

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS

2
3 FINANCIAL SERVICES DIVISION

4
5 The Hon. Mr Justice Andrew J. Jones QC

6 In Chambers, 4 April 2014

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8 CAUSE NO. FSD 82 OF 2010(AJJ)
9 CAUSE NO. FSD 269 OF 2010(AJJ)

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12 IN THE MATTER OF THE COMPANIES LAW (2012 REVISION)

13
14 AND IN THE MATTER OF ICP STRATEGIC CREDIT INCOME FUND LTD.

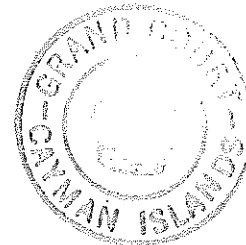
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16 AND IN THE MATTER OF ICP STRATEGIC CREDIT INCOME MASTER FUND LTD.

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19 **Appearances:**

20 Mr Tom Lowe QC instructed by Mr D. Fraser Hughes and Erik Bodden of Conyers Dill &
21 Pearman for the Joint Official Liquidators

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23 The Liquidation Committee was not represented

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25 DLA Piper LLP was not represented



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29 REASONS
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- 34 1. On 28 May 2013 I made an order sanctioning the commencement of proceedings by the
35 Joint Official Liquidators ("the JOLs") of the ICP Strategic Credit Income Fund Ltd ("the
36 Offshore Feeder Fund") and the ICP Strategic Credit Income Master Fund Ltd ("the
37 Master Fund") against the United States firm of DLA Piper LLP ("DLA"). The order is
38 expressed in general terms. It authorises the JOLs to commence proceedings against DLA
39 in respect of its involvement in the payment of approximately US\$36.5 million of the
40 Master Fund's money to Barclays Bank Plc in circumstances which are alleged to
41 constitute a breach of fiduciary duty on the part of its directors. Although expressed in
42 these general terms, having regard to the way in which the application was presented by

1 counsel for the JOLs I intended my order to authorise the JOLs to assert that DLA had
2 knowingly aided and abetted a dishonest breach of fiduciary duty.
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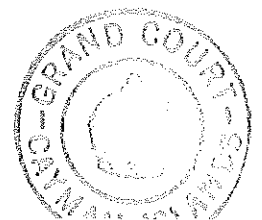
4 2. It was subsequently brought to my attention that the JOLs had come to the conclusion that
5 the factual evidence against DLA justified the inclusion of an additional cause of action in
6 the Funds' complaint. In addition to aiding and abetting the breach of fiduciary duty
7 (Count 1) and aiding and abetting fraud (Count 2), the complaint includes a claim for a
8 declaration that DLA is liable to contribute to the assets of the Funds pursuant to section
9 147 of the Companies Law (Count 3) on the ground that it was a party to fraudulent
10 trading. Counts 1 and 2 assert causes of action belonging to the Funds which arose under
11 United States law and were capable of being asserted prior to the commencement of the
12 liquidation proceedings. Count 3 asserts a statutory claim arising under Cayman Islands
13 law as a result of the winding up order. It is a cause of action which belongs to the Official
14 Liquidators and was not capable of being asserted by the Funds themselves prior to the
15 commencement of their liquidation. Having already commenced proceedings in the
16 Supreme Court of the State of New York, the JOLs made an application (on notice to DLA)
17 for an order that the decision to include the fraudulent trading claim in the complaint
18 (Count 3) be sanctioned retrospectively. On 4 April 2014 I made an order in favour of the
19 JOLs and I now give my reasons for that decision.
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21 3. Section 147 of the Companies Law provides as follows :-

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- 23 (1) If in the course of the winding up of a company it appears that any business of the company
24 has been carried on with intent to defraud creditors of the company or creditors of any other
25 person or for any fraudulent purpose the liquidator may apply to the Court for a declaration
26 under this section.
 - 27 (2) The Court may declare that any persons who are knowingly parties to the carrying on of the
28 business in the manner mentioned in subsection (1) are liable to make such contributions, if
29 any, to the company's assets as the Court thinks proper.
30

31 The word "Court" is defined by section 2(1) of the Companies Law to mean "the Grand
32 Court of the Cayman Islands" and so the question arises whether the Supreme Court of
33 the State of New York or any other foreign court has jurisdiction (as a matter to Cayman
34 Islands law) to exercise this statutory power.
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36 4. I remind myself that the basic rule of statutory interpretation is that it is taken to be the
37 legislature's intention that a statute will be construed in accordance with the general
38 guides to legislative intention laid down by law. There is a presumption that the literal or
39 grammatical meaning should be followed. The literal or grammatical meaning of the word
40 "Court" as defined in section 2(1) is clear, but I can nevertheless depart from that meaning
41 if, when put into its proper context, the literal meaning creates an anomaly or otherwise
42 produces an irrational or illogical result. See Bennion's *Statutory Interpretation* (5th Edition,
43 2008), Sections 285 and 315 at pages 864-9 and 986-999.
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1 5. I think that section 147 should be read together with section 146. Both these sections were
2 introduced by the Companies (Amendment) Law 2007. Both sections deal with the
3 consequences of fraudulent trading. Section 147 creates a compensatory remedy when any
4 part of a company's business has been carried on with intent to defraud creditors. Section
5 146 creates a restitutionary remedy when any of a company's property has been disposed
6 of at an undervalue with intent to defraud its creditors. These sections create statutory
7 remedies aimed at different aspects of the same kind of mischief. There is no apparent
8 reason why the legislature should have intended that official liquidators be permitted to
9 pursue the section 146 remedy in a foreign court but prohibited from pursuing the section
10 147 remedy in a foreign court. This would be the result if the word "Court" (which is used
11 in section 147 only) is construed to mean the Grand Court of the Cayman Islands. It seems
12 to me that this is an anomalous and illogical result which the legislature is inherently
13 unlikely to have intended to achieve.

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15 6. Counsel for the JOLs also drew my attention to the fact that the section 147 remedy is
16 modelled on the current English law. It is actually identical to section 213 of the English
17 Insolvency Act 1986, except that the word "court" (with a lower case 'c') is not used as a
18 defined term to mean the English High Court. In *Bilta (UK) v. Nazir (No.2)* [2014] Ch. 52 it
19 was held that section 213 of the English statute has extraterritorial effect and that the
20 expression "any person" includes those who are domiciled and resident out of the
21 jurisdiction. I think that section 147 of the Cayman Islands statute must be construed in
22 the same way. If the remedy was available only against persons resident or domiciled in
23 this country it would be stripped of much of its utility. If the remedy is available against
24 foreigners, as I think it is, then it is inherently unlikely that the legislature would have
25 intended that official liquidators be prohibited from seeking the remedy in foreign courts.

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27 7. For these reasons I concluded that, on its true construction, official liquidators are not
28 prohibited from pursuing section 147 claims in foreign courts. The alternative of pursuing
29 the claim in this Court is not open to the JOLs in the circumstances of this case. DLA
30 carries on its practice in the United States. The firm does not have any presence in the
31 Cayman Islands. The damage suffered by the Funds resulted from acts committed in New
32 York and advice given by a lawyer working in the firm's New York office. In these
33 circumstances there would appear to be no basis under GCR Order 11 upon which this
34 Court could exercise jurisdiction over DLA. It follows that any proceedings against DLA
35 for a section 147 remedy will have to be commenced, if at all, in the United States.

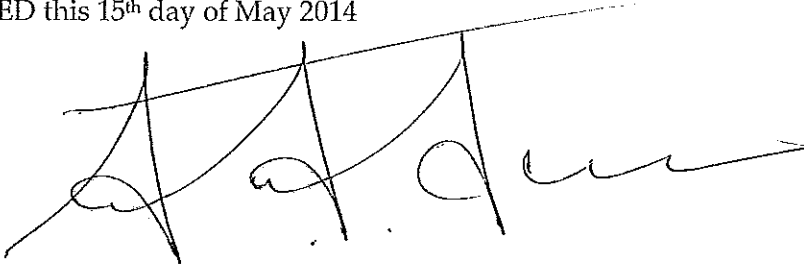
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37 8. I also need to consider whether the Supreme Court of the State of New York has
38 jurisdiction to apply the substantive Cayman Islands law and grant the section 147
39 remedy. I would not sanction the JOLs to commence or continue an action in a foreign
40 court if the evidence were that it was likely to be struck out on jurisdictional grounds. In
41 this regard I have the benefit of expert evidence about the applicable United States law in
42 the form of a report from the Honourable Melanie L. Cyganowski, who is a former Chief
3 Judge of the United States Bankruptcy Court for the Eastern District of New York. The

1 JOLs filed a petition for recognition under Chapter 15 of the United States Bankruptcy
2 Code and on 8 August 2013 the Bankruptcy Court for the Southern District of New York
3 entered an order recognizing that the liquidation proceedings pending before this Court
4 constitute the "foreign main proceedings" under Chapter 15. In these circumstances, Ms
5 Cyganowski's opinion is that the Bankruptcy Court overseeing the Chapter 15
6 proceedings will authorise the JOLs to pursue claims against DLA in the State Court and
7 that it will likely apply the substantive Cayman Islands law. In other words, her evidence
8 is that Count 3 of the complaint is likely to be entertained by the New York Court if the
9 commencement or continuation of the proceeding has been sanctioned by this Court.
10

- 11 9. For these reasons and for the reasons given in my previous ruling, I was satisfied that the
12 JOLs do have a cause of action under section 147 which is capable of being pursued in the
13 Supreme Court for the State of New York and that the interests of the Funds' creditors will
14 be best served by allowing the proceeding to continue.
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16 DATED this 15th day of May 2014

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24 The Hon. Mr. Justice Andrew J. Jones QC
25 JUDGE OF THE GRAND COURT

