Michaelmas Term
[2015] UKPC 46
Privy Council Appeal No 0089 of 2014

JUDGMENT

Krys and others (Respondents) *v* KBC Partners LP and others (Appellants) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Mance
Lord Sumption
Lord Reed
Lord Toulson
Lord Hodge

JUDGMENT GIVEN ON

19 November 2015

Heard on 17 June 2015

Appellants

Ian Mill QC
Philip Jones QC
Tom Weisselberg QC
(Instructed by Brown Rudnick LLP)

Respondents (Kenneth Krys and John Greenwood - Liquidators)
David Head

(Instructed by Jones Day)

Respondent (New World Value Fund Limited)
Christopher Pymont QC
Ciaran Keller
(Instructed by Signature Litigation LLP)

LORD SUMPTION: (with whom Lord Reed, Lord Toulson and Lord Hodge agree)

1. Part VI of the Partnership Act 1996 of the British Virgin Islands provides for the creation of limited partnerships on the footing that the partnership business is conducted by the general partner, and the limited partners are not liable for partnership obligations unless they participate in its management. This appeal arises out of a dispute about the distribution of partnership assets upon its dissolution.

2. Value Discovery Partners LP ("VDP") was a BVI limited partnership formed in 2004. Its purpose was expressed in its articles of partnership (clause 1.2) to be:

> "to carry on business and in particular but without limitation to identify, research, negotiate, make and monitor the progress of and sell, realise, exchange or distribute investments which shall include but shall not be limited to the purchase, subscription, acquisition, sale and disposal of shares, debentures, convertible loan stock and other securities in unquoted companies and in certain quoted situations, and the making of loans whether secured or unsecured to such companies in connection with equity or equity-related investments, with the principal objective of providing the Limited Partners with a high overall rate of return."

3. There were four partners:

(1) The Principal Limited Partner was New World Value Fund ("NWVF"), a company registered in Gibraltar whose ultimate beneficial owners were Boris Berezovsky, a controversial Russian politician and businessman who died in 2013, and his Georgian business associate Arkady Patarkatsishvili, who died in 2008. NWVF contributed assets valued at US$320m to the partnership, substantially the whole of the initial capital. These assets consisted of ordinary shares in various companies carrying on business in the Balkans and the former CIS states. They were divided into categories, corresponding to business areas, which are referred to in the articles as "Strategies".

(2) The General Partner was a company called Salford Capital Partners Inc ("Salford"), which was controlled by a Mr Eugene Jaffe, a professional fund manager. Salford was entitled under the articles to a management fee of 2% of the aggregate capital contributions of the limited partners.

(3) In addition, there were two Special Limited Partners, KBC Partners LP and SCI Partners LP, referred to in the articles as Special Limited Partner I and II respectively. KBC and SCI were BVI limited partnerships owned by Mr Jaffe which made nominal capital contributions of $100 each. Their role was to represent his interests and those of a number of individuals working for Salford or otherwise concerned in the management of VDP.

4. It is clear from the terms of the articles that the principal purpose of the partnership was to manage the investments contributed by Messrs Berezovsky and Patarkatsishvili through NWVF with a view to selling them off within the partnership term and achieving the maximum return. It is apparent from the evidence that the disposal of the investments was expected to be difficult, partly because of their location in a part of the world where business conditions are notoriously difficult, and partly because their sale value was likely to be undermined if their connection with Messrs Berezovsky and Patarkatsishvili became known. NWVF and VDP were structured in such a way as to conceal that connection as far as possible.

5. Clause 1.5 of the articles provided that the partnership should terminate on 1 July 2008, subject to clause 11.2, which provided for this date to be extended for successive periods by the General Partner "in order to permit an orderly liquidation of the Partnership Assets". An extension was conditional on the General Partner notifying the limited partners in writing that it was of the view that an orderly liquidation of the partnership's assets was not possible by the existing date of termination. The management fee payable in respect of the extended period was reduced to 0.4%. In no case were the extensions to exceed four years in total. In other words, the last possible date of termination was 1 July 2012. In the event, the duration of the partnership was successively extended, but none of the partnership assets had been sold when the partnership was finally terminated on the long-stop date 1 July 2012. It is now in liquidation.

6. The present appeal arises out of proceedings brought in the BVI by the joint liquidators to determine the distribution of the partnership's assets in the liquidation. The joint liquidators are neutral on this issue, and have taken no substantial part in this appeal. The real issue is between NWVF, which had contributed substantially all the capital, and the two Special Limited Partners KBC and SCI, which represented the interest of those contributing management skills. Shortly stated, the question is whether the Special Limited Partners are entitled to recover a sum referred to in the articles as "Carried Interest" in circumstances where the assets had not been sold at the time of termination. The Court of Appeal, overruling the trial judge, held that they were not.

7. Carried Interest is in substance a bonus or success fee payable to interests associated with the management for selling the investments. The articles provide for two kinds of "Carried Interest". "Senior Carried Interest" is related to the management

of the assets as a whole and is payable to KBC ("Special Limited Partner I") at 24% of the net profits and gains realised on the sale of the investments. "Strategy Carried Interest" is related to the management of the assets comprised in individual "Strategies" and is payable to SCI ("Special Limited Partner II") at 6% of the profits and gains realised on sale. The combined effect of the provisions for Carried Interest is that individuals associated with the management stood to gain 30% of any profits or gains made on the sale of the investments.

8. Clause 11.5 deals with liquidation. Clause 11.5.3 provides:

> "Upon termination or liquidation of the Partnership … no further business shall be conducted except for such action as shall be necessary for the winding-up of the affairs of the Partnership and the distribution of the Partnership Assets amongst the Partners."

Clause 11.5.4 provides for the treatment of the assets of the partnership on liquidation after termination:

> "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 remaining proceeds and assets (if any) shall be distributed amongst the Partners on the basis set out in clause 8."

Clause 8 provides for distributions, some of which may be made at any time at the discretion of the General Partner, and some of which may be made only upon termination. Among those which can be made only upon termination are sums allocated under clauses 7.2.2 and 7.2.3, which deal with Carried Interest.

9. At this point it is convenient to set out, so far as relevant, clauses 7 and 8 of the articles, whose construction is decisive of the issue now before the Board:

> "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.

…

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.

…

8.1 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) first, in payment of the Management Fee …

(b) second, to the Principal Limited Partner in amounts allocated to it pursuant to clause 7.1.6 and not characterised as Capital Contributions;

(c) third, to the Principal Limited Partner in repayment of its Capital Contributions;

(d) to Special Limited Partner I and Special Limited Partner II in repayment of their Capital Contribution pro rata to the amount of their respective Capital Contributions;

(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;

(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.

8.2.2 Unless otherwise specifically permitted hereunder, distributions of Net Income, Capital Proceeds and other assets of the Partnership may be made at any time, and in any manner, with the agreement of the General Partner and the Limited Partners. In each such case, the General Partner and the Limited Partners shall each have an absolute right to refuse consent with or without cause.

8.2.3 Distributions up to the amount of the Preliminary Carried Interest attributable to the relevant Investment(s) may be made to the Special Limited Partner II upon the satisfaction of the following conditions:

(a) all Investments representing a Strategy have been sold and the aggregate Acquisition Costs of Investments that have been sold is equal to or exceeds 30% of Invested Capital of the Partnership; and

(b) the Annual Rate of Return on Investments that have not been sold is not less than 20%.

(c) Except as provided below, distributions made pursuant to this Clause 8.2.3 shall be made on a pro rata basis from the Carried Interest Accounts for the Investments that have been sold.

8.2.4 Distributions up to the amount of the Preliminary Carried Interest attributable to the relevant Investment(s) may be made to the Special Limited Partner II upon the satisfaction of the following conditions:

(a) all Investments representing a Strategy have not been sold and Investments have been sold whose aggregate Acquisition Costs is equal to or exceeds 50% of Invested Capital of the Partnership; and

(b) the Annual Rate of Return on Investments that have not been sold is not less than 20%.

Distributions made pursuant to this clause 8.2.4 shall be made on a pro rata basis from the Carried Interest Accounts for the Investments that have been sold. …

8.3 Carried Interest Accounts

8.3.1 Subject to clauses 8.3.7 and 8.3.8 be1ow, upon the sale of any Investment after 1 July 2007 or upon the sale of any Investment that gives rise to Capital Proceeds in excess of 20,000,000 (twenty million) US Dollars, 30% of the Net Investment Return of the Investment (if any), less any amounts of Investment Income relating to such Investment previously deposited under clause 8.3.2, shall be deposited in a separate bank account (a 'Carried Interest Account') of the Partnership that corresponds to the Relevant Strategy and shall only be distributed or transferred in accordance with this clause 8.3. A Carried Interest Account shall be opened and operated for each Strategy. …

8.3.3 Except as provided in clauses 8.3.4 and 8.3.6, the only distributions or transfers that may be made from Carried Interest Accounts are distributions to the Limited Partners pursuant to clauses 8.1(d), (e), (f) or (g) (and in that order), clause 8.2.3 or 8.2.4. …

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).
> …
>
> 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."

10. The effect of these complex provisions can be summarised as follows:

(1) Clauses 8.2.3 and 8.2.4 provide for what amount to interim payments of Carried Interest. As and when investments are sold during the term of the partnership, distributions up to the amount of the "Preliminary Carried Interest" (6% of the net investment return attributable to the investments which have been sold) may be made to SCI if the conditions set out in clauses 8.2.3 or 8.2.4 are satisfied. These conditions prescribe a minimum proportion of the assets of the partnership or of individual strategies which must have been realised and a minimum rate of return which must have been achieved.

(2) Clause 7.2 provides for the distribution of Carried Interest once all the investments have been sold: see clause 7.2.1. In that event, the income and gains are to be allocated in accordance with clauses 7.2.2 and 7.2.3, both of which are expressly predicated on there having been a sale of all the investments. Under clauses 7.2.2 and 7.2.3, a share of the income and gains is distributed to the Special Limited Partners according to a formula dependent on the Annual Rate of Return over the period during which the investments were held, calculated by reference to (among other things) the proceeds of their sale.

(3) Apart from the interim payments authorised by clauses 8.2.3 and 8.2.4, clauses 7.2.2 and 7.2.3 are the only clauses providing for a distribution of income and gains to the Special Limited Partners. Clauses 8.1(e) and (f) are contingent on clauses 7.2.2 and 7.2.3 having been applied. If there has not been a sale of all the investments, neither of them applies. In that event, 100% of the income and gains is allocated to the Principal Limited Partner under clauses 7.2.4 and 8.1(h).

(4) The combined effect of clauses 8.1(e)-(g) and 8.2.1 is that any distributions due under clause 7 are distributed "at the end of the term of the Partnership."

11. There having been no sales, on the face of it the Special Limited Partners are entitled to nothing more than the return of the nominal capital contributions of $100 each. Since distributions have to be made in the course of the liquidation at the end of the term of the partnership, there is no scope for a distribution in their favour by reference to a sale made after the partnership has terminated.

12. The Special Limited Partners object to this conclusion on the ground that "sale" has an extended meaning in clause 7, embracing any disposal of the investments, including their disposal after termination in the course of liquidation or their distribution in specie to the Principal Limited Partner. The requirement of clause 8.2.1 that distributions under clause 8.1 be made at the end of the partnership term means, they say, "at or after" that time.

13. These contentions were supported by a variety of ingenious arguments, but the Board is unable to accept them. "Sale" has a well understood meaning. It means a transfer of property to another party for a money consideration. It could not extend to a distribution to the Principal Limited Partner in specie. In the first place, the articles refer throughout to other modes of disposal such as "distribution" or "exchange" when these are intended, but clauses 7.2.2 and 7.2.3 refer only to a "sale". Secondly, a number of clauses distinguish in terms between "sale" and "distribution", treating them as alternatives, notably clause 11.5.4. Thirdly, since the ultimate object of the partnership is to realise the investments for the benefit, primarily, of the Principal Limited Partner who contributed them, a sale cannot sensibly be thought to include a distribution in specie to that very partner in the course of a liquidation. The Special Limited Partners relied in support of their case on clause 7.3.8, which they argued constituted a general definition under which a distribution in specie counted as a sale. But in the Board's opinion that provision has a more limited effect. It treats a distribution in specie as a realisation only for the purpose of enabling the assets to be valued for the purpose of computing Capital Gains, Losses and Proceeds. It does not create or assume any entitlement to amounts based on these values which is not to be found in the operative provisions of clauses 7 and 8.

14. Under clause 11.5.4 it would be open to the liquidator to liquidate the assets of the partnership by sale instead of by distribution in specie, although this seems unlikely to happen in the present case given the difficulty that Salford has encountered in selling. However, a sale in the course of liquidation after termination could not give rise to a distribution "at the end of the term of the Partnership" for the purpose of clause 8.2.1. Clause 8.2.1 does not of course envisage a distribution at that very moment. It means a distribution in the course of the liquidation but (as with a liquidation under the

Companies Acts) by reference to the state of affairs at its commencement. This assumes that a "sale" has already occurred before that time.

15. Underlying the Special Limited Partners' arguments on construction there is a consistent theme. They say that the apparent result of the language of the articles is extraordinary, since it leaves them with nothing more than their nominal capital contributions if they fail to sell all the investments, however valuable the investments remaining in their hands, however much they may have succeeded in selling and however much the liquidator or NWVF may realise after termination. Even if the Board regarded these consequences as absurd, such arguments have limited force in the face of the clear language of the articles.

16. However, the information available to the Board discloses no reason for regarding the terms appearing from the language of the articles as commercially unwise, let alone as "absurd". This is an unusual partnership made against an unusual background. It is far from clear by what standards of commercial normality any particular provisions are to be measured. There is little to be gained by imagining more or less far-fetched examples of cases in which the articles of partnership would operate harshly if construed according to the ordinary meaning of the words, especially when those examples assume investments of a different kind from those which VDP actually held. The salient points are (i) that substantially all the assets of the partnership were contributed by NWVF, and (ii) that Carried Interest is in effect a success fee earned by the Special Limited Partners by selling the investments. Against this background there is nothing surprising about the contingent character of the interest of the Special Limited Partners. Nor is there anything uncommercial about a construction which leaves them upon termination with nothing but their original nominal capital contribution if Salford has failed to sell all the investment when the long-stop date of termination arrives. The Special Limited Partners submit that the all or nothing basis on which Carried Interest is apparently earned under clause 7.2 is so unreasonable that some other meaning must be found. The Board would not be disposed to accept this even if the premise were correct. But it is not correct. Even if Salford failed to sell all of the investments, the Special Limited Partners would still have been entitled to distributions up to the amount of the Preliminary Carried Interest if they had sold enough of them to satisfy the conditions in clauses 8.2.3 and 8.2.4. Moreover, Salford will have earned the Management Fee even if it has sold nothing. At the trial, evidence was led by them to suggest that their management fee was an inadequate reward by the standards of this kind of asset management business, unless supplemented by the distribution of Carried Interests. But evidence of this kind is almost invariably unhelpful, as it is in this case. It is equally consistent with alternative explanations.

17. For these reasons, which substantially correspond to those of the Court of Appeal, the Board will humbly advise Her Majesty that the present appeal should be dismissed.

LORD MANCE: (dissenting)

18. This appeal involves a one-off issue of interpretation of convoluted articles of partnership in Value Discovery Partners LP ("VDP"). Its resolution might appear to be unimportant, except to the Partners in VDP and those behind them. I have therefore hesitated whether to express my dissent. I have concluded that I should, because I regard the Board's approach as inconsistent with the principle that contracts should be construed as a whole, with their principal objective in mind and without excessive reliance on a literal reading of individual words or phrases. Further, the approach leads to a conclusion which is both capricious and unfair to the two Special Limited Partners who are the appellants and irrationally favourable to the Principal Limited Partner which is the only active respondent (and which I shall call simply the respondent) on this appeal. The judge at first instance, Bannister J, correctly recognised this, and I find myself in large measure in accord with his characteristically clear judgment, although its reading of the articles was incorrect in one or two particulars. As in *In re Sigma Finance Corpn* [2009] UKSC 2, [2010] 1 All ER 571, para 12, so here, the contrary conclusion reached in the Eastern Caribbean Court of Appeal and by the majority in my opinion "attaches too much weight to what the courts perceived as the natural meaning of the words …, and too little weight to the context … and to the scheme … as a whole". The Board has not in my opinion applied the lessons illustrated by this case and others such as *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56, where the United Kingdom Supreme Court held that a reference to the "actual sale proceeds" must in context refer not to the actual sale to an associated company which had occurred, but to a hypothetical sale on the open market at a market price (see especially per Lord Clarke at paras 30 to 31).

19. The reasons for my conclusion follow. I start with a general summary of the scheme of the articles:

> 19.1 The partners in VDP consist in a General Partner, Salford Capital Partners Inc ("SCP"), the Principal Limited Partner, New World Value Fund Ltd ("NWVF") and Special Limited Partners I and II, now KBC Partners LP ("KBC") and SCI Partners LP ("SCI").
>
> 19.2 Except where otherwise expressly provided, the conduct and control of the Partnership's business, operations and affairs were vested exclusively in the General Partner, SCP (clause 4.1.1). The two Special Limited Partners have no such role, but were vehicles by which the General Partner's individual employees (in respectively London and the Central and Eastern European areas where Investments were to be made) were to be rewarded for positive performance, as hereafter appears.

19.3 The principal objective of the Partnership is defined in clause 1.2 as that "of providing the Limited Partners with a high overall rate of return".

19.4 To achieve that principal objective, the purpose of the Partnership is defined by clause 1.2 as being "to carry on business and in particular but without limitation to … sell, realise, exchange or distribute investments …".

19.5 Investments are defined to include but not to be limited to "shares, debentures, convertible loan stock, options, warrants or other securities of and loans (whether secured or unsecured) made to any body corporate or other entity". They were to be acquired in accordance with an Investment Strategy defined as:

> "investment in restructuring and consolidation opportunities in Central and Eastern Europe, as well as special situations worldwide, with particular emphasis on the Food and Beverage and FMCG industries in the Balkans and CIS."

Individual investments with common characteristics were under clause 4.7.1 to be grouped, each group being called a "Strategy".

19.6 The Partnership has (again under clause 1.2) power, through the General Partner, to "execute … all contracts and other undertakings and engage in all activities and transactions as may in the opinion of the General Partner be necessary or advisable in order to carry out the foregoing purposes and objectives, subject to and in accordance with the provisions of these Articles and the Investment Strategy". Clause 4.1.1 underlines this, by expressly conferring on the General Partner:

"full power and authority …

> (a) to carry out the purposes of the Partnership;
>
> (b) to perform all acts, and to enter into and to perform all contracts and other undertakings, which the General Partner may in its sole discretion deem necessary or advisable, or which are incidental, to or for the carrying out of the purposes of the Partnership; …

(d) to evaluate and negotiate investment opportunities and to purchase, subscribe for, exchange or sell or otherwise dispose of Investments for the account of the Partnership;
…

(f) to manage, hold and control Investments on behalf of the Partnership ….”

19.7 The Principal Limited Partner contributed at the outset all the Partnership investments with an initial value of US$320m, these being in fact investments previously acquired on its behalf by the General Partner. The Special Limited Partners each provided nominal Capital Contributions of US$100, and the objective in providing the Special Limited Partners with a high overall rate of return was to incentivise the General Partner’s employees to achieve the like result for the Principal Limited Partner. The General Partner was to receive a management fee (of in effect US$6m per annum in the initial two year Partnership periods ending 1 July 2008, reducing to US$1.4m during any extended periods up to the final Extended Termination Date of 1 July 2012: see para 19.13 below).

19.8 For the Special Limited Partners, the high overall rate of return envisaged consists, broadly speaking, in shares in net returns of 24% (by way of Senior Carried Interest) in the case of Special Partner I and 6% (by way of Strategy Carried Interest) in the case of Special Limited Partner II (ie 30% in all). The remaining 70% of any positive return was to be for the benefit of the Principal Limited Partner (see further paras 19.14 to 19.16 below).

19.9 With limited exceptions, there were to be no distributions of net return while Partnership Investments were being actively managed, but only thereafter when that ended. (A purpose of this was, according to the evidence of Mr Jaffe of the General Partner, SCP, again to incentivise the individual employees whose interests were represented by the Special Limited Partners to continue to create the high overall return which was the Partnership’s principal objective.)

19.10 Provision was however made for the Special Limited Partners’ 30% interest by payments into Carried Interest Accounts. Thus, subject to some qualifications, upon the sale of any investment made after 1 July 2007 or giving rise to capital proceeds in excess of US$20m, 30% of the Net Investment Return of the investment was to be deposited in a Carried Interest Account corresponding to the Relevant Strategy (clause 8.3.1);

and, likewise, apart from investment income covered by clause 8.2.6 (ie received after an Extended Termination Date: para 19.21 below), 30% of any investment income after 1 July 2007 was to be deposited in a Carried Interest Account corresponding to the Relevant Strategy (clause 8.3.2).

19.11 By way of exception to para 19.10 above, clauses 8.2.3 and 8.2.4 provide for Distributions, up to the amount of Preliminary Carried Interest (defined as 6% of the Net Investment Return attributable to relevant investments sold), to Special Limited Partner II out of a Carried Interest Account while Partnership Investments are still being actively managed in the following limited circumstances:

> 19.11.1 under clause 8.2.3, if all Investments representing a Strategy were sold, their Acquisition Costs were equal to or exceeded 30% of Invested Capital of the Partnership and the Annual Rate of Return on unsold investments was at least 20%; or
>
> 19.11.2 under clause 8.2.4, if all such Investments representing a Strategy were not sold, but Investments were sold with Acquisition Costs of at least 50% of Invested Capital and the Annual Rate of Return on unsold Investments was again at least 20%.

Mr Jaffe explains the background to these limited exceptions. Those interested in Special Limited Partner II were local Central or Eastern European employees, who might, if all or half the Investments in a Strategy were sold, cease to be involved in the General Partner or Special Limited Partner II before the Partnership came to an end. Hence, the interim or preliminary provision made for their reward.

19.12 Otherwise, clause 8.3.3 provides (with presently immaterial exceptions) that:

> "the only distributions or transfers that may be made from Carried Interest Accounts are distributions to the Limited Partners pursuant to clauses 8.1(d), (e), (f) or (g) (and in that order), clause 8.2.3 or 8.2.4."

Clause 7.1.7 adds that:

> "Net Income, Net Losses, Capital Gains and Capital Losses arising from a Carried Interest Account shall be allocated to the Partner or Partners to whom the original amount deposited in such Carried Interest Account is distributable in accordance with clause 8.3 and in the ratio of such distributions."

19.13 The Life of the Partnership extends under clause 11.1 to a Termination Date of 1 July 2008, capable under clauses 11.2.1 and 11.2.2 of various extensions by the General Partner alone or with the Limited Partners' consent to 1 July 2011, basically "in order to permit an orderly realisation of the Partnership Assets" and capable in that event under clause 11.2.3 of further extension to an Extended Termination Date as follows:

> "If the Termination Date is extended by the General Partner pursuant to clause 11.2.1 in order to permit an orderly liquidation of the Partnership's Assets, then not less than 90 (ninety) days prior to such Termination Date the General Partner must notify the Limited Partners in writing that the General Partner is of the view that orderly liquidation of the Partnership Assets is not possible by such Termination Date due to market conditions for the sale of certain Investments and provide the Limited Partners with a written summary of its reasons for such a view. If the General Partner so issues such a notification, then the General Partner and the Limited Partners undertake in good faith to discuss the options for disposal of the Partnership Assets. Following such discussions, the General Partner may acting reasonably and in good faith extend the Termination Date (with such extended Termination Date referred to as the 'Extended Termination Date') by such time as is necessary to complete the orderly liquidation of the Partnership Assets but in no event more than 4 (four) years. The General Partner shall notify the Limited Partners of such extension by not less than 30 (thirty) days prior to the Termination Date."

It is common ground that the Partnership was extended under these provisions to 1 July 2012.

19.14 The articles contain distinct provisions regarding the allocation of profits and losses between partners during the life of the Partnership

(clauses 7.1 and 7.2) and the timing of distributions in respect of profits and losses so allocated (clause 8.2.1). Thus, clause 7.1 covers, principally, the allocation to the General Partner of its Management Fee and to the Principal Limited Partner of 100% of Interim Investment Income in respect of each Accounting Period, while clause 7.2 covers the allocation of remaining income and gains, by providing that:

> "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."

19.15 The word "only" in clause 7.2 emphasises that this is both a triggering provision and a provision for the allocation which follows when the trigger is pulled. The stipulated trigger is "sale of all Investments of the Partnership". If this occurs, and:

> 19.15.1 there is a positive Annual Rate of Return for all such Investments (clause 7.2.2), then 24% thereof is allocated by way of Senior Carried Interest to Special Limited Partner I and 6% by way of Strategy Carried Interest to Special Limited Partner II or, alternatively,
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> 19.15.2 if there is no positive Annual Rate of Return for all such Investments, but there is for one or more Strategies, then 6% is allocated by way of Strategy Carried Interest to Special Limited Partner II (clause 7.2.3).
>
> 19.15.3 In each case, clauses 7.2.2 and 7.2.3 provide for the remaining Net Income, Net Losses, Capital Gains and Capital Losses to be allocated 100% to the Principal Limited Partner.

19.16 Clause 7.2.4 further provides:

> "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."

19.17 Clause 8.1 headed Priority of Distributions lists a "waterfall" of priorities, starting in clauses 8.1(a) to (d) with the General Partner's Management Fee, the Interim Investment Income allocated to the Principal Limited Partner and the Limited Partners' respective Capital Contributions and continuing thereafter in clauses 8.1(e), (f) and (g) with references to "net positive amounts" allocated to "the Partners" if clauses 7.2.2, 7.2.3 or 7.2.4 respectively has been applied. (The final provision, clause 8.1(h), again refers to "net positive amounts" allocated to the Partners under clause 7.1.7, consisting of net earnings on deposits in Carried Interest Accounts distributable to the Partners.)

19.18 Clause 8.2.1 provides for the timing of Distributions under the waterfall provisions of clause 8.1. Distributions under clauses 8.1(a) to (d) may be made at any time by the General Partner acting reasonably. In contrast, amounts due under clauses 8.1(e), (f), (g) and (h) are payable "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". The "end of the term" must here refer to the Termination Date of the Partnership, as defined by clause 11.2. Clause 11.5.4 (para 19.19 below) also indicates this. The reference to "such other time as may be agreed" again suggests that the parties cannot have regarded the termination or liquidation of the Partnership and its Investments as critical to the making of distributions under clauses 8.1(e), (f), (g) and (h).

19.19 The articles address the distribution of assets unsold at the Termination Date at various points, particularly in clauses 11.5.4 and 8.6. Clause 8.6 provides, under the heading "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."

Clause 11.5.4 provides:

> "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."

It also specifies that, after payment of or allowance for all present or future Partnership debts, obligations and liabilities and all liquidation costs that:

> "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."

19.20 In short, the articles contemplate that the waterfall provided in clause 8 will on termination of the Partnership be capable of operation by distributions made in specie, if the General Partner or liquidating trustee so decides. Clause 7.3.8 completes the picture by providing for the basis on which assets distributed in specie are to be valued:

> "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."

"Value" is defined by recital (6) as

> "such value as shall be determined by the General Partner acting in its reasonable discretion and in good faith and in applying the Valuation Procedures (taking into account local market conditions."

The Valuation Procedures are defined by reference to the British Venture Capital Association's Reporting and Valuation Guidelines of July 2003. Further, the definition of "Capital Proceeds" "available for distribution … or … distributed by the Partnership" expressly includes "the Value of any Investments distributed in kind, and for purposes of determining the Annual Rate of Return on an unsold Investment, the Value of such unsold Investment".

19.21 Clause 8.2.6 also addresses the situation where at the Extended Termination Date not all the Investments have been sold. It provides that, when that occurs:

> "then the Annual Rate of Return of all unsold Investments of the Partnership as of the Termination Date shall be calculated as of such date …"

Clause 8.2.6 goes on to provide that distributions shall be made as from such Termination Date as follows: if the Annual Rate of Return of such Investments exceeds 0% at the Extended Termination Date, then "Investment Income received by the Partnership after the Termination Date" shall go first to reduce the Net Capital Contributions of the Principal and Special Limited Partners to nil and thereafter be paid as to 24% as Senior Carried Interest to Special Limited Partner I and as to 6% as Strategy Carried Interest to Special Limited Partner II, with the balance going to the Principal Limited Partner, but if the Annual Rate of Return of such Investments is 0% or less, then such Investment Income received after the Termination Date shall go wholly to the Principal Limited Partner.

19.22 None of the Partnership Investments was sold or it appears realised as at the Extended Termination Date of 1 July 2012. Nevertheless, the Partnership appears, from the information the Board was given, to have been highly successful in terms of increasing the overall value of its Investments. That is what this litigation is about. The Investments will either be or have been disposed of to third parties or distributed in specie during the Partnership's liquidation. A computation of the cumulative Net Income, Net Losses, Capital Gains and Capital Losses will show a highly positive Annual Rate of Return. The Special Limited Partners claim their respective portions of a 30% share of this. The Principal Limited Partner claims the entirety of it, after covering (if not already paid) each of the Special Limited Partners' US$100 Capital Contributions.

20. The respondent Principal Limited Partner's case, accepted by the Court of Appeal and by the majority, is that the Special Limited Partners' claim to all or any part of a 30% share in net positive returns is limited to situations where distributions can be made:

20.1 to Special Limited Partner II of a share of up to 6% of Net Investment Return out of a Carried Interest Account in the limited circumstances defined by clause 8.2.3 or 8.2.4 (para 19.11 above):

20.2 upon the sale to third parties for cash of all the Investments of the Partnership, to the Special Limited Partners in their respective percentages of 24% and 6% of any positive Annual Rate of Return on all such

Investments or any particular Strategy pursuant to clause 7.2.2 or 7.2.3 (para 19.16 above);

20.3 in respect of any Investment Income received on unsold Investments which showed a positive Annual Rate of Return upon termination of the Partnership at an Extended Termination Date, then, after repaying any outstanding Net Capital Contributions, to Special Limited Partners I and II in respect of their respective percentages of 24% and 6% of such Investment Income Return (para 19.21 above).

21. Both Special Limited Partners' claim to shares of any positive Annual Rate of Return on the Partnership's *overall* Investment record would thus depend essentially upon the General Partner arranging the sale - in a strict legal sense involving the transfer of property for monetary consideration - of *all* the Partnership's investments. Special Limited Partner II's claim to a 6% share in the limited circumstances defined by clause 8.2.3 or 8.2.4 is described and clearly contemplated as a preliminary share, arising from interim achievement.

22. The respondent's interpretation depends upon:

22.1 reading the phrase "sale of all Investments of the Partnership" in clause 7.2 as referring to sale in the strict legal sense mentioned in the preceding paragraph, and as imposing this as a strict pre-condition to the operation of clauses 7.2.2 or 7.2.3 both when they are applied in isolation and when they are applied as a result of references back to them in later clauses, such as clause 8.1 read with clauses 8.2.1 and clause 11.5.4. This limb of the respondent's case rests essentially upon a repeated comparison between the "well understood" narrow legal concept of "sale of all Investments of the Partnership" in clause 7.2 and fuller terminology expressly embracing realisation and exchange, found elsewhere in the articles, eg in clauses 1.2, 4.1.1 and 11.5.4.

22.2 reading clause 7.2.4 as directed not merely to situations where no positive Annual Rate of Return has been achieved bringing clause 7.2.2 or 7.2.3 into operation, but also as directed to a situation where there has not been "sale of all Investments of the Partnership". Indeed, the respondent goes further and submits (written case, para 50) that the latter purpose is in reality the only purpose of clause 7.2.4, since there could never be any positive return to be distributed to the Principal Limited Partner under clause 7.2.4 and clause 8.1(g), if the Annual Rate of Return of the Partnership was 0% or less;

22.3 treating the phrase "at the end of the term of the Partnership" in clause 8.2.1 as the date by which any sale of all the Partnership investments must have occurred for the waterfall provisions in clauses 7.2.2 or 7.2.3 read with clauses 8.1(e) and (f) to apply; and

22.4 treating the references in clauses 7.3.8, 8.6 and 11.5.4 to distribution of Partnership assets and proceeds amongst the Partners in specie upon termination of the Partnership in accordance with clause 8, and to valuation of assets so distributed, as explicable on the marginal basis that such distributions might be made to satisfy outstanding management fees or capital contributions.

23. In the advice prepared by Lord Sumption, the majority of the Board supports this interpretation on the basis that:

23.1 "It is clear from the terms of the articles that the principal purpose of the partnership was to manage the investments … with a view to selling them off within the partnership term and achieving the maximum return", giving sale "a well understood meaning" of "transfer of property to another party for a money consideration" (Lord Sumption, paras 4 and 13); and

23.2 any distributions "at the end of the term of the Partnership" (clause 8.2.1) enable distributions to be made during the course of liquidation, but require these to be made by reference to a state of affairs existing at the commencement of the liquidation, rather than by reference to the position as and when distributions are made (Lord Sumption, para 14).

In my opinion, the principal purpose of the partnership was and is as defined in para 19.3 above, namely to achieve a high overall rate of return, for the benefit of all concerned, in all the ways indicated in para 19.4 above, and the articles contemplate distributions during liquidation by reference to values ascertained during the process of liquidation and distribution.

24. In my opinion neither the respondent's nor the Board's interpretation corresponds with any intention which the Partners are likely to or did have when agreeing these articles. Starting with the points identified in paras 22.1 and 22.2, I accept of course that, taken by itself "sale of all investments of the Partnership" points to a sale in the strict legal sense involving the transfer of property for a monetary consideration. But I do not consider that this is or can be its only meaning in the context of clause 7.2, even in the basic situation contemplated by that clause, and still less, as will appear, in the context of termination and liquidation of the Partnership:

24.1 First, it is clear that the primary object of the phrase "only following the sale of all investments of the Partnership" is to act as a trigger to define when and how allocations between Limited Partners are to be made. But clause 7.2.1 also postulates, as an alternative, agreement between the General and Limited Partners on some other trigger. That means that clauses 7.2.2 and 7.2.3 must have been intended to operate by agreement in circumstances short of "the sale of all Investments of the Partnership" – this, despite these clauses' repetition of the phrase "following sale of all Investments of the Partnership", without qualification to cover situations where the Partners agree otherwise under clause 7.2.1. This itself points against sale of all Investments being regarded as the sole trigger for allocation of their percentages of any positive Annual Return to the Special Limited Partners. The parties would not have provided specifically for something to which they were, on the respondent's case, opposed as a matter of fundamental principle.

24.2 Second, there is no sensible commercial reason why the sale in a strict legal sense of all investments should be made a pre-condition to the intended rewards which the Special Limited Partners were to receive. Commercial parties are not likely to gamble on uncertainties which are irrelevant to their principal objective and over which they have no necessary control. Even if the Partnership had been limited to investments only realisable by sale, it could very easily have been highly profitable without all investments being sold. The fact that one investment was not sold or saleable might be insignificant, compared with a hugely positive return on the sale of every other investment. The fact that there was not a sale of an investment could be due to any number of matters throwing no doubt on the general investment skills or success of the General Partner or of its employees interested in the Special Limited Partners. These included but are not limited to the materialisation of the acknowledged risk of compulsory acquisition without compensation by a Central or Eastern European state. It is no answer to these points for the respondent to point out that no investments at all had in fact been sold by the Extended Termination Date. That was plainly not envisaged by anyone. But what must have been envisaged is that most of investments would be sold, whereas one or two might not be (and would either have disappeared or would have to be distributed in specie). The question is whether, in that situation, the parties can sensibly have intended that the Special Limited Partners would forego their 30% share, even though they had (as appears to be the case here) contributed to a highly positive overall Annual Rate of Return on the Partnership Investments. I do not think so.

24.3 Third and in any event, the Partnership purposes were expressly not limited to investments only realisable by sale. The nature of the Investment Strategy and of the contemplated Investments (para 19.5

above) demonstrates their contemplated variety. If sale in a strict legal sense of all investments was critical, there is no sense in the wide powers conferred on the Partnership and on the General Partner, to invest in investments the value of which would not be realised by such sale, and to exchange, realise or otherwise dispose of investments (see paras 19.4 to 19.6 above). The principal objective was to be achieved by selling, realising, exchanging or distributing investments, the value of many of which could not or would or might well not be realised by sale. The General Partner would have been failing in its duty if it did not consider investing, and where it seemed best investing, in investments which could or would be realised by means other than sale. It would have been failing in its duty if it did not realise their value in the best way, even if that did not involve sale in a strict legal sense. Some might be exchanged for other investments, which on a literal reading would mean that not all the investments were sold, even though the new investments so acquired were sold for cash. Others might be realised by a leveraged recapitalisation, involving the distribution of a large dividend, reducing or eliminating their equity value. Critically, many of them might only be realisable or realised by being repaid or reaching maturity. The phrase "sale of all investments" cannot have been intended to operate in the narrow legal sense advocated by the respondent as a trigger in all circumstances to the operation of clauses 7.2.1 to 7.2.3. It would be in fundamental conflict with the intended Investment Strategy, with the nature and purpose of the intended Investments and with the principal objective and purposes of the Partnership.

24.4 Fourth, the respondent's case introduces into the Partnership and articles perverse conflicts of interest. Assuming an overall successful investment history as the Partnership was nearing its final termination date, the Special Limited Partners would only be rewarded if their employees achieved sales, at whatever value (provided it did not eliminate the overall positive net return). Otherwise, on the respondent's case, the Principal Limited Partner would scoop the pool, as it is by this litigation seeking to do. Especially in a context where the whole purpose of the Special Limited Partners' involvement was to incentivise the General Partners' employees behind the Special Limited Partners to achieve a high overall return (which it was no doubt their duty in law as employees to seek to achieve in any event), it seems completely unrealistic to ignore the implausibility of reverse incentivisation of this nature. Human nature is human nature - as the very presence and role of the Special Limited Partners as parties to the articles recognises.

24.5 Fifth, if failure to sell for cash all the Partnership investments was critical, what reason could there be for allowing the Special Limited Partners their 24% and 6% shares of any Investment Income received after

the Extended Termination Date on unsold investments yielding a positive Rate of Return at that Date (paras 19.21 and 20.3 above)?

24.6 Sixth, the respondent's case on clause 7.2.4 (paras 19.17 and 22.2 above) represents in my opinion both an unnatural and an unrealistic reading of the place and sense of that clause in the overall scheme:

a. On its face clause 7.2.4 is directed to a situation where no positive Annual Rate of Return has been achieved bringing either clause 7.2.2 or 7.2.3 into operation. The respondent submits that there could not in this situation be any positive net distribution to the Special Limited Partners under clause 7.2.4, or under clause 8.1(g) which refers to "the positive amounts allocated to [the Partners]" under clause 7.2.4, so that these clauses must be dealing with something else, viz the distribution of net surplus in a situation where there was a positive Annual Rate of Return but no "sale of all Investments of the Partnership".

b. This is to my mind unpersuasive:

i. A similar point could be taken on the combination of clause 7.2.3 and clause 8.1(f) which refers back to "the positive amounts allocated to them [the Partners]" under clause 7.2.3. If the Annual Rate of Return of all Partnership Investments is 0% or less, which is the predicate of clause 7.2.3, then there can be no positive amounts allocated to the Principal Limited Partner under clause 7.2.3(b).

ii. In reality, all these clauses are drafted in a similar format and wording, and a degree of incongruity or redundancy is unsurprising. Both clauses 7.2.3(b) and clause 7.2.4 in fact refer not to distribution but to allocation, a term appropriate to cover a situation of net negative Annual Rate of Return; and each is expressed to relate to all the individual elements that go to make up any such Rate of Return ("Net Income, Net Losses, Capital Gains and Capital Losses"), some of which may show a net positive Return, and others a net negative Return, with the overall result being a net negative Annual Rate of Return.

iii. Clauses 8.1(f) and (g) do in contrast refer to "net positive amounts" being "allocated to them [the Partners]"

pursuant to respectively clauses 7.2.3 and 7.2.4. Again, this is repetition of the format and language which appears throughout clauses 8.1(e) to (h). Both the reference in clause 7.2.3(b) to "the cumulative Net Income, Net Losses, Capital Gains and Capital Losses of each Strategy" being "allocated between the Partners" in respect of unprofitable Strategies, "100% to the Principal Limited Partner" and the reference in clause 8.1(g) to the net positive amounts "allocated to them [the Partners]" pursuant to clause 7.2.4 (which on any view only allocates amounts to the Principal Limited Partner) appear on any view inapt.

iv. It is impossible to derive from nice grammatical points of this nature made by the Principal Limited Partner a conclusion that clause 7.2.4 relates to anything other than its natural subject-matter, that is situations in which there has been sale (whatever that means) of all Partnership Investments, but no net profitability bringing either clause 7.2.2 or 7.2.3 into play.

c. The respondent's submission that clause 7.2.4 has the sole purpose of addressing situations where not all the Investments are sold is thus in my opinion both unnatural and unreal. But so too is any modified submission that the respondent advances that it has at least an additional purpose of addressing such situations. Nothing in clause 7.2.4 or in its context suggests that it has a double purpose. Clause 7.2.4 was clearly directed to situations of no net positive return on sale of all investments. Had it been intended to make the fundamental point that, if sale of all the investments was not completed, then, whatever the net profitability of the Partnership, the whole benefit was to go to the Principal Limited Partner, with the Special Limited Partners getting nothing, one can be confident that this fundamental additional purpose would have been made clear.

d. This is reinforced by the consideration that, since it was contemplated that clauses 7.2.3 and 7.2.4 could operate in a situation where not all Partnership investments had been sold if the Partners so agreed (para 24.1 above), clause 7.2.4 cannot have been intended to be triggered by such a situation, or it would undermine the provision for, and any purpose in, such an agreement between Partners.

e. In my opinion, both on its natural reading and in the light of the above, clause 7.2.4 is a provision subsidiary to clause 7.2.1 which, like clauses 7.2.2 and 7.2.3, only operates when there has been a sale of all Investments, whatever that may mean in context either during or at the end of the life of the Partnership.

f. If this is so, then on the respondent's case that "sale of all Investments" is to be read in a narrow legal sense, no distributions at all to anyone are possible, since no such sale has occurred. But that in my view brings one full circle to the conclusion that clause 7.2.4 is simply addressing situations where the operation of clause 7.2 has been triggered, but there has been no net positive Annual Rate of Return, either on all investments or on any particular Strategy. It is not addressing situations where the operation of clauses 7.2.1 to 7.2.3 has not been triggered.

g. The conclusion from all the above points is that sale of all Investments of the Partnership must in the context of clause 7.2.4 be given an umbrella meaning covering all types of realisation of the Partnership Investments – though not, save on termination and liquidation, any distribution in specie (to which I turn in the next paragraph).

25. As to the points identified in paras 22.3 and 22.4 above:

25.1 The respondent's reliance on the phrase "at the end of the term of the Partnership" in clause 8.2.1 to exclude from consideration under clauses 7.2 and 8.1 all that happens thereafter by way of sale of investments (in whatever sense the word "sale" is used) involves a literalism which I am unable to accept. Once it is accepted, as Lord Sumption accepts, that clause 8.2.1 prescribes that distributions are to be made at or after the end of the Partnership term, and so during the course of liquidation, it is natural that they should also be made by reference to values and priorities ascertained at the same time.

25.2 The phrase "at the end of the term of the Partnership" is coupled with the alternative "or at such other time as may be agreed by the General Partner and the Limited Partners". Again, this is inconsistent with a literal reading according to which the parties viewed it as critical that entitlement to distribution under the waterfall in clause 8.1 must have accrued by the end of the term of the Partnership.

25.3 The provision in clause 7.2 for allocations where all the Partnership Investments are sold or where the Partners agree must be read with the elaborate provisions in clauses 8.2.1, 8.6 and 11.5.4 for distributions when the Partnership has reached its end at a Termination or Extended Termination Date and is being liquidated. During the life of the Partnership, the only distributions capable of being made under clause 8, referring back to the allocation provisions of clause 7.2, are in cash. Clause 8.6 so provides (subject only to the possible impact of any agreement under clause 8.2.2, which can for present purposes be left on one side).

25.4 However, at the end of the Partnership, clauses 8.2.1, 8.6 and 11.5.4 all contemplate that the waterfall in clause 8.1 (and so on their face the provisions of clauses 7.2.2 and 7.2.3) will be capable of operation in favour of the Special Limited Partners even though Partnership Investments remain unsold and have to be or are distributed in specie. There is nothing to suggest that clauses 8.1(e) and (f) are in this context irrelevant. In short, the scene changes at the end of the Partnership, and distributions are now permissible in specie, although the underlying scheme of profit sharing provided via clauses 8.1(e) and (f) by reference to clauses 7.2.2 and 7.2.3 remains applicable. It follows that clauses 7.2.2 and 7.2.3 must be read as prescribing profit sharing on a basis which does not require all or any of the Partnership Investments to have been sold or realised for monetary consideration in any way.

25.5 These elaborate provisions, for distribution in specie after termination and in liquidation, are coupled with clause 7.3.8 (para 19.20 above) providing for assets distributed in specie to be "deemed to be realised" for the purposes of computing Capital Gains, Capital Losses and Capital Proceeds at "their Value". The significance which the respondent tries to attach to this provision is that it would be relevant to final accounting under clauses 6 and 12 and in particular to determining what would constitute repayment to the Special Limited Partners of any outstanding management fee due to the General Partner or any outstanding Capital Contributions due to any of the Limited Partners under clauses 8.1(c) or (d).

25.6 That is to my mind an implausibly limited explanation of clause 7.3.8, not least when management fees were payable to the General Partner in advance in quarterly instalments and were a first deduction against Net Income (clauses 7.1.3 and 7.1.5(a)) and the Special Limited Partners' Capital Contributions amounted to US$100 each:

25.6.1 Clause 7.3.8 is an integral part of clause 7.3. Clause 7.3 is entitled "Calculation of Income, Gains and Annual Rate of Return" and its provisions address in detail the calculation of the "Net Income, Net Losses, Capital Gains and Capital Losses" and the "Annual Rate of Return" which are themselves integral to clause 7.2.

25.6.2 Clause 7.3.8 appears in the middle of clause 7.3 between provisions of general application regarding the calculation of Acquisition Costs and Annual Rate of Return: see clauses 7.3.6 to 7.3.10. Clause 7.3.7 concerns the determination of Annual Rate of Return at the time of sale of an Investment. Clause 7.3.8 is a parallel provision designed to equate a distribution in specie upon liquidation with a realisation by way of sale "for the purposes of computing Capital Gains, Capital Losses and Capital Proceeds at their Value". For good measure, "Capital Proceeds" is, as noted (para 19.20 above), also defined in general terms to cover "the Value of … Investments distributed in kind".

25.6.3 Clause 7.3.8 refers expressly to distributions in specie under clause 8.6. Clause 8.6 is another provision of general application and deals in terms with "all" distributions under clause 8, by providing first that these must be in cash prior to final liquidation of the Partnership, but may be in the form of non-marketable securities, ie in specie, thereafter.

25.6.4 The use in clause 7.3.8 of the word "realised" to my mind confirms rather than undermines the proposition that sale should be understood in a broad sense, capable in liquidation of embracing a distribution in specie.

25.7 The respondent's case effectively deprives clauses 8.1(e) and (f) of any relevance on a distribution following termination. Nothing in the articles hints at this.

25.8 Further, accepting, as I do, that clause 8.2.1 must be read with clause 11.5.4, so that clauses 8.1(e) and (f) which in turn refer to clauses 7.2.2 and 7.2.3, contemplate allocations and distributions by reference to sales taking place during the process of liquidating the Partnership assets, nothing in these clauses hints at a continuing distinction between sales in a strict legal sense and distributions in specie. On the contrary, distribution in specie is introduced in bland terms as a right available to the General Partner on a final liquidation (clauses 8.6 and 11.5.4). Why the General

> Partner would want or ever dream of exercising the right when its exercise would, on the respondent's case, be fatal to its employees receiving their intended profit share is wholly unexplained.

26. It is in my view, therefore, clear that the Special Limited Partners were intended to receive profit shares totalling 30% of any Annual Rate of Return on termination of the Partnership and liquidation of its assets calculated under clauses 8.1(e) and (f) by reference to clauses 7.2.2 and 7.2.3, even though not all the Partnership assets were sold in a strict legal sense or realised at all and some or all were as a result distributed in specie. I would have humbly advised Her Majesty to allow this appeal accordingly and restore the judgment given by Bannister J at first instance in favour of the two Special Limited Partners.