



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CAUSE NO. FSD 236 OF 2020 (RPJ)**

**B E T W E E N**

**(1) KUWAIT PORTS AUTHORITY**

**(on its own behalf and on behalf of The Port Fund L.P.)**

**(2) THE PUBLIC INSTITUTION FOR SOCIAL SECURITY**

**(on its own behalf and on behalf of The Port Fund L.P.)**

**(3) THE PORT FUND L.P.**

**Plaintiffs**

**and**

**(1) PORT LINK GP LTD. (IN RECEIVERSHIP; IN VOLUNTARY LIQUIDATION)**

**(2) MARK ERIC WILLIAMS**

**(3) WELLSRING CAPITAL GROUP, INC**

**(4) KGL INVESTMENT COMPANY ASIA (IN VOLUNTARY LIQUIDATION)**

**(5) GOLDEN SHAHIN GENERAL TRADING & CONTRACTING COMPANY**

**(6) APACHE ASIA LIMITED (A HONG KONG COMPANY)**

**(7) RONALD HENRY AYLIFFE**

**(8) KGL INVESTMENT COMPANY K.S.C.C.**

**(9) APACHE ASIA LIMITADA (A MACAO COMPANY)**

**Defendants**

**and**

**(1) GORDON MACRAE**

**(2) ELIZABETH MACKAY**

**(in their capacity as joint receivers of Port Link GP Ltd)**

CAUSE NO. FSD 97 of 2021

- (1) KUWAIT PORTS AUTHORITY  
(on its own behalf and on behalf of The Port Fund L.P.)  
(2) THE PUBLIC INSTITUTION FOR SOCIAL SECURITY  
(on its own behalf and on behalf of The Port Fund L.P.)  
(3) THE PORT FUND L.P.

Plaintiffs-and-

- (1) WALKERS (A FIRM)  
(2) WALKERS (DUBAI) LIMITED LIABILITY PARTNERSHIP

Defendants

CAUSE NO. FSD 41 of 2022

- (1) GULF INVESTMENT CORPORATION  
(2) GENERAL RETIREMENT AND SOCIAL INSURANCE AUTHORITY

Plaintiffs-and-

- (1) PORT LINK GP LTD  
(2) MARK ERIC WILLIAMS  
(3) WELLSPRING CAPITAL GROUP, INC  
(4) KGL INVESTMENT COMPANY ASIA (IN VOLUNTARY LIQUIDATION)  
(5) APACHE ASIA LIMITED (A HONG KONG COMPANY)  
(6) APACHE ASIA LIMITED (A MACAO COMPANY)  
(7) RONALD HENRY AYLIFFE  
(8) ELITE FIRST INVESTMENT LIMITED

Defendants

**Before:** The Hon. Justice Parker

**Appearances:** Mr David Allison KC, Mr Derrick Dale KC, Ms Jennifer Fox and Mr Harry Clark of Ogier (Cayman) LLP for the Plaintiffs in FSD 236 of 2020 and FSD 97 of 2021

Mr Graham Chapman KC, Mr Andrew Pullinger and Ms Katie Logan of Campbells LLP for the Second, Third and Fourth Defendants in FSD 236 of 2020 and FSD 41 of 2022 (“D2-D4”)

Mr Paul Stanley KC and Ms Anna Peccarino of Travers Thorp Alberga for the Plaintiffs in FSD 41 of 2022

Mr Daniel Bayfield KC, Mr Matthew Dors and Ms Natascha Steiner-Smith of Collas Crill for the GP which is the First Defendant in FSD 236 of 2020 and FSD 41 of 2022

Mr Denis Olarou of Carey Olsen for the Sixth, Seventh and Ninth Defendant in FSD 236 of 2020 and the Fifth, Sixth and Seventh Defendant in FSD 41 of 2022 (“Apache Defendants”)

Mr Ben Hubble KC, Mr Sebastian Said, Ms Susan Fallan and Ms Shari Walton-Rankin of Appleby (Cayman) Ltd. on behalf of Walkers (a Firm) and Walkers (Dubai) Limited Liability Partnership, the First and Second Defendants in FSD 97 of 2021 (“Walkers Defendants”)

**Heard:** 26 & 27 February 2024

**Draft judgment  
circulated:** 15 March 2024

**Judgment delivered:** 28 March 2024

## INDEX

*Combined Case management conference-procedural issues-overriding objective-directions to trial-joint trial -trial date-stay-relitigation-privies-issue estoppel-election to be bound-discretion*

## JUDGMENT

### Introduction

1. This is the decision of the Court following a combined case management conference (the “Combined CMC”) in cases FSD 236 of 2020 (“FSD 236”), FSD 97 of 2021 (“FSD 97”) and FSD 41 of 2022 (“FSD 41”). The proceedings concern the affairs of The Port Fund L.P., (“Fund” or “TPF”) which is an exempted limited partnership formed pursuant to the Exempted Limited Partnership Act (as amended), with one general partner (Port Link GP Ltd, the “GP”) and eleven limited partners (“LPs”). The Plaintiffs are all limited partners in TPF. They claim that the GP and those connected to it misappropriated substantial sums of money from the Fund.

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2. The Plaintiffs in FSD 236 and FSD 97 (“KPA” and “PIFSS”) are represented by Ogier and by David Allison KC and Derrick Dale KC, respectively.
3. The Plaintiffs in FSD 41 are represented by Travers Thorp Alberga (“TTA”) and by Paul Stanley KC.
4. The GP (which is D1 in FSD 236 and FSD 41 but is not a party to FSD 97) is represented by Collas Crill and by Daniel Bayfield KC.
5. D2 to D4 in FSD 236 and FSD 41 are represented by Campbells and by Graham Chapman KC.
6. D6, D7 and D9 in FSD 236 and D5 to D7 in FSD 41 are represented by Carey Olsen and by Denis Olarou.
7. The Walkers Defendants (D1 and D2 in FSD 97) are represented by Appleby and by Ben Hubble KC.
8. This decision follows a two day hearing on 26 and 27 February 2024.
9. The first thing to record is that these are complex, high value and multi-party proceedings which have already been the subject of numerous interim decisions and appeals. No doubt considerable expense has already been incurred and therefore questions of efficiency and economy have to be viewed in that context.
10. However, efficient and fair case management in accordance with the Overriding Objective needs to be achieved to ensure these complex cases are fairly disposed of and tried as economically as possible. In particular there needs to be careful case management in order to avoid duplication, unfairness, unnecessary expense, delay, undue demands on Court resources, and inconsistent findings.

#### *FSD 236*

11. FSD 236 involves claims against various defendants including the GP. The case was commenced by KPA and PIFSS, initially against the GP only, on 14 October 2020. KPA and PIFSS have brought direct claims (for breaches of duty owed to them as limited partners and accessory liability related to those breaches) and/or derivative claims (on behalf of TPF) against the GP (D1), Mr

Williams (D2), Wellspring (D3), KGLI Asia (D4), Golden Shahin (D5), Apache Asia (D6), Mr Ayliffe (D7), KGLI (D8) and Apache Macao (D9).

12. The Plaintiffs' claims in FSD 236 involve in summary:
- a) Direct claims against the GP for various breaches of its duties owed to the Limited Partners of TPF, and claims for an account where further information is required.
  - b) Direct and derivative claims against Mr Williams and Wellspring arising from Mr Williams' alleged central involvement in sham proceedings in the DIFC (the "DIFC Proceedings") between TPF and its former Investment Manager ("EMPEML"), which were allegedly used as a pretext for the unlawful payment of USD 59 million of TPF's funds to Wellspring.

There are also:

- a) derivative claims against KGLI Asia for knowing receipt of at least USD 3.3 million of TPF's monies that were paid in breach of trust and/or breach of fiduciary duty.
  - b) derivative claims against Golden Shahin in relation to a payment of USD 14 million made in breach of duty out of TPF's monies.
  - c) direct and derivative claims against Apache Asia, Mr Ayliffe, Apache Macao and KGLI in relation to fees in excess of USD 66 million charged by Apache Asia and/or Apache Macao, of which at least USD 14.5 million were paid to KGLI.
13. The GP has raised a counterclaim against KPA for an alleged overpayment of USD 13.1 million and a crossclaim against the Sixth Defendant and the Ninth Defendant for an alleged overpayment of just over USD 2 million.
14. D2-D4 also advance a counterclaim against the Plaintiffs contending that the case was brought as part of an unlawful means conspiracy between, inter alia, the Plaintiffs and the State of Kuwait, and a crossclaim against the GP (the "Crossclaim") seeking (a) further payment to D3 as a result of EMPEML's alleged entitlements under the IMA and (b) indemnification of D2, D3 and D4 from the GP pursuant to various contractual agreements.

*FSD 97*

15. Another case, FSD 97, is brought against the GP's former legal advisors, Walkers (A Firm) ("Walkers Cayman") and Walkers (Dubai) Limited Liability Partnership ("Walkers Dubai") (together "Walkers"). This case concerns Walkers' role in the management of TPF's affairs as advisers to both the GP and TPF, and the former investment manager of TPF EMPEML.
16. KPA and PIFSS bring derivative claims (on behalf of TPF) against Walkers. Claims of breach of fiduciary duty, alternatively negligence, are brought, founded on allegations involving Walkers' advice given in light of an alleged attempted expropriation of USD 496 million in sales proceeds belonging to TPF (the "Clark Asset Proceeds") by the State of Kuwait, which had been frozen at Noor Bank in Dubai, and the subsequent "Common Strategy" determined by TPF and EMPEML, to prevent the release of the Clark Asset Proceeds from Noor Bank to Kuwait and, instead, to secure their release to TPF.
17. This case is currently stayed until 21 days after final determination of the issues raised in the judgment of the Cayman Islands Court of Appeal ("CICA") handed down on 20 January 2023 (see below) (the "CICA Judgment"). The CICA Judgment considers the test for bringing derivative claims under section 33(3) of the ELP Act. Since D2-D4 have obtained leave to appeal the CICA Judgment to the Privy Council, FSD 97 has in practice been stayed until 21 days after final determination of the appeal by the Privy Council.

*FSD 41*

18. Two other Limited Partners ("GRSIA and GIC") also commenced their own proceedings: GRSIA and GIC against the GP and other defendants ("FSD 41"), and GRSIA (alone) against Walkers Dubai in FSD 383. GIC is an investment company jointly owned by the states of Kuwait, Qatar, Bahrain, Oman, Saudi Arabia and the UAE. GRSIA is a Qatari state-owned institution.
19. In FSD 41, they bring direct claims (for breaches of duty owed to them as partners and accessory liability relating to those breaches) and a claim for an account. These are very similar to the claims in FSD 236 for a proportion of the same loss and the defendants largely overlap.
20. They similarly make claims against the GP, Mr Williams, and Wellspring in respect of the DIFC Proceedings and the Wellspring Payment including similar claims to those made in FSD 236 in respect of: (i) breach of trust and/or duty and/or negligence by the GP; (ii) dishonest assistance

against Mr Williams in respect of the GP's breaches; and (iii) an alleged unlawful means conspiracy among the GP, Mr Williams, Wellspring and KGLI.

21. In the FSD 383 proceedings, GRSIA makes substantially similar claims against Walkers Dubai as in FSD 97, although with some different legal bases. These claims are brought both directly and derivatively (on behalf of TPF). The proceedings have been stayed<sup>1</sup> since 31 August 2022 pending the determination of FSD 97.

#### *Relevant procedural matters*

##### *Strike out*

22. In FSD 236, the GP (when under the control of the FFP Directors) and D2-D4 sought to strike out certain of the claims against them. The Court refused those applications.
23. Both the GP and D2-D4 appealed to the CICA. As stated above the CICA Judgment was handed down on 20 January 2023, striking out the derivative claims against the GP (which were pleaded in the alternative to the primary direct claims against the GP). The GP having failed to strike out the direct claims against it, chose not to appeal further.
24. However, as recorded above D2-D4 are appealing to the Privy Council against the CICA's refusal to strike out the derivative claims against them with the Plaintiffs cross appealing on one point. The appeal has been listed for a one-day hearing in the Privy Council on 20 June 2024.

##### *Receivership*

25. Following the resignation of the FFP Directors on 15 February 2023 (due to a cessation of funding by KGLI), the Plaintiffs in FSD 236 were concerned to protect their position with respect to (i) FSD 236 as a whole and (ii) the crossclaim alleged by D2-D4 against the GP in particular. This was an issue because Mr Williams is the ultimate beneficial owner of the GP and so responsible for controlling the GP after the resignation of the FFP Directors.
26. Mr Williams placed the GP into voluntary liquidation and appointed joint voluntary liquidators on 2 May 2023. The Plaintiffs in FSD 236 applied (i) to be joined as defendants to the Crossclaim and (ii) for the Receivers to be appointed in respect of the GP. The Court handed down judgment on 25

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<sup>1</sup> Judgment in FSD 383 dated 27 June 2022.

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May 2023, joining the Plaintiffs as defendants to the Crossclaim and appointing Receivers over the GP.

27. On 5 June 2023, the joint voluntary liquidators then issued an application to convert the voluntary liquidation into compulsory liquidation which would have displaced the Receivers. Since this application was dismissed on 18 September 2023, the Receivers have been able to progress their investigations without risk of being displaced.
28. D2-D4 have appealed to the CICA against the order on the joinder application. This appeal was due to be heard on 6 March 2023.

#### *Service of proceedings*

29. As at the date of the Combined CMC, the Plaintiffs in FSD 236 had not yet effected service on D5 and D8. D5 and D8, who are based in Kuwait, were joined to the proceedings on 17 May 2023, at which time leave was granted to serve them both in Kuwait. The claims against those parties are substantial and intertwined with other pleaded claims. The alleged Golden Shahin Payment, said to be in the amount of circa USD 14 million, is apparently relevant to the claims of knowing receipt and dishonest assistance made against Golden Shahin (and, in turn, related claims for breach of trust and/or duty by the GP). KGLI is alleged to have received unlawful “kickbacks” in respect of claims relevant to the Apache Defendants (D6, D7 and D9) in a total amount of circa USD 14.5 million.
30. As at the time of the Combined CMC, D5 and D8 had not been served, so neither participated in the hearing.

#### *The Court’s approach*

31. The parties will appreciate, the Court indicated at the outset of this Combined CMC that it would take some time to consider and provide its decisions having carefully considered all the affidavit evidence and written material advanced and the extensive submissions of Leading Counsel for each of the parties. It is not in all the circumstances having regard to the efficient disposal of business necessary to set out all the contentions, evidence and law the Court was referred to which can be identified from the transcript. The Court will give its decisions therefore in summary form which will allow the parties to draw up the necessary Orders for the Court’s approval.



32. The Court approaches all of the outstanding issues in accordance with the Overriding Objective:

*“The overriding objective of these Rules is to enable the Court to deal with every cause or matter in a just, expeditious and economical way.”<sup>2</sup>*

33. What dealing with the cause or matter justly includes, so far as it is practicable, is to ensure that the normal advancement of the proceeding is facilitated rather than delayed. It goes without saying that avoiding delay can save considerable expense. In complex hotly contested, international multi party litigation such as this, the Court strives to find the most expeditious and least expensive way to a determination consistent with ensuring that each party is given a fair trial. The parties and their attorneys are of course obliged to assist the Court to further the Overriding Objective and the Court must actively manage proceedings to try to achieve it.

34. What the Court is aiming to achieve is a fair procedural lead up to trial with the minimum of delay which balances the interests of the various parties. I have carefully considered what would be the best process by which the cases (FSD 236 and FSD 97) can be fairly resolved in accordance with the overriding objective. I will deal with FSD 41 separately.

*What directions should be given to trial*

*FSD 236 and 97*

35. It is agreed by all parties that FSD 236 and 97 should be case managed together. The Court also agrees. It is also agreed that the stay in FSD 97 will be lifted, the case having had two years ‘in abeyance’.

36. The parties’ views on the best way to get to a trial diverged. Mr Chapman KC submitted that it is necessary, at this long-awaited Combined CMC, for the Court to make considered, robust case management directions to avoid further delays in the proceedings, and to bring FSD 236 and FSD 97 to trial as soon as possible.

37. He advanced D2-D4’s application that FSD 97 and FSD 236 be heard together and for specific directions through to a joint trial of the action. That approach is supported by the other defendants to FSD 236 who are to some extent associated with D2-D4 (namely, Apache Asia Limited, Ronald Henry Ayliffe and Apache Asia Limited (“D6-7 and 9”) represented by Mr Olarou).

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<sup>2</sup> *Grand Court Rules (2023 Revision) Preamble.*

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38. The Court has reviewed Mr Williams' evidence<sup>3</sup>. It notes his position that the case against him is significantly prejudicing his business and political interests and the sooner those claims are heard the better. I also note that Mr Chapman KC said on instructions that Mr Williams has unfortunately been forced to complete the sale of his main residence to continue to fund his legal fees in these proceedings.
39. Notwithstanding the submissions made by Mr Chapman KC (supported by Mr Olarou), the detailed procedural timetable he urges upon the Court (involving a compressed timetable for pleadings and discovery and witness statements to follow soon after) will not be imposed now in light of the objections taken by the other parties with significant interests in the proceedings.
40. Sensible and pragmatic arguments were made as to why it would not be appropriate to accept Mr Chapman KC's process and timetable by the numerous parties who resisted it: the parties to FSD 97 (Messrs Dale KC and Hubble KC); and Mr Allison KC for the FSD 236 Plaintiffs; and Mr Bayfield KC for the Receivers.
41. In view of all the submissions made by Leading Counsel for the respective parties I have decided that it is appropriate to allow various matters to take effect before revisiting specific directions to trial. These can be best taken at a further CMC in Q4 of this year. That in my view is the most fair and efficient way of proceeding.
42. One important outstanding matter is that, as at the date of the Combined CMC, D5 and D8 were likely to be served in Kuwait reasonably soon, according to Mr Allison KC, and assuming they put in defences, pleadings would have a good prospect of being closed by the time of a second CMC in the autumn in relation to those two defendants who are of some importance to the trial.
43. Another important matter is that the parties to FSD 97 have agreed an order between them on this Combined CMC which the Court regards as appropriate and will approve. The Court would be loathe to disturb that order, unless there was a good reason to do so. That order provides that there should be no detailed directions until after close of pleadings at a further CMC. Having heard Mr Hubble KC for the Walkers Defendants the Court agrees that it is not fair for them to have a detailed procedural timetable put in place when they are still facing a large amount of pleading which they will need to consider and respond to. The pleadings in FSD 97 are going through a significant round of amendments. There is no need in my view to shorten the period the parties to FSD 97 have agreed for pleadings, or to order discovery as contended for by Mr Chapman KC.

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<sup>3</sup> *Mr Williams 12<sup>th</sup> and 13<sup>th</sup> Affidavits.*

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44. A further matter is the appeal heard by CICA on 6 March 2024, which if successful would cause the Receivers to potentially adopt some, but not all of, the pleaded case of the Plaintiffs. That outcome is another factor to take into account.

*Joint trial*

45. Having carefully considered the submissions of Leading Counsel for the relevant parties I have concluded that it is premature to order that FSD 236 and FSD 97 should be tried together. Until the scope of the amendments in FSD 97 become clearer a decision as to whether there should be a joint trial and what form that trial should take cannot be sensibly taken. The Court would need to have a clearer picture of how the Walkers Defendants should participate in any joint trial were one to be ordered.
46. A joint trial may be the best way of proceeding in due course having regard to the substantial overlap of issues, evidence and likely arguments. Consistency of decisions and apportionment of liability (if any) will also be important matters to consider. Although not agreed by the other parties, annexure A to the written arguments of D2 to D4 indicates the level of overlap and common issues.
47. However, I would rather make a decision as to any joint trial when the parties have made further progress with regard to pleadings and the preparations for giving discovery. It would in my view be premature at this early stage of FSD 97 to give directions beyond listing a further CMC after the close of pleadings, or to decide whether the claim in FSD 97 should be tried together with the claims in FSD 236.
48. I have balanced this decision against all of the submissions made by Mr Chapman KC and in particular the prejudice he points to of further delay keeping in mind that ‘delay is the enemy of justice’ as he put it. Mr Chapman KC points out that the proceedings have been on foot against his clients for three years. He referred to paragraphs 11 to 14 of the Twelfth Affidavit of Mark Williams dated 22 December 2023, where Mr Williams deposes to, the ongoing challenges faced by D2-D4 as a result of, in his view, the unnecessarily complex, inefficient and duplicated manner the Plaintiffs have chosen to pursue claims. I have taken all of these points on board.
49. I also bear in mind that Mr Hubble KC’s clients (Walkers) are also facing extremely serious and complex allegations made against partners and associates of the Firm.
50. Mr Chapman KC suggested that if tight discipline by way of a procedural timetable were not imposed there would be ‘drift’. The Court does not expect that the respective parties will simply be

waiting around for the next CMC and the cases will be allowed to ‘drift’. There is plenty of preparation and work for the parties and their attorneys to be working on with regard to pleadings and discovery and other procedural matters (including the disposal of the appeals).

51. All parties have an interest in having these complicated and high value matters resolved as quickly and efficiently as possible, but this should not proceed at a pace or in a way which prevents proper preparation and fair presentation of their respective cases, especially for the parties (the Walkers Defendants and the Receivers) who require time to catch up and to get up to speed.
52. There is to be liberty to apply to the Court for any party that seeks to argue that there is undue delay and also with regard to any proposed variations to the orders made at this Combined CMC.

#### *Trial date*

53. Having considered the submissions of Leading Counsel for each of the parties the Court takes the view that it would be appropriate to make a trial listing now in FSD 236 (without prejudice to whether and to what extent the Walkers Defendants in FSD 97 would participate in that trial) which would be 10 to 12 weeks commencing in early 2026, which can then be reviewed at the next CMC for FSD 97. Having heard submissions from Leading Counsel, especially Mr Hubble KC for the Walkers Defendants in FSD 97 and Mr Bayfield KC for the Receivers, the Court is of the view that it is unrealistic to have a trial date set for 2025.

#### *Discovery protocol*

54. Mr Chapman KC for D2-D4 submitted that the best way forward in relation to discovery is to avoid the complexity and the generic nature of the draft discovery protocol proposed by the FSD 236 Plaintiffs (and therefore the room for debate caused by such a protocol) by the Court making a standard discovery order requiring the parties to comply with their obligations<sup>4</sup>.
55. This would require the parties to discover all documents “*which can properly be said to contain information which may enable [him] either to advance his own case or to damage the case of his adversary*” including “*documents which may fairly lead him to a train of enquiry, which may have either of these two consequences*”. The parties are agreed that there should be standard discovery on the *Peruvian Guano* basis so that is not in issue.

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<sup>4</sup> Pursuant to *Compagnie Financiere du Pacifique v Peruvian Guano Co* (1882) 11 QB.

56. Notwithstanding Mr Chapman KC's submissions that there is no good reason to impose a discovery protocol and certainly not in place of setting a discovery timetable now, the Court has decided that a discovery protocol would be the most appropriate way forward in these cases before the parties embark upon the process of discovery in earnest whereby hundreds of thousands of documents may be identified and reviewed without a clear understanding of the correct parameters.
57. An early understanding of and agreement to the mechanics and processes of discovery (for example, custodians, date ranges, keyword searches, and the use of technology) will be beneficial to the parties and to the Court. It will reduce the scope for substantive disputes on the basis of complaints of inadequate or deficient discovery down the line. This is particularly important having regard to the nature of the pleaded allegations, involving as they do serious wrongdoing in complex commercial litigation.
58. The Court is not saying that a protocol which is appropriate in FSD 236 will be appropriate in FSD 97. They are likely to be bespoke to some extent. The parties to FSD 236 and FSD 97 should take all necessary steps to agree a discovery protocol in each action within six weeks. By the time the next CMC is heard the matter can then be presented to the Court for approval or with regard to resolving any disputed items.

*List of issues and case memorandum*

59. The parties to FSD 236 and FSD 97 should also seek to agree a list of issues arising in each action and a concise case memorandum for each action. Again, those documents will be useful going forward and to the extent that there are any areas of disagreement by the time of the next CMC those can also be resolved. The attorneys are reminded that the list of issues and case memorandum are documents intended to assist the Court and to focus attention on the matters to be resolved, not an opportunity for written advocacy or to advance facts which are in contention.

*Next CMC - Timetable*

60. At the next CMC, the parties should be ready with agreed directions for a discovery timetable (on the assumption pleadings have closed) and for factual and expert evidence leading up to trial. Again, to the extent there are disagreements on the timetable the Court will resolve those matters.
61. I now turn to FSD 41.

*FSD 41*

62. There are two issues with regard to this action. The first is whether the parties to FSD 41 should be bound by the findings of fact and law that are made in FSD 236 (and FSD 97) on the basis that FSD 41 is stayed pending the determination of FSD 236 (and FSD 97). The second is what rights if, any, should the FSD 41 Plaintiffs have to the discovery exchanged in FSD 236 (and FSD 97) during the proposed stay, if it is so ordered.

*Relitigation*

63. As to the first issue, the Court agrees that it is clearly important to avoid, if possible, relitigation on the same issues of law and fact after FSD 236 (and FSD 97) have been determined.
64. The FSD 236 Plaintiffs and FSD 41 Plaintiffs are all limited partners in the Fund, and all of their claims relate to the Fund. The FSD 236 Plaintiffs bring their claims for the benefit of all of the Fund's limited partners (including the FSD 41 Plaintiffs) on a derivative basis, and seek relief for the benefit of all limited partners.
65. There is substantial overlap between the Defendants in FSD 41 and FSD 236. Seven of the eight Defendants in FSD 41 are Defendants in FSD 236 and default judgment has been obtained against the single non-overlapping Defendant (Elite First Investment Limited). On analysis the claims asserted in FSD 41 are very similar to those asserted in FSD 236.
66. It would in the Court's view be unfair and contrary to the Overriding Objective to require the Defendants who are common to FSD 236 and FSD 41 to defend effectively the same claims twice. The Court needs to try to ensure that there is minimal risk of *two* substantial trials of substantially the same claims, involving substantially the same parties.
67. Mr Chapman KC for D2-D4 (supported by Mr Olarou for his clients) submitted that the Plaintiffs in FSD 41 were privies<sup>5</sup>. He urged the Court to ensure there was finality and to make an order as follows:

*“Nothing in this order shall prejudice the Plaintiffs' right to pursue claims in FSD 41 or to apply for interim relief against some or all of the FSD 41 Defendants following (a) the*

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<sup>5</sup> *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* (formerly known as Contour Aerospace Ltd) [2013] UKSC 46 and *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 924.  
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*lifting of the stay (for any reason) in FSD 41 or (b) determination of FSD 236, save that no party to FSD 41 will be permitted to re-try or re-litigate issues of fact or law which have already been determined in FSD 236 and/or FSD 97” (emphasis added).*

68. Mr Chapman KC submitted that because the Plaintiffs in both actions, FSD 236 and FSD 41, are all Limited Partners in the Fund and all of their claims relate to the Fund any loss suffered is a loss to the Fund. The Fund itself as an ELP has no separate legal personality from its Limited Partners and as a result, the position is analogous to a trust where the trustee and beneficiaries are privies of themselves and each other. The Plaintiffs in FSD 236 and FSD 41 are sufficiently related to be privies and the FSD 41 Plaintiffs should be ordered to be bound by the outcome of the trial.
69. Mr Bayfield KC for the Receivers of the GP (D1) added the argument that even if the FSD 41 Plaintiffs are not to be treated as ‘privies’, the usual principle that a party will not be bound by findings made in a case to which he or his privy was not a party<sup>6</sup> should not apply on the basis that these are not ordinary proceedings. They concern identical interests (limited partnership interests in the Fund), which the Plaintiffs seek to protect through identical (or very near-identical) claims advanced by different Limited Partners in different proceedings but in respect of substantially the same factual matrix.
70. Mr Stanley KC for the FSD 41 Plaintiffs explained that his clients wanted to leave this particular door ajar and submitted there was no need to firmly try to close it now. Indeed, it would be wrong for the Court to do so. He could indicate ‘an expectation’ on his clients’ behalf that there would be no more litigation concerning their claims in FSD 41 but he could not say that with certainty or give any form of guarantee.
71. He suggested a form of wording to leave the door ajar:

*“...This order is without prejudice to any arguments any party to FSD 41 may make as to the extent (if any) to which findings made in FSD 236 shall bind the Plaintiffs in FSD 41.”*

72. He submitted that it was highly likely that the parties to FSD 41 will accept that decisions in FSD 236 will also hold good in FSD 41, because the Court will be considering most of the same evidence and arguments in both cases.

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<sup>6</sup> See *Shalabayev v JSC BTA Bank* [2016] EWCA Civ 987.

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73. However, he argued that the pragmatic force of that point, does not mean that the decision in FSD 236 *will* be legally binding in FSD 41.
74. His clients are different from the entities pursuing FSD 236. For one thing they are not making derivative claims. He submitted that his clients' claims are made independently as Limited Partners and each of them is owed obligations under the partnership agreement by the General Partner. They are each in a position akin to a beneficiary in respect of their claims. They also bring tort claims for example in conspiracy against third parties.
75. At this stage it is not known whether those kinds of claim would lead the Court to order restoration of the trust fund and consequently whether there is in any real sense privity with the Plaintiffs in FSD 236. There may be, depending upon the outcome of the trial and findings made by the Court, but it is too early to tell with certainty that that is the case. It may matter, for example, if compensation is ordered to be paid to certain Plaintiffs directly in respect of their individual losses or if it is ordered to be paid in respect of all losses suffered by certain Plaintiffs for them to hold on trust for the Limited Partners generally.
76. Mr Stanley KC argued that it would not be right for the Court to decide now, especially not as a matter of case management that regardless of the circumstances or of the fact in question and the legal conclusion in question, his clients are fully and finally bound by the outcome in FSD 236.
77. Moreover, if the case the FSD 41 Plaintiffs brought is stayed they will not have an ability to put evidence before the Court and may not even see what the Court is seeing in terms of critical disclosure, if the Court is minded to accept Mr Chapman KC's submissions on provision of discovery (see below).
78. The right course he submitted is the conventional one (which has been taken in relation to the similarly overlapping actions against Walkers). That is to stay FSD 41 until the conclusion of FSD 236 without imposing this condition.
79. Pragmatically, that will probably mean that FSD 41 never needs to be litigated, but none of the parties to it can guarantee that, and nobody can say with any certainty or clarity that they would not be entitled to do so.
80. After all, he submitted, since the Plaintiffs in FSD 41 will not have participated in, or been able to adduce evidence, examine witnesses, or make submissions in FSD 236, it is obviously unfair that they should be required to be bound by it at this time.



81. The Court should leave the cards to 'lie where they fall'. To make the parties to FSD 41 bound, the Court would have to order not a stay, but a concurrent trial, which is not what the parties think will be efficient.
82. Having reflected on these cogent arguments, the Court is also concerned that there may not be a sure way to foreclose or forestall the FSD 41 Plaintiffs from bringing such further applications or claims as they might have depending on the issues adjudicated upon at trial.
83. However, the Court is not prepared to accept Mr Stanley KC's submission that the door should be left ajar in the way he proposes. This would not in my view be a good, efficient and fair case management outcome. The Defendants, for the reasons advanced by Mr Chapman KC and Mr Bayfield KC, should not have the real risk of relitigation hanging over them, whatever expectations there may be.
84. The Court will not impose a declaratory order on the FSD 41 Plaintiffs against their wishes. The Court agrees with Mr Stanley KC that as a matter of case management it would not be right to impose an order upon the Plaintiffs to FSD 41 (declaring for example that they are privies and bound) as it may well be the case that the legal consequences of any issue estoppel, which would only apply to essential elements of the claim in question, will need to be judged with certainty at the conclusion of any trial, and cannot be certain now.
85. Having considered the matter in the round I have concluded that in circumstances where Mr Stanley KC's clients are not prepared to be bound by the outcome in FSD 236 and FSD 97, FSD 41 will not be stayed.
86. The Court will indicate that if it was to exercise its discretion to stay FSD 41, as a condition of the stay no party to FSD 41 will be permitted to re-try or re-litigate issues of fact or law which have already been determined in FSD 236 and/or FSD 97 as sought by the Defendants. At present the FSD 41 Plaintiffs have refused to give that comfort.
87. Therefore, the Court puts the Plaintiffs in FSD 41 to an election. They can decide whether to 'sit on the sidelines' (by way of a stay) and agree to be bound, or they can participate in the FSD 236 and FSD 97 proceedings and all three matters will be case managed together.
88. If they do not agree to be bound within 14 days FSD 41 will no longer be stayed and will need to be case managed alongside FSD 236 and FSD 97. In that event the parties are to agree directions

or return to Court for a further determination of matters not agreed. That might, as Mr Bayfield KC suggested, be an unfortunate outcome as it might well involve a longer trial and greater expense being incurred, but it would be the lesser of two evils for his clients as there would be finality.

89. If Mr Stanley KC's clients agree to be bound in the form of wording suggested by Mr Chapman KC that is the next best thing with regard to finality and FSD 41 will be stayed on that condition. It would still leave Mr Stanley KC's clients with the ability to apply to the Court and to argue that there were still issues (of fact and/or law) which they should be allowed to advance and which were not common or had not been tried in FSD 236.

#### *Discovery*

90. This aspect will not arise if Mr Stanley KC's clients choose not to agree to be bound and so elect to participate in the trial.
91. If, however, they do agree to be bound, as discussed above, and the Court stays FSD 41, then they ask for the disclosed documents as they emerge in discovery in FSD 236 and FSD 97.
92. The Court, having considered what rights, if any, the FSD 41 Plaintiffs should have to the discovery exchanged in FSD 236 (and FSD 97) during any stay has concluded that the parties to FSD 236 / FSD 97 will be under no obligation to provide the FSD 41 Plaintiffs (who are not parties to FSD 236) with copies of the discovery given in FSD 236 / FSD 97.
93. The Court is persuaded by Mr Chapman KC that the FSD 41 Plaintiffs are not entitled to be given discovery in an action to which they are not parties to use as they see fit in FSD 41 while they 'sit on the sidelines' without incurring the substantial legal costs of the parties to FSD 236 and FSD 97.
94. There is no reciprocal obligation to give discovery on Mr Stanley KC's clients in this scenario. Furthermore there is, in the Court's view, a reasonable offer from D2-D4 for all filed Court documents to be provided to the FSD 41 Plaintiffs to include: copies of any pleadings (including amended pleadings), summonses, witness and/or any other statements (including affidavits) together with their exhibits, expert reports, skeleton arguments and any hearing bundles (including the trial bundle) and (b) any transcript of any hearing or trial in FSD 236. They can also attend the trial.

95. In the Court's view, that should be sufficient to enable the FSD 41 Plaintiffs to follow proceedings, remain informed about the evidence in the case, and protect their position. There are provisions in the draft order (which would stay FSD 41) that further protect the position of the Plaintiffs in FSD 41 with regard to any settlement of FSD 236, and as to a right to be heard on the form of relief, if any, to be granted at the conclusion of FSD 236 if the Defendants are found to be liable. They also will have a general liberty to apply.
96. As a footnote, the position in FSD 383 was different. As Mr Hubble KC reminded the Court it did not have, either in writing or orally, anything like the detailed written submissions and authorities that have been made available on the issue estoppel questions and whether the Limited Partners are privies. The context in FSD 383 was quite different as can be seen from the Judgment<sup>7</sup>.
97. A balance was struck following short written submissions on an information sharing mechanism to allow close monitoring in light of the Court's judgment (§88) which said that if the Plaintiffs were dissatisfied with the outcome of the case advanced in FSD 97 they could at an appropriate time apply to lift the stay and pursue claims, or ask the Court for directions. If any party to FSD 383 wishes to revisit that position having reviewed this decision, they may do so.

#### *Costs*

98. The Court notes that there has been substantial agreement on the issue of costs of the Combined CMC summonses.
99. If there are any costs orders that are required to be made which the parties have been unable to agree the Court will determine those on the basis of short (no more than five page) written submissions.
100. The Court is grateful to Leading Counsel and their respective teams for their considerable assistance.



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

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<sup>7</sup> Judgment in FSD 383 dated 27 June 2022.

240328- In the matter of Kuwait Ports Authority & Ors. v Port Link GP Ltd. & Ors. – FSD 236 of 2020 (RPJ), FSD 97 of 2021 (RPJ) and FSD 41 of 2022 (RPJ)- Combined CMC- Judgment