IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 22 OF 2024 (IKJ)

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP ACT (2021 REVISION)

AND IN THE MATTER OF ONE THOUSAND & ONE VOICES AFRICA FUND I, L.P. (IN VOLUNTARY LIQUIDATION)

BETWEEN:

AFRICA INVESTMENTS, LLC

Petitioner

-and-

ONE THOUSAND & ONE VOICES AFRICA FUND I INVESTORS, LTD., AS GENERAL PARTNER FOR AND ON BEHALF OF ONE THOUSAND & ONE VOICES AFRICA FUND I INVESTORS, L.P., AS GENERAL PARTNER FOR AND ON BEHALF OF ONE THOUSAND & ONE VOICES AFRICA FUND I, L.P. (IN VOLUNTARY LIQUIDATION)

Respondent

IN COURT

Before:	The Hon. Justice Kawaley
Appearances:	Mr Sebastian Gollins Kobre & Kim (Cayman), for the Appointees
	Mr Jordie Fienberg of Campbells LLP, for the Respondent
Heard:	On the papers
Draft Reasons circulated:	9 December 2024
Reasons delivered:	19 December 2024

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REASONS FOR RULING ON TERMS OF HANDOVER ORDER

Introductory

1. On 2 May 2024 I appointed Alexander Lawson and Christopher Kennedy of Alvarez & Marsal Cayman Islands as the persons responsible for winding-up the affairs of the Partnership pursuant to section 36 (13) of the Exempted Limited Partnership Act (as revised) (the "Appointees"/the "Appointment Order").

2. The Appointment Order provided for a turnover of records (paragraph 5- "Turnover Order") and for a handover of bank accounts (which is not an issue for present purposes-paragraph 6).

3. On 3 May 2024, the Respondent filed a Summons seeking a stay of the Appointment Order pending appeal. A Skeleton Argument in support of the stay was filed, and the Petitioner filed a Skeleton Argument opposing the stay. An interim stay was sought before the stay application was heard. I dealt with that on the papers in the terms of the following Ruling:

> "*1. The Order of 2 May 2024 provides so far as is relevant as follows:*
>
> > *'5. The Respondent be directed and required to produce, deliver up and deliver to the Appointees all books and records, documentation and information relating to and/or belonging to the Partnership within its possession, custody or control to the Appointees within 14 days of the date of this Order.*
> >
> > *6. The Respondent be directed and required to take or procure to be taken all steps necessary to transfer control of the bank accounts containing the Partnership's funds to the Appointees (including bank accounts held in the*

name of the Respondent or its general partner), including (without limitation) by executing any bank mandates and/ or authorised signatory forms, within 14 days of the date of this Order."

2. *An application to stay the entirety of the Order pending appeal is due to be heard on 16 May 2024. Yesterday, via email, Harneys requested an amendment to the Order before that hearing takes place on the basis that (1) full compliance with paragraph 5 within 14 days was not practicable (although some information could be provided on a rolling basis), and (2) compliance with paragraph 6 would be an irreversible step which would, in effect, render the stay application nugatory.*

3. *This morning Walkers on behalf of the Petitioner objected to any modification of the existing Order, in essence on the grounds that (1) there was no good reason why compliance with paragraph 5 should not continue to be required, and that (2) transferring control of the bank accounts would not be irreversible.*

4. *As regards paragraph 5, it frequently occurs that applications are made to extend the time for fully complying with information orders. The Court has a generous discretion to extend the time fixed by the Rules or orders under GCR Order 3 rule 5, even after the time has expired. The Respondent has leave to issue a Summons returnable for 16 May 2024 supported by an Affidavit filed no later than 14 May 2024, in accordance with the usual practice, explaining what compliance steps have been taken and why more time for full compliance is required. The Petitioner can, if so advised, file responsive evidence on the morning of the hearing although it may well be possible to deal with the matter by way of submission.*

5. *In the interim, the Respondent must obviously use its best endeavours to comply with an aspect of the Order, which compliance would not make any subsequent stay nugatory.*

6. *As regards paragraph 6, I remind myself of the primary reason why I granted the 2 May 2024 Order on a summary basis. It would be inconsistent with my determination that the Partnership assets needed safeguarding to leave them under*

> *the unsupervised control of the Respondent when nothing irreversible will take place if the Appointees take control of the assets for a short period before a stay is possibly granted. At this juncture, of course, I have no basis upon which I can properly evaluate the merits of the proposed stay application which fall to be evaluated in light of, inter alia, the merits of the appeal. However, the factual and legal matrix of the present case are not at first blush easily married with the factors which ordinarily operate in favour of a full stay of a judgment pending appeal.*
>
> 7. *I accordingly decline to grant a stay of paragraph 6 until the stay pending appeal hearing. The interim stay I granted yesterday is discharged forthwith.*"

4. The stay application was not heard on 15 May 2024 as initially contemplated, the Court determined costs on 23 July 2024 and the Respondent's new attorneys came on the record in early September. On 6 September 2024 they filed a Summons seeking a stay of the Costs Orders dated "*23 July 2024 and 24 July 2024*" pending the determination of the Respondent's pending appeal. The Third Affidavit of Hendrik Jordaan sworn in support explained how the hearing of the 3 May 2024 stay Summons was delisted in mid-May after a decision to withdraw it and pursue an expedited appeal instead. Forbearance was sought on the grounds that the amounts subsequently claimed by the Petitioner were disputed and the Respondent's attorneys were heavily involved in preparing for an appeal hearing in 12 weeks' time.

5. On 10 September 2024 I confirmed that I would deal with the 6 September 2024 Summons on the papers. The Petitioner filed its written submissions on 13 September 2024. On 20 September 2024, I then requested that the following preliminary views be communicated to counsel:

> "*The Judge has considered the stay/extension of time application including the Petitioner's submissions received on 13 September 2024. His provisional view is that the stay application should be refused but the extension of time application has arguable merit.*
>
> *On the assumption that the parties have not agreed that the GP should have an opportunity to reply, of the Court's own motion, he grants the GP liberty until close of business on 23 September 2024 to:*

(a) reply to the Petitioner's legal submissions relating to the stay limb of its application (if so advised);

(b) clarify the reference made in its Summons to this Court's '24 July 2024' Order; and

(c) identify the categories or types of documents and their relevance to taxation to which access has been denied through the exercise of Harney's lien over its files (i.e. documents over and above Court documents filed by the GP which should be accessible via the Court's portal)."

6. I do not believe a response to my request for clarification was received and believe that only one Costs Order dated 23 July 2024 was made. But in this fast-moving case, the point soon became academic. On 23 September 2024, Campbells advised the Court that the parties had agreed an extension of time and so the Respondent sought leave to withdraw the 6 September 2024 Summons. The costs of that Summons were also agreed. I sighed with relief, looking forward to some respite from these interlocutory skirmishes. However, shortly thereafter a new legal player entered the stage, and no sooner was the curtain dropped it was raised once again.

The present Summons

7. Kobre & Kim (Cayman) ("**Kobre & Kim**") filed a 25 September 2024 Summons seeking the following principal relief:

"***Orders***

2. An order endorsed with a penal notice that within 7 days the Respondent shall comply with paragraph 5 of the Appointment Order and shall cause the Manager, the Investment Manager, and their Affiliates to facilitate the Respondent's compliance with the Turnover Order, including but without restricting the generality of the Turnover Order, by producing and/or delivering to the Appointees those documents or classes of documents identified at Annex A to the Draft Order.

3. *An order that the Respondent, acting by the Ultimate GP through Mr Jordaan, shall, within 7 days, swear an affidavit and file and provide the same to the Court and the Appointees:*

   (a) identifying any of the Annex A Documents that (i) do not exist and/or (ii) are not or are no longer in the possession or control of the Respondent or the Management Entities and in respect of such documents identifying their current whereabouts;

   (b) identifying the documents, materials, records and information or categories of the same it contends are held by the Third-Party Service Providers for the Respondent, or Management Entities for their own account as opposed to in any capacity relating to the Partnership; and

   (c) stating whether such documents, materials, records and information are and/or have been held by the Third-Party Service Providers on a comingled basis along with the Partnership's documents and at the expense of the Partnership.

4. *An order that the Appointees shall have liberty to apply, pursuant to the terms of this Order and/ or paragraph 8 of the Appointment Order.*"

8. Campbells' response to requests for a listing of this Summons was to indicate they were busy preparing for an early November appeal and had no convenient dates until the New Year. Kobre & Kim protested that compliance with the document Turnover Order would be outstanding for 8 months if the application was not heard until the New Year. I asked for the following directions to be communicated to counsel:

> "*The Judge considers it to be a serious abuse of process for a party to manipulate the Court's processes by ignoring an Order which has not been stayed while pursuing an appeal which it hopes will render compliance irrelevant. This is what appears to have happened in the present case.*

Prima facie, the Petitioner is entitled to the Order sought by its Summons, and it is for the Respondent to show cause why the Order should not be made (and, indeed, why indemnity costs should not be awarded). He accordingly directs as follows, avoiding any actual or apparent interruption to Campbells' appeal preparations for 14 November 2024:

(a) the Respondent shall, if so advised, file submissions explaining why the relief sought by the Petitioner should not be granted summarily on the papers on 19 November 2024;

(b) the Petitioner shall file any responsive submissions by 21 November 2024, unless the Court directs no reply is required.

Because of the penal nature of the Order, the Judge declines to exclude the Respondent from seeking an oral hearing if so advised, assuming of course that bona fide and substantial grounds of opposition have been advanced."

9. The abuse of process provisional finding was, regrettably, an overly dramatic and ultimately unjustified response which was prompted by my eliding the recently abandoned Summons relating to the Costs Order with the Summons seeking a stay of, *inter alia*, paragraph 5 of the Appointment Order which the Appointees had not sought to enforce since May. On 19 November 2024, the Respondent filed its written submissions and an Affidavit exhibiting party and party correspondence. On 20 November 2024, before I had had an opportunity to consider whether I required further submissions from the Appointees' counsel, they filed a revised draft Order which I was invited to approve, supported by objections to certain wording added by Campbells and including two new paragraphs prescribing a procedure for dealing with commingled documents, which it was stated were minor changes.

10. Campbells did not share that view of the additional wording and their howls of protest prompted me to consider the dispute as to the form of Order dispute more rigorously than I initially considered was required. Additionally, when it became clear that I would be bound to depart from the strong provisional view I had expressed about costs, it seemed appropriate to explain as clearly as possible the basis for this change of course and to provide reasons for my decision.

11. The controversial issues were the following:

(a) whether the primary production obligation under paragraph 2 of the draft Order should be qualified by the words "*If and to the extent the Respondent has not already done so*".

(b) whether the verifying Affidavit obligations under paragraph 3 should be qualified by the words "*if and to the extent known*".

(c) whether the time period for complying with paragraphs 2 and 3 should be 7 or 21 days (although this was not identified as one of the "*main residual areas of disagreement*" in Kobre & Kim's email to the Court of 21 November 2024);

(d) whether two additional paragraphs should be added prescribing a procedure for comingled documents (together with a third dealing with the costs of that exercise; and

(e) whether the costs of the Summons should be awarded to the Appointees at all and, if so, on the standard or indemnity basis.

Findings

Paragraphs 2 and 3: additional wording proposed by the Respondent

12. These two disputes were very minor. I decided:

(a) the additional wording proposed by the Respondent was appropriate, because it seemed self-evident that some documents had already been provided since the Appointment Order was made. That ought to be clear on the face of the Order; and

(b) every affidavit or affirmation is averred to be true to the best of the affiant's "*knowledge and belief*". No useful purpose would be served by the additional wording the Respondent proposed in the various sub-paragraphs of paragraph 3 of

the draft Order. As the Appointees' counsel complained, the additional language could conceivably be used to dilute the relevant obligations.

Paragraphs 2 and 3: time for compliance (7 or 21 days)

13. Kobre & Kim did not join issue with Campbells' assertion that the Appointees would not be prejudiced by an extra 14 days for compliance. I agreed to adopt the Respondent's time period.

Paragraphs 4 and 5: commingling mechanism

14. The Respondent's counsel complained that it was wrong in principle for substantive new elements of a draft Order which was proposed by the Appointees to be advanced for the first time by way of reply. They submitted that a fresh or amended Summons was required. Bearing in mind that the Appointees have pressed for the urgent adjudication of their Summons and had primary control of the application, I agree that it is inherently unfair to introduce such substantive changes at such a late stage of the application. That is particularly the case because a form of Order with a penal notice attached was being sought. If further directions on this topic are required because a protocol cannot be agreed, the Appointees can make the requisite application in due course.

Costs: basis of taxation

15. GCR Order 62 rule 4 provides as follows:

> "*(11) The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently.*"

16. My provisional view that indemnity costs were appropriate because the Respondent had postponed compliance with the document turnover provisions of the Appointment Order while pursuing a recently abandoned stay application was based on a misunderstanding of the facts. The relevant part of the proceedings for costs purposes was accordingly the period after 25 September 2024 when the application for an Unless Order was made. The material before the Court indicates that:

    (a) the Respondent's initial response was to query the urgency for the Summons being heard, because cooperation with the Appointees had taken place and that the first

formal step to enforce the handover obligations was being taken four months after the Appointment Order;

(b) the Respondent complied with the directions ordered, fairly challenged the Court's adverse provisional views about their conduct and submitted, *inter alia*, *the Respondent and Mr Jordaan have taken significant steps over many months to comply with the Turnover Order and address the further requests made by the Appointees, many of which were raised for the first time by the Summons*" (paragraph 2.2);

(c) the Respondent consented to the Order sought in principle but contended that either there should be no order as to costs or that any adverse costs ordered should be awarded on the standard basis.

17. It seemed clear to me that the Appointees were justified in applying for the Order the Respondent ultimately accepted they were entitled to. No conduct justifying disallowing their costs had been complained of or was apparent. However, I was not satisfied that the Respondent had responded to the Appointees' Summons in such a manner as would justify the award of indemnity costs, having regard to GCR Order 62 rule 4 (11). On a proper analysis, my initial provisional view that the Respondent's prior conduct in relation to document turnover issues amounted to an abuse of the processes of this Court was based on a misunderstanding of the procedural history of this matter.

Conclusion

18. For these reasons, on 25 November 2024, I resolved the disputes about the form of Order to be made in relation to the Appointees' 25 September 2024 Summons in the manner explained above.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT