IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 236 OF 2020 (RPJ)

BETWEEN:

(1) KUWAIT PORTS AUTHORITY
(on its own behalf and on behalf of The Port Fund L.P.)

(2) THE PUBLIC INSTITUTION OF SOCIAL SECURITY
(on its own behalf and on behalf of The Port Fund L.P.)

(3) THE PORT FUND L.P.

Plaintiffs/Applicants

AND

PORT LINK GP LTD

(in voluntary liquidation)

First Defendant

(2) MARK ERIC WILLIAMS

Second Defendant

(3) WELLSPRING CAPITAL GROUP, INC

Third Defendant

(4) KGL INVESTMENT COMPANY ASIA

Fourth Defendant

Appearances:

Mr David Allison KC instructed by Ms Rachael Reynolds and Mr Harry Clark of Ogier (Cayman) LLP for the Plaintiffs

Mr Graham Chapman KC instructed by Mr Andrew Pullinger and Mr Harry Shaw of Campbells LLP for the Second, Third and Fourth Defendants

Before: The Hon. Raj Parker

Heard: 24 April 2023

Date of decision: 25 May 2023

Draft Judgment circulated: 16 May 2023

Judgment delivered: 25 May 2023

HEADNOTE

Application for joinder and receivership-GCR Order 15 r6-section 11 Grand Court Act (2015 Revision)-section 37 English Senior Courts Act 1981-sections 14 and 33 of Exempted Limited Partnership Act (2021 Revision)-principles for receivership order-discretion-alternative remedies.

PARKER J, giving the judgment of the Court:

Introduction

1. Kuwait Ports Authority ("KPA") and the Public Institution for Social Security ("PIFSS", together the "Plaintiffs" or "Applicants") apply for the Plaintiffs to be joined as defendants to the crossclaim advanced by D2-4 in their Defence, Counterclaim, and Crossclaim (the "Crossclaim") against Port Link GP Ltd (the "General Partner") (the "Joinder Application") pursuant to O.15, r6(2)(b)(i) and/or (ii) and for the appointment of joint receivers (the "Receivers") in respect of the General Partner and The Port Fund L.P. ("TPF") pursuant to section 11 of the Grand Court Act (2015 Revision) (the "Receiver Application").

2. The General Partner is the general partner of TPF and the Applicants are limited partners in TPF (together with the other limited partners in TPF, the "Limited Partners") representing approximately 65% in value of the total investment into TPF. The Receiver Application is also supported by other Limited Partners, namely the Gulf Investment Corporation ("GIC") and the General Retirement and Social Insurance Authority, Qatar ("GRSIA") holding a further approximately 15% of the total investment in TPF. Approximately 93% of Limited Partners who are not connected to D2-4 (as defined below) support the Receiver Application[1].

[1] Second Affidavit of Marc-Edouard Florent dated 26 August 2021 ("Florent 2") at [32] and Third Affidavit of Charles McKenzie dated 18 April 2023Thomson 3") at [13].

3. The litigation was commenced by the Plaintiffs against the General Partner, Mark Williams ("Mr Williams" or "D2"), Wellspring Capital Group, Inc ("Wellspring" or "D3"), KGL Investment Company Asia ("D4") (collectively the "Defendants" and without the General Partner, "D2-4") and now certain other proposed defendants ("D5-9") (the "Proceedings"). In the Proceedings, the Plaintiffs are seeking to recover sums said to belong to TPF and/or the Limited Partners in excess of USD 100 million which they say have been allegedly misappropriated by the Defendants.

4. The General Partner has advanced a Counterclaim against the Plaintiffs ("D1's Counterclaim"), D2-4 have also advanced a Counterclaim against the Plaintiffs ("D2-4's Counterclaim"), and as stated above D2-4 have also advanced a Crossclaim against the General Partner (in its capacity as general partner of TPF).

Plaintiffs case

In summary

5. Mr David Allison KC appeared for the Plaintiffs. In summary, his submissions were as follows.

6. The Plaintiffs say that if successful, the Crossclaim will significantly reduce and possibly completely extinguish the Plaintiffs' claims against D2-4. Accordingly, the Plaintiffs (as opposed to the General Partner which currently has no assets) have the primary economic interest in the Crossclaim and should be allowed to defend it.

7. A governance void at the General Partner has existed since 15 February 2023 when its directors resigned. The defence of the Crossclaim is therefore in jeopardy. The General Partner is wholly owned by Port Link Holdings USA Inc. ("Port Link Holdings"), which is controlled by Mr Williams as sole shareholder and director. The Plaintiffs say in the absence of directors, any decisions made by the General Partner have to be made by its shareholder. As such, Mr Williams is in de facto control of the General Partner, and accordingly is in control of both the prosecution and defence of the Crossclaim. That is plainly unsatisfactory.

8. The Plaintiffs wish to ensure that (i) D2-4 could not apply for judgment in default of the General Partner's defence to the Crossclaim or otherwise procure that the General Partner admit the Crossclaim and (ii) the General Partner was not struck off the register for failing to comply with its administrative requirements.

The GP claims

9. Mr Allison KC explained the claims in these proceeding to which the General Partner is a party as follows.

(a) The Plaintiffs have advanced claims against the General Partner, which fall broadly into three categories:

(i) Claims for breach of duty and/or trust, the vast majority of which are also pursued against D2-4 and now D5-9;

(ii) Claims that the General Partner entered into an unlawful means conspiracy with certain of D2-4; and

(iii) Claims for an account (on the basis of wilful default or for a common account) in respect of information which the General Partner should have, but has not, provided to the Plaintiffs.

(b) The General Partner's Counterclaim against the Plaintiffs has two parts:

(i) A counterclaim for an alleged overpayment to KPA of USD 13,230,876: see paragraphs 180 to 187 of D1's Counterclaim (the "Overpayment Counterclaim"); and

(ii) A counterclaim alleging that the Plaintiffs are engaged in an unlawful means conspiracy to injure TPF, including by seeking to expropriate the sale proceeds of the Clark Asset and acting in breach of their statutory and/or contractual obligations to the General Partner and/or TPF (the "Conspiracy Counterclaim"). D2-4 have also alleged a counterclaim against the Plaintiffs based on an identical factual matrix[2].

The Crossclaim

10. Mr Allison KC explained the Crossclaim as follows.

[2] First Affidavit of Charles McKenzie Thomson dated 28 March 2023 ("Thomson 1") at [54].

11. D2-4 have also advanced the Crossclaim against the General Partner which has two parts, which are set out in paragraphs 181 to 207 of D2-4's Defence, and can be summarised as follows:

(a) A claim that the General Partner was in breach of the Investment Management Agreement (the "IMA") in failing to pay certain fees to the Investment Manager ("EMPEML") in relation to the investment in the Clark Asset and the investment in Negros Navigation (paragraphs 181 to 184 of D2-4's Defence), seeking a total of USD 28,821,496. These claims are based on the alleged assignment of EMPEML's assets to Wellspring (set out in paragraphs 185 to 190 of D2-4's Defence (the "IMA Crossclaim");

(b) Claims for indemnifications under clauses 11.1 and 11.2 of the IMA (with respect to Wellspring and Mr Williams), clause 5.4 of the Limited Partnership Agreement (the "LPA") (with respect to Mr Williams) and clause 7 of the Administrative Services Agreement (the "ASA") (as defined in paragraph 6.4 of D2-4's Defence (with respect to D4).

12. The Plaintiffs say, without making any admission as to whether or not D2-4 fall within the indemnities in the IMA, the LPA, and/or the ASA, that each of the indemnity provisions have carve-outs with respect to negligence, wilful default, fraud, and dishonesty (the "Indemnity Crossclaim").

13. In the Crossclaim, D2-4 allege that, if they are found to be liable to the Plaintiffs either directly or derivatively via TPF, they are entitled to set-off that liability against their Crossclaim (paragraph 178 of D2-4's Defence).

14. The Plaintiffs say that if D2-4, succeed in the Crossclaim, D2-4 would say that the claims for indemnification under the IMA and the LPA rank in priority to any distribution to the Limited Partners. Accordingly, the effect of the claims for indemnification would be, if successful, to significantly reduce and possibly extinguish in their entirety all financial claims against D2-4.

CICA

15. On 20 January 2023, the Cayman Court of Appeal (the "CICA") handed down judgment (the "CICA Judgment") refusing to strike out the majority of the Plaintiffs' claims against the Defendants.

16. As summarised in paragraph 218 of the CICA Judgment:

(a) the General Partner's appeal against the refusal to strike out the Plaintiffs' direct claims against the General Partner was dismissed;

(b) the General Partner's appeal against the refusal to strike out the Plaintiffs' derivative claims against the General Partner was allowed and those claims were struck out. As to the effect of this, the Plaintiffs say that since all of the derivative claims were also brought as direct claims, this does not alter the substance of the relief sought;

(c) D2-4's appeals against the refusal to strike out the Plaintiffs' derivative claims against them were dismissed; and

(d) the General Partner's appeal against the refusal to order that the Plaintiffs provide security for costs was dismissed.

17. On 6 April 2023, the CICA refused D2-4's application for permission to appeal that decision to the Privy Council, in a reasoned judgment.

18. On 11 April 2023, the CICA also directed that in light of the General Partner being without legal representation or directors, its application for a variation of the first instance costs order is adjourned generally with liberty to apply.

Recent events

19. Mr Allison KC summarised relevant recent events as follows.

20. On 9 February 2023, Kobre & Kim (Cayman) LLP came off the record as attorneys for the General Partner in the Proceedings. This is apparently because the General Partner was unable to pay their professional fees[3]. The FFP Directors then resigned on 15 February 2023.

21. As explained above, the Plaintiffs are concerned that the General Partner is unable to prosecute or defend the claims to which it is a party in the Proceedings whether on its own behalf, or more importantly, in its capacity as the General Partner of TPF and therefore as statutory trustee of TPF's assets (or any other pending proceedings).

[3] Eighth Affidavit of Mark Williams sworn 11 April 2023 ("Williams 8") at [14].

22. The Plaintiffs are also concerned that the General Partner is incapable of acting independently of Mr Williams.

Joinder submissions

23. Mr Allison KC submitted that the Plaintiffs ought to be given permission to be joined to the Crossclaim where:

(a) D2-4 seek to set off the amounts claimed in the Crossclaim against the Plaintiffs' claims (see paragraph 178 of D2-4's Defence);

(b) If the Crossclaim is successful, any recoveries against the General Partner would be a loss to TPF and its constituent Limited Partners (of which the Plaintiffs hold the majority interest);

(c) The Plaintiffs already plead to the factual basis of the Crossclaim (see paragraph 112 of the Re-Amended Writ of Summons and Statement of Claim);

(d) Mr Williams controls both D2-4 and the General Partner and it would be an abuse of process for the plaintiff and defendant to the Crossclaim to be represented by the same individual; and

(e) It is therefore in the interests of justice for the Plaintiffs to be joined to intervene in an action where the General Partner is unable and/or unwilling to defend (whether by reason of having no directors or of its position of conflict).

24. The Plaintiffs seek to be joined as defendants to the Crossclaim in their capacity as the Plaintiffs in the Proceedings of which the Crossclaim forms part, because the outcome of the Crossclaim could have a material impact on the recoveries available to the Plaintiffs in the Proceedings. The Plaintiffs are not seeking to be joined in their capacity as Limited Partners, nor in order to represent the General Partner, but in their individual capacities as the Plaintiffs in the Proceedings.

Interrelationship between Receivership and Crossclaim

25. Mr Allison KC submitted that the joinder relief is sought so that the Plaintiffs who have the primary economic interest in the Crossclaim should be allowed to defend it. It is ancillary to the Receiver Application. He submitted that this is important as neither a receiver nor a liquidator would be in

as good a position to defend the Crossclaim and would have to be funded by either the Plaintiffs or D2-4 in any event.

26. He submitted that in addition to the joinder relief, Receivers should be appointed who can "hold the ring", with broad powers to preserve the General Partner and manage the litigation on behalf of the General Partner as they see fit.

27. Mr Allison KC submitted that the General Partner is currently 'rudderless' and at risk of being struck from the register. Mr Williams, the alleged co-conspirator shareholder, is in sole control of the General Partner. Mr Williams is also the key plaintiff under the Crossclaim and would have the ability to delay and complicate the proceedings and/or otherwise manage matters to his advantage, which according to the Plaintiffs is plainly an unacceptable position.

28. There is a need for an office holder who is independent of, and unaffected by, the outcome of the Plaintiffs' Joinder Application.

29. Irrespective of the Crossclaim and who is entitled to defend it, the General Partner is currently in a constitutional vacuum, such that no decisions can be made save by the resolution of its sole shareholder, Port Link Holdings, which is 100% controlled by Mr Williams.

30. If the Plaintiffs are not joined as defendants to the Crossclaim, Mr Williams would be permitted to be both one of the parties advancing the Crossclaim (D2) (and the individual responsible for the actions of D3 and D4) and to control the party defending the Crossclaim (the General Partner).

31. This would be a highly unjust outcome for the Plaintiffs, particularly in circumstances where it is alleged that Mr Williams had exploited his positions as principal/decision-maker for both parties to the DIFC Proceedings to procure and predetermine the outcome of those proceedings for his own benefit and for the benefit of those connected to him, to the detriment of TPF and the Limited Partners[4] .

32. Even if, said Mr Allison KC, the Plaintiffs are joined as defendants to the Crossclaim, it would still be inappropriate for Mr Williams to be left in sole control of the defendants to his own Crossclaim.

[4] Thomson 1 at [39].

D2-4's case

In summary

33. Graham Chapman KC appeared for the Defendants who resisted both applications as set out in the Eighth Affidavit of Mark Williams sworn 11 April 2023 ("Williams 8").

34. In summary Mr Chapman KC submitted as follows.

ELP and alternative remedies

35. The Plaintiffs' application to be joined as defendants to the Crossclaim filed by D2-4 against the General Partner is bound to fail as such joinder is expressly prohibited by statute, specifically section 33(1) of the Exempted Limited Partnerships Act (2021 Revision) (the "ELP Act").

36. In addition, equitable receivers and managers, which the Plaintiffs seek to vest with broad but uncertain powers, are inappropriate, particularly in light of the applicable statutory regime, ELP documents and structure, and the availability of alternative remedies.

37. Even ignoring the statute-bar imposed by the ELP Act, there is no proper basis for the Plaintiffs to be joined as defendants to the Crossclaim.

Procedural defects

38. There were also procedural irregularities. The Plaintiffs have failed to serve the Joinder and Receiver Applications on the necessary parties, or even to give all such parties proper notice of either Application, and have adopted the procedurally irregular approach of making the Receiver Application by way of an interlocutory summons in these proceedings rather than by way of originating process as they ought to have done. The Receiver Application is therefore procedurally defective and falls to be dismissed on that basis alone.

The context

39. The Plaintiffs are seeking impermissibly to involve themselves in the affairs of the General Partner and TPF, and to exert undue control over the General Partner in circumstances where there are, by the Plaintiffs' admission, alternative remedies available.

40. In particular, he submitted that it is open to the Plaintiffs to:

(a) appoint liquidators over the General Partner (or agree with D2-4 to the appointment of mutually acceptable liquidators); and/or

(b) exercise their majority interest as Limited Partners in TPF to appoint an appropriate person to liquidate the property of TPF in accordance with clause 9.2(a) of the LPA.

41. Independent liquidators, rather than equitable receivers and managers, are the conventional and appropriate office holders to address the "constitutional vacuum" following the resignation of the former independent directors of the General Partner.

42. In circumstances where independent liquidators and/or a liquidating trustee designated pursuant to the LPA can be appointed, there is simply no need to resort to the extraordinary equitable remedy of appointing receivers and managers vested with broad and unclear powers that are ripe for further dispute (and the inevitable attendant delay, expense, and satellite litigation that doing so would produce).

43. Furthermore, the General Partner is unable to pay its debts as they fall due, and appears to be insolvent on a cash flow basis.

44. The General Partner does however have several valuable assets, including:

(a) Its approximately USD 13.2 million claim against KPA for overpaid distributions (which KPA has refused to return to TPF).

(b) A contingent claim against Noor Bank for approximately USD 9 million in interest arising from the freezing of TPF's bank account in Dubai. The judgment of the UAE Court of Cassation in this regard is reserved and may be delivered within a matter of weeks.[5]

(c) A claim related to a convertible loan agreement with KGL International for Ports, Warehousing and Transport K.C.S.C. dated 22 August 2007 which is the subject of ongoing civil proceedings in Kuwait[6].

[5] Williams 8 at [15].
[6] D2-4's Statement of Defence, Counterclaim, and Crossclaim at [37.2].

45. As is detailed in Williams 8 at [16]-[17], D2-4 offered various undertakings to the Plaintiffs not to seek default judgment or take steps to have the General Partner admit the Crossclaim until the Joinder and Receiver Applications are determined[7]. Further, Mr Williams has offered to procure the appointment of a new registered office for the General Partner and to pay the annual fees to remove the risk of the General Partner being struck off for these reasons.[8] Accordingly, the Plaintiffs' purported concerns in this regard have never been well-founded or have been satisfactorily addressed.

46. Moreover, D2-4's proposal to appoint independent liquidators would address each of the Plaintiffs' purported concerns.

47. However, Mr Chapman KC submitted, that this solution would not provide the Plaintiffs with what they truly seek, namely to exert undue control over and intermeddle in the affairs of the General Partner and TPF. He said this has been a constant theme since the freezing of the Noor Account in 2017 when the Plaintiffs sought repeatedly and egregiously for nearly a year to expropriate USD 496 million of TPF's cash for themselves.

Joinder

The law

48. GCR O.15, rule 6 provides as follows:

> "*…(2) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application…*
>
> *(b) order any of the following persons to be added as a party, namely —*
>
> *(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or*

[7] A dispute about whether the undertaking agreed extended beyond the hearing of this application arose after the hearing.
[8] Ninth Affidavit of Mark Eric Williams dated 21 April 2023 ("Williams 9") at [13]-[14].

> *(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between the person and that party as well as between the parties to the cause or matter.*
>
> *(3) An application by any person for an order under paragraph (2) adding the person as a party must, except with the leave of the Court, be supported by an affidavit showing the person's interest in the matters in dispute in the cause or matter or, as the case may be, the question or issue to be determined as between the person and any party to the cause or matter.*"

49. The jurisdiction of the Court is wide and discretionary.

50. The words "*cause or matter*" under sub-rule 2 mean the action as it stands between the existing parties,[9] and the words "*may exist a question or issue*" relates to any existing question or issue between the existing parties.[10]

51. As for the role of the Court, the Court adopts the following test:

> "*The terms of R.S.C. Order 15, rule 6(2)(b)(ii) impose upon the court the responsibility for determining two questions. First, whether on the facts there may exist a question or issue arising out of, or relating to, or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties in the matter. That, for the reasons stated by Bridge L.J., requires the court to examine the facts and to decide whether, if the facts alleged are proved, there then is a question or issue of the kind described.*"[11]

52. The Courts have taken a broad and flexible approach to joinder where it would serve the interests of justice.

53. In *Carter v Dawson [1997 CILR 487*] at page 492, Orr Ag J held that an insurer who would be liable to pay any damages that were found due on an assessment of damages should be joined as a

[9] *Amon v Raphael Tuck & Sons Ltd [1956] 1 QB 357* at page 369; *OBM Limited v Christian Bay Beach Club Limited [2000] Bda LR 57*.
[10] *Spelling Goldberg Productions Inc. v BPC Publishing Ltd [1981] RPC 280 CA* ("*Spelling Goldberg*")
[11] *Spelling Goldberg* at page 282.

defendant under O.15, r 6, citing with approval the following statement of Lord Denning M.R. in the English Court of Appeal decision of *Gurtner v Circuit [1968] 1 All E.R. 328* at page 332:

> "*It seems to me that, when two parties are in dispute in an action at law and the determination of that dispute will directly affect a third person in his legal rights or in his pocket, in that he will be bound to foot the bill, then the court in its discretion may allow him to be added as a party on such terms as it thinks fit. By so doing, the court achieves the object of the rule. It enables all matters in dispute 'to be effectually and completely determined and adjudicated upon' between all those directly concerned in the outcome. …[T]he Motor Insurers' Bureau are vitally concerned in the outcome of the action. They are directly affected, not only in their legal rights, but also in their pocket. They ought to be allowed to come in as defendants. It would be most unjust if they were bound to stand idly by watching the plaintiff get judgment against the defendant without saying a word when they are the people who have to foot the bill*."

54. In *Re Bitmain Technologies Holdings Company; Great Simplicity Investment Corporation v Bitmain Technologies Holding Comp*any *2020 (2) CILR 888* at [34] Segal J held that, under O.15, r.6(2)(b),

> "*…(c) The third party must have an interest which is directly related to or connected with the subject matter of the action. The interest must be a legal and not just a commercial interest (see In re I.G. Farbenindustrie A.G. Agreement) ([1944] Ch. at 43–44, per Lord Greene, M.R.))*."

55. The above principles were affirmed in the recent judgment of Kawaley J in *Re Global Cord Blood Corporation (unreported, 31 March 2023, Kawaley J)* at [23]:

> "*(a) the parties seeking to intervene in ordinary civil litigation clearly did have directly cognizable interests in the litigation…;*
>
> *(b) joinder in proceedings which started as matrimonial proceedings was necessary (in the absence of express joinder rules) to enable the Court to determine a single broad dispute in one proceeding rather than in a multiplicity of proceedings…;*
>
> *(c) a flexible joinder power similar to that in ordinary civil litigation existed and could appropriately be exercised: e.g. Caldero Trading Limited v Beppler & Jacobson Limited et al [2012] EWHC 1609 (Ch) where the joinder power was deployed in favour of parties*

who "have every interest in resisting the finding which is being sought, which will affect them… it is plainly important that they be bound by the result".

Receivership

The law

56. Section 11 of the Grand Court Act (2015 Revision) provides that:

> "*(1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by —*
>
> *(a) Her Majesty's High Court of Justice; and*
>
> *(b) the Divisional Courts of that Court,*
>
> *as constituted by the Senior Courts Act, 1981, and any Act of the Parliament of the United Kingdom amending or replacing that Act.*
>
> *(2) Without prejudice to subsection (1), the Court shall have and shall be deemed always to have power to make binding declarations of rights in any matter whether any consequential relief is or could be claimed or not.*"

57. Section 37 of the English Senior Courts Act 1981 provides that:

> "*(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.*
>
> *(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.*"

58. Equitable receivers may be appointed in a range of circumstances and for a variety of purposes. For example, receivers may be appointed over specific property by means of enforcement of a

security interest, over the assets of a judgment debtor by way of equitable execution of an existing judgment debt, or over a company or its assets under the Court's jurisdiction to grant interim relief.

59. The cases establish that the Court has power to appoint a receiver whenever it is just and convenient to do so, and that the power to appoint a receiver is exercisable even when the claimant does not claim any proprietary interest in the relevant assets, or any legal or equitable entitlement to have them dealt with in a particular way: see *Gee on Commercial Injunctions* at [16-004].

60. Incapacity is another reason. Per *Lightman & Moss on Receivers of Companies*[12] at [29-007]:

> "*The court may also appoint a receiver or receiver and manager of the company itself in cases where the company is incapable of managing its own affairs by reason of the absence of a properly constituted board or deadlock on the board of directors. … The appointment will, however, only be made as a temporary measure pending the resolution of the difficulties which prevent the board from exercising control of the company's affairs or which make it inappropriate that they should do so. … Thus in the case of litigation relating to a 'quasi-partnership' company, a receiver and manager may be appointed pending the dismissal of the petition, the making of a winding-up order…, or the making of an order under the Companies Act 2006 s.996 regulating the management of the company or directing one party to sell his shares to the other.*"

61. Further at [29-008]:

> "*The court is most unlikely to appoint a receiver simply to provide a regime for the proper administration of the affairs of a company in financial difficulties where the company objects to the appointment. The overriding issue in all cases will be whether the appointment is the appropriate remedy in the particular circumstances of the case, having regard in particular to the damage which may be occasioned by the appointment to the defendant and third parties.*"[13]

62. The Court needs to examine carefully whether the appointment of Receivers is just and convenient, and the most appropriate remedy in the circumstances to meet the particular issues to be addressed and the ends of justice.

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[12] *Lightman & Moss on the Law of Administrators and Receivers of Companies* (6th Ed, Sweet & Maxwell, 2017).
[13] *Bond Brewing Holdings Ltd v National Australia Bank Ltd [1990] 1 ACSR 445.*

63. It is for the Plaintiffs to show that they have a good arguable case on the merits of the claim, i.e. a good arguable case as to the entitlement to some legal or equitable right that will be protected by the appointment; the appointment is just and convenient because other less invasive remedies would be inadequate (or, put another way, the Plaintiffs have to show that the appointment is justified because alternative remedies available at law are inadequate to meet the ends of justice) and a real risk of unjustified dissipation, supported by solid evidence.[14]

64. Ordinarily, the Court will want to be satisfied of a real risk of dissipation, but this latter requirement may not always be critical, depending on the facts of the case and the purpose of the receivership and issues to be addressed.

65. For example, one of the circumstances in which it is just and convenient to appoint a receiver in the context of litigation is where there is uncertainty about who has authority to represent one of the parties: see *JSC BTA Bank v Ablyazov & Ors [2012] I.L.Pr 53* and *Libyan Investment Authority v Societe Generale SA [2015] EWHC 1925 (QB)*.

66. In *Ablyazov*, the matter in issue was "*the ability of one defendant to the proceedings commenced by the Bank to be represented at trial*" ([19]). Teare J held at [22] that:

> "*In principle, the requested appointment of a receiver is just and convenient because its purpose is to ensure that Usarel, a defendant to a very large claim in fraud, is represented at trial by solicitors and counsel. It must be in the interests of justice that a defendant to such a claim be represented at trial.*"

67. In *Libyan Investment Authority*, the issue was who had authority to give instructions on behalf of the Libyan Investment Authority. Flaux J said at [2] that "*it seems to me that the circumstances in which the court is being asked to appoint a receiver are in broad terms similar circumstances to that which led Teare J in the BTA Bank v Ablyazov litigation to appoint a receiver in respect of Usarel Investment Limited in his judgment [2012] EWHC 2968 Comm, and it is not necessary to say any more about either the jurisdiction or the discretion in this judgment.*"

68. Neither Court seems to have specifically applied the 'real risk of unjustified dissipation test' in granting the applications, in the context of ensuring the particular remedy led to a just outcome in the relevant litigation.

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[14] *Hudson Capital Solar Infrastructure GP, LP (suing in its capacity as general partner of Hudson Solar Cayman LP) v Sky Solar Holdings Limited (unreported, 27 August 2021) per Kawaley J* at [25].

Determination

Joinder

69. As identified above, in the Joinder Application, the Plaintiffs seek to be joined as defendants to the Crossclaim in their individual capacity, and not on behalf of the General Partner of TPF.

The ELP arguments

70. Mr Chapman KC relied on section 14, and more particularly, section 33 of the ELP Act to submit that joinder was expressly prohibited. He submitted that section 33 operated as a complete bar to the joinder application. The Court is unpersuaded that is the proper effect of the provisions when applied to the facts of this case.

71. Section 14(1) of the ELP Act provides that "*[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*".

72. Section 33(1) of the ELP Act provides that:

> "*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.*"

73. Section 33(3) states:

> "*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*".

74. Mr Chapman KC submitted that subsection (1) provided a prohibition on a limited partner to be a party to or named in the proceedings against the partnership and that the exception provided by subsection (3) is limited. What section 33 does not do, as it could have done, he submitted, is to permit the derivative defence of a claim brought against the partnership.

75. However, it is relevant to note that the Plaintiffs are already litigating their claims against the Defendants, and have been permitted by the CICA to continue those claims against D1 (the General

Partner, directly in their individual capacities) and against D2-4 (both directly in their individual capacities as against D2 and D3, and derivatively on behalf of TPF as against D2-4).

76. Those claims have as their basis that the Plaintiffs are Limited Partners in TPF.

77. The proceedings in relation to which permission has been given under section 33(3) of the ELP Act for the Limited Partners to bring derivative claims, and which the Limited Partners have been allowed to bring themselves claims directly without the need for permission, are those which in the Court's view must also include any counterclaims or crossclaims within those proceedings. They are inextricably linked. The Court does not accept that the Crossclaim is a separate '*lis'* which stands alone.

78. The Plaintiffs were not required to satisfy the test contended for in section 33(1) of the ELP Act in order to bring direct claims against D2 and D3 (or against D1) at first instance nor in the CICA. The section does not apply to prohibit their claims. The section is aimed at ensuring that if a party wishes to sue the partnership, which has no separate legal identity, they do so by suing the General Partner rather than the Limited Partners. Likewise, when a partnership decides to sue, it does so by the General Partner.

79. If a limited partner is given permission under section 33(3) of the ELP Act, where the general partner has without cause, not pursued a claim, it would be illogical and unfair if that derivative claim could be pursued on behalf of the partnership, but the limited partner not be permitted to defend a counterclaim or a crossclaim. If the limited partner was so prevented that could stymie the derivative claims from properly proceeding.

80. As to section 14 of the ELP Act, conducting litigation in their individual capacities against third parties who have had dealings with TPF and/or the General Partner (namely, D2-4) does not in the Court's view contravene the restriction on the Limited Partners' involvement in the conduct of the business of TPF in section 14(1) of the ELP Act (or for that matter the restriction on limited parties being named in proceedings commenced by or against TPF in section 33(1) of the ELP Act). Defending the Crossclaim to protect their individual interest does not involve the Plaintiffs conducting the business of TPF.

81. The Plaintiffs seek to be joined as defendants to the Crossclaim in their capacity as the Plaintiffs in the Proceedings of which the Crossclaim forms part. The Plaintiffs are not seeking to be joined as Limited Partners, nor in order to represent or replace the General Partner, but in their individual capacities as the Plaintiffs in the Proceedings. The Court will allow them to do so.

82. The Joinder Application is an application for the Plaintiffs to defend the claim in their own right as the Plaintiffs in the Proceedings. It is the Plaintiffs who are affected by and would suffer the loss in the event the Crossclaim against the General Partner succeeds.

83. In the event the Crossclaim is successful any recoveries against the General Partner will likely be a loss to TPF of which the Plaintiffs hold the majority interest as Limited Partners.

84. The Court has a wide and flexible jurisdiction to permit joinder in the interests of justice. It also has a wide discretion to do so when appropriate.

85. The Court accepts Mr Allison KC's submissions that the requirements of GCR Order 15 are made out. The Plaintiffs are necessary parties whose rights will be affected by the outcome of the Crossclaim. There are legal issues, including the construction of the LPA and the claims which arise in the Proceedings and it is just and convenient for the Court to hear those matters together with all the relevant documentary and oral evidence.

Discretion

86. The Court exercises its discretion in favour of the Joinder Application. The Court accepts Mr Allison KC's submission that the need for the Plaintiffs to be joined as defendants to the Crossclaim is not affected by who is in charge of the General Partner (i.e. director, receiver, or liquidator). Neither a receiver nor a liquidator would be in as good a position to defend the Crossclaim as the Plaintiffs and an office holder would have to be funded by either the Plaintiffs or D2-4.

87. The parties with an acute economic interest (albeit indirect by way of their interest in TPF) in defending the Crossclaim (and in whom the relevant knowledge to enable a defence to be advanced resides) are the Plaintiffs and in the Court's judgment they should be allowed to defend the Crossclaim.

Relevance of Receivers

88. Mr Williams says that, if either receivers or liquidators are appointed, the office holder will then be in a position to prosecute and defend claims by and against the General Partner.[15]

[15] Williams 8 at [39].

89. However, irrespective of such appointment, in circumstances where the Plaintiffs are the parties most affected by the Crossclaim, in that they will bear the actual financial loss if it succeeds, it is just to permit the Plaintiffs to participate in defending the Crossclaim in addition to the General Partner (acting through independent office holders).

90. The Court has been persuaded that it would not be in the interests of justice if Mr Williams were permitted to be both one of the parties advancing the Crossclaim (D2) (and the individual responsible for the actions of D3 and D4) and to control the party defending the Crossclaim (the General Partner). It is an allegation in the Proceedings that Mr Williams exploited his positions as principal/decision maker for both parties to the DIFC Proceedings to procure and predetermine the outcome of those proceedings for his own benefit and for the benefit of those connected to him, to the detriment of TPF and the Limited Partners: see Thomson 1 at [39].

91. The Court accepts that these allegations are denied and are far from being proven. Indeed, it is asserted that the sole director of the General Partner at the time (Mr Alwadhi) with the benefit of legal advice was responsible. The Court does not have to decide those matters for present purposes.

92. The Court is satisfied that joining the Plaintiffs as defendants to the Crossclaim in these circumstances would not be unfair to D2-4.

93. Joining the Plaintiffs as defendants is a sensible way to ensure that the claims in the Crossclaim are justly, conveniently, and fairly resolved.

Receivers

Procedural concerns

94. Mr Chapman KC submitted that the Receiver Application adopts an inappropriate procedural course which prejudices parties whose rights will be affected without their being given a proper opportunity to be heard. The Court is not persuaded by these arguments.

95. The Court accepts that the Limited Partners for whom addresses are known by the Plaintiffs have been given notice and the overwhelming majority are in support of the Receiver Application.[16]

[16] Thomson 3 at [13].

96. The Court is not persuaded that the Receiver Application fails because it was not commenced by originating summons or because there has not been formal service. The Receiver Application is properly brought within the Proceedings and there is no prejudice which can be reasonably identified which persuades the Court otherwise.

The merits

97. The Court exercises the necessary caution required before appointing Receivers, and asks itself whether the appointment is really necessary and appropriate in all the circumstances.

98. The Court has been persuaded in all the circumstances of this case that it is just and convenient to do so notwithstanding the resistance put forward by D2-4.

99. The Court proceeds on the basis that the Plaintiffs have a good arguable case in relation to their various claims. There has been no attempt to strike them out on their merits.

100. The claims which are being pursued by the Plaintiffs against the General Partner and D2-4 have withstood the Defendants' attempts to strike them out both in this Court and the CICA, and the CICA has recently dismissed D2-4's application for permission to appeal the CICA Judgment to the Privy Council.

101. There is a value in the contingent claims brought by and against the General Partner.

102. If the derivative claims brought in the name of the General Partner are successful and that results in the realisation of assets by the General Partner (for distribution to creditors), those assets may be depleted in the event that any of the Crossclaims brought by D2-4 against the General Partner are successful. The General Partner acts as the statutory trustee of TPF.

103. It is therefore important to fairly establish the merits of the respective claims in the interests of justice.

104. The Court has accepted Mr Allison KC's submission that the joinder of the Plaintiffs as defendants to the Crossclaim does not do away with the need for a Receiver to be appointed. The fact that the Plaintiffs are given permission to be joined as defendants to the Crossclaim, does not make it appropriate for Mr Williams to be left in sole control of the defendant to his own Crossclaim.

105. Mr Allison KC submitted that the Plaintiffs are willing and able to fund a Receiver to "hold the ring" to enable the Proceedings to proceed, likely by enabling them to be litigated by the real parties to those proceedings. Whether that course is followed or not will depend on the view the Receivers, acting independently, take.

Influence

106. The Court is not persuaded that because the General Partner and TPF may not have sufficient liquidity to meet any office holder remuneration and so could not presently be indemnified out of any assets, this causes difficulty in relation to the risk of improper influence by the Plaintiffs over the independent office holders. The Court will be able deal with any allegations of improper influence through the supervision of the Receivers who will report to it.

107. As to the specific risk of influence or interference by the Plaintiffs, the Receivers will be under the general supervisory jurisdiction of the Court. They are independent and professional office holders. The Court is satisfied that the funding arrangements entered into to date[17] do not fetter their discretion, and any future funding arrangements must not do so.

108. D2-4 may apply to the Court at any appropriate time if, as they fear, the Receivers allow the Plaintiffs to exert undue control over or "intermeddle in the affairs of Port Link and the Fund", as Mr Chapman KC put it. The Court makes it clear that the Receivers should themselves make an application in circumstances where their independence is put in jeopardy.

109. The Court also makes it clear that by offering and agreeing to fund the Receivers going forward is not to be equated with any measure of preference or control for the Plaintiffs. The Court has no reason to doubt the integrity and professionalism of the proposed Receivers and also requires the funding arrangements to be open and transparent on an ongoing basis.

Receivers to manage the litigation

110. The crux of the dispute is about control of the General Partner, which is itself, incapable of exercising any management functions. The Court has concluded that the most appropriate remedy in all the circumstances which does justice between the parties is to appoint independent Receivers. The main purpose of the appointment is for an independent professional to manage the complex litigation on behalf of the General Partner reasonably and efficiently. This leads to a more bespoke

[17] See Funding Agreement dated 30 March 2023 as amended.

method of supervision by the Court than that of a statutory liquidation with its rigid rules. The Receiver Application is more flexible and may be tailored to the material circumstances relating to the litigation which will inevitably change.

111. In the Court's view, it would be just and convenient to appoint the Receivers for the purpose of ensuring that there is a professional, independent, and impartial office holder in place who will regularly report to the Court and in the meantime ensure the interests of the General Partner in the litigation are monitored, protected, and advanced appropriately. Importantly, the General Partner's interests will be advanced on an objective, reasonable, and independent basis free from the improper influence by any of the protagonists in the litigation.

112. An independent, court-appointed Receiver would be the most appropriate means by which to manage the litigation concerning the General Partner and therefore, in this regard, the business and assets of TPF. The individuals responsible for overseeing the General Partner and TPF's assets will be free from interference from all parties and supervised by the Court.

113. This is not a case where the Receivers will displace existing directors or where the General Partner is carrying on an active business such that the appointment will interfere with the decision-making of directors or the success of such business. In the present case there are no directors and (until the appointment of joint voluntary liquidators — see below) there is no-one other than Mr Williams administering and controlling the General Partner.

114. It is relevant to note that approximately 80% of Limited Partners equating to approximately 93% (by value)[18] of the Limited Partners (who are not connected to D2-4) are supportive of the Receiver Application. They are the majority beneficiaries of the statutory trust for which the General Partner acts as trustee.

115. Given the General Partner would appear to have no assets (except for contingent claims in the litigation) and is indemnified by TPF, it is the Limited Partners who are likely to bear the costs incurred by the General Partner.

116. The General Partner is not trading and so there is no prospect of it suffering reputational damage or commercial disruption as a result of Receivers being appointed.

[18] The Application is supported by two further Limited Partners (GIC and GRSIA) who together hold approximately 15% of the total investments into TPF.

Risk of dissipation

117. In this case, there are no liquid assets which can be said to be at risk of dissipation. In all the circumstances of this case, which are analogous to the *Ablyazov* and *Libyan Investment Authority* cases where authority to act was uncertain, the appointment of a receiver is appropriate without applying the 'dissipation of assets' test.

118. Even were the Court to apply the 'dissipation of assets' test, it would have to be applied by reference to contingent assets in the form of claims, including the claims that form the subject of the Proceedings.

119. The Court is satisfied that the outcome of such claims, and the distribution of any assets arising from such successful claims, is in jeopardy for so long as the General Partner is without directors and (until the appointment of joint voluntary liquidators — see below) under the control of its ultimate owner, Mr Williams, who is an alleged co-conspirator in the claims brought by the Plaintiffs. As the statutory trustee of TPF's assets, the General Partner could in theory dispose of contingent claims.

120. The Court accepts Mr Allison KC's submission that the risk is to be measured by reference to the likely consequences of the General Partner being managed so as to prejudice the claims of the Limited Partners and that choses in action, such as contingent claims, could be dissipated. The Court is of the view that, were it necessary to so find, the real risk of dissipation is satisfied in this case.

Alternative remedies

LPA trustee

121. Clause 9.1(a)(i) of the LPA provides that the dissolution of TPF will be triggered upon the end of its term. TPF's term ended on 31 December 2014 and it is therefore currently in dissolution. The clause has no application here.

122. Clause 9.2(a) of the LPA provides that where TPF is in dissolution:

> "*…the property and business of the Partnership shall be liquidated within a reasonable period of time by the General Partner, or, in the event of the unavailability of the General Partner, by a person designated by more than 50% in interest of the Limited Partners.*"

123. The power is limited to appointing a person to liquidate "*the property and business of [TPF]*", and does not address the governance or actions of the General Partner in litigation that is required in the present situation.

Liquidation

124. There is no full and complete evidence before the Court as to the General Partner's financial position. There is some evidence of lawyers and others who are prospective creditors. There is no evidence to support an assertion that it is cash flow insolvent. There is no evidence of any creditor's petition against the General Partner or TPF. Liquidation is not the natural or obvious remedy to the incapacity issue at the General Partner.

125. A liquidation would result in a statutory stay of all proceedings concerning the General Partner. The Court is not persuaded that a statutory stay of the litigation involving the General Partner is a good reason in itself for a liquidator to be appointed, as Mr Chapman KC submitted, so that any stay would only be lifted against all claims, not only one.

126. The Court accepts Mr Allison KC's submission that as the Court is presently choosing between liquidation and receivership, liquidation would also be the more invasive remedy. A liquidator would be bound to follow the statutory scheme. The Court agrees with Mr Allison KC that this would sound the 'death knell' for the General Partner and liquidators would assume full control going forward.

127. Mr Williams has put forward potential liquidators. The Court is not satisfied at this stage that he is the right person to propose potential office holders. He has no direct financial interest in the General Partner, albeit he owns the sole shareholder.

128. A liquidator is a remedy of last resort and the Court has formed the view that it is not appropriate, necessary or desirable at present.

129. The issue which concerns the Court and which is the remedy it intends to direct its equitable relief towards is one of incapacity at the General Partner in the context of claims and crossclaims in litigation, not, at least on presently available evidence, insolvency.

130. For all these reasons the Court will make a Receivership order, restricted to the conduct of litigation (including to instruct attorneys and counsel), to the effect that :

Gordon MacRae and Elizabeth Mackay of Interpath (Cayman) Limited be appointed as interim receivers of Port Link GP Ltd and its assets, and the assets of The Port Fund L.P., with the power to act jointly and severally.

131. The Court directs that there should be a fresh statement of independence in the form of consent to act from the Receivers before the Order is finalised and the Plaintiffs are to give an undertaking to provide transparency on an ongoing basis as to the funding arrangements agreed between the Plaintiffs and the Receivers which are to be disclosed to D2-4 and notified to the Court.

132. The terms of the Order, including as to length and scope, are to be agreed by the parties and provided to the Court in the light of the Court's views as set out above. In the event of a dispute the parties have liberty to apply for the Court to settle the matter.

133. To meet the defendants concern that the Receivers will be "in office but not in power", for the avoidance of any doubt, the Receivers ought to apply to the court for directions, if they find that a particular course of action, which they consider to be appropriate, is not being approved of and therefore not funded by the Plaintiffs. The Court has in mind in particular, the General Partner's counterclaim against the Plaintiffs, the defence of the Plaintiffs' claim against the General Partner, and the defence of the General Partner as to the Crossclaim.

134. The Court directs the parties to agree a date within 6 weeks of the date of the agreed Order when there will be a review of the receivership with the Receivers having liberty to apply for directions at any time they think appropriate.

135. Costs should follow the event in the two applications made and the Court's present inclination is to award them to be taxed on the standard basis if not agreed.

136. If either party wishes for a different costs outcome they may apply by way of written submissions (no more than 5 pages in length) and the Court will deal with the matter on the papers.

Events since the hearing on 24 April 2023

137. Disclosure of the engagement letter (with an initial cap on funding between the Plaintiffs and the proposed Receivers which has now been lifted) has apparently caused Mr Williams sufficient concern to appoint joint voluntary liquidators ("JVLs").

JVLs

138. Mr Williams has procured, since the hearing, the appointment of JVLs by the sole shareholder.[19] This has set in train a path to a hearing for a supervision order and the possibility of official liquidators being appointed in due course. The identity of any official liquidators has not yet been determined.

139. There is at present no funding proposed to support any liquidator. The Plaintiffs have said they will not fund a liquidator. Any funding for the JVLs in the interim is not apparent.

Injunction

140. The Court is satisfied that the present funding agreement in place does not fetter the discretion of the Receivers nor that anything submitted at the hearing by Mr Allison KC on behalf of the Plaintiffs (before the engagement letter was disclosed) was in any way inaccurate. The Plaintiffs applied for an urgent order that the JVLs and Mr Williams should be restrained from taking steps to further the procedure for an application for a supervision order pending this Judgment.

141. The Plaintiffs applied for interlocutory relief, which was heard *inter partes* on 9 May 2023. The Court decided not to grant the relief sought and dismissed the application. A further written Judgment is to follow which will provide reasons.

142. As far as the Court is aware, the present state of play is therefore that pursuant to sections 123 and 124 of the Companies Act (2023 Revision) and the Companies Winding Up Rules (Order 13, Rule 2), within 28 days of the commencement of the voluntary winding up, the JVLs are to make a number of filings to the Registrar, publish notice of the voluntary winding up in the Gazette, and if there is no declaration of solvency from the directors of the company within 28 days from the commencement of the liquidation, the voluntary liquidators must apply to the Court for a supervision order so that the matter proceeds as an official liquidation within seven days.

143. In the meantime, as noted by the Court at the *inter partes* injunction hearing, the JVLs have undertaken to limit their activity to the gathering and review of information and documents relevant to the liquidation and their statutory duties, and that they would provide notice if they were required to take any additional steps to both the attorneys and to the Court.

[19] On 2 May 2023.

144. The Court reserves to itself (Parker J) any matters which arise from the procedure commenced by the appointment of JVLs. At any supervision order hearing at least the JVLs, the Receivers, and material creditors should appear or make their views known.

THE HON. MR JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT