

# Cayman ELPs and limited partner protections: first substantive decision on derivative claims

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Cayman Islands exempted limited partnerships (ELPs) are an important feature of the Cayman Islands' financial services industry and funds business, and remain one of the most widely used vehicles selected by fund sponsors setting up private equity and real estate structures, tax transparent master funds and single investor vehicles. However, an ELP is effectively no more than a contract between parties, it has no separate legal personality, and its general partner holds the ELP's assets on statutory trust, including legal claims, and conducts all of its business and affairs (to the exclusion of the limited partners). Whilst this balance of power facilitates passive investment and limits the liability of investors; it begs the question: how are the interests of its limited partners protected? The recent judgment discussed in this note provides some answers to this question.

On 25 November 2021, the Grand Court of the Cayman Islands delivered the first Cayman Islands judgment clarifying the meaning and application of section 33(3) of the Exempted Limited Partnership Act (ELPA), which provides limited partners in an ELP with the statutory right to bring derivative claims on behalf of the ELP. This represents an important protection against a miscreant or conflicted general partner who refuses or fails to bring a claim which the limited partners believe would be in the interests of the partnership.

The judgment also deals with the nature and extent of the duties owed by a general partner to a limited partner and the latter's ability to pursue any claims for breach of those duties.

Section 33(3) of the ELPA provides:

"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."

# Background

The Port Fund L.P. (**Fund**) is a Cayman Islands ELP and was set up in 2007 as a vehicle for investments in port-related assets around the world. Various state-owned entities invested.

On 14 October 2020, the majority (in value) of the limited partners of the Fund issued proceedings against the general partner of the Fund, namely Port Link GP Ltd, concerning allegations of wrongdoing in relation to the dealings with the assets and affairs of the Fund.

The Defendants issued strike out and security for costs applications.

## Judgment

Parker J dismissed the Defendant's strike out applications and permitted the limited partners' derivative claims to continue.

### **Section 33(3) of the ELPA**

The Defendants argued that the Court ought to adopt the approach to derivative claims taken in the context of companies, trusts or foreign limited partnerships. However, Parker J agreed with the limited partners' argument that section 33(3) of the ELPA "occup[ies] the field" in the Cayman Islands in respect of ELP derivative claims, with there being "no room for a case by case judge led formulation of a common law or equitable test." The learned Judge found that it would be a matter of fact whether a general partner had failed or refused to institute proceedings.

As such, other tests for the bringing of derivative claims (such as in the corporate, trust, foreign limited partnerships) were considered to be irrelevant. In short, the Court found that an ELP is a creature of Cayman Islands statute with its own regime for the bringing of derivative claims.

Accordingly, the test under section 33(3) did not require a limited partner to specifically and expressly request that the general partner bring certain claims, and for the general partner to refuse for section 33(3) of the ELPA to be capable of being relied upon. It was enough that the general partner had failed to bring the claims.

### **Partnership account – v – direct claims**

Parker J concluded that the limited partners were permitted to bring claims on their own behalf and were not restricted to the taking of a partnership account (such as would be the case in respect of an ordinary partnership), as argued by the general partner, for the following reasons.

Firstly, a general partner owes fiduciary and contractual duties directly to the limited partners and those duties are enforceable directly by the limited partners. Therefore, to the extent that there is a breach by the general partner of those duties, these claims are vested in the limited

partners themselves and may be brought directly.

Secondly, whilst alike in many ways, and in fact the rules of common law and equity applicable to partners and partnerships are preserved unless they are inconsistent with the express provisions of the ELPA, there are important differences between a general partnership and an ELP provided for in the ELPA Act. In particular;

- i. a general partner has unlimited liability whilst the liability of a limited partner is limited to its capital contribution;
- ii. a general partner owes fiduciary duties to the limited partners (unless modified by the partnership deed) whereas limited partners owe no fiduciary duty either to the ELP or to other partners (unless the partnership deed provides otherwise); and
- iii. limited partners have no active involvement in the business of the ELP, which is carried out by a general partner.

In light of these differences, the importation of the rule from ordinary partnerships that the taking of partnership accounts is the only route for a limited partner to obtain redress for the wrongs of a general partner was inappropriate.

### **Security for costs**

The Defendants' applications seeking security for costs were also dismissed. In the present case, the plaintiffs were both state entities and Parker J affirmed an established line of authority (*Tasarruf Mevduati Sigorta Fonu [2006 CILR 351]* and *Re Cybervest Fund [2006 CILR 80]*) that there is a rebuttable presumption that security for costs should not be ordered against state entities and which arises from "comity and common sense" unless there are exceptional circumstances and such circumstances did not exist in this case.

### **Conclusion**

The main body of the Cayman Islands case law concerning ELPs arises in the context of the winding up of ELPs, whereas this judgment is the first to consider derivative claims by limited partners and the ability to bring direct claims against a general partner of an ELP.

The judgment provides helpful guidance and clarification as to the statutory test for the bringing of a derivative claim on behalf of an ELP, and claims against a general partner.

David Allison QC, together with Rachael Reynolds QC, Jennifer Fox, Oliver Green and Harry Clark of Ogier successfully appeared for the plaintiffs.

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