



IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 201 OF 2021 (RPJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF PADMA FUND L.P.

IN OPEN COURT

Appearances: **Mr. Liam Faulkner of Campbells LLP on behalf of Padma Fund LP**

Mr. Peter Sherwood and Mr Tim Baildam of Carey Olsen on behalf of the Petitioners

Mr. Tony Heaver-Wren of Appleby on behalf CCP Henderson Capital Limited

Before: **The Hon. Justice Parker**

Heard: **14 September 2021**

Draft Judgment Circulated: **5 October 2021**

Judgment Delivered: **8 October 2021**

HEADNOTE

Winding up petition – s. 92(d) Companies Act (2021 Revision) - s.36(3) of Exempted Limited Partnership Act (2021 Revision) - jurisdiction on a creditor’s petition - s. 91 of Companies Act - applicability of Part V of Companies Law - s.33(1) of Exempted Limited Partnership Act – s.3 of Exempted Limited Partnership Act and s.35 of Partnership Act (2013 Revision) - proceedings may be commenced by petition of creditor against general partner only, not the exempted limited partnership.

JUDGMENT

Introduction

1. The Petition of San Miguel Holdings Corp (“SMHC”) and Atlantic Aurum Investments B.V. (“AAIBV”, and SMHC, together the “Petitioners”) presented on 19 July 2021 seeks orders for the winding up of Padma Fund L.P. (the “Partnership”).



2. The Petitioners seek an order that the Partnership be wound up pursuant to section 92(d) of the Companies Act (2021 Revision) (the “Companies Act”), as applied by section 36(3) of the Exempted Limited Partnership Act (2021 Revision) (the “ELP Act”), on the basis that the Partnership is unable to pay its debts.
3. Parallax Capital Management (the “General Partner”) acts on behalf of the Partnership. The General Partner is the sole general partner of the Partnership.
4. The Partnership, acting by its General Partner, opposes the Petition on the following grounds:
 - (1) the Petition is procedurally defective and the Court has no jurisdiction to make the orders sought by the Petition;
 - (2) the Statutory Demand relied upon to evidence insolvency is defective and invalid;
 - (3) the Petition debt is disputed bona fide on substantial grounds;
 - (4) the Partnership (acting by its General Partner) has a cross-claim exceeding the amount of the alleged petition debt;
 - (5) the Petition has been presented for a collateral and improper purpose and is an abuse of process.
5. Mr Liam Faulkner who appeared on behalf of the Partnership argues that if he succeeds on the jurisdiction argument (ground (1) above) then the Petition must be dismissed. Mr Peter Sherwood who appeared on behalf of the Petitioners did not dispute this, but argued that all five arguments in opposition were each without merit. Mr Tony Heaver-Wren who appeared for CCP Henderson Capital Limited opposes the making of the winding up order, but took no position on the jurisdiction argument.

Background¹

6. In summary, the Partnership (acting by its General Partner) is a minority shareholder of AAIBV. SMHC is the only other shareholder in AAIBV, which is a joint venture vehicle. Disputes have arisen in respect of the joint ventures which are the subject of ongoing

¹ *Park 1*



arbitration proceedings. The Petitioners have presented a winding up petition in respect of a costs award arising out of one of the arbitrations. The Partnership says its assets exceed its liabilities and it has a cross claim against the Petitioners in the arbitration which exceeds the petition debt.

7. The Partnership says the Petition has been presented for a collateral and improper purpose and for strategic reasons in the ongoing arbitration. It says that the intention and effect of the Petition, if a winding up order is made, would be to displace the General Partner, who has the institutional knowledge and expertise concerning the Partnership's affairs and the ongoing litigation against the Petitioners, and put the conduct of the litigation in the hands of court appointed liquidators nominated by the Petitioners who have none of that institutional knowledge and expertise.

The jurisdiction argument

8. Mr Faulkner submits that the Petition is procedurally defective and the Court has no jurisdiction to make the orders sought by the Petition. He relies on the statutory framework applicable to an exempted limited partnership. He also argues that section 91 of the Companies Act does not apply to exempted limited partnerships.
9. This leads to the result that the remedy of a creditor of an exempted limited partnership, such as the Petitioners, is to commence proceedings against the general partner. It is the general partner who (a) has the authority to enter into agreements and contracts on behalf of the Partnership; (b) holds the assets of the Partnership on a statutory trust; and (c) has unlimited liability in respect of the Partnership's liabilities.
10. A petition presented against the general partner would need to be served on the general partner and advertised in accordance with the Companies Winding Up Rules, 2018. Essentially, in Mr Faulkner's submission, the wrong procedure has been used and the court therefore has no jurisdiction to make the orders sought. The correct course of action, where adequate grounds exist, is for a creditor to present a winding up petition against the general partner.



11. Mr Sherwood for the Petitioners submits that the decision of Kawaley J in *XIO Diamond*² would have to be departed from for this argument to succeed. This is a high bar. In any event the court would have to reach a tortured and a wrong construction of section 36(3) of the ELP Act so as to conclude that it does not mean what Kawaley J said it did.
12. He added that the practice of attorneys in the Cayman Islands who are experts in “Funds work”, which involves Cayman Islands exempted limited partnerships, is that section 91 of the Companies Act applies to exempted limited partnerships by virtue of section 36(3) of the ELP Act. He provided an annex to his written submissions listing the cases decided in the Grand Court pursuant to winding up petitions issued against the exempted limited partnership, not the general partner. He argued that the Partnership’s argument was novel and without merit.

Decision on jurisdiction

Approach

13. The Petitioners have presented the winding up Petition against the Partnership. The onus is on the Petitioners to satisfy the Court that it has the jurisdiction to make the orders sought by the Petition.
14. Section 18(1) of the Grand Court Law (2015 Revision) provides that:

“Subject to this or any other law, the jurisdiction of the Court shall be exercised in accordance with any Rules made under this Law.”
15. The Court’s jurisdiction is to be exercised in accordance with the Rules, with the corollary that English practice may apply where no other provision is made.
16. Both Mr Faulkner and Mr Sherwood agreed that the scope of the Court’s jurisdiction under section 91 of the Companies Act and section 36 of the ELP Act is a matter of statutory interpretation.
17. The principles of statutory interpretation are well established and were succinctly summarised by the Privy Council in *Shanda Games Ltd v Maso Capital* where Lady Arden said at §[27]:

² (unreported, 30 April 2020, FSD 256 of 2019 (IKJ))



“the court has to ascertain the intention of the legislature from the words it has used in their context, and also in the light of any material which demonstrates the mischief that it was concerned to redress by the statutory provision.”

Analysis

18. The Partnership is an exempted limited partnership which was registered in the Cayman Islands on 8 September 2008.
19. Section 2 of the ELP Act in material part defines an “**exempted limited partnership**” as a partnership formed and registered under section 9(1) of the ELP Act.
20. The formation, operation and termination of exempted limited partnerships in the Cayman Islands is governed by the ELP Act and by certain provisions of the Partnership Act (2013 Revision) (the “Partnership Act”), as well as by certain principles of common law and the provisions of the limited partnership agreement entered into between the parties.
21. Section 3 of the Partnership Act states that a partnership is “*the relation which subsists between two or more persons carrying on a business in common with a view to profit.*” This concept survives from English law dating back to the late 19th century.
22. Section 4(2) of the ELP Act provides that to be an exempted limited partnership, the partnership must consist of:
 - (i) at least one person, called the general partner who, in the event that the assets of the exempted limited partnership are inadequate, is liable for all of the debts and obligations of the exempted limited partnership; and
 - (ii) at least one person, called the limited partner, who shall not be liable for the debts or obligations of the exempted limited partnership in excess of the capital contributed by that person to the exempted limited partnership, save as provided for in the partnership agreement or otherwise in the limited circumstances specified in sections 20(1) and 34(1) of the ELP Act.
23. This is a modification of section 10 of the Partnership Act which provides that:



“Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner...”

24. It is also a modification of section 13 of the Partnership Act which provides:

“Every partner of a general partnership is liable jointly with this co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under section 11 (liability of the firm for wrongs) or 12 (misapplication of money or property).”

25. An exempted limited partnership is not an entity with separate legal personality and cannot own property in its own right.
26. Pursuant to section 16(1) of the ELP Act, any rights or property of every description of an exempted limited partnership shall be held or deemed to be held by the general partner upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement.
27. The business carried on by an exempted limited partnership is conducted by its general partner who has the authority to enter into all letters, contracts, deeds, instruments or documents whatsoever on behalf of the exempted limited partnership: section 14(2) of the ELP Act.
28. By contrast, section 14(1) of the ELP Act prohibits a limited partner from conducting business on behalf of the exempted limited partnership in its capacity as a limited partner.
29. The key and controlling role the general partner plays in an exempted limited partnership is therefore made clear by the ELP Act.
30. That role extends to insolvency situations. Section 2 of the ELP Act provides that in the ELP Act:

*“**Insolvency of the exempted limited partnership**” means that the general partner is unable to pay the debts and obligations of the exempted limited partnership, otherwise than in respect of liabilities to partners on account of their partnership interests, in the ordinary course of business as they fall due out of the assets of the exempted limited partnership, without recourse to the separate assets of the general partner not contributed or committed to the exempted limited partnership and “**insolvent**” shall be construed accordingly;”*



31. The defined term “insolvency of the exempted limited partnership” is used in section 20(1) and 34(1)(b) of the ELP Act only and the defined term “insolvent” used in sections 34(1)(a) and 43(2)(g) only. There is therefore a distinct definition of insolvency applicable to exempted limited partnerships.

32. Against that backdrop section 33(1) of the ELP Act states that:

“Proceedings.

(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 causes, failed or refused to institute proceedings.”(my emphasis)

33. I reject Mr Sherwood’s submission that because the clause does not say in terms one cannot issue proceedings against an exempted limited partnership that the Petitioners are permitted to do so.

34. As to interpretation Mr Sherwood submitted that the clause would have to say:

“You may not issue proceedings against an exempted limited partnership or against a limited partner. You may only commence them against the general partner”.

35. There is however no provision within the ELP Act or the Partnership Act which provides that legal proceedings may be instituted against an exempted limited partnership in the name of the partnership. This is because it is through the general partner that its debts and obligations are enforced. Section 33(1) of the ELP Act says in terms proceedings may be instituted against the general partner(s) only.

36. Mr Sherwood relied on Order 81, rule 12 of the Grand Court Rules, 1995 (Revised Edition) which provides that any action by or against an exempted limited partnership may be commenced in the name of the firm. However in my view that does not assist Mr Sherwood because the applicable statutes must take precedence over procedural rules, and the particular rule does not in my view deal with the court’s winding up jurisdiction.



37. Section 2 of the Companies Act defines a “**company**” as, except where the context excludes exempted companies, a company formed and registered under the Companies Act or an existing company.
38. Section 89 provides that in Part V of the Companies Act: a “**company**” includes a foreign company in respect of which the Court has made a winding up order.
39. Neither of these two definitions include an exempted limited partnership because it is not a company.
40. Section 89 provides that in Part V of the Companies Act: a “**limited partnership**” means an ordinary limited partnership registered in accordance with section 49 of the Partnership Act (2013 Revision) or an exempted limited partnership registered in accordance with section 9 of the ELP Act (2021 Revision).
41. Section 91 of the Companies Act provides :

“Jurisdiction of the Court

The Court has jurisdiction to make winding up orders in respect of –

- (a) an existing company;*
 - (b) a company incorporated and registered under this Act;*
 - (c) a body incorporated under any other law; and*
 - (d) a foreign company which –*
- ...
- (iii) is the general partner of a limited partnership” (my emphasis).*

42. The defined term “limited partnership” is used only once in Part V of the Companies Act – in section 91(d)(iii) which gives the Court jurisdiction to wind up a foreign company which acts as the general partner of a limited partnership. It is therefore clear that the court has jurisdiction to make a winding up order in respect of a general partner of the limited partnership.
43. I accept Mr Faulkner’s submission, having set out these provisions, that if the intention of the legislature were for the Court to have jurisdiction to wind up an exempted limited partnership



under section 91 of the Companies Act then this would have been expressly provided for in section 91. The entities over which the court has jurisdiction were clearly delineated in section 91.

44. However, Mr Sherwood relies on section 36(3)(a) of the ELP Act to argue that reference in section 91 of the Companies Act to a company is deemed to be a reference to an exempted limited partnership. By the Petition, the Petitioners plead that section 92(d) of the Companies Act applies to an exempted limited partnership by virtue of section 36(3) of the ELP Act.

45. This is an important point which has not, I am informed by Mr Faulkner, been fully considered by this court in light of all the relevant statutory provisions.

46. Section 36 of the ELP Act was introduced into Cayman law when the Exempted Limited Partnership (Amendment) Law, 2009 came into force on 11 May 2009, as section 15(3) of the Exempted Limited Partnership Law (2007 Revision). I am informed by Mr Faulkner that there was no equivalent provision in the repealed Exempted Limited Partnership Law (2007 Revision) prior to that amendment.

47. Section 36(3) of the ELP Act states:

“Except to the extent that the provisions are not consistent with this Act, and in the event of any inconsistencies, this Act shall prevail, and subject to any express provisions of this Act to the contrary, the provisions of Part V of the Companies Act (2021 Revision) and the Companies Winding Up Rules, 2018 shall apply to the winding up of an exempted limited partnership and for this purpose...”(my emphasis)

48. It seems to me that this provision does not give a freestanding right for a creditor to present a winding-up petition against an exempted limited partnership³.

49. I also find that there is no jurisdiction for the court to make a winding-up order against an exempted limited partnership on a creditor’s winding up petition. I have reached this conclusion for the following reasons.

50. The prefatory words of section 36(3) are clear that Part V of the Companies Act only applies to an exempted limited partnership if and to the extent that the provisions are not inconsistent

³ *XIO Diamond supra at § 26*



with the ELP Act, and in the event of any inconsistencies, the ELP Act is to prevail, and Part V is subject to any express provisions of the ELP Act to the contrary.

51. The presentation of a creditor's petition against an exempted limited partnership seems to me to be inconsistent with (and is contrary to) the provisions of section 33(1) of the ELP Act.
52. An exempted limited partnership can be wound up and the partnership dissolved in one of two scenarios:
 - (1) voluntarily in accordance with the provisions of the partnership agreement pursuant to section 36(1) of the ELP Act; or
 - (2) by the Court pursuant to section 35 of the Partnership Act, which applies by virtue of section 3 of the ELP Act (see below).
53. Section 36(1) of the ELP Act contains provisions for the voluntary winding up and dissolution of an exempted limited partnership upon the occurrence of two events: (a) at the time or upon the occurrence of any event specified in the partnership agreement; or (b) unless otherwise specified in the partnership agreement, upon the passing of a resolution of all the general partners and a two-thirds majority of limited partners.
54. Section 3 of the ELP Act provides that the rules of equity and of common law applicable to partnerships as modified by the Partnership Act (but excluding sections 31, 45 to 54 and 56 to 57) shall apply to an exempted limited partnership, except where they are inconsistent with the express provisions of the ELP Act.
55. Section 35 of the Partnership Act contains five grounds on which a court may order the dissolution of a partnership on application by a partner and includes, at sub-section 35(d), when the business of the partnership can only be carried on at a loss and, by sub-section 35(e), whenever in any case circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.
56. Section 35 of the Partnership Act is in substantially the same terms as section 35 of the English Partnership Act 1890. It was introduced into Cayman Islands law by section 36 of the Partnership Law, 1983.



57. From this chronology, at the time of introducing the ELP Act into law, it is to be reasonably inferred that the legislature chose not to dis-apply or modify section 35 of the Partnership Act.

Application

58. When considering section 36(3) of the ELP Act, following the Privy Council in *Shanda* the Court is required to identify “*the mischief that it was concerned to redress by the statutory provision*”.
59. I accept Mr Faulkner’s submission that the intention of the legislature could not have been to enable a partner of an exempted limited partnership to apply to wind up and dissolve an exempted limited partnership on just and equitable grounds pursuant to section 92(e) of the Companies Act as the jurisdiction to do so already existed under section 35(e) of the Partnership Act.
60. As the remedy already existed, there was no “mischief” to redress. Indeed, I accept Mr Faulkner’s submission that the Court’s jurisdiction to dissolve an exempted limited partnership on the application of a partner under section 3 of the ELP Act and section 35 of the Partnership Act appears to be broader than under section 92 of the Companies Act. I accept his submission that it could not have been the intention of the legislature to narrow the Court’s jurisdiction by replacing section 35 of the Partnership Act (which specifically applies to partnerships) with section 92 of the Companies Act.
61. It seems to me that from a proper analysis of the above statutory provisions that the Court’s jurisdiction to wind up an exempted limited partnership on the application of a partner on the grounds that it is just and equitable to do so arises by virtue of section 3 of the ELP Act and section 35(e) of the Partnership Act only.
62. This is relevant for when one examines the decision in *XIO Diamond LP* below as, unlike the present case, it concerned an analysis of the situation which applied on the application to wind up by a limited partner.
63. I have considered whether there was “mischief” which the legislature sought to address by introducing section 36(3) of the ELP Act to enable a creditor to present a winding up petition against an exempted limited partnership, as in the present case.



64. I have concluded that no mischief existed as the creditor was (and remains) entitled to enforce any debt against the general partner which, unlike the exempted limited partnership, has a legal personality.
65. In any event, the provisions of Part V of the Companies Act referenced in section 36(3) of the ELP Act are subject to section 33(1) of the ELP Act which expressly states that legal proceedings against an exempted limited partnership may be instituted against a general partner only.
66. It seems to me therefore that the legislative purpose of introducing section 36(3) was to apply the applicable provisions of Part V of the Companies Act and the Companies Winding Up Rules, 2018 *following* the commencement of the winding up in order to facilitate the orderly winding up of the partnership's affairs.
67. This analysis accords with the commercial position and the legal liabilities which arise on the insolvency of a partnership where the business of the partnership is conducted by the general partner, the assets of the partnership are held by the general partner on a statutory trust and the general partner is personally liable for the debts of the partnership.
68. Pursuant to section 2 of the ELP Act, the partnership is deemed to be insolvent when the general partner is unable to pay the debts and obligations of the exempted limited partnership in the ordinary course of business as they fall due out of the assets of the exempted limited partnership, without recourse to the separate assets of the general partner not contributed or committed to the exempted limited partnership.
69. In that scenario the general partner remains personally liable for the partnership's debts and therefore the remedy of any creditor when the partnership is insolvent is to commence proceedings against the general partner. This is consistent with section 33(1) of the ELP Act.
70. The winding up procedure as it relates to exempted limited partnerships also fits with this analysis. When an exempted limited partnership is being wound up, either voluntarily under section 36(1) of the ELP Act or by order of the court pursuant to section 35 of the Partnership Act, the general partner is deemed to be the liquidating trustee of the partnership unless the court orders otherwise.



71. The role of the liquidating trustee is to conduct the orderly winding up of the partnership's affairs by collecting in and realising its assets, paying its liabilities, and distributing any surplus to the partners in accordance with their contractual rights under the limited partnership agreement. In the event of a shortfall, the general partner remains personally liable for the shortfall.

72. I accept Mr Faulkner's analysis that it follows that the remedy of any creditor of an exempted limited partnership is to commence proceedings against the general partner. In the event that a winding up order is made against the general partner, any liquidator appointed will continue to hold the assets of the exempted limited partnership on a statutory trust to be distributed to the creditors of the exempted limited partnership in accordance with the statutory scheme. In the event of a shortfall in the partnership assets, the liquidating trustee has a claim against the separate assets (if any) of the general partner and such claim would constitute an unsecured claim in any liquidation of the general partner which ranks *pari passu* with the claims of other creditors of the same class who have an unsecured claim against the general assets of the general partner.

73. It is also illustrative to look at the position in England. There is no statutory equivalent in the Cayman Islands to Part IV of the Insolvent Partnerships Order 1994 (the "IPO") which is in force in England.

74. The IPO modifies Part V of the Insolvency Act 1986 to extend the jurisdiction of the English Court to wind up a partnership as an unregistered company in certain scenarios. An "unregistered company" is defined by the Insolvency Act 1986, s.124 A to include: "*any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom*".

75. Pursuant to sections 7 and 8 of the IPO, the procedure for a creditor to petition for the winding up of a limited partnership can be implemented either with concurrent actions against one or more current or former partners or against the partnership alone. The English Court's jurisdiction to make the winding up order arises under the IPO. I note that a statutory equivalent has not been introduced in the Cayman Islands.



The decision of the Court in *XIO Diamond*

76. It is necessary to examine this case in a little detail. It concerned a just and equitable winding up petition presented by the sole limited partner against the exempted limited partnership.
77. Kawaley J held at §[23] that section 36 of the ELP Act applies to voluntary liquidations *after* their commencement and, at §[26], that section 36(3) of the ELP Act does not confer a freestanding judicial power to make a winding up order. I respectfully agree.
78. However the learned Judge made certain other findings (the ‘other findings’) which Mr Sherwood relies upon:
- (1) At §[28] he held that Part V of the Companies Act applies to exempted limited partnerships where an official liquidation is sought by a limited partner;
 - (2) At §[30] he held that:
 - (i) section 94 of the Companies Act applies to exempted limited partnerships, and expressly confers the right to petition for a winding up on the grounds set out in section 92 of the Companies Act; and
 - (ii) section 95 of the Companies Act applies to exempted limited partnerships and expressly empowers the Court to appoint official liquidators.
 - (3) At §[31] he held that section 36(3) of the ELP Act provides access to the winding up jurisdiction of Part V of the Companies Act.
79. It is important to note that it appears that Kawaley J was not taken to and did not consider section 33(1) of the ELP Act or section 3 of the ELP Act and section 35 of the Partnership Act. No inconsistency seems to have been pointed out or raised.
80. The parties proceeded on the basis that there was an agreed basis for the limited partner to petition to wind the partnership up on just and equitable grounds. Indeed Mr Faulkner who was counsel in the case submitted that a winding up order would have been made in any event, but the jurisdictional gateway should have been section 3 of the ELP Act and section 35 of the Partnership Act. Mr Faulkner submitted that it was wrong to interpret the decision to



mean that a creditor can use Part V of the Companies Act in relation to an exempted limited partnership to present a petition to wind it up.

81. Mr Faulkner informed me that none of the decisions concerning the application of section 36(3) of the ELP Act, since it came into force on 11 May 2009, have considered section 33(1) or section 3 of the ELP Act and section 35 of the Partnership Act, including the in the case of *Rhone Holdings LP*,⁴ which also concerned an application by a limited partner to wind up an exempted limited partnership on just and equitable grounds. It was common ground in that case that the Part V jurisdiction existed to properly bring a winding up petition against the exempted limited partnership.
82. It is to be noted that the applicable provisions of section 3 of the ELP Act and section 35(e) of the Partnership Act expressly gives the Court jurisdiction to dissolve an exempted limited partnership on the application of a limited partner where it is just and equitable to do so. Section 36(3) is expressly subject to section 3 of the ELP Act.
83. Upon a winding up order being made pursuant to those provisions, the commencement date of the winding up would be the presentation of the petition by the limited partner pursuant to section 36(10)(e) of the ELP Act and, following such commencement, the Court may make any order and give directions for the winding up and dissolution of the exempted limited partnership as may be just and equitable under section 36(3)(g) of the ELP Act. Sub-section 36(2) of the ELP Act governs the winding up regime of an exempted limited partnership that is being wound up pursuant to either section 36(1) of the ELP Act or section 35 of the Partnership Act.
84. I respectfully differ from Kawaley J's 'other findings'. I bear in mind that a decision of another Judge of this court should be followed unless I am convinced it is wrong⁵ and special care must be taken in circumstances where the Judge heard argument by experienced lawyers and wrote a fully reasoned judgment⁶. I would add that I hesitate long and hard before differing from a Judge so eminent and experienced in this field.
85. However having been taken to the statutory framework in some detail by Mr Faulkner I am regrettably bound to do so. I note in this context that not only was Kawaley J not taken to the relevant provisions of the ELP Act and the Partnership Act set out above, but also in *XIO*

⁴ (Unreported 16 September 2015)

⁵ *China Shanshui* [2015 (2) CILR 255] §64

⁶ *Simamba v Health* [2019 (2) CILR 213] §§68-71



Diamond the general partner did not oppose a winding up order being made on the just and equitable ground of loss of substratum (but opposed the loss of trust and confidence ground) and in that sense the petition was unopposed in substance.

86. His decision is also distinguishable (as is the *Rhone* case) on the basis that the position of a limited partner to dissolve a partnership is distinct from those of a creditor, like the Petitioners in this case, who are outsiders to the Partnership.
87. I have concluded that the court in *XIO Diamond* was in error to state that the jurisdictional basis for winding up the exempted limited partnership was section 36(3) of the ELP Act and Part V of the Companies Act.
88. Mr Faulkner accepted the line of authority relating to the jurisdiction by which the Court can order the winding up of an exempted limited partnership on the application of a partner. He accepted that the Court has jurisdiction, but submitted that that jurisdiction arises by virtue of section 3 of the ELP Act and section 35 of the Partnership Act (which is broader in scope than section 92 of the Companies Act). I agree with this analysis. The proper jurisdictional basis was section 3 of the ELP Act and section 35(e) of the Partnership Act, which it appears the court was not referred to.

Summary

89. It is clear in my view from a review of the statutory provisions engaged, that the Companies Act is not of general application to an exempted limited partnership. To the extent that its provisions apply, they apply (i) only to the extent that the provisions are not inconsistent with the ELP Act and in the event of any inconsistencies the ELP Act is to prevail and (ii) subject to any express provisions of the ELP Act to the contrary.
90. The scope of the Court's jurisdiction to make a winding up order under the Companies Act is set out in section 91, and this provision does not on its terms expressly extend to an exempted limited partnership.
91. This seems to me to be consistent with an exempted limited partnership not being an entity with separate legal personality; the partnership is simply the relation which subsists between the general partner(s) and the limited partner(s) by virtue of section 3 of the Partnership Act.

92. My conclusion is that the court has no jurisdiction over a creditor's winding up petition against an exempted limited partnership.
93. The creditor has an available statutory alternative remedy which is to commence proceedings against the general partner, which accords with the commercial and legal position.

It follows that the Petition is dismissed.



THE HON. JUSTICE PARKER
JUDGE OF THE GRAND COURT