IN THE SUPREME COURT OF BERMUDA

COMMERCIAL COURT
2007: No. 155

BETWEEN:-

JOSEPH E. LENIHAN

Plaintiff

-and-

LSF CONSOLIDATED GOLF HOLDINGS LTD.
(as the General Partner of LSF Pacific Golf Holdings LP)

Defendant

RULING

Date of hearing: June 19-20, 2007
Date of Judgment: June 28, 2007

Ms. Kiernan Bell, Appleby, for the Petitioner
Mr. Paul Smith, Conyers Dill & Pearman, for the Respondent

Introductory

1. The Petitioner applies for the interim appointment of Receivers over the assets of a limited partnership registered under the Limited Partnership Act 1883, LSF Pacific Golf Holdings LP ("the LP"), of which the Respondent is purportedly the General Partner and the Petitioner purportedly the Limited Partner. By his Petition, he seeks various forms of relief at trial, most importantly cancellation of the registration of the LP, together with its dissolution and winding-up.

2. The LP was contractually formed on or about March 10, 2005 through a partnership agreement ("the PA"), Article 16 of which contains an arbitration clause, governed by Bermuda law, but providing for arbitration in Japan under ICC rules. The Respondent invokes that clause and applies for a stay of the present proceedings, under Article 8 of the UNCITRAL Model Law.

3. The two applications were heard together because it was common ground that whether or not the Respondent was entitled to a stay, the Court had jurisdiction to entertain the application for interim relief. Such relief was sought on the grounds that (a) it was likely that the LP would have to be wound –up, and /or (b) that the Respondent could not reasonably be trusted to protect the Petitioner's interests in the partnership assets before the winding-up process actually commenced. The stay application was opposed on the grounds that the

crucial legal and factual issues in controversy were not arbitrable disputes, but matters which this Court alone had competence to adjudicate.

Factual matrix: facts which are not disputed and/or which do not appear to be seriously controversial

4. The PA provides in Article 1.1 that "*'Acts' shall mean the Limited Partnership Act 1883 as amended, of Bermuda, the Partnership Act 1902 as amended, of Bermuda and the Exempted Partnerships Act 1992, as amended, of Bermuda.*" Article 2.1 provides:

> "*The parties hereby form an exempted limited partnership pursuant to the provisions of the Acts. The rights and liabilities of the Partners shall be as provided in the Acts, except as herein otherwise expressly provided.*"

5. The term "*Investment*" is defined by article 1.1 of the PA as meaning "*all debt, equity or other interests in any member of the Pacific Golf Group held, directly or indirectly, by the Funds*…" The "Funds" are four other "*Lone Star*" limited partnerships, two of which are established in Bermuda and two of which are established in Delaware. The principal purpose of the partnership business, according to Article 2.5 is:

> " *(a) to buy, sell, exchange or otherwise acquire, hold, trade, or invest, directly or indirectly, in the investment, and to do every other thing incidental or related to such activities as the General Partner may deem appropriate, necessary or advisable to conduct the business of the Partnership and to carry out any of the foregoing…*"

6. The Respondent's contributions in its capacity as General Partner are described in Article 3.1 as $338,931,769. Article 3.2 ("*Limited Partner Contributions*") provides as follows:

> "*The Limited Partner has not made any Capital Contributions to the Partnership, and no Capital Contribution shall be required of or permitted by the Limited Partner. As of the Effective Date, the Capital Account balance of the Limited Partner shall equal zero.*"

7. Inconsistently with this clause, but not at this stage supported by any other evidence, the LP's Register of Limited Partners as at April 19, 2007 suggests that the Petitioner's capital contribution is $240. This document bears a date after the Petitioner on March 8, 2007 sent a somewhat intemperate email to the Respondent making allegations of misconduct in the management of the partnership and threatening legal action[1]. Prior to this, the Respondent's own accounting (forwarded to the Petitioner by Michael Thompson, President of the General Partner) had reflected the fact that, as at December 31, 2006, capital "*Contributions to date*" by the Petitioner were nil[2].

8. In paragraph 72 of the Petitioner's June 7, 2007 Affidavit, he deposes that the Register is "*untrue*" in stating that he contributed $240 to the LP. As reflected in the PA, he states that he made no contribution. The Respondent's response Affidavit, sworn by Michael Thompson on June 18, 2007, does not join issue with this important factual assertion. The Petitioner's case that the LP is liable to be dissolved, in significant part because the partnership is not a valid limited partnership, is only apparently challenged on legal grounds:

> *"The Respondent denies that the Petitioner is entitled to dissolve the Partnership, not only because the arguments in the Lawsuit are not supportable, but because the Parties' LP Agreement addresses this issue,*

[1] Pages 730-731 of exhibit "JEL-1" to the Petitioner's Affidavit sworn on June 7, 2007.
[2] Exhibit "JEL-1", page 725.

and he cannot demonstrate the right thereunder to dissolve the Partnership. Moreover, the claims made in Lawsuit are subject to the agreement to arbitrate in the LP Agreement and are thus brought in violation of the LP Agreement."[3]

9. Mr. Smith suggested that the failure to join issue with the assertion that the Limited Partner made no capital contribution was explicable by reference to the obvious haste with which the Affidavit was prepared. But in paragraph 5 of the Thompson Affidavit, the rationale behind the PA is explained and the capital contribution made by the Respondent is described. It seems improbable that the failure to assert that a capital contribution was, contrary to the express terms of the PA, in fact made or promised by the Limited Partner was simply an oversight. As Ms. Bell for the Petitioner pointed out, Mr. Thompson in his Affidavit[4] positively relied on the accuracy of an "*Equity Summary Amounts as of 3/31/07*" showing the Limited Partner's Capital Contribution as nil.

10. The important factual issue of whether or not the Petitioner actually or contingently made a Capital Contribution is, accordingly, either not disputed or not seriously open to doubt, based on the material presently before this Court.

11. It was also common ground that on March 10, 2005, the LP was registered as an exempted partnership and as a limited partnership under the Exempted Partnership Act 1992 as amended and under the Limited Partnerships Act 1883.

Factual matrix: controversial factual issues

12. It is common ground that the disputes surrounding the parties' respective commercial rights under the PA are caught by the arbitration clause. The Respondent's gripe is that, shortly after negotiating the PA which was designed to compensate him for his ongoing employment, the Petitioner "*abruptly*" resigned. They contend that postponing further distributions at this juncture is consistent with the PA and reasonable. The Petitioner, very broadly speaking, complains that he is entitled to receive further distributions now, and should not be required to sign loan documentation, in lieu of a distribution, save on a non-recourse basis. Complaint is made that the terms offered to the General Partner for an equivalent loan were far more favourable.

13. The Petitioner deposes that he has lost trust and confidence in the General Partner, in part because the way in which its Capital Contribution was retrospectively increased after the PA, and in part because of (a) his alleged mistreatment while he was employed, which prompted him to resign, and (b) his general suspicions, in effect, that the Respondent is not managing the LP (and/or dealing with him as Limited Partner) in good faith. These matters are, to some extent at least, relevant to whether or not Receivers ought to be appointed on an interim basis.

14. A further potentially controversial factual issue joined by Counsel in argument is whether or not the PA may be rectified to cure any legal complications which flow from the agreement that no Capital Contribution is required from the Limited Partner. The presently available evidence exhibited to the Petitioner's Affidavit on the course of negotiations between the parties in relation to the PA suggests (a) that the terms of the PA were negotiated and settled without regard to Bermuda counsel and (b) that the parties never considered the issue of a nominal Capital Contribution at all[5]. The first draft of the PA (not exhibited) was seemingly forwarded by Mr. Thompson on behalf of the Respondent to the Petitioner by email on December 14, 2004. This email attached a diagram explaining the partnership structure, which at the top states: "*GP (capital partner)*" and "*LP (profits partner)*".

[3] Thompson Affidavit, paragraph 19.
[4] Paragraph 17, Exhibit "MDT-1" page 2.
[5] Exhibit "JEL-1", pages 171-325.

15. At this interim stage, therefore, it seems improbable that the parties averted to the need for at least a minimum Capital Contribution to be made or undertaken by the Petitioner as Limited Partner at all. Although this matter was not argued or placed before me in evidence, it appears to be the case under Delaware law that a limited partner is not required to make or commit to make a capital contribution to a limited partnership, and if he does so will become a general partner[6]. This is the converse of the Bermuda law position. American lawyers drafting and reviewing a limited partnership agreement in the United States, in relation to a structure involving Delaware limited partnerships as well, may well have assumed that, the Bermuda law concept was the same as under US law. In any event, the Petitioner positively deposes that he never sought Bermuda law advice before executing the PA, and the contemporaneous documentation relating to the negotiation of the agreement presently in evidence does not suggest that the Respondent averted to the Bermuda law position either[7].

Legal grounds for appointing interim receivers over partnership assets

16. There appears to be no local judicial authority on the test applicable to the circumstances in which the Court will exercise its discretion to appoint a receiver over partnership assets, either on an interim or final basis. The Bermuda law position appears to be the same as the English law position, in terms of broad principle at least. Section 19(c) of the Supreme Court Act 1905 provides as follows:

> "*(c) an injunction may be granted, or a receiver appointed, by an interlocutory order of the court in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court thinks just…*"

17. Both Counsel relied primarily on Muir Hunter, '*Kerr and Hunter on Receivers and Administrators*' 18th edition (Sweet & Maxwell: London, 2005), and differed in truth on the application of principles which were not, substantially, in dispute. I regard the following principles to be of particular relevance in the present case:

    (a) a clear case for appointing receivers over partnership assets will only exist when it is clear that the partnership has already dissolved at the date of the application[8];
    (b) the Court should not in any event appoint a receiver "*unless it is reasonably clear that a dissolution will be ordered at trial*"[9];
    (c) even if a case for dissolution is made out, some special ground for appointing a receiver must be made out involving the destruction of the mutual confidence which should exist between partners[10];
    (d) a receiver may be appointed at the same time as an action is stayed pending arbitration proceedings in relation to partnership disputes[11];
    (e) the Court may have regard to the Overriding Objective, with a view to avoiding excessive costs.[12]

18. In the course of argument, Ms. Bell for the Petitioner argued that it was enough, to justify the interim relief which she sought, for her to make out a clear case that the partnership either had been or would likely be dissolved, relying on the disputed misconduct as a supplementary support for the appointment of receivers. A careful reading of the text authority on which she relied does not,

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[6] Delaware Revised Uniform Limited Partnership Act, sections 17-301 (d), 17-304(a).
[7] Save by offering the Petitioner access to the Respondent's Bermuda attorneys.
[8] '*Kerr and Hunter on Receivers and Administrators*', paragraph 2-83.
[9] *Ibid*, paragraph 2-85.
[10] Ibid, paragraph 2-87.
[11] Ibid, paragraph 2-92.
[12] 'Lindley and Banks on Partnership'18th edition (Sweet & Maxwell: London, 2002), paragraph 23-153.

however, support this submission. The Petitioner must make out special grounds for the appointment of receivers, as Mr. Smith rightly contended in reliance upon paragraph 23-162 of '*Lindley and Banks on Partnership*', the recognised grounds being:

> "*(1) Breach of a dissolution agreement under which the partners have given up their personal right to wind up the firm's affairs.*
> *(2) Misconduct plus jeopardy to the partnership assets.*
> *(3) Fraud.*
> *(4) Wrongful exclusion.*"

19. These principles are clearly ordinarily subject to substantial modification in the context of a limited partnership, where the original bargain was that the Limited Partner would be excluded from the management of the partnership assets from the outset. Mr. Smith, in his written submissions, rightly identified this as the first factor the Court should take into account when considering the exercise of its discretion to appoint receivers. But the force of this point is, potentially at least, significantly weakened by the peculiar facts of the present case.

20. The Petitioner principally contends that the true legal position is that the LP is in law an ordinary partnership, not a limited partnership at all. If this contention is strongly arguable, then the threshold of breach of confidence that the Petitioner must make out will logically be no higher than in the case of an ordinary partnership.

21. So the application to appoint interim receivers turns primarily on an assessment of the following factors: (a) whether the LP likely to be declared to be dissolved; (b) the cogency of the claim that the LP was never properly constituted as such, and that the Petitioner is a general partner of the Respondent with unlimited liability for the partnership debts; and (c) whether the Petitioner's misconduct complaints are made out to the extent that is, in all the circumstances, required.

Legal principles applicable to dissolution and to validity of limited partnerships

22. Although the LP was registered as an exempted partnership, it seems to be clear that the dominant legal character of the partnership is defined by the PA as read with the Limited Partnership Act 1883. As permitted by the Exempted Partnership Act, section 9(4), the Registrar has issued one certificate under both Acts. But section 24 of the 1992 Act goes on to provide that where an exempted partnership is also registered as a limited partnership under the 1883 Act, all obligations under the 1992 Act apply only to the general partner. The Minister's consent is required for any change to the general partner (section 13), and the certificate is liable to be revoked under the 1992 Act if the partnership is dissolved.

23. So although the Petition makes no reference to the 1992 Act, it does not seem to be seriously arguable that if the LP was dissolved as a limited partnership no question of revocation of the partnership's status as an exempted partnership would arise. On the contrary, questions would arise as to whether a valid exempted partnership was formed, because only the respondent, as General Partner of the LP, has been certified as a partner for the purposes of the 1992 Act. No general partnership under the 1992 Act between the parties to the present proceedings has ever been approved.

24. Although this point was not fully argued at all, it does seem to be seriously arguable that if the LP were to be invalid according to its terms, the legal effect of that would be that the Petitioner would be exposed to liability to third parties on the basis that the partnership in fact took effect from the outset as an ordinary partnership, not a limited one. The Petitioner's Counsel relied heavily on Alison Manzer, '*A Practical Guide to Canadian Partnership Law*' (Canada Law Book: Loose-leaf, Ontario, Canada), paragraph 9.457, which text suggests that even if

the parties to a limited partnership may waive any irregularities in the formation of the partnership, it "*is doubtful that a similar result would occur if the dispute were between a third party and an improperly created limited partnership*". More significantly still, the learned author goes on to opine:

> "*As noted elsewhere, registration under the relevant Limited Partnership Act or Partnership Act is necessary to create a limited partnership. If the registration is not done, then another relationship, ordinary or general partnership must be the relationship if the persons involved are otherwise conducting business under the indicia of partnership.*"

25. I have dealt with the consequences of invalid formation of the LP first, because this seems to be the most contentious legal issue. The Canadian cases, it must be noted, seem to be cases where no registration as a limited partnership ever occurred, and so third party creditors would have been entitled to assume that they were dealing with an ordinary partnership, even though at the contractual level all the requirements for creating a limited partnership may well have been met. In the present case, the converse is the position, although it is contended that no valid registration ever took place because of non-compliance with mandatory statutory obligations.

26. The Partnership Act 1902 provides in section 34 that:

> "*A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm to be carried on for the members of the firm to carry it on in partnership.*"

27. The Petitioner's Counsel contended that this provision was engaged because the LP contravened the 1883 Act. This issue is also contentious, it being far from obvious that non-compliance with the statutory requirements for the creation of limited partnership "*makes it unlawful for the business of the firm to be carried on for the members of the firm to carry it on in partnership.*" If a valid limited partnership is not formed, it is difficult to see why it would be unlawful for the partnership of the business to be carried on "*in partnership*" at all, as opposed to as a limited partnership.

28. But the following legal propositions, relied upon by Ms. Bell, are clear beyond serious argument. Firstly, the very concept of a limited partnership requires the limited partner to make or undertake to make a capital contribution, and that this is a mandatory statutory requirement for valid registration which cannot be contracted out of. Secondly, and interrelated with the first proposition, there is a mandatory statutory requirement that the certificate of a limited partnership should be cancelled if there is no limited partner.

29. Section 2(1) of the Limited Partnerships Act 1883 ("*Constitution of, and contribution to, limited partnership*") provides:

> "*Limited partnerships shall consist of-*
>
> *(a)one or more general partners who shall be jointly and severally responsible as partners now are by law; and*
> *(b)any other persons who contribute, or undertake to contribute, to the limited partnership cash or other property (but not services) as capital, who shall be called limited partners and who, except as provided by this Act, shall not be liable for any debts of the limited partnership.*"

30. It seems clear that it is an essential statutory requirement that a limited partner shall make (or undertake to make) a capital contribution. Because section 7(1) provides that the general partners "*shall*" establish a register which contains the particulars set out in subsection (2). Section 7(2)(c) requires the register to particularize "*the value of money and other property contributed or undertaken*

to be contributed by each limited partner as capital." It seems equally clear that a limited partnership is fundamentally a creature of statute, even though its formation is partially grounded in a contract between the parties. Where the statutory requirements are met, the limited partner has limited liability, to the extent of his capital contribution obligations (by way of analogy with a shareholder, whose limited liability is also derived from statute), but the parties cannot by contract between themselves, and seek to bind third parties, that one partner's liability will be more limited than another's. Section 8D defines the extent of a limited partner's liability to the partnership, and section 16 provides :

> "*All suits respecting the business of a limited partnership shall be prosecuted by and against the general partners only, except in those cases where limited partners are held severally responsible.*"

31. This section would only apply where a limited partnership as defined by the Act has been validly formed, or where it may be said that a limited partner as defined by the statute exists. Where a limited partner has not contributed or undertaken to contribute capital, he would not appear to have become a limited partner at all. Without deciding this issue at an interlocutory stage, this is very arguably the legal position.

32. Section 8A(1)(4) provides that the "*register of limited partners shall be prima facie evidence of any matter by this Act required to be stated therein.*" In the instant case, for present purposes, that evidential presumption has been discharged. It seems doubtful that prior to the emergence of the present dispute in or about March 2007, that the register described the Petitioner as having made any capital contribution. Since under section 8(2), the register is open to public inspection, theoretically at least third parties dealing with the LP would have been entitled to assume that no valid limited partnership was ever formed. In any event, if the Petitioner is able to prove that he never became a limited partner, section 8F(1) provides:

> "A certificate of limited partnership shall be cancelled-
>
> *(a) upon the commencement of the winding-up of the affairs of a limited partnership consequent upon the dissolution of that partnership; and*
> **(b) at any other time, if there are no limited partners**." [emphasis added]

33. One point which impacts marginally on the cogency of the Petitioner's argument was not addressed in argument, because both Counsel referred to the version of section 2 of the 1883 Act which was amended by the Limited Partnership Amendment (No. 2) Act 2005, with effect from December 29, 2005, which repealed subsections (2)-(5) of the 1883 Act. This amendment was seemingly designed to deregulate altogether the limited partner's capital contribution and participation, which was originally subject to approval in the same way as the general partner's participation is. The breadth of these amendments may have left the Minister and/or the Registrar bereft of any means of determining whether a capital contribution has been made or undertaken to be made at all. But when the LP in this case was purportedly formed on or about March 10, 2005, the Respondent was required[13] to give notice of the Petitioner's capital contribution (if it was made) to both the Registrar and the Bermuda Monetary Authority under section 2 (3)-(4) of the Act which provided as follows:

[13] Although the Minister could under section 2(5) have exempted the Respondent from complying with subsection (3).

> "*(3) Within thirty days after a limited partner makes, or undertakes to make, a capital contribution to a limited partnership, a general partner shall—*
>
> > *(a) deliver a notice thereof, containing the particulars specified in subsection (4), to the Registrar for registration by him in the register; and*
> >
> > *(b) deliver a copy of such notice to the Bermuda Monetary Authority.*
>
> *(4) The notice referred to in subsection (3) shall contain the following particulars, that is to say,—*
>
> > *(a) the name of the limited partnership;*
> >
> > *(b) the name and address of the limited partner that made, or undertook to make, the capital contribution; and*
> >
> > *(c) the amount of the capital contribution made or undertaken to be made and the date of such making or undertaking."*

34. These provisions seem designed to deal with the case of a new limited partner joining a pre-existing limited partnership. But it suggests that on an application to form a new limited partnership, the amount of the initial limited partner's contribution, not to mention the fact that any contribution was in fact made or promised, would have constituted an essential element of the registration process. The approval process for an exempted limited partnership, according to the published procedures of the Bermuda Monetary Authority, seems to require disclosure of the partnership agreement and the amount of capital contributed.[14]. And section 5(3) of the 1883 Act, repealed on December 29, 2005, empowered the Minister to declare by order a "*minimum limited partners' capital*", a term which is still defined in section 2 of the Act. So when the LP was purportedly formed on March 10, 2005, the extent of a limited partner's capital contribution had even greater legal significance than it has today.

Legal principles governing rectification of a contract

35. Mr. Smith contended that, despite the fact that it appeared that the LP may not have been validly formed, it was still possible that the PA could be rectified. This issue must also be considered, not by way of decision, but by way of assessing the likelihood that the LP will ultimately be dissolved.

36. Although all the facts are not before this Court, it seems somewhat improbable that the Respondent will be able to succeed on a claim of rectification as the present case seems to fall outside the recognised parameters of such relief. Assuming that it may be possible to seek rectification based on a common mistake of pure law[15], there is no presently obvious basis for the assertion that the parties directed their mind to the Bermuda law position on capital contributions at all. According to Chitty[16]:

> "*It has long been an established rule of equity that where a contract has by reason of a mistake common to the contracting parties been drawn up so as to militate against the terms intended by both as revealed in their previous oral understanding, the court will rectify the contract so as to carry out their intentions…rectification… will …be refused if a written agreement fails to mention a matter*

[14]" http://www.bma.bm/Company_Matters/Partnerships."
[15] '*Chitty on Contracts*', 29th edition, Volume 1, paragraph 5-093.
[16] Ibid, paragraph 5-092.

because the parties simply overlooked it, having no intention on the point at all."

37. Nevertheless, rectification is an arguable potential defence to the Petitioner's dissolution claim.

Findings: application for a stay under Article 8 of the UNCITRAL Model Law

38. Article 8 of the UNCITRAL Model Law provides as follows:

> "**Article 8. Arbitration agreement and substantive claim before court**
>
> *(1)A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.*
> *(2)Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.*"

39. The Respondent's Counsel rightly pointed out that there is a strong public policy in favour of arbitration under the Model Law, incorporated into Bermuda law by the Bermuda International Conciliation and Arbitration Act 1993. This is relevant to the question of whether or not a particular dispute falls within or without the scope of an arbitration clause. The arbitration clause in the PA, which is governed by Bermuda law, is broadly drafted, and reads in salient part as follows:

> "*16.2 Dispute Resolution*
>
> *(a)The parties hereto shall attempt in good faith to resolve all disputes, controversies, or claims arising out of or in connection with the interpretation or application of the provisions of this Agreement or in connection with the determination of any matters which are subject to objective determination pursuant to this Agreement (each, a 'Dispute') by mutual agreement in accordance with this Section.*
>
> *(b)If any Dispute cannot be resolved by the parties pursuant to clause (a) above or otherwise, then such Dispute shall be resolved by arbitration pursuant to the Rules of Arbitration of the International Chamber of Commerce (excluding its conflict of laws principles). The arbitration shall be the sole and exclusive forum for resolution of such Dispute, and the award rendered shall be final and binding…*"

40. The Petitioner contends that because this Court alone can grant various heads of statutory relief claimed under the Petition, which relief would flow from a finding that the LP was never formed as a legally valid limited partnership, the question of the validity of the PA is beyond the scope of the arbitration clause. The Respondent contends that the arbitrators would clearly possess the competence to determine whether, as a matter of Bermuda law, (a) the partnership has been dissolved, (b) whether the register of limited partners should be rectified, the certificate of registration should be cancelled, and whether the LP should be dissolved and wound-up, on a renewed application to this Court, because no limited partnership was properly formed. No statutory provision on which the Petitioner relies excludes the possibility that any legal question, the determination of which a subsequent Court application may depend upon, must itself be determined by this Court.

41. The parties have agreed to refer to arbitration "*all disputes, controversies, or claims arising out of or in connection with the interpretation or application of the provisions of this Agreement or in connection with the determination of any matters which are subject to objective determination pursuant to this Agreement*". These words are extremely broad. In *LV Finance Group Limited and another-v- IPOC International Growth Fund Limited* [2006] Bda LR 69, I ruled as follows:

> "*193. The phrase "any dispute arising out of or in connection with" has been held to apply to a non-contractual claim for misuse of confidential information "touching" contractual confidentiality rights: Paczy-v-Haendler & Natermann G.M.B.H. [1979] F.S.R. 420*[17]*. The words "all disputes arising out of or in relation to" have been described as "perhaps even wider": Faghirzadeh-v- Rudolf Wolff (S.A.) (Pty) Ltd. [1977] 1 Lloyd Law Rep. 630 at 641. The arbitration clauses in the present case combine all three terms, "arising out of ", "relating to" and "in connection with" , and so are clearly intended to cover all disputes connected with the agreements. This view is supported by the following dictum from Lightman J in Asghar-v-Legal Services Commission [2004] EWHC 1803 (Ch) in the context of considering a more narrowly drafted clause:*
>
> > "*21. In my judgment, the expression "disputes concerning alleged breaches of the Contract" is very wide. No authority or text book has been cited to me which has considered the meaning of any such expression or the word "concerning" in this context. I am accordingly neither assisted nor trammelled by any such guidance. The use of the expression makes plain that the jurisdiction of the arbitrator is not confined to the consideration of the parties' causes of action for breach of the contract. It is only necessary to establish jurisdiction that the dispute concerns what is alleged to be a breach of contract, but not that the dispute is exclusively concerned with what are alleged to be breaches of contract. If the determination of a claim in tort by the Claimants requires determination whether one or other party has committed a breach as part of the Contract, the arbitrator has jurisdiction to determine the claim in tort. The arbitrator has jurisdiction to determine whether a party has not merely acted in breach of the Contract but committed a tort. By use of the expression "disputes concerning alleged breaches of the Contract the parties have made plain their intention that there shall be one-stop adjudication for all disputes in which the issue of breach of contract arises and that the occasion shall not arise for the determination of the issue of breach of contract which the parties have agreed in the arbitration clause shall be determined by arbitration being determined in some other way. In a word the provision for arbitration is not to be by-passed without the consent of the parties by raising that issue and having it determined as an issue in court proceedings however framed.*"

42. In the present case the Petitioner complains of breaches of contract in support of his claim for the LP to be wound –up on just and equitable grounds under section 35 of the Partnership Act 1902, and concedes that these issues are arbitrable. It is well settled that arbitrators can determine the validity of the contract containing the arbitration clause. And the Petitioner's remaining claims raise just such a question, albeit in substantial reliance on an alleged failure to comply with mandatory statutory provisions. The disputes between the parties, as opposed to the ultimate relief which the Petitioner may, if successful, ultimately seek, clearly fall within the scope of the arbitration clause.

[17] At page 3 of the Judgment transcript.

43. Under Article 8 of the Model Law, no question of refusing to stay the Court proceedings because there is no arguable dispute arises; nor is it open to the Court at this stage to speculate as to whether any award which may be obtained might not be enforceable, for instance, on public policy grounds. Accordingly, the Respondent's application for a stay is granted. Unless either party applies within 21 days to be heard as to costs, I would award the costs of the stay application to the Applicant/Respondent.

Findings: application for the appointment of interim joint receivers

44. For the legal reasons set out above, I find that it is strongly arguable that the LP will have to be dissolved and wound-up because it was not validly formed as a limited partnership. The more difficult question is whether the Petitioner has demonstrated a sufficiently cogent risk of misconduct on the Respondent's part, in the interim, to justify the expense of appointing interim receivers.

45. To my mind it is clear that no serious question arises about the need to appoint receivers to do anything more than to monitor the Respondent's management of the partnership business. Mr. Smith made the interesting response, to Ms. Bell's skilful marshalling of her client's case on misconduct, that any defaults could be remedied in damages. The Respondent is part of a corporate group with substantial assets, and no practical question of either insolvency or unlimited liability for the Petitioner to third party creditors arose. This submission is all well and good, but the Respondent was not willing to go so far as to offer to indemnify the Petitioner against potential third party claims which it contends are unlikely to arise.

46. The risk of unlimited liability which the Petitioner is, in my view, potentially exposed to brings into sharper focus the pivotal considerations upon which the receivership application turn. Should the Court treat this as a classic limited partnership relationship, or as a normal general partnership relationship? If it is a classical limited partnership scenario, then the Petitioner has no real right to complain about how the General Partner manages the LP at all, pending trial of the relevant disputes. Because all the case-law on misconduct which the Petitioner relied upon is based on the premise that both parties to the dispute have an equal right to both manage and bind the partnership. As a matter of law, a limited partner must refrain from taking part in the management of a Bermuda limited partnership, if he wishes to retain his unlimited liability: Limited Partnership Act 1883, section 8C(2).

47. But taking part in the management of the business does not include "*consulting or advising the general partner with respect to the business of the limited partnership*" or "*taking any actions, or making any decisions, in respect of any investment made by the limited partnership*" : section 8C(3) (b), (bb). In a limited partnership which is essentially engaged in making and/or managing investments, the Limited Partner's role is not as marginal as it might otherwise be. The principal statutory obligation owed by the Respondent as General Partner to the Petitioner as Limited Partner, assuming the LP to have been validly formed, is under section 9 of the 1883 Act, which provides as follows:

> "*The general partners shall be liable to account to each other, and to the limited partners, for their management of the concern, both at law and in equity, as other partners are now liable.*"

48. In these circumstances, the approach which appears to be required is as follows. The Court cannot dismiss out of hand the possibility that the LP will be held to have been a general partnership *ab initio*, and that the Respondent's management of the partnership between now and the determination may in fact have bound the Petitioner in the same manner as would occur in a an ordinary partnership. Indeed, this outcome seems probable. Nor can the Court dismiss out of hand the possibility, admittedly far less probable, that the LP will become

insolvent and that the Petitioner may be required to contribute to third party creditor claims, not to mention losing his present hopes of further cash payments. Nevertheless, it is still necessary to assess the cogency of the misconduct claims asserted, and assess their significance in the factual matrix of the present case. And it must not be forgotten that this is a case where the Petitioner has made no capital contribution and is only entitled to a return on 2% of the investment, based on his former status as a senior and seemingly vital management employee.

49. One of the main contractual disputes is whether the Respondent acted reasonably in making a limited distribution out of a seemingly large pool of available cash, which it then lent to itself in return for 5% accruable interest to invest for its own account. The Petitioner contends, in effect, that this was done to deliberately deny him access to funds, and that it is unreasonable for him to be required to take out a similar loan. The Petitioner further contends that he cannot trust the Respondent not to manipulate the accounts so as to reduce the amounts he ultimately receives.

50. Many of the apparent accounting discrepancies of which complaints were made are most likely entirely innocent. But it does seem to me to be plausible that the Respondent, unenthused by the Petitioner's "abrupt" resignation just after he negotiated the PA, may well be motivated to spin out the present dispute and adopt a hardball approach in any negotiations, taking full advantage of the vastly superior financial resources at its disposal. It is also far from clear that the Respondent appreciates, that even if the LP was validly effective as such, its accounting obligations to the Petitioner are not diluted by his status as Limited Partner. It is questionable whether the Petitioner will be afforded a fair opportunity to determine whether or not his fears of accounting manipulation are or are not justified.

51. The motivation of the Respondent to play "hardball" is supported by the following facts. Firstly, despite its proclaimed almost limitless resources, the Respondent has not simply "cut a deal" with its 2% partner and simply paid him off. Instead, it is insisting that the business be run-off in the ordinary course, and has requested arbitration, in accordance with its contractual rights, in far away Japan. Secondly, it seems highly plausible that bad blood exists between the parties. It is possible that the Respondent's principal, as alleged by the Petitioner in a strongly-worded email[18], did in fact say to the Petitioner before he resigned: "*I will f…ng fire you and you will never see a dime of your f…ng money*". Certainly, telling the current President of the Respondent that the company's stock had declined by 40% since he replaced the Petitioner is unlikely to have provoked a "warm and fuzzy" feeling toward the Petitioner.

52. There is also a lack of clarity as to what the scope of the General Partner's accounting obligations is. On July 25, 2006, the Respondent responded to an email from the Petitioner as follows:

> "*As a limited partner…you are entitled to inspect the books and records of the partnership, which of course we will abide at your request. But that does not extend to the detailed activities of lower-tier entities…*"[19]

53. Even if the Petitioner's suspicions about manipulation of the cash available for distribution are unfounded, the risk that a full accounting, commensurate with what a general partner would be entitled to receive, will not be given to the Plaintiff clearly exists. But while sufficient grounds for the potential appointment of a receiver have been made out, it remains to determine whether the Court should exercise its discretion to make the interim appointment the Plaintiff seeks.

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[18] March 8, 2007, in which the Petitioner made allegations of fraudulent conduct against officers of the Respondent.
[19] Exhibit "JEL-1", page 700.

54. The Respondent conceded that the Overriding Objective fell to be taken into account on an application to appoint a receiver over partnership assets, but contended that it was only relevant as regards saving costs, as illustrated by '*Lindley and Banks on Partnership*'18th edition (Sweet & Maxwell: London, 2002), paragraph 23-153. Certainly, appointing two receivers is a costly course to follow, even if the LP can bear the costs, and this course will inevitably reduce the funds available for distribution to both parties, impacting far more on the commercial interest of the 98% stake of the Respondent. But if the Overriding Objective may be taken into account, all of Order 1A is potentially relevant, subject to the applicable context. Saving expense is the goal set out in Order 1A/ 1(2)(b). The first element of dealing with cases justly under Order 1A/1(2)(a) is "*ensuring the parties are on an equal footing.*" And Order 1A/1(2)(c)(iv) requires the court to deal with cases in a way which is proportionate "*to the financial position of each party.*"

55. The requirement to ensure that the parties are on an equal footing is an incident of the Court's duty to ensure that each party's constitutional fair hearing rights are not infringed, and derives from the "equality of arms" principle developed under article 6 of the European Convention of Human Rights in the case-law of the European Court of Human Rights. Where, as here, the Respondent is admittedly part of a substantial corporate group with far greater financial resources than the Petitioner, this Court must be astute to ensure that the litigation is not conducted in a way which enables the Respondent to gain an unfair tactical advantage through its superior financial position. The Respondent can potentially gain an unfair tactical advantage which the appointment of a receiver might well help to prevent. The receiver would be entitled to obtain access to relevant financial documents saving the Petitioner from having to fund potentially expensive discovery requests. The appointment of a receiver, primarily at the Respondent's expense, would most likely dissuade the Respondent from spinning out the interim process by which the Petitioner is given an accounting of the partnership business, and raising the level of costs. The costs burden would clearly impact the Petitioner more adversely than the Respondent. However, it is the fairness of these proceedings and the related receivership issues, which this Court must take into account, not the arbitration proceedings' adjudication of the substantive disputes between the parties.

56. In summary, while the Petitioner has made out grounds which potentially justify the appointment of one or more receivers, I am not satisfied that the need to make such an order has made out at this stage with sufficient cogency as to justify the inevitable expense, having regard to the fact that the Petitioner will only bear some 2% of those costs. Nor am I satisfied, on the other hand, that it is appropriate to dismiss the Petitioner's application at this stage, having regard to the fact that, without the possibility of further intervention by this Court, there is a risk that the Petitioner's interests may be unfairly prejudiced, pending the determination of these proceedings. Although the case for appointing a receiver has been made out in forensic terms, this Court must seek to apply both legal and commercial logic.

57. I accordingly exercise my discretion in favour of adjourning the Petitioner's application to appoint receivers generally, with liberty to restore by letter to the Registrar. Unless either party applies to be heard as to costs within 21 days of the present Ruling, the costs of the receivership application are reserved. It is to be hoped that, having regard to the contents of the present Ruling, the Respondent will not deal with the Petitioner in such a manner going forward as would justify the Petitioner renewing its application to appoint receivers. If this optimism is shown to have been misplaced, the Petitioner can renew the present application, fortified by additional evidence. It has not been demonstrated that any irreparable harm would likely flow from the failure to appoint receivers as a matter of urgency.

Conclusion

58. The Petitioner's application to appoint receivers on an interim basis is adjourned generally with liberty to restore by letter to the Registrar. The Respondent's application to stay the present proceedings, pending the determination of the disputes between the parties in the arbitration proceedings it recently commenced, is granted. Unless either party applies within 21 days to be heard as to costs, the costs of the stay application are awarded to the Respondent, and the costs of the application to appoint receivers are reserved.

Dated this 28th day of June, 2007

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Kawaley J