

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Apple Tree Life Sciences, Inc., <i>et al.</i> , ¹	Case No. 25-12177 (LSS)
Debtors.	(Jointly Administered)
	Re: Docket Nos. 131, 132, 224, 225, 226 & 227

DEBTORS’ OMNIBUS REPLY TO (A) LIMITED OBJECTION OF RIGMORA BIOTECH INVESTOR ONE LP AND RIGMORA BIOTECH INVESTOR TWO LP TO DEBTORS’ APPLICATION FOR AN ORDER AUTHORIZING THE RETENTION AND EMPLOYMENT OF QUINN EMANUEL URQUHART & SULLIVAN, LLP AS CO-COUNSEL FOR THE DEBTORS EFFECTIVE AS OF THE PETITION DATE, AND (B) LIMITED OBJECTION OF RIGMORA BIOTECH INVESTOR ONE LP AND RIGMORA BIOTECH INVESTOR TWO LP TO DEBTORS’ MOTION FOR ENTRY OF AN ORDER (I) APPROVING THE RETENTION AND EMPLOYMENT OF B. RILEY RESTRUCTURING SERVICES, LLC TO PROVIDE THE DEBTORS WITH A CHIEF RESTRUCTURING OFFICER AND ADDITIONAL STAFF EFFECTIVE AS OF THE PETITION DATE; (II) DESIGNATING PERRY M. MANDARINO AS THE CHIEF RESTRUCTURING OFFICER TO THE DEBTORS; AND (III) GRANTING RELATED RELIEF

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) submit this reply (“Reply”) to the *Limited Objection of Rigmora Biotech Investor One LP and Rigmora Biotech Investor Two LP to Debtors’ Application for an Order Authorizing the Retention and Employment of Quinn Emanuel Urquhart & Sullivan, LLP as Co-Counsel for the Debtors Effective as of the Petition Date* [Docket Nos. 224 and 226] (the “Counsel Objection”), and the *Limited Objection of Rigmora Biotech Investor One LP and Rigmora Biotech Investor Two LP to Debtors’ Motion for Entry of an Order (I) Approving the Retention and Employment of B. Riley*

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number include: Apple Tree Life Sciences, Inc. (4506); ATP Life Science Ventures, L.P. (8224); ATP III GP, Ltd. (6091); Apertor Pharmaceuticals, Inc. (3161); Initial Therapeutics, Inc. (2453); Marlinspike Therapeutics, Inc. (4757); Red Queen Therapeutics, Inc. (8563); Evercrisp Biosciences, Inc. (4437); Nine Square Therapeutics, Inc. (4503); and Nereid Therapeutics Incorporated (8493). The location of the Debtors’ service address in these chapter 11 cases is 230 Park Avenue, Suite 2800, New York, NY 10169.



Restructuring Services, LLC to Provide the Debtors with a Chief Restructuring Officer and Additional Staff Effective as of the Petition Date; (II) Designating Perry M. Mandarino as the Chief Restructuring Officer to the Debtors; and (III) Granting Related Relief [Docket Nos. 225 and 227] (the “CRO Objection,” and with the Counsel Objection, the “Objections”),² each filed by Rigmore Biotech Investor One LP and Rigmore Biotech Investor Two LP (collectively, “Rigmore”). In support of this Reply, the Debtors respectfully state as follows:

PRELIMINARY STATEMENT³

1. Rigmore is desperate. Desperate because its continued efforts to liquidate the Partnership Debtor and defund the Portfolio Companies continue to fall flat. Contrary to Rigmore’s efforts, the Delaware Chancery Court found that **Rigmore** breached the LPA by refusing to honor the May 30 Capital Calls and required it to pay approximately \$97 million to the GP Debtor. Rigmore also opposes virtually all of the Debtors’ chapter 11 relief—every motion,

² Richards, Layton & Finger, P.A., which acts in these Chapter 11 Cases as Rigmore’s Delaware co-counsel, did not sign the CRO Objection, which is only signed by Debevoise & Plimpton LLP. The reasons for this apparent dissociation between Rigmore’s law firms are unclear. Also, it is unclear whether the CRO Objection filing complies with applicable Local Rules given that Debevoise & Plimpton LLP has no offices in Delaware.

³ All terms not defined herein have the meanings ascribed to them in (i) the *Debtors’ Application for an Order Authorizing the Retention and Employment of Quinn Emanuel Urquhart & Sullivan, LLP as Co-Counsel for the Debtors Effective as of the Petition Date* [Docket No. 132] (the “Counsel Motion”); (ii) the *Debtors’ Motion for Entry of an Order (I) Approving the Retention and Employment of B. Riley Restructuring Services, LLC to Provide the Debtors with a Chief Restructuring Officer and Additional Staff Effective as of the Petition Date; (II) Designating Perry M. Mandarino as the Chief Restructuring Officer to the Debtors; and (III) Granting Related Relief* [Docket No. 131] (the “CRO Motion”); (iii) the *Declaration of Seth Harrison in Support of Chapter 11 Petitions and First Day Motions* [Docket No. 18] (the “Harrison Declaration”); (iv) the *Declaration of Perry M. Mandarino, Chief Restructuring Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Motions* (the “Mandarino Declaration”) [Docket No. 25]; (v) the *Supplemental Declaration of Perry M. Mandarino, Chief Restructuring Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Motions* [Docket No. 63]; (vi) the *Second Supplemental Declaration of Perry M. Mandarino, Chief Restructuring Officer of the Debtors, in Support of Chapter 11 Petitions and First Day Motions* [Docket No. 163] (the “Mandarino Second Supplemental Declaration”); (vii) the *Declaration of Perry M. Mandarino in Support of Debtors’ Motion for Entry of Interim and Final Orders to (I) Make and Accept Secured Loans to Portfolio Companies, (II) Authorize to the Extent Outside the Ordinary Course of Business Payment of Management Company Expenses and (III) Grant Related Relief* [Docket No. 90] (the “Mandarino First Funding Declaration”); and (viii) *Declaration of Perry M. Mandarino, Chief Restructuring Officer of the Debtors in Support of Debtors’ Motion for Entry of Order (I) Authorizing Use of Funds to (A) Fund Portfolio Companies, (B) Pay Management Company Expenses and (C) Pay Chapter 11 Expenses, and (II) Granting Related Relief* (the “Mandarino Second Funding Declaration”) [Docket No. 229].

every issue. And, relatedly, Rigmora engages in scorched-earth discovery that has the sole effect of driving up the costs of these Chapter 11 Cases to the detriment of the estates. But the Debtors' chapter 11 filings (i) forced Rigmora to fund, reluctantly, the \$97 million and have this Court oversee those assets; and (ii) meant that the Portfolio Companies that Rigmora starved for months finally received the necessary funding to continue their operations albeit on a minimal basis. Despite Rigmora's never-ending refrain, the Debtors continue to act in the best interests of the Partnership Debtor, which benefits Rigmora by preserving the value of the Portfolio Companies that the Partnership Debtor owns.

2. The Objections further prove that Rigmora's desire to reverse the Chancery Judgment prevails over any rational economic calculus. According to Rigmora, Quinn Emanuel and B. Riley—which act for the Debtors in maximizing the value of these estates—should be disqualified because their legal and financial services contradict Rigmora's goal to reverse the Chancery Judgment and recoup the \$97 million that the Chancery Judgment ordered Rigmora to pay. But Rigmora erroneously conflates its hyper-partisan desires with the Debtors' best interests. Rigmora's upside-down logic, bereft of any evidence or witnesses, entails that Quinn Emanuel and B. Riley should be disqualified because their efforts to maximize the value of the Debtors' estates for the benefit of all stakeholders stand in the way of Rigmora's goal to reverse the Chancery Judgment at all costs. Rigmora's Objections conjure up supposed conflicts of interest that the Chancery Judgment already rejected, rest on twisted factual allegations, and rely on rank speculation. This Court should therefore overrule these Objections.

BACKGROUND⁴

A. Debtors' Business and Its Long History of Success

3. The Debtors comprise a biotechnology venture capital enterprise operating in the United States. Harrison Decl. ¶¶ 6, 37. The Corporate Debtors' operations and business are integrated as follows: (i) the Partnership Debtor acts as the primary investment vehicle in the fifteen Portfolio Companies; (ii) the GP Debtor manages the Partnership Debtor's investments and operations, in relation to which the GP Debtor maintains exclusive management and control; and (iii) ATLS handles operational expenses including facility costs, leases, and employee compensation. Harrison Decl. ¶¶ 6, 37; Jan 20, 2026 Tr. (Harrison) at 17:16-17, 17:25-18:1, 18:9-11, 18:17-23, 19:22-20:4.

4. At its core, the Debtors' business consists of: (i) the Corporate Debtors making capital calls to Limited Partners to provide funding to the Portfolio Companies; and (ii) the Portfolio Companies using those funds to advance Research Programs (as defined below) for development of new treatments for life-threatening conditions including cancer, blindness, opioid addiction, and obesity, among others.⁵ Harrison Decl. ¶¶ 6, 26; Jan. 20, 2026 Hearing Tr. (Harrison) at 42:20-43:6; Jan. 20, 2026 Hearing Tr. (Mandarino) at 103:12-20; 104:2-13.

⁴ The purpose of this background section is to provide proper contextualization for the circumstances of these Chapter 11 Cases; circumstances that Rigmora distorted in its Objections.

⁵ Of the fifteen Portfolio Companies, (i) nine are in the preclinical stage (Debtors Apertor, Evercrisp, Initial, Marlinspike, Nereid, Nine Square, and Red Queen, and nondebtors Aethon, and Deep Apple); (ii) four are in the clinical stage (nondebtors Aulos, Ascidian, Marengo, and Replicate); and (iii) two are in the commercial stage (nondebtors Braeburn and Galvanize). Harrison Decl. ¶¶ 6, 28; Jan. 20, 2026 Hearing Tr. 23:24-24:5, 24:12-22. Dr. Seth Harrison ("Dr. Harrison") and/or at least one of the Partnership Debtor's venture partners co-lead the Portfolio Companies. Harrison Decl. ¶ 26.

As of the Petition Date, the Partnership Debtor owed hundreds of millions in unfunded commitments to various Portfolio Companies in connection with Series A stock purchase agreements (the "Series A") through which the Partnership Debtor made its investments in the relevant Portfolio Companies. Harrison Decl. ¶ 47; Mandarin Second Funding Decl. ¶ 11.

5. Under the leadership of Dr. Harrison, the GP Debtor’s managing director and Chief Executive Officer (“CEO”), the Partnership Debtor has been extraordinarily successful. Harrison Decl. ¶ 4; Jan. 20, 2026 Hearing Tr. (Mandarino) at 134:4-18. Indeed, as of early 2025 and prior to Rigmora’s breaching the LPA (*see infra*), the Partnership Debtor reached a total value of approximately \$6.5 billion (more than triple the \$2.1 billion invested in the Portfolio Companies) and distributed over \$2 billion to its limited partners. Harrison Decl. ¶ 4; Jan. 20, 2026 Hearing Tr. (Mandarino) at 133:7-17.

B. Rigmora Breaches the LPA

6. As a result of Rigmora’s liquidity crisis, on May 15, 2025, Yuri Bogdanov, the Co-CEO of Rigmora Holdings, sent an email to the Debtors (the “May 15 Email”) that (i) declared that the Partnership Debtor should “cease funding” the seven Portfolio Companies despite Rigmora having already approved budgets for them; and (ii) conditioned any further funding discussions on the GP Debtor’s agreement to “wind down or liquidate” all of the early-stage companies. Harrison Decl. ¶ 62.⁶ As the Delaware Chancery Court found, Rigmora’s May 15 Email “left [the GP Debtor] with very few options,” so that “[the GP Debtor] decided to lean on its contractual rights” under the LPA. *Id.*, Ex. B at 35.

7. On May 30, 2025, the GP Debtor issued the May 30 Capital Calls. *Id.* ¶ 63. These calls were made strictly within previously approved budgets and Rigmora’s remaining capital commitments under the LPA. As stated in the Chancery Judgment (defined below), “there is no factual basis to question [the GP Debtor]’s good faith” in making the May 30 Capital Calls. *Id.*, Ex. B at 59.

⁶ As revealed in the Delaware Chancery Court trial, Rigmora’s requests in the May 15 Email had nothing to do with the performance of the Partnership Debtor or the Portfolio Companies but emanated from Rigmora’s own ongoing liquidity crisis. Harrison Decl. ¶ 53.

8. Rigmora did not voluntarily pay any of the May 30 Capital Calls, and did not honor any portion of them until after the Chancery Judgment was issued and the Debtors' Chapter 11 Cases were commenced. Rigmora's refusal to honor the capital calls had catastrophic implications, resulting in employee terminations across the Portfolio Companies and the severe disruption of years of research and clinical developments. *Id.* ¶ 64. Rigmora's self-serving refusal to honor its capital commitments caused the Debtor GP to "enter[] survival mode at great expense to the [Portfolio Companies]," entailing the risk that creditors would not hold off for much longer and the Partnership Debtor would "likely ... lose the assets" entirely. *Id.*, Ex. B at 43.

C. The GP Debtor Files Suit in the Delaware Chancery Court, Unleashing Rigmora's Retaliation

9. On May 30, 2025, the GP Debtor filed suit in the Delaware Chancery Court seeking specific performance of Rigmora's capital contribution obligations under the LPA. Harrison Decl. ¶ 66; *id.*, Ex. B at 36-37. The GP Debtor moved to expedite on grounds that the Portfolio Companies faced imminent collapse without funding. *Id.* at 37.

10. Rigmora reacted by immediately deploying retaliatory and obstructive tactics. Harrison Decl. ¶¶ 12, 14, 67-68.⁷ On June 2, 2025, Rigmora filed a Writ of Summons against the GP Debtor in the Grand Court of the Cayman Islands; four days later, Rigmora filed a Winding Up Petition against the GP Debtor in the same court, alleging "mismanagement and lack of probity." *Id.*, Ex. B at 37-38. When viewed in context, these allegations were mere pretext because "Rigmora sought to accomplish through the Cayman court what Bogdanov had unilaterally demanded in the May 15 Email—a liquidation." *Id.* at 38. Rigmora still seeks a liquidation today.

⁷ Rigmora's retaliatory litigation is summarized in the table at paragraph 20 of the *Debtors' Motion for an Order (I) Enforcing the Automatic Stay and (II) Imposing Sanctions Against Rigmora* [Docket No. 110].

11. Rigmora’s campaign of retribution continued. On June 12, 2025, Rigmora filed an *ex parte* on notice summons in the Cayman proceedings and on June 20, 2025 appeared *ex parte* before the Cayman Court and obtained an injunction barring the Partnership Debtor from (i) taking steps to declare Rigmora a Defaulting Limited Partner under the LPA, or (ii) calling additional capital.⁸ *Id.* ¶ 69.

12. On December 5, 2025, after a two-day trial, the Delaware Chancery Court found that Rigmora had breached its obligations under the LPA and issued a final judgment ordering Rigmora to transfer \$96,960,925.88 to the Partnership Debtor (the “Chancery Judgment”). *See id.* at ¶ 11; *id.*, Ex. B at 66. The Delaware Chancery Court expressly found that Dr. Seth Harrison’s “testimony was highly credible,” *id.* at 60, that none of Rigmora’s grievances in relation to the May 30 Capital Calls “support[ed] a finding that [the GP Debtor] acted in bad faith,” *id.* at 61, and that the GP Debtor proved by clear and convincing evidence that it was entitled to the *equitable* remedy of specific performance. *Id.* at 66. Other key findings include:

- “The Fund would enter into Series A stock purchase agreements with the relevant portfolio companies. ... [M]ost of the Fund’s portfolio companies rely on funding from the Fund exclusively.” *Id.* at 9.
- “Bogdanov gave [the GP Debtor] an ultimatum: liquidate the preclinical companies with already approved budgets to obtain funding for companies during clinical trials. Rigmora stated that it would not even ‘consider’ the budgets for clinical-stage companies until ATP agreed to release Rigmora from its obligations to meet

⁸ In its Objection, Rigmora misleadingly asserts that “[t]he GP’s default claim as originally formulated ... caus[ed] the Cayman Court to enter [the] injunction.” Counsel Obj. ¶ 11 n.10. The injunction, by its nature, was interlocutory and thus involved no finding by the Cayman Court as to whether the “default claim” was “contrary to the terms of the LPA and Cayman law.” Also, the only party to have been found in breach of the LPA is Rigmora, and terms of the LPA specifically preclude Rigmora from claiming a breach of fiduciary duty because the GP Debtor has the obligation to seek a “favorable result.” *See* LPA § 18(g)(iv) (“In determining what action, if any, shall be taken against a Limited Partner in connection with such Limited Partner’s breach of this Agreement, the General Partner shall seek to obtain a favorable result (as determined by the General Partner in its sole discretion) for the Partnership and the other Partners ... To the fullest extent permitted by law, each Limited Partner hereby specifically agrees that, in the event such Limited Partner violates the terms of this Agreement, such Limited Partner shall not be entitled to claim that the Partnership or any of the other Partners are precluded, on the basis of any fiduciary or other duty arising in respect of such Limited Partner’s status as such, from seeking any of the remedies permitted under this Agreement or applicable law.”).

capital calls for already-approved budgets and abandon existing investments through liquidation or wind down.” *Id.* at 34.

- “The funding freeze ... placed several of the portfolio companies at risk of insolvency.” *Id.* at 1.
- “The sudden discontinuation of funding can lead creditors to trigger bankruptcy proceedings and force a sale of the companies for ‘a fraction of their actual value.’” *Id.* at 43.
- “[The GP Debtor] recognized the portfolio companies’ urgent need for funding and knew that Rigmora would immediately file suit in the Cayman Islands as soon as [the GP Debtor] issued capital calls.” *Id.* at 61.
- “ATP has proven by clear and convincing evidence that Rigmora must meet Capital Calls within approved portfolio company budgets.” *Id.* at 66.
- “On balance, the equities favor ATP. Rigmora has the funds available to meet the Capital Calls. Moreover, the portfolio companies are developing treatments for serious medical conditions, including childhood blindness, various cancers, obesity, and neurodegenerative diseases. The public interest strongly favors preserving potentially life-saving research programs.” *Id.* at 67.

The Delaware Chancery Court deferred to the Cayman Court on Rigmora’s contention that the GP Debtor breached its fiduciary duties by filing the May 30, 2025 lawsuit. *Id.* at 78-79. Nevertheless, the Delaware Chancery Court pointed out that “[t]he **factual findings in [the Chancery Judgment] speak for themselves.**” *Id.* at 79 (emphasis added).⁹

⁹ Rigmora’s Objection (¶ 12 n.11) overlooks that, while the Delaware Chancery Court did not rule on the alleged fiduciary duty breach, the Delaware Chancery Court made it clear that, in its view, the facts of the case do not support the existence of such a breach.

As further discussed below (Section E), in the hypothetical scenario that the Two-Day Trial (as defined below) would take place (being the trial that Rigmora wants to pursue through their Motion for Relief from the Automatic Stay), the only “live” issue before the Cayman Court would be whether the Debtor Partnership should be brought to an end or not. Before the Cayman Court, there is no “live” issue or “active litigation” regarding “whether the GP (aided by Quinn Emanuel) has sought to adopt an illegitimate strategy to default the LPs” or whether “the GP has mismanaged the Fund, repeatedly breached its fiduciary duties to the LPs, and failed to exercise its fiduciary powers for a proper purpose.” *See* Counsel Obj. ¶¶ 12, 19, 21; CRO Obj. ¶¶ 2, 10. At this juncture, these are, at the best, hypothetical, dormant issues to be addressed by the Cayman Court. Also, in light of the Delaware Chancery Court’s findings and considerations, these and related allegations by Rigmora sound detached from reality and defeat credibility.

D. The Cayman Winding Up Proceeding

13. The Cayman winding-up proceeding seeks to wind up the Partnership Debtor and appoint Cayman Island-based liquidators, who would liquidate the Partnership Debtor’s assets—the Portfolio Company equity stakes—piecemeal.¹⁰ Harrison Decl. ¶ 12.

14. Trial in the Cayman winding-up proceeding was scheduled for January 12, 2026 (the “Cayman Trial”), approximately five weeks after the Delaware Chancery Court’s decision and more than one month after the Corporate Debtors and four Portfolio Companies filed for chapter 11 relief.¹¹ Harrison Decl. ¶¶ 12-13. The Cayman Trial did not drive the Debtors’ decision of when to file bankruptcy. Instead, the Debtors needed to ensure that the specific performance ordered by the Delaware Chancery Court could be enforced before Rigmora displaced the GP Debtor in the Cayman Islands with the resulting loss of funding needed to preserve the Portfolio Companies’ value to the Partnership Debtors.¹² Rigmora needed liquidity at all costs, but the Debtors have a fiduciary duty to preserve value for all stakeholders.

¹⁰ Under Cayman law, the liquidators’ mandate is to convert assets to cash and distribute proceeds to partners. And, since they are based in the Cayman Islands, the liquidators would need to take steps to interact with 15 separate United States-based companies (largely the same companies that were deprived of funding by Rigmora) to attempt to market the Partnership Debtor’s interests. That is a recipe for a massive loss in value.

¹¹ The commencement of Debtors’ Chapter 11 Cases had the effect of limiting the issues Rigmora currently seeks to put before the Cayman Court. Indeed, the only actual issue is whether the Debtor Partnership should be wound up (*see* footnotes 9 and 12 for additional details). In the hypothetical event that this Court were to grant Rigmora’s Stay Relief Motion (as defined below), this limited issue would be tried at the two-day trial (the “Two-Day Trial”) that Rigmora seeks to pursue through that motion.

¹² In a hypothetical Cayman Two-Day Trial, the winding up of the Partnership Debtor would be the only “live” issue before the Cayman Court. Contrary to Rigmora’s misleading assertions, the Cayman Court would address *no issues* regarding “fund governance,” “whether the GP is entitled under Cayman law to continue acting for the Fund and its limited partners” (unless for the sole and hypothetical scenario where the Cayman Court would be called to rule on whether the GP Debtor, by filing for chapter 11, automatically triggered a voluntary liquidation based on section 10(b) of the LPA, which is an invalidated ipso facto provision under the Bankruptcy Code), or whether “it was appropriate for the GP to transfer \$20 million to Quinn Emanuel,” to enable the GP Debtor to successfully enforce the Partnership Debtor’s contractual rights against Rigmora in Delaware. *See* Counsel Obj. ¶¶ 3, 7-8, 12. The Two Day Trial would focus on whether the Partnership Debtor should be ended, and not on control of the Partnership Debtor. Also, if Rigmora’s vague reference to a “fund governance” issue relates to (unfounded) allegations of mismanagement committed by the GP Debtor, that contention fails because Rigmora’s own counsel stated to the Cayman Court that the Two-Day Trial would not require any investigations into the GP Debtor. *See Exhibit 1*, December 17, 2025 Hearing Tr. (Rigmora’s Counsel) at 6:2-12 (“[A] determination from

E. The Chapter 11 Cases

i. Debtors' Reasons to Seek Chapter 11 Relief and Restructuring Goals

15. On December 9, 2025, the Debtors commenced certain of these Chapter 11 Cases because (i) the Portfolio Companies needed immediate funding to avoid a collapse that would have a ripple effect on the value of the Partnership Debtor; (ii) Rigmora had demonstrated it would not provide funding voluntarily; and (iii) chapter 11 provided the only forum where all stakeholders' interests could be protected in a comprehensive reorganization.¹³ Harrison Decl. ¶ 16; Jan. 20, 2026 Hearing Tr. (Harrison) at 25:20-23; 32:19-33:1.

16. Through these Chapter 11 Cases, the Debtors seek to (i) save, preserve, and enhance the value of the Portfolio Companies (which preserves and enhances the value of the Partnership Debtor); (ii) provide a path for a reorganization of the Debtors; and (iii) provide a fair and substantial recovery for all stakeholders, including limited partners like Rigmora. *See* Harrison

your Lordship on those issues would be helpful to the parties in the context of these Cayman proceedings because... they will in practice dispose of the case"); 54:7-12 ("[T]his issue is well capable of being dealt with within the context of the two-day hearing that we suggest, once it is recogni[z]ed that this is not an issue that will require your Lordship to form a view as to the allegations of misconduct against the GP.")

In addition, no "active misrepresentation" or "duplicitous behaviour" occurred before the Cayman Court by Quinn Emanuel. Although the first affidavit of Andrew Berdon, Esq. referred to in paragraph 17 of the Counsel Objection (the "Berdon 1") did not include the full suite of relevant correspondence between the parties' U.S. attorneys, this omission was inadvertent. Mr. Berdon swore a second affidavit (the "Berdon 2") on December 2, 2025, at the same time Berdon 1 was sworn (Berdon 1 having previously been provided to the Cayman Court in signed but unsworn form on account of the Thanksgiving holiday). Berdon 2 ensured that the record was complete concerning the relevant correspondence passing between the U.S. attorneys following the last email correspondence that had been exhibited to Berdon 1. The Debtors provided Berdon 2 to Campbells (Cayman Islands attorneys for Rigmora) along with the sworn version of Berdon 1 on December 2, 2025, but Campbells refused to consent to Walkers filing Berdon 2. Ultimately, Walkers attempted to clarify the record before the Cayman Court and reserved the right to file Berdon 2 if necessary. The GP Debtor was then prevented from applying for leave to file Berdon 2 as a result of the automatic stay upon filing the Chapter 11 Cases. Whilst Berdon 2 did not affect Justice Asif's findings with regard to Berdon 1, set out in his January 27, 2026 judgment, this timeline means that Mr. Berdon has not had the opportunity to defend Rigmora's false accusation before the Cayman Islands Court. In sum, Mr. Berdon and Quinn Emanuel deny any wrongdoing and look forward to presenting a full record on this issue at the appropriate time. Rigmora's attempts to leverage the undeveloped record in the Cayman Court should be seen as pure gamesmanship because they know the true facts.

¹³ In contrast, as previously stated, the retaliatory Cayman winding-up proceeding seeks the liquidation of the Partnership Debtor, thereby destroying the value of the Portfolio Companies.

Decl. ¶ 17; Mandarino Decl. ¶¶ 9-12; Mandarino Second Funding Decl. ¶ 8; Jan. 20, 2026 Hearing Tr. (Mandarino) at 113:14-20. Thus, Rigmora’s accusations that the Debtors’ filed these Chapter 11 Cases for the purpose of displacing Rigmora are false. *See* Counsel Obj. ¶¶ 19-20.¹⁴

ii. The Advisors Involved in these Chapter 11 Cases

17. The Debtors act as fiduciaries of the estates under sections 1107 and 1108 of the Bankruptcy Code. Relatedly, the Debtors have sought the advice and assistance of several advisors to carry out the Debtors’ duties in their respective Chapter 11 Cases. These include Quinn Emanuel,¹⁵ B. Riley and Perry M. Mandarino (“Mandarino”), Potter Anderson & Corroon LLP, and Walkers (Cayman) LLP. *See* Docket Nos. 132-33, 147. In addition, the Debtors moved to retain and employ Murphy & King, P.C. (“M&K”) to act as bankruptcy counsel for the seven Debtor Portfolio Companies, including with respect to any matters in conflict with the Corporate Debtors, and provide them with comprehensive legal services to preserve and enhance their estates,

¹⁴ If, through these Chapter 11 Cases, the Debtors obtain a financial partner other than Rigmora, that would be (i) the result of the Debtors’ strategy to protect and maximize the value of their estates through the continued development of their research programs for the treatment of serious medical conditions (collectively, the “Research Program[s]”), a strategy that proved successful throughout the life of the Partnership Debtor; and (ii) the consequence of Rigmora’s intention to liquidate the Debtors for its liquidity needs, which is incompatible with the Debtors’ strategy.

¹⁵ In the Counsel Objection (¶ 15), Rigmora points out that Quinn Emanuel previously represented Dr. Harrison. In that respect, between November 202 and June 2021, Quinn Emanuel represented Dr. Harrison responding to a third party subpoena relating to a dispute between Dr. Rybolovlev (Rigmora’s ultimate Russian-born owner) and Sotheby’s related to a dispute that Dr. Rybolovlev had with the famous art dealer. The total fees that Quinn Emanuel billed for that matter were \$10,548.98. In addition, between October 2023 and December 2023, Quinn Emanuel represented Dr. Harrison in an intellectual property dispute with Novartis where (i) Dr. Harrison was a potential defendant along with ATP; and (ii) ATP paid the related professional fees (totaling \$57,448.40). These representations, which are unrelated to these Chapter 11 Cases and ended several years ago, cannot be a basis for disqualification. *In re Boy Scouts of Am.*, 35 F.4th 149, 158 n.5 (3d Cir. 2022) (“We also note that § 327(a) is written in the present tense: it bars the retention of professionals who “hold or represent” adverse interests. It only allows disqualifications for adverse interests that exist at the time of retention.”).

In connection with the Counsel Motion, the Debtors disclosed the payment of a retainer of \$20,000,000 million (the “Retainer”) to Quinn Emanuel on August 4, 2025. *See* Docket No. 132-3.

including restructuring negotiations with affiliates and other constituencies and prosecution of claims. *See* Docket No. 134 at ¶¶ 4, 9, 17.¹⁶

18. The Debtors have also retained Timothy Pohl as an independent director of the GP Debtor. *See* **Exhibit 2**. Notably, one week prior to Rigmora’s filing of the Objections, the Debtors asked Rigmora to provide one or more potential candidates to be considered for the independent director role, but Rigmora refused to provide any names. On February 2, 2026, the Debtors informed Rigmora that the GP Debtor selected Timothy Pohl for the independent director’s role subject to Rigmora’s suggestion otherwise. Rigmora raised no objections regarding the independent director proposed by the Debtors.

19. The United States Trustee appointed a creditors’ committee (the “Committee”), which has also retained counsel. Docket Nos. 194, 198.

20. And the record of these Chapter 11 Cases shows that no one or nothing prevented Rigmora from advocating for its own interests before this Court.¹⁷ Indeed, since the commencement of these Chapter 11 Cases, Rigmora has, among other things, (i) asked the Court to dismiss the cases of the Corporate Debtors only three days after they sought chapter 11 Relief; (ii) asked the Court to lift the stay, so that Rigmora could continue its retaliation against the Debtors

¹⁶ As stated in Docket No. 134 (¶ 17), the Debtors sought M&K’s retention to provide the following professional services: (i) advising the Debtor Portfolio Companies as to their rights, powers, and duties as debtors-in-possession under chapter 11 of the Bankruptcy Code, preparing documents and pleadings on behalf of the Debtor Portfolio Companies as necessary; (ii) assisting with the Debtor Portfolio Companies’ negotiations with key constituents, including affiliates, as well as prosecution of actions on the Debtor Portfolio Companies’ behalf, defense of actions commenced against the Debtor Portfolio Companies and preparation of objections to claims; (iii) assisting the Debtor Portfolio Companies in connection with any plan, strategic sale transactions or foreclosure proceedings, or out of court recapitalization or financial restructuring; (iv) taking all necessary actions to protect and preserve the Debtor Portfolio Companies’ estates during these Chapter 11 Cases; and (v) performing such other legal services for the Debtors that are necessary and proper in these proceedings as requested by the Debtors.

¹⁷ Setting aside the issue that Rigmora is asking the Court to assume that Rigmora will prevail in the Cayman winding up proceeding, Rigmora has not yet explained why these Chapter 11 Cases deprive it of the “safeguards” (?) to which Rigmora alleges it is “entitled” under Cayman law. *See* Counsel Obj. ¶ 15.

in the Cayman Islands; and (iii) filed a flurry of objections to various relief sought by Debtors (including opposing Debtors' cash collateral motion, Debtors' wages motion, and Debtors' December 23, 2025 funding motion). Rigmora has served dozens of requests for production, interrogatories, and several notices of deposition. Rigmora's litigation furor is unnecessary and leaning toward the irrational. Beyond that, Rigmora has reflexively multiplied the costs of these Chapter 11 Cases resulting in unnecessary waste of the Debtors' time and limited resources.

iii. Portfolio Companies' Funding

21. In these Chapter 11 Cases, consistent with its ordinary practices, the Debtors sought to fund the Portfolio Companies so that the latter can continue developing their Research Programs. *See* Docket Nos. 89 and 228; Harrison Decl., Ex. B at 67. The Debtors sought (and is seeking) the Court's authorization to provide funding to the Portfolio Companies at levels far lower than those previously budgeted and approved by Rigmora. The funding requests (i) reflect Debtors' sound business judgment that meeting these reduced Portfolio Companies' capital needs that will preserve and enhance their respective Research Programs; and (ii) avoid the immediate value destruction that a precipitous cessation of funding would cause at both the Portfolio Company and Corporate Debtor level. *See* Mandarino First Funding Decl. ¶¶ 9, 11; Mandarino Second Funding Decl. ¶ 10; Jan. 20, 2026 Hearing Tr. (Harrison) at 42:20-43:6, 47:19-23, 50:21-24; *id.* (Mandarino) at 117:16-118:2; *see also* **Exhibit 3**, Jan. 19, 2026 Dep. Tr. (Mandarino), 126:19-127:7, 128:17-129:5, 131:10-14.

22. Funding the Portfolio Companies satisfies the best interests of the Portfolio Companies, the Corporate Debtors (and, by extension, Rigmora). As the Delaware Chancery Court unequivocally stated, "it would be weird to describe the parties as conflicted concerning whether to call capital." Harrison Decl., Ex. B. at 73. But Rigmora wants and needs liquidity now

at the expense of maximizing the Portfolio Companies' values for all stakeholders.

23. At the January 20, 2026 hearing, this Court commented that the funding at issue was justified by the Debtors' sound business judgment. Jan. 20, 2026 Hearing Tr. (Court) at 151:22-152:3, 153:20-21. And only after the Court encouraged discussions between the Debtors and Rigmora did the latter finally acknowledge that the value of the Debtors' enterprise will increase if the Partnership Debtor funds the Portfolio Companies. Indeed, when cornered, Rigmora agreed with the Debtors that approximately \$11.91 million should be used to satisfy the immediate funding needs of nine Portfolio Companies through February 20, 2026.¹⁸

24. Having failed to persuade the Court, Rigmora filed these Objections to engineer conflicts that would undermine Quinn Emanuel and B. Riley's retentions for the purpose of taking another shot at the process of funding the Portfolio Companies and the Debtors' related judgment that such funding best serves the rational interests of the Debtors and their stakeholders. *See, e.g.*, CRO Obj. ¶ 2.¹⁹

ARGUMENT

I. Legal Standard

25. Section 327(a) of the Bankruptcy Code is the starting point for retaining a debtor's professionals. *In re Boy Scouts of Am.*, 35 F.4th 149, 157 (3d Cir. 2022). Section 327(a) authorizes

¹⁸ In contrast, before the Cayman Court, Rigmora has repeatedly advocated for ending all funding for seven early-stage Portfolio Companies that Rigmora deemed "hopeless investments." It is only in these Chapter 11 Cases and thanks to Quinn Emanuel's efforts to maximize Debtors' estates (for the benefit of all stakeholders) that Rigmora temporarily agreed to reverse its no-funding course. New evidence uncovered in discovery suggests that Rigmora has used its power of the purse to force a distressed sale of the Portfolio Debtors so that a competitor of the Debtors, in which Rigmora holds a significant investment, RTW Investments, can acquire the Portfolio Debtors on the cheap while depriving other stakeholders, such as the unsecured creditors, their aliquot share.

¹⁹ In the Objections, Rigmora echoed allegations and arguments made in the *Motion of Rigmora Biotech Investor One LP and Rigmora Biotech Investor Two LP for Relief from the Automatic Stay* [Docket No. 125] (the "Stay Relief Motion") and the *Amended Motion to Dismiss Case Filed by Rigmora Biotech Investor One LP, by its general partner Unicorn Biotech Ventures One Ltd, Rigmora Biotech Investor Two LP, by its general partner Unicorn Biotech Ventures Two Ltd* [Docket No. 204].

a debtor-in-possession to employ professionals if they “do not hold or represent an interest adverse to the estate” and are “disinterested persons.” 11 U.S.C. § 327(a). This statute “ensure[s] effective represent[ation] of the estates; in other words, it ... ensure[s] that the professional is able to act in the best interest of the estates and can competently and vigorously represent the ... debtor-in-possession.” *In re Boy Scouts of Am.*, 630 B.R. 122, 130 (D. Del. 2021), *aff’d*, 35 F.4th 149 (3d Cir. 2022) (citations and internal marks omitted). The purpose of section 327 is not, however, “to vindicate the rights of non-debtor entities,” and consistent with the plain language of the statute, a court must assess “the factual scenario in front of it from the perspective of the estate,” and not of a mere party-in-interest. *Id.* (citations and internal marks omitted).

26. The Third Circuit recognizes that the two prongs of section 327(a) (i.e., not holding an adverse interest and being disinterested) often “effectively collapse into a single test ... [consisting] of whether the professional holds or represents an adverse interest to the interests of the debtor and its estate.” *In re Boy Scouts of Am.*, 35 F.4th at 157 (citations and internal marks omitted).

27. Under section 327(a) “a professional holds a prohibited ‘adverse interest’ where that professional holds or represents interests in competition with the debtor that would actually (as opposed to speculatively) impair its service as an estate fiduciary”. *In re Boy Scouts of Am.*, 630 B.R. at 130 (citing *In re First Jersey Sec., Inc.*, 180 F.3d 504, 509 (3d Cir. 1999) and *In re Marvel Ent. Grp., Inc.*, 140 F.3d 463, 477 (3d Cir. 1998)). In that respect, under section 327(a), courts are required to disqualify a professional only where there is an “actual conflict of interest.” *In re Marvel Ent. Grp., Inc.*, 140 F.3d at 476; *see also In re First Jersey Sec., Inc.*, 180 F.3d at 509 (“[Section] 327(a) mandates disqualification when there is an actual conflict of interest, allows for it when there is a potential conflict, and precludes it based solely on an appearance of conflict.”).

28. The term “actual conflict of interest” “has been given meaning largely through a case-by-case evaluation of particular situations arising in the bankruptcy context” and “[c]ourts have been accorded considerable latitude in using their judgment and discretion in determining whether an actual conflict exists in light of the particular facts of each case.” *In re BH & P Inc.*, 949 F.2d 1300, 1315 (3d Cir.1991) (citation and internal marks omitted). That said, no “actual conflict of interest” exists when the interests of two parties “coincide[] ... [because] both [are] interested in enlarging the estate.” *In re Johnson*, 312 B.R. 810, 822 (E.D. Va. 2004) (holding that law firm representing both creditor and trustee was not operating under an actual conflict of interest). Also, the term “actual” is “understood in the legal context to mean ‘[e]xisting in fact; real,’” as opposed to something that is hypothetical, constructive, or speculative. *In re KLE Equip. Leasing, LLC*, 672 B.R. 756, 765 (Bankr. E.D. Wis. 2025) (citing Black’s Law Dictionary (12th ed. 2024));²⁰ *see also In re Kelton Motors, Inc.*, 109 B.R. 641, 650 (Bankr. D. Vt. 1989) (“[M]ere hypothetical conflicts do not meet the heavy burden of proof to warrant disqualification of ... attorney.”). And a conflict “in which the competition [between two interests] ‘is presently dormant, but may become active if certain contingencies occur,’ is merely potential and thus does not warrant disqualification.” *In re Johnson*, 312 B.R. at 822 (quoting *In re BH & P, Inc.*, 103 B.R. 556, 563 (Bankr. D.N.J. 1989) (internal marks omitted)).

29. In chapter 11 cases that are jointly administered, “multi-debtor representation under Section 327(a) is also determined on a case-by-case basis, and rather than disapproving of multi-

²⁰ In *In re KLE Equip. Leasing, LLC*, the Court cited additional, authoritative dictionaries: “*see also, e.g., Actual*, Black’s Law Dictionary (5th ed. 1979) (further defining ‘actual’ in part to mean ‘existing presently in act; having a valid objective existence as opposed to that which is merely theoretical or possible’, ‘[o]pposed to potential, possible, virtual, theoretical, hypothetical, or nominal’, and ‘[s]omething real, in opposition to constructive or speculative’); *Webster’s Third New International Dictionary* 22 (2002) (defining ‘actual’ in part as ‘existing in act’, ‘contrasted with *potential and possible*’; ‘existing in fact or reality’, ‘contrasted with ... *hypothetical*’; and ‘something that is actual or exists in fact’).” 672 B.R. at 765.

debtor representation as a per se conflict, courts should examine the factual circumstances surrounding the representation to determine whether it is appropriate.” *In re Schwindt*, 2013 WL 321297, at *4 (Bankr. D. Colo. Jan. 28, 2013) (citations and internal quotes omitted). Potential conflicts of interest between estates do not necessarily require the appointment of separate professionals. *See Ritchie Special Credit Invs., Ltd. v. U.S. Tr.*, 415 B.R. 391, 400 (D. Minn. 2009), *aff’d*, 620 F.3d 847 (8th Cir. 2010); *see also In re BH & P, Inc.*, 949 F.2d at 1310-11 (noting that “[j]oint administration by a single trustee is commonplace in the scheme of bankruptcy administration and its positives often outweigh any negatives”). In particular, “[c]onflicts of interest posed by intercompany claims commonly occur in jointly administered cases,” and they often do not justify burdening the bankruptcy estates with the costs that the appointment of separate professionals entail. *Ritchie Special Credit Invs., Ltd. v. U.S. Tr.*, 415 B.R. at 400-02. Also, one court observed that where several debtors function as a single business enterprise, “joint representation of debtors with potentially conflicting interests (here the existence of potential inter-debtor claims)” should be approved if the joint representation “is more likely to maximize the value of all the represented estates than would requiring some or all of the estates to be separately represented.” *In re KLE Equip. Leasing, LLC*, 672 B.R. at 766.

30. Moreover, when exercising its discretion under section 327(a) of the Bankruptcy Code, courts should be wary of permitting preemptive plan objections and unsupported allegations regarding prepetition conduct to become the basis for a tactical disqualification designed to delay proceedings, or gain an unfair advantage. *Cf. In re Golden Guernsey Dairy, LLC*, 2015 WL 3669932, at *2 (Bankr. D. Del. June 12, 2015); *see also In re Harold & Williams Dev Co.*, 977 F.2d 906, 910 (4th Cir. 1992) (court’s discretion must be exercised with a view to the “protection of the interests of the bankruptcy estate and its creditors, and the efficient, expeditious, and

economical resolution of the bankruptcy proceeding”). Rigmora exemplifies the reason for this cautionary consideration.

31. While the initial burden of satisfying section 327 of the Bankruptcy Code rests on the applicant, that burden has been met by the filing of the Application. *In re Caesars Entm’t Operating Co., Inc.*, 561 B.R. 420, 431 (Bankr. N.D. Ill. 2015). Accordingly, the “burden of going forward” has “shift[ed] to the objecting party,” which is Rigmora. *Id.* (citations omitted). Here, Rigmora has failed to meet that burden with respect to both Quinn Emanuel and B. Riley.²¹

II. Both Quinn Emanuel and B. Riley Meet the Standard for Retention

32. To start, in opposing Quinn Emanuel’s and B. Riley’s retentions, Rigmora is wrong in alleging that, in these Chapter 11 Cases, there is a “ripe conflict between the Fund and the GP.” Counsel Obj. ¶ 19; CRO Obj. ¶ 19. Rigmora’s assertion is based on the false premise that the best interests of the Partnership Debtor are indistinguishable from—and should solely reflect—the best interests of Rigmora, so that the GP Debtor’s role is relegated to merely bending the knee to Rigmora. But this is obviously not the case. After all, the LPA confirms this principle, as it allows the General Partner, when needed, to pursue and enforce the Partnership Debtor’s rights against a limited partner. *See* LPA § 5(c). Thus, Rigmora asserts a conflict of interest by substituting its

²¹ The Debtors do not concede that section 327 of the Bankruptcy Code applies in connection with the retention of B. Riley (*see* CRO Obj. ¶ 17), and maintain that such retention should be evaluated under section 363(b) of the Bankruptcy Code. Indeed, several courts have authorized debtors to retain officers and management and turnaround consulting firms pursuant to section 363(b) of the Bankruptcy Code. *See, e.g., In re Enron Corp.*, 2006 WL 1030421, at *2 (Bankr. S.D.N.Y. Apr. 12, 2006) (noting that, under section 363(b), the court authorized to retain a management consulting firm to provide a chief restructuring officer and additional individuals to serve as additional personnel during the chapter 11 cases); *In re Ajubeo LLC*, 2017 WL 5466655, at *4 (Bankr. D. Colo. Sept. 27, 2017) (approving retention of management consulting firm to provide a chief restructuring officer under section 363(b)); *see also In re Nine West Holdings, Inc.*, 588 B.R. 678, 686-87 (Bankr. S.D.N.Y. 2018) (recognizing the “mountain of precedent” in which other courts have authorized debtors to retain professionals, including CROs, under § 363(b)). In addition to this case law, courts in this district have routinely approved retentions under section 363(b) similar to the one sought for B. Riley. *See* CRO Motion, ¶ 3. That said, the Debtors believe Rigmora’s argument is merely academic, given that B. Riley’s retention meets the standard of section 327 of the Bankruptcy Code.

own partisan liquidity interests for those of the Partnership Debtor. But, as previously mentioned, section 327 of the Bankruptcy Code should not be used as a battering ram to vindicate the myopic and conflicted views of Rigmora. *See In re Boy Scouts of Am.*, 630 B.R. at 130.

33. In applying section 327 of the Bankruptcy Code, the Court must view the facts not from Rigmora's perspective, but from the perspective of these bankruptcy estates. *Id.* And from the estates' perspective, Quinn Emanuel and B. Riley were not (and are not) conflicted because they sought approval of Partnership Debtor's funding the Portfolio Companies to preserve their value—the original sin that motivates Rigmora's Objections. *See, e.g.*, Counsel Obj. ¶¶ 23, 24, 26; CRO Obj. ¶¶ 2, 21-24. Contrary to Rigmora's assertions, the interests of the Partnership Debtor, the GP Debtor, and the Portfolio Companies remain aligned with respect to funding because it maximizes the value of their estates by avoiding and preventing catastrophic value loss while formulating a solution to the KYC issue posed by Rigmora. *In re Johnson*, 312 B.R. at 822–23 (E.D. Va. 2004). Conversely, interrupting the necessary flow of funds from the Corporate Debtors to the Portfolio Companies guarantees their collapse and destroys value, with a consequent loss of value for the Partnership Debtor. *See, e.g.*, January 20, 2026 Hearing Tr. (Mandarino) at 109:3-13. Rigmora knows this because the Chancery Court and this Court made it abundantly clear. In December 2025, the Delaware Chancery Court observed that it is “weird” to allege a conflict when the GP Debtor wants to use capital to fund Portfolio Companies, (“[I]t would be weird to describe the parties as conflicted concerning whether to call capital.”), noting that there is a direct correlation between having the Portfolio Companies funded and the value of Partnership Debtor. *See Harrison Decl.*, Ex. B. at 73. After the extensive testimonies of Dr. Harrison and Mr.

Mandarino at the January 20, 2026 hearing,²² this Court also stated that it had no doubt that the funding at issue reflected Debtors' sound business judgment under section 363 of the Bankruptcy Code. Jan. 20, 2026 Hearing Tr. (Court) at 151:22-152:3. At bottom, Rigmora's allegations of conflict rests solely on its *ipse dixit* of what it thinks the Debtors should do based on Rigmora's abject liquidity needs (or RTW subterfuge) divorced from the traditional notions of value-maximizing business judgment for the benefit of all stakeholders.

34. The existence of intercompany obligations arising from the Series A does not justify disqualifying Quinn Emanuel and B. Riley from representing all the Debtors.²³ As stated above, the interests of the Corporate Debtors and Portfolio Companies are aligned and not in conflict, because they both are directed toward the preservation and maximization of the estates. The appointment of additional professionals to represent a subset of Debtors should not be required because the Portfolio Debtors already have separate counsel. M&K can take all necessary actions to protect and preserve the Debtor Portfolio Companies in the hypothetical scenario that their interests conflict with those of the Corporate Debtors, including in connection with the Series A. Thus, requiring a *fourth* set of lawyers for the Debtors will substantially increase the costs of these Chapter 11 Cases with no marginal benefit. *See* January 20, 2026 Tr. (Mandarino) at 121:21-122:1; *see also In re Adelpia Communications Corp.*, 342 B.R. 122, 128 (S.D.N.Y. 2006) ("Due to the substantial cost of requiring additional trustees or counsel in cases where individual debtors have claims against each other, courts have taken a wait and see, fact-driven, approach, to determine the extent to which additional professionals are necessary.") (cleaned up)).

²² *See, e.g.*, Jan. 20, 2026 Hearing Tr. (Harrison) at 42:20-43:6, 47:19-23, 50:21-24; *id.* (Mandarino) at 117:16-118:2, 122:11-22.

²³ These obligations are the result of Debtors' ordinary, prepetition business, which, in this respect, is no different from other venture capital enterprises. *See* January 20, 2026 Hearing Tr. (Mandarino) at 104:2-13, 127:3-8.

35. In addition, disqualifying Quinn Emanuel and B. Riley from representing one or all of the Corporate Debtors cannot be reconciled with applicable corporate governance principles. Under both the LPA and the Cayman Islands Exempted Limited Partnership Act, the GP Debtor maintains the exclusive management and control of its own operations and those of the Partnership Debtor.²⁴ The foregoing includes the selection of substitute counsel and financial advisor. Thus, even if these advisors were disqualified from representing one or more of the Corporate Debtors, the GP Debtor would remain in charge of selecting the new advisors for the GP Debtor and the Partnership Debtor. And, objectively, Rigmora would continue to have grievances against new advisors, who—following what is Rigmora’s theory in these Objections—would also be conflicted if they also followed a holistic value-maximizing path rather than Rigmora’s own agenda.

36. Rigmora argues that the Debtors have erected no safeguards in place to avoid or mitigate conflicts of interest. Counsel Obj. ¶¶ 1-2, 7, 15-16, 25; CRO Obj. ¶¶ 1, 3, 13. But Rigmora refused to provide the Debtors with one or more candidates to be considered for the role of independent director at the level of the GP Debtor. *See supra* ¶ 18. The Debtors have appointed Timothy Pohl as an independent director to act for the Partnership Debtor—which Rigmora knows. Rigmora further ignores that, throughout this restructuring, M&K specifically represents the interests of the Debtor Portfolio Companies. *See supra* ¶ 17. In addition, in these Chapter 11 Cases, the Committee acts as an independent fiduciary of the estate and can evaluate and investigate claims between the Partnership Debtor and Portfolio Companies where its members assert claims.

²⁴ *See* section 14(1) Exempted Limited Partnership Act (2025 Revision) “A limited partner shall not take part in the conduct of the business of an exempted limited partnership in its capacity as a limited partner” (**Exhibit 4**); and the Cayman Islands Court of Appeal in *Kuwait Ports Authority v Port Link GP Limited* [2023] (1) CILR 50 at [24(2)]: “By s.14 of the ELPA limited partners have no active involvement in the business in their capacity as limited partners. The business is carried out by the general partner who enters into all contracts by or on behalf of the ELP....” (**Exhibit 5**).

37. In its ham-fisted attempt to concoct a conflict, Rigmora next stoops to mischaracterization, fantasy, and speculation, making the Objections more of a conspiracy manifesto than a legal brief. Counsel Obj. ¶¶ 3, 7, 12-13, 21, 24; CRO Obj. ¶¶ 2, 10. Astonishingly, Rigmora speculates about aiding and abetting claim(s) by the Partnership Debtor against Quinn Emanuel for its provision of legal services in connection with proceedings before the Delaware Chancery Court, the Cayman Court and this Court. Counsel Obj. ¶¶ 21, 26. As previously mentioned (*supra* ¶¶ 14, 16), in the hypothetical scenario that the retaliatory Cayman winding up proceeding were not stayed by the Bankruptcy Code, the only “live” issue before the Cayman Court at the Two-Day Trial²⁵ would be the question of whether the Partnership Debtor should be wound up. Contrary to Rigmora’s misleading characterizations, before the Cayman Court would be no “live” issue or “active litigation” regarding “fund governance” or fiduciary duty issues or the Retainer paid to Quinn Emanuel to enable the GP Debtor to successfully enforce its contractual rights against Rigmora in Delaware.²⁶ These whataboutisms represent, at best, hypothetical, dormant conflicts that do not warrant disqualification. Further, Rigmora’s allegations of a breach of fiduciary duty directly countermands its contractual obligation to *not* assert a breach of fiduciary duty in retaliation for the GP Debtor *enforcing* Rigmora’s capital call obligations. *See* LPA § 18(g)(iv). Thus, no party can “aid and abet” a non-existent breach of

²⁵ Which Rigmora seeks to advance through its Stay Relief Motion and which Rigmora’s counsel, in submissions to the Cayman Court, stated would “in practice dispose of the case” (if Rigmora were successful). *See* December 17, 2025 Hearing Tr. (Rigmora’s counsel) at 6:11-12.

²⁶ The GP Debtor and Partnership Debtor’s position is that all legal expenses in respect of both the Delaware Chancery proceedings and Cayman proceedings were paid in full compliance with the terms of the LPA and they reserve their right to make any and all arguments in respect of the same at the appropriate time. For present purposes, it is noted that the Partnership Debtor is solvent and this fatally undermines Rigmora’s arguments regarding the “claw back” of the \$20 million paid to Quinn Emanuel. *See* Counsel Obj. ¶ 21. Even in a scenario where the Partnership Debtor is wound up by the Cayman Court and such payment were void under the provisions of the Cayman Islands Companies Act (the GP Debtor and Partnership Debtor reserve all rights with regard to applying for a validation order before the Cayman Court), the result would be legitimate legal expenses owed by a solvent entity that would be due and payable.

fiduciary duty and especially not one that the governing contract deems to be not a breach of fiduciary duty. Again, Rigmora again violates the LPA to serve its liquidity (or money grab) goals, but hypotheticals and speculation cannot justify disqualification under section 327 of the Bankruptcy Code, particularly where the parties' contract disallows the assertion of a fiduciary duty breach. *See In re Johnson*, 312 B.R. at 822 (quoting *In re BH & P, Inc.*, 103 B.R. at 563); *In re KLE Equip. Leasing, LLC*, 672 B.R. at 765; *In re Kelton Motors, Inc.*, 109 B.R. at 650.

38. In sum, the Court should overrule Rigmora's Objections because no conflict of interest exists that justifies disqualifying Quinn Emanuel and B. Riley under section 327 of the Bankruptcy Code. Rigmora's Objections concoct speculative and false conflicts to advance Rigmora's value-destructive interests to the detriment of the Debtors and other stakeholders.

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WHEREFORE, the Debtors respectfully request that the Court enter an order, substantially in the form of the Proposed Order, granting the relief requested in the Motions, and granting such other and further relief to the Debtors as the Court may deem just and proper.

Dated: February 13, 2026
Wilmington, Delaware

Andrew M. Berdon, Esq. (admitted *pro hac vice*)
Patricia B. Tomasco, Esq. (admitted *pro hac vice*)
Rachel E. Epstein, Esq. (admitted *pro hac vice*)
Alain Jaquet, Esq. (admitted *pro hac vice*)
Rachel Harrington, Esq. (admitted *pro hac vice*)
**QUINN EMANUEL URQUHART
& SULLIVAN, LLP**
295 5th Avenue, 9th Floor
New York, New York 10016
Telephone: (212) 849-7000
Facsimile: (212) 849-7100
Email: andrewberdon@quinnemanuel.com
pattytomasco@quinnemanuel.com
rachelepstein@quinnemanuel.com
alainjaquet@quinnemanuel.com
rachelharrington@quinnemanuel.com

Respectfully submitted,

/s/ Ethan H. Sulik

L. Katherine Good (No. 5101)
Brett M. Haywood (No. 6166)
Shannon A. Forshay (No. 7293)
Ethan H. Sulik (No. 7270)
POTTER ANDERSON & CORROON LLP
1313 N. Market Street, 6th Floor
Wilmington, Delaware 19801
Telephone: (302) 984-6000
Facsimile: (302) 658-1192
Email: kgood@potteranderson.com
bhaywood@potteranderson.com
sforshay@potteranderson.com
esulik@potteranderson.com

-and-

Eric D. Winston, Esq. (admitted *pro hac vice*)
Razmig Izakelian, Esq. (admitted *pro hac vice*)
Benjamin Roth, Esq. (admitted *pro hac vice*)
**QUINN EMANUEL URQUHART
& SULLIVAN, LLP**
865 S. Figueroa Street, 10th Floor
Los Angeles, California 90017
Telephone: (213) 443-3000
Facsimile: (213) 443-3100
Email: ericwinston@quinnemanuel.com
razmigizakelian@quinnemanuel.com
benroth@quinnemanuel.com

Proposed Counsel to the Debtors and Debtors in Possession

EXHIBIT 1

OPUS2

Unicorn Biotech Ventures v ATP III GP

Day 1PTR1

December 17, 2025

Opus 2 - Official Court Reporters

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Email: transcripts@opus2.com

Website: <https://www.opus2.com>

1 Wednesday, 17 December 2025
 2 (3.03 pm GMT)
 3 JUSTICE ASIF KC: Good morning.
 4 MR SCOTT: My Lord, good morning.
 5 I appear, as before, with Mr Faulkner for
 6 the plaintiffs and petitioners, the Rigmora LPs; my
 7 learned friends Mr Ayres and Ms White for the defendant,
 8 the GP.
 9 Submissions by MR SCOTT
 10 As your Lordship knows, this is the PTR ahead of
 11 the January trial in these proceedings. We were last
 12 before your Lordship at the end of November, when
 13 your Lordship dismissed the mediation and privilege
 14 summons brought by the GP.
 15 JUSTICE ASIF KC: Yes.
 16 MR SCOTT: There have since been two very significant
 17 developments in Delaware. The Delaware judgment came
 18 out on Friday, 5 December, and there followed, on
 19 Tuesday, the 9th, commencement by the GP of Chapter 11
 20 proceedings against itself and against the Partnership
 21 and against ATLS. There has since been a flurry of
 22 activity in Delaware. Subject to your Lordship, what
 23 I want to do this morning is address the court on three
 24 topics. The first is the Delaware judgment and its
 25 significance for your Lordship's purposes, and its

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1 principal significance is that, as a result of
 2 the Delaware judgment, the substratum of the Partnership
 3 is now gone, and it is gone because the Chancellor
 4 accepted our case as to what our total contingent
 5 subscriptions are and accepted our case that we have an
 6 unfettered discretion over budget approval. And
 7 the upshot of that is that once we have complied with
 8 the Delaware judgment, as we will do in the coming days,
 9 and paid those of the May capital calls which the
 10 Chancellor has required us to pay, there will be just
 11 US\$29 million left in undrawn contingent subscriptions
 12 left to call and we will have an unfettered discretion
 13 over budget approvals in respect of any future calls for
 14 that sum.
 15 So the Partnership has no future in the form that
 16 was envisaged by the parties under the LPA. As I say,
 17 its substratum has gone and so it needs to be wound up.
 18 My Lord, that will be the first topic.
 19 The second will be the Chapter 11 proceedings. As
 20 your Lordship will have seen from our skeleton, we
 21 stayed(?) and are moving in Delaware to have them
 22 dismissed on the basis that they are a bad faith filing,
 23 an attempt to avoid the consequences of the Delaware
 24 judgment, a device by which to kill the January trial in
 25 your Lordship's court that the GP agreed should take

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1 place, and a device pursued in circumstances where
 2 the Partnership is not facing financial distress in
 3 the slightest, its stated assets being multiple orders
 4 of magnitude greater than the paltry debts mentioned in
 5 the petitions.
 6 My Lord, the Delaware Bankruptcy Court will rule in
 7 due course on the motion to dismiss. What I want to
 8 focus on is the implications, again for your Lordship's
 9 purposes, of the commencement of the Chapter 11
 10 proceedings having regard to the relevant provisions of
 11 the Limited Partnership Agreement, the LPA, and
 12 the associated provisions of the ELP Act, because,
 13 regardless of whether the Chapter 11 filings were done
 14 in good faith or bad faith, regardless of that,
 15 the contractually agreed and statutory consequences of
 16 their commencement in respect of the GP is that
 17 the Partnership shall now be wound up under
 18 the supervision of this court. So the issue that now
 19 confronts your Lordship in these proceedings is not
 20 whether the Partnership should be wound up, but rather
 21 how and by whom.
 22 My Lord, that brings me to the third topic that
 23 I wish to address, the question of how your Lordship
 24 should manage these proceedings in the light of these
 25 recent developments in Delaware.

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1 JUSTICE ASIF KC: Mr Scott, before we go much further, can
 2 I just make sure that the message has got back to
 3 everyone that we absolutely must be finished by
 4 2 o'clock? If we have to sit over lunch, we can do
 5 that, but I've read everyone's skeletons, I've read
 6 the Delaware judgment, I've read the transcript of
 7 the hearing before the bankruptcy judge in Delaware, so
 8 I've got a pretty good picture of the current lie of
 9 the land in Delaware, and so I would hope that this
 10 morning — and also I'm also very conscious of what
 11 the parties are allowed to argue in front of me as
 12 permitted by the bankruptcy judge in Delaware and what
 13 they're not currently allowed to argue in front of me,
 14 so I would hope that that might speed up matters today
 15 somewhat.
 16 MR SCOTT: I'm grateful, my Lord. That indication had
 17 indeed come to us. I would not expect to be much more
 18 than an hour on my feet.
 19 JUSTICE ASIF KC: Right, okay.
 20 MR SCOTT: My Lord, I should also say at this point, there
 21 is, I understand, a further hearing in Delaware, I think
 22 scheduled for 3.30 today.
 23 JUSTICE ASIF KC: Yes, I did see that.
 24 MR SCOTT: And it would be helpful, if possible, if
 25 your Lordship were able to indicate at the end of

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1 submissions this morning what your Lordship's view is on
 2 the lie of the land and the way forward so that that can
 3 be communicated --
 4 JUSTICE ASIF KC: Communicated.
 5 MR SCOTT: -- (overspeaking) -- in Delaware --
 6 JUSTICE ASIF KC: No, that's understandable, Mr Scott, and
 7 I'm happy to do that -- well, assuming we've reached
 8 a position where I'm able to.
 9 MR SCOTT: I'm grateful, my Lord.
 10 JUSTICE ASIF KC: I will provide whatever assistance to
 11 the judge in Delaware that I can.
 12 MR SCOTT: I'm grateful.
 13 My Lord, just to complete the overview on the third
 14 topic, how your Lordship should take forward these
 15 proceedings, what we invite your Lordship to do is to
 16 direct a two-day hearing, ideally in the week commencing
 17 19 January. We understand that week had been reserved
 18 in your Lordship's diary for judgment writing following
 19 the trial. And the purpose of that two-day hearing
 20 would be to determine the contractual and statutory
 21 consequences of the recent development in Delaware as
 22 a matter of Cayman law, and they are the paragraph 10(b)
 23 issues, as we have termed them, identified in our
 24 skeleton at paragraph 12. Perhaps can I just ask
 25 your Lordship to take that up.

5

1 JUSTICE ASIF KC: Yes, I've got that.
 2 MR SCOTT: Your Lordship sees at 12.1, 12.2 and 12.3
 3 the paragraph 10(b) issues. They are all issues of
 4 Cayman law. They are discrete issues capable of
 5 determination without a need to resolve any factual
 6 issues, because they're issues that -- they're simply
 7 the legal consequences of what has happened in Delaware.
 8 We say that a determination from your Lordship on
 9 those issues would be helpful to the parties in
 10 the context of these Cayman proceedings because, if we
 11 are right about them, they will in practice dispose of
 12 the case. A determination from your Lordship is also
 13 likely to be very helpful in the context of
 14 the Chapter 11 proceedings in Delaware, because it would
 15 provide to the Delaware Bankruptcy Court and to third
 16 parties an authoritative statement of the Cayman law
 17 consequences of what has happened and that can then be
 18 factored into whatever decisions need to be taken by
 19 the bankruptcy judge in the US proceedings, and it will
 20 obviate, for example, the need for the US bankruptcy
 21 judge to hear Cayman law expert evidence on these
 22 issues, because there could be no one more expert than
 23 a judge of this court pronouncing on the issues as they
 24 arise in this particular case.
 25 JUSTICE ASIF KC: Can I just understand, how does this fit

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1 in with your intended application in terms of whether to
 2 strike out the -- or to dismiss the Chapter 11
 3 proceedings? Are you saying that whatever I say about
 4 the position of the ELP and the paragraph 10(b) issues
 5 needs to be determined before that application is made,
 6 or is it not?
 7 MR SCOTT: So that application has been made.
 8 JUSTICE ASIF KC: Yes, it's been made, but I know it's not
 9 been heard?
 10 MR SCOTT: It hasn't been heard yet. The parties, as
 11 I understand it, are in a process of agreeing a schedule
 12 to brief and then have that motion served --
 13 JUSTICE ASIF KC: Yes. And the Delaware judge has indicated
 14 pretty plainly that she's not going to make a decision
 15 on that in time for the trial here --
 16 MR SCOTT: No, indeed.
 17 JUSTICE ASIF KC: -- the intended trial here to go ahead.
 18 MR SCOTT: Indeed. And the way we see this working is that
 19 your Lordship's determination on the paragraph 10(b)
 20 issues will be relevant for the purpose of disposing of
 21 the motion to dismiss. They will also be relevant more
 22 broadly.
 23 JUSTICE ASIF KC: But how are you going -- in that case, how
 24 are you going to be able to run that before you've got
 25 a decision from the Delaware judge permitting you to do

7

1 that, given the automatic stay under Chapter 11?
 2 MR SCOTT: My Lord, because what we intend to do, and to do
 3 before the end of this week, is to make a motion to vary
 4 the moratorium --
 5 JUSTICE ASIF KC: All right.
 6 MR SCOTT: -- to permit us to have the paragraph 10(b)
 7 issues determined.
 8 JUSTICE ASIF KC: Right.
 9 MR SCOTT: If -- my Lord, I understand the position in
 10 Delaware so far as the rules are concerned to be that,
 11 having made that motion, the hearing can come on, if it
 12 can be accommodated, within 14 days thereafter. That
 13 takes us to the very early part of January, and we would
 14 hope that the Delaware bankruptcy judge would hear us on
 15 the motion to vary the moratorium in very early January
 16 to enable us to come back before your Lordship later in
 17 the month to argue out the point. So that's
 18 the schedule that we have in mind.
 19 All I'm asking today is that your Lordship reserves
 20 the slot in the court's diary and we work towards it.
 21 But, of course, if the judge in Delaware cannot
 22 accommodate the motion to vary, or is not prepared to
 23 grant motion to vary, then we will need to come back and
 24 deal with the consequences of that, because, as I hope
 25 we made plain in the skeleton, and let me make it plain

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1 again orally, we intend to comply with the moratorium,
 2 and nothing that I'm saying to your Lordship today
 3 should be misrepresented or weaponised in Delaware as
 4 any suggestion to the contrary.
 5 JUSTICE ASIF KC: No, that's fine. I just — I was just
 6 trying to work out how the chronology would be likely —
 7 allay(?) in my own head how the chronology would be
 8 likely to work out.
 9 MR SCOTT: That's the chronology as we see things.
 10 JUSTICE ASIF KC: Right.
 11 For what it's worth, the week commencing 19 January
 12 is — looks to me to be possible, but it does depend on
 13 quite a lot of good will from the judge in Delaware
 14 being able to accommodate your motion in time, and also
 15 because, presumably, everyone is going to say that
 16 unless and until the Delaware judge has granted your
 17 relief, no one can properly start spending on all
 18 the money preparing for the paragraph 10(b) arguments.
 19 What I can say at this stage is, if the 19th — if
 20 the week of 19 January is not feasible, then, subject to
 21 26 January being a bank holiday, I could do later in
 22 that week. I could do the week of the 2nd. But then
 23 I can't do anything until 2 March.
 24 MR SCOTT: Just so I have that clear, my Lord.
 25 JUSTICE ASIF KC: Yes. The week of the 26th, the 26th is

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1 a public holiday. I have something on the 27th, but
 2 I could do 28, 29 or 30 January.
 3 The week of the 2nd, I've got a short hearing on
 4 Tuesday morning, but apart from that, that week is
 5 currently clear. And then I could not do anything,
 6 because of trials, until 2 March.
 7 MR SCOTT: That's a very helpful indication, my Lord. Could
 8 I just turn my back for one moment?
 9 (Pause)
 10 So, my Lord, with that —
 11 JUSTICE ASIF KC: And can I also just say, again, with
 12 a view to trying to assist the parties, it seems to me
 13 it's preferable that I at least allocate some time at
 14 this stage so that there is a space set aside in my
 15 calendar, which fills up, as everyone knows, fairly
 16 quickly, because if we don't do it now and simply wait
 17 until the judge in Delaware has ruled, that builds in at
 18 least three or four weeks of unnecessary delay in
 19 the resolution of the matters you want to have
 20 determined.
 21 MR SCOTT: Indeed. And the concern is, on our side of
 22 the court at least, before you know it, those issues
 23 aren't getting determined until the spring.
 24 JUSTICE ASIF KC: Yes.
 25 MR SCOTT: And we do say they really are issues of

10

1 fundamental importance. I mean, in some ways they're
 2 gating(?) issues in the case.
 3 JUSTICE ASIF KC: And the other thing, in my view, is this.
 4 If it turns out that the Delaware judge says, no, you
 5 can't do any of this, then it's much easier to release
 6 the time than it is to try and work in the other
 7 direction.
 8 MR SCOTT: Well, we respectfully agree, my Lord.
 9 My Lord, with that introduction, can I deal with my
 10 first topic, which is the Delaware judgment and its
 11 implications.
 12 JUSTICE ASIF KC: Yes.
 13 MR SCOTT: If I can ask your Lordship please to take up our
 14 skeleton, paragraph 16.
 15 JUSTICE ASIF KC: Yes. I thought it was very interesting
 16 how both sides managed to portray the judgment as
 17 a resounding victory.
 18 MR SCOTT: Well —
 19 JUSTICE ASIF KC: I mean, that's par for the course.
 20 MR SCOTT: Indeed. My Lord, without meaning to be flippant,
 21 it's an odd victory won by the GP that results in
 22 a Chapter 11 filing just a couple of days later, but
 23 there we are.
 24 My Lord, what I want to do is just invite
 25 your Lordship's attention to the contrast between what

11

1 the GP was asking for in May and what it achieved in
 2 the Delaware judgment. Can I ask your Lordship to
 3 re-read the subparagraphs of paragraph 16, which
 4 summarise the GP's ask back in May.
 5 (Pause)
 6 JUSTICE ASIF KC: Yes, I've read that.
 7 MR SCOTT: And if your Lordship would then please read
 8 paragraph 17, we set out there what we say the effect of
 9 seeking this relief was.
 10 JUSTICE ASIF KC: Yes, I've read that.
 11 MR SCOTT: I'm grateful.
 12 And as your Lordship knows from the submissions
 13 I made at the August hearing in this matter, our
 14 position consistently has been that there was never any
 15 basis in the LPA for this suite of relief, and what
 16 the Delaware complaint as issued was was an account in
 17 effect to restructure the Partnership through orders for
 18 declaratory relief and supposed specific performance,
 19 specific performance of the obligations which didn't
 20 exist under the LPA but which the GP invited
 21 the Delaware Court to impose.
 22 My Lord, the absence of any contractual basis for
 23 that relief is illustrated by two things. The first is
 24 that the GP had abandoned a good deal of it by the time
 25 the Delaware trial took place, with more still abandoned

12

1 come closing arguments.

2 The second is the fact that the Delaware Chancellor
3 has found, in her judgment following the trial, that
4 the GP's case in the most part has failed. It failed in
5 particular as regards the level of total contingent
6 subscriptions, and it failed in particular as regards
7 the attempt to strip us of budget approval rights.

8 If your Lordship will then go, please, to
9 paragraph 18 in our skeleton.

10 JUSTICE ASIF KC: Yes.

11 MR SCOTT: Your Lordship sees that by the time the music
12 stopped, so to speak, and we got to the end of the trial
13 in Delaware, there were five claims left in play, which
14 we identify in paragraph 18. First, the claim for
15 a declaration that we had breached the LPA or our common
16 law duties by refusing to consider budgets in good faith
17 and had waived our rights to do so in the future. That
18 claim failed and the declaration sought was refused.
19 And importantly, the claim failed because the alleged
20 duty relied upon, derived from Braganza, was held by
21 the Delaware judge not to exist in the context of this
22 partnership, and that chimes with an observation that
23 your Lordship made at the August hearing, that
24 the application of Braganza in the context of an ELP did
25 not appear to reflect Cayman law, as it does not.

13

1 My Lord, second, there was a claim from the GP for
2 specific performance requiring payment of the disputed
3 capital calls made in May. Now, this succeeded to
4 the extent of US\$96 million or so of those calls and we
5 intend to pay them as soon as the GP supplies us with
6 the account details required under the Chancellor's
7 post-judgment order, which includes protective measures
8 to hold the payment in a segregated account to the order
9 of the US Bankruptcy Court.

10 My Lord, third, the GP had sought a declaration that
11 its filing of the Delaware complaint was not done in bad
12 faith and was consistent with its fiduciary duties and
13 the terms of the LPA. The Chancellor declined to make
14 that declaration, or to deal with the issue in her
15 judgment, and that is because, as she said in her
16 judgment, it was an issue more appropriate for
17 determination by your Lordship.

18 My Lord, fourth, the GP had sought a declaration
19 that the default provisions in the LPA had not been
20 amended. That declaration bore no resemblance to
21 the relief initially sought in the Delaware complaint,
22 whereby, if granted, the GP would have been entitled to
23 apply a default charge across all of our interests in
24 the Partnership. That request was abandoned come
25 the trial. The declaration that was sought in its place

14

1 was pointless, because we had never disputed that
2 the default provisions had not been amended, and
3 the Chancellor duly refused to grant that pointless
4 declaration.

5 My Lord, fifth and finally, the GP had pursued
6 a claim for costs, but the Chancellor dismissed this
7 too, finding that the claim had been waived in
8 the course of arguments.

9 My Lord, the summary I've just given you is set out
10 in a bit more detail in paragraph 19 with references to
11 the Delaware judgment, but I'm not proposing, in
12 the light of your Lordship's indication, to take that up
13 at this stage. But we do say that there is a stark
14 contrast between what the GP sought to achieve by its
15 filing in May and what it has achieved. The GP had
16 claimed that the Partnership had \$550 million of capital
17 commitments remaining, had more than \$214 million of
18 unfunded approved budgets and that we had lost our
19 rights to approve further budgets. And one can readily
20 see that, if that reflected the true position under
21 the LPA, this Partnership would have a future. But it
22 does not reflect the true position under the LPA, as
23 the Chancellor has found, because following the Delaware
24 judgment, the GP has at most \$29 million in capital
25 commitments left to call from us(?), and in

15

1 circumstances where we are free to reject further
2 budgets, as it is our right to do and as we are inclined
3 to do given that we have no trust and confidence in
4 Dr Harrison and the GP.

5 My Lord, we respectfully submit that, in those
6 circumstances, the Partnership substratum is simply gone
7 and there is no serious argument to the contrary.
8 That's not an issue that turns upon the facts about
9 whether the loss of trust and confidence is justified.
10 It doesn't depend on any of that. It just depends on
11 the financial implications of the Delaware judgment. So
12 what we would envisage as regards determination of that
13 issue in January really are submissions to your Lordship
14 on the substratum case law and then the application of
15 the principles from those cases to the undisputed
16 financial landscape that results from the Delaware
17 judgment.

18 My Lord, can I make one thing clear at this point,
19 and it's important that this not be misrepresented in
20 Delaware or weaponised there. In saying what we do
21 about the loss of substratum of the Partnership, we are
22 not saying — we are not saying that the Partnership is
23 financially distressed. Plainly it is not: it has
24 billions of dollars in assets, it has piles of cash.
25 There is no suggestion that the Partnership is unable to

16

1 meet its liabilities as they fall due, nor any
2 suggestion of any risk that such difficulties may arise
3 at the Partnership level, whether imminently or
4 otherwise. The point is not that the Partnership is in
5 financial distress. The point is that Dr Harrison has
6 so managed the Partnership capital that the purpose for
7 which it was formed can no longer be carried out. It is
8 impossible or impracticable, the language used by
9 the case law, to continue where the Partnership has just
10 29 million in remaining available capital, a sum that
11 would soon be burned through by the ATLS fee that
12 Dr Harrison causes to be charged.

13 Now, he must have recognised that that would be
14 the position if we were correct in our contentions on
15 total contingent subscription amounts and our unfettered
16 right under the LPA to give or refuse budget approvals,
17 and that is no doubt why he caused the GP to put its
18 case so high in the Delaware complaint as issued in May
19 and to persist in the fantasy that we had agreed to
20 contribute hundreds of millions more in capital than we
21 ever did, because once the true contractual position is
22 ascertained, as it now has been, it was obvious and it
23 is obvious that the Partnership cannot continue its
24 business within the contractually agreed framework of
25 the LPA.

17

1 And, my Lord, the attempt by the GP to achieve
2 a restructuring through the Delaware complaint having
3 died with the Delaware judgment, what happened is
4 the pivot just a few days later to Chapter 11 as
5 the means by which to achieve the restructuring. And
6 the commencement of those Chapter 11 proceedings
7 effectively concedes that the substratum of
8 the Partnership has gone, because if the Partnership
9 could continue for the purpose for which it was formed,
10 there would be no basis to seek restructuring under
11 Chapter 11.

12 Importantly, the GP is not — is not seeking
13 Chapter 11 relief to deal with any insolvency at
14 the Partnership level, because there is none, and
15 my Lord, that is apparent from the Chapter 11 filings
16 themselves. I don't know if your Lordship has had
17 the opportunity to look at those.

18 JUSTICE ASIF KC: I didn't look at those, no.

19 MR SCOTT: Perhaps I should just show them to your Lordship.

20 They're in the hearing bundle and they're in broadly
21 similar terms. If your Lordship would just give me
22 a moment to find an example. If we take one in the case
23 of the Partnership, it's at tab 14. Your Lordship sees
24 that it's expressed to be a "Voluntary Petition". It
25 certainly wasn't voluntary from our perspective.

18

1 And if your Lordship turns to page 336 in
2 the bundle, your Lordship sees the estimated assets of
3 the Partnership are put at between \$1 billion and
4 \$10 billion and the estimated liabilities are put at
5 between \$100,000 and \$500,000. Well, if that's
6 financial distress, I suspect many of us in the world
7 would wish to be financially distressed. That's
8 the basis upon which this restructuring relief is being
9 sought.

10 My Lord, whatever the relief that will ultimately be
11 sought in Delaware if the Chapter 11 proceedings are not
12 struck out, it will be a form of reorganisation that
13 attempts to vary the terms upon which the Rigmora LPs
14 have agreed to participate in the Partnership and to do
15 so without our consent, and again, that illustrates that
16 the substratum of the Partnership is gone.

17 My Lord, another illustration, if you would go,
18 please, to tab 24 in the hearing bundle at page 621, and
19 this is a declaration of Dr Harrison that was filed
20 earlier this week in the Chapter 11 proceedings. Can
21 I ask your Lordship, please, to read paragraphs 16 and
22 17.

23 (Pause)

24 As your Lordship sees, Dr Harrison there admits that
25 one of his aims in pursuing the Chapter 11 proceedings

19

1 is to effect "a restructuring of the Partnership's
2 capital structure" and to "bring in new investors to
3 replace the defaulting limited partners". Well, we're
4 not defaulting partners and the suggestion otherwise is
5 difficult to reconcile with the injunction that
6 your Lordship made earlier this year and continued in
7 August. That prevents the GP from treating us as
8 defaulting partners on the basis of those disputed
9 capital calls. As I have said, we intend to comply with
10 them as soon as the GP provides us with the relevant
11 account details.

12 But, my Lord, the fact that Dr Harrison is taking
13 this stance in the Chapter 11 proceedings, whatever
14 the rights and wrongs of it, further illustrates that
15 the substratum of this Partnership is gone, because on
16 his own evidence, his own evidence, he's seeking
17 a restructuring of the Partnership's capital structure
18 and admission of new investors, all without our consent
19 or without any right to do it under the LPAs. My Lord,
20 it is, with respect, impossible to see how Dr Harrison
21 thinks he can get away with that, given there is
22 a petition on foot in your Lordship's court and given
23 the provisions of Section 99 of the Companies Act, under
24 which, in the event that a winding-up order is made, any
25 alteration in the status of the Partnership's members

20

1 would be void absent a validation order from
2 your Lordship, and there is no suggestion from the GP
3 that it intends to seek one of those, as it has not
4 during the life of these proceedings on a single
5 occasion.

6 Now, my Lord, these are among the points that we say
7 illustrate the abusive nature of the Chapter 11
8 proceedings, and the Delaware Court will rule on that in
9 due course. I'm obviously not asking your Lordship to
10 rule upon it. The key point for your Lordship's
11 purposes is that the commencement of the Chapter 11
12 proceedings in the circumstances of this case concedes
13 that the substratum of the Partnership has now gone and
14 that would be a sufficient basis for the court to wind
15 up the Partnership on just and equitable grounds and to
16 do so summarily.

17 My Lord, that brings me to my second topic, which is
18 the contractual and statutory consequences of
19 the Chapter 11 proceedings themselves.

20 My Lord, before I address that, just a brief word,
21 if I may, on the circumstances in which the Chapter 11
22 bankruptcy proceedings were brought. They are nothing
23 short of extraordinary. Your Lordship will recall that
24 back in August, when the GP abandoned its stay
25 application, it agreed to a trial of these Cayman

21

1 proceedings in January. It joined with us in asking
2 your Lordship to make available court time to have
3 the dispute resolved because it was in the interests of
4 all the parties that it be resolved at the January
5 trial. The GP did not indicate at that stage that it
6 might seek Chapter 11 protection, nor was that suggested
7 to your Lordship at the October mention, the October
8 CMC, the recent hearings on mediation and privilege
9 summonses, and that's more than a week of court time
10 during which the GP kept this under wraps. Nor was it
11 ever suggested to the Chancellor in Delaware. Nor had
12 the possibility ever been suggested in
13 the correspondence that passed between the parties.
14 The Chapter 11 proceedings were entirely unheralded.
15 The first we heard of them was in a casual email from
16 Mr Berdon of Quinn Emanuel, the individual who had filed
17 misleading evidence before your Lordship at the last
18 hearing, for which my learned friend Mr Ayres rightly
19 apologised. Now, we learned from him in the course of
20 email exchanges on 9 December about settling
21 the post-trial order in Delaware. Mr Berdon said,
22 "Well, the GP has filed Chapter 11 proceedings". And
23 that was remarkable and remarkable in circumstances
24 where the GP had repeatedly represented to us that it
25 was not seeking to imperil the January trial.

22

1 If your Lordship will just go, please, to tab 6 in
2 the hearing bundle, your Lordship should have there an
3 email from Walkers to the court on Monday of this week,
4 8 December — I'm so sorry —
5 JUSTICE ASIF KC: Last week.
6 MR SCOTT: — Monday last week.
7 JUSTICE ASIF KC: Yes.
8 MR SCOTT: I'm so sorry, I've lost a week! Monday last
9 week:
10 "Dear Ms Wood,
11 "Thank you for your email.
12 "We write to confirm that we are instructed to
13 appeal the Judge's decision on the Privilege Summonses."
14 Well, no surprise that those instructions were
15 given. But then this:
16 "In order to progress our client's appeal promptly
17 and so as not to imperil the January trial fixture, we
18 would be grateful if the reasoned judgment could be
19 handed down as soon as reasonably practicable."
20 JUSTICE ASIF KC: Yes, I spent most of the next day working
21 on the draft judgment because I also had the request
22 from the Court of Appeal to finalise it as soon as
23 possible.
24 MR SCOTT: And the GP didn't trouble to tell your Lordship
25 that at the same time that your Lordship was working

23

1 away on the judgment, the GP and Quinn Emanuel were
2 working away on these petitions. And your Lordship may
3 wish to ask Mr Ayres, when he gets on his feet, when
4 Walkers first knew that this was underway, because it's
5 very difficult to see how an email can have been sent
6 properly in those terms if Walkers knew that Chapter 11
7 filings were going to be made.

8 My Lord, likewise, if you turn the tab, please, to
9 tab 7, we've got a letter here from Walkers on
10 9 December, the very same day that the filings were
11 made. It's dealing with the appeal in relation to
12 the privilege summonses, and your Lordship sees, at
13 paragraph 3, Walkers say this:

14 "... for the avoidance of doubt, we reject any
15 suggestion in Your Letter that our client's appeal is in
16 any way unmeritorious or a tactical attempt to delay
17 the trial."

18 Or could multiply these communications. Take, for
19 example, the communication to the Court of Appeal
20 demanding that it convene a special sitting in an
21 attempt to preserve the January trial.

22 Your Lordship will recall from prior hearings in
23 this case the concerns that we have repeatedly expressed
24 about the GP's wrecking strategy in relation to
25 your Lordship's jurisdiction and the repeated attempts

24

1 made to forestall this court's examination of the GP's
 2 conduct and the application of its winding up
 3 jurisdiction to this Cayman ELP. Your Lordship will
 4 recall the failed stay applications, the one abandoned
 5 by Ms Prevezer in August and the one informally made by
 6 Mr Ayres when he came on the scene at the October
 7 mention. Your Lordship will recall the charade at
 8 the October CMC when the GP turned up without any
 9 proposals for directions to trial other than that we
 10 kick everything off for a two-day CMC to be listed who
 11 knows when. Your Lordship will recall the failed
 12 mediation summonses, the failed privilege summonses,
 13 the manoeuvrings in Delaware by which we were forced to
 14 withdraw our PL application. And, my Lord,
 15 the unheralded Chapter 11 proceedings coming hot on
 16 the heels of the disaster that the Delaware judgment was
 17 for the GP is all of a piece with the wrecking strategy
 18 that Dr Harrison has evidently settled upon in relation
 19 to proceedings in your Lordship's court.
 20 Your Lordship sees that strategy in some ways reach
 21 the denouement shortly following the Chapter 11
 22 proceedings, because if your Lordship will go next to
 23 tab 9 in the hearing bundle, does your Lordship have
 24 the — an email from Ms Moseley of Walkers on the 10th?
 25 JUSTICE ASIF KC: Yes.

25

1 MR SCOTT: And your Lordship will no doubt have read this,
 2 I suspect, as it came in. Walkers asserting that
 3 the effect of what had happened in Delaware was to
 4 automatically stay these Cayman proceedings, such that
 5 the PTR and the January trial had to be vacated. Now,
 6 that is quite wrong as a matter of Cayman law, as we
 7 explain in our skeleton, because it's a decision for
 8 your Lordship how to conduct these proceedings, and I'll
 9 return to that in due course.
 10 But when we declined to acquiesce to the GP's
 11 suggestion that the PTR should simply come out of
 12 the diary, declined because we said we wished to update
 13 your Lordship on these important developments, we
 14 received a truly remarkable letter from Quinn Emanuel.
 15 And if your Lordship will please turn that up, it's
 16 tab 10 —
 17 JUSTICE ASIF KC: Yes, I've read that.
 18 MR SCOTT: You've read the letter? I'm grateful. And
 19 your Lordship will no doubt have formed his own view on
 20 the appropriateness of a US law firm writing personally
 21 to a Cayman attorney, threatening him with severe
 22 consequences in the event of any knowing violation of
 23 the automatic stay. And my Lord, we would invite you to
 24 note the contrast between the aggressive tone that Quinn
 25 Emanuel took in this letter to Mr Farmer with

26

1 the position that they adopted before the judge in
 2 Delaware on Monday.
 3 JUSTICE ASIF KC: Yes, I've read the transcript as well.
 4 MR SCOTT: Your Lordship will note that the Quinn Emanuel
 5 counsel on that occasion did not draw to the Delaware
 6 judge's attention the letter that Quinn had sent just
 7 a few days prior.
 8 As your Lordship knows, we filed the motions to
 9 strike out the Delaware bankruptcy proceedings on
 10 12 December — that was on Friday. Ancillary to that,
 11 we moved to shorten the timetables for the GP to respond
 12 and that led to the scheduling hearing on Monday, and
 13 your Lordship has indicated that you've read
 14 the transcript so I don't need to go back over that.
 15 Your Lordship will have seen that the Delaware
 16 bankruptcy judge was content for the PTR to go ahead and
 17 that is why we are before your Lordship today.
 18 I've already addressed your Lordship on what we see
 19 as the next steps in Delaware, a motion to vary the stay
 20 this week, a request to the Delaware judge, if she can
 21 accommodate it, for a ruling in early January that will
 22 then clear the field for a determination by
 23 your Lordship of the paragraph 10(b) issues.
 24 So let me turn then to those paragraph 10(b) issues,
 25 and I've already addressed your Lordship on

27

1 the substratum aspect of it. I want to turn next to
 2 the contractual and statutory consequences of
 3 the commencement of the Chapter 11 proceedings, because
 4 in the GP's desperate attempt to avoid your Lordship's
 5 jurisdiction, it seems to have overlooked the statutory
 6 and contractual consequences, because this latest front
 7 in the wrecking strategy is in fact a form of kamikaze.
 8 If I can ask your Lordship please to take up
 9 the authorities bundle at tab 3.
 10 JUSTICE ASIF KC: Yes.
 11 MR SCOTT: (Inaudible) — the ELP Act. If I just invite
 12 your Lordship's attention to section 36(1):
 13 "An [ELP] shall ..."
 14 Shall:
 15 "... be voluntarily wound up in accordance with
 16 the provisions of the partnership agreement —
 17 "(a) at the time or upon the occurrence of any event
 18 specified in the partnership agreement ..."
 19 And if your Lordship will then move ahead, please,
 20 to page 10, your Lordship sees that:
 21 "The winding up of an exempted limited partnership
 22 shall be deemed to commence upon the earlier to occur
 23 ... of the following ..."
 24 And then (d):
 25 "The occurrence of an event provided by

28

1 the partnership agreement upon which the [ELP] is to be
2 wound up ..."

3 If your Lordship will then take up the hearing
4 bundle, please, at tab 5, and if your Lordship will go,
5 please, to page 55 — that's a bad reference. It should
6 be page 56. At the foot of the page, you should have
7 paragraph 10(b). And (a) having provided that:

8 "The Partnership shall continue in perpetuity,
9 unless it is sooner dissolved as provided in Paragraph
10 10(b) or by operation of law."

11 10(b) says this:

12 "The Partnership shall be wound up ..."

13 "Shall be wound up":

14 "... and dissolved (i) upon any event in respect of
15 the General Partner specified in Section 15(5) of
16 the ELP Law ..."

17 This LPA defines the ELP law as the 2012 revision as
18 amended from time to time. And the events to which
19 section 15(5) of the 2012 revision referred are now
20 found in section 36(7) of the Act. And if your Lordship
21 would please go to section 36(7), your Lordship sees
22 the relevant events there set out, and at (b), one such
23 event is "the commencement of liquidation, bankruptcy or
24 dissolution proceedings", and there can be no doubt, we
25 respectfully —

29

1 JUSTICE ASIF KC: Well, it's in relation to the sole or last
2 remaining qualified General Partner, so it's specific to
3 the General Partner.

4 MR SCOTT: Indeed, yes. And the point I was —
5 the follow-on point is that, where the General Partner
6 has commenced Chapter 11 bankruptcy proceedings against
7 itself, that is plainly an event of withdrawal within
8 the meaning of this section and that brings about
9 the termination provision in 10(b) of the LPA.

10 The effect of these provisions, the contract and
11 the statute under which the Partnership was created and
12 to which it owes its sole existence, the effect is that
13 a voluntary winding up is deemed to have commenced upon
14 9 December with the commencement of the Chapter 11
15 proceedings in respect of the GP. So that is why I say
16 the question is no longer whether the Partnership should
17 be wound up, the parties have agreed that it shall, with
18 the statutory provision that it shall, in the events
19 which have occurred, namely the Chapter 11 proceedings
20 in respect of the GP. And so the question now is how
21 and by whom the winding up should be conducted.

22 Now, our preference is for a compulsory winding up
23 order to be made.

24 JUSTICE ASIF KC: Can I just ask one question, Mr Scott?

25 MR SCOTT: Of course.

30

1 JUSTICE ASIF KC: So if that is right, then doesn't it have
2 the result that Section 99 only applies from 9 December
3 onwards, so you each say you may want or you may have
4 reason to want to try to persuade me to wind up on
5 the existing petition?

6 MR SCOTT: Well, that was the first reason why our
7 preference is that there be a compulsory winding-up
8 order on the petition, to preserve the operation of
9 Section 99. So that's the first reason and it's an
10 important reason.

11 There is a further reason, that we apprehend — and
12 I don't put it any higher than that — but we apprehend
13 that it may be easier for court-appointed liquidators in
14 a compulsory liquidation to obtain Chapter 15
15 recognition in the States and it would be for voluntary
16 liquidation.

17 So that's our preference, my Lord, and that's where
18 the substratum point comes in, because if we are right
19 on the substratum point, the consequence would be
20 a winding-up order on the just and equitable basis in
21 the existing petition.

22 But, my Lord, an alternative approach to
23 the preference I've just set out would be for the court
24 to exercise its power to remove the GP as liquidating
25 agent in the voluntary liquidation that is presently on

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1 foot and replace it with court appointees. My Lord,
2 the Cayman Court of Appeal has confirmed that there is
3 jurisdiction to do just that. That's the One Thousand &
4 One Voices case to which we refer at paragraph 35 of our
5 skeleton and which your Lordship has at tab 8 of
6 the authorities bundle, page 152.

7 JUSTICE ASIF KC: I also read that yesterday.

8 MR SCOTT: I'm grateful.

9 And we say this would be a clear case for exercising
10 that jurisdiction where we have the majority interest in
11 the winding up, and our preference is that it be done by
12 court appointees rather than the GP. I don't know if
13 your Lordship has had the opportunity to remind himself
14 of what Justice Kawaley said on that issue at first
15 instance in One Thousand & One Voices.

16 JUSTICE ASIF KC: You mean the paragraph at the end?

17 MR SCOTT: Indeed.

18 JUSTICE ASIF KC: Yes.

19 MR SCOTT: I am grateful. About the importance of giving
20 due weight, save for exceptional circumstances —

21 JUSTICE ASIF KC: To the parties with the economic interest.

22 MR SCOTT: Indeed, yes.

23 And again, it seems to us that that's an issue
24 your Lordship properly can and should grapple with at
25 the January hearing we seek and an issue that won't

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1 involve having to investigate whether trust and
2 confidence has justifiably gone, it will simply involve
3 taking due account of our interests as the majority in
4 having the winding up conducted by court appointees,
5 rather than a GP who we don't trust.

6 I turn finally to the question how the court should
7 proceed. And as I said earlier, we have every intention
8 of complying with and respecting the automatic stay,
9 which is why we have applied to have it lifted and why
10 we will be making a further application this week to
11 vary it to permit the termination of the paragraph 10(b)
12 issues in January. What I'm addressing your Lordship
13 on, as I am bound to do as an attorney of this court, is
14 your Lordship's powers and the principles that govern
15 them, and it's a matter for your Lordship how to proceed
16 in the light of the Chapter 11 proceedings. We address
17 the principles in our skeleton at 36 to 40.

18 JUSTICE ASIF KC: Yes.

19 MR SCOTT: The Chapter 11 stay is not a part of Cayman law.

20 If it is to have effect in this jurisdiction, it would
21 be as a result of a decision by your Lordship to
22 exercise his own power to stay the proceedings. And in
23 the usual way, your Lordship would do that where
24 the interests of justice so require, where to do so
25 would further the overriding objective, and recognising

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1 that while the court properly can and does give
2 assistance to foreign courts conducting insolvency
3 proceedings, the court cannot override local substantive
4 law and local public policies. And as a matter of
5 Cayman substantive law and public policy, it is
6 ordinarily important to hold commercial parties to their
7 bargains to protect the property rights that accrue to
8 them under such bargains and to supervise the winding up
9 of legal persons who owe their sole existence to Cayman
10 law, as does this Partnership.

11 My Lord, we do say, applying those principles,
12 the most appropriate course would be for your Lordship
13 to direct the two-day hearing we seek to determine
14 the paragraph 10(b) issues. As I said, they are
15 discrete issues of Cayman law and they can be determined
16 without the need to resolve any contentious issues of
17 fact and where the resolution will, or at least may,
18 provide a short answer to what should happen to this
19 Partnership from the perspective of Cayman law under
20 which it exists.

21 If we are right that the Delaware judgment means
22 the substratum of the Partnership has gone or if we are
23 right that the contractually agreed and statutory
24 consequences of Chapter 11 are that we are in winding up
25 now already, there will be no need for your Lordship to

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1 determine the various other issues in these proceedings.

2 My Lord, there is a further practical significance
3 about these issues, because if we are right on
4 the paragraph 10(b) point, then the Partnership has
5 already entered voluntary winding up, and that being so,
6 the GP is contractually obliged "to carry out
7 the winding up of the affairs of the Partnership
8 pursuant to the LPA". That is expressly set out in
9 paragraph 11(a) of the LPA. And the provision continues
10 to explain that the GP is required to do two things,
11 first, cause the Partnership to satisfy its liabilities
12 and obligations to creditors, and then, second, to
13 distribute the net assets remaining to the Partners.
14 Those are the purposes for which the GP can act now that
15 voluntary winding up is in train and they are the powers
16 that the GP can exercise.

17 JUSTICE ASIF KC: So are you saying that pursuant —

18 a restructuring is outside the scope of the powers?

19 MR SCOTT: Yes.

20 JUSTICE ASIF KC: Right.

21 MR SCOTT: And that's among the reasons why we say it would
22 be valuable to the Delaware bankruptcy judge to have
23 your Lordship's views on that question, because if
24 your Lordship agrees with us that pursuit of
25 the restructuring is outside the GP's powers under

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1 the LPA, or at least an improper exercise of such powers
2 that the GP has, that's another matter that the Delaware
3 judge may wish to bear in mind in determining how to
4 proceed with the Chapter 11. But we do say it's in
5 the interests not just of the parties, but the Delaware
6 court, and indeed all stakeholders in relation to these
7 Chapter 11 proceedings, to have clarity on the position
8 under Cayman law that results under this LPA and
9 the ELP.

10 My Lord, we also say that would further
11 the interests of justice and it would further
12 the overriding objective. It would avoid junking in its
13 entirety the January fixture that we have and the work
14 that the parties have been doing in preparation for it.
15 And the course we propose would not offend against
16 the Chapter 11 stay because, as I have said, we intend
17 to move in Delaware to have the stay lifted to
18 the extent necessary to permit determination of
19 the paragraph 10(b) issues.

20 My Lord, can I finish on this with a brief word
21 about the GP's position today. As I understand the GP's
22 skeleton, its position is that your Lordship should
23 simply vacate the January trial and give the parties
24 liberty to apply if the Chapter 11 stay is lifted.
25 That's paragraph 8 of their skeleton. That will achieve

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1 the long-standing wrecking strategy that the GP has been
 2 pursuing. The only reason given for it in the GP's
 3 skeleton is the suggestion that "the most appropriate
 4 way to recognise the effect of the worldwide stay
 5 imposed by the US Bankruptcy Proceedings" is to vacate
 6 the trial. Your Lordship has my submission that
 7 the question is not one of recognition, at least not at
 8 this stage. There's no appointee or approved
 9 restructuring in the Chapter 11 proceedings yet and
 10 there may never be one. All there is at this stage is
 11 the institution of proceedings. That does not result in
 12 an automatic stay under Cayman law. The question is
 13 instead a matter for your Lordship's discretionary
 14 decision taking account of all the circumstances. And
 15 we do say the appropriate and the fair and just exercise
 16 of discretion is the one that we propose, whereby we try
 17 to do something useful in January that will assist all
 18 concerned in relation to progressing the orderly winding
 19 up of this Partnership.

20 If your Lordship will just give me one moment.

21 (Pause).

22 My Lord, if I can just come back to the helpful
 23 indication that your Lordship gave about dates in
 24 January and February. What we would propose is that we
 25 will contact the court tomorrow, after we have had

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1 the scheduling conference in Delaware.
 2 JUSTICE ASIF KC: That's fine, Mr Scott.
 3 MR SCOTT: But what I can say, my Lord, and this is
 4 the attempt to be helpful, and I hope there will be
 5 a similar attempt on the other side, but what I can say
 6 is that from our perspective, our Cayman team can do all
 7 of the dates that your Lordship has indicated. I think
 8 I can do most of them.
 9 JUSTICE ASIF KC: That's fine.
 10 MR SCOTT: And if Mr Ayres would be good enough to indicate
 11 his side's availability, and if your Lordship is
 12 persuaded to make these two days available, we can all
 13 work together to get something in that fits both here
 14 and with the schedule in Delaware.

15 Unless I can assist your Lordship further, and I'm
 16 sorry I've slightly overrun.

17 JUSTICE ASIF KC: No, that's fine, Mr Scott.

18 The only -- I'm not suggesting this to anyone,
 19 the parties will take their own counsel as to the course
 20 they want to pursue, but I'm certainly conscious that
 21 judges in the Grand Court have, in the past, made
 22 anti-suit injunctions to prevent proceeding with
 23 liquidations or Chapter 11 in the States where
 24 the companies are Cayman incorporated companies. So I'm
 25 alive to the fact that just because the GP has commenced

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1 Chapter 11 proceedings is not necessarily the end of
 2 the matter.

3 MR SCOTT: Well, I hope that has been heard on the other
 4 side of the court. Obviously it's not an application --
 5 JUSTICE ASIF KC: No.

6 MR SCOTT: -- I am making to your Lordship, or can, but
 7 your Lordship is quite right to identify the court's own
 8 powers to protect its jurisdiction from these sorts of
 9 vexatious and oppressive attacks.

10 JUSTICE ASIF KC: Yes. Thank you, Mr Scott.

11 Yes, Mr Ayres.

12 Submissions by MR AYRES

13 MR AYRES: My Lord, I'm going to be in my submissions much
 14 shorter than my learned friend, and part of the reason
 15 for that is because I am going to be cautious about what
 16 I say in light of the fact there is Chapter 11
 17 bankruptcy proceedings, including the fact that although
 18 the judge, Judge Silverstein, gave permission for this
 19 PTR to take place, that was not a permission, as far as
 20 we were concerned, where any party, myself included, or
 21 the opponents, could simply trespass on the merits,
 22 describe in detail the positions that they wish to put
 23 forward and effectively advance the merits. So,
 24 my Lord, I am not going to respond in detail to a lot of
 25 what my learned friend said and your Lordship should not

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1 take that as an acceptance that he has.

2 My Lord, just one point of information in relation
 3 to a document my learned friend took you to. If
 4 your Lordship can go -- I think he took you to page 632,
 5 which is part of the declaration of Dr Harrison in
 6 relation to the application for Chapter 11
 7 reorganisation, and --

8 JUSTICE ASIF KC: It's actually 621, I think.

9 MR AYRES: Yes, and if your Lordship goes down in that
 10 document to the top of page 633 and reads paragraphs 46
 11 and 47, you'll see, my Lord, in paragraph 47, it's set
 12 out there that:

13 "the Partnership owes more than \$221 million in
 14 unfunded commitments to certain of the PortCos."

15 So, my Lord, that's obviously a fact that --

16 JUSTICE ASIF KC: Well, isn't that reflected in the
 17 (inaudible)?

18 MR AYRES: No, no. No, but it's an additional fact that's
 19 being put before the court at the same time.

20 So, my Lord, in terms of what I want to say, as
 21 I said, I'm going to be narrow and cautious in what
 22 I say. Your Lordship's seen and read the transcript of
 23 what happened in front of Judge Silverstein on Monday,
 24 and of course there are -- or at that stage on Monday
 25 there were two applications which were being made to

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1 the Delaware Bankruptcy Court. First of all was
2 the motion to dismiss the whole bankruptcy, and
3 secondly, as my learned friend alluded to, I call it
4 "the expedition motion", but I think in Delaware speak
5 it's called "the motion to shorten time".

6 JUSTICE ASIF KC: Yes.

7 MR AYRES: And in terms of dealing with the motion to
8 shorten time, that was dismissed. And I know
9 your Lordship's looked at it, but I just want to make
10 sure your Lordship's got the right page — I know
11 you have — just to remind you of the relevant section
12 where this is dealt with, 766 of the hearing bundle, in
13 the transcript, which is in tab 25. She makes her
14 ruling at line 13:

15 " ... I'm not going to shorten ... time ... "

16 And then over the page, your Lordship will see,
17 between lines 3 and 16, the judge talks about her own
18 scheduling issues and, of course, the fact that she'd
19 had a case settle which would allow her to effectively
20 deal with the application quicker than the parties had
21 hoped. But, my Lord, she makes that comment effectively
22 in — cognisant of you, and she says:

23 " ... I'm quite aware of setting aside scheduling

24 time, I'm quite aware of preparing for matters that
25 don't go forward, and I don't like to disrupt ... other

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1 judge's schedule[s] ... "

2 So your Lordship should be aware, and, you know,
3 this is in the context of obviously this
4 multi-jurisdictional case, that the Delaware Court is
5 expressly cognisant of the fact that it is either
6 disrupting or potentially disrupting something that is
7 happening in this court, so —

8 JUSTICE ASIF KC: Well, Mr Ayres, from my point of view,
9 the January trial is clearly not going ahead, both
10 because of the consequences of the Delaware trial and
11 also because of the Chapter 11 process, the current
12 existence of the Chapter 11, whether it continues beyond
13 the motion to dismiss or not, is irrelevant for that
14 purpose.

15 I raised the question of my availability later than
16 19 January because I am slightly concerned that it's
17 a pretty optimistic timetable, bearing in mind what
18 Judge Silverstein said about her own availability, to
19 expect everyone to be ready for 19 January. But, as
20 I've indicated, as it happens, I do have availability in
21 early February, and in the following — the week of
22 26 January, subject to the Bank Holiday, and the week of
23 2 February, which seemed to me to be a more realistic
24 timeframe to work with without requiring the judge in
25 Delaware to disrupt her own schedule.

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1 MR AYRES: So, my Lord, we are officers of the court and we
2 will cooperate with the question of giving our available
3 dates. I can say personally, myself, I am free on
4 the 19th because I was going to have to be anyway. But
5 my Lord, being officers of the court and co-operating
6 with our opponents and with you as to our available
7 dates, I should make it clear we are not consenting to
8 anything, we are not accepting that any of this should
9 be going ahead, and in fact quite the opposite. So,
10 my Lord, I think that needs to be made clear.

11 Just back on the page, my Lord, if you've got —

12 I know your Lordship wants to get me on to the topic
13 of —

14 JUSTICE ASIF KC: No, no.

15 MR AYRES: — where we go and how this works, but I just
16 want to just finish off that Judge Silverstein made it
17 very clear in lines 14 to 16 that she is going to grant
18 the relief — the relief from the stay for this —

19 JUSTICE ASIF KC: Sorry, is this on 766 or 767?

20 MR AYRES: This is 767, lines 14 to 16 — the whole passage
21 from 3 to 16 is appropriate. But she's very clear that:

22 " ... not any further than that at this point in
23 time."

24 So —

25 JUSTICE ASIF KC: Well, I think, really my understanding of

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1 what she says in the transcript — and tell me if I'm
2 wrong — is — if you think that I'm wrong — is that
3 she is content for the parties and the court,
4 the Grand Court, to deal with, if I can describe it like
5 this, practicalities, but not substantive matters.

6 MR AYRES: Well, my Lord, partly correct, but there's
7 a narrower — what she is content — as I understand it
8 objectively, she is content for the parties to come
9 before your Lordship to discuss the vacation of
10 the January trial, and that's it. And my opponents, I'm
11 afraid to say, have overstepped the mark in terms of
12 the Delaware Bankruptcy Court, and obviously —

13 JUSTICE ASIF KC: Well, she'll decide whether she thinks —

14 MR AYRES: She'll decide that. But obviously my learned
15 friend, he made an hour's worth of submissions and on
16 two occasions he said, "This should not be weaponised or
17 misrepresented". Now, of course it won't be
18 misrepresented, but he has said what he's said on
19 instructions from his client and he has been, in my
20 submission, highly incautious in relation to his
21 submissions to this court and how they will be treated
22 in a different court. But, my Lord, that's not really
23 a matter for me, that is a matter for the Delaware
24 Court.

25 But, my Lord, I want to come back to the real topic,

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1 and I don't really have a great deal to say in relation
2 to this, or certainly more than a few more minutes'
3 worth of submissions, but question is: what is workable?
4 My opponents will say, well, of course he's saying it's
5 unworkable, why wouldn't he, because that's part of
6 the wrecking strategy that they always suggest that we
7 are guilty of. But, my Lord, I am going to make some
8 submissions in relation to how this is actually going
9 to, in practical terms, work.

10 So there's already a motion to dismiss which needs
11 to be determined at some stage when Judge Silverstein
12 can do so. We are told that there is also going to be
13 a new motion issued in Delaware, which is a motion to
14 vary the stay, and as I understand it, we've been told
15 that we'll see that on 19 December. And as my learned
16 friend alluded to, if they can persuade
17 the Delaware Court to hear that in two weeks or as
18 promptly as possible, we're going to have — and this is
19 of course conjecture — a determination of that motion
20 to vary in early January. Now, first of all, we simply
21 just don't know at this stage whether that can happen.
22 You've heard nothing from my learned friend to
23 the effect that they have got some promises or some
24 assurances or even some less than assurances from
25 the Delaware Court that that may happen. So that's got

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1 to happen.

2 If the variation is granted, my Lord, then we can't
3 deal with all these new points that my learned friend
4 has addressed you on today, including the one he
5 mentioned at the very end of his submissions in an
6 unstructured way and without either some form of
7 originating process which is new or the amendment of
8 the existing petition, or both. And, my Lord, we
9 haven't seen a draft of any of these amendments or new
10 originating process, but what we have been provided with
11 in the skeleton argument, at paragraph 12, is what's
12 called the "paragraph 10(b) issues". My learned friend
13 was good enough to suggest that they call them the 10(b)
14 issues, because I certainly wouldn't call them 10(b)
15 issues, because the only one that really is a 10(b)
16 issue is the first one, 12.1.

17 Now, I would accept, subject to everything I've said
18 earlier on, that 12.1 is a reasonably neat and tidy
19 question, it's slightly more than a point of law, but it
20 involves the question of whether or not the references
21 to liquidation, bankruptcy or dissolution proceedings
22 include Chapter 11. And, my Lord, because I'm not going
23 to trespass on the merits, I'm not going to say anything
24 more about that, but you shouldn't take my non-trespass
25 as acceptance.

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1 But, my Lord, the second and third issues which are
2 described as paragraph 10(b) issues, they're either
3 completely new issues or they are the reheating of
4 the existing dispute in a different context. And as far
5 as 12.2 is concerned, that is a request for a compulsory
6 winding-up order, in other words the same sort of order
7 that is on the basis of the current petition, using
8 the fact that or the suggestion that the Partnership
9 substratum has now gone, based upon recent events,
10 including, as it says there, a consequence of
11 the Chapter 11 bankruptcy proceedings in the Delaware
12 judgment. Well, my Lord, obviously your Lordship can do
13 what you like, but the reality of that is that that is
14 going to need amendment of the existing proceedings in
15 order to be fair to the GP, no matter how rotten my
16 learned friends think the GP actually is.

17 And as far as 12.3 is concerned, that is not
18 a two-day determination, because that is a determination
19 of the question, notwithstanding what my learned friend
20 says about One Thousand & One Voices, as to whether or
21 not it is in fact the case that independent liquidators
22 should be appointed in place of the GP as liquidating
23 agent. Now, my Lord, one might make submissions about
24 the question of the economic interest, but of course in
25 One Thousand & One Voices, there was a considerable

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1 amount of misconduct of the GP in that case during
2 the course of the liquidation, which also supported
3 the decision that was made in that case. So it is not
4 a complete "slam dunk" that the Rigmora LPs are going to
5 be able to say One Thousand & One Voices, therefore that
6 is a completely easy application.

7 My submission is the reason that it's not a two-day
8 application, 12.3, is that we are going to be
9 considering the impact of the Delaware judgment,
10 the question of whether findings in the Delaware
11 judgment are binding upon you, and the question of
12 whether or not the GP is as rotten and guilty of
13 misconduct as the Rigmora LPs say, and that's simply
14 a reheating of the whole dispute. So it's completely
15 unworkable that we can have a two-day hearing. So,
16 my Lord, we say it can't be fairly tried procedurally,
17 either with a run up of two weeks in early January to
18 the 19th or in any of the dates that your Lordship said
19 in — I think I should have a look at the dates.

20 JUSTICE ASIF KC: February.

21 MR AYRES: So, my Lord, in terms of, I think, the 27th,
22 the week of that, I think I'm personally — I'm
23 personally free, I think. Yes, so — no, sorry, tell
24 a lie, I'm not free that week, but I am free in the week
25 of 2 February. I can do those dates. I am also free on

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1 2 March.
 2 So, my Lord, I don't want to suggest in any shape or
 3 form that I personally have availability issues. There
 4 may be Walkers issues, but we'll come back to that, and
 5 obviously client issues, which we'll communicate with
 6 Campbells about tomorrow. But, my Lord, it's simply not
 7 workable to have that.
 8 If your Lordship wants to set aside time for
 9 the purposes of making sure that isn't taken up by other
 10 cases, then, my Lord, I've got nothing to say about
 11 that, that's a matter for you, and something you're
 12 perfectly entitled to do. But the idea that this can
 13 happen quickly, in January, is, we say, for the birds,
 14 because there are too many hurdles, too much uncertainty
 15 and too many contingencies in place.
 16 And so, my Lord, as I said, I'm going to be much
 17 shorter than my learned friend. I'm not going to
 18 trespass on the merits. I'm not going to argue against
 19 what my learned friend said in relation to many of his
 20 points, not because I agree with them, because I do not
 21 want it to be said that we are acquiescing in a hearing
 22 which is effectively turning into a merits hearing, and
 23 that is completely contrary to the Chapter 11 bankruptcy
 24 stay.
 25 My Lord, unless I can assist further, those are my

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1 submissions.
 2 JUSTICE ASIF KC: Thank you.
 3 Reply submissions by MR SCOTT
 4 MR SCOTT: I hope your Lordship knows that none of my
 5 submissions invited your Lordship to determine any point
 6 on the merits. What I did was to identify to
 7 your Lordship the issues as we see them arising out of
 8 two undisputed facts: one, the Delaware judgment; and
 9 two, the Chapter 11 proceedings. I understand Mr Ayres'
 10 instructions will no doubt be to attempt to lay
 11 the ground for some argument in Delaware that we have
 12 breached the moratorium, but we have not.
 13 What we would invite your Lordship to note is,
 14 despite all the attempts to put roadblocks in the way of
 15 determination of the issues I've identified — and I'll
 16 come back to those roadblocks in a moment — there was
 17 no suggestion from Mr Ayres that the GP has
 18 a substantive answer to them.
 19 My Lord, before I deal with the paragraph 10(b)
 20 issues, can I just correct or at least give our
 21 perspective on the point from Dr Harrison's declaration
 22 that your Lordship was taken to. If we can go back to
 23 it, please, it's tab 24, 633. Your Lordship was shown
 24 46:
 25 "In addition to the unsecured obligations owed by

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1 the Partnership, ATP and ATLS ..."
 2 If your Lordship just pauses there. Those are the
 3 entities which filed on 9 December, and I'll show
 4 your Lordship one of the filings. What then had
 5 happened by the time of Dr Harrison's petition is that
 6 some of the portfolio companies had filed as well, and
 7 they are "the Filing Portfolio Companies", and it is
 8 they who are said to "owe more than \$5.4 million to
 9 dozens of creditors", as your Lordship would see from
 10 the petitions from the portfolio companies that are in
 11 the hearing bundle.
 12 I should, while we have this open, invite
 13 your Lordship's attention to 47, the suggestion that:
 14 "the Partnership owes more than \$221 million in
 15 unfunded commitments to certain of the PortCos."
 16 That is wrong. The Partnership does not owe
 17 anything. It does not have any legal commitment or
 18 liability whatsoever to those PortCos. What Dr Harrison
 19 means there is that he would wish to use that money if
 20 it were available to him, which it is not, as a result
 21 of the Delaware judgment.
 22 My Lord, while we have the hearing bundle open, if
 23 we could just please go again to the transcript of
 24 the conference earlier in the week, and if I can ask
 25 your Lordship please to take up page 766.

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1 JUSTICE ASIF KC: Yes.
 2 MR SCOTT: Lines 18 and 19 are, with respect, crystal clear:
 3 "I will grant relief from stay for the pretrial
 4 conference to go forward in the Caymans on Wednesday."
 5 If your Lordship would just re—read it — I know
 6 your Lordship has read it already — from line 18 down
 7 to line 2 over the page. Nothing in what I have said to
 8 your Lordship today is remotely inconsistent with that.
 9 So far as concerns the paragraph 10(b) issues, we're
 10 not remotely precious about labelling, we could call
 11 them "the issues" if that would be more palatable, but
 12 what they are in effect are preliminary issues. What
 13 we're asking your Lordship to do is direct their
 14 determination. In the usual way, your Lordship will
 15 give such directions as you think appropriate for
 16 the determination of those issues. So if your Lordship
 17 takes the view that there ought to be either amendments
 18 or the issuance of some originating process,
 19 your Lordship has ample power to direct that.
 20 Your Lordship might take the view that the issues can
 21 amply be addressed in skeleton arguments. That's
 22 certainly our view.
 23 My Lord, so far as the issues themselves and whether
 24 it makes sense to direct their determination,
 25 I understood Mr Ayres to accept that, subject to his

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1 overarching position of being unable to assist
 2 your Lordship today, that paragraph 12.1 is an issue
 3 that makes sense to determine. I think he called it
 4 a "neat and tidy" issue. We respectfully agree with
 5 that.
 6 On paragraphs 12.2 and 12.3, they were objected to
 7 as raising either new issues or rehashing the existing
 8 issues on the case, and what underlies all of that is
 9 the, with respect, false premise that the determination
 10 of those issues depends on your Lordship reaching a view
 11 about the GP's misconduct, and it does not. What it
 12 depends upon is your Lordship reaching a determination
 13 based upon the two undisputed facts identified in
 14 the Delaware judgment and the Chapter 11 bankruptcy
 15 proceeding and then applying to those undisputed facts
 16 principles of Cayman law.
 17 And, my Lord, as for the suggestion that this cannot
 18 be dealt with in a two-day hearing, can I just ask
 19 your Lordship please to take up tab 7 of the authorities
 20 bundle.
 21 JUSTICE ASIF KC: Yes.
 22 MR SCOTT: This is Justice Kawaley's decision in One
 23 Thousand & One Voices. Your Lordship will see that it
 24 was heard on a single day, 11 April '24, and -- on
 25 the papers, and the decision followed on 2 May.

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1 If I could just invite your Lordship's attention to
 2 paragraph 20, could I ask your Lordship please to read
 3 20 down to 26, which summarise the principles that apply
 4 in this context.
 5 (Pause)
 6 JUSTICE ASIF KC: Yes, I've read that.
 7 MR SCOTT: So we do say, with respect, this issue is well
 8 capable of being dealt with within the context of
 9 the two-day hearing that we suggest, once it is
 10 recognised that this is not an issue that will require
 11 your Lordship to form a view as to the allegations of
 12 misconduct against the GP. And as I say, we're very
 13 much in your Lordship's hands as to what, if any,
 14 additional directions are necessary to bring the matter
 15 forward in an orderly way. If your Lordship wants us to
 16 amend, of course we'll do that, subject to lifting
 17 the stay to the extent necessary to achieve that.
 18 My Lord, unless I can assist the court further,
 19 those are our submissions.
 20 I am reminded that it will assist
 21 the Delaware Court, from our perspective, to have
 22 your Lordship's ruling on these issues, if it were
 23 possible, in time for the hearing at 3.30 today.
 24 JUSTICE ASIF KC: Just remind me, is Delaware currently on
 25 the same time zone as the Cayman Islands or -- yes --

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1 MR SCOTT: I see everyone to my right nodding.
 2 JUSTICE ASIF KC: So I've got about four hours. That's
 3 fine. I'm just going to rise for about 10/15 minutes
 4 maximum and then I will come back and tell you what I'm
 5 going to do.
 6 (4.31 pm GMT)
 7 (A short break)
 8 (4.53 pm GMT)
 9 JUSTICE ASIF KC: This matter --
 10 MR AYRES: Before your Lordship starts. It's probably in
 11 everyone's interests that the microphones aren't muted.
 12 JUSTICE ASIF KC: Thank you, Mr Ayres.
 13 Judgment (excised for approval)
 14 That will need to be tidied up, because my sentences
 15 fell to pieces in a few areas, but I hope that gives
 16 a sufficient indication, first of all, of my reasons,
 17 and hopefully some useful input for the judge in
 18 Delaware this afternoon.
 19 MR SCOTT: I'm very grateful, my Lord.
 20 I've been asked to ask your Lordship if the court's
 21 audio recording could be shared with Opus 2.
 22 JUSTICE ASIF KC: Yes, of course.
 23 MR SCOTT: I think that means shared right now, so that we
 24 can ensure that corrections are properly made.
 25 JUSTICE ASIF KC: Yes. As soon as I rise, I will ask

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1 Ms Wood to make that available. Can you make sure that
 2 someone gives me, to give to her, or emails her with an
 3 email address for Opus 2 so that she can communicate as
 4 quickly as possible.
 5 MR SCOTT: I'm grateful, my Lord.
 6 I think, in the usual way, and in accordance with
 7 our duty as counsel, it falls to us to draft an order --
 8 JUSTICE ASIF KC: Yes, please.
 9 MR SCOTT: -- to reflect your Lordship's ruling.
 10 JUSTICE ASIF KC: Yes. I think the only actual order is
 11 that the trial needs to be vacated.
 12 MR SCOTT: And the direction of preliminary issues.
 13 JUSTICE ASIF KC: Yes, I suppose that's right. Yes, yes.
 14 MR SCOTT: And we would also ask your Lordship to reserve
 15 the costs of today.
 16 JUSTICE ASIF KC: That's fine. I'm happy to do that.
 17 MR SCOTT: I'm happy to put a (inaudible) hand to do
 18 the first draft of the order.
 19 JUSTICE ASIF KC: For what it's worth, again, it doesn't
 20 seem to me that there can be any sensible argument that
 21 that is outside the scope of what the judge in Delaware
 22 ordered was permissible in the context of what she said
 23 in the transcript at page 766 of the hearing bundle,
 24 where she said she'll:
 25 "... grant relief from stay for the pretrial

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1 conference to go forward in the Caymans on Wednesday.
 2 I don't know, it hasn't really been described to me what
 3 would be -- what substantively would go forward, what
 4 dates will be established by the court, or what's really
 5 left for the judge to decide ..."
 6 Et cetera. As I indicated to you in the course of
 7 argument, I read that as indicating that she was content
 8 for this court and for the parties to deal with
 9 the procedural consequences of the Chapter 11 filing,
 10 and it seems to me it's absolutely plain that that must
 11 include drawing up an order after the hearing today in
 12 order to reflect what I have ordered.
 13 MR SCOTT: Very grateful for that indication.
 14 MR AYRES: Well, the only thing I would say is we have no
 15 difficulty with the fact that the court needs to make an
 16 order, that seems to be obvious, that if counsel weren't
 17 helpful, your Lordship would do it.
 18 My Lord, just in relation to the question of whether
 19 you're going to make any further directions beyond
 20 vacation of the trial, my Lord, I'd urge some caution in
 21 relation to that, because there may be some incongruence
 22 with what you said in the judgment. You've made it
 23 clear that you've accepted the submission that there
 24 will need to be amendments to the pleadings. The
 25 reality is the formulation of preliminary issue can only

1 sensibly happen once --
 2 JUSTICE ASIF KC: (Overspeaking -- inaudible).
 3 MR SCOTT: -- once this is filed. So I would ask
 4 your Lordship not to --
 5 JUSTICE ASIF KC: Yes.
 6 Mr Scott, I did hesitate, because -- when you were
 7 asking about that, because I wasn't entirely sure.
 8 I think it's right that until the pleadings have been
 9 amended it's probably better to hold back on the wording
 10 of the order for the preliminary issues. I mean, it
 11 seems to me it's plain from what's said in paragraph 12
 12 of the skeleton that everyone knows what the issues are
 13 intended to be.
 14 MR SCOTT: Indeed. And equally plain that your Lordship has
 15 just ruled that there will be a trial of those issues.
 16 JUSTICE ASIF KC: Yes.
 17 MR SCOTT: I'm very happy to defer formalising that in an
 18 order until we have been permitted to go through
 19 the process of pleading.
 20 JUSTICE ASIF KC: I think -- I think, just --
 21 MR SCOTT: But I don't want anyone to be suggesting this
 22 afternoon in Delaware --
 23 JUSTICE ASIF KC: That I haven't said.
 24 MR SCOTT: -- that it hasn't happened, because it has
 25 happened.

1 JUSTICE ASIF KC: Exactly. No, I think, bearing in mind
 2 the sensibilities -- everyone is concerned about
 3 trespassing on the Delaware court -- I'm happy to -- not
 4 to include form -- not to include that in a form of this
 5 order at this stage, but I have given a very clear
 6 indication that that is what I intend to happen, and
 7 absent something happening in Delaware to derail that,
 8 that is what I consider should happen.
 9 MR SCOTT: So the order will in that case provide for
 10 the January hearing to be --
 11 JUSTICE ASIF KC: Vacated.
 12 MR SCOTT: -- vacated and the two-day hearing to be fixed in
 13 the week commencing the 2nd?
 14 JUSTICE ASIF KC: Exactly. And costs reserved.
 15 MR SCOTT: I'm very grateful. We'll turn that around and
 16 hopefully get that to you very shortly.
 17 JUSTICE ASIF KC: All right. Thank you all very much.
 18 (5.15 pm GMT
 19 (The hearing concluded)
 20
 21
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EXHIBIT 2

**ATP III GP, LTD.
(THE "COMPANY")**

**WRITTEN RESOLUTIONS OF THE SOLE DIRECTOR
OF THE COMPANY DATED 9th FEBRUARY 2026**

1. BACKGROUND

1.1 IT IS NOTED that:

- (a) the Company is the general partner of ATP Life Science Ventures, L.P., a Cayman Islands exempted limited partnership (the "**Partnership**");
- (b) the partnership agreement of the Partnership confers upon the Company as general partner of the Partnership, broad power and authority to manage the affairs and conduct of the business of the Partnership;
- (c) all references in these resolutions to things being done by the Partnership shall be construed as to things being done by the Company as general partner of the Partnership; and
- (d) on 9 December 2025, each of the Company, the Partnership and Apple Tree Life Sciences, Inc., a Delaware corporation (the "**Corporation**" and collectively with the Company and the Partnership, the "**ATP Group**"), filed, or caused to be filed, a voluntary petition for relief commencing a case (collectively the "**Chapter 11 Case**") under the provisions of chapter 11 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (as amended). The Company on behalf of the Partnership owns interests in certain companies and interests (the "**Portfolio Companies**"), certain of which also commenced Chapter 11 Cases.

2. DIRECTOR'S INTEREST

2.1 IT IS NOTED that:

- (a) Dr Seth Harrison discloses an interest as a shareholder, employee, Director and/or officer of the ATP Group and/or various of the Portfolio Companies (together, the "**Group Companies**");
- (b) pursuant to the articles of association of the Company (as amended from time to time) (the "**Articles**"), "*a general notice that a Director is a shareholder, Director, officer or employee of any specified firm or company and is to be regarded as interested in any transaction with such firm or company shall be sufficient disclosure for the purposes of voting on a resolution in respect of a contract or transaction in which he has an interest, and after such general notice, it shall not be necessary to give special notice relating to any particular transaction*"; and
- (c) the Director named above therefore:
 - (i) is to be considered as interested in any relevant contract or arrangement with such Group Companies; and
 - (ii) requests that the foregoing be treated as general notice of such interests.

3. APPOINTMENT OF INDEPENDENT DIRECTOR

3.1 IT IS NOTED that:

- (a) the Director wishes to appoint Tim Pohl as an Independent Director of the Company with immediate effect pursuant to the terms set out in these resolutions (notably, the terms set out in Schedule 1 attached hereto) and that such proposed Independent Director has indicated a willingness to hold such office and intends to deliver a letter of consent to the Company (such appointment, the "**Independent Director's Appointment**"); and
- (b) Tim Pohl accepts appointment as an Independent Director of the Company in reliance on, inter alia, the indemnity in favour of, inter alios, the Directors, as set out in the Articles.

3.2 IT IS RESOLVED that:

- (a) the Independent Director's Appointment be and is hereby approved with immediate effect until such time as the Independent Director resigns or is removed from office in accordance with the Articles;
- (b) in connection with the Independent Director's Appointment, Tim Pohl in his capacity as an Independent Director of the Company, to the maximum extent permitted by law, shall exercise such powers, perform such duties, assume such responsibilities and do all acts and matters on behalf of the Company and/or the Partnership as set out in Schedule 1 attached hereto; and
- (c) the Company's registered office provider, Maples Corporate Services Limited, be and is hereby instructed to update the Register of Directors of the Company and to make the necessary filings with the Registrar of Companies to reflect the Independent Director's Appointment.

4. GENERAL AUTHORISATION

4.1 IT IS RESOLVED that, in connection with or to carry out the actions contemplated by the foregoing resolutions, the Director, officer or (if applicable) any attorney or duly authorised signatory of the Company (any such person being an "**Attorney**" or "**Authorised Signatory**" respectively) be, and such other persons as are authorised by any of them be, and each hereby is, authorised, in the name and on behalf of the Company, to do such further acts and things as the Director or officer or such duly authorised other person shall deem necessary or appropriate, including to do and perform (or cause to be done and performed), in the name and on behalf of the Company, all such acts and to sign, make, execute, deliver, issue or file (or cause to be signed, made, executed, delivered, issued or filed) with any person including any governmental authority or agency, all such agreements, documents, instruments, certificates, consents or waivers and all amendments to any such agreements, documents, instruments, certificates, consents or waivers and to pay, or cause to be paid, all such payments, as any of them may deem necessary or advisable in order to carry out the intent of the foregoing resolutions, the authority for the doing of any such acts and things and the signing, making, execution, delivery, issue and filing of such of the foregoing to be conclusively evidenced thereby.

5. RATIFICATION OF PRIOR ACTIONS

5.1 IT IS RESOLVED that any and all actions of the Company, or of the Director or officer or any Attorney or Authorised Signatory, taken in connection with the actions contemplated by the foregoing resolutions prior to the execution hereof be and are hereby ratified, confirmed, approved and adopted in all respects as fully as if such action(s) had been presented to for approval and approved by, the Director prior to such action being taken.

[Signature page follows]



Dr Seth Harrison
Director

SCHEDULE 1

1. SCOPE OF POWER AND AUTHORITY GRANTED IN CONNECTION TO THE INDEPENDENT DIRECTOR'S APPOINTMENT

All capitalised terms used in this Schedule 1 that are not otherwise defined herein shall have the meaning given to such term in the accompanying Director's resolutions.

1.1 To the maximum extent permitted by law, in connection with the Independent Director's Appointment, Tim Pohl is only permitted to do such acts, attend to such matters and otherwise have such power and authority for and on behalf of the Company and/or on behalf of the Partnership as set out below:

- (a) be authorised, empowered and directed, in the name and on behalf of the Company and/or the Partnership to undertake such acts as reasonably expected of a director of a Cayman Islands exempted company in circumstances where Dr Seth Harrison has a Conflict of Interest (as such term is defined herein); and
- (b) be authorised, empowered and directed, in the name and on behalf of the Company and/or the Partnership to execute and deliver any and all documents, agreements, letters, certificates or other instruments that such Independent Director reasonably considers necessary, advisable or convenient in the furtherance of his role as an Independent Director as set forth in clause (a) above; and
- (c) directed, in the name and on behalf of the Company and/or the Partnership to certify and deliver a true copy of the foregoing resolutions to any person to whom such certification and delivery is necessary or appropriate in the opinion of Tim Pohl.

1.2 Dr Seth Harrison will only have a "**Conflict of Interest**" in the following circumstances:

1.2.1 *Divergence of Dr Seth Harrison's personal or other interests from the best interests of the Partnership and/or the Company in its capacity as the General Partner of the Partnership*

- (a) Dr Seth Harrison has, or may have, the following personal interests:
 - (i) the holder of all shares in the capital of the Company;
 - (ii) the director of the Company;
 - (iii) the holder of limited partnership interests in the Partnership;
 - (iv) the settlor of the Les Pommes Trust, such trust being the holder of limited partnership interests in the Partnership;
 - (v) the director or officer or committee member or similar of certain of the Portfolio Companies;
 - (vi) the director and officer of the Corporation,(collectively "**Dr Harrison's Personal Interests**").

- (b) Dr Seth Harrison will have a conflict of interest in any circumstances where any of Dr Harrison's Personal Interests diverge, or may diverge, from the best interests of the Partnership and/or the Company in its capacity as the General Partner of the Partnership.

EXHIBIT 3

1 research. This isn't opening a, you know, 2,000
2 square foot, you know, bagel store.

3 Q. So whose job is it or whose right
4 is it to determine whether or not they should be
5 shut down?

6 A. I believe -- again, this is --
7 MS. TOMASCO: Calls for a --
8 objection. Calls for a legal conclusion. You
9 can answer to the extent --

10 THE WITNESS: Because I don't
11 want to tread on, you know, you're going to
12 point out something, you know, an amendment,
13 like, 30 -- or amendment 2016 that -- if I'm
14 wrong about this.

15 You know, it's the general
16 partner has that duty to determine what to do
17 next. I can't tell you specifically anything
18 about the limited partner. You know, the
19 limited partner's rights are to stop funding or
20 not. I do not believe they could -- if you will
21 unbudget a company, I don't believe that's a
22 right that they have, because I've -- you know,
23 my reading and, you know, my understanding and
24 that's a layperson's understanding, so you can
25 point me out if I'm wrong.

1 But that's the mandate of the
2 general partner and of The Fund to continue the
3 programs that they have going. And that's what
4 this is. That's what your clients bought into
5 when they funded, you know, their \$2.3 billion
6 and they got a bunch of that money back.

7 BY MR. TAFT:

8 Q. And now, it's also your
9 responsibility to determine whether or not
10 funding should be cut off for these portfolio
11 companies, correct?

12 MS. TOMASCO: Objection. Form.
13 Calls for a legal conclusion.

14 THE WITNESS: Well, I mean, I was
15 going to answer, says you, maybe? I don't know
16 if you're arguing with me now or if you're
17 asking --

18 BY MR. TAFT:

19 Q. I'm asking: Do you consider it
20 to be your responsibility to assess whether or
21 not these portfolio companies warrant further
22 investment?

23 A. I think -- I think my
24 responsibility is to rely on the people whose
25 business judgment have -- are in charge of the

1 actual programs, and understand what they're
2 doing, and make a determination, if at this
3 stage, what's the best way to achieve value.

4 Because if you shut these
5 programs down, I will tell you they are worth
6 zero. And so all that money that went into
7 them, that was your guys' money is worth zero.

8 Q. This budget for Apetor calls for
9 total funding through July 31st of \$3.5 million,
10 correct?

11 A. \$3,524,250.

12 Q. At the end of that 30 -- you
13 know, July 31st, is there a possibility that
14 Apetor is worth zero?

15 A. Yes.

16 Q. Okay. Have you assessed the
17 likelihood of that possibility?

18 A. I can't assess the -- I cannot
19 assess -- I'm sorry.

20 Have I -- what's the word you
21 used?

22 Q. Assessed.

23 A. Assessed, sorry. I had a brain
24 fog on that. Excuse me.

25 Q. No problem.

1 A. Have I assessed the likelihood?

2 I assessed the likelihood that,
3 based on the facts that they know today, the
4 management team, the experts think it's worth
5 funding.

6 Q. But you have not independently
7 analyzed -- and you and B. Riley have not
8 analyzed the value of the -- the current value
9 today of Apetor, correct?

10 A. We have not.

11 Q. And you haven't analyzed the
12 expected value of Apetor if this 31-week funding
13 budget goes forward, correct?

14 A. What I've assessed is, the value
15 of Apetor, if it gets shut down is zero.

16 Q. Okay.

17 A. And then given its mandate.
18 Excuse me. Given its mandate and given that
19 there hasn't been, you know, in my discussions
20 with the management team, given its mandate,
21 there hasn't been anything that would suggest
22 that it should be cut off and not pursued, then
23 it's worth going forward.

24 Because that's what this company
25 does. That's what your guy invested in. Your

1 guy invested in thoughts and ideas of people.

2 And that's what's going on here.

3 I will tell you, if you don't
4 fund it, it's worth zero. That's an easy
5 assessment.

6 Q. And it might be worth zero today,
7 correct?

8 A. It might be.

9 Q. Okay.

10 A. Who knows? It might be, but it's
11 worth -- but it's certainly worth the business
12 judgment of the people say it's worth keeping
13 going. None of these companies have we put
14 forth where we said, gee, there's been some bad
15 results, this hasn't worked, that hasn't worked.
16 That hasn't happened.

17 And so you keep the mandate, you
18 keep the normal, normal course of business.
19 That's what this company does. It's not like
20 all of a sudden, they decided to wake up and
21 say, oh, we're going to try to cure cancer,
22 we're going to try to get, you know, we're going
23 to try to, you know, cure this flu or
24 Parkinson's, right?

25 This is research that continues.

1 It's on a -- it's on a -- what's the word I'm
2 looking for? It's on a --

3 MS. TOMASCO: Iterative.

4 THE WITNESS: No, no, no.

5 MR. TAFT: Objection.

6 THE WITNESS: The word I'm
7 looking for -- it's on a continuum, sorry. It's
8 on a continuum of starting from the idea and
9 getting it to market, to commercialization. And
10 that's a process, and the company is doing what
11 it's supposed to do, what your guy bought into,
12 and to invest in that process.

13 If your guy doesn't want to do it
14 anymore, that's okay. But, you know, we're
15 continuing with the process.

16 BY MR. TAFT:

17 Q. So your recommendation as CRO is
18 that, notwithstanding that Apetor might be worth
19 zero today and might be worth zero 26 weeks from
20 now, The Fund should invest a further
21 \$3.5 million in Apetor, correct?

22 A. I -- that premise is something I
23 cannot accept, because first of all, you've
24 asked me that question 16 times and so she
25 should be saying objective -- "objection, asked

1 and answered." But it's -- that's not how --

2 MS. TOMASCO: Objection. Asked
3 and answered.

4 THE WITNESS: That's not how
5 these companies work. These companies work, is
6 that the determination to not fund is when -- is
7 when the medical experts, are you trying to get
8 me to say I'm not a medical expert, I'm not a
9 medical expert, okay?

10 But I relied on people, who they
11 are, okay? And their business judgment is that
12 it continues, because it's worth zero if you
13 don't. All the money that's gone into it was a
14 waste of money.

15 BY MR. TAFT:

16 Q. And you have the opportunity here
17 to waste an additional \$3.5 million that might
18 or might not generate any return, correct?

19 A. No. Because -- says you that
20 it's a waste.

21 Q. Have you concluded that it won't
22 be a waste?

23 A. I have concluded that it's worth
24 zero. If it's -- it's worth zero, if it's not.
25 So then again, relying on the

1 business judgment of the management team, the
2 management team who are the experts. Put up an
3 expert. Let me talk to one of your guys that's
4 an expert and let me hear what he or she has to
5 say.

6 Q. I've got --

7 A. Be happy to.

8 Q. I've got you.

9 Have you concluded that it will
10 be worth at least \$3.5 million if you spend this
11 additional \$3.5 million over the next 26 weeks?

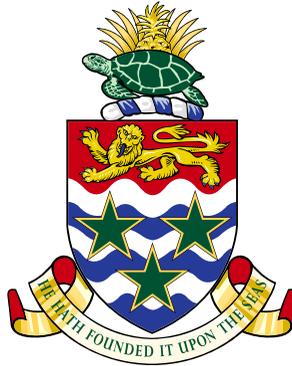
12 A. I don't know.

13 Q. Okay. Have you done that
14 analysis for any of the PortCos covered by the
15 funding motion?

16 A. I would answer, all the PortCos
17 similarly, although with Aulos, which is a
18 clinical stage company, it, you know, based on
19 the discussions with the management team and
20 based on, you know, Mr. Bogdanov, if I'm saying
21 the name, Yuri's last name, based on his email,
22 offering, you know, put in 10 million into it,
23 that seems to be -- that seems to be, I don't
24 know, evidence, if that's the right word, that
25 Aulos is super, you know, super, worth putting

EXHIBIT 4

CAYMAN ISLANDS



EXEMPTED LIMITED PARTNERSHIP ACT

(2025 Revision)

Supplement No. 3 published with Legislation Gazette No. 7 of 30th January, 2025.

PUBLISHING DETAILS

Law 5 of 2014 consolidated with Laws 10 of 2017, 31 of 2020, Act 13 of 2024 and as amended by Act 56 of 2020.

Revised under the authority of the *Law Revision Act (2020 Revision)*.

Originally enacted —

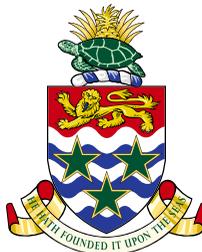
- Law 5 of 2014-11th April, 2014
- Law 10 of 2017-27th March, 2017
- Law 31 of 2020-1st July, 2020
- Act 56 of 2020-7th December, 2020
- Act 13 of 2024-11th December, 2024.

Consolidated and revised this 1st day of January, 2025.

Note (not forming part of this Act): This revision replaces the 2021 Revision which should now be discarded.



CAYMAN ISLANDS



EXEMPTED LIMITED PARTNERSHIP ACT
(2025 Revision)

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CAYMAN ISLANDS



EXEMPTED LIMITED PARTNERSHIP ACT
(2025 Revision)

Short title

1. This Act may be cited as the *Exempted Limited Partnership Act (2025 Revision)*.

Interpretation

2. In this Act —

“**certified translator**” means a person whose interpretation or translation competence has been tested and approved by a professional association or governmental body or any other person determined by the Registrar;

“**commitment**” means cash, property, services rendered or other assets which a partner agrees to contribute to the capital of an exempted limited partnership in its capacity as partner but does not include any moneys agreed to be lent to an exempted limited partnership;

“**Companies Act**” means the *Companies Act (2025 Revision)*;

“**contribution**” means cash, property, services or other assets which a partner contributes to the capital of an exempted limited partnership in its capacity as partner but does not include any moneys lent by a partner to an exempted limited partnership;

“**court**” means the Grand Court;

“**dual foreign name**” means an additional name in any language not utilising the Roman alphabet, utilising any letters, characters, script, accents and other diacritical marks, and which does not have to be a translation or transliteration of the name in the Roman alphabet;



“exempted limited partnership” means —

- (a) a partnership formed and registered under section 9(1); or
- (b) a partnership that before the commencement of the *Exempted Limited Partnership Law, 2014 (Law 5 of 2014)* was formed and registered under the **repealed** *Exempted Limited Partnership Law (2013 Revision)*;

“general partner” means a person who is named as such in the statement filed pursuant to section 9 or 10(2) and if more than one shall mean each general partner, unless this Act otherwise provides;

“general partnership interest” means the partnership interest of a general partner in that person’s capacity as such;

“insolvency of the exempted limited partnership” means that the general partner is unable to pay the debts and obligations of the exempted limited partnership, otherwise than in respect of liabilities to partners on account of their partnership interests, in the ordinary course of business as they fall due out of the assets of the exempted limited partnership, without recourse to the separate assets of the general partner not contributed or committed to the exempted limited partnership and **“insolvent”** shall be construed accordingly;

“limited partner” means a person who has become a limited partner in accordance with section 4(2) or otherwise pursuant to section 32;

“limited partnership interest” means the partnership interest of a limited partner in that person’s capacity as such;

“majority of limited partners” means a majority or number of limited partners, or class or category of limited partners, or other persons, whether parties to the partnership agreement or otherwise including the general partner, required by or specified, either generally or in respect of a particular matter, in the partnership agreement and calculated in the manner specified in the partnership agreement, but if no such majority or manner is specified in the partnership agreement any required majority of the limited partners shall be a simple majority of the limited partners calculated by reference to the value of the contributions of the limited partners at the time of determination;

“overseas company” means a company, body corporate or corporate entity existing under the law of a jurisdiction outside of the Islands;

“part” means, in relation to a partnership interest, a proportionate part of that partnership interest, comprising both the rights, and the obligations under the partnership agreement and this Act but without prejudice to the liability of a general partner under section 4(2);

“partner” means a limited partner or a general partner;

“partnership agreement” means any agreement of the partners which provides for the establishment of, and regulates the affairs of, an exempted limited



partnership, the conduct of its business and the rights and obligations of the partners amongst themselves;

“**partnership interest**” means the interest of a partner in an exempted limited partnership in respect of profit, capital and voting or other rights, benefits or obligations to which that partner is entitled or subject pursuant to the partnership agreement or this Act;

“**public in the Islands**” excludes any exempted or ordinary non-resident company registered under the *Companies Act (2025 Revision)*, a foreign company registered pursuant to Part 9 of the *Companies Act (2025 Revision)*, a foreign limited partnership registered under section 42, any company acting as general partner of a partnership registered under section 9(1) or any director or officer of the same acting in that capacity or the trustee of any trust registered or capable of registration under section 74 of the *Trusts Act (2021 Revision)* acting in that capacity;

“**qualifying general partner**” means a general partner of an exempted limited partnership that satisfies paragraph (a), (b), (c) or (d) of section 4(4);

“**registered office provider**” means in relation to an exempted limited partnership the person who provides the registered office for that exempted limited partnership;

“**Registrar**” means the Registrar of Exempted Limited Partnerships appointed in accordance with section 8;

“**security interest**” means a legal mortgage, an equitable mortgage, charge or other form of security interest granted with respect to a partnership interest or part thereof whether or not governed by the laws of the Islands;

“**signature**” includes a facsimile of a signature however reproduced and a digital signature;

“**special economic zone business**” means any type of business authorised to be carried on in a special economic zone pursuant to any Law in force in the Islands; and

“**translated name**” means a translation or transliteration of an exempted limited partnership’s dual foreign name into the English language provided by either a person licensed to provide the exempted limited partnership’s registered office in the Islands or a certified translator, together with a statement as to the foreign language in which the dual foreign name is written.

Saving of rules of equity and common law

3. The rules of equity and of common law applicable to partnerships as modified by the *Partnership Act (2025 Revision)* but excluding sections 31, 45 to 54 and 56 to 57 shall apply to an exempted limited partnership, except where they are inconsistent with the express provisions of this Act.



Constitution

4. (1) An exempted limited partnership may be formed for any lawful purpose to be carried out and undertaken either in or from within the Islands or elsewhere upon the terms, with the rights and powers, and subject to the conditions, limitations, restrictions and liabilities mentioned in this Act but an exempted limited partnership shall not undertake business with the public in the Islands other than so far as may be necessary for the carrying on of the business of that exempted limited partnership exterior to the Islands.
- (2) An exempted limited partnership shall consist of one or more persons called general partners who shall, in the event that the assets of the exempted limited partnership are inadequate, be liable for all debts and obligations of the exempted limited partnership, and one or more persons called limited partners who shall not be liable for the debts or obligations of the exempted limited partnership save as provided in the partnership agreement and to the extent specified in sections 20(1) and 34(1), but a general partner, without derogation from that general partner's position as such, may, in addition, take an interest as a limited partner in the exempted limited partnership.
- (3) A body corporate, with or without limited liability, and a partnership whether in the name of the partnership and whether or not an exempted limited partnership, may be a general or limited partner of an exempted limited partnership.
- (4) Any one or more of the limited partners and general partners of an exempted limited partnership may be resident, domiciled, established, incorporated or registered under the laws of the Islands or outside of the Islands but at least one general partner shall —
- (a) if an individual, be resident in the Islands;
 - (b) if a company, be registered under the *Companies Act (2025 Revision)* or registered pursuant to Part 9 of the *Companies Act (2025 Revision)*;
 - (c) if a partnership, be registered pursuant to section 9(1) or 42, as applicable; or
 - (d) if any other person, be registered under any other Law or regulation as may be prescribed.
- (5) A limited partner, or person with analogous status, of a partnership which is the general partner of an exempted limited partnership shall not, by virtue of that fact alone, be taken to be a general partner of the exempted limited partnership.
- (6) A limited partner of an exempted limited partnership shall not cease to have the benefit of limited liability by reason only of the partnership ceasing to have a qualifying general partner.



When licence not required

5. A person who acts as a general partner of an exempted limited partnership is not, by virtue solely of so acting, required to be licensed under the *Local Companies (Control) Act (2025 Revision)* and shall not require a trust company licence under the *Banks and Trust Companies Act (2025 Revision)*, a mutual fund administrator's licence under the *Mutual Funds Act (2025 Revision)*, a licence under the *Companies Management Act (2025 Revision)* or a licence under the *Trade and Business Licensing Act (2021 Revision)*.

Name reservation

- 5A. (1) A person ("applicant") may apply to reserve a specified name by —
- (a) filing with the Registrar (including by permitted electronic means) an application executed by the applicant specifying the name to be reserved and the name and address of the applicant; and
 - (b) paying the prescribed application fee.
- (2) If, on an application made under subsection (1), the Registrar finds that the name is available for use by an exempted limited partnership or a foreign limited partnership, the Registrar may reserve the name for exclusive use by the applicant for a period of up to four months.
- (3) On or before the expiry of the period for name reservation under subsection (2), the applicant may make further successive applications pursuant to subsection (2) to reserve the specified name.

Name and registered office

6. (1) Every exempted limited partnership shall have a name which —
- (a) shall include the words "Limited Partnership" or the letters "L.P." or "LP";
 - (b) may include the name of any general partner or limited partner or any derivation thereof; and
 - (c) in the case of an exempted limited partnership carrying on special economic zone business, shall include the words "special economic zone" or the letters "SEZ",

in each case which may be preceded by or followed with a dual or foreign name, but no exempted limited partnership shall have a name or translated name which, because it is identical or similar to the name of any other entity or it falsely suggests the patronage of or a connection with some person or authority or it suggests that the exempted limited partnership is licensed whether in the Islands or elsewhere to carry on any type or class of business when it is not in fact so licensed or because of any other reason, is calculated or likely to mislead.

- (2) Every exempted limited partnership shall have a registered office situated in the Islands for the service of process and to which all notices and communications may be addressed.
- (3) The registered office of an exempted limited partnership shall be the same as the address of a person licensed by the Authority under the *Banks and Trust Companies Act (2025 Revision)*, the *Companies Management Act (2025 Revision)* or the *Mutual Funds Act (2025 Revision)* except where the registered office was at a different address immediately prior to the date of commencement of this Act and remains at that address on or after the date of commencement of this Act.
- (4) For the purpose of subsection (3) the Authority means the Cayman Islands Monetary Authority established under section 5(1) of the *Monetary Authority Act (2020 Revision)*, and includes a person acting under the Authority's authorisation.

Establishment

7. A partnership, limited or otherwise, shall not be an exempted limited partnership unless registered as such under section 9(1).

Registrar

8. The Registrar of Companies appointed under the *Companies Act (2025 Revision)* shall be the Registrar of Exempted Limited Partnerships.

Registration

9. (1) The registration of an exempted limited partnership shall be effected by payment to the Registrar of a registration fee of an amount that the Cabinet shall, from time to time, by regulation prescribe and by filing with the Registrar a statement signed, subject to section 11, by or on behalf of a general partner containing —
 - (a) the name or dual foreign name and translated name of the exempted limited partnership;
 - (b) the general nature of the business of the exempted limited partnership;
 - (c) the address in the Islands of the registered office of the exempted limited partnership;
 - (d) the term, if any, for which the exempted limited partnership is entered into or, if for unlimited duration, a statement to that effect and the date of its commencement;
 - (e) the full name and address of the general partner and, if more than one of each of them, specifying each of them as a general partner and
 - (i) in the case of a corporate general partner, there shall be filed with the statement a certificate of incorporation and a certificate of good standing (or similar documents under the laws of the jurisdiction of



- incorporation) or a certificate of registration and a certificate of good standing under Part 9 of the *Companies Act (2025 Revision)*;
- (ii) in the case of a general partner which is a partnership registered under this Act, there shall be filed with the statement a certificate of registration and a certificate of good standing or certified copies thereof; and
 - (iii) in the case of a general partner who is an individual there shall be filed with the statement photographic evidence of that person's identity and evidence of that person's residential address in the Islands; and
- (f) a declaration that the exempted limited partnership shall not undertake business with the public in the Islands other than so far as may be necessary for the carrying on of the business of that exempted limited partnership exterior to the Islands.
- (2) The Registrar shall maintain a record of each exempted limited partnership registered under this Act and all the statements filed in relation to the exempted limited partnership, which records and statements shall be kept open to public inspection during all usual business hours.
 - (3) An exempted limited partnership's dual foreign name shall only be entered on the record if its translated name conforms with the provisions of section 6(1).
 - (4) If the exempted limited partnership does not conform with section 6(1) then the dual foreign name and the translated name shall not be entered on the record.
 - (5) The Registrar shall issue a certificate of registration under the Registrar's hand and seal of office as soon as the registration of the statement pursuant to subsection (1) has been effected.
 - (6) A limited partner of an exempted limited partnership formed after the 15th July, 1991 shall not have the benefit of limited liability until the date indicated on the certificate referred to in subsection (5) issued by the Registrar, and a partnership registered in accordance with section 40(1) shall obtain the benefit of limited liability under this Act with effect from that date but subject to section 40(2).
 - (7) A certificate issued under subsection (5) shall be conclusive evidence that compliance has been made with all the requirements of this Act in respect of the formation and registration of an exempted limited partnership but subject to section 40(2).
 - (8) Notwithstanding subsections (1) and (5), the Registrar may refuse to accept the registration of an exempted limited partnership and refuse to issue a certificate of registration in any case where, in the Registrar's opinion, the name or translated name of the proposed exempted limited partnership is in contravention of section 6(1).



Changes in registered particulars

10. (1) Without prejudice to subsection (2), if, during the continuance of an exempted limited partnership, any change is made or occurs in any matter specified in paragraphs (a) to (e) of section 9(1), a statement signed, subject to section 11, by a general partner specifying the nature of the change shall, within sixty days of the change, be filed with the Registrar.
- (2) A statement signed in accordance with subsection (1) in respect of any arrangement or transaction consequent upon which any person will be removed, replaced or admitted as a general partner in any exempted limited partnership, shall, within fifteen days of the arrangement or transaction, be filed with the Registrar and, until the statement is so filed, the arrangement or transaction shall, for the purposes of this Act and the partnership agreement, not be effective to remove, replace or admit that person as a general partner of the exempted limited partnership and with respect to a replacement or admitted general partner the documentation required by subsection 9(1)(e)(i), (ii) or (iii) of this Act shall be provided as the case may require.
- (3) Save with the written consent of any person thereby affected, no arrangement or transaction shall take effect to the extent that it seeks to relieve or discharge a general partner from the obligations of a general partner with regard to any debt or obligation of the exempted limited partnership to a person incurred before the arrangement or transaction takes effect.
- (4) If default is made in compliance with this section, each general partner in default shall incur a penalty of two hundred dollars for each day that the default continues which penalty shall be a debt due to the Registrar and the general partner shall indemnify any person who thereby suffers any loss.
- (5) The name or translated name of an exempted limited partnership shall not be changed so as to contravene section 6(1) and the Registrar may refuse to accept a statement under subsection (1) which, in the Registrar's opinion, seeks to effect such a change.

Failure to file statement

11. If a person required by section 9(1), section 10(1) or (2) or section 36, or by the partnership agreement to execute and file a statement or notice fails to do so, any other partner, and any assignee of a partnership interest who is or may be affected by the failure or refusal may petition the court to direct a person the court sees fit to sign the statement and file the same on behalf of the person in default.

Copies of certificates

12. (1) Any person may require a certified copy of the certificate of registration, a certificate of good standing or a copy of or extract from any registered statement filed in relation to the exempted limited partnership to be certified as a true copy by the Registrar on payment of a fee the Cabinet may by regulation prescribe.



- (2) A certificate of registration, a certificate of good standing or a copy of or extract from a registered statement filed with the Registrar issued under this Act, if certified by the Registrar to be a true copy, shall be received in evidence in all legal proceedings.

Fees for administrative services

12A. A person shall pay to the Registrar the prescribed fee for the provision by the Registrar of any administrative services as may be prescribed.

Express fees

- 13.** (1) The Registrar, on receipt of —
- (a) an application for registration under section 9 or 42;
 - (b) an application for any certificate, other than a certificate under section 9(5) or 42(9), which the Registrar is authorised to provide under this Act;
 - (c) the filing of a notice of termination of registration and written confirmation that the action is authorised by the partnership agreement, for de-registration under section 41;
 - (d) an application for de-registration under section 43; or
 - (e) any relevant information for a transaction under subsection (2),
- which is accompanied by the prescribed fees and the prescribed express fee, shall complete the relevant transaction by —
- (i) the end of the working day, where the application, filing or relevant information and all fees are received by 12 noon; or
 - (ii) 12 noon on the following working day, where the application, filing or relevant information and all fees are received after 12 noon.
- (2) For the purposes of subsection (1)(e), the transactions are —
- (a) the filing of any document with the Registrar (other than the filing of any document made as part of an application);
 - (b) certifications by the Registrar;
 - (c) the issuance or making of copies by the Registrar;
 - (d) the issuance of certificates by the Registrar, including customised certificates; or
 - (e) the issuance of letters by the Registrar, including customised letters.

Modification of general law

- 14.** (1) A limited partner shall not take part in the conduct of the business of an exempted limited partnership in its capacity as a limited partner.



- (2) All letters, contracts, deeds, instruments or documents whatsoever shall be entered into by or on behalf of the general partner (or any agent or delegate of the general partner) on behalf of the exempted limited partnership.

Agreement may specify delegation of authority

15. Where an exempted limited partnership has more than one general partner and this Act gives an authority, consent or power but not an obligation or liability, to the general partner, the partnership agreement may specify which general partner is entitled to exercise that authority, consent or power to the exclusion of any other general partner.

Property

16. (1) Any rights or property of every description of the exempted limited partnership, including all choses in action and any right to make capital calls and receive the proceeds thereof that is conveyed to or vested in or held on behalf of any one or more of the general partners or which is conveyed into or vested in the name of the exempted limited partnership shall be held or deemed to be held by the general partner and if more than one then by the general partners jointly, upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement.
- (2) Any debt or obligation incurred by a general partner in the conduct of the business of an exempted limited partnership shall be a debt or obligation of the exempted limited partnership.
- (3) The assets of an exempted limited partnership, or any class of assets, may be the subject of a floating charge, whether or not the partners of the exempted limited partnership, or any of them, are companies, overseas companies or bodies corporate.

Rights, property and proceeds to vest in incoming partner

17. (1) On the admission or substitution of any general partner or general partners, in this subsection referred to as an “incoming general partner”, in accordance with the terms of the partnership agreement and this Act, all rights or property of every description of the exempted limited partnership, including all choses in action and any right to make capital calls and receive the proceeds thereof, held or deemed to be held by the general partner or general partners in accordance with the foregoing subsection, in this subsection referred to as the “existing general partners”, shall vest without the requirement for further formalities in the incoming general partner and any continuing existing general partners and shall be held by it or them in accordance with this Act.
- (2) On the withdrawal of a general partner in accordance with the terms of the partnership agreement and this Act —



- (a) all rights or property of every description of the exempted limited partnership, including all choses in action and any right to make capital calls and receive the proceeds thereof, shall vest without the requirement for further actions or formalities in the remaining general partner or general partners and shall be held by it or them in accordance with this Act; and
- (b) subject to section 10(3), the remaining general partner or general partners shall be liable for and the property of the exempted limited partnership held by them in accordance with this Act shall be subject to all mortgages, charges or security interests and all contracts, obligations, claims, debts and liabilities of the exempted limited partnership.

Transactions with the exempted limited partnership

- 18.** Subject to any express or implied term of the partnership agreement to the contrary and to the duty imposed upon a general partner by section 19(1), a partner may lend money to, borrow from and transact other business with the exempted limited partnership so that an asset, debt or obligation of the exempted limited partnership shall thereby be created and with or without interest or security as the general partner shall determine, and shall have the same rights and obligations with respect thereto as a person who is not a partner, but the obligations of the exempted limited partnership to repay a debt to a general partner shall, at all times, be subordinated to the claims of secured and unsecured creditors of the exempted limited partnership.

General partner to act in good faith

- 19.** (1) A general partner shall act at all times in good faith and, subject to any express provisions of the partnership agreement to the contrary, in the interests of the exempted limited partnership.
- (2) Subject to any express provisions of the partnership agreement to the contrary, a limited partner of an exempted limited partnership in that capacity does not owe any fiduciary duty in exercising any of its rights or authorities or otherwise in performing any of its obligations under the partnership agreement to the exempted limited partnership or any other partner.

Liability of limited partner

- 20.** (1) If a limited partner takes part in the conduct of the business of an exempted limited partnership in its dealings with persons who are not partners, that limited partner shall be liable, in the event of the insolvency of the exempted limited partnership, for all debts and obligations of that exempted limited partnership incurred during the period that that limited partner participates in the conduct of the business as though that limited partner were, for that period, a general partner, but that limited partner shall be liable only to a person who transacts business with the exempted limited partnership during the period with actual knowledge of that limited partner's participation and who then reasonably believed the limited partner to be a general partner.
- (2) A limited partner does not take part in the conduct of the business of an exempted limited partnership within the meaning of this section by —
- (a) holding an office or interest in, or having a contractual relationship with, a general partner or being a contractor for or an agent or employee of the exempted limited partnership or of a general partner or acting as a director, officer or shareholder of a corporate general partner;
 - (b) consulting with and advising a general partner or consenting or withholding consent to any action proposed, in the manner contemplated by the partnership agreement, with respect to the business of the exempted limited partnership;
 - (c) investigating, reviewing, approving or being advised as to the accounts or business affairs of the exempted limited partnership or exercising any right conferred by this Act;
 - (d) acting as surety or guarantor for the exempted limited partnership either generally or in respect of specific obligations;
 - (e) approving or disapproving an amendment to the partnership agreement;
 - (f) calling, requesting, attending or participating in any meeting of the partners;
 - (g) taking any action that results in the winding up or the dissolution of the exempted limited partnership;
 - (h) taking any action required or permitted by the partnership agreement or by law to bring, pursue, settle or terminate any action or proceedings brought pursuant to section 33(2);
 - (i) appointing a person to serve on any board or committee of the exempted limited partnership, a general partner or a limited partner or removing a person therefrom;
 - (j) serving on any board or committee of the exempted limited partnership, a general partner, the limited partners or the partners, or by appointing, electing or otherwise participating in the choice of a representative or any



- other person to serve on any board or committee, or by acting as a member of any board or committee either directly or by or through any representative or other person, including giving advice or consenting, or refusing to consent, to any action proposed by the general partner on behalf of the exempted limited partnership and exercising any powers or authorities or performing any obligations as a member of that board or committee in the manner contemplated by the partnership agreement;
- (k) serving on the board of directors or a committee of, consulting with or advising or being an officer, director, shareholder, partner, member, manager, trustee, agent or employee of, or by being a fiduciary or contractor for, any person in which the exempted limited partnership has an interest or any person providing management, consultation, custody or other services or other products for, to or on behalf of, or otherwise having a business or other relationship with, the exempted limited partnership or a general partner of the exempted limited partnership; or
 - (l) voting as a limited partner on —
 - (i) the winding up and dissolution of the exempted limited partnership;
 - (ii) the purchase, sale, exchange, lease, mortgage, pledge or other acquisition or transfer of any asset by or of the exempted limited partnership;
 - (iii) the incurrence or renewal of indebtedness by the exempted limited partnership;
 - (iv) a change in the nature of the business of the exempted limited partnership;
 - (v) the admission, removal or withdrawal of a general or limited partner and the continuation of business of the exempted limited partnership thereafter; or
 - (vi) transactions in which one or more of the general partners have an actual or potential conflict of interest with one or more of the limited partners.
 - (3) Subsection (2) shall not import any implication that the possession or exercise of any other power by a limited partner will necessarily constitute the taking part by that limited partner in the business of the exempted limited partnership.

Accounts

- 21.** (1) A general partner shall keep or cause to be kept proper books of account including, where applicable, material underlying documentation including contracts and invoices, with respect to —
- (a) all sums of money received and expended by the exempted limited partnership and matters in respect of which the receipt of expenditure takes place;



- (b) all sales and purchases of goods by the exempted limited partnership; and
 - (c) the assets and liabilities of the exempted limited partnership.
- (2) For the purposes of subsection (1), proper books of account shall not be deemed to be kept if there are not kept such books as are necessary to give a true and fair view of the business and financial condition of the exempted limited partnership and to explain its transactions.
- (3) Where the general partner keeps the books of account described in subsection (1) at any place other than at the registered office of the exempted limited partnership or at any other place within the Islands, the general partner shall, upon service of an order or notice by the Tax Information Authority pursuant to the *Tax Information Authority Act (2021 Revision)*, make available, in electronic form or any other medium, at its registered office copies of its books of account, or any part or parts thereof, as are specified in the order or notice.
- (4) A general partner shall cause all books of account required to be kept under subsection (1) to be retained for a minimum period of five years from the date on which they are prepared.
- (5) A person who, being a general partner, knowingly and wilfully contravenes subsection (1) or (4) shall be subject to a penalty of five thousand dollars.
- (6) A person who, being a general partner, defaults in complying with an order or notice under subsection (3) without reasonable excuse, shall incur a penalty of five thousand dollars and a further penalty of one hundred dollars for every day during which the non-compliance continues.

Information regarding condition of partnership

- 22.** Subject to any express or implied term of the partnership agreement, each limited partner may demand and shall receive from a general partner true and full information regarding the state of the business and financial condition of the exempted limited partnership.

Differences decided by general partner

- 23.** Any difference arising as to matters connected with the business of the exempted limited partnership shall be decided by the general partner, and, if more than one, by a majority of the general partners as is provided in the partnership agreement.

Establishment, regulation of boards, committees

- 24.** (1) Where a partnership agreement contains provisions for the establishment and regulation of any boards or committees of an exempted limited partnership, its partners or any class or category of those partners, or representatives of any of the partners, including —
- (a) the establishment and constitution of boards or committees;



- (b) the manner and terms of appointment and removal of the members of boards or committees;
- (c) the powers, rights, authorities, obligations and duties of the members of boards or committees;
- (d) the regulation of the proceedings of boards or committees; and
- (e) the rights of the members and former members of boards or committees to exculpation or to be indemnified out of the assets of the exempted limited partnership,

then, subject to the express provisions of the partnership agreement, any person duly appointed to be a member of any board or committee in accordance with those provisions shall be deemed to have notice of and shall have the benefit of those provisions which shall not be unenforceable by any person in that person's own right by reason only that the person is not a party to the partnership agreement.

- (2) Subject to any express provisions of the partnership agreement to the contrary, a member of any board or committee referred to in subsection (1) does not owe any fiduciary duty in exercising any of its rights or authorities, or otherwise in performing any of its obligations, as a member of the board or committee to the exempted limited partnership or any partner.

Failure to perform

- 25.** (1) If a partnership agreement provides that where a partner fails to perform any of its obligations under, or otherwise breaches the provisions of, the partnership agreement that partner may be subject to or suffer remedies for, or consequences of, the failure or breach specified in the partnership agreement or otherwise applicable under any law then those remedies or consequences shall not be unenforceable solely on the basis that they are penal in nature.
- (2) The remedies or consequences under subsection (1) may include but are not limited to any one or more of the following —
 - (a) reducing, eliminating or forfeiting the defaulting partner's partnership interest in the exempted limited partnership or any rights of the defaulting partner under the partnership agreement;
 - (b) subordinating the defaulting partner's partnership interest to the interests of non-defaulting partners;
 - (c) effecting a forced sale or forfeiture of the defaulting partner's partnership interest;
 - (d) arranging for the lending by other partners or other persons to the defaulting partner of the amount necessary to meet the defaulting partner's commitment;



- (e) providing for the fixing of the value of the defaulting partner's partnership interest by appraisal or by formula and the redemption or sale of the defaulting partner's partnership interest at that value; or
 - (f) exercising any other remedy or consequence specified in the partnership agreement or available under any applicable laws.
- (3) Subject to the general partner's duty under section 19(1), a general partner shall not be liable for its decision to impose or for imposing any remedies or consequences upon any partner, or for its decision not to do so and references in this subsection to a partnership interest shall for the avoidance of doubt also be construed as including any part thereof.

Agreement as to benefits

- 26.** A person who has executed the partnership agreement of an exempted limited partnership or who is named or otherwise identified, including as a class, in the partnership agreement shall not be deemed to be or otherwise construed as a partner of the exempted limited partnership if —
- (a) that person has executed the partnership agreement solely in order to take the benefit of a provision of, or assume an obligation under, the partnership agreement otherwise than as a partner; or
 - (b) where, on a proper construction of the partnership agreement, the parties did not intend the person to be a partner of the exempted limited partnership.

Execution considered valid

- 27.** (1) Any partnership agreement, any agreement pursuant to which any person agrees to make any commitment or contribution to an exempted limited partnership as a partner and any agreement, contract, deed, instrument including any instrument under seal or document entered into by or on behalf of the general partner for itself in the case of the partnership agreement or otherwise on behalf of the exempted limited partnership is executed validly by the parties thereto where it is executed in any manner contemplated by the parties thereto, including, without limitation —
- (a) where the complete agreement, contract, deed, instrument or document is executed; or
 - (b) where any signature or execution page to the agreement, contract, deed, instrument or document is executed, whether or not the agreement, contract, deed, instrument or document is at the time in its final form, and which is attached by, or on behalf of, the relevant party to, or otherwise with the relevant party's express or implied authority to, the agreement, contract, deed, instrument or document,



if the agreement, contract, deed, instrument or document is executed in conformity with this Act or any other Law of the Islands applicable to execution of the agreement, contract, deed, instrument or document.

- (2) Subsection (1) shall apply to agreements, contracts, deeds, instruments including instruments under seal or other documents regardless of whether they were made before, on or after the commencement of this subsection and no agreement, contract, deed, instrument, including instruments under seal, or other document made before the commencement of this subsection shall be invalid if it satisfies the requirements of subsection (1).

Power of attorney

28. (1) For the purposes of the *Powers of Attorney Act (1996 Revision)* and section 8 of the *Property (Miscellaneous Provisions) Act (2017 Revision)* where a partnership agreement purports to create or grant a power of attorney, including an irrevocable power of attorney, that power shall be deemed validly to have been executed as a deed and if required duly witnessed on execution of the partnership agreement by or on behalf of the donor of the power or on adherence thereto by the donor of the power pursuant to section 32 without demonstration or satisfaction of any further formalities regarding its execution.
- (2) Subsection (1) applies equally to every partnership agreement entered into prior to as well as after the commencement of this Act.

Register of limited partnership interests

29. (1) Subject to subsection (2) the general partner shall maintain or cause to be maintained in the country or territory that the general partner may determine a register of limited partners which shall contain the name and address of each person who is a limited partner of the exempted limited partnership, the date on which a person became a limited partner and the date on which a person ceased to be a limited partner, and the register shall be updated within twenty-one days of the date of any change in the particulars therein.
- (2) The general partner shall maintain or cause to be maintained at the registered office of the exempted limited partnership a record of the address at which the register of limited partners is maintained, which record shall be updated within twenty-one days of the date of any change in the particulars therein.
- (3) The register of limited partners and the record of the address at which the register of limited partners is maintained shall be open to inspection during all usual business hours in the place where the register or record is maintained by —
 - (a) subject to any express or implied term of the partnership agreement, all partners; and
 - (b) any other person with the consent of the general partner.



- (4) The register of limited partners shall be *prima facie* evidence of the matters which are directed by this Act to be inserted therein.
- (5) Where the register of limited partners is kept at a place other than the registered office of the exempted limited partnership, the general partner shall make available at the registered office, in electronic form or any other medium, the register of limited partners upon service of an order or notice by the Tax Information Authority pursuant to the *Tax Information Authority Act (2021 Revision)*.
- (6) A person who, being a general partner, defaults in complying with subsection (1) or (2), commits an offence and is liable on summary conviction to a fine of ten thousand dollars for each day that the default continues and shall indemnify any person who thereby suffers any loss.
- (7) A person who, being a general partner, defaults in complying with an order or notice under subsection (5) without reasonable excuse, shall incur a penalty of five hundred dollars and a further penalty of one hundred dollars for every day during which that non-compliance continues.

Maintenance of records

- 30.** (1) The general partner shall maintain or cause to be maintained in any country or territory that the general partner may determine, a record of the amount and date of the contribution or contributions of each limited partner and the amount and date of any payment representing a return of the whole or any part of the contribution of any limited partner, which record shall be updated within twenty-one days of the date of any change in the particulars therein.
- (2) Subsections (4), (5), (6) and (7) of section 29 shall apply to the records required to be maintained pursuant to this section.
- (3) The records maintained pursuant to this section shall be open to inspection during all usual business hours in the place where the records are maintained by any person with the consent of the general partner.

Registration of security interests

- 31.** (1) The general partner shall maintain or cause to be maintained at the registered office, a register of security interests in which shall be registered each security interest in relation to which a valid notice has been served in accordance with section 32(9).
- (2) The register of security interests under subsection (1) shall contain the identity of the grantor and grantee, the partnership interest or part thereof subject to the security interest and the date on which notice of the security interest was validly served in accordance with section 32(9).
- (3) The register described in subsection (1) may be inspected by any person during all usual business hours.



- (4) Any security interest over the whole or any part of a limited partnership interest shall have priority according to the time that the written notice is validly served at the registered office of the exempted limited partnership in accordance with section 32(9).
- (5) If default is made by a general partner in the maintenance of the register described in subsection (1), each general partner in default shall incur a penalty of twenty-five dollars for each day that the default continues.

Transfer of partnership interests

- 32.** (1) A partnership interest is transferable in whole or in part in accordance with the provisions of the partnership agreement and this section.
- (2) Subject to the partnership agreement, a person may become a partner of an exempted limited partnership either by executing and delivering the partnership agreement or any supplement thereto or counterpart thereof together with the general partner, by acceding to the partnership agreement in accordance with its terms or upon the transfer of all or part of a partnership interest in accordance with this section, each of which is for this section referred to as an “**admission**”, and in each case without the consent of the limited partners.
- (3) Where the requirements for or conditions to an admission contained in the partnership agreement have been complied with in accordance with their terms or, to the extent permitted by the partnership agreement, waived, any person, however admitted, shall without the requirement for any further actions or formalities, be deemed to have adhered to and agreed to be bound by the terms and conditions of the partnership agreement and shall have the rights and be subject to the obligations contained in the partnership agreement and this Act as if the person and all existing partners had together duly executed and delivered the partnership agreement.
- (4) The provisions of subsection (3) shall apply to every transfer or purported transfer of a partnership interest in whole or in part and each admission of a person as a partner of an exempted limited partnership prior to, as well as after, the commencement of this Act.
- (5) Section 6 of the *Property (Miscellaneous Provisions) Act (2022 Revision)* shall not apply to partnership interests.
- (6) Subject to the partnership agreement, no limited partner may —
- (a) transfer; or
 - (b) grant any security interest in,
- the whole or any part of that person’s limited partnership interest except with the written consent of the general partner given prior to, or simultaneously with, the transfer or grant.

- (7) Subject to the partnership agreement and this Act, a general partner may transfer or grant a security interest in the whole or any part of that person's general partnership interest with the written consent of any other general partner given prior to, or simultaneously with, the transfer or grant.
- (8) Subject to the partnership agreement —
- (a) the transferee of a general partnership interest or part thereof shall be admitted as a general partner in place of and subject to section 10(2) to the exclusion of, or in addition to, as the case may be, the transferor in respect of the general partnership interest or part thereof transferred but —
- (i) the transferee shall not be liable for any obligation of the exempted limited partnership incurred before the transferee is so admitted unless otherwise agreed in writing by the transferor and the transferee; and
- (ii) the transferor shall remain liable for any obligation of the exempted limited partnership incurred before the transferor ceased to be a general partner unless otherwise agreed in writing by the transferor, the transferee and the person to whom the obligation is owed; and
- (b) the transferee of a limited partnership interest or part thereof shall be admitted as a limited partner, wholly or partly, as the case may be, in place of and to the exclusion of the transferor in respect of the limited partnership interest or part thereof transferred but, unless otherwise agreed in writing by the transferor, the transferee and the general partner, the transferee shall not assume any liability of the transferor pursuant to section 20(1) or section 34(1) and no transfer shall relieve the transferor of any liability under those subsections.
- (9) Written notice of the grant of a security interest over the whole or any part of a limited partnership interest shall be given by the grantor or the grantee to the exempted limited partnership at its registered office.
- (10) A notice under subsection (9) is not validly given unless it specifies the agreement pursuant to which the security interest is granted including the date thereof and the parties thereto, the identity of the grantor and grantee of the security interest, and the partnership interest or part thereof that is subject to that security interest.
- (11) Nothing in this section shall prevent a partner from assigning or otherwise disposing of, whether absolutely or by way of security in any manner permitted by law, any right, debt or other chose in action arising under a partnership agreement but no assignment or other disposition may, subject to the partnership agreement, be made without the consent of the general partner or, in the case of an assignment or disposition by a general partner, the consent of any other general partner given prior to, or simultaneously with, the assignment or disposition.



- (12) A partnership agreement may provide that, as against any other partner, any assignment or other disposition by a partner of any right, debt or other chose in action arising under a partnership agreement shall confer economic rights only and for the purposes of this section “**economic rights**” are —
- (a) any rights to make and enforce capital calls, to receive the proceeds thereof and to enforce payment of, and receive any sums payable to the partner including the rights on the winding up and dissolution of the exempted limited partnership;
 - (b) the right to receive a share of profits of the exempted limited partnership or a share of the property on its winding up and dissolution;
 - (c) the right to an account for the purpose of ascertaining the amount or share of any of the foregoing; and
 - (d) any other rights that are expressly stated in the partnership agreement to be assignable.
- (13) Any consent of a general partner required by this section may, subject to any express provision of the partnership agreement to the contrary, be withheld in the general partner’s sole discretion.
- (14) Any notice of any assignment or other disposition referred to in subsection (11) that may be required or permitted to be given to any one or more of the other general partners of an exempted limited partnership shall, notwithstanding any other rule of law or equity, be deemed to have been so given if given to the exempted limited partnership.

Proceedings

- 33.** (1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.
- (2) If the court considers it just and equitable any person or a general partner shall have the right to join in or otherwise institute proceedings against any one or more of the limited partners who may be liable under section 20(1) or to enforce the return of the contribution, if any, required by section 34(1).
- (3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings.
- (4) If any action taken pursuant to subsection (3) is successful, in whole or in part, as a result of a judgment, compromise or settlement of any action, the court may award any limited partner bringing any action reasonable expenses, including attorney’s fees, from any recovery in any action or from an exempted limited partnership.



Return of contributions

- 34.** (1) If a limited partner receives a payment representing a return of any part of that person's contribution or is released from any outstanding obligation in respect of that person's commitment and at the time that the payment was made or the release effected —
- (a) the exempted limited partnership is insolvent including where the payment or release causes the insolvency; and
 - (b) the limited partner has actual knowledge of the insolvency of the exempted limited partnership,
- then for a period of six months commencing on the date of that payment or release but not thereafter, the limited partner shall be liable to the exempted limited partnership for the amount of the payment or the due performance of the released obligation in respect of that person's commitment in each case to the extent that the repayment or performance of the released obligation is necessary to discharge a debt or obligation of the exempted limited partnership incurred during the period that the contribution or commitment represented an asset of the exempted limited partnership.
- (2) Any amount required to be repaid pursuant to this section shall, unless the partnership agreement specifies otherwise, bear simple interest at the rate of ten per cent per annum, calculated on a daily basis.
 - (3) The partnership agreement may specify —
 - (a) that no interest shall apply;
 - (b) that a different rate of interest, including a compound rate shall apply; or
 - (c) a different basis for calculating interest payable.

Manner in which partnership may not be dissolved

- 35.** Subject to any express or implied term of the partnership agreement to the contrary —
- (a) an exempted limited partnership shall not be dissolved nor the partnership agreement terminated by —
 - (i) changes in, additions to or substitutions of any one or more of the partners;
 - (ii) the transfer of the whole or part of the partnership interest of a limited partner;
 - (iii) the death, bankruptcy, dissolution, removal, withdrawal or winding up of a limited partner or a limited partner's withdrawal or redemption of, or repurchase by the partnership of, any limited partnership interest;
 - (iv) the incapacity of a limited partner;



- (v) any one or more of the limited partners granting a mortgage, charge or other form of security interest over the whole or part of that person's partnership interest;
 - (vi) the sale, exchange, lease, mortgage, pledge or other transfer of any of the assets of the exempted limited partnership; or
 - (vii) a de-registration of the exempted limited partnership pursuant to section 41 or 43; and
- (b) a limited partner shall not be entitled to wind up and dissolve the partnership by notice.

Dissolution

- 36.** (1) An exempted limited partnership shall be voluntarily wound up in accordance with the provisions of the partnership agreement —
- (a) at the time or upon the occurrence of any event specified in the partnership agreement; or
 - (b) unless otherwise specified in the partnership agreement, upon the passing of a resolution of all the general partners and a two-thirds majority of limited partners.
- (2) On the completion of the winding up of an exempted limited partnership, the general partner or other person appointed as liquidator in accordance with subsection (12) shall —
- (a) file a notice of dissolution with the Registrar; and
 - (b) submit to the Registrar the prescribed fee,
- and subject to section 37, an exempted limited partnership shall not be dissolved by an act of the partners or otherwise until a notice of dissolution signed by a general partner or liquidator has been filed with the Registrar and the prescribed fee has been submitted to the Registrar.
- (3) Except to the extent that the provisions are not consistent with this Act, and in the event of any inconsistencies, this Act shall prevail, and subject to any express provisions of this Act to the contrary, the provisions of Part 5 of the *Companies Act (2025 Revision)* and the *Companies Winding Up Rules (2023 Consolidation)* shall apply to the winding up of an exempted limited partnership and for this purpose —
- (a) references in Part 5 to a company shall include references to an exempted limited partnership;
 - (b) the limited partners shall be treated as if they were shareholders of a company and references to contributories in Part 5 shall be construed accordingly, except that the application of the provisions shall not cause a limited partner to be subject to any greater liability than that limited partner

- would otherwise bear under this Act, but for the application of this paragraph;
- (c) references in Part 5 to a director or officer of a company shall include references to the general partner of an exempted limited partnership;
 - (d) except for sections 123, excluding subsection (1)(b) and (c), 129, 140, 145, and 147 of the *Companies Act (2025 Revision)*, Part 5 shall not apply to a voluntary dissolution and winding up under subsection (1);
 - (e) in the case of a voluntary winding-up of an exempted limited partnership under subsection (1) where the partnership was registered under section 9 prior to 11th May 2009, the necessary time period for compliance with the requirements of section 123 (1) of the *Companies Act (2025 Revision)* shall be at least twenty-eight days prior to the final distribution of the assets of the exempted limited partnership to partners rather than within twenty-eight days of the commencement of its voluntary winding-up;
 - (f) the Insolvency Rules Committee established pursuant to the *Companies Act (2025 Revision)* shall have the power to make rules and prescribe forms for the purpose of giving effect to this section or its interpretation; and
 - (g) on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable.
- (4) Notwithstanding that any order or direction has been made pursuant to subsection (3)(g) or that the winding up of an exempted limited partnership has commenced, a creditor who has security over the whole or part of the assets of the exempted limited partnership is entitled to enforce that person's security without the leave of the court and without reference to the general partner or any liquidator appointed to wind up the exempted limited partnership.
- (5) Where a liquidator sells assets on behalf of a secured creditor of an exempted limited partnership, the liquidator is entitled to deduct from the proceeds of sale a reasonable sum by way of remuneration.
- (6) Where an exempted limited partnership is being wound up and a liquidator is appointed, the Registrar shall within 28 days of the appointment be notified of the name and business address of the liquidator.
- (7) The general partner or its legal representative shall promptly serve notice on all limited partners informing the limited partners of —
- (a) the death;
 - (b) the commencement of liquidation, bankruptcy or dissolution proceedings; or
 - (c) the withdrawal, removal or making of a winding up or dissolution order,
- in relation to the sole or last remaining qualifying general partner and in this section each event is referred to an “**event of withdrawal**”.



- (8) If default is made in compliance with this section, each general partner or its legal representative, in default shall incur a penalty of twenty-five dollars for each day that the default continues, which penalty shall be a debt due to the Registrar.
- (9) Unless the partnership agreement provides otherwise, if a new qualifying general partner is not elected within ninety days after the service of notice of an event of withdrawal in accordance with subsection (7), in this section referred to as “**the automatic wind up date**”, the exempted limited partnership shall be wound up in accordance with the partnership agreement or the orders or directions the court may make or give in accordance with subsection (3)(g).
- (10) The winding up of an exempted limited partnership shall be deemed to commence upon the earlier to occur of any of the following —
 - (a) the passing of a resolution for winding up;
 - (b) subject to subsection (9), the automatic wind up date;
 - (c) the expiry of the period fixed for the duration of the exempted limited partnership by the partnership agreement;
 - (d) the occurrence of an event provided by the partnership agreement upon which the exempted limited partnership is to be wound up; or
 - (e) where a winding up order has been made, the presentation of the petition for winding up.
- (11) In the event that an exempted limited partnership is required to be wound up in accordance with the provisions of subsection (9) then the date of commencement of winding up shall be the date falling ninety days after the service of notice of an event of withdrawal.
- (12) If a majority of limited partners specified in the partnership agreement as being entitled to vote to elect a new general partner in accordance with the terms of the partnership agreement elects one or more new qualifying general partners by the automatic winding up date —
 - (a) the exempted limited partnership shall not be required to be wound up and dissolved; and
 - (b) the business of the exempted limited partnership may be resumed and continued as provided for in the partnership agreement or any subsequent agreement.
- (13) Following the commencement of the winding up of an exempted limited partnership its affairs shall be wound up by the general partner or other person appointed pursuant to the partnership agreement unless the court otherwise orders on the application of any partner, creditor or liquidator of the exempted limited partnership pursuant to subsection (3)(g).



Registrar may strike off register

37. (1) Where the Registrar has reasonable cause to believe that an exempted limited partnership is not carrying on business or is not in operation, the Registrar may strike the exempted limited partnership off the register and the exempted limited partnership shall thereupon be dissolved.
- (2) A request on behalf of the general partner to strike the exempted limited partnership off the register shall be accompanied by a fee in the amount prescribed by the Cabinet by regulation.
- (3) Where an exempted limited partnership is being wound up, and the Registrar has reasonable cause to believe either that no liquidator is acting, or that the affairs of the exempted limited partnership are fully wound up, the Registrar may strike the exempted limited partnership off the register and the exempted limited partnership shall thereupon be dissolved without the need for a notice of dissolution to be filed pursuant to section 36(2).
- (4) The Registrar shall immediately publish a notice in the Gazette to the effect that the exempted limited partnership in question has been struck off the register, the date on which it has been struck off and the reason therefor.
- (5) A general partner, limited partner or creditor who objects to an exempted limited partnership being struck off the register pursuant to this section, on the grounds that the exempted limited partnership was at the time it was struck off the register carrying on business, in operation or otherwise, may make an application to the court for the name of the exempted limited partnership to be restored to the register.
- (6) An application under subsection (5) shall be made —
- (a) within two years of the date upon which the name of the exempted limited partnership was struck off the register; or
- (b) within a period that the Cabinet may by order allow but which shall not exceed ten years of the date upon which the name of the exempted limited partnership was struck off the register.
- (7) The court, if satisfied that the exempted limited partnership was, at the time that it was struck off the register, carrying on business, in operation or otherwise, may order that the name of the exempted limited partnership be restored to the register upon —
- (a) payment by the applicant of a reinstatement fee;
- (b) payment by the applicant of any other accrued outstanding fees; and
- (c) any other terms and conditions which the court considers just.
- (8) The reinstatement fee referred to in subsection (7) shall be the same as the fee paid by the exempted limited partnership upon initial registration.



- (9) Where an order is made under subsection (7) the exempted limited partnership is deemed to have continued in existence as if it had not been struck off.
- (10) The court may, in addition or subsequent to, an order made under subsection (7), by order give directions and make provision for, as far as possible, placing the exempted limited partnership and all other persons affected from the name of the exempted limited partnership being struck off the register, in the same position as if the name of the exempted limited partnership had not been struck off the register.
- (11) The striking off the register of any exempted limited partnership under this Act shall not affect the liability, if any, of any general partner or limited partner of the exempted limited partnership, and the liability shall continue and may be enforced as if the exempted limited partnership had at all times continued to be in existence.
- (12) An act performed or thing done by the Registrar under this section shall not attract any liability.

Tax undertaking

- 38.** (1) The Financial Secretary may, on application by a general partner, give an undertaking in respect of any exempted limited partnership that a law which is hereafter enacted in the Islands imposing any tax to be levied on profits or income or gains or appreciations shall not apply to the exempted limited partnership or to any partner thereof in respect of the operations or assets of the exempted limited partnership or the partnership interest of a partner therein.
- (2) Any undertaking given under subsection (1) may provide, in addition, that the aforesaid taxes and any tax in the nature of estate duty or inheritance tax shall not be payable in respect of the obligations of the exempted limited partnership or the interests of the partners therein.
- (3) Any undertaking as aforesaid may be for a period not exceeding fifty years from the date of the approval of the application and may be in the form determined by the Financial Secretary.
- (4) The Financial Secretary shall prepare and present to the Cabinet, a report of all applications made and granted pursuant to this section on a monthly basis.
- (5) The first report due to be prepared pursuant to subsection (4) shall be presented to the Cabinet on the date specified by the Cabinet by Order.

Annual return

39. (1) An exempted limited partnership shall, in January in every year, file with the Registrar a return signed by or on behalf of a general partner certifying that the exempted limited partnership has, during the prior calendar year, complied with section 10(1) and that there has been no breach of the declaration given in accordance with paragraph (f) of section 9(1) and pay to the Registrar an annual fee of the amount that the Cabinet shall, from time to time, by regulation prescribe.
- (2) The annual fee payable and the return due to be filed under subsection (1) shall be tendered at the same time.
- (3) An exempted limited partnership which fails to comply with subsection (1) shall —
- (a) where the annual fee is paid or the return is filed between 1st April and 30th June, incur a penalty of 33.33% of the annual fee;
 - (b) where the annual fee and penalties are paid or the return is filed between 1st July and 30th September, incur a penalty 66.67% of the annual fee; and
 - (c) where the annual fee and penalties are paid or the return is filed between 1st October and 31st December, incur a penalty 100% of the annual fee.
- (4) A penalty specified in subsection (3) shall be a debt due to the Registrar.

Re-registration

40. (1) Any partnership registered under the *Limited Partnership Law (Revised)* prior to its **repeal** or sections 45 to 54 and 56 to 57 of the *Partnership Act (2025 Revision)* or any Law amending or replacing the same shall not be affected by this Act but shall continue to be governed by that law.
- (2) A partnership described in subsection (1) and any partnership established under the laws of a jurisdiction other than the Islands, in this section referred to as a “**registered partnership**”, may, at any time, upon —
- (a) effecting the amendments to the partnership agreement as shall be necessary to comply with this Act, if any;
 - (b) paying a fee of the amount that the Cabinet may by regulation prescribe; and
 - (c) filing the statement required by section 9(1),
- be registered under this Act and, with effect from the date indicated on the certificate of registration issued by the Registrar pursuant to section 9(5), shall be governed exclusively thereafter as an exempted limited partnership in accordance with this Act.
- (3) With effect from the date indicated on the certificate of registration described in subsection (2), the exempted limited partnership and the partnership interests of



the parties therein and their rights and liabilities, as against any person who is not a partner, shall cease to be governed by the **repealed** *Limited Partnership Law (Revised)*, or sections 45 to 54 and 56 to 57 of the *Partnership Act (2025 Revision)* or the laws of any other jurisdiction, as the case may be, save in respect of any act or omission occurring before that date which shall continue to be governed by the law of the other jurisdiction.

- (4) Without prejudice to the foregoing generality such registration shall not operate to —
- (a) create a new legal entity;
 - (b) affect the property previously acquired by or on behalf of the exempted limited partnership;
 - (c) affect any act or thing done prior to registration or the rights, powers, authorities, functions or obligations of the exempted limited partnership, any partner or any other person prior thereto; or
 - (d) render defective any legal proceedings by or against the exempted limited partnership or any partner or any other person, and any legal proceedings that could have been continued or commenced by or against the exempted limited partnership or any partner or any other person before its registration hereunder may, notwithstanding registration, be continued or commenced after registration and in respect of which the law of the other jurisdiction shall be of application.
- (5) With effect from the date indicated on the certificate of registration described in subsection (2), all property of every description, including all choses in action and any right to make capital calls of the registrant partnership shall be the property of the exempted limited partnership to be held in accordance with section 16(1).

De-registration pursuant to partnership agreement

- 41.** A general partner of an exempted limited partnership may at any time terminate the registration of an applicant partnership as an exempted limited partnership, if termination of registration is permitted under the terms of the partnership agreement, by filing a written notice of termination of registration with the Registrar together with written confirmation that the action is authorised by the partnership agreement, accompanied by the prescribed fee.

Registration of foreign limited partnerships

- 42.** (1) In this section —
- “**foreign limited partnership**” means a limited partnership or limited liability partnership established in a recognised jurisdiction outside the Islands.
- “**recognised jurisdiction**” is one that is prescribed as such by the Cabinet in regulations made under this Act; and



“**relevant authority**” means the national, state or local government authority, registry or other body in the recognised jurisdiction that is responsible for forming or establishing the foreign limited partnership.

- (2) Subject to subsection (3), a foreign limited partnership may apply to be registered pursuant to this section in order to act as the general partner of an exempted limited partnership.
- (3) A foreign limited partnership may be registered by the Registrar upon payment to the Registrar of a registration fee of the amount the Cabinet by regulation, prescribes and by filing with the Registrar certified copies of —
 - (a) its certificate of formation in its jurisdiction of establishment or the equivalent document issued by the relevant authority as evidence of its formation; and
 - (b) a certificate of good standing issued by the relevant authority.
- (4) If the certificate of good standing required under subsection (3)(b) is unavailable from the relevant authority, then the foreign limited partnership is required to file with the Registrar, a declaration signed by a person authorised to act on behalf of the foreign limited partnership stating that the foreign limited partnership is in good standing with the relevant authority.
- (5) Neither certificate of good standing under subsection (3)(b) nor the declaration under subsection (4) shall be dated earlier than one month prior to the date of its delivery to the Registrar, and shall be accompanied by a statement signed by or on behalf of the foreign limited partnership specifying —
 - (a) the name, dual foreign name and the translated name, if applicable, of the foreign limited partnership;
 - (b) the jurisdiction in which it is established;
 - (c) whether the foreign limited partnership is deemed to be a separate legal person under the laws of the jurisdiction in which it is established and, if so, the full name and address of any managing member or other person, if not identified in paragraph (f), who immediately controls or directs the affairs of the foreign limited partnership;
 - (d) the address of its registered office in its jurisdiction of formation or establishment;
 - (e) the names and addresses of some one or more than one person resident in the Islands authorised to accept on its behalf service of process and any notices required to be served on it; and
 - (f) the full name and address of any general partners of the foreign limited partnership, if applicable.
- (6) A foreign limited partnership shall, in January of each year, pay to the revenues of the Islands an annual fee in the amount and in the manner the Cabinet by regulation, prescribes.



- (7) A foreign limited partnership that defaults in paying the annual fee specified in subsection (6) shall incur a penalty of —
 - (a) 33.33% of the annual fee specified in subsection (6) if the fee and penalty are paid between the 1st April and the 30th June;
 - (b) 66.67% of the annual fee specified in subsection (6) if the fee and penalty are paid between the 1st July and the 30th September; and
 - (c) 100% of the annual fee specified in subsection (6) if the fee and penalty are paid between the 1st October and the 31st December.
- (8) A penalty specified in subsection (7) is a debt due to the Registrar.
- (9) Upon compliance with subsections (3), (4) and (5) the Registrar shall issue a certificate of registration under the Registrar's hand and seal of office to the foreign limited partnership.
- (10) A certificate of registration of a foreign limited partnership issued under subsection (9) is conclusive evidence that compliance has been made with all requirements of this Act in respect of registration.
- (11) If any change is made in any details contained in the statement filed under subsection (5), a statement signed by or on behalf of the foreign limited partnership specifying the nature of the change shall, within sixty days of the change, be filed with the Registrar.
- (12) If default is made in compliance with subsection (11), each foreign limited partnership shall incur a penalty of two hundred dollars for each day that the default continues which shall be a debt due to the Registrar and the foreign partnership shall indemnify any person who thereby suffers any loss.
- (13) Any process or notice required to be served on a foreign limited partnership is sufficiently served if addressed to any person whose name has been delivered to the Registrar under subsection (5) and left at or sent by post to the address which has been so delivered.
- (14) A document may be served on the foreign limited partnership by leaving it at or sending it by post to any place of business established by the foreign limited partnership in the Islands.
- (15) An instrument executed by or on behalf of a foreign limited partnership outside the Islands is, and is to be treated as, a deed or instrument under seal —
 - (a) if it is —
 - (i) sealed; or
 - (ii) expressed to be, or is expressed to be executed as, or otherwise makes clear on its face it is intended to be, a deed; and
 - (b) if it is executed in conformity with any requirement imposed by —



- (i) the laws of the jurisdiction in which the foreign limited partnership was established; and
 - (ii) its partnership agreement or equivalent governing document.
- (16) An instrument executed in accordance with subsection (15) meets any requirement of any law that the instrument is, and is to be treated as, a deed or instrument executed under seal.
- (17) The execution of an instrument in accordance with subsection (15)(a) and the fact that it was executed in accordance with subsection (15)(b) may be proved by the affidavit or solemn declaration of a witness to the execution of the instrument sworn or made before a notary public or any other person qualified to administer oaths in any jurisdiction.
- (18) If a foreign limited partnership ceases to be a general partner of an exempted limited partnership, it shall as soon as reasonably practicable —
 - (a) file a notice to that effect with the Registrar; and
 - (b) submit to the Registrar the prescribed fee,and from the date on which the notice and the prescribed fee are submitted to the Registrar, the obligation of the foreign limited partnership to deliver any document to the Registrar ceases.
- (19) Notwithstanding subsection (18) if the Registrar is satisfied by any other means that a foreign limited partnership has ceased to be a general partner of an exempted limited partnership the Registrar may close the file of the foreign limited partnership and thereupon the obligation of the foreign limited partnership to deliver any document to the Registrar ceases.
- (20) A general partner of a foreign limited partnership shall not be deemed to have established a place of business in the Islands or commenced carrying on business in the Islands pursuant to Part 9 of the *Companies Act (2025 Revision)* by virtue solely of so acting.

De-registration for continuation in another jurisdiction

- 43.** (1) A general partner on behalf of an exempted limited partnership which proposes to be registered by way of continuation as a partnership, body corporate or any other form of entity under the laws of any jurisdiction outside the Islands, in this section referred to as an “**applicant**”, may apply to the Registrar for the exempted limited partnership, in this section referred to as the “**applicant partnership**”, to be de-registered in the Islands.
- (2) The Registrar shall de-register an applicant partnership if —
- (a) the applicant proposes to register the applicant partnership by way of continuation in a jurisdiction which permits or does not prohibit the transfer of the applicant partnership in the manner provided in this section referred to as a “**relevant jurisdiction**”;



- (b) the applicant has paid to the Registrar a fee equal to three times the annual fee that would have been payable pursuant to section 39(1) in the January immediately preceding the application for de-registration;
- (c) the applicant has filed with the Registrar notice of any —
 - (i) change in the name or dual foreign name;
 - (ii) change in the applicant partnership; and
 - (iii) change in its proposed registered office or agent for service of process in the relevant jurisdiction;
- (d) no petition or other similar proceeding has been filed and remains outstanding or order made or resolution adopted to wind up, dissolve or liquidate the applicant partnership in any jurisdiction and no time or event has occurred upon which the applicant partnership is to be wound up;
- (e) no receiver, trustee or administrator or other similar person has been appointed in any jurisdiction and is acting in respect of the applicant partnership, its affairs or its property or any part thereof;
- (f) no scheme, order, compromise or other similar arrangement has been entered into or made whereby the rights of creditors of the applicant partnership are and continue to be suspended or restricted;
- (g) the applicant partnership is not insolvent;
- (h) an application for de-registration is *bona fide* and not intended to defraud creditors or the limited partners of the applicant partnership;
- (i) the applicant has delivered to the Registrar an undertaking signed by an authorised signatory of the applicant that notice of the transfer has been or will be given within twenty-one days to the secured creditors of the applicant partnership;
- (j) any consent or approval to the transfer required by any contract or undertaking entered into or given by the applicant partnership has been obtained, released or waived, as the case may be;
- (k) the transfer is permitted by and has been approved in accordance with the partnership agreement of the applicant partnership;
- (l) the laws of the relevant jurisdiction with respect to transfer have been or will be complied with;
- (m) the applicant partnership, if licensed or registered under the *Banks and Trust Companies Act (2025 Revision)*, the *Companies Management Act (2025 Revision)*, the *Insurance Act, 2010 [Law 32 of 2010]*, the *Mutual Funds Act (2025 Revision)*, the *Private Funds Act (2025 Revision)* or the *Securities Investment Business Act (2020 Revision)*, has obtained consent of the Cayman Islands Monetary Authority to the transfer;



- (n) the applicant partnership will upon registration under the laws of the relevant jurisdiction continue as a partnership, body corporate or other form of entity;
 - (o) the applicant partnership is in good standing with the registrar and all outstanding fees due to be paid in relation to the applicant partnership to the Registrar are paid; and
 - (p) the Registrar is not aware of any other reason why it would be against the public interest to de-register the applicant partnership.
- (3) Paragraphs (d), (e), (f), (g), (h), (j), (k), (l) and (n) of subsection (2) may be satisfied by filing with the Registrar a voluntary declaration or affidavit of an authorised signatory of the applicant to the effect that, having made due enquiry, the Registrar is of the opinion that the requirements of those paragraphs have been met.
- (4) A declaration or affidavit under subsection (3) shall include a statement of the assets and liabilities of the applicant partnership.
- (5) The statement under subsection (4) shall be based on an assessment of the assets and liabilities of the applicant partnership as at the date of the declaration or affidavit or the date as close as is practicable to the foregoing date.
- (6) An authorised signatory of the applicant, who makes a declaration or affidavit under subsection (3) without reasonable grounds commits an offence and is liable on summary conviction to a fine of fifteen thousand dollars and to imprisonment for five years.
- (7) The Registrar may, upon request from an applicant, where the Registrar is satisfied that the applicant has complied with subsection (2), de-register the applicant partnership.
- (8) Section 41 does not apply to an applicant partnership under this section.

Certificate of de-registration

44. (1) Upon the termination of registration of a partnership under section 41, the Registrar shall issue a certificate under the Registrar's hand and seal of office that the registration of the partnership as an exempted limited partnership has been terminated and specifying the date of termination; and shall enter in the register of exempted limited partnerships the date of termination of the registration of the partnership under section 41.
- (2) Upon de-registration of an applicant partnership under section 43, the Registrar shall issue a certificate under the Registrar's hand and seal of office that the applicant partnership has satisfied the de-registration requirements under section 43 and been de-registered as an exempted limited partnership and specifying the date of de-registration and shall enter in the register of exempted



limited partnerships the date of de-registration of the applicant partnership under section 43.

- (3) From the commencement of the date of termination of registration under section 41 or de-registration under section 43 the applicant partnership shall cease to be an exempted limited partnership for all purposes under this Act and in the case of de-registration under section 43 shall continue as a partnership, body corporate or other entity under the laws of the relevant jurisdiction.
- (4) From the commencement of the date of termination of registration of a partnership under section 41 the applicant partnership becomes a general partnership under the *Partnership Act (2025 Revision)* and in the case of an applicant partnership de-registered under section 43, the applicant partnership de-registered shall not by virtue of that de-registration alone cease to be a partnership, body corporate or other entity under the laws of the relevant jurisdiction.
- (5) This section shall not operate, in relation to an applicant partnership de-registered under section 43 and continued as a partnership under the laws of the relevant jurisdiction —
 - (a) to create a new legal entity unless otherwise provided by the laws of the relevant jurisdiction;
 - (b) to prejudice or affect the identity or continuity of the applicant partnership as previously constituted unless otherwise provided by the laws of the relevant jurisdiction;
 - (c) to affect the property of any applicant partnership;
 - (d) to affect any appointment made, resolution passed or any other act or thing done in relation to the applicant partnership pursuant to a power conferred by the partnership agreement of the applicant partnership or by the laws of the Islands;
 - (e) except to the extent provided by or pursuant to section 43 and this section, to affect the rights, powers, authorities, functions and liabilities or obligations of the applicant partnership or any other person unless otherwise provided by the laws of the relevant jurisdiction; or
 - (f) to render defective any legal proceedings by or against the applicant partnership, and any legal proceedings that could have been continued or commenced by or against the applicant partnership before its de-registration under this Act may, notwithstanding the de-registration, be continued or commenced by or against the applicant partnership after de-registration.



Notice of de-registration

45. The Registrar shall give notice in the Gazette of the termination of registration of a partnership under section 41 or the de-registration of an applicant partnership under section 43 and, in the case of de-registration under section 43, the jurisdiction under the laws of which the applicant partnership has been registered by way of continuation and the name of the applicant partnership, if changed.

Certificate of good standing

46. (1) The Registrar may on application made by —
- (a) an exempted limited partnership; or
 - (b) a foreign limited partnership registered under section 42,
- issue a certificate of good standing to the exempted limited partnership or the foreign limited partnership that is in good standing in accordance with subsection (2).
- (2) A certificate of good standing is evidence of the fact that the exempted limited partnership is in good standing on the date that the certificate of good standing is issued.
- (3) An exempted limited partnership is deemed to be in good standing if all fees and penalties under this Act have been paid and the Registrar has no knowledge that the exempted limited partnership is in default under this Act.

Electronic business

47. Nothing in this Act shall prohibit an exempted limited partnership from offering, by electronic means, and subsequently supplying, real or personal property, services or information from a place of business in the Islands or through an internet service provider or other electronic service provider located in the Islands.

Regulations

48. (1) The Cabinet may make Regulations in respect of exempted limited partnerships and foreign limited partnerships prescribing —
- (a) the duties to be performed by the Registrar for the purposes of this Act;
 - (b) the forms to be used for the purposes of this Act;
 - (c) the fees payable to the Registrar in respect of filings, certifications, administrative services or otherwise pursuant to this Act; and
 - (d) generally, the conduct and regulation of registration under this Act and any matters incidental thereto.
- (2) Regulations made under this Act may —
- (a) make different provision in relation to different cases or circumstances;



- (b) apply in respect of particular persons or particular cases or particular classes of persons or particular classes of cases and define a class by reference to any circumstances whatsoever; and
 - (c) contain such transitional, consequential, incidental or supplementary provisions as appear to the Cabinet to be necessary or expedient for the purposes of the regulations.
- (3) Regulations made under this Act may create an offence punishable by a fine not exceeding fifteen thousand dollars.
- (4) Fees prescribed for the purpose of this Act need bear no relationship to the cost of providing any service.

Recovery of penalties

49. (1) Notwithstanding any provision of this Act which prescribes a specific *per diem* penalty in respect of a default of any obligation to make a filing, to serve a notice or to maintain a record set out in this Act the Registrar may, in any case where the aggregate *per diem* penalty has exceeded the amount of one thousand dollars and the Registrar is satisfied that the failure is not due to wilful default, accept payment of a penalty of one thousand dollars in lieu thereof.
- (2) Without prejudice to the powers exercisable by the Registrar under this Act, all sums that the Registrar is entitled to recover by way of fees or penalties are recoverable either summarily as a civil debt, or as a simple contract debt, in any court of competent jurisdiction.

Repeal of the Exempted Limited Partnership Law (2013 Revision) and savings

50. (1) The *Exempted Limited Partnership Law (2013 Revision)* is **repealed**.
- (2) The **repeal** of the *Exempted Partnership Law (2013 Revision)* shall not affect any exempted limited partnership registered under the **repealed** *Exempted Limited Partnership Law (2013 Revision)* and a provision in any document referring to the **repealed** *Exempted Limited Partnership Law (2013 Revision)* or its revision shall, so far as may be necessary for preserving its effect, be construed as referring to the corresponding provision in this Act.

Validation of the Exempted Limited Partnership Regulations, 2014

51. (1) The purpose of this section is to remedy certain defects in the *Exempted Limited Partnership Regulations, 2014* which were purported to be made in accordance with section 48 of the *Exempted Limited Partnership Act, 2014*.
- (2) Section 48 of the *Exempted Limited Partnership Act, 2014* provided for the making of regulations by the Cabinet in respect of exempted limited partnerships but the *Exempted Limited Partnership Regulations, 2014* also provided for foreign limited partnerships.



- (3) The defect under subsection (2) makes regulations 2, 5 and 6 and Schedules 1, 4 and 5 of the *Exempted Limited Partnership Regulations, 2014* inconsistent with the *Exempted Limited Partnership Act, 2014* to the extent that those regulations and Schedules provided for matters concerning foreign limited partnerships without statutory authority.
- (4) Notwithstanding the inconsistency referred to in subsection (3), during the specified period —
- (a) the fees paid without statutory authority to the Registrar in respect of foreign limited partnerships; and
 - (b) any forms for a translation certificate submitted in respect of foreign limited partnerships,
- are validated and deemed to have been paid or submitted, as applicable, in accordance with the *Exempted Limited Partnership Act, 2014*.
- (5) For the purposes of this section —
- (a) “**specified period**” means the period commencing on 2nd July, 2014, which is the date of the commencement of the *Exempted Limited Partnership Act, 2014*, and ending on 1st January, 2025, the commencement date of the *Exempted Limited Partnership (Amendment and Validation) Act, 2024 [Act 13 of 2024]*; and
 - (b) references to the *Exempted Limited Partnership Act, 2014* and the *Exempted Limited Partnership Regulations, 2014* include any amended or revised versions of that Act and those Regulations, prior to 1st January, 2025, the commencement date of the *Exempted Limited Partnership (Amendment and Validation) Act, 2024 [Act 13 of 2024]*.

Validation of payment and collection of fees

52. The payment of fees to, and the charging and collection of fees by, the Registrar without statutory authority for any service provided by the Registrar prior to 1st January, 2025, the commencement date of the *Exempted Limited Partnership (Amendment and Validation) Act, 2024 [Act 13 of 2024]* are —

- (a) validated; and
- (b) taken to have been lawfully charged by, paid to and collected by the Registrar,

as if the Registrar was empowered under the *Exempted Limited Partnership Act (2021 Revision)* as amended by *Exempted Limited Partnership (Amendment and Validation) Act, 2024 [Act 13 of 2024]* to charge and collect those fees.



Orders or determinations by court not affected

- 53.** The *Exempted Limited Partnership (Amendment and Validation) Act, 2024 [Act 13 of 2024]* does not affect any order or determination made by a court with respect to fees charged by, paid to and collected by the Registrar without statutory authority for any service provided by the Registrar prior to 1-Jan-2020, the commencement date of the *Exempted Limited Partnership (Amendment and Validation) Act, 2024 [Act 13 of 2024]*.

Publication in consolidated and revised form authorised by the Cabinet this 21st day of January, 2025.

Kim Bullings
Clerk of the Cabinet



ENDNOTES**Table of Legislation history:**

SL #	Act/Law #	Legislation	Commencement	Gazette
51/2024		Exempted Limited Partnership (Amendment and Validation) Act, 2024 (Commencement) Order, 2024	19-Dec-2024	LG47/2024/s17
	13/2024	Exempted Limited Partnership (Amendment and Validation) Act, 2024	1-Jan-2024	LG47/2024/s4
		Exempted Limited Partnership Law (2021 Revision)	29-Jan-2021	LG9/2021/S3
	56/2020	Citation of Acts of Parliament Act, 2020	3-Dec-2020	LG89/2020/s1
	31/2020	Exempted Limited Partnership (Amendment) Law, 2020	7-Jul-2020	LG49/2020/s7
		Exempted Limited Partnership Law (2018 Revision)	16-Mar-2018	GE22/2018/s15
	10/2017	Exempted Limited Partnership (Amendment) Law, 2017	5-Jun-2017	G12/2017/s7
	5/2014	Exempted Limited Partnership Law, 2014	2-Jul-2014	GE48/2014/s1







(Price: \$9.60)



EXHIBIT 5

[2023 (1) CILR 50]

**KUWAIT PORTS AUTHORITY, PUBLIC INSTITUTION FOR
SOCIAL SECURITY and THE PORT FUND L.P. v.
PORT LINK GP LIMITED, WILLIAMS, WELLSPRING
CAPITAL GROUP INCORPORATED and KGL INVESTMENT
COMPANY ASIA**

C.A. (Field, Birt and Beatson, JJ.A.) January 20th, 2023

Partnership — exempted limited partnership — derivative action by limited partners — derivative action by limited partner against general partner struck out where exempted limited partnership had no claim against general partner and limited partner had adequate alternative remedy, namely direct claim against general partner for breach of duty

Partnership — exempted limited partnership — derivative action by limited partners — derivative action by limited partner against shareholder of general partner and others not struck out — general partner alleged to be involved in wrongdoing had conflict of interest in relation to whether to institute proceedings

The plaintiffs/respondents brought claims concerning an exempted limited partnership.

The first and second plaintiffs were Kuwaiti state-owned enterprises financed by Kuwaiti public funds. They were two of the eleven limited partners in an exempted limited partnership, The Port Fund L.P. (“TPF”). The first and second plaintiffs had invested US\$125m. in TPF, which was almost two-thirds of the total investment. The first defendant/appellant, a Cayman Islands exempted limited company, was the general partner of TPF (“D1” or “the GP”). The second defendant/appellant (“D2”) was the sole shareholder of Port Link Holdings USA Inc., which was the sole shareholder of the GP. D2 was the CEO, CFO, President, Vice-President, Treasurer and Secretary of the third defendant/appellant (“D3”), a company incorporated in the United States. D2 was also closely involved in the management of the fourth defendant/appellant (“D4”), a Cayman Islands incorporated company, now in voluntary liquidation, which had provided administrative support to TPF.

The plaintiffs pleaded that in breach of statutory, contractual, common law and fiduciary duties owed by the GP to TPF and the limited partners and pursuant to a conspiracy to injure TPF and the limited partners by

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unlawful means, the GP had made very substantial payments using TPF moneys that were not for the benefit of TPF and the limited partners. The plaintiffs alleged that the defendants' wrongdoing had caused TPF and its limited partners losses in excess of US\$100m. The plaintiffs claimed to be entitled to bring their claims against the GP alleging systematic unlawful conduct in relation to the assets and affairs of TPF on their own behalf, but in the alternative they also advanced the claims as derivative claims on behalf of TPF. Similarly, the plaintiffs' primary case was that they were entitled to bring claims against D2 and D3 on their own behalf, but they also sought to advance like claims as derivative claims on behalf of TPF. The plaintiffs' claims against D4 were advanced solely on the derivative basis.

The plaintiffs' direct claims against D2 and D3 were for relief under the Fraudulent Dispositions Act (1996 Revision). They claimed that those defendants culpably participated in the improper payments made by the GP and/or dishonestly received such payments or the traceable proceeds thereof. They claimed that D3 was party to an unlawful means conspiracy, dishonestly assisted in a breach of trust/duty by the GP, knowingly procured a breach of the contractual obligations the GP owed to the limited partners and was liable in knowing receipt. The plaintiffs claimed that D2 conspired and dishonestly assisted in the GP's breaches of duty and was in breach of the fiduciary duties to TPF and the GP.

The derivative claims were brought pursuant to s.33(3) of the Exempted Limited Partnership Act ("the ELPA") on the basis that the GP had without cause failed or refused to initiate the proceedings and there was no real prospect of it doing so. Section 33 provided:

"(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.

...

(3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings."

The GP's current directors claimed to have conducted an extensive investigation into the alleged wrongdoing and to have concluded that there was not cause to bring the claims advanced by the plaintiffs as derivative claims. The plaintiffs submitted that the current directors, although not implicated in the defendants' alleged wrongdoing, were not independent and had not investigated matters properly.

The GP applied to strike out the direct and derivative claims against it. It accepted that the pleaded allegations were arguable but contended in relation to the direct claims that it was impermissible for two of eleven limited partners to claim damages from the GP to be paid directly to themselves except by seeking partnership accounts that would require the joinder of the other limited partners. D2–D4 applied to strike out the

derivative claims against them. D2 and D3 did not apply to strike out the direct claims against them but they did not admit that the plaintiffs had standing to bring the claims and maintained that they should have been pursued by way of a partnership account as against the GP.

In the Grand Court, the judge rejected the submission that direct claims by a limited partner could only be vindicated by the taking of partnership accounts. The judge accepted the plaintiffs' submission that the claims advanced were principally direct claims vested in the individual limited partners rather than in TPF and that the taking of partnership accounts was not the only procedural route available to the plaintiffs.

The GP submitted that (a) the application of the partnership accounts rule/principle to limited partnerships was not inconsistent with the provisions of the ELPA and therefore was not disapplied by s.3; (b) the GP relied on authorities which held that claims by partners *inter se* could only be brought in the context of the taking of partnership accounts; (c) there were sound practical reasons for the application of the partnership account rule/principle to Cayman Islands exempted limited partnerships; (d) the judge's holding that the property of an exempted limited partnership was held "on trust for each of the limited partners" was a misreading of s.16(1) of the ELPA which provided that the rights and property of an exempted limited partnership, including all choses in action, were held "by the general partners jointly, upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement."

The plaintiffs submitted that (a) the reasons given by the judge for concluding that the partnership rule/principle was disapplied by s.3 of the Act and was inconsistent with the scheme of the ELPA were correct; (b) the authorities relied on by the GP emphasized the reciprocity of personal obligation and trust and the mutuality of personal liability in an ordinary partnership, which was absent in a limited partnership; (c) the plaintiffs relied on authority to show that in a partnership dispute it was not always necessary to have a claim for a partnership account at the outset; and (d) because an exempted limited partnership had no separate legal personality, the only sensible construction of s.16(1) of the ELPA was that the general partner of an exempted limited partnership held its assets on trust for all the limited partners. The judge was correct so to hold. Because the general partner owed fiduciary duties to all the limited partners, any breaches of those duties must be enforceable by the limited partners themselves. Where there was a claim against the general partner itself, it could not be only the general partner who could institute proceedings.

The Grand Court did not strike out the plaintiffs' claims. The judge rejected the defendants' submission that, when considering s.33(3), the court had to apply principles derived from cases dealing with derivative claims in other contexts. The judge considered s.33(3) to be *sui generis*. On appeal, the defendants submitted that the judge erred in stating that the principles applicable in other contexts, such as trusts and companies, were not applicable in relation to the statutory test. The plaintiffs submitted that the judge was correct to hold that s.33(3) "occupies the field" and that there

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was no scope or reason to import any “special circumstances” test or other common law or equitable principles that applied to derivative claims in respect of other entities or structures. The GP submitted that, regardless of whether the test in s.33(3) was otherwise met, the derivative claim against the GP should be struck out because, on the judge’s finding, TPF had suffered no loss or damage and therefore had no claim of its own to bring. The judge held that s.33(3) required a finding as to whether the GP had failed or refused to institute the proceedings without cause, not the directors at the relevant time. The judge concluded that there was a good arguable case that the GP had a relevant inhibition because it was conflicted in relation to the plaintiffs’ claims. Its decision not to bring the claims against D2–D4 was made unsafe by the facts giving rise to its conflict of interest. (The Grand Court judgment is reported at [2022 \(1\) CILR 12.](#))

Held, judgment as follows:

(1) The GP’s appeal against the refusal of the judge to strike out the plaintiffs’ direct claims against it would be dismissed. The differences between ordinary partnerships and exempted limited partnerships meant that it was not appropriate to require that a direct claim by a limited partner against the general partner must always be initially brought by way of a claim for partnership accounts and that it was not necessary to protect the positions of the creditors and other limited partners by requiring this. The scheme of the ELPA with the absence of reciprocity and mutuality of rights and obligations was inconsistent with requiring claims by a limited partner to be brought by taking partnership accounts in proceedings to which all the limited partners were party. The court accepted the submission that because an exempted limited partnership had no separate legal personality the only sensible construction of the words in ELPA s.16(1) was that the general partner of an exempted limited partnership held its assets on trust for all the limited partners. Because a trust also had no separate legal personality, thus making the position similar to the statutory trust created by ELPA s.16(1), the court regarded the position of a claim by a beneficiary of a trust against the trustee as important. The beneficiary of a subsisting trust including a discretionary trust was entitled to bring a claim against the trustee to recover loss suffered by the trustee’s breach of trust, but the remedy was for an order to restore to the trust what ought to have been there. The partnership accounts rule/principle was inconsistent with the ELPA and the judge was correct in his conclusion. In proceedings against the GP, a limited partner could recover for loss suffered by the breach of the statutory trust but the remedy would be the restoration of the exempted limited partnership’s fund thus compensating the direct losses suffered by all the limited partners. This remedy prevented a limited partner claimant from benefitting alone from any recovery either at the expense of the other limited partners or of the exempted limited partnership’s creditors. The problem of multiplicity of actions could be dealt with by robust case management. The court’s rejection of the submission that the direct claims were defective in not at the outset joining all partners and seeking

partnership accounts did not mean that the court could not direct that there be such a procedure at a later stage as part of its case management powers if that proved necessary ([paras. 53–64](#)).

(2) If D2 and D3 had applied to strike out the plaintiffs' direct claims against them, the court's preliminary view was that the objections raised to the plaintiffs' standing to bring the claims were unfounded. The question was whether, if D2 and D3 were held liable to the plaintiffs for breach of their statutory, equitable and other obligations, it was open to the court to order that those defendants restored the fund rather than paid the plaintiffs. The court's preliminary view was that the plaintiffs had a good arguable case that, where third parties were liable for breaches such as those claimed against D2 and D3, the court could order those defendants to restore the fund rather than pay the plaintiffs and thus avoid the risk of prejudice to other limited partners or creditors. As in the case of a claim against the general partner, the starting point was the position of a claim by a beneficiary of a trust. It was clear that the interest of a beneficiary of a discretionary trust was enforceable against a third party who received trust property which the trustee did not have authority to transfer and the third party knew enough to make it unconscionable to retain the asset for his own benefit. The beneficiary's only right would be to have the asset or its proceeds reinstated to the trustee. Given the analogy between a non-partnership trust, an exempted limited partnership with no separate legal personality and the statutory trust imposed by s.16(1) of the ELPA, it was possible to order third parties such as D2 and D3 to restore the fund where the claim against them succeeded. The analogy rested on the fact that, in cases of knowingly assisting a trustee in a fraudulent and dishonest disposition of trust property, although the third party was not in fact a trustee, he was made liable in equity as if he were a trustee. This reflected the fact that it was the fund which had suffered the loss and an order to restore was the only way in which all beneficiaries' rights could be protected. For these reasons, had D2 and D3 applied to strike out the plaintiffs' direct claims against them, the court's preliminary view was that the objections raised to the plaintiffs' standing to bring the claims were unfounded. It would be for the court hearing the claims to decide whether they were made out on the merits and whether, in the circumstances of this case, an order to restore the fund should be made and, given that the GP would be implicated in the wrongdoing, steps such as placing the assets in escrow, the appointment of a receiver or the taking of partnership accounts were necessary ([paras. 65–72](#)).

(3) The legislature had prescribed in s.33(3) of the ELPA when a derivative action could be brought in respect of an exempted limited partnership, *i.e.* "if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings." Where the legislature established a statutory test for bringing a derivative action in respect of an exempted limited partnership, the courts were duty bound to apply that statutory test. The test could not be replaced by

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common law and equitable principles developed in other contexts even if, in the absence of a statutory test, the courts would no doubt have applied those principles to an exempted limited partnership. Nor could those principles form an additional threshold beyond the statutory test. The statutory test was in general and imprecise terms and left open how the test should be applied in practice. However, the expression “without cause” must carry the implication of “good” cause. The court was entitled to have regard to and could derive assistance from the developed principles in other contexts. In particular, given the existence of the statutory trust imposed by s.16(1) of the ELPA, the court was likely to derive assistance from considering whether special circumstances (as established in the contexts of trusts and English limited partnerships) existed. If special circumstances existed, this was likely to assist the court in deciding whether a general partner’s decision not to institute proceedings was “without cause.” However, the court emphasized that its duty was to apply the statutory test of “without cause”; it was not sufficient simply to consider whether there were special circumstances and, if so, then to allow a claim under s.33(3). If the court decided that the facts would satisfy the special circumstances test, it must nevertheless go on and consider whether they therefore satisfied the “without cause” test in s.33(3). Conversely, the facts of a case might enable the court to find that the general partner’s decision was “without cause” without consideration of whether there were special circumstances. The two tests were not to be equated although it was envisaged that consideration of whether there were special circumstances was likely in most cases to be of considerable assistance in determining whether the decision was “without cause” ([paras. 94–99](#)).

(4) The court summarized its conclusions in relation to s.33(3): (i) There was no requirement for leave to bring derivative proceedings under s.33(3). A limited partner could simply institute such proceedings. (ii) A limited partner must however plead the facts and matters relied upon as showing that he could bring himself within the requirements of the subsection because this formed an essential part of his cause of action. (iii) If a defendant wished to raise an issue as to the standing of a limited partner to bring such derivative proceedings, he should do so by means of a strike out application or seek the trial of a preliminary issue. (iv) Whichever route was chosen did not affect the test that had to be applied in deciding whether s.33(3) was complied with and whether a limited partner should be permitted to continue with the derivative claim. (v) The decision of the court on such an application or preliminary issue was determinative (subject to appeal). If the court held that the derivative claim could be continued, the limited partner thereafter had the necessary standing to pursue the claim. It was not an issue which was deferred until or revisited at trial (save possibly in the context of costs at the end of the trial). (vi) The court should not conduct a mini trial as to whether the requirements of s.33(3) were satisfied. The court had to reach its decision on the basis of the material before it, which would be more limited than it would be following discovery and trial. (vii) At the hearing, the onus was on the

limited partner to satisfy the court that the requirements of s.33(3) were met. Reference to “onus” was not to be mistaken as a reference to a “burden” in the sense of having to show something on the balance of probabilities. (viii) The essential task for the court at such a hearing was to determine whether the limited partner had failed or refused to bring the relevant proceedings without cause. (ix) In determining this issue, the court was likely to be assisted by consideration of whether special circumstances (as developed in cases concerning trusts, limited partnerships and other entities) existed, but the court’s task remained one of applying the statutory test set out in s.33(3). (x) Whilst reference to a “good arguable case” might be a helpful indicator of the level of comfort which the court should have when deciding whether the requirements of s.33(3) were met, the court’s task was essentially an evaluative one having regard to the facts as they appeared to the court at that stage of the proceedings from the material before the court and the need to avoid injustice balanced with the need to respect the fact that a derivative action was an exception to the general principle in the ELPA that management (including decisions as to litigation) of an exempted limited partnership was for the general partner not the limited partners. The court should consider, *inter alia*, the strength of the evidence that the general partner had failed or refused to institute proceedings without cause, the strength of the underlying claim that was sought to be brought and the likelihood and nature of any injustice if the derivative claim was not permitted. (xi) The court should reach its decision as to standing by reference to the facts as they appeared at the date of the hearing of the strike out or preliminary issue. (xii) Even where the requirements of s.33(3) were met, the court had a discretion as to whether to permit a derivative claim to continue. One of the factors which was likely to be relevant in exercising that discretion was whether the plaintiff had an alternative remedy ([para. 140](#)).

(5) The GP’s appeal against the refusal of the judge to strike out the plaintiffs’ derivative claims against it would be allowed and the claims would be struck out. A derivative action allowed a party to bring a claim in the name of and on behalf of a second party against a third party. It followed that the second party must have a claim against the third party before the first party could be permitted to bring such a claim derivatively. Section 33(3) presupposed that there was a claim to be brought by the GP on behalf of the partnership. If, as the judge held, the partnership had no claim against the GP, there could be no failure by the GP to bring such a claim without cause. Even if this were wrong, the derivative claim against the GP would not be permitted because the plaintiffs as limited partners had an adequate alternative remedy. A limited partner had the right to claim against a general partner for breach of duty on the part of the general partner. In the event of such a claim succeeding, the appropriate remedy would almost certainly not be an award of equitable compensation to the particular limited partners who had sued but instead an order that the general partner restore the trust fund. In these circumstances, exactly the same would be achieved by a direct claim as would be the case in a

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derivative action. In the event of the plaintiffs succeeding in their direct claim, the estate of TPF would be made whole by payment from the GP pursuant to an order for restoration of the trust fund. Success in a derivative action would have the same result. Accordingly, there was simply no need for a derivative action; it would add nothing to the direct claims brought by the limited partners coupled with an order for restoration of the trust fund in the event of such claims succeeding. Therefore, as a matter of discretion, the derivative claim against the GP should not be permitted ([paras. 141–151](#)).

(6) The appeals of D2, D3 and D4 against the refusal of the judge to strike out the plaintiffs' derivative claims against them would be dismissed. The GP had a conflict of interest in relation to whether to institute proceedings against D2–D4. On the plaintiffs' case, D1 as the GP was deeply involved in all the alleged wrongdoing, as was D2. D1 had to decide whether to institute proceedings against D2–D4 in circumstances where (i) the essential wrongdoing giving rise to the claims against D2–D4 was that of D1 itself in making the various payments and where it was said to be part of the unlawful means conspiracy to injure TPF involving D2 and D3; (ii) the contemplated proceedings would have to be brought against the beneficial owner of the GP and against two companies in which D2 was deeply and closely involved, namely D3 and D4; and (iii) D1 would also have to consider whether (as general partner) it should sue itself (in its own right) as a co-conspirator in the alleged unlawful means conspiracy. On the face of it, by reason of the obvious and serious conflict of interest, D1 was under an inhibition which would amount to special circumstances in the context of a trust or limited partnership and this inhibition also meant that the failure by D1 to bring proceedings against D2–D4 was without cause for the purposes of s.33(3). The defendants' submissions that this was not the position because (i) the current directors of D1 were wholly independent and were not in office at the time of the alleged wrongdoing on the part of D1, and (ii) the independence of the current directors was fortified by the fact that D2 had given an undertaking that the shareholder of the GP would not exercise any powers so as to remove the current directors or interfere in any way in the exercise of their functions did not overcome the inhibition. In relation to the first point, the judge was correct to focus on the entity which was the general partner rather than the directors for the time being of that entity. Section 33(3) referred to the "general partner" having failed or refused to bring proceedings without cause. The general partner was the legal entity D1. D1 was subject to the conflicts of interest and thus could not be seen to be in a position to take a fair and independent decision about the potential litigation. New directors were not in the same position as a liquidator, who was appointed by and subject to the supervision of the court and therefore clearly independent of the company, its directors and shareholders. The current directors owed a fiduciary duty to act in the best interests of D1. The defendants submitted that because D1 owed fiduciary duties to act in the best interests of the partnership, the current directors therefore had a duty to act in the best

interests of TPF. However, there was certainly the potential for conflict between acting in the best interests of TPF (which might include taking action against D1 as a co-conspirator) and acting in the best interests of D1 (which might be said to include the avoidance of being sued). The undertaking given by D2 was insufficient to overcome the inhibition from which D1 as general partner suffered. The plaintiffs, who alleged that there had been serious wrongdoing by the defendants which had cost TPF over US\$100m., would have a justified lack of confidence that a fair and independent decision was taken by D1 as to whether to seek recompense from any one or more of the defendants, even following the appointment of the current directors. There was no doubt that D1 suffered from an inhibition which led to the conclusion that, subject to the exercise of any discretion, it was appropriate for the plaintiffs to bring derivative claims on behalf of TPF pursuant to s.33(3) against D2–D4. As to discretion, the defendants submitted that because the plaintiffs were bringing direct claims against D2 and D3, they had an alternative remedy in respect of those two defendants and there was no need for them to bring a derivative action. However, D2–D4 expressly reserved the right to challenge the plaintiffs’ standing to bring such claims. It would be inconsistent with the overriding objective and highly undesirable to run the risk of the court eventually finding against D2 and D3 on the underlying merits of the claims but also finding that the plaintiffs did not have standing for the direct claims or that it could not make an order for restoration of the trust fund in the absence of a derivative claim on behalf of TPF. There was sufficient uncertainty about whether the plaintiffs had direct claims against D2 and D3 or whether the court could order restoration of the trust fund on the success of such claims that, as a matter of discretion, it was just and fair to allow the derivative claims to proceed alongside the direct claims so that they were all heard at the same time. If, following a trial, the direct claims were upheld and the court also held that it could order restoration of the trust fund as a remedy for such claims, there would be no need to make any award on the derivative claims; if, on the other hand, the direct claims were found not to be maintainable or restoration of the trust fund could not be ordered, the derivative claims would be necessary to provide a remedy, assuming that the underlying allegations against the defendants were upheld ([paras. 158–170](#)).

(7) The GP’s appeal against the refusal of the judge to order the plaintiffs to provide security for costs would be dismissed. The judge erred in proceeding on the basis that there was a presumption arising from comity and common sense that security for costs should not be awarded against the plaintiffs, although each case would be decided on its own facts. When dealing with a security for costs application against a foreign state or foreign state agency that enjoyed good standing in the international community, the court should treat this as a factor in favour of such a plaintiff to be weighed with all the other factors when the court exercised its discretion. The judge also erred in stating that a foreign plaintiff did not have to establish that it had fixed and permanent property within the

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jurisdiction. Evidence that a foreign plaintiff had valuable property within the jurisdiction would obviously be of relevance but the significance of this evidence would depend on all the facts of the case, including any evidence as to the permanency of the property and its freedom from encumbrances (or the lack of such evidence) and other evidence tending to show that the plaintiff could be trusted to honour an adverse costs order. The judge's errors played such a significant role in the exercise of his discretion that his decision must be set aside. In the circumstances it was open to the court to exercise the discretion conferred by GCR O.23, r.1(1). The court proceeded on the assumption that the defendants were correct that there would be very real difficulties in enforcing in Kuwait costs orders made against the plaintiffs if their claims against the defendants were dismissed. Although it was a necessary condition for the ordering of security for costs that there was a real risk that an adverse costs order would not be enforced against a foreign plaintiff in his/its home jurisdiction, this was not a sufficient condition for ordering security for costs whatever the other circumstances of the case. Instead, it was open to the court, if there was sufficient evidence to support such a conclusion, to find that there was no real risk that the plaintiff would not honour an adverse costs order and to decline to order security for costs. The present case was such a case. The plaintiffs were agencies of a foreign state, Kuwait, which was of good standing in the international community and enjoyed diplomatic relations with HM Government. Further, a formal letter had been sent to the judge on behalf of the State of Kuwait, among others, confirming that the plaintiffs were wholly owned by the State of Kuwait and attaching letters by the plaintiffs confirming that they would comply with any final and binding costs orders made against them in the proceedings. The letters amounted to a representation intended to be relied on by the Grand Court that the plaintiffs would honour any final and binding costs orders made against them. The letters provided strong support for the conclusion that there was no real risk that such costs orders would not be paid. Further support for this conclusion came from the evidence as to the financial resources of the plaintiffs, which showed that they could be expected to have the ready funds to pay an adverse costs award ([paras. 188–217](#)).

Cases cited:

- (1) [Ahmad Hamad Algosaibi & Bros. Co. v. Saad Invs. Co. Ltd.](#), 2017 (2) CILR 602, referred to.
- (2) [Autumn Hldgs. Asset Inc. v. Renova Resources Private Equity Ltd.](#), 2017 (2) CILR 136, referred to.
- (3) [Banco Economico S.A. v. Allied Leasing & Fin. Corp.](#), 1998 CILR 102, considered.
- (4) *Barnes v. Addy* (1873–74), 9 Ch. App. 244, referred to.
- (5) *Barrett v. Duckett*, [1995] 1 BCLC 243; [1995] BCC 362, considered.
- (6) *Chief Commr. of Stamp Duties v. Buckle*, [1998] HCA 4; (1998), 192 CLR 226; 38 NSWLR 574; 151 ALR 1, considered.

- (7) *Commr. of State Revenue v. Rojoda Pty. Ltd.*, [2020] HCA 7; (2020), 268 CLR 281; 94 ALJR 423; 376 ALR 378, considered.
- (8) *Costa Rica (Rep.) v. Erlanger* (1876), 3 Ch. D. 62, referred to.
- (9) [Cybervest Fund, In re, 2006 CILR 80](#), followed.
- (10) [Elliott v. Cayman Islands Health Serv. Auth., 2007 CILR 163](#), referred to.
- (11) *Foss v. Harbottle* (1843), 2 Hare 461; 67 E.R. 189, referred to.
- (12) *Golstein v. Bishop*, [2013] EWHC 881 (Ch); [2014] 1 Ch. 131; [2013] 3 W.L.R. 572; on appeal, [2014] EWCA Civ 10; [2014] 1 Ch. 455; [2014] 2 W.L.R. 1448; [2014] 3 All E.R. 397, considered.
- (13) *Henderson PFI Secondary Fund II LLP v. Henderson Equity Partners (GP) Ltd.*, [2012] EWHC 3259 (Comm); [2013] 1 Q.B. 934; [2013] 2 W.L.R. 1297; [2013] 3 All E.R. 887; [2012] 2 CLC 905, followed.
- (14) *Hugh Stevenson & Sons v. Akt. für Cartonagen-Industrie*, [1918] A.C. 239, referred to.
- (15) *Hughes v. Colin Richards & Co.*, [2004] EWCA Civ 266; [2004] PNLR 35, referred to.
- (16) *Hurst v. Bryk*, [2000] UKHL 19; [2002] 1 A.C. 185; [2000] 2 All E.R. 193, referred to.
- (17) *Iesini v. Westrip Holdings Ltd.*, [2009] EWHC 2526 (Ch); [2010] BCC 420, considered.
- (18) *Kleanthous v. Paphitis*, [2011] EWHC 2287 (Ch), referred to.
- (19) *Knight & Tabernacle, &c., Socy., In re* (1892), 2 Q.B. 613; 62 L.J.Q.B. 33, considered.
- (20) *Leyvand v. Barasch*, [2000] WL 191256, considered.
- (21) *Meyer v. Faber (No. 2)*, [1923] 2 Ch. 421, referred to.
- (22) *Ministère de la Culture &c. de France v. Lielb*, [1981] 1 WLUK 253, considered.
- (23) *Ministry of Foreign Affairs (Italy) v. Simeone*, [2016] QDC 160, referred to.
- (24) *Ninemia Maritime Corp. v. Trave Schiffahrts G.m.b.H. und Co. K.G., The Niedersachsen*, [1984] 1 All E.R. 398; [1983] 2 Lloyd's Rep. 600; [1983] Com. L.R. 234, considered.
- (25) *PJSC Tatneft v. Bogolyubov*, [2019] Costs L.R. 977, referred to.
- (26) *Papua New Guinea v. Sandline*, [1998] QDC 298, referred to.
- (27) *Pisante v. Logothetis*, [2020] EWHC 3332 (Comm), referred to.
- (28) *Prudential Assur. Co. Ltd. v. Newman Indus. Ltd.*, [1982] Ch. 204; [1982] 2 W.L.R. 31; [1982] 1 All E.R. 354, followed.
- (29) *Public Trustee v. Elder*, [1926] 1 Ch. 776, referred to.
- (30) *Roberts v. Gill & Co. Solicitors*, [2010] UKSC 22; [2011] 1 A.C. 240; [2010] 2 W.L.R. 1227; [2010] PNLR 30; [2010] WTLR 1223, considered.
- (31) *St. John's Trust Co. (PVT) Ltd. v. Medlands (PTC) Ltd.*, [2021] CA (Bda) 20 Civ, Bermuda C.A., December 12th, 2021, followed.
- (32) [Scully Royalty Ltd. v. Raiffeisen Bank Intl. Ltd., 2022 \(1\) CILR 118](#), referred to.

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- (33) *Selangor United Rubber Estates Ltd. v. Craddock (No. 3)*, [1968] 1 W.L.R. 1555; [1968] 2 All E.R. 1073, referred to.
- (34) *Sierra Leone Govt. v. Davenport*, [2003] EWHC 1913 (Ch); [2003] All E.R. (D.) 183; 2003 WL 21047383, referred to.
- (35) *Smith v. Croft (No. 2)*, [1988] Ch. 114; [1987] 3 All E.R. 909; 1987 PCC 209; [1987] 1 FTLR 319, considered.
- (36) *Soar v. Ashwell*, [1893] 2 Q.B. 390, referred to.
- (37) *SPhinX Group, In re, 2010 (1) CILR 234*, referred to.
- (38) *Target Hldgs. Ltd. v. Redferns*, [1996] A.C. 421; [1995] 3 W.L.R. 352; [1995] 3 All E.R. 785; [1995] CLC 1052; [1995] N.P.C. 136; [1995] 3 LRC 162, considered.
- (39) *Tasarraf Mevduati Sigorta Fonu v. Wisteria Bay Ltd., 2006 CILR 351*, considered.
- (40) *Top Jet Enterprises Ltd. v. Sino Jet Holding Ltd., 2018 (1) CILR 18*, referred to.
- (41) *Waddington Ltd. v. Chan Chun Hoo Thomas*, [2008] HKCFA 63; (2008), 11 HKCFAR 370; [2009] 4 HKC 381; [2008] HKCU 1381; [2009] 2 BCLC 82, considered.

Legislation construed:

Exempted Limited Partnership Act (2021 Revision), s.3: The relevant terms of this section are set out at [para. 34](#), fn. 7.

s.16(1): The relevant terms of this subsection are set out at [para. 19](#).

s.32(12): The relevant terms of this subsection are set out at [para. 36](#), fn. 9.

s.33: The relevant terms of this section are set out at [para. 20](#).

Grand Court Rules 1995, O.23, r.1(1): The relevant terms of this subrule are set out at [para. 176](#).

C. Stanley, K.C., P. Tyers-Smith and T. Wright for the first appellant;

G. Chapman, K.C., A. Pullinger and H. Shaw for the second to fourth appellants;

D. Allison, K.C., J. Fox, O. Green and H. Clark for the respondents.

1 FIELD, J.A.:**Introduction**

This is the judgment of the court to which each member has contributed.

2 There are two appeals before the court. The first is brought by all the appellants from the order made by Parker, J. (“the judge”) dismissing their summonses to strike out certain claims in the amended statement of claim¹ (“the ASOC”) (“the strike out appeal,” reported at [2022 \(1\) CILR 12](#)). The second appeal is brought by the first appellant against the dismissal of its

¹ The defendants’ application to strike out those paragraphs of the ASOC that pleaded the criminal convictions in Kuwait of a Ms. Lazareva and a Mr. Dashti was not opposed and the judge so ordered.

summons for security for costs (“the SFC appeal”). Hereinafter, we refer to the appellants as “the defendants” or “D1,” “D2,” “D3” and “D4” and to the respondents as “the plaintiffs.”

The strike out appeal

3 This appeal raises important issues concerned with: (a) the nature of a Cayman Islands exempted limited partnership (“ELP”) established under the Exempted Limited Partnership Act (2021 Revision) (“the ELPA”); (b) whether a limited partner of an ELP can sue, independently of any of the other limited partners, alleged wrongdoers, including the ELP’s general partner, who are alleged to have been parties to the wrongful misappropriation of the ELP’s assets held on trust by the general partner and, if so, what is the appropriate remedy to be granted by the court; and (c) the circumstances in which a limited partner can bring a derivative action under s.33(3) of the ELPA in the name of the ELP against the general partner for breaches of contractual, statutory and fiduciary duty.

4 The ELP in question is The Port Fund L.P. (“TPF”) which was registered on March 21st, 2007. It was established as a vehicle for investments in port-related assets around the world. It has one general partner and eleven limited partners including the two plaintiffs, the Kuwait Ports Authority (“KPA”), which it is alleged has invested US\$85m. giving it at least a 41% interest in TPF and the Public Institution for Social Security (“PIFSS”), which it is alleged invested US\$40m. (giving it a 23.77% interest in TPF). The total invested in TPF by the limited partners was US\$188,152,000.

5 The first defendant, Port Link GP Ltd. (“the GP” or “D1”), is a Cayman Islands exempted limited company incorporated on March 8th, 2007. It was appointed the general partner of TPF pursuant to a limited partnership agreement (“the LPA”) made on March 21st, 2007 between it and the original limited partners of TPF. The whole of the GP’s share capital is held by Port Link Holdings USA Inc. (“PLH”), a Delaware company; and the whole of PLH’s share capital is held by the second defendant (“Mr. Williams”). Mr. Williams is also CEO, CFO, President, Vice President, Treasurer and Secretary of the third defendant, Wellspring Capital Group Inc. (“Wellspring”), a company incorporated in the US State of Georgia. Wellspring is owned by the Mark E. Williams Living Trust, the trustees of which are Mr. Williams, his wife, Laura Williams, and his brother, Dylan Williams.

6 TPF’s sponsor and placement agent was KGL Investment Co. KSCC, a Kuwaiti company (“KGLI Kuwait”). From September 2007 until 2008, Mr. Williams was KGLI Kuwait’s Vice President and he was its Investment Director from 2009 to 2011. He was also a member of TPF’s Investment Committee in the years 2009–2013.

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7 Pursuant to an agreement with the GP dated June 28th, 2007 (“the IMA”), KGL Investment Cayman Ltd. was appointed TPF’s investment manager. In July 2018, KGL Investment Cayman Ltd. changed its name to Emerging Markets PE Management Ltd. (“EMPEML”). The ultimate beneficial owner of EMPEML as at the date of the IMA and until around January 2018 was KGLI Kuwait, which is the 100% shareholder of the fourth defendant (“KGLI Asia”). KGLI Asia is said by the defendants to have provided administrative support to TPF between December 2017 and August 2020 pursuant to an agreement for the provision of such services dated December 1st, 2017 (“the ASA”).

8 Briefly put, the plaintiffs plead in the ASOC that assets of TPF worth hundreds of millions of US dollars held on trust by the GP have been misappropriated as part of an unlawful means conspiracy and/or dishonest breaches of trust and fiduciary duty and that each of the defendants has wrongfully participated in some or all of these defalcations, in some cases having knowingly received some or all of the proceeds thereof. Amongst the allegations made against the defendants is a claim that the GP made substantial improper payments using TPF moneys that were not for the benefit of TPF.

9 Two of the other limited partners in TPF, Gulf Investment Corp. (“GIC”) and General Retirement and Social Insurance Authority of Qatar (“GRSIA”), who between them it is alleged invested 15.14% of the total alleged investment in TPF, have brought claims against the second and third defendants in the US State of Georgia alleging that those parties are guilty of dishonesty, deliberate breaches of fiduciary and unlawful means conspiracy. GIC and GRSIA have consented to a stay of their claims in the courts of Georgia pending determination of the instant proceedings which they support.

10 The two current directors of the GP (“the FFP directors”) are individuals recruited from FFP (Directors) Ltd. Mr. Andrew Childe (“Mr. Childe”) was appointed on January 29th, 2020 and Mr. Richard Lewis (“Mr. Lewis”) on October 28th, 2020, replacing Mr. Christopher Rowland (“Mr. Rowland”) who had been appointed at the same time as was Mr. Childe.

11 The FFP directors have no connection to any of the wrongdoing alleged in the ASOC and describe themselves as “independent directors.” In his third affidavit, Mr. Lewis states that, fully cognisant of their fiduciary duties, they have conducted an intensive, forensic investigation into the actions of the GP and the former management team of TPF for the benefit of all the limited partners and not just the plaintiffs. The stated results of the FFP directors’ forensic investigation are set out in a series of memoranda issued to the limited partners in an update to the limited partners dated May 29th, 2021, save for their investigations into the DIFC

proceedings claim and the Lazareva lobbying campaign which are respectively dealt with in paras. 300–345 and 346–399 of Mr. Lewis’s third affidavit. In their view, there is currently no cause to bring the derivative claims and even if TPF had meritorious claims, it would be necessary to consider whether the claims were worth pursuing on a cost/benefit analysis and, if so, whether TPF was in a position to pursue them or could raise funding to do so, and whether it would be in the best interests of TPF to do so.

12 The plaintiffs plead individual direct claims against the defendants for losses each has suffered as a limited partner in TPF by reason of the defendants’ actionable involvement in the wrongful misappropriation of assets held on trust by the GP. Relying on s.33(3) ELPA, they also plead derivative claims against the GP and the other defendants on behalf of TPF in respect of the aforesaid alleged misappropriation of assets.

The direct claims and the applications to strike them out

13 We first consider the direct claims brought against the GP (D1), Mr. Williams (D2), and Wellspring (D3). It is not necessary to consider the plaintiffs’ claims against KGLI Asia (D4) for their losses from payments made to that entity under the ASA because the plaintiffs’ counsel, Mr. Allison, K.C., accepted that there is no direct claim against D4 (see respondents’ skeleton, para. 48).

14 The plaintiffs plead that in breach of the statutory, contractual, common law and fiduciary duties owed by the GP to TPF and the limited partners and pursuant to a conspiracy to injure TPF and the limited partners by unlawful means, the GP made very substantial payments using TPF moneys that were not for the benefit of TPF and the limited partners. These payments were allegedly made to the following five recipients and/or for the following purposes: (i) Apache Asia Ltd. and its related Macau entity, Apache Asia Ltda. (“Apache”) which received US\$58,528,399 from the GP, of which US\$45,850,000 was purportedly for services under an advisory agreement and US\$14,550,000 was directed to be paid to KGLI Kuwait; (ii) Wilfredo Placino who received US\$2,920,000 purportedly by way of “advisor fees”; (iii) lawyers and lobbyists acting for Ms. Marsha Lazareva (a director of the GP from March 8th, 2007 to May 24th, 2018), and Mr. Saeed Dashti (a director of the GP from April 16th, 2007 to May 24th, 2018); (iv) a group of Kuwaiti service providers, allegedly for services rendered, of which US\$14,070,000 was paid to Golden Shahin General & Trading Contracting Co. (“Golden Shahin”), which is part of a group of companies associated with KGLI Kuwait and Mr. Dashti; and (v) Wellspring, which received US\$59,990,461.30 (“the Wellspring payment”) by way of a payment alleged to be due under a judgment given

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in proceedings brought by EMPEML against the GP and TPF in the Dubai International Finance Centre Court (“the DIFCC”).

15 The alleged background to (v) is that on November 15th, 2017, US\$496,429,767 (representing part of the net proceeds resulting from the sale by the GP of a TPF asset in the Philippines called “Clark City”) were transferred to the GP’s account with Noor Bank PJSC (“Noor Bank”). The same day, Noor Bank made a suspicious transaction report to the Financial Intelligence Function of the UAE which issued a report to the Dubai Public Prosecutor who successfully moved to freeze the transferred money, an order that remained in place until February 2019. On July 9th, 2018, EMPEML commenced proceedings (“the DIFC proceedings”) against the GP and TPF in the DIFCC of First Instance claiming unpaid carry in the sum of US\$45,462,000, compound interest on the unpaid carry sum, and unpaid management fees of US\$8,106,386 with compound interest thereon at 8% pa. The GP acknowledged service of the claim, submitted to the jurisdiction of the DIFCC and admitted the claim in the sum of US\$56,808,005. The DIFCC then entered judgment ordering the GP and TPF to pay US\$56,999,978 and, at the request of EMPEML, the GP transferred US\$59,990,461.30 to Wellspring in satisfaction of the judgment. The plaintiffs claim, *inter alia*, that this payment was made by the GP in wilful and negligent breach of trust in that EMPEML had no entitlement to the claimed management fees having assigned its rights therein to KGLI Kuwait; there was no contractual right to interest; it was wrong to submit to the jurisdiction of the DIFCC when the law of the Cayman Islands governed the relationship between the GP and EMPEML; and the IMA contained an exclusive jurisdiction clause in favour of the courts of the Cayman Islands. The plaintiffs also allege that the payment made in satisfaction of the DIFCC judgment was made on the advice of the same legal counsel who, to the GP’s knowledge, was also advising EMPEML with respect to its entitlement.

16 The plaintiffs’ direct claims against D1 and D3 are for relief under the Fraudulent Dispositions Act (1996 Revision) (see ASOC, paras. 179 and 189). They claim that these defendants culpably participated in the aforementioned improper payments made by the GP that are related in paras. 14 and 15 above and/or dishonestly received such payments or the traceable proceeds thereof. They maintain that Wellspring was party to an unlawful means conspiracy, dishonestly assisted in a breach of trust/duty by the GP, knowingly procured a breach of the contractual obligations the GP owes the limited partners, and is liable in knowing receipt for the Wellspring payment, holding the Wellspring payment or its traceable proceeds on constructive trust for TPF. The plaintiffs also claim that Mr. Williams conspired and dishonestly assisted in the GP’s breaches of duty and was in breach of his fiduciary duties to TPF and the GP by orchestrating the DIFC proceedings and the Wellspring payment.

17 The GP applied to strike out the direct and the derivative claims against it but not on the ground that they lacked merit. Instead, it accepted that the pleaded allegations were arguable, but contended in relation to the direct claims that it is impermissible for two members of a class of eleven limited partners to claim damages from the GP to be paid directly to themselves except by seeking partnership accounts that would require the joinder of the other limited partners.

18 D2–D4 applied to strike out the derivative claims against them but D2 and D3 did not apply to strike out the direct claims against them. They have not appealed the judge’s decision, but do not admit that the plaintiffs have standing to bring the direct claims that they face. Like D1, they maintain that these claims “ought to be pursued by way of a partnership account as against the GP.”

The general rule as to who may bring proceedings by or against an ELP

19 Section 16 ELPA provides that all rights or property of an ELP shall be held on trust by the GP as an asset of the ELP and s.33 contains the general rule as to who can bring proceedings by or against an ELP. Section 16(1) reads:

“Any rights or property of every description of the exempted limited partnership, including all choses in action ... shall be held or deemed to be held by the general partner and if more than one then by the general partners jointly, *upon trust as an asset of the exempted limited partnership* in accordance with the terms of the partnership agreement.” [Emphasis added.]

20 The material provisions of s.33 are:

(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.

(2) If the court considers it just and equitable any person or a general partner shall have the right to join in or otherwise institute proceedings against any one or more of the limited partners who may be liable under section 20(1) or to enforce the return of the contribution, if any, required by section 34(1).

(3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings.”

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21 It is important to note that, as recognized in paras. 2 and 6 of D2–D4’s skeleton argument for the appeal, the effect of ELPA s.33 is that “ordinarily, actions *for and on behalf of an ELP* must by statute be brought by the general partner of that ELP” and “*a claim belonging to a limited partnership must be brought by the GP acting for and on behalf of the ELP.*” [Emphasis added.] Sections 33(1) and (3) thus apply only to claims brought by or on behalf of an ELP, that is to derivative claims. They therefore do not apply to direct claims brought by a limited partner in respect of its own right of action against the GP and others.

The judge’s decision on the direct claims

22 The judge dealt with direct claims by a limited partner at [2022 \(1\) CILR 12, paras. 61–65](#). Before doing so (*ibid.*, at paras. 46–60) he helpfully considered and analysed the characteristics of an ELP, how it differs from an ordinary partnership and a company, and the statutory regime established by the ELPA.

23 He stated (*ibid.*, at paras. 46–47) that the rights and obligations of the limited partners and the general partner (or partners) *inter se* are regulated by the ELPA, the express provisions of which are to prevail where they are inconsistent with the rules of equity and of common law applicable to partnerships as modified by the Partnership Act (2013 Revision). He also referred (*ibid.*, at para. 46) to the provision in s.3 of the ELPA that absent such inconsistency those rules “shall apply to an exempted limited partnership.”

(a) Characteristics of an ELP that differ from those of an ordinary partnership

24 The judge identified the following characteristics of ELPs which he considered to be important points of distinction from an ordinary partnership, and which create different rights and obligations between the partners to those in an ordinary partnership (*ibid.*, at paras. 46–53):

(1) By ss. 4(2) and 20 of the ELPA, the limited partners in an ELP have limited liability whereas the general partner is liable for all debts and obligations of the ELP (para. 48).

(2) By s.14 of the ELPA limited partners have no active involvement in the business in their capacity as limited partners. The business is carried out by the general partner who enters into all contracts by or on behalf of the ELP (paras. 49 and 52).

(3) Section 19(1) of the ELPA imposes an express duty of good faith on the general partner of an ELP requiring the general partner to act in the interests of the ELP (para. 50).²

² The judge did not mention, but must have been aware, that this statutory duty is subject to any express provisions to the contrary in the partnership agreement.

(4) Whereas in an ordinary partnership, mutual and reciprocal rights and obligations are owed to each other by partners, s.19(2) of the ELPA provides that, unless the partnership agreement provides to the contrary, a limited partner owes no fiduciary duty either to the ELP or to other partners (para. 51).

(b) Characteristics of an ELP that differ from those of a company

25 The judge stated (*ibid.*, at paras. 54–55) that the fundamental legal distinction is that an ELP has no separate legal personality and exists only as its constituent partners and cannot own property in its own right. He stated that the consequence of the ELP not having a separate legal personality is that its general partner holds its rights and property, including choses in action, on trust for each of the partners. Because a limited partnership has no legal personality, the partnership as a whole is not able to enforce the general partner’s obligations as trustee.

26 The judge then identified other characteristics of ELPs which he considered to be important points of distinction from those of companies:

(1) The general partner of an ELP owes its duties to all of the individual limited partners whereas the board of directors of a company only owe duties to the company (as the legal entity) and not to its shareholders (paras. 56–57).

(2) Because in the case of a company directors’ duties are owed to the company, any breach by them is generally only actionable by or on behalf of the company and not by shareholders, although there are important exceptions where the wrongdoer directors are in control of the company (paras. 57–59).

(3) By s.33(1) of the ELPA, the general partner in an ELP is the only entity who can institute proceedings *on behalf of the partnership*, whereas in the case of a company there are exceptions to the rule in *Foss v. Harbottle* (11) where the wrongful directors are in control of the company. The judge stated that (2022 (1) CILR 12, at para. 60):³

“If the limited partners have claims against the GP, it is in practice unworkable for it to bring proceedings against itself for breach of duty. If the GP is the arbiter of whether to bring claims against itself that clearly gives rise to a conflict of interest.”

³ In para. 60, the judge does not mention s.33(3) of the ELPA which, as we have seen, permits a limited partner to bring a derivative action: “an action on behalf of an [ELP] if any one or more of the general partners with authority to do so have, without cause, failed or refused to do so.”

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(c) Direct claims by a limited partner

27 The judge accepted the submissions of counsel for the plaintiffs, Mr. Allison, K.C., based on the characteristics of an ELP which differ from those of an ordinary partnership and a company, in particular that an ELP has no separate legal personality and that a limited partner does not owe fiduciary duties to the ELP or to the other limited partners. He stated that (*ibid.*, at paras. 61–62):

“[T]he logical consequence of the aforesaid analysis of the nature and characteristics of an ELP is that the GP’s obligations must be capable of enforcement by each of the partners to whom it owes duties individually. That is to be contrasted with the situation where directors of a company hold the company’s assets and are treated as trustees because they owe fiduciary duties to the company. In that situation they hold the assets for the company, rather than the shareholders.

62 ... [T]he GP of an ELP owes fiduciary duties to each of the limited partners and any breaches are therefore enforceable by the limited partners themselves.”

28 The judge then stated (*ibid.*, at para. 63):

“It follows that where an ELP is alleged to have suffered loss, as in this case, that is the loss of each of the limited partners. There is no distinct or separate loss in respect of ‘the partnership’ (TPF), which as an entity does not exist at law. The limited partners in enforcing their individual claims do not owe duties to each other: ...”⁴

29 He concluded that (*ibid.*, at para. 64):

“[T]he direct claims in respect of the individual partners’ losses are vested in the limited partners alone, and are not claims that can be brought on behalf of TPF derivatively, except in the circumstances permitted by s.33(3) of the ELPA where the limited partners who wish to obtain redress for TPF are in effect put in the place of the GP, and bring claims on behalf of TPF.”

30 The judge rejected the submission on behalf of the GP and the other defendants that s.16(1) of the ELPA and cll. 3.1 and 3.3 of the LPA prevented such direct claims because the limited partners cannot usurp the function of the GP, who is the only authorized agent of the partnership, here TPF, able to sue. He stated (*ibid.*, at para. 76) that: “the practical difficulty with that submission is that in practice the GP could obviously

4 The last sentence, stating that, in enforcing their individual claims, limited partners do not owe duties to each other, contains a footnote referring to s.19(2) of the ELPA, on which see para. 24(4) above.

not sue itself and suffers from the conflict of interest” that arises if the GP is the arbiter of whether to bring claims against itself which clearly gives rise to a conflict of interest (see *ibid.*, at para. 60).

(d) *The Henderson case*

31 The judge considered (*ibid.*, at paras. 66–78) the decision of Cooke, J. in the English Commercial Court in *Henderson PFI Secondary Fund II LLP v. Henderson Equity Partners (GP) Ltd.* (13) (hereafter “*Henderson*”). That case concerned the similar but by no means identical UK statutory regime in the Limited Partnerships Act 1907 under which such partnerships also have no legal existence independent of their constituent partners. The focus of *Henderson* was whether limited partners were entitled to pursue derivative claims on behalf of the partnership, and, if so, the consequence of doing so.⁵ We therefore primarily consider it when giving our conclusion and reasons about the derivative claim against D1 at paras. 147–148 below. But in considering entitlement to pursue a derivative claim, Cooke, J. also considered whether a limited partner could sue the general partner for “its own loss on its own claim” under the limited partnership agreement ([2012] EWHC 3259 (Comm), at para. 32). He stated that it could because it “has its own contractual or fiduciary claim for its own loss” (*ibid.*, at para. 28).

32 In the present case, the judge stated that Cooke, J. held that:

(i) “each limited partner could in its own individual capacity sue ... the general partner, for its own losses in respect of liabilities under the limited partnership agreement” ([2022 \(1\) CILR 12, at para. 69](#));

(ii) “any claim brought by each limited partner as an individual contractual or fiduciary claim would not involve management of the partnership business” (*ibid.*, at para. 72); and

(iii) “the partnership which consisted of the limited partners and the general partner together, had no form of joint right or claim against the general partner” (*ibid.*, at para. 72).

(e) *Must direct claims by a limited partner be by seeking an order for partnership accounts?*

33 The judge considered the GP’s submission that direct claims by a limited partner can *only* be vindicated by the taking of partnership accounts (*ibid.*, at para. 79ff.). He rejected it and accepted the plaintiffs’ submission that the claims advanced were principally direct claims vested in the individual limited partners rather than in TPF (the ELP itself) and that the

5 *I.e.* whether the pursuit of derivative claims constituted taking part in the management of the business of the partnership so that, under s.6(1) of the 1907 Act, claimants doing so would forfeit their limited liability.

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taking of partnership accounts was not the only procedural route available to the plaintiffs (*ibid.*, at paras. 86–87).⁶

34 The judge took into account the distinct characteristics of an ELP and the provisions of the ELPA (*ibid.*, at paras. 80–81). He considered that the English authorities on ordinary partnerships which Ms. Stanley submitted were “pellucidly clear” in requiring rights and obligations between partners only to be procedurally adjudicated by the taking of partnership accounts had no direct application to Cayman Islands’ ELPs. His reasons were that, unlike ordinary partnerships, under a Cayman Islands’ ELP:

(i) there are no reciprocal fiduciary obligations or reciprocal duties between the limited partners unless the LPA provides otherwise (*ibid.*, at para. 84);

(ii) the absence of reciprocal fiduciary obligations between the limited partners means that the joinder of all partners to any proceedings so that the necessary accounting for any monetary claims required by *Public Trustee v. Elder* (29) ([1926] 1 Ch. at 789) does not apply to a Cayman Islands’ ELP ([2022 \(1\) CILR 12](#), at para. 82, fn. 18);

(iii) the general partner owes fiduciary and contractual duties directly to the limited partners and those duties are enforceable directly by the limited partners (*ibid.*, at para. 83);

(iv) each limited partner is not, as is the case in an ordinary partnership, jointly and several liable for the partnership’s liabilities; referring to ss. 3,⁷ 4(3), 16(1) and 19(2) of the ELPA, the judge stated that “The rules of equity and common law applicable to ordinary partnerships are in this respect inconsistent with express provisions of the ELP ...” (*ibid.*, at para. 85);

(v) claims against the general partner for a breach of the statutory, equitable, common law or contractual duties owed to the limited partners are vested in the limited partners themselves and may be brought directly (*ibid.*, at para. 87).

The questions before us and the submissions

35 We have stated that D2 and D3 did not apply to strike out the direct claims against them but do not accept that the plaintiffs have standing to bring such claims against them and, although D2 and D3 were not partners, maintain that their direct claims “ought to be pursued by way of a partnership account as against the GP.” The result was that the focus of the submissions before us was on the judge’s rejection of the application to

⁶ His summary of the GP’s submissions is at para. 32(i)–(ii).

⁷ “The rules of equity and of common law applicable to partnerships as modified by the Partnership Act (2013 Revision) but excluding ss. 31, 45–54 and 56–57 shall apply to an exempted limited partnership, except where they are inconsistent with the express provisions of this Act.”

strike out the direct claims against the GP. Little was said specifically about the direct claims against D2 and D3. Ms. Stanley for D1, accepted in substance, that there are direct claims against the GP. But, supported by Mr. Chapman, she submitted that the judge erred in two respects. The first was his finding that the rule/principle that claims by partners *inter se* can only be brought by the taking of partnership accounts does not apply to a limited partnership. She maintained that the judge erred in holding (*ibid.*, at para. 85) that the application of the rule/principle is inconsistent with the express provisions of the ELPA and that it has therefore been disapplied by s.3 of the ELPA. She submitted that his second error was in holding (*ibid.*, at para. 55) that the GP holds the property of the ELP “on trust for each of the partners.” That, she submitted, was a clear misreading of ELPA s.16(1). However, she accepted that before the dissolution of a partnership, although there is jurisdiction to obtain a partnership account, “it is an exceptional jurisdiction to allow an account pre-dissolution.”

36 On behalf of the plaintiffs, Mr. Allison submitted that the partnership accounts rule/principle does not apply to ELPs in this jurisdiction, in the same way that it does not apply to limited partnerships in England and Wales.⁸ This, he maintained, is because the element of reciprocity of fiduciary duties in an ordinary partnership is absent in an ELP. Moreover, in an ordinary partnership, but not an ELP, all the partners have unlimited liability for the partnership’s liabilities, and (subject to contrary agreement) are entitled to take part in the management of the partnership business. Mr. Allison further argued that to apply the rule/principle would be inconsistent with ELPA s.32(12)(c)⁹ which makes it clear that partners in an ELP have a right to an account. Here the pleaded claims against the GP and D2 and D3 include claims for accounts and equitable compensation for the plaintiffs’ individual losses. Mr. Allison submitted that they are entitled to bring these against the GP because of the GP’s position as a fiduciary and statutory trustee and its overarching duty to account. Although less clearly stated, it appears that the basis for the plaintiffs’ entitlement to bring direct claims against D2 and D3 is their knowing receipt of TPF’s property or moneys which the GP transferred to them in breach of its statutory, equitable and other obligations, and their participation in a conspiracy to cause loss to the plaintiffs by unlawful means. During Ms. Stanley’s oral submissions there was some debate as to whether, in a claim by a limited partner against the GP or against a third party, the court could order that the remedy against an unsuccessful defendant should be the restoration of

⁸ In fact the Limited Partnership Act 2007 applies throughout the UK.

⁹ “A partnership agreement may provide that, as against any other partner, any assignment or other disposition by a partner of any right, debt or other chose in action arising under a partnership agreement shall confer economic rights only and for the purposes of this section ‘economic rights’ are ... The right to an account for the purpose of ascertaining the amount of share of any of the foregoing ...”

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the trust fund by analogy with the position where a claim is brought by the beneficiary of a trust: *Target Hldgs. Ltd. v. Redferns* (38) (hereafter “*Target v. Redferns*”). Ms. Stanley accepted that this was possible in a claim against the GP but did not accept that it was possible in a claim against a third party such as D2 and D3. She stated that the obvious way for a limited partner to make a claim against a third party would not be by a direct claim but, using the trust analogy, by a claim on behalf of the trust. That appears to be a submission that the claim must be a derivative claim and thus subject to the requirements of ELPA s.33(3). Mr. Chapman’s written submissions on behalf of D2 and D3, to which we have referred, are to the same effect.

37 In principle, two main questions arise in respect of the direct claims although, in the light of the way the appeal has proceeded, the second does not in fact arise. The first question is whether a direct claim by a limited partner against the general partner must be made by claiming partnership accounts in proceedings to which all the partners are parties as it must in an ordinary partnership. Can a limited partner claim an account against a general partner for breach of fiduciary or other duty without at the outset joining the other partners and, if the breach is established, may a limited partner obtain an order that the general partner restore the fund?

38 The second question is whether the ELP itself, although not a legal entity, also has a claim against the GP or a third party such as D2 and D3 for breach of their fiduciary and other obligations. The judge stated ([2022 \(1\) CILR 12, at para. 63](#)) (set out at para. 29 above) that there is no distinct or separate loss in respect of “the partnership” which does not exist in law as an entity. When dealing with the derivative claims later in this judgment, we state that, for the reasons we give at para. 145 below, we are not to be taken as agreeing that the judge was correct in concluding that the partnership has no claim against the GP. However, absent a respondents’ notice in respect of the judge’s finding or any submission by the plaintiffs that the judge was wrong, the question is not properly before us. But since it is accepted that a limited partner may have a direct claim against the GP for breach of its fiduciary and other duties, albeit only in the context of partnership accounts, uncertainty as to whether TPF itself also has a claim *qua* ELP does not affect our resolution of the dispute about the plaintiffs’ direct claims.

39 There were three limbs to Ms. Stanley’s submissions. The first was that the application of the partnership accounts rule/principle to limited partnerships is not inconsistent with the provisions of the ELPA and therefore is not disapplied by s.3. She accepted that there are obvious examples of inconsistency between the rules of equity and common law that apply to ordinary partnerships and the provisions of the ELPA governing limited partnerships. She gave three examples. The first is the disapplication by ELPA ss. 4(2) and 16(2) of the rule that in ordinary

partnerships each partner is liable jointly and severally with the other partners for all partnership liabilities. The second is s.32(11)'s provision that in limited partnerships the rule that a partner cannot assign its partnership interest to a third party without the consent of the other partners does not apply. The third is that, in the case of limited partnerships, the rule in ordinary partnerships that certain events cause a dissolution of the partnership does not apply to the events specified in ELPA s.35(a)(i)–(vi). But she submitted that none of these “shed light on the fundamental question at issue on Grounds 2 and 3, namely whether limited partners are entitled to bring direct claims against the GP.” It would appear this may require some reformulation in the light of her acceptance during her oral submissions in response to questions by Birt, J.A. that in a claim by a limited partner against the GP the court could order that the defendant restore the fund and that it is exceptional to obtain partnership accounts whilst the partnership is continuing.

40 As to the meaning of “inconsistent,” Ms. Stanley relied on *In re Knight & Tabernacle, &c., Socy.* (19) ([1891] 2 Q.B. at 69). That case concerned a statutory provision that its provisions were to apply except where those provisions were inconsistent with those of another statute. She submitted that this approach applied where, as in the case of s.3 of the ELPA, the question is whether non-statutory rules and principles are inconsistent with the express provisions of a statute and that the partnership accounts rule/principle is not inconsistent with these provisions in the sense used in *Re Knight & Tabernacle*. That case stated that to be “inconsistent,” the rule/principle must be so at variance with the machinery and procedure indicated by the statute that, if it is applied, the statute would not work. Ms. Stanley argued that this shows that “inconsistent” means “irreconcilable” rather than “different from,” and that there is no such irreconcilability between the partnership accounts rule/principle and the provisions of the ELPA.

41 Ms. Stanley also referred to the judge’s statement ([2022 \(1\) CILR 12, at para. 86](#)) that there is “no good reason why the taking of partnership accounts should be the only procedural route available to the plaintiffs to obtain redress under the ELPA.” She submitted that the judge thus “accepted that partnership accounts *were* a means of redress available” which showed that there is no irreconcilability or inconsistency between the partnership accounts rule/principle and the provisions of the ELPA.

42 Mr. Allison’s response to these submissions was that the reasons given by the judge (*ibid.*, at paras. 82–85) (summarized at para. 34 above) for concluding that the partnership rule/principle was disapplied by ELPA s.3 and is inconsistent with the scheme of the ELPA were correct. As to the scheme of the ELPA, he also submitted that the inconsistency is shown *inter alia* by s.16(1) which makes the GP trustee of an ELP’s assets, and

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by s.32(11) which permits the assignment of a limited partner's interest without the consent of the other partners, and s.32(12)(c) which gives a limited partner the right to claim an account.

43 The second limb of Ms. Stanley's submissions were the authorities which hold that claims by partners *inter se* can *only* be brought in the context of the taking of partnership accounts. She referred to the statements in *Meyer v. Faber (No. 2)* (21) ([1923] 2 Ch. at 439) and *Hurst v. Bryk* (16) ([2002] 1 A.C. at 194) respectively that in an action against a co-partner "the only relief which the plaintiff could obtain would be an account" and that "the amount owing to a partner by his fellow partners is recoverable only by the taking of an account in equity after the partnership has been dissolved." Mr. Allison's response was that the cases relied on by Ms. Stanley emphasize the reciprocity of personal obligation and trust and the mutuality of personal liability in an ordinary partnership, and Cooke, J. in *Henderson* (13) ([2012] EWHC 3259 (Comm), at para. 28) emphasized the absence of this in a limited partnership.

44 The third limb of Ms. Stanley's submissions were considerations of "practicality and policy." She maintained that there were sound practical reasons for the application of the partnership account rule/principle to Cayman Islands ELPs. The rule/principle ensures that the creditors of the partnership are paid first before the partners (as they should be) and that all the limited partners will be bound by the outcome. It, she argued, prevents a multiplicity of proceedings with resulting chaos by providing a mechanism for the orderly winding up of the affairs of the ELP.

45 Ms. Stanley submitted that if the partnership accounts rule/principle does not apply "the limited partners would have to bear the additional burden of the costs of the GP dealing with a multiplicity of proceedings, rather than one." There was, she argued, no prejudice to the partners of an ELP by the application of the rule/principle because "claims can all be dealt with in the managed process of the taking of partnership accounts." She relied on the statements in *Public Trustee v. Elder* (29) ([1926] Ch. at 784) that all partners needed to be joined "to avoid multiplicity of actions," in *Hugh Stevenson & Sons v. Akt. für Cartonnagen-Industrie* (14) ([1918] A.C. at 247) that partners "cannot sue each other excepting for the balance of the account taken in accordance with the principles which the courts of equity apply in working out the results of dissolution," and on "Partnerships, Limited Partnerships and LLPs," 29(1) *Atkins Court Forms*, at para. 15.

46 In his oral submissions, Mr. Allison relied on *Golstein v. Bishop* (12) to show that in a partnership dispute it is not always necessary to have a claim for a partnership account at the outset. Mr. Christopher Nugee, Q.C., sitting as a Deputy High Court judge, stated ([2013] EWHC 881 (Ch), at paras. 2 and 24) that factual matters and the merits of the claim in that case, which included a claim for damages for breach of the partnership

agreement,¹⁰ would be determined but that dissolution accounts would be taken at a later stage. In the Court of Appeal, Briggs, L.J., with whom Kay and Sullivan, L.J.J. agreed, recognized that there are remedies other than the taking of a partnership account that might be available for breaches of duty in an ordinary partnership (see [2014] EWCA Civ 10, at para. 11). Ms. Stanley submitted that *Golstein v. Bishop* was distinguishable for two reasons. The first was that the point before us did not arise in that case because the parties had agreed to this being dealt with by way of preliminary issue. Secondly, the substance of the partnership rule/principle was satisfied in that case because there were only two partners, and they were both before the court. Notwithstanding the force of those points, the case shows that, even in the case of an ordinary partnership, there is room for flexibility.

47 As to misreading ELPA s.16(1), its material provisions are set out at para. 19 above. It expressly provides that the rights and property of an ELP, including all choses in action are held “*by the general partners jointly, upon trust as an asset of the exempted limited partnership* in accordance with the terms of the partnership agreement.” [Emphasis added.] Ms. Stanley compared its wording with the judge’s holding ([2022 \(1\) CILR 12, at para. 55](#)) that the property of an ELP is held “*on trust for each of the limited partners.*” [Emphasis added.]

48 She submitted that the judge’s holding was clearly a misreading of s.16(1). The legislature has directed that the assets are those of “the partnership.” Thus, giving full recognition to the fact that whilst an ELP has no independent legal personality, it provided for there to be a first call on the assets by the creditors of limited partnerships and that the limited partners stand behind those creditors. She argued that s.16(1) is consistent with the preservation of the operation of the partnership accounts rule/principle which enables the court to identify the assets of the ELP which are “actually available” for distribution to limited partners after the creditors had been paid.

49 Drawing on the analogy of the position under a non-partnership trust, she also relied on the statements in the decisions of the High Court of Australia in *Chief Commr. of Stamp Duties v. Buckle* (6) and *Commr. of State Revenue v. Rojoda* (7). In *Buckle’s* case the High Court stated ([1998] HCA 4, at para. 48) that:

“The entitlement of the beneficiaries is confined to so much of those assets as is available after the liabilities in question had been discharged or provision has been made for them.”

10 The Chancery Report omits paras. 178–214 of the judgment which deal with the claim for damages for breach of the partnership agreement but those paragraphs are included in the neutral citation version available on the BAILII website.

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In *Rojoda*, the High Court stated that ([2020] HCA 7, at para. 33):

“unlike a beneficiary of a fixed trust, it was well established that a partner’s interest was not an interest in, or in relation to, any specific asset other than an entitlement to the partner’s share of the net proceeds from the sale of each asset at the completion of winding up. In other words, the only right that the partners have, both before and after dissolution, in relation to each asset is a right to the account and distribution after sale of the proceeds of that asset— ‘not to an individual proportion of a specific article, but to an account: the property to be made the most of, and divided.’”

50 In *Buckle’s* case, the High Court also stated ([1998] HCA 4, at para. 47) that in aid of the right of a trustee to reimbursement or exoneration for liabilities properly incurred by the trustee in the administration of the trust, “the trustee cannot be compelled to surrender the trust property to the beneficiaries until the claim has been satisfied.” It stated that (*ibid.*, at para. 48), until such reimbursement or exoneration, “it is impossible to say what the trust fund is.”

51 Mr. Allison submitted that because an ELP has no separate legal personality the only sensible construction of the words in ELPA s.16(1) is that the general partner of an ELP holds its assets on trust for all the limited partners. The judge was correct so to hold. Because the general partner owes fiduciary duties to all the limited partners, any breaches of those duties must be enforceable by the limited partners themselves. Where there is a claim against the general partner itself it cannot be only the general partner who can institute proceedings. The absence of separate legal personality means that, legally, it is the ELP’s constituent limited partners who suffer loss directly and the general partner’s fiduciary obligations “must be capable of enforcement by the other partners (just as the obligations of any other trustee are enforceable at the suit of the beneficiaries).”

Conclusions on the direct claims

52 We first consider the direct claims brought by the plaintiffs against the GP and then consider the direct claims brought against D2 and D3.

(a) *Direct claims by a limited partner against the GP*

53 There is considerable force in the considerations of “practicality and policy” relied on by Ms. Stanley and the need to protect the positions of the creditors of an ELP and of the other limited partners. But we have concluded that the differences between ordinary partnerships and ELPs mean that it is not appropriate to require that a direct claim by a limited partner against the GP must always be initially brought by way of a claim for partnership accounts and that it is not necessary to protect the positions

of the creditors and of the other limited partners by requiring this. We have so concluded for the following reasons.

54 First, we have borne in mind two related factors based on the wording of the ELPA. One is the inconsistency of the proposition that such a claim must be by way of partnership accounts with the right given to a limited partner under ELPA s.32(12)(c) to claim “an account.” The legislature addressed the question and used the word “account” but not the term “partnership account.” We agree with Mr. Allison’s submission that it is difficult to see a principled justification for refusing a limited partner a claim to “an account” but permitting such a partner to claim “a partnership account” although there are no mutual and reciprocal rights and obligations between limited partners or fiduciary duties. The other is that ELPA s.16(1) provides that the general partner holds or is deemed to hold “[a]ny rights or property of every description of the exempted limited partnership, including all choses in action ... upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement.” [Emphasis added.] That in substance (see para. 56 below), provides that the assets of an ELP are held by the general partner on a statutory trust for the limited partners.

55 Secondly, an ELP does not have the mutuality and reciprocity of obligations that are the hallmark of an ordinary partnership. This is because ELPA s.19(2) provides that, absent express provision in the partnership agreement, the limited partners owe no fiduciary duties. The statements in the cases relied on by Ms. Stanley requiring the claim to be brought by way of a partnership account emphasize the reciprocity and mutuality that exists between conventional partners.

56 We turn to Ms. Stanley’s submissions based on s.3 of the ELPA that, absent inconsistency with the rules of equity and of common law applicable to partnerships, those rules “shall apply to an exempted limited partnership” and *Re Knight & Tabernacle* (19). We bear in mind the modern purposive approach to statutory interpretation. We consider that, as well as provisions such as ss. 16(1), 19(2) and 32(12)(c), the scheme of the ELPA with the absence of reciprocity and mutuality of rights and obligations is inconsistent with requiring claims by a limited partner to be brought by taking partnership accounts in proceedings to which all the limited partners are party. We accept Mr. Allison’s submission that because an ELP has no separate legal personality the only sensible construction of the words in ELPA s.16(1) is that the GP of an ELP holds its assets on trust for all the limited partners. On its own, the judge’s use of the phrase “on trust for each of the partners” ([2022 \(1\) CILR 12, at para. 55](#)) may leave some uncertainty as to whether he meant to treat the entitlement of each of the partners as totally individuated, but (*ibid.*, at 61) what he said was

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“capable of enforcement by each of the partners to whom [the GP] owes duties individually.”

57 Because a trust also has no separate legal personality, thus making the position similar to the statutory trust created by ELPA s.16(1), we also regard the position of a claim by a beneficiary of a trust against the trustee as important. The beneficiary of a subsisting trust including a discretionary trust is entitled to bring a claim against the trustee to recover loss suffered by the trustee’s breach of trust, but the remedy is for an order to restore to the trust what ought to have been there: see *Target v. Redferns* (38); *Lewin on Trusts*, 20th ed., para. 21–046 (2020) and *Snell’s Equity*, 34th ed., paras. 2–003 – 2–004, and 21–046 (2022).

58 In *Target v. Redferns* ([1996] A.C. at 436D–E), Lord Browne-Wilkinson stated that the rule developed by equity reflected the fact that while each beneficiary had the right to claim, “no one beneficiary was entitled to the trust property” and there was a “need to compensate all beneficiaries for the breach.” He had earlier stated (*ibid.*, at 434C–D) that an order to restore was “the only way in which *all* beneficiaries’ rights [could] be protected” [Emphasis added]. The remedy thus ensured that all the beneficiaries’ rights were protected and that the beneficiary who issued the proceedings did not steal a march on the others and scoop the pool. There is no inconsistency between such an order and what was stated in *Chief Commrs. of Stamp Duties v. Buckle* (6) and *Rojoda* (7) because all that is ordered at that stage is restoration of the fund. Should there be a claim against the ELP, it can then be determined. There is also no inconsistency between such an order and what was said by the High Court of Australia in *Rojoda* about the nature of the partnership trust in an ordinary partnership and the difference between that and that of the beneficiary of a fixed trust because ordering restoration of the fund does not give an individual limited partner an interest in any specific asset.

59 We consider that this approach and remedy is equally applicable in the case of the statutory trust created by s.16(1) ELPA. We have had regard to the two factors based on the wording of the ELPA referred to at paras. 54 and 55 above; the inconsistency of the proposition that such a claim must be by way of a partnership account with the right expressly given to a limited partner under ELPA s.32(12)(c) to claim “an account” and the absence in an ELP of the mutuality and reciprocity of obligations that is the hallmark of an ordinary partnership. Whilst, as Ms. Stanley submitted at paras. 20–25 of her reply skeleton by reference to *Rojoda*, assets held by a partner of an ordinary partnership are also held on trust for the partnership, these factors lead to the conclusion that the partnership accounts rule/principle is inconsistent with the ELPA and the judge was correct in his conclusion. Mr. Allison accepted that it was likely that the plaintiffs could not have as a remedy equitable compensation payable directly to them because that took no account of the other limited partners

and of the ELP's creditors. We have concluded that in proceedings against the GP, a limited partner can recover for loss suffered by the breach of the statutory trust but that the remedy would be the restoration of the ELP's fund thus compensating the direct losses suffered by all the constituent limited partners. We discuss further aspects of ordering the restoration of the fund and its doctrinal underpinning when considering the plaintiffs' direct claims against D2 and D3. The important point is that while the individual partners, like the beneficiaries of a discretionary trust, have a direct claim, if established, the remedy for that claim reflects the fact that no one partner is entitled to all of the fund.

60 This remedy prevents a limited partner claimant from benefitting alone from any recovery either at the expense of the other limited partners or of the ELP's creditors. It thus directly meets the "stealing a march" and "scooping the pool" elements of the practical and policy reasons relied on by Ms. Stanley, the substantive elements of her case for requiring a claim by a limited partner against the GP to be by way of partnership accounts from the outset. As we have stated, *Golstein v. Bishop* (12) shows that even in the case of an ordinary partnership there is room for flexibility and that a trial of the merits of the claim may be held before taking a partnership account. It suggests that where there is no prejudice either to the creditors of the partnership or to other third parties it is possible to have a trial of the merits of a claim brought by a partner before a partnership account is taken.

61 We consider that the problem of multiplicity of actions and what Mr. Chapman referred to as an "ungated litigation superhighway" can be dealt with by robust case management. Later claims brought in a single jurisdiction can be stayed or consolidated and ordered to be heard together. Where claims are brought in more than one jurisdiction, stays or anti-suit injunctions can also be used to avoid the problems identified by Ms. Stanley and Mr. Chapman.

62 Mr. Allison's description (see skeleton, at para. 89) of the insistence on the joinder of all the limited partners from the outset as "unedifyingly formalistic" may put it too highly. We, however, consider that insistence that a claim for partnership accounts always be made at the outset reflects an entirely technical procedural approach. In her responses to questions by the court, Ms. Stanley at one stage suggested that the plaintiffs in effect should start again and now seek the taking of partnership accounts and that this either be by the court now directing further pleadings or an inquiry to identify what is being alleged by the limited partners. She argued that the taking of partnership accounts occurs "in a much more court managed process than a fraud trial where anything goes ..."

63 Our rejection of the submission that the direct claims are defective in not at the outset joining all partners and seeking partnership accounts does not mean that the court cannot direct that there be such a procedure at a

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later stage as part of its case management powers if that proves necessary. If, after the merits of the plaintiffs' claims against the GP have been determined, it appears that an order to restore the fund should be made but that, given the GP's wrongdoing, steps such as placing the assets in escrow, appointing a receiver, or taking partnership accounts are necessary, the court can make appropriate directions. Alternatively, if the plaintiffs so apply, we would allow them now to add a prayer for the taking of partnership accounts to their pleading, but that such accounting should take place only after the resolution of the issues in their current claims and only if, at that time, it appears necessary.

64 In summary, for the reasons we have given, we dismiss the GP's appeal against the judge's refusal to strike out the plaintiffs' direct claims against the GP. The consequence is that the plaintiffs may bring their direct claim against the GP. We wish to make it clear that, in the event of success, the likely remedy would be an order to restore the trust fund rather than equitable compensation payable directly to the relevant limited partner.

(b) *Direct claims by a limited partner against third parties such as D2 and D3*

65 We have stated that there was no application by D2 and D3 to strike out the direct claims against them on the merits but they submit that the plaintiffs do not have standing to bring the direct claims against them and ought to have brought the claims against the GP seeking the taking of partnership accounts.

66 The question is whether, if D2 and D3 are held liable to the plaintiffs for breach of their statutory, equitable and other obligations, it is open to the court to order that those defendants restore the fund rather than pay the plaintiffs. If the court is not able to order this, there will be a risk of prejudice to the creditors of the ELP and/or to the other limited partners in the ways we have discussed in the context of claims against the GP but concluded it did not exist in that context. Indeed, since different limited partners may bring claims against different third parties, there may be a multiplicity of both plaintiffs and defendants and the risk of chaos referred to by Ms. Stanley and Mr. Chapman might well be greater. That risk would be avoided by a derivative action where the requirements of s.33(3), discussed at paras. 94–98 below, are satisfied.

67 Ms. Stanley submitted that it is not possible to order D2 and D3 to restore the fund and that the only way that TPF would be entitled to anything is if the plaintiffs' claims are made on its behalf and are thus derivative claims. During an exchange primarily about the claims against the GP, it was put to Mr. Allison that against the other defendants he might not be able to get an order restoring the trust. His response was “arguably

not” but it is not altogether clear whether the exchanges related to the direct or the derivative claims against D2 and D3.

68 Since D2 and D3 did not apply to strike out the direct claims against them, strictly the question of whether it is possible for the court to order D2 and D3 to restore the fund is one which falls for determination after the merits of the claims against them have been determined. Although we did not hear full argument on this question, in the light of the points that were made, we consider it appropriate to give our preliminary view on the question. We consider that the plaintiffs have a good arguable case that, where third parties are liable for breaches such as those claimed against D2 and D3, the court may order those defendants to restore the fund rather than pay the plaintiffs and thus avoid the risk of prejudice to other limited partners or creditors.

69 As in the case of a claim against the general partner, the starting point is the position of a claim by a beneficiary of a trust. It is clear that the interest of the beneficiary of a discretionary trust is enforceable against a third party who received trust property which the trustee did not have authority to transfer and the third party knew enough to make it unconscionable to retain the asset for his own benefit: see *Lewin on Trusts*, 20th ed., para. 21–046, at 901 (2020), and *Snell’s Equity*, 34th ed., paras. 2–003 – 2–004, at 22–23, and para. 21–046, at 650 (2022).

70 *Snell* also states (*op. cit.*, para. 21–045, at 650) that “the beneficiary’s only right would be to have the asset or its proceeds reinstated to the trustee” (to the same effect, see para. 22–005, at 655–656, and para. 30–015, at 845–846). The reason given is that the beneficiary “could not compel the third party to transfer the asset directly to himself since this would give him a greater equitable right against the third party than he had against the trustee ...” In para. 2–004, at 22–23 of *Snell*, it is stated that “the third party’s duty is to restore the trust asset to the properly appointed trustee” and that this would happen “if the original trust involved continuing duties to manage a fund and if the beneficiary did not have the entire beneficial interest in the trust asset.” Nolan, “Equitable Property” (2006) 122 LQR 232, at 242–243 states that the cases on the rights of a beneficiary against the recipients of misapplied trust assets all acknowledge that a recipient is bound to restore the assets and their proceeds to the relevant trustees, or else transfer them at the direction of a beneficiary or beneficiaries who, being absolutely entitled to the assets in equity, may terminate the trust and direct such a transfer. He states (*op. cit.*, at 255) that the cases provide a doctrinal basis for actions to restore the integrity of a pool of assets held in trust, should it be depleted without authority.

71 That doctrinal basis explains why, given the analogy between a non-partnership trust, an ELP with no separate legal personality, and the

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statutory trust imposed by s.16(1) of the ELPA, it is possible to order third parties such as D2 and D3 to restore the fund where the claim against them succeeds. The analogy rests on the fact that, in cases of knowingly assisting a trustee in a fraudulent and dishonest disposition of the trust property, although the third party is not in fact a trustee, he is made liable in equity “as if he were” a trustee: *Selangor United Rubber Estates Ltd. v. Craddock* (33) ([1968] 1 W.L.R. at 1580 and 1582), citing Lord Esher, M.R. in *Soar v. Ashwell* (36) ([1893] 2 Q.B. at 394–395), and Lord Selborne, L.C. in *Barnes v. Addy* (4) (9 Ch. App. at 251). This reflects the fact that it is the fund which has suffered the loss and, in the words of Lord Browne-Wilkinson in *Target v. Redferns* (38), an order to restore is “the only way in which *all* beneficiaries’ rights” could be protected ([1996] A.C. at 434).

72 For these reasons, had D2 and D3 applied to strike out the plaintiffs’ direct claims against them, our preliminary view is that the objections raised to the plaintiffs’ standing to bring the claims are unfounded. The consequence is that the plaintiffs may bring these claims against D2 and D3. It will be for the court hearing the claims to decide whether they are in fact made out on the merits and, if they are, whether, in the circumstances of this case, an order to restore the fund should be made and, given that the GP would be implicated in the wrongdoing, steps such as placing the assets in escrow, the appointment of a receiver, or the taking of partnership accounts are necessary.

The derivative claims

73 We turn to consider the derivative claims brought against D1 and D2–4. This is the first occasion on which one or more limited partners of a Cayman Islands ELP have sought to bring a derivative claim pursuant to s.33(3) ELPA and accordingly we shall proceed to review the approach adopted by the judge and consider if we can provide any guidance for the future.

74 We begin with a brief discussion of derivative claims generally before turning to consider the interpretation of s.33(3). We shall then consider a number of specific matters of principle raised by the parties before turning to apply our conclusions on the law to the facts of this case.

(a) *Derivative claims in general*

75 The general rule is that the only person who can bring an action against another who has caused injury or damage is the person who has suffered that injury or damage. As the Court of Appeal put it in the leading case of *Prudential Assur. Co. Ltd. v. Newman Indus. Ltd.* (28) ([1982] 1 Ch. at 210):

“A derivative action is an exception to the elementary principle that A cannot, as a general rule, bring an action against B to recover

damages or secure other relief on behalf of C for an injury done by B to C. C is the proper plaintiff because C is the party injured, and, therefore, the person in whom the cause of action is vested. This is sometimes referred to as the rule in *Foss v Harbottle* (1843) 2 Hare 461 when applied to corporations, but it has a wider scope and is fundamental to any rational system of jurisprudence.”

76 The court went on to outline an exception to the rule in *Foss v. Harbottle* (11) in the following terms (*ibid.*, at 211):

“There is an exception to the rule where what has been done amounts to fraud and the wrongdoers are themselves in control of the company. In this case the rule is relaxed in favour of the aggrieved minority, who are allowed to bring a minority shareholders’ action on behalf of themselves and all others. The reason for this is that, if they were denied that right, their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue.”

77 A further helpful general description of a derivative claim in the context of companies is to be found in the judgment of Lewison, J. in *Iesini v. Westrip Hldgs. Ltd.* (17) ([2009] EWHC 2526 (Ch), at para. 73):

“I should begin by saying a little about derivative claims generally. In the first place the new code has replaced the common law derivative action. A derivative claim may ‘only’ be brought under the [Companies Act 2006]. As section 260 (1) makes clear a derivative claim is one in which the cause of action is vested in the company, but where the claim is brought by a member of the company. This reflects the old law in which a derivative action was an exception to the general principle (known as the rule in *Foss v Harbottle* ... that where an injury is done to a company only the company may bring proceedings to redress the wrong. Allied to this principle was the principle that whether a company should bring proceedings to redress a wrong was a matter that was to be decided by the company internally; that is to say by its board of directors, or by a majority of its shareholders if dissatisfied by the board’s decision. The court would not second guess a decision made by the company in accordance with its own constitution. The exception to these principles was necessitated where the company’s own constitution could not be properly operated. If the wrongdoers were in control of the company (because they were a majority of the shareholders) they would not in practice vote in favour of taking proceedings against themselves, even though the taking of proceedings would be in the company’s best interests ...”

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78 Derivative claims are not restricted to companies. They can also be brought, for example, in connection with trusts and limited partnerships.

79 In relation to trusts, it is well-established that, although in general terms the only person who may bring an action against a third party on behalf of a trust is the trustee, a beneficiary can, in special circumstances, bring a derivative action so as to stand in the place of the trustee. In *Roberts v. Gill & Co. Solicitors* (30), Lord Collins of Mapesbury summarized the position as follows ([2011] 1 A.C. 240, at para. 46):

“The cases go back to the 18th century, and many of them were reviewed in *Hayim v Citibank NA* [1987] AC 730. The special circumstances which were identified in the earliest authorities as justifying a beneficiary’s action were fraud on the part of the trustee, or collusion between the trustee and the third party, or the insolvency of the trustee, but it has always been clear that these are merely examples of special circumstances, and that the underlying question is whether the circumstances are sufficiently special to make it just for the beneficiary to have the remedy ...”

80 To like effect is the observation of Lord Walker of Gestingthorpe (*ibid.*, at para. 110) (omitting references):

“There is ample authority, comprehensively reviewed in the judgment of Lord Collins JSC, as to the need for special circumstances before the court will countenance a derivative action. Such actions are now relatively common in cases concerned with mismanaged companies, and in many jurisdictions actions by or on behalf of minority shareholders are now regulated by a statutory code ... Derivative actions by beneficiaries under inter vivos trusts or wills are less common ... But in all these cases the unifying factor—what has to be special about the circumstances—is that the derivative action is needed to avoid injustice ...”

81 A helpful summary of the position in relation to trusts under the law of England and Wales is to be found in *Lewin on Trusts*, 20th ed., at paras. 47–006 and 47–008, at 1024–1026:

“47–006. However, as an alternative to proceedings brought in the name of trustees, a beneficiary may, sometimes, bring an action in his name on behalf of the trust against a third party. The fact that the action is brought in the name of the beneficiary rather than the name of the trustee does not alter its character. The action is a derivative action in which the beneficiary stands in the place of the trustees and sues in right of the trust, and does not enforce duties owed to him rather than the trustees; a beneficiary can be in no better position than trustees carrying out their duties in a proper manner ...”

47–008. A beneficiary can bring a derivative action only in special circumstances, *for example circumstances which tend to disable the trustees from suing (as where their acts and conduct with reference to the trust fund are impeached), or circumstances rendering it difficult or inconvenient for the trustees to sue, as where there is a conflict between their interest and duty*. Special circumstances are not confined to circumstances of these kinds. The guiding principle is that there must be exceptional circumstances, which embrace a failure, excusable or inexcusable, by the trustees in the performance of a duty to the beneficiaries to protect the trust estate, or to protect the interests of the beneficiaries in the trust estate. The special circumstances relied on must have something to do with the willingness or ability of the trustee or alleged trustees to bring the action.” [Emphasis added]

As can be seen from the emphasized passage, circumstances where the trustees are inhibited from suing because their own conduct in relation to the trust is impeached or they are under a conflict of interest are leading examples of “special circumstances.”

82 Turning to English limited partnerships, the question of whether and, if so, in what circumstances a limited partner can bring a derivative claim on behalf of the limited partnership arose in *Henderson* (13) referred to above in para. 31. As we have already stated, although by no means identical, there are similarities between an English limited partnership and an ELP. In particular, neither is a separate legal entity and, as in an ELP, the limited partners in an English limited partnership may not take part in the management of the partnership business which is to be left in the exclusive hands of the general partner. Thus, in the ordinary way, a limited partner cannot sue a third party in the name of the limited partnership; such action can only be taken by the general partner.

83 In *Henderson*, a majority of limited partners instituted derivative proceedings on behalf of the partnership against the general partner and the manager of the partnership (who had been appointed as manager by the general partner on behalf of the partnership). The manager was a sister company of the general partner. The claims sought compensation in respect of various alleged breaches of duty by both the general partner and the manager. It was directed that a preliminary issue should be tried as to whether the claimants could bring derivative claims on behalf of the partnership against the general partner and the manager, and it was this issue which came before Cooke, J.

84 For reasons discussed below, Cooke, J. held that the limited partners could not bring a derivative claim against the general partner. However, having referred to *Roberts v. Gill* (30) and to the equivalent passage in the 18th edition of *Lewin* (2007) to that referred to at para. 81 above, he held that special circumstances existed which enabled the derivative claim to be

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brought against the manager. The special circumstances were that the general partner had an irremediable conflict of interest because it was a sister company of the manager and was therefore not in a position to be seen fairly to determine whether to sue the manager. Cooke, J. therefore allowed the derivative claim against the manager to proceed, but went on to hold that, under the relevant provision of the English statute, the limited partners would lose their limited liability as a consequence.

85 In summary, Cooke, J. applied the “special circumstances” test concerning trusts (as summarized in *Lewin*) to limited partnerships.

86 Although the ability to bring a derivative action in respect of a company is now governed by statute in England and by the Grand Court Rules in this jurisdiction, the principles governing such claims were developed as a matter of common law. Similarly, the requirement of special circumstances in connection with trusts and limited partnerships has been developed entirely by the courts.

87 The position is different in relation to ELPs because of the terms of s.33(3) of the Act and accordingly we turn next to consider the correct interpretation of that provision.

Interpretation of s.33(3) of the ELPA

88 Unlike in the case of trusts or English limited partnerships, the legislature has prescribed in s.33 ELPA when a derivative action may be brought in respect of an ELP. For convenience we repeat the relevant provisions of s.33 at this stage:

“(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.

(2) ...

(3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings.”

As can be seen, the key requirement is that the general partner must have “without cause, failed or refused to institute proceedings.”

89 Before the Grand Court, the defendants argued that, when considering s.33(3), the court had to apply principles derived from cases dealing with derivative claims in other contexts. The judge rejected this submission. His conclusion is expressed in his judgment ([2022 \(1\) CILR 12, at paras. 98–101](#)):

“98 The terms of s.33(3) ELPA which allows a limited partner in an ELP to bring proceedings on behalf of the ELP if the general partner has *without cause failed or refused* to do so has no language requiring permission or special circumstances. In my view the principles taken from the common law or equity for bringing derivative claims whether as regards companies, trusts, limited partnerships or associations are not applicable.

99 In my judgment s.33(3) is *sui generis* and is not subject to the rules relating to permission or for special circumstances for derivative actions in other contexts. I accept Mr. Allison, Q.C.’s submission that to this extent it can be said to ‘occupy the field’ in the Cayman Islands with respect to ELPs and there is no room for a case-by-case judge led formulation of a common law or equitable test.

100 I have, in coming to this view, had regard to the principles Ms. Stanley, Q.C. and Mr. Chapman, Q.C. referred me to relating to cases which dealt with failures or refusals to bring claims in other contexts, for example where the board of the company or the trustee had the relevant inhibition which prevented a decision to bring claims. Whilst these principles provide helpful guidance, the company and trusts law cases to which I was referred do not directly apply to the position in this case which involves the application of a specific statutory test for Cayman Islands ELPs.

101 I note, however, that the common thread running through those cases is that where the authorized decision maker is inhibited, the court may permit, in the interests of justice, derivative claims.” [Emphasis in original.]

90 On appeal, the defendants have argued that the judge fell into error in stating (*ibid.*, at paras. 98 and 99) that the principles applicable in other contexts, such as trusts and companies, are not applicable in relation to the statutory test. At para. 68 of her skeleton argument, Ms. Stanley submitted that “without cause” should be interpreted by reference to the well-established tests applied in all other derivative actions. Similarly, at para. 8 of his skeleton argument, Mr. Chapman submitted that the statutory gateway prescribed by s.33 did not oust the ordinary rules of common law and equity. On the contrary, it provided a *further* statutory hurdle or threshold that had to be met, together with those imposed by the common law and equity, before a derivative claim would be permitted. He submitted that this was a fundamental error in the judge’s approach.

91 Conversely, in his skeleton argument, Mr. Allison submitted at paras. 124 and 125 that the judge was correct to hold that s.33(3) “occupies the field” and that there was no scope or reason to import any “special circumstances” test or other common law or equitable principles that apply

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to derivative claims in respect of other entities or structures. There was no reason to imply any requirements for derivative claims beyond those explicitly mentioned in s.33(3).

92 It seems to us that, during the course of the hearing, both sides rather modified their submissions and were eventually not very far apart in relation to the proper construction of s.33(3). Thus Mr. Chapman (who by agreement with Ms. Stanley presented the main argument on the derivative claims on behalf of all the defendants) conceded that, to the extent that his written submissions had suggested that one imported wholesale the common law and equitable principles on derivative claims, this might go too far. He accepted that one had to apply the statutory test set out in s.33(3), but submitted that this test was consistent with the established principles and that one derived assistance from those principles when construing and applying the statutory test.

93 Similarly, Mr. Allison accepted that, when applying the statutory test and determining whether the failure by the general partner to institute proceedings was “without cause,” one could have regard to the principles established in other contexts, such as whether special circumstances existed.

94 In our judgment, in circumstances where the legislature has established a statutory criterion for bringing a derivative action in respect of an ELP, the courts are duty bound to apply that statutory test. The test cannot be replaced by common law and equitable principles developed in other contexts even if, in the absence of a statutory test, the courts would no doubt have applied those principles to an ELP. Nor can those principles form an additional threshold beyond the statutory test, as submitted by Mr. Chapman in his skeleton argument referred to at para. 90 above.

95 The statutory test is in general and imprecise terms and leaves open how the test should be applied in practice. However, we think that the expression “without cause” must carry the implication of “good” cause. The legislature cannot have intended that a decision for *any* cause, no matter how inhibited or conflicted the decision-maker, would be sufficient to prevent a derivative action. This is so notwithstanding the fact that, as originally enacted, the legislation referred to “good cause” whereas, in its current form, the word “good” is omitted. No guidance as to the reason for this change is to be found in the legislative materials produced in relation to the revision of the statute and we cannot attribute any significance to the change.

96 In these circumstances, we are of the view that the court is entitled to have regard to and may derive assistance from the developed principles in other contexts. In particular, given the existence of the statutory trust imposed by s.16(1) of the ELPA (namely that the general partner holds the property of the ELP “upon trust as an asset of the exempted limited

partnership in accordance with the terms of the partnership agreement”), the court is likely to derive assistance from considering whether special circumstances (as established in the contexts of trusts and English limited partnerships) exist.

97 If special circumstances exist, this is likely to assist the court in deciding whether a general partner’s decision not to institute proceedings is “without cause.” Indeed, in opening his oral submissions on appeal, Mr. Allison (rightly in our view) accepted that, if a general partner were under a relevant inhibition or conflict of interest—concepts which emerge strongly from consideration of special circumstances as stated in the emphasized passage from para. 47–008 of *Lewin* quoted at para. 81 above—his decision would necessarily and unavoidably be “without cause.”

98 We emphasize, however, that the court’s duty is to apply the statutory test of “without cause”; it is not sufficient simply to consider whether there are special circumstances and, if so, then to allow a claim under s.33(3). Consideration of whether there are special circumstances, if it assists at all, is simply a step on the road to determining the statutory test. If the court decides that the facts would satisfy the special circumstances test, it must nevertheless go on and consider whether they therefore satisfy the “without cause” test in s.33(3). Conversely, we do not rule out the possibility of a case in which the facts enable the court to find that the general partner’s decision is “without cause” without consideration of whether there are special circumstances. The two tests are not to be equated, although we envisage that consideration of whether there are special circumstances is likely in most cases to be of considerable assistance in determining whether the decision is “without cause.” Indeed, it was common ground before us that a decision by a decision-maker which is made under a relevant inhibition will be a decision “without cause.”

99 Although there is some ambiguity and possible inconsistency between paras. 98 and 99 of the judge’s judgment on the one hand and para. 100 on the other, we do not see the judge’s decision on this aspect as being essentially any different from our own. Paragraphs 98 and 99, when read in context, simply state that the court’s duty is to apply the statutory test, not the common law and equitable principles, but para. 100 goes on to explain that, although they are not directly applicable, these principles provide helpful guidance. The fact that such helpful guidance may be obtained is emphasized by the fact that, when he goes on to consider the application of the statutory test to the facts of this case, the judge concentrates exclusively on the fact that, in his view, the GP was subject to an inhibition because of its conflict of interest. Inhibition is not a word which appears in s.33 but, as the judge correctly states at para. 101 of his judgment, it is a concept which is a common thread in the cases which

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allows the court to permit derivative claims in other contexts in the interests of justice.

100 Having expressed our view as to the correct interpretation of s.33(3), we turn next to consider a number of supplementary points which were argued before us in relation to the statutory test.

Procedure for determining the statutory test

101 Unlike in the case of companies, there is no requirement under s.33 for a limited partner to seek leave from the court to bring derivative proceedings under s.33(3). It follows that a limited partner is free to commence derivative proceedings without leave.

102 In this respect, the position is the same as derivative claims in respect of companies prior to the introduction by statute and/or rules of court of a requirement for leave and is the same as it remains in respect of trusts and English limited partnerships. But, despite the historical lack of a requirement for leave in respect of companies, it was established as long ago as 1982 in *Prudential* (28) that the question of whether a plaintiff should be permitted to bring a derivative action on behalf of a company should be determined at an early stage rather than left until trial. In *Prudential*, the defendant applied by summons to have heard as a preliminary issue whether the plaintiff was entitled to maintain the derivative action. The judge dismissed the summons on the ground that it was more convenient to decide the issue after the action had been heard. The Court of Appeal was very critical of this decision saying ([1982] Ch. at 221):

“First, as we have already said, we have no doubt whatever that Vinelott J. erred in dismissing the summons of May 10, 1979. He ought to have determined as a preliminary issue whether the plaintiffs were entitled to sue on behalf of Newman by bringing a derivative action. It cannot have been right to have subjected the company to a 30-day action (as it was then estimated to be) in order to enable him to decide whether the plaintiffs were entitled in law to subject the company to a 30-day action. Such an approach defeats the whole purpose of the rule in *Foss v. Harbottle* and sanctions the very mischief that the rule is designed to prevent.”

103 Following *Prudential*, it has been the practice that a plaintiff’s standing to bring a derivative action is determined at an early stage in the proceedings rather than the issue being left to trial, with all the disadvantages which that course would bring as described in *Prudential*. Where there is a leave requirement (*e.g.* for companies) the issue is dealt with on the application for leave. Where there is no requirement to obtain leave, the matter is traditionally dealt with on an application by the defendant to strike out the proceedings on the ground of a lack of standing

on the part of the plaintiff or by the court ordering, at the request of the defendant, the trial of a preliminary issue as to whether the plaintiff has the necessary standing to bring a derivative action.

104 The practice was conveniently summarized by Chadwick, P. in this court in the case of [*Autumn Hldgs. Asset Inc. v. Renova Resources Private Equity Ltd. \(2\)*](#) (2017 (2) CILR 136, at para. 26), where he quoted with approval from the judgment of Ribeiro, P.J. in the Hong Kong Final Court of Appeal in the case of *Waddington Ltd. v. Chan Chun Hoo Thomas* (41) where that learned judge said ([2009] 2 BCLC 82, at paras. 13–14):

“[13] ... Procedurally, there is no requirement at common law for a person seeking to sue derivatively first to obtain the leave of the court ...

[14] The time honoured practice at common law is for the plaintiff to issue proceedings ‘on behalf of himself and the other shareholders other than the defendants’, naming the company on whose behalf the proceedings are brought as one of the defendants. A challenge to the plaintiff’s locus generally takes the form of an application by the relevant defendants to strike out the claim or to have the court determine as a preliminary issue that the plaintiff has no locus to sue on the company’s behalf.”

105 In our judgment, this is also the appropriate procedure to be followed in relation to proceedings brought under s.33(3). The subsection is clear that a limited partner may only *bring* a derivative claim if the general partner has refused or failed to do so without cause. It is therefore necessary for the court to decide at an early stage of the proceedings whether the limited partner can indeed bring himself within s.33(3) and therefore “bring” the claim. For the reasons set out so graphically in *Prudential* (28), this is not a matter which should normally be left until trial. We agree therefore that a defendant wishing to challenge the right of a limited partner to have instituted proceedings on behalf of an ELP pursuant to s.33(3) should do so either by applying to strike out the proceedings on the ground of a lack of standing (as was done in this case) or by applying for the court to direct the trial of a preliminary issue as to the limited partner’s ability to bring himself within subs. (3).

106 The question then arises as to the approach which the court should adopt on such an application. In the first place, it is clear that the outcome cannot depend on which of the two courses a defendant chooses to follow. The court’s approach must therefore be the same whether there is a strike out application or the trial of a preliminary issue.

107 The judge held that, as this was a strike out application, the normal approach on such an application should be adopted, with the result that the defendants had to show that it was certain that, at trial, the plaintiffs would

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fail to bring themselves within the terms of s.33(3); see *Hughes v. Colin Richards & Co.* (15), cited with approval in [In re SPhinX Group \(37\) \(2010 \(1\) CILR 234, at para. 37\)](#). The burden lay upon the defendants to show this and there was no burden on the plaintiffs to show that they came within s.33(3). If there was an arguable case that at trial the plaintiffs would be able to satisfy the requirements of that subsection, that was sufficient to enable the case to proceed.¹¹ It would only be at trial that it would be finally resolved whether the plaintiffs had brought themselves within s.33(3).¹² Although at times the judge used slightly inconsistent language about his approach,¹³ we are satisfied that he essentially applied the test we have just described and which he spelt out at [2022 \(1\) CILR 12, para. 33](#). Mr. Allison submitted that the judge had followed the right approach.

108 Mr. Chapman, on the other hand, submitted that this was the wrong approach. In his submission, the onus lay upon the plaintiffs to satisfy the court that they came within s.33(3), *i.e.* that the GP had refused or failed to institute proceedings without cause.

109 In other contexts, the onus lies upon a plaintiff to satisfy the court that he should be permitted to bring a derivative action. Thus in *Prudential* (28), after the passage cited above, the Court of Appeal went on to say ([1982] 1 Ch. at 221–222):

“... [W]e do not think that the right to bring a derivative action should be decided as a preliminary issue upon the hypothesis that all the allegations in the statement of claim of ‘fraud’ and ‘control’ are facts, as they would be on the trial of a preliminary point of law. In our view, whatever may be the properly defined boundaries of the exception to the rule, the plaintiff ought at least to be required before proceeding with his action to establish a *prima facie* case (i) that the company is entitled to the relief claimed, and (ii) that the action falls within the proper boundaries of the exception to the rule in *Foss v. Harbottle*.”

This approach has been followed in this jurisdiction in relation to companies; see [Top Jet Enterprises Ltd. v. Sino Jet Holding Ltd. \(40\) \(2018 \(1\) CILR 18, at para. 29, per Segal, J.\)](#).

110 It is not entirely clear what standard the Court of Appeal in *Prudential* was intending to set by referring to a plaintiff “at least” being required to establish a “*prima facie*” case that he falls within the exception to the rule in *Foss v. Harbottle* (11). Some assistance can be derived from

¹¹ [2022 \(1\) CILR 12, paras. 33](#), 119, 123.

¹² [2022 \(1\) CILR 12, paras. 33\(ii\)](#), 138.

¹³ Thus at [2022 \(1\) CILR 12, para. 102](#) the judge refers to “good arguable case” and paras. 106 and 136 might be said to suggest that he was in fact making a clear finding that D1 had failed without cause to bring proceedings rather than that it was simply arguable.

the subsequent judgment of Knox, J. in *Smith v. Croft (No. 2)* (35) ([1988] Ch. at 138–139), approved in *Top Jet* ([2018 \(1\) CILR 18, at para. 30](#)) as follows:

“My conclusion is that it is the question stated by the Court of Appeal that has to be decided as a preliminary matter, that it is a special form of procedure concerned with giving sensible operation to the rule in *Foss v Harbottle* ... and which is concerned with avoiding the Scylla and Charybdis, on the hand of having a preliminary issue which effectively requires one to try the whole action where the rules serves no useful purpose, and on the other side of the strait, of assuming that everything the plaintiffs allege is necessarily correct as a matter of fact, which is of course the technique the court adopts when it has was called a strict demurrer. The Court of Appeal has laid down a halfway house for this very special type of case, one in which the legal issues in this particular case are sufficiently well defined for the parties to be able to argue them.”

In other words, the approach should be a halfway house between a strike out application and a full trial.

111 When pressed during the hearing as to what he thought the Court of Appeal meant by a *prima facie* case, Mr. Allison suggested that it meant a good arguable case and that was in fact an expression the judge used at para. 102 of his judgment, despite his references (see para. 107 above) to mere arguability being the test. This court recently had occasion to consider what was meant by the expression “good arguable case” in *Scully Royalty Ltd. v. Raiffeisen Bank Intl. Ltd.* (32) ([2022 \(1\) CILR 118, at paras. 47–52](#)). In particular, the court approved the observation of Mustill, J. in *Ninemia Maritime Corp. v. Trave Schiffahrts G.m.b.H. und Co., The Niedersachsen* (24) ([1983] 2 Lloyd’s Rep. at 605) where he said:

“I consider that the right course is to adopt the test of a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the Judge believes to have a better than 50 per cent chance of success.”

112 During the hearing, the court invited counsel to ascertain whether recent English decisions in relation to derivative actions offered any assistance as to the standard to be applied when considering whether the grounds for permitting a derivative action had been made out. However, counsel’s researches were unable to come up with anything of significant assistance.

113 Mr. Chapman referred us to the decision of the English Court of Appeal in *Barrett v. Duckett* (5), which was decided before the requirement for leave in relation to companies was introduced by statute. This was a case where B & D each held a 50% shareholding in a company. B instituted

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a derivative action against D and others on behalf of the company alleging wrongdoing by D and others, D being the sole director of the company. The defendants applied to strike out the claim on the basis that it was not a proper case for a derivative action. In the course of his judgment, Peter Gibson, L.J. sought ([1995] 1 BCLC at 249) to summarize the principles in relation to derivative actions concerning companies in the following terms (omitting passages not relevant for our purposes):

“The general principles governing actions in respect of wrongs done to a company or irregularities in the conduct of its affairs are not in dispute:

1. The proper plaintiff is prima facie the company.
2. ...
3. There are however recognised exceptions, one of which is where the wrongdoer has control which is or would be exercised to prevent a proper action being brought against the wrongdoer: in such a case the shareholder may bring a derivative action (his rights being derived from the company) on behalf of the company.
4. When a challenge is made to the right claimed by a shareholder to bring a derivative action on behalf of the company, it is the duty of the court to decide as a preliminary issue the question whether or not the plaintiff should be allowed to sue in that capacity.
5. In taking that decision it is not enough for the court to say that there is no plain and obvious case for striking out; it is for the shareholder to establish to the satisfaction of the court that he should be allowed to sue on behalf of the company.
6. ...”

114 Mr. Chapman relied in particular on the second part of 5 above, namely that it is for the shareholder to establish to the satisfaction of the court that he should be allowed to sue on behalf of the company. He submitted not simply that this places the onus on the shareholder, which we accept, but that it means that the shareholder must establish his ability to sue on the balance of probabilities. He says that *Barrett* changed the test set out in *Prudential* (28), with its reference to a *prima facie* case.

115 We are unable to place such weight on the decision in *Barrett*. Peter Gibson, L.J. was simply recording general principles, which were not in dispute. We do not think that it assists on how a shareholder satisfies the court that he should be allowed to sue on behalf the company. What is made clear, however, in the first part of 5 above is that the court should not apply the normal strike out test. It is therefore inconsistent with the approach which the judge adopted in the present case.

116 It is perhaps of note that the relevant provisions of the English Companies Act set out a number of factors which the court should consider when deciding whether it should allow a derivative action, but the matter is ultimately left to the court as a matter of evaluation. In our judgment, that approach is consistent with the observation of Lord Collins (“the underlying question is whether the circumstances are sufficiently special to make it just for the beneficiary to have the remedy”) and Lord Walker (“the unifying factor—what has to be special about the circumstances—is that the derivative action is needed to avoid injustice”) in *Roberts v. Gill* (30) quoted above in relation to special circumstances.

117 It is clear that, whether the matter is being considered on a strike out application or on the trial of a preliminary issue, the court should not hold a mini trial in order to decide whether the criterion in s.33(3) is met. However, it should, as in the present case, permit the parties to adduce affidavit evidence on the topic. Ultimately, the court must then reach a view on the material provided to it.

118 Whilst reference to a “good arguable case” may in some cases be a helpful criterion, in our judgment the task is ultimately an evaluative one. The court must decide, on the basis of the material before it, whether the likelihood of the general partner having failed or refused to institute proceedings without cause is sufficient to lead the court to conclude that a derivative action should be permitted in the interests of justice. In reaching this evaluative conclusion, the court will no doubt have regard, *inter alia*, to the strength of the evidence that the general partner has failed or refused to institute proceedings without cause, the strength of the underlying claim which is sought to be brought and the likelihood and nature of any injustice if the derivative claim is not permitted.

119 For these reasons, we respectfully disagree with the judge that, because this was a strike out application, the burden was on the defendants and he only had to consider whether it was merely arguable that the plaintiffs met the statutory criterion in s.33(3). That was to set the bar too low. It follows that, as Mr. Chapman submitted, he erred in this respect.

120 However, we have before us the same affidavit evidence that was before the judge and accordingly we propose to reach our own decision, applying the approach we have just described.

Timing

121 As occurred in this case, and as will invariably be the position, given that there is no requirement for leave before commencing an action in reliance on s.33(3), the hearing of a strike-out application or a preliminary issue as to whether the claim falls within s.33(3) will take place at some point after the action is begun. The question then arises as to whether the

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court should assess compliance with s.33(3) by reference to the facts at the time of commencement of the action or as at the date of the hearing of the strike out or preliminary issue.

122 The judge held ([2022 \(1\) CILR 12, at paras. 127–128](#)) that the question of whether the general partner had failed or refused to bring a claim without cause was to be judged on the relevant facts as they were at the time the proceedings were commenced.

123 The plaintiffs support the judge’s decision. They point out that the words “failed or refused” in s.33(3) are in the past tense, which suggests that the relevant failure or refusal must have taken place before the date of institution of the derivative claim.

124 We do not agree with the judge’s decision on this point, essentially for the reasons advanced by Mr. Chapman. The plaintiffs’ approach would require the court to ignore anything that has happened between the institution of the proceedings and the hearing of the relevant strike out application/preliminary issue. This could lead to highly unsatisfactory results. Thus, suppose that, after the institution of the proceedings, a new general partner was appointed with completely separate ownership, so there was no longer any question of an inhibition or conflict of interest. Suppose further that the new general partner has reviewed the alleged claim and decided in good faith on commercial grounds to maintain the decision of the former general partner not to institute proceedings against the alleged wrongdoer.

125 In our judgment, the legislature cannot have intended that the court should allow a derivative claim to proceed in circumstances where, as at the date of the hearing of the strike out or preliminary issue, the requirements of s.33(3) are not met because, for example, any inhibition of the general partner has disappeared. In our judgment, the natural meaning of s.33(3) is that the court should consider the issue of whether the requirements of the subsection are met by reference to the facts as they are at the time of the hearing of the strike out or preliminary issue. Mr. Allison submitted that the court could surmount any difficulty which his construction of s.33(3) might cause by taking any change of circumstances into account when considering whether to exercise its discretion to allow the derivative claim to proceed. However, we do not see that as a satisfactory solution, nor is it in our view consistent with the natural meaning of s.33(3).

126 Whilst by no means determinative—because the legislation is not the same—we note that in England and Wales, in the context of derivative actions for companies, the court does take into account events which have occurred between the institution of the proceedings and the hearing before the court as to whether the derivative action should be allowed to proceed: see, for example, the decision of Newey, J. in *Kleanthous v. Paphitis* (18), where the judge placed great weight on the fact that, since the institution

of the proceedings, the company had appointed a special committee of independent directors which had decided that the company should not bring or continue the claim which the plaintiff was seeking to bring derivatively.

127 In our judgment therefore, a judge hearing a strike out application or preliminary issue in relation to an ELP should consider whether the test in s.33(3) is met by reference to the facts as they appear at the time of the relevant hearing.

Pleading

128 In relation to the derivative claim against D1, para. 25 of the ASOC pleads:

“In the alternative, if and to the extent that the claims set out in this Statement of Claim (or any of them) are properly regarded as and/or must be brought as derivative claims on behalf of TPF, the Plaintiffs will contend that Port Link has without cause failed to initiate proceedings on behalf of TPF against itself (and there is no real prospect of it doing so) such that the requirements of section 33(3) of the Exempted Limited Partnership Act (2020 Revision) (the ‘ELP Act’) are satisfied, such that the Plaintiffs should be permitted to prosecute the relevant claims on behalf of and in the name of TPF.”

129 In relation to the derivative claims against D2, D3 and D4, para. 25B of the ASOC pleads:

“The balance of the claims against Mr Williams and Wellspring and the claim against KGLI Asia are brought by the Plaintiffs as derivative claims on behalf of TPF in circumstances where Port Link has without cause failed to initiate proceedings on behalf of TPF against those parties and there is no real prospect of it doing so. Not only did Port Link fail to commence such claims; as described in paragraph 4 above, it deliberately withheld from the Limited Partners the information upon which the claims are based. In the premises, the requirements of section 33(3) of the ELP Act are satisfied such that the Plaintiffs should be permitted to prosecute these claims on behalf of and in the name of TPF.”

130 The judge held ([2022 \(1\) CILR 12, at para. 127](#)) that para. 25B of the ASOC was sufficient to enable the defendants to understand the gist of the case, which had also been factually set out in the detailed evidence filed in the strike out applications.

131 That conclusion was criticized by Mr. Chapman. He submitted that it was necessary for a limited partner to plead the facts and matters relied upon as allowing the limited partner to bring a derivative claim pursuant to

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s.33(3) and that the particulars in this case were wholly inadequate to serve that purpose. Thus, there was no pleading of the facts and matters relied upon to show that D1 as general partner was under an inhibition or suffered from a conflict of interest.

132 Mr. Allison, on the other hand, submitted that the facts and matters relied upon emerged with sufficient clarity from the detailed allegations of wrongdoing against D1 and the other defendants set out in the ASOC.

133 In our judgment, the ASOC was inadequately pleaded in this respect. In *Roberts v. Gill* (30), Lord Walker, in relation to a derivative claim on the grounds of special circumstances concerning an estate or trust, said this (2011] 1 A.C. 240, at para. 103):

“So while he need not obtain prior leave from the court, he must plead the special circumstances entitling him to the court’s indulgence. Those special circumstances are part of his cause of action.”

134 In our judgment, the position is analogous in cases brought pursuant to s.33(3). There is no requirement for leave but a limited partner may only bring a claim where the general partner has failed or refused to bring proceedings without cause. The failure or refusal without cause is part of the cause of action brought by the limited partner and must therefore be pleaded. In our judgment, it is not sufficient simply to plead the wording of s.33(3) as was done by the plaintiffs in this case. A limited partner must plead the facts and matters relied upon as showing that he comes within the provisions of s.33(3).

135 What is relied upon by the plaintiffs in this case is that D1 as general partner is under a clear inhibition arising from its conflict of interest. The facts and matters relied upon as showing that this was so should therefore have been pleaded. Accordingly, we differ from the judge’s assessment that the pleading was adequate. However, we are satisfied that no prejudice has been caused to the defendants by this failure. As the judge correctly stated, the points of issue emerge very clearly from the evidence filed during the strike out applications and it is clear that the defendants knew the case which they had to meet. We therefore decline to decide this case on a technical pleading point, although we emphasize, for the future, that simply pleading that a claim is brought pursuant to s.33(3) is not sufficient and that a plaintiff must plead the facts and matters relied upon as showing that he falls within the subsection.

Need for a request to sue

136 It is common ground that the plaintiffs in this case did not request or demand that D1 as general partner bring proceedings against D2–D4. Mr. Chapman submits that there must be such a request before a general partner

can be said to have failed or refused to bring such proceedings. We agree that the word “refused” implies the existence of a request. However, this is not so in relation to the word “failed.” A general partner can be said to have “failed” to bring proceedings if he simply has not brought such proceedings.

137 Whilst it will often be the case that, before instituting derivative proceedings under s.33(3), a limited partner will have requested the general partner to institute the relevant proceedings, it is not a necessary pre-condition that he has done so. In this case, it is perfectly apparent from the evidence that D1 has not brought the relevant proceedings and has no intention of doing so. As outlined earlier, it has reached a decision not to institute proceedings even following the change in the board of directors by the appointment of the FFP directors. The requirement of s.33(3) that the general partner has failed to bring proceedings on behalf of TPF has obviously been satisfied.

Discretion

138 It is well established in other contexts that the court has a discretion whether or not to allow a derivative claim even where the relevant ground for the bringing of such an action (*e.g.* an exception to the rule in *Foss v. Harbottle* (11) in the case of companies and “special circumstances” in the case of trusts or limited partnerships) is met. Although there is no reference to the existence of a discretion in s.33(3) itself, the judge considered that he had such a discretion and it was common ground before us that there is such a discretion.

139 Thus, even if it be satisfied that a plaintiff can bring himself within s.33(3), the court may in its discretion decide that he should not be permitted to continue the derivative claim. One relevant factor in the exercise of this discretion is likely to be whether the plaintiff has an alternative remedy, so that a derivative action is not required in order to avoid injustice.

Summary

140 Pulling the threads of the above discussion together, we would attempt to summarize our conclusions in relation to s.33(3) as follows:

(i) There is no requirement for leave to bring derivative proceedings under s.33(3). A limited partner may simply institute such proceedings.

(ii) A limited partner must however plead the facts and matters relied upon as showing that he can bring himself within the requirements of the subsection because this forms an essential part of his cause of action.

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(iii) If a defendant wishes to raise an issue as to the standing of a limited partner to bring such derivative proceedings, he should do so by means of a strike out application or seek the trial of a preliminary issue.

(iv) Whichever of these routes is chosen does not affect the test which has to be applied in deciding whether s.33(3) is complied with and whether a limited partner should be permitted to continue with the derivative claim.

(v) The decision of the court on such an application or preliminary issue is determinative (subject to appeal). If the court holds that the derivative claim may be continued, the limited partner thereafter has the necessary standing to pursue the claim. It is not an issue which is deferred until or revisited at trial (save possibly in the context of costs at the end of the trial).

(vi) The court should not conduct a mini trial as to whether the requirements of s.33(3) are satisfied. The court has to reach its decision on the basis of the material before it, which will be more limited than it will be following discovery and trial.

(vii) At the hearing, the onus is on the limited partner to satisfy the court that the requirements of s.33(3) are met. Reference to “onus” is not to be mistaken as a reference to a “burden” in the sense of having to show something on the balance of probabilities.

(viii) The essential task for the court at such a hearing is to determine whether the limited partner has brought himself within the terms of s.33(3), namely that the general partner has failed or refused to bring the relevant proceedings without cause.

(ix) In determining this issue, the court is likely to be assisted by consideration of whether special circumstances (as developed in cases concerning trusts, limited partnerships and other entities) exist, but the court’s task remains one of applying the statutory test set out in s.33(3).

(x) Whilst reference to a “good arguable case” may be a helpful indicator of the level of comfort which the court should have when deciding whether the requirements of s.33(3) are met, the court’s task is essentially an evaluative one having regard to the facts as they appear to the court at that stage of the proceedings from the material before the court and the need to avoid injustice balanced with the need to respect the fact that a derivative action is an exception to the general principle in the ELPA that management (including decisions as to litigation) of an ELP is for the general partner, not the limited partners. As stated at para. 118 above, the court should consider, *inter alia*, the strength of the evidence that the general partner has failed or refused to institute proceedings without cause, the strength of the underlying claim which is sought to be brought and the likelihood and nature of any injustice if the derivative claim is not permitted.

(xi) The court should reach its decision as to standing by reference to the facts as they appear at the date of the hearing of the strike out or preliminary issue.

(xii) Even where the requirements of s.33(3) are met, the court has a discretion as to whether to permit a derivative claim to continue. One of the factors which is likely to be relevant in exercising that discretion is whether the plaintiff has an alternative remedy.

Application to the facts

(a) *The claim against D1*

141 It is to be recalled that, as described at para. 75 above, a derivative action allows a party to bring a claim in the name of and on behalf of a second party against a third party for loss and damage caused to the second party. It follows that the second party must have a claim against the third party before the first party can be permitted to bring such a claim derivatively.

142 Ms. Stanley submits that, regardless of whether the test in s.33(3) is otherwise met (*i.e.* that D1 is subject to an inhibition which makes its decision in relation to potential proceedings one which is without cause), there is a more fundamental reason why the derivative claim against D1 should be struck out, namely that, on the judge's finding, the ELP has suffered no loss or damage and therefore has no claim of its own to bring.

143 The judge said ([2022 \(1\) CILR 12, at para. 63](#)):

“It follows that where an ELP is alleged to have suffered loss, as in this case, that is the loss of each of the limited partners. There is no distinct or separate loss in respect of ‘the partnership’ (TPF), which as an entity does not exist at law.”

144 To similar effect is the decision of Cooke, J. in *Henderson* (13) in relation to limited partnerships ([2012] EWHC 3259 (Comm), at paras. 28–32). Thus at para. 28 he said:

“The Partnership, unlike a limited company, does not possess a corporate legal personality. Like an ordinary partnership under the Partnership Act, ‘the Partnership’ is simply a convenient way of referring to the body of partners as a whole. In my judgment therefore, no difficulty arises for a Limited Partner’s claim against the General Partner, regardless of whether or not removal and substitution of the General Partner is possible. The claim to be made against the General Partner is that of the individual Limited Partners and is not a Partnership Asset. Each Limited Partner has its own contractual or fiduciary claim for its own loss, where the inter-relationship with the General Partner is governed by the RPA. *The Partnership, which*

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consists of the Limited Partners and the General Partner together has no form of joint right or claim against the General Partner, as the claimants suggest.” [Emphasis added.]

145 We are not to be taken as agreeing that this is correct. As already stated, s.16(1) of the Act provides that the general partner will hold the assets of the ELP upon trust. In the case of a trust, whilst a beneficiary undoubtedly has a direct claim against the trustee for breach of trust, the appropriate remedy (as discussed above by reference to *Target v. Redferns* (38)) is for an order that the trustee restore the trust fund to what it would have been had the breach not been committed. Such a claim may be brought by one or more beneficiaries, but a successor trustee will often bring such a claim against a former trustee for breach of trust on behalf of the trust as a whole and will hold any sums recovered from the former trustee upon the terms of the trust. Thus, even though like an ELP, a trust is not a separate legal entity, it can properly be said that the trust as well as a beneficiary has a claim against a trustee for breach of trust and that such a claim can be considered as an asset of the trust. It seems to us strongly arguable that the position is the same in relation to an ELP, particularly given that the general partner is also a trustee.

146 However, there has been no respondents’ notice in respect of the above finding of the judge and indeed the plaintiffs have not sought to argue that the judge was wrong in this respect. What they say is that the judge was correct in what he said ([2022 \(1\) CILR 12, at para. 64](#)) where, immediately following the passage quoted above in para. 143 above from para. 63, he said:

“64 I therefore find that the direct claims in respect of the individual partners’ losses are vested in the limited *partners* alone, and are not claims that can be brought on behalf of TPF derivatively, except in the circumstances permitted by s.33(3) of the ELPA where the limited partners who wish to obtain redress for TPF are in effect put in the place of the GP, and bring claims on behalf of TPF.” [Emphasis in original.]

147 With respect to the learned judge we cannot accept that s.33(3) permits a claim in such circumstances. The subsection presupposes that there is a claim to be brought by the general partner on behalf of the partnership. If, as the judge held, the partnership has no claim against the general partner, there can be no failure by the general partner to bring such a claim without cause.

148 Even if we are wrong on this point, there is a second reason for not permitting the derivative claim against D1 as a matter of discretion; that is because the plaintiffs as limited partners have an adequate alternative remedy.

149 As we have held earlier in this judgment, a limited partner has the right to claim against a general partner for breach of duty on the part of the general partner. In the event of such a claim succeeding, the appropriate remedy will almost certainly not be an award of equitable compensation to the particular limited partners who have sued (thereby potentially causing difficulties in relation to those who have not also joined in the action and in respect of creditors of the ELP), but instead an order that the general partner restore the trust fund as outlined in *Target v. Redferns*.

150 In these circumstances, exactly the same will be achieved by a direct claim as would be the case in a derivative action. In the event of the plaintiffs succeeding in their direct claim, the estate of the ELP will be made whole by payment from the general partner pursuant to an order for restoration of the trust fund. Success in a derivative action would have the same result. Accordingly, there is simply no need for a derivative action; it would add nothing to the direct claims brought by the limited partners coupled with an order for restoration of the trust fund in the event of such claims succeeding. Indeed, during oral argument, Mr. Allison accepted that, if the plaintiffs have a valid direct claim against D1 for which restoration of the trust fund can be awarded, there would be no need for the derivative action. In those circumstances, we conclude that, as a matter of discretion, the derivative claim against D1 should not be permitted.

151 Accordingly, for both of the above reasons, we strike out the derivative claim of the plaintiffs against D1.

(b) *The claims against D2–D4*

152 We have described the claims brought against the various defendants at paras. 13–16 above. The relevant features for present purposes can be summarized as follows:

(i) The plaintiffs invested some 65% of the total amount invested in TPF.

(ii) Other limited partners, who invested 15.14%, have instituted broadly similar claims against D2 and D3 in the State of Georgia, USA. Thus a total of 80.3% by value of limited partners are litigating on the basis of alleged serious wrongdoing on the part of the GP.

(iii) Of the remaining 19.7% (by value), 14% are associated with the GP.

(iv) The plaintiffs allege that D1 as the general partner has been guilty of wrongdoing which has caused TPF loss said to be well in excess of US\$100m.

(v) The claims against D1 essentially allege that, in breach of its fiduciary, contractual and other duties, it acted contrary to the interests of TPF and the limited partners by making substantial payments, using TPF's moneys, that were not for the benefit of TPF and/or the limited partners.

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Amongst these is the alleged sham settlement of the DIFC proceedings brought against it in the DIFCC as a result of which the Wellspring payment of US\$59,990,461.30 was paid to D3. The ASOC alleges that D1 conspired with, amongst others, D2 (Mr. Williams) and D3 (Wellspring) to cause loss to TPF and/or the limited partners by unlawful means in relation to the DIFC proceedings and the Wellspring payment.

(vi) The claims against D2 are that he orchestrated the DIFC proceedings and the Wellspring payment and was accordingly party to the above conspiracy. It is further alleged that he dishonestly assisted in D1's breach of trust/fiduciary duty, knowingly procured D1 to breach its contractual duties and was in breach of fiduciary duties he owed to TPF and/or D1.

(vii) The claims against D3 are for knowing receipt of the Wellspring payment, conspiracy in relation to the Wellspring payment and the DIFC proceedings and for repayment of the Wellspring payment pursuant to s.4 of the Fraudulent Dispositions Act (1996 Revision).

(viii) The claim against D4 is for knowing receipt in respect of a number of payments said to have been made to it in breach of trust and/or fiduciary duty by D1 as general partner.

153 The judge held ([2022 \(1\) CILR 12, at para. 106](#)) that s.33(3) required a finding as to whether the GP (*i.e.* the relevant corporate entity) has failed or refused to institute the proceedings without cause, not the directors at the relevant time. He concluded (*ibid.*, at para. 102) that there was a good arguable case that D1 had and still has a relevant inhibition because it is conflicted in relation to the plaintiffs' claims. Its decision not to bring the claims against D2–D4 was infected and made unsafe by the facts giving rise to its conflict of interest.

154 The underlying facts in relation to the inhibition were not disputed before us and would appear to be as follows:

(i) Mr. Williams, D2, is the sole shareholder of PLH, a Delaware company, which in turn is the sole shareholder of D1. Thus Mr. Williams is the sole ultimate beneficial owner of the general partner of TPF. He was the investment director of TPF's sponsor and placement agent from 2009–2011 and a member of the Investment Committee of TPF from 2009–2013.

(ii) On January 23rd, 2020, he was appointed as the authorized representative of D1 in relation to proceedings against D1 by certain limited partners (including the first plaintiff) pursuant to s.22 of the ELPA seeking disclosure of full information regarding the state of the business and financial condition of TPF. The resolution conferred full authority on Mr. Williams to take all necessary actions in relation to the s.22 proceedings. The application of the limited partners under s.22 was opposed by D1 at a time when the FFP directors were in post and eventually Parker, J. ruled against D1 and ordered it to make disclosure. Thereafter, D1 sought to

appeal that decision but the appeal was eventually compromised and D1 agreed to provide the necessary information.

(iii) Mr. Williams is the CEO, CFO, President, Vice-President, Treasurer and Secretary of D3, Wellspring. The company is owned by the Mark E. Williams Living Trust, of which Mr. Williams, his wife and brother are the trustees. The ASOC pleads that it is to be inferred that the beneficiaries are also Mr. Williams' family.

(iv) D4, KGLI Asia is a company incorporated in the Cayman Islands and Mr. Williams was its CEO from January 1st, 2012.

155 As can be seen therefore, Mr. Williams is the ultimate beneficial owner of the GP and has very close connections with Wellspring and KGLI Asia.

156 In considering whether D1 as the general partner would be under an inhibition in relation to the taking of proceedings against D2–D4, it is useful to refer to the case of *Henderson* (13). The facts of that case are summarized at paras. 83–84 above. Certain limited partners of an English limited partnership sought to bring a derivative action against, *inter alia*, the manager, who had been appointed by the general partner and was a sister company of the general partner.

157 Cooke, J. held ([2012] EWHC 3259 (Comm), at para. 59) that as a result the general partner had an irreconcilable conflict of interest in relation to whether to institute proceedings against the manager and this constituted “special circumstances” which therefore justified the limited partners being able to bring a derivative claim. In coming to that conclusion, he held that (i) the ability (which was not straightforward) under the limited partnership agreement for the limited partners to remove and replace the general partner, and (ii) the ability of the limited partners to sue the general partner for wrongly failing to institute proceedings against the manager, were not satisfactory alternative remedies so as to refuse the limited partners the ability to bring a derivative claim.

158 We respectfully agree with the decision of Cooke, J. in *Henderson*. In our judgment there is a similar conflict of interest in the present case. On the plaintiffs' case, D1 as the general partner was deeply involved in all the alleged wrongdoing, as was Mr. Williams. D1 has to decide whether to institute proceedings against D2–D4 in circumstances where:

(i) The essential wrongdoing giving rise to the claims against D2–D4 was that of D1 itself in making the various payments and where it is said to be part of the unlawful means conspiracy to injure TPF involving Mr. Williams and Wellspring.

(ii) The contemplated proceedings would have to be brought against the beneficial owner of the GP and against two companies in which Mr.

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Williams is deeply and closely involved, namely Wellspring and KGLI Asia.

(iii) D1 would also have to consider whether (as general partner) it should sue itself (in its own right) as a co-conspirator in the alleged unlawful means conspiracy.

159 On the face of it, by reason of the obvious and serious conflict of interest, D1 is under an inhibition which would amount to special circumstances in the context of a trust or limited partnership and this inhibition also means that the failure by D1 to bring proceedings against D2–D4 is without cause for the purposes of s.33(3).

160 However, the defendants say that this is not the position for two associated reasons. First, they point out that the present directors of D1, namely the FFP directors, are wholly independent and were not in office at the time of the alleged wrongdoing on the part of D1. They do not therefore suffer from any conflict of interest. They are in a position to bring an independent and impartial view to bear on whether claims should be brought against D2–D4 and in this respect are in the same position as a liquidator of a company who has to decide whether to bring a claim against former directors or other parties for injury caused to a company. The defendants point out that, as summarized in the third affidavit of Mr. Lewis, the FFP directors have reviewed the position thoroughly with the benefit of legal advice and have concluded that the interests of TPF are best served by not instituting any claims against D2–D4 for the reasons there set out.

161 It is clear, submit the defendants, that the court must give great weight to the commercial judgment of those who have responsibility for the management of the relevant entity under the constitutive documents; see for example the observation of the Lewison, J. in *Iesini* (17) quoted at para. 77 above.

162 Secondly, they submit that the independence of the FFP directors is fortified by the fact that Mr. Williams has given an undertaking that the shareholder of the GP will not exercise any powers so as to remove the FFP directors or interfere in any way in the exercise of their functions. Thus, submit the defendants, the FFP directors are, and are seen to be, free to act independently.

163 In our judgment, these submissions do not overcome the inhibition referred to earlier. In relation to the first point, the judge was in our view correct to focus on the entity which is the general partner rather than the directors for the time being of that entity. Section 33(3) refers to the “general partner” having failed or refused to bring proceedings without cause. The general partner is the legal entity D1. D1 is subject to the conflicts of interest we have summarized above and thus cannot be seen to be in a position to take a fair and independent decision about the potential

litigation. New directors are not in the same position as a liquidator, who is appointed by and subject to the supervision of the court and therefore clearly is and is seen to be independent of the company, its directors and shareholders. The FFP directors owe a fiduciary duty to act in the best interests of D1. The defendants submitted that because D1 owes fiduciary duties to act in the best interests of the partnership, the FFP directors therefore have a duty to act in the best interests of TPF. However, there is certainly the potential for conflict between acting in the best interests of TPF (which might include taking action against D1 as a co-conspirator) and acting in the best interests of D1 (which might be said to include the avoidance of being sued).

164 In connection with the undertaking, we were referred to the case of *St. John's Trust Co. (PVT) Ltd. v. Medlands (PTC) Ltd.* (31) ("*B Trust*"), a decision of the Court of Appeal of Bermuda. That was a case which involved a number of issues but for present purposes it is sufficient to say that one of the issues before that court was whether it would be appropriate to reappoint St. John's Trust Co. (PVT) Ltd. ("*SJTC*") as trustee of the B Trust. SJTC was wholly owned by a company, Cabarita, which was in turn wholly owned by a Mr. T. Mr. T was said to have misappropriated funds from the B Trust and there were ongoing proceedings against him in this respect.

165 Mr. T had appointed two independent directors of SJTC and, before the Bermuda Court of Appeal, he proffered an undertaking not to interfere with the appointment of these two individuals. Despite this, the Bermuda Court of Appeal held ([2021] CA (Bda) 20 Civ, at para. 62) that it was clearly not appropriate for SJTC to be trustee. It would be contrary to the interests of the beneficiaries for Mr. T to have any control or influence over the B Trust. This would be possible, despite his undertaking, by reason of his ownership of Cabarita which owned SJTC. The undertaking did not meet the fundamental issue of Mr. T's potential influence.

166 Mr. Chapman sought to distinguish *B Trust* on three grounds. First, he pointed out that Mr. Williams is only an *indirect* beneficial owner of D1, but that was also the case in *B Trust* as Mr. T owned Cabarita which owned SJTC. Secondly, he referred to the undertaking by Mr. Williams not to interfere. However, an undertaking was also given by Mr. T in *B Trust* and this did not persuade the Bermuda Court of Appeal that his potential influence was thereby negated. Thirdly, he submitted that *B Trust* was concerned with whether there might be interference in the future by Mr. T whereas the present case was concerned with a decision (namely not to issue proceedings) which had already been taken. However, we do not see that this is a significant point of difference. The fact is that the decision as to whether to institute proceedings on behalf of TPF involved consideration by the GP of whether to sue itself as an alleged co-conspirator and whether

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to sue its beneficial owner and two closely linked companies in circumstances where the claims were said to arise on the basis of the wrongdoing of the GP and its beneficial owner.

167 We find the reasoning of the Court of Appeal of Bermuda to be persuasive. In our judgment, the undertaking given by Mr. Williams is insufficient to overcome the inhibition from which D1 as general partner suffers. If one stands back and considers how it would appear to the plaintiffs (who allege that there has been serious wrongdoing by D1–D4 which has cost TPF over US\$100m.) for the decision as to whether to seek recompense from any one or more of D1–D4 to be left in the hands of D1, they would have no confidence that a fair and independent decision had been taken, even following the appointment of the FFP directors. In our judgment, they would be justified in this lack of confidence. There is no doubt in our view that D1 was and is suffering from an inhibition which leads to the conclusion that, subject to the exercise of any discretion, it is appropriate for the plaintiffs to bring derivative claims on behalf of TPF pursuant to s.33(3) against D2–D4.

168 Given our decision to uphold the judge’s conclusion that it is the position of D1 as the general partner which must be considered in relation to any inhibition rather than the position of the directors from time to time, it is not necessary for us to address his finding about the position of the FFP directors. Suffice it to say that, if we had found it necessary to do so, we would have considered that the judge was entitled to reach the conclusions which he did in this respect.

169 As to discretion, the defendants submit that, because the plaintiffs are bringing direct claims against D2 and D3, they have an alternative remedy in respect of those two defendants and there is no need for them to bring a derivative action. They point out that they have not sought to strike out the direct claims against D2 and D3. That is so, but it is of note that footnote 10 at para. 15 of the skeleton argument of D2–D4 states:

“For the avoidance of doubt, [D2–D4] do not admit that the Respondents, in particular KPA, have standing to bring the direct claims, and expressly reserve the right to challenge the Respondents’ standing to bring such claims, including on the basis of a lack of authority in the case of KPA.”

170 As stated at para. 67 above, Ms. Stanley asserted in oral argument that the only way to get the proceeds of any successful claim against D2 and D3 into TPF is by way of a derivative claim. Furthermore, despite the defendants’ explanation, submitted in response to the draft of this judgment, that footnote 10 was only intended to cover the KPA lack of authority point and the partnership accounting point, the fact remains that the footnote expressly reserves the right to challenge the plaintiffs’ standing to bring the direct claims in general terms and the KPA point is

merely mentioned by way of inclusion as a ground of challenge. We bear in mind the overriding objective and, in our view, it would be inconsistent with that objective and highly undesirable to run the risk of the court eventually finding against D2 and D3 on the underlying merits of the claims but finding that the plaintiffs did not have standing for the direct claims or that it could not make an order for restoration of the trust fund in the absence of a derivative claim on behalf of TPF. The existence of an alternative remedy is a matter to be taken into account when determining whether to allow a derivative claim to proceed although its existence is not conclusive of the matter; see *Henderson* (13) ([2012] EWHC 3259 (Comm), at para. 39). In our judgment, whilst we have expressed certain preliminary views at paras. 65–72 above, in the light of the above matters there is sufficient uncertainty about whether the plaintiffs have direct claims against D2 and D3 or whether the court could order restoration of the trust fund on the success of such claims that, as a matter of discretion, it is just and fair to allow the derivative claims to proceed alongside the direct claims so that they are all heard at the same time. If, following a trial, the direct claims are upheld and the court also holds that it can order restoration of the trust fund as a remedy for such claims, then there will be no need to make any award on the derivative claims; if on the other hand the direct claims are found not to be maintainable or restoration of the trust fund cannot be ordered, the derivative claims will be necessary to provide a remedy, assuming that the underlying allegations against the defendants are upheld.

171 We add by way of postscript, that both sides sought to raise arguments based on the position of the Cayman Islands as a leading centre for the establishment of investment funds. Thus the defendants argued that, by setting the bar for derivative actions too low, the judge had rendered it less likely that promoters of investment funds in the form of ELPs would choose the Cayman Islands as the location of their funds because of the comparatively easy exposure to derivative claims.

172 Conversely, the plaintiffs argued that it was important for the reputation of the Cayman Islands as a centre for investment funds that persons who have invested in ELPs should have a remedy when the general partner is alleged to have been guilty of wrongdoing and that a derivative action is the only remedy in such circumstances. It should not therefore be too difficult to bring such an action.

173 Whilst noting these arguments, we have not decided this case by reference to the arguments' respective merits, which are more matters for the legislature. We have confined ourselves to construing s.33(3) in the light of the words used against the background of the law on derivative claims generally.

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Summary of conclusions reached on the derivative claims

174 In respect of D1, for the reasons which we have given above, we allow the appeal to the extent of striking out the plaintiffs' derivative claims against it.

175 In relation to the derivative claims against D2–D4, we dismiss the appeals brought by these defendants, with the consequence that the plaintiffs may bring those claims under s.33(3).

The SFC appeal

176 At the hearing below, the GP (D1) applied for security of costs (“SFC”) in the sum of US\$5,536,025.50 and the sum sought by D2–D4 was US\$2,720,000. It is and was common ground that the plaintiffs are both Kuwait state-owned enterprises ordinarily resident out of the jurisdiction and accordingly the judge had jurisdiction to exercise the discretion conferred on the court by GCR O.23 r.1(1), which reads in relevant part:

“Where, on the application of a defendant to an action or other proceedings it appears to the Court—

(a) that the plaintiff is ordinarily resident out of the jurisdiction ...

then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.”

177 Briefly summarized, the defendants' case was that there were substantial obstacles to the enforcement in Kuwait of an adverse costs order since there was no treaty between Kuwait and the Cayman Islands for the mutual enforcement of judgments and as a matter of Kuwaiti law even a judgment of the Kuwaiti courts was incapable of enforcement against the plaintiffs because they were state entities.

178 In dismissing the SFC applications, the judge began by setting out the legal principles he found to be applicable. He then analysed the principles and applied them to the case before him and then proceeded to give the reasons for his decision. The key elements of this part of his judgment can be summarized as follows:

The applicable principles

179 (i) There is no presumption that the court will ordinarily require a foreign plaintiff to give SFC; rather the discretion “is to be exercised on a case-by-case basis, as the rule states, having regard to all the circumstances

of the case”; see [In re Cybervest Fund \(9\) \(2006 CILR 80, at para. 24, per Smellie, C.J.\) \(para. 149\)](#).

(ii) The court should follow the guidance on the interpretation of O.23 r.1(1) provided by the following passage in the judgment of Smellie, C.J. in [Tasarruf Mevduati Sigorta Fonu v. Wisteria Bay Ltd. \(39\) \(2006 CILR 351, at para. 14\) \(para. 150\)](#):

“There is no hard and fast rule that every foreign plaintiff must be required to put up security. The matter is one, as already stated, of discretion to be exercised in every case. All the circumstances will be considered including the means and ability of the plaintiff to pay and even, in an appropriate case, the relative strength or weakness of the case for each side provided those factors are clearly discernable from the evidence. See, for these propositions, the leading case of *Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd.* ...”

(iii) The court’s discretion must be exercised impartially and must not be exercised discriminately; see [e.g. Ahmad Hamad Algosaibi & Bros. Co. Ltd. v. Saad Invs. Co. Ltd. \(1\) \(2017 \(2\) CILR 602, at para. 21\) \(para. 151\)](#).

(iv) The merits of the case will only be relevant if: (i) either party can clearly demonstrate a strong probability of success, or (ii) the court is considering a summary judgment application at the same time (para. 152).

Analysis and application of the principles to this case

(v) In this case, the merits could not be properly determined at this stage (para. 153).

(vi) The issue to be decided was whether the defendants had shown there are objectively justified grounds for concluding that there are obstacles or burdens to the enforcement of a costs order against the plaintiffs, such that there is a real risk of non-enforcement and whether, if there are such real risks, it is just in the circumstances to order security and if so, on what terms (para. 154). (This proposition, like principle (iii) above, is based on *AHAB v. Saad*, where Smellie, C.J. stated ([2017 \(2\) CILR 602, at paras. 15–16](#)):

“... the focal concern of the modern case law is not to ensure that a plaintiff is seldom required to provide security or that orders for security are only exceptionally made but to ensure that such orders are not imposed in an arbitrary or discriminatory manner. Accordingly, the making of such orders against a non-resident plaintiff would be appropriate, and may now be justified, not simply on the discriminatory basis of the plaintiff’s foreign status but because real risks of unenforceability are shown ‘on objectively justified

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grounds' to exist: *per* Gloster, L.J. in her *dictum* cited above from *Bestfort* ..., applying the *dictum* of Mance, L.J. from *Nasser* ...

16 This approach dictated by the modern cases is aimed at addressing not only basic tenets of fairness but more particularly, the requirements of the Constitutional Bill of Rights where, in s.16, it is mandated that 'government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution'—the most directly operative here being that right to a fair and public trial guaranteed by s.7 which states that 'Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.'"

(vii) Where the plaintiff is a foreign government or state agency, there is a presumption that SFC should not be awarded, although each case will turn on its own facts. The presumption arises from comity and common sense and may be displaced by the evidence; see *Tasarruf* (39) ([2006 CILR 351, at para. 22](#)) (para. 156).

(viii) As Smellie, C.J. observed in *Tasarruf*, the only modern reported case in which SFC had been ordered against a foreign government was *Sierra Leone Govt. v. Davenport* (34) where the circumstances were exceptional in that Sierra Leone had recently emerged from a civil war (para. 157).

(ix) PIFSS (the second plaintiff) was the subject of the SFC application determined in *Cybervest* (9), where PIFSS was petitioning as a shareholder for the winding up of a Cayman incorporated investment fund. In giving judgment in this case, Smellie, C.J. noted that PIFSS had "immensely valuable assets to be regarded as being within the jurisdiction" and so if PIFSS failed to pay an order for costs it would be open to the applicant to seek recourse. The SFC application was dismissed on the grounds that: (a) PIFSS's very valuable shareholding in the fund was to be treated as assets within the jurisdiction; and (b) PIFSS was ([2006 CILR 80, at para. 27](#)):

"a state agency of a foreign government of undoubted resources and enjoying a high reputation in the global financial and commercial community. This is relevant insofar as it would tend to negate any concern that the plaintiff would be unlikely to obey an order for costs made in favour of the respondent."

(x) Security will not be required of a foreign plaintiff who has substantial assets within the jurisdiction: see *Cybervest* (*ibid.*, at para. 25) (para. 160).

(xi) Where any liability for costs on the plaintiffs' part will inevitably be joint and several, security will not be required if at least one plaintiff has substantial assets within the jurisdiction (para. 160).

(xii) A foreign plaintiff does not have the burden of establishing that it has fixed and permanent property within the jurisdiction (para. 161). See the following extract from the judgment of Lightman, J. in *Leyvand v. Amnon Barasch* (20) ([2000] WL 191256, at para. 6):

“The common sense principle applies that the existence of assets within the jurisdiction, their fixity and performance, are among a number of potentially relevant factors, their importance depending on the particular facts of the case. The Court will not infer the existence of a real risk that assets within this country will be dissipated or shipped abroad to avoid their being available to satisfy a judgement for costs unless there is a reason to question the probity of the claimant: there is no such reason in this case. If there is a reason to question the claimant’s probity, the character of his property within the jurisdiction is relevant in assessing the risk: the risk may be greater if the property is cash or immediately realisable or transportable, and less if fixed and permanent.”

(xiii) Undertakings given by a plaintiff that it will not raise any of the potential defences in their home jurisdiction should an award of costs be made against it would be very persuasive evidence in any court in the plaintiff’s home jurisdiction (para. 162). See Sanderson, Ag. J. in [Elliott v. Cayman Islands Health Serv. Auth. \(10\) \(2007 CILR 163, at para. 18\)](#).

The judge’s reasons why, on the application of the foregoing principles, the SFC application would be refused

(xiv) The plaintiffs are both wholly owned by, and are the agents of, the State of Kuwait. There is therefore on the decided cases a rebuttable presumption that security for costs should not be ordered (see [Tasarruf \(39\) \(2006 CILR 351, at para. 23\)](#)). This presumption has not been rebutted on the evidence adduced. The plaintiffs appeared to have ready access to funds and would be able to satisfy any adverse costs order in a timely manner (paras. 164–166).

(xv) KPA is an internationally recognized commercial organization and relies on its international reputation to do business. Its profit for the financial year 2020–2021 was KWD56,450,000 (about US\$187,522,553 based on the exchange rate on August 9th, 2021). The Director General of KPA has confirmed that it has sufficient resources to meet any costs order made against it in these proceedings, and will comply with any such costs orders in a timely fashion, a position that has been reconfirmed by the Kuwaiti Department for Legal Advice and Legislation (“DLAL”). In addition, KPA has provided a written undertaking to this effect to the court on May 27th, 2021 (paras. 167–169).

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(xvi) PIFSS is a public institution which administers Kuwait's pension fund for all Kuwaiti citizens in the workforce, both in public and private sectors. It operates independently from the State of Kuwait and has its own budget and board of directors. It has a global investment asset portfolio worth approximately US\$133.7bn. (as at March 31st, 2021). Its profit for the period March 2020 to December was US\$18.9bn. An officer in PIFSS's Compliance and Government Department had confirmed that PIFSS had sufficient resources to meet any costs order made in these proceedings and will comply with any such orders in a timely fashion. PIFSS has provided a written undertaking to this effect to the court. In addition, PIFSS has been party to several sets of proceedings before the Cayman Islands courts and has never failed to comply with any costs order (paras. 170–172).

(xvii) It would be clearly detrimental to PIFSS's ongoing commercial reputation and business to be in breach of an order of the Cayman Islands courts (para. 173).

(xviii) Accordingly, after a careful consideration of the evidence, the presumption against ordering security against agents of a foreign state has not been rebutted. Accordingly, it would not be just to grant the SFC applications against the plaintiffs (para. 174).

(xix) It is well established that security will not be ordered against a foreign plaintiff who has substantial assets within the jurisdiction (see *Cybervest* (9)) and PIFSS is such a plaintiff by reason of its interest valued at €35,074,942 as a March 31st, 2021 in the Jermyn Street Commercial Real Estate Fund ("the Jermyn Street Fund"), of which PIFSS is a limited partner (paras. 175–176).

(xx) There is no reason to doubt the probity of PIFSS, which is an agent of the State of Kuwait and familiar with conducting international litigation (including in the Cayman Islands) (para. 177).

(xxi) There is no reason to conclude that PIFSS's interest in the Jermyn Street Fund is encumbered, or not amenable to enforcement if necessary, and no reason to conclude that PIFSS would dispose of or otherwise encumber its interest to attempt to defeat an order as to costs (para. 177).

(xxii) Accordingly, since PIFSS has sufficient assets within the jurisdiction to cover any costs order that is made against the plaintiffs (in respect of which they would be jointly and severally liable), and in circumstances where both plaintiffs have given written undertakings to the court, it would not be just to require the plaintiffs to pay security for costs (even if they were not agents of the State of Kuwait) (para. 178).

(xxiii) In light of the correspondence between Campbells (for D2–D4) and Ogier (for the plaintiffs) there was no basis to form the view that PIFSS would seek to frustrate the enforcement of a cost order against it by

disposing of its interest in the Jermyn Street Fund, even if it were able to do so (para. 179).

(xxiv) The enforceability of Cayman Islands judgments in Kuwait does not therefore arise for determination (para. 189).

The case advanced by the GP (D1)

180 (i) By reason of the errors made by the judge in reaching his decision to refuse to order SFC, his decision should be set aside and the SFC summons remitted to another judge of the Grand Court or alternatively the judge himself.

(ii) Although the discretion under GCR O.23, r.1(a) is at large, it can only be properly exercised when *all* of the circumstances are taken into account, and this the judge failed to do because he did not consider the obstacles of enforcement in Kuwait. Instead, he appears to have been satisfied that the plaintiffs could and would pay adverse costs order without question and the defendants had not proved otherwise.

(iii) The judge erred in principle in proceeding on the basis that there was a presumption that a foreign government or state agency will not be ordered to provide security for costs unless the applicant “rebutts” the presumption. The authorities the judge relied for the presumption—*Cybervest* (9) and *Tasarruf* (39)—laid down no such principle. Instead, Smellie, C.J. in the former case decided it on the basis that the court had a wide discretion which fell to be exercised on a case-by-case basis and in the latter case, Smellie, C.J. highlighted that it was all a matter of discretion taking into account all the circumstances. The true ratio was that the court does not apply the rules for SFC differently depending on whether the plaintiff is a state or an individual but on the basis that all plaintiffs who seek to engage the court’s jurisdiction must play by the same rules. This, after all, is the position in England (see *Sierra Leone (Govt.) v. Davenport* (34)) and in Australia (see *e.g. Papua New Guinea v. Sandline* (26) ([1998] QDC 298, *per* Andrews, J.) and *Ministry of Foreign Affairs (Italy) v. Simeone* (23)).

(iv) Where there is joint and several liability between plaintiffs for costs and one of them is in the jurisdiction, it is the practice not to make a SFC order against the plaintiff who is resident outside the jurisdiction if it is inevitably to be inferred by the court that there will be joint liability for costs between the plaintiffs. Assuming that this practice can apply to a situation where both plaintiffs are outside the jurisdiction but one has substantial assets within the jurisdiction, D1 submits that there were no sufficient grounds for the judge to have concluded that the plaintiffs would be jointly and severally liable for the costs. Indeed, D1 pleads a defence against KPA that it commenced and carried on its claims against them

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without due authority, and ratification of these acts is not possible under Kuwaiti law.

(v) The judge erred in taking into account the confirmation from the Director General of KPA, Mr. Al-Sabah, which was related to Mr. Florent, who in turn related it in para. 18 of his third affidavit, that KPA had sufficient resources to meet a costs order made against it in these proceedings, and would comply with any such costs order in a timely fashion. Mr. Florent's third affidavit was sworn on August 27th, 2021 but Mr. Al Sabah had been suspended from the position of Director General of KPA by the Minister of Commerce and Industry on October 24th, 2021 pending investigations of "violations" attributed to him. The expert evidence before the judge was that during his suspension Mr. Al-Sabah was not authorized to represent KPA in any capacity or exercise any powers on behalf of KPA.

(vi) The judge erred in treating the letters he called "undertakings" to pay an adverse costs order as if they were indeed "undertakings" when they were merely "comfort letters" since they contained the words, "Without prejudice to the exercise of KPA's legal rights" and stated "*we confirm* that KPA will comply with any final and binding costs orders ..." Even if the letters had contained express undertakings on behalf of the plaintiffs to pay an adverse costs order, the judge should have considered whether there remained a significant risk that such a costs order would not be paid and gone on to find that there was such a risk because the undertaking could only be enforced by committal or sequestration proceedings in the jurisdiction and such an order would not be enforceable in any other court. Nor was it clear that the comfort letters would be enforced by the courts of Kuwait.

(vii) The judge erred in placing reliance on the evidence given in Mr. Florent's third affidavit to the effect that PIFSS had never failed to comply with any costs order made in proceedings before the courts of the Cayman Islands when there was no evidence that any adverse costs order had ever been made against PIFSS in any Cayman Island proceedings. What the judge should have done was to require production of examples of Cayman Islands costs orders that had been honoured by PIFSS.

(viii) The judge made the following errors in giving the weight he did to PIFSS's assets within the jurisdiction:

- (a) He stated that the plaintiff does not have the burden of establishing that it has fixed and permanent property within the jurisdiction when that burden in fact lay upon the plaintiffs and he should have taken note of the fact that PIFSS's interest in the Jermyn Street Fund was not of a fixed or permanent nature but was in the nature of a receivable in the event that a distribution were to be made and/or the Fund were wound up.

- (b) He was wrong to consider whether there was any reason to doubt the probity of PIFSS when the question to be considered was whether there was a real risk that the assets in the jurisdiction may not be available if and when a case of enforcement arises; see Butcher, J. in *PJSC Tatneft v. Bogolyubov* (25) ([2019] Costs L.R. 977, at para. 49) and Henshaw, J. in *Pisante v. Logothetis* (27) ([2020] EWHC 3332 (Comm), at paras. 65–66).

Discussion and decision

181 We deal first with D1’s submission that the judge erred in proceeding on the basis there was a presumption that a foreign government or state agency will not be ordered to provide security for costs unless the applicant “rebutts” the presumption.

182 The principal authority relied on by the judge for the aforesaid presumption was *Tasarruf* (39). Here, as related in Smellie, C.J.’s judgment ([2006 CILR 351, at paras. 2–3](#)), in that case, the plaintiff was a Turkish state entity authorized by statute to recover deficiencies in the accounts of insolvent banks by, among other things, the seizure and sale of the assets of their managers, shareholders or auditors. This authorization was given as part of a regulatory scheme to protect depositors against bank failure. In March 2004, the plaintiff seized in Turkish waters two motor yachts registered in the Cayman Islands Shipping Registry in the names of the corporate defendants. These yachts were said to belong to the controlling shareholders of a leading Turkish bank now in the administration of the plaintiff. In December 2004, the plaintiff brought an action in the Grand Court to prevent the completion of registration of mortgages for amounts in excess of their total value, granted against each vessel in favour of the third defendant in person.

183 On the question whether the plaintiff should be ordered to provide SFC, in *Tasarruf* the Chief Justice said that the fundamental question was whether an agency of a friendly foreign state, enjoying good standing in the international community and which has invoked the jurisdiction of this court, should be required to put up security for a defendant’s costs of the action (*ibid.*, at para. 14). In earlier times there had been a practice that a foreign plaintiff should be ordered to provide SFC¹⁴ but given the changes to the Rules since then and the discretionary nature of the exercise requiring the court to consider all the circumstances, a modern and different approach where the plaintiff is a foreign state, was discernible from the judgments in [Banco Economico S.A. v. Allied Leasing & Fin. Corp. \(3\)](#) and *Ministère de la Culture &c. de France v. Lielb* (22) ([1981] 1 WLUK 253, at paras. 16–18). This modern principle (*ibid.*, at para. 22) was—

¹⁴ See *e.g. Costa Rica (Republic) v. Erlanger* (8).

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“that where the plaintiff is the government (or a state agency) of a foreign state enjoying good standing in the international community (in particular from this court’s point of view, enjoying diplomatic relations with H.M. Government) it should be assumed as a matter of comity and common sense, in the absence of anything to the contrary, that it will honour its obligations for costs made against it. Nonetheless, as the question remains one to be decided on a case by case basis in the discretion of the court, an order for security for costs could undoubtedly be made against a foreign state in appropriate circumstances.”

184 In *Banco Economico S.A. v. Allied Leasing & Fin. Corp.* (3), the plaintiff, a Brazilian bank, itself in liquidation and under the control of a liquidator appointed by the Brazilian Government, petitioned for the winding up of the respondent. Mr. Justice Smellie (as he then was) was of the *prima facie* view that there was merit in the petition (1998 CILR at 112–113) and he concluded:

“that the proper balance is struck when account is taken of the consideration that the petitioner is now under the control of a liquidator who is appointed by the Brazilian Government. Even in the ordinary case, the fact of insolvency will not by itself dictate an order for security. When the entity is a large bank, as the petitioner is, any such presumption becomes even less appropriate as grounds for ordering security for costs: see *Dartmouth Harbour Commrs. v. Mayor of Dartmouth Hardness* ... and the notes in 1 *The Supreme Court Practice 1997*, para. 23/1–3/13, at 412.

Although Ms. Collins (who argued the aspect of the matter for the petitioner) had no instructions to give an undertaking as to costs, I have nothing at all before me to support any suggestion that the Brazilian Government would not ensure that its obligations for costs (to be incurred if its appointed officer proves unsuccessful before this court) would not be honoured. In the interest of comity, I would consider that any presumptions would arise in favour of such obligations being met and not the other way around. The rule in the *Dartmouth Harbour Commrs.* case applies, *a fortiori*, to the present circumstances.”

185 As related at para. 179 (ix) above, *Cybervest* (9) concerned a petition to wind up a fund incorporated in the Cayman Islands presented by PIFSS which faced a SFC application. In his judgment, Smellie, C.J. said (2006 CILR 80, at paras. 22–24):

“The wording of [O.23, r.1(1)] plainly reveals the wide discretion to be exercised in the making of an order.

23 The wording does not admit any judicial policy that would mandate the making of an order simply because the plaintiff is a foreign plaintiff; the requirement that the plaintiff is ordinarily resident outside the jurisdiction is simply a pre-condition to the making of an order under the particular O.23, r.1(1)(a). It is a precondition just like those stipulated in (b)–(d), the other sub-rules, which are aimed at plaintiffs who may not ordinarily reside out of the jurisdiction ...

24 ... I would simply add that discretion is to be exercised on a case-by-case basis, as the rule states, having regard to all the circumstances of the case.”

186 After noting the significant fact that PIFSS had immensely valuable assets (its shares in the fund PIFSS was seeking to have wound up) that were to be regarded as being within the jurisdiction, Smellie, C.J. went on to say (*ibid.*, at para. 27):

“Another circumstance, of some weight, is the fact that the petitioner is a state agency of a foreign government of undoubted resources and enjoying a high reputation in the global financial and commercial community. This is relevant insofar as it would tend to negate any concern that the plaintiff would be unlikely to obey an order for costs made in favour of the respondent. To my mind, it also addresses the concern raised by Mr. Farrow, that efforts to enforce an order in Kuwait, if it ever came to that, could be met with a plea of state immunity.”

187 The judge supported his statement in his judgment ([2022 \(1\) CILR 12, at para. 165](#)) that there was a rebuttable presumption that SFC should not be ordered by reason of the plaintiffs being the agent of, and wholly owned by, the State of Kuwait by footnote 28 which reads “*TMSF v. Wisteria Bay Ltd.* ... ([2006 CILR 351, at para. 23](#)).” However, it is clear that the paragraph of the judgment in *Tasarruf* (39) to which the judge intended to refer was para. 22 which reads:

“Taken together, there is a common practical principle to be discerned from these last cited three cases which is that where the plaintiff is the government (or a state agency) of a foreign state enjoying good standing in the international community (in particular from this court’s point of view, enjoying diplomatic relations with H.M. Government) *it should be assumed* as a matter of comity and common sense, *in the absence of anything to the contrary*, that it will honour its obligations for costs made against it. Nonetheless, as the question remains one to be decided on a case by case basis in the discretion of the court, an order for security for costs could undoubtedly be made

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against a foreign state in appropriate circumstances.” [Emphasis added.]

188 It was no doubt in light of the emphasized words in this passage that the judge expressed himself as he did in para. 165 of his judgment. In our view, with respect to the judge, the Chief Justice is not to be taken here as laying down a principle based on a presumption that was to prevail unless it was rebutted. We say this having regard to the words used in the following sentence in the quoted passage that stress that the court is exercising a broad discretion on a case-by-case basis. It follows, in our opinion, that the judge erred in law in proceeding as he did on the basis that there was a presumption arising from comity and common sense that security for costs should not be awarded against the plaintiffs, although each case will be decided on its own facts.

189 In our opinion, the approach of the court when dealing with an SFC application against a foreign state or foreign state agency that enjoys good standing in the international community should be that it can treat this as a factor in favour of such of a plaintiff to go into the scales but on the basis that it is just one amongst all the other factors that must be weighed by the court when exercising the discretion conferred upon it.

190 We also accept Ms. Stanley’s submission that the judge erred in stating that a foreign plaintiff does not have the burden of establishing that it has fixed and permanent property within the jurisdiction. The judge supported this statement by citing Lightman, J.’s *dictum* in *Leyvand v. Barasch* (20) that the court will not infer a real risk that assets within the jurisdiction will be dissipated or moved abroad in the absence of a question over the plaintiff’s probity. Whilst the judge clearly intended this statement to apply to a situation where the evidence showed that a foreign plaintiff had property within the jurisdiction but there was nothing or very little about the property’s permanency or freedom from encumbrances, we find it to have been too broadly expressed. Evidence that a foreign plaintiff has valuable property within the jurisdiction will obviously be of relevance but the significance of this evidence will depend on all the facts of the case, including any evidence as to the permanency of the property and its freedom from encumbrances (or the lack of such evidence) and other evidence tending to show that the plaintiff can be trusted to honour an adverse costs order. We also respectfully disagree with Lightman, J.’s *dictum* in *Leyland v. Barasch*. In our view, the approach adopted by Butcher, J. in *PJSC Tatneft v. Bogolyubov* (25) ([2019] Costs L.R. 977, at para. 49) and Henshaw, J. in *Pisante v. Logothetis* (27) ([2020] EWHC 3332 (Comm), at para. 65): “the question is not whether a lack of probity has been shown, but whether there is a real risk that the assets in a Contracting State may no longer be available if and when an asset enforcement arises,” is to be preferred.

191 We turn to Ms. Stanley’s submission challenging the finding by the judge ([2022 \(1\) CILR 12, at para. 178](#)) that, if the plaintiffs’ claims against the defendants all fail, there will be a costs order in respect of which KPA and PIFSS will be jointly and severally liable, the latter having substantial assets within the jurisdiction. Ms. Stanley’s submission is based on the contention now pleaded in para. 12 of D1’s defence that KPA’s claim is a nullity because it was not authorized by the Chairman of KPA, who, as a matter of Kuwaiti law (having regard to KPA’s constitution) is the only officer of KPA who can authorize the bringing of claims by the company and who has no authority to delegate this power or to ratify an earlier unauthorized issue of proceedings.

192 D1’s defence and counterclaim to KPA’s claim was served and filed on January 31st, 2022, over three months after the hearing below. In her skeleton argument for this appeal, Ms. Stanley submits that:

“As recorded in the evidence [the fourth affidavit of Mr. Lewis] and then set out in the GP’s Defence at [12], there is a major factual dispute in this case as between KPA and the Appellants as to whether these proceedings have been commenced and continued on behalf of KPA with its authority (there being no power under Kuwaiti law to ratify proceedings if brought without authority.)”

193 Attention was first drawn to the significance of the plaintiffs being joint and several debtors under an adverse costs order in para. 20 of Mr. Florent’s third affidavit, dated August 27th, 2021, where he deposed that he had alerted PIFSS to the possibility that, owing to the joint and several nature of costs orders in the Cayman Islands, it was possible that PIFSS would be required to satisfy any costs order that may be made in these proceedings in full from its own resources.

194 In paras. 42–47 of his fourth affidavit, dated September 17th, 2021, Mr. Lewis deposed that the FFP directors had been sent an opinion of Mr. Omar Al Qahtani of the Turkey office of Al Tamimi & Co. (“the Al Tamimi opinion”) stating that only the Chairman of KPA had authority to approve the issuance of proceedings by KPA and this authority was not capable of being delegated; nor could an unauthorized issuance of proceedings be ratified by the KPA’s Chairman. Reference was also made to the suspension of Mr. Al Sabah on August 24th, 2021 from his position as Director General KPA.

195 Curious as to how this lack of authority contention was deployed below, the court has perused the skeleton arguments relied on before the judge and the transcript of the oral submissions advanced below by Ms. Stanley for D1, Mr. Chapman for D2–D3 and Mr. Allison for the plaintiffs.

196 In para. 245 of his skeleton argument for the hearing below, Mr. Allison contended that PIFSS had sufficient assets within the jurisdiction

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to cover any costs order that might be made against the plaintiffs in respect of which they would be jointly and severally liable.

197 Mr. Chapman did not contend in either his skeleton argument or his oral opening submissions that one of the consequences of the Tamimi opinion was that it was not inevitable that if the plaintiffs' claims were dismissed they would both be jointly and severally liable for the costs of the proceedings.

198 Ms. Stanley also did not contend in her skeleton argument or in her opening or closing submissions that, in light of the Tamimi opinion, KPA's claim was a nullity so that it could not be said that it was inevitable that if KPA's and PIFSS's respective claims were dismissed, the plaintiffs would be jointly and severally liable for the costs of the proceedings. Instead, she contended that the effect of the Tamimi opinion was that it undermined the plaintiffs' contention that an adverse costs order would be enforceable in Kuwait and undermined KPA's reliance on assurances given by KPA's Director General, Mr. Al Sabah, both before and after he was suspended from that office, that KPA would honour any costs order made against it.

199 In his oral submissions in reply, Mr. Allison observed that the defendants had not taken the point that it was only one of the plaintiffs, PIFSS, that had assets within the jurisdiction and contended that, even if it had been taken, as Mr. Florent explained in para. 30 of his third affidavit, PIFSS was well aware of the joint and several nature of costs orders so that it may have to pay the whole sum from its own resources. Mr. Allison also submitted that the "lack of authority issue" was not a live issue in the proceedings before the court because there had been no application to strike out KPA's claim on that basis or to seek the determination of a preliminary issue.

200 In the course of his reply submissions made ahead of Ms. Stanley's reply submissions, Mr. Chapman accepted that, if the plaintiffs' claims were dismissed, the likely costs order would be a joint and several one, subject to the possibility that PIFSS might well argue that joint and several liability should not apply if KPA's claim was found to have been brought without authority.

201 Whilst Ms. Stanley had expressly adopted Mr. Chapman's opening oral submissions when she made her own opening oral submissions, she did not adopt the same course when she delivered her oral closing submissions, in the course of which she said she was going to deal just with the Al Tamimi/authority/suspension point and the point she wished to make was not the lack of authority to commence KPA's proceedings but the suspension of Mr. Al Sabah as Director General of KPA and the resulting loss of his authority to provide information to Mr. Florent upon which Mr. Florent had purported to rely in advancing KPA's case.

202 In our judgment, since the point now taken by D1¹⁵ as to the impact of the lack of authority contention on what the judge said (2022 (1) CILR 12, at para. 178) was not taken on behalf of D1 below, when it plainly could have been, it is not open to D1 to take the point in this appeal in support of D1's case that the judge's decision refusing the defendants' SFC applications should be set aside.

203 In our judgment, the errors of the judge identified in paras. 188 and 190 above played such a significant role in the exercise of his discretion (see *e.g.* paras. 155, 165, 166 and 176) that his decision must be set aside.

204 In these circumstances, it is open to us to exercise the discretion conferred by GCR O.23, r.1(1) and since we have before us all the evidence and the parties' skeleton arguments that were before the judge and the transcript of the oral submissions the judge heard on the SFC issue, we propose to decide whether SFC should or should not be ordered against each of the plaintiffs.

205 We proceed on the assumption that the defendants are correct in their submission that there would be very real difficulties indeed in enforcing in Kuwait costs orders made against the plaintiffs if their claims against the defendants are dismissed.

206 Although it is a necessary condition for the ordering of SFC that there is a real risk that an adverse costs order would not be enforced against the postulated foreign plaintiff in his/its home jurisdiction, this is not a sufficient condition for ordering SFC whatever the other circumstances of the case. Instead, it is open to the court, if there is sufficient evidence to support such a conclusion, to find that there is no real risk that the plaintiff will not honour an adverse costs order and for this reason to decline to order SFC. In our judgment, this is such a case having regard to the following matters.

207 As is common ground, the plaintiffs are agencies of a foreign state, Kuwait, which is of good standing in the international community and enjoys diplomatic relations with HM Government. Further, as related above, an instrumentality of the State of Kuwait, the DLAL, acting by the Head of its International Arbitration and Litigation Sector, sent a formal letter to the judge on behalf not only of KPA and PIFSS but also the State of Kuwait that reads in relevant part:

“Dear Sirs.

Cause No. FSD 236 of 2020 (RPJ)—(1) Kuwait Ports Authority and (2) The Public institution for Social Security v (1) Port Link GP Ltd.,

¹⁵ See para. 180(iv) above.

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(2) Mark Eric Williams, (3) Wellspring Capital Group, Inc and (4) KGL Investment Company Asia (the 'Proceedings')

I am the Head of the International Arbitration and Litigation Sector for the Department of Legal Advice and Legislation (the 'Department') of the State of Kuwait.

One of the responsibilities of the Department is to act as legal adviser to the State of Kuwait as well as to certain State entities and/or incarnations of the State. In particular, the Department currently advises and represents each of the Kuwait Ports Authority ('KPA') and The Public Institution for Social Security ('PIFSS') in connection with the Proceedings.

I hereby confirm, on behalf of the Department, that KPA and PIFSS are wholly owned by the State of Kuwait and bring to your attention the attached letters, duly signed by authorised representatives of KPA and PIFSS confirming that they will comply with any final and binding costs orders made against them in the Proceedings ('Costs Orders').

We respectfully request, on behalf of KPA and PIFSS [and the State of Kuwait]^[16] that the Grand Court take these letters into consideration in determining whether or not KPA and/or PIFSS should be required to provide security for costs in the Proceedings."

208 The letters (also addressed to the judge) that were sent with the DLAL letter on behalf of PIFSS and KPA were in common form. In relevant part, they read:

"Dear Sirs

We refer to the abovementioned Proceedings before the Grand Court of the Cayman Islands, in which Kuwait Ports Authority ('KPA') [PIFSS] is a Plaintiff.

Without prejudice to the exercise of KPA's [PIFSS's] legal rights, including without limitation its right to appeal, or to seek leave to appeal, any decision of the Grand Court, we confirm that KPA will comply with any final and binding costs order(s) made against KPA in the course of the Proceedings ('Costs Orders').

Yours faithfully"

209 The KPA letter is signed by Mr. Al Sabah in his capacity as KPA's Director General. The letter is dated May 27th, 2021, which was at least

16 The brackets do not signify that the words they contain were not part of the original letter: they were.

two months before Mr. Al Sabah was suspended from this office on August 24th, 2021.

210 Ms. Stanley criticizes the judge for placing the reliance he did on these letters. Focusing on the words, “Without prejudice to the exercise of KPA’s [PIFSS’s] legal rights, including without limitation to its right to appeal, or to seek leave to appeal, any decision of the Grand Court,” she submits that the letters were merely “comfort letters” and further contends that the judge should have found there remained a significant risk that an adverse costs order would not be paid because the confirmation expressed in the letters could only be enforced by committal or sequestration proceedings in the jurisdiction and such an order would not be enforceable in any other court; nor was it clear that the comfort letters would be enforced by the courts of Kuwait.

211 We do not accept these criticisms. In our judgment, the three letters amount to a representation intended to be relied on by the Grand Court that the plaintiffs would honour any final and binding costs order made against them and we regard the letters as providing strong support for the conclusion that there is no real risk that such costs orders would not be paid. We say this because we have no doubt that the State of Kuwait and its agencies, KPA and PIFSS, would suffer very significant reputational damage if the plaintiffs were to depart from the confirmations given in the letters. Also, further support for this “no real risk” conclusion comes from the evidence as to the financial resources of the plaintiffs that shows that each could be expected to have the ready funds to honour an adverse costs award.

212 As related by the judge, the unchallenged evidence is that PIFSS, which administers independently Kuwait’s pension fund for all Kuwaiti citizens in the workforce, had a global investment asset portfolio worth approximately US\$133.7bn. as at March 31st, 2021 and earned a profit for the period March 2020 to December 2020 of US\$18.9bn. Included in these assets is its investment in the Jermyn Street Fund, a Cayman Islands ELP, which was valued at €35,074,942 as at March 31st, 2021. It is true that PIFSS is likely to be entitled to redeem this investment under the partnership agreement and to do so without publicity but there are no reasons to think that PIFSS would set about redeeming its investment and transferring the proceeds out of the jurisdiction to avoid having to satisfy a costs order: accordingly its existence provides reassurance that PIFSS is going to have amply sufficient resources over at least the next five to six years to meet an adverse costs order should its claims against the defendants be dismissed.

213 When setting out KPA’s financial details that are recorded in para. 179(xv) above when relating his reasons why the SFC applications should be dismissed, the judge was relying on the evidence given in Mr. Florent’s

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third affidavit which was based in part on information that had come from Mr. Al Sabah. Ms. Stanley submits that this evidence was and is inadmissible because it is hearsay and Mr. Florent's third affidavit was sworn on August 27th, 2021 after Mr. Al Sabah was suspended on August 24th, 2021. We are not impressed by this submission. Even assuming that the information from Mr. Al Sabah was provided to Mr. Florent after Mr. Al Sabah had been suspended (which we think unlikely), Mr. Al Sabah would have been in a position to provide reliable figures showing that KPA's profit for the financial year 2020–2021 was KWD56,450,000, the equivalent to c.US\$187,522,553 (based on a foreign exchange currency conversion of KWD1: US\$3.32 as at August 9th, 2021). Further, Mr. Florent exhibits a public announcement made by KPA on April 4th, 2021 that KPA's profit for the financial year 2020–2021 was KWD56,450,000.

214 Apart from its interest in the assets held on trust for it and TPF by the GP, KPA has no assets within the jurisdiction but it is clear to us from the level of profit earned by KPA for the year 2020–2021 that it is extremely likely to have ample resources to honour an adverse costs order over the next five to six years.

215 It was argued below by the defendants that the plaintiffs could not be trusted to honour an adverse costs order on two particular grounds: the attempts by the Attorney General of Kuwait to obtain the moneys that had been paid into the account held at the Noor Bank that were part of the proceeds from the sale of Clark City, TPF's asset in the Philippines; and the manner in which the defendants had conducted the proceedings, including the bringing of proceedings against Walkers, the defendants' previous attorneys, the bringing of derivative claims for proceeds that would be paid to the plaintiffs and the plaintiffs' alleged refusal to compromise the SFC issue. These contentions are not advanced by Ms. Stanley. Had they been, they would have found no favour with the court.

216 For the reasons given in paras. 205–215 above, we find that there is no real risk that the plaintiffs will not honour their confirmations that they will pay any final and binding costs order made against them and accordingly we order that the plaintiffs should not be ordered to provide security for costs.

217 It follows that D1's appeal against the judge's refusal to order SFC must be and is dismissed.

Summary of conclusions

218 We would summarize our conclusions as follows:

(i) D1's appeal against the refusal of the judge to strike out the plaintiffs' direct claims against D1 is dismissed.

(ii) D1's appeal against the refusal of the judge to strike out the plaintiffs' derivative claims against D1 is allowed and the claims are struck out.

(iii) The appeals of D2, D3 and D4 against the refusal of the judge to strike out the plaintiffs' derivative claims against them are dismissed.

(iv) The appeal of D1 against the refusal of the judge to order the plaintiffs to provide security for costs is dismissed.

219 Our preliminary view as to costs is:

(i) There should be no order as to costs in respect of D1's strike out appeal. Although D1 succeeded in having the derivative claim against it struck out, it did not succeed on its argument that the plaintiffs' claims were misconceived because they were not in the form of an application for partnership accounts.

(ii) D2, D3 and D4 should pay the costs of their strike out appeals.

(iii) D1 should pay the costs of its SFC appeal.

(iv) The parties are at liberty to contend for different costs orders than those set out in (i)–(iii) but they must serve (concise) written submissions in support thereof within 10 days of the issuance of this judgment.

220 **BIRT, J.A.:** I agree.

221 **BEATSON, J.A.:** I also agree.

Judgment accordingly.

Attorneys: *Kobre & Kim* for the first appellant; *Campbells LLP* for the second to fourth appellants; *Ogier* for the respondents.
