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

CICA NO: 1/2017
CAUSE NO. FSD 103 of 2015 (RMJ)

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP LAW (2014 REVISION)
AND IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)
AND IN THE MATTER OF TORCHLIGHT FUND L. P.

BETWEEN **(1) AURORA FUNDS MANAGEMENT LIMITED (as trustee for the Bear Real Opportunities Fund)**

(2) CROWN ASSET MANAGEMENT LIMITED

(3) ACCIDENT COMPENSATION CORPORATION OF NEW ZEALAND

APPELLANTS

AND **TORCHLIGHT GP LIMITED**

(General Partner for TORCHLIGHT FUND LP)

RESPONDENT

Before:	**The Hon. John MARTIN QC, Justice of Appeal** **The Hon. Sir George NEWMAN, Justice of Appeal** **The Hon. Dennis MORRISON, Justice of Appeal**
Appearances:	**Mr. Tom Lowe QC and Ms. Hilary Stonefrost for the Appellants instructed by Ms Jessica Williams of Harneys** **Mr. John Wardell QC and Mr. Andrew Mold for the Respondent instructed by Mr Ben Hobden of Conyers Dill & Pearman**
Heard:	**11 September 2017**
Finalised and Released:	**27 April 2018**

MORRISON JA

Introduction

1. Section 99 of the Companies Law (2013 Revision) provides that, upon the making of a winding up order, "*any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of the winding up is, unless the Court otherwise orders, void*".

2. Proceedings for winding-up having been instituted, the respondent sought an order from the court, pending the completion of the winding-up proceedings, sanctioning various dispositions falling within section 99 ("**a validation order**"). By his order made on 6 December 2016, McMillan J ("**the judge**") granted the application and, after a further hearing on 19 January 2017, made detailed orders giving effect to the validation order.

3. This is an appeal from the judge's decision to make the validation order. Leave to appeal having been refused by the judge, the appeal comes before us by way of leave granted by Goldring P on 3 February 2017. On that same date, Goldring P also made an order staying the judge's decision pending the hearing of the appeal.

4. In the grounds of appeal filed on their behalf, the appellants' principal complaint is that the judge failed to give adequate reasons for his decision to make the validation order, particularly insofar as it had the effect of permitting dispositions enjoined by a previous order made by Clifford J in the winding-up proceedings. The appellants also complain that there was "*a demonstrable failure*" by the judge to consider the relevant evidence; and that the judge's decision to grant the order "*cannot be reasonably explained or justified and the decisions he made were decisions that no reasonable judge could have reached*"[1].

[1] Petitioners' Skeleton Argument dated 13 July 2017, para 45.

5. There is no contention on appeal that the judge's approach to the application for a validation order was wrong in principle. The substantial issue which arises is therefore whether the judge's conclusion was correct in the light of the material which was placed before him for and against the grant of the validation order.

6. The appeal was heard on 11 September 2017. At the outset of the hearing, the court heard an application by the respondent for leave to file a Respondent's Notice out of time and to adduce fresh evidence in the appeal. This application (which I will refer to as "**the fresh evidence application**") was dismissed and the appeal proceeded. At the end of the argument, after a short adjournment, the appeal was dismissed, with costs to the Respondent to be agreed or taxed forthwith. These, with apologies for the delay in producing them, are the reasons which were then promised for the dismissal of the fresh evidence application and the appeal.

The parties

7. The appellants, Aurora Funds Management Limited (as trustee for the Bear Real Opportunities Fund), Crown Asset Management Limited and Accident Compensation Corporation of New Zealand are the petitioners in these proceedings.

8. The petitioners are limited partners of an exempted limited partnership known as Torchlight Fund L.P. ("**the Partnership**"), which is registered under the laws of the Cayman Islands.[2] The petitioners are supported by two other limited partners of the Partnership, Public Trust of New Zealand and Logic Fund Management Ltd ("**the supporting limited partners**").

9. Prior to the petitioners and the supporting limited partners becoming limited partners of the Partnership, they were limited partners in a New Zealand domiciled

[2] Registration number 68543

partnership ("**the NZ Partnership**"). Although the petitioners and the supporting limited partners contend that this was achieved without their consent and or prior knowledge, it is common ground that, with effect from 12 December 2012, (i) the assets of the NZ Partnership were transferred to the Partnership; and (ii) the petitioners and the supporting limited partners became limited partners in the Partnership.[3]

10. The Partnership was set up to make, hold and dispose of investments as permitted by the Partnership Agreement, with its principal objective being to provide investors with returns from the various categories of investment.

11. The respondent, Torchlight GP Limited ("**the General Partner**"), an exempted limited company registered[4] under the laws of the Cayman Islands, is the General Partner of the Partnership. Mr George Kerr (the managing director) and Mr Russell Naylor are the two directors of the General Partner. The General Partner is the wholly owned subsidiary of Pyne Gould Corporation ("**PGC**"), a New Zealand Company, of which Mr Kerr is also the managing director and majority shareholder.

The background to the application for a validation order

12. On 18 June 2015, the petitioners issued a petition for the winding up of the Partnership on just and equitable grounds[5].

13. In summary[6], the petitioners say that (i) they have lost trust and confidence in the General Partner and its management; (ii) the General Partner has not been and is not conducting the affairs of the Partnership in the best interests of the Partnership, and is acting in a manner prejudicial to the interests of the limited

[3] See Amended Petition, para 8A
[4] On 9 September 2012
[5] Pursuant to leave granted by the court on 12 May 2016, an Amended Petition was filed on 8 September 2016.
[6] See the Petitioners' Background & Chronology, Core Bundle, Tab 1.

partners and/or is acting with a lack of probity; (iii) the petitioners have suffered oppression by the conduct of the General Partner; and (iv) there has been an irreconcilable breakdown in the relationship between the General Partner, on the one hand, and the petitioners and the supporting limited partners on the other.

14. On 24 June 2016, the Partnership filed a Defence in which it responded in detail to all the statements in the Amended Petition. The Partnership denied that the petitioners were entitled to the relief sought or to any relief and, with particular reference to the grounds of the Amended Petition, stated the following[7]:

> *"112.1 It is denied that the Petitioners have a honestly held lack of confidence in the General Partner or that there are any grounds for any breakdown of trust and confidence in the General Partner;*
>
> *112.2 On the contrary, this Petition has been brought in bad faith pursuant to an unlawful means conspiracy, particulars of which have been set out in the Conspiracy Letter of Claim and which will be pleaded in proceedings to be issued in July 2016;*
>
> *112.3 The General Partner denies all allegations made by the Petitioner as to its conduct and management and specifically denies any lack of probity as alleged or otherwise; and*
>
> *112.4 The General Partner denies that there are any grounds for the [partnership] to be wound up."*

15. The summons seeking the validation order with which this appeal is concerned, which was issued on 8 September 2016, was in fact the Partnership's fourth application for a validation order. The first and second applications were refused by Clifford J on 31 July 2015 and 22 January 2016 respectively, on the ground that the evidence supplied in support of them was insufficient. The third application, which sought validation of a specific payment, was not opposed and was granted

[7] Defence filed 24 June 2016, para 112

by the judge on 26 April 2016.[8] Nothing now turns on either the first or the third application, though I will need to refer again to Clifford J's ruling on the second application ("**the Clifford ruling**").

The court's approach to an application for a validation order

16. As there is no dispute between the parties as to this, it may first be helpful to discuss briefly the proper approach to an application for a validation order. As they did before the judge, both sides referred us to the criteria laid down by Henderson J in **In the Matter of Fortuna Development Corporation**[9] ("**Fortuna**"), as supplemented by Smellie CJ in his subsequent judgment in **In the matter of the Cybervest Fund**[10] ("**Cybervest**").

17. In **Fortuna**, a winding up petition was brought in respect of a solvent company. When the company sought an order validating the giving of security on a refinancing of its debt and that of its subsidiaries, the petitioner sought an adjournment of the application on the ground that the evidence provided in support of it was insufficient.

18. Basing himself on the judgment of Slade J in **In re Burton & Deakin Ltd**[11], Henderson J considered[12] that, in the case of a solvent company, the following four elements had to be established before an applicant would be entitled to a validation order:

> "*1. The proposed disposition must appear to be within the powers of the directors.*

[8] For further details, see para 3 of the judge's judgment
[9] [2004-05] CILR 533
[10] [2006] CILR 80
[11] [1977] 1 WLR 390, 397. In that case, the court was considering the equivalent, if not identical, section 227 of the Companies Act 1948.
[12] At page 536

2. *The evidence must show that the directors believe the disposition is necessary or expedient in the interests of the company.*
3. *It must appear that in reaching the decision to make the disposition the directors have acted in good faith (the burden of establishing bad faith being on the party opposing the application).*
4. *The reasons for the disposition must be shown to be ones which an intelligent and honest director could reasonably hold."*

19. As regards the specific application before him, Henderson J accordingly considered that the question with which he needed to be concerned was whether the decision to arrange refinancing and the terms of the proposed refinancing were "*within the realm of reasonableness*"[13]. Henderson J added that –

> "*The test the applicant must satisfy is not high. Nevertheless, there must be a body of evidence which, viewed objectively, establishes that the decision is one which a reasonable director, having only the best interests of the company in mind, might endorse."*

20. Then, in granting the validation order, Henderson J described the question which he was required to answer at that stage as "*a narrow one* ... [m]*ight an intelligent and honest director acting reasonably come to such a conclusion?*"
21. In **Cybervest**, Smellie CJ agreed with and adopted Henderson J's summary of the applicable principles. In that case, however, in which it was alleged that there had been a deliberate attempt by the fund managers to divert the company's assets for their own purposes and that the substratum of the company had failed, Smellie CJ added this[14]:

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[13] At para 9
[14] At para 29

> "*There is another consideration to add to this list, in the light of the concerns raised in this matter, although arguably it is subsumed within the third and fourth elements. This would be whether irregularities in the conduct of the affairs of the company can be shown, even if the company is clearly solvent, as is alleged here.*"

22. In the result, Smellie CJ declined to make a validation order, on the basis that he did not think that "*the directors could properly hold that these dispositions are necessary or expedient in the interests of the company at this time*"[15].

The Clifford ruling

23. It may also be helpful to say something about the Clifford ruling at this stage, given the significance it would later assume as matters progressed. There were in fact two applications before the court on that occasion: the first was the Partnership's application for a validation order in respect of certain payments and dispositions made in the ordinary course of business; and the second was an application by the petitioners for an injunction in respect of the disposition of proceeds from the sale of the Partnership's interest in Local World Holdings Limited ("**Local World**"), and all other dispositions of the Partnership's assets.

24. The Partnership contended that the order sought was, as Clifford J put it[16], "*the standard kind of validation order made pending the hearing of a winding up petition in the case of a solvent entity in accordance with longstanding practice*". The petitioners for their part resisted the application on the ground that the evidence filed in support of it was, to quote Clifford J again, "*wholly inadequate to enable the Court to determine, in accordance with established principles, whether*

[15] Para 35
[16] At para 23

to make a validation order". In particular, the petitioners complained that the Partnership had paid out substantial sums, including sums paid to related parties, "*but had failed to show proper grounds for validation of those payments*".

25. After considering the applicable principles (as set out at paragraphs 16-22 above), Clifford J accepted the petitioners' contention that the evidence produced by the Partnership had failed to meet the established criteria for the making of a validation order. He observed that[17], "[s]*o far as the listed payments are concerned, that is all it is, a list*"; further, "*there is no evidence to show that the payments were necessary or expedient and in the interests of the Partnership*"; and, further still, "*there* [are no] *reasons given for the payments so that it can be ascertained whether an intelligent and honest General Partner would have made these payments*".

26. In relation to the various specific payments put forward by the Partnership for validation, Clifford J said this[18]:

> "*There are specific payments referred to but there is lack [sic] of information in respect of them and some relate to matters which are very much in issue in the proceedings. Thus payments have been made in respect of a Credit Suisse loan, but no information has been provided about the loan or whether this involves related parties. It appears that substantial payments have been made to certain related parties, but again there is a lack of explanation for or documents relating to the payments. This is of obvious concern having regard to the issues about such payments. Much the same can be said of the payment of management fees and the issue whether it is necessary or expedient in the interests of the*

[17] At para 43
[18] At para 44

Partnership that such payments should be made. The cash flow forecast, by itself, without supporting evidence, is insufficient for the purpose. The Proceeds of the Local World transaction, of particular concern in relation to the Applications before the Court, have not even been included in the inflows section of this forecast. Mr Kerr says in very general terms in his Third Affidavit that the General Partner will do nothing other than use the proceeds in the ordinary course of business of the Partnership. But he has not provided any detail of payments needed to be made in the interests of the Partnership."

27. Next, Clifford J observed that[19]:

> *"At an early stage of the proceedings, on the hearing of the first summons for directions on 31 July 2015, I declined to make a general validation order having regard to the lack of evidence for such an order and the issues raised in the proceedings. That remains the position. It will be open to the Partnership, or perhaps more appropriately the General Partner, to make application in the future for a validation order. This will require to be done on a proper basis in respect of dispositions which can be supported by evidence going to the elements which must be established for the making of such an order."*

28. And finally, in relation to the petitioners' application for an injunction, Clifford J noted[20] that the Local World transaction, in respect of which a specific order was sought, had been overtaken by events, since, *"... on the evidence, it appeared that not only have the proceeds probably already been received by the Partnership, but*

[19] At para 48
[20] At para 51

also they have likely been spent". For this and other reasons, the petitioners modified their application for an injunction so as to limit it to an order restraining dispositions to persons related to the General Partner without the consent of the petitioners or order of the court.

29. In the result, Clifford J dismissed the application for a validation order, but granted the modified application for an injunction. The latter order restrained the Partnership from making –

> "... *any disposition of the assets of the Partnership by the General Partner to persons related to the General Partner without the consent of the Petitioners or an order of the Court made on an application, supported by evidence, for prospective validation ...*"

The fourth application

30. It is against this background that the Partnership issued its summons seeking orders and directions on 8 September 2016. The specific orders sought were as follows:

> "*1. That:*
>
> *a. payments made into or out of the bank accounts of the Partnership in the ordinary course of business of the Partnership; and*
>
> *b. dispositions of the property of the Partnership made in the ordinary course of its business for proper value between the date of presentation of the Petition and the date of judgment on the Petition or further order in the meantime, shall not be void by virtue of the provisions of section 99 of the Companies Law (2013 Revision) in the event of an Order for the winding up of the Partnership being made on the said Petition ...*

2. *In the alternative to paragraph 1, that notwithstanding presentation of the Petition, dispositions of the Partnership property for the purposes and of the kind described in the Seventh Affidavit of Russell James Naylor sworn to on 8 September 2016 shall not be void by virtue of s. 99 of the Companies Law.*
3. *That the terms of the undertakings given in Schedule 1 of the Order for an Injunction by the Hon Mr Justice Clifford QC dated 22 January 2016 be varied.*
4. *That provision be made for the cost of this application.*
5. *Such further and additional orders as may be just and proper."*

31. This application was supported by the seventh affidavit of Mr Naylor, sworn to[21] in his capacity as a director of the General Partner. Mr Naylor set out the relevant background as follows[22]:

> "*4. The Partnership is a going concern business and is involved on a day-to-day basis in managing its investments (which are held by subsidiaries) through the agency of the General Partner. Whilst the General Partner is the agent through which the Partnership makes the decisions, the Partnership is responsible for discharging the liabilities incurred in the ordinary course of business. As a going concern business, the Partnership incurs liabilities to third-party providers as and when the need arises. Whilst the General Partner is confident of success at the trial next year, it is not fair on the third-party providers to expose them to the risk of payments received by them being avoided pursuant to*

[21] On 8 September 2016
[22] At paras 4-6

section 99 of the Companies Law (2013 Revision) even though the reality is that any avoidance will be academic as the Partnership is solvent. I deal with the issue of solvency in detail below.

5. *In addition, as a separate but related point, the current injunction which prevents payments being made to related parties is causing serious financial prejudice to [PGC] as the management fees that it is due to receive under the Limited Partnership Agreement are its main source of its cashflow. PGC is listed on the New Zealand stock exchange and its inability to receive its principal cashflow from the General Partner (which in turn is wholly owned by PGC's subsidiary Torchlight Group) is not only damaging to it but also to its shareholders, 20% of whom are ordinary retail investors.*
6. *Not only has PGC been deprived of its cashflow, it is also a substantial creditor of the Partnership. Together with its wholly-owned subsidiary the Torchlight Group it has made advances of working capital to the Partnership and the total outstanding balance owed under the two loan agreements is approximately AUD 1 million. These loan agreements have been provided to the Petitioners as part of the ongoing discovery exercise being undertaken by the General Partner and the Partnership. The current injunction is preventing any repayments of capital or interest being made to them at all, thus exacerbating the issue. I understand that PGC's auditors have raised the question whether or not they can sign off PGC's audited accounts on a going concern basis. This is solely due to the inability of the General Partner to authorise payment of management fees as well as payment of interest and capital on its loan."*

32. Mr Naylor went on to point out[23] that, at the time of the hearing of the second application, the Partnership's 2015 audited accounts were not yet available. However, those accounts, which were signed off by the Partnership's auditors, Grant Thornton Guernsey ("**GT**"), on 10 February 2016, shortly after the Clifford ruling, revealed that the Partnership (i) reported a net profit of AUD10.9 million for the year ending 31 March 2015; (ii) had assets with an audited carrying value of AUD197.9 million; and (iii) had net liquid current assets of AUD14 million (including cash of AUD1 million). GT's unqualified audit report confirmed that the Partnership was solvent.[24]

33. The fourth application related to (i) a total of 233 payments made by the Partnership since the presentation of the petition ("**past payments**"); and (ii) all future payments that it might make falling within certain stated categories ("**future payments**"). A list of the 233 past payments was attached to Mr Naylor's affidavit.

34. The past payments were divided into several categories, which may be summarised as follows:

> 1. Payments to Credit Suisse
>
> These payments were the largest in number (92 in all). Mr Naylor explained[25] that Credit Suisse ("*one of the largest investment banks in the world*") had made a line of credit available to the Partnership in the sum of CHF 50 million (approximately AUD 67 million). The line has been used by the Partnership for working capital purposes and to acquire follow-on investments. Mr Naylor exhibited a copy of the agreement between the Partnership and Credit Suisse ("*the* ***Framework***

[23] At paras 16-18
[24] This was in fact common ground before the judge, the petitioners themselves having pleaded as much at paras 13 and 56 of the Amended Petition.
[25] At paras 36-40

Agreement"), and stated that: (i) all payments made to Credit Suisse were payments of interest and capital in respect of monies received by the Partnership under the agreement[26]; and (ii) "*failure to make these payments would be poor business practice and highly damaging to the Partnership as Credit Suisse would no doubt enforce its rights under* [the agreement]"[27].

2. Payments to Torchlight Group

The Torchlight Group, Mr Naylor explained,[28] is a provider of working capital funding in the sum of AUD15 million to the Partnership. This is an unsecured loan, in respect of which Mr Naylor exhibited a copy of the relevant loan agreement[29], which provided for interest to accrue on the loaned amounts at 9% per annum. However, no payments had been made since the Clifford ruling and the amount currently outstanding in respect of capital and interest is approximately AUD 1 million. Mr Naylor stated[30] that one outcome of this was that "*Torchlight Group is unwilling to allow further substantial drawdowns to be made because of its inability to be repaid*".

3. Payment to PGC

This was a payment made pursuant to a loan agreement dated 10 February 2014 between the Partnership and PGC for the purpose of providing working capital.[31] The outstanding amount of AUD

[26] Para 39
[27] Para 40
[28] At paras 41-46
[29] Dated 10 February 2014
[30] Para 45
[31] Paras 47-51

9,145,077 was repaid in full on 18 November 2015, but "[the Partnership] *has not been able to make further drawdowns because of the injunction granted by Clifford J*[32]".

4. Payments for securities purchases

These payments related to purchases of shares in the Lantern Hotel Group Limited ("**Lantern**").[33] Mr Naylor confirmed[34] that the Partnership regarded its holding of shares in Lantern, which is publicly traded on the Australian Stock Exchange and not a related company, to be "*one of* [its] *key strategic investments*". Currently, the Partnership holds 36% of the shares in Lantern, with a current worth of about AUD 36 million (net of a capital return of AUD 6.5 million), as against acquisition costs of about AUD 26 million.

5. Other "*follow-on*" Investments

These payments related to an investment by the Partnership in 25 development lots at East Wanaka in New Zealand, in respect of which the Partnership stood "*to generate a substantial profit of approximately NZ$200,000 per lot*"[35].

6. Payments of legal and expert fees for the New Zealand litigation

These payments related to litigation in New Zealand involving the New Zealand Partnership.[36] The litigation arose out of a claim by Wilaci Pty

[32] Para 49
[33] Paras 52-58
[34] At para 54
[35] Para 60
[36] Paras 64-66

("**Wilaci**"), a creditor of the New Zealand Partnership, which claimed to be owed a substantial late payment fee, on the basis of which it placed the New Zealand Partnership in receivership some 18 months before the Partnership was set up. The New Zealand Partnership defended the claim on the ground that the late payment fee was a penalty and, in Mr Naylor's assessment[37], the claim had to be fought. Had it not been, "*the New Zealand Partnership would have been liable for in excess of AUD 30 million which would have been passed on to the Partnership pursuant to the indemnity given to the New Zealand Partnership at the time of the setting up of the Partnership*". In order to demonstrate this, Mr Naylor exhibited a copy of the relevant Subscription Payment and Assignment Deed. He also indicated that the New Zealand High Court had found in favour of the New Zealand Partnership on the penalty point. Accordingly, Mr Naylor concluded[38], "[t]*he outcome has been to substantially increase the value of the Limited Partners' interests as the liability has fallen away*".

7. Payments to other non-Caymanian legal advisers

These payments related to additional legal and expert advice sought by the General Partner, in connection with the New Zealand litigation, and generally.[39] Although the professionals involved were predominantly from New Zealand, an Australian law firm was also retained to advise, in light of the fact that the Wilaci loan agreement was subject to Australian law.

8. Payments to Conyers Dill & Pearman ("**Conyers**")

[37] Para 65
[38] At para 66
[39] Paras 67-77

Conyers was at all material times the Cayman Islands law firm acting for the Partnership and the General Partner in the winding-up proceedings. However, the two payments for which validation was sought actually related to non-litigation advice and services rendered to the Partnership.[40]

9. General partnership administration payments

This category of payments related to general partnership administration, and included payments to accountants, auditors, custodians and fund administration service providers.[41]

10. Payments to Praxis Fund Services Limited ("**Praxis**") and Deloitte

Praxis provides accounting and administrative services to the Partnership and was as such responsible for all bank reconciliations and financial reporting. Mr Naylor explained[42] that, in his view, "*it is best practice to have a clear separation between management on the one hand and financial reporting on the other*". Deloitte provides taxation advice to the Partnership, primarily in relation to the provision of tax certificates for the New Zealand domiciled tax paying Limited Partners. Mr Naylor described Deloitte's role[43] as "*ongoing and crucial to the day-to-day operation of the Partnership*". He also pointed out that both Praxis' and Deloitte's work product was subject to review by the auditors, "*who have in every instance given the Partnership (and before it the New Zealand Partnership) an unqualified audit*".

11. Payments to GT

[40] Paras 78-80
[41] Paras 81-87
[42] At para 83
[43] At para 84

As the Partnership's auditors, GT were engaged as part of the statutory and contractual requirement for audit of its accounts.[44]

12. Payments to other advisers

(i) These included payments to other independent consultants and advisers, such as New Zealand Capital Partners Limited (who provided advice in respect of proposed divestment of assets)[45]; and ABCL Limited and Artefact Partners LLP (who advised on the proposed sale of the Partnership's investment in Local World, "*a highly successful investment generating a return of five times the original investment*"[46]).

(ii) Also included in this category was the payment on one invoice from Mr Naylor's firm, Naylor Partners, on 7 December 2015. As Mr Naylor readily acknowledged[47], he is a related party, though he explained[48] that the particular invoice in question "*relates back to a time when I was not a related party because it relates to services that predated the setting up of the Partnership*". Mr Naylor further explained that his firm had not issued any invoice to the Partnership since the service of the petition, though "*they have reserved the right to do so*"[49]. He stated his belief that "*it is essential for the Partnership that I continue to act as a director and continue to provide* [various consultancy services]"[50].

13. Payments to Torchlight GP Limited

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[44] Para 87
[45] Para 88
[46] Para 90
[47] At para 91
[48] At para 92
[49] Para 94
[50] As itemised at para 91

(i) This was the final category of past payments for which validation was sought. It concerned payment of management and other fees to the General Partner under the Limited Partnership Agreement (the "**LPA**"). After setting out the relevant terms of the LPA, Mr Naylor stated[51] that –

> "*... the General Partner has a clear and undisputed contractual right to payment of its management and other fees. This right subsists up to and including any removal of the General Partner for cause or any winding up order (see clauses 11.3 and 11.5).*"

(ii) Mr Naylor stated[52] that all fee calculations "*are carried out by Praxis (and before them Deloitte) and reviewed by Grant Thornton as part of the audit review process*". He also exhibited a copy of a letter from Praxis dated 15 October 2015, which confirmed that "*all management fees up to 30 September 2015 have been calculated in accordance with the LPA*"[53].

35. Mr Naylor went on to explain in some detail why, in his view, some of the litigation costs associated with the winding-up proceedings should properly be met out of the Partnership.[54]

36. In the case of each of the past payments, Mr Naylor stated, as appropriate, (i) that the payee was not a related party; and (ii) why, in his opinion, the particular payment was in the best interests of the Partnership and such that "*any intelligent and honest director*" would have authorised.[55]

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[51] At para 98
[52] At para 100
[53] Para 101
[54] Paras 112-114
[55] See, for example, para 63, in which, with regard to the follow-on investments, Mr Naylor stated that "I believe that the payments made in respect of follow-on investments are in the best interests of the Partnership and that no intelligent and honest director would have behaved any differently".

37. In addition to the listed past payments, the General Partner also sought validation of such future payments as it might make in the following categories: (i) ordinary third-party creditors; (ii) management and other fees; (iii) payments to lenders, being Credit Suisse, PGC and Torchlight Group; and (iv) continuing investments in Lantern.

38. Mr Naylor justified this aspect of the application on the basis that a prospective validation order would obviate the need for costly and time-consuming applications on a continuous basis and provide "*certainty to those that continue to engage with the Partnership until such time as the Petition is heard*"[56].

39. In his conclusion, Mr Naylor described the Partnership[57] as "*highly successful and solvent*" and accordingly asked the court to validate all listed past and future payments.

40. The petitioners opposed the fourth application in certain respects. Mr Naylor's seventh affidavit was answered on their behalf by the eighth affidavit of Michael Russell Catchpoole[58], an Australian lawyer. Mr Catchpoole stated that the petitioners were not opposed in principle to validation orders in respect of certain payments, subject to proof that they were properly due and paid.[59] However, the petitioners opposed validation orders in respect of payments to Credit Suisse, Torchlight Group, PGC, certain advisers and consultants (including Mr Naylor) and for investments in the East Wanaka Land and general partnership administration.[60]

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[56] At para 115
[57] At para 123
[58] Sworn to on 30 September 2016
[59] Among these were payments to Praxis, Deloitte, GT, Lowndes Jordan (a New Zealand law firm), as well as for purchases of shares in Lantern and certain of Conyers Dill & Pearman's fees – see paras 12, 13 and 15.
[60] Para 14

41. Mr Catchpoole complained[61] that, if a validation order were made in respect of the payments which the petitioners opposed, "*it will have the effect of the Court deciding in advance of the trial of the Petition, that certain aspects of the conduct of the General Partner which have been put in issue in these proceedings do not, as the Petitioners contend, amount to misconduct*". Further[62], that the fourth validation application was "*largely unsupported by documentary evidence*", and the limited financial evidence provided was in fact "*less fulsome than that previously rejected by* [Clifford J] *in his ruling dated 9 February 2016*". This limited financial information in turn gave rise to a concern that, among other things, the assets of the Partnership "*have been dissipated and mismanaged*", the evidence before the court "*is incomplete and/or misleading*", and "*breaches of the injunction formed [sic] by Clifford J may have occurred*"[63].

42. As regards the financial circumstances of the Partnership, Mr Catchpoole pointed out[64] that, as at the date of the filing of the fourth application, the 2016 audited accounts for the Partnership were overdue and still outstanding ("*48 days late*"[65]). He also suggested[66] that, based on the last set of audited accounts, the Partnership and its predecessor were "*loss making*", with cumulative losses of nearly AUD $440 million. Notwithstanding these losses, he commented[67], "*the General Partner of the Partnership paid the General Partner of the NZ Fund a performance fee of $10.26m which would only be payable out of very substantial profits*".

43. Mr Catchpoole next turned specifically to Mr Naylor's evidence. Making a general point in relation to Mr Naylor's credibility, he drew attention[68] to Mr Naylor's

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[61] At para 16
[62] At para 17
[63] Para 22
[64] At para 26
[65] At para 28
[66] At para 32
[67] At para 33
[68] At para37

statement in his third affidavit[69] that the General Partner and the Partnership were unable to give discovery in relation to a particular request, "*as these documents simply do not exist*". In fact, as Mr Naylor himself later accepted in his sixth affidavit[70], that statement was erroneous, as the information in question was in fact captured in email correspondence which had since been disclosed.

44. Mr Catchpoole then went on to make a number of statements/comments about various aspects of the General Partner's conduct of the business of the Partnership. I hope I do them no disservice by summarising them as follows:

i. He alerted the court[71] to "*PGC's numerous periods of suspension from quotation*" on the New Zealand Stock Exchange for failure to file accounts on time.

ii. He highlighted[72] a pattern of activity in the Partnership's bank accounts in the run-up to the second validation application and the Clifford ruling. This activity, he stated[73], showed that between the first mention of the petitioners' application for an injunction and the hearing of the application, "*the General Partner paid to itself and its related parties approximately $12.5m out of the $31m cash in hand*".

iii. He complained[74] of the General Partner's failure to discover bank statements covering the period during which the various payments for which validation was sought were made (June 2015 to September 2016), in circumstances in which "*the latest audited accounts provided by the Partnership are current as at 31 March 2015 (i.e. over 18 months ago)*".

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[69] See para 24 of Mr Naylor's third affidavit, sworn to on 18 February 2016.
[70] See paras 8 and 9 of Mr Naylor's sixth affidavit, sworn to on 26 August 2016.
[71] At paras 40-46
[72] At paras 47-62
[73] At para 62
[74] At paras 63-66

iv. More generally, he complained[75] of the paucity of financial information supplied by the General Partner in support of each validation application. He was nevertheless able to discern a pattern of activity which "*appears to be consistent with a stripping of cash from the Partnership before a winding up order is made*"[76].

v. In relation to transactions with Credit Suisse, he complained[77] that, although validation orders were being sought "*in relation to tens of millions of dollars' worth of loan transactions ...* [there] *is no evidence as to the purpose for which funds were drawn down or what use was made of those funds*". This gave rise to the possibility, he surmised[78], that the Partnership may have directed Credit Suisse to "*pay advances to third parties as a means of circumventing the injunction or trying to avoid the recovery of those amounts by a liquidator*". He also noted[79] that there were a number of terms in the Credit Suisse Framework Agreement "*which may prevent draw-downs from being made if winding-up proceedings are on foot*".

vi. In relation to payments to PGC and Torchlight Group, he also bemoaned the absence of evidence "*that amounts were ever drawn down from those related parties or what those payments were applied towards*"[80]. Further, as regards fees paid to the General Partner, he observed[81] that those monies may prove to be irrecoverable if at the end of the winding-up it turns out that it was either not entitled to any fees at all, or liable to pay substantial damages, on the ground that it had misconducted the business of

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[75] At paras 67-74
[76] Para 75
[77] At para 76
[78] At para 79
[79] At para 81
[80] At para 82
[81] At para 83

the Partnership. In any event, he said[82], he was not aware of any documents "*which disclose the actual calculation of the General Partner's fees*".

vii. Finally, he made a number of complaints and observations about the Partnership's liability for and the quantum of payments made in relation to the East Wanaka transaction[83]; Mr Naylor's fees[84]; legal costs of the NZ Fund in respect of Wilaci[85]; and fees to certain advisers and consultants[86].

viii. In conclusion, he stated[87] that '[i]*f the orders sought by the* [Fourth] *Validation Application are made then it may limit a liquidator's ability to investigate and recover payments for the benefit of all limited partners*".

45. Mr Catchpoole's eighth affidavit prompted an eighth affidavit from Mr Naylor[88], running to 102 paragraphs. Among other things, Mr Naylor -

i. questioned the petitioners' motive for opposing the fourth application, characterising it[89] as part of an improper scheme being carried out for an ulterior motive;

ii. acknowledged[90] that the suggestion in his third affidavit that certain documents did not exist was a mistake, for which he had already apologised;

iii. pointed out[91] that, in any event, those documents were helpful to the General Partner's defence to the petition;

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[82] At para 87
[83] Paras 84-86
[84] Paras 88-91
[85] Paras 92-99
[86] Paras 100-101
[87] At para 106
[88] Sworn to on 7 October 2016
[89] At para 5
[90] At para 8
[91] At para 9

iv. observed[92] that, in considering the second application, "*Clifford J did not have the benefit of a detailed Defence or a long affidavit explaining why the particular payments were in the best interests of the Partnership*"; and

v. in response to Mr Catchpoole's concern that a validation order might limit a liquidator's ability to investigate and recover payments in due course, observed[93] that "[t]*he fact that the Court validates payments made bona fide or in the ordinary course of business will not prevent a liquidator investigating any impropriety on the part of the General Partner or seeking an appropriate remedy*".

46. Mr Naylor's eighth affidavit drew yet another, a ninth from Mr Catchpoole[94], this time running into a further 44 paragraphs. Mr Catchpoole strongly objected to Mr Naylor's attribution of an improper motive to the Petitioners in opposing the application. Among other things, he pointed out[95] that –

> "*6. The General Partner has been running the Partnership for eighteen months without a validation order and has allowed a period of nearly eight months to elapse since its failed Second Validation Application which was made in January 2016. The court is now being asked to validate a substantial number of payments that have already been made and which relate to issues in the Amended Petition. Retrospective validation is not necessary or expedient to enable the Partnership to continue to trade in the very short period that now remains until trial.*

[92] At para 15
[93] At para 101
[94] Sworn to on 14 October 2016
[95] At paras 6-7

7. The concerns of the Petitioners are that this application is being made for a validation of prospective transactions to remove cash from the Partnership, leaving no cash available for liquidators, were they to be appointed, to investigate the conduct of the Partnership. Further, while the validation of past payments would not prevent the liquidators from challenging the transactions, it would shift the burden of proof so that instead of a transaction being void unless it is shown to be proper the liquidators would have to investigate and prove transactions were improper."

47. Mr Catchpoole's ninth affidavit was followed by a ninth from Mr Naylor[96] exhibiting a copy of GT's unqualified audit accounts for the Partnership, issued on 21 October 2016, for the year ended 31 March 2016. In addition, Mr Naylor exhibited a copy of a letter from Praxis dated 4 October 2016, which confirmed that management fees due to the General Partner between 1 October 2015 and 30 September 2016 had been calculated in accordance with the LPA.

48. And finally, insofar as the evidence which was before the judge goes, there was Mr Naylor's eleventh affidavit[97], exhibiting a copy of a letter from GT dated 1 November 2016, written at the request of the General Partner, explaining their approach to the related party transactions disclosed in the 2016 audited accounts:

> *"The Partnership's significant related parties are Torchlight GP ('TGP'), Torchlight Group, Pyne Gould Corporation ('PGC') and RCL Group. Significant related party transactions for the year were management fees payable to TGP and advances from Torchlight Group and PGC. As part of our audit procedures, a lower materiality threshold was considered in testing the movement of these transactions for the year and agree [sic] to the supporting*

[96] Sworn to on 1 November 2016
[97] Sworn to on 1 November 2016

documents, we also compared the outstanding balances to the related parties' books and performed recalculation of interest expense.

On 22 January 2016, the Court granted an injunction limited to preventing the payment to persons related to the TGP without the consent of the Petitioners. As part of our procedures, we examined payments after the injunction date and ensured that these are authorized by the court. Based on the procedures we performed, the related party balances are fairly stated, the interest expense recognized is reasonable and payments after injunction were valid."

The judge's decision

49. In his judgment issued on 6 December 2016, after setting out the test propounded by Henderson in **Fortuna**, the judge commented as follows[98]:

> *"It is important to note that the test is not a high one. Although much time and indeed energy have been expended upon this issue, the Court reminds itself both that these are interlocutory proceedings only, where no final determinations of facts have yet been made, and moreover that it is not the function of the Court to place itself in the role of directors or of a General Partner or directly assume their business responsibilities."*

[98] At para 9

50. Turning to **Cybervest**, after mentioning Smellie CJ 's cautionary note relating to cases in which "*irregularities in the conduct of the company can be shown*", the judge observed[99] that "*at this stage of proceedings the alleged circumstances of the instant case cannot be said to be comparable in scope or severity with those alleged in* [**Cybervest**], *taking the matter broadly as it stands as a whole*".

51. The judge next considered the Clifford ruling, firstly[100], highlighting Clifford J's criticisms of the material supplied in support of the second application for want of detail; and, secondly[101], drawing attention to Clifford J's specific indication that it remained open to the General Partner "*to make application [sic] in the future for a validation order ... supported by evidence going to the elements which must be established for the making of such an order*".

52. And next, before discussing the issues placed before the court by the fourth application, the judge observed that[102]:

> "*The Court notes that since February 2016 there has been a very considerable amplification of pleadings, along with the accrual of a large body of evidence, albeit much of which evidence is strenuously disputed.*"

53. The judge then gave a brief summary[103] of the issues raised on the several affidavits, before stating that[104]:

> "*25. This Court accepts that in the instant application the Court need not have explicit documentary evidence for all the items in the General Partner's list. Nonetheless the Court must be satisfied*

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[99] At para 12
[100] At paras 17-18
[101] At para 19
[102] At para 20
[103] At paras 21-23
[104] At paras 25-26

in accordance with the test prescribed by law that there is a sufficiency of admissible evidence which taken as a whole meets the relevant legal standard which has been above described.

26. The Court also carefully reminds itself once again that the test is not a high one."

54. Finally, before returning to a detailed assessment of the evidence before him, the judge stated his view of the required approach to the application in the following terms[105]:

"34. It is the view of the Court that in the course of interlocutory proceedings, where no final determinations of fact have yet been made, the Court should not unnecessarily be deterred from making a Validation Order if to do so is consistent with the law and practice which have previously been set out.

35. Such a decision if otherwise justified would in no way prejudge the triable issues in this case, nor should a decision be seen as somehow prejudicing either one party's interests or those of the other party in relation to specific triable issues.

36. Indeed, in the interests of justice any tendency to regard such interlocutory hearings as mini-trials must actively be discouraged."

55. The judge then reviewed the evidence before him in detail, at several points noting matters which were in dispute between the parties and observing[106], in relation to

[105] At paras 34-36
[106] At para 62

Mr Catchpoole's ninth affidavit, that a "*considerable body of* [it] *deals with matters upon which the Court has yet to decide*". Having considered the evidence, as well as the petitioners' challenge to Mr Naylor's credibility, the judge stated his conclusions as follows[107]:

> "*71. The Court takes due account of the fact that elements of Mr. Naylor's evidence are supported in important and material respects by the unqualified audit reports described above and also by the Praxis correspondence. This is a factor of some persuasiveness.*
>
> *72. The court accepts that Mr. Naylor's evidence is sufficiently credible to meet the legal standard for this matter.*
>
> *73. The Court has considered the evidence produced, the governing principles of applicable law and the respective submissions of Leading Counsel for the Petitioners and for the General Partner.*
>
> *74. First, the Court accepts that the proposed dispositions appear to be within the powers of the General Partner.*
>
> *75. Secondly, the Court accepts that the evidence shows that the General Partner believes the dispositions are necessary or expedient in the interests of the Partnership.*
>
> *76. Thirdly, it appears to the Court that in this context in reaching the decision which the General Partner has reached the General Partner acted in good faith.*

[107] At paras 71-78

77. Fourthly, the reasons for the dispositions have been shown to be ones which an intelligent and honest General Partner could reasonably hold.

78. The Court takes fully into account that the test which an applicant must satisfy is not high, as previously indicated. Nevertheless, the Court accepts that there is a body of evidence which, viewed objectively, establishes that the decision is one which a reasonable General Partner, having all the best interests of the Partnership in mind, might endorse."

56. In the result, the judge made the validation order in the alternative form asked for in the General Partner's summons:

> *"... notwithstanding presentation of the Petition, dispositions of the Partnership property for the purposes and of the kind described in the Seventh Affidavit of Russell James Naylor sworn to on 8 September 2016 shall not be void by virtue of s. 99 of the Companies Law."*

57. On 16 January 2017, the judge made a further order elaborating the validation order by setting out in detail the dispositions sanctioned by it. In particular, this order provided that the dispositions validated by the court did not constitute a breach of the order for an injunction granted by Clifford J on 23 January 2016.

The grounds of appeal

58. The grounds of appeal are as follows[108]:

[108] Petitioners' Memorandum of Grounds of Appeal dated 16 February 2017

"1. *The judge erred in law in failing to give any or adequate reasons in his judgment for granting validation of related party payments with the effect of rendering nugatory the injunction granted by Clifford J on 22 January 2016. The judge did not give any reasons for allowing payments to be made which would otherwise be injuncted pending the trial of the petition listed to commence on 20 February 2017.*

2. *The judge erred in failing to consider the possible consequences of the General Partner being permitted to make payments to itself which may be irrecoverable in circumstances where there are serious issues to be tried as to the propriety of payments it has made itself. There was no evidence before the Court of the financial capacity of the General Partner or its ability to repay the Partnership if ordered to do so.*

3. *The judge erred in concluding there was sufficient admissible evidence to make validation orders, including by:*

    i. *failing to take into account that the documentary evidence filed in support of the validation application was inadequate and little different from the documentary evidence dismissed as inadequate by Clifford J in his ruling in this matter on 9 February 2016 declining to make validation orders sought for many of the same payments. The court failed to address the fact the documentary evidence provided in support of the Fourth Validation Application was not materially different from the documentary evidence in support of the Second Validation when the application was dismissed on the grounds that the body of evidence, viewed objectively did not establish that the decision was one which a reasonable director, having only the best interests of the company in mind, might endorse;*

    ii. *failing to take into account the lack of any admissible evidence that payments to related parties had been properly authorised in accordance with the terms of the LPA, such that payments prohibited by the LPA may have been authorised;*

iii. *failing to take into account the terms of the alleged indemnity between the Partnership and the New Zealand Partnership (which was not before the Court the purpose of the validation application) before validating payments made on behalf of the New Zealand Partnership notwithstanding that Clifford J noted that this was "plainly in issue on the proper construction of the document";*

iv. *concluding that Mr Naylor's evidence is sufficiently credible to meet the legal standard for this matter without giving any reasons for rejecting detailed submissions made by the petitioners on Mr Naylor's lack of credibility.*

4. *The judge erred in not taking into account (or giving any reasons as to how each of the following was taken into account):*

i. *Clifford J's findings that there are serious issues to be tried in relation the propriety of fees that the General Partner has paid itself and other related party transactions and the apparent irregularity of those statements;*

ii. *Clifford J's findings that the General Partner dissipated the proceeds of the Partnership's investment in certain shares while an injunction application was pending;*

iii. *the General Partner's failure to give adequate discovery in the proceeding, including the General Partner's apparent failure to comply with its discovery obligations by 30 September 2016 as required by previous orders made by this court and obvious non-compliance with its obligations of discovery;*

iv. *that the General Partner was seeking validation of orders defending the conduct of its directors in taking out a AU$37m loan for a term of 60 days with a late payment fee of $500,000 per week and failing to repay that loan for over two years and then subsequently defending proceedings brought by the Receivers and Managers of the New Zealand Partnership;*

v. *that the General Partner was seeking validation of payments made by Mr Naylor to himself pursuant to an undocumented and un-particularised arrangement;*

vi. *that other payments were not evidenced by any written agreement and were entirely unsupported by any documentary evidence in circumstances where the petitioners specifically allege that the General Partner has failed to keep proper records and McMillan J has made findings to the effect that Mr Naylor's evidence in relation to available books and records of the Partnership is not credible;*

vii. *the existence of a pending appeal judgment in New Zealand by the Partnership may result in a liability of the Partnership for approximately US$25m, being US$21m more than the available liquid assets of the Partnership as disclosed by the General Partner's evidence.*

5. *The judge erred in concluding without reasons that the General Partner should be entitled to recover the costs of giving discovery in the petition proceedings from the Partnership without addressing the General Partner's failure to confirm it had completed its discovery in accordance with the orders made by this court at the time of the hearing or considering any of the appellant's arguments in relation to that matter.*

6. *The judge erred in giving insufficient weight to the petitioners' evidence."*[109]

The fresh evidence application

59. By the time the appeal came before the court in September 2017, the hearing of the winding-up petition was already underway. The initial hearing had taken place between 21 February and 10 March 2017, a further hearing scheduled for May

[109] It is no longer necessary to mention ground 7, which complained of the judge's failure to grant a stay of the validation order pending appeal.

2017 had been completed and the trial was adjourned part heard for continuation from 12 to 29 September 2017.

60. By Notice of Motion filed on 22 June 2017, the General Partner sought orders from the court (i) extending the time for filing a Respondent's Notice until 22 June 2017; and (ii) permitting the General Partner to adduce fresh evidence in support of the Respondent's Notice. The petitioners opposed the application and, on 11 September 2017, having heard submissions from counsel, the court refused it. My brief reasons for concurring in this decision are as follows.

61. The 'fresh evidence' upon which the General Partner sought to rely related to matters which had arisen out of cross-examination of witnesses in support of the petition at the initial and the further hearings before the judge. In the General Partner's view, this evidence, "*fatally undermines*" the petitioners' case and suggested that there was "*no basis for the Petitioners maintaining the appeal and stay in respect of the Validation Order, or indeed for maintaining the Related Party Injunction*".[110]

62. Rule 13(4) of the Court of Appeal Rules (2014 Revision) ("**the Rules**") requires that a Respondent's Notice be served within 14 days after the service of the memorandum of grounds of the appeal on the respondent. By June 2017 an extension of time to file a Respondent's Notice was therefore necessary, the General Partner having been served with the petitioners' Memorandum of Grounds of Appeal on 16 February 2017.

63. The General Partner explained[111] that it did not file a Respondent's Notice in time because it did not have the benefit of the evidence which subsequently emerged during the initial and the May hearings of the petition. However, having had the

[110] See paras 15 and 16 of the eighth affidavit of Sarah Natalie Lewis, sworn to on 22 June 2017 and filed in support of the General Partner's Notice of Motion.
[111] Ibid, para 14

opportunity to review and consider that evidence fully, it now sought to file its Respondent's Notice, "*as soon as has been reasonably practicable following the conclusion of the Initial and May hearings*".

64. In support of the fresh evidence application, Mr Wardell QC referred us to rule 17(2) of the Rules, which gives to the court "*full discretionary power to receive further evidence upon questions of fact*". We were also referred to the following note of the decision of this court in **Columbraria Ltd v Beteta**[112]:

> "*The Court of Appeal has an unfettered discretion under the Court of Appeal Rules ..., r.17(2) to hear fresh evidence on an appeal if there has as yet been no trial of the substantive issues in the case. Accordingly, if the evidence is relevant and would not unduly prejudice the party against whom it is to be tendered, the court may give leave to admit fresh evidence on an appeal from a decision of the Grand Court concerning the proper forum for the trial of the case. However, after a trial on the merits of the case, the court's discretion is subject to the more restrictive provisions of O.59, r.10 of the Rules of the Supreme Court and fresh evidence may be adduced only on 'special grounds' (Ladd v Marshall [1954] 1 WLR 1489 applied).*"

65. In this case, it was submitted, although the court was not being asked to make findings of fact, it was right that the court should have the benefit of the current state of affairs arising out of the hearing of the petition.

66. The petitioners opposed the fresh evidence application, contending that the evidence was irrelevant to the issues on the appeal. However, the petitioners submitted, if the court were minded to allow the application and admit the fresh evidence, it should only be on condition that the remaining evidence at the trial be

[112] [2000] CILR Notes - 2

also considered and that the appeal be adjourned in order to facilitate this. In any event, Mr Lowe QC pointed out, the application was based on cross-examination of witnesses for the petitioners who had nothing to do with the management of the Partnership. It therefore had no bearing on the question of whether the Partnership should be wound up on just and equitable grounds.

67. In my view, the General Partner's application for leave to file Respondent's Notice and to adduce fresh evidence fell short for at least three reasons. Firstly, no good reason was shown for the delay of over three weeks between the completion of the May hearing and the filing of the Notice of Motion on 22 June 2017, despite the fact that the significance of the various admissions supposedly made by the petitioners' witnesses during the initial and the May hearings must have been readily apparent to the General Partner's advisors at the time they were made. Secondly, and perhaps more substantially, that evidence had no real bearing on the issues joined between the parties on this appeal, which have entirely to do with whether the judge was right to make the validation order on the basis of the material before him. And, thirdly, I did not think that it would be fair to the petitioners' case on this appeal to introduce matters, taken out of the context of the trial of the petition as a whole, at a time when the evidence was incomplete and the judge's overall assessment of all the evidence adduced had yet to be made.

The submissions on the appeal

68. After reviewing the relevant authorities, Mr Lowe QC acknowledged that the judge had set out the correct legal test which the court should apply on a validation application. But he complained that, because the judge's reasons were inadequate, it was not possible to tell how he had applied the test. The judge's reasoning was wanting because it failed to explain what weight he gave to the petitioners' complaints, all of which related to the subject matter of the petition.

69. But, significantly in the light of all that had gone before, Mr Lowe QC indicated that the petitioners did not now suggest that there had been any breach of the injunction granted by the Clifford ruling. Further, the petitioners no longer opposed the validation of a number of the dispositions for which validation was sought. These included payments in respect of (i) repayment of the Credit Suisse loan; (ii) securities purchases; (iii) follow-on investments; (iv) Conyers; (v) general partnership administration; (vi) Praxis; (vii) Deloitte; (viii) GT; and (ix) litigation costs (limited to the costs of discovery only).

70. However, the petitioners maintained their opposition to validation of payments to Torchlight, various legal advisers in connection with the New Zealand litigation, PGC, Mr Naylor and others. The grounds of objection continued to be that they had been inadequately explained; and/or were not legally due; and/or amounted to related party payments.

71. Mr Lowe made the general point that, in cases of retrospective validation, it was sometimes better left to the end of the winding-up process. In this case, there was no pressing need for validation at the time it was sought, especially since the trial of the petition itself was imminent. The judge had failed to consider whether he might not have been in a better position to consider validation after hearing the evidence presented at the hearing of the petition. Resolution of the several issues raised by the petitioners should therefore have been left to the liquidator to resolve, thus making a blanket validation premature.

72. In the circumstances, the petitioners submitted, the judge demonstrably failed to consider the relevant evidence and, in the result, reached a decision that no reasonable judge could have reached.[113]

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[113] See the petitioners' Skeleton Argument, para 84.

73. In their Skeleton Argument, the petitioners referred us to **English v Emery Reimbold & Strick Ltd**[114] (to make the point that a judge is required to provide adequate reasons so as to enable a losing litigant to understand why he has lost); **Tommy Crinion et al v IG Markets Ltd**[115] (for the proposition that a judge who simply adopts in a wholesale fashion the submissions put forward by one litigant will not discharge his judicial duty); and **Henderson v Foxworth Investments Ltd**[116] (to support the submission that, in this case, (a) there was a demonstrable failure by the judge to consider the relevant evidence; and (b) the judge's decision to validate all the payments, past and future, cannot be reasonably explained or justified and the decisions he made were decisions that no reasonable judge could have reached). I will come to these cases in a moment.

74. Mr Wardell QC for the General Partner submitted that the judge had adopted the **Fortuna** test, addressed all the petitioners' objections, considered all the evidence, applied the appropriate principles and arrived at a rational decision. The judge attached particular emphasis to the letter from Praxis, which vouched the correctness of the calculation of the fees paid to the General Partner, and the audited accounts prepared by the independent auditors. In all the circumstances, the judge's decision was the correct one, based on ample evidence, and the petitioners can have been in no doubt why they lost. In any event, what the judge did was eminently within his discretion and no basis had been shown for this court's intervention. What the judge did was also in keeping with Clifford J's indication that it would be open to the General Partner to seek a validation order at some later stage based on more detailed evidence.

75. As regards the petitioners' complaint about the adequacy of the judge's reasons, Mr Wardell QC referred us to the decision of the House of Lords in **South Bucks**

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[114] [2002] 1 WLR 2409
[115] [2013] EWCA Civ 587
[116] [2014] UKSC 41

District Council and another v Porter (No 2)[117], to demonstrate that, although reasons for a decision should be intelligible and adequate to enable the reader to ascertain what was decided, they could, depending on the nature of the issues in the case, be briefly stated.

Discussion

76. As I have already indicated, there was very little dispute between the parties as to the principles which should apply on an application for a validation order, such differences as there are relating to matters of emphasis only. So, for instance, the General Partner stressed that, in the case of a solvent company, as Slade J explained in **Re Burton & Deakin Ltd**[118], the court will normally the inclined to make a validation order once evidence is placed before the court, "*(a) showing that the directors consider that a particular disposition falling within their powers under the company's constitution is necessary or expedient in the interests of the company, and (b) the reasons given for this opinion are reasons which the court considers that an intelligent honest man could reasonably hold ...*". The petitioners, on the other hand, while not dissenting from this approach as a general rule, were concerned to sound Smellie CJ's cautionary note in **Cybervest** that, even in the case of a solvent company, the judge considering an application for a validation order must still have regard to whether irregularities in the conduct of the affairs of the company and their relation to the grounds of the petition for winding up can be shown.

77. Nor is there any real dispute that, in stating the principles which he proposed to apply to his consideration of the fourth validation application, the judge got them right. So, the only question that arises is whether, in his application of the principles to the facts of this case, the judge exercised his discretion under section 99 in a demonstrably rational manner. I put it this way since, if he did, as is well

[117] [2004] UKHL 33; [2004] 1 WLR 1953
[118] At page 637

known, this court will not ordinarily second-guess the judge's exercise of his discretion.

78. In considering this question, it is also relevant to keep in mind the concessions made (quite properly, if I may say so) on behalf of the petitioners by Mr Lowe on his feet before us. These concessions have had the effect of substantially narrowing the scope of the petitioners' complaints on appeal about the judge's decision. Indeed, the remaining areas of dispute now appear to relate principally to (i) related party transactions, such as payments to Torchlight Group, PGC, Naylor Partners (Mr Naylor's firm) and payments of management and other fees to the General Partner under the LPA; and (ii) payments to legal experts in relation to the New Zealand litigation, other advisers in New Zealand, and litigation expenses other than those relating to the discovery exercise.

79. In relation to these matters, the petitioners maintained their complaint that the inadequacy of the judge's reasons for his decision was such as to bring about an injustice; and that the judge's decision to grant the validation order was one which no reasonable judge could have reached.

Were the judge's reasons adequate?

80. In **English v Emery Reimbold & Strick Ltd**, the Court of Appeal of England and Wales considered three cases in which it was said that the trial judge had failed to give adequate reasons. In two of them, the trial judge, after reviewing at length the evidence of the witnesses, including rival expert witnesses, preferred one side's evidence over the other, without giving any reasons or offering any analysis or explanation. In the third, in which the claimant succeeded in relation to about a third of the items for which he claimed, the trial judge made no order as to costs, but gave no reasons for that decision.

81. In respect of the first two cases, it was held that, although there were shortcomings in the judgments, the court was satisfied that it could follow the reasoning of the judges when considered in the light of the evidence and the submissions at trial. In the third case, the court was satisfied that it had been open to the judge in the circumstances of the case to reach her conclusion not to make any order as to costs.

82. But, in a passage upon which the petitioners rely, Lord Phillips MR said this[119]:

> "*There is a general recognition in the common law jurisdictions that it is desirable for judges to give reasons for their decisions, although it is not universally accepted that this is a mandatory requirement ... While a constant refrain is that reasons must be given in order to render practicable the exercise of rights of appeal, a number of other justifications have been advanced for the requirement to give reasons. These include the requirement that justice must not only be done but be seen to be done. Reasons are required if decisions are to be acceptable to the parties and the members of the public ...*
>
> ...
>
> *We would put the matter at its simplest by saying that justice will not be done if it is not apparent to the parties why one has won and the other has lost.*
>
> *As to the adequacy of reasons, as has been said many times, this depends on the nature of the case ...* ***In Eagil Trust Co Ltd v Pigott-Brown*** *[1983] 3 All ER 119, 122, Griffiths LJ stated that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case ...*

[119] At paras 15-21

It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

83. In **Tommy Crinion et al v IG Markets Ltd**, the complaint on appeal was that the closing submissions of the claimant's counsel at trial provided the basis (virtually word for word) of the greater part (estimated by the appellant to be 94%) of the judgment of the trial judge. The Court of Appeal agreed, Underhill LJ observing[120] that "*the overall impression on comparing the two documents is that the latter is derived almost entirely from the former*". Underhill LJ, with whom Sir Stephen Sedley and Longmore LJ agreed, went on to observe[121] that "*it was indeed thoroughly bad practice for the Judge to construct his judgment in the way that he did ...*" By doing so, as counsel for the appellant submitted[122], what the trial judge did "*creates the impression that he had abdicated his core judicial responsibility to think through for himself the issues which it was his job to decide ...*".

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[120] At para 11
[121] At para 16
[122] See para 13

84. However, Underhill LJ considered that it did not necessarily follow from the fact that the judgment was seriously defective that there had been an injustice which required that the appeal be allowed. Referring to **English v Emery Reimbold & Strick Ltd**, Underhill LJ pointed out[123] that, in the three cases involved in that appeal, "*... the Court was able in the end, by careful analysis of the judgment in the context of the evidence and submissions made, to satisfy itself that the judge had in each case performed his or her judicial function*". Accordingly –

> "*... in this case, if it is possible to demonstrate that, whatever the first impression created by the way he constructed his judgment, the Judge did in fact carry out a proper judicial evaluation of the essential issues and did not simply surrender his responsibility to counsel, then the judgment should stand. This involves no qualification of the principle that justice must be seen to be done; but in deciding whether that is so it is necessary, at least in a case like this, to go beyond first impressions.*
>
> *In the end, and not without some hesitation, I have come to the conclusion that the judgment in this case does show, when examined carefully in the context known to the parties, that the Judge performed his essential judicial role and that his reasons for deciding the dispositive issues in the way that he did are sufficiently apparent ...*"

85. Lastly under this head, I should mention **South Bucks District Council and another v Porter (No 2)**, the case to which Mr Wardell QC referred us. The question in that case was whether the reasons given for the grant of planning

[123] At para 17

permission by an inspector attached to the South Bucks District Council were adequate. Although Lord Brown's detailed review of the authorities relating to the adequacy of reasons was carried out in the context of the grant or refusal of planning permission, his conclusion may be of more general application[124]:

> "*The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.*"

[124] At para 36

86. Hardly surprisingly, this highly selective review of the authorities to which we were referred fully supports the view that judges are in general required to give reasons for their decisions. The reasons should be such as to enable the parties to understand why one has won and the other has lost. A trial judge should also support the appellate process by enabling the Court of Appeal to understand the basis of the decision appealed against. The adequacy of the reasons provided will depend on the nature of, and the issues involved in, the particular case. While in the formulation of his or her reasons a judge may naturally derive assistance, in many cases significant assistance, from the skeleton arguments and other material placed before the court by the parties, it is the judge's core responsibility to evaluate the evidence and the arguments and to come to a reasoned conclusion of his or her own.

87. However, despite the obvious strength of the general rule, it does not necessarily follow that a departure from these standards by a trial judge will lead to the conclusion that an appeal from the resultant judgment must be allowed. The Court of Appeal will in every case closely examine the judgment in the context of the evidence and submissions of the parties at trial in order to determine if, all matters having been taken into account, justice has been done. In this regard, the party seeking to set aside a judgment on the ground that the reasons given in support of it were inadequate must satisfy the court, as Lord Brown put it in **South Bucks District Council and another v Porter (No 2)**, "*that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision*".

88. Initially in this case, a significant aspect of the petitioners' complaint about the inadequacy of the reasons given by the judge related to what was said to be his failure to "*give any reasons for allowing payments to be made which would otherwise be injuncted pending the trial of the petition*"[125].

[125] Ground 1 of the grounds of appeal; see also para 51 of the petitioners' Skeleton Argument.

89. But, as Mr Wardell QC pointed out (and as Mr Lowe QC appeared to accept during the argument), the judge's approach was entirely in keeping with what Clifford J appears to have contemplated in his ruling on the second application, at any rate in the body of his judgment. It is true that the actual order which Clifford J made was, on the face of it, concerned to enjoin future dispositions of Partnership assets, "*without the consent of the Petitioners* ***or an order of the Court made on an application, supported by evidence, for prospective validation***" (my emphasis). However, it nevertheless seems clear from the general tenor of the judgment as a whole that Clifford J also had in mind the possibility of further applications, supported by appropriate evidence, in respect of past dispositions. So, for instance, as will be recalled[126], Clifford J had expressly indicated that "[i]*t will be open to the Partnership, or perhaps more appropriately the General Partner, to make application in the future for a validation order ... on a proper basis in respect of dispositions which can be supported by evidence going to the elements which must be established for the making of such an order*".

90. It follows from this, as it seems to me, that once the judge came to the conclusion on the evidence before him that a particular disposition should be validated - and in the absence of any further or alternative contention that the injunction should nevertheless remain in place – it was not necessary for the judge to offer any separate justification for the removal of the injunction.

91. As regards the petitioners' more general complaint that the judge's reasons were inadequate, I think that it is clear from his judgment - produced, I might add, at great speed and under the pressure of a mountain of material - that he fully appreciated and understood that (i) the appropriate test for the grant of a validation order was that set out in the judgment of Henderson J in **Fortuna**, as subsequently supplemented by the observations of Smellie CJ in **Cybervest**; (ii)

[126] See para 27 above

the second application for a validation order failed because Clifford J considered that the evidence produced by the General Partner in support of it fell short of what the law required to establish an entitlement to the order; and (iii) it was therefore necessary to scrutinise the evidence produced in support of the fourth application with great care in order to ensure that, this time, the requisite test for the grant of such an order was satisfied.

92. Against this background, the judge looked at and examined the evidence produced in support of each disposition in respect of which validation was sought; measured it against the standard established by the authorities (viz, that there should be "*a sufficiency of admissible evidence which taken as a whole meets the relevant legal standard which has been above described*"[127]); reminded himself at several points that, at this interlocutory stage of the winding-up proceedings, he was not required to embark upon a mini-trial; noted the significance of the fact that several of the dispositions complained of had passed the scrutiny of the independent auditors (describing this as "*a factor of some persuasiveness*"[128]); and concluded that "*there is a body of evidence which, viewed objectively, establishes that the decision is one which a reasonable General Partner, having all the best interests of the Partnership in mind, might endorse*"[129].

93. In my view, the judge's reasons for this conclusion were entirely sufficient to enable the parties to understand why the fourth application for a validation order succeeded. While he may not have dealt with every argument addressed to him, he was not required to do so. Nor was he obliged to make findings of fact in respect of the contrasting positions placed before him by Mr Naylor and Mr Catchpoole. What the judge was obliged to do was to satisfy himself, applying the

[127] See para 70 above
[128] See para 72 above
[129] Ibid

appropriate legal test, that the making of a validation order would be a proper exercise of his discretion in all the circumstances.

94. The Clifford ruling, the evidence produced in support of the fourth application and the rival contentions of counsel supplied the relevant context for the judge's consideration. Taken against this context, I think it is clear that the fourth application succeeded because the judge considered that Mr Naylor's evidence, significantly bolstered this time around by the unqualified 2015 and 2016 audit reports, was sufficient to fill the gaps which the Clifford ruling had exposed in the second application. Accordingly, in my view, the petitioners' challenge based on the alleged inadequacy of the judge's reasons cannot succeed.

Was the judge's decision one which a reasonable judge could have reached?

95. This formulation of the petitioners' complaint on this score obviously derives from the decision of the Supreme Court in the Scottish appeal of **Henderson v Foxworth Investments Ltd and another**. That was a case in which a judgment of the Lord Ordinary, Lord Glennie, was set aside by an Extra Division of the Inner House. As it happens, one of the grounds upon which the judgment was set aside was also that the Lord Ordinary had failed to give satisfactory reasons for the factual conclusions which he had reached on the evidence before him.

96. In allowing an appeal from the decision of the Extra Session, Lord Reed observed, firstly[130], that "[a]*n appellate court is bound, unless there is compelling reason to*

[130] At para [48]

the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration".

97. Secondly[131], that –

> "*... in any event, the validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although, as I have explained, it need not all be discussed in his judgment). The weight which he gives it is however pre-eminently a matter for him, subject only to the requirement, as I shall shortly explain, that his findings be such as might reasonably be made. An appellate court could therefore set aside judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.*"

98. And thirdly[132], that –

> "*... in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified.*"

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[131] At para [57]
[132] At para [67]

99. The matters before the judge in this case did not, as he was obviously aware, require him to make findings of fact. But, of course, as is well known, an appellate court's approach to a challenge to a judge's exercise of his discretion is very similar to its approach to a judge's findings of fact. So, as Lord Diplock famously explained in **Hadmor Productions Ltd and others v Hamilton and others**,[133] an appellate court –

> "*... may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it ... there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own.*"

100. I am satisfied that, applying either the **Henderson** or **Hadmor** criteria, there is nothing in the judge's exercise of his discretion in this case which could possibly warrant this court's intervention. Some of my reasons for this conclusion have

[133] [1981] 2 All ER 1024, 1046

already been foreshadowed by my earlier discussion on the adequacy of the judge's reasons. Having correctly established the standard which the evidence in support of the fourth application was required by the authorities to meet, the judge paid particular attention to the extent to which the shortcomings which Clifford J had perceived in the second application were met by the evidence supplied in support of the fourth.

101. Thus, to name but a few of them, earlier concerns about the Credit Suisse payments (which have in any event now fallen away completely) were addressed by the provision of the requisite agreement. Payments to the Torchlight Group and PGC, which, as related party transactions, had given Clifford J so much concern, were also supported by reference to loan agreements. Payments to Torchlight GP Limited in respect of management fees, another major source of concern, were certified by Praxis as having been properly calculated under the terms of the LPA. In respect of each payment, Mr Naylor provided an explanation and asserted his belief that the particular payment was in the best interests of the Partnership, and such that "*any intelligent and honest director*" would have authorised. And, obviously of greatest significance in the opinion of the judge, was the fact, which would not have been known at the time of the Clifford ruling, that GT provided unqualified audit reports in respect of both the 2015 and 2016 audited accounts. In other words, from the objective stand point of the independent auditors, the payments for which validation was sought had passed muster.

102. I have not lost sight of the fact that, on the other side, there was Mr Catchpoole's evidence in opposition to the fourth application. However, the weight to be attached to that evidence in the context of the application for a validation order was entirely for the judge to decide. In fact, what the judge did was to avoid taking any final position on the evidence by declining to embark on a mini-trial at this interlocutory stage. Instead, the judge focussed on whether, as the **Fortuna** test obliged him to do, there was "*a body of evidence which, viewed objectively,*

establishes that the decision is one which a reasonable director, having only the best interests of the company in mind, might endorse"[134].

103. I cannot fault the judge's approach in this regard. Given that definitive findings of fact are neither possible nor desirable at this stage of the proceedings, what the judge was required to do was to determine, taking a broad view of the matter, whether the General Partner had satisfied the criteria for the grant of a validation order. For the reasons which I have attempted to state, I do not think that the petitioners have made good their complaint that the judge's exercise of his discretion was such as to warrant this court's interference.

Conclusion

104. The judge's decision to make the validation order was one which fell within his undoubted discretionary powers. In order for that decision to be successfully challenged on appeal, it was therefore necessary for it to be demonstrated that the judge had proceeded on some wrong principle, or otherwise misunderstood the law which he was required to apply, or the evidence which the parties provided for his consideration. The petitioners' appeal failed because they were unable to satisfy this test and no basis was therefore shown for this court's interference.

105. O.62 r.9(1) of the Grand Court Rules, 1995[135] provides that, subject to O.62 r.9(2), "*the costs of any proceedings shall not be taxed until the conclusion of the cause or matter in which the proceedings arise*". However, O.62 r.9(2), to which O.62 r.9(1) is subject, provides that "[i]*f it appears to the Court when making an order for costs that all or any part of the costs ought to be taxed at an earlier stage it may order accordingly*".

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[134] See para 19 above

[135] Which are made applicable to this court by rule 28 of the Rules.

106. I accept that at the conclusion of interlocutory proceedings in the Grand Court – or indeed in this court - an order for costs to be paid before the end of the substantive cause or matter may require to be justified by special circumstances. However, this is a case in which the petitioners' appeal has been finally disposed of by the court's order. It appears to me that it therefore stands on an entirely different footing, leaving it open to the court to make such order as it considers just in all the circumstances. It is on this basis that, in the absence of any application by the petitioners for a contrary order at the time of the making of the order, the court concluded that an order for immediate taxation was appropriate.

Martin JA

Newman JA