

law”,⁹ could incur loss.¹⁰

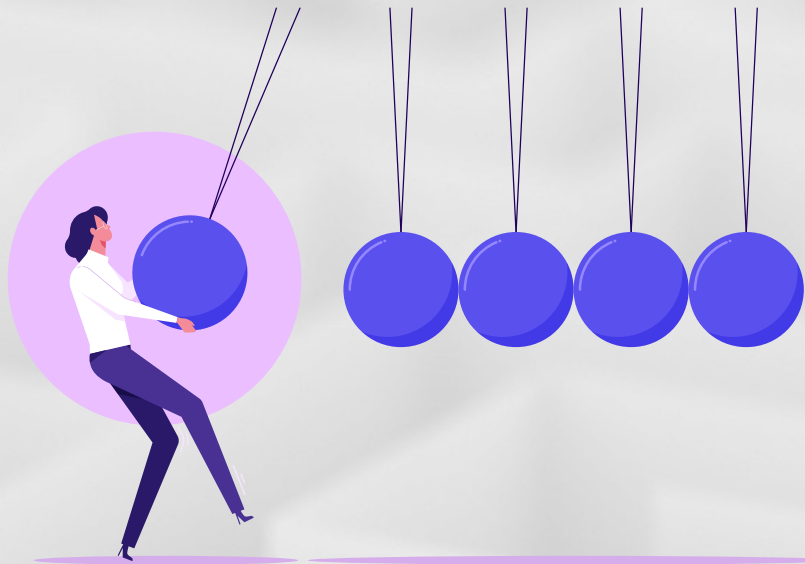
The judge at first instance thought not, holding that,

“where an ELP is alleged to have suffered loss, as in this case, that is the loss of each of the limited partners”.¹¹

This finding was not appealed but the CICA stressed that it was, “not to be taken as agreeing that this is correct”.¹² The CICA referred first to the statutory trust arising pursuant to s.16(1), under which the “GP of an ELP holds its [i.e., the ELP’s] assets on trust for all the limited partners”.¹³ In the case of a trust, a trustee’s breach of trust may cause a loss to the trust fund,¹⁴ and a beneficiary of a subsisting trust may bring a claim to recover that loss.¹⁵ The remedy is for an order to “restore to the trust what ought to have been there”.¹⁶ The CICA said the same approach and remedy was equally applicable in the case of the statutory trust created pursuant to s.16(1), concluding that “in proceedings against the GP, a limited partner can recover for loss suffered by the breach of the statutory trust but that the remedy would be the restoration of the ELP’s fund thus compensating the direct losses suffered by all the constituent limited partners”.¹⁷



Secondly, the CICA referred to the principle that a successor trustee may bring a claim against a former trustee



for breach of trust and for restoration of the trust fund.¹⁸ “Thus”, the CICA concluded, “even though like an ELP, a trust is not a separate legal entity, it can properly be said that the trust as well as a beneficiary has a claim against a trustee for breach of trust”

(emphasis added).¹⁹ By analogy, the CICA appeared to consider that an ELP could have a claim against a GP.

In a trust context, whether a derivative action is possible appears to depend on whether the cause of action can be considered trust property.²⁰ If it cannot, a beneficiary has no ability to bring a claim derivatively on behalf of the trust.²¹ If, as the CICA said in the Kuwait Ports case, it is, “strongly arguable that the position is the same in relation to an ELP”,

then it is submitted that precisely the same question must be posed under s.33(3), namely: is the claim which the LP seeks to bring properly to be considered as being partnership property? Only if that question is answered in the affirmative will it become necessary to consider the “without cause” test. Whether a,

“particular chose in action is or is not a trust asset involves no contest involving high principles and great authorities but rather an examination of the particular facts of the particular case”.²²

including examination of what, if any, is the connection between the cause of action and the administration of the trust and the nature and extent of any such connection.²³ In this context, it may be necessary to differentiate between claims against third parties and claims against the incumbent (defaulting) trustee.

Claims of the former type can quite clearly constitute trust property. For example, when a contract is made by the trustee in the course of the administration of the trust, and for the purpose of the trust,²⁴ the benefit of the contract will itself be trust property with the result that any right of action thereunder will also constitute trust property.²⁵ By parity of reasoning, an

9 Kuwait Ports at [63].

10 Kuwait Ports (CA) at [142].

11 Kuwait Ports at [63].

12 Kuwait Ports (CA) at [145].

13 Kuwait Ports (CA) at [56].

14 Lewin on Trusts (20th Ed., 2023) (“Lewin”), at [41-002].

15 Lewin, at [41-010] and [41-071].

16 Kuwait Ports (CA) at [57] citing Target Holdings Limited v Redferns [1996] AC 421. And see Lewin, at [41-010].

17 Kuwait Ports (CA) at [59].

18 Lewin, at [41-080].

19 Kuwait Ports (CA) at [145].

20 Lewin, at [47-007] referring to claims against third party advisers to the trustee. See also Bayley v SG Associates [2014] EWHC 782 (Ch) at [47]. This article assumes the position is the same when the putative claim is against a defaulting trustee.

21 Bradstock Trustee Services Ltd v Nabarro Nathanson [1995] 1 W.L.R. 1405 at page 1411F

22 HR v JAPT [1997] Pens. L.R. 99 at [78].

23 Young v Murphy [1996] 1 VR 279 at page 317.

24 Importantly, not all contracts made by trustees, are necessarily made by them in the course of the administration. A contract may be made for private purposes as opposed to being made in the management of the trust estate: Young v Murphy at page 291.

25 Young v Murphy at page 317. Bayley v SG Associates [2014] EWHC 782 (Ch); [2014] W.T.L.R. 1315 at [51]. See also Royal Brunei Airlines v Tan [1995] 2 AC 378, at page 391F.

