



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 230 OF 2022 (RPJ)

**IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIPS ACT (2021 REVISION)
AND IN THE MATTER OF ECM STRAITS FUND I, LP**

MALAYSIA VENTURE CAPITAL MANAGEMENT BERHAD

Plaintiff

-and-

(1) ECM STRAITS FUND I, LP

(2) ECM STRAITS FUND GP I, LP

(3) ECM STRAITS FUND UGP I, LTD

Respondents

Appearances:	Peter Sherwood of Carey Olsen on behalf of the Applicant
Before:	The Hon. Raj Parker
Heard:	24 November 2022
Date of decision:	24 November 2022
Draft Reasons circulated:	19 December 2022
Judgment delivered:	20 December 2022

Headnote

ss.9,36 Exempted Limited Partnerships Act (2021)-voluntary winding up-s.11(2) Grand Court Act (2015)-GCRO.15r6 -Part V Companies Act -Companies Winding Up Rules 2018-disapplication of ss.124,131-133 Companies Act by s.36 ELPA

Introduction

1. On 24 November 2022 I granted the following relief:
 - (a) a declaration that ECM Straits Fund I, LP (the "Partnership") entered voluntary winding up on 25 November 2021 in accordance with the terms of the Amended and Restated Exempted Limited Partnership dated 25 November 2013 and pursuant to section 36(1)(a) of the Exempted Limited Partnership Act (2021 Revision) (the "ELP Act");
 - (b) Orders pursuant to sections 36(3)(g) and 36(13) of the ELP Act appointing Mr Michael Penner and Mr Michael Green of Deloitte & Touche LLP and Mr. Matthew Becker of Deloitte LLP (Singapore) to conduct the winding up of the Partnership in place of ECM Straits Fund GP I, LP (the "General Partner");
 - (c) Orders as to the Liquidator's powers.
2. This Judgment gives reasons for that decision which traverse a new area of law in relation to liquidators powers under a voluntary liquidation in respect of an exempted limited partnership.

Background

3. Malaysia Venture Capital Management Berhad (the "Applicant") is a subsidiary of the Malaysian government and is the only known Limited Partner of the Partnership.
4. The Partnership is a Cayman Islands exempted limited partnership ("ELP") registered on 6 November 2013 pursuant to Section 9(1) of the ELP Act. The purpose of the Partnership was to

make venture capital investments in tech-enabled growth companies located primarily in Malaysia, Indonesia and Southeast Asia.

5. The Partnership is governed by the terms of the Amended and Restated Exempted Limited Partnership dated 25 November 2013 (the "LPA").
6. The general partner of the Partnership is ECM Straits Fund GP I, LP (the "General Partner"). It is also a Cayman Islands exempted limited partnership registered on 6 November 2013 pursuant to the ELP Act (but has since been struck off the register). The general partner of the General Partner is ECM Straits Fund UGP I, Ltd (the "UGP").
7. The Partnership's assets are primarily shareholding interests in entities which the Partnership has, indirectly or directly, invested (the "Portfolio Entities").

Expiry of the term of the Partnership

8. Clause 9.1 of the LPA provides that the Partnership "*shall be dissolved on the eighth anniversary of the Final Closing Date*" unless extended in accordance with the provisions of that clause.
9. It has not been possible to determine the "*Final Closing Date*" from the LPA alone.
10. However, on 1 April 2021, the General Partner informed the Applicant that the term of the Partnership would expire on 25 November 2021 and would not be extended. The letter stated that the General Partner "*is working aggressively to liquidate its portfolio holdings and provide the LP's exits prior to wrapping up the Fund.*"
11. Consistent with section 36(13) of the ELP Act clause 9.4 of the LPA provides that the General Partner shall be the liquidator of the Partnership upon the commencement of the winding up and the General Partner's letter stated that it "*is working aggressively to liquidate its portfolio holdings and provide the LP's exits prior to wrapping up the Fund.*"

12. Clause 9.4(b) of the LPA provides a scheme for the winding up of the Partnership and the distribution of surplus assets to the limited partner(s).
13. The following facts appear from the Applicant's evidence and documents submitted¹.

Failure to wind up the Partnership's affairs and strike-off of the General Partner

14. Since the Partnership's term expired, little progress has been made and it now appears that the Partnership has effectively been abandoned by the General Partner and the individuals with authority to act on the General Partner's behalf:
 - (a) responsibility for managing the Portfolio Entities was apparently split between three individuals, Mr Ahmed, Mr Azahar and Mr Hussain, the managing directors of the UGP. However, only Mr Ahmed has remained in communication with the Applicant. Mr Ahmed explained in an email on 22 June 2022 that the three individuals have "*gone their separate ways*", and that he would only be able to assist with the distribution of the five Portfolio Entities which he purportedly manages (out of the 12 Portfolio Entities under the Partnership);
 - (b) on 27 April 2022, Mr Ahmed issued an invoice to the Applicant for US\$125,000 for what was described as "*de facto management fees since fund termination*". There is no contractual basis for these fees, or for Mr Ahmed in his personal capacity to charge any fees to the Applicant;
 - (c) the registered office provider for the Partnership, the General Partner and the UGP has resigned (which is usually indicative of a failure to pay registered office fees and/or to comply with statutory filing obligations);

¹ First Affidavit of Shahril Anas Bin Hasan Aziz dated 19 October 2022, the Second Affidavit of Shahril Anas Bin Hasan Aziz dated 19 October 2022

- (d) both the General Partner and the UGP were ultimately struck off the register on 29 July 2022; and
- (e) the Partnership was designated "*pending strike off*" by the Registry but the Applicant wrote to the Registrar to explain the situation and request that the Partnership is not struck off pending the outcome of the present application. The Registrar has helpfully returned the status of the Partnership to "*active*".
15. In addition, on 14 June 2022, the Applicant raised concerns with the General Partner that Mr Ahmed has instructed Portfolio Companies to transfer shares in those companies held on behalf of the Partnership to entities related to him. No substantive response to this allegation has apparently been received.
16. As the General Partner is no longer acting, the Applicant seeks the appointment of independent liquidators to wind up the Partnership's affairs and to conduct such investigations into the Partnership's affairs as the liquidators consider appropriate.

The Law

Commencement of the voluntary winding up of the Partnership

17. Section 36(1)(a) of the ELP Act provides that:

"An exempted limited partnership shall be voluntarily wound up in accordance with the provisions of the partnership agreement –

(a) at the time or upon the occurrence of any event specified in the partnership agreement; or [...]"

Section 36(10) provides that the winding up of an exempted limited partnership "*shall be deemed to commence upon the earlier of:*

(a) *the expiry of the period fixed for the duration of the exempted limited partnership;*

(c) *the occurrence of an event provided by the partnership upon which the exempted limited partnership is to be wound up;"*

[...]

18. A number of recent decisions of the Grand Court have considered the jurisdiction of the Court (or lack of jurisdiction) to order the winding up of an exempted limited partnership on the petition of a creditor or limited partner. While the reasoning in these decisions differed to a certain extent, there does not appear to be any controversy surrounding the route into *voluntary* winding up via section 36(1)(a) in those decisions².
19. In *In Re Duet Real Estate Partners 1 LP* (unreported, FSD 22 of 2020, 9 June 2020) a limited partner successfully petitioned for a winding up order under the Companies Act despite the fact that the term of the exempted limited partnership had already expired (and therefore pursuant to section 36(1)(a) of the ELP Act the voluntary liquidation had already commenced). It is not clear why the petitioner in that case sought a winding up order under the Companies Act rather than relying on section 36(1)(a) (which does not appear to have been considered) and the question of whether a winding up order can be made in respect of an exempted limited partnership that is already in voluntary liquidation is not discussed in the judgment. I accept Mr Sherwood's submission that it may be that an application under the Companies Act is not the proper route as, with very limited savings, it would seem to have no application to voluntary liquidations-see 36(3)(d) of the ELP Act.

² See references to the voluntary route in eg *In Re Xio Diamond Ltd* (unreported, FSD 256 of 2019, 30 April 2020) at §20(a) and *In Re Padma Fund LP* (unreported, FSD 201 of 2021, 8 October 2021) at § 52

Jurisdiction of the Court to grant declaratory relief

20. The wide jurisdiction of the Court to grant declaratory relief in relation to the commencement of a voluntary winding up is derived from section 11(2) of the Grand Court Act (2015 Revision) which provides that:

"Without prejudice to subsection (1), the Court shall have and shall be deemed always to have had power to make binding declarations of right in any matter whether any consequential relief is or could be claimed or not."

21. Also relevant is Order 15 rule 16 of the Grand Court Rules which provides that *"the Court may make binding declarations of right whether or not any consequential relief is or could be claimed"*.

22. The jurisdiction to grant declaratory relief was recently exercised by the Grand Court in the context of a voluntary winding up of an ELP in *In the matter of Kuwait LBO Fund L.P.* (unreported, FSD 273 of 2021, 9 November 2021).

23. In that case, Justice Doyle referred to the judgment of Justice Mangatal in *Woods v. Thompson and Saxon Motor and General Insurance Company Limited* [2016 (2) CILR 1] and derived the following principles from the English authorities:

- (a) per Neuberger J's (as he then was) judgment in *Financial Services Authority v. Rourke (trading as J E Rourke & Co)* [2002] CP Rep 14:

"...when considering whether to grant a declaration, the Court should take into account what was just for both parties, whether the declaration would serve a useful purpose and whether there were special reasons why the Court should not grant a declaration."

- (b) per Aikens LJ in *Rolls-Royce plc v. Unite the Union* [2010] 1 WLR 318:

"(1) The power of the court to grant declaratory relief is discretionary."

(2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.

(3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question."

24. With these principles in mind, the Court considered that a declaration affirming the validity of a resolution appointing voluntary liquidators of the ELP would serve a "*useful purpose*", by bringing clarity to their appointments.
25. Whilst in the *Kuwait LBO* case the voluntary liquidators were appointed by resolution pursuant to the Limited Partnership Agreement, and in the present case the appointment would be made by the Court, nevertheless, as Mr Sherwood submitted, it would be useful to have a declaration as to the commencement of the voluntary liquidation, as this engages the Court's jurisdiction to make the orders under section 36(3)(g). That date is 25 November 2021.
26. A declaration that the Partnership entered voluntary winding up would serve to confirm the same to any interested parties (such as the Registrar, which was not aware that the Partnership was being wound up).

Jurisdiction of the Court to appoint liquidators in place of the General Partner

27. Section 36(13) of the ELP Act provides:

"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)."

28. Accordingly, if the winding up of the Partnership has commenced under section 36(1)(a), the Applicant has standing to apply under section 36(3)(g) for an Order that the Partnership is wound up by persons other than the General Partner.
29. Upon a section 36(3)(g) application, the Court may make such orders "*as may be just and equitable*". The extent of the Court's jurisdiction under this provision is discussed further below, but it evidently extends to the appointment of replacement liquidators under section 36(13).
30. The Applicant submits that it would plainly be "*just*" for the Court to appoint alternative liquidators in circumstances where the incumbent liquidator is not performing the role and has been struck off.
31. In *Kuwait LBO* [§52], Doyle J took the view that in a situation where there was an absent General Partner and the liquidation was not progressing, it was clearly just and equitable that the liquidators be replaced.

The powers of the incoming liquidators

32. While acknowledging that this is a novel area of law Mr Sherwood submitted that the Court's discretionary powers under section 36(3)(g) extend to granting orders and directions that have the equivalent effect to the making of a supervision order under the Companies Act (2022 Revision) (the "Companies Act").
33. Section 36(3) provides that certain provisions of the Part V of the Companies Act and the Companies Winding Up Rules, 2018 apply, except to the extent of any inconsistencies, to the winding up of an exempted limited partnership.
34. However, section 36(3)(d) disapplies the majority of Part V to voluntary liquidations, with limited savings. The provisions disapplied include the entire scheme for applications to being a voluntary liquidation of a company under the supervision of the Court (sections 124, 131, 132 and 133 of the Companies Act).

35. Consequently, there is no express mechanism for bringing a voluntary liquidation of an exempted limited partnership under the supervision of the Court so that it may proceed as an official liquidation (other than, as Mr Sherwood submitted, section 36(3)(g)).
36. Section 36(3)(g) was considered by Kawaley J in *Xio Diamond (ibid)* a case in which a limited partner had sought to bring a winding up petition under that section and section 36(13). The Court found that those provisions do not create a freestanding jurisdiction to wind up an exempted limited partnership, but are only engaged once a voluntary liquidation was already on foot:

"25. The general rule created by section 36(13) logically applies in all instances when a voluntary winding-up has commenced on a date specified in any of subsections (a) to (d) of section 36(10). Where no voluntary winding-up has commenced independently of the making of a winding-up order, it is not easy to see how the question of appointing someone in place of the general partner arises. Section 36(3)(g) itself, carefully read, is not expressed in terms suggesting that a freestanding jurisdiction to present a winding-up petition is being created. Rather, as Mr Faulkner rightly submitted, subsection (3)(g) is expressed (read in the wider context of section 36 as a whole) in terms consistent with creating a supervisory jurisdiction over voluntary winding-ups".

Justice Kawaley went on to state:

"29. In my judgment, section 36(3)(g) of the ELP Law is analogous to the following provision applicable to voluntary liquidation under Part V of the [Companies Act] which does not apply to section 36(1) winding-ups:

"References of questions to Court

129(1) The voluntary liquidator or any contributory may apply to the Court to determine any question arising in the voluntary winding up of a company or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up under the supervision of the Court.

(2) *The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partly to the application on such terms and conditions as it thinks fit, or make such other order on the application as it thinks just."*

37. While *Xio Diamond* was not followed in all respects in subsequent decisions (most notably in *Padma*), the suggestion that section 36(3)(g) represents an avenue for parties to seek directions concerning an existing liquidation has not been challenged (and was expressly supported in *Padma*³).
38. Mr Sherwood submitted that the broad jurisdiction envisaged by Justice Kawaley in *Xio Diamond* is correct, and that the jurisdiction extends to making directions akin to a supervision order, for the following reasons:
- (a) Section 36(3)(g) is drafted in the broadest terms, allowing the Court to make whatever directions and orders it considers are just and equitable;
 - (b) The need for a broad mechanism in this regard is plain. In contrast to the position for companies, there are no rules for exempted limited partnership voluntary liquidations equivalent to the Companies Winding Up Rules or schedules of powers equivalent to Schedule 3 of the Companies Act (except insofar as the Companies Act and Companies Winding Up Rules may apply);
 - (c) After lodging the skeleton argument, immediately before the hearing, the Applicant lodged some further materials including an Annexure to the skeleton argument addressing the legislative history of section 36 of the ELP Act, the relevant Explanatory Memorandum to the bill that brought in (what is now) section 36 and the relevant extracts from Hansard.
39. It is clear from those materials that section 36 was enacted because "*the existing section 15 fell far short of a meaningful dissolution framework for exempted limited partnerships*" and that "*clause*

³ Ibid §83

10 is a significant and necessary improvement that addresses a current gap in the Law in the immediate term" (Official Hansard Report, pp1050 per Hon. G. Kenneth Jefferson

40. At the hearing, Mr Sherwood submitted that the Court has been given a broad discretion *precisely because* of the lack of meaningful framework and the need to "fill in the gaps":

- (a) there is a clear need for a mechanism for a voluntary liquidation to be brought under the supervision of the Court in cases where it is discovered that there is a need for independent, qualified Court-appointed liquidators to take control (such as in cases of insolvency, malfeasance, or where it is otherwise more effective or efficient);
- (b) applying the principles of statutory interpretation summarised by the Privy Council in *Shanda Games Ltd v Maso Capital*⁴, the mischief that section 36(3)(g) is concerned to redress is that the provision must be sufficient to allow the Court to perform a "*supervisory role*" in the absence of the statutory scheme and guidance that exists for companies;
- (c) further, the need for the Court to be permitted to make orders as to the liquidators' powers is clear from the nature of exempted limited partnerships, which do not have legal personality or the ability to hold assets. In contrast to the position for company voluntary liquidations, therefore, in which the company's corporate state and powers are unaffected⁵, an incoming liquidator of an exempted limited partnership must be empowered to take control of and deal with the partnership's assets from the general partner, and to take such other steps as are necessary in the winding up.

41. Mr Sherwood further submitted that in contrast to liquidators appointed pursuant to the terms of a partnership's LPA, 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.

⁴ As applied in *Padma* at §17

⁵ See section 118(2) of the Companies Act

42. The Court accepts Mr Sherwood's submissions

Conclusion

43. The Court accepts that the partnership entered voluntary winding up on 25 November 2021.

44. The Court accepts that it is necessary to replace the General Partner with Messrs Penner Green and Becker of Deloitte and they are suitable replacements.

45. As to the powers the incoming liquidators should have, the Court has been considerably assisted by Mr Sherwood's researches and submissions in this new area of law as it relates exempted limited partnerships, by analogy with the Court's powers to make orders and directions in making supervision orders in respect of companies in voluntary liquidation, and makes the Orders sought.



**THE HON. MR JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT**