

Cayman Islands Grand Court provides guidance on fraud claims and the role of receivers in complex disputes

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The Port Fund L.P. litigation: A summary

The Grand Court of the Cayman Islands (**Court**) recently determined two related actions concerning The Port Fund L.P., a Cayman Islands exempted limited partnership (**Fund**).

Two Kuwaiti state-owned limited partners (**Plaintiffs**), alleged that more than US\$100 million had been misappropriated from the Fund through unlawful means conspiracy, breaches of trust and fiduciary duty, dishonest assistance and knowing receipt.

The defendants included the Fund's general partner, Port Link GP Ltd (**GP**), certain individuals and entities involved in managing the Fund, an investment banking business and the Fund's former Cayman Islands counsel.

The Court found, among other things that:

- a. the conspiracy, breach of trust, fiduciary duty, dishonest assistance and knowing receipt claims were not proved, and that the professional negligence and fiduciary claims against the law firm defendants were not established;
- b. the counterclaim alleging abuse of process by the Plaintiffs was not established, and that a cross-claim against the GP for further investment management fees could not be pursued; and
- c. one limited partner had received more than US\$13 million in excess of its entitlement from the distribution of sale proceeds, which must now be repaid to the Fund.

The judgment addresses several matters of general application to litigation where allegations of dishonesty and impropriety are advanced including the application of the civil standard of proof to serious allegations advanced largely by inference; and the circumstances in which adverse inferences may be drawn from absent witnesses and/or missing documents.

The judgment, and the Port Fund litigation more generally, also highlights the role that court-supervised receivers can play in complex, multi-party litigation and provides useful guidance on the nature and scope of the participation expected of officeholders appointed over a party to legal proceedings.

Collas Crill acted for Gordon MacRae and Cassandra Ronaldson of Interpath who were appointed as receivers (**Receivers**) of the GP, its assets and the assets of the Fund.

Background facts

The Fund was formed in 2007 to invest in air and sea ports and related logistics. It was sponsored by KGL Investment Company K.S.C.C.. Limited partners invested approximately US\$188 million, of which the Plaintiffs together contributed about 65%.

Two of the Fund's four principal investments were written off. The other two were sold at substantial profits: the interest in Negros Navigation for approximately US\$112 million, and the interest in the Clark City development in the Philippines for US\$655 million.

When the sale of the Clark City development completed in November 2017, net proceeds of approximately US\$496 million were frozen by the Dubai authorities, and remained frozen until February 2019. In July 2018, the Fund's investment manager brought proceedings against the GP and the Fund in the DIFC Courts. The GP submitted to the jurisdiction and admitted the claim, and judgment was entered.

The Plaintiffs commenced the main action in October 2020. Their claims for conspiracy, breach of trust, fiduciary duty, dishonest assistance and knowing receipt were based on:

- i. the proceedings brought against and admitted by the GP in the DIFC Courts and the resulting payment, which the Plaintiffs alleged was a sham aimed at diverting money to certain of the defendants;
- ii. fees of approximately US\$66 million paid to investment banking entities in connection with the sale of the Fund's assets, which they alleged had been inflated to fund kickbacks to KGL Investment Company K.S.C.C. (and its affiliates); and
- iii. payments to third-party advisers, including US\$14.07 million paid to a Kuwaiti service provider, which were said to have been made in breach of the GP's duties to the Fund (and by extension its limited partners).

A separate action against the Fund's former legal advisers alleged breach of fiduciary duty and negligence in connection with the DIFC proceedings. The actions were tried together.

Key takeaways

Inference and the civil standard

The Court confirmed that there is a single civil standard of proof, the balance of probabilities, and 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. In this case where allegations of wrongdoing were made, the Court applied the principle that the more serious the allegation, the less likely it is that the conduct occurred.

Therefore the evidence should be particularly cogent before the Court should conclude that the allegation is established.

Coincidences of timing, unusual features of transactions and an incomplete documentary record were insufficient to establish the alleged conspiracy, but reasonable grounds for suspicion do not of themselves discharge the burden of proof.

Adverse inferences from absent witnesses and documents

The absence of a witness or of documents may add weight to an inference otherwise properly open on the evidence, but cannot supply a missing evidential link or shift the burden of proof. The Court declined to draw adverse inferences against any party. It noted gaps in the evidence on both sides, but was able to reach its conclusions on the available material.

Role of the Receivers

When appointing the Receivers in June 2023, on the application of the Plaintiffs, the Court confirmed that equitable receivers may be appointed in a range of circumstances and for a variety of purposes, provided that the Court considers that it is just and convenient to do so.

In circumstances where the genesis of the dispute in the Port Fund proceedings was the propriety of the management of the GP, the Court concluded that it would be just and convenient to appoint the Receivers for the purpose of ensuring that there is a professional, independent, and impartial office holder in place to regularly report to the Court. This would also ensure the interests of the GP/Fund (and its stakeholders) in the litigation were monitored, protected, and advanced appropriately on an objective, reasonable, and independent basis, free from any influence by any of the protagonists in the litigation.

As the Receivers were appointed after the litigation had commenced, and well after the occurrence of the acts and transactions which are the subject of the dispute, the evidence adduced on behalf of the GP was based on the conclusions of the Receivers' investigations and review of the documentary record.

This evidence, though independent, was not neutral due to the Receivers' duty in relation to the allegations made against the GP. The Receivers' evidence was ultimately uncontested and was accepted by the Court in several key respects.

Conclusion

The judgment illustrates the evidential demands that accompany allegations of fraud and conspiracy in commercial litigation. Where such allegations depend substantially on inference from an incomplete documentary record or absent witnesses, the Court will assess the inherent probabilities, the contemporaneous material and the explanations offered, and will require cogent evidence before finding dishonesty has been proved.

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The case also illustrates the benefit of court-appointed receivers in multi-party litigation. The Receivers' role was to protect the interests of the GP, the Fund and its stakeholders, in an entirely independent manner, free from any conflict of interest, and to assist the court with evidence drawn from the Receivers' professional review of the matters in dispute.

COLLAS CRILL

For more information please contact:



Matthew Dors

Partner | Cayman

t: +1 345 914 9631 | **e:** matthew.dors@collascrill.com



Annalisa Shibli

Counsel | Cayman

t: +1 345 914 9656 | **e:** annalisa.shibli@collascrill.com



April Bradey

Associate | Cayman

t: +1 345 914 9634 | **e:** april.bradey@collascrill.com