IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 383 OF 2021 (RPJ)

B E T W E E N

(1) THE PORT FUND L.P.

(2) GENERAL RETIREMENT AND SOCIAL INSURANCE AUTHORITY

Plaintiffs

and

WALKERS (DUBAI) LIMITED LIABILITY PARTNERSHIP

Defendant

Appearance:	**Mr Thomas Grant QC, and Ms Anna Peccarino of Travers Thorp Alberga for the Plaintiffs** **Mr Ben Hubble QC and Mr Sebastian Said, and Ms Susan Fallan of Appleby for the Defendant**
Before:	**Hon. Justice Parker**
Heard:	**18 May 2022**
Draft Judgment Circulated:	**14 June 2022**
Judgment Delivered:	**27 June 2022**

HEADNOTE

Strike out-stay pursuant to Court's case management powers-multiplicity of proceedings in same Court-two substantial sets of near identical cases against same defendant-claims in negligence-breach of fiduciary duty and dishonest assistance-derivative and direct claims-principles concerning case management stays-public interest that the Court should be astute to secure outcomes for litigants which are just, expeditious, and which causes the least expense reasonably possible in determining cases-judicial case management and strong reasons for a stay-conditions of stay.

JUDGMENT

Introduction

The application

1. The Defendant, Walkers (Dubai) Limited Liability Partnership ("Walkers"), apply to strike out the Plaintiffs' claim issued on 30 December 2021 and served on 4 February 2022 and/or to dismiss it pursuant to GCR Order 18 or 19 and/or the court's inherent jurisdiction.

2. Walkers claim in the alternative for an order that such claims be stayed pending the determination of the proceedings before this court in FSD 97/2021 ("Cause 97").

3. To the extent necessary, Walkers also claim that the second Plaintiff ("P2" or "GRSIA") does not have standing pursuant to section 33(3) of the Exempted Limited Partnership Law 2021 revision (the "ELP Act") to bring the claims pleaded derivatively on behalf of the first Plaintiff ("P1" or the "Port Fund").

4. The evidence filed consists of the First Affidavit of Mr. Daniel Wood dated 22 March 2022 (Managing Partner of Walkers) and Exhibit, the First Affidavit of Mr. Bader El-Jeaan dated 14 April 2022 (Managing Partner of the Kuwaiti law firm Meysan Partners) and Exhibit, and the Second Affidavit of Mr. Wood dated 26 April 2022 and Exhibit

Background

5. Since November 2019 when another Limited Partner in the Port Fund, Gulf Investment Corporation ("GIC"), issued a Summons against Port Link and the Port Fund seeking relief under section 22 of the ELP Act[1] there has been a pattern in this Court of the Limited Partners in the Port Fund issuing successive proceedings which overlap which are then sought to be prosecuted concurrently. There is as a result a multiplicity of overlapping proceedings, relating to the Port Fund, already before this Court.

6. That has the undesirable consequence of giving an unfair advantage to the later claims prosecuted because they can be tailored according to the positions taken by parties in pleadings, witness statements and written arguments, as well as by reference to interlocutory decisions of this Court in the earlier claims.

[1] P2 was later joined as a co-plaintiff to that Summons. Another Limited Partner, the Kuwait Ports Authority ("KPA") also issued its own Summons seeking similar relief. The Court issued a Judgment on 16 June 2020.

7. I note that apart from these two claims against Walkers, FSD 236 of 2020 ("Cause 236"), issued on 14 October 2021[2] in which KPA and the Public Institution for Social Security ("PIFSS") claim against Port Link GP Ltd ("Port Link" or the "GP") and Mr. Mark Williams ("Mr Williams"), Wellspring Capital Group, Inc ("Wellspring") and KGL Investment Company Asia ("KGLI Asia") also materially overlaps with FSD 41 of 2022, issued on 3 March 2022 in which GIC and GRSIA also claim against the GP and Mr. Williams, Wellspring and KGLI Asia, and additionally Apache Asia Ltd (a Hong Kong company), Apache Asia Ltd (a Macao company), Mr. Ronald Ayliffe and Elite First Investment Ltd.

8. P1, the Port Fund, is a Cayman Islands exempted limited partnership ("ELP") within the meaning of section 2 of the ELP Act. It was set up in 2007 for investments in port related assets around the world. Port Link is, and was at all material times, the General Partner of the Port Fund.

9. P2, GRSIA, is an enterprise owned by the state of Qatar and is responsible for administering the Qatari social security system. P2 is, and was at all material times, a Limited Partner of the Port Fund. It invested a total of USD 9.852 million in the Port Fund in 2007. There are a total of 11 Limited Partners with investments in the Port Fund.

10. Two of those Limited Partners, KPA and PIFSS are Kuwaiti state-owned enterprises with a combined contribution of around 65% of the total investment in the Port Fund (in the total amount of USD 125 million).

[2] Judgment dated 25 November 2021 (on appeal to the CICA)

11. Together with the Port Fund, KPA and PIFSS are Plaintiffs in Cause 97 brought against Walkers. This action was served six months earlier than the present case in August 2021.

12. Walkers is a DIFC Limited Liability Partnership which is (and has been since 6 December 2005) registered in the public register of the Dubai Financial Services Authority. It holds itself out as a full-service law firm providing legal services in a number of core practice areas including commercial dispute resolution and offshore funds.

13. Walkers is sued in relation to its involvement in what has been described in various pleadings in this Court and others as the "DIFC Proceedings", a claim commenced in July 2018 against the Port Fund by its investment manager ("EMPEML" or the "Manager") in the DIFC. The loss claimed is in respect of US$59.9m paid from the Port Fund to Wellspring following the DIFC judgment.

14. Both the claim in Cause 97 and these proceedings arise out of Walkers' representation of and advice to the Port Fund, Port Link (the GP) and EMPEML.

Summary of respective arguments

15. Mr Ben Hubble QC appears for Walkers. He argues that it cannot really be disputed that the two sets of proceedings[3] against Walkers, by two sets of Limited Partners and

[3] Cause 97 and this case Cause 383

the Port Fund, advance substantially the same claims, based on substantially the same facts. They claim the same losses, on behalf of (with one limited exception) the same party, namely the Port Fund. These two sets of proceedings are now concurrent in the same Court before the same Judge.

16. He asserts that this is a unique set of circumstances and is a situation which is already causing prejudice to Walkers. The prejudice to Walkers will increase should this situation be left unaddressed, given the requirement for (i) concurrent and increasing case preparation, and (ii) conduct of two substantial sets of proceedings in parallel.

17. The consequences of serving a near identical claim six months after the first in time causes real concern to Walkers which is already applying substantial resources and energy to answer the case brought against it by KPA and PIFSS (Cause 97).

18. Mr Hubble QC argues that it is abusive, unjust, and prejudicial to the proper and fair conduct of its defence, for Walkers to have to defend itself in respect of essentially the same allegations on two fronts simultaneously.

19. Mr Thomas Grant QC resists the application for the Plaintiffs. He argues that it is a very strong thing to do to shut out a plaintiff from placing its complaint before a court to have it adjudicated upon. It is the constitutional role of courts to determine disputes and they should do everything they can, subject to narrow exceptions, and subject to the Court's inherent power to control its own processes, to ensure that parties have unimpeded access to justice.

20. He argues that whilst the categories of abuse of process are not fixed, the usual basis upon which a claim may be struck out as abusive (assuming as here it is accepted the claim itself discloses reasonable grounds of success) is where there is a collateral attack on an earlier judgment, or it is abusive within the *Henderson v. Henderson* principle, or there has been an unwarranted delay, or the proceedings have been brought for the collateral purpose of harassment rather than to actually seek determination of the claim. He argues that his clients' claim cannot be regarded as vexatious or abusive.

21. The earlier proceedings were brought by wholly separate entities over which his clients have no control and who are not acting as agents or privies. There should be no summary deprivation of the constitutional right of his clients to have an otherwise just civil claim determined.

22. As to stay, Mr Grant QC accepts that the derivative claims in negligence and breach of fiduciary duty could be stayed by consent, in principle, if terms can be agreed but the evidence shows that there are important differences between the parties[4] and unfortunately that has not been achieved.

23. The differences between the parties on these points are in summary: Walkers say that *all* of the claims should be stayed, not just those in negligence and breach of fiduciary duty brought by way of derivative action.

24. P2 disagrees and in addition says the price of any stay should be that Walkers abandons what it refers to as certain 'plaintiff specific defences' which Walkers take in Cause

[4] El-Jeaan §101 and response of Wood 2 §26

Walkers say they are not 'plaintiff specific defences' at all. They are defences that would be run whichever Limited Partner was bringing the claim on behalf the Fund. Walkers should not have its ability to run defences curtailed as the price of the stay.

25. Finally, P2 says that Walkers should give up their denial that the test for section 33(3) ELP Act is met in relation to Cause 97, which Walkers argues is an unreasonable request in circumstances where the appeal has just been heard by the Cayman Islands Court of Appeal ("CICA") on this very issue in Cause 236.

The relevant law

Strike out, abuse of process and vexation

26. The jurisdiction to strike-out claims arises, as well as under the Court's inherent jurisdiction, pursuant to the provisions of GCR O.18 r.19(1) which provides:

> *"The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –*
>
> *(a) it discloses no reasonable cause of action or defence, as the case may be; or*
> *(b) it is scandalous, frivolous or vexatious; or*
> *(c) it may prejudice, embarrass or delay the fair trial of the action; or*
> *(d) it is otherwise an abuse of the process of the court,*

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be".

27. The nature of the jurisdiction and circumstances in which it will be exercised as well as the test to apply are set out in the well-known passage in *Hunter*[5]:

> *"My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules,* ***would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people****.*
> *The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.*" (emphasis added)

28. I note the concepts of manifest unfairness to a party and bringing the administration of justice into disrepute as relevant factors in relation to the Court's inherent power to control its procedure.

Case management stays

[5] *Hunter v. Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 536

29. The Supreme Court Practice "White Book" at §9A-183 provides helpful guidance. It states:

> "*Circumstances can arise in which it becomes apparent that two (or possibly more) separate sets of proceedings (perhaps in the same Court, perhaps in different Courts) are related in some material way and that it is just and convenient that one (or some) should be stayed pending the final determination of the other (or others). One set of proceedings may be 'the senior of the two' in the sense that it was commenced before, or had reached a later stage of pre-trial development than the other: J Bollinger SA v. Goldwell Ltd [1971] RPC 412 at 423…"*

30. Although there is no specific power dealing with case management stays in this jurisdiction, this seems to me to be a sensible statement of the practice which allows a court to stay proceedings pending the final determination of other materially related proceedings.

31. GCR Preamble r.4.2 sets out a non-exhaustive list of powers the Court may exercise to assist in its duty to further the overriding objective of dealing with cases justly, by actively managing proceedings (Preamble r.4.1).

32. They are broad and include: at (e) *"deciding the order in which issues are to be resolved*", at (f) "*fixing timetables or otherwise controlling the progress of the proceeding"* and at (g) "*considering whether the likely benefits of taking a particular step will justify the costs of taking it*."

33. The Cayman Court of Appeal in *Re Nanfong International Investments Ltd* [2018] 2 CILR 321 considered in detail case management stays, involving concurrent proceedings, in the more usually encountered circumstance where they arose in different jurisdictions.

34. Moses JA, delivering the Judgment of the Court stated:

a. *"there is no specific power contained within the Cayman Islands legislation for the imposition of a case management stay. The courts invoke their inherent jurisdiction and their general case management powers derived from the Preamble to the Grand Court Rules (1995) and the Financial Services Guide…sA-4 at 9-10 (2015) which reproduces the same text*." (at §42)

b. The principles *"relevant to the grant of a stay on case management grounds are to be found in Reichhold Norway ASA v. Goldman Sachs [2000] 1 WLR 173 (CA). In that case, the Court of Appeal approved the principles of Moore-Bick J, who stayed the hearing of an action for negligent misstatement by Goldman Sachs in relation to the sale of shares in a Norwegian company pending an arbitration in Norway to be brought by Reichhold alleging breach of warranty under the sale agreement. If the arbitration proceedings were successful there would be no need for Reichhold to sue Goldman Sachs, the vendors' advisers."* (at §17)

c. The principle applied by Moore-Bick J, and upheld by Lord Bingham CJ, was that a temporary stay of proceedings properly commenced required *"**very strong reasons for doing so and the benefits which were likely to result from doing so clearly outweigh the disadvantages to the plaintiff.**"* (at § §18 – 19) (emphasis added)

d. Applying the principle to the facts, he granted a temporary stay to manage the order in which the proceedings were heard*: "not only because the existence of the concurrent proceedings may give rise to undesirable consequences in the form of inconsistent decisions, but also because the outcome of one set of proceedings may have an important effect on the other."* (at §20)

e. Moses JA confirmed that *"the proper approach is to apply the principles identified in Reichhold without qualification."* (at §25)

f. The critical parts of Moses JA's decision on the application to the facts in *Nanfong*[6] are at §§38 – 41; and 43:

> *"…it is inevitable, in my judgment, that the question of BIIL's authority has to be decided in two different jurisdictions, at least absent any case management decision as to the order in which those two decisions will be made. It follows that there arises the real difficulty of inconsistent*

[6] Kawaley J had decided not to grant a temporary case management stay of a Cayman winding up petition, pending determination of one of the issues included in the petition, which had been raised separately in concurrent Samoan proceedings, namely whether the petitioner had authority to bring the petition.

decisions. Absent a stay, two courts in two different jurisdictions will have to decide, in the case of the Samoan court, mixed questions of law and fact as to BIIL's authority and, in the Cayman Islands, questions of fact which include Samoan issues of law, which themselves might require further resolution in the Samoan appellate process. If the proceedings in Cayman are stayed, then the Grand Court will have the benefit of the Samoan court's ruling on the issue of authority in a manner which is likely to be determinative of the issue in the Cayman Islands.

Moreover, it is difficult to foresee any particular disadvantage to BIIL by granting a temporary stay. It will have to litigate the issues arising out of its purported resolutions in Samoa. A stay may well avoid unnecessary duplication of costs.

In my view those considerations afford compelling and very strong reasons for granting a temporary stay in order to manage the order of proceedings … For those reasons I would grant a temporary stay to ensure that the issue is decided in the order that will most likely further the ends of justice. That was the reason why the order was granted in Reichhold. In that case, the court did have an interest in the order in which proceedings were pursued where concurrent proceedings may have given rise to inconsistent decisions and the outcome of one set of proceedings might have had an important effect on the conduct of the other."

g. Moses JA concluded by implicit reference to the power of the Court to re-visit the terms of, or whether to lift, a temporary case management stay, on

an application by the parties under a standard-form liberty to apply: "*If circumstances change in a way which cannot at the moment be foreseen, then it is necessary to emphasize that this case management stay is temporary.*"

35. In *Unwired Planet v. Conversant Wireless Licensing SARL* [2020] UKSC 37, the Supreme Court summarised case management powers, including temporary case management stays:

> *"We therefore turn to case management. The English courts have wide case management powers, and they include the power to impose a temporary stay on proceedings where to do so would serve the Overriding Objective: see CPR 1.2(a) and 3.1(2)(f). For example, a temporary stay is frequently imposed (and even more frequently ordered by consent) in order to give the parties breathing space to attempt to settle the proceedings or narrow the issues by mediation or some other form of alternative dispute resolution. A temporary stay may be ordered where there are parallel proceedings in another jurisdiction, raising similar or related issues between the same or related parties, where the earlier resolution of those issues in the foreign proceedings would better serve the interests of justice than by allowing the English proceedings to continue without a temporary stay: see Reichhold Norway ASA v Goldman Sachs International [2000] 1 WLR 173. But this would be justified only in rare or compelling circumstances: see per Lord Bingham MR at pp 185-186, and Klockner Holdings GmbH v Klockner Beteiligungs GmbH [2005] EWHC 1453 (Comm)."* (at §99)

36. There are a number of Cayman Islands authorities on case management stays, in particular in the context of winding up petitions.

37. In *AHAB v. Al-Sanea* [2010] 2 CILR 289*,* which was the leading Cayman authority prior to *Nanfong,* the Court of Appeal applying *Reichhold* reversed the Chief Justice's grant of a temporary case management stay of Cayman proceedings in favour of proceedings before the Saudi Committee, formed by Royal Order in Saudi Arabia.

38. The Court considered that the likely benefits of the stay did not clearly outweigh the disadvantages to the Plaintiff as: (i) there was no evidence that there would be a dispositive decision of the claims by the Saudi Committee, given its unclear remit, and there was no guarantee that the Saudi Arabian Courts would reach such a decision within a measurable period, or at all; (ii) the Saudi proceedings would not resolve issues which would otherwise have to be tried in the Cayman Islands; (iii) there was no reason to expect that the Saudi court decisions would be treated as binding between the parties; (iv) the stay actually gave rise to the possibility of the underlying issues being tried in both jurisdictions; and (v) that gave rise to the possibility of inconsistent findings.

39. In a decision of this Court in *Martin v. Circumference Holdings Ltd* (FSD, Unreported, 3 May 2021, Parker J), the Court held that a case management stay based on *Nanfong* would have been ordered, staying a Cayman petition in favour of English and Luxembourg proceedings, had the Court not formed the view that the petition fell to be struck out as an abuse of process, both because the other proceedings provided an alternative remedy, and because it was being pursued for the improper collateral purpose of obtaining a benefit in those other actions.

40. At §57, the Court stated the test as follows: *"there must be strong reasons for granting the stay to further the ends of justice, and the benefits which are likely to result from the stay must clearly outweigh any disadvantage to the Petitioner".*

41. Doyle J in *Enigma Diagnostics Ltd v Boulter* (8 February 2022), at §22 recently said:

> "*The jurisdiction to grant such case management stays is only exercised in rare and compelling circumstances which do not exist in this case. It is well established that such exceptional jurisdiction should be exercised with caution and only for very good reason (Nanfong International Investments Limited 2018(2) CILR 321)."*

42. In the even more recent decision of *Re New Silk Route Advisers LP* (FSD, Unreported, 10 February 2022, Doyle J), on another strike out application with a case management stay application in the alternative, in just and equitable petition proceedings, the Court refused the strike-out, but granted the stay such that:

> *"the future progress of these proceedings in the Cayman Islands should await the determination of issues in proceedings in the United States of America which were commenced in 2020 (a year before the petition in this case was filed)."* (at §8)

43. Doyle J helpfully set out the law at §§48 – 57 citing and following *Nanfong; Reichhold; Unwired Planet*; and *Circumference Holdings*. The Court also cited with approval an Isle of Man appeal, *Hiranandani*[7], in which it was stated:

> *"the burden on an applicant who seeks a case management stay is high. This is because a case management stay prevents a claimant from exercising its fundamental right of access to court in respect of a bona fide claim based on a properly pleaded cause of action."*

44. Having cited that, the Court continued:

> *"I also remind myself that the right to petition for a just and equitable winding up order is a remedy available as of right provided by statute and such right should not lightly be interfered with."* (at §55)

45. Despite each of those considerations, the Court granted the stay of the petition in favour of the New York proceedings as (i) the proceedings were well advanced; (ii) the determination of the issues in the New York proceedings would *"significantly assist this court in the fair, just and cost-effective determination of the issues which arise in the petition"*; (iii) it would *"in the long run, save the parties' time and costs"*; (iv) "*it will also ensure that the best use is made of court time and resources in respect of these proceedings in the Cayman Islands"*; (v) although the New York proceedings would not be determinative of the Cayman petition, there was *"significant duplication between the issues"* and *"significant common issues"*; and (vi) the determinations in

[7] 27 February 2014

New York would have *"an important effect"* on the Cayman proceedings (all at §§61 – 69).

46. The Court ended its judgment with an important statement on the manner in which the Court's approach to case management stays has developed in the 20 or so years since *Reichhold* (and with which I respectfully agree):

> *"I should add that active judicial case management has moved on considerably since … Reichhold. It may be that Lord Bingham's 'rare and compelling circumstances' comments in Reichhold need to be read in light of the more modern litigation culture in 2022 which requires more active judicial case management than was in its infancy in 1999 … The law and practice of case management stays has been developing since the 1990s. With much more cross-border international litigation in 2022 as compared with 1999 it is inevitable that the circumstances which justify a temporary case management stay in 2022 will not be as rare as the circumstances prevailing in 1999 … each case must of course be decided on its own facts and circumstances … there needs to be a good reason. At the very least the determinations in the foreign court must be considered to be likely to have 'an important effect' on the proceedings in the Cayman Islands, if not actually determinative of them. Moreover, case management stays may be imposed where imposing such would 'better serve the interests of justice.' The Court has a wide discretion which must be exercised cautiously with regard to the relevant facts and applying the relevant principles outlined in the authorities…"* (at §§70 – 71)

Analysis

47. The causes of action advanced against Walkers in this case are:

a. in ***negligence*** brought ***derivatively*** on behalf of the Port Fund;

b. for ***breach of fiduciary duty***, also brought ***derivatively*** on behalf of the Port Fund;

c. for ***dishonest assistance***, brought ***derivatively*** on behalf of the Port Fund; and

d. for ***dishonest assistance***, brought ***directly by P2 (GRSIA***) for its 5.86% interest.

48. Having reviewed the pleadings in this case and in Cause 97, it is clear that both claims against Walkers relate to the same subject matter and raise substantially the same questions relating to Walkers' actions in performing its retainer for the Port Fund and the Manager in respect of the DIFC proceedings.

49. The central question in both cases is whether Walkers is or is not liable for the alleged breach of its obligations as a result of those actions and if so for what loss. There is a complete overlap in relation to the claims for negligence and breach of fiduciary duty brought derivatively on behalf of the Port Fund.

50. There are only two main differences as to the remainder. The first is that Cause 97 does not contain a derivative claim based on dishonest assistance (47.c. above). The second is that there is no direct claim by the Limited Partners (KPA/PIFSS) in Cause 97 (47.d. above).

The direct claim in dishonest assistance

51. Having reviewed the pleadings, the direct claim alleging dishonest assistance arises out of the same subject matter and raises substantially the same issues as in the earlier proceedings. It seeks a share of 5.86% of the Port Fund's total alleged losses.

52. In my view the derivative claims asserted on behalf of the Port Fund in Cause 97 effectively cover the same ground for both liability and losses such that these pre-existing claims are substantially the same as this direct claim.

53. I accept Mr Hubble QC's submission, that if Walkers is liable to the Port Fund for breach of fiduciary duty, liability for dishonest assistance is practically irrelevant.

54. He acknowledges that there are different legal elements to the claim in dishonest assistance in the sense that the test would be whether the assister (here Walkers) dishonestly provided assistance to the trustee (here the GP) in relation to their breaches of trust.

55. This seems to me to be the right analysis[8]. As to dishonesty, knowledge and belief are the key factual elements of the enquiry, and dishonesty would be established if an honest and reasonable person in Walkers' position, knowing the facts they did, would have concluded that the trustee was not entitled to act as they did[9].

[8] *Snell's Equity* (34th Ed) at [30-077] – [30-079]
[9] *Group Seven v. Nasir* [2020] Ch 129 (CA) at §58 and §95

56. Despite Mr Grant QC's able attempts to persuade me otherwise, I accept Mr Hubble QC's submission that the differences in practice are not significant, albeit of course the allegation of dishonesty presents a high bar if advanced against professional people.

57. The case that is advanced by KPA/PIFSS in Cause 97, whilst not going this far, is likely to cover substantially the same ground: that is that Walkers deliberately and consciously acted in breach of its fiduciary duty and knew that the GP was improperly acting in breach of its duties.

58. On this basis if Walkers is neither liable in negligence, nor for breach of fiduciary duty, it is hard to see how it could be liable in dishonest assistance. The Court will have considered and ruled on most of the relevant underlying matters relating to Walkers' knowledge and belief and any breach of trust by the GP. It is specifically alleged in the breach of fiduciary duty claim that Walkers knew that the GP had acted or was acting dishonestly. That is likely to include an examination of facts which would go to whether or not Walkers had themselves acted dishonestly.

59. If on the other hand the derivative claims on behalf of the Port Fund in Cause 97 succeed, such that Walkers has to compensate it for all of its losses, then this direct claim is effectively subsumed in the total losses claimed on behalf of the Port Fund. In practice the direct claim is a subset of the derivative claim, in which GRSIA has a 5.86% interest (or US$3.14m of a total claim of circa US$60m).

60. I accept, as Mr Grant QC submits, that in a dishonest assistance claim seeking to reverse the consequences of fraud, it is not an answer to say that the claimant's loss would have

occurred anyway (because the wrongdoing fiduciary would have committed the breach even without the assistance[10].)

61. By contrast, in answer to the breach of fiduciary duty case in Cause 97 I note that Walkers do take the causation point that, even if they had not acted in breach, the same events would have transpired.

62. I acknowledge that the mechanism for calculating loss is different in a dishonest assistance claim. The approach in a dishonest assistance claim would be, assuming assistance was given by Walkers, to calculate the loss that has been caused by the trustee's (here the GP's) breach of duty.

63. However, notwithstanding the difference, my conclusion is that it still all amounts to the same loss, albeit causation may be treated differently.

64. It is therefore not clear to me what difference in practice the dishonest assistance claim would make as to recovery. Legal distinctions in relation to causation and loss do not in and of themselves merit the time and expense and potential prejudice to Walkers of a separate cause of action proceeding at the same time.

65. In my estimation the breach of fiduciary duty claim in Cause 97 is likely to determine the relevant issues between the Plaintiffs in this case and Walkers one way or another without the need for a separate claim.

[10] *Group Seven ibid* §110

Section 33(3)

66. As to whether section 33(3) is satisfied or not, the question as to whether the GP failed to bring this claim *"*without cause" must be viewed against the backdrop of the pre-existing and substantially similar proceedings commenced earlier against Walkers by Limited Partners with a much greater economic interest in Cause 97. For the reasons I set out below it is not necessary for the Court to reach a view on this question.

Decision

67. As this Court has decided in Cause 236, in contrast to a company and in common with a partnership the Port Fund, as an ELP, has no separate legal personality and exists only as its constituent partners[11]. Where the ELP has suffered loss that is the loss of each of the Limited Partners and there is no distinct or separate loss in respect of the Port Fund which as an entity does not exist at law[12].

68. When derivative claims are brought on behalf of the Port Fund, those claims by certain Limited Partners are made on behalf of all the Limited Partners. It follows that the derivative claims made in Cause 97 would include GRSIA's claims.

69. Since the Grand Court Rules provide that a claim can be brought by and against an ELP it seemed to me to make sense to join the Port Fund to Cause 236 so that it was bound by and was a party to the proceedings, even though it is not a legal entity. In that way the interests of the other Limited Partners, on whose behalf the derivative claims were

[11] Judgment dated 25 November 2021 at §54
[12] *Ibid.* §§63-64

brought, could be formally recognised[13]. I am told that was done in that case and has also been done in Cause 97.

70. In my judgement this matter can most conveniently and justly be disposed of by considering a case management stay rather than the Court's abuse of process jurisdiction by which Walkers seek to strike out the claims altogether. To debar the Plaintiffs from bringing these claims at all would not in all the circumstances be appropriate when there is another just and convenient remedy available.

Should a case management stay be ordered, and if so, in respect of which claims?

71. The question I ask myself is whether in all the circumstances of this case there are strong reasons for granting a stay to further the ends of justice, carefully weighing the benefits and any prejudice which are likely to result.

72. Looking at the matter in this way and in general terms, I am of the view that the two sets of proceedings against Walkers are substantially the same and in my judgment it is in both the public interest, and upon balancing the private interests of the parties, that there should only be one action for Walkers to defend.

73. That action should be Cause 97 as it was first in time, is further advanced, and is brought by Limited Partners with a far greater economic interest in the Port Fund.

[13] *Ibid.* §124

74. I accept the evidence of Mr Wood[14] that to allow this claim to continue in parallel with Cause 97 could well expose Walkers' witnesses to two separate cross examinations on the same issues successively at one trial (even if they are conjoined in some way) which would in principle be oppressive and unfair to the witnesses involved. I bear in mind that Walkers' witnesses are likely to include people who will be defending their careers and professional reputations against very serious allegations. They should not have to do so twice, however well the trial Judge manages the process to ensure fairness.

75. In addition, litigation proceeding against Walkers on two fronts over many years is also likely to impose a substantial burden upon it with consequent increases in management and witness time commitment as well as legal costs. I accept the risks outlined by Mr Wood[15]:

> *"Inevitably, we would need to review and respond to many further letters, e-mails, pleadings, etc. as and when generated by GRSIA's legal team (or our own); as well as to deal with as many interlocutory hearings as are required by either GRSIA's, or our own applications, each seeking to protect their interests in the proceedings in the usual way. That will all need to be done simultaneously with the equivalent activity by KPA and PIFSS, and ourselves, in Cause 97, over a period of some 3 - 5 years, and potentially even longer than that … there are two separate and extensive legal teams for (1) KPA and PIFSS in Cause 97, and (2) GRSIA in these proceedings; and … each of those legal teams will doubtless be alive to the ability to cause strategic difficulty for Walkers by virtue of the two claims proceeding at the same time."*

[14] Wood 1 §§10-12
[15] Wood 1 §10(b)

76. The Plaintiffs in the two claims against Walkers, unsurprisingly as separate entities, have separate legal teams. Walkers has one legal team. Apart from its own costs burden which arises from defending itself on two fronts in respect of essentially the same claim, Walkers also faces the risk of two sets of adverse costs.

77. I also consider it an important factor in weighing up my decision that substantially more Court resources and available Court time will be used up by two sets of proceedings to the detriment of other Court users.

78. I adopt what Justice Doyle had to say in *New Silk Route Advisers*[16] in February of this year (although his comments were made in the context of cross border litigation with parallel cases in more than one jurisdiction). I agree that the approach to case management stays needs to be adapted to current times where there is a greater emphasis on the importance of active judicial case management, which leads to efficiency in disposing of litigation. The principle seems to me to apply even more so to the Court controlling procedure in its own jurisdiction in the present circumstances.

79. I have concluded that there are good reasons relating to the administration of justice and the unfairness and prejudice this claim causes to Walkers for the Court to step in and regulate matters. In addition, it is in the public interest that the Court should be astute to secure outcomes for litigants which are just, expeditious, and which cause the least expense reasonably possible in determining cases.

[16] (FSD, Unreported, 10 February 2022, Doyle J)

80. The fair, reasonable and proportionate course is to stay these proceedings *as a whole* with a liberty to apply.

81. That would cause in my judgement the least irremediable prejudice to both parties. As I have referenced above, GRSIA have agreed in principle to stay a large part of the claim (subject to terms which deal with protecting its interests in the context of KPA/PIFSS pursuing their claims).

82. Mr Grant QC helpfully made clear that GRSIA have no interest in pursuing derivative causes of action in negligence or breach of contract and fiduciary duty in addition to those brought in Cause 97 for the benefit of the entire corpus of Limited Partners, who of course have a commonality of interest.

83. To not stay the remainder (the derivative and direct dishonest assistance claims) would still visit the same prejudice and vexation on Walkers, would not save substantial expense for all parties, and would not avoid an unnecessary waste of Court time and resources required to deal with these claims which are, as I have found, substantially duplicative of the claims in Cause 97.

84. To stay all the claims will in my view secure the just, most expeditious, and least expensive determination of the matter, and would in particular avoid duplication of substantial expense.

85. In my judgment GRSIA are reasonably protected by this outcome. A stay with liberty to apply does not finally preclude GRSIA's claims. Any delay to a claim not established in Cause 97 could be compensated by an interest calculation.

86. There seems to me to be no reason to have as a condition of this stay that Walkers should abandon the so-called plaintiff specific defences and its defence based on section 33(3). The section 33(3) point is currently awaiting determination by the CICA as I have said.

87. Having reviewed the defences and Mr Wood's affidavit[17], they do not seem to me to be specific to KPA and PIFSS in Cause 97, may therefore be used more widely, and there is no basis to force Walkers to abandon them.

88. If GRSIA is dissatisfied with the outcome of the case advanced in Cause 97 it may at an appropriate time apply to lift the stay and pursue its claims or ask the Court for directions.

89. A condition of the stay should be that Walkers would undertake to the Plaintiffs to notify them in writing 21 days in advance of any settlement in Cause 97 to allow for any concerns to be raised as to payment arrangements.

90. As well as liberty to apply generally, the Plaintiffs should also in particular be given the right to make submissions in respect of any relief that might be necessary if the Court finds Walkers liable at trial.

91. It seems to me that the Limited Partners should also co-operate between themselves in respect of Cause 97 so as to ensure, consistent with the Overriding Objective and the

[17] Wood 1 §§ 38-45

public interest in the efficient conduct of litigation, that there is no need for two concurrent claims, when one will suffice.

92. The Court is minded to Order that costs should be in the cause. If any party disagrees the matter will be determined on the papers on the basis of short written submissions to be filed within 14 days from the handing down of this Judgment.

THE HON. RAJ PARKER
JUDGE OF THE GRAND COURT