

Cayman limited partner protections

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Cayman Islands exempted limited partnerships (ELPs) 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. The fund documentation invariably contains extensive details of the general partner's rights, powers and protections. Nevertheless, in addition to their contractual entitlements, the limited partners also have certain protections under Cayman law that it is helpful for both sponsors and investors to understand.

This article will briefly consider certain of the rights often available to a limited partner to obtain redress in the face of mismanagement of an ELP.

1. Equitable rights and inviolable duties

A Cayman 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). The primary check on this unbalanced balance of power in this relationship is that, despite the significant freedom to agree the terms of the relationship between the partners, there are certain duties and principles that cannot be avoided.

Firstly, the general partner has a inviolable statutory duty of good faith. This duty requires the general partner to act 'at all times in good faith', ie genuinely and honestly, and (unless expressly disapplied) in what it considers to be the interests of the partnership as a whole. Other duties and obligations emerge from the application of the equitable and common law partnership principles that still apply to ELPs and attach to the general partner's exercise of its powers and discretions. The economic purpose of the structure and the contractual licence afforded to partners do not override the fundamental (and most prominently equitable) characteristics of an ELP as a partnership and the nature of the relationship created as being

principally fiduciary in character. English case law has established that the legal rights, duties and obligations of the partner will be determined so far as possible in accordance with that nature and often by analogy to general partnership principles.^[1] We expect that this approach will be followed in Cayman and thus will often afford significant protection to the rights of limited partners.

2. Right to information

Another protection is a limited partner's statutory right to obtain information about the ELP. A limited partner may compel the general partner to provide it with 'true and full information' about the business, affairs and financial condition of the ELP pursuant to section 22 of the Exempted Limited Partnership Act (**ELP Act**). This statutory entitlement is subject to few exceptions and its availability and scope has now been well established in a number of recent decisions of the Cayman courts.^[2] The most notable exception to the entitlement is where the terms of the limited partnership deed itself either curtails the statutory right or removes it completely. Importantly, unlike might be the case regarding the exercise of contractual rights, it has been held that the motives of the limited partner seeking partnership information pursuant to this statutory right are irrelevant.^[3] Where GP mismanagement is suspected, this statutory right therefore represents a powerful tool in the limited partner's armoury.

3. Ability to pursue claims

Given the nature of a Cayman ELP (explored above) it is clear that it is fundamentally different to a company. However, the Cayman legislature has afforded limited partners in Cayman ELPs the statutory right (pursuant to section 33(3) of the ELP Act) to bring derivative claims on behalf of the ELP. Corporate derivative claims are well established under Cayman law,^[4] and are claims brought or continued by a shareholder on behalf of the company usually in circumstances where the directors or the majority shareholders wrongfully prevent the company bringing such a claim itself. General partners of Cayman ELPs often cause the Cayman ELP to enter into agreements with third parties, and thus without limited partners having the ability to bring a derivative claim and in circumstances where a general partner failed or refused to bring such a claim on behalf of the ELP, for example arising out of the breach of any such agreements, then they might be left without a remedy. It is therefore well understandable why this statutory protection has been made available to limited partners.

The inherent logic in section 33(3) also accords with the approach taken with respect to English limited partnerships. In *Certain limited partners in Henderson PFI Secondary Fund II LP (a firm) v Henderson PFI Secondary Fund LP (a firm) and others* [2012] EWHC 3259 (Comm) (**Henderson**), the English High Court found that, whilst there is no statutory right for limited partners to bring a derivative claim in England, such a right exists under common law, and in that case the English court permitted a derivative claim to be brought against the investment manager of the investment fund in question (which manager owed its contractual duties to the

fund and not the individual limited partners). To bring a derivative claim in Cayman, the limited partner must show that the general partner has 'failed or refused' to bring the relevant action 'without good cause'. It will be a question of fact whether or not the general partner's failure or refusal to bring the claim in question was for a good cause. In addition to limited partner derivative claims, limited partners may also bring claims for the breach of duties owed to them personally such as those owed directly to them by the general partner (whether contractual or otherwise). Indeed the existence of this ability to pursue both types of claims was made clear in England in *Henderson*, although it would be surprising if that were not the case given the fundamental nature of an English limited partnership (which is very closely related to a Cayman ELP). These options should mean that a limited partner is not left without a remedy where for instance an errant general partner has abused its powers.

This brief note highlights a few of the rights often available to a limited partner of a Cayman ELP concerned with the behaviour of general partners or related parties. Of course other options may also exist which could include leveraging any role on any limited partner advisory committee, removing a general partner utilising any provisions in the fund documentation, and the right to petition the Cayman court to wind up the ELP on the basis that it would be just and equitable to replace the general partner with liquidators. In all, the protections afforded to limited partners in a Cayman ELP can be significant and create a balance between general partners and limited partners that should be welcomed by all parties.

[1] *Inversiones Frieira SL v Colyzeo Investors II LP* [2012] Bus LR 1136 at 1146 [23] per Norris J.

[2] See *Dorsey Ventures 2019 (1)* CILR 249 (**Dorsey**), and *In the Matter of Gulf Investment Corporation et al v The Port Fund LP et al* (Unreported 16 June 2020) (**Port Fund**).

[3] *Dorsey* and *Port Fund*.

[4] *Renova Resources Private Equity Limited* [2009] CILR 268.

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