

No running away from supervision – the Court's powers in a voluntary liquidation of an Exempted Limited Partnership

Briefing Summary: The recent Cayman Grand Court ruling of *In the Matter of ECM Straits Fund I, LP* ("ECM Straits Fund") helpfully clarifies that voluntary liquidators of an Exempted Limited Partnership ("ELP") can be subject to court supervision, with the result that voluntary liquidators can be granted powers that are usually reserved for court-appointed liquidators.

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Introduction

In recent times, the Court has been asked to hear cases where a General Partner ("**GP**") has failed to discharge its duties in relation to the affairs of an ELP. Without the co-operation of the GP, Limited Partners are often left bereft of information relating to assets of the ELP. They cannot properly realize their investments under the ELP and, even if they can, there is a spectre of doubt over whether the distributions represent their full entitlement in the assets of the ELP. In circumstances where the term of the ELP has come to an end, one remedy for a Limited Partner in this predicament would be to appoint an independent liquidator to oversee the realization of the ELP assets, and to identify assets or information withheld by the GP.

However, a Limited Partner will generally encounter two difficulties in the appointment of a liquidator. Firstly, a Limited Partner acting on his own may not be entitled under the terms of the Limited Partnership Agreement ("**LPA**") to appoint a liquidator without making an application to the Court. Secondly, even if a Limited Partner may appoint a liquidator under the LPA, the powers required for a liquidator to properly discharge its duties are powers which can only be granted by the Court in an official liquidation (i.e. to realize assets and investigate potential claims).

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The apparent solution is therefore for the Court to grant orders and directions that have the equivalent effect of making a supervision order under the Companies Act (2023 Revision) ("**Companies Act**"). What is less apparent is how this hybrid can be achieved within the statutory framework of the Exempted Limited Partnership Act (2021 Revision) ("**ELP Act**"). As it stands, Section 36(3)(d) of the ELP Act disapplies the majority of Part V of the Companies Act to an ELP, including the provisions for the supervision of the Court in a voluntary liquidation.

The case of *In the Matter of ECM Straits Fund I, LP*

In *ECM Straits Fund*, the LPA provided for the GP to conduct the voluntary liquidation of the partnership at the expiry of its term. However, the GP was not performing this role and was eventually struck off. The Limited Partner sought the appointment of independent liquidators to wind up the ELP's affairs and to conduct any such investigations into the ELP's affairs as the liquidators considered appropriate. In a case that was described by the Court to have "*traverse[d] a new area of law*", the Court agreed with the Limited Partner's submissions that the Court's discretionary powers under Section 36(3)(g) of the ELP Act extend to granting orders and directions that have the equivalent effect to the making of a supervision order under the Companies Act. The Court accepted the submissions that:

- Section 36(3)(g) is drafted in the broadest possible terms, allowing the Court to make whatever directions and orders it considers are just and equitable;
- The need for such latitude is plain as there are no rules for an ELP voluntary liquidation equivalent to those in the Companies Winding Up Rules (nor any schedules of powers similar to those in the Companies Act);
- The legislative history of Section 36 of the ELP Act makes it clear that it was enacted to fill in the gaps in the voluntary liquidation of an ELP; and
- In contrast to liquidators appointed pursuant to the terms of the LPA, liquidators appointed by the Court under Section 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.

Significance of the decision

A Limited Partner may now seek assistance from the Court to appoint an independent liquidator to replace GPs who have failed to conduct an orderly voluntary liquidation of an ELP. Such court-appointed liquidators can be empowered to act under such terms as the Court considers just and equitable. While appointing independent liquidators to replace the GP was the appropriate solution in *ECM Straits Fund*, the Court confirmed that Section 36(3)(g) is of wider import – it grants parties an avenue to seek **any** directions from the Court in an existing voluntary liquidation.

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This ruling brings much needed clarity to an area that has been fraught with uncertainty for ELPs in voluntary liquidation. Navigating the ELP Act does not always give rise to easy answers, and Court has previously refused to wind up a ELP where the proper procedural basis has not been followed by the relevant party. Notably, in *Re Xio Diamond Ltd* (unreported, FSD 256 of 2019), the Court found that section 36(3)(g) of the ELP Act did not create a freestanding jurisdiction to wind up an ELP, and the party seeking to wind up an ELP on that basis could not do so unless the winding up petition was amended to reflect the correct grounds.

The decision in *ECM Straits Fund* follows shortly after the Court's ruling in *Re Formation Group (Cayman) Fund I LP* (unreported, FSD 366 of 2021) where Carey Olsen was also successful in acting for the Limited Partners who had sought to bring winding up proceedings against the ELP in its own name.

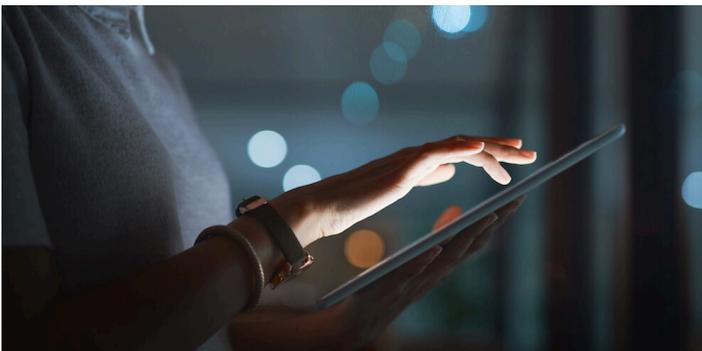
James Noble, Peter Sherwood, Amelia Tan, Nicholas Lee and Mark Ffrancon Dowsds acted for the Limited Partner in ECM Straits Fund.

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