IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NOs: 322 of 2020 (RPJ)
141 of 2021 (RPJ)
52 of 2022 (RPJ)

BETWEEN:

NEOMA MANAGER (MAURITIUS) LIMITED,
in its capacity as the manager of
NEOMA PRIVATE EQUITY FUND IV L.P.

Plaintiff

AND:

(1) ABRAAJ ABOF IV SPV LIMITED
(2) MARK LONGBOTTOM AND
GEOFFREY VARGA, AS TRUSTEES
OF THE CREDITORS OF MEMBERS
OF ABOF IV FUND INVESTOR
LIMITED, DISSOLVED
(4) COLUMBUS VENTURES LIMITED (acting by its joint receivers, Mark Shaw and Russell Smith)
(6) MENA VEHICLE LIMITED (acting by its joint receivers, Mark Shaw and Russell Smith)

Defendants

AND: **ABRAAJ GENERAL PARTNER VIII LIMITED,**
in its capacity as the general partner of
NEOMA PRIVATE EQUITY FUND IV L.P.

Additional Defendant

Appearances:	Ms Clare Stanley KC instructed by Mr. Barnaby Gowrie and Mr. Blake Egelton of Walkers (Cayman) LLP on behalf of the First Defendant Mr Sebastian Said and Mr Daniel Coelho of Appleby (Cayman) Ltd on behalf of the Fourth and Sixth Defendants Ms. Sue Prevezer KC instructed by Mr. James Kennedy, Mr. Mark Russell, and Ms. Alexandra Murphy of KSG on behalf of the Plaintiff and Additional Defendant
Before:	The Hon. Justice Raj Parker
Heard:	6 & 7 February 2023
Date of Decision:	10 March 2023
Draft Judgment Circulated:	27 February 2023
Judgment Delivered:	10 March 2023

HEADNOTE

Calculation of limited partners' capital account balances - s.22 Exempted Limited Partnership Act (as amended) - Observations as to compliance with s.22 ELPA - Application for summary judgment - Application for case management directions - The order in which applications are to be considered.

Introduction

1. Abraaj ABOF IV SPV Limited ("D1") is a limited partner in the Neoma Private Equity Fund IV L.P. (the "Fund" or "Partnership"). Columbus Ventures Limited ("D4") and Mena Vehicle Limited ("D6") are also each limited partners in the Partnership.

2. The Additional Defendant to D1, D4 and D6's Counterclaims in litigation before this Court is Abraaj General Partner VIII Limited (the "GP"), the general partner of the Partnership.

3. Between 24 September 2008 and 13 July 2019, the manager of the Partnership was Abraaj Investment Management Limited ("AIML"). AIML also acted as the investment manager of the Abraaj Group and was responsible for the management of all of the funds of that group.

4. In 2018, certain financial irregularities were identified in the Abraaj Group and regulatory proceedings in Dubai and the US have followed. Certain former directors of the GP have faced and are facing allegations of serious wrongdoing.

5. Abraaj Holdings Limited ("AH"), the parent company of the Abraaj Group, was placed into provisional liquidation on 18 June 2018. AIML was placed into provisional liquidation on 18 July 2018. AH and AIML were placed into official liquidation on 11 September 2019.

6. On 14 July 2019, the Plaintiff, Neoma Manager (Mauritius) Limited (the "Manager"), was appointed as the new manager of the Partnership. An Amended and Restated Limited Partnership Deed ("LPA") was concluded on 14 July 2019.

7. The AH Joint Official Liquidators ("AH JOLs") have concluded that the Abraaj Group was effectively operated as a single entity with little regard for the separate corporate personality of the various companies within the Abraaj Group, including the Partnership. The Manager was appointed against the backdrop of the Abraaj Group's collapse and serious allegations of fraud and mismanagement.

8. Pursuant to the new LPA, the Manager was charged with determining each limited partner's 'Capital Account Balance'. Under clauses 11.1 (h) and 11.1 (h) (iii), the Manager undertakes "*as soon reasonably practicable following the date of this Deed*" to provide or procure the provision to each limited partner of "*all relevant supporting documentation*". There is now litigation between the Manager as Plaintiff and D1, D4 and D6 (and D2) as Defendants in FSD 322 of 2020 (the "CAB proceedings"). The Manager is an entirely new entity and has no financial incentive or interest in the outcome of the CAB proceedings.

9. Clare Stanley KC appeared for D1. Sebastian Said appeared for D4 and D6. Sue Prevezer KC appeared for the Plaintiff and Additional Defendant.

D1's Capital Account Balance

10. On 27 May 2020, the Manager reissued the limited partners' Capital Account Balances, following which D1, along with 25 other limited partners representing approximately 30% of all limited partners, disputed the accuracy of the Manager's calculations.[1]

11. In the case of D1, the Manager concluded (D1 says wrongly) that D1 had not made any of its capital contributions. The consequence was that D1's Capital Account Balance was negative (-US11.9 million), meaning that D1 has no economic interest in the Partnership.

12. D1 alleges (in its Defence), among other matters, that the Manager's calculation was fundamentally flawed not least because the Manager ignored the reality of the way that the Abraaj Group as a whole was operated. In addition, D1 also alleges that although the Manager had possession of some 300,000 documents, it failed to review at least 231,000 (77%) of them.

13. D1 contends that it was always the position that further time and information was required to properly calculate D1's Capital Account Balance and that the Manager's calculation and issuance of the Capital Account Balances following its appointment was premature.[2]

14. In accordance with the machinery under the LPA, D1 issued an 'Adjustment Notice' on 21 October 2020, which triggered a review period whereby the Manager and D1 could seek to reach agreement on D1's Capital Account Balance.

15. No agreement was reached, and the Manager issued the CAB proceedings on 23 December 2020 to seek declarations as to the accuracy of its calculations.

16. On 6 August 2021, D1 issued its counterclaim against the Manager and the GP (as an Additional Defendant),[3] seeking relief under s.22 of the Exempted Limited Partnership Act (as amended) (the "ELPA").

17. As against the GP, the counterclaim seeks an order pursuant to s.22 of the ELPA that the GP "*do forthwith provide to the First Defendant true and full information regarding the state of the*

[1] *All but 4 limited partners have agreed to their opening account balances: Russell 1 in FSD 322 of 2020 at § 34.*
[2] *Hutchison 1 in FSD 322 of 2020 at §§ 27 to 53; Shaw 1 at § 12.*
[3] *Since the GCR do not expressly allow a counterclaiming defendant to apply for summary judgment against anyone other than the Plaintiff, D1 issued fresh proceedings against the GP seeking information under s. 22 ELPA.*

business and financial condition of the Partnership", including a list of specific classes of documents in particular which related to the calculation of D1's Capital Account Balance.

D4's and D6's Capital balances

18. D4 and D6 are also each limited partners in the Partnership. D4 and D6 act via their Joint Receivers who were appointed by Société Générale SA ("SocGen"). SocGen advanced a loan of US$100 million to AH on 24 September 2014, drawn down in full, on the security of D4's and D6's interests in the Partnership and allegedly on the strength of representations by the GP that D4 and D6 had fully paid up all of the drawdowns requested as at 22 September 2014.

19. D4 and D6 say that the GP provided signed extracts of the Partnership's register, to prove compliance with the standard secured finance obligation that the security interests in the form of D4's and D6's Partnership stakes were fully paid-up. D4 and D6 say that it is particularly unsatisfactory that the same GP, having induced SocGen to lend to AH on the basis that their stakes were fully paid-up, should now contend (as it does in the CAB proceedings through its new Manager) that there is no evidence that the stakes were ever funded at all. They make similar counterclaims in respect of s.22 ELPA.

The summary judgment applications

20. D1 by summons filed 4 April 2022 , D4 and D6by summons filed 3 March 2022, now apply for summary judgment on their counterclaims under s.22 of the ELPA against the GP and for summary judgment against the Manager under clauses 5.1(h) and 11.1(h)(iii) of the LPA against the Manager.

21. The order sought by D1 is (*inter alia*) for declaratory relief as to D1's entitlement under s.22, and for the provision of "*true and full information regarding the state of the business and financial condition of [the Partnership]"* (the "s.22 Information").

22. D1 contends that notwithstanding numerous demands having been made by D1 under s.22 for many months, both the GP and the Manager have refused to comply with those demands, and none of the s.22 Information has been forthcoming.

23. The s.22 Information D1 requires, it says, will include a large number of documents, but it will go further than just documents; it will require the GP (and therefore its agent, the Manager) to provide "*information*", which will include explanations and answers to certain questions which have been put by D1 in its s.22 requests.

24. D1 also says that the s.22 Information which has been sought is wider than just information as regards the calculation of the Capital Account Balances. The s.22 Information as sought is "*true and full information regarding the state of the business and financial condition*" of the Partnership.

25. D1 says it follows that documents and information regarding the Manager's calculation of the Capital Account Balances are likely to be included in the s.22 Information when it is provided by the GP.

26. D1 says whilst it is possible that some documents which are relevant only to the calculation of the Capital Account Balances will not be included in the s.22 Information as provided because the GP might say that those documents do not concern the "*state of the business and financial condition of the Partnership"*, those additional CAB documents will fall to be disclosed by the Manager in its discovery in the CAB proceedings, albeit that they will not have been disclosed under s.22.

27. D1 says there is likely to be a large number of documents in the s.22 Information which have little or no relevance to the calculation of the CAB. These non-CAB documents will not fall to be disclosed by the Manager in its discovery in this action but must be disclosed by the GP under s22.

28. D4 and D6 support D1's arguments for summary determination of the entitlement to s.22 Information and say the issues raised concern questions of law, the contractual and statutory entitlements are clear, and are already the subject of prior (and clear) authority in this Court, and the documents and information sought are of critical importance to their ability to plead a full defence. They echo D1's case that the GP and the Manager have both given no satisfactory answer as to why the documents and information sought has not been provided and that the GP and the Manager have no real defence to D4 and D6s' counterclaims.

Should discovery in the CAB proceedings await the outcome of the summary judgment applications?

29. The first issue which arose was in relation to the hearing and determination of a directions summons filed by the Manager on 27 May 2022 some months after the s. 22 summonses were issued and listed for hearing at the same time. The GP and the Manager argued that the summary judgment applications should be adjourned to allow discovery to take place in the CAB proceedings and if it then transpired that D1, D4 and D6 were of the view that there were documents which fell within s. 22 that ought to have been provided but were not, they could then bring their applications under s.22.

30. D1, D4 and D6 say that the issuance of the directions summons is consistent with the tactical approach that the Manager and the GP have adopted to addressing their obligations under s.22 ELPA and the LPA. They say that they have sought to wrap those issues into the Manager's general discovery obligations in the CAB proceedings so as to limit the their access to information at the outset of the proceedings and make the costs of providing documents costs of the proceedings (rather than costs of the Fund).[4]

31. The GP and the Manager say[5] that the Manager has obtained data from three sources: AIML under the control of the AIML Joint Official Liquidators; the Fund's limited partners; and the GP including documents provided to the GP by the AIML Joint Official Liquidators. They say that they have made several good faith efforts to resolve the summary judgment applications and that D1's and D4/D6's rejection of those efforts demonstrates that the current application is tactical and a renewed effort to delay the litigation.

32. They also say that vast quantities of documents have already been provided by the Manager and the GP, either voluntarily or in response to particular requests. Those documents (listed in Schedule 1 to the Statement of Claim) include all Fund bank statements within the control, possession or power of the Manager and the GP, all iterations of the Partnership Register within the control, possession or power of the Manager and the GP, all drawdown notices for D1, D4 and D6 within the control, possession or power of the Manager and GP, and copies of the Partnership's general ledger from inception to 31 March 2019 (being the relevant date for the purposes of the Opening Capital Account Balances). The GP and the Manager say that the summary judgment applications ought never to have been brought and that they have complied with their obligations under s.22.

33. They also say that they have already provided full information as to the Partnership business, that certain documents or information are not within their control, and that some categories of documents fall outside the ambit of s.22. They say the summary judgment applications are misconceived and should be dismissed. Moreover, they argue that they have made practical proposals which effectively provide or offer to provide the material that D1, D4 and D6 say they are entitled to.

[4] *See §11.1(o) LPA.*
[5] *See Russell 1 §§27-28.*

Determination

34. The Court is of the clear view that the resolution of the directions to trial in the CAB proceedings will not dispose of the important issues raised in the summary judgment applications. It is relevant in this regard to note that s. 22 ELPA entitles D1, D4 and D6 to true and full information (and not just documents) regarding the state of the business and financial condition of the Partnership, which is an obligation that goes wider than the discovery obligations in the CAB proceedings. As "*information*" is wider than documents, the obligation must also in the Court's view logically extend to making requests of third parties.

35. In the Court's assessment, the summary judgment applications need to be determined now. As the Court indicated to the parties at the outset of the hearing of this matter, directions on disclosure or a timetable to trial in the CAB proceedings cannot fairly be given until the summary judgment applications are determined. It may be that the core factual issues in the CAB proceedings as presently constituted are relatively narrow. However, one cannot judge what the ambit of the issues will be assuming the summary judgment applications are granted.

36. It is therefore more efficient and just in the Court's judgment to deal with them first as the outcome may inform the issues in dispute in the CAB proceedings, and so affect the scope of discovery to be given in the litigation.

37. It would be unsatisfactory for the parties to carry out a discovery exercise in the CAB proceedings, and then revisit the case on any new issues raised by information provided under s .22 (assuming it was so ordered). It would also be particularly unfair to D1, D4 and D6 to progress to discovery in the CAB proceedings without full information (to which they are entitled under statute as limited partners in the Partnership) being provided.

38. If the Court rejected the applications for summary judgment under s.22 that matter can proceed to trial.

39. If the Court acceded to the applications, the s.22 Information would have to be provided and reviewed by D1, D4 and D6. Directions can then be made in the CAB proceedings on a basis where D1, D4 and D6are much better informed.

40. As is well known, a limited partner does not have to commence proceedings in order to be provided "*full information*" as to the Partnership business run on its behalf. It simply has to make a demand of the GP. If that demand is not satisfied it may then make an application to the Court.

41. Discovery in the CAB proceedings is not likely to be an answer to a limited partner's request to enforce its statutory and contractual information rights. Discovery in litigation requires the disclosure of documents (and not information) which are or have been in the party's possession custody or power and is restricted to matters in issue in the action. The obligation to give "*true and full*" information "*is not a process of disclosure (like that under the CPR)"*.[6]

42. Further, a s22 ELPA right is a substantive legal right, not a procedural right. It exists independently of and in addition to the procedural rights afforded to the parties under the GCR in the context of discovery. The granting (or not) of summary judgment involves a determination of the parties' substantive legal rights. It is not a case management decision, and should not ordinarily be influenced by case management considerations.[7]

The test for summary judgment

43. The test for summary judgment is straightforward and is contained in GCR Ord 14, rr. 1 and 5. Rule 1 provides:

> "*Where in an action to which this rule applies a statement of claim has been served on a defendant and that defendant has given notice of intention to defend the action, the plaintiff may, on the ground that the defendant has no defence to a claim included in the writ, or to a particular part of such a claim, or has no defence to such a claim or part except as to the amount of any damages claimed, apply to the Court for judgment against the defendant.*"

44. The words "*has no defence*" have been interpreted as requiring the claimant to demonstrate that the defendant has no defence with a real prospect of success, as confirmed by the Cayman Islands Court of Appeal in *Walkers v Arnage Holdings Ltd.*[8]

45. As to the proper approach to such applications, the Court should not allow such applications to take the form of mini trials on extensive facts.

46. However, where an application gives rise to "*a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the*

[6] See *Inversiones Frieira SL v Colyzeo Investors II LP [2012] EWHC 1450 (Ch) (Inversiones 2) at § 7.*
[7] See *Arnage v Walkers (CICA, 1 February 2021, unreported)* at §17.
[8] Ibid at *§12.*

question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it": see *Easyair Ltd (t/a Openair) v Opal Telecom Ltd.*[9]

The ELPA

47. Section 22 of the ELPA provides:

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

48. The terms of the LPA do not in this case displace or substantially restrict the s.22 ELPA right. The parties did not agree to change the depth and width of the statutory obligation in any material respect.

49. As noted above, a limited partner may make a relevant "*demand*" of the GP. Once that demand is made, the GP is then under an obligation to provide the requested material provided it falls within the wide ambit of the section.

50. The entitlement is to "*true and full information"* regarding "*the state of the business and financial condition of the exempted limited partnership*".

51. The entitlement is in reality to be put on 'a level playing field' with regard to information. It arises from the GP's position as agent and fiduciary of the Partnership and, since the exempted limited partnership has no separate legal personality, as agent of each of the limited partners. The GP also holds the assets of the Partnership on a statutory trust and is, as trustee, under an obligation to account to the limited partners. By s.14 of the ELPA, the limited partner is prevented from taking part in the conduct of the business. By s.16 of the ELPA, all rights or property of the Partnership which is held on behalf of the GP or in the name of the Partnership is deemed to be held by the GP upon trust as an asset of the Partnership.

Section 21

52. Section 21 of the ELPA also obliges the GP to keep or cause to be kept "*proper books of account, including, where applicable, material underlying documentation"*, extending to records of all sums

[9] *[2009] EWHC 339 (Ch)* at *§15* per *Lewison J.*

of money received or expended by the Partnership, of all matters relating to expenditure, and of all its assets and liabilities.

53. Moreover, proper books of account shall not be deemed to be kept if there are not kept "*such books as are necessary to give a true and fair view of the business and financial condition of the exempted limited partnership and to explain its transactions."*

Relevant authorities

54. These sections of the ELPA have been considered recently by this Court in the *Dorsey Ventures* [2019 (1) CILR 249] ("*Dorsey*") and *Port Fund*[10] cases.

55. In *Dorsey*, Mangatal J considered an argument that a limited partner's rights to information under s. 22 ELPA were limited or superseded by the contractual information rights contained in the limited partnership agreement. Those contractual rights were limited to a right to request accounts and updates within a reasonable period.[11]

56. Mangatal J did not accept the argument that the contractual rights ousted the statutory ELPA right. She held that the s.22 ELPA right was general and unqualified, and was qualitatively different from the specific rights granted under the limited partnership agreement.

57. She held that although the limited partnership agreement in that case provided for and addressed the provision of accounts, that was not the same thing as the topic dealt with under s.22 of the ELPA, which is the limited partner's right to demand and receive from a general partner "*true and full information*". This was "…*wide and encompasses more than accounts, audited and unaudited*".[12]

58. *Dorsey* was considered and followed in *Port Fund* (Parker J) where it was held at §§ 83-84 that it was necessary to adopt a "*plain and natural reading of [s.22 ELPA]"*. The plain language of the section provided for wide information rights, and that this made "*logical commercial sense*" because the general partner was the limited partner's agent and, indeed, the limited partners had paid for all of its activities.[13]

[10] *Gulf Investment Corporation and others v the Port Fund and Port Link GP (Grand Ct, 16 June 2020)* per *Parker J.*
[11] Ibid *§33.*
[12] Ibid *§37.*
[13] Ibid *§ 8*5.

59. At §§ 86 and 87 the Court said:

> *"[S.22 ELPA] is a very wide unqualified provision and will include all of the books and records maintained by the General Partner pursuant to the statutory obligation imposed on it under [s.21 ELPA]. However, it is wider than [s.21 ELPA] as it requires information to be provided, not just documents, and the information needs to be 'true and full', not 'true and fair' as is the case under [s.21 ELPA], which only deals with books and records of account*".
>
> *"It is only if there is a proper basis for contending that any of the categories of information demanded fall outside the operation of [s.22 ELPA] that the Plaintiffs claim would fail. That would only be in cases where it is clear that the information sought did not relate to the business and financial affairs of the partnership, which is a very wide target to aim at".*

60. There had been a previous decision of the English court which is also relevant to consider: *Inversiones Friera SL v Colyzeo Investors II LP [2012] 1 BCLC 469 (Norris J).* This was a case in which two limited partners in a collective investment scheme sought access to documents from the scheme's investment manager, who acted as delegee of the general partner's powers. Specifically, and further to a fall in the value of the scheme's investments, they sought disclosure of certain classes of document concerning the investments made on the partnership's behalf.

61. The claimants relied on s.6 of the Limited Partnerships Act 1907 (the "1907 Act"), which on its terms is narrower than s.22 of the ELPA. The claimants also relied on the terms of the partnership deed and management agreement that permitted inspection of the partnership "books" which are in similar terms to the LPA on which D1, D4 and D6 rely in this case. The claim was issued under the Part 8 procedure in England. The issue was whether the limited partners' admitted rights to inspect the partnership books extended only to its "*books of account*" (as the manager alleged) or encompassed "*all books and records of [the partnership] that concern the investments made"* (as the partners alleged).

62. Summarising the conclusions of Norris J at § 23, I derive the following guidance from this case:

    i) A limited partnership is a partnership, and every partner has a right to disclosure by his co-partner of true accounts and full information as to all matters relating to the partnership dealings and transactions.

ii) The manager was under a duty to maintain books of the Partnership, and that record was meant to be a record of "*the partnership's business and affairs sufficient to enable a partner, whether general or limited, with access to it to examine into the state and prospects of the partnership business*".

iii) If the manager (as delegee of the general partner) had failed to maintain records of all information necessary for recording the partnership business, then "*the limited partners must see the primary documents from which such books of the partnership would have been prepared*". They are also entitled to see underlying documents establishing the existence of assets or liabilities.

iv) The limited partners were also entitled to see the documents which support the valuations of the partnership investments and, if those valuations were based on the manager's own data, to see that underlying data: "*It is not possible to understand the state of the partnership business… without understanding the robustness of the attributed values and to what matters they may be sensitive*".

v) All materials and advice produced by the manager and paid for by the partnership, or for which the manager was paid as part of its remuneration *qua* manager, should in principle be available to the limited partners so far as they relate to the partnership business. That extends to reports and minutes of meetings between the general partner and manager.

63. Following disagreement between the parties as to the scope and effect of the judgment, Norris J handed down a further judgment addressing matters arising out of the first judgment *("Inversiones 2").*[14] In this further judgment, he "*took the view that, in general, if it would be necessary or advantageous for the general partner or its delegate to rely on a document to establish rights as against a third party or to determine rights as between the members of the partnership themselves, then the document should be available for inspection by the limited partners"*.[15] He also noted that the limited partner could not make requests without reference to some practical advantage in understanding the partnership business.

Determination

64. Although this case arises against the backdrop of the Abraaj Group collapse and fraud allegations, the Court notes that the present Manager was not involved in any wrongdoing in the Abraaj Group which occurred before it was appointed, and has no vested interest in the outcome of the CAB

[14] *Inversiones Frieira SL v Colyzeo Investors II LP [2012] EWHC 1450 (Ch).*
[15] Ibid *§4.*

proceedings. It also notes that the GP, is now run by 'neutral' management and that it inherited a situation where complete documents were not available. The - Partnership is apparently in run off and not actively recruiting new investment.

65. The LPA was not substantively amended notwithstanding this inherited situation of incomplete records. Clauses 11.1(h)(ii) and (iii) of the LPA only modify to a small degree but do not restrict the scope of the s. 22 ELPA right.

66. Doubtless the exercise has been a difficult and resource intensive one for the GP and the Manager who have had to patch together information from various sources.[16] The Court also notes that other limited partners have agreed their CAB positions.[17] Whilst not minimising the effort required to satisfy the obligation, none of these matters can be properly said to affect the entitlement of D1, D4 and D6 to true and full information.

67. Ms Prevezer KC submitted that there is no real dispute between the parties as to the scope of the entitlement that D1, D4 and D6 have to true and full information. That may be right at a high level of principle, but it has not resulted in anything close to an agreement on a number of issues.

68. Indeed the Court does not accept having reviewed the pleadings and evidence[18] in this case and carefully listened to the submissions of Ms Prevezer KC on behalf of the GP and the Manager, that full information has been provided, or has been offered to be provided to these Defendants.[19]

69. The GP and Manager have taken the position at various times that the limited partners were not entitled to the information they have requested, that their requests were unreasonable and/or disproportionate, that they did not have and could not obtain the information, that some categories of documents fell outside the ambit of s.22, and as outlined above that D1, D4 and D6 would receive sufficient information in discovery in the CAB proceedings in any case.

70. The Court does not accept the suggestion that these applications have been brought to delay the CAB litigation or because D1, D4 and D6 simply do not like the answers contained in the information given to date.

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[16] See *Russell 1 in FSD 322 of 2020 at § 28.*
[17] See *Russell 1 in FSD 322 of 2020 at §§30-34.*
[18] *Hutchison 1 and 2 in FSD 322 of 2020; Russell 1 and 2 in FSD 322 of 2020; Fariba 1 in FSD 322 of 2020; Shaw 1 and 2 in FSD 322 of 2020.* The Court was also referred to transcripts of meetings and four video presentations given by the Manager in 2020 and the Explanatory Note provided by the Manager.
[19] The Court has carefully reviewed the Plaintiff's written argument dated 30 January 2023 at §§5.4 and 5.5 and schedules A and B referenced therein.

71. The Court has formed the clear view that they have been properly brought by D1, D4 and D6 after many months of wrangling over the scope of the entitlement and the practicalities of complying with it.

72. On analysis there is no reasonably arguable defence to the declarations and judgment sought. The GP and Manager have not persuaded the Court that there are plausible arguments that there are legal and/or factual issues which arise on this application that will require a trial to determine them. In keeping with other Courts faced with similar issues, (*Dorsey* and *Port Fund* proceeded by way of Originating Summons and *Inversiones*, by way of a Part 8 claim) a summary determination can and should be made.[20]

73. In this case the determination of rights under statute (the ELPA) and the construction of an LPA are points of law which do not require a trial. The applications do not require a trial to determine what documents and information have been provided, what documents and information are within the Manager and the GP's possession, custody and control, and whether the explanations that have been provided to date fulfil the statutory obligation.

The way forward

74. The Court is persuaded that there is a pragmatic purpose to the relief sought. Once the legal framework has been made clear, the Court expects the parties to work more collaboratively and constructively to agree a sensible way forward as to the provision of information than has been the case to date, and in accordance with the Overriding Objective.

Observations

75. The Court makes the following observations to assist the parties in reaching an agreement for the provision of information.

a) The economic owners of the Partnership (the limited partners) who have paid for all of the business activity undertaken on their behalf by the GP and its delegates are each entitled to true and full information. The GP is in a fiduciary position and acts as trustee for the interests of the limited partners. The GP owes fiduciary duties to the limited partners. The business and affairs of the Partnership are managed exclusively by the

[20] *Inversiones Friera SL v Colyzeo Investors II LP [2012] Bus LR 1136 § 19.*

GP and its delegates for and on behalf of the limited partners. As is evident, the limited partners are not entitled to participate in the management of the business under the terms of the LPA and the ELPA and so have limited visibility into its affairs.

b) Section 22 of the ELPA seeks to address the imbalance of information which arises. In this case, the parties have not substantively excluded or modified the application of s.22 (as they could have done under the LPA) and are to be held to its plain meaning and effect.

c) The limited partners will not have information concerning the day-to-day operations and business activities of the Partnership, unless they are provided with it. However, the Court, following Norris J's reasoning in *Inversiones 2*, is not prepared in the abstract to say that there are no practical and purposive boundaries built into the statutory right. It may be that such boundaries could be drawn if it was in the interests of justice to do so. But it is a free standing statutory right.

d) A limited partner's ability to exercise its s. 22 ELPA right is not impacted by its motives or the intended use of the documents. However, the Court expects the parties to conduct litigation reasonably and efficiently in accordance with the Overriding Objective. In the context of the counterclaim in the CAB proceedings, the Court expects the information will go principally (but not exclusively) to the issues concerning the business managed on behalf of D1, D4 and D6 which will assist them to properly defend the CAB proceedings. However, the obligation is wider than the presently pleaded issues in the CAB proceedings. The limited partners are entitled to the same information that is available to the GP concerning the business and financial affairs of the Partnership in this regard so that they may be properly informed as to what has been done on their behalf.

e) Where, as in this case, the GP has undertaken an assessment relying upon supporting documentation and internal data or information, the limited partners are entitled to that information to allow themto understand that assessment properly. The Partnership's records were incomplete at the time that the Manager took over from AIML, and there was missing information in respect of the drawdown requests. It is therefore important that the underlying materials are provided so that the limited partners can be properly informed. If judgment calls have been made by the GP and/or the Manager in circumstances where there are discrepancies or incomplete information, that should be identified and explained. If the information is mixed up or mingled or hard to identify,

this is not a reason to refuse to provide it to D1, D4 and D6. The GP and/or the Manager, if they cannot find a solution to that type of problem, should err on the side of 'over provision' rather than 'under provision' so that D1, D4 and D6 may receive the full picture and if necessary sift the information for themselves.[21]

f) Similarly it may be necessary to create a document, for example a schedule, in order to satisfy the obligation to provide true and full information. It is to be noted that the obligation is an ongoing one.

g) To satisfy the obligation the GP may also, where necessary, have to seek to obtain material from the Manager and relevant third parties. Where it can be obtained reasonably upon request without steps being taken at disproportionate expense it should be obtained.[22]

h) There is no requirement in s.22 for the information to be in the possession of the GP. The GP may have a legal right to require material which is not in its possession. If it does not, it should make all reasonable efforts to try to obtain material from third parties in order to fulfil the obligation.

i) There should be no difficulty in the GP obtaining the Manager's documents and records which relate to the Partnership which it will be entitled to as principal. Further, pursuant to the LPA, the Manager has the obligation (under clauses 5.1 (a) and 5.2 (a) (xii)) as the delegate and lawful attorney of the GP to maintain the Partnership's records and books of account. Working papers would also be included.[23]

j) The GP (working in conjunction with the Manager) will therefore have to search for and produce documents and information to the extent such information exists and has not already been provided. It is no answer to say that the Partnership would thereby expend significant time and resources answering the requests of only a few limited partners in this case who have not agreed their capital account balances. As the court has made clear, D1, D4 and D6are entitled to full information which goes wider than the issues in the CAB proceedings. What is required to fulfil the obligation to provide

[21] See *Equitas v Horace Holman [2007] EWHC 903 Comm. At § 27 citing Colman j in Yasuda v Orion [1995] QB at 174 p .191F.*
[22] *Inversiones 2 at §32.*
[23] *Port Fund ibid at §104.*

'full information' will vary from case to case depending on the circumstances and the test as Mr Justice Norris indicated in *Inversiones* is essentially a functional one.

k) It is of course self evident that if material does not exist the GP and/or the Manager cannot conjure it up out of thin air. Material already provided can be excluded from any Order drawn up by the parties. It seems to the Court that the GP and/or the Manager should, in such circumstances, explain what searches have been conducted and why it is not possible to retrieve or find the relevant information.

Conclusion

76. Neither the GP nor the Manager have a triable defence to the claims made against them respectively in the counterclaims advanced by D1, D4 and D6. The Manager and GP should perform their obligations under the LPA and the GP should perform its obligations under the ELPA. The relief sought in the summonses will be granted. There are practical benefits in the information being made available to D1, D4 and D6 as soon as is reasonably practicable. The Plaintiff's and Additional Defendant's summons for directions in the CAB proceedings is adjourned with liberty to apply.

77. There should be a stay of the CAB proceedings for a period of three months following receipt of the information provided pursuant to the Orders made, in order to give D1, D4 and D6 an appropriate opportunity to review the material. The parties may then apply to Court for directions as necessary.

78. The parties should draw up and agree the relevant Orders which reflect this judgment.

79. D1, D4 and D6's respective costs of and incidental to the summary judgment applications shall be payable by the Manager and the GP to be assessed if not agreed. There is to be no order on the costs of the adjourned summons for directions in the CAB proceedings.

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