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

**CAUSE NO: FSD 22 OF 2020 (IKJ)**

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

**AND IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)**

**AND**

**IN THE MATTER OF DUET REAL ESTATE PARTNERS 1 LP**

**IN COURT (VIA ZOOM AND LIVESTREAMING)**

| | |
|---|---|
| **Appearances**: | Ms Anya Park and Ms Katie Pearson of Harneys for Colville LLC (the "Petitioner") |
| | The Respondent (the "Fund") did not appear |
| **Before**: | The Hon. Justice Kawaley |
| **Heard**: | 7 May 2020 |
| **Date of decision**: | 7 May 2020 |
| **Draft Reasons Circulated:** | 25 May 2020 |
| **Reasons Delivered:** | 9 June 2020 |

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*Winding-up of exempted limited partnership - expiry of term of partnership - sufficient interest requirements - date of commencement of winding-up - Exempted Limited Partnership Law (2018 Revision), sections 36 (3), 36 (1) (c) - Companies Law (2020 Revision), sections 92 (c), 101(b)*

## Introductory

1. The Petition was presented by the Petitioner as a limited partner of the Fund on February 12, 2020. The Petition was served at the Fund's registered office on February 12, 2020.

2. The Summons for Directions was heard on March 25, 2020 (via Zoom) and the Fund did not appear. Directions ordered included the following:

> "*1. The Fund is properly able to participate in the proceeding.*
>
> *2. The proceeding is treated as a proceeding against the Fund.*
>
> *3. The Petitioner shall, by 4pm on 9 April 2020, cause an advertisement of the Petition to be placed in a newspaper having circulation in the Cayman Islands, and newspapers having circulation in the United Kingdom, Switzerland, and St Barthelemy.*
>
> *4. The following directions are given in relation to Ground 1 only:*
>
> *(a)...*
>
> *(c) The Petitioner shall file and serve any affidavit evidence in reply to the evidence filed and served by the Fund by 4pm on **24 April 2020**. The Petitioner shall also place before the Court any further information or documentation which either supports or undermines Ground 1 of the Petition by **24 April 2019**...*

(g) *The trial of Ground 1 shall be listed to be heard on the first available date after **1 May 2020**, with an estimate of two hours…*"

3. The Affidavit of Moesha Ramsay-Howell sworn on April 29, 2020 established that Harneys by email dated March 25, 2020 (a) notified a representative of the Fund that the Petition was listed for hearing on May 7, 2020, and (b) provided a copy of the approved Directions Order made on that date. The same Affidavit also deposed to advertisement of the Petition in early April 2020 and a reminder letter about the May 7, 2020 hearing being sent by email on April 24, 2020 to the person who had previously communicated with the Petitioner on behalf of the Fund.

4. At the hearing of the Petition the Fund again did not appear. The Petitioner had sensibly sought to convince the Court to grant the relief sought based on the potentially more evidentially straightforward and therefore more economical expiry of term ground (Ground 1), reserving the right to pursue the more evidentially elaborate and therefore less economical just and equitable ground if necessary at a subsequent hearing.

5. Because Ground 1 of the Petition involved a ground not seemingly considered before by this Court, and in light of the direction given requesting the Petitioner's counsel to put before the Court any material which might undermine the case for a winding-up order, the Petitioner's counsel gave a helpfully full and nuanced presentation on both the facts and, in particular, the law. At the conclusion of the hearing, I ordered, *inter alia*, that:

"*1. The Fund be wound up in accordance with section 92(c) of the Companies Law and section 36(3) of the ELP Law.*

*2. The winding up of the Fund is deemed to commence on 30 March 2012 pursuant to section 36(10) (c) of the ELP Law.*

*3. Michael Pearson and Richard Murphy of FFP Limited, 2nd Floor,*

*Harbour Centre, 42 North Church Street, George Town, Grand Cayman, Cayman Islands, be appointed as joint official liquidators of the Fund (the **Liquidators**)...*"

6. These are the reasons for that decision.

**The Factual Matrix**

7. There was no reason to doubt that the Petitioner had invested some US$4.5 million and become a limited partner of the Fund in 2007, and thereafter received no return on its investment. The critical area of factual inquiry was the documents constituting the Fund and the contractual provisions relating to the Fund's intended duration. The Petitioner's counsel was able to clearly identify what might be described as the 'primary' termination date, but that date was subject to extension depending on what subsequent events occurred. Two alternative later dates, both now long past, were also readily identified. Subject to jurisdictional questions of law, the case for a winding-up on Ground 1 was evidentially supported.

8. The Petitioner also sought a declaration as to the date on which the winding-up should be deemed to have commenced. For these purposes, it was necessary for the Court to decide whether the evidence supported the Petitioner's case that the 'primary' termination date, March 30, 2012, applied. Because of the Fund's non-participation, I was anxious about the possibility that crucially relevant material might not be before the Court. My initial inclination was adopt a precautionary approach and conclude that the latest possible date was most clearly supported by the evidence. However, Ms Park's careful dissection of the evidence at the hearing ultimately persuaded me that it was appropriate to infer from the proven facts that, on a balance of probabilities, no extension of the termination date had occurred.

9. It was submitted in the Petitioner's Skeleton Argument that:

> "*12. Clause 2.4 of the Limited Partnership Agreement dated 15 December 2006 (**LPA**) provided that (page 17 of exhibit AM-1):*
>
> *'The life of the Fund shall continue until the fifth anniversary of the Final Closing Date, unless:*
>
> *(a) Extended at the discretion of the General Partner or it's [sic]duly authorised delegates for up to two consecutive additional one year periods from and after such date; or*
>
> *(b) Terminated in accordance with the terms of this Agreement.'*
>
> *13. The Final Closing Date is defined as '30 March 2007 or such earlier or later date as determined by the General Partner.' So far as the Petitioner is aware, the Final Closing Date has not been varied by the General Partner, nor has the life of the Fund been extended. Accordingly, pursuant to the LPA the term of the Fund expired on 30 March 2012...*
>
> *15. The LPA further provided that the Fund shall be dissolved upon the earliest to occur of certain events, including the 'end of the term of the [Fund], as provided in clause 2.4' (clause 9.1(a) (ii)).*"

10. It was properly disclosed that because the LPA (clause 8.1(a) (i) also provided that that a capital contribution could not be made after the Final Closing Date), and the Petitioner had made a second capital contribution on or about November 1, 2007, it could be argued that the General Partner must have extended the Final Closing Date until at least then. On

that basis, the General Partner might potentially have extended the Final Closing Date until November 1, 2014 at the latest. The possibility of commitments by existing or additional limited partners after November 1, 2007 was refuted by reference to accounts sent out by the General Partner in 2012, after which there were no audited accounts. These did not reveal any further capital commitments. And it was broadly consistent with the proposition that the Final Closing Date was indeed viewed by those managing the Fund as being March 30, 2012 that no audited accounts were prepared for any subsequent year. That said, nothing in the Financial Statements for the year ending 2012 was said to provide positive support for the date contended for and Investor Reports were prepared in subsequent years before the Fund was struck off the register on December 31, 2016.

11. The Petitioner fairly acknowledged that it was theoretically possible that without its knowledge the Final Closing Date could have been expressly extended by the General Partner. However, counsel pointed, in particular, to three factors supporting a contrary inference:

(a) after resolving a dispute with one of the Fund's principals in relation to a separate investment between 2011-2016, the Petitioner began to make inquiries about its investment with the Fund. During these exchanges the Fund did not reveal any extension of the Final Closing Date;

(b) on September 3, 2018, Harneys wrote, *inter alia*, the General Partner foreshadowing an application to reinstate the Fund (which had by that date been struck-off the register of exempted limited partnerships[1]) and wind it up. It was asserted that the Final Closing Date appeared to be March 30, 2012 and an

[1] The Registrar of Companies is also the Registrar of Exempted Limited Partnerships: section 8. Section 9 of the ELP Law requires the Registrar of Companies to maintain a record of exempted limited partnerships. Section 37(1) empowers the Registrar to strike a partnership off the register if it appears to have ceased conducting business. Section 37 (5) permits, *inter alia*, a limited partner to apply to the court to restore the exempted limited partnership to the register.

express request was made for any documents indicating an extension of life beyond that date. The letter was responded to but the request for any documents indicating an extension was ignored;

(c) an opportunity had been given to those who managed the Fund in the prelude to the hearing of the Petition to advance a contrary case but that opportunity had also been spurned.

12. I concluded that the uncontroversial evidence supporting the March 30, 2012 Final Closing Date was more probative than the evidence supporting a later date, taking the surrounding legal context provided by the LPA into account. On balance, it appeared that the Fund was at least informally in winding-up mode by the end of 2012 and that no formal decision to extend the duration of the Fund was ever taken.

13. The evidence also showed that the winding-up process contemplated by the LPA had not taken place and that the Petitioner had for several years been pursuing the Fund's management for information about the state of its investment. The Petitioner was effectively being told that its investment had been lost, had not been supplied with sufficient information to be able reach an informed view as to whether it was entitled to a recovery or not.

**Legal findings: jurisdiction to make a winding-up order on a contributory's petition on the ground that the duration of the Fund is at an end**

**Statutory basis for winding-up: which statute?**

14. The Petitioner's counsel addressed the interaction between the Companies Law (2020 Revision) (the "Law") and the Exempted Limited Partnership Law (2018 Revision) (the "ELP Law") in her Skeleton Argument as follows:

"*52. The Cayman Island Court of Appeal (CICA) held in In the matter of*

*Rhone Holdings LP [2016 (1) CILR 46], in an application to extend the time for seeking leave to appeal where the CICA considered the merits of the proposed appeal, that (per Rix JA at paragraph 20 [sic, paragraph 23]):*

> *'... Mr Asif was bound to concede, as he did, that the power to wind up on the just and equitable ground, or indeed on any ground, is to be found not in the Exempted Limited Partnership Law, but in the underlying provisions of Part V of the Companies Law, to which of course s.36(3) of the Exempted Limited Partnership Law makes express reference, and that there is no language, express or necessarily to be implied, in the Exempted Limited Partnership Law which is inconsistent with provisions for winding up to be found in Part V of the Companies law... This may be contrasted with certain provisions of s.36 (3) of the Exempted Limited Partnership Law which plainly are inconsistent with certain provisions of Part V of the Companies Law, for instance s.36(3)(b) and (d) of the Exempted Limited Partnership Law...' (Emphasis added).*"

15. As I noted in the course of the hearing, the quoted passage does not strictly reflect a holding by the Court of Appeal as Sir Bernard Rix was only agreeing with the soundness of a point which was conceded. It is nonetheless the most authoritative appellate statement on the fact that if one seeks to wind-up an exempted limited partnership, it is the provisions of Part V of the Law which apply unless there are conflicting provisions of the ELP Law. This point was actually decided in *Re XIO Diamond LP*, FSD 256 of 2019 (IKJ), Judgment dated April 30, 2020 (unreported) and the significance of *Re Rhone Holdings LP* as providing valuable *obiter dicta* was not acknowledged. In short, the provisions of Part V of the Law applicable to contributories apply to petitions presented

by partners and the regime which was applicable to creditors of companies apply to petitions presented by creditors of an exempted limited partnership

**Standing: could the Petitioner demonstrate a sufficient or tangible interest in a winding-up?**

16. In the present case, therefore, no dispute arose about whether the winding-up order should be made under the Law or the ELP Law. Instead, the 'new point' which the Petitioner's counsel addressed was what tangible interest had to be established to justify a winding-up order on the expiry of term (as opposed to just and equitable ground). If the same test applied in both cases, there was room for evidential doubt as to whether the Fund was solvent and the Petitioner had any tangible interest in a winding-up. If a more fluid test applied, the Petitioner's standing was not in doubt.

17. Ms Park initially adopted the more conservative stance that the more stringent tangible interest test applicable to just and equitable petitions applied and but that the Petition fell within an exception to that test. However, at the hearing she adopted the bolder primary submission that a more flexible standing test applied to the section 92(c) ground.

18. The standard sufficient or tangible interest test (based on just and equitable petition case law) was summarised in the Petitioner's Skeleton Argument as follows:

> "*29. A contributory must normally establish that it has a 'sufficient interest' in the winding up.*
>
> *30. The English High Court noted in Re C & MB Holdings Ltd [2017] 1 BCLC 269 held that a 'sufficient interest' can be established 'by proving on the balance of probability that a winding up will result in a distribution to creditors provided the distribution will be more than negligible' but that 'solvency' is only an example of the application of the sufficient interest rule.*"

19. Various judicial articulations of an exception to the general rule were cited which was it was contended the Petitioner was entitled to rely upon. In essence, the Petitioner could not be required to establish the solvency of the Fund in circumstances where its management was depriving it of relevant information. One authority cited was the following:

> *"35. In Re Commercial and Industrial Insulations Ltd [1986] BCLC 191, Hoffman J (as he then was) referred to the exception to the sufficient interest rule and noted (at page 193):*
>
> *'This, if I may say so, seems to me to be common sense, because it would obviously be unjust to the petitioner to have his petition struck out in limine because he was unable to allege a surplus on a winding up on account of wrongfully being deprived of access to the necessary documents.'"*

20. Accordingly, the Petitioner concluded by submitting, inter alia:

> *"39...the Petitioner considers that the financial position of the Fund is not clear, the amounts of assets and liabilities in the accounts which the petitioner has seen are disputed on the basis that they contain material inconsistencies and/or are not properly explained, and the financial position of the Fund therefore requires further investigation."*

21. I had little difficulty in accepting that if the requirement to show that it was likely that the Fund was solvent did apply to Ground 1 of the Petition, there being no doubt that it applied to the just and equitable ground (Ground 2), the facts of the present case brought the Petitioner within the ambit of the exception. Counsel also aptly relied upon *Re*

*Chesterfield Catering Co* [1976] 2 All ER 294 and the following observation of Oliver J (as he then was, at page 298):

> "*...I do not think that as the law now stands the exception goes beyond this: that a petition will not be regarded as demurrable on the ground of the petitioner's lack of locus standi if his inability to prove his locus standi is due to the company's own default in providing him with information to which, as a member, he is entitled. ....*"

22. The Petitioner (I found) had an entitlement to a winding-up at the end of the duration of the Fund under LPA. No winding-up had occurred and the Petitioner had no reliable basis upon which to determine whether or not the Fund was solvent.

23. The Petitioner's alternative argument was that if it had to prove the likelihood of solvency and its entitlement to a distribution, the evidence did support such finding in any event. This argument was inconsistent with the primary position that an investigation was at least required and was based on a "*to wish is to hope, to hope is to expect*" view of the evidence. Had it been necessary for me to consider this fall-back submission, I would have found that the Petitioner had failed to establish sufficient interest.

24. I preferred the bolder submission that a somewhat flexible test applied to Ground 1 of the Petition which was broadly analogous to the exception to the usual sufficient interest rule upon which the Petitioner relied. That test is closely connected with a proper analysis of the statutory function of section 92 (c) of the Law and will be considered along with the analysis of the relevant jurisdiction below.

**The statutory function of section 92 (c) and what interest must the applicant for a winding-up order possess?**

25. Section 92 (c) of the Law provides as follows:


> "***92***. *A company may be wound up by the Court if—*
>
> ...
>
> *(d)the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be wound up…*"

26. The Petitioner advanced the following main submissions on the function or purpose of this statutory provision:

> "*54. There appear to be no reported cases on the application of section 92(c) of the Companies Law.*
>
> *55. Section 92(c) was proposed by the Companies (Amendment) Bill 2007.*
> *Page 4 provides:*
>
> *'4. Section 92 widens the circumstances in which a company may be wound up by the Court. Section 92(c) provides that a company may be wound up by the Court if the period, if any, fixed for the duration of the company by the articles of association expires...This is a basis up on which a company may be put into voluntary liquidation automatically. It is also intended to be a ground upon which a contributory (or conceivably a creditor) should be able to present a*

*petition. For example, if the directors of a company which has gone into liquidation automatically are failing to wind up its affairs, a contributory should be entitled to present a petition on this ground.' (Emphasis added)*

*56. The Petitioner submits this explanatory memorandum suggests that the purpose of section 92(c) is to expedite the automatic winding up of a company (or fund) at the instance of a shareholder, where the automatic voluntary winding up is not progressing as it should."*

27. There is no ambiguity about the words of the new subsection in taking into account the wider context of section 92 and Part V of the Law as a whole. But The 'Memorandum of Objects and Reasons' found in the 2007 Bill does provide helpful confirmation of what the language of the statutory provision suggests its legislative purpose was. As Mangatal J observed in *BDO Cayman Limited et al –v- Governor in Cabinet* [2018 (1) CILR 457] (at 125), even where the meaning of words is clear external aid can be used, as it were, as a cross-check to verify the reasonableness of the primary statutory meaning. She then noted :

*"126 On an "informed interpretation" the court considers the wider context including internal aids, such as other provisions in the same statute, and it may include external aids, such as the legislative history and other materials in pari materia which may provide guidance as to the underlying legislative intention. It is in my view not necessary (as the applicants contend) for there to be some 'ambiguity' before those aids to construction may be considered. Thus, the court can consider these aids to construction even where the grammatical or legal meaning of a provision is clear."*

28. However, the Court has even broader scope to consider explanatory memoranda with a view to understanding what the legislative object of a provision actually is. As Lord Steyn opined in *Westminster City Council-v-National Asylum Support Service* [2002] UKHL 38:

> "5. *The question is whether in aid of the interpretation of a statute the court may take into account the Explanatory Notes and, if so, to what extent. The starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that the context must always be identified and considered before the process of construction or during it. It is therefore wrong to say that the court may only resort to evidence of the contextual scene when an ambiguity has arisen. In regard to contractual interpretation this was made clear by Lord Wilberforce in Prenn v Simmonds [1971] 1 WLR 1381, 1384-1386, and in Reardon Smith Line Ltd v Yngvar Hansen-Tangen [1976] 1 WLR 989, 995-996. Moreover, in his important judgment in Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912-913, Lord Hoffmann made crystal clear that an ambiguity need not be established before the surrounding circumstances may be taken into account. The same applies to statutory construction. In River Wear Commissioners v Adamson (1877) 2 App Cas 743, 763, Lord Blackburn explained the position as follows:*
>
> > *'I shall . . . state, as precisely as I can, what I understand from the decided cases to be the principles on which the courts of law act in construing instruments in writing; and a statute is an instrument in writing. In all cases the object*

*is to see what is the intention expressed by the words used. But, from the imperfection of language, it is impossible to know what that intention is without inquiring farther, and seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view; for the meaning of words varies according to the circumstances with respect to which they were used."*

*Again, there is no need to establish an ambiguity before taking into account the objective circumstances to which the language relates. Applied to the subject under consideration the result is as follows. Insofar as the Explanatory Notes cast light on the objective setting or contextual scene of the statute, and the mischief at which it is aimed, such materials are therefore always admissible aids to construction. They may be admitted for what logical value they have. Used for this purpose Explanatory Notes will sometimes be more informative and valuable than reports of the Law Commission or advisory committees, Government green or white papers, and the like. After all, the connection of Explanatory Notes with the shape of the proposed legislation is closer than pre-parliamentary aids which in principle are already treated as admissible: see Cross, Statutory Interpretation, 3rd ed (1995), pp 160-161. If used for this purpose the recent reservations in dicta in the House of Lords about the use of Hansard materials in aid of construction are not engaged: see R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349, 407; Robinson v Secretary of State for*

*Northern Ireland [2002] UKHL 32, The Times, 26 July 2002, in particular per Lord Hoffmann, at paragraph 40. On this basis the constitutional arguments which I put forward extra-judicially are also not engaged: "Pepper v Hart: A Re-examination" (2001) 21 Oxford Journal of Legal Studies 59.*" [emphasis added]

29. So Ms Park's submissions established that one express purpose of the new subsection was to provide a remedy to a contributory to seek a winding-up order from this Court when the duration of a company had come to an end and the contributory's contractual right to an "automatic" voluntary winding-up (using the language of the Bill) had been denied[2]. The suggestion conveyed by the language of section 92(c) that its main purpose is to provide a statutory alternative to a contractual 'automatic' right to a voluntary winding-up is confirmed by the Memorandum of Objects and Reasons which introduced the Bill to the Legislature. I inferred from the literal meaning of section 92 (c) of the Law as confirmed by the Bill which preceded its enactment that the most essential jurisdictional conditions which the Petitioner had to meet (and had met to my satisfaction) required it to establish:

(a) that the Respondent had a fixed duration which had expired and/or that an event had occurred which triggered the contractual entitlement to a voluntary winding-up;

(b) that the Respondent was a contributory with a crystallised or vested contractual right to a voluntary winding-up (or, possibly, had some other legal basis contemplated by the section 92(c) for invoking the statutory remedy).

[2] Section 36(9) of the ELP Law has a special definition of "*automatic winding-up*" which was not engaged by the facts of the present case. The terms of LPA provided that a winding-up should occur upon the expiry of the Fund's fixed term, so an automatic right to a voluntary liquidation clearly existed in the broader sense used in the 2007 Bill.

30. The policy underpinning section 92(c) was also explained in the Petitioner's Skeleton Argument as follows:

> "*57. It is further submitted that there is a point of principle to consider, in that a shareholder should not be locked into a company or fund for a period longer than that for which the shareholder signed up.*"

31. That submission in my judgment understated the present position. Where a winding-up order is sought under section 92(c) on the grounds that the duration of the relevant investment vehicle has come to an end, as in the present case, the only point of principle which is engaged is that the investor "*should not be locked into a company or fund for a period longer than that for which the shareholder signed up.*" Here the expiry of the term of the Fund was itself one of various events which gave rise to a contractual right to a voluntary winding-up. The difference between seeking a winding-up order under section 92(c) and section 92(e) on the just and equitable ground is quite distinct, in legal context terms.

32. Although prior to the enactment of section 92(c) shareholders with a contractual right to a voluntary winding-up which had been thwarted presumably had no choice but to rely upon section 92(e), the just and equitable jurisdiction was created in the 19th century before modern bespoke investment vehicles like the Fund had been invented. It is reasonable to assume that the overwhelming majority of just and equitable petitions which generated the early case law in England which helped to define the jurisdiction involved unlimited duration companies where only a majority of shareholders had a contractual right to obtain a voluntary winding-up.

33. The 'Memorandum of Objects and Reasons' in the 2007 Bill suggested that "*conceivably*" a creditor could invoke the new winding-up jurisdiction. I assumed for the

purposes of the present proceedings that section 92(c) is primarily designed for use by shareholders as that view finds support both in the statutory language and wider context, including the express terms of the Bill. No need to consider the position of creditors arose.

34. It is only in light of this understanding of the statutory object of the 2007 vintage section 92(c) jurisdiction that one can properly analyse the appropriate sufficient or tangible interest requirements which a petitioner relying on this winding-up ground should be required to meet.

**Standing: sufficient interest in the section 92(c) context**

35. Based on the statutory construction of section 92(c) set out above, I found that once a petitioner under section 92(c) establishes that (a) the duration of the respondent has expired or some other contractual right it holds to a voluntary winding-up has occurred, and that (b) the petitioner is prima facie qualified to enforce that right, the following additional standing requirements it will usually have to be met:

(1) showing that there is a tangible and practical need for a winding-up;

(2) showing that there are no more appropriate remedies that the Petitioner should be left to pursue as an alternative to a winding-up order under section 92(c).

36. Most winding-up proceedings are driven by commercial logic. But the jurisdiction is only available to achieve legitimate aims. If a winding-up petition was filed under section 92(c) by a contributory who had been fully paid, the lack of any commercial interest in a winding-up despite possessing an abstract contractual right to one might would likely be grounds for refusing the relief sought. The same would probably apply if it was obvious

that the respondent to the petition was insolvent and creditors wished to pursue some other course.

37. Again, it might be held that jurisdiction to wind-up did not exist if as soon as the right to a contractual voluntary liquidation crystallised, the petitioner came straight to Court. It might be said that the more appropriate remedy was to afford the management of the respondent a reasonable opportunity to conduct the voluntary liquidation. The practical need for a winding-up will usually mean that that the petitioner has no available and more suitable alternative remedies.

38. Where, as here, the limited partner/shareholder had invested with no return in a fixed term investment vehicle the duration of which had expired and which had not been voluntarily wound-up, these standing requirements were easily met. The legal underpinnings for these conclusions are elaborated upon below.

39. I found important judicial support for the ultimately elementary proposition that the content of the standing requirements must be informed by the winding-up ground which a petitioner invokes in *Re Chesterfield* [1976] 3 All ER 294, upon which the Petitioner relied. Oliver J (as he then was) held that a fully-paid contributory presenting a just and equitable petition had to show a likelihood of a surplus available on a winding-up. However, in discussing the sufficient interest test, he observed: (at page 298)

> "*I think that what counsel for the petitioners says is right, but I do not think that as the law now stands the exception goes beyond this: that a petition will not be regarded as demurrable on the ground of the petitioner's lack of locus standi if his inability to prove his locus standi is due to the company's own default in providing him with information to which, as a member, he is entitled. Thus, for instance, I cannot think that a petition presented*

*by a fully paid shareholder on ground (b) of s 222 of the 1948 Act could be treated as demurrable because he was unable to allege that there would be a surplus of assets.*" [emphasis added]

40. Section 222 of the Companies Act 1948 provided that:


"*A company may be wound up by the court if-*

...

*(b) default is made in delivering the statutory report to the registrar or in holding the statutory meeting…*"

41. Although only *obiter dicta*, I found these observations, and those set out below, quite compelling. The ground on which a winding-up is sought must logically inform what the standing requirements are. This is why, even on a just and equitable petition where the established general rule is that a shareholder must prove that he is likely to be entitled to recover from a surplus, exceptions to that general rule have been developed as the specific factual grounds upon which reliance is placed may vary from case to case. As Oliver J went on to say in *Re Chesterfield:* (at page 299)

> "*I also think, if I may say so respectfully, that the references to 'a surplus' or to 'assets for distribution amongst the shareholders', which appear in some of the cases, are to some extent an unnecessarily restrictive gloss on what was said in Re Rica Gold Washing Co. What was required for a fully paid shareholder to petition was, Jessel MR said, 'a sufficient interest to entitle him to ask for the winding-up of the company'. 'He must shew', he said, 'what I may call a 'tangible interest'. He then went on to stress that he was not going to lay down any rule as to what that tangible interest must be, and gave as an example of what was not a sufficient interest a negligible surplus on the distribution.*

*I do not, however, think that it can be quite accurate to say that the tangible interest of the fully paid shareholder must necessarily and in all cases be restricted to the existence or the prospective existence of a surplus. Indeed, Jessel MR himself in Re Rica Gold Washing Co (11 Ch D at 42, 43), in the opening words of the paragraph which I have read, seems to suggest that the potential liability of a shareholder can constitute an interest for this purpose. And, for instance, a fully paid shareholder who petitions to wind up a company on ground (d) of s 222 of the 1948 Act, ie that the number of members has been reduced below the requisite minimum, has the strongest possible interest in seeing that the company's business is brought to an end, for otherwise he may find himself personally liable for the company's debts under s 31; and I cannot conceive, if the company were insolvent and his peril thus increased, that the court would tell him that the petition was incompetent on this ground. Furthermore, it must be recalled that the fasciculus of sections dealing with winding-up applies to unlimited companies as well as to limited companies, and a shareholder, albeit his shares were fully paid in such a company, might have a very strong interest in the liquidation of the company which was totally insolvent simply from the point of view of terminating his liability as a member....*

*The reported cases in which, in recent years, the question has arisen, have all been cases of petitions either under s 210 of the Companies Act 1948*[3] *or on the just and equitable ground, and no doubt it is true that in such cases the test of a sufficient interest will*

[3] A minority shareholder oppression provision.

*be the existence or probable existence of a surplus. It seems clear, however, that the same or similar principles apply in other cases: see, for instance, Re London Suburban Bank, where a shareholder's petition on the ground of insolvency was dismissed by reason of the paucity of his interest, and Re New Gas Generator Co, where a subscriber's petition based on the failure of the company to commence business within a year of its incorporation was dismissed. But I have not been referred to any case in which so amorphous an interest as that alleged in the present petition has been held to be sufficient to support a petition by a fully paid shareholder, and it seems to me to be contrary to the principle of all the cases to suggest that, even allowing that there may be exceptions to the general rule, a petitioner can demonstrate his locus standi by pointing to some private advantage which he may derive from the winding-up and which is unconnected with his membership of the company.*" [emphasis added]

42. These observations support the conclusion that no matter what winding-up ground is relied upon, the petitioner must have a sufficient interest to justify obtaining the relief sought. What that interest must be is a question which will ultimately be shaped by the specific winding-up ground relied upon in each case.

43. Indeed there appears to be a broader rule of practice to the effect that the applicant for any statutory relief in relation to a winding-up must have sufficient interest to make the relevant application. *Deloitte and Touche-v- Johnson and Dinan* [1999 CILR 297] (Privy Council) was placed before the Court. That case concerned an application to remove official liquidators under section 106(1) of the Companies Law (1995 Revision). Section 106 (1), somewhat like section 92(c), creates a power to grant relief without conferring an express broad statutory discretion as does section 92(e) of the Law. The Privy Council

characterised the determination of what the standing requirements for obtaining such statutory relief as a doctrine of "*judicial restraint*". This was to be contrasted with both (a) determining who was jurisdictionally qualified to make an application and (b) determining the purpose and scope of the jurisdiction created by the Legislative Assembly, which were exercises in statutory interpretation.

44. As Lord Millett opined (at pages 304-305, delivering the advice of the Board):


> "*In their Lordships' opinion two different kinds of case must be distinguished when considering the question of a party's standing to make an application to the court. The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court, for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by statute to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint. Orders made by the court are coercive. Every order of the court affects the freedom of action of the party against whom it is made and sometimes (as in the present case) of other parties as well. It is therefore incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction.*


*Where the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application. This does not mean, as the appellant submits, that he 'has an interest in making the application or may be affected by its outcome'. It means that he has a legitimate interest in the relief sought. Thus, even though the statute does not limit the category of person who may make the application, the court will not remove a liquidator of an insolvent company on the application of a contributory who is not also a creditor: see In re Corbenstoke Ltd. (No.2) (1989) 5 B.C.C. 767. This case was criticised by the appellants: their Lordships consider that it was correctly decided.* " [emphasis added]

**Date of commencement of winding-up**

45. The Petitioner's counsel also referred to the statutory provisions governing the commencement of the winding-up. Section 101(b) of the Law provides that where before a petition is presented:

> "*the period, if any, fixed for the duration of the company by the articles of association has expired...the winding up of the company is deemed to have commenced at the time of passing of the resolution or the expiry of the relevant period*".

46. Section 36 (10) of the ELP Law provides that:

> "*The winding up of an exempted limited partnership shall be deemed to commence upon the earlier to occur of... (c) the expiry of the period fixed for the duration of the exempted limited partnership by the*

*partnership agreement*".

47. The ELP is entirely consistent with the Law in this regard so the provisions of the Law could clearly be applied.

**Conclusion**

48. For the above reasons on May 7, 2020 I ordered that the Fund should be wound-up under section 92(c) of the Companies Law.

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