

Focus on fraud and asset tracing: Cayman Islands Court of Appeal upholds Grand Court's decision on exempted limited partnerships derivative claims

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On 20 January 2023, the Cayman Islands Court of Appeal handed down its judgment *In the Matter of the Kuwait Ports Authority & others -v- Port Link GP Ltd and others*.

The substantive issue on appeal concerned the test for a limited partner to bring derivative claims on behalf of a Cayman Islands exempted limited partnership under section 33(3) of the Exempted Limited Partnership Act:

"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 Cayman Islands Court of Appeal (**CICA**) upheld the first instance decision of Parker J in the Grand Court of the Cayman Islands dated 25 November 2021. Further, the CICA confirmed that section 33(3) of the Exempted Limited Partnership Act (**ELPA**) is to be considered a standalone statutory test. Only this statutory test needs to be satisfied. Other common law tests to bring derivative claims, such as those applicable to companies or trusts, do not need to be satisfied for a limited partner to pursue a derivative claim.

However, the CICA considered that: "the expression 'without cause' must carry the implication of 'good' cause. The legislature cannot have intended that a decision for any cause, no matter how inhibited or conflicted the decision-maker, would be sufficient to prevent a derivative action".

Notwithstanding the CICA's decision, it was noted that in deciding whether a general partner has "without cause, failed or refused to institute proceedings", a limited partner and/or the

Court "is likely to derive assistance from considering whether special circumstances (as established in the contexts of trusts and English limited partnerships) exist." However, this is only a consideration that may assist in establishing the statutory "without [good] cause" test.

In addition to the above, since this was the first case concerning section 33(3) heard by the CICA, the Court expressed the following applicable principles, which will likely prove helpful for funds practitioners and litigators in the Cayman Islands:

- there is no requirement that a limited partner seek leave to bring derivative proceedings under section 33(3) before issuing a claim or to seek leave to continue that claim once issued
- if a defendant wishes to raise an issue as to the standing of a limited partner to bring derivative proceedings, that defendant should do so through a strike out application or seek the trial of a preliminary issue
- the onus is on the limited partner to satisfy the Court that the requirements of section 33(3) are met
- the question of whether the general partner has "failed or refused" to commence proceedings should be assessed at the hearing of the strike out application or preliminary issue, not when the proceedings are issued. Accordingly, actions taken after the institution of proceedings and before the hearing of the section 33(3) issue should be taken into account when the Court considers whether the statutory test has been satisfied
- a limited partner must plead the facts and matters relied upon as showing that the limited partner satisfies section 33(3) (in other words, it has a claim that the GP has, without good cause, failed or refused to bring) because this forms an essential part of its cause of action
- it is not a necessary pre-condition that a limited partner ask a general partner to bring the claim before issuing a derivative claim under section 33(3). It is enough that it has "failed" to do so, given the wording of section 33(3)
- the Court retains the discretion to prevent a derivative claim from proceeding even where the requirements of section 33(3) are met. One such scenario may be where the plaintiff has an adequate alternative remedy

Ogier acted for the successful Plaintiffs in this matter, alongside a team from Baker McKenzie in London. David Allison KC was instructed to appear at first instance and on the appeal.

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