

# Kaupthing EHF v Carta Capital GP 1 Ltd

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	J. A. Clyde-Smith O.B.E., Jurats Ramsden, Hughes
<b>Judgment Date:</b>	07 January 2021
<b>Neutral Citation:</b>	[2021] JRC 2
<b>Date:</b>	07 January 2021
<b>Court:</b>	Royal Court

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## Text

[2021] JRC 2

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith O.B.E., Commissioner, and Jurats Ramsden and Hughes

In the Matter of the Representation of Kaupthing EHF as a Limited Partner of Carta Capital  
Mezzanine Fund LLP

And in the Matter of Article 51 of the Trusts (Jersey) Law 1984

Between  
Kaupthing EHF  
Representor  
and  
Carta Capital GP 1 Limited  
First Respondent

and

Mr Stuart Arthur Gardner  
Second Respondent

and

Mr Patrick Joseph Brazzill  
Third Respondent

and

F fasteignafélag ehf  
Fourth Respondent

and

Islandsbanki hf  
Fifth Respondent

and

Birta Lifeyrissjoður  
Sixth Respondent

and

Arion banki hf  
Seventh Respondent

and

Lífsvirk  
Eighth Respondent

and

VIS hf  
Ninth Respondent

and

Islandsbanki hf. and Miðengi hf  
Tenth Respondent

and

Landsbankinn hf  
Eleventh Respondent

and

Clarity Partners  
Twelfth Respondent

and

Audun Gudmundsson/Audun Gudmundsson's trustee in bankruptcy  
Thirteenth Respondent

**Advocate L. A. Woolrich for the Representor.**

### **Authorities**

Trusts (Jersey) Law 1984.

*In the Matter of the H and HJ Trusts* [\[2017\] \(2\) JLR 187](#).

*Public Trustee v Cooper* [\[2001\] WTLR 901](#).

Lewin on Trusts.

*In the matter of the E,L,O and R Trusts* [\[2008\] JLR 360](#).

Trust — reasons for the appointment of a new trustee

### **THE COMMISSIONER:**

- 1 On 10<sup>th</sup> November 2020, the Court removed Carta Capital GP 1 Limited (“Carta”) as liquidating trustee of the limited partnership known as Carta Capital Mezzanine Fund 1 LP (“the Partnership”) and appointed licensed insolvency practitioners as liquidating trustees in its place. We now set out our reasons.

### **Background**

- 2 The Partnership is a limited partnership established under the UK Limited Partnership Act 1907. The Partnership agreement is governed by English law.
- 3 The Partnership was constituted in order to carry on the business of an investor and to make and realise investments in mezzanine facilities in companies based in Europe. Investments were held through a wholly owned company Cartainvest II SA, a Luxembourg company.
- 4 The managing general partner of the Partnership was Carta, which is a Jersey resident and

incorporated company, with its registered office provided by Crestbridge Limited ("Crestbridge"). On 27<sup>th</sup> June 2019, Crestbridge filed a notice on the Jersey Financial Services Commission's companies registry stating that it no longer authorised Carta's use of Crestbridge's premises as its registered offices.

- 5 The directors of Carta are the thirteenth respondent, Mr Audun Gudmundsson and two other individuals namely Mr Johann Magnusson and Mr Abdou Amadou. There are eleven limited partners of the Partnership, namely the fourth to thirteenth respondents. The representor has the most substantial holding in the Partnership of some 46.7%. Mr Gudmundsson is a limited partner, as well as being a director of Carta, holding a 3.51% interest in the Partnership. On 26<sup>th</sup> February 2020, a bankruptcy order was made in respect of Mr Gudmundsson and his interest in the Partnership now vests in his trustee in bankruptcy.
- 6 On 29<sup>th</sup> June 2016, Carta wrote to the limited partners to notify them that, with their written consent, the Partnership would be terminated and a voluntary liquidation of the Partnership commenced with effect from midnight on 28<sup>th</sup> June 2016, in accordance with clause 14 of the Partnership agreement, which provides that:

*"14.5.3 Upon termination or liquidation of the Partnership ... no further business shall be conducted except for such action as shall be necessary for the orderly winding-up of the affairs of the Partnership, the protection and realisation of the Partnership Assets and the distribution of the Partnership Assets among the Partners. The Managing General Partner shall act as liquidating trustee ...*

*14.5.4 Upon termination of the Partnership, the liquidating trustee ... may sell any or all of the Partnership Assets on what it considers to be the best terms available or may at its or their discretion .... distribute all of any of the Partnership Assets in specie in accordance with clause 11... The liquidating trustee ... shall cause the Partnership to pay all debts, obligations and liabilities of the Partnership and all costs of liquidation and shall make adequate provision for any present or future contemplated obligations or contingencies in each case to the extent of the Partnership Assets. The remaining proceeds and assets (if any) shall be distributed amongst the Partners ..."*

- 7 The limited partners provided their written consent to the voluntary liquidation of the Partnership on terms which included that Carta would be appointed as the liquidating trustee. Accordingly, as of that date, Carta became the liquidating trustee and the assets of the Partnership vested in Carta as the liquidating trustee, with Carta being under an obligation to realise the assets, discharge the liabilities and distribute the sale proceeds in any remaining assets to the limited partners.
- 8 The representation is supported by an affidavit, sworn by Ms Thorunn Helga Thordardottir, legal counsel at the representor, who deposes that the limited partners received sparse

updates as to the progress of the liquidation, initially attributed to a delay in finalising the partnership accounts. Carta appeared unwilling to act and progress the liquidation and the representor had grave concerns as to the location of the remaining partnership assets.

- 9 It would seem that Carta instructed English solicitors, Jirehouse, in June 2016 to provide legal services in relation to the Partnership, and particularly to advise and assist with the liquidation and arrange for the distribution of assets. Between October 2016 and March 2019, the representor had various exchanges with Jirehouse and sought updates as to the status of the liquidation, which ended with the representor's e-mail of 20<sup>th</sup> March 2019, to which no response was received.
- 10 Mr Gudmundsson informed the representor that the assets of the Partnership had been held by Crestbridge until May or June 2019, at which time they were transferred to Jirehouse (which statement of Mr Gudmundsson could not be verified by the representor, which had no evidence as to the location of the assets of the Partnership during the relevant periods). In October 2019, the representor became aware that the principal of Jirehouse, Mr Stephen David Jones, had been convicted and imprisoned for offences relating to the misappropriation of client funds, following an investigation into the practice of Jirehouse, which had been undertaken by the Solicitors Regulatory Authority ("the SRA"). The SRA appointed Devonshire Solicitors, LLP ("Devonshires") as the intervening agent for the SRA in respect of Jirehouse, which is no longer permitted to operate. It is understood that all client funds previously held by Jirehouse were transferred to Devonshires.
- 11 An application was made to the High Court of England and Wales to place Jirehouse in voluntary winding-up, which was brought to an end on 14<sup>th</sup> January 2020. Stephen Robert Cork of Cork Gully LLP was appointed as administrator of Jirehouse ("the Administrator") on 16<sup>th</sup> July 2019 to assist with the collection of the remaining assets of Jirehouse for the benefit of its creditors. Jirehouse was subsequently placed in a compulsory liquidation and joint liquidators in respect of Jirehouse ("the Joint Liquidators") were appointed.
- 12 The representor and its legal advisers have made repeated attempts to no avail to obtain information in relation to the liquidation and the location of the Partnership assets from each of Devonshires, the Administrator, the Joint Liquidators, the directors and Crestbridge.
- 13 From the correspondence exhibited to the affidavit of Ms Thordardottir, it would seem clear that:
  - (i) Carta was not willing to progress the liquidation in accordance with the Partnership agreement and the directors were refusing to provide any further information or updates to the limited partners;
  - (ii) Both Crestbridge and Devonshires were or considered themselves to be prevented from disclosing information relating to the Partnership, the liquidation

and/or the assets of the Partnership to the representor, on the basis that such information could only be disclosed to Carta or with Carta's consent; and

(iii) If new trustees were appointed, this would permit Devonshires and other relevant parties to disclose information to the new trustees.

- 14 In addition to the lack of progress regarding the liquidation, and the lack of information provided to the representor and its legal advisers, the representor had grave concerns as to the location of the assets of the Partnership. In relation to this, Mr Gudmundsson has informed the representor that he had knowledge that the lawyers at Jirehouse who had conduct of matters concerning the Partnership had questionable business partners in Russia. Based on the conversations with Mr Gudmundsson, the representor was concerned that Jirehouse may have orchestrated a transfer of the assets of the Partnership to sources in Russia.
- 15 Accordingly, the liquidation and the distribution of the assets of the Partnership was hamstrung by the situation, as the Partnership has been left without a liquidating trustee who was willing to act for the benefit of the Partnership as a liquidation trust or the limited partners as beneficiaries. The representor was concerned that the assets of the Partnership may have been dissipated, and therefore it was important that new trustees are appointed so that urgent steps and investigations are undertaken to seek to recover the assets. The accounts for the period ending 28<sup>th</sup> June 2016, the last accounts produced, indicated that there was a balance for distribution to the limited partners of some €2.6 million.
- 16 The lawyers for Mr Gudmundsson's joint trustees in bankruptcy confirmed that they did not oppose the relief that was being sought and all of the other limited partners had provided letters expressing their support for the appointment of new liquidating trustees.
- 17 Addleshaw Goddard representing two of the directors of Carta, namely Mr Gudmundsson and Mr Magnusson, wrote to Carey Olsen acting for the representor on 6<sup>th</sup> November 2020 denying the allegations made against Carta and explaining the problems the directors had encountered in particular as a result of the failure of Jirehouse. Their understanding was that Carta as the incumbent trustee had to consent to its removal and they said it would be minded to step down voluntarily in favour of a successor if it was able to do so. As a matter of procedure they said the creditors of the Partnership had not been contacted or convened. Being an English law partnership, they expected that the English courts would have jurisdiction over and be the proper forum for any application. They accepted, however, that the Court could at a hearing in due course remove Carta, but they needed a suitable period of time in which to regularise matters and suggested that in the interests of saving costs and court time, the proceedings be stayed or withdrawn.
- 18 Carey Olsen responded on 9<sup>th</sup> November 2020 rejecting the proposal that the proceedings be stayed or withdrawn, pointing out that it was over 4 years since the commencement of the liquidation and that their clients had had ample opportunity to take

action to preserve and advance the interests of the limited partners over that time but had failed to do so. The concerns of the limited partners had been compounded by the lack of information provided to them by Carta and in particular, by Mr Gudmundsson. They pointed out that it was not correct that the removal of Carta required its consent as incumbent trustee or that the application had to be brought before the English courts. As to the convening of creditors, the lack of information received regarding the liquidation meant that the representor did not hold details of their identity but that was a consequence of Carta's own making. In any event, it was not standard procedure for creditors to be convened to an application of this kind. Furthermore, the interests of any creditors and the limited partners were aligned, and it was in both their interests for new liquidating trustees to be appointed.

- 19 Addleshaw Goddard LLP responded on 9<sup>th</sup> November 2020 expressing disappointment at the actions being taken by the representor and saying it would be inappropriate for the representor to seek the summary removal of Carta on the basis of the extensive allegations of breach of duty, including positive misconduct, which were denied and in circumstances where Carta was unable to take a position and defend itself against such allegations. It was their intention that Carta should step down voluntarily in favour of a successor liquidating trustee without admission if it had the capacity to do so.

### Jurisdiction of the Court

- 20 The Partnership and the liquidating trust created under it is governed by English law and it is therefore a “**foreign trust**” for the purposes of the Trusts (Jersey) Law 1984 (“the Trusts Law”). However, under Article 5, the Court has jurisdiction where a trustee of a foreign trust is resident in Jersey and the Court therefore had jurisdiction on that basis. Furthermore and in addition, Clause 19.11 of the Partnership agreement provided that the courts of both England and Jersey would have jurisdiction over any disputes:

#### *“19.11 Governing Law*

*This Agreement and the rights, obligations and relationships of the parties hereto under this Agreement and in respect of the Information Memorandum shall be governed by and construed in accordance with the laws of England and all the parties irrevocably agree that only the courts of England and Jersey are to have jurisdiction to settle any disputes which may arise out of or in connection with this Agreement or the information Memorandum or the acquisition of Commitments, whether or not governed by the laws of England or Jersey, and that accordingly any suit, action or proceedings arising out of or in connection with this Agreement or the information Memorandum or the acquisition of commitments shall be brought in such courts. The parties hereby waive, to the extent not prohibited by applicable law, and agree not to assert by way of motion, as a defence or otherwise, in any such proceeding, any claim that it is not subject personally to the jurisdiction of such courts, that any such proceeding brought in such courts is improper or that this agreement or the Information Memorandum, or the subject matter hereof or thereof, may not be*



enforced in or by such courts.” (our emphasis)

- 21 Accordingly, the Court was satisfied that this application for the removal of Carta and the appointment of new liquidating trustees was properly brought in this jurisdiction.
- 22 The representor sought orders from the Court pursuant to Article 51(2)(a) of the Trusts Law, which provides that:

**“(2) The court may, if it thinks fit –**

**(a) make an order concerning –**

**(i) the execution or the administration of any trust .**

**(ii) The trustee of any trust including an order relating to the exercise of any power, discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee, the submission of accounts, the conduct of the trustee and payments, whether payments into court or otherwise,”**

- 23 Further, Article 51(4) of the Trusts Law provides that:

**“Where the court makes an order for the appointment of a trustee it may impose such conditions as it thinks fit, including conditions as to the vesting of trust property.”**

- 24 In *In the Matter of the H and HJ Trusts* [\[2017\] \(2\) JLR 187](#), the Court rejected the submission that its powers under Article 51 of the Trusts Law were limited such that it could not be construed as giving the Court jurisdiction over foreign trusts for the purposes of *Public Trustee v Cooper* [\[2001\] WTLR 901](#) applications and stated that:

**“The court is given jurisdiction over Jersey resident trustees of a foreign trust under art. 5 of the Trusts Law.** It is a jurisdiction that is given over the Jersey resident specifically in its capacity as trustee of that foreign trust. It would be self-defeating if the Trusts Law were on the one hand to give the court jurisdiction over a Jersey resident trustee in that capacity and on the other hand to then curtail the court's ability to do anything to enforce that foreign trust by limiting the court's powers under art. 51 to Jersey trusts. There is every good reason for the court, having been given jurisdiction over a Jersey resident in that capacity, to have all of the powers available under art. 51 to enforce that foreign trust. We rejected the suggestion, therefore, that the court's powers under art. 51 were limited in this way.”

- 25 Accordingly, the Court had jurisdiction over Carta and the power to remove it as liquidating



trustee and appoint new liquidating trustees in its place.

- 26 The approach of the courts in both England and Jersey as to the principles to be applied when exercising jurisdiction to remove and appoint trustees is set out in paragraphs 24–076 and 24–077 of Lewin on Trusts as follows:

***“The general principle guiding the court in the exercise of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour.*** In cases of positive misconduct the court will, without hesitation, remove the trustee who has abused his trust; but it is not every mistake or neglect of duty or inaccuracy of conduct on the part of a trustee that will induce the court to adopt such a course. Subject to the above general guiding principle, the act or omission must be such as to endanger the trust property or to show a want of honesty or a want of proper capacity to execute the duties, or a want of reasonable fidelity .

***The views of the beneficiaries may be relevant to an exercise of the court's inherent jurisdiction, though it rarely suffices to say that a beneficiary has fallen out with a trustee.*** Friction or hostility between trustees and beneficiaries, or between a trustee and his co-trustees, is not of itself a reason for the removal of a trustee. But where hostility is grounded on the mode in which the trust has been administered, where it is caused wholly or partially by overcharges against the trust estate, or where it is likely to obstruct or hinder the due performance of the trustee's duties, the court may come to the ***conclusion that it is necessary, for the welfare of the beneficiaries, that a trustee should be removed.*** In assessing the significance of friction or hostility between original trustees or executors and a beneficiary, it is relevant to have regard to the fact that they were chosen by the settlor or testator and evidence as to his reasons for that choice.”

- 27 For all extents and purposes, this is identical to the approach of this Court under Jersey law – see *In the matter of the E,L,O and R Trusts* [2008] JLR 360 at paragraphs 27 and 28.

## Decision

- 28 Both Carta and Mr Gudmundsson had been convened and had failed to appear and in the view of the Court and notwithstanding the correspondence from Addleshaw Goddard, this was a clear case in which it should exercise its powers to remove Carta as liquidating trustee. The evidence presented before the Court speaks for itself in that the last accounts produced by Carta were for the period ending 28<sup>th</sup> June 2016 over 4 years ago. Since then, little information had been provided by Carta as to its conduct of the liquidation and there was growing and understandable concern as to the whereabouts of the Partnership assets.

29 It was manifest that the liquidating trust was not being administered competently in the interests of the limited partners as beneficiaries. That sufficed for the Court to exercise its powers and it was not necessary when doing so for the Court to make findings of positive misconduct on the part of Carta or to conduct a lengthy trial of disputed allegations. It was necessary for the welfare of the beneficiaries of the liquidating trust and its competent administration that new trustees be appointed. The Court therefore removed Carta as liquidating trustee and appointed Stuart Arthur Gardner of Ernst & Young LLP and Patrick Joseph Brazzill of Ernst & Young LLP as trustees in its place.