

ECM Straits: The Grand Court of the Cayman Islands confirms its power to bring the voluntary winding up of Exempted Limited Partnerships under the supervision of the Court

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In the recent decision of *Re ECM Straits Fund I, LP*,^[1] the Grand Court of the Cayman Islands confirmed that there was power in the Exempted Limited Partnership Act to bring the voluntary liquidation of an exempted limited partnership under the Court's supervision by appointing official liquidators in place of a voluntary liquidator.

This decision has settled an area of long running uncertainty about the Court's powers, providing much needed clarification as to the jurisdiction of the Cayman Court over the winding up of exempted limited partnerships.

| Winding up of exempted limited partnerships (ELPs)

The ELP is a fusion of Cayman statute, common law and equitable principles which is unique to the Cayman Islands. First introduced in 2014 by the Exempted Limited Partnership Act (ELP Act), ELPs have become a vehicle of choice for particular types of international business.^[2] However, given their novelty and popularity, the Cayman Courts have increasingly been called on to clarify the meaning of certain provisions of the ELP Act,^[3] particularly those relating to the Court's jurisdiction to place those structures into liquidation.

Section 36(1) of the ELP Act provides that an ELP may be voluntarily wound up in accordance with the provisions of the applicable partnership agreement either at the time or upon the occurrence of any event specified in the agreement or, unless otherwise specified in the agreement, upon the passing of a resolution of all the general partners and a two-thirds majority of limited partners. In a voluntary liquidation, the affairs of an ELP are wound up by the

general partner or other person appointed pursuant to the partnership agreement.[4]

Section 36(3) of the ELP Act provides that the provisions of Part V of the Companies Act and the Companies Winding Up Rules apply to the winding up of ELPs. While there are a number of authorities, albeit conflicting ones, concerning whether winding up proceedings ought to be presented against the general partner of the ELP[5] or against the ELP itself,[6] none of those authorities dealt with the process to be used where an ELP is *already* in voluntary liquidation.

The ordinary course for companies falling under the Companies Act is to apply for a supervision order which will replace the voluntary liquidators with official liquidators thereby placing the liquidation under the Court's supervision.[7] However, the ELP Act itself carves a majority of the provisions relating to voluntary liquidation (including supervision orders) out of the general application of Part V of the Companies Act to ELPs.[8]

Accordingly, prior to the delivery of the judgment in *ECM Straits*, there had been no certainty as to what power, if any, a creditor or contributory, or indeed the Court itself, has to bring the liquidation of an ELP under the supervision of the Court once a voluntary liquidator has already been appointed.

Facts of *ECM Straits* case

In *ECM Straits*, an ELP with one known limited partner had reached the end of its term, and the general partner was appointed as voluntary liquidator of the ELP pursuant to the terms of the partnership agreement.

Since the ELP's term expired, there was an apparent breakdown in relations between relevant individuals at the general partner and the general partner had ceased performing its role; moreover, the general partner itself was ultimately struck off the Companies Register. As a result, the general partner could no longer continue to act as voluntary liquidator. This was problematic as, due to the absence of an express statutory power to do so, it was unclear whether the liquidation of the ELP could be brought under court supervision.

Decision in *ECM Straits* case

Notwithstanding the lack of clarity on the position, the limited partner brought an application for the appointment of official liquidators. It did so pursuant to sections 36(3)(g) and 36(13) of the ELP Act which provide as follows:

(3)(g) on 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.

.....

(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).

In determining the limited partner's application, Parker J acknowledged that there was no express mechanism for bringing a voluntary liquidation of an ELP under the supervision of the Court. However, he accepted that the Court had the jurisdiction to make the orders sought by the limited partner for the following reasons^[9]

- there is a clear need for voluntary liquidations of ELPs to be brought under the supervision of the Court in cases where it is discovered that the liquidation would be better carried out by independent, qualified Court-appointed liquidators (such as in cases of insolvency, malfeasance, or where it is otherwise more effective or efficient)
- applying the principles of statutory interpretation^[10], section 36(3) (g) is drafted in broad terms which permits the Court to perform a "*supervisory role*"; particularly in the absence of a specific statutory scheme such as that which exists for companies – a matter supported by its legislative history and earlier authority
- in the specific context of liquidations, the need for the Court to provide guidance and make directions is clear from the nature of ELPs, which do not have legal personality or the ability to hold assets
- in contrast to liquidators appointed pursuant to the terms of a partnership agreement, liquidators appointed by the Court under sections 36(3) (g) and (13) derive their power from the Court. Therefore, if the Court has jurisdiction to appoint or replace liquidators, it follows that it must have jurisdiction to grant those liquidators the necessary powers to conduct the liquidation, including as to the control and administration of the ELP's assets.

Conclusion

In circumstances where the ordinary course is for a partnership agreement to provide that the general partner will act as voluntary liquidator, problems may arise if that general partner fails or refuses to discharge their obligations and realise the assets of the ELP.

The decision in *ECM Straits* provides welcome certainty on what avenues are available where you have a recalcitrant general partner by confirming that the Court retains a power to appoint suitably qualified independent liquidators to oversee the liquidation.

It will be of interest to stakeholders in ELPs to see what use can be made of section 36(3) (g) in the future, as the Court made it clear that the jurisdiction granted to it by that provision is to be

seen as broad and flexible and empowered it to make any direction in the context of an ongoing voluntary liquidation that it may see as necessary to ensure its successful conduct.

[1] (Unreported, Parker J, 20 December 2022).

[2] See Ogier, Cayman Islands Exempted Limited Partnerships (Insight, 4 July 2022).

[3] This occurred in the recent Cayman Islands Court of Appeal decision of *Kuwait Ports Authority v Port Link GP Ltd* (Unreported, CICA, 20 January 2023) where the Court clarified the circumstances in which a limited partner could make a derivative claim in the name of the ELP under s 33(3) of the ELP Act. See our article on *Kuwait Ports Authority*.

[4] ELP Act, s 36(13).

[5] *Re Padma Fund LP* (Unreported, Parker J, 8 October 2021). See our article on *Re Padma*.

[6] *Re Formation (Cayman) Fund I, LP* (Unreported, Kawaley J 21 April 2022). See our article on *Re Formation*.

[7] See our article on the recent decision of *Re Touradji Private Equity Master Fund Ltd* (Unreported, Parker J, 20 December 2022) which set out the principles that the Court will apply when making supervision orders.

[8] ELP Act, s 36(3)(d).

[9] *ECM Straits* at [40].

[10] *Shanda Games Ltd v Maso Capital* [2020] UKPC 2.

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