IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 236 OF 2020 (RPJ)

BETWEEN:

(1) KUWAIT PORTS AUTHORITY

(2) THE PUBLIC INSTITUTION FOR SOCIAL SECURITY

Plaintiffs

AND:

(1) PORT LINK GP LTD.

(2) MARK ERIC WILLIAMS

(3) WELLSPRING CAPITAL GROUP, INC

(4) KGL INVESTMENT COMPANY ASIA

Defendants

IN CHAMBERS

Appearances:	Mr David Allison QC, Ms Rachael Reynolds QC, Ms Jennifer Fox, Mr Oliver Green, and Mr Harry Clark of Ogier for the Plaintiffs
	Ms Clare Stanley QC, Mr Peter Tyers-Smith and Mr Thomas Wright of Kobre & Kim on behalf of the First Defendant
	Mr Graham Chapman QC, Mr Andrew Pullinger, Mr Harry Shaw, and Ms Katie Logan of Campbells on behalf of the Second - Fourth Defendants
Before:	The Hon. Justice Parker
Heard:	13 – 19 October 2021
Draft Judgment Circulated:	17 November 2021
Judgment Delivered:	25 November 2021

HEADNOTE

*Exempted Limited Partnership Act (2021 Revision)-**strike out**- GCR O.18 r.19 -Section 33 ELPA-direct and derivative claims by limited partner against general partner and others-procedure-nature of Exempted Limited Partnership-section 33(3) ELPA derivative claims-failure or refusal without cause-approach to the evidence on 'without cause'-joinder of the limited partnership-GCR O.81 r.12-discretion-**security for costs**- GCR O.23 r. 1-foreign plaintiffs-discretion-foreign government or state agency-assets within jurisdiction- undertakings by plaintiffs*

JUDGMENT

Introduction

1. The Plaintiffs (KPA and PIFSS) are Kuwaiti state-owned enterprises and are financed by Kuwaiti public funds. They are Limited Partners in The Port Fund L.P. ("TPF").

2. TPF is an exempted limited partnership formed under the Exempted Limited Partnership Act (as amended) ("ELPA"), pursuant to the terms of a limited partnership agreement dated 21 March 2007 and amended and restated on 24 July 2008 (the "LPA").

3. The First Defendant ("D1") Port Link GP Ltd (the "GP"), is a Cayman Islands company incorporated on 8 March 2007 as an exempted limited company. It is the General Partner of TPF and was responsible for managing its affairs at all material times.

4. According to the Plaintiffs TPF made four known investments over the course of its term, two of which were written off as total losses[1]. Its main asset, the Clark Global City asset in the Philippines, was sold in November 2017 and USD 496,429,767 representing the net proceeds of sale, were paid into the GP's account with Noor Bank in Dubai[2]. The Noor Bank account, according to the Plaintiffs, was frozen upon the resolution of the Dubai Public Prosecutor following a suspicious transaction report made by Noor Bank to the relevant Dubai authorities[3]. The Kuwait Attorney General entered into correspondence with the Dubai authorities seeking to recover the funds for the benefit of the Plaintiffs and (the Plaintiffs say) the other Limited Partners[4]. It should be noted that this episode is hotly contested by the Defendants who argue that the Plaintiffs sought to have most of this amount paid over to them[5] and instead of obtaining orders from the relevant courts sought to extract the monies through high level political channels. Happily those matters do not arise for determination on this application.

5. What is relevant for this application is that when the account was unfrozen in February 2019 the Plaintiffs say there was a fraudulent scheme to expropriate money from TPF by the Defendants. It is alleged that the GP made numerous payments to third parties engaged by the GP, many of whom were apparently engaged for the purpose of assisting with unfreezing the

[1] *Florent 2 §40*
[2] *Florent 2 §46*
[3] *Florent 2 §§54 and 56*
[4] *Florent 2 §57*
[5] *Lewis 3 § 38*

funds in the Noor Bank account and some of whom were closely associated with the KGLI group and those who controlled and owned the GP[6]. The Plaintiffs' claims derive from the way in which the GP dealt with the proceeds of sale.

The former directors of the GP

6. Marsha Lazareva ("Ms Lazareva") was a director of the GP between 8 March 2007 and 24 May 2018. Saeed Dashti ("Mr Dashti") was a director of the GP between 16 April 2007 and 24 May 2018. Both Ms Lazareva and Mr Dashti have been convicted in proceedings concerning various criminal offences connected to TPF and/or the Limited Partners in Kuwait (the "Kuwaiti Criminal Proceedings").

7. Abdulghfoor A M Alwadhi ("Mr Alwadhi") was a director of the GP between 18 November 2010 and 28 March 2021. He was its sole *de jure* director from 24 May 2018 until 29 January 2020.

D2-D4

8. The Second Defendant ("D2"), Mark Eric Williams ("Mr Williams"), is resident in the USA. He is the sole shareholder of Port Link Holdings USA Inc, a Delaware company which he incorporated on 29 May 2018. This entity is the sole shareholder of the GP.

9. He was Vice President of KGL Investment Company KSCC ("KGLI KSCC") from September 2007 until 2008 and Investment Director of KGLI KSCC from 2009 to 2011. KGLI KSCC is incorporated under the laws of Kuwait and acted as TPF's sponsor and placement agent. He was also a member of the Investment Committee of TPF from 2009 through 2013.

10. Mr Williams is also the CEO, CFO, President, Vice-President, Treasurer and Secretary of the Third Defendant ("D3"), Wellspring Capital Group, Inc ("Wellspring"). Wellspring is a company incorporated in the state of Georgia in the USA. Wellspring is owned by the Mark E Williams Living Trust, the Trustees of which are Mr Williams, his wife (Laura Williams), and his brother (Dylan Williams).

[6] *Florent 2 §§245-246 and 274*

11. Mark Williams was also closely involved in the management of the Fourth Defendant ("D4"), KGL Investment Company Asia ("KGLI Asia"), a Cayman Islands incorporated company, now in voluntary liquidation. It provided administrative support to TPF between December 2017 and August 2020, pursuant to an Administrative Support Agreement dated 1 December 2017 (the "ASA").

The Plaintiffs' case in summary

12. The Plaintiffs' case is that the Defendants' wrongdoing has caused TPF and its Limited Partners losses well in excess of USD 100 million. The Plaintiffs' primary case is that they are entitled to bring their claims against the GP alleging systematic unlawful conduct in relation to the assets and affairs of TPF on their own behalf, but in the alternative they also advance those claims as derivative claims on behalf of TPF.

13. Similarly the Plaintiffs' primary case is that they are entitled to bring claims against Mr Williams and Wellspring on their own behalf, although they also seek to advance like claims as derivative claims on behalf of TPF. The Plaintiffs' claims against D4 are advanced solely on a derivative basis.

14. The Plaintiffs specifically claim: [7]

    a) against D1 to D3, equitable compensation payable to them direct, alternatively to TPF and damages payable to them direct, alternatively to TPF.

    b) against D1, accounts in equity on the footing of wilful default, alternatively common accounts.

    c) against D1 and D3, relief under the Fraudulent Dispositions Act.

    d) against D3, a declaration that it holds the Wellspring payment or the traceable proceeds thereof on constructive trust for TPF or the partners therein.

    e) against D4, equitable compensation payable to TPF.

[7] *§211 ASOC*

GP's current directors

15. The GP's current directors are two individuals at FFP (Directors) Limited who were appointed on 29 January 2020 (the "FFP Directors"). Andrew Childe and Christopher Rowland of FFP were the original appointees. Mr Rowland was subsequently replaced by Richard Lewis on 28 October 2020.

The derivative case

16. The Plaintiffs argue that each of the derivative claims in the Amended Statement of Claim ("ASOC") are brought pursuant to section 33(3) of the ELPA on the basis that the GP has without cause failed, further or alternatively refused, to initiate these proceedings and there is no real prospect of it doing so. The Plaintiffs maintain that the FFP Directors are not independent and have not investigated the relevant matters properly or formed sound judgments in relation the claims the Plaintiffs wish to bring.

17. The FFP Directors for their part say that they have conducted an extensive investigation into the actions of the GP and the former management team of TPF for the benefit of the Limited Partners. They have concluded that there is currently cause not to bring claims advanced as derivative claims by the Plaintiffs. Even if they had concluded that there were claims of merit available to TPF it would be necessary for them to consider, on a cost benefit analysis, whether those claims were worth pursuing and if so whether TPF was in a position to pursue them and, if not, whether it could raise funding to do so, and whether doing so would be in the best interests of TPF. Detailed reasons for this are given in the third affidavit of Richard Lewis[8].

18. The Plaintiffs do not suggest that the FFP Directors are implicated in the Defendants' alleged wrongdoing which is said to have taken place well before they were appointed, but contend that the FFP Directors have been so influenced by those who allegedly conspired with the GP and its advisors at the relevant times that they have lost their objectivity. They do not accept that a proper investigation has been conducted by them.

[8] *Lewis 3, 4 June 2021*

The relevant entities and their interests

19. The relevant factual involvement of the various entities can be taken from the second and third affidavits of Mr Florent sworn on behalf of the Plaintiffs[9]. Mr Florent is a partner at Baker McKenzie, the firm advising the Plaintiffs in connection with their attempts to seek redress for their losses.

20. TPF is comprised of twelve partners. They are the GP, the two Plaintiffs as Limited Partners, and nine other Limited Partners.

21. Between them, the Plaintiffs invested USD 125 million in TPF, amounting to almost two thirds (65.16%) of the total supposed investment in TPF[10].

22. Among the other Limited Partners in TPF, Gulf Investment Corporation ("GIC") and the General Retirement and Social Insurance Authority of Qatar ("GRSIA"), who between them invested 15.14% of the total supposed investment in TPF, have brought claims against D2-D3 in the State of Georgia, USA alleging (*inter alia*) that the Georgia defendants are guilty of dishonesty, deliberate breaches of fiduciary duty and unlawful means conspiracy.

23. Therefore, according to the Plaintiffs, the majority by value of the Limited Partners and investors in TPF (some 80.3%) are litigating against it on the basis that the GP or related entities have committed serious wrongdoing. GIC and GRSIA support the current proceedings and have consented to a stay of their claim in the State of Georgia pending the determination of these proceedings.

24. According to the Plaintiffs, of the remaining 19.7% (by value) of the Limited Partners and investors in TPF, 14% of the total supposed investment in TPF are associated with the GP.

25. Limited Partners who are currently presumed 'neutral' therefore account for only 6% of the total supposed investment in TPF.

26. In addition, TPF is no longer trading. It has no creditors apart from disputed claims by the Defendants and certain advisers' fees.

[9] *26 August 2021 and 27 August 2021*
[10] *Although the Plaintiffs do not accept KGLI KSCC invested USD 20 million in TPF as the GP and KGLI KSCC claim.*

27. The Court heard applications to strike out parts of the Plaintiffs' case[11], for case management directions and for security for costs[12], made on behalf of the Defendants over five days.

The strike out applications

28. Mr David Allison QC, who appeared for the Plaintiffs, properly conceded in his oral submissions that criminal convictions pleaded against the two former directors of the GP convicted in the Kuwaiti criminal proceedings should be struck out.[13]

29. However, he resisted all the other applications to strike out his clients' claims. I summarise the arguments deployed in those applications below.

Summary of submissions

30. Ms Clare Stanley QC, who appeared for the GP (D1), submitted in summary that:

i) to the extent that the Plaintiffs seek to bring derivative claims, these are claims for TPF to bring, by its duly authorised agent, namely the GP. In order for the Plaintiffs to bring a derivative claim, they need to plead a claim which meets the statutory threshold in section 33 of the ELPA, and join TPF which they have not done.

ii) to the extent that the Plaintiffs bring direct claims and seek to obtain damages from the GP and D2-D4 paid to themselves directly, this is impermissible. They are but two members of a class of eleven Limited Partners (the other nine Limited Partners not being parties to these proceedings), and they have no standing, still less authority, to receive such compensation themselves. The Plaintiffs are contractually and statutorily prohibited from involving themselves in the management of TPF, and payment of compensation to themselves would be to usurp the management function of the GP.

iii) the Plaintiffs have not obtained any authority from the other Limited Partners permitting them to have control of TPF funds (any compensation), whether as trustees or otherwise. Given the historic willingness by the State of Kuwait (of which the Plaintiffs are entities) to seize TPF's funds for the sole benefit of the Plaintiffs, and the

[11] *Pursuant to GCR O.18 r.19*
[12] *Pursuant to GCR O.23 r. 1*
[13] *§§16,17,19,20 and 21 ASOC*

failure of KPA to repay over USD 13 million which is due to TPF, the Court cannot be confident that it would be in TPF's best interests for the Plaintiffs to have control of the choses in action belonging to TPF[14].

iv) the Plaintiffs complain about a number of payments made by the GP during the lifetime of TPF. It would be arguable (if pleaded) that the Plaintiffs can seek partnership accounts from the GP (notwithstanding that there has been no dissolution) in respect of those payments, but presently the Plaintiffs have not pleaded such a claim and no application to amend has been made. The joinder of the other Limited Partners would be necessary for such accounting proceedings.

v) even if the Plaintiffs had sought partnership accounts (originally or by amendment), the 'scattergun' and 'kitchen sink' approach that the Plaintiffs have adopted in their ASOC is not conducive to the expeditious and efficient resolution of such an account. Some order needs to be brought to the case. The starting point might be, for example, a Scott Schedule by the Plaintiffs.

31. Mr Graham Chapman QC, who appeared for D2-D4, submitted in summary that :

i) the derivative claims should be struck out on the ground that the Plaintiffs have not established, and cannot establish, any right to bring those claims and, even if they could, they should not, as a matter of the Court's discretion, be permitted to continue with those claims.

ii) this issue turns on the proper construction and application of section 33 of the ELPA which provides that a claim belonging to a limited partnership must be brought by the GP acting for and on behalf of the partnership.

iii) exceptionally, section 33(3) also permits a derivative claim to be brought by a limited partner for and on behalf of a limited partnership where the GP has refused or failed to bring that claim "without cause". The decision by the GP not to bring or adopt the claims has been taken by the FFP Directors. The FFP Directors have not simply failed to pursue the claims but have, after a detailed investigation and undertaking their own

[14] *Florent 2 § 61 says that he has been informed by the Director General of KPA that the full amount is held in a segregated account until its external auditors have confirmed that there is no dispute or question over the amount of its entitlement.*

assessment of the position, positively decided in respect of each claim not to bring the clams as they do not consider doing so would be in the best interests of TPF.

iv) accordingly, it is these decisions of the FFP Directors not to bring the claims which the Plaintiffs have the burden of demonstrating were taken "without cause". This requires the Plaintiffs to plead and demonstrate that the decision itself or the decision making-process was inhibited in the sense of being bound up in the wrong-doing upon which the claims are based, or which results from a conflict of interest, which prevents an independent decision in relation to the claims being reached.

v) alternatively, the Plaintiffs must show that the decision is so unreasonable as effectively to be irrational, such that it could not have been taken in good faith in the interests of TPF. Given the independence of the FFP Directors, that they were not involved in the events that are said to give rise to the claims and, given further, their detailed and dispassionate review of the claims, the Plaintiffs are simply unable to discharge this burden. This is all the more so where it is not even alleged that the FFP Directors have acted dishonestly or in bad faith.

vi) notwithstanding the extensive affidavit evidence submitted, the Court should not determine the merits of the Plaintiffs' claims on a summary basis in these applications.

vii) the decisions taken by the GP, acting through the FFP Directors, not to bring or adopt the derivative claims brought by the Plaintiffs were reasoned and reasonable. The GP's evidence addresses this issue and, in order to assist the Court, provides a (partnership) account. This evidence demonstrates that, far from being without cause, the decisions not to bring the claims have been taken with cause (although this need not be demonstrated in order for the strike out application to succeed, the burden being on the Plaintiffs to demonstrate that the decisions were taken without cause). Importantly, they were commercial decisions taken by the FFP Directors and the Court should not ordinarily interfere, absent special or exceptional circumstances.

viii) the Plaintiffs have, on their own case, an available alternative remedy in the form of the personal and direct claims that they are currently pursuing against the Defendants (other than KGLI Asia) in the proceedings and the derivative claims should be struck out as an exercise of the Court's discretion. D2-D4 do not seek to strike out the direct claims brought against them by the Plaintiffs.

32. In response to these points Mr Allison QC submitted in summary that:

i) the Plaintiffs' claims are principally (if not exclusively) advanced as direct claims, vested not in TPF but in the Limited Partners. A proper analysis of the unique nature of Exempted Limited Partnerships ("ELPs") demonstrates this to be so.

ii) an ELP is more closely analogous to a partnership, not a company. Whereas the directors of a company owe fiduciary duties to the company alone (and not to the company's shareholders), so that a breach of their fiduciary duties is only actionable by or on behalf of the company, the general partner of an ELP owes fiduciary duties to all of the ELP's limited partners. Such duties can only be enforceable by the Limited Partners themselves. Indeed, claims in respect of breaches by a general partner of an ELP of the statutory, equitable, common law and contractual duties that they owe to the ELP's Limited Partners are not assets of the ELP at all: they are vested in the Limited Partners alone. They are thus not claims that can be brought 'on behalf of the ELP' and cannot be brought 'derivatively'. When a wrong is done to a company, it is the company that suffers loss. If the company has a cause of action in respect of that loss, the law does not recognise loss suffered by its shareholders by reason of a decrease in the value of their shareholding and/or the dividends or other distributions that they received by reason of their shareholding. In contrast, when a wrong is done to an ELP, its constituent partners suffer loss directly: the ELP does not suffer any loss that is separate or distinct from the partners' loss, because an ELP (unlike a company) has no separate legal personality.

iii) on a proper understanding of section 33(3) of the ELPA, all the derivative claims pleaded in the ASOC are permissible. The Court need not embark on a detailed inquiry as to the substantive merits of the underlying claims. The derivative claims are (at least) well maintainable as pleaded. The GP has had a reasonable opportunity to bring the claims in question but has not done so. Therefore the GP has "failed" to bring them within the meaning of section 33(3). Moreover, if and to the extent that it is relevant, it is clear that the FFP Directors have no intention of causing the GP to bring them.

iv) the GP, which is distinct from the FFP Directors, is hopelessly conflicted by the actions of wrongdoers who caused it to breach its duties and is bound up in the wrongdoing. It is prevented by reason of this conflict from reaching an independent view of the

Plaintiffs' claims which are clearly against its interests. The GP cannot simply cure this irreconcilable conflict by having appointed the FFP Directors in 2020.

v) in any case the Court cannot safely hold at an interlocutory stage that the GP had "cause" not to bring the derivative claims, not least because (a) both the GP and its former attorneys, Walkers, are (and were) conflicted, it being the Plaintiffs' case that they both are guilty of serious wrongdoing in their dealings with TPF, and (b) the assessment of whether the GP had "cause" not to institute the derivative claims is informed by the merits of the claims, which the Court cannot safely or fairly assess until trial. The question of whether the GP had 'cause' is a question to be determined as at the date that claims which engage section 33(3) were issued.

Relevant legal principles

33. There are a number of relevant legal principles that I bear in mind in determining the strike out applications:

i) An application to strike out should not be granted unless the Court is certain, not just satisfied on the balance of probabilities, that the claim is bound to fail. This is a high standard of proof[15].

ii) A statement of claim is not suitable for striking out if it raises a serious live issue of fact which can only be finally determined by hearing oral evidence.[16] The live issue of fact with regard to the derivative claims is the 'without cause' issue under section 33(3) ELPA.

iii) It is not appropriate to strike out a claim that raises complex issues of law, a fortiori in an area of developing jurisprudence. In such areas, decisions as to new points of law should be based on actual findings of fact[17].

[15] *Hughes v Colin Richards & Co [2004] EWCA Civ 266 cited with approval in Re Sphinx Group [2010 1 CILR 234] at §37*
[16] *Bridgeman v McAlpine-Brown, 19 January 2000, unreported.*
[17] *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd [2020] CIGC J0406-3 unreported 6 April 2020 per Segal J at §§111 and 112 citing with approval Farah v British Airways, The Times, 26 January 2000, CA*

iv) In addition all Leading Counsel agreed a 'mini-trial' is inappropriate in deciding whether the section 33(3) criteria are satisfied in this case.

v) Likewise the allegations in the ASOC are not, as Leading Counsel all agreed, to be assessed on the merits at the hearing of the strike out applications. Notwithstanding detailed criticisms of the ASOC made by both Mr Chapman QC and Ms Stanley QC, this is not a 'merits based' strike out application. I proceed on the basis that the pleaded claims meet the test of a real (as opposed to fanciful) prospect of success at a trial, and they are good arguable claims.

vi) As it is for the Defendants to prove that the claims should be struck out, it is only if the Court is certain[18] that the GP has *not* refused or failed to bring the claims "without cause", that the derivative claims must be struck out. I do not accept Mr Chapman QC's submission that the Plaintiffs have the legal burden at this stage to prove that they may bring the derivative claims. There is, for the reasons given below, no 'leave stage' for the Plaintiffs to overcome when section 33(3) is examined, or any special circumstances to be pleaded. It is different from the position of a shareholder asking the Court to be allowed to bring a derivative action on behalf of a company, where it is for the shareholder to establish to the satisfaction of the Court that he should be allowed to sue[19].

vii) I accept that in deciding the issue now rather than at trial the Court needs to assess on the available evidence whether there is an arguable case that the GP and, if necessary, the FFP Directors have failed without cause to bring the claims.

Analysis

Background to Plaintiffs' complaints

34. It is clear from the material before the Court [20] that the Plaintiffs have been raising serious concerns with the GP concerning the management of TPF for many years dating back to October 2016. The requests of the Plaintiffs seeking large amounts of information regarding

[18] *Re Sphinx ibid*
[19] *Barrett v Duckett [1995] 1 BCLC p 250 §§ 5 and 6 per Peter Gibson LJ*
[20] *Florent 2 at §92*

the state of the business and financial condition of TPF has led to litigation between the GP and KPA in this Court before these proceedings were issued in October 2020[21].

35. The Plaintiffs, relying in part on information obtained as a result of those proceedings, now make particularised allegations about the conduct of the GP, Mr Williams, Wellspring and KGLI Asia and allege losses well in excess of USD 100 million caused to the TPF.

36. Dishonesty, breach of fiduciary duty and knowing receipt, as well as unlawful means conspiracy are alleged. The ASOC alleges that the GP breached numerous statutory, contractual, common law, and fiduciary duties owed to TPF and to the Limited Partners by making substantial payments in respect of five main categories with TPF monies[22]. Each of these categories will involve a detailed factual enquiry at trial.

37. The Plaintiffs also make numerous complaints in this application about the appointment of the FFP Directors and their approach and conduct.

38. First, they were appointed by Mr Alwadhi who was the sole director of the GP and Mr Williams, the ultimate beneficial owner of the GP, on 29 January 2020[23]. Mr Alwadhi was a director of the GP from 2010 to March 2021 and the sole appointed director from May 2018 to January 2020 at the time when much of the alleged wrongdoing took place.

39. Second, they assert that it is remarkable, given the allegations made against him in these proceedings and in the proceedings in the State of Georgia, that Mr Williams appears to be one of the main sources of information for the FFP Directors[24]. Moreover, they point out that the FFP Directors continued to be advised by Walkers until 14 September 2021 and continue to be advised by another law firm, Crowell & Moring. They assert that neither law firm can be regarded as suitable counsel for assisting with or advising on independent investigations, given that they were both involved with advising the GP at times when the alleged wrongdoing was carried out[25].

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[21] See judgment (unreported dated 16 June 2020) Parker J which dealt with the Plaintiffs entitlement to true and full information regarding the business and affairs of TPF under s.22 ELPA.
[22] Apache fees, Placino payment, lobbying fees for Dashti, Lazareva and third parties, payments to Kuwaiti service providers and conduct in the DIFC proceedings.
[23] Exhibit RL 5 § 257 and Florent 2 §128
[24] Florent 2 at § 130
[25] Florent 2 §136

40. Finally the Plaintiffs also assert that the FFP Directors are being financed by KGLI KSCC, a company which was centrally involved in the alleged wrongdoing. Mr Dashti and Ms Lazareva were shareholders and Chairman and Vice Chairman respectively. Mr Williams is or was its Vice President and investment director. KGLI KSCC is said to be responsible for placing KGLI Asia into voluntary liquidation on 20 December 2020 and seeking to have it dissolved[26].

41. The Plaintiffs say that since their appointment the FFP Directors have consistently rejected their concerns out of hand including opposing proceedings in this Court and in the US for disclosure of information.

42. The Plaintiffs allege that the FFP Directors have been so influenced by those implicated in the alleged wrongdoing, including their advisers, that they have lost independence and objectivity and have shown themselves to be incapable of making a fair judgment after a thorough and independent investigation. The alleged wrongdoers at the GP may no longer be directors, but Mr Williams through his ownership interest in the GP, the Plaintiffs allege, still has a significant interest and influence.

43. The FFP Directors deny any improper influence and say they have reached fair judgments after a thorough and independent investigation. They say that the sole shareholder of the GP has undertaken (albeit this is dated 23 March 2021 some five months after the issuance of these proceedings against D1), not to obstruct or interfere with the independent directors in the discharge of their duties.[27] The Plaintiffs say Mr Williams could easily revoke this and remove the FFP Directors.

44. It is also said by the Plaintiffs that the GP and the FFP Directors, whose primary duty is to the GP of which they are directors, have an irreconcilable conflict of interest in assessing whether TPF has and should bring claims against the GP. This is also denied by the Defendants and the FFP Directors.

45. In order to determine the legal questions at the heart of the arguments as to the position of the GP, the Plaintiffs' claims on behalf of themselves directly and on behalf of TPF, it is necessary to examine the characteristics of an ELP.

[26] *Florent 2 at §152 and exhibit RL 3 at §5*
[27] *Lewis 3 §33*

An ELP is distinct from an ordinary partnership

46. An ELP is a creature of statute. There is a specific Cayman Islands statutory regime which regulates the rights and obligations of the Limited Partners and the General Partner(s) *inter se;* the ELPA.

47. 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[28]. It follows that the express provisions of the ELPA are to prevail in the event of any inconsistency with the rules of common law and equity applicable in ordinary partnership matters.

48. An important characteristic of an ELP and point of distinction from an ordinary partnership is that, unlike the GP(s), the Limited Partners in an ELP have limited liability[29].

49. Another important characteristic is that the Limited Partners have no active involvement in the business, which is carried out by the GP. In particular, all contracts are entered into by the GP for and on behalf of the ELP[30]. The fact that a Limited Partner is prohibited from taking part in the conduct of the business of the limited partnership can be said to be the *quid pro quo* for having the benefit of limited liability.[31]

50. By section 19(1) of the ELPA the GP of an ELP is subject to an express (statutory) duty of good faith requiring the GP to act in the interests of the ELP. That is unsurprising given the GP's key role in the limited partnership's business dealings.

51. Importantly, unless the partnership agreement provides to the contrary, a Limited Partner owes no fiduciary duty either to the ELP or to other partners.[32] This is of course different from an ordinary partnership where mutual and reciprocal rights and obligations are owed to each other by partners.

52. As can be seen from this analysis, the existence of the GP in an ELP introduces an important difference to ordinary partnerships with regard to the management of the partnership business and the specific duties owed.

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[28] *ELPA section 3*
[29] *ELPA sections 4(2) and 20*
[30] *ELPA section 14(2)*
[31] *ELPA section 14 (1)*
[32] *ELPA section 19(2)*

53. The consequence of this unique structure is that an ELP, which consists of the GP(s) and non-participating Limited Partners with limited liability, also creates different rights and obligations to an ordinary partnership arising between the partners.

An ELP is distinct from a company

54. Critically, in contrast to a company, but in common with a partnership, an ELP has no separate legal personality and exists only as its constituent partners. That is a fundamental legal distinction.[33] It cannot own property in its own right.

55. The fact that the partnership has no separate legal personality means that the GP of an ELP holds its rights and property of every description, including choses in action, on trust for each of the partners which make up the limited partnership as a whole. There is no ability however to enforce the GP's obligations as trustee by the partnership as a whole, because it has no legal personality.

56. Moreover the GP of an ELP owes its duties to all of the individual limited partners. That is different to a board of directors of a company who only owe duties to the company as the legal entity, not to its shareholders.

57. A company is a separate legal entity in itself and its articles of association form the contract between the company and its members. The so called *Foss v Harbottle*[34] rule imposes upon the directors of the company fiduciary duties to the company alone, and not to the company shareholders. Any breach by the directors is only actionable by or on behalf of the company. The rule is not just a rule of the law of companies in England, it has been extended to a rule of the law of associations applicable to all associations which can bind themselves by decision of a simple majority of their members[35].

58. It follows that where the company has suffered loss it is the company that has a cause of action in respect of that loss and the law does not recognise losses suffered by shareholders[36].

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[33] *See section 3 Partnership Act (2013 Revision) and Padma (unreported 8 October 2021) § 21 Parker J.*
[34] *(1843) 2 Hare 461*
[35] *Palmer Limited Liability Partnership Law (second edition) A5-28 p198 ,citing Edwards V Halliwell [1950] 2 All ER 1064 CA which concerned a trades union.*
[36] *Sevilleja v Marex [2020] UKSC 31(the so called rule against reflective loss)*

59. There are, however, important exceptions to this rule where the wrongdoer directors are in control of the company. The courts have made an exception in those cases so that shareholders can sue on behalf of the company, derivatively, to prevent injustice[37].

60. Another distinction an ELP has from a company is that the GP in an ELP is the only entity who can institute proceedings on behalf of the partnership[38]. If the limited partners have claims against the GP it is in practice unworkable for it to bring proceedings against itself for breach of duty. If the GP is the arbiter of whether to bring claims against itself that clearly gives rise to a conflict of interest.

Direct claims by a Limited partner

61. I accept Mr Allison QC's submission that the logical consequence of the aforesaid analysis of the nature and characteristics of an ELP is that the GP's obligations must be capable of enforcement by each of the partners to whom it owes duties individually. That is to be contrasted to the situation where directors of a company hold the company's assets and are treated as trustees because they owe fiduciary duties to the company. In that situation they hold the assets for the company, rather than the shareholders.[39]

62. I accept Mr Allison QC's submission that the GP of an ELP owes fiduciary duties to each of the Limited Partners and any breaches are therefore enforceable by the Limited Partners themselves.

63. It follows that where an ELP is alleged to have suffered loss, as in this case, that is the loss of each of the Limited Partners. There is no distinct or separate loss in respect of 'the partnership' (TPF), which as an entity does not exist at law. The Limited Partners in enforcing their individual claims do not owe duties to each other.[40]

64. I therefore find that the direct claims in respect of the individual partners' losses are vested in the Limited Partners alone, and are not claims that can be brought on behalf of TPF derivatively, except in the circumstances permitted by section 33(3) of the ELPA where the Limited Partners

[37] *Wallersteiner v Moir (no 2) [1975] QB 373 at p 390 and Iesini v Westrip [2009] 2526 at §§ 73 and 74 per Lewison J and UPM v Gilkicker [2013] Ch 551 Briggs J.*
[38] *Section 33(1) ELPA*
[39] *Auden Mckenzie v Patel [2019] EWCA civ 2291 § 57*
[40] *Section 19 (2) ELPA*

who wish to obtain redress for TPF are in effect put in the place of the GP, and bring claims on behalf of TPF.

65. The statutory and contractual prohibitions upon Limited Partners participating in the conduct of the business[41] do not affect this conclusion in my view, providing the circumstances of section 33(3) are met. Otherwise for the reasons stated above there would be no mechanism for a derivative claim on behalf of a limited partnership to be brought against a GP.

Henderson

66. The decision of the English High Court in *Henderson*[42] is instructive in this regard. Mr Justice Cooke was dealing with an English limited partnership, which also has no legal existence independent of its constituent partners. Whilst subject to a different (and much older) statutory regime, English limited partnerships are also creatures of statute and are similarly used by the financial community as a useful structure for investment.

67. It is also to be noted that Cooke J was deciding a number of points following a hearing on preliminary issues. It was not a strike out application, as in this case. The preliminary issues included whether the limited partners were entitled to pursue the claims as derivative claims on behalf of the partnership, and if so whether the pursuit of those claims constituted taking part in the management of the business of the partnership for the purposes of the Limited Partnerships Act 1907,[43] such that claimants would forfeit their limited liability. It is important to note that there is no section 33(3) equivalent provision in the English statute.

68. The claimants comprised the majority of the limited partners. D1 was the partnership, D2 the investment manager and D3 the general partner. It was alleged that D2 and D3 had used the partnership's capital to make unauthorised investments. The relationship between the parties was governed by the limited partnership agreement, the Limited Partnerships Act 1907 and a management deed.

69. Cooke J held that each limited partner could in its own individual capacity sue D3, the general partner for its own losses in respect of liabilities under the limited partnership agreement,

[41] *For example section 14 ELPA*
[42] *[2012] EWHC 3259*
[43] *section 6 (1)*

without reference to the losses of other limited partners, who chose not to make such a claim. The individual claims were not treated as partnership assets.

70. It seems to be the case that, for whatever reason, the arguments Ms Stanley QC advances that the Plaintiffs can only seek partnership accounts from the GP (notwithstanding that there has been no dissolution) were not advanced.[44]

71. Derivative claims were also sought to be brought by the limited partners both against D3, the general partner, and D2, the investment manager, on behalf of the partnership. The derivative claim was not permitted against the general partner on the basis that the limited partners had direct claims of their own against it and so a derivative claim was unnecessary.

72. Cooke J held that any claim brought by each limited partner as an individual contractual or fiduciary claim would not involve management of the partnership business. He also held that the partnership which consisted of the limited partners and the general partner together, had no form of joint right or claim against the general partner.

73. He says at § 28:

> *"The Partnership, unlike a limited company, does not possess a corporate legal personality. Like an ordinary partnership under the Partnership Act "the Partnership" is simply a convenient way of referring to the body of partners as a whole. In my judgement therefore no difficulty arises for a Limited Partner's claim against the General Partner, regardless of whether or not removal and substitution of the General Partner is possible. The claim to be made against the General Partner is that of the individual Limited Partners and is not a Partnership Asset…."*

74. Any claim against D2, the investment manager, was however a partnership asset and could only be pursued by the general partner in the name of the partnership or by means of a derivative claim. The derivative claim would have been permitted against the investment manager on the basis that there was a conflict between the general partner and the investment manager (because they were sister companies) and injustice would have been caused if no such claim had been allowed. In that event (with regard to the investment manager claim), he held that the limited partners would forfeit their right to limited liability.

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[44] *§28*

75. One of the arguments advanced by the Defendants on this application is that the effect of section 16(1) of the ELPA and the LPA (clauses 3.1 and 3.3) prevent such direct claims because the Limited Partners cannot usurp the function of the GP. They argued that the GP is the trustee holding all of the partnership property on trust for TPF, not the Limited Partners, who are prohibited from being involved. On that basis all claims for wrongs done to the partners, some eleven of whom have not given authority for the Plaintiffs' claims, belong to TPF and the GP is the *only* authorised agent of TPF able to sue.

76. The practical difficulty with that submission is that in practice the GP could obviously not sue itself and suffers from the conflict of interest I have outlined above. In addition, in agreement with Cooke J, I find that the Plaintiffs bringing such claims would not involve management of the partnership business. Moreover I find that the authority point does not arise because these are claims the Plaintiffs are entitled to bring on their own account.

77. I therefore reject the Defendants' argument that the individual partners have no entitlement to any specific asset or share of any specific asset and cannot obtain individual compensation as the Plaintiffs seek to do.

78. I have accepted that the consequence of the ELP structure is that the GP's obligations must be capable of enforcement by each of the partners to whom it owes duties individually. Again, in agreement with the analysis of Cooke J in this regard, I find that the Plaintiffs may bring direct claims. I find that a direct claim made against the GP is that of the individual partners and is not a partnership asset. They are claims which they are entitled to bring individually. That leads to the question of what is the correct procedure for them to be brought, which was Ms Stanley QC's principal argument.

Partnership accounts

79. Ms Stanley QC submits that the report of the decision of Cooke J does not deal with how the limited partners claims were advanced, whether by direct action for damages/compensation, or for partnership accounts. It is only the latter procedure which she says is legally permissible.

80. She concentrated her forceful submissions on the premise that the direct claims against the GP can *only* be vindicated by the taking of a partnership account[45]. Notwithstanding her arguments to the contrary, I do not accept that in a Cayman Islands ELP applying the provisions of the ELPA and bearing in mind the distinctive characteristics they import, that the causes of action belong to TPF and fall to be distributed by the taking of partnership accounts and in no other way.

81. Ms Stanley QC submits that the rights and obligations between the partners are only to be procedurally adjudicated by the taking of partnership accounts, before or after dissolution, because the English law authorities dealing with ordinary partnerships are 'pellucidly clear'[46]. However, on analysis in my view those authorities have no direct application to Cayman Islands ELPs.

82. Ordinary partnerships involve reciprocal fiduciary obligations between the partners and the necessary joinder of all partners to any proceedings so that the necessary accounting for any monetary claims can take place[47]. This is not the case with a Cayman Islands ELP.

83. As I have set out above, a Cayman Islands ELP is distinct from an ordinary partnership under English law. A general partner is inserted into the structure owing fiduciary and contractual duties directly to the limited partners and those duties are enforceable directly by the limited partners.

84. There are no reciprocal duties owed by the limited partners, unlike the position in ordinary partnerships. In fact no fiduciary duties are owed at all by the limited partners to the other partners, unless the limited partnership agreement provides otherwise.[48]

85. Each partner is not, as is the case in an ordinary partnership, jointly and several liable for the partnership's liabilities. The rules of equity and common law applicable to ordinary partnerships are in this respect inconsistent with express provisions of the ELP, which deals

[45] *Meyer v Faber (no 2) [1923] 2 Ch .421, Hurst V Bryk [2002] 1 AC 185 and Public Trustee v Elder Ch D [1926] 776*

[46] *Atkins Court Forms Partnership, Limited Partnerships and LLPs: Vol 29 § 15 and § 31 accounts and enquiries § 123 and § 138 Vol 29(2) § 461;, Popat v Soncchatra 1 WLR p 1367 at p1372 ,Hurst v Bryk [2002] 1 AC 185 at p 194 ,Meyer v Faber 2 Ch p 421 .*

[47] *See Public Trustee v Elder ibid at § 789*

[48] *Section 19(2) ELPA*

with unique rights and obligations of partners in an ELP and the statutory provisions of the ELP are to prevail.[49]

86. In these circumstances, not only do the English authorities and cases dealing with ordinary partnerships not apply, there seems to me to be no good reason why the taking of partnership accounts should be the only procedural route available to the Plaintiffs to obtain redress under the ELPA.

87. I have concluded that if there was a breach by the general partner of the statutory, equitable, common law or contractual duties owed to the limited partners, these claims are vested in the limited partners themselves and may be brought directly in the ways pleaded in the ASOC.

Section 33(3) ELPA

88. The general rule provided for in section 33(1) ELPA is that proceedings by or against an ELP may only be instituted by or against the GP, and a limited partner will not be a party to the proceedings. What Mr Chapman QC described as an exception to this general rule is provided for in section 33(3) ELPA.

89. I was informed by Mr Chapman QC that there is currently no Cayman Islands authority on the interpretation and meaning of section 33 ELPA. Further, while similar statutory provisions exist in the Bahamas, British Virgin Islands, Delaware, Hong Kong, and New Zealand, they too appear not to have been considered in any decided cases. We are therefore treading new ground.

90. Section 33(3) 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."*

91. That is the straightforward test the court has to apply when determining whether a limited partner may bring a derivative claim. The ELPA, unlike other statutory regimes for derivative claims[50], imposes no requirement to obtain the leave of the Court to bring or continue

[49] *Section 3 ELPA, see also sections 4(2),16(1) and 19 (2).*
[50] *For example, GCR O.15 r.12A regarding derivative claims by shareholders in a company and section 261 English Companies Act 2006 ,which requires a member to apply to court for permission to continue a derivative claim. See Iesini ibid at § 78per Lewison J*

proceedings on behalf of an ELP, nor is there any language to suggest special circumstances would need to be pleaded by a limited partner.

92. The Defendants argued that the Court should apply principles derived from cases dealing with derivative claims in other contexts, including English cases.

The English cases

Trusts

93. Beneficiaries are not required to seek leave to bring a derivative claim on behalf of a trust, although they must plead and establish special circumstances, and join the trustee to the proceedings if they wish to sue.[51] As the authors of *Lewin on Trusts 20th Ed.* explain:

> *"for example, circumstances which tend to disable the trustees from suing (as where their acts and conduct with reference to the trust fund are impeached) or circumstances rendering it difficult or inconvenient for the trustee to sue, as where there is a conflict between their interest and duty. Special circumstances are not confined to circumstances of these kinds. The guiding principle is that there must be exceptional circumstances, which embrace a failure, excusable or inexcusable, by the trustees in the performance of a duty to the beneficiaries to protect the trust estate, or to protect the interest of the beneficiaries in the trust estate. The special circumstances relied on must have something to do with the willingness or ability of the trustee or alleged trustees to bring the action.*[52]

94. As can be seen the authors refer to the concept of 'special circumstances' in the trusts context when the trustee has been unwilling or unable to bring the action.

English limited partnerships

95. The issue of derivative claims in the context of an English limited partnership was considered in *Henderson*[53], as I have set out above. Mr Justice Cooke said:

> "*It is common ground that derivative claims are not limited to the corporate context. They can arise in other circumstances where the justice of the case demands it, such as where a beneficiary sues to enforce the cause of action vested in a trust or where a legatee under a will seeks to enforce a cause of*

[51] *Roberts v Gill Roberts [2011] 1 AC 240 §§50-53 and 103 and Lewin at § 47-012*
[52] *Lewin at § 47-008*
[53] *[2012] EWHC 3259*

> *action vested in the estate. There is however a need for "special circumstances" to justify a derivative action. What matters is the person seeking to pursue the derivative action has a legitimate interest in the relief claimed, sufficient to justify him in bringing the proceedings to obtain it. It is agreed that there is no example in English law of a claimant limited partner seeking to pursue a derivative claim on behalf of a limited partnership, but the claimant submits there is no reason in principle why such a claim should not be made provided that there are special circumstances which would warrant a departure from the usual rule that the party in whom the cause of action vests must bring the claim."*

96. As set out earlier in this judgment, the relevant "special circumstance" in *Henderson* was that the general partner had a conflict of interest because it could not or would not sue itself or the manager of the fund, which was its sister company. For that reason, a derivative claim against the manager was permitted to proceed.

97. As I have noted above there is no equivalent to section 33 ELPA in the English Limited Partnership Act 1907.

98. The terms of section 33(3) ELPA which allows a limited partner in an ELP to bring proceedings on behalf of the ELP if the general partner has *without cause failed or refused* to do so has no language requiring permission or special circumstances. In my view the principles taken from the common law or equity for bringing derivative claims whether as regards companies, trusts, limited partnerships or associations are not applicable.

99. In my judgment section 33(3) is *sui generis* and is not subject to the rules relating to permission or for special circumstances for derivative actions in other contexts. I accept Mr Allison QC's submission that to this extent it can be said to '*occupy the field'* in the Cayman Islands with respect to ELPs and there is no room for a case by case judge led formulation of a common law or equitable test.

100. I have in coming to this view had regard to the principles Ms Stanley QC and Mr Chapman QC referred me to relating to cases which dealt with failures or refusals to bring claims in other contexts, for example where the board of the company or the trustee had the relevant inhibition which prevented a decision to bring claims. Whilst these principles provide helpful guidance, the company and trusts law cases to which I was referred do not directly apply to the position in this case which involves the application of a specific statutory test for Cayman Islands ELPs.

101. I note however that the common thread running through those cases is that where the authorised decision maker is inhibited, the Court may permit, in the interests of justice, derivative claims.

Has the statutory test been satisfied?

The GP

102. In my judgment the evidence shows a good arguable case that the GP has failed and refused to bring the claims set out in the ASOC over a period of years.[54] I have also come to the view that there is a good arguable case that the GP had and still has a relevant inhibition because it is conflicted in relation to the Plaintiffs' claims.[55]

103. I accept Mr Alison QC's submission that in exercising its fiduciary obligations to TPF the GP should take a neutral position with regard to claims sought to be advanced by the Limited Partners derivatively. It should act in what it considers to be the best interests of TPF, and not with regard to its own interests. It clearly cannot do so given the claims advanced against it. I accept Mr Allison QC's submission that its decision not to bring the claims is infected and made unsafe by the facts which give rise to this conflict of interest.

104. The GP is a Defendant to litigation where it is accused of serious wrongdoing: wilful default, liability under the Fraudulent Dispositions Act, and conspiracy with the other Defendants are alleged.

105. A large number of the claims against D2-D4 are premised on a breach of duty by the GP. For example the allegation of knowing receipt is based upon a breach of duty by the GP. In the circumstances the GP cannot be expected to be the arbiter of whether to bring a claim against another Defendant that is premised on its own breach of duty. It is in my view incapable of exercising an impartial decision-making function.

106. I accept Mr Allison QC's submission that section 33(3) ELPA requires a finding as to whether '*the GP'*, that is to say the relevant corporate entity, has failed or refused to institute proceedings, not whether the directors at the relevant time can be said to have done so. I find that the GP has without cause failed to bring the derivative claims.

[54] *See Florent 2*
[55] *Florent 2 §§89-98*

107. I therefore accept the Plaintiffs' case that the FFP Directors and the GP are not one and the same. The statute applies to the legal entity which is the GP, not its directors at any one time. I set out below my findings on the position of the FFP Directors in case I am wrong about that.

FFP Directors

108. The FFP Directors owe their duties primarily to the GP, not the limited partners. I accept Mr Chapman QC's submission in response to this that the duties of the GP and the FFP Directors should be aligned. That is, to bring the claims if that is overall in the best interests of the limited partnership. He submits that there is no problem if they thought that was the right thing to do, but they have after careful independent investigation and analysis decided against that and given perfectly defensible reasons based on commercial judgments.

109. That to my mind does not change the analysis that they are separate from the GP and it is the GP that matters for the statutory test. Neither does it change my conclusion below that there is a real conflict that the FFP Directors have not themselves identified.

110. I find that there is a *prima facie* case that they are unable to assess the claims properly in an independent and objective way, notwithstanding Mr Lewis' extensive evidence.[56] I accept of course that there is no challenge to their integrity and honesty and in accordance with ordinary principles the Court should be slow to interfere with the commercial judgments of decision makers.[57] I also accept that they are experienced professionals in these matters and they have confirmed that they fully understand and have complied with the nature and scope of their duties as fiduciaries. It is, however, the case that they owe their duties primarily to the GP and it is obviously not in the GP's interests to be sued. That seems to me to place them in a position where they are seriously inhibited from making impartial decisions.

111. I also find that there is a *prima facie* case that they have been guided (until recently) in their investigations by information provided by those who were under investigation themselves, and by their legal advisers, who were also conflicted.

112. The Plaintiffs also claim that there is an arguable case that they continue to be funded by entities closely associated with the alleged wrongdoers[58]. I should make clear that I accept the evidence

[56] *See Lewis 3 at §33 and Florent 2 §§126-153*
[57] *See Iesini v Westrip at § 85 per Lewison J and Kleanthous v Paphitis per Newey J*
[58] *Florent 2 §152*

that the FFP Directors themselves are financially disinterested from the assets and affairs of TPF and the outcome of these proceedings [59]and were not, it is agreed[60], involved in the events which form the basis of the derivative claims. I also accept the evidence that their views and conclusions have no link to their own compensation.

113. That in my view does not change the finding that there is a *prima facie* case that they are not capable of being truly independent and objective.

114. Having reviewed the FFP Memoranda and the nature of the investigations carried out and the detailed explanation in Lewis 3 as to how decisions were reached, I am left with the fact that, perhaps of necessity, these investigations involved interviewing individuals or representatives of parties who are either Defendants in these proceedings, or were closely associated with them, or who have allegedly made, received or benefited from payments from TPF assets.

115. I have carefully noted Mr Lewis's evidence'[61]

> "*.. I wish to make clear that the conclusions reached by the Independent Directors (and I hasten to add that several investigations are ongoing) are based on commercial judgement, with the benefit of legal and expert advice where appropriate. Where investigations are ongoing, needless to say we are not satisfied that it is prudent or appropriate to commence proceedings in the name of the Fund. To do so would be premature and irresponsible."*

116. The FFP Directors' evidence is that the decisions taken were good faith determinations for which there was a rational basis, that the risks of pursuing the claims outweighed the benefits, or that there were other good grounds not to pursue the claims and it was not in TPF's interest to do so. Ms Stanley QC and Mr Chapman QC submit that the Court should not interfere with these commercial judgments of experienced professionals whose integrity is not impugned.[62] The Court, it is said, is not in a position to and should not 'second guess' those commercial judgments.

117. However, if this point is relevant and my decision in relation to the GP itself is wrong, in my judgment the question of 'cause' cannot be one for the FFP Directors to decide alone without more given the circumstances of this case.

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[59] *Lewis 5 § 29*
[60] *Florent 2 § 127*
[61] *Lewis 5 § 76*
[62] *Lewis 5 at § 76*

118. I note that Mr Lewis says:[63]

> *"I appreciate that the Plaintiffs have strong views about Mr Williams, but in exercising our discretions and powers in discharging our fiduciary and other obligations to the GP, the Independent Directors are not acting in a judicial capacity. We are required to consider and evaluate relevant matters, disregard irrelevant matters, and have regard to the interests of the various constituents of the GP and the Fund, including the shareholders, financial stakeholders, employees, and creditors when reaching our conclusions. That is what we have done."*

119. The Court has a role to ensure that the process described by Mr Lewis[64] was fair and the decisions taken were impartial and sound when assessing whether they were taken '*without cause'* under section 33(3) ELPA. I am, on the evidence, unable to accept the FFP Directors' views at this stage that the GP had cause not to institute claims on behalf of TPF (which of course include serious claims against the GP itself). There is a *prima facie* case that the decisions were not taken in fair or safe circumstances and I find that there is therefore an arguable case that they failed to bring the claims without cause.

120. To be clear I do not find that the FFP Directors have been "*engaged as 'friendly' professionals to provide a 'veneer of independence' in order to vindicate the personal positions of those that participated in the former management of the Fund"* or that they "*…have behaved in a way that facilitates an exercise in whitewashing"*.[65]

121. Based on the available evidence, I have formed the view that there is a relevant inhibition which prevents the FFP Directors' decision making process being fair, because the decisions not to pursue the claims are insufficiently distinct from the wrongdoing upon which the claims are founded. As a consequence TPF is prevented from pursuing claims which it legitimately has. A derivative claim by the Plaintiffs to obtain redress for TPF would therefore lie in my view to avoid injustice.

122. I have taken into account that the issue of statutory interpretation raised by section 33(3) is a new and important point of law which has not been the subject of any judicial consideration and which arises against a complex and hotly contested set of facts. In the circumstances I have

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[63] *Lewis 5 § 45*
[64] *See for example Lewis 5 §§ 44-46*
[65] *Lewis 5 at §§42 and 43*

concluded that I should decide the '*failed without cause'* issue now,[66] in favour of the Plaintiffs who should be permitted to continue with the derivative claims.

123. The applications have proceeded on the basis that the Plaintiffs' claims have a real prospect of success (having had regard to the criticisms of the language of the pleading advanced by the Defendants) and in my view the Plaintiffs should be permitted to bring the derivative claims under section 33(3) ELPA. There is an arguable case that the criteria in section 33(3) are satisfied.

Joining TPF

124. Since the Grand Court Rules provide that a claim can be brought by and against an ELP[67] it seems to me to make sense to join TPF in its name, so that it is bound by and is a party to the proceedings, even although it is not a legal entity. In that way the interests of the nine non-participating Limited Partners' interests on whose behalf the derivative claims are also brought, can be formally recognised. That is not because the claims as formulated are not properly constituted without the joinder, but because it is in my view desirable in the circumstances of this case for TPF to be joined.

Are the derivative claims properly pleaded?

125. The Defendants argued that the derivative claims were not properly pleaded.

126. The plea at § 25B of the ASOC is as follows:

> "*The balance of the claims against Mr Williams and Wellspring and the claim against KGLI Asia are brought by the Plaintiffs as derivative claims on behalf of TPF in circumstances where Port Link has without cause failed to initiate proceedings on behalf of TPF against those parties and there is no real prospect of it doing so. Not only did Port Link fail to commence such claims; as described in paragraph 4 it deliberately withheld from the Limited Partners the information upon which the claims are based. In the premises, the requirements of section 33(3) of the ELP Act are satisfied such that the Plaintiffs should be permitted to prosecute these claims on behalf of and in the name of TPF."*

[66] *Prudential v Newman [1982] Ch 204 CA*
[67] *GCR O.81 r.12*

127. This is in my view sufficient to enable the Defendants to understand the gist of the case, which has been factually set out in the detailed evidence filed on these applications. Given the background to the bringing of the Plaintiffs' claims set out earlier in this judgment, there was no necessity for the Plaintiffs to have made any formal demand on the GP before commencing proceedings seeking derivative relief. The statutory gateway of section 33(3) requires only a failure or refusal to bring a claim, which is to be judged on the relevant facts as they were at the time proceedings were commenced.

128. In interpreting the plain words of section 33(3), which are expressed in the past tense, I accept Mr Allison QC's submission that the GP has failed since at least the time the Plaintiffs brought the derivative claims, which for the GP was October 2020 and for D2-D4 was early this year. That is the correct time at which the point is to be assessed.

129. Mr Chapman QC on behalf of D2 to D4 submitted that the ASOC is also inadequate in the way it pleaded the detail of the derivative claims. Having gone through the relevant paragraphs which were criticised in some detail I am not so persuaded. The submissions in relation to the statutory gateway apart, there is no strike out application on the merits. The facts as pleaded, the Court must assume for this application, would be established at trial.

130. He also submitted on the Plaintiffs' own pleaded case they had an alternative remedy available to them in their direct claims against all of the Defendants other than D4, which is a powerful reason why they should not be permitted to bring the derivative claims. An alternative remedy is an important consideration in the exercise of the Court's discretion, but is not conclusive[68] and in this case no defences have yet been served. In my view the Plaintiffs should be allowed to proceed with direct and derivative claims (which are not legally identical) as it would not be fair or safe to conclude at this stage that there is an effective alternative remedy available. The trial Court will ensure that there is no risk of double recovery.

Discretion

131. Finally the Defendants argue that in the Court's discretion the derivative claims should not be allowed to proceed. They argue that the Court can be satisfied there is serious doubt as to whether the Plaintiffs are appropriate parties to bring a derivative claim for and on behalf of TPF given the complex and often toxic relationship between the parties and the Plaintiffs'

[68] *Henderson §§31,32 and 39*

previous conduct. They allege that the State of Kuwait (of which the Plaintiffs are entities) attempted to seize TPF's funds for the sole benefit of the Plaintiffs, and that KPA failed to repay over USD 13 million which is due to TPF. They argue that the Court cannot be confident that it would be in TPF's best interests for the Plaintiffs to have control of the choses in action belonging to TPF.

132. These matters are no doubt going to be vigorously contested at trial. There is evidence that [69] the Director General of KPA has confirmed that that the full amount is held in a segregated account until its external auditors have confirmed that there is no dispute or question over the amount of its entitlement.

133. The Defendants say that this is the latest proxy war as part of a larger commercial dispute and point to the multiple derivative claims on foot brought in different proceedings by different Limited Partners against different parties relating to the same underlying subject matter, which is a highly unsatisfactory situation.

134. I should first say that an important factor in the exercise of my discretion is that the direct claims against D1-D3 are going to trial. I have decided that they should not be struck out by the GP (D1). There was no attempt to strike them out by D2 and D3, who also face direct claims in unlawful means conspiracy.

135. I am not persuaded that there is a serious doubt as to whether the Plaintiffs are appropriate parties so as to refuse in my discretion to allow these claims to be pursued on the grounds advanced by the Defendants. Nor am I persuaded that as a matter of discretion they should be struck out because there are a number of proceedings by different Limited Partners against different parties relating to the same underlying subject matter. This Court will case manage the cases it has jurisdiction over appropriately in due course.

136. Having found that the GP has failed without cause to bring the derivative claims, in the exercise of my discretion the Plaintiffs should be allowed to continue with those claims which are brought (save in the case of D4) as an alternative to the Plaintiffs' direct claims.

[69] *Florent 2 § 61*

137. An additional factor in the exercise of my discretion to allow the claims to proceed in this case is that the Plaintiffs, who represent the vast majority[70] of the Limited Partner economic interests in TPF, are also bearing the litigation costs and adverse costs risk of litigating these claims on behalf of TPF. Moreover TPF is no longer trading and has few creditors. The risk of real damage to ongoing commercial relationships does not seem to be material.

138. Also, I take into account that it is common ground that the derivative claims raise a new point of law of some importance to the Funds community in the Cayman Islands on the application of section33(3) ELPA. There will be a factual enquiry into these claims at trial. In those circumstances the right course in my view is to allow the Court at trial to assess the merits, boundaries and overlap of the direct and derivative claims against these Defendants.[71]

The security for costs (SFC) applications

The Defendants' case

I summarise below the submissions of Mr Chapman QC and Ms Stanley QC

139. The GP (D1) seeks security in the amount of USD 5,536,025.50. D2-D4 seek security in the sum of USD 2,720,00.

The gateway is met

140. The Plaintiffs are Kuwaiti state entities. They are both, undisputedly, ordinarily resident outside of the Cayman Islands, and so the gateway for SFC is established.

Discretion

141. As for the exercise of discretion in favour of ordering SFC, there is a real risk that there will be substantial obstacles to the enforcement of an adverse costs order made by the Grand Court:

(i) there is no bilateral treaty between the Cayman Islands and Kuwait for the enforcement of judgments;

[70] *When one removes the Limited Partners associated with the Defendants ,94% by value bring proceedings against the Defendants*
[71] *Tianrui ibid*

(ii) there is no clear alternative route to enforcing and executing a money judgment against a state-owned entity, such as the Plaintiffs;

(iii) there is ample evidence to demonstrate that the Plaintiffs would or at the very least might not pay.

The attempts to compromise

142. On 25 March 2021, the Plaintiffs were invited to voluntarily provide SFC in the amount of USD 4,105,438.00[72] by D1. On 7 April 2021, by letter from their attorneys the Plaintiffs refused to voluntarily give security on the premise of a bare assurance that they "*will comply with any final and binding costs orders of the Cayman Court*."

143. By letter dated 19 August 2021, Campbells (for D2-D4) informed Ogier (for the Plaintiffs) that if the Plaintiffs remained unwilling to pay a sum by way of security into Court on a voluntary basis, the Defendants would in principle be amenable to adjourning the Security Application if they could be satisfied that any costs order against both KPA and PIFSS could readily be enforced. That would be taken against the Jermyn St Fund interest said to be held by PIFSS in the Cayman Islands by putting in place appropriate security arrangements. This reasonable and pragmatic attempt to address the concerns as to enforcement was rejected by the Plaintiffs.

144. A further attempt to reach a pragmatic solution on the part of D2-D4 was also rejected. By letter dated 8 September 2021, D2-D4 proposed that the Plaintiffs hold funds in a Cayman Islands money market account, over which the Plaintiffs would retain control over all investment decisions and would be entitled to withdraw any interest or profits made above the value of the security for costs (thus mitigating all downsides which would otherwise result from the Plaintiffs not being able to invest the secured funds while the proceedings are determined). Again, this reasonable proposal was rejected out of hand and without providing any reasons.

The difficulties with enforcement

145. The Plaintiffs are not natural persons or corporate entities against which a lawful demand for payment could be made under threat of bankruptcy or winding up proceedings. Beyond that, it is clear on the Plaintiffs' own evidence that, as a matter of Kuwaiti law, even a judgment of the

[72] *Lewis 2 at § 21*

Kuwaiti courts is incapable of being enforced against them. There is not only a real risk that a costs order against the Plaintiffs would not be enforced but, according to Mr Chapman QC, a certainty: even if the order of the Cayman Islands Court were adjudged by the Kuwaiti courts as being capable of being enforced as an order of the Kuwaiti courts (which is highly unlikely), that order (of the Kuwaiti courts) would itself be incapable of being enforced against the Plaintiffs.

The relevant legal principles applicable to this case

The discretion in GCR O.23, r1 (1)

146. GCR O.23, r.1(1) provides :

> "*Where, on the application of a defendant to an action or other proceedings it appears to the Court – (a) that the plaintiff is ordinarily resident out of the jurisdiction... then if, having regard to all the circumstances of the case, the Court thinks it just to do so, it may order the plaintiff to give such security for the defendant's costs of the action or other proceedings as it thinks just.*"

147. Both Plaintiffs are ordinarily resident outside the jurisdiction (in Kuwait) and, accordingly, the Court has discretion to require them to provide security for the Defendants costs pursuant to GCR O.23, r.1(1)(a).

148. This rule gives the Court a wide discretion when considering whether to make such an order. The fact that a plaintiff is ordinarily resident outside the jurisdiction is simply a necessary pre-condition to the making of an order under GCR O.23, r.1 (1) .[73]

149. There is no presumption that the Court will ordinarily require a foreign plaintiff to give security for costs; rather, the "*discretion is to be exercised on a case-by-case basis, as the rule states, having regard to all the circumstances of the case*".[74]

150. The interpretation of this rule has been explained by Smellie C.J. as follows:[75]

[73] *Re Cybervest Fund [2006 CILR 80] at §23 per Smellie C.J.*
[74] *Cybervest at § 24 citing Aeronave SpA v Westland Charters Ltd. 1 W.L.R. [1971] 1 W.L.R. 1445 per Lord Denning at 1449.*
[75] *Tasaruff § 14*

> "*There is no hard and fast rule that every foreign plaintiff must be required to put up security. The matter is one, as already stated, of discretion to be exercised in every case. All the circumstances will be considered including the means and ability of the plaintiff to pay and even, in an appropriate case, the relative strength or weakness of the case for each side provided those factors are clearly discernible from the evidence. See, for these propositions, the leading case of Sir Lindsay Parkinson & Co. Ltd. v. Triplan Ltd. (8).*"

151. The Court's discretion must be exercised impartially and must not be exercised discriminatorily[76]. The discrimination of which the Courts are conscious is not the more serious discrimination arising out of nationality, but a lesser discrimination based on residence. There needs to be objectively justifiable grounds for the exercise of the discretion.

152. The merits of the case will only be relevant if (i) either party can clearly demonstrate a strong probability of success or (ii) the Court is considering a summary judgment application at the same time.[77]

Analysis and application of principles to this case

153. Dealing with the latter point first, the merits of the case cannot be properly determined at this stage, save to say that the Plaintiffs' claims are clearly arguable and in my judgment may proceed to trial.

154. The issue I have to decide is whether the Defendants have shown there are objectively justified grounds for concluding that there are obstacles or burdens to the enforcement of a costs order against the Plaintiffs, such that there is a real risk of non-enforcement and whether, if there are such real risks, it is just in the circumstances to order security and if so on what terms.

Foreign government or state agency

155. Where the plaintiff is a foreign government or state agency, there is a presumption that security for costs should not be awarded, although each case will turn on its own facts. The presumption arises from comity and common sense and may be displaced by the evidence.

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[76] *Walkers v Arnage unreported 2 August 2021 at §§ 43-50 and Jafar v Abraaj unreported 10 August 2021 and AHAB v SICL (2) CILR 602 at § 21*
[77] *Cesar Hotelco v Ryan [2012 (2) CILR 164] per Cresswell J, applying Fernhill Mining v Kier Construction [2000] CP Rep 69*

156. As Smellie C.J. has held, drawing the common practical principles together from decided cases:[78]

> *"..where the plaintiff is the government (or a state agency) of a foreign state enjoying good standing in the international community (in particular from this court's point of view, enjoying diplomatic relations with H.M. Government) it should be assumed as a matter of comity and common sense, in the absence of anything to the contrary, that it will honour its obligations for costs made against it. Nonetheless, as the question remains one to be decided on a case by case basis in the discretion of the court, an order for security for costs could undoubtedly be made against a foreign state in appropriate circumstances."*

157. As Smellie C.J. also observed the only modern reported case in which security has been ordered against a foreign government was *Sierra Leone Govt. v. Davenport [2003] EWHC 1913 (Ch).* The circumstances in that case were exceptional, as Sierra Leone had recently emerged from a civil war. There was accordingly [79]

> *"..no certainty that, faced with many competing demands on limited financial resources, the claimant Government is likely to provide spontaneous payment in a rapid timescale. And, so far as enforcement is concerned, there is nothing to indicate that there is likely to be any ready means by which the judgment for costs could be enforced against the Government in Sierra Leone. Nor is it suggested that there are any assets readily susceptible to execution, either in this country or in a Brussels or Lugano State".*

158. The petitioner (and respondent to the security for costs application in *Cybervest)* was the Second Plaintiff in this case, PIFSS (and the decision in *Cybervest* was considered in *Tasarruf* decided later that same year). Smellie C.J. noted that PIFSS had "*immensely valuable assets to be regarded as being within the jurisdiction"*[80] and so if PIFSS failed to pay an order for costs it would be open to the applicant to seek recourse.

159. Another circumstance "*of some weight*" was the fact that [81]

> "*..the petitioner is a state agency of a foreign government of undoubted resources and enjoying a high reputation in the global financial and commercial community. This is relevant insofar as it would tend to negate any concern that the plaintiff would be unlikely to obey an order for costs made in favour of the respondent. To my mind, it also addresses the concern raised by Mr. Farrow, that efforts to enforce an order in Kuwait, if it ever came to that, could be met with a plea of state immunity."*

[78] *Tassaruff §22*
[79] *§ 14*
[80] *Cybervest at § 25*
[81] *Cybervest at §27*

Assets within the jurisdiction

160. Security will not be required of a foreign plaintiff who has substantial assets within the jurisdiction.[82] Where any liability for costs on the plaintiffs' part will inevitably be joint and several, security will not be required if at least one plaintiff has substantial assets within the jurisdiction.

161. A foreign plaintiff does not have the burden of establishing that it has fixed and permanent property within the jurisdiction.

> "*The common sense principle applies that the existence of assets within the jurisdiction, their fixity and performance, are among a number of potentially relevant factors, their importance depending on the particular facts of the case. The Court will not infer the existence of a real risk that assets within this country will be dissipated or shipped abroad to avoid their being available to satisfy a judgment for costs unless there is reason to question the probity of the claimant: there is no such reason in this case. If there is reason to question the claimant's probity, the character of his property within the jurisdiction is relevant in assessing the risk: the risk may be greater if the property is cash or immediately realisable or transportable, and less if fixed and permanent*"[83]

Undertakings given by a plaintiff

162. The value of an undertaking given by the plaintiff in the context of a security for costs application was considered by Sanderson Ag. J.[84]. He concluded that:

> "*Should a plaintiff in this jurisdiction sign an agreement that he will not raise any of the potential defences in his home jurisdiction should an award of costs be made against him, it would, I think, be very persuasive evidence to any court in the United States"* (the United States being the plaintiff's home country in that case).[85]

Decision

163. Applying these principles to the facts of this case in my judgment, the SFC applications should be dismissed. I am of the view that there is no real risk that the Defendants will be unable to obtain costs awarded against the Plaintiffs because the Plaintiffs are agents of the State of

[82] *Cybervest at § 25 and In re Apollinaris Co.'s Trade Mark [1891] 1 Ch 1*
[83] *Oded Moshe Leyvand v Amnon Barasch and others [2000] WL 191256 at §6 per Lightman J*
[84] *Elliott v Cayman Islands Health Service Authority [2007 CILR 163]*
[85] *At § 18*

Kuwait and there is no reason to doubt that they would satisfy any award. In addition, PIFSS has substantial assets within the jurisdiction.

Agents of the State of Kuwait

164. It is not in dispute that the Plaintiffs are both agents of the State of Kuwait. The Head of the Kuwaiti Department for Legal Advice and Legislation ("DLAL") has provided a letter to the Court dated 20 May 2021 confirming that PIFSS and KPA are wholly owned by the State of Kuwait and are both advised by DLAL. [86]

165. There is therefore on the decided cases a rebuttable presumption that security for costs should not be ordered[87].

166. That presumption has not been rebutted on the evidence adduced on this application. The Plaintiffs would appear to have ready access to funds and would be able to satisfy any costs order against them in a timely manner.

KPA

167. KPA is an internationally recognised commercial organisation and relies on its international reputation to do business.[88] Its profit for the financial year 2020-2021 was KWD 56,450,000 (about USD 187,522,553 based on the exchange rate on 9 August 2021).[89]

168. The Director General of KPA has confirmed that it has sufficient resources to meet any costs order made against it in these proceedings, and will comply with any such costs orders in a timely fashion, a position that has been reconfirmed by DLAL.

169. In addition, KPA provided a written undertaking to this effect to the Court on 27 May 2021, a copy of which was sent to the Defendants' attorneys on 3 August 2021.

[86] *Florent 3 at §14*
[87] *Tasarruf at §23*
[88] *Florent 3 at §17*
[89] *Florent 3 at §18*

PIFSS

170. PIFSS is a public institution which administers Kuwait's pension fund for all Kuwaiti citizens in the workforce, both in public and private sectors. It operates independently from the State of Kuwait and has its own budget and board of directors. PIFSS has a global investment asset portfolio worth approximately USD 133.7 billion (as at 31 March 2021).[90]

171. Its profit for the period March 2020 to December 2020 was USD 18.9 billion. An officer in the Compliance and Governance Department of PIFSS has confirmed that PIFSS has sufficient resources to meet any costs order made in these proceedings, and will comply with any such costs orders in a timely fashion. PIFSS provided a written undertaking to this effect to the Court on 24 May 2021, a copy of which was sent to the Defendants' attorneys on 3 August 2021.

172. In addition, PIFSS has been a party to several sets of proceedings before the Cayman Islands Courts and has never failed to comply with any costs order.[91]

173. It would in my view be clearly detrimental to PIFSS' ongoing commercial reputation and business to be in breach of an order of the Cayman Islands Courts.

174. Accordingly, having carefully considered the evidence on this application, I find that the presumption against ordering security against agents of a foreign state has not been rebutted. It would therefore not be just to grant the SFC applications against the Plaintiffs.

PIFSS has substantial assets within the jurisdiction

175. Moreover, PIFSS has substantial assets in the Cayman Islands.[92] It is a limited partner of Jermyn Street Commercial Real Estate Fund V LP ("Jermyn St Fund"), a Cayman Islands ELP. Its interest in the Jermyn St Fund was EUR 35,074,942 as at 31 March 2021.[93] This significantly exceeds the security for costs collectively sought by the Defendants (c.USD 6.8 million).

176. It is well established that security will not be ordered against a foreign plaintiff who has assets within the jurisdiction.[94]

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[90] *Florent 3 at §20*
[91] *Florent 3 at §21*
[92] *Florent 3 at §§22 - 27*
[93] *Florent 3 at §24*
[94] *Cybervest at 25 and In re Apollinaris Co.'s*

177. There is no reason to doubt the probity of PIFSS, which is an agent of the State of Kuwait and familiar with conducting international litigation (including in the Cayman Islands). There is no reason to conclude that PIFSS' interest in the Jermyn St Fund is encumbered, or not amenable to enforcement if necessary, and no reason to conclude that PIFSS would dispose of or otherwise encumber its interest to attempt to defeat an order as to costs.

178. Accordingly, since PIFSS has sufficient assets within the jurisdiction to cover any costs order that is made against the Plaintiffs (in respect of which they would be jointly and severally liable), and in circumstances where both Plaintiffs have given written undertakings to the Court, it would not be just to require the Plaintiffs to pay security for costs (even if they were not agents of the State of Kuwait).

179. I have reviewed the correspondence between Campbells (for D2-D4) and Ogier (for the Plaintiffs) in this regard and conclude there is no basis to form the view that PIFSS would seek to frustrate the enforcement of a costs order against it by disposing of its interest in the Jermyn St Fund even if it were able to do so.

180. The enforceability of Cayman Islands judgments in Kuwait does not therefore arise for determination.

Conclusion

1. The Defendants' applications to strike out are dismissed save that:

    a) the paragraphs in the ASOC which rely on criminal convictions are to be struck out.[95]

    b) the Plaintiffs are to join TPF to the proceedings.[96]

2. The applications for SFC are dismissed.

The Defendants should pay the Plaintiffs' costs, to be taxed if not agreed.

Trade Mark [1891] 1 Ch. 1

[95] *§§16,17,19,20 and 21 ASOC*

[96] *Under GCR O.81, r.12*

If costs cannot be agreed I will deal with the matter on the basis of short written submissions.

THE HON. JUSTICE PARKER
JUDGE OF THE GRAND COURT