



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

**CAUSE NO: FSD 366 OF 2021 (IKJ)**

**IN THE MATTER OF THE PARTNERSHIP ACT (2013 REVISION) AND THE EXEMPTED  
LIMITED PARTNERSHIP ACT (2021 REVISION) AND THE COMPANIES ACT (2021 REVISION)**

**AND IN THE MATTER OF FORMATION GROUP (CAYMAN) FUND I, L.P.**

**BETWEEN**

- (1) COUNTRY GARDEN (HONG KONG) DEVELOPMENT  
COMPANY LIMITED**
- (2) FAIRCHARM GLOBAL LIMITED**
- (3) DRAKESVILLE INVESTMENT LIMITED**
- (4) FORTUNE BRIDGE (CHINA) LIMITED**
- (5) YOUSU HONG KONG LIMITED**
- (6) PERFECT ONE VENTURES LIMITED**

**Petitioners**

**AND**

**FORMATION GROUP (CAYMAN) FUND I, L.P.**

**Respondent**

**IN CHAMBERS**

**Appearances: Mr Peter Sherwood and Mr Nigel Smith, Carey Olsen, for the  
Petitioners**

**Mr Hamid Khanbhai, Campbells, for Formation Group GP I, LLC as  
general partner of the Respondent (the “GP”)**

**Before: The Hon. Justice Kawaley**

**Heard: 18 March 2022**

**Draft Judgment  
Circulated: 11 April 2022**

**Judgment Delivered: 21 April 2022**



## HEADNOTE

*Petition by limited partners to dissolve or wind-up an exempted limited partnership-strike-out application by general partner-whether winding-up proceedings can validly be brought against an exempted limited partnership in its own name as opposed to against the general partner-statutory interpretation-Exempted Limited Partnership Act (2021 Revision), sections 3, 4, 33(1), 36(3)- Companies Act (2021 Revision), section 92(e)*

## JUDGMENT

### Introduction

1. By their Petition dated December 15, 2021, the Petitioners (who contributed approximately 70% of the Respondent’s capital contributions) claiming to be contingent creditors of the Respondent sought the following principal relief, namely an Order that:

“1. *The Partnership be dissolved or wound up in accordance with Section 3 of the ELP Act and Section 35(e) of the Partnership Act or, in the alternative, Section 36(3) of the ELP Act and Section 92(e) of the Companies Act...*”

2. The GP applied by Summons dated January 14, 2022 for the following principal relief, namely an Order that:

“1. *The Winding Up Petition dated 15 December 2021 be struck out, on the basis that it has been presented against the Respondent rather than against the GP...*”

3. Although Mr Khanbhai for the GP sought to delicately avoid directly engaging with this underlying conflict, the present strike-out application focussed on a standing point which reflects conflicting approaches by different judges of the Grand Court. Mostly recently, in *Re Padma Fund LP* (FSD 201 of 2021 (RPJ), 8 October 2021), Parker J held that there was no jurisdiction to wind-up an

exempted limited partnership (“ELP”) under the Companies Act. I took the contrary view, consistent with earlier decisions of this Court, in *Re XIO Diamond LP* (FSD 256 of 2019 (IKJ), 30 April 2020, which Parker J in *Padma* concluded was wrongly decided. Although Mr Sherwood for the Petitioners was keen for obvious forensic reasons to reduce the strike-out argument to a choice between following my own decision and Justice Parker’s conflicting decision, the present application cannot be approached in such a binary fashion. The arguments canvassed in *XiO* were not precisely the same as those advanced in *Padma*, and the submissions in the present case are not precisely the same as those advanced in either of the two previous conflicting decisions.

4. Interpreting bespoke legislative instruments such as the Exempted Limited Partnership Act (the “ELP Act”) without the benefit of nourishment from persuasive authorities from larger common law jurisdictions is often a challenging endeavour. Through an incremental process in which different judges confront different legal points and similar legal points framed in somewhat different ways, a consensus gradually emerges as to the meaning of the most important statutory provisions. In this context, in my judgment, each judge is entitled to be more willing than might be appropriate in more settled areas of law to depart from previous decisions, even his or her own.

#### **The GP’s case for striking-out**

5. By way of overview, Mr Khanbhai submitted:

- “5. *The correct jurisdictional gateway, i.e. between the Companies Jurisdiction and the Partnerships Jurisdiction, is not a question that arises on the Strike Out Application.*
6. *The Strike Out Application turns only on one discrete point. Who is the proper respondent to a petition seeking the relief sought by the Petitioners?*
7. *The Petition has been filed against Formation Group (Cayman) Fund I, L.P. (the ‘Fund’). The respondent to the Petition is not a legal entity. The Petitioners should have named the GP in its capacity as general partner of the Fund, as the respondent to the Petition. As a result, the Petition is defective and falls to be struck out. That is the end of the matter.”*

6. The GP's counsel's central thesis was set out in his Skeleton Argument as follows:

- “13. *An exempted limited partnership is a creature of statute, comprising at least one general partner and one limited partner. It has no legal personality. It cannot own property in its own right. Its business is carried on by its general partner: section 14 of the ELP Act. Further:*
- (a) *It is the general partner that holds assets of the partnership on trust for the partnership, in accordance with the partnership deed: section 16(1) of the ELP Act.*
  - (b) *On the admission or substitution of a general partner, the assets of the exempted limited partnership vest in the new general partner by operation of law: section 17 of the ELP Act.*
  - (c) *It is also the general partner that incurs debts or obligations on behalf of the partnership: section 16(2) of the ELP Act.*
14. *Section 33 of the ELP Act provides expressly in relation to ‘Proceedings’. Section 33(1) provides that: “Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings” (emphasis added)*
15. *Subsection (3) relates to derivative actions brought by limited partners and so is not relevant for present purposes.*
16. *Winding up proceedings (Companies Jurisdiction) or proceedings for a decree of dissolution (Partnerships Jurisdiction) are ‘legal proceedings... against an exempted limited partnership’ within the meaning of section 33(1).*
17. *It follows that the Petition should have named the GP as the Respondent.*
18. *Proceedings which appear to be duly issued but fail to comply with a statutory requirement are a nullity which is incurable: the third of three classes of nullity referred to by Upjohn LJ in *Re Pritchard* [1963] Ch 502 at page 5242 *Finnegan v Cementation* [1953] 1 QB 688.*
19. *The consequence of failing to comply with section 33(1) of the ELP Act, when filing the Petition, is that the proceedings are a nullity which is incurable (as opposed to an irregularity which might be capable of being cured).*

20. *In Padma Fund FSD 201 of 2021 (unrep. 8 October 2021), Parker J was considering a winding up petition presented against an exempted limited partnership. He had to consider two separate issues:*
- (a) *First, in the case of a petition presented against an exempted limited partnership, who was the proper respondent to the petition? In particular, was it the general partner or was it the fund?*
- (b) *Second, on such a petition what is the appropriate jurisdictional gateway, the Companies Jurisdiction or the Partnership Jurisdiction?*
21. *It is only the first issue (proper respondent) that arises on this Strike Out Application. Padma is the only Cayman Islands decision on that first issue. XiO Diamond LP (unrep.30 April 2020, FSD 256 of 2019 (IKJ)), for example, is an authority that deals with the second point but not the first.*
22. *On the proper respondent issue, Parker J held at paragraphs 35 and 36 of Padma that section 33(1) of the ELP Act is determinative of who should be the respondent when the originating process is intended to invoke the court's winding up jurisdiction in relation to an exempted limited partnership:*
- “35. *There is ... no provision within the ELP Act or the Partnership Act which provides that legal proceedings may be instituted against an exempted limited partnership in the name of the partnership. This is because it is through the general partner that its debts and obligations are enforced. Section 33(1) of the ELP says in terms proceedings may be instituted against the general partner(s) only.*
36. *Mr Sherwood relies on Order 81, rule 12 of the Grand Court Rules, 1995 (Revised Edition) which provides that any action by or against an exempted limited partnership may be commenced in the name of the firm. However in my view that does not assist Mr Sherwood because the applicable statutes must take precedence over procedural rules, and the particular rule does not in my view deal with the court's winding up jurisdiction.”*

7. In short, the GP invites this Court to follow its earlier decision in *Padma* and to hold that the ELP Act only permits legal proceedings to be brought against a general partner of an ELP and not against the ELP itself. While it seems clearly right that the GP has only directly based its strike-out application on the section 33(1) of the ELP Act point, it seems difficult as a matter of preliminary analysis to see how the construction of section 33(1) which was applied by Justice

Parker in *Padma* can be properly assessed by entirely divorcing the construction analysis from the wider legal context in which it is embedded.

### **The Petitioners' primary response**

8. The Petitioners' Skeleton Argument firstly made it clear that they were primarily relying upon the winding-up jurisdiction under the Companies Act:

“3. *The petition is for a winding up order under the Companies Act 2021 ('Companies Act'), as applied to ELPs by section 36(3) of the Exempted Limited Partnership Act (2021 Revision) ('ELPA') or, in the alternative, an order for dissolution under the Partnership Act (2013 Revision) ('Partnership Act'). The petition has been presented in this way due to recent conflicting decisions of this Court.*”

9. Secondly, in defining the issues, Mr Sherwood effectively submitted that the true legal question was the broader question of whether an ELP could be wound-up at all, with the question of whether proceedings could be brought against an ELP being merely one element of that broader jurisdictional question:

“7. *The petitioners say - consistent with a long line of Grand Court decisions including Re XIO Diamond LP (FSD 256 of 2019 (IKJ), 30 April 2020)7 - that limited partners may petition for the winding up of an ELP under Part V of the Companies Act, and that the Fund is the correct respondent to the petition. The only outlier is the recent decision in Re Padma Fund LP (FSD 201 of 2021 (RPJ), 8 October 2021), in which Parker J determined that Re XIO (and implicitly earlier decisions) was wrongly decided.*

8. *Until Re Padma, there was never any jurisprudential doubt that, procedurally, a just and equitable petition was correctly issued by a limited partner against an ELP (and not the general partner) pursuant to section 36(3) of the ELPA, which imports the winding up jurisdiction and procedure in Part V of the Companies Act...*

11. *The case concerned a creditor's petition on insolvency grounds against an ELP. Despite this, Parker J made wider observations on the source of the Grand Court's jurisdiction to wind up an ELP on just and equitable grounds. This included, at paragraph 61, the observation that the Grand*

*Court's jurisdiction to wind up an ELP by a limited partner on just and equitable grounds arises under section 3 of the ELPA and section 35(e) of the Partnership Act 'only'. His Lordship went on to consider this Court's decision in Re XIO at 76-88, respectfully concluding that it was decided in error at paragraph 87.*

12. *The ratio in Re Padma is to be found at paragraphs 72, 92 and 93, and it is limited to a finding that a creditor of an ELP must commence its petition against the general partner and not the ELP. This decision was based on two primary findings: (a) First, because the general partner is responsible for the debts of the ELP; (b) Secondly, because section 33(1) of the ELPA absolutely prohibits proceedings being issued against the ELP itself.*
13. *It is not necessary for this Court to determine the correctness of the ratio in Re Padma as it relates to creditor petitions. But this Court may feel compelled to do so in light of Parker J's heavy if not singular reliance on (respectfully) an incorrect interpretation of section 33(1) of the ELP Act which led to His Lordship's obiter comments regarding just and equitable petitions. His Lordship's interpretation of section 33(1) is also relied on by the Fund in its strike out application."*

10. As to the merits of the legal point, it was further argued most pertinently as follows:

- “16. *First, it is accepted that section 33(1) states that: "legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only..." [our emphasis in bold]. However, the literal wording of a statute must be read in its context and the surrounding words and scheme of the legislation must be used as an aid to a purposive reading of the relevant provision.*
17. *Section 33(1) immediately goes on to provide further guidance as to the true scope of the subsection by saying "... and a limited partner shall not be a party to or named in the proceedings". Those words cannot be read in isolation to those that preceded them. The mischief at which section 33(1) is aimed is merely to reverse the general rule which applies to ordinary partnerships where any partner may be named as a defendant in proceedings relating to the liabilities of the partnership. Those are the 'legal proceedings' at which section 33(1) is aimed and certainly not collective proceedings for winding up.*
18. *Subsections (2) and (3) provide exceptions to the general rule stated in subsection (1) and therefore serve as additional context. Subsection (2) confirms that limited partners may become defendants in cases where they have taken part in the management of the ELP (section 20(1)) or because they have received distributions subject to clawback (section 34(1)). Subsection (3) confirms when limited partners may issue*

*proceedings derivatively. These subsections place subsection (1) in context.*

19. *Accordingly, section 33 as a whole is aimed at setting the parameters for proceedings to be issued by or against limited partners in respect of the ELP. It does not in terms prevent proceedings being issued against an ELP.*
  20. *Second, the interpretation of section 33(1) must be read consistently with the express provisions of section 36(3), which are specific to winding up (and not 'legal proceedings' generally, as that term is used in section 33(1)). The provisions of section 36(3) are not remotely ambiguous. Part V of the Companies Act is imported into the ELPA for winding up purposes. Accordingly, contrary to Parker J's finding at paragraph 43 of *Re Padma*, there is no need in section 91 of the Companies Act specifically to confer jurisdiction on the Court to wind up ELPs. This is because section 36(3)(a) specifically treats references to 'company' to 'exempted limited partnerships' for the purposes of section 91 and elsewhere in Part VI2.*
  21. *Third, to the extent it is necessary, assistance in discerning the legislature's intentions can be found in the Explanatory Memorandum for the Bill which brought in (the forerunner of) section 36(3) of the ELPA and the Official Hansard Report for the second reading of the same, which are set out in the Annex to this skeleton argument.*
  22. *These clearly show that the Legislative Assembly's intention was to apply the winding up provisions of Part V of the Companies Act to ELPs. The legislation was enacted because the existing provisions 'fell far short of a meaningful dissolution framework for exempted limited partnerships'. This is in direct contrast to the conclusion reached at paragraph 60 of *Re Padma* (where the Court did not have the benefit of these materials) that there was no 'mischief' for the legislation to redress because that dissolution framework already existed."*
11. These submissions provoked two initial reactions. Firstly, construing section 33(1) of the ELP Act was a difficult point of statutory interpretation. Secondly, it seemed impossible to engage in a meaningful process of statutory construction of that provision without also making sense of other relevant provisions in the same statute, namely the provisions relating to winding-up under the Companies Act.
12. The Petitioners advanced alternative arguments as to how, if their primary arguments were rejected, the standing problem could be cured by amendment. I indicated in the course of the



hearing, based on the GP's compelling contrary submissions, that this alternative case seemed hopeless. I will address this subsidiary issue briefly below.

## Legal findings

### The statutory provisions

13. The first key statutory provision is section 33 of the ELP Act:

- “(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.*
- (2) If the court considers it just and equitable any person or a general partner shall have the right to join in or otherwise institute proceedings against any one or more of the limited partners who may be liable under section 20(1) or to enforce the return of the contribution, if any, required by section 34(1).*
- (3) A limited partner may bring an action on behalf of an exempted limited partnership if any one or more of the general partners with authority to do so have, without cause, failed or refused to institute proceedings.*
- (4) If any action taken pursuant to subsection (3) is successful, in whole or in part, as a result of a judgment, compromise or settlement of any action, the court may award any limited partner bringing any action reasonable expenses, including attorney's fees, from any recovery in any action or from an exempted limited partnership.”*

14. The most obvious literal meaning of section 33(1) is that it creates a general rule immunizing limited partners from being sued in respect of an ELP's affairs and conferring the primary right to sue and be sued in respect of an ELP's affairs on the general partner(s). An exception to this general rule is then set out in section 33(3), which Mr Khanbhai aptly described as “derivative claims”. Section 33 does not in terms prohibit proceedings against an ELP altogether. Whether such a prohibition should be inferred accordingly requires further contextual statutory analysis.

15. Mr Khanbhai submitted that “*may*” in section 33(1) is mandatory. He placed reliance on the following provisions of section 4 of the ELP Act:

“(2) *An exempted limited partnership shall consist of one or more persons called general partners who shall, in the event that the assets of the exempted limited partnership are inadequate, be liable for all debts and obligations of the exempted limited partnership, and one or more persons called limited partners who shall not be liable for the debts or obligations of the exempted limited partnership save as provided in the partnership agreement and to the extent specified in sections 20(1) and 34(1), but a general partner, without derogation from that general partner’s position as such, may, in addition, take an interest as a limited partner in the exempted limited partnership.*”

16. This does provide some potential support for the proposition that a general partner is, as section 33(1) arguably implies, the only proper party to sue in respect of partnership debts. However, carefully read, it does not meaningfully advance the thesis at all. Rather, section 4(2) is only explicitly defining two central characteristics of an ELP:

- (a) as a general rule, limited partners have no liabilities in respect of ELP debts; and
- (b) as a general rule, general partners “*shall, in the event that the assets of the exempted limited partnership are inadequate, be liable for all debts and obligations of the exempted limited partnership*”.

17. The statutory language clearly envisages that an ELP will have its own “*assets...debts and obligations*” and that a general partner will only be liable in the event that the ELP’s assets are “*inadequate*” to meet its liabilities. In brief, this implies that an ELP has some degree of legal personality as one would expect drawing upon the more longstanding traditional partnership construct. Section 4(2) is ultimately neutral in terms of shedding light on how section 33(1) should be construed, but provides some general support for the proposition that as far as winding-up is concerned, an ELP does have its own pot of assets and liabilities which are capable of being wound-up separate and apart from the general partner(s). Mr Sherwood’s oral submissions to this effect were quite powerful in conceptual and practical terms.

18. The most important other provisions in the ELP Act for present purposes are the following provisions of section 36:

- “(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.”*

19. These provisions read in a straightforward and uncomplicated manner appear at first blush to be quite clear and unambiguous. They provide most significantly as follows:

- (a) *“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”*, subject to specified modifications;
- (b) the word “company” shall be read as “exempted limited partnership”;
- (c) the word “contributories” shall be read as “limited partners”;
- (d) the word “director” includes “general partner”; and
- (e) subject to specified exceptions, Part V of the Companies Act does not apply to voluntary dissolutions under section 36(1) of the ELP Act.

20. Section 36(3) appears to provide in explicit terms that an ELP may be wound-up under Part V of the Companies Act and the Companies Winding Up Rules and that, minor modifications apart, references in Part V to “company” apply to an ELP and references to a “contributory” apply to a limited partner. By necessary implication, a limited partner may petition to wind-up an ELP on the same grounds as would be available to a contributory in relation to a company.

**Preliminary view on the proper construction of sections 33(1) and 36(3) of the ELP Act**

21. Taking a preliminary view without regard to any judicial or other authority, it would seemingly require equally clear statutory language in some other part of the ELP Act to justify the conclusion that although section 36(3) provides that an ELP can be wound-up by the Court in the same manner as a company, there is an exception to this general rule to the effect that the general partner and not

the ELP itself must be the respondent to the winding-up petition. Section 33(1) does expressly provide that (a) proceedings against an ELP can only be brought against a general and not against a limited partner, and (b) proceedings on behalf of an ELP can only generally be brought by a general partner. But section 33(1) does not with any real clarity suggest or imply that a limited partner may not present a winding-up petition against an ELP, the seemingly clear contrary terms of section 36(3) notwithstanding.

22. One point seems clear beyond serious argument having regard to the most elementary rules of statutory construction. It makes no sense at all to seek to determine a question of standing to present a petition under Part V of the Companies Act, as applied to an ELP by section 36(3) of the ELP Act, by ignoring section 36(3) and focussing solely on section 33(1). Mr Khanbhai's beguiling invitation to the Court to adopt such a blinkered approach seemed indicative of the fact that section 36(3) is the 'Achilles heel' of the GP's standing analysis.
23. Mr Sherwood aptly relied upon the following principles of statutory interpretation. In *Shanda Games Ltd v Maso Capital Investments Ltd* [2020 (2) CILR 293] (UKPC), Lady Arden (delivering the advice of the Judicial Committee) opined as follows:

“27     *The Board considers that, when and to the extent that any issue ...is to be ascertained by statutory interpretation [i]n that situation, the court has to ascertain the intention of the legislature from the words it has used in their context, and also in the light of any material which demonstrates the mischief that it was concerned to redress by the statutory provision.*”  
[Emphasis added]

24. This preliminary view must accordingly be tested by reference to both the relevant authorities and any material relating to the legislative history of the statutory provisions which elucidates their purpose or, in more classical terms, the mischief they were designed to remediate.



**The pre-Padma authorities’ implicit support for the view that an ELP could be wound-up under Part V of the Companies Act**

25. Authorities in which it was assumed that a winding-up petition could be presented against an ELP, with no attempt being made to dispute the assumption, can for obvious reasons be mentioned briefly:

- (a) *Re Cybernaut Growth Fund LP*, FSD 73 of 2013 (AJJ), Judgment dated September 12, 2013 (unreported): the petition was presented against the ELP by limited partners complaining of mismanagement by the general partner. Following a contested hearing at which Richard Hacker QC appeared for the general partner, a winding-up order was made against the ELP under the then Companies Law. No point was taken that an ELP could not be wound-up or that a petition could not be presented solely against an ELP (although it appears that the GP and another entity involved in the management of the partnership were joined as respondents to the petition at the directions stage);
- (b) *Re Rhone Holdings LP*, FSD 119/2016 (IMJ), Judgment dated September 16, 2016 (unreported): the petition was presented against the ELP and sought its winding-up. The general partners, for whom Mr Tom Lowe QC appeared, successfully applied to strike-out the petition but did not rely on a lack of standing ground or the argument that an ELP could not be wound-up. The Court of Appeal refused leave to appeal against Ingrid Mangatal J’s decision and expressly confirmed that the ELP Act provided for the winding-up of an ELP under the Companies Act: *Re Rhone Holdings LP* [2016 CILR (1) 273];
- (c) *Re XiO Diamond LP*, FSD 256 of 2019 (IKJ), Judgment dated April 30, 2020 (unreported): a winding-up petition was presented against an ELP and was opposed by counsel appearing for the ELP. The respondent ELP contended that there was no jurisdiction to wind-up under section 36(3)(g) and that jurisdiction did exist to wind-up under section 92 (e) of the Companies Act which relief it would not oppose. The petition was amended to seek this relief and I ordered that: “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)”;*

- (d) *Re Duet Real Estate Partners I LP*, FSD 22 of 2020 (IKJ), Judgment dated (unreported) June 9, 2020: a winding-up petition was presented against an ELP and served at its registered office. It was expressly directed that the ELP “*is properly able to participate in the proceedings*”. Although the petition was unopposed, I ordered that the ELP “*be wound up in accordance with section 92(c) of the Companies Law and section 36(3) of the ELP Law*”.

26. Mr Sherwood referred to other cases where winding-up orders were made against ELPs without considered judgments being delivered. These cases may be said to provide at best strong, indirect support for the Petitioners’ construction of section 33(1) as read with section 36(3) of the ELP Act, consistent with the thesis propounded in ‘*The Wisdom of Crowds: Why the Many are Smarter than the Few and How Collective Wisdom shapes Business, Economies, Societies and Nations*’<sup>1</sup>. The cases demonstrate a fairly broad consensus that section 36(3) means what it says when it purports to confer jurisdiction on this court to wind up an ELP under the Companies Act. This is of course by no means conclusive; there was once a broad and now discredited general consensus that the earth was flat. But when distinguished commercial silks are briefed to oppose a winding-up petition (as happened in *Re Cybernaut Growth Fund LP* and *Re Rhone Holdings LP*) and fail to raise the standing point raised by the GP in the present case, this strongly suggests that the point now being raised (and first raised in *Padma*) must be a point which is either counterintuitive or less than obvious at least. It is noteworthy that although section 33(1) was not expressly considered in *Re XiO Diamond LP*, counsel for the ELP in that case (a) formally appeared for the ELP and (b) positively asserted that jurisdiction to wind-up existed under the Companies Law (as it was then).
27. It is important to reiterate that what was assumed to reflect the correct legal position in these past cases without direct consideration of the point raised for consideration in relation to the present

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<sup>1</sup> James Surowiecki (Doubleday/Anchor: 2004).

Petition does little more than to cause me to approach the presenting standing point with a healthy degree of scepticism. The construction of section 33(1) of the ELP Act as it applies to winding-up petitions presented pursuant to section 36(3) must be determined on its merits as this is an issue that the previous decisions never directly addressed. It is not unknown for legal points which have not been taken at first instance for several years to be belatedly taken and upheld at the highest appellate level<sup>2</sup>.

### **Re Padma**

28. In *Re Padma Fund LP*, FSD 201 of 2021 (RPJ), the petitioners sought the winding-up of an ELP under section 92(d) of the Companies Act (2021 Revision) as creditors. The GP on behalf of the ELP contended the Court had no jurisdiction to make the order sought. Justice Raj Parker agreed. Mr Sherwood, who also appeared for the petitioners in that case, was unable to persuade the Judge that *Re XiO Diamond Fund LP* was correctly decided. In the present case, he sought to distinguish *Re Padma* as limited to the context of creditors' petitions but sensibly acknowledged that the findings recorded potentially applied to the winding-up remedy generally. The pivotal finding made in *Padma* was the following:

“35. *There is however no provision within the ELP Act or the Partnership Act which provides that legal proceedings may be instituted against an exempted limited partnership in the name of the partnership. This is because it is through the general partner that its debts and obligations are enforced. Section 33(1) of the ELP Act says in terms proceedings may be instituted against the general partner(s) only.*” [Emphasis added]

29. It is that pivotal preliminary finding which then founds the following key conclusory finding that an ELP cannot be wound-up at all under the Companies Act:

“47. *Section 36(3) of the ELP Act states: ‘Except to the extent that the provisions are not consistent with this Act, and in the event of any*

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<sup>2</sup> *Re Saad Investments Company Ltd* [2014] UKPC 34: the Judicial Committee held that the jurisdiction to wind-up overseas companies (which had been assumed to exist in Bermuda since 2000 based on a judgment in case where there was an unopposed winding petition) did not properly exist.



*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...’ (my emphasis) 48. It seems to me that this provision does not give a freestanding right for a creditor to present a winding-up petition against an exempted limited partnership.”*

30. This conclusion was buttressed by proper regard being had to the legislative purpose of section 36(3):

- “61. *It seems to me that from a proper analysis of the above statutory provisions that the Court’s jurisdiction to wind up an exempted limited partnership on the application of a partner on the grounds that it is just and equitable to do so arises by virtue of section 3 of the ELP Act and section 35(e) of the Partnership Act only.*
62. *This is relevant for when one examines the decision in XIO Diamond LP below as, unlike the present case, it concerned an analysis of the situation which applied on the application to wind up by a limited partner.*
63. *I have considered whether there was “mischief” which the legislature sought to address by introducing section 36(3) of the ELP Act to enable a creditor to present a winding up petition against an exempted limited partnership, as in the present case.*
64. *I have concluded that no mischief existed as the creditor was (and remains) entitled to enforce any debt against the general partner which, unlike the exempted limited partnership, has a legal personality.*
65. *In any event, the provisions of Part V of the Companies Act referenced in section 36(3) of the ELP Act are subject to section 33(1) of the ELP Act which expressly states that legal proceedings against an exempted limited partnership may be instituted against a general partner only.*
66. *It seems to me therefore that the legislative purpose of introducing section 36(3) was to apply the applicable provisions of Part V of the Companies Act and the Companies Winding Up Rules, 2018 following the commencement of the winding up in order to facilitate the orderly winding up of the partnership’s affairs.*
67. *This analysis accords with the commercial position and the legal liabilities which arise on the insolvency of a partnership where the business of the partnership is conducted by the general partner, the*

*assets of the partnership are held by the general partner on a statutory trust and the general partner is personally liable for the debts of the partnership.*

68. *Pursuant to section 2 of the ELP Act, the partnership is deemed to be insolvent when the general partner is unable to pay the debts and obligations of the exempted limited partnership in the ordinary course of business as they fall due out of the assets of the exempted limited partnership, without recourse to the separate assets of the general partner not contributed or committed to the exempted limited partnership.*
69. *In that scenario the general partner remains personally liable for the partnership's debts and therefore the remedy of any creditor when the partnership is insolvent is to commence proceedings against the general partner. This is consistent with section 33(1) of the ELP Act.*
70. *The winding up procedure as it relates to exempted limited partnerships also fits with this analysis. When an exempted limited partnership is being wound up, either voluntarily under section 36(1) of the ELP Act or by order of the court pursuant to section 35 of the Partnership Act, the general partner is deemed to be the liquidating trustee of the partnership unless the court orders otherwise.”*
31. As a matter of first impression, when *Re Padma* was initially decided, I felt that Parker J's well-reasoned Judgment articulated a sound and novel basis for concluding that my own contrary previous decisions, particularly *Re XiO Diamond Fund LP*, had been wrongly decided. This preliminary view entailed accepting:
- (a) the hypothesis set out at paragraph 35 of *Re Padma* that there was “*no provision within the ELP Act or the Partnership Act which provides that legal proceedings may be instituted against an exempted limited partnership in the name of the partnership*”; and
- (b) the hypothesis set out at paragraphs 61-70 of *Re Padma* that the legislative purpose of section 36(3) was not to provide a wide gateway to winding-up ELPs in the same manner as companies.
32. The merits of the GP's present strike-out application turn on an assessment of the validity of these two pivotal propositions.

### The legislative purpose of section 36(3) of the ELP Act

33. Parker J was clearly right in his statutory construction exercise to have regard to the “*mischief*” the relevant provisions sought to address, although I prefer the modern terminology of seeking to ascertain the ‘legislative purpose’ of new or uncertain provisions. As Professor Burrows (as he then was)<sup>3</sup> has opined extra-judicially:

*“...it is tolerably clear today that our judges have moved from an old literal to a modern and contextual approach...the modern approach has subsumed many of the old so-called ‘canons of interpretation...they have lost primacy with the demise of literalism and have tended to be swallowed up by the modern contextual and purposive approach...when we talk of ‘purpose’, we are looking at the policy behind the statute or statutory provision. Identifying the policy is not dependent on identifying any person’s intentions...Indeed to expose the practical irrelevance of the legislator’s intention, it may be helpful to focus on the purpose rather than the legislator, and an advantage of such a switch of focus is that it helps to clarify that what ultimately matters is the judicial analysis, at the time a dispute arises, of what the statute means...”*

34. Mr Sherwood, still bearing the scars of his unsuccessful battle in *Re Padma*, provided me with more guidance as to the legislative purpose underpinning section 36(3) of the ELP Act in light of its now evident pertinence. Annexed to his Skeleton Argument were the following important submissions about the legislative history of section 36(3):

***“ANNEX – LEGISLATIVE HISTORY OF THE RELEVANT SECTIONS OF THE ELPA***

***Section 36(3) of the ELPA.***

1. *Section 36(3) of the ELPA was originally enacted (as section 15(4)) by the Exempted Limited Partnership (Amendment) Law, 2009 (the ‘2009 Amendment’).*

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<sup>3</sup> Andrew Burrows, ‘*Thinking About Statutes: Interpretation, Interaction and Improvement*’ (Cambridge University Press: Cambridge, 2018), The Hamlyn Lectures, pages 7-8, 19-20.

2. *Prior to the 2009 Amendment, the relevant dissolution provision (being section 15(2) of the Exempted Limited Partnership Law (2007) Revision) provided only:*

*‘On application by a partner or a creditor, the court may decree dissolution of an exempted limited partnership, and may make such orders and give such directions for the winding up of its affairs as may be just and equitable.’*

3. *That language unambiguously intended to provide a procedure for the winding up of exempted limited partnerships, rather than a supplementary provision to the existing procedure for partnerships, being section 15(1) of the Partnership Act (2002 Revision), which was in effect at the time the Exempted Limited Partnership Law (2007 Revision) was legislated:*

*‘On application by a partner the court may decree a dissolution of the partnership in any of the following cases... whenever in any case circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved.’*

4. *It is in that context that the new section 15(4) (now 36(3)) was enacted. The Exempted Limited Partnership (Amendment) Bill, 2009 (the ‘2009 Bill’) states precisely what was the intention of the Legislative Assembly (as it was then) in legislating new dissolution provisions in its Memorandum of Objects and Reasons:*

*‘Clause 10 of the Bill repeals and replaces the provisions governing the winding up and dissolution of an exempted limited partnership. They are brought, so far as is possible, in line with the provisions of the Companies Law (2007 Revision) as amended by the Companies (Amendment) Law 2007.’*

5. *The Official Hansard Report for the second reading of the 2009 Bill is also instructive (emphasis added):*

*‘Clause 10 upgrades section 15 of the principal Law in relation to winding-up and dissolution of exempted limited partnerships. Industry has advised, and government has agreed, that in the current climate the existing section 15 fell far short of a meaningful dissolution framework for exempted limited partnerships. The revised and improved section 15 was developed in close consultation with the Cayman Islands Society of Professional Accountants (CISPA). The provisions in clause 10 take the benefit as far as possible of the provisions for winding up and dissolution in the new (2007) Part V of the Companies Law, and cross-refer to those provisions to the extent sensible. The ultimate, longer-term objective is to*

*have a self-contained framework for winding up and dissolution within the Exempted Limited Partnership Law itself (that is, without cross-referral), but in the interim, clause 10 is a significant and necessary improvement that addresses a current gap in the Law in the immediate term.*”

35. In my judgment, the quoted extracts from the legislative history of section 36(3), which were not considered by this Court in *Re Padma*, provide compelling support for the preliminary view that section 36(3) means what it says when it provides that an ELP may be wound-up in the same manner as a company under Part V of the Companies Act. It was seeking to move further away from the traditional Partnership Act constraints on dissolution and to embrace, according to the Memorandum and Objects of the Bill “*so far as is possible*”, the more flexible winding-up mechanisms applicable to companies. The following explanation given to the Legislative Assembly on the Second Reading of the Bill, combined with the quoted averments in the Memorandum and Objects, puts the legislative purpose of the then new provisions clear beyond serious argument:

*“...The provisions in clause 10 take the benefit as far as possible of the provisions for winding up and dissolution in the new (2007) Part V of the Companies Law, and cross-refer to those provisions to the extent sensible...”*

### **The proper construction of section 33(1)**

36. Having regard to the legislative history of section 36(3), it is clear that this statutory provision may indeed simply be interpreted according to its literal terms. The conceptual underpinnings for the pivotal finding in *Re Padma* as to the effect of section 33(1) of the ELP Act on the ability to wind-up limited partnerships melt away. The finding that there was “*no provision within the ELP Act or the Partnership Act which provides that legal proceedings may be instituted against an exempted limited partnership in the name of the partnership*” is clearly unsupportable because section 36(3) does expressly provide just that. Section 36(3) most importantly provides:

*“(3) 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...(a) references in Part V to a company shall include references to an exempted limited partnership...”*

37. Accordingly, and ultimately very simply, section 36(3) expressly provides that a winding-up petition may be presented against an ELP in the same manner as in relation to a company and this special provision overrides the general terms of section 33(1). The fact that an ELP generally has no separate legal personality is entirely beside the point when Parliament has expressly extended the company winding-up regime to such entities. I therefore confirm the preliminary interpretative view I set out above.
38. As already noted above, making sense of such bespoke investment vehicles as ELPs and the statutory provisions which define them is difficult because of the absence of persuasive authority. It is doubly difficult in the absence of judicial experience of how such windings-up actually play out in practice. However, I ultimately accept Mr Sherwood's oral submissions that it is entirely logical for the business of an ELP to be wound up separate and apart from its general partner which may have other entirely separate business concerns.
39. It is true that a general partner is ultimately responsible for an ELP's debts, but this responsibility is only triggered when the ELP's assets are insufficient to meet those debts. The need to call upon a general partner may not be apparent until the winding-up of an ELP which is cash-flow insolvent is incomplete. When an ELP is being wound-up on just and equitable grounds and is solvent, the rationale for naming the general partner as respondent to a petition is indecipherable altogether. The idea of an ELP being wound-up is consistent with the statutory scheme, because section 4(2) makes it clear that such legal entities have their own assets and liabilities distinct from the general partners who manage them and the limited partners which invest in them.
40. Nor can it be said to be anathema in light of the general partnership law position for an ELP to be a party to legal proceedings for any purposes at all. A traditional partnership can sue and be sued under the firm name under GCR Order 81 rule 1. Mr Sherwood was keen to point out that Parker J himself had recently joined an ELP to proceedings initially commenced against its general partner: *Kuwait Ports Authority v Port Link GP Ltd* (unreported, 25 November 2021, FSD 236 OF 2020 (RPJ)). However, he also pointed out that GCR Order 81 rules 12-15 also contemplate that an ELP may be sued in the firm name:

***“Actions by and against firms within jurisdiction (O.81, r.12)***

12. Any actions by or against an ordinary limited partnership or exempted limited partnership may be commenced in the name of the firm.

***13. Service of writ (O.81, r.13)***

13. Where an action is commenced against a firm, whether sued in the firm name or in the name of the general partner, the writ shall be served —

- (a) in the case of an ordinary limited partnership, by delivering the writ to its registered principal place of business; and
- (b) in the case of an exempted limited partnership, by delivering the writ to its registered office.

***14. Acknowledgment of service in action against firm (O.81, r.14)***

14. Where an ordinary limited partnership or exempted limited partnership is sued in its firm name, service may not be acknowledged in the name of the firm but only by the general partner thereof in the general partner’s own name, but the action shall nevertheless continue in the name of the firm.

***15. Enforcing judgment or order against firm (O.81, r.15)***

15. (1) Where a judgment is given or order made against a firm, execution to enforce the judgment or order may be issued against any property of the firm within the jurisdiction.

(2) Where a judgment is given or order made against a firm, execution to enforce the judgment or order may be issued against any person who —

- (a) acknowledged service of the writ in the action as a general partner; or
- (b) is registered as a general partner of the firm; or
- (c) was admitted in any pleading to be a general partner of the firm; or
- (d) was adjudged to be a general partner of the firm pursuant to Section 52(2) of the Partnership Act (as amended and revised), or Section 14 of the Exempted Limited

*Partnership Act (as amended and revised), as the case may be.*

- (3) *Except as provided by paragraph (2), where a judgment is given or order made against a firm, execution to enforce the judgment or order shall not be issued against any person who is registered as a limited partner.”*

41. Mr Khanbhai correctly submitted that rules of court cannot be used as an aid to construing primary legislation. However, the fact that the Rules Committee, like the various judges and lawyers in the previous winding-up cases, clearly assumed that the ELP Act permitted ELPs to be sued is not entirely without forensic effect. The starting assumption ought to be that the Rules Committee did not misconstrue their rule-making powers in relation to ELPs<sup>4</sup>. My preliminary view of section 33(1) was that it did not in terms impose a mandatory requirement that all suits against an ELP must be brought against the general partner of an ELP. Section 33(1) says, it bears remembering:

*“(1) Subject to subsection (3), legal proceedings by or against an exempted limited partnership may be instituted by or against any one or more of the general partners only, and a limited partner shall not be a party to or named in the proceedings.”*

42. Although this conclusion is strictly *obiter*, I find no reason to depart from my preliminary view (which is confirmed in an indirect sense by GCR Order 81 rules 12-15), that the legislative purpose of section 33(1) is primarily to reinforce the legal status of limited partners as not ordinarily liable to be sued (or entitled to sue) in respect of ELP liabilities and rights. This legislative purpose combined with the statutory language of the relevant provision in its wider statutory context strongly suggests that the “may” in section 33(1) is permissive and that there is no general or usual mandatory rule that proceedings cannot be issued against an ELP in its own name. The legislative history of section 33(1) itself does not undermine these provisional conclusions.

43. ELPs were created by the Exempted Limited Partnership Law 1991. Section 13(1) is substantially the same as section 33(1) today. The Memorandum of Objects and Reasons simply states: “*Clause 13 deals with the means of bringing proceedings against such a partnership.*” The section was not materially changed by the Exempted Limited Partnership Law 2007 or 2009.

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<sup>4</sup> Section 19(1) of the Grand Court Law provides that the Rules Committee shall consist of the Chief Justice, the Attorney General and two legal practitioners.



44. The central basis for my conclusion that an ELP may be the respondent to a winding-up petition is that, however section 33(1) falls to be construed, section 36(3) expressly permits a petition being presented in such a manner. As Mr Sherwood rightly contended, even if section 33(3) imposes a mandatory general requirement to sue the general partner, relying on section 36(3) is justified by the following rule of statutory interpretation articulated by Lord Sales in *Day v Governor of the Cayman Islands* [2022] UKPC 6 (and applied to my mind in a somewhat novel way in that case) as follows:

*“30...This means that the principle of interpretation encapsulated in the Latin maxims ‘lex specialis derogat legi generali’ (the specific law prevails over the general) and ‘generalia specialibus non derogant’ (general provisions should not undermine the intended effect of provisions specifically drafted to deal with the particular case), which is a principle of coherent interpretation of legal instruments of any character, is applicable.”*

45. Despite Mr Khanbhai’s able arguments to the contrary, I am bound to find that, with the greatest of respect to Justice Parker, *Re Padma* was wrong in finding that section 33(1) as read with section 36(3) of the ELP Act does not permit the presentation of a winding-up petition against an ELP alone because only the general partner may be sued. This conclusion was admittedly consistent with the implicit assumptions made in previous decision, including two of my own. However, the scales were tipped heavily in favour of the ultimate conclusion by the legislative history of section 36(3) which was placed before me and which Justice Parker did not have the benefit of considering. This additional material in my view helps to explain why in the earlier cases (and when the Rules Committee made Order 81 rules 12-15 of the Grand Court Rules) it was clearly assumed that ELPs could be wound-up under Part V of the Companies Act.

#### **Alternative findings: application to amend**

46. The Petitioners submitted (to my mind with little coherence or conviction) that any standing defect could be cured by amendment. The GP contended that if the Petition was liable to be struck-out because it was impermissibly presented against the ELP, the consequences of this were fatal and could not be cured by amendment. Mr Khanbhai advanced the following cogent submissions in this regard:



- “28. *The proceedings being a nullity, there can be no cure. The originating process has no more effect to commence the proceedings than a dog licence (as Lord Millett said in Strachan v The Gleaner, borrowing the language of Danckwerts LJ in Re Pritchard).*
29. *Further and in any event, there is no power to permit substitution of the respondent to a winding up petition.*
- (a) *The CWR applies, irrespective of the jurisdictional gateway: see section 36(3) of the ELP Act. The CWR expressly provide in relation to amendment of a petition (CWR Order 3 rule 2(3)). The CWR expressly provide in relation to substitution of the petitioner. There is no express rule in the CWR about correcting the name of or changing the respondent to a petition. There would have been one if that was contemplated.*
- (b) *The analogous rule in the GCR (viz. GCR O.15 r.6), which relates to correcting the name of a party, does not apply in proceedings governed by the CWR.”*
47. In my judgment it is indeed inconsistent with the statutory winding-up regime to substitute the respondent to a petition. The GP’s counsel identified one simple yet fundamental legal conundrum which would arise if this were done: what would the date of the commencement of the proceedings be? Accordingly, if I had found that the Petition was liable to be struck-out, I would have further found that naming the wrong respondent was fatal and could not be cured by amendment.

### **Disposition of strike-out application**

48. I accordingly find that that the GP’s strike-out Summons must be dismissed. I will hear counsel, if required, as to:
- (a) costs;
- (b) the terms of the Order to be drawn up to give effect to the present Judgment; and
- (c) directions in relation to the further conduct of the Petition.

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**THE HON. MR JUSTICE IAN RC KAWALEY**  
**JUDGE OF THE GRAND COURT**