



IN THE CAYMAN ISLANDS COURT OF APPEAL ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

**CICA (Civil) APPEAL No. 0011 of 2023
(Grand Court Cause No. FSD 0236 of 2020 (RPJ))**

BETWEEN:

- (1) MARK ERIC WILLIAMS
(2) WELLSRING CAPITAL GROUP, INC
(3) KGL INVESTMENT COMPANY ASIA (IN VOLUNTARY LIQUIDATION)**

Appellants

-AND-

- (1) KUWAIT PORTS AUTHORITY
(on its own behalf and on behalf of The Port Fund L.P)
(2) THE PUBLIC INSTITUTION FOR SOCIAL SECURITY
(on its own behalf and on behalf of The Port Fund L.P)**

Respondent

BEFORE:

**The Hon John Martin KC, Justice of Appeal
The Hon Sir Richard Field, Justice of Appeal
The Hon Sir Michael Birt, Justice of Appeal**

Appearances

**Mr Graham Chapman KC and Mr Andrew Pullinger,
Mr Harry Shaw and Ms Katie Logan of Campbells LLP on
behalf of the Appellants
Mr David Allison KC and Ms Jennifer Fox and Mr Harry Clark
of Ogier (Cayman) LLP for the Respondents**

Date of hearing: 6 March 2024

Draft circulated: 30 July 2024

Judgment delivered: 15 August

JUDGMENT

MARTIN JA:

Introduction

1. This is an appeal from the order of Justice Parker (“the Judge”) made under GCR O.15, r.6 on 2 June 2023 joining the respondents in as defendants to the crossclaim brought by the appellants in the proceedings designated FSD 236 of 2020 (RPJ) (“the main action”).
2. The principal issue to be decided in the appeal is whether the Judge lacked jurisdiction to make the aforesaid order by reason of section 14(1) and/or section 33(1) and (3) of the Exempted Limited Partnership Act (2021 Revision) (“ELPA”), which provide:

14 (1) *“A limited partner shall not take part in the conduct of the business of an exempted limited partnership in its capacity as a limited partner”.*

33 (1) *“Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings”.*

(3) *“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”.*

3. The second issue is whether, in deciding to order joinder of the respondents into the crossclaim, the Judge exceeded the margin of discretion afforded to him under GCR O.15, r.6.

The factual background

4. The respondents are two of eleven limited partners in The Port Fund L.P. (“TPF”), an Exempted Limited Partnership (“ELP”) formed under the ELPA. TPF’s General Partner is Port Link GP Ltd (“GP”) which was appointed pursuant to a limited partnership agreement (“the LPA”) dated 21 March 2007 between it and the original partners of TPF. The whole of GP’s share capital is

held by Port Link Holdings USA Inc (“PLHI”) which in turn is wholly owned by the first appellant, Mr Mark Williams.

5. By a written Investment Management Agreement (“the IMA”) dated 28 June 2007 made between GP and KGL Investment Cayman Ltd (“KGLI”), KGLI was appointed the Investment Manager of TPF on terms that it would be paid an annual management fee equal to 2% of TPF’s aggregate Capital Commitments for the first five years of the appointment and thereafter until the termination of the fund a fee of 1.5% of TPF’s aggregate Capital Commitments.
6. In July 2018, KGLI changed its name to Emerging Markets PE Management Limited (“EMPEML”). The ultimate owner of EMPEML as at the date of the IMA was KGL Investment Company K.S.C.C (the Eighth Defendant to the main claim) which is the 100% shareholder and voluntary liquidator of the third appellant, KGL Investment Company Asia (“KGLI Asia”). It is averred in paragraph 17.5 of the appellants’ Defence in the main action that on or around 4 February 2019 the shares in EMPEML were acquired by Asia Alternative Asset Management Limited (“AAAML”). It is further averred in paragraph 189 of the appellants’ Defence that EMPEML’s claims for underpayment of fees and for indemnification under the IMA and/or the LPA were assigned to the second appellant, Wellspring Capital Group Inc (“Wellspring”).
7. By a written Administrative Support Agreement (“the ASA”) made effective on 1 December 2017, TPF, acting by GP, appointed the third appellant (KGLI Asia) to provide administrative and personnel support to TPF for which the third appellant was to be paid US\$125,000 per month.
8. In the main action the respondents bring direct, personal claims against GP (D1) and the second and third appellants (D2-D3), and derivative claims against all three appellants (D2-D4), having obtained leave to do so from the court under section 33(3) ELPA². It is alleged in all of the claims, direct and derivative, that the defendants (D1-D4) are implicated, whether as active participants and/or as wrongful recipients, in the wrongful diversion of over US\$100 million held on trust for TPF and the limited partners by GP.

² The respondents’ derivative claims against GP were struck out by order of this Court on 20 January 2023 on the alternative grounds that TPF had itself not suffered any loss since the assets of the partnership were held on trust for the benefit of the limited partners and because the plaintiffs had an alternative remedy in the form of their direct personal claims; see *Kuwait Ports Authority et al v Port Link GP Ltd et al* (Unreported, 20 January 2023, FSD 236 171 of 2023 (RPJ) at paras 146-151.

9. Against GP: (i) it is alleged that it entered into an unlawful means conspiracy with certain of the other defendants, including the first and second appellants, in connection with proceedings issued by EMPEML against GP and TPF in the Dubai International Financial Centre Court which were used as a pretext for an unlawful payment of US\$59,990,461.30 of TPF's funds to the second appellant Wellspring ("the Wellspring Payment"); and (ii) there are claims for an account (whether on the basis of wilful default or a common account) in respect of information which GP should have, but has not, provided to the respondents.
10. Against the appellants, the respondents advance claims for breach of duty and/or trust regarding certain of their dealings with GP and TPF including the aforesaid unlawful conspiracy and in respect of the Wellspring Payment and receipt of US\$3.3 million of TPF's monies that were paid in breach of trust and/or breach of fiduciary duty.
11. On 2 May 2023, Mr Williams procured the appointment by PLHI of joint voluntary liquidators of GP, and at the same time as the Judge ordered the joinder of the respondents as defendants to the crossclaim, the Judge granted the respondents' application for the appointment of receivers to have the conduct of the litigation to which GP is a party.

The Crossclaim against GP in its capacity as General Partner of TPF

12. The three appellants plead in paragraphs 179 – 207 of their Amended Defence, Counterclaim and Crossclaim in the main action the following crossclaims, which are brought only against GP as representative of TPF and not against any of the respondents:
 - (i) A claim in damages or equitable compensation recoverable by the second appellant (Wellspring) as assignee in respect of an alleged breach by TPF of the IMA in failing to pay EMPEML's Performance Fees in the sums of US\$17,079,142 and US\$11,742,344 respectively due in relation to two different transactions.
 - (ii) A claim by the second appellant as assignee that it is entitled to be indemnified by TPF against all the claims made against it in the main action pursuant to clauses 11.1 and 11.2 of the IMA.

- (iii) Claims by the first appellant that he is entitled to be indemnified by TPF under clauses 11.1 and 11.2 of the IMA and clauses 5.4(a)(i), 5.4(a)(ii) or 5.4(a)(iii) of the LPA against all the claims made against him in the main action.
- (iv) A claim by the third appellant that it is entitled to be indemnified under clause 7 of the ASA by TPF against all the claims made against it in the main action.

13. In pleading the crossclaims the appellants repeat “the above paragraphs of the Amended Defence” which include the defence of set-off related below in the following paragraph.

The appellants’ pleaded set-off

14. In paragraph 178 of the appellants’ Defence in the main action, the appellants (D2-D4) plead they are entitled to set-off against any liability each of them may be found to owe to the respondents the liabilities of TPF to the appellants on the crossclaims and/or the liabilities of the respondents on the crossclaims/counterclaim subsequently pleaded in extinction or diminution of that liability on the following two alternative bases:

(1) To the extent that the respondents bring personal claims against D2 and D3 those claims are brought expressly on the basis of them being limited partners in TPF, and by reference to the value of their interests in TPF. In the premises, any such claims are franked by, and are subject to, the crossclaims against TPF.

(2) To the extent that the respondents purport to bring claims derivatively on behalf of TPF, then any such claims, if permitted, are subject to any and all equities, including equitable defences, that would have been available to the appellants had those claims been brought by TPF (acting by and through its general partner, GP). In the premises, any such claims are franked by, and are subject to, the crossclaims against TPF.

The joinder summons

15. By summons dated 13 March 2023 the respondents applied to the Grand Court for an order pursuant to GCR O.15, r.6(2)(b) that they be joined as defendants to the crossclaims against GP. This application was resisted by the appellants on the principal ground that joinder was

prohibited by the terms of sections 33 and 14 of the ELPA (quoted so far as relevant in paragraph 2 above), the submission being in essence that only the general partner was a competent party to proceedings by or against an ELP. By the order now appealed against, the Judge granted the relief sought.

16. As recorded by the Judge, the respondents' submissions before him were as follows:
- (1) if successful, the crossclaim would significantly reduce and possibly completely extinguish the respondents' claims against D2-D4. Accordingly, the respondents (as opposed to GP (which currently had no assets)) had the primary economic interest in the crossclaim and should be allowed to defend it.
 - (2) A governance void had existed at GP since 15 February 2023, when its directors resigned. The defence of the crossclaim was therefore in jeopardy. In the absence of directors, any decisions made by GP would have to be made by its shareholder PLHI, which was controlled by Mr Williams as sole shareholder and director. As such, Mr Williams was in de facto control of GP, and accordingly was in control of both the prosecution and defence of the crossclaim.
 - (3) The respondents wished to ensure that (i) D2-D4 could not apply for judgment in default of GP's defence to the crossclaim or otherwise procure that GP admit the crossclaim and (ii) GP was not struck off the register for failing to comply with its administrative requirements.

The Judge's reasoning in finding that sections 14 and 33(1) were not bars to the respondents defending the crossclaim

17. Having observed in paragraph 76 of the judgment that the personal and derivative claims brought by the respondents had as their basis that the Plaintiffs are Limited Partners in TPF, the Judge continued as follows in paragraphs 77-83.

77. The proceedings in relation to which permission has been given under section 33 (3) of the ELP Act for the Limited Partners to bring derivative claims, and which the

Limited Partners have been allowed to bring themselves claims directly without the need for permission, are those which in the Court's view must also include any counterclaims or cross claims within those proceedings. They are inextricably linked. The Court does not accept that the Crossclaim is a separate "lis" which stands alone.

78. The Plaintiffs were not required to satisfy the test contended for in section 33 (1) of the ELP Act in order to bring direct claims against D2 and D3 (or against D1) at first instance nor in the CICA. The section does not apply to prohibit their claims. The section is aimed at ensuring that if a party wishes to sue the partnership, which has no separate legal identity, they do so by suing the General Partner rather than the Limited Partners. Likewise, when a partnership decides to sue, it does so by the General Partner.

79. If a limited partner is given permission under section 33 (3) of the ELP Act, where the general partner has without cause, not pursued a claim, it would be illogical and unfair if that derivative claim could be pursued on behalf of the partnership, but the limited partner not be permitted to defend a counterclaim or a crossclaim. If the limited partner was so prevented that could stymie the derivative claims from properly proceeding.

80. As to section 14 of the ELP Act, conducting litigation in the individual capacities against third parties who have had dealings with TPF and/or the General Partner (namely, D2–4) does not in the Court's view contravene the restriction on the Limited Partners' involvement in the conduct of the business of TPF in section 14 (1) of the ELP Act (or for that matter the restriction on limited [partners] being named in proceedings commenced by or against TPF in section 33 (1) of the ELP Act). Defending the Crossclaim to protect their individual interest does not involve the Plaintiffs conducting the business of TPF.

81. The Plaintiffs seek to be joined as defendants in the Crossclaim in their capacity as the Plaintiffs in the Proceedings of which the Crossclaim forms part. The Plaintiffs are not seeking to be joined as Limited Partners nor in order to represent or replace the General Partner, but in their individual capacities as the Plaintiffs in the proceedings. The court will allow them to do so.

82. *The Joinder Application is an application for the Plaintiffs to defend the claim in their own right as the Plaintiffs in the Proceedings. It is the Plaintiffs who are affected by and would suffer the loss to TPF in the event the Crossclaim against the General Partner succeeds.*

83. *In the event, the cross claim is successful, any recovery against the General Partner will likely be a loss to TPF of which the Plaintiffs hold the majority interest as Limited Partners.*

The grounds of appeal

18. The appellants appealed on two grounds, as follows:

“(1) The judge erred in law in finding that the court had jurisdiction to make the said Order dated 2 June 2023 notwithstanding section 33(1) and section 14 of the Exempt Limited Partnership Act.

(2) The judge acted outside the margin of discretion afforded to him in ordering that the Plaintiffs be joined as defendants to the said crossclaim notwithstanding his decision to appoint independent receivers with specific authority to conduct the litigation on behalf of the First Defendant”.

The appellants’ case

19. The appellants submit that: (i) section 33(1) applied to the respondents’ application to be joined in as parties to the crossclaim in the capacity of defendants because the respondents are limited partners of TPF and the crossclaim is properly and separately brought against TPF acting through the GP; (ii) the effect of the words “a limited partner shall not be a party to or named in the proceedings” in subsection (1) is to prohibit the respondents from being defendants to the crossclaim; (iii) section 33(3) does not permit a limited partner to *defend* an action or a crossclaim brought by the General Partner on behalf of an ELP; (iv) it is plain and obvious that no joinder order can be made under GCR O15 r6 if the proceedings in question are prohibited

by section 33(1); (v) it follows that the Judge had no jurisdiction to order the joinder of the respondents as defendants into the crossclaim proceedings.

20. It is also contended by the appellants that the Judge erred in finding that the respondents sought to be joined in their “individual capacities” as “plaintiffs in the Proceedings” when the respondents’ claims in the main action are advanced solely in their capacity as limited partners and it is only in this latter capacity that they are able to claim they have suffered loss and have rights or interests to protect. It follows that the respondents’ conduct of the defence will be in the capacity of limited partners which will amount to a clear breach of the prohibition imposed by section 14 against limited partners taking part in the conduct of the business of an exempted limited partnership in their capacity as limited partners.

The respondents’ case

21. The respondents submit that the references to “limited partners” in section 33(1) & (3) are references to limited partners acting in the capacity of limited partners and not to limited partners acting in an individual, personal capacity and it is this that explains why their direct, personal claims in the main action are outside what would otherwise be the prohibitions imposed by section 33(1) on proceedings being brought on behalf of an ELP by a “limited partner” and on “limited partners” being parties to or named in proceedings brought against an ELP. It follows, say the respondents, that the Judge was correct when he found that he had jurisdiction to join the respondents as defendants in the crossclaim brought against TPF by the appellants, none of whom was a limited partner. The respondents may be bringing their direct, personal claims *by reason of* being limited partners of TPF but there is a bright line distinction between derivative claims brought by a limited partner in the capacity of a limited partner and direct, personal claims pursued by a limited partner in its individual capacity. It follows that if direct claims brought by a limited partner *ex hypothesi* in an individual capacity are not prohibited by section 33(1), it must be the case that limited partners acting in an individual, personal capacity are free to be parties or named in proceedings brought by or against an ELP as is the case with the crossclaim herein.
22. In respect of section 14 of the ELPA, the respondents contend that this provision does not apply to litigation involving GP and TPF, for if it did so the blanket ban on a limited partner taking

part in the business of an ELP in its capacity as a limited partner would be impossible to reconcile with section 33(3).

Discussion and decision

23. It is important at the outset to note two things. First, the crossclaim concerns allegations of breach of contracts (the IMA, the LPA and the ASA) which were entered into, and could only have been entered into, by GP on behalf of TPF. Secondly, the respondents made clear to the Judge that they sought to be joined in their “personal capacities”, not in their capacities as limited partners, and that was the basis on which the Judge joined them (see paragraph 81 of the judgment). The initial question arising in those circumstances is whether the ELPA, and in particular section 33(1) of it, prevents joinder on that basis.
24. On the face of it, it does. The subsection provides that, subject only to subsection (3), legal proceedings against an ELP may be instituted against the general partner only, “and a limited partner shall not be a party to or named in the proceedings”. Viewed in isolation, the crossclaim constitutes legal proceedings against TPF, and the only proper defendant to it is GP. As Mr Chapman KC, for the appellants, pointed out, the crossclaim could have been brought by way of separate proceedings (although it would have been less efficient to do so); and, had that happened, it would have been clear that GP was the only proper defendant. In the unlikely event that the appellants had wanted to include the respondent limited partners as defendants to those separate proceedings, they would have been debarred from doing so by the express words of section 33(1).
25. The Judge’s reasons for his conclusion that section 33(1) did not prevent joinder of the respondents as defendants to the crossclaim are expressed in paragraphs 77 to 79 of the judgment (quoted in paragraph 17 above). There appear to be three strands to those reasons: (a) the proceedings, whether based on direct claims or derivative claims authorised under section 33(3), must also include any counterclaims or crossclaims within those proceedings, such that the crossclaim could not be regarded as a separate *lis* standing alone (paragraph 77); (b) the direct claims do not fall within section 33 (paragraph 78); and (c) it would be illogical and unfair if a limited partner permitted to pursue a derivative claim under section 33(3) were not also permitted to defend a counterclaim or a crossclaim in order that the derivative claim could proceed properly (paragraph 79).

26. Of these, (a) and (b) may be taken together. Underlying both of them is the proposition that proceedings based on direct claims do not fall within section 33(1) at all, so that no permission is needed for their institution or for the defence of counterclaims or crossclaims arising in the same proceedings. I accept this proposition in relation to the institution of proceedings and the defence of *counterclaims*; but it does not follow that section 33 can have no application to a *crossclaim*. As I have indicated above, the appellants' crossclaim constitutes legal proceedings against GP on behalf of TPF in relation to contracts which GP entered into (and only GP could have entered into) on behalf of TPF, and on the face of it constitutes – contrary to the Judge's view – a separate *lis* between the appellants and GP falling squarely within the terms of section 33(1). There may be cases where a crossclaim may properly be regarded as merely a facet of the existing litigation rather than as the promotion of a separate cause of action, and in such cases the Judge's underlying proposition may apply. But in the present case the position is in my view closer to the latter than the former (leaving aside any effect of the set-off defence); and I do not consider that the appellants' crossclaim can be regarded, as other aspects of the litigation can, as falling outside section 33 altogether.
27. As to (c), I agree that permission under section 33(3) to bring a derivative action includes permission to defend a counterclaim. I reject Mr Chapman's submission that the only thing capable of being authorised under section 33(3) is the "bringing" of an action: it is implicit in the subsection that the limited partner, which is taking the place in the litigation of a general partner who has without cause failed or refused to institute proceedings, has authority to conduct all aspects of the litigation to its conclusion. This is, in my view, explicitly recognised elsewhere in the ELPA. As indicated above, one of the appellants' contentions is that defence to the crossclaim is prohibited also by section 14 of the ELPA, since participating in litigation brought against an ELP involves a limited partner in taking part in the conduct of the ELP's business. However, section 20 of the ELPA, which in subsection (1)³ in summary provides that a limited partner who does take part in the conduct of the business of an ELP "in its dealings with persons who are not partners" may lose the protection of limited liability, identifies in section 20(2) circumstances which do not constitute taking part in the conduct of the business;

³ 20(1) If a limited partner takes part in the conduct of the business of an exempted limited partnership in its dealings with persons who are not partners, that limited partner shall be liable, in the event of the insolvency of the exempted limited partnership, for all debts and obligations of that exempted limited partnership incurred during the period that that limited partner participates in the conduct of the business as though that limited partner were, for that period, a general partner, but that limited partner shall be liable only to a person who transacts business with the exempted limited partnership during the period with actual knowledge of that limited partner's participation and who then reasonably believed the limited partner to be a general partner.

and one such circumstance, identified in paragraph (h), is “taking any action required or permitted by the partnership agreement or by law to bring, pursue, settle or terminate any action or proceedings brought pursuant to section 33(2)”. Section 33(2) provides as follows:

“If the court considers it just and equitable any person or a general partner shall have the right to join in or otherwise institute proceedings against any one or more of the limited partners who may be liable under section 20(1) or to enforce the return of the contribution, if any, required by section 34(1)” [liability for contributions returned or obligations released while the ELP is insolvent].

This is, of course, not the subsection under which permission is given for derivative actions, which is subsection (3); but it seems to me clear that the reference in section 20(2)(h) to section 33(2) is in fact a mistake, the true legislative intention being to refer to section 33(3). That is because section 33(2) contemplates proceedings internal to the ELP (and therefore not proceedings which are “dealings with persons who are not partners” in the terms of section 20(1)), whereas section 33(3) contemplates an action on behalf of the ELP against one or more third parties; and it is the assumption of the conduct of the ELP’s affairs in relation to the outside world that carries the risk of forfeiting limited liability protection under section 20. It therefore makes no sense to state that participating in proceedings under section 33(2) does not amount to conducting the business of the ELP, since that participation falls outside section 20 in any event; but derivative proceedings under section 33(3) are prima facie within section 20(1), and for consistency need to be exempted from the inhibition on conducting business. It appears also that the legislature has realised its mistake: we were shown a consultation draft of an Exempted Limited Partnership (Amendment) Bill 2024, clause 8 of which would if enacted substitute a reference to section 33(3) for the existing reference to section 33(2) in section 20(2)(h). But on the basis that section 20(2)(h) applies to proceedings authorised under section 33(3), it clearly contemplates that a limited partner pursuing a derivative action will have authority to “bring, pursue, settle or terminate” the action; in other words, not merely to “bring” the action but to take all necessary steps in relation to it.

28. There are, however, two problems with accepting the Judge’s reason (c) as a justification for his order. First, the fact that authority under section 33(3) to bring proceedings includes authority to defend a counterclaim does not necessarily have the consequence that the authority extends to intervention in a crossclaim, even one brought against a general partner whose failure

or refusal to institute proceedings has led to the institution of the original derivative claim. As with the Judge’s implicit proposition that direct claims are not within section 33 at all, the question is likely to turn on the extent to which the crossclaim can be regarded as merely a facet of the existing litigation rather than as the promotion of a separate cause of action; and, as I have said, in the present case (again leaving aside any effect of the set-off defence) the position is closer to the latter than the former. But the second and major problem is that the respondents were joined as defendants to the crossclaim not in their capacities as promoters of the derivative claims but in their individual capacities as plaintiffs in the proceedings. This means that, whatever implicit authority they might have had in their representative capacities, the respondents’ position in relation to the direct claims does not derive from section 33(3); and, since that subsection is an exception to the general rule contained in section 33(1), there is nothing to prevent the operation of whatever bar it is that section 33(1) imposes.

29. What, then, is that bar? This is a question of statutory construction, the principles of which were not in dispute – indeed, were barely mentioned in oral submissions. In his skeleton argument, however, Mr Chapman referred to certain authorities, including Joint Administrators of LB Holdings Intermediate 2 Ltd v Joint Administrators of Lehman Brothers Intl (Europe) [2017] UKSC 38 in which Lord Neuberger summarised the approach as follows (at [123]) in a statement I adopt:

“ . . . [W]hen it comes to deciding the meaning of a legislative provision, judges are primarily concerned with arriving at a coherent interpretation, which, while taking into account commerciality and reasonableness, pays proper regard to the language of the provision interpreted in its context.”

30. Mr Chapman relies on the words “a limited partner shall not be a party to or named in the proceedings” as representing an absolute prohibition on a limited partner playing any part in proceedings by or against an ELP. He says those words are unequivocal in their meaning and admit of no exceptions. But in my view the section needs to be read in the context of the overall scheme of the ELPA. The essence of that scheme is expressed in section 4(2) of the ELPA as follows:

“An exempted limited partnership shall consist of one or more persons called general partners who shall, in the event that the assets of the exempted limited partnership are inadequate, be liable for all debts and obligations of the exempted limited partnership,

and one or more persons called limited partners who shall not be liable for the debts or obligations of the exempted limited partnership save as provided in the partnership agreement and to the extent specified in sections 20(1) and 34(1) ...”.

The other provisions of the ELPA are designed to maintain that distinction. This is particularly apparent in section 14, which in subsection (1) contains the restriction on a limited partner taking part in the conduct of the ELP’s business in its capacity as a limited partner quoted at paragraph 2 above and in subsection (2) provides that “all letters, contracts, deeds, instruments or documents whatsoever shall be entered into by or on behalf of the general partner... on behalf of” the ELP. Significantly, section 20 contemplates the possibility that a limited partner may participate in the business of the ELP notwithstanding the terms of section 14(1), but provides that the only sanction is loss of the protection of limited liability. I accept the submission of Mr Allison KC, for the respondents, that that means that section 14(1) is not an absolute prohibition on a limited partner participating in the business of an ELP. Taken overall, the ELPA is designed to provide a framework through which sleeping partners may invest with the protection of limited liability, all dealings with the outside world being conducted by the general partner. Viewed in that light, section 33(1) is to be regarded as merely a feature of the separation of functions between limited partner and general partner; it is designed to prevent a limited partner from being sued in respect of liabilities for which, under the scheme of the ELPA, only the general partner is liable, and to reinforce the principle set out in section 14 that a limited partner should not take part in the conduct of the ELP’s business and its dealings with the outside world. It cannot, in my view be regarded as an absolute prohibition on a limited partner participating in any way in litigation, still less a prohibition on which a hostile party in the litigation is entitled to rely. On that basis, the Judge had jurisdiction to join the respondents to the crossclaim.

31. There are two other reasons why I take that view. First, even if read literally and taken at its highest, the focus of section 33(1) is on the inception of the proceedings: they may not be instituted by or against a limited partner, and a limited partner is not to be a party or even named in the proceedings. But once proceedings have been commenced in compliance with the provisions of section 33(1), as so far as was necessary the present proceedings were, they come under the control of the court in the normal way; and nothing in the terms of section 33(1) can be taken as intended or effective to limit the ordinary powers of the court – including the power to join parties under GCR O.15, r.6.

32. The second reason relates to the defence of set-off. The terms in which this is pleaded are set out in paragraph 14 above. On one level, all that is being said is that the respondents' claims, if successful, will fall to be valued by reference to the assets of the EPA, and those assets will be diminished if the crossclaim succeeds. As it was put in paragraph 16 of the appellants' skeleton argument: "The respondents' interest in the crossclaim is inseparable from that of the Fund; any loss suffered by the respondents on the crossclaim would arise solely indirectly on the basis of the respondents' capacity as limited partners in the Fund". But that is not all that the set-off does. It is pleaded specifically as a defence to the respondents' claims, and the effect of pleading it as a defence is in my view to place the merits of the crossclaim squarely in issue between the appellants and the respondents, as well as between the appellants and GP. The respondents are plainly entitled to contest the defence of set-off, but cannot do so effectively without being able to contest the underlying merits of that defence as set out in the crossclaim. That means that, whereas standing alone the crossclaim may properly be regarded as a separate *lis*, the defence of set off makes it a facet of the existing proceedings which, for the reasons I have given above, is not to be regarded as falling within section 33(1).
33. Accordingly, I consider that the Judge was entitled to hold that he had jurisdiction to join the respondents as defendants to the crossclaim, and I would dismiss that aspect of the challenge to his decision.
34. That leaves the question of whether or not he exceeded the proper bounds of his discretion under GCR O.15, r.6 by ordering the respondents' joinder. As indicated in the second ground of appeal, the basic contention is that the Judge's separate decision to appoint receivers of the GP to conduct its defence of the litigation made the joinder of the respondents unnecessary and vitiated the Judge's decision to join them.
35. Order 15 rule 6 provides, so far as relevant, as follows:

"Misjoinder and nonjoinder of parties (O.15, r.6)

...

(2) Subject to the provisions of this rule, at any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application –

...

(b) order any of the following persons to be added as a party, namely –

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter”.

36. The Judge’s reasons for joining the respondents are set out in paragraphs 84 to 93 of the judgment. They may be summarised as follows:

(a) The court had a wide and flexible jurisdiction to permit joinder in the interests of justice or when it was appropriate to do so (paragraph 84).

(b) The requirements of O15 were made out: the plaintiffs were necessary parties whose rights would be affected by the outcome of the crossclaim. There were legal issues, including the construction of the LPA and claims which arose in the proceedings, and it was just and convenient for the court to hear those matters together (paragraph 85).

(c) The court exercised its discretion in favour of joinder. It accepted that the need for the respondents to be joined as defendants to the crossclaim was not affected by who was in charge of GP (i.e. director, receiver or liquidator). Neither a receiver nor a liquidator would be in as good a position to defend the crossclaim as the respondents, and an officeholder would have to be funded by either the respondents or D2-D4 (paragraph 86).

(d) The parties with an acute economic interest (albeit indirectly by way of their interest in the ELP) in defending the crossclaim (and in whom the relevant knowledge to enable a defence to be advanced resided) were the respondents and they should be allowed to defend the crossclaim (paragraph 87).

(e) Irrespective of the appointment of an officeholder, in circumstances where the respondents were the parties most affected by the crossclaim and would bear the actual financial loss if it succeeded, it was just to permit the respondents to participate in defending the crossclaim in addition to the GP acting through independent officeholders (paragraph 89).

(f) It would not be in the interests of justice for Mr Williams to be permitted to be both one of the parties advancing the crossclaim as D2 (and the individual responsible for the actions of D3 and D4) and to control the party defending the crossclaim (the GP) (paragraph 90).

(g) The court was satisfied that joining the respondents as defendants to the crossclaim would not be unfair to D2-D4 (paragraph 92).

(h) Joining the respondents as defendants was a sensible way of ensuring that the claims in the crossclaim were justly, conveniently, and fairly resolved (paragraph 93).

37. In his written and oral submissions, Mr Chapman sought to raise the question of whether there were grounds on which the Judge could conclude that the respondents fell within any of the gateways defined in GCR O.15, r.6 as justifying joinder. But that question was not within the scope of the second ground of appeal, which assumed the existence of a discretion to join and took issue with the exercise of that discretion on the sole ground that the Judge's simultaneous appointment of receivers with authority to conduct the litigation on behalf of GP made joinder of the respondents unnecessary. We indicated to Mr Chapman that we were not prepared to consider arguments as to the existence of the discretion; and discussion of this topic is accordingly confined to the question of the validity of its exercise in light of the appointment of the receivers.

38. As to that, the appellants' position is adequately summarised in paragraph 69 of their skeleton, which gives the following reasons why it is said the Judge fell into error in the exercise of his discretion and misdirected himself as to the scope of that discretion:

“(a) The test is not about what might be perceived to be just, convenient or fair in any broad or general sense but about the exercise of a judicial discretion with regard to the more narrow object of O. 15 r. 6, namely avoiding a multiplicity of proceedings and conflicting outcomes on common issues.

(b) On the one hand the learned judge concluded that the appointment of receivers to have conduct of the litigation on behalf of D1 was necessary, just and convenient – implicitly recognising that the receivers would be able to conduct the litigation effectively for and on behalf of D1 and TPF – yet in the very same judgment the learned judge appears to find that the receivers are in no position properly to defend the crossclaim (or at least not in as good a position as the respondents to do so) such that the respondents need to step into their shoes. Such findings are inconsistent and wrong. If the receivers' appointment would not affect the position either way, and the economic stakeholders should be permitted to advance their own position on behalf of D1 then why appoint the receivers at all?

(c) The reasons given by the Judge for exercising his discretion in the manner he did ignore or give undue weight to the fact that (i) discovery will be given by all parties in the proceedings, (ii) the respondents have no personal knowledge of the matters arising on the crossclaim which the receivers could not learn by discovery, (iii) the court-appointed receivers who were instituted for the very purpose of conducting the litigation on behalf of D1/ TPF are funded and will acquire the same documents and knowledge as all other parties by discovery, and (iv) a defendant's perceived ability to defend a claim does not provide a basis, let alone a sound one, to be joined to an action in which no relief is sought against it.

(d) The appointment of the receivers to have conduct of the litigation on behalf of D1 entirely removes the concerns raised by the respondents (which led to the respondent's filing of the joinder summons in the first place) that Mr Williams' beneficial ownership of D1 would be abused to ensure the crossclaim was not properly defended. After the learned Judge had determined to appoint the receivers over D1, he erred in failing to take account of such determination when exercising his discretion on the joinder summons. The two matters are inextricably linked; any "need" that might have existed for the respondents to be joined (it being denied any need ever existed) fell away the moment the court decided to appoint receivers. The Judge also failed to consider that it was in fact the respondents who were seeking to obtain an unfair advantage by being able to raise defences to the crossclaim which D1 was not prepared or able to advance,

not least because of the claims that D1 itself faces from the respondents in relation to the same or related subject-matter”.

39. In my judgment, none of these matters is sufficient to indicate that the Judge trespassed beyond the legitimate bounds of his discretion. He was well aware that the appointment of receivers meant that there would be officeholders in place capable of dealing with some aspects of the litigation; but he took the view that no officeholder would be in as good a position as the respondents to defend the crossclaim, that a defence of the crossclaim by an officeholder would have to be funded by the respondents or (which in the circumstances is unlikely) D2-D4, and that it was the respondents who had the knowledge necessary to defend the crossclaim and the economic interest in doing so. There was ample material on which the Judge could base that view. It cannot be said that he took into account any irrelevant consideration, or failed to have regard to any relevant one, or that his decision was perverse. In my view, this ground of appeal, too, must fail.
40. For these reasons, I would dismiss the appeal. My provisional view is that the costs of the appeal should be paid by the appellants to the respondents on the standard basis; but if either party wishes to propose a different order they may do so in writing within 10 working days of the circulation in draft of this judgment and the matter will then be dealt with on the papers.

BIRT JA:

41. I agree.

FIELD JA:

42. I also agree

