

**BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

IN THE MATTER OF ORTLAND EQUITIES CORPORATION (in Liquidation)

AND IN THE MATTER OF SECTION 246 OF THE INSOLVENCY ACT 2003

CLAIM NO: BVIHC (COM) 2010/11

BETWEEN:

**(1) WILLIAM TACON
(2) ALASTAIR BEVERIDGE
(in their capacity as Joint Liquidators of Ortland Equities Corporation (in
Liquidation)**

Claimants

and

PITKIN GROUP LIMITED

Defendant

Appearances: Mr Jonathan Russen QC and Ms Arabella di Iorio for the Joint Liquidators
Mr Matthew Collings QC, Mr Ray Ng and Ms Claire-Louise Whiley for the Defendant
company

JUDGMENT

[2011: 19, 20, 21 September 14 October]

(Undervalue transaction - company in insolvent liquidation - company holding limited partnership shares ('the shares') in closed investment funds ('the funds') stated by their General Partner to have had an aggregate unaudited capital value as at 30 September 2008 of US\$16,709,109 – partnership shares carrying obligation upon company to contribute further capital up to a maximum of US\$3,290,891 - company transferring the shares to defendant – company subsequently going into insolvent liquidation – defendant a connected person for the purposes of section 246 Insolvency Act, 2003 ('section 246') – transfer an insolvency transaction taking place within vulnerability period for the purpose of section 246 – whether transfer a gift within the meaning of section 246(1)(a) - whether any consideration given by defendant for the transfer – whether any

consideration given significantly less than the value of the transferred shares – date at which shares to be valued for that purpose)

- [1] **Bannister J [ag]:** This is an application made under section 246 of the Insolvency Act, 2003 ('section 246', 'IA 2003') by the Joint Liquidators of Ortland Equities Corp ('Ortland'). Ortland was incorporated on 9 August 2002 under the International Business Companies Act and subsequently re-registered under the Business Companies Act, 2004. Ortland is owned in equal shares by two brothers, Lydur and Agust Gudmundsson ('the Gudmundssons') and was used by them as a private investment company. Ortland had a secured investment line with Kaupthing Bank Luxembourg SA ('KBL') (the Gudmundssons had an indirect 23% interest in KBL's Icelandic parent company). Each of KBL and Ortland got into difficulties in the autumn of 2008. Ortland owed money to KBL which it could not repay and KBL itself went into a form of administration on 9 October 2008. On 9 January 2009 Ortland, without informing KBL, executed a document transferring its share in two funds under the management of Clayton, Dubilier & Rice ('CDR') to the defendant company ('Pitkin', 'the transfer'). Pitkin is also jointly owned by the Gudmundssons. The share had a reported unaudited value in the books of CDR as at 30 September 2008 of US\$16,709,109, but carried with it a liability to make further investments into the funds up to a maximum amount of US\$3,231,399 if and when called upon by CDR to do so. The liability had and still has the potential to extend until 21 December 2014, but to date has not been called upon. An effect of the transfer was that Ortland was relieved of this liability, which was assumed by Pitkin in its place. No money was paid or payable by Pitkin to Ortland in consideration of the transfer.
- [2] On 11 November 2011 Ortland was wound up as insolvent on the application of KBL¹ and the applicant Joint Liquidators were appointed as its liquidators. On 1 February 2010 the Joint Liquidators issued these proceedings under section 246 for a declaration that the transfer was void and should be set aside accordingly. At the hearing I gave permission for the prayer to be amended to claim such relief as the Court should think fit if it should hold that the transfer was an undervalue transaction within the meaning of section 246.

¹ actually, on the application of a company called Pillar Securitisation Sarl ('Pillar'), which had succeeded to KBL's loan book

Ortland's investment and liabilities

[3] On 27 December 2006 Ortland committed to subscribe US\$20 million to the CDR funds. The capacity in which it held the investment represented by its actual capital contributions was as a limited partner under a limited partnership agreement whose latest manifestation is an amended and restated agreement reflecting an amendment made to the earlier agreements on 14 May 2007 ('the LPA'). Over the period between 11 June 2007 and 28 August 2007 Ortland complied with capital calls made by CDR to an aggregate amount of US\$17,710,365, which was applied by CDR to its so-called Co-investment Fund. US\$1,128,379 of that was returned to Ortland in October 2007, leaving Ortland with a net capital outflow² of US\$16,581,986. In March 2008 Ortland answered a capital call in the sum of US\$186,615, which was applied by CDR to its so-called Credit Co-Investment fund. No further capital calls have been made. Ortland's net capital outflow is thus US\$16,768,601, which means that Ortland has since March 2008 been and remains liable, if called, to contribute a further US\$3,231,399.³ The documents show that in May 2009 the board of Pitkin considered the correct figure to be marginally less than that and the figure agreed on the pleadings is marginally more, but I do not think that establishing the precise amount of the outstanding capital liability to such tolerances is material for present purposes.

The terms of the LPA

[4] The important provisions of the LPA for present purposes may be summarised as follows.

[5] The term, as I have said, expires on 21 December 2014⁴ unless determined earlier in certain circumstances set out in the LPA⁵. It is not suggested that any of these events had happened or was likely to happen, so that it is to be assumed that the term will run to 2014. Management is

² and outstanding capital commitment of US\$3,418,014 (by clause 5.3 of the LPA unused portions of capital contributions were not treated as capital contributions)

³ I ignore minor adjustments for expenses, etc

⁴ Counsel suggested (and the Claimants plead in reply) that the term could be extended for three successive one year period, but that, in my view, is a misinterpretation of clause 1.4 of the LPA, which refers only to the expiry of the *term* under the Primary Fund agreement, not to any agreed extensions, which in any event required the consent of an Advisory Committee, something which was not in place under the amended and restated LPA

⁵ clause 5.6

entrusted to the General Partner.⁶ Limited Partners, such as Ortland, have, in general, no power to interfere in management.⁷ The fund may invest in so called Portfolio investments,⁸ bridging finance⁹ or 'follow on' investments.¹⁰ Drawdown notices must specify a drawdown date (not earlier than ten days following the date when the drawdown notice was served) upon which the amount of each limited partner's contribution or additional contribution must be paid.¹¹ Contributions are payable on a prorated basis.¹² It follows from this and from the figures set out in paragraph [4] above that in March 2008 the fund became paid up (and has at all times subsequently remained paid up) as to some 84% of its possible maximum.

[6] If a limited partner does not comply with a drawdown notice, the forfeiture provisions contained in clause 5.5(d) of the LPA come into play. These enable the General Partner at its discretion¹³ (a) to reduce amounts otherwise distributable to the defaulting partner by 50% and (b) to retain the remaining 50% to satisfy amounts outstanding from the defaulting partner. As from the date of default the defaulting partner is treated as having no rights under the LPA¹⁴ and if there is a positive balance after satisfaction of amounts due from the defaulting partner, that balance is distributable rateably between the non-defaulting partners. Whether these savage provisions would survive an attack as amounting to a penalty was not discussed,¹⁵ but it seems to me that there is no good reason why they should not be upheld at least to the extent that they provide security for unpaid calls, interest and expenses. On that basis, and assuming a call for the whole amount of US\$3.2 million as yet uncalled from Ortland/Pitkin, the value of Ortland's prorated share in the underlying assets of the fund as at 1 October 2008 would, according to their valuation by Pitkin's expert, Mr Daniel Ryan ('Mr Ryan'),¹⁶ have had to have lost some 70% of their value at that date before the fund found itself without security for the call.

⁶ clause 2

⁷ clause 3

⁸ defined as more or less any debt or equity investment

⁹ clause 4.1(b)

¹⁰ further investment in respect of previously made portfolio investments – clause 4.1(a)(iii)

¹¹ clause 5.2

¹² clause 5.2(d)

¹³ the General Partner may choose not to designate a Limited Partner as a Defaulting Partner: clause 5.5(a)

¹⁴ although it remains liable for fund expenses

¹⁵ the LPA is governed by the law of the Cayman Islands

¹⁶ Mr Ryan valued the proportion of the fund's underlying investments borne by Pitkin's capital contributions to the total capital contributed to the fund by Pitkin (3.7%) at US\$12.1 million. He does not, of course, accept that this is the value of Pitkin's interest in the fund itself

- [7] These forfeiture provisions are without prejudice to the fund's rights to recover the outstanding call at law or in equity.¹⁷ Pitkin is correct, therefore, to say that Orland was at risk at any time after March 2008 of being sued in debt or wound up on an application by the fund if it failed to meet an outstanding call.
- [8] Distributions are governed by clause 6 of the LPA. The provisions are complex and do not need to be considered here in any detail, but broadly speaking distributions are to be made when investments generate cash and there is an express provision¹⁸ that distributions are to be made only out of available assets.¹⁹ Clause 6.9 of the LPA provides that no Partner has the right to withdraw capital from the fund or to receive distributions except as otherwise expressly provided.
- [9] With certain exceptions which are not material for present purposes, transfers of partnership interests are permitted only with the consent of the General Partner, to be given or withheld in its sole discretion, unless the transferee falls within certain restricted categories, in which case consent is not to be unreasonably withheld.²⁰ Affiliates are one of those categories. Approved transfers have to satisfy certain unexceptionable conditions. There is a provision forbidding Limited Partners from entering into derivative contracts tracking or reflecting their interests in the fund.
- [10] Clause 6.1 of the LPA requires the fund to maintain in its books a capital account for each Partner. There were in evidence at trial quarterly statements, described as Treasurer's Reports, from the third quarter of 2007 onwards. The majority of them state against the name of each partner the amount of its capital contribution adjusted for income received, various portfolio and fund costs and expenses. The 'capital accounts' therefore contain, for the most part, book or carrying values. The single exception, so far as I am aware, was a 50% write down in the Treasurer's Report for the fourth quarter of 2008 of the value attributed to the fund's 4.8% interest in HD Supply Inc ('HD Supply'), from its acquisition cost of US\$125 million to US\$62 million, which resulted in consequential adjustments to the Partners' capital accounts. No later Treasurer's Reports were in

¹⁷ clause 5.5(e)

¹⁸ clause 6.6(a)

¹⁹ defined as cash or cash equivalents and liquid securities in excess of necessary reserves (as determined by the General Partner)

²⁰ clause 10(1)(a)

evidence, so that it is not known whether the fund has made any further adjustments to Partners' capital accounts.

- [11] The conformed copy of the amended and restated LPA carries a health warning on its cover page. The warning includes the statements that interests must be acquired for investment only, that they are subject to significant restrictions on transferability and that purchasers of partnership interests will accordingly be required to bear the risk of their investment for an indefinite period of time. That seems to me to be a very fair assessment, in the light of the provisions of the LPA, of the nature of the investment which it offered.

The facts

- [12] I heard evidence of fact from Mr William Tacon, one of the Joint Liquidators of Ortland and therefore one of the two Claimants in these proceedings; from Mr Lydur Gudmundsson ('Mr Gudmundsson'); and from Mr Bjarnfredur Olafsson, a partner in the Icelandic legal firm LOGOS Legal Services ('Mr Olafsson'). All three witnesses were cross examined and from the totality of their evidence I find the following facts in addition to those which I have already found in paragraphs [1], [2] and [3] above, which I believe to be uncontentious.
- [13] Some time in October 2003 KBL entered into a Corporate Service Agreement ('CSA') with the Gudmundssons in respect of Ortland. KBL was described as the Corporate Agent and agreed to provide standard form corporate services including, if invited to do so by the Gudmundssons, the provision of directors. Such a request must have been made, because when the narrative opens the directors of Ortland were three BVI companies provided by and managed by KBL.
- [14] On 5 September 2006 Pitkin was incorporated.
- [15] Between June 2007 and March 2008 Ortland, as I have said, invested US\$16.8 million in the CDR fund.

- [16] On 8 April 2008 Ortland entered into a Secured Investment Line Agreement with KBL with a maximum availability of 50 million euros. Outstanding borrowings as at 2 October 2008 amounted to around 20 million euros, although none of the lending had then fallen due for repayment. Pillar has entered a claim in Ortland's liquidation in the sum of 19.5 million euros, although it has not formally been admitted and adjustments may need to be made for disposals of assets held in custody.
- [17] Mr Gudmundsson says in his witness statement, correctly, that KBL went into administration²¹ on 9 October 2008. He says that he immediately asked Mr Olafsson to obtain irrevocable powers of attorney over each of the associated companies managed by KBL, including Ortland. He goes on to say that Mr Olafsson obtained those powers of attorney on 10 October 2008. Mr Olafsson says in his witness statement that he requested such powers of attorney on 10 October 2008 on Mr Gudmundsson's instructions. A copy of the power of attorney relating to Ortland is in evidence, although the copy appears to be truncated since, although expressed to be given by all three of the Kaupthing-provided corporate directors of Ortland, the copy only shows the execution of the document by two of them. Contrary to what is said in the witness statements of Mr Gudmundsson and Mr Olafsson, the document is dated 8 October 2008. When Mr Gudmundsson was asked about this discrepancy, he insisted that the document had not been backdated. Mr Olafsson said that he asked for the document on 8 October 2008 but only received it on 10 October. The discrepancy is surprising, but I accept Mr Olafsson's evidence on the point and I think that the confusion must have arisen because Mr Gudmundsson is mistaken when he attributes the request as consequential upon his learning that KBL had actually gone into administration. He must have got wind of the imminence of such a thing happening and acted with speed to obtain the power of attorney. It is improbable to a degree that the KBL employees who acted on behalf of Ortland's corporate directors would have been in a position to execute such a document after the Luxembourg Court had put KBL into administration.
- [18] The document is expressed to be irrevocable. The power actually conferred by its operative part is a power to dispose of assets of a company described as 'Mainbeach.' I assume that this is evidence of haste and that Mainbeach is another of the Gudmundssons' companies, but the

²¹ strictly speaking, it was a provisional administration

discrepancy does not appear to have troubled CDR when it approved and executed the transfer agreement of 9 January 2009 and I do not think that it has any bearing on what I have to decide. The donees of the power were Mr Gudmundsson, his brother and Mr Olafsson. The document is silent as to whether the power was granted to them jointly or jointly and severally.

[19] Mr Gudmundsson said that he obtained this power in order that he and his brother could manage (among other companies) Ortland while KBL was in administration. I accept that evidence.

[20] On 15 October 2008 Mr Olafsson emailed a gentleman described at trial as Thordur Emil but whose full name appears to have been Thordur Emil Olafsson²², Ortland's account manager at KBL. I shall call him Mr Emil to avoid confusion. The purpose of the email as described by Mr Olafsson was to ascertain what assets were available to set off against Ortland's liability to KBL. It was for that reason that he gave Mr Emil a short list of classes of possibly available assets, including private equity funds, which Mr Olafsson described, in the translation from the original Icelandic which was put in evidence by Pitkin, as frozen and not for valuation. Mr Emil replied, according to the translation of his email, so far as private equity investments were concerned, in these terms:

'Private Equity funds – invested directly in these funds on behalf of Ortland upon the brothers' request, we are not with the stakes in our custody and my view is that these stakes are impossible to sell. The brothers could though possibly have connections into the funds to see if there is a possibility to get out.'

Mr Olafsson confirmed that the assets being referred to here by Mr Emil included the CDR investments. He told me that KBL said that they had no interest in this asset because it could not be sold and that KBL was well aware of the contingent liability to which it was subject and which he discussed with KBL when going through a statement of affairs. It is clear even from the rough translation of its email that KBL did not consider that it had any security interest in the CDR investment. I accept Mr Olafsson's evidence about this exchange of emails.

[21] On 13 November 2008 Mr Gudmundsson emailed Mr Christian Broberg, Ortland's relationship manager at CDR 'Re: meeting.' Mr Gudmundsson explained to me that this was a reference to a

²² he refers to himself in the email chain to which I was referred as Thordur Emil

meeting of the Limited Partners in the CDR fund due to be held in New York on 26 November 2008. He told Mr Broberg that he was looking forward to seeing him at the meeting, although he told me that he did not think that in fact he attended. In the email he said he would like to ask Mr Broberg about 'our investment in [the CDR fund] is [sic] under the investment vehicle Ortland Equities.' He went on: 'Is there any problem for us to transfer our assets in that fund another [sic] investment vehicle? There have been capital calls on our commitments today [sic] of US\$17.710.365.' Mr Gudmundsson says in his witness statement that at this time Ortland had little or no cash in hand and no liquid assets. Finally, Mr Gudmundsson asked Mr Broberg to provide him with the latest valuation of the asset.

[22] Mr Gudmundsson explained in his evidence that the reference to US\$17.7 million was to historical capital calls and that the reference should have been to US\$16.5 million. In fact, Mr Gudmundsson was precisely right, as the calculations in paragraph [3] above make clear.

[23] Theresa Gore replied on behalf of CDR to Mr Gudmundsson's email on 14 November 2008. She sent him a schedule of Ortland's net capital contributions together with the Treasurer's Report for the quarter ended 30 September 2008. Although there was no direct evidence to that effect, it can only be inferred that she did so in response to Mr Gudmundsson's request for the latest valuation of the asset. If he read the copy of the Treasurer's Report which he was sent by Ms Gore, Mr Gudmundsson would have seen that Ortland's capital account stood at US\$16,709,109 as at 30 September 2008.

[24] Ms Gore's email of 14 November 2008 went on to say

'Regarding the transfer, we will need you to complete the transfer documents. Please contact Jon Adler . . . to proceed with the transfer. Transfers are effective the first or last day of a quarter. If this proceeds quickly, we can back date the transfer to October 1st if it would help.'

[25] On 20 November 2008 Mr Olafsson wrote to Jon Adler (via Ms Gore) as advised by Ms Gore and told him that pursuant to the power of attorney (a copy of which he attached) he would like to have the transfer documents made as of October 1st. He told Mr Adler that the transfer would be made to Pitken [sic] Ltd 'with Credit Suisse' and promised to send him the Credit Suisse contact details.

[26] On the following day Mr Adler sent Mr Olafsson a draft transfer agreement together with a tax form to be completed by Pitkin. He asked Mr Olafsson to have the agreement executed by Ortland and by Pitkin. He reminded Mr Olafsson that Ortland and/or Pitkin was responsible for associated costs, which he assured Mr Olafsson would be modest 'assuming no complicated issues arise.'

[27] On 22 November 2008 Mr Olafsson sent a copy of the draft transfer agreement to Peter Neman of Credit Suisse and asked him to get in touch with Mr Adler.

[28] On 8 December 2008 Mr Neman wrote to Mr Adler asking for a copy of the Partnership Agreement and asking who was the fund administrator, how much of the US\$20 million commitment had been already called, and

'what services are expected from Credit Suisse: manage capital calls through CS account (Operations)?'

[29] Mr Neman's mail was answered by Jason Auerbach, a clerk with Debevoise & Plimpton LLP ('D&P'). He sent a copy of the Partnership Agreement, told Mr Neman that CDR acted as Manager of the fund and explained that D&P were checking on the amount of the outstanding capital commitment. In answer to the question what services would be required of Credit Suisse, Mr Auerbach's response was that D&P were not sure that they understood the question and suggested a telephone discussion. It may perhaps be observed that one service that appears not to have been expected (at any rate at that stage) was confirmation of Pitkin's net asset position. Mr Neman forwarded Mr Auerbach's answer to Mr Olafsson on 10 December 2008.

[30] On 11 December 2008 Ms Katarina Lif Burren, of Kendris Private Ltd, which appears to have supplied Pitkin's director, confirmed to Mr Neman that one of her colleagues would sign the transfer agreement on behalf of Pitkin and that Mr Neman would receive it by email in due course. She asked Mr Neman to let Kendris know the amount of the remaining capital commitment in due course. Mr Olafsson says in his witness statement that Mr Neman confirmed the amount of the outstanding commitment, to ensure, as Mr Olafsson puts it, that these amounts could be met by Pitkin, but if he did there is no document in evidence confirming that fact.

[31] The transfer agreement was executed by Mr Olafsson for Ortland, by Pitkin's corporate director, by two individuals, one of whom appears to have been Ms Burren, for Pitkin and by Ms Gore for CDR. The document is dated 9 January 2009. After reciting that capitalised terms in the transfer agreement should have the meaning assigned to them in the LPA, the document went on to recite that Ortland had a capital commitment of US\$20 million (no mention of any outstanding uncalled figure) and continued

'NOW, THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties, etc'

Clause 1 assigns Ortland's share to Pitkin and provides that the transaction shall be effective as at close of business on 1 October 2008. By clause 2 Pitkin assumed Ortland's liability under the LPA and agreed to be bound by it and by the terms of Ortland's subscription agreement of 28 December 2006. Pitkin also agreed by clause 2 to be and become a party to the LPA 'as a Substitute Partner.' 'Substitute Partner' is assigned the meaning given to the terms in clause 10.1(d) of the LPA, which defines the term as a person admitted to the Fund as a substitute Limited Partner. On its own this definition is unhelpful but clause 10.1(d) goes on to provide that the Substitute Partner shall succeed to all of the rights and obligations of the Transferor under the LPA. Clause 3 of the transfer provided that historic capital contributions made by Ortland should be credited to Pitkin. By clause 4 CDR consented to the transfer and admitted Pitkin to the partnership. By clause 5.6 Pitkin warranted that it had net assets in excess of US\$1.5 million. There was no mention of any representation by Pitkin that it was capable of meeting outstanding capitals call up to a total of US\$3.2 million – on the contrary, the inclusion of the US\$1.5 million warranty excludes the existence of any such representation.

[32] It was Mr Olafsson's evidence that the form of transfer agreement was described by CDR as their standard transfer document and that they did not want it altered.

[33] No one on behalf of either Ortland or Pitkin informed KBL of the transfer – whether before it was executed or subsequently. On 3 February 2009, however, KBL discovered its existence and three days later revoked the supposedly irrevocable power of attorney. On 29 June 2009 the Gudmundssons were appointed directors of Ortland by members' resolution. On 18 August 2009

Pillar applied for the appointment of liquidators to Ortland and that application was granted on 11 November 2009. These proceedings were commenced on 1 February 2010 and on 18 February Pitkin undertook not to dispose of the partnership interest pending trial. Between March 2010 and January 2011 CDR made distributions to Pitkin in the aggregate sum of US\$53,000 (of which US\$19,000 was set off against a call made in January 2011 to cover liability for expenses, etc).

- [34] I will have to return later to the explanations and justifications provided by Mr Gudmundsson and Mr Olafsson for these facts, but I think that at this point I should set out the respective contentions of the parties.

The Claimants' case

- [35] In their amended statement of claim, dated 12 October 2010, the Claimants set out some of the facts outlined above and say that the transfer was an undervalue transaction within the meaning of section 246. Section 246 is in the following terms:

'246. (1) Subject to subsection (2), a company enters into an undervalue transaction with a person if

- (a) the company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration; or
- (b) the company enters into a transaction with that person for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by the company; and
- (c) in either case, the transaction concerned
 - (i) is an insolvency transaction; and
 - (ii) is entered into within the vulnerability period.

(2) A company does not enter into an undervalue transaction with a person if

- (a) the company enters into the transaction in good faith and for the purposes of its business; and
- (b) at the time when it enters into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

- (3) A transaction may be an undervalue transaction notwithstanding that it is entered into pursuant to the order of a court or tribunal in or outside the Virgin Islands.
- (4) Where a company enters into a transaction with a connected person within the vulnerability period and the transaction falls within subsection (1)(a) or subsection (1)(b), unless the contrary is proved, it is presumed that
 - (a) the transaction was an insolvency transaction; and
 - (b) subsection (2) did not apply to the transaction.'

[36] The Claimants plead that Ortland and Pitkin were connected persons, that the transfer fell within the 'vulnerability period' and that the transfer was an 'insolvency transaction.' There is no issue as to any of that.

[37] The Claimants go on to plead that the cash consideration received by Ortland for the transfer was nil and that the value of the consideration provided by Ortland was in excess of US\$16 million. It is (unnecessarily) alleged in the amended statement of claim that Ortland did not enter into the transaction in good faith and for the purposes of its business and that there were no reasonable grounds for believing that the transaction would benefit Ortland. The Claimants rely upon the value attributed to Ortland's interest in the capital account statements for the third quarter of 2008 in support of an allegation that Ortland's interest was US\$16,709,109 but they rely in the alternative on their own commissioned valuation in support of an allegation that the value of the interest was US\$15,776,517 as at 1 October 2008. Finally, the Claimants say that they make no admissions with regard to any allegation by Pitkin that the consideration for the transfer was Pitkin's outstanding liabilities under the LPA, but even if (which they do not admit) the value of Ortland's commitment was, as they put it, US\$3,415,978, they say that that was significantly less than the value of the consideration provided by Ortland to Pitkin.

Pitkin's case

[38] Pitkin's case is embodied in a re-amended defence dated 5 September 2011. The document sets out various of the terms of the LPA which I have summarized above (although the forfeiture

clause²³ is misconstrued); relies upon the restrictions on transfer as reducing the value of Ortland's interest; and pleads that the consideration received by Ortland was not significantly less than that which it provided to Pitkin. In relation to this last contention, Pitkin pleads that the transfer was effective as of close of business on 1 October 2008 and says that, following the collapse of Lehman Brothers shortly before that date liquidity was almost non-existent and book values wholly unreliable. In addition, it is pleaded that Ortland's interest in the fund consisted of highly leveraged investments, with a corresponding increase in risk and volatility. The re-amended defence pleads that the interest falls to be appraised as at 1 October 2008 by reference to (1) its 'calculable value', which depends in turn on the calculable value of the underlying investments in the fund; (2) Ortland's inability to meet future calls, if made; (3) the limited pool of potential transferees; (3) the general climate of financial unease; and (4) the fact that any disposal would have had to have been on a forced sale basis. For these reasons, it is pleaded that the interest had a nil value; or that it was impossible to place a value upon it; or that it was less than the value of being relieved from the obligation to meet further calls. Pitkin pleads that as at the date of actual transfer, no Treasurer's Reports later than that for the second quarter of 2008 had been received, that that had been rendered unreliable by the collapse of Lehman Brothers and that the values given in the Treasurer's Reports were book or carrying values (with the exception of the 50% reduction in the value of HD Supply). Finally, Pitkin says that Ortland entered into the transaction in good faith and for the purposes of its business and with reasonable grounds for believing that the transaction would benefit the company.²⁴

[39] The Claimants put in an amended reply, but I hope I will be forgiven if I say that it consists largely of argument and I do not think it is necessary to set out any of its terms in this judgment.

Is the transfer caught by section 246(1)?

[40] The structure of section 246 is, first, to define, in subsection 246(1), an undervalue transaction. Although subsection 246(2) is worded as if it were a standalone definition of the set of all

²³ clause 5.5(d)

²⁴ in breach of the general principles of pleading, the re-amended defence purports to rely on Mr Gudmundsson's witness statement of 29 July 2011

transactions which are not undervalue transactions,²⁵ in my judgment and in the context of section 246 taken as a whole it is to be read as providing an exception for a certain class of transactions which would otherwise be caught by subsection 246(1). It is saying that, despite the fact that a transaction satisfies one or more of the criteria in subsection 246(1), it is to be treated as falling outside the ambit of subsection 246(1) if it satisfies the tests in subsection 246(2). If this is correct as a matter of construction, it must follow that subsection 246(2) has no application to a transaction unless it would otherwise fall within subsection 246(1). It must further follow that the task of the Court, when presented with an allegation that a transaction is caught by section 246, but to which a response is that the transaction is saved by subsection 246(2), is first to determine whether it falls within subsection 246(1) and then to go on to consider whether it is saved by the exception in subsection 246(2).

[41] At trial, the debate revolved primarily around the question whether the transfer was caught by subsection 246(1)(b): in other words, whether the value of the supposed consideration passing to Pitkin was significantly less than the value of the consideration received. I raised the question whether it might not be the case that the transfer fell foul of subsection 246(1)(a). It seemed to me that such a case was open to the Claimants on their amended statement of claim²⁶ and Mr Collings QC did not contend that it was not. Since, however, the point took the parties somewhat by surprise, I allowed time for them to put in written submissions dealing with it and I have since received helpful further submissions dealing with the issue.

[42] As a matter of construction, it seems to me that subsection 246(1) is dealing with, or is designed to catch, two different species of transaction. The first, covered by subsection 246(1)(a), includes transactions in respect of which the company receives nothing in return for its part in the transaction.²⁷ That will obviously embrace gifts (expressly mentioned in the subsection), but it also covers any 'transaction' which 'provides for' the transferring company to receive 'no consideration.' The latter category is obviously intended to catch 'transactions' which do not have the quality of

²⁵ read literally It would, for example, include the purchase of materials to enable the completion of a contract

²⁶ paragraph 15 of the amended statement of claim reserves the Claimant's position whether any consideration passed from Pitkin to Ortland

²⁷ section 246 is not confined to asset transfers; its terms are wide enough to catch transactions under which, for example, the company undertakes obligations on behalf of a third party or grants right to a third party over property of a company, or releases a third party from obligations owed to the company

pure and simple gifts, as the words 'or otherwise' make clear, but which are 'transactions' entered into by a company, not being gifts, whose terms provide for the transferring company to receive no consideration. It seems to me that the latter expression must be read as including transactions whose terms do not provide for the transferring company to receive any consideration, since a transaction expressly *providing* for a transferee to give no consideration would, in my view, be an extremely rare bird.

- [43] Subsection 246(1)(b), which is a true alternative to subsection 246(1)(a),²⁸ is plainly designed to catch transactions which do provide for the transferring company to receive consideration, but where the value of that consideration is significantly out of balance with the value of the consideration received by the company. This category obviously covers, and is probably confined to, contracts, although it is not necessary for me, for present purposes, to express a view on the latter point.
- [44] Having considered subsection 246(1) as a whole, the first question is what transactions, not being gifts, are covered by subsection 246(1)(a). In my judgment it covers any transaction under which no consideration is to be received by the company in question that cannot be described as a gift. For example, a promise under seal to release a director from a restrictive covenant could not be properly described as a gift, yet it would clearly be a 'transaction' and would not be supported by consideration, or at any rate not by valuable consideration. It would therefore fall within section 246(1)(a). In the present case there was clearly a transaction, under which Ortland parted with a valuable asset. The transaction is embodied in the transfer agreement, whose principal terms I have summarised in paragraph [31] above. None of those terms, in my judgment, provides for Ortland to *receive* any consideration, whether from Pitkin or from any other person.
- [45] It is true that by a combination of clause 2 of the transfer agreement and clause 10.1(d) of the LPA Pitkin 'succeeded to' all the rights and obligations of Ortland under the LPA and I accept that the practical effect of that was that Ortland was relieved of any future performance of its obligations under the LPA, but I do not accept that the terms of the transaction were such that Ortland

²⁸ as demonstrated by the introductory word 'or'

‘received consideration’ from Pitkin under it within the meaning of section 246(1)(a).²⁹ No term of the transfer agreement provided that Ortland should receive any consideration. Pitkin paid Ortland no money, agreed to transfer or confer upon to Ortland no benefit and made Ortland no promises. The effect of the transaction was that Ortland parted with the interest for nothing.

[46] If the owner of valuable property, but which is saddled with an onerous obligation, agrees to transfer it on the understanding or even on the promise that the transferee will perform the obligation the transferor cannot be heard to say that he has *received* anything for the transfer. That will be so even if the obligor releases him from the obligation. The transferor has been relieved of an obligation, but he has not received any consideration for the transfer of the valuable asset. The transferee takes the asset in the same state and with precisely the same value as it was held by the transferor at the moment of transfer and pays nothing for it. In point of law the transfer is a gift. Even if the gift is made conditional upon the transferee’s promise to indemnify the transferor against future liabilities in respect of the property, the transaction remains one of gift, not of bargain and sale.

[47] An example may make this clearer. Assume that an insolvent company is the owner of a dwelling house which it makes available to its CEO as his residence. The property is worth US\$5 million, but is encumbered with a mortgage for US\$1 million. The company transfers the property to the wife of the CEO, who undertakes to keep down the mortgage and indemnifies the company against any future liabilities under it. The mortgagee releases the company from its covenant. The company has thus transferred its equity in the property worth US\$4 million to the CEO’s wife. If the question is asked what consideration the company has received for the transfer the answer, in my judgment, is nothing³⁰.

[48] However, I accept the submission of Mr Collings QC that if it appears that Ortland’s interest in the partnership had no value, then section 246 is not engaged at all. I also accept his submission that it is for the Claimant liquidators to establish the value of the asset at the relevant time. That

²⁹ the recital in the transfer agreement that Ortland had received other good and valuable consideration in addition to ‘the premises’ was unsupported by any evidence that it had done so and can be ignored for present purposes

³⁰ Mr Russen QC has referred me to **Mansukhani v Sharkey** (1992) 24 HLR 600, which is consistent with this reasoning

requires an examination of the evidence of value which was put before the Court on this application.

The Expert evidence

[49] Ms Pamela O'Neill ('Ms O'Neill') gave evidence for the Claimants. Mr Daniel Ryan ('Mr Ryan') gave evidence for Pitkin. Each is impressively qualified and each gave her/his evidence with care and complete candour. I am grateful to them both for the assistance which they gave to the Court.

[50] Ortland's interest was a 3.69% limited partnership share in the fund. I have summarised above the principal provisions of the LPA affecting this investment. The fund's assets consisted of shares in three companies, which had been acquired in concert with other investors and private equity funds between July and August 2007 with the assistance of significant borrowings. Ms O'Neill described them as 'highly leveraged.' Mr Ryan's figures, which were not challenged, showed that of the aggregate purchase price of the underlying companies, some 75% was debt funded. Specifically, the fund held 7.8% of the shares of a company called US Foodservice ('USF'); 9.4% of ServiceMaster; and 4.8% of HD Supply ('the equity investments'). These companies had thus been taken private, which meant that there was a dearth of publicly available information for the experts to work on at trial. The fund also held a loan investment, which hardly featured in the expert evidence and of which Ortland's share stood in the Treasurer's Report for 1 October 2008 at US\$200,775. The experts agree that this figure needs to be added to the values of the fund's underlying investment in the three companies.

[51] The experts were agreed on the basic approach to be taken to the valuation of the fund's equity investments. Given the fact that they are not listed and that only limited financial information was publicly available, they agreed that a 'Market Approach' was the only available valuation tool. Essentially, this required the expert to calculate an appropriate earnings multiple by comparing the market capitalisation of comparable quoted companies to their earnings and then applying this multiple to the known earnings of each underlying company. In this way (a) an enterprise value could be established for each underlying company, from which (b) an estimate could be made of the value of the fund's interest in each underlying company, from which (c) an estimate could be

made of Ortland's 3.69% interest in the fund. Although their figures differed significantly there was a fair measure of agreement between the experts as to the outcome of step (a) but their methodology and thus their valuations diverged sharply at steps (b) and (c).

[52] Ms O'Neill took the price paid for each underlying company on their respective buyouts as her base enterprise value. She then took the earnings before interest, tax, depreciation and amortisation ('EBITDA') for each underlying company for the preceding twelve months as disclosed in the relevant Treasurer's Report. By dividing the amount actually paid for underlying company by the EBITDA she was able to obtain a theoretical earnings multiple relative to the acquisition price. She then compared this figure with the earnings multiples³¹ of her selected comparable companies, which established that the fund and its co-investors had paid a premium over market value for each company. She expressed this premium as a percentage of her market derived earnings multiple ('the premium percentage').

[53] When valuing each underlying company at the agreed valuation date of 1 October 2008³², Ms O'Neill arrived at an earnings multiple for each underlying company based upon the median of her selected comparable companies' earnings multiples as derived from Bloomberg as at 1 October 2008. She applied her premium percentage to these figures (in other words she assumed that each underlying company should still be valued at a premium to the market) to reach an enterprise value for each underlying company. From that value she deducted debt to arrive at an equity value for each underlying company. She then valued the fund's share of each company's equity value on a pro rata basis and Ortland's share of the fund's holding by applying its percentage holding in the fund, which she expressed as 3.7%. The result of these calculations (after some adjustments subsequently agreed between the experts) was that Ms O'Neill valued Ortland's interest in the fund (including the US\$200,000 referable to the Credit Co-Investment Fund) as at 1 October 2008 at US\$15.4 million. She considered that Ortland's contingent liability to make further capital contributions was to be ignored since, in her view, any further capital contribution would be reflected in a corresponding increase in the value of the overall holding.

³¹ derived from Bloomberg

³² Mr Collings QC argued that the value should be taken at 9 January 2009, but, as I have pointed out, Pitkin's defence contends that the correct date is 1 October 2008

- [54] Although Mr Ryan carried out his base valuations (before adjustments for illiquidity) using both the relevant EBITDA and EBIT³³ of the underlying companies, he subsequently agreed at the meeting of experts that EBITDA was the most appropriate measure and in what follows I shall therefore ignore his EBIT-based calculations. Mr Ryan first established an implied earnings multiple for each underlying company by dividing the acquisition price by EBITDA. He then examined the changes in the earnings multiples of his chosen comparable companies between the date of acquisition of each comparable company and 1 October 2008 and adjusted the opening earnings multiple for each underlying company by the same percentage. Taking the earnings of each underlying company at 1 October 2008 and applying his adjusted earnings multiple enabled him to arrive at an enterprise value from which he deducted debt to arrive at an equity value for each underlying company as at 1 October 2008. The result of these calculations³⁴ (after adding in the US\$200,000 for the Credit Co-Investment Fund) was to give an unadjusted equity value for Ortland's interest in the fund as at 1 October 2008 of US\$12.5 million, as against Ms O'Neill's US\$15.4 million.
- [55] Mr Ryan carried out a rough cross check based upon the overall movement of the Standard and Poors 500 Index ('S&P') between the acquisition date of each company and 1 October 2008 and applying that to the acquisition price of each company. After carrying out that calculation he deducted debt and reached a figure of US\$2.7 million for Ortland's proportionate interest in the fund at 1 October 2008. Ms O'Neill satisfied me that Mr Ryan's methodology in reducing the enterprise values of the underlying companies by the S&P movement and deducting debt from the resulting figures was incorrect. The correct approach was to deduct debt from the enterprise value to arrive at a figure for equity and adjust that figure by the S&P movement. On that basis, Mr Ryan's S&P method produces a figure of US\$12.8 million – remarkably close to his original calculation.
- [56] Mr Ryan also performed a calculation based upon an assumption, which he derived from an analysis produced by an enterprise called Cogent Partners ('Cogent') and which included the assertion that the average high bid for both buyout and venture secondaries continued the first half [of 2008] decline and fell in the second half to 61% of NAV. Reducing the carrying value of the

³³ earnings before interest and tax

³⁴ at the meeting of experts Mr Ryan agreed certain adjustments to his figures but they were self cancelling and may be ignored

fund's interest at 30 September 2008 by that percentage and prorating for Ortland's 3.69% holding, he arrived at a figure for the Ortland interest of US\$10.3 million.³⁵

- [57] Both experts agreed that the value of HD Supply, when calculated on the market method by reference to comparables, was nil, although they agreed that that did not mean that it was valueless. The discrepancy, therefore, revolves around their different treatment of Servicemaster and USF. Ms O'Neill's market derived comparables produced an earnings multiple for Servicemaster as at 1 October 2008 of 12.32%, while the figure used by Mr Ryan was 7%. Ms O'Neill's corresponding earnings multiple for USF was 8.915, while Mr Ryan's was 13.1%. On the other hand, Ms O'Neill's EBITDA for Servicemaster at 1 October 2008 was US\$524.6 million, while Mr Ryan's was US\$570.4 million. The corresponding figures for USF were US\$663.6 million (Ms O'Neill) and US\$512.1 million (Mr Ryan).
- [58] Not only did the experts use different comparables, they used different methods of arriving at their preferred earnings multiple. Ms O'Neill used the median figure to arrive at her market based earnings multiples, while Mr Ryan used an average. There was debate as to which was the more appropriate method, but I do not feel able to resolve it by attempting to analyse the material relied upon by each expert. Similarly, there was a difference between the materials used to establish earnings figures. Ms O'Neill used last 12 month figures derived from the Treasurer's Reports, while Mr Ryan relied on published financial statements which, because they were compiled using different year ended dates, had to be adjusted. Each method had its separate virtues. Use of last 12 month figures brought consistency, while financial statements provided fuller information. Again, I am unable to judge which method is to be preferred, since I have no sufficiently comprehensive reasoning from the experts to enable me to make this choice.
- [59] As can be seen from paragraph [57] above, some of the terms in the equations relied upon by each expert favour the party on whose behalf she/he has given evidence and others are to that party's disadvantage. I cannot decide on the evidence before me which is the absolutely 'right' term in each case. In any case, I think that it would be wrong for the Court to carry out the exercise of examining (even if it had the material to do so) each rival pair of terms, choosing those it feels are

³⁵ If one includes the US\$200,000 debt fund interest

most appropriate and then reworking the analysis. It seems to me that that would involve the Court deconstructing the evidence before it and acting as its own expert. In the light of the type of evidence given by each expert and the element of professional judgment that has gone into the selection of the figures upon which they have based their conclusions, I have to take a broader approach than that and assess the expert evidence overall and then decide which of the conclusions offered by each of them are to be preferred. That does not mean that I cannot prefer the methodology of one expert over that of the other. It means merely that I should not attempt to substitute my own judgment for that of the experts where I have absolutely no material upon which to make a choice, as is the case in respect of the matters to which I have referred above.

[60] In deciding which valuation to accept, I am struck by the correlation between Mr Ryan's results, as adjusted by Ms O'Neill, using the overall decline in the S&P Index and his results based upon his chosen market comparables. It seems to me that it is more probable than not that they represent the unadjusted value of the three underlying companies as at 1 October 2008 than do Ms O'Neill's calculations. It seems to me that to carry over a premium paid on acquisition into a valuation as of 1 October 2008, immediately after the credit crunch had begun and after Lehman Brothers had filed for bankruptcy, merely by way of assumption (as Ms O'Neill frankly admits in her report) is less likely to produce a current market value than the approach (and adjusted cross check) of Mr Ryan, which relies upon actual market evidence without making adjustments based upon an unsubstantiated assumption that whatever factors prompted the buyout teams to pay a premium when the underlying companies were acquired continued to operate to affect their enterprise value in October 2008. I therefore prefer Mr Ryan's approach (as adjusted in the S&P case by Ms O'Neill). Having preferred his approach, for the reasons I have given, I am also going to adopt his averaged earnings multiples and his EBITDA figures because, having no means of preferring one term to another, it seems to me that, having preferred the overall approach of Mr Ryan, it makes sense in these circumstances to accept the variables upon which he relied. I therefore find that the unadjusted value of Ortland's interest in the fund as at 1 October 2008 was US\$12.75 million (being the midpoint between Mr Ryan's market valuation of the Ortland interest at US\$12.5 million³⁶ and the adjusted S&P based valuation of US\$13 million³⁷).

³⁶ US\$12.3 million plus US\$200,000 for the debt interest

³⁷ US\$12.8 million plus the US\$200,000 debt interest

- [61] The next question is whether a discount should be applied to this figure to reflect the bleak economic/financial outlook in October 2008. I was referred to and the experts were asked about the CBOE Volatility Index ('VIX'), which demonstrates that there was high volatility in the markets in the third quarter of 2008. Ms O'Neill accepted in cross examination that that was not a good time to sell a company. But she says that in applying contemporaneous market based earnings multiples one is already pricing in market uncertainty and I accept this evidence. The difference, in other words, between the book value of Ortland's investment (US\$16,768,601) and its unadjusted value as at 1 October 2008 (US\$12.75 million) already incorporates market uncertainty and volatility. In my judgment, therefore, Ms O'Neill is right to say that there is no need to make a further adjustment for gloomy economic and financial outlook.
- [62] As to marketability, or liquidity, it is true that Mr Emil was of the view in October 2008 that investments like those of Ortland in the fund were impossible to sell. But he was speaking as a creditor of a highly indebted and insolvent borrower. There was some evidence, in the form of the Cogent analysis and some transfers evident from successive Treasurer's Reports, of a secondary market for this type of investment and experience shows that there is always some market for any investment. I would nevertheless accept, if I thought it was material, that it might be very difficult to offload the Ortland share in a hurry at otherwise than a fire sale price and I bear in mind the restrictions upon transfers contained in the LPA. The answer to all of this, however, is, in my judgment, that the partnership interest was designed as and intended to be held as a long term investment and the Gudmundssons must be taken to have realised as much when they caused Ortland to make it – see the health warning summarised in paragraph [11] above. Its value to Ortland was as a long term investment. There was no reason to realise it in a hurry or at all. Had it been there when the company went into liquidation the liquidator could simply have waited until it fell in. If he wished to make a speedy realisation, the asset might have to be discounted, but there would be no compulsion upon him to do so. If a capital call had been made, he would have had to decide how to deal with it – whether by negotiation with the General Partner or otherwise. None of that, in my judgment would have affected the value of the investment as at 1 October 2008.

[63] Nor do I accept, if indeed it was the case, that the fact (if true) that no market except, perhaps, on bargain basement terms, existed for this investment in October 2008 means that it had no, or only nominal value. A married couple may own their home in equal shares as tenants in common. Their interests are unsaleable separately. That does not make them valueless. It is simply that they are to be taken to have agreed that they will only realise them together and by agreement. Ortland was holding a long term investment giving it an indirect interest in valuable underlying assets which would release value either when the underlying companies became subject of IPO's or on dissolution of the partnership after 21 December 2014. Because of the restrictions on transfer Ortland knew that its return would come when the value of the underlying companies was unlocked. In other words, it had bargained for liquidity in the future. It is, with respect, unreal to suggest that had the General Partner invited Ortland, on 30 September 2008, to surrender its interest on payment of one cent, it would have agreed to do so on the grounds that it was worthless. Yet that is what the submission that the interest had no value because it was not immediately marketable amounts to.

[64] It is true that there was an exposure to a future capital call, which Ortland was in no position to meet and that the General Partner had remedies available to it should Ortland default. In theory that could have meant the loss of half the investment, although it is clear that the remedies of the General Partner were discretionary and it must be seriously doubted whether they would have been pursued *à l'outrance* had Ortland defaulted. Be that as it may, there have been no capital calls since March 2008 and none in pursuit of acquisitions since August 2007. Given the stagnation in the investment market it is a reasonable inference and I find that the general consensus among the limited partners has been and was at 1 October 2008 that there should be no further investment for the foreseeable future. Ms O'Neill said that any capital call would be offset by a corresponding increase in the value of the interest. While this might be true in any given case, it is not necessarily the case. But whether it is or is not the case, the question is whether the existence of the liability would depress the value of the interest in Ortland's hands as at 1 October 2008. I was presented with no market based evidence that it would have had any such effect and I accordingly find that it would not have had.

[65] Mr Ryan gave generalised evidence that the combination of lack of control, adverse market conditions and the forced circumstances of any sale which Ortland might have attempted, together with the capital commitment, would depress the value of the Ortland interest by a factor of between 50% and 75%. At one point he said that the value, depending on relevant external factors, could be anywhere on a scale from one to a hundred. He did accept, however, that the least Ortland could have expected to have achieved on a sale at 1 October 2008, giving full weight to all the price depressing factors upon which he relied and including relief from the liability for further capital contributions, would have been US\$3.1 million.

[66] Broadly speaking, therefore, I prefer the evidence of Ms O'Neill to that of Mr Ryan on the question of discount and find that the value of the interest at 1 October 2008 was an undiscounted US\$12.75 million.

Conclusion on subsection 246(1)

[67] In my judgment, therefore, the transfer was an undervalue transaction within the meaning of subsection 246(1)(a). Had the transaction fallen within subsection 246(1)(b), which in my judgment and for the reason which I have given, it did not, then it would have been caught by subsection 246(1)(b), on the grounds that the disparity between the consideration given by the company (US\$12.75 million) and that received (on the assumption that the consideration received was relief from a contingent liability which is to be valued at the maximum conceivably possible of US\$3.2 million) was significantly in Pitkin's favour. Even if Mr Ryan's net figure of US\$3.1 million were the right one, the transaction would still fall foul of subsection 246(1)(b).

Subsection 246(2)

[68] Pitkin relies upon subsection 246(2). Since Pitkin is a connected party, there is a presumption that it does not apply. In my judgment there is no need for the Claimants to rely upon the presumption: the evidence clearly shows that this was not a transaction entered into in good faith and for the purposes of Ortland's business and there were no grounds at all for thinking that it would benefit Ortland.

- [69] The case put by Mr Gudmundsson was that Ortland did not have the means to pay any contingent capital call and that the transfer was made to save Ortland from this risk. This contention will not bear scrutiny. Ortland could not repay KBL what it owed. That remained the position when Ortland was wound up. The contingent liability made no difference at all to the fact of Ortland's insolvency. As at 9 January 2009 Ortland had no business. It cannot, therefore, have been the case that the transfer was made for the purposes of Ortland's business. Nor can there have been any grounds for believing that making a gratuitous transfer of an interest worth US\$12.75 million would benefit Ortland. Even if a capital call for the full outstanding amount were made and Ortland defaulted and even if the General Partner had exercised the lien in full, Ortland would still have been left with an asset worth over US\$6 million – whether or not the General Partner had exercised its rights to bring legal proceedings or to place Ortland in liquidation, which, given the self help remedies available to it I regard as unlikely in the extreme.
- [70] Apart from all that, this explanation, which did not surface until Mr Gudmundsson made his witness statement on 29 July 2011, will not sit with the narrative set out in paragraphs [17] to [33] above. At no point in the exchanges of emails set out in those paragraphs is there even a hint that the purpose of the transfer was to protect Ortland. On the contrary, once Mr Emil said KBL was not interested in the asset, Mr Gudmundsson was in touch with Mr Broberg about transferring the asset 'to another investment vehicle.' Mr Gudmundsson wanted to know the value of the asset but he does not mention the possibility of – let alone any anxiety about – a future capital call.
- [71] It is true that there is a reference to the management of capital calls through 'CS account (Operations)' in Mr Neman's email of 8 December 2008 from Mr Neman to Mr Adler and that Mr Auerbach told Mr Neman that D&P were checking on the outstanding capital commitment. It is also true that Ms Burren asked Mr Neman to let Kendris know the amount of the outstanding capital commitment. Mr Olafsson said that Mr Neman confirmed the outstanding amount of the commitment, but there is no document recording that. Nor is there any evidence that CDR had any anxiety about Pitkin's ability to make any future calls, let alone that it made any request for any evidence of such ability beyond the warranty in the transfer agreement that Pitkin had net assets of US\$1.5 million.

[72] While it is fair to say that these exchanges are evidence that Pitkin had some interest in the amount of outstanding capital commitment (which could in any event be calculated as a matter of pure arithmetic) there is nothing in any of the material which has been put in evidence to corroborate the suggestion that the motive for the transfer was the protection of Ortland. Even making the most generous allowances for informality and thus excusing the absence of board minutes evidencing the thought processes behind the transfer, it is astonishing, if that were indeed the Gudmundssons' motivation, that no trace of it can be found reflected in any of the contemporaneous materials. Mr Olafsson could not support or corroborate any such motivation, since he gave clear evidence that he was instructed only after the decision to make the transfer had been made and that his role was limited to execution. That is surprising in itself. If the purpose had been to save Ortland, one might have expected the Gudmundssons at least to have discussed the principle of the thing with Mr Olafsson. After all, he describes himself as their legal adviser and executed the transfer agreement as attorney for Ortland – a position which he accepted imposed upon him fiduciary duties.

[73] What plainly happened, and I find, is that once KBL had announced itself uninterested in the asset the Gudmundsson's decided that they might as well have it for themselves. That was why the transfer was made. The position of Ortland, as the absence of any mention of it in the documents and Mr Olafsson's passivity in the matter make clear, was not considered. Pitkin fails to rebut the presumption in subsection 246(4).

Conclusion

[74] The Claimants therefore succeed in establishing that the transfer was an undervalue transaction within the meaning of section 246. I will hear the parties on a date to be fixed on the question of the appropriate order to be made under subsection 249(1)(b) of the Insolvency Act, 2003 and on the question of costs.

Commercial Court Judge
14 October 2011