A case of Rhone: Agreement of limited partners not to petition for the winding up of a Cayman Islands exempted limited partnership upheld on appeal

The appeal in *Rhone Holdings*[1] concerned a petition presented by limited partners for the winding up of a Cayman Islands exempted limited partnership, which had been struck out by the Grand Court as contrary to an express term of the partnership agreement not to present such a petition.

In summary, the Cayman Islands Court of Appeal held that:

- Section 95(2) of the Companies Law, which provides that the Court shall dismiss or adjourn a winding up petition against a company on the ground that the petitioner is contractually bound not to petition, also applies to petitions against exempted limited partnerships, and is not inconsistent with section 36(3)(g) of the Exempted Limited Partnerships Law (the "**ELP Law**").
- An agreement by a limited partner not to present a petition to wind up an exempted limited partnership is not contrary to public policy, not least because section 95(2) gives statutory strength to what would otherwise merely be a contractual agreement.
- Section 95(2) mandates dismissal of a winding up petition presented in respect of an exempted limited partnership in breach of a binding term of the partnership agreement not to present a petition. Section 95(2) allows an adjournment of the hearing of the petition, as an alternative to the mandatory dismissal, only where the parties have agreed to first try to resolve their dispute through mediation, arbitration, or some other form of alternative dispute resolution.

The decision in *Rhone Holdings* provides welcome clarification as to the enforceability of non-petition clauses against limited partners in an exempted limited partnership, but the extent to which such clauses can be relied on to prevent shareholders from petitioning to wind up Cayman Islands companies remains uncertain.

Background

The applicants sought leave out of time to appeal a decision of Mrs Justice Mangatal dismissing a petition presented by four limited partners of an exempted limited partnership to wind up the partnership. Mangatal J had dismissed the petition on the basis that the partnership agreement, binding the applicants and the respondents, included a contractual obligation not to petition to wind up the partnership; and under section 95(2) of the Companies Law, the Court had a duty in such circumstances to dismiss the petition.

The applications for permission to appeal, and for an extension of time in which to seek permission, were unanimously dismissed by the Court of Appeal because the appeal had no realistic prospect of success.

Three short points of substantive law arose:

- Does section 95(2) of the Companies Law apply to exempted limited partnerships at all, or was it inconsistent with section 36(3)(g) of the ELP Law and therefore overridden by it?
- Should the contractual obligation in the partnership agreement in any event be overridden by considerations of public policy?
- When applying section 95(2) of the Companies Law, in what circumstances should an adjournment be ordered rather than a dismissal of a petition?

The relevant statutory provisions

Section 36(3) of the ELP Law provides in part as follows:

"(3) Except to the extent that the provisions are not consistent with this Law, and in the event of any inconsistencies, this Law shall prevail, and subject to any express provisions of this Law to the contrary, the provisions of Part V of the Companies Law… shall apply to the winding up of an exempted limited partnership and for this purpose…

…

(g) on application by a partner… the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable".

Section 95 of the Companies Law provides in part as follows:

"(1) Upon hearing the winding up petition the Court may (a) dismiss the petition; (b) adjourn the hearing conditionally or unconditionally; (c) make a provisional order; or (d) any other order that it thinks fit.

(2) The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that a petitioner is contractually bound not to present a petition against the company".

Does section 36(3)(g) of the ELP Law override section 95 of the Companies Law?

The applicants argued that the general language of section 36(3)(g) was inconsistent with the provisions for winding up found in Part V of the Companies Law. Further or alternatively, it was argued that the general language in section 36(3)(g) was not expressed to be subject to, for instance, the provisions of section 95(2) of the Companies Law.

Before the Court of Appeal, however, the applicants conceded when pressed that the power to wind up on the

just and equitable ground, or indeed on any ground, was to be found, not in the ELP Law, but in Part V of the Companies Law to which section 36(3) of the ELP Law makes express reference, and that there is no language, express or implied, in the ELP Law which is inconsistent with provisions for winding up to be found in Part V of the Companies Law, or in particular, section 95(2) of that Law.

Accordingly, the submission that section 36(3)(g) overrides section 95 of the Companies Law and, by overriding it, excludes the provision of section 95(2) was rejected as "*a simply impossible submission*".

Is an agreement not to petition to wind up a Cayman Islands exempted limited partnership contrary to public policy?

This was also held to be an "*impossible submission*" in light of the statutory wording. Section 95(2) of the Companies Law applied to companies but also to exempted limited partnerships. That statutory provision was held to make it plain that a contract or agreement not to present a petition against a company or an exempted limited partnership was not contrary to public policy but, on the contrary, represented the policy of the law by express enactment, since the express wording of section 95(2) gave statutory strength to what would otherwise merely be a contractual agreement.

When can the Court adjourn the petition under section 95(2) of the Companies Law?

The applicants also submitted that the Court was not under a duty to dismiss a petition presented in breach of a contractual obligation not to present a winding up petition, since the language of section 95(2) included an alternative power to adjourn the hearing of the winding up application.

It is unclear where this submission would have taken the applicants' case on appeal. In any event, the Court of Appeal held that such a power was reserved for situations in which the relevant agreement prohibiting petitioning to wind up the company or partnership included a binding alternative dispute resolution clause. In such circumstances, the Court may adjourn the petition to allow the parties to follow such contractual procedures as may have been agreed. However, Rix JA held that such circumstances do not detract from the message of section 95(2) which is that "*where parties have agreed not to present a petition, then they are not permitted to act in breach of that agreement*". Save for adjournment for negotiations, mediation or arbitration, as the case may be, section 95(2) compels the Court to dismiss the petition to give effect to the parties' binding contractual agreement.

Two procedural points of note

First, in support of their application for an extension of time in which to seek leave to appeal, the applicants submitted that there had been no prejudice caused by the delay of a week. Rix JA did not make a finding on the facts about whether any prejudice had been caused, but said that "*in matters which call into question the potential existence or not of a company as a functioning company, any delay is potentially prejudicial and may indeed be seriously prejudicial*".

Second, the applicants came in for criticism for failing to bring section 95(2) of the Companies Law to the attention of Mrs Justice Mangatal, when the petition had initially been presented *ex parte*, along with an application for joint provisional liquidators to be appointed. At the *ex parte* hearing, Mangatal J ordered the

appointment of the liquidators. On the return date when the respondents appeared, and upon being referred to section 95(2), she ordered the petition be dismissed and the JPLs discharged.

Conclusion

Despite the applicants' "*gamely made*" submissions, it is clear that the Court of Appeal considered there to be no room for doubt about both the statutory construction and public policy behind sections 95(2) of the Companies Law and 36(3) of the ELP Law. A binding agreement not to petition for winding up a company or exempted limited partnership would be upheld, and the Court would dismiss the petition except in circumstances where a binding alternative dispute resolution clause in the same agreement should be performed first.

This decision also throws into relief, but leaves unresolved, questions regarding how section 95(2) of the Companies Law applies to shareholders of companies. A settled line of English authority, starting with *Re Peveril Gold Mines Ltd* [1898] 1 Ch 122, stands for the proposition that a shareholder's right to petition to wind up a company cannot be excluded in the company's articles of association, on public policy grounds. Though the point was expressly left undecided in *Peveril*, there is some subsequent English and Commonwealth authority to suggest that a separate contract between the shareholder and the company outside the articles purporting to exclude the same right would also be struck down on the same grounds.[2] Has the legislative introduction of section 95(2) of the Companies Law led to a divergence between the law in the Cayman Islands and other common law jurisdictions?

Section 95(2) refers to a petition presented by a "*petitioner*" rather than specifically by a creditor. It appears, therefore, that the provision is intended to bite not only on a petition to wind up a company that is presented by a creditor in breach of a non-petition agreement, but also on, for example, a petition presented by a shareholder who has promised not to present a winding up petition. Did the legislature in the Cayman Islands intend that, in contrast to some English and Commonwealth authority, a non-petition agreement would be upheld if made outside the articles of association between a shareholder and a company? Did it also intend that *Peveril* is no longer good law in the Cayman Islands, such that the articles of association of a Cayman company can include a non-petition provision?

There does not appear to be any guide in the pre-legislative material. Nor are these important questions answered by *Rhone*; and they fall to be considered on another occasion. In light of the use of "*petitioner*" rather than "*creditor*" in section 95(2) of the Companies Law, it may be that a non-petition agreement between a shareholder and a company will be upheld if specifically made (and not within the articles of association). But we consider it less likely that the legislature intended, without comment, to permit articles of association to prohibit shareholders' petitions and thereby do away with such well-established authority as *Peveril.*

1 Appeal No. 21 of 2015, Cause No. FSD 119 of 2015
2 See McPherson's Law of Company Liquidation (3rd ed.) at 4-007.

Hamid Khanbhai
Partner

+1 345 914 5834
hkhanbhai@campbellslegal.com

Guy Manning
Partner

+1 345 914 5868
gmanning@campbellslegal.com

Andrew Pullinger
Partner

+1 345 914 5865
apullinger@campbellslegal.com