Neutral Citation Number: CICA (Civ) 8

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA (CIVIL) APPEAL No. 21 of 2023
(FSD 52 OF 2022 (RPJ))

BETWEEN:

ABRAAJ GENERAL PARTNER VIII LIMITED, in its capacity as the General Partner of NEOMA PRIVATE EQUITY FUND IV L.P.

Proposed Appellant

AND

ABRAAJ ABOF IV SPV LIMITED

Proposed Respondent

CICA (CIVIL) APPEAL No. 23 of 2023
(FSD 322 OF 2020 (RPJ))

BETWEEN:

(1) NEOMA MANAGER (MAURITUS) LIMITED, in its capacity as the Manager of NEOMA PRIVATE EQUITY FUND IV L.P.
(2) ABRAAJ GENERAL PARTNER VIII LIMITED, in its capacity as the General Partner of NEOMA PRIVATE EQUITY FUND IV L.P.

Proposed Appellants

AND

(1) ABRAAJ ABOF IV SPV LIMITED

Proposed Respondent

Before:

The Rt Hon Sir John Goldring (President)
The Hon John Martin KC, JA
The Rt Hon Sir Michael Birt, JA

Representation: Susan Prevezer KC, Leading Counsel
James Kennedy, Partner, KSG Attorneys at Law
Matthew Harders, Associate, KSG Attorneys at Law
for the Applicant.

Clare Stanley KC, Leading Counsel
Nick Dunne, Partner, Walkers (Cayman) LLP
Jamie Brislane, Associate, Walkers (Cayman) LLP
Lauren Vernon, Associate, Walkers (Cayman) LLP
for the Respondent

Heard: 2 September 2024

Draft Judgment circulated: 19 March 2025

Judgment delivered 8 April 2025

JUDGMENT

The Hon John Martin KC , JA

Introduction

1. These are applications for leave to appeal against an order of Parker J dated 27 June 2023. By that order the judge gave summary judgment against the general partner and the manager of an exempted limited partnership requiring production of documents and information pursuant to section 22 of the Exempted Limited Partnership Act ("the ELPA") and the provisions of the limited partnership agreement.

2. The judge refused leave to appeal; but by order of the President dated 18 December 2023 the applications were referred to the full court for consideration, with the substantive hearing immediately to follow should leave be granted. Early in the hearing we required to be satisfied that the applications raised a live issue between the parties, given the applicants' acceptance that most if not all of the documents they had been ordered to produce would have to be disclosed on discovery in parallel proceedings between the

same parties; but having been persuaded that there was an issue at least in relation to costs (which the judge had ordered the applicants to pay), and a real point of principle (of particular general importance to the manager as a professional manager of limited partnerships) as to the scope and extent of the section 22 disclosure obligation, we gave leave to appeal and proceeded to hear the appeal itself. Where necessary, I refer hereafter to the applicants as the appellants.

Factual and procedural background

3. The partnership, now known as Neoma Private Equity Fund IV L.P. ("the ELP"), was established on 23 July 2008 pursuant to the ELPA under the name Abraaj Buyout Fund IV L.P. It was subsequently renamed Abraaj Private Equity Fund IV L.P. Its purpose is to carry on the business of investing, in particular by making and monitoring investments in buy-outs, growth capital opportunities, greenfield projects and privatisations.

4. The general partner of the ELP has throughout been the second appellant Abraaj General Partner VIII Limited ("the GP"); the initial manager was Abraaj Investment Management Limited ("AIML"). As the names suggest, the GP and AIML were members of the Abraaj group, which also included Abraaj Holdings Limited ("AH"). AIML and AH are Cayman companies but were based in Dubai. In 2018 and 2019 allegations of serious financial mismanagement within the Abraaj group were made, resulting in the appointment by the Grand Court of provisional liquidators in relation to AIML and AH on 18 June 2018, the imposition of a fine of US $299,300,000 on AIML by the Dubai Financial Services Authority on 29 July 2019, and the compulsory winding up of AIML and AH by the Grand Court on 11 September 2019.

5. In his judgment, the judge recorded that the Joint Official Liquidators of AH had concluded that the Abraaj group was effectively operated as a single entity with little regard for the separate corporate personality of the various companies within the Abraaj group, including the ELP.

6. Against this background, on 14 July 2019 an Amended and Restated Limited Partnership Deed ("the LPA") was executed between the GP, the first appellant Neoma Manager (Mauritius) Limited ("the Manager") and the limited partners in the ELP, one of which

is the respondent, Abraaj ABOF IV SPV Limited. Among other things, the LPA recorded the renaming of the ELP to its current name; the appointment of the Manager in place of AIML; the appointment of an independent director to the board of the GP; and the delegation by the GP of its functions to the Manager, so that (subject to limited exceptions) the Manager should have full power and authority to do all things necessary to carry out the purposes of the ELP.

7. A limited partner in the ELP was obliged to commit to provide an identified sum for investment. The respondent's commitment was ultimately US$45 million. By clause 11.1(h)(iii) of the LPA the Manager undertook to provide or procure the provision to each limited partner as soon as reasonably practicable after the date of the LPA "*the capital account balances that the Manager considers reasonably and in good faith to be the* [limited partner's] *capital account balance as at 31 March 2019*". Subsequent provisions of clause 11.1 provided that a limited partner who determined that its opening capital account balance ("CAB") was incorrect should promptly serve on the Manager an adjustment notice stating what it believed to be the correct amount; that the Manager and the limited partner thereafter for a period of 45 days should cooperate in good faith in an attempt to agree the CAB; and that if there were no agreement at the end of that period the dispute should be referred to arbitration or, at the option of either party, to the Grand Court.

8. On 27 May 2020 the Manager provided a statement to the respondent specifying its CAB as minus US$11,900,468. On 21 October 2020 the respondent issued an adjustment notice contending that its true CAB was (plus) US$41,999,987. No agreement was reached as to the correct figure. On 23 December 2020 the Manager elected to have the dispute resolved by the Grand Court, and on the same day it issued proceedings (FSD 322 of 2020: "the CAB proceedings") seeking a declaration that the CABs of the respondent (as first defendant) and other limited partners were as determined by the Manager, or such other amount as the Court determined.

9. On 6 August 2021 the respondent served a Defence and Counterclaim in the CAB proceedings. It joined the GP as an additional defendant to the counterclaim. The essence of the respondent's defence was expressed in paragraphs 3-5 as follows:

"*3. The premise of the Plaintiff's case is that the First Defendant has paid none of its capital commitments to the Partnership. The First Defendant's primary case is that such premise of the Plaintiff's case is false, and that in fact the First Defendant discharged all of the capital commitments that were due. The Plaintiff would know this if the Plaintiff had adequately conducted an investigation into the affairs of the Partnership, and obtained and reviewed all of the books and records of the Partnership. However, (a) the Plaintiff has not obtained all of the books and records of the Partnership, and (b) to the extent that it has, it has not (or not adequately) interrogated them.*

4. These proceedings have accordingly been issued prematurely. The First Defendant's investigations into the relevant affairs of the Partnership (in particular its gathering and review of information from the joint official liquidators of… AIML, the former investment manager of the Partnership, and other third parties) remain ongoing. The Plaintiff was invited to extend time for the First Defendant to file and serve its Defence to afford the First Defendant sufficient time to gather and review such information to enable it to interrogate the accuracy of the Plaintiff's purported calculation of the First Defendant's [CAB] – a task which should have been conducted by the Plaintiff itself – but the Plaintiff unreasonably declined that invitation. Accordingly, it may prove necessary to amend this Defence and Counterclaim once further information is made available. The First Defendant will seek the costs of that exercise from the Plaintiff personally and will contend that the Plaintiff has no entitlement to be indemnified out of the Partnership in respect of those costs, or indeed any of the costs of these precipitate proceedings.

5. The First Defendant sent its objections to the Plaintiff regarding its calculation of the [CAB] prior to the commencement of these proceedings, but inexplicably and in breach of the Plaintiff's fiduciary obligations both under the terms of the LPA and under section 19 of the [ELPA], its obligation as the delegate of the General Partner to keep or cause to be kept proper books of account pursuant to section 21 of the [ELPA], and/or its obligation to provide true and full information regarding the state of the business and financial condition of the Partnership pursuant to section 22 of the [ELPA], the Plaintiff has failed substantively to respond to such objections both in pre-action correspondence and in its Statement of Claim".

10. The counterclaim claimed an order for production by the Manager of eleven categories of documents; an order for the production by the GP of "*true and full information*

regarding the state of the business and financial condition of the Partnership", including a further eight categories of documents; a declaration that the respondent's CAB was as it contended; and other alternative and ancillary relief. The nature of the documents claimed appears from the terms of the schedule to the order made by the judge, summarised at paragraph 15 below.

11. On 3 September 2021 the Manager and the GP served a Reply and Joint Defence to Counterclaim in the CAB proceedings. The essence of the defence to the counterclaim for documents and information was set out in paragraph 47, which so far as relevant said this:

> *"47.1 The counterclaims serve no purpose and are therefore an abuse of process and liable to be struck out on that basis;*
>
> *47.2 As more particularly set out below, the documentation and information sought from the [GP] has already been provided to [the respondent] by the Manager, and the claim against the [GP] is therefore an abuse of process and liable to be struck out on that basis; and*
>
> *47.3 Further, any requests for further or additional documentation or information from the Manager ought to be dealt with through the ordinary discovery process in this litigation or through the Court's case management jurisdiction".*

12. On 15 March 2022 the respondent issued new proceedings (FSD 52 of 2022) against the GP seeking substantially the same relief against it as was sought by the counterclaim in the CAB proceedings. These proceedings were said to be necessary because the Grand Court Rules do not expressly allow a counterclaiming defendant to seek summary judgment against anyone other than the plaintiff.

13. On 4 April 2022 the respondent issued summonses in both sets of proceedings seeking summary judgment on its counterclaim in the CAB proceedings and its claim in the new proceedings.

14. The summonses (and similar summonses issued by two other limited partners) were heard by Parker J on 6 and 7 February 2023, and allowed by the order dated 27 June 2023, the subject of this appeal.

Order

15. So far as concerned the respondent's claims, the order contained the following elements:

> *(1) A declaration that the respondent was entitled, pursuant to section 22 of the ELPA, to receive (and correlatively that the GP must supply to the respondent) true and full information regarding the state of the business and financial condition of the ELP.*
>
> *(2) An order that the respondent may demand and shall receive from the Manager and the GP true and full information regarding the state of the business and financial condition of the ELP.*
>
> *(3) An order that the Manager and the GP, as applicable, shall provide the respondent with all of the information and documents set out in a schedule to the order as soon as reasonably practicable and in any event no later than three months from the date of the order.*
>
> *(4) An order that where the Manager and the GP (or either of them) "consider they have previously provided any of the information to the [respondent], [the Manager and the GP] shall not be required to provide that information to [the respondent] again, but shall in respect of each piece of the information they consider they have previously provided: (a) identify specifically when the piece of information was provided, in what form it was provided and where it can be located; (b) explain what searches were conducted in providing such information; and (c) clarify whether they requested such information (or any aspect of such information) from a third party or third parties, and if so, identify the same and provide a detailed explanation as to such third party's/parties' responses".*
>
> *(5) A schedule (primarily reflecting what was sought by the counterclaim but also ordering production of documents sought subsequently by the respondent by letter dated 8 December 2021) ordering production (among other, more specific, items) of the following categories of documents:*
>
> > *(a) all documents relating to the process and calculation of the respondent's CAB including, but not limited to, any*

internal memoranda and working papers supporting the calculation;

(b) the Manager's working papers, internal memoranda, reports and supporting evidence in so far as they relate to the calculation or assessment of drawdowns paid or settled, any and all offsets, assignments or settlements of intercompany balances within the wider Abraaj Group, intercompany ledger entries, and any and all distributions paid or payable to the respondent;

(c) all documents evidencing the Manager's reconciliation of the GP's bank statements, including tracing of all receipts and payments made into GP bank accounts [this category, which formed item 3 of the schedule, is replicated in identical terms in item 10];

(d) copies of drawdown notices issued to the respondent and/or confirmation of drawdown dates and amounts;

(e) copies of all bank statements relating to bank accounts opened in the name of the GP, the ELP, the respondent, AIML and AH;

(f) copies of all internal ledgers (as opposed to extracts) for the ELP, AH and AIML, and any ledger entries relating to any of the drawdowns for which the respondent was liable;

(g) copies of full general ledgers of any other entity which is recorded to have settled commitments on behalf of limited partners of the ELP;

(h) copies of all Limited Partner Investment Summary statements, which the respondent understood had been issued by AIML; and

(i) copies of all emails and written correspondence between the Manager, AIML, and the GP relating to the ELP.

16. The judge's reasons for making this order were explained in a judgment dated 10 March 2023. He first decided that it was more efficient and just to deal with the summary

judgment applications before disclosure in the CAB proceedings, a decision which is not called into question on the appeal. He gave two principal reasons: first, because section 22 of the ELPA entitled the respondent "*to true and full information (and not just documents) regarding the state of the business and financial condition of the Partnership, which is an obligation that goes wider than the discovery obligations in the CAB proceedings. As "information" is wider than documents, the obligation must also in the Court's view logically extend to making requests of third parties*" (paragraph 34); and secondly because the outcome might inform the issues in dispute in those proceedings and so affect the scope of discovery to be given in that litigation (paragraph 36).

17. The judge then considered the test for summary judgment (noting that it required the claimant to demonstrate that the defendant had no defence with a real prospect of success) and went on to consider the legal framework. He quoted section 22 of the ELPA, saying this about it (paragraph 51):

> *"The entitlement is in reality to be put on 'a level playing field' with regard to information. It arises from the GP's position as agent and fiduciary of the Partnership and, since the exempted limited partnership has no separate legal personality, as agent of each of the limited partners. The GP also holds the assets of the Partnership on the statutory trust and is, as trustee, under an obligation to account to the limited partners. By s. 14 of the ELPA, the limited partner is prevented from taking part in the conduct of the business. By s. 16 of the ELPA, all rights or property of the Partnership which is held on behalf of the GP or in the name of the Partnership is deemed to be held by the GP upon trust as an asset of the Partnership".*

After referring to section 21 of the ELPA (set out in paragraph 22 below), requiring there to be maintained proper books of account sufficient to give a true and fair view of the business and financial condition of the ELP and to explain its transactions, the judge cited previous decisions of the Grand Court in *Dorsey Ventures Limited v Xio GP Limited* [2019 (1) CILR 249] ["*Dorsey Ventures*"] and *Gulf Investment Corporation v The Port Fund* (16 June 2020) ["*Port Fund*"], the latter a decision of his own from which he quoted (among other references) the following statement:

> *"It is only if there is a proper basis for contending that any of the categories of information demanded fall outside the operation of* [s. 22 ELPA] *that the Plaintiff's claim would fail. That would only be in cases where it is clear that the information sought did not relate to the business and financial affairs of the partnership, which is a very wide target to aim at"* [paragraph 88].

He next referred to the English High Court decision in *Inversiones Friera SL v Colyzeo Investors* II LP [2012] 1 BCLC 469 (Norris J) ["*Inversiones*"], a decision on the (differently worded) Limited Partnerships Act 1907. The judge then said (paragraph 68) that, having reviewed the pleadings and evidence and carefully listened to the submissions on behalf of the GP and the Manager, he did not accept that full information had been provided, or had been offered to be provided. He then said this (at paragraphs 72 to 74*):*

> *"72. On analysis there is no reasonably arguable defence to the declarations and judgment sought. The GP and Manager have not persuaded the Court that there are plausible arguments that there are legal and/or factual issues which arise on this application that will require a trial to determine them. In keeping with other Courts faced with similar issues, (Dorsey and Port Fund proceeded by way of Originating Summons and Inversiones, by way of a Part 8 claim) a summary determination can and should be made.*
>
> *73. In this case the determination of rights under statute (the ELPA) and the construction of an LPA are points of law which do not require a trial. The applications do not require a trial to determine what documents and information have been provided, what documents and information are within the Manager and the GP's possession, custody and control, and whether the explanations that have been provided to date fulfil the statutory obligation.*
>
> *The way forward*
>
> *74. The Court is persuaded that there is a pragmatic purpose to the relief sought. Once the legal framework has been made clear, the Court expects the parties to work more collaboratively and constructively to agree a sensible way forward as to the provision of*

information than has been the case to date, and in accordance with the Overriding Objective".

18. The judge then set out eleven paragraphs of "*observations to assist the parties in reaching an agreement for the provision of information*". These paragraphs shed much light on the judge's overall approach, and it is necessary to quote them almost in full (any emphasis being mine):

"a) The economic owners of the Partnership (the limited partners) who have paid for all of the business activity undertaken on their behalf by the GP and its delegates are each entitled to true and full information. The GP is in a fiduciary position and acts as trustee for the interests of the limited partners. The GP owes fiduciary duties to the limited partners. The business and affairs of the Partnership are managed exclusively by the GP and its delegates for and on behalf of the limited partners. As is evident, the limited partners are not entitled to participate in the management of the business under the terms of the LPA and the ELPA and so have limited visibility into its affairs.

b) Section 22 of the ELPA seeks to address the imbalance of information which arises. In this case, the parties have not substantively excluded or modified the application of section 22 (as they could have done under the LPA) and are to be held to its plain meaning and effect.

c) The limited partners will not have information concerning the day-to-day operations and business activities of the Partnership unless they are provided with it. However, the Court, following Norris J's reasoning in Inversiones 2, is not prepared in the abstract to say that there are no practical and purposive boundaries built into the statutory right. It may be that such boundaries could be drawn if it was in the interests of justice to do so. But it is a freestanding statutory right.

d) A limited partner's ability to exercise its s. 22 ELPA right is not impacted by its motives or the intended use of the documents. However,

the Court expects the parties to conduct litigation reasonably and efficiently in accordance with the Overriding Objective. In the context of the counterclaim in the CAB proceedings, the Court expects the information will go principally (but not exclusively) to the issues concerning the business managed on behalf of [the respondent] which will assist [it] to properly defend the CAB proceedings. However, the obligation is wider than the presently pleaded issues in the CAB proceedings. The limited partners are entitled to the same information that is available to the GP concerning the business and financial affairs of the partnership in this regard so that they may be properly informed as to what has been done on their behalf.

e) *Where, as in this case, the GP has undertaken an assessment relying upon supporting documentation and internal data or information, the limited partners are entitled to that information to allow them to understand that assessment properly. The Partnership's records were incomplete at the time that the Manager took over from AIML, and there was missing information in respect of the drawdown requests. It is therefore important that the underlying materials are provided so that the limited partners can be properly informed. If judgment calls have been made by the GP and/or the Manager in circumstances where there are discrepancies or incomplete information, that should be identified and explained. If the information is mixed up or mingled or hard to identify, that is not a reason to refuse to provide it to [the respondent]. The GP and/or the Manager, if they cannot find a solution to that type of problem, should err on the side of "over provision" rather than "under provision" so that [the respondent] may receive the full picture and if necessary sift the information for themselves.*

f) *Similarly it may be necessary to create a document, for example a schedule, in order to satisfy the obligation to provide true and full information. It is to be noted that the obligation is an ongoing one.*

g) *To satisfy the obligation the GP may also, where necessary, have to seek to obtain material from the Manager and relevant third parties. Where*

it can be obtained reasonably upon request without steps being taken at disproportionate expense it should be obtained.

h) There is no requirement in S. 22 for the information to be in the possession of the GP. The GP may have a legal right to require material which is not in its possession. If it does not, it should make all reasonable efforts to try to obtain material from third parties in order to fulfil the obligation.

i) … Working papers would also be included.

j) The GP (working in conjunction with the Manager) will therefore have to search for and produce documents and information to the extent such information exists and has not already been provided.… As the court has made clear, [the respondent is] entitled to full information which goes wider than the issues in the CAB proceedings. What is required to fulfil the obligation to provide "full information" will vary from case to case depending on the circumstances and the test as Mr Justice Norris indicated in Inversiones is essentially a functional one.

k) It is of course self-evident that if material does not exist the GP and/or the Manager cannot conjure it up out of thin air. Material already provided can be excluded from any Order drawn up by the parties. It seems to the Court that the GP and/or the Manager should, in such circumstances, explain what searches have been conducted and why it is not possible to retrieve or find the relevant information."

19. The judge then expressed his conclusion as follows in paragraph 76:

"Neither the GP nor the Manager have a triable defence to the claims made against them respectively in the counterclaims advanced by [the respondent]. The Manager and GP should perform their obligations under the LPA and the GP should perform its obligations under the ELPA. The relief sought in the summonses will be granted. There are practical benefits in the information being made available to [the respondent] as soon as is reasonably practicable."

Grounds of appeal

20. The Grounds of Appeal call into question the Judge's decision on the following grounds:

(1) The judge was wrong in law to hold that limited partners "*are entitled to the same information that is available to the GP concerning the business and financial affairs of the partnership*". That holding did not reflect the proper purpose and intent of section 22 or construed it too broadly, or wrongly applied the general law of agency to a statutory provision specifically designed to govern the relationship between general and limited partners; was inconsistent with the judge's prior decision in *Port Fund*, which expressly envisaged that there might be certain categories of information that fell outside the operation of section 22; and failed to recognise any practical purposive boundaries to section 22 and/or the necessary application of the functional test when assessing compliance with section 22.The judge ought to have held that the proper purpose and intent of section 22 is to entitle a limited partner to such information as is necessary to enable it to gain a full and proper understanding of the business and financial condition of the partnership: it does not entitle a limited partner to all ("the same") documentation and information held by the general partner, that being the necessary conclusion of the judge's holding.

(2) The judge was wrong to grant summary judgment in circumstances where in respect of certain categories (a) the Manager and the GP had already provided all the information and documentation requested; and/or (b) the information and documentation requested did not exist, as the respondent had been told; and/or (c) the Manager and the GP had given sufficient information and documentation to provide each limited partner with "*true and full information regarding the state of the business and financial condition*" of the ELP, as required under section 22, and/or the Manager and the GP had offered openly to provide by way of discovery in the CAB proceedings all documentation and information requested by the limited partners notwithstanding that some of that documentation and/or information fell outside section 22. The judge ought to have held that as regards those categories of documents and information the Manager and the GP had a fair or reasonable probability that they had real bona

fide defences to the claims, and/or that the defences had some real prospect of success, and/or that there was a proper alternative to ordering summary judgment, such that summary judgment ought not to have been granted in all the circumstances.

(3) In ordering summary judgment in respect of each and all of the categories of documents and information demanded by the respondent, without distinction, the judge erred in failing to assess the Manager's and the GP's defences, notwithstanding that the judge recognised that section 22 could be subject to practical and purposive boundaries and involved a functional test.

(4) The judge was wrong to grant the declaration and make the order relating to full information regarding the state and business and financial condition of the ELP since they simply mirrored the wording of section 22, in circumstances where the Manager and the GP did not contest that wording or its application but contested its proper purpose and ambit; and/or the declaration served no useful purpose because it was ineffective in its terms to resolve the dispute between the parties, which was not about the respondent's entitlement to information under section 22 but whether true and full information within that section had already been provided and/or because, even on the judge's holding that limited partners were entitled to the same information as was available to the GP, that information had in fact been provided, and/or the judge did not make any findings of fact to justify a declaration in such general terms, and/or he erred in holding that no examination of the facts was required to make the declaration.

(5) The judge erred in ordering the Manager and the GP to pay the costs of the summary judgment applications, which costs would in effect be borne by the other limited partners in the ELP.

(6) The judge was wrong, having handed down judgment on 10 March 2023, to include in the order directives requiring production by the Manager and the GP of certain categories of documents and information which had not been sought in the summary judgment applications; and/or in including certain provisos to the order with a view to avoiding the Manager and the GP providing for a second

time information or documents which they had already provided or having to give information which in fact did not exist.

Legal framework

21. Before considering the merits of the appeal, it is desirable to set out the legal framework and give some consideration to the cases relied on by the judge.

22. Relevant provisions of the ELPA for present purposes are sections 3, 21 and 22. They provide as follows:

> Section 3:
> The rules of equity and of common law applicable to partnerships as modified by the Partnership Act (2024 Revision) 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 Act. [The relevant provision of the Partnership Act in this context is section 28(1), which provides that "*Partners are bound to render true accounts and full information of all things affecting the partnership to any partner or his agents*".]
>
> Section 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 or 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 its transactions.….
>
> Section 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.

23. *Dorsey Ventures* concerned a claim – brought, as Parker J in the present case noted, by originating summons – for production of information pursuant to s. 22 of the ELPA. The issue was whether the terms of the limited partnership agreement had excluded or modified the s. 22 obligation, and Mangatal J held that it had not. She did not have to decide what was the scope of the s. 22 obligation in that case, and did not do so; but she did state (at paragraph 37) that "*the right to demand and receive true and full information, in my view is wide, and encompasses more than accounts, audited and unaudited*" (original emphasis).

24. *Port Fund* concerned a claim, again brought by originating summons, for disclosure of true and full information regarding the business and financial condition of The Port Fund under s. 22 of the ELPA. As I have said, the judge was Parker J. At paragraphs 17 and 76 he stated that he was deciding matters of principle only, leaving it to the parties to decide what documents were to be provided in light of the principles he had expressed. As he put it in paragraph 17:

> "*As I made clear at the hearing, the court is not going to embark on a line by line analysis of which requests should be met, if at all, and by when. Instead the court will determine the legal issues that have arisen between the parties in order that the points of principle can then inform the parties' approach to the provision of the requested materials. If the parties cannot agree any particular items there will of course be liberty to seek further guidance from the court*".

25. The substance of the judge's decisions on principle in that case lies between paragraphs 83 and 88 of the judgment, parts of which (in particular paragraphs 86 and 88, the latter misdescribed as 87) were quoted in the judge's judgment in the present case. In paragraph 83, the judge said that s. 22 was a different obligation from s. 21: it was in its terms broader and required provision of more than accounting information. At paragraphs 84 to 86, he said that:

> "*on a plain and natural reading of section 22 it provides the Plaintiffs with an entitlement to demand and receive true and full information regarding the business and financial affairs of the partnership.*
>
> *[85] This makes logical commercial sense as they are partners in the business and its financial affairs are managed on their behalf. They have in effect paid for all of the activity undertaken on their behalf pursuant to which they require true and full information.*
>
> *[86] It is a very wide unqualified provision and will include all of the books and records maintained by the General Partner pursuant to the statutory obligation imposed on it under section 21. However, it is wider than section 21 as it requires information to be provided, not just documents, and the information needs to be "true and full", not "true and fair" as is the case under section 21 which only deals with books and records of account.…*
>
> *[88] I accept the Plaintiffs submissions that there is no requirement for a limited partner to provide its reasons for the demand. It is only if there is a proper basis for contending that any of the categories of information demanded fall outside the operation of section 22 [ELPA] that the Plaintiffs' claim would fail. That would only be in cases where it is clear that the information sought did not relate to the business and financial affairs of the partnership, which is a very wide target to aim at*" (emphasis added).

26. *Inversiones* is a decision of the English High Court concerning a collective investment scheme operated through a limited partnership. The case primarily concerned the entitlement of limited partners to information, specifically to information about investments made on the partnership's behalf. The claim was brought partly under the terms of the limited partnership deed and partly – and relevantly for present purposes –

pursuant to section 6(1) of the Limited Partnerships Act 1907, which provides as follows:

> "*A limited partner shall not take part in the management of the partnership business, and shall not have power to bind the firm: Provided that a limited partner may by himself or his agent at any time inspect the books of the firm and examine into the state and prospects of the partnership business, and may advise with the partners thereon*".

The claim sought an order requiring the general partner and manager to permit the claimants to inspect and copy all books and records concerning the partnership's investments, and specified 60 categories of documents of which inspection was sought. The claim was unsuccessfully resisted on the basis that the claimants' right of inspection was limited to books of account.

27. As Parker J pointed out, the claim in *Inversiones* was brought under Part 8 of the Civil Procedure Rules, which prescribes a procedure appropriate to "*a question which is unlikely to involve a substantial dispute of fact*". But it is important to note that the judge (Norris J) recorded (at paragraph 20 of the judgment) that:

> "*At the hearing I was invited not to consider or to rule upon each claimed document in each of the 60 categories, but rather to address the question as one of principle (so far as could be done), ruling which of the respective extreme positions was correct, and if neither, then to give guidance to where the line should be drawn".*

28. At paragraph 23 of his judgment, Norris J set out his conclusions of principle. Those most relevant to the present case seem to me to be the following:

> *"(b) Every partner has a right to disclosure by his co-partner of all matters relating to the partnership dealings and transactions: this was the principle stated by Lord Lindley* [quoted in Lindley & Banks on Partnership, 19th ed (2010): "the right of every partner to a discovery from his co-partner of all matters relating to the partnership dealings and transactions is as incontestable as his right

to an account"] *and it finds its current expression in* [the equivalent of s.28 (1) of the Partnership Act (2024 Revision)]*… "*.

"(d)… It is not implicit in [the restrictions on a limited partner taking part in the management of the partnership business and on his ability to bind the firm] *that the limited partner's right to information about the partnership business is restricted. His capital remains at risk in the partnership business, the entire conduct of which he has entrusted to the general partner. There is every reason why the general partner should be obliged to render a true account and provide full information. It is simply an aspect of the central duty of good faith which the general partner owes to the limited partners as the party having the sole power to bind the partnership.…".*

"(j) That which [the manager and the general partner in that case] *had to maintain… was a record (either by processing raw data and creating an account or other document or by organising raw data so as to make key data accessible) of the partnership's business and affairs sufficient to enable a partner, whether general or limited, with access to it to examine into the state and prospects of the partnership business. I use language derived from the 1907 Act. But I also have in mind the words of Collins LJ in Bevan v Webb [1901] 2 Ch 59, 68 (expressed in relation to* [the obligation to maintain accounts contained in the Partnership Act 1890]*): "What is the object with which this right, or permission, or privilege is given to each of the partners in a partnership? What is the common sense meaning of it? Surely the object is to enable the partners to ascertain the position of the partnership business. The partnership business is their own business, the books are their own books, and each of them has a right in them. Of course, their rights are qualified and regulated by the corresponding rights of the other partners; but the books which they desire to inspect, and which they have a right to inspect, are their own books. For what purpose is*

this provision made? It must be that the partners may be able to inform themselves of the position of the partnership"."

"*(k) What is required to fulfil such a general obligation will vary from case to case depending on the nature of the partnership business and its mode of conduct and the terms of the governing documents read in the light of current business practice. There is little to be gained by looking at the decided cases to see if they establish categories of document which as a matter of law every partnership must maintain as part of its records and which every partner has a right to inspect. The test is a functional one. As a rough rule of thumb, if it would be necessary or advantageous for* [the manager or the general partner] *to rely on the document or record in order to establish the rights of the partnership as against a third party, or in order to determine or adjust the rights of the partners inter se, then it is a "book, document or record" which relates to the affairs of the partnership, and a limited partner is entitled to see it: and if the partnership has paid for the document that would also establish that it related to the affairs of the partnership (for why else would a fiduciary agent like* [the general partner or the manager] *charge the partnership for it?).*"

"*(l)… If* [the manager] *has not done so* [i.e. has not compiled full and accurate books] *then the limited partners must see the primary documents from which such books of the partnership would have been prepared. If* [the manager] *has done so then the limited partners are in principle entitled to inspect the documents which record and which establish (for example) the assets and the liabilities.*"

"*(m) They are entitled (in order to gain an understanding of the state of the partnership business) to establish the existence of those assets.… The same is true of the liabilities to which the partnership*

is directly exposed…: limited partners may see the documents from which the liabilities derive."

"(n) Proper reports to the limited partners will have put a value on the assets and will have quantified the liabilities. The limited partners are in my judgment in principle entitled to see the documents which support those valuations…. If the value is based on [the manager's] *own data… then the limited partners should in principle see that data. It is not possible to understand the state of the partnership business (or to confer or "advise" with the other partners as to the prospects of the partnership business) without understanding the robustness of the attributed values and to what matters they may be sensitive."*

"(r) The only general restriction is that the documents and information relate to the business and prospects of the partnership as it is. What might have been (offers that were unsuccessfully solicited, applications which failed, proposals that did not come to fruition, drafts which were subsequently altered) is not relevant to the current state and prospects of the partnership and would not in my judgment be in principle open to inspection or copying; unless they were documents for which the partnership paid because the cost of their preparation was treated as an operating expense of the partnership (in which case the limited partners would be entitled to see what was done with the partnership money)."

29. In paragraphs 25 and 26 of his judgment, Norris J dealt with a suggestion that the purpose of the claim was to obtain material sufficient to prepare a claim against the manager. He said this: "*In my judgment the question of motive or purpose is irrelevant to the exercise of a statutory right of access to the partnership books. I accept the proposition… that because the statutory right of inspection is expressed in unqualified terms the motives and bona fides of the partner seeking to exercise it will be irrelevant*".

30. Despite Norris J's statements of principle, the parties in *Inversiones* failed to reach any agreement on the documents to be produced. This necessitated a further hearing and a second judgment ("*Inversiones 2*") to determine what documents in fact should be provided. It is useful to quote the following paragraphs from that second judgment:

> *"6.… I had intended clearly to communicate my view that what must be shown to the limited partners will vary from case to case (depending on the nature of the partnership business and its mode of conduct), that there was little to be gained by looking at decided cases to see if they established categories of document which as a matter of law every partnership had to maintain and which every partner had a right to inspect; and that the whole process should be grounded upon what documents actually existed, and their function, and not upon abstract categories.*
>
> *7. As a starting point, the process undertaken by the defendants was essentially that which I envisaged. Whilst I recognise (and would underline) the fact that affording to limited partners access to the partnership books is not a process of disclosure (like that under the CPR) I do agree with the sentiment…: "We do not consider that the parties can endeavour to agree the application of the principles without knowing what documentation actually exists".*
>
> *11 … It is important not to lose sight of the interest of other partners when considering the rights of* [the two claimant limited partners]. *As Collins LJ said in Bevan v Webb… "Their rights are qualified and regulated by the corresponding rights of the other partners". Whatever further provision of documents might be considered, that provision must be such as is truly appropriate to address real and substantial (and not merely theoretical) issues. Equally, it is important not to lose sight of the fact that whatever it is held must be provided to Inversiones must also be made available to every other limited partner of the partnership.*

16. *The fourth point to make is that Inversiones were anxious to stress (i) that they were seeking to exercise contractual and equitable rights to inspect partnership books and documents (and doing so by means of a Part 8 claim); and (ii) they were not seeking to enforce an obligation to make specific disclosure. Accordingly, they argued that to obtain an order they did not have to establish that the claimed documents existed, or that there were any gaps in the documents contained in the 76 files* [which had been disclosed]. *They simply had to establish their technical entitlement to documents of the type included in any given category, and it was then for the court to order production and inspection of every document within that category. If documents of type "X" existed then the court had to order production of all type "X" documents, and neither the Court nor the general partner could restrict Inversiones' right to only such of the documents of type "X" as would be sufficient for it to understand the partnership business. The order must be made: if there were none, or no more than had already been provided, then* [the general partner/ manager] *had to do nothing.*

17. *I disagree. The matter is not to be approached on such an abstract basis.* [The general partner] *has, in the light of the principles set out in my first judgment, identified and collated a substantial body of documents which it acknowledges are partnership documents. In practice the onus is now on Inversiones to indicate in what respects the available documents are not sufficient to enable Inversiones to examine into the state and prospects of the partnership business and consult with the other limited partners thereon, or indicate the existence of other documents which would be just as material to that exercise as those which have been provided. That is partly because the court will not grant an injunction which has no practical effect. It is partly because the court will not direct the incurring of expense which may have to be borne by the partners generally simply upon the request of one*

> *limited partner who cannot demonstrate that the incurring of that expense secures any practical advantage.…"*

Issues

31. The issues on the appeal come down to two points encapsulated in the following statement from paragraph 5.2 of the appellants' reply skeleton:

> "*What was in issue before Parker J, and is in issue on this Appeal is: (a) the scope of the Section 22 right; and (b) whether it is appropriate to grant summary judgment on an application under Section 22 where, on the evidence, the Appellants have already provided the information and documentation requested and/or the requested documents do not exist and/or the requests for documents and information are so broad as to raise issues of proportionality as regards the purpose of Section 22; in short, where the Appellants raise defences on the evidence to the summary judgment application which have a "real prospect of success*"" (original emphasis).

Arguments

32. The arguments on both sides were fully rehearsed in extensive written submissions (relating both to the application for leave to appeal and to the merits of the appeal) and in oral submissions. Their essence may be summarised as follows.

33. The central arguments of the appellants were these. They had never disputed the obligation to provide true and full information about the business and affairs of the partnership, and had never said that it was the same as the disclosure obligation in civil litigation. They did not contend that the obligation under section 22 had been modified by the LPA, but did contend that the section was to be construed in the context of the partnership arrangements. They challenged the judge's finding that a limited partner was entitled to the same information as the general partner, and contended that the principles were accurately set out in *Inversiones*, where the statutory provision was in different terms but dealt with a similar purpose. Summary judgment should never have been granted: the appellants had triable defences to the effect that they had already provided documents sought, or could not provide those documents, or the documents were outside

section 22 because those already provided constituted full information sufficient to satisfy section 22. Evidence to support these defences was properly before the court, and the judge should have dealt with them. Had he done so, he could not have granted summary judgment. To do so with provisos was wrong in principle; and the declaration granted by the judge merely restated the terms of section 22 (as to which there was no dispute, although their effect was contested) and so served no useful purpose.

34. The respondent supported the judge's reasoning and conclusions. The issue before the judge was whether the appellants had a triable defence on the basis that they had already provided true and full information; but their evidence did not say that they had in fact provided true and full information, and it could not truthfully have claimed that because the persons currently in charge had no first-hand knowledge of the matters relevant to the calculation of the CAB, the historical books and records were wholly inadequate, the appellants had not in fact reviewed all the documents they had received, and they had not obtained all available documents. The information which the respondent had sought was carefully targeted and did not in terms or in substance require production of everything that the General Partner and Manager had; and the information that was sought was necessary to enable the respondent to plead a proper defence in the CAB proceedings. As to the scope of section 22, the fiduciary position of the General Partner meant that it had the widest possible obligations in relation to disclosure of partnership documents and information, and the requirement under section 22 to provide full information was to be read in that light. In the often-repeated phrase of Ms Stanley KC, what was required was an "*open kimono*" approach, meaning that there should be full disclosure of all information relating to the business and affairs of the partnership. The judge had correctly identified the underlying ethos and true meaning of section 22, and the relevant potential qualifications to the obligation it imposed, and there was no ground to overturn his decision.

The scope of section 22

35. While I accept that the question of the scope of section 22 arises on the appeal, it is necessary to keep in mind that it only does so as an aspect of the complaint about summary judgment – with the consequence that the issue falls to be decided against a limited factual background. As I say below, this means that the court should be cautious

of expressing firm views in the abstract about how an essentially fact-sensitive exercise should be conducted.

36. The meaning and scope of section 22 of the ELPA is a matter of statutory construction. It is trite that the starting point is the ordinary meaning of the words used by the legislature, construed in their context. That context includes the structure of a limited partnership, in which the general partner (and, in the present case, the General Partner's agent, the Manager) has the entire conduct of the business with the limited partners being no more than sleeping partners. In the context of an investment vehicle such as the ELP, the fate of the investments made by the limited partners is entirely in the hands of the general partner, who – as the judge rightly remarked – owes the fiduciary duties of a partner, agent and trustee. As the judge again rightly remarked, the limited visibility which this structure affords to the limited partners requires safeguards, which are to be found in sections 22, 21 and the general provisions of the partnership legislation preserved by section 3 of the ELPA. But whilst this is the context, it is still necessary to have regard to the words of section 22 itself. That section entitles a limited partner to "*true and full information regarding the state of the business and financial condition of the exempted limited partnership*". Although the judge was right to contrast this wording with that of section 21, which requires the keeping of such books of account "*as are necessary to give a true and fair view of the business and financial condition of the exempted limited partnership and to explain its transactions*", and consequently to take the view that a "*full*" view meant something more than a "*fair*" view, it seems to me that there are nevertheless limitations on the information which can be obtained pursuant to section 22 which the judge failed to recognise, or at least to take into account in his disposition of this case. That is for the following reasons.

37. Of the authorities cited to us, it is *Inversiones* which seems to me to be by some distance the most useful. It is of course the case that it was concerned with a provision in the (English) Limited Partnerships Act which entitled a limited partner to "*inspect the books of the firm and examine into the state and prospects of the partnership business, and…advise with the partners thereon*"; and that wording differs, at least in form, from the entitlement under section 22 of the ELPA to "*true and full information regarding the state of the business and financial condition of the exempted limited partnership*". But it appears to me that the way in which Norris J analysed the rationale and effect of the

English provision demonstrates that he was in substance dealing with an entitlement not just to proper accounts but to full information about the financial state of the partnership business – in other words, with an entitlement whose ambit was the same as that of the section 22 entitlement. I have quoted the relevant parts of Norris J's reasoning in paragraph 28 above, but I refer again in particular to the following: the principle stated by Lord Lindley to the effect that every partner has a right to disclosure "*of all matters relating to the partnership dealings and transactions*" (subparagraph (b)); the statement that "*there is every reason why the general partner should be obliged to render a true account and provide full information*" (subparagraph (d)); the reference to Collins LJ's statement that the object of the right to inspect accounts "*is to enable the partners to ascertain the position of the partnership business*" (subparagraph (j)); and the reference to the only general restriction being that "*the documents and information relate to the business and prospects of the partnership as it is*" (subparagraph (r)). I therefore regard Norris J's remarks as strongly persuasive of the meaning and scope of section 22. *Inversiones* is also the only reported case in which a judge has had to apply broad statements of principle to particular facts; and the way in which that was done in *Inversiones* sheds more light on how the entitlement is to be applied in practice than mere statements of principle, important though they are, can do.

38. It is, however, necessary to note that the absence of any attempt in the present case to apply principles to the facts means that this court should, in my view, be wary of attempting to set out a definitive view of the full scope of the section 22 obligation, when the application of section 22 will often be fact sensitive.

39. That said, it seems to me that the following may be stated at a high level of generality.

(1) The section 22 entitlement is a fundamental safeguard to the limited partners (even though it may by consent be varied or even abrogated). They have no entitlement to interfere in the business and are dependent for their understanding of the state and condition of the business and of the well-being of their stake in the partnership upon the materials provided to them by the general partner and its agents. But the purpose of the entitlement is to enable the limited partners to have a comprehensive understanding of the business decisions being made on their behalf and the financial consequences of those

decisions both to the limited partners and to the business itself. What is meant by "*full information"* is to be determined in this light.

(2) In ordinary circumstances, the court may be expected to accept a limited partner's statement, however widely expressed, of what it requires to satisfy that purpose. That is particularly so because of the conceptual difficulty (identified in paragraph 7 of *Inversiones 2* (see paragraph 30 above)) of applying section 22 "*without knowing what documentation actually exists*".

(3) In this context it is important to note that, whilst the section 22 entitlement is not merely to accounts (as Mangatal J rightly held in *Dorsey Ventures*), that does not mean that the accounts are irrelevant. The obligation to maintain accounts and "*material underlying documentation*" is one which may not be altered by the parties (unlike the section 22 obligation); and the "*fair*" view of the business and financial condition of the partnership to be shown by proper accounts should in most cases provide at least a substantial part of the information needed by the limited partners to understand "*the state of the business and financial condition*" of the partnership.

(4) If and when the general partner has provided information about what documents exist that relate to the business and affairs of the partnership (if necessary supplementing the accounts for that purpose), the onus will shift to the limited partner "*to indicate in what respects the available documents are not sufficient…, or indicate the existence of other documents which would be just as material to that exercise as those which have been provided*" (paragraph 17 of *Inversiones 2*).

(5) In setting out to satisfy that onus, it is not sufficient for the limited partner to identify the existence of a particular document and demand all documents falling within the same category. See paragraphs 16 and 17 of *Inversiones 2*, quoted in paragraph 30 above.

(6) Thereafter, the exercise will require a fact-specific investigation of what is required to comply with the section 22 obligation. It will depend on the nature of the partnership business, its mode of conduct, and the terms of the governing documents read in the light of current business practice. The test is a functional one (see paragraph 28 (k) above). What Norris J meant by a functional test in this context appears from paragraph 6 of *Inversiones 2*, where he said that "*the whole process should be grounded upon what documents actually existed, and*

their function". I accept that much of the focus will be on the function of the documents themselves; but it also seems to me that the phrase has more general application, indicating an overall requirement that the test is in general terms whether whatever is sought is properly required to allow the limited partner a comprehensive understanding of the state of the business and of its investment in it, and of the risks attaching to that investment.

(7) Once the court is satisfied that in principle it should grant relief in support of the section 22 entitlement, it must be satisfied that the provision it proposes to make is "*such as is truly appropriate to address real and substantial* (and not merely theoretical*) issues*" (paragraph 11 of *Inversiones 2*). That is partly because the court will not grant an injunction which has no practical effect, and partly because "*the court will not direct the incurring of expense which may have to be borne by the partners generally simply upon the request of one limited partner who cannot demonstrate that the incurring of that expense secures any practical advantage*" (paragraph 17 of the same judgment).

(8) Nevertheless, in an appropriate case, the court does have power (as Parker J identified) to require the general partner to obtain information within its power from other persons and – if it can do so without incurring unreasonable expense, again a fact-sensitive question – to seek to procure information that is not within its power.

(9) Finally, it is necessary to have regard to the fact that documents and information made available to one limited partner are in principle (and subject to issues of confidentiality) available to all limited partners (see paragraph 11 of *Inversiones 2*); but in my view this factor, although relevant, cannot be determinative if the applicant limited partner can establish that the documents and information are properly required to enable it to understand the state of the business and the limited partner's financial position within it.

40. It follows from what I have said that Parker J's statement in *Port Fund* that a claim under section 22 would fail "*only… in cases where it is clear that the information sought did not relate to the business and financial affairs of the partnership, which is very wide target to aim at*" (see paragraph 17 above) is overly restrictive. The same applies to his statement that "*the entitlement is in reality to be put on "a level playing field*" with regard to information" (paragraph 51 of his judgment), and to his statement that "*the*

limited partners are entitled to the same information that is available to the GP concerning the business and financial affairs of the partnership in this regard so that they may be properly informed as to what has been done on their behalf" (see paragraph 18 (d) above). It is fair to point out that he recognised in principle that there might be practical and purposive boundaries built into the statutory right if they were in the interests of justice (see paragraph 18 (c) above) and that the test was essentially a functional one (see paragraph 18 (j) above); and his statement that he expected the information to go principally (but not exclusively) to the issues concerning the business managed on behalf of the respondent which would assist it to properly defend the CAB proceedings (see paragraph 18 (d) above) indicates that he appreciated how the purposive element of the test might be relevant. But the fact of the matter is that he did not attempt to apply these qualifications to the facts of the present case; and that brings me to the second issue, the appropriateness of the summary judgment he granted.

Summary judgment

41. The judge identified the correct test for granting summary judgment by reference to the wording of Order 14, rules 1 and 5 of the Grand Court Rules (as amended), summarising it as requiring the claimant to demonstrate that the defendant had no defence with a real prospect of success.

42. There was no dispute that section 22 entitled the respondent to true and full information: the issue was what that meant and whether it had been complied with in the present case.

43. It seems to me evident that the judge gave summary judgment on the basis that the General Partner and Manager had not established that they had provided every document in their possession or power. His overall view was clearly that the obligation to provide full information required the General Partner and the Manager to provide everything they had or could obtain. This view was made express in paragraph 51 of his judgment ("*the entitlement is in reality to be put on 'a level playing field' with regard to information*") and in the statement in paragraph 88 of *Port Fund* (quoted in the judgment in the present case) to the effect that a claim would fail only if it were clear that the information sought did not relate to the business and financial affairs of the partnership "*which is a very wide target to aim at*". The view that the GP and the Manager were liable unless they could satisfy him that they had provided everything they had or could

get also seems to me to be the only possible way of explaining his granting of summary judgment without considering the detail of the asserted defences, and to be the only possible justification for the inclusion in his order of categories of documents which were not claimed in the counterclaim or in the summary judgment summons. The review of the pleadings and evidence which the judge said at paragraph 68 he had conducted (without giving any details of the exercise), and which resulted in his conclusion that full information had not been given or offered, plainly involved no greater consideration than whether everything in the possession or power of the GP and Manager had been or would be supplied.

44. For the reasons given above, I consider that the judge's underlying view was far too narrow. But even on the slightly wider view evinced elsewhere in the judge's judgment, encompassing limited exceptions such as functionality, proportionality and the relevance of the CAB proceedings, he could not properly have given summary judgment without assessing whether the specific defences raised before him fell within the exceptions or otherwise satisfied the section 22 obligation.

45. The judge's explanation for not engaging with those defences appears to lie in paragraphs 72 and 73 of his judgment, quoted in paragraph 17 above. What is said there is that there were no plausible arguments that there were legal and/or factual issues that would require a trial to determine them; that a summary determination could and should be made; that the determination of rights under the ELPA and the LPA were points of law which did not require a trial; and that "*the applications do not require a trial to determine what documents and information have been provided, what documents and information are within the Manager and the GP's possession, custody and control, and whether the explanations that have been provided to date fulfil the statutory obligation*". I have quoted again that last passage because it seems to me that resolution of those issues was precisely what was required; and if the matter was not to proceed to trial, the summary judgment application was the only possible opportunity for their resolution. In stating his decision that a summary determination was appropriate, the judge said that that was in keeping with the procedural approach taken in *Dorsey Ventures*, *Port Fund*, and *Inversiones* (originating summons or Part 8 claim). But there is no equivalence between a summary judgment application and proceedings commenced by originating summons or under Part 8. In the former case, the whole issue is whether or not there is

a defence capable of going to trial; in the latter, the process will result in a trial, although not normally one with a large factual content. The originating summons procedure is not a summary procedure: as *Inversiones* exemplifies, a full engagement with the factual issues may be necessary and is capable of being accommodated within the Part 8 procedure or its equivalent. In the context of that procedure, there are good reasons for adopting the method of resolving matters of principle and leaving it to the parties to implement those principles, as was done in *Port Fund* and *Inversiones*; but adopting that approach involves no formal resolution at that stage of the proceedings, and does not necessarily involve a conclusion about the overall merits. By contrast, an order for summary judgment brings the proceedings to an end and is a final determination of the merits. Unless the entire dispute in the present case was as to the meaning (as opposed to the application) of section 22, summary judgment could not be granted without a full consideration of the suggested defences as to why the section did not apply. As I have said, the judge appears to have considered that the question of principle was indeed determinative; but, for the reasons I have given, he was in my view wrong about that. That being so, engagement with the asserted defences was required if summary judgment were to be granted.

46. The problem with the judge's order is in fact evident on the face of that order. Paragraphs 6, 7 and 8 contain provisos exempting the GP and the Manager from providing information which prior paragraphs of the order direct them to provide if they have previously provided or are unable to provide it. What those provisos do is recognise the potential existence of plausible defences to the prior orders for production of documents; but if such defences existed, they should have been adjudicated on before an order for summary judgment was made in respect of the documents to which the provisos related.

47. It was suggested to us that the existence of the provisos, and the appellants' acknowledgement that the documents sought would be disclosable on discovery in the CAB proceedings, meant that substantial justice was done, and that we should dismiss the appeal on that basis under section 5 of the Court of Appeal Act. That seems to me to be an untenable proposition. Leaving aside the fact that the respondent chose to pursue what I regard as an inappropriate procedure, and leaving aside also the question of costs, it seems to me that the errors of principle – and in particular the judge's failure to grapple

with the question whether in all the circumstances "*full*" information had already been provided - mean that the outcome represented a substantial injustice to the appellants.

Disposition

48. For these reasons, I would allow the appeal and discharge the judge's order. My provisional view is that the appellants are entitled to their costs of the appeal and the first instance proceedings; but if the respondent wishes to propose a different order it may do so in succinct written submissions provided to us and the appellants within 10 days of circulation of this draft, with the appellants having an opportunity to provide a succinct written response within 10 days thereafter and the respondent an opportunity to reply within a further 5 days. The court will then deal with the matter on the papers.

Rt Hon Sir Michael Birt, JA

49. I agree.

The Rt Hon Sir John Goldring, President

50. I also agree.