

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FINANCIAL SERVICES DIVISION

CASE NO. FSD 103 OF 2015 (RMC)

4

5 IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP LAW, 2014

6 AND IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

7 AND THE MATTER OF TORCHLIGHT FUND L.P.

8

9 **Appearances:** Mr. Gabriel Moss Q.C. instructed by Mr. David Butler and Ms. Jessica
10 Williams of Harney Westwood & Riegels for the Petitioners
11 Mr. Robin Hollington Q.C. (appearing by video-link) instructed by Mr.
12 Ben Hobden and Mr. Erik Bodden of Conyers Dill & Pearman for
13 Torchlight Fund L.P. and the General Partner
14

15 **Before:** The Hon. Mr. Justice Robin McMillan, IN CHAMBERS

16
17 **Heard:** 26 February 2016

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19 **Draft Judgment**

20 **Circulated:** 2 April 2016

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22 **Judgment Delivered:** 6 April 2016

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HEADNOTE

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28 *Discovery pursuant to GCR 0.24, r.7 – Scope of discovery- Burden on Applicant- Obligations of*
29 *discovery - Legal privilege – A Limited Partnership is not generally allowed to claim privilege*
30 *against its own Limited Partners – Interests of Justice*

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JUDGMENT



Introduction

1. This application is made on behalf of Aurora Funds Management Ltd (as trustee for the Bear Real Opportunities Fund), Crown Asset Management Ltd and the Accident Compensation Corporation of New Zealand ("the Petitioners") in respect of Torchlight Fund L.P. ("the Partnership"). The Petitioners issued a petition to wind-up the Partnership on 18 June 2015 ("the Petition"). The Petition was served on Torchlight GP Limited ("the General Partner") ("the Respondent") on 26 June 2015.

2. The Petitioners have issued a Summons seeking an order that the General Partner serve a further and better list of documents pursuant to GCR O.24, r.3 and/or give specific discovery of certain documents pursuant to GCR O.24, r.7 within 14 days of the date on which the order is made ("the Discovery Application").

3. The Court set aside time on 21 and 22 January 2016 to hear the Petitioners' successful injunction application and the General Partner's unsuccessful validation application. The Petitioners asked the Court, time permitting, to hear the Discovery Application at that hearing, but that was not possible.

1 **Evidence**

2 4. The Court has read the Third Affirmation of Michael Russell Catchpoole sworn on 18
3 January 2016 ("Catchpoole 3") in support of the Discovery Application. The Court was
4 also asked to read the Unless and Directions Order made on 15 October and the Ruling
5 handed down on 9 February 2016 which set out the reasons for the Court refusing to
6 make a validation application.

7
8 5. On 18 February 2016 the General Partner served the Third Affidavit of Russell Naylor
9 ("Naylor 3") in answer to the Petitioners' application, which the Court has also read.



11 **The General Partner and the Partnership**

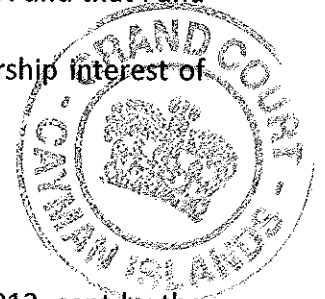
12 6. The General Partner was registered under the laws of the Cayman Islands as an
13 exempted limited company on 5 September 2012. Mr. George Kerr ("Mr. Kerr") is the
14 managing director of the General Partner and, with Mr. Russell Naylor, is one of the two
15 directors of the General Partner. The General Partner is a wholly owned subsidiary of
16 Pyne Gould Corporation ("PGC"), a company listed on the New Zealand Stock Exchange.
17 Mr. Kerr is the Managing Director of PGC and owns some 80% of the issued share capital
18 of that company.

19
20 7. On 7 November 2012 the General Partner and Michael Owen Tinkler entered into an
21 Exempted Limited Partnership Agreement ("the Partnership Agreement") pursuant to
22 which the Partnership was formed. The Partnership was registered under the laws of the

1 Cayman Islands as an exempted limited partnership on 8 November 2012. The
2 Partnership makes, holds and disposes of investments with the objective of providing
3 investors with a return.

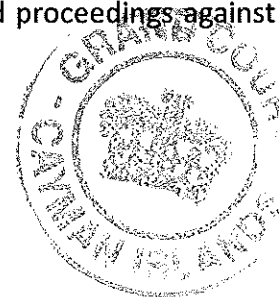
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5 8. The General Partner and the Partnership were established in order to facilitate the
6 relocation of assets from a fund established in New Zealand, Torchlight Fund No 1 LP
7 ("the NZ Fund") to the Cayman Islands. On 17 December 2012 Mr. Kerr and Mr. Naylor
8 wrote to the Limited Partners stating that there were some structural disadvantages in
9 the NZ Fund structure and that a new limited partnership had been established in
10 Cayman for the purpose of holding the assets of NZ Fund and the material terms and
11 conditions of the Partnership were consistent with those of the New Zealand
12 Partnership. On 21 August 2013 Mr. Kerr wrote to the Limited Partners informing them
13 that as a result of a review of the effectiveness of the structure of the NZ Fund that Fund
14 had contributed all of its assets to the Partnership and that the partnership interest of
15 the Limited Partners had become domiciled in the Cayman Islands.

16
17 9. The Limited Partners were informed, in a circular dated 17 December 2012, sent by the
18 General Partner of the NZ Fund, Torchlight (GP) 1 Limited ("the NZ GP") that all of the
19 assets of the NZ Fund has been transferred to the Partnership in return for the NZ Fund
20 acquiring interests in the Partnership. It is alleged that transfer took place without
21 consultation with or approval by the Petitioners and the Supporting Limited Partners (as
22 defined below). The Limited Partners were also informed that the terms of the new



1 Partnership Agreement with the Cayman entities were materially the same as the terms
2 that governed the NZ Fund. It is alleged that turned out not to be the case and that there
3 are a number of material differences between the partnership agreements, most notably
4 that the term of the Partnership is three years longer than the term of the NZ Fund.

5
6 10. The NZ Fund is now in receivership and has commenced proceedings against the assets
7 of the Partnership.



8
9 **The Petitioners**

10 11. The Petitioners are limited partners of the Partnership who hold some AU\$89.88 million
11 of committed capital in the Partnership. The Petition is supported by others with
12 holdings of, in total, AU\$5.58million ("the Supporting Limited Partners"). The Petitioners
13 believe that these holdings amount to some 36.9% to 44% of limited partnership
14 interests in the Partnership and some 85% of limited partnership interests that are
15 neither related to nor associated parties of the General Partner. Prior to the transfer of
16 the assets described above, the Petitioners were limited partners of the NZ Fund.

17
18 **The Petition**

19 12. The primary relief sought in the Petition is that the Partnership be wound up in
20 accordance with the Companies Law together with consequential orders for the
21 appointment of nominated liquidators, the powers that those liquidators are to have and
22 the functions they are to discharge.

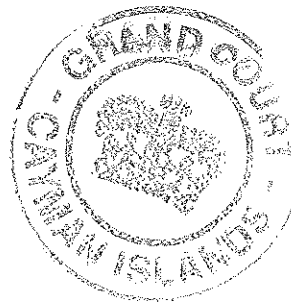
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13. An order to wind up the Partnership has been sought on the following grounds:

- (1) The Petitioners and the Supporting Limited Partners have justifiably lost trust and confidence in the General Partner and in Mr. Kerr, the controlling mind of the General Partner;
- (2) The General Partner is not conducting and has not conducted the affairs of the Partnership in the best interests of the Partnership;
- (3) The General Partner is acting and has acted in a manner prejudicial to the interests of the Limited Partners; and/or,
- (4) The General Partner is acting and has acted with a lack of probity.

14. The Petitioners have asserted the following additional grounds for seeking to wind up the Partnership:

- (1) The conduct of the General Partner and of Mr. Kerr requires urgent investigation by a liquidator.
- (2) The Petitioners have suffered oppression as a consequence of the General Partner's conduct.
- (3) There has been an irreconcilable breakdown in the relationship between the General Partner, on the one hand, and the Petitioners and Supporting Limited Partners on the other.



1 15. The references to the General Partner in this Judgment include references to the NZ GP
2 whilst it was acting as general partner to the NZ Fund.

3
4 16. The facts and matters asserted by the Petitioners in support of the grounds for an order
5 winding up the Partnership are summarized in the Petition and are, briefly, as follows:

6 (1) **Related Party Transactions.** The General Partner has entered into related party
7 transactions which are not transparent or explicable and do not appear to have
8 been approved in accordance with the terms of the Partnership Agreement.
9 These transactions appear to have prejudiced the interests of the Partnership
10 and to have benefited Mr. Kerr and/or entities connected or associated with
11 him. In May 2012, KPMG, the then auditors of PGC and the NZ Fund resigned
12 over the treatment of related party transactions. The following transactions are
13 in issue in these proceedings:

14 a. The related party transaction involving land in New Zealand in 2010
15 (paragraph 19 of the Petition).

16 b. The loan made, in 2012, by an investment fund to the NZ Fund that was
17 made in breach of trust by the investment fund which was under Mr. Kerr's
18 ultimate control (paragraph 20 of the Petition).

19 c. The General Partner appears to have preferred its own interest to that of the
20 Partnership in transactions involving shares in a company called Epic Ltd
21 (paragraph 22 of the Petition).



1 d. In the period 2012 to 2015 the General Partner caused the Partnership to
2 enter into related party transactions involving PGC, or entities to PGC,
3 acquiring "participations" in a wholly owned subsidiary of the Partnership
4 (paragraph 23 of the Petition).

5 e. According to the General Partner there was a substantial increase in
6 committed capital between June 2012 and November 2014. A substantial
7 part of that increase appears to have occurred as a consequence of related
8 party transactions, including the payment of fees to the General Partner and
9 the conversion of participations held by PGC and its related entities into
10 interests in the Partnership.

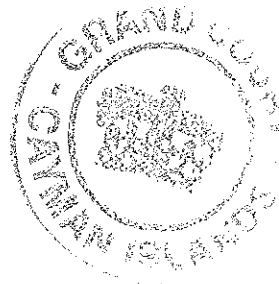
11 (2) **Fees.** The General Partner has charged fees to the Partnership to which it is not
12 entitled, in breach of the Partnership Agreement (paragraphs 26 to 28 of the
13 Petition).

14 (3) **Performance Fee.** The General Partner has been paid a performance fee to
15 which it was not entitled, in breach of the Partnership Agreement (paragraphs 29
16 to 31 of the Petition).

17 (4) **Acquisition Fee.** The General Partner appears to have received an acquisition fee
18 to which it is not entitled (paragraph 32 of the Petition).

19 (5) **The failure to provide accounts and other information on the Partnership.** The
20 terms of the Partnership Agreement require the General Partner to provide
21 financial information within specific time periods. The information has either not
22 been provided at all or has been very late (paragraphs 33 to 37 of the Petition).

- 1 (6) Inconsistent financial information provided. Such information as has been
2 provided by the General Partner is contradictory and cannot be reconciled, in
3 particular the fund valuations for the Partnership and the value of PGC's interest
4 in the Partnership.
- 5 (7) The valuation methodology is unapproved. The fund valuations conducted by
6 the General Partner in the period since 31 March 2012 has been on a basis that
7 was not approved by the auditors of the Partnership. PGC's annual report states
8 that it disagrees with the auditor's valuation methodology for its interest in the
9 Partnership (paragraph 40 of the Petition).
- 10 (8) The role of the auditors. No auditors appear to have been appointed by the
11 General Partner to discharge the requirements of an auditor under the
12 Partnership Agreement (paragraph 41 of the Petition).
- 13 (9) Unwillingness to supply information. The General Partner has failed to respond
14 to reasonable requests from the Limited Partners for information with the
15 consequence that, since March 2013, the Limited Partners have not been able to
16 ascertain the value of their investments (paragraph 42 of the Petition).
- 17 (10) Investment criteria and gearing. The General Partner appears to have failed to
18 comply with the investment criteria in the Partnership Agreement which restricts
19 the acquisition costs of any one investment. The General Partner appears also to
20 have failed to adhere to the gearing ratio in the Partnership Agreement
21 (paragraph 43 of the Petition).



1 (11) **Mismanagement and claims against Partnership Management.** The Petitioners
2 refer, in particular, to the following:

3 a. A loan made in breach of trust. (See paragraph 44 of the Petition and
4 paragraph 16(1) (b) above).

5 b. A loan made to the NZ GP and the NZ Fund and secured against their
6 assets by Wiliaci on which interest accrued at the rate of US\$500,000 per
7 week. (Paragraph 44 of the Petition)

8 c. The relocation of the assets of the Fund from New Zealand to the
9 Cayman Islands and the proceedings brought by the NZ Fund and NZ GP,
10 in receivership, against the assets of the Partnership. (See paragraphs 8
11 and 9 above and paragraph 47 of the Petition).

12 d. The misleading information provided about the terms of the Partnership
13 Agreement when the fund was transferred from New Zealand.
14 (Paragraph 48 in the Petition)

15 (12) **Failure to convene a meeting.** On 9 October 2014 Millennium Asset Services
16 (MAS), acting as trustee for the Bear Real Opportunities Fund and the
17 Petitioners (other than Aurora Fund Management Limited), in accordance with
18 the terms of the Partnership Agreement, requested that Mr. Kerr call a meeting
19 of Limited Partners. Until that date the General Partner had recognized MAS as
20 the Limited Partner acting as Trustee for the Bear Real Opportunities Fund. In
21 response to the request for the meeting, the General Partner alleged that MAS

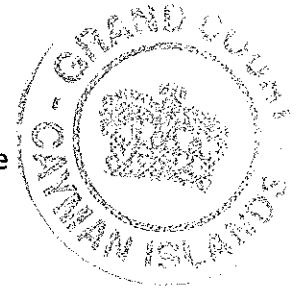
1 was not entitled to request a meeting and the General Partner refused to
2 convene a meeting (paragraphs 51 to 54 of the Petition).

3 **The Proceedings to Date**

4 17. The Petitioners' Summons for directions filed on 25 June 2015 came on for hearing
5 before the Hon. Justice Clifford Q.C. ("Clifford J.") on 31 July 2015. At that hearing Clifford
6 J. set a timetable for the next steps taken in the proceedings and also ordered that:

7 a. The Partnership be treated as the subject-matter of the Petition and be a
8 party to the proceedings only for the purpose of being bound by orders of
9 the Court made in the proceedings and for the purpose of giving discovery
10 and such other assistance as the Court may direct.

11 b. The Petition be treated as an inter partes proceeding between the
12 Petitioners and the General Partner and not as proceedings against the
13 Partnership until further or other order of the Court.



14
15 18. On 21 August 2015 Clifford J. granted, *ex parte*, Aurora Funds Management Ltd
16 ("Aurora") and Millennium Asset Services Party Ltd an injunction restraining the General
17 Partner from, in summary, acting on a notice of default dated 13 August 2015 that had
18 been sent by the General Partner to Aurora and/or causing or procuring the sale of or
19 otherwise dealing with Aurora's limited partnership interest in the Fund. The General
20 Partner has not challenged this injunction.

21
22 19. At the hearing on 31 July 2015 the General Partner was ordered to file and serve any
23 affidavit evidence on or before 4:00 p.m. on 18 September 2015. The General Partner
24 apparently failed to comply with this Order. On 15 October 2015 Clifford J. made an

1 Order that unless the General Partner filed and served any affidavit evidence in
2 opposition to the Petition by 30 October 2015 and gave discovery of documents verified
3 by affidavit by 4:00 p.m. on 27 November 2015, the General Partner would be debarred
4 from defending the Petition. The General Partner did file and serve evidence and gave
5 some discovery in accordance with this timetable.

6
7 20. At a hearing on 21 and 22 January 2016 before Clifford J. the General Partner applied for
8 a validation order under s.99 of the Companies Law and the Petitioners applied for an
9 injunction to restrain the General Partner from making certain payment. Clifford J.
10 dismissed the General Partner's application and granted an injunction in the following
11 terms:

12 *"...No disposition of assets of the Torchlight Fund L.P. be made by*
13 *Torchlight GP Limited (the General Partner) to persons related to the*
14 *General Partner without the consent of the Petitioners or an order of the*
15 *Court made on an application, supported by evidence, for prospective*
16 *validation...."*

17
18 21. The Court also directed that the General Partner could apply to the Court for a validation
19 order on not less than 3 business days' notice, or such shorter notice as the Court may
20 allow, to the Petitioners.

21
22 22. It is noteworthy that Clifford J. in his Ruling dated 9 February 2016 made the following
23 statement at paragraph 13:



1 *"13. Extensive evidence has been exchanged. It is clear from this, in my*
2 *view, that there are serious issues to be tried in this case in respect of a*
3 *number of matters. This is relevant in relation to both the Partnership's*
4 *Application and the Petitioners' Application. The issues go to the very core*
5 *of what can properly be regarded as being in the ordinary course of*
6 *business of the Partnership and its proper management and disposition of*
7 *assets."*

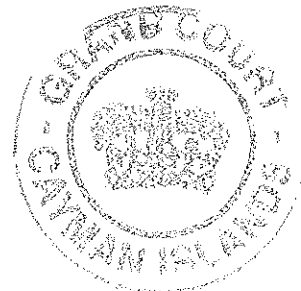
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9 23. The Court considers this comment to be both significant and helpful in approaching the
10 matter presently before it and the comment establishes an appropriate context to the
11 questions currently raised.

12 **Discovery to Date**

13 24. The Petitioners sought to agree a discovery regime with the General Partner in July 2015
14 but were unable to do so. On 6 October 2015 the Petitioners filed and served a Summons
15 for directions including an order for discovery. On 15 October 2015 the Court made an
16 order for discovery in standard terms and, without limiting the scope of that order, also
17 ordered specific discovery of certain documents ("the Order")

18
19 25. On or about 27 November 2015 the General Partner provided a list of documents which
20 the Petitioners say purported to comply with the Order. The Petitioners submit that the
21 discovery given by the General Partner is deficient.

22
23 **Discovery of Particular Documents**



1 26. Pursuant to GCR O.24, r.7, the Court may make an order for discovery of particular
2 documents:

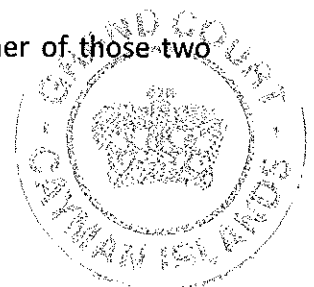
3 *“Subject to rule 8, the Court may at any time, on the application of any*
4 *party to a cause or matter, make an order requiring any other party to*
5 *make an affidavit stating whether any document specified or described in*
6 *the application or any class of documents so specified or described is, or*
7 *has at any time been in his possession, custody and control and if not then*
8 *in his possession, custody or power when he parted with it and what has*
9 *become of it.”*

10

11 27. The Court can make such an order even where the party has already made a list of
12 documents; O.24, r.7(2). A party who has served a list of documents is required to let the
13 other party inspect the documents referred to in the list and to take copies of those
14 documents, O.24, r.9.

15

16 28. The Petitioners argue that documents are required to be provided by way of discovery if
17 it is reasonable to suppose that they contain information which may enable the
18 Petitioners to advance their case or to damage that of the General Partner. See *Ahmad*
19 *Hamad Algozaibi and Brothers Company v Saad Investments Company Limited* [2013
20 (1) CILR 202]. The Petitioners go on to state that in fact the obligation goes wider than
21 this, as the Chief Justice observed when he quoted (at paragraph 36) Note 24/12/11 of 1
22 The Supreme Court Practice 1999 and its reference to the obligation to discover such
23 documents as well as those which lead to a train of enquiry have either of those two
24 consequences.



1 29. It is the Petitioners' case that the General Partner is in breach of its discovery obligations.

2

3 30. The refusal or failure to comply with discovery obligations is a clearly serious matter. GCR
4 O.24, r.20 provides as follows:

5 *"Where the Court has made an order for discovery.....against any party*
6 *and such party fails to comply, the Court may make such order as it thinks*
7 *just, including in particular, an order that the action be dismissed or, as*
8 *the case may be, an order that the defence be struck out and final*
9 *judgment entered accordingly."*

10

11 31. The reason for the sanction in O.24, r.20 is stated by Foster J., in *Renova Resources*
12 *Private Equity Limited v Gilbertson* [2011 (2) CILR 148] (at paragraph 56):

13 *"The Court does not strike out a petition or a defence because it*
14 *disapproves of the conduct of the party that has failed to comply with its*
15 *discovery obligations, it does so because it is satisfied that there is an*
16 *unacceptable risk that the trial would be unfair and a judgment in favour*
17 *of that party would be unsafe".*

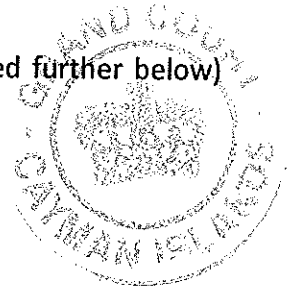
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19 Once again, Clifford J.'s comment regarding the scope of the issues in this case must be
20 borne in mind.

21

22 32. The Petitioner submits that the Court should make an Order in the terms sought in the
23 Summons that requires the General Partner to provide a further and better list of
24 documents, such list to identify all relevant documents and also to give discovery of





1 certain Outstanding Documents and the Omitted Material (as described further below)
2 pursuant to O.24, r.7

3
4 **The Alleged Outstanding Documents**

5 33. On 11 December 2015 the Petitioners' attorneys ("Harneys") informed the General
6 Partner's Attorneys ("Conyers") that the discovery given by the General Partner was
7 deficient and identified 26 categories of documents that the Petitioners consider
8 relevant to the proceeding and in the possession, custody and power of the General
9 Partner. The Petitioners asked the General Partner to provide the further documents that
10 they say should have been provided pursuant to the Order without the need for the
11 Petitioners to make an application to this Court. The categories of documents that were
12 requested are listed in paragraph 20 of Catchpoole 3 ("the Outstanding Documents").
13

14 34. The General Partner questioned the relevance of the Outstanding Documents and
15 alleged that the Petitioners were "fishing". Conyers on their behalf asked Harneys to
16 provide an explanation as to how each of the categories of Outstanding Documents
17 related to the dispute in these proceedings. This was done in a letter dated 18 December
18 2015; see paragraph 25 of Catchpoole 3. The issue in connection to which each category
19 of documents is relevant was set out by reference to specific paragraphs of the Petition.
20

21 35. It is contended that the General Partner has not complied with the terms of the Order as
22 the documents requested are obviously relevant to the proceedings and are obviously in

1 the possession, custody and power of the General Partner. The deficiencies in the
2 documents that have been produced by the General Partner are said to be striking and
3 numerous (see paragraph 27 of Catchpoole 3) and are said to include:

4 (1) A complete failure to provide any transaction documents for the related party
5 transactions described in the audited accounts or documents showing approval
6 of those transactions by the Advisory Committee and any documents recording
7 the operation of that committee.

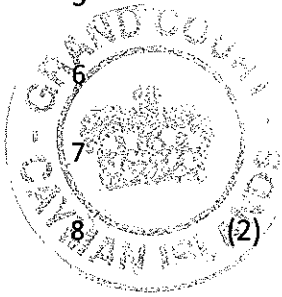
8 (2) An almost complete failure to provide financial information about the
9 Partnership, other than one set of management accounts and the audited
10 accounts for the period to 31 March 2014.

11 (3) An almost complete failure to disclose the Pleadings and Court documents with
12 respect to proceedings in New Zealand; all that has been disclosed is a series of
13 minutes of order.

14 (4) An almost complete failure to provide documents recording or referring to the
15 plan to transfer the assets of the NZ Fund to Cayman; only one email has been
16 produced.

17 (5) An almost complete failure to produce documents relating to the issue of limited
18 partnership capital to related parties in return for in-kind contributions and
19 documents recording the value of those contributions; all that has been provided
20 are incomplete documents showing escrow arrangements.

21 (6) A failure to produce correspondence with the Partnership's auditors concerning
22 the delayed accounts and valuation methodologies or valuations of the



1 partnership assets (other than those prepared by the General Partner, which are
2 inconsistent with the audited accounts).

3 (7) A failure to produce any loan, finance or other documents that go to the issue as
4 to whether the Partnership has or has not been run in accordance with the
5 Investment Criteria.

6 (8) A failure to produce any documents referring to the dispute with Wilaci Pty Ltd
7 in relation to Wilaci's claim for late fees in the sum of AU\$33.6million.

8 36. For the Court's assistance a schedule identifying the failures in the General Partner's
9 discovery with greater particularity was attached to the Petitioners' Skeleton Argument.

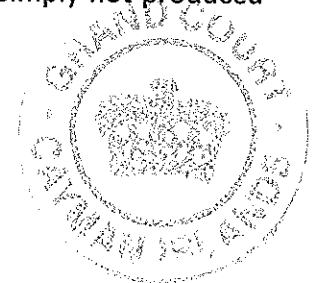
10 Naylor 3 exhibited the General Partner's Second List of Documents: this listed 23
11 additional documents, 13 of which are extracts from Credit Suisse account statements.

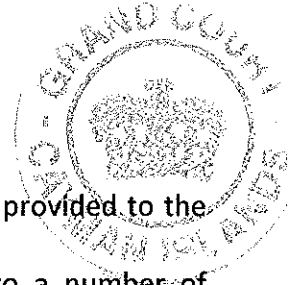
12 These documents have not been provided to the Petitioners by the General Partner and
13 are not presently included in the schedule.

14 37. In the letter of 18 December 2015 the General Partner was informed that if the
15 documents were not provided the Petitioners would apply to Court.

16 **The Alleged Omitted Material**

17 38. A number of the documents discovered by the General Partner were incomplete: email
18 chains were incomplete; an annex to a Call Option Deed was missing; no complete copy
19 of a Grant Thornton Report report referred to in Mr. Kerr's affidavit sworn on 30 October
20 2015 has been produced and there were also incomplete copies of a number of other
21 documents. It is said that some of the documents referred to were simply not produced
22 at all. (See paragraph 28 of Catchpoole 3)





1 **Legal advice privilege and confidentiality**

2 39. The General Partner also, it is alleged, has failed to produce any advice provided to the
3 Partnership, a nominal participant in these proceedings, in relation to a number of
4 matters where the Partnership, acting by the General Partner, would have been expected
5 to have acted on legal advice. A list of nine such matters is set out in paragraph 24 of
6 Catchpoole 3. The list includes (but is not limited to) the relocation of the business from
7 New Zealand to the Cayman Islands; claims made against the Partnership by creditors of
8 the NZ Fund (in particular by Wilaci); the Deed of Subscription and Adherence made with
9 MAS; and the operation of the Partnership Agreements.

10 40. The General Partner is legally required to disclose to the Petitioners any legal advice
11 provided to the Partnership that is relevant to the issues in these proceedings. No claim
12 to privilege can be made by the Partnership against its Limited Partners, a submission
13 which I here accept. The only legal privilege that the General Partner can invoke relates
14 to the provision of legal advice to the General Partner about its dispute with the
15 Petitioners.

16 41. The Petitioner submits that the legal position was set out recently by Nugee J in *Sharp v*
17 *Banking Group Plc* [2015] EWHC 2681 9 (Ch). The general rule, established in the closely
18 analogous situation of a company and its members, is that a company (here the
19 Partnership) is not allowed to claim privilege against its own shareholders (here, the
20 Limited Partners): *Dennis & Sons v West Norfolk Farmers* [1943] Ch. 220 at 222. The
21 established exception is where there is actual or threatened litigation by the
22 shareholders against the company: *Ibid at 223, Woodhouse & Co Ltd v Woodhouse*

1 (1914) 30 TLR 559. Although sometimes rationalized on the grounds of common interest
2 privilege, the correct foundation of the rule according to Nugee J. (at [9]) is that, by
3 analogy to the position of a trustee as against beneficiaries,

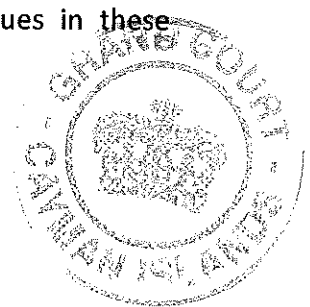
4 *“...a company taking advice on the running of the company’s affairs and paying*
5 *for it out of the company’s assets cannot assert a privilege against the*
6 *shareholders who, similarly, have indirectly paid for it.”*

7 42. Precisely the same rationale applies in the present case as between the Partnership and
8 the Limited Partners: the Partnership, through the General Partner, cannot assert a
9 privilege against the Limited Partners who have indirectly paid for the advice given to the
10 Partnership. As I have already indicated, the Court accepts this position.

11 43. Paragraph 3 of the List provided by the General Partner on behalf of the Partnership
12 objects to the production of certain documents pending an application under section 4
13 of the Confidential Relationships (Preservation) Law. The List was filed on 27 November
14 2015 according to the date stamp and it is contended the application to Court for
15 directions relating to discovery should have been made and determined long ago. The
16 General Partner has not indicated that it has applied at this stage, but this is surely
17 capable of practical resolution in the timely course of events without due complication.

18 **The Petitioners’ alleged concerns about the deficient discovery given by the General Partner**

19 44. The Petitioners contend that the General Partner’s discovery is deficient because Mr.
20 Kerr does not want to provide to the Petitioners documents relating to important aspects
21 of the conduct of the business of the Partnership that are central issues in these
22 proceedings. These documents include (paragraph 31 of Catchpoole 3):



- 1 (1) Basic financial records.
- 2 (2) Electronic communications between Mr. Kerr and others which show the manner in
3 which the business has been conducted.
- 4 (3) The records of the Partnership relating to proceedings involving or concerning the
5 NZ Partnership and the Partnership (in Cayman).
- 6 (4) The documents that show partnership capital granted to associates of the General
7 Partner for in kind distributions.
- 8 (5) Loans made to entities associated with Mr. Kerr by the Partnership.
- 9 (6) Documents that show why the audits were not completed on time.
- 10 (7) Documents relating to valuation methodology used by the Partnership but not
11 approved by the auditors.
- 12 (8) Documents relevant to the related party transactions
- 13 (9) Records and other documents that relate to the decisions of the Board, the
14 Investment Committee and the Advisory Committee.
- 15 (10) Documents that relate to the *in specie* distribution in late 2012.

16 **The Petitioner's Comments upon Evidence in Answer: Naylor 3**

17 45. Naylor 3 was served late on 18 February. The Petitioners argue that the contents of
18 Naylor 3 do not seek to address any of the concerns highlighted above: Instead, the
19 Respondents assert in general terms that the Petitioners are attempting to embark on a
20 fishing expedition.

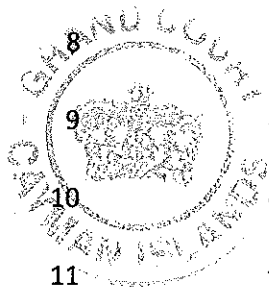
21 46. The Petitioners proceed to make the following points:



1 (1) The Petitioners have put together a compendious list of categories of documents
2 which they would have expected the General Partner to have in its possession
3 custody or power, which have not been disclosed to date and which are, on any
4 view, relevant to the matters in question in the proceedings. In response, a further
5 23 documents (13 of which are recent bank statements) have been discovered.

6 (2) Many of documents sought concerning the NZ Fund and transactions into which it
7 entered are said not to be in the possession custody or power of the General Partner
8 because the NZ GP is in receivership. It is submitted that a person who inherits an
9 operating business lock stock and barrel, such as the General Partner did here,
10 cannot possibly have done so without also taking into its possession the documents
11 that evidence all of the prior dealings of that business. If the General Partner has
12 given the documents to the receiver, the General Partner would have retained
13 copies. In relation to any documents handed over, they should have been listed in
14 Schedule 2 as having been handed over. Mr. Naylor's story is described as
15 incomplete and is not credible.

16 (3) In response to the Petitioners' request that copies of all documents recording or
17 referring to board packs, minutes and reports of the General Partners of the
18 Partnerships be provided, Naylor 3 (para 19) states that these do not exist because
19 "... the General Partner does not hold board meetings". No detail is given as to how
20 in fact the General Partner makes decisions. Whatever the decision making process
21 of the General Partner, it must have involved the production of documents. The
22 suggestion that there are none is described by the Petitioners as not credible.

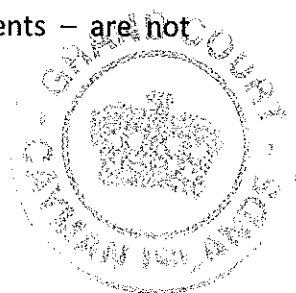


1 (4) There are sweeping claims to withhold documents on the grounds of privilege. They
2 are bad claims and no privilege attaches to the Partnership's documents other than
3 those created for the purpose of this litigation.

4 (5) Discovery of certain documents are resisted on grounds of confidentiality.
5 Confidentiality in and of itself is not a reason to withhold discovery (or inspection) of
6 documents. To the extent that the documents are caught by the Confidential
7 Relationships (Preservation) Law the General Partner must make an application
8 under section 4 of that Law. The Court reiterates that this exercise *per se* should
9 cause no practical difficulty.

10 (6) There are claims that many documents belong to "*subsidiaries*" and are not
11 therefore in the General Partner's possession, custody or power as the General
12 Partner has no legal right to them. No attempt however is made to explain the basis
13 for this claim, nor have any documents been disclosed concerning those subsidiaries
14 which would make good such claims. The Petitioners say it is not credible that (i) the
15 General Partner has made over AU\$200m of investments without there being
16 documents about them which it has kept or (ii) that the General Partner has no
17 power to obtain relevant documents from subsidiaries. For example, the General
18 Partner could not create valuations, draw up accounts or have audits without such
19 information.

20 (7) It is contended by the Respondent that the financial accounts of subsidiaries –
21 apparently entities through which the Partnership makes investments – are not



1 available to the Partnership because they are not within the possession, custody or
2 power of the Partnership.

3 (8) The resistance to producing documents that are relevant to the Petitioners'
4 allegations that there have been transactions with related parties or out of which a
5 party related to Mr. Kerr has benefited – which are at the heart of the Petition – is
6 based on the fact that the General Partner “do[es] not understand the relevance of
7 this request to the issues raised in the Petition..” Allegations have been made against
8 the General Partner that there have been related party transactions that have been
9 entered into without proper authority. As Clifford J has emphasized, however, what
10 can properly be regarded as being in the ordinary course of business of the
11 Partnership and its proper management and disposition of assets is at the core of
12 these proceedings.

13 (9) Various arrangements with admitted related parties – for example with Mr. Naylor’s
14 consultancy business and Mr. Kerr’s firm Australasian Equity Partners (GP) No. 1 Ltd
15 – are said to be undocumented, as, apparently, is the basis on which they are
16 remunerated. Those transactions ought to have been approved by the Advisory
17 Committee, but such approval does not appear to have been recorded in writing. It
18 is contended it is not credible, if such payments are claimed to be legitimate, that
19 they would not be backed by suitable documentation.

20 (10) Despite the number of transactions with related parties there is said to be only
21 one resolution of the Advisory Committee in existence and that documents
22 comprising communications of the Advisory Committee “*simply do not exist*”

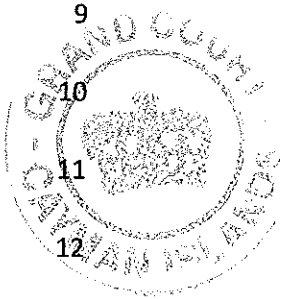
1 because "all communications of the Advisory Committee took place via telephone",
2 discussions "were not minuted" and "resolutions were not passed." The Petitioners
3 conclude that either the Advisory Committee was a sham or not operating, or there
4 must have been documents created. There must also have been written
5 communications with the auditors to satisfy them these transactions were properly
6 authorized.

7 47. The Petitioner's Supplemental Skeleton Argument includes at paragraph 12 the
8 following comment:

9 *"The Petition may be the "starting point" for the scope of discovery, but not the*
10 *end: it is usual for petitions to be elaborated by evidence and Petitioners have*
11 *filed voluminous evidence in this case. Moreover, one of the complaints in the*
12 *Petition [A/11] is "Unwillingness to Supply Information" (page 11) and many*
13 *more facts have emerged from extremely late filed accounts (for both 2014 and*
14 *2015) and from third parties."*

15 48. The Petitioners state at paragraphs 14-16

16 14. *"In any event, it is absolutely obvious from documents signed by Kerr and Naylor, the*
17 *directors of the General Partner, why the facts pleaded and put in evidence about the NZ*
18 *Partnership are relevant. They themselves say that the Cayman Partnership was*
19 *intended to be a vehicle to hold the assets of the NZ Partnership: see E/1 pages 92, 125.*
20 *The Cayman Partnership took over the assets and business of NZ Partnership: see also*
21 *2015 accounts (attached) at Note 4 on page 17. To have a trial of the petition without*
22 *considering the events in the NZ Partnership which have damaged the interests and*



1 confidence of the Petitioners and supporting investors in the General Partner and
2 Cayman Partnership would be absurd.

3 15. The two people running the general partners of each partnership are the same: Kerr
4 and Naylor. The fundamental lack of trust by the Limited Partners in these men carries
5 over from the NZ Partnership to the Cayman Partnership and their actions in the
6 previous partnership are directly relevant to the Petition.

7 16. Moreover, when the business moved from one partnership to the other, the Cayman
8 Partnership must have inherited all the books and records of the NZ Partnership.
9 Likewise, the General Partner must have acquired the books and records of NZ GP.
10 Furthermore, if in fact the NZ GP handed over the documents of the NZ Partnership to its
11 receivers, it must have kept copies. This is corroborated by the fact that the change in
12 partnerships is reflected in the 2015 accounts and that they have been audited, so that
13 there must be a proper "paper-trail" in the possession custody or power of the General
14 Partner."

15 The Respondent's Arguments

16 49. The Respondent makes the following rebuttal statement in its Skeleton Argument at
17 paragraph 5:

18 5. "Further, it is submitted that the Respondent has been placed in an unacceptable
19 position by reason of the way the Petitioners seek to pursue their case. The Petitioners'
20 pleaded case, as advanced in the Petition, is to a large extent based upon the conduct
21 and affairs of a separate limited partnership registered in New Zealand (the NZ
22 Partnership") which is not a party to the petition and is in receivership in New Zealand.



1 *The Respondents' position has from the outset been that the conduct and affairs of the*
2 *NZ Partnership cannot be relied upon as grounds for the just and equitable winding up of*
3 *the Partnership. There is also a significant disparity between the Petitioners' pleaded*
4 *case and the matters complained of in the evidence filed on behalf of Petitioners and in*
5 *particular, their evidence filed in Reply. These issues have been raised again recently in*
6 *correspondence; they inevitably impact upon the present application and are developed*
7 *below."*

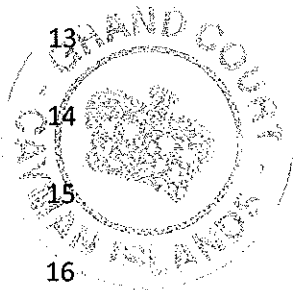
8 50. The Court is then reminded of certain dicta of Mustill L J, set out at paragraph 20:

9 *"It is submitted that the correct approach to an application for specific discovery under*
10 *O.24 r.7 is as set out by Mustill L.J. (as he then was) in Berkeley Administration Inc v*
11 *McClelland [1990] F.S.R. 381, a case decided under RSC Order 24 rule 7, which was in*
12 *almost identical terms to GCR O.24 r.7:*

13 (1) *There is no jurisdiction to make an order under R.S.C. Order 24, rule 7, for*
14 *production of documents unless (a) there is sufficient evidence that the*
15 *documents exist which the other party has not disclosed; (b) the document or*
16 *documents relate to the matters in issue in the action; (c) there is sufficient*
17 *evidence that the document is in the possession, custody or power of the other*
18 *party.*

19 (2) *When it is established that those three prerequisites for jurisdiction do exist,*
20 *the court has discretion whether or not to order disclosure.*

21 (3) *The order must identify with precision the document or documents or*
22 *categories of document which are required to be disclosed, for otherwise the*



1 *person making the list may find himself in serious trouble for swearing to a false*
2 *affidavit, even though doing his best to give an honest disclosure.”*

3 51. The Respondent continues at paragraph 21:

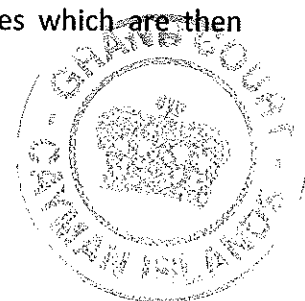
4 *21. Before responding to the individual documents or classes of documents sought by the*
5 *Petitioners, the Respondents set out their general grounds of opposition, as expanded*
6 *in turn below:*

- 7 *i. The Summons fails to comply with O.24 r.7(3) of the GCR;*
8 *ii. The Summons is misconceived insofar as it seeks documents that are not (and*
9 *have not at any time been) in the possession, custody or power of the*
10 *Respondents;*
11 *iii. The Petitioners are only entitled to the discovery of documents which are relevant*
12 *to their pleaded case and it is for the Petitioners to identify the relevance*
13 *specifically;*
14 *iv. The Petitioners fail to identify the documents or classes of documents sought*
15 *with sufficient particularity.”*

16 52. The Respondent relies upon a number of established legal principles which ~~are then~~
17 addressed at paragraph 24:

18
19 *“24. The position is settled and uncontroversial:*

- 20 *i. In Berkley Administration v McClelland it held that there was no jurisdiction to*
21 *make an order under RSC, O.24, r.7 (which is, to all intents and purposes,*



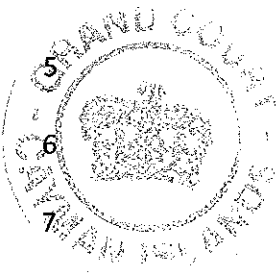
1 identical to GCR O.24, r.7) unless there was sufficient evidence before the court
2 that the particular document existed.

3 ii. In *Chandler & Ors v Water Corporation* it was held that the affidavit filed in
4 support of specific discovery application “must offer substantial assistance in
5 establishing whether the particular documents to which the application refer
6 exist...” (emphasis added)

7 iii. In *Embassy Investments Limited v Ascot Corporate Name Limited and Twelve*
8 *Others Henderson J* held that:

9 “[The] affidavit satisfies the requirement of order 24 Rule 7(3), i.e., he
10 does assert under oath a belief that the respondents have the requested
11 document. That, however cannot be the end of the matter. There must be
12 some evidence, apart from the subjective opinion of the applicant, which
13 gives the court reason to believe that the document exists. In other words,
14 compliance with Rule 7(3) is necessary but not dispositive. The applicant
15 carries a limited burden of showing objectively that there is reason to
16 believe the requested document exists and that it is or has been in the
17 possession, custody or power of the respondent. If the rule were
18 otherwise, Order 24 Rule 7 could become a supposed justified for
19 meritless and abusive applications.”





1 iv. *The Cayman Islands has adopted the same approach. In *Tasarruf Mevduati**

2 *Sigorta Fonu v Wisteria Bay Limited, Utterton Limited, Abdullah Ibrahim Abdullah*

3 *Al-Ayed and Registerar of Shipping, Smellie J held at paragraph 19 that:*

4 *“There is a well-established rule that a statement by a party that he has*

5 *disclosed all relevant documents that are or have ever been in his*

6 *possession, custody or power, is at an interlocutory stage at least,*

7 *conclusive and not susceptible to challenge in the absence of compelling*

8 *and stark evidence that such a statement be false.”*

9 53. Applying the law to the facts the Respondent then invites the Court to draw this

10 conclusion at paragraph 25:

11 *“25. The Summons faces an insuperable hurdle in so far as the Respondents*

12 *have stated, in the second and third Affidavits of Russell Naylor, that documents*

13 *do not exist. It is submitted that where that is the Respondents’ position, that is*

14 *the end of the matter, because the Petitioners have failed to explain why, with*

15 *reference to evidence other than the subjective opinion of the applicant, the*

16 *document does exist. To adopt the terminology of Smellie J. there is no*

17 *compelling and stark evidence demonstrating that the Respondents’ position on*

18 *disclosure is false.”*

19

20

21 54. With great respect and in light of the evidence taken as a whole, the conclusion proposed

22 is one that this Court is unable to accept. There is at this stage of the proceedings reason

1 to believe that the requested documents do exist. In that regard, I adopt and approve the
2 detailed reasoning put forward by the Petitioners as to why this is so.

3 **The Scope of Discovery**

4 55. It is a requirement of O.24 r.7 for an applicant to show that the document or class of
5 documents applied for relates to one or more of the matters in question in the cause or
6 matter. The *"train of enquiry"* test as propounded in *Peruvian Guano* is of general
7 application.

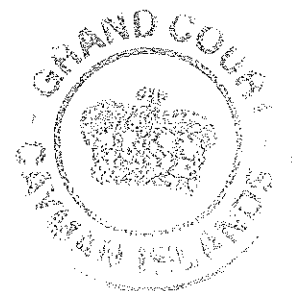
8 In *Campagnie Financiere et Commerciale du Pacifique v Peruvian Guano Co.* (1882) 11
9 QBD 55 Brett J. states at page 63:

10 *"It seems to me that every document relates to the matters in question in the*
11 *action, which not only would be evidenced upon any issue, but also which, it is*
12 *reasonable to suppose, contains information which may- not which must – either*
13 *directly or indirectly enable the party requiring the affidavit to advance his own*
14 *case or to damage the case of his adversary."*

15 56. The Court accepts entirely that discovery should not be permitted to enable applicants to
16 embark upon an expensive and unnecessary fishing expedition.

17 57. However, as the Petitioners point out, an unwillingness to supply information is indeed
18 one of the complaints in the Petition.

19 58. Furthermore, as the Petitioners also point out, the Petition may be *"the starting point"*
20 for the scope of discovery, but not the end: It is usual for Petitions to be elaborated by
21 evidence.



1 59. Finally in this regard there is Clifford J's own evaluation that there are serious issues to
2 be tried in this case in respect of a number of matters including the proper management
3 of the partnership and the disposition of assets.

4 60. For these reasons the Court concludes that it is in the interests of justice that further
5 discovery should be permitted in accordance with the *Peruvian Guano* principle.

6 61. In light of this conclusion the Court will make the Orders in terms of the draft version of
7 the Orders submitted by the Petitioners, subject to one qualification.

8 62. The further list of documents to be made together with a comprehensive affidavit should
9 be provided within 21 days of the Orders and not within 14 days.

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Robin McMillan
The Hon. Mr. Justice Robin McMillan
Judge of the Grand Court

