

# Cayman Islands fund finance update: A potential respite from Padma?

**Briefing Summary:** As many in the industry are aware, the October 2021 decision of the Grand Court of the Cayman Islands in *Padma*<sup>1</sup> has resulted in some uncertainty on the proper process for bringing proceedings against Cayman Islands exempted limited partnerships (“ELPs”).

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## The Padma Decision

Specifically, based on a somewhat novel reading of the Exempted Limited Partnership Act, the judgment held that a creditor’s winding up petition must be brought, not against the ELP itself, but through the prism of its general partner. The judgment also expressed the view that all legal proceedings against an ELP (i.e. not merely winding up petitions) must be brought against the general partner.

In the fund finance space, given that:

- ELPs remain the most common vehicle of choice for Cayman Islands private equity fund structures; and
- standard industry credit agreements regularly include some form of language limiting the right of a lender to bring proceedings against the general partner of an ELP,

the decision has focused the minds of lenders and counsel alike on the specifics of any limited recourse wording and whether it might operate to impinge upon the lender’s right to seek redress against an ELP.

## A possible course correction

For several months the Cayman Islands legal community has been hopeful that subsequent judgement(s) would clarify (or perhaps even overturn) the *Padma* decision and restore what many perceive as a more orthodox approach – i.e. that actions may be brought against ELPs in their own name without further procedural complication.

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Recently, in [*In the Matter of Formation Group (Cayman) Fund I, L.P.*], the Grand Court has accepted our colleague Peter Sherwood's submissions on the point and in doing so has offered the first basis for some limited respite from *Padma*.

*Formation* concerned an application to strike out a limited partner's petition to wind up an ELP on the basis that, following *Padma*, such proceeding had not been instituted against such ELP's general partner.

Following specific consideration of the logical underpinnings of *Padma*, the judge held that its conclusion that there was "no [legislative] provision... which provides that legal proceedings may be instituted against an exempted limited partnership in the name of the partnership..." was incorrect, and that specifically, a petition to wind up an ELP may indeed be brought against the ELP in its own name. The judge also concluded (albeit on an obiter basis) "*there is no general or usual mandatory rule that proceedings cannot be issued against an ELP in its own name*".

## Still cause to be wary?

While *Formation* certainly represents a welcome development, it is important to note that:

- the case involved a winding up petition brought by a limited partner. Strictly speaking, therefore, *Padma* is still authority on the appropriate route for a creditor to petition (although it would not operate to bind the Grand Court even in respect of creditor petitions, and we are hopeful that in future the *Formation* decision would be followed);
- the views expressed by the Court in *Formation* as to whether legal proceedings (other than winding up petitions) may be commenced against an ELP was expressly *obiter* (and as such is not binding); and
- it remains possible that the Court of Appeal will be enlisted to determine whether the approach in *Padma* or that in *Formation*, is the correct one.

Consequently, we would continue to advise lenders in the space to give careful consideration to the impact that any limited recourse language may have on their ability to vindicate their rights fully, and, where appropriate, seek to include clear language creating an exception for this particular purpose.

We will of course continue to watch for and report on any further developments as they arise.

### 1. *In the Matter of Padma Fund L.P. (unreported)*

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