

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**

**APPEAL NO. 21 OF 2015**

**ON APPEAL FROM THE GRAND COURT**

**CAUSE NO. FSD 119 OF 2015**

**IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)**

**AND IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP LAW (2014 REVISION)**

**AND IN THE MATTER OF RHONE HOLDINGS LP**

**Between**

- (1) Reservoir Capital Master Fund II, LP**
- (2) Reservoir Capital Master Fund, LP**
- (3) Reservoir Capital Investment Partners, LP**
- (4) Reservoir Capital Partners, LP**

**Petitioners/Applicants**

**-and-**

- (1) Ritchie Capital Management LLC**
- (2) Ritchie Capital Management Ltd**
- (3) Rhone Capital (GP) Ltd**

**Respondents**

**BEFORE:     The Rt. Hon. Sir John Chadwick, President**  
**The Rt. Hon. Sir Bernard Rix, J.A.**  
**The Hon. Sir Richard Field, J.A.**

Appearances: Mr Jalil Asif QC and Ms Pamella Mitchell for the Appellants and Mr Thomas Lowe QC, Mr David Butler and Ms Gráinne King for the Respondents.

**Hearing and Judgment delivered: 19 November 2015**

**Transcript approved and released: 14 April 2016**

**RIX JA (Orally)**

1. This is an application to extend time for the purposes of obtaining leave to appeal for an appeal against the judgment of Mrs. Justice Mangatal whose decision was delivered on 18 August 2015 and whose written reasons were delivered on 16 September 2015.
2. The judgment arises out of the presentation of a petition by the Petitioners and would be Appellants -- perhaps I should call them Applicants -- who are four limited partners whose names begin Reservoir Capital. The Respondents are three Respondents beginning with the name Ritchie Capital. The details of the relationships in this set up are set out in the opening paragraphs of the judge's judgment and need not be repeated.

3. The essence of the issue, both below and on this application, is whether the Applicants can avoid the consequences of having contracted with the Respondents under their applicable partnership agreement not to present a petition to wind up the partnership. The partnership in question is an exempted limited partnership governed by the Exempted Limited Partnership Law 2014.
4. The critical clause of the amended and re-stated Limited Partnership Agreement is Clause 5.12 set out in paragraph 20 of the judge's judgment, the effect of which is that the parties agree not to cause an involuntary proceeding to be commenced or an involuntary petition to be filed seeking, inter alia, the winding up, liquidation, dissolution, reorganisation, or other relief in respect of the Partnership.
5. What originally happened was that the Applicants, on 23 July 2015, made an ex parte application for the appointment of joint provisional liquidators on their petition to wind up the partnership on the just and equitable ground. We have the winding up petition before us and our attention has been taken by Mr. Jalil Asif QC, who appears on behalf of the Applicants, to paragraph 6 of the following petition in which complaints are made, as a result of a total loss of confidence between the Applicants and the Respondents and their discovery that they are being charged millions of dollars of backdated expenses which they believe not to be genuine, that it would be just and equitable for the court to order the winding up of the partnership.
6. This petition, of course, is prima facie in breach of Clause 5.12 of the Partnership Agreement.
7. In making their application for the appointment of joint provisional liquidators in ex parte form, the Applicants brought to the attention of the Court provisions of the Exempted Limited Partnership Law 2014 but not the provisions of the Companies Law (2013 Revision), and in particular section 95, and in particular 95(2) of Part V of that Law. It is a matter of surprise to me that the Court was not taken to section 95(2) whose relevant provisions I shall mention in a moment.
8. Now, section 95 appears in a section of the Companies Law which begins at section 92 and deals with the subject matter of winding up by the court. Section 92 says that "A company may be wound up by the Court if -" and then various circumstances are set out, including in 92(e): "the Court is of the opinion that it is just and equitable that the company should be wound up."
9. Section 95(1) provides that: "Upon hearing the winding up petition the Court may- (a) dismiss the petition; (b) adjourn the hearing conditionally or unconditionally; (c) make a provisional order; or (d) any other order that it thinks fit, ...."

10. Section 95(2), which for present purposes is the critical provision, provides: "The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that a petitioner is contractually bound not to present a petition against the company".
11. Now, the Companies Law is expressed in terms of companies. But the Exempted Limited Partnership Law makes it clear that, save where there are inconsistent provisions in that Law, the provisions of Part V of the Companies Law relating to winding up shall apply to exempted limited partnerships just as though all references in Part V of the Companies Law were to, and included references to, an exempted limited partnership. I refer, therefore, to sections 35 and 36 of the Exempted Limited Partnership Law.
12. Section 36 of the Exempted Limited Partnership Law provides, by subsection (3), as follows:  
"Except to the extent that the provisions are not consistent with this Law, and in the event of any inconsistencies, this Law shall prevail, and subject to any express provisions of this Law to the contrary, the provisions of Part V of the Companies Law and the Companies Winding Up Rules 2008 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 he would otherwise bear under this Law, 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 the exempted limited partnership;
  - (d) except for sections 123, excluding subsection (1)(b) and (c), 129, 140, 145, and 147 of the Companies Law, 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 11 May 2009, the necessary time period for compliance with the requirements of section 123(1) of the Companies Law 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 Law 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."

13. Now, the submission of Mr. Asif, on behalf of the Applicants, is that that last subsection, namely section 36(3)(g) of the Exempted Limited Partnership Law was a provision of that law which was inconsistent with and, therefore, under the terms of that Law, overrode the prohibition in the Companies Law and section 95(2) of that Law that the court shall dismiss or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company.
14. As I have stated, section 95(2) of the Companies Law was not brought to the attention of the court at the time of the original ex parte application for the appointment of joint provisional liquidators pursuant to the Applicants' winding up petition. As a consequence, on 24 July 2015, an ex parte order was made appointing joint provisional liquidators. When the matter, however, came back before the judge for argument on 12-13 August 2015 inter partes, the attention of the judge was brought to the provisions of section 95 of the Companies Law. It was in those circumstances that Mr. Asif, on behalf of the Applicants, submitted to the judge, as he has submitted to this court this morning, that section 36(3)(g) of the Exempted Limited Partnership Law is inconsistent with and overrode Section 95(2) of the Companies Law. He made that submission and he also submitted that the agreement not to present a petition for the winding up of the partnership should be overridden as a matter of public policy given, as he submits, the importance of the jurisdiction of the court to wind up, in particular where allegations requiring winding up on the just and equitable ground are made out.
15. Following that inter partes argument, the judge, as we have said, made her decision contrary to those submissions and ordered the striking out of the petition and the discharge of the previously appointed joint provisional liquidators and followed up that decision with her written reasons in mid-September.
16. Now, following that decision, any intent to appeal against it was required by the Court of Appeal Rules to have been brought within 14 days of filing of the Order on 8 September 2015, and it was necessary for purposes of bringing such an appeal that the leave of the court to make such an appeal should have been applied for within the same period of time.
17. Notice of appeal was served on 22 September 2015; but no summons was taken out to seek the leave of the court for the making of such an appeal until 29 September 2015. It is submitted that no prejudice has been caused by this delay, but whether that is so or not — and it needs to be stated that in matters which call into question the potential existence or not of a company as a functioning company, any delay is potentially prejudicial, and may indeed be very seriously prejudicial.
18. The position is, as a result of this failure to comply with the Rules and this delay, the Applicants now find themselves today in a position where they are required to ask for the leave of this court to extend time for the making of their application for permission to appeal. The Applicants, therefore,

not only need permission to appeal, but they need this court's indulgence to extend time for that application for permission to appeal to be made.

19. Those circumstances raise the question whether, in the light of the argument that the Applicants wish to make on any appeal, there is any realistic prospect of those arguments succeeding on appeal. Because if there is no realistic prospect, then this court should not give permission or, indeed, extend time.
20. So I come back to the two arguments which Mr. Asif wishes to make this morning on the merits of the case, which are, as I have already stated, first, that section 36(3)(g) of the Exempted Limited Partnership Law is inconsistent with and therefore overrides section 95(2) of the Companies Law; and, secondly, that, in any event, the contractual prohibition on the bringing of such a petition as has been sought to be brought should be overridden by considerations of public policy.
21. Mr. Asif has, if I may say so, gamely made his submissions in the face of some considerable flak from the court and I compliment him on the way he has risen to that challenge, in particular in circumstances where, as he has made clear, he had not considered that it would be necessary for him to address, in the way in which the court has required him to address, the merits of the appeal for which he needs permission. I therefore address those merits.
22. Mr. Asif's first submission is that the general reference in 36(3)(g) of the Exempted Limited Partnership Law is an inconsistent provision with all the provisions for winding up to be found in Part V of the Companies Law. At any rate, where winding up on the ground of it being just and equitable to do so is concerned, he makes that submission on the basis that in the general language of subsection (g) there is no express provision to, for instance, the provisions of section 95(2).
23. Nevertheless, when pressed, 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 section 36(3) of the Exempted Limited Partnership Law makes express provision, 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, or in particular, section 95(2) of that Law. This may be contrasted with certain provisions of section 36(3) of the Exempted Limited Partnership Law which plainly are inconsistent with certain provisions of Part V of the Companies Law, such as may be found in subsection (3), for instance 3(b) and (d), of the Exempted Limited Partnership Law, which I set out earlier in this judgment.

24. In my judgment, therefore, the submission that section 36(3)(g) overrides section 95 of the Companies Law, and by overriding it magically excludes the provision of section 95(2) requiring the court to dismiss or adjourn a winding up petition brought in breach of a contractual obligation not to present a petition, is a simply impossible submission and one that has no reasonable prospect of success on appeal.
25. I turn to Mr. Asif's second submission, that whether the provisions of section 36 of the Exempted Limited Partnership Law are or are not inconsistent with Section 95 of the Companies Law, nevertheless the provisions of Section 95(2) of the Companies Law should simply be ignored, on the grounds that an agreement not to present a petition against an exempted limited partnership is contrary to public policy. But that submission is an impossible submission where section 95(2), which applies generally, of course, to companies, but also expressly by reasons of the provisions of Exempted Limited Partnership Law to exempted limited partnerships, makes it plain, that such a contract or agreement not to present a petition against a company or an exempted limited partnership is not contrary to public policy but, on the contrary, represents the policy of the law by express enactment because the express terms of section 95(2) give statutory strength to what would otherwise merely be a contractual agreement not to present a petition by stating that the court shall dismiss a petition or adjourn it when the parties have bound themselves contractually not to present such a petition. So such an agreement not to present a petition cannot possibly be contrary to public policy.
26. A sub-submission of Mr. Asif's is to refer to that alternative language in section 95(2) of the Companies Law "or adjourn the hearing of a winding up petition". Mr. Asif has sought to submit that that language by itself permits the court by its power to adjourn to avoid the dismissal of a winding up petition which a party is contractually bound not to present.
27. In my judgment, it does no such thing. The allowance of adjournment as an alternative to an immediate dismissal is no doubt meant to deal with the sort of situation where a partnership agreement or other agreement between the relevant parties has concluded some such provision as those binding the parties to attempt a settlement either by negotiations between the parties, or possibly by mediation, or indeed by arbitration, in circumstances where the factual matters in dispute between the parties which lie behind a potential petition could be dealt with by arbitration.
28. Those sorts of circumstances do not detract in any way, in my judgment, from the underlying message of section 95(2), which is that where parties have agreed not to present a petition, then they are not to be permitted to act in breach of that agreement, that the court will uphold that agreement. Of course, if adjournment is necessary for something like mediation or arbitration or potential settlement, that's another matter and the court may wish to adjourn in those circumstances. But, otherwise, section 95(2) compels the court by mandatory terms "shall dismiss" to give effect to the parties' contractual agreement.

29. Therefore, for those reasons, it is my judgment that this second alternative submission equally holds no realistic prospect of success on any appeal for the Applicants.

30. In those circumstances, where there is no realistic prospect of any success upon an appeal for these Applicants, it seems to me that this court should refuse to extend time, refuse to grant leave to bring such an appeal as the Applicants wish to make and, for these reasons, dismiss the applications which are before the court.

**FIELD JA:** I agree.

**CHADWICK, President:** I also agree. The application for permission to appeal and an extension of time for that purpose are dismissed. The effect is that the order made by the Judge on 18 August stands and this petition is struck out.