

THIS JUDGMENT IS RELEASED FOR PUBLICATION BY ORDER OF THE COURT
ON 21 FEBRUARY 2019

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 38 of 2018 (IMJ)

IN THE MATTER OF SECTION 22 OF THE EXEMPTED LIMITED PARTNERSHIP
LAW, 2014

BETWEEN

DORSEY VENTURES LIMITED

Plaintiff

AND

XIO GP LIMITED

Defendant

IN CHAMBERS AND IN PRIVATE

Appearances: Mr. Matthew Collings QC instructed by Mr. Christopher Levers and
Ms. Jessica Vickers of Mourant Ozannes for the Plaintiffs
Lord Grabiner QC instructed by Mr. Marc Kish and Ms. Gemma
Lardner of Ogier for the Defendant

Present: Lord Goldsmith QC, Mr. Colin McKie QC and Mr. Paul Smith of
Maples and Calder (with leave of the court)

Before: The Hon. Justice Ingrid Mangatal

Heard: 1st June 2018

**Draft Judgment
Delivered:** 15 October 2018

**Judgment
Released to the Parties:** 22 October 2018



HEADNOTE

*Exempted Limited Partnership Law (2014 Revision), sections 21 and 22 - Contract - Amended Limited
Partnership Agreement - Construction - Implied terms*

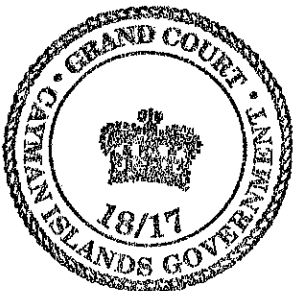
JUDGMENT

Introduction

1. This application has been referred to during the hearing and related proceedings as the “**Disclosure Proceedings**”. It concerns XIO Fund I LP (“**the Fund**”), which is a Cayman Islands exempted limited partnership which has been registered under the *Exempted Limited Partnership Law*, 2014 (“**ELP**”). The Plaintiff is Dorsey Ventures Limited (“**Dorsey**”). Dorsey is the Fund’s limited partner and the Defendant, XiO GP Limited (“**XiO GP**”) is its general partner. Dorsey seeks from XiO GP certain information and documentation and relies upon section 22 of the *ELP*.

Background

2. There is a dispute between Ms. Athene Xiang Li (“**Ms. Li**”) and Mr. Xie Zhikun (“**Mr. Xie**”) as to the beneficial ownership of Dorsey. Ms. Li incorporated Dorsey in the Cayman Islands on 10 July 2014 as a special purpose vehicle for facilitating investments by PRC investors into global private equity deals.
3. Mr. Xie claims that Dorsey was incorporated on his instructions and that pursuant to a Share Entrustment Agreement (“**SEA**”) Ms. Li holds the shares in Dorsey on trust for Mr. Xie. The question of Mr. Xie’s interest in Dorsey is the subject of an arbitration commenced by him in the Hong Kong International Arbitration Centre on 16 February 2017, with arbitration number A117035 (“**the SEA Arbitration**”).
4. Ms. Li’s position in the SEA Arbitration is that:
 - a. Ms. Li never agreed to the terms of the SEA and is the sole legal and beneficial owner of Dorsey;
 - b. Dorsey is a dormant entity. Its only asset is its limited partnership interest in the Fund and it is obliged to repay the US\$70 million in Initial Capital Contribution to its lenders; and
 - c. Ms. Li does not claim an economic interest in Dorsey. Instead she asserts that she holds the benefit of her shares in Dorsey on trust for those who, by virtue of their



capital contributions to the purchase of the underlying assets of the Fund, can be said to have the real economic interest in the Fund.

5. Given this dispute over the beneficial ownership of Dorsey, Ms. Li resigned as sole director of Dorsey on 3 February 2017 and sought the appointment of independent directors. Following her resignation, Ms. Li appointed two directors from FTI but they later resigned. Ms. Li subsequently appointed, with Mr. Xie's agreement, Mr. David Bennett and Ms. Tsz Nga Georgia Chow of Grant Thornton Directorship Services Ltd as independent directors (the "**GT Directors**"), by written resolution dated 11 August 2017.
6. The terms on which the GT Directors were appointed are set out in a protocol agreement dated 14 August 2017 (the "**Dorsey Protocol**") and a Director Services Agreement of the same date. The scope of the GT Directors' reporting obligations under the Dorsey Protocol is the subject of a separate application in Cause No. FSD 17 of 2018 (IMJ) ("**the Dorsey Protocol Proceedings**").
7. There are substantive proceedings before the Grand Court, filed by Mr Xie, Fortune Favours Holdings Limited, and Shengshi View International Holdings Ltd ("**the Applicants**") against XiO GP, Joseph Pacini, Ms. Li and Dorsey. The claims in that suit, FSD 25 of 2017 (IMJ), are complex. After hearing extensive arguments in March, May and June 2017 in that Cause, I continued certain interlocutory injunctions, initially granted *ex parte*, but as varied, in favour of the Applicants. The injunction application is the subject of my written unreported judgment delivered in private, date of delivery being 6 June 2017. That judgment has been appealed to the Court of Appeal, which heard the matter in November 2017 and reserved judgment.

Ruling on Application on 30 May 2018, by the Applicants to be joined or alternatively inspect the file or alternatively attend hearings and make submissions

8. On 30 May 2018, the Applicants sought either to be joined as parties to the proceedings, alternatively, to be granted leave to inspect and take copies of documents on the court file in this Cause, FSD 38 of 2018 (IMJ), or further or alternatively, to be granted leave to attend and observe all hearings in the proceedings.



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9. It is to be noted that, by consent of the parties to the proceedings, and at their request, I made a sealing order on certain terms on or about 12 April 2018. One of the terms of the Order sealing the Court file from inspection without leave of the Court on notice to the parties, was as follows:

“Nothing in this order prevents the independent directors of the Plaintiff from reporting on the status of the Proceedings in accordance with the terms of a protocol agreement entered into between each of them and Mr. Xie Zhikun and Ms. Athene (Xiang) Li dated 14 August 2017.”

10. On 31 May 2018, I ruled on the application by the Applicants as follows:

“.....

2. *The Court, having heard from attorneys for the Applicants, Plaintiff and Defendants [sic], is not satisfied that the Applicants are necessary parties to the proceedings or that they have a separate dispute that needs to be determined along with the issue in FSD 38 of 2018. The narrow issue in FSD 38 of 2018 is between Dorsey... and XiO GP ..., who are the only parties to the Amended LPA. Further, to the extent that the Applicants have questions relating to the meaning and scope of the Dorsey Protocol, they are able to and are in fact fully participating in FSD 17 of 2018 - the Dorsey Protocol Proceedings.*
3. *However, the Applicants are parties that may be affected by the outcome of the FSD 38 of 2018 proceedings, and I therefore think that they should be allowed to attend and observe all hearings in the proceedings in FSD 38 of 2018 and make brief legal submissions, if necessary.*
4. *I do not view it as appropriate for the Applicants to have leave to inspect and take copies of the documents on the court file. There are confidentiality issues, and Mr. Xie's entitlement to receive*



confidential information as a matter of construction of the Dorsey Protocol, is already the subject of the Dorsey proceedings.

5. *The hearing tomorrow (1st June 2018) will therefore have to be tailored in such a way that confidential documents and information are not expressly referred to in the hearing.”*

11. Lord Goldsmith QC, did, on behalf of the Applicants, make brief submissions at this hearing.

The application by Dorsey

12. The application is brought by way of an originating summons which states:

“..the Plaintiff is seeking the following relief:

1. *Pursuant to section 22 of the Exempted Limited Partnership Law, 2014, an order that the Defendant deliver up to the Plaintiff true and full information regarding the state of the business and financial condition of XiO Fund I LP by reference to the categories of documents more particularly described in paragraph 40 of the First Affidavit of Mr. David James Bennett filed in support of this originating summons.*

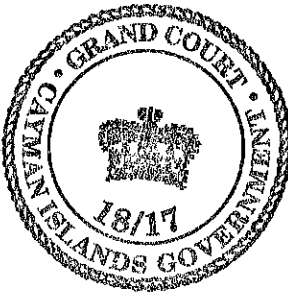
2. *Further or other relief as the Court considers fit.*

3. *An order that the Defendant do pay the Plaintiff's costs of and incidental to this originating summons to be taxed, if not agreed, on an indemnity basis.”*

13. Paragraph 40 of Mr. Bennett's First Affidavit states as follows:

“By the same letter, we requested within 14 days of the date of the letter:

- (a) *a copy of the Detailed Breakdown:*



- i. *in Microsoft Excel format; and*
- ii. *disclosing the payer/recipient for each transaction;*
- iii. *ensuring that multiple transactions are not grouped into a single line entry; and*
- iv. *categorising each transaction item into one of the following:*
 1. *Management Fees, or*
 2. *Establishment Expenses, or*
 3. *Investment Related and Non-Consummated Deals; or*
 4. *Fund Expenses; or*
 5. *Partnership Expense;*

(b) *supporting documentation for the transactions disclosed in Annex A of that letter, which amounted to 224 line items representing 93% of the Detailed Breakdown aggregate value. We noted that such supporting documentation should include, but not be limited to:*

- i. *copies of quotes, leases, purchase orders, invoices (including supporting narratives, if applicable) and receipts;*

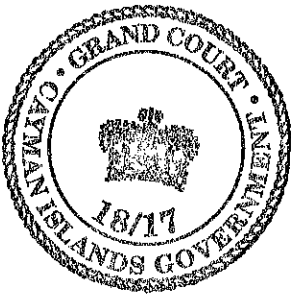
1. *For example legal/accounting invoices should be supported by narrative and billing details; and*
2. *If any narrative is subject to legal privilege, the relevant individual narrative lines may be redacted;*

- ii. *if the cost was a cost shared between various entities, documentation in support of the cost share arrangement, for example:*

1. *signed share cost agreement;*
2. *evidence of payment by the entities sharing the cost;*
3. *correspondence in support of the arrangement and the relevant commercial terms/rationale for splitting costs;*

- iii. *in respect of travel-related costs;*

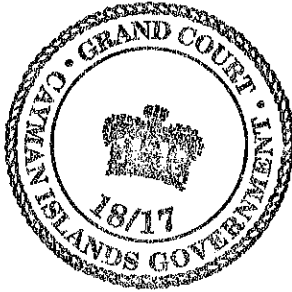
1. *a schedule for all travel-related costs including:*
 - a. *the employee(s)/individual(s) who incurred such expenses;*
 - b. *the purpose of the expenses/trip*
 - c. *the dates of travel and the locations visited;*



- d. *if the expense is tied to a particular investment, the investment/project name (on the basis that non-disclosure of a particular project would be assumed to be a general costs of the GP).*

iv. *in respect of Establishment Expenses:*

1. *a schedule of the employee(s)/individual(s) to whom each relocation costs/visa cost related;*
2. *employment contracts for all employees whose recruitment costs/professional charges have been charged as an Establishment Expense;*
3. *a schedule of the location tied to each transaction for leasehold improvement costs, office equipment, computer equipment and rental costs;*
4. *a copy of the fixed asset register and depreciation schedule in relation to the office equipment, computer equipment and other assets of a capital nature;*
5. *if the costs was a cost shared between various entities, documentation in support of the cost share arrangement;*



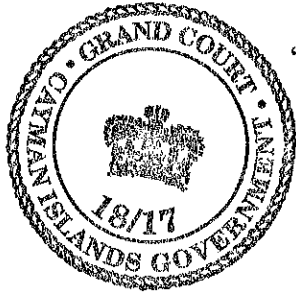
v. *in respect of Partnership Expenses:*

1. *a schedule detailing the different types of operating expenses within the Partnership;*
 - a. *a schedule detailing the target investment company name(s) associated with each project name;*
 - b. *bank statements for the bank account(s) which were used for the ICC expenditure (for the period during which expenditure took place); and*
 - c. *details of whether any of the costs paid have been reimbursed to the Fund by other entities."*

Dorsey's Position

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14. Reliance is placed upon section 22 of the *ELP* (which is in the same terms as the *Exempted Limited Partnership Law (2018 Revision)* which provides as follows:-



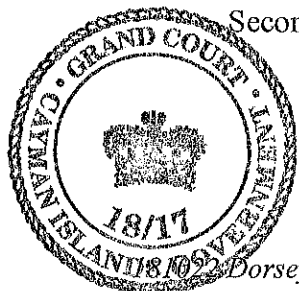
"Subject to any express or implied term of the partnership agreement, each limited partner may demand and shall receive from a general partner true and full information regarding the state of the business and financial condition of the exempted limited partnership."

15. Dorsey seeks documents and information relating to the initial capital contribution of USD \$70 million injected by Dorsey into the Fund. Mr. Collings QC, who appears on behalf of Dorsey, asserts that the GT Directors have been seeking for some time to understand how these monies have been spent, given they comprise Dorsey's investment in the Fund, and they (the GT Directors) have been unable accurately to reconcile its expenditure with the documents and information which have been provided to Dorsey by XiO GP to date. The Amended LPA contains, at clause 15.2, an obligation on the general partner to keep proper, full and accurate records and accounts; and at clause 15.3 an obligation on the general partner to provide the limited partner with annual audited accounts and other information.
16. The duties owed to Dorsey by the GT Directors, as directors of Dorsey, have been addressed in their skeleton argument in respect of the Dorsey Protocol Proceedings. In those arguments, the GT Directors declare that they do not accept that those duties are (or could be) constrained in any way. In particular, the GT Directors must, it was submitted, acquire and maintain, on an ongoing basis, a sufficient knowledge and understanding in order to properly discharge their duties of supervision and control of Dorsey's affairs.
17. The evidence on this application consists of the First Affidavit of Mr. Bennett, one of the GT Directors, the First Affidavit of Mr. Pacini of 24 April 2018, on behalf of XiO GP, and the Second Affidavit of Mr. Bennett. XiO GP has also filed the First Affidavit of David Andrew Freeman, who is a litigation paralegal at Ogier, which exhibits correspondence and documents. One of the documents exhibited to Mr. Freeman's Affidavit, is a copy of the Limited Partnership Agreement ("The LPA") in respect of the

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Fund dated 6 August 2014. The terms of the Amended LPA under discussion here do not appear to be materially different from that which was contained in the original LPA.

18. XiO GP also relies upon Ms. Li's Second Affirmation in the Dorsey Protocol Proceedings to provide its position on the background to the appointment of the GT Directors, Dorsey's independent directors and its view of the purpose behind that appointment.
19. Mr. Bennett's First Affidavit describes the assistance which has been afforded, and the materials which have been provided, by XiO GP. Mr Bennett also describes the difficulties which have arisen, and explains the justification for Dorsey's further requests, and the need for this application to ensure that they are met.
20. Mr. Collings argues that although section 22 is in wide terms, the request (and this application) for disclosure is focused and proportionate: it is set out in Mr. Bennett's First Affidavit, having previously been set out in a letter dated 21 February 2018.
21. Mr. Collings submitted that the robust stance taken by Mr. Pacini in his Affidavit on behalf of XiO GP, may be ameliorated, in the light of a meeting which took place the day after his Affidavit was sworn. The meeting is described at paragraph 15 of Mr. Bennett's Second Affidavit, and Mr. Bennett also refers to the prior provision of information by XiO GP. Mr. Bennett asserts that during that meeting Mr. Pacini openly agreed that Dorsey was entitled to the information sought in this application.
22. It was hoped, Dorsey says, that these proceedings could have been avoided, particularly in circumstances including Mr. Pacini's concession that Dorsey is entitled to the information sought by these proceedings and that it should be provided to Dorsey.
23. The GT Directors also refute strongly the criticism by Mr. Pacini and XiO GP that the GT Directors' fees have been excessive or unnecessarily incurred. At paragraph 11 of his Second Affidavit, Mr. Bennett states as follows:



"11. *Our investigations have not been undertaken at the behest of Mr. Xie as suggested by Mr. Pacini. As we have been at pains to point*



XiO GP's Position

out, we owe our duties to Dorsey, not to any of Mr. Xie, Ms. Li or the GP (see Mourant's letter to Campbells the GP's former Cayman Counsel) and Maples dated 23 January 2018."

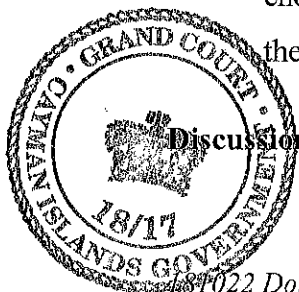
24. Lord Grabiner QC, on behalf of XiO GP submits that this application is misconceived. Section 22 of *the Law* provides that the right to request true and full information is "subject to any express or implied term of the partnership agreement". He argues that the Amended LPA makes detailed express provision for the severely restricted information rights of Dorsey, as the limited partner of the Fund. Further that the contractual provisions governing the limited partner's information rights in the Amended LPA are therefore flatly inconsistent with the general right under section 22 and do not extend to the very detailed information sought in this application. On its true construction, the Amended LPA excludes the general right under section 22. Alternatively, an implication of a term to this effect is both obvious and necessary to give business efficacy to the Amended LPA.

The Law and the Amended LPA

25. Lord Grabiner submits that the Amended LPA expressly addresses the respective rights to information of the limited partner and the general partner. Clause 9.2(b) provides for Dorsey, as limited partner, to receive a budget of annual partnership expenses for approval. Clause 14.3 imposes a duty on Dorsey to supply such information as the general partner may reasonably request. Clause 15.3 provides for Dorsey to receive the Partnership's annual audited accounts and unaudited quarterly accounts. Further, whilst clause 15.2 of the Amended LPA requires XiO GP to maintain records and books of account, it does not require XiO GP to provide Dorsey with copies of such records or books of accounts, nor does it give Dorsey the right to inspect them.
26. In circumstances where the XiO GP has not been able to comply with the deadlines referred to in clauses 15.3 (a) and 15.3 (b), it is obliged to use its best endeavours to deliver the relevant accounts to Dorsey "*as soon as practicable*".

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27. Lord Grabiner argues that these express provisions of the Amended LPA do not entitle Dorsey to the information requested in this application under the provisions of the Amended LPA. Further, the argument continues, these provisions are inconsistent with an overriding general right to information under section 22. As a matter of construction of the Amended LPA, read with the opening words of section 22, the general right to information under section 22 is excluded. Alternatively, in order to give efficacy to the Amended LPA and/or to give effect to the obvious but unexpressed intentions of the parties, a term excluding what would be the right under section 22 is implied: reference was made to *Marks and Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2016] AC 742.
28. It follows that Dorsey is not entitled to the information sought and the application should be dismissed.
29. As regards the audited accounts which are the subject of clause 15.3 of the Amended LPA, XiO GP says that the GT Directors have already been advised that the Fund's auditors, PricewaterhouseCoopers are preparing the Fund's audited accounts, and XiO GP will provide the audited accounts to Dorsey as soon as practicable in accordance with clause 15.3(c) of the LPA.
30. As to the GT Directors' forensic point that Mr. Pacini did not object to provision of the information requested in this application until the service of his First Affidavit, learned Counsel submits that as Mr. Pacini explains in that affidavit, XiO GP initially sought to co-operate with the GT Directors to the maximum extent possible, notwithstanding the limits on their entitlement to information, in the hope that it could get the GT Directors up to speed and address any concerns without delay. However, in the light of the GT Directors' many demands for historical information in relation to the Fund and the massively disproportionate costs incurred by the GT Directors as a result, XiO GP had no choice but to insist on limiting the information provided to the GT Directors to that which they are entitled to receive: namely, the audited accounts.



Discussion and Analysis

31. Clause 9.2 of the Amended LPA states:

“9.2 Partnership Expenses and Other Fees

(a) The General Partner, acting for the account of the Partnership, will pay all Partnership Expenses out of the Assets.

(b) The General Partner will prepare a budget for the anticipated Partnership Expenses for each Fiscal Year and the budget will be approved by the Limited Partner.

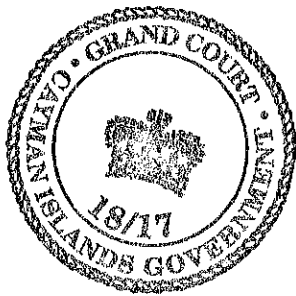
(c) The General Partner, on behalf of the Partnership, may pay its agents, delegates and professional advisors any fees that form part of the Partnership Expenses.”

(My emphasis)

32. Clause 14.3 of the Amended LPA provides as follows:

“14.3 Supply of Information

The Limited Partner must use all reasonable endeavors to promptly supply the General Partner any information, in substantially the form the General Partner reasonably requests, in order for the Partnership, General Partner, Manager and/or their Affiliates to comply with applicable legal or regulatory requirements or guidelines, including, but not limited to, in connection with Assets or proposed investments, or in relation to the taxation of the Partnership, the General Partner, their Affiliates, or any Limited Partner, or otherwise.”



33. Clauses 15.2 and 15.3 of the Amended LPA provide :

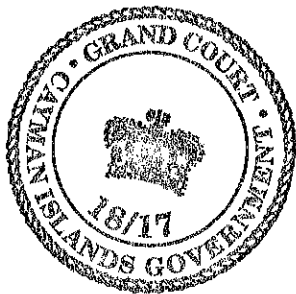
“15.2 Records and Books of Accounts

The General Partner will keep proper and complete records, books of account and Accounts of the Partnership in accordance with Applicable

Law and this Agreement, in which will be entered fully and accurately all transactions and other matters related to the business of the Partnership as are usually entered into records, books of account and Accounts maintained by persons engaged in similar businesses, including a Capital Account for the Limited Partner. The Partnership books, records and Accounts will be prepared in accordance with recognized auditing standards.

15.3 Annual Accounts and Other Information

- (a) *No later than 120 days after the end of the first full Fiscal Year and each Fiscal Year thereafter, the General Partner will provide the Limited Partner with audited accounts of the Partnership in respect of the immediately preceding Fiscal Year. The audited accounts will comprise an annual investment report and annual financial statements of the Partnership. The first audited Accounts will be prepared for the Fiscal Year ending 31 December 2015.*
- (b) *Within 30 Business Days following the end of the first Fiscal Quarter and each Fiscal Quarter thereafter, the General Partner will send to the Limited Partner a report containing the unaudited accounts of the Partnership, an unaudited valuation report of the Investments, an update on the Partnership's existing investments, Investment pipeline and divestments (if any) for the immediately preceding Fiscal Quarter.*
- (c) *For the avoidance of doubt, a failure by the General Partner to provide any information or documentation within the relevant period stipulated in this clause 15.3 does not amount to a breach of this Agreement by the General Partner. In the event that the General Partner is not able to comply with the deadlines set out above, the General Partner will use its best endeavors to deliver the relevant accounts as soon as practicable thereafter.”*



34. In my judgment, it is important to bear in mind, the proviso in the opening words of section 22 of the *ELP* which state “*Subject to any express or implied term of the partnership agreement*”.
35. However, it is also important to look at the terms of section 21 of the *ELP*, which immediately precede section 22. It is useful to set out that section, which deals with the issue of “*Accounts*”, followed directly after by section 22 which covers “*Information regarding condition of partnership.*” Sections 21 and 22 provide as follows

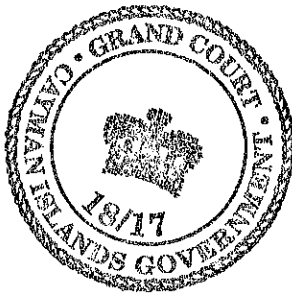
“Accounts

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.*

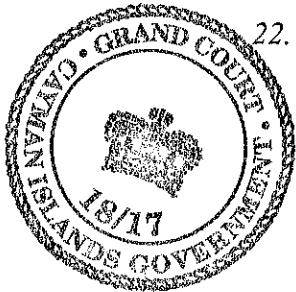
(2) For the purposes of subsection (1), proper books of account shall not be deemed to be kept if there are not such books as are necessary to give a true and fair view of the business and financial condition of the exempted limited partnership and to explain its transactions.

(3) Where the general partner keeps the books of account described in subsection (1) at any place other than the registered office of the exempted limited partnership or at any other place within the Islands, the general partner shall, upon service of an order or notice by the Tax Information Authority pursuant to the Tax Information Authority Law (2017 Revision), make available, in electronic form or any other medium, at its registered office copies of its books of account, or any part or parts thereof, as are specified in the order or notice.



- (4) *A general partner shall cause all books of account required to be kept under subsection (1) to be retained for a minimum period of five years from the date on which they are prepared.*
- (5) *A person who, being a general partner, knowingly and wilfully contravenes subsection (1) or (4) shall be subject to a penalty of five thousand dollars.*
- (6) *A person who, being a general partner, defaults in complying with an order or notice under subsection (3) without reasonable excuse, shall incur a penalty of five thousand dollars and a further penalty of one hundred dollars for every day during which the non-compliance continues.*

Information regarding the condition of partnership



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.”*

(My emphasis)

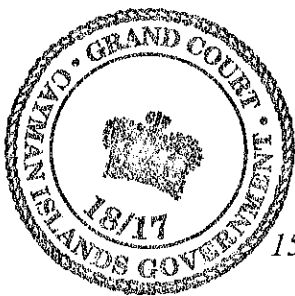
36. In my judgment, there is nothing in the wording of the Amended LPA that is inconsistent with an overriding general right to information under section 22 of the ***ELP***. It seems to me, that in so far as clause 15.2 of the Amended LPA provides that *“The general partner will keep proper and complete books of account and Accounts of the Partnership in accordance with Applicable Law and this Agreement, in which will be entered fully and accurately all transactions and other matters related to the business of the Partnership as are usually entered into records, books of account and Accounts maintained by persons engaged in similar businesses, including a Capital Account for the Limited Partner”*, the general partner has agreed to keep complete books and accounts in accordance with the ***ELP***.

37. The fact that the Amended LPA, at clause 15.3 provides for and addresses the subject of the furnishing of accounts is not the same thing as the topic dealt with under section 22 of the *ELP*, which is the limited partner's right to demand and receive from a general partner true and full information regarding the state of the business and the financial condition of the exempted limited partnership. The right to demand and receive true and full information, in my view is wide, and encompasses more than accounts, audited and unaudited.
38. Section 21 of the *ELP* provides for the keeping of detailed accounts, and information and documentation. It seems obvious to me, that, in relation to this Amended LPA, XiO GP is bound expressly to keep books of account in accordance with the *ELP*. Unless the Amended LPA said expressly that the limited partner is not entitled to true and full information, then the limited partner has the right under the governing law, the *ELP*, to such information.
39. In my judgment, the reasonable man with the background knowledge of the parties could not reasonably have understood the parties to have meant by their agreement that the limited partner's right to demand information would be excluded. I have found paragraphs 14 and 15 of the judgment of Lord Neuberger in the *Marks & Spencer* case, which was referred to by both parties, instructive. It is there stated:

"Implied terms in contracts

14. *It is rightly accepted on behalf of the claimant that there is no provision in the lease which expressly obliges the landlords to pay the apportioned sum to the tenant. Accordingly, it follows that in order to succeed the claimant has to establish that such an obligation must be implied into the lease.*

15. *As Baroness Hale of Richmond JSC pointed out in **Geys v Societe Generale, London Branch** [2013] 1 A.C. 523, para 55, there are two types of contractual implied term. The first, with which this case is concerned, is a term which is implied into a particular contract, in the light of the express terms, commercial common*

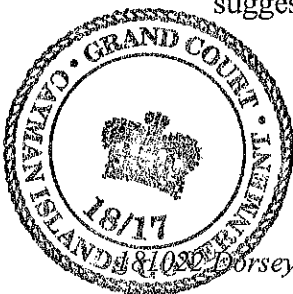


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sense, and the facts known to both parties at the time when the contract was made. The second type of implied terms arises because, unless such a term is expressly excluded, the law (sometimes by statute, sometimes through the common law) effectively imposes certain terms into certain classes of relationship.”

(My emphasis)

40. Mr. Collings also referred to paragraph 21 of the *Marks & Spencer* judgment, where Lord Neuberger suggests that a term can only be implied if, without the term, the contract would lack commercial or practical coherence. In my judgment, the Amended LPA could not properly be said to lack commercial or practical coherence unless a term excluding the information is implied.
41. Quite the contrary, because what section 22 of the *ELP* speaks to is a default situation, that effectively, in accordance with commercial common sense, and the dimensions of the relationship between a general and limited partner, applies unless the terms of the LPA expressly or impliedly exclude it. What this means is that the statute law, the *ELP*, implies the rights and relationship covered under section 22 unless the Amended LPA expressly or impliedly excludes such rights.
42. The fact that clause 14.3 speaks to supply of information by the limited partner does not assist with the question of construction. This is because that clause is not addressing the matter of true and full information regarding the state of the business and financial condition of the exempted limited partnership, as does section 22 of the *ELP*. Clause 14.3 is aimed at the limited partner providing information to the general partner for the purpose of compliance with applicable legal or regulatory requirements or guidelines. It is therefore addressing a completely different purpose and subject matter and does not suggest express or implied exclusion of the matters dealt with at section 22 of the *ELP*.



THIS JUDGMENT IS RELEASED FOR PUBLICATION BY ORDER OF THE COURT
ON 21 FEBRUARY 2019

43. In my judgment, upon a proper construction of the Amended LPA, and having regard to commercial common sense, it is plain that the limited partner's right to demand and receive full information has neither been expressly nor impliedly excluded.
44. I am of the view that the information and matters sought in the Originating Summons ought to be provided to Dorsey by XiO GP and I order that this be provided by the 31 October 2018. It does seem to me that this information ought to have been provided long ago. Indeed, at the very latest period, around the time of the meeting when Mr. Pacini indicated his accord that Dorsey was entitled to the information sought. It does seem that XiO GP has acted unreasonably in that regard.
45. Costs are awarded to Dorsey as sought in the originating Summons, to be paid by XiO GP to be taxed, if not agreed, on an indemnity basis.


THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT

