

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

**CLAIM NO: BVIHCV COM) 96/2011
IN THE MATTER OF HAMILTON LANE PRIVATE EQUITY PARTNERS LP**

BETWEEN:

RANDY STILMAN

Claimant

and

THE ATTORNEY GENERAL

First Defendant

THE FINANCIAL SERVICES COMMISSION

Second Defendant

Appearances: Ms Claire Robey for the Claimant
Ms Dian Fahie-deCastro for the second Defendant
The first Defendant was not represented and did not appear

JUDGMENT

[2011: 2, 9 June]

(Application by liquidator of Limited Partnership asking that dissolution be declared void and that partnership be restored to Register of Limited Partnerships – whether Court has jurisdiction to grant such relief – whether alternative relief to be granted)

- [1] **Bannister J [ag]:** This is an application brought by the Liquidator of an International Limited Partnership called Hamilton Lane Private Equity Partners LP ('the Liquidator', 'the Partnership') for orders that the dissolution of the Partnership be rescinded and 'declared void'; that the Partnership be restored to the Register of Limited Partnerships ('the Register'); and/or for a declaration that the Partnership be deemed never to have been dissolved and struck off the Register.
- [2] On 18 January 2011 the Partnership's general partner adopted a written Plan of Dissolution pursuant to section 105 of the Partnership Act 1996 ('section 105', 'the Act'). The Plan of

Dissolution appears to have contained the seven statements which it was required by section 105 to incorporate. One of those statements was that the winding up of the Partnership would commence upon the date when articles of dissolution were submitted to the British Virgin Islands Financial Services Commission or on such later date, not more than thirty days later, stated in the articles of dissolution. On the following day, 19 January 2011, a document was executed on behalf of the general partner stating that it had authorized the Plan of Dissolution, which was then set out *in extenso* (including the provision for commencement on such later date as might be set out in the articles of dissolution – no such later date being specified) but with the addition of the following wording:

‘The Dissolution of the Partnership at this time is required by the terms of the Memorandum and Articles of Partnership and was authorized by the General Partner of the Partnership on 18 January 2011.’

The document was headed ‘Articles of Dissolution’. Subsection 105(2) of the Act requires a limited partnership to execute articles of dissolution after approval of any plan of dissolution.

- [3] As required by subsection 105(3) of the Act the Articles of Dissolution were submitted to the Registrar of Corporate Affairs and notices were published in the Virgin Islands Gazette (on 3 March 2001) and in the BVI Beacon (on 10 March 2011) containing the particulars required by the subsection: that the Partnership was in dissolution¹; that the dissolution commenced on 16 February 2011; and giving the name of the Liquidator. It can be inferred from these notices that 16 February 2011 was the date upon which the articles of dissolution were registered by the Registrar, because subsection 105(4) provides that a winding up and dissolution commences on the day the articles of dissolution are registered by the Registrar or on a later date not more than thirty days afterwards if specified in the articles of dissolution (none was).
- [4] Subsection 105(5) requires the liquidator of a limited partnership ‘upon completion of a winding up and dissolution’ to send a statement to the Registrar informing her that the winding up and dissolution have been completed in accordance with the Act. In anticipation of having to submit such a statement the Liquidator signed, but did not date, the appropriate document and left it with the Partnership’s registered agents, expecting that they would retain the document until he had

¹ actually, the notice in the Gazette said that ‘the Company is being dissolved’, but nothing turns on that

completed his task and told them to submit it to the Registrar. There is no evidence that the Liquidator gave any express instructions to that effect. For whatever reason, the statement was in fact submitted to the Registrar on 21 March 2011. On the same day the Financial Services Commission ('the FSC') issued a certificate of dissolution pursuant to subsection 105(5)(b) certifying that the Partnership had been dissolved on that day. The certificate further certified that all the requirements of the Act in respect of dissolution had been complied with by the Partnership. The latter certification appears to have been based upon subsection 105(6)(a), which states that a certificate of dissolution is *prima facie* evidence of compliance with all the requirements of the Act in respect of dissolution, but there was no way in which the FSC could have had actual knowledge that all the Act's requirements in respect of dissolution had been complied with and that particular certification is not, in any case, a requirement of the Act.

- [5] Subsection 105(6)(b) provides that the dissolution of a limited partnership is effective from the date of the issue of the Registrar's certificate – so, in this case, on 21 March 2011.
- [6] Subsection 105(5)(a) also requires the Registrar, upon receipt of a statement of completion of a winding up and dissolution, to strike the relevant limited partnership off the register. There is no specific evidence before me that any such striking off has actually been effected, but I think that it is to be inferred from the issue of the Certificate.
- [7] In his first affidavit sworn in support of this application the Liquidator explains that pursuant to Article 2.6 of the Partnership's Articles of Association the Partnership was to continue in existence until (in the events which happened) 17 November 2010 (some two months before the articles of dissolution were executed). Paragraph 1 of the Plan of Dissolution states that 'since the Closed End Period (under Article 2.6) had expired, the Articles of Association of the Partnership 'required that the Partnership be dissolved, liquidated and terminated.' This last was a reference to the language of Article 10.2, which provides for termination of the Partnership on a number of grounds, the first listed being the expiry of the Closed End Period.
- [8] In his affidavit evidence the Liquidator explains that the Partnership is invested in private equity funds and companies. He says that his fear is that, if the Partnership is not, as he puts it, re-instated it will be extremely difficult, if not impossible, to continue the divestment of these assets and complete the liquidation in a manner that is fair to the limited partners. Specifically, he says

that if the Partnership is dissolved before the liquidation process is complete, all the investments held by the Partnership would need to be distributed proportionately to all of the limited partners, a process which, in his view, would be chaotic, time-consuming and expensive, depleting the ultimate proceeds received by the limited partners.

- [9] I do not find this reasoning easy to follow, but that may not be important. What is important is to examine the scheme of the Act in order to ascertain what is the effect of the issue of the certificate and the striking off.

The Scheme of the Act

- [10] Section 114(1) of the Act repealed the Partnership Act of 1888 (Cap 295). That Act was a remarkable piece of legislation which consisted of four sections providing that certain trading relationships did not, without more, make the parties to them partners and one section providing for the subordination in the estate of a bankrupt trader of a loan creditor who had stipulated for interest calculated by the borrowers profits or for a share of those profits. Similar provisions would come to be found in the English Partnership of 1890 and they codify earlier common law rules for determining the existence of partnership.
- [11] Sections 1 to 46 of the Act codify existing partnership law. Sections 47 to 109 deal with the new concept of limited partnerships and the remaining sections of the Act deal with various miscellaneous matters. By subsection 47(3) those sections of the Act which codify existing partnership law² apply to limited partnerships, but 'subject to' sections 47 to 108. I take this to mean that in the event of any conflict between a provision contained in any of sections 1 to 46 and the provisions dealing with limited partnerships, the latter provisions are to prevail, but otherwise limited partnerships are as much covered by sections 1 to 46 as are what might be called the traditional form of partnership (and which I am going to refer to in this judgment merely as partnerships).
- [12] Sections 34 to 46 of the Act deal with the dissolution of partnerships. By section 34, a partnership is dissolved by effluxion of time, by the termination a particular single adventure for which it was entered into, or by notice. Sections 35 and 36 provide for automatic dissolution on the occurrence

² sections 1 to 46

of certain events and section 37 provides for dissolution by order of the Court. Sections 38 and 39 deal with the protection of former partners from being liable on the principle of holding out after dissolution has taken place.

[13] Subsections 40(1) and 41(1) provide as follows:

'40(1) Subject to subsection (2), after the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise.

41(1) Subject to subsection (2), on the dissolution of a partnership every partner is entitled, as against the other partners in the firm and all persons claiming through them in respect of their interests as partners,

(a) To have the property of the partnership applied in payment of the debts and liabilities of the firm; and

(b) To have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm,

and for that purpose any partner or his executors or administrators may on the termination of the partnership apply to the court to wind up the business and affairs of the firm.'

[14] Sections 34 to 41 make clear the existing state of the law in respect of the dissolution of partnerships. That is, they make clear that dissolution is the termination of the *relationship* between the partners. Following the termination of that relationship, which occurs on the occurrence of any of the events which I have briefly summarized above, the affairs of the partnership are then wound up and any unfinished transactions closed out or completed. For that purpose and for that purpose only, the former partners continue to have the rights and obligations which they had before the dissolution.

[15] Turning to limited partnerships, section 2 defines a limited partnership as a partnership formed under Part VI referred to in section 47. Subsection 47(1) deals with the formation of limited partnerships:

'47(1) A limited partnership is a partnership formed by two or more persons under this Part which has one or more general partners and one or more limited partners, and a limited partnership may be either a local limited partnership or an international limited partnership.'

General partners are defined by section 2 of the Act as partners in a limited partnership who are not limited partners and limited partner means a partner in a limited partnership who does not take part in the control of the partnership business and whose liability is limited subject to the provisions of the Act. While the Act prescribes formalities for the formation of limited partnerships (section 53) and while some of those formalities are similar to those required on the incorporation of a limited company, there is nothing in the Act which provides for a limited partnership to have a separate legal personality, distinct from those of the persons who are the partners.

[16] Section 65 defines the rights of a limited partner. They are to inspect the books true and full information about the partnership and its affairs. Sub-section 65(c) is in the following terms:

'65(1) A limited partner shall have the same rights as a general partner to

.....

(c) subject to any limitation set forth in the articles apply to the court for an order that the partnership be dissolved and wound up.'

Subsection 71(4) give a limited partner the right in certain circumstances to have the partnership dissolved and wound up. It is not clear whether this right is additional to the right under subsection 65(c) or is merely explanatory of the grounds upon which an order may be sought under section 65(c). In my judgment, this right (or these rights) must be read as excluding any other right of a limited partner to bring about the dissolution of the partnership, for example, by notice under section 34(c). The right may be further circumscribed by the terms of the limited partnership's articles of association.

[17] Section 75 provides as follows:

'75. The retirement, death, incapacity, or bankruptcy or insolvency of a general partner dissolves the partnership, unless the business is continued by the remaining general partners

(a) under a right so to do stated in the articles; or
(b) with the consent of all partners.'

[18] This provision clearly overrides section 35(1). In other words, it is only in the case where one of these events affects a general partner that a dissolution occurs (unless other general partners are permitted in those circumstances to carry on the business and decide to do so). Section 76 prescribes what happens on the death of a limited partner.

[19] Section 105 is side-headed 'Procedure on winding up and dissolution'. It must be set out in full:

'105(1) The general partners of a limited partnership required or proposing under this Act to wind up and dissolve shall approve a plan of dissolution containing

- (a) a statement of the reason for the winding-up and dissolution;
- (b) a statement that the limited partnership is, and will continue to be, able to discharge or pay or provide for the payment of all claims, debts, liabilities and obligations in full;
- (c) a statement that the winding up will commence on the date when articles of dissolution are submitted to the Registrar or on such date subsequent thereto, not exceeding thirty days, as is stated in the articles of dissolution;
- (d) a statement of the estimated time required to wind up and dissolve the limited partnership;
- (e) a statement as to whether the liquidator is authorized to carry on the business of the limited partnership if the liquidator determines that to do so would be necessary or in the best interests of the limited partnership or creditors;
- (f) a statement of the name and address of each person to be appointed a liquidator and the remuneration proposed to be paid to each liquidator; and
- (g) a statement as to whether the liquidator is required to send to all partners a statement of account prepared or caused to be prepared by the liquidator in respect of his actions or transactions.

(2) After approval of the plan of dissolution, articles of dissolution shall be executed by the limited partnership and shall contain

- (a) the plan of dissolution; and
- (b) the manner in which the plan of dissolution was authorized.

(3) The general partners of a limited partnership shall submit articles of dissolution to the Registrar who shall retain and register them and within

thirty days immediately following the date on which the articles of dissolution are submitted to the Registrar, the general partners of the limited partnership shall cause to be published, in the *Gazette*, and in a publication of general circulation in the Territory, a notice stating

- (a) that the limited partnership is in dissolution;
- (b) the date of commencement of the dissolution; and
- (c) the names and addresses of the liquidators.

(4) A winding-up and dissolution commences on the date the articles of dissolution are registered by the Registrar or on such date subsequent thereto, not exceeding thirty days, as is stated in the articles of dissolution.

(5) A liquidator shall, upon completion of a winding-up and dissolution, submit to the Registrar a statement that the winding-up and dissolution has been completed in accordance with this Act and upon receiving the notice, the Registrar shall

- (a) strike the limited partnership off the register; and
- (b) issue a certificate of dissolution under his hand and seal certifying that the limited partnership has been dissolved.

(6) Where the Registrar issues a certificate of dissolution under his hand and seal certifying that the limited partnership has been dissolved,

- (a) the certificate is *prima facie* evidence of compliance with all requirements of this Act in respect of dissolution; and
- (b) the dissolution of the limited partnership is effective from the date of issue of the certificate.

(7) Immediately following the issue by the Registrar of a certificate of dissolution under subsection (5), the liquidator shall cause to be published, in the *Gazette*, and in a publication of general circulation in the Territory, a notice that the limited partnership has been dissolved and has been struck off the register.

(8) A general partner of a limited partnership that contravenes subsection (3) commits an offence and shall be liable on summary conviction to a penalty of one hundred dollars and shall be liable to the same penalty for each day or part thereof during which the contravention continues.'

[20] Subsection 105(1) is in mandatory terms. It applies where general partners are either (a) required or (b) propose under the Act to wind up and dissolve. Subject to what follows, general partners will

presumably be required under the Act to wind up and dissolve where any of the situations envisaged by subsections 34(a) (effluxion of time) or (b) (termination of single adventure) or 35 (illegality) or 37 (order of the Court) applies. It is not clear in what circumstances general partners could 'propose *under the Act*' to wind up and dissolve.

[21] The procedure envisaged by section 105, once the general partners are required or propose to wind up and dissolve, is set out in the remaining paragraphs of subsection 105(1). The process is to be carried out by a liquidator (unlike the winding up of a partnership, which is carried out by the partners themselves, unless they are at odds, in which case the Court will appoint a receiver). This would appear to mean that section 40(1) has no application to limited partnerships. The winding up process is described in subsection 105(3) as dissolution. The term is clearly being used here in a different sense from that which it bears in Part V. In Part V (and, confusingly, in subsections 65(c) and 71(4) of Part VI) the term is used to describe the termination of the partnership relationship (subject to the ongoing relationship envisaged by section 40 for the sole purpose of winding up). In section 105 (which reverses the expression 'dissolution and winding up' so that it becomes 'winding up and dissolution') it is used to describe either the process of winding up (itself described in subsection 105(3) as 'dissolution'), or something which looks very much as though it was intended to incorporate the sort of dissolution which occurs upon the completion of the winding up of a limited liability company (subsections 105(5) and (6)).

[22] The draftsman of the Act appears to have wished to give the limited partnership some, at least, of the indicia of an incorporated body. For example, the insistence upon the use of memorandum and articles and their filing; the requirement that limited partnerships should have registered agents; the keeping of a register of limited partnerships in which certain specified documents are to be filed; and the use of a liquidator to carry out the winding up. The references to striking off and dissolution appear to be part of this tendency. Be that as it may, the use of these devices and terms cannot alter the fact that limited partnerships are not incorporated entities and to say that a limited partnership is dissolved in the sense in which a limited company is dissolved is meaningless. The partnership relationship may have come to an end and its affairs may have been wound up, but no separate entity goes out of existence as a result because there was never a separate entity in the first place.

- [23] It seems to me, therefore, that there is nothing in the fact that a certificate of dissolution has been issued to prevent the general partner from continuing, through the Liquidator, the mandatory winding up process which was put in train when the Plan of Dissolution was approved. All that has happened is that a certificate that that process is now complete has been issued in error (through no fault of the Registrar of Corporate Affairs or of the FSC) and the name of the Claimant limited partnership has been removed from the Register of Limited Partnerships, something which, for the reasons I have given, was of no legal consequence so far as the ongoing existence of the limited partnership is concerned.
- [24] It is obviously undesirable, however, that erroneous certificates should be in issue or that registers maintained under statute should carry incorrect or incomplete information. Section 94 of the Act provides, among other matters, that the Governor in Council may make Regulations providing for the restoration of a limited partnership, the name of which has been struck off the register, to the register. I infer from the fact that neither party has referred me to any such Regulations that none has been made.
- [25] I do not think that that means that the Court is without power to put right what has happened. Equity has long recognized the remedy of delivery up and cancellation of documents which have been procured by fraud or which are the result of a mistake, provided that the document is wholly void.³ Similarly, a court of equity will set aside gifts made by mistake.⁴ In the present case incorrect information was by mistake supplied to the Registrar as a result of which she innocently issued a certificate which misrepresents the state of affairs as to the limited partnership and proceeded to strike its name from the register. Although it may not be possible to describe the certificate as void, in the strict sense of that term, it seems to me that in the context of publicly issued certificates and publicly maintained registers the position is analogous, since the certificate purports to record a transaction which has not taken place and thus ought not to have currency. In context, it seems to me appropriate to treat the document as if it were void. The Liquidator has not been guilty of any inequitable conduct in bringing about this state of affairs and in those circumstances, I consider that I have jurisdiction to grant the equitable remedy to which I have

³ see Snell, Equity, 31st Ed at paragraphs 12-13 and 12-14

⁴ Lady Hood of Avalon [1909] 1 Ch 476

referred, and to order the delivery up of the certificate to the Registrar of Corporate Affairs for her to cancel it. By way of necessary ancillary relief the register will be rectified accordingly.

[26] The Claimant must pay the costs of the FSC, to be assessed if not agreed.

A handwritten signature in black ink, appearing to read 'H. J. J.', written in a cursive style.

Commercial Court Judge

9 June 2011