

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2 FINANCIAL SERVICES DIVISION

3 CAUSE NO. FSD 42 OF 2015 (NAS)

4 IN OPEN COURT

5 BEFORE THE HON JUSTICE NICK SEGAL

6 ON THE 17TH MARCH 2015

7

8 IN THE MATTER OF SECTION 36(3) OF THE EXEMPTED LIMITED
9 PARTNERSHIP LAW 2104

10 AND

11 IN THE MATTER OF ASIA STRATEGIC CAPITAL FUND, L.P.

12

13 APPEARANCE: Mr. Robert Levy QC instructed by Walkers for ORIX Corporation and
14 New York Life Insurance Company

15 Mr. Marc Kish of Harney Westwood & Riegels for Mr. Ferrigno, Mr.
16 Bye and Mr. Nacson

17
18 REASONS

19 **Introduction**

20 1. These are my reasons for making the order which I made on 17 March appointing
21 provisional liquidators in respect of Asia Strategic Capital Fund, L.P. (the
22 *Partnership*).

23 2. At the hearing I gave brief reasons for my decision but stated that they were only in
24 summary form and would be subject to further elaboration and explanation if needed.
25 The Petitioners have subsequently requested that I provide written reasons which I
26 now do.

27 3. The Partnership is an exempted limited partnership registered in the Cayman Islands.
28 A winding-up petition was presented, and an application for the appointment of
29 provisional liquidators was made, by two (of the four) limited partners of the
30 Partnership. The Petitioners are ORIX Corporation (*Orix*) and New York Life
31 Insurance Company (*NYLC*).

1 4. The general partner of the Partnership is Asia Strategic Capital Fund GP, Ltd (the
2 **General Partner**). The General Partner is an exempted limited company
3 registered in the Cayman Islands. The shares in the General Partner appear to be
4 divided into two classes, class A shares and class B shares (I say appear to be divided
5 because there is an issue arising from the failure to incorporate the class rights, which
6 are included in a shareholders' agreement, into the General Partner's articles of
7 association). The class A shares, as I explain further below, are held by a company
8 controlled by Mr. Joseph William Ferrigno III (**Mr. Ferrigno**) while the class B
9 shares are held by the Petitioners asnd an entity affiliated with Orix.

10 5. The Petition and the application for the appointment of provisional liquidators has
11 resulted from disputes between Mr. Ferrigno and the limited partners. These disputes
12 have given rise to allegations of mismanagement and breach of contract and duty.
13 They have also involved steps being taken to remove directors from and appoint
14 directors to the board of the General Partner, the validity and effect of which steps
15 have been and continue to be challenged.

16 6. The Petitioners seek a winding up order on the basis that the alleged mismanagement
17 and breaches of contract and duty by Mr. Ferrigno and the companies he controls have
18 resulted in the Petitioners justifiably losing trust and confidence in the management of
19 the Partnership and Mr. Ferrigno and his companies. They seek the appointment of
20 provisional liquidators on the basis that urgent action needs to be taken, in order to
21 protect the interests of the Partnership, to ensure that control and management of the
22 Partnership's assets are assumed by an independent party who can take the necessary
23 action to protect and preserve them and who can restore certainty and stability to the
24 management of the Partnership pending the hearing of the Petition.

25 **Opposition to the application**

26 7. The winding-up petition and the summons seeking the appointment of the provisional
27 liquidators were both issued and served on the General Partner on 10 March.

28 8. At the hearing on 17 March, the Petitioners were represented by Mr. Robert Levy QC.
29 Mr Kish of Harneys also appeared at the hearing and made an application for an
30 adjournment of the hearing of, and opposed, the application to appoint provisional



1 liquidators. Shortly prior to the hearing an affidavit of Mr. Ferrigno had been sworn
2 and a copy was provided to the Court at the commencement of the hearing.

3 9. There was some uncertainty and a dispute as to who Mr Kish was authorised to
4 represent. Mr. Kish informed the Court that he had been instructed by Mr. Ferrigno
5 and two others, namely Mr. Bye and Mr. Nacson (Mr. Ferrigno, Mr. Bye and Mr.
6 Nacson being the *Purported Class A Directors*).

7 10. Mr. Ferrigno in his affidavit stated that he remained a director and believed that he
8 was duly authorised to give evidence on behalf of the General Partner but
9 acknowledged that “there is a current dispute as to the validity of [his] appointment as
10 director.” Mr. Kish explained that it was the Purported Class A Directors’ position
11 that they had been validly appointed as directors of the General Partner and
12 constituted the majority of the General Partner’s board (since there were only two
13 other directors still in office, namely Mr. Briscoe and Mr. Wong who are together
14 referred to as the *Class B Directors*). Mr. Kish referred to and relied on a certified
15 copy (dated 13 January 2015) of the General Partner’s register of directors which
16 listed the Purported Class A Directors and the Class B Directors as being the
17 remaining directors of the General Partner. Mr. Kish argued that the Class A Directors
18 were therefore able to act on behalf of the General Partner (although it was not clear
19 whether there had been any meeting of the General Partner’s board at which the
20 directors had purported to pass resolutions and act as a board).

21 11. Mr. Levy on behalf of the Petitioners argued that none of the Class A Directors had
22 been properly appointed and that they were not directors of the General Partner. They
23 were therefore not entitled to represent the General Partner. In any event, there was a
24 continuing dispute as to whether the Purported Class A Directors had been properly
25 appointed as was evidenced by the fact that separate proceedings had recently been
26 issued in this Court by the Partnership against the General Partner seeking, in
27 substance, a declaration that the Purported Class A Directors had been properly
28 appointed (although these proceedings had not yet been served).

29 12. In these circumstances it was clear that Mr. Ferrigno could not establish that he and
30 the other Purported Class A Directors were authorised, and Mr. Kish could not
31 establish that he had authority, to represent the General Partner. Nonetheless, the



1 Purported Class A Directors could at least, in their personal capacities, as interested
2 parties asserting that they were and remained directors of the General Partner, make
3 submissions in relation to the application for the appointment of the provisional
4 liquidators. For these purposes they would be treated and could be referred to referred
5 to as the purported Class A Directors. The Petitioners did not object to Mr. Kish
6 making submissions on this basis provided that it was clear that the Petitioners'
7 challenge to the validity of the appointment and authority of the Purported Class A
8 Directors was unaffected.

9 13. The winding-up petition and the summons seeking the appointment of the provisional
10 liquidators were both issued and served on the General Partner on 10 March. The
11 General Partner had therefore been given the four clear days notice required by CWR
12 Order 4, rule 1(2) and Mr. Kish confirmed that he did not wish to take any points
13 regarding the effectiveness or timeliness of service.

14 14. What he did submit (and Mr. Ferrigno averred in his affidavit) was that first, in view
15 of the substantial volume of the evidence filed in support of the Petition (the exhibits
16 run to over 1,960 pages) the Purported Class A Directors had not had sufficient time
17 to enable them to be in a position properly to oppose and to file full evidence for the
18 purpose of opposing the application to appoint provisional liquidators; secondly that
19 the evidence did not demonstrate that there was an urgent need to appoint provisional
20 liquidators and thirdly that in the absence of access to the funds of the General Partner
21 to fund the opposition, the General Partner and the Purported Class A Directors were
22 not in a position to engage substantively with the hearing of the application (this was a
23 point that Mr. Kish had made in correspondence with Walkers, the attorneys acting
24 for the Petitioners).

25 15. After hearing detailed submissions from Mr. Kish and Mr. Levy and carefully
26 considering the application I declined to order an adjournment of the hearing. The
27 evidence did, in my view, establish that the application to appoint provisional
28 liquidators did need to be dealt with urgently. The dispute between the Petitioners and
29 Mr. Ferrigno had resulted in uncertainty as to whether anyone was properly able to act
30 on behalf of and protect the assets and interests of the Partnership and therefore it was
31 likely that the Partnership's assets and interests could be at risk, and that action would
32 need to be taken to preserve and protect these assets and interests, during the period of



1 any adjournment. Furthermore, while Mr. Ferrigno (and Mr. Kish) had only been
2 given a short period in which to prepare for the hearing, they had been able to file
3 some evidence and were able to participate in the hearing. I was also of the view that
4 it would not be appropriate, in a case in which the real dispute was between the partners
5 in the Partnership (in substance the dispute was between the Limited Partners on the
6 one hand and Mr. Ferrigno and the companies he controlled on the other - including
7 AMCP which is the majority shareholder in the General Partner), to allow the assets
8 and funds of the Partnership to be used to fund the costs of one of the parties to the
9 dispute (although in the absence of the citation of any authority on this issue I
10 declined to give a definitive ruling on this point).

11 **Background**

12 16. The Partnership was registered in the Cayman Islands on 9 January 2008 as an
13 exempted limited partnership pursuant to the Exempted Limited Partnership Law
14 2014.

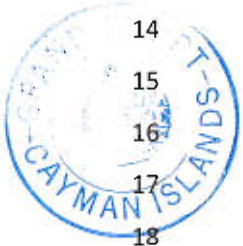
15 17. The General Partner is the general partner of the Partnership. There are, as noted
16 above, four limited partners (the *Limited Partners*). These are Orix, NYLC,
17 Massachusetts Mutual Life Insurance Company (*Mass Mutual*) and Nippon Life
18 Insurance Company (*Nippon Life*). Orix and NYLC together hold approximately 63.2
19 per cent of the limited partnership interests and Mass Mutual and Nippon Life
20 hold 10.5 per cent and 26.3 per cent respectively. The Petitioners, Mass Mutual,
21 Nippon Life and the General Partner are parties to an Amended and Restated Limited
22 Partnership Agreement dated 24 April 2008 (the *LPA*).

23 18. The Petitioners and ORIX Asia Limited are also minority shareholders in the General
24 Partner. NYLC holds 20 per cent, Orix holds 15 per cent and ORIX Asia Limited
25 holds 5 per cent of the voting share capital of the General Partner. The remaining 60
26 per cent of the voting share capital is held by Asia Mezzanine Capital Partners, L.P.
27 (*AMCP*), a Cayman Islands limited partnership. AMCP is in turn owned and
28 controlled by Mr. Ferrigno and Asia Mezzanine Capital Group. On 12 September
29 2007, prior to the registration of the Partnership and the entry into of the LPA, the
30 General Partner, NYLC, ORIX Asia Limited and AMCP had entered into an amended
31 and restated shareholders agreement (the *SHA*) to govern the relationship between the

1 shareholders in the General Partner. By a Deed of Amendment and Accession
2 executed in August 2008, Orix agreed to observe, perform and be bound by the terms
3 of the SHA.

4 19. Pursuant to the SHA (a) AMCP (as the only Class A shareholder) has the right to
5 appoint up to five directors and (b) the Petitioners and ORIX Asia Limited (as the
6 Class B shareholders) have the right to appoint up to two directors to the board of the
7 General Partner. The articles of association for the General Partner however do not
8 provide for these appointment rights (but instead provide for a board of not less than
9 one person) and there is a dispute between the Limited Partners and Mr. Ferrigno as to
10 which provisions have supremacy.

11 20. On 24 April 2008 the General Partner, the Partnership and Asia Mezzanine Capital
12 Corporation, a Cayman Islands limited liability company, (*AMCC*) entered into a
13 management agreement (the *MA*) pursuant to which the General Partner engaged
14 AMCC and delegated to it the powers of the General Partner under and to the extent
15 permitted by the LPA and engaged AMCC to assist the General Partner in the
16 performance of its duties. The investment adviser to the Partnership was Asia
17 Mezzanine Capital Advisers Ltd (*AMCA*), a company incorporated in Hong Kong.
18 Both AMCC and AMCA are controlled by Mr. Ferrigno.



19 **The winding-up petition and the evidence in support**

20 21. The Petitioners seek a winding-up order in respect of the Partnership on the ground
21 that it is just and equitable that the Partnership be wound up.

22 22. They rely on section 92(e) of the Companies Law (2013 Revision) and section 36(3)
23 of the Exempted Limited Partnership Law 2014. Pursuant to section 36(3) the
24 provisions of Part V of the Companies Law and the Companies Winding Up Rules
25 2008 are applied to the winding up of an exempted limited partnership (except to the
26 extent that such provisions are not consistent with, and subject to any express
27 provisions of, the Exempted Limited Partnership Law). Pursuant to section 36(3)(b) of
28 the Exempted Limited Partnership Law the limited partners of an exempted limited
29 partnership are to be treated as if they were shareholders of a company and references
30 to contributories in Part V are to be construed accordingly. Pursuant to section
31 36(3)(c) of the Exempted Limited Partnership Law references in Part V to a director

1 or officer of a company are to include the general partner of an exempted limited
2 partnership. Therefore the Petitioners are to be treated as contributories and the
3 Petition is to be treated as a contributories petition for the purpose of Part V.

4 23. The principal ground on which the Petitioners rely is that they have justifiably lost
5 trust and confidence in the management of the Partnership by Mr. Ferrigno, who they
6 allege has, or has the ability to obtain, management and control of the General Partner
7 (and therefore the Partnership).

8 24. The basis for this loss of trust and confidence is the alleged mismanagement and
9 breach of contract and duty by Mr. Ferrigno and the companies he controls occurring
10 in connection with the Partnership's assets and affairs. The Petitioners assert that Mr.
11 Ferrigno was in control of the Partnership and its assets until August 2013 by reason
12 of being a director and having control of the General Partner, the manager of the
13 Partnership's affairs (namely AMCC) and certain wholly owned subsidiaries of the
14 Partnership which hold assets of the Partnership in the form of loans made to certain
15 borrowers. They assert that during that period Mr. Ferrigno and the companies he
16 controlled acted in breach of contract and duty and in a manner prejudicial to the
17 interests of the Partnership. As a result of this behaviour steps were taken in April
18 2014 to remove Mr. Ferrigno from the board of the General Partner and from
19 positions of influence in the Partnership and to put the management of the
20 Partnership's assets and affairs in the hand of independent directors. However, Mr.
21 Ferrigno has disputed the validity and effectiveness of the steps taken to remove him
22 and since October last year has sought to re-establish control over the management of
23 the Partnership's assets and affairs. He has taken steps through AMCP to remove the
24 Class A directors who had voted for his removal from office, to appoint three new
25 Class A directors, including himself (so that such directors would represent the
26 majority of directors on the General Partner's board), and through AMCC and
27 personally to involve himself in the activities of the wholly owned subsidiaries of the
28 Partnership and the management and recovery of their investments and the loans
29 owed to them. The Petitioners say that the positions of the Petitioners and Mr.
30 Ferrigno are wholly incompatible and, as a result of these irreconcilable differences
31 and Mr. Ferrigno's conduct, there has been a complete breakdown in trust and
32 confidence between the Limited Partners and Mr. Ferrigno - so that the management



1 of the assets and affairs of the Partnership is not being properly conducted and those
2 assets are in real and imminent danger if Mr. Ferrigno is permitted to continue with
3 this current course of conduct and assert control over the Partnership.

4 25. The Petition also refers to other grounds (such as loss of substratum). However in
5 their outline submissions and at the hearing the Petitioners relied primarily on their
6 loss of trust and confidence resulting from their complaints and concerns regarding
7 the conduct of Mr. Ferrigno and his companies and did not seek to develop a case
8 based on loss of substratum.

9 26. The Petitioners' petition is supported by the affidavits of Mr. Stephen Briscoe and Mr.
10 Jonathan Hatch.

11 27. Mr. Briscoe is a director of the General Partner. He is one of the Class B Directors
12 and was initially appointed by the Petitioners and ORIX Asia Limited. He has been a
13 director of the General Partner since August 2013 and the validity of his appointment,
14 although originally subject to challenge, is not disputed (and had been confirmed by
15 unanimous resolution of the shareholders of the General Partner dated 19 August
16 2013).

17 28. Mr. Hatch was also appointed as a director of the General Partner in August 2013.
18 However, he was nominated by AMCP (with the approval of Mr. Ferrigno) and also
19 appointed by the unanimous resolution of the shareholders of the General Partner
20 dated 19 August 2013. He has subsequently and recently resigned as a director (on 25
21 February 2015) although he continues to have a role in managing the investments of
22 the Partnerships and sits on the boards of companies to whom loans have been made
23 from Partnership funds.

24 29. The Petitioners, in reliance on the evidence of Mr. Briscoe and Mr. Hatch, make a
25 number of serious allegations regarding the manner in which the business and affairs
26 of the Partnership have been managed and the conduct of Mr. Ferrigno and his
27 companies. In outline, Mr. Briscoe and Mr. Hatch aver that:

28 (a) in the period prior to August 2013:

29 (i) the management of the Partnership's affairs had been under the control
30 of Mr. Ferrigno. There had never been more than two directors of the



1 General Partner (Mr. Ferrigno and Mr. Temple) both of whom had
2 been appointed by AMCP.

3 (ii). Mr. Ferrigno and his companies misappropriated or misapplied funds
4 of the Partnership in a manner which benefitted his interests and
5 prejudiced the interests of the Partnership (and the Limited Partners).

6 (iii). Mr. Ferrigno and his companies failed to manage the Partnership in
7 accordance with the corporate governance mechanisms built into the
8 Partnership's governing documents, which prevented the Limited
9 Partners from having proper oversight of Mr. Ferrigno's activities.

10 (iv). Mr. Ferrigno and his companies acted in a manner prejudicial to the
11 Partnership in his dealings with respect to various assets owned by and
12 debts owed to the Partnership or wholly owned subsidiaries of the
13 Partnership. In particular the allegations relate to action taken in
14 relation first to a debt of US\$ 25,000,000 owed by Yingliu
15 International Holdings Limited (*Yingliu*) to a wholly owned subsidiary
16 of the Partnership, ASCF (Cayman Islands) I Limited (*ASCF I*) and
17 secondly to a debt of US\$30,000,000 owed by CAAM Limited
18 (*CAAM*) to another wholly owned subsidiary of the Partnership, ASCF
19 (Cayman Islands) II Limited (*ASCF II*). The loan made to and debt
20 owed by Yingliu is referred to as the *Yingliu Investment* while the loan
21 made to and debt owed by CAAM is referred to as the *Project King*
22 *Investment*. Allegations are also made in relation to another investment
23 of the Partnership, namely the convertible debentures issued by SFO
24 Technologies Pvt. Ltd (*SFO*) which are held by another wholly owned
25 subsidiary of the Partnership, ASCF L.P. (Mauritius) Company
26 Limited (*ASCF Mauritius*). This investment is referred to as the
27 *Project Pantheon Investment*.

28 (b). in August 2013 as a result of their concern regarding Mr. Ferrigno's conduct
29 the Petitioners, in the exercise of their rights under the SHA, sought to appoint
30 two new directors to the board of the General Partner (Mr. Briscoe and Mr.
31 Wong Teck Meng). AMCP and Mr. Ferrigno contested the validity of this

1 appointment and they argued that (since the terms of the SHA had not been
2 incorporated into the General Partner's articles) all the shareholders of the
3 General Partner (including AMCP) needed to consent to such appointments.
4 Nonetheless in response to the appointment of Mr. Briscoe and Mr. Wong,
5 AMCP sought to exercise its rights under the SHA to appoint further directors
6 to the board of the General Partner and sought to appoint four professional
7 directors (being Cosimo Borrelli, Jason Kardachi and Jacqueline Walsh of
8 Borrelli Walsh and Mr. Hatch). After the initial disagreement, all these
9 appointments were confirmed by a unanimous written resolution of the
10 General Partner's shareholders.

11 (c). in the period between August 2013 and April 2014, the newly appointed
12 directors investigated the concerns raised by the Petitioners and the other
13 Limited Partners, and sought to protect the investments made by the
14 Partnership. During this period, Mr Ferrigno did not cooperate with the board
15 and failed to provide information and documents that had been requested by
16 the newly appointed directors, and which he had promised to provide. Mr
17 Ferrigno further sought to act unilaterally with respect to the Partnership's
18 investments without consulting the board and made payments out of the
19 Partnership's funds without the board's consent, and contrary to an
20 undertaking that he had given to the board on 18 August 2013.

21 (d). on 4 April 2014 as a result of these investigations and Mr. Ferrigno's conduct,
22 the board of the General Partner resolved at a board meeting to remove Mr.
23 Ferrigno as a director of the General Partner (and ASCF II).

24 (e). in the period after October 2014, Mr Ferrigno has contested his removal from
25 office and sought to take control of the General Partner by convening board
26 meetings to pass resolutions, the purpose of which has been to restore Mr
27 Ferrigno to positions of influence with respect to the Partnership, and to
28 unwind actions previously taken by the board of the General Partner during the
29 prior period.

30 30. Mr. Briscoe identifies the various positions held by Mr. Ferrigno in relation to, and as
31 a result of which he was able to control, the affairs of the Partnership. These were:



- 1 (a). being the beneficial owner (presumably of the shares) and sole director of
2 AMCC (the manager appointed by the General Partner to undertake certain
3 management functions relating and to assist the General Partner in relation to
4 the management of the Partnership's affairs).
- 5 (b). being the beneficial owner (presumably of the shares) and a director of AMCA
6 (the investment adviser to the Partnership).
- 7 (c). being the beneficial owner (presumably of the shares) and a director of AMCP
8 (the limited partner that owns 60 per cent of the voting share capital of the
9 General Partner).
- 10 (d). being a director of ASCF I.
- 11 (e). being a director of ASCF II and
- 12 (f). being a director of ASCF Mauritius.

13 31. The evidence in support of the Petition sets out the alleged misconduct and
14 mismanagement in considerable detail. The further detail can be summarised as
15 follows:

- 16 (a). In the period prior to August 2013:
- 17 (i). part of the alleged misconduct relates to action taken by AMCC whilst
18 acting as the facility agent under the facility agreements pursuant to
19 which loans were made to Yingliu and CAAM. It is alleged that sums
20 were paid by Yingliu and CAAM to AMCC for the account and benefit
21 of, but that AMCC failed to account for these sums to, ASCF I and
22 ASCF II respectively. This, it is said, constituted a breach by AMCC of
23 its obligations to account without deduction for these payments. It is
24 further alleged that AMCC used the funds it had received for its own
25 and unauthorised purposes.
- 26 (ii). as regards the Yingliu Investment, Mr. Briscoe avers that part of the
27 funds paid to AMCC in respect of the Yingliu Investment were
28 improperly retained by AMCC and used to meet expenses of AMCC
29 (including purported remuneration of US\$2,428,429 paid to Mr.



1 Ferrigno). The sum so retained is US\$5,489,575 (the *Yingliu*
2 *Receivable*). AMCC has acknowledged that the Yingliu is due and
3 payable but it appears that AMCC is unable to pay that amount.

4 (iii). as regards the Project King Investment, it is alleged that a closing fee
5 of US\$1,500,000 was paid by CAAM to AMCC under the facility
6 agreement governing the Project King Investment but AMCC failed to
7 account to ASCF II for the sums received by it as it was required to do
8 under the terms of the facility agreement. Instead AMCC used the
9 funds received to pay various expenses and liabilities which it is
10 alleged AMCC was not authorised to do. It appears from the evidence
11 that AMCC did in January 2015 account for, and make a payment for
12 the account of ASCF II in respect of, part of the closing fee but it is
13 alleged that further sums have yet to be accounted for.

14 (b). In the period between August 2013 and April 2014:

15 (i). the newly appointed directors reviewed the Limited Partners' concerns
16 (which had been summarised in briefing note prepared by Walkers, the
17 attorneys advising the Petitioners) and conducted an investigation into
18 the affairs and governance of the Partnership (which included meetings
19 with and hearing representations from Mr. Ferrigno).

20 (ii). in addition, following their appointment the directors sought to stabilise
21 the Partnership and to establish appropriate safeguards and controls
22 over the cash and proper corporate governance of the Partnership,
23 including preparation of regular budgets and a cash flow forecast.

24 (iii). one of the safeguards which was put in place was a written deed of
25 undertaking from Mr Ferrigno and AMCC dated 18 August 2013. This
26 was an undertaking not to deal in, transfer or otherwise dissipate any
27 assets of the General Partner or the Partnership, and not to cause or
28 allow any other third party to do so, unless such dealings, transfers or
29 payments were approved by the board (the *Undertaking*).



- 1 (iv). but Mr. Ferrigno did not co-operate with the investigation and failed to
2 provide the information and copies of books and records as
3 requested.
- 4 (v). furthermore, it transpired that the safeguards did not prevent Mr.
5 Ferrigno from acting unilaterally with respect to the Partnership's
6 investments or funds and he and AMCC were subsequently found to
7 have breached the Undertaking on two separate occasions.
- 8 (vi). as a result of the problems in securing Mr. Ferrigno's co-operation and
9 his lack of transparency the directors decided in November 2013 that
10 Mr. Hatch would need to take on the role of meeting and working with
11 Yingliu, CAAM, the Moraitis group and other relevant parties so that
12 he could produce revised budgets, review valuations and establish and
13 verify key information relating to the Partnership's investments.
- 14 (vii). however, throughout November 2013 and December 2013 Mr.
15 Ferrigno continually delayed making himself available for meetings
16 and had unauthorised and separate discussions with the entity that
17 controls CAAM (Chevalier International Holdings Limited -
18 ***Chevalier***) regarding the debt owed by CAAM to ASCF II. Mr. Hatch
19 alleges that Mr Ferrigno had, during discussions with CAAM, stated
20 that AMCF II would exercise its right to accelerate the CAAM loan
21 facility underlying the Project King Investment if satisfactory terms
22 were not agreed but despite repeated questioning by Mr. Briscoe in
23 board meetings, including a meeting on 16 December 2014, and Mr.
24 Hatch's own private questioning of him, Mr. Ferrigno had never
25 disclosed the discussions he was having with CAAM or sought board
26 approval before issuing such a threat.
- 27 (viii). furthermore, at a series of meetings that Mr. Hatch attended with the
28 Partnership's auditors, PricewaterhouseCoopers (***PwC***), and Mr
29 Ferrigno, on 29 November 2013, 2 December 2013, 12 December 2013
30 and 16 January 2014, PwC expressed a high level of dissatisfaction
31 with the valuations that Mr. Ferrigno had provided in respect of the



1 Partnership's investments and the lack of progress that he had been
2 made in respect of items that they had requested him to deliver. Mr
3 Ferrigno's failure to provide such documents and information caused
4 delays in finalising the audit of the financial statements of the General
5 Partner and the Partnership. Despite Mr Ferrigno's statement to the
6 General Partner's board that he would provide the audit report by 18
7 October 2013, it was only eventually issued on 23 July 2014 (although
8 it was dated 6 March 2014).

9 (ix). at these meetings, Mr. Hatch was informed by the partner in charge at
10 PwC that in 2012 PwC had by letter warned Mr Ferrigno about a
11 significant and dangerous lack of proper controls and corporate
12 governance at the General Partner and the Partnership. Mr. Hatch
13 asserts that at no point did Mr Ferrigno inform the board of the General
14 Partner or him of the existence of such a letter, nor has he ever
15 provided a copy of this letter. PwC also told Mr. Hatch that they had
16 serious misgivings regarding Mr Ferrigno and that they had retired as
17 the auditor from his other companies the previous year. Mr. Hatch says
18 that he had to persuade PwC not to resign as auditors of the
19 Partnership.



20 (x). there were particular problems that developed in relation to the Project
21 King Investment (and the debt owed by CAAM). It appears that the
22 purpose of the Project King Investment was to fund, in part, the
23 acquisition of four companies forming the Moraitis Group. So the sums
24 advanced to CAAM in respect of the Project King Investment were
25 used to fund the acquisition. Thereafter, although financial support for
26 CAAM was available from the entity that controls CAAM (Chevalier
27 International Holdings Limited, as noted above) CAAM was
28 dependent, at least in part, on funds being received from the Moraitis
29 Group in order to enable CAAM to make interest and other repayments
30 to ASCF II.

31 (xi). following the advance of the loan to CAAM and the acquisition by
32 CAAM of the Moraitis Group, the Moraitis Group suffered financial

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problems due to the adverse business conditions in its underlying business and as a result was in breach of certain covenants in its loan agreement with its senior lenders. It therefore became necessary for the Moraitis Group to enter into negotiations with its senior lenders to establish a basis for remedying the covenant breach and to restructure its debt. Such a restructuring was also likely to impact CAAM and CAAM's ability to repay the Project King Investment and the restructuring negotiations were likely to give rise to demands from CAAM's senior lenders for revisions to and a restructuring of CAAM's liability to ASCF II. Mr. Hatch's evidence is that Mr. Ferrigno, who had also been appointed a director of both CAAM and companies in the Moraitis Group (no doubt, I would interpose, at least in part in order to enable him to oversee and protect the Partnership's interest in the Project King Investment), became involved in the restructuring negotiations with CAAM, Chevalier and the senior lenders to the Moraitis Group and had been, prior to the efforts to remove Mr. Ferrigno as a director of the General Partner in April 2014, negotiating a substantial restructuring of the Project King Investment without the knowledge or approval of the board of the General Partner and contrary to the wishes and instructions of other directors. The proposed restructuring would have involved a substantial capital injection by Chevalier provided that ASCF II and the General Partner agreed to certain amendments to and concessions in respect of the terms of the Project King Investment including the subordination of the Project King Investment to this new capital injection. Mr. Hatch says that Mr. Ferrigno failed to inform him and the General Partner's board of a payment default by the Moraitis Group (which occurred in November 2013) until March 2014 and repeatedly held himself out to CAAM, Chevalier and others as having the authority of the board of the General Partner to agree to a restructuring despite having been repeatedly told that he had no such authority and must not represent himself as being authorised to reach an agreement on behalf of ASCF II and the General Partner. Mr. Hatch considered that the proposed restructuring of the



1 Project King Investment would have potentially prejudiced the
2 recoverability of the principal sum owing in respect of the Project King
3 Investment and damaging to the interests of the Partnership. The
4 restructuring proposed by Mr. Ferrigno ultimately did not proceed
5 since (as is noted below) Mr. Hatch and Mr. Borrelli were able to
6 prevent it being implemented and an alternative, more attractive,
7 restructuring was agreed.

8 (c). During the period from April to October 2014:

9 (i). on 3 and 4 April 2014 (and in advance of a board meeting convened for
10 4 April) the independent Class A directors (Cosimo Borrelli, Jason
11 Kardachi and Jacqueline Walsh and Mr. Hatch) met with Mr Ferrigno
12 and requested that he provide an undertaking not to commit, bind or
13 make any agreements to amend the terms of the Project King
14 Investment without the approval of the General Partner's board. Mr
15 Ferrigno refused to provide the undertaking requested.

16 (ii). at the board meeting on 4 April 2014 the board resolved to remove Mr.
17 Ferrigno as a director of the General Partner. Following his removal
18 Mr. Ferrigno was reminded of the removal of his authority to act on
19 behalf of the General Partner and that he should communicate this to
20 Chevalier. Mr Ferrigno was also asked if he had purported to make any
21 commitments or arrangements with Chevalier in respect of proposed
22 amendments requested by Chevalier or anything else, to which he
23 responded that he had reached an in-principle agreement with
24 Chevalier to restructure the Project King Investment, which was
25 subject to documentation.

26 (iii). following that meeting Mr Borrelli on behalf of the Partnership and the
27 General Partner confirmed to Chevalier that Mr Ferrigno had no
28 authority to make any agreement or commitment on behalf of the
29 Partnership or any entity associated with it in respect of the proposed
30 restructuring and that the Partnership and the General Partner were not
31 aware of, and had not consented to any terms or proposals affecting the



1 Partnership's economic interests in the Project King Investment. Mr.
2 Hatch, in his capacity as a director of ASCF II, on 5 April 2014 also
3 sent a notice to Mr Ferrigno and Chevalier revoking any authority, if
4 given, for AMCC, in its capacity as the facility agent, to consent to any
5 amendments to the Project King facility agreement.

6 (iv). at the 4 April board meeting it was also agreed by the board that steps
7 would be taken to terminate the MA on notice in accordance with its
8 terms. A termination notice was accordingly served on AMCC.

9 (v). under the terms of the facility agreement relating to the Project King
10 Investment ASCF II as "Majority Lender" was permitted to replace the
11 security agent and the facility agent on notice. Given the prior conduct
12 of AMCC in relation to the Project King closing fee, Mr Ferrigno's
13 unwillingness to provide an undertaking not to commit the General
14 Partner or the Partnership to any further agreements with respect to the
15 Project King Investment, and notice having been served on AMCC to
16 terminate the MA, in order to preserve the value of the Partnership and
17 the Project King Investment, the board of directors of ASCF II decided
18 that it was also necessary to remove AMCC from its position as facility
19 agent and security agent in respect of the Project King facility
20 agreement, and to appoint Madison Pacific as a successor facility agent
21 and security agent. A letter was sent to AMCC on 22 April 2014
22 notifying AMCC of its replacement and instructing AMCC to resign as
23 facility agent and security agent.



24 (vi). despite further letters being sent to AMCC on 21 June 2014 and 25
25 June 2014, AMCC refused or failed to resign as facility agent and
26 security agent. Therefore on 7 July 2014, proceedings were issued by
27 ASCF II against AMCC in the High Court of Hong Kong seeking
28 AMCC's resignation as facility agent and security agent and the
29 delivery up of all books and records relating to the Partnership in
30 AMCC's possession. ASCF II made an application for summary
31 judgment, but shortly before the summary judgment hearing, Mr

1 Ferrigno purported to convene a board meeting of the General Partner
2 to pass resolutions (among other things) to replace the directors of
3 ASCF II.

4 (vii). in light of the continuing dispute as to who has the authority to act on
5 behalf of ASCF II, the parties to the Hong Kong proceedings
6 eventually agreed to an adjournment of the summary judgment hearing
7 on condition that proceedings would be commenced in this Court to
8 seek a determination of the validity of the resolutions purportedly
9 passed by AMCP as the Class A shareholder in October 2014 to
10 remove and appoint directors to the board of the General Partner (these
11 resolutions are discussed below). Such Cayman proceedings were, as
12 noted above, commenced by AMCP by way of a writ issued on 9
13 February 2015 but have not yet been served.

14 (d). During the period from October 2014:

15 (i). Mr. Ferrigno has taken steps to dispute and challenge his removal as a
16 director and to obtain control over the Partnership and its affairs (this
17 has included action taken in relation to the Project Pantheon Investment
18 where it is alleged that Mr. Ferrigno sought to hinder efforts at reaching
19 a settlement between SFO and the General Partner's board).

20 (ii). on 31 October Mr. Ferrigno, as the authorised signatory of the general
21 partner of AMCP, signed what purported to be written resolutions of
22 AMCP as the Class A shareholder of the General Partner (the **October**
23 **2014 Resolutions**). These resolutions revoked the appointment of
24 Messrs. Borrelli, Walsh, Kardachi and Hatch and sought to remove
25 them as the Class A directors with immediate effect. Further
26 resolutions were passed replacing them by Messrs. Ferrigno, Nacson
27 and Bye.

28 (iii). in passing the October 2014 Resolutions, Mr Ferrigno and AMCP
29 sought to rely upon a right purportedly conferred by resolutions passed
30 at a board meeting of the General Partner held on 28 July 2005. The



1 2005 resolutions do not form part of the statutory records of the
2 General Partner seen by Mr. Briscoe or Mr. Hatch or any of the
3 Limited Partners prior to November 2014.

4 (iv). both the directors of the General Partner who AMCP sought to remove
5 and those who were not removed (the Class B Directors) have
6 challenged and do not accept the effectiveness of the October 2014
7 Resolutions. They have also asserted that Mr. Ferrigno and AMCP did
8 not have the authority to give instructions that the General Partner's
9 register of directors be updated without the authorisation of the Class B
10 Directors.

11 (v). nonetheless, Mr. Ferrigno has sought to act on the basis that the
12 October 2014 Resolutions are effective. He sought to convene a
13 meeting of the reconstituted board in order to pass resolutions which
14 would have had the effect of changing the directors of ASCF II, the
15 ASCF II nominated director on the board of directors of CAAM, King
16 Holding Company I Pty. Limited (the Project King Investment project
17 company) and the directors of ASCF Mauritius and re-appointing
18 AMCC as manager of the Partnership and confirming AMCC as the
19 facility agent and security agent under the Project King facility
20 agreement (as well as acknowledging the amendments to the Project
21 King facility agreement previously proposed by Mr Ferrigno as well as
22 confirming the appointment of General Partner's purported investment
23 committee).

24 (vi). the Class B Directors, because they consider that Mr. Ferrigno, Mr.
25 Nacson and Mr. Bye have not been properly appointed, have not co-
26 operated and refused to attend or accept the validity of any board
27 meetings convened by Mr. Ferrigno. Nonetheless, Mr. Ferrigno, Mr.
28 Nacson and Mr. Bye have proceeded and sought to hold board
29 meetings (in December 2014 and January and February of 2015), of the
30 General Partner and pass resolutions thereat. These resolutions have
31 included resolutions to change the signatories on the General Partner's



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bank accounts and to ratify the decision of the board at a meeting held on 13 September 2013 to amend the articles of association in order to incorporate the terms of the SHA. In addition, the General Partner's register of directors has (as noted above) on the instructions of Mr. Ferrigno been updated to reflect the appointment of Messrs. Ferrigno, Nacson and Bye and the removal of Messrs. Borrelli, Walsh, Kardachi and Hatch. Furthermore, following the commencement by AMCP of the action in this Court seeking a declaration that the October 2014 Resolutions were validly made and in order to direct that the register of directors be suitably amended, Mr. Ferrigno sought to convene a special board meeting of the General partner's board for the purpose of considering how the General Partner should respond to the action brought by AMCP. Mr Ferrigno subsequently indicated that the purported special board meeting was adjourned for a lack of quorum.

(vii). the Class B Directors and the Class A directors purportedly removed by AMCP (Messrs. Borrelli, Walsh, Kardachi and Hatch) have themselves also sought to act as the board of the General Partner. On 24 February 2015 they, purporting to act as the board, passed unanimous written resolutions *inter alia* approving the payment of the expenses of the Partnership and distributions to the Limited Partners (including the Petitioners) (the "**Distribution**"). Mr. Briscoe states that as a result of the Distribution, there are now no material liquid assets remaining in the Partnership, and its sole remaining asset is a right to a future payment of principal and interest under the restructured Project King Investment and the claims against Mr Ferrigno and entities controlled by him arising out of their conduct with respect to the Partnership. There are, he says, no prospects of the Partnership, at least with the consent of the Petitioners, making any further investments. No doubt Mr. Ferrigno would wish to challenge and dispute the basis for and validity of such action.



1 **The jurisdiction to appoint provisional liquidators**

2 32. Section 104(1) of the Companies Law (2013 Revision), which is applied by the
3 Exempted Limited Partnership Law 2014, states that the Court may at any time after
4 the presentation of a winding-up petition but before the making of a winding up order
5 appoint a liquidator provisionally.

6 33. Section 104(2) (read in conjunction with and as modified by the Exempted Limited
7 Partnership Law) states that an application for the appointment of a provisional
8 liquidator may be made under subsection (1) by, inter alia, a contributory (which
9 includes a limited partner of an exempted limited partnership) on the grounds that:

- 10 (a). there is a *prima facie-case* for making a winding-up order; and
- 11 (b). the appointment of a provisional liquidator is necessary in order to-
 - 12 (i). prevent the dissipation or misuse of the partnership's assets;
 - 13 (ii). prevent the oppression of minority partners;
 - 14 (iii). prevent mismanagement or misconduct on the part of the general
15 partner of the partnership.

16
17 34. There are therefore two main issues. First, is the *prima-facie* case requirement
18 satisfied? Secondly, if it is, is the appointment of a provisional liquidator necessary to
19 achieve one or more of the purposes set out in section 104(2)(b)?

20 **The Petitioners' submissions**

21 35. In relation to the *prima-facie* case requirement, the Petitioners submit as follows:

- 22 (a). the statutory test does not require the court to be satisfied that a winding up
23 petition *will* be made; that would be to pre-judge the merits of the Petition,
24 which, by definition has not yet come on for hearing. Rather the test is
25 necessarily lower.
- 26 (b). they are entitled to a winding-up order because they have justifiably lost trust
27 and confidence in the management of the Partnership by Mr. Ferrigno and his
28 companies – as noted above, the basis for this loss of trust and confidence is
29 the alleged mismanagement and breach of contract and duty by Mr. Ferrigno
30 and the companies he controls in connection with the Partnership's assets and
31 affairs.



1 (c). the evidence filed in support of the Petition establishes and demonstrates that
2 there has been such a loss of trust and confidence and establishes the obvious
3 mismanagement or misconduct in the management of the Partnership and its
4 assets by Mr Ferrigno and the entities he controls which justifies such a loss of
5 trust and confidence. The evidence filed in support of the Petition sets out a
6 series of *prima facie* serious complaints concerning Mr Ferrigno's conduct.

7 (d). Mr. Levy submitted that the evidence clearly showed that Mr Ferrigno had
8 shown a complete disregard of the interests of the Petitioners and had acted
9 solely for his own benefit, to the detriment of the Petitioners and is now taking
10 active steps to regain control of the Partnership. Furthermore, there had been
11 an admitted deprecation from Partnership assets of more than US\$ 5.34
12 million (this submission being based on the letter dated 12 December 2013
13 from AMCC, signed by Mr. Ferrigno as a director, confirming that AMCC
14 was indebted to the Partnership) and no attempt had been made to repay that
15 sum.

16 (e). taking into account all the evidence there can be no real controversy as to
17 whether a *prima facie* case has been made out. This is plainly not a frivolous
18 application, or an application made to prevent some other stakeholder
19 appointing a liquidator of its choice. It is case where the Petitioners have
20 shown, on solid evidence, very real concerns.

21 36. In relation to the requirements of section 104(2)(b) the Petitioners submit as follows:

22 (a). The Petitioners rely on subsections (i) (prevention of the dissipation or misuse
23 of the partnership's assets) and (iii) (prevention of mismanagement or
24 misconduct).

25 (b). As to the ground that the appointment of provisional liquidators is necessary in
26 order to prevent the dissipation or misuse of the Partnership's assets:

27 (i). Mr. Levy relied on *Re a company (No 003102 of 1991) ex parte*
28 *Nyckeln Finance Co Ltd* [1991] BCLC 539 for the proposition that in
29 this context the Court is not concerned with dissipation in the *Mareva*

1 sense; rather it is concerned with “any serious risk that the assets may
2 not continue to be available to the [partnership].”

3 (ii). Mr. Levy submitted that the evidence clearly demonstrated that this test
4 was satisfied in the present case and that there was a serious risk that
5 unless provisional liquidators were appointed Mr. Ferrigno and his
6 companies would take action (and continue to take action) that would
7 result in the dissipation of assets and be prejudicial and damaging to
8 the interests of the Partnership.

9 (iii). Mr. Levy relied on the evidence of Mr. Hatch and Mr. Briscoe relating
10 to the action taken by Mr. Ferrigno to obtain and reassert control of the
11 General Partner and deal with the assets and interests of the Partnership
12 despite the validity of the Purported Class A Directors’ appointment
13 being disputed and his action being inconsistent with the wishes of the
14 Limited Partners. Mr. Levy submits that the evidence raised serious
15 concerns that steps might be taken to unwind the Partnership’s existing
16 contractual relationships and amend its rights and interests and to
17 remove or transfer away Partnership assets. Mr Levy referred to the
18 evidence suggesting that Mr. Ferrigno (and the other Purported Class A
19 Directors) intended to change of the signatories to the General
20 Partner’s bank accounts. He also indicated that substantial funds were
21 due to be received in May from the Project King Investment and that
22 should the Purported Class A Directors purport to pass a resolution
23 (and assert that a board resolution had been properly passed) which
24 changed the account signatories and gave Mr. Ferrigno control over the
25 Partnership’s funds then there was a serious risk of those funds being
26 misapplied and dissipated.

27 (c). As to the ground that the appointment of provisional liquidators is
28 necessary in order to prevent mismanagement or misconduct of the
29 Partnership’s assets:

30 (i). Mr. Levy submitted that this ground was established on the
31 evidence for two reasons: first, because “on the (only possible



1 valid) assumption that “mismanagement” in s104(2)(b)(iii)
2 includes “non-management” or “incapable of proper
3 management” it is clear that provisional liquidators should be
4 appointed to prevent mismanagement and secondly because
5 “there is a strong *prima facie* case that to the extent that Mr
6 Ferrigno is properly to be considered a director of the General
7 Partner, then there is cogent evidence of past misconduct on his
8 part, such that an appointment should be made to prevent
9 further misconduct.”

10 (ii). accordingly Mr. Levy relied on the dispute as to the
11 appointment and removal of the directors to and from the
12 General Partner’s board and the resulting uncertainties as to
13 who was authorised to act on behalf and bind the General
14 Partner (and deal with the assets and interests of the
15 Partnership) as satisfying the requirement for mismanagement.

16 (iii). Mr. Levy submitted that “As matters stand there is a substantial
17 question mark over who is properly appointed to the [General
18 Partner’s] board... Accordingly, the General Partner, and hence
19 the Partnership, is rudderless. Therefore the company is
20 incapable of proper management unless and until the question
21 of the proper composition of the board is determined. Of
22 course, if it should be determined that Mr Ferrigno’s interests
23 should be entitled to control the board, then that merely feeds
24 into the deadlock that exists between the competing interests in
25 the General Partner, as the Petitioners have, in any event, lost
26 all trust and confidence in Mr Ferrigno (and his corporate
27 emanations).”

28 (iv). he also referred to the recently issued (but currently unserved)
29 proceedings in this Court between AMCC and the General
30 Partner which “apparently seek to determine the proper
31 composition of the board... But there is division within the
32 General Partner and so it will not be possible to agree a





1 response to those proceedings. That being the case there is a
2 serious question mark over how those proceedings will be
3 disposed of.”

4 (v). additionally, Mr. Levy relied on the evidence as demonstrating
5 that there had been and was now a serious risk of continuing
6 breaches of duty and contract and the misapplication of the
7 assets of the Partnership by Mr. Ferrigno and his companies.

8 **Is the prima-facie case requirement satisfied?**

9 37. I am satisfied that there is a *prima case* for making a winding-up order on the just and
10 equitable ground in section 92(e) of the Companies Law.

11 38. The only authority to which Mr. Levy referred on this issue was the judgment of Mr.
12 Justice Jones in *In the Matter of Orchid Developments Group Ltd* [2012] (2) CLR N
13 14. He cited this case in support of the proposition that the statutory test does not
14 require the court to be satisfied that a winding up petition *will* be made and stated, in
15 his Outline Submissions, that Jones J had explained in [*Orchid Developments*] that
16 the purpose of the limitations in s104(2) [was] to “prevent petitioners from abusing
17 the ability to appoint provisional liquidators and so make it more difficult for other
18 stakeholders to appoint a liquidator of their choice.” However this judgment, only
19 briefly reported as a note in the Cayman Island Law Reports, does not appear to deal
20 with the *prima-facie* case requirement but instead addresses the “restrictions” (i.e. the
21 separate and additional requirements) imposed by section 104(2)(b), which on the
22 facts of that case (having regard to the reasons supporting the application for the
23 appointment of provisional liquidators) were not satisfied.

24 39. To the extent that guidance is required or useful as to what needs to be established in
25 order to satisfy the prima-facie case requirement I would refer to the well-known
26 decision of Plowman J in *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105.
27 In that case Plowman J, when considering the jurisdiction to appoint provisional
28 liquidators under English law (where the statutory power to appoint, currently in
29 section 135 of the Insolvency Act 1986 but at the time of the judgment in section 238
30 of the Companies Act 1948 and in similar terms to section 135, makes no reference to
31 the need for there to be a *prima facie* case) held that a good prima-facie case was

1 established by showing first that the allegations in the petition were supported by the
2 evidence (at least to the extent of a good prima facie case) and secondly that it was not
3 possible to say that the allegations had been disproved, bearing in mind that conflicts
4 of evidence cannot be resolved until the substantive hearing of the petition.

5 40. *Union Accident* is not, of course, a decision directly on section 104 and indeed Rimer
6 L.J. in the English Court of Appeal has recently said (in *Revenue and Customs Comrs*
7 *v Rochdale Drinks Distributors Ltd* [2012] 1 BCLC 748 at [77]) that he regards the
8 continued use of the phrase “good prima facie case” as unsatisfactory – as being
9 elusive – and substituted a (probably higher) requirement for a petitioner to
10 demonstrate that he is likely to obtain a winding up order on the hearing of the
11 petition . Accordingly, the decision in *Union Accident* needs to be treated with caution
12 and I refer to it only by way of illustration of an approach which has been adopted
13 when deciding whether a (good) prima facie case for a winding-up order has been
14 made out.

15 41. In any event, it seems to me that the prima facie case requirement is satisfied in the
16 present case:

17 (a). while no authorities were cited to me to support the proposition that this was a
18 case in which a loss of trust and confidence would be a proper and sufficient
19 basis on which a winding up order could be made, it seems to me that it clearly
20 is. This case involves an exempted limited partnership which was established
21 as a closed-end private investment fund. The relationship between the General
22 Partner and the Limited Partner, governed both by the LPA and the Exempted
23 Limited Partnership Law, is such that it clearly gives rise to a legitimate
24 expectation that the Partnership will be conducted on the basis of a personal
25 business relationship between the General Partner and the Limited Partners
26 involving mutual trust and confidence. I note that Mr. Justice Jones remarked
27 in *Re Cybernaut Growth Fund, L.P. (Unreported, FSD 73 of 2013)* that “it
28 [was] not disputed [in that case] that [the] principles [in *Ebrahimi v*
29 *Westbourne galleries* [1973] AC 360] apply to the liquidation of an exempted
30 limited partnership in the same way as they apply to a company.”



1 (b). affidavits have been filed by Mr. Yamaguchi on behalf of Orix and Mr.
2 Haubenstricker on behalf of NYL in support of and confirming the truth of the
3 statements made in the petition. The petition, as noted above, states that “The
4 Petitioners and the other [Limited Partners] have lost all trust and confidence
5 in Mr Ferrigno’s ability or willingness to manage the Partnership’s affairs in
6 the best interests of the Partnership as a whole, without favouring his own
7 interests over those of the Limited Partners.”

8 (c). the affidavits of Mr. Briscoe and Mr. Hatch establish the basis on which the
9 Limited Partners have lost trust and confidence in Mr. Ferrigno and
10 demonstrate why this is a reasonable response to the action taken by Mr.
11 Ferrigno and his companies.

12 (d). I recognise and take into account that Mr. Ferrigno disputes the account of
13 events given by Mr. Briscoe and Mr. Hatch and, as his affidavit explains, he
14 considers that he has not had time to prepare and file a full and proper
15 response (as he notes in paragraph 6 of his affidavit: “This affidavit responds
16 only in brief to the various allegations made by the Petitioners in the lengthy
17 affidavit evidence filed in support of the Petition and only as is necessary in
18 the context of the adjournment application. This affidavit is not a substantive
19 response to the evidence filed by the Petitioners and the General Partner
20 specifically reserves its right to respond in full in due course.”).

21 (e). accordingly, I take into account the fact that the evidence remains incomplete
22 and that further evidence may be filed by Mr. Ferrigno and others in advance
23 of the hearing of the Petition – and that conflicts in the evidence filed to date
24 can only be resolved at the substantive hearing of the Petition.

25 (f). however, the breakdown in the relationship between the Limited Partners and
26 Mr. Ferrigno (and its damaging effect on the conduct and management of the
27 Partnership’s business) is beyond dispute and I give considerable weight to the
28 evidence of Mr. Hatch who was at one time a nominee of Mr. Ferrigno and
29 who appears to have carefully and patiently investigated the Limited Partners’
30 allegations against and concerns relating to Mr. Ferrigno’s conduct and
31 avoided any rush to judgment. His evidence, which includes a series of very



1 serious allegations against Mr. Ferrigno, sets out in a clear and credible
2 manner the reasons and justifications for the Limited Partners' loss of trust and
3 confidence and is balanced and convincing. Mr. Hatch has clearly concluded
4 that Mr. Ferrigno has not acted properly and in accordance with his obligations
5 and cannot be trusted to act properly in the future.

6 (g). without wishing to select or rely only on parts of Mr. Hatch's evidence, I
7 would highlight certain of his critical conclusions (in paragraphs 15, 105 and
8 106 of his affidavit) as follows:

9 "After Mr Ferrigno's removal as a director in April 2014, the Board sought at
10 all times to operate with the knowledge and approval of its stakeholder
11 Limited Partners, including with respect to sale and restructuring of the
12 Investments of the Partnership. As Mr Ferrigno demonstrated at the time of
13 the original Project King Investment, in diverting the Yingliu Receivable and
14 the Project King Closing Fee to his own improper use (indeed, not even
15 notifying the Limited Partners of the transaction itself that resulted in the
16 diverted Yingliu Receivable) and in numerous other instances culminating in
17 the secret deal with Chevalier discovered by the Board in early April 2014, Mr
18 Ferrigno prefers to operate in secret and without seeking or listening to any
19 valid input from other stakeholders. In my experience with the Partnership to
20 date, Mr Ferrigno acts only in the interest of himself and ignores any
21 conflicting considerations, including the best interests of the Partnership."
22 [paragraph 15]

23 "It is my belief that Mr Ferrigno's and AMCC's interest are in a critical
24 conflict with those of the Partnership. AMCC, in its capacity as former
25 manager of the Partnership, owes at least US\$6,667,708.63 to the Partnership
26 (being the total amount of the Yingliu Receivable plus the amount of the
27 Project King Closing Fee misused by AMCC) and only has two sources of
28 income pursuant to the LPA, namely management fees and carried interest,
29 which is a percentage of profits of the Partnership. As detailed in paragraph
30 46 of my Initial Investment Summary (at pages I49 to 191), these two sources
31 will almost certainly be insufficient to make any substantial repayment of the
32 amount due and owing to the Partnership. [paragraph 105]

1 “As there is no possibility for AMCC to increase assets under management or
2 earn any further management fees from the Partnership, AMCC’s only
3 prospect for repaying the amounts owing to the Partnership is to gamble with
4 the principal amount of the Investments in the hope of achieving a speculative
5 profit sufficient to repay the amounts outstanding (including, but not limited
6 to, the Yingliu Receivable and the funds that it used out of the Project King
7 Closing Fee).” [paragraph 106]

8 (h). Mr. Briscoe’s and Mr. Hatch’s evidence, taken together, establish the facts that
9 support a finding of a *prima facie* case for the winding-up of the Partnership on
10 the basis of a justifiable loss of trust and confidence by the Limited Partners in
11 the management of the Partnership (by the General Partner, Mr. Ferrigno and
12 his companies).

13 42. I would add one further point. The evidence in support of the Petition, and Mr. Levy’s
14 submissions, have highlighted the breakdown in the business relationship between the
15 parties to the LPA and the SA and between the Limited Partners and Mr. Ferrigno and
16 the serious effects of this breakdown. It could be said that the management of the
17 Partnership’s affairs has been paralysed and that the refusal by these parties to co-
18 operate has resulted in the kind of deadlock that may also be a basis for making a
19 winding up order on the just and equitable ground. To the extent that deadlock is a
20 separate ground for making, as opposed to just an alternative way of formulating the
21 Petitioner’s case in support its Petition seeking, a winding-up order in this case I
22 would hold that there is also a *prima facie* case for making a winding up order on that
23 ground.

24 **Is the appointment of provisional liquidators necessary in order to prevent dissipation**
25 **or misuse of the Partnership’s assets?**

26 43. Section 104(2)(b)(i) requires the Petitioners to demonstrate that the provisional
27 liquidators are needed (necessary) to prevent dissipation or misuse of the
28 Partnership’s assets.

29 44. In *Re a company (No 003102 of 1991) ex parte Nyckeln Finance Co Ltd*, cited by
30 Mr. Levy and referred to above, Harman J considered the circumstances in which a



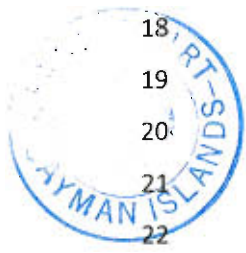
1 provisional liquidator would be appointed to protect assets in the context of a
2 creditor's winding up petition. He said that:

3 "If there is a risk of assets being dissipated – that is made away with other than by the
4 rateable distribution amongst all the company's creditors at the date of the
5 presentation of the winding-up petition – there must be a good case for the court
6 appointing its own officers .. It is not a dissipation" in the *Mareva* [freezing
7 injunction] sense of deliberately making away with the assets but any serious risk that
8 the assets may not continue to be available to the [partnership].

9 45. On a contributory's petition, as in the present case, it is sufficient if it is shown that the
10 assets of the company (or partnership) are being, or are likely to be, dissipated to the
11 detriment of the petitioners (see *Levy v Napier* 1962 SC 468; *South Downs Packers v*
12 *Beaver* (1984) 8 ACLR 990; *Re Nerang Investments* (1985) 9 ACLR 646 and *Re Bike*
13 *World* (1992) 6 ACSR 681).

14 46. The evidence of Mr. Briscoe and Mr. Hatch demonstrates that there is at least a
15 serious risk that Mr. Ferrigno and his companies will take further steps and action in
16 relation to the Partnership's assets and interests (in particular its investments) which
17 could result in funds being paid away and the rights of the Partnership (including its
18 wholly owned subsidiaries) being amended in a way that makes them less valuable.
19 This evidence establishes that the appointment of provisional liquidators is necessary
20 to protect the assets and rights of the Partnership and to ensure that during the period
21 before the hearing of the Petition a person with proper and undisputed authority to
22 deal with the assets can take steps to preserve and protect them and prevent any
23 unauthorised dispositions or dealings with the assets that could result in them being
24 transferred or rights being amended in a prejudicial manner.

25 47. Mr. Briscoe states that it is necessary for provisional liquidators to be appointed to the
26 Partnership pending the hearing of the Petition in order to safeguard the assets of the
27 Partnership and to ensure that Mr Ferrigno does not engage in any further
28 mismanagement or misconduct which would be contrary to the interests of the
29 Limited Partners and the Partnership as a whole. He asserts that the action which Mr
30 Ferrigno has indicated that he wishes and intends to take if he is able, or while
31 seeking, to obtain control of the General Partner would result in the assets and rights



1 of the Partnership being damaged and reduced in value. Mr Briscoe states that if a
2 provisional liquidator is not appointed there is a serious risk that Mr Ferrigno will take
3 steps to unwind the arrangements that have been put in place to safeguard the value
4 and protect the assets of the Partnership particularly the Project King Investment and
5 seek to appropriate such assets and any future funds received for his own purposes
6 (unrelated to the General Partner and the Partnership), as he has done in the past with
7 the Yingliu Receivable and the Project King Closing Fee.

8 48. These views and concerns are supported and reinforced by Mr. Hatch. He avers that
9 through his negotiations with third parties, Mr Ferrigno has shown that he is prepared
10 to prejudice the interests of the Limited Partners (and the Partnership) in favour of his
11 own interests and that he is concerned that Mr Ferrigno may seek to take actions to
12 prejudice the interests of the Limited Partners and the Partnership, including, but not
13 limited to interfering with the Project King Investment to the detriment of the
14 Partnership. He agrees with Mr. Briscoe and also says that he is concerned that Mr
15 Ferrigno will take steps to unwind the arrangements that have been put in place in
16 order to safeguard the assets of the Partnership, and appropriate such assets and any
17 funds received for his own purposes. He states that he is particularly concerned that if
18 Mr Ferrigno were able to re-establish control of the Partnership, he would act in his
19 own interest and against the interests of the Partnership. Particularly with respect to
20 the Project King Investment, Mr Ferrigno could, for example:

- 21 (a). reappoint AMCC as manager, resulting in unnecessary fees to the Partnership;
- 22 (b). appoint AMCC as the Facility Agent under the Project King Investment
23 Facility Agreement, enabling him to unlawfully retain and misappropriate
24 future interest and amortization payments to his controlled companies as he
25 did with respect of the Yingliu Receivable and Project King Closing Fee;
- 26 (c). as there is currently no possibility of earning carried interest from the
27 Partnership, Mr Ferrigno could seek to rescind or vary the restructuring that
28 has been agreed in relation to the Project King Investment or renegotiate the
29 terms in order to seek potential speculative returns instead of protecting the
30 value of the asset. He believes that Mr Ferrigno could negotiate with
31 Chevalier for the Partnership to subordinate the Project King Investment to the

1 approximately AUD28 million Chevalier has loaned to CAAM to date in
2 return for warrants in the CAAM entity. This would jeopardise the principal
3 of the Project King Investment, but in certain unlikely scenarios could
4 potentially yield profits significant enough for Mr Ferrigno's controlled
5 entities to earn carried interest (and pay monies owing by them). This scenario
6 is not remote or speculative as it is similar to the earlier deal Mr Ferrigno was
7 trying to document in secret in April 2014 before he was removed as a director
8 of the General Partner.

9 49. Mr. Hatch concludes that he believes that the risks he has described are not only real,
10 but are very likely to transpire if Mr Ferrigno is given the opportunity and if
11 provisional liquidators are not appointed.

12 50. Mr. Ferrigno, in his brief evidence in response denies that there is any risk of
13 dissipation or misuse of the Partnership's assets. He refers to the Project King
14 Investment as the principal asset of the Partnership and states that due to the dispute
15 with the Petitioners he and the other Purported Class A Directors have made and *are*
16 *continuing to make* efforts to come to a consensual agreement to avoid further
17 dissipation of the value of the Partnership (emphasis added). Mr. Ferrigno says that
18 the Purported Class A Directors have not continued to challenge the appointment of
19 Mr. Hatch to the board of CAAM or the designations of the authorised signatories of
20 the bank accounts of ASCF II and the General Partner, so that these accounts are
21 under the control of representatives of the Petitioners. In these circumstances the
22 Purported Class A Directors submit that since the Partnership's principal asset is
23 under the control of the Class B Directors and the Petitioners there can be no urgency
24 or justification for the appointment of provisional liquidators – with Mr. Hatch on the
25 board of CAAM and its cash under the control of the CAAM board there can be no
26 risk of Partnership assets being dissipated or misused.

27 51. While it is not possible to resolve conflicts of evidence before the hearing of the
28 petition and I acknowledge that Mr. Ferrigno and Mr. Kish on behalf of the Purported
29 Class A Directors have made it plain that there is further evidence which they would
30 wish to file on this issue, I am satisfied that the Petitioners' evidence in support
31 establishes a serious risk of dissipation. Even if Mr. Ferrigno were correct that as



1 matters currently stand the Class B Directors have control of CAAM and the Project
2 King Investment (including the cash and other funds paid and payable to CAAM and
3 ASCF II), there remains a material risk that he will take further action to change or
4 interfere with the status quo and seek to obtain control of ASCF II and funds payable
5 in respect the Project King Investment and seek to arrange for the amend the terms of
6 agreements which affect the value of the Partnership's interest in the Project King
7 Investment. The evidence of Mr. Briscoe and Mr. Hatch shows that Mr. Ferrigno has
8 continued to be active and to be seeking in January to have the Purported Class A
9 Directors pass resolutions that would change the signatories to the Partnership's bank
10 accounts. In his evidence, as noted above, Mr. Ferrigno refers to continuing efforts to
11 reach new agreements – while this may be a reference to agreements with the
12 Petitioners it may also be a reference to new agreements with Chevalier. In any event
13 the evidence of Mr. Briscoe and Mr. Hatch demonstrates a serious concern that Mr.
14 Ferrigno will seek, and a risk of Mr. Ferrigno seeking, to enter into discussions and
15 new agreements with Chevalier. In the absence of a clear basis for being able to
16 conclude that Mr. Ferrigno will not seek and continue to take action to deal with,
17 dispose of, amend or affect the rights of the Partnership in relation to the Project King
18 Investment the evidence of Mr. Briscoe and Mr. Hatch demonstrate a real and
19 material risk of further action by Mr. Ferrigno and his companies that would result in
20 dissipation or a misuse of the Partnership's assets and rights. I find Mr. Briscoe and
21 Mr. Hatch's evidence persuasive and that their challenge to the integrity and motives
22 of Mr. Ferrigno gives rise to substantial concerns as to what may happen to the
23 Partnership's assets if provisional liquidators are not immediately appointed.

24 **Is the appointment of provisional liquidators necessary in order to prevent**
25 **mismanagement or misconduct on the part of the general partner of the partnership?**

26 52. In view of my conclusion that the evidence establishes that the appointment of a
27 provisional liquidator is necessary in order to prevent the dissipation or misuse of the
28 Partnership's assets it is not, strictly speaking, necessary for me to deal with the need
29 to establish mismanagement or misconduct. However, I propose to set out briefly my
30 conclusions on whether the requirements of section 104(2)(b)(iii) of the Companies
31 Law are also satisfied in this case.



1 53. Section 104(2)(b)(iii) of the Companies Law, when read with section 36(3)(c) of the
2 Exempted Limited Partnership Law, requires the Court to be satisfied that the
3 appointment of a provisional liquidator is necessary to prevent mismanagement or
4 misconduct *on the part of the general partner* (section 104(2)(b) refers to
5 mismanagement or misconduct on the part of the company's directors and section
6 36(3)(c) says that references to a director shall include the general partner). There is
7 an issue in the present case as to whether the action taken and likely to be taken by
8 Mr. Ferrigno and his companies can be treated as conduct taken or threatened by the
9 General Partner.

10 54. The Petitioners argue that there has been and continues to be a real risk of
11 mismanagement and misconduct by Mr. Ferrigno (and Mr. Nacson and Mr. Bye who
12 it is suggested are acting in accordance with Mr. Ferrigno's wishes) and his
13 companies in relation to the affairs of the Partnership. Some of the conduct giving rise
14 to the alleged mismanagement and misconduct took place while Mr. Ferrigno was a
15 director of the General Partner and before his purported removal in April 2014. Some
16 of the alleged mismanagement and misconduct took place and the concerns regarding
17 further and future action that might be taken by Mr. Ferrigno relate to action that
18 would take place, after his purported removal. It is future and not past
19 mismanagement and misconduct which is relevant for these purposes (allegations of
20 past misconduct are insufficient to justify the appointment of provisional liquidators).
21 If Mr. Ferrigno's removal was valid and effective then he would not be acting as a
22 director of the General Partner and would not have the actual authority to bind it
23 although the fact that he is recorded in the register of directors may mean that third
24 parties dealing with him are able to argue that he has ostensible authority to bind the
25 General Partner. In any event, in the present circumstances, where the evidence shows
26 that there is an unresolved dispute as to whether Mr. Ferrigno is able to, and he asserts
27 that he does have authority to, act on behalf of the General Partner (and Partnership) it
28 seems to me that I may and should have regard to his conduct and threatened conduct,
29 even after his purported removal, as evidence of mismanagement and misconduct for
30 the purpose of section 104(2)(b)(iii). The allegation is that, even though Mr. Ferrigno
31 and his companies are not currently entitled to exercise control they may acquire such
32 right or through their actions exercise de facto control by being able to deal with the

1 Partnership assets and third parties as if they were authorised to act on behalf of the
2 Partnership.

3 55. In the evidence in support of the Petition allegations are made that the General Partner
4 while under the control of Mr. Ferrigno or Mr. Ferrigno while having de facto control
5 of the assets and affairs of the Partnership misappropriated or misapplied Partnership
6 assets and funds and acted in breach of contract or duty by applying such funds for
7 their own benefit and to prejudice the interests of the Partnership. I have already
8 summarised these allegations and this evidence above.

9 56. Mr. Ferrigno has denied that the General Partner or he misappropriated funds
10 belonging to the Partnership. He asserts that the action taken by the General Partner
11 (and presumably AMCC) while acting as facility agent in respect of facility
12 agreements regulating the Yingliu Investment and the Project King Investment) was
13 permitted by and in accordance with the LPA. Mr. Ferrigno states that the General
14 Partner had received legal advice from highly reputable and leading law firms to the
15 effect that the General Partner was able to retain and withhold part of the proceeds of
16 an investment and delay distributing such proceeds to the Limited Partners where the
17 General Partner considered that doing so was in the interests of the Partnership,
18 disclosure was made to the Limited Partners and the funds would be distributed before
19 the end of the life of the Partnership in 2020. He says that there was a proper basis for
20 not distributing and for using the funds which the Petitioners allege were
21 misappropriated

22 57. Once again, it is not possible to resolve the conflicts in the evidence at this stage. In
23 order to be able to form a firm view on whether the failure by AMCC whilst acting as
24 a facility agent to account immediately and without deduction for, and its use of,
25 payments received from Yingliu and CAAM gave rise to breaches of AMCC's
26 contractual obligations and whether any breaches involved breaches of the LPA and
27 breaches of fiduciary or contractual duties to the Partnership by AMCC, the General
28 Partner and Mr. Ferrigno I would need to see further submissions and possibly further
29 evidence.

30 58. I note however that there is strong evidence of other examples of mismanagement or
31 misconduct by the General Partner, Mr. Ferrigno and AMCC. The following are



1 examples: AMCC has acknowledged its liability and the unpaid debt owed to the
2 Partnership in respect of the Yingliu Receivable; that there is strong evidence that
3 AMCC and Mr. Ferrigno were both in breach of the undertaking dated 18 August
4 2013 that required them to obtain the approval of the board of the General Partner
5 before disposing of Partnership assets; that the Partnership's auditors (PwC) had
6 warned Mr. Ferrigno about a significant and dangerous lack of proper controls and
7 corporate governance at the General Partner and Partnership (including the lack of
8 segregation between the accounts of the Partnership and the General Partner on the
9 one hand and AMCC on the other); that there have been delays in finalising the
10 Partnership's audited financial statements in breach of the LPA; that Mr. Ferrigno had
11 been uncooperative in the investigation conducted by the board after August 2013 and
12 had repeatedly failed to keep the board informed of relevant matters or deliver up and
13 failed to deliver up books and records.

14 59. It seems to me to be clear that these matters constitute evidence of past
15 mismanagement and misconduct for these purposes. Nothing that Mr. Ferrigno has
16 said persuades me that this evidence should be treated as disproved. Furthermore, and
17 importantly, the evidence suggests that there is a serious risk that if Mr. Ferrigno and
18 his companies were to be permitted to continue to seek to be involved in dealings
19 with, or to assert control over, the Partnership's assets and affairs in the period before
20 the hearing of the Petition, similar conduct would be repeated. The risk of further
21 failures of governance and breaches of applicable agreements, combined with the risk
22 of further action which would be damaging to the interests of the Partnership and
23 instead promote the separate interests of Mr. Ferrigno and his companies, is
24 established by the evidence and is sufficient in my view to satisfy the requirements of
25 section 104(2)(b)(iii) of the Companies Law.

26 60. Mr. Levy, as I have noted above, also submitted that mismanagement in section
27 104(2)(b)(iii) includes "non-management" or "incapable of proper management." I do
28 not need to decide this point for the purpose of this application. However, I would
29 note that section 104(2)(b)(iii) refers to mismanagement or misconduct on the part of
30 (or by) the general partner (or, in the case of a company, directors). This, as it seems
31 to me, connotes culpable behaviour involving a breach of duty or improper behaviour
32 that involves a breach of the Partnership's governing documents and governance



1 regime. This could involve inaction where such inaction would give rise to a breach of
2 duty and action was needed and possible to protect the interests of the Partnership.
3 But I doubt that mere paralysis is sufficient where there is a dispute between the
4 partners and uncertainties as to the authority of the General Partner to act on behalf of
5 the Partnership. Of course such a situation, as in the present case, can and often will
6 give rise to a risk of assets being dissipated or misused and justify the appointment of
7 provisional liquidators on the basis of section 104(2)(b)(i).

8 **The impact of and need for provisional liquidators in the present circumstances**

9 61. Accordingly I hold that the requirements of section 104(1) and (2) are satisfied and
10 that in all the circumstances it is necessary and appropriate to appoint provisional
11 liquidators in respect of the Partnership and its assets. The precise powers of the
12 provisional liquidators are set out, and the terms on which the provisional liquidators
13 are appointed are dealt with, in an order which I settled after the hearing of this
14 application and discussions between Mr. Levy and Mr. Kish.

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DATED 30 DAY OF April 2015



The Hon. Justice Nick Segal
JUDGE OF THE GRAND COURT

