

Claims by Limited Partners in Cayman Islands Exempted Limited Partnerships

Kuwait Ports Authority v Port Link GP Ltd. FSD 236 of 2020 (RPJ) (Unreported, 25 November 2021, Grand Court (the "Court")) considers the rights of limited partners ("LPs") in Cayman Islands exempted limited partnerships ("ELPs") to bring direct and derivative claims against the general partner of the ELP ("GP") and third parties.

It is the first decision to involve detailed consideration of section 33(3) of the Exempted Limited Partnership Act (As Revised) ("ELP Act"), which gives LPs the right to bring claims derivatively for loss caused to the ELP.

ELPs are one of the most widely used vehicles in the Cayman Islands financial services industry, particularly in investment fund structures. This decision considers a number of points relevant to the pursuit of claims by LPs which allege wrongdoing against those involved in the management of the ELP.

Background

The Port Fund L.P. ("TPF") is a Cayman Islands ELP. The proceedings involve claims brought by certain of its LPs against the GP, service providers to TPF and various individuals associated with them seeking equitable compensation and other relief for serious alleged wrongdoing by the Defendants.

Section 33(3) of the ELP Act provides that "A limited partner may bring an action on behalf of

an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings".

The Defendants sought to strike out the claims on the following grounds:

- The LPs did not have standing to bring the claims asserted by them directly in their own name; and
- The statutory threshold for bringing a derivative claim in section 33(3) of the ELP Act had not been met because the independent directors of the GP (whose appointment post-dated the events giving rise to the claims) had investigated the claims and concluded that it was not in TPF's interest to pursue them.

Decision

GPs Owe Duties to the LPs - the LPs Can Sue to Enforce Them

The Court confirmed that the GP of an ELP owes fiduciary duties directly to each LP. This is because, unlike a company, an ELP does not have separate legal personality.

Accordingly, each LP has standing to bring direct claims against the GP in respect of any breach of those duties. As each LP is enforcing rights owed to it personally, and because the LPs do not generally owe duties of a fiduciary nature to

each other, an LP can pursue such a claim without joining the other LPs.

The GP had argued that the LPs' rights were limited to bringing an action for a partnership account in the same way that a partner in a general law partnership could have done so. The Court rejected that argument and held that the taking of a partnership account is not the exclusive remedy available to the LPs.

Derivative Actions under Section 33(3) of the ELP Act

The Court noted that the derivative action expressly set out at section 33(3) of the ELP Act is unique to ELPs as compared with other vehicle types. Accordingly, the legal and equitable principles governing derivative actions in respect of companies, trusts, English limited partnerships and associations do not apply. An LP does not need leave of the Court in order to pursue such an action whereas a shareholder in a Cayman Islands company would require such leave and an LP does not first need to request that the GP bring the claim in order for it to be permitted to bring a section 33(3) derivative action.

Where the GP finds itself in a conflicted situation in determining whether to bring an action against third parties, the Court indicated that it is open to ruling that a GP which fails or refuses to bring proceedings does so "*without cause*". The fact that the management of the GP have investigated the issues and decided that it is not in the ELP's interest to bring such a claim does not necessarily lead to a different conclusion if the Court determines that the GP is subject to a conflict of interest that affects its ability to act impartially.

Takeaways

The decision arose in a strike out application involving allegations of serious wrongdoing and

wilful default and it remains to be seen how this decision will be applied more generally. The key observations made by the Court in this case are that:

- GPs owe fiduciary duties directly to LPs and LPs can enforce those duties directly against the GP.
- While the precise relationship between LPs' direct and derivative rights of action is open to further clarification in future judgments, it appears that the Court's view in this case was that reliance on section 33(3) of the ELP Act would only be necessary where the ELP has a claim against a third party rather than where one or more LPs has a claim against the GP. This aligns with the broader purpose of section 33 of the ELP Act which governs the relationship of LPs to actions involving an ELP.
- Due to the nature of ELPs, the rights of LPs are not identical to partners of an ordinary partnership and, notably, are not limited to the taking of a partnership account where LPs have claims for wrongdoing against the GP and others involved in the management of the ELP.
- The term "*without cause*" in section 33(3) of the ELP Act is to be interpreted broadly. In appropriate circumstances, where a GP is (or appears to be) conflicted, an LP may be able to commence proceedings against a third party on behalf of an ELP in reliance on section 33(3) even if the GP has investigated the claims and made a determination not to pursue them.

If you would like further information, please liaise with your usual Maples Group contact or any of the persons listed below.

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