IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Neutral Citation Number: [2025] CIGC (FSD) 87

CAUSE NO: FSD 285 OF 2023 (IKJ)

IN THE MATTER OF THE RECEIVERSHIP OF PORT LINK GP LTD (IN VOLUNTARY LIQUIDATION) ITS ASSETS AND THE ASSETS OF THE PORT FUND L.P. (THE "RECEIVERSHIP")

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances: Mr Dan McCourt Fritz KC of counsel with Ms Jennifer Fox, Mr Harry Clark and Ms Ghita Moyle of Ogier (Cayman) LLP for Kuwait Ports Authority ("KPA") and the Public Institution for Social Security ("PIFSS") (together the "Funders")

Mr Graham Chapman KC of counsel with Mr Harry Shaw of Campbells LLP for Mr Mark Williams, Wellspring Capital Inc. and KGL Investment Company Asia, the 2nd to 4th Defendants in FSD 236/2020 (RPJ)(D2-D4)

Mr Daniel Bayfield KC of counsel with Mr Matthew Dors and Ms Kirsten Bailey of Collas Crill LLP for the Receivers

Heard: 30 July 2025

Draft Ruling circulated: 18 August 2025

Ruling delivered: 27August 2025

Court appointed receiver - construction of receivership order - power of court to confer priority in respect of receivership funders - Grand Court Act (2015 Revision), section 11 (1)

RULING ON FUNDERS' SUMMONS

Introductory

1. By a Summons dated 27 November 2024, the Funders sought the following Order:

> "*1. That, consistent with the Receivers' right to an indemnity from, and a lien over, the assets of Port Link GP LTD (the 'GP') and the Port Fund L.P. (the "Fund") (together the 'Receivership Assets'), any sums paid by the Funders to the Receivers in respect of their remuneration and expenses fall to be reimbursed from the assets of the GP and/or the Fund in priority to any unsecured claims to the Receivership Assets and/or the unsecured debts and liabilities of the GP and/or the Fund;*
>
> *2. Further or alternatively, that the Funders should be subrogated to the rights of the Receivers in respect to the Receivers' right to an indemnity from, and a lien over, the Receivership Assets; and*
>
> *3. That any reimbursement due to the Funders pursuant to paragraph 5 of the Receivership Order, and/or by way of equitable subrogation to the rights of the Receivers in respect to the Receivers' right to an indemnity from, and a lien over, the Receivership Assets shall be payable as soon as reasonably practicable out of the assets of the GP and/or Fund.*"
>
> *4. The Funder's costs of and incidental to this Summons shall be costs in the Receivership and paid from the Receivership Assets.*

2. The Funders are the Plaintiffs in FSD 236/2020 and D2-D4 significant Defendants. The Funders allege that D2-D4 and other defendants are responsible for substantial financial losses suffered by The Port Fund L.P. (the "Fund"), the General Partner of which was Port Link GP (the "GP") and the 1st Defendant in FSD 236/2020. Mr Williams is the ultimate beneficial owner of the GP yet D2-4 advance a Crossclaim against the GP in those

proceedings. The Receivers were appointed over the GP (on the Funders' application) by Parker J by Order dated 1 June 2023 (the "Receivership Order"). The application was granted for the reasons set out in Parker J's 25 May 2023 Judgment in FSD 236/2020 which explained, *inter alia*, as follows:

> "*102. If the derivative claims brought in the name of the General Partner are successful and that results in the realisation of assets by the General Partner (for distribution to creditors), those assets may be depleted in the event that any of the Crossclaims brought by D2-4 against the General Partner are successful. The General Partner acts as the statutory trustee of TPF.*
>
> *103. <u>It is therefore important to fairly establish the merits of the respective claims in the interests of justice</u>….*
>
> *110. The crux of the dispute is about control of the General Partner, which is itself, incapable of exercising any management functions. The Court has concluded that the most appropriate remedy in all the circumstances which does justice between the parties is to appoint independent Receivers. The main purpose of the appointment is for an independent professional to manage the complex litigation on behalf of the General Partner reasonably and efficiently. This leads to a more bespoke method of supervision by the Court than that of a statutory liquidation with its rigid rules. The Receiver Application is more flexible and may be tailored to the material circumstances relating to the litigation which will inevitably change.*
>
> *111. In the Court's view, it would be just and convenient to appoint the Receivers for the purpose of ensuring that there is a professional, independent, and impartial office holder in place who will regularly report to the Court and in the meantime ensure the interests of the General Partner in the litigation are monitored, protected, and advanced appropriately. Importantly, the General Partner's interests will be advanced on an objective, reasonable, and independent basis free from the improper influence by any of the protagonists in the litigation…*

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

3. The Receivers were appointed "*in the interests of justice*" in circumstances where their costs had to be, in the first instance, underwritten by the Funders because neither the GP nor the Fund had available liquid assets. The Judge's assumption was that the Limited Partners would likely have to fund the GP's and the Fund's expenses, presumably on a *pro rata* basis. Parker J was seemingly keenly aware, before the Receivership Order was made, that liquidity was an issue.

4. The Receivers were appointed under the jurisdiction conferred by section 11 of the Grand Court Act (2015 Revision) as read with section 37 of the Senior Courts Act 1981 (England and Wales). As regards the ability of the Funders to recover funding advanced for the Receivership, the Receivership Order provides:

"*5. To the extent the Receivers' remuneration and expenses, as approved by the Court, are paid by the Applicants, the sums paid by the Applicants shall be repaid to the Applicants as expenses of the Company and/or the Fund.*

6. The Applicants undertake promptly to provide (i) copies of any written funding agreement or arrangement and (ii) particulars of any oral funding agreement or arrangement, entered into by the Applicants and the Receivers, and any amendments thereto made from time to time, to the Second to Fourth Defendants and the Court."

5. They have essentially been appointed over the GP in its capacity as general partner of the Fund. Paragraph 1 of the Receivership Order formally appoints the Receivers "*as interim receivers of Port Link GP Ltd (the 'Company') and its assets and the assets of The Port Fund L.P. (the 'Fund')*". As I indicated in the course of the hearing, it appeared to me that paragraph 5 meant 'expenses of the Receivership', by analogy with the common term used in winding-up proceedings ("expenses of the liquidation") to confer priority on liquidation expenses. While paragraph 6 contemplated that a funding agreement would be entered into between the Funders and the Receivers at some future date, the Receivership Order did not expressly reserve for future consideration the question of the basis on which the Funders would be entitled to be

repaid. As a matter of common sense, it seems to beggar belief that Parker J would have intended in all the circumstances to require the Funders to fund the receivership established "*in the interests of justice*" without affording the sort of protections that funders of illiquid entities typically receive.

6. In the circumstances which will be considered below, the Funders sought to fortify their legal position after the Receivership Order was perfected on 1 June 2023. Unsurprisingly, having regard to the highly contentious nature of the proceedings in FSD 236/2020, D2-D4 did not welcome the Funders' proposals with open arms. This prompted the filing of the Funders' 27 November 2024 Summons which, after further attempts to reach a compromise through open correspondence, was eventually heard on 30 July 2025. In the course of that hearing, I expressed the following strong provisional views:

   (a) it was properly open to the Court to construe the terms of the Receivership Order and declare what priorities (if any) it conferred on the Funders' reimbursement rights; and

   (b) it was not properly open to the Court to grant fresh security to the Funders in the terms proposed in their Summons.

The Evidence

7. The Funders' Summons was supported by the Second Affidavit of Charles Thomson of Baker & McKenzie LLP ("Thomson 2") and the First and Second Affidavits of Ogier's Harry Clark, which exhibited correspondence and other documents.

8. Thomson 2, sworn on 18 December 2024, articulated the primary relief sought in the following terms:

   > "4. *Paragraph 5 of the Receivership Order provides that: 'to the extent the Receivers' remuneration and expenses, as approved by the Court, are paid by the [Funders], the sums paid by the [Funders] shall be repaid to the [Funders] as expenses of the Company and/or the Fund.' By this application, the Funders seek an order:*

> *(a) Confirming that, consistent with the Receivers' right to an indemnity from, and a lien over, the Receivership Assets, any sums paid by the Funders to the Receivers in respect of their remuneration and expenses fall to be reimbursed from the assets of Port Link GP Ltd (the 'GP') and/or the Fund in priority to any unsecured claims to the Receivership Assets and/or the unsecured debts and liabilities of the GP and/or the Fund…*" [Emphasis added]

9. It might be said that paragraph 4(a) signified that the primary relief being sought was guidance as to what paragraph 5 of the Receivership Order meant and that only in the alternative was fresh relief sought through subrogation. However, the deponent further explains that in the lead up to an 18 September 2023 hearing to decide whether the Receivers should continue in office or the Joint Voluntary Liquidators ("JVLs") should remain in office:

> "*40. …given the significant sums likely to be involved, the Funders wanted to put it beyond any doubt that the funding they were advancing to fund the Receivership pending the resolution of the claims made in FSD 236 (of which the Funders also bear the full cost) would benefit from the indemnity granted to the Receivers and the lien over the Receivership Assets that arises as a matter of receivership law generally. The Funders also wanted to ensure that they would be reimbursed promptly.*"

10. Parker J, very properly, decided at that hearing that all issues relating to the Receivership should be dealt with by another judge. The present proceedings were issued and came before me for the first time on 11 December 2023. In the run up to that hearing, due to the failure to reach agreement on a modified form of order, no modification was sought at that hearing. It is then further averred:

> "*53. It is worth pointing out at this juncture that the Funders do not seek a separate indemnity in respect of the substantial funding that they have advanced to the Receivers, they instead simply wish for the Court to confirm that they will benefit from the Receivers' indemnity from the Receivership Assets and lien, and that any funding advanced will be reimbursed to them on that basis, and for any such repayment will be made as soon as reasonably practicable.*

> 57. *The Funders' position is that the effect of paragraph 5 of the Receivership Order (and the intention underlying it) is that, to the extent that assets are available for the Receivers to enforce their indemnity against, they should do so to enable them to reimburse the Funders. I would suggest that this interpretation is consistent with authority and principle, and is the only realistic construction of paragraph 5 having regard to the other terms of the Receivership Order and the context in which it was made (referred to above).*"

11. Viewing this evidence on its own merits, putting aside how the Summons was framed and the way D2-D4 framed their adversaries' application, it was clear that the primary relief sought was clarification of whether or not paragraph 5 of the Receivership Order enabled the Funders to benefit from the lien that the Receivers had over the assets of the GP and the Fund. Thomson 2 also set out the position of the various interested parties at the date of this Affidavit:

> "*56. From the correspondence referred to above, I believe that the position of each of the other parties is as follows:*
>
> *(a) Campbells for D2 to D4 oppose the relief sought and will likely oppose this Application, possibly on the basis detailed in their letter of 6 December 2023;*
>
> *(b) Collas Crill for the Receivers do not disagree with the principle underpinning this Application (as per their letter of 21 February 2024, set out in paragraph [55] above);*
>
> *(c) GIC and GRSIA's position (summarised in paragraph [50] above), is that it is not clear to them whether the Court has jurisdiction to grant this relief and they make no concessions in this regard (and therefore it appears possible that they may oppose);*
>
> *(d) Appleby for Walkers agree that the funding provided by the Funders is protected by the Receivers' Lien in that, they say the Receivers are entitled to an indemnity and a third party order is not required (set out in paragraph [52] above); and*

> (e) *KGLI Kuwait's position is unclear, but given its strong connections to D2 to D4, and the security it obtained in relation to the funding it previously provided to the FFP Directors, the Funders suspect they would oppose the relief sought if they chose to make an appearance before the Court.*"

12. As for the position based on subsequent correspondence, there was no dramatic change. For instance:

    (a) Campbells for D2-D4 on 6 January 2025 reiterated their position that the Summons should not be listed until the end of the trial. However, on 14 February 2025 complaint was made about the Funders' delay in listing and pursuing the Funding Summons and it was suggested the application could be dealt with on the papers;

    (b) Harneys for the former JVLs wrote to Ogier on 16 January 2025 advising that their clients did not oppose the present application "*on the basis that the real dispute on the Application appears to be between your clients and those parties with unsecured claims*";

    (c) Collas Crill on behalf of the Receivers informed Ogier on 17 March 2025 that they did not anticipate adopting any position at the hearing save that the Receivers' fees and expenses should take priority over all other claims;

    (d) however, contrary to the supportive position Mr Thomson tentatively anticipated in December, Appleby on behalf of Walkers on 24 March 2025 suggested the Summons should not be heard until the end of the FSD 236 proceedings.

13. Reference should also briefly be made to the "Funding Letter" dated 30 June 2023 and entered into between the Funders and Interpath (Cayman) Limited. The letter stated (at pages 5-6):

    > "*Pursuant to paragraph 5 of the Order, in the event that the Company or the Fund has sufficient assets lawfully available to repay in cash any portion of our Fees which you*

> *have already paid, the amount of any such portion will be repaid to You as soon as possible <u>as an expense of the Company and/or the Fund.</u>*" [Emphasis added]

14. While the Funding Letter is only a contract, its reference to paragraph 5 of the Receivership Order provides some, albeit indirect, support for the construction the Funders contend for in relation to that part of the Order. Further indirect support for the meaning of paragraph 5 of the Receivership Order is provided by the correspondence relating to the proposed terms of the Order which is considered below.

The submissions

<u>**The Funders' submissions**</u>

15. Mr McCourt Fritz KC in the Funders' Skeleton Argument dated 27 March 2025 (in Section C headed "*THE FUNDERS BENEFIT FROM THE RECEIVERS' INDEMNITY*") advanced the following key legal propositions:

> "*46. Receivers appointed by the Cayman Islands Grand Court are entitled to recover their fees as a first charge over the assets of the relevant company: AHAB v Saad 2011 (2) CILR 1 per Smellie CJ at [3].*
>
> *47. This is consistent with the position in England, where a receiver appointed over the assets of a company is entitled to be paid next after payment of the costs of realisation, although not in priority to prior charges: Kerr & Hunter on Administrators & Receivers (22nd Edition) at 11-7, Re Glyncorrwg Colliery Co [1926] Ch. 951 and Choudri v Palta [1992] BCC 787. The receiver also benefits from a lien for his remuneration and expenses, and to secure his right of indemnity, which binds the assets in the receivership, irrespective of whether they are in the receivers' physical possession: Kerr & Hunter (ibid) at 11-8: Mellor v Mellor [1992] 1 W.L.R. 517.*
>
> *48. In Capewell v Her Majesty's Revenue and Customs [2007] UKHL 2 the House of Lords held as follows (at [21]-[22]):*

'21. It has always been a basic principle of receivership that the receiver is entitled to be indemnified in respect of his costs and expenses, and his remuneration if he is entitled to be remunerated, out of the assets in his hands as receiver. Warrington, J. stated the principle in a well-known passage in Boehm v. Goodall, [1911] 1 Ch. 155, at 161, [1908–10] All E.R. Rep. 485, at 487:

> *'Such a receiver and manager [that is one appointed by the court] is not the agent of the parties, he is not a trustee for them, and they cannot control him. He may, as far as they are concerned, incur expenses or liabilities without their having a say in the matter. I think it is of the utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of the Court. The Court itself cannot indemnify receivers, but it can, and will, do so out of the assets, so far as they extend, for expenses properly incurred; but it cannot go further. It would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control.'*
>
> *This passage was cited and applied by Vinelott J in Evans v Clayhope Properties Ltd [1987] 1 WLR 225, 229–230 (upheld by the Court of Appeal [1988] 1 WLR 358, Nourse LJ, at p 363, sharing Vinelott J's doubts as to whether a receiver's remuneration could be recovered as litigation costs).*

22. These principles were applied (though with some reluctance) by the Court of Appeal in In re Andrews [1999] 1 WLR 1236, a case of alleged VAT and PAYE frauds in which restraint and

receivership orders were made against a father (who was eventually acquitted and awarded his costs out of public funds) and a son (who was eventually convicted of fraud). The facts were rather obscure since their business activities were carried on by three different companies, and the degree of control and financial interest enjoyed by different members of the family was uncertain. Ward LJ and Aldous LJ (with both of whom Hirst LJ agreed) said that remuneration and expenses (as such) could be charged only against receivership assets, and could not (under guise of litigation costs) be charged to anyone else on the principle in Aiden Shipping Co Ltd v Interbulk Ltd [1986] AC 965, 975.' …

58. It is patently clear from paragraph 5 of the Order – and also from the Funding Letter – that the Funders should be entitled to recover any sums which they pay to the Receivers as expenses of the GP and/or the Fund in precisely the same way that the Receivers themselves would be entitled to recover their fees and expenses from the GP and/or the Fund (i.e., just as liquidators would in a liquidation)…"

16. In the Funders' Supplemental Skeleton Argument, the following additional arguments, *inter alia*, were set out:

"12. Although D2-D4 persisted in their objections to other aspects of the Funders' proposed draft order (including for example that a provision should be included requiring the Receivers to act independently), they conceded the argument on what became paragraphs 3 and 5 of the Receivership Order, adopting the Funders' proposed wording in the draft that they lodged with the Court on 25 May 2023 (see paragraphs 5 and 7 of the draft).

13. Having argued but then conceded the points, and accepted the Funders' proposed wording of what became Paragraph 5 on the explicit basis that it was intended to entitle the Funders to be reimbursed "as expenses of the [GP] and/or the Fund" in priority (and not "pari passu" as D2-D4 had proposed in

their 24 May draft), D2-D4 are estopped from advancing the construction of the Paragraph 5 that they now seek to propound.

14. The Receivership Order was made on the basis of D2-D4's concession as to the wording and effect of what became Paragraph 5, and the Funders relied on that concession in advancing funding to the Receivers."

The Receivers' submissions

17. In the Receivers' Skeleton Argument the following key submissions were made:

"*6. The Receivers set out their position regarding the relief sought by the Funders in the Summons, by way of letter to all parties dated 17 March 2025 (Receivers' Letter).*

7. As set out in the Receivers' Letter, the Receivers' position in relation to the Summons is as follows:

(a) the Receivers' fees and expenses have priority above any and all other claims to the assets of the GP and Fund, whether from the Funders for reimbursement or the former Joint Voluntary Liquidators (JVLs) or otherwise;

(b) without prejudice to any claims that the Receivers might have against the Funders, the Receivers' fees and expenses should be paid first out of any recoveries made by the GP and/or Fund; and

(c) The Receivers do not object to the payment of the deferred element of their fees ranking pari passu with the Funders' claim."

18. Mr Bayfield KC confirmed that (1) the Receivers' 17 March 2025 Letter had not disputed his clients' position and (2) his clients adopted a neutral position in relation to the present application.

D2-D4s' submissions

19. Mr Chapman KC in oral argument sought to demonstrate the reasonableness of his clients' oppositional position, in part by building on my observation during the opening of the application that the Summons did not make it clear that the Funders were primarily seeking an interpretation of paragraph 5 of the Receivership Order. D2-D4's counsel also emphasised the opposition of other stakeholders and the inappropriateness of deciding questions of priority including the subrogation issue at this stage. The position was summarised at the beginning of D2-D4's Skeleton Argument as follows:

> "*4. D2-D4 oppose the application on the grounds that it would adversely and prematurely affect the rights and interests of the creditors of the GP and the Fund. Moreover, and in the circumstances, it is unnecessary and would be inappropriate for these issues to be determined now and in the context of the Receivership supervision proceedings. D2-D4 therefore contend that (i) the application should be adjourned generally pending the conclusion of the proceedings brought in FSD 236, and (ii) the issues raised as to the priority of the competing claims to the GP's assets should be determined at that stage, in light of the findings and costs orders made in those proceedings, and in the context of the liquidation of the GP and by the Judge appointed to supervise the liquidation.*"

20. A persuasive case is then set out as to why the Court should not at this stage predetermine the priorities which should apply to various claims likely to be made in the liquidation of the GP. These submissions are all premised on the assumption that the Funders' Summons requires the Court to determine issues which the Court has not yet determined. The central thesis underpinning this case was set out in the following paragraph:

> "*15. Paragraph 5 of the Receivership Order provides that to the extent that the Receivers' remuneration and expenses approved by the Court are paid by the Funders, the sums paid shall be repaid to the Funders as expenses of the GP and/or the Fund. However, the Receivership Order does not address the priority of the repayment of such sums out of the Receivership Assets as against the claims of other creditors.*"

21. Despite the fact that D2-D4 had seemingly implicitly agreed to paragraph 5 of the Receivership Order being framed in a way which suggested priority being conferred on the Funders' repayment rights, in my judgment the Funders' own subsequent attempts to seek clarification of the position made it unsurprising that D2-D4 should seek to exploit the Funders' lack of conviction that their position was already adequately protected. In these circumstances, the suggestion that D2-D4 were estopped from resiling from the construction of paragraph 5 of the Order which the Funders contended for seemed somewhat overreaching. The following oral submissions accordingly fall to be taken into account together with the written submissions:

(a) paragraph 5 does not say that the Funders are entitled to benefit from the Receivers' security or deal with priority at all. The Order as a whole only dealt with the Receivers' priority;

(b) if paragraph 5 was clear, it made no sense that the present application was being made;

(c) there was no need to revisit the Funding Letter;

(d) there was insufficient particularity to enable the Court to determine that the Funders had acquired security over specific assets; and

(e) the application should be adjourned.

22. The most significant feature of Mr Chapman KC's oral and written submissions was their failure to advance any convincing basis for construing paragraph 5, and the term "*as an expense of the GP and/or the Fund*", otherwise than in accordance with what I suggested during the hearing was arguably the natural meaning of those words in their context. He did however submit that I was correct to express concern as to whether, outside of the statutory priorities conferred by the winding-up regime, the Court had no jurisdiction to confer the priority contended for or sought by the Funders. However, Mr Chapman KC did make the following legal points to support his clients' position on the construction of paragraph 5:

(a) there was a legal distinction between the security rights of receivers and their funders: *AHAB v Saad* 2011 (2) CILR 1; and

(b) as a matter of law a receiver's funders do not derive security from the appointment: *In re A. Boynton Limited* [1910] 1 Ch. 519.

23. The first proposition is sound as a matter of general principle, although it is not clearly supported by the *AHAB* case. The second proposition is also sound as a matter of general principle, although the *In re A. Boynton Limited* case deals with subrogation and there was no suggestion that the funder was asserting an entitlement to benefit from the receiver's appointment by reference to express terms of the receivership.

<u>The Funders' reply submissions</u>

24. The principal issue I indicated I was concerned about as regards the construction of paragraph 5 was the jurisdictional basis for the Court conferring the security the Funders' contended for. Mr McCourt Fritz KC submitted that the power clearly existed under the inherent jurisdiction of the Court. In addition he submitted:

(a) what happened after the Receivership Order was made was irrelevant to its construction; and

(b) if the relief sought was not within the terms of paragraph 1 of the Funders' Summons, the Court should grant leave to amend to permit the clarification sought to be given.

Findings: are the Funders entitled to benefit from the Receivers' security by virtue of the terms of the Receivership Order?

<u>Preliminary</u>

25. In my judgment the relief sought under paragraph 1 of the Funders' Summons was materially different to the relief sought on the grounds set out in Section C of the Funders' skeleton Argument because:

(a) paragraph 1 of the Summons sought an Order that the Funders were entitled to recover sums advanced "*consistent with the Receivers' right to an indemnity*"; and

(b) Section C of the Skeleton Argument contended that the Funders were entitled to benefit from the Receivers' indemnity.

26. The Funders submitted most relevantly:

> "*56. The references to the Funders being reimbursed for payments that they make on account of the Receivers' remuneration and expenses "as expenses" or "as an expense" of the GP and the Fund are only consistent with their having the benefit of the Receivers' indemnity or an indemnity of like effect. In the closely analogous context of liquidations, "expenses" refer to officeholders' fees; the term was used in the Receivership Order and the Funding Letter in that sense and with the intention that the Funders would in turn be indemnified.*"

27. In addition, Thomson 2 filed in support of the Summons in November 2024 (paragraph 4(a)) made it clear that the Funders were seeking at least in part to obtain confirmation that their position was protected by paragraph 5 of the Receivership Order. In these circumstances it seems to me that it is open to the Court to consider providing the confirmation sought without amending the Summons under paragraph 4 ("*Such further or alternative relief as the Court sees fit*").

<u>Approach to construing paragraph 5</u>

28. The starting point in the analysis of what paragraph 5 provides, if anything, in relation to the priority of the Funders' reimbursement rights is that it is essentially common ground that "*the Receivers' fees and expenses have priority above any and all other claims to the assets of the GP and Fund, whether from the Funders for reimbursement or the former Joint Voluntary Liquidators (JVLs) or otherwise*" (Receivers' Skeleton Argument, paragraph 7(a)). I say "essentially", because in reality what the Court is being asked to decide is whether the Receivers' "expenses":

(a) include the sums advanced to fund the Receivership by virtue of paragraph 5 of the Receivership Order; or

(b) exclude those expenses.

29. The only genuine consensus thus appears to be that the Receivers' fees and expenses have priority over any and all claims. It is quintessentially a matter for the Court to clarify the terms of one of its Orders where any of its terms are in doubt. The disputed question of construction involves three layers of analysis:

(a) the relevant terms of the Order;

(b) the commercial and/or legal purpose of the relevant terms as demonstrated by the legal and commercial context in which the Receivership Order was made; and

(c) the scope of the Court's jurisdiction.

30. That is the approach I was minded to adopt without reference to authority. However, to the extent that it might be suggested that authority is needed to justify this approach, the following observations of Ward LJ in *Feld-v-Secretary of State for Business, Innovation and Skills* [2014] EWHC 1383 (Ch) provide helpful guidance:

> "*27. In a court order; one is concerned with the intention of the court in making the order, and this is closer to the exercise involved in construing the intention of the legislature when enacting a statute than it is to construing the intention of parties to a contract. On the other hand, it would be a rare and unusual case where a person to whom a statutory provision was to be applied (in a civil or criminal proceeding where the meaning of the statutory provision was at issue) had been involved in the drafting of that provision. But where a court order is to be applied to a person, such as Mr Feld, who had a hand in drafting the terms of the order, the court should be entitled to have regard, as part of the exercise of construing the order, to what that person could reasonably have been thought to have intended in drafting the order in a particular way, as far as that may be objectively determined on the basis of the evidence presented to the court.*

28. The interpretation of a court order cannot be entirely assimilated to the exercise of interpreting a contract nor can it be entirely assimilated to the exercise of interpreting a statute. In all three cases, however, the common starting point is the natural and ordinary meaning of the words used in light of the syntax, context and background in which those words were used. What additional principles and factors come into play as part of the court's exercise of interpretation will depend on the nature of the writing to be interpreted (contract, court order or statute) and, of course, will be highly dependent on the facts of the specific case. In the context of statutory interpretation, Lord Reid pointed out in Cozens *v* Brutus, *and Lord Hoffmann in* Moyna, *the importance of interpreting the natural and ordinary meaning of the words used in the relevant statute in light of the "syntax, context and background" in which those words were used (*Moyna *at [24], quoted by Dyson LJ* In Evans *at [14])*."
[Emphasis added]

The relevant terms of the Receivership Order

31. The most pertinent portions of the Order for present purposes are the following:

"*1. Gordon MacRae and Elizabeth Mackay of Interpath (Cayman) Limited, 38 Market Street, Suite 4208, Canella Court, Camana Bay, Grand Cayman, KY1-9006, Cayman Islands (the "Receivers") be appointed, until further order, as interim receivers of Port Link GP Ltd (the "Company") and its assets and the assets of The Port Fund L.P. (the "Fund") with the power to act jointly and severally, with such appointment being restricted to the conduct of litigation to which the Company and/or the Fund is or becomes a party…*

3. The Receivers shall be indemnified out of the assets of the Company and/or the Fund (as may be appropriate) for all remuneration, costs, fees, charges, expenses, disbursements, claims, demands and liabilities which they may reasonably incur or for which they may become liable arising out of or in connection with or in relation to the proper performance of their duties pursuant to this Order.

4. *The Receivers shall be authorised to be reimbursed for their reasonably incurred expenses and to charge remuneration by reference to time spent at their ordinary hourly rates from time to time in amounts to be approved periodically by the Court.*

5. *To the extent the Receivers' remuneration and expenses, as approved by the Court, are paid by the Applicants, <u>the sums paid by the Applicants shall be repaid to the Applicants as expenses of the Company and/or the Fund</u>.*" [Emphasis added]

32. The three key features of the Order can be summarised as follows:

(a) the Receivers were appointed by the Court to conduct a bespoke role of conducting litigation on behalf of "*the Company and/or the Fund*" (paragraph 1);

(b) the Receivers were granted an entitlement to be "*indemnified out of the assets of the Company and/or the Fund*" for, *inter alia,* "*all remuneration*…[and]…*expenses*…" (paragraph 3); and

(c) provided that the sums advanced by the Funders are approved by the Court as part of the Receivers expenses, such sums shall be repayable to the Funders as "*expenses of the Company and/or the Fund*" (paragraph 5).

33. On a straightforward reading of the Order, the Funders are entitled to be repaid any sums paid to the Receivers on the basis that such repayments form part of the expenses of the Company and/or the Fund in respect of which the Receivers are given a right of indemnification. It is also self-evident that the term "*Company and/or Fund*" means the GP or the Fund "in Receivership", so that the relevant indemnity in substance relates to costs and expenses "of the Receivership".

34. Of indirect relevance to the just quoted paragraphs of the Receivership Order is the fact that paragraph 2 empowers the Receivers:

"*2.3 To appoint counsel, attorneys, and/or professional advisors, as they may reasonably consider necessary to act for the Company and/ or the Fund, and*

/or advise and assist them in the performance of their duties and on such terms as they may think fit."

35. So fees payable to the Receivers' attorneys would also be covered by the Receivers' right of indemnity. Although the Order does not directly address the issue of priority, the language of paragraph 3 closely mirrors that which would be used in a standard form order appointing provisional or official liquidators. Paragraphs 3 and 5 of the Order more directly track the language of the following paragraphs of the Funders' Summons dated 28 March 2023 seeking the Receivers' appointment:

> "3. *The Receivers shall be indemnified out of the assets of the Company and/or the Fund (as may be appropriate) for all remuneration, costs, fees, charges, expenses, disbursements, claims, demands and liabilities which they may incur or for which they may become liable arising out of or in connection with or in relation to the proper performance of their duties pursuant to this Order.*
>
> *4. To the extent the Receivers' remuneration and expenses are in fact paid by the Applicants, the sums paid by the Applicants shall be repaid to the Applicants as expenses of the Company and/or the Fund.*"

The commercial and/or legal purpose of paragraphs 3 and 5 of the Receivership Order

36. In my judgment it is obvious that the relevant provisions of the Receivership Order were designed to confirm that the Receivers had an entitlement to be reimbursed from the assets of the Receivership on a priority basis as typically occurs when such officers are appointed by the Court in relation to entities which are either insolvent or illiquid. The commercial and legal function of conferring such an indemnity is central to the ability to make the appointment in a timely manner. It is simply standard commercial practice for professional officeholders to insist on the protection of such indemnification rights as a term of their appointment. This is why Parliament has enacted statutory priorities for the winding-up sphere (e.g. Companies Act (2025 Revision, sections 109(1)-(2), section 130(1), section 228). These provisions cover solvent and insolvent liquidations, and segregated portfolios as well.

37. Similar principles apply absent these statutory supports in relation to receiverships established by order of the Court. *Re Ahab* was a case where receivers were appointed by the Court and Smellie CJ described the settled principles as follows:

> "*1. The question in this application is whether I should approve the receivers' fees, charged by them in respect of the several companies placed into their receivership by the order of Henderson, J. on July 24th, 2009 (as varied by his further order of September 4th, 2009). These companies have subsequently been placed into liquidation and so the receivers have been replaced by liquidators.*
>
> *2. The receivers' fees contain two components: those of the receivers themselves and those of their attorneys for which the receivers are contractually liable. I am satisfied as to the reasonableness-both as to quantum and apportionment as between the different companies-of the fees.*
>
> *3. <u>On settled principles of the case law, receivers are entitled to recover their fees as a first charge over the assets of the respective companies of their receivership</u> (see Capewell v. H.M.R.C. (2)).*
>
> *4. Nothing presented by the circumstances here would justify a departure from that settled principle.*
>
> *5. The fact that no causes of action have been pleaded against some of these defendant companies (the "NCADs") does not, to my mind, give rise to circumstances justifying departure from the settled principle. The arguments on behalf of the NCADs by Mr. Golaszewski that the plaintiff, as the party who sought their appointment, should pay the receivers' fees, is contrary to the settled principles. This is clear from the following passage from Capewell (2) ([2007] 2 All E.R. 370, at para. [21]), citing with approval the earlier case of Boehm v. Goodall (1):*
>
>> *'<u>It has always been a basic principle of receivership that the receiver is entitled to be indemnified in respect of his costs and expenses, and his remuneration if he is entitled to be remunerated, out of the assets</u>*

> *in his hands as receiver. Warrington, J. stated the principle in a well-known passage in Boehm v. Goodall, [1911] 1 Ch. 155, at 161, [1908-10] All E.R. Rep. 485, at 487:*
>
> > *'Such a receiver and manager [that is one appointed by the court] is not the agent of the parties, he is not a trustee for them, and they cannot control him. He may, as far as they are concerned, incur expenses or liabilities without their having a say in the matter. I think it is of the utmost importance that receivers and managers in this position should know that they must look for their indemnity to the assets which are under the control of the Court. The Court itself cannot indemnify receivers, but it can, and will, do so out of the assets, so far as they extend, for expenses properly incurred; but it cannot go further. It would be an extreme hardship in most cases to parties to an action if they were to be held personally liable for expenses incurred by receivers and managers over which they have no control'*" [Emphasis added]

38. Based on these passages in this authority alone, it is clear that as a matter of law a receiver appointed by the Court is generally entitled to be indemnified for fees and expenses on a priority basis out of the assets of the receivership. Reliance was placed in *Re Ahab* not on the terms of the receivership order in that case but rather on general principles of receivership law. This is relevant to the construction of paragraph 5 (as read with paragraph 3) of the Receivership Order because the commercial and legal function of conferring a right of indemnity on receivers in respect of fees and expenses is completely aligned with the meaning contended for by the Funders.

39. The distinction between the factual matrix in *Re Ahab* and the present case is immaterial to construing paragraph 5. That happened to be a dispute between rival creditors after the company had been placed into liquidation. Here, early in the Receivership, the Funders who appointed the Receivers are seeking confirmation that the terms of the Receivership Order (i) allow their reimbursement right to piggy-back on the Receivers' rights of indemnity and priority, and (ii) do in fact express this legal intent. Mr Chapman KC was clearly right in general terms in contending that the present hearing was not the appropriate forum for formally deciding as

between competing stakeholders what the precise order of priorities should be in relation a specific fund of assets.

40. Further support and elucidation of the relevant legal position can be found in '*Kerr & Hunter on Receivership*', 22nd edition (paragraph 11-08):

> "*The receiver has a lien for his or her remuneration and expenses, and to secure his or her right of indemnity, which binds the assets bound by the receivership. Its existence is independent of the receiver's physical possession of any assets, and extends not merely over those assets in his or her actual possession, but also over all the assets so bound. Those rights do not terminate on the receiver's discharge, nor on the return or delivery of the assets to the parties entitled to them.*"

41. The Funders' interpretation of what the Receivership Order records is accordingly confirmed not just by the general principles of law and practice but also by the drafting history in relation to the Order upon which Mr McCourt Fritz KC also relied. In summary:

(a) paragraphs 3 and 5 mirror the language in the Funders' Receivership Summons (paragraphs 3 and 4);

(b) Ogier prepared a draft Order on behalf of the Funders proposing paragraphs 3 and 5 in the form which was ultimately approved. Campbells on behalf of D2-D4 sought to modify draft paragraphs 3 and 5 of the draft Receivership Order to signify that the Receivers' costs and expenses would rank *pari passu;*

(c) in an email dated 25 May 2023 from Ogier to Campbells, the following observations were made:

> "*Your suggestion that the Receivers remuneration ranks pari passu as an unsecured debt of the Company and the Fund. The Receivers' remuneration should be paid as an expense in priority in the usual course. The same goes for any sum paid by the Plaintiffs towards the Receivers remuneration and expenses. This position is entirely reasonable. As such, we have deleted your additions to paragraphs 3 and 5….*

Please confirm your clients' agreement to the attached amended draft order by 5pm today. <u>In the event that your clients do not agree to the attached version by 5pm, we shall provide the Court with the competing orders and the updated consents to act from the Receivers and seek that Parker J adjudicates on the competing orders</u>." [Emphasis added]; and

(d) Campbells did not contest Ogier's form of Order as regards paragraphs 3 and 5 and so Parker J approved that wording on an uncontested basis.

42. The drafting history of paragraphs 3 and 5 reveals that these clauses were subjectively intended by the drafters of the Order to confer priority in favour of the Receivers' right to be indemnified out of the Receivership assets in respect of remuneration and expenses including the liability to repay sums advanced by the Funders. It is unsurprising that Campbells were unable to muster any resistance to wording reflecting the "*usual course*".

43. Finally, the distinctive legal role to be played by the Receivers sheds light on why it would have been tactically unattractive for D2-D4 to oppose the Receivers and (indirectly) the Funders being given security in the "*usual course*". Parker J had opined that the Receivership was needed most importantly "*in the interests of justice*". Both the Receivers and the Funders as funders were needed to ensure that the substantive claims involving complaints of managerial misconduct against D2-D4 could be fairly determined by the Court without serious conflict of interest concerns.

44. D2-D4 could not plausibly contest allegations of misconduct and contend for their own probity while seeking to undermine the Judge's desired route to ensuring a fair trial. Suggesting that the Receivers be appointed on terms that they were unlikely to accept and contending that the Funders should provide funding on terms that no arms-length funder would accept would not, to put it mildly, have impressed the trial Judge. He considered the Receivers needed to be appointed not in aid of the Plaintiffs' case, but to ensure that a fair trial could take place. Not only was it self-evident that this required the Receivers to have the usual priority in respect of their fees and expenses, it meant that any funders of the Receivership required similar protections as well.

45. Against this background, it is also unsurprising that D2-D4's opposition to the present application focussed not on the terms of paragraph 5 but the appropriateness of the Court granting any fresh security protections to the Funders. True, it was argued that paragraph 5 did not explicitly mention priority, but that was a hopeless submission.

46. The commercial and legal function of paragraphs 3 and 5 of the Receivership Order combined with the legal and commercial context in which they were drafted unambiguously support the Funders' case as to how they should be construed.

The Court's jurisdiction

47. Section 11 of the Grand Court Act (2015 Revision) provides in material part as follows:

> "**Jurisdiction vested in the Court**
>
> *11. (1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by —*
>
> *(a) Her Majesty's High Court of Justice; and*
>
> *(b) the Divisional Courts of that Court,*
>
> *as constituted by the Senior Courts Act, 1981[U.K. Act], and any Act of the Parliament of the United Kingdom amending or replacing that Act.*"

48. The Senior Courts Act 1981 (England and Wales) provides so far as is material:

> " ***37 Powers of High Court with respect to injunctions and receivers.***
>
> *(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.*

(2) *Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.*" [Emphasis added]

49. This jurisdiction was exercised by Parker J in his Judgment dated 25 May 2023 in deciding that the Receivers should be appointed. He recorded two key findings for present purposes, one substantive the other procedural:

(a) "*Gordon MacRae and Elizabeth Mackay of Interpath (Cayman) Limited be appointed as interim receivers of Port Link GP Ltd and its assets, and the assets of The Port Fund L.P., with the power to act jointly and severally*" (paragraph 130); and

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

50. The Receivership Order was made on the basis that any disputes as to its terms would be resolved by the Court but that otherwise terms should be agreed. It is accepted that the Receivers are entitled to their fees and expenses on a priority basis in accordance with paragraph 3 and/or under general principles of receivership law. No question appears to me to arise as to the existence of the Court's jurisdiction to direct that the Funders' reimbursement claims can be treated as an expense of the Receivership in circumstances where:

(a) it is accepted that the Receivers are entitled to receive their fees and expenses paid on a priority basis in accordance with paragraph 3 of the Receivership Order and/or under general principles of receivership law;

(b) paragraph 5 was approved by the Court on an unopposed basis; and

(c) the Court's statutory jurisdiction to impose conditions when appointing a receiver under section 11 of the Grand Court Act is generous and empowers the Court to make an appointment "*on such terms and conditions as the Court thinks just*".

Findings

51. The breadth of the Court's statutory receivership jurisdiction further supports the view that paragraph 5 of the Receivership Order (read according to its terms and in the wider context of the Order, its drafting history and the reason why the Order was made) was intended to extend the benefit of the Receivers' rights of indemnity over the Receivership assets to the Funders' reimbursement rights. As noted above, D2-D4 were unable to advance any coherent alternative construction to place upon the relevant terms of the Receivership Order.

52. The Funders are accordingly entitled to an Order confirming that paragraph 5 of the Receivership Order bears the meaning they ultimately contended for. Namely it entitles them to benefit from the Receivers' security through directing that the sums advanced pursuant to the Funding Letter are repayable by the Receivers as an expense of the Receivership out of the Receivership assets. Such an outcome is precisely what one would expect had the Receivers been required to obtain third-party funding. This may explain why the lawyers on all sides during the process of finalising the Receivership Order instinctively considered the provisions to be not capable of giving rise to serious controversy.

53. The fact that the intent and effect of paragraph 5 is far easier to initially discern as a matter of instinct rather than from a decontextualised reading of its bare terms may well explain why, as the sums advanced began to cause the Funders' eyes to water, they developed anxieties as to whether they had in fact adequately protected their position. However, a fair reading of the relevant provision in its commercial and legal context is ultimately clear beyond sensible debate.

Subrogation

54. I did not hear oral argument on the alternative subrogation issue and no need to consider it arises.

Conclusion

55. I will hear counsel if required on the terms of the Order and costs although my impressionistic provisional view is that the Funders should not be entitled to have all of their costs paid by D2-

D4, having regard to the narrower basis on which the application was ultimately determined in their favour. Arguably, a disproportionate amount of time was expended on superfluous matters.

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THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT