IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 131 of 2016 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF PLATINUM PARTNERS VALUE ARBITRAGE FUND L.P. (IN OFFICIAL LIQUIDATION)

IN CHAMBERS

Appearances:	Mr Barry Isaacs QC instructed by Mr Matthew Dors, Rupert Stanning and Sally Peedom of Collas Crill, on behalf of the JOLs
	Mr David Lee and Mr Daniel Hayward-Hughes of Appleby - on behalf of White Rock Properties LLC (as the opposing PSC)
	Mr Ben Hobden and Roisin Liddy-Murphy of Conyers, Dill and Pearman –on behalf of the litigation funder;
	Mr John Harris and Allyson Speirs of Higgs & Johnson – on behalf of 43 PPNE creditors, Kismetia and Twosons Corporation (the PSCs)
	Mr Nick Hoffman and James Eggleton of Harneys Westwood & Riegels – on behalf of the Liquidation Committee member, Washington National Insurance Company (WNIC).
	Mr Ian Lambert of HSM Chambers - on behalf of the Liquidation Committee member, Platinum Partners Value Arbitrage Fund (International) Limited (In Official Liquidation);

Hearing:	**16 and 17 October 2018**
Post hearing submissions filed:	**19 October 2018**
Draft judgment circulated:	**23 October 2018**
Judgment Delivered:	**31 October 2018**

JUDGMENT

Introduction

1. This is the application of the joint official liquidators (the ***JOLs***) of Platinum Partners Value Arbitrage Fund L.P. (the ***Master Fund***) for sanction to enter a litigation funding agreement with LL Finance LLC (***LLF***) upon substantially the terms as are contained in a draft funding agreement exhibited to the Fourth Affidavit of Mr Trott at pages 190 to 231 (the ***Funding Agreement***). The JOLs were represented at the hearing of the application by Mr Barry Isaacs QC (who was instructed by Collas Crill).

2. The application is opposed by White Rock Properties LLF (***White Rock***). White Rock is one of a large number of creditors who claim to hold non-possessory security interests over the assets of the Master Fund. They claim a security interest over all the proceeds of all claims which are to be subject to the Funding Agreement and that at least some of the claims themselves are subject to those security interests under applicable law. These purported secured creditors are referred to by the JOLs as the ***PSCs*** and I use the same terminology in this judgment.

3. White Rock filed two sets of written submissions and were represented at the hearing of the application by Mr Lee and Mr Hayward-Hughes of Appleby. They explained that White Rock did not oppose the principle of funding being obtained by the JOLs to enable them to pursue litigation; rather their concerns related to certain terms of the Funding Agreement and the failure, in their view, of the JOLs to provide sufficient information to allow White Rock to satisfy itself that its rights and position as a secured creditor were adequately protected. In their second set of written submissions they sought certain directions that would require the JOLs to provide further documents and information on an expedited basis to enable them to consider further the Funding Agreement and challenged the jurisdiction or power of the Court to approve the Funding Agreement in so far as it sought to impose liabilities which would be charged on and payable in priority to their own secured claims out of the claims over which they asserted a security interest. At the hearing I was told by Mr Harris that the other PSCs had decided not to support White Rock's opposition or make submissions but did not consent to or support the JOLs' application.

4. For the reasons set out below I have decided, on balance and after careful consideration, to grant the JOLs' application and make the order they seek.

The relevant terms of the Funding Agreement

5. Under the Funding Agreement, LLF agrees to provide funding to the JOLs to allow them to investigate and, if appropriate, pursue claims against third parties (defined in the Funding Agreement as "Claims"). The funding is structured as a facility provided to the JOLs which is split into various sub-facilities. The main division is between (using the definitions contained in the Funding Agreement) the Investigations and Implementations Sub-Facility and the Litigation Sub-Facilities. Under the former, advances are to be made (up to US$6.650 million) to pay accrued and unpaid fees and expenses (including those incurred since 23 May 2018 but only up to 31 December 2019) due to Professionals in connection with the JOLs investigation of the Claims. Under the latter, advances are to be made if the JOLs decide to go ahead with proceedings in connection with a Claim, make a request to LLF for funding and LLF agrees to provide funding (the relevant Claim then being treated as an Approved Claim) to fund the fees and expenses due to the JOLs, Professionals, court fees incurred, adverse or security for costs orders and ATE insurance premiums incurred or payable in connection with the relevant proceedings (there is to be a separate Sub-Facility for each Approved Claim).

6. In return for LLF's agreement to provide this funding, certain payment obligations to LLF are assumed. The JOLs agree (in clause 5.1), "*on behalf of the Master Fund and/or the Secured Estate, if applicable*" to pay certain sums to LLF (I explain the definition of and references to the Secured Estate below). These include:

   (a). interest (compound interest) on all sums advanced under any Sub-Facility.

   (b). a maximum of 30% of net recoveries made by the JOLs in respect of Approved Claims. The precise percentage varies according to whether the recoveries are made and obtained prior to the Repayment Date (being the date on which the JOLs have paid all sums owing to LLF and LLF has ceased to have an obligation to provide further funding under the Funding Agreement).

   (c). 20% of net recoveries made by the JOLs after the Repayment Date where the Claim was solely prosecuted after that date. This covers any Claim which was not the subject of an Approval Notice (which is issued when LLF grants the JOLs' funding request prior to the Repayment Date) and excludes, I believe a Claim for which funding has been declined by LLF (which is dealt with by the separate provision mentioned below),

(d). 5% (up to US$6.650 million) of net recoveries made by the JOLs on Non-Approved Claims. These are Claims for which LLF has denied a funding request made by the JOLs.

7. The Funding Agreement establishes an exclusive funding arrangement (see clause 6.1) under which the JOLs are, subject to certain limited exceptions, required to permit LLF to fund, and LLF is given a right of first refusal to provide funding of, all Claims. This is the quid pro quo, as are the financial terms described above, for LLF agreeing to advance up to US$6.650 million to fund the JOLs investigations of potential Claims. LLF assumes the risk that the JOLs will conclude that there are no viable Claims to be prosecuted in which case LLF will lose all the sums it advanced. Furthermore, even if the JOLs do decide to proceed with litigation they accept, and this application is made on the basis that, they will need further sanction from the Court before being able to commence such proceedings.

8. All Recoveries made and received by the JOLs must be paid into a segregated trust account (the Recoveries Account) held on trust for LLF, the JOLs, the Master Fund and the "*stakeholders of the Secured Estate.*" The Secured Estate is defined as "*the Master Fund's assets (including Claims) that are under the JOLs' control and subject to non-possessory security interests that are, or are analogous to or materially similar to, floating charges.*" (I would note in passing that it is not clear to me why security interests arising under US state law – including US state law based on the Uniform Commercial Code – need to be or are described in this way and by reference to the floating charge). There are, as I have already noted, certain creditors who claim to hold non-possessory security interests over the assets of the Master Fund. The PSCs claim security interests under the law of various US states by reason of and pursuant to various agreements and documents although their entitlement and the extent and scope of any security which they hold are challenged by the JOLs and remain to be established. As I shall explain, it is the uncertainty over and the need to consider and protect appropriately the potential security interests of the PSCs that have given rise to a number of the issues which fall to be dealt with on this application.

9. There are certain carve-outs from the Claims subject to the Funding Agreement, mainly to deal with the position of the PSCs and to ensure that the proceeds of the Claims which the JOLs consider to be covered by the PSCs' asserted security interests cannot be used to pay sums due to LLF under the Funding Agreement. The Funding Agreement contains a definition of Excluded Claims which lists a number of Claims. The JOLs say that these are all the Claims which, as currently advised, should properly be regarded as being covered by the PSCs' asserted security interests but they accept that at this stage they cannot be sure that other Claims are not

covered as their investigations are incomplete and there are a number of unresolved legal issues concerning the possible scope of the asserted security interests (in particular under applicable US law some Claims cannot be subject to the asserted security interests). Accordingly, there are two categories of secured claims dealt with by the Funding Agreement. First, those included as Excluded Claims. Secondly, those which are not Excluded Claims because the JOLs do not consider them to be subject to the PSCs' claimed security interests but which subsequently may turn out to be so:

(a). as regards Excluded Claims, the proceeds of Excluded Claims may not be used to pay sums due to LLF (see clause 5.5 which says that ".. *the JOLs shall not be obliged to make any payment to [LLF] from and [LLF] shall have no interest in or recourse against, the Excluded Assets*"). However, clause 6.1 provides that if the JOLs do seek financing for the purpose of pursuing an Excluded Claim "*so long as such financing is not being provided by a creditor with a Lien against such Excluded Claim, [LLF shall have a right of first refusal to provide such financing.*" But "*the terms of the [Funding Agreement will] not control the funding of any such Excluded Claim unless*" the JOLs and LLF agree. It therefore appears that LLF has the exclusive right to provide financing even for proceedings in respect of the Excluded Claims if the PSC who has a security interest over the relevant Excluded Claim declines to do so (the draft Funding Agreement could, in my view, be clearer on this point to spell out that that LLF's rights only arise after the relevant PSC has been asked to fund and declined or failed to respond within a certain period). Furthermore, bespoke terms for such funding would need to be agreed, no doubt in consultation with the relevant PSC. In this way the position of the PSCs is said to be protected.

(b). as regards other Claims which turn out to be subject to the PSCs' security interests but which are not Excluded Claims (the ***Other Secured Claims***), sums due to LLF must be paid out of the proceeds of such Other Secured Claims and such proceeds must be paid into the Recoveries Account. Pursuant to clause 4.2 of the Funding Agreement:

> "*To the extent that amounts due to [LLF] are to be paid from Recoveries which constitute assets of the Secured Estate, those amounts shall be paid as expenses incurred in connection with the identification, preservation and realization [of] such assets and shall be categorised as senior and otherwise payable in priority to (i) all other expenses of the Secured estate and (ii) any other payment or distribution of Recoveries that form part of the Secured Estate. For purposes of clarity, (a) none of the Recoveries that constitute an asset of the Secured Estate may be distributed to any party for any reason unless and until all [sums owing to LLF under the Funding Agreement] have been satisfied in full in cash and (b) the foregoing does not apply to the*

proceeds of any Excluded Claim or other assets of the Secured Estate that are outside of [the Funding Agreement]."

(c). I take the purpose of this clause to be to assert and seek to establish that the legal basis for encumbering the Other Secured Claims is that the sums to be paid to LLF are to enable the JOLs to conduct the investigation (of whether any such claims exists and are likely to be successful) and proceedings to recover them and are therefore necessary in order to generate any recoveries at all and are incurred for the benefit of the relevant PSCs (and so are the type of expense which in the context of work done by liquidators to establish whether assets in their possession or control are subject to trust or secured claims and to protect, preserve and realise such assets may be paid out of the proceeds of such trust or secured assets under the legal principles discussed below). The reference to "*other assets of the Secured Estate that are outside of [the Funding Agreement]*" is I believe to secured assets (collateral) other than Claims (as the Funding Agreement only deals with Claims).

(d). I also note that the draft order filed by the JOLs includes a paragraph (paragraph 2) in terms similar to those contained in clause 4.2 of the Funding Agreement, as follows:

> "*All amounts due to LLF under the [Funding Agreement] shall be paid as expenses of the liquidation pursuant to Order 20(1)(f) of the [CWR, as amended] except to the extent to which amounts due to LLF are to be paid from Recoveries which constitute assets of the Secured Estate (as defined in the [Funding Agreement]) in which case those amounts shall be paid as expenses incurred in connection with the identification, preservation and realization of such assets and, in either case, the payment of amounts due to LLF shall be made in accordance with the terms of the [Funding Agreement].*"

(e). the sums payable out of the proceeds of the Other Secured Claims are:

(i) all sums advanced under the Investigations and Implementations Sub-Facility (to cover the costs of the investigation of all Claims).

(ii). all sums advanced under the Litigation Sub-Facilities (to cover the costs of litigating all Claims).

(iii). interest on such advances.

(iv). a share of the Recoveries depending on how the Other Secured Claim is categorised – the Funded Recovery where the Claim is an Approved Claim (30%) or a Partially Funded Claim (that is an Approved Claim which was partially funded by LLF prior to the Repayment Date and the JOLs after the Repayment Date where the percentage payable is based on a formula which depends on how much was funded by LLF and the JOLs) or the Non-Funded Recovery if it is a Non-Approved Claim (5% in respect of Non-Approved Claims, where the JOLs requested funding from LLF but LLF declined the request) or a Post-Repayment Date Claim (20% of the Net Recoveries of Other Secured Claims that were not the subject of a request for funding by the JOLs prior to the Repayment Date).

The issues arising on the application

10. A number of issues arise on the application:

(a). first, the impact and effect of the Funding Agreement on those who claim to have security interests over some or all of the Claims covered by the Funding Agreement (the PSCs) and whether the Court should sanction the Funding Agreement in the absence of the consent of the PSCs or indeed where they object (the ***PSC Issue***).

(b). secondly, which powers the JOLs seek to exercise and whether in the circumstances the JOLs have satisfied the Court that it should exercise its discretion to sanction the exercise of these powers having regard to the applicable principles – in particular the principles set out in the judgment of the Chief Justice in his judgment in *Re DD Growth* [2013 CILR (2) 361] (the ***Discretion to Sanction Issue***)

(c). thirdly, although an issue relevant to the exercise of the discretion to sanction the entry into of the Funding Agreement, whether the Funding Agreement is unlawful by reason of champerty and maintenance (the ***Champerty and Maintenance Issue***).

The PSC issue

11. I deal first with the PSC Issue.

12. There are fifty four PSCs with claims totaling approximately $140 million (see Mr Trott's Fifth Affidavit, paragraph 5). The PSCs claim to be secured creditors of the Master Fund and to hold security interests over some or all of the Claims which are to be covered by the Funding Agreement (see Mr Trott's Third Affidavit, paragraph 12). These security interests arise under or in connection with agreements governed by the law of various states of the US and in accordance with state statutes incorporating the US Uniform Commercial Code. Only very limited information regarding the nature and terms of the PSCs' claimed security interests have been provided in the evidence in support of the application (although the Court has been provided with more detail in previous applications heard by Justice Jones).

13. I have set out above the key terms of the Funding Agreement and how they impact the rights and position of the PSCs. It is clear that the PSCs will be affected because:

(a). as regards Excluded Claims, the options for funding the prosecution of such Claims are to a certain extent limited by the Funding Agreement and in certain circumstances LLF is permitted to provide such funding on terms to be agreed. If (as I read the Funding Agreement) the JOLs decide to seek funding for the investigation and prosecution of the Excluded Claim and the relevant PSC declines to fund the Claim which it asserts to be subject to its security interest, then LLF has the exclusive right to provide the funding and terms would need to be agreed between the JOLs and LLF. But the PSC is protected to a significant extent since it is given the opportunity to provide the required funding and thereby to establish funding terms that would be acceptable or at least preferable to terms which LLF would be likely to require. Furthermore, it is to be expected that the JOLs will consult with the PSC as to the appropriate terms on which to arrange funding if the PSC is unwilling or unable to provide it and that a further application to the Court to sanction any such new funding agreement would be required on which application the PSC would be entitled to be heard.

(b). as regards Other Secured Claims, LLF will be entitled to be paid the sums owing to it under the Funding Agreement out of the proceeds of recoveries and in priority to the secured claims of the relevant PSC. I have described these in paragraph 9(e) above. Three aspects are worthy of particular mention. First, sums are payable out of the proceeds of the Other Secured Claims to repay amounts which have not been used to investigate or pay the costs of proceedings relating to the relevant PSC's Other Secured Claim. There is cross-collateralisation under the Funding Agreement because liabilities to repay sums advanced to cover investigation and litigation costs of any Claim are payable out of the proceeds of Recovery of any other Claim (save for Excluded Claims

and Liquidators' Claims Recoveries). Second, the amount payable is substantially greater than the amounts advanced as it includes interest and a share of recoveries. Thirdly, the share of recoveries is substantial ranging from 5% to 30%.

14. The JOLs have given notice of the application to the PSCs. Notice was sent by email on 2 October pursuant to a direction made by me and the PSCs were required to notify the JOLs by 4pm Cayman time on 10 October if they intended to appear at the hearing (the JOLs originally requested only a period of 3 days but I considered that to be too short). Prior to this the JOLs had had various discussions with the PSCs. These discussions included a meeting on 22 August 2018 and a subsequent meeting on 26 September 2018. Following the 22 August meeting Appleby wrote to Collas Crill on 14 September on behalf of the PSCs including certain PPNE Noteholders (I assume that all the PSCs were represented by Appleby and not just the named noteholders). Appleby stated that:

> "*The approach being adopted by the JOLs towards the Funding Agreement and their apparent intentions in respect of the management of the Litigation Claims will clearly cause very substantial prejudice to the PSCs. The JOLs have stated that the appropriate time to challenge whether claims fall within the Secured estate is at the time that proceeds are realized from those claims. This is not correct. If the Litigation Claims are inappropriately brought in such a way as to exclude some or all claims which fall outside the Commercial Tort Claim Exception or are settled at an early stage the ability of the PSCs to challenge the status of the claim at the time that proceeds are realized will have been significantly damaged. This is all the more so given the very limited information regarding the Litigation Claims which the JOLs have been willing to provide to date and appear to be willing to provide in the future.*
>
> *In light of the above the PSCs insist that the JOLs give notice of any sanction application to approve the Funding Agreement so that the PSCs have a proper opportunity to object ...*
>
> *For the avoidance of doubt the PSCs do not object to a funding agreement in principle. However, any funding agreement must contain, and/or be subject to, appropriate mechanisms to provide the PSCs sufficient information so as to confirm that claims are being brought and managed in a way that does not prejudice them...*"

The reference to the Commercial Tort Claim Exception is to a principle of US state statute law (mention has been made of article 9-108(c) of the New York Uniform Commercial Code) governing security interests which stipulates that certain classes of claim fall outside the security (and therefore in the present case outside the Secured Estate). These include claims for aiding and abetting a breach of fiduciary duty against service providers.

15. The correspondence and discussions continued after Appleby's letter dated 14 September. Collas Crill responded to that letter on 21 September; Appleby wrote again on 27 September

and Collas Crill responded on 28 September. The correspondence concluded with a further letter dated 5 October from Appleby (sent after receipt of notice of the application) and a response dated 10 October from Collas Crill.

16. In their letter of 5 October, Appleby once again raised the "significant concerns" of the PSCs regarding the form of the funding agreement which had been provided to them, in particular the fact that it applied to all claims brought by the JOLS or the Master Fund unless specifically excluded from the agreement, so that all recoveries will be subject to the

> "*Funder's substantial costs including a 30% share of net recoveries on top of recovering its financing costs. This may be appropriate. It may not. The PSCs have no way of knowing. The JOLs' refusal to provide any meaningful information in respect of the Litigation Claims means that the PSCs are not in a position to assess this. It is .. very possible that there are certain claims which clearly have very high prospects of success – in these cases a 30% share of net recoveries going to the Funder may be completely inappropriate. The PSCs may prefer to fund certain claims themselves – and have attempted, without success, to pursue the possibility with the JOLs... some of the Litigation Claims themselves fall within the PSCs' security and the proceeds from all the Litigation Claims themselves fall within the PSCs' security. In the circumstances, the PSCs must be given the opportunity and the information to determine whether it is appropriate for all claims to be subject to the Funding Agreement.*"

Appleby went on to make three proposals: first that the PSCs be provided with sufficient information on identified litigation claims to enable them to determine whether it was appropriate for the funding agreement to apply to all claims or whether the PSCs could offer to fund certain claims which may be on better terms than those of the proposed funder; second, that the PSCs be involved in the management of the litigation claims so that they can ensure that their interests are properly protected and thirdly, that the PSCs be paid a certain percentage of all relevant Recoveries after payments made to the funder (to create a priority class of unsecured creditors).

17. Collas Crill had repeatedly stated in their responses to the letters from Appleby that the Funding Agreement provided that all identified assets or claims that were known (by the JOLs) to fall within the scope of the PSCs' security were expressly excluded so that the Funding Agreement was of limited application to the PSCs. In their letter dated 10 October Collas Crill:

(a). reiterated that:

> "*identifiable claims which clearly fall within the scope of the PSCs' security interests (assuming they are valid) have been excluded [from the Funding Agreement]. The potential exclusion of the remainder of claims that might fall*

within the scope of the PSCs' interests (i.e. unknown and unformulated claims) was considered at an early stage in the negotiations. However, the approach is unworkable because the value of non-excluded claims and the extent to which they fall within the scope of the PSCs' security are uncertain. No funder was willing to fund on the basis that an uncertain number of claims of indeterminate value was excluded and this would render it impossible to assess the commerciality of funding."

(b). pointed out that because the JOLs had excluded any claims of identifiable value, the PSCs might have no economic interest as PSCs in the litigation claims subject to the Funding Agreement. Furthermore, it was not possible to exclude the Other Secured Claims from the Funding Agreement since doing so would disproportionately jeopardise the interests of all stakeholders, including the PSCs themselves. It was necessary and appropriate for all claims to be subject to the Funding Agreement because the realisations available to the JOLs were insufficient to fund the necessary investigations and litigation. Third party funding was necessary and would serve the interests of all stakeholders. Without it there would be no proceeds and recoveries from the Claims for anyone to share in.

(c). explained again that the level of information that the JOLs could provide to the PSCs was limited. As they had said in their letter dated 28 September this was because the JOLs' US counsel had advised that communications with the PSCs regarding litigation claims would not be privileged from production in US proceedings and because the JOLs were concerned that communications to the PSCs would not be kept confidential (in circumstances where one of the PSCs had in the past breached the terms of an NDA to which it was a party). Accordingly, the information which the JOLs were properly able to provide to the PSCs would not allow for a proper determination of which further Claims could and should be excluded from the Funding Agreement without jeopardizing the interests of both the PSCs and other stakeholders. Subsequently in his Fifth Affidavit, served on 15 October (the day before the hearing began), Mr Trott sought to explain in further detail the problems that prevented the disclosure of information to the PSCs and exhibited a note dated 14 October from the JOLs' US counsel, Holland & Knight, dealing with the privilege issues.

18. White Rock's position as set out in their very brief written submissions (which was not supported by any evidence at all) can be summarised as follows:

(a). White Rock did not oppose funding being obtained to pursue litigation claims in principle.

(b). instead White Rock's objection to the Funding Agreement was based on specific concerns with certain details of the Funding Agreement as well as with the conduct of the JOLs in negotiating it.

(c). despite the Liquidation Committee being given a copy of a draft of the Funding Agreement on 11 August 2018 and despite the extensive work conducted by the JOLs, the PSCs were not provided with a copy until 2 October 2018. Moreover, at no point had White Rock been provided with adequate information to understand whether the Funding Agreement prejudiced their interests.

(d). White Rock's fundamental concern was that the Funding Agreement applied to all Claims brought by the JOLs or the Master Fund unless they had been specifically excluded from the Funding Agreement. The JOLs had accepted that this will necessarily include Claims that fall within the PSCs' security. All recoveries from those Claims will be subject to the Funder's very substantial costs - including a 30% share of net recoveries on top of recovering its financing costs. This may be appropriate. It may not. White Rock and the PSCs had no way of knowing. The JOLs' refusal to provide any meaningful information in respect of the Claims meant that White Rock was not in a position to assess this.

(e). the JOLs had previously sought to avoid sharing information on the Claims with White Rock on the basis that there was a risk that communications between PSCs would not be privileged as a matter of US law. Despite this assertion, the JOLs had not provided White Rock with any formal US law advice to this effect. Moreover, the JOLs had not put forward any mechanisms which could be used to address the suggested privilege challenges. It was notable that the JOLs had found a means of sharing privileged material with the Liquidation Committee.

(f). White Rock's concern had been to understand the Claims that were potentially available and to consider whether it was appropriate for all of those Claims to be subject to a funding agreement. They considered that there were ways of managing this risk identified by the JOLs so that they could be provided with much of the information they needed for this purpose. For example, reliance could be placed on common interest privilege or there could be the provision of non-privileged information relating to the Claims. But the JOLs had not been prepared to adopt any such approaches.

(g). in the absence of further information White Rock simply has no way of assessing the veracity of the JOLs' assertion that they have identified all of the Claims which clearly fall within the scope of the Secured Estate and have excluded these from the Funding Agreement.

(h). the JOLs have identified and allocated three Secured Estate litigations to White Rock. Putting aside the surprisingly small number of identified claims, White Rock noted that none of the Claims are against former professional advisors, service providers, principals of the Master Fund or other such claims which one would expect in a liquidation of this size. White Rock had no way of knowing whether the JOLs had identified Claims which could be brought on behalf of the Secured Estate (i.e. breach of contract, fraud) or would, as the JOLs claim, be excluded from the Secured Estate under the commercial tort exemption. It was entirely possible that certain Claims could be brought under both heads or in the alternative.

(i). at paragraph 14 of his Third Affidavit, Mr Trott stated that there was great urgency in securing funding because the relief granted to the Master Fund under Chapter 15 of the US Bankruptcy Code included a two-year automatic stay on (or tolling of) claims and this was due to expire on 22 November 2018. But White Rock was not satisfied that this was a serious concern because it was possible that the limitation period for at least some of the Claims expired later than this. In any event the JOLs had not established that the value of the Claims that might be subject to limitation problems were significant (this was an issue addressed and responded to by Mr Trott in his Fifth Affidavit).

19. The question therefore arises as to whether the liabilities owed to LLF under the Funding Agreement, which become payable out of the Other Secured Claims, can be charged (imposed) on the assets (collateral) subject to the PSCs' security interests without their consent and whether the Court should sanction the exercise of the JOLs' powers to enter into the Funding Agreement on terms which affect the PSCs as secured creditors (or at least as potential secured creditors) in the manner I have described without their consent.

20. The issue was not addressed in the Outline Submissions of the JOLs filed before the hearing. Mr Isaacs QC for the JOLs sought to deal with the issue during his oral submissions on the first day of the hearing on 16 October (in response to the questions I raised) but since the point seemed to me to both important and less than straightforward I requested Mr Issacs to prepare further submissions on this issue overnight before the start of the hearing on 17 October, which he kindly did (these were the JOLs' Supplemental Submissions). Since these had been prepared

in haste and it was clear during the hearing on 17 October that further authorities needed to be considered I gave the JOLs and White Rock until 4pm Cayman time on 19 October to file further written submissions on this issue if they wished to do so. Mr Isaacs filed the JOLs' Second Supplemental Submissions before that deadline but Appleby subsequently confirmed that White Rock did not wish to file any further submissions. I am grateful to Mr Isaacs for these further submissions, and the further authorities which he has provided, which I have found very helpful.

21. Mr Isaacs' submissions, as set out in the three sets of written submissions he filed and as explained during the hearing, can be summarised as follows:

(a). Mr Isaacs submitted that the Court has jurisdiction to sanction the Funding Agreement notwithstanding that the Funding Agreement imposes a first ranking security interest on Recoveries which may be subject to the security interests of PSCs. He submitted that the Court should exercise that jurisdiction in the present case because the funding costs arising under the Funding Agreement must be paid in order to enable the Claims to be pursued by the JOLs and therefore in order to generate funds out of which the secured claims of the PSCs can be paid.

(b). he relied both on the Court's general jurisdiction and a statutory power. The statutory power is contained in section 142(2) of the Companies Law (2018 Revision) and provides that "*where the liquidator sells assets on behalf of a secured creditor, he is entitled to deduct from the proceeds of sale a sum by way of remuneration equivalent to that which is or would be payable under section 109.*" I discuss the submissions as to the application of section 142(2) in paragraph 21(l) below.

(c). Mr Isaacs relied on a number of authorities in England and Australia to support the proposition that costs incurred by liquidators in realising charged assets are payable ahead of the secured creditor's claims and referred to the brief statements of principle to this effect in the House of Lords in *Buchler v Talbot* [2004] 2 AC 298 (per Lords Nicholls at [19], Hoffmann at [31], and Millett at [51]). The authorities on which he relied considered the basis and scope of the jurisdiction to award liquidators an allowance for such costs.

(d). he submitted that even though the decision of Edward Nugee QC (the ***Deputy Judge***) in *Re Berkeley Applegate* dealt with the jurisdiction to award liquidators an allowance for their costs out of trust property in their control ahead of the claims of beneficiaries,

it was also relevant to the award of an allowance out of charged property because the Deputy Judge had referred to and considered a number of earlier cases dealing with this issue.

(e). these included *Re Marine Mansions* Co LR 4 Eq 601, *In re Oriental Hotels Co.* (1871) L.R. 12 Eq.126 *In re Regent's Canal Ironworks Co; Ex p Grissell* (1875) 3 Ch. D. 411 and *In re Northern Milling Co.* [1908] 1 I.R. 473 (an Irish case). In *Re Marine Mansions* a liquidator had been allowed the costs incurred in preserving mortgaged property (sale costs, the costs of rendering the property fit for sale and rent paid to the landlord – to which allowance the debenture holder did not object). The other costs incurred by the liquidator in the winding-up and any remuneration payable to him were postponed to the rights of the debenture holder. In *Oriental Hotels* it was held that the expenses of the realisation of a property by the liquidator took priority over any claim by the mortgagee but the mortgagee's claim was paramount to the general costs of the winding up. The Deputy Judge noted (at pages 44-H-45A) that:

> "*I do not find these two cases of very much assistance. In both of [these cases] the mortgagee could have sold regardless of the winding up and the liquidator was in effect selling on his behalf. The expenses which he incurred for the purpose of selling to the best advantage were of a different character from the expenses incurred by the liquidator in the present case [the liquidator was seeking an order authorising his reasonable remuneration and not just his expenses]. Nevertheless they recognise that where a mortgagee permits a liquidator to sell the company's property which is subject to his mortgage, he cannot claim the entire proceeds of sale without allowing the liquidator the costs which he has properly incurred in connection with the sale* [my underlining].

(f). in *Regent's Canal Ironworks Co* the limits of the jurisdiction were emphasised. There court appointed liquidators had carried on the business of the company for nine years under a number of orders of the court which were expressed to be without prejudice to the claims of the debenture holders. Eventually under a further order of the court they realised the property subject to the debenture. This property consisted of certain leases, machinery and plant (but not the undertaking and business of the company). The liquidators claimed to be allowed the costs of carrying on the business in priority to the debenture holders. The English Court of Appeal held that the costs properly incurred in realising the properties subject to the security were payable out of the proceeds of sale but the liquidators other claims were not allowed. James LJ said that "*Those who render services to an insolvent company .. frequently find that they have to go without payment*

and the liquidators should not have incurred disbursements which they had no means of being reimbursed." He would have allowed costs properly incurred in preserving the property such as costs of repairs, the payment of rates and taxes necessary to prevent a forfeiture or putting a person in to take care of the property but not payments made as part of the current outgoings of the business. But the liquidators had not paid any such costs. The Deputy Judge in *Re Berkeley Applegate* thought that this case was no different in principle from *Re Marine Mansions*. The liquidator and contributories had thought it was for their own benefit that the business (which was not part of the charged property) should be carried on and the debenture holders were content to rely on their security. When the business failed and the security realised it was only the costs of realisation that could be charged against the debenture holders.

(g). *Re Berkeley Applegate* referred to overlapping sources of the jurisdiction to award such an allowance: the equitable maxim that he who seeks equity must do equity (47B, 50E); salvage (47B, 51F, H); and the inherent jurisdiction of the court (although as regards the source of the jurisdiction with respect to preserving mortgaged as opposed to trust property he noted (47C) the submission of counsel that the jurisdiction might be seen as based on the maxim or on the jurisdiction of the Court to promote the proper administration of trusts).

(h). Mr Isaacs also relied on the decision of the High Court of Australia in *In Re Universal Distributing Co Ltd* (in liquidation) (1933) 48 CLR 171 (***Re Universal Distributing***). In that case the assets realised by the liquidator of a company were insufficient to meet the liability owing under debentures which were secured by the undertaking. Dixon J held (at 174) that expenses which had been reasonably incurred in the care, preservation and realisation of the property charged to the debenture holders could be deducted from the fund realised by the liquidator. (Dixon J had relied (at 174) on *Re Marine Mansions* as well as other cases which had been referred to in *Re Berkeley Applegate*). This case was authority for the proposition that costs incurred by liquidators in realising charged assets are payable ahead of the debenture holder's claims.

(i). the underlying principle was that a secured creditor cannot lay claim to the benefit of realised assets without the costs of their realisation being met. In particular, the secured creditor may not have the benefit of a fund created by a liquidator's efforts in the winding up, without the liquidator's costs and expenses of creating that fund being first met. To that end, equity will create a charge over the fund in priority to that of the secured creditor. These propositions may be derived from another and more recent

decision of the High Court of Australia, *Stewart v Atco Controls Pty Ltd* (2014) 252 CLR 307 (***Atco Controls***). In this case a company in liquidation brought proceedings against a first ranking secured creditor and against receivers appointed by it seeking to set aside the security or the receivers' appointment. The receivers paid a sum to settle the litigation but the challenge to the security failed. The secured creditor claimed the settlement sum pursuant to its mortgage while the liquidator asserted an equitable lien over the sum on account of his costs, expenses and remuneration in obtaining the sum. The High Court held in favour of the liquidator. The Court considered that *Re Universal Distributing* established the applicable principle (the ***Universal Distributing Principle***) which could be formulated as follows:

> "*The principle in Universal Distributing [can] be shortly stated as: a secured creditor may not have the benefit of a fund created by a liquidator's efforts in the winding up without the liquidator's costs and expenses, including remuneration, of creating that fund being first met. To that end, equity will create a charge over the fund in priority to that of the secured creditor.*
>
> *The circumstances in which the principle will apply are where: there is an insolvent company in liquidation; the liquidator has incurred expenses and rendered services in the realisation of an asset; the resulting fund is insufficient to meet both the liquidator's costs and expenses of realisation and the debt due to a secured creditor; and the creditor claims the fund. In these circumstances, it is just that the liquidator be recompensed. To use the language of Deane J in Hewett v Court, it might be said that a secured creditor would be acting unconscientiously in taking the benefit of the liquidator's work without the liquidator's expenses being met. However, such a conclusion is avoided by the application of the principle stated in Universal Distributing.....*
>
> *In this context, Dixon J may be understood to say that a secured creditor "comes in" to a winding up when it lays claim to, and seeks the benefit of, a fund created by the liquidator in the winding up in order to satisfy its charge. This may be contrasted with the situation where a security holder acts independently of the winding up and realises and enforces the security by its own action. Atco does not seem to be in a position relevantly different from the debenture holder in Universal Distributing. It did not, and could not, bring proceedings with respect to Newtronics' chose in action against the receivers which gave rise to the fund. Atco made claim to the fund and sought orders against the liquidator to disburse it. It has, in the sense referred to, come in to the winding up. Atco's argument that it did so unwillingly and was effectively forced to claim the settlement sum does not alter that conclusion…*
>
> *... [Dixon J had said that] "I see no reason why remuneration for work done for the exclusive purpose of raising the fund should not be charged upon it" (emphasis added)... Dixon J went on to fix the liquidator's remuneration and, in that process, excepted certain items from the liquidator's first-ranking charge. His Honour's reference to exclusivity of purpose is likely to have been intended to convey that only work done in connection with creating the fund was to be reimbursed. It most certainly does not imply that the subjective*

purpose of the liquidator is a relevant consideration. The proper question that follows from what Dixon J said is whether, in a general sense, the costs and expenses claimed by the liquidator could be said to have been incurred in the realisation of the asset which created the fund. Whether the costs and expenses claimed were in fact so incurred is a matter to be determined when the liquidator verifies his accounts. "

[my underlining]

(j). in *Townsend v Biscoe* 2010 WL 316608, 10 August 2010 (a case involving an application by an English administrator under a statutory power in the Insolvency Act 1986 - which is not available in Cayman - for permission to sell charged property as if it were not subject to the charge on condition that the administrator account for the net proceeds of sale) the Registrar also compare and contrast the secured creditor's position in the liquidation with what would happen if it took steps itself to enforce its security and realise the charged assets. At paragraph 29 the Registrar said:

> "*The Applicants as secured creditors took no steps to enforce their security. They neither sought the Administrators permission nor did they apply to the court. The moratorium can be overcome so I cannot accept the submission that the Applicants are deprived of their security so that the restrictions imposed by Paragraph 71 are a trade-off for that loss. It is clear in those circumstances that they allowed the administrators to proceed so, in my judgement, they "cannot claim the entire proceeds of sale without ... allowing the costs properly incurred in connection with that sale" See In re Berkeley Applegate. Looked at conversely had the Applicants sought to enforce their security they would have incurred themselves the very expenses to make the properties saleable about which they now complain or sell the properties at a much reduced price.* [my underlining]

(k). the cases which establish the general principle that work and labour done or money expended by one man to preserve or benefit the property of another does not create any lien upon the property saved or benefited (or create any obligation to repay the expenditure) were distinguishable. These cases included *Re Asphaltic Wood Pavement Co, Lee & Chapman's Case* (1885) 30 Ch D 216 (CA) (see Cotton LJ at 225) and *Falcke v Scottish Imperial Insurance Co* (1886) 34 Ch D 234 (CA) (see Bowen LJ at 248). The jurisdiction to award liquidators their remuneration and expenses out of mortgaged property and trust property was an exception to this principle and this was supported in *Atco Controls* (see paragraphs 46-48).

(l). as regards section 142(2), Mr Isaacs submitted that he did not need to rely on the statutory power but did so to the extent necessary. He initially submitted that if the Funding Agreement was sanctioned, the JOLs may realise assets on behalf of the PSCs

and there was no good reason to adopt a narrow construction of the word "sells" in section 142 which excludes "realises". It is to be inferred he submitted that the purpose of section 142(2) was to preserve the rights of secured creditors when their assets are realised by a liquidator, save that the costs and expenses of realisation may be deducted from the proceeds. However, on the second day of the hearing he accepted that section 142(2) was of limited assistance to his argument since it only applied to "remuneration" and the obligations payable by the Master Fund and the JOLs to LLF under the Funding Agreement, which were to be paid out of the Other Secured Claims, on any reading went beyond remuneration. This seems to me be correct so that section 142(2) was not of direct assistance to the JOLs on this application.

22. In my view the following issues arise, points can be made and conclusions reached.

(a). I note that in the present case the rights of the PSCs are said to be governed by applicable US state law. It appears that the Claims may well be governed by applicable US law and could be treated as located (having a situs) in one or more US states. However, no analysis has been provided to the Court as to the position under the Uniform Commercial Code or of the rights of the PSCs under applicable US law nor have White Rock (or the JOLs) argued that the US connection affects the analysis of the JOLs' application. I therefore assume that the position and rights of the secured creditors are the same as under Cayman law and that all issues are governed by Cayman law.

(b). it is clear that there is jurisdiction enabling the Court to order that costs incurred by liquidators in realising charged assets are payable out of the charged assets ahead of the secured creditor's claims. The authorities cited by Mr Isaacs establish that. I also agree with the propositions of law set out in Mr Isaacs' submissions, as I have summarised them above. But the issue that arises is the exact scope of the jurisdiction and how it should be exercised on the present application. I should say that I do not consider that section 142(2) of the Companies Law limits the scope of the non-statutory jurisdiction although this was not an issue that was explored in the written or oral submissions and may need to be considered further on another application. It seems to me, as presently advised, that the section deals with remuneration and is not to be treated as intended to limit the Court's jurisdiction laid down in the cases with respect to costs although one would expect the applicable principles to be similar. Section 142(2) refers to a liquidator who "*sells assets on behalf of a secured creditor*" which suggests that there

must either be consent by the secured creditor to the liquidator acting on its behalf or, at a minimum, a realisation for the benefit of the secured creditor concerned.

(c). the JOLs submit that, in the present circumstances and in light of the limited funds available to them in the liquidation, the only way in which the Claims (other than the Excluded Claims) can be prosecuted and realised by action is if they obtain third party litigation funding and that the deal agreed with LLF is the best and cheapest deal available. The costs of the litigation funding – the liabilities to LLF to be taken on under the Funding Agreement - are therefore to be treated as a necessary cost and expense which have to be incurred and paid in order to collect in the Claims and generate a fund out of which the PSCs (and after them other creditors) can be paid. The test for the application of the *Universal Distributing Principle*, namely whether "*in a general sense, the costs and expenses claimed by the liquidator could be said to have been incurred in the realisation of the asset which created the fund*", is therefore to be treated as satisfied.

(d). as I have already noted the JOLs seek, in the draft order lodged with the application, not only an order that they have sanction to enter into the Funding Agreement but also an order that all amounts due to LLF (under the Funding Agreement) be paid as expenses of the liquidation:

> "*except to the extent to which amounts due to LLF are to be paid from Recoveries which constitute assets of the Secured Estate (as defined in the [Funding Agreement]) in which case those amounts shall be paid as expenses incurred in connection with the identification, preservation and realisation of such assets and, in either case, the payment of amounts due to LLF shall be made in accordance with the terms of the [Funding Agreement].*"

This does not spell out that the amounts due to LLF are to rank ahead of the secured claims of the PSCs but that is obviously the purpose and effect of the draft order. The draft wording is intended to confirm the purpose for which the funding is required by the JOLs and that the sums due to LLF are costs and expenses of the kind covered by the *Universal Distributing Principle* and the authorities discussed above. The Court is being asked to declare that the sums payable to LLF come within the *Universal Distributing Principle* and are payable out of the Recoveries in respect of the Other Secured Claims even though the PSCs do not give their consent.

(e). it seems to me that the statement of the *Universal Distributing Principle* set out by the High Court of Australia in *Atco Controls* is a good summary of the applicable law and

should be followed by this Court. It also seems to me that the JOLs are right, on the evidence and for the reasons they have given, to say that the basic test (of whether in a general sense the costs and expenses claimed by the liquidator can be said to be incurred in the realisation of the asset which created the fund) is to be treated as satisfied.

(f). but it does not automatically follow that it is appropriate to apply the principle in the present case. This case is clearly different in a number of important respects from the authorities which establish the *Universal Distributing Principle*:

(i). first, the authorities deal with the situation in which a liquidator has already taken steps and incurred expenses to protect, ready for sale and sold charged assets without interference by or objection from the secured creditor. In the present case the JOLs seek an order in advance of taking the relevant steps and incurring the relevant expenses or liabilities – as they must because they require the sanction of the Court before entering into the Funding Agreement. In this case, the affected secured creditors object in advance to the JOLs taking the steps they propose to take and oppose the relief sought by the JOLs.

(ii). secondly, this case involves a litigation funding agreement which involves intangible assets (the Claims) and imposes obligations of a different kind and extent from those ordinarily associated with the preservation and sale of tangible property. LLF is entitled to a substantial share of recoveries in addition to reimbursement of the sums advanced to pay expenses incurred in investigating and litigating claims (the obligation to repay advances plus interest can be characterised as a liability to repay borrowed monies). Furthermore the liabilities are not always directly referable to the preservation and realisation of the secured assets but may also be referable to unsecured assets. A share of the Recoveries made in respect of Other Secured Claims must be given to LLF even when no funds have been advanced to fund litigation to recover the Other Secured Claim (either because LLF has refused to provide funding – when there is a limit on the aggregate amount payable to LLF in respect of all Non-Approved Claims - or because the JOLs did not seek it).

(g). as to the first point of distinction:

(i). White Rock opposes the application and while not making its own submissions challenging the JOLs submissions as to the existence of the jurisdiction to allow the JOLs to recover certain costs out of the Other Secured Claims and while not objecting to the JOLs being permitted to arrange other or amended litigation funding asks the Court not to exercise its jurisdiction to sanction the entering into of the Funding Agreement or prospectively to permit the liabilities to be assumed to LLF to be charged on the Other Secured Claims in priority to the secured claims of the PSCs. The other PSCs have confirmed that they neither consent nor oppose the JOLs' application.

(ii). however neither White Rock nor the other PSCs have sought to enforce (either in this Court, perhaps by way of an application for the appointment of a receiver or in the US) their security interests and take control of the process of investigating and prosecuting the Claims covered by their security interests. There are no doubt a number of reasons why (although I am left to speculate in view of the absence of submissions or evidence on the point). It appears, as I have explained, that in some cases the PSCs may not have security interests over the Claims themselves but only over the proceeds of such Claims. This may affect their ability to take enforcement action which involves bringing proceedings in respect of the relevant Claims (but no submissions were made and certainly no evidence was filed to make good such a concern). In addition it appears that the JOLs challenge the validity and scope of at least some of the PSCs' asserted security interests so that it may be necessary to resolve these disputes before the security interests could be enforced. This would be expensive and time consuming (and risky if, as the JOLs claim, there are serious risks that a delay in bringing proceedings may result in the expiry of limitation periods - the JOLs have made it plain that they wish to avoid having to incur, before Recoveries have been made, the costs of litigating the disputes with the PSCs). But if the PSCs were so seriously concerned about their treatment and their position, it has, it appears, always been open to them to assert their rights and take enforcement action to protect their position. This they have not done.

(iii). despite the fact that the PSCs, since no Recoveries have yet been made, are not able to "lay claim" to actual funds in the liquidation, they are to be treated as asserting their rights and participating in ("coming in to") the liquidation

sufficiently to engage the *Universal Distributing Principle* and it seems to me that the fact that their objection is made in advance of the steps to be taken by the JOLs that will give rise to the relevant liabilities to be paid out of the secured assets does not change the analysis or the approach to be adopted by the Court, provided that the nature and extent of those liabilities is sufficiently clear. They are sufficiently clear from the terms of the Funding Agreement.

(h). I am however troubled by the second point of distinction:

(i). the authorities demonstrate that the courts, quite properly in my view, have been concerned to protect the position and property rights of secured creditors and to limit the application of the *Universal Distributing Principle*. It seems to me that two limitations are of particular relevance and importance. First, the cases make it clear that expenses incurred for protecting and realising the company's general estate for the benefit of the unsecured creditors are not covered. Secondly, only expenses of the kind and extent that the secured creditor would (have to) incur if it exercised its enforcement powers and took steps to protect, get in and realise the secured assets (for example by appointing a receiver over the secured assets) are covered.

(ii). in the present case, it can be argued that the provisions in the Funding Agreement which I have mentioned above (pursuant to which sums are payable to LLF even when not directly referable to the preservation and realisation of the Other Secured Claims so that a share of the Recoveries made in respect of Other Secured Claims must be given to LLF even when no funds have been advanced to fund litigation to recover the Other Secured Claim) mean that the first limitation is not being observed. The secured assets are bearing costs and expenses incurred to realise unsecured assets. But, on balance, I have concluded that this is not right. The terms of the Funding Agreement and the funding arrangements which they represent must be viewed as a whole. It is appropriate, on the evidence of the JOLs and in the circumstances of this case, to view the sums payable out of the Other Secured Claims as representing sums which must be paid for the purpose of investigating those Claims. The only terms on which LLF is prepared to make any funding available for investigating the Claims – and therefore for the purpose of investigating the Other Secured Claims – involve a share of the Recoveries made out of the Other Secured Claims even where LLF ultimately

does not fund the prosecution of those Claims. There will of course only be proceeds received in respect of the Other Secured Claims where no funding for their prosecution is provided by LLF if someone else provides the required funding and if the Claims are successful or settled. The sums payable to LLF will represent an additional, and a significant extra cost. But, as it seems to me, that extra cost is the price payable for securing funding to investigate the Other Secured Claims. Otherwise there will be no investigation and no realisation of such Claims. In such circumstances, it seems to me that it is permissible and appropriate to apply the *Universal Distributing Principle*.

(iii). the substantial amounts payable to LLF (in particular the share of Recoveries of between 5% and 20% in cases where LLF does not fund the prosecution of the Claims) is a cause of concern but on the JOLs' evidence the sums are not commercially unreasonable and represent the most commercially attractive terms available. Furthermore it would follow, on the JOLs' evidence, that if the PSCs exercised their rights and enforced their security interests (for example by applying to the Court for the appointment of a receiver over the charged assets) the receiver would need to obtain litigation funding and that would be on no more attractive terms than that provided under the Funding Agreement.

(iv). White Rock challenges the JOLs' evidence on this point of course (in their submissions but not in evidence). They say that the absence of the information they have requested has prevented them from properly considering the Funding Agreement or making alternative proposals. Therefore it is not possible to say whether, if the PSCs enforced their security interests, litigation funding would not be available (perhaps from the PSCs themselves) on cheaper and commercially more attractive terms. But it seems to me that on the evidence I am unable to conclude that the JOLs have behaved unreasonably or that there is a real and realistic prospect of other funding being made available on cheaper and commercially more attractive terms. Furthermore, on the evidence, there is an urgent need to put the funding in place and therefore giving directions requiring further information to be given to White Rock and to allow White Rock more time in which to make alternative funding proposals is not justifiable.

(v). I have set out above details of the information requests made by Appleby to Collas Crill and the concerns expressed by White Rock (and the other PSCs) as a result of what they say has been the JOLs failure to provide them with adequate information or to engage with the PSCs properly. Mr Lee and Mr Hayward-Hughes maintain that the information which the JOLs had provided prior to the hearing, despite their client's repeated requests for more, has not been sufficient to enable White Rock to determine whether its interests would be prejudiced by consenting to the Funding Agreement or whether there are preferable alternatives. For this reason White Rock requested that the Court direct the JOLs to provide the following information:

(A). copies of all funding proposals sent to the proposed funders and to LLF.

(B). copies of correspondence and analysis provided to the Liquidation Committee regarding the Claims.

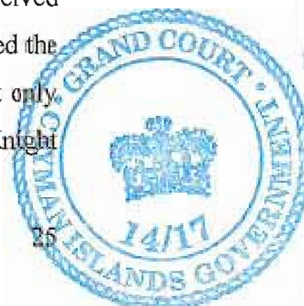
(C). copies of any analysis undertaken regarding the allocation of Claims between the secured and unsecured estate.

(D). details of all IPR costs charged to the secured and unsecured estate including narratives sufficient for an analysis to be conducted on the appropriateness of such allocations and of the IPR costs themselves.

(E). all information and analysis regarding the merits of the PSCs' Claims and identifying any issues relating to validity.

(F). a copy of the US law advice from Holland & Knight referred to at paragraph 4 of Mr Trott's Fifth Affidavit (an extract of which had been read out during the hearing by Mr Isaacs but not provided to White Rock).

(vi). the JOLs in their evidence say, as I have explained, that they were and remain unable to provide the information – or at least all of the information - requested by White Rock (and the other PSCs) because they have received US law advice to the effect that the provision of such information risked the loss of privilege in the information and therefore serious prejudice not only to the JOLs but also to the PSCs themselves. The note from Holland & Knight



set out a brief explanation of their analysis and the reasons for their concerns. White Rock have not put in evidence contrary to the US law advice and Mr Lee and Mr Hayward-Hughes did not seek to challenge Holland & Knight's analysis as the US law advice has not been provided to White Rock. I do have sympathy with White Rock's frustrations and for my own part, as I explained at the hearing, find it surprising that the relationship between liquidators and secured creditors, at least to the extent that the liquidators are discussing how to obtain litigation funding for, protect and realise the secured creditors' collateral, if and to the extent that their security interests are established to be valid, is insufficient, or cannot be structured in a way, to allow information needed by the secured creditors to evaluate funding proposals to be provided to them without losing or waiving privilege. However, in the absence of a cogent challenge to the Holland & Knight analysis or a concrete alternative proposal presented to the Court and put in evidence as to how to structure the relationship between the JOLs and White Rock so as to permit the sharing of the required information (save for the proposal that White Rock be appointed to the Liquidation Committee without White Rock establishing an unsecured shortfall claim, which cannot work) I am not prepared to accept that the JOLs have behaved unreasonably or improperly in not providing the information sought or to make the directions sought by White Rock.

(vii). I have also been troubled by the failure in this case to ensure that the PSCs have a larger role and to involve them more fully in the decision making process with respect to the secured Claims (for example by forming a PSC committee with whom the JOLs could liaise and to whom information could be disclosed). I appreciate that in some respects the JOLs and the PSCs have been adverse parties in so far as there remain challenges to and disputes concerning the PSCs' security interests. But it seems to me to be important that the JOLs have regard, when considering funding arrangements that will affect secured creditors, to the interests of those secured creditors and satisfy themselves that on balance the interests of the secured creditors are properly protected. In the present case, Mr Trott's evidence is that the JOLs have had regard to the interests of the PSCs (albeit that the PSCs remain opposed to the Funding Agreement being entered into). Mr Trott says (in paragraph 49 of his First Affidavit) that in the circumstances the JOLs consider that the interests of the PSCs and the liquidation estate are best served by incorporating within the scope of the Funding Agreement Claims subject to the PSCs' security

interests unless the information available to the JOLs is sufficient to enable them to make an informed decision as to whether the Claim should be funded by the proceeds of realisations already made in the liquidation. Where the position is sufficiently clear the Claims have been treated as Excluded Claims. Furthermore the JOLs consider that it may be the case that the Excluded Claims cover all the Claims subject to the PSCs' security interests so that the risk to the PSCs is low or at least properly balanced against the overall benefits to be derived from the Funding Agreement. In this case it has not been possible to carve out completely from the Funding Agreement the further Claims that might turn out to be subject to those security interests. Funding would not be available if that were done. And if no funding were available there would be no Recoveries for the PSCs (or anyone else). This rationale seems to me to be both commercially sound and in the absence of alternative funding proposals, fair to the PSCs.

(viii). I also appreciate that there have been without prejudice negotiations the details of which obviously cannot be disclosed to the Court so that it is impossible to ascertain whether reasonable efforts to involve and accommodate the PSCs have been made. I also note, and give significant weight to the fact, that the relationship between the JOLs and the PSCs was considered by the Court in earlier hearings before Justice Jones and that the approach adopted by the JOLs has followed those hearings and I assume is in accordance with the views of Justice Jones. I therefore, in this case, am not prepared to decline to sanction the entering into of the Funding Agreement or to apply the *Universal Distributing Principle* until further information has been provided to White Rock (and the other PSCs) so that they can consider further the terms and merits of the Funding Agreement and make alternative proposals and further submissions (which in other circumstances I might well have been inclined to do). I did ask at the hearing whether White Rock was prepared to confirm that it would provide litigation funding at least for its own secured Claims and was told (as appears in the correspondence from Appleby) that they were prepared to consider doing so and had wanted to discuss options with the JOLs but had not been given the opportunity of doing so. In any event, as matters currently stand, they have not put forward in writing and in open form an alternative to the Funding Agreement.

(ix). as regards the urgency of arranging litigation funding asserted and relied on by the JOLs, I have noted the doubts expressed by White Rock in their written submissions. But the points made by Mr Trott in his Fifth Affidavit respond to these concerns and White Rock has filed no evidence to challenge his views and explanations. In these circumstances I am bound to accept that there is a serious risk of limitation periods expiring and an urgent need to put litigation funding in place.

The Discretion to Sanction Issue

23. The JOLs seek sanction of the exercise of powers falling within Part 1 of Schedule 3 to the Companies Law (2018 Revision) which may only be exercised with the sanction of the Court.

24. Mr Isaacs submitted that entering into the Funding Agreement involved the exercise by the JOLs of their powers under paragraphs 1 (power to bring or defend any action or other legal proceeding); 3 (power to dispose of any property of the company); 7 (power to deal with all questions in any way relating to or affecting the assets or winding up of the company) and 9 (power to raise or borrow money).

25. Mr Isaacs submitted, in reliance on the judgment of the Chief Justice *in Re DD Growth Premium 2X Fund* [2013 CILR (2) 361] at para 30, that in exercising its discretion as to sanction, the Court should take into account and apply the following principles:

(a). the Court must consider all the relevant evidence.

(b). the Court must consider whether the proposed transaction is in the commercial best interests of the company, reflected prima facie by the commercial judgment of the liquidator.

(c). the Court should give the liquidator's views considerable weight unless the evidence reveals substantial reasons for not doing so.

(e). the liquidator is usually in the best position to take an informed and objective view.

(f). unless the Court is satisfied that, if the company is not permitted to enter the deal in question, there will be better terms or some other deal on offer, the choice is between the proposed deal and no deal at all.

26. Mr Isaacs noted that in deciding whether to sanction the entry into a litigation funding agreement, the Court will also consider whether the agreement is unlawful by reason of maintenance and champerty. I consider this issue separately below.

27. Mr Isaacs submitted that the evidence (in particular the Third, Fourth and Fifth Affidavits of Mr Trott) demonstrated that the Funding Agreement was in the best interests of the Master Fund:

(a). it was the JOLs' commercial judgment, which had been exercised in consultation with and based on advice from their Cayman and US legal advisers, that the Funding Agreement was in the best interests of the Master Fund.

(b). they had reached this conclusion for a number of reasons:

(i). there are insufficient funds in the liquidation estate, and the JOLs have no other funding, to enable them to pursue claims.

(ii). the JOLs have sought to obtain the best offer available by conducting an extensive negotiation process. The JOLs contacted seventeen potential funders, with whom they had in excess of thirty-five meetings, numerous telephone calls and exchanged many emails. Twelve funders had expressed an interest, of which eight entered NDAs and four submitted proposals.

(iii). LLF's (which was backed by a large global private investment management firm (the Funder) proposal was the most commercially attractive, because it was significantly less expensive than the other proposals.

(iv). The Funder was recommended to the JOLs by their asset advisors as an investment management firm focused on private equity and credit investment opportunities, with billions of dollars of capital under management, and offices in New York and London. It has a wealth of experience as a funder, having funded disputes since 2002. The JOLs conducted online research into the Funder, held initial discussions with its principals, and discussed its reputation with their US counsel. The JOLs considered that the Funder was a highly regarded, professional and experienced investment manager.

(v). the Liquidation Committee had been kept informed about the status of negotiations with potential funders. At a meeting of 13 June 2018, the Liquidation Committee, by majority, accepted that the offer from the Funder was the most economical and feasible option available and agreed that the JOLs should continue to focus their discussions with this Funder as the preferred funder.

(vi). the terms of the offer from the Funder had been heavily negotiated over many months, in consultation with the Liquidation Committee, to arrive at an agreement that addresses the JOLs' and Liquidation Committee concerns, best serves the interests of the Master Fund, and contains important features (such as those relating to control, termination and communications).

(vii). the Liquidation Committee supported the JOLs' entry into the proposed agreement: three members voted in favour and one member had abstained.

(viii). members of the Liquidation Committee had confirmed their reasons for supporting entry into the Funding Agreement in letters which had been put in evidence by the JOLs. Reference was made to a letter dated 1 October 2018, from New Mountain Finance Corporation (***New Mountain***), in its capacity as a member of the Liquidation Committee in which New Mountain stated that, since the first half of 2018, the JOLs had consulted extensively with the Liquidation Committee in relation to funding, that the consultation process included a review of the process to seek funding proposals, an in-depth review of the merits, and considerations of the proposals. Once it was determined that the Funder was the preferred funder, the JOLs worked on behalf of the Liquidation Committee and the Master Fund to address concerns raised by Liquidation Committee members. New Mountain's view was that it was in the best interests of the Master Fund to enter into the Funding Agreement because (inter alia) the liquidation estate has inadequate resources to fund claims; there was an urgent need to investigate and commence claims in the US before 22 November 2018 to avoid limitation issues; and the Funding Agreement had overall merit compared to the terms, conditions and cost of the other proposals received following the JOLs' broad solicitation of interest. Mr Isaacs also noted that a similar letter had been received from Washington National Insurance Company dated 9 October 2018, one of the other two

members who had voted in favour of the resolution that the JOLs enter into the funding agreement.

(ix). there was an urgent need to secure funding, because some Claims may become subject to limitation defences after 22 November 2018, and therefore require thorough investigation and commencement or a standstill agreement to be reached prior to this date.

28. White Rock did not challenge the JOLs' position on this issue (beyond the challenge based on their own treatment which I have already dealt with). Having considered all the evidence and the circumstances, I accept Mr Isaacs' submissions on this issue.

The Champerty and Maintenance Issue

29. Mr Isaacs submitted that a litigation agreement made between an official liquidator and a funder, who has no interest in the liquidation as a creditor or as a shareholder, will only contravene the principles of maintenance and champerty if the funder is in a position to control or exercise a significant degree of influence over the conduct of the litigation. Where the Court is asked to sanction a litigation funding agreement, its terms will be carefully scrutinised to ensure that it does not confer upon the funder any right to interfere in the conduct of the litigation or put the funder in a position in which it will be able, as a practical matter, to exert undue influence or control over the litigation (*Re ICP Strategic Credit Income Fund*, FSD 82 of 2010 (AJJ), unreported, 4 April 2014, at paras 14, 18).

30. Mr Isaacs referred to and relied on my judgment in *In A Company v A Funder*, FSD 68 of 2017 (NSJ), unreported, 23 November 2017. He submitted that this case established that the crucial issue was whether the funding agreement has the tendency to corrupt public justice, undermine the integrity of the litigation process and give rise to a risk of abuse. Such a question requires the closest attention to the nature and surrounding circumstance of the agreement (paras 42, 44). The following seven features of a funding agreement were likely to have particular significance (para 45):

(a). the extent to which the funder controls the litigation;

(b). the ability of the funder to terminate the agreement at will or without reasonable cause;

(c). the level of communication between the funded party and the solicitor;

(d). the prejudice likely to be suffered by a defendant if the claim fails;

(e). the extent to which the funded party is provided with information about, and is able to make informed decisions concerning, the litigation;

(f). the amount of profit that the funder stands to make; and

(g). whether or not the funder is a professional funder and/or is regulated.

31. Mr Isaacs reviewed the Funding Agreement and the application of above features to it and submitted as follows:

(a). the extent to which the funder controls the litigation. Under clause 9, the JOLs shall be solely responsible for the conduct of any claims or proceedings. LLF will not seek to influence the JOLs in respect of any claims of proceedings.

(b). the ability of the funder to terminate the agreement at will or without reasonable cause. LLF is unable to terminate the Funding Agreement at will or without reasonable cause. The circumstances under which LLF may terminate the agreement are limited to those set out in clause 15, and any termination shall only be effective if agreed by the JOLs or sanctioned by the Court.

(c). the level of communication between the funded party and the solicitor. Clause 9.1 provides that LLF will not seek to influence any professionals engaged by the JOLs. LLF's rights of communication with professionals engaged by the JOLs is limited to the right under clause 9.2 to attend consultations with professionals, and any hearings, mediations, arbitrations and settlement meetings.

(d). the prejudice likely to be suffered by a defendant if the claim fails. The proceedings contemplated by the Funding Agreement are likely to be brought in the US, so adverse costs orders are unlikely to be made. In any event, clause 3.1(a) permits Advances from the Litigation Sub-Facilities to be used to pay fees and costs incurred in the prosecution of Approved Claims, which may include adverse costs or security for costs orders and ATE insurance premiums.

(e). the extent to which the funded party is provided with information about, and is able to make informed decisions concerning, the litigation. The JOLs shall be solely responsible for the conduct of any claims or proceedings. The Funding Agreement contains no restrictions on the information about the litigation which is provided to the JOLs or their ability to make informed decisions concerning the litigation.

(f). the amount of profit that the funder stands to make. The return to LLF is a compound rate of interest of 10% per annum on the loan and the percentage of the Recoveries is as specified in clause 7.3 and described above. The evidence is that this return was the most attractive to the Master Fund as compared to the other proposals received. The Master Fund's interest in Recoveries is and will remain substantial.

(g). whether or not the funder is a professional funder and/or is regulated. The Funder is a highly regarded, professional and experienced investment manager with a wealth of experience as a funder, having funded disputes since 2002.

32. Once again White Rock did not challenge the JOLs' position on this issue. And once again, having considered all the evidence and all the circumstances, I accept Mr Isaacs' submissions on this issue as well.

Mr. Justice Segal
Judge of the Grand Court, Cayman Islands