IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 256 OF 2019 (IKJ)

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP LAW (2018 REVISION)

AND

IN THE MATTER OF XIO DIAMOND LP

IN OPEN COURT (VIDEOCONFERENCE)

Appearances:

Mr Lachlan Greig and Mr Paul Smith, Harneys, for China Life Trustees Limited (the "Petitioner")

Mr Liam Faulkner, Campbells, on behalf of XiO Diamond LP (the "Partnership")

Before:	The Hon. Justice Kawaley
Heard:	27 March 2020
Date of decision:	27 March 2020
Draft Ruling Circulated:	27 April 2020
Ruling Delivered:	30 April 2020

REASONS FOR DECISION

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Just and equitable winding-up petition-adequacy of pleading-amendment-loss of substratum-whether jurisdiction to wind-up exists under section 36(3) as read with section 36(13) of the Exempted Limited Partnership Law (2018 Revision)-sections 92, 94 Companies Law (2020 Revision) - Order 1 rule 4, Order 3 rule 2 Companies Winding Up Rules, 2018-Grand Court Rules Orders 9 rule 2 and Order 20 rule 8(1)

Background

1. The Petition herein is dated December 23, 2019 and was presented on or before December 27, 2019[1]. The Petitioner primarily sought an Order that the "*Partnership be wound up according to the Law.*" The "Law" was defined by reference to the Exempted Limited Partnership Law (2018 Revision) (the "ELP Law"). It petitioned as the sole limited partner and economic stakeholder in the Partnership. The central basis for the Petition was that the main business purpose of the Partnership was to hold and dispose of "Portfolio Investments"; this function had allegedly been fulfilled. It was alleged that the distribution to which the Petitioner was entitled could not take place because of an injunction granted in confidential proceedings against the General Partner, XIO Diamond GP Limited (the "GP") and its sole director. Accordingly, a winding-up was said to be required so that independent liquidators could make the relevant distribution and wind-up the Partnership.

2. The principal ground initially relied upon was the typically contentious 'loss of trust and confidence' ground. At the hearing of the Petition on March 27, 2020, the only ground for winding-up relied upon by the Petitioner was the alternative 'loss of substratum' ground. The Partnership's position was that it would not oppose a winding-up on this ground if a *prima facie* case was made out; but it submitted that on the face of the Petition no legally sustainable basis for winding-up had been pleaded. As a matter of law, it was argued, reliance was wrongly placed by the Petitioner on, *inter alia*, section 36 (3) (g) of the ELP Law. The only available statutory jurisdiction was under section 92(e) of the Companies Law (2020 Revision) (the "Law"), the Partnership argued.

3. At the conclusion of the hearing I made the following interlocutory Order:

[1] I do not decide the disputed issue what the presentation date was.

"1. The Petitioner is granted leave to amend the Petition pursuant to section 95(1)(d) of the Companies Law (2020 Revision) and CWR Order 3, Rule 2(3) as read with GCR Order 20, Rule 5 and/or Rule 8:

a) by adding after paragraph 21 a new paragraph 21A:

'21A. Further and/or alternatively, the Petitioner seeks an Order that the Partnership be wound up under sections 92(e) and 94 (1)(c) of the Companies Law as read with section 36(3) of the Exempted Limited Partnership Law" ; and

b) *by deleting the words "the Law" and replacing them with "applicable law" at the end of paragraph 1 of the Prayer to the Petition...."*

4. I also granted a final Order which provided, *inter alia*:

"1. The Partnership be wound up in accordance with sections 92(e) and 94(1)(c) of the Companies Law (2020 Revision) as read with section 36(3) of the Exempted Limited Partnership Law (2018 Revision).

2. *Luke Almond of Borrelli Walsh (Cayman) Limited, Strathvale House, 3rd Floor, 90 North Church Street, Grand Cayman KY1-1204, Cayman Islands and Cosimo Borrelli of Borrelli Walsh Limited of Level 17, Tower 1, Admiralty Centre, 18 Harcourt Road, Hong Kong be appointed as joint official liquidators (the "**Liquidators**") of the Partnership."*

5. I reserved the costs of both the amendment application and the Petition. I now give reasons for these decisions.

The Petition

6. At the hearing, it being agreed that the loss of trust and confidence case would not be pursued, the only centrally relevant aspects of the Petition were the following pleas:

"12. Sections 9.2 and 9.3 of the LPA deal with the process for winding-up the Partnership and the final distribution of the Partnership's assets. Section 9.2 provides:

'Upon the occurrence of an Event of Dissolution, the Partnership shall be wound up and dissolved. The General Partner, or if there is no general partner, a liquidator appointed by a Majority in Interest of the Limited Partners, shall proceed with the Dissolution Sale and the Final Distribution.'...

13. ...The Transaction [completed on 16 December 2019] will lead to the automatic winding up of the Partnership pursuant to the terms of the LPA, as well as pursuant to sections 36(1)(a) and 36(10)(d) of the Exempted Limited Partnership Law (2018 Revision) (the Law)...

19. The Petitioner is the sole Limited Partner of the Partnership and is entitled to petition for the winding up of the Partnership pursuant to section 36(3)(g) of the Law and, pursuant to section 36(13) of the Law, to seek an order that the affairs of the Partnership be wound up by a person appointed by the Court other than XIO Diamond GP...

YOUR PETITIONER THEREFORE HUMBLY PRAYS THAT:

1. The Partnership be wound up in accordance with the Law."

7. It was also agreed that although reliance was placed on the existence of those provisions of the LPA relating to automatic winding-up, the Petitioner's original argument that the voluntary winding-up had already commenced would not be pursued.

The Petitioner's submissions

8. The first legal submission advanced in the Petitioner's Skeleton Argument was the following:

"28. The Petitioner petitions for the winding up of the Partnership pursuant to section 36(3)(g) of the Exempted Limited Partnership Law (2018 Revision) (the ELP Law):

> *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 and the Companies Winding Up Rules 2018 shall apply to the winding up of an exempted limited partnership and for this purpose –*
>
> *(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.*

29. The circumstances in which it will be just and equitable to order a winding up are not closed to particular categories – those words are general and the circumstances in which it may be just and equitable to order a winding up are diverse (French at [8.158 -8.159] citing (among other authorities) Lord Wilberforce's judgment in Ebrahami v Westbourne Galleries Ltd [1973] AC 360).

30. The Petitioner says that it is just and equitable that the Partnership be wound up in the following circumstances (whether taken alone or together)."

9. This submission retains the pleaded reliance on section 36(3)(g) of the ELP, but also mentions for the first time the winding-up jurisdiction on the just and equitable ground under Part V of the Law. The Petitioner goes on to submit:

"33. The Petitioner and the General Partner disagree as to whether the voluntary liquidation of the Partnership has been triggered pursuant to the Article 9.1 of the LPA. The Petitioner submits that is not an issue the Court needs to determine on this petition. Assuming that the General Partner's position is the correct one...the position would be the same: the Injunction prevents the General Partner from winding up the Partnership.

34. The loss or failure of a company's substratum is one of the well-recognised illustrative categories of case where a Court may wind up a company on the just and equitable basis (French at [8.260]). The Court may conclude that a

company's substratum is gone if the company was formed to pursue a specific business that has come to an end (French at [8.262] citing Re Amalgamated Syndicate [1897] 2 Ch 600).

35. In Re Amalgamated Syndicate, the company was formed to provide facilities for the Queen's Diamond Jubilee. After the Jubilee, a shareholder successfully sought the winding up of the company on the just and equitable basis in circumstances where the primary purpose of the company had been achieved and the company's directors did not intend to return the remaining capital to the shareholders. The Petitioner says that it is in an analogous position to the petitioning shareholder in Re Amalgamated Syndicate: the Partnership has achieved its purpose but the General Partner is not in a position to take the steps necessary to wind up the affairs of the Partnership. It would therefore be just and equitable for the Court to order the winding up of the Partnership. Absent such an order, the only (albeit unpalatable) option for the Petitioner would be to do a deal with the General Partner and attempt to obtain a variation of the Injunction."

10. This submission supports an entirely new un-pleaded statutory basis for winding-up. The Petitioner's Skeleton proceeds to set out the pleaded loss of confidence ground in terms which make it explicit that reliance was indeed placed on section 36(3)(g) of the ELP Law as read with Part V of the Law. Section 36(13), pleaded in paragraph 21 of the Petition as the statutory basis for appointing liquidators, receives no mention in the Plaintiff's Skeleton.

11. The Skeleton Argument of the Partnership, *inter alia*, challenged the pleaded reliance on the ELP Law head on:

"41 The Petition does not seek relief pursuant to section 92(e) of the Companies Law for the Partnership to be wound up on the just and equitable basis. The relief sought is confined to sections 36(13) and 36(3) (g) of the ELP Law. As an Event of Dissolution has not occurred, those provisions are not engaged and the Petition must be dismissed.

42 The Petitioner's application is analogous to an application for a supervision order by a shareholder of a company in voluntary liquidation. In the same way that the Court does not have jurisdiction to make a supervision order under section 131 of the Companies Law in respect of a company which is not in voluntary liquidation, the Court does not have the jurisdiction to grant the relief sought in the Petition.

43 There is no precedent or jurisdiction for the Court to make an order to wind up an exempted limited partnership which is not in voluntary liquidation other than pursuant to section 92 of the Companies Law. By way of example:

43.1 In re Cybernaut Growth Fund LP (unreported, FSD 73/2013, 11 September 2013) the Court ordered that an exempted limited partnership be wound up on the just and equitable basis pursuant to section 92(e) of the Companies Law.

43.2 In re Rhone Holdings LP (unreported, FSD 119/2015, 28 September 2015) limited partners of the exempted limited partnership petitioned to wind up the partnership pursuant to section 92(e) of the Companies Law. The petition was dismissed on its merits but it was procedurally sound.

44 If the Court agrees that the Partnership has not commenced voluntary liquidation and that the Court does not have jurisdiction to grant the relief sought in the Petition pursuant to sections to sections 36(13) and 36(3)(g) of the ELP Law, the Petition must be struck out and it is not necessary for the Court to consider any of the other issues in dispute. The Partnership therefore invites the Court to determine this issue as a preliminary point."

12. In answer to the Court, Mr Faulkner indicated that this jurisdictional point had been raised in correspondence and in the First Affirmation of Athene Li. In that Affirmation, Ms Li deposed:

"*47. As an Event of Dissolution has not occurred, China Life is not entitled to the relief it seeks pursuant to section 36(10)(d) and section 36(13) of the ELP Law, each of which is premised on an Event of Dissolution having occurred within the meaning of the LPA.*"

13. This appeared to me to express the jurisdictional challenge in a somewhat narrower way than was advanced in argument at the hearing of the Petition when it was agreed that the Petitioner would not seek to establish that an Event of Dissolution had already occurred. The proposition that a winding-up order could only be granted under Part V of the Law if a voluntary liquidation had not already commenced was at best implied rather than expressly articulated.

14. In his oral submissions, the Partnership's counsel argued in opening the preliminary point that the Petitioner had failed to plead a viable statutory basis for winding-up. Reliance was placed on the requirements of Companies Winding Up Rules ("CWR") Order 3 and Grand Court Rules ("GCR") Order 9 rule 2 as read with Form 7. He submitted that the Petition was presented pursuant to sections 36(13) and 36(3)(g) of the ELP Law and the critical question was: did these statutory provisions create a freestanding basis for winding-up on the just and equitable ground? Clearly not, Mr Faulkner contended. This was because section 36(3)(g) was designed to provide relief within the context of a voluntary winding-up under the ELP Law; Part V of the Law was generally dis-applied as regards voluntary windings-up under section 36(1) by section 36(3)(d). This central proposition was also supported by reference to the fact that the only other provision which mentioned subsection (3)(g) was subsection (13).

15. It was submitted that the Petition should be dismissed with costs. I put to Mr Faulkner that if his submissions were correct, the defects in the pleading were capable of being cured by amendment. He responded that as the Petitioner had alternative remedies, exceptional circumstances were required to permit an amendment.

16. I asked Mr Greig before he began his response whether he would seek leave to amend if required. He replied that the Court had a discretionary power to amend and that he would seek leave to amend if necessary. However, he indicated that the Petitioner's primary position was that the necessary jurisdiction existed under the Petition as pleaded. Section 36 (3) had been relied upon, and that incorporated the Law.

17. The Petitioner's counsel contended that the authorities relied upon by the Partnership were not material to the issue at hand. He insisted that section 36(3) (g) did create a freestanding jurisdictional basis for a winding-up order. In *Re Cybernaut Growth Fund LP* FSD 73 of 2013 (AJJ), Judgment dated September 12, 2013 (unreported), the jurisdictional point at issue in the present case was not argued. Mr Greig submitted the same was true of *Re Rhone Holdings Limited* FSD 119/2015 (IMJ), Judgment dated September 16, 2015 (unreported).

18. As regards the merits of the loss of substratum argument, Mr Greig submitted that the Partnership's purpose had been met. There was no viable prospect of concluding the distribution process. It would be just and equitable for the Court to wind it up in the circumstances bearing in mind that the Petitioner was the sole economic stakeholder.

19. Mr Faulkner in reply indicated that he left the merits of the loss of substratum ground to the Court. However, he submitted that the relevant test required the Petitioner to demonstrate that achieving its commercial object had become "*impossible*": *Re Harbinger Class PE Holdings (Cayman) Ltd.* [2015 (2) CILR Note 6].

Findings: did jurisdiction exist to wind-up the Partnership on just and equitable grounds (and appoint official liquidators) on a freestanding basis under section 36 (3) (d) as read with section 36(13) of the ELP Law?

20. Whether this Court had power to wind-up the Partnership under section 36 of the ELP Law on a freestanding statutory basis was ultimately a short point of statutory construction. I found Mr Faulkner's analysis of section 36 to be compelling. The main features of section 36 may be summarised as follows:

(a) provision is made for voluntary winding-up and dissolution in accordance with the partnership agreement on the occurrence of certain events (subsections (1)-(2));

(b) provision is made for winding-up exempted limited partnerships under Part V of the Law and the CWR, subject to the primacy of the ELP Law. How Part V of the Law applies to partnerships is spelt out; it does not generally apply to a voluntary liquidation under section 36(1). The Court is given the power to make directions for the winding-up of a partnership on the application of a partner, liquidator or creditor (subsection (3));

(c) provision is made in relation to secured creditors (subsections (4)-(5));

(d) provision is made for notices and various 'administrative' matters (subsections (6)-(9));

(e) provision is made for the date when a liquidation commences (subsection (10)-(11));

(f) an exception to automatic winding-up is provided for (subsection (12));

(g) provision is made for the general partner to conduct the winding-up unless the Court otherwise orders (subsection (13)).

21. The Petitioner, seemingly seeking to benefit from an earlier commencement of the liquidation date than the making of a winding-up order, contended that the following two provisions conferred jurisdiction to wind-up and appoint official liquidators. Firstly, section 36(3) which provides 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 and the Companies Winding Up Rules 2018 shall apply to the winding up of an exempted limited partnership and for this purpose -*

(a) references in Part V to a company shall include references to an exempted limited partnership;

(b) the limited partners shall be treated as if they were shareholders of a company and references to contributories in Part V shall be construed accordingly, except that the application of the provisions shall not cause a limited partner to be subject to any greater liability than he would otherwise bear under this Law, but for the application of this paragraph;

(c) references in Part V to a director or officer of a company shall include references to the general partner of an exempted limited partnership;

(d) except for sections 123, excluding subsection (1)(b) and (c), 129, 140, 145, and 147 of the Companies Law, Part V shall not apply to a voluntary dissolution and winding up under subsection (1);

(e) in the case of a voluntary winding-up of an exempted limited partnership under subsection (1) where the partnership was registered under section 9 prior to 11th May 2009, the necessary time period for compliance with the requirements of section 123 (1) of the Companies Law shall be at least twenty-eight days prior to the final distribution of the assets of the exempted limited partnership to partners rather than within twenty-eight days of the commencement of its voluntary winding-up;

(f) the Insolvency Rules Committee established pursuant to the Companies Law shall have the power to make rules and prescribe forms for the purpose of giving effect to this section or its interpretation; and

(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." [emphasis added]

22. I accept entirely that the literal meaning of the words of section 36(3)(g) (given emphasis above) potentially embraces the construction contended for by the Petitioner. The prefatory words of section 36(3) state that Part V of the Law applies, subject to the ELP Law, and subsection (3)(g) provides that a partner may apply for an order or directions for the winding-up of an exempted limited partnership "*as may be just and equitable*". However, this meaning suggests a somewhat unusual and indirect access route being given to an official liquidation under Part V of the Law. The Partnership relied heavily on the fact that the only other reference in the ELP Law to section 36(3)(g) was to be found in the following subsection of section 36 itself:

> "*(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).*" [emphasis added]

23. This subsection does not in and of itself suggest that the only order that can be made under section 36(3)(g) is an order appointing someone other than the general partner as the liquidator. Rather, it is a strong pointer to the fact that section 36 of the ELP Law most substantively and directly applies to voluntary liquidations after their "*commencement*". Subsections (1)-(2) begin by addressing voluntary liquidations in accordance with the partnership agreement; subsection (13) concludes by formulating the general rule that the general partner shall ordinarily conduct the winding-up. The jurisdiction conferred on the Court by section 36(3)(d) is identified as a remedy to deal with cases where the general partner cannot, for whatever reasons, conduct the winding-up, after it has started.

24. This sits uncomfortably with the idea of construing section 36(13) as conferring the power to appoint official liquidators upon the making of a winding-up order on a limited partner's petition presented under section 36(3)(g). The purpose of section 36(13) appears to be to formulate a general rule applicable to who winds-up an exempted limited partnership voluntarily and to provide an exception to that general rule. A winding-up commences on the following dates according to section 36:

> "*(10) The winding up of an exempted limited partnership shall be deemed to commence upon the earlier to occur of any of the following -*
>
> *(a) the passing of a resolution for winding up;*

(b) subject to subsection (9), the automatic wind up date;

(c) the expiry of the period fixed for the duration of the exempted limited partnership by the partnership agreement;

(d) the occurrence of an event provided by the partnership agreement upon which the exempted limited partnership is to be wound up; or

(e) where a winding up order has been made, the presentation of the petition for winding up."

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:

> "*(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.*"

26. It is difficult to construe this subsection as conferring a freestanding litigation right to present a winding-up petition and a freestanding judicial power to make a winding-up order for a more important reason. Section 36(3) by its terms simply provides that Part V of the Law shall, with modifications, apply to exempted limited partnerships. A straightforward way of construing such a legislative statement of intent is that unless such a result is expressly or by necessary implication precluded by the ELP Law:

(a) matters which are governed by the Law apply to exempted limited partnerships under the Law; and

(b) matters which are governed by the ELP Law apply to exempted limited partnerships under the ELP Law.

27. Or, to put it another way, if section 36(3)(g) was intended to create a freestanding jurisdiction to petition for a winding-up order, it is difficult to see why such a legislative purpose was not explicitly expressed. Instead, the section crucially provides 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 and the Companies Winding Up Rules 2018 shall apply to the winding up of an exempted limited partnership and for this purpose -*
>
> *(a) references in Part V to a company shall include references to an exempted limited partnership;*
> *(b) the limited partners shall be treated as if they were shareholders of a company and references to contributories in Part V shall be construed accordingly, except that the application of the provisions shall not cause a limited partner to be subject to any greater liability than he would otherwise bear under this Law, but for the application of this paragraph;*
> *(c) references in Part V to a director or officer of a company shall include references to the general partner of an exempted limited partnership;*
> (d) *except for sections 123, excluding subsection (1)(b) and (c), 129, 140, 145, and 147 of the Companies Law, Part V shall not apply to a voluntary dissolution and winding up under subsection (1);...*"
> [emphasis added].

28. So although section 36(3) provides that Part V applies to exempted limited partnerships, Part V does not (save for a few exceptions) apply to winding-ups under section 36(1) of the ELP Law. This is a powerful indicator that section 36 as a whole applies to voluntary windings-up in accordance with a partnership agreement, and that section 36(3) enables access to the winding-up regime under Part V of the Law where an official liquidation is sought. The sections of the Law in Part V which do apply to windings-up under section 36(1) of the ELP Law (by virtue of section 36(3(d)) are the following:

(a) most of section 123 ("*Notice of voluntary winding up*");

(b) section 140 ("*Distribution of a company's property*");

(c) section 145 ("*Voidable preference*"); and

(d) section 147 ("*Fraudulent trading*").

29. In my judgment, section 36(3)(g) of the ELP Law is analogous to the following provision applicable to voluntary liquidations under Part V of the Law which does not apply to section 36(1) windings-up:

> "*Reference 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.*"

30. Section 94 of the Law applies to exempted limited partnerships, and expressly confers the right to petition for a winding-up order on the grounds set out in section 92. Section 95 of the Law, which also applies to exempted limited partnerships, expressly empowers the Court to appoint official liquidators. It makes no sense for section 36 (3) to be construed as simultaneously applying these provisions of the Law to exempted limited partnerships and simultaneously creating an equivalent overlapping regime under the ELP Law. It is presumably for these reasons that this point of construction has not been argued in other cases. It has simply been accepted that one presents a petition under Part V of the Law if one wants to compulsorily wind-up an exempted limited partnership through an order of the Court. Thus:

(a) in *Re Cybernaut Growth Fund LP* FSD 73 of 2013 (AJJ), Judgment dated September 12, 2013 (unreported), it is unclear from the judgment on what statutory basis the just and equitable winding-up order was made, as Mr Greig rightly pointed out. However the Petition was placed before the Court and it crucially provided:

> *"129. The Petitioners present this Petition in accordance with section 15(4) of the Exempted Limited Partnership Law and section 92(e) of the Companies Law"*;

(b) section 15(4) of the 2012 Revision of the ELP Law was the predecessor provision of what is now section 36(3) of the ELP Law. The *Cybernaut* Petition concluded with a prayer for the following primary relief:

> *"The Partnership be wound up in accordance with section 15(4) of the ELP Law and section 92(e) of the Companies Law (2012 Revision)"*;

(c) in *Re Rhone Holdings Limited* FSD 119/2015 (IMJ), Judgment dated September 16, 2015 (unreported), it was effectively common ground that the petition to wind-up the exempted limited partnership was properly made under Part V of the Law. The petition was struck-out by Mangatal J under section 95(2) of the Law on the grounds of a contractual prohibition on presenting the petition.

31. These cases, I accept entirely, do not decide the point at issue in the present case as Mr Greig argued. But they do demonstrate that the proposition that section 36(3) of the ELP provides access to the winding-up jurisdiction in Part V of the Law rather than creating a freestanding winding-up jurisdiction has been accepted as being uncontroversial in at least two previous cases before this Court. That provides further forensic support for the conclusion that I would in any event have reached. Namely, that section 36 of the ELP Law does not create a freestanding statutory basis for winding-up an exempted limited partnership.

Findings: the Petition is liable to be dismissed

32. The Petition was liable to be struck-out or dismissed because it did not plead a legally sustainable basis for obtaining a winding-up order. CWR Order 3 rule 2 provides as follows:

> *"(2) Every winding up petition shall comply with the requirements of GCR Order 9 and shall contain:-*
> ...

(d) a concise statement of the grounds upon which the winding up order is sought..."

33. GCR Order 9 rule 2 pertinently provides as follows:

> "*(1) Every petition (except an election petition) shall be in Form No. 7 of Appendix I and shall include a concise statement of the nature of the claim made or the relief or remedy required in the proceedings begun by the petition.*"

34. By necessary implication, every petition must disclose a reasonable cause of action in the sense of identifying a legally sustainable basis for obtaining a winding-up order. Although GCR Order 18 rule 19 does not appear to apply to winding-up proceedings, the Court's inherent jurisdiction to strike-out a petition which is an abuse of process because, *inter alia*, it is bound to fail cannot be doubted. This jurisdiction is either preserved or given independent statutory force by section 95 of the Law which provides 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,*
>
> *but the Court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or that the company has no assets.*" [Emphasis added]

35. On a proper analysis the need to deploy the power to strike-out did not arise because the jurisdictional point was not raised at the interlocutory stage as a means of circumventing the need for a "trial". In *Re Rhone Holdings Limited,* the petition was struck-out on abuse of process grounds at the interlocutory stage. Mangatal J held:

> "*56. ... In my judgment the word 'shall' in s. 95(2) provides for a mandatory meaning. Once the Court finds that the Petitioner is contractually bound not*

to present a petition, then save for the type of circumstance such as the existence of an interested creditor who wishes to be substituted, then the Petition must be dismissed. It would otherwise be an exercise in futility to simply adjourn the Petition rather than striking it out.

57. It was for these reasons that I made the decision and order striking out the Petition."

36. Since the jurisdictional point was taken in this case at the hearing of the Petition, albeit as a preliminary point, the legal issue correctly raised by Mr Faulkner for the Partnership was whether the Petition should be dismissed (or was liable to be dismissed). The Petition clearly was liable to dismissed because it did not disclose a reasonable cause of action and/or failed to plead a legally sustainable ground for winding-up.

Findings: the amendment of the Petition

37. GCR Order 1 rule 4 provides:

"*(3A) GCR Order 20 shall apply mutatis mutandis with respect to any amendment to any document filed in the Court office.*"

38. GCR Order 20 provides as follows:

"*(5) (1) Subject to Order 15, rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct...*

(8) (1) For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

39. The usual governing principle in relation to applications to amend is that "*generally amendments will be allowed to reflect the true issues between the parties*": *Worldwide Corporation Ltd-v-GPT Ltd & Anor* [1998] EWCA Civ 1894 (Waller LJ).

40. The "*real question in controversy between the parties*" by the date of the hearing of the Petition, was whether or not it was just and equitable that the Partnership should be wound-up on loss of substratum grounds. The Partnership indicated that it would not oppose a winding-up on those grounds if the Court was satisfied that they were made out. The only objection validly raised and positively asserted by the Partnership was that the Petition was defectively pleaded in that reliance was placed on the wrong statutory gateway for obtaining the relief sought. There was no suggestion that the proposed the amendment would require an adjournment because the 'new case' would take the Partnership by surprise. On the contrary, the new case was preferable to the Partnership because it cast no aspersions on the conduct of the GP's principal, Ms Li.

41. This was a world away from a late amendment necessitating an adjournment to enable the parties to address the new case necessitating a more restrictive approach. I accordingly granted the Petitioner leave to amend to, most significantly, expressly rely on sections 92(e) and 94 (2) (c) of the Law.

Findings: whether the loss of substratum case was made out

42. The loss of substratum ground for a just and equitable winding-up is, where made out, a strong one. According to *French* (at paragraph 8.196):

> "*If the substratum of the company has gone, winding up will usually be ordered despite the opposition of a majority of members.*"

43. In my judgment what facts support a finding that a company's substratum has been lost is not a question which requires the Court to fit the facts relied upon by the Petitioner into a neat pre-determined category. In French, '*Applications to Wind Up Companies*', Third Edition, at paragraph 8.260, the learned author describes the ground in the following way:

> "*It is just and equitable for the court to order the winding up of a company if 'that which the company was formed to do can no longer be done' or if the company has ceased to carry on its business and the carrying on of the business has become, in a practical sense, impossible…*" [emphasis added]

44. Mr Greig rightly submitted that the umbrella just and equitable ground relied upon is a jurisdiction which applies to an infinite variety of facts. He relied in this regard on a passage in *French* which cited Lord Wilberforce's judgment in *Ebrahami v Westbourne Galleries Ltd* [1973] AC 360. Lord Wilberforce most pertinently opined as follows about the English provision from which section 92(e) is derived:

> "*…there has been a tendency to create categories or headings under which cases must be brought. This is wrong. Illustrations may be used, but general*

words should remain general and not be reduced to the sum of particular instances."

45. If a flexible approach should be taken to the just and equitable jurisdiction, where a petitioner for illustrative purposes relies upon a recognised category of case, the legal focus must properly be on whether the facts justify winding-up, not whether they match the facts of previous cases based on broadly similar grounds. If 'impossibility' of carrying on the business is a requirement of establishing the loss of substratum ground, then it must be impossibility "*in a practical sense*" as *French* suggests. This is a broader and more practical consideration than whether the Partnership is automatically liable to be wound-up under the terms of the LPA.

46. The Petitioner submitted in its Skeleton Argument:

> "*34...The Court may conclude that a company's substratum is gone if the company was formed to pursue a specific business that has come to an end (French at [8.262] citing Re Amalgamated Syndicate [1897] 2 Ch 600).*
>
> *35. In Re Amalgamated Syndicate, the company was formed to provide facilities for the Queen's Diamond Jubilee. After the Jubilee, a shareholder successfully sought the winding up of the company on the just and equitable basis in circumstances where the primary purpose of the company had been achieved and the company's directors did not intend to return the remaining capital to the shareholders. The Petitioner says that it is in an analogous position to the petitioning shareholder in Re Amalgamated Syndicate: the Partnership has achieved its purpose but the General Partner is not in a position to take the steps necessary to wind up the affairs of the Partnership. It would therefore be just and equitable for the Court to order the winding up of the Partnership. Absent such an order, the only (albeit unpalatable) option for the Petitioner would be to do a deal with the General Partner and attempt to obtain a variation of the Injunction.*"

47. The critical facts are that the GP is prevented from (1) making the distribution to which the Petitioner is admittedly entitled and (2) winding-up the Partnership because it is subject to an injunction granted in proceedings unconnected with the Petitioner. The only remaining "business" wholly or substantially involves those two steps. I found that these facts established:

(a) that the Partnership in a practical sense has ceased to carry on business and could not carry on; and

(b) that it was just and equitable for the Partnership to be wound-up at the instance of its sole economic stakeholder. I was satisfied that the GP lacked standing to suggest that no relief should be granted because there were alternative remedies that the Petitioner should pursue. I regarded the position of the GP as analogous to that of the holder of a sole management share of a fund company in relation to a sole participating

shareholder in the context of how a solvent fund should be wound-up. As the Cayman Island Court of Appeal observed in *Re Asia Private Credit Fund Limited; Re Adamas Strategic Opportunity Fund Limited*, CICA Nos. 17 and 76 of 2019, Judgment dated 8 November 2019 (Sir Richard Field JA) (unreported):

> "97…*Where, however, the company is an investment fund and the company is solvent so that all creditors will be paid, as is the case in these two appeals, the Managers with the entitlement to put the fund into the voluntary liquidation will have no financial stake in the winding up and the question arises as to the extent to which the Court in considering the requirements of paragraph (b) can and should have regard to the fact that the Participating Shareholders* [are] *the sole stakeholders in the winding up.*"

Summary

48. For the above reasons on March 27, 2020 I ordered that the Partnership should be wound-up.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT