

Binscarth Holdings LP v. Grant Anthony: limited partnership derivative actions

AUTHORS



Andrew Gray



Huw Evans



Cameron D. Koziskie

In [*Binscarth Holdings LP v Grant Anthony*](#) (*Binscarth*), the Court of Appeal for Ontario determined that derivative actions may provide a remedy for limited partners where their limited partnership interests are harmed by the actions of third parties. Modifying the statutory test for leave to bring a derivative action under corporate law, the Court indicated that leave may be granted where: (i) a general partner refuses to pursue a claim against the alleged third-party wrongdoer; (ii) the limited partner appears to be acting in good faith; and (iii) it appears to be in the best interest of the limited partnership that the action be brought. The Court considered the limited partnership form of business organization and a series of non-exhaustive factors specific to that form of business organization that will be relevant when a court decides whether to grant leave. In future cases, those factors could include the extent to which the limited partnership agreement restricts limited partner claims.

What you need to know

- The derivative action—traditionally, most commonly understood as a corporate law remedy—is confirmed to be available in the limited partnership context for partners who suffer harm when a general partner refuses to pursue claims against third parties for the benefit of the limited partnership.
- The use of the action is likely greatest in areas where conflicts of interest are common between partners and third parties.
- Parties contracting in this area should consider whether to limit the availability of the derivative action in the partnership’s constating documents.

The decision

Background

Binscarth Holdings LP (the Limited Partnership) was established as a family business with significant real estate holdings. A dispute arose between its limited partners (the LPs) and the general partner (the GP), the principal of which was a family member. The LPs alleged that the GP’s principal was appropriating Limited Partnership benefits for himself and his related third parties to the detriment of the LPs and the Limited Partnership. The LPs moved for permission from the Court to commence a derivative action to recover the inappropriate benefits from the GP, its principal and his related parties, citing breach of fiduciary duty, breach of trust, breach of contract, breach of statutory duties, conversion, unjust enrichment and gross negligence.

The Court at first instance allowed the commencement of the derivative action against the GP and its principal only. The Court of Appeal agreed that a derivative action was available to the LPs but only against the principal's related parties—not against the GP or its principal.

Because the alleged wrongdoing was on the part of the GP, the Court noted that the limited partnership form of business organization would not preclude individual LPs from pursuing direct claims against the GP. In general, limited partners have a cause of action against the general partner by virtue of their contractual relationship with the general partner and the general partner's duties. In fact, in this case, the Limited Partnership Agreement governing the Limited Partnership in question (the LPA) contemplated such a cause of action by the LPs against the GP; therefore, the derivative action mechanism was unnecessary.

Where an alleged wrongdoer is a third party, however, limited partners are left with little recourse. The limited partnership is not itself a legal entity—it is a business arrangement between limited partners managed by a general partner. The general partner has control over the business of the limited partnership, including decisions over whether to pursue claims against third parties. If the general partner refuses to pursue a claim against third-party wrongdoers that harm the limited partnership, limited partners lack standing to directly pursue a claim to remediate the harm suffered by the limited partnership.

In this respect, the problem presented by the limited partnership form of business organization is similar to the *Foss v. Harbottle* problem in corporate law: claims indirectly affecting shareholder interests belong to the corporation and its directors determine whether to litigate, as shareholders have no direct interest in the claims and no standing to sue. In corporate law, the derivative action was developed to overcome the issue of standing for shareholders pursuing claims in the name of a corporation. Developed by common law and now codified in statute, the derivative action is available to shareholders: with leave of the court, a shareholder may pursue a claim in the name of the corporation for its direct benefit.

Recognizing that circumstances may present a gap in respect of limited partnerships, the Court of Appeal in *Binscarth* found that a derivative action may also be available to injured limited partners.

The test for leave

Modifying the statutory test for leave to bring a derivative action under the *Business Corporations Act* (Ontario) and the *Canada Business Corporations Act*, the Court indicated that leave may be granted where: (i) a general partner refuses to pursue a claim against the alleged third-party wrongdoer; (ii) the limited partner appears to be acting in good faith; and (iii) it appears to be in the best interest of the limited partnership that the action be brought.

However, the Court noted that there must be sensitivity to the particular context of the limited partnership structure. Sensitivity must be paid to: (i) the relationship between the limited partners and its general partner; (ii) the management role of the general partner; (iii) the terms of the limited partnership agreement; and (iv) the provisions of the *Limited Partnerships Act* (Ontario). In doing so, the Court may consider the following non-exhaustive factors: (i) whether the general partner's failure to act is unreasonable or in bad faith; (ii) the existence of any conflict of interest between the general partner and the third-party wrongdoers; (iii) the presence of a strong *prima facie* case; and (iv) the existence of any alternative, non-derivative remedies.

In *Binscarth*, the Court referred to the following in granting the LPs leave to bring the derivative action:

- the extensive general partner powers under the LPA;
- the apparent conflict of interest between the GP, its principal, and the related third parties—two of which being corporations solely owned by the principal and one being his common-law spouse; and
- the existence of a strong *prima facie* case.

While the Limited Partnership was the damaged party and the GP would ordinarily have the power to bring claims, the GP was conflicted, and it was, therefore, appropriate to grant leave to the LPs to sue the alleged wrongdoers in the name of the Limited Partnership.

Significance of the decision

The significance of the *Binscarth* decision lies in the Court of Appeal's explanation as to the availability, in principle, of the derivative action mechanism in respect of a limited partnership and in the guidance arising from the decision specific to the Limited Partnership as to when the court should permit a derivative action.

The *Binscarth* decision also raises questions for those who commonly use the limited partnership form of business organization: (i) to what degree can clients structure partnership agreements to avoid this result and contract out of such claims; and (ii) how can you obtain an advance waiver of these claims?

The Ontario *Partnerships Act* and the *Limited Partnerships Act* govern limited partnership law in Ontario. Both regimes set out default rules applicable to limited partnerships, but parties can—and often do—contract out of the default rules in limited partnership agreements. Although *Binscarth* concludes that the derivative action can be utilized in the limited partnership context, limited partnership law ultimately supports parties' freedom of contract. Accordingly, in certain circumstances, parties drafting limited partnership agreements should consider addressing the extent to which the remedy is available, or specifically delineating the scope of the general partner's obligation to pursue third-party claims.

Implications for businesses

Parties leveraging the limited partnership form of business organization in areas where conflicts of interest often arise should turn their minds to the potential risk that the derivative remedy poses. In the funds space, for example, where a general partner manages a limited partnership's relationship with the fund manager or other related parties—or in the infrastructure and energy project space, where affiliates of partners often provide services to the limited partnership by contract—parties should be aware of the potential conflicts between partners and related parties. Where these contracts are material to the limited partnership's or partners' interest, parties should consider the degree to which they want to contract out of or waive derivative claims.

A further point for consideration is that, in *Binscarth*, the Court did not rule on whether a limited partner's control over a claim could affect a limited partner's limited liability by virtue of taking part in the control of the business of the limited partnership. While we do not think a court would necessarily subject a limited partner to the liability as a general partner as a result of bringing a derivative action, this point remains untested.

To discuss these issues, please contact the author(s).

This publication is a general discussion of certain legal and related developments and should not be relied upon as legal advice. If you require legal advice, we would be pleased to discuss the issues in this publication with you, in the context of your particular circumstances.

For permission to republish this or any other publication, contact [Richard Coombs](#).

© 2026 by Torys LLP.

All rights reserved.