

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

3  
4 **Cause No: FSD 218 of 2010**

5  
6  
7 **IN THE MATTER OF SECTION 94 OF THE COMPANIES LAW**  
8 **(2010 REVISION)**

9  
10 **AND IN THE MATTER OF GFP DUNAS PARTNERS HOLDINGS,**  
11 **INC**

12  
13  
14 **Appearances:** **Mr. James Corbett, Q.C., instructed by**  
15 **Mr. Graeme Halkerston and Mr. Rupert Coe of**  
16 **Appleby for the Petitioner**

17  
18 **Mr. James Thom, Q.C., instructed by**  
19 **Mr. Michael Makridakis of Ogier for the**  
20 **Respondent**

21  
22 **Before:** **Hon. Justice Henderson**

23  
24 **Heard:** **December 15 – 17, 2010**

25  
26  
27 **JUDGMENT**

28  
29 1. The petitioner, GFP Dunas Holdings, Inc (“GFP Dunas”) is a voting shareholder  
30 and director of GFP Dunas Partners Holdings, Inc. (“the Company”). The  
31 Petitioner has on 1<sup>st</sup> October 2010 presented a petition to wind up the Company  
32 pursuant to s.92(e) of the *Companies Law* (2010 Revision) on the ground that it is

1 just and equitable that it should be wound up. The Company was incorporated in  
2 the Cayman Islands in 2007. The petition is opposed by the other principle  
3 shareholder and director of the company, Nexstar ESM Holdings (Cayman) Ltd.  
4 (“Nexstar”).

- 5
- 6 2. Nexstar has on 7<sup>th</sup> December 2010 presented a cross-petition to wind up the  
7 Company pursuant to Part V of the *Companies Law* (2010 Revision) and as an  
8 alternative seeks relief under s. 95(3) of the *Companies Law* (2010 Revision).

9

10 **Background**

- 11
- 12 3. The Company is a joint venture vehicle for a quasi-partnership between Nexstar  
13 and GFP Dunas, both of which are Cayman Islands companies. Nexstar is the  
14 Class A shareholder and holds a majority shareholding of approximately 66% of  
15 the Company. GFP Dunas is the Class B shareholder and holds approximately  
16 34% of the Company. Nexstar and GFP Dunas both have representatives on the  
17 board of directors of the Company. The ultimate underlying asset of the Company  
18 is a power company in Peru. It is common ground that the investment strategy at  
19 the outset was to enhance the underlying asset with a view to its sale for a profit  
20 in early 2010.

- 21
- 22 4. Under Article 10.b of the Articles of the Company Nexstar and GFP Dunas each  
23 have 50% of the vote at meetings of the Company’s shareholders. At all material

1 times, Nexstar was represented on the Company’s board of directors by Mr. Peter  
2 Getsinger and Mr. Pieter Wernink (until Mr. Wernink’s resignation on 28<sup>th</sup> July  
3 2010) (the “A Directors”). GFP Dunas was represented by Mr. Rob Venerus and  
4 Mr. Tom Tribone (the “B Directors”). The Company is able to act only where  
5 there is a consensus between the A and the B Directors.

6  
7 5. The Company owns 99% of the Peruvian company Dunas Energia S.R.L.  
8 (“Energia”). Energia, in turn, owns over 99% of the shares of Electro Dunas  
9 S.A.A (formerly Electro Sur Medico S.A.A.) (“ESM”), a publicly listed Peruvian  
10 power company. Under a technical assistance agreement dated 14<sup>th</sup> December  
11 2007 (the “ESM Agreement”) ESM receives business, financial, technical and  
12 commercial advice from Guggenheim Franklin Park Management LLC  
13 (“Guggenheim FP”), a company related to GFP Dunas. Since 2007 the  
14 management team of ESM has consisted of Ismael Rodriguez (“Mr. Rodriguez”),  
15 the President of the board of directors, and 4 other members (together the “ESM  
16 Management Team”).

17  
18 **Breakdown of Trust and Confidence: Complaints of GFP Dunas**

19  
20 6. GFP Dunas says that there has been an irreparable breakdown in trust and  
21 confidence between the quasi-partners. A number of actions by Nexstar have  
22 caused or contributed to the breakdown.

1 7. Nexstar sought to appoint new directors to ESM in August 2010, two of whom  
2 would be Nexstar representatives, notwithstanding the agreement of the partners  
3 that one director would be appointed by each. In effect, Nexstar was requesting a  
4 rearrangement of the Board which would give it a much greater degree of  
5 influence than its partner.

6  
7 8. GFP Dunas says that Nexstar has contributed to the breakdown of trust and  
8 confidence between the joint venture parties through a series of unwarranted  
9 complaints. GFP Dunas says the complaints were financially insignificant,  
10 unjustified and provocative. These complaints (expressed in a letter dated 18  
11 February 2010) were used as a basis for issuing a deadlock notice to GFP Dunas  
12 under Article 63 of the Company Articles. The deadlock notice was admittedly  
13 deficient because no prior directors' meeting had been held to discuss the issues  
14 identified in it, contrary to a requirement in the Company Articles.

15  
16 9. It is also alleged that Nexstar exploited and misrepresented the deadlock in the  
17 Company in aid of certain unauthorized legal actions it took in Peru, without  
18 consultation with the board of the Company, arising from concerns it had about  
19 transactions entered into by the ESM Management Team. Without any prior  
20 notice to or authorization from GFP Dunas or the B Directors, around 22 April  
21 2010 Nexstar applied to the Court in Pisco, Peru (the "Pisco Court") for an  
22 injunction which would suspend provisionally all powers of the ESM  
23 Management Team and secure the appointment of a Judicial Administrator of

1           ESM. On 10<sup>th</sup> May 2010 the Pisco Court refused Nexstar’s application.

2

3   10.    Around 18<sup>th</sup> May 2010, again without any prior notice to or authorization from  
4           GFP Dunas or the B Directors, Nexstar applied to the Fifth Transitory Civil Court  
5           in Ica, Peru (the “Ica Court”) for the same relief. An injunction was granted  
6           initially by the Ica Court but, following an unsuccessful application to the Court  
7           in Lima, Peru (the “Lima Court”) for enforcement orders, the Ica Court reversed  
8           its order and dismissed the application. ESM is currently seeking compensation of  
9           US\$7 million in damages caused by the installation of the Judicial Administrator  
10          under the Ica injunction.

11

12   11.    GFP Dunas says that following its unsuccessful efforts in the Peruvian courts  
13          Nexstar resorted to trial by media. As a result ESM was mired in a controversy  
14          which was inimical to its planned sale.

15

16   12.    Without consultation with Nexstar’s joint venture partner (i.e., GFP Dunas) or  
17          authorization from the board of the Company, Mr. Getsinger met with Peruvian  
18          government officials including the regulator of ESM (in the Ministry of Energy  
19          and Mines) and rehearsed some of the complaints in the Nexstar petition. He also  
20          engaged in discussion with Banco Internacional del Peru S.A. A. (“InterBank”).  
21          GFP Dunas says that the discussion led to InterBank’s refusal to provide Electro  
22          Dunas S.A.A. with a new letter of credit in favour of the Peruvian Ministry of  
23          Energy and Mines, an allegation which has been denied by the Chief Executive

1 Officer of InterBank. GFP Dunas says that Nexstar's complaints are over-blown  
2 and part of a strategy to de-stabilise the joint venture investment with a view to  
3 acquiring the underlying asset at a discounted price for its own benefit.  
4

5 **Breakdown of Trust and Confidence: Complaints of Nexstar**  
6

7 13. In its cross-petition Nexstar submits that as a majority shareholder with equal  
8 voting rights it has been excluded from many significant management decisions  
9 of the Company.  
10

11 14. Nexstar says that by a letter of credit issued on 12<sup>th</sup> August 2009 Mr. Rodriguez  
12 had ESM assume liability for a certain US \$6.4 million guarantee provided by  
13 Hidroelctrica Marañon SLR (Marañon). That sum was to be payable if certain  
14 construction had not started by March 2010. Energia, an ESM affiliate,  
15 eventually acquired an equity interest in Marañon but that did not occur until 30<sup>th</sup>  
16 May 2010. For a period of some seven months, ESM guaranteed Marañon's  
17 performance without deriving any commercial benefit from its exposure.  
18

19 15. On the 1<sup>st</sup> July 2009, Mr. Tribone had turned down the opportunity for a  
20 Guggenheim FP affiliate to invest in Marañon. On 7<sup>th</sup> July 2009, Mr. Rodriguez  
21 pitched Marañon to Mr. Getsinger and on 14<sup>th</sup> December 2009 he pitched it to Mr.  
22 Wernink. Both presentations failed to arouse any interest in them. On 18<sup>th</sup>  
23 December 2009, within 4 days of Mr. Rodriguez's pitch to Mr. Wernink, QV

1 Americas Inc., a Panamanian company of which Mr. Rodriguez was (since 2008)  
2 both a director and secretary, acquired 100% of Marañon. Its acquisition was not  
3 registered until 11<sup>th</sup> May 2010. Energia acquired its equity interest in Marañon  
4 from QV Americas Inc. Mr. Rodriguez was appointed General Manager of  
5 Marañon. Nexstar alleges that this was an obvious case of self-dealing and says  
6 that Mr. Rodriguez caused Energia to purchase an investment which had been  
7 rejected by all four directors of the Company.

8  
9 16. Nexstar also alleges that Mr. Rodriguez's relationship with GFP Dunas is much  
10 closer than it had been led to believe. He was paid US\$150,000 per annum plus  
11 expenses by Guggenheim FP but no contract for services has been disclosed. The  
12 complaint is that Mr. Rodriguez cannot, because of his close relationship with the  
13 owners of GFP Dunas, carry out his executive duties without favouring its  
14 interests (and his own) over those of Nexstar.

15  
16 17. A review by Ernst & Young of ESM's records has identified a number of  
17 questionable transactions, including the following:

- 18  
19 1. An agreement dated 15<sup>th</sup> December 2009 by which ESM assigned to a company  
20 called SIGCOM its billing software. There was no evidence of consideration for  
21 the assignment. The agreement was signed by Mr. Rodriguez on behalf of  
22 SIGCOM.  
23 2. the payment of over US \$900,000 to an interior decorating business called Studio

1 Gaia, the proprietor of which is described (by Mr. Santivañez of the Peru law firm  
2 Santivañez Abogados) as Mr. Rodriguez’s “domestic partner”.

3 3. the payment of at least US \$155,000 to MWH Peru SA on behalf of Marañon  
4 several days before the latter’s purchase by Energia.

5 4. payments to Guggenheim FP for the period 1<sup>st</sup> June 2009 to 10<sup>th</sup> June 2010 well in  
6 excess of the annual fee set by the ESM Agreement of US \$736,000.

7

8 **Issues**

9

10 18. GFP Dunas says that there has been a loss of mutual trust and confidence between  
11 the two quasi-partners owing to the secretive and unilateral actions of Nexstar and  
12 Mr. Getsinger. They have acted contrary to the legitimate expectation that the  
13 Company would be managed on a joint basis and that significant decisions would  
14 not be taken without the agreement of both quasi-partners. The result is a  
15 deadlock without any chance of reconciliation. It says there are three issues:

16 (1) Was this a quasi-partnership?

17 (2) If so, has the relationship between parties broken down irretrievably?

18 (3) If so, is Nexstar at least partly responsible for the breakdown?

19

20 19. Nexstar’s cross-petition is based on the contention that, given the common ground  
21 that the Company’s indirect interest in ESM should be sold, the real dividing issue  
22 is how that should be approached. Nexstar seeks the removal of Mr. Rodriguez  
23 and directions intended to effect the sale in a manner which protects its own

1 position, thus accomplishing the intended goal of the partnership.

2  
3 **Analysis**

4  
5 *The Companies Law S. 92 (e) provides;*

6 *A company may be wound up by the Court if –*

7 *.....*

8 *(e) the Court is of the opinion that it is just and equitable that the company*  
9 *should be wound up.*

10  
11 A quasi-partnership is likely to be characterized by one or more of the following  
12 three features;

13 (i) *an association formed or continued on the basis of a personal*  
14 *relationship involving mutual confidence... ;*

15  
16 (ii) *an agreement or understanding , that all, or some (for there may be*  
17 *'sleeping' members) of the shareholders shall participate in the*  
18 *conduct of the business;*

19  
20  
21 (iii) *restriction upon the transfer of the members' interest in the*  
22 *company... . (Ebrahimi v Westbourne Galleries Limited [1973] AC*  
23 *360, Lord Wilberforce at 379F-G.)*

24  
25 20. Lord Millett has provided this succinct definition:

26 *Companies where the parties possess rights, expectations and obligations which*  
27 *are not submerged in the company structure are commonly described as 'quasi-*  
28 *partnerships'. Their essential feature is that the legal, corporate and employment*  
29 *relationships do not tell the whole story, and that behind them there is a*  
30 *relationship of trust and confidence similar to that obtaining between partners*  
31 *which makes it unjust or inequitable for the majority to insist on its strict legal*  
32 *rights. (Re CVC/Opportunity Equity Partners Ltd [2002] CILR 77, at para 36.)*  
33

1 It is not necessary that the members have equal shareholdings to satisfy the  
2 requirement of a quasi-partnership: *Re Modular Furniture Pty Ltd* (1981) 5  
3 ACLR 463.

4

5 21. The evidence before me shows clearly that the parties were engaged in a joint  
6 venture with all of the salient characteristics of a quasi-partnership. That is not  
7 contested by Nexstar.

8

9 22. A Court will wind up a quasi-partnership company just as it would dissolve a  
10 partnership where the relationship of mutual trust and confidence has irretrievably  
11 broken down: *Ebrahimi v Westbourne Galleries Limited*, supra, Lord Cross at  
12 383H-384A. The following five principles emerge from the judgment.

13 • First, the remedy of a winding up should not be confined to any pre-  
14 determined, finite list of factual situations.

15 *Illustrations may be used, but general words should remain general and not*  
16 *be reduced to the sum of particular instances:* Lord Wilberforce, at 374H.

17 • Second, the petitioner may rely upon any circumstances of justice or equity  
18 which affect it in its relations with the company or the other shareholders:  
19 Lord Wilberforce, at 375A-B.

20 • Third, *it is not a condition precedent to the making of an order....that the*  
21 *conduct of those who oppose its making should have been unjust or*  
22 *inequitable:* Lord Cross, at 383F.

23 • Fourth, a winding up order may be made; (i) regardless of any available

1 contractual mechanism for dispute resolution and (ii) regardless of whether  
2 the company is economically successful: Lord Cross, at 383G-H.

- 3 • Fifth, in order to resist a winding up order successfully the respondent must  
4 show that the petitioner *has been solely responsible for the situation which*  
5 *has arisen*: Lord Cross, at 383H-384A.

6

7 23. Loss of confidence may be unilateral. It is sufficient that a petitioner has lost  
8 confidence in the respondent regardless of whether the respondent has lost  
9 confidence in the petitioner provided the court is satisfied that the petitioner's  
10 view is justified: Spence J in *Belman v Belman* (1995)26 OR (3d) 56.

11

12 24. It is obvious that the trust and confidence necessary to the success of the business  
13 relationship between the parties was extinguished some time ago. The mutual  
14 complaints described in brief above are sufficient to demonstrate that. The  
15 relationship cannot be restored to a state of harmony at this juncture.  
16 Consequently GFP Dunas is entitled to the order sought unless either of the two  
17 aspects to which I will refer below satisfy me that my discretion should not be  
18 exercised in its favour.

19

### 20 **Clean hands**

21

22 25. The first is the doctrine of clean hands. The relief sought is an equitable remedy.  
23 Nexstar says that GFP Dunas does not come to the court with clean hands and

1 should, therefore, be denied the assistance it seeks. The basis for this submission  
2 is a remark by Lord Cross:

3  
4 *A petitioner who relies on the 'just and equitable' clause must come to court with*  
5 *clean hands, and if the breakdown in confidence between him and the other*  
6 *parties to the dispute appears to have been due to his misconduct he cannot insist*  
7 *on the company being wound up if they wish it to continue. (Lord Cross in*  
8 *Westbourne Galleries, supra, at 387F.)*  
9

10 26. Mr. Thom (for Nexstar) accepts that he must show that the breakdown in trust and  
11 confidence was caused solely by the acts of GFP Dunas itself. If the acts of each  
12 party contributed in some measure to the breakdown then, even if their respective  
13 contributions were disproportionate and even if GFP Dunas was largely to blame,  
14 the partnership should be dissolved.

15  
16 27. Mr. Thom's mandate was an onerous one. He has said all that can be said on  
17 behalf of Nexstar but he has failed to satisfy me on the balance of probabilities  
18 that the acts of this petitioner were the sole cause of the breakdown of trust and  
19 confidence. Mr. Getsinger also contributed to that breakdown by:

- 20 1. proposing that the board of ESM be reformed with unequal representation of the  
21 two partners;
- 22 2. issuing a deadlock notice which was not preceded by the requisite board meeting;  
23 and
- 24 3. initiating a court application in Peru in April 2010 which sought the appointment  
25 of a Judicial Administrator for ESM without consulting GFP Dunas.

26

1           These acts were material contributing factors to the difficulties between the  
2 parties.

3

4           **O'Neill v Phillips**

5

6 28.     I turn to the second question. If an offer to purchase the petitioner's shares in  
7 accordance with the procedure described in *O'Neill v Phillips* has been made and  
8 rejected, the court would be justified in dismissing or staying the petition. That  
9 remains so even though Nexstar has the larger of the two investments. The  
10 justification arises from a recognition

11           *.....that there will be cases in which equitable considerations make it unfair for*  
12 *those conducting the affairs of the company to rely upon their strict legal powers.*  
13 *Thus unfairness may consist in a breach of the rules or in using the rules in a*  
14 *manner which equity would regard as contrary to good faith. ... Parties ought to*  
15 *be encouraged, where at all possible, to avoid the expense of money and spirit*  
16 *inevitably involved in such litigation by making an offer to purchase at an early*  
17 *stage. (Re a company (No 00709 of 1992 O'Neill and another v Phillips and*  
18 *others [1999] 2 ALL ER 961, per Lord Hoffmann)*

19  
20

21           So that litigants might know what counts as a reasonable offer the judgment laid  
22 down the following five criteria:

- 23           • *In the first place, the offer must be to purchase the shares at a fair value.*
- 24           • *Secondly, the value, if not agreed, should be determined by a competent expert.*
- 25           • *Thirdly, the offer should be to have the value determined by the expert as an*  
26 *expert.*
- 27           • *Fourthly, the offer should ... provide for equality of arms between the parties.*
- 28           • *Fifthly, there is the question of costs. ... the majority shareholder should have a*  
29 *reasonable time to make the offer before his conduct is treated as unfair. The*  
30

1           *mere fact that the petitioner has presented his petition before the offer does not*  
2           *mean that the respondent must offer to pay the costs if he was not given a*  
3           *reasonable time.*  
4  
5

6   29.    In a letter dated 2<sup>nd</sup> December 2010, some two months after the presentation of  
7           the Petition and less than two weeks before the hearing, Nexstar offered to GFP  
8           Dunas an *ad hoc* restructuring and liquidation process which would take place  
9           over approximately two years. Although that Nexstar said that its offer “was  
10          made pursuant to the principles laid down in *O’Neill v Phillips*”, it required the  
11          following:

- 12          1) that the management and board of both ESM and Energia be removed and  
13             replaced;
- 14  
15          2) that ESM operate for a period of not less than 6 months under the new board in  
16             order to ‘normalise’ and only after a period of ‘normalisation’ would an  
17             investment banker be retained to prepare the Company, Energia and ESM for  
18             sale;
- 19  
20          3) that only if the investment banker could not sell the assets of the Company  
21             would a valuation process begin to determine the price at which Nexstar  
22             would purchase GFP Dunas’ shareholding. No time limit for delivery of the  
23             valuation was specified.  
24

25   30.    Nexstar's proposal, whatever else may be said of it, is not an *O’Neill v Phillips*  
26          offer. It is hedged with conditions, would provide no immediate relief to GFP  
27          Dunas, and contemplates the deadlocked partners agreeing upon questions which  
28          are unlikely to be resolved amicably. There is also no evidence that Nexstar can  
29          finance the purchase of GFP Dunas’ shareholding. A prospective buyer must  
30          provide sufficient evidence to support a conclusion that it will be able to pay the  
31          likely valuation price: *West v Blancheht* [2000] 1 BCLC 795.

32

1           **Conclusion**

2

3   31.    I conclude that GFP Dunas is entitled to a winding up order. As to its wording, I  
4           prefer the form submitted by Nexstar in its draft order. The power of the JOLs to  
5           replace the boards of Energia and ESM should be set out expressly in the order.

6

7   32.    Nexstar has asked for a mandatory direction to the JOLs that Mr. Rodriguez be  
8           removed from office. The evidence before me does suggest that Mr. Rodriguez  
9           played no small role in the deteriorating relationship between these parties. In  
10          addition, Ernst & Young have identified some transactions entered into by  
11          Mr. Rodriguez which seem to require investigation. The JOLs should, as a high  
12          priority, consider whether Mr. Rodriguez must be removed. I am content to leave  
13          that decision to them. In considering the question, the JOLs should take into  
14          account the views of each of the parties.

15

16   33.    It follows that the petition is allowed and the cross-petition is dismissed. The  
17          JOLs are of course at liberty to apply.

18

19          Dated this 31<sup>st</sup> day of May, 2011

20

21

22          Henderson, J.  
23          Judge of the Grand Court