Neutral Citation Number: [2023] EWHC 2723 (Ch)

Case No: BL-2021-002293

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 6 November 2023

Before:

MASTER BRIGHTWELL

- -

Between:

FRONTIERS CAPITAL I LIMITED PARTNERSHIP (acting by Frontiers Capital General Partner Limited)	**Claimant**
- and -	
THOMAS FLOHR	**Defendant**

- -
- -

Sir Geoffrey Cox KC and Ben Walker-Nolan (instructed by **The Khan Partnership**) for the **Claimant**
Jonathan Cohen KC, Nicholas Goodfellow and Bláthnaid Breslin (instructed by **Grosvenor Law**) for the **Defendant**

Hearing dates: 19–21 July 2023

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Approved Judgment

This judgment will be handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00am on Monday 6 November 2023

Master Brightwell:

1. The question before the court is whether the general partner of a limited partnership governed by the Limited Partnerships Act 1907 ("the 1907 Act") has standing after the dissolution and apparent winding up of the partnership to sue a third party in respect of a cause of action accruing before dissolution. The defendant contends not, both as a matter of the construction and effect of the partnership agreement, and also because of the effect of section 38 of the Partnership Act 1890 ("the 1890 Act"), which concerns the authority of partners after dissolution of a partnership and for the purposes of winding up its affairs.

2. The general partner of the claimant ("FCILP"), Frontiers Capital General Partner Limited ("FCGPL"), a Guernsey company, was dissolved on 2 November 2010 and restored to the Guernsey register of companies on 4 February 2021.

3. The claimant alleges in the particulars of claim that FCILP was a fund formed for the purpose of making venture capital investments in the technology sector, that its business ceased on 5 April 2010 and that it was dissolved without knowledge of the cause of action pleaded in this claim. It is common ground that FCILP is a pre-2009 limited partnership. It was governed by a Limited Partnership Agreement ("LPA") dated 15 May 2001, which amended an earlier agreement of 3 April 2001. The LPA was executed by the general partner, the initial limited partner (then known as nCoTec Holdings BV, of which Mr Timothy Horlick was a shareholder in the order of around 30%) and a carry partner. The evidence filed on behalf of the claimant suggests that there were many limited partners at various points, but they are not identified. It was suggested at the hearing that the limited partners include well-known financial institutions.

4. The claimant claims that the defendant, Mr Thomas Flohr, is liable to account for profits, and/or pay damages or equitable compensation for breaches of contract and fiduciary duty in respect of a Subscription and Shareholders' Agreement made on 27 March 2002 by FCILP, Mr Flohr and others. The agreement concerned the business in a company ultimately known as Comprendium (UK) Limited. The claimant alleges that, in breach of duty, Mr Flohr caused a series of other companies containing the name Comprendium to be incorporated, and used them to acquire interests in subsidiaries of Comdisco Inc after it entered Chapter 11 bankruptcy in the United States, thus profiting to the detriment of or causing loss to FCILP.

5. The alleged breaches took place in 2002 to 2005, but the claimant alleges that the defendant deliberately concealed key elements of the claim such that it is not time barred, by virtue of section 32 of the Limitation Act 1980.

6. I would note that a claim substantially mirroring this claim had previously been issued by the current director of the general partner, who is Mr Horlick, in 2019 and subsequently discontinued.

7. Without filing a defence, the defendant has filed an application notice seeking orders striking out and/or granting summary judgment to the defendant. The claimant has separately filed an application seeking permission to amend the particulars of claim in order to introduce a claim in deceit, to allege that Mr Flohr procured the initial investment of FCILP into Comprendium (UK) Limited by fraudulently misrepresenting his intentions in entering into the joint venture to which the Subscription and Shareholders' Agreement gave effect.

8. The defendant contends that any reliance by the claimant on deliberate concealment for the purposes of section 32 of the Limitation Act 1980 is fanciful, such that summary judgment should be granted in favour of the defendant. He also contends that other elements of the claim have no realistic prospect of success and opposes the application to amend to add the claim in deceit. Further, he seeks an order dismissing the claim on the ground that FCGPL has no authority or standing to bring it on behalf of FCILP.

9. The defendant also issued an application for confidentiality orders in respect of allegations said to be both scandalous and irrelevant contained within evidence filed on behalf of the claimant and in the amended particulars of claim and referred to in parts of the many bundles filed in advance of the hearing.

10. The hearing on 19 to 21 July 2023 was listed in order to deal with all the above applications. In the event the confidentiality application took considerable time and was, on the second day, resolved by the making of an order by consent. This did not leave sufficient time to deal with the other applications. The parties agreed, accordingly, that submissions would be limited to the authority or standing point and it is that issue with which this judgment is concerned.

The defendant's position on authority

11. The defendant's position on authority emerges from both the first and second witness statements of his solicitor, Mr Daniel Astaire. The first witness statement, at paragraphs 18 to 19, argues that section 38 of the 1890 Act does not apply, because the claim is not necessary to wind up the affairs of the partnership, and further, because the claim could have been brought on or before the winding up of FCILP but was not.

12. Mr Astaire's second witness statement contends at paragraphs 29 to 31 that on a construction of clause 13.5.3 of the LPA, and in light of the evidence filed by the claimant in response to the application, the dissolution of FCILP took place because of the "withdrawal" of the general partner, who is as a matter of contractual construction thus deprived of the authority to act. Consideration of this ground of opposition to the claim requires analysis of the relevant provisions of the LPA.

13. Clause 13 of the LPA is headed 'Termination and Liquidation'. Clause 13.1 provides as follows:

'13.1 Termination

The death, bankruptcy, insolvency, dissolution, liquidation, expulsion or withdrawal of a Limited Partner shall not operate to terminate the Partnership and the estate or trustee in bankruptcy or receiver or liquidator of a deceased, bankrupt, insolvent or dissolved Limited Partner shall not have the right to withdraw the balances on such Limited Partner's partnership accounts or require repayment of such Limited Partner's Outstanding Loan otherwise than in accordance with this Agreement. Subject as provided in clause 13.2 [which allows for the extension of the LPA], the Partnership shall terminate on the expiry of ten years from the Final Closing Date or shall terminate prior to such date upon the happening of any of the following events without any further action on the part of the Partners:

(a) the bankruptcy, insolvency, expulsion, dissolution, liquidation, removal or withdrawal of the General Partner (otherwise pursuant to clause 13.4 [which provides for the removal of the general partner by resolution of the Limited Partners]), unless the Partnership is reconstituted pursuant to clause 13.3 [which permits the continuation of the partnership when it is terminated pursuant to clause 13.1(a) or (d)]; or

(b) the agreement as to such termination of the General Partner and of the Investors by an Investors' Special Consent; or

(c) the determination by the General Partner in good faith that termination of the Partnership is necessary to avoid a violation or continuing violation of ERISA; or

(d) the removal of the General Partner pursuant to clause 13.4 unless, in any such case, the Partnership is reconstituted pursuant to clause 13.3.

13.5 Liquidation of Interests of Partners

13.5.1 Save as provided in clauses 2.1, 3.4, 5.4 and 11.8 [none of which are said to be relevant], a Partner shall not have the right to the return of its Capital Contribution except upon the liquidation of the Partnership.

…

13.5.3 Upon termination or liquidation of the Partnership (unless reconstituted under clause 13.3) no further business shall be conducted except for such action as shall be necessary for the orderly winding-up of the affairs of the Partnership, the protection and realisation of the Partnership Assets and the distribution of the Partnership Assets amongst the Partners. The General Partner shall act as liquidating trustee provided however that if the Partnership is terminated for a reason set forth in clause 13.1(a) or 13.1(d), unless the

> Partnership is reconstituted pursuant to clause 13.3, the Limited Partners shall designate some other party or parties to act as a liquidating trustee or trustees. In either case the liquidating trustee or trustees shall receive such remuneration for so acting as the Investors between them holding more than 50% of the Total Commitments shall agree.'

14. An Investors' Special Consent is defined as 'the written consent (which may consist of one or more documents each signed by one or more of the Investors) of Investors (save for any Associate of the General Partner) who hold commitments which in aggregate equal or exceed 75% of Total Commitments (excluding any Commitments held by Associates of the General Partner) provided that an Investors' Special Consent shall only be effective if Investors in the Partnership and such other Parallel Funds [as defined] (excluding any such commitments held by Associates of the General Partner) shall have signed similar consents (and, for the avoidance of doubt, an Investor shall be entitled to split its Commitment for these purposes so that an Investor may consent in respect of part of the Commitment and withhold consent in respect of the balance).'

15. The parties also referred to clause 11.5 of the LPA:

> '11.5 Assignment of Rights and Obligations and Retirement of General Partner
>
> The General Partner shall not sell, assign, transfer, exchange, pledge, encumber or otherwise dispose of all or any part of its rights and obligations as a general partner, other than to an Associate of the General Partner (whereupon in the case of an assignment or transfer, such Associate shall become the General Partner in place of the transferor), or voluntarily withdraw as the general partner of the Partnership, without the approval of Investors by an Investors' Special Consent.'

Nature of limited partnership

16. It is important to bear in mind that a limited partnership is different in character from an ordinary partnership. The general limitation of liability of the limited partners and the requirement for at least one general partner is made plain in section 4(2) and 4(2A) of the 1907 Act, as amended:

> '(2) A limited partnership . . . must consist of one or more persons called general partners, who shall be liable for all debts and obligations of the firm, and one or more persons to be called limited partners . . .
>
> (2A) Each limited partner in a limited partnership that is not a private fund limited partnership shall, at the time of entering into the partnership, contribute to the partnership a sum or sums as capital or property valued at a stated amount, and shall not be liable for the debts or obligations of the firm beyond the amount so contributed.'

17. As the editors of *Partnership Law*, 5th edn, say (at 24.2) one of the ways in which a limited partnership differs from an ordinary partnership is that the limited partners take no part in the management of the business and are not agents for their partners because the general partner acts for all of them as well as for itself. This will be relevant when considering the effect of section 38 of the 1890 Act in relation to limited partnerships, depending as it does in the case of an ordinary partnership on the agency of each partner in the winding up of the partnership's affairs. The provisions of the 1890 Act, and the rules of common law and equity applicable to partnership, apply generally to limited partnerships, unless inconsistent with the 1907 Act: section 7 of the 1907 Act.

18. For present purposes, the point is that the winding up of a limited partnership is to be carried out by its solvent general partner(s) only, not by any limited partner. This point is made explicit by section 6(3) of the 1907 Act. The court will authorise a limited partner to wind up the firm only if every general partner is dead or incapable, or it may appoint a receiver to do so: *Partnership Law* at 24.46. I do not need to decide for present purposes whether the terms of a limited partnership agreement may take precedence over section 6(3), noting that clause 13.5.3 of the LPA (set out above) provides that where the general partner is disabled from acting, the limited partners are to designate another party or parties to wind up the partnership's affairs.

19. The LPA also sets out, at clause 4.5, the powers of the general partner during the course of the partnership, giving it full power and authority to do a list of acts or things on behalf of the partnership and so as to bind it. A Manager (as defined) is given certain powers by clause 4.3, and may be given further powers as provided by clause 4.5.1(b) to (d). Only the general partner is given power to 'commence, conduct, settle or defend litigation that pertains to the Partnership or to any of the Partnership Assets': clause 4.5.1(g).

20. The construction and effect of the LPA must be considered in light of the general law relating to limited partnerships. In particular, if the general partner is (for any reason) disabled from winding up a dissolved partnership, there can be no question of the limited partners simply carrying out the role. If the general partner cannot act, and there are partnership assets remaining to be dealt with, the correct course is generally for a limited partner to apply to court for the appointment of some other suitable person to do so or for permission to wind up the (remaining) assets itself.

The evidence on behalf of the claimant

21. There are before the court three witness statements made by Mr Nigel Spray, a former director of Frontiers Capital Limited (formerly nCoTec Ventures Limited), which was the Manager of FCILP (and of Frontiers Capital II Limited Partnership, "FCIILP") until 2008.

22. In his first witness statement, dated 15 November 2022, Mr Spray describes FCILP as Mr Horlick's limited partner fund, and FCIILP as his (Mr Spray's) limited partner fund. He says that over the summer of 2003 he and Mr Horlick discussed a merger of the two limited partnerships. He suggests that in late 2003 there was the creation of a "merged entity", bearing the name "Frontiers Capital". I understand his evidence to be that FCILP was the result of the merger, although do not consider this to matter for present purposes.

23. An LLP known as Frontiers Capital Partners LLP was established in March 2008 in order to take over the managerial responsibilities of the Manager. (The relationship between the LLP and the Manager, which became a member of the LLP and continued in existence, is unclear from the evidence.) The executives involved in FCILP were, he says, employed by a service company called Frontiers Capital Advisers Limited. Mr Spray also says that in 2007, Mr Herman Spruit joined the LLP as a Designated Member, later becoming a director of Frontiers Capital Advisers Limited on 7 October 2008 and a director of the Manager on 5 December 2008. Mr Spruit was added to the list of directors of the Manager on 19 May 2009.

24. Mr Spray discusses how Mr Horlick decided to step aside from his involvement with FCILP, leading to his resignation as a member of the LLP, as a director of the general partner, 'and all portfolio companies'. He then says at paragraphs 26 and 27 of his first witness statement:

> '26 After Mr Horlick's departure, which took place during the Global Financial Crisis that had begun in 2007/08, the remaining management decided to wind up [FCILP]. I notified Companies House that the Claimant had ceased its business on 5 April 2010 and had been dissolved.
>
> 27 The affairs of FCILP were, therefore, wound up in 2010 without knowledge of the causes of action it held against the Defendant, which are now the subject of this Claim. The General Partner was wound up by special resolution on 30 July 2010. The last Annual Validation for The General Partner, filed at the Guernsey Registry on 22 January 2010 confirmed that it had three Directors before it was wound up; Mr Pascal Mahieux, Mr Richard Stapley and Mr Spruit. The Manager was then dissolved on 12 October 2010. The LLP was dissolved on 25 January 2011 and I remained an LLP member until its dissolution.'

25. The notification to Companies House was made by form LP6, giving effect to the registration requirements in section 9 of the 1907 Act. In the form in which it is exhibited to Mr Spray's first witness statement it is signed by Mr Spray and bears the date "04/02/2014" on a Companies House sticker which is affixed to it.

26. It was on the basis of this evidence that the defendant indicated his position via Mr Astaire's second witness statement that FCGPL has no authority to act on behalf of FCILP. He made the following points:

i) The partnership was to endure for ten years (clause 13.1) unless terminated in accordance with the provisions of clause 13.1(a) to (d).

ii) The particulars of claim and the evidence of Mr Spray and of the claimant's solicitor, Ms Lucy Vials, refer to the partnership having been dissolved.

iii) The only possible method of termination is withdrawal of the general partner under clause 13.1(a). In particular, Mr Spray did not suggest that there was an Investor's Special Consent for the purposes of clause 13.1(b) (and he indicated that the decision was taken by management).

iv) Where clause 13.1(a) applies, including where the general partner "withdraws", clause 13.5.3 provides that the Limited Partners shall designate some other party or parties to act as liquidating trustee (language explained at the hearing as being derived from US precedents).

27. The explanation of this part of the defendant's application by Mr Jonathan Cohen KC, appearing for the defendant, appeared to catch the claimant's legal team very much on the hop. Further witness statements from Mr Spray were filed and served on both the second and third days of the hearing. Sir Geoffrey Cox KC, appearing for the claimant, made clear that these statements had been prepared with no more than a few hours' notice. Mr Cohen did not object to the admission of the further statements, although he was very critical of them, as I will come on to below.

28. In Mr Spray's second witness statement dated 20 July 2023, he comments further on paragraph 26 of his first statement (set out above), summarised as follows:

i) To the best of his knowledge and recollection, he says, the dissolution of the claimant was carried out with the full knowledge and written consent of its limited partners and all proper procedural requirements were complied with.

ii) All formal corporate procedures and communications in connection with the partnership were handled by Northern Trust of Guernsey. Mr Spray says that 'Northern Trust is one of the most reputable and well established professional fund and trust administrator and fiduciary service providers globally, operating for over 130 years in more than 70 global locations, and forming the largest fund administrator in Guernsey'. There was an independent director from Northern Trust, he believes of FCGPL, whose role was to take charge of formal corporate procedures for the claimant.

iii) Solicitors had been instructed throughout the lifetime of the Frontiers Capital Group, including SJ Berwin LLP and Macfarlanes LLP, to ensure legal requirements were complied with from the outset and, to Mr Spray's recollection, continued throughout the lifetime of the claimant.

iv) The limited partners are professional, institutional investors who had collectively invested tens of millions of pounds, and with the structure that was in place to ensure the claimant's legal, financial and regulatory compliance and professional administration, the claimant would not have been wound up without each limited partner having been contacted for consent.

29. Mr Spray also indicates that documents held by former independent advisors will be relevant and disclosed when required in these proceedings.

30. The claimant also relies on a third witness statement of Mr Spray, also dated 20 July 2023. He adds to his second statement by indicating that the directors of FCGPL from Northern Trust were Messrs Pascal Mahieux and Richard Stapley. He then says at paragraphs 8 and 9 of his third witness statement that:

> '8 As a result of our discussions, the directors of the General Partner agreed that Northern Trust would carry out the formal procedures of the dissolution of the Claimant in accordance with the Partnership Agreement. I do not recall at any stage, any concern that I had at the time that the dissolution was not being done in accordance with the General Partner's intentions, and as far as I was concerned, it was done. I would not have given notice to Companies House and filed the LP6 Form confirming that the Claimant had ceased its business on 5 April 2010 and had been dissolved unless I had been informed by the directors of the General Partner that our intentions had been complied with as to the Claimant's dissolution in accordance with the Partnership Agreement.
>
> 9 I can confirm that the General Partner did not ever unilaterally withdraw from its role as General Partner of the Claimant; nor was the General Partner in any way terminated or wound up prior to the Claimant's cessation of business and dissolution on 5 April 2010.'

Discussion

31. Mr Cohen characterises the evidence from Mr Spray as deplorable. He takes the following points:

i) Mr Spray was not a director of FCGPL, and had no involvement with FCILP itself.

ii) He gives no positive evidence about the decision to dissolve, i.e. (as I understand it) merely conjecturing as to what would have happened. An oral agreement to dissolve (i.e. outside the terms of the LPA) would be difficult to arrive at and would involve careful consideration of the precise words used, as to which there is no evidence.

iii) He does not say that an Investors' Special Consent was made. No evidence about the consent that was sought, and as Mr Spray believes was given, is set

out in the witness evidence.

iv) The claimant had five months to produce documents and there is no reason to suppose that a professional services company would have anything from 13 years ago. SJ Berwin no longer exists. The claimant relies on *Korea National Insurance Corporation v Allianz Global Corporate & Specialty AG* [2007] 2 CLC 748, where the relevance of the question of what evidence would be available at trial to a summary judgment application was considered.

v) The statement that FCGPL did not withdraw is self-serving and is inconsistent with paragraph 26 of Mr Spray's first witness statement, which says in terms that the decision to dissolve was taken by "management", which connotes a withdrawal by the general partner.

vi) There is no witness statement from Mr Spruit, despite the claimant having indicated in court that such a statement would or might be produced.

vii) There is an inconsistency in Mr Spray's evidence. On the one hand he says that everything was done properly and thus in accordance with the LPA, and on the other he says that in any event the consent of all limited partners would have been obtained, i.e. outside the terms of the LPA.

32. Sir Geoffrey in response contended that the implication to be drawn from Mr Spray's evidence, read as a whole, was that FCILP was dissolved by an Investors' Special Consent. In making this submission, he relies on the maxim, *Omnia praesumuntur rite esse acta* (all things are presumed to have been rightly done), submitting that it is to be presumed that all things were done as they ought to have been. The authority relied on for this is *Harris v Knight* (1890) 15 PD 170, where it was held that when it is proven that a will was made, executed and attested, it will be rebuttably presumed that the testator knew and approved the contents of the will. The maxim applies to establish proof of title to property or to an office (such as where a deed of appointment has been lost), and I am not convinced that it can be applied to show that a partnership was dissolved under one provision of an agreement rather than under another, but it is not a point which requires to be determined for present purposes.

33. At times, Sir Geoffrey's submission appeared to be that I should make a positive determination now that the dissolution of FCILP was effected by an Investors' Special Consent within clause 13.1(b), such that the general partner is given authority to wind up the partnership's affairs. Mr Cohen suggests that the question is one of whether the claimant, on this issue, surmounts the summary judgment test of showing a realistic rather than a fanciful prospect of establishing that FCGPL has authority to act in the winding up of the partnership. That is clear from his reliance on the *KNIC* case. Likewise, as I have noted, Mr Spray comments on the documents that will be disclosed in due course, indicating that the defendant's application is for summary judgment.

34. The test for summary judgment is well established and is set out, e.g. by Lewison J in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15]. Of relevance in the present case, it may be possible to discern that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents, and the court must consider the evidence that can reasonably be expected to be available at trial. Furthermore,

> '…[a]lthough a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case.'

35. For the reasons summarised above, Mr Cohen submits that there is no likelihood of further evidence becoming available. In the *KNIC* case, at [14], Moore-Bick LJ said this:

> '14 In the present case Allianz criticised the judge for having failed to make allowance in its favour for the likelihood that additional evidence relating to various aspects of this defence would be available at trial to cast a more benevolent light on events, but in my view that criticism is unfounded. It is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial. If it wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up. It is not sufficient, therefore, for a party simply to say that further evidence will or may be available, especially when that evidence is, or can be expected to be, already within its possession, as is the case here. Allianz was quite entitled, if it so chose, to confine its evidence to the factual allegations in the defence, but having done so, and having failed to give any indication of what other evidence can be expected to be available at trial, it cannot complain that the court has not speculated about whether there might be any such evidence, and if so what its nature might be.'

36. It is quite clear to me that, whether rightly or wrongly, the contents of Mr Spray's first witness statement were prepared without a proper appreciation on the part of the claimant of the argument that the defendant was putting forward. The evidence filed during the hearing was prepared on the hoof, and Sir Geoffrey was (ultimately) clear that the claimant was not asking for an adjournment, and would not seek to file further

evidence after the hearing. I must form a realistic assessment of the quality of the evidence before the court, and of the likelihood of further relevant evidence becoming available which might cast light on the way in which the dissolution of FCILP was effected.

37. Mr Cohen submits, relying on *KNIC*, that a party does not get a free pass on the need to respond fully to a summary judgment application by saying that it will deploy its weaponry later, and the claimant had months in which to make enquiries. He suggests that more could have been done within a two-day period to make enquiries, for instance of Northern Trust, and suggests that ordinary document retention periods mean that no further documents will be available.

38. I agree with Mr Cohen that, if the only evidence available were that currently in Mr Spray's witness statements, it would probably not lead to a finding that there was an Investors' Special Consent, or that the informed and written consent of all the Limited Partners had been obtained. Mr Spray's evidence is essentially not supported by any of the documentation that should be available to support the contention that there was an Investors' Special Consent, which has particular procedural requirements. The fact that the claimant's position is that, even if there was no such formal consent, all the limited partners must have consented in some other way hardly supports the submission that all must have been done properly. There are also unexplained discrepancies in the evidence, such as the fact that the LP6 form appears to have been submitted in 2014, even though Mr Spray is clear in saying that the dissolution took place in 2010. It is wholly unclear when capital was returned to the limited partners, as the LP6 suggests had happened by February 2014.

39. On the other hand, it would certainly also appear that Mr Spray is not the only person who can give relevant evidence on the question of how FCILP was dissolved. Having signed the LP6, and as a member of the LLP, he appears to have been involved with the administration of FCILP, although quite what was the nature of what he describes as the earlier "merger" with his own fund is not entirely clear. In light of his second and third witness statements, the contents of which are summarised above, it appears that the statement in paragraph 26 of his first witness statement was made without any real understanding of the point that he was addressing. The criticism in that regard is likely to be of the claimant's lawyers rather than of Mr Spray himself.

40. I do not think I can go so far as to say that the professional advisers to FCILP and FCGPL (and to other relevant parties, such as the Manager) will not realistically continue to hold any documents in any form. That might include the successor firm to SJ Berwin. It also seems to me that Mr Spray has (to adopt the words of Moore-Bick LJ in the *KNIC* case), at least in general terms, described the nature of the evidence which the claimant says may well be available, its source and its relevance to the issues before the court.

41. There are two further points. First, I am told that there were a significant number of limited partners and that they included large financial institutions. It seems to me more than realistic that one or more of those institutions will retain some paperwork (or some collective memory, independent of Mr Horlick) about the way in which FCILP was dissolved. Sir Geoffrey indicated that he was sure that the limited partners knew about the litigation. Secondly, for the general partner to withdraw without an Investors' Special Consent would have been a breach of clause 11.5, and it may be inherently unlikely that specialist solicitors advised on such a course, i.e. if Mr Spray's recollection of the extent of their involvement is correct.

42. Accordingly, I have come to the view that the claimant has more than a fanciful prospect of establishing that FCILP was dissolved either by an Investors' Special Consent or by the consent of all the limited partners. I therefore decline at this stage to strike the claim out or to grant summary judgment on the basis that FCGPL has no standing or authority to pursue the claim on behalf of FCILP.

43. I should comment further on the possibility that there was no Investors' Special Consent, and that all the limited partners otherwise consented. Clause 16.5.1 of the LPA sets out that such an Investors' Special Consent is required in order to effect any variation of the agreement. Mr Cohen submits that any variation to permit dissolution by informal consent would require the formalities of that provision to be satisfied before dissolution could be effected otherwise than in accordance with clause 13.1. In doing so, he relies on the decision of the Supreme Court in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119, where the majority held that the common law would give effect to a "no oral modification" clause, or a clause requiring specified formalities to be observed before a contract could be varied.

44. Sir Geoffrey submits that this rule is modified in the case of a partnership by section 19 of the 1890 Act, which provides that the mutual rights and duties of partners may be varied by consent, and that such consent may be either express or implied from a course of dealing. The point was left open by Mr Philip Marshall QC in *Patel v Patel* [2019] Bus LR 1066 at [27] (which predated the decision in *Rock Advertising*). The claimant relies on the suggestion by the editor of *Lindley and Banks on Partnership*, 21st edn at 10-43, that the common law rule does not apply in the case of a partnership, which, as Lord Millett said in *Hurst v Bryk* [2002] 1 AC 185 at 194, is much more than a simple contract.

45. At this stage I merely note the argument which, depending on the facts, may require to be determined in due course.

46. I should also record that, despite the result in this judgment, I have considerable sympathy for the defendant's legal team given the wholly unsatisfactory way in which the claimant's position emerged, and the way in which the already fractious hearing was extended as a result. Nonetheless, and whilst these matters may be relevant when

costs come to be considered, they do not lead me to the view that I can presently determine that FCGPL has no standing to pursue the claim on behalf of FCILP.

Section 38 of the Partnership Act 1890

47. The defendant also contends that FCGPL has no standing to sue on behalf of FCILP, both because the proceedings are not "necessary" for the purposes of section 38 of the 1890 Act, and because FCILP has already been fully wound up by the return of the limited partners' capital.

48. So far as relevant, section 38 of the 1890 Act provides as follows:

> '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.'

49. It was common ground that section 38 applies to limited partnerships, subject to the terms of the 1907 Act. This must mean that it is read as referring to the authority of the general partner after dissolution (see section 6(3) of the 1907 Act), rather than to the authority of each partner.

50. Mr Cohen submits that proceedings of this nature, which he describes as speculative, do not fall within the rubric of what is necessary to wind up the affairs of the partnership. He accepted that a straightforward debt claim would be permitted, but not speculative litigation. The following extract of Mr Cohen's submissions from the transcript of the hearing sets out the basis of the defendant's position on this point better than I could summarise it:

> 'What I mean by speculative litigation is that there is an obvious difference between a straightforward debt collection exercise, even if the debt is disputed, when the court can see how long it will take and what it involves and an exercise of seeking damages for breaches of duty which is something else altogether. The reason it is something else altogether is that, if you are seeking to recover a debt, the court offers short, sharp procedures for that and almost inevitably the cost of doing so are very limited. Whereas if you are seeking damages in an action, what you are doing is yoking together the partners for a long period of time because a piece of litigation is going to take at least a year to a year and a half to come on for hearing, and you are making them spend money, potentially quite a lot of money, and you are exposing them to substantial financial liability. Although it might be said, well, in a limited partnership not so much because the liability is limited. The principles cannot differ as between the 1890 Act partnerships and the limited partnerships. Section 38 is doing the same thing for both of them. That is why I distinguish speculative litigation from what I would describe as debt

> recovery exercises. Point number 1, I say section 38, well, I think I would go so far as to say never but I do not have to go that far; it would not justify this sort of litigation, perhaps save in the most exceptional of circumstances where the court can see that there is some kind of overriding necessity, but not this.
>
> ….
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> The starting point is that a piece of speculative legislation never falls within the necessity test. One might be able to evidence to the court an exceptional situation where it does and, Judge, you give one example which I rather had in mind where it is absolutely impossible to see a defence, for example, because there has been an admission in correspondence. It might not be a debt collection exercise. It might be breach of duty where there is an admission and it is obvious to everybody that a summary judgment application is very likely to succeed. Even then, I am less than sure it would be necessary but, nonetheless, I can envisage there might be at least that very limited possibility but just a pure unadulterated piece of speculative litigation where a partner says, well, I think this is a good claim, that is not enough. That is not necessary because of the effect that it has on fellow partners and because of the time it would take in circumstances where the dissolution period is supposed to be short.'

51. There would appear to be no English authority concerned with whether the bringing of proceedings after the date of dissolution is necessary. The authorities are principally concerned with the question of whether a 'transaction begun but unfinished at the time of dissolution' should be completed. That was so in *Boghani v Nathoo* [2011] 2 All ER (Comm) 743, concerned with hotel developments uncompleted at dissolution, and to which I was referred. Sir Andrew Morritt C summarised, at [27], the principles derived from the earlier authorities in the following way:

> '27 In my view the terms of s 38 as explained in the authorities to which I have referred, in particular *IRC v Graham's Trustees* 1971 SC (HL) 1, demonstrate the following propositions. (1) The obligations of partners to third parties continue notwithstanding the dissolution of the partnership. (2) In England, if not in Scotland, the satisfaction of those obligations by performance, release or novation or the payment of damages will not usually involve reliance on the terms of s 38. (3) Section 38 does not entitle the surviving partners to engage in new bargains or contracts so as to bind a deceased or former partner. (4) Even in relation to transactions, not being new bargains or contracts, begun but unfinished at the time of dissolution s 38 applies only if and to the extent that the completion of such transactions is necessary to wind up the affairs of the partnership. (5) Section 38, if applicable, confers a power; it does not impose any additional duty….'

52. *Boghani* was a dispute between former partners, not between the partners and a third party. The uncompleted hotel contracts could be assigned in order to facilitate their completion, so it was not necessary for the winding up of the firm's affairs for them to be completed by one of the partners and the power in section 38 was accordingly not available.

53. This does not address the question of how causes of action accruing to the partnership before dissolution are to be dealt with. In order to wind up the affairs of a partnership, any cause of action which is partnership property must either be pursued, or a decision made not to pursue it. The cause of action might in principle be dealt with by assignment to another in order for that other person to pursue it. When I asked Mr Cohen whether such an assignment to another might encounter problems in light of the principles of champerty and maintenance to the extent that they continue to apply, he indicated that this might be a difficult question and he did not encourage me to consider it further. And, if a speculative claim could be assigned, so could a simple debt claim. The possibility of assignment cannot mean that section 38 never permits the commencement of proceedings (and Mr Cohen did not suggest that it did). In the normal course, the way in which a cause of action will be realised as part of the winding up is for proceedings to be issued unless, of course, it is possible for the claim to be satisfied out of court and without the need to take that step. That is the only way in which the property can be converted into money for division among the partners, after payment of the debts and liabilities of the partnership.

54. Where the claim is for a money judgment, whether liquidated or otherwise, any sum once recovered will therefore be dealt with in accordance with the partnership agreement. It is easy to imagine other types of claim, such as a claim to a declaration concerning land which is a partnership asset. I can well see in such a case it may be appropriate, if the land is to be returned to one or more partners, for them to take proceedings themselves after that has happened. But if the land must be sold and it cannot be sold before a dispute with a third party has been resolved, it may well be thought to be appropriate, i.e. necessary, for the proceedings to be taken before that can be done. Such is the sort of consideration which might inform the question whether it is necessary for the proceedings to be taken before the winding up is complete.

55. The only authorities on the question of the extent to which section 38 of the 1890 Act permits the commencement of proceedings to emerge during the course of the hearing were Australian authorities, the relevant legislation being in essentially identical terms. In *Queensland Southern Barramundi v Ough Properties Pty Ltd* [2000] 2 Qd 172, the issue for determination was whether, as matter of procedural law, a claim issued by a single partner after the dissolution of the partnership was properly constituted. It was said by the Queensland Supreme Court that the equivalent power in the local legislation 'includes the authority to start a claim as necessary in the firm name'.

56. The issue was further considered by the Western Australian Court of Appeal in *Belgravia Nominees Pty Ltd v Lowe Pty Ltd* [2015] WASCA 143. There, a partner of a dissolved partnership of two partners pursued a claim against a third party, being the agent under an agreement by which he had managed the property business formerly carried on by the partnership. The question for the court was whether section 49 of the Partnership Act 1895 (Western Australia), the cognate provision of section 38 of the 1890 Act, was the exclusive source of a partner's right to recover partnership property (see at [2]). The decision of the court was that the statute is not the exclusive source; it is open to the partner to sue personally on the cause of action, which is itself partnership property. In doing so, the suing partner should join the other partner(s) as plaintiff (or claimant) or, if they will not consent to be so joined, as defendant, because the remedy is one to which the former partners are jointly entitled. This is consistent with English law: all persons jointly entitled to the remedy claimed by a claimant must be parties unless the court orders otherwise, and if any such person does not agree to be a claimant, they must be made a defendant, again unless the court orders otherwise: CPR r 19.3.

57. In *Belgravia Nominees*, the plaintiff partner sought permission to join the former co-partner as defendant, and the court agreed that this was a permissible way in which to constitute the proceedings. The Western Australian Court of Appeal thus did not have to rule on the construction of section 49 and the question whether the pursuit of the proceedings by one partner alone was "necessary". The Master in the court below had considered that the proceedings were not necessary because in his view they did not have to be taken to wind up the partnership's affairs, and there was no guarantee of success. Murphy JA, however, said the following at [63] to [67]:

> '63 It is unnecessary for present purposes to determine the metes and bounds of s 49 of the Act. Nor is it necessary to reach a final view of the meaning of the word "necessary" as it appears in s 49(1). Nevertheless, I would observe, on a preliminary basis, that I am not persuaded by the registrar's view that the word "necessary" in s 49 imports the "strictest kind of necessity". The section does not use the language of "strictly" necessary, let alone other language denoting the "strictest kind of necessity". That would appear to me to put a gloss on the provision.
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> 64 The meaning of the word "necessary" is to be determined having regard to the statutory context and purpose. Its meaning may include "reasonably required" rather than "essential", and that it is to be "subjected to the touchstone of reasonableness".
>
> 65 Having regard to the common law position referred to earlier; the context of s 49 within the Act as a whole, its evident relationship with s 26 in particular on the topic of agency; and the conjunction of the word "necessary" with the phrase "to wind up the affairs of the partnership"; I would have thought that the better

> view is that the word "necessary" in s 49(1) of the Act is to be understood in the sense of reasonably required.
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> 66 Moreover, on any view of the word "necessary", I would have thought that it is "necessary" to get in the firm's assets to undertake a winding up of the firm. Upon dissolution, the partner's right and duty is to wind up the partnership affairs. A partner commencing proceedings, following a general dissolution, for relief to which the partnership is entitled arising from causes of action accruing prior to its dissolution would, in the language of Farwell LJ in *Seal* [*& Edgelow v Kingston* [1908] 2 KB 579] ordinarily be "endeavouring to get in the firm's assets", absent proof of any collateral purpose.
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> 67 That conclusion is consistent with the observations of de Jersey CJ in *Queensland Southern Barramundi v Ough Properties Pty Ltd* with respect to the corresponding Queensland provision:
>
> > [It] operates to continue the authority of each partner to bind the former firm so far as may be necessary to wind up its affairs. I accept that that includes the authority to start a claim as necessary in the firm name.'

58. The other members of the court did not join in those comments and they are *obiter*. Nonetheless, the test must be ascertainable, and I consider that the test of what is reasonably required in order to get in and wind up the affairs of the partnership is correct, it being "necessary" (as Murphy JA suggested) to wind up those affairs.

59. I cannot see any justification for the test put forward on behalf of the defendant (and which appears to be similar to that which had found favour with the Master in *Belgravia Nominees*), i.e. whether the proceedings are simple or speculative, bringing the former within the section 38 power and taking the latter outside it. As noted above there was discussion at the hearing about whether what would otherwise be a speculative claim would cease to be so if there were some admission of liability on the part of the defendant. Mr Cohen acknowledged that might change the characterisation of the claim. But, this seems to me to highlight the impracticability of the test proposed. Any number of factors could affect the extent to which a proposed claim was straightforward (or simple) or speculative. If there is a partnership asset being a claim with some merit, and that claim is capable of being realised, then I consider that the power given by section 38 of the 1890 Act permits the claim to be brought. As Murphy JA acknowledged, that does not mean that it will be necessary to commence proceedings in all circumstances. It would clearly not be so where the defendant is insolvent and there is no prospect of any recovery, or where the partner proposing to bring the claim has received advice that the claim is hopeless for some particular reason. The defendant in the present case does not rely on any such fact-specific considerations, and it is perhaps unsurprising that a stranger to the partnership will not generally be in a position to put forward an argument as to why proceedings are not reasonably required (or depart from the touchstone of reasonableness). As

Murphy JA suggested, a collateral purpose may mean that the proceedings are not so required, but the burden will be on the objecting defendant to show such a purpose.

60. There is a further point in the case of a limited partnership. Statute provides that the winding up, just like the conduct of the partnership's affairs up until its dissolution, is to be carried out by the general partner and not the limited partners. The statutory exclusion of the involvement of the limited partners thus extends to the very end of the partnership's affairs. It would be inconsistent with the policy of the 1907 Act if the pursuit of claims accruing to a partnership before dissolution and constituting partnership property had to involve the participation of all of the limited partners after the dissolution of the partnership. If this were so, then any limited partner would prima facie have to be a claimant unless it did not agree to be so. I see no reason why this would leave the partners less yoked together than in the case of a claim brought by the general partner alone, or by another person appointed by the court to wind up the affairs of the partnership.

61. In light of my view of the construction of section 38 of the 1890 Act, I do not need to decide whether, in the case of a limited (as opposed to an ordinary) partnership, it is possible for a single partner to pursue a cause of action accrued to the partnership against a stranger to the partnership before dissolution, joining all other partners as either claimants or defendants, i.e. not in reliance on the power given by section 38. It seems to me, however, at least doubtful whether this is permissible given the way in which limited partnerships operate.

62. That also addresses the separate point argued by the defendant that, even if the proceedings would have been necessary during the winding up of the partnership, now that the limited partners' capital has been returned and many years have passed the authority of the general partner has necessarily lapsed. Both counsel indicated that the question does not seem to be the subject of previous authority. Mr Cohen's submission was that if a claim such as the present is to be brought at this juncture, it must be brought by all the partners together, including the general partner. This is the course that was in fact followed in the *Belgravia Nominees* case. Mr Cohen suggested that any corporate partner which had been struck off must be restored to the register of companies in order for this to happen (although I would note that this is generally not possible in England after six years have passed).

63. In the case of a limited partnership, the winding up must be completed either by the general partner or by the person appointed by the court to do so, which may be a limited partner but is most unlikely to be all the limited partners. I discern Mr Cohen's argument to be that once their capital has been returned, the winding up is complete, and any subsequent proceedings then concern a partnership asset in the hands of one of them. There are cases where, after winding up, a partner claims to be entitled to an asset or to an interest in or produced by an asset retained by another and proceedings will then take place between those partners (see, e.g., *Nilsen v Murcott* [2008] 2 NZLR 750, which was not referred to during the hearing but which is consistent with

Mr Cohen's submissions). Such proceedings are not brought on behalf of the partnership against a third party, but between former partners in relation to a dispute over the partnership assets.

64. I consider that a cause of action against a third party accrued to the partnership before dissolution, which is not pursued or realised or dealt with by assignment, and which does not become time barred, remains a partnership asset and thus its realisation is one of the affairs of the partnership which remains to be wound up even if the person carrying out the winding up mistakenly believes that it has been completed. Even though the partners may all have believed that the affairs of partnership had been wound up and that its capital had been returned accordingly, in such circumstances those affairs will in fact not have been fully wound up and the ghost of the former firm will not have been finally laid to rest. There will remain a cause of action constituting an asset of the partnership, which has not been dealt with. I can well see that particular considerations may arise where the general partner expressly decides not to pursue a claim and one or more limited partners wish it to do so. In such a case, the remedy would be for them to apply to court for an order under section 6(3) of the 1907 Act appointing a different person to carry out the winding up.

65. I also consider that a further consideration arises on the facts of the present case. It is the contention of the claimant that the defendant deliberately concealed the cause of action such that no person whose knowledge could be attributed to FCILP had knowledge of the claim until many years after the dissolution of the partnership. It would be an understatement to say that the defendant strenuously denies the allegation, and he has applied for reverse summary judgment on the basis that the claimant's limitation arguments are not realistically arguable. I have not yet heard submissions on this part of the application and express no view on it. But, I consider that it is in accordance with the law concerning limitation of actions that the question falls to be decided. Subject to resolution of the standing argument dealt with in the first part of this judgment, if the claimant has no real prospect of arguing that the claim was deliberately concealed or, indeed, if it fails to make this good at trial, then the claim will be dismissed. If the claimant is ultimately vindicated in its position on this argument, then it will be through the defendant's fault that this claim could not be brought before the partnership was ostensibly wound up. Furthermore, even though a winding up should be carried out as expeditiously as possible (see *Sheveleu v Brown* [2018] CSIH 68 at [36]), there would be a good reason why that has not happened.

Conclusion

66. I would not grant summary judgment to the defendant on the ground that FCGPL as general partner has no standing to pursue the claim. Despite the unsatisfactory way in which the claimant's position as to the way in which FCILP was dissolved has emerged, I am satisfied that it has a realistic prospect of establishing that its powers under the partnership agreement have not lapsed. I also consider for reasons given above that the defendant has not established that (if the claimant does establish that it

is the person tasked with winding up FCILP's affairs) the power in section 38 does not extend to the bringing of these proceedings, and I would not strike out the claim for that reason.

67. The issue of whether the claimant has standing by virtue of clause 13.5.3 of the LPA (and, if not, whether some other person can continue the present proceedings on behalf of FCILP) therefore remains to be determined. When this judgment is handed down, I wish to hear from the parties how and when they consider that the point ought to be determined. As it might bring the proceedings to an end, my present view is that it would be unsatisfactory for it simply to be put off to trial. As matters stand, the balance of the applications currently before the court have been adjourned to be heard from 6 to 8 March 2024 (the long delay being the result of the unavailability of leading counsel). My present view is that the standing point at least arguably ought to be determined either before or with those applications. If the parties cannot agree on how this issue should be resolved, I will list a short directions hearing, which I presently consider suitable for junior counsel.