

# Another take on winding-up exempted limited partnerships in the Cayman Islands

UPDATE

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The Grand Court of the Cayman Islands has recently ruled *In the Matter of Formation Group (Cayman) Fund I, LP (Formation)*<sup>1</sup> that it is possible to bring a just and equitable petition to wind-up an exempted limited partnership (ELP) in its own name, as opposed to that of the general partner (GP). This decision contradicts aspects of Justice Parker's judgment *In The Matter of Padma Fund LP (Padma)*.<sup>2</sup> In this update, we consider these conflicting first instance decisions.

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## Background

Prior to the Grand Court's decision in *Padma*, it had been assumed in a number of cases that a winding-up petition could be presented against an ELP and that the provisions in Part V of the Companies Act applied. That assumption was questioned in *Padma*, in which Parker J held that a creditor's winding-up petition could only be presented against the GP of an ELP and not against the ELP itself. The bases of Parker J's decision were that (a) the GP is responsible for the debts of the ELP, and (b) section 33(1) of the Exempted Limited Partnership Act (the ELPA) absolutely prohibits proceedings being issued against the ELP itself.

Section 33(1) of the ELPA provides:

*'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.'*

In *obiter*, Parker J said that the Court's jurisdiction to wind-up an ELP and dissolve the partnership arose under section 3 of the ELPA, which applies the provisions of the Partnership Act (2013 Revision) (the Partnership Act) to ELPs.<sup>3</sup>

Parker J also held that there was no jurisdiction to wind-up under section 36(3) of the ELPA. He said that such a construction would be inconsistent with section 33(1) of the ELPA, which prohibits proceedings being brought against the ELP. Parker J found that section 36(3) simply applies the statutory provisions relating to companies, to the winding-up process of an ELP after an order for dissolution has been made.

Section 36 of the ELPA provides:

*'(3) 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 ...*

*(g) on the application by a partner, creditor or liquidator, 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.*

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<sup>1</sup> Unreported, 21 April 2022.

<sup>2</sup> Unreported, 8 October 2021.

<sup>3</sup> Section 35 of the Partnership Act (2013 Revision) provides for the dissolution of partnerships.

(13) *Following the commencement of the winding up of an exempted limited partnership its affairs shall be wound up by the general partner or other person appointed pursuant to the partnership agreement unless the court otherwise orders on the application of any partner, creditor or liquidator of the exempted limited partnership pursuant to subsection (3)(g).*'

## Formation

In *Formation*, in the context of a just and equitable winding-up petition presented by a limited partner, Kawaley J was asked to decide whether there was jurisdiction to present it against the ELP, rather than against the GP. The GP invited the Court to follow *Padma* and hold that section 33(1) of the ELPA only permits legal proceedings against a GP of an ELP and not against the ELP itself. Kawaley J said that it was impossible to engage in an analysis of section 33(1) without considering the wider legal context and section 36(3) of the ELPA.

Kawaley J held that an ELP may be the respondent to a winding-up petition. Contrary to the view expressed by Parker J in *Padma*, Kawaley J found that section 36(3) of the ELPA expressly permits a petition being presented directly against the ELP. Kawaley J said that this construction was supported by the legislative purpose and history of section 36(3) of the ELPA, which was originally enacted as section 15(4) by the Exempted Limited Partnership (Amendment) Law, 2009 (the **2009 Amendment**). Prior to the 2009 Amendment, the relevant dissolution provision (being section 15(2) of the Exempted Limited Partnership Law (2007) Revision) provided:

*'On application by a partner or a creditor, the court may decree dissolution of an exempted limited partnership, and may make such orders and give such directions for the winding up of its affairs as may be just and equitable.'*

When section 15(4) (now 36(3)) was enacted, the Exempted Limited Partnership (Amendment) Bill, 2009 (the **2009 Bill**) stated that:

*'Clause 10 of the Bill repeals and replaces the provisions governing the winding-up and dissolution of an exempted limited partnership. They are brought, so far as is possible, in line with the provisions of the Companies Law (2007 Revision) as amended by the Companies (Amendment) Law 2007.'*

The Official Hansard Report for the second reading of the 2009 Bill included the following:

*'Clause 10 upgrades section 15 of the principal Law in relation to winding-up and dissolution of exempted limited partnerships. Industry has advised, and government has agreed, that in the current climate the existing section 15 fell far short of a meaningful dissolution framework for exempted limited partnerships. ...The provisions in clause 10 take the benefit as far as possible of the provisions for winding up and dissolution in the new (2007) Part V of the Companies Law, and cross-refer to those provisions to the extent sensible. The ultimate, longer-term objective is to have a self-contained framework for winding up and dissolution within the Exempted Limited Partnership Law itself (that is, without cross-referral), but in the interim, clause 10 is a significant and necessary improvement that addresses a current gap in the Law in the immediate term.'* (Our emphasis)

In relation to section 33(1), Kawaley J said that its purpose is primarily to reinforce the legal status of limited partners as not ordinarily liable to be sued (or entitled to sue) in respect of ELP liabilities and rights. He said that this was indirectly confirmed by the Grand Court Rules, Order 81, Rules 12-15, which contemplate that an ELP may sue or be sued in the name of the partnership.

## Difficulties arising

It is obviously problematic that there are now conflicting Grand Court authorities on the construction and interpretation of the ELPA.

A difficulty that arises from Parker J's approach in *Padma* is that section 35 of the Partnership Act only provides partners with the right to apply to dissolve a partnership and does not confer that right on creditors. The previous express right in the ELPA for creditors to apply to dissolve an ELP was removed by the 2009 Amendment. However, it may be that a creditor, whose interest is in being paid, can seek to enforce the debt against the GP, as Parker J suggested in *Padma*.

One issue that was not addressed by Kawaley J in *Formation* is that there is already a statutory jurisdiction to dissolve and wind-up ELPs, through section 3 of the ELPA, which applies section 35 of the Partnership Act. It is not obvious why the legislature would have sought to create multiple and duplicative jurisdictions to wind-

up an ELP. This was one of the reasons given by Parker J in *Padma* for finding that there was no jurisdiction to wind-up an ELP under the Companies Act through section 36(3) of the ELPA.

Another difficulty arises from the legislative history. The comments in the 2009 Bill and Hansard Report (quoted above) state that the amendments were intended to bring the winding-up regime for ELPs in line with those for companies 'so far as is possible'. However, on Kawaley J's construction of the ELPA the amendments do more than that and introduce an identical regime for ELPs as that which is in place for companies. Parker J considered that the legislative purpose of introducing section 36(6) was to apply the provisions of the Companies Act and the Companies Winding Up Rules following the commencement of winding-up, in order to facilitate the orderly winding-up of the partnership's affairs. That interpretation is also consistent with section 36(13) of the ELPA (as quoted above).

There is also some confusion in the language and concepts, in both the legislation and the judgments. A partnership, including an ELP, is first dissolved and then wound up. This can be seen from the heading of Part 5 of the Partnership Act '*Dissolution of Partnership and its Consequences*'; section 38 of the Partnership Act '*After the dissolution of a partnership ... [rights continue] so far as may be necessary to wind up the affairs of the partnership*'; and section 39 of the Partnership Act '*... for that purpose any partner or his executors or administrators may, on the termination of the partnership, apply to the court to wind up the business and affairs of the firm*'. Section 36(13) of the ELPA (quoted above) appears to recognise this distinction but it is blurred in section 36(3)(g) of the ELPA. It is also not fully considered and addressed in the judgments.

Finally, it is difficult to construe the actual words used in section 33(1) of the ELPA in the manner contended for by Kawaley J. Section 33(1) appears relatively clear and section 36(3) of the ELPA only applies to the extent that it is not consistent with the other provisions of the ELPA. It is therefore difficult to construe section 33(1) as being limited by section 36(3).

## Conclusion

The two conflicting Grand Court decisions create uncertainty in this area of the law. It will be important for the law to be clarified, either by way of amendment to clarify the statute or by a judgment from the Cayman Islands Court of Appeal. In the meantime, the safest course of action for a creditor is to seek to enforce their debt against the GP rather than attempting to present a winding-up petition against the ELP. It is clear that a limited partner can apply for the dissolution of an ELP, although there are some question marks around the proper procedure to achieve that, in particular whether a limited partner should make an application against the GP seeking orders for dissolution and winding-up (which would be consistent with section 33(1) of the ELPA) or whether a limited partner can present a winding-up petition directly against the ELP.

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