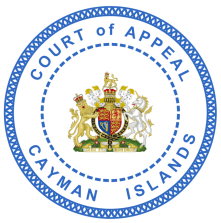

Neutral Citation Number: [2025] CICA (Civ) 9

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA (CIVIL) APPEAL NO: 6 of 2024
(FORMERLY CAUSE NO: FSD 22 of 2024 (IKJ))

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP ACT (2021 REVISION) AND IN THE MATTER OF ONE THOUSAND & ONE VOICES AFRICA FUND I, L.P. (IN VOLUNTARY LIQUIDATION)

BETWEEN:

ONE THOUSAND & ONE VOICES AFRICA FUND I INVESTORS, LTD., AS GENERAL PARTNER FOR AND ON BEHALF OF ONE THOUSAND & ONE VOICES AFRICA FUND I INVESTORS, L.P., AS GENERAL PARTNER FOR AND ON BEHALF OF ONE THOUSAND & ONE VOICES AFRICA FUND I, L.P. (IN VOLUNTARY LIQUIDATION)

Appellant

-and-

AFRICA INVESTMENTS, LLC

Respondent/Petitioner

Before: **The Hon John Martin KC, Justice of Appeal**
The Hon Sir Richard Field, Justice of Appeal
The Hon Sir Jack Beatson, Justice of Appeal

Appearances: **Mr Tom Lowe KC instructed by Andrew Pullinger and Mr Jordie Fienberg of Campbells LLP for Appellant**
Mr David Allison KC instructed by Mr Rupert Bell of Walkers Cayman LLP for Respondent
Mr Sebastian Gollins of Kobre & Kim (Cayman), for the Appointees

CICA Civil Appeal 6 of 2024 One Thousand & One Voices Africa Fund I, L.P. – reissued with editorial corrections.

Date of Hearing: **14 November 2024**

Draft Circulated: **04 August 2025**

Judgment Delivered: **12 August 2025**

JUDGMENT

MARTIN JA;

1. This appeal is against orders of Kawaley J dated 24 April and 2 May 2024. The orders were made in the context of a petition brought by Africa Investments, LLC ("the petitioner"), one of the limited partners in an exempted limited partnership called One Thousand & One Voices Africa Fund I, L.P. ("the ELP"), seeking removal of the general partner One Thousand & One Voices Africa Fund I Investors, L.P. ("the GP") as liquidating agent of the ELP and the appointment in its place of Alexander Lawson and Christopher Kennedy ("the appointees") as the persons responsible for the winding up of the affairs of the ELP.

2. By the first of those orders the judge dismissed an application by the appellant GP for the determination of a preliminary issue as to jurisdiction in the following terms:

> "*Does the Court have jurisdiction under section 36 of the Exempted Limited Partnership Act (2021 Revision), or otherwise, to order the removal of [the GP] as Liquidating Agent (as defined in the LPA) and its replacement as either Liquidating Agent or otherwise as persons responsible for winding up the affairs of the Partnership by persons not nominated by the GP pursuant to Arts. 1 and 13 of [the LPA] where no "Cause Event" (as defined in the LPA) has occurred so as to satisfy the conditions for removal of the GP under the LPA?"*. [The LPA is identified in paragraph 6 below.]

3. By the second order, the judge appointed the appointees as the persons responsible for the winding up of the affairs of the ELP in place of the GP.

4. The notice of appeal dated 13 May 2024 challenged both orders, and the memorandum of grounds of appeal raised a number of grounds of complaint in relation to the second order. However, *by the time the appeal was heard*, and following a change of attorneys and counsel by the GP, the challenge had become confined to a challenge to the first order, the appellant making it clear that if it failed on the jurisdiction point it would not pursue its complaints about

the judge's decision to appoint the appointees in place of the GP. The memorandum of grounds of appeal was amended to reflect this. Thus the appeal ultimately related only to the first order.

5. At the conclusion of oral argument on behalf of the appellant, we announced that we would dismiss the appeal for reasons to be given later. These are my reasons.

Background

6. The ELP was formed as an exempted limited partnership on 28 August 2013. Its governing document is the Third Amended and Restated Exempted Limited Partnership Agreement ("the LPA") dated 8 September 2014 and made between the limited partners and the GP.

7. On 22 November 2023 limited partners holding approximately 97% in interest in the ELP, including the petitioner, resolved that the ELP should be wound up with effect from 27 November 2023. From 27 November 2023 until 2 May 2024, the winding up of the ELP was conducted by the GP acting as "*Liquidating Agent*" under the terms of the LPA.

8. The petition was presented on 25 January 2024, and was supported by limited partners representing approximately 97% in interest in the ELP.

The statutory framework

9. *The Exempted Limited Partnership Act (2021 Revision) ("the ELPA").*

Section 36 of the ELPA provides as follows:

> "36. (1) 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
> (b) unless otherwise specified in the partnership agreement, upon the passing of a resolution of all the general partners and a two-thirds majority of limited partners.
>
> (2) Upon the completion of the winding up of an exempted limited partnership, the general partner or other person appointed as liquidator in accordance with the provisions of subsection (12) shall file a notice of dissolution with the Registrar and subject to section 37, an exempted limited partnership shall not be dissolved by an act of the partners or otherwise until a notice of dissolution signed by a general partner or liquidator has been filed with the Registrar.

(3) Except to the extent that the provisions are not consistent with this Act, and in the event of any inconsistencies, this Act shall prevail, and subject to any express provisions of this Act to the contrary, the provisions of Part V of the Companies Act (2021 Revision) 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 that limited partner would otherwise bear under this Act, 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 Act (2021 Revision), 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 Act (2021 Revision) 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 Act (2021 Revision)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.

(4) Notwithstanding that any order or direction has been made pursuant to subsection (3)(g) or that the winding up of an exempted limited partnership has commenced, a creditor who has security over the whole or part of the assets of the exempted limited partnership is entitled to enforce that person's security without the leave of the court and without reference to the general partner or any liquidator appointed to wind up the exempted limited partnership.

(5) Where a liquidator sells assets on behalf of a secured creditor of an exempted limited partnership, the liquidator is entitled to deduct from the proceeds of sale a reasonable sum by way of remuneration.

(6) Where an exempted limited partnership is being wound up and a liquidator is appointed, the Registrar shall within 28 days of the appointment be notified of the name and business address of the liquidator.

(7) The general partner or its legal representative shall promptly serve notice on all limited partners informing the limited partners of —

(a) the death;

(b) the commencement of liquidation, bankruptcy or dissolution proceedings; or

(c) the withdrawal, removal or making of a winding up or dissolution order, in relation to the sole or last remaining qualifying general partner and in this section each event is referred to an "*event of withdrawal*".

(8) If default is made in compliance with this section, each general partner or its legal representative, in default shall incur a penalty of twenty-five dollars for each day that the default continues, which penalty shall be a debt due to the Registrar.

(9) Unless the partnership agreement provides otherwise, if a new qualifying general partner is not elected within ninety days after the service of notice of an event of withdrawal in accordance with subsection (7), in this section referred to as "the automatic wind up date", the exempted limited partnership shall be wound up in accordance with the partnership agreement or the orders or directions the court may make or give in accordance with subsection (3)(g).

(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.

(11) In the event that an exempted limited partnership is required to be wound up in accordance with the provisions of subsection (9) then the date of commencement of winding up shall be the date falling ninety days after the service of notice of an event of withdrawal.

(12) If a majority of limited partners specified in the partnership agreement as being entitled to vote to elect a new general partner in accordance with the terms of the partnership agreement elects one or more new qualifying general partners by the automatic winding up date —

(a) the exempted limited partnership shall not be required to be wound up and dissolved; and

(b) the business of the exempted limited partnership may be resumed and continued as provided for in the partnership agreement or any subsequent agreement.

(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)."

10. *The Companies Act.*

Except for sections 123 (excluding subsection (1)(b) and (c)),129, 140, 145, and 147, Part V of the Companies Act does not apply to the voluntary (as opposed to compulsory) dissolution and winding up of an exempted limited partnership: section 36(3) of the ELPA. The applicable sections are as follows.

1) Section 123 requires notice to be given to the registrar of a voluntary winding up (subsections (b) and (c) dealing with the liquidator's consent to act and a declaration of solvency).
2) Section 129 provides as follows:

"(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 order on the application as it thinks just."

3) Section 140 provides for the collection and application of the property of the company, subsection (1) stating that the property of the company is to be applied in satisfaction of its liabilities pari passu and subject thereto shall be distributed amongst the members according to their rights and interests in the company, subsequent subsections modifying that in defined ways.
4) Section 145 deals with voidable preferences.
5) Section 147 deals with fraudulent trading.

Sections of Part V which do not apply include section 121 (removal of voluntary liquidators, including by application by a contributory to the court) and 124 and 131-133 (dealing with supervision orders, section 133 stating that subject to defined exceptions a supervision order is to take effect for all purposes as if it was an order that the company be wound up by the Court).

The LPA

11. Relevant provisions of the LPA are as follows.

> (1) Liquidating Agent was defined by clause 1.1 to mean the GP or any person appointed by the GP to oversee the winding-up and liquidation of the ELP in accordance with article XIII.
>
> (2) Clause 4.6 provided that the GP could be removed by a supermajority in interest (meaning at least sixty-six and two-thirds per cent) of the limited partners following the occurrence of a Cause Event, essentially meaning the conviction of the GP for actual fraud or wilful misconduct or a final determination by a court of competent jurisdiction that the GP had wilfully and materially breached its duties under the LPA. Clause 4.6(d) provided that the GP could be removed only pursuant to clause 4.6; and clause 5.1 provided that except as provided in clause 4.6 no limited partner should have the right to vote for the removal or replacement of the general partner.
>
> (3) Clause 13.1 provided for the ELP and its affairs to be wound up and the ELP subsequently dissolved upon the first to occur of any of a number of specified events, including (as in fact occurred) the affirmative vote of 75% in interest of the limited partners.
>
> (4) Clause 13.2(a) provided that
>
> > "*Upon the winding up of the [ELP], the Liquidating Agent shall proceed … to liquidate the assets of the [ELP], and the Liquidating Agent shall apply the proceeds of such liquidation, or in its sole discretion distribute the partnership assets"*
>
> in a defined order of priority.

The judge's jurisdiction ruling

12. From the outset of his judgment, the judge made clear his preliminary view that the GP's challenge to jurisdiction was wrong. In paragraph 2, he described the GP's point as "*not only unappetising but indigestible*", and in paragraph 8 he said that his starting assumption was that the petitioner's case on jurisdiction appeared to be irresistible. In paragraph 9, however, he identified the "*key foundations*" of the GP's jurisdictional challenge, which were:

(a) amendments made to the ELPA in 2014 were intended to make the parties' commercial bargain "King";

(b) section 36(1) mandated the application of the liquidation provisions of the LPA;

(c) section 36(13) did not apply to voluntary liquidations at all, because the reference to subsection (3)(g) signified it was only available where Part V of the Companies Act had been engaged; and

(d) if section 36(13) applied to voluntary liquidations at all it only applied to fill gaps, for example where a partnership agreement was silent as to the identity of the voluntary liquidator or where the contractually agreed mechanism was not available.

13. As to the first of these, the judge accepted that the GP was entitled to rely on the legislative history to provide context for ascertaining the purpose of the enactments, but said that it was not of very great assistance. The extent to which the ELPA provided for the parties' agreement to prevail could only sensibly be assessed by reference to its terms. As to (b), section 36(1) had to be read in the context of section 36 as a whole. It was to be understood as providing that, subject to the rest of section 36 itself, a voluntary liquidation should be conducted in the contractually agreed manner. Subsequent subsections explicitly or implicitly applied to voluntary liquidations, including the filing obligations on dissolution in subsections (2) and (5)-(8), the explicit application to voluntary liquidations of certain aspects of Part V of the Companies Act in subsection (3), and the provision for the winding-up commencement date of inter alia voluntary liquidations in subsection (10). Read in the context of section 36 as a whole, section 36(1) could not be understood as imposing an unqualified requirement to wind up voluntarily in accordance with the terms of the relevant partnership agreement.

14. The judge then said that subsection (13) appeared simply to deal with the separate topic of who should conduct a voluntary winding-up. It did this by providing that the starting position was the general partner or other person prescribed by the agreement, subject to the qualifying words "*unless the court otherwise orders*". He said that the only seriously arguable basis advanced for doubting this straightforward proposition arose from the reference to "*an application… pursuant to subsection (3)(g)*"; that that subsection could at first blush most naturally be read as applying only to windings-up conducted under Part V of the Companies Act, not to voluntary liquidations at all; that some legislative schemes were drafted with more precision than others, and the petitioner's counsel had frankly acknowledged that section 36 was not at the top of the precision scale; and that the clearest illustration of that was the terms of subsection (2), which required service of a notice of dissolution on completion of the winding up by "*the general partner or other person appointed as liquidator in accordance with the provisions of subsection (12)*". The judge said that he found that provision almost dispositive of the question at hand:

reference to subsection (12) could only sensibly be read as a reference to subsection (13), which was the only subsection which conferred a power to appoint liquidators. The provision was clearly dealing with what happened at the end of a voluntary winding-up and expressly contemplated that it might be completed by a liquidator appointed under subsection (13). Although subsection (2) did not by itself resolve the question of how subsection 3(g) could be read as applying to voluntary liquidations, subsection (9) helped to resolve that sub-issue. The latter subsection provided for an automatic winding-up date in specified circumstances, and provided that "*unless the partnership agreement provides otherwise*" the partnership was to be wound up in accordance with the partnership agreement "*or the orders or directions the court may make or give in accordance with subsection (3)(g)*". The significance of that was that subsection (9) expressly contemplated that a voluntary winding-up might be administered or managed not only in accordance with the partnership agreement but also in accordance with orders or directions made under subsection (3)(g). The judge then said this (paragraph 23):

> "*This is, in my judgment the clearest possible manifestation of a legislative intention that section 36(3)(g) is intended to confer on the Court a general power to supervise voluntary liquidations. It may properly be viewed as, in effect, a freestanding subsection within section 36 rather than as a sub-paragraph of subsection (3), limited by that subsection's prefatory words*".

15. The judge then said that it followed from the above analysis that the argument that the Court's powers under section 36(13) were only available when a partnership agreement was silent, or its prescribed liquidation procedure had broken down, could only properly be rejected. He went on to say this (paragraph 28):

> "*[T]he draftsman of section 36 clearly took considerable care to specify precisely when the provisions of the Act would give way to contrary provisions in the partnership agreement. No such language appears in section 36(3)(g) or 36(13). The right of access to the Court in relation to voluntary liquidations under section 36 of the Act is seemingly greater than it is in relation to the right to present a winding-up petition under Part V of the Companies Act. That Act expressly provides that it is permissible to contract out of the right to present a winding-up petition (section 95(3)). No such provision exists in section 36 or elsewhere in the Act".*

16. The judge finally went on to state his provisional views on the merits of the petition. It is not necessary to deal with them here.

The amended memorandum of grounds of appeal

17. The amended memorandum of grounds of appeal specifies six grounds of challenge to the judge's ruling, as follows:

(1) The judge was wrong in law to hold that the court had a broad supervisory role and accordingly that the court was entitled to remove the GP as a liquidating agent appointed in accordance with the LPA and to appoint independent third parties. He ought to have held that no such jurisdiction was conferred by section 36 of the ELPA. Specifically, (a) the judge should have held that section 36(1) of the ELPA is expressed in mandatory language and not subject to any exceptions so that a voluntary winding up must proceed in accordance with the LPA; (b) since the LPA provides for the voluntary liquidation to be conducted by the GP as liquidating agent, effect must be given to it and there was no contractual mechanism in the LPA that allowed the scheme of the voluntary liquidation to be altered. Subsections (3) and (13) could not be read as contradicting subsection (1); (c) unlike a winding up of a company under the Companies Act, section 36(1) of the ELPA contemplated that the voluntary liquidation of an exempted limited partnership should be governed by the pre-existing contractual arrangements, and there was no principle which prevents the LPA from operating in the case of a voluntary liquidation; and (d) if the appointment of a liquidating agent is governed by the terms of the LPA, the method of removal of the liquidating agent should also be found in the LPA since an exempted limited partnership represents merely a contractual relationship in which the LPA has primacy subject to the mandatory provisions of the ELPA.

(2) Although section 36(3) of the ELPA applies Part V of the Companies Act to the winding up of an exempted limited partnership, that Part is (save for very few specified provisions) expressly disapplied to a voluntary winding up in accordance with the LPA. The provisions in Part V of the Companies Act for converting a voluntary liquidation into a supervised one are excluded in the case of a voluntary liquidation of an exempted limited partnership. The judge ought to have held that it was wrong for the court to assume the identical power by replacing a liquidating agent with a court supervised liquidator.

(3) The judge ought to have held that section 36(13) applied only when there was a compulsory liquidation because it expressly referred to section 36(3)(g) and a winding up under Part V of the Companies Act.

(4) The judge was wrong to support his conclusion by treating the reference in section 36(2) to section 36(12) as intended to refer to section 36(13). He ought to have recognised that the limited partners could appoint a voluntary liquidator in accordance with section 36(12) on the automatic dissolution of an exempted limited partnership if provision was made accordingly in the partnership agreement.

(5) In holding that it was necessary to imply a jurisdiction to remove a voluntary liquidator, the judge erred by failing to find that the remedy for a limited partner who is dissatisfied with the voluntary liquidation was to apply for a winding up of the exempted limited partnership under the just and equitable ground pursuant to Part V of the Companies Act.

(6) The judge erred in law in exercising his discretion to make a winding up order on the just and equitable ground (a) without doing so in accordance with the principles ordinarily applicable to winding up applications under section 92(e) of the Companies Act and (b) in any event, exercising that discretion summarily.

The GP's skeleton argument

18. The GP's initial skeleton stated that the central issue before the judge and on appeal was whether section 36 of the ELPA gave the court jurisdiction to replace the contractually agreed liquidating agent on the ground that it was just and equitable to do so, even if such removal and replacement was inconsistent with the express terms of the LPA. Put another way, could the Court override the contractual bargain struck between the parties regarding the appointment of the liquidating agent?

19. The GP was conducting a voluntary liquidation under the provisions of the LPA as liquidating agent pursuant to a contractually agreed process. The court had no role in supervising a general partner at that stage any more than it did during the life of an exempted limited partnership. The petitioner had sought the wrong relief. Section 36(1) of the ELPA was in mandatory terms ("shall") and provided for the primacy of the partnership agreement in a voluntary winding up on the occurrence of an event or a resolution. Section 36(3) applied Part V of the Companies Act to the winding up of an exempted limited partnership, but most of Part V was expressly disapplied to a voluntary winding up of an exempted limited partnership. The provisions that were expressly disapplied included the provisions removing a voluntary liquidator, replacing him with an official liquidator, and bringing a voluntary liquidation under the supervision of the Court.

20. It was submitted that the court had no supervisory jurisdiction over the ELP, or the liquidating agent, once voluntary liquidation commenced, with the result that the court was not entitled to remove the GP as the liquidating agent appointed in accordance with the LPA. Properly construed, section 36(13) conferred no such jurisdiction. The intention of the legislature could not have been to create an avenue for a limited partner to remove a contractually appointed liquidating agent when to do so would be inconsistent with the express terms of the partnership

agreement. There was no basis for interfering in the contractual process without express statutory provision: to allow limited partners to circumvent the terms of the limited partnership agreement by applying to the court would undermine the parties' contractual autonomy and certainty, and the liquidated partners should be held to their bargain.

21. Section 36(13) expressly referenced directions which might be given under section 36(3)(g). As the judge noted, this suggested that directions under section 36(13) were confined to directions under Part V of the Companies Act as applied by section 36(3). That was clear from the words of section 36(3): "*the provisions of Part V of the Companies Act … shall apply to the winding up and dissolution of an exempted limited partnership and for this purpose …".* The emphasised words limited the scope of subsequent sub paragraphs. The net effect of the section was that the court had jurisdiction in a winding up of an exempted limited partnership under Part V of the Companies Act to give directions and make orders under section 36(3)(g), but not in relation to a voluntary winding up save as permitted by section 36(3)(d) – that is to say, for the purpose of implementing the few sections of Part V of the Companies Act which were expressed to apply to voluntary liquidation of an exempted limited partnership.

22. Section 129 of the Companies Act, which was one of the sections expressed to apply to a voluntary liquidation of an exempted limited partnership, allowed the voluntary liquidator or a limited partner (substituted for contributory by virtue of section 36(3)(b)) to apply to the court for directions or to exercise such powers as it might exercise if the exempted limited partnership were being wound up under supervision of the court. The availability of that section was inconsistent with reading section 36(3)(g) or 36(13) as allowing the court to make directions and give orders in a voluntary winding up, as it would duplicate powers. Moreover, section 129 of the Companies Act could not allow the court to exercise the same powers as it would in a supervised liquidation, as that would be inconsistent with the ELPA which disapplied all of the provisions dealing with supervision (sections 131-133 of the Companies Act).

23. There was no basis for treating section 36(13) as a power to remove the general partner if it had been agreed in the partnership agreement that he was to be the voluntary liquidator. To imply such a power would be bizarre, since section 36(3)(d) had expressly excluded the power of removal in section 121 of the Companies Act and the power to apply for a supervision order.

The petitioner's skeleton argument

24. The petitioner's skeleton argument supported the judge's conclusion and reasoning. It said that the GP's position was contrary to the plain language of section 36(13), and that the GP's basic argument – which the petitioner identified as being that section 36(13) only applied if the court had first made a winding-up order – was manifestly wrong. It was contrary to the plain language of section 36(13), and was also contrary to the legislative history of section 36(13) and the authorities, including this Court's decision in *TNT v Logispring* [2009 CILR 456]. It was simply irrelevant whether a just and equitable winding up petition could be presented against an exempted limited partnership: the inescapable fact was that the Grand Court did have jurisdiction to appoint a person other than the general partner to wind up the affairs of an exempted limited partnership under section 36(13) in circumstances where the exempted limited partnership was already being wound up voluntarily. The existence of that power did not depend on whether the Grand Court had any other related powers, for example to place the exempted limited partnership into compulsory liquidation.

25. Section 36(13) applied "*following the commencement of the winding up of an exempted limited partnership*". There could be no doubt this provision applied to a voluntary winding up, since the commencement of a winding up was expressly defined by section 36(10) to include the date of the passing of a resolution to wind up the exempted limited partnership or the occurrence of an event provided for by the partnership agreement upon which the exempted limited partnership was to be wound up. Moreover, it was impossible to see how section 36(13) could be concerned with compulsory winding-up, rather than a voluntary winding up, because in the former case the liquidator was required to be an officer of the court who must be a qualified insolvency practitioner. The judge was right to say that the suggestion that subsection (13) did not apply to voluntary liquidation was ultimately a hopeless proposition. The fact that section 36(13) cross-referred to section 36(3)(g) did not cut across or undermine the court's power to appoint a person other than the general partner to wind up the partnership's affairs in a voluntary winding up. Section 36(3)(g) was simply the procedural framework through which an application could be made under section 36(13), and it supplied the legal test which should be applied by the court in this context.

The GP's reply skeleton argument

26. The appellant's reply skeleton made explicit for the first time that "*the question here is whether Section 36(13) permits the removal of an existing liquidator once in place in an ongoing voluntary liquidation*". The GP's submission had always been that the court cannot use section 36(13) to *replace* a voluntary liquidator, this being implicit in the contention that section 36(13)

was only available to fill gaps. The petitioner had not dealt with the question of removal head on. Section 36(13) concerned the *appointment* of a liquidator and was clearly not framed as a power of removal. The subsection was perfectly usable: it could be used either at inception of the liquidation (e.g. when the person nominated as a liquidator had been somehow disqualified, incapacitated, or had declined to assume the role) or in an ongoing liquidation (e.g. the person appointed as liquidator had become incapacitated or resigned). There was no wording that permitted the compulsory removal of a voluntary liquidator, and that could not be implied as a matter of statutory construction given that the Companies Act power to remove a voluntary liquidator had been specifically excluded. Section 36(13) was expressly and plainly only a power of appointment: it was not expressed as, nor did it purport to be, a power to remove a liquidator who had already assumed office. A power of removal was not a necessary corollary to a power of appointment. Section 36(13) did not refer to an existing liquidator (voluntary or otherwise) and was capable of being exercised without any liquidator having to be removed after the commencement of a winding up. The exercise of the power of appointment was not predicated on a prior period of active liquidation or the removal of a liquidator. The power was also capable of being exercised during a liquidation without the need for removal, for example if a corporate general partner was itself wound up. It was also possible for an existing liquidator to apply to the court because he wished to or needed to resign and to that end sought the appointment of someone in his place. Section 36(13) accordingly had a perfectly workable and sensible sphere of application which existed even when there was no possibility of removal. It was not for the court to read in a reference to removal when that was not present in section 36(13) or to find ambiguity where there was none. The absence of a power of removal for voluntary liquidators reinforced the primacy of the LPA over the voluntary liquidation expressly acknowledged by the opening provision in section 36(1). Although it was obvious that the importance accorded to the LPA by section 36(1) gave way to qualifications in the remaining provisions in section 36, that still did not provide a basis for implying a power in section 36(13) to remove a voluntary liquidator. To treat the subsection as including an implied power of removal would subvert the expressly agreed provisions of the LPA, which itself provided for removal of the GP but only upon the occurrence of a cause event and a supermajority vote of the limited partners (clause 4.6). Clause 4.6(d) of the LPA provided that the general partner might be removed only pursuant to section 4.6, and clause 5.1 stated that "except as provided in section 4.6, no Limited Partner shall have the right to vote for the election, removal or replacement of the General Partner". Since the provisions of the Companies Act dealing with removal were disapplied for voluntary liquidations of an exempted limited partnership, the reference in section 36(13) to section 36(3)(g) was necessarily inconsistent with the court

having any power of removal. It was well established that words could only be implied into a statute if it were necessary to do so; but it could not be necessary in circumstances where the express power of removal in the Companies Act had been excluded. Since the legislature had specifically and deliberately excluded the power of removal, it must be taken to have had a reason for doing so, which the GP identified as the need to give autonomy to the voluntary liquidation of an exempted limited partnership. The GP accepted the petitioner's assertion that the whole point of section 36(13) was that the Grand Court could step in and appoint someone else to perform the role of voluntary liquidator; but that proposition went only to the court's power to appoint a liquidator, not to remove one. Moreover there was no need to imply a power of removal in circumstances where the remedy of a just and equitable winding up under the Companies Act was available.

The appointees' position

27. The appointees filed a note making clear that they adopted a neutral position in respect of the appeal and providing the court with basic information about the progress of the liquidation. They instructed counsel for the purposes of assisting the court if required; but in the end we did not see the need to call upon their counsel.

The GP's oral submissions

28. The GP's oral submissions closely followed the line taken in the GP's reply skeleton. The relevant point of construction was whether section 36 allowed the court to remove a voluntary liquidator, it being the GP's case that there was no such power. Section 36(13) only dealt with appointment: neither expressly nor impliedly did it deal with removal. Subsection (1) emphasised the primacy of the LPA, which appointed the GP as liquidating agent and provided that the GP could be removed as GP (and hence as liquidating agent) only if a cause event occurred. Section 36(3), incorporating Part V of the Companies Act, explicitly excluded sections which would otherwise have given the court a power of removal of a voluntary liquidator and a power of supervision of a voluntary liquidation; and section 129, which was said to apply to voluntary liquidations, could not be used to supply a power of supervision which had itself been disapplied. Section 36(3)(g) was important: its sole purpose was that it applied only in the context of an existing winding up conducted under the terms of the Companies Act, and it could not be construed so as to permit a back-door introduction of a power to remove which had been disapplied. It was not necessary to imply a power to remove, not least because the application of Part V of the Companies Act to exempted limited

partnerships meant that such partnerships could in appropriate circumstances be wound up on the just and equitable ground.

Discussion

29. It will be evident from the foregoing that the GP's case changed, at least in emphasis, over the course of the proceedings. Before the judge, the argument was that section 36(13) did not apply at all to voluntary liquidations of exempted limited partnerships, but if it did it was available only where the contractual arrangements were for some reason not applicable. The GP's original grounds of appeal took a similar line, as did the original skeleton argument. The focus of all these documents was upon the ability of the court to appoint someone in place of the contractually agreed liquidator, in the face of the contractual arrangements. It was only in the GP's reply skeleton that the focus was placed firmly on the ability of the court to remove an existing liquidator. This meant that ultimately the challenge to the judge's decision, which because of the way in which the case was argued before him had not addressed as a separate issue the court's ability to remove an existing liquidator, was not so much to his reasoning as to the fact that in order to make the appointment of the appointees he had had to remove the GP as liquidating agent.

30. The cornerstone of the GP's argument is the proposition that the ELPA recognises the primacy in a voluntary liquidation of the parties' contractual arrangements, and the court has no power to interfere with those arrangements. As expressed in the GP's original skeleton argument (paragraphs 26 and 30), the proposition is this:

> "*The intention of the legislature could not have been to create an avenue for an LP to remove the contractually appointed Liquidating Agent when doing so is inconsistent with the express terms of the partnership agreement. … There is no basis for interfering in that contractual process without express statutory provision setting it at nought* (sic). *To allow LPs to circumvent the terms of the limited partnership agreement by applying to the Court would undermine the parties' contractual autonomy and certainty. The LPs should be held to their bargain*".

Again, in paragraph 11 of the GP's reply skeleton argument, it is said:

> "*If Section 36(13) were to be construed as including an implied power to remove the GP, that would subvert the expressly agreed provisions of the LPA in this case (as almost certainly in other cases), thereby subverting party autonomy and contractual certainty*";

and in paragraph 12 of the same document it is said that the exclusion by section 36(3)(d) of the powers to remove a voluntary liquidator or to convert a voluntary liquidation into a supervised one "*is consistent with the legislature's intention to hold the stakeholders to their bargain in the LPA…*".

31. This seems to me an impossible proposition to maintain. Irrespective of the effect of section 36(13), the ELPA provides a clear route by which a limited partner may "*set at naught*" the agreed contractual process for liquidation of an exempted limited partnership. It does so by providing in section 36(3) that the provisions of Part V of the Companies Act are to apply to the winding up of an exempted limited partnership, with the limited partners being treated as if they were shareholders of a company (the reference in Part V to contributories being construed accordingly). The consequence of this is that a limited partner is entitled under section 94 of the Companies Act to petition for the winding up of the exempted limited partnership. It is of course the case that if the petition is granted the winding up will be a compulsory one, not a voluntary one; but the significance for present purposes is that it will not be a winding up conducted in accordance with the terms of the partnership agreement. It cannot be said, therefore, that the overall legislative intention evinced by the ELPA is that the winding up should be conducted in accordance with the terms of the partnership agreement, or that section 36(1) has the effect that the terms of that agreement are incapable of being subverted.

32. In reality, section 36 (1) does no more than provide as a starting point that the voluntary liquidation of an exempted limited partnership shall be conducted in accordance with the provisions of the partnership agreement. It is, as the GP itself recognises, subject to exceptions; and the real question is as to the extent of those exceptions.

33. The first point to note is that there is no question that the remaining provisions of section 36 are capable of applying to a voluntary liquidation. The contrary is no longer argued, although it was a live issue at first instance. Such force as the argument had was derived from the combination of the words "*and for this purpose*" in section 36(3) (the purpose being the application of Part V of the Companies Act to the winding up of an exempted limited partnership) and section 36(3)(g), giving the court the ability to make orders and give directions for the winding up and dissolution of an exempted limited partnership as might be just and equitable. Since section 36(13) permitted the court to appoint some other person than the general partner "*on the application of any partner, creditor or liquidator of the exempted limited partnership pursuant to subsection (3)(g)*", the argument was that the jurisdiction under section 36(13) could only be exercised for the purpose of applying Part V to the winding up, and the

exclusion of most of the provisions in Part V from operation in the case of a voluntary winding up meant that there was nothing in that Part whose purpose would be served by the replacement of the general partner as liquidating agent.

34. The argument did at least have the merit of coherence, but the conclusion to which it was said to lead – that section 36(13) could not apply to a voluntary winding up at all – has now been abandoned. It was in any event wrong, for the principal reason that if section 36(13) does not apply to a voluntary winding up it cannot apply to anything at all. That is because in the case of a compulsory winding up questions of the identity of the official liquidator are matters for the court exercising jurisdiction under the Companies Act, not under the ELPA.

35. The argument was wrong also in light of the terms of section 36(2) of the ELPA. It is notable that that subsection follows immediately after subsection (1), which undoubtedly deals with voluntary liquidations, but precedes subsection (3), which is the subsection dealing with the application of the Companies Act. Read in that context, there is in my view no doubt that the introductory words of subsection (2) – "*upon the completion of the winding up of an exempted limited partnership*" – have application to a voluntary winding up. That being so, the ensuing words – *"the general partner or other person appointed as liquidator in accordance with the provisions of subsection (12)"* clearly evince an intention that the section 36(13) power is available in the case of a voluntary liquidation. In that connection, it is entirely clear that the reference to subsection (12) is to be read as a reference to subsection (13): no other subsection in terms gives a power to appoint a person to wind up the affairs of the partnership, and Hansard indicates that what became subsection (13) in the ELPA was subsection (12) in the antecedent Bill.

36. The GP's suggestion that the reference might be to subsection (12) because that subsection allowed the limited partners to choose some other person to conduct a liquidation is wrong, that subsection in fact dealing with the avoidance of a liquidation by the election of a new general partner following an event of withdrawal. It is similar in that respect to subsection (9), which itself provides a further indication that section 36(3)(g) does not confine the operation of subsequent parts of section 36 to implementation of provisions of the Companies Act. Subsection (9) is concerned with a position in which the sole or last qualifying general partner has ceased to be able to continue to act as such by reason of an event of withdrawal as defined in subsection (7). Nothing in the Companies Act says anything about such a situation; but subsection (9) nevertheless provides that unless the limited partners choose a new qualifying

general partner the partnership is to be wound up "*in accordance with the partnership agreement or the orders or directions the court may make or give in accordance with subsection (3)(g)*". Utilisation of the subsection (3)(g) power in those circumstances cannot be for the purpose of implementing some provision of the Companies Act. Viewed in this light, the expression "*for this purpose*" is no more than a phrase introducing modifications to or explications of the regime put in place by the preceding parts of section 36(3).

37. The position thus reached is that section 36(13) applies in the case of a voluntary liquidation and is not limited by section 36(3)(g) to implementation of such provisions of the Companies Act as apply to voluntary liquidations. On that footing, what is the scope of section 36(13)? On the face of it, it enables the court to decide that the affairs of the exempted limited partnership should be wound up by somebody other than "*the general partner or other person appointed pursuant to the partnership agreement*", and to do so pursuant to its general power, given by section 36(3)(g), to "*make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable"*. The orders made by the judge in the present case fall squarely within that language: their effect is to appoint somebody other than the GP as liquidating agent on the ground that it was just and equitable to do so.

38. The only remaining basis of challenge to this conclusion is that section 36(13) does not include an express power to remove the person designated in the limited partnership agreement to conduct the winding up. This argument was not expressly considered by the judge, because it was not put to him in terms which placed the focus on the absence of a power to remove; but he did consider the GP's alternative contention put to him, namely that the power was only available to fill a gap – such that it could only be exercised where there was nobody already in place as liquidating agent. The judge had no difficulty in rejecting this argument, and he was right to do so.

39. It is the case that section 36(13) does not contain an express power of removal. On the other hand, it gives a power of appointment which is on the face of it unlimited, and specifically is not expressly limited by reference to whether or not a liquidation conforming to the contractual arrangements has already started. By its plain words, it gives an unrestricted power to appoint a person other than the contractual liquidator whether there is someone already in place or not.

40. The GP's main argument in this context is twofold: first, that the sections of the Companies Act which apply to voluntary liquidations by virtue of section 36(3) do not include the power to

remove a voluntary liquidator, and the intention could not have been to reinstate later in the same section a power expressly excluded earlier in that section; secondly, and more generally, that nothing in section 36(3)(g) or 36(13) can be construed as giving the court a power to supervise a voluntary liquidation, since the provisions of the Companies Act giving such a power in the case of voluntary liquidations have been expressly excluded from applying to voluntary liquidations of exempted limited partnerships. The GP also referred to section 129 of the Companies Act, one of the few sections to be applied to voluntary liquidations of exempted limited partnerships, saying that that section (which gave a general power to the court to determine any question arising on a voluntary winding up or to exercise any power which the court might exercise if the partnership were being wound up under the supervision of the court) provided the only means necessary for access to the court, and could not have been meant to be duplicated by section 36(3)(g) or section 36(13) of the ELPA.

41. This last point was to my mind substantially reduced in force by the GP's contention that, notwithstanding that section 129 spoke of the court exercising any power which could be exercised if the partnership were being wound up under the supervision of the court, it could not in fact exercise any such power in the case of an exempted limited partnership because to do so would be to reintroduce by a back door the concept of a winding up conducted under the supervision of the court which was excluded by section 36(3) of the ELPA. If this contention were correct, it would mean that the only thing the court could do under section 129 in the case of a voluntary liquidation of an exempted limited partnership would be to resolve questions, so that there would be no or minimal overlap with section 36(3)(g), depriving the argument of most of its force; but the contention is in any event wrong, since there would be no point in the express application of section 129 if a large part of it had to be treated as of no effect.

42. The apparent overlap of powers inherent in the application of section 129 of the Companies Act to voluntary liquidations of exempted limited partnerships nevertheless points to the fact that there are difficulties in identifying a clear means of reconciling the provisions of section 36 itself with the limited application of the Companies Act regime to voluntary liquidations. That notwithstanding, it seems to me that the legislative intention is clear. The expectation is that the winding up of an exempted limited partnership will be conducted in accordance with the agreed arrangements (section 36(1)), but an alternative route to winding up (albeit compulsory winding up) is provided by the application of Part V of the Companies Act, which does not involve application of the provisions of the partnership agreement – indeed, is contradictory to them. In its application to voluntary liquidations of exempted limited partnerships, the

Companies Act has limited application; but tools which would otherwise be available to the court in the case of voluntary liquidations, such as removal of the liquidator and the exercise of overall supervision, are replaced by general powers contained in section 36(3)g) and section 36(13). This pattern is also evident in the application of section 129 of the Companies Act: although the express power of removal of a voluntary liquidator and the ability to wind up under the supervision of the court do not apply as such to a voluntary liquidation of an exempted limited partnership, they are replaced by the court's ability under section 129 to exercise all the powers available to it in the case of a winding up under supervision – which by section 133 of the Companies Act has the effect for all purposes of a compulsory winding up. The justification for reinstatement or replication in the ELPA of powers otherwise contained in the Companies Act may well be that the legislature recognised that a compulsory winding up (or a supervision order to equivalent effect) might not be necessary or desirable in all cases, but it was desirable to retain a right of access to the court to enable control of the liquidation where necessary. Whilst section 129 of the Companies Act and section 36(3)(g) do to some extent cover the same ground, that does not seem to me to be a reason for diminishing the clear effect of the latter subsection. To hold otherwise would be to deprive 36(3)(g) of any practical meaning; and, whilst the overlap might not strictly bring the provisions into conflict, section 36(3) makes clear ("*in the event of any inconsistencies, this Act shall prevail*") that the provisions of the ELPA are intended to predominate.

43. Finally on this aspect, it is notable that the consequence of the GP's arguments is no more than that the petitioner has chosen the wrong method of bringing its complaints before the court. It is accepted by the GP that the petitioner could have petitioned to wind up the ELP on the just and equitable ground; and the petitioner could also have applied to the court under section 129 which, on the view I take of the availability of that section, would have allowed the judge to do exactly what he did do by his second order. Viewed in that light, the appeal represents no more than an arid dispute about procedure.

44. Three further points remain to be mentioned. First, the judge referred to certain cases as consistent with his view of the scope of section 36(13), but also recognised that "*the point of statutory construction ... has not previously received the benefit of any argument in a comparable factual context*". Each of the cases - *Re XIO Diamond LP* [2020 (2) CILR 270], *Malaysia Venture Capital Management Berhad v ECM Straits Fund 1, LP* (unreported, FSD 230 of 2022 (RPJ)) and this court's decision in *TNT NV v Logispring GP LP* [2009 CILR 456] – assumes the existence of a wide jurisdiction to appoint a substitute liquidator under section

36(13), but says nothing capable of application to the present case. I see no advantage in addressing them in detail. Secondly, both parties dealt with the legislative history of section 36; but like the judge I do not find it of assistance in construing what I regard as the clear terms of the current provisions, and again see no advantage in addressing it. Finally, we were urged by the GP to give guidance on the availability of a winding up of an exempted limited partnership on the just and equitable ground, something which was said to be controversial on the first instance authorities. I do not think we should do so: the issue does not arise in this case, it being the GP's own position that the petitioner could and should have petitioned for winding up on that ground, and the matter was not fully argued before us.

45. For these reasons, I consider that the judge was right to dismiss the challenge to his jurisdiction, and correct in his reasoning. The appeal accordingly failed.

FIELD JA:

46. I agree.

BEATSON JA:

47. I also agree.