

IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

OA No 3/2010

IN THE MATTER

of the Declaratory Judgments Act
1994

AND

IN THE MATTER

of the International Partnership Act
1984

AN APPLICATION BY

FAR HORIZONS PARTNERSHIP, a
limited partnership, having its
registered office at Rarotonga, Cook
Islands

Respondent

Hearing date: 1 December 2010

Counsel: Mr Arnold for the Applicant

Judgment: 22 December 2010 (New Zealand Time)

JUDGMENT OF GRICE J

Declaratory Judgment

1. Far Horizons Partnership is a limited partnership registered in the Cook Islands under the International Partnerships Act 1984 ("the Act"). The partnership was formed to acquire, own and operate a motor yacht. It entered into various guarantees and security arrangements with the Bank of New Zealand ("the Bank") to finance the acquisition of the vessel. The Act provides for international and for limited partnerships. Both types of partnership require the involvement of foreign or international companies.
2. Two of the general partners wish to transfer their partnership interests to a third general partner. The question has arisen as to whether the proposed transfer will affect the validity of the bank security and guarantees from the limited partnership. Part III of the Act which deals with limited partnerships is silent on the assignment of partnership interests.
3. The declarations sought in these proceedings relate to the transfer of the general partners' interests in the limited partnership. The application seeks declaratory orders in the following terms:

"1. Given that Part II of the International Partnership Act 1984 ("the Act") contains express provisions addressing transfers of the partnership interests in an international partnership, but Part III of the Act does not contain equivalent provisions addressing transfers of partnership interests in a limited partnership, on the true construction of the Act, and in particular section 52 of the Act, do the provisions of section 52, together with section 3 have effect:

- a. such that the rules of equity and common law apply to the assignment or transfer of a partnership interest in a limited partnership so that in appropriate circumstances, the assignee/transferee is placed in the position previously held by the assignor/transferor, and the status of the limited partnership is unaffected by a change in partners; or

- b. to preclude the transfer of a partnership interest in a limited partnership to an existing partner or third party by reason of the absence of an express provision addressing the transfer of a partnership interest in a limited partnership so that any such “transfer” would require the existing partnership to be dissolved and a new partnership created in its place; or
- c. in some other manner.

2. If the answer to question 1 is in the affirmative to either the first alternative (subparagraph (a)) or the third alternative (subparagraph (c)):

- a. are Ken Wimsett and Donald Stott, as partners of the Far Horizons Partnership (“the Partnership”) (partnership number 16/2008 as registered on 16 December 2008 pursuant to Part III of the Act) free to exit the Partnership in accordance with the Partnership Agreement) and if so,
- b. does the change in composition of the Partnership resulting from the exit of Ken Wimsett and Donald Stott necessitate the dissolution and reconstitution of the partnership under either the provisions of the Act or the applicable principles of common law and equity?

3. If the answer to question 1 is in the affirmative to either the first alternative (subparagraph (a)) or the third alternative (subparagraph (c)), should any of the partners of the Partnership choose to exit the Partnership in accordance with the Partnership Agreement, (or one or more persons agree to become a partner of the Partnership in accordance with the Partnership Agreement) does the change in composition of the partnership resulting from the exit from (or entry to) the Partnership necessitate the dissolution and reconstitution of

the Partnership under either the provisions of the Act or the applicable principles of common law and equity?"

Declaratory Judgment

4. Section 3(1)(b) of the Declaratory Judgments Act 1994 allows an application for a declaratory judgment where any person:

"(b) claims to have acquired any right under any such enactment, deed, will, document of title, agreement, memorandum, articles, or instrument, or to be in any other manner interested in the construction or validity thereof, such person may apply to the High court by originating summons for a declaratory order determining any [enactment] ..., or of any part thereof".

5. Under s 4 any declaration has the same effect as a like declaration in a judgment and so binds the person making the application and all persons on whom the application has been served.

6. The jurisdiction to grant the declaration is discretionary. The Court may, on any grounds which it deems sufficient, refuse to give or make the order.

7. The present issue, relates to the construction of an enactment and in particular the application of the Act as it affects assignment of partners interests. The issue is therefore appropriate for the declaratory procedure.

8. Mr Arnold accepted that the Court in making a declaration is confined to the interpretation of the relevant provisions of the International Partnerships Act. The application of common law or equitable principles to the case at hand is outside the scope of this declaration.

International Partnerships Act 1984

9. The Act provides for international partnerships which may be either international or limited partnerships. The law in force in the Cook Islands and the rules of common law and equity applicable to partnerships apply to international partnerships and

limited partnerships except so far as they are inconsistent with the express provisions of the Act (s 3).

10. Part II of the Act deals with ordinary international partnerships. The Register of partnerships under the Act is kept by the Registrar of Partnerships (s 6). International Partnerships hold certificates of registration which are effective for one year from registration and are renewable annually (s 11). The registered office must be in the Cook Islands (s 13). The rules as to the interest and duties of partners are set out at s.34. These are subject to any agreement between the parties and include the right to share equally in the capital and profits as well as the obligation to contribute equally to the liabilities of the business.

11. In an international partnership a partner may also, subject to the partnership agreement, assign their share in the partnership (s 40). The assignment does not give the assignee the right to interfere in the management or administration of the partnership business, or to accounts or to inspect the partnership books. The assignee is entitled to receive the share of profits of the assignor. Upon distribution the assignee is entitled to the share of the partnership assets and to an account in respect of the assigning partners share (s 40).

12. Part III of the Act relates to limited international partnerships. In that part s 52 provides:

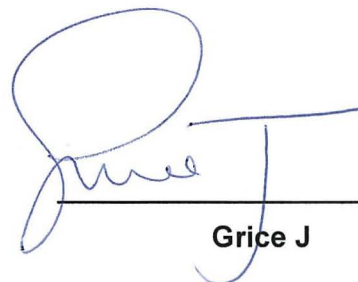
“52. Part II not to affect limited partnerships – Part II of this Act shall not affect limited partnerships except insofar as the general law relating to partners in [sic] declared by the succeeding provisions hereof to be applicable to limited partnerships.”

13. Part II of the Act relating to international partnerships does not apply to limited partnerships unless specifically declared to apply. There is no specific declaration in Part III which applies the assignment provisions of Part II to limited partnerships.

14. Limited partnerships are also registered with the Registrar of Partnerships and the certificates of registration are renewable annually.

15. Details of the partnership including the name (or style of the term under which the partnership is to be conducted), the names and addresses of the partners, the capital contributed by the limited and general partners, the notice of the business, its place/s; of business and its commencement and termination must be certified and provided to the Registrar. (Section 56)
16. The liability of limited partners generally is limited to their contribution to the common stock as capital (s 62). General partners are jointly and severally liable as under the ordinary rules of partnership law. The partners are prohibited from withdrawing the certified sums from the capital of the partnership during the continuation of the limited partnership (s 63).
17. Mr Arnold for the applicant in the application pointed out that a possible construction of Part III is that assignments of limited partnership shares are prohibited because such assignments are not expressly provided for. This is in contrast to the provisions Part II of the Act which expressly provide for assignments of partner's shares in international partnerships.
18. The assignment of limited partnership interests is not expressly prohibited by the Act. Nor does the Act purport to oust the general law relating to partnerships. By virtue of s 3 the law in force in the Cook Islands and the rules of common law and equity apply to limited partnerships except so far as they are inconsistent with the express provisions of the Act. The application of the general law and rules of common law and equity to limited partnerships is not inconsistent with the express provisions of Part III of the Act.
19. The general law in the Cook Islands relating to assignment of a partners share and the resultant effect of an assignment on the partnership and the partners applies to limited partnerships registered under the Act. This is subject always to the provisions of the Act and the Partnership Agreement or other agreement between the partners.

20. The application of the law relating to assignments of partners shares on the partnership is a matter which have been the subject of judicial and academic commentary.¹ The application of that law to the present partnership is not properly the subject of a declaration.
21. Turning to the application itself. Paragraph 1(a) as presently drafted seeks a wider declaration than is appropriate in these proceedings. In particular it seeks clarification of the general partnership law on an assignment of a partners share.
22. I decline to make a declaratory order on the terms sought in paragraph 1(a) but I am prepared to make a declaration in terms of paragraph 1(c) of the application that as a matter of construction s 3 of the International Partnerships Act 1984 applies to Part III of the Act
23. Paragraph 2 and 3 of the application seek further declarations as to the application of the Partnership Agreement to the exit of two named partners and to the exit of partners in general from the Far Horizons Partnership. Given my conclusion as to the interpretation of the Act and that there is no question or controversy relating to the interpretation of the Partnership Agreement, I also decline to make the declaration as sought at paragraphs 2 and 3 of the application. These are matters for the legal advisors.
24. Accordingly I make a declaratory order on the construction of the International Partnership Act 1984 that s 3 of the Act applies to Part III of the Act.



Grice J

¹ See for instance Lindley & Banks on Partnership, 18th Edition at p.71. The editor submits that an assignment does not automatically dissolve the partnership.