EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2013/0017

BETWEEN:

[1] KENNETH KRYS
[2] JOHN GREENWOOD
(As Joint Liquidators of Value Discovery Partners, LP)
Respondents / Claimants

and

[1] NEW WORLD VALUE FUND LIMITED
Appellant / First Defendant

and

[2] KBC PARTNERS LP, by its General Partner, Salford Capital Partners Inc.
[3] SCI PARTNERS LP, by its General Partner, Salford Capital Partners Inc.
[4] SALFORD CAPITAL PARTNERS INC.
Respondents / Second to Fourth Defendants

Before:

The Hon. Dame Janice M. Pereira — Chief Justice
The Hon. Mde. Gertel Thom — Justice of Appeal [Ag.]
The Hon. Mde. E. Ann Henry, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Christopher Pymont, QC, with him, Mr. Ciaran Keller and Mr. Brian Lacy for New World Value Fund Limited
Mr. Ian Mill, QC for KBC Partners LP, SCI Partners LP and Salford Capital Partners Inc.
Ms. Nadine Whyte for the Joint Liquidators of Value Discovery Partners, LP

2014: January 14;
2014: May 26.

Partnership in liquidation – Articles of Partnership – Construction – Allocation of assets – Entitlements of partners to assets of Partnership in liquidation – Construction of clauses in Articles of Partnership affecting partners' entitlements – Meaning to be given to word 'sale' in phrase 'following the sale of all Investments of the Partnership' – Whether 'sale' should be given plain ordinary meaning or alternatively extended meaning so that it is read instead as 'sale or distribution in specie' – Whether sale of all Investments of Partnership had to take place during term of Partnership – Whether learned judge erred in holding that word 'sale' ought to be given extended meaning

The joint liquidators of Value Discovery Partners LP ("the Partnership" / "VDP") brought a claim in the court below to ascertain the meaning of certain words used in VDP's Articles of Partnership. The construction of the Partnership's Articles essentially determined whether KBC Partners LP ("KBC") and SCI Partners LP ("SCI") would receive a certain percentage of the net gains and profits of the Partnership, known as Carried Interest. The construction which New World Value Fund ("NWVF") contended was correct, would result in KBC and SCI not receiving Carried Interest, and NWVF's share of the Partnership's assets would be greater. The construction which KBC, SCI and Salford Capital Partners Inc. ("Salford") contended was correct, would have the opposite result – KBC and SCI would be entitled to receive Carried Interest and accordingly, NWVF's share of the assets would be less.

The case turned on the meaning of the word 'sale' in the phrase 'following the sale of all Investments of the Partnership'. NWVF argued that the word ought to be given its plain, ordinary meaning so that it refers to a sale in the trader's sense, while KBC, SCI and Salford (together, "the Salford Respondents") argued that the word ought to be given an extended meaning, so that it includes the realisation of an asset in specie during liquidation, after the end of the term of the Partnership. The learned judge held that the word ought to be given the extended meaning and that this approach was the more sensible one, commercially. Accordingly, he found in favour of the Salford Respondents.

NWVF appealed, contending that the learned judge: erred in his construction of VDP's Articles of Partnership and in his analysis of the evidence which was before him; made incorrect factual findings and placed reliance on the wrong clauses in the Articles of Partnership in order to interpret the meaning of the wording in other clauses; and reached the wrong conclusion in the circumstances.

Held: allowing the appeal, and setting aside paragraphs 1, 3 and 5 of the learned trial judge's order dated 27th June 2013, that:

1. The word 'sale' in the phrase 'following the sale of all Investments of the Partnership' should be accorded its natural and ordinary meaning and this was one of the conditions precedent to KBC and SCI receiving Carried Interest. The learned trial judge accordingly erred in construing VDP's Articles of Partnership.

2. The language of the clauses in issue in VDP's Articles of Partnership is unambiguous, and where the language is unambiguous in a contract, the Court must apply it. It is not for the Court to re-write the parties' bargain. It is where a

term of a contract is open to more than one interpretation that it will be generally appropriate for the Court to adopt the interpretation which is most consistent with business common sense.

Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 applied; Al Sanea v Saad Investments Co Ltd [2012] EWCA Civ 313 applied.

3. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is only concerned to discover what the instrument means.

Attorney General of Belize and Others v Belize Telecom Ltd and Another [2009] 1 WLR 1988 applied.

4. A court is only justified in departing from the plain meaning of words if it leads to an absurdity, that is, where the court is satisfied that a mistake has been made and is satisfied as to what has to be done to correct it. While KBC and SCI not receiving Carried Interest may seem unfair to the Salford Respondents in hindsight, it does not make the arrangement or scheme devoid of any commercial purpose or lead to a ridiculous or absurd result.

Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd [2006] EWCA Civ 1732 applied.

JUDGMENT

[1] PEREIRA JA: Value Discovery Partners LP ("the Partnership" / "VDP") was established in 2004 as a limited partnership under the laws of the Virgin Islands. The Partnership terminated on 1st July 2012 and is now in liquidation. This appeal arises from proceedings brought in the court below by the joint liquidators of the Partnership, Mr. Kenneth Krys and Mr. John Greenwood. The liquidators' claim essentially concerned ascertaining the meaning of words used in VDP's Articles of Partnership, which meaning would impact upon the entitlements of the members of the Partnership to the assets of the Partnership in the liquidation.

[2] At the time of the liquidation, the Partnership comprised the following 4 members: (i) the appellant, New World Value Fund Limited ("NWVF"), (ii) the respondent KBC Partners LC ("KBC"), (iii) the respondent SCI Partners LP ("SCI"), and (iv) the

respondent Salford Capital Partners Inc. ("Salford").[1] The Articles of Partnership of VDP defined NWVF as the Principal Limited Partner, KBC as Special Limited Partner I, SCI as Special Limited Partner II, and Salford as the General Partner.

[3] Salford's principal role as the General Partner was to manage the assets of VDP; it had exclusive conduct and control of the Partnership's business, operations and affairs. NWVF, which had been incorporated in 2002 as an 'investment vehicle', had provided practically all of VDP's assets. Prior to the transfer of these assets to VDP however, certain individuals working for Salford had provided management services to NWVF (in respect of the assets). KBC and SCI represent the interests of these individuals in the present proceedings. KBC, SCI and Salford all brought the same case both in the court below and on appeal, and I shall refer to them collectively as "the Salford Respondents".

Relevant background

[4] As mentioned above, NWVF initially held the vast majority of the assets which were later transferred to VDP. Between 17th March 2005 and 21st July 2006, a total of US$320 million in assets was transferred to VDP from NWVF. These assets consisted of mineral water businesses in the Ukraine, Georgia and the Russian Federation, and dairy, confectionary and bottled water businesses in the Balkans. SCI and KBC made nominal Capital Contributions to VDP of US$100.00 each.

[5] VDP's investments were classed into "Strategies", which were groups of investments with common characteristics. Schedule 2 of VDP's Articles of Partnership listed the 3 Strategies of the Partnership as "Water"; "Balkan Food & Beverage"; and "Other". VDP's assets were 'actively managed' by Salford during the lifetime of the Partnership; the General Partner's focus was not on getting the assets sold, but rather, on establishing management teams for the assets,

[1] The original Special Limited Partners of VDP (as is evident from the Articles of Partnership) were Eastern Venture Investments Limited and Basic Industries Investments Limited. Their interests were acquired by KBC and SCI in September 2006 and February 2007 respectively, although the identity of the underlying beneficiaries remains the same.

integrating them and restructuring them, such that they increased in value.[2] It was not in dispute that as at the date of termination of the Partnership (1st July 2012), not a single one of VDP's investments had been sold.

[6] Initially, the Partnership was to operate up until 1st July 2008 ("the Termination Date"). However, Clause 11.2 of VDP's Articles of Partnership made it possible to extend the term of the Partnership past this date, provided that certain conditions were met. Clause 11.2.1 allowed for the extension of the Termination Date by 1 year (to 1st July 2009) 'in order to permit an orderly liquidation of the Partnership Assets'.[3] Clause 11.2.3 stipulated that if the Termination Date had already been extended pursuant to 11.2.1 by 1 year, the term of the Partnership could be further extended by the General Partner after discussions with the Limited Partners, provided that the General Partner was of the view that orderly liquidation of the Partnership's Assets was not possible (during the initial 1 year extension period) due to market conditions for the sale of certain investments. Clause 11.2.3 further stipulated that the Termination Date could be extended in no event, by more than 4 years. In the circumstances, the parties extended the Termination Date to 1st July 2012, pursuant to Clause 11.2.3.

[7] Salford, as the General Partner, was to be remunerated for managing VDP's assets during the term of the Partnership. Pursuant to Clause 7.12 of the Articles of Partnership, Salford was to receive a 'Management Fee' for each Accounting Period which was 2% per annum of the weighted average of the aggregate amount (for the time being) of all of the Capital Contributions that had been made to the Partnership (not exceeding US$300 million). If however, the Termination Date of the Partnership was extended pursuant to either Clause 11.2.1 or 11.2.3 (as was the case here), then this Management Fee was to decrease to 0.4% of the weighted average of the aggregate amount (for the time being) of all of the Capital

[2] See Second Affidavit of Eugene Jaffe dated 24th May 2013, para. 13.

[3] Clause 11.2.1 could also be applied to further extend the termination date by one year if it had already been extended (by special consent of the General Partner and a Limited Partner) by 2 years, to 1st July 2010, pursuant to Clause 11.2.2. Again, the purpose of this further extension pursuant to Clause 11.2.1 would be to permit an orderly liquidation of the assets. In the circumstances however, Clause 11.2.2 was not applied.

Contributions, during the period by which the term of the Partnership was extended.

[8] The liquidation of the Partnership was to be carried out in accordance with the Articles of Partnership. The assets of the Partnership were to be distributed in a particular order and in specified proportions, and certain distributions were dependent on various conditions being satisfied. A dispute arose between NWVF and the Salford Respondents in relation to whether, the Partnership having terminated, the two Special Limited Partners (KBC and SCI) were each entitled to a particular percentage of the cumulative Net Income, Net Losses, Capital Gains and Capital Losses of the Partnership; if they were entitled to these amounts, NWVF would be left with a smaller share of the profits. In the case of KBC, this percentage was known as Senior Carried Interest and had a value of 24%, and in the case of SCI, it was known as Strategy Carried Interest and had a value of 6%. NWVF's position was that the Special Limited Partners were not entitled to Senior and Strategy Carried Interest (I shall use the term "Carried Interest" to refer generally to either one or both of these types of Carried Interest) while the Salford Respondents' position was that they were. The joint liquidators turned to the court to ascertain which position was correct and the learned trial judge, having looked at various key clauses in VDP's Articles of Partnership, made a determination that KBC and SCI were entitled to Senior Carried Interest and Strategy Carried Interest respectively. NWVF appealed.

The issues on appeal

[9] This entitlement of the Special Limited Partners to Carried Interest was essentially dependent on the interpretation of Clauses 7.2.2 and 7.2.3 of the Articles of Partnership, which came under a section of the Articles called 'Allocation of Remaining Income and Gains'. These two clauses indicated how it was to be determined whether KBC or SCI should receive Senior Carried Interest and Strategy Carried Interest, respectively. To understand these two clauses in the proper context, I shall set out the entire Clause 7.2 below.

"7.2 Allocation of Remaining Income and Gains

7.2.1 Except as provided in Clause 7.1, all Net Income, Net Losses, Capital Gains and Capital Losses of the Partnership shall be allocated between the Partners only following the sale of all Investments of the Partnership or at such other time as may be agreed by the General Partner and the Limited Partners.

7.2.2 Subject to Clause 7.1, if following the sale of all Investments of the Partnership the Annual Rate of Return of the Partnership exceeds 0%, then cumulative Net Income, Net Losses, Capital Gains and Capital Losses of the Partnership shall be allocated between the Partners by allocating the portion of each such amount equal to the Senior Carried Interest multiplied by such amount to the Special Limited Partner I, the portion of each such amount equal to the Strategy Carried Interest multiplied by such amount to the Special Limited Partner II, and the balance of such amount to the Principal Limited Partner.

7.2.3 Subject to Clause 7.1, if following the sale of all Investments of the Partnership the Annual Rate of Return of the Partnership is 0% or less and the Annual Rate of Return of at least one Strategy exceeds 0%, then the cumulative Net Income, Net Losses, Capital Gains and Capital Losses of each Strategy shall be allocated between the Partners as follows:

(a) for each Strategy for which the Annual Rate of Return exceeds 0%, such amounts shall be allocated between the Partners by allocating the portion of each such amount equal to the Strategy Carried Interest multiplied by such amount to the Special Limited Partner II, and the balance of such amounts to the Principal Limited Partner; and

(b) for all other Strategies, 100% to the Principal Limited Partner.

7.2.4 Subject to Clause 7.1, if neither Clause 7.2.2, nor Clause 7.2.3 applies, then Net Income, Net Losses, Capital Gains and Capital Losses of the Partnership shall be allocated 100% to the Principal Limited Partner." (Underlining added).

It will also be useful at this point to set out relevant provisions from Clauses 8.1 and 8.2.1:

"8.1 Priority of Distributions

Subject to Clauses 8.2, 8.3, and 8.7, Net Income, Capital Proceeds and other assets of the Partnership shall be distributed in the following order of priority (after payment of the expenses and liabilities of the Partnership):

(a) …
(b) …
(c) …
(d) …
(e) fifth, if Clause 7.2.2 has been applied, then to the Partners in the net positive amounts allocated to them pursuant to such Clause;
(f) sixth, if Clause 7.2.3 has been applied, then to the Partners in the net positive amounts allocated to them pursuant to such Clause;
(g) seventh, if Clause 7.2.4 has been applied, then to the Partners in the net positive amounts allocated to them pursuant to such Clause;[4]
(h) eighth, if Clause 7.1.7 has been applied, then to the Partners in the net positive amounts allocated to them pursuant to such Clause.

The amounts distributable to a Partner under sub-clauses (c), (d), (e), (f) and (g) above shall be decreased, in descending order, by amounts previously distributed to such Partner pursuant to Clauses 8.2.2, 8.2.3, 8.2.4, 8.2.5, 8.2.6 and 8.3.

8.2 Timing of Distributions

8.2.1 Subject to the provisions of this Clause 8.2 and Clauses 8.5 and 8.8, Net Income, Capital Proceeds and other assets of the Partnership shall be distributed in respect of the amounts under sub-clauses (a), (b), (c) and (d) of Clause 8.1 (and in that order) at any time by the General Partner acting reasonably and in good faith, and in respect of the amounts under sub-clauses (e), (f), (g), and (h) of Clause 8.1 (and in that order) at the end of the term of the Partnership or at such other time as may be agreed by the General Partner and the Limited Partners." (Underlining added).

[10] It should be noted that Clause 8.2.1 states that Net Income and Capital Proceeds and other Partnership assets were to be distributed in respect of the amounts

[4] As indicated by the learned trial judge at paragraph 23 of his judgment, something seems to have gone wrong in the drafting of Clause 8.1(g), since NWVF alone is entitled to receive an allocation under Clause 7.2.4.

under sub-clauses (e), (f), (g) and (h) 'at the end of the term of the Partnership' (the distributions under sub-clauses (e) and (f) being dependent on the application of 7.2.2 and 7.2.3). Also, both Clauses 7.2.2 and 7.2.3 included the words '… following the sale of all Investments of the Partnership …' in their opening sentences. NWVF's case hinged upon these two facts, and was straightforward – the Special Limited Partners' entitlement to Carried Interest was contingent upon both of the following two conditions being satisfied: (i) a positive Annual Rate of Return of the Partnership, and/or of a particular Strategy must have been achieved; and (ii) there must have been a sale of all Investments of the Partnership by 1st July 2012. This not having been the case (since not a single one of VDP's assets had been sold by the date of termination of the Partnership), NWVF contented that KBC and SCI were not entitled to receive Carried Interest. The Salford Respondents' case in the court below, as well as on appeal, which the trial judge accepted, was that, reading the Articles of Partnership as a whole, the concept of 'sale' in Clauses 7.2.2 and 7.2.3 is broader than 'sale to a third party', and the word should accordingly be construed so as to include 'a realisation of an asset in specie'.[5] In essence, the word 'sale' should be read as 'sale or distribution in specie', and such 'sale' could have taken place after the Partnership had terminated. As such, they contended that a 'sale' (in the ordinary sense of the word) of all of the Partnership Investments by the end of the term of the Partnership was not a condition precedent to the Special Limited Partners receiving a distribution under Clauses 8.1(e) and 8.1(f), and the only thing that their entitlement to Carried Interest was contingent upon was the satisfaction of the necessary conditions relating to the value of the Annual Rate of Return. The learned judge held that this latter interpretation was the one which made more commercial sense.

[11] NWVF, by notice of appeal filed on 8th August 2013, challenged several findings of fact and law made by the learned trial judge. The notice of appeal contained a

[5] 'In specie' generally means 'in its present form'. Clause 8.6 gave the General Partner of VDP the express power to make distributions in the form of non-marketable securities (i.e. in specie) upon the final liquidation of the Partnership.

total of 23 detailed grounds of appeal, in which the appellant contended that the learned judge: erred in his construction of VDP's Articles of Partnership; erred in his analysis of the evidence which was before him; made incorrect factual findings in coming to a conclusion on the issues before him; placed reliance on the wrong clauses in the Articles of Partnership to interpret the meaning of the wording in other clauses; and reached the wrong conclusion in all the circumstances.

[12] Determining whether the learned judge erred in the above respects essentially involves making a determination on 2 main issues:

(1) What exactly is meant by the words 'following the sale of all Investments of the Partnership' and, in particular, whether the word 'sale', which appears in the first sentence of both Clauses 7.2.2 and 7.2.3, should be given its plain, ordinary meaning or alternatively, an 'extended' meaning so that it is read as 'sale or distribution in specie'; and

(2) Whether the 'sale of all Investments of the Partnership' had to take place during the term of the Partnership (that is, before 1st July 2012).

[13] NWVF is seeking, on appeal, that paragraphs 1, 3 and 5 of the judge's order be set aside as well as declarations that:

(1) the Special Limited Partners are not entitled, in the events which have happened, to either Senior Carried Interest or Strategy Carried Interest (as defined in VDP's Articles of Partnership);

(2) the Special Limited Partners are not entitled to participate in any distribution made in specie.

Issue 1 – The meaning to be given to the word 'sale' in the phrase 'following the sale of all Investments of the Partnership'

[14] In relation to this first issue, the learned trial judge seems to have arrived at the conclusion that the word 'sale' should be read as including 'distribution in specie' by placing reliance on the fact that Clauses 8.6 and 7.3.8 cater for distributions in specie to be taken into account in the calculations called for by Clause 7.2. At paragraph 44 of his judgment, he stated:

"In my judgment Clause 7.2 is a book keeping provision which has nothing to do with entitlement. The idea that it should be incapable of application in cases where it is decided to distribute assets *in specie* is, in my view, unsustainable. 'Sale', where it occurs in Clause 7.2, must be read as including distribution *in specie* under the Articles of Partnership (itself, like all redemptions, involving a species of sale). Clauses 8.6 and 7.3.8 cater for distributions to be taken into account in the calculations called for by Clause 7.2." (Underlining added).

Clauses 7.3.8 and 8.6 state as follows:

"7.3 Calculation of Income, Gains and Annual Rate of Return

…

7.3.8 If a decision is made to distribute any Partnership Assets in specie in accordance with Clause 8.6, those assets shall be deemed to be realised for the purposes of computing Capital Gains, Capital Losses and Capital Proceeds at their Value."

…

8.6 Distributions Other Than Cash

Prior to the final liquidation of the Partnership, the General Partner shall make all distributions under Clause 8 in cash. Upon the final liquidation of the Partnership, the General Partner has the right to make distributions in the form of non-marketable securities."

[15] The learned judge further held, at paragraph 45, that:

"… it is a well established principle of construction that in context words may have extended meanings if to give them their strict meaning would be to produce a result which the parties cannot have intended. There is no good reason, to be derived from the background or from the intention of the Articles of Partnership, so as can be elicited from their wording and structure, why the Special Limited Partners' interests should be contingent not only upon the achievement of a positive Annual Rate of Return, but upon accidents of timing without any commercial logic, or upon the hazard that assets may have to be realized by one method permitted by the Articles rather than by another." (Emphasis added).

[16] The learned trial judge appears to have reasoned[6] that since the application of Clauses 7.2.2 and 7.2.3 (pursuant to Clause 8.1) would involve calculating percentages of, among other things, Capital Gains and Capital Losses, then it is not logical that these calculations be done at the date of termination of the Partnership (as NWVF contends), if Clauses 7.3.8 and 8.6 provide for the computation of Capital Gains and Capital Losses 'upon the final liquidation of the Partnership', which would be subsequent to the date of termination. It would make more sense that all Capital Gains and Capital Losses are determined before any calculations are done in respect of them. The learned judge further concluded[7] that it would not be commercially sensible for the Special Limited Partners' entitlements to be dependent upon whether or not an asset was sold (in the trader's sense) during the liquidation, since distribution of assets in specie during that period is entirely at the discretion of the General Partner.

[17] NWVF submitted that the judge wrongly construed the word 'sale' in the phrase 'following the sale of all Investments of the Partnership' to mean 'sale or distribution in specie'. NWVF states that given the clear and simple words used and their natural meaning, the starting point must be that, objectively, the parties would not reasonably have understood this word in Clauses 7.2.2 and 7.2.3 to mean 'sale or distribution in specie' and that they would have understood the word to mean what is commonly and commercially understood by that term. The term is clear and unambiguous and the Court should be astute not to find an ambiguity which, according to the natural and ordinary meaning of the words, is not there.

[18] In support of this submission, NWVF stated that the Articles of Partnership, far from conflating or confusing the word 'sale' in its 'plain', 'strict' or 'trader's' sense, clearly distinguish between the two. This distinction is expressly drawn in the first sentence of Clause 11.5.4 which states that: 'Upon termination of the Partnership, the liquidating trustee or trustees may sell any or all of the Partnership Assets on the best terms available or may, at its or their discretion, distribute all or any of the

[6] At para. 44 of the judgment.
[7] At para. 45 of the judgment.

Partnership Assets in specie.' (Emphasis added). Clause 7.3.8 also draws a clear distinction between a 'sale' and a 'distribution in specie' by providing that in certain circumstances and for certain limited purposes only (not applicable to the pre-condition in Clauses 7.2.2 and 7.2.3) a distribution in specie 'shall be deemed to be realised'.

[19] NWVF further contends that if the judge's construction was correct, the startling consequence would be that the same word, 'sale' means different things at different places in the same document. In fact, the word 'sale' is used consistently throughout the Articles to mean 'sale' in its natural commercial sense and not 'sale or distribution in specie'. The following are instances of this: (1) Clause 8.3.6,[8] uses the precise phrase 'following the sale of all Investments', as used in Clauses 7.2.2 and 7.2.3, in a context which that phrase must refer only to a sale and not to a sale or distribution in specie; (2) both Clauses 7.3.7 and 8.2.5 refer to a 'sale' in the context of a purchaser retaining a portion of the selling price of an Investment – there would be no selling price, or retention, following a distribution 'in specie'; (3) Clause 8.3.1, refers to a 'sale' in the phrase 'upon the sale of any Investment' in the context of the deposit of monies in a bank account – there would be no monies to be deposited on a distribution 'in specie'; (4) Clause 11.2.3 refers to 'sale' in the context of an extension of the term of the Partnership to permit the orderly liquidation of the Partnership assets where the 'sale' of Partnership assets is not possible 'due to market conditions' – market conditions have no relevance to whether a distribution 'in specie' is possible; and (5) the first sentence of Clause 11.5.4 (set out in previous paragraph) draws a clear distinction between a 'sale' and a distribution 'in specie' – if the former includes the latter, then the latter is otiose.

[8] "8.3.6 If following the sale of all Investments of the Partnership and distribution of all assets of the Partnership other than amounts in Carried Interest Accounts, if any, the Capital Contributions of the Limited Partners are not fully repaid in accordance with Clause 8.1(c), then such amounts in the Carried Interest Accounts shall be distributed to the Limited Partners until their respective Net Capital Contributions are 0 (zero) and the balance of the amounts in the Carried Interest Accounts (if any) shall be distributed in accordance with Clauses 8.1(d), (e), (f) or (g) (and in that order)."

[20] NWVF further submits that the absence of any mechanism within the framework of the Articles for ascertaining when and how the amount of Carried Interest is to be determined and paid following a distribution in specie, as opposed to following the sales of Investments (this mechanism is set out in Clause 7.2) is a powerful indicator that the parties did not contemplate an entitlement in such circumstances.

[21] The Salford Respondents submit that the appellant, by asserting that objectively, the parties would not reasonably have understood the word 'sale' in Clauses 7.2.2 and 7.2.3 to mean 'sale or distribution in specie', has started the process of construing the word 'sale' from the wrong place. They submit that the word 'sale' in those clauses needs to be put into its proper context by first considering the commercial purpose of VDP, then considering Clause 11.5.4,[9] then turning to the provisions of Clause 8.1, before turning to the terms of Clause 7.2. They submit that it is only within this context that the Court is able to properly consider the purpose of Clause 7.2. In response to NWVF's contention that in Clauses 11.5.4 and 7.3.8 'sale' is treated as being different from 'distribution in specie', the Salford Respondents submit that in Clause 11.5.4, the recognition of the distinction between these two words in that clause does not assist with the proper construction of Clauses 7.2.2 and 7.2.3 and Clause 7.3.8 actually positively supports the Salford Respondents' case since it makes clear that any distribution in specie is to be deemed to be 'realised' for the purposes of computing values that are subsumed within the items that are to be allocated between the Partners pursuant to Clauses 7.2.1, 7.2.2 and 7.2.3.

[9] "11.5.4 Upon termination of the Partnership, the liquidating trustee or trustees may sell any or all of the Partnership Assets on the best terms available or may, at its or their discretion, distribute all or any of the Partnership Assets in specie. The liquidating trustee or trustees shall procure that the Partnership pay all debts, obligations and liabilities of the Partnership and all costs of liquidation and shall make adequate provision for any present or future contemplated obligations or contingencies in each case to the extent of the Partnership Assets. The remaining proceeds and assets (if any) shall be distributed amongst the Partners on the basis set out in Clause 8. Partners receiving a distribution of Partnership Assets in specie shall be bound by the provisions of any agreements relating to such Partnership Assets, to the extent such agreements so provide."

[22] In response to the appellant's point that the learned trial judge's construction of the word 'sale' would lead to the 'startling consequence' that it means different things at different places in the Articles of Partnership the Salford Respondents submit that in principle, even if correct, this is not startling and certainly does not serve to undermine the construction adopted by the learned judge. It is vital to construe the word within its proper context. In any event: (1) with regard to Clause 8.3.6, it contains the phrase 'sale of all Investments of the Partnership and distribution of all assets of the Partnership' which is much wider than 'all the Investments of the Partnership' as it includes both Interim Investments (which are excluded from the definition of Investments) and the contents of Carried Interest Accounts; there is no basis for concluding that the expression 'sale of all Investments' does not include a distribution in specie; (2) Clauses 7.3.7 and 8.2.5[10] do not undermine an expanded definition of a sale, they only make the reference to an in specie distribution inapposite to the particular factual circumstances which those clauses addressed; this is because those clauses are controlled by Clause 8.6 which operates to prevent the General Partner from making any distribution prior to the final liquidation of the Partnership other than in cash. Accordingly there is no inconsistency between the extended definition of the term 'sale' and other clauses of the Articles.

[23] In response to the assertion that the absence of any mechanism within the Articles for ascertaining when and how the amount of Carried Interest is to be determined and paid following a distribution is a powerful indicator that there was to be no

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[10] "7.3.7 For purposes of determining Annual Rate of Return at the time of sale of an Investment, the Capital Proceeds from the sale of the Investment shall include any portion of the selling price of the Investment that is retained by or for the benefit of the purchaser of the Investment pending the occurrence of future events that will determine the final selling price of the Investment. Upon the determination of the final selling price in such circumstances, the Annual Rate of Return of the Investment shall be recalculated as required based on the total amount paid by the purchaser for the Investment."

"8.2.5 If Clause 7.3.7 applies to the sale of an Investment, then the portion of the selling price that is retained by or for the benefit of the purchaser shall reduce, on a pro rata basis, any amounts otherwise distributable to the Limited Partners as a result of the sale. As the retained amount or any portion thereof is paid by the purchaser or its agent, such payments shall be distributed to the Limited Partners from whom distributions have been withheld as described above and based on the recalculated Annual Rate of Return of the Investment under Clause 7.3.7, if applicable."

such entitlement, the Salford Respondents submit that this submission of the appellant's overlooks the fact that the Articles expressly provide that pursuant to Clause 7.3.8, if a decision is made to distribute any Partnership Asset in specie, those assets shall be deemed to be realised for the purposes of computing Capital Gains, Capital Losses and Capital Proceeds at their Value and that the calculation of the Annual Rate of Return includes the value of 'any investments distributed in kind' which feeds into the definition of 'Net Investment Return' which in turn feeds into the definition of 'Gross Return'. Also the articles expressly provide for a mechanism for calculating the value of Investments distributed in specie. These provisions enable the calculation of the value of investments for the purpose of calculating Carried Interest in the context of a distribution in specie. Thus, a value for distributions in specie is to be included in the calculation of Annual Rate of Return, which is the crucial question for the purposes of Clauses 7.2.2 and 7.2.3. The fact that a value for an in specie distribution will not be included in a Carried Interest Account (created in accordance with Clause 8.3.1) during the term of the Partnership is neither here nor there, given that Clause 8.6 operates to prevent any in specie distribution prior to the final liquidation of VDP. Accordingly NWVF's submissions on the word 'sale' should not lead the Court of Appeal to reach a conclusion that differs from that of the judge.

Legal principles on the construction of commercial contracts

[24] In the case of Rainy Sky SA v Kookmin Bank[11] English Supreme Court held that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. A reasonable person here is one who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract. The relevant background knowledge includes absolutely anything which would have affected the way in which the language of the document would have been understood by a

[11] [2011] 1 WLR 2900.

reasonable man, excluding earlier drafts of the agreement and evidence of the content of pre-contractual negotiations and the parties' subjective intentions.

[25] Rainy Sky involved a shipbuilder who had entered into six shipbuilding contracts to build and sell one vessel to each of the first six claimants. It was a term of the contract that as a condition precedent to the payment of the first instalment the shipbuilder would give the buyers refund guarantees relating to the instalments. The defendant bank accordingly issued each claimant with advance payment bonds. After all six claimant buyers had paid the first instalment and the first claimant had paid the second instalment, the shipbuilder ran into financial difficulties and became subject to a debt work-out procedure. The claimants demanded from the builder an immediate refund of all instalments paid, alleging that paragraph 3 of the bonds had been triggered. However, the builder refused to make any refund. The claimants then brought proceedings against the bank, demanding repayment under the bonds of the instalments paid under the contracts. The bank refused to pay, contending that, paragraph 3 of the bonds ought to be read with paragraph 2, and on its true construction, paragraph 3 did not cover refunds which the claimants sought, but covered pre-delivery instalments in circumstances limited to where there was a termination of the contract or a total loss of the vessel. The bank's argument was rejected by the learned judge at first instance, who held that the construction of paragraph 3 of the bonds would have an uncommercial result, and gave summary judgment for the claimants. The bank appealed, but conceded that the two different interpretations of paragraph 3 (i.e. the bank's and the claimants') were both arguable. The Court of Appeal, by a majority, held that the construction contended for by the bank would not produce an absurd or irrational result and merely saying that no credible commercial reason has been advanced for the limited scope of the bond, would put the court in real danger of substituting their own judgment of the commerciality of the transaction for that of those who were actually party to it. Accordingly, the Court of Appeal allowed the appeal and gave summary judgment for the bank. The Supreme Court allowed the claimants' appeal, and restored the order of the first instance judge.

[26] Rainy Sky was a case where there was an ambiguity. Here, the parties are agreed that there is no ambiguity in the language used. Rather, the opposing parties contend that their interpretation of the clauses in the contract – each leading to a different result – is the only correct one. Where the parties have used unambiguous language, the court must apply it. A court can only consider the commercial purpose where the language used is ambiguous. Further, a court is only justified in departing from the plain meaning of words if it leads to an absurdity – that is, where the court is satisfied that a mistake has been made and is satisfied as to what has to be done to correct it.[12]

[27] Although the facts of Rainy Sky are not on all fours with those of the present case in the sense that neither party is contending that the clauses in issue may be interpreted in more than one way, the principles which can be distilled from Rainy Sky are instructive. They were summarised by Gross LJ in the case of Al Sanea v Saad Investments Co Ltd:[13]

> "i) The ultimate aim of contractual construction is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. The reasonable person is taken to have all the background knowledge which would reasonably have been available to the parties in the situation in which they were in at the time of the contract.
>
> ii) The Court has to start somewhere and the starting point is the wording used by the parties in the contract.
>
> iii) It is not for the Court to rewrite the parties' bargain. If the language is unambiguous, the Court must apply it.
>
> iv) Where a term of a contract is open to more than one interpretation, it is generally appropriate for the Court to adopt the interpretation which is most consistent with business common sense. A Court should always keep in mind the consequences of a particular construction and should be guided throughout by the context in which the contractual provision is located.

[12] See Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd [2006] EWCA Civ 1732.
[13] [2012] EWCA Civ 313.

v) The contract is to be read as a whole and an "iterative process" [see para. 28 of Rainy Sky] is called for:

> '… involving checking each of the rival meanings against other provisions of the document and investigating its commercial consequences.'"[14]

[28] The case of Attorney General of Belize and Others v Belize Telecom Ltd and Another[15] concerned the construction of a company's articles of association. At paragraph 16, Lord Hoffman stated that: 'The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means.'

[29] In the case of Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd[16] Neuberger LJ stated that the Court should be astute not to depart from the plain and ordinary meaning of the words used merely because it conflicts with the Court's own notions of commercial purpose or business common sense. He stated:

> "21. … it seems to me right to emphasise that the surrounding circumstances and commercial common sense do not represent a licence to the court to re-write a contract merely because its terms seem somewhat unexpected, a little unreasonable, or not commercially very wise. The contract will contain the words the parties have chosen to use in order to identify their contractual rights and obligations. At least between them, they have control over the words they use and what they agree, and in that respect the words of the written contract are different from the surrounding circumstances or commercial common sense which the parties cannot control, at least to the same extent.
>
> "22. Particularly in these circumstances, it seems to me that the court must be careful before departing from the natural meaning of the provision in the contract merely because it may conflict with its notions of commercial common sense of what the parties may, must or should have thought or intended. Judges are not always the most commercially-minded, let alone the most commercially experienced, of people, and should, I think, avoid arrogating to themselves overconfidently the role of arbiter of commercial reasonableness or likelihood. …

[14] At para. 31.
[15] [2009] 1 WLR 1988.
[16] [2006] EWCA Civ 1732.

> Furthermore, sometimes it is plainly justified to depart from the primary meaning of words and given them what might, on the face of it, appear to be a strained meaning, for instance where the primary meaning of the words leads to a plainly ridiculous or unreasonable result." (Emphasis added).

Analysis

[30] In their written submissions, the Salford Respondents described the Special Limited Partners not receiving Senior and/or Strategy Carried Interest – which would be the case if NWVF's construction is accepted – as them being 'punished'. This of course, would not be the case if their (the Salford Respondents') construction is accepted and the word 'sale' is given the extended meaning to have it include a 'distribution in specie'. In my view, the Salford Respondents are seeking here to suggest a 'fairer' interpretation of the clauses in issue by reading into the Articles that which is just not there. It is essentially an attempt to introduce terms into the contract in order to improve upon it, and is precisely what Lord Hoffmann and Neuburger LJ warned against in Attorney General of Belize and Skanska Rashleigh Weatherfoil Ltd, respectively. The court's only concern should be to discover what the instrument means. It has no power to improve upon the instrument which it is called upon to construe. It cannot introduce terms to make it fairer or more reasonable. Further, the Salford Respondents contended that it was necessary to put the word 'sale', where it appeared in Clause 7.2, into its proper context by first considering the commercial purpose of VDP, then considering Clause 11.5.4, then turning to the provisions of Clause 8.1, before turning to the terms of Clause 7.2. To do this however, would be to go directly against the guidelines as stated by Gross LJ in Al Sanea, derived from Rainy Sky.

[31] The correct starting point is the wording used by the parties in the contract. It is not for the Court to rewrite the parties' bargain. If the language is unambiguous, the Court must apply it. NWVF submitted that the judge's approach subverts the proper process of construction of the language actually used and under the guise of interpretation, re-writes the bargain the parties made. I agree. The language of

the contract in my view is unambiguous. Construing the language contained in clause 7.2 which sets out the allocations of the partners and the basis on which the allocation is made does not lead to an absurdity. According the language and the word "sale" therein its natural and ordinary meaning and applying it to the circumstances where, as it has turned out, not a single asset or strategy was sold during the life of the partnership merely results unfortunately for the Salford Respondents,specifically the Special Limited Partners, in not having made good use of the "Carried Interest" incentives provided in the agreement. Such a result may seem unfair to them in hindsight, but that certainly does not make the arrangement or scheme devoid of any commercial purpose or lead to a ridiculous or absurd result.

[32] Furthermore, the learned trial judge's reasoning in relation to his interpretation of the word 'sale'[17] is flawed since there is absolutely nothing which precludes an 'entitlement scheme' (the percentages of the gains of the Partnership which each partner is entitled to receive) from being established at the end of the term of the Partnership, and then applied at a point in time after its establishment, once the Partnership has been liquidated. This would need to be done if the General Partner determines that it is necessary to make certain distributions in specie pursuant to Clause 8.6. These assets would of course need to be realised for the purposes of computing Capital Gains, Capital Losses and Capital Proceeds,[18] so that the entitlement scheme can be applied to them. As NWVF rightly contends, the learned trial judge appears to have confused entitlement to a distribution with the form in which a distribution is to be made. Clause 8.1,[19] deals with entitlement to Partnership assets, while Clause 8.6[20] deals with the form in which Partnership assets are to be distributed, distinguishing between the position during the term of the Partnership (when distributions may be made only in cash – thus from sales and income) and the position after the end of the term of the Partnership (when distributions may be made in cash or in specie).

[17] Set out at para. 16 above.
[18] Pursuant to Clause 7.3.8.
[19] Set out at para. 9 above.
[20] Set out at para. 14 above.

[33] NWVF accordingly succeeds on the first issue. I shall now proceed to deal with the second issue.

Issue 2 – Whether the 'sale of all Investments of the Partnership' had to take place during the term of the Partnership

[34] The learned judge arrived at the conclusion that the sale of all Partnership assets could have taken place after the date on which the term of the Partnership had ended. Indeed, it was necessary for him to make this finding before he could have made the above finding that 'sale' ought to be given its extended meaning to include 'distribution in specie', since Clause 8.6 prevents any distribution from being made in specie before the end of the term of the Partnership. At paragraph 39, the learned trial judge states:

> In the context of the Articles taken as a whole the words 'at the end of the term,' where they appear in Clause 8.2.1 obviously mean 'once the term has expired', or 'not before the end of the term,' just as the words 'Upon termination of the Partnership' where they occur at the beginning of Clause 11.5.4 do not mean that the entirety of the liquidation must be carried out during the course of 1 July 2012, but mean that the liquidation is not to commence until that point is reached."

[35] The learned trial judge appears to have arrived at this point after having attributed to NWVF a submission, which they made abundantly clear on appeal, had never been made by them. The judge said at paragraph 38:

> "[Counsel for NWVF] says that in the liquidation currently under way the Joint Liquidators are required by Clause 11.5.4 to distribute the assets on the basis set out in Clause 8; that the Special Limited Partners are not entitled to more than a return of capital unless either of Clauses 8.1(e) or 8.1(f) apply [sic]; that neither clause applies because no allocations are permissible under Clause 7.2 until after all the Partnership Investments have been sold (7.2.1); that that has not happened and cannot now happen, so that the Special Limited Partners are not entitled to any allocations under either of Clauses 7.2.2 or 7.2.3, with the consequence that they are not entitled to distributions pursuant to Clause 8.1(e) or 8.1(f). In any event, he submits that it is now too late for any distributions to be made under Clauses 8.1(e) to (h), because Clause 8.2.1 requires that they are to be made at the end of the Partnership Term, and that date is now past." (Emphasis added).

[36] Clause 7.2.1 appears to have influenced significantly the learned trial judge's reasoning, and perhaps formed the basis for his finding at paragraph 39. Clause 7.2.1 states:

> "7.2.1 Except as provided in Clause 7.1, all Net Income, Net Losses, Capital Gains and Capital Losses of the Partnership shall be allocated between the Partners only following the sale of all Investments of the Partnership or at such other time as may be agreed by the General Partner and the Limited Partners."

The learned judge, by saying in paragraph 38 that: '… no allocations are permissible under Clause 7.2 until after all the Partnership Investments have been sold (7.2.1) …' appears to have taken all the remaining sub-clauses in 7.2, so 7.2.2, 7.2.3 and 7.2.4, to be subject to Clause 7.2.1. He interpreted this as meaning that if the phrase 'at the end of the term of the Partnership' referred to in Clause 8.2.1 is taken to mean the date of termination of the Partnership (i.e. 1st July 2012) and no later, then, if any (or all – as was the case here) of the Partnership Assets remained unsold as at 1st July 2012, the effect would be that it would not be possible to allocate any Net Income, Net Losses, Capital Gains and Capital Losses to any of the partners, which in my view would be totally absurd. At this point, the learned trial judge appears to have figured that the only way Clause 7.2 would make sense (if Clauses 7.2.2, 7.2.3 and 7.2.4 were read subject to Clause 7.2.1) is if the sales of the Partnership Investments could take place after the termination date, during the liquidation. All Partnership Investments would necessarily have to be sold before the liquidation of the Partnership is completed, and thus, it would be possible to make allocations at that point.

[37] However, the problem here does not seem to be the time frame for the sale of investments (i.e. the meaning of the phrase 'at the end of the term of the Partnership'), but rather, the basis for the learned judge saying that Clauses 7.2.2, 7.2.3 and 7.2.4 ought to be read subject to Clause 7.2.1. In the judgment, he provided no reason why this should have been the case.

[38] In their written submissions, the Salford Respondents stated that Clause 7.2.1 makes NWVF's case on construction absurd and uncommercial, when it is 'rightly

treated' as controlling Clause 7.2.4 as much as it controls Clauses 7.2.2 and 7.2.3. NWVF submits that, based on its wording, Clause 7.2.1 is only applicable to clauses 7.2.2 and 7.2.3 – both of these clauses deal with the situation where 'all Investments of the Partnership have been sold'. In fact, the wording in Clauses 7.2.1, 7.2.2 and 7.2.3 is identical: 'following the sale of all Investments of the Partnership'. Thus, pursuant to 7.2.1, allocation between the partners is possible if there has been a 'sale of all Investments of the Partnership' by 1st July 2012. NWVF submits that if this is not the case, then 7.2.4 would apply, and this clause is different, in the sense that it is not subject to the pre-condition that there has been a 'sale of all Investments of the Partnership' – these words are found nowhere in that clause. NWVF further submits that the use of the word 'between' in Clause 7.2.1 is significant; 'shall be allocated between the Partners' (emphasis added) suggests that an allocation is to be made to more than one partner, and this is not the case if Clause 7.2.4 applies – the words '100% to the Principal Limited Partner' in that clause mean that only NWVF would receive an allocation. On NWVF's formulation, not having all Investments of the Partnership sold by 1st July 2012 would not produce an absurd result. It would just mean that there would be no allocation 'between the Partners', so neither of 7.2.1, 7.2.2 or 7.2.3 would apply, but that there would be an allocation to one partner only, i.e. NWVF.

[39] I agree with the appellant's submission. In my view, the Salford Respondents cannot say, without more, that Clause 7.2.1 should be 'rightly treated' as controlling Clause 7.2.4 as much as it controls Clauses 7.2.2 and 7.2.3. No concrete basis is provided for this assertion, and one is necessary to take the Salford Respondents any further on this point, since when Clause 7.2 is read as a whole, it seems most logical that Clauses 7.2.1, 7.2.2 and 7.2.3 would cover one situation and Clause 7.2.4, a totally different one.

[40] The above point aside, I shall take a closer look at the words 'at the end of the term of the Partnership' which appear in Clause 8.2.1.

[41] The word ‘at’ in the phrase ‘at the end of the term of the Partnership’ clearly suggests that a specific point in time is being referred to. I do not know whether the phrase could be much clearer than it is. It would be far easier to accept the learned judge’s determination on this issue if the word ‘at’ in that phrase had been, say, the word ‘following’, which would clearly suggest any point in time subsequent to the date on which the Partnership ended.

[42] Further, in paragraph 39 the learned judge seeks to draw a similarity between the phrases ‘at the end of the term of the Partnership’ and ‘upon termination of the Partnership’. In my view, however, the words ‘at’ and ‘upon’ suggest two completely different time frames. The word ‘upon’ preceding some ‘trigger event’ in a phrase, suggests ‘once that trigger event has occurred’, so, any time after its occurrence. The word ‘at’, on the other hand, suggests ‘precisely when the trigger event takes place’. In my view, it is pushing things too far, to say that the words ‘at’ and ‘upon’ mean the same thing. Simply put, there is no justification for treating “at” and “upon” as being the same.

[43] I would hold therefore, for all of the reasons outlined above, that the learned trial judge erred in respect of this issue.

Contextual Considerations

[44] The findings above are sufficient to dispose of the appeal, but I shall nevertheless adopt an iterative approach in dealing with a few points below which the appellant submits further supports their position that the sale (to a third party in the trader’s sense) of all of the Partnership Investments before 1st July 2012 was a condition precedent to the Special Limited Partners’ entitlement to Senior and/or Strategy Carried Interest.

[45] The learned trial judge stated at paragraph 36:

> “[Counsel for NWVF] starts by stressing, independently of the true construction of the Articles of Partnership, that the underling purpose of the Partnership was to achieve a sale of all its assets within the initial term or any extension. I do not accept that submission. The purpose of the

> Partnership is expressly set out in clause 1.2. It makes no mention of sale. Indeed, an express power of sale is not even conferred upon Salford by Clause 4, although the many references in the Articles of Partnership to sales being made show that it clearly had such a power.

NWVF submitted that the judge wrongly held in the above paragraph that Clause 1.2 of the Articles which he stated expressly set out the purpose of the Partnership 'makes no mention of sale' since the very first sentence of this clause states expressly that the sale of the Partnership's investments is part of the purpose of the Partnership. The Salford Respondents responded by saying that NWVF's contention is misplaced, since what the judge was considering here in referring to 'sale' was within the context of the Partnership's purpose being to achieve 'the sale of **all** of its assets'.

[46] Taking the words of the judge at face value however, saying that '[the Partnership's Purpose clause] makes **no mention of sale'** (my emphasis), is certainly going farther than using words to imply merely that the main purpose of the Partnership was not to achieve a sale of all its assets, as the Salford Respondents suggest his words meant. The fact is that the purpose clause does include the sale of investments as one of the purposes of the Partnership whether this particular purpose is seen as the principal one or not. I agree with the appellant's submission. Even if Clause 1.2 did not contain the exact words that 'the purpose is to achieve a sale of **all of the assets** of the Partnership', it does expressly state that one purpose of the partnership was to 'sell … investments with the principal objective of providing the Limited Partners with a high overall rate of return.' Read altogether, it seems to me to be basic business sense that the best way to ensure that one's returns on a certain investment are high (through the sale of these investments) would be to sell as many of them as possible, with a sale of **all** the investments being the best possible result that one could hope for. In this vein, it therefore makes sense that this is a condition precedent to an award of a 'success fee', as NWVF has referred to the Special Limited Partners' entitlement to Senior and/or Strategy Carried Interest.

[47] Further, as previously mentioned, Clause 11.2.1 provided for a 1 year extension to the term of the Partnership in order to 'permit an orderly liquidation of the Partnership assets'. Also, Clause 11.2.3 could be relied on if Clause 11.2.1 had already been utilised but the General Partner was of the view that the orderly liquidation of the Partnership's Assets was not possible during the 1 year extension, due to market conditions for the sale of certain Investments. This clearly suggests that the sale of Partnership assets was of considerable importance. Moreover, I believe it is significant that Salford's Management Fee was to decrease from 2% to 0.4% during the period by which the term of the Partnership was extended beyond 1st July 2008. This seems to show that there was less of an incentive to the Partnership operating during these extended periods. Furthermore, even if all of the Investments of the Partnership were not sold during the term of the Partnership, SCI could nevertheless receive something called Preliminary Carried Interest if all the Investments in one Strategy, or over half of the total investments, had been sold, and the Annual Rate of Return on the unsold Investments was not less than 20%.[21] This, to me, shows that it was envisaged that it was entirely possible that all the Partnership assets may not have been sold by the end of the term of the Partnership. However, notwithstanding this, a reward could still be obtained, depending on how many sales were achieved during the term of the Partnership. As NWVF contends, this shows that there is a 'carefully calibrated system of rewards built into the Articles'. I cannot therefore agree with the Salford Respondents' contention that, properly construed, the Articles permit the Special Limited Partners to share in the profits of the Partnership, irrespective of whether or not all investments of VDP Partnership have been sold by the time of the termination of the Partnership. When the agreement is construed and checked against other provisions therein, the purpose of the agreement, and thus the intention of the parties, is inescapable. The purpose was to achieve a sale of the assets. On achieving a sale, interest is paid. Where no sale is achieved, no interest is paid. There is nothing absurd or uncommercial about that.

[21] See Clauses 8.2.3 and 8.2.4 of the Articles of Partnership.

Conclusion

[48] For the reasons set out above I would allow the appeal and set aside paragraphs 1, 3 and 5 of the learned trial judge's order dated 27th June 2013. I would further declare that:

(a) The Special Limited Partners are not entitled, in the events which have happened, to either Senior Carried Interest or Strategy Carried Interest as defined in VDP's Articles of Partnership;

(b) The Special Limited Partners are not entitled to participate in any distribution made in specie.

Costs

[49] NWVF having succeeded on appeal, I would further order that:

(a) NWVF's costs on this appeal and in the court below be paid by the Salford Respondents.

(b) The joint liquidators' costs of the appeal and in the court below be costs in the liquidation of VDP.

Janice M. Pereira
Chief Justice

I concur.

Gertel Thom
Justice of Appeal [Ag.]

I concur.

E. Ann Henry, QC
Justice of Appeal [Ag.]