

## CAYMAN ISLANDS GRAND COURT

***In the matter of ICP Strategic Credit Income Fund Ltd, Grand Court of the Cayman Islands (Financial Services Division) Cause No. 82/269 of 2010, per Jones J (4 April and 15 May 2014)***

**FRAUDULENT TRADING - LITIGATION FUNDING AND CONTINGENCY FEE AGREEMENTS - LIQUIDATORS APPLICATIONS FOR SANCTION TO COMMENCE LEGAL PROCEEDINGS**

Liquidators applied to the Grand Court for sanction to bring proceedings in the United States against Barclays Bank PLC and DLA Piper LLP under Section 147 of the Cayman Islands Companies Law (2013 Revision). The intention was to have those US proceedings funded pursuant to a contingency fee agreement with Reid Collins & Tsai LLP, a New York law firm.

The judgment is important because Jones J took the opportunity to provide what amounts to a helpful guide in respect of the Cayman Court's approach to liquidator's applications (pursuant to Section 110 of the Companies Law) for sanction to commence proceedings within and outside of the jurisdiction. Jones J also discussed the type of litigation funding and contingency fee agreements the Court would be willing to sanction and what they should contain.

In respect of application by liquidator for sanction to commence proceedings, Jones J confirmed that the Court must be satisfied that the causes of action against the proposed defendants have a reasonable prospect of success and that the interests of the creditors will be best served by allowing proceedings to be commenced.

Jones J also found that the considerations which apply to litigation funding agreements generally apply equally to contingency fee agreements, save that there is an additional public policy consideration which renders all contingency fee agreements unlawful and unenforceable if they relate to litigation which will be conducted in the Cayman Islands. However, Jones J went on to state that such agreements, where expressed to be governed by

Cayman Islands law, which would be contrary to public policy if performed within the Cayman jurisdiction, are capable of being valid and enforceable if the terms require that it be performed wholly outside the Cayman Islands and in a foreign country where performance would not be contrary to the public policy of that country.

Furthermore, the proposed contingency agreement must: (1) comply with the requirements of the Cayman Islands Companies Winding Up Rules Order 25; (2) the performance of the agreement in question must be permitted by the law and professional conduct rules applicable in the country in which the litigation is to be conducted; and (3) the official liquidator must not fetter his fiduciary power to control the litigation.

A secondary issue, for which Jones J provided separate reasons, was whether "Court" in Section 147 means that the Cayman Courts have exclusive jurisdiction to determine liability under the section. In this respect, Jones J found that the Cayman Courts do not have exclusive jurisdiction, and that Section 147 claims can be brought by liquidators outside of the jurisdiction.

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