remedies may include claims against former management who would not be parties to any arbitration agreement. The need to avoid different findings by different adjudicators is another reason why a collective enforcement procedure is clearly in the wider public interest.

46. We, therefore, are of the opinion that the insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. The court should treat disputes arising from the operation of the statutory provision of the insolvency regime per se as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement."

85. Mr Chapman submitted that the position was the same here. There was subject matter non-arbitrability because the intention of the statutory provisions was for the court, and no other tribunal, to have the power to grant directions and determine questions during the voluntary liquidation of an ELP and there was a strong public interest in any case which affected the rights and financial interests of all the limited partners of an ELP being heard in public rather than in a private arbitration to which most of the other limited partners were not party. The GP had brought the proceedings invoking the supervisory jurisdiction of the court which could not be ousted. Furthermore, there was a public

policy interest, as in *Larsen*, in having the dispute resolved by the courts, not least because the resolution of the dispute would affect the substantive rights of other limited partners.

86. Mr Chapman further submitted that there was also remedial non-arbitrability as it was only the court which could grant some of the relief sought and an arbitral tribunal could not make orders which would be binding on the other limited partners. It was not a case which would be suitable for bifurcation.

87. An alternative way of looking at it, he submitted, was by way of ascertaining the true construction of clause 11.8 of the LP Deed. The parties could not be taken to have intended that a request for directions or resolution of a question under the Statutory Provisions would have to be submitted by the GP to arbitration. The effect of the Second Arbitration would be to usurp the statutory supervisory regime for the liquidation of the Fund. It therefore related to *'matters'* which were not covered by the arbitration provision in the LP Deed.

88. Finally, he submitted that, because of the fact that other limited partners would not be bound by any decision of the Second Arbitration, so that it would be necessary to revert to the court for certain orders in any event, staying the proceedings in favour of the Second Arbitration would be an exercise in futility and amounted to an abuse of process, as envisaged as a possibility at [64] of the judgment of Lord Hodge in *FamilyMart*.

89. In agreement with the Judge, I am unable to accept these submissions. I would summarise my reasons as follows:

(i) I accept that the Grand Court has a general supervisory jurisdiction in respect of the winding up of an ELP, including a voluntary winding up, as described in the *One Thousand Voices* case by Kawaley J and in this Court by Martin JA (with whom the other members of the Court agreed) at [31] –[32] and [37]. However, that case had nothing to say about the relationship between arbitration and the court's supervisory jurisdiction as the point did not arise, there being no arbitration agreement in that case.

(ii) I also accept that the GP, as stated in its writ and statement of claim, is applying for determination of issues and/or directions pursuant to s129 of the Companies Act as applied by s36(3)(d) of the ELPA. However, as Lord Hodge made clear at [59] of *FamilyMart*, the court must ascertain the substance of the dispute or disputes between the parties and that

while this involves looking at the pleading, it also requires the court not to be overly respectful to the formulations in those pleadings which made be aimed at avoiding a reference to arbitration. The court must also take into account all reasonably foreseeable defences to the claims.

(iii) The matters in dispute between the GP and WCL as set out in the GP's statement of claim relate to actions which WCL has taken in its capacity as a limited partner. As Mr Chapman accepted, the clearly foreseeable defence by WCL will be to assert the validity of its claims against the GP in the Second Arbitration and indeed the GP specifically seeks a declaration in these proceedings that it is not liable in respect of those claims.

(iv) Thus, the matters in dispute in these proceedings concern whether the GP has breached its duties as general partner under the LP Deed and the ELPA and whether WCL has breached its obligations as a limited partner. The dispute falls fairly and squarely within the terms of the arbitration provision contained at clause 11.8 of the LP Deed.

(v) In my judgment, whilst it is true that the actions complained of took place after the expiry of the term of the Fund, these are not matters which concern how the Fund should be wound up. There is no claim against the Fund or against the Fund's assets; it is simply a dispute between partners as to their respective actions. It is not therefore the sort of matter which is only suitable for public policy reasons for determination by the court alone.

(vi) Mr Chapman placed reliance on *Larsen*. I note in passing that in *Bridgehouse*, Newey LJ noted at [58] that doubt had been cast in a subsequent English case on the proposition in *Larsen* that disputes arising from the operation of the statutory provisions of the insolvency regime were per se non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement. However, I proceed on the basis that proceedings in a liquidation to avoid transactions as fraudulent preferences etc. would be subject matter non-arbitrable. But that seems to me very different from the present case, which is entirely concerned with alleged breaches of the obligations of the parties under the LP Deed and/or the ELPA.

(vii) Indeed, the Court of Appeal in *Larsen* itself drew a distinction of this nature. Thus at [20] it stated that the generous approach towards arbitration clauses was reasonable in relation to private remedial claims, which may arise either before or during the period when a company becomes insolvent. It drew a distinction at [21] between those claims and claims which could only be made by a liquidator / judicial manager of an insolvent company, where the public policy considerations pointed against staying proceedings for arbitration.

(viii) I do not consider that the Judge's decision in this case has the effect of ousting the court's general supervisory jurisdiction in respect of the voluntary winding up of an ELP as described by Kawaley J and this Court in the *One Thousand Voices* case (see sub-paragraph (i) above). That jurisdiction continues to exist. As the Judge pointed out, both in s36(3)(g) and s129(2), it is said that the court *'may'* make orders. I do not consider that it is inconsistent with the statutory right of a liquidator (or general partner) to apply to the court under either of these Statutory Provisions for the court, on the facts of a particular case, to say in effect *"This is a dispute which you have previously agreed in an arbitration agreement should be resolved by arbitration rather than by the court. On the facts, I do not consider that there are sufficient public policy or statutory considerations to lead me to conclude that the court should nevertheless deal with the matter and you should not be held to your bargain to have the dispute decided by arbitration"*. In my judgment, that is not to oust the jurisdiction of the court; it is the court deciding on the facts of a particular case that it will not give any directions or decide any questions but instead will hold the parties to their agreement to have such matters decided by arbitration.

(ix) Mr Chapman submitted that there were public policy considerations which should lead to the conclusion that the matters in dispute are non-arbitrable, both on subject matter grounds and on remedial grounds. In relation to the former, Longmore LJ said at [96] in *Fulham Football Club* (quoted with approval by Newey LJ at [56] of *Bridgehouse*:

> ***"..the fact that a statutory power, which a court would not have at common law apart from the statutory provision, is given to the court does not mean that an arbitrator, to whom a dispute is properly agreed to be referred, does not have a similar power."***

(x) Similarly, the fact that third parties may be affected by an arbitration award does not necessarily lead to the conclusion that the matter is non-arbitrable; see Patten LJ at [61] of *Fulham Football Club* and Newey LJ at [61] of *Bridgehouse*. In this case, it is correct that no other limited partner will be bound by any award in the Second Arbitration unless they become parties to it. Ultimately, for the reasons set out above, I do not consider that the matters which fall to be decided in the Second Arbitration are subject matter non-arbitrable.

(xi) In relation to remedies, I have already held that some matters may have to come back to the court. Thus, although the tribunal may make an award for restoration of the trust fund, there may need subsequently to be a partnership accounting so that the consequence of the restoration of the trust fund can be worked out as between all the limited partners and creditors. In particular, one of the matters challenged by WCL and IDB in the Second

Arbitration is a transaction which included a payment of cash to the limited partners. Clearly the tribunal has no jurisdiction to set that payment aside. However, I see no reason why, when taking a partnership account, the court should not give credit against a limited partner's share for any sum already received by way of the above cash payment, if that is the consequence of an award in the Second Arbitration.

(xii) The authorities are clear that the fact that a tribunal cannot give all the relief sought is not necessarily a reason to allow litigation to proceed in breach of an arbitration agreement; see for example Longmore LJ at [103] of *Fulham Football Club*, Sundaresh Menon CJ at [100] of *Tomolugen Holdings Limited v Silica Investors Limited* [2015] SGCA 57, [2016] 1 SLR 373, Males LJ at [79] of *Bridgehouse*, and Patten LJ at [84] of Fulham Football Club where he said " ... *these jurisdictional limitations on what an arbitration can achieve are not decisive of the question whether the subject matter of the dispute is arbitrable. They are no more than the practical consequences of choosing that method of dispute resolution...*".

(xiii) I see no reason why, if it finds the claims against the GP proved, the tribunal should not make an order for restoration of the trust fund. Any consequential matters which the tribunal was unable to order, such as a partnership accounting, could then be brought back before the court.

(xiv) Mr Chapman submitted that this was an exercise in futility. He submitted that the obvious method of proceeding, if WCL or IDB wishes to challenge actions taken by the GP, is for them to apply under the Statutory Provisions for the appointment of an independent liquidator in place of the GP, who could then take action, if so advised, against the GP. This would have the advantage of binding all limited partners. I accept that this would clearly be a sensible method of proceeding, but there is no application by any party to that effect at present and accordingly we have to proceed on the basis of the position as it now is.

(xv) Mr Chapman also submitted that as no other limited partner would be bound, any award by the tribunal in the Second Arbitration would achieve very little.

(xvi) I do not agree that the Second Arbitration would be an exercise in futility. It is open to any limited partner to apply to join in the Second Arbitration and indeed I would encourage the parties and the tribunal to issue an invitation to all other limited partners to participate in the Second Arbitration so that as many as possible could have an opportunity of making their submissions and become bound. But, assuming the tribunal makes an award for restoration of the trust fund, whilst it would theoretically be open to any limited partner to argue that the award by the tribunal was insufficient, this seems unlikely in practice where at present no

other limited partners have instituted a claim against the GP and where, if the procedure described above is followed, they will have had an opportunity of joining in the arbitration. All in all, I do not consider that allowing these matters to proceed to arbitration would be futile to the extent that it would become an abuse of process.

90. In summary, for the reasons which I have endeavoured to set out, I do not consider that the fact that the Fund may be regarded as being wound up under the general supervisory jurisdiction of the court as described at paragraph 89(viii) above (despite the Judge's suggestion to the contrary at [98] of the Judgment) affects the position and leads to a conclusion that these proceedings should not be stayed in favour of the Second Arbitration.

(iv) Abuse of process

91. Mr Chapman's final argument was that the Judge should have refused to grant the stay because it would be an abuse of process for the Second Arbitration to continue. This was on the basis that WCL was bringing the Second Arbitration for an improper purpose and was acting in bad faith, essentially to foil the Sage transaction at the instance of the Al Jomaih interests. He also listed a number of other reasons for saying it would be an improper process but these are matters which I have dealt with already (such as the effect on third parties). He submitted that pursuing the Second Arbitration forms part of a pattern of vexatious and oppressive conduct on the part of WCL borne out of frustration that the offer from the Al Jomaih interests was rejected by the joint official liquidators of AIML in favour of the offer from Sage.

92. As already mentioned, WCL submits to the opposite effect and asserts that Sage has procured that the GP has acted in the interests of Sage / Mr Chishty as opposed to the interests of the Fund and the limited partners and these matters need to be adjudicated upon.

93. The Judge held he was simply not in a position, on contrasting evidence, to decide whether WCL was pursuing the Second Arbitration in bad faith and/or was not pursuing a legitimate goal. I entirely agree. It is impossible to determine on the present evidence where the truth lies on these contrasting allegations and accordingly the arguments put forward on behalf of the GP cannot lead to the conclusion at this stage that no stay of the present proceedings should be granted and that the Second Arbitration should not be allowed to proceed.

Conclusion

94. For the reasons which I have given, I would dismiss this appeal.

Sir Anthony Smellie, JA

95 I agree.

Sir Jack Beatson, JA

96 I also agree.