

31-01-12

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

The Hon. Mr. Justice Andrew J. Jones QC  
In Chambers, 3<sup>rd</sup> February 2012



Cause No. FSD 82 of 2010 (AJJ)  
Cause No. FSD 269 of 2010 (AJJ)

IN THE MATTER OF THE COMPANIES LAW (2010 REVISION)

AND IN THE MATTER OF ICP STRATEGIC CREDIT INCOME FUND LTD (IN LIQUIDATION)

AND IN THE MATTER OF ICP STRATEGIC CREDIT INCOME MASTER FUND LTD (IN LIQUIDATION)

**Appearances:** Mr. Fraser Hughes of Conyers, Dill & Pearman appeared for the Joint Official Liquidators of the Funds

KPMG LLP of 150 John F Kennedy Parkway, Short Hills, New Jersey, USA did not appear and was not represented by counsel

RULING

1. This is an application by the Joint Official Liquidators ("the JOLs") of the ICP Strategic Credit Income Fund Ltd and the ICP Strategic Credit Income Master Fund Ltd, which I shall refer to collectively as "the Funds" and individually as the "Offshore Feeder Fund" and the "Master Fund" respectively. The JOLs' summonses seek orders against KPMG LLP pursuant to section 103(3) of the Companies Law that they be required to deliver up "all property or documents belonging to the [Funds]" which is in their possession, custody or control. The matter first came before the Court on 20<sup>th</sup> January when I declined to deal with it

because no summons or supporting affidavit had been served on KPMG LLP. I am satisfied that the summonses now before the Court were served on KPMG LLP at their offices in New Jersey on 30<sup>th</sup> January 2012.

2. The circumstances in which the Offshore Feeder Fund was put into compulsory liquidation are described in my Judgment dated 10<sup>th</sup> August 2010 and do not need to be repeated except to the extent that it is necessary to put this application in context. It formed part of a "master-feeder" structure established in September 2005 and promoted by ICP Asset Management LLC whose founder and chief executive officer is Mr Thomas Priore. It was the vehicle through which non-US persons and US tax-exempt persons invested into the Master Fund. US taxable persons invested into the Master Fund through a Delaware limited partnership called ICP Strategic Credit Income LP. Having taken control of the Offshore Feeder Fund, the JOLs were in a position to put the Master Fund into voluntary liquidation which was then brought under the supervision of the Court by an order made on 23<sup>rd</sup> December 2010. The three ICP Funds had common management. They also had common auditors, namely KPMG LLP which was retained pursuant to engagement letters dated 27<sup>th</sup> May 2008 and 28<sup>th</sup> May 2009. The only audited financial statements ever issued related to the Master Fund for the period from inception to 31<sup>st</sup> December 2007. The Offshore Feeder Fund's failure to produce any audited financial statements for the years ended 31<sup>st</sup> December 2008 and 2009 was one of the reasons why I made a compulsory winding up order. KPMG LLP ultimately resigned on 29<sup>th</sup> March 2010 without having issued any further audit opinions, although it appears that they did do further work during the period between the 19<sup>th</sup> December 2008, the date on which they issued the opinion on the 2007 financial statements, and their resignation some fifteen months later.

3. Mr Thomas Priore and the management companies controlled by him are the subject of proceedings commenced by the United States Securities and Exchange Commission. This Court has sanctioned the commencement of proceedings against them for breach of fiduciary duty and/or negligence. In these circumstances it is perhaps not surprising that Mr Priore and his companies have co-operated with the JOLs only to a limited extent. For this reason the JOLs have felt it necessary to turn to KPMG LLP as a potential source of reliable information about the affairs of the Funds. In the circumstances of this case it is reasonable to believe that their audit files contain information which would be of use to the JOLs in the performance of their duties. KPMG LLP have not appeared or otherwise responded to the summonses, which is hardly surprising since they were served only four days ago. However, I am asked to infer from correspondence passing between them and the JOLs that KPMG LLP will be content to comply with whatever order this Court sees fit to make.
  
4. The contractual relationship between the Funds and KPMG LLP was terminated by KPMG LLP's resignation 29<sup>th</sup> March 2010. Whether and, if so to what extent, the Funds have a continuing contractual right to require that KPMG LLP provide them with copies of documents created or received by them during the course of conducting the audit work is not an issue which arises in this case. Instead of asserting the Funds' contractual rights, the JOLs rely upon their own personal statutory right to apply to the Court for an order under section 103 of the Companies Law. This provision empowers the Court to make two kinds of orders against those who have been involved in the promotion or management of a company in respect of which a compulsory winding up order has been made. It can make an order for examination, which can take the form of an order

to swear an affidavit in answer to written interrogatories or an order to submit to an oral examination conducted by or on behalf of the company's official liquidators. The Court may also make orders requiring that documents belonging to a company in liquidation, which are in the possession, custody or control of relevant persons, be delivered up to the official liquidators. The expression "document" includes any device by which information is stored or recorded electronically. In this case the JOLs are seeking an order for the production of documents and there is no application for an order for examination.

5. In order to make the order sought by the JOLs, I have to be satisfied that KPMG LLP is a "relevant person" within the meaning of section 103(1) and that they have in their possession documents which can fairly be said to "belong" to one or other of the Funds. In my judgment the application fails on the first count, with the result that it must be dismissed and I do not need to go on and determine to what extent the content of KPMG LLP's audit files can be said to "belong" to their former clients within the meaning of section 103.

6. Section 103(1) provides as follows –

"This section applies to any person who, whether resident in the Islands or elsewhere –

(a) has made or concurred with the statement of affairs;

(b) is or has been a director or officer of the company;

(c) is or was a professional service provider to the company;

(d) has acted as a controller, advisor or liquidator of the company or receiver or manager of its property;

(e) not being a person falling within paragraphs (a) to (c), is or has been concerned or has taken part in the promotion or management of the company, and such person is referred to in this section as the 'relevant person' ".

7. The JOLs put their case on the basis that KPMG LLP, as the Funds' auditor, was a "professional service provider" within the meaning of sub-section (1)(c). In its ordinary business usage, this expression has a very wide meaning which probably does include auditors. However, the statutory power to compel persons to co-operate with official liquidators for the ultimate benefit of a failed company's creditors and/or shareholders is intended to apply only to those who were involved in its promotion and/or management. Section 103(1) defines "relevant persons" by reference to their role in the company's affairs, not by reference to the fact that they may be expected to possess information which would be of use to an official liquidator. The Court is not empowered to make such orders against outsiders whose only relationship with the company is that they have done business with it or contracted to provide it with goods or services. For this reason the expression "professional service provider" is narrowly defined by section 89 to mean "a person who contracts to provide general managerial or administrative services on an annual or continuing basis". In the case of these Funds, it is perfectly clear that their former investment manager and former administrators fall within this definition. However, in my judgment it is equally clear that the former auditors fall outside the definition because they were not engaged to provide "general managerial or administrative services". They were engaged to express an audit opinion upon the Funds' financial statements. If KPMG LLP or any of its partners had in fact provided any form of managerial or administrative services to the Funds, the firm would have been disqualified from acting as their auditor because it would not have

met the applicable independence requirement. It follows that KPMG LLP were not "professional service providers" to these Funds within the meaning of section 103(1).

8. As an afterthought, counsel suggested that the Court might have jurisdiction on the basis that KPMG LLP could be characterised as an "advisor" within the meaning of sub-section (1)(d). This sub-section relates to persons who are appointed to act in connection with a company or its property by a third party without the consent of the company itself. The expressions "controller" and "advisor" mean persons appointed by the Monetary Authority under one or other of the regulatory laws. In the context of this case an "advisor" means a person appointed under section 30(3)(d) of the Mutual Funds Law to advise the Funds on the proper conduct of their affairs. By definition, an auditor appointed by the Funds cannot be an "advisor" within the meaning of section 103(1)(d).
  
9. It follows that the Court has no jurisdiction to make the orders sought by the JOLs and their summonses must be dismissed. I should add that, if I had come to a different conclusion on the jurisdictional issue, I would have adjourned the hearing on the ground that KPMG LLP had been given insufficient notice.

Dated the 3<sup>rd</sup> February 2012

  
The Honourable Mr Justice Andrew J. Jones QC  
JUDGE OF THE GRAND COURT

