



**THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**Cause Nos: FSD 236 of 2020 (RPJ)**

**BETWEEN:**

- (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 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 (A HONG KONG COMPANY)**
- (7) RONALD HENRY AYLIFFE**
- (8) KGL INVESTMENT COMPANY KSCC**
- (9) APACHE ASIA LIMITADA (A MACAO COMPANY)**

**DEFENDANTS**

- (1) GORDON MACRAE**
- (2) ELIZABETH MACKAY**

**(In their capacity as joint receivers of Port Link GP Ltd and The Port Fund L.P.)**

**INTERESTED PARTIES**

**Before:** The Hon. Raj Parker

**Appearances:**

Mr David Allison KC instructed by Ms Jennifer Fox and Mr Harry Clark of Ogier (Cayman) LLP for the Plaintiffs

Mr Andrew Johnstone and Ms Rhiannon Zanetic of Harneys for the Joint Voluntary Liquidators ("JVLs")

Mr Daniel Bayfield KC instructed by Mr Matthew Dors of Collas Crill, for the Interested Parties (the "Receivers")

**Heard:** 18 September 2023

**Date of Decision:** 18 September 2023

**Reasons Delivered:** 6 October 2023

**HEADNOTE**

*Section 124 of the Companies Act-discretion-supervision application-liquidation-continuation of receivership-factors in exercise of discretion -dismissal of supervision application and liquidation-different Judge to oversee continuing receivership.*

**REASONS FOR DECISION***Introduction*

1. On 18 September 2023, the Court heard an application by the joint voluntary liquidators ("JVLs") of Port Link GP Ltd (the "GP") for an order that the liquidation of the GP continue under the supervision of the Court pursuant to section 124 of the Companies Act (the "supervision application") and to review the Receivership order it had granted in respect of the GP on 1 June 2023.
2. Mr David Allison KC appeared for the Plaintiffs. Mr Andrew Johnstone appeared for the JVLs. Mr Daniel Bayfield KC appeared for the Receivers.

3. The Court decided that the Receivers should remain in office and the GP should not go into official liquidation. The supervision application was dismissed.
4. The Court also decided that the receivership proceedings should be assigned to a separate judge in the Financial Services Division of the Grand Court for the purposes of supervision of the receivership.

These are the reasons for that decision.

### *Background*

5. Port Link GP Ltd is the general partner of The Port Fund L.P. (“TPF”). The Plaintiffs are Limited Partners of TPF and together with the other limited partners of TPF together hold approximately 65% in value of the total investment.
6. The term of TPF expired almost nine years ago on 31 December 2014. Since then, TPF's principal activity has been to complete an orderly wind down and make distributions to those entitled to them.
7. The claims of the limited partners as to the misconduct of TPF's business by the GP (and its related entities and persons) has led to extensive litigation in this Court. Before the orderly wind down of TPF can be completed this litigation needs to be concluded.
8. One piece of litigation is particularly significant. In the FSD 236 of 2020 proceedings<sup>1</sup> the Plaintiffs are seeking to recover sums belonging to TPF and/or the Limited Partners in excess of USD 100 million which have allegedly been misappropriated by the GP and the other Defendants. The proceedings were commenced some three years ago.<sup>2</sup>
9. The Court is of the view that it is important to ensure that this litigation continues without further undue delay and cost. It will manage the litigation in a cost effective and efficient way, which is

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<sup>1</sup> In addition to the FSD 236 proceedings: two other Limited Partners, GRSIA and GIC, have sued the GP and other defendants in the Cayman Islands (FSD 41 of 2022); the Plaintiffs have commenced proceedings against the GP's former attorneys, Walkers and Walkers (Dubai) Limited Liability Partnership in the Cayman Islands (FSD 97 of 2021) (the “Walkers Proceedings”); GRSIA has also sued Walkers (Dubai) Limited Liability Partnership – these proceedings have been stayed pending the conclusion of the Walkers Proceedings; the GP is also a party to ongoing proceedings brought by KPA under the Confidential Information Disclosure Act in the Cayman Islands regarding the disclosure provided as part of the Section 22 Disclosure to the State of Kuwait for use in arbitration proceedings commenced by Ms Lazareva which are now subject to appeal.

<sup>2</sup> On 20 January 2023 the Court of Appeal refused to strike out the Plaintiffs' claims against the Defendants. Permission to appeal was refused on 27 April 2023. D2-D4 have applied to the JCPC seeking permission to appeal.

fair to all parties, and which does not prejudice those involved in or affected by it, in accordance with the Overriding Objective.

*JVLs in place*

10. On 15 February 2023 the GP's former independent directors (the "FFP directors") resigned which left it unable to prosecute or defend the claims to which it is a party. This left D2, Mr Williams, in ultimate control of the GP who could thereby influence the prosecution of the GP's counterclaims and its defence to the cross claim brought by D2 - D4. The Court found that state of affairs to be unsatisfactory and, following a hearing and a reasoned Judgment, appointed receivers as independent officers of the Court to manage the various proceedings on the GP's behalf. It also granted the Plaintiffs leave to defend the cross claim as limited partners of TPF.<sup>3</sup>
11. On 2 May 2023 the GP's sole shareholder passed resolutions *inter alia* to appoint the JVLs of the GP. On 5 May 2023 the JVLs issued a notice of winding up and consent to act in accordance with sections 123(a) and (b) of the Companies Act and Order 13 rules 2 (a) and (b) of the Companies Winding Up Rules (2023 revision). The JVLs, as they are required to, have now made this application.
12. They seek to continue to wind up the GP as Official Liquidators under the supervision of the Court in circumstances where there are no directors of the GP able to sign a declaration of solvency.

*Receivership in place*

13. As stated above, the Court has relatively recently appointed Joint Receivers (the "Receivers") over the litigation for the GP having decided in its judgment of 25 May 2023 (at [128]) that it was not appropriate, necessary or desirable to appoint a liquidator.
14. The Court relevantly decided:

at [110] that: "*...the most appropriate remedy in all the circumstances which does justice between the parties is to appoint independent Receivers. The main purpose of the appointment is for an independent professional to manage the complex litigation on behalf of the GP reasonably and efficiently. This leads to a more bespoke method of supervision by the Court than that of a statutory liquidation with its rigid rules. The Receiver Application is more flexible and may be tailored to the material circumstances relating to the litigation which will inevitably change.*"

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<sup>3</sup>On 15 July 2023 leave to appeal to the Court of Appeal was refused by Beatson JA, with reasons. A renewed application to the full CICA has been made and is pending.

at [126] that : “as the Court is presently choosing between liquidation and receivership, liquidation would also be the more invasive remedy. A liquidator would be bound to follow the statutory scheme. The Court agrees with Mr Allison KC that this would sound the ‘death knell’ for the General Partner and liquidators would assume full control going forward.”

at [129] the issue was: “one of incapacity at the General Partner in the context of claims and crossclaims in litigation, not, at least on presently available evidence, insolvency.”

#### *JVLs*

15. On 5 June 2023, the JVLs issued and served the supervision application, indicating that the directors of the GP had not provided a declaration of solvency within 28 days of the commencement of the voluntary liquidation of the GP (unsurprisingly as the GP has no directors) and accordingly seeking that the winding up of the GP continue under the supervision of the Court.
16. The JVLs say the supervision application has been made in compliance with the mandatory requirements of the Companies Act, and that it was made “*not to seek to infringe upon or otherwise duplicate the efforts (or costs) of the [JRs] but simply to comply with section 124(1) of the [Companies Act]*”.
17. Mr Johnstone’s main arguments in support of the JVLs’ written position to continue as official liquidators was to draw the Court’s attention to the JVLs’ interpretation of the statutory regime. He argued that the Court retained a discretion as to whether to grant a supervision order, but it is a very limited discretion. It arises merely because there is a rebuttable presumption of insolvency. There is no wider discretion.
18. He was at some pains to point out that the JVLs remained neutral as to the outcome, but the JVLs had provided their consent to act as joint official liquidators of the GP in the event that the Court should consider that appropriate.

#### *The law*

##### *Section 124(1) of the Companies Act*

19. Section 124(1) of the Companies Act provides that:

*“where a company is being wound up voluntarily its liquidator shall apply to the Court for an order that the liquidation continue under the supervision of the Court unless, within twenty-eight days of the commencement of the liquidation, the directors have signed a declaration of solvency in the prescribed form in accordance with subsection (2).”*

20. Section 124(2) of the Companies Act provides that:

*“a declaration of solvency means a declaration or affidavit in the prescribed form to the effect that a full enquiry into the company’s affairs has been made and that to the best of the directors’ knowledge and belief the company will be able to pay its debts in full together with interest at the prescribed rate, within such period, not exceeding twelve months from the commencement of the winding up, as may be specified in the declaration.”*

21. Section 133 of the Companies Act provides that:

*“a supervision order shall take effect for all purposes as if it was an order that the company be wound up by the Court except that*  
*(a) the liquidation commenced in accordance with section 117 [i.e. at the time of the passing of the resolution for voluntary winding-up]; and*  
*(b) the prior actions of the voluntary liquidator shall be valid and binding upon the company and its official liquidator.”*

22. As can be seen, section 124 is mandatory in its terms. The JVLs have a statutory duty to apply, absent a declaration of solvency.

23. However, in this case there is no application made upon evidence that the JVLs have determined that in all the circumstances that it is necessary or desirable for there to be a Court supervised liquidation. The application is made simply because it is a mandatory step that the JVLs should apply for an order that the liquidation continue under the supervision of the Court.

24. There is some limited case law guidance on section 124(1).

25. In the first case to which the Court’s attention was drawn, *In Re AWJ Master Fund II Limited 2011 (1) CILR 363 (“AWJ”)* Jones J stated *obiter* that, where there is no declaration of solvency *“the court must make a supervision order. It has no discretion on this matter”*.

26. It appears that this statement was made without hearing legal argument and as Quin J pointed out in *OVS* (below) it was an *obiter* comment.

27. In this later case, *OVS Capital Management (Cayman) Limited 2017 (1) CILR 232* (“OVS”) the company was solvent but had not provided a declaration of solvency due to an administrative error. The section 124(1) petition was dismissed.
28. Quin J held that, when determining a section 124(1) petition (at [37]):
- “The court has a discretion, after reviewing all the facts and surrounding circumstances, to decide whether or not to make a supervision order. Furthermore, if the court had no discretion one would expect to find some mandatory language contained within s.124 of the Companies Law removing the court’s discretion. The primary purpose of a supervision order is to ensure that an insolvent company is brought under the supervision of the court so as not to allow the insolvent company to continue in the voluntary unsupervised process. Insolvent companies should not be allowed to wind down voluntarily.”*
29. This Court respectfully agrees with that analysis. The fact that the Court retains a discretion as to whether and how to determine a section 124(1) petition is also given some support by the language used by Doyle J more recently in *Global Fidelity Bank Limited (in voluntary liquidation) 2021 (2) CILR 361*, in which he cited Quin J's statement in *OVS* at [22].
30. When making an unopposed supervision order Doyle J stated at [2] that *“It was sensible and appropriate that the liquidation...be continued subject to the supervision of the court, and I made an unopposed order to that effect.”*
31. I accept Mr Allison KC’s submission that the implication of this wording is that (i) it is possible that the application could have been successfully opposed, had there been opposition to the supervision order being made, and (ii) Doyle J was content to grant the supervision order on the basis that it was, in his view, *“sensible and appropriate”* to do so.
32. In the Court’s view the purpose and effect of a section 124(1) petition is, to all intents and purposes, the same as a winding-up petition. Its purpose is to ensure that an insolvent company is brought under the supervision of the Court<sup>4</sup> and the effect of granting a supervision order is that the company be compulsorily wound up by the Court.
33. The Court is of the view that it therefore has analogous powers on the hearing of an application for a supervision order under section 124(1), as those that it has on a winding up petition presented in the ordinary way. If a supervision order was made, then the official liquidation would proceed as if it were a winding up by the Court made on a winding up petition.

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<sup>4</sup> *OVS*, [37].

34. The Court accepts Mr Allison KC's submission that it follows that the Court has jurisdiction and retains a broad discretion to do any of the things listed in section 95(1) of the Companies Act. This includes, at section 95(1)(a), dismissing the petition. It would also include the power to adjourn or stay the petition.
35. It does not follow on a plain reading of section 124 that the Court's discretion is removed and the Court has no option other than to make an order appointing official liquidators, as contended for by Mr Johnstone for the JVLs, where there is no certificate of solvency and no evidence of solvency.
36. That would be a most surprising result, particularly on the facts of this case where the failure to provide the declaration arises out of incapacity (no directors) and there is no good evidence of insolvency one way or the other.
37. Reliance on the *obiter* comment by Jones J in *AWJ* is misplaced. The decisions of Quin J and Doyle J support the Court's conclusion and reinforce the Court's view that it retains a broad discretion to make a decision on an informed basis and in the interests of justice as to how to determine a section 124 petition.
38. As Quin J pointed out, there is no mandatory wording in section 124 to the effect that upon such an application (which must be made under the statute) the Court must grant the supervision order. Rather, in the Court's view it retains a broad discretion to achieve an outcome which would be in the best interests of the Company's stakeholders and its creditors. It is not, as Mr Johnstone contended, a narrow discretion to assess the rebuttable issue of insolvency.
39. The Court therefore rejects the argument that the fact that the GP has not provided a declaration of solvency means that the supervision application must be granted.
40. The fact that the GP has not provided a declaration of solvency does not mean that the GP is insolvent. Indeed, there is no cogent evidence regarding the GP's current financial position. The GP remains unable to provide a statement of solvency compliant with section 124(2) because it has no directors. The GP's financial position will not be known until the conclusion of the litigation to which the GP is a party. Depending on the outcome of the FSD 236 Proceedings, TPF may receive a substantial payment.
41. It would in the Court's view be inappropriate and premature to place the GP into court-supervised liquidation at this stage. The Court reached the same conclusion in the Judgment given in the Receivership Application on 25 May 2023.



*Exercise of discretion*

42. The Court has taken into account that direct creditors comprising: former directors of the GP (the FFP directors); its former attorneys (Kobre & Kim); and KGLI (D8) have each said they are content for the supervision application to be granted and for there to be a Court supervised liquidation<sup>5</sup>. Kobre & Kim and the FFP directors also say they have no objection to the existing Receivers (Interpath) continuing in this regard.
43. D8 seeks the discharge of the Receivers. The Court notes that D8 is connected to Mr Williams and is a defendant to a substantial derivative claim (US\$60m). It may also be a creditor of TPF, not the GP.
44. The Court has also taken into account the views of Walkers (Cayman and Dubai) who take a neutral stance on the supervision application and the review of the receivership.
45. The Court has come to the clear view that there is no benefit to commencing a court-supervised liquidation procedure at this stage.
46. The Court is also of the clear view that a just an expeditious outcome and one which provides the best regime to allow the FSD 236 litigation to progress efficiently would be served by dismissing the supervision application, with the conduct of the litigation remaining under the control of the Receivers acting on behalf of the GP.
47. This outcome is supported by 93% of the Limited Partners by value who are not affiliated in some way to the Defendants in the FSD 236 litigation<sup>6</sup> and who wish to prosecute the litigation. It is they that have the substantial economic interest in this case. There is furthermore no real prejudice shown by any creditor to this outcome.
48. The Court has weighed, in reaching this conclusion, the fact that moving the GP into compulsory liquidation is not reversible, even if it subsequently transpires that TPF is solvent following the conclusion of the various legal proceedings and its assets fall to be distributed in accordance with the terms of the Limited Partnership Agreement.
49. In addition, as was identified in the Judgment of 25 May 2023, the Official Liquidators would be subject to various statutory duties which are not necessary or appropriate in the GP's circumstances

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<sup>5</sup> *Lynch 3 §18-20*

<sup>6</sup> *In addition to the Plaintiffs, Gulf Investment Corporation ("GIC") and the General Retirement and Social Insurance Authority, Qatar ("GRSIA") holding a further 15% of the total investment in TPF*

(see for example, sections 102(1), section 105(3) of the Companies Act, O8, r2 of the Companies Winding-Up Rules 2023). There would be no need for proofs of debt or distributions to be assessed, as this will be dependent on the outcome of the litigation.

50. A further important consideration is that all claims against the GP would be automatically stayed in a liquidation. This is a significant factor in this case because of the GP's involvement in the FSD 236 Proceedings (and others) as a defendant. The automatic stay would be a barrier to the Plaintiffs, TPF and the other Limited Partners to prosecute their claims against the GP. It may be a barrier they would seek to overcome, but it is still a barrier. The GP is not trading and the advantages of a stay in that circumstance do not apply.
51. An application to lift the stay would cause further delay, uncertainty and increased costs. This litigation has already generated a number of appeals and the Court of Appeal have considered, at some length, the appropriateness of the litigation continuing.
52. Moreover, there have already been significant costs (funded by the Plaintiffs) in the appointment of the Receivers for the purpose of overseeing the litigation by and against the GP. In terms of duplication, there are already Court-appointed officeholders supervising the conduct of the GP in place. Reasons were given for that appointment in the Judgment of 25 May 2023. There has been no material change of circumstances since then.
53. Moreover, the Receivers have done a considerable amount of work since their appointment at the beginning of June and have reported to the GP's stakeholders on 14 August 2023. It is not necessary to set out the detail of that here; suffice to say many important work streams have been commenced as is reflected by the fees they have incurred, which are approaching US\$1m in a relatively short space of time.
54. Mr Bayfield KC said that the Receivers have confirmed that they are able and well placed to continue acting as receivers to manage the litigation on behalf of the GP, or instead to act as joint official liquidators of the GP if the Court so determines. He pointed out that they note that they would only be able to discharge these functions if properly funded and that it is currently not clear how joint official liquidators would be funded, given that the GP does not currently have liquid assets available.
55. The Court has weighed the issue of funding in the balance as well. It is obviously of great practical importance in relation to achieving potential recoveries for the benefit of all creditors and stakeholders. The Plaintiffs are prepared to continue to fund the Receivers as they have done to date. Whilst funding may become available in the future, there is currently no funding available to the JVLs to deal with the proceedings which involve the GP or to conduct the liquidation.

56. For all these reasons the Court in its discretion will dismiss the supervision application to ensure that the Receivers can continue to oversee the expeditious continuation of the litigation to which the GP and/or TPF is a party without incurring any further unnecessary costs or delay. If the creditors or other stakeholders consider it would be appropriate to move the GP into compulsory liquidation at a later stage, they are of course at liberty to apply to the Court at that stage.
57. The Receivers are both highly experienced practitioners who have been involved in the management and direction of Court supervised matters in multiple jurisdictions over many years. Substantial progress has already been made by them in FSD 236. Since the GP will not be placed into official liquidation the issue of which office holder should be appointed does not arise.
58. The receivership should continue, overseen and supervised by a different FSD Judge to avoid any actual or perceived conflicts with the litigation in which the GP is engaged.



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**THE HON. MR JUSTICE RAJ PARKER**  
**JUDGE OF THE GRAND COURT**