

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW
YORK**

In re:

PLATINUM-BEECHWOOD LITIGATION.

Civil Action No. 18-cv-6658 (JSR)

MARTIN TROTT and CHRISTOPHER SMITH, as
Joint Official Liquidators and Foreign
Representatives of PLATINUM PARTNERS
VALUE ARBITRAGE FUND L.P. (in
Official Liquidation) and PLATINUM
PARTNERS VALUE ARBITRAGE FUND
L.P. (in Official Liquidation),

Plaintiffs,

against -

PLATINUM MANAGEMENT (NY) LLC, *et al.*,

Defendants.

Civil Action No. 18-cv-10936 (JSR)

DECLARATION OF MARC KISH REGARDING CAYMAN LAW

MARC KISH, of Ogier, 89 Nexus Way, Camana Bay, Grand Cayman KY1-9009, Cayman Islands, deposes and says:

1. I am a partner of the law firm of Ogier, and am an attorney licensed to practise in the Cayman Islands. I am based in the Cayman Islands office and head of the firm's Restructuring and Insolvency Group in the Caribbean and Asia. I specialise in contentious and non-contentious restructuring and insolvency proceedings, commercial litigation, and fraud and asset-tracing claims. My practice includes acting for companies, office holders,

and investors in Cayman Islands structures, as well as providing advice and representation to investors in and managers of exempted limited partnerships in the Cayman Islands.

2. I have been engaged by Holland & Knight, on behalf of Martin Trott and Chris Smith of R&H Restructuring in their capacity as Joint Official Liquidators of Platinum Partner Value Arbitrage Fund LP (in Official Liquidation) (the "**Fund**"), to provide the Court with a brief overview of Cayman Islands law as it relates to voidable preferences and dispositions at an undervalue.

PROFESSIONAL BACKGROUND

3. I earned an Honours Bachelor of Arts degree in Modern Languages from Oxford University in the United Kingdom in 1997 and completed the Legal Practice Course at the College of Law in London in 2000 and was called to the Bar of England and Wales in 2003. I also received a Master of Arts degree from Oxford University in 2005.
4. I was admitted as an attorney in the Cayman Islands in 2008 and have practised continuously in the Cayman Islands since that time. Through my law practice and education, I am familiar with and knowledgeable about Cayman Islands law and legal procedures.

Voidable preferences

5. Section 145 of the Cayman Islands Companies Law is in the following terms:

"145. (1) Every conveyance or transfer of property, or charge thereon, and every payment obligation and judicial proceeding, made, incurred, taken or suffered by any company in favour of any creditor at a time when the company is unable to pay its debts within the meaning of section 93 with a view to giving such creditor a preference over the other creditors shall be invalid if made, incurred, taken or suffered within six months immediately preceding the commencement of a liquidation.

(2) A payment made as aforesaid to a related party of the company shall be deemed to have been made with a view to giving such creditor a preference.

(3) For the purposes of this section a creditor shall be treated as a "related party" if it has the ability to control the company or exercise significant influence over the company in making financial and operating decisions. "

6. In *Re Weaving Macro Fixed Income Fund Limited (in liquidation)* [2016 (2) CILR 514] the Cayman Islands Court of Appeal held that section 145 of the Companies Law does not contain any requirement of dishonesty, only an intention on the part of the company to prefer one creditor over another.¹
7. In *RMF Market Neutral Strategies (Master) Limited v DD Growth Premium 2X Fund* [2014 (2) CILR 316], Smellie CJ confirmed that the dominant motive of the particular payment needs to be to prefer a creditor. He distinguished this from other dominant motives such as responding to commercial pressure applied by the creditor in question.²

Dispositions at undervalue

8. Section 146 of the Companies Law is in the following terms:

"146. (1) In this section and section 147 -

(a) "disposition" has the meaning ascribed in Part VI of the Trusts Law (2018 Revision);

(b) "intent to defraud" means an intention to wilfully defeat an obligation owed to a creditor;

¹ 2016 (2) CILR 514 at [52]

² [2014 (2) CILR 316 at [8]-[9].

(c) "obligation" means an obligation or liability (which includes a contingent liability) which existed on or prior to the date of the relevant disposition;

(d) "transferee" means the person to whom a relevant disposition is made and shall include any successor in title; and

(e) "undervalue" in relation to a disposition of a company's property means-

(i) the provision of no consideration for the disposition; or

(ii) a consideration for the disposition the value of which in money or monies worth is significantly less than the value of the property which is the subject of the disposition.

(2) Every disposition of property made at an undervalue by or on behalf of a company with intent to defraud its creditors shall be voidable at the instance of its official liquidator.

(3) The burden of establishing an intent to defraud for the purposes of this section shall be upon the official liquidator.

(4) No action or proceedings shall be commenced by an official liquidator under this section more than six years after the date of the relevant disposition.

(5) In the event that any disposition is set aside under this section, then if the Court is satisfied that the transferee has not acted in bad faith-

(a) the transferee shall have a first and paramount charge over the property, the subject of the disposition, of an amount equal to the entire costs properly incurred by the transferee in the defence of the action or proceedings; and

(b) the relevant disposition shall be set aside subject to the proper fees, costs, pre-existing rights, claims and interests of the transferee (and of any predecessor transferee who has not acted in bad faith)."

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: March 6th, 2020



MARC KISH