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THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 236 OF 2020 (RPJ)

B E T W E E N:

(1) KUWAIT PORTS AUTHORITY
(on its own behalf and on behalf of The Port Fund L.P.)

(2) THE PUBLIC INSTITUTION FOR SOCIAL SECURITY
(on its own behalf and on behalf of The Port Fund L.P.)

(3) THE PORT FUND L.P.

Plaintiffs

AND

(1) PORT LINK GP LTD
(in voluntary liquidation and in receivership)

(2) MARK ERIC WILLIAMS

(3) WELLSPRING CAPITAL GROUP, INC

(4) KGL INVESTMENT COMPANY ASIA

(5) GOLDEN SHAHIN GENERAL TRADING & CONTRACTING COMPANY

(6) APACHE ASIA LIMITED

(7) RONALD HENRY AYLIFFE

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

(9) APACHE ASIA LIMITADA

Defendants

THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No. FSD 97 of 2021 (RPJ)

(1) KUWAIT PORTS AUTHORITY
(on behalf of The Port Fund L.P.)

(2) THE PUBLIC INSTITUTION FOR SOCIAL SECURITY
(on behalf of The Port Fund L.P.)

(3) THE PORT FUND L.P.

Plaintiffs

AND

(1) WALKERS (A FIRM)

(2) WALKERS (DUBAI) LIMITED LIABILITY PARTNERSHIP

Defendants

Before: The Hon. Justice Raj Parker

Appearances: David Allison KC and Dan McCourt Fritz KC, and Jennifer Fox, Harry Clark and Rondelle Keller of Ogier (Cayman) LLP for the Plaintiffs in FSD 236 of 2020
Dan McCourt Fritz KC, and Jennifer Fox, Harry Clark and Rondelle Keller of Ogier (Cayman) LLP for the Plaintiffs in FSD 97 of 2021
Justin Fenwick KC, and Matthew Dors, Annalisa Shibli and April Bradey of Collas Crill for the First Defendant
Graham Chapman KC and Peter Morcos, and Andrew Pullinger, Harry Shaw, and Matheo Vinciullo of Campbells LLP for the Second to Fourth Defendants
Henry Ayliffe, Litigant in Person, the Seventh Defendant
Ben Hubble KC and Sebastian Said, and Susan Fallan, Daniel Coelho and Lisle Chase of Appleby (Cayman) Ltd for the Walkers Defendants

Heard: 2 February 2026 – 1 May 2026

Draft Judgment circulated: 24 August 2026

Judgment delivered: 22 October 2026

Exempted limited partnership - allegations of unlawful means conspiracy against general partner - investment manager and third parties - Fraudulent Dispositions Act - allegations of breaches of trust - fiduciary duty - dishonest assistance - knowing receipt-attribution of knowledge - reflective loss - waiver-estoppel - indemnity provisions - abuse of process - professional negligence and breach of duty allegations against law firm - allegations of facilitating and failing to warn or advise - conflict of interest - causation and loss - approach to factual evidence - expert evidence on third party fees and investment banking fees

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JUDGMENT

Introduction

1. The trial of this action concerns two cases, FSD 236 and FSD 97, which were tried together.

FSD 236

2. The Plaintiffs are two of the Limited Partners (LPs) in The Port Fund L.P. (TPF or the Fund), a Cayman Islands Exempted Limited Partnership.

3. They are the Kuwait Ports Authority (KPA) and the Public Institution for Social Security (PIFSS). They are both Kuwait State owned entities.[1]

4. The State of Kuwait is not a party to this litigation.

5. The Plaintiffs originally advanced claims only against the General Partner of the Fund, Port Link GP Ltd (in Receivership) (Port Link or the GP). The GP (D1) is also a Cayman Islands Exempted Limited Company incorporated on 8 March 2007.

6. The Plaintiffs over time and no doubt in response to further information which they strived hard to obtain, advanced claims against individuals and entities involved in the management of the Fund's affairs who they say were involved in and benefited from the misappropriation of monies belonging to the Fund.

7. The claims include allegations of dishonesty, deliberate breaches of duty and unlawful means conspiracy against the various Defendants. The Plaintiffs' claim to recover sums belonging to the TPF and/or the LPs of over US$100m.

[1] *The chairs of both KPA and PIFSS are senior government ministers. In KPA's case, it is the minister of Transport (formerly the Minister of Communications). For PIFSS, it is the Minister of Finance. Investments by the two entities are treated as investments of the State of Kuwait, and the monies invested are treated as public funds.*

Background to the Fund in outline

8. The Fund was formed in 2007 to invest in air and sea ports and related logistics around the world. It originally had a term of seven years comprising an initial five-year period which was extended for a further two years, expiring on 31 December 2014. The Fund is no longer trading and has been in wind down.

KGL Investment Company K.S.C.C. (*KGLI)*

9. The Fund was established by KGL Investment Company KSCC (KGLI) which acted as the Fund's sponsor and placement agent. KGLI was a company within the KGL (Kuwait and Gulf Link) Group of companies.

10. The 2007 Private Placement Memorandum (PPM) disclosed various matters[2] to potential investors, including the Plaintiffs:

    a) The Fund (acting by Port Link) and KGL Investment Cayman Ltd (being the Fund's investment manager (IM) shared legal counsel, including "*General Legal Counsel*", "*Onshore Legal Counsel*" and "*Cayman Islands'* [sic] *Legal Counsel*";

    b) Walkers Dubai was legal counsel for both the Fund (acting by Port Link) and the IM in matters of Cayman Islands law;

    c) The shareholders of the IM may be the same as those of the GP; and

    d) The experience and career histories of the key personnel who were to manage the Fund.

11. At the time of incorporation KGLI was the 100% shareholder of the GP. KGLI is also one of the Limited Partners in the Fund.

12. Proceedings in this Court were discontinued by KPA against KGLI (D8) on 11 October 2024 as a result of ongoing proceedings it has against KGLI in Kuwait.

13. PIFSS continues its claims against KGLI in this Court, which to date KGLI has taken no part in.

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[2] *pp 103 ,129 and 132.*

LPAs

14. The GP and the LPs are parties to identical Amended and Restated Limited Partnership Agreements signed by the LPs between 5 June 2007 (PIFSS) and 14 July 2008 (KPA).

The Investment Manager

15. Pursuant to an agreement with the GP dated 28 June 2007 (the Investment Management Agreement or IMA), KGL Investment Cayman Ltd was appointed as the Fund's IM.

16. KGLI was the owner of 100% of the Class A shares and one of 500 Class B shares in the IM. The remaining 499 Class B shares in the IM were held by individuals who were at various times employees of KGLI.[3]

17. Shortly after entering into the IMA, the IM also entered into a Sub Advisory agreement with KGLI dated 2 September 2007. By that agreement, the IM, which had no employees, used the personnel of KGLI in managing the Fund. KGLI agreed to perform all the IM's responsibilities under the IMA but was not entitled to any remuneration pursuant to the Sub Advisory agreement directly. The IM assigned its entitlement to Management Fees under the IMA to KGLI.4

18. In January 2018, KGLI sold its shares in the IM to Asia Alternative Asset Management Limited (AAAML), a company beneficially owned by Mr Henry Ayliffe (D7).

19. In July 2018, KGL Investment Cayman Limited changed its name to Emerging Markets PE Management Limited (EMPEML)..

20. The IM was placed into voluntary liquidation in February 2020 and dissolved on 22 June 2020.

KGLI Asia

21. KGLI is also the 100% shareholder of D4, KGLI Asia. KGLI Asia provided administrative support to the Fund between December 2017 and August 2020 pursuant to an agreement for the provision of such services dated 1 December 2017 (ASA).

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[3] *At one stage Mr Mark Williams (D2) owned 29.8% of the Class B shares i.e. 149 shares.*
[4] *Even though KGLI had a right to 100% of the Management Fees as the owner of 100% of the Class A shares in the IM.*

Ms Lazareva and Mr Dashti

22. Mr Dashti was Chairman of KGLI. Ms Lazareva was Vice Chairman and CEO of KGLI.

23. Ms Lazareva became the sole director of both the GP and the IM on the date of incorporation of both companies, 8 March 2007.

24. On 16 April 2007, she was joined on the board of the GP by Mr Dashti, and another senior KGLI employee, Mr Al Jazzaf. Ms Lazareva and Mr Dashti remained directors of the GP until 24 May 2018.

25. Ms Lazareva was also the sole director of the IM for most of its existence, except for 28 August 2007 to 8 February 2009, when Kevin Krucik, another KGLI employee, was also a director. Between March 2007 and 24 May 2018 she was a director of both the GP and the IM.

26. Ms Lazareva ceased to be the IM's director on 4 February 2019 concurrently with the repurchase of the IM's Class B shares.

Other directors

27. From 16 April 2007 onwards there was at least one director of the GP who did not also sit on the board of the IM. Those directors were Mr Dashti, Mr Al Jazzaf and Mr Alwadhi.

28. Mr Al Jazzaf resigned as a director on 30 June 2010 and was replaced by Mr Dashti, who remained as a director of the GP until May 2018.

29. Mr Alwadhi was the GP's sole director from 24 May 2018 to 29 January 2020.

The criminal convictions

30. Mr Dashti and Ms Lazareva were arrested in Kuwait on 28 November 20175 and have been convicted of criminal offences in Kuwait.[6]

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[5] *Petith 1, at §§67, 81.*
[6] *These are later detailed.*

31. As a consequence, Mr Dashti is apparently serving a prison sentence in Kuwait. Ms Lazareva has been described as a 'fugitive from justice' having apparently absconded while on bail.

32. None of the aforesaid individuals, including Mr Alwadhi, have taken any part in the trial of this action.

33. Two individuals, who are also individual Defendants in this case, Mr Williams and Mr Ayliffe gave extensive written and oral evidence.

Mark Williams

34. Mr Williams (D2) was employed by KGLI as '*Vice -President – Private Equity'* on 1 September 2007. The Fund was KGLI's sole private equity vehicle at that time. He was appointed as an Investment Director of KGLI on 2 January 2009.

35. Mr Williams is now the ultimate beneficial owner of the GP (in Receivership), which had previously been owned by KGLI until 22 July 2018. Mr Williams was appointed as the authorised representative of the GP on 23 January 2020.

36. Mr Williams is also the Chief Executive, Chief Financial Officer, President, Vice President, Treasurer and Secretary of Wellspring (D3). Wellspring is owned by the Mark E Williams Living Trust, the trustees of which are Mr Williams, his wife, and his brother.

37. Mr Williams has also been a director of KGLI Asia since 15 June 2011 and he became the CEO of KGLI Asia on 1 January 2012. As mentioned above KGLI Asia is a wholly owned subsidiary of KGLI and is incorporated in the Cayman Islands.

Henry Ayliffe

38. Mr Ayliffe (D7) is the founder and owner of Apache Asia (D6) and Apache Asia Macau (D9) (the Apache Defendants) which provided investment banking services to the Fund between 2012 and 2017.

The investments by the LPs in outline

39. The LPs invested a total of US$188,152,000 in the Fund. Between them the Plaintiffs invested approximately 65% by value of the Limited Partner contributions to the Fund.

40. PIFSS invested US$40 million by means of a single transfer on or around 5 June 2007 and KPA invested a total of US$85,000,000 by means of two transfers of US$50 million in July 2010 and US$35 million in April 2013.

41. Two other limited partners, Gulf Investment Corporation (GIC) and the General Retirement and Social Insurance Authority of Qatar (GRSIA), who between them invested just over 15% of the LP contributions, have brought similar claims in this Court and in the State of Georgia, USA. The claims of those two LPs have been stayed pending determination of this case. [7]

42. The Plaintiffs point out that LPs holding over 80% by value of the interest in the Fund are making similar allegations of wrongdoing concerning the management of the Fund.

43. The Fund made four principal investments:

a) Damietta International Ports Company (DIPCO);

b) Munchmeyer Petersen Capital Global Maritime Opportunities (MPC);

c) Negros Navigational Company (NNC); and

d) Clark City (Clark Asset).

44. The first two of these investments failed and were written off as total losses, however the third and fourth investments were highly profitable for the Fund.

45. The Fund invested US$28.5m in Negros Navigation Company Incorporated (NNC). Its interest in NNC was apparently sold for US$120m.

46. The Fund invested approximately US$85m in Clark City. This was the development of an airport park/city in the Philippines. It apparently sold its interest for US$655m.

[7] *FSD 41 of 2022.*

The Plaintiffs' case in outline

47. The Plaintiffs claim that assets of the Fund worth over US$100 million and held on trust by the GP, have been misappropriated as part of an unlawful means conspiracy and/or breaches of trust and fiduciary duty and that each of the Defendants has wrongfully participated in some or all of the relevant transactions, in some cases having knowingly received some or all of the proceeds.

48. It is also alleged by the Plaintiffs:

a) that Mr Williams caused payments to be made using Fund monies for legal and lobbying fees concerning the actions of the Kuwait authorities that they say were not for the Fund's benefit; and

b) that in breach of the duties[8] owed by the GP to the Fund and the LPs and pursuant to a conspiracy to injure the Fund and the LPs by unlawful means, the GP made substantial payments using Fund monies to third parties that were not for the benefit of the Fund and the LPs.

49. Following release of the proceeds of sale of the Clark Asset on 5 February 2019 the Plaintiffs allege at least US$191 million was wrongfully paid to third parties including payments of:

a) advisory services by Apache of US$36.2 million;

b) c. US$ 60m to Wellspring as agent for the IM, after the GP had admitted the claim in the DIFC (see below); and

c) c. US$14m to Golden Shahin (D5).

50. They bring:

a) derivative claims against KGLI Asia, D4 (there is no direct claim against D4) for knowing receipt of the Fund's monies, paid allegedly in breach of trust and /or breach of fiduciary duties;

[8] *Statutory, contractual, common law and fiduciary.*

b) derivative claims against Golden Shahin (said to be part of a group of companies associated with KGLI) in relation to payments allegedly made in breach of duty out of the Fund's monies; and

c) direct and derivative claims against Apache Asia, Mr Ayliffe, Apache Macau in relation to fees charged by Apache Asia and/or Apache Macau of which certain amounts were allegedly paid on to KGLI or associated entities.

51. As mentioned above, KGLI (D8) which, until it passed to Mr Williams, owned the GP, has not participated in the proceedings.

52. D5, Golden Shahin has also not participated in these proceedings.

53. None of the Apache Defendants (Mr Ayliffe, D6 and D9) are represented.

54. Mr Ayliffe has given extensive evidence and made submissions in person. Allowances were made by the Court at the trial for his unrepresented status.

55. The Defendants essentially deny all of the claims made against them and bring counterclaims against the Plaintiffs.

56. There are also cross claims against the GP brought by D2-D4 which the Plaintiffs are defending.

Defences in outline

D1 (the GP)

57. Since 1 June 2023 D1 has been managed by Receivers.

58. D1 argues that it is not liable as alleged and/or is entitled to a full indemnity under the LPA in respect of the Plaintiffs' claims.

59. In general, it denies or does not admit any of the claims against it, save that it takes a neutral position on quantum arising as a result of the DIFC proceedings as that issue is primarily contested between the Plaintiffs and D2-D4.

60. It does however counterclaim against KPA for c.US$13m from the Clark Asset sale under the LPA which it says is an overpayment.[9]

D2-D4 (the Williams Defendants)

61. D2-D4 advance various defences that they did not act dishonestly, in breach of duty, or otherwise so as to give rise to the causes of action pleaded against them.

62. In particular, as regards the DIFC proceedings, they say the Wellspring payment was lawfully and properly made and relates to sums due and owing by the Fund to the IM under the terms of the IMA and in fact the true contractual entitlement of the IM was greater than the Wellspring payment.

63. They say that to address a real concern that there was an unlawful expropriation attempt by the Plaintiffs with the State of Kuwait to procure the transfer of the Clark Asset Proceeds to Kuwait, they embarked on a strategy which resulted in the DIFC proceedings to prevent the release of these monies to Kuwait and instead to secure their release to the Fund.

64. They also say that the payments made to KGLI Asia were lawfully and properly made in relation to services provided to the Fund under the ASA.

65. Mr Williams strongly denies any wrongdoing or being part of any unlawful means conspiracy

a) in relation to the fees paid to Apache, which he says were fees to which Apache was entitled for the valuable services it had provided to the Fund; and

b) in relation to the legal and/or the lobbying fees.

66. Further, D2-D4 deny that the Plaintiffs or the Fund have suffered any loss, that any such claims have been waived and/or they are entitled to be indemnified by the Fund.

67. D2-D4 contend that if the Plaintiffs' direct or derivative claims against them succeed they would be entitled to set off that liability under the relevant indemnities which would reduce and possibly extinguish the entirety of the financial claims against D2-D4.

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[9] *It also has a cross claim against Apache Macao and Apache Asia, neither of which has filed a defence and D1 obtained default judgment against Apache Macao on 29 May 2025.*

68. They say that insofar as the claims are pursued by the Plaintiffs personally those are losses which are purely reflective of losses suffered by the Fund and should not be allowed.

Abuse of process

69. D2-D4 also counterclaim against the Plaintiffs contending that the case has been brought as part of an unlawful means conspiracy between, among others, the Plaintiffs and the State of Kuwait.

70. They say that the proceedings are being maintained and pursued as part of a strategy related to:

a) the Plaintiffs' attempt to expropriate the monies frozen at Noor Bank for their own benefit and to the detriment of the Fund and its other LPs; and

b) to cause damage to D2-D4 and /or KGLI; and/or

c) to advance the commercial interests of Agility Public Warehousing Company, KSCP (Agility), which is KGLI's largest competitor.

71. They say the proceedings are an abuse of process commenced for an improper collateral purpose.

72. They also bring a cross claim against the GP seeking further payment to Wellspring as a result of the IM's alleged entitlements under the IMA and require indemnification of D2-D4 from the GP pursuant to various contractual agreements.[10]

73. The Plaintiffs are defending that cross claim on behalf of the Fund.[11]

D6, D7 and D9 (the Apache Defendants or Henry Ayliffe related Defendants)

74. These Defendants (through the person of Mr Ayliffe) essentially say that their engagements to provide professional financial services to the Fund were successful, against all odds, in extremely difficult circumstances, and the fees paid were justified and reasonable.

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[10] *The IMA for Mr Williams and Wellspring, the LPA for Wellspring, and the ASA between the GP and KGLI Asia.*
[11] *On 15 August 2024 the Cayman Islands Court of Appeal upheld the decision of this Court to permit the Plaintiffs to be joined as parties to the cross claims in order to defend them.*

75. They say that the engagements were at arm's length and commercial, and that there were no unlawful kickbacks paid. Mr Ayliffe strongly refutes any wrongdoing on his part.

The case against Walkers

FSD 97

76. The Plaintiffs also bring claims against the GP's former legal advisers Walkers (a firm) (Walkers Cayman) and Walkers (Dubai) Limited Liability Partnership (Walkers Dubai) (together Walkers) who had a role in advising the management of the Fund and acted at various times for the Fund itself, the GP and the IM.

77. The Plaintiffs' claims are brought derivatively on behalf of the Fund against Walkers including claims for breach of fiduciary duty and negligence, which concern Walkers' advice in relation to the Clark Asset Proceeds. Walkers strongly refute all of these allegations.

78. In further response to this claim Walkers, adopting the case of D2-D4 in FSD 236, say that the State of Kuwait (Kuwait), which they say effectively owned the Plaintiffs, sought to pressurise the Emirate of Dubai into transferring all, or an amount in excess of the Plaintiffs' proportionate interest in the Fund of the Clark Asset Proceeds, to Kuwait. That they say was an unlawful attempt at expropriation.

79. They say that to address this they advised as part of a common strategy determined by the Fund and the IM which resulted in the DIFC proceedings to prevent the transfer of these monies to Kuwait and instead to secure their release to the Fund.

The claims in more detail in FSD 236

80. There are three main heads of claim:

DIFC

a) claims concerning the proceedings in the DIFC which the Plaintiffs say were a sham, between the IM (as claimant) and the GP and the Fund (as Defendants) that it is alleged Mr Williams conceived and engineered with the assistance of Walkers and other lawyers. It is alleged that Mr Williams used the judgment obtained in the DIFC

proceedings as a pretext for transferring over US$59 million of the Fund's monies to D3, Wellspring Capital Group, Inc.

Kickbacks

b) claims in respect of fees totalling c. US$66 million paid to or at the direction of the "Apache" entities (D6 and D9) purportedly in respect of services that those entities (through Mr Ayliffe) provided to the Fund.

The Plaintiffs allege that:

i) the relevant Apache engagements were not at arm's length and were not negotiated on an arm's length basis;

ii) the terms of the relevant engagements were materially disadvantageous to the Fund;

iii) a substantial proportion of Apache's fees (over half) were paid as 'kickbacks' to KGLI or otherwise for the benefit of persons associated with it;

iv) The largest 'kickback' was disguised as a purchase by another entity owned by Mr Ayliffe (Asia Alternative Asset Management Limited ("AAAML")) of the ownership interest in the Fund's investment manager EMPEML[12] for US$18.55 million; and

v) there was a payment of a secret commission and /or bribe in the form of the Apache/KGLI payment of US$14,550,000 of TPF funds to KGLI at the direction of Mr Ayliffe.

Third party fees

c) claims concerning payments that the GP made to third parties for services that were allegedly not for the Fund's benefit, or for no legitimate services. The largest of these was a payment of US$14.07 million made to D5 (Golden Shahin), purportedly in

[12] *Comprising the 500 Class A and 1 Class B share.*

respect of services that Golden Shahin had been contracted to provide in relation to the unfreezing of the Clark Asset Proceeds.

FSD 97, the case against Walkers in more detail

81. Walkers Dubai was engaged and acted on various matters in connection with the Fund over many years from 2007, including drafting the constitutional documents and advising KGLI at the outset when the Fund was being set up and promoted, and acting as Cayman Islands counsel to the GP, the Fund and the IM.

82. There was no formal engagement letter in place between Walkers Dubai and the Fund or the GP until March 2020.

The DIFC proceedings

83. It is alleged by the Plaintiffs that the GP conspired with, among others, Mr Williams and Wellspring to cause loss to the Fund and/or the LPs by unlawful means in relation to the DIFC proceedings and the subsequent payment to Wellspring.

84. It is alleged that Mr Williams orchestrated the DIFC proceedings and the payment to Wellspring and that he was central to the conspiracy. It is further alleged that he dishonestly assisted in the GP's breach of trust and fiduciary duty and knowingly procured the GP to breach its contractual duties. The claims against Wellspring are based on knowing receipt.

85. The DIFC proceedings were commenced on 9 July 2018 by the IM against the GP. The GP acknowledged service of the claim, submitted to the jurisdiction of the DIFC, admitted the claim and judgment was entered. At the request of the IM the GP transferred the money to Wellspring.

86. The Plaintiffs claim, among other things, that this payment was made in wilful and negligent breach of trust for a number of reasons:

a) the IM had no entitlement to the claimed monies having assigned its rights to KGLI;

b) there was no contractual right to interest;

c) it was wrong to submit to the jurisdiction of the DIFC when the law of the Cayman Islands covered the relationship between the GP and the IM; and

d) the IMA contained an exclusive jurisdiction clause in favour of the Courts of the Cayman Islands.

87. The Plaintiffs allege, in relation to the DIFC proceedings, that Walkers:

a) had an unmanageable conflict of interest and notwithstanding their conflict, actively facilitated the IM's inflated claim and advised the GP and the Fund to admit the claim in response, contrary to the Fund's interests;

b) wrongly advised the GP on various issues connected to the DIFC proceedings in July and August 2018, thereby breaching their fiduciary duties to the Fund and/or the GP, and further or alternatively breaching their contractual and/or tortious duty to exercise reasonable care, skill and diligence;

c) failed properly to warn or advise the GP and the Fund in relation to the IM's claim against the GP and the Fund for Performance Fees and Management Fees;

d) gave advice which was one-sided (in favour of the IM), misleading and wrong; and

e) failed properly to warn the GP and the Fund about the risk of proceeding with the allegedly 'sham' DIFC Proceedings (in circumstances where the GP and the Fund had received no advice about their potential defences and counterclaims against the IM).

88. As stated above, Walkers deny the claims made against them in full. Walkers did not themselves advance a counterclaim alleging that the proceedings in FSD 97 were an abuse of process, but made a contingent plea in their Defence that if D2-D4 succeeded in their abuse of process counterclaim (see paras [68–70] above), the same reasoning would apply to FSD 97.

89. They say only Walkers Dubai were advising the Fund and there is no arguable case against Walkers Cayman.

90. Walkers Dubai say that it understood at the time that there was a real threat that the Emirate of Dubai would give in to the diplomatic pressure being applied by the State of Kuwait and so release the whole, or the bulk of the Clark Asset Proceeds to Kuwait, whereupon such monies

would be lost to the Fund and wrongfully expropriated by or for the benefit of only two of the LPs (the Plaintiffs) to the detriment of the other LPs and creditors of the Fund, which was why the common strategy was pursued.

Short history of the dispute

91. Since 2012 concerns were being expressed in Kuwait that agreements were being entered into by the Fund with linked entities which procured services that the GP or the IM should have been providing and there was an unjustified increase in fees and expenses.

92. The Fund was not a typical KPA investment.

93. Sheikh Khaled, the current Director General of KPA confirmed in evidence that KPA's investment in the Fund, as an international investment, is the only such investment KPA has made "*in its entire history*".[13]

94. Mr Al Othman's written evidence was that:

> *"At the time of the formation of the External Committee,* [on 7 April 2015] *KPA did not have an investment team and its investment in TPF was unchartered* [sic] *territory. KPA's business was managing Kuwait's ports. It was not equipped to make or manage private equity or other financial investments"*.[14]

95. The Fund attracted political interest in Kuwait as it involved the investment of public funds. Complaints were made in Kuwait by "*certain citizens to His Highness the Prime Minister*" and there were local media reports.[15]

96. It would seem that PIFSS had more experience than KPA in the type of investment made in the Fund.[16]

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[13] *Day9MT1/50:1-2.*
[14] *Al Othman 1 at §3.4*
[15] *As evidenced by the letter from the then KPA Director General to the Chairman of the KPA Board dated 12 March 2014, which enclosed a memorandum regarding potential misconduct on the part of KPA's management in connection with its decision to invest in the Fund. The memorandum includes an allegation that the individual who signed the "participation agreement" on behalf of KPA, the then-Vice Chairman of KPA, failed to disclose his relationship with KGLI Kuwait.*

[16] *In October 2014 KPA wrote to PIFSS: '... based on the principle of joint cooperation between all government entities, [PIFSS should provide] us with the measures you have taken to preserve the rights of the Authority and your share of the*

The External Committee

97. The Fund's term expired on 31 December 2014, and on 7 April 2015, the Kuwaiti government set up the External Committee.[17] At the time, the Fund had not made any distributions and still held the (ultimately profitable) NNC and Clark Assets.

98. The External Committee was set up to advise KPA on its options to exit the Fund in a way that would cause minimal financial loss.

99. The External Committee issued three reports from June 2015 to March 2016. Additionally, in his witness statement, Mr Al Othman (who was the Chairman of the External Committee), said there were numerous perceived problems with the Fund, including:

(i) by 2015, its term had already ended after two one-year extensions, but none of the Limited Partners had received any distributions;

(ii) the financial performance was poor;

(iii) Ms Lazareva and the other KGLI personnel running the Fund appeared significantly less experienced than expected;

(iv) similarly, Apache was an unknown firm and did not appear to have any real experience;

(v) there had been a lack of diversity in the Fund's investments (both geographically and as to the number of investments);

(vi) the term was unusually short;

(vii) two of the four investments (*MPC and Damietta*) had been total failures; and

(viii) the Fund had an unorthodox way of calling capital from its investors.

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capital in the Fund, so that we may be guided by them, as both our entities are participants in the same Port Fund, in order to take the necessary action in light of that'.

[17] *Al Othman 1 at [3.1]-[3.18].*

100. The State Audit Bureau of Kuwait (SAB) had repeatedly criticised KPA for its investment in the Fund, and the fact that the Fund had exceeded its term without making a distribution was an "*obvious* […] *red flag*" for the SAB.[18] Mr Al Othman also explained in his written evidence that KPA did not have an investment department.

101. Mr Al Othman explained that the work of the External Committee included "*collecting and reviewing documents relating to KPA's investment in TPF, as well as general TPF documentation such as the fund's financial statements*".[19] He says he attended meetings with KGLI to discuss the Fund's management.[20]

The Kuwait criminal proceedings

102. For some years the Kuwait Public Prosecutor (KPP) had also been investigating the Fund's affairs.

103. On 17 December 2017 Ms Lazareva and Mr Dashti were formally indicted in Kuwait. Two sets of criminal proceedings with case numbers 1496/2012 and 1942/2015 were brought against them.

104. The respondents to the Accusation Reports include former KPA personnel, from which it can be inferred that KPA were involved in and supported these proceedings.[21]

2012 case

105. The Accusation Report in Case 1496/2012 filed on 26 April 2017 which related to the Fund, alleged misconduct by Ms Lazareva:

(i) causing TPF to make payments to KGLI and its affiliates (charges 1-3);

(ii) causing TPF to make payments to MPC-GMO after its sale (charge 4);

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18 *Day12MT1/105:20 – Day12MT1/106:25.*
19 *Al Othman 1 at [3.6].*
20 *Al Othman 1 at [3.6].*
21 *The judgment of the Court dated 6 May 2018 in case no. 1942/2015 shows that the criminal complaint was submitted by the Minister of Communications in his capacity as KPA Chairman.*

(iii) causing TPF to loan funds to KGLI International for Ports, Warehousing and Transport (charge 5);

(iv) causing TPF to provide financial facilities provided to UNIF (charge 6);

(v) causing TPF to pay KWD 350,000 to Mr Dashti (charge 7); and

(vi) misappropriating Global Gateway Development Corporation (GGDC) (charge 8).

106. Among these charges were the allegation that she had embezzled public funds by transferring monies from the Fund's account, causing it to issue a guarantee and by transferring GGDC to Clark Gateway Investment Group (CGIG) and committed money laundering by transferring funds from the Fund to KGLI, and then from KGLI to other recipients.

107. Ms Lazareva was accused of 10 charges in total but was convicted (by the Kuwait Court of First Instance) on only three of those charges. Ms Lazareva was acquitted of the remaining seven charges.

108. One of the charges of which Ms Lazareva was acquitted related to the Clark Asset. This charge had accused Ms Lazareva of misappropriating the Clark Asset by transferring ownership of the relevant corporate vehicle into CGIG.[22]

109. In the result Ms Lazareva and Mr Dashti were convicted on only two counts of embezzlement and part of the money laundering charge on 11 November 2019. They were sentenced to 10 and 15 years in prison respectively. Appeals against that judgment were dismissed by the Court of Appeal on 24 June 2020 and the Court of Cassation on 31 January 2021.

2015 case

110. The Accusation Report in case 1942/2015 dated 19 December 2017[23] which did not relate directly to the Fund alleged that, between April 2006 and March 2013, the former CFO of KPA had embezzled public funds by making various fraudulent transfers from KPA's accounts to KGLI and four other companies. Ms Lazareva and Mr Dashti were accused of assisting him.

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[22] *It apparently acquitted her of this charge after considering, among other things, a financial transactions report prepared on her behalf by Baker Tilly and a clarificatory statement issued by Walkers as to the ownership of the Clark Asset.*
[23] *Witnesses testifying against Ms Lazareva and Mr Dashti in case no 1942/2015 included Sheikh Yousef (then the KPA's Director-General), KPA's Head of Legal, KPA's Head of Finance and several former employees of KPA.*

111. On 6 May 2018, the Kuwait Criminal Court handed down judgment in 1942/2015, sentencing Ms Lazareva and Mr Dashti to 10 and 15 years' imprisonment with hard labour respectively.

112. Ms Lazareva and Mr Dashti were also jointly held liable to pay for embezzlement of KWD 11m and a further fine of KWD 22m. That judgment was overturned on appeal on 5 May 2019.

113. However, on 20 January 2020, having retried the case, the Court of Appeal handed down its second judgment, which re-convicted each of the defendants (including Ms Lazareva and Mr Dashti) but decreased their sentences to 7 and 10 years respectively.

114. Mr Dashti appealed to the Kuwait Court of Cassation, which on 1 March 2021 handed down its judgment upholding Dashti's conviction but reducing his sentence to 7 years.

The Kuwait civil proceedings (Civil Cases 11553/2016, 3924/2017 and the subsequent appeals)[24]

115. On 29 December 2016, KPA brought civil proceedings against KGLI in Kuwait in relation to KPA's investment in the Fund in proceedings originally numbered 11553/2016 and later numbered 3924/2017.

116. In those proceedings KPA claimed it was owed more than US$275 million including the return of its invested sum of US$85 million and accrued returns, apparently based on the premise that KPA had a right as against KGLI to a 20% return on its investment. [25]

117. In advance of a hearing on 23 October 2018, KPA filed submissions claiming that it was owed in excess of US$1.3 billion on the basis that KPA was entitled to 30% p.a. interest on the US$85 million that it had invested in TPF for the duration of the Fund, stated to be 10.5 years. This was subsequently revised to US$331,348,886 in or around November or December 2018, before being revised up again to US$553,418,974 on the basis that the Fund had realised US$980 million[26] from the sale of GGDC and the further assumption that KPA was entitled to 50.3% of the purchase price for the Fund's investments in GGDC and NNC.

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[24] *This summary is taken from Appendix 1 of the Walkers defendants written opening.*
[25] *KGLI Kuwait was the Eighth Defendant in FSD 236 before the case against it was discontinued and so KPA was at one stage pursuing claims in both jurisdictions. The claim against KGLI Kuwait in FSD 236 is now brought only by PIFSS.*
[26] *It is accepted by KPA in these proceedings to have been US$655 million. The purchaser, a company in the Udenna group, appears to have reported the transaction cost as US$980m, whereas the Clark Asset sale price was US$655m. This may explain the figure in the Kuwaiti civil proceedings of US$980m.*

118. On 16 November 2023, the Kuwaiti Plenary Court gave judgment in KPA's favour in the amount of US$553,418,974.90. On 5 March 2024, the Plenary Court Judgment was upheld by the Kuwaiti Court of Appeal.

119. This Judgment was apparently premised on the basis that the total net profits of the Fund amounted to US$1.1 billion and did not give credit for the US$136,222,152 which had been distributed to KPA. The claim is understood to be subject to an appeal to the Court of Cassation, Kuwait's highest Court.[27]

Proceedings in Cayman

120. The Plaintiffs had been raising serious concerns about the GP's conduct and the management of the Fund since 2016 and through their attorneys in Cayman from January 2020. The Plaintiffs made repeated and extensive requests for information from the GP. This then led to protracted litigation in the Cayman Courts about information and disclosure.

121. On 29 January 2020 KPA commenced proceedings under section 22 of the Exempted Limited Partnership Act (2021 Revision) (ELPA) against the GP seeking disclosure of certain documents to which it claimed to be entitled. Those proceedings, although resisted, were ultimately successful.

122. On 14 October 2020, KPA and PIFSS commenced FSD 236. On 21 April 2021 and 4 August 2021, KPA and PIFSS commenced FSD 97 against Walkers Cayman and Walkers Dubai.

Relevant legal principles to be applied

Burden and standard of proof

123. The Plaintiffs have the burden of proving their case against each of the Defendants. They bring serious claims involving wrongdoing against multiple parties. Clear and convincing evidence is required to prove their claims.

124. The essential thrust of the Plaintiffs' case against Mr Williams and Mr Ayliffe is that there was a dishonest conspiracy to defraud the Fund conducted principally by Mr Williams and, in relation to the Apache fees, Mr Ayliffe (with Mr Williams and others at KGLI).

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[27] *See Florent 9 at [22(f)].*

125. As regards Walkers, the Plaintiffs say they were in breach of fiduciary duty and/or negligent in its execution in some respects, principally in relation to the DIFC proceedings.

126. No case in dishonesty is advanced against Walkers, but there are serious allegations of wrongdoing made against legal professionals.

127. Notwithstanding the seriousness of the allegations and their consequences if proven, the standard of proof the Plaintiffs have to meet is the balance of probabilities.

128. The Court needs to be satisfied on the evidence as a whole, before it finds that a particular event occurred, that it is more likely to have occurred than not.

129. Lord Hoffmann in *Re B* [2009] 1 AC 11 said after citing with approval a passage from the speech of Lord Nicholls in *In Re H* [1996] AC 563 [28] at paras 13 and 15.

> "*… the time has come to say, once and for all, that there is only one civil standard of proof and that is proof that the fact in issue more probably occurred than not.*
>
> *… There is only one rule of law, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Common sense, not law, requires that in deciding this question, regard should be had, to whatever extent appropriate, to inherent probabilities."*

130. In this case, where allegations of wrongdoing are made, the Court applies the common-sense principle that the more serious the allegation made the less likely it is that the conduct occurred and so the evidence should be particularly cogent before it should conclude that the allegation is established.

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[28] *Lord Nicholls at 586D-H with emphasis added: 'The balance of probability standard means that a Court is satisfied an event occurred if the Court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the Court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the Court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence …. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established'.*

131. The Court bears in mind that allegations of fraud and dishonesty are made in this case against professional individuals (Mr Williams and Mr Ayliffe), and certain other parties. Fraud is generally speaking less likely to have occurred than negligence.

132. This is a case where in order for the allegations made by the Plaintiffs to be true, a large number of individuals would need to have been involved in the wrongdoing over a period of time.

133. In assessing an allegation of conspiracy, the Court needs to assess each party's motive to participate, taking into account disincentives to such participation including the inherent disinclination to unlawful conduct by professional people of good character, but also the risks to reputation and other serious consequences if found out.

134. The Court has also had particular regard to the inherent probabilities of the competing factual versions of material events. The more improbable the conduct, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be proven.

Circumstantial and inferential evidence

135. It is an inherent feature of covert misconduct that the parties involved generally do not act in an open and documented manner.

136. Sometimes even if the matters at issue may have been documented at the time, material is lost or not available at trial and there are substantial gaps in the contemporaneous record. That has been shown to be the case in this trial.

137. The Plaintiffs' case alleging covert misconduct has been largely inferential, based on the cumulative evidential picture, much of which consisted of circumstantial evidence.

138. As Lord Millett recognised in *Three Rivers* § 186*,29* an allegation of dishonesty is usually a matter of inference from primary facts and it is these facts which are relied upon at trial to justify the inference of dishonesty that must be set out and established.

139. Lord Millett said there must be some fact which '*tilts the balance'* and justifies an inference of dishonesty.

[29] *Three Rivers [2001] UKHL 16.*

140. In *Kuwait Oil Tanker Co SAK v Al Bader (No 3)* [2000] All ER (Comm) 271 (a case concerning the tort of unlawful means conspiracy) Nourse LJ observed at para 112:

> "*It will be the rare case in which there will be evidence of the agreement itself*."

and he approved the statement of O'Connor LJ in the criminal case of *R v Siracusa* (1990) 90 Cr. App. R 340 §349 (emphasis added):

> *"… the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made, or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt act**s**. Participation in a conspiracy is infinitely variable: it can be active or passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is the agreement or adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity".*

141. Further, as Lord Simon of Glaisdale put it in *R v Kilbourne* [1973] AC 729 at 758,

> *'Circumstantial evidence . . . works by cumulatively, in geometrical progression, eliminating other possibilities'.*

142. The essence of the Plaintiffs' case is that the evidence as a whole, whilst largely inferential and circumstantial, is stronger than the individual parts.

143. The Court accepts that the events in issue must be looked at as a '*continuum*'. In practical terms that means not compartmentalising individual points or pieces of evidence or adopting a piecemeal approach.

144. Although of course each item of evidence needs to be considered individually and in its own right, it also means standing back and considering the implications of facts found in the round and looking at later facts to consider the likelihood of earlier facts having occurred, and *vice versa.*

Contemporaneous documents and oral evidence

Facts in hindsight and contemporaneous knowledge

145. There is a difference between:

1. what witnesses may say with the benefit of hindsight (and with *ex post facto* rationalisation) by reference to matters now before the Court, but which they may not have known at the time; and

a) what they actually knew <u>at the time</u>, i.e. contemporaneously.

146. The Court has been astute to identify the distinction and guard against it in this case.

147. It is always important in cases like these to avoid hindsight being overlaid onto the evidence.

148. The Court has had regard to the strict chronology of relevant events and what was known or knowable at the time, rather than with the benefit of hindsight.

Oral evidence

149. The Court approaches the oral evidence which does not match the documentary record with care, preferring the documentary record where it exists.

150. In *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] 4 WLR 112 §48 Males LJ observed:

> '*… I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party's internal documents including e-mails and instant messaging. Those tend to be the documents where a witness's guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law, those documents are generally regarded as far more reliable than the oral evidence of witnesses, still less their demeanour while giving evidence'.*

151. The Court also notes what Leggatt J has said with regard to the unreliability of human memory (whether innocent or not)

> *"The best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth*."[30]

152. The Court adopts the guidance from Males LJ and Leggatt J from those decisions.

153. In the Court's experience the recollections of witnesses can and frequently do play an important role in ensuring that the evidential picture before the Court is complete. Its significance will of course vary.

154. In addition, testing the witness against the contemporaneous material is vital.

155. However, in the case of events where there is no contemporaneous documentary record (such as an undocumented meeting or conversation) or where the contemporaneous documentary record is incomplete, because documents are missing or not available, oral evidence from witnesses about events that occurred may be the only direct evidence about those events that the Court hears and may well take on increased significance as a result.

Lapse of time

156. Where there has been a lengthy period of time between the relevant events and a trial, as is the case, the Court accepts that it is of particular importance to test the oral evidence given by

[30] §*22 Gestmin SGPS SA v Credit Suisse (UK) Ltd [2020] 1 CLC 428.*

witnesses about such events against contemporaneous documents and known and probable facts to the extent that it is possible to do so.[31]

Self serving evidence

157. The Court also guards against witness recollections which support the best narrative for the success of their cases.

158. Sometimes this will be because of a belief in the validity of their case which may be genuine and strongly felt. This is particularly so where feelings run strongly on all sides.

159. The significance that a particular version of events has for a particular witness, especially when they themselves are parties to the proceedings or have real loyalties to a particular version of events which affords a better outcome, is a matter to be carefully assessed.

Written witness statements

160. Independent recollection of events long after they have occurred is further eroded by the process of lengthy witness statements (running to hundreds of pages) often drafted by or in conjunction with lawyers. The Court is well aware that what witnesses say and the way they say it has the benefit of advice of lawyers carefully weighing the forensic significance to the case at all times.

Truthfulness of evidence

161. Many cases turn on the Court's assessment of the witnesses who gave evidence and were cross examined.

162. In such cases testing the veracity of witnesses by reference to the objective facts provable independently of their evidence by reference to contemporaneous documents and other known facts is important.[32]

163. The Plaintiffs' case is that Mr Williams' and Mr Ayliffe's evidence to the Court cannot be explained on the basis that memories have faded or that they have misremembered events, but

[31] Natwest Markets plc v Bilta (UK) Ltd *[2021] EWCA Civ 680.*

[32] The Ocean Frost *[1985] 1 Lloyd's Rep 1 at 57, per Goff LJ.*

rather that they gave evidence that they knew to be untrue in order to conceal what was really going on at the time, or in order to support a self-serving outcome.

164. A similar approach was taken against the Walkers witnesses.

165. In this case Mr Williams and Mr Ayliffe were each cross examined for many days and the Walkers witnesses likewise spent a considerable time giving evidence.

The documentary record

166. This is of course the factual bedrock of what happened at the relevant time.

167. However, documentary evidence may not always be accurate. Different documents can record contemporaneous events in different ways depending on the perspective of the author.

168. People can make mistakes in documents, either because they inaccurately record their own intentions or knowledge (deliberately or not) in the document or because they have a mistaken underlying knowledge of the subject matter about which they are writing.

169. People can use ambiguous language in documents that may be open to multiple interpretations, particularly in instantaneous digital communications.

170. People also can and do deliberately misrepresent matters in documents for different reasons. Sometimes that is done to present a documentary case which does not reflect or to disguise what was really going on.

171. The contemporaneous record is far from complete in this case. Documents and categories of documents are absent. Substantial gaps exist and various reasons for these gaps have been proffered.

172. The Court has been careful to assess whether the picture painted by the incomplete documentary record is an accurate one, or whether, had the gaps been filled, the picture would have looked different.

Adverse inferences

173. The Court has a discretion to draw adverse inferences: *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882.

Witnesses

174. In *Royal Mail Group Ltd v Efobi* [2021] UKSC 33 the Supreme Court considered when it might be appropriate to draw an adverse inference from the absence of a witness. At para 41 Lord Leggatt said this:

> "*The question whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in Wisniewski v Central Manchester Health Authority [1998] PIQR P324 is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules."*

175. Assuming that there is a case to answer, in the sense that the Court would expect from the available evidence on an issue that a witness might be called to answer, then the question as to why that witness was not called becomes relevant, and the Court needs to assess whether the explanation given is satisfactory or not. It also needs to have in mind the considerations set out by Lord Leggatt in *Efobi* above.

176. It is important to note that the absence of a witness can only provide additional support to an inference otherwise properly open to the court to draw on the evidence and cannot be used to supply a missing evidential link or to shift the burden of proof.

Missing documents

177. A broadly similar approach is to be adopted when considering what inferences it might be appropriate to draw as regards 'missing documents' i.e. documents that have not been provided by a party that might reasonably have been expected to provide them.[33]

178. In a typical case whether it is appropriate to draw an inference from an absence of documents, and if so the nature and extent of the inference, will depend on the facts of the particular case, and while a failure to adduce relevant documents could convert evidence on the other side into proof, whether or not it in fact does so will depend in part on the explanation given for the absence of the documents.

179. Where the Court would expect a document or series of contemporaneous written documents to exist if the oral evidence were correct, and the party producing that oral evidence is responsible for its non-production, the documents may be conspicuous by their absence and the judge may be able to draw adverse inferences from their absence[34].

180. An explanation might be that the documents have been deliberately suppressed or destroyed, in which case the Court would be entitled to draw strong adverse inferences against a party against whom this was proven.

181. Similarly in the case where it is proven that a party relied on documents which were invented and never existed in the first place and then gave oral testimony which therefore must be false as to their existence.

182. At the other end of the scale is an innocent explanation, which is reasonable and believable for their non-production.

183. It is important to approach missing documents on the basis that they may affect what inferences can properly be drawn in relation to a particular fact, but they do not reverse the burden of proof and do not substitute for proof of the conduct said to underlie the relevant allegation.

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[33] *See Johnstone v Fawcett's Garage (Newbury) Limited [2025] EWCA Civ 467.*

[34] *Mumtaz Properties [2011] EWCA Civ 610 at §14.*

Elements of the conspiracy case

Unlawful means conspiracy

184. The ingredients of a claim in unlawful means conspiracy are:

(a) a combination or agreement between two or more people;

(b) an intention to injure another individual or separate legal entity;

(c) unlawful acts carried out pursuant to the combination or agreement as a means of injuring the Plaintiff; and

(d) causing loss suffered by the Plaintiff.[35]

185. If these elements are proven, Defendants to a conspiracy claim will be jointly and severally liable to the plaintiff in respect of the damage caused.[36]

186. As the Court of Appeal explained in *Kuwait Oil Tanker Co SAK v Al Bader (No 3) [2000] 2 All ER (Comm) 271 at §111:*

> *"it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end."*

187. As stated above it is usually impossible to establish a specific agreement by direct evidence, and so it is generally both necessary and sufficient for a plaintiff to piece together evidence of what each defendant knew at the various stages of the alleged conspiracy.[37]

188. If the Court rejects the Defendants' explanation for their conduct as being inherently improbable or internally inconsistent:

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[35] *Manek v Wirecard AG* [2020] EWHC 1904 (Comm) at [44], Sir Ross Cranston, *Civil Fraud* at 2-007.
[36] *Civil Fraud at 2-129*.
[37] *Civil Fraud, 2-141*.

"*it may legitimately conclude that the conspiracy is established both by reference to that being the most probable alternative explanation and by an inference to be drawn from the fact that an untrue explanation has been put forward"*.38

189. Whether a defendant had the necessary intention to cause harm, and therefore had joined the combination, turns on whether they knew about the alleged conspiracy:

"*Knowledge includes "blind eye" or "Nelsonian" knowledge as well as actual knowledge. That requires a suspicion that certain facts may exist, and a conscious decision to refrain from taking any step to confirm their existence.*"[39]

190. In order for a company to be involved in a conspiracy, it must:

"*have relevant knowledge or intention via the human agents whose knowledge or intention is properly attributable to them."*[40]

191. An individual can enter into a conspiracy with a company of which he is the sole controller. [41]

192. The unlawful acts relied on (which must be independently actionable in themselves) must have been:

(a) causative of loss; and

(b) carried out pursuant to the alleged conspiracy.

193. However, such acts can be both active and passive, and it is not necessary that each member of the conspiracy was aware of each act carried out.[42]

194. The plaintiff must show that the unlawful acts carried out pursuant to the conspiracy themselves caused the damage and were the means of doing so.[43]

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[38] *Do-Buy Limited v National Westminster Bank Plc* [2010] EWHC 2862 (QB) at §52.
[39] *Manek v Wirecard* (ibid); see also *Group Seven & Ors v Nasir* [2019] EWCA Civ 614; [2020] Ch 129, §§59 and 60.
[40] Civil Fraud, 2-018.
[41] *Barclay Pharmaceuticals v Waypharm LP [2012] EWHC 306 (Comm) per Gloster J at [227]-[229] and Reuse Collections Ltd v Sendall [2014] EWHC 3852 (QB); [2015] I.R.L.R. 226 at [171] per HHJ Stephen Davies; and see Lifestyle Equities CV v Ahmed [2021] EWCA Civ 675; [2021] Bus.L.R.1020.*
[42] *Civil Fraud at 2-031.*
[43] *Civil Fraud at 2-088.*

195. To be liable in unlawful means conspiracy, a defendant must intend to cause damage to the plaintiff (although there is no requirement that such damage be either the defendant's predominant intention or their end).[44] Where loss to the plaintiff is the obverse side of the coin from gain to the Defendants, the requisite intention is made out.[45]

196. As Lord Nicholls said in *OBG (ibid)*

> *"One intends to cause loss even though it is the means by which one achieved the end of enriching oneself. On the other hand, one is not liable for loss which is neither a desired end nor a means of attaining it but merely a foreseeable consequence of one's actions".*

197. Each defendant to an unlawful means conspiracy must also have sufficient knowledge that acts are being carried out which are subsequently held to be unlawful. There is no requirement for the defendant also to be aware that the acts in question were unlawful at the time. In other words, it is necessary to show knowledge of the facts that gave the relevant unlawful acts and their quality of unlawfulness.[46]

198. It is not necessary for all of the Defendants to have joined the conspiracy at the same time in order for them to be liable, but they should know the facts and share the same object.[47]

Dishonest assistance

199. The elements of a claim in dishonest assistance are

(a) a trust relationship or fiduciary duty in relation to property;

(b) a breach of trust by the trustee of that trust;

(c) the defendant induces or assists that breach of trust; and

(d) the defendant does so dishonestly.[48]

200. The 'litmus test' is whether a defendant providing such assistance was:

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[44] *Lonrho Plc v Fayed [1992] 1 A.C. 448 at 463-464.*
[45] *OBG Ltd v Allan [2007] UKHL 21, [2008] 1 A.C. 1 per Lord Nicholls at §167.*
[46] *Civil Fraud at 2-082, Belmont Finance Corp v Williams Furniture Ltd (No. 2) [1980] 1 All E.R. 393 at 404-5.*
[47] *Harman J in Huntley v Thornton [1957] 1 WLR 321, 343.*
[48] *Lewin on Trusts, 43-014, 43-026.*

"*not acting as an honest person would in the circumstances.*"[49]

201. The question of whether a defendant has "assisted" in a breach of trust or breach of fiduciary duty is a question of fact. What is required is:

> "*conduct which in fact assists the commission of the act which is a breach of trust by the trustee*"

but there is no mental element required in addition to the separate requirement of dishonesty.[50]

202. The assistance relied upon must be:

> "*more than of minimal importance, and must enable the breach by the trustee to be committed, but there is no requirement that what is done by the defendant inevitably has the consequence that a loss is suffered.*"[51]

Knowing receipt

203. The elements of a claim in knowing receipt are:

(a) that there is property subject to a trust or a fiduciary relationship;

(b) the property is transferred and received;

(c) the transfer is in breach of trust or fiduciary duty;

(d) the property or its traceable proceeds is received by the defendant;

(e) the receipt is for the defendant's own benefit;

(f) the defendant receives the property with knowledge that the property is trust property and has been transferred in breach of trust.[52]

204. In this case, the critical elements to establish for the knowing receipt claim are whether the payments to the relevant third party recipient were made in breach of trust, and whether the relevant third party recipient was aware of the breach of trust sufficient to make it unconscionable for him to retain the benefit of the receipt.

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[49] *Civil Fraud at 13-033.*
[50] *Madoff Securities International Ltd v Raven [2013] EWHC 3147 (Comm); [2014] Lloyd's Rep FC at §351.*
[51] *Lewin on Trusts, 43-032.*
[52] *Lewin on Trusts, 42-023.*

205. A breach of trust is essential to the cause of action, but it does not matter whether the breach is fraudulent.[53]

206. The starting point for the level of knowledge required by a defendant to a knowing receipt claim is that their knowledge must be sufficient:

> "*to make it unconscionable for him to retain the benefit"*

of the monies received[54]

The factual evidence

207. As in any case, the Court was able to form a provisional view of each witness and the reliability and quality of their evidence as that evidence was given.

208. However, the Court formed no concluded view on such matters until the hearing had ended when it was able to consider and reconsider their evidence in the light of the entirety of the evidence that the Court had by then heard on the issues that each witness addressed.

Plaintiffs' witnesses

Sheikh Khaled Salem Abdulaziz Al-Sabah

209. Sheikh Khaled is the current Director General at KPA having been appointed in July 2024. He is the most senior executive at KPA.

210. Sheikh Khaled was apparently originally to be called to deal with an authority question. The issue as to the authority to bring these proceedings on behalf of KPA had been raised by D2-D4 and the GP, but had been compromised before trial, so his evidence at trial was not required on this point. He was however still called and was the sole witness from KPA.

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[53] *Lewin on Trusts, 42-044, Courtwood Holdings SA v Woodley Properties Limited [2018] EWHC 2163 (Ch) per Nugee J at §60.*
[54] *Civil Fraud at 12-039.*

211. The Court found him to be an honest witness. Unfortunately his evidence was of little assistance as to the material events in dispute as he had no contemporaneous knowledge and is not closely involved in the various current legal proceedings which involve KPA.

212. It was apparent from his evidence that he only had a high-level view of the proceedings. He had not investigated any of the key facts involved, or reviewed the underlying documents, or read the pleadings in this case (or the Kuwaiti proceedings in which KPA is also a Plaintiff).

213. He was unsure of the amounts at stake saying that he understood the value of KPA's claim in these and the Kuwait civil proceedings was something above US$400 million.[55]

214. He maintained however that KPA's intention in pursuing this case is simply to recover funds which it believes are owing to it and not to 'harm KGLI Kuwait'.[56] The Court accepts his evidence on this important issue.

215. He also confirmed that there was a close relationship between KPA and the Kuwaiti government[57] and that the Kuwaiti government takes an interest in KPA's business.[58]

216. He confirmed that as Director General he also has a close relationship with the Chair (a minister in the Kuwaiti government) and speaks to her often. He could not however confirm this was the case with his predecessor, Sheikh Yousef.[59]

217. The Court was left with the impression that although he was the person ultimately in charge now, the litigation was commenced well before his tenure, and he had not familiarised himself with the detail of the various cases he had inherited and relied on his legal team to brief him as necessary.

218. Because he had no knowledge of the issues in these proceedings and had not made himself aware of the key details, he could not assist the Court on issues such as:

a) KPA's decisions to invest in the Fund and subsequent events;

b) the formation of the External Committee[60]; or

[55] *Day9MT1/59:15.*
[56] *Day10MT1/14:1–8 and Day10MT 1/14:19-21*
[57] *Day 10 MT 1/55;17.*
[58] *Day9MT1/48:19.*
[59] *Day9MT1/47:16.*
[60] *Day 9MT1/98:10-16*

c) the conduct of and departure of his predecessor Sheikh Yousef (although he had seen some of the stories in the press the Court was referred to).[61]

219. The Court does not accept Mr Chapman KC's argument in closing that he was advised or decided not to investigate and understand the matters about which he would be questioned in order to maintain 'plausible deniability'. That goes much too far.

Mr Al Jarrah

220. Mr Al Jarrah's evidence was given through an interpreter. He also could not give evidence relevant to the facts in this case. He was not at the State Audit Bureau at the relevant time, so could not shed light on the alleged expropriation attempts by Kuwait of the Clark Asset Proceeds. He had not been asked for any documents relating to the September 2018 meeting and was unaware if anyone else had been.[62]

221. The Court derived little assistance from his evidence.

Mr Al Othman

222. Mr Al Othman, by contrast to Sheikh Khaled and Mr Al Jarrah, was the only witness called by the Plaintiffs who was involved in material events between 2017 and 2019. He held positions at both KPA and PIFSS. He chaired the External Committee relating to KPA's investment in the Fund in 2015. He joined PIFSS in 2017 and became Director General in January 2019 where he remained until leaving in 2022. He has no ongoing role at PIFSS. He was also previously a director of KPA from March 2017 to March 2018.

223. The Court found him to be a generally straightforward witness, albeit he was guarded at times in his answers.

224. In particular he was reluctant to comment on decisions taken in Kuwait even where he was seemingly involved at the time.

225. The Court consequently treats his evidence on those issues with some caution, unless it is supported by contemporaneous documents and where it is inconsistent with contemporaneous documents it prefers to rely on the contemporaneous record.

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[61] *Day9MT1/70:22.*
[62] *Day10 MT1/120:19.*

The criminal and civil cases

226. The Court agrees with the Defendants that the following issues are notable examples of his reluctance to engage on certain matters.

a) When directly asked about criminal and civil allegations against Ms Lazareva and Mr Dashti in which both KPA and PIFSS were involved, which it was suggested conflicted with his knowledge and views at the time, he appeared to distance himself from knowledge of what was being alleged in the civil and criminal proceedings.[63]

b) It was put to him on a number of occasions that if he had been in any doubt over whether the Clark Asset had been stolen or misappropriated this would have been recorded in the reports from the External Committee which had made no mention of this, but had confirmed that the Fund had retained its interest in the Clark Asset.[64] He was unwilling to deal convincingly with this suggestion. He said he was not really involved.

c) He did however:

i) maintain that he had doubts about the explanations from Ms Lazareva and from Walkers who had provided comfort on the point. There is no contemporaneous record that these doubts were expressed or recorded; and

ii) maintain that ownership of the Clark Asset was '*not part of the mandate'* of the External Committee and instead was for KPA to ascertain, which does not fit with the comfort sought and obtained from Walkers and does not make sense when one examines its work and its reports.

227. He was aware by 2017 that the criminal investigations were the result of suspicion by KPA, Kuwait government ministers, and the SAB as to the conduct of those managing the Fund and KGLI. He said he had reasons to suspect the Clark Asset sale proceeds were higher than the amounts reported and that as part of their duty as government officials they had to make sure

[63] *Day11MT1/45:11.*
[64] *Day 11MT1/34:1 and 42:1.*

that everything was done correctly.[65] He did ultimately accept that by the time of the transfer of funds to the Noor Bank account he understood that the Clark Asset had not been stolen.[66]

Sheikh Yousef

228. Whilst the Court has not heard from Sheikh Yousef, who was the Director General of KPA at the relevant time, it appears from the contemporaneous record that Mr Al Othman took a more reasonable and measured approach to the issues with the Fund than that taken by Sheikh Yousef, who from the contemporaneous material appeared to have formed particular views about, and was hostile and aggressive towards those managing the Fund.

229. An example of his approach which would appear to have been more measured is that Mr Al Othman had favoured the Plaintiffs accepting the distribution offered by the Fund in November 2017 and not pursuing their claims against KGLI.[67]

Potential disagreement with facts put forward in Kuwait

230. The Court also found him to be less than forthcoming when asked about matters which risked criticising the conduct of a department at the Kuwaiti government or a senior individual in Kuwait.

231. An example of this was when he was asked about his letter to the Kuwaiti Attorney General dated 27 February 2019 at which he put a value of approximately US$14m to PIFSS entitlement [68] which contemporaneous materials show was inconsistent with the position being taken by KPA through Sheikh Yousef, the recommendations of the Committee formed by the Kuwait Minister of Finance and the sentiment of members of Kuwait National Assembly.[69]

232. The mood in Kuwait can be seen from a question raised in the Kuwait Parliament on 10 June 2019 to the Minister of Finance which alleged that the proceeds of sale from the Fund's assets were US$1.1 billion,[70] US$520 million of which were due to KPA and PIFSS but were missing from the Fund and recommended that the file be referred to the KPP to investigate.

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[65] Day 12 MT1/10-13.
[66] Day12 MT1/99:12 Day12MT1/95:10; Day12MT1/95:15; Day12MT1/98:14 to Day12MT1/99:21.
[67] *Draft KPA board minutes 22 November 2017.*
[68] *This was criticised in a parliamentary question submitted to the Minister of Finance by Mr Al -Adsani.*
[69] *See19 May 2019, 30 June 2019 and July 2019 ministerial committee meetings.*
[70] *At the time of the Clark Asset sale, the Philippines press was reporting that the purchase price was US$1 billion. See the article dated 19 November 2017 from the Manila Bulletin and the article dated 29 May 2018 from the Manila Standard; US$1 billion was also being reported by the buyer (Udenna) in its public regulatory filings. See: extract from Udenna's audited financial statements for the year ended 31 December 2017, at §35.3; and the Philippines Securities and Exchange*

233. The Court found his answers to these matters, which conflicted with the contemporaneous record concerning his views at the time, somewhat evasive.

234. Whilst he accepted that the Minister of Finance was under some political pressure, he denied that there was any pressure on him to bring a larger claim than was justifiable[71].

235. He was unwilling to admit apparent anomalies which would involve disagreeing with the Kuwaiti Attorney General (KAG). For example, the KAG's assertion in a letter that the GP had no connection to the Fund, an inaccuracy he would have known from his time on the External Committee. On this aspect he said that he did not know the context or what documents were being considered by the KAG and refused to comment further.

236. While Mr Al Othman's reluctance may be understandable it was not, in the Court's view, open and frank.

The 10 September 2018 meeting

237. He was also questioned extensively about the 10 September 2018 meeting at which the Defendants alleged that it was agreed that the Fund's monies frozen at Noor Bank would be transferred to the KAG, consistent with KAG's letter of 7 August 2018 to the Dubai Attorney General (DAG) requesting the transfer of the full US$496 million.

238. This meeting assumed some prominence at the trial as it was alleged by the Defendants that it recorded an agreed strategy between the Plaintiffs and the Kuwaiti government in relation to the frozen monies.

239. His evidence was that he did not know, if it be the case, that Kuwait was trying to gain control of the whole amount and he thought the understanding was that each of the LPs would get their fair share.[72]

240. He believed that the Plaintiffs had not received their lawful share of the Fund's profits.[73] The Court accepts his evidence on this latter point.

Commission filing dated 16 April 2018 lodged by Clark Global City Corporation (the Udenna subsidiary which was purchasing the Clark Asset).
[71] Day12MT1/49:11 and 50:1.
[72] Day11MT1/184:5 and 14.
[73] Day9MT1/136:4; Day9MT1/136:24; Day9MT1/137:5; Day9MT1/139:22; Day9MT1/145:6.

241. The Court does not regard any agreements reached at the 10 September 2018 meeting as a once and for all plan. It is clear from the record that the plan changed to ask for lesser amounts.

The Cayman proceedings

242. He confirmed that he had authorised the issue of the Cayman proceedings as Director General of PIFSS, but he had delegated the detail to others and to DLAL, (the government legal service which represents the State of Kuwait and State entities in Kuwait). He had not reviewed the claim before it was issued.

Ms Al Shatti

243. Ms Al Shatti is a legal counsellor at DLAL and explained why the KAG is not able to provide evidence in these proceedings. She gave evidence as a witness of fact.

244. She had no direct evidence to give concerning the material events of 2017-2019.

245. She was not put forward as an expert, but in the Court's view there is no reason to doubt her evidence that the legal position in Kuwait is that the KAG cannot give evidence.[74] She relayed that the KAG believes himself to be legally precluded from giving evidence in foreign judicial proceedings because this would amount to subjecting his office to the judicial authority of a foreign state, which in his view is prohibited by the Kuwaiti constitution as well as Kuwaiti statute.[75]

246. The Court will not draw any adverse inference against the Plaintiffs for his non-appearance as a witness in the circumstances. The Court accepts that although the Plaintiffs are State owned entities they have no powers of compulsion or practical ability to ensure his attendance.

247. The Court notes that no other person from his office or from DLAL was put forward to deal with communications between the Kuwait State, the Plaintiffs and with the Dubai authorities concerning the Noor Bank freeze. This is regrettable but there is sufficient evidence for the Court's conclusions on this aspect.

[74] *Day12MT1/134-140.*
[75] *Al Shatti 1, paras 12-18.*

Overall impressions of the Plaintiffs' factual witnesses and failure to call Sheikh Yousef

248. In the Court's view some important witnesses who would have been of assistance to the Court in this case have not been called. Most notable among these is Sheikh Yousef.

249. Of the four witnesses presented by the Plaintiffs, only Mr Al Othman had any involvement with the Fund during the key period of 2017 to 2019.

250. As described above, Sheikh Khaled, the current Director General of KPA, with current responsibility for the civil proceedings against KGLI in Kuwait commenced in late 2016, and the present proceedings in FSD 236 and FSD 97 in Cayman commenced a few years later, knew very little about the Plaintiffs' case and apparently had little grasp of the underlying facts.

251. Mr Allison KC for the Plaintiffs said after he had been cross examined

> "*As my Lord will understand, the primary purpose of [Sheikh Khaled's] evidence was to deal with the authority to bring the claim because that was previously disputed and dropped after the evidence".*[76]

252. With respect to the other two witnesses, they did not have much of relevance to say.

253. Much of the cross examination therefore involved the witnesses quite understandably, but predictably, declining to answer questions on the basis they were not involved in the relevant matters at the time and had no knowledge of the facts.

254. The Defendants alleged that from at least 9 May 2018 the State of Kuwait on behalf of and with KPA and PIFSS, actively tried to wrongfully expropriate all of the frozen Clark Asset Proceeds to Kuwait. This was an important feature of the Defendants' case and the Court would have benefited from the full facts.

255. Sheikh Yousef was the person at KPA, from the contemporaneous material, who was in charge of the strategy in relation to the Fund at the material time.[77] He was the former Director General of KPA in the important period from 2016 to 2021. He provided affidavit evidence in the section 22 proceedings when he was in office.

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[76] *Day10MT1/85:21.*
[77] *Sheikh Khaled accepted that Sheikh Yousef was the "driving force" behind the civil and criminal litigation in Kuwait Day9MT1/140:16 – Day9MT1/142:4.*

256. The Court was told he was not called as a witness because he no longer works for KPA. Mr McCourt Fritz in closing submitted that the decision not to call him was taken based on the pleadings that there was no case advanced that he was behind any alleged expropriation attempt. Be that as it may he was clearly a material witness on the state of the pleadings and no good reason has been provided for his absence.[78]

257. Sheikh Khaled did not know if anyone at KPA had made any attempt to contact Sheikh Yousef to see if he was available to give evidence and he could not explain why he was not being called.

258. Mr Al Othman did not know why Sheikh Yousef had left KPA or why he was not at the trial to answer questions being raised.[79]

259. Ms Al Shatti accepted that there was nothing preventing Sheikh Yousef from giving evidence in these proceedings.[80]

260. In the Court's view Sheikh Yousef could have assisted on the following issues relating to the alleged expropriation of the Clark Asset and the Kuwaiti civil and criminal proceedings:

a) the questions raised by the Defendants relating to the civil case in Kuwait against KGLI and regarding KPA's involvement in the criminal proceedings;

b) the consideration given by KPA to the reports of Mr Al Othman's External Committee;

c) KPA's relationship with the Fund and KGLI at the relevant times; and

d) his correspondence with the KAG in 2018 and 2019.

261. The fact he was not called in these circumstances does not on balance however, in the Court's view, lead to the inference to be drawn that his evidence was likely to have been unhelpful to KPA and helpful to the Defendants' case of the improper motives which lay behind the Plaintiffs' litigation strategy.

262. Even if such an inference were to be drawn it would not be sufficient to alter the Court's conclusion that the Cayman proceedings were not brought abusively.

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[78] Day9 MT1/166:12;Day 10MT1/29:19;Day10MT1/67:4;Day11MT1/6:14.
[79] Day11MT1/6:10-14; Day12MT1/63:19-21.
[80] Day12MT1/127:20.

263. The Court has relied on the contemporaneous material and other evidence which exists to resolve this issue.

264. Similarly with the criminal proceedings in Kuwait and the allegedly inconsistent civil claims in Kuwait and in this Court, the Court has been able to reach a view from the contemporaneous material and does not draw an adverse inference from the non-attendance of Sheikh Yousef. The Court does not infer that he was not called because he would have been important in making the case for the Defence.

Plaintiffs' missing documents

265. The Court notes that although extensive criticisms have been levelled at the Plaintiffs' discovery by the Defendants there has been no application for specific discovery.

266. It also notes the evidence of Mohamed Al Khaldi and Abdulkareem Adnan Al Shatti about working practices at the Plaintiffs. The Court makes due allowance for the differences between those practices and those in the Cayman Islands with regard to the use of electronic communications.

267. It accepts that at the relevant time in Kuwait the primary method of communication was through hard copy documents and telephone calls, or in person meetings, rather than by email.

268. However, even though documents may have been generated and stored in hard copy and required manual searching and collation there are one or two important topics on which very little has been disclosed.

269. There are understandable reasons for this in some instances. For example, the Court accepts that the Plaintiffs do not have possession or power of documents at the KPP and can only disclose documents voluntarily provided so that they become within the Plaintiffs' possession, custody or power.

270. Having examined the arguments and evidence, overall the Court accepts that the Plaintiffs, with the considerable assistance of their external lawyers,[81] properly discharged their discovery obligations. The Court does not draw adverse inferences against the Plaintiffs arising from the Defendants' criticisms. However, the Court should record the following gap in documentary material.

[81] *Ogier and Baker & McKenzie.*

271. An important topic, at least at trial, was the 10 September 2018 meeting. Other than a brief account of the meeting contained in a long PIFSS report there is apparently no other reference to this meeting in the Plaintiffs' discovery.

272. Although the Plaintiffs have said that they do not have any notes of the meeting there are no surrounding documents[82] either which the Defendants say is surprising. The Defendants say that it appears that the Plaintiffs have not disclosed any records of that meeting or any similar meetings.

273. The Defendants have pointed out that in his evidence, Mr Al Othman mentioned various categories of documents which were prepared or likely to have been prepared but which had not been disclosed, including in relation to the September Meeting.[83] These included:

a) working papers which were stored at the Kuwait Fund for Arab Economic Development, where three committee members worked[84] and he believed those working papers were delivered to the Minister of Transportation (*i.e*. the chairperson of KPA);[85]

b) a written record of the assistance and information that Mr Al Othman said PIFSS's Compliance Team may have provided the KAG's office (he did not know if there was such a record);[86] and

c) written communications between PIFSS's Compliance Team and the KAG's office during 2018 in connection with the former providing assistance to the latter concerning correspondence with the DAG or UAE more generally.[87]

274. The Court accepts the Defendants' case that the September Meeting is unlikely to have happened in a vacuum and infers that there is likely to have been written material internal to each Plaintiff, passing between the Plaintiffs, and passing between the Plaintiffs and the Kuwaiti Government, which has not been disclosed. There could be various reasons for this. It could have been destroyed, lost, or not looked for or located by the Plaintiffs.

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[82] No communications, papers, agendas, briefs, minutes, notes, diary appointments, reports or other records.
[83] This led to correspondence between the parties and was raised in Mr Hubble KC's opening submissions at Day8MT1/7:4 – Day8MT1/9:18.
[84] Day11MT1/12.
[85] Day11MT1/12:13.
[86] Day11MT1/157.
[87] Day11MT1/165.

275. Those materials might be relevant to the issue of the extent to which the Plaintiffs co-operated to encourage the State of Kuwait to intervene and seize the Clark Asset Proceeds. The evidence from the relevant witnesses is that they had not been asked to search for such relevant documents.[88]

276. Notwithstanding the allegations made by the Defendants the Court does not conclude that from the absence of such documentary material that it is reasonable to find that the material is likely to have been unhelpful to the Plaintiffs' case and that:

a) the Plaintiffs knowingly failed to preserve, collect and discover this documentary evidence; or

b) that they elected not to rely upon or explain the documents they did discover because they knew that translating them would reveal to the Court matters which were contrary to their own case.

277. The Court accepts the Plaintiffs' answers to these accusations, which whilst not wholly satisfactory, do not lead to the inferences sought.

278. The Court has been able to reach a concluded view on the evidence in relation to the important issues concerning the External Committee and the Noor freeze from other contemporaneous material.

Other potential witnesses

279. Sheikh Yousef was recorded as an attendee at the September Meeting. So too were Hamad Al-Humaidi, the then Director General of PIFSS, Nayef Al-Hajraf, the then-Minister of Finance, chairman of PIFSS and Mr Fouad Dashti, director of KPA's legal department. No reason was given as to why they were not called. Ms Al Shatti saw no legal prohibition on them, or Sheikh Yousef, giving evidence.

280. Again the Court has noted their absence but will not draw the inference that their evidence would not have been helpful to the Plaintiffs in relation to the September Meeting. The Court has enough contemporaneous documentary material to reach a view on the relevant issues.

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[88] *Day12MT1/153:5-25.*

The Kuwaiti civil claims

281. The Defendants have raised questions about why KPA has apparently advanced civil cases in Kuwait and the Cayman Islands on apparently contradictory bases. The witnesses who were called were asked to accept that KPA's claim, and first instance and appeal judgments in KPA's favour in the Kuwaiti civil proceedings for USD 553,418,974.90, are seemingly based on a mischaracterisation of the facts.

282. No witness who was called by the Plaintiffs accepted that they are inconsistent with facts now apparently accepted by the Plaintiffs in these proceedings.

283. As explained above the Court formed the impression that none of the Plaintiffs' witnesses was willing to give answers to questions which involved criticism of the State of Kuwait, including the civil or criminal Courts, the KAG and the KPP. The evidence was therefore constrained by that tendency.

284. The Plaintiffs' witnesses had a strong sense of loyalty and civic duty to give evidence in support of the State of Kuwait and for the actions taken for the protection of "public funds". This is not surprising and the Court makes no criticism of the witnesses for that tendency.

285. However, it has led the Court to approach the evidence of the Plaintiffs' factual witnesses with care whenever it touched on the motives or actions of the State of Kuwait, and by and large the Court prefers to rely on the contemporaneous documentary record.

Defendants' witnesses - Mr Williams, Mr Ayliffe, Mr MacRae

Mark Williams

286. Mr Williams did not attend the trial in person because he is facing criminal charges brought in August 2025 in Kuwait, which he strongly denies. He was unwilling to leave the US and give his evidence in person at the trial in Cayman, with an attendant extradition risk.

287. After the trial concluded here there has apparently been a judgment entered against him in Kuwait.[89]

[89] *As per Campbells letter to the Court dated 15 May 2026.*

288. Mr Williams gave evidence over video link over 4 days. The technology worked well and the Court was able to form an accurate assessment of his evidence.

Observations

289. As to demeanour, he was reasonably 'upbeat' considering the seriousness of the allegations levelled against him, and the disruption to his personal and professional life that this litigation and the Kuwaiti criminal proceedings have caused.

290. Overall the Court found him to be a straightforward witness who was willing to answer all the questions put to him. At times however he was cautious and guarded.

291. Given the high stakes ranged against him in this litigation and the criminal proceedings against him in Kuwait his wariness at times was understandable.

292. His cross examination traversed many issues and he was challenged repeatedly over the relevant events, as was to be expected.

293. Given the extent and seriousness of the Plaintiffs' allegations as to his conduct, and the number of issues they put to him to advance their case, the cross examination was no doubt a gruelling ordeal for him. It was conducted commendably fairly.

294. Apart from one or two occasions when his emotions were revealed, Mr Williams remained calm.

The Plaintiffs' submissions on Mr Williams' evidence

295. The Plaintiffs had described Mr Williams as untruthful, unwilling to accept fault, and a conspiracy theorist.

296. The phrase used by Mr McCourt Fritz KC in closing was that he was '*a careful fraudster'*.

297. The Court did not find this to be so.

298. The Court was left with the impression that insufficient headway was made as to the issues touching upon his alleged dishonesty and wrongdoing, notwithstanding the four days of detailed questioning it took to traverse the relevant ground.

299. The Court did not find him to be untruthful or his evidence to be unreliable. He gave his evidence in a straightforward manner and was not evasive.

300. The Court was alive to the risk of being 'taken in' by a person who, as the Plaintiffs alleged, has convinced himself that he is morally in the right, who 'made up stories' to aid his case.

301. The Court did not find that he made up stories, was prone to 'making speeches', or that his evidence had been prepared in advance to the point of not 'ringing true'.

302. It is no surprise to the Court that he would have rigorously prepared given the scale of the allegations made against him and his personal stake in the litigation.[90]

303. He had a good recollection of the details of events over the relevant periods of time, especially considering the events occurred many years ago.91

304. The error he made in relation to the sequence of the President Trump retweet concerning the Noor Bank freeze was, in the Court's view, a simple mistake for which he apologised when it was pointed out in the Plaintiffs' opening.

305. The majority of his written evidence as to the role of the US administration92 was not challenged. The documents show that the US administration was keen to assist the Fund at the time.

306. The Court is not prepared to take what the Court regards as a mistake as an indication, as the Plaintiffs say, of a wider tendency of Mr Williams to make bold claims without having checked the underlying facts, or adopt and assert unreasonable beliefs as fact. The Court has not found that he was repeatedly picked up for errors or omissions.

307. For completeness the Court does not accept Mr Chapman KC's closing submissions that the conspiracy in relation to the DIFC claim and the lobbying and third party payment claims were not properly put to Mr Williams. The Court finds that the gravamen of these alleged conspiracies were put fairly to and answered by Mr Williams.

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[90] *He submitted four detailed and lengthy witness statements (over 200 pages) and thousands of pages of documentary evidence.*

[92] *Williams supplemental §§12-39.*

Clyde & Co documents

308. Having reviewed the Clyde & Co documents, the Court does not accept, as the Plaintiffs say, that:

a) Mr Williams attempted to hide behind an incorrect claim of privilege in order to fabricate evidence about the advice of Cayman law that Clyde & Co and Mr Black QC gave him.

b) Mr Williams had made a plan to mislead the Court by reference to documents that he believed the Court would never see and repeatedly suggested that he wished he could share the contents of these documents with the Court, when in truth he had no such wish and knew that he was misrepresenting the contents of the relevant documents.

309. Quite apart from the fact that these allegations were never put to Mr Williams because he was not recalled to deal with them, the Court rejects this characterisation of his evidence in light of its findings in relation to the Clydes documents.

Findings

310. In response to the 6 March 2026 ruling by the Court, D2-D4 produced discovery the same day of approximately 80 Clyde & Co Documents dated mainly between 27 June to 12 July 2018. These documents evidence the advice given by Clyde & Co in the days prior to the filing of the DIFC Claim Form on 9 July 2018.

311. The documents:

a) are consistent with the oral evidence of Mr Williams who had said that:

i) Clyde & Co analysed the underlying contractual documents and advised on the IM's fee claim;

ii) their advice was different from Walkers';

iii) he relied on their advice in relation to the IM fees claim; and

iv) Mr Black QC was consulted and advised Clyde & Co.

b) show that Clyde & Co

i) gave advice by email on 29 June 2018, including in relation to the GP's submission to jurisdiction, bringing a claim for Carry of US$45,462,000, procedural matters and enforcement of a DIFC judgment in the UAE via a "*precautionary attachment of Noor Bank funds to be based on the DIFC Courts judgment*".

ii) advised the IM, through Mr Williams, to claim for Management Fees together with interest and on non-payment as a ground for termination of the IMA.

iii) drafted the demand letters and associated calculations

iv) '*advised on Cayman law'* in the sense of analysing and interpreting the IMA and LPA, which were both Cayman law governed.

312. The Plaintiffs' arguments that Mr Williams gave false evidence or was attempting to mislead the Court are not made out.

Mr Williams' conduct

313. Mr Williams found himself dealing with a number of crises from time to time. The multiple issues he had to deal with at the Fund were sensitive and difficult.

Authority

314. He was not a director of the GP, the IM or KGLI, even though he was the '*last man standing'* at critical times.

315. He was the only person present to conduct operations of the GP on a day-to-day basis at important times, including in relation to the Apache engagements.

316. The Court accepts his evidence that he routinely consulted with the decision makers, including Ms Lazareva and Mr Alwadhi when he needed approval.

317. His understanding of the limits of his authority were evident for example when he engaged lawyers about the remit of Ms Lazareva's power of attorney[93] and when he tried to contact her in prison in relation to whether she was prepared to sell the IM.[94]

318. Another example is in relation to the evolution of the draft GP resolution admitting the DIFC claim after it had been sent to Mr Alwadhi.95

319. In the light of his interactions with Mr Alwadhi and Ms Lazareva the Court does not accept he was the '*directing mind and will'* of the GP or a '*de facto'* director on important issues, where the Court finds he would regularly seek and obtain their approval.

Assessment of his motives

320. The impression the Court has formed on all the evidence is that Mr Williams was 'firefighting' on multiple fronts and was seeking to protect the Fund.

321. He was doing the best he could in very difficult circumstances. Sometimes, it seemed to the Court, that he was out of his depth in terms of experience and expertise and was struggling to keep matters from overwhelming the business of the Fund.

322. It is clear on all the evidence that Mr Williams was consultative by nature and careful to ensure that any steps he took on behalf of the GP or the IM were authorised and approved by the relevant officeholders.

323. Whilst reasonably capable and careful he was not qualified or experienced enough to manage on his own which is why no doubt he was not slow to consult internally and externally.

324. The Court accepts that he took care, when operating under huge pressure, to attempt to secure outcomes that he believed were in the interests of the Fund.

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[93] *Day14MT1/54:5-Day14MT1/57:11.*
[94] *Day17MT1/208:8-Day17MT1/214:17.*
[95] *Day17MT1/201:5-Day17MT1/205:19.*

325. The Court does not find, as alleged by the Plaintiffs, that he was seeking to dishonestly enrich himself and KGLI and its associates from Fund assets or that he engaged in deliberate wrongdoing.

326. Those allegations have not been proven.

Use of lawyers

327. As is clear from the documentary material he instructed numerous lawyers on the behalf of the GP and the IM whose advice he routinely followed.[96]

328. The Court is of the view that his requests for legal assistance in achieving outcomes for the Fund were:

a) genuine;

b) not, as the Plaintiffs say, designed to pressurise lawyers to find a way of achieving ends for his own benefit, or to '*paper over'* unlawful transactions; and

c) not so that he could attempt to circumvent legal advice the lawyers he instructed gave him.

329. Rather it finds that he was keen to obtain all conceivable advice for various scenarios which he believed to be in the interests of the Fund and he routinely sought to follow it.

330. For example, he obtained the opinion of Walkers and Richard Gillis KC on the scope of the Fund's indemnity obligations and followed the advice received.

331. As to the large amount of fees incurred in obtaining advice and assistance this seems to the Court to be commensurate with the myriad of issues the advisers were asked to deal with.

[96] *For example in relation to the proposed Elite payment and again with Richard Gillis KC in relation to the scope of the Fund's indemnity obligations.*

332. He gave credible evidence that the Fund did not continue paying for service providers related to KGLI, Ms Lazareva and Mr Dashti after the Noor Bank account was unfrozen and that new engagements were entered into with those clients.[97]

Belief in expropriation attempt by Kuwait

333. A core issue is whether Mr Williams had a reasonable belief in 2018 that:

a) the entirety of the Clark Asset Proceeds were in danger of being expropriated by the State of Kuwait,

b) the DIFC proceedings might assist to prevent that occurring; and

c) the sums claimed in those proceedings were due to the IM.

334. A large number of lawyers were engaged by him in relation to preventing the transfer of the Clark Asset Proceeds to Kuwait and they provided and discussed with him the intelligence they had gathered.

335. Having examined the evidence, the Court finds that his belief was honestly held and reasonable at the time on these issues.

336. Despite numerous attempts to undermine his evidence in cross examination, the Plaintiffs have not proven otherwise.

Udenna

337. Another difficult issue arose when as part of the deal for the sale of the Clark Asset, Udenna (the purchasers) apparently insisted that a US$250m fee be paid to its adviser, Elite, via GGDC (to be funded by Udenna).

[97] *Day17MT1/131:10-Day17MT1/132:4.*

338. When Mr Williams became aware of the proposed Elite payment he consulted Walkers on how to proceed. [98] This is consistent with his general approach to instructing external counsel, even though this might have had a risk of prejudicing the completion of the GGDC sale.[99]

339. There is no evidence to support the Plaintiffs' argument in closing[100] (which was not pleaded) that Mr Williams supported a dishonest scheme to defraud Udenna's lending banks, or indeed that Walkers had any knowledge of such a scheme at the time.

Mr Williams' missing documents

340. Mr Williams apparently disclosed c.100,000 documents.

341. The Court notes that neither Mr Williams nor Mr Ayliffe have provided evidence of WhatsApp communications between them before 2019. Mr Williams accepted that he would have had WhatsApp communications with Mr Ayliffe but according to the Plaintiffs apparently has only provided WhatsApp communications before 2019 with other individuals.

342. The Plaintiffs also say there were no WhatsApp communications disclosed between Mr Williams and Ms Lazareva.

343. It was not put by the Plaintiffs to Mr Williams that he had deliberately withheld these materials if they existed, or even that they may have been lost.

344. In all the circumstances the Court will not draw any adverse inference against D2-D4 in respect of any missing materials their discovery.

Mr Henry Ayliffe

General observations

345. The Court found, having assessed his personality, motivations and working practices over many days of cross examination that Mr Ayliffe was:

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[98] *Walkers Dubai advised that "there is nothing in here which contravenes Cayman law" email dated 8 August 2017 from Mr Wood to Mr Williams and Ms Lazareva.*
[99] *Walkers filed a Suspicious activity report (SAR) as a result of the structuring of the payment to Elite on 12 December 2017: see Mr Wood's evidence Day23MT1/202:17 – Day23MT1/220:23; Day24MT1/196:11 – Day24MT1/199:10.*
[100] *§ 23.1 Plaintiffs written closing.*

a) straightforward;

b) trying to be helpful and to assist the Court; but

c) prone to going off on a tangent and making speeches;

d) at times confused; and

e) not always careful and consistent

346. The Court did not find him to be dishonest and to have participated in the wrongdoing the Plaintiffs allege.

347. As a litigant in person the Court makes allowances for his evidence being less than reliable in certain respects.

348. He bore the considerable burden without legal representation of:

a) meeting the Plaintiffs' case;

b) being an advocate in his own cause;

c) being a witness of fact (cross examined for days by Leading Counsel);

d) representing the Apache defendants in complex litigation.

349. The Court did its utmost to ensure that he received a fair trial.

350. However, it was necessarily the case that he faced the enormous challenge of dealing with the Plaintiffs' case against him on his own.[101]

351. The Court has made allowance for that as a matter of fairness given the obvious '*inequality of arms'* in and outside of the Court.

[101] *Eg he prepared a detailed witness statement of 180 pages upon which he was cross examined at length.*

352. Even making these allowances, Mr Ayliffe was somewhat careless with the accuracy and import of what he was saying at times as a witness. There were also times when he was confused and inconsistent.

353. These problems with his evidence did not persuade the Court that he was dishonest when he was involved in the transactions the Plaintiffs relied on to make their case, or that he was now repeatedly lying to the Court as they suggested. They affected his reliability, rather than his integrity.

354. As a general observation whilst he was evidently highly experienced and effective as an investment banking professional, he was somewhat disorganised in relation to Apache's business dealings.

355. He had very little in the way of 'back up' resource to match his deal making ability.

Kickbacks

356. By the start of the trial the Plaintiffs accepted that Apache had done substantial work under the five Apache mandates, but maintained that:

a) it had been deliberately overpaid in order to cause loss to the Fund; and

b) Mr Ayliffe had also caused kickbacks to KGLI be made.

357. The payments which the Plaintiffs say were kickbacks were itemised in the table in Appendix 1 to their closing submissions. They say that they reveal:

(a) a clear and consistent pattern of Apache making substantial payments to KGLI and its associates shortly after receiving fees under each of the engagement letters; and

b) that no satisfactory explanation or documentary evidence has been put forward by the Defendants (essentially Mr Ayliffe and Mr Williams).

358. They say that it was implausible that an experienced and successful banker such as Mr Ayliffe would have:

(i) lent many millions of pounds to KGLI on an unsecured basis without any documentary evidence;

(ii) failed to take any action in relation to repayment even though, on Mr Ayliffe's own evidence, he is currently impecunious; and

(iii) purchased a company for US$18.55m (the IM) without undertaking any due diligence.

359. Mr Ayliffe consistently and vehemently denied these allegations.

360. When the kickbacks allegation assumed particular prominence in the Plaintiffs' written opening before trial, Mr Ayliffe attempted to address those matters in his written opening and his supplemental witness statement.

361. The Plaintiffs say that these provide no proper explanation, there is no documentary evidence to support his new answers and that they are undermined by earlier evidence he gave and his earlier pleaded case.

362. To prove their case the Plaintiffs sought to persuade the Court that:

a) the relevant Apache engagements were not at arm's length and were not negotiated on an arm's length basis;

b) the terms of the relevant engagements were materially disadvantageous to the Fund;

c) a substantial proportion of Apache's fees (over half) were paid as 'kickbacks' to KGLI or otherwise for the benefit of persons associated with it;

d) the largest 'kickback' was disguised as a purchase by another entity owned by Mr Ayliffe (Asia Alternative Asset Management Limited ("AAAML")) of the ownership interest in the Fund's investment manager EMPEML[102] for US$18.55 million; and

e) there was a payment of a secret commission and /or bribe in the form of the Apache /KGLI payment of US$14,550,000 of TPF funds to KGLI at the direction of Mr Ayliffe.

[102] *Comprising the 500 Class A and 1 Class B share.*

363. The Defendants had argued that the kickbacks case was not properly pleaded.

364. In the Court's ruling, appended to this Judgment of 4 March 2026, it decided that it was open to the Plaintiffs to advance the case set out in opening as falling within their existing pleaded case alleging kickbacks and had that not been the case the Court would have given permission to amend.

365. It was then argued by the Defendants that the kickbacks case was not properly put to Mr Ayliffe (or Mr Williams).

366. The Plaintiffs to make good their resistance to this suggestion provided the Court with extensive transcript references which the Court has reviewed.

367. The Court finds that taking all the evidence and written submissions into consideration the kickbacks case was properly and fairly put in cross examination.

Proof of allegations of kickbacks

368. In assessing whether or not the Plaintiffs have proved these allegations the Court has had regard to:

a) the standard of proof required;

b) all the available evidence, including the substantial amount of unchallenged evidence Mr Ayliffe gave and the expert evidence on Apache's fees;

c) the inherent improbability of a senior finance professional of Mr Ayliffe's standing agreeing to participate in a dishonest conspiracy to defraud the Fund which:

i) covered several years;

ii) could have been discovered by many people;

iii) was to benefit persons at KGLI with whom there is no evidence to suggest Mr Ayliffe had a prior relationship; and which

iv) had no obvious guarantee of benefit to himself; and

v) had fees being earned on a contingent basis.

369. The Court has also had regard to the Plaintiffs' arguments that Mr Ayliffe was persistently lying as to inconsistencies in his written evidence and pleaded case, and lack of documentary evidence to support his answers to the allegations.

370. Having assessed:

a) Mr Ayliffe's oral testimony as a whole over many days;

b) inconsistencies in Mr Ayliffe's written evidence and pleaded case, and lack of documentary to support his answers; and

c) the inherent probabilities,

the Court was not satisfied that the Plaintiffs' case theory of kickbacks to shareholders and affiliates of KGLI in return for inflated advisory fees for the Apache Defendants was made out with the requisite cogent evidence to support it.

371. The Court's detailed findings in relation to the advisory fees, after assessment of the expert evidence, are set out below. It finds that they were not improperly inflated and were reasonable in all the circumstances when viewed objectively.

372. The Court has borne in mind that the more serious and less likely an allegation is, the more convincing the evidence must be before a court can find it proved.

373. The Plaintiffs' case relied on a sequence of transactions, one after the other, not an isolated or opportunistic incident.

374. Mr Ayliffe as a highly experienced corporate finance professional used to operating in regulated environments, was very alive to the risks to his new business venture (Apache) and his own reputation of participating in any wrongdoing.

375. The Court is of the view that he was very unlikely to have participated in a pattern of conduct which carried so much risk and which was so uncertain for him in terms of tangible benefit.

376. There is no evidence to suggest (and it was not put to him in cross examination) that he agreed to the kickbacks scheme to win the Fund's business.

377. Without that clear and convincing evidence, in the context of a plausible case theory, the Plaintiffs were largely forced to try to cross examine their way to proof of the allegations based on inferences from the less than complete documentary record.

378. After all the evidence was given, there was no proof which '*tilts the balance'* and justifies a finding of dishonesty or wrongdoing as alleged.

379. At the end of extensive cross examination and review of the documents and other evidence made available103 the Court was not satisfied that the case had been proven that Mr Ayliffe [104] sought to benefit KGLI and those associated with it in the ways alleged in a course of dealings over the relevant time.

380. It was not established:

a) when the dishonest kickback scheme was agreed;

b) between which individuals and upon what terms (including as to who as between Apache and KGLI was to receive what);

c) whether there was a single agreement or multiple agreements in relation to the various Apache engagements; or

d) whether any agreement(s) were concluded before, during or after each engagement.

381. The coincidence of timing from receipt of Apache fees to the payments to KGLI did not of itself prove the Plaintiffs' case.

382. In the Court's assessment, Mr Ayliffe's evidence whilst not wholly satisfactory withstood challenge on key aspects, particularly:

e) His consistent denial that it was always understood and agreed that Apache would not keep all of its fees but would pass it on to KGLI and its associates.[105]

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[103] *Including the pleaded allegations, the documents available, the missing documents, the missing witnesses.*
[104] *Or indeed Mr Williams*
[105] *Day18MT1/164:10-14; Day18MT1/204:13-18.*

f) His consistent denial that the vast majority of the Apache fee was always going to be paid on to KGLI and associates.[106]

383. Obviously mere denials are not enough in the face of convincing evidence to the contrary, but no such evidence has been established.

384. He was at pains to explain the commercial rationale for the transactions in his mind at the time.

385. No convincing case theory was put to Mr Ayliffe as to why it was always understood that he was going to, and that he would wish to, benefit KGLI and its associates in this way.[107]

386. Mr Ayliffe's evidence as to what took place looks, albeit with the benefit of hindsight, somewhat out of the ordinary and did not always make sense to the Court.

387. However, in the Court's assessment, his own idiosyncrasies in the way he operated and the unusual nature of the transactions were not sufficient to convert the evidence as a whole into proof that he engaged in a dishonest kickback scheme to benefit KGLI as alleged.

388. In the Court's overall assessment, taking his testimony as a whole, the Court found Mr Ayliffe to be at times a less than reliable witness, but not a dishonest one.

389. It prefers to rely on the contemporaneous documentary record, where it is not consistent with his oral evidence, and where it was produced.

390. However, the contemporaneous record is substantially incomplete, particularly in relation to negotiations of the Apache engagements in respect of which the Plaintiffs have raised serious questions.

391. The Plaintiffs say the Court should not believe Mr Ayliffe where there is no contemporaneous documentary support.

392. They say in particular it is simply not credible that he would have failed to have taken any action in relation to the repayment of the alleged loans.

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[106] Day19MT1/58:25; Day19MT1/76:8.
[107] There is evidence of his threat to resign from the Negros Financing deal where he considered there was damage to his relationship with other more important clients. That is not consistent with participation in an agreed kickbacks scheme.

393. Mr Ayliffe's records were certainly not of assistance in providing a full account of Apache's dealings with the Fund.

394. The Court accepts the force of the Plaintiffs' submissions but is of the view that in the absence of a sufficient account of the circumstances of all payments to KGLI and its associates, and proof that these were made dishonestly as kickbacks, the case is not made out.

395. The Plaintiffs may have reasonable grounds for suspicion, but that is not enough to prove their case.

The loans and retainers

396. In his oral evidence Mr Ayliffe maintained that the US$950,000 repaid to KGLI in September 2013 was in respect of a retainer and start-up costs.[108] He denied this was a kickback.[109]

397. The Court accepts his evidence notwithstanding that this was not set out in his pleaded case when he was represented by Carey Olsen.

398. His witness statement also states that a payment of US$1,500,000 was made in repayment of the retainer and start-up costs in August 2015.

399. The substantive transactions which Mr Ayliffe said were entered into included:

a) the alleged retainer agreement whereby KGLI apparently agreed to pay Apache US$70,000 a month;

b) the alleged loan facility agreement for US$975,000 between KGLI and Apache dated November 2015;

c) the alleged loan facility agreement for US$2m between KGLI Petroleum and Apache dated December 2015; and

[108] *Day18MT1/138:5.*
[109] *Day18MT1/144:13-19.*

d) the alleged loan facility agreement for US$8m between KGLI and Apache dated April 2016.

400. The Plaintiffs say Mr Ayliffe has fabricated all of these agreements. They say that:

a) KGLI never paid interest on the alleged US$975,000 loan from November 2015, and KGLI had never repaid any principal or interest either under the alleged US$2m facility with KGL Petroleum or the alleged US$8m facility with KGLI.

b) The principal and interest having gone unpaid makes it even more implausible that Mr Ayliffe would have lost the documents that evidence the alleged liability. If he had really lost the agreements, there is no reason why he could not have obtained copies from KGLI, the debtor.

c) The natural inference from KGLI's failure to provide these documents to Mr Ayliffe, or for Mr Ayliffe's apparent failure to ask KGLI to produce them, is that they do not exist, because the payments were unlawful kickbacks.

401. The Plaintiffs invite the Court to find that Mr Ayliffe was lying in his oral evidence about these agreements.

402. It is true that he did not set all of this out in his earlier written evidence or in the pleadings and there are very few documents, however the Court does not find he fabricated these arrangements.

403. Mr Ayliffe said that the only loan that was repaid by KGLI was the US$975,000 which was repaid without interest and that Ms Lazareva agreed to remedy this.[110] The Court accepts his evidence. There are payments from Star Advisory in October 2015 and January 2016 to Apache which correspond with this sum and perhaps also the interest.[111] This is consistent with his evidence that the payments made to KGLI were loans, and inconsistent with the case that they were unlawful payments made to KGLI/kickbacks.

404. As to the US$8m facility Mr Ayliffe said:

a) he negotiated the US$8m loan to KGLI in Kuwait in person;

[110] *Day20MT1/33:4.*
[111] *Payment on 23 January 2016.*

b) although he did not know this at the time he was asked to make payments to Star Advisory[112] because KGLI was having trouble with its bank accounts;

c) he did not have concerns about KGLI's credit in late 2016, and that he thought KGLI would be in funds once the sale proceeds from the Clark Asset were released, this was not why he made the loan in April 2016, but rather why he made a further loan at a later date;

d) the payment of US$1.6m on 7 July 2017 to Star Advisory was not a kickback, this payment, and the US$1.5m paid in early June 2017 were draw downs on the $8m loan;

e) by April 2019 he had lent US$10m, and that this grew by another US$3m; and

f) these loans were never cancelled.

405. Again, the Court accepts his evidence, notwithstanding that the Plaintiffs say that it is not credible that there are no loan documents and that Mr Ayliffe's account (including the loss of a USB stick) was untrue. Given his track record for the loss of portable devices it was not improbable that Mr Ayliffe would lose a USB stick.

406. The documents show that an agreement was reached to consolidate and then extend the initial lending by providing a US$19m facility.[113] Mr Ayliffe's evidence was consistent with this and the numbers added up.

407. The main reason for the Court's acceptance of Mr Ayliffe's evidence on the loans, in spite of the Plaintiffs' case that these were all unbelievable and untrue, is that these financial arrangements were too fundamental to Mr Ayliffe's business to have been misrecollected or mistaken.

408. The Plaintiffs' case that he fabricated them and lied to the Court about each of these arrangements requires a finding that:

a) there is cogent evidence to support the case;

b) the facts are more consistent with dishonesty than another explanation;

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[112] Star Advisory was a company whose sole director and shareholder was Dr Akbar who was a director and chairman of KGLI.
[113] Approved by KGLI's board.

c) Mr Ayliffe was dishonest;

d) the inherent probabilities supported the case, or at least made no difference,

This finding is unsupported by the evidence.

409. In the Court's view, his inability to produce the relevant documents is more likely to be due to his poor record keeping.

410. His business affairs and deals were quickly completed and lacked formality.

411. They were completed in circumstances where he was solely concentrated on getting the deals done (with limited or no back up).

Purchase of the IM

412. The Plaintiffs allege that the largest 'kickback' was disguised as a purchase by an entity owned by Mr Ayliffe (AAAML) of the ownership interest in the Fund's IM114 for US$18.55 million, in circumstances where it had no assets, no continuing business and no employees.

413. They say that it had only been an investment manager of the Fund (and even in that role had outsourced its function to KGLI),115 and no due diligence seems to have been undertaken.

414. Upon freezing of the Clark Asset Proceeds KGLI found itself severely short of money.

415. In late December 2017, Mr Ayliffe had agreed to purchase KGLI's shares in EMPEML (then known as KGL Investment Cayman Ltd), and a draft resolution was prepared on behalf of KGLI approving the sale on 31 December 2017.

416. On 21 January 2018 KGLI reassigned certain rights back to EMPEML. On the same day the sale and purchase by AAAML occurred.

417. Ownership of the Class A shares in the IM entitled the owner to 100% of the management fees and 50% of the performance fees due to the IM.

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[114] *Comprising the 500 Class A and 1 Class B share.*
[115] *On 2 September 2007 EMPEML (the IM) assigned its rights to management fees in respect of the Fund to KGLI.*

418. Ownership of the Class B shares entitled the owner to the other 50% of the performance fees.

419. The purchase was funded by US$4 million in cash (payable within 14 days), and a note for the remaining US$14,550,000.

420. The Plaintiffs point out that the board resolution of KGLI dated 7 January 2018 says, in the light of the freezing of the Clark Asset Proceeds, the directors of KGLI "*deem[ed] it best to sell its shares in the capital of the Company in order to finance its operations.*"

421. The Plaintiffs say this is odd given KGLI deferred almost 80% of the consideration.

422. In fact, KGLI did not receive the US$14.55 million until after the Clark Asset Proceeds were unfrozen.[116]

Was the IM deal a way of unlawfully channelling funds to KGLI?

423. Mr Ayliffe was cross examined on the basis that:

a) his account that this was a legitimate commercial transaction was untrue;

b) the transaction defied commercial logic or understanding other than as a pretext for a kickback to KGLI and its associates;

c) the IM was tainted by association with KGLI and what was going on in Kuwait and had no clean track record;

d) it had no employees and no ongoing business beyond the Fund itself;

e) there is nothing in the documentary record dealing with the calculation of the purchase price or its negotiation; and

f) there is nothing to show any due diligence was done.

[116] *A payment that KGLI received from the GP via an account held at Crowell & Moring.*

424. Mr Ayliffe consistently maintained his denial of any wrongdoing in relation to the transaction.

425. The Plaintiffs' case was that Mr Williams was also central to this alleged kickback involving the purchase of the IM.

426. Having carefully considered the evidence of both Mr Williams and Mr Ayliffe and what little documentary record was presented, the Court is not persuaded that the alleged kickback concerning the IM has been proven.

Mr Ayliffe's evidence on the purchase

Carry

427. The Plaintiffs say Mr Ayliffe's first witness statement showed that whilst he agreed to pay US$18.55 million for the IM, he misunderstood what he was buying.

428. This, the Plaintiffs say, showed Mr Ayliffe's ignorance of what AAAML purchased and the rights attaching to those shares, which for an experienced investment banker is not credible, and points to the deal not being an arm's length negotiation for US$18.55 million.

429. In his opening submissions Mr Ayliffe corrected the position and said that:

> "*at the time of the acquisition of EMPEML, I was informed that the rights to the carry had already been assigned to Ms Lazareva, Mr Williams and others*" [117]

430. Mr Ayliffe accepted in cross examination that he had got matters wrong in relation to fee entitlement and carry in his first witness statement.

431. In fact it was accepted at the time that KGLI was getting the carry and AAAML (the purchaser) was not. This was consistent with the oral evidence of Mr Williams and Mr Ayliffe.

432. The Court accepts that he had incorrectly set out the entitlements in his first witness statement and later corrected the position.

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[117] *§117.*

Why an IM purchase

433. As to price and motivation the Court has regard to his evidence that he had been negotiating for the purchase of another investment manager, Putra Star, for twice as much as the IM c. US$36m.[118] He had been unable to complete that deal because he had not received his fee entitlement from the Fund because of the Noor freeze.

434. The Court accepts Mr Ayliffe's evidence as to his plan to buy an investment manager for a large sum.[119]

Mr Williams' evidence on the purchase of the IM

435. The Court accepts Mr Williams' evidence that:

a) Mr Ayliffe was not buying the proceeds to any fees and that is why there was provision for the deal to be completed 15 days after KGLI received its contractual carry, so that those funds could be distributed via a share repurchase;[120]

b) he would have told Mr Ayliffe that Mr Ayliffe would not have been entitled to any material proceeds from the IM fees;[121]

c) the sale of EMPEML was the sale of a company with a track record but no material monies owed to it;[122]

d) Mr Ayliffe made his own valuation of the goodwill in the IM;[123]

e) KGLI would not allow Mr Ayliffe to continue to use the KGLI name;[124]

f) KGLI got the most up-front money it could from Mr Ayliffe for EMPEML;

g) KGLI thought the monies would be released sooner than they were in fact released

[118] §§*514-515 Ayliffe 1.*
[119] *He calculated the purchase price of investment managers in a similar way:10% of the committed capital.*
[120] *Day16MT1/86:16.*
[121] *Day16MT1/97:14 Day16MT1/99:8.*
[122] *Day16MT1/109:20.*
[123] *Day16MT1/113:22.*
[124] *Day16MT1/114:14.*

h) the unfreezing of the funds alone would not have cured all of KGLI's cashflow issues as they needed to post a US$30 million bond;[125]

i) the plan was to transfer the company to US ownership but to keep Mr Ayliffe as the ultimate beneficial owner, on the suggestion of Crowell & Moring in order to assist with lobbying efforts;[126] and

j) the purpose of the US$14.5m payment to KGLI was to settle the obligations under the promissory note.[127]

436. The Court is not persuaded that, as the Plaintiffs allege, Mr Williams' evidence (or indeed Mr Ayliffe's evidence) was dishonest or lacking in credibility.

Lack of documentary record

437. The Plaintiffs also point out that:

a) there is no documentary record of how the deal was negotiated and agreed; and

b) there is no documentary record showing how US$18.55m was calculated or negotiated or any other due diligence conducted by Mr Ayliffe/AAAML.[128]

438. The Court is not persuaded that these matters prove that there was no genuine deal.

439. Judging from his multiple business dealings, which have come under intense scrutiny in this case, it was not Mr Ayliffe's practice to enter into written negotiations or due diligence. He was a poor record keeper and conducted his business dealings informally.

Evidence of negotiation

440. The Court accepts Mr Williams' evidence supported by contemporaneous communications between Mr Williams and Ms Lazareva that:

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[125] *Day16MT1/108:17.*
[126] *Day16MT1/142:13 ;Day16MT1/143:19.*
[127] *Day16MT1/165:5.*
[128] *Mr Williams confirmed that Mr Ayliffe never made any requests related to due diligence: Day16MT1/89:13 - Day16MT1/90:21.*

a) Ms Lazareva did not initially understand the transaction[129] and that he (Mr Williams) discussed it with her a couple of times;[130]

b) by 10 January 2018, and by reference to a memo delivered to Ms Lazareva in prison, she was not sure she wanted to go ahead with the deal to sell EMPEML which is why the memo stated *"Holding on sale per your instructions";*[131]

c) an offer of US$18.5m had been accepted by 15 January 2018; and

d) Ms Lazareva's position then was that a deal needed to be done and if US$2m was not paid with reference to an email that day (23 January 2018) the deal would be off.

441. This sequence of events does not fit with a pre agreed kickback deal with Mr Ayliffe for which there was no negotiation.

442. It does not fit with the Plaintiffs' case that Ms Lazareva and Mr Williams were co-conspirators to extract monies illegitimately from the Fund.

443. As to the genesis of the deal, Mr Ayliffe had said in his written evidence that:

a) Mr Williams "*suggested that I might consider engaging with KGLI to acquire EMPEML"* but that he "*made it clear to Mr Williams that I had no interest in entering into direct discussions with KGLI on this matter. Accordingly, Mr Williams assumed the role of intermediary in any communications with KGLI."*[132]

b) "*all negotiations with KGLI in respect of the acquisition of EMPEML were conducted strictly at arm's length. The negotiation, acquisition, ownership and ultimate closure of the company were managed exclusively through my external legal advisers, Weir & Associates and Carey O*lsen."[133]

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[129] *Ms Lazareva's manuscript comment on a note from Mr Williams was "Also, during our last conversation, I didn't get why our friend [Mr Ayliffe] will buy the rest of the company.*
[the IM]. Please explain it on paper or when I am comfortable talking".
[130] *Day17MT1/213:4.*
[131] *Day17MT1/213:24.*
[132] *Ayliffe 1,§ 515.*
[133] *Ayliffe 1, §518.*

444. The Plaintiffs say that is inconsistent with Mr Williams' written evidence that "*it was Henry who first expressed an interest in purchasing the Investment Manager"* citing an email from Mr Williams to Mr Ayliffe on 15 January 2018 referring to "*your verbal offer*".

445. Mr Ayliffe said he could not recall verbatim the call he had with Mr Williams and who raised the idea of a sale, but he believed it came from Mr Williams. Mr Ayliffe said in his oral testimony "*I don't think that's a big issue as to who – who raised it*".[134]

446. The Court notes the difference in recollection, but tends to agree.

447. What matters is whether the deal was set up to facilitate a kickback to KGLI as the Plaintiffs allege and was not a genuine transaction.

448. The email of 15 January of 2018 which attached draft deal documents suggests that a deal had been agreed, in the sense that Mr Ayliffe had made an offer which had been accepted.

Use of external advisers

449. Mr Ayliffe also corrected his written evidence that his external advisers exclusively managed the negotiations for the deal saying "*that statement is not – accurate, I conducted the negotiation, my Lord, and I apologise*".[135]

450. The Court is not prepared to infer from this correction in the witness box that he dishonestly invented the involvement of Weir & Associates and Carey Olsen in an attempt to make the deal seem more legitimate.

451. It is more likely to have arisen as a result of an error on his part when the witness statement was drafted and finalised.

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[134] *Day19MT1/146:13-20.*
[135] *Day19MT1/174:7-9.*

Monies owed by KGLI

452. The Plaintiffs also argue that Mr Ayliffe's oral testimony was that he (Apache) was owed US$10m of principal plus interest as at January 2018[136] so it was highly implausible that Mr Ayliffe would have agreed to pay KGLI a further US$18.55m for in effect 'a shell'.

453. They say that Mr Ayliffe was unable to give a convincing answer to this during his cross examination. They say:

a) He initially claimed not to understand the question[137] and then said that he did not ask about offsetting the outstanding amount.[138]

b) He then said that "*there was an element of competitive tension to acquire the fund manager*"[139] which the Plaintiffs say is not credible because:

i) there is no evidence that anybody else was interested in purchasing the IM;

ii) there is no plausible reason why the IM would have been an attractive target for anyone to purchase at that price;

iii) Mr Ayliffe was a creditor of KGLI and would have leveraged that; and

iv) the IM was a shell company.

454. The Court agrees that Mr Ayliffe did not give convincing answers to each of these points.

455. However, his central response to these arguments was that he did not reduce the purchase price of the IM by the amount of the outstanding loans because he thought "[KGLI] *were coming back to ask, would I pay more money"140.*

456. This does make sense given that KGLI's urgent need for a large amount of money in January 2018 would not have been satisfied by a setting-off of the purchase price.

457. The Court does not find that Mr Ayliffe lied about the purchase of the IM.

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[136] *Day20MT1/34:6.*
[137] *Day20MT1/39:15-16.*
[138] *Day20MT1/41:5.*
[139] *Day20MT1/40:8-12.*
[140] *Day20MT1/40:7.*

Purchase price

458. As to value, Mr Ayliffe strongly resisted the suggestion that this was 'made up' and maintained that the IM was an attractive proposition because:

a) EMPEML's track record as the Fund's IM was strong;

b) *the issues were at KGLI and if you cut the nexus with KGLI, restaff the entity itself, then it would be clean.*";[141]

c) the value was based on the same calculation he had ascribed to Putra Star "*10% of the historic assets under management and that – that reflects the profitability of the business going forward if we can only raise the same amount*",[142]

d) he knew he was not receiving carry in the purchase of the IM;

e) he believed he would have no entitlement to distributions or fees;

f) he knew the rights to the carry had been assigned but he wanted the shares delivered up front because he had been let down previously in relation to the purchase of KGLI shares from Al Morabitoon;[143] and

g) he knew that he was buying a shell company.

459. As stated above the Court accepts that at times Mr Ayliffe's evidence was confused and did not always make sense.

460. However, it does not find that he was lying about the transaction itself in his extensive evidence to the Court on this issue.

461. As the Court has found, Mr Ayliffe's evidence was at times unreliable and where possible the Court has relied on the few contemporaneous records.

[141] *Day19MT1/167:4-6.*
[142] *Day19MT1/147:8-15.*
[143] *Day20MT1/17:22.*

462. For example, KGLI[144] produced audited financial statements and there is a board resolution which approved the sale. A covert scheme to pay unlawful kickbacks would not naturally fit with this level of disclosure.

463. Although the deal had some unusual features, the Court does not find that it was an unlawful means of channelling money to KGLI.

464. On the inherent probabilities and the evidence, the Court finds that the purchase of the IM was not set up to pay a substantial kickback to KGLI as alleged.

465. The documentary record is unfortunately incomplete and there are some unusual features to the parties' dealings. However there is insufficient proof that this payment bore the hallmarks of a dishonest kickback as alleged.

466. As an aside, the Court has noted that right across the matters in dispute in this case there are numerous dealings between the parties on all sides relating to the Fund's affairs which look odd or unusual.

467. A transaction with unusual features which gives rise to reasonable suspicions is insufficient to discharge the Plaintiffs' burden of proving that a dishonest kickback was paid without cogent evidence.

The purchase of shares in KGLI for US$2.9m from Al Morabitoon

468. The Plaintiffs say:

a) On or around 5 October 2016, Mr Ayliffe transferred US$2m to Al Morabitoon.

b) According to Mr Ayliffe, this transfer was a part payment for the 10,200,000 shares in KGLI that Apache purchased from Al Morabitoon.

c) The earliest evidence of this share purchase is an email from Ms Lazareva to Mr Ayliffe in November 2016. The agreement was still unsigned on 18 December 2016, more than two months after Mr Ayliffe's supposed part payment. When the agreement was signed, it was backdated to October 2016.

[144] *Which apparently had over 700 shareholders.*

d) Mr Ayliffe transferred a further US$902,000 to Al Morabitoon in November 2016.[145]

e) The US$2m paid in October 2016 and the US$902,000 paid in November 2016 were kickbacks and the backdated share purchase agreement was a fabricated pretext for these payments.

f) There is no evidence that Mr Ayliffe ever chased for the transfer of the shares until a year later, when on 20 October 2017 he wrote to Mr Dashti apologising "*for the delay in requesting the formal transfer*" of the shares.

g) Mr Ayliffe's explanations in evidence were inconsistent and untrue.

469. The Court is not persuaded this transaction was set up to give a dishonest kickback to KGLI.

470. Mr Ayliffe's business model was to take equity stakes in clients which he explained he did to a substantial degree, notably in his business dealings in Korea.

471. Mr Ayliffe said:

a) negotiations for the KGLI share purchase took place in KGLI's offices in Kuwait (face to face) with Dr Akbar and Ms Lazareva;

b) there were no electronic communications;

c) there would have been a signed agreement for the purchase of the KGLI shares;

d) he made a payment for the KGLI shares before an agreement had been signed and he trusted people to follow through on their word;

e) he understood that the shares would be transferred even if they were late;

f) the shares were in fact transferred and paid for; and

g) it was a bona fide agreement to purchase equity, and he still owns the relevant shares.

472. In the Court's assessment the Plaintiffs have not proven that this evidence was untrue and that the deal was not an arm's length genuine transaction but a dishonest set up to pay a kickback KGLI. The Court accepts Mr Ayliffe's explanation.

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[145] *The Plaintiffs say as with all of the other Kickbacks, the payments of US$2m and US$902,000 were both made shortly after receiving comparable or larger sums from the Fund or, in this case, Star Advisory.*

Valuation

473. The Plaintiffs also say that Mr Ayliffe said that the price he paid for the shares was their book value. However, they say this is undermined by the valuation of unlisted securities held by Apache dated 11 November 2017 (less than a year after the share purchase agreement) which valued those same shares at just US$340,000.

474. In fact as was pointed out by Mr Chapman KC during Mr Ayliffe's cross examination, this valuation was expressly said not to reflect a market valuation.[146]

475. The Plaintiffs then say that:

(a) when confronted with this Mr Ayliffe changed his tune, saying "*I wasn't valuing these on book value. I wasn't thinking – I don't care about book value*".[147]

(b) this directly contradicted what he said in his supplemental witness statement[148] and is 'another example of Mr Ayliffe's willingness to say anything that he thought might help his defence, irrespective of its relationship to reality'.

476. Notwithstanding these submissions the Court has concluded from the documentary record, as explained by Mr Chapman KC's submissions, that:

(a) Mr Ayliffe confirmed that his pricing of the KGLI shares totalling US$2.9m came from the audited consolidated accounts of KGLI as referred to and resulting in 86 fils per share; [149]

(b) the relevant accounts (page 6 of the balance sheet) show the share capital as 17m KWD;

(c) as per the note at page 34, this is the recorded nominal value of 170,000,000 shares;

(d) the equity attributable to shareholders of the parent company is c.$14m;

(e) if this is divided by the 170m shares then the equity per share is 86 fils; and

[146] *Day20MT1/38:10.*
[147] *Day20MT1/39:2-5.*
[148] *See §41 where he claimed that "the shares were valued at book value per share".*
[149] *Day20MT1/164:12.*

(f) this is consistent with the value of the shares recorded in the SPA.

477. The Court agrees that the valuation evidence put forward by Mr Ayliffe to explain the transaction therefore makes sense.

Mr Williams - kickbacks

478. It follows that the case against Mr Williams in unlawful means conspiracy to facilitate the kickbacks because of his central role in the management of the Fund also fails.

479. Not only do the findings made in relation to the kickbacks case result in no liability established against him, it is also clear on the evidence that Mr Williams was not the decision maker but deferred to others, including Ms Lazareva. His role was essentially administrative, acting as a conduit.

Missing documents - Mr Ayliffe

480. Mr Ayliffe said in his written evidence:

> "*I estimate that more than eighty per cent (80%) of my emails are missing. Nonetheless, I had such problems with email, that a few times I used my Hotmail account. I believe enough of a record remains to show that I did an enormous amount of work on these transactions*".[150]

481. The Court has noted that large gaps appear in his written records. There seem to be various reasons for this, none of which point to deliberate suppression.

482. The Court finds that Mr Ayliffe's record-keeping and document-management practices were disorganised. It does not conclude on the evidence that he deliberately suppressed material.

483. Mr Ayliffe confirmed that in his prior roles at BAML and Deutsche Bank the mid-office or back-office staff would be tasked with documenting retainers and dealing with invoicing/payments, and when he set up Apache these tasks fell to him and Hexagon[151]

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[150] *Ayliffe 1, §206.*
[151] *Day20MT1/167:14-Day20MT1/168:25.*

484. The Court accepts that these tasks, including documenting loans, were not performed as they would have been in a larger operation and that he was so busy trying to get the deals done for the Fund that these tasks did not get the attention which they deserved.

485. In addition, Mr Ayliffe had laptops stolen.

The stolen laptops

2014 Hong Kong

486. Mr Ayliffe communicated the first theft of his laptop to Matt Williams [152] on 17 December 2014, stating:

> "*I had my computer nicked and need to reconfigure the apacheasia email*".

487. The Plaintiffs say this is fabricated. In the light of that email the Court finds it unlikely that the theft did not occur and was "made up" by Mr Ayliffe.

488. The Court has also taken account of an email sent over 10 years later dated 26 March 2025 sent to Mr Matt Williams.

489. This email arose in the context of Mr Ayliffe seeking assistance from Matt Williams to recover historic emails for the purposes of giving discovery[153] and confirms that Mr Ayliffe's emails from 2013 to 2016 were no longer available.

490. This is not consistent with an attempt to deliberately suppress documents, but to see if they were recoverable.

491. Mr Ayliffe said he was told by Matt Williams on 15 February 2016 that his historic emails had been backed up.

492. Mr Ayliffe says he did not need access to historic emails at the time and only became aware of the loss of those historic emails in March 2025

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[152] *Mr Williams' brother, who helped Apache/Mr Ayliffe with IT issues by 'HostGator '(the domain host for Apache's historic emails between 2013 and early 2016 before he moved to Google Business 'in February 2016).*
[153] *Day18MT1/63:20.*

493. It was during the period 2013 to 2016 when Mr Ayliffe entered into each of the five Apache mandates and allegedly conspired with others to facilitate the kickbacks.

494. In the Court's view the Plaintiffs' criticisms of Mr Ayliffe, and the allegation he destroyed or withheld documents, is not compatible with him having sought Matt Williams' assistance to recover historic emails in 2025 and the domain host confirming to Matt Williams they were no longer available.

495. Mr Ayliffe confirmed that any communications from his Hotmail account or copied to that account would have been discovered.[154]

496. The Court accepts from the documentary record that Mr Williams apparently gave discovery of relevant documents where Mr Ayliffe was a sender or recipient of emails to this account.

2018 Singapore

497. The evidence Mr Ayliffe gave in relation to this episode involved a number of unusual events.

498. The laptop was apparently left on a plane; it was subsequently found (which he was told about) and then it was subsequently stolen from the person who found it by her husband.

499. A police report was submitted in Singapore.

500. On analysis and taking into account all the relevant evidence it seems inherently improbable that Mr Ayliffe (or Ms Shen) would have submitted a false police report in 2018 (with the attendant risks) to suppress information which would otherwise have to be discovered in this case.

501. The police report narrative is consistent with Mr Ayliffe's evidence to the Court.

502. The litigation in Cayman had not started in 2018 and there is no evidence to show that Mr Ayliffe was closely aware of the proceedings in Kuwait regarding the freeze of the Noor monies.

[154] *Day18MT1/36:15; Day18MT1/75:24.*

503. If there had been emails that had been suppressed in some way it is unlikely that they would not have had a counter party or that some other evidence would have revealed that they had existed.

504. Just like his message in 2014 to Matt Williams when the laptop was stolen in Hong Kong, Mr Ayliffe also sent a contemporaneous email to Mr Weir on 11 December 2018 which referenced the loss of his laptop on the flight and that it had been returned to Singapore.

505. He explained that he did not email Matt Williams about the theft in 2018 in Singapore (as he had done in 2014) because at that stage he was using Gmail and could reset his email directly without reference to Matt Williams.[155] The Court accepts his evidence.

506. The Court does not draw an adverse inference that the laptop would have contained material which would have been unhelpful to Mr Ayliffe's case, particularly in relation to the purchase of the IM, the negotiations concerning Apache's fees and the KGLI/Apache loan, as the Plaintiffs maintain, and these events were fabricated by Mr Ayliffe to conceal such information. It is more likely that his account is unusual but true.

507. The Court also notes that Mr Ayliffe disclosed an email exchange with Ms Wong dated 15 November 2017 which was relied on by the Plaintiffs as evidence of kickbacks being paid to Star Advisory and about which he was cross examined. It would seem unlikely to the Court that if he was seeking to suppress potentially damaging communications that he would have missed this one.

D2-D4 missing witnesses

508. In the Court's view no adverse inferences should be drawn from the fact other witnesses were not called who might have corroborated their evidence, or indeed Walkers' evidence.

Mr Alwadhi

509. No positive case of wrongdoing is pursued against Mr Alwadhi by the Plaintiffs.

510. The Plaintiffs say that the Court should draw an adverse inference from his absence as a witness because his testimony would have been likely to have harmed the defence of the proceedings. They point in particular to the fact that:

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[155] *Day18MT1/78:15.*

a) he was a director of the GP throughout the relevant period, having been appointed in 2010 and so was in place from the earliest of the Apache engagements right through to the payment out of the monies frozen in the Noor Bank account;

b) he had submitted a witness statement as part of the GP's opposition to the section 22 proceedings;

c) the Defendants have placed considerable reliance on him even though there is no documentary record to back up his suggested involvement and approvals; and

d) there is no documentary record of him assuming any significant role and the Walkers witnesses confirmed they had no direct interaction with him.

511. The Plaintiffs say in relation to the DIFC proceedings Mr Alwadhi:

a) signed the various documents on Mr Williams' say-so without a properly informed basis for doing so and without exercising any independent judgment;

b) had no substantial role in relation to the DIFC Proceedings (apart from signing documents when asked to do so by Mr Williams);

c) was not provided with full and frank disclosure of all material facts in relation to the DIFC Proceedings and therefore did not and could not give his fully informed consent thereto on behalf of the GP and TPF.

512. They also asked the Court to draw the inference that had he attended to give evidence and answered questions honestly then he would have undermined the defence in relation to the DIFC proceedings, as well as the kickbacks case, and his role as a Director of the GP as Mr Williams described it.

513. As to the latter relationship, the Plaintiffs suggested that this would have shown that he was not just 'rubber stamping' what Mr Williams (and others) had decided to do namely to move monies out of the Fund illegitimately.

514. As a senior grandee with clout or "*wasta*" the Court should find that he would have made sure what was being done was lawful and honest.

515. That is inconsistent with the other argument the Plaintiffs make that he signed documents put in front of him with no thought.

516. The Court agrees that he was not a 'rubber stamp' and would have been likely to have taken care to properly approve the matters he was asked to consider.

517. The Court does not accept the Plaintiffs have made out their case on the evidence that matters were set up to move monies out of the Fund illegitimately.

Mr Alwadhi's role and involvement

518. From the contemporaneous record, it is clear that he, as the GP's director, was made aware of and authorised matters relating to the DIFC proceedings.

519. Mr Alwadhi had, by mid-2018, been a director of the GP for more than 7 years and would have had a good understanding of its business affairs.

520. From a board resolution dated 18 November 2010 appointing him it can be seen that he was an experienced businessman with over 30 years of advisory services experience at that time.

521. From Mr Williams' evidence, which the Court accepts, he had held a senior position in the Kuwait Secret Service, in the criminal investigation division, and after that was involved in private industry and served as an adviser to the Prime Minister of Kuwait.[156]

522. The Court also accepts Mr Williams' evidence that:

a) he worked under the direction of Mr Alwadhi in the sense that he routinely sought approval from him in relation to matters affecting the GP;

b) Mr Alwadhi had signed many documents for the Fund over time, either as one of three directors or alone; and

[156] *Day14MT1/17:12.*

c) that he had taken an active role in the Fund's business.[157]

523. The Court also accepts, in relation to his interactions with Mr Alwadhi, that Mr Williams had oral communications (rather than by email) with him concerning the resolutions of the GP in connection with the DIFC proceedings, to make sure he, sometimes with Dr Akbar's assistance for translation purposes, understood and approved what was being communicated.[158]

524. Mr Alwadhi was in his seventies, and the Court accepts he would have been more comfortable with face to face communications, phone calls and hard copy documents, than with digital communications.[159]

525. The documents show that Mr Alwadhi carried out his duties as a Director at the GP in the usual way, taking part in the Fund's affairs, attending meetings and signing documents either with Ms Lazareva and Mr Dashti as his co-directors, or sometimes as sole signatory.[160]

Mr Wood's evidence about Mr Alwadhi

526. The Court notes that Walkers Dubai had little or no direct contact with Mr Alwadhi, and its knowledge of the arrangements with him was limited.[161]

527. However, Mr Wood of Walkers Dubai supported Mr Williams' account of Mr Alwadhi's role and involvement.

528. He stated that he knew Mr Alwadhi's name was regularly on resolutions and that he had travelled to Dubai multiple times to assist with the unfreezing process and he seemed to act like an ordinary director.162

529. Mr Wood's understanding was that Ms Al Sonbaty and Dr Akbar translated for Mr Alwadhi but that he did not know for certain.[163]

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[157] *Williams 1 §34.*
[158] *Day 15MT1/76:7; Day15MT1/76:24; Day15MT1/77:3; Day15MT1/170:22.*
[159] *Ms. Sara Al-Sonbaty, an Arabic and English-speaking former KGLI employee based in Kuwait, was asked to assist on numerous occasions to obtain his signature.*
[160] *The TPF Advisory Board Visit on 28 January 2014; the board resolutions of 23 February 2016; the board resolution of 24 November 2017; travel to Dubai in November 2017 to try to release the monies frozen at Noor Bank; the affidavit in support of the GP's defence of the Section 22 Proceedings.*
[161] *Wood 1 §§62-63.*
[162] *Day 24MT1/25:4-8.*
[163] *Day 24MT1/30:1.*

530. Mr Wood said that his assumption was that Mr Alwadhi was fully briefed and fully on board at all times.[164]

531. Mr Wood said:

> *'... it was not uncommon, in my experience, for nationals of Middle Eastern countries unconnected with a fund's promoter to be appointed as directors on the board of the general partner. Often such people were senior statesmen and had many years of experience in the industry. From experience with other funds, there might have been some perceived advantage of having another Kuwaiti, possibly with some local influence, appointed to the board'.*[165]

532. The Court accepts his evidence.

Adverse inferences from non-attendance of Mr Alwadhi

533. The Plaintiffs invite the court to draw adverse inferences from the non-attendance of Mr Alwadhi.

534. As stated above, on one argument the Plaintiffs invited the Court to infer that Mr Alwadhi's testimony would have confirmed that he had no active role in decision-making, with his involvement being limited to executing documents Mr Williams put in front of him.

535. The Court does not find on the evidence that Mr Williams controlled the GP and Mr Alwadhi was a mere cipher.

536. The Court is not prepared to draw that inference as a result of the evidence of Mr Williams, Mr Wood and the documentary record. Nor does it find that (as the Plaintiffs invite it to) that:

a) Mr Williams was acting as a de facto director of the GP and/or its directing mind and will at all material times; and/or

[164] *Day 24MT1/67:15.*
[165] *Wood 1 §62.*

b) Mr Williams failed to provide the explanations in relation to the DIFC Proceedings to Mr Alwadhi (or obtain the informed consent from him) that he claimed to have done; and/or

c) the reason Mr Alwadhi has not been called is because his testimony would have been damaging to the GP's defence and to Mr Williams' defence because he would have admitted what had occurred (once it was fully explained to him) was unlawful.

Ms Lazareva

537. The Court is invited to infer that Ms Lazareva has not been called as a result of a deliberate choice. The Plaintiffs say that it is remarkable that the GP has not managed to communicate with her or retain any of her documents despite the fact that she has participated in other legal proceedings in the Cayman court. [166]

538. The Plaintiffs rely in particular on the following points:

a) she was a director of the GP for the relevant period until she resigned in May 2018;

b) she was the sole validly appointed director of the IM for the duration of the relevant events until she resigned in February 2019;

c) the evidence of Mr Williams and Mr Ayliffe was that she was the person responsible for negotiating the Apache fees; and

d) she was allegedly involved in the payment of the Kickbacks.

539. The Court is not in all the circumstances prepared to draw the inference that Ms Lazareva was not called to give evidence because in giving evidence she would have damaged the Defendants' case.

[166] *FSD 118 of 2021 Parker J (in which KPA sought permission to share information with Kuwait for use in Ms Lazareva's arbitration proceedings against Kuwait); the arbitration was dismissed in August 2022 on jurisdictional grounds and the appeal by the Paris Court of Appeal in September 2025.*

Reasons for non-attendance

540. The Court finds that there are good and understandable reasons for both Mr Alwadhi and Ms Lazareva's non-attendance.

541. Ms Lazareva had apparently sought asylum in the Russian embassy in Kuwait and is now apparently in hiding.

542. Mr Alwadhi is now charged in criminal proceedings dated 20 August 2025, alongside Ms Lazareva, Mr Dashti and Mr Williams.

543. Mr Dashti is understood to still be in prison.

544. In all the circumstances the Court is not prepared to draw any adverse inferences from their non-attendance as witnesses.

Mr MacRae

545. As one of the Receivers of the GP, Mr MacRae had no contemporaneous evidence to give. His investigations were funded by the Plaintiffs. His investigations were largely unsupportive of the Plaintiffs' case, albeit that he was precluded from being completely impartial because of his duties in relation to the allegations made against the GP.

546. In the result there was no cross examination of Mr MacRae.

547. The Joint Receivers addressed the payments the Plaintiffs' claim were made unlawfully by the GP and:

a) invited the Court to find in relation to lobbying fees for the release of Ms Lazareva and in respect of the Kuwaiti criminal and civil proceedings, they were incurred indirectly for the benefit of the Fund as a means of removing obstacles to the unfreezing of the Noor Bank funds;

b) submitted that there was a significant body of evidence indicating that a reasonable GP might consider it appropriate to make payments of that sort and produced an Annex A

to their written closing which reflected their comments to which the Court has had regard; and

c) in their closing submissions pointed out that there was ample evidence to justify a conclusion that money spent with these objectives in mind involved legitimate attempts to facilitate the release of the Clarke Asset Proceeds.

547. The Court agrees with their analysis.

Findings in relation to the Noor Bank freeze and the alleged expropriation attempt by Kuwait

Were the Clark Asset Proceeds credited to the Noor account?

548. The answer is yes, it is more likely than not the proceeds were so credited.

549. The Clark Asset sale completed on 14 November 2017.

550. The proceeds, almost half a billion US$ (US$496,429,767), represented the net proceeds of sale of the Fund's largest asset which had been successfully exited at a profit.

551. The GP of the Fund had a bank account in the Noor Bank in Dubai into which those proceeds were to be transferred. The GP would in the ordinary course then, in accordance with its duties, prepare to pay the Fund's various stakeholders, including the LPs, the IM and other creditors.[167]

552. The Plaintiffs say that the proceeds were immediately placed by Noor Bank into a suspense account in November 2017 and did not enter the GP's account until February 2019.

553. They point to a letter from the GP to Noor Bank dated 19 November 2017 stating that the proceeds were:

> *"received by the bank on Tuesday 14 November 2017 and as of today's date we are still awaiting for* [the Clark proceeds] *to be credited* [to the GP's Noor account]*"*.

554. However, the later documents suggest that the proceeds were credited to the GP's account:

[167] *The GP wrote letters to Noor Bank dated 15 November 2017 asking it to make payments in accordance with the Fund's then calculations of how the Clark Asset Proceeds were to be divided between the stakeholders.*

a) Noor Bank received a letter from the UAE Central Bank Financial Intelligence dated 21 November 2017.The letter directed the CEO of Noor Bank to initiate the freeze on the account:

> *"in the name of Port Link GP Ltd."*, and continued: *"with reference to your suspicious transaction report…dated 19/11/2017 regarding the above mention[e]d account, and based on the decision of the Attorney General of Dubai…dated 21/11/17 you are required immediately to freeze the said account, and transfer its balance to an interest bearing suspense account"*.

b) On 6 December 2017, Noor Bank confirmed to the GP that the Central Bank of the UAE had ordered Noor Bank to '*freeze the funds in question and to transfer them to an internal suspense account.'*

c) Noor Bank had filed a Suspicious Transaction Report on 15 November 2017,[168] following their four month investigation specifically into the bank account of the GP at Noor Bank, including all suspicious transfers and banking transactions that: *"On 15/11/17, a transfer of USD 496,429,767 … was received by Port Link at Noor Islamic Bank…"*.

d) There is also a statement in the UAE / Dubai Public Prosecutor (Dubai PP) Judicial Assistance Request summarising events as at 22 March 2018 that: *"On 21/11/17, the Public Prosecution issued its resolution to freeze Port Link GP Ltd. Company's Bank Account at Noor Bank"*

e) When the funds were finally released on 5 February 2019, Mr Rahman the GC of Noor Bank confirmed the statement in the UAE / Dubai PP Judicial Assistance Request summarising events as at 22 March 2018 that: *"On 21/11/17, the Public Prosecution issued its resolution to freeze Port Link GP Ltd. Company's Bank Account at Noor Bank*".

555. These documents support the conclusion that the monies would have been received by Noor Bank and credited to the GP's account before being transferred into a suspense account following the instructions from the Central Bank.

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[168] *Which was recorded at item 7 of the Dubai Police / UAE Central Bank Joint Technical Report of 18 March 2018.*

556. The Court was also referred to documents filed by Noor Bank itself in proceedings before the Dubai Court of Appeal[169] which state the following:

a) [Noor Bank's Reply Memorandum filed in the Appeal proceedings]: under section "the Correct Facts": the proceeds of the Clark Asset were transferred to the GP's Noor Bank account on 14 November 2017 and Noor Bank was directed on 19 November 2017 to freeze the amount pending further investigation;

b) [Noor Bank's Reply Memorandum to the Expert's Final Report]: Noor Bank did not utilise the sums deposited into the GP's account on 14 November 2017, which stood to the credit of the GP in the sum of US$497,163,064.98 (when added to the existing credit balance of $733,297.98), and Noor Bank transferred the balance of the GP's account to the suspense account on 21 November 2017; and

c) [the Judgments of the Dubai Court of First Instance after a public hearing on 23 December 2020 and the Dubai Court of Appeal after the public hearing on 7 July 2022] which each confirm the deposit into the GP's account at Noor Bank.

557. It seems more likely from the documentary record that the monies were in fact paid (i.e. received) into the GP's account before being transferred to a suspense account.

558. Whilst there is no direct evidence from the November Noor Bank statements to show that the Clark Asset Proceeds were credited to the GP's account, before being transferred into a suspense account, this does not in the Court's view displace that this is more likely than not from the available evidence.

What was the cause of the freeze?

559. The answer is mainly suspicions of wrongdoing leading to many red flags identified by the Noor bank and the Dubai authorities, and only partly as a result of Kuwait's actions.

560. By the time of the sale of the Clark Asset both the civil and criminal litigation in Kuwait was underway.

[169] *Appeal No 143/2021. These proceedings apparently concerned whether Noor Bank owed the GP interest for the period that the balance of GP's bank account was frozen at Noor Bank.*

561. It seems highly probable to the Court that the Kuwait criminal proceedings were at least part of the factual picture communicated to the Dubai authorities which caused the freeze. That is made clear in the Dubai police report dated 18 March 2018.

562. The report records that on 15 November 2017 proceeds were sent to Noor Bank and upon receipt of the SWIFT message Noor Bank conducted an investigation which revealed six red flags. The first red flag noted that Mr Dashti, Ms Lazareva and others were under criminal investigation in Kuwait.

563. On the same day, 15 November 2017, Noor Bank sent a suspicious transaction report to the UAE Central Bank's Financial Intelligence unit. The matter was then passed to the Dubai public prosecution.

564. There is no mention in the Dubai police report of any involvement by the Kuwaiti authorities in the freeze. Indeed the Dubai police conducted their own investigation into the transfer by interviewing the GP's authorised signatories, Abdullah Akbar and Qasim Hafeez, as well as Evan McBride, who was employed by KGLI, and further by reviewing relevant documentation.[170] This suggests to the Court that the Dubai authorities were forming their own view from their own investigations.

565. There was liaison between the Kuwait and Dubai authorities, and the Dubai police report also records that the Dubai PP notified the Kuwait Financial Intelligence Unit (KwFIU) on 22 November 2017 about the GP transaction via the Egmont group platform.

566. However, although the Dubai Police Report appears to have been enclosed with the JAR sent to the Kuwaiti authorities, there is no evidence that it was sent to the Plaintiffs. It appears to have been prepared principally for the Dubai public prosecutor (Dubai PP).[171]

Did the Kuwaiti authorities[172] cause the freeze to be made or prolonged?

567. The answer is no. Their actions were in part factors, but not the main causes.

[170] *See pp 6 and 10.*
[171] *See p 1.*
[172] *With the support of the Plaintiffs.*

568. The SAB's Commentary on the Response of the KPA to the Notes Resulting from the Examination and Audit of the Accounts and Records of PIFSS for the Fiscal Year 2017/2018 states:

> "*... Noor Bank referred the transaction details to the Dubai authorities. At the end of November, the bank notified the fund that the Dubai Attorney General's Office had ordered the funds frozen pending clarification from the Kuwaiti Attorney General*."

569. This is in the Court's view consistent with the contemporaneous material.

570. The Judicial Assistance Request (JAR) of 22 March 2018 from Dubai to Kuwait records a passage apparently taken from the earlier Dubai police report which states that the funds were "*of a legal source*". Somewhat curiously that phrase does not actually appear in the Dubai police report in the trial documents.

571. Assuming that it was in the original Dubai police report, what is meant by the phrase is unclear. If it simply recorded that the monies were the proceeds of the sale of the Clark Asset that was true.

572. As observed in the JAR:

> "*...this money is of a legal source. However, for unknown technical reasons, the money was transferred to the company's account in the country instead of being directly transferred from the Philippines to the* [investors'] *bank accounts, the bank account through which the investors' money was initially received at the beginning of the subscription process, or KGLI Company's bank account in Kuwait.*"

573. It is clear from the Dubai police report that the Dubai authorities were unsure and concerned about the use or destination of the proceeds, not just their source.

574. Another red flag was that a signatory of the Noor account, Dr Akbar, the chairman of KGLI, had requested a transfer of US$94,613,499.00 from the Noor Account to Ideal Gulf Holdings Limited (Ideal) (a company he owned) despite that company not being among the list of the Fund's investors. This fact was also highlighted in the later JAR.

575. The JAR repeats (at pages 2-3) the background of the freezing of the proceeds, including:

a) the suspicious features which Noor Bank in November 2017 had observed about the incoming transfer and proposed destination of the monies;

b) Noor Bank's suspicious transaction report to the UAE Central Bank on 15 November 2017;

c) Noor Bank's report to the Dubai PP on 21 November 2017 about potential money laundering concerns;

d) the Dubai PP's resolution on 21 November 2017 to freeze the Noor Account; and

e) the Dubai authorities' disclosure to the Kuwaiti authorities on 22 November 2017.

576. Again there is no mention in the JAR, as with the Dubai police report, of any involvement by the Kuwaiti authorities in the freeze.

577. The JAR goes on to seek additional information in relation to

a) the Kuwait criminal proceedings against Ms Lazareva and Mr Dashti and any connection the transfer of the Clark Asset Proceeds had to the criminal proceedings;

b) why the proceeds were being transferred to the GPs account in Dubai and not KGLI's account in Kuwait or to the investors accounts; and

c) the Ideal transfer.

578. The JAR was followed by a certificate from the Dubai authorities dated 29 March 2018 confirming that they were still investigating and were awaiting a response from Kuwait.

579. The conclusion the Court draws from this documentary record is that:

a) there were still facts being investigated by the Dubai authorities relevant to a decision to continue the freeze;

b) the Dubai authorities had not in March 2018 determined that the money was of 'a legal source' in the sense that it was free from any illegitimacy and so could be paid out; and

c) the fact that the monies had come from the sale of the Clark Asset was just one part of the picture and there were a number of other red flags which needed investigating including Dr Akbar's request concerning the 'Ideal' transaction referred to above

580. The Kuwait criminal proceedings were at least part of the factual picture which caused the freeze and its continuation.

581. The fact that two out of three Directors on the GP's board as of November 2017 faced serious criminal charges relating to the Fund's money was an obvious red flag which needed to be investigated.

582. Perhaps the concerns which led to the External Committee being set up were also part of the picture as related to Dubai by Kuwait, but as can be seen in the documentary record there were also numerous other red flags which were identified by the Dubai authorities.

583. There is in the Court's view no good evidence that the State of Kuwait or the Plaintiffs were wholly or mainly responsible for the decision to freeze the Funds or to prolong the freeze.

584. Those decisions were made by the Dubai authorities, taking their own course.

585. The Court finds:

a) the Dubai authorities had not concluded their investigations into the Clark Asset Proceeds by March 2018 and still had concerns;

b) there is insufficient evidence to support the case that Kuwait or the Plaintiffs had any decisive influence over keeping the freeze in place. They provided information to the Dubai authorities who were not looking to Kuwait for permission; and

c) the Dubai authorities took their own course and did not accede to the requests of Kuwait, even those of the Kuwait Prime Minister (which are detailed in paragraphs 602, 606-607 below).

The alleged unlawful expropriation attempt

586. As can be seen from the following sequence of communications there is no doubt on the contemporaneous material that the Kuwaiti authorities (supported by the Plaintiffs) sought to persuade Dubai to transfer all or part of the proceeds[173] to Kuwait.

587. On the 9 May 2018 KPP sent a letter to the DAG in response to the JAR. In that letter (see pages 3-6), the KPP explained the basis for its request, making the point that as a matter of Kuwaiti law, any company of which the Kuwaiti State or any public institution holds, directly or indirectly 25%, constitutes "Public Funds".

588. It provided the Dubai PP with information regarding the criminal investigations against Ms Lazareva and Mr Dashti, including the Kuwait PP's findings that they had embezzled funds from the Fund.

589. The KPP (see pages 6-7) requested the Dubai PP to take steps to "*transfer the amount of four hundred million US Dollars*" from the Clark Asset Proceeds to PIFSS and KPA in Kuwait[174] from the Noor Bank account. Reference was made to the allegation that the Clark Asset itself had been misappropriated by Ms Lazareva and Mr Dashti.

590. The response from DAG on 7 June 2018 was to ask for a court order to support the Kuwaiti request.

591. It is clear that the Dubai authorities were not going to simply take the Kuwait requests at face value.

592. No court order was provided and instead on 7 August 2018 KPP wrote to DAG making the bold (and incorrect) assertions that the GP:

a) lacked legal capacity in relation to the monies in the Fund[175]

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[173] *At various stages US$400m, US$496,429,767, US$125m and US$79.2m.*
[174] *D2-D4 suggest this may be based on KPA's civil claim in Kuwait against KGLI. On this basis KPA was purporting to claim US$275m on an initial US$85m plus 20% simple return annually for 11 years. On the same calculation PIFSS could claim to be entitled to approximately US$128m (namely US$40m, plus 20% simple return annually for 11 years).*
[175] *The GP was '...neither the Fund Manager of The Port Fund nor manager of its investments nor its Custodian'.*

b) was deployed as a vehicle for misappropriation of monies;

c) was incorporated in the Cayman Islands for the purpose of facilitating money laundering by obscuring the source of funds through the establishment of investment companies.

593. It informed the Dubai PP that Case No 1496/2012 was still ongoing in the Kuwaiti courts and had not yet reached a verdict and asked for confirmation that US$496,429,767 was going to be transferred to the Plaintiffs in Kuwait.

594. From this sequence of correspondence, the 'high water mark' of Kuwait's attempts to have the proceeds transferred to Kuwait, the Court finds that the KPP had:

a) asserted that the Funds were public funds;

b) made factually incorrect assertions to persuade the DAG to release the monies;

c) linked the Clark Asset proceeds to the criminal proceedings which had not yet concluded[176] and inferred that the Clark Asset itself had been misappropriated by Ms Lazareva and Mr Dashti; and

d) asked for the full amount of the proceeds to be transferred to Kuwait

595. On 5 September 2018, the KPP wrote to the Kuwait Deputy Minister of Foreign Affairs reporting on the freezing of the Clark Asset Proceeds. The Kuwait PP noted (see last page) that:

> "*no decision or request has been issued by the Public Prosecution of the State of Kuwait to the legal authorities in the United Arab Emirates - the Emirate of Dubai - to freeze or seize the aforementioned funds."*

596. This suggests that Kuwait were recording internally, as the Court has found, that no request to freeze the funds had been made.

[176] *The 2012 Proceedings were still ongoing. Closing arguments were not heard until 9 September 2019 and the Kuwait Court of First Instance's verdict was issued on 11 November 2019.*

597. Instead it is said:

> "*the Public Prosecutions sought the taking of the necessary steps to effect the transfer of the sum of USD 496,429,767…held in bank accounts in the United Arab Emirates, to [PIFSS] and [KPA] in the State of Kuwait…This request was founded upon the findings of the investigation in Case No. 1496 of 2016".*

598. On 10 September 2018 there is the meeting of the representatives of the State of Kuwait, KPA and PIFSS. A PIFSS Update Response to the SAB's Observations for Financial Year 2017/2018 states:

> *"PIFSS met with KPA on 10/09/2018 whereupon it was understood and agreed that the funds held at Noor Bank in Dubai would be transferred to Kuwait under the control of the Kuwaiti Attorney General."*

599. On the available evidence the Court finds that this is consistent with the diplomatic efforts that Kuwait was using to persuade Dubai to transfer the monies to Kuwait.

600. Kuwait wanted all of the proceeds to be transferred, were praying in aid the Kuwaiti criminal and civil proceedings, and were somewhat loose on factual accuracy.

601. Whilst this appears to have been the express intention of Kuwait, whether Dubai was prepared to comply was another matter.

602. Just over a week later the matter was further escalated and the Prime Minister of Kuwait wrote to the Ruler of Dubai by letter dated 18 September 2018 stating that:

> .."*the Kuwait Attorney General requested at the time not to allow the transfer of this amount to any entity outside the State of Kuwait in order to enable investors to receive their money*",

and again requesting payment of the monies to Kuwait.

603. The KPP then wrote to the Dubai PP on 16 October 2018, requesting only US$125m[177] be paid to KPA and US$79.2m to PIFSS.

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[177] *Which the GP says was approximately US$13m more than KPA was entitled to.*

604. No explanation was provided as to why the amounts had been reduced from earlier amounts requested of US$400m and US$496,439,767.

605. The KPP seemed content that the remainder of the funds would be transferred to the GP's Noor account:

> "*provided that such funds be distributed among the Kuwaiti government entities mentioned above and eligible shareholders.*"

606. On 3 November 2018, the Ruler of Dubai responded to the Kuwaiti Prime Minister's letter dated 18 September 2018.

607. The Ruler of Dubai expressed confidence that ongoing discussions between the Dubai PP and the KPP would yield fair solutions and prevent stakeholders from being harmed. However, he did not accede to the Kuwaiti Prime Minister's request for the funds to be released.

608. On 17 December 2018, the KPP wrote to the Dubai PP requesting an update regarding the Noor Account. The letter stated:

> "*kindly let us know if this money is still restricted or not, and if restricted the party that ordered it. In the case that there is no directive for it to be restricted, please clarify whether the account holder can take control of it or not*"

609. On 30 December 2018, the KPP wrote again asking whether the US$496m was still frozen, and "*about the entity who ordered such freezing.*"

610. The KPP also requested the Dubai PP's assistance to "*remove the freezing*" and to enable the GP to transfer the funds to PIFSS, KPA "*and to other eligible shareholders*".

611. The Dubai PP replied on 13 January 2019 stating that in November 2017:

> "*the Dubai Public Prosecution [had] decided to freeze"* the Clark Asset Proceeds and "*we are studying the File referred to and the competent committee report to take the decision to remove the freezing within two weeks from the date of this letter."*

612. The Clark Asset Proceeds were duly released to the Noor account in early February 2019.

613. From this sequence of correspondence the Court concludes:

a) the Dubai authorities were acting of their own accord and made their own decisions, albeit information was provided by the Kuwaiti authorities which had made a number of different requests, none of which were granted;

b) these requests included a request to unfreeze the funds and for all the money (and then part of it) to be transferred to Kuwait;

c) the Kuwaiti authorities and the Plaintiffs provided information (some of which was incorrect) and arguments to the Dubai authorities but the freeze was kept in place as a result of the decisions of the Dubai authorities to do so;

d) although the Kuwaiti authorities did request the Dubai authorities to transfer all or some of the frozen funds to Kuwait the basis for this request was a belief (supported by the Plaintiffs)[178] that there were financial irregularities within the Fund; and

e) the Kuwait belief was that the Clark Asset Proceeds would be misappropriated if they were credited to the GP's account and efforts were therefore made to have the full amounts (and then lesser sums) transferred to Kuwait in the further belief that they were public funds (albeit there were also private investors involved)[179] that needed protection.

Consequence of these conclusions

614. The Court does not accept D2-D4's (and Walkers) case that these efforts amounted to an attempt to unlawfully expropriate all (or as much as possible) of the monies frozen at Noor Bank to which Kuwait had no lawful entitlement, which exceeded the amounts to which KPA and PIFSS stood to receive, and which benefitted themselves to the detriment of the Fund and the other LPs.

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[179] *In the letters dated 16 October 2018 and 30 December 2018, the Kuwaiti authorities stated that their intentions were for the funds to be distributed among KPA, PIFSS and other "eligible shareholders*."

615. The Court accepts in particular Mr Othman's evidence on this when he said the understanding was that each of the LPs would get their fair share.[180] He believed that the Plaintiffs had not received their lawful share of the Fund's profits.[181]

616. KPA were not seeking to 'double recover'.

617. The Court rejects the Defendants' case that:

a) the State of Kuwait caused the freeze or caused it to be maintained;

b) the State of Kuwait was able to and did cause the frozen funds to be released;

c) the release of the funds was always within 'Kuwait's gift' after Dubai had determined in March 2018 that the funds were "*of a legal source*",

for the reasons given above.

618. Although some of the information provided by the Kuwaiti authorities to Dubai was incorrect there is no good evidence to show that they did not believe (albeit erroneously) the facts and arguments that they were advancing in the documents.

619. Although the Court was invited to draw an adverse inference from the lack of evidence presented by the Plaintiffs as to what was going on in the background, particularly from Sheikh Yousef and the documents surrounding the September 2018 meeting, that inference does not fall to be drawn in all the circumstances.

Abuse of process

The legal test

620. As Lord Sumption said:[182]

[180] *Day11MT1/184:5 and 14.*
[181] *Day9MT1/136:4; Day9MT1/136:2; Day9MT1/137; Day9MT1/139:22; Day9MT1/145:6.*
[182] *§149 of Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd [2013] UKPC 17; [2014] A.C. 366.*

> *"… The essence of the tort is the abuse of civil proceedings for a predominant purpose other than that for which they were designed. This means for the purpose of obtaining some wholly extraneous benefit other than the relief sought and not reasonably flowing from or connected with the relief sought."*

The evidence

621. The Court has regard to the inherent improbability, absent compelling evidence to the contrary, that the State of Kuwait deliberately attempted, with the support of the Plaintiffs, to unlawfully expropriate funds[183] from a friendly neighbouring state.

622. The Court has borne in mind that the State of Kuwait is not a party to this litigation.

623. Having examined the available evidence in that context, the Court finds that these proceedings have not been brought by the Plaintiffs for an improper or collateral purpose completely unconnected to the relief sought.

624. Although the Plaintiffs have failed to prove their substantive case of wrongdoing and misappropriation of monies on the evidence as assessed by this Court, it does not follow that they were motivated by improper factors collateral to the enforcement of the Plaintiffs' legal rights.

625. The Court accepts the evidence of the Plaintiffs' witnesses and in particular Sheikh Khaled's evidence in this regard as to the Plaintiffs motivation to obtain what they considered to be their proper entitlements.

626. The Court has examined the documentary material from the Kuwaiti criminal and civil proceedings and is not persuaded on the evidence that the Plaintiffs have used these Cayman proceedings as an additional form of 'lawfare' in an effort to impose improper pressure and oppress their targets.

627. This Court is unable to form the judgments D2-D4 invite it to in relation to the Kuwaiti proceedings, namely that:

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[183] *c.US$500m.*

a) the criminal proceedings were motivated solely to advance the Plaintiffs' commercial interests; and

b) the civil proceedings deliberately included false claims and exaggerated sums.

628. The Court has confined its judgment to the issues raised in the Cayman proceedings and declines to make any assessment of the Kuwaiti proceedings.

629. It has only an imperfect and incomplete picture of the Kuwaiti proceedings even were it minded, which is not, to make any such assessment.

Agility

630. Mr Williams' evidence[184] was to the effect that Agility:

a) is a global logistics company headquartered in Kuwait;

b) is KGL's largest competitor, and is in direct competition with KGL for US defence contracts in Kuwait and the wider region;

c) has a long history of both creating issues for KGL and of misconduct;

d) was suspended from doing business with the US Government in November 2009, following a criminal federal fraud indictment by the US Government for fraudulent billing practices;

e) lost the opportunity to obtain significant amounts in revenue associated with lucrative US government contracts;[185]

f) instigated a smear campaign against KGL;

[184] *§§1023-1033 Williams 1.*
[185] *KGL ultimately won those US government contracts.*

g) through its attorney Mr El-Jeaan sent an email on 14 June 2019 to certain limited partners in the Fund, making various unfounded and misleading allegations of fraud;[186] and

h) is a prominent and long-standing major client of Meysan Partners and Mr El-Jeaan himself.[187]

631. Although Mr Williams' evidence in relation to Agility was not challenged in cross examination, the Court is not satisfied that a case has been made out that ties the Plaintiffs' motivations and decisions in these proceedings to any commercial activities involving Agility.

632. Mr Williams could not say that the 14 June 2019 email had been received by the Plaintiffs, or that the Plaintiffs had any involvement in the matters he referred to.[188]

633. Mr Al Othman's evidence was that these proceedings are not being pursued for any collateral purpose:

> "*PIFSS' only objective in bringing these proceedings is to recover the monies that are owed to it by those in charge of or connected to TPF*."[189]

634. Sheikh Khaled's evidence was that these proceedings are being pursued by KPA to recover funds it believes were misappropriated by or with the assistance of the Defendants and not for any ulterior purpose and he has no intention of damaging KGL Group or providing assistance to Agility.[190]

635. In cross examination Sheikh Khaled said[191] that he was unaware of the following facts and matters put to him:

a) the former chair of KPA, Mr Al-Harees, had been accused and convicted[192] of corruption offences in relation to a company forming part of the Agility group;

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[186] The email concluded with a recommendation to commence proceedings in the Cayman Islands and stated that the recommendations had been "discussed with Tarek" (apparently a reference to Agility's CEO, Tarek Sultan).
[187] D2-D4 say Meysan & Partners presented the criminal complaint naming and seeking to indict (among others) Mr Williams, Mr Petith and Ms Arch.
[188] Day14MT1/158:5-17 and 159;2-7.
[189] Al Othman 1 § 5.6 and 5.4.
[190] Al Sabah 1§8.2.
[191] Day 9MT1/65.
[192] In fact he was apparently acquitted of the charge relating to Agility:Kuwait Court Judgment 8 October 2024.

b) that Mr Al-Roudhan, another former chair of KPA, had been the subject of a corruption allegation relating to Agility; and

c) that it has been alleged that members of the board of KPA have been involved in corruption with Agility companies.

636. The Court accepts Mr Al Othman and Sheikh Khaled's evidence.

637. The Court is unpersuaded on the evidence that the present proceedings are being pursued to cause damage to D2-D4 and to KGLI and/or to advance the commercial interests of Agility as pleaded.[193]

638. In conclusion the Defendants' abuse of process case fails on this ground as well.

Walkers

639. As the Court has decided above, the documentary contemporaneous material is consistent with the evidence given by Messrs Williams, Wood and Petith of their understanding at the time of the intentions of the State of Kuwait and the Plaintiffs to have the Clark Asset Proceeds transferred to Kuwait.

640. It is a separate question as to whether:

a) Mr Williams and Walkers held an honest belief that, unless the DIFC Proceedings were instituted, there was a real risk of the proceeds being transferred to Kuwait;

b) that belief was reasonably held based on the information they had at the time; and

c) the DIFC proceedings were a lawful and appropriate response.

[193] *D2-D4 defence §44.2.*

Findings in relation to the DIFC proceedings

The Plaintiffs' allegations against Walkers Dubai in summary

641. The Plaintiffs make allegations against D2-D3 on the basis that the DIFC Proceedings:

a) were a "*sham*" brought by Mr Williams acting with the GP with the assistance of various lawyers including Walkers; and

b) were designed as a 'cover' to enable Mr Williams and his alleged accomplices to misappropriate c. US$60m from the Fund.

642. The Plaintiffs do not allege Walkers were dishonest.

643. They allege that Walkers preferred the IM's interests over those of the Fund and the GP by:

a) acting for the IM and taking instructions from Mr Williams on behalf of the IM when they were aware that there was a direct conflict between the interests of the IM and the GP;

b) taking instructions from Mr Williams in his role as representative of the GP when they were aware he was in a position of conflict with the Fund's interest;

c) failing to advise the GP to disclose the conflicts to the LPs;

d) failing to advise the Fund and the GP as to the merits of the IM's claims, the defences and potential counterclaims that the Fund and the GP might have against the IM; and

e) failing to advise the Fund and the GP that they should contest the jurisdiction of the DIFC Court and not submit to judgment.

644. They say that:

a) as of July 2018, there was no reasonable basis for Walkers or Mr Williams to believe that there was a real danger of the Clark Asset Proceeds being expropriated by Kuwait;

b) there was no reasonable basis for them to adopt Mr Williams' drastic strategy of bringing the proceedings and obtaining a judgment against the GP/the Fund, where the claim was admitted by the GP/Fund without contest, and without taking any proper merits advice;

c) the GP did not give its valid consent to Mr Williams' actions/strategy;

d) there was no reasonable basis for Mr Williams or Walkers to believe that the GP had given its valid consent;

e) Mr Williams knew that he had not provided Mr Alwadhi with full disclosure and Mr Alwadhi was not exercising any independent judgement;

f) Walkers should not have made assumptions based on information provided by Mr Williams (on which they had no knowledge) given that Mr Williams was himself conflicted;

g) Mr Williams' strategy was not for the benefit of the Fund and was instead for the benefit of himself, Ms Lazareva and their KGLI associates; and

h) Walkers ought to have realised that it was likely that payments out of the Noor account (once it was unfrozen) would be made pursuant to the judgment in the DIFC proceedings.

645. The Court has decided to dismiss the Plaintiffs' claim for breach of fiduciary duty and negligence against Walkers Dubai in its entirety.

646. The following sections of this judgment explain why. To do so it has been necessary to examine the relevant chronological events.

The Walkers witnesses

647. The Walkers Defendants adduced detailed written evidence from three partners: from Walkers Dubai, Mr Wood and Mr Petith, and from Walkers Cayman, Mr Dunne.

648. Mr Wood and Mr Petith gave evidence in stressful circumstances because of the war that had been commenced in Iran which resulted in their families in Dubai experiencing anxiety and danger.

649. It was clear in the case of Mr Petith from his oral evidence to the Court that the criminal complaint in Kuwait made against him and Ms Terry-Ann Arch, a lawyer in his team at Walkers, had upset him considerably.[194]

650. Mr Wood felt that he was responsible, as the partner who supervised Ms Arch, for her having been named, which apparently resulted in her giving up her legal career.

651. The Court made allowances for the effect of their emotions that these events had on their testimony.

652. The Plaintiffs' characterization of Walkers Dubai as a firm that would readily bend to the will of a demanding client (in the form of Mr Williams) and which was easily taken in by him without asking questions is not the impression the Court has formed from hearing their testimony.

653. It was regrettable that the Plaintiffs suggested195 that Walkers Dubai were eager to satisfy Mr Williams who was holding '*the purse strings for their fees'* which was neither pleaded nor put to the Walkers' witnesses.[196]

654. The Court finds, having examined the evidence both written and oral, that Walkers acted professionally and with proper independence.

Daniel Wood

655. Mr Wood is the managing partner of Walkers Dubai, a position he has held since 2012. Mr Wood provided two detailed witness statements and gave evidence over two Court days.

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[194] *In April 2021, GIC made a criminal complaint in Kuwait naming 26 individuals and corporate entities including Mr Petith and Ms Arch of Walkers Dubai.*

[195] *Plaintiffs' written closing § 184.*
[196] *Mr Wood gave examples of when he pushed back about what Walkers Dubai could assist with: Wood 1 §65 and 104.*

656. On a key issue his evidence was that the IM was seeking to claim the largest sum to which it was entitled, but not an inflated sum. The Court accepts that evidence.

657. The Court found Mr Wood to be an honest and open witness. Where appropriate, he accepted matters candidly.

658. For example, he freely admitted that having a "*general matters*" file for Fund business was "*less than ideal*".[197] Compliance has no doubt moved on considerably in the intervening years.

659. Mr Wood is experienced in Cayman Islands funds law, having practised in the field for nearly two decades. Further, he has lived in the Middle East for the same length of time. The Court found Mr Wood's evidence about his experiences working with the Fund, and the way it operated and did business, helpful background.

660. The Court did not find, as the Plaintiffs suggested, that he was prone to self-enhancing recollection, or self-serving reconstruction, or *post hoc* justification.

Mr Wood's evidence on the documentary record

661. Mr Wood said that:

a) It was the understanding of the law firms he was getting information from[198] that the freeze was tied to the imprisonment of Ms Lazareva and Mr Dashti in Kuwait.[199]

b) Ms Lazareva's arbitration was intended to put pressure on Kuwait to release her which would then assist in the release of the frozen funds.[200]

c) Dr Merdas of Global Advocates (described by Mr Petith as one of the most senior and respected lawyers in the UAE[201]) was of the view that the reason for the freeze was the size of the transaction and the criminal proceedings in Kuwait.[202]

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[197] *Day23MT1/50:7 – Day23MT1/52:6; Day23MT1/53:25.*
[198] *and primarily from Dr Merdas and Dr Harbash Day23MT1/89:5-17.*
[199] *Day23MT1/89:7.*
[200] *Day23MT1/90:5.*
[201] *Day25MT1/22:23.*
[202] *Day23MT1/128:11.*

d) By August 2018 the intelligence was that there were requests by the Kuwait government to transfer the full amount to them imminently.[203]

662. The Court accepts his account.

Luke Petith

663. Mr Petith was an associate of five years PQE at the time of the DIFC Proceedings. His evidence was that he carried out instructions given to him by the client partner Mr Wood. Mr Petith is now himself a Partner at Walkers Dubai

664. The Court found him to be forthright and honest. He was clear about which matters he remembered and which he did not.[204] He was robust and forthright when challenged in cross examination.

665. The Court does not accept that his obvious emotion and unfavourable opinion of the Plaintiffs and their case strategy affected adversely the accuracy and truthfulness of his evidence.

666. The Court did not find that he was prone to self-enhancing recollection or self-serving reconstruction, or *post hoc* justification as the Plaintiffs suggested.

Nicholas Dunne

667. Mr Dunne is a partner at Walkers Cayman. He gave a short statement confirming the minimal role he and a small number of others at Walkers Cayman played in June 2018 (before the DIFC Proceedings were issued), assisting Walkers Dubai in the background, but having no separate retainer with the GP, the IM or the Fund.

668. In the event, some weeks into the trial, the Plaintiffs confirmed that Mr Dunne was not required for cross examination and his witness statement was admitted into evidence unchallenged.

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[203] *Day23MT1/169:2.*
[204] *See for example Day25MT1/89:7 – Day25MT1/90:18 where Mr Petith said he remembered the call with Clydes on 1 July 2018 but not the detail of the call. Also he said "I have a much better recollection of events in relation to Phase 2 [litigation work] than Phase 1[work for the Fund at the time]. My independent recollection of many of the events relevant to Phase 1 is now limited" Day25MT1/18:5-19.*

Overall impressions of the Walkers witnesses

669. The Court found Messrs Wood and Petith to be honest and straight forward.

670. The Plaintiffs suggested that the Court ought to be cautious about their evidence because they had a clear motive to support Walkers and they had been guided by a large and assiduous legal team.

671. The Court does not accept that these factors, if they had an impact at all, affected the accuracy and truthfulness of their evidence.

672. With regard to certain specific criticisms of the evidence:

a) the Court does not accept that the use of the phrases 'common strategy' and 'judgment strategy' in their evidence indicate that those were 'lawyer constructs' and not concepts which applied in June and July 2018, even if those particular phrases were not used at the time;

b) Mr Wood's evidence in relation to what he understood by the approvals given by Mr Alwadhi was credible, even though he was not privy to the specific communications of Mr Williams to Mr Alwadhi at the time;

c) their evidence that after mid-June 2018 Walkers' role became 'peripheral' and 'negligible' was not, as the Plaintiffs say, demonstrably untrue, but rather was consistent with the documentary record.

Key Findings

Did Walkers Cayman play any role?

673. The answer is that it did not.

674. Walkers Dubai acted for KGLI in setting up the Fund. Walkers Dubai's Standard Terms of Engagement were provided at the outset of the original engagement. These remained the terms

applicable to Walkers Dubai's retainer, and KGLI remained the nominal client of record on Walkers Dubai's files until 2019.[205]

675. Walkers Cayman is a distinct legal entity which had no retainer with the GP.

676. Mr Wood states in his written evidence: [206]

> *"Walkers Cayman is a separate legal entity from Walkers Dubai… and… did not open their own file or advise the client directly at that time. As was usual practice, I was the partner on the file with the client relationship and with overall responsibility for the work done, including for contentious work handled by Sophie and Luke* [two more junior lawyers with Walkers Dubai]*, even where they had reached out to another office for assistance. There were occasions during the life of the Fund where a different approach was taken. For example, in 2014, Walkers Hong Kong assisted on a contentious issue for the Fund and the Fund had direct contact with the Hong Kong partner… who opened his own file and the client was provided with Walkers Hong Kong's terms of business. However, that was not the arrangement with Walkers Cayman in 2017-19."*

677. Mr Petith states in his written evidence:[207]

> "…*I sought senior litigation input from our Cayman Islands* [Insolvency and Dispute Resolution] *Partners too. The Cayman Islands office is a separate legal entity from Walkers Dubai… The Walkers Cayman team did not open their own file or advise the client directly during 2017 – 2018. Their only involvement was to provide me with the senior litigation input described below while Sophie was unavailable".*

678. Mr Dunne, a Walkers Cayman partner says in his written evidence:[208]

> *"We sometimes speak colloquially of Walkers' "Dubai office" or "Cayman office", but in fact Walkers Dubai and Walkers Cayman are distinct entities, who issue their own separate engagement letters and kept their own distinct files (albeit on a global database). To the best of my knowledge and belief, Walkers Cayman had no retainer*

[205] *Wood 1 §§26-28.*
[206] *Wood 1 §15.*
[207] *Petith 1 §143.*
[208] *Dunne 1 §7.*

or client relationship with the Port Fund prior to 2019. All the work done by Walkers Cayman in 2018 on this matter was behind the scenes work to assist Walkers Dubai on their file… My involvement in this matter was for a very short period of time and related to one discrete issue as the email correspondence and documentation…. Demonstrates".

679. This evidence from Messrs Wood and Petith went unchallenged. Mr Dunne was not required to give oral evidence and his evidence was unchallenged.

680. The Court has decided on the evidence that Walkers Cayman did not play any material role in relation to the DIFC proceedings. No case has been made out of any act or omission by any partner or employee of Walkers Cayman said to amount to a breach of duty or to have caused any loss to the Fund.

681. The claim against Walkers Cayman was finally abandoned during the Plaintiffs' oral closing submissions.

Role of Walkers Dubai

General role

682. Walkers Dubai was retained as Cayman Islands counsel to the Fund which of course acted through its GP, having no legal personality of its own. It also acted for the IM from the Fund's inception.[209]

683. The documentary record shows the legal work undertaken by Walkers Dubai as Cayman Islands attorneys to the Fund was *ad hoc* once the Fund had been set up and the various companies in the structure were incorporated.

684. Occasionally, Walkers Dubai was asked to undertake additional corporate related tasks.

685. For example, sometimes Walkers Dubai was instructed to prepare draft board resolutions for the GP or the IM, or a draft contract to be governed by Cayman Islands law.

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[209] *the original engagement letter as between KGLI Kuwait, as promoter of the Fund, and "Walkers" is dated 6 February 2007. The 2007 Engagement Letter was issued by Walkers Dubai only, on Walkers Dubai letterhead and signed by then Walkers Dubai partner, Roderick Palmer.*

686. Most of the actual business of the Fund involved investments in foreign jurisdictions in Europe, Egypt and the Philippines.[210]

687. There is no evidence to suggest Walkers Dubai knew anything at the time of the Fund's arrangements with service providers such as Apache Asia and/or Apache Macao. There is nothing to suggest that Mr Wood knew who Mr Ayliffe was at the time.211

688. The documentary record and witness evidence from Mr Wood indicates that Walkers Dubai would be given specific narrow pieces of advice or assistance to undertake from time to time212 and usually under urgent timeframes.

Initial stages of DIFC claim

What did Walkers Dubai believe was the purpose of the DIFC proceedings and what was their involvement?

689. The Court finds on the evidence that:

a) Walkers Dubai understood that Mr Williams and the law firms involved reasonably believed that the Plaintiffs, and/or the State of Kuwait, were seeking to misappropriate the Clark Asset Proceeds and the DIFC Proceedings might assist to prevent such misappropriation by obtaining a judgment to attach to the funds held in Dubai;

b) the KPP's letter of 9 May 2018 coincided with the Fund's strategy to escalate its efforts to release the Clark Asset Proceeds and indeed Ms Lazareva and Mr Dashti from prison;

c) the strategy, then developed between the GP, the IM, Mr Williams and those advising him to protect the Clark Asset proceeds and the advisers finally alighted upon a viable way of doing this (having considered numerous other avenues) by obtaining a judgment by the IM against the GP and the Fund in respect of the IM's Management Fees and Performance Fees;

[210] *Wood 1 §35 and 36.*
[211] *Wood 1 §§101 and 445-446.*
[212] *Wood 1 §36.*

d) Walkers Dubai did not devise or direct this strategy.

690. In the Court's view Walkers Dubai assumed and were entitled to assume that there was no intention by any party to create a false impression that the IM was due fees which were not due.

691. Walkers Dubai correctly assumed that the IM was owed fees having successfully exited the Clark Asset. The fact that the case was uncontested was part of the plan to obtain a swift judgment in Dubai.

692. Mr Wood describes Mr Williams' actions in 2017 to 2019 as follows:

> *"…I never had any doubt that Mark was trying to do what was best for the Fund. I did not believe he wanted to take advantage of the situation to defraud the Fund or benefit himself personally. I recall him saying to me that he felt it was up to him to rescue the Fund's money from unlawful attempts by the State of Kuwait to confiscate it…. He gave me the impression that he felt taking on the State of Kuwait was a heavy and thankless burden, with obvious dangers and risks, but it was his duty to take it on"*[213]

693. The Court rejects the argument that because Walker's Dubai did not see the KAG and other correspondence at the relevant time[214] that they acted unreasonably in believing that there was an attempted expropriation by Kuwait of the Clark Asset proceeds.

694. In the Court's view they were entitled to accept the instructions and intelligence[215] received from and on behalf of the GP at the relevant time.

695. The Court finds that Walkers Dubai reasonably believed that:

a) Mr Williams was acting honestly and in the best interests of the GP and the Fund;

b) there was a community of interest between the GP and the IM; and

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[213] *Wood 1 §188.*
[214] *Which both Messrs Wood and Petith had made clear in their written statements.*
[215] *From Dr Merdas and Dr Harbash.*

c) the GP and the IM were working together to prevent the State of Kuwait transferring the Clark Asset Proceeds to Kuwait.

696. Walkers Dubai's further involvement was as follows:

a) On 9 May 2018 both Mr Williams and Mr McBride emailed Mr Wood to enquire about the prospect of bringing a claim against Noor Bank in the Cayman Islands. Walkers Dubai's advice was not encouraging;

b) On 15 May 2018 Mr Williams called Mr Wood and asked him to consider whether it would assist to have a Cayman Islands Court-appointed receiver over the GP or the assets of the Fund. Again Walkers Dubai's advice was not positive.

c) Walkers Dubai advised on replacing Ms Lazareva and Mr Dashti on the board of the GP with independent professional directors. The approach of appointing new directors was not pursued at that time, but Ms Lazareva and Mr Dashti did resign as directors. Their resignations were designed to distance the Fund from the Kuwaiti criminal proceedings.[216] Mr Alwadhi was left as the sole Director;

d) Walkers had some involvement with steps taken to distance KGLI from the Fund and the GP:

i) the IM changed its name from KGLI Cayman Ltd. to EMPEML in a process started in 2017.[217]

ii) KGLI transferred its interest in the GP to a newly incorporated US company.[218]

iii) KGLI planned to sell or assign its LP interest, although this did not occur.[219]

iv) KGLI sold its interest in the IM, namely 500 class A shares and 1 class B share, in January 2018 to AAAML (a company beneficially owned by Mr Ayliffe).

v) Staff at KGLI stopped using "kglinvest" email addresses.

[216] *Wood 1 at §258 and §§263-270*
[217] *Williams 3 at §§ 26-28*
[218] *Wood 1 §§273-274*
[219] *Wood 1 §271*

697. These involvements did not result, in the Court's view, in any breach of Walkers Dubai's duties to the GP.

The genesis of the DIFC proceedings

698. The Court finds that in May 2018 the lawyers advising the Fund, in particular at Crowell & Moring and, from early June 2018, Laktineh & Co, were actively devising a legal case which would secure a release of the Funds and stop their transfer to Kuwait, but had difficulties in deciding:

a) in which jurisdiction to bring the claim;

b) the proper claimant; and

c) the cause of action.

699. There were a number of law firms instructed at the time:

a) Crowell & Moring (Crowell);

b) Laktineh & Co.220 (Laktineh);

c) Global Advocacy and Legal Counsel221 (Global Advocates); and

d) Clyde & Co (Clydes).

700. The latter two firms were 'on the record' for respectively the GP/the Fund and the IM.

701. Walkers Dubai were not part of that core team. They were given discrete pieces of advice and assistance to undertake from time to time.

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[220] *Mr Laktineh was an attorney in Abu Dhabi with US experience*
[221] *Dr Merdas, a senior UAE lawyer of Global Advocates apparently had good intelligence concerning the correspondence between Kuwait and Dubai.*

702. The Court finds that although Walkers Dubai did provide some initial advice and assistance in relation to the DIFC proceedings in response to specific requests,[222] it was not part of the core team which devised the strategy and which brought the case itself.

703. The Court finds that Crowell (David Hammond) with support from Dr Ayman Merdas and Jade Laktineh (instructed on a day-to-day basis by Mr Williams) were in the driving seat in relation to the strategy223 and responsible for the numerous efforts made to execute it.

704. For example:

a) on 13 May 2018 Crowell wrote to the governor of the UAE Central Bank, H.E. Mubarak Rashed Kamis Al Mansouori, copying the Dubai Financial Services Authority (DFSA) about the freezing of the Clark Asset Proceeds, saying that adequate information had now been provided so as to enable Noor Bank to release the funds. Walkers Dubai was copied in to drafts of such letters but did not provide substantive input; and

b) on 12 June 2018, Mr Williams emailed Mr Laktineh, Dr Merdas and Mr Hammond (but not Walkers Dubai) with the idea of a freezing order in Dubai:

> *'Jade & Ayman:*
> *Can the two of you speak extensively tomorrow morning Dubai time regarding a 7-8 day freeze order in Dubai for filing on Thursday morning Dubai time? Can we have a conference call at 4:30pm Dubai tomorrow Wednesday to discuss your findings/drafting's.*
> *David will update on the USA initiative at that time.'*

705. Walkers Dubai had been instructed separately to consider seeking a freezing order in the Cayman Islands. Mr Wood was copied to the group email chain only to advise specifically on that issue.

706. The lawyers then spoke on 13 June 2018. The action points arising from the email are unsurprising, in relation to Walkers Dubai's role.

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[222] *For example, on 22 May 2018 Mr Williams asked Walkers Dubai whether the IM could be said to be a creditor of the Fund. Walkers Dubai's advice was not positive: Wood 1 §260*
[223] *Wood 1 §211*

707. The sole action for Walkers Dubai was to "*Continue reviewing strategy of filing legal action in Cayman*".

708. Mr Petith progressed the action assigned to Walkers Dubai and contacted the dispute lawyers in Walkers Cayman.[224]

709. Mr Dunne in Walkers Cayman responded pragmatically and perceptively as follows on 13 June 2018:

> *"It's pretty clear that in order to stop this money heading off to Kuwait, it is going to be necessary to get some sort of order from the Dubai local courts preventing it from doing so. It looks from the papers that the freeze is administrative, imposed by the central bank and/or the prosecutor, so it would be good to put some sort of order in place that would require them to go to court before spiriting the money away … _*
> *This is all fairly speculative, and it is going to be a big ask to resist what at the moment looks like an attempt via political backchannels to secure a preference for the Port Authority without putting itself to the trouble of actually litigating the issue of its entitlement. It might technically be possible to sue them as an LP in Cayman for return of monies, but even if that could be done, the prospects of enforcing any judgment in Kuwait against a state entity don't strike us as brilliant, to say the least. On that basis, the best option seems to be to throw as many grenades as possible at this stage in an attempt to stop the transfer being made: once the money is across the border, we suspect it isn't coming back."*

710. Walkers Dubai's interpretation of this advice was naturally that it was going to be necessary to get an order from the Dubai local courts as opposed to the Cayman court to prevent Noor Bank from transferring the funds to Kuwait.

711. Mr Petith made clear that his reference to local courts was drafted with the local courts in mind, not with the DIFC specifically in mind.225

712. The Fund decided not to proceed with any litigation in Cayman at that stage.[226]

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[224] *Petith 1 §§ 159-167*
[225] *Petith 1 §178.*
[226] *Williams 1 §937.*

713. By contrast, there were a number of action points for Crowell, Global Advocates and Laktineh.

714. Many different possible legal actions were being considered:

a) in the Cayman Islands;

b) Dubai;

c) the US;

d) the Philippines;

e) Kuwait; and

f) by way of an arbitration pursuant to a bilateral investment treaty.[227]

The GP's board resolutions dated 15 June 2018 and 11 July 2018

15 June 2018

715. By mid-June 2018, Mr Williams considered that he needed authorisation from the GP to assist it with protecting the frozen monies, given that he had no official role with the GP and he was, out of necessity, representing both the IM and the GP on a day to day basis.

716. There was only one surviving director of the GP available to authorise matters: Mr Alwadhi.

717. Crowell prepared a draft set of resolutions to be passed by Mr Alwadhi for the GP. Walkers Dubai made some suggestions to the text, which were then further amended by Mr Williams and Mr Hammond.[228] The final form of the resolutions was signed by Mr Alwadhi and is dated 15 June 2018.

[227] *Wood 1 §§289-292 and Petith 1 § 155-157.*
[228] *Wood 1 §§293-295.*

718. The text of the resolutions is important, as it records the views of the GP and those advising it at the time. It spells out the particular concerns.

719. At recitals 2.1(g) and (h) the resolutions record:

> "*..(g) based on and in connection with the Accusations* [i.e. the criminal accusations against Ms Lazareva and Mr Dashti in Kuwait], *the Director* [Mr Alwadhi] *understands that one or more government authorities in the State of Kuwait has/have requested that the governmental authorities in Dubai transfer the entire amount of the Deposit* [i.e. the Clark Asset Proceeds] *to an account controlled by the State of Kuwait*;
>
> *(h) advisors in Kuwait have reported to the Director that they have a credible belief that, if the entire amount of the Deposit is transferred to the an* [sic] *account controlled by the State of Kuwait, that the KPA, PIFSS, and/or other government instrumentalities in the State of Kuwait will claim and retain the entire amount of the Deposit, thereby rendering the Deposit totally unavailable for creditors and other limited partners of the Partnership, even though KPA and PIFSS collectively are only entitled to 65.2% of the net Distributions (as defined in the Partnership Agreement) made by the Company, after taking appropriate reserve for expenses and other liabilities and obligations of the Partnership.*"

2.1(k) resolved that it was in the best interests of the Fund not to permit the State of Kuwait to seize the Clark Asset Proceeds on the basis that the director [Mr Alwadhi] believed it was in the best interests of the Partnership and all of its LPs and creditors for the assets to be distributed as per the LPA (and not to permit the assets to be seized by the State of Kuwait for the benefit of KPA, PIFSS, and/or the State of Kuwait).

720. The GP resolved at 2.2(a) to:

> "*take all appropriate action to protect the assets of the Partnership (including the Deposit)"* and authority is given by clause 3 to Mr Williams to represent and act on behalf of the GP as "Authorised Officer" "*as may be necessary or appropriate in their opinion to effectuate and comply with the purpose and intent of the foregoing resolutions*".

721. There is therefore evidence to show that the GP had given its informed consent to the course of action and the reasons for it.

722. There is no good evidence to show, as the Plaintiffs suggest, that Mr Williams knew that he had not provided Mr Alwadhi with full disclosure and/or that Mr Alwadhi was not exercising any independent judgement and was simply a 'rubber stamp'.

723. The reality was that Mr Alwadhi had witnessed Ms Lazareva and Mr Dashti, two directors with whom he had been on the board at the GP, having been imprisoned following their arrest shortly after the freezing of the Clark Asset Proceeds in November 2017. His attention to Fund affairs was likely to have been heightened. He had personally travelled to Dubai in an unsuccessful attempt to secure a release of the monies.

724. The Court finds that Walkers Dubai were entitled to and did believe that the resolutions record that Mr Alwadhi was:

a) aware of the risk of the Clark Asset Proceeds being transferred to Kuwait;

b) willing to authorise Mr Williams to take such steps as he saw fit to protect them; and

c) willing to ratify all prior actions contemplated by the resolutions.

GP's submission to jurisdiction and admission of the claim

725. Clyde & Co gave detailed advice by email on 29 June 2018. The submission to the jurisdiction was in order to obtain an attachment of the funds based on the DIFC Court's judgment in Dubai. It is clear that was part of the strategy.

726. Mr Williams sent an email on 6 July 2018 enclosing the IM's change of name certificate to Clyde & Co saying:

> "*I will work with TPF to get their consent to DIFC jurisdiction as soon as I receive confirmation from you that you have emailed Walkers and I receive those docs from you*."

727. This reflects the fact that he was seeking approval from the GP, consistent with his oral and documentary evidence regarding his communications with Mr Alwadhi. [229]

728. On 8 July 2018, Mr Alwadhi signed the letter from Clyde & Co to confirm that the GP and the Fund submitted to the jurisdiction of the DIFC Courts and confirming the address for service. This was done prior to Walkers Dubai reviewing the relevant correspondence.[230]

729. The Court accepts that on the evidence Walkers Dubai was not involved in the decision to submit to the jurisdiction.

730. On 11 July 2018, Mr Alwadhi signed the board resolution which gave Global Advocates the instructions they needed to file a formal admission of the DIFC claim. By that resolution the GP (acting through Mr Alwadhi) formally confirmed that the GP accepted the claim was valid and ratified the submission to the DIFC Courts (at 3.2(a) and (b)). Moreover, the resolutions contain a provision formally ratifying all prior actions:

> "5.1 *IT IS RESOLVED that any and all actions of the Company and/or the Partnership, or of the Director or officer or any Attorney or Authorised Signatory, taken in connection with the actions contemplated by the foregoing resolutions prior to the execution hereof be and are hereby ratified, confirmed, approved and adopted in all respects as fully as if such action(s) had been presented to for approval and approved by, the Director prior to such action being taken"*

731. The Court finds that it is clear that the requisite consent was given prospectively on 15 June 2018, and then ratified retrospectively on 11 July 2018, by Mr Alwadhi.

732. The Plaintiffs do not pursue a case of wrongdoing against Mr Alwadhi.

733. The Court infers that the GP on the face of the documents knew what it was doing and did so in furtherance of the strategy devised for the protection of the Clark Asset Proceeds

[229] *Day15MT1/141:15-Day15MT1/145:1; Day16MT1/120:16.*
[230] *Wood 1 §§371-373.*

The draft complaint

734. The Fund did not ask Walkers Dubai to advise on the claim. The documents show that Crowell prepared a draft "*complaint*" (although the document itself is entitled "*Claimant's Skeleton Argument*")231 seeking a freezing injunction in Dubai.

735. This was then discussed over email by Mr Hammond, Mr Laktineh and Mr Williams on 15 and 16 June 2018, without copying Walkers Dubai.

736. The Court finds that Walkers Dubai did not have a hand in drafting the complaint.

737. The claim to be made before the DIFC Court was to be brought by the IM against the GP and the Fund, in respect of unpaid 'Carry' of US$45,462,000. The relief requested is a freeze of all the funds held by Noor Bank for the Fund.232

738. Mr Williams sent Crowell and Laktineh the Fund's 2016 financial statements.

739. Mr Williams wrote on 16 June 2018:

> *'I am also attaching the TPF 2016 financials which show the amount due to the Investment Manager. Note the amount shown in the 2016 financials is actually higher than the amount claimed due to expenses, etc. incurred in 2017 thereby lowering the monies due to the Investment Manager*."

740. Later on the same day Mr Williams forwarded the email chain with the other lawyers to Mr Wood, and then followed up with a further email to Mr Wood and Ms Arch,[233] attaching a letter from the IM to the GP and the Fund dated 16 June 2018 entitled "*Re: DEMAND NOTICE*".

741. This Demand Notice said that the GP and the Fund must pay the IM its Carry entitlement of USD 45,462,000 by 10am Dubai time on 18 June 2008 [sic]:

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[231] *Dated 18 June 2018*

[232] *The IMA is not mentioned. While it is stated that the LPA is governed by Cayman Islands law, it is not stated which law should apply to the claim brought by the IM.*

[233] *Mr Petith was on holiday between 15 June 2018 and 24 June 2018 and did not do any work relevant to the Fund during that time, see Petith 1 at §170*

"*or it will institute immediate legal action to* [sic] *against Port Link and the Partnership to recovery* [sic] *the Carry, including seeking an order to enjoin Port Link and the Partnership from dissipating or disposing of any asset available to satisfy a judgment in the amount of the Carry plus interest and other damages*".

742. The Court finds on the evidence that Walkers Dubai played no part in drafting this document and that it was probably drafted by Crowell.

743. The Court makes the following findings and observations in relation to the early stages of the DIFC claim, on the evidence:

a) Walkers Dubai did not prepare the draft complaint or the Demand Notice. Both appear to have been drafted by Crowell and, from the emails, it appears Mr Laktineh and Mr Williams added comments to the draft complaint and Mr Williams edited the June 2018 Demand Notice.

b) Walkers Dubai was not asked to advise on the quantum of the IM's fee entitlement, and it seems Mr Williams did not seek advice from any of the external lawyers on that issue.

c) Mr Williams/the Fund did not value the claim at the sum allocated to the IM in the 2016 financial statements (US$50,508,050). The amount was reduced, due to 2017 expenses incurred, down to US$45,462,000.

d) The draft complaint sought to freeze the entirety of the Clark Asset Proceeds (c. US$496m) purportedly to secure the IM's fee entitlement (a much lesser sum).

e) The idea of bringing a claim in the DIFC was conceived and developed without input from Walkers Dubai.

744. Local Dubai and DIFC legal advice, and assistance with strategy, was provided by a combination of Global Advocates and Laktineh.

745. As to the DIFC Proceedings themselves, the Claimant, IM, was represented by Clydes, and the Defendants, the GP and the Fund, were represented by Global Advocates.

The demand letters

746. To start the process, Clydes sent the two demand letters dated 7 July 2018 to the GP and the Fund and they were copied to Walkers Dubai by Mr Williams on an 'FYI' basis.

Procedural steps

747. Clydes submitted the claim form, not Walkers Dubai.

748. The 'non-involvement' of Walkers Dubai is also supported by the DIFC Claim Form itself, which:

a) advances a claim for Management Fees pursuant to clause 5.1 of the IMA. Walkers Dubai advice on 3 and 4 July 2018 was not relied on as was made clear in his oral evidence to the Court by Mr Williams[234].They had advised against a claim under clause 5.1; and

b) sets out the quantum of the claim for Carry and Management Fees, and claims for interest, both matters on which Walkers Dubai was not consulted or asked to advise upon.

749. There is no evidence that Walkers Dubai had any involvement in the GP / Fund admitting the claim. Global Advocates acting for the GP/the Fund and Mr Williams worked together to file an admission to the claim once the Fund was satisfied that the amount claimed was due.

750. Mr Williams forwarded the DIFC Claim Form, and related documents already finalised and filed to Mr Wood.

751. Mr Williams made no request for advice and Mr Wood's evidence is that Walkers Dubai gave no advice about this.[235]The Court accepts his evidence.

752. Mr Petith noted:

[234] *See cross examination of Mr Williams Day 17 MT1/178:4-11*
[235] *Wood 1 §374*

"*that the Judgment Strategy was underway… and… any actions arising were a matter for… Clydes… for the IM, and Global Advocates for the GP and the Fund*."[236]

753. Walkers Dubai were then instructed to prepare a set of resolutions for the GP in respect of the DIFC claim.

754. The Court finds in relation to the DIFC proceedings themselves on the evidence:

a) Walkers Dubai had no role in drafting the claim or in its early stages.

b) Mr Williams worked with Mr Laktineh and Global Advocates to complete the formalities for admitting the claim, including filing the admission. Walkers Dubai was not involved in that correspondence.

c) Walkers Dubai were asked to and did prepare draft board resolutions for the GP.

d) When sending out the first draft of the resolutions, Ms Arch was clear that Walkers Dubai was giving no advice on merits stating: "*As discussed on the phone, we note that we are not advising on the merits of the claim by the investment manager against the fund*".

e) Submission to the jurisdiction had occurred without Walkers Dubai's involvement. Although the claim form states that the claim is governed by Cayman Islands law, there is no reference in the correspondence that anyone actively considered this or that any advice was given in relation to it.237

755. More generally, from the evidence the Court concludes, in relation to the DIFC proceedings, that Walkers Dubai did not direct the strategy or prepare or review prior to filing any of the documents used in the case or advise the IM to bring or admit the claim. They were not qualified to advise on the local law aspects of the claim in Dubai.

756. Walkers Dubai's role was limited to providing discrete advice on Cayman law and corporate support from time to time.

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[236] *Petith 1 §231*
[237] *Wood 1 §§ 373 and 383*

757. Walkers Dubai were not asked for specific Cayman law advice on the merits of the proposed claim, and Walkers Dubai expressly stated they were not providing such advice.

758. The Court concludes that Walkers Dubai were not responsible for the GP/the Fund admitting a liability to the IM.

Clydes' onboarding for the IM

759. On 19 June 2018 Mr Wood sent the IMA to Mr Williams, at Mr Williams' request. Later that day, Mr Wood was copied into a chain of emails involving Mr Williams, Mr Hammond, Mr Laktineh and various lawyers at Clydes including Keith Hutchison (Mr Hutchison) and Victoria Yates.

760. Mr Hutchison replied that:

> *(i) "We shall await the opinion from Cayman counsel on authority to represent and give instructions on behalf of KGLI [i.e. the IM]".*

761. Mr Hutchison was clearly keen to know that Mr Williams, giving instructions on behalf of the IM, was authorised to do so. Presumably had Ms Lazareva, the IM's sole director, not been in prison she could have given instructions.

762. The input provided by Walkers Dubai was as to the authority of an individual to represent a company under Cayman Islands law.

763. In relation to the setting up of the IM as a client of Clydes, Walkers Dubai prepared a first draft of resolutions by which the IM's board (Ms Lazareva), appointed Mr Williams as authorised representative. The draft resolutions were altered by Mr Hutchison and had input from Mr Hammond and Mr Williams before Ms Lazareva signed.

764. The Court finds that this involvement of Walkers Dubai to the on boarding of Clydes was essentially administrative and not substantive *vis a vis* the strategy of the claim.

765. Mr Hammond then emailed the group on 20 June 2018:

"*Can the Investment Manager be authorized [in the resolutions] to take all actions necessary to protect and obtain the release of all funds frozen at Noor Bank and not just the Carry?"*

766. Mr Wood replied that this:

"*is really action to be taken by the GP given it holds the account with Noor. It is not appropriate to include this in resolutions of the IM".*

767. Mr Williams then responded:

'As discussed, the IM will be suing the GP (not Noor) since the IM is not able to execute on its responsibilities in the IMA. Only once the IM has the judgement against the GP will it go to the Dubai courts to have the GP funds at Noor Bank frozen. Noor Bank is not a named party by the IM'.

and then:

To clarify further, the IM will be filing against the GP for the full $496MM plus any interest that has accrued.'

768. This shows that at 20 June 2018, Crowell and Mr Williams' strategy was for the IM to bring proceedings in Dubai to protect the full amount of the Clark Asset Proceeds and it looks likely that Walkers Dubai were then apprised of that after the event and corrected in their suggestion that it was for the GP to bring a claim for the Noor monies.

769. Mr Laktineh responded to Mr Wood's email, but only to Mr Williams and Mr Hammond (removing Walkers Dubai and Clydes from the email chain):

"*Last thing we wanted from them* [Walkers Dubai]. *Let's discuss over our call. Can we push it to 11 am eastern time?*"

770. From this the Court concludes:

a) Mr Laktineh and Mr Hammond were in the 'driving seat' on strategy;

b) the claim then contemplated was for a claim brought by the IM to freeze all the Clark Asset Proceeds to prevent them being transferred to Kuwait;

c) Walkers Dubai had not been invited to attend strategy calls with them but simply to provide corporate authorisations; and

d) it looks like Walkers Dubai had got the 'wrong end of the stick' with regard to the strategy, before being corrected.

The call and email on 1 July 2018

771. Messrs Wood and Petith spoke to Clydes' Mr Hutchison on 1 July 2018 and had a brief exchange of emails before the call. The issue which Clydes asked was, according to Mr Wood:

> "*whether the Investment Manager can make a claim against the Fund/GP for the various unpaid distributions owed to the Limited Partner[s]".*

772. The issue identified was how could the IM claim for the full amount of the monies owed to the LPs (not just its own fees).

773. Mr Wood responded to Mr Williams (but not Clydes) as follows:

> *'In summary, we have not identified any express provisions in the LPA or the IMA that would allow the Investment Manager to pursue a claim for any unpaid distributions which are owed to the Limited Partners of the Fund. Both the LPA and the IMA clearly prescribe that any distributions made by the Fund will be the responsibility of the GP – and not the Investment Manager. As such, we do not consider that the Investment Manager would have a claim against the Fund/GP for unpaid distributions owed to the Limited Partners of the Fund as a matter of Cayman Islands law'*

774. Mr Wood's evidence is that Clydes also raised the conflicts issue on the call.[238]

775. Mr Wood went on to suggest that one possible alternative would be for the LPs to assign their rights to the IM. His email ended by stating:

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[238] *Wood 1 §332*

> *"Note that we have not copied Clyde & Co on this email given that they are acting for the Investment Manager in the DIFC Proceedings rather than the Fund / the GP who we continue to act for. We discussed conflicts briefly with Clyde & Co this morning and note that Walkers (and presumably all law firms involved) may need to consider conflict positions to the extent the DIFC Proceedings continue".*[239]

776. From this interaction the Court concludes that Walkers Dubai:

a) were not, as alleged by the Plaintiffs, assisting Clydes in respect of the DIFC proceedings on behalf of the IM and also advising the GP and the Fund so as to put themselves in a position of conflict;

b) advised Mr Williams only (in answer to Clydes' question) that the claim by the IM for the entirety of the Clark Asset Proceeds was not sustainable.

777. Mr Hammond responded to Mr Wood's email later on 1 July 2018:

> *'What if the IM files suit on its own behalf against the GP for breach of the IMA? The breach is based on the GP actions or inactions that allowed the money to be frozen, thus preventing the IM from managing the investment and, potentially, having it expropriated by the State of Kuwait, resulting in a total loss of the remaining monies in the Fund.*
> *The IM would not be suing the GP on behalf of the LPs. Is there support under Cayman law for this approach?'*

778. A call was arranged for Mr Wood, Mr Hammond and Mr Williams to discuss this suggestion.

779. Mr Wood's internal response was:

> *'Not sure how the below* [Mr Hammond's email] *will help in the current situation given the IM can only sue for loss or damage it suffers - which would not include monies due to LPs*.'

[239] *Walkers Dubai had no further contact with Clydes*

780. Mr Wood and Mr Petith subsequently exchanged internal emails referring to the proposed call with Mr Hammond and Mr Williams as "*a fishing expedition*", that being the phrase they used "*to refer to the increasingly optimistic suggestions which Mark and David* [Mr Williams and Mr Hammond] *came up with in order to try to stop the Clark Asset Proceeds leaving Dubai"*.[240]

781. In the end Mr Wood attended the call alone, and after the call he emailed Mr Petith:

> *'Bunch of stuff to do on this tomo. Need letter to GP outlining our advice that IM has no basis to sue for distributions due to LPs.*
> *Separately consider termination of IMA. Whether that crystallizes fees due? If so, prepare notice of termination*.'

Emails and memorandum of 2 July 2018

782. In response to the instructions given, Walkers Dubai considered the IMA and the LPA and advised that, on the facts as presented in their 2 July Memorandum, the Fund had exited an investment, received the proceeds of sale, and failed to make a distribution within 60, or 90, days from receipt.

783. That meant the IM could seek to pursue a claim for its fees for a breach of clause 5.2(d) of the IMA, and the LPs had grounds to bring a claim under clause 4.4(a) of the LPA, but did not give the IM the right to claim for distributions owed to LPs.

784. As for the email of 2 July 2018, Mr Petith considered whether termination of the IMA would crystallise the fees due to the IM and concluded that the IM "*could argue*" that there has been a material breach of the IMA entitling it to terminate with immediate effect. He advised that valid termination would crystallise the sums due to the IM.

785. Mr Petith provided a draft notice of termination with the email. At the end of the email, Mr Petith said:

> *'Before serving any termination notice, we would recommend that KGL* [the IM] *seeks legal advice from its legal advisors (Clyde & Co) as to the advantages and*

[240] *Wood 1 §338*

disadvantages of terminating the IMA at this stage. As Walkers act as legal counsel to the Fund, we cannot provide this advice to KGL in the current circumstances'

786. The Court concludes that these documents were prepared in the context that:

a) advice was required as to whether the IM could bring a claim against the GP/ the Fund for the monies due either to the IM itself (unpaid fees) or the LPs (unpaid distributions);

b) the strategy was for a Court Order in Dubai which could be attached to at least some (or ideally all) the Clark Asset Proceeds so that Dubai would not release them to Kuwait;

c) it was reasonably considered by all involved (at Walkers Dubai and the Fund) to be in the interests of the GP and the Fund for such an order to be obtained, if possible;

d) Walkers Dubai were not instructed to consider possible defences to such a claim. There was no instruction or desire to consider possible defences on behalf of the GP; and

e) Walkers Dubai were not instructed to consider the quantum of such a claim, or the interest elements to such a claim.

The 3 and 4 July 2018 emails from Walkers Dubai

787. These emails attracted numerous interpretations and argument.

788. The Court concludes as to context:

a) The emails were sent in the context of seeking to protect the Clark Asset Proceeds to as large an extent as possible;

b) The GP and the IM both believed that the larger the amount frozen, the better in terms of securing a greater portion of the Clark Asset Proceeds;

c) The Fund had been proceeding on the assumption that the IM had no entitlement to Management Fees after 31 December 2014. The Fund was considering whether the IM was entitled to claim for Performance Fees; and

d) Mr Williams wanted to reconsider whether Management Fees were also chargeable. He asked Walkers Dubai to consider whether the IM could lawfully continue to claim Management Fees.

789. The substantive advice given was as follows:

a) Walkers Dubai advised that, although the clause was ambiguous, the better view was that the IM could not claim Management Fees under clause 5.1(b) of the IMA after the end of the Fund's term.[241]

b) The main difference between the 3 and 4 July 2018 emails is that the latter considered the relevance of clause 3.1(b)(xii) of the LPA for the period of 1 January 2015 – 14 November 2017.[242]

c) The Court does not accept, as the Plaintiffs say, that it is impossible to reconcile the advice given in the two emails or that there was a stark and significant tension between the two emails.

d) The advice given on 3 and 4 July 2018, (which was limited to the question of whether Management Fees were payable post 31 December 2014) was that Management Fees were not due under IMA clause 5.1(b), but might in certain circumstances be due under clause 3.1 of the LPA if certain preconditions were met.

e) After the end of the Fund's term on 31 December 2014, the IM continued to work towards exiting the Fund's investments including NNC and the Clark Asset, until the latter was finally and successfully sold. Mr Williams' request was whether Management Fees could be due for that work done.

f) In the 4 July 2018 email, Walkers Dubai advised that the GP, if it believed:

[241] *Clydes appears to have disagreed with that conclusion. Walkers Dubai's position at trial was that Clydes' and Walkers Dubai's original November 2014 views were in fact correct i.e. that the IM was entitled to Management Fees pursuant to clause 5.1(b) of the IMA because "termination" of the Fund means the final dissolution of the Fund, and is not synonymous with the end of the Fund's term: as per Walkers Dubai's earlier advice dated 23 November 2014.*
[242] See *Wood 1 at §355 that this was raised by Mr Williams apparently at the suggestion of Mr Hammond*

i) that the IM continued to provide discretionary investment management services after 31 December 2014; and

ii) that retaining the IM to carry out this role was in the best interests of the Fund; then

iii) the GP "*could seek to justify*" paying the Management Fees.

790. The Court accepts Mr Petith's evidence in this regard:

> *"[Walkers Dubai] were not ourselves seeking to find a way to justify payment of the Management Fee. We identified… that there was a general discretion under the LPA which allowed the GP to retain an investment manager to provide discretionary investment management services, and that it was up to the GP to consider whether that was the position in those circumstances. At the time, I absolutely did not think that the content of the 4 July Email would be taken as finally determinative as to whether a Management Fee was due and payable to the IM or not, during any period of time."*[243]

Consequence of the emails

791. The Court has found (see below) that the IM was entitled to Management Fees pursuant to clause 5.1(b) of the IMA because "termination" of the Fund means the final dissolution of the Fund, and is not to be equated with the end of the Fund's term.

792. The claim to Management Fees in the DIFC Proceedings was brought pursuant to clause 5.1(b) of the IMA, not clause 3.1(b)(xii) of the LPA in any event, so the 3 and 4 July 2018 emails are not causative of the GP, as the Plaintiffs suggest, wrongly seeking to justify paying a management fee to the IM after the termination of the Fund's term.

793. There is also no evidence to suggest that Clydes or Global Advocates saw the emails of 3 and 4 July 2018.

794. There was in any case no reliance by the GP on Walkers Dubai's advice in the circumstances.

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[243] *Petith 1 at § 226.*

795. The case that the Plaintiffs bring that Walkers Dubai gave negligent advice is not made out on the evidence.

Were the DIFC proceedings a sham?

796. The Court has decided that the DIFC proceedings were not a sham. Those involved in bringing the proceedings did not falsely intend to give the appearance of creating rights and obligations which did not exist.[244]

797. There was a contractual entitlement to the IM's fees and the strategy was to prevent Kuwait from transferring the frozen monies out of Dubai to Kuwait.

798. Although the IM's contractual right did not result in an ability to claim for the full amount which had been frozen in the Noor account, having examined all of the relevant evidence, it is clear that the proceedings were aimed at:

a) securing an order preserving at least a material part; but more importantly

b) stymieing Kuwait's attempts to transfer the whole of the funds from the Noor account.

799. The Court finds that the proceedings were a genuine attempt to turn a contractual right to payment into a judgment debt which could be secured by way of attachment for a legitimate purpose, namely to stop the Clarke Asset Proceeds from being transferred to Kuwait.

800. The fact that an attachment order was sought and obtained from the Dubai local courts supports the fact that the monies held at Noor were to be protected. After the freeze was removed an application was made to have the attachment released so that the IM could be paid.

801. As recorded above, the Court has found on the evidence that Mr Williams was in communication with lawyers throughout the period leading up to the DIFC Proceedings and was receiving advice concerning what proceedings should be brought, by which entity and in which forum in order to best enable the funds in the Noor Bank account to be protected, which was to the benefit of the Fund, the GP, the other LPs, and the IM.

802. The fact that a number of potential claims were considered:

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[244] *Denning LJ in Snook v West Riding Investments [1967] 2QB 786 at 802C.*

a) for the full amount of the frozen funds;

b) injunctive relief;

c) putting the GP into liquidation;

d) assignment of the LPs' rights to the IM,

is consistent with the strategy to protect the frozen funds rather than a dishonest scheme to extract money for the benefit of the alleged wrongdoers in this case.

803. The evidence also shows that the GP and the IM sought to identify the IM's entitlement to fees before the claim was issued.

Was there a conflict between the GP and the IM in relation to the DIFC proceedings?

804. The Court answers this in the negative.

805. The Court has decided that there was no conflict between the GP and the Fund on the one hand, and the IM on the other, in respect to the DIFC proceedings.

806. True it is that the GP and the IM had different economic interests and duties.

807. However they shared in common the interest of protecting an enormous Fund asset from being transferred out of Dubai to Kuwait.

808. The IM's fee entitlement is governed by the Fund's governing contracts and set out in the Fund's Private Placement Memoranda (the 2007 PPM and the 2009 PPM).

809. It was not against the GP/Fund's interests to make payment of debts as they fall due.

810. The Court accepts on the evidence that the purpose of the DIFC Proceedings was for the IM to claim for fees payable to the IM. Walkers Dubai understood this at the time.

811. There was no conflict of interest in the GP paying its obligations in full in accordance with the IMA.

812. Mr Wood said in relation to the expropriation attempts:

> "*we were concerned that Kuwait may yet be able to convince Dubai to transfer the monies*".[245]

813. Mr Petith says:

> "*It was Mark [Williams] being made aware of these developments* [i.e. the attempts by Kuwait to transfer the monies] *which triggered the flurry of urgent activity by the Fund's legal advisors during June and July 2018, as there was a genuine belief that the whole amount of the Clark Asset Proceeds could be lost to Kuwait at any moment."*[246]

814. The Court accepts their evidence.

815. The Court finds on the evidence that, consistent with the legal advice at the time from numerous firms, obtaining a judgment from the DIFC which was capable of swift recognition within the UAE was the best way to protect the Noor Bank account funds in circumstances where attempts were being made to transfer the proceeds to Kuwait.

816. Mr Williams clearly wished to make the claim as high as was justifiably possible, but it does not follow that it was contrary to the GP's interests to admit the claim. The higher the DIFC Judgment, the larger the potential impact that judgment would have in preventing the Clark Asset Proceeds being released to Kuwait. [247]

817. The Court finds that the IM was owed (at least) the sums claimed in the DIFC proceedings248 and the GP and the IM had a common interest in paying the IM the fees due to it.

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[245] *Wood 1 § 286.*
[246] *Petith 1 §134.*
[247] *See Petith 1 at §184.*
[248] *See IM Fee entitlement section of this Judgment.*

818. The common interest was not displaced when the IM was claiming the 'highest stateable claim' it could as it was owed the money and the GP would be liable for it if it was properly due. There is no evidence that the claim was improperly inflated.

819. Whilst the GP and the IM might theoretically have had different interests if there was a dispute as to the amount of the IM fee entitlement between them, those were not the interests at issue because any judgment obtained would be for the amount which the GP had independently verified and admitted to being due to the IM.

820. The Plaintiffs say that Walkers Dubai was inhibited from advising the GP about "*potential defences, counterclaims, or quantum issues*" relating to the IM's claim for its fees.

821. The Court finds that Walkers Dubai did not advise on those matters because it was not instructed to do so, and not because it was inhibited from advising.

822. In addition, the Court finds

a) there was no inhibition because there was no conflict between the IM and the GP who were working together towards a common goal. Raising possible defences and counterclaims would have been contrary to the common purpose of the DIFC proceedings.[249] The fact that the IM was also a client and that, via Mr Williams, it was aware of such advice does not change the position, because of the common purpose of the GP and the IM.

b) Walkers Dubai did advise the GP, in response to specific instructions, that certain steps proposed to be taken by the GP, or the IM were unsustainable or unadvisable, which indicates that they saw no inhibition preventing them from giving advice to the GP in a way which might limit the IM's claim.[250]

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[249] *Walkers Dubai did not have the information from which to do so,even if they had a duty to investigate, which they did not.*
[250] *Examples of this are: on 14 June 2018, Mr Petith advised against a Cayman Islands freezing order;on 1 July 2018, Mr Wood advised that "the IM can only sue for loss or damage it suffers - which would not include monies due to LPs", thereby advising the GP against admitting a claim filed by the IM which related to the full amount of the Clark Asset Proceeds; on 2 July 2018, that advice was repeated at §10 in the memorandum of advice to the GP's board; on 3 and 4 July 2018, Mr Petith advised the GP of (Walkers' view at the time) the weaknesses in the IM's claim to Management Fees under clause 5.1(b) of the IMA.*

c) Walkers Dubai did not, as the Plaintiffs allege, advance the interests of the IM at the expense of the GP as a result of the Walkers relationship with the IM and its major stakeholders, Mr Williams and Ms Lazareva. There is no evidence that Walkers Dubai was distracted from its duties in any way by any misplaced sense of loyalty to Mr Williams or Ms Lazareva personally, or any other stakeholders of the IM.

d) Walkers Dubai did not as was suggested in the Plaintiffs Closings '*fail to scrutinise instructions from Mr. Williams and conflate their multiple clients'*.

823. If this analysis is wrong and Walkers Dubai could be said to have acted under a conflict of interest the Court finds that it provided no material advice in that:

a) it did not prepare the DIFC proceedings which claimed fees[251] and interest on which it had no input;

b) the decisions to submit to the jurisdiction of the DIFC, admit the claim, and agree the quantum to be admitted were all made without its input; and

c) overall it had a minor administrative role in relation to the DIFC proceedings, limited to preparing draft board resolutions, and giving *ad hoc* advice in circumstances where Walkers Dubai expressly stated that it was not advising on the merits of the claim.

824. The Plaintiffs say that Walkers Dubai should have ceased to act for one of the GP/the Fund and the IM (and probably both having first drawn attention to the relevant conflict) instead of having assisted the IM in preparing a claim against the Fund for whom it continued to act.

825. As stated above the Court finds that there was no conflict between the GP and the IM. Walkers Dubai did not act on the DIFC proceedings. Neither did it assist the IM in preparing or bringing its claim.

826. Walkers Dubai were correct not to ignore Mr Williams' instructions because they reasonably understood Mr Alwadhi was made aware of the circumstances and approved Mr Williams' actions for the GP.

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[251] *under clause 5.1(b) of the IMA contrary to Walkers Dubai's advice*

827. Walkers Dubai did not fail to meet the standard of care required of them in this regard and were not in breach of any duty owed.

Duty to warn

828. The Plaintiffs say that Walkers Dubai should have advised the GP that there were or might be defences and counterclaims available to it in respect of the IM's claim or at least advised the GP to take further advice. The Court has concluded that there was no such duty to warn.

829. Walkers Dubai was entitled to assume that the Fund would only admit the correct sums due to the IM and it was not asked to advise on quantum.

830. The Court disagrees with the Plaintiffs' case against Walkers Dubai on a duty to warn for the following reasons, many of which have already been recorded, but which are set out again for completeness:

a) Walkers Dubai was not instructed to consider or advise as to potential defences and counterclaims.

b) A warning of the type suggested would have been unwarranted given the objective the Fund was pursuing, and which the GP and the IM had a common interest in pursuing.

c) Walkers Dubai were entitled to assume that Mr Williams and Mr Alwadhi knew what they were doing and had the commercial imperatives of the Fund firmly in mind.

d) There were four other firms advising and Walkers Dubai was neither responsible for the strategy or the formulation of the DIFC proceedings and they were not asked for input.[252]

[252] *The other firms were content to advise and act on the DIFC Proceedings despite not being qualified under Cayman Islands law.*

e) Walkers Dubai expressly told the GP that they were not advising on the merits of the DIFC claim.[253]

f) There was a reasonable belief from the intelligence being provided from Kuwait that there was a risk that the Clark Asset Proceeds would be transferred out of Dubai to Kuwait. Walkers Dubai were entitled to share that belief based on the evidence they had at the time.

g) The Court is not persuaded nor that Walkers Dubai had information suggesting that there might be valid defences which should have been advanced to the IM's claim.

h) Walkers Dubai were asked to advise urgently on whether in principle the IM's fee entitlement had arisen on the face of the contractual documents with the Fund (the IMA and LPA). There was no duty to warn reasonably incidental to that.

Did the Fund suffer any loss?

831. Even if the Court had concluded, contrary to the above, that there was a breach of duty by Walkers Dubai, the Plaintiffs have not shown that the Fund has suffered loss attributable to their conduct in the DIFC Proceedings/the Wellspring Payment which was caused by such a breach.

832. The Court has concluded on the evidence that the payment by the GP to the IM was contractually due and the monies would have been paid without the DIFC proceedings as and when the Clark Asset Proceeds were released.

Claims against D2-D4 in respect of DIFC proceedings

833. It follows from these detailed factual findings in respect of the case against Walkers Dubai that the claims against D2-D4 also fail.

834. The claim in respect of the DIFC Proceedings is premised on the assertion that the DIFC Proceedings were a "*sham*" brought by Mr Williams acting "*in concert*" with the GP and the numerous lawyers from different law firms engaged as a cover to enable Mr Williams and his alleged accomplices to misappropriate c. US$60 million from the Fund.

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[253] *Email of 10 July 2018 from Ms Arch.*

835. The Court has found on the evidence that there were no sham proceedings, no unlawful means conspiracy, and no misappropriation of monies.

836. The allegations that the Plaintiffs make against Mr Williams are also inherently improbable for the following reasons

a) The subject-matter of the DIFC Proceedings was a contractual claim by the IM to sums to which it was entitled under the terms of the IMA in the DIFC courts with a number of lawyers advising from different law firms.

b) There was no secrecy. The lawyers all had regulatory and ethical considerations to abide by and would have been unlikely to deliberately act in concert or turn a blind eye to the alleged impropriety at the heart of the case and consequently breach their obligations and put reputations at risk.

c) It is unlikely that in all the circumstances the improper purpose alleged would not have been brought to light and called out.

837. As is consistent with its findings when examining the case against Walkers the Court accepts, with regard to the case against Mr Williams:

a) the DIFC proceedings were a genuine attempt, in light of the Noor Bank freeze, to protect those funds from being transferred to Kuwait and to preserve them for the benefit of the Fund and its LPs.

b) it was believed by those involved in the proceedings that obtaining a judgment against the GP in the DIFC would prevent the frozen funds from being misappropriated and would assist in having them unfrozen for the benefit of the Fund.

c) Mr Williams' evidence that the general strategy behind the DIFC Proceedings was to "gum up" the account at Noor Bank until there was a resolution with Kuwait[254]. He said that part of the thinking behind the DIFC claim was to lock up the judgment sum, and to show the Dubai authorities another side of the argument.[255]

[254] *Day15MT1/10:24 Day15MT1/122:11; Day17MT1/163:8.*
[255] *Day15MT1/124:19; Day17MT1/168:17.*

d) Mr Wood's evidence as to the urgency perceived:

> "*we were concerned about and what five other law firms on record were all concerned about was the very real risk that these funds would be lost to Kuwait, and all the five separate law firms all clearly understood, having been working in the Middle East for a long period of time, that if those funds did go to Kuwait, they were never, ever coming back and the chances of getting anything back was zero*".[256]

e) the IM was contractually entitled to receive at least the amounts claimed in the DIFC Proceedings and in fact was entitled to substantially more. The Fund has not therefore suffered any loss.

The IM's fee entitlement

Introduction

838. The Court accepts Mr Williams' evidence that:

a) Crowell had tried to open accounts for the GP and the IM in the US but these efforts were unsuccessful such that Wellspring was a last resort.[257]

b) His belief that he was due monies from the DIFC judgment was founded on his written agreement with the IM entitling him to 25% of all of the IM's fees and that this applied to both Management Fees and Carry.[258]

c) He believed KGLI were paying him out of the money that was going to be due to it, rather than to other shareholders, because Mr Williams was considering leaving KGLI due to the strain his employment had put on his family.[259]

[256] *Day24MT1/64:21.*
[257] *Day16MT1/40:5.*
[258] *Day16MT1/88:21, Day16MT1/98:19.*
[259] *Day16MT1/118:23, Day16MT1/120:16.*

d) There was a commercial rationale for the payments to Wellspring and the Paying Agent arrangement for onward payments to the IM's former shareholders (including Mr Williams and Ms Lazareva).

839. The IM was owed fees as a result of successfully exiting NNC and the Clark Asset.

840. That fee entitlement exceeded the US$59,990,461.30 which was paid to Wellspring in satisfaction of the IM's fees/the DIFC Judgment on 7 February 2019, for the reasons set out below.

841. The DIFC Judgment sum of US$56,999,978, included an admitted amount of US$56,808,005 comprising Performance Fees, Management Fees and interest.

842. The DIFC Judgment sum also included interest for the 16 days between the 9 July 2018 Claim Form and 25 July 2018 Judgment. The total DIFC Judgment sum therefore comprised:

a) Performance Fees and interest owed to the IM in respect of the exit of the Clark Asset of US$45,462,000 (fee) and US$1,718,789 (interest), totalling US$47,180,789.

b) Management Fees owed to the IM from 1 January 2015 to 14 November 2017 of US$ 8,106,386 (fee) and US$1,520,830 (interest), totalling USD 9,627,216.

c) Interest at the rate of 8% pa compound from the date of the DIFC Claim Form (9 July 2018) to Judgment (25 July 2018), of US$191,973.

843. The Wellspring Payment was paid on 7 February 2019 in the sum of US$59,990,461.30, in discharge of both the DIFC Judgment sum of US$56,999,978 (for Performance Fees, Management Fees and Interest as above), and the Court ordered simple interest at 9% pa that had accrued between July 2018 and February 2019 in the sum of US$2,990,483.30.

844. The three experts from whom the Court heard on the IM fees calculations at trial: Mr Griffin for the Walkers Defendants; Mr Hanson for D2-D4; and Mr Bullmore for the Plaintiffs all agreed in their Joint Memorandum that the IM's Performance Fee entitlement alone was

US$65,703,097 upon the exit of NNC260 and the Clark Asset exclusive of interest, assuming Clawback is not applicable.

845. Therefore, the sum actually paid to the IM was a considerable shortfall on this basis.

846. In addition, for the reasons given below the Court has decided that there should be no Clawback (see below).

847. It follows that D2-D4's calculations are right:

a) the amount owing to the IM in Performance Fees alone was c. US$5.7 million greater than the amount paid to settle both Performance Fees and Management Fees by the Wellspring Payment; and

b) the amount owing to the IM in Performance Fees alone was, in fact, c.US$18 million greater than the sum claimed in respect of Performance Fees in the DIFC Proceedings and later paid by the Wellspring Payment.

What is the IM's fee entitlement governed by?

Governing agreement - IMA

848. The IM's fee entitlement was governed by the IMA to which the IM was a party and not the LPA to which it was not a party. The doctrine of privity cannot be circumvented simply because common personnel worked for the GP and the IM.

849. The Plaintiffs allege that the IM had no entitlement to be paid a Management Fee after 1 January 2015 because the Fund terminated on 1 January 2015. This argument in the Court's view conflates the expiry of the Fund's term with its termination, the latter being an event that has not yet occurred, and which is relevant for the purposes of clause 5.1(b) of the IMA, which gives rise to the IM's entitlement to Management Fees.

[260] *proceeds from the NNC sale were received for purposes of clause 5.2(d) of the IMA on or about 16 August 2016. No Performance Fees were paid to the IM for the NNC exit in breach of the IMA.*

850. Management services continued to be provided beyond 31 December 2014. Indeed, such services were critical to the successful exits of NNC and the Clark Asset in 2016 and 2017 respectively.

851. Whilst the LPA is relevant background context in interpreting the IMA it does not govern the IM's fee entitlement.

852. The Court:

a) rejects the Plaintiffs' case based on clauses 2.1 to 2.3 of the IMA to import the terms of the LPA;

b) finds that those clauses mean that the IM should generally have regard to the terms of the LPA in its discharge of duties and powers as the IM;

c) rejects the suggestion that in the event of any inconsistency as to the terms for payment of the IM the terms of the LPA should prevail;[261]

d) finds that had the IM and the GP intended that the provisions of the LPA relating to the IM's fee entitlements would govern, there would be no need for the IMA to include detailed provisions addressing the IM's fee entitlements.

Management fees

853. Clause 5.1 of the IMA provided for the payment of Management Fees.262 It provides:

> *"5.1 In consideration of the provision of discretionary investment management services in accordance with this Agreement, the Investment Manager shall be entitled to receive, and the Fund shall pay the following management fees in USD to the Investment Manager (the "Management Fee"):*

[261] *Lewison on the Interpretation of Contracts (8th Ed) at § 9.100.*
[262] *In fact the equivalent provision, at Clause 3.7 of the LPA, is in materially identical terms using the phrase 'until termination of the Fund[partnership]'.*

i. from the Initial Closing Date until 31 December following the fifth Anniversary of the Initial Closing Date, an annual management fee equal to 2% of the Fund's aggregate Capital Commitments; and

(b) from 1 January following the fifth anniversary of the Initial Closing Date, until ***the termination of the Fund*** *for any subsequent period, an annual management fee equal to 1.5% of the Fund's aggregate Capital Commitments"; (emphasis added)*

854. The main area of dispute between the parties is the meaning of the phrase "*termination of the Fund".*

Termination of the Fund

855. The LPA itself refers to the termination of the Fund in Clause 9 ("*Termination, Dissolution, Liquidation*") as follows:

> *"…the Partnership shall not terminate until the assets of the Partnership have been distributed as provided in Clause 9.2 and a notice of dissolution has been signed by the General Partner and filed in accordance with the Partnership Law."* (Clause 9.1(b), LPA).

856. These events had not occurred by the time of the 7 July 2018 demand for payment of Management Fees (claimed to 14 November 2017) and the Performance Fee, or termination of the IMA for material breaches of non-payment of both.

857. The Fund has to date not been terminated. The Court has concluded that this will only occur once the assets of the Fund have been distributed and the notice of dissolution has been filed.

858. The effect of this is that, as the Court finds:

a) Management Fees were properly claimed by the IM for the period from 1 January 2015 to 14 November 2017 in the DIFC Proceedings; and

b) the IMA was validly terminated by the IM for material breach for non-payment of Management Fees, as they had been owing throughout that period, and had not been paid in breach of the terms of Clause 5.1 of the IMA, which required that *"the*

Management Fee shall be paid quarterly in advance, commencing on the Initial Closing Date and thereafter on the first day of each calendar quarter'

859. The Court rejects the Plaintiffs' interpretation that the termination of the Fund means the end of the term of the Fund which had ended on 31 December 2014.[263]

860. If the Plaintiffs were right in their interpretation:

a) no Management Fees could be charged at all from 31 December 2014 onwards and so those claimed in the DIFC proceedings for the period 1 January 2015 to 14 November 2017 were wrongly claimed;

b) there was consequently no material breach for non-payment; and

c) which meant that the termination of the IMA on that basis on 7 July 2018 by Clydes' letter was invalid.

861. The supporting factors as to why the Court finds that the Plaintiffs' interpretation is wrong are:

a) The terms of the LPA itself in Clause 9 quoted above "…*the Partnership shall not terminate until the assets of the Partnership have been distributed…and a notice of dissolution has been signed…and filed*,".

b) If it had been intended that Management Fees were only to be payable up to the "*end of the term of the Fund"* or "*up to two consecutive additional one-year periods*", the parties could have contracted in those or similar terms[264] and they did not do so. The Management Fees clauses do not expressly limit the Fee to the Term of the Fund (if that was intended), by either expressly limiting Management Fees to "*the end of the Term of the Fund,*" or with a cross-reference back to the Term Clause at clause 2.4 of the LPA.

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[263] *The Fund's original term as set out at Clause 2.4 of the LPA expired on the 31 December following the fifth anniversary of the Initial Closing Date (of 30 July 2007) i.e. 31 December 2012; The Fund resolved to extend the Fund's term under Clause 2.4: "at the discretion of the General Partner for up to two consecutive additional one-year periods from and after such date to permit orderly dissolution" viz. an extension to 31 December 2014.*

[264] *as was done in the Term clause itself, at Clause 2.4 of the LPA.*

c) Under Clause 12.1 of the IMA, the agreement continued "*for successive periods of twelve months*" after 15 July 2014. If it were the case that payment of the Management Fees was to cease as at 31 December 2014 once the term ended, the IM could be left in a position where it was liable for its ongoing overhead and administrative expenses (Clauses 5.3, 5.4 and 5.5(h) of the IMA), over many years without the ongoing source of regular income, (quarterly paid Management Fees), with no certainty as to whether or Performance Fees would be payable. This would not make commercial sense.

d) The use of the same phrase "*termination of the Fund*" in Clause 6.1 of the IMA (Clawback) supports the conclusion that the same phrase in clause 5.1 of the IMA has the same meaning, i.e. that "*termination of the Fund*" does not refer to the expiry of the term of the Fund, but was intended by the parties to refer to the time at which the Fund had been fully wound up and a notice of dissolution filed; and therefore Management Fees were payable until that point in time, pursuant to clause 5.1.

e) Clause 6.1 provides for clawback by the limited partners from the IM's Carry, if "*upon termination of the Fund*" they have "*received back less than their Capital Contributions employed in Fund Investments together with 8% per annum (compound interest) thereon*…".

f) Clause 6.1 does not make sense if "*termination of the Fund*" is taken to mean the expiry of the term of the Fund at 31 December 2014. That is because, at that time, prior to the winding up of the Funds' investments and the generation of sales proceeds for distribution, it would be unclear whether the limited partners would or would not receive back less than their Capital Contributions plus 8% compound interest.

g) Clause 6.1 does on the other hand make sense if "*termination of the Fund*" refers to the time at which the Fund is fully wound up, investments are disposed of, and a notice of dissolution has been filed. At that time, it would be clear whether or not the limited partners had received back less than their Capital Contributions plus 8% pa compound interest.

862. The Plaintiffs rely on the following additional matters:

a) neither of the 3 and 4 July 2018 emails from Walkers Dubai concluded that Management Fees were payable after 31 December 2014 on the basis of clause 5.1 of the IMA;

b) clause 5.1 does not refer to Management Fees being payable until the termination of the IMA;

c) the Term Clause, at clause 2.4 of the LPA, does not refer to Management Fees being payable beyond the Term of the Fund;

d) the 2007 and 2009 PPM's make no mention of Management Fees beyond the two one year option periods in which the Term could be extended; and

e) the notes to the Fund's 2015 and 2016 Accounts state that no Management Fees were charged or chargeable after the end of the Fund's term.

863. The Court is not persuaded that these matters affect its interpretation for the following reasons

a) The notes to the accounts and the views of the auditors are not of any assistance in interpreting the contract made.

b) The 2007 and 2009 PPM are subject to and qualified by reference to the LPA and IMA.[265] The PPM's do not reflect the full wording of the clauses, leaving out the important wording in both clause 3.7 of the LPA and clause 5.1 of the IMA: "…*until termination of the Fund [Partnership]*". The terms of the LPA and IMA should therefore prevail.

c) The fact that the Term clause at clause 2.4 of the LPA does not mention Management Fees is not relevant, given that it sets out the Term of the Fund and there is a separate later clause, clause 3.7 of the LPA, which deals expressly with Management Fees (and is in substantially the same terms in clause 5.1 of the IMA).

d) The Court accepts Mr Petith's explanation for the emails of 3 and 4 July 2018 [266]that

[265] *Important notices section on p.1.*
[266] *Petith 1 §216.*

Walkers Dubai did identify the correct interpretation[267], albeit as an "*alternative view"* which was in fact the correct one, on further reflection stating: *"I believe that the reason I reached a different view in July 2018 was due to the time pressure and a conflation between "termination" and "end of term*" .[268]

864. For completeness the Court finds that KGLI reassigned the Management Fees rights back to the IM by its letter of 21 January 2018 at the time of the sale of KGLI's shares in the IM to AAAML. The Court is not persuaded that the letter signed by Ms Lazareva is not valid. It expressly states that all its rights to Management Fees were being reassigned by KGLI to the IM which included the accrued rights to unpaid fees that were payable from 1 January 2015 onwards.

IM fees accounting expert evidence

865. In large part, the experts agree (and Walkers' expert, Mr Griffin, was not required to attend for cross-examination).

866. In particular, the IM fee experts agree that (subject to clawback and regardless of whether the IMA or LPA applies), the IM was entitled to Performance Fees of US$65,703,097.

867. The Court finds in relation to the two experts called to give oral evidence:

a) Mr Hanson, instructed on behalf of D2-D4, had more extensive direct experience and expertise in relation to Cayman investment funds and ELPs in particular.

b) Mr Bullmore (instructed by the Plaintiffs) fairly accepted that if accounting and industry practice were relevant, then the more actual ELP experience that an expert had and the more current it was, the more helpful that would be to the Court. [269]

[267] *Walkers Dubai did not conclude that Management Fees could not be charged by the IM after 31 December 2014. It ultimately concluded in its 4 July 2018 e-mail that they could do so in appropriate circumstances, but by virtue of Clause 3.1(b)(xii) of the LPA, rather than Clause 5.1 of the IMA. Clydes determined that clause 5.1 of the IMA did provide for Management Fees to be paid from 1 January 2015 to 14 November 2017 and that was the basis on which the DIFC claim was advanced.*

[268] *Walkers Dubai's earlier Memorandum dated 23 November 2014 had set out the correct position.*

[269] *Day26MT1/5:4-19.*

c) Mr Bullmore also fairly accepted that he did not take audit or any insolvency or restructuring appointments over ELPs and had not done any audit or insolvency work involving calculating distributions to LPs and carry to IMs.[270]

868. The Court as a result of this difference in specific expertise prefers the evidence of Mr Hanson to the extent that it differs from that given by Mr Bullmore.

Management fees - quantum

869. The experts' position is summarized in the Joint Memorandum at paragraph 6.3:

> *"6.3 Mr Bullmore was not instructed to consider or calculate Management Fees, on the basis that the quantum is a matter for legal submissions… Mr Bullmore does not opine on the calculation of Management Fees.*
>
> *Mr Griffin and Mr Hanson agree that if the Court determines that the Investment Manager is entitled to Management Fees from 1 January 2015 onwards:*
>
> *(a) The Investment Manager would be entitled to an amount of US$ 8,111,155 for the period 1 January 2015 to 14 November 2017;[271] and*
>
> *(b) The Investment Manager would be entitled to an amount of US$ 9,928,240 for the period 1 January 2015 to 7 July 2018."[272]*

870. The Court therefore determines that:

a) the correct end date for the Management Fees entitlement is 14 November 2017 (being the date of disposal of the Clark Asset);

b) the agreed quantum, according to the two experts who were instructed to consider the question, is US$ 8,111,155.

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[270] *Day26MT1/7:8-22.*
[271] *The amount claimed in the DIFC proceedings for the period 1 January 2015 to 14 November 2017 (completion of Clark asset exit).*
[272] *7 July 2018 being the termination of the IMA.*

871. That is a higher sum than the Management Fees (excluding interest) claimed in the DIFC Proceedings, of US$8,106,386.

Performance fees - quantum

872. The experts agreed that the Performance Fees were not properly quantified in the DIFC Claim.

873. The GP did not calculate catch up and carry in the way now agreed by the experts. The experts agreed that the Performance fees claimed in the DIFC proceedings were more than c. US$20m less than the Performance Fee agreed by the experts in the present proceedings, before any applicable clawback.

874. The Court agrees with D2-D4's calculations that the amount owing to the IM in Performance Fees alone was c. US$5.7 million greater than the amount paid to settle both Performance Fees and Management Fees by the Wellspring Payment.[273]

Legal interpretation

Performance fees

875. The Plaintiffs say that the IM was not entitled to a Performance Fee when the funds were frozen in the Noor Account, because distribution to creditors and LPs needed to happen first, per clause 4.3 of the LPA.

876. In the Court's view the payment of Performance Fees to the IM is governed by the IMA, in particular clauses 5.2 and clause 12 of the IMA, not the LPA.

877. Clause 5.2 of the IMA states:

> *"(a) The Net Profit (as defined in the Partnership Agreement) attributable to any exited Fund Investment shall be allocated among the Limited Partners as*

[273] *The experts agreed in their Joint Memorandum that the IM's Performance Fee entitlement alone was US$65,703,097, assuming clawback is not applicable.*

follows (subject to appropriate adjustments being made in the case of Defaulting Partners):

(i) 100% to all Limited Partners in proportion to their respective Capital Contributions employed in that Fund Investment, until such time that each Limited Partner receives an amount equal to its Capital Contribution employed in that particular Fund Investment; then

(ii) 100% to the Limited Partners in proportion to their respective Capital Contributions employed in that Fund Investment, until such time that each Limited Partner receives (pro rata on the basis of a 365 day year) a compounded 8% per annum return on its Capital Contribution employed in that particular Fund Investment; then

(iii) 100% to the Investment Manager, until such time that the Investment Manager receives 20% of the amount allocated to the Limited Partners pursuant to (ii) above; then

(iv) 80% to the Limited Partners in proportion to their respective Capital Contributions employed in that Fund Investment and 20% to the Investment Manager.

(b) Net Profit not attributable to exited Fund Investments shalt be allocated as to 80% to all Limited Partners in proportion to their respective capital contributions and 20% to the Investment Manager (subject to appropriate adjustments being made in the case of Defaulting Partners).

(c) Any Net Loss (which includes Realized Investment Losses) shall be allocated among the limited Partners in proportion to their respective Capital Contributions and then deducted from each Limited Partner's Capital Account (subject to appropriate adjustments being made in the case of Defaulting Partners).

(d) Distributions may be made to the Limited Partners in the General Partner's sole discretion. The General Partner will make distributions from the Fund Investments to the investment Manager and Limited Partners within 60 calendar days from receipt of the proceeds from each exited Fund Investment, in the following amounts and order of priority:

i) Return of capital: 100% to the Limited Partners in proportion to their respective Capital Contributions employed in that Fund Investment, until such time that each Limited Partner receives an amount equal to its Capital Contributions employed in that particular Fund Investment; then

ii) Preferred return: 100% to the Limited Partners in proportion to their respective Capital Contributions employed in that Fund Investment, until such time that each Limited Partner receives (pro rata on the basis of a 365 day year) a compounded 8% per annum return on its Capital Contribution employed in that particular Fund Investment; then

iii) Investment Manager Catch-up: 100% to the Investment Manager, until such time it receives 20% of the amount allocated to the Limited Partners pursuant to (ii) above; then

iv) 80% to the Limited Partners in proportion to their respective Capital Contributions employed in that Fund Investment and 20% to the Investment Manager (the "Carry").

Other Distributions (as defined in the Partnership Agreement) shall be made 80% to all Limited Partners In proportion to their respective Capital Contributions and 20% to the Investment Manager.

The payments made to the investment Manager above are collectively referred to as the 'Performance Fee'".

878. The Court finds that:

a) The IM is entitled to Performance Fees, comprising two elements, "catch up" (clause 5.2(a)(iii)) and "carry" (clause 5.2(a)(iv)), on an investment by investment basis, to be calculated having regard to the Capital Contributions employed in each Fund Investment.

b) Performance Fee entitlements are expressly calculated on an investment by investment basis (*i.e.* on the Net Profit earned on the total Capital Contributions actually invested in a particular investment) rather than on an aggregate basis (*i.e.* on the Net Profit

earned on the total Capital Contributions invested in the Fund or invested across all investments made by the Fund) under clause 5.2.

c) The 8% return referred to in clause 5.2(a)(ii) is calculated from the date (or dates) of the Fund employing Capital Contributions in the relevant Fund Investment (distinct from the date when the Capital Commitment is paid by an LP to the Fund). The end date is the date when each Fund Investment is exited.

d) Clause 5.2(b) concerns the allocation of "*Net Profit not attributable to exited Fund Investments*". There was no Net Profit not attributable to exited Fund Investments and so clause 5.2(b) was not engaged.

e) Clause 5.2(c) states that "[a]*ny Net Loss… shall be allocated among the Limited Partners in proportion to their respective Capital Contributions and then deducted from each Limited Partner's Capital Account…*" consistent with the nature of ELPs wherein LPs share in the profits and losses of the Fund, and liabilities and investment losses are met by the LPs.

f) Clause 5.4 states that the IM will not be responsible for any expenses of the Fund, including without limitation those listed in clauses 5.4 and 5.5, responsibility for which is borne by the Fund.

879. Clause 5.2(d) and Clause 12.5 of the IMA are replicated in materially identical terms at Clause 4.3(a)-(d), and Clause 4.3(k) of the LPA:

"12.5 of the IMA provides as follows

Subject to Section 7 [Reserve Account]*, upon termination of this Agreement the Investment Manager shall be entitled to receive immediately all fees and other moneys accrued but not yet paid on a pro rata basis up to the date of such termination as provided in this Agreement and shall repay on a pro rata basis fees and other moneys paid to it in respect of any period after the date of such termination. In addition to amounts payable under this clause, the Fund shall also pay immediately to the Investment Manager expenses referred to in this Agreement to the extent to which the Investment Manager is obliged to continue to make such payments for and on behalf of the Fund beyond the date of termination of this Agreement.* ***In addition to the amounts***

payable under this clause, the Fund shall also pay immediately a performance fee to the Investment Manager based on the accrued value of any Fund Investments which have not been disposed of (such value to be determined by an independent valuer being an independent international investment bank with the skills, reputation and experience to value such Fund Investments to be appointed by agreement between the Investment Manager and the General Partner, failing which the Auditor (as referred to in the Offering Memorandum) who shall make such appointment), to be calculated in accordance with the distribution methodology outlined in clause 5 ("Accrued Performance Fee"). **(with emphasis added)**

880. The Court finds that the meaning and effect of these provisions is:

a) once the IMA was validly terminated by the IM for material breach (for the non-payment of Carry and Management Fees), the IM became entitled to an Accrued Performance Fee, on the basis (set out in Clause 12.5 of the IMA);

There is an entitlement to:

b) payment of the Performance Fee where an asset had been disposed of and the proceeds had been received, and were available for distribution by the GP; and

c) payment of the Performance Fee where an asset had *not* been disposed of based on the accrued value of the asset.

881. In this case the Clark Asset had been disposed of but the proceeds had not been received because of the Noor Bank freeze.

882. In the Court's view Clause 12.5 and Clause 5.2(d) of the IMA establish that the intention of the parties to the IMA was that the IM should receive on termination of the IMA Performance Fees in situations a) and b) above.

883. The Court also finds that it would be unfair and uncommercial if an investment had been disposed of but the proceeds had not yet been received at the time of termination (as in this case), that the IM was not entitled to payment of a Performance Fee under the IMA (similarly calculated in accordance with the distribution methodology outlined in Clause 5).

884. The Court will imply a term to give effect to this outcome. It does so in accordance with the legal test for implication of terms where the Court may do so:

a) to ascertain the presumed intention of the parties to give the contract such efficacy as both parties must have intended; or

b) if necessary in the business sense to give efficacy to the contract; or

c) if such a term could be confidently said at the time the contract was being negotiated was one the parties would have agreed would apply in a certain event. If the parties were asked they would have replied: "*Of course, so and so will happen; we did not trouble to say that; it is too clear*."[274]

885. Whilst the Plaintiffs accept that Performance Fees were payable from 7 February 2019 after the Clark Asset Proceeds were unfrozen, they advance three main arguments as to why they say that no Performance Fees were owing or payable as at the time of the DIFC proceedings in July 2018.

886. The Plaintiffs say:

a) On the terms of 5.2 (d) of the IMA, the IM was not entitled to its Performance Fees in July 2018 before the LPs received their distributions (relying on "*in the following amounts and order of priority*");

b) On the terms of clause 5.2 (d) of the IMA, the IM was not entitled to be paid its Performance Fees because the proceeds from the exit of the Clark Asset were not released into the GP's bank account (relying on: "The General Partner will make distributions from the Fund Investments to the Investment Manager and Limited Partners within 60 calendar days from receipt of the proceeds");

c) On the terms of Clause 9 of the LPA providing for the process of dissolution at the end of the Fund's term, the IM was not entitled to be paid Performance Fees because it had not completed the steps required to be undertaken by Clause 9 (which they say are

[274] *Per Lord Neuberger in Marks & Spencer v. BNP Paribas [2016] AC 742 at §§14-21.*

liquidation of TPF's assets, and then allocation of stakeholders' entitlements in the liquidated assets).

887. The Court rejects these contentions.

888. The Court finds that priority refers to the order to be adopted in allocating the sums to be distributed, without affecting the entitlements in the waterfall if the sums have been properly allocated in order of priority.

889. In the Court's view it would be unfair and uncommercial to accept the Plaintiffs' interpretation which would mean that actual payments had to be made in accordance with the priority order in the waterfall and that no later entitlement in the waterfall would even arise until the earlier entitlements have been actually paid.

890. The Court has found on the balance of probabilities that the Clark Asset Proceeds were received for the purposes of clause 5.2(d) of the IMA into the GP's bank account at Noor Bank on or around 14 November 2017 and transferred from the GPs account into a suspense account.

891. As to Clause 9 the Court finds:

a) the IM's entitlement to Performance Fees arises under clause 5.2 of the IMA (on receipt of the Clark Asset Proceeds) and/or clause 12.5 (on termination as an express or implied Accrued Performance Fee). Neither of those clauses are expressed to be affected by clause 9 of the LPA;

b) Clause 9 is not replicated in the IMA in respect of the fee clauses. The IMA does otherwise contain drafting seeking to align the two agreements;

c) Clause 9 does not provide for the IM's entitlement to Performance Fees generally (unlike clause 5 IMA), or its entitlement to Accrued Performance Fee on termination of the IMA (unlike clause 12.5 IMA);

d) the Plaintiffs' expert Mr Bullmore has proceeded on the basis that, even where the Fund is in dissolution in accordance with the process set out in Clause 9, it does not impact

the calculation of and entitlement to Performance Fees;[275] and

e) it would not have made commercial sense to delay any distributions, including of Performance Fees to the IM, when an investment was exited. If the Plaintiffs' analysis was correct it would preclude any distributions prior to the final return of capital to the LPs, because clause 4.3(f) of the LPA contemplates the aggregate return of capital plus 8% on total commitments (not just commitments in Fund Investments). If the Plaintiffs' analysis was right, the IM could only ever be paid after the final return to Limited Partners (which may be years after the termination of the IMA). That would be unfair and uncommercial.

892. The Plaintiffs contend that the IM continued to be bound by clause 4.3 of the LPA even though the IMA had been terminated. This is inconsistent with the assertion that the LPA governs the position rather than the IMA.

893. It would not make sense that the IM could:

a) validly terminate (the premise upon which this argument falls to be considered) the IMA, which is the contract which governed its appointment and which contains an express survival clause that does not extend to either the clauses requiring it to comply with the LPA (clauses 2.1 and 2.2) or the clawback provision in the IMA itself (clause 6.1); and yet

b) find itself continuing to be bound by a provision (clause 4.3) in a contract (the LPA) to which it was not a party and in respect of which any obligation it had to comply with came to an end upon termination of the IMA. The survival clause in the IMA (clause 12.7) applies.

894. Although the Fund entered dissolution on 31 December 2014, the Plaintiffs were aware that the marketing of the Clark Asset would continue beyond the end of the dissolution process as provided for in clause 9.3 (31 December 2016) and wished to receive distributions from sales proceeds generated by a sale of the Clark Asset (cf. as would have been required by clause 9.3,

[275] *Bullmore 1 at §20 and Joint Report at §4.2.*

being paid out shortly after 31 December 2016 based on a "*fair value*" determination by the GP of any undisposed assets such as the Clark Asset).[276]

895. The Plaintiffs agreed and/or acquiesced in Clause 9's terms not being adhered to from 31 December 2016 onwards.

896. The sale price of US$655 million achieved for the Clark Asset was considerably in excess of the valuations the Fund had of the Clark Asset at the end of 2016.

897. The Plaintiffs did not assert that Clause 9 was not being adhered to until shortly before trial perhaps to meet the argument that the IM was entitled to its Performance Fees having successfully sold the Clark Asset.

Expert evidence

898. The experts have agreed that the Performance Fee (before any applicable clawback) is in the sum of US$65,703,097.[277]

Clawback

899. The Court has decided that on the terms of both the LPA and the IMA, clawback is not engaged on the facts of this case for the following reasons:

a) The identical contractual 'trigger' in both the IMA clawback clause and the LPA clawback clause ("the termination" of the Fund), had not occurred at the time of the termination of the IMA on 7 July 2018, such that it was not an accrued right which survived the IMA's termination (clause 12.7 of the IMA) and termination of the Fund, as required by both the IMA and LPA clawback clauses, has still not occurred.

b) Clause 12.7 of the IMA provides that: *"The termination of this Agreement shall be without prejudice to accrued rights and liabilities and any provisions expressed to survive the termination hereof. The liability and indemnity provisions herein shall survive the termination of this Agreement."*

[276] *Quarterly Performance Update Q3 2016 and TPF letter to PIFSS dated 10 January 2017 both of which advised that the sale process for GGDC would continue into 2017.*
[277] *This is US$20,241,097 more than claimed in the DIFC proceedings.*

c) Clawback was not an accrued right as at 7 July 2018 when the IMA was terminated as the contractual trigger of the Fund's termination had not occurred.

d) The IMA clawback clause at Clause 6.1 was also not "*expressed to survive termination*" of the IMA (unlike e.g., the confidentiality clause at Clause 13 of the IMA, and the liability and indemnity provisions, as expressly stated in clause 12.7 of the IMA itself).

900. The two clawback clauses are at Clause 6 of the IMA, and (Clause 4.3(f) of the LPA). The two clauses contain materially different wording:

> *"IMA*
>
> ***6.1*** *If, upon termination of the Fund, Limited Partners have received back less than their Capital Contributions* ***employed in Fund Investments*** *together with 8% per annum (compound interest) thereon as calculated from the date of each drawdown by the General Partner to the date such sums are returned to such Limited Partners, then the Investment Manager will rebate to them, out of the Carry that it has received (but not otherwise) the lesser of: (a) the sum(s) of the Carry received by it; and (b) such amount that would return to each Limited Partner the aggregate of the Capital Contributions plus 8% per annum (compounded interest) thereon from the date of drawdown to the date such sums are returned."* [emphasis added, not included in the LPA Clawback Clause].

LPA

901. The relevant clause 4.3 (f) does not have the additional words '*employed in Fund investments*" after Capital Contributions.

902. Had the Court decided that Clawback applied the experts agree that the LPA wording leads to a higher starting figure than the IMA wording.

903. Under the IMA wording, the experts are agreed that on the facts of this case there would be no clawback: see §5.6 of the Joint Memorandum.

904. Under the LPA wording, the experts agree that there would be clawback, but the extent of it varies widely on the experts' agreed calculations, depending on the various inputs adopted.

905. Contrary to its finding, if the Fund had terminated and clawback had applied, the Court would have found there would in any event be no clawback, based on the experts' agreed position under the IMA wording which prevails over the LPA wording.

906. The Court finds that absent clawback, there is no loss and damage to the Fund because the IM's Performance Fee entitlement was US$20,241,097 more than was paid for the IM's Performance Fees. It follows that the IM was underpaid, not overpaid.

Summary of decision in respect of the IM entitlement.

907. As a result of the DIFC Proceedings the IM was paid less than it was entitled to:

a) when the monies were paid to and received at Noor Bank, they were "received" by the GP within the meaning of the IMA and LPA

b) whether applying the IMA or the LPA the true sum due to the IM was US$65,703,097

i. as between the IM and the GP, the governing document is the IMA.

ii. under the IMA clawback does not apply. In any case the clawback provisions did not survive termination of the IMA.

iii. There is a shortfall between what was paid to the IM and its true entitlement in the sum of US$20,241,097.[278]

D2-D4 cross claim for the IM underpayment

908. The crossclaim for IM underpayment is brought by Wellspring, as assignee of the IM's rights.

[278] *The experts agree that the total Carry was US$50,606,304. US$45,462,000, was claimed in relation to Carry in the DIFC Proceedings. This leaves a shortfall in respect of Carry of US$5,144,304.*
The experts agree that the total Catch-Up was US$15,096,793. There was no claim for Catch-Up in the DIFC Proceedings. The shortfall in relation to Catch-Up is US$15,096,793.

909. On 15 April 2021, Mr Ayliffe, AAAML and Wellspring entered into an Irrevocable Assignment Agreement (IAA) pursuant to which AAAML agreed irrevocably to transfer, convey and assign all rights, title, interests and benefits in the Undistributed Assets to Wellspring.

910. D2-D4 rely on the correspondence between the parties and the submissions of Mr McCourt Fritz KC in the course of the privilege summons that the IAA divested the IM of *"everything that it still had. That's obvious. No one suggests otherwise. No one could realistically suggest otherwise"*. However, there are in the Court's view still factual issues which would need further exploration before it could express a view on the validity of the assignment.

911. Mr Ayliffe said in evidence:

a) that he first found out about Wellspring when he was asked to sign the document, and that he was not aware that Wellspring was controlled by Mr Williams when he signed it;[279]

b) Mr Williams suggested that the IM assign its rights to Wellspring, initially claiming that he could not remember why;[280]

c) that he discussed the purpose of the IAA with Mr Williams, and that he understood that it was just a "*belt and braces*" way of ensuring that the IM had no further rights to what Mr Ayliffe understood had already been assigned before AAAML purchased the IM;[281]

d) contrary to the recital in the IAA, Mr Ayliffe (as voluntary liquidator) may not in fact have believed that the IM had any undistributed assets at that stage; and

e) that he signed a document that was put in front of him by Mr Williams without paying attention to its contents.[282]

912. The evidence suggests that Mr Ayliffe did not turn his mind to whether the IM had any actual or potential creditors before signing the IAA at Mr Williams' request. This may give rise to arguments that he was in breach of his duties as voluntary liquidator to consider the Company's solvency and take any appropriate steps arising from that.

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[279] *Day20MT1/124:7-16.*
[280] *Day20MT1/125:2-11.*
[281] *Day20MT1/129:15 - Day20MT1/130:5.*
[282] *Day20MT1/131:5 - Day20MT1/132:12.*

913. The Court does not need to further address that issue because the Plaintiffs have persuaded it that there is no good claim by D2-D4 for the underpayment on a number of other bases:

a) The IM's entitlements to Carry and Management Fees were subject to a full and final judgment in the form of the DIFC Judgment (which was eventually discharged by the Wellspring Payment). The legal consequence is that the IM's entitlements were merged into the DIFC Judgment and cannot be re-opened.[283]

b) The doctrines of *res judicata*, issue estoppel and *Henderson* abuse would also produce the same result and would have prevented the IM (and now prevents Wellspring) from suing the GP/the Fund again in respect of allegedly unpaid Management Fees and Performance Fee.

c) The IM was itself dissolved on 22 June 2020. In the circumstances, no further sums in respect of Performance Fees and Management Fees did accrue or could have accrued to the IM's benefit.

d) Even if the IM had not been dissolved, it terminated the IMA on 7 July 2018 and ceased to act as the Fund's Investment Manager from that date. In addition, the IM relied on the terms of the IMA to calculate its final entitlements under the IMA as the basis for the quantum of its claim in the DIFC Proceedings. There is no good basis for contending that any sums could have continued to accrue to the IM under the IMA and/or LPA.

e) The GP would have needed to consent to an assignment of the IM's rights under the IMA pursuant to clause 16(1) of that agreement. There is no evidence that it did so.

914. It follows that D2-D4's cross claim against the GP for the underpayment fails.

Apache fees

915. The Court has set out its findings in relation to Mr Ayliffe's evidence above.

916. The Plaintiffs say that the fees paid to Apache were above market rate, and so the portion of the fees paid above that rate was in breach of the GP's fiduciary duties to the LPs.

[283] *Colerio v De Luca [2004-05 CILR 115] at §15.*

917. The Plaintiffs' burden in proving this is both additional to and separate from the kickback allegations.

918. To support the kickback allegations the Plaintiffs sought to prove the Apache fees were improperly inflated and so unreasonable that no reasonable General Partner could have agreed to them. As a consequence, the Court was presented with expert evidence in relation to the fees charged by Apache.

919. The Court heard evidence from four experts on the reasonableness of the Apache fees: Mr Webster, instructed by the Plaintiffs; Mr Webb by D2-D4; Mr Farrell by Walkers; and Ms Murray by the Receivers. All four experts called were in the Court's view qualified to and did give helpful evidence and assistance to the Court.

Market rate

920. The key question is whether the fees agreed were reasonable when viewed objectively. That does not mean that they were the lowest fees that could have been negotiated with the cheapest service provider that could have been found who was willing to take the mandates, but rather that they were fees that could reasonably have been negotiated between well informed and rational counterparties in the particular circumstances which prevailed at the time.

Mr Webster

921. Mr Webster had undoubted relevant expertise and experience, but he found himself in the minority of experts (the only one) who expressed views on the reasonableness of the fees which differed materially from the others. At times this exposed him to some uncomfortable cross examination where his evidence became unconvincing and a little argumentative and defensive.

Datasets

922. The Court has concluded that the weight placed by him on the available datasets and on the statistics which should be derived from them is not justified.

923. The defects in his datasets were that they:

a) excluded transactions that did not complete;

b) did not include private transactions that were not reported; and

c) failed to identify retainers and whether any such retainers were rebatable out of the success fees.

924. These factors could have had a significant effect on the relative returns of other market transactions by comparison with a transaction where the fee was contingent and the risk of non-completion was significant.

925. It is also relevant in this context to note that the evidence of Mr Farrell was to the effect that most of those advisers who might have been considered suitable for the engagement would not have been permitted to take it on for compliance reasons.[284] The Court accepts his view.

926. Having assessed the totality of the expert evidence given, both written and oral, the Court has concluded with regard to the expert evidence of Mr Webster:

a) his evidence alone records views which do not accord with Messrs Webb and Farrell and indeed Ms Murray on the central issues, all of whom have broadly consistent opinions;

b) whilst endeavouring to assist the Court Mr Webster was sometimes unwilling to make concessions and stuck to his opinion;[285]

c) where Mr Webster's views differed from those of the other three experts who were broadly consistent, the evidence of the other three is to be preferred.

The Court notes that Mr Webster:

a) did agree that the fifth Apache engagement was within market rates.[286]

[284] *Day30MT1/168:23 and Day30MT1/201:19.*
[285] *The three experts other than Mr Webster agreed that all of the Apache mandates were within the bounds of applicable market rates at the relevant times.*
[286] *Mr Webster was asked what he meant in §15.11 of his report when he said "at least" four of the five engagements were above market rates given he had agreed that the fifth was in fact within market rates. He accepted that this was a fair question to ask as he had in fact agreed that the fifth was within market norms Day27MT1/8:16.*

b) did accept that the NNC financing and the GGDC financing mandates were within (or potentially within) market rates for the original sums sought to be raised when they were agreed, but that he would have expected a renegotiation at later stages when more money was raised.

927. With respect to this latter point, it is relevant to note that the Fund had no legal right to demand such a renegotiation.

928. Mr Webster accepted that in an example in which BDA achieved a much higher sale price than anticipated by a client, the client did not try to renegotiate, so he did not maintain that a renegotiation would always happen.[287]

929. Mr Webster seemed to accept when questioned by Mr Ayliffe that he may have used the wrong comparator figure when looking at the NNC exit fee, and that when one took value into account in fact the NNC exit fee may also have been within market rates.

930. He agreed at least with the hypothetical mathematical calculation put to him by Mr Ayliffe, although he did not accept that his analysis was wrong or that the fee percentage on the NNC Engagement was 3.9%.

931. The Court found that on occasion Mr Webster appeared to be too rigid in his views. The following instances illustrate this:

a) the evidence concerning the Firmex email;[288]

b) his challenge to Mr Webb's reliance on data;[289]

c) his reluctance to accept Apache was a suitable adviser even though that had been agreed in the joint report;[290]

[287] *Day28MT1/134:23-24.*
[288] *Day28MT1/5:19; Day28MT1/7:24; Day28MT1/10:19.*
[289] *Day28MT1/9:22, Day28MT1/10:3.*
[290] *Day27MT1/6:15, Day27MT1/7:2.*

d) his reluctance to agree with the proposition that there was a direct correlation between risk and failure rates. He answered that a riskier deal might command a higher fee, but that this should only make a marginal difference.[291]

Ms Murray

932. The Plaintiffs trenchantly criticised Ms Murray's evidence in a number of respects.

933. The Court disagrees with the Plaintiffs' submissions that it should reject her views because she:

a) did not have the relevant experience and expertise necessary for her evidence to be of assistance to the Court;

b) is effectively a professional expert (and was previously instructed by the FFP Directors in 2021);

c) assumed the role of advocate and provided opinions outside her expertise without making it clear that she was doing so and gave opinions unsupported by her own evidence;

d) was evasive when asked questions that she did not wish to answer, frequently giving ambiguous answers; claiming that she could not recall facts or stating that she was not comfortable expressing opinions that should have been well within her expertise;

e) did not comply with the duties and responsibilities that the role of independent expert entails; and

f) did not really assess the market value at all but was just trying to find the top end of the observable fee in the market without formulating an appropriate range.

To the contrary, the Court found her to be a helpful witness and the Court does not accept the Plaintiffs' characterisations of her, or her evidence.

[291] *Day27MT1/107:23.*

934. The Plaintiffs also pointed out that her evidence was previously rejected by this and a US Court in two other cases. In this Court's view, whilst it has taken note of those two decisions, they do not undermine her credibility in this case.

935. The main issue with her evidence was as to specific experience. She had no experience of working in M&A or financing transactions in Asia. Her professional background was in US distressed debt markets, as she made clear. That did not disqualify her in the Court's view from expressing an opinion from her deal and finance experience even though none of it was obtained on M&A or financing transactions in Asia which were outside her own experience. The Court still found her views useful and adjusted the weight it gave to her views depending on the importance of her lack of specific experience.

Mr Farrell

936. The Plaintiffs also strongly criticised Mr Farrell's evidence, whilst accepting that he had considerable experience of working in Asia, on the basis that he:

a) did not fully appreciate the duties that the role imposes[292];

b) acted as an advocate for the parties instructing him rather than an independent expert;

c) made partisan comments as to the facts;

d) was often defensive and/or evasive;

e) did not refer to any data regarding financing transactions and made last-minute changes in the errata to his report that changed the features and relevance of transactions on which he claimed to have worked on during his career about which he was unable to disclose specific details.

937. The criticisms of his evidence are in the Court's view either misplaced or exaggerated.

938. The Court disagrees with the Plaintiffs that it should treat his opinions with a high degree of caution and give them no weight where they are unsupported by relevant data or experience.

[292] *Perhaps because he had not acted as an expert witness before.*

GGDC fee

939. The Court also disagrees that he did not give an unbiased and objective opinion on the 7% GGDC sale fee.

940. The Court appreciates that:

a) the GGDC Sale Engagement resulted in a fee payable to Apache of US$45.85m[293], by far the largest single fee paid to Apache; and

b) Mr Webster's opinion is that the GGDC sale fee was many multiples above the market range for deals of this size.[294]

Nevertheless, it prefers the evidence of Messrs Farrell and Webb on this issue.

941. Mr Webb said he thought long and hard about it, but concluded that the fee under the GGDC Sale Engagement was reasonable, despite the fact that he had not seen a fee of 7% charged on a transaction of the magnitude of the GGDC Sale Engagement before.

942. Mr Farrell referred to three transactions that were within his professional experience:

a) Vietnam

The circumstances in relation to the Vietnamese transaction were that it took place during a period of economic uncertainty in Vietnam, where foreign-ownership restrictions, protracted regulatory approval processes and a narrow universe of qualified potential acquirors increased execution risk.

b) Mongolia

The circumstances in relation to the Mongolian transaction were that it took place in a challenging regulatory environment, with shifting policy settings, constrained local financing capacity and significant uncertainty on government approvals

[293] *7% fee on a transaction value of US$655m.*

[294] *His view is that the market range for this transaction was 0.5%-1.5%*

c) China

The exceptional circumstances in relation to the Chinese real estate mandate were that it was shaped by foreign-ownership restrictions, complex land-title and licensing requirements, and a small universe of credible potential acquirors.

943. The Plaintiffs point out that the Vietnamese transaction resulted in a fee of approximately 4% of the enterprise value of those shares, which was US$300m.

944. The Mongolian transaction resulted in a fee of 3% on an enterprise value of US$460m.

945. The Chinese real estate transaction resulted in a fee of 3% on an enterprise value of US$110m.

946. The Plaintiffs say none of them achieved a fee close to 7% and the deal sizes were considerably smaller than the GGDC Sale.

947. That may be so, but does not in the Court's view render the 7% fee negotiated by Apache artificially inflated or beyond an amount which was justifiable in all the circumstances of the GGDC deal.

948. Mr Farrell notes that each of these transactions generated fee outcomes that exceed those found in conventional data sets, and said that:

"*the Clark Asset Sale exhibited an analogous combination of elevated risks, disputes, regulatory uncertainty and a limited acquiror universe.*"

949. The Court accepts his evidence on this and that a range of particular exceptional circumstances may justify fees above conventional data sets.

950. The Court accepts the views that Mr Farrell provided and does not, as the Plaintiffs submit, give no weight to his evidence on the GGDC Sale Engagement or treat the balance of his evidence with caution.

951. Having carefully considered his evidence and data, the Court rejects Mr Webster's evidence that a fee of 7% on the GGDC Sale Engagement was many times above the market range, and that the market range fee for such a transaction was 0.5%-1.5%.

Mr Webb

952. The Plaintiffs accepted that Mr Webb had substantial experience in relation to mining and natural resource deals, but pointed out that this did not compare to Mr Webster's experience of M&A transactions in Asia.

953. The Court found Mr Webb to be an impressive witness who was of assistance on key issues.

954. The Court does not agree, as the Plaintiffs maintained, that the data sets he relied on were of limited or no assistance, because he accepted:

a) that the Divestopedia/Firmex survey needs to be "*treated with some caution*";[295]

b) that the SDC Platinum financing data was limited to senior debt[296] and so "*has very little relevance to how more junior debt fees would be structured*"[297]*;*

c) that his attempt to compare the financing fees to equity raises was included "*for completeness*" rather than because they are of any direct relevance[298]; and

d) that the SDC Platinum M&A data "*doesn't actually help us very much other than establishing one end of one side of the tramline.*"[299]

955. The Court does not agree that these views render his data sets of limited or no assistance, rather that he fairly accepted their limitations. In the Court's assessment Mr Webb was fair and cautious in his views.

956. The Court will now deal with some specific issues raised by the expert evidence.

Particular circumstances of mandates

[295] *Day30MT1/55:19-20.*
[296] *Day30MT1/57:9 - Day30MT1/58:3.*
[297] *Day30MT1/58:25 - Day30MT1/59:13; Day30MT1/59:20 - Day30MT1/61:2.*
[298] *Day30MT1/63:17- Day30MT1/64:3.*
[299] *Day30MT1/46:7-14.*

957. The exceptional circumstances which prevailed, particularly for the Negros Sale Engagement and the GGDC Sale Engagement, were the main rationale upon which Mr Webb and Mr Farrell (and Ms Murray to a lesser extent) [300] justified the fees paid under both sale engagements.

958. By contrast Mr Webster's view is that the circumstances of the sale engagements did not justify such high fees. Mr Webster's datasets for M&A transactions support fees of less than 1% for deals of this size.

959. Mr Webster's view is that data sets are just as likely to exclude unusually low fees as unusually high fees, and so the data sets "*still provide a centered point of reference"* and, therefore remain a useful benchmarking tool.

960. The Court prefers Mr Webb and Mr Farrell's evidence that private deals with high fee percentages are likely to have been excluded from the data sets (Mr Webb agreeing with Mr Webster that lower fees are also likely to be excluded)[301].

961. Mr Webster also said that, particularly for data gathered from transactions in emerging markets, exceptional circumstances will have already been priced into the fee because they are often complex.

962. That may be so, but what to take from this would depend on the utility of the data sets. They can be an important starting point and cross check especially if there is data in relation to the specific region and type of transaction.

963. The Court notes that the SDC Platinum data revealed that, out of 29,545 deals with a value of US$100m or more, only 19 had a fee of greater than or equal to 5%.

964. Mr Webb fairly accepted that, on this basis, a fee of 5% or more for a US$100m transaction "*is indeed an outlier*" but maintained that "*this data set doesn't actually help us very much other than establishing one side of the tramline.*"[302]

965. The Court agrees.

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[300] *she thought 5-7% are within the range of fees observable in the market for these kinds of deals.*
[301] *Day30MT1/47:3-14.*
[302] *Day30MT1/46:7-14.*

966. The Court also acknowledges that:

a) Mr Webb had never himself seen a fee of 7% on a transaction value of US$655m; and

b) transacting in Asia Pacific, as Mr Webster says, is frequently likely to involve complexities which can be considered exceptional circumstances, but it does not follow that they are priced into the data sets he produced.

967. However, Mr Webster gave, in the Court's view, insufficient weight to both the complexity of the transactions and the risk that the fee would not be earned at all.

968. The Court is of the view that the huge difficulties of obtaining funding and a good commercial exit against the challenges which were present in each engagement made these super high risk mandates.

969. The Fund was in a somewhat unique situation where an adviser (if they were prepared to take the mandates on) could reasonably have sought a significant risk premium.

970. The Court is satisfied on the factual evidence as a whole and on the expert evidence that the circumstances were sufficiently exceptional to justify the fees charged. They were in the Court's view within the range of reasonableness in all the circumstances.

Related parties

971. The Court accepts:

a) Ms Murray's evidence that two related parties could agree to do business on terms consistent with arm's length deals; and

b) Mr Farrell's evidence that 'side arrangements' were one of a number of points as to whether transactions were commercially reasonable and that they would not have made a huge amount of difference.[303]

Retainers

[303] *Day29MT1/25:2, Day29MT1/27:7, Day29MT1/26:4, Day29MT1/26:4.*

972. Mr Ayliffe claims, although he cannot produce supporting documentation, that Apache was paid a retainer of US$70,000 a month between January 2013 and September 2015 pursuant to an agreement between Apache and KGLI. The Court has accepted his evidence that this was more like a loan than a retainer.

973. The Plaintiffs do not accept that any such agreement ever existed but say if such an arrangement was in place that it would fundamentally change the risk profile of the engagements for Apache, particularly given that each of the relevant Apache engagements were entered into at a time when Apache was apparently receiving the monthly retainer.[304]

974. The Court disagrees. Having a guaranteed income would have been of material assistance to Apache, particularly during the period 2013-2015, but is not a reason for concluding that the Apache Fees fundamentally changed the risk profile or were inflated above market norms.

975. The Courts also accepts Ms Murray's view that:

a) working without a retainer represented more risk for the adviser because the client did not have 'skin in the game'; and

b) the existence or absence of a retainer can be a material factor on the market rate for an engagement[305]. She agreed that if Apache was being paid US$70,000 a month (in addition to the US$15,000 a month that it was being paid for the duration of the Negros Sale Engagement) that would have been a material sum by way of retainer,[306] but she refused to accept that this impacted her overall analysis[307].

976. She also noted that the US$70,000 retainer paid to Apache was paid by KGLI not the Fund which represented more of a risk for the adviser as the client was not financially committed.

977. As to the latter point, the Court has in any case accepted Mr Ayliffe's evidence that this was more like a loan rather than a retainer, as it was recoverable so long as Apache received any success fees from any other engagement or client. It was not a retainer linked to any specific engagement or designed to mitigate the risks of any such engagement.[308]

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[304] *Negros Financing Engagement, 12 February 2013; GGDC Financing Engagement, 9 April 2013; Negros Sale Engagement, 30 September 2014 (after which point the monthly amount apparently increased to a total of $85,000); GGDC Sale Engagement, 17 April 2015*
[305] *Day29MT1/32:20-23 and Day29MT1/34:1-3.*
[306] *Day29MT1/33:23 - Day29MT1/34:3.*
[307] *Day29MT1/35:6-10.*
[308] *§§33 and 34 Ayliffe supplemental.*

978. The Court notes that assuming a retainer was paid Mr Farrell's view[309] was that:

a) the NNC sale retainer was not sufficiently material to change his recommendation of whether the transaction was reasonable;

b) a US$70,000 a month retainer was not necessarily material because it depended on the form of the retainer or loan and the costs associated with the mandate; and

c) a retainer that had to be repaid regardless of outcome would place more contingent risk on a mandate.

979. The Court also accepts Mr Webb's evidence that:[310]

a) retainers were a consideration on fees at the margins and US$15,000 did not represent an above average retainer in his experience and was not a large retainer for complex transactions;

b) a US$70,000 a month retainer would be "*certainly a consideration*" when working out the appropriate success fee percentage[311] and was "*large in quantum*";[312]

c) the size of Apache was not relevant to retainer size, and a retainer may be intended to cover costs and defray opportunity cost;[313]

d) his own retainers were US$75,000 per month for him and a junior or US$125,000 per month for a team;

e) the Apache fees were reasonable in the context of the unwillingness of other advisers to assist and Mr Ayliffe's capacity;

f) he personally would not have been allowed by his employer to work on these transactions; and

[309] *Day31MT1/9:4, Day31MT1/11:12, Day31MT1/13:1.*
[310] *Day30MT1/13:20, Day30MT1/14:16, Day30MT1/14:22, Day30MT1/53:7.*
[311] *Day30MT1/12:25 - Day30MT1/13:22; Day30MT1/14:19-22.*
[312] *Albeit he then qualified this by saying that, in his experience at Rothschild he worked with larger retainers: Day30MT1/14:22- Day30MT1/15:4.*
[313] *Day30MT1/17:9- Day30MT1/18:3.*

g) only someone who had left the big banks would be able to dedicate this much time to a project.[314]

Beauty parades and who was available to take the mandates

980. The Court accepts Ms Murray's views[315] that:

a) beauty parades sometimes occurred, but often did not;

b) the way an adviser gets mandates for repeat clients without beauty parades was by doing a good job and working well with the client;

c) an individual banker who leaves a large firm could still be the person the client wants to work with and could earn a high rate;

d) track record for the client was the most important thing, and network was important if matched by standing in the market, as well as trustworthiness; and

e) sector knowledge might be less important if you had confidence the person could master that sector and get the deal done.

981. The Court accepts the evidence of Ms Murray, Messrs Webb and Farrell[316] that the most important factors with regard to the attributes of advisers were:

a) confidence they would get the deal done;

b) interpersonal skills;

c) knowledge, experience and trust; and

d) tenacity.

[314] *Day30MT1/78:5.*
[315] *Day29MT1/53:17, Day29MT1/57:20, Day29MT1/61:17, Day29MT1/65:14, Day29MT1/65:4.*
[316] *Day29MT1/20:1, Day29MT1/21:4, Day30MT1/16:23, Day31MT1/7:5.*

982. It was no doubt important to the Fund to retain an adviser who knew the business, in whom they (and the GP) had confidence and whose track record they knew. Mr Ayliffe and Apache obviously fitted the bill.

983. Finally, Mr Webster fairly accepted that in order to persuade the Court that Apache's fees were too high one would need to show that there were other advisers prepared to do it for less.[317]

984. Mr Farrell's evidence was to the effect that most of those who might have been considered suitable for the engagement would not have been permitted to take it on for compliance reasons.[318] The Court accepts this evidence.

985. The Court is not persuaded on all the evidence that other suitable advisers would have been prepared to take on the mandates.

Inverse relationship between fee percentage and deal size

986. There appeared to be agreement between the experts that, as a general rule, fee percentage tends to decrease as deal size increases.[319] This would seem logical.

987. Mr Webster, Mr Webb and Mr Farrell were in agreement on this general principle,[320] although Mr Webb and Mr Farrell emphasised that the fee percentage for any individual deal can vary depending on the specific circumstances.[321]

988. Ms Murray was the outlier on this and the Court prefers the evidence of the other three experts on this issue.

'Cliff edge' fee ratchets

989. The Joint Memorandum records that, where a success fee structure includes a fee ratchet:

> "*the higher fee percentage more normally applies to incremental sales value rather than to the entire sales value*".

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[317] *Day27MT1/90:8-18.*
[318] *Day30MT1/168:23 and Day30MT1/201:19.*
[319] *Joint Memorandum, issue 5.3.*
[320] *Day30MT1/157:4-9, Day31MT1/46:5-11.*
[321] *Joint Memorandum, issue 5.3.*

990. As to the prevalence of 'cliff edge' ratchets (where the higher percentage is applied to the full sales value) the views of the experts were mixed:

a) Ms Murray had not seen a cliff edge fee ratchet in practice.[322]

b) Mr Webb said that whilst he had "*got away with*" a cliff edge ratchet "*on a number of occasions*", he could not recall a private equity firm ever having agreed to give him such a fee.[323] He also confirmed that fee ratchets of this nature were "*increasingly rare*".[324]

c) Mr Webster's written evidence was that fee ratchets of this nature are very rare, and that he has never seen one agreed to by a private equity client.

d) Mr Farrell said that he only agreed to the statement in the Joint Memorandum "*at a very high level*", and that he had seen cliff-edge structures "*many times*" to the point where he "*wouldn't agree that it's unusual*".[325]

991. Notwithstanding Mr Farrell's view, the Court takes from this evidence that these structures are rare.

992. Clearly the prevailing contemporaneous circumstances and market in which the structures were agreed and the particular features of the relationships and requirements of the parties needs to be taken into account when assessing the reasonableness of such structures.

Relationship-based pricing

993. The expert opinions were also mixed on this issue.

994. In Mr Webster's opinion, where there is a longstanding relationship between client and financial adviser and no beauty parade (i.e. no competitive tendering process), the commercial norm is to have discounted or relationship-based pricing. This conclusion is supported to some extent

[322] *Joint Memorandum issue 4.9 and footnote 2; Day29MT1/132:1-1.*
[323] *Day30MT1/104:6-11.*
[324] *Day30MT1/104:6 - Day30MT1/105:2.*
[325] *Day31MT1/38:7 - Day31MT1/39:1.*

by Mr Farrell who stated that the tighter fee bands for transactions in the Philippines reflect repeat banking relationships.[326]

995. Mr Webb accepted that this trend "*has been my experience in some cases but not other cases*".[327]
Ms Murray gave her evidence on beauty parades,[328] and would not agree with Mr Webster. She said that "*I don't have a basis to agree with that*".[329]

996. The Court accepts on the basis of the opinions on this issue that relationship-based pricing may exist as a commercial norm and may result in lower fees being agreed when one does not have a beauty parade as a price discovery mechanism. Again it depends on all the circumstances.

997. The Court does not accept that the relationship features relevant to the Apache fees, which led to a 7% fee in the GGDC Sale Engagement, supports the conclusion that Apache's fees were inflated above market norms by the parties so as to achieve an unreasonable and unjustifiably excessive fee.

Summary findings on the Apache fees and kickbacks

Market rate

998. On all the evidence, including the expert investment banking evidence, the Court's key findings in relation to market rate are, in summary:

a) The Apache fees were paid in respect of valuable services provided by Apache to the Fund and were reasonable having regard to applicable market rates.

b) Apache and Mr Ayliffe contributed substantially to the success of the investments in NNC and the Clark Asset, working effectively full time on them for more than three years at considerable risk.

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[326] *Day31MT1/21:12 - Day31MT1/22:1. Although he sought to distinguish the kind of repeat banking relationships he intended to refer to from Apache.*
[327] *Day30MT1/195:11-12.*
[328] *Day29MT1/53:14-23; Day29MT1/55:9-14; Day29MT1/56:2 - Day29MT1/57: 16.*
[329] *Day29MT1/57:16.*

c) Mr Ayliffe possessed unique skills in relation to his experience, contacts and personality to successfully complete the transactions and it was unlikely that the Fund would have been able to procure the services of a suitable alternative adviser to secure any similar outcomes.

d) Apache was in a strong negotiating position. The Fund was in real difficulties with regard to obtaining funding and negotiating a good commercial and timely exit from the Fund's two remaining investments. It was reasonable for the GP to engage Apache upon the terms that it did.

e) Mr Ayliffe's efforts contributed substantially to the success of the NNC and Clark investments.

f) These efforts required a huge personal commitment on his part, were skilful and tenacious and carried out in very difficult circumstances.[330]

g) The GP was unable to obtain assistance from other potential investment banking firms - there were unsuccessful attempts by other bankers and consultants to achieve successful outcomes in relation to the necessary funding and routes to completion and exit.

h) The Court accepts Mr Ayliffe's evidence that:

i) he was positioning Apache as a merchant bank, albeit in 'start up' mode, which intended to take equity stakes in his clients and lend to his clients;

ii) the making of loans to KGLI and the purchase of an equity position was consistent with Apache's model; and

iii) the loans to KGLI were made on commercial terms but they often went unpaid as events turned out, which caused him and Apache considerable financial difficulties.

[330] *Mr Ayliffe's evidence was that during the period from early 2013 to mid-2017 he had an agreement with Ms Lazareva that he would prioritise her work and that he was working flat out for three and a half years on the Clark asset sale: Day19MT1/110:7, Day19MT1/111.*

Kickbacks

999. The Plaintiffs have not proven that improper kickbacks were paid.

1000. The payments made by Apache to KGLI or entities associated with it were more likely to have been made for legitimate commercial purposes, consistent with its business model.

1001. The impugned transactions represented repayments of advances used to fund start up and operating costs, the making of loans, and the purchase of the IM.

Mr Williams

1002. As regards Mr Williams' role in relation to these transactions the Court finds that he had no material role in the negotiations which preceded the Apache deals and was not a relevant decision maker.

1003. The negotiations took place in person between Mr Ayliffe and Ms Lazareva or over the telephone and were not generally recorded in writing.[331] Mr Williams was not involved nor was he authorised to agree matters with Mr Ayliffe.[332] The Plaintiffs' case that Mr Williams' central role in the management of the Fund was such that it is to be inferred that he participated in arranging the transactions and payments relating to Apache is not made out on the evidence

1004. Similarly Mr Williams was limited to a conduit role in relation to the purchase of the IM and the US$19m facility while Ms Lazareva was in jail. He was not a relevant decision maker. He was not otherwise involved in any of the so called kickback payments, nor benefited from them.

1005. The Plaintiffs' case that Mr Williams knew that Apache was not engaged at arm's length, in good faith, or as the result of any genuine or good faith negotiation, and that the true purpose of the transactions relating to Apache was to benefit Apache, Mr Ayliffe and the recipients of the Kickbacks (to the detriment of the Fund and the LPs) is not made out on the evidence.

1006. It follows from these findings from the factual and expert evidence on Apache that there is:

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[331] *Ms Lazareva is neither a party to these proceedings nor a witness. She has not had an opportunity to answer the allegations made by the Plaintiffs which concern her.*
[332] *Ayliffe 1 §§51 ,249 ,279, 322, 393, 412 ,537 and Williams 2 §12.*

a) no liability of the GP for breaching the fiduciary duties that it owed to the Fund and the LPs by facilitating the payment of the Kickbacks and/or by agreeing to pay the Apache Defendants fees that were above market rate;

b) no liability of Apache Asia or Apache Macao as the recipients of 'overpayments' made (whether as a result of payments to fund Kickbacks or as a result of fees that were inflated above market rates), in both knowing receipt and dishonest assistance in respect of those sums;

c) no liability in dishonest assistance or unlawful means conspiracy proven against Mr Ayliffe; and

d) no liability in unlawful means conspiracy against Mr Williams.

The Legal and Expenses Claims

1007. The Court has reviewed the detail of these claims (some of which have been abandoned)[333] which is not repeated here to avoid prolixity concerning the work done by various service providers.[334]

1008. The Court accepts the analysis performed by the Receivers in this regard in Annex A of their closing submissions (as updated by Mr Fenwick KC in his closing submissions) and as set out in their written closing submissions[335]

1009. The Court has carefully assessed the assertions by the Plaintiffs that each of the payments were improper.

1010. It has found no firm evidence supporting a lack of justification for the payment and impropriety or breach of fiduciary duty by the GP.

1011. The Court finds that:

[333] *According to Annex A of Receivers closing submissions: Global Advocacy; Jimeno Cope; Michael Russell; Placino.*
[334] *See Annex 1 D2-D4 written opening; American Continental Group; Aurora International LLC; Brownstein Hyatt Farber Schreck LLP; Covington & Burling; Crowell & Moring; DiGenova & Toensing; Fahmy Hudome International LLC; Laktineh & Co Ltd; Marathon Strategies; McKool Smith; Navigant Consulting; Neil Bush; Squire Patton Boggs; Triple Canopy Media.*
[335] *See Receivers closing submissions at §§74-184.*

a) The fees for legal advice, government relations and intelligence were incurred in the belief that they were in the interest of the Fund with a view to protecting the Noor Bank monies;

b) once the monies were released the fees reduced and then ceased; and

c) the Plaintiffs' claims in unlawful means conspiracy and that they were not in the interests of the Fund in respect of these payments fail.

1012. The Court accepts the evidence of Mr Williams (about which many of these payments went unchallenged), and the analysis done by the Receivers.

1013. The Court accepts the views of the FFP Directors and the Receivers that the Fund paid significant fees to legal and lobbying professionals, of which some could not be said to be for the direct benefit of the Fund. That does not reverse the burden of proof on the Plaintiffs.

1014. As to the payments which were not for the direct benefit of the Fund, the Receivers concluded that the GP properly dealt with and accounted for them by recovering the relevant sums from KGLI or setting them off against other fees due.[336]

1015. The Court accepts the Receivers' analysis that no loss has been suffered by the Fund or the LPs as a result.

1016. The Court is not, on the evidence, persuaded that the Plaintiffs have proven that the payments they pursue were made:

a) in the belief that they were not in the interests of the Fund; and/or

b) where there was no benefit derived by the Fund from the work undertaken; and/or

c) pursuant to an unlawful means conspiracy involving Mr Williams to cause loss to the Fund.

1017. The Plaintiffs also say that the GP wrongfully paid out a significant amount of Fund monies totalling approximately US$11.3 million used to fund:

[336] *§§25A and B of D1 Defence.*

a) Ms Lazareva and Mr Dashti's defence of a number of Kuwaiti criminal proceedings;

b) an international lobbying campaign for Ms Lazareva; and

c) Ms Lazareva's legal fees in an investor-state arbitration which she brought against the State of Kuwait (the "ICSID Arbitration").

1018. The Plaintiffs say that following admission from the FFP Directors, not withdrawn by the Receivers, some of these payments have been accepted not to have been for the direct benefit of the Fund.[337]

1019. In their closing submissions the Plaintiffs limited their case to those payments which they said were demonstrably not paid for the Fund's benefit or for which there is no evidence of any work done and the quantum of which is readily ascertainable. This they say comes to a total of US$3,216,785.73[338].

1020. The Court remains unpersuaded that the Plaintiffs have discharged the burden of proof they carry with regard to these payments.

Payments for Ms Lazareva's Criminal Proceedings and ICSID Arbitration

1021. The Plaintiffs say that even if third party fees were properly incurred they were not justified for the defence of the criminal proceedings in Kuwait, Ms Lazareva's ICSID arbitration and lobbying.

1022. As to the ICSID Arbitration the Plaintiffs say there was no basis to indemnify Ms Lazareva from the Fund's money for the costs of the ICSID Arbitration, because they were not proceedings brought against her *"in consequence of being Investment Manager or by reason of some act or omission in a relevant TPF capacity"*. [339]

1023. According to Mr Williams, the ICSID Arbitration was brought tactically so as to "*maximize the pressure on Kuwait*" (and "*not to engage in a full-blown arbitration case*"). The Court

[337] *US$1.58m, D1's Re-Re-Re-Amended Defence, para 25A.*
[338] *Appendix 2 of Plaintiffs' closing submissions.*
[339] *See: §§ Plaintiffs' written closing submissions, §§589–595.*

accepts that was his view at the time, which was reasonable, and those payments which were connected to the objective of the release of the frozen monies were justified.

1024. The Court also accepts Mr Williams' evidence in relation to Crowell & Moring's work on the arbitration that he did not allow Fund money to be spent after the release of the freeze.[340].There is evidence to show that the relevant invoices were sent to Ms Lazareva personally and paid by KGLI[341].

1025. The Court acknowledges that the subject matter of the criminal proceedings and the ICSID Arbitration did not relate directly to the Fund's business or Ms Lazareva's work for the Fund. However, it is persuaded on the evidence that the work done was incidental to the primary objective of protecting and releasing the frozen funds.

1026. Mr Wood's evidence, which the Court has accepted, was that the understanding of the law firms involved was that the freeze of the Clark Asset proceeds was strongly tied to the imprisonment of Ms Lazareva and Mr Dashti in Kuwait and Ms Lazareva's arbitration was to put pressure on Kuwait to release Ms Lazareva, which would assist in the release of the funds[342] .

1027. The Court accepts Mr Williams' evidence that in the initial phases of the expropriation attempts by Kuwait, the Fund's approach was to seek to defend the criminal proceedings brought against individuals as part of a broader strategy to protect its assets.[343]

1028. The Plaintiffs also say that these payments were not on the available evidence for the Fund's benefit or in its best interest by reference to the advice given on the non-application of various indemnities.[344]

1029. The Plaintiffs' submissions as to the advice given on the indemnities does not answer the question as to whether the payments made were in the interests of the Fund.

1030. The Court is persuaded on the evidence that the motivation for these proceedings and the intention to engage the relevant service providers was to assist in getting the Clark Asset Proceeds unfrozen and transferred back to the Fund, not to Kuwait.

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[340] *Day17MT1/134:1.*
[341] *In the sum of US$366,102.75.*
[342] *Day23MT1/89:7; Day23MT1/90:5.*
[343] *§§878 and 879 Williams 1.*
[344] *Walkers advice by email dated 6 December 2017; Richard Gillis QC's advice dated 10 April 2019; Mr Gillis QC's further written advice dated 28 April 2019.*

Kuwaiti service providers

1031. These claims are made only against the GP and Golden Shahin.

1032. The Fund paid US$16,704,256.59 to various Kuwaiti service providers, the largest of which were payments of US$14,070,000 to Golden Shahin and US$918,235.69 to Dr Al Harbash.

1033. Golden Shahin has not participated in the case. The evidence is therefore substantially incomplete.

1034. The Plaintiffs point to the lack of documentary evidence dealing with:

a) the engagement of Golden Shahin beyond a two page engagement letter and an addendum letter (under which all of their fees are to be passed on to Al Morabitoon[345]);

b) negotiation of the engagement or on the actual work performed under the engagement; and

c) the expertise of Golden Shahin.[346]

1035. Mr Dashti is apparently associated with the company. The Plaintiffs say this arrangement was set up to funnel money to Mr Dashti and Dr Akbar.

1036. They allege against Golden Shahin dishonest assistance.

1037. The Plaintiffs also point out that the fee payable is a flat fixed US$14,070,000 plus all costs and expenses of retained third parties, which does not fit with the case that it retained Kuwaiti consultants on an ongoing basis.

1038. The Plaintiffs allege against the GP a breach of duty. There is no claim of dishonesty against the GP. They say that the payment to Golden Shahin was not reasonably made and in the interests of the Fund.

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[345] *Which is associated with Dr Akbar and KGLI.*
[346] *The company is registered with the Kuwaiti Chamber of Commerce and Industry as a general cleaning company for roads and buildings.*

The evidence

1039. The scant evidence available is as follows.

1040. A two page engagement letter dated 1 December 2017 signed by Mr Alwadhi for the Fund and Mr Andalaki for Golden Shahin.

1041. It stated in material part that the engagement was to:

> " *..exert its best efforts to provide the Services required by the Client for unfreezing and releasing the exit proceeds held in UAE and to restore the reputation of the Client discredited by the smear campaign led [by a] strong business competitor and other governmental authorities in Kuwait and Dubai as well as different entities and individuals including government officers*"

1042. This was then supplemented by an Addendum dated 15 August 2018 between the Fund, Golden Shahin, and Al Morabitoon International General Trading and Contracting WLL ("Al Morabitoon"). It provided that Al Morabitoon would undertake the services promised under the Golden Shahin Agreement (Clause 3.1).

1043. On 10 February 2019, the GP made a payment request to Noor Bank to make the Golden Shahin Payment (i.e. USD 14,070,000) to Golden Shahin. The payment request contained the reference "*Retainer fees - Professional & Legal*".

1044. The Court finds:

a) there is no case brought against Mr Williams in unlawful means conspiracy. He was nevertheless asked about Golden Shahin in cross examination and said that he understood that the payments made at the time related to the work of the consultants in Kuwait who were providing the intelligence in respect of the Noor freeze. The Court accepts that evidence;[347] and

[347] *See the FFP Directors memorandum of 28 May 2021 "…there is evidence which indicates that Golden Shahin and Al Morabitoon provided legitimate services to TPF and that such services contributed to the ultimate release of the frozen funds"… 'the Independent Directors have not concluded their investigation with respect to TPF's engagement of Golden Shahin, and in particular are waiting to receive responses to letters issued to Mr Alwadhi and Golden Shahin…".*

b) having examined the evidence on these payments[348] these engagements appear to be part of the Fund's strategy to resist Kuwait's attempt to have the Noor Bank monies transferred and to unfreeze the account.

1045. The Court is not persuaded that because the two companies' (Golden Shahin and Al Morabitoon) registered activities and company records did not fit with the services which in fact were provided, proves that these were sham agreements and that fraudulent payments were made to enrich Mr Dashti and his KGLI associates.

1046. There is insufficient evidence to prove these allegations by general inference having regard to the available documentary and witness evidence.

1047. The Plaintiffs' case that they delivered no benefit to the Fund is not made out.

1048. It follows that:

a) the GP is not liable to the Plaintiffs for such payments in breach of fiduciary duty or dishonest assistance; and

b) Golden Shahin is not liable in dishonest assistance.

KGLI Asia

1049. The Plaintiffs bring derivative claims against KGLI Asia, for knowing receipt of the Fund's monies, paid allegedly in breach of trust and /or breach of fiduciary duties.

1050. The Court finds that this claim fails and finds on the evidence that:

a) the ASA was entered into in the best interests of the Fund at a time when the IM and KGLI lacked personnel with the expertise and knowledge capable of advancing the Fund's interests, with two of the directors of the GP (Ms Lazareva and Mr Dashti) in jail;

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[348] §§912 to 913 Williams 1; Day15MT1/82 - Day15MT1/85; Day15MT1/85; Day17MT1/155 - Day17MT1/156; Day17MT1/156; Mr Wood and Mr Petith; § 286 of Wood 1 and Day24MT1/201 - Day24MT1/205; §§59 and 193 of Petith 1. and Day25MT1/29. See also the affidavits of Ross Gow and Vladimir Platonov who had involvement with the consultants retained by Golden Shahin and Al Morabitoon in Kuwait and confirmed the role they performed in unfreezing the Clark Asset Proceeds.

b) KGLI Asia was required to undertake considerable work for the benefit of the Fund;

c) the Fund required support after the Clark Asset sale concluded, particularly in relation to the efforts being undertaken to release the monies frozen at Noor Bank. The GP retained KGLI Asia under the terms of the ASA to provide such services;

d) the payments to KGLI Asia related to the services provided under the terms of the ASA. The Court accepts Mr Williams' evidence in this regard; [349] and

e) there is no evidence to suggest that the IM could or did provide the services KGLI Asia performed.

1051. There is insufficient evidence to prove that the ASA and the payments made under it were improper.

The GP's counterclaim[350]

1052. It has not been disputed that KPA received over US$13 million more than its entitlement in respect of US$125 million paid to it from the Clark proceeds in 2019. Sheikh Khaled fairly accepted in cross examination that if KPA had been overpaid it should return the relevant sums.

1053. PIFSS had apparently received US$79.2 million which was its true pro rata allocation. The other limited partners were entitled to that overpayment received by KPA. The GP is entitled to judgment on its counterclaim plus interest and the issue of who is ultimately entitled to those proceeds will be determined in due course.

Claim for wrongful payment of success fee

1054. The Plaintiffs' claim against KGLI for wrongly taking a payment in relation to the second PPM fundraise where there was no entitlement to do so. In relation to the first fundraise on in April 2007, KGLI was entitled to a success fee as disclosed within the PPM and then as individually

[349] *See Williams Day14MT1/51:23; Day17MT1/91:14; Day17MT1/92:7; Day17MT1/93:11; Day17MT1/93:14.*
[350] *Day10MT1/83:16-24.*

negotiated with the Plaintiffs, as can be seen in the subscription letters (3% of the total amount of financing raised).

1055. KGLI took a second success fee (US$2.265m) on 26 June 2013 in relation to the second fundraise which the Plaintiffs say it was not entitled to. The Plaintiffs say that nothing in the LPA or the IMA permitted a success fee to be charged on the funds raised in the secondary capital raise. The Court agrees that this is the case.

1056. KPA and PIFSS pursue this claim against the GP and PIFSS alone pursues the claim against KGLI.

1057. KGLI have not participated in this litigation.

1058. The Receivers in their pleaded case[351] say they have not seen a request for the transfer of the second success fee but otherwise admit the facts. They do not admit, but advance no positive case or evidence, that the LPA or the IMA permitted a success fee to be charged on the funds raised in the secondary capital raise.

1059. As a result, the Court finds on the available evidence the Plaintiffs' case proven against the GP and PIFSS case proven against KGLI.

Summary Outcome

1060. For the reasons given in this Judgment the Plaintiffs' substantive claims:

Against the Defendants in FSD 236:

a) that assets of the Fund have been misappropriated as part of an unlawful means conspiracy and/or breaches of trust and fiduciary duty fail; and

b) that monies were wrongly spent on advisers pursuant to a conspiracy to injure the Fund fail.

Against Walkers in FSD 97 including claims for breach of fiduciary duty and negligence fail.

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[351] *§§ 175 G1 and G2 Re-Re-Re Amended Defence, Counterclaim and Cross claim responding to §217A-C of the Re-Re-Re-Re-Amended Statement of Claim.*

1061. The Defendants' (D2-D4) counterclaim against the Plaintiffs in relation to abuse of process fails.

1062. D2-4's cross claim against D1 (the GP) in relation to the IM's entitlements fails.

1063. D1's counterclaim in respect of the overpayment to KPA succeeds.

1064. The Plaintiffs' claim for the success fee against the GP, and PIFSS's claim against KGLI succeed.



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THE HON. JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT

Appendix 1

Written reasons for ruling on Pleadings Application in FSD 236 on 19 February 2026

1. On 19 February 2026 I made the following decisions and delivered them without reasons in Court in view of the impending evidence to be given by Mr Williams and Mr Ayliffe.

2. It is open to the Plaintiffs to advance the case that the payments referred to in paragraph 142 of their written opening constituted alleged 'kickbacks' funded by payments the GP made, purportedly in respect of Apache fees, in the course of the alleged unlawful means conspiracy involving the GP, the Apache defendants and Mr Williams.

3. The Plaintiffs' pleaded case in conspiracy is sufficiently clear and comprehensible. The Defendants have had fair notice of the case they had to meet both with regard to the Apache fees themselves, which the Plaintiffs say were paid without any legitimate rationale or proper process, and that they included or facilitated 'kickbacks' to companies or persons associated with KGLI. As to the payments referred to in paragraph 142 specifically, the Defendants addressed them in their written opening submissions and in the case of Mr Ayliffe in the further witness statement that he served following commencement of the trial.

4. If I had considered that the Plaintiffs were not entitled to contend that the paragraph 142 payments were made in the course of the alleged conspiracy on the pleadings as they stand, in all the circumstances I would have given permission to amend to the Plaintiffs based on the relief sought in their protective summons.

5. The Plaintiffs also plead as a fact that the Clark Asset Proceeds were not credited to the GP's account with the Noor Bank until the 5th of February 2019. It was not strictly necessary for them to plead the legal consequences of the LPA or the IMA in support of their case that the IM was not entitled to performance fees before that date.

6. These are now reasons for those decisions.

Kickbacks

Paragraph 142

7. The trial started on 2 February 2026.

8. This issue seems to have arisen because of paragraph 142 of the Plaintiffs' written opening dated 19 December 2025 which set out a number of kickbacks alleged to have been paid by Apache which the Defendants say go well beyond the Plaintiffs' pleaded case.

9. Mr Chapman for D2-D4 said that if the conspiracy allegation against Mr Williams included every alleged kickback in paragraph 142 this ought to have been pleaded. There were, he said, 14 additional payments to four different payees identified which were not in the Plaintiffs' pleaded case.

The pleading

10. The Plaintiffs plead payments to Apache out of TPF funds totalling at least US$66,114,500 (paragraph 65D of the statement of claim).

Paragraph 1

11. Paragraph 1(f) of the statement of claim identifies Mr Williams as part of the unlawful means conspiracy described in sub paragraph (v) and paragraph 72B.

12. Subpara (v) of paragraph 1 of the statement of claim sets out that the Plaintiffs' claim against the Apache defendants, among other things, in unlawful means conspiracy the following payments:

> "the payment of US$950,000 to KGLI in September 2013; the payment of US$ 14,550,000 made to KGLI in February 2019; and the KGLI/Apache loan (a loan agreement dated 11 June 2019 which provided KGLI with US$ 19,000,000)".

13. It is said that the latter two payments were secret commissions agreed by Apache Asia and/or Mr Ayliffe as a kickback.

14. Therefore, these payments were identified as part of the unlawful means conspiracy which the Plaintiffs plead Mr Williams and the Apache defendants were party to.

Paragraph 72 B

15. This alleges that:

> "*It is appropriate to infer and is inferred and alleged, that the payment of the purported Apache fees (including but not limited to the Apache /KGLI payment*[352]*) was the product of and made in furtherance of an unlawful means conspiracy to which Port Link, Apache Asia, Apache Macao, Mr Ayliffe, Mr Williams, KGLI and EMPEML were party".*

16. The second sentence of paragraph 72B alleges that the unlawful means conspiracy is based on alleged breaches of trust, fiduciary duty, and contract.

17. The third sentence pleads that the conspirators intended to cause loss to TPF and/or the limited partners.

18. Pausing there, that seems to me to be a general plea which identifies the alleged conspirators, the legal basis for the plea, and identifies the Apache fees (and an alleged kickback as an example of an illegitimate payment) which was the product of the conspiracy.

19. In support of the allegation of unlawful means conspiracy pleaded at paragraph 72B the Plaintiffs rely on the following facts and matters:

> subpara (i) refers to matters in paragraphs 46 to 69 and paragraph 72A. Those kickbacks identified at paragraph 65(G) and 67 (iv) were said to be the payment of US$950,000 to KGLI in 2013, the payment of US$ 14,550,000 made to KGLI in February 2019 and the KGLI/Apache loan;
>
> subpara (v) The Apache defendants knew that the transactions between Port Link and Apache were not arm's length transactions or commercial transactions entered into in

[352] The *US$14,550,000 payment made by Crowell & Moring on behalf of TPF to KGLI at the direction of Mr Ayliffe.*

good faith and that Mr Ayliffe knew that the fees charged by Apache were not reasonable commercial fees or the result of any genuine or good faith negotiation;

subpara (vi) Mr Ayliffe and the Apache defendants knew that one purpose of the transactions and payments relating to Apache was to injure TPF and cause harm to the limited partners because there was no legitimate rationale for the level of fees charged;

subpara (vii) Mr Williams' role in relation to the management of TPF was such that it is to be inferred that he participated in arranging the transaction and payments relating to Apache;

subpara (ix) Mr Williams knew the matters set out in sub paragraphs (v) and (vi) above and acted with the intention of harming TPF and the limited partners (as a means to an end) and deliberately contrary to their interests; and

subpara (x) The transactions and payments relating to Apache could not have been effected except with the agreement of Apache, the GP, KGLI, Mr Ayliffe and Mr Williams.

Analysis

20. These paragraphs show that there is a plea in conspiracy that the GP, the Apache defendants and Mr Williams combined unlawfully with the result that the Apache fees were paid without any legitimate rationale or good faith process *and* that they included and/or facilitated kickbacks.

21. The kickbacks specifically alleged are in paragraph 1 (v) and 67 (iv), but by the general plea at paragraph 72 B, the inference of dishonest conspiracy is from the primary facts alleged that there was no legitimate rationale for the payments and that the Apache fees included kickbacks.

22. I have considered Mr Chapman's submissions relating to the principles to be applied when the court is considering pleas of fraud and particularly those in the cases he referred to[353].

[353] *Three Rivers [2001] UKHL 16 see Lord Millett § 185-186, McKillen [2012] EWHC 521 Ch and Hungrypanda [2022] 10 WLUK 403*

23. Mr Chapman correctly submits that where fraud or dishonesty is alleged by way of inference a plaintiff must plead all the primary facts which will be relied upon at trial to justify drawing that inference and that it is not open to the court to infer dishonesty from facts which have not been pleaded. Particulars of facts which are consistent with honesty are not sufficient.

24. I also accept that the function of a pleading is to give the opposing party a fair opportunity to understand and deal with the case made. All the more so in a case alleging serious wrongdoing against individuals who will spend days being cross examined, as is the case here.

25. I also accept the proposition that an allegation of fraud or dishonesty must be sufficiently particularised and pleadings need to be carefully formulated, properly signed off on and scrutinised with great care to ensure a proper factual basis for the plea.

26. As Lord Millett recognised in *Three Rivers § 186* an allegation of dishonesty is usually a matter of inference from primary facts and it is these facts which are to be relied upon at trial to justify the inference of dishonesty that must be set out.

27. Lord Millett said: "*There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved".*

28. Here the facts which give rise to the inference have been set out, albeit that each and every instance of an alleged kickback as listed out in paragraph 142 is not pleaded.

29. The core allegation is that the payment of fees in respect of the Apache services were illegitimate and enabled the making of kickbacks which were paid.

30. In my view the overlap between the pleaded case and the paragraph 142 further particulars of kickback payments is clear. There is no new case advanced by the Plaintiffs by paragraph 142 or unfairness to the Defendants in permitting the Plaintiffs to advance it.

31. I take the view that the pleading puts squarely in issue the extent to which the Apache fees were paid, without any legitimate rationale or good faith process *and* directly or indirectly constituted or facilitated kickbacks, including the three transactions specifically identified at paragraph 1 (v) and 67 (iv). Those matters of course need to be specifically proven.

32. If a claim in conspiracy is proven, the relevant Defendants may be liable in damages which would include accounting for the proven kickbacks that the Apache fees included or facilitated.

33. That conclusion is supported to some extent by documents the parties agreed as 'the Agreed issues for discovery' and 'the List of issues for trial' but the court does not place great weight on those documents as they were not drafted to, nor could they legitimately, expand on the pleaded issues, which take precedence. They do however give an indication of what the parties understood was in issue.

The protective summons

34. Had it been necessary to do so I would have given permission to the Plaintiffs to amend their pleadings in accordance with their protective summons. This lists out each of the individual payments that were outlined in opening by reference to paragraph 142 of the Plaintiffs written opening submissions.

35. Mr Chapman argued that there was no good reason put forward by the Plaintiffs for their application to amend which has been made very late. He argued that the modern approach is to focus on the Overriding Objective and the disruption and prejudice caused to other litigants by late amendments.

36. He relied on English authorities to found a submission that a late amendment should in general not be allowed, that a heavy burden lies on a party seeking it, which requires a good explanation for the delay, and that an amendment which would result in real disruption or prejudice to the parties and /or the court is unlikely to be allowed.[354]

37. It may be said that the English courts have adopted a firmer test in relation to late applications to amend than the current position in Cayman, particularly where amendments were sought which would cause the trial to be delayed or serious inconvenience to the parties or to other litigants in other cases[355].

38. Chief Justice Smellie recently dealt with the perceived difference in *Lemos.* Chief Justice Smellie's view, which I gratefully adopt, is that it is still good practice in Cayman that however

[354] *Quah Su-Ling [2015] EWHC 759 Carr J, Swain-Mason v Mills & Reeve LLP [2011] EWCA Civ 14, Worldwide Corp [1998] EWCA Civ 1894*
[355] *Swiss Bank and Trust Corporation Limited v Iorgulescu [1994-95 CILR 149] CA*, *Lemos (unreported, Smellie CJ 19 February 2025), Ascentra [2025] CIGC (FSD) 46 Richards J: §§41, 46, 49(a), 49(c) and 173.*

late the proposed amendment it should be allowed, if it could be made without prejudice being caused to the other side[356] and may be compensated by costs.

39. In his view consequential detrimental impact on other cases and court users did not extend the principle any further, because an otherwise just and proper amendment would likely be allowed whether or not disruption was caused.[357]

40. Here there is no risk that the trial would be disrupted.

41. It seems to me that the most important issue is whether the Defendants are prejudiced by the application. Particularly so when Mr Ayliffe appears in person. I have taken into consideration the points he put forward in person as to prejudice.

42. Having carefully assessed the matter I do not consider that there would be any real prejudice in practice. The Defendants know the case they have to meet and have to some extent already addressed it.

43. Mr Ayliffe addressed the kickbacks issue in his witness statement of 15 September 2025.

44. The Plaintiffs' case in relation to the paragraph 142 payments was set out in detail in their written opening submissions filed on 19 December 2025.

45. The Defendants addressed them in their written opening submissions and in the case of Mr Ayliffe in a further witness statement that he served on Sunday 8 February 2026, after the trial had started.

46. I do not accept that the Defendants would be deprived of their right fully and fairly to defend the paragraph 142 allegations by allowing the amendment application

47. It seems to me that the factual inquiry is really the same, which as Mr Allison submitted is:

> "*...were there kickbacks and if so how much was paid in respect of kickbacks in relation to the fees relating to Apache from the monies which would otherwise have been held by the GP for the benefit of the limited partners*."

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[356] *Ketteman [1988] All E R 38 at p 82 HL*
[357] *Lemos § 19*

48. The amendments in this case would arise from substantially similar facts.[358]

49. No further discovery would be required. The proposed amendments would assist the court in determining the real question in controversy between the parties.

50. I do not accept Mr Chapman's argument that the proposed amendments are not arguable or coherent as a matter of pleading. These are arguments that he will no doubt develop further when the allegations are considered in detail following the oral evidence.

51. In my discretion it would have been in the overall interests of justice to grant the Plaintiffs' summons had it been necessary to do so, in order that these matters may be properly ventilated in this trial.

The Clark Asset Proceeds.

52. It is contended by Mr Chapman that the Plaintiffs' pleading limits the submissions that the Plaintiffs are permitted to make as to the consequences that flow, on the various different constructions of the LPA and the IMA, from the pleaded fact that the Clark Asset Proceeds were not credited to the GP's account with Noor Bank until 5 February 2019.

53. The Plaintiffs wish to contend that the investment manager had no entitlement to performance fees before that date. They rely on the LPA. That is clear from §§ 112(iii)(c), 130 and 131 of the statement of claim.

54. The Plaintiffs have pleaded that the Clark Asset Proceeds were delayed for many months as they were not released into the Noor Bank account until 5 February 2019, having been frozen in a suspense account until that date. The court is going to have to make a determination in relation to that fact as pleaded.

55. The Plaintiffs went on to plead the legal consequences that flowed from that delayed receipt on their construction of the relevant contractual documents. They say it is the LPA rather than the IMA which governs the investment manager's performance fee entitlement.

[358] *This was also the case in Ascentra :§161*

56. They did not plead the legal consequences of the delayed receipt if, contrary to their case, the IMA governed the question asked as contended by D2-D4.

57. The rule is that a party which relies on matters for their claim or defence has to plead a statement, in summary form, of the material facts on which he relies.[359] Here the material fact relied upon is that the proceeds from the Clark Asset were not credited to the GP's account until a particular date over a year after the sale proceeds had been transferred.

58. The competing submissions on the LPA and IMA are all matters of law which will be dealt with by legal argument. They are not matters which need to be pleaded.[360]

59. The Plaintiffs and the Defendants are entitled to advance legal arguments which arise from the parties' reliance on and construction of the relevant agreements.

[359] *GCR o.18 r.7 (1)*
[360] *In fact the Plaintiffs did plead that 14 November 2017 was not the correct assessment date and that the investment manager had no accrued entitlement to any sum on that date or when the IMA was terminated on 7 July 2018 since there were no accrued performance fees by either of those dates*

Appendix 2

Written Decisions on Discovery Summons of 6 March 2026

1. On 6 March 2026 I informed the parties of the following decision without reasons:

'6 March 2026

Decision without reasons

This application was prompted by the evidence of Mr Williams given last week.

By summonses dated 2 March the Plaintiffs seek orders

a) In FSD 236 that D2-D4 disclose legal advice and related communications received by Mr Williams (on behalf of the Investment Manager) as to the Investment Manager's rights, claims, and entitlements against the General Partner and /or The Port Fund from Clyde and co and/or Michael Black KC in June and July 2018;

Alternatively

b) In both FSD 236 and 97 that all of the Defendants be precluded from relying on that advice for any purpose.

I have reviewed the helpful written submissions filed by the parties and heard Leading Counsel on their behalf. I have also been referred to a number of authorities, trial documents and other materials.

I said I would consider the position overnight and give the parties my decision without reasons to allow for the progress of the trial and so the parties each knew where they stood

I will give written reasons in due course if requested to do so.

I have decided:

1. To entertain the application for and to grant the relief sought by the Plaintiffs that D2-D4 disclose legal advice and related communications received by Mr Williams (on behalf of the Investment Manager) as to the Investment Manager's rights, claims, and entitlements against the General Partner and /or The Port Fund from Clyde and co and/or Michael Black KC in June and July 2018.

2. The period should be strictly limited to the approximately 2 week window in which the advice was provided.

3. No privilege attaches to the relevant advice and related communications because of Mr Williams' dual role, for the General Partner and the Investment Manager in obtaining that advice.

4. The alternative relief sought does not therefore arise.

The parties are to agree the particular items which fall to be disclosed and the timing of production which is to be made to all parties at the same time, and as soon as practicable.

The Plaintiffs are to engage with the Walkers Defendants to allow, as far as is reasonably practicable, a timetable for the cross examination of Mr Wood and Mr Petith which causes them the least prejudice which arises from this late disclosure.'

2. These are the written reasons for that decision as requested.

Introduction

3. The Plaintiffs submitted that the summonses were prompted by and concern new and 'unheralded' oral evidence given by Mr Williams between 24 and 26 February 2026 to the effect that Clyde & Co (Clyde) and Michael Black KC provided written advice to Mr Williams (in his capacity as the authorised representative of The Port Fund's Investment Manager (the "IM")) in late June 2018 as to the IM's rights, claims and entitlements as a matter of Cayman law against The Port Fund and/or its general partner (the "GP").

4. They say that this evidence took them by surprise and is potentially of considerable significance to issues that the Court is required to determine in both sets of proceedings at this trial.

Mr Williams' evidence

5. Mr Williams in his evidence was keen to emphasise that he was relying on legal advice when he did what he did in relation to the DIFC proceedings. He tried hard not to reveal the content of any legal advice and was repeatedly told by Leading Counsel that we were operating within boundaries so as not to elicit the content of such advice, and he was also reminded of the same by me.

6. Whilst giving evidence Mr Williams stated that decisions in relation to the DIFC proceedings were made based on advice from Clyde because "…*we had to make sure that whatever we claimed in the DIFC was…contractually due"*[361]

7. He went on to say that Clyde *"…provided me with advice and provided the investment manager with advice on the management fee and on the carry, the performance fee and the catch-up fee."*[362]

8. When asked by Mr Allison why the IM had claimed management fees despite Walkers' advice that it had no claim to them, Mr Williams confirmed that he was given very clear advice by Clyde which was different to that which he had obtained from Walkers[363].

9. When asked about compound interest on unpaid sums he implied that this was once again on the advice of Clyde and that he relied on what he was told [364]. Similarly, when asked why the IM's claim did not account for clawback he stated that this decision was taken on advice in regards to the carry and the applicability and non-applicability of clawback from Clyde[365].

10. Further, when asked why compound interest was claimed on the carry he told the Court *"I would love to answer you. I was given specific reasons by counsel"*[366].

[361] *Day15MT1/124:6-11.*
[362] *Day15MT1/127:2-7.*
[363] *Day15MT1/136:8-25 - Day15MT1/137:1-2.*
[364] *Day15MT1/152:22-23.Day15MT1/153:5.*
[365] *Day15MT1/154:1-10.*
[366] *Day15MT1/155:20-22.*

11. When asked by Mr Hubble whether as result of dealings with Clyde he decided a claim would be brought for management fees on a different basis to the one that Walkers Dubai had floated with him, he agreed and confirmed that the IM decided that based on advice from Clyde[367].

12. The above testimony is clearly to the effect that Mr Williams, with his IM hat on, was following Clyde's advice which D2-D4 have withheld from disclosure on the basis that it was privileged.

13. The clear impression I formed from this evidence was that Mr Williams was seeking to support his case (and that of Wellspring) that he had done nothing wrong because he was following advice given to the IM by Clyde. The Plaintiffs now want to see that advice.

Was this evidence 'unheralded"

14. This question is relevant to whether, as particularly the Walkers defendants say, there has been inordinate delay on the part of the Plaintiffs who they say should have sought a declaration that the IM has no privilege in the advice months before the trial started.

15. The Walkers defendants and D2-D4 submit that this application should not be entertained at all because it is made too late, coming on day 21 of the trial, just after the relevant witness evidence from Mr Williams and just prior to the Walker's witnesses gave their evidence. Any challenge to privilege should have been made well before trial.

16. Unworkability and prejudice were advanced by Mr Hubble on behalf of Walkers as good reasons not to entertain the application.

17. Notwithstanding those submissions I did entertain the application because I am satisfied that it was not apparent until Mr Williams gave evidence of the nature and extent of Clyde's advice that he now says he relied on, namely: Clyde had advised him on various aspects of the IM's claim against the GP; and advised on Cayman law; and this advice was different from the advice given by Walkers.

18. It has also become apparent during this trial that the joint privilege asserted by D2-D4 (that of KGLI and the IM) as a reason for withholding Clyde's advice no longer holds good. By the time of the Clyde advice KGLI had no ownership interest in the IM, had no common interest

[367] *Day17MT1/178:16-21.*

in the IM's fee entitlement, and has not itself been alleged to have been party to the common strategy to prevent expropriation of the Clarke Asset by Kuwait.

19. Moreover, Mr Williams confirmed Clyde were only acting for the IM (not KGLI) and he, for the IM, accepted the advice and followed it.

20. I also accepted Mr McCourt Fritz' submissions that it was not apparent from the written materials advanced by D2-D4 (including Mr Williams' witness statements) that the IM had relied on Clyde's advice.

21. It seems to me that it is reasonable for the Plaintiffs to say that D2-D4's case has, as understood by them, changed as a result of Mr Williams' evidence.

22. The fair outcome is for the Plaintiffs (and indeed all parties) to see the advice in principle assuming there was no privilege in it, and the volume of material would not prejudice the Walkers witnesses by disclosure and production at this very late stage.

23. In fact, the Plaintiffs' application was confirmed to only cover a two week period in June and July 2018, and the number of relevant written communications, which I understand to be mainly in the form of emails, would be reasonably limited. Any real prejudice to Walkers was thereby relatively limited.

24. Mr McCourt Fritz also indicated that he did not anticipate putting the Clyde advice to Messrs Wood and Petith, but he reserved his position.

Is the Clyde advice privileged?

25. If the advice was not privileged in the first place the questions of waiver advanced by the parties do not arise, for example:

a) whether it was waived by Mr Williams' communications with Mr Alwadhi for the GP (a nominally adverse party to the DIFC proceeding brought by the IM).

b) if privilege survived the exchange with Mr Alwadhi and was then assigned to Wellspring, whether it was waived by Mr Williams giving evidence (or should now be waived formally by him).

c) whether it was not waived or assigned and remains privileged post the dissolution of the IM.

26. Having reviewed the evidence given in this case by Mr Williams it is clear that he personally had at least a dual role in the DIFC proceedings, acting for both the GP and the IM.

27. He was giving instructions to the lawyers on behalf of both the GP and the IM who were on one level adverse to each other in relation to the IM's claim. I say on one level because the Defendants say that the DIFC proceedings were part of a common strategy to obtain a Judgment in Dubai effectively by default to prevent Kuwait from taking the proceeds frozen in the Noor Bank in Dubai. There was therefore a common interest and no conflict. A finding on that issue will be made at the end of the trial.

28. However, they were a claimant (the IM) represented by Clyde and a Defendant (the GP) represented by Global Advocates on the face of the DIFC proceedings.

29. Any advice Mr Williams received from Clyde was immediately known to the GP through him as the only natural person involved in a day-to-day client position for both 'adverse' parties to the DIFC proceedings.

30. Notwithstanding the arguments as to a common strategy as to why that claim was brought in the first place, (that is to defeat Kuwait's attempts to misappropriate the Clarke Asset,) this does not in my view extend to specific Clyde advice as to the IM's legal or economic entitlement against the GP in the DIFC proceedings. Mr McCourt Fritz made it clear that the Plaintiffs' application was confined to that narrow target.

31. That advice to the IM, given to Mr Williams who was also receiving the very same advice for the GP, naturally lacked confidentiality vis-à-vis the GP because as a natural person, receiving that advice for two parties whose interests on the face of the DIFC pleadings were adverse to each other, Mr Williams could not keep the advice separate in his head.

32. I have decided that the answer to the question of whether the Clyde advice was privileged is that it was not. It never did have the essential feature of confidentiality on the unusual facts of this case. Confidentiality is a necessary but not a sufficient condition for privilege to apply[368].

[368] *Candey Ltd v Bosheh [2022] EWCA Civ 1103 at §115 Arnold LJ*

33. There is also good precedent that there cannot be privilege in communications between a claimant and a defendant to litigation (or their lawyers), subject to the special case of without prejudice privilege[369].

Prejudice and delay

34. I have formed the view that there is no culpable delay on the part of the Plaintiffs in making this application, albeit that it is made very late and in the middle of the trial.

35. In my view there would be an injustice if the documents were not now produced in short order on the basis of Mr Williams' evidence and my finding that the Clyde advice was not privileged in the first place.

36. I have carefully considered the position of the Walkers witnesses and I am satisfied that they will not be unduly prejudiced by the provision of this limited material. I am satisfied that through the cooperation between Mr McCourt Fritz and Mr Hubble they will be given time and opportunity to examine it in detail and if they were to be asked any questions about it, measures would be taken to ensure fairness to them.

37. It is not necessary to consider the alternative relief claimed by the Plaintiffs because of my finding that privilege did not attach to the Clyde advice.

[369] *Stax v Bank of Nova Scotia Nova Scotia Channel Islands Ltd [2007] EWHC 1153 (Ch) Warren J at §10*