IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 103 of 2015 (RMJ)

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP LAW, 2014

AND IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND THE MATTER OF TORCHLIGHT FUND L.P.

IN COURT 6

Appearances:	**Mr. Tom Lowe QC and Ms. Hilary Stonefrost instructed by Ms. Jessica Williams, Ms. Gemma Lardner and Ms. Aleisha Brown of Harneys for the Petitioners**
	Mr. John Wardell QC and Mr. Andrew Mold instructed by Mr. Ben Hobden, Mr. Erik Bodden and Jordan McErlean of Conyers Dill & Pearman for the Respondent
Before:	**The Hon. Justice Robin McMillan**
Heard:	**20 February to 10 March 2017** **8-12 May 2017** **12-29 September 2017** **26 October 2017** **23-24, November 2017** **27 November 2017** **28 November to 1 December 2017**
Draft Judgment Circulated:	**16 July 2018**
Judgment Delivered:	**25 September 2018**

HEADNOTE

The just and equitable grounds for winding up an exempted limited partnership-The distinction between a partnership and an exempted limited partnership- The interplay of contract and statute in statutory winding up – A winding up petition must not be brought for an improper purpose-The limited application of the clean hands doctrine in statutory winding up- The role of the decision maker under a limited partnership agreement.

JUDGMENT

Introduction

1. The Petitioners in this matter have issued a Petition for the winding-up of Torchlight Fund LP ("the Partnership").

2. On 10 July 2018, at a time when the Court had essentially completed but not circulated its Judgment in these proceedings to the Parties, the Court was informed that a confidential settlement had been reached between the Parties. As a result, the Court was invited, and agreed, to withdraw the Petition with no order as to costs. In such circumstances, the Court has an independent discretion to decide whether to deliver its Judgment or not. Having carefully considered the views of the parties and the relevant authorities such as the Court of Appeal's judgment in *Barclays Bank v Nylon Capital LLP* [2012] ALL ER (comm) 912, the Court determined that there were two specific reasons that weighed in favour of this Judgment being published. First, Mr. George Kerr and Mr. Russell Naylor have been heavily criticised by the Petitioners in the course of these proceedings and their professional standing has been consistently impugned. Not only are Mr. Kerr and Mr. Naylor entitled to know that they have been exonerated but the public is entitled to know it as well. This is a matter of human rights as much as it is a matter of commercial law, and in this context public access to justice is paramount. Secondly, there has arisen a number of issues of law which in the opinion of the Court are of general significance both to the legal profession and to the public at large. Accordingly, there is a strong public interest that

these rulings of the Court be made public and the Court has therefore determined in its discretion to issue this Judgment.

3. This Petition ("the Petition") was issued on 21 June 2015 and it was served on Torchlight GP Limited ("the General Partner") on 26 June 2015. An Amended Petition was filed on 8 September 2016 with leave of the Court.

The Petitioners

4. The Petitioners are Aurora Funds Management Ltd ("Aurora"), Crown Asset Management Ltd ("CAML") and Accident Compensation Corporation of New Zealand ("ACC"). They are all respective Limited Partners in the Partnership.

5. Aurora is trustee of the Bear Real Opportunities Fund ("the Bear Fund"). The Bear Fund is an investment vehicle for three Australian managed investment schemes. They are the van Eyk Blueprint Fund, the van Eyk Blueprint High Growth Fund and the van Eyk Blueprint Capital Stable Fund ("the Blueprint Funds"). Aurora used to have van Eyk Research Pty Ltd ("van Eyk") as its investment manager. The principal asset of the Bear Fund is its interest in the Partnership. The total amount invested by the Bear Fund in the Partnership is said to be some AU$55 million. The sole beneficiary of the Bear Fund is Macquarie Investment Management Ltd. ("MIML"), the responsible entity of the Blueprint Funds. MIML is a division of Australia's largest investment bank, Macquarie Group Ltd.

6. CAML is a New Zealand Crown Company and is wholly owned by the New Zealand Government. CAML was incorporated in February 2012 for the purpose, among others, of acquiring, managing and realizing the residual assets of five of eight failed finance companies which the New Zealand Government had supported under its Retail Deposit Guarantee Scheme. Some of the companies went into receivership and, once the receivers had recovered the readily realisable assets, CAML was entrusted with achieving the best realisations from the remaining highly distressed assets. One of the companies qualified under the Retail Deposit Guarantee Scheme had an investment of some NZ$30 million in

Torchlight Fund No 1 Limited Partnership ("the NZ Partnership") which has been transferred to the NZ Partnership pursuant to an Assignment Deed. This company was South Canterbury Finance Limited ("SCF"). CAML holds the investment in the Partnership on behalf of New Zealand taxpayers.

7. ACC was incorporated on 1 April 1974 under the Accident Compensation Act 1972 of New Zealand. ACC is a Crown entity and its board of directors are responsible to a New Zealand Cabinet Minister. The operation of ACC is governed by the Accident Compensation Act 2001 of New Zealand. ACC manages New Zealand's universal no-fault personal injury cover for all New Zealand residents and visitors. ACC's investment activities are designed to fund the payment of claims from injured persons. ACC invested in the NZ Partnership in October 2010.

The Partnership

8. The Partnership is an exempted limited partnership which was registered on 8 November 2012 under the laws of the Cayman Islands. The Partnership was established to make, hold and dispose of investments. Prior to the Petitioners becoming Limited Partners of the Partnership, they were Limited Partners of a New Zealand domiciled Limited Partnership, Torchlight Fund No. 1 LP ("the NZ Partnership").

9. The General Partner of the Partnership is Torchlight GP Limited, an exempted company which was registered on 5 September 2012 under the laws of the Cayman Islands. The General Partner (" the GP") is and has at all material times been a wholly owned company of Pyne Gould Corporation Limited ("PGC") a company listed on the New Zealand stock exchange that has changed its domicile to Guernsey. The directors of the GP are Mr. George Kerr and Mr. Russell Naylor.

The Jurisdiction of the Court

10. The Petitioners seek an order for the winding up of the Partnership pursuant to section 92 (e) of the Companies Law (2013 Revision) ("the Companies Law") and section 36 (3) (g)

of the Exempted Limited Partnership Law, 2014 ("the Law") which applies the relevant provisions of the Companies Law and Companies Winding Up Rules.

11. Section 36 (3) of the Law states:

"Except to the extent that the provisions are not consistent with this Law, and in the event of any inconsistencies, this Law shall prevail, and subject to any express provisions of this Law shall prevail, and subject to any express provisions of this Law to the contrary, the provisions of Part V of the Companies Law and the Companies Law and the Companies Winding Up Rules 2008 shall apply to the winding up of an exempted limited partnership and for this purpose-

(a) reference in Part V to a company shall include references to an exempted limited partnership;

(b) the limited partners shall be treated as if they were shareholders of a company and references to contributories in Part V shall be construed accordingly, except that the application of the provisions shall not cause a limited partner to be subject to any greater liability than he would otherwise bear under this Law, but for the application of this paragraph;

(c) references in Part V to a director of a company shall include references to the general partner of an exempted limited partnership;

(d) except for sections 123, excluding subsection (1)(b) and (c), 129, 140, 145, and 147 of the Companies Law, Part V shall not apply to a voluntary dissolution and winding up under subsection (1);

(e) in the case of a voluntary winding-up of an exempted limited partnership under section (1) where the partnership was registered under section 9 prior to 11th May 2009, the necessary time period for compliance with the requirements of section 123 (1) of the Companies Law shall be at least twenty-eight days prior to the final distribution of the assets of the exempted limited partnership to partners rather than within twenty-eight days of the commencement of its voluntary winding-up;

(f) the Insolvency Rules Committee established pursuant to the Companies Law shall have the power to make rules and prescribe forms for the purpose of giving effect to this section or its interpretation; and

(g) on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable."

12. In this regard it should be noted that under section 92 (e) of the Companies Law a company, and thus for present purposes an exempted limited partnership, may be wound up if the Court is of the opinion that it is just and equitable that the company should be wound up.

13. The Petitioners submit at paragraph 2 of their Summary Closing Submissions ("Closing Submissions") that the Petition is based on a justifiable loss of trust and confidence of the Petitioners in the GP.

14. Generalised lack of probity on the part of the GP is raised and alleged in the pleadings. However, Leading Counsel for the Petitioners has subsequently made clear that neither dishonesty nor fraud is alleged. Furthermore, as the Court understands the position, bad faith is also not specifically alleged, nor indeed were allegations of bad faith put to Mr. Kerr or Mr. Naylor of the GP in the course of their cross-examination.

15. Instead, the Petitioners' case now appears to concentrate on matters of persistent poor corporate governance, as demonstrated by:

a) a failure to keep proper books and record on a number of levels,

b) a deliberate lack of transparency and constant breach of reporting requirements,

c) a failure to operate proper independent checks, which were designed to protect the interests of Limited Partners, and

d) improvident borrowing as exemplified by the Wilaci loan.

16. It is however also accepted at this stage that the Partnership is not only solvent but that it controls assets which are valuable assets.

17. In these circumstances before the Court can purposefully apply the relevant law to the facts as the Court may ultimately find them to be, the Court must first determine what the contemporary principles of law are and what in the instant case is the scope of their application.

18. In *Ex parte Sparkman* (1849) IMAC & G 170 Cottenham LC states at page 175 in relation to just and equitable dissolution of a company that there must be something in the management and conduct of the company which shows the court that it should no longer be allowed to continue.

19. Then in the leading authority *Loch v. John Blackwood Ltd.* (1924) AC 783 having made reference to submissions in the petition for winding-up of a company, Lord Shaw of Dunfermline states as follows at pages 787-788:

> *"In their opinion, however, elements of that character in the history of the company, together with the fact that a calling of a meeting of shareholders would lead admittedly to failure and be unavailable as a remedy, cannot be excluded from the point of view of the Court in a consideration of the justice and equity of pronouncing an order for winding up. Such a consideration, in their Lordships' view, ought to proceed upon a sound induction of all the facts of the case, and should not exclude, but should include circumstances which bear upon the problem of continuing or stopping courses of conduct which substantially impair those rights and protections to which shareholders, both under statute and contract, are entitled. It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up."*

As a pronouncement of the Privy Council, this passage is of critical importance to the exercise of the just and equitable jurisdiction in the Cayman Islands.

20. First, it concerns courses of conduct which "*substantially impair*" those protections to which shareholders, both under statute and contract, are entitled.

21. Secondly, we see an allusion to the interplay of statute and contract, a theme to which the Court will return in the context of the relevant Limited Partnership Agreement ("the LPA"), and in the context of default notices.

22. Thirdly, there must not merely be a lack of confidence but a "*justifiable lack of confidence*".

23. Fourthly, this lack of confidence must be grounded on conduct of the directors (or in this instance the GP) in regard to the company's business. This point will have further significance when the Court comes to address the question of how allegations, not in relation to the Partnership, but in relation to the NZ Partnership should properly be addressed and demarcated.

24. Fifthly, it is remarked that whenever the lack of confidence is rested "*on a lack of probity in the conduct of the company's affairs*", the former is justified by the latter. It would appear from this comment that in the *Loch* case lack of probity imports some kind of dishonesty or bad faith. Subsequently the term has been given a somewhat wider meaning, so as to encompass what can broadly be termed as very serious issues of mismanagement. Indeed, it is in this wider sense only of lack of probity that the Court understands that the Petitioners' position is currently put.

25. Sixthly, at page 796 Lord Shaw states that the application must succeed on the "*broad ground*" that confidence in the company's management was most justifiably at an end. Hence the Court looks at matters broadly rather than narrowly.

26. In conclusion, this authority emphasises both substantial impairment of shareholders' rights and protections and circumstances where confidence in management is most justifiably at an end. In other words, winding-up is a course of action which a court should only take in an extremely serious situation and not otherwise.

27. In *Baird v. Lees (No. 9)* (1924) SC 83 the Lord President (Clyde) states at page 92:

"I have no intention of attempting a definition of the circumstances which amount to a "just and equitable" cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the Court to wind up the company. It is, no doubt, always possible in such a case that there may be other shareholders whose interests would be adversely affected by the winding-up, and if it were possible that any shareholders in that position should exist in the present case, the justice and equity of pronouncing a winding-up order might be open to question. But there are none. Mr. Greig, as we are told by his counsel, controls the interests of the other shareholders."

28. It is noteworthy that the learned Judge declines any attempt to define the circumstances which amount to a "*just and equitable*" cause. It is also noteworthy that commercial probity and efficiency are identified in a conjunctive manner and that the conditions for Court intervention are clearly conditions once again of some gravity.

29. A number of important observations then appear in *Elder v. Elder and Watson (No. 7)* [1952] SC 49. The Lord President (Cooper) states at page 54:

"The purpose underlying the new provisions of section 210 of the Companies Act, 1948, as read along with sections 164 to 169 and section 225 (2), is sufficiently plain. Previous practice had shown that, wide as were the powers of the Court to

order a winding-up under the "just and equitable" cause (which dates back to 1862), strong grounds were normally insisted upon before the Court would afford a form of relief which tended to be regarded as only available in the last resort, and in the absence of feasible alternative remedies. In many such cases, moreover, the cure would have been worse than the disease, owing to the prejudice likely to be inflicted upon the applicants for relief as a result of a compulsory liquidation of the company. In that situation the new Act has empowered the Court in certain circumstances to afford relief by various methods falling far short of the extreme expedient of a winding-up, but the conditions for the exercise of this new jurisdiction require careful scrutiny."

30. Two aspects of this passage merit special attention. First, strong grounds are normally insisted upon. Secondly, winding-up is viewed as an extreme expedient, carefully reflecting the theme in the earlier cases cited above.

31. The learned Judge continues at page 55:

"The decisions indicate that conduct which is technically legal and correct may nevertheless be such as to justify the application of the "just and equitable" jurisdiction, and, conversely, that conduct involving illegality and contravention of the Act may not suffice to warrant the remedy of winding-up, especially where alternative remedies are available. Where the "just and equitable" jurisdiction has been applied in cases of this type, the circumstances have always, I think, been such as to warrant the inference that there has been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy. The phrase "oppressive to some part of the members" acquires a certain colour from its collocation in section 165 with such stronger expressions as "intend to defraud", "fraud," "misfeasance" or "other misconduct," and the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of

fair play on which every shareholder who entrusts his money to a company is entitled to rely. This, broadly speaking, was the class of case which the draftsman of section 210 evidently had in mind, and the question is whether the petitioners have brought themselves within the scope of the section."

32. Accordingly, a helpful question which may be asked is whether there has been at the lowest a visible departure from the standards of fair dealing and a violation of the conditions of fair play. If the answer to the question is in the negative, then it may logically be inferred that the remedy of winding-up is not appropriate.

33. In *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360, the Headnote states at page 361 B-E:

"Held, allowing the appeal, that a limited company was more than a mere legal entity and the rights, expectations and obligations of the individuals behind in inter se were not necessarily merged in its structure (post, p. 379 B-C); that, while the "just and equitable" provision did not entitle a party to disregard the obligation which he assumed by entering a company, it enabled the court to subject the exercise of legal rights to equitable considerations of a personal character arising between individuals which might make it inequitable to insist on legal rights or to exercise them in a particular way (post, pp. 379D, 386H-387A); that, in the present case, the appellant and N had joined in the formation of the company on the basis that the character of the association, viz., inter alia, that the appellant was entitled to participate in the management, would, as a matter of personal relation and good faith, remain the same; and that, N having in effect repudiated that relationship and the appellant having lost the right to a share in the profits and being in that respect at the mercy of N and G and being unable to dispose of his interest without their consent, the proper course was to dissolve the association by winding up the company (post, pp. 380G, 381C-F 386E-387A)."

34. Lord Wilberforce indicates at page 374 H – 375A that there has been a tendency to create categories or headings under which cases must be brought if a just and equitable winding-up order is to be made:

> *"This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances."*

35. Having reviewed a number of authorities, Lord Wilberforce continues at pages 379 A-380 B:

> *"My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" pro-vision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way. It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are*

very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of personal relationship, involving mutual confidence-this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members) of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company-so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere. It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to "quasi-partnerships" or "in substance partnerships" may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words " just and equitable" sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."

36. It appears to this Court that Lord Wilberforce's comments encourage a broader view rather than a narrower view of the Court's responsibilities in this area of law. Equity resides in the subjection of legal rights to equitable considerations and this subjection will therefore

very much depend on the individual facts and circumstances particular to the case at hand, but nonetheless taking a broad view overall.

37. Finally, Lord Wilberforce states at page 381 H that to confine the application of the just and equitable clause to proved cases of mala fides would be to negate the generality of the words. It might perhaps usefully be added that whether there is mala fides or not in the circumstances strong grounds are still required.

38. A further aspect of establishing a loss of confidence in directors is to be found in *RCB and Six Others v. Thai Asia Fund Limited* [1996] CLR 9, where Smellie J after referring to the *Loch* case states at page 23, lines 5-10:

> *"To my mind, all that the petitioners are able to point to is their alleged subjective loss of confidence arising from dissatisfaction about the conduct of the domestic policy of the company. The authorities are clear that that is not enough."*

39. In other words, not only is a subjective and actual loss of confidence required, but also that loss of confidence is one that must be objectively justified as well.

40. The various principles of winding-up have been recognised and applied by Mangatal J. in *In the Matter of Sterling Macro Fund (No.1) (Unreported 6 April 2017)* and by Mangatal J in Re *Washington Special Opportunity Fund Inc (Unreported 1 March 2016*).

41. Mangatal J at paragraph 106 of the *Washington* case refers specifically to standards of fair dealing and conditions of fair play which a shareholder is entitled to expect.

42. Then at paragraph 120 the learned Judge highlights the dichotomy between subjective dissatisfaction and "*establishing necessary touchstone of objectively justified lack of probity*", which this Court has previously pointed out.

43. Having set out the general guiding principles, the Court now turns to consider the scope and ambit of its role in this case.

The Scope and Ambit of the Role of the Court

44. It is apparent from the Amended Petition as read with subsequent pleadings and affidavit evidence that the Petitioners rely on a series of events in New Zealand during the duration of the NZ Partnership to support their allegations of lack of probity and loss of trust and confidence. Indeed, a considerable amount of time has been spent adducing evidence as to those matters.

45. In weighing the legality and relevance of this material, the Court must have regard to three related principles of law set out below.

46. In the *Loch* case it will be recalled that the lack of confidence must be grounded on the conduct of the directors, (or here the GP), in regard to the company's business. In the case of the Partnership, the business only commenced in the Cayman Islands at the end of 2012. It is the conduct of that business to which this Court must have regard, and to no other.

47. In *Re Fildes* [1970] 1 WLR 592. Headnote (3) states at page 593 D-E:

> *"(3) That the question whether it was just and equitable to make a winding up order must be determined on the facts existing at the date of the hearing; and that as matters now stood, the grounds alleged in the petition did not justify a winding up order and the petition would be dismissed (post, pp. 597D,E, 598C,H)."*

48. The facts existing at the time of this hearing must be facts relating to the Partnership itself and not relating to some other entity beyond the jurisdiction of this Court.

49. In addition, Mangatal J very helpfully points out at paragraph 124 of the *Washington* case that it cannot be the Court's function "*to go looking through every nook and cranny, which the Petitioner has now brought up.*"

50. The learned Judge had earlier noted at paragraph 120 that to a large extent the claims were founded "*on matters of some antiquity.*"

51. Having considered these authorities and having examined extensively the evidence in question, the Court concludes that, save in relation to specific matters affecting the Partnership and addressed in this Judgment, those matters of complaint which preceded the Cayman Islands Partnership should be left out of account both as a matter of law and as a matter of evidential irrelevance. It is not material to consider them and it is unfairly prejudicial to the GP to do so.

The Purpose or Purposes underlying the Petition

52. Before turning to specific issues and evidence, the Court must refer to one further matter.

53. In *CVC Opportunity Equity Partners Ltd. v. Demarco Almeida* [2002] CILR 77 Lord Millett states at paragraph 57:

> *"The special nature of winding-up proceedings and the loss which they may cause the company and its shareholders, however, makes it incumbent on the court to ensure that they are not brought for an improper purpose. In particular, they must not be brought simply to bring pressure on the respondents to yield to the petitioner's demands, however unreasonable, rather than suffer the losses consequent upon the presentation of a petition for the making of a winding up order."*

54. This is not merely a matter to which the Court should have regard. The stipulation goes much further than that: it is expressly incumbent on the Court to ensure that the proceedings are not brought for an improper purpose.

55. It has been contended by the GP that the Petition has been brought to ensure or enable an early distribution of assets to take place. All other matters being satisfied, it still remains the duty of the Court to ensure that this is not the position before it can grant the Petition in any event.

56. Furthermore, in *Re a Company* [1983] BCLC page 492 Harman J had to consider whether a winding up petition had been genuinely brought for the benefit of the class or for some other purpose of the Petitioner's. At page 495 D-H, Harman J states:

> *"The question for me, therefore, is whether I am satisfied that the petitioner seeks this winding up for the benefit of his class. I am not concerned with his motives or with the past conduct of the company, which was here deplorable or worse and which may have led the petitioner to have justifiable dislike for and a desire to see the downfall of some person such as the main protagonist in the company. In my judgment the Bryanston Finance case merely shows that in this field the rule which applies at common law, that malice or bad motive does not make unlawful that which is otherwise lawful (compare Bradford Corporation v Pickles [1895] AC 587) also applies. The decision in Bryanston Finance [1976] 1 All ER 25 never sought to overrule the basic law that the only proper purpose for which a petition can be presented is for the proper administration of the company's assets for the benefit of all in the relevant class. To hold otherwise would be to confuse motive, which is past, with purpose, which is future.*
>
> *The question, therefore, is not does the petitioner genuinely wish to wind up this company's, as counsel for the petitioner (Mr. Littman) submitted. It would be hard for me to find that this petitioner, which has taken all regular steps to prosecute its petition and which plainly has reasons to desire the winding-up of this company,*

since that must put beyond much cavil the future of the company's lease, does not in truth desire to wind up the company. In my judgment the true question is 'for what purpose does the petitioner wish to wind up this company'. A judge has to decide whether the petition is for the benefit of the class of which the petitioner forms a part or is for some purpose of his own. If the latter, then it is not properly brought."

57. Once again, this is a matter which this Court has to decide in due course.

The Status of the Limited Partnership Agreement and the Legislative Context

58. The Court has already commented upon the protections to which shareholders and Limited Partners are entitled, both under statute and contract, as illustrated in the *Loch* case.

59. Before turning to the LPA itself however, it is appropriate to draw attention at this stage to a decision of the Privy Council in *Kelly v. Cooper* [1993] AC 205, where Lord Browne-Wilkinson states at page 215 A-D:

"In Hospital Products Ltd. v. United States Surgical Corporation (1984) 156 C.L.R. 41, 97, Mason J. in the High Court of Australia said:

"That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed

upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."

Thus, in the present case, the scope of the fiduciary duties owed by the defendants to the plaintiff (and in particular the alleged duty not to put themselves in a position where their duty and their interest conflicted) are to be defined by the terms of the contract of agency."

60. Taking into account the relevant dicta in both the *Loch* case and the *Kelly* case the Court reminds itself that in considering and weighing the Petitioners' complaints those complaints must not be viewed in isolation from the broad governing contractual context in which they arise as well.

61. Section 3 of the Law states:

"The rules of equity and of common law applicable to partnerships as modified by the Partnership Law but excluding sections 31, 45 to 54 and 56 to 57 shall apply to an exempted limited partnership, except where they are inconsistent with the express provisions of this law."

62. Section 4 (1) and (2) of the Law then state:

"4. (1) An exempted limited partnership may be formed for any lawful purpose to be carried out and undertaken either in or from within the Islands or elsewhere upon the terms, with the rights and powers, and subject to the conditions, limitations, restrictions and liabilities mentioned in this Law but an exempted limited partnership shall not undertake business with the public in the Islands other than so far as may be necessary for the carrying on of the business of that exempted limited partnership exterior to the Islands.

(2) An exempted limited partnership shall consist of one or more persons called general partners who shall, in the event that the assets of the exempted limited partnership, are inadequate, be liable for all debts and obligations

of the exempted limited partnership, and one or more persons called limited partners who shall not be liable for the debts or obligations of the exempted limited partnership save as provided in the partnership agreement and to the extent specified in sections 20(1) and 34 (1), but a general partner, without derogation from his position as such, may, in addition, take an interest as a limited partner in the exempted limited partnership."

63. By way of a modification of general law, section 14 (1) limits the role of a limited partner as follows:

"14. (1) A limited partner shall not take part in the conduct of the business of an exempted limited partnership in its capacity as a limited partner."

64. In addition, section 36 (3) (b) provides inter alia that "*the limited partners shall be treated as if they were shareholders*."

65. Part V of the Companies Law is headed "*Winding up of Companies and Associations*", and therefore it appears to this Court that in considering and weighing grounds for winding up the general law governing the winding up of companies is applicable, rather than the general law governing the winding up of private partnerships.

66. The Petitioners have argued at paragraph 3 of their Summary Closing Submissions as well as orally that it is indisputable that *" the proceedings now feature a level of hostility which excludes any prospect of compromise and renders it almost impossible to see how the Partnership can carry on as before with the independent limited partners*."

67. In effect, for the purpose of this specific argument the Petitioners equate an exempted limited partnership with a private partnership where such differences as they have alleged could arguably lead to a deadlock.

68. As the Court has indicated, the traditional position has been modified by statute, rendering it necessary to treat the Limited Partners as if they were shareholders within the winding up.

69. In addition, clause 4.1 (a) of the LPA sets out the management rights and duties of the GP in this manner:

> *"4.1 Management:*
>
> *(a) The General Partner has exclusive responsibility for the management and control of the business and affairs of the Limited Partnership and, subject to the terms of this Agreement:*
>
> *(i) has the power and authority to do all things necessary to carry out the business;*
>
> *(ii) must devote as much of its time and attention as is reasonably required for the management of the Business;*
>
> *(iii) must procure that all filings and registrations required in relation to the Limited Partnership pursuant to the Act are promptly made; and*
>
> *(iv) must operate the Limited Partnership in accordance with this Agreement including, without limitation, in accordance with the Investment Criteria."*

70. Unlike the case of a partnership, management of an exempted limited partnership is vested exclusively in the GP and it therefore follows that even where some degree of discord may arise, that discord, or even hostility, does not as a matter of law and as a matter of fact necessarily prevent the legal entity from functioning as it was intended and expected to operate.

71. For the various reasons which have been set out, the Court perceives no difficulty in approaching the issue of whether the Partnership should be wound up in accordance with the general principles of company winding up which have earlier been described without further modification.

The Composition of the Petitioners' Pleaded Case

72. Although the Amended Petition refers to lack of probity and loss of trust and confidence both the Amended Petition and subsequent pleadings appear to the Court to demonstrate insufficient connective particulars as to how the lack of probity and loss of trust and confidence arise.

73. The relevant law may be succinctly stated. In the *Fildes* case, having dealt with the question of whether it is just as equitable to wind up the company on the facts which exist at the time of the hearing, Megarry J then observes at pages 597 G-H – 598 A-B:

> *"Second, the petitioner is confined to the heads of complaint set forth in his petition. His evidence may no doubt amplify and explain these complaints, but I do not think that he can rely upon any new head not fairly covered by his petition. For this proposition Mr. Instone cited In re Cuthbert Cooper & Sons Ltd., which I have already mentioned, where Simonds J. said, at p. 399:*
> *"For the purpose of determining whether the petition should be granted or not, it is necessary for me to look at the allegations in the petition, and I do not propose to travel beyond them."*
>
> *This can hardly be said to carry the point, though it gives some indication of it. I think, however, that the matter is covered by more recent authority. In In re Lundie Brothers Ltd. [1965] 1 W.L.R. 1051, 1058, Plowman J. said:*
>
> *"It was suggested in the course of argument that it was really the evidence and not the allegations in the petition which was of importance in this matter. I entirely dissent from that proposition. It seems to me that it would be wrong for the court to travel outside the allegations in the petition, particularly in a case of this sort where the petition is based on the proposition that the respondents to it have been guilty of some oppression or some lack of probity."*

74. Similarly in *Re Tecnion Investments Ltd* [1985] BCLC 434 Dillon LJ observes at page 441 a-b:

> *"It is very important that the allegations which are being relied on in a petition of this nature should be properly set out in the petition itself and not merely collected from various places in voluminous affidavit evidence. For my part, I would emphatically endorse the comments and citations of Megarry J in Re Fildes Bros Ltd [1970] All ER 923 at 927, [1970] WLR 592 at 597-598."*

75. In the present case it is almost unnecessary to state that we also have voluminous affidavit evidence in addition to pleaded complaints which with great respect are at best opaque.

76. In the Closing Submissions of the GP this difficulty is variously addressed at paragraph 24, setting out the following points:

> *"24. Because the Petition has been brought simply to achieve the desired outcome of an exit, rather than as a result of genuine grievances, the Petitioners have engaged their legal team to come up with any material that might persuade the Court to grant the relief that is sought. Hence, we see the following:*
>
> *(i) Reliance placed on events about which no complaint was made at the time or at all (save for Ms Burleigh's contrived email of 2 April 2015 [E27/16799] issued for the purposes of the Petition). On the contrary, in some instances, some of the Petitioners were fully supportive of the matters about which complaint is now made – for example, Aurora's investment of a further AU$5m following the establishment of the Cayman Partnership.*
>
> *(ii) A constant shift in the focus of the case – it started off complaining about a lack of audited accounts, then appeared to focus on related party transactions, and now, in a desperate attempt to re-shape the case at the*

eleventh hour appears to be based on corporate governance and record keeping. The Court should need no reminding that it is of fundamental importance in proceedings of this nature that the allegations are properly set out in the Petition and that the case is decided by reference to the pleaded issues: In Re Tecnion Investments Ltd BCLC 434 at 441 per Dillion LJ and McKillen v Misland (Cyprus) Investments Ltd [2012] EWHC at [12] per David Richards J.

(iii) The Petitioners have been uncertain and inconsistent about how highly they try to put their case against the General Partner. In the Petitioners' pleadings, there are serious allegations of: a 'lack of probity' (see paras 10 and 55 of the Amended Petition); a lack of 'good faith' (see para 13 of the Reply); the 'trustworthiness' of General Partner being 'deeply flawed' (para 22 of the Reply). Further, at the CMC held on 14 September 2016, the General Partner gained the clear impression from the Petitioners' leading counsel's submissions that the Petitioners' case involved allegations of dishonesty. Despite this, no proper particulars supporting these allegations of conscious impropriety or dishonesty were ever provided, despite the fact that any such allegation needed to be fully particularised. However, more recently, at the PTR and then the CMC held on 8 September 2017, the Petitioners' counsel explained that their case was not one of 'fraud'. No allegation of fraud or even a lack of good faith was put to any of the General Partners' witnesses and on a number of occasions the Petitioners' Leading Counsel made it clear in his cross examination that he was not accusing the General Partners' witnesses of dishonesty the Petitioners have now confirmed in writing in their closing submissions that dishonesty is not alleged against the General Partner (para 29 (a)).

(iv) Case theories have been made up on the hoof which has led to numerous factual blunders by Petitioners' counsel during cross examination. These are set out in the Sections that follow but, at this juncture, one example will suffice. In the September 2017 tranche of the trial, the Petitioners' Leading Counsel suggested to Mr Naylor that the establishment of the Cayman

Partnership was in order to reduce Limited Partners' rights, notably, because they would no longer have access to the names and addresses of other Limited Partners. This was fundamentally and inexcusably wrong. Not only was the opposite the case: namely that details of the Limited Partners were accessible in the Cayman Islands (but notably not in New Zealand as the Petitioners' counsel had wrongly asserted) but the Petitioners had requested and been provided with an unredacted copy of the Cayman Partnerships' register of members. Mr Roe filed evidence for the Aurora Default Injunction exhibiting the unredacted register as early as August 2015 and Mr Walsh (an Australian lawyer acting for Aurora) filed further evidence exhibiting a copy during the course of the February 2017 tranche of the trial. It even appears that an unredacted copy of the register was in Court at the time the cross-examination was being conducted. Despite numerous requests, the Petitioners' legal team has failed to provide any explanation of why, in those circumstances, this line of cross examination was put to Mr Naylor.

(v) *The Petitioners have been reluctant to commit themselves to a pleaded case. The Court will recall the Petitioners' counsel's resistance to providing an explanation of their case about 'related parties' at the PTR, instead suggesting that all would become clear at trial. As the Court will no doubt appreciate and as explained below, it has not.*

(vi) *The Petitioners have refused (at least expressly) to withdraw any complaints that have been made even in the face of compelling explanations in response. They have also opposed even the most compelling of applications – such as the validation of ordinary course payments. That opposition was supported by an affidavit of Mr Catchpoole of HDY ('Catchpoole 8') of which there were not only two versions but also in respect of which no witness of the Petitioners had given instructions. When cross examined on this, the Petitioners' witnesses confirmed that they did not support the allegations that Mr Catchpoole had made. On the validation*

appeal, the Petitioners' Leading Counsel conceded that no reliance should be placed on Mr Catchpoole's evidence."

77. While giving all due regard to the skill and persuasiveness of Leading Counsel for the GP, these are very serious criticisms to which the Court gives considerable weight.

78. The Petitioners stipulate at paragraphs 4 of their Summary Closing Submissions that there is "*persistent poor corporate governance*".

79. Mr. Lowe then makes the following statement in oral submissions on Day 34, page 14, lines 15-21:

> *"15 One of the complaints that we make your Lordship*
> *16 described compendiously as bad corporate governance. In*
> *17 fact, there were a number of complaints such as not*
> *18 producing accounts on time, not producing reports on*
> *19 time, not keeping proper books and records and so on, we*
> *20 say that are all part of that. It is compendiously best*
> *21 described as poor corporate governance."*

80. Mr. Lowe then elaborates at page 26, lines 7-25 page 27 lines 7:

> *"7 Moving on to the next point which is about lack of*
> *8 probity or what really has to be alleged which isn't*
> *9 lack of probity, you will have noticed that throughout*
> *10 their submissions the General Partner is elevating the*
> *11 complaint that we make into one of or should be making*
> *12 into one of dishonesty or bad faith.*
> *13 We say that is based on a mis-characterisation of*
> *14 what is actually a fairly straightforward case that we*

have on bad corporate governance and skews the case law on impairment of confidence beyond what we have to say. It's the usual trick at the bar of making your opponent's case, saying it is actually something because the test is higher than it really is and then shooting it down. We say that that is – a fraud case is a completely unnecessary mountain for us to climb and we haven't climbed it and I haven't alleged it and I made that clear to your Lordship throughout my cross-examination and our submissions.

JUSTICE MCMILLAN: I think that may be the position during the course of the trial but, with respect, during the sanction application, for example, I think there was some implication that there was a danger of moneys being spirited away.

MR LOWE: Yes. The problem is when your investor protections aren't working and you don't have full disclosure, which is the position that we were taking and we still take, that is the sort of suspicion you have. There's a difference though and I imagine that's what they were making the submissions to you about—we can look at the transcript if this is an issue. The point I want to make is that in terms of what we actually allege about the conduct, it is not based on dishonesty and if that was a mountain I had to climb I wouldn't be able to. That's really the point. That's why I've always said I'm not alleging it. In fact, unlike Mr. Wardell, I normally act for defendants and I'm not used to alleging dishonesty

except in cases like AHAB but normally that's not a word I would use lightly and I don't use it against the General Partner. I hope your Lordship realised when I did start to have to make comments or ask questions or was asked to say something that I disavowed that kind of allegation.

I had to make it clear to Mr. Naylor when he came in the box because he obviously thought that's about what I was going to do, if you remember that.

JUSTICE MCMILLAN: Yes, I think there was some evidence certainly from Mr. Wallace and Mr. Marshall that might have gone along that road."

81. A further helpful exchange occurs at page 164, lines 18-25 - page 166 lines 14:

"*JUSTICE MCMILLAN: One issue is to clarify what your position is on the just and equitable issue and the other is also to examine, if it is appropriate, whether the petitioners have been changing their position on that. I don't say that with any criticism.*

MR LOWE: On just and equitable, my Lord, that is –what I outlined to you as the law, we haven't made those submissions before. We have made submissions to you in our skeletons about what the just and equitable law is but we have always said to you that it's about the Loch v John Blackwood loss of confidence and if you— will show you the pleading but you will see that it's not actually changed.

JUSTICE MCMILLAN: No. Well, you are clarifying the scope of the arguments, the scope of the debate at least, which I am not sure was, with no disrespect to anyone, quite clarified before because it did seem that lack of probity to some degree was an issue.

MR LOWE: It may have been and on the pleading it was – I mean, I'm not saying it wasn't alleged on the pleading but I disavowed it now for months.

JUSTICE MCMILLAN: That's why I said there might be an issue as to whether or not you may have altered your position as distinct from expanding on your position.

MR LOWE: I've never altered my position. From the very first time when I started cross—examining Mr. Naylor I made sure that he knew I was not challenging his honesty and his integrity in a general way. It's never been my position that there is a case of lack of probity because it's certainly not a case which rises to the level of, if my learned friends are right, what I have to describe as dishonesty. That's not something I've ever put.

JUSTICE MCMILLAN: No. I think way back a long time ago when the matter first crystallised before Mr. Justice Clifford, there may have been an impressions to that effect. That's all I can say. I don't go beyond that but I am only going by what I have been reading because I wasn't there.

MR LOWE: At the end the day—you may criticize us on

costs or whatever but, at the end of the day, for a long time the case has been what I am putting to you."

82. Although these excerpts have been extremely extensively quoted, the Court views it as essential to identify with precision what indeed the Petitioners' complaints actually are. Obviously their case has been imperfectly pleaded and with a diffusiveness that encapsulates the kinds of concerns which both Megarry J and Dillon LJ have comprehensively identified and even condemned.

83. Despite those major and potentially fatal imperfections, it is nonetheless in the interests of justice that there should be a definite conclusion to those proceedings, and on that basis the Court will proceed to decide the matter.

84. In summary, the Court will decide whether in light of the legal principles which have been identified and the findings of fact which the Court will make it is just and equitable to wind up this Partnership on the grounds of loss of trust and confidence due to misgovernance on the part of the GP.

85. Finally, for the avoidance of doubt if the doctrine of lack of probity applies at all it is only in the expanded sense of a justifiable loss of trust and confidence rather than in the sense of dishonest conduct or of conduct which is in bad faith.

The Wallace Incident

86. The trial of this matter was set down to begin on 21 February 2017.

87. At the time Mr. Hector Robinson Q.C. appeared on behalf of Millinium Asset Services Pty Ltd ("MAS") in relation to a Summons Application dated 17 February 2017.

88. In relevant part the Summons Application sought:

> *"1. that Millinium Asset Services Pty Ltd be substituted as the petitioner in these proceedings in the place of Aurora Funds Management Limited.*
>
> *2. that the hearing of the petition be adjourned for a period of no less than 21 days to a date to be fixed.*
>
> *3. that the costs of and occasioned by this Summons be paid by Aurora Funds Management Limited, and costs of and occasioned by the adjournment be reserved.*
>
> *4. such further and other relief as this Honourable Court may deem just and appropriate."*

89. Notwithstanding this Application Mr. Robinson indicated that based on instructions he did not propose to proceed with the Application.

90. However, what is of greater significance are the comments of Mr. Gabriel Moss Q.C., who at that time was Leading Counsel for the Petitioners, having since then been succeeded by Mr. Lowe.

91. Mr. Moss states inter alia on Day 1, page 3, lines 8-25 page 4, lines 1-20:

> *"8 MR MOSS: May it please your Lordship, this has always*
> *9 been from the start an utterly hopeless application.*
> *10 Not only is it a hopeless application but it is one that*
> *11 is designed to blackmail my clients. Your Lordship*
> *12 hasn't seen the exhibits but essentially the gentleman*

behind MAS, the applicant, is a Mr. Wallace who is one of our witnesses.

JUSTICE McMILLAN: Yes.

MR MOSS: In the correspondence, Mr. Wallace has said that he is not coming to be cross-examined unless we meet certain conditions which my clients have absolutely no intention of being blackmailed or giving way to the conditions so we rejected that suggestion altogether. This application is not only totally hopeless for reasons that your Lordship may have seen in our skeleton argument but it is also one designed for a completely ulterior purpose, the ulterior purpose being in relation to some litigation that is proceeding in New South Wales

which your Lordship will have seen mention of. That litigation concerns people who are not parties to the petition, namely the party that is in effect or, in fact, the sole beneficiary of the fund held by Aurora as the Registered Limited Partner, that is Macquarie. There is litigation between Macquarie and MAS in New South Wales about MAS's standing as trustee, whether it is a properly appointed trustee under New South Wales law or whether it is a trustee do son tort

and what the legal consequences are flowing from that.

That matter is before the New South Wales courts.

There is absolutely—MAS had absolutely no business bringing that dispute here or trying to get it resolved or putting pressure on my clients in relation to the resolution of that dispute.

In short, not only is this a completely hopeless application which my learned friend, Mr. Robinson, has very fairly refused to move, very properly if I may respectfully say so, but it is also one that is designed for an ulterior purpose."

92. Mr. Moss has clearly stated that a witness whom the Petitioners intended to call was in effect a blackmailer.

93. In similar vein Mr. Lowe has subsequently described Mr. Wallace as a charlatan meaning, as best I understand the general use of the term, a person practising quackery or some similar confidence trick or deception in order to obtain money, fame or other advantages via some form of pretence or deception.

94. What is of initial significance in relation to this somewhat singular occurrence on 21 February is that it was Mr. Wallace who, in addition to being a prospective witness, also verified the original version of the Petition.

95. Paragraph 6 of the First Affidavit of Thomas James Wallace states:

"6. *I have read a true copy of the Petition. As a director of MAS, trustee of the Bear Fund, I have been concerned in the matters giving rise to the Petition. In so far as the statements in the Petition are within my personal knowledge, they are true. In so far as they appear from MAS, or the other Supporting Limited Partners, books and records, they are true to the best of my knowledge, information and belief."*

96. Mr. Wallace's conduct and that of his associated colleague Mr. Gregory Philippe Marshall feature prominently in the history and evolution of both the Petition and the Amended Petition. In addition, such contacts and communications as Mr. Wallace and Mr. Marshall had with the Petitioners will also feature.

97. At this preliminary stage the Court simply draws attention both to the lack of esteem and respect in which the Petitioners who originally relied upon Mr Wallace's proposed evidence currently hold him and to the evident disarray which ensued from their prior association with him.

The General Approach of the Court to the Evidence

98. At paragraph 19 (a) and (b) (i) of the Petitioners' Summary Closing Submissions, Mr. Lowe states:

"19. *The Court has heard a great deal of oral evidence. It will make its own assessment on the quality and veracity of this evidence but in summary at this stage, the Petitioners make the following observations:*

(a) Oral evidence is inherently less reliable than documentary evidence and does not make up for gaps in documentary evidence. The Court needs to be

extremely cautious when considering such evidence: see Gestmin SGPS v Credit Suisse (UK) Ltd [2013] EHC 3560 Comm at para 15 to 22 where Leggatt J (who seems to have studied relevant research material for this purpose) explained why little weight can be given to evidence of recollection in any commercial case and why oral factual testimony is often of such limited value.

(b) The cross-examination of lay witnesses who were employees of the Petitioners is not a tool for extracting a party's position on the case: that is an exercise for submission and lawyers.

(c) Much of the cross-examination of the Petitioners' witnesses proceeded on the misconceived assumption that they represented spokespeople or manifestations of their employers."

99. In support of his contention as to paragraph 19 (a), the following dicta of Leggatt J in *Gestmin SGPS v. Credit Suisse (UK) Ltd* (2013) EWHC 3560 (Comm) are relied upon:

"15 An obvious difficulty which affects allegations and oral evidence based on recollection of events which occurred several years ago is the unreliability of human memory.

16 While everyone knows that memory is fallible, I do not believe that the legal system has sufficiently absorbed the lessons of a century of psychological research into the nature of memory and the unreliability of eyewitness testimony. One of the most important lessons of such research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (an related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more

confident another person is in their recollection, the more likely their recollection is to be accurate.

17 *Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories that is memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).*

18 *Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs. Studies have also shown that memory is particularly vulnerable to interference and alteration when a person is presented with new information or suggestions about an event in circumstances where his or her memory of it is already weak due to the passage of time.*

19 *The process of civil litigation itself subjects the memories of witnesses to powerful biases. The nature of litigation is such that witnesses often have a stake in a particular version of events. This is obvious where the witness is a party or has a tie of loyalty (such as an employment relationship) to a party to the proceedings. Other, more subtle influences include allegations created by the process of preparing a witness statement and of coming to*

court to give evidence for one side in the dispute. A desire to assist, or at least not to prejudice, the party who has called the witness or that party's lawyers, as well as a natural desire to give a good impression in a public forum, can be significant motivating forces.

20 *Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial. A witness is asked to make a statement, often (as in the present case) when a long time has already elapsed since the relevant events. The statement is usually drafted for the witness by a lawyer who is inevitably conscious of the significance for the issues in the case of what the witness does nor does not say. The statement is made after the witness's memory has been "refreshed" by reading documents. The documents considered often include statements of case and other argumentative material as well as documents which the witness did not see at the time or which came into existence after the events which he or she being asked to recall. The statement may go through several iterations before it is finalised. Then, usually months later, the witness will be asked to re-read his or her statement and review documents again before giving evidence in court. The effect of this process is to establish in the mind of the witness the matters recorded in his or her own statement and other written material, whether they be true or false, and to cause the witness's memory of events to be based increasingly on this material and later interpretations of it rather than on the original experience of the events.*

21 *It is not uncommon (and the present case was no exception) for witnesses to be asked in cross-examination if they understand the difference between recollection and reconstruction or whether their evidence is a genuine recollection or a reconstruction of events. Such questions are misguided in at least two ways. First, they erroneously presuppose that there is a clear distinction between recollection and reconstruction, when all remembering of distant events involves reconstructive processes. Second, such questions*

disregard the fact that such processes are largely unconscious and that the strength, vividness and apparent authenticity of memories is not a reliable measure of their truth.

22 In the light of these considerations, 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 witness' 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 the 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.

23 It is in this way that I have approached the evidence in the present case."

100. The *Gestmin* case concerns a claim for damages for the giving of allegedly negligent advice and the learned Judge was perceptively commenting on the weight to be attached to witnesses' recollections of what was said in meetings and conversations a number of years before and highlighting the fallibility of the human mind, as Mr. Wardell points out at paragraph 32 of the GP's Closing Submissions.

101. It appears to the Court that this is not a case where facts are largely and widely in dispute. It is about alleged loss of trust and confidence, and whether that loss is established both by fact and by operation of law. In this light the Court has sought to identify with as much precision as it reasonably can what the witnesses actually state, and indeed on a balance of

probabilities what if anything should be made of the Petitioners' assertions in that regard, upon reviewing the evidence in the case taken as a whole.

102. One must also ask in relation to the same exercise whether if the Petitioners' principal witnesses do not represent or are not manifestations of their respective employers, what function are they then performing in giving evidence at all?

103. Oral evidence based on recollection or events which occurred several years ago must of course be treated with great and understandable care. However, in the instant case given the importance to be attached to the quality of the evidence as it impacts on the central legal and factual issues which have earlier been set out in this Judgment, the Court is unable to agree with or to accept the narrowing effect of the Petitioners' submissions on this point. In other words, such a narrow approach would unfairly negate the whole purpose of this hearing.

The Petitioners' Witnesses

104. The witnesses for the Petitioners are as follows:

(i) Mr. Ian Stuart Roe, a former Director of Aurora

(ii) Mr. Gary Traveller, former Chairman of the Board of CAML

(iii) Ms. Sharon Lesley Burleigh, former General Manager of CAML

(iv) Mr. Nicholas Stuart Bagnall, Chief Investment Officer for ACC

(v) Mr. Gregory Philippe Marshall, Managing Director of Logic Fund Management Limited

(vi) Mr. Dennis Church, General Manager of Corporate Trustee Services, Public Trust.

(vii) Mr. Paul Quinn, Chairman of Ngati Awa Asset Holdings Limited

(viii) Ms Betty Po Wan Poon, now former Director, Company Secretary and Chief Financial Officer of Aurora

(ix) Wynand Mullins, Chartered Accountant and Partner of Ferrier Hodgson.

105. In relation to Mr. Roe the Petitioners have filed a Hearsay Notice that they intend to give in evidence the statements made in the First Affidavit of Mr. Roe sworn on 20 August 2015 and its Exhibit ISR-1 and the Third Affidavit of Mr. Roe sworn on 16 March 2016 and its Exhibit 1 SR-3, and that Mr. Roe shall not be called as a witness of fact to give oral evidence "*because Mr. Roe is outside of the Cayman Islands.*"

106. In light of the contested nature of the proceedings and the fact that the GP would have no opportunity to cross-examine Mr. Roe as to the content of his evidence, the Court formally rules that even if this evidence is technically admissible no weight shall be given to it by the Court in any event. Any other course would be unfairly prejudicial to the GP and contrary to the interests of justice.

The Respondent's Witnesses

107. The witnesses for the GP are as follows:

"(i) Mr. George Charles Desmond Kerr, Director of Torchlight GP Limited, the General Partner of the Partnership

(ii) Mr Russell James Naylor, Director of the General Partner

(iii) Mr. Darryl Harford, Director of Podere Investments Limited, a Limited Partner in the Partnership

(iv) Mr. Peter Bruce Grant Cleary of Cleary Wealth Management, representing a number of Limited Partners in the Partnership

(v) Mr. Michael Tinkler, Attorney

(vi) Mr. Michael Weaver, Chartered Accountant and a Managing Director of Duff & Phelps.

Evidence of Mr. Traveller

108. In Mr. Traveller's Second Affidavit dated 9 February 2016 he confirms that he was Chairman of the Board of Directors of CAML and that he is qualified as a Chartered Accountant.

109. He states at paragraph 8 that CAML had inherited its investment in the New Zealand domiciled Limited Partnership from the receivers of South Canterbury Finance Limited ("SCF") on 1 June 2012.

110. He states at paragraph 11 CAML's concern to exit the NZ Partnership and the Partnership due to the lack of transparency and communication, and then states that CAML would have been prepared to wait for the Partnership's assets to be realised had the term of the "*Torchlight Fund*", meaning the Partnership, not been unilaterally extended from at least 2016 until at least 2019.

111. He disputes whether negotiations for CAML to exit the Partnership were to be negotiated in good faith and then at paragraph 15 that the Petition proceeding was commenced as a last resort.

112. Mr. Traveller recounts various proposals for CAML to exit the fund and characterises them as an attempt "*to buy more time.*"

113. At paragraph 33 he claims the only recourse he was aware of to protect CAML's interest (that did not involve the New Zealand Crown commencing proceedings in the Cayman Islands without any other limited partner support) was to attempt to call a meeting of Limited Partners to replace the General Partner.

114. He states that in reference to certain proposed amendments to the LPA CAML did not agree to them or support them.

115. He refers to a letter from the NZ Credit Fund (GP) 1 Limited (In Liquidation) (formerly Torchlight (GP) 1 Limited) (the "NZ GP") to the Limited Partners dated 19 December 2012, concerning what is known as an in specie distribution to the New Partnership, and states that CAML was not consulted prior to the in specie distribution. However, as we shall see, the NZ GP had made CAML aware of this possibility.

116. He takes issue with the Partnership not being a continuation of the NZ Partnership, a proposition which as a matter of law and fact this Court rejects as inaccurate.

117. Mr. Traveller makes complaint about audited financial statements not being up to date, although at the time of this hearing this is no longer the case.

118. He states at paragraph 55 his concern that the Partnership may not have maintained proper books and records even though in light of various unqualified audits the Court concludes that there is no arguable basis for that assertion when looked at objectively.

119. He raised various "*significant concerns*" about related party transactions, without as it appears to the Court making any actual accusations but claiming they should be investigated.

120. As with a number of the issues raised in this matter, they need to be viewed in light of information as it now stands.

121. He makes complaint also about Mr. Russell Naylor's consulting fees, noting that, in his view at least, it is unclear from the notes to the financial statements what consulting

services have been provided by the Naylor Partners, but that, again in his view, it appears that these consulting fees are in addition to any remuneration received by Russell Naylor as director of the General Partner.

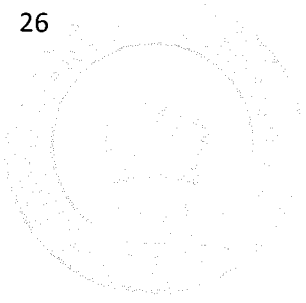
122. Mr. Traveller refers to historical transactions which in accordance with the Court's earlier ruling the Court intends to decline to consider.

123. Mr. Traveller complains of GP fees, but in terms of how they were arrived at the Court considers that Mr. Traveller now has all the relevant information that he could possibly need.

124. Again, in relation to the Partnership Advisory Committee it is now known that no relevant transactions occurred in a 15 month period between at least May 2014 and August 2015.

125. He raises the issue of what is known as the Wilaci loan, raised by Mr. Kerr for the NZ Partnership in very difficult circumstances, which nonetheless ultimately led to the present Partnership both surviving and even thriving. The notion that taking such a loan was mismanagement is one that the Court ultimately rejects; an extreme measure is not necessarily an irresponsible one.

126. He questions the reliability of Mr. Harford, the GP's supporting witness, as a known associate of Mr. Kerr. In circumstances where Mr. Traveller did not know about, or was silent as to both the existence of a Valuation Report commissioned by CAML and the favourable outcome of a regulatory investigation, only disclosed in the course of this trial, it is helpful to put Mr. Traveller's complaints in context.



127. In his Fourth Affidavit dated 2 December 2016. Mr. Traveller elaborates at paragraph 15 on how CAML was established to acquire, manage and realise residual assets of certain failed finance companies which the New Zealand Government had supported, having inherited a NZ $30 million investment in the NZ Partnership from SCF.

128. He alleges, without particulars, at paragraph 19 that the GP has preferred, and continues to prefer, its own interests over the interests of Limited Partners, as well as mismanaging the Partnership.

129. As the Court understands it, allegations of such unfair preference have not been pursued. The comment does, however, reflect Mr. Traveller's attitude and general disposition.

130. Following a meeting in Sydney on 7 November 2012, he claims at paragraph 24 that Mr. Kerr failed to uphold his promise to secure a redemption of CAML's investment in the immediate future.

131. In fact, Mr. Kerr was not at liberty to make any promise, of that nature. The best course achievable would be to amend the new L.P.A. to allow for non pro rata distribution.

132. He describes the majority of the meeting in question as taken up with small talk, something entirely different from what the annotated presentation documents themselves disclose.

133. He reiterates at paragraph 30 that at no stage was it suggested or even contemplated that CAML would become part of a Cayman Islands entity.

134. Rather oddly, he then states that CAML's concern in this regard was not actioned "*because we considered that Mr. Kerr and the General Partner were acting bona fide in relation to*

CAML's exit, which had been agreed at the meeting in November 2012", and he claims CAML was misled.

135. He states that CAML was not aware that the GP had made material changes to the LPA, including extending the terms of the Partnership for 3 years and removing the requirement to hold an annual general meeting of Limited Partners.

136. Even though CAML was a Limited Partner in a closed fund, Mr. Traveller asserts in paragraph 46 that as a result of inconclusive exit negotiations CAML had lost all trust and confidence in the GP at this point in time and they had little faith that the GP would act other than in accordance with its own interests.

137. Mr. Traveller denies that writing letters to the Partnership's auditors PwC was inappropriate or an attempt to delay the audited accounts.

138. At paragraph 56 he alleges a lack of bona fide intent demonstrated throughout the exit negotiations, even though this is no proof of that alleged fact being offered.

139. At paragraph 57 he refers to CAML's concern in respect of the security of its investment being heightened by the NZ Partnership being put into receivership in respect of the Wilaci loan, and delayed audited accounts and, inter alia, "*substantial losses*", none of which is ultimately correct or justified.

140. Then at paragraph 58 a reference is made to CAML being contacted by Mr. Wallace from MAS. Mr. Traveller states that he understood MAS "*also had significant concerns as to the management of the Cayman Partnership and was seeking support to replace the General Partner*" pursuant to the rights afforded to Limited Partners under the LPA. He does not seem to have troubled himself as to whether MAS was in fact a lawful Limited Partner.

141. He then refers to MAS, Mr. Marshall of Logic and other relevant independent professionals forming a new management team to replace the GP. If he regarded Mr. Wallace and Mr. Marshall at any point in the light of relevant independent professionals he may well have been mistaken.

142. At paragraph 61 he claims that the GP refused to hold a meeting of Limited Partners "*as requested*" and put a vote out of reach through the conversion of PGC debt into interests in the Partnership, thereby diluting the other investors' interests in the Partnership. Both of these assertions are factually wrong: MAS was not a Limited Partner, and at the relevant time then was no dilution of investors' interests. Furthermore, the GP had no requirement to hold the meeting.

143. Mr. Traveller then claims at paragraph 62 to there being no alternative to CAML commencing proceedings.

144. In cross-examination Mr. Traveller agrees that he and his colleague Ms. Burleigh were aware that the Partnership's strategy was a long term one, with no right as such to exit the fund early.

145. He confirms that he and Ms. Burleigh were told on 7 November 2012 that the new structure was going to be with a Cayman unit trust or limited partnership and that Ms. Burleigh had actually made a handwritten note to that effect. He also understood the change would allow for a non-pro rata exit, as indeed it ultimately did.

146. At no time was any shock at the move communicated by CAML to the GP, and he recognised that a capital raising offer from the new Partnership was very fair to existing Limited Partners.

147. It was made clear that Mr. Traveller's focus was on an early exit, rather than on other matters.

148. He appears to contradict himself by conceding that Mr. Kerr "*was being entirely upfront*" at the relevant time, and ultimately he confirms to Mr. Wardell that he had no objective support for his opinion that there was any evidence of bad faith on Mr. Kerr's part.

149. He accepts that a letter from Grant Thornton, as auditors of the Partnership, to the GP dated 1 November 2016 should give "*a considerable degree of comfort*". The Court notes that this is notwithstanding the fact that this letter had not been provided to CAML prior to discovery.

150. Mr. Traveller concedes that the GP's management fee, acquisition fee and performance fee arising out of the in specie distribution were properly considered and audited and were clearly entitled.

151. He admits to having no difficulty in communicating with Mr. Kerr, and the Court correspondingly has no difficulty in concluding that as between them there was no personal discord or disharmony whatever.

152. He accepts that Mr. Kerr had in fact told him that MAS was not a Limited Partner, which was correct, but that although he did not understand why, he did not then go back and enquire.

153. He confirms that the Partnership's particular strategy in relation to Lantern Hotel Group Limited ("Lantern"), (to which the Court will return), was being hijacked by MAS and that Mr. Wallace and MAS were a competitor. He accepts also that this was an attack on the Partnership's own interest.

154. Mr. Traveller confirms that Mr. Marshall was a difficult person who had an issue with Mr. Kerr. At a meeting between CAML, Mr. Wallace and Mr. Marshall in October 2014 Mr. Marshall had been very emotional.

155. This meeting where the discussion concerned the desire to change the GP was not referred to his Second Affidavit, and he was not able to explain why that was so.

156. He is aware that Mr. Marshall and MAS's lawyers had taken complaints to the New Zealand Financial Markets Authority ("the FMA"). He had received a request from the FMA re documents but said he had no communication with them since then.

157. Reviewing two letters from MAS and Logic to the auditors on 2 October 2014, he agrees they were remarkably similar, and that receiving such a letter could delay the audit.

158. He is taken to CAML's letter to PwC and agrees it was very likely to delay the accounts.

159. He refers to a letter from CAML to PwC dated 25 March 2015 and agrees it bore remarkable similarities to letters written by MAS and Logic.

160. By the time of a letter from CAML to Grant Thornton dated 26 March 2015 work on the Petition was under way.

161. It is put to Mr. Traveller that in light of a non pro rata offer made to CAML in June 2015 the Petition was hardly a last resort. The Court asks the witness as to the impression created by referring to a last resort as distinct from preferring that choice over a less attractive one, and the witness appears to accept that the last resort impression was unfortunate.

162. Taking Mr. Traveller's evidence as a whole, the Court finds his position as to a loss of trust and confidence less than persuasive and as little more than formulaic. He had no compunction about associating CAML with MAS notwithstanding its willingness to act in a manner inimical to the Partnership. He maintained a channel of communication with the GP but acted behind its back to cause its replacement. He knew or should have known the Partnership had assets of considerable value while alleging precisely the opposite. In summary, the Court is most reluctant to believe him as to the alleged loss of trust and confidence which he maintains.

Evidence of Ms Burleigh

163. In Ms. Burleigh's First Affidavit dated 25 May 2015 she confirms that she was General Manager of CAML.

164. At paragraph 21 she refers to information released by the FMA, that Mr. Kerr had recently been the subject of proceedings by the FMA in relation to Perpetual Cash Management Fund *("PCF")*. In fact Mr. Kerr was not personally the subject of the proceedings, and this characterization is inaccurate and incorrect.

165. She states at paragraph 25 that following the FMA information release a summary paper was prepared by Mr. Gary McCosh, Senior Manager, highlighting concerns, including a perceived lack of investment information from the NZ Partnership, the level of fees, and apparent disregard for restrictions on third party transactions, evidenced by a PGC loan to the NZ Partnership.

166. She states that on 7 November 2012 along with Mr. Traveller she met with Mr. Kerr to commence discussions for an orderly exit of CAML. In fact, the meeting was far more

wide-ranging and involved prepared presentation documents and an investment address, as Ms. Burleigh would have known and could have comprehensively recorded.

167. At paragraph 29 she describes Mr. Kerr as saying the fund would likely be moved offshore at the requirement of other overseas investors and would probably be Cayman domiciled.

168. She explained at the meeting that CAML's mandate was to recover the assets it had acquired by June 2014 and indeed Mr. Kerr began corresponding with proposals.

169. She refers at paragraph 33 to receiving a letter from the NZ GP, dated 17 December 2012, informing CAML that a new Limited Partnership called Torchlight Fund LP had been established in the Cayman Islands, and that Partnership Interests in this Fund were being transferred by way of pro rata in specie distribution to all partners of the NZ Partnership. She states that CAML's consent was not obtained, although it should be pointed out that to effect such a process that consent did not need to be obtained.

170. Meanwhile discussions as to an exit deal continued.

171. Then in paragraph 43 Ms. Burleigh states that CAML received an investor letter and she learns of a proposal to amend the LPA to allow for non pro rata redemptions. CAML did not sign the letter or agree to the amendment although it is difficult to gauge fully the reasons in light of CAML's exit objectives.

172. Again further proposals were put forward by Mr. Kerr but ultimately they were not acceptable to CAML.

173. At paragraph 56 she states that by now CAML had lost all trust and confidence that Mr. Kerr could complete any deal for CAML's exit. The Court has reviewed the e-mail

correspondence on this subject and finds no evidence that Mr. Kerr was acting anything other than diligently and sincerely, although he was not able to find a solution that met CAML's goals.

174. Again at paragraph 62 she refers to a deal to exit as being CAML's main priority. This is highly significant as evidence of CAML's principal and conceivably exclusive purpose.

175. She describes at paragraph 62.3 worrying developments for the long term value of the investment. These are worries which in the view of the Court if they existed were ultimately unfounded and misplaced. In relation to the Wilaci loan, she states Mr. Kerr informed her that there was no impact at all on the global fund.

176. She describes at paragraph 64 Mr. McCosh receiving a number of telephone calls from Mr. Marshall, expressing a desire to take action against the GP for breaches of the LPA.

177. Then at paragraph 66 Ms. Burleigh describes how on 21 August 2014 she met with Mr. Wallace "*and learned that other investors shared CAML's concerns over the lack of transparency*".

178. It then appears that from August 2014 to October 2014 CAML and MAS explored the possibility of cooperating, while Mr. Kerr in the meantime innocently continued with his proposals to arrange an acceptable exit for CAML.

179. She recounts that in October 2014 a group of Limited Partners requested a meeting of the partners of the Partnership but that on 7 November 2014 CAML received an e-mail from Mr. Giugni, Mr. Kerr's associate, attaching a letter in which the GP declined to call a meeting as the required 20% of Total Committed Capital had not been met (paragraph 68).

180. Ms. Burleigh sets out at paragraph 71 a number of CAML's concerns. Apart from the issue of related parties, which the Court will deal with in the context of the terms of the LPA, it appears to be self-evident that these concerns are based on a lack of basic understanding of the Partnership's true position. Not only are the audited accounts totally in order, but far from incurring debt as Ms. Burleigh alleges, the Partnership was in fact acquiring what proved to be an extremely valuable asset.

181. Perhaps even more disturbing is the suggestion that the FMA was conducting an inquiry into the Partnership, the GP and related entities, where in fact there was documentary evidence in the possession of CAML of complete exoneration. In addition, as also emerged only much later, CAML had in its possession a Report of Crowe Horwath indicating that the Partnership had assets of very considerable value as well as a Supplemental Report indicating a lesser but still substantial value.

182. In Ms. Burleigh's Third Affidavit, dated 24 June 2016, Ms. Burleigh provides verification of the Amended Petition.

183. Turning to Ms. Burleigh's Fourth Affidavit, dated 30 November 2016, she alleged at paragraph 9-12 that the Partnership has accumulated substantial losses and that CAML has not received any return on its investment. In the view of the Court this deliberately misrepresents the position of what is a closed long term fund, and moreover one in which there is even reason to believe that CAML's interest has increased in value along with the interests of every other Limited Partner.

184. She complains at paragraphs 13-21 about delays in investor reports and audited accounts, but with the benefit of hindsight it is possible to conclude that as a result of the delays no conceivable harm has been done to the Partnership assets. While criticism of delay must always be taken seriously, they are by no means dispositive.

185. With reference to the meeting on 7 November 2012, Ms. Burleigh now states at paragraph 39 that CAML was provided with at least one printed PowerPoint presentation, on which her notes of the meeting appear. She also reconfirms mention of the establishment of a Cayman Islands fund and that this would allow for an early exit of CAML's investment. She also remarks that there would be a Cayman Islands subsidiary formed.

186. At paragraph 45 she states that she does not recall Mr. Kerr, Mr. Naylor or Mr. Wightman making any comments or complaint that CAML had contacted PwC to remind them that CAML was relying on the auditors diligently discharging their function. However, she does not actually confirm that they knew about it, before making that particular observation.

187. She confirms at paragraph 57 that CAML approached ACC about purchasing CAML's interest, but ACC declined.

188. On 21 August 2014, Ms Burleigh confirms meeting with Mr. Wallace, who told her that MAS had become trustees of the Bear Real Opportunities Fund which had an investment of approximately AU$ 55 million in the Partnership (paragraph 70).

189. On 3 October 2014, a proposal was made to CAML that MAS and Mr. Marshall would form the new management team to replace the GP, but CAML was not prepared to support the involvement of Mr. Marshall (paragraph 74).

190. In paragraph 78, Ms. Burleigh reiterates that CAML's main interest was in protecting investments from further mismanagement in light of the matters that had come to light earlier in 2014 and CAML's loss of trust and confidence in the GP.

191. In paragraph 96, she denies that CAML breached the LPA and provided a copy of a draft settlement to MAS, or provided any confidential information to MAS, a proposition which the Court in fact has difficulty in accepting.

192. In cross-examination, Ms. Burleigh admits to having no records and no notes reflecting the proposition that Mr. Kerr had acted in bad faith in the exit negotiation process. She accepts that when asked for management accounts Mr. Kerr had provided them.

193. She admits making no enquiry as to the value of underlying asset sites at Henley Downs, Jacks Point and East Wanaka nor did she ask investment questions at the meeting on 7 November 2012.

194. Indeed, she accepts the proposition that ultimately the purpose of the Petition was to satisfy CAML's desire to get cash out. She confirms that in a report to Ministers CAML failed to inform them that Mr. Kerr has offered a non-pro rata exit to CAML on two occasions.

195. She agrees that she sought to present a picture of the Partnership as loss-making, when in fact the Crowe Horwath Report commissioned by CAML was at variance with that picture.

196. She agreed that Crowe Horwath's view that the strategy adopted by the GP could produce exceptionally strong positive cash flow was impossible to reconcile with what she had said. She agrees the Report made no suggestion of mismanagement.

197. Ms. Burleigh also confirms that she had no basis for thinking that the assets of the Partnership have now been dissipated. On being told of the investment gains described in Mr. Kerr's Fifth Affidavit she states that she was not able to dispute that.

198. She accepts that the Partnership's investment strategy for Lantern had been hijacked by MAS.

199. As to the GP's management, acquisition and performance fees, she appears to take no further issue.

200. She admits that Mr. Marshall's interventions that Mr. Kerr could not be trusted "*increased the level of concern*", and that Mr. Wallace emphasised there might be nothing left or very little left.

201. Ms. Burleigh accepts that Mr. Wallace envisaged two roles, bringing in fees as investment manager and as General Partner.

202. She agrees that the actions of MAS re Lantern were regarded by the Partnership as being damaging to its best strategic interest, although it appears this did not cause her any discomfort or alarm, as far as the Court can see anyway.

203. Significantly in the opinion of the Court, Ms. Burleigh agrees that Mr. Wallace and Mr. Marshall were alleging dishonesty against Mr. Kerr and "*They made that perfectly plain from day one*".

204. It is worth the Court remarking that, on that now discarded basis, this entire case has originally been built either expressly or by necessary implication.

205. Ms. Burleigh admits being aware of a press campaign regarding Lantern only. She does however agree that in relation to a disclosure by a Mr. Tim Hunter giving information about East Wanaka, the performance fee and the Wilaci litigation, that the material should never have been revealed, as being contrary to the confidentiality provisions in the LPA.

206. She accepts that as far as the proceedings were concerned MAS had been driving it forward from the outset.

207. Taking Ms. Burleigh's evidence as a whole the Court finds it unconvincing on the issue of whether there has been a loss of trust and confidence. On the one hand, it is tenuous and unreliable and driven more by expediency than by belief. On the other hand, in the areas where it demonstrates clarity and definition it assists the GP much more than it assists the Petitioners, as revealing the extent of the activities of Mr. Wallace and Mr. Marshall and the false nature of the allegations to which the activities give rise. Finally, Ms. Burleigh's failure to reveal in a timely way and for whatever reason critical documentation as to Crowe Horwath and the FMA causes the Court to view the testimony with serious caution and reservation.

Evidence of Mr. Bagnall

208. In Mr. Bagnall's First Affidavit dated 2 June 2015 he confirms that he is the Investment Manager for ACC, having held that title since 1999.

209. He states at paragraph 8 that ACC has lost all trust and confidence in the GP and/or Mr. George Kerr and the Management of the Partnership.

210. He recounts at paragraphs 9-14 the history of ACC from its incorporation on 1 April 1974. Its purpose was to manage New Zealand's universal accident insurance scheme, which was funded by public levies. He states that ACC required significant reserves to fund claims costs and that at present ACC has NZ$31 billion under management.

211. In March 2010 further to a proposed swap transaction ACC ultimately invested NZ $2.25 in the NZ Partnership.

212. Mr. Bagnall complains at paragraph 35 that since the investment he had been provided with various financial reports required under the LPA either late or not at all.

213. At paragraph 37 he recounts expressing his concerns to Mr. Kerr regarding fund transparency, and receiving a copy of the audited accounts for the financial year ending on 31 March 2012 on 22 November 2012.

214. At paragraph 38 he states that between 12 December 2012 and 28 December 2012 he received a series of emails from the NZ GP in relation to the in specie distribution from the NZ Partnership of an interest in the Cayman based Partnership to NZ fund investors, and that ACC had not been asked for nor given approval for any relocation.

215. Then on 3 April 2015 he received an email from the GP confirming that ACC held an interest in the Partnership. He states at paragraph 39 that he was not aware that the life of the Torchlight Fund had been extended by 3 years.

216. He recounts at paragraph 40 his efforts to obtain accounts for the year ending 31 March 2013.

217. At paragraph 42 he mentions seeing a report that the NZ Partnership had been placed into receivership and that Mr. Kerr had described there being a shell left from the restructuring. The audited accounts were received on 2 July 2014, approximately 297 days late. Mr. Bagnall was clearly frustrated by the financial reporting, taking into account that ACC was a Crown entity.

218. Mr. Bagnall refers at paragraph 52 onwards to transactions concerning Logic, the NZ Partnership and what are described as IEF shares, but as they predate the creation of the Partnership the Court has already ruled that these matters are legally and evidentially irrelevant.

219. He states at paragraph 69 that in September 2014 he became aware that other Limited Partners had concerns regarding the management of the Partnership, and on 2 October 2014 he received an email from Logic exhibiting correspondence to the Partnership's auditors. He indicates at paragraph 71 that ACC resolved to support a motion to conduct a meeting of Partners with a view to removing the GP.

220. He records that the GP declined to call a meeting on the basis that the requisite parties did not hold 20% of Total Committed Capital as required by the LPA and he complains in effect that the concerns of a substantial body of the investors were not being addressed.

221. At paragraph 75 he refers to a failure by the Partnership to meet obligations to a secured creditor (i.e., the Wilaci loan), and notes based on PGC unaudited accounts that the valuation of the Partnership had declined by approximately 15%. He then expresses the belief, which as it turns out is entirely erroneous, that the Partnership may not be able to pay any liability established in the Wilaci proceedings.

222. At paragraphs 79 he refers to concerns that the Partnership is being blatantly mismanaged and that ACC have been provided with misleading information and that the GP and/or Mr. Kerr and/or the management of the Partnership "*are not to be trusted*". He then restates at paragraph 81 that the GP has refused to call a meeting regardless of whether it is obligated or not, and at paragraph 82 that ACC has completely lost all trust and confidence, believing that the Partnership ought properly to be wound up.

223. Mr. Bagnall's Third Affidavit is dated 11 February 2016.

224. At paragraphs 7-10 he reiterates that ACC had concerns since January 2011 and that by email dated 3 February 2011 he had indicated to the NZ GP that he had lost his trust in the NZ Partnership.

225. He refers to another investment "*managed by Mr. Kerr*" which he states had failed and caused investors to lose money, and in an email to Ms. Burleigh of 5 July 2013 he refers to a lack of transparency with investors' money, and that his Omaha Beach Development scheme had apparently lost investors their money.

226. At paragraphs 18 he expresses concern that the Partnership Advisory Committee has only ever comprised two members, and for over 15 months following the death of Mr. Andrew Wilson constituted only Mr. Kerr, and complains that Mr. Wilson had been an associate of Mr. Kerr.

227. He disputes at paragraph 19 Mr. Kerr's assertion that he had raised no issues with the in specie distribution, when in fact by email dated 8 April 2013 he asked "a *number of questions*."

228. At paragraph 26 he states that he understood that the NZ Partnership had been in effect transferred to the Cayman Islands, citing similarities between the two funds.

229. He reiterates his complaint about lateness of audited accounts, and cites his email to Mr. Kerr dated 12 June 2014 referring to a year of being spun stories and requesting to know what has been going on.

230. At no point notwithstanding the complaints about lack of financial information and audited accounts does Mr. Bagnall identify any damage which has actually been caused.

231. At paragraph 45 he refers to the Partnership interests being diluted to the point where the Partnership is a subsidiary of PGC, and in paragraph 46 Mr. Bagnall again raises ACC's complete loss of trust and confidence in the GP.

232. In Mr. Bagnall's Sixth Affidavit dated 29 November 2016 he states at paragraph 10 that the Petition was brought and pursued by ACC on the basis of ACC's justifiable lack of confidence and trust in the GP as a result of ACC's concerns as to the management of the Partnership and the safety of its investment.

233. He denies that the Petition is being pursued as part of an unlawful means conspiracy and that he has given false or misleading evidence. He claims that the manner in which the GP was conducted the proceedings has exacerbated the loss of trust and confidence. ACC wanted to ensure it would receive a reasonable price on any sale or other "*exit*".

234. Mr. Bagnall confirms at paragraph 16 (e) that ACC, by way of email, asked the GP to sell ACC's investment as part of a capital raising exercise in late 2012, and the GP failed to act on the request. However, he denies at paragraph 17 that ACC's motivation in bringing this Petition is simply to obtain an early exit.

235. In relation to an assertion by Mr. Kerr that ACC was in fact provided with advanced notice of the proposed transfer in an email dated 31 October 2012, Mr. Bagnall continues nonetheless at paragraph 21 to deny that ACC was asked about or approved the relocation. At paragraph 27 he states that was no recognisable benefit to ACC from a regulatory or legal perspective in such a move.

236. He states that he was away on leave from 22 December 2012 until 6 January 2013 and did not fully appreciate the importance of the communication received. He reiterates at paragraph 32 that he did not appreciate what had happened.

237. At paragraph 34 he states that material amendments had been made to the LPA without the knowledge or consent of ACC and at paragraph 35 that ACC were not consulted.

238. With reference to ACC having voted in favour of the non pro rata redemption amendment provision, he states at paragraph 37 that ACC at that point was not aware of the other changes previously introduced and accepted that they were not material, but consistent with those applicable to the NZ Partnership. However he admits at paragraph 41 that he did not give the proposed non pro rata redemption amendments much thought in circumstances where ACC had already communicated a desire to exit the investment and this proposed amendment would, on its face, facilitate that exit.

239. He highlights again at paragraph 48 the delays in providing audited accounts, without specifying what damage, if any, resulted.

240. At paragraph 52 he notes that the GP had failed properly to report to the Limited Partners in respect of transactions with related and associated parties without specifying them or whether any damage resulted.

241. At paragraphs 53-54 he disputes whether the Partnership is likely to be extremely successful, ACC having to date not received any cash return while in the meantime the GP and Mr. Naylor and their related or associated entities have received considerable fees. He claims that there were actual loses and that ACC has not been able properly to value its investment. He alleged in any event that other comparable investments have done better.

242. At paragraph 60 he describes being approached by Mr. Marshall in or around September 2014, "*in respect of his concerns in relation to the management of the Partnership.*" He also describes being introduced to Mr. Wallace at around this point and states at paragraph

63 that he understood that MAS as trustee of the Bear Real Opportunities Fund was a Limited Partner of the Partnership.

243. He describes Mr. Marshall on 6 October 2014 emailing to him a strategy document containing a proposal from Logic and MAS seeking support for the replacement of the GP. He refers to envisaging steps being taken to analyse the true value of the Partnership and to maximize the recovery of investors' capital in an orderly, efficient and transparent manner.

244. It was subsequently decided that ACC would support the request for the GP to call a general meeting of Limited Partners (paragraph 67). He refers to the request being refused, without commenting on whether it was technically a valid request, and alleges without explanation the assertion that the GP quickly took steps to put a vote out of the reach of the Limited Partners by increasing PGC's shareholding in the Partnership.

245. Then at paragraph 69 Mr. Bagnall reasserts that in the circumstances ACC had no alternative but to join with the other Petitioners to issue these proceedings, taken as a last resort and with a view to protecting ACC's investment.

246. Regarding the GP's issuing to ACC a default notice and allegations of breaches of confidentiality, he admits at paragraph 73 (d) to speaking with Mr. Tim Hunter, a journalist, but denies disclosing confidential information of the Partnership to him. He affirms that he has dealt with this issue in his Fourth Affidavit.

247. He denies approaching the FMA, or that he has communicated with the auditors of the NZ Partnership or the Partnership, and once again restates concern about management and lack of transparency.

248. In cross-examination by Mr. Wardell he agrees that he held the view that Mr. Kerr was a skilled and thoughtful investor, and concedes that he had only recently been reading the Affidavit evidence in the case.

249. He comments favourably on the GP's August 2013 investor letter, and agrees that with pressing responsibilities he did not read the accounts at the time. In addition he did not provide instructions regarding Mr. Catchpoole's Eighth Affidavit, subsequently withdrawn by the Petitioners.

250. Mr. Bagnall accepts that the true value of ACC's investment was greater than the NZ$2.25 million put in.

251. He further admits in relation to the in specie distribution that the ACC investment was converted to the Partnership at a higher level, roughly equivalent to NZ$2.5 million.

252. He accepts that if true the Duff & Phelps Report, to which the Court will come later, showed a "*fantastic result*".

253. He agrees that what is known as the Local World Investment was a very good outcome and undoubtedly a very successful investment.

254. He also accepts that notwithstanding the changes to the board of Lantern and its new strategy the value of the investment had more than doubled, and was a reasonable outcome.

255. He confirms that at his meeting with Mr. Marshall and Mr. Wallace in 2014 he had a more positive view than those expressed by Mr. Wallace of the Lantern asserts.

256. Mr. Bagnall agrees that he received legal assistance with affidavit drafting, and Ms. Burleigh's Affidavit had a similarity in approach. He notes that she must have had the same law firm make similar suggestions as to what she could say.

257. Significantly, despite his expressed concern as to the value of ACC's interest, he agrees with the Crowe Horwath Report's analysis that historic performances were of no real relevance to the current market value, although he now accepts at least that such performance could be of limited relevance rather than no real relevance.

258. He said that his understanding was that the redeemable preference shares RCL were an asset of Torchlight, RCL having issued redeemable preference shares that the Partnership owns.

259. In respect of the GP's performance fee he accepts that no cash was paid out. It was all in Partnership interest and subsequently transferred to the Cayman Islands. He comments that it was the view of "*the likes of Tom Wallace*" that the performance fee was an illegal payment.

260. There was cross-examination as to the IEF transactions, which this Court has ruled to be irrelevant. He admitted he knew that an email exchange with Mr. Kerr had at least at some point improved his comfort with the situation, as he put it.

261. With regard to the witness's negative comments about Mr. Kerr's Omaha Beach development scheme, he admits that the allegation in his Affidavit was entirely hearsay, and he concedes that he was sorry that having found out that his allegations were wrong he did not correct them by saying that part of the Affidavit was no longer true.

262. On this subject, he admits that it appeared that everyone had been paid out in full and that he "*didn't investigate*".

263. He accepts that the various issues which he said he had were actually never canvassed by him in or around the relevant time with a regulatory authority (in response to the question from the Court).

264. Regarding the FMA investigation which took place into the Perpetual loan, he agrees that this was in fact an issue for Perpetual and not for the Partnership. It was as such an investigation into the Perpetual Cash Management Fund.

265. He accepts in substance that it was wrong to create an implication that Mr. Kerr had done something wrong.

266. He believes that he received a telephone call from Mr. Kerr as to non pro rata redemption, and believes it was introduced to help CAML achieve an exit. In relation to a redemption allowed in favour of Artefact Partners Global Opportunity Fund ("APGOF"), in fact Mr. Bagnall once again apologises for alleging that APGOF was apparently connected with Torchlight and Mr. Kerr, when in fact it was probably Mr. Wallace who had told him that.

267. He accepts that it would make no difference if a Limited Partner was paid in cash and then invested cash back into the Partnership as a Partnership interest as compared with if no money had in fact changed hands and a loan was repaid by the issue of a Partnership interest.

268. Contrary to his earlier allegation that following the attempt to call a further meeting of the Limited Partners, the GP quickly took steps to put a vote out of reach by increasing PGC's shareholding, he now accepts that in light of the earlier capital raising documentation the possibility of increasing PGC's shareholding had predated his complaint of subsequent dilution.

269. Likewise he accepts that a unanimous written resolution whereby Torchlight had agreed to exchange its RCL participation for Partnership interests was dated 30 September 2014, "*before anyone tries to call a meeting*". He would therefore remove any implication of dilution intention.

270. In relation to whether, if MAS was not a Limited Partner, Aurora should have been approached his answer was that MAS should have talked to Aurora at that stage, and they did not.

271. This exchange to a significant degree indicates to the Court that the involvement of Mr. Wallace and MAS was the primary involvement, and that of ACC rather more of a secondary, if not simply responsive, nature.

272. He acknowledges that although Mr. Kerr had sent him an email in July 2014 inviting him to ask any questions following the distribution of the Partnership's accounts to March 2013, he never did so.

273. This may perhaps be seen as a small detail, but it casts doubt for example on the generalised allegations of the Petitioners about an unwillingness by the GP to supply information.

274. He accepts that when the Petitioners were proposing to remove the GP, starting asking questions "*would be tactically disadvantageous*".

275. One has to ask at this point to what does the Petitioners' concept of fairness therefore effectively amount.

276. Mr. Bagnall admits to being dissuaded at a meeting in December 2014 from asking questions about the Wilaci loan issue with the dissuasion coming from MAS. He adds that

it was fair to say that MAS was ramping up the pressure and saying there was an urgent need to act now.

277. He accepts that he had not performed due diligence in relation to Mr. Marshall, and felt more comfortable dealing with CAML and even Mr., Wallace, commenting that Mr. Marshall would talk without thinking in some cases. He was part of *"the dodgy crowd who turned good"* as Mr. Bagnall put it. It is hardly a reassuring turn of phrase in any context.

278. He decided, it seems, to follow the lead of Mr. Marshall and Mr. Wallace, stating *"I'll tail coat them"* His thinking was to let them *"do the work and try and get a better outcome for investors"*.

279. Mr. Bagnall accepts that he saw Mr. Wallace and Mr. Marshall having a degree of conflict of interest, in that what they wanted for Lantern might not necessarily coincide with what ACC might want as a Partnership investor. Whereas the Partnership's strategy was to reinvest and grow, that of MAS was to realize assets and return funds to shareholders.

280. He accepts that Mr. Wallace envisaged a more multifaceted campaign to change the GP, including complaining to the FMA as to related party transaction, the performance fee, and the Perpetual Cash Fund loan to the NZ Partnership. Mr. Bagnall considered this to be working against ACC's interest as an investor, but he was more relaxed about making an approach to the auditors. It was possible that Mr. Wallace did mention a press campaign.

281. He denies that MAS's strategy was interfering with the management of the Partnership, but accepts that trying to replace the Partnership directors and get them off the board of Lantern was a hostile act against the GP.

282. It appeared to the Court that this is a problematic and disingenuous distinction on Mr. Bagnall's part.

283. The Court raised Mr. Bagnall's failure to mention meetings with Mr. Marshall and Mr. Wallace in his First Affidavit, and he seemed to concede it might be relevant to do so.

284. In an exchange with the Court, Mr. Bagnall was initially reluctant to accept the idea of there being a conflict between MAS and the Cayman Partnership in respect of Lantern, with the Court enquiring as to them being competitors. After what was clearly a struggle for Mr. Bagnall, he accepted that "*at one level*" MAS was in competition. Overall, the Court finds this reluctance to recognise clear but inconvenient facts to be highly alarming.

285. Mr. Bagnall was taken to the confidentiality provisions of the LPA and seemed to admit he was not aware of the terms, which were tighter than what he was used to seeing. He did not have the tighter provisioning in mind when he spoke to Mr. Hunter.

286. He had confirmed to Mr. Hunter that ACC was an investor, that it was unhappy with it, and that the provision of information to investors had been poor and late. He also appeared to imply or argue that such a breach of a very small aspect of the LPA was technical only and subject to an equitable interpretation.

287. He confirms that the press reference "*one Torchlight investor expressed frustration at the funds disclosure*" was a reference to him.

288. He discloses that at the time of receiving an email communication from Mr. Hunter he also received a telephone call on the same day, he believes, from Mr. Marshall who set up a meeting with Mr. Wallace and Mr. Marshall to come and see Mr. Bagnall. He states that the impression he had at the meeting was that Mr. Wallace and Mr. Marshall saw the way of changing the GP as being more multifaceted, including as has been noted approaches to the FMA and the auditors.

289. In the course of his cross-examination Mr. Bagnall was at various times both emotional and even irrational. He made a number of statements in his Affidavits particularly in relation to Mr. Kerr's character which were both unfounded and unfair, and which only with reluctance did he ultimately abandon or withdraw. In the course of his Affidavit evidence he had referred only minimally to Mr. Wallace and Mr. Marshall, as indeed had Mr. Traveller and Ms. Burleigh, and in depicting the assets of the Partnership as either indeterminate or in jeopardy he greatly exaggerated and misrepresented the facts.

290. It is also troubling that he failed to restrain or at least dissociate ACC from the proposals and initiatives of Mr. Wallace and Mr. Marshall in light of the very clear conflict of interest arising from the Lantern matter.

291. As with both Mr. Traveller and Ms. Burleigh, the Court must approach Mr. Bagnall's evidence with a considerable degree of caution in assessing whether there has been on ACC's part a justifiable loss of trust and confidence. Repeating the same allegations over and over again does not in reality reinforce them if they are inflated and exaggerated to begin with. On the central issue as to purported loss of trust and confidence the Court does not find Mr. Bagnall's evidence to be persuasive.

Evidence of Mr. Marshall

292. In Mr. Marshall's First Affidavit dated 23 June 2015 he confirms that he is a registered financial advisor and Managing Director of Logic Fund management Ltd ("Logic"), which offers independent private wealth management advice for trusts, businesses and individuals. He supports the Petition.

293. He states at paragraph 2 that Logic is a Limited Partner in the Partnership.

294. He recounts how the "*domicile*" of the Partnership, as he describes it, was moved to the Cayman Islands in December 2012.

295. At paragraph 16 he states that his relationship with Mr. Kerr is currently acrimonious, worsened by concerns in relation to the management of the Partnership.

296. He refers at paragraph 17 to the initial source of his frustration flowing from a put option and Mr. Kerr's alleged refusal to honour it. None of this is relevant to the current matter before the Court.

297. From paragraphs 18-30 Mr. Marshall sets out a series of complaints relating to land in East Wanaka, and Mr. Kerr's conduct. Then from paragraph 31-42 he continues with what he calls the IEF transactions. From paragraphs 43-53 the subject is the negotiation of Logic's put option.

298. None of this evidence is of any relevance, and the Court which has other pertinent issues to consider will pay it no further regard.

299. Mr. Marshall refers to the move to the Cayman Islands from paragraphs 54 onwards and then states at paragraph 57 that he was not satisfied with the information provided in respect of the in specie distribution.

300. At paragraph 59 he states that he is not aware that an Advisory Committee in respect of the Partnership has properly operated at any time since his involvement in both New Zealand and the Cayman Islands.

301. At paragraph 61 he states without elaboration that from about March 2012 the FMA commenced an investigation into the conduct of PGC and NZ GP.

302. He refers at paragraph 67 to van Eyk Research Pty Limited and expresses a belief that Mr. Kerr had a degree of influence over the Chief Executive Officer Mr. Mark Thomas. He also states that he contacted Mr. Tom Wallace of MAS whom he was told was the trustee of funds managed by van Eyk.

303. On 16 October 2014 he states that he refers to Mr. Kerr a request for a meeting of the Limited Partners, on the part of CAML, Bear Real Opportunity Fund and ACC.

304. On 5 November 2014 he states that he wrote to the FMA setting out his concerns (paragraph 72).

305. He makes complaint about not receiving any accounts or financial information from the Partnership since July 2014.

306. At paragraph 78 (h) he raises the prospect that the interests of existing Limited Partners will be substantially diluted, and at paragraph 78 (k) he sets out the potential that existing Limited Partners, including Logic, related entitles and Logic investors, will suffer the loss of their investment or a substantial part of it.

307. In effect a number of insinuations are made on which are based an assertion that it would be in the best interest of the Limited Partners to appoint official liquidators.

308. Mr. Marshall's Second Affidavit is dated 11 February 2016.

309. At paragraph 6 he refers to a number of Logic investors who are themselves Limited Partners who have authorized him to swear evidence on their behalf.

310. At paragraph 7 he states that he had never been advised of Mr. Wilson's membership of the Partnership Advisory Committee and only became aware of his existence on receipt of the June 2014 investor report which informed Limited Partners of Mr. Wilson's death.

311. Mr. Marshall then continues with his irrelevant account of the IEF transaction. He also provides commentary on the Perpetual Cash Management Fund loan to the NZ Partnership, and on the circumstances of a resignation by KPMG as auditors of PGC. None of this is of any help to the Court.

312. In Mr. Marshall's Third Affidavit dated 29 November 2016 he takes issue with allegations made about him by Mr. Kerr.

313. At paragraph 16 he denied conspiring with ACC and CAML to obtain liquidity.

314. At paragraph 18 Mr. Marshall refers explicitly to his attempts to have addressed the "*misappropriation*" of Logic client's funds and the mismanagement of the Partnership.

315. The Court finds this reference to misappropriation to be significant, because it appears to the Court that this was a general insinuation in the Amended Petition and Affidavits on behalf of Petitioners, since abandoned, but not actually explicitly revealed for what it fundamentally encompassed. In that respect, Mr. Marshall provides a glimpse of the nature of what was originally being maintained rather than yet another euphemism.

316. Mr. Marshall also confirms in paragraph 18 that CAML did not want to deal with him.

317. Again in paragraph 19 he states that he was totally convinced that not only was Mr. Kerr dishonest, but if left to his own devices Mr. Marshall's clients would receive no return on the investment in the NZ Partnership, as he puts it.

318. In light of the fact that allegations of dishonesty and dissipation of assets have been categorically abandoned, it is a source of puzzlement to the Court as to why any evidence was adduced from Mr. Marshall at all. It is as though the earlier substance of the Petitioners' strategy had been abandoned while pointlessly retaining the form.

319. Mr. Marshall concedes at paragraph 20 (a) that he had a plan to generate fees for himself by becoming part of the replacement General Partner in September and October 2014. The Court notes that this piece of information was omitted from Mr. Marshall's previous Affidavit.

320. He refers at paragraph 20 (b) to the GP having continuously lied about the state of the fund including transactions it had undertaken and their success, a comment which the Court considers to be both unfairly prejudicial and wrong.

321. He affirms that his primary concern is to ensure that there is some eventual return from the money that the Partnership has, in his opinion, effectively stolen from Logic's clients.

322. It is extraordinary that the Petitioners would allow such an allegation of the gravest nature to be put forward in late November 2016, when to all intents and purposes the Petitioners have since gone forward on an entirely different basis as to the principles and practice of Partnership governance. Furthermore, it was unnecessary for the Petitioners to put Mr. Marshall forward as a witness unless they genuinely wanted to do so for whatever reasons they calculated would be beneficial and helpful to the Court. However, those reasons remain inexplicable.

323. At paragraph 20 (d) Mr. Marshall admits to writing two letters to the Partnership's former auditors, PwC. He highlights yet again what he calls Mr. Kerr's "*propensity towards dishonesty*". He adds that he wished to warn the auditors and to enhance the prospects of his clients being able successfully to sue the auditors in the event that the assets of the Partnership were fraudulently dealt with by Mr. Kerr.

324. Mr. Marshall states at paragraph 20 (f) that it is alleged by Mr Kerr that he had a plan to cause proceedings to be issued to wind-up the Partnership in October 2014 in combination with Mr. Wallace. However, if the evidence of the Petitioners is to be believed they had no such orchestrated plan at that time. In any event, the Court concludes that a plan originated from Mr. Wallace and Mr. Marshall, whose personal characters have now been variously commented upon.

325. Finally, in relation to complaints made by Mr. Marshall to the FMA, he maintains that his concerns were genuine and based on his belief of financial misconduct. He alleges that the Partnership had been used to confer "*special benefits*" on the GP and its associates at the expense of Limited Partners more generally. Once again, this is not part of the Petitioners' current case, but Mr. Marshall's statement may well nonetheless be a useful and revealing commentary on how this case has evolved from one characterization into another one over the course of time.

326. He admits to being questioned by Mr. Hunter the journalist and to discussing the Wanaka land using publicly available information. He admits that Mr. Hunter's article regarding the Partnership would imply that Mr. Hunter had looked at the accounts for the year to March 2013.

327. He admits to embarking on a campaign against Mr. Kerr which was designed to ensure that the GP was replaced. He admits meeting Mr. Wallace and Mr. Thomas of van Eyk several days after news of van Eyk's financial difficulty, and he knew of Mr. Wallace's strategy to

seek removal of the Partnership appointees to the Lantern board through an Australian Stock Exchange Notice dated 24 September 2014.

328. He agrees that there were discussions with Mr. Wallace before the joint MAS/Logic recovery and exit strategy was finalised. He was also in contact with Mr. Wallace, including via numerous emails.

329. He was referred to an email to Erin Day, in which he states a belief that the Partnership assets were very valuable. He admits meeting with CAML and ACC, as well as reaching out to Aurora but not hearing back.

330. He admits approaching the FMA on 24 June 2014.

331. In reference to a letter dated 5 November 2014 which he sent to the FMA, the Court enquired whether Mr. Kerr and the Partnership had even been notified. Mr. Wardell confirmed that this was not so.

332. In cross-examination by Mr. Wardell, Mr. Marshall accepts that he had been in dispute with Mr. Kerr over a put option matter. He also accepts that he had made email comment directly to Mr. Kerr. After reviewing his Fifth Affidavit, referring to "*untreated syphilis*" another odd comment was contained in an email link to a video sent by him to Mr. Kerr, with the words "*Jane's Addiction, being caught stealing*".

333. The Court considers this as a significant indication of Mr. Marshall's negative, emotional and hostile attitude where Mr. Kerr was concerned.

334. Mr. Marshall accepts the suggestion that the put option dispute prompted him to investigate Mr. Kerr's dealings in respect of both the NZ Partnership and the Partnership. Despite

various encouragement to do so, Mr. Marshall never produced an executed version of the put option document he claims.

335. He claims to use a reasoning tool called triangulation to come to conclusions as to the truth, using information from different sources as the Court understands it. It was put to him however that this amounted to conspiracy theory, although he denied it.

336. East Wanaka features in the cross-examination and he was challenged as to his assertion that Mr. Kerr had somehow been masking his own interests. None of this however ultimately concerns this Court as having any relevance.

337. He claims in regard to the IEF transaction that he had been involved along with Mr. Kerr in questionable "*cleansing transactions*". Not only is the Court unconcerned with the matter itself, but in any event Mr. Marshall's credibility on this issue as on others must be viewed as less than reliable.

338. There were some exchanges as to alleged threats that Mr. Marshall had made against Mr. Kerr and his family both by telephone and email.

339. Under question by the Court, he admits that he had never put everything together in terms of his allegations and asked Mr. Kerr to answer those concerns.

340. Mr. Marshall admits in effect that he had encouraged Mr. Bagnall to write to the auditors "*to remind them of their obligations*". He knew that Mr. Wallace was also writing to the Partnership auditors in February 2016.

341. In summary, not only was Mr. Marshall's evidence replete with personal animosity towards Mr. Kerr, but it was also calamitous. He made fervent attacks on Mr. Kerr's integrity, even

though that approach was expressly abandoned on behalf of the Petitioners. With Mr. Wallace he conceived and executed a plan to replace the GP ostensibly in the interests of the investors but actually for their own enrichment, and he did so in conjunction with an individual, Mr. Wallace, whom the Petitioners themselves have expressly condemned. All in all, his testimony provided a fascinating and brutal insight. It was not evidence on which reliance should be placed by the Court, save in so far as it may properly assist the GP's case.

Evidence of Ms. Poon

342. In Ms. Poon's First Affirmation dated 8 February 2017 she states that she was a Director Company Secretary and Chief Financial Officer ("CFO") of Aurora, and that her employment with Aurora commenced on 20 May 2013 as CFO. She then became Company Secretary in January 2014 and a Director in September 2015. She is a qualified Chartered Accountant.

343. Ms. Poon refers to having read Mr. Roe's First and Third Affidavit. The Court has already indicated that it will place no reliance on the content of Mr. Roe's evidence.

344. Ms. Poon refers at paragraph 8 to Mr. Roe ceasing to work for Aurora on 14 July 2016. She also states at paragraph 11 that Mr. Roe has stopped engaging with Aurora. Around 27 January 2017 Aurora concluded that it would be unable to secure Mr. Roe's attendance at this substantive hearing.

345. She explains at paragraph 12 that Aurora is an Australian registered corporation, which provides professional trustee and investment management services. Pursuant to a trust deed dated 20 December 2010 Aurora was appointed as trustee of the Bear Real Opportunities Fund ("the Bear Fund").

346. She elaborates at paragraph 13 that the Bear Fund is an investment vehicle for three Australian managed investment schemes commonly referred to as "*the Blueprint Funds*". The sole beneficiary of the Bear Fund is MIML in its capacity as responsible entity for each of the Blueprint Funds.

347. Numerous references are made in Ms. Poon's evidence to Mr. Roe's involvement, but to the extent that those references rely in turn on Mr. Roe's evidence the Court intends to ignore them except where the facts are undisputed.

348. Aurora retired as trustee for the Bear Fund on 3 December 2013 and MAS was subsequently appointed, or purported to be appointed, in Aurora's place.

349. She states at paragraph 18 that she does not recall when she became aware of the "*relocation*" from New Zealand to the Cayman Islands. Initially she was responsible for limited administrative and operational matters such as execution of documents and pricing. Her role expanded throughout December 2013 and early 2014.

350. She refers to Aurora holding significant concern as to the valuation methodology adopted by the GP, which impacted on Aurora's ability to price the Bear Fund.

351. She states at paragraph 23 that on 11 September 2013 Aurora suspended unit pricing of the Bear Fund as a result of its concern. Subsequently however pricing was recommenced on or around 25 September 2013. It was following this that Aurora agreed pursuant to instruction from MIML to retire as trustee of the Bear Fund.

352. She states at paragraph 25 that from December 2013 until late October 2014, MAS "*acted as*" the Limited Partner for the Bear Fund's interest and as trustee. Also Aurora did not

"*consider itself*" the Limited Partner for the Bear Fund because Aurora had retired as trustee and was not involved in the management of the Bear Fund.

353. She was jointly responsible with Mr. Roe for communicating with the GP in respect of Aurora's request for the Bear Fund's interest in the Partnership to be transferred to MAS.

354. At paragraph 32 she states that her knowledge of the "*relocating*" to the Cayman Islands is constructed from the review of the relevant documentation and discussions with her colleagues after the event.

355. She states at paragraph 33 that she is not aware of Aurora having been properly consulted or having consented, or of Aurora having been provided with prior notice of the amendments to the LPA.

356. She confirms that to the best of her knowledge and belief Aurora is taking steps with respect to these proceedings on account of its lack of trust and confidence in the GP and in order to protect the investment of the Bear Fund from further mismanagement and misconduct. This knowledge is based on her roles at Aurora, the records available which she has reviewed, and her conversations, whatever they may be, with Mr. Roe and other colleagues.

357. Then in paragraph 38 she states being involved in discussions with Mr. Roe in relation to concern that the investment was in jeopardy. No explanation for either the jeopardy or the loss of trust and confidence is set out at this point in the Affirmation.

358. Ms. Poon refers at paragraph 43 to the engagement of Grant Thornton to produce a report in respect of valuation methodology. She states that she was not aware of the full report being provided to Aurora, although it is in fact the position that a summary of the report findings relating to RCL was shown to Aurora, and the report furnished to its auditors.

359. Ms. Poon returns to the subject of trust and confidence at paragraphs 48-57.

360. She complains of lack of transparency and misconduct and mismanagement. Financial information was provided late and in breach of the LPA, but she does not claim that when provided it was in any way inaccurate.

361. Notwithstanding the audited accounts she asserts that Aurora continues to be concerned about related party transactions "*that have not been sufficiently explained*".

362. Ms. Poon places continuing reliance on Mr. Roe's evidence which, it should be added, the GP would have no way even to challenge if it were to be accepted by the Court .

363. At paragraph 63 she refers to Aurora remaining of the view that the facts and matters identified in Mr. Roe's evidence demonstrated the lack of probity shown by the GP and its management, which has resulted in a complete breakdown of trust and confidence.

364. In cross-examination by Mr. Wardell Ms. Poon confirms that she read the Fifth Affidavit of Mr. Kerr and the Tenth Affidavit of Mr. Naylor only in the last week or two before given evidence and she later confirms that she did not read them in detail as they were too long.

365. Ms. Poon agrees that Aurora was not itself responsible for the decision to invest in Torchlight; "*the decision was taken by van Eyk/TPPM*".

366. Ms. Poon was taken to an email of Mr. Roe to van Eyk dated 12 November 2013 confirming that Aurora wanted to stay on as trustee, and citing in support the imminent delivery of an unqualified audit report and ongoing unit pricing.

367. She agrees that there was a very close relationship between Aurora and van Eyk.

368. She agrees that the GP liaised with van Eyk in relation to the setting up of the Partnership and that van Eyk approved the establishment of the Cayman Partnership and instructed Aurora to sign the deed of adherence. She also accepts that it was van Eyk that should have consulted Aurora about the establishment, as opposed to the GP.

369. She confirms that for the terms of the new LPA, it was again van Eyk that was responsible for considering and approving the terms and instructing Aurora to sign.

370. She states that the decision to obtain a report on the valuation described above was prompted by Aurora's auditors, and they raised a question about a comparison between PGC's approach to valuation in PGC's audited accounts and the approach to valuation in Torchlight's accounts. It was not disputed that Mr. Naylor had made a distinction between valuation in the statutory accounts and the regular daily valuations that Torchlight produced.

371. She states that Mr. Naylor showed Aurora an executive summary of the Grant Thornton Report, and a full copy of the Report was provided to Aurora's auditors Deloitte. Ultimately the pricing issue was resolved on 25 September 2013 in any event.

372. Moving on to MAS, she confirms that Mr. Di Francesco of van Eyk should not have sent MAS the executive summary of the Grant Thornton report on 23 September 2013 because that was a breach of the confidentiality provision of the LPA.

373. She comments that Mr. Wallace's email to Mr. Davidson of Aurora dated 24 September requesting information and attaching a list of documents he wanted was in anticipation of being appointed as trustee.

374. She confirms that in respect of the documents provided to MAS the quarterly reports were going to refer to the affairs of the Partnership. This was even though at this stage Aurora was not proposing to pass the Partnership interest over as at September 2013.

375. She saw in Jacqui Lemon's email attaching numerous documents nothing requesting MAS to keep the information confidential.

376. Ms. Poon is asked what information she provided to MAS in December 2013, and she listed all books and records, unit pricing, data, financial statements they had prepared, any audit reports received. However, she could not recall that MAS was required to enter into any confidentiality agreement at any time.

377. She agrees with the Court that Aurora was a Petitioner because it remained a Limited Partner regardless of other disputes.

378. In relation to the trusteeship she confirms that the Deed of Assignment signed by MAS dated 4 February 2014 was never signed by Aurora.

379. Significantly she acknowledges her awareness that MIML is seeking to wind up the Blueprint Funds.

380. She agrees with the comment of the Court that MAS was trying to get control of the Bear Fund in replacing Aurora, and van Eyk was the subject of a separate battle for control between two other individuals, Mr. Barnes and Mr. Thomas, with all of this going on at the same time.

381. She comments that MIML came to Aurora, believed to be in May 2015, informing Aurora that they were concerned about the management and asking Aurora to review some

documents, and if Aurora came to the same conclusion, which it did, to put the Petition forward.

382. Ms. Poon adds that Aurora had insisted on an indemnity from MIML for legal costs before Aurora was prepared to act. She also noted that all the work had been done by others already.

383. Ms. Poon concedes that she has not fully read Mr. Kerr's Fifth Affidavit in relation to the third party transactions, inter alia, before the hearing.

384. Having since done so, she confirms that she was not able to disagree with what Mr. Kerr stated there in relation to the New Chums Beach and Jacks Point Golf Club acquisitions. This is an important concession, given that these remain among the limited issues still extant in this case.

385. As to whether Mr. Wilson was not an independent member of the Advisory Committee, she did not appear to have any knowledge independent of Mr. Roe's account.

386. In relation to Mr. Naylor's fees, she accepts that she was not in a position to say that there was anything improper in the consultancy fees charged by Mr. Naylor.

387. The Court has subsequently been told that Ms. Poon's employment at Aurora has been terminated in circumstances where the loss of a large sum of money is being examined. However, in the absence of any further definitive information, the Court draws no inferences or conclusions from that set of circumstances.

388. In the course of Ms. Poon's testimony she refers to lack of transparency, misconduct and mismanagement of the affairs of the Partnership, late provision of financial information

and related party transaction. However, for entirely understandable reasons Ms. Poon is not able to provide the degree of factual supporting information that might have been expected. As the Court has earlier indicated, there must be strong grounds to support a winding up petition on the just and equitable basis, and the difficulty which confronts the Court is whether, as indeed is also the case of the other major witnesses for the Petitioners, the Petitioners through Ms. Poon are able to provide an evidential foundation capable of establishing the level of proof expected and required. As with the other principal witnesses, she fails to provide detailed and convincing testimony.

389. The nature of the Petitioners' predicament is even more acute where as in these proceedings the scope of the allegations has now in reality been narrowed so substantially and yet Ms. Poon's testimony remains couched in vague generalities only.

Evidence of Mr. Church

390. In his Affidavit dated 4 June 2015 Mr. Church states that he is General Manager of Corporate Trustee Services Public Trust ("Public Trust").

391. He explains that Public Trust, in its capacity as trustee of PAM 40 (also known as the Perpetual Wholesale Alternatives Fund) invests through its company, Perpetual Asset Management Nominees Limited, in the Partnership on behalf of PAM 40 unit holders.

392. He makes his Affidavit in support of the Petitioners' application.

393. Public Trust is a statutory corporation in New Zealand, and the corporate trust service of which he is general manager is one of the three divisions of Public Trust.

394. Mr. Church states at paragraph 9 that he is a member of Chartered Accountant Australia and New Zealand.

395. He explains that PAM 40 was managed by Blueprint Investment Management Limited, a New Zealand subsidiary of the failed Australian investment management group van Eyk Research Pty Ltd. Then following the failure and liquidation of van Eyk in September 2014 and "*the subsequent liquidation of Blueprint in March 2015*", Public Trust has undertaken most of the trust activities in respect of PAM 40. Apart from some cash, PAM 40's only asset is its investment in the Partnership.

396. He describes how PAM 40 invested in the NZ Partnership in June and July 2010.

397. At paragraph 21 he states that Public Trust first became aware of the in specie distribution of the NZ Partnership to the Partnership on 19 December 2012, by way of letter dated 17 December 2012 from the NZ Partnership to the Limited Partners.

398. He states that PAM 40 did not consent to the in specie distribution at the time, nor was it asked to consent, but neither did it dispute the proposed distribution at this time.

399. He complains at paragraphs 24 and 25 about not receiving regular complete financial reporting.

400. He recounts the late provision of audited financial statements and at paragraph 40 he notes that the audited financial statements for the 2014 financial year remain outstanding although this is of course no longer correct.

401. He records that on or about 21 August 2013, the Partnership circulated an investor letter which proposed amending the LPA to enable pro rata redemptions. This was seen as an

opportunity to redeem PAM 40's investment and Blueprint requested that Public Trust ratify the proposal on that basis.

402. Mr. Church states at paragraph 44 that in late 2014 he was contacted by Mr. Wallace of MAS "*acting as trustee for Bear Real Opportunities Fund*" and Greg Marshall of Logic Finance.

403. He was subsequently made aware that the GP declined to hold a meeting on the basis that the requesting parties did not hold 20% of Total Committed Capital, and at paragraph 46 he confirms that the refusal caused him significant concerns.

404. Mr. Church also confirms that in March 2015 he became aware that Wilaci Pty Limited was seeking a declaration in the High Court of New Zealand that their security interest over the NZ Partnership extends to the assets of the Partnership. However, as has also become apparent, the Wilaci litigation has now been settled.

405. Finally, Mr. Church expresses "*very real concerns*" for the security and value of the Public Trusts investment in the Partnership being in jeopardy. Once again, as it will become apparent on reviewing the expert valuation evidence, these concerns are without foundation.

406. In cross-examination by Mr. Mold, Mr. Church confirmed that he was not involved in the original investment. Although he was not personally responsible for managing the investment he has overall oversight of the file.

407. He also confirms that he had not personally read the audited accounts from 2014, 2015 or 2016. It also became clear that since February 2017 he ceased to be General Manager for Public Trust.

408. He concedes that the investment was a long-term investment and they were not able to produce a document showing that PAM 40 had an early redemption right.

409. Mr. Church concedes that it was a reasonable assumption, that Perpetual Asset Management Limited on behalf of PAM 40 was aware of the transfer to the Cayman Islands and the reason for the transfer, given the connection between it and the NZ Partnership.

410. He accepts that his serious concerns about PAM 40's investment were no longer correct as the GP was now up to date with audited accounts and fund valuations.

411. He agrees with Mr. Traveller's assessment that letters written by CAML, MAS and Logic to the auditors could well delay the audit.

412. He accepts that in reference to financial reporting the position had obviously moved on a lot since the time he swore his Affidavit, and he does not maintain his concerns that the security and value of the Public Trust investment were in jeopardy.

413. He concedes that other than newspaper articles he had no knowledge of related party dealings until March 2015 when the lawyers acting for the Petitioners approached Public Trust to see whether they were interested in joining the Petition, but Public Trust was not interested.

414. Gregg Marshall had telephoned him about the Petition at one stage but he did not want to be involved.

415. Significantly, he had not personally checked the underlying factual basis of the allegations about related party dealings made in the Petition. He had just relied on what he had been

told by the Petitioners or their lawyers. He accepts that a letter dated 1 November 2016 in relation to related party transactions reports would provide him with some comfort if the auditors had signed it.

416. The Court considers especially in light of the passage of time that the issues raised by Mr. Church have substantially fallen away. Indeed, they have done so to a degree that provided assistance to the GP's case rather than that of the Petitioners. As with so much of the unfolding content of their case, the reasoning of the Petitioners in adducing his evidence at the hearing is not entirely clear to the Court.

Evidence of Mr. Quinn

417. In his First Affidavit dated 21 January 2016 Mr. Quinn states that he is chairman of Ngati Awa Asset Holdings Limited ("NAAHL"), having held the position since August 2014.

418. He explains that NAAHL was a Limited Partner of the NZ Partnership and now of the Partnership, and he makes the Affidavit in support of the Petitioners' application.

419. He states at paragraph 7 that NAAHL is a subsidiary of Te Runanga o Ngati Awa, and established to undertake commercial activities on its behalf for the benefit of the Ngati Awa hapu people.

420. He states that he is concerned about NAAHL's investment in the Partnership and in particular about the GP's management and lack of information.

421. NAAHL first became aware of the in specie distribution by way of a letter dated 17 December 2012 from the NZ Partnership. Although he was not there at the time, he states

that NAAHL understood the purpose was to minimise tax liabilities, and that there were no material changes to the LPA, which was incorrect.

422. NAAHL did not consent, nor was it asked to consent, to this.

423. He makes complaint about late financial reporting, with no explanation from the GP and expresses concerns about the Advisory Committee consisting of Mr. Kerr as the sole or only active member.

424. In particular he takes issue with Mr. Cleary being a member, and he states, erroneously as it transpired, that Mr. Cleary has never represented NAAHL, although in fact Mr. Cleary is no longer authorized to do so. He refers to concerns for the security and value of NAAHL's investment, and states that NAAHL has lost trust and confidence in the GP.

425. In his Second Affidavit dated 23 November 2016 Mr. Quinn reiterates that Mr. Cleary does not, and has never, acted for NAAHL (paragraph 10).

426. It appears that some differences had emerged between Mr. Cleary and NAAHL. Alternatively, Mr. Quinn states that if Mr. Cleary had authority to act for NAAHL, that authority was terminated by email dated 17 May 2016.

427. He proceeds to outline a history of relations between NAAHL and Mr. Cleary's company Cleary Wealth Management. It seems that a portfolio managed by Mr. Cleary's company included the investment in the Partnership.

428. Mr. Quinn confirms at paragraph 24 that since September 2012, NAAHL has been attempting to exit its investment, including with respect to its investment in the Partnership.

429. The extensive discussion of their differences set out in the second Affidavit are not of assistance to this Court other than in showing differences had arisen with Mr. Cleary.

430. At paragraphs 30-32 Mr. Quinn refers to the relocation. He reiterates that NAAHL was not aware of the proposal, and that Mr. Cleary had not advised NAAHL of this development.

431. He adds at paragraph 32 that at this point NAAHL was looking to exit from Torchlight and would not have consented to the relocation or the extension of the term of the fund.

432. Mr. Quinn maintains that unlike Mr. Cleary NAAHL was concerned about delayed financial reporting.

433. He adds that it does not consider Mr. Cleary to be independent of Mr. Kerr.

434. Finally, and without particularisation, Mr. Quinn states at paragraph 45 that due to the loss of trust and confidence in the GP, NAAHL fully supports the Petition, and asserts that NAAHL's concern has been exacerbated since he swore his First Affidavit.

435. Cross-examined, Mr. Quinn says he was not a member of the Board of NAAHL at the time of the in specie letter and did not personally have any understanding arising out of the letter.

436. Although he had scanned certain Affidavits for relevance to NAAHL, and found no reference, he admits in relation to Mr. Kerr's First Affidavit that he was not party to the issues, could not shed any light on those matters and had no knowledge of most of what was being claimed by the various parties.

437. He did not know that MAS was not a Petitioner, that the Petitioners had described Mr. Wallace through Leading Counsel as a blackmailer or that Mr. Wallace "*had tried to take over the proceedings.*"

438. Mr. Quinn confirms that he had not seen the letters sent by MAS, Logic and CAML to the GP's auditors and was unaware that six audit partners from Grant Thornton had worked on the 2016 audit.

439. He also comments that the move to the Cayman Islands was of no moment to him.

440. He agrees that NAAHL wanted to extricate itself from this investment, and that this was their focus.

441. He accepts that NAAHL wanted to exit and had not been able to do so, adding that they had not been receiving any satisfactory response to the process of endeavouring to exit. However, neither he nor anyone at NAAHL contacted the GP directly to request information, all requests being made through Mr. Cleary. He also confirms supporting the Petition to get out of the investments NAAHL had made with Mr. Cleary, regarding him as the conduit for dealing with the Partnership.

442. In summary, Mr. Quinn's knowledge of these proceedings was limited and somewhat peripheral, particularly in light of the narrow issues as to management of the Partnership which are now defined as being central. In other words, although he supports the Petition and has stated that support on behalf of NAAHL, he does not in practice take matters much further than that nor does his evidence provide any real assistance to the Court.

Evidence of Mr. Naylor

443. Mr. Naylor's Tenth Affidavit is dated 1 November 2018. He is a director of the GP. At paragraph 1.3 he formally refutes that the Petitioners have any grounds to question the probity of the GP or that any lack of confidence in the conduct or management of the Partnership is justifiable.

444. In paragraph 1.5 he states that as a result of the discovery provided to the GP it has become apparent that the Petition has been issued and is being pursued "*in furtherance of an unlawful means conspiracy*" in which Mr. Marshall, MAS and Mr. Wallace have played a central role and to which CAML and ACC, as well as ACC's Chief Investment Officer, Mr. Bagnall, had also been party.

445. For the avoidance of any doubt upon this issue the Court intends to refrain from engaging in any express determination of these conspiracy allegations per se. Instead the Court will decide this case more narrowly and on the basis of the relevant principles governing just and equitable winding up which the Court has earlier identified. These proceedings are already exceedingly voluminous and to expand them further is both unnecessary and undesirable.

446. Mr. Naylor explains that he spent 20 years at National Australia Bank, one of Australia's largest banks, culminating in senior management positions. He managed accounts of large private clients and had national responsibility for major structuring and pricing exposures. He sets these duties out in some detail.

447. He indicates at paragraph 2.4 that he left this bank in July 2009 to found Naylor Partners, a boutique Sydney-based Corporate Advisory business. His clients included Mr. George Kerr and a number of entities in which Mr. Kerr held an interest. He acted for the GP of the NZ Partnership before the in specie distribution.

448. From December 2011 until 24 June 2015 he was also managing director of Lantern, an entity listed on the Australian Stock Exchange formerly known as ING Real Estate Entertainment Fund ("IEF").

449. He was introduced in 2007 to Mr. Kerr, who is also a director of the GP. He attributes the success of the NZ Partnership and the Partnership to Mr. Kerr's "*expertise, skill and leadership*" and notes that the NZ Partnership and the Partnership have between them 7 years of unqualified audits by PwC and Grant Thornton. He supports the continuation of the Partnership to maximise returns and investment gains for its Limited Partners.

450. Mr. Naylor states at paragraph 4.2 that the NZ Partnership became inactive as an investment vehicle following the decision taken by the NZ GP to distribute its assets by way of an investment into the Partnership and an in specie distribution to its Limited Partners in December 2012. Importantly for this case, he states that this distribution was permitted under clause 8 (2) of the Limited Partnership Agreement dated 23 October 2009 and amended by deed on 14 May 2010 ("the New Zealand Partnership Agreement").

451. He states at paragraph 4.3 that as a result of a dispute with one of its lenders, Wilaci, the NZ Partnership was placed into receivership, but this happened at a time where it was no longer operating as an investment vehicle. It is the Court's understanding as previously stated that this particular dispute has since then been resolved and settled.

452. Mr. Naylor points out at paragraph 4.4 that at the time of distribution the net assets and liabilities of the NZ Partnership against the Gross Committed Capital of NZ $150 million showed a return/profit of NZ$ 58,737,505 achieving an internal rate of return of 15.2% per annum over its lifetime.

453. In relation to the NZ Partnership, Mr. Naylor had not been a director of the NZ GP, but as he put it an executive director. He was also a member of the Investment Committee. He indicates at paragraph 4.6 that a good example of that Committee's workings was the strategy of seeking to build up a cornerstone position in Lantern.

454. Following the Christchurch, New Zealand earthquake (in February 2011) and the destruction of PGC head office the fund administration was moved to Deloitte NZ. The NZ Partnership's auditors were PwC based in New Zealand.

455. Mr. Naylor then addresses the Petitioners' allegations concerning the NZ Partnership. These are not material, save that there is a discussion as to KPMG resigning as auditors of PGC and differences as to whether certain transactions were third party related. In any case, and to the degree it is even relevant, PwC was appointed as PGC's auditor and PwC subsequently confirmed PGC's treatment of the transactions as appropriate and provided PGC with an unqualified audit of its financial statements for the year ended June 2012.

456. At paragraph 5.1 Mr. Naylor states that the directors of the NZ GP, Mr. Kerr and Mr. Tinkler, considered that the NZ Partnership was no longer suitable to serve the best interests of the Limited Partners.

457. Then he states at paragraph 5.2:

> "5.2 *As explained by Mr. Kerr in his Fifth Affidavit, the purpose of the Partnership was to: (i) resolve tax issues faced by the NZ Partnership, (ii) to address the conflicting liquidity needs of the NZ Partnership's Limited Partners, and (iii) to facilitate the raising of new capital in order to take advantage of a specific investment opportunity concerning the potential to restructure the assets owned by the Residential Community Living Group. At that time, the NZ Partnership held a substantial quantity of debt owed by*

Residential Community Living Group and had a plan to enforce that debt with a view to get control of the underlying assets to thereby maximize the returns available to its Limited Partners (the "RCL Investment Opportunity")."

458. It is important to bear this passage mind, even though as the Court understands it neither dishonesty, bad faith nor dissipation of assets are in fact being alleged.

459. He stipulates that the Partnership is not a continuation, but could be considered instead as a successor fund. When first established it held the same assets and liabilities as those held by the NZ Partnership, but this changed quickly with the acquisition of Local World, which could not have been completed by the NZ Partnership because for example it was outside its mandate. In addition, as a result of a capital raising the Partnership achieved Committed Capital of over AU $276 million, more than twice the amount ever held by the NZ Partnership.

460. Mr. Naylor then emphasizes that the Partnership does not, and is not required to, make annual distributions.

461. Mr. Naylor explains at paragraph 5.5 the he is a director of the GP and he is also retained as a consultant in a similar role to his role in the NZ Partnership. He also acts as the Partnership's representative director on the boards of a number of RCL subsidiary companies, but he has no financial interest in the Partnership and is not a Limited Partner of it.

462. Regarding the in specie distribution Mr. Naylor states as follows:

"*5.8 The right of the NZ Partnership's General Partner to make the NZ Partnership a Limited Partner of a new investment vehicle was permitted*

under clause 4.2(e) of the NZ Partnership Agreement and, as stated above, the right of the NZ Partnership's General Partner to undertake an in–specie distribution to the Limited Partners of the NZ Partnership was also permitted under the NZ Partnership Agreement (clause 8(2)).

5.9 *The Limited Partners were informed of the creation of the Cayman Partnership and transfer of assets through an investor letter dated 17 December 2012 sent by email by Yvonne Chan. Following that, letters describing the in-specie process, the capital call and Deeds of Subscription and Adherence were sent to the Limited Partners on 21 December 2012. Aurora had been sent the documentation earlier for review because it was considering making a further investment, which it subsequently did.*

5.10 *As I had been assisting the NZ General Partner with this matter, I signed the 17 December 2012 investor letter on its behalf. Having reviewed the title recorded underneath my name on this document, I have noticed that this mistakenly refers to me as "director", when it should have read "executive director". This was simply an error and I have explained my role at the NZ General Partner above at paragraph 4.5. It appears that the Petitioner have relied upon this to allege that I was in fact a "director" of the NZ Partnership and that the directors of the NZ Partnership and the Cayman Partnership were the same individuals. This is not the case.*

5.11 *The General Partner was not obliged under the terms of the NZ Partnership Agreement to inform, seek the approval of, or consult with, the Limited Partners of the NZ Partnership prior to the in- specie distribution. However, the General Partner did in fact consult with or advise each of Aurora and CAML, two of the largest Limited Partners, as well as a number of other Limited Partners (including ACC) or their advisors in relation to the transfer.*

Aurora

5.12 Aurora was fully aware of the intention to create the Partnership and was given the opportunity to comment on the proposed structure. Mr. Kerr and I actively engaged with Three Pillars Portfolio Managers Pty Ltd ("Three Pillars"), a subsidiary of van Eyk and the Bear Fund's investment manager, and discussed the launch of the Cayman Partnership with Jacqui Lemon and Mark Thomas of van Eyk. Aurora used Three Pillars and van Eyk, as their day to day contact in respect of its investment in the NZ Partnership (and subsequently the Cayman Partnership) and so was fully aware of these discussions. In his fifth Affidavit, Mr. Kerr has explained his email correspondence with van Eyke, on Aurora's behalf, which shows that Aurora fully supported the proposal to create the Cayman Partnership and conduct an in-specie distribution. I should add that I distinctly recall discussing with Ms. Lemon and Mr. Thomas at the time whether Aurora would prefer the new entity to be a limited partnership or a unit trust.

5.13 I understand that Mr. Ian Roe of Aurora states that to the best of his knowledge, Aurora did not consent to the setting up of a partnership located in the Cayman Islands (Roe 3, para 20). I do not know Mr. Roe and my contact with Aurora during this period was through Three Pillars/van Eyk and Mr., Davidson and, to a lesser extent, Mr. Matthews of Aurora. Furthermore, the email correspondence exhibited by Mr. Roe, between Ms. Jacqui Lemon and Mr. Kerr, shows that he is wrong. In later correspondence in February 2013 between Ms. Lemon, Mr., Davidson of Aurora, Mr., Kerr and me, Mr. Davidson was reminded of the consultation that occurred in 2012, which resulted in Aurora concluding that it was happy with the proposal to set up the Partnership in the Cayman Islands (see pages 39-43 of ISR3). In addition, Aurora committed an additional AU$5 million to the Cayman Partnership having reviewed the Cayman Partnership Agreement. Given all of the above, I am surprised that Mr. Roe makes this complaint...

ACC

5.16 I did not have any conversation with anyone at ACC regarding the creation of the Cayman Partnership and the in-specie distribution. I cannot now recall whether I knew at the time that Mr. Kerr had given Mr. Bagnall notice of the proposals in October 2012, and had exchanged emails with him in late December 2012 which referenced the capital raising."

463. The Court has set out these passages at considerable length because they go to one important aspect of these proceedings. It may well be a matter of debate and even opinion as to whether the Limited Partners were as adequately and comprehensively informed as indeed ideally they should have been. However, it is entirely clear to the Court that no surreptitious or dishonourable motive can be attributed to the process of the distribution itself. Communication could have been done better, but that is a long way from concluding that what was done was done with a lack of probity, either in its narrow sense or in its broad sense or at all.

464. Regarding the extension of the term of the Partnership, Mr. Naylor indicates his view that this was in the interests of the Limited Partners as giving the Partnership sufficient time to optimize the new investment strategy. He also makes the important point at paragraph 5.21 that in any event such extension would be more than counter-balanced by the non-pro rata withdrawal mechanism, which was one of the reasons for setting up the NZ Partnership.

465. He recounts at paragraph 6.3 that from December 2012 to May 2014 Mr. Kerr and Mr. Andrew Wilson sat on the Advisory Committee. Mr. Wilson was chairman and Mr. Kerr represented the Partnership's largest Limited Partner, the Torchlight Group.

466. Following Mr. Wilson's death in May 2014 Mr. Cleary was appointed as Chairman, and Mr. Cleary now represents a number of Limited Partners.

467. He notes at paragraph 6.6 that the Advisory Committee are to be appointed by the GP (clause 6.4 (b) of the LPA). None of the Petitioners had even approached the GP and asked that one of their representatives should be appointed. Mr. Naylor points out that whilst there was a period before Mr. Cleary was appointed in that time there were no transactions requiring Advisory Committee approval.

468. Mr. Naylor states that no requests for information regarding investment strategy, or management, or the Partnership's financial position, or payment of performance fees or related party transactions were received from the Petitioners. The only request received was from MAS, which is not a Limited Partner.

469. He reiterates that MAS was not a Limited Partner for the purpose of calling a meeting, which the GP refused. In any case, Aurora, CAML and ACC had sufficient votes to call a meeting (paragraph 6.9).

470. The Partnership's long term approach was to invest in liquid assets, and the only asset realised to date, shares in Local World, had been a success (paragraph 7.1), and very substantial returns were expected. He then deals with the core investments.

471. Local World was a U.K media and newspaper company, and the investment was held until December 2015 when Local World was sold.

472. Regarding RCL Mr. Naylor states at paragraph 7.5-7.1:

> *"7.5 As explained in Mr. Kerr's Fifth Affidavit, the NZ Partnership held an interest in primary debt owed by the Old RCL Company to Bank of Scotland International and one of its subsidiaries. Subsequently, though a number of transactions that Mr. Kerr has described in his Fifth Affidavit, the Partnership now has a 100% equity holding*

in the Torchlight Real Estate Group, which is a Group created by the Cayman Partnership to hold equity stakes in land investment and development companies. The Torchlight Real Estate Group holds 100% of the equity and a redeemable preference shareholding in the RCL Group, an Australian based land investment and development company formed for the purpose of making real estate investments, including acquiring a number of assets from the Old RCL Company after it defaulted on its credit obligations. This is a very valuable interest for the Cayman Partnership and its value will gradually be realised over the life of the Cayman Partnership as blocks of land are converted to actual cash sales over time. It currently has sales of land sites for residential housing in excess of AU$100m a year (relating to the gradual sale of the land blocks).

7.6 *The General Partner has made its strategy in relation to the RCL Group clear to each of the Limited Partners through its investor reports. For example, page 3 of the 10 August 2013 investor (pages 92) states:*

"The credit bid of RCL allows Torchlight to monolise and maximize the long-term cash returns from this asset... Without a long term strategy, simply buying well only allows us to convert the sites to cash by a quick sale in the market- and thereby monetize the discount the debt has been acquired at. A far superior strategy is to take full advantage of the low purchase price, on a per site basis, by selling retail over a long-term basis."

7.7 *And, the first page of the June 2014 report (page 117) states:*

"from an investment perspective [completion of the RCL credit bid] allows us to go beyond the one-off gain of a typical distressed debt fund and earn repeatable long-term returns from ownership of the assets."

7.8 *The Cayman Partnership's strategy in respect of RCL is now beginning to produce very substantial returns. It is anticipated that that, by the time the strategy has been fulfilled, the net realization value will be in excess of AU$500 million."*

473. Although the Petitioners have challenged the details of this valuation overview, the Court has no doubt that this asset is a very valuable one, a fact no longer in dispute in these proceedings, nor can it be in dispute.

474. Regarding Lantern, Mr. Naylor states at paragraph 7.9-7.10:

"*Lantern*

7.9 *Lantern is a public company listed on the Australian Securities Exchange, which owns a chain of hotels in Australia. The Partnership currently holds a 37% shareholding in Lantern and, up until 24 June 2015, I was the Partnership's representative on the board of directors and held the position of Managing Director. I was then removed as a result of a coup by MAS, which I refer to in more detail below.*

7.10 *As a result of MAS's intervention, the Cayman Partnership's investment in Lantern will not be as successful as was once anticipated as Lantern is now running a liquidation strategy which has led to the sale of key assets, the holding of which were central to the Cayman Partnership's strategy. Despite this, the Cayman Partnership's investment in Lantern has been and remains successful. Precise details are set out in the Fifth Affidavit of Mr. Kerr."*

475. Then at paragraph 8.1-8.3 Mr. Naylor explains why liquidation of the Partnership would result in very substantial losses to the Limited Partners, including prospects of any forced sale resulting in discounted value. He refers to an investor report from March 2015 emphasising that the investment was long term, and not set by investors' needs or demands for liquidity. Mr. Lowe challenges this view by arguing that any winding up could be carefully managed under the supervision of the Court. It is worth adding however it is not the function of this Court to involve itself in commercial decisions where that can properly be avoided.

476. In addressing the Petitioners' allegations, Mr. Naylor first describes at paragraph 9.1 his concern that the complaints are often unclear and difficult to understand. The Court has already dealt with this question in terms of the pleaded case, and in light of that at least the areas of complaint before the Court are now considerably narrowed.

477. In response to criticism as to providing RCL underlying documentation, he states at paragraph 9.4.2-9.4.6 and 9.1.10 – 9.7.11:

> *"9.4.2 As the Petitioners are aware, I am actively involved in the management of the RCL Group having been engaged through my company Naylor Partners and am a director of each of its Australian subsidiaries as well as the majority of its New Zealand ones. Naylor Partners is paid AU $25,000 per month by the RCL Group in respect of my role. This fee is limited to matters on which I am engaged as a director of the subsidiaries of the RCL Group. This does not include work done for the Cayman Partnership, in respect of which I would be entitled to issue separate invoices. For completeness, I can confirm that neither Mr. Kerr nor any entities "associated" with Mr. Kerr are paid by any subsidiaries of the Partnership.*
>
> *9.4.3 The entire Cayman Partnership RCL investment structure hinges on there being complete separation between the General Partner and its subsidiaries. This is because if the Cayman Partnership was deemed to have an active management role in the operation of the Australian subsidiary companies then the Cayman Partnership could become a deemed Australian tax payer, which would be detrimental to any of the Limited Partners of the Cayman Partnership who are not domiciled in Australia. For that reason, all of the Cayman General Partner's subsidiaries run autonomously. This rationale was set out in a power point presentation prepared by Deloitte for the New Zealand General Partner as part of the consultation process in respect of the in-specie distribution (pages 142-*

156). The ultimate effect of this structure is that the Cayman General Partner has no management control over the decisions made by its subsidiaries and, if it purported to be actively engaged in management, it would jeopardise the tax structure that has been put in place for the investment in RCL.

9.4.4 *The Cayman Partnership as an investment entity cannot operate or be seen to operate an active business, which is another reason for the clean separation between the activities of management of the Partnership and investee companies.*

9.4.5 *This separation of management control is therefore fundamental to the success and profitability of the Cayman Partnership. It is not some artifice invented to justify an unwillingness to produce documents. It does however mean that the Cayman Partnership cannot call for documents held by the RCL subsidiaries as they are not within its control and, wearing my hat, as a director of the subsidiaries, I would be most unwilling to hand over such documents in case it prejudiced the tax structure. In addition, the cost of undertaking a detailed discovery exercise would be enormous and would be a huge distraction to the very small teams employed by the subsidiaries who are actively involved in the development and sale of thousands of plots of land. I should add that I am very conscious that I wear a number of different hats and I always endeavor to ensure that there is no leaking of confidential information.*

9.4.6 *I understand that the Petitioners have criticized the Cayman Partnership's investment in RCL. This criticism is misconceived. I refer to the latest quarterly investment update letter which explains the success of the Partnership's investments in RCL (pages 157-161). I would also highlight note 6 in the Cayman Partnership's audited accounts for the financial year ended 31 March 2015 which explains "As the Partnership is an investment entity, the investment in RCL Group... has been valued on a fair market*

value basis...At March 2015, using the same valuation methodology for financial reporting purposes, an increase of AUD5, 492,942 occurred on fair value of the Investment in RCL."

9.7.10 The General Partner has explained the different methodologies to the Limited Partners in its investor reports, including the report (31 March 2015) in which it was noted that "the quarterly fund valuations are higher than the statutory accounts, the primary difference is that the fund valuations reflect actual outcomes expected over the life of individual projects, while the statutory accounts assume assets are valued as if sold on balance date i.e. all of the risk, return and profits from developing out the projects are generated by a 3rd party purchaser". (pages 130)

*9.7.11 More recently, in its letter dated 21 October 2016, the General Partner has again explained the difference between the audit value and the net realisable value that the General Partner adopts in its fund valuation updates: "The audit value of AUD$109m for the investment in RCL assumes each project is sold rather than being developed out by RCL. Carrying value for non-current assets is at substantial discount to the net realization value of each asset. The expected net realization value of RCL over the life of the fund is over 5x audit value" (*pages 86*)".*

478. Frankly this is not a matter that causes the Court any reason for concern.

479. In response to criticism of the GP accepting and facilitating in kind capital contributions from related parties of approximately AU$88 million without Advisory Committee approval or external valuation, he states at paragraph 9.8.3:

"(a) the figure alleged of AU$88m as relating to capital contributions from related parties is incorrect. Of this amount only AU$49.4m of the figure alleged by the Petitioners relate to contributions from related parties,

namely Torchlight Group and PGC. These contributions relate predominantly to the Cayman Partnership satisfying existing payment obligations to Torchlight Group and PGC in respect of their RCL participations and the satisfaction of debt (both of which would otherwise have been payable in cash). The ability to satisfy these liabilities in a non-cash manner was highly beneficial to all Limited Partners, as explained in my seventh Affidavit. The balance of approximately AU$38.6m relates to contributions from non-related parties.

(b) *Approximately AU$33.4m relates to contributions by Artefact is not a related party. These contributions are predominantly two-fold: first, in respect of their holding in Local World, which was acquired by the Cayman Partnership (the success of this investment has been dealt with elsewhere in this affidavit). Secondly, the Cayman Partnership interest. The ability to satisfy this liability in a non-cash manner was highly beneficial to all Limited Partners.*

(c) *The remaining amount of approximately AU$5.2m referenced by the Petitioners in the F&BP Reply (paragraph 56) relate to contributions from non-related Limited Partners. This amount relates predominantly to the acquisition of loans by the Cayman Partnership. These loans have since been fully recovered, including interest and fees payable by the borrowers, providing a positive return to the Cayman Partnership, which has exceeded the in-kind value paid.*

(d) *Advisory Committee approval was not required for the contributions received from non-related parties. The satisfaction of amounts owing to PGC and Torchlight Group did not require Advisory Committee approval because these were liabilities of the Cayman Partnership that would have otherwise been payable in cash and it was clearly beneficial to be able to*

satisfy them in a non-cash manner. This is particularly so given that the Cayman Partnership was unable in the short-term to repay these debts in cash without negatively impacting on the investment strategy. As I will explain below, proceeding in this way has had a positive effect on the Partnership as a whole.

(e) As to the suggestion that external valuation was required for these transactions, the General Partner was not obliged to obtain external valuation and, in any event, the vast majority of the contributions related to the satisfaction of liabilities owed by the Cayman Partnership, which were set out in the audited accounts. As to Local World (being the largest asset acquisition via in-kind contribution), this investment has already been realised with a substantial return to the Cayman Partnership and, therefore, the General Partner's assessment of the merits of this transaction has already been vindicated."

480. In the absence of impropriety the Court considers that these are surely matters of professional and commercial judgment.

481. Mr. Naylor also maintains that the in kind contributions far from having a negative or prejudicial effect of dilution do not mean that the value of the existing Limited Partners' interests has been detrimentally impacted (paragraph 9.8.4). In fact, he asserts, the conversion of debt to equity has improved the position of the Limited Partners and instead demonstrated a negative impact on PGC.

482. He refers to a number of years of unqualified audited accounts and states at paragraph 9.10.6 that although it is correct that audited accounts have been delivered late, which was not solely due to the GP in any case, he does not accept that this lateness can justifiably lead to a loss of trust and confidence in the GP.

483. He provides a narrative account of the accounts starting with 2013, and at paragraph 9.10.10 he states:

> *"Further it has now become apparent that PwC's audit was hindered and further delayed by the (unknown) intervention of the Conspirators who by this time were engaged in an active campaign of disruption and were sending numerous letters and emails to PwC questioning transactions and highlighting media reports, instigated by the Conspirators, and reserving purported rights against PwC in respect of the audited accounts. The correspondence that I have reviewed from Logic, MAS, and CAML dates from October 2014 through to 1 July 2015, when CAML appears to have made a last-ditch (but unsuccessful) attempt to influence the audit after it became aware that the publication of the audited accounts was imminent by writing to PwC and suggesting that PwC out to make enquiries with the General Partner as the Petition was relevant to the discharge of PwC's office."*

484. Mr. Naylor also states for example at paragraphs 9.10.15-9.10.16:

> *"9.10.15 In particular, it has now become apparent that upon receiving notice of GT's appointment, the Conspirators continued their strategy of applying pressure and attempting to delay and/or prevent the issue of unqualified accounts. Since reviewing the Petitioners' disclosure, I have become aware that on 26 March 2015, MAS wrote to Grant Thornton claiming wrongly that Grant Thornton were conflicted from accepting the appointment as auditors of PGC and the Cayman Partnership. In this letter, MAS informed Grant Thornton that they would be referring this matter to the FMA. I am not aware of whether MAS carried out this threat but, as a far I know, nothing has been heard by the General Partner from the FMA on this point or indeed on any matter.*
>
> *9.10.16 I can only assume that MAS's threatening letter of 26 March 2015, in addition to the issue of the Petition on 18 June 2015, was what prompted Grant*

Thornton to undertake audit processes that I would describe as being akin to a "forensic audit" rather than accepting PwC's prior work. This led to substantial delay in completing the 2015 audit."

485. While tardiness can of course generate an appropriate level of debate, it can scarcely be said that delay in these instances is of terminal gravity or significance.

486. With regard to the keeping of books and records of the Partnership, Mr. Naylor states at paragraph 9.12.1 – 9.12.2:

"*9.12.1* *The Petitioners have also alleged in the Amended Petition (at paragraph 54A), that the General Partner has failed to keep proper books and records as required by section 21 of the Cayman Partnership Law. I find this allegation completely unsustainable in circumstances where (i) the Petitioners are aware that the Cayman Partnership engages Praxis to provide accounting and administrative services, and prior to them Deloitte and (ii) both the NZ Partnership and the Cayman Partnership have always obtained unqualified audit opinions from PwC and GT which necessarily requires that proper books and records are maintained.*

9.12.2 *Similarly, the contribution register for the Partnership is kept by the Partnership's corporate secretary (provided by Conyers) and is available to review upon request. Indeed, I understand from Conyers that Harneys inspected the register on 27 May 2015, and that the Petitioners were therefore aware of its existence before issuing the Petition."*

487. Again while there is always scope for differences of viewpoint, it can hardly be argued that the GP has no responsible answer to give at all on these issues.

488. Mr. Naylor also makes some important points in relation to investment criteria at paragraphs 9.13.1- 9.13.2:

"*9.13.1* *I understand that the Petitioners allege that the General Partner has failed to comply with the prudential limits set out in the Investment Criteria in Schedule 3 of the Cayman Partnership Agreement and the NZ Partnership Agreement (paragraph 43, Amended Petition). This allegation is wrong because the transaction size and gearing limits did not apply to the period ending December 2013 as prescribed in Clause 3.3 of Schedule 3 of the Cayman Partnership Agreement.*

9.13.2 *In any event, the Petitioners have calculated the gearing ratio incorrectly as they have included total liabilities. For example, Ms. Burleigh at paragraph 85.2 of her first affidavit, references an alleged "substantial increase" in liabilities and gearing ratio by comparing total liabilities and total assets in the accounts for the year ended 31 March 2013. The correct calculation is not based on the statutory values reported in the audited accounts and it does not take total liabilities into account; both are irrelevant to the gearing calculation as set out in paragraph 3.2 of Schedule 3, which refers explicitly to aggregate borrowings only and is based upon Gross Fund Valuation as defined in the Cayman Partnership Agreement. In addition, as explained by Mr. Kerr in his first affidavit, the RCL structure is not a third party single asset investment. The RCL Group is a wholly-owned subsidiary of the Cayman Partnership and is a holding company for a structure of multiple and separate special purpose vehicles, which all hold one residential land development project per vehicle. There is no "significant concentration risk" and the combined total value of the projects is irrelevant to the investment criteria. No single acquisition of any asset by the Cayman Partnership via a special purpose vehicle owned by the new RCL exceeded 25% of Gross Fund Valuation (i.e. the General Partner's valuation as defined in Clause 1 of the Cayman Partnership Agreement).*

489. At paragraph 10 Mr. Naylor sets out in detail his explanation for the alleged default actions on the part of Aurora. For reasons of practicality the Court will refer only to certain passages. He states at paragraphs 10.1- 10.6:

> *"10.1 I have read what Mr. Kerr has to say in relation to Defaulting Partners and agree with his account of events. However, given my own close personal involvement with Lantern (as its former managing director), I deal with this topic below.*
>
> *10.2 As explained by Mr. Kerr, in his fifth affidavit, it became apparent to the General Partner, by August 2015, that Aurora had breached its confidentiality obligations under clause 15.5 of the Cayman Partnership Agreement by disclosing, and by authorizing or allowing the disclosure by individuals connected or associated with Aurora of, a significant amount of highly confidential documentation concerning the affairs of the Partnership and the General Partner's investment strategy to MAS.*
>
> *10.3 MAS is a competitor of the Partnership. As explained above, MAS is not, and has never been, a Limited Partner of the Partnership. It appears that MAS has used the confidential information received in order to:*
>
> *(a) steal the General Partner's investment strategy in respect of Lantern;*
>
> *(b) block the General Partner's attempts to fully implement this investment strategy; and*
>
> *(c) further an unlawful means conspiracy against the Partnership and the General Partner.*
>
> *10.4 I have already referred to Lantern in paragraph 7.9 above. Lantern is a public company listed on the Australian Securities Exchange, which owns a chain of hotels in Australia. The Partnership currently holds a 37% shareholding in Lantern and, up until 24 June 2015, I was the Partnership's*

representative on the board of directors of Lantern and held the position of Managing Director.

10.5 As evidenced by the documents exhibited to Mr. Wallace's affidavits served in these proceedings, by at the latest the end of September 2013, MAS had been given confidential information by van Eyk (who were acting on behalf of Aurora), including the investor Report for the period ended June 2013, which contained highly confidential information concerning the Cayman Partnership's strategy for Lantern in the following terms (pages 90-94):

"Torchlight then crossed the ditch to Australia to find better, and frankly more willing, prospects. These were disguised as a pair of weather beaten Aussie divorcees, or overleveraged "A-REITS" – ASX listed Australian Real Estate Investment Trusts – Residential Communities Limited (RCL – previously Bacock and Brown Land Partners) and the Lantern Hotel Group (previously ING managed IEF Real Estate Entertainment Group)."

Lantern Hotel Group

The period was a very successful one for Lantern Hotel Group. Limited Partners may recall that Lantern held a troubled exposure to the Panthers League Club arising from an AUD87m investment made during ING's management.

Panthers were close to bankruptcy and this AUD87m was regarded as potentially impaired by ING. We saw it, however, as highly likely to be recovered if managed well. It was critical it was returned intact as these funds allowed the ability to recycle into core pubs in NSW and the beginning of a buyback program on Lantern. To cut a long story short, Panthers repaid the entire AUD87m over the period after a tough drawn out negotiation. For an entertaining version of events, please see appendix 3 – "Packer saves Panthers".

This now establishes Lantern as a very tidy freehold group with stable earnings and a very strong balance sheet. They have recently begun acquisitions – with the purchase of the Crown Hotel in Sydney and have circa AUD 50m of un used credit lines.

The total shares on issues have been reduced by buyback from 1bm to circa 900m.

The Executive Director of Lantern is Russell Naylor and he comments: "During the last year Lantern Hotel Group has successfully transitioned from a passive landlord model to a stable and diversified freehold going-concern hotel operator. The group has invested significantly in transforming its operating assets to well-presented venues with fresh and motivated staff.

"Whilst we have started building a stable platform, we have much more to do and this journey will continue over the course of the next year as we complete the first wave of capex on the existing venues. The ongoing works program is expected to continue to result in trading disruption within the venues, however, we consider this short term pain vital to ensure that we have a strong foundation to build long term performance".

10.6 As is clear from this investor report, the General Partner had a long-term strategy for the Cayman Partnership to extract value from Lantern by running it as a going concern. Its only vulnerability was that it only had a minority interest in Lantern, at that time, controlling about 33% of the issued share capital. Another significant shareholder in Lantern at this time was the Borg Fund. However, as was made clear in the earliest investor report for the end of December 2012, being the last investment letter for the NZ Partnership, Torchlight's long-term goal was to acquire a greater share of the equity of Lantern and continue to unlock its value (pages 55-59).

490. Mr. Naylor goes on to describe in great detail how MAS moved matters forward in a manner contrary to the interests of the Partnership. For example, he states at paragraph 10.15:

> *"10.15 In the meantime, MAS had taken steps to remove the board of Lantern and had served a notice to that effect on 24 September 2014 (pages 379-380). No reasons for this were given in the notice. At the same time, MAS was responsible for running a highly misleading media campaign directed at both the Cayman Partnership and Lantern. The campaign was seen to be so misleading and inaccurate that Bryan Mogridge, the Chairman of Lantern, published an ASX announcement on 2 October 2014 in an attempt to correct the misrepresentations made by MAS (pages 381-383). In addition to correcting the misrepresentations, this ASX announcement explained that "The Lantern board believes MAS' actions to date are destabilising Lantern and are impeding on its ability to implement its announced strategy for continued improvement and growth"* (page 420).

491. Finally on this subject he states at paragraph 10.24:

> *"10.24 As a consequence of MAS's actions, the Cayman Partnership has suffered a loss as it has been prevented from implementing its strategy for its investment in Lantern. The General Partner's best estimate of the loss that this has caused the Cayman Partnership is at least AU$28 million. The General Partner has also suffered a loss as it has lost at least the potential carry of 20% that it could have earned had it increased the returns of the Partnership through the implementation of its strategy for its investment in Lantern."*

492. The Court has no reason to doubt what Mr. Naylor has set out on this subject. Clearly the Petitioners were in association with individuals and entities whose interests were at least

in part adverse to the interests of the Partnership and therefore to the interests of the Limited Partners themselves. This is an extraordinary state of affairs.

493. In further examination-in-chief Mr. Naylor says that regarding the RCL debt purchase there was a debt discount of around 50 million dollars on the face value of the debt versus the purchase price by the NZ Partnership, and all of the economic benefit of the discount went to the NZ Partnership.

494. Asked by the Court about records retention, Mr. Naylor said he did not see any need for retention of documents that he had no further use for, but he agrees that with hindsight one could see other uses that might have emerged.

495. He says that he was appointed a member of the PGC board on 14 February 2012.

496. He is asked about the mechanics of how RCL debt and RCL assets were acquired. A receiver was appointed and the receiver ran a sale process in which the assets were sold. The purchaser was the new RCL companies. One would acquire or consolidate or syndicate the debt and then go a step further to acquire the assets.

497. He also explains that the original debt had been owed to BOS International (Australia) Ltd ("BOSI"). Torchlight Real Estate Fund Limited ("Torchlight Real Estate"), a wholly owned subsidiary of the NZ Partnership, acquired that debt from BOSI.

498. However, Torchlight Real Estate did not own the entirety of the loans from BOSI, and there were additional sub-participation agreements which were treated as payment obligations as well. Effectively Mr. Naylor was drawing a distinction between acquiring a debt and actually owning all of it beneficially. Mr. Naylor says he thinks Torchlight Real Estate was created for the purpose of being trustee so it held the debt "*on behalf of all the*

participants". Mr. Naylor also states that, from memory, the only residual participant was PGC.

499. Mr. Lowe asked whether the NZ Partnership or PGC purchased all the debt participation rights and Mr. Naylor confirms that between them they bought all of them.

500. He confirms that the new RCL companies which owned the assets were all subsidiaries of the Partnership.

501. He confirms that Mr. Tinker became a director of PGC on 20 February 2012.

502. He was asked about a transaction called the Perpetual loan, made to the NZ Partnership by a wholly owned subsidiary of PGC. However, this is not a matter in relation to the current affairs of the Partnership with which this Court need be concerned.

503. He agrees that liquidity problems had arisen from the purchase of the RCL debt and a bridging loan in 2012 with Wilaci, an entity owned and controlled by a wealthy individual called Mr. John Grill ("Mr. Grill"), resulting ultimately in a disputed additional liability of $500,000 per week accruing since day 60 of the loan period. The amount owed was repaid, but not at that particular time the disputed interest, which was also being claimed.

504. Following some exchanges as to the underlying RCL documentation, to which it appears the Partnership does not have direct or indirect access, cross- examination continued in relation to a cash flow model utilized by Mr. Naylor and others involved with various RCL developments. Mr. Naylor agrees that this was a very elaborate form of calculating tool based on widely available computer software, permitting information to be entered and cross-referenced for calculation purposes.

505. Mr. Naylor states that it was more sophisticated than a simple monthly operational model, showing inter alia annual cash flow. It was also a data storage programme that multiple numbers of people could access from different places and at different times. Access could also be gained to another tool called Estate Master, for pricing matters.

506. Mr. Naylor was examined as to the functioning of these applications and the Court forms the view that he was very competent, very well informed and very professional in his approach to the business issues which he was extensively demonstrating.

507. He was able to illustrate historic sales data, forecasts and business planning.

508. He states his understanding that the books and records of the NZ Partnership had been handed over by Deloitte to the receivers of the NZ Partnership. In regard to the Partnership itself however he said that Deloitte continued to keep its books and records until Praxis was appointed.

509. There was some discussion of the Partnership engaging Grant Thornton in relation to the Aurora pricing issue that had arisen concerning valuation methodology. He states that following the acquisition of the RCL debt the valuation methodology for the fund valuation had changes "*to legal balance as opposed to amortised cost*". As a result, the Partnership was engaging Grant Thornton to confirm that the GP's approach in that respect was reasonable.

510. There followed extensive cross-examination as to the Grant Thornton Report, none of which is of serious significance in relation to the issues currently before this Court.

511. Moving on to annual general meetings, Mr. Naylor confirms that they had been omitted from the new Partnership LPA because of the perceived lack of interest on the part of

Limited Partners in attending. Mr. Naylor indicates that there were other direct ways to interact with the GP instead. Mr. Naylor also confirms that neither CAML nor ACC had raised any objection to the launching of a new fund in the Cayman Islands.

512. He states that Three Pillars Portfolio Management ("TPPM") was the investment manager for the Bear Fund and another fund called the Borg Fund. TPPM was a wholly owned subsidiary of van Eyk and the Bear Fund was the investment vehicle for the three Blueprint Funds. Aurora was the trustee of the Bear Fund, and MIML in turn was the responsible entity for the Bear Fund.

513. Mr. Naylor stated that the relationship between Aurora and van Eyk started to break down in April/May 2013, and in addition a war took place between Mr. Thomas and Mr. Barnes for control of van Eyk, which Mr. Naylor confirms he thinks is now in administration. Meanwhile Mr. Kerr had become controlling shareholder of PGC in the course of 2012. PGC, which had an interest in van Eyk, exited in the earlier part of 2013. All of these circumstances and events are, once again, of very limited if any assistance to the Court in these proceedings.

514. Mr. Naylor says he was not aware that MIML had instructed Aurora to retire as trustee, handing over trusteeship.

515. He points out that an Assignment was not signed by the Partnership, a prior Deed of Assignment being the mechanism for actually seeking the consent from the GP for the transfer of the Partnership interest. Hence MAS never became the incoming Limited Partner. Aurora could not assign its Partnership interest on a unilateral basis. Accordingly, in relation to the subsequent requested meeting just over 16% of investors were in support, and not the requisite 20%.

516. Mr. Lowe moved on to ask Mr. Naylor about PGC's RCL loan receivables, and Mr. Naylor pointed out to the Court that PGC's receivables were distinct from the Partnership's receivables.

517. Mr. Naylor also confirms that, separate and apart from that, on 10 February 2014 the Partnership entered into facilities for a total of $31 million from two companies in the same PGC Group as the GP, at 9% interest with no date stipulated for payment of interest or of any instalments.

518. There was further examination as to the mechanics of the RCL transactions, and Mr. Naylor was asked as to whether the Advisory Committee met in relation to the subsequent in kind subscription with PGC and Torchlight Group. Mr. Naylor states there was no meeting, because the GP's view was that no Advisory Committee approval was required.

519. Mr. Naylor was asked about the reasons for the move to the Cayman Islands, and he said his understanding was that it was primarily around being able to attract investors from other jurisdictions. A New Zealand domiciled Partnership investing in assets in other jurisdictions could encounter quite large issues. In addition, with a new non pro rata redemption provision, there would be a discretionary right to accommodate different liquidity requirements.

520. His understanding was that the move was not an issue for Aurora.

521. In summary, Mr. Naylor was a most impressive witness. He presented his evidence in a straightforward, unembellished manner. His mastery of technical detail was considerable and he was fully able to demonstrate both that he discharged his duties with competence and professionalism and that the underlying business activities of the Partnership were being supervised and managed in way that was entirely worthy of confidence. He was cross-examined both energetically and at length but nonetheless his credibility as a witness was only enhanced by that process.

Evidence of Mr. Kerr

522. The First Affidavit of Mr. Kerr is dated 30 October 2015 and his Fifth Affidavit is dated 7 November 2016.

523. He states at paragraph 7 of his Fifth Affidavit that he has attempted to draft it in a way that incorporated the responses contained in his First Affidavit so that it can be read as a stand-alone document.

524. Mr. Kerr is a Director of the GP. He is also a Director of the NZ GP.

525. At paragraph 8 of his Fifth Affidavit he states that he does not accept that the Petitioners have actually lost trust and confidence in the GP and he considers that the Amended Petition is in fact being pursued as part of an unlawful means conspiracy. He refers to filing a Writ and Statement of Claim in that regard.

526. He emphasises at the outset that the Petitioners are seeking to wind up a highly successful Partnership and are making a series of historic allegations concerning the NZ Partnership in an attempt to justify the issuing of the Petition (paragraph 15).

527. He notes at paragraph 16 that the NZ Partnership was highly successful. It initially raised capital of NZ$150 million, and over its investment life achieved a net internal rate of return of 15.2% and investment gains in excess of NZ$50 million. He describes it as one of the top performing funds of its kind in the world. It obtained four consecutive annual unqualified audit reports from PwC between its establishment in October 2009 and its final accounts.

528. Turning in paragraph 17 to the Partnership, he states that it too is highly successful. As at 30 July 2016, the Net Fund valuation was AU$275 million, representing a total non-annualised return of $12.5%.

529. He states at paragraph 18 that it is extraordinary that the Petitioners assert that the value of their investments might be at risk. As best the Court can understand it, this particular allegation is no longer being pursued.

530. Mr. Kerr also points out that the Petitioners have failed to inform the Court that the FMA was asked by Logic and MAS to consider substantially the same allegations that have been made in their Petition but the FMA subsequent to an investigation took no action.

531. He states that the Bear Fund was created in late 2010 with the specific mandate to invest in long term investments, and in 2011 and 2012 it invested in the NZ Partnership. In addition, Aurora actively participated in the capital raising of the new Partnership in December 2012 by investing AU$5 million. Its strategy is based on three valuable investments, Local World Holdings Limited ("Local World"), Lantern and RCL Real Estate Pty Limited ("RCL"). He also states that the Partnership has successfully executed the debt to equity conversion of its debt investment in the Old RCL Company, creating a very substantial Australian land developer that is 100% owned by the Partnership through its subsidiaries. One of its projects at Jack's Point, Queenstown, New Zealand, has been the subject of an extensive case study by Harvard Business School. He refers to circulating regular investor update reports and to obtain four consecutive annual unqualified audit reports between the Partnership establishment in December 2012 and the swearing of the Affidavit. Delays to the audits had been caused by pressuring and interference from those involved in the alleged conspiracy.

532. Importantly Mr. Kerr also points out at paragraph 24 that Aurora has always held more than 20% of the total Committed Capital of the NZ Partnership and the Partnership. The

LPAs for both have always allowed Limited Partners to call a general meeting of the relevant partnership by sending the relevant GP a notice signed by Limited Partners representing 20% or more of the total Committed Capital. To Mr. Kerr's knowledge Aurora has never sent a notice.

533. Mr. Kerr also points out that Limited Partners have the right to pass an ordinary resolution represented by at least 50% of the Committed Capital to remove the GP for cause. The Petitioners and supporting Limited Partners collectively held over 50% at all times since Aurora's initial investment in 2011 until June 2013, but no such attempt was made. Furthermore, whilst MAS convinced CAML and ACC to sign their request for a meeting in October 2016, Aurora did not sign such a request.

534. Mr. Kerr adds at paragraph 29 that he believes the real reason Aurora is pursuing the Amended Petition is that in August 2014, MIML as the responsible entity decided to liquidate the Blueprint Funds. Since then, MIML has been focused on liquidating all of the underlying investments held by those funds including the Bear Fund's investment in the Partnership. In light of Ms. Poon's vague and uninformative testimony, the Court finds this explanation of Aurora's purpose and intent a persuasive one.

535. Turning to CAML, Mr. Kerr indicates at paragraph 30 that CAML was a vehicle set up with "*the specific mandate*" to seek to liquidate all financial assets it holds, and it has never been interested in long term investment.

536. He adds at paragraph 32 that in exploring ways to achieve liquidation CAML have taken inappropriate steps to damage and place pressure upon the GPs of the NZ Partnership and the Partnership. He refers to CAML's credit committee minutes of 13 July 2012 recording that CAML contacted the NZ Partnerships auditors to bring pressure on Torchlight for open and fair disclosure, requesting that employee Steve Smith should talk to ACC regarding their positions, requesting that employee Steven Fyfe make informal enquiries

of the FMA and requesting that Mr. Traveller should talk to the Companies Office. He also cites an e-mail dated 23 July 2012 from Steve Smith to CAML employees, recording inter alia allegedly Mr Smith speaking to Justice Paul Heath who was presiding over a case in the New Zealand Courts concerning the Perpetual Cash Fund. There is also reference by Mr. Kerr to CAML writing a number of letters to the Partnership's previous auditors PwC emphasising CAML's links to the New Zealand Government. A letter dated 25 March 2015 was one day before MAS sent a similar letter to the current auditors, Grant Thornton, and in the same month MAS's attorneys wrote similarly to PwC.

537. Mr. Kerr states at paragraph 33 that the various CAML correspondence appears to be an attempt to interfere with and delay the timely completion of PwC's audit. He further alleges at paragraph 34 that CAML, MAS, Logic, Mr. Marshall, ACC and Mr. Bagnall conspired to pursue the Petition, and agreed that each of the parties would contact the Partnership's auditors in an attempt to delay and obstruct the timely provision of the Partnership's audited accounts. There is no doubt that this concerted action did delay the accounts in fact.

538. Mr. Kerr confirms that in negotiation with CAML he always acted in good faith, and he had assumed CAML was also approaching the negotiations in good faith. Once more, it is not being alleged by the Petitioners that Mr. Kerr acted other than good faith in this regard.

539. Mr. Kerr notes at paragraph 35 that from a review of documents disclosed by ACC he became aware that Ms. Burleigh approached Mr. Bagnall in July 2013 and that they began to consider ways to "*force a wind-up*". Ms. Burleigh also informed Mr. Bagnall that CAML was formulating its wind down plans as CAML's mandate for asset realization was to have everything dealt with by June 2014.

540. Despite this Mr. Kerr points out that Mr. Traveller was fully aware that the Partnership was to run until at least 2019 and could be extended until 2021. Mr. Kerr records that two

days before CAML chose to issue the Petition Mr. Kerr had made a non pro rata offer to CAML on 16 June 2015 offering to redeem the entirety of CAML's Limited Partnership interest at a price of NZ$30 million, the amount of the original contributed capital in the NZ Partnership that CAML inherited from SCF. Frankly in light of that fact the Court finds Mr. Traveller's assertion that CAML issued the Petition as " *a last resort*" baffling at best and entirely disingenuous on any reasonable construction of the facts.

541. Mr. Kerr points out that a non pro rata payment is calculated to compensate the Limited Partner fairly whilst also protecting the value of the other Limited Partners' investments. In other words, the GP runs a commercial operation which governs its freedom of action.

542. In this regard, he points out at paragraph 37 that the GP subsequently accepted a non pro rata redemption request from APGOF leading to APGOF "*receiving early cash liquidity for its entire investment*".

543. He describes various other redemption efforts made for CAML's benefit, and makes the pragmatic observation that if CAML had concerns about its investment being in danger it could have accepted such an offer (paragraph 39). The Court finds Mr. Kerr's contentions on this subject to be factually compelling and entirely consistent with common sense.

544. Similarly Mr. Kerr explains how ACC came to invest in the NZ Partnership as being to achieve a quick exit from a separate investment, rather than any real desire to participate in a long term investment, and so Mr. Bagnall reached an agreement with Mr. Kerr for ACC to swap the entirety of its NZ$4.5 million in debt instruments in Southbury Corporation Ltd ("Southbury") for an equivalent holdings in the NZ Partnership. However, shortly before completion ACC received news its investment in Southbury would be repaid in full, and so the investment in the NZ Partnership was renegotiated to a smaller amount of NZ$2.25 million, from the proceeds of the Southbury debt realization process. Mr. Kerr attributes this to a binding agreement, rather than, as Mr. Bagnall purports to do, to a moral obligation.

545. Mr. Kerr points out that ACC's internal documents confirm that ACC retained an interest in an early exit, although despite voting in favour of the right to have an early non pro rata redemption no approach was made by ACC to facilitate this outcome.

546. In relation to Logic, Mr. Kerr explains that whereas AU$2.7 million was invested into the NZ Partnership by investors who were represented by Logic, Mr. Marshall appears now only to act for investors with c$150,000 of investment in the Partnership.

547. There follows an account of a 180 day put option between Logic and Torchlight Investment Group that would have allowed Logic to sell any interest that it had in the NZ Fund to Torchlight Investment Group Limited, if the option was called within the period. Mr. Kerr maintains that the draft deed for this was never executed, and in any event any alleged put option was exercised if at all far too late. Notwithstanding Mr. Marshall's fanatical preoccupation with the matter, all of this is of no interest or relevance to the Court in these proceedings.

548. At paragraph 58 Mr. Kerr refers to a deterioration of his relationship with Mr. Marshall, including threats being made to Mr. Kerr by Mr. Marshall. Mr. Kerr claims that Mr. Marshall had a vendetta, rather than general concerns as to the Partnership, and indeed he wanted to take control of the Partnership, a fact which in itself is not in dispute.

549. Mr. Kerr proceeds to outline the history of the NZ Partnership, a matter with which this Court is largely unconcerned. It was what Mr. Kerr described as a closed investment, meaning a long term investment.

550. Significantly he explains at paragraph 72 that the NZ Partnership LPA did not allow for an early non pro rata exit. To obtain liquidity a Limited Partner therefore would have to

sell the interest, although in practice there was no functioning secondary market in New Zealand.

551. He describes the core investments of the NZ Partnership, including in primary debt owed in the Residential Community Living Group, an Australian based, ASX traded property development company ("the Old RCL Company") and its subsidiaries. There was also investment in a number of development sites in New Zealand intended to complement and enhance the value of the old RCL Company.

552. Additionally, there was investment in Lantern which owns part of the liquor and gaming sector in Australasia.

553. Mr. Kerr at paragraph 76-79 deals with the in specie distribution and related matters:

> "*76. For reasons that I explain in more detail below, the General Partner contributed the NZ Partnership's assets to the Cayman Partnership in consideration for partnership interests in the Cayman Partnership. The NZ Partnership then made an in-specie distribution of its partnership interest in the Cayman Partnership to the Limited Partners of the NZ Partnership in December 2012. The Petitioners therefore ceased to be investors in the NZ Partnership and became investors in the Cayman Partnership in December 2012 as a result of the transfer of all assets and liabilities of the NZ Partnership and the in-specie distribution.*
>
> *77. The NZ Partnership was fully entitled to make these steps under the NZ LPA. In particular, clause 4.2(e) of the NZ LPA permitted the NZ General Partner to establish investment vehicles such as the Cayman Partnership which could hold its assets and clause 8.2 of the NZ LPA permitted the in-specie distribution to be made.*

78. *At the time the transfer took place in December 2012, the net assets and liabilities of the NZ Partnership were valued at AU$166,794,549 (equivalent at that time to NZ$208,737,505). When compared with the gross committed capital over the lifetime of the NZ Partnership of NZ$150m, this represented a return of NZ$58,737,505. As stated above, this equated to an internal rate of return of 15.2% over the 4 year period between its establishment on 26 October 2009 and the transfer of assets and liabilities to the Cayman Partnership on 17 December 2012. Since it was consistent with the targeted return, I find it impossible to understand how the Petitioners can take issue long after the event with some of the investments made on behalf of the NZ Partnership.*

79. *The NZ Partnership's General Partner held a general meeting of its Limited Partners in the fourth quarter 2011. None of the issues concerning the management of the General Partner of the NZ Partnership or the investments it made that now appear in the Amended Petition were raised by any of the Limited Partners at this meeting. In my view, this shows that none of the Petitioners held any such "genuine" concerns and that the concerns about the management of the NZ Partnership that have been included in the Amended Petition have been raised now in bad faith by the Petitioners."*

554. At paragraphs 83-85 Mr. Kerr explains the question of loans:

"Loans

83. *Investment vehicles such as the NZ Partnership and the Cayman Partnership operate by raising capital from investors and investing this capital over the life of the investment vehicle into long term investments. In order to increase the prospects of such investment vehicles achieving their target return for their investors, the main investments are typically made within the initial few years following the investment vehicle's incorporation with smaller follow-on investments made at later dates. This is so that the investments can be left to mature for a number of years in an attempt to*

increase the level of return that can be achieved for the investors by the end of the investment vehicle's life.

84. *Like any business, each of the NZ Partnership and the Cayman Partnership incur day to day expenses whilst they are active investment vehicles. This includes (amongst others) the wages of its staff, rent and bills for its offices, legal and professional fees incurred in identifying, finalizing and maintaining the investments, and audit fees. A significant amount of working capital is, therefore, required from time to time in order to allow the Partnerships to operate both prior to, and after, the committed capital of each Partnership has been invested. It is common practice for businesses such as the NZ Partnership and the Cayman Partnership to obtain loans from their parent companies as this often provides flexibility in terms of the draw down and repayment dates that would otherwise be more difficult to achieve in the market place from third party lenders.*

85. *All loans taken out by the NZ Partnership and any outstanding liabilities in respect of each loan, were reviewed by the NZ Partnership's auditors, PwC, each year prior to PwC providing the NZ Partnership with an unqualified audit. If PwC had any concerns with these, they would not have provided the NZ Partnership with an unqualified audit opinion."*

555. Mr. Kerr refers at paragraph 86 to loans in July 2011 and February 2012 from Perpetual Mortgage Fund and Perpetual Cash Management Fund, both repaid. They have no bearing on these proceedings.

556. He also refers to a loan of AU$37 million from Wilaci in August 2012 which has also been repaid, and in relation to which a further interest payment dispute that arose has now been settled following a court ruling.

557. He explains the circumstances at paragraph 102 – 108:

"*The Wilaci Loan*

102. In August 2012, the NZ Partnership required a bridging loan of AUD$37m. As detailed further below, one of the NZ Partnership's investments was the purchase (with co-investors) of the Old RCL Loans (as defined below) from the Bank of Scotland International (BOSI was in the final stages of exiting all of its investments in Australasia at this time, and this debt was one of the last assets to be realised. Whilst the NZ Partnership had already paid 80% of the amount due to purchase its interest in the Old RCL Loans to BOSI by this time, the balance of AU$37m fell due on 17 August 2012. The NZ Partnership was planning to raise further capital following the completion of the BOSI transaction, but to ensure full repayment to BOSI in the interim, short term financing was necessary to bridge the timing gap between the payment to BOSI and the capital raising.

103. I was introduced to Mr. John Grill, the sole director and shareholder of Wilaci in early August 2012 through Mr. Andrew Skidmore, a financial and investment consultant. I had been acquainted with Mr. Skidmore since approximately 2010 and had developed a good working relationship with him over time. It was Mr. Skidmore who suggested that I should approach Mr. Grill (one of his largest clients) for the financing. I was aware that Mr. Grill was a high net worth individual. Between 16 August and 27 August 2012, I negotiated with Wilaci to see whether an agreement could be reached for Wilaci to provide a short term loan to the General Partner and on 27 August 2012 an agreement was reached for Wilaci to lend the General Partner AU$37,000,000.

104. *The terms of the Wilaci loan were recorded in a loan agreement dated 27 August 2012 (a copy of which can be found at pages 568 to 585) the "Wilaci Loan Agreement"). The principal terms of the Wilaci Loan Agreement were:*

(a) *Wilaci advanced AUD$37,000,000 to the General Partner of the NZ Partnership for a term of 60 days;*

(b) *AUD$320,000 of interest was payable on the loan in relation to the 60 day term (this equates to a rate of interest of 5.25% per annum). This interest was due to be paid at the end of the 60 day term;*

(c) *A fee of AUD$5,000,000 was payable to Wilaci 120 days after Wilaci had made the advance; and*

(d) *The NZ General Partner was required to provide Wilaci with security over the loan by entering into a general security deed that covered all assets and undertakings of the NZ Partnership.*

105. *The Wilaci Loan Agreement also included a late payment clause which stated "if the Loan is not repaid on the Date of the Final Payment, the Late Payment Fee as set out in the Loan terms will apply." The Late Payment Fee was defined as a weekly payment of "$500,000 which amount will reduce on a pro rata basis by the equivalent percentage reduction that occurs on any principal repayment of the Loan being made."*

106. *On the date that the Wilaci Loan was entered into, the NZ Partnership's General Partner fully intended to repay the entire AUD$37,000,000 plus interest of AUD$320,000 on 26 October 2012 when the 60 day term expired and to pay the AU$5,000,000 fee on the date that this became due. The repayment was to be made via the proposed capital raising.*

107. *However, the capital raising, was delayed because the NZ Partnership was also proceeding with the RCL Credit Bid (as detailed more fully below), which required Australian Foreign Investment Review Board approval.*

Whilst this approval was eventually secured, it took significantly longer than anticipated, which had a knock-on effect in delaying the capital raising.

108. Following the transfer of all assets and liabilities of the NZ Partnership to the Cayman Partnership in December 2012 (which I discuss in more detail below), the General Partner of the Cayman Partnership paid off all outstanding amounts under the Wilaci Loan (including the principal AUD$37,000,000 advanced, the AUD$5,000,000 fee, and interest on these sums at an effective rate of 5.25% per annum). It successfully challenged the late payment fee and Wilaci's right to recover any monies under this clause on the ground that it is a penalty. This decision has been appealed by Wilaci."

557. Since then the Wilaci appeal had proved to be successful, but in any event the dispute has now been settled. The Petitioners have strongly criticized Mr. Kerr for entering into such a loan, but it must be borne in mind that in any commercial undertaking some initiatives will prove more successful than others, and in the field of distressed debt in particular Mr. Kerr points out that the risk of occasional disappointment is proportionately higher. In the opinion of the Court that is no basis for conclusion that this loan or its ultimate resolution, taken in isolation, could justify any loss of trust and confidence in the GP.

558. There follows a series of paragraphs concerning Kingston Road and Maori Jack Road, the Alta Credit mortgage and East Wanaka. However, these are matters which predate the Partnership and which do not require consideration.

559. At paragraph 131 Mr. Kerr refers to Lantern, part of the liquor and gaming sector in Australia that both the NZ Partnership and the Partnership sought to invest in. From November 2010 the strategy had been to build a material position in Lantern, as illustrated by Mr. Kerr in a number of investor reports from which he quotes.

560. Then at paragraph 132(e) he states:

"In its investor report dated 31 March 2015 (a copy of which can be found at pages 631 to 643), the General Partner of the Cayman Partnership informed the Limited Partners that MAS, a competitor of the Cayman Partnership which at that time held a 24% stake in Lantern, was attempting to "provoke litigation to provide a platform to escape or improve the terms of the deal with Lantern" and that this had delayed the completion of Lantern's share buyback plan. I explain in more detail below how MAS has used confidential information from the Cayman Partnership's investor updates (which Aurora has provided to MAS in breach of its obligations under the limited partnership agreement) to implement its competing strategy in respect of Lantern for its own commercial benefit. The General Partner of the Cayman Partnership also explained in this report that "We anticipate that once [the MAS/MIML Litigation] has ultimately been successfully resolved, the buyback will proceed in accordance with the agreed scheme. Upon successful completion of the buyback, Torchlight's stake in Lantern will increase to more than 40%."

561. He then continues at paragraph 134:

"134. Notwithstanding the damage caused to the Partnership as a result of MAS's competing strategy the Partnership's investments in Lantern has still been successful. The weighted average price paid for shares in Lantern over the whole period was AU$5.9 cents. Over that period, cash distributions have been received by the Cayman Partnership in the sum of AU$2.5 cents giving a cost base of AU$3.4 cents. The current share price is AU$10 cents. So the value of this investment has more than doubled."

562. This is but one of a number of instances of Mr. Kerr's skills as an investor which in themselves are not in any serious dispute in this case.

563. There is then a lengthy discussion of what Mr. Kerr describes as a transfer of his Lantern shares in return for 5 million PGC shares and some cash, in about October and November

2010. Mr. Marshall as has been noted described the matter differently. All of this has no conceivable relevance to the Partnership and its future.

564. Mr. Kerr goes on to describe transactions in Equity Partners Infrastructure Company No.1 Limited ("EPIC"), a widely held New Zealand company whose principal investments were a stake in Moto, a UK motorway Services Company and an indirect 1.24% shareholding in Thames Water, the England-based water company.

565. On 5 April 2012, the NZ Partnership GP sold its minority shareholding in EPIC to Torchlight Securities Limited, an associated entity of the Torchlight Investment Group which owns the NZ GP for NZ $3.033 million, a price or NZ$.42 per share, even though they had been purchased in September 2010 at NZ$.90 per share. However as Mr. Kerr explains this was in light of the EPIC board deciding to block the NZ Partnership's strategy. Then in October 2014 PGG sold its own larger stake in EPIC at about NZ $.60 per share. He states, and there is no reason to doubt him, that this was merely in line with the then market value.

566. Once again, Mr. Kerr's time, and indeed the Court's time, has been taken up with historical analysis of no intrinsic forensic value.

567. Mr. Kerr then goes on to set out the background to the RCL investment, to which for practical reasons the Court will refer as sparingly as possible. He explains at paragraphs 162-163;

"*The Initial Investment in RCL*

"162. BOS International (Australia) Limited ("BOSI"), part of the Bank of Scotland Group, had made (directly and via one subsidiary) a series of secured loans to the Old RCL Company and its subsidiaries. These included:

(a) A corporate loan facility of AUD$86.438 million to the Old RCL Company, which the Old RCL Company had in turn advanced to subsidiaries which were undertaking property development projects; and

(b) *Seven direct development loan facilities totaling AUD$85.232 million made directly to specific property projects being run by the OLD RCL Company and its subsidiaries.*

(Collectively the "Old RCL Loans")

163. In 2011, the NZ Partnership's General Partner became aware that BOSI was seeking to exit Australasian markets and wished to sell its interest in the Old RCL Loans. A number of the Old RCL Loans were in default at this time and so BOSI were willing to sell its interest in the Old RCL Loans at a 15% discount to face value."

568. At paragraph 165 – 167 he continues:

"165. The NZ Partnership's General Partner instructed Cadex Partners, a consultancy firm specialising in the valuation of development real estate to assist it with this due diligence. As a result of this due diligence, Cadex Partners and the NZ Partnership's General Partner determined that the value of the underlying security of the Old RCL Loans was higher than the amount that BOSI were willing to sell its interest in the Old RCL Loans for and that the true value of the Old RCL Loans was likely to be the full face value of the loans themselves. This meant that BOSI's offer to sell its interest in the Old RCL loans for a discount of 15% to face value appeared to significantly undervalue the worth of the Old RCL loans and this presented a significant investment opportunity for the NZ Partnership. The NZ Partnership's General Partner therefore purchased an interest in the Old RCL Loans via its subsidiary, Torchlight Real Estate Fund Ltd ("TREF"), as part of an investment consortium with PGC and its related companies, and other investors between December 2011 and January 2012. The co-investments made by PGC in RCL loans are referred to below as the "PGC RCL Sub-Participations".

166. The Old RCL Company continued to be in default under the Old RCL loans and so in February 2012, TREF took the decision to appoint receivers over the Old RCL

Company so that the debt investors could optimise their return on the investment in the Old RCL loans.

The Valuation of the Old RCL loans

167. Given that due diligence undertaken by the NZ Partnership's general partner and Cadex Partners had identified that the Old RCL Loans were expected to be fully repaid (including all interest and fees), the NZ Partnership's General Partner considered it more appropriate to reflect the legal balance in its quarterly net fund valuations instead of the discount price at which the loans were acquired. This was so that the NZ Partnership's Limited Partners were aware of the true underlying values of the assets that the Partnership held as opposed to the discounted amount that the NZ Partnership had purchased the investments for. The NZ Partnership therefore recorded the carrying value of the Old RCl Loans in its quarterly fund valuations at their full balances of NZ$199.108 million at 31 March 2012."

569. Finally he states at paragraphs 173-174:

"*173. As I explain in more detail below, the valuation methodology adopted by the NZ Partnership in respect of its investments in the Old RCL loans benefitted the Limited Partners of the NZ Partnership (including CAML, ACC and Aurora) by protecting the increase in value of their investment when the assets and liabilities of the NZ Partnership were contributed to the Cayman Partnership and the in-specie distribution occurred in December 2012.*

174. Given the above, I do not understand either the basis on which the Petitioners are maintaining their allegations about the valuation methodology (in paragraph 40 of the Amended Petition) or how the Petitioners can be genuinely concerned with this."

570. It is hard to imagine a more straightforward explanation than Mr. Kerr provides in his Affidavit on these issues.

571. He summarises the rationale for the termination of the NZ Partnership at paragraphs 175-177:

"*175. Whilst the NZ Partnership had been extremely successful since its formation in October 2009, by 2012, it was becoming apparent that the structure and domicile of the NZ Partnership was restricting the ability of the NZ Partnership's General Partner to maximize the value of its investment portfolio for the benefit of its Limited Partners.*

176. The NZ Partnership's General Partner therefore initiated a detailed structural review with its tax and legal advisors, Deloitte and Baker & McKenzie, to identify how best to proceed. In the covering letter that was sent to the Limited Partners with the NZ Partnership's audited accounts for the financial year ended 31 March 2012, I explained (on behalf of the NZ Partnership's General Partner) "Torchlight is no longer a New Zealand focused fund. Today its core assets are in Australia and in RCL and IEF. Torchlight is a very substantial participant in real estate across Australia. With assets and investments now from multiple countries, we have asked our tax and legal advisors, Deloitte and Baker & McKenzie, to review the structure of Torchlight to ensure it delivers to the Partners objectives."

177. There were three key reasons why the NZ Partnership's General Partner concluded in 2012 that the NZ Partnership was no longer suitable to serve the best interests of the Limited Partners of the NZ Partnership:

(a) The adverse tax rules applicable to partnerships registered in New Zealand;

(b) The conflicting liquidity preferences of the NZ Partnership's Limited Partners; and

(c) The opportunity to take advantage of a specific investment opportunity that would combine the owners of the entire debt syndicate of the Old RCL Company into one investment structure."

572. In other words he is saying that this was a legitimate business decision which the GP was entitled to take, and frankly the Court can see no reason to disbelieve him based on the evidence in this case.

573. One obvious attraction of moving to the Cayman Islands, as Mr. Kerr puts it, was that foreign tax domiciled investors were not interested in investment due to adverse tax into a New Zealand investment vehicle due to adverse tax consequences, hence leading to obstacles in raising further capital as required.

574. Mr. Kerr states that he saw the possibility of acquiring the underlying assets of the Old RCL Company and repackaging them into a new property company where the original debt could be restructured to maximise returns. Additional capital was needed however for the consolidation.

575. In relation to consultation with Aurora, he states at paragraphs 194-197:

> "*194. Aurora as trustee for the Bear Fund was the largest Australian-domiciled Limited Partner of the NZ Partnership. Aurora and the Bear Fund were fully aware of the intention to create the Partnership, to conduct the in-specie distribution and to take advantage of the RCL Investment Opportunity. As I explained in paragraph 28 of my first Affidavit, they were actively consulted in respect of the launch of a proposed Cayman Partnership and had direct input into the structure of the Cayman Islands entity.*
>
> *195. At this time, and until September 2014, van Eyk Research Pty Ltd's ("van Eyk") 100% owned subsidiary, Three Pillars Portfolio Managers Pty Ltd ("Three Pillars") was the duly appointed investment manager for the Bear Fund. Three Pillars and van Eyk therefore dealt with the day to day management of the Bear Fund's investment in the NZ Partnership (and subsequently the Cayman Partnership) on behalf of Aurora. It was standard practice at this time for me to communicate directly with Jacqui Lemon (employed by van Eyk as Senior Product Manager) in respect of matters*

concerning the NZ Partnership. Jacqui Lemon would then liaise separately with Aurora.

196. In the months prior to the launch of the Cayman Partnership, I therefore liaised directly with Jacqui Lemon about this proposal in order to ensure that Aurora were fully supportive of the proposal to set up the Cayman Partnership and conduct an in-specie distribution. Jacqui Lemon liaised directly with Aurora to explain this and reported back to me that Aurora were happy with these proposals.

197. This is recorded in an email chain between Jacqui Lemon and me, and Jacqui Lemon and Richard Matthews and Alastair Davidson of Aurora on 24 October 2014, which was reference in paragraph 28 of my first Affidavit and exhibited at pages 86 to 90 of my first Affidavit. In this email chain, I explained to Jacqui Lemon "we are planning a capital distribution of 150m and from the NZ Partnership. This is expected shortly and will hold the RCL debt – we are finalising tax vehicle it is likely to be a Caymans LP- please confirm this works for Bear?" The same day, Jacqui Lemon emailed Richard Matthews and Alastair Davidson and stated "Guys, any preference on vehicle? I think Caymans LP should be fine- can you think of any issues?" After checking this with Aurora, Jacqui Lemon responded and stated "So long as the Cayman fund won't distribute (as is our preference), we should be ok under this structure".

576. Regarding CAML, Mr. Kerr sets out his position at paragraphs 201-206 as follows:

"*201. Given CAML's mandate to liquidate their assets as soon possible, it had a significant amount to gain from the proposal for the NZ Partnership to subscribe to the Cayman Partnership, conduct an in-specie distribution of its interests in the Cayman Partnership to its Limited Partners and for the Cayman Partnership to pass a Special Resolution that would allow an early non-pro-rata exit for Limited Partners.*

202. *In paragraph 28 of my first Affidavit, I explained that non-tax paying Limited Partners of NZ Partnership, such as CAML and ACC, were not consulted on the basis that there would be no negative tax consequences as a result of holding an investment in a Cayman Limited Partnership. By this, I meant that the NZ Partnership did not discuss with either CAML or ACC (as it did with Aurora) the specific tax rules that applied to Cayman domiciled funds. The NZ Partnership's General Partner did, however, inform both CAML and ACC of its proposal to set up the Cayman Partnership and to conduct an in-specie distribution of the assets of the NZ Partnership.*

203. *On 7 November 2012, David Wightman (the chief executive of both the old and new RCL), Mr. Naylor and I gave a presentation on behalf of the NZ Partnership's General Partner to CAML in Sydney in which the proposal to register a new partnership in the Cayman Islands and to conduct an in-specie distribution of the NZ Partnership's holding in this new partnership to its Limited Partners was discussed and explained. Ms. Burleigh and Mr. Traveller both attended this presentation, which lasted about 3 hours and was followed by a lunch at Café Sydney. A hard copy of the slides from this presentation together with hand written notes can be found at pages 755 to 775 (the "CAML Presentation Slides").*

204. *Page 2 of the CAML Presentation Slides referred to a "Torchlight Real Estate Fund" that would be "100% owned by Fund 1" and "(t)ax neutral for offshore investors – to be in specie". The reference to "Torchlight Real Estate Fund" is a reference to the intention to set up the Partnership. The reference to "Fund 1" is a reference to the NZ Partnership. The reference to "in specie" is a reference to the intention to conduct an in-specie distribution of the NZ Partnership's holding in the Partnership to the NZ Partnership's Limited Partners. "*

205. Page 2 of the CAML Presentation Slides includes hand written notes from the presentation. This copy of the presentation slides was disclosed by CAML as part of its discovery obligations in the Petition proceedings and so I infer that these are handwritten notes made by a CAML employee, presumably either Ms. Burleigh or Mr. Traveller who both attended the presentation. The hand written notes next to the bullet points concerning the intention to register the Partnership and conduct the in specie distribution include references to "long term basis", "offshore LP's require this (Fortess/Macq)", "Caymans unit Trust or LP", "will allow LP's to redeem with consent of GP", "Waiting on final advice on structure but hopefully will allow repayment", "will own 100% RCL +positioning to own 100 IEF" and "Existing LP's get a right to increase pro-rata holding. If don't then Torchlight underwrite".

206. Mr. Traveller is therefore wrong to state at paragraph 40 of his second Affidavit that "CAML was not consulted prior to the in-specie distribution". Similarly, Ms. Burleigh is wrong to state at paragraph 35 of her first Affidavit that "CAML was not consulted on any in specie distribution and its consent was not obtained." I note that the CAML Presentation Slides were disclosed by CAML over two months before Mr. Traveller swore his second Affidavit. So it is surprising that he has maintained this stance."

577. Mr. Kerr then deals with ACC, at paragraphs 208-215:

"*208. I understand that ACC does not pay tax on the proceeds from its investment in the Partnership and did not pay tax on the proceeds of its investment in the NZ Partnership. ACC's investment was not, therefore, affected by the tax implications of the proposal to transfer the investments held in the NZ Partnership into the Partnership. The discussions with the Bear Fund concerning the different tax implications associated with the unit trust and limited partnership models that were being considered for the Partnership*

in the Cayman Islands were not, therefore, considered by the NZ Partnership's General Partner to be of particular relevance to ACC.

209. *I did, however, provide ACC with advance notice of the proposed transfer in an email dated 31 October 2012, five weeks before the transfer occurred. A copy of this email can be found at page 776. In this email, I informed Mr. Bagnall "The MTM valuation is being done by Deloitte at the moment as with RCL and IEF the fund is largely off shore so we considering in specie of a tax neutral to consolidate ownership interests of our coinvestors in entities" and "Our plan is simply to get in the right tax structure and spend a decade building and selling homes". This email is an example of the updates concerning the investment strategy of the NZ and Cayman Partnerships that I provided to the Petitioners when requested. It provides yet further confirmation that the Petitioners are wrong to suggest that I did not provide such information. To the extent that Mr. Bagnall is attempting to suggest that he had received "no prior advice about this" in paragraph 39 of his first statement, Mr. Bagnall is therefore wrong. This document was disclosed by ACC on 9 December 2015, well before the Petition was amended.*

210. *On 17 December 2012, shortly after the Partnership was registered and the in specie distribution had been completed, the NZ Partnership's General Partner wrote to each of the NZ Partnership's Limited Partners including ACC, the Bear Fund and CAML to inform them of the rationale behind the creation of the Partnership and the in specie distribution in order to transfer the investments of the NZ Partnership into the Partnership. A copy of this letter can be found at pages 780-781.*

211. *After considering whether ACC should participate in the capital call, Paul Robertshawe, ACC's Investments Portfolio Manager, emailed me on 26 December 2012 and explained:*

"As you know, [ACC's investment in the Partnership] is held in our main NZ listed equity portfolio and does not really meet the fund investment criteria given its liquidity and relatively low level of disclosures. As such, we would like to offer the ACC holding into the capital call at the A$1.0714 price. Perhaps these units could be used to fulfil the level of over-subscriptions or perhaps you could see it as a way of providing an investor who has other priorities a liquidity event. As suggested above, we will not be taking up our pro-rata call. Please let us know as soon as possible if our request to sell our stake is feasible for you to act upon at this time."

212. *This email demonstrates that ACC's desire to sell its investment in the Partnership was being driven by the fact that investments in an illiquid investment fund such as the Partnership did not fit with ACC's investment portfolio – not due to any "concerns" that ACC now allege that they had with the conduct of the NZ General Partner or the transfer of the NZ Partner's assets to the Cayman Partnership which had had just occurred (and which ACC was aware of) when this email was sent.*

213. *I responded to Paul Robertshawe's email on 28 December 2012 and explained:*

"Paul I will factor in.. and see if we can work out as sale or redemption path. Torchlight Fund LP will be able to allow the GP to consent to non pro rata redemptions of capital-but after a 75% vote (which we expect will have 100% support)

an "early redeemer" (not a pejorative terms) would get the capital amount acquired by a new partner or redeemed by the fund – but profit interests would typically accrue to the stayers".

The good news is that the in specie on closure of the capital; raising resets the capital account so subject to it being in the interests of the LP I am

happy working out a reasonable endeavours path to facilitate an exit at AUD1.0714

In practice this would occur after the raising closes and the subsequent vote allowing what are essentially buybacks- but not far away- and be structured as non pro rata capital redemption as internal cashflow allows.

Please confirm this works for you and I will send you the relevant consent document to make it happen."

A copy of this email and the email from Mr. Robertshawe on 26 December 2012 can be found at pages 782 to 783."

214. *Despite my offer to assist ACC in achieving its desired liquidity at this stage, ACC did not engage with me further on this. As I explain in detail below, the Special Resolution to allow non-pro rata redemptions was in due course passed by the Partnership's Limited Partners with ACC voting in favour of this special resolution. Despite this, ACC has not sought to utilize this method of achieving liquidity.*

215. *If ACC had any complaints in respect of the creation of the Partnership or the in specie distribution of the NZ Partnership's interest in the Partnership, they would, and should, have raised these concerns in December 2012 as part of their discussions with me concerning the capital call. Instead, aside from the email exchange with Mr. Bagnall that I refer to below, nothing was said at the time or since until the Petition was issued."*

578. As a keen and astute businessman anxious to maximise a commercial opportunity, Mr. Kerr employed means of communication which were not always as structured and as formal as ideally one would prefer to see. However, the Court considers this characteristic to be more an aspect of Mr. Kerr's enthusiasm and commitment to his investors rather than being evidence of any ulterior or dishonourable intentions.

579. Mr. Kerr details the in specie arrangements at paragraphs 217- 221, stating:

> *"217. The NZ Partnership's General Partner was permitted under clause 4.2 (e) of the NZ Partnership Agreement to make the NZ Partnership a Limited Partner of a new investment vehicle such as the Cayman Partnership. It was also permitted under clause 8(2) of the NZ LPA to conduct an in specie distribution of the NZ Partnership's holding in the Cayman Partnership provided it obtained the approval of the NZ Partnership's Advisory Committee.*
>
> *218. These clauses record the fact that the NZ Partnership's General Partner was permitted to take each of these steps "without consultation of any of the limited partners". Despite this, and as explained in more detail in section 7 above, the NZ Partnership's General Partner actively consulted with its Limited Partners before taking these steps.*
>
> *219. The written resolutions, and deed of subscription and adherence to the Cayman Partnership limited partnership agreement that were required to authorize the NZ Partnership's subscription to the Cayman Partnership were signed on 7 December 2012. The effect of these documents is that the NZ Partnership agreed to contribute the assets and liabilities of the NZ Partnership as a capital contribution in the Cayman Partnership. This amounted to a contribution of assets and liabilities with a net worth of AUD$166,794,549 to the Cayman Partnership (the "Initial Contributed Capital").*
>
> *220. The NZ Partnership and the Cayman Partnership's general partners had calculated the value of the Initial Contributed Capital using the same valuation methodologies that had been approved by Grant Thornton Valuation Report. As explained above, this valued the NZ Partnership's investment in the Old RCL Loans as well as all other assets held by the NZ Partnership as at 31 March 2012. The NZ Partnership therefore used the carrying value of the Old RCL loans at their legal balances as at 7*

December 2012 rather than at the lower cost value of the Old RCL Loans to the NZ Partnership. This materially benefitted the Limited Partners of the NZ Partnership (including each of the Petitioners) as it crystallised the increase in the value of their initial investment that was related to the NZ Partnership's investment in the Old RCL Loans prior to the subsequent capital call by the Cayman Partnership (which is discussed below and which resulted in new capital being subscribed).

221. In contrast, if the NZ Partnership investments in the Old RCL loans had instead been valued on a cost basis when calculating the Initial Contributed Capital for the Cayman Partnership, this would have allowed all future investors, (including new investors), in the Cayman Partnership to gain the benefit of the increase in value of the NZ Partnership's investment in the Old RCL Loans. Such an approach did not seem appropriate or fair to the Limited Partners in the NZ Partnership who were the investors at the time that the NZ Partnership's investment in the Old RCL Loans occurred."

580. These passages are important. On the one hand there are the Petitioners' vague and opaque imputations of sinister impropriety and on the other hand Mr. Kerr's factually detailed responses to those imputations. There is simply no equivalence between them.

581. Mr. Kerr continues similarly at paragraphs 224-225:

"*224. The assets and liabilities contributed to the Cayman Partnership included the liability to PGC for its RCL Sub-Participations. The total amount of PGC liability for RCL Sub-Participations that was reviewed by the Cayman Partnership's auditors for the Cayman Partnership's audited accounts for the year ended 31 March 2013 and a note concerning this liability can be found in note 13 of those accounts.*

225. Following the in specie distribution in December 2012, the NZ Partnership became inactive. It had a clean closing audit from PwC for the financial year ending 31 March 2013. Since then, its only material activity has been

the defence of litigation in New Zealand, as a result of which it was placed into receivership. The NZ Partnership has successfully defended this litigation (albeit it is subject to an ongoing appeal). The receiver of the NZ Partnership has been directed to retire although this direction has been stayed pending the outcome of the appeal."

582. Mr. Kerr then goes on to address such differences as there are between the NZ Partnership LPA and the Partnership LPA, which itself was subsequently amended.

583. In relation to the removal of the annual meeting requirement he states that liaising with Limited Partners and answering direct queries as and when posed appeared to be the preferred way that historically the Limited Partners wanted to communicate, and as the Court has noted any Limited Partners could call a meeting of all Limited Partners by providing the receiving GP with a written request signed by Limited Partners representing 20% or more of a relevant Total Committed Capital. In other words, Mr. Kerr's explanation seems an entirely sensible one.

584. The definition of "*special resolution*" was changed so that a special resolution could be passed by Limited Partners holding two thirds rather than as previously was the case three quarters of the Total Committee Capital, thus giving more power to the Limited Partners. The Limited Partners could now direct the removal of the GP without cause under clause 11.4 (b) of the LPA by passing such a special resolution, for example.

585. Mr. Kerr also notes at paragraph 233 that at the date of commencement of the Petition Limited Partners who were not related to the GP of the Partnership held at least 70% of the limited partnership interests and despite the numerous concerns variously expressed no special resolution has ever been proposed by any Limited Partners of the Partnership.

586. The GP has been heavily criticised in relation to the term of the Partnership and once again while the criticism is at least superficially plausible Mr. Kerr's explanation is far from being tenuous or sophistical. Mr. Kerr states at paragraphs 235-238:

"235. *Clause 11.1 (e) of the NZ LPA provided that the NZ Partnership would expire on 26 October 2016 subject to an absolute right vested in the NZ General Partner to extend the life of the NZ Partnership for two one year periods, thus creating a long-stop date of 26 October 2018. Given the long term nature of the investments held by the Cayman Partnership, this clause was amended in the Cayman Partnership limited partnership agreement so that the Cayman Partnership would expire on 30 November 2019 subject to a similar right to extend the life of the Cayman Partnership for two additional one year periods. To date, the General Partner of the Cayman Partnership has not currently exercised its discretion to extend the life of the Cayman Partnership at this time. The Cayman Partnership is, therefore, currently due to expire on 30 November 2019.*

236. *In short, the reason for the extension was to give the General Partner the ability to realize the maximum value and thereby increase the value the Cayman Partnership for the benefit of its Limited Partners. By way of example, the recent rezoning of the Partnership's assets in Hanley Downs has unlocked a new profit stream in 2016 that will continue for the next few years.*

237. *Whilst I acknowledge that the term of the Cayman Partnership is slightly longer than the term of the NZ Partnership, I do not consider this to be a material change between the Limited Partnership Agreements of the NZ Partnership and the Cayman Partnership, particularly when considered with the inclusion of the non-pro rata early exit mechanism in the Cayman Partnership which was not available in the NZ LPA. This is because investments are typically categorized as either being short term, medium term or long term investments. At the time that ACC, Aurora and SCF (CAML's predecessor) invested into the NZ Partnership between 2010 and 2011, they were each aware that the NZ Partnership was a closed investment vehicle for which liquidity could only be achieved through either a secondary market sale or through the NZ Partnership coming to the end*

of its term in 2016, 2017 or 2018 (depending on how long the NZ Partnership chose to extend the term for). The Petitioners will, therefore, have been aware that their investments were 6-8 year investments in a closed investment vehicle. This type of investment would typically be classed as an illiquid long term investment by investors and accounted for on that basis in their investment portfolio. Each of the Petitioners are fully aware of this:

(a) As I have referenced in paragraph 7.5 above, ACC have informed me that they hold their investment in their "main NZ listed equity portfolio" and ACC acknowledge to me that this is not an appropriate classification as it "does not really meet the fund investment criteria".

(b) As I have explained in section 3 above, the Bear Fund was created with the specific mandate to invest into long term investments such as the NZ and Cayman Partnerships; and

(c) As I have explained in section 3 above, Mr. Traveller is aware that each of the NZ and Cayman Partnerships are long term investment vehicles and has acknowledged to me that the General Partner has been attempting to assist CAML to achieve "an exit that was never contemplated when the Fund was established."

238. The extension of time to enable the strategy to be realised does not change the character of what was, from the outset, long term investment. Indeed, the fact that the Cayman Partnership allows early liquidity to be achieved via non-pro rata redemptions balances has made it a more liquid asset."

587. Mr. Kerr describes the need for capital raising in order to take more ample advantage of the RCL opportunity at paragraphs 242-247:

"*242. On 20 December 2012, the General Partner wrote to all Limited Partners (including the Bear Fund, CAML and ACC) in order to explain that the General Partner wished the Partnership to take advantage of the RCL*

Investment Opportunity. The pro rata capital call was considered to be an equitable way of raising capital whilst safeguarding the interests of all the Limited Partners of the Cayman Partnership. The Bear Fund, CAML and ACC, together with each of the original Limited Partners of the Partnership were provided with the first opportunity to participate in the capital raising by the Partnership on a pro-rata basis. A copy of the letter send to all Limited Partners can be found at pages 93-95 of GCDK1 (the "Capital Call Letter"). This letter explained that:

"As reflected in the annual accounts Torchlight Fund LP 1 has syndicated its debt participation of the loan portfolio acquired from the Bank of Scotland International/Capital Finance Australia. We wish to consolidate ownership of all syndicated debt and proceed with a credit bid. Torchlight Fund No. 1 LP does not have the capital base currently to proceed with this credit bid without the injection of fresh capital. Proceeds from capital raised will therefore be utilized primarily to acquire all participations not currently held by Torchlight to provide the fund with 100% ownership of the underlying debt position as a pre-cursor to a credit bid and outright ownership of the underlying real estate portfolio."

243. On page 3 of this letter (page 95 of GCDK), the General Partner explained:

"Important Notes

1. *Torchlight Group will be taking up its full pro rata allocation.*
2. *Torchlight Group will bid for overs of an additional $30 million.*
3. *Other major Limited Partners have indicated full take up of pro rata allocation.*
4. *We have received total pre-bids for overs in excess of $50 million including the $30 million from Torchlight Group.*
5. *The Deed of Subscription and Adherence showing your current holdings and pro-rata allocation will be sent immediately following this notice.*

The offer has been structured to ensure that existing Limited Partners have priority over new investors and is priced at a level that is equitable to both existing and new investors. Any component of the offer not taken up or bid for by existing Limited Partners will be offered to new investors.

We highly recommend you take up your full pro rata allocation."

244. *The Bear Fund and its trustee Aurora participated in this pro rata capital call and committed AU$5,000,000 increased capital to the Cayman Partnership. Attached at pages 791 to 795 is a Deed of Subscription and Adherence dated 21 December 2012 signed by Richard Matthews and Simon Lindsay, directors of Aurora on behalf of the Bear Fund (the Bear Deed of Subscription"). Clause 1 of the Deed of Subscription and Adherence (page 791) explains that Aurora as trustee for the Bear Fund "shall have the benefit and obligations of and be bound by the terms of the LPA as a Limited Partner".*

245. *CAML and ACC chose not to follow the recommendation to participate in the capital call. However, no objection was raised by them to the capital raising at the time. It is clear from the Petitioners'' discovery that ACC discussed this decision internally. On 24 December 2012, Mr. Bagnall emailed Mr. Robertshawe and commented "On the face of it, [Mr. Kerr's] intention to go for over-subs is a positive in terms of indicating that [Mr. Kerr] believes what [he] told [ACC] in terms of upside to NAV." A copy of this email can be found at pages 796 to 797. The "over-subs" reference is a reference to my explanation that Torchlight Group would be seeking to invest in the capital call. As explained below, ACC voted in favour of the Special Resolution shortly after this and so were considered by the General Partner of the Cayman Partnership to be happy with how the Cayman Partnership was being run at this time.*

246. *Against this background, it is hard to reconcile the complaints now being made by the Petitioners that they had no knowledge of and did not consent*

to the in specie distribution. Even if such complaints could be made. These must lie with the NZ Partnership and not the Cayman Partnership.

247. As intended and explained in the Capital Call Letter, Torchlight Group took up its full pro-rata allocation. Details of the capital contributions made to the Cayman Partnership, including capital contributions by Torchlight Group and PGC, are set out in Mr. Naylor's tenth Affidavit."

588. Far from demonstrating any lack of probity, Mr. Kerr in these paragraphs provides evidence of the GP's commitment to look after the interests of the Limited Partners as well and as conscientiously as it can accomplish.

589. Mr. Kerr then provides a brief account of the non pro rata special resolution at paragraphs 249-253:

"249. Accordingly in 2013, shortly after the registration of the Cayman Partnership, a special resolution was proposed by the General Partner in order to incorporate the right for the General Partner to accept, in its complete discretion, requests for non-pro rata exists from the Partnership (the "Special Resolution").

250. ACC and Aurora each voted in favour of the Special Resolution. Copies of the written resolutions signed on behalf of each of ACC and Aurora can be found at pages 798 and 799. These written resolutions provide "the form and terms of the Revised Partnership Agreement be and is hereby approved and adopted as the governing document of the Partnership between the general partner of the Partnership and the limited partners referred to therein once approved by the General Partner with 2/3 Committed Capital approval". Each of Aurora and ACC had been provided with a clean and marked up copy of the Limited Partnership Agreement prior to the written resolution being passed. In light of this it is all the more concerning that the Petitioners are now seeking to argue that they have not, and would not, approve certain terms of the Limited Partnership Agreement. If any of the

Petitioners had any issue with the terms of the Cayman Partnership Agreement (by which I mean the version that includes the non-pro rata payment mechanism) they would, and should, have raised these issues rather than signing the written resolutions or (in the case of CAML) abstaining from the vote.

251. *As to CAML's abstention from voting on the Special Resolution, this was due to the fact that CAML viewed itself as being conflicting from voting. On 21 August 2013, I emailed Sharon Burleigh and Gary McCosh at CAML to explain that the Special Resolution would need to be passed in order to enable CAML to take advantage of the possible exit for CAML from the Cayman partnership that we had been discussing in principle. A copy of this email can be found at pages 800 to 801. I remember being informed shortly after this email (I believe by my lawyers, Bell Gully who were assisting me with the CAML negotiations at this time) that CAML viewed itself as being conflicted from voting on the Special Resolution due to their material interest in it being passed and that they therefore chose to abstain from the vote.*

252. *Irrespective of CAML's reasons for abstaining, they never raised any concerns in respect of the proposal to pass the Special Resolution. Further, CAML was made fully aware of the intention to incorporate a mechanism to allow non-pro rata exits from the Cayman Partnership at the General Partner's sole discretion before the Partnership was registered. Page 2 of the CAML Presentation Slides (pages 756) include a handwritten note from the presentation on 7 November 2012 (which I have addressed above) which states "will allow LP's to redeem with consent of GP. Waiting on final advice on structure but hopeful will allow repayment".*

253. *The Special Resolution was passed by the Cayman Partnership's Limited Partners in September 2013. This was of particular benefit to Limited Partners who wished to obtain early liquidity from their investments."*

590. It is apparent to this Court that none of these steps taken by the GP are either improper or even remotely untoward.

591. Mr. Kerr then summarises the Partnership's investment strategy at paragraph 257:

> *"257. The Cayman Partnership's general Partner sent a detailed seven page letter to all Limited Partners on 10 August 2013 in which it explained its investment strategy, provided an update on its capital call and its three core investments Lantern Hotel Group, Local World and RCL and (in particular) gave details of the progress of the Henley Downs and Jack's Point developments. A copy of this letter can be found at pages 592 to 618. The Petitioners and all Limited Partners were, therefore, fully informed of the investments being pursued by the Cayman Partnership and the reasons why these investments were expected to generate significant returns for the Cayman Partnership."*

592. Mr. Kerr then explains the history of the Advisory Committee of the Partnership. Mr. Andy Wilson was appointed as Chairman from the establishment of the Partnership until he died in May 2014. He was a businessman of extensive experience and connections and according to Mr. Kerr he was well-established at managing equity based investment funds. Although there has been criticism of Mr. Kerr historical connection to Mr. Wilson it must be noted that there is not the slightest indication that Mr. Wilson's presence on the Advisory Committee has either threatened or caused to the Partnership any material loss whatsoever.

593. Mr. Kerr then reiterates at paragraph 260 that he also serves on the Advisory Committee representing Torchlight Group, a Limited Partner of the Partnership which had by far the greatest investment (in excess of AU$100 million invested capital), and he thought it "*only right and proper*" that he should be a member.

594. When Mr. Wilson died, Mr. Kerr then approached Mr. Cleary, who represented a number of Limited Partners including NAAHL. However, he was not willing to be appointed until the 2014 and its accounts were available, leading to a delay of just over a year.

595. Mr. Wilson had represented APGOF, a Limited Partner of the Partnership until the non pro rata exit was finalised in April 2015. Mr. Richard Boon was however the sole founding shareholder of APGOF, and Mr. Kerr explains that in the period before Mr. Cleary assumes his duties Mr. Boon who deputised for Mr. Wilson was available and Mr. Kerr was in regular communication with him about Partnership investments. In the event, Mr. Kerr asserts, no issue arose after Mr. Wilson's death that required the involvement of the Advisory Committee.

596. Mr. Boon's role has been likewise criticised, as with effect from August 2013 he joined the Partnership's London office to work on Local World and other potential U.K investments. Once again, there is no indication that Mr. Boon's role with the Advisory Committee has either threatened or caused any material loss to the Partnership.

597. Mr. Kerr confirms at paragraph 265 that the Partnerships' auditors have provided the Partnership with unqualified accounts for every year since it was established in December 2012, and he states that had there been any concerns the auditors would have taken them up. Although not dispositive, the existence of these unqualified audits is necessarily a very important factor in the Court's deliberations.

598. He recounts that credit facilities are necessary for working capital requirements, and that those facilities have been reviewed by the auditors prior to signing off the unqualified accounts, commenting further that it was not a requirement to provide Limited Partners with all details of every credit facility that the Partnership had obtained.

599. He adds at paragraphs 271-272:

> *"271. The Torchlight Group and PGC Group Facilities were payable on demand and accrued interest at a market standard rate of 9% per annum. The Advisory Committee was aware of the proposed agreements but did not give its formal approval as it was considered that none was needed under the Cayman Partnership's Partnership Agreement.*
>
> *272. As Torchlight Group and PGC are classed as related parties of the Cayman Partnership for the purposes of the statutory accounts, details concerning*

these credit facilities and the precise amount owing and repaid under each of the Torchlight Group Facility and the PGC Facility at the end of each financial year is set out in the "related party disclosures" notes in the Cayman Partnership's audited accounts. For example, the related party disclosure notes for the Cayman Partnership's audited accounts for:

(a) the financial period ended 31 March 2014 state that AUD$7,149,574 was due under the Torchlight Group Facility as at 31 March 2014 with 9% interest per annum being charged on this amount (no amount was due under the PGC Facility at this time);

(b) the financial period ended 31 March 2015 state that AUD$15,536,161 (inclusive of interest due) was due under the Torchlight Group Facility and AUD$2,983,719 was due under the PGC Facility as at 31 March 2015; and

(c) the financial period ended 31 March 2016 state that AUD$663,182 (inclusive of interest due) was due under the Torchlight Group Facility and that there was no outstanding amount under the PGC Facility as at 31 march 2015."

600. It is extremely difficult to see what grounds of suspicion such arrangements could possibly raise.

601. At paragraphs 275-277 Mr. Kerr gives various insights into the RCL project, none of which seem to the Court to be in the least controversial:

"*275. I provided an update on the Cayman Partnership's successful negotiations to the Limited Partners as part of the June 2014 investor report. I explained:*

"By early 2012 Torchlight has placed the company into receivership and embarked on a credit bid for its assets, enabling us to obtain a larger land bank at very low cost per site. To illustrate, in 2006 at over AU$600 million enterprise value, the market valued RCL at AU$100,000 per raw site.

Torchlight paid an average price of a third of that amount. Consistent with the strategy, Torchlight has merged its direct real estate assets into a new RCL Group to achieve management and capital synergies. This unlocks zoning gains through asset amalgamation in New Zealand where we expect the land bank to ultimately reach 1,500 with sales of 100 to 150 lots per year. The new RCL has interests in 16 residential projects which a land bank expected to yield about 6,000 lots at a consolidated level. Now selling at a rate of around 600 sites per year, the land bank is expected to last to last for 10 years. Three quarters of the sites are in Australia, with the remainder in New Zealand. The business has little under AU$200 million of capital employed and is expected to deliver NPAT of AU$20 million and up to AU$30 million per annum..."

276. *The Cayman Partnership's RCL investment continues to be successful for the Cayman Partnership. It currently has sales of land sites for residential housing in excess of AU$100m a year. I have continued to provide further detailed updates on the success of the Cayman Partnership's RCL investments in each investor report. For example:*

(a) *In the investor report dated 31 March 2015 in which I explained "Most of RCL's assets were acquired by Torchlight in October 2013. Since that time low interest rates have continued to support growth in property prices and sales volumes across Australia and Queenstown, New Zealand. Consequently RCL's sales, settlements and development activities are well ahead of initial forecasts. In addition to this, management is successfully value-adding specific sites through a combination of rezoning, undertaking built form and negotiating lease commitments to major end users for strategically located commercial land.";*

(b) *In the investor report dated 13 November 2015, I explained "RCL holds a long-tail land bank across Australia and New Zealand. By*

nature, investing in land and development required patience. The investment and expenditure upfront is intentive and value takes some years to realise. We remain confident in the long-run value of RCL and fully expect the Partnership to be well rewarded over the life of the Fund. An operating update on RCL will be provided with the audited annual financial statement..."

(c) *In the June 2016 investor report, I explained "The main driver [in the 10.44% quarterly lift in net fund valuation] was value gains within RCL. In the first quarter of 2016 significant progress was made to unlock value at Hanley Downs in Queenstown, major project in New Zealand. Please refer to the attached article. This is one of several media reports of Development Approvals being granted for Queenstown, New Zealand. Torchlight Fund LP (via RCL) holds exposure though a number of projects. This is an important event for RCL. Given the progress in progressing planning outcomes in the underlying projects, the Redeemable Preferences Shares (RPS) have been held at face value, pending planning outcomes. However, in view of the progress that has been made, a coupon has now been accrued and reflected in the quarterly fund valuation."*

(d) *In the October 2016 investor, I explained "The aggregated audited carrying value of the residential real estate assets is approximately AUD$120m. This is up over the last 12 months from AUD$160m in the FY15 year. Major contributors to gains have been AUD$5m from the core RCL business as it continues to convert its real estate book to cash and AUD$7m from gains in East Wanaka. Post balance date we exercised the first tranche of our option to receive finished stock at construction cost at East Wanaka. The audit value of AUD$109m for the investment in RCL assumes each project is sold today rather than being developed out by RCL. Carrying value for*

non-current assets is at a substantial discount to the net realization value of each asset. The expected net realization value of RCL over the life of the fund is over 5x audit value."

277. The Petitioners and other Limited Partners have, therefore, been fully aware of the Cayman Partnership's investment strategy in respect of RCL for a number of years. It is misleading for the Petitioners to now allege that the Cayman Partnership has somehow failed to provide sufficient information in respect of its investments."

602. He then describes how the Partnership's investment in Local World Media had progressed. In February 2015 the Partnership received £8 million in dividends and in October 2015 the Partnership sold its stake for £20million. This meant that the Partnership made five times its original investment in less than these years (paragraph 280).

603. He then provides a somewhat lengthy but comprehensive account of investments in New Chums Beach and Jack's Point Golf Course at paragraphs 281-290, which the Court for reasons of fairness now sets out:

"281. As will be clear from the above, as result of the successful restructuring of the Old RCL Company, by 2013 the Cayman Partnership held investments (via its subsidiary companies) in a significant amount of real estate throughout New Zealand. After severing his economic ties with me in 2009, Mr. Darby had also built up his own large portfolio of New Zealand real estate. This led to a position in 2013 where the Cayman Partnership and Mr. Darby (through his holding company NZ Land Trust) owned adjacent plots of land on the Hanley Downs site that were covered by the same zoning requirements. The Cayman Partnership wished to acquire the land held by Mr. Darby so that it could benefit from the enhanced value arising from the re-zoning of Hanley Downs. The General Partner therefore sought to identify synergies between its holdings and Mr. Darby's holdings with a view to achieving this outcome.

282. Mr. Darby's property companies owned a farm adjacent to and behind New Chums Beach, a beach on the northeast coast of the Coromandel Peninsula, New Zealand. The farm did not have access to New Chums Beach, which was owned by an entity in which I had an indirect interest (Galt Nominees Limited). If it did, it would very considerably enhance the value of the farm land due in part to the additional development rights that he could obtain by creating conservation blocks. I knew that Mr. Darby would be willing to pay a high price for this or alternatively be willing to trade key assets strategic to the Cayman Partnership's objectives at Henley Downs. The land that the Cayman Partnership wanted to buy at Henley Downs from Mr. Darby's interests was priced at NZ$7.5 million. In our view, this was would give the Cayman Partnership an extra benefit from the planning permission and increase the value of that particular parcel from NZ$7.5 million to NZ$25 million. Accordingly, it was desirable for the Cayman Partnership to purchase Galt Nominees' interest in New Chums Beach with a view to being able to use it in negotiations with Mr. Darby. In particular the Cayman Partnership wished to trade the land at Chums Beach in exchange for the land it was interested in at Hanley Downs or negotiate a transaction which could merge the farmland interests held by Mr. Darby with the New Chums Beach land, therefore significantly increasing the value of both parcels of land.

283. Since the Cayman Partnership was an overseas entity and since the New Chums Beach Site would have been classed as being "sensitive" land in New Zealand under the Overseas Investment Act 2005, the Cayman Partnership would require overseas investment approval from the New Zealand Overseas Investment Office if it chose to purchase the underlying property at New Chums Beach from Galt Nominees.

284. A typical way for foreign investors such as the Cayman Partnership to gain exposure to such "sensitive" land (or high value businesses worth more than NZ$100 million which also require overseas investment approval),

without the need for prior overseas investment approval is to structure property transactions as limited recourse loans rather than unconditional purchases. In such transactions, the owner of the property is "lent " an amount equal to the value of the property and the "purchaser's" right of recourse under the loan is limited to enforcing its right to purchase the property for the amount of the "loan". A conditional sale and purchase agreement is entered into which is conditional upon overseas investment approval being obtained. If such approval is granted, the property (or property holding company) can be transferred to the purchaser in satisfaction of the purchaser's limited recourse loan. In order to maintain flexibility on sale negotiations, this transaction provides the Cayman Partnership the option of either taking ownership of the underlying land (after achieving overseas investment approval) or transacting on the debt to an overseas or local party without needing to seek overseas investment approval. This structure is particularly suitable for negotiations with potential purchasers such as Mr. Darby whose investors are based overseas.

285. *In about September 2013 Galt Nominees and a subsidiary of the Cayman Partnership entered into a limited recourse loan under which instalments of NZD$3.7m and NZD$5m were paid to Galt Nominees in September 2013 and November 2013 respectively.*

286. *The acquisition of the land at Hanley Downs has been agreed at NZ$7.5 million but is yet to be completed. As for New Chums Beach, overseas investment approval has not currently been sought by the General Partner's subsidiary. This is because a deal has been agreed in principle at NZ$8.7 million plus a profit share in the proposed New Chums development. Overseas investment approval is not required in order for this deal to be finalised.*

Jack's Point Golf Course

287. Some of the land at Jack's Point that was owned by the subsidiaries of the Cayman Partnership had access to a golf course in Jack's Point ("Jacks Point Golf Course"), which was owned by an entity in which both Mr. Darby and myself had an interest. However, the access from the land owned by the Cayman Partnership's subsidiaries required fees and levies to be paid to the golf course. The Cayman Partnership therefore determined that it could reduce or extinguish its liability to these fees and levies if it purchased Jacks Point Golf Course and sold it on to companies owned by Mr. Darby on terms that those fees and levies would be cancelled.

288. In February 2014, the Cayman Partnership agreed to purchase a part interest in Jack's Point Golf Course for NZ$2.75m. The Cayman Partnership subsequently negotiated with Mr. Darby and successfully sold its interest, which when taken in conjunction with the cancellation of fees and levies that was eventually achieved, provided a total return substantially in excess of the price paid for it.

Advisory Committee Approval

289. Given that the purchase of the interest in the New Chums Beach Site and the purchase of the Jack's Point Golf Course each concerned a subsidiary of the Cayman Partnership purchasing the interest from a company that I held an indirect economic interest in, the General Partner viewed these as transactions that required Advisory Committee approval. I therefore provided Mr. Wilson, the chairman of the Advisory Committee at that time, with all the relevant information concerning the purchases of the interests in the New Chums Beach Site and the Jack's Point Golf Course. As stated above, Mr. Wilson was careful to ensure that the proposed transactions were beneficial to the Cayman Partnership.

290. The Advisory Committee meeting was held at Cowley Street, Westminster, London on 25 February 2014 at 9:00am. I declared my conflict of interest in each of the New Chums Beach and Jacks Point Golf Course transactions

and so abstained from voting on the questions of whether these transactions should be approved by the Advisory Committee meeting. Mr. Wilson was satisfied that both transactions were profitable and in the interests of the Cayman Partnership and he accordingly approved each of these transactions. A copy of the Advisory Committee meeting minute recoding this decision can be found at pages 889 to 890 (the "Advisory Committee Meeting Minute")."

604. Mr. Kerr then addresses the Petitioners' criticisms at paragraphs 292-294:

"292. It appears that the Petitioners have fundamentally misinterpreted the commentary in note 13 of the Cayman Partnership's unqualified audited accounts concerning the New Chums Beach and Jack's Point Golf Course transactions. They have conflated the NZ$7.75m spent on acquiring the New Chums Beach Site and the NZ$2.75m spent on acquiring the Jack's Point Golf Course in paragraph 22B (b) and misleadingly defined this as a "Kerr Loan", As I hope is apparent from the paragraphs above, the New Chums Beach and Jack's Point Golf Course acquisitions were two entirely separate acquisitions of property interests by subsidiaries of the Cayman Partnership. Whilst the New Chums Beach transaction was structured using a limited recourse loan, the Jack's Point Golf course transaction involved no loan whatsoever. The limited recourse loan used for the New Chums Beach transaction was simply a way of structuring this transaction whilst overseas investment approval was pending. There has been no "forgiveness" of any loan as alleged by the Petitioners in paragraph 2B (d), the Cayman Partnership's subsidiary maintains it rights under the limited recourse loan relating to the New Chums Beach transaction and this allows the Cayman partnership's subsidiary to hold its investment in this asset in a flexible way whilst it finalizes the deal to sell this interest.

293. Given that each of the New Chums Beach and Jack's Point Golf Course transactions were approved by the Cayman Partnership's Advisory

Committee and reviewed by the Cayman Partnership's auditors prior to them signing off on unqualified accounts for the financial period ended 31 March 2014, I fail to see any basis for the Petitioners to maintain these allegations. It is worth noting that the Petitioners received a copy of the Advisory Committee Meeting Minute as part of the initial round of discovery, well before the Amended Petition was finalised. Indeed, the Petitioners themselves refer to the Advisory Committee Meeting Minute in paragraph 22A (e) of the Amended Petition.

294. Each of Mr. Traveller (in paragraphs 60 and 61 of his second Affidavit) and Mr. Roe (in paragraphs 121 and 122 of his third Affidavit) complain that the explanation provided in respect of these transactions in the Cayman Partnership's unqualified audited accounts is "unclear". I do not accept it is. In any case, neither Mr. Traveller nor Mr. Roe (or any other employee of the Petitioners) has ever asked the General Partner about these notes. If they had done, I would have provided the explanation above."

605. It appears to the Court that none of this can have caused any conceivable harm to the commercial interests of the Limited Partners or justify any loss of trust and confidence on the part of the Petitioners. The Court has exercised inordinate patience throughout these proceedings, but it can hardly be said at this juncture anyway that there is any clear and proper basis for winding up an indisputably successful business.

606. The Court does not propose to set out in detail Mr. Kerr's account of the Wilaci loan and the Wilaci litigation. The loan was assumed at a difficult time for the NZ Partnership and subsequently it resulted as the Court understands it in assumed liabilities of the Partnership. However, in the overall context of distressed debt investment it has certainly not been of serious detriment to the Partnership.

607. He states at paragraph 301 that each of the NZ Partnership's and the Partnership's auditors have reviewed the Wilaci loan and the position in regard to the Wilaci litigation as part of their audits for the financial years ended 31 March 2013, 2014, 2015 and 2016 and in each

instance they provide unqualified audited accounts. Seemingly the Court is being invited by the Petitioners to go behind those audits and the Court firmly declines to do so.

608. Mr. Kerr however does raise a further aspect of the matter in relation to the industrious efforts of Mr. Wallace. He states at paragraphs 302 -307:

> *"302. It appears, from the evidence filed by Mr. Wallace, Mr. Marshall and the Petitioner and from documents that have been disclosed by MAS in these proceedings, that alleged "concerns" relating to the Wilaci Loan contained in the Amended Petition have in fact come from MAS rather than any of the Petitioners.*
>
> *303. In paragraph 43 of his second Affidavit, Mr. Wallace explains that he contacted the receivers of the NZ Partnership and discussed the Wilaci Loan with the receivers. This is despite the fact that MAS were not, and have never been, a Limited Partner in either the NZ Partnership or the Cayman Partnership.*
>
> *304. MAS' solicitors, Russells LP, wrote to the FMA on 28 July 2014 raising a number of questions in respect of the Wilaci Loan and the contribution of the NZ Partnership's assets and liabilities to the Cayman Partnership. A copy of Russells LP's letter to the FMA concerning the Wilaci Loan can be found at pages 892 to 895.*
>
> *305. On the same day, Mr. Wallace of MAS wrote to the General Partner of the Cayman Partnership requesting copies of documentation concerning the Wilaci Loan. As MAS was a competitor of the Cayman Partnership and was not a Limited Partner, it had no entitlement to any documentation from the Cayman Partnership's General Partner. The General Partner did not, therefore, provide any of the requested information to MAS.*
>
> *306. In paragraphs 52 and 53 of Mr. Wallace's second Affidavit, he explains that he met the FMA with Russells LP on 21 August 2014. It appears likely that Mr. Wallace discussed the Wilaci Loan with the FMA at this meeting. In*

paragraph 54 of Mr. Wallace's second Affidavit, he states that he was informed at this meeting that the FMA had started an investigation into the NZ Partnership and me, presumably as a result of the letter received from Russells LP on MAS' behalf. I understand that the FMA has subsequently held meetings with Mr. Marshall and with CAML to discuss these matters in February 2015.

307. Despite MAS' successful attempts to convince the FMA to investigate matters concerning the Wilaci Loan and the contribution of the NZ Partnership's assets and liabilities to the Cayman Partnership, the FMA has taken no steps to contact me, the NZ Partnership's General Partner or the Cayman Partnership's General Partner. It therefore appears that the FMA has investigated Mr. Wallace's alleged concerns in respect of these matters and has decided that no action is warranted."

609. Subsequent information presented by Mr. Wardell to the Court confirms that the FMA had closed its investigation.

610. He proceeds to explain the conversion of PGC's RCL Sub Participation at paragraphs 308-313, thereby creating further additional interests in the Partnership, and the position is summarized thus:

"311. In order to support the Cayman Partnership, Torchlight Group agreed to accept settlement for amounts owing under the PGC RCL Sub participation agreement and the Torchlight Group Facility by way of additional interests in the Cayman Partnership.

312. In paragraph 24B of the Amended Petition, the Petitioners have alleged that these transactions have "caused prejudice to the Partnership by potentially diluting the value of Partnership interests" and that the in kind contributions may not "truly [be] as valuable as stated". This allegation has no merit whatsoever. In fact, the in kind contributions have actually

increased the value of the Limited Partnership interests held by all limited partners (including the Petitioners and Torchlight Group).

313. I understand that Mr. Naylor explains that the in kind contributions in more detail in his tenth Affidavit and explains why the Petitioner's allegations are misconceived. As he makes clear, the "in kind" contributions to the Cayman Partnership referred to by the Petitioners, in so far as they relate to PGC or its subsidiaries, had the effect of reducing the Cayman Partnership's liabilities to these parties that would have otherwise been payable in cash, which was materially beneficial to the Cayman Partnership."

611. As far as the Court can see, all of this is completely unexceptionable and makes eminent good sense.

612. Mr. Kerr then turns to the role of Mr. Wallace and MAS as he perceives it. He refers to certain proceedings in New South Wales between MAS and MIML and alleges that MAS has been attempting to liquidate the Bear Fund. He then points out that irrespective of any change in trusteeship of the Bear Fund from Aurora to MAS Aurora has remained as the Limited Partner and has at all times been included on the Partnership register as a Limited Partner, and he adds at paragraph 320:

> *"Under the terms of the Limited Partnership Agreement, no substitution of a Limited Partner can be made without the consent of the General Partner. The General Partner is entitled to withhold its consent on certain grounds, including because the proposed new Limited Partner is a competitor of the Partnership."*

613. He describes a significant breach of confidentiality on behalf of Aurora as he alleges at paragraph 321, which reads in part:

> *"321. Whilst open to considering suitable replacements for Aurora as Limited Partner, the General Partner has not consented to MAS becoming a Limited Partner. This is clear from the summary of events set out below.*

(a) *In around September 2013, the General Partner was approached by van Eyk in relation to the possibility of assigning Aurora's interest in the Cayman Partnership. Whilst I was aware of this approach, as far as I knew, the identity of the assignee was not identified at this stage. This is reflected by the fact that draft deed of assignment that passed between the General Partner and van Eyk did not identify the assignee (copies of those drafts are at pages 936 to 939).*

(b) *From the contents of Mr. Wallace's first and second affidavits, it has become apparent that van Eyk (on behalf of Aurora) have provided a significant amount of confidential information concerning the affairs of the Cayman Partnership to MAS on 24 September 2013, without informing the General Partner of the Cayman Partnership and in breach of Aurora's confidentiality obligations under the limited partnership agreement of the Cayman Partnership. The email from Jacqui Lemon and its enclosures are exhibited at pages 210-658 of TJW2 shows that she provided Mr. Wallace with a huge amount of highly confidential material concerning the investment strategy and financial affairs of the Cayman partnership. Amongst the attachments was the General Partner's Investor Report for the period ended June 2013, which was issued on 10 August 2013 and contained details of the Cayman Partnership's strategy of building up its shareholding in Lantern. I am extremely concerned by this as it appears that MAS has subsequently used this confidential information to purposefully impede the Cayman Partnership's strategy in respect of building up its shareholding in Lantern and to further the unlawful means conspiracy. This is explained in more detail in Mr. Naylor's tenth Affidavit. As I explained in more detail in section 13 below, once the General Partner of the Cayman Partnership became aware of this significant and detrimental breach by Aurora of its obligations under the limited partnership*

agreement, it served a default notice on Aurora in accordance with its rights under clause 10.1 of the Partnership."

614. The Court will be returning to the issue of default notices at a much later stage of this Judgment.

615. Mr. Kerr notes at paragraph 321 (i) that Aurora refused to execute a Deed of Assignment in favour of MAS, regarding the Bear Fund, and that MAS was fully aware of this from the background email correspondence.

616. Mr. Kerr then makes a number of critical observations as to the conduct of MAS at paragraph 322:

> *"322. The fact that MAS had unsuccessfully attempted to become a Limited Partner in early 2014 is confirmed by an exchange of correspondence on the point between MAS and the General Partner in November 2014 and a subsequent request made by Aurora (on 9 December 2014) seeking the Cayman General Partner's consent to the assignment of Aurora's interest in the Cayman Partnership to MAS. The Cayman General Partner declined to give its consent on the ground that MAS was a competitor and informed Aurora of its decision on 14 January 2015. Copies of the relevant correspondence on this point are at pages 990 to 1008. Despite it being clear that the General Partner had not consented to an assignment of Aurora's interest to MAS – and that MAS was therefore not a Limited Partner – MAS has nonetheless intermeddled in the affairs of the Cayman Partnership and held itself out as if it was a Limited Partner. Amongst other things:*
>
> *(a) As I have explained above, MAS wrote directly to the General Partner on 28 July 2014 seeking information and documentation about the Cayman partnership. The General Partner wrote to van Eyk on 9 September 2014 to explain that the General Partner would not be communicating with MAS as*

MAS was not a Limited Partner. Copies of this correspondence are at page 1009).

(b) Russells (who are lawyers instructed by MAS) wrote to, and then later met with, the FMA raising alleged concerns about the New Zealand General Partner and the Cayman General Partner. In doing so, Russells wrongly represented that MAS was a Limited Partner. A copy of Russell's letter to the FMA dated 28 July 2014 is at pages 1010 to 1013.

(c) Russells also wrote to McGrath Nicol on 28 July 2014 who were the receivers appointed over the New Zealand General Partner. A copy of Russells' letter is at pages 1014 to 1016.

(d) MAS also wrote directly to the Cayman Partnership's auditors raising questions about the Cayman Partnership's financial statements."

617. The Court at this point carefully reminds itself that MAS was an entity with which the Petitioners chose to ally themselves.

618. There then follows a series of paragraphs dealing with the unsuccessful attempt by MAS and Logic to call a general meeting.

619. The paragraphs are central to forming a coherent understanding of what the GP alleges to have transpired in this case, and once again in the interests of justice the Court considers that it has an obligation fully to set out the relevant paragraphs, from paragraphs 323-326, as follows:

"*323. On 3 October 2014, Mr. Wallace on behalf of MAS and Mr. Marshall on behalf of Logic sent a joint letter addressed to the Limited Partners of the Cayman Partnership (a copy of which is at pages 1017 to 1028).*

(a) The letter was entitled, "Torchlight Fund LP (TFLP) – Recovery and Exit Strategy' and went on to explain that the 'strategy' included the removal of the Cayman GP and the adopting of asset strategies to maximise the recovery of investors' capital.

(b) *The letter stated that:*

"Both Greg Marshall from Logic Fund Management Limited ("Logic") and Millinium have worked together on the Recovery and Exit Strategy which briefly is to:

1. *Replace the [Cayman GP];*
2. *Engage a new investment team lead by Millinium and Logic ("New GP")...*
3. *Mandate the New GP to drive, without delay, the realization and return of investors' capital...*
4. *Ideally execute the Recovery and Exit Strategy over two years...'*

(c) *After setting out a list of alleged complaints about the Cayman General Partner's conduct, the letter set out proposed changes that Logic and MAS wished to introduce to the fees that would be payable to Logic and MAS on replacing of the Cayman General Partner. These included the introduction of a 'Disposal Fee' of 1.35% of the sale price on disposal of the Cayman Partnership's investments and an amendment to the 'Performance Fee' so that a performance fee was payable in the following way 'Baseline value as the start point, 15% of the profits above a 10% investor IRR payable at fund wind up'*

(d) *The letter also stated that Mr. Marshall would' contact each of you shortly to arrange a meeting in Auckland during October 2014 to introduce the new GP team and to more fully outline the proposed Recovery and Exit Strategy'*

324. *Accordingly, it is clear from the content of the above letter that MAS and Logic were looking to remove the General Partner so that they could themselves take over the management of the Cayman Partnership and thereby generate significant fees for themselves.*

325. *In addition to contacting the Limited Partners directly in an attempt to persuade them to remove the General Partner so that they could themselves take over the management of the Cayman Partnership and thereby generate significant fees for themselves.*

(a) *I can see from the document at pages 1029 to 1031 that, on 9 October 2014, Mr. Marshall sent Mr. Bagnall a letter on MAS and Logic headed paper addressed to the Cayman General Partner requesting a meeting of the partners of the Cayman Partnership. The evident purpose of this meeting was to pass resolutions to remove the Cayman General Partner and appoint MAS and Logic in its place. At Mr. Marshall's request, ACC signed a letter to the same effect.*

(b) *On 16 October 2014, a request for a meeting of the partners of the Cayman Partnership was then made to the Cayman General Partner by Mr. Marshall (a copy of which is at pages 1032 to 1035). No resolutions or purpose were proposed.*

(c) *As I have explained earlier, in order to call a partners' meeting, it is necessary that those requesting the meeting reach a threshold of 20% of the committed capital of the Partnership. However, the request put forward by Mr. Marshall fell short of that threshold and therefore the General Partner was not required to call a meeting.*

(d) *I have seen an email dated 24 October 2014 that Mr. Wallace sent to Mr. Marshall which forwarded an email that Mr. Wallace had just sent to the Cayman Partnership's auditors (once again seeking to apply pressure to them). A copy of that email is at pages 1036 to 1037. In his email, Mr. Wallace also stated, 'Kerr's failure to respond will be good for the court proceedings – when they occur '. Accordingly, it seems clear that Mr. Wallace was expecting the Cayman General Partner to resist their actions and that the dispute would lead to legal proceedings. Mr. Wallace was also looking to create a documentary trial that he could rely on in those proceedings.*

(e) *On 29 October 2014, the Cayman General Partner wrote to Aurora informing it that it had received correspondence from another party (namely, MAS) purportedly in the capacity as trustee of the Bear Fund. A copy of the General Partner's letter is at page 1038.*

(f) *On 31 October 2014, the Cayman General Partner wrote to Mr. Wallace informing him that it had no record of MAS's ownership of an interest in the Cayman Partnership. This accurately reflected the true position, as explained above. A copy of the General Partner's letter is at page 1039.*

(g) *The Cayman General Partner then wrote to each of Logic, ACC and CAML in early November 2014 to explain that the request for a meeting of the partners would not be acceded to as the 20% threshold was not met. A copy of the General Partner's correspondence is at page 1040 to 1042.*

(h) *On 17 November 2014, Mr. Marshall wrote to the General Partner complaining that a meeting of the partners should be called because the threshold of 20% of committed capital had in fact been met. A copy of Mr. Marshall's letter is at page 1043. Mr. Marshall was wrong and it appears that he had erroneously included MAS, as if it was a Limited Partner, representing Aurora's interest, within his calculations.*

(i) *On 20 November 2014, I also received an email from Mr. Traveller (of CAML) asking what the level of committed capital in the Partnership was at that time. I responded to Mr. Traveller on 22 November 2014 informing him that the issued capital was AUD266m. On 28 November 2014, the General Partner responded to Mr. Marshall's letter of 17 November 2014 confirming that the threshold required had not been met. A copy of that correspondence is at page 1044.*

(j) On 8 December 2014, I exchanged further emails with Mr. Traveller in which I explained to him why the threshold had not been met- namely, because MAS was not a Limited Partner. Copies of those emails are at pages 1045 to 1047.

326. Therefore, despite MAS and Logic's best efforts to force out the General Partner by persuading the general body of Limited Partners that this course of action was warranted, their attempts to do so had failed. Having failed in that approach, they evidently turned their attention towards the Petition proceedings."

620. The narrative of events contained in these passages is one that the Petitioners have not attempted to refute. That is not surprising, because the narrative is incontrovertible. Instead, they currently seek to maintain the Amended Petition on much narrower and more technical grounds. Nonetheless this episode is important in assisting the Court to determine which witnesses are credible and which are not, and which ones may be subject to ulterior intentions.

621. Mr. Kerr for understandable reasons then elaborates further upon the facts in the context of what he describes as an unlawful means conspiracy, implicating the following:

(a) Millinium, MAS, Mr. Wallace;

(b) Mr. Marshall;

(c) ACC, Mr. Bagnall; and

(d) CAML

622. The Court does not consider that it is necessary or appropriate to enter upon a formal examination of these alleged matters because the just and equitable jurisdiction of this Court in respect of these present proceedings must be exercised in accordance with the legal principles which have been earlier identified.

623. However, some aspects of those allegations do give rise to issues which it is relevant for this Court to take into account. For that reason the Court on a selective basis only will highlight some of Mr. Kerr's factual complaints:

624. For example, paragraph 329(c) (A) (B) (C) (D) and (E):

> "(A) *As explained above, confidential information about the Cayman Partnership has been provided, in breach of the Cayman Limited Partnership Agreement, to MAS. That information has enabled MAS to interfere with the Cayman Partnership's investment strategy in respect of Lantern and to join in the campaign with the other Conspirators against the Cayman Partnership and the Cayman General Partner.*
>
> *(B) Confidential information in respect of the Cayman Partnership has also been provided to journalists so that it might be used in furtherance of a misleading press campaign and in an attempt to mislead regulators and auditors into thinking that purportedly genuine concerns had been covered by the press. In particular, on 23 September 2014, Mr. Bagnall spoke with Mr. Tim Hunter, then deputy editor of the Auckland Business Bureau at Fairfax media which led to Mr. Hunter publishing an article about the Cayman Partnership on 28 September 2014 (a copy of which is at page 1049). In that article, various confidential matters were revealed and reference was made to certain of the allegations that are now included in the Amended Petition. Mr. Hunter also referred to both CAML and ACC being partners in the Cayman Partnership. It is evident that Mr. Marshall (at least) was also heavily involved in these events because he subsequently emailed one of the Logic Investors (Erin Day) explaining that he had intended to contact her that 'a media campaign will begin in earnest this weekend" and that she should not 'be alarmed by what you read and hear... the fund assets are very valuable" (a copy of Mr. Marshall's email is at pages 1051 to 1065).*

(C) Repeated attempts have been made to disrupt and delay the completion of the audit of the Cayman Partnership's financial statements and prevent unqualified audits from being given. As I have already explained, the Conspirators have repeatedly contacted the Cayman Partnership's auditors raising various complaints about the Cayman General Partner and seeking to apply pressure to the auditors. By way of example, almost identical letters have been sent to the Cayman Partnership's auditors by MAS and Logic in October 2014. Copies of these letters can be found at pages 1053 to 12057. Whilst the auditors have continued to provide unqualified audits, as a result of the Conspirators interference, they have had to undertake a far more in-depth and time consuming audit procedures than would normally be the case.

(D) Despite multiple consecutive unqualified audit reports, the Conspirators have also repeatedly made similar complaints to regulatory bodies about the conduct of the Cayman General Partner. Those complaints have been based on the same false allegations that re contained in the Amended Petition.

(E) The Conspirators have caused the Petition proceedings to be issued on the basis of false and misleading evidence, baseless accusations and the false suggestion that the Cayman Partnership should be would up on account of concerns genuinely held by the Petitioners about the Cayman General Partner's conduct when in fact the Petition has been brought on account of the common aims."

625. At paragraph 329 (f), Mr. Kerr continues:

"(f) Whilst Mr. Marshall and Mr. Wallace may be the drivers of the conspiracy, it appears that CAML and ACC (in particular, Mr. Bagnall) have also been willing participants.

(A) *they appear to have met together to discuss how the conspiracy should be pursued and shared confidential information;*

(B) *they have also approached the FMA in an attempt to prompt it to take action against the General Partner;*

(C) *they have applied pressure to the Cayman Partnership's auditors; and"*

(D) *they have prepared evidence (which in many places is disingenuous) in support of the allegations contained in the Amended Petition"*

626. At this point the Court reminds itself that even if there has been misconduct on the part of the Petitioners that is not necessarily misconduct which the Court is enabled to take into account in determining whether it is just and equitable to wind up this Partnership, as there are circumscribing principles which as we shall see must govern the Court's approach. More broadly, however, in relation to assessing credibility at large, misconduct by the Petitioners is a matter to which the Court has a duty to have regard.

627. In the closing part of his very substantial Fifth Affidavit Mr. Kerr deals with certain default notices issued under section 13 of the Partnership LPA. They raise an issue which will be dealt with and decided at the conclusion of this Judgment, and they may or may not also have any direct or indirect bearing on the exercise of the just and equitable jurisdiction itself, but instead will possibly constitute a separate matter for consideration.

628. Paragraphs 333-339 state:

"*Aurora*

"*333. As I have already explained, it became apparent to the General Partner, by August 201, that Aurora had breached its confidentiality obligations under clause 15.5 of the Cayman Partnership LPA. Specifically, van Eyk (on behalf of Aurora) provided a significant amount of confidential information concerning the investment strategy and financial affairs of the Cayman Partnership to MAS, competitor of the Cayman Partnership, in September 2013. The provision of that information enabled MAS to implement its own*

competing strategy in respect of Lantern, ultimately allowing MAS to block the General Partner served a default notice on Aurora on 13 August 2015. In response to this, Aurora has obtained an Order of Injunction to prohibit the General Partner from referring to Aurora as a "Defaulting Party", pending determination.

334. *It has become clear from the Petitioners' discovery that ACC has interfered with the conduct and management of the Cayman Partnership in breach of Clause 4.7 (a) of the Cayman Partnership LPA. In particular, ACC attended meetings from, at the latest, the beginning of October 2014, onwards with other parties, including MAS, to form a plan with MAS and other to interfere in the management of the Cayman Partnership as part of the unlawful means conspiracy detailed above.*

335. *In addition, ACC has shared confidential information in breach of clause 15.5 of the Cayman Partnership LPA. In particular, Mr. Bagnall spoke with Mr. Tim Hunter of Fairfax Media on 23 September 2014 and disclosed confidential information about the Cayman Partnership as explained above. The disclosure of this information by Mr. Bagnall, in breach of ACC's confidentiality obligations under the Cayman Partnership LPA, and in furtherance of the unlawful means conspiracy was intended to cause prejudice to the General Partner and the activities of the Cayman Partnership.*

336. *On becoming aware of these breaches, the General Partner therefore served a default notice on ACC on 27 May 2016.*

CAML

337. *As explained above, CAML has interfered with the conduct and management of the Cayman Partnership in breach of Clause 4.7 (a) of the Cayman Partnership LPA. It is evident from the Petitioners' discovery that CAML attended meetings with parties, including with MAS, to form a plan*

to interfere in the management of the Cayman partnership's auditors, PwC, on 25 March 2015 and again on 1 July 2015 to request that PwC conduct a detailed review of the conduct and management of the Cayman Partnership. This was designed to interfere with and delay or prevent the provision of the audited accounts by PwC, and significantly added to the cost of the Cayman Partnership's audit, to the detriment of the Cayman Partnership.

338. In addition, and in breach of Clause 15.5 of the Cayman Partnership LPA, CAML has breached its confidentiality obligations by sharing sensitive and confidential information with MAS. In particular, it appears from MAS's discovery that CAML provided them with the draft dead of settlement between CAML and the Torchlight Group that included amendments proposed by Burton & Co, the lawyers to the Torchlight Group. This draft settlement agreement contained highly confidential material concerning the price at which the Torchlight Group was willing to purchase CAML's interest in the Cayman Partnership. I note that CAML suggest that they are not the source of this document but, in circumstances where it was not provided by me, I do not understand how otherwise it would have come into MAS's possession. We do know, from documents disclosed, that as part of the concerted action to bring this Petition, the Petitioners have agreed to provide each other with documentation. On that basis, a route from CAML to MAS seems the only inference to draw.

339. On becoming aware of these breaches, the General Partner therefore served a default notice on CAML on 27 May 2016. "

629. In supplementary examination–in-chief Mr. Kerr corrects paragraph 124 of his Fifth Affidavit, to the effect that he did not own the assets of Galt Nominees Ltd, albeit members of his family did. He held the shares as trustee only. He explains that PGC and SCF had been historic competitors for about 100 years.

630. SCF had been the largest financial company in New Zealand, followed by another entity owned by PGC. Of the 62 finance companies that existed in New Zealand in 2000, 61 had failed and only the one owned by PGC survived ("MARAC").

631. Mr. Kerr goes on to describe the Christchurch earthquake in February 2011, causing the loss of lives of 18 people in PGC House. He indicates that "*pretty much the entire members of staff who did the work for Torchlight were killed.*"

632. He explains that the Partnership had a cornerstone position in Lantern and had a ten year strategy which they believed was going to create an enormous amount of value. The strategy was first to restructure the business, and then embark on improving the operating returns. The Partnership could buy back stock thereby increasing the Partnership's share of the benefit. Then, based on information received from Aurora MAS moved to try and get out of the obligation to sell shares back to Lantern. Instead, the opportunity to gain control was lost, and with it according to Mr. Kerr $200- odd million which would have accrued to the Partnership.

633. Put in the manner that Mr. Kerr has put it to the Court this was clearly a very major matter, and not merely an incidental event. In other words, the harm that was done to the Partnership was clearly measureable harm.

634. In cross-examination, Mr. Lowe brought to Mr. Kerr's attention the LPA provisions dealing with audited accounts, and the requirement that they be furnished within 135 days following the end of the accounting period. Mr. Kerr points out that notwithstanding lateness all sets of accounts had been completely unqualified and "*the actual timing is in the hands of the auditors*".

635. There were exchanges as to letters sent on the part of the Petitioners to Grant Thornton and PwC, with Mr. Kerr stating that the auditors were "*bombarded*". Mr. Kerr also raises the Smith email to which reference has been made and "*the overall strategy anticipated in the Smith email*".

636. Then follows a rather confusing exchange concerning RCL valuation and the different accounting methodologies for valuations, none of it of a significant assistance to the Court.

637. Mr. Kerr does however state that whereas previously audit exercises had been relatively economic and at $50-60,000 a year, following the communications received they went to "*half a million dollars and so on*".

638. Mr. Kerr states that as a result of seeing the Smith email in discovery the extent of the "*conspiracy*" was realised led in large part originally by CAML.

639. He also reiterates that the auditors reduced the level of materiality so that means they took a lot longer.

640. There was some discussion as to the role of Praxis in Guernsey and how a drop box was used for collecting data, accessible through the internet.

641. There was then some discussion of how PGC had failed to provide its half year report for a six month period ending 31 December 2015 by 31 March, resulting in a regulatory breach in New Zealand. Apparently this was attributable to its new auditors adopting a conservative approach. None of this is of help to the Court, which at one point refers to a good deal of "*red tape*".

642. Mr. Kerr indicates that converting debt to equity took longer than the "*work out*" of existing assets. RCL was considering building houses as distinct from developing land value was realised over time through to the end of the fund.

643. He expresses his belief that liquidators would not do a better job than the GP in realizing value: "*dumping assets*" would make him extremely uncomfortable, with focus on short-term asset value. The Partnership owned a land bank for which zoning could be increased over time and there was the potential to create a very substantial business: "*Can we be a billion dollar business? Absolutely*".

644. Mr. Kerr differentiates between existing assets and a restocking.

645. He was referred to an email dated 16 December 2012, headed "*Final Terms*", where Mr. Grill of Wilaci had written to his associate Mr. Skidmore concerning security for the Wilaci loan: "*I agree to the arrangements you have agreed with George as described below*". Mr. Kerr was challenged as to whether this was finally agreed as distinct from what the terms

should be, and Mr. Kerr rejected that assertion, stating that he felt bona fide that there was an agreement from which Mr. Grill resiled.

646. Mr. Kerr maintains that Mr. Grill and Mr. Skidmore knew of the in specie distribution which followed, and without an agreement thinks there would be no reason to proceed with the in specie distribution. Mr. Grill had sent Mr. Skidmore to Geneva "*to oversee the in specie*".

647. Mr. Kerr points out that the $37 million owing was repaid in good faith to Wilaci, and the remaining issue related to the validity of certain penalty fees, a matter now resolved by consent as the Court has been informed.

648. As with many commercial disputes, there are broad differences of view point on both sides. However, given Mr. Kerr's understanding of events and the state of mind to which he refers in his evidence the Court is of the view that this matter is essentially of no significant relevance to the matters which must be decided. Like so much else, it is a diversion only.

649. Mr. Lowe confirmed to the Court that there was no dispute as to the Partnership holding a valuable asset, although there was obviously a debate of about 100 million here or there in effect.

650. Although this concession was made orally, it is to be noted that it is one which inevitably changed the entire character of these proceedings from their point of origin.

651. Returning to the subject of Mr. Grill, Mr. Kerr states that the agreed variation was that he would accept from the Cayman Partnership $37 million plus $5million plus the AUD$500,000 alleged penalty component, and this was a variation agreed on 16/17 December 2012.

652. Mr. Kerr was asked about his relationship with Mr. John Darby in New Zealand but this is of historical interest only to this Court.

653. There followed questioning about East Wanaka, and Mr. & Mrs. Meehan, and certain transactions with Mr. Darby during 2010 and 2011, none of it bearing on the current Partnership. Assets were acquired from Mr. Darby as part of the broader RCL strategy, Mr.

Darby being chairman of the NZ Partnership Advisory Committee. In the absence of any suggestion of possible financial impropriety being involved the Court found this questioning to be generally uninformative.

654. Mr. Kerr was asked about the sale of EPIC shares by the NZ Partnership to Torchlight Investment Group in April 2012, and he said that the latter was not a related party under New Zealand Stock Exchange Rules, and that the GP was in compliance with the relevant LPA. He did not accept there was any negative impact to the Partnership. In Mr. Kerr's view it was compliant with the LPA and better than on an arm's length basis. The terms of sale were actually better for the NZ Partnership than on the open market, and fully disclosed. Mr. Kerr denies Mr. Lowe's suggestion there was a conflict of interest, bearing in mind both the relevant LPA and the arm's length principle. At the material time Mr. Michael Tinkler was counsel to the NZ Partnership and provided advice as required.

655. During this phase the Court intervened to express concern at the extent to which New Zealand law was being brought into the picture.

656. Mr. Kerr points out the destruction of NZ Partnership documents as the central repository had been destroyed in the earthquake.

657. Communication with the respective Advisory Committee members Mr. Darby, Mr. Wilson and Mr. Cleary often involved telephone discussion, only minutes in the case of Mr. Cleary anyway if a particular issue needed to be resolved. There would be 20 meetings a year including telephone calls and in Mr. Wilson's case significantly more. Mr. Kerr said that when a resolution was required, they knew how to do it properly.

658. He was taken to a minute concerning New Chums Beach, and the GP seeking approval for the proposal for a strategy to obtain a small extra piece of land from Mr. Darby.

659. He was asked about APGOF investing in the Blueprint Funds. There followed a long series of exchanges concerning the demise of APGOF and van Eyk, none of which once again was of any great help to this Court in examining the central issues of this case. It appears that APGOF had acquired RCL sub-participations which were converted into Limited Partnership interests rather than repaid. Mr. Kerr emphases that this was the commercial

choice made in the interests of the Partnership: "*My job is to operate on behalf of Torchlight*".

660. MIML had made a redemption request of APGOF, with which APGOF could not comply.

661. Mr. Kerr states that the reason van Eyk failed is that its funds under management declined from $2 billion to $1 billion and at the critical time the $30 million investment in APGOF on behalf of MIML could not be redeemed.

662. Mr. Kerr asserts, correctly, that he was not responsible for these events. As far as this Court can see, no adverse inference whatsoever can be drawn against the GP in these proceedings arising from those events. If APGOF found itself in an illiquid position, that was its responsibility.

663. He was asked about the various negotiations with CAML, notwithstanding the background of triggering an intent to investigate disclosed in the Steve Smith email, and how in Mr. Kerr's view this has caused a lot of requests to be received by auditors and regulators. The Court accepts Mr. Kerr's view as correct.

664. In due course Mr. Kerr was asked about the default notices and he said that if the winding up is unsuccessful the GP would see itself as prosecuting the default notices. Nothing in the response can fairly be seen to be indicative of any vendetta on Mr. Kerr's part. He did however admit to being emotional and upset, and he reiterated that this was a very successful Partnership. These appear to the Court to be entirely normal reactions. He also said he is angry at not being able to focus on the job at hand. Again, this is hardly surprising or unjustified for him to express.

665. During re-examination the Court asked Mr. Kerr about an entity described as Fortress, and Mr. Kerr explained that this was a very large American asset management company, and a Limited Partner in the Partnership. Mr. Kerr's evidence was that Fortress had at one point objected to the non pro rata redemption proposal, and ultimately it removed its objection.

666. He commented on CAML using its relationships with fellow government agencies, auditors, "*even judges*", to put a lot of pressure on the Partnership and on Mr. Kerr. He

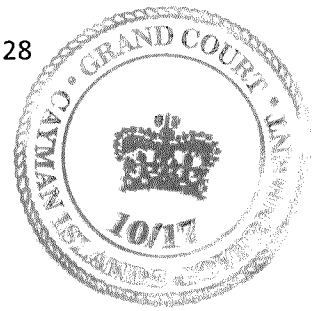
added that there had been a continued bombardment of pressure on the auditors: "*So I felt these people weren't acting as Partners, they were really seeking to destabilise the Partnership*:"

667. Mr. Kerr clarified that of the original issued capital of $275 million, $31 million was the APGOF/MIML non-pro rata redemptions, which took the figures down to $245 million. About $88 million, give or take, was from the Petitioners and the balance was held by the remaining Limited Partners: "*so that's about 150-something million of initial original capital*".

668. Mr. Kerr added that an enormous amount of time had been devoted to defending the Petition and that the costs had been "*extraordinary*". However, the ultimate distributional cheque would probably be two times the investment at the end of the life of the Partnership.

669. The Court has had the opportunity to see and hear Mr. Kerr over an extended period and also to read his very substantial Affidavit evidence. The impression formed is of a very skillful and talented investment professional who is also forward-looking in terms of both opportunities and risk-management. He appears to have paid less attention to administrative matters than was perhaps ideal, including such areas as personal record-keeping and ensuring that the Advisory Committee was populated at higher than minimal level at various times.

670. However, in this context two important factors must be borne in mind. First, it is not alleged nor can it be alleged that any aspect of his stewardship has caused any fundamental financial detriment to the Partnership. Secondly, it was not alleged in cross-examination that Mr. Kerr acted either dishonestly or alternatively even in bad faith in any of his Partnership activities. Any such emotion as he has expressed is entirely understandable in light of the history of these proceedings and the allegations and insinuations which have been made against him and against the GP at large. In conclusion, the Court considers him to be an honest and reliable witness along with his colleague Mr. Naylor and one whom the Court accepts as truthful and reliable.



Evidence of Mr. Harford

671. In the Affidavit of Darryl Harford dated 28 October 2016 Mr. Harford states that he is a director of Podere Investments Limited ("Podere"), which is a Limited Partner in the Partnership.

672. He describes his background and role at paragraphs 3 and 4:

> "*3. I am a professional investor-with many years' experience as a Director of Investments and Chairman of the Investment Committee at ipac securities limited (ipac). Ipac is a well-respected research group, adviser and partnerships manager based in Sydney, Australia and was established in 1984 by several well regarded Sydney investment professionals. I joined ipac in 1985, shortly after its formation. Ipac forms part of the AMP group.*
>
> *4. I have University degrees in law and economics and hold other tertiary qualifications in finance and investment. I was one of the early Directors of ipac and spent much of my professional investment career with the company in a variety of roles – culminating in leading its investment management activities, from 2000 to 2006. During my oversight the funds Under Management grew in excess of $ 12 billion and included the multi manager portfolios designed for Australia and New Zealand's then second largest life insurance company, AXA Asia Pacific Holdings Limited (AXA APH).*
>
> *5. I was a member of the senior executive team of AXA APH, following their purchase of the original partner's shares in ipac securities in August 2002.*
>
> *6. I swear this Affidavit in support of the General Partner's defence in these proceedings."*

673. Mr. Harford confirms that he has read the Amended Petition and the Defence. He affirms his surprise and states there is no basis on which it can properly be said that the GP is not acting in the best interests of the Partnership. He adds at paragraph 10 that liquidation

would not be in pursuance of the maximum long term return for all Limited Partners in accordance with the original objectives and time frame of the Partnership.

674. He has a high regard for Mr. Kerr's investment ability.

675. At paragraph 14 he refers to Mr. Traveller seeking to question Mr. Harford's independence as formerly the chief investment officer of PGC and Perpetual Cash Fund, but he disputes that he is an "*associate*" of Mr. Kerr.

676. He states that between June 2011 and July 2012 he was retained on a monthly consultancy retainer by the then managing director of Perpetual Trust to provide advice to the business, and to act as chief investment officer until a suitable candidate could be recruited. Nonetheless he has not been retained by Mr. Kerr nor the GP.

677. He describes investing in the NZ Partnership and being satisfied with its performance.

678. He states at paragraphs 19-24:

"*The in-specie distribution*

19. During the second half of 2012, Mr. Kerr discussed with me and (as I understand it) several other limited partners at the time his concerns whether New Zealand was the most suitable domicile for the Partnership.

20. He explained that the investment focus of the NZ Partnership was now oriented more to Australia and the UK- rather than the New Zealand – where it had been established. In particular, it was clear that NZ Partnership would need to seek new investors to take advantage of a significant investment opportunity that had arisen following the NZ Partnership's decision to place the old ASX listed RCL Company into receivership. I understood that the NZ Partnership's General Partner was considering ways of restructuring the assets of the old RCL Company so that a new property business could be created and the assets owned by the old RCL Company for the benefit of all Limited Partners. This required significant additional investment. However, if this strategy could be

successfully implemented, which would take time, the long term realisable gains could be significant for all Limited Partners.

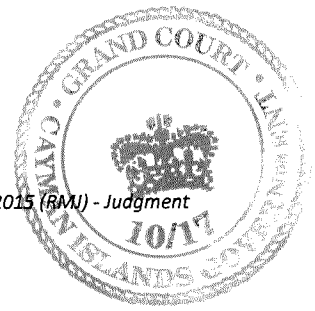
21. Mr. Kerr also articulated the rationale for the change of structure and capital raising and how the new Cayman Partnership would make use of the new capital raised in letters he sent to the Limited Partners during December 2012.

22. Following this the NZ Partnership made an in specie distribution of its assets into the new Cayman Partnership in December 2012. I am aware that the new Cayman Partnership raised additional capital, which it needed to pursue to its investment strategy. As far as I was concerned these steps and the strategy were adequately explained to me in my capacity as a Limited Partner.

23. I had no objection to the assets of the NZ Partnership being contributed to a successor Partnership in a different domicile if it assisted the raising of further capital and allowed for the implementation of the intended investment strategy. I was pleased about the prospects for my investment and the value uplift likely to be created once RCL was restructured so as to be operated as an equity investment. I recognised Mr. Kerr as one of the few investment professionals able to identify and execute on this strategy. And that extra value would be create for the Cayman partnership.

24. I decided to increase my investment by participating in the capital raising by the new Cayman Partnership. I also suggested to my brother that he might wish to become an investor as part of the new capital raising. My brother met with Mr. Kerr and me during this period and following those discussions, my brother arranged for his private superannuation fund to invest in the Cayman Partnership."

679. He continues at paragraphs 27-33:



"27. *Most investors in private equity are attracted by the special skill set of the General Partner (or manager) who is also seen as the "promoter" of the Partnership. Investors evaluate the skill of the manager and agree to invest monies in the Partnership managed by him in the belief that he will achieve a good outcome for them over the life of the Partnership. This is especially true of distressed debt investing as the skill set is a very specialized one. It was the recognised skills of Mr. Kerr and his team that attracted me to invest first in the NZ Partnership and then subsequently in the Cayman Partnership.*

28. *Distressed debt investing can be an unpopular activity and is not for the faint hearted. Commercial disputes often arise and people with strong egos and emotions have divergent views about the best outcomes. The former equity holders in a failed enterprise are seldom happy experiencing the owners of the enterprise's debt take control to capture value. The Torchlight team- led by Mr. Kerr – has managed the investment strategies of both Partnerships with determined focus, skill and perseverance since 2009. In my experience few managers are capable of articulating and implementing this particular specialized investment strategy. The Torchlight team identified and implemented the South Canterbury Finance investment opportunity which drove a significant part of the good result achieved by the NZ Partnership. The RCL and Lantern investment opportunities – also commenced during the NZ Partnership – will in due course – and with skillful execution and adequate time – drive a much more significant return outcome for all the investors in the Cayman Partnership.*

29. *Another distinctive feature of distressed debt investments is the high need for confidentiality in order for a Partnership to realize its full potential. A distressed debt investor often acquires a strategic control holding in an investment but also wishes to acquire a greater holding at the lowest possible price. He will subsequently use his position to increase the value of the investment before it is realised.*

30. *Professional investors also know that time is required to realize investments from distressed debt structures. When an investor chooses to invest in a limited partnership structure such as the NZ Partnership or the Cayman Partnership, he makes such an investment knowing from the outset that this is an, illiquid medium to long term investment and very different, from example, to investing into a listed company on the equity markets.*

31. *Investors in limited partnerships such as the Cayman Partnership do not, therefore, expect the same level of disclosure as they would receive from a publicly listed company in which they are directly invested and can trade on a daily basis. The rules governing public companies are quite different and high levels of disclosure are clearly laid down in stock exchange rules.*

32. *I am happy with both the initial strategy and execution of the investment program undertaken by Mr. Kerr and the two Partnerships since my initial investment and with what the General Partner has achieved. I have no doubt that this is due to Mr. Kerr's skill and acumen and in his senior team's discipline in implementing the investment strategy to date.*

33. *It is hard to contemplate a worse event of the Cayman Partnership than to now be put into liquidation and its assets sold for whatever price can be achieved quickly. In my experience, liquidators normally have neither the correct financial incentive nor skill set or patience to manage assets to optimize the long-term recoverable value of each. In addition to its successful sale of its holding in Local World which generated significant investment returns, the Cayman Partnership has now restructured a very valuable land bank that it holds in its RCL investment that will, I believe, yield very significant returns for all Limited Partners if the General Partner is allowed to complete the task it has set itself. Genuine medium to long term investors in distressed debt partnerships view the appointment of a receiver or liquidator as having a significant negative impact on value. For my part, I certainly believe that a court imposed liquidation could destroy*

the value of my investment and would definitely impair the potential return by a huge margin."

680. Mr. Harford goes on to indicate that throughout the period of this investment he has felt adequately informed, and that investor letters provide clear explanations.

681. Mr. Harford has not been overly concerned about financial accounts being delivered late as the strategy has always been a long term one where value is expected to arrive near end of the Partnership's life. He adds that Mr. Kerr has been available for regular conversations.

682. Mr. Harford sees no difficulty in the alignment of the Partnership with the Torchlight Group itself or in the GP holding a significant equity interest in the Partnership.

683 At paragraph 40 he draws a significant distinction between delays in providing information from a listed company and a closed investment vehicle with a long term strategy.

684. He notes at paragraph 41 that the accounts when provided have been unqualified.

685. Mr. Harford concludes by expressing his full confidence in the GP's stewardship, and expresses concerns at financial loss if the Partnership is wound up prematurely.

686. Mr. Harford adds in further examination-in-chief that he had advised large superannuation funds and had experience of private equity investment. He states that he found nothing unusual in a limited partnership agreement that allowed Carry to be paid on distributions in kind, contrary to views expressed by Mr. Bagnall.

687. In terms of information, he states that investment reports of Torchlight were extremely open, generous and informal in their provision of information

688. Under cross-examination by Ms Stonefrost, he says he had known Mr. Kerr for nearly 30 years and had worked with him at Ipac Securities Limited. They did not socialize.

689. He likes longer term investment and saw the Partnership investment as an outstanding opportunity. He knew of Mr. Andrew Wilson and knew of Mr. Grant Cleary. He disagreed with closing the fund.

690. Mr. Harford is aware that CAML had a desire to exit. In terms of a long fund, he has concerns about pulling out and "*was concerned that he had partners with conflicted objectives*".

691. He favours staying the distance to achieve good outcomes and the longer term.

692. He was asked about his consultancy role at Perpetual Trust Limited being a wholly owned subsidiary of PGC and about a loan to the NZ Partnership. Eventually, in the absence of independent valuation scrutiny, the NZ Partnership was required to repay the loan. He said the loan was unwound and no one lost any money.

693. In relation to private equity investment, he says the concern was for the appropriate timing "*to do the best thing by the assets*". He recalls discussing with Mr. Kerr what would be an appropriate time frame to gain value from RCL. He had increased his investment and "*doubled up*".

694. In re-examination he says the GP did not keep its strategy a secret from the Limited Partners, and he again emphasises engagement for the long haul.

695. In relation to Mr. Harford's supporting evidence, the first point to make is that notwithstanding the effort to discredit him somehow in relation to the Perpetual loan, a matter which in any event is irrelevant to these proceedings, Mr. Harford's testimony in support was entirely rational and wholly believable. With a wealth of experience in investment matters he provided Affidavit evidence and oral evidence that was perfectly consistent with the precepts of good sense. Bearing that fundamental reality in mind, the Petitioners' attempts to weaken his credibility did no more than emphasise the weakness and the difficulty of their own predicament. The Court accepts the truth of his evidence, such as it is, unreservedly.

Evidence of Mr. Cleary

696. In Mr. Grant Cleary's First Affidavit dated 31 October 2016 he sets out his history at paragraphs 1, 2, and 3:

"1. *I am a member of the US Financial Planning Association, the New Zealand Estate and Taxation Planning Council and Triple A Advisors Association. In 1993 I founded (and I still run) Cleary Planning Services Ltd (which is now trading as Cleary Wealth Management) ("CWM"), a boutique wealth management company based in Auckland, New Zealand. CWM now has assets under advice worldwide of more than NZ$1 billion, for clients who are, broadly speaking, based in the United States, Australia and New Zealand.*

2. *In my capacity as investment advisor at CWM, I help clients design investment portfolios which are bespoke to their specific needs. Once the investment portfolio has been set up, I provide ongoing monitoring services and advice on investment decisions. I run each of these bespoke portfolios on behalf of my clients but I do not accept any discretionary mandates; I work collaboratively so each investment decision is approved by me client on the basis of my advice.*

3. *In addition, CWM provides advisory services to investment and advisory committees of corporate clients."*

697. He then adds:

"8. *I understand that one of the supporting the Petitioners is identified as GT Nominees Ltd AXA – A/C Ngati Awa Asset Holdings Limited. As far as I am aware this particular entity hasn't existed for a number of years. The correct Limited Partner entity is Ngati Awa Asset Holdings Limited ("NAAHL") and I represent this entity.*

9. *Based on my knowledge and involvement with the Cayman Fund, as Advisory Committee member and before that advisor to a number of Limited Partners, I do not accept that any lack of confidence in the conduct or management of the Cayman Fund is justifiable. I accordingly make this affidavit in support of the General Partner's defence of the Proceedings."*

698. He met Mr. Kerr in New Zealand in early 2009, and like Mr. Kerr he is interested in distressed assets. He states that the aim is to increase the value of the asset through investment, development and management over a period of time, rather than a quick disposal. The Court considers this to be an important consideration which with all due respect to the Petitioners has been substantially overlooked by them throughout the course of this case.

699. Mr. Cleary continues at paragraphs 12-13:

> *"12. Generally speaking, an investor making an investment in a closed fund is backing the fund manager and not just the asset class. For my part, I look for an individual who shares my philosophy and passion and has the capability to carry out the investment strategy. Mr. Kerr is such an individual who shares my approach to the merits of distressed investing. I am convinced that he has the skill set required to deliver on such an investment strategy. This is why I advised my clients to invest in the NZ Partnership in 2009 and 2010.*
>
> *13. I had no concerns about the management of the NZ Partnership before the in specie distribution to the Cayman Partnership. On the contrary, from the information that I received on behalf of the Limited Partners that I represented, I was of the view that Mr. Kerr was, through the NZ General Partner, successfully delivering on its core investment strategy. I certainly had no concerns which made me question Mr. Kerr's probity or his ability to deliver on this strategy."*

700. He records that he understood the benefits of the in specie distribution into the Cayman structure and he understood its rationale.

701. Like Mr. Harford, Mr. Cleary professes no concern as to management practice, stating at paragraphs 15-17:

> *"15. As a representative for a number of the Limited Partners, I receive the Cayman Partnership's quarterly reports which take the form of newsletters*

or investor reports. They contain comprehensive detail and provide valuable information about the Cayman Partnership's investments and the General Partner's strategy. The newsletters often contain not just what is happening vis-à-vis a particular investment but also the underlying thesis behind what is happening. This is rare. The newsletters also offer up detailed minutiae of progress with investments such as progress with consents on Jack's Point, valuation discussions on RCL RPSs, and the rationale for the decision to invest in Local World.

16. *Whilst the publication of the General Partner's investment reports have sometimes been delayed, this is not a matter that has particularly concerned me. In contrast to the picture the Amended Petition seeks to portray about this evidencing Mr. Kerr's poor management of the fund and lack of transparency, I think the delays result often from Mr. Kerr's desire that the reports should always be engaging and informative and provide useful information for investors and that, as a result, he has in the past often delayed reporting until he feels there is something of material value to share. However, bearing in mind the details of the quarterly reports when received, the suggestion that delays in reporting could lead to a loss of confidence in the General Partners is difficult for me to comprehend. It certainly led to no concerns on my part.*

17. *Regarding the audited accounts, it is obviously important that the accounts have always been unqualified. This is particularly significant here given the level of attention which I understand the auditors have given to each set of accounts. I also think it is significant for an investor that the current auditors are Grant Thornton now and were previously PwC. I would have expected that unqualified audits from such prestigious and respected institutions would be of significant comfort to the Petitioners. I do find it surprising that the Petitioners appear to retain such suspicion even where the auditors have, as a matter of obvious inference, reviewed the particular transactions that are being called into question in this Petition."*

702. In summary, Mr. Cleary expresses satisfaction that the GP has at all times been completely transparent.

703. He describes how Mr. Wilson was on the Advisory Committee of the Partnership until he died in the summer of 2014. He himself was asked to take a position on the Committee by Mr. Kerr, but he refrained from doing so as he did not think it sensible to accept the position until the audit of the 2015 accounts was complete, so that he could review them before commencing the new role. This was his standard practice and not due to any specific concerns.

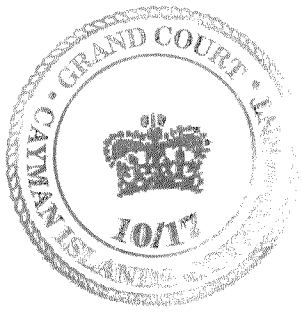
704. He was formally appointed on 14 August 2015. Mr. Kerr and Mr. Cleary formally met quarterly face-to-face and the meeting allowed him to understand and comment upon investments and strategy. Importantly he notes at paragraph 22 that Mr. Kerr also kept him updated, usually by texts and telephone calls. He states that he acted independently.

705. He maintains that whilst formal Advisory Committee approval was not required for the sale of the Partnership's investment in Local World, nevertheless he was kept informed and updated throughout the negotiations by Mr. Kerr (paragraph 24).

706. Contrary to assertions that he allegedly does not represent NAAHL, he affirms that at the time of his appointment he represented a number of Limited Partners based in New Zealand, including NAAHL. He refers Mr. Quinn's assertion to the contrary, and points to exhibited communication as evidence. Furthermore, he is not aware of any reason why his impartiality or competence might be questioned.

707. He refers at paragraph 26 to the Petitioners' allegations that he is an associate of Mr. Kerr, as follows at paragraphs 26-28:

> "*26. I have been shown a response provided by the Petitioners to a request for request for Further and Better Particulars which concerns me. I note that the Petitioners allege that I am an "associate" due to (i) Mr. Kerr's attempts to sell my financial planning practice to Van Eyk in 2013; (ii) Mr. Kerr's knowledge of the fact that I have cancer; (iii) Mr. Kerr's suggestion in an email that I am a "good" Iwi investor; (iv) the fact that I have*



expressed admiration for various investor update letters sent to Mr. Kerr; and (v) that I am aware of an apparent "plan" to make a buy-out offer to the Petitioners.

27. *I do not understand why any of the points made by the Petitioners have any relevance to the allegations made in the Petition. Indeed, it is unclear precisely what the Petitioners suggest is wrong with any of the five points that they make or why that would make me an "associate" (whatever such term means). None of the points raised have any impact upon my independence from Mr. Kerr or my role on the Advisory Committee. Nevertheless, I deal with each of these suggestions below:*

    (i) *Mr. Kerr introduced me to Van Eyk soon after PGC became a shareholder as Van Eyk were in the market for a wealth management company such as CWM. I can't remember exactly when this was but I had preliminary meetings with Mark Thomas of Van Eyk in Sydney and in Auckland subsequently in 2013 but concluded I was not interested in selling CWM to Van Eyk without any formal sale process having been commenced. No offer was ever discussed. I fail to see how the fact that Mr. Kerr introduced me to Van Eyk to discuss a possible transaction, which did not materialize, is relevant to the Petition or of any concern to the Petitioners. A general rule of business is that all businesses are always for sale and I am always happy to discuss someone's potential interest in my business.*

    (ii) *I cannot see how my medical condition or Mr. Kerr's knowledge of this is in any way relevant and I am concerned by the Petitioners' decision to include a reference to this private matter. Who I speak to about such matters is a private matter for me. It has no bearing upon my role on the Advisory Committee and I fail to see how it can be a matter of concern for the Petitioners.*

(iii) *Similarly, I cannot see how Mr. Kerr's opinion of me as being a "good" Iwi investor is relevant. Mr. Kerr is perfectly entitled to have his own opinion on my qualities as an investor. I take my independent role on the Advisory Committee seriously and any opinions that Mr. Kerr may hold about me have no impact on this.*

(iv) *I have explained my views on the helpful and insightful investor updates that Mr. Kerr provides to its Limited Partners above. This has no impact upon my independent role on the Advisory Committee or my scrutiny of any proposals made to me in this role by the General Partner.*

(v) *I am not a party to any discussions between the General Partner and the Petitioners. I am aware that a "non-pro rata exit" mechanism exists under the Cayman Limited Partnership Agreement whereby Limited Partners can redeem their limited partnership interests in the Cayman Partnership earlier than the mandated end of the Cayman Partnership. This has been used by the General Partner in the past to enable a Limited Partner to achieve early liquidity from its investment and redeem its entire interest in the Cayman Partnership. If, and to the extent that there are any negotiations or "plans" underway in respect of facilitating an early exit for any of the Petitioners (whether though the non-pro rata exit mechanism or other method), that is a matter for the Petitioners and the General Partner.*

28. *I do not understand what, if any, allegation is intended to be made about me by the Petitioners but I can confirm that I act independently and that my views on Mr. Kerr and the General Partner's conduct are not influenced by a misplaced loyalty to Mr. Kerr or by any of the matters set out above."*

708. The Court carefully reminds itself of a need to ensure that the testimony of witnesses supporting the GP should not be discarded or disparaged on the basis that any professional

connection with Mr. Kerr is in itself somehow itself indicative of bad or unreliable character on their part. Denigration of that nature is not merely unfair but is also deplorable.

709. Mr. Cleary disputes that there is any proper basis for claiming lack of trust and confidence in the GP and he expresses confidence that the GP is seeking to deliver long term value (paragraph 29).

710. Mr. Cleary then makes the general observation that it would be unreasonable for his clients to be prejudiced by an early termination of the Partnership because other investors have not allocated their liquidity requirements properly.

711. He states that it is self-evident that significant valuation will be lost if the Partnership is wound up before the planned time has lapsed, and he considers it is in the best interests of his clients that the Partnership continues for its full anticipated term. He continues to have trust in Mr. Kerr's judgment and ability.

712. Mr. Cleary then proceeds to provide some highly significant information about the background activities of Mr. Marshall and Mr. Wallace at paragraph 37-41:

> "*37. In late 2014, Mr. Marshall contacted me by phone to inform me that he was seeking to convince other Limited Partners to agree to a plan to replace the General Partner with a new General Partner led by Mr. Marshall and Mr. Wallace from Millinium Asset Management Pty Ltd. Mr. Marshall was seeking to persuade me to sign up to this plan. He didn't go into detail as he said he needed a non-disclosure agreement and I declined given that my view was the General Partner was doing a good job in managing the Cayman Partnership.*
>
> *38. Notwithstanding my initial indication to Mr. Marshall that I was not interested in participating in any attempts to remove the General Partner, in early 2015, I became aware that Mr. Marshall was running a "project" in which he was seeking to gather information concerning the General Partner from other Limited Partners or related individuals and share this information with any Limited Partners or other individuals who agreed to*

sign up to this "project". The aim of this "project" was to seek to remove the General Partner of the Cayman Partnership.

39. *Mr. Marshall approached me in February 2015 and asked me to sign up to this "project" and suggested that he would provide me with copies of the information he had obtained from other Limited Partners and copies of the legal advice he had obtained in relation to his attempts to remove the General Partner. On 2 February 2015, he sent me a copy of a draft Confidentiality and Non-Circumvention Deed that he asked me to sign and return a copy of this to him in order to confirm my support for the "project". A copy of Mr. Marshall's email on 2 February 2015 and the draft Confidentiality and Non-Circumvention Deed that was enclosed with this email can be found at pages 6-11 (the "Confidentiality Deed").*

40. *The Confidentiality Deed includes the following:*

(i) The recitals explain that Logic "has information and legal advice in relation to the Project" and that it intended to make this information available to me (the "Recipient") if I signed the Draft Confidentiality Deed "for the Permitted Purpose";

(ii) The "Project" is defined as "the investigation of, and steps taken, including the commencement of legal proceedings seeking the removal of the General Partner of the Torchlight Fund LP, Torchlight (GP) Ltd and any and all ancillary action that may be taken to secure the assets of the Torchlight Fund LP or to pursue persons or entities for the benefit of the Limited Partners of the Torchlight Fund LP";

(iii) The "Permitted Purpose" is defined as "the review of the Confidential Information by the Recipient for the purpose of assisting Logic in securing the aims of the Project";

(iv) Clause 2 placed a number of obligations on the Recipient;

(v) *Clause 4 contained an indemnity in favour of Logic for any breach of the obligations by the Recipient;*

(vi) *Clause 8 provided "In consideration of the provision of the Confidential Information and the introduction of the Project to the Recipient by Logic, the Recipient undertakes to Logic that it or its Representatives will not directly or indirectly contact, Transact with any person or entity associated with the Project without the prior written approval of Logic, which Logic may withhold in its absolute discretion"; and*

(vii) *"Transact" is defined as "to discuss the Project or deal in any way in relation to the Project to parties other than Logic".*

41. Given that I had no concerns with the conduct of the General Partner, and no wish to join a project that was seeking the removal of the General Partner, I did not agree to become a party to the Project and I did not sign the Confidentiality Deed."

713. The Court notes that Mr. Cleary's account is supplemented by other evidence in this case as to Mr. Wallace and Mr. Marshall that serves to support and confirm this witness's credibility and reliability.

714. At paragraph 46 Mr. Cleary notes that the GP is alleging that Mr. Marshall and CAML had interfered with the timely publication of the audited accounts for the financial period ended 31 March 2015, and that CAML had even written directly to the Partnerships' accountants. He also expresses concern that information which he provided to Mr. Marshall regarding imminent publication of accounts may have been acted upon by Mr. Marshall to ensure that they were further delayed.

715. Mr. Cleary's Second Affidavit is dated 27 February 2017, in response to the Second Affidavit of Mr. Quinn dated 23 November 2016, in which he disputed Mr. Cleary's representation of NAAHL.

716. Aside from NAAHL, Mr. Cleary sets out in paragraph 6 a total number of four Limited Partners whom he represents and who have consented to being identified. Then in paragraph 7 he states that he also represents a number of other Limited Partners. None of the Limited Partners whom he represents are related parties to Mr. Kerr.

717. He explains that until recently he was under the impression that NAAHL still wanted him to represent them. He states that it only in May 2016 that it was suggested that he was no longer appointed to represent them and was instead only appointed to act as a broker to find a purchaser for their investment. He accepts that position and will continue to liaise with NAAHL in respect of any potential sale of their investment.

718. None of this detrimentally affects Mr. Cleary's credibility nor does it have any material bearing on the issues in these proceedings.

719. In further examination-in-chief, commenting on Mr. Quinn's statement that NAAHL was introduced to the investment by Nick Farror Jones, Mr. Cleary confirms that Mr. Jones had no connection with Torchlight.

720. He explains also that he had sold off part of NAAHL's interest for them. Changes in personnel at NAAHL had resulted in breaks in communication.

721. Under cross-examination by Mr. Lowe he agrees that he has a fiduciary responsibility to his client and must avoid conflict of interests.

722. He had been associated with a fund named EPIC and a fund named Artefact before he met Mr. Kerr.

723. He had read the quarterly reports and was aware of the Perpetual loan investigation. He later became aware of the repayment of that loan and was aware of the Wilaci loan, both as a result of following up with Mr. Kerr. Mr. Kerr had borrowed from Wilaci to repay Perpetual.

724. He was not initially aware of the intention to establish the Cayman Islands Partnership and to make an in specie distribution. His understanding was that New Zealand limited partnership law was very new, whereas in the Cayman Islands the relevant law was well

established, so he felt more comfortable with the latter jurisdiction. The first time he heard something concrete about the new development was at a meeting with Mr. Kerr later in 2012.

725. He notes that the life of the fund had been extended, at a time when NAAHL had instructed him to exit, and he would have informed NAAHL.

726. He accepts that NAAHL had only a small Partnership interest, less than 2 percent. He considers that someone with a small economic stake in the fund could sufficiently deal with conflicts of interest on the Advisory Committee. He wrote to all the investors with news of his appointment but not specifically to NAAHL.

727. He accepts that he was now in a conflict with NAAHL as to his role on the Advisory Committee. There were some exchanges as to the capacity in which he discharged his role and he accepted that he had no authority to oppose the Petition on behalf of NAAHL.

728. He says that Mr. Kerr and Mr. Naylor were a good combination because Mr. Kerr had the helicopter view and Mr. Naylor had the ground view.

729. Minutes from Mr. Kerr were brilliant minutes although not often in a timely manner.

730. Mr. Cleary's attendance expenses were agreed at $15,000 per quarter.

731. There followed some lengthy but uninformative cross-examination. Mr. Kerr discussed CAML's prospective exit with Mr. Cleary at Advisory Committee level however.

732. Asked about his understanding as to the Partnership's status he says it was illiquid in the sense that by definition it does not have a formal secondary market: "*so you put a dollar in, you don't expect to see it again for ten years*". As it turns out for NAAHL, they put in a million, they withdrew half and got 600,000: "*they're 100,000 up*".

733. The Court commented that this was in respect of what has been described as an illiquid fund.

734. It was noted by Mr. Wardell that while Mr. Cleary had ceased to represent NAAHL, that was distinct from him never having represented them.

735. Mr. Cleary gave his evidence in a fair and straight forward manner and his evidence-in-chief was unimpaired by cross-examination. Once again, the suggestion and indeed the insinuation that he was or could simply have been some kind of agent for Mr. Kerr was simply not substantiated, if indeed that was even the major point of challenge. The Court accepts that his testimony was balanced, professional and fair and was fully capable of belief.

Evidence of Mr. Tinkler

736. The First Affidavit of Mr. Michael Tinkler is dated 3 November 2016. He describes his background at paragraphs 1-3:

> *"1. I am a commercial real estate attorney qualified in New Zealand and a partner at Burton Partners (previously known as Burton & Co), a boutique law firm based in Auckland, New Zealand. I have held this position since 15 October 2012.*
>
> *2. Burton Partners was formerly a legal advisor to Torchlight (GP) 1 Limited (now NZ Credit Fund (GP) 1 Limited) (the "New Zealand Partnership") and now advises those of the subsidiary companies of Torchlight Fund L.P. (the "Cayman Partnership") which are registered in New Zealand in respect of the New Zealand real estate investments of those companies.*
>
> *3. I am a nominee director of Torchlight Real Estate Fund Limited which is a subsidiary of the Cayman Partnership and I am also a nominee director of Ferrero Investments Limited and Equity Partners Infrastructure Management Limited which are subsidiaries of Pyne Gould Corporation Limited which is the parent company of the General Partner of the Cayman Partnership. I am a shareholder of Pyne Holdings Limited but only in my capacity as professional trustee of the Pyne Trust. "*

737. He sets out his professional background at paragraphs 7-9:

> *"My Professional Background*

7. I hold a bachelor of laws degree from Otago University. I was admitted as a barrister and solicitor of the High Court of New Zealand in 1989 and have practiced as a lawyer since that time. Arising out of my role as a legal advisor I have also held a number of directorships for various clients, including the directorships that I have held and currently still hold for subsidiaries of PGC and the Cayman Partnership.

8. After working for a number of other law firms in both New Zealand and abroad in the early days of my career, I joined the New Zealand national law firm, Buddle Findlay, in 1998 and became a partner of that firm on 1 January 2004 which position I held until 31 December 2010.

9. From 1 January 2010 until 15 October 2012 I was a sole practitioner under the name of Tinkler & Co. As explained above, from 15 October 2012, I have been a partner with Burton Partners (previously known as Burton & Co.)"

738. He has known Mr. Kerr since they met at University in the mid - 1980s.

739. Mr. Tinkler describes the extent of his familiarity with Mr. Kerr at paragraphs 10-12:

"*Mr. Kerr*

10. I have known George Kerr since we met at University in the mid-1980s. After University we moved in the same circle of friends and we came to know each other quite well. I then worked overseas in the Cook Islands and then Los Angeles for 5 years before returning to New Zealand in 1996 to work initially in Wellington.

11. After two years I moved to Auckland and, as I have explained above, I joined Buddle Findlay in 1998. On my return to Auckland I became reacquainted with Mr. Kerr and started to act for him professionally

in 1999/2000. The first legal instruction involving an iconic New Zealand coastal property. Since that time, I have provided legal services to Mr. Kerr and his business interests over the years although I have never been the sole and exclusive lawyer. Mr. Kerr and his interest have used a variety of firms over the years depending on the nature of work required.

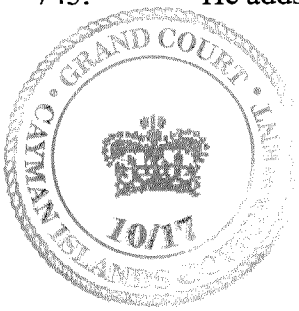
12. During this time I have come to know Mr. Kerr very well in both a personal and professional capacity. Mr. Kerr is a very capable and intelligent man and prior to the Global Financial Crisis ("GFC") he was lauded as one of New Zealand's brightest and most successful businessmen particularly after his success with Spicers Asset Management of which he was one of the major shareholders which was sold in the early 2000s for circa AUD$274 million. During this time Mr. Kerr had a string of very successful deals and transactions. I acted for him on a number of these transactions and always found him very tough and demanding to work for. However, I found him to be a very loyal client."

740. He goes on to describe his role in the NZ Partnership where he was a director of the NZ GP, resigning on 12 December 2012. He was also a director of the Cayman Islands GP before Mr. Naylor was appointed. His firm at the time, Buddle Findlay, was involved in setting up the NZ Partnership structure.

741. He denies that he or his firm are related parties of the Partnership, never having held any financial interest in either the NZ GP, or Cayman Islands GP, and having only ever provided arm's length legal services.

742. He states at paragraph 26 that he agreed with Mr. Kerr's rationale for the termination of the NZ Partnership.

743. He adds at paragraph 28:



"28. *My firm provided advice on the in specie distribution. Part of this related to advice sought by the New Zealand General Partner as to whether the in-specie distribution constituted a distribution which gave rise to a Carry under the terms of the Limited Partnership Agreement. My advice was that it did."*

744. In further examination Mr. Tinkler states that in New Zealand the limited partnership register is confidential, and a limited partner can only search for his own investment in the limited partnership. He was aware that Mr. Kerr and Mr. John Darby separated their business interests in or about August 2009. Mr. Tinkler said he had never been a director of Perpetual Trust Limited.

745. In cross-examination by Mr. Lowe he said that he became a director of PGC in February 2012. The appointment continued for less than a year.

746. He agrees that his principal client was PGC, and effectively Mr. Kerr. He is asked about a number of directorships which he held, and he says he was aware of his director's duties under New Zealand law, but that he was not an expert on English law and he was not involved with the bid to buy RCL debt from BOSI. He is aware of his director's duties also as a nominee director for the GP.

747. He is aware of the Wilaci legal proceedings and the appointment of receivers over the NZ Partnership. He had ceased to be a director of the NZ GP before them. He is however not aware of an allegation made by the receivers that assets of the NZ Partnership had been removed in breach of the negative covenant in the Wilaci loan.

748. He says he was a director of Real Estate Southern Holdings Limited which had sold land at East Wanaka to a Mrs. Meehan, who later became his client, on 24 July 2012.

749. He had also been a director of van Eyk from 20 October 2011 to 8 July 2014, as a nominee director for PGC.

750. He states that PGC was an investment business.

751. He was aware that van Eyk managed a fund called the Bear Fund and that the trustee was Aurora. It was put that Mr. Tinkler was identified with Kerr and he indicated that was correct.

752. Although a director of van Eyk Mr. Tinkler was not aware of the investment in the Bear Fund. There was a separately appointed investment committee, and he was not involved at that level of detail.

753. He is not able to recall a loan of $100 million by the NZ Partnership to Torchlight Real Estate Fund, which Mr. Lowe alleged was undocumented. Mr. Tinkler could not recall seeing a record of the transaction. He said he was not involved with the Partnership apart from being a nominee director on a couple of New Zealand subsidiaries.

754. Asked about section 193 of the New Zealand Companies act requiring the keeping of minutes and financial records he states he was not an expert in statutory interpretation as he specialized in real estate. He acknowledges that if there were no records or files of minutes after the earth quake in February 2011 that would be wrong.

755. He describes his role as PGC's general counsel before joining Burton and Partners, a separate firm from Buddle Findley, on 15 October 2012. He had worked for a year and a half for PGC as general counsel before being appointed a director.

756. There was discussion of the affairs and administration of the NZ Partnership, which once again is of no assistance to this Court.

757. However, one exchange concerned records and the Court pointed out that the New Zealand legal commentary referred to in submission indicated that the records themselves do not have to show the financial position of the company. They must be such that they will at any time enable the position to be determined.

758. He says that at the time of the Perpetual Trust loan he did draft some PGC minutes and resolutions but he did not turn his mind to the relationship between Mr. Kerr and PGC. The only comment to be made at this juncture is that the Perpetual loan matter per se is of no relevance to the Partnership, and such significance as it is would only be in relation

to Mr. Tinkler's general credibility bearing in mind his past association with Mr. Kerr. Before reaching any inference or conclusion concerning Mr. Tinkler's evidence, the Court must of course bear those factors in mind to the extent that credibility itself is an issue.

759. He was asked about a purchase by the NZ Partnership of some shares in IEF Holdings Ltd. As the Court has already indicated, it does not find these historical reviews of any relevance or assistance in the present proceedings.

760. In terms of performance fee on a distribution in kind under New Zealand law, he was asked about his legal advice to the NZ GP that the NZ GP was able to make distributions in kind as opposed to cash, when it came to distributing interest in the Cayman Partnership, and advising that clause 8.2 allows the GP to do so.

761. Mr. Tinkler's view was that regarding distribution clause 8.4 had to be read subject to clause 8.2. Asked about circumstances permitting payment to be made to the GP in circumstances when the payment is not for cash, but as happened here, in kind, Mr. Tinkler affirms that this could be done because of clause 8.2 overriding clause 8.4.

762. The Court will return to the issue at a later point. However, what will ultimately concern the Court is not the construction of these provisions, but whether in light of the evidence the course that was adopted, whether the right or wrong course, was one that the GP as advised by its counsel could reasonably and genuinely act upon, as distinct from one precipitating a justifiable loss of trust and confidence.

763. Mr. Tinkler points out that regarding the drafting of the new LPA he would have deferred to the Cayman Islands lawyers because he would not have known the law in the Cayman Islands.

764. He confirms the mechanics whereby the NZ Partnership invested into the Partnership in exchange for Limited Partnership interests which were then in specie-ed to the New Zealand Limited Partners.

765. Mr. Tinkler states regarding the assets that a liability can be assigned with the consent "*of the counter party*" and in this case his understanding was that the NZ GP did have the consent of Wilaci.

766. Mr. Tinkler agrees that in law assigning a liability if the counter party consents to it is called a novation. He said he understood that Wilaci consented to the transfer of the loan to the Cayman Islands, having been approached.

767. He concurs with Mr. Lowe that he had joined the GP as Director in 2012 and resigned in August 2013.

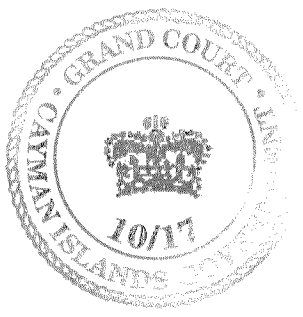
768. He was shown a deed by which Torchlight Real Estate Fund took and acquired an assignment of debts owed to BOSI, being the purchase of the RCL debt.

769. Subsequently the shares in Torchlight Real Estate Fund were transferred to the Partnership.

770. Regarding the Wilaci loan, he says he acted on the basis that Mr. Kerr told him that Wilaci consented to the restructuring and the NZ Partnership was not in breach of the Wilaci loan security documents by transferring assets to the Partnership. However, he did not minute this exchange with Mr. Kerr nor asked for correspondence from Wilaci to confirm it.

771. In re-examination he says that in New Zealand he would look for the duties of a partnership in the Limited Partnership Act and for a company in the Companies Act.

772. Mr. Tinkler points out that Torchlight Real Estate Fund Limited was not the same entity as Torchlight Real Estate Group, the latter of which he was not a director. This was in circumstances where for the latter company there was an unsecured loan for $100 million in 2012. The credit bid was some time during 2013 to the best of his recollection. Mr. Tinkler confirmed also that Torchlight Real Estate Fund Limited itself did not have this liability.



773. He was taken to a minute of the Advisory Committee of the NZ Partnership concerning a request from the NZ GP to approve the payment of Carry "*as defined in the Torchlight Limited Partnership Agreement by way of a distribution.*"

774. He was taken to clause 8.3 (a) of the NZ Partnership LPA, whereby the General Partner is not obliged to cause the Limited Partnership to make a distribution pursuant to clause 8.4 "*unless there is cash available for such distribution other than in respect of in kind distribution*". He states that clause 8.3 (a) confirms his views.

775. He explains the provision as saying that if there is an in kind distribution there was no need to worry about it being cash; it did not need to be a distribution in cash.

776. Mr. Wardell invited Mr. Tinkler to look at various correspondence between Mr. Kerr, Mr. Grill and Mr. Skidmore, including the email where Mr. Grill stated to Mr. Skidmore that he agreed to the arrangement Mr. Skidmore had agreed with Mr. Kerr. He was asked about a suggestion that he had been making it up that he had seen the consent, and Mr. Tinkler replies that the true position was that they got the consent.

777. The impression formed by the Court of Mr. Tinkler is that he is not specifically familiar with litigation matters, nor probably with transactional law outside the scope of general real estate matters. That is not necessarily a detriment as he gave his evidence straight forwardly and as best he could and without subterfuge or adornment. He seems to have fulfilled a satellite role in support of the business endeavours of Mr. Kerr and Mr. Naylor and he was not primarily engaged in administrative matters or in the systematic retention of their business documentation.

778. There is no evidence that he acted at any time dishonestly or in bad faith.

779. In relation to the matter of Carry, which is perhaps the principal issue of contention, he has provided an interpretation of the relevant clauses of the New Zealand LPA (the "NZ LPA") that is both feasible and sustainable. It may or may not ultimately be right in law, but that is not a question which it is even necessary for this Court to decide.

780. Bearing properly in mind Mr. Tinkler's limited degree of involvement in these contested issues, the Court finds him to be a credible and reliable witness.

The Experts

781. The Court has before it a Report of Mr. Michael Weaver dated 30 January 2017 and a Supplemental Report of Mr. Weaver dated 25 September 2017, presented on behalf of the GP.

782. The Court also has before it a Report of Mr. Wynand Mullins dated 31 January 2017, presented on behalf of the Petitioners.

783. Further oral evidence has been provided by both Mr. Weaver and Mr. Mullins.

784. The Court will address the expert evidence adduced in the order set out above because to all intents and purposes Mr. Weaver sets out identifiable propositions as to the underlying asset valuation of the Partnership, whereas conversely Mr. Mullins does not see his way to doing so.

785. In addition, there is a Joint Experts' Memorandum dated 12 September 2017. This document includes at section A3 what are there described as Areas of Disagreement.

786. The Court does not consider it necessary, appropriate or helpful to conduct a detailed analysis of the contents of this specific Memorandum for two reasons.

787. First, the Court reminds itself of the statement by Lord Wilberforce in the *Ebrahimi* case at page 374H-375A to the effect that in relation to the just and equitable jurisdiction there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply, but that this is wrong. The learned Judge continues: "*Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances.*"

788. In other words, it is undesirable in this context for the Court to concern itself with microscopic details, as the Petitioners have frequently invited it to do throughout these proceedings.

789. Secondly, and equally fundamentally, Mr. Lowe has conceded and agreed that the Partnership holds assets which are valuable. That has not always been the stance which the Petitioners have adopted, but regardless of that this is their current position.

790. As a result, the evidence as to valuation is no longer as central or indeed as crucial as it once may have been. Nonetheless, it is helpful to the Court to gain an overview of these matters in terms of better understanding the management practices of the GP and their potential outcomes.

791. Mr. Weaver sets out his background at section 1 of his first Report.

> *"1.1 Formal Details*
>
> *1.1.1 I, Michael Weaver, am a Chartered Accountant and a Managing Director of Duff & Phelps Ltd ("Duff & Phelps"). Duff & Phelps is a provider of valuation and corporate finance advisory services located at level 14, The Shard, 32 London Bridge Street, SE 1 9SG, London.*
>
> *1.1.2 My area of expertise is in the valuation of all types of financial assets, including businesses, shares, complex financial instruments and intangible assets for a variety of reasons, including mergers & acquisitions, restructuring, litigation, arbitration, business strategy, tax and financial reporting. My qualifications and experience are set out in Appendix 1-1.*
>
> *1.1.3 I have been instructed by Conyers at Cricket Square. PO Box 2681, Grand Cayman KY1-1111, who are acting on behalf of the Respondent."*

792. Appendix 1-1 states:

> *"Qualifications and Experience*
>
> *I am a Chartered Accountant and a Managing Director of Duff & Phelps Ltd. ("D&P"). D&P is a global valuation and corporate finance advisory firm.*
>
> *I have 19 years of valuation and advisory experience, having started my career at PwC in 1995. I left PwC's Valuation and Strategy division in 2002 to start my own valuation business, Gravitas Partners LLP with a number of other senior PwC colleagues to take*

advantage of the continuing move towards independent advice. Gravitas Partners LLP was purchased by American Appraisal in 2005. Subsequently, in 2015 D&P acquired American Appraisal.

I am a Committee member of the Valuation Special Interest Group at the Institute of Chartered Accountants in England and Wales ("ICAEW"), a member of the Royal Institute of Chartered Surveyors' Business Valuation division, and am an active participant in driving the future of the valuation profession globally.

I am regularly appointed by the President of the Institute of Chartered Accountants to opine on valuation issues on matters of contention and litigation proceedings, and am one of the share valuation experts on the HMRC panel of valuation providers.

I became an Associate Chartered Accountant ("ACA") of the ICAEW in 1999 having completed my accountancy exams and relevant experience. I was designated a Fellow ("FCA") of the ICAEW in 2010 having completed 10 years of relevant experience as an ACA. I hold an ICAEW practicing certificate which enables me to engage in a public audit practice.

I have significant experience of valuing all types of financial assets, including businesses, shares, complex financial instruments and intangible assets and regularly lecture on the subject of business and share valuation techniques. I prepare valuations for a variety of reasons including for merger & acquisition deals, restructuring, litigation, arbitration, business strategy advice, tax and financial reporting.

I have been working in fiscal valuation since 1999, performing around fifty valuations per annum since that date (a significant percentage of these were fiscal valuations). I was a witness of fact in the Court case Saltri III Limited v. MD Mezzanine SA Sicar & Ors 2012 EWHC 3025 (Comm). I was also in Court as an expert witness in a share valuation expert capacity for a court case involving a hedge fund which was in dispute with a majority shareholder of a mutually owned asset."

793. He states at section 3.1.1 that he has been instructed to produce expert valuation evidence in relation to the particulars of the value of Torchlight Fund LPA as outlined:

"*3.1.1.1.* *Fair values of core investments (i.e. Lantern and RCL) as of September 30, 2016 (the "Valuation Date");*

3.1.1.2. *Liquidation discounts to the fair values of the investments in Lantern and RCL, on the assumption that the Court orders a wind up of the Cayman Partnership in May 2017. I have been instructed to assume that, based on this wind up (or liquidation) order, the liquidator will have to realise the investments of the Cayman Partnership, rather than the Cayman GP;*

3.1.1.3. *In addition to the liquidation discount in respect of the RCL investment, the comparison of the undiscounted cash flows of the investment and the fair value of the investment after applying the liquidation discount; and*

3.1.1.4 *Merits of the Cayman Partnership's investment strategy in relation to:*

3.1.1.4.1 *The Local World investment*

3.1.1.4.2 *The Lantern investment*

3.1.1.4.3 *The RCL investment, including the decision to acquire the debt issued by the Old RCL Company and subsequently acquire a majority of the Old RCL Company assets via the RPS and Ordinary Shares of RCL; and*

3.1.1.4.4. *The decision to accept the sub-participations of the Cayman GP's parent company in RCL's debt (the "RCL Sub-Participations") as an in-kind contribution to the Cayman Partnership's equity capital."*

794. His broad conclusions are summarized at sections 3.4.1 and 3.4.2:

"*3.4* ***My Conclusions***

My Conclusions on the Fair Value of Investments as at the Valuation Date

3.4.1 Based on analysis in Sections 4 and 5, I conclude on the fair values of the Cayman Partnership's investments in Lantern and RCL as at the Valuation Date as follows:

3.4.1.1 The fair value of the investment in Lantern's equity – AUD32.6 million;

3.4.1.2 The fair value of the investment in the RPS and RECL – AUD219.7 million; and

3.4.1.3 The fair value of the investment in the Ordinary Shares of RCL – AUD139.7 million.

My Conclusions on the Liquidation Discounts for Investments as at the Valuation Date

3.4.2 Based on my analysis in Section 6, I conclude on the liquidation discounts for the Cayman Partnership's investments in Lantern and RCL as at the Valuation Date as follows:

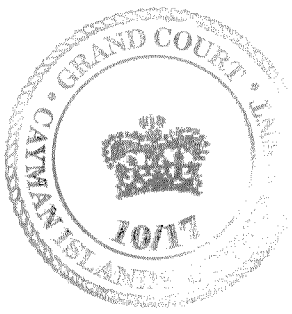
3.4.2.1 The liquidation discount for the investment in Lantern's equity – 20%; and

3.4.2.2 The liquidation discount for the combined investment in the RPS and Ordinary Shares of RCL- AUD44.3%

3.4.3. I note that the above liquidation discount conclusions are based on the assumption of the forced/fire sale scenario where the market is fully appraised of the liquidation circumstances. The shorter the liquidation period ordered by the Court, the higher the liquidation discounts of the above investments would be."

795. As to his broad conclusions on investment strategy, he states at section 3.4.5:

"*My Conclusions on the Investment Strategy*



3.4.5 *Based on my analysis in Sections 7 to 9, I conclude on the merits, from a valuation perspective, of the Cayman Partnership's investment strategy in relation to its core investments as follows:*

3.4.5.1 *The investment strategy in relation to the Local World investment was successful in that (a) the investment was acquired at an EBITDA multiple lower than that of comparable companies and transactions; (b) the investment was realised at an EBITDA multiple that was broadly in line with the comparable multiples; and (c) the internal rate of return ("IRR") of 84.2% achieved on this investment exceeded the target IRR of the Cayman Partnership and the median gross IRRs of buyout private equity funds in general;*

3.4.5.2 *The investment strategy in relation to the Lantern investment was successful in that Lantern's shares have been, on average, acquired at a discount to the listed share price. However, I note that the IRR of 10.1% achieved on this investment up to the valuation date was (a) below the target IRR of the Cayman Partnership and the median gross IRRs of real estate private equity funds in general on this Cayman Partnership and the median gross IRRs of real estate private equity funds in general, although I am instructed that the Respondent's case is that the reason the actual IRR achieved was below the target rate was due to the actions of at least some of the Petitioners and Millinuim Asset Services Pty Ltd.'s ("MAS's") competing strategy, which prevented the Respondent from being able to implement the intended investment strategy for Lantern on which the target rate had been based; but (b) above the threshold IRR entitling the Cayman GP to receive performance fees;*

3.4.5.3 *The investment strategy in relation to the RCL investment was successful in that the IRR of 26.5% achieved on this investment exceeded the target IRR of the Cayman Partnership and the median gross IRRs of real estate private equity funds in general; and*

3.4.5.4 *The decision as to the in-kind contributions and the conversion of RCL Sub-Participations to LP interests in the Cayman Partnership has been beneficial in*

that (a) the remaining LPs gained an increased LP interest exposure in the Cayman Partnership and (b) cash was not withdrawn from the Cayman Partnership or RCL, making more capital available for reinvestment into a growing RCL business."

796. He provides his conclusion as to Lantern at section 4.2.22:

> *"4.2.21. I note that the Cayman Partnership valued it investment in Lantern based on the listed share price in its audited financial statements for the year ended March 31, 2016*
>
> *4.2.22 Furthermore, I note that the NZ Partnership and the Cayman Partnership as its successor acquired Lantern's shares for a total amount of AUD25.4 million, received dividends from these shares of AUD6.5 million, and the fair value of this investment is AUD32.6 million as at the Valuation Date, resulting in a positive return on this investment. I comment on the merits of the Cayman Partnership's investment strategy in relation to Lantern in Section 7."*

797. Some information background as to RCL is found at Section 5.1:

> *"Calculation of the Fair Value of the Investment in RCL*
>
> *5.1 Company Description*
>
> *5.1.1. RCL Real Estate Holdings Limited ("RCL") is an Australian residential land investor and developer with a land bank of circa 3,000 residential sites located in New Zealand and Australia. RCL is headquartered in Melbourne, Australia.*
>
> *5.1.2. RCL's investments strategy relies on developing and selling 500 lots of land on average per annum while reinvesting internally generated cash flow to maintain a sustainable land bank of around 3,000 sites. It only*

invests in or around government defined growth corridors, infill sites, or areas possessing long term growth potential in Australia and New Zealand.

5.1.3 RCL's current investments are divided into the following regional portfolios:

5.1.3.1 Victoria Portfolio, which includes Grandvue Officer, Renaissance Rise and Sanctuary Lakes;

5.1.3.2 New South Wales Portfolio, which includes Haywards Bay, Mirador and Pacific Dunes; and

5.1.3.3 New Zealand Portfolio, which includes Jack Point's and Hanley Farm."

798. He summaries his methodology at section 5.3.1:

"5.3.1. The estimation of RCL Enterprise Value is based on the present value of the expected cash flows of RCL. My analysis comprises two steps. First, to review the reasonableness of the management business plan, as set out in the "Business Plan Review" sub-section below, and make adjustments to the business plan where I consider appropriate. I have performed this analysis with the support of Duff & Phelps Real Estate Advisory Group. In a second step, I have independently estimated the discount rate to be relied upon in calculating the present value of future expected cash flows."

799. He goes on to examine such matters as cash flow forecasts and market support, including historic sales, taking into account acquisition costs, which he considered reasonable, and development costs. He also looks at sections 5.3.9 and 5.3.10 at rate of return on equity. He takes into account a statistical measure of price volatility called "*beta*", and he conducts comparison with nine comparable companies.

800. He notes at section 5.3.42:

"5.3.42 *The concluded RCL Enterprise Value of AUD359.3 million is significantly different from the investment value in RCL provided in the Cayman Partnership's March 31, 2016 financial statements of AUD108.7 million. I understand from the Respondent that this value of AUD108.7 million was calculated on the assumption that the land plots were sold and not developed at March 31, 2016 and consequently does not capture the profit RCL would generate through (a) developing the existing land plots and (b0 buying and developing new land plots."*

801. Following a lengthy technical analysis, Mr. Weaver finds that the redeemable preference share value in RCL is $219,670,787 and the ordinary share value is $139,672,659.

802. Lantern and Local World are also dealt with.

803. He outlines more RCL history at section 9.1 and then at section 9.2 he analyses the in-kind contributions of the RCL sub-participations:

"*9.2 Analysis of the In-Kind Contributions of the RCL Sub-Participations*

9.2.1 I set out the facts in relation to the in-kind contributions and the conversation of RCL Sub-Participations and loans to the LP interests in the Cayman Partnership below:

9.2.1.1 On June 30, 2015, Torchlight Group held AUD65.0 million in LP interests in the Cayman Partnership, representing 30.56% LP ownership interest in the Cayman Partnership. On July 1, 2015, the Cayman GP satisfied payment obligations in respect of AUD26.5 million of the RCL Sub-Participations and AUD17.0 million of loans made by PGC to the Cayman Partnership by issuing partnership interests as consideration. As a result, the LP interest of PGC (via Torchlight Group) increased from 30.56% before the conversion to 42.34%;

9.2.1.2 Before the conversion, PGC had exposure to the Cayman Partnership of AUD84.7 million. After the conversion, that exposure was reduced to

AUD75.6 million. Therefore, on a face value basis, there was a drop in PGC's holdings of AUD9.1 million, which was gained by other limited partners in the Cayman Partnership;

9.2.1.3. Moreover, instead of receiving the RCL Sub-Participations and loan redemptions in cash, PGC received LP interests in the Cayman Partnership. This means that instead of withdrawing cash from the RCL business, the exchanged amount was available for reinvestment which, based on the analysis below in sub-section 9.3, achieved a positive IRR and, therefore, created value to the Cayman Partnership.

9.2.1.4 On December 20, 2012, limited partners of the Cayman Partnership received an invitation to participate in a new capital raising, with the Petitioners (with the exception of the Third Petitioner LP interest in the Cayman Partnership was diluted on a percentage basis but, due to the above in-kind contributions and loan conversion, the value of these interests have not been impacted negatively.

9.2.2 Based on the above facts, I conclude that the decision to convert the RCL Sub-Participations into LP interests in the Cayman Partnership was beneficial to the value of the Cayman Partnership in that (a) the remaining LPs gained an increased LP interest exposure in the Cayman Partnership on a nominal basis and (b) cash was not withdrawn from the Cayman Partnership or RCL, making more capital available for reinvestment into a growing business of RCL."

804. His overall conclusions are at section 10:

"10. ***My Conclusions***

10.1 My Conclusions on the Fair Value of Investments as at the Valuation Date

10.1.1 Based on my analysis in Sections 4 and 5, I conclude on the fair value of the Cayman Partnership's investment in Lantern and RCL as at the Valuation Date as follows:

10.1.1.1 The fair value of the investment in Lantern's equity-AUD32.6 million;

10.1.1.2 The fair value of the investment in the RPS of RCL- AUD219.7 million; and

10.1.1.3 The fair value of the investment in the Ordinary Shares of RCL-AUD 139.7 million.

10.2 My Conclusions on the Liquidation Discounts for Investments as at the Valuation Date

10.2.1 Based on my analysis in Section 6, I conclude on the liquidation discounts for the Cayman Partnership's investments in Lantern and RCL as at the Valuation Date as follows:

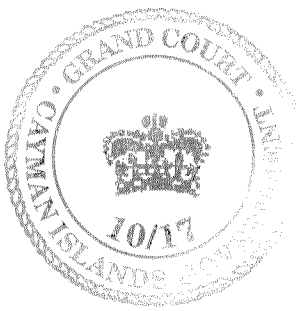
10.2.1.1. The liquidation discount for the investment in Lantern's equity – 20%; and

10.2.1.2. The liquidation discount for the combined investment in the RPS and Ordinary Shares of RCL – 44.3%.

10.2.2 I note that the above liquidation discount conclusions are based on the assumption of a forced/fire sale scenario where the market is fully appraised of the liquidation circumstances. The shorter the liquidation period ordered by the Court, the higher the liquidation discounts of the above investments would be.

10.2.3 I note that the sum of the undiscounted cash flows of RCL according to the business plan I have been provided with is AUD480.5 million as at the Valuation Date (see Section 5), compared to my estimate of the likely liquidation value of AUD200.0 million (see Section 6).

10.3 My Conclusions on the Investment Strategy



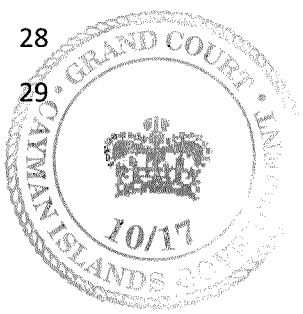
10.3.1 Based on my analysis in Section 7 to 9, I conclude on the merits, from a valuation perspective, of the Cayman Partnership's investment strategy in relation to its core investments as follows:

10.3.1.1 The investment strategy in relation to the Local World investment was successful in that (a) the investment was acquired at an EBITDA multiple lower than that of comparable companies and transactions; (b) the investment was realised at an EBTIDA multiple that was broadly in line with the comparable multiples; and (c) the IRR of 84.2% achieved on this investment exceeded the target IRR of the Cayman Partnership and the median gross IRRs of buyout private equity funds in general;

10.3.1.2 The investment strategy in relation to the Lantern investment was successful in that Lantern's shares have been, on average, acquired at a discount to the listed share price. However, I note that the IRR of 10.1% achieved on this investment up to the Valuation Date was (a) below the target IRR of the Cayman Partnership and the median gross IRRs of real estate private equity funds in general, although I am instructed that the Respondent's case is that the reason the actual IRR achieved was below the target rate was due to the actions of at least some of the Petitioners and MAS's competing strategy, which prevented the Respondent from being able to implement the intended investment strategy for Lantern on which the target rate had been based; but (b) above the threshold IRR entitling the Cayman GP to receive performance fees;

10.3.1.3 The investment strategy in relation to the RCL investment was successful in that the IRR of 26.5% achieved on this investment exceeded the target IRR of the Cayman Partnership and the median gross IRRs of real estate private equity funds in general; and

10.3.1.4 The decision as to the in-kind contributions and the conversion of RCL Sub-Participations to LP interests in the Cayman Partnership has been beneficial in that (a) the remaining LPs gained an increased LP interest exposure in the



Cayman Partnership and (b) cash was not withdrawn from the Cayman Partnership or RCL, making more capital available for reinvestment into a growing business of RCL."

805. In his Supplemental Report Mr. Weaver having held discussions with Mr. Mullins and having reviewed his Report at section 2.3.1 states a revised valuation of RCL at $352.7 million (from $359.3 million) on adjustments made to RCL's central costs for costs and working capital items. He also comments at section 3.4.1 on Mr. Mullins being unable to check the assumptions in the Estate Master data, commenting that this information was provided and the key assumptions have been tested for reasonableness.

806. In cross- examination by Mr. Lowe, Mr. Weaver says that existing projects were those where the lots were divided up, with infrastructure, and the buyer would build the building. New projects were where the land had been bought, and land was now being parceled up and developed so that the individual lots could be sold.

807. He said that for valuation purposes his firm had produced its own model.

808. He is also asked about aspects of the RCL model and about related issues such as inflation. He reviewed historic sales of RCL, and he had reviewed the position for similar companies. He had looked at market conditions in New Zealand and Australia.

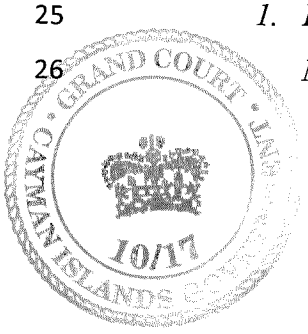
809. Mr. Weaver accepted that any undisclosed debt of RCL companies other than the redeemable preference shares owed by the Partnership, would result in different valuation calculations.

810. Notwithstanding Mr. Lowe's cross-examination the Court did not perceive there to be any major or significant challenge as to the content of Mr. Weaver's two Reports.

811. In his Report Mr. Wynand Mullins sets out his background at sections 1-7:

"*Formal Details*

1. *I, Wynand Nicholas Mullins, am a Chartered Accountant and hold a Bachelor of Management Studies Accounting from University of Waikato, New Zealand.*



2. *As a Partner of the firm Ferrier Hodgson, and leader of its forensic accounting practice in Sydney, New South Wales, Australia, I specialize in the provision of forensic accounting and valuation services, including the preparation of expert reports concerning investigation, loss qualification and business valuation, particularly in the context of litigation.*

3. *I have the following qualifications and relevant professional memberships and designations:*

   (a) *Bachelor of Management Studies Accounting, University of Waikato, New Zealand*

   (b) *Member of Chartered Accountants Australia and New Zealand (CAANZ)*

   (c) *Accredited Business Valuation Specialist by CAANZ*

   (d) *Member of the Australian Restructuring Insolvency & Turnaround Association (ARITA)*

   (e) *Member of the Economic Society of Australia*

4. *I joined Ferrier Hodgson in 2006 and became a partner of the firm in July 2014.*

5. *I have managed assignments in New Zealand, Australia, United Kingdom and Europe. These assignments included entities registered in those jurisdictions as well as Vietnam, Hong Kong, Czech Republic, Poland, Romania, Germany and the Cayman Islands.*

6. *I have significant experience in leading and completing valuations of business and shares in the context of litigation, and for taxation and restructuring purposes, across various industries including:*

   (a) *Fund management entities;*

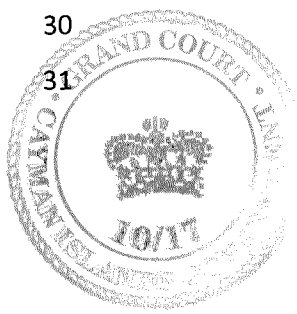
   (b) *Financial and professional services;*

   (c) *Manufacturing;*

   (d) *Investment vehicles such as trusts;*

   (e) *Retail; and*

   (f) *Media and marketing.*



7. I also have significant experience in leading and completing complex investigations, including:

(a) Financial investigations identifying movements of funds and assets;

(b) Reconstructing specific transactions and financial statements;

(c) Advising corporate entities in relation to compliance with relevant accounting standards, including the correction of prior period errors; and

(d) Identifying and reporting on the modus operandi of company officers involved in the misappropriation of funds."

812. It is difficult to summarize his findings because as he states for example at section 109 there is little, if any, utility in performing a current valuation of the Partnership based on the information provided to him. He considers that an historic valuation would be irrelevant to his instructions.

813. Again at section 162 he states that he has not identified an independent third party document which verifies the assertions made by the GP in relation to RCL.

814. At section 165 (d) he states that he has not sought to reconcile or verify each input into the RCL Estate Model. Any errors would directly impact valuation.

815. Similarly he states at section 195 he is unable to form a view as to an estimated outcome in the event that the Partnership is placed into liquidation.

816. He states at section 200:

"*200. In Summary:*

(a) A valuation of the Cayman Partnership's net assets at any future date would require:

(i) An assumption that the Cayman Partnership continues to exist at the future valuation date (i.e. it has not been wound up for insolvency or any other reason);

(ii) Identification of the Cayman Partnership's assets and liabilities at the future valuation date; and

(iii) A reasonable basis to estimate the values of those assets and liabilities;

(b) I express no opinion as to whether the Cayman Partnership will be wound up for insolvency or any other reason between now and a future valuation date."

817. The Report continues on in similar manner which it is unnecessary to cite in detail.

818. In cross-examination by Mr. Wardell he is accused of painting a very negative picture of the Partnership. However, he denies that he was really trying to carry out an audit exercise or an accounting exercise and not a valuation exercise.

819. He was also accused of saying nothing about the performance of the underlying property business included in the Partnership, but he indicates he was concerned with assets and liabilities.

820. He says that the GP was the one responsible for preparing reports, and an auditor is only responsible for checking the accounts to ensure truth and fairness. It was not clear to the Court that this was of practical assistance with valuation matters.

821. He said he had a concern with the Estate Master worksheets as there was no narration around inputs.

822. He said he did not know the funding structure of RCL and he needed to know the value of the transaction based on independent assessment for context.

823. He appears to accept however that the redeemable preference shares were clearly an asset of the Partnership while at the same time being a debt of RCL.

824. He states that without strategy papers he could not discuss the merits of the investment, so as to measure the success.

825. He also expresses concern that the Estate Master input or document was "*hard coded*". Therefore he could not trace back to its "*source numbers*".

826. Ultimately, it must be born in mind that this is a Court of law and not a Court of accountancy. While expertise which assists the Court is obviously most welcome, evidence based on that expertise must be received in the broader context of the proceedings as a whole.

827. In this instance it is an unquestionable fact, which Mr. Lowe does not contest, that the assets of the Partnership are valuable. Indeed, Mr. Lowe to his credit goes a good deal further in this regard than Mr. Mullins has done.

828. Furthermore, in terms of actual evidence Mr. Weaver has produced an assessment which while highly structured and theoretical nonetheless does identify material likely to be of assistance to the Court. Without disparaging Mr. Mullins' contribution it is inevitably challenging to counter something with nothing. It may well be a form of nothing which can be professionally justified and maintained, but in the broader framework of this case the Court is unable to agree that Mr. Mullins' approach with great respect is either realistic or useful.

829. On the other hand, Mr. Weaver's assessment in broad terms, and perhaps even in narrow terms, is both realistic and useful. The Court does not necessarily conclude that the assets of the Partnership are precisely of the value that Mr. Weaver describes. It is enough to find that the assets of the Partnership are of real and substantial value and that such a conclusion cannot sensibly be disputed. In other words, the concerns of the Petitioners that the Partnership assets are or may be worthless are entirely without foundation.

The Activities of Mr. Wallace and Mr. Marshall in Perspective

830. The case has evolved in such a way as to preclude from any doubt a finding as to the destructive and concerted activities of Mr. Wallace and Mr. Marshall, endorsed by the Petitioners in ways that were both explicit and implicit.

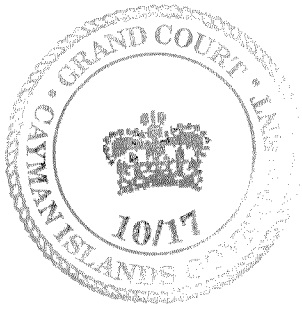
831. Ultimately this coalescence may or may not amount to what the GP has described as an unlawful means conspiracy. In any event, however, it does serve to impair the credibility of the Petitioners and to diminish if not to obliterate their claims to have suffered a loss of trust and confidence due to the lack of probity of the GP, however widely or narrowly that alleged lack of probity may be defined.

832. Ms. Burleigh composed a file note of a meeting on 5 December 2014 attended by a number of people including Mr. Traveller, Mr. Marshall, Mr. Bagnall, Mr. Wallace and herself. In the note she stated that MAS was concerned with the potential for George Kerr to continually capitalise fees and convert debt to equity, thereby eroding the Limited Partners' equity. Although there was no real foundation for this assertion, it is not difficult to see the negative potency of the allegation.

833. A letter from Mr. Marshall and Mr. Wallace sent on 3 October 2014 included a list of "*grave concerns relating to the conduct*" of the GP. Not only it is now clear that there was no basis for such broad ranging concerns, but describing them as "*grave*" when they are not germane to the present state of the proceedings merely demonstrates with hindsight the difference between respective appearances and realities.

834. A file note of Ms. Burleigh in respect of a further meeting attended by Ms. Burleigh, Mr. Marshall and Mr. Wallace among others records that the meeting was requested by Logic and that Logic raised a concern that there were irregularities and that moving assets to an offshore fund was a significant red flag. Time after time in the history of these proceedings concerns have been deployed in substitution for facts.

835. In cross-examination Ms. Burleigh was taken to paragraph 62.1 of her First Affidavit in relation to the in specie distribution which stated *"I now understand that none of the Limited Partners of Torchlight NZ who were non-related parties to Mr. Kerr and PGC were consulted, nor was their consent obtained."* Ms. Burleigh was also taken to paragraph 74 of the same which made the same allegation.



836. When asked, "*On what is this understanding based or, to be more precise, who has told you this?*" Ms. Burleigh confirmed: "*That came from information that was provided to us at the meeting with Mr. Wallace and Mr. Marshall.*"

837. Also in their letter of 3 October 2014, Mr. Marshall and Mr. Wallace state that "*we contend that there is prima facie evidence that investors' funds have been depleted via a combination of willful and reckless management and related party transactions.*"

838. In a letter from Mr. Marshall to the FMA on 5 November 2014 Mr. Marshall alleges that there "*appears to be a campaign to oppose minority interests to acquire assets cheaply at the expense of his investors and extract significant fees and expenses, which are either in direct contradiction to the limited partner agreement, in bad faith or by fraudulent means.*"

839. Letters from Mr. Wallace to PwC and from Mr. Marshall to PwC dated 2 October 2014 in respect of the 2014 audited accounts include allegations concerning related party disclosure.

840. Significantly in cross-examination Mr. Bagnall states:

"*So at the time I wrote the first affidavit, I very much kept it to matters where I—I was confident of my own knowledge. Now, at this time I had spoken to, you know, as you've been keen to find out, I've spoken to Greg Marshall and Tom Wallace and Crown Asset Management and they'd made me aware of transactions…*"

841. In the letter from Mr. Marshall to the FMA on 5 November 2014. Mr. Marshall wrote making complaints about the East Wanaka transaction, alleging that this was a related party transaction that caused loss to the Partnership and urging the FMA to "*commence a forensic investigation of PGC and its subsidiaries*", "*suspend PGC from trading*" and "*ensure the Cayman Partnership meets its reporting requirements.*"

842. In cross-examination Mr. Bagnall confirmed that in late September 2013, Mr. Marshall called and made him aware of the East Wanaka and IEF transactions: "*I think the main complaint that he made me aware of at that stage was the related party transactions on East Wanaka and also confirmed to me that there had been some shady dealings involving*

him and Kerr on the transfer of the IEF shares into Torchlight." Mr. Bagnall admitted that in relation to East Wanaka he had done no due diligence on Mr. Marshall's allegation and that "*I've never looked at a land registry. I've taken what I'm told on that..,*" and that on this point he had just been relying on what Mr. Marshall told him.

Mr. Bagnall was taken to an email dated 10 February 2011 in which Mr. Kerr confirmed to Mr. Bagnall that the Logic clients still owned the shares purchased from Mr. Kerr and consequently could not have passed them on the NZ Partnership. Mr. Bagnall responded to this email: "*Thanks that improves my comfort with the situation*".

843. When asked "*Why is that document not referred to in your affidavit?*", Mr. Bagnall confirmed that, because of what he had been told by Mr. Marshall, he had decided his original comfort with the situation was wrong: "*by the time I'd signed the affidavit I had met with Greg Marshall and he told me contrary to what I was told here that he had in fact done a cleansing transaction on behalf of George Kerr... which took me back to the—my original suspicion rather than this answer that they gave me.*"

844. All of this is indicative to the Court of uncritical acquiescence in what Mr. Marshall and Mr. Wallace were both saying and doing.

845. In his letter to the FMA on 5 November 2014 Mr. Marshall also wrote making complaints inter alia about Perpetual loans, alleging that the General Partner had committed fraud and misappropriated retail investor's funds.

846. In cross-examination Mr. Traveller was taken to a letter sent from CAML to PwC on 25 March 2015 concerning KPMG's resignation as auditors of Torchlight and PGC regarding the disagreement requiring or not requiring the disclosure of related party transactions and that PwC have had similar disagreements with PGC and the GP regarding the valuation of Torchlight. Mr. Traveller agreed that this misunderstanding "*may well have*" come from Mr. Wallace or Mr. Marshall and that he could not recall where it came from. Mr. Traveller also accepted that by this time, he knew that "*Mr. Marshall was unreliable and... that Mr. Wallace wasn't an LP*".

847. In a letter from Russells, Australian (an Australian law firm) on behalf of MAS, to the FMA on 28 July 2014, they made allegations concerning the entry into the Wilaci loan by the NZ Partnership and the New Zealand litigation concerning this. In this letter, Russells asked the FMA to confirm whether it would be investigating the New Zealand Limited Partnership, the New Zealand General Partner, the Cayman Partnership and the Cayman General Partner and explained that MAS would assist in any such investigation.

848. In the letter addressed to all Limited Partners "*apart from the Kerr camp*" on 3 October 2014 entitled "*Recovery and Exit Strategy*", one of the complaints listed included whether the transfer to the Cayman Islands was "*simply a mechanism to try and avoid creditors*". It also raised a concern that Logic could not establish as to whether "*the Wilaci loan was struck on an arm's length basis*".

849. As to an issue with the GP's performance fee, with which Mr. Wallace had taken issue, Mr. Bagnall confirmed that he did not deal with the performance fee in his First Affidavit: "*I had been told there was a problem with the performance fee by other people who read – I hadn't had time to read it...It was only more recently that I familarised myself with it and taken the view that... the view that the likes of Tom Wallace were taking was correct and this was an illegal payment.*"

850. He also accepted that the performance fee was disclosed in the Cayman accounts for the year ended 2013 but that: "*In any case, I didn't register that the performance fee had been paid because I obviously didn't read that note to the accounts until Mr. Wallace and/or Mr. Marshall told me about it later in 2014.*"

851. In a letter from MAS to Grant Thornton dated 26 March 2015 MAS states: "*Currently, MAS is investigating the role played by parties associated with PGC and the TFLP in causing van Eyk Research Pty Ltd and its subsidiaries to make an investment in the TFLP. As part of those investigations, MAS has become aware that GT has previously provided non-audit services to PGC and the GP of the TFLP. Included in those non-audit services is a valuation of the Perpetual receivable for the purpose of PGC's accounts, a report found in the records of the Bear Real Opportunities Fund on the valuation methodology for the TFLP and we believe as expert witnesses in various contexts with the FMA. In the*

circumstances, we believe that GT is severely conflicted from accepting an appointment as PGC and TFLP's auditors. We would be grateful if you could outline, ahead of us referring this matter to the FMA, what if any arrangements exist inside your firm to deal with the obvious conflict and what steps your audit engagement team intend to take to make their own independent assessment of matters where GT has previously provided advisory services to PGC and its related entities".

852. This behaviour was much more likely to delay the Partnership's audited accounts being finalised than to facilitate their timely completion, in the opinion of the Court.

853. In an email from Mr. Wallace to Mr. Marshall dated 24 October 2014 in respect of his requests for information from the General Partner he noted "*Kerr's failure to respond will be good for the court proceedings – when they occur.*"

854. In the presentation given by MAS to CAML, ACC, Mr. Marshall and others dated 4 December 2014, this presentation states that "*the fund's lack of transparency*" and the General Partner's refusal to accept MAS' request for a meeting means that MAS "*believe the asset base of the fund is at risk and that action is required*".

855. Once again, in cross-examination Mr. Bagnall stated:

I hadn't been aware until [Mr. Marshall and Mr. Wallace] advised me that the term of the Partnership had been extended which was, you know, the real breach of trust, that and the performance fee. Those were -- the unauthorized performance fee".

"*I did not become aware that they had extended by three years and Marshall and Wallace told me that in late 2014.*"

856. In relation to the amended LPA circulated in August 2013 he stated:

"I think I read the explanation. I didn't read through the new Limited Partnership Agreement. There was no mention in there that they paid themselves a performance fee that they are not entitled to. There was no mention that the term of the Partnership had been extended. I did not find out about those until—this would have been at 2014 when Wallace and Marshall drew my attention to the fact that these changes had happened."

857. A similar theme is found with Ms. Burleigh:

Ms. Burleigh was taken to paragraph 62.2 of her First Affidavit in relation to the proposal to amend the Cayman LPA to allow non pro rata redemptions and to her statement CAML did not sign the letter or agree to the *"amendment and I am not aware of"* any other Limited Partner who did so. Ms. Burleigh confirmed that she had not asked Aurora or ACC if they had signed up to it before swearing her affidavit, and did not have any communications with Aurora before swearing the affidavit but had discussed it with Mr. Wallace.

858. There is this exchange:

"*Justice McMillan: So is the witness saying you arrived at the position you did after speaking with Mr. Wallace but not after speaking with anyone else? Is that correct? The position where you say, "I'm not aware of any other Limited Partner who agreed to the amendment", is that after—you make that statement, as I understand it, after speaking to Mr. Wallace but not after speaking to any other—*

Ms. Burleigh: Yes, that would be correct."

859. Mr. Bagnall was taken to paragraph 40 of his Sixth Affidavit which stated "*Whilst ostensibly for the benefit of independent Limited Partners wishing to exit the investment, I am advised that this mechanism has been used to date with respect to Artefact Partners Global Opportunity Fund (**APGOF**), an entity apparently connected with Torchlight and Mr. Kerr."*

860. Mr. Bagnall accepted that "*probably, in all honesty, it was probably Tom Wallace*" who had told him that Artefact was apparently connected with Torchlight and Mr. Kerr.

861. He added: "What *I have seen in the—seen in other people's affidavits leads me to believe that there was a close connection between Richard Boon of Artefact and George Kerr and…*" He also accepted: "*I don't think he's heavily influenced my views but I accept on the relationship with Artefact that I don't have a strong understanding of that connection and I apologise to the Court because, as Mr. Wardell points out, it wasn't really within my own knowledge and I should have acknowledged."*

862. In a letter from Mr. Wallace to Ms. Burleigh dated 26 August 2014, Mr. Wallace raised concerns of "*the possibility of some or all of the Bear Fund's investment being lost. We understand the sensitivities surrounding CAML's NZ$30 million investment in the Current LP and Millinium is keen to assist CAML in relation to the recovery of its investment...we are also very actively engaged in recovery of the Bear Fund's AU$55 million investment.*"

863. It is noteworthy that those comments are in the context of the "*recovery*" of their investments by CAML and Aurora, and not merely in the context of an alleged preservation. This distinction is of importance in assisting the Court as to whether the Petitioners have an improper purpose, a matter to which the Court will later return.

864. The CAML file note for 27 August 2014 records that this meeting was requested by Logic and that "*They expressed significant concerns that by 2019/2021 there would be little left in the fund for investors.*"

865. This depiction was of course both inflammatory and false.

866. Even more alarming in nature is an email message from Mr. Wallace to Ms. Burleigh dated 2 October 2014 stating:

"*.....I have asked Greg for the full list for me to send through to you though I will remind you that when we met we did say that no matter what level of vote we obtain, Kerr will litigate to hang on to Torchlight. This does not trouble us because if we do not take this action, there will be no return of capital to investors.*" The email also states: "*Our lawyers wrote to the ASIC yesterday requesting the enforcement team to move on them and I understand Greg is passing this information to the SFO and FMA today.*"

867. To describe this as a campaign may well be an understatement.

868. In an email from Mr. Wallace to Ms. Burleigh dated 6 October 2014 Mr. Wallace states:

"*.....We are at a point now that we all, as limited partners, need to move cohesively as one, to take on and remove the General Partner before our respective capital is lost. The analysis we provide is not good reading.*"

869. MAS of course was not a Limited Partner, although represented as such by Mr. Wallace, and his promotion of need to move cohesively as one to take on and remove the GP constituted a strategic invitation.

870. Ms. Burleigh accepted in cross-examination that Mr. Wallace emphasised "*almost at every opportunity...that there might be nothing left or very little left*" in relation to the Partnership.

871. Ms. Burleigh however agreed that the Crowe Horwath Report "*made it clear that the fund was profitable and there wasn't a risk of [CAML] losing [its] investment. Then Mr. Wallace comes along and is spinning a very different story*". Ms. Burleigh also accepted that Mr. Wallace's "*view was different from the Crowe Horwath report, yes*".

872. Knowing both the content of the original Crowe Horwath Report and the role of MAS in pursuing a strategy in relation to Lantern that could only be perceived as injurious to the Partnership, the reticence of CAML is most remarkable.

873. The CAML file note dated 27 August 2014 contains a number of revealing factors. It recorded that

> "*Millinium is a focused asset manager and was prepared to accept the role and then set about an orderly wind up of the assets.*"

The file note also recorded: "*It is clear that both van Eyk and Millinium are intent on taking whatever steps it can to effectively freeze the assets of Torchlight, remove George's control over the fund and realise the assets in an orderly fashion. They are clearly committed to undertaking such action either with the assistance of regulatory authorities here in New Zealand by seeking the statutory management of PGC or via the FMA and its relationships with regulators in the Cayman Islands, or with the necessary voting power. Whatever the way ultimately chosen, there is certainly a will to proactively take action to protect the funds they have at risk.*"

It also recorded that "[*b*]*ecause we are unlikely to be able to exit our interest, not least of all because we will have to disclose our knowledge of Millinium's and van Eyk's proposed*

actions..." and that "*[o]n the other hand if Millinium and/or other investors succeed in removing George from control over these assets, CAML's interest will be considerable advanced.*"

874. In their letter dated 3 October 2014 Mr. Wallace and Mr. Marshall seek to "*target an exit of the portfolio in two years*".

875. It would seem from these extracts that CAML was either primarily or exclusively occupied by its own interests rather than those of the Partnership, once again providing some evidence of an improper purpose.

876. The presentation given by MAS to CAML and ACC on 4 December 2014 refers to the "*next steps*" following the removal of the General Partner to include MAS as new GP to drive, without delay, the realization and return of investors' capital and to "*target a two year recovery and exit strategy*".

The presentation requests "*LPs to agree an exit strategy for execution by the New GP*".

The presentation also includes a redacted "*Litigation Road Map*".

877. CAML and ACC obviously knew what they were engaging upon and who they were engaging with in launching this Petition.

878. Meanwhile, a press campaign was instigated by Mr. Wallace and Mr. Marshall to call into question the viability of the Partnership. Accordingly on a number of fronts those persons whose standing is so badly compromised were permitted and even encouraged to proceed.

879. As for Aurora quite apart from the question of a possible release of confidential Partnership material, to which the Court will return, there is also the fact that Aurora was directed by MAS to commence the Petition proceedings. Aurora was for a significant period under the control of MAS, and frankly it could therefore be described as being scarcely more than Mr. Wallace's puppet.

880. The Court at this stage reminds itself of the guiding principle that the propriety of the Petitioners' own actions and responsibility are considered in direct relation to the matters

of which complaint is made in the Petition and not more broadly (see Mangatal J in the *Washington* case at paragraph 29). This principle in no way derogates from the requirement of the Petitioners' witnesses to demonstrate their credibility, especially in circumstances where they claim a justifiable loss of trust and confidence due to the GP's lack of probity stemming from mismanagement. The question which one asks is how are they to be believed?

An Overview of the State of the Proceedings

881. It is helpful to review in broad terms the state of the proceedings prior to setting out and considering to the degree appropriate the submissions of the Petitioners.

882. All allegations and expressed concerns as to the possible worthlessness of the Partnership assets have been abandoned and/or discredited.

883. All allegations and expressed concerns as to dishonesty or bad faith on the part of Mr. Kerr and Mr. Naylor have been abandoned and/or discredited.

884. It is essentially undisputed that the Petitioners associated themselves with a campaign on the part of Mr. Wallace and Mr. Marshall to undermine and ultimately replace the GP, thereby enriching Mr. Wallace and Mr. Marshall and it would also seem expediting the early exit of the Petitioners from the Partnership.

885. In light of that association and the anticipated benefits to be derived from it the Court has great difficulty in accepting the credibility of the Petitioners' principal witnesses. In contrast, the Court has found both Mr. Kerr and Mr. Naylor to be honest and reliable. In circumstances where the Petitioners' witnesses on the one hand and Mr. Kerr and Mr. Naylor on the other hand differ as to fact, the Court unreservedly prefers and accepts the evidence of Mr. Kerr and Mr. Naylor. It is as simple as that.

The Petitioners' Submissions

886. The Petitioners' submissions consist of written Summary Closing Submissions, supplemental Speaking Notes and final oral submissions.

887. The Petitioners submit that the Amended Petition is based on justifiable loss of trust and confidence of the Petitioners in the GP.

888. They state at paragraph 4:

> "4. *The objective justification for this breakdown, in the opinion of the Limited Partners is simple: it is persistent poor corporate governance, as demonstrated by (a) a failure to keep proper books and records on a number a levels, (b) a deliberate lack of transparency and constant breach of reporting requirements, and (c) a failure to operate proper independent checks, which were designed to protect the interests of limited partners. Indeed an obvious aspect of poor governance is the fact that neither Mr. Kerr, nor any of his evangelistic supporters, grasp basic principles of stewardship. They could not identify let alone see anything wrong with self-dealing, conflicts of interest or duty, or concluding transactions for the Partnership which were not at arm's length, or were simply commercially inappropriate.*
>
> *5. Contrary to what the General Partner has suggested, the Petition is not about the additional discovery by CAML during the first week of the trial, or the imaginings of a non-existent and misconceived case of conspiracy by CAML, ACC or their officers. These allegations were a deliberate diversion during the first three weeks of the trial. The Petitioners make no excuses for Mr. Marshall or Mr. Wallace whom they do not represent."*

889. They complain at paragraph 6 that they have seen no return so far, although given that this is a long term investment fund that fact is hardly surprising, and although they now accept that RCL is a valuable asset they contend that their investment cannot objectively be said to have been a success.

890. They complain of inadequate discovery by the GP notwithstanding the numerous unqualified audit reports. However, despite those anxieties the Court has had no difficulty in forming the conclusion based on the totality of the evidence that the Partnership is flourishing. In fact, that is self-evidently so.

891. They argue at paragraph 8 that a winding up order will not jeopardize the sole remaining business carried on by the Partnership's wholly owned subsidiary RCL, and at paragraph 9 that a liquidator is needed to investigate transactions, restore accountability and transparency and ensure the independent Limited Partners "*are not shunned or treated with disdain.*" The Court however finds it almost inconceivable following an eight week trial that there is anything left to investigate or even to render transparent that is not already transparent.

892. An overview of the Petitioners' financial interests is found at paragraphs 13-15:

> "*13. The Petitioners are Limited Partners of the Partnership holding approximately AU$89.888m of Committed Capital in the Partnership. The Petition is supported by a number of other Limited Partners who hold interests in the Partnership of about AU$6.5m (Supporting Limited Partners). The total Committed Capital invested by Limited Partners asking the Court to make a winding up order is AU$96.388m.*
>
> *14. All of this investment was made in cash by entities wholly independent of the General Partner.*
>
> *15. When the Petition was presented, in June 2015, the total Committed Capital of the Partnership was apparently AU$216.5m (including within that total certain suspect interests of persons associated with the General Partner). On this basis, however, the Petitioners and independent supporters who invested AU$96.388m cash represented 44.5% of the Committed Capital at this time.*
>
> *16. The investments made in the Partnership by Limited Partners who oppose the winding up are trifling by comparison. The sums invested by these Limited Partners are extremely small.*"

893. Mr. Kerr's interests are described at paragraph 21:

"21. *Mr. Kerr was the ultimate controlling mind of the NZ Fund and is the ultimate controlling mind of the Partnership. Mr. Kerr controlled the conduct of the NZ GP and controls the conduct of the General Partner. The NZ GP and the General Partner are wholly-owned subsidiaries of Pyne Gould Corporation (PGC). From March 2010 to 2 April 2012 Mr. Kerr, through entities owned by him, was the largest shareholder in the PGC and since 2 April 2012 has controlled 80% of the shares in PGC. Mr. Kerr is the managing director of PGC. Mr. Naylor is also a director of PGC."*

894. Mr. Kerr's evidence is generally described in these terms at paragraph 22:

"22. *What, the Petitioners say, emerged from Mr. Kerr's evidence can be summarized as follows:*

(a) He could not resist giving the longest, frequently rehearsed answers to simple questions, many of which remained unanswered. This detracted from the usefulness of much of his evidence.

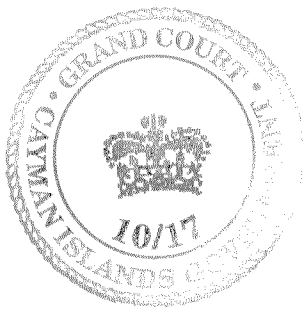
(b) Mr. Kerr came across as a highly intelligent and articulate man who inspires fierce loyalty in people who work with him (such as Mr. Harford, Mr. Naylor and Mr. Tinkler).

(c) Mr. Kerr also has a dark side:

(i) He clearly brooks no disagreement.

(ii) He shares information only with those he trusts and not as a matter of good corporate governance.

(iii) Mr. Kerr seems to think that his duties to the Limited Partners go no further than considering whether a person is a related party within the definition in the NZX rules (although he himself seems unaware of the definition of a related party within the NZX Rules, which is fairly broad).



(iv) He also does not understand why it might be inappropriate to transact business for the Partnership with his own associates. The involvement of PGC, Torchlight Group, Mr. Darby, Mr. Wilson and Mr. Boon in the Partnership was inappropriate.

(v) He thinks nothing of inveigling others to behave questionably if it promotes his interests. His response to drawing Artefact into investing in RCL participations was a good example.

(vi) He was willing to mislead counterparties and/or omit material information in the event that it benefited his interests.

(d) There is only a thin veneer disguising his visceral hatred for the Petitioners, including Aurora (who is not alleged to have participated in any conspiracy), which manifested itself long before the proceedings had cost him so much time and money (as he was keen to say in cross-examination and re-examination)."

895. As Mr. Wardell has pointed out, related party transactions and indeed what have been described as self-dealing must be seen in terms of the LPA itself and in particular what the Agreement permits and under what circumstances and conditions it so permits it.

896. Mr. Naylor's evidence is generally described at paragraph 23:

"*23. Mr. Naylor was a bank employee for a number of years before joining the NZ GP as a de facto director. He has no university degree or professional training or qualifications. He was Mr. Kerr's right-hand man, a truculent and uncompromising enforcer, who crossed many lines of acceptable conduct for that reason. During the course of his association with Torchlight, Mr. Naylor was appointed, on behalf of Torchlight, to the board of Lantern, hotel group, despite his lack of expertise and relevant experience. His evidence was delivered in much the same confrontational manner as Mr. Kerr.*

(a) Mr. Naylor has clearly been put in charge of the proceedings (for example, it was Mr. Naylor and nor Mr. Wightman (CEO of RCL) who briefed Mr.

Weaver). Mr. Naylor, who was in Court throughout the trial sitting with the General Partner's team of English solicitors, clearly knew and was prepared for every argument. As a result, an analysis of his long evidence demonstrates it was never balanced and in many respects plainly rehearsed.

(b) Mr. Naylor's willingness to be transparent only exists on his terms. He refused to disclose his emails and claimed to have deleted them all, although certain of his invoices were miraculously produced when he needed to justify his fees. Documents evidencing very large transactions such as loans and RCL "participants" were not produced. Despite his clear command of all of RCL's information, he was unwilling to disclose financial statements of RCL or updated versions of the "RCL Model", despite the RCL investment having been put in issue by the General Partner as a runaway success story. He was only willing to disclose documents of RCL and other subsidiaries when it suited him.

(c) He also displayed a complete lack of understanding of basic principles of stewardship:

(i) When asked for whose benefit he, as director of the solvent RCL companies, was running those companies, he was unable to answer the question. Worrying, Mr. Naylor did not know that his obligation as a director of a solvent company, is to act in the interests of the company's shareholders.

(ii) Mr. Naylor also gave evidence that, in his view, there was nothing wrong with an Advisory Committee, which had the role of policing conflicts of interest, having one of the principles of the General Partner (Mr. Kerr) as one of the members of that committee, where there was only one other member.

(iii) He participated in and organized the back to back transactions by which Mr. Kerr sold IEF shares to Torchlight using Logic as a conduit, seeking no approval and not disclosing the self-dealing in the accounts or otherwise to the Limited Partners. He seemed quite unable to grasp anything wrong with this singularly inappropriate

behavior. He also failed to answer Mr. Bagnall's subsequent queries in relation to this transaction truthfully or in a transparent fashion.

(d) *Mr. Naylor, who is a director of the Partnership, said he was not a director of the NZ GP; he styled himself as an "executive director". Mr. Naylor has more than thirty directorships and the only time he has adopted this title is in relation to the NZ GP and one other Torchlight company. The title of "executive director" is commonplace only in large organisations. Mr. Harford was of the view that Mr. Naylor's role in the Partnership (of which he was a de jure director) was no different from his role in the NZ GP. Mr. Naylor was clearly a de facto director of the NZ GP."*

897. Mr. Naylor is the central management figure responsible for the Partnership's current operations. He did not appear to the Court to be either truculent or confrontational, but instead he was measured and professional. Indeed, he conceded to the Court that with the benefit of hindsight it would have seen better not to discard his email records as he went along. In any event, nothing has emerged to indicate that in doing so he acted either with impropriety or ulterior motive.

898. Mr. Tinkler's legal advice on the payment of Carry and his expertise and independence were criticised at paragraph 24. He was "*another of Mr. Kerr's lieutenants* ", although it is difficult to understand why Mr. Kerr should not be able to call on the assistance of others to any lesser degree that anyone else.

899. Various complaints are made about the absence of documentation regarding for example the PGC and Torchlight loans, entitlement to fees and the title to RCL participations, claiming that unqualified audit opinions were not adequate or sufficient in the circumstances, and indeed that the auditors were not called to provide a statement.

900. The Court takes the pragmatic view that in the absence of allegations of dissipation of funds or of dishonesty or bad faith these omissions such as they are have no practical consequences for those proceedings. The Petitioners have spent a great deal of time and effort on matters which are ultimately not material even to their own case.

902. There follow extensive submissions as to what may constitute in law a loss of trust and confidence, and in relation to those legal issues an indication has already been given as to how the Court has stated it will apply the relevant law.

903. The Petitioners refer to an important issue at paragraphs 40-43:

> "*40. The Petitioners accept that the equitable maxim that he who comes to equity must come with clean hands does apply to those who petition for a just and equitable winding-up; see Re Heriot [2011] CILR 1 and Re Sterling Macro Fund. However, this is not some general defence and has no application here:*
>
> *(a) Unclean hands must be directly related to the conduct of the Petition or the allegations being made in it. In Sterling unclean hands consisted of the Petitioner's perjury, fraud and forgery, all of which were intended to bolster its case.*
>
> *(b) If it be the fact that one of the Petitioners came with unclean hands (which is strenuously denied) it does not mean that the other Petitioners also come with unclean hands. They are not vicariously responsible for one another. On the contrary a winding up petition is a class remedy and it cannot be the case that the whole class is disqualified by the independently bad behavior of one Petitioner.*
>
> *(c) Further it is submitted that identifying a tort is not sufficient for the defence of "unclean hands". After all, if there is a tort it has its own remedies. Dishonesty in the Petitioners' conduct, as in Sterling, must be distinctly alleged and proved for that to operate in the context of a winding up petition.*
>
> *41. Moreover even if the Court concludes that a petitioner does not have clean hands, that is not an end to the inquiry; the Court must also consider whether the petitioner's misconduct which has caused the Court to conclude that the petitioner did not have clean hands, has also caused the breakdown in trust and confidence in question. In Vujnovich v Vujonvich [1990] BCLC Lord Oliver said [231]:*

"What counsel for the appellants seeks to do is to extract from [Lord Cross's reference] to coming to court with clean hands as if it stood alone and to suggest that since [the first instance judge] and the Court of Appeal were of the view that the respondent had misconducted himself in relation to the diversion of the business away from the company, that should have concluded the case against the making of a winding up order. The same submission was made to the Court of Appeal who rightly rejected it. It is quite clear that Lord Cross was considering the positon in which the petitioner's misconduct (and thus the relative uncleanliness of his hands) was causative of the breakdown in confidence on which the petition was based. On no analysis of the facts could that possibly apply here."

42. *The Grand Court applied this principle in the Cayman Islands in Re Heriot African Trade Finance Fund Limited [2011] (1) CILR 1 where Jones J summarized (and applied) the Privy Council's views in Vujnovich as follows:*

"As the Privy Council subsequently explained in Vujnovich, Lord Cross was saying that if the matters complained of were brought about by the petitioner's own conduct, he could not expect the court to make a winding-up order. In this case, Mr. Papastavrou's poor behavior has no bearing upon the reasons why I consider that it is just and equitable to make a winding-up order, and counsel rightly abandoned his argument."

43. *Thus, a petitioner's misconduct is only relevant if it has an immediate and necessary relation to the unfairly prejudicial conduct of which complaint is made."*

904. As the Court understands the submission, a finding of misconduct on the part of the Petitioner which was not causative of the breakdown in confidence on which the Petition was based has no bearing on the reasons whether it is just and equitable to make a winding up order.

905. While this principle is clearly correct, it must also be borne in mind that Petitioners who have misconducted themselves are far less likely to be believed as witnesses than those

who have not misconducted themselves, and in the present proceedings that lack of credibility is itself an important factor in assessing their shifting allegations.

906. Moreover, the Petitioners make express complaint about delay in receiving audited accounts as a basis for lacking trust and confidence and yet as the evidence has unfolded it is obvious that delays caused by a series of unwarranted negative correspondence to the auditors has itself been productive of some of that delay. In relation to that specific matter therefore the Court finds that this poor behaviour has a direct bearing at least in part upon the reasons expressly put forward for a just and equitable winding up. Accordingly this is a specific matter which the Court as required by law will take into account in arriving at a final decision and will again consider later.

907. An additional point to make is that the equitable maxim that he who comes to equity must come with clean hands in no way detracts from the further principle that a Petitioner must not bring the Petition for an improper purpose, in this case for example in order to engineer an early exit which would not otherwise be available to that Petitioner.

908. The Petitioners make comment about what they describe as the "*transfer*" from New Zealand to the Cayman Islands and a lack of proper consultations. First, the course which was adopted was one which the NZ GP had the authority to adopt. Secondly, although the degree of consultation was somewhat unstructured and piecemeal, nonetheless it must be seen in relation to whether it provides a basis for substantial and justifiable impairment of trust and confidence in the GP as envisaged by law. Thirdly, as to the question whether the terms and conditions of the new Partnership were materially different from those of the NZ Partnership, it is far from clear in this case than this amounts to anything more than perhaps mutual misunderstanding as to what constitutes materiality.

909. The Court certainly accepts that the GP was acting in what it perceived to be in the best interest of the Limited Partners, and in the absence of any allegations of bad faith the question will be whether this per se constituted a basis for a substantial and justifiable loss of trust and confidence in all of the circumstances.

910. The Petitioners' arguments are set out at paragraph 53 as follows:

"*53. Contrary to the representations made by Mr. Kerr and Mr. Naylor to the Limited Partners in December 2012, the terms of the LPA for the Cayman Partnership were materially different from the terms of the NZ LPA and they knew this to be the case. At no stage, did the General Partner provide the Petitioners or the Supporting Limited Partners with a marked up version of the LPA highlighting the amendments that were made in December 2012. Without any consultation Mr. Kerr and Mr. Naylor, assisted by Mr. Tinkler, changed highly material terms on which the Petitioners' investments were held:*

(a) The period of the investment was unilaterally extended by Mr. Kerr. The term of the NZ Fund under the NZLPA was seven years from the commencement of the Limited Partnership on 27 October 2009, subject to the General Partner having discretion to extend the term twice for an additional one year period. The maximum term of the NZ Fund was, therefore, 9 years. Absent an extension the term of the original fund would have ended a year ago on 27 October 2016. Even if the term of the original fund would have ended a year ago on 27 October 2016. Even if the term had been extended by the maximum period it would have ended in October next year (2018). The extension of the period in the terms of the LPA means the Partnership can now continue until November 2021. An extension of the period of investment by three years, an increase of one-kind of the period of under the NZLPA, is obviously not materially consistent with the terms of the NZLPA as Mr. Kerr and Mr. Naylor represented to the Limited Partners.

(b) The requirement that the General Partner hold an AGM was removed. This change removed an important check on the conduct of the business of the Partnership by the General Partner. The evidence of Mr. Kerr and Mr. Naylor as to why this provision was removed is inconsistent. In any event, this was plainly contrary to the interests of the Limited Partners and was removed contrary to the interests of the Limited Partners and was removed

contrary to the advice given by Mr. Tinkler that the provision for the AGM should be retained and that the removal of this requirement would likely to be seen as an erosion of Limited Partners' rights.

(c) *The investment criteria of the Cayman Partnership were no longer focused on Australia and New Zealand but extended to entities in OECD countries and Cayman Islands replaced New Zealand law as the governing law of the agreement between the Cayman General Partner and the Limited Partners. The Petitioners are based in Australia and New Zealand. A change in the investment criteria to enable investments to be made outside these two countries and a change in the governing law from New Zealand law to Cayman Islands law is also obviously not materially consistent with the terms of the NZLPA.*

54. The General Partner procured a financial benefit for itself from the extension of this period as it will now be paid management fees (which have averaged in excess of AU$3 million a year) for an extra three years. There was a clear conflict of interest between the General Partner and the Limited Partners in the extension of the life of the NZ Fund on the move to Cayman that was not disclosed or approved by any person independent of the General Partner.

55. There was a complete lack of probity in Mr. Kerr and Mr. Naylor's treatment of the Limited Partners in relation to the move to Cayman and the change of the terms on which the investors' money was held."

911. The Petitioners also criticise the constitution of the Advisory Committee, although much of their criticism seem to focus on the Advisory Committee of the NZ Partnership, which does not actually concern this Court.

912. They state at paragraphs 56-60:

"*56. From the Limited Partners' perspective, the most important safeguard of their interests in the LPA is the requirement for independent scrutiny of any transactions that involve or potentially involve a situation where the General Partner has a*

conflict of interest or enters into transactions with related parties and/or is self-dealing in relation to the use of the Partnership's assets.

57. Mr. Kerr has not behaved properly when there is a need to disclose conflicts of interest or the need to disclose related party transactions or the need to ensure that any transactions that involve self-dealing are properly approved by independent persons. The specific transactions in issue are identified separately below.

58. The Cayman LPA imposes obligations on the General Partner to establish an Advisory Committee. The functions of the Advisory Committee include the requirement to approve all related party transactions and to review all actual or potential conflicts of interest between the General Partner (or its affiliates) and the Partnership. The provisions in the NZ LPA are substantially the same.

59. Both the LPAs made it mandatory for there to be an Advisory Committee. Members of the Advisory Committee are required to be a representative of a Limited Partner. The Advisory Committee could have up to six members and was required to have at least two in addition to a representative from the General Partner. The LPAs expressly state that members must serve without compensation; they are entitled to reasonable out of pocket expenses incurred in relation to the role on the Advisory Committee.

60. Meetings were required to be held at least twice a year or at such other frequency as the Members and General Partner determined. The meetings were to convene by the majority of Members of the General Partner by giving not less than 10 business days' written notice which notice was required to contain reasonable particulars of the matters to be discussed unless this requirement was waived in writing by all the Members and the General Partners."

913. They continue:

"*67. The Partnership's Advisory Committee is alleged to have two members. Mr. Kerr and Mr. Wilson. The General Partner did not advise the Limited Partners of Mr. Wilson's alleged position on the Advisory Committee until after his death in May*

2014. Further, no appointment documents have been discovered by the General Partner. The only resolution of the Advisory Committee of the Partnership discovered by the General Partner refers to the "Chairman [Mr Wilson] Appointment in September 2013.

....

70. *Mr. Kerr was the only member of the Advisory Committee from May 2014 to August 2015. There are no documents relating to the functioning of this committee for this period. Mr. Kerr says that it does not matter that there was no properly constituted committee because there were no transactions that needed to be considered by the Advisory Committee during this time.*

(a) *This attitude on the part of Mr. Kerr illustrates his disregard for the terms on which he has been entrusted with other people's money. The limited Partners invested on the basis of a contract that required there to be an Advisory Committee at all times and its purpose was to protect their interests. The function of the committee was much broader than the need to approve specific transactions. This was supported by the evidence of Mr. Quinn on behalf of Ngati Awa who gave evidence that having a properly appointed and functioning Advisory Committee was not merely a technical issue but a "good governance issue".*

(b) *It is also factually incorrect to say there were no relevant transactions during this period. Indeed there was clearly related party dealing during this period, not least the Partnership's acceptance of in kind contributions.*

71. *Mr. Cleary allegedly became a member of the Advisory Committee in August 2015 (after the presentation of the Petition) although the timing of his appointment is inconsistent with the email correspondence discovered by the General Partner. Mr. Cleary's evidence stated that he was representing the Limited Partner Ngati Awa on the Advisory Committee. Ngati Awa filed evidence that this was not the case and that Mr. Cleary had never spoken to Ngati Awa about membership of the Advisory*

Committee. Ngati Awa supports the winding up of the Partnership and its Chairman, Mr. Quinn, gave evidence in support of the Petitioners. Mr. Cleary's response to this evidence was to identify other investors that he represents. Strangely, only one out of the four investors he identifies acknowledges his position on the Advisory Committee. The investors Mr. Cleary says he represents on the Advisory Committee have no more than 2% of the funds invested in the Partnership. Mr. Cleary, like Mr. Wilson, also invoiced the Partnership for compensation for work done as a member of the Advisory Committee, in breach of the LPA.

72. *There are no documents that have been provided by the General Partner concerning the functioning of the Advisory Committee in the period after Mr. Cleary became a member of the Advisory Committee. Mr. Cleary, in cross-examination, said that there were quarterly meetings and that there were minutes of those meetings, what he described as "brilliant minutes" produced by Mr. Kerr, albeit late. This evidence is entirely contrary to evidence of Mr. Naylor and Mr. Kerr in relation to the functioning of the Advisory Committee and the pleaded position of the General Partner. In any event, it is a shame that the Court has not had an opportunity to read these minutes. Mr. Cleary said he would provide copies of the minutes, as well as significant additional documentation that he has maintained. He had not done so.*

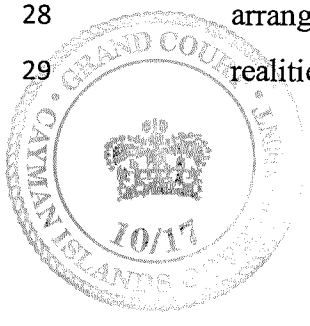
73. *A properly functioning Advisory Committee is central to proper conduct of the business of the Partnership by the General Partner. The function of the Advisory Committee is to provide a check on the business conducted by the Partnership to ensure that what is done is in the interests of the Limited Partners. It is important to ensure that there is an independent properly functioning Advisory Committee able to scrutinize properly those transactions that are with related parties or otherwise give rise to conflicts of interest. This is why the terms of the LPA require a member of the Advisory Committee to be a representative of a Limited Partner. This is why the terms of the LPA provide for there to be up to six members of the Advisory Committee. The representatives of the Limited Partners who have been members of the Advisory Committee have been personal friends or acquaintances*

of Mr. Kerr, who do not have significant sums invested in the Partnership, and who gain a financial benefit from their membership of the Advisory Committee. None of the Petitioners or the Supporting Limited Partners have ever been asked to nominate or appoint representatives to the Advisory Committee, notwithstanding that they collectively represent in excessive of AU$90 million of the funds invested in the Partnership and are the only (with some minor exceptions) independent investors in the Partnership.

74. *Other than the resolution recorded in the minute referred to in paragraph 69 (a). above, the only resolutions for the entire 8 year life of the Partnership and the NZ Fund are the resolutions in December 2012 where: approval is sought by the NZ Fund in connection with the General Partner in the form of an interest in the Partnership valued at AU$10.26m; and, for a change in the investment criteria. These documents show no independent check or scrutiny of these extremely important transactions; what they do show is Mr. Kerr, as the sole member of the Advisory Committee, approving the requests of the NZ GP, made by Mr. Kerr who is (wrongly) stated to be the sole director of the NZ GP, save that one request was made by Mr. Kerr and Mr. Tinkler both as directors. In substance, Mr. Kerr was approving his own requests and there were no minutes of the Advisory Committee as there could be none as Mr. Kerr made the decisions on his own. Mr. Darby, the other member of the Advisory Committee, was not at the "meetings" and does not appear to have been involved in approving the transactions in question. The Advisory Committee, to the extent that it existed at all, was being used improperly by Mr. Kerr for his own benefit."*

914. How Mr. Kerr can have used or did use the Advisory Committee for his own benefit when there is no allegation being made of dishonesty or bad faith is difficult for the Court to follow or accept.

915. Equally it is not alleged that the Partnership suffered any detriment as a result of these arrangements, imperfect as they may have been. Ultimately this Court must look at realities, and not at mere appearances.



916. Then there follow numerous passages of complaint about New Zealand transactions, with which this Court once again is not concerned.

917. There is a complaint about loans made by PGC and by Torchlight Group, in paragraphs 92-96:

> *"92. On 10 February 2014 the Partnership entered into two loan agreements with companies in the same group for total of AU$31m. One was with Torchlight Group and other was with the PGC and each of the agreements was for AU$15.5m. It is not known how value was given for these loans. There is no record of cash being paid into the Partnership's bank accounts. Given the tendency of in-kind transactions, the substance behind these loans and circumstances in which they were concluded at the very least merits further investigation by a liquidator.*
>
> *93. The loan agreements are signed by Mr. Kerr and Mr. Naylor's as director of the lenders and by Mr. Kerr and Mr. Naylor as directors of the Partnership. Mr. Naylor's evidence was that he was not aware of any communications between the General Partner and the Torchlight Group prior to the conclusion of these loan agreements. His evidence was "Obviously Mr. Kerr and I would have discussed the position from both the fund's perspective on one hand and PGC's on the other." He agreed that they were both wearing both hats and were "considering the transaction from each side." Mr. Naylor did not demonstrate any awareness that there is any problem with this approach.*
>
> *94. The terms of the loans, which were the same, were not normal commercial terms. There was no repayment date and both loans were repayable on demand whenever the lender felt like recalling the loan. There were no dates stipulated for payment of payment of interest. The interest rate was rolled up until repayment was demanded at 9% per annum.*

95. If Mr. Kerr and Mr. Naylor had any regard for proper corporate governance they would have known that it was a breach of their fiduciary duties to the Limited Partners to act on both sides of a transaction with the Partnership. The terms of these loans should have been disclosed to and considered by persons independent of Mr. Kerr and Mr. Naylor who were also acting for the lender. The Advisory Committee, such as it was, comprising Mr. Kerr and Mr. Wilson at this time, were not asked to consider whether it was in the interests of the Partnership to take on loans on loans on these uncommercial term with companies in the same group controlled by Mr. Kerr.

96. The loans were repaid (other than £1 million of the sum outstanding) from the proceeds of sale of Local World."

918. The position expressed by Mr. Kerr is that these transactions were at arm's length and in no way detrimental to the Partnership. The Court will in due course consider the situation where under the precise terms of the LPA the GP enters into arrangements which it believes to be in the interests of the Partnership, and in the absence of bad faith or other dishonest motive.

919. There is criticism too of RCL participations in the sense that full documentation has not been forthcoming. At the same time, no complaint is made that the overall arrangements were either harmful or unpropitious, and ultimately the Court has to examine all of the issues as they are now, and not as how they appeared to be in any event years ago. The Court must make a practical decision and not merely a theoretically based one.

920. Turning to the matter of in kind contributions the Petitioners state at paragraphs 118-120:

"*118. The Committed Capital of the Limited Partnership has increased from NZ$150m, which was AU$166m, as at the date of the transfer from New Zealand to Cayman, to AU$226 m as at November 2014. This increase was purportedly the consequence of the capital raising conducted in late 2012/early 2013 which, on the Partnership's own accounts, raised only AU$12m in cash between December 2012 and June 2013.*

119. The increase was primarily the consequence of partnership capital being allocated to the General Partner for Carry in the sum of AU$10.16m, a sum to which the General Partner was not entitled under the LPA (see paragraphs 138 to 144 below); and, the conversation of RCL participations held by PGC and its related and associated entities into Partnership interests of some AU$88m which were never independently valued, see paragraphs 110 to 112 above.

120. If the in kind contributions (i.e. management fee or "RCL Participations") were worth less than the allocated capital value obtained by the General Partner and PGC then they obtained capital in the Partnership on the cheap. These cheap contributions will have diluted the interests of all other Limited Partners in the assets of the Partnership."

921. The Court is particularly mindful of the hypothesis set out in paragraph 120. Not only has no evidence been produced to support it, but also nothing has emerged from the various unqualified audits to support it either and the Court has no reason to believe that the hypothesis has any merit or evidential support.

922. Complaint is then made of the Wilaci loan arrangements. The Petitioners state at paragraphs 124-125:

"*124. On 22 August 2012 the NZ entered into a loan agreement with Wilaci Pty Limited (Wilaci) on extremely onerous terms:*

(a) The loan was for AU$37 million for a term of 60 days.

(b) The interest on the loan was Credit Suisse's cost of funds plus a margin of 150 basis points.

(c) There was an establishment fee of AUD$5 million which was payable 120 days after the advance.

(d) Further, there was a late payment fee per week of NZ$500,000 (the Late Payment fee).

(e) Wilaci was also given security over all its present and after acquired property and perfected that security by registration.

125. No limited partners were informed of the terms of this loan, or the security to be advanced in respect of the services to be rendered. Contrary to the General Partner's assertions about the adequacy of its reporting to limited partners, the General Partner has to this day failed to properly explain the loan and the events that have followed its decision not to repay the loan on time. Even assuming the principal was repaid within the 60 day period (which did not happen), the rate of interest on AUD$37m for 60 days was 13.5% of the principal sum which is an annual rate of interest in excess of 80%.

...

133. Whether this debt will ultimately be visited on the Partnership is a matter which can be investigated by a liquidator.

134. It is, however, a legitimate complaint that the General Partner, behaved in a manner which appears to be sharp practice and did so without the knowledge or agreement of the Limited Partners, transferred the liability for this onerous loan to the Cayman Partnership and failed properly or at all to agree with Wilaci that the assets of the NZ Fund that were subject to security provided by the NZ Fund to Wilaci could be transferred to the Cayman Partnership free of the security given to Wilaci by the NZ Fund."

925. At this stage the Court will merely comment that while this loan was entered into in extremely critical circumstances it may subsequently be viewed as a means by which the Partnership was able to both prosper and grow as well as survive.

926. In addition, the evidence discloses that Mr. Kerr's belief that Mr. Grill had agreed to a modification of the original loan agreement was neither spurious nor unreasonable, and from a legal perspective it was at least seriously arguable that Mr. Kerr's interpretation of his email exchanges with Mr. Grill was entirely correct. In any case, this matter has now been settled. It is in the past and not the present.

927. As far as management fees and acquisition fees are concerned, the Petitioners complain about them but in light of the independent role played by both Praxis and the professional auditors, the Court sees no basis to sustain those concerns.

928. In relation to the GP's entitlement to Carry, this has been addressed and will be addressed further when the relevant provisions of the LPA come to be examined.

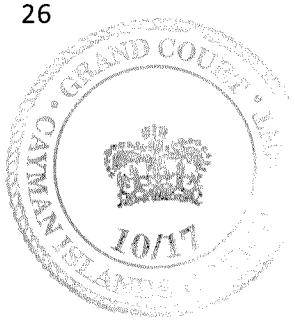
929. Complaint too is made about the provision of information. Paragraphs 155-156 state:

> "*155. It is a requirement, under the Partnership Agreement and the NZPA, that the General Partner and the NZ GP provide: audited annual financial accounts to 31 March within 135 days following the end of the Accounts Period (Clause 13.2); and, 'reasonable quarterly reports' within 45 days of the end of the relevant quarter (clause 13.3); tax statements within 120 business days from 31 March each year (clause 13.3).*
>
> *156. The General Partner has persistently been extremely late in providing audited accounts in breach of the LPA. For example, the 31 March 2014 accounts were due no later than 13 August 2014 and were only provided on 27 July 2015, which was 348 days late and, were not provided to Aurora until 29 October 2015, which was 442 days late."*

930. While the GP's governance in this area has been less than perfect, the position is both that there was no adverse news to report and again ultimately that no harm whatsoever resulted to the Partnership.

931. It is alleged that the GP has failed to keep proper books and records as required by section 21 of the relevant Law. However, the work of administering the Partnership is under the auspices of Praxis in Guernsey. Section 21 (1) and (2) states:

> "*21. (1) A general partner shall keep or cause to be kept proper books of account including, where applicable, material underlying documentation including contracts and invoices, with respect to-*



(a) *All sums of money received and expended by the exempted limited partnership and matters in respect of which the receipt of expenditure takes place;*

(b) *All sales and purchases of goods by the exempted limited partnership; and*

(c) *The assets and liabilities of the exempted limited partnership.*

(2) For the purposes of subsection (1), proper books of account shall not be deemed to be kept if there are not kept such books as are necessary to give a true and fair view of the business and financial condition of the exempted limited partnership and to explain transactions."

932. The GP has caused books of account to be kept, and obviously those books of account have been kept such as are necessary and sufficient to enable the auditors to form a true and fair view of the Partnership business and financial condition and to explain its transactions. Consequently the Court is unable to accept that there has been any genuine failure in this respect.

933. In addition, section 22 states:

"*22. Subject to any express or implied term of the partnership agreement, each limited partner may demand and shall receive from a general partner true and full information regarding the state of the business and financial condition of the exempted limited partnership."*

934. From time to time there have been delays, but it is not factually correct to allege that true and full information regarding the state of businesses financial condition of the Partnership have not been received. Once again the Court states that there is an abundance of information about this Partnership and in the context of these proceedings arguably an excess of it.

935. The Petitioners also raise the issuance of certain default notices against them as an indication of the GP's hostility towards them. The substance of the default notices will be

considered later, but both in relation to their issuance and indeed more broadly it is not the case that even acrimony and hostility arising means that the Partnership cannot continue. In circumstances where management and ownership are segregated by operation of law, the Partnership can continue without any difficulty whatsoever. That is a strength and not a weakness of the statutory framework. The Court has already expressed its view of the applicable legal principles at an earlier stage of the Judgment.

936. At paragraphs 183-188 there is a formal refutation of the GP's separate claim in respect of an unlawful means conspiracy against inter alia CAML and ACC. It is unnecessary for this Court to enter upon a consideration of the matter as it has no bearing on whether the winding up jurisdiction on just and equitable grounds should be exercised.

937. Submissions follow regarding the evidence of Mr. Weaver and Mr. Mullins, even though at paragraph 189 the Petitioners assert that expert evidence on the value of the investments in the Partnership is irrelevant to the decision as to whether the Court should make a winding up Order. The Court will merely confine itself to confirming once more that Mr. Weaver's evidence was of great assistance and Mr. Mullins' evidence was of no assistance at all.

938. It is argued at paragraph 192 that:

> "*192. The effect of a winding up order in respect of the Partnership does not, of itself, have any impact at all on the RCL companies and the value of the value assets held in those companies. The Partnership is a holding company and a separate corporate entity for the trading companies that hold the investments.*"

939. It is also submitted that a liquidator as an independent person "*can hold the ring*".

940. The next phase of the Petitioners' submissions consists of what are called Speaking Notes. During oral submissions Mr. Lowe indicated that a further 500 pages of written submissions would be forthcoming from the Petitioners, and on the Court indicating its difficulty with this proposed course the Petitioners instead abbreviated their endeavours and produced a series of shorter summary points as previously indicated.

941. The Court has reviewed the Speaking Notes but it will not set them out in comprehensive and indeed exhaustive detail, recalling the impeccable guidance of Mangatal J on the exploration of every nook and cranny.

942. Concerning the in specie distribution Note 9 states that the NZ GP's resolution authorising and approving the investment in the Partnership and the Advisory Committee Meeting Resolution approving the same are signed by Mr. Kerr and that Mr. Kerr was the only attendee at the latter meeting.

943. Note 15 also states that the approval of Carry by the Advisory Committee comprises only Mr. Kerr. Mr. Kerr has however given evidence that he had received legal advice as to the Carry in kind.

944. With regard to the provision of audited accounts and quarterly reports the Petitioners point to repeated and sometimes extensive delays, which in the latter instance it should be said have subsided since September 2016. The most recent audited accounts for 31 March 2017 were on time and provided to the Limited Partners on 12 August 2017. Although this history is disappointing and in breach of the LPA, the contents of these documents amply demonstrate the financial success of the Partnership, thus to a considerable extent allaying any excessive concern.

945. As to the value of the Partnership on liquidation, it is noted at Note 11 that Mr. Weaver adopts a fire sale definition of liquidation. There is a further assertion at Note 11 that a liquidator could "*workout*" the asset and not subject it to a forced sale. It is rather like saying that a proposed cure may not necessarily be fatal.

946. Under the RCL transactions, there is renewed criticism as to the lack of underlying documentation. No doubt had litigation been forecast or anticipated the history would have been documented in a more elaborate manner, but once again with great respect that is to look backwards rather than forwards. The Court is not required to write a history but to make a decision and to explain it.

947. Changes in the terms of the LPA are addressed. On that subject it appears to the Court that communications by the GP could certainly have been improved but that despite this relative

inadequacy there was no improper and ultimate intent. It would be fair to state that while Mr. Kerr's business skills are exceptional and the Limited Partners have unquestionably benefited from them his governance style has not been quite so highly developed. However, if that became the sole measure for winding up a solvent business there might not be many businesses that unequivocally survived.

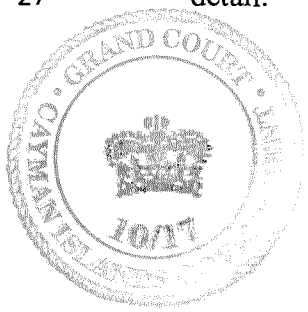
948. The Speaking Notes refer to in kind contribution to capital made by what are described by the Petitioners as related parties, e.g. PGC. As we have seen, Mr. Kerr maintains they were not related party transactions but arm's length ones and in any event as has also been made clear they actually benefited the Partnership at the financial expense of PGC. Mr. Kerr and Mr. Naylor maintain that Advisory Committee approval was not sought because it was not required.

949. In relation to the in kind contributions to capital and in relation to PGC and Torchlight loans, given the disclosures in the audited accounts it is difficult to see not so much the point being made but the practical importance of the point made.

950. Under the subject of fees, the Petitioners submit that the GP used the new Partnership arrangement so as to enjoy enhanced management fees for an extra two years. On the other hand, the prospect of possibly enhanced profits for the Partnership is a countervailing factor also to bear mind.

951. There is also a complaint that Mr. Naylor's fees have not been fully verified. This insinuation is that something is wrong, without once again the Petitioners putting themselves to the inconvenient but essential burden of proving something is wrong.

952. The Petitioners rely on section 17 of the relevant Law for the proposition that a general partner shall act at all times in good faith, and, subject to any express provisions of the partnership agreement to the contrary, in the interests of the exempted limited partnership. This means they say that the duty to act in good faith is absolute, but in fact acting in the interests of the Partnership can be qualified by express agreement as we shall see in more detail.

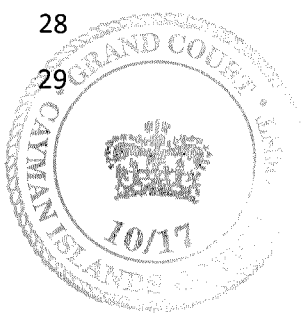


953. Notwithstanding that important qualification, to which the Court will return when considering the GP's own submissions, the Petitioners rely on the underlined principle of Lord Cranworth LC in *Aberdeen Rail Co. v. Blaikie Brothers* (1854) Mac 461; [1843-60] E.R. Rep 249 at page 253:

> *"This, therefore, brings us to the general question, whether a director of a railway company is or not precluded from dealing on behalf of the company with himself or with a firm in which he is partner. The directors are a body to whom is delegated the duty of managing the general affairs of the company. A corporate body can only act by agents, and it is, of course, the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such an agent has duties to discharge of a fiduciary character towards his principal, and it is a rule of universal application that no one having such duties to discharge shall be allowed to enter into engagements in which he has or can have a personal interest conflicting or which possibly may conflict with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. It obviously is, or may be, impossible to demonstrate how far in any particular case the terms of such a contract have been the best for the cestui qua trust which it was impossible to obtain. It may sometimes happen that the terms on which a trustee has dealt or attempted to deal with the estate or interests of those for whom he is a trustee have been as good as could have been obtained from any other person; they may even at the time have been better. But still so flexible is the rule that no inquiry on that subject is permitted."*

954. The Petitioners also rely for example on the underlined passage from the learned dicta of Millett J in *Bristol & West Building Society v. Mothew* [1998] Ch. 1 stating at page 18 A-C:

> *"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty.*



The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out if his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work Fiduciary Obligations (1977), p.2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

955. Millett J also states at pages 19 D-H:

"*D That, of course, is not the end of the matter. Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other: see Finn, p. 48. I shall call this "the duty of good faith." But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal. Conduct which is in breach of this duty need not be dishonest but it must be intentional. An unconscious omission which happens to benefit one principal at the expense of the other does not constitute a breach of fiduciary duty, though it may constitute a breach of the duty of skill and care. This because the principle which is in play is that the fiduciary must not be inhibited by the existence of his other employment from serving the interests of his principal as faithfully and effectively as if he were the only employer. I shall call this "the no inhibition principle." Unless the fiduciary is inhibited or believes (whether rightly or wrongly) that he is inhibited in the performance of his duties to one principal by reason of his employment by the other his failure to act is not attributable to the double employment. Finally, the fiduciary must take care not to find himself in a position where there is an actual conflict of duty so that he cannot fulfill his obligations to one principal without failing in his obligations to the other: see*

Moody v. Cox and Hatt [1917] 2 Ch. 71; Commonwealth Bank of Australia v. Smith (1991) 102 A.L.R. 453. If he does, he may have no alternative but to cease to act for at least one and preferably both. The fact that he cannot fulfil his obligations to one principal without being in breach of his obligations to the other will not absolve him from liability. I shall call this "the actual conflict rule."

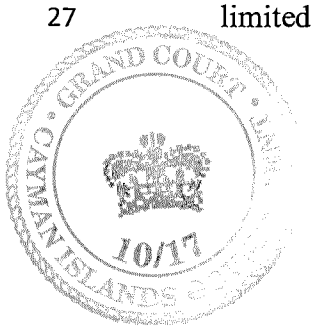
956. These general propositions are of course completely sound. But in the Cayman Islands they must been seen in the specific context of what both the relevant statute and the relevant LPA actually state.

957. The legislature has clearly intended to attract talented entrepreneurs to this jurisdiction, and they may work in some cases either individually or indeed be entitled to act and responsible to act on behalf of a wider range of interests rather than just those of a particular partnership. Subject to express terms of agreement, and subject to a separate duty to act in good faith, it appears to the Court that those individuals and entities are fully at liberty to do so.

958. In regards to the Petitioners' criticisms as to the Advisory Committee constitution and functions, alleged related party transactions, self-dealing and indeed the in kind allocation of Carry, the LPA itself has to be most carefully scrutinized. When the Court reviews the submissions of the GP this important contractual theme raised by the Petitioners and countered by the GP will be further considered.

959. It does seem to the Court, in any event, that without more precision as to how or why or when parties are either related or associated parties the term adopted is more denigratory than informative. The Court is invited to speculate when there may well be nothing of moment or consequence about which to speculate in any event.

960. It is necessary to add that although the rule as to self-dealing is inflexible in general law it can be tempered by both express agreement and by statute, and in those respects the Court considers the law of the Cayman Islands to have moved on in this area as far as exempted limited partnership law is concerned.



961. Mr. Kerr's historical involvement with van Eyk is noted, along with that of Mr. Naylor, and the fact that PGC was the largest shareholder and note holder until it sold its interest in van Eyk in 2013. None of this is of any practical assistance in the resolution of these present proceedings. It is not enough for the Petitioners to claim that a fact is relevant if it is of no probative value at all in applying the principle in the *Loch* case.

962. Complaints are then made that the default notices are defective and unjustified. This issue will be dealt with later as a separate subject.

963. There are renewed accusations about the keeping of books and records, on the merits of which the Court has already expressed views. While there is always the possibility of room for improvement, and Mr. Naylor for instance with hindsight could have done a better record keeping job, it is difficult to see these complaints rising to a level where the Partnership should be liquidated. As with so much of this case, what is being proposed is irrational, disproportionate and wholly destructive.

964. As for witnesses, Mr. Naylor is accused of speechifying and being confrontational, and Mr. Kerr is said to have acknowledged his own paranoia in the context of discussion about accounts. A more objective analysis may well be that their patience has been strenuously tested as the proceedings have unfolded, mutated and evolved.

965. The third phase of the Petitioners' submissions consists of oral argument.

966. Mr. Lowe very appropriately pointed out that the just and equitable jurisdiction is not susceptible to definition.

967. He emphasised that the level of enmity in this particular case is quite unusual, and that in a partnership situation where this arose it was quite a different situation to any other.

968. Mr. Lowe reiterated that "*one of the complaints*" of the Petitioners' case was based on "*bad corporate governance*". The Court did point out however that during an earlier sanction application, for example, there was "*some implication that there was a danger of moneys being spirited away.*"

969. Mr. Lowe continued with a very helpful review of the case law, which the Court has earlier reviewed prior to setting out the legal principles by which it now intends to be guided.

970. Mr. Lowe also pointed to the fact that a winding up of a limited partnership "*is a rather peculiar beast*" because it has to take place in the context of certain contractual rights which one cannot change in a winding up, including the rights of the GP under the LPA.

971. Mr. Lowe stated also that the loss of confidence is to be assessed as at the date of the hearing, a matter not in controversy or dispute at this point in so far as it refers to the facts existing at the date of the hearing.

972. Turning to Ms. Poon's evidence he said she was perfectly entitled to express a view about Aurora's position based on the documents she had read and based on what she had seen. That would be correct but only as far as it can go.

973. Regarding proper purpose, he noted that a just and equitable petition was a class remedy, and that the Judge has to decide whether the petition is for the benefit of the class of which the Petitioner formed a part or some other purpose of his own. This is of course one of the many issues which this Court will decide, having earlier set out the law.

974. He indicated that one of the functions of a liquidator is to investigate, if there are matters to investigate. This Court is not persuaded that in this instance after a hearing lasting many weeks there is anything left to investigate that is worthy of the description.

975. Mr. Lowe drew attention to the absence of allegedly independent Limited Partners giving evidence on behalf of the GP, claiming also that Mr. Cleary has a stipend on the Advisory Committee and Mr. Harford "*was an employee effectively of Mr. Kerr's at PGC.*"

The Petitioners, on the other hand, were independent of the GP.

976. None of this in any way inhibits the Court from coming to its conclusion as to respective credibility.

977. There was some discussion of the distinction that while under section 22 of the Law limited partners may demand and should receive information regarding the condition of the

partnership, there was no corresponding right to demand books of account under section 21.

978. The Petitioners emphasised their role as partners, enabling them as partners to ascertain the position of the partnership business, it being their business and the books being their books. The practical question which arises within the frame work of this Petition is whether there is any further point for factual ascertainment.

979. Mr. Lowe stated that there had been a breach of fiduciary duty, and it was often something that was part of the cause of a winding up. It does seem to the Court however that even in the event of a valid complaint of that nature there can be other remedies available than winding up, and that the jurisdiction must be exercised judiciously and not automatically, particularly when the underlying transactions criticised appear to be entirely proper and beneficial in any event.

980. Mr. Lowe turned to the GP's contention that the Petitioners should have put all of their allegations and their case to the GP's witnesses in the course of cross-examination. However, he identified the principle in *Browne v. Dunn* (1894) 6 R 67 as being that if a party intends to impeach a witness that party is bound in cross-examination to give the witness an opportunity of making any explanation open to the witness. In his submission, the authority concerned accusations about lying and not about putting all of one's case and all of one's allegations to a witness. In addition, while "*adequate notice*" has to be given, although it is usually through an opportunity to cross-examine, it is not exclusively so given.

981. Mr. Lowe added that in light of this learning the point really was that what the Petitioners did was not unfair simply because they did not take the GP's principal witnesses to issues in dispute, point by point. In effect, he argued, it is permissible to make one's case other then by putting it to opposing witnesses if truthfulness is not itself the issue.

982. The Court is grateful to Mr. Lowe for clarifying the Petitioners' position on this particular question, and also for confirming that accusations of lack of probity in the sense of challenging honesty and integrity do not arise nor have done so for some time. The

following passages on day 34 page 165, lines 11-25 – 167 lines 1-2 lay this matter at least to rest:

11	*Justice McMillan:*	*No. Well, you are clarifying the scope*
12		*of the arguments, the scope of the debate at least,*
13		*which I am not sure was, with no disrespect to anyone,*
14		*quite clarified before because it did seem that lack of*
15		*probity to some degree was an issue.*
16	*Mr Lowe*	*I mean, I'm not saying it wasn't alleged on the pleading*
17		*but I disavowed it now for months.*
18	*Justice McMillan:*	*That's why I said there might be an issue*
19		*as to whether or not you may have altered your position*
20		*as distinct from expanding on your position.*
21	*Mr Lowe:*	*I've never altered my position. From the very*
22		*first time when I started cross-examining Mr Naylor*
23		*I made sure that he knew I was not challenging his*
24		*Honesty and his integrity in a general way. It's never*
1		*been my position that there is a case of lack of probity*
2		*because it's certainly not a case which rises to the*
3		*level of, if my learned friends are right, what I have*
4		*to describe as dishonesty. That's not something I've*
5		*ever put.*
6	*Justice McMillan:*	*No. I think way back a long time ago*
7		*when the matter first crystallised before Mr Justice*
8		*Clifford, there may have been an impression to that*
9		*effect. That's all I can say. I don't go beyond that*
10		*but I am only going by what I have been reading because*
11		*I wasn't there.*
12	*Mr. Lowe:*	*At the end of the day—you may criticise us on*
13		*costs or whatever but, at the end of the day, for a long*
14		*time the case has been what I am putting to you.*

Justice McMillan: That is why I was very interested in terms of describing the matter as a basket of different possibilities. You've eliminated some possibilities from that basket and then we will look to see what remains and what the grounds are for supporting what you say. So that clarifies—

Mr Lowe: That is essentially what I said to your Lordship today which is – I am just submitting to you what the legal gateways are for the moment, is the what I call maladminstration and then the transactions which we say are in the Loch v John Blackwood category which impair

our confidence and make our lack of confidence justifiable without me having to go so far as to call them dishonest or underhand or it's a lack of probity because its very important that Loch v John Blackwood, as I said to your Lordship, upholds the petition when the McLarens had paid themselves wages and had written off the loan in circumstances where the Privy Council isn't willing to call that dishonest, isn't willing to call it lack of probity, but finds that that justifies the loss of confidence. You remember—

Justice McMillan: I think the implication was that the company was not functioning as a company because it wasn't paying proper dividends and moneys were going in other directions.

Mr. Lowe: Exactly, I mean, there were things happening—

Justice McMillan: The business wasn't working properly.

Mr. Lowe: The business was working fine.

Justice McMillan: But not for its –

Mr. Lowe: Not for its stakeholders.

20 *Justice McMillan:* *Exactly.*

21 *Mr. Lowe:* *That was the point. There were, as you saw at the*

22 *beginning of the judgment, complaints about the*

23 *administration, no meetings and so on.*

24 *Justice McMillan:* *Again, I think there may be distinctions*

25 *between imperfect administration and maladministration...*"

983. Once again there is a relevant exchange on the issue of the nature of the allegations on Day 35, page 14, lines 19-25, page 15 lines 1-25 and page 16 lines 1-9:

"19 *Justice McMillan:* *I think part of the problem may be that*

20 *there was some confusion over whether you were alleging*

21 *or the petitioners were alleging, to put it neutrally,*

22 *a lack of probity and that would have caused some*

23 *anxiety about these credibility points but we've been*

24 *over that.*

25 *Mr. Lowe:* *We've been over that. Actually—*

1 *Justice McMillan:* *You are not alleging that as matters stand at the*

2 *moment and that may—*

3 *Mr. Lowe:* *I checked overnight, my Lord, after we had that*

4 *debate. In fact, it has been clear since the PTR that*

5 *that is not the case, not dishonesty, and it's not*

6 *a fraud case. It has been clear since the PTR that*

7 *that's not the case. There may have been some—there*

8 *may have been and there may still be some difference*

9 *between us as to what it is meant by lack of probity. If*

10 *it means dishonesty or fraud, that's not our case. If*

11 *that means, then it's not our case.*

12 *My case is that the misconduct rises to the level*

13 *of Loch v John Blackwood a breach of fiduciary duty.*

They are not dishonest. No breach of fiduciary duty is necessarily dishonest and that's well covered by authority. If you put yourself in a position of conflict, it's a strict rule. It's not about dishonesty. You can obviously commit dishonest breaches of fiduciary duty but not every breach of duty is dishonest. You can certainly don't have to describe them as dishonest. That's Armitage v Nurse, if nothing else. There are lots of cases about that. So that is—it's never been a fraud case and if it had been, then obviously the court might have directed pleadings and particulars in a different form.

My learned friends might have obtained an order to that effect. But the fact is that isn't how—this isn't a petition based on fraud, however much my learned friends would like it to be because of course that then—they can make arguments which are appropriate to that sort of case. But this is fundamentally a winding-up case, just and equitable petition based on loss of confidence and the question is whether I can prove that and I can justify that."

984. Mr. Lowe further relied on *Chen v. Ng* [2017] UKPC 27 for the proposition of Lord Neuberger and Lord Mance at paragraph 54 to the effect that a witness can be disbelieved on grounds which were not put to him in cross-examining. One should perhaps add that this is in circumstances that the disbelief is not due to impeachment on the basis of lying but is for a variety of other reasons.

985. The Court must state however that where matters are not put which in practice ought to have been put that omission renders the requirement of a fair trial considerably more complex. That essentially is where the problem arises in this instance.

986. In light of that situation the Court in *Chen v. Ng* [2017] UKPC 27 notes, as some assurance and guidance, the comments of the learned Judges at paragraph 56:

> "*56. It is also worth an appellate court having in mind in this context what was said by Lord Hoffmann in Piglowska v Piglowski [1999] 1 WLR 1360, 1372:*
>
> *"If I may quote what I said in Biogen Inc v Medeva Plc [1997] RPC 1, 45:*
>
> *'...[S]pecific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance... of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.'*
>
> *...The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed."* "

987. The *Gestmin* case was then reviewed, and the fallibility of human memory duly considered, and Mr. Lowe made reference to a growing tendency to warn about oral evidence and the information of the documentary record. These are comments which have been fully borne in mind in relation to the statements of the Court already set out where the *Gestmin* principle has been reviewed.

988. There is then the matter of the role of Mr. Marshall stated on Day 35, page 26, lines 7-12:

> "*Mr. Lowe:*
>
> *Yes. Logic—I don't know quite what the*

relationship between Logic and these investors are but these are people who represent Logic's investment in Torchlight and, as I said, have the misfortune of being managed by the extraordinary Mr. Marshall. That's why he gave evidence."

989. The Court would only add that although Mr. Marshall was certainly extraordinary he also played a leading role in the genesis and development of this entire case. It was Mr. Marshall and Mr. Wallace who led the Petitioners forward and it was not the other way around.

990. Mr. Lowe submitted that in relation to unclean hands allegations Aurora represented a fund sponsored by MIML, with supporting investors whom it is not suggested are guilty of unclean hands irrespective of what was alleged against CAML and on a lesser level against ACC.

991. A complaint as to the independence of the Advisory Committee is thus described on Day 35, page 63, lines 14-25 page 64, lines 1-18:

"14 what is the point of monitoring conflicts if you
15 don't have someone independent to do that? It becomes
16 a meaningless mechanism if the people who monitor
17 conflicts have other commercial personal relationships
18 with you. So to make this provision operate properly,
19 it needs to be staffed by independent people.
20 For a considerable period of time Mr. Kerr was the
21 sole member of this committee. When I say some of the
22 provisions were set at naught, this is the provision
23 that I'm principally speaking about. This is one of the
24 main protections that the investors have against that
25 kind of activity.

1 Notice that the Advisory Committee also has other

functions and powers. It's supposed to meet quarterly but that on top of the meetings it's supposed to have or the consideration, the review of any actual or potential conflicts of interest. You can understand how in a properly organized Advisory Committee you would consult when you were worried about a conflict of interest when that occurred to you and the Advisory Committee would say, "Well, we have thought about this, we've asked the legal member or whoever it is and they don't see that you have one".

But it won't work if the person you talked to is your mate from university or he is you, he's allied to the manager and he has to then review your conflict of interest. That's not how it was presented to investors, as you saw. Investors thought that there might be— Mr. Kerr would be there or somebody would be there but That there would be independent people as well."

992. It is then submitted that Carry can only be made from cash receipts under the NZ LPA, and that variously there has been a form of conduct giving rise to a loss of confidence without it being dishonest. Mr. Lowe also referred to the New Chums Beach transaction as an example of what he called self-dealing. .

993. Referring to the LPA, Mr. Lowe then emphasised that conflicts of interest must be scrutinized and monitored. He proceeded to cite various authorities on the nature of a fiduciary duty. These principles have already been set out. The critical point appears to be that even honest self-dealing if it arose could amount to a breach of fiduciary duty in turn giving rise to a technical lack of probity. Whether this Court would be minded to wind up

an exempted limited partnership based on such a technicality is quite another matter and the precise relevant terms of the LPA on that arising will be considered later.

994. The Petitioners' proposition is perhaps even more tenuous where no harm has been caused, as the Court has repeatedly pointed out.

995. Mr. Lowe then continued to revisit his themes at some length.

996. Obviously with the benefit of hindsight, the Petitioners' Summary Closing Submissions, Speaking Notes and extensive oral arguments could have been compressed into one orderly document. Although it was agreed at the end of oral evidence that submissions would be exchanged in this way not only has the width of the process placed the Court in a situation of difficulty, but also more importantly it has created real problems for the administration of justice in ensuring that the GP as Respondent has the essential benefit of a fair trial. Justice must not only be done but must be seen to be done in this essential regard.

The Submissions of the General Partner

997. The GP's submissions consist of written Closing Submissions, additional Notes and oral arguments.

998. At paragraph 3 it was submitted that much of the cross examination carried out on behalf of the Petitioners had little relevance to the issues that the Court must address. The Court agrees that it was difficult at times to see what was the issue in dispute, and what was perhaps simply peripheral.

999. By way of overview, attention was drawn to the commercial strategy of Mr. Kerr and Mr. Naylor in order to optimize for the Partnership the benefits of the acquisition of distressed debt from BOSI by the NZ Partnership, with the ultimate objective of running a land development business (paragraph 7).

1000. It was pointed out that the GP had no reason to think it did not have the support of the Limited Partners for a second stage and there was some consultation with CAML and ACC,

although as the Court previously indicated Mr. Kerr's strengths are primarily in areas of finance and business rather than in formally structured administration and communication. There were also attractions to CAML and ACC in facilitating early exit through the intended non pro rata regime in the new Cayman Islands Partnership.

1001. After the launch of the new Partnership a successful investment was made in Local World, the Lantern stake continued to be built up, and RCL "*started growing in value for the enormous benefit*" of all Limited Partners.

1002. The Closing Submissions continued at paragraph 10 as follows:

> "*10. Whilst Mr. Kerr and Mr. Naylor became aware that Mr. Wallace of MAS was embarking on a competing strategy in relation to Lantern, they had no idea that, behind the scenes, he had joined forces with Mr. Marshall, who by then was strongly disaffected and driven by personal animosity towards Mr. Kerr. They also had no idea that Aurora had provided a significant number of confidential documents and confidential information to MAS concerning the affairs of the Partnership that MAS were seeking to use against the interests of the Partnership. It is clear now that Mr. Wallace and Mr. Marshall then embarked on a multi-faceted campaign to disrupt the General Partner's management of the Partnership, smear the question of the General Partner with misleading press articles, its auditors and regulations and to get other Limited Partners on-side with a view to replacing the General Partner, which they have sought to do by this ill-starred Petition. When embarking on this strategy, they, with the full support of CAML and ACC, were completely indifferent to the fact that, by doing so, they would cause a massive loss of the long term value of the Partnership to the detriment of all Limited Partners. In addition to Mr. Marshall's own personal animosity towards Mr. Kerr, both Mr. Wallace and Marshall were motivated by the fees that they hoped to earn as replacement General Partner (in particular, by disposing of the Cayman Partnership's assets for which they would receive an additional fee not payable to the current General Partner).*"

1003. This important passage well summarises a number of facts and conclusions which the Court finds to be absolutely accurate and correct.

1004. Furthermore, the GP reminded the Court that Mr. Wallace, as "*Chief instigator of the Petition*" had affirmed the original Petition prior to it being filed. Paragraphs 12 and 13 continue:

> "*12. ...However, he subsequently turned against his fellow collaborators and attempted to hijack the Petition. That attempt was unsuccessful and ultimately led to MAS paying the costs of the General Partner on an indemnity basis and Mr. Wallace was (rightly but no less ironically) branded a 'blackmailer' by the Petitioners' own counsel. He has more recently been described as a 'charlatan' by the Petitioners' own leading counsel who acknowledged that what Mr. Wallace had done was "shocking. Absolutely shocking" during the Aurora Default Hearing.*
>
> *13. This conduct was befitting of the main conspirator, as the General Partner had rightly branded Mr. Wallace, and consistent with the manner in which he had already behaved to the serious detriment of the Partnership. Despite this obvious and inescapable body blow to the Petitioners' case, true to form, they proceeded as if nothing had happened."*

1005. Paragraphs 14 and 15 then reinforced the comments, although the last sentence is disputed by the Petitioners:

> "*14. The point has already been made that Mr. Wallace had not acted alone but had joined forces with Mr. Marshall (with whom he intended jointly to act as replacement General Partner). Mr. Marshall, at least, turned up to give evidence. How the Petitioners must wish that he had not. So much could be said about Mr. Marshall, but in short, he was an atrocious witness. This view appears to be shared by the Petitioners whose own counsel has lost no opportunity to denigrate Mr. Marshall and abandon any reliance upon him. Incredibly, despite basing the whole Petition around the claims of Mr.*

Wallace and Mr. Marshall, the Petitioners now say in their written closing (at para 5) that they 'make no excuse for Mr. Marshall and Mr. Wallace whom they do not represent'.

15. So much for the two drivers of the Petition who had assembled the list of phony complaints against the General Partner and had been responsible for propagating a climate of fear in which investors' whole stake in the Partnership was said to be at risk. CAML and ACC appeared to have been only too willing to join in this strategy, which was conduct completely inappropriate for a Limited Partner."

1006. A submission was made in regard to the subject of improper purpose in law at paragraph 17, although again it is disputed by the Petitioners:

"17. The explanation for CAML and ACC's conduct is because it suited their commercial aims to adopt this course. Quite simply, they wanted early liquidity (despite knowing full well that they had no entitlement to it) and, in their view, that end justified the means. Hence, any natural misgivings or common sense was put to one side, as Mr. Bagnall, Mr. Traveller and Ms. Burleigh heard what they wanted to hear. For CAML, or course, this conduct was more of the same. The Court will recall that since 2012, CAML had been running its own strategy of writing to the Partnership's auditors, petitioning the regulators to initiate investigations and even approaching a High Court Judge in New Zealand (in an attempt to influence the Perpetual litigation) as a way of obtaining leverage in its negotiations with the General Partner to exit the Partnership [E9/5340]. Accordingly, CAML and ACC signed up to the Wallace and Marshall ticket, or to use Mr. Bagnall's telling turn of phrase, decided to 'tail coat' them [Day11/142/15]."

1007. Paragraph 18 is significant:

"*18. In their evidence, both ACC and CAML admitted to being fully aware of the approaches that were being made to the Partnership's auditors and the regulators and to MAS's aggressive strategy concerning Lantern. In the case of CAML, it not only agreed to support the campaign involving the auditors but also agreed to lend its weight to an approach to the FMA again and therefore became "involved in a very aggressive activist campaign" against the General Partner [Day7/82/24-83/3]. CAML's own lawyers had explicitly warned CAML about MAS's conflict of interest [CAMLB/10]. In the case of ACC, Mr. Bagnall (together with Mr. Marshall) gave interviews to the press to publish a damaging article about the Partnership. In the same week that these interviews were given to the press, Mr. Bagnall met with Mr. Marshall and Mr. Wallace and discussed the "multi-faceted" campaign that was initiated against the General Partner [Day12/93/7-97/6]."*

1008. The GP then turned to the involvement of Aurora at paragraph 20:

"*20. Aurora's role in this Petition is equally troubling. It has now transpired that the only reason why Aurora (in the place of MAS) agreed to become a Petitioner in the weeks running up to the Petition was because they were instructed to do so by Mr. Wallace and indemnified by MIML. The Court will recall that the only witness who gave oral evidence on behalf of Aurora (Ms. Poon) had barely any firsthand knowledge of events but had instead conducted an ex post facto review of documents and repeated complaints that had been provided to her."*

1009. In the opinion of the Court the inevitable question arises as to why when it comes to allegations of a loss of trust and confidence the principal witnesses for these entities should be believed in any material way.

1010. Paragraph 24 (ii) very succinctly referred to an issue which has been a constant and troubling concern of this Court:

"(ii) *A constant shift in the focus of the case – it started off complaining about a lack of audited accounts, then appeared to focus on related party transactions, and now, in a desperate attempt to re-shape the case at the eleventh hour appears to be based on corporate governance and record keeping. The Court should need no reminding that it is of fundamental importance in proceedings of this nature that the allegations are properly set out in the Petition and that the case is decided by reference to the pleaded issues: In Re Tecnion Investments Ltd [1985] BCLC 434 at 441 per Dillion LJ and Mckillen v Misland (Cyprus) Investments Ltd [2012] EWHC at [12] per David Richards J."*

1011. The GP submitted that many of the pleaded allegations were not put to the GP's witnesses and their evidence was not challenged.

1012. The submissions continued at paragraphs 28 - 29:

"*28. In addition to the baseless complaints made in the Petition, the conspirators have embarked upon a co-ordinated, and, to use Mr. Bagnall's own term, 'multi-faceted' [Day 12/94/5] campaign. This has consisted of:*

(i) disclosing confidential information to both MAS and to the media in breach of the Limited Partnership Agreement ('LPA');

(ii) attempting to disrupt and delay the completion of the audit of the Partnership's financial statements by applying pressure directly to Partnership's auditors;

(iii) making false complaints to regulatory bodies about the General Partner's management of the Partnership;

(iv) fuelling a misleading media campaign and then disingenuously seeking to rely upon alleged concerns reported in the media;

(v) filling false and misleading affidavits, which were drafted for them by HDY with a view to painting a highly misleading and distorted picture.

29. By their conduct, each of the Petitioners is guilty of committing a number of serious breaches of the LPA and has been served with a Default Notice by the General Partner, as it was only proper for the General Partner to do. The Court will be asked to determine the validity of those Default Notices which, if valid, will mean that the Petitioners' rights as Limited Partners will be suspended and the basis for their Petition will fall away. These are not steps that the General Partner has taken out of revenge: they have been taken because it is the General Partner's duty to do so in managing the Partnership."

1013. The Court has set out these passages at the risk of some prolixity because the Court agrees with them almost entirely, with one technical qualification. That qualification is that within the framework of the just and equitable jurisdiction it is unnecessary for this Court to decide whether CAML and ACC were in fact conspirators or not.

1014. It is also important for the Court to keep in mind the comments as to regulatory supervision made at paragraph 30 (ii):

"(ii) In respect of the regulatory authorities, they have decided against instigating any form of disciplinary process and have not imposed any form of sanction despite the best efforts on behalf of the Petitioners that they do so. As the Court may recall, Mr. Kerr gave evidence of his discussions with the Partnership's audit partner (Mr. Schubert) who had informed Mr. Kerr that the FMA had been in contact with Partnership's auditors and had taken into account the fact that the audit was unqualified [Day26/63-64]. Clearly, the FMA looked carefully at the complaints made to them. In direct conflict with the evidence given by Ms. Burleigh and Mr. Traveller to the Court, CAML had been informed very shortly after the Petition was issued that the FMA had closed it investigation."

1015. After contending that the Petitioners witnesses failed to support and maintain their case, the GP added at paragraph 33:

"33. In contrast, the witnesses who gave evidence on behalf of the General Partner were universally impressive. Each of them was clearly honest, conscientious and very

credible. In particular, no fair-minded person who had been in Court during the (extremely lengthy) oral evidence of Mr. Naylor and Mr. Kerr could have been left with any other impression than that the management of the Partnership was in extremely safe and highly skilled hands. The Petitioners' attempt to criticise the General Partner's witnesses in their closing submissions is detached from reality. Indeed, it is rather telling that none of the Petitioners were in Court to hear that evidence: had they been so, they could not have failed to have been impressed. In contrast, both Mr. Naylor and Mr. Kerr attended every day of the February, May and September hearings. They clearly take their responsibilities towards the Partnership extremely seriously. Contrary to the picture that the Petitioners have tried to suggest in their written closing, Messrs Naylor and Kerr were clearly not consumed by feelings of hatred or revenge – and it is notable that no such case was put to them. They are professionals who take their duties seriously and will continue to act in a professional manner."

1016. As the Court has already recorded in its findings as to credibility, this is an assessment with which the Court wholly and unequivocally concurs.

1017. The GP then raised a point concerning related party transactions which the Court has already highlighted. The GP stated at paragraph 38 (iii):

"(iii) The Petitioners have relied on so-called 'related party' transactions. Almost all of these are historic and relate to the NZ Partnership and were not put to the General Partner's witnesses. However, they also rest on false factual premises and a misunderstanding of the requirements of the LPA. Insofar as any of these allegations survive, they are addressed below. None of them close to justifying a winding up order. It is noteworthy that the Petitioners not only failed to put allegations as to why they said these transactions were "related party transactions" but they also failed to set out their case as to how any individual they identified is a related party by reference to the LPA. This is despite the Petitioners' counsel having assured the Court at the PTR in response to the General Partner's application for further and better particulars on this issue that the Petitioners'

contentions about who was a related party would all become clear from the course of the trial."

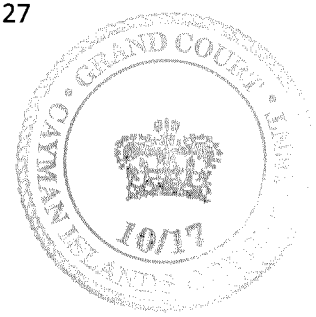
1018. In other words, it is very difficult to defend against an allegation which is nothing more than a diffuse insinuation. A tautology is not an explanation.

1019. The Court also accepts and adopts the submission as to books and records at paragraph 38 (v):

> *"(v) Much is now made by the Petitioners about books and records. In response, the General Partner has explained that the Partnership's books and records are maintained by Praxis and even produced its engagement agreement with Praxis proving that to be the case [L/4]. It has made no secret of Praxis's role and indeed, Aurora has previously liaised directly with Praxis (and before it Delotte) when it has needed to. The appointment of Praxis, combined with the consistent and up to date unqualified accounts, makes the Petitioners' complaint about a lack of books and records absurd (as the Court rightly sought to point out to the Petitioners' counsel at the CMC on 8 September 2017 when the point was debated)."*

1020. It is at this juncture worth mentioning the Petitioners' complaint that the GP had unfairly and improperly failed to call a meeting of the Limited Partners at the request of MAS, which was not of course a Limited Partner in any event. Paragraphs 41 and 42 state:

> *"41. Furthermore, at the time the Petition was issued, the General Partner and its connected interests held less than one third of the Committed Capital in the Partnership (see para 7A(a) of the Amended Petition). Accordingly, it was open to the Petitioners to seek to seek to pass a special resolution (which required 2/3 of the Committed Capital) removing the General Partner even without showing 'cause'. As explained above, the Petitioners had access to the names and addresses of the other Limited Partners, indeed they had specifically obtained a copy of the register of members, and therefore were able to follow this approach had they chosen to do so.*



42. The failure to follow this alternative form of relief is another compelling reason why a winding up order should be refused and again casts doubt on the purposes for which these proceedings are being pursued. It also entirely refutes the suggestion made by the Petitioners' leading counsel in opening that the General Partner had sought to dilute other Limited Partners' interests in order to prevent them passing a resolution to remove the General Partner (see [Day 5/27-28]). That suggestion was misconceived on a number of levels as explained further below."

1021. The GP then considered the respective expert evidence of Mr. Weaver and Mr. Mullins, upon which the Court has passed its own comments and then made the submission that were a winding up order to be made it is expected that there would be a very significant loss of value. It is hard to see a contrary conclusion being reasonably maintained.

1022. Then followed a series of submissions as to the scope and application of the just and equitable jurisdiction. The Court has taken these submissions along with those Mr. Lowe fully into account in arriving at the legal analysis which has already been set out in this judgment.

1023. The GP then made submissions as to the evidence adduced as to the credibility of the witnesses themselves. Once again, the Court has taken these submissions along with those of Mr. Lowe fully into account in forming the views which it has expressed, as to whom the Court believes and why it chooses to do so.

1024. It is here worth mentioning the submissions at paragraph 81 that "*the very fact that the Petitioners were prepared to bring the Petition based on Mr. Marshall's unsubstantiated theories is both disturbing and remarkable.*"

1025. In relation to Mr. Marshall's unsatisfactory evidence, the GP states at paragraph 81:

"*81. It is, therefore, little wonder that the Petitioner's leading counsel and many of their own witnesses have sought to distance themselves from Mr. Marshall and find him unreliable. However, the very fact that the Petitioners were prepared to bring the Petition based on Mr. Marshall's unsubstantiated theories is both disturbing and*

remarkable. The same comment, of course, also applies to Mr. Wallace who, before he double-crossed the Petitioners, was due to give evidence on their behalf."

1026. The Court has formed an impression that from time to time in organizing their case the Petitioners did not clearly articulate what they were doing or why they were doing it.

1027. As for Mr. Bagnall, the Court finds the following comments at paragraph 82 are once again by no means unfair or unmeasured although the Petitioners claim them to be mischaracterised:

> "*82. Mr. Bagnall is the chief investment officer of ACC. Mr. Bagnall was an incredibly argumentative witness who refused to answer straightforward questions. He was also very willing to make serious accusations without having any sound basis for doing so. Mr. Bagnall in relation to Company A and Company B and Mr. Bagnall's reluctance to accept that MAS could be characterized as a competitor [Day 12, p127-130]. He was also quick to assert that it was impossible that Mr. Kerr had sold a considerable number of IEF shares on market via Macquarie only to have to retract the point, rather sheepishly, once he had actually checked the position [Day 11/66-67]."*

1028. It was also stated correctly that Ms. Poon was the only witness put forward to give oral evidence by the largest Petitioner, Aurora, suggesting it is claimed that this in itself illustrated Aurora's lack of involvement and engagement in the Petition proceedings. It is the case that she had very little first-hand knowledge of the material events alleged to justify a loss of trust and confidence. It was however also argued that her evidence was of most relevance in relation to the provision of information to MAS in breach of the LPA and Aurora's refusal to assign its Partnership interest to MAS.

1029. It may be recalled that in response to a question from the Court Ms. Poon had accepted that there was an extremely close relationship between Aurora and van Eyk. She had also confirmed that as of September 2013 Aurora was not proposing to pass its Partnership interest over, and that at the time of Ms. Lemon's attachment to Mr. Wallace of numerous documents Ms. Poon said she could not see anything in Ms. Lemon's email that requested

MAS to keep the information itself confidential beyond the words "Commercial in confidence". As the Court understands it, this is why the GP contends that Ms. Poon's evidence was helpful as to the default issue, among other issues.

1030. The Court has already formally ruled as to Mr. Roe's evidence, which was not tested in cross-examination. As the Court has previously remarked, it is essential that the Court does what is necessary and essential so that the trial is a fair one. Mr. Roe it seems was not even prepared to give evidence by way of video-link.

1031. There was a series of short comments as to various witnesses. Mr. Naylor was one who is described as a thoughtful and reliable witness with a facility for detail, and who was said to be honest. That is exactly how the Court saw him also.

1032. Mr. Kerr too was described as providing compelling explanations about the management of the Partnership and its investments. The Court accepts too that he displayed no hostility or visceral hatred towards the Petitioners. There was nothing in the course of his testimony to suggest or establish that he acted other than in the best interests of the Partnership as he believed those interests to be. Indeed the Court found him to be an excellent witness as well.

1033. The GP then explored its proposition that the Petitioners have not come before the Court with "clean hands" and attributed this to being a direct result of the fact that the Petitioners at no time had a genuine loss of trust and confidence in the GP but had joined forces with Mr. Wallace and Mr. Marshall with a view to achieving early liquidity (paragraph 110). This is a theme which has been examined throughout the proceedings and also throughout this Judgment in a number of different ways. It is central to whether on a balance of probabilities the Petitioners can evidentially prove their case as to loss of trust and confidence and it is one of the primary reasons that the Petitioners have so much difficulty in persuading the Court that are valid grounds for winding up the Partnership.

1034. An extremely extensive list by the GP of Mr. Wallace's misdeeds followed. These criticisms appear at paragraph 112 (i) – (vi), by way of example only:

"(i) *It is common ground that Mr. Wallace received a mass of confidential documents from Ms. Lemon in September 2013 and additional confidential information (including all documents concerning the Bear Fund's investment in the Partnership) from Ms. Poon in December 2013. There can be no doubt that he used that information to launch a competitive strategy against Lantern which was clearly contrary to Torchlight's interests. So, for example, MAS, acting in its capacity as trustee of the Borg Fund granted options to Totem Holdings Limited and CVC Limited with a view to blocking the buy-back of Lantern's shares which would have given Torchlight control of Lantern and meant that the Borg Fund was no longer a shareholder (see e.g. the ASX Announcement at* ***E21/13134****). This prompted litigation which was ultimately settled on terms that the buy-back agreement would be implemented and Lantern would pay MAS "AU$1.4 million to facilitate settlement with Totem and CVC"* ***[E21/13409]****. In breach of trust, MAS pocketed nearly AU$600,000 of this sum for the benefit of this parent:* ***[E25/15999*** *and* ***16019]****.*

(ii) *Shortly afterwards, Mr. Wallace joined forces with Mr. Marshall (who everyone acknowledges to be unreliable and motivated by personal animosity against Mr. Kerr) and together they embarked on a multifaceted campaign which was designed to allow MAS and Logic to take over the role of General Partner. This campaign started in about July 2014 when solicitors acting for MAS wrote to the FMA and the receivers of the New Zealand Partnership giving the false impression that MAS had replaced Aurora as the Limited Partner [E23/14532-14538]. This was despite the fact that, shortly before this, Mr. Wallace had (by an email from Mr. di Francesco dated 16 July 2014) been reminded of the fact that Aurora had refused to execute the deed of assignment [E23/14431J].*

(iii) *This was followed a few weeks later by a media campaign, which was designed to spread alarm amongst Limited Partners and to give a deliberately false impression about the solvency of the Cayman Partnership, as was made clear in Mr. Marshall's letter to his clients in which he acknowledged that he and other investors knew that "the fund's assets are very valuable" [E24/15141-2]. The*

media campaign and regulators' involvement was used to justify an alleged loss of trust and confidence.

(iv) *The media interest was also used by Mr. Wallace and Mr. Marshall to justify making a concerted approach to the Cayman Partnership's auditors, PwC, questioning the auditing of related party transactions and the payment of the performance fee [E24/15146-7, 15154-6]. This approach will have led to delays in the production of audited accounts, which was also upon by the Petitioners as a further justification for the loss of trust and confidence.*

(v) *The same day, Mr. Marshall also emailed Mr. Bagnall a copy of the letter he had sent PwC and told him "it would help the cause if you could send a similar letter to them as well" [24/15145]. Mr. Wallace also informed Ms. Burleigh in an email the same day on 2 October 2014 that he had written to Lantern's auditors on 23 September 2014 to place them on notice in respect of related party disclosure [CAML B/31]. The letter was couched in the same terms as that sent to the Partnership's auditors the same day. Notably Mr. Wallace advised Ms. Burleigh that this letter had caused a "slight delay" to Lantern audited accounts as he had "put them on notice over a week ago about related party disclosure".*

(vi) *The approach to the auditors was made on 2 October 2014 and was followed the next day by the MAS/Logic Recovery and Exit Strategy letter which was circulated to a number of Limited Partners and was designed to persuade them to participate in an agreed strategy to make more complaints to regulators, to seek to replace the General Partner with a manager run by Mr. Wallace and Mr. Marshall and, eventually, to support a false allegation of a loss of trust and confidence. The Recovery and Exit Strategy painted an alarming picture of the state of affairs of the Cayman Partnership. In particular, it gave the false impression that the investors' funds had been depleted by willful and reckless management and that the Cayman Partnership was insolvent. Accordingly, there was, they claimed, an urgent need to act: [E24/15277-87]. This was a thoroughly dishonest document: MAS failed to disclose that it was not a Limited Partner; it failed to disclose that there had been no dialogue at all with the General Partner and that no attempt to ascertain the true state of affairs. MAS and Mr. Marshall also intended to introduce a new fee*

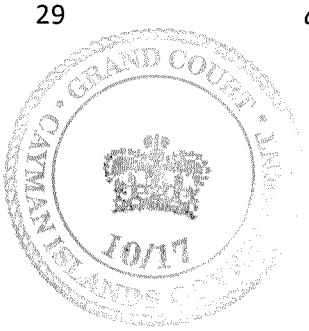
structure which was based on baseline value determined by the new investment manager (namely MAS and Logic) and exposed the Cayman Partnership to paying fees way in excess of the Partnership's assets had been implemented. It seems that Mr. Bagnall was alive to this but failed to heed the alarm bell that should have been ringing in his head [Day 12/156-157].

(vii) In addition to being appointed the new General Partner (whether with Mr. Marshall or alone), MAS was looking to extract additional fees from CAML by being appointed as the latter's investment manager as well.

(viii) Mr. Wallace and Mr. Marshall pressed their case at meetings with CAML in August 2014, with CAML and ACC at the end of October 2014 and again at the beginning of December 2014. It was their constant refrain that there was an urgent need to move quickly before the entire investment was lost.

(ix) Between these meetings, Mr. Marshall wrote a thoroughly dishonest letter to the FMA on 5 November 2014 [E25/15591-5]. In this, he complained that the General Partner had "stolen money" by the extraction of unearned performance, management and arrangement fees and by entering related party transactions to the detriment of the Cayman Partnership. It went on to accuse Mr. Kerr of "steadfastly" refusing to answer any questions or concerns. This was a blatant lie. It ended by asking that PGC be suspended from trading and be placed under statutory management, an extraordinary request in relation to a publicly listed company. It also asked the FMA to carry out a forensic investigation of PGC and its subsidiaries and to ensure that the Cayman Partnership be required to comply with its reporting requirements under the Limited Partnership Agreement.

(x) Having persuaded CAML and ACC to join the campaign, MAS procured CAML to increase the pressure on PwC [E27/16693-4] and to write a thoroughly disingenuous email to the General Partner [E27/16799] which was clearly



designed to paper the file and to create the false impression that the General Partner had refused to answer legitimate questions.

(xi) *On 10 April 2015, Mr. Wallace made an unjustified complaint to ASIC about Mr. Naylor and Mr. Mogridge being associated parties with a view to weakening Torchlight's minority control over Lantern [E27/16824-7].*

(xii) *At a meeting of shareholders on 24 June 2015, Torchlight's nominees on the board of Lantern were all voted off the board [E27/17164A]. The new board consisting mainly of MAS nominees then voted not to proceed with the buy-back and implemented a strategy of selling off all Lantern's assets. This effectively destroyed the strategy that the General Partner's nominee directors had been seeking to implement, as had been made clear in the investor reports. The Court heard compelling evidence from Mr. Naylor at the trial about the Cayman Partnership's long term Lantern strategy and how it had already been beginning to reap rewards. It is notable that even the Petitioners' witnesses acknowledged that the investment had been a success, albeit not as successful as it would have been but for MAS' actions [Day 6/36/3-7]. Whilst the issue of the amount of any damage suffered as a result of the hijacked Lantern strategy, does not fall to be decided in this Petition, once regard is had to the success of the Cayman Partnership's other investments in Local World and RCL, the working assumption must be that the General Partner's strategy would have yielded significantly more value had it been allowed to run its course. In any case, what matters now is that, contrary to Mr. Bagnall's remarkable evidence in which he initially attempted to argue that MAS was not a competitor, despite the boardroom coup and the refusal to implement the buyback which trashed the General Partner's long-term strategy for Lantern, he ultimately conceded that MAS did act as a competitor of the Partnership [Day 12/129/8-21]."*

1035. The Court has set out all of this material with reluctance, but it considers it important to identify the activities in which Mr. Wallace and Mr. Marshall were engaged and in which the Petitioners were complicit as well. Although Aurora was more passive in its role than CAML and ACC, nonetheless Aurora was implicated in the conduct of Mr. Wallace

because Mr. Wallace exercised such a dominance over Aurora at the material time. Aurora knowingly albeit more passively extended Mr. Wallace's insidious reach.

1036. The GP's criticisms of CAML ACC and Aurora are found at paragraphs 113-116:

> "*113. The Petitioners now seek to distance themselves from Mr. Wallace and Mr. Marshall. As shall be made clear below, this is not possible because they cynically aligned themselves with the strategy with a view to achieving early liquidity in full knowledge of the Lantern play and thereby in full knowledge that they were helping MAS to act in direct competition with the Cayman Partnership. They also swore affidavits that gave a materially misleading picture as to the true position. More particularly, in the case of CAML, it committed the following acts which whether taken alone or together amount to serious misconduct, in direct breach of its obligations as a Limited Partner:*
>
> *(i) As soon as it inherited an interest in the NZ Partnership, it made improper approaches to the auditor and, more importantly, Mr. Justice Heath who was in the middle of dealing with the Perpetual matter.*
>
> *(ii) It joined forces with MAS in the knowledge that MAS was adopting a competitive strategy in relation to Lantern and despite having been warned by its own lawyers of MAS's conflict [CAML B/10]. This is a clear breach of paragraph 4.7 (a) of the LPA.*
>
> *(iii) At MAS's prompting, it made an approach to the FMA in November 2014 in the knowledge that MAS and Mr. Marshall had already been to see the FMA. This was clearly designed to persuade the FMA to investigate and it had the desired effect because of the notices that the FMA served in February 2015.*
>
> *(iv) It provided confidential documents to MAS in breach of clause 15.5 of the LPA (this will be discussed in more detail when dealing with the Default Notices below).*

(v) *It, along with Mr. Wallace and Mr. Marshall, persuaded Mr. Bagnall not to ask any questions of the General Partner but instead to issue proceedings.*

(vi) *It continued to support MAS's strategy even though it had been told by Mr. Kerr that MAS was not a Limited Partner and even though it knew that MAS was acting as a competitor to the Limited Partnership by blocking the General Partner's investment strategy in respect of Lantern. Thus, as stated above, it sought to put pressure on PwC and to write a thoroughly disingenuous email to the General Partner. It also continued to attend meetings with MAS to discuss the Petition in the months before it was issued. For example, Mr. Traveller admitted that CAML attended meetings with MAS and Henry Davis York in January 2015 in respect of the options to present the Petition [Day 4/80/16-25].*

(vii) *It refused to accept two qualified offers of non-pro rata redemption which would have given it the full value of its investment, which was three times the carrying value on its books. One of these offers was made in July 2014 but was mischaracterized as an "asset swap" in CAML's evidence. The second was made shortly before the issue of the Petition and was omitted from the evidence in which CAML instead wrongly asserted that it had no other choice but to issue the Petition as a "last resort" in order to protect its investment (see para 15 of Traveller 2 [A3(A)/12]). As the Court rightly pointed out, the omission of these facts from Mr. Traveller's affidavits "are a little puzzling and creates confusion, with respect" [Day4/116].*

(viii) *It failed to give disclosure of the Crowe Howarth report which showed that the Partnership was extremely valuable (which was at odds with their affidavit evidence that they held concerns that there would be "no return to the NZ tax payer" [D/25] and with the notes of the key meetings with MAS and Mr. Wallace). The obvious inference is that this was deliberate.*

(ix) *Mr. Traveller and Ms. Burleigh swore affidavits which were grossly misleading and at times false and which they must have known to be so.*

(x) *In particular, the principal criticisms that can be levelled at Mr. Traveller's affidavits are as follows: in his first affidavit, he claimed that the Cayman*

Partnership might be worthless without mentioning the Crowe Howarth report. In his second, he wrongly accused Mr. Kerr of negotiating CAML's exit in bad faith; he failed to mention the two offers of a non-pro rata redemption and misleadingly suggested that CAML knew nothing about the in specie distribution and was not consulted about the re-domicile in Cayman; he falsely claimed that he did not know that the life of the Cayman Fund could be extended until 2021 and made unsustainable allegations about related party transactions; he wrongly accused the General Partner of misconduct in relation to the conversion of sub-participations into partnership interests; he wrongly accused the General Partner of misconduct in relation to the conversion of sub-participations into partnership interests; he wrongly accused the General Partner of claiming acquisition fees to which it was not entitled and falsely claimed that the NZ General Partner had refused to disclose the identity of the members of the Advisory Committee. In his fourth affidavit, he repeated allegations of bad faith and lack of probity. When swearing these affidavits, he cannot have had a genuine belief in any of these matters as became apparent during the course of his oral testimony.

(xi) *Similar criticisms can be levelled at Ms. Burleigh's affidavits. In her first affidavit, she falsely claimed that CAML had completely lost trust and confidence in General Partner; she falsely alleged that the General Partner had been responsible for investment churn and had in any event claimed fees to which it was not entitled; she also complained about the failure to call a meeting of Limited Partners even though she knew that the threshold had not been met and knew that MAS was not a Limited Partner had refused to engage with the Limited Partners' concerns. She also gave a very misleading and partial account of the involvement of Mr. Wallace and Mr. Marshall. In her fourth affidavit, she argued by reference to the audited accounts that the Cayman Partnership was losing-making. It is obvious, in the light of Mr. Bagnall's evidence, that this information was fed to her by Henry Davis York and that she did not have a bona fide belief as to its*

accuracy. She went on to give a misleading impression of the presentation CAML received from the NZ General Partner before the move to Cayman (in stark contrast to the evidence of this presentation that she gave when being when cross examined), to deny that the General Partner had ever made an unconditional redemption offer and to insist that the Cayman Partnership was loss-making and unsuccessful.

(xii) *Ms. Burleigh also perjured herself when she told the Court that she did not know whether the FMA investigation was ongoing. The fact is that she was told by the FMA in July 2015 that the investigation had been closed and that she informed Mr. Traveller and the rest of the CAML board of this at the time.*

114. *ACC is in no better position.*

(i) *It divulged confidential information to a journalist Mr. Hunter, in clear breach of the LPA. Mr. Hunter published a critical and misleading article about the Cayman Partnership that contained references to the confidential affairs of the Partnership.*

(ii) *It joined forces with MAS in the knowledge that MAS was adopting a competitive strategy in relation to Lantern. This is a clear breach of paragraph 4.7 (a) of the LPA.*

(iii) *It continued to support the multi-faceted MAS' strategy even though it had been told that, so far as the General Partner was concerned, MAS was not a Limited Partner. Even though Mr. Bagnall realised that the proper course for a Limited Partner acting in good faith would be to engage with the General Partner, he allowed himself to be persuaded not to do so.*

(iv) *Mr. Bagnall swore affidavits which were grossly misleading and which he must have known were misleading. In his first affidavit, he accused Mr. Kerr of impropriety in relation to historic purchases of IEF (Lantern) shares by*

reference to partial and misleading evidence, which he had been fed by Mr. Marshall. In his third affidavit, he gratuitously accused Mr. Kerr of being responsible for losses in relation to the Omaha Beach investment. This allegation appeared to be based on tittle-tattle and Mr Bagnall admitted at trial that it was "entirely hearsay" [Day11/136/3]. It remained uncorrected despite the fact that he found out this was untrue before he gave evidence {Day11/136-138]. In his sixth affidavit, he challenged head-on Mr. Kerr's evidence that the Cayman Partnership was successful by reference to selective and misleading material that had been fed to him by Henry Davis York. He went on to complain about the failure to call a meeting and to falsely accuse the General Partner of deliberately taking steps to make it impossible for the Limited Partners to call such a meeting.

115. *As for Aurora, whilst it is not suggested that it is a co-conspirator, it has not come to this Court with "clean hands". On the contrary, it is responsible for multiple breaches of the confidentiality provisions in the LPA, which enabled MAS to embark on its competing strategy. It joined forces with MAS in making a thoroughly misleading application to Clifford J for injunctive relief. This point has already been fully argued at the recent Aurora Default hearing. It compounded that by producing highly misleading affidavits from Mr. Roe and Ms. Poon. It is not surprising that, in the event, Mr. Roe was not prepared to be cross-examined even by video link.*

116. *The evidence that the Petition Proceedings have not been brought in good faith is overwhelming. None of the Petitioners have clean hands."*

1037. As for how the clean hands doctrine should ultimately be addressed or not addressed in the instant case, that ruling shall be made at a later point, and thereafter the default notices will also be determined. However, the collective criticisms levelled against Mr. Wallace, Mr. Marshall, and the CAML, ACC and Aurora witnesses are sufficiently grave and well supported for the Court to treat the Petitioners' evidence with extreme caution and circumspection. Taking all of this into account, the Court has already set out its findings as

to credibility at large. To rely ultimately on the contested evidence of persons who have been thus impugned, and with good reason, would be most unwise, and the Court declines to do so.

1038. There then followed a discussion of how alleged conduct in relation to the NZ Partnership should be dealt with. Once more, as the Court has already decided, historic events which cannot pertain to the conduct of the affairs of the Partnership itself must be disregarded. As the *Loch* case confirms, the conduct relied upon must be conduct of the affairs of the company/Partnership that is sought to be wound up. The Court accepts the GP's submissions that the proper approach if any would be to seek recourse against the NZ GP. The legal system of the Cayman Islands must operate with all due respect for both judicial comity and fairness.

1039. The GP then explained that all Limited Partners were written to by the NZ GP on 17 December 2012 explaining the establishment of the Partnership and the in kind distribution, and that none of the Petitioners objected.

1040. The GP continued at paragraph 137 (vii) – (vi):

> *"(vii) Further, in the case of both Aurora and ACC, they approved resolutions confirming the terms of the Cayman LPA: see Kerr 5 at paras 248 to 253 [A3 (B)/689-91]. On the case of CAML, as indicated above, it did not object to the establishment of the Cayman Partnership at the time and recognised that it would likely lead to the introduction of the NPRR Mechanism enabling Limited Partners to redeem their investment early. Indeed, the CAML memorandum dated 13 February 2013 prepared by Ms. Burleigh [E/11/7143] makes it clear that CAML understood that '[p]ayment from the Torchlight fund will also be dependent upon the changes being sought to the fund to relocate to Cayman Islands, attract new investors and have the ability to make non pro rate distributions'. Further, this memorandum was updated on 18 February 2013 and stated that "the board is generally accepting of the offer...however, needs to be confident that existing the investment at face value is appropriate given the circumstances*

surrounding the proposed changes to the Limited Partnership, the investor communication in December 2012 valuing the fund units at AUD1.07 (NZD1.33 and recent capital raising in Australia by GK" [E/11/7151]. Mr. Traveller appeared to accept in cross- examination that the memorandum was therefore expressing the view that CAML had benefited from the in specie distribution financially [Day 3/114-115]. A few months later, CAML even insisted as part of a proposed settlement that the General Partner provide evidence that the Partnership had been duly incorporated in the Cayman Islands [E/14/8526].

(viii) Aurora was also in favour of the introduction of the NPRR Mechanism that it was anticipated would be available under the Cayman Partnership "as van Eyk intended to use the buyback amendment to reduce their exposure to Torchlight in the near term (and had in fact suggested this amendment to Torchlight" [E18/10914]. The Petitioners' Leading Counsel accepted during the course of Mr. Naylor's cross examination that the introduction of this mechanism was not criticised but was a 'good thing' [Day 22/41/5-18]. Mr. Traveller also said that he was 'pleased to see that the restructuring was going to go ahead because it would at least open the possibility of the non-pro rata distribution' [Day3/91/16-19]. Mr. Bagnall gave evidence that Mr. Kerr had in fact called him to explain the purpose of the NPRR Mechanism [Day 12/10/7-11] before ACC subsequently voted in favour of its incorporation into the Limited Partnership Agreement.

(ix) It is surprising that the Petitioners (in their written closing submissions) seek to maintain the case that they were misled about the length of term of the Cayman Partnership. Not only is that proposition hopeless given the evidence but it is also another example of a change of position by the Petitioners – their original focus had been on an alleged lack of consultation. In their oral evidence, the Petitioners' witnesses were unable to support a case that they had been misled about the term of the Cayman Partnership: on the contrary, they accepted that they had always known it

length (see, for example, Mr. Traveller at [Day 3/157/17]. Mr. Naylor also pointed out that TPPM and Aurora clearly knew about the length of the Cayman Partnership [Day 22/39/16-20] as this was recorded in an email from Jacqui Lemon to Richard Matthews and copied to Stewart Roe and Alastair Davidson in August 2013 [E18/10878]. Further, in the case of Aurora and ACC (as stated above) they signed resolutions confirming the terms of the Cayman LPA; and, in the case of all Petitioners, they have known about the length of Cayman Partnership's term for a considerable time and yet raised no complaint.

(x) *Of course, the need for a longer term was so as to enable the General Partner to carry out its strategy which had changed from being a holder of distressed debt to owning the underlying assets that it wanted to develop properly, which Duff & Phelps have independently confirmed as being very financially advantageous for the Limited Partners. Therefore, this was a decision that was in the best interests of the Limited Partners. The term of the Cayman Partnership was 'consistent' with the term of the NZ Partnership (i.e. 7 years plus the possibility of 2 single year extensions). As Mr. Naylor confirmed in his oral evidence, the General Partner did not receive a single query, expression of concern or objection in relation to the length of the term [Day 21/71-75].*

(xi) *At the start of the trial of the Petition (back in February 2017), the Petitioners opened their case by suggesting that the Cayman Partnership had been established in order to avoid the Wilaci loan which they claimed the NZ Partnership was unable to repay. As explained below, this was another speculative case theory on the part of the Petitioners which was a departure from their pleaded case and, as the evidence has shown, was completely misplaced and was unsupported by any evidence.*

(vi) *The Court will no doubt recall the evidence of Mr. Harford who 'doubled down' on his investment on the launch of the Cayman Partnership (as well as recommending to his brother to make an investment) [Day 17/13-14]. Mr. Harford explained that he was fully consulted about the term of the Cayman Partnership, received a presentation similar to CAML's, understood the commercial rationale for this and even discussed with Mr. Kerr whether an even longer term could be appropriate in order to maximise the investment potential in RCL [Day 17/66-68, 69-70, 72-73, 75-78]. Mr. Harford is a value investor who understands and follows the General Partner's strategy. His actions, dealing with his own personal money, provide a stark contrast with the witnesses on behalf of the Petitioners who have not invested their own money and simply want to exit. He would hardly have followed this approach if he had any concerns about the management of the Partnership."*

1041. All of this provides answers of substance to the various manifestations of the case put forward by the Petitioners. Questions have been put, and answers have been given which the Court finds to be sound, serious, irreproachable and valid.

1042. The Court also finds itself in agreement with the GP's submissions at paragraph 139-140 regarding alleged related party transactions:

"*139. It is incredible, even at this stage of the proceedings, and despite the assurances given by the Petitioners at the PTR, the General Partner is still left in the dark in relation to the Petitioners' case on related parties. No attempt is made in the Petitioners' written closing submissions to explain what meaning should be given to that crucial term. Instead, a few limited and partial submissions are made in relation to a few isolated transactions almost all of which involved the NZ Partnership.*

140. This state of affairs is completely unacceptable. The Petitioners had every opportunity to give proper particulars in advance of the trial but chose not to. They could have opened the point orally but chose not to. They could and should have put their case in cross-examination but chose not to. The

reason that they did not do so is obvious: they had no faith in the wild imaginings of Mr. Marshall and no answer to the coherent and detailed explanation given by Mr. Kerr in his affidavits. So, they are left to cobble together a case based on smear and innuendo, which is far removed from their pleaded case. In doing so, they transgress basic rules of fairness. They should not be permitted to do so."

1043. The GP then attempted to fill the explanatory gap, submitting at paragraphs 141 - 145;

"*141. The term 'related party' is defined in the Cayman LPA (it was also a defined term in the NZ LPA). This is important because, in a commercial relationship where the parties' respective rights and obligations have been committed to a detailed written agreement, it is that agreement which should govern the parties' conduct and reasonable expectations.*

142. The relevant definitions under clause 1 of the Cayman LPA are as follows:

(i) 'Related Party means the General Partner, each Advisor or any of their Affiliates; any person who is a "related party" (as defined in the Act) of such a person (as if that person were an issuer), and any entity, fund or other person managed by any of the aforementioned persons' [A4/3/5].

(ii) 'Adviser means an investment manager or investment adviser in respect of the Limited Partnership which is from time to time appointed by the General Partner, or by another Adviser with the prior written approval of the General Partner' [A4/3/1].

(iii) 'Affiliate means any entity which in relation to the person concerned is:

(a) a Holding Company or a Subsidiary of that person or another Subsidiary of such a Holding Company; or

(b) a company, body corporate, trust, partnership or limited partnership, or incorporated or unincorporated body of persons,

which Controls, is Controlled by or is under common Control with, the person' [A4/3/1].

143. There is an obvious error in the definition of 'Related Party' in the Cayman LPA by its reference to 'as defined in the Act'. This is because the Exempted Limited Partnership Law (which is the 'Act') does not contain a definition of 'related party'. What appears to have happened is that the definition of 'Related Party' as contained in the NZ LPA – which instead of referring to 'as defined in the Act' referred to "as defined in Listing Rule 9.2 of the New Zealand Stock Exchange listing rules' [A4/1/5] – was adapted with 'the Act' taking the place of the wondering italicized immediately above.

144. In the General Partner's submission, on a true construction of the term 'Related Party' in the Cayman LPA, it should be afforded the same meaning as applied under the NZ LPA (with any necessary changes so that it makes sense in the context). Accordingly, a party would only be a "related party" of the Cayman General Partner, if it has a relationship with the Cayman General Partner as would have qualified it to be a 'related party' of the NZ General Partner as would have qualified it to be a 'related party' of the NZ General Partner had it had the same relationship with the NZ General Partner.

145. Therefore, the definition of 'related party' under Rule 9.2 of the New Zealand Stock Exchange listing rules becomes relevant. The precise form of Rule 9.2 has changed over time. However, its ambit is tightly prescribed, describing whether a person is or is not a 'related party'. A copy of Rule 9.2 is at [A1/7]."

1044. As Mr. Kerr understood the requirements, he says he believes that he did not breach them, in that all transactions were done at arm's length and for proper market value and that the GP entered no transaction with any individual entity in which he had an interest in excess of 10% as prescribed in New Zealand. The Court sees no reason whatever to doubt Mr.

Kerr's truthfulness and sincerity on the matter, and even if the GP fell into technical error the Court considers that no conceivable harm resulted to the Partnership.

1045. It was also stated that the audited accounts for each financial year (for the NZ Partnership and the Cayman Partnership respectively) have included related party disclosures and therefore it is clear that the auditors were satisfied in respect of these issues.

1046. The GP then proceeded to analyse a number of New Zealand transactions, with which the Court has ruled that it is not concerned. However, it is worth noting that time and resources have had to be expended in presenting that analysis for the Court.

1047. There was also a very detailed account of the RCL debt conversion and how with the establishment of the new Partnership the interests of existing limited partners were protected. None of this seems to the Court to be in the least improper or controversial.

1048. The GP stated at paragraphs 195-196:

> "*195. Accordingly, once the RCL investment is properly understood, and the value that has been created (both to date, and in the future) for the Cayman Partnership is recognised, it is difficult to see how anyone could properly use this as a cause for complaint. On the contrary, the RCL investment has been hugely successful and, conversely, a premature termination of the Partnership (by way of a winding up order) would be very destructive of value for all Limited Partners.*
>
> *196. Further, the allegation that has been made repeatedly by the Petitioners that the conversion of the RCL debt into Partnership interests was a step taken in order to deprive the Limited Partners which the ability to remove the General Partner is clearly wrong. It is of real concern that they all made the same point in their affidavits even though they all knew or should have known that it was a thoroughly bad one. This again highlights the baleful influence of Mr. Wallace and Mr. Marshall and the lack of rigour shown by those who should have known better."*

1049. The GP also sought to put into perspective the activities of the Partnership Advisory Committee:

"*204. The criticism of the number of written resolutions passed by the Advisory Committee that have been discovered in these proceedings is also unwarranted. The need for the approval of the Advisory Committee is far more likely to arise during the investment stage. The fact is, in recent times, there have been few matters that have required Advisory Committee approval. Hence, there is nothing strange in the fact that the Cayman Partnership does not have many resolutions from the Advisory Committee. As Mr. Kerr stated in evidence, the investments of the NZ Partnership were made prior to the Christchurch earthquake and therefore, as explained below, it is unsurprising that there are not copies of the Advisory Committee minutes still available from prior to that time [Day 27/121]. Further, as Mr. Kerr explained in his oral evidence, since Mr. Cleary's appointment, there have been no issues involving conflicts of interest that have required Advisory Committee approval [Day 29/48/1-4].*"

1050. None of this has caused the Court any degree of concern.

1051. The GP went on to deal with the Wilaci loan, for example at paragraphs 210-211 (ix):

"*210. The Petitioners opened their case (back in February 2017) suggesting for the first time that the establishment of the Cayman Partnership had been engineered in an attempt to evade the Wilaci Loan which the New Zealand General Partner was unable to repay (see, for example, para 52 of the Petitioners' written opening). A moment's consideration of the documents in the trial bundle should have made the Petitioners realise that this case theory was utterly misconceived. In fact, the counterparty to the Wilaci Loan, in the form of Mr. Grill, was well aware of the intention to establish the Cayman Partnership. It was also, quite clearly the case that Mr. Kerr believed that Mr. Grill had consented to the in specie distribution at the time that it took place. So it is clear that the structuring of the establishment of the Cayman Partnership had nothing to do with defeating a claim by Wilaci (as Mr. Naylor made clear at [Day 20/60/19-24]. This being so, quite what the Petitioners consider that the Wilaci loan has to do with the Petition proceedings is unclear.*"

211. Stripped down, the salient facts are as follows:

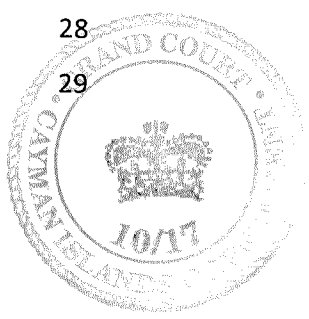
(i) *The Wilaci loan was entered into as a short-term bridging arrangement in order to take full advantage of the RCL investment opportunity (which, was expected to be, and has turned out in fact to be, highly successful investment). Essentially, the loan was needed in order to bridge the timing gap between the payment to Bank of Scotland International ('BOSI') for the purchase of its debt and the capital raising that was intended (see Kerr 5 at paras 102 to 108 [A3(B)/6/42-44].*

....

(vii) *...Mr Kerr sent an email, directly to Mr Grill, on 26 October 2012 explaining the intention with the asset transfer to Torchlight Cayman and the in specie distribution [E10/5945]. On 2 November 2012, Mr. Kerr emailed Mr. Grill with an update in relation to the establishment of the Cayman Partnership [E10/5960].*

(viii) *Furthermore, Mr. Grill confirmed his agreement to the in specie distribution taking place by his email dated 16 December 2012 [E34/21692] (see also the earlier email of 15 December 2012 [E11/6333] which indicated that the in specie distribution was to take place before the exchange of security). In his email (which Mr. Skidmore forwarded to Mr. Kerr), Mr. Grill stated in terms, 'I agree to the arrangement you have agreed with George' [E11/6686]. Mr. Tinkler was taken to this email on re-examination and the Petitioners' leading counsel acknowledged that he "wasn't aware of the document... but it deals, I think, with one of our concerns" [Day 25/149/9-14].*

(ix) *Only once this agreement had been received from Mr. Grill, did the transfer of assets and liabilities to the Cayman Partnership take place on the following day. As Mr. Kerr explained, Mr. Skidmore was present with Mr. Kerr in Switzerland at the time when the transaction took place. Putting matters at its absolute lowest, Mr. Kerr reasonably considered an agreement had been reached and in good faith acted on the basis of that*



agreement. Furthermore, Mr. Tinkler confirmed during his oral evidence that it was also his understanding that Wilaci had consented to the transfer [Day 25/95-96]]."

1052. No aspect of this explanation is in any way unsatisfactory to the Court, and there is really no more to be said.

1053. The GP then dealt with the allegations as to an impermissible form of performance fee or Carry. The GP stated at paragraphs 224-225:

"*224. The Petitioners also criticise the entitlement to performance fee on the in specie distribution made by the NZ General Partner of the Cayman Partnership interests (see para 30 to 31A of the Amended Petition). Not only is this complaint clearly one directed at the NZ General Partner – the Cayman General Partner has taken no performance fees at all – but it is misconceived. The NZ LPA allowed for a performance fee to be paid on an in specie distribution, it was approved by the Advisory Committee (see the minute from December 2012 at [E/01/00107]), verified by external counsel (see Burton & Co.'s note of 29 August 2013 [E/17/10819-10821]) and the calculation of the performance fee (or 'carry') was reviewed by Deloitte (see Naylor 10 at para 9.5.7 to 9.5.8 [A3(B)/4/32-33]). Furthermore, since the obligation to pay carry was an obligation owed to the NZ General Partner in relation to the performance of the NZ Partnership, it plainly needed to be dealt with at the time of the in specie distribution.*

225. The cross-examination of Mr. Tinkler on whether he gave correct advice that 'carry' could be paid on an in specie distribution provided no support for the Petitioners' case. Indeed, it is clear that, on a proper construction of the LPA, carry is payable on an in specie distribution.

(i) Under cl.8.1, distributions of the Limited Partnership include distributions in kind.

(ii) *Under cl.8.2, the General Partner has the specific right to make or permit distributions in kind where it deems appropriate prior to the dissolution of the Partnership.*

(iii) *Of particular importance, cl.8.3 (a) clearly envisages that a distribution under cl.8.4 may be made in kind.*

(iv) *Under cl.8.4 (b), the General Partner has a right to be paid its carry.*

(v) *It would make no commercial sense for distributions in kind to be permissible but no carry to be paid when they are made. As the Court heard from Messrs. Harford [Day 17/5-6] and Naylor [Day 17/90-92]], it is commonplace within the private equity industry for distributions in kind to be made and carry to be payable."*

1054. The Court has reviewed the provisions of clause 8 dealing with distributions, and it reminds itself that this is an agreement governed by and construed in accordance with the laws of New Zealand, as to which apart from Mr. Tinkler's testimony no pertinent evidence has been given. All the Court would venture to remark is that while distributions under clause 8.4 shall be paid from cash receipts, nonetheless clause 8.3 concerning limitations on distribution stipulates that the NZ GP is not obliged to cause the NZ Partnership to make any distribution pursuant to clause 8.4 (a)"*unless there is cash available for such distribution (other than in respect of in kind distributions)"*. There is therefore a sufficient argument at least as to whether a GP could regard itself as entitled to make and receive a distribution in kind instead of in cash. Certainly there is nothing that this Court can see which would indicate that the GP was acting recklessly or improvidently in doing what it did, as fortified by the legal advice of Mr. Tinkler. In summary the Court finds no merit in the Petitioners' point.

1055. The Court does not propose to dwell on the provision of unqualified audited accounts, which are now up to date. Paragraph 231 however does raise an issue of what caused the

historical delay. This becomes important in assessing whether matters of which the Petitioners complain in the Petition are themselves derived to any extent from actions which are their own responsibility:

"*231. Furthermore, in respect of the now purely historical position, whilst it is accepted that the audited accounts were provided late, there are reasons for this delay so that late provision alone cannot possibly make it 'just and equitable' to wind up the Cayman Partnership.*

(i) The cause for the delay in finalising the audits was explained by Mr. Naylor in his evidence: see Naylor 10 at para 9.10.1 to 9.10.17 [A3 (B)/4/45-50]. Mr. Naylor was not challenged on this during cross examination.

(ii) Importantly, it is clear that much of the delay has been caused by the actions of the conspirators who have contacted and applied pressure to the auditors as part of a coordinated campaign (see, for example, amongst other similar emails, Mr. Marshall's email to Mr. Bagnall dated 2 October 2014 urging Mr. Bagnall to 'help the cause' by sending a further letter to PwC [E/31/19609-19615]). As early as 2012, CAML also sent letters to the auditors with a view to putting behind-the-scenes pressure on the New Zealand General Partner [E9/5332; E27/16693]. It appears from the disclosure ID in the top right hand corner of this document (MAS.001.003.0180) that this letter was also provided to MAS as part of the concerted campaign. As explained above, this amounts to a breach of CAML's confidentiality obligations under the Limited Partnership Agreement. In his email to the CAML board in July 2012, Steve Smith also explained how as part of this strategy he had spoken to the FMA and PwC at the Auckland PwC function and had also approached Mr. Justice Heath who was mid-hearing the Perpetual matter [E9/5340]. In CAML's letters to the auditors, they emphasised that they effectively acting on behalf of the New Zealand Government, thereby naturally increasing the weight that would be given to them. In their oral evidence, the Petitioners witnesses admitting that they had been acting collectively. For example, Mr. Traveller

accepted that the parties had been coordinating their approach to the auditors [Day 4/90/13-21] and that writing to the auditors in these terms "could well" serve to delay the completion of the audit [Day 4/8/1-9 and 4/11/1]. Mr. Traveller's evidence is particularly telling in this regard given his prior employment at PwC.

(iii) As Mr. Naylor has explained, no less than six audit partners were used by Grant Thornton – thus showing that the conspirators' campaign had real effect (Naylor 7 at para 21 [D/34/21]). It follows that one consequence of the conduct of the conspirators applying pressure to the auditors is that they have carried out unusually detailed and thorough audits: see Naylor 10 at para 9.10.6 [A3(B)/4/49] which refers to Grant Thornton undertaking an audit process akin to a 'forensic audit'. Not only does this serve to explain some of the delay but it must reasonably give an even greater level of confidence in the audited accounts.

(iv) Mr. Kerr also gave extensive evidence explaining the delays during his cross-examination. In particular, Mr. Kerr explained that, in addition to the actions of the conspirators which had clearly delayed the audits, there was external causes for the delay, including the decision by PwC to adopt a very different way of valuing the investment in RCL as had been adopted in previous years, requiring a mark to market (or fair value) valuation [Day 26/59]. The Petitioners' leading counsel accepted that this change in methodology had produced a complexity in the exercise [Day 26/59/25 to 60/4]. As Mr. Kerr explained [Day 31/30/16-21], this unexpected change in approach had a very significant impact on the length of audit, which was (before the decision to change methodology) almost complete. Given the timing, it is reasonable to conclude that this change in approach (and therefore delay) was a consequence of the letters written to the auditors by the alleged conspirators. The decision to change methodology was taken in 2014, after receipt of correspondence from MAS [E24/15088 and Day 31/30/23-25].

(v) *Importantly, no case was put to either Mr. Kerr or Mr. Naylor in cross examination that the General Partner had acted unreasonably or been responsible for the delay in the preparation of the audited accounts. This is important because not only does it undermine any basis for losing trust and confidence but pursuant to cl.15.14 of the LPA, '[w]henever any act or thing is required of the General Partner hereunder within any specified period of time, the General Partner hereunder within any specified period of time, the General Partner shall be entitled to such additional period of time to do such acts or things as shall equal any period of delay resulting from causes beyond the reasonable control of the General Partners' (underlining added). Of course, it is the auditors, not the General Partner, who are responsible for the timing of the completion of the audit. So long as the delay in completion of the audit is not attributable to the fault of the General Partner, it should not be criticised and will not be in breach of the LPA.*

(vi) *The delay also has to be viewed in the content of the kind of investment that the Limited Partners have in the Partnership. This is a closed investment vehicle holding long-term assets. It is not a public listed company with a ready market for its investors to trade in their investments and thus the investors in the Partnership do not trade their investments in response to periodic financial reporting in the same way as in respect of a public listed company. Accordingly, an investor familiar with this type of investment would not expect the regularity of information as in the case of a public company. Mr. Harford (an independent Limited Partner who opposed the Petition) explains this well at para 40 of his evidence [A3 (B)/ 2]. It is notable that the Crowe Horwath Report (commissioned by CAML) also states in respect of Historic Financial Performance that " As is common with hedge funds, reporting periodic trading results pending realization of the underlying asset base is generally of little value" [CAML A/45]"*

1056. The Petitioners have made the point however, that it was Ms Burleigh's evidence that writing to the auditors in these terms "*could well*" serve to delay the completion of the audit, and the further point that Mr. Smith's email is not to be relied upon for the purposes identified by the GP.

1057. As to Mr. Steve Smith's assertion itself, it is enough to state that making such a distasteful assertion, irrespective of the actual facts themselves, casts CAML in an unattractive light.

1058. The Court does not intend to examine whether there was or was not a conspiracy. However, in the context of what had actually happened, the Petitioners' complaints as to audit delays in their entirety do not reflect well on their own integrity. He who comes to equity must come with clean hands and in relation to complaints of delay in the Amended Petition brought about by the Petitioners' own actions and behaviour the Court will take such conduct into account in forming a final opinion as to whether the Petitioners' evidence is credible or not.

1059. There followed a repudiation of the allegations that inaccurate and inconsistent financial information has been provided by the GP. The supporting reasons are set out at paragraph 234 and the Court accepts them. The criticism does not provide any basis for it being just and equitable to wind up the Partnership, either in terms of the GP's provision of quarterly reports or otherwise.

1060. In relation to what has been investment criteria and gearing contained in schedule 3 of the LPA, paragraph 239 (i) states that the limits in terms of both concentration in a single investment and gearing return not apply for 12 months from the Closing Date, which is defined as 21 December 2012, and therefore those limits did not apply until 21 December 2013. Further, it is submitted that there has not been a breach of the 25% investment limit because the RCL investments are not a single asset investment but a structure of multiple and separate special purpose vehicles and no single acquisition has exceeded 25% of the gross fixed valuation.

1061 It appears to the Court that these are all issues of detail which could have been readily resolved with a polite enquiry, to which Mr. Kerr or Mr. Naylor no doubt would have responded.

1062 Regarding an alleged failure to keep books and records the GP submitted at paragraphs 241-244:

"*241. The General Partner remains at a loss to understand how this allegation can possibly be maintained in the light of: (i) the consistent and fully up to date receipt of unqualified audited financial statements by the Partnership; and (ii) the engagement of Deloitte and subsequently Praxis to maintain the books and records of the Partnership.*

242. The Court will recall that this point was ventilated at the CMC held on 8 September 2017. During that hearing, the Court shared the General Partner's concern about this allegation and questioned the Petitioners' counsel about how this part of the case could be maintained. No adequate explanation was provided and indeed, the Petitioners' counsel declined the Court's repeated invitation to provide further particulars of the Petitioners' case on this issue. Importantly, the Petitioners' counsel confirmed that their case was limited to a complaint under s.21 of the Exempted Partnership Law being the pleaded allegation.

243. The implicit suggestion by the Petitioners appears to be that in order to prove that proper books and records are maintained, the General Partner is required to give discovery of <u>all</u> books and records. This is patent nonsense.

244. The complaint made in para 54A of the Amended Petition is fundamentally flawed for the reasons set out below.

(i) Most of the transactions relied upon to support this allegation (see Response 77(d) of the Petitioners' Re-Amended Reply to the Request for further and better particulars of the Amended Petition [A1/6/36]) relate to conduct by the NZ General Partner before the Cayman Partnership even existed. Therefore, these transactions cannot possibly form the basis of any

criticism against the Cayman General Partner in reliance upon the Cayman statute.

(ii) *It is clear from section 21(2) that the purpose of the requirement under section 21(1) is to provide a 'true and fair' view of the business and financial condition of the Partnership. The Partnership's auditors have consistently been able to provide a 'true and fir' view of the Partnership's financial affairs (including most recently in August of this year) and thus there is no possible basis for alleging that there are inadequate books and records thus preventing such a view being taken.*

(iii) *The Court made an observation to the above effect to the Petitioners' counsel during the CMC on 8 September 2017. The point was also made by Jones J in Re Cybernaut Growth Fund LP (unreported, 12 September 2013 at [8]):*

'...It is relevant to observe that E&Y expressed unqualified audit opinions. This fact does point to the conclusion that proper books and records relating to these accounting periods must have been maintained and existed at the time when the audit opinions were issued.'

(iv) *The General Partner has explained the state of its books and records in its evidence and how they are maintained by Praxis: in this respect, it should be noted that the obligation under section 21 (1) is either to keep or 'cause to be kept' proper books of account (i.e. it is not necessary that the General Partner itself keeps such books). In the light of the unqualified audits referred to above, there is no basis for going behind that evidence.*

(v) *The obligation is to cause to be kept 'books of account'. This does not entail maintaining every single document that has ever been generated in relation to the Partnership. As the Court noted at the CMC on 8 September 2017, s.21 is a narrow provision.*

(vi) *In any event, the remedy provided by the Cayman statute for breach of section 21(1) is a fine of CI$5,000 and only if done so knowingly and willfully (see section 21(5)).*

(vii) *Accordingly, this allegation cannot possibly justify an order winding up the Partnership on the 'just and equitable' ground."*

1063 The Petitioners' complaint at its highest is one of form rather than substance. They have identified no issue of misconduct on which these records can or may shed any light whatsoever. These are complaints of matters which are entirely inconsequential.

1064. The Court fully accepts the GP's contention at paragraph 246 that the Petitioners' own witnesses do not appear to have any concerns in respect of the Partnership's books and records.

1065. There was also a reminder that the offices at which the NZ Partnership's records kept were completely destroyed, along with tragic loss of life, in February 2011. Paragraph 247 states, inter alia:

"Accordingly, in addition to these documents being historic and relating to a different entity, it is obvious why they would not be available."

1066. The GP rejected the alleged deficiency of its discovery, and noted that as a matter of principle a complaint about discovery cannot of itself possibly found a Petition for just and equitable winding up: there must be some free-standing issue in dispute which justifies the Petition and in respect of which discovery needs to be given. Moreover, it was submitted that the GP has provided extensive discovery, and that this contrasts with the late provision of 127 documents originally not provided by CAML, including the Crowe Horwath Report. The GP reminded the Court too that although CAML had been informed that the FMA had closed its investigation their own document showing that only emerged much later.

1067. In terms of the principles set out in the *Loch* case and other similar authorities once again these are complaints that in the view of the Court do not assist the Petitioners with the case they need to make out as to a substantial, justified impairment of confidence.

1068. As far as activating a necessary recourse to winding up the Partnership is concerned, the GP set out its argument forcefully and comprehensively at paragraph 255, following on from the GP's refusal of MAS's request for a meeting:

"*255. The above episode also highlights another fundamental flaw in the Petitioners' case. The Petitioners did have (and, subject to the Default Notices, still do have) an alternative to seeking the winding up of the Partnership.*

(i) As explained above, the Petitioners between them, and indeed Aurora alone, have always had, and still have, in excess of 20% of the Committed Capital of the Partnership. Accordingly, the Petitioners (or simply Aurora) have the ability to require the General Partner to call a meeting of the Partners. This factor also undercuts the suggestion that the Petitioners have been caused any prejudice by the removal of the requirement to hold an AGM under the Cayman LPA. As the General Partner's witnesses have explained, this requirement was removed because the previous AGM that had been held was something of a non-event (see Mr. Naylor's evidence at [Day 21/64-66; Day 22/88-89] and Mr. Kerr's evidence at para 79 of Kerr 5 [A3 (B)/6]).

(ii) Had he Petitioners in fact sought a meeting, it would be open to the Limited Partners to remove the General Partner at such a meeting. Such removal may take place by virtue of an ordinary resolution (i.e. one passed by 50% of the Committed Capital), if the removal is for cause (clause 11.4 of the LPA).

(iii) Even now, in excess of 50% of the Committed Capital is held by Limited Partners who are independent of the General Partner (see Naylor 10 at para 6.4 [A3(B)/4/20] which explains that 44.24% of Committed Capital is held by the Torchlight Group). Indeed, prior to June 2013, the Petitioners alone had in excess of 50% of the Committed Capital and would have been able to remove the General Partner for cause by themselves alone (as explained in para 26 of Kerr 5 [A3(B)/6/12]). If the Petitioners cannot persuade a majority of the Limited Partners to remove the General Partner,

because the majority does not consider this to be in the best interests of the Partnership (or the requisite cause to exist), then the Court should not itself take the step of winding up the Partnership: the Petitioners should be held to the mechanism provided for in the LPA.

(iv) Moreover, at the time that the Petition was issued, the General Partner's interests held less than 1/3 of the Committed Capital (see para 7A of the Amended Petition). Accordingly, the Petitioners could have looked to remove the General Partner even without showing 'cause', which the General Partner would have been unable to block. Such a resolution required 66% to be passed and not 75%, being the figure erroneously put in cross- examination to Mr. Naylor: see Day 23/40/18-20 and Day 24/40-41. As the definition of 'Special Resolution' under the LPA makes clear, such a resolution could have been passed in writing even without holding a meeting. As explained above, the Petitioners had access to the register of Limited Partners and therefore the simple means to gain the support for such a resolution if it was warranted."

1069. These are all highly persuasive arguments, reinforcing the GP's contention that these legal proceedings are fundamentally misguided and misconceived, and the Court accepts the arguments as correct.

1070. There followed a discussion of the respective merits of the expert evidence of Mr. Weaver and Mr. Mullins, submitting that Mr. Mullins had failed to value the RPS in his Report because he did not realise that the RPS was in fact "*an asset of the Cayman Partnership.*" It was submitted that he also refused to ascribe a terminal value to RCL. It was stated at paragraph 263 (iii) – (iv):

"(iii) Reflecting Mr. Mullins' determination not to arrive at any valuations, he failed to seek out basic information that was publicly available and would have enabled him to stress test the RCL management's assumptions. Thus, he failed to obtain historic real estate sales from the Australian database Corelogic RP Data despite the fact he admitted having his own access to that database [Day 32/29/3-4]. In any event,

as Mr. Weaver explains in para 3.4 of his Supplemental Report, this information was provided to both experts by the RCL management [F3/1/10-11]. Accordingly, the suggestion in para 26 of the Petitioners' closing submissions that there was a lack of information in relation to RCL is demonstrably false: one need only look at the level of detail within the RCL model itself.

In contrast, the General Partner's expert, Mr. Weaver provided clear and convincing evidence in relation to the value and success of the Partnership. His views were barely challenged in cross examination. Even the Petitioners' leading counsel highlighted that Mr. Weaver's report was "excellent" [Confidential Day 33/79]. The suggestion made by the Petitioners in their written closing that Mr. Weaver did not include the debt in the RCL structure is wrong. On the contrary, the RCL model which both Mr. Weaver and Mr. Mullins had and used as the basis for their report had already taken into account the debt within the RCL structure as at September 2016 as it had been prepared on a net debt basis. It also included a forecast of what the net debt in the RCL structure was expected to be as at June 2017, with its forecast being $40m [see the Annual CF tab – G/128 of the model [Exhibit MW-15]. When asked about the actual level of debt in the RCL structure in May 2017, Mr. Naylor made it clear that the debt figure was approximately $60 million in May 2017 [Day 20/21/3-12]".

1071. The Court has already indicated how it views the evidence of both Mr. Weaver and Mr. Mullins, and it finds no difficulty in accepting the relevant arguments put forward by the GP. The Petitioners have however asked the Court to note that Mr. Mullins' evidence has in fact always been that the RPS was an asset of the Partnership and a liability of the RCL.

1072. In relation to liquidation values, the GP made the following point at paragraphs 268:

"*268. The success of the Cayman Partnership and before it the New Zealand Partnership has been built on the brilliance of Mr. Kerr and Mr. Naylor. They had the version to see value at a time when most of the world could not. They had the skills and*

drive to implement that vision and to convert a valuable holding of distressed debt to a much more valuable holding of a land development business. The next step that they want to implement is an IPO. They have reason to be proud of what they have achieved and they have the support of those Limited Partners who invested their own monies and do not have a need for early liquidity. In these circumstances, it would be a travesty to put someone else in charge of the business. The Petitioners' suggestion that the liquidators they list in the Amended Petition would be in an equivalent or better position to effectively run the RCL business (a substantial property business based in Australia) and achieve the same value for investors that is reasonably envisaged to be achieved if Mr. Kerr and Mr. Naylor are permitted to continue to develop the RCL business to implement their long term strategy beggars belief. One only has to contemplate liquidators being in charge of an IPO to appreciate how damaging that is going to be to value. It is an outcome which could not possibly be justified on the evidence this Court has heard."

1073. Although a commercially successful exempted limited partnership can be wound up where the conditions prescribed by law have been satisfied, this is a course which should be adopted only after grave consideration and where there is ample and convincing evidence to require it, and not otherwise.

1074. Before turning to the GP's oral submissions, it is necessary for the Court to mention certain short supplementary arguments which the GP had prepared in note form at the specific invitation of the Court in order better to comprehend the GP's positions.

1075. The first set of such submissions refers to whether the Petition has been brought as a "class remedy" or for the Petitioners' own purposes, having regard to the dicta of Harman J, in *Re a Company [1983] BCLC 492*.

The GP submitted that:

"In the present case, each of the Petitioners have brought the Petition not for the benefit of the class of Limited Partners but for some purpose of their own, namely to obtain early liquidity.

(i) *In the case of CAML, it has been negotiating for an early exit from the Partnership for some time. In their evidence, both Ms. Burleigh [e.g. Day 8/49/5-6] and Mr. Traveller [e.g. Day 4/152/20 to Day 4/153/13] admitted that CAML wanted early liquidity. This was consistent with CAML's settled approach as can be seen from the note of the meeting on 27 August 2014 [CAML Disclosure B/Tab 22] in which it was noted that CAML's interests were 'entirely aligned' with MAS and van Eyk. This is consistent with the approach CAML had previously indicated in Ms. Burleigh's email to Mr. Bagnall on 5 July 2013 [E14/8669] and Mr. Traveller's email of 17 February 2014 to Mr. Kerr [E21/12893].*

(ii) *In the case of ACC, Mr. Bagnall also admitted that ACC is seeking early liquidity of its investment in the Partnership [Day 12/43/19-25; Day 12/45/20-21]. This is consistent with ACC signing up to the Recovery and Exit Strategy letter prepared by Mr. Wallace and Mr. Marshall [E24/15277] which proposed the disposal of the Partnership's assets and Mr. Bagnall's email of 29 September 2014 in which Mr. Bagnall referred to a possible takeover bid for Lantern which should 'relieve the funding pressure' (i.e. provide liquid funds) [E24/15111].*

(iii) *In the case of Aurora (which is the trustee of the Bear Fund), the underlying funds that have invested in the Bear Fund, namely the Blueprint Funds, are in liquidation and are seeking to liquidate all of their investments. This is explained at para 29 and 318 of Kerr 5 [A3(B)/6]; is pleaded in the proceedings in New South Wales between MIML and MAS [E25/15995/para 42]; confirmed by an announcement by MIML dated 15 August 2014 [E24/14902-4]; and is consistent with the evidence given by Ms. Poon [Day 13/26-27; Day 13/93/9-21]."*

1076. This is an issue of fundamental importance, and if it is fully resolved in favour of the GP the Petition then falls away. Based on the evidence which has unfolded there has to be a clearly established, proper and legitimate purpose. The Court accepts as correct the facts set out above and it will make its final decision later by applying the relevant principles of law to those facts.

1077. The GP's separate contention that an appointment of a liquidator would lead to an event of default within the RCL Group is set out as follows:

"*In the General Partner's submission, the appointment of a liquidator would be highly detrimental to the Partnership (and thus to the body of Limited Partners as a whole). In addition to the detrimental consequences referred to in paras 46 to 48 and 264 to 228 of the General Partner's written closing and the oral submissions made on [Day 37/68-72], the appointment of a liquidator in relation to the Partnership would lead to an event of default within the RCL Group.*

(i) *At [E35//21959] is a Loan Note Subscription Agreement dated 9 September 2013 that was entered into by RCL Real Estate Pty Ltd (defined as the 'Company') and various other parties (the 'RCL Loan Facility'). This is the loan facility under which the RCL Group borrowed monies from Pacific Alliance Group ('PAG').*

(ii) *Cl.17.1 of the RCL Loan Facility sets out 'Events of Default' [E35/22040]. These include:*

> *'(i) (change of Control) the persons who at the date of this agreement have Control of an Obligor cease to have Control of the Obligor or one or more persons acquire Control of an Obligor after the date of this agreement'*
>
> *'(1) (appointment of manager) a person is appointed under insolvency legislation to manage any part of the affairs of an Obligor or any of its Subsidiaries...'*
>
> *'(m) (Material Adverse Effect) an event occurs which has, or is likely to have (or a series of events occur which, together, have, or are likely to have), a Material Adverse Effect, and is not cured within 28 Business Days of the Financier's notice to the Company of the same'.*

(iii) *'Obligor' is defined to mean, amongst others, 'the Company' [E35/21988].*

(iv) *'Control' of a corporation is defined to include:*

'the direct or indirect power to directly or indirectly:

(a) Direct the management or policies of the corporation; or

(b) Control the membership of the board of directors,

whether or not the power has statutory, legal or equitable force or is based on statutory, legal or equitable rights and whether or not it arises by means of trusts, agreements, arrangements, understandings, practices, the ownership or any interest in shares or stock of the corporation or otherwise' [E35/21976-7]."

(v) A helpful structure chart is contained at [E35/22103] which has the Cayman Partnership at the top of the structure.

(vi) It follows that an appointment of a liquidator to assume the powers of the General Partner would trigger an event of default under the RCL Loan Facility on account of a change in control of the Company. It might also fall within cl. 17.1 (l) as qualifying as the appointment of a manager to manage 'any part' of the affairs of the Company or fall within cl.17.1 (m) as a 'material adverse effect'.

(vii) The potential consequences of an event of default include that the total amount owing under the RCL Loan Facility may become immediately due for payment together with an obligation to pay interest on the total amount owing at the Default Rate (cl.17.2 [E35/22042] and cl.19.1 [E35/22046]). The 'Default Rate' is defined as 5% per annum over the normal Interest Rate [E35/21977].

(viii) An event of default might also result in other enforcement action, for example, the appointment of a receiver.

(ix) Accordingly, the appointment of a liquidator in respect of the Cayman Partnership is likely to cause significant financial loss to the RCL Group and therefore also to the Cayman Partnership and its Limited Partners."

1078. In summary this too is a fundamental issue of principle to be resolved, and not disregarded or ignored, when it comes to the perceived benefits of winding up and the potentially destructive effects.

1079. The third question upon which the GP has also provided a Note has to do with what has been characterized as the Petitioners' "*self-dealing*" point, derived from broad doctrines of equity and of fiduciary responsibility. This is an area appropriate for serious consideration,

and once again notwithstanding the Court's concerns as to prolixity it is necessary to set out Mr. Wardell's argument at some length, so as to ensure there is no neglect of its importance.

1080. The submission begins by defining the Petitioners' case as being based on a generalized concept of *"self-dealing"*. The procedural observation is then made that this subject has not been pleaded, or previously presented, in the way that it has now been explained by them. The Court finds merit in that particular comment, because as this Judgment has unfortunately illustrated it has been immensely onerous to define what the Petitioners' heads of argument are and where they may be helpfully identified.

1081. In any event, the GP then states that the Petitioners now say that Mr. Kerr and Mr. Naylor are so oblivious to the concept of self-dealing or conflicts of interest that (even though they have acted perfectly honestly and in good faith) it is justifiable for trust and confidence to be lost in them.

1082. The GP then makes a submission which this Court considers of critical importance to these entire proceedings. Paragraph 4, 5 and 6 of the Note read as follows:

> *"4. This new submission is flawed for the reasons set out below. However, at the outset, it is worth viewing this submission in context.*
>
> *(i) It is not suggested that Mr. Kerr or Mr. Naylor acted in anything other than an honest and good faith way.*
>
> *(ii) It is not suggested that any of the relevant transactions were at an undervalue/overvalue or caused loss to the Partnership about which any complaint can be made.*
>
> *5. Therefore, stepping back, it is an extreme submission to suggest that there is a justifiable basis for losing trust and confidence despite these admissions. Even if the Petitioners were right as a matter of technical legal analysis in relation to self-dealing (which, as explained below, they are not), this could not possibly give rise to a justifiable loss of trust and confidence. As the authorities suggest (see, in*

particular, para 53 and 54 of the General Partner's main written closing) and consistent with the General Partner's submissions in relation to the circumstances that might justify a winding up order on the just and equitable ground, technical breaches are insufficient to warrant such an order.

6. It is also important to note that the loss of trust and confidence must be in respect of the future conduct of the Partnership as judged at the time of the hearing. If the General Partner innocently misunderstands the technical legal position but is then put right, there is no reason why a reasonable observer should not have trust and confidence going forward, when there are no allegations of bad faith made."

1083 This is a convenient and salutary moment for the Court to remind itself of the observation of Hoffman LJ in *Re Saul D Harrison & Sons plc* [1994] BCC 475 at para 489 (a case considering the English unfair prejudice remedy) that "*trivial or technical infringements*" would not give grounds for an unfair prejudice petition. Instead, there had to be a visible departure from standards of fair dealing and the conditions of fair play.

1084. The reasoning of the arguments continue at paragraphs 7-10 of the Note:

"*7. The fundamental flaw in the Petitioner's counsel's new approach is that it ignores the terms of the LPA and the relevant provisions of the Exempted Limited Partnership Law. Indeed, the Petitioners' counsel did not appear to consider it necessary to particularise why the transactions the Petitioners complain about fall within the 'related party' provisions under the LPA.*

8. The relationship between the General Partner and the Limited Partners derives from the LPA – that is its foundation. Accordingly, in determining what duties are owed, one must focus first and foremost on the LPA.

9. There is nothing unusual in a fiduciary (or similar) relationship being shaped by the terms of a contract. The Petitioners accept this by reference to the Privy Council decision of ***Kelly v Cooper*** *[1993] AC 205* ***[Auths Tab 18]*** *which they have referred to in their own written closing."*

1085. The Note continues at paragraphs 11-15:

> "*11. In the context of conflicts of interest (which is the issue on which Kelly v Cooper was focusing) it is routine for a governing document to provide a mechanism for dealing with potential conflicts – and often for authorizing them. Thus, one regularly sees articles of association that allow directors to vote on matters notwithstanding a personal interest. Similar provisions are also sometimes found in trust instruments.*
>
> *12. Thus, the Petitioners' counsel's reliance on cases of some antiquity which express the general 'no conflicts' rules in unqualified terms rather misses the point – they do not consider circumstances in which the unqualified position has been modified by the governing instrument.*
>
> *13. This also explains why the criticism now made that Mr. Kerr and Mr. Darby should never have been on the Advisory Committee is wholly misplaced. They were specifically included in the Information Memorandum as members of the Advisory Committee [E1/118] – therefore, their membership was authorized from the outset. Furthermore, cl.6.8 of the LPA [A4/3/20] expressly envisages a member of the Advisory Committee who is both a representative of the General Partner and a Limited Partner being entitled to vote at Advisory Committee meetings.*
>
> *14. Therefore, where a detailed and precise mechanism for dealing with conflicts of interest has been set down in the governing document, one cannot simply ignore that mechanism and fall back on an unqualified and general allegation of self-dealing or conflict of interest.*
>
> *15. Thus, in the present case, it is fundamental to consider the terms of the LPA. That is why the General Partner has (for over a year now) been pressing the Petitioners to explain their allegations by reference to the terms of the LPA."*

1086. The Court finds the logic of these passages to be impeccable, and notwithstanding the scope and learning of Mr. Lowe's contrary submissions it finds the passages most persuasive both as to law and fact in this case. In this regard, the Court also refers to its own previous analysis of the *Kelly* case.

1087. The GP then continues with its analysis of the governing Law at paragraphs 16-19:

> "*The Exempted Limited Partnership Law*
>
> *16. The starting position is section 18 of the ELP Law.*
>
> *(i) This position permits transactions to be entered into between the General Partner and the Partnership subject to the terms of the LPA and the General Partner's duty in section 19 (1). Section 18 provides as follows:*
>
> *'18. Subject to any express or implied term of the partnership agreement to the contrary and to the duty imposed upon a general partner by section 19 (1), a partner may lend money to, borrow from and transact other business with the exempted limited partnership shall thereby be created and with or without interest or security as the general partner shall determine, and shall have the same rights and obligations of the exempted limited partnership to repay a debt to a general partner shall, at all times, be subordinated to the claims of secured and unsecured creditors of the exempted limited partnership.'*
>
> *(ii) The term 'partner' means the General Partner or a Limited Partner (section 2).*
>
> *(iv) Therefore, in effect, section 18 is a statutory authorization for what might otherwise loosely be described as 'self-dealing'.*
>
> *17. The duty in section 19(1) is to:*

'act at all times in good faith and, subject to any express provisions of the partnership agreement to the contrary, in the interests of the exempted limited partnership'.

18. The Petitioners' counsel has disavowed any suggestion in this case that the General Partner has acted in bad faith.

19. Accordingly, even before turning to the LPA, one can see the fallacy in the Petitioners' argument that the duty to act in good faith and in the interests of the Partnership necessarily imports with it a duty to avoid any conflicts of interest (or any form of 'self-dealing'). If that were the case, then section 18 would have no purpose or application."

1088. The accompanying analysis of the LPA itself then follows at paragraphs 20-26 of the Note:

"*The terms of the LPA*

20. Under the LPA, the starting point is clause 4.8. As the Petitioners' counsel accepted, this serves to exclude any fiduciary duties on the part of both Limited Partners and the General Partner (as both fall within the definition of 'Partner') unless expressly provided for in the LPA.

21. The sole source in the LPA of any possible fiduciary duties on the part of the General Partner is in clause 4.9.

22. Clauses 4.9 (b) to (d) effectively deal with duties of reasonable care and skill and rather than fiduciary duties.

23. Clause 4.9 (a) requires the General Partner to:

'act bona fide <u>in what the General Partner believes</u> to be in the best interests of the Limited Partnership in a proper, efficient and business- like manner'. (underlining added)

24. As explained below, it is worth noting the slight difference in language of clause 4.9 (a) compared with section 19 (1).

25. *The Petitioners' counsel appeared to argue that clause 4.9 (a) captures all wider fiduciary duties including the 'no conflicts' rule (or 'self-dealing'). Thus, so it was said, because the General Partner is subject to clause 4.9 (a), the General Partner is necessarily prevented from ever having a conflict of interest (or engaging in any form of 'self-dealing').*

26. *In the General Partner's respectful submission, this approach is clearly wrong.*

(i) By constructing clause 4.9 (a) as encompassing all wider fiduciary duties (the Petitioners' counsel referred to this as the 'freight' that the obligation carries with it), that leaves no room for clause 4.8 to operate so as to exclude any fiduciary duties as regards the General Partner, despite the clear wording of clause 4.8 that fiduciary duties are excluded unless 'expressly' imposed.

(ii) As explained above, the Petitioners' approach is inconsistent with section 18 of the Exempted Limited Partnership Law which specifically authorizes transactions that would otherwise give rise to a conflict of interest (or could be termed 'self-dealing').

(iii) The Petitioners' approach is also inconsistent with the normal formulation of fiduciary duties under which the 'no conflicts' rule is usually considered separately from the duty to act in good faith in the interests of the principal. Thus, a fiduciary can still act in good faith and in the interests of his or her principal notwithstanding a conflict of interest. Accordingly, where a conflict is authorised, the duty to act in good faith and in the principal's interest remains.

(iv) This last point can be seen from the decision of Bristol & West BS v Mothew [1998] Ch. 1 [Auths Tab 28].

(a) At p18B-C Millett LJ distinguishes between the duty of good faith and the no conflicts rule.

(b) *At p19D Millett LJ envisages a fiduciary acting for two principals with a potential conflict but still being subject to the duty to act in good faith in their interests. His lordship stated:*

'Even if a fiduciary is properly acting for two principals with potentially conflicting interests he must act in good faith in the interests of each and must not act with the intention of furthering the interests of one principal to the prejudice of those of the other: see Finn, p.48. I shall call this "the duty of good faith." But it goes further than this. He must not allow the performance of his obligations to one principal to be influenced by his relationship with the other. He must serve each as faithfully and loyally as if he were his only principal.'

(v) *In the same way, under the English Companies Act 2006, the codification of the duty to act bona fide in what the directors believe to be the interests of the Company (s.172) is dealt with separately from the duty to avoid conflicts of interest (s.175).*

(vi) *It is also worth noting that the common law duty on a company director is judged subjectively one (see Re Smith and Fawcett Ltd [1942] Ch. 304 per Lord Greene MR at 306 and Regentcrest Plc v Cohen [2001] BCLC 80. In the latter case, Jonathan Parker LJ stated.*

'The nature of a director's fiduciary duty

[120] The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law para 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission

was in the interests of company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test.

[121] As Lord Greene MR put it in Re Smith & Fawcett Ltd [1942] 1 All ER 543, [1942] Ch 304 at 306:

"The principles to be applied in cases where the articles of association of a company confer a discretion on directors ... are, for present purposes, free from doubt. They must exercise their discretion bona fide in what they consider – not what a court may consider – to be in the interests of the company, and not for any collateral purpose.' (My emphasis.)

[122] To similar effect is the following passage from the judgment of Millett LJ in Bristol and West Building Society v Mothew (t/a Stapley & Co) [1996] 4 All ER 698 at 712, [1998] Ch. 1 at 18:

'The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.'

[123] The position is different where a power conferred on a director is used for collateral purpose. In such circumstances it matters not whether the director honestly believed that in exercising the power as he did he was acting in the interests of the company; the power having been exercised for an improper purpose, its exercise will be liable to be set aside (see, e.g., Hogg v Cramphorn Ltd [1966] 3 All ER 420, [1967] Ch. 254). However, it has not been contended that that principle applies in the instant case.'

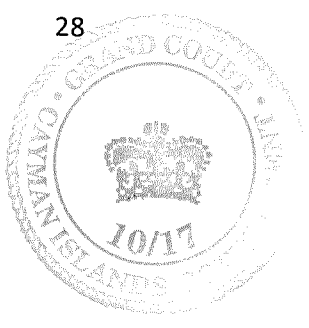
(vii) *Accordingly, to the extent that the Petitioners' counsel was suggesting that the test under clause 4.9 (a) of the LPA was to be judged objectively [Day 36/122/23-25], that is not the case. Indeed, the specific wording used in clause 4.9 (a) (as underlined in para 23 above) should be contrasted with the wording in section 19(1). The obligation under clause 4.9 (a) is clearly to be judged subjectively. In any event, there is no justification for suggesting that this obligation has been breached (whether judged subjectively or even objectively).*

(viii) *Finally, the suggestion of some wider duty to avoid conflicts being introduced by clause 4.9 (a) is also inconsistent with the more specific regime for dealing with conflicts laid down in the LPA. Where there is a specific regime for dealing with conflicts, one cannot seek to imply a blanket prohibition: otherwise, what would be the point in the specific regime?"*

1089. Once any suggestion that Mr. Kerr and Mr. Naylor have acted with anything other than honesty and good faith has been abandoned, then there is no basis for saying that the GP has acted contrary to what either the governing Law or the governing LPA requires in this regard. In other words, the argument that the GP has acted in accordance with prudent, acceptable and permitted standards of conduct becomes an argument that is overwhelmingly persuasive. As the GP succinctly puts it, it is not a breach of fiduciary duty if the so-called "conflict" is specifically authorised under the terms of the relevant governing document and the Court finds that to be the case here. Once again, the Court refers back to its own analysis of the status of the LPA.

1090. Paragraphs 28-29 are also of help in illustrating this underlying theory of conflicts:

"*28. Consistent with the explanation set out above (and the specific terms of clause 4.9 (a), it is also important to note that the focus under the LPA is on requiring Advisory Committee approval for conflicts of interest of which the General Partner is aware – rather than inadvertent conflicts. Thus:*



(i) *Clause 6.3 of the LPA imposes a duty on the General Partner to inform the Advisory Committee of conflicts of interest of which the General Partner becomes aware.*

(ii) *Clause 2.1 of Schedule 3 to the LPA also deals with transactions with parties who are known by the General Partner to be Related Parties.*

(iii) *Clause 4.3 permits transactions with the General Partner or its Affiliates which are on 'arm's length terms'. Accordingly, if the terms are 'arm's length', then the transaction is permissible. The suggestion made by the Petitioners' counsel that this restricted to structuring transactions through a broker is clearly misplaced.*

Further explanation of how the regime operates under the LPA is contained in paras 141 to 151 of the General Partner's main written closing.

29. It follows that where the General Partner was not aware of the alleged conflict or the transaction was on arm's length terms, there is limited (if any) scope for criticism under the terms of the LPA. That is why it is very important in the present case that (as the Petitioners' counsel has repeatedly confirmed) no allegations of bad faith are maintained and it is not alleged that transactions were at an undervalue/overvalue."

1091. Quite apart from this most informative and attractive technical argument, the GP also casts some aspersions at paragraph 35, in closing the Note on how alternatively nobody could even consider bringing a claim for breach of fiduciary duty where no loss has been caused (and profit made by it) and the breach was committed in good faith, and yet in the same circumstances the Petitioners are asking the Court for the extreme remedy of a winding up order. These are all profound factors which must weigh heavily with the Court and which the Petitioners have frankly failed to overcome.

1092. The Court will now identify some of the remarks made by Mr. Wardell in his oral submissions before then going on to consider its own findings and conclusions.

1093. While keeping largely to his written submission, Mr. Wardell also made this point on Day 37 at page 6 lines 7-25- page 7, lines 1-20:

> *In addition to Mr. Marshall's own personal animosity towards Mr. Kerr, both Mr. Wallace and Mr. Marshall were motivated by the fees they hoped to earn as replacement GP. You will recall that Mr. Wallace was hoping to get a fee as investment manager. They were then going to introduce a new baseline figure for value which would be in their discretion and charge a profit fee of 15 per cent over and above that baseline figure.*
>
> *In addition, they were going to introduce a new fee of 1.35 per cent on the disposal of assets. The petition contains numerous allegations that the GP was quickly able to demonstrate were ill – founded, which it did in its very detailed defence. Despite this, the petitioners and their witnesses persisted in their complaints which appear to be largely crafted for them by their Australian lawyers, Henry Davis York, and which they must have known to be baseless.*
>
> *My Lord, most of those complaints have now been abandoned to be replaced by Mr. Lowe's self-dealing case. This self-dealing case is not pleaded. It appears to be entirely lawyer-led. It's also appears to be based on a tortured, misreading of the LPA so when I get to it, which won't be today, we say the self-dealing case is based on a misconceived analysis of the law and the LPA. In any event, even then, even if we're wrong about that, it amounts to no more than a technical breach or*

technical breaches which has caused no possible prejudice and no possible loss. Picking it up at paragraph 12, Mr. Wallace's and Mr. Marshall's strategy began to unravel even before the first witness was called. Mr. Wallace the chief instigator of the petition who promoted the complaints against the GP as part of MAS' competitive strategy and was billed as the petitioner's star witness revealed his true colours. It was, lest one forgets, Mr Wallace rather than any of the petitioners who affirmed the petition prior to it being filed in June 2015 and then filed evidence in support. However, he turned against his fellow collaborators and tried to hijack the petition. That attempt was unsuccessful and ultimately led to MAS paying the cost of the GP on an indemnity basis and Mr Wallace was rightly but no less ironically branded..."

1094. It was submitted that the explanation for CAML and ACC's conduct is that it suited their commercial interest. They wanted early liquidity knowing they had no entitlement to it.

1095. The GP's submissions on Aurora's alleged role are set out on Day 37, page 16 lines 3-18:

"Aurora's role is equally troubling. It's transpired that the only reason why Aurora agreed to become a petitioner in the weeks running up to the petition was because they were instructed to do so by Mr. Wallace and indemnified by MIML. They weren't party to asking for a meeting. They never sought a meeting even though Aurora's own holding gets over this 20 per cent threshold. They played no role at all in

the preparation of the petition. They didn't attend any meetings with Mr. Wallace and Mr. Marshall, CAML and ACC. You will remember the only evidence to suggest any possible involved was given by Mr. Marshall. He told you he had rung someone from Aurora and never got a call back, so Aurora was in complete ignorance of what was going on until out of the blue they were told, "You've got to bring this petition and we'll indemnify you".

1096. He continues at page 17, lines 11-21:

"*Then you get this trumped up, ridiculous trumped up case from Betty Poon complaining about the Grant Thornton report and trying to suggest that she had concerns that Torchlight was dragging its feet about the Grant Thornton report, when the Grant Thornton report was done for their benefit. Torchlight did not have to assist but did and Mr. Naylor assisted with good grace. It was a ridiculous piece of evidence Betty Poon put in and now it appears, a nice book end to this case, Betty Poon has been sacked and she appears to be implicated in the left of AU$1 million.*

It's important to understand the motivation behind the petition because it helps to explain the way in which the petition has been run and why when the complaints are subject to analysis, it's not surprising."

1097. Mr. Wardell submitted that the case had started off complaining about a lack of audited accounts and appeared now to focus on third party transactions now "*in a desperate attempt to re-shape the case*". It appeared now to be based on corporate governance and

record-keeping. Allegations of animosity as a basis for winding up was not put in the Petition at all. Indeed, no animosity to Mr. Kerr had been expressed by Mr. Bagnall, Mr. Traveller or Ms. Poon.

1098. Mr. Wardell submitted that there were many other innocent Limited Partners whose interests had been damaged by the Lantern affair and whose interests would be further damaged by a winding up.

1099. With regard to the absence of cross-examination of Mr. Kerr and Mr. Naylor on contested matters, Mr. Wardell stated on Day 37 at page 39, lines 5-25:

> *"There was no rebuttal evidence put in. No-one swore an affidavit saying, "Mr. Kerr says this but he's wrong for the following reasons ..." There were further affidavits put in but they didn't engage with the explanations given by Mr. Kerr and Mr. Naylor. So when Mr. Kerr, for instance, says they got it completely wrong, about New Chums and that embraces three transactions, no one says, "You are wrong about that", or, "I don't accept your explanation for the following reasons..." So when they get into the witness box they have absolutely no idea why, if it be the case, their explanations are challenged. In those circumstances, if Mr. Lowe wants to argue in closing that an explanation they have given is not to be accepted, he has to challenge it and it is a massive problem for the other side.*
>
> *To take just a few obvious examples, the classic one is Lantern. Mr. Lowe just said to Mr. Naylor I'm just going to show you some documents and didn't put any case. So that means the explanation given by Mr. Naylor and Mr. Kerr about Lantern remains unchallenged."*

1100. As for allegations relating to the NZ Partnership, it was submitted that any liquidator of the Cayman Islands Partnership would not have powers to investigate the affairs of the NZ Partnership, and allegations against the former cannot be a basis for winding up the latter. The Court sees clear merit in this submission, as in a number of other ones as well.

1101. A pragmatic and functional approach was urged by Mr. Wardell in relation to the Wilaci loan, on Day 37, page 62, lines 2-18:

> "2 *We then deal with Wilaci. A great deal of time*
> 3 *spent on cross-examination about Wilaci. It was even*
> 4 *said in opening that the whole motivation behind setting*
> 5 *up the Cayman Partnership was to avoid repayment to*
> 6 *Wilaci. That theory was entirely divorced from the*
> 7 *incontestable facts. In any event, the whole Wilaci*
> 8 *episode has little relevance to the petition. In*
> 9 *essence, it involved a commercial decision taken by the*
> 10 *New Zealand General Partner to take full advantage of the*
> 11 *RCL investment opportunity.*
> 12 *That decision has been entirely vindicated by the*
> 13 *outstanding success of the RCL investment and it's not*
> 14 *this court's function to second guess commercial*
> 15 *judgments, let alone ones taken by the New Zealand*
> 16 *general Partner which have turned out to be highly*
> 17 *successful."*

1102. It would seem to the Court that in commercial matters the weight to be given to advantages as opposed to disadvantages is peculiarly one for management to make, as it cannot be the responsibility of the Court to run businesses or to ruminate on how they should be run.

1103. Then there was an exchange with the Court as to the effect of the GP ceasing to have control over the Partnership, triggering default in regard to RCL. Mr. Wardell submits that there was a risk a receiver would be appointed over the entirety of RCL, and that Mr. Lowe sought to counter by saying he was not seeking to change the GP, who would remain the GP following the appointment of liquidator. Mr. Wardell emphasised that if the Lender said there was an event of default however and put receivers into RCL "*there was a huge battle to be had*".

1104. The Court's only comment at this stage is that this is not a prospect to be viewed with passive equanimity or placid optimism.

1105. Mr. Wardell made further observations on future plans on Day 37, page 78, lines 4-23:

"*My learned friend – the next thing is critically you will recall from Mr. Kerr's evidence that the next stage in this is the ultimate IPO of RCL. That's the game plan. It always has been. Distressed debt, convert it to the credit bid, build out the business, it is maturing but not mature, they expect it to go on increasing in value, and then in the end at the appropriate time have an IPO. We say it is frankly absurd to suggest that a liquidator would be willing to sign a prospectus and give representations and warranties to enable an IPO to proceed. We've looked and researched to find any example anywhere of an IPO being done by a liquidator and can find none, not surprisingly. Liquidators do not give representations. They do not give warranties. It would be equally absurd that if liquidators - -*

Justice McMillan: They could be personally liable, not if they had the sanction of the court I suppose, but there is a danger of liability.

23 Mr. Wardell: Absolutely."

1106. Mr. Wardell amplified this contention by stating that in a winding up there would be no plan, and in those circumstances the Court would not be able to fulfill its obligation to preserve and recover value.

1107. Having reiterated his submission as to the improper purpose of CAML and ACC, Mr. Wardell stated regarding Aurora at page 87, lines 23-25 – page 80, lines 1-4:

"*23 Mr. Wardell: The Blueprint funds are being wound up. All*
24 the assets are being liquidated. They are just in the
25 same position. You will remember the Blueprint Funds

1 went under shortly before the exit and recovery strategy
2 was formulated. So Aurora has no interest, and those
3 behind Aurora have no interest, in being in the fund for
4 the long haul."

1108. On the nature of an exempted limited partnership, he stated at page 92, line 25 – page 93, lines 1-22:

"*25 In a traditional partnership, the partners have*

1 a right to participate in the conduct and management of
2 the business; whereas an ELP they are actually forbidden
3 from doing so and it's that which makes this much more
4 analogous to a company rather than a traditional
5 partnership.
6 That also explains why a mere breakdown in
7 relations, if there is one, between a limited partner
8 and the general partner, doesn't provide a justification
9 for a winding –up order.
10 In a limited partnership, the limited partner and

the general partner are not carrying on business together. Therefore, even if there is some discord between them, there's absolutely no reason why the business cannot continue. That's exactly the same position, my Lord, in relation to shareholders who fall out with the board of directors. The mere falling out between shareholders and the board provides no basis for winding up a company. I will come back to the level of dislike. I have already touched on that. We don't think its there but even if it was, that provides no basis for minding up."

1109. Mr. Wardell clarified on Day 38, page 65, line 18-25- pages 66, line 1 his interpretation of the scope of the doctrine of lack of probity as follows:

"*Where I accept that we've overstated it is over the page and I must correct that. The authorities do not say that lack of probity is tantamount to an allegation of dishonesty at the top of page 27, as you have seen from Mrs. Justice Mangatal's judgment and the other cases we have been looking at. It extends to abuse of power, acting in bad faith, preferring your own interests and general unfair dealing to the prejudice of the petitioners."*

1110. This very much accords with the view which the Court has now formed and indeed has already comprehensively articulated.

1111. As to alternative remedy Mr. Wardell argues that the Petitioners could have called a meeting. Aurora itself could have called a meeting: "*right to remove the GP for cause if 50 percent are in favour of that outcome; right to remove the GP without cause if two thirds of the LP's are in favour of the outcome.*"

1112. Therefore, it was submitted, even if a winding up order were otherwise appropriate it would not be appropriate where there was an alternative remedy in any event.

1113. Mr. Traveller and Ms. Burleigh were criticised for knowing that the FMA investigation had concluded yet leaving an impression otherwise.

1114. Mr. Wardell went on to draw a distinction between the duty to act in good faith and what he described as the conflicts rule. Thus where a conflict is authorised (for example under section 18 of the Law) the duty to act in good faith and in the principal's interest remain. There was no mutual exclusion, and moreover in this context the precise terms of the LPA must be taken into account. If some act had been authorised under the terms of the relevant contract it could not be a breach of fiduciary duty, rather, the focus was on regulated conflict of interest "*of which the GP was aware.*" In this case, it was argued none had been made out.

1115. This point was then elaborated in the following exchange later the day on Day 39 at page 54 lines 23-25 – page 55, lines 1-24:

"*23 There is only one question for the court, there*
24 could be only one question for the court dealing
25 with conflicts here: is the GP acting bona fide in what

1 the GP believes to be in the best interests, subjective
2 test. The other side do not say it has acted in bad
3 faith and that really is the end of it. Everything
4 falls away. Even if all my other points are bad,

everything falls away on this.

Justice McMillan: I suppose there are two opposing positions and nothing in the middle. Either someone Acts in good faith in the interests of the Partnership Or they do the opposite.

Mr. Wardell: Yes.

Justice McMillan: So it's either an honest exercise of powers or a dishonest exercise and there's nothing in the middle.

Mr. Wardell: Exactly, exactly. You'll remember Lord Wilberforce in the Westbourne Galleries case, when you are dealing with a commercial contract you don't superimpose all these other equitable principles which you would in a quasi-partnership. You look at the terms of the agreement and ask yourself have there been breaches of that agreement. That has to be the starting point of any assessment as to whether there had been an actual subjective loss of trust and confidence and whether any such loss in trust and confidence is objectively justified."

1116. Then the additional point was made once again that where no loss had been caused and any breach was committed in undisputed good faith, this was scarcely a basis for justified loss of trust and confidence.

1117. A number of additional subjects were then raised by Mr. Wardell, but as those have been amply set out in the closing submissions it is unnecessary to elaborate on them.

1118. There was no case put to Mr. Kerr and Mr. Naylor that the GP had acted unreasonably or been responsible for the delay in the preparation of the auditors' accounts. In addition, it was argued that in the instance of a closed investment vehicle holding long-term assets an

investor would not expect the same regularity of information as in the case of a public company.

1119. Mr. Wardell stated on Day 40, page 51, lines 12-25 – page 52, lines 1-8:

> *"One does not lose trust and confidence with someone who's acting in good faith and making money for you, particularly do not lose trust and confidence when there are no breaches of the LPA, alternatively, at worst, technical ones. Even if they did have a subjective loss of trust and confidence, it's not a justifiable one. So the objective part of the test disappears. We infer that the only reason they are still fighting this case is because of the default notices and if it hadn't been for them they would have walked away months ago. My Lord, we say that the case for dismissing this petition is unanswerable and there is no other option reasonably open to the court. A winding –up order should only be made in clear cases and where there's a lack of probity in the broad sense discussed earlier on this week. There's got to be bad faith, there's got to be abuse of power, there's got to be unfair dealing and there's definitely got to be prejudice resulting. To wind up for technical breaches with no lack of good faith, no loss and no prejudice would be a radical extension of the law."*

The Petitioners' Oral Submissions in Reply

1120. Mr. Lowe maintained that whether complaints were legitimate or not in themselves for the purposes of a Petition they did explain the breakdown in confidence. Suspicions started to build up instead of being dealt with.

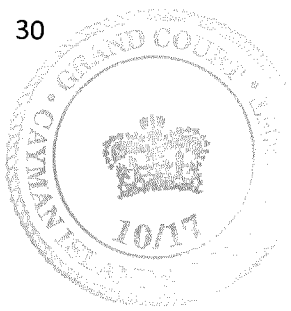
1121. As to the applicable legal test as to what can constitute lack of probity of those in control, Mr. Lowe submitted on Day 40 at page 77, lines 15-20:

> "15 *Loch v John Blackwood is itself authority for*
> *16 a fairly broad spectrum involving behaviour that can be*
> *17 like the Baird v Lees conduct which relates to*
> *18 administration not honesty, and like the behaviour in*
> *19 Loch v John Blackwood itself which no –one is willing to*
> *20 describe as dishonest."*

1122. This is now an area of broad agreement.

1123. Mr. Lowe questioned how in the case of a corporate petitioner one can assume that the loss of confidence has to be subjective on the part of a company. It was more of a decision taken by the corporate body or association, as distinct from a subjective belief to be tested. The Court considers that the answer to that may well lie in whether there is an actual belief on the part of the subject claiming that belief, rather than one that is manufactured or not even held at all. Here the Petitioners claim to have lost trust and confidence, so whether they have subjectively done so must be material.

1124. Referring to *In re Yenidje Tobacco Limited* [1916] 2 Ch. 426, Mr. Lowe argued that *"deadlock"* was only an example of the reasons why it would be just and equitable to wind up a company and that *Yenidje* was not simply a case of deadlock but was concerned with the situation where a company was in a state which the parties would not have contemplated when the association was formed and that just and equitable considerations could apply under such circumstances.



1125. He argued also that a limited partnership was completely different from a company. It had no corporate personality and the interplay of equity was plainly not as or like with a company. He added that the real difference between a partnership and a limited partnership was the feature that members had limited liability. The Court has taken these submissions into account, but as the Court has earlier indicated in its review of the general legal principles the Court declines to take what might be respectfully called the narrower approach as to the nature of an exempted limited partnership.

1126. Mr. Lowe went on to reproach the GP for issuing its default notices, describing this as "*all-out war*".

1127. He accepted that the Blueprint Funds were being liquidated "*but not the ones that are in Bear*". In view of the underlying position, the distinction if any appears to the Court to be a very slight and inconsequential one.

1128 Mr. Lowe maintained that the Advisory Committee was not a proper committee and he implied that the power to appoint to it had not been used correctly. Mr. Wardell intervened to assert that this was a new case being put forward. However, in response to an enquiry from the Court, Mr. Lowe did not claim that the GP acted with deliberate impropriety.

1129. A number of points were then re-stated which had emerged from Mr. Lowe's written submissions.

1130. He stated that the Carry was paid out in breach of the LPA, and there was no entitlement under the NZ LPA and no reason why under the Cayman LPA the Partnership had to pay the Carry to the NZ Partnership.

1131. Following the conclusion of Mr. Lowe's remarks, Mr. Wardell then added the following comments on Day 40, page 171, lines 1-25 – page 172, lines 1-2:

> "*I It was then said by Mr. Lowe - - I will try to be as*

quick as I can - - it was said that there was no evidence that Aurora wanted liquidity and I am just going to remind you about what Mr. Kerr says in two passages. It is the easier way of finding it. I don't think you need to look it up. I will just read them out for speed. Paragraph 29 of Kerr 5, he says:

"I believe the real reason Aurora is pursuing this is that in August 2014 MIML, responsible entity of the Blueprint Capital Stable Fund, Blueprint Balance Fund And Blueprint High Growth Fund and decided to liquid These funds."

He expands on that in paragraphs 318 where he cites from the Australian proceedings:

"In the MAS MIML litigation, MIML are challenging MAS' right to act as trustee", et cetera, et cetera.

"In paragraph 43 of MIML's statement of claim on 11 August MAS informed MIML of steps it had taken or was contemplated taking to liquidate the investments of Bear and Borg. It was strategy for Borg to liquidate Borg's investment by selling the securities Borg held in Lantern and then pursue any other options available to liquidate Borg's holding in Lantern. Its overarching objective in respect of Bear was to secure the assets of Torchlight and then liquidate as quickly as possible

Bear's investment and it continued to liaise with MIML As a matter of priority."

1132. The Court reminds itself at this point that it is incumbent on the Court to ensure that the Petitioners have no improper purpose, and not merely to take that issue into account.

The Findings and Evaluations of the Court

1133. The first issue for consideration is whether this Amended Petition has been brought by Aurora, CAML and ACC for an improper purpose. These proceedings have been conducted by the Petitioners on grounds which have been subject to radical and substantial change and development over the course of the history of the proceedings themselves.

1134. More particularly the Petitioners must demonstrate that the Petition has been pursued in the interests of the Limited Partners as a class and not merely for their own individual interests whatever they may be.

1135. In regard to both CAML and ACC it appears to the Court that their involvement with and support for the activities of Mr. Wallace and Mr. Marshall has been opportunistic and self-serving. In regard to Aurora, no clear purpose at all has been identified by Ms. Poon, and in any event Aurora was at the relevant time when the Petition was brought subject to the influence and direction of Mr. Wallace.

1136. Mr. Wardell has put forward a submission that each of the Petitioners acts as they do for the same improper purpose, which is to obtain accelerated liquidity from what is a closed long term investment fund. The facts and reasoning put forward by Mr. Wardell on this point are accepted. This is a feature which the Court finds as a fact common to all three Petitioners as distinct from the Limited Partners taken as a whole for which as a class the Petitioners claim to act.

1137. Because it is incumbent on the Court to ensure that the proceedings are not brought for an improper purpose, this is an issue which the Court has to decide. Having considered all the history and background and having taken into account the principles of law earlier set out the Court finds that each of the Petitioners has brought the Petitioner for an improper purpose and that this constitutes an abuse of the process of the Court. That purpose is to obtain accelerated liquidity.

1138. However, should the Court be in error in arriving at this particular finding the Court will also proceed to consider the merits of the Amended Petition upon the grounds themselves which have been put forward.

1139. Put another way, should it be the case that the Court has fallen into error in dispositively ruling that the Petitioners have brought the Amended Petition for an improper purpose, it remains of course necessary for the Court to consider and determine in any event whether in its opinion there are just and equitable grounds for winding up the Partnership.

1140. The Court has already elaborated upon the applicable principles of equity and law and it will at this ultimate stage confine itself to their practical application.

1141. The overarching theme as expressed by Lord Wilberforce in the *Ebrahimi* case is that general words should remain general and not be reduced to the sum of particular instances. This approach is entirely consistent with Lord Shaw's comment in the *Loch* case at page 796 that an application must succeed on the "*broad ground*" that confidence in the management was most justifiably at an end.

1142. Various courts have sought to interpret this guiding principle by explaining it in numerous different forms.

1143. In the *Sparkman* case, it is said that there must be something in the management and conduct of the company which shows the Court it should no longer be allowed to continue.

1144. In the *Loch* case itself there is reference to substantially impairing the rights and protections to which shareholders, both under statute and contract, are entitled.

1145. In the *Elder* case, at the lowest there should be a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder is entitled to reply.

1146. In the *Elder* case, it is also made clear that strong grounds are normally insisted upon and an impairment of confidence in the probity with which the company's affairs are being conducted.

1147. In the *Baird* case, the Court refers to a guarantee of commercial probity and efficiency.

1148. The Court has in mind all of these legal considerations in weighing whether it is just and equitable to wind up the Partnership.

1149. The Petitioners' complaints and evidence adduced in support of them have been set out at very great length. Likewise, the GP's evidence has been set out at very great length as well.

1150. Having reviewed all of that material, the Court finds that the Petitioners have failed to prove their case on a balance of probabilities.

1151. Furthermore, in terms of evidential content, the Court believed and accepts the evidence of the Respondent's witnesses and it disbelieved and rejects the evidence of the Petitioners' witnesses.

1152. At best there is a very small sum of particular instances where in its day to day management the GP has fallen short of perfection. While perhaps the same can be said of many commercial undertakings, this in itself is nowhere near enough.

1153. The Court would also add, with great regret, that where there have been any departures from the standards of fair dealing and a violation of the conditions of fair play such conduct has been attributable to the Petitioners' conduct alone. Whatever issues the Petitioners may have in regard to what may be called the domestic policy of the Partnership this fails to justify the course which they have adopted.

1154. The Court finds that the Petitioners had no subjective and actual loss of trust and confidence in the GP. Furthermore even if that finding by the Court is incorrect, any such loss of trust and confidence is not objectively justified on any conceivable analysis.

1155. By way of amplification, an exhaustive review of the facts and of the law leads inevitably and overwhelmingly to the conclusion which the Court has now stated.

1156. While the Court accepts that there has been an absence of "clean hands" in the Petitioners' conduct, after careful consideration the Court must endorse the submission made by Mr. Lowe that such an absence is not in itself a sufficient reason for not making a just and equitable winding up where it would otherwise be appropriate to do so. This is of course clearly not a case where it would otherwise be appropriate to make that order in any event.

1157. Mr. Lowe's point that the equitable maxim is not imported into the statutory provisions governing just and equitable winding up is one that is widely recognised and judicially approved.

1158. The underlying concept is that "unclean hands" must be directly related to the conduct of the Petition of the allegations being made in it. As Mr. Lowe puts it, a Petitioner's misconduct is only relevant if it has an immediate and necessary relation to the unfairly prejudicial conduct of which complaint was made.

1159. Mr. Wardell's counter argument is essentially that the Petitioners at no time had a general loss of trust and confidence in the GP but had joined forces with Mr. Wallace and Mr. Marshall with a view to achieving early liquidity. While the Court accepts Mr. Wardell's proposition as an accurate statement of the facts nonetheless the Court is not satisfied that broad misconduct by the Petitioners as thus defined comes within the narrow principle which has been set out. Therefore out of an abundance of caution, and with one important qualification, the Court declines to take into account the Petitioners' disappointing behaviour.

1160. As stated previously, the qualification relates to the specific complaint as to delay in the preparation of audited accounts in circumstances, where entirely unknown to the GP, the Petitioners were actually promoting and bringing about the delay themselves. This misconduct is relevant in weighing the equities. The Court has already ruled that the Petitioners are not entitled to relief and this is simply a further, stand-alone reason as to why they are not entitled. They have behaved in an inequitable manner in relation to a particular aspect of their complaints and equity can play no role in assisting them.

1161. In summary, this Amended Petition is without merit and it must be refused. Moreover, the Court is of the opinion that to wind up the Partnership would not be in the interests of the Limited Partners taken as a whole because to do so could be financially devastating. It is not a wise course as the GP has shown in its arguments which the Court accepts.

The Default Notices

1162. CAML and ACC issued a summons dated 10 June 2016 ("CAML/ACC Summons") seeking declarations that the respective default notices issued to each of them (both default notices dated 27 May 2016) are void and of no force and effect. On 5 October 2017, the Court adjourned the CAML/ACC summons to the trial of the Petition. By its summons dated 11 August 2017 the GP sought an order that the Default Notice issued by the GP to Aurora on 13 August 2015 be deemed valid. The GP seeks orders that the Default Notices issued by the GP to Aurora on 13 August 2015, and the Default Notices to CAML and ACC be deemed valid.

1163. The Aurora notice states in relevant part:

> "*Torchlight Fund LP*
>
> "*We write to give you formal notice under Clause 10 of the Limited Partnership Agreement ("LPA") that you are in default by reason of your having breached a provision of the LPA, namely clause 15.5, which breach by its very nature is incapable of remedy and accordingly you are in immediate default. By reason of that breach you are deemed to be a Defaulting Partner as defined in the LPA.*

You breached clause 15.5 by disclosing to Millinium Asset Services ("MAS") confidential Limited Partnership information concerning the affairs of the Limited Partnership, including copies of the LPA and other partnership documents and communications on a Portfolio Company, namely Lantern Hotels and any proposed or actual Investment by the company, including Lantern Hotels amongst other investments. MAS are a competitor of the Limited Partnership and are running a competitive strategy in respect of, inter alia, Lantern Hotels.

Evidence, which demonstrates the breach, is contained in the first and second affidavits of Thomas James Wallace, a director of MAS, filed in the Grand Court of the Cayman Islands in Cause FSD No. 103 of 2015 and in documents exhibited to those affidavits."

Without prejudice to all of our other rights pursuant to clause 10 of the LPA, and in particular our rights under clauses 10.4 and 10.8 of the LPA, we inform you that pursuant to clause 10.2 of the LPA, unless we determine otherwise, you have no right to vote at any meeting of the Limited Partnership. In addition, and again without prejudice to all of our rights, pursuant to clause 10.2(a) we hereby suspend all of your rights under the LPA, including, but not limited to, your rights to receive valuations, reports and other information, whether under clause 13 of the LPA or otherwise. This is necessary to protect the interests of the Limited Partnership having regard to the fact that you have previously breached your confidentiality obligations under clause 15.5."

1164. The CAML notice which is more broadly based states in relevant part:

"*Breaches of Clause 4.7 (a)*

5. *In breach of clause 4.7 (a), CAML has interfered with the conduct and the management of the Limited Partnership. Such interference has been undertaken in bad faith and has been directed towards causing the General Partner and the Partnership prejudice in an attempt:*
    a. *to increase CAML's prospects of forcing an early exit from the Partnership in order to satisfy its own liquidity objectives, to the detriment of the Partnership and the Limited Partners as a whole; and*

b. to create a platform to wind up the Partnership pursuant to the Petition that has been issued by CAML and others against the Partnership in June 2015 (the "Petition") to the detriment of the Partnership and the Limited Partners as a whole, in order, in the case of CAML, to satisfy its desire to liquidate its interest prematurely.

(the "Recovery and Exit Strategy")

6. In particular, in order to further the Recovery and Exit Strategy:

(a) From at the latest August 2014 onwards, CAML attended meetings with parties including Millinium Asset Management Pty Ltd ("MAS"), a competitor of the Partnership, and formed a plan with MAS and others to interfere in the management and conduct of the Partnership. This was to the detriment of the Partnership and the Limited Partners as a whole. The aim of the Recovery and Exit Strategy was either:

(i) to replace the General Partnership of the Partner with MAS pursuant to an agreement that MAS would facilitate the Recovery and Exit Strategy in consideration for supporting MAS' attempt to replace the General Partner; or

(ii) to force a winding up of the Partnership to the detriment of the Partnership and its Limited Partners as a whole.

(b) CAML agreed with MAS and others to become a named Petitioner on the Petition.

(c) CAML wrote to the Partnership's auditors on 25 March 2015 and 1 July 2015 and requested that the Partnership's auditors conduct a detailed review of specific aspects of the conduct and management of the Partnership. This was designed to interfere with and delay the provision of the audited accounts by the Partnership's auditors and significantly added to the cost of the Partnership's audit. CAML and the auditors and significantly added to the cost of the Partnership's audit. CAML and the other Petitioners (and supporting Petitioners) then sought to rely on these

same delays in the Petition as constituting a basis for the winding up of the Partnership.

7. *CAML, together with others, has participated in an unlawful means conspiracy with the aim of furthering its own interest, and in particular the Recovery and Exit Strategy, causing prejudice to the General Partner, the Partnership and the Limited Partners as a whole.*

Breaches of Clause 15.5 (a)

8. *In breach of Clause 15.5 (a), CAML shared confidential information concerning the affairs of the Partnership with the aim of furthering the Recovery and Exit Strategy.*

9. *In particular Ms. Sharon Burleigh obtained and shared highly sensitive and confidential information with Millinium Asset Services Pty Ltd ("MAS"), a competitor of the Partnership, in 2014 and 2015 in order to further the Recovery and Exit Strategy.*

10. *An example of highly confidential Partnership information that has been provided by CAML to MAS is a copy of a draft deed of settlement between CAML and the Torchlight Group that included amendments proposed by Burton & Co, the lawyers for Torchlight. This draft settlement agreement contained highly confidential material concerning the price at which the Torchlight Group was willing to purchase CAML's interest in the Partnership."*

1165. The ACC notice uses similar language in paragraph 5 to the CAML Notice, and it then states:

"6. In particular, in order to further the Recovery and Exit Strategy:

(a) From at the latest the beginning of October 2014 onwards, ACC attended meetings with parties including Millinium Asset Management Pty Ltd ("MAS"),

a competitor of the Partnership, and formed a plan with MAS and others to interfere in the management and conduct of the Partnership. This was to the detriment of the Partnership and the Limited Partners as a whole. The aim of the Recovery and Exit Strategy was either:

(i) to replace the General Partnership of the Partner with MAS pursuant to an agreement that MAS would facilitate the Recovery and Exit Strategy in consideration for supporting MAS' attempt to replace the General Partner; or

(ii) to force a winding up of the Partnership to the detriment of the Partnership and its Limited Partners as a whole.

(b) ACC agreed with MAS and others to become a named Petitioner on the Petition.

7. *ACC, together with the others, has participated in an unlawful means conspiracy with the aim of furthering its own interests, and in particular the Recovery and Exit Strategy, causing prejudice to the General Partner, the Partnership and the Limited Partners as a whole.*

Breaches of Clause 15.5 (a)

8. *In breach of Clause 15.5 (a), ACC shared confidential information concerning the affairs of the Partnership with the aim of furthering the Recovery and Exit Strategy. In particular:*

(a) ACC shared confidential information concerning the identity of a Partner of the Partnership with CAML in July 2013 when seeking to group together a number of Limited Partners who wished to pursue the Recovery and Exit Strategy;

(b) Mr. Bagnall of ACC passed confidential information concerning the affairs of the Partnership, the identity and affairs of some of the Limited Partners and certain investments of the Partnership to a journalist, Mr. Tim Hunter, (at that time, employed by Fairfax media) on or around 23 September 2014. Mr. Bagnall disclosed the confidential information with the intention that

such information would be published, even if disguised as to source, as part of a concerted and coordinated campaign to cause prejudice to the General Partner and the activities of the Partnership and therefore assist ACC in its pursuit of the Recovery and Exit Strategy. Shortly after Mr. Bagnall's conversation with Mr. Hunter, an article was published by Stuff.co.nz on 28 September 2014 which contained confidential details of the Partnership's transactions, confidential details about the General Partner's remuneration, and referenced its confidential audited financial statements. The article referred to the following confidential information:

(i) The identity of Crown Asset Management, ACC and Bear Real Opportunities Fund as investors in the Partnership;

(ii) The value of Crown Asset Management and ACC's interests in the Partnership;

(iii) A purported "discrepancy" in the Partnership's accounting of a land deal on the outskirts of Wanaka;

(iv) A reference to the Star-Times being shown a copy of the Partnership's confidential audited financial statements; and

(v) A reference to confidential information as to the amount of the performance fee paid to the Partnership's General Partner;

and

(c) From at least November 2014 onwards, ACC shared confidential information and documents concerning the affairs of the Limited Partnership with Millinium Asset Services Pty Ltd ("MAS"), a competitor of the Partnership which was attempting to replace the General Partner and be appointed as a General Partner of the Partnership. This confidential information has been used in support of the Petition.

Breach of the Implied Duty of Good Faith

9. *Each of the breaches set out above also constitute breaches of the implied duty of good faith. As set out above, ACC has conspired with others to achieve the Recovery and Exit Strategy. The General Partner will send you a letter before action relating to this shortly.*

Default

10. *The breaches are incapable of being remedied. Therefore, you are a Defaulting Partner as defined in the LPA and, amongst other things, have no right to pursue the Petition.*"

1166. The GP's arguments in support of its application are set out at paragraphs 117-131 of its written Closing Submissions. In addition, in Mr. Kerr's Fifth Affidavit at paragraphs 330-343 and in Mr. Naylor's Tenth Affidavit at paragraphs 10.1 – 10.24 the financial damage to the Partnership caused by the competing strategy of MAS in regard to Lantern is extensively set out. The GP submits at paragraph 121 that the evidence served by the GP was unchallenged.

1167. The submissions proceed as follows at paragraph 124-125:

"*124. As was made clear at the hearing of the Aurora Default Summons, it is common ground that the information provided on 24 September 2013 was confidential. Aurora's leading counsel sought to argue that (i) Jacqui Lemon was not acting for Van Eyk/TPPM when handing over the documents but was on a frolic of her own and (ii) there was no evidence that Aurora knew what she was doing. The Court will probably not need reminding of the General Partner's response to these: these is overwhelming evidence that Jacqui Lemon was at the time the point of contact between Aurora and Van Eyk/TTPM and that she was therefore acting in her capacity as a representative of the investment manager. As for (ii), the evidence that Mr. Davidson of Aurora knew what was happening and gave his consent is overwhelming. Even if it was not, Aurora has elected to adduce no evidence on this point and cannot therefore invite the Court to make a finding of fact that Mr.*

Davidson did not know. Even if it could, it would make no difference because Aurora is bound by the acts of its agent in the ordinary way. Similarly, no argument can be raised about the decision to issue the Default Notice because no point was put to Mr. Kerr or Mr. Naylor.

125. The arguments made by the Petitioners' leading counsel at the recent hearing of the Aurora Default Summons were notably different from those relied upon before Clifford J when obtaining the injunction. Moreover, they appear to have changed yet again. In the Petitioners' Skeleton Argument dated 20 August 2015, at para 17, the Petitioners' counsel categorically denied that Aurora had breached the confidentiality provisions under the LPA in any way, even going so far as to say that it 'is inconceivable that the General Partner is saying that it did'. This was clearly wrong not least because Aurora did not get MAS to enter into any confidentiality deed for the benefit of the Partnership and on the terms required under the LPA. However, the Petitioners' counsel now admit that the provision of information in December 2013 by Aurora to MAS did amount to a breach of the LPA because no confidentiality deed was obtained, albeit they now describe it as breach 'in literal terms' (see para 176 of their written closing). They appear to take this view on the basis that a confidentiality deed would have served no purpose as Mr. Wallace would have simply ignored it. In another change of position, the Petitioners appear now to argue that the Default Notices were motivated by anger on the part of the Mr. Kerr, whilst only a few weeks ago (see para 4 of their Skeleton dated 17 October 2017) stating that they were not. As explained, above, and as was evident from Mr. Kerr's evidence, the Default Notices were not motivated by anger but instead have been served pursuant to the General Partner's obligations under the LPA."

1168. The argument relating to ACC then proceeds at paragraphs 126-128:

"*ACC Default Notice*

126. *As Mr. Bagnall effectively acknowledged, ACC has also disclosed confidential information concerning the affairs of the Cayman Partnership in breach of clause 15.5(a). Amongst other things:*

(i) Mr. Bagnall discussed and passed confidential information concerning the affairs of the Partnership, the identity and affairs of some of the Limited Partners and certain investments of the Partnership to a journalist, Mr. Hunter, on or around 23 September 2014.

(ii) When doing so, Mr. Bagnall must have appreciated that such information would be published to the detriment of the Cayman Partnership and other Limited Partners. He must also have known that Mr. Hunter had already spoken to Mr. Marshall and that this was all part of the misleading press campaign that had been initiated.

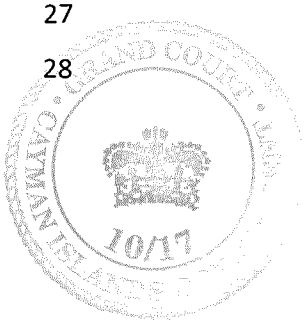
(iii) Shortly after Mr. Bagnall's conversation with Mr. Hunter, a critical article about the Partnership was published by Mr. Hunter on 28 September 2014 which contained confidential details of the Partnership's transactions, confidential details about the General Partner's remuneration, and referenced its confidential audited financial statements. The article referred to the following confidential information [E/24/15105-15108]:

(a) the identity of CAML, ACC and the Bear Fund as investors in the Partnership;

(b) the value of CAML and ACC's interests in the Partnership;

(c) a purported 'discrepancy' in the Partnerships accounting of a land deal on the outskirts of Wanaka;

(d) a reference to the Star-Times being shown a copy of the Partnership's confidential audited financial statements;



(e) *a reference to confidential information as to the amount of the performance fee paid to the General Partner; and*

(f) *a reference to the General Partner's financial reporting.*

127. Further, from at least November 2014 onwards, ACC shared confidential information and documents concerning the affairs of the Partnership with MAS. The Recovery and Exit Strategy letter from MAS to ACC dated 4 November 2014 [E25/15582], specifically referred to a meeting that had taken place the previous week. That letter also requested 'your files (hard and soft copies) in relation to your respective communications with the Old GP'. At MAS's request, Mr. Bagnall signed the letter on behalf of ACC [E25/15915]. Despite Mr. Bagnall's denial that he provided documents to MAS, the irresistible inference is to the contrary.

128. In addition to breaches of clause 15.5 (a) by virtue of the disclosure of confidential information, the ACC Default Notice also describes how ACC has acted in breach of clause 4.7 (a) by interfering with the conduct and management of the Partnership by virtue of its participation in the unlawful means conspiracy."

1169. That in relation to CAML the GP states at paragraphs 129-131:

"*CAML Default Notice*

129. CAML has also disclosed confidential information concerning the affairs of the Cayman Partnership in breach of clause 15.5 (5) in particular, by disclosing confidential information to MAS in 2014 and 2015. Documents provided by MAS in these proceedings indicate that this disclosure included CAML providing MAS with a draft deed of settlement between CAML and the Torchlight Group that included amendments proposed by Burton & Co, the lawyers to the Torchlight Group [E30/19173A-19173T]. This draft deed contained highly confidential material concerning the price at which the Torchlight Group was willing to purchase CAML's interest in the

Partnership. It also gave MAS a copy of its initial correspondence with PwC about the Partnership [E9/5332].

130. In addition to breaches of clause 15.5 (a) by virtue of the disclosure of confidential information, the CAML Default Notice also describes how CAML has acted in breach of clause 4.7 (a) by interfering with the conduct and management of the Partnership by virtue of its participation in the unlawful means conspiracy.

131. Despite the Court having decided not to determine the validity of the Aurora Default Notice at the recent interlocutory hearing, the evidence of breaches of the LPA on the part of each of the Petitioners is compelling if not irresistible. This being so, there can be no serious debate as the validity of the Default Notices. Because of their impact on the issue whether the Petition has been brought in good faith or not and on their standing, it will be submitted that this issue needs to be addressed at the outset of any judgment in this case."

1170. Mr. Wardell also made the comment on Day 1 of his earlier Aurora Default Notice application, subsequently adjourned, at page 44, lines 19-21 that Ms. Poon confirms that Aurora had done nothing to ensure that MAS would keep confidential the information disclosed to MAS.

1171. At paragraphs 170-182 of the Petitioners' Summary Closing Submissions they set in relatively brief form their current position.

1172. They argued that in relation to a question of this importance the better practice would have been to set out all of the GP's allegations in properly pleaded form and with evidence sworn by witnesses with first-hand knowledge of the facts and matters, who could be cross-examined on their evidence.

1173. While this course might have its attractions in proceedings of less magnitude and complexity than these ones, it is necessary for the Court also to give consideration to the interests of justice and the need for both proportionality and finality. Given the range of

evidence and other material to which the GP has been obligated to respond, it is also somewhat unsettling to note that the Petitioners are seeking even more elaboration as to the issues. Practicality must be considered as well in legal proceedings.

1174. The Petitioners proceed to affirm that the Default Notices are all invalid as they do not comply with the LPA, for the reasons given at the earlier hearing of the GP's application against Aurora, and that the GP made its decisions without giving the Limited Partners the 5 days required before those decisions could be made.

1175. In addition, they stated there is no evidence of any disclosure by Aurora of any confidential information to MAS on 24 September 2013 in breach of the confidential provisions on the LPA. However, even if that is narrowly correct, there was disclosure surely on Aurora's behalf by a representative of Aurora's agent.

1176. They continued at paragraph 176 of the Petitioners' Closing Submissions:

> "*176. It is true that the failure in December 2013 to obtain a confidentiality deed was in literal terms a breach of the LPA. It was not one of any consequence because (i) MAS was already a fiduciary for the Bear Fund who should not have disclosed anything (ii) Mr. Wallace clearly had no compunction in doing so in breach of his duties as a fiduciary. No deed would have produced a different result. The breach was technical in the circumstances/one of no real consequence to justify removal of the rights of a Limited Partner.*"

1177. It was also stated that no Default Notice has been served on Aurora alleging any breach of confidentiality on any date other than 24 September 2013.

1178. The submissions continued at paragraph 178:

> "*178. In any event, the exercise of powers consequent on the default notice under Clause 10.2 of the Limited Partnership Agreement (actual in the sense of Clause 10.2 and 10.2 (a) and threatened to the extent Clause 10.4, the power of sale was invoked) was not/would not be Wednesbury reasonable and the outcome disproportionate*

(as to which see Braganza v BP Shipping [2015] UKSC 17; Burger King Corporation v Hungry Jack's Pty Ltd (2001) 69 NSWLR 558)."

1179. Then the allegations of breach of confidence against both ACC and CAML in their respective Default Notices were denied in paragraph 181 of the Petitioners' Closing Submissions:

> *"181. Moreover, the allegations of breach of confidence against both ACC and CAML in their respective default notices are entirely unsupported by the evidence. CAML has repeatedly denied providing its draft settlement deed to MAS and there is no basis for the General Partner to maintain this allegation. There is also no evidence that Mr. Bagnall disclosed any confidential information to Mr. Hunter when he was contacted, save for confirming ACC's investment, which is publicly available information in New Zealand."*

1180. Finally, it was contended that the Default Notices demonstrated the GP's hostility and an intention to disrupt the proceedings and to put inappropriate pressure on the Petitioners.

1181. The Petitioners' earlier Skeleton Argument dated 17 October 2017 extends to 141 paragraphs and 48 pages. To a considerable extent it also concerned case management issues as to when the validity of the respective Default Notices should be determined, a question which the Court has decided should be dealt with at the conclusion of the hearings.

1182. The Petitioners pointed out in their Skeleton Argument dated 17 October 2017 that serious consequences could flow from a default, set out at clause 10 of the LPA. Representations had not been invited from any of the Petitioners before the Default Notices were issued.

1183. They maintained that neither Mr. Davidson nor Ms. Lemon were acting on behalf of Aurora rather than van Eyk, a proposition that the Court finds difficult and indeed ultimately impossible to accept simply as a matter of fact.

1184. However, the Court is also concerned with a broader matter of legal principle raised in the Petitioners' Skeleton Argument, viz., that arising from the decision in *Braganza v. BP Shipping* [2015] UKSC17. The Supreme Court has indicated that it was an implied term

that the decision of a contractual fact finder had to be rational in the sense described in the well-known authority of *Associated Provincial Picture Houses Ltd v. Wednesbury Corp* [1948] KB 223, CA.

1185. In this Court's Case Management Ruling dated 9 November 2017, the Court summarised the question raised at that stage on behalf of Aurora only in this way at paragraphs 32-33:

"*32. After reviewing a number of authorities Lady Hale further states at paragraphs 28-30:*

> "*28. There are signs, therefore, that the contractual implied term is drawing closer and closer to the principles applicable in judicial review. The contractual cases do not in terms discuss whether both limbs of the Wednesbury test apply. However, in Gan Insurance, where the issue was the limits, if any, to the reinsurers' power to withhold approval to the insured's agreement to settle a claim, Mance L first commented that "what was proscribed was unreasonableness in the sense of conduct or a decision to which no reasonable person having the relevant discretion could have subscribed" (para 64); but he concluded that "any withholding of approval by reinsurers should take place in good faith after consideration of and on the basis of the facts giving rise to the particular claim and not with reference to considerations wholly extraneous to the subject matter of the particular reinsurance..." (Para 67).*
>
> *29. If it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question. It is of the essence of "Wednesbury reasonableness" (or GCHQ rationality") review to consider the rationality of the decision-making process rather than to concentrate upon the outcome. Concentrating on the outcome runs the risks that the Court will substitute its own decision for that of the primary decision-maker.*

30. *It is clear, however, that unless the court can imply a term that the outcome be objectively reasonable-for example, a reasonable price or a reasonable term-the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose. For my part, I would include both limbs of the Wednesbury formulation in the rationality test. Indeed, I understand Lord Neuberger (at para 103 of his judgment) and I to be agreed as to the nature of the test."*

33. *Taking only one aspect of how an implied term of rationality, or perhaps even of proportionality, might arise in practice, Aurora complains that before issuing the Default Notice (set out above), the General Partner first should have informed Aurora of the course it was proposing to adopt and the adverse factors which the General Partner might choose to take into account, and Aurora argues that the General Partner should have invited Aurora to provide a response before a final decision to issue the Default Notice was in fact made."*

1186. This is an important principle, but it is also extremely important to recognize that even within the terms of the *Braganza* case the principle is not an unqualified one. This factor is clearly evident, for example, from the wording of the Headnote at page 640 C-F:

"*Held- (1) the standard of review generally adopted by the courts to the decisions of a contracting party should be the same as the standard of review adopted in the judicial review of administrative action. Both limbs of the administrative law test should be incorporated, namely (i) that the decision maker took account of all relevant considerations and excluded irrelevant considerations, and (ii) that they did not reach a decision which no rational decision maker could have made. Unless the Court could imply a term that the outcome be objectively reasonable – such as a reasonable price or a reasonable term – the court would only imply a term that the decision-making process be lawful and rational in the public law sense. Whatever term might be implied would depend on the terms and the context of the*

particular contract involved (see [19], [30], [31], [32], [53], [103], below); Socimer International Bank Ltd v Standard Bank Ltd [2008] All ER (D) 331 (Feb) and Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680 considered."

1187. Two aspects immediately emerge. First, reference is made to the standard of review "*generally adopted*". Secondly, whatever term might be implied would depend on the terms and context of the particular contract involved.

1188. In furtherance of this qualification, Mr. Wardell drew to the Court's attention section 25 (1) of the governing Law. He stated on Day 40, page 57, lines 22-25 – page 58, lines 17-24:

"*the purpose of*

showing you section 25 is we say it provides a very strong indication that administrative law concepts are

not to be imported into a commercial agreement.
Section 25 (1):
"If a Partnership Agreement provides that where
A partner fails to perform any of its obligations under or otherwise breaches the provisions of the partnership agreement, that partner may be subject to or suffer remedies for or consequences of the failure or breach specified in the partnership agreement or otherwise applicable under any law then those remedies or consequences shall not be unenforceable solely on the basis they are penal in nature."
so no relief from forfeiture. Statutory provision saying no relief and forfeiture. That's important when it comes to asking yourself the question of whether or

not it's it's appropriate to import natural justice provisions and administrative law concepts into the LPA and it's important not to forget the context. By the time the GP learnt of the default by Aurora the horse had already bolted, Lantern had already been damaged because the board room coup had already been carried out. So the idea that at that stage the GP should have sat down and given Aurora an opportunity to explain itself when Aurora had already issued a petition doesn't seem to us to work."

1189. It is the view of this Court that those who enter into and participate in complex and sophisticated commercial arrangements must be taken to be fully aware of what they are doing and what the potential consequences may be. Not only are they bound in this case by the LPA but that LPA itself is further grounded in this instance by an express statutory provision.

1190. Therefore, taking into account the terms and context of this particular contract, the Court rules that the standard of review adopted in the judicial review of administration action does not apply nor does it have any relevance.

1191. It now remains for the Court to consider what is the correct approach to the evidential merits of this particular issue.

1192. On this point the Court refers to paragraphs 28 and 29 of the Ruling of 9 November 2017:

"*28. At paragraph 19 Lady Hale states:*

"There is an obvious parallel between cases where a contract assigns a decision-making function to one of the parties and cases where a statute (or the royal prerogative) assigns a decision –making function to a public authority. In neither case is the Court the primary decision –maker. The primary decision-maker is the contracting party or the public authority."

1193. In regards to the giving of a Default Notice, Aurora contends that the General Partner is exercising such an assigned decision-making function. For the purposes of the present Summons, the Court accepts this function to be the case on the part of the General Partner.

1194. Turning to the precise issue as to who is the primary decision-maker, the Court considers this is a role which falls to the GP alone and not to the Court.

1195. It is the responsibility of the GP to weigh the material before it and to make the appropriate decision in the interests of the Partnership as a whole. The Court has no appellate role to play, nor should it have, nor in the circumstances of this case as the Court has explained does it have a review role to exercise either.

1196. As the GP has correctly indicated the defaults in question were also by their nature incapable of remedy regardless of any time period for correction.

1197. Even if the Court is in error on this matter, in the alternative the Court finds that there was in any case a sufficient basis on the facts to issue the Default Notices which were issued, for the reasons which the GP has identified.

1198. In summary, the GP made decisions which it was entitled to make and the Court concludes that the GP was right in doing so.

Conclusion

1199. Below follow the orders that the Court would have made, had it not made an order by consent withdrawing the Petition with no order as to costs:

1. The Amended Petition is refused.

2. The Default Notices issued by the GP to Aurora, ACC and CAML are deemed to be valid.

3. The Court will hear the parties as to costs.

Robin McMillan

THE HON. JUSTICE McMILLAN
JUDGE OF THE GRAND COURT