

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

3 **CAUSE NO. FSD 119 OF 2015 (IMJ)**

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

5 **AND IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIPS LAW 2014**

6 **AND IN THE MATTER OF RHONE HOLDINGS, L.P.**

7

8 **Appearances:** **Mr. Thomas Lowe Q.C, Mr. David Butler and Ms. Grainne King**
9 **of Harneys for the Respondents/Applicants**

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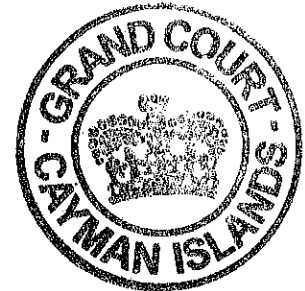
Before: **Justice Ingrid Mangatal**

Heard: **12, 13, August 2015**

Decision Delivered: **18 August 2015**

Written Reasons
Delivered: **16 September 2015**

Delivered with Errata: **29 September 2015**



Companies Law (2013 Revision), Part V, s. and s.s.89, 92, 95(1)(2) and (3) - Exempted Limited Partnership Law (2014 Revision), s. and s.s.3, 4(1)(2), 35, 36 - Partnership Law (2013 Revision) s. and s.s.26(1), 32 and 58 - Winding Up Petition filed on Just and Equitable Ground - Striking Out Application - Clauses in Limited Partnership Agreement by which partners agreed not to present winding up petition and termination of Partnership to occur only in manner provided for in Agreement - Whether enforceable or whether void as contrary to public policy - Whether s.95(2) of Companies Law applicable to exempted limited partnership.

REASONS FOR JUDGMENT

1. Rhone Holdings, L.P. ("the Partnership") is an exempted limited partnership formed on 7 March 2007 pursuant to the laws of the Cayman Islands and whose registered office is

1 Intertrust Corporate Services (Cayman) Limited, 190 Elgin Avenue, George Town,
2 Grand Cayman KY1-9005. The Partnership was registered on 22 March 2007.

3
4 2. Reservoir Capital Master Fund II L.P., Reservoir Capital Master Fund L.P., Reservoir
5 Capital Investment Partners, L.P., and Reservoir Capital Partners, L.P. (together, “the
6 Petitioners”) are all the limited partners in the Partnership.

7
8 3. The Partnership has two general Partners: Rhone Capital (GP) Ltd., an exempt company
9 registered in the Cayman Islands (“the Ritchie GP”), and Rhone Holdings SLP, L.L.C., a
10 Delaware, U.S.A. limited liability company (“the Reservoir GP”).

11
12 4. Mr. Thane Ritchie is a Director of Ritchie Capital Management, L.L.C. and Ritchie
13 Capital Management Ltd. (collectively “RCM”) and of the Ritchie GP. (RCM and the
14 Ritchie GP are collectively “the Respondents”). The Ritchie GP is controlled by RCM.

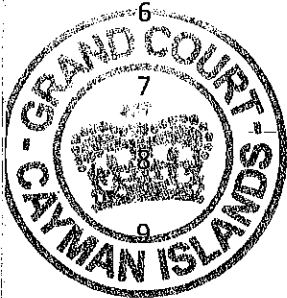
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16 5. The Reservoir GP is controlled by the Petitioners, which are investment funds managed
17 by Reservoir Capital Management, L.L.C., a Delaware limited liability corporation.

18
19 6. The Petitioners are also shareholders in Rhone Holdings II Limited (“Rhone II”) which
20 according to the Petition is, and has been at all material times the sole asset owned by the
21 Partnership.



1 7. On 22 July 2015, the Petitioners filed a Winding Up Petition, seeking to have the
2 Partnership wound up in accordance with the *Companies Law (2013 Revision)* (“the
3 *Law*”) and the *Exempted Limited Partnership Law (2014 Revision)* (“the *ELPL*”).
4

5 8. On 23 July 2015, on the hearing of an ex parte application filed with the Winding Up
6 Petition on 22 July 2015, on behalf of the Petitioners, this Court made, amongst other
7 orders, an order (“the Order”), appointing Mr. David Griffin and Mr. Andrew Morrison
8 of FTI Consulting (Cayman) Ltd., Joint Provisional Liquidators (“the JPLs”) of the
9 Partnership.
10



11 9. On 6 August 2015, the Respondents filed a Summons seeking the following orders and
12 directions:

- 13 “1. *[That] The Petition be struck out as an abuse of the Process of the*
14 *Court.*
15 2. *That the Petitioners do pay the Respondents their costs of and*
16 *occasioned by the Petition on the indemnity basis.*
17 3. *That the costs of the [JPLs] be paid by the Petitioners.*”
18

19 10. I heard extensive contested legal argument in respect of this application to strike out over
20 two days, 12 and 13 August 2015. I wish to thank and commend Counsel on both sides
21 for the high quality and clarity of the submissions and thorough research. The Court has
22 been greatly assisted at this *inter partes* hearing.
23

24 11. The Respondents had also filed a Summons on 5 August 2015 seeking to have the Order
25 appointing the JPLs discharged. However, in light of the extensive nature of the



arguments in respect of the Striking Out Summons, and the additional argument and evidence that would have to be referred to if the Summons to Discharge was also to be dealt with, all parties appreciated that this could not all be accomplished in the limited time available for the hearing.

5

6 12. It was also indicated to Counsel that I would be on leave and off the island for two weeks
7 as of 15 August 2015 and would for that time not be able to conduct further hearings.
8 Both sides stressed the urgency of the matter. Counsel for the Respondents, learned
9 Queen's Counsel Mr. Lowe, highlighted the allegedly "calamitous effect of the ...Order
10 and the winding up proceedings on the whole structure" of the Partnership. Learned
11 Queen's Counsel Mr. Asif pressed the points which he had made at the *ex parte* hearing,
12 notably as to the urgency of having and maintaining the JPLs in place to prevent alleged
13 dissipation or misuse of the Partnership's assets, and alleged mismanagement or
14 misconduct on the part of the Ritchie GP. It was understood and agreed that I would
15 deliver my decision on or before 18 August 2015, with written reasons to follow.

16

17 13. On 18 August 2015, I delivered the following Judgment and made the following Order:

18 *"Upon the Respondents' Summons filed 6 August 2015 coming on for*
19 *hearing, IT IS HEREBY ORDERED AS FOLLOWS:*

- 20 1. *The Petition is struck out as an abuse of the process of the Court.*
- 21 2. *The Petitioners are to pay the Respondents their costs of and*
22 *occasioned by the Petitioner on an indemnity basis.*
- 23 3. *The Costs of the Joint Provisional Liquidators are to be paid by*
24 *the Petitioners.*
- 25 4. *Written reasons for this decision to follow shortly.*

1 5. *Any consequential applications by the parties or by the Joint*
2 *Provisional Liquidators are to be listed for hearing on the first*
3 *convenient open date after 7 September 2015.”*
4

5 14. On the 8 September 2015, the Court was asked to sign off on the formal order herein. The
6 following order, which was presented, approved as to form and content by the parties,
7 was signed. This order was substantially in the terms above, except that it was more
8 detailed and dealt with consequential aspects of the matter, in relation to the JPLs. So far
9 as material, it reads as follows:

10 “*IT IS HEREBY ORDERED THAT:*

- 11 1. *The Petition be and is hereby struck out as an abuse of the process*
12 *of the Court;*
- 13 2. *The Joint Provisional Liquidators (JPLs) appointed by Order*
14 *dated 23 July 2015 be and are hereby discharged;*
- 15 3. *The JPLs shall be at liberty to return or destroy the Company’s*
16 *books and records collected in by them and shall not be required*
17 *to retain any liquidation file;*
- 18 4. *The Second and Third Affidavits of David Griffin referred to in the*
19 *Schedule shall stand as the JPLs report to the Court and the JPLs*
20 *shall not be required to file any further report in relation to their*
21 *conduct of the provisional liquidation;*
- 22 5. *The Petitioners shall pay to the Respondents their costs of and*
23 *occasioned by the Petition on an indemnity basis; and*
- 24 6. *The Petitioners shall pay the costs and expenses of the JPLs on a*
25 *full contractual indemnity basis pursuant to their undertaking to*
26 *the Court.”*
27



1 15. There were four main grounds upon which the Respondents argued that the Petition
2 should be struck out as being an abuse of the process of the Court. These were
3 essentially, as follows:

- 4 1. It was an abuse of process to present a petition when the Petitioners were
5 precluded from doing so under the Partnership Agreement.
- 6 2. The availability of alternative relief or remedies.
- 7 3. The lack of any tangible interest of the Petitioners in a winding up.
- 8 4. Misuse of confidential information.



9
10 16. By way of email copied to both parties, responding to Mr. Asif Q.C.'s query as to which
11 of the four grounds argued were successful after I made my decision on the 18 August, I
12 responded as follows:

13 *"The contractual agreement not to pursue winding up relief point has*
14 *succeeded. As that point has succeeded, I have not gone on at this time to*
15 *consider the other points argued."*

16
17 17. I confirm in these written reasons that this was the basis of my decision. As Mr. Lowe
18 Q.C. argued at the time of the hearing, this was a discreet legal point which could be
19 decided upon by the Court and which determined the application.

20
21 18. In the event, having reflected on the matter, and having advised myself fully, it appears to
22 me that the only point that I should address in these reasons is the point which formed the
23 basis of my decision on 18 August. Thus, whilst the other points were important and very
24 comprehensively and thoroughly argued, in my judgment it would not be appropriate to

1 address my mind to them. One highly persuasive reason is that whatever I had to say
2 would now be *obiter*. The other is that RCM have now filed a law suit, Cause
3 G151/2015, against the Reservoir entities and another, on the basis of the same or similar
4 points argued in this Striking Out Summons, in relation to the alleged misuse of
5 confidential information. I regret that time, circumstances, the nature of the applications,
6 and indeed, Counsels' own preferences, did not allow for argument to be addressed to me
7 solely on this point about the contractual agreement. I regret also that there may have
8 been some waste of time and resources in dealing with the other points. However, I am
9 fortified in my view as to the correct course that I should adopt at this stage, by a passage
10 I came across in the recent unreported judgment of the Cayman Islands Court of Appeal,
11 notably that of Chadwick P. in *Cayman Islands Tax Information Authority v. MH*
12 *Investments, JA Investments Limited*, C.I.C.A. No. 31 of 2013, judgment revised from
13 transcript and released 31 July 2015. At paragraph 39, the learned President expressed
14 sentiments, which, although made in relation to an appellate court, in my view apply just
15 as much, if not more forcefully, to a judge at first instance. Chadwick P. observed the
16 following:



21 *“39. We were invited to go on to decide a number of questions which, it is*
22 *accepted, no longer arise on this appeal; but which, it is said, may arise in*
23 *the future and on which the views of this Court would be of some value.*
24 *We declined that invitation. For my part, I declined it for two reasons.*
25 *First, I think it is dangerous for an appellate court below the level of the*
26 *final court of appeal-in this context, the Privy Council- to venture opinions*
on matters which it does not need to decide. In any future litigation about
those matters, it will be said by one party or the other that the opinions
being obiter- are not binding and carry little or no weight.....”

1 19. The JPLs were represented by Mr. Mark Goodman of the firm Campbells. On the first
2 morning of the hearing, Mr. Goodman indicated that the JPLs having filed affidavit
3 evidence to enlighten the Court as to where matters had reached and providing an update
4 as to the current state of their activities in respect of the provisional liquidation, their
5 position with regard to the application was neutral. Mr. Goodman sought, (responsibly,
6 in my view), to be released from the hearing, thereby avoiding unnecessary costs. This
7 application was granted, with Counsel agreeing to make himself available in the event
8 that the Court or the parties should require any input from the JPLs at a later stage of the
9 hearing.



10
11 **BACKGROUND**

12 20. The Amended & Restated Limited Partnership Agreement of Rhone Holdings, L.P. dated
13 4 November 2013, ("the LPA") has a number of provisions that are relevant to this issue,
14 particularly Clause 5.12. Clauses 1.5, 5.12, 12.1, 12.2, and 14.1 state as follows:

15 *"Article I, Organizational Matters*

16 *Effective Date: Term*

17 *This Agreement shall be deemed effective as of, and the Partnership shall*
18 *be deemed to have commenced its existence as of the 22nd day of March*
19 *2007 ("the Effective Date"). **The Partnership shall continue its existence***
20 ***until terminated in accordance with this Agreement.***

21 *Article V, Management and Operations*

22 *5.12 Bankruptcy. The parties agree not to cause (a) an involuntary*
23 *proceeding to be commenced or an involuntary petition to be filed*
24 *seeking (1) winding up, liquidation, dissolution, reorganization, or other*
25 *relief in respect of the Partnership or Rhone II under any bankruptcy,*
26 *insolvency, receivership or similar law of any jurisdiction now or*

1 hereafter in effect or (2) the appointment of a receiver, trustee,
2 custodian, sequestrator, liquidator, administrator, conservator, or
3 similar official for the Partnership or Rhone II, or (b) the Partnership or
4 Rhone II to (1)voluntarily commence any proceeding or file any petition
5 seeking winding up, liquidation, dissolution, reorganization or other
6 relief under any bankruptcy, insolvency, receivership or similar law of
7 any jurisdiction now or hereafter in effect,(2) consent to the institution
8 of, or fail to contest in a timely and appropriate manner, any proceeding,
9 application or petition described in clause(a) above, (3) apply for or
10 consent to the appointment of a receiver, trustee, custodian,
11 sequestrator, liquidator, administrator, conservator or similar official
12 for the Partnership or Rhone II or for a substantial part of any of its
13 assets; (4) file an answer admitting the material allegations of a petition
14 filed against it in any such proceeding, (5) make a general assignment
15 for the benefit of creditors or (6) take any action for the purpose of
16 effecting any of the foregoing.

17

18 *Article XII. Termination*

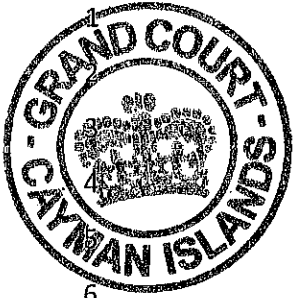
19 12.1 Termination. *This Agreement may be terminated at any time upon*
20 *the Approval of (i) the Ritchie General Partner (ii) the Reservoir*
21 *General Partner (iii)Partners holding a majority of the preferred Units*
22 *then outstanding, and (iv) Limited Partners holding a majority of the*
23 *Common Units (whether Class C Common or Class D Common Units)*
24 *(such Approval of all, the "Termination Approval").*

25 12.2 Dissolution. *If this Agreement is terminated pursuant to Section*
26 *12.1hereof, then the Partnership shall be terminated and dissolved (with*
27 *such further action as required under the law of the Cayman Islands, but*
28 *no further action of the Limited Partners) pursuant to Article XIII.*

29

30 *Article XIV. Miscellaneous*





14.11 Governing Law. The Agreement shall be governed by and construed and enforced in accordance with, the laws of the Cayman Islands save for any determination in respect of gross negligence which shall be determined in accordance with the laws of the State of New York...

Each party irrevocably submits to the non-exclusive jurisdiction of the courts of the Cayman Islands."

(My emphasis)

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7
8
9 21. A letter written by the Petitioners' Attorneys to the Ritchie GP dated 16 July 2015, was
10 exhibited to the First Affidavit of Eric Engler, Managing Director of Reservoir Capital
11 Group, L.L.C, and Director of Rhone II, filed 22 July 2015. In that letter, written on
12 behalf of the Petitioners, and stated to be with the concurrence of the Reservoir GP, a
13 demand was made of the Ritchie GP that as the other general partner of the Partnership, it
14 concur in the approval of the immediate termination of the LPA, in accordance with
15 article 12.1, and concur in the appointment of Messrs. Griffin and Morrison as
16 Liquidators. The letter warned that in the event that there was failure to comply, an
17 application would be made to wind up the Partnership without further reference to the
18 Ritchie GP.

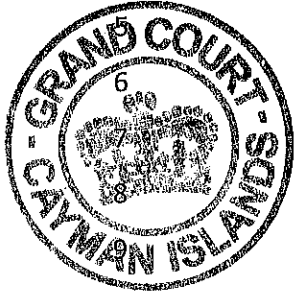
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20 22. At the *ex parte* hearing, it was argued on behalf of the Petitioners that Clause 5.12 of the
21 LPA was unenforceable. It was submitted that s.36 of the *ELPL* did not render the ability
22 to present a winding up petition subject to contrary terms in the LPA. Reference was
23 made to the Cayman Islands authorities of *TNT NV Logispring GP L.P.* [2009] CILR
24 456, a decision of the Court of Appeal, and *Re Cybernaut Growth Fund L.P.*, an
25 unreported decision of Jones J., delivered 23 July 2013.

1 23. At the *ex parte* hearing there was no reference made to, and the Court's attention was
2 regrettably not, whether of its own motion or by Counsel, drawn to s.s.95(2) of the *Law*.

3
4 24. S.95(2) of the *Law* provides:

"Powers of the Court

*95.(2) The Court shall dismiss a winding up petition 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."*



10 **THE RESPONDENTS ARGUMENTS**

11 25. Mr. Lowe Q.C. in his submissions argued that Clause 5.12 of the LPA was a bar to these
12 proceedings, that the Petition was plainly demurrable, and should be struck out. He
13 submitted that s.s.36(3) of the *ELPL* is made subject to Part V of the *Law* to the extent
14 that the provisions of Part V are not inconsistent with the *ELPL*. Further, that the *ELPL*
15 makes no reference to winding up proceedings being prohibited by agreement, and
16 therefore the matter is left to be dealt with by Part V and is dealt with by Part V, where
17 s.s.95(2) is to be found.

18
19 26. Learned Queen's Counsel further submitted that s.s.95(2) is in mandatory terms; using
20 the word "shall", and that therefore the Court must dismiss the Petition where the
21 Petitioner is contractually bound not to present it.

22
23 27. Mr. Lowe, Q.C. posited that the statutory provisions and law which contemplate that
24 Partners may contract with each other not to present a winding up petition have existed



1 for a long time. Reference was made to the English Divisional Court and Court of
2 Appeal's decisions, in *Moss v Elphick* reported respectively at [1909] 1 K.B. 465, and
[1910] 1 K.B. 846.

4

5 28. Learned Counsel argued that the reasoning in *Moss v. Elphick* applies to the instant case.
6 Reference was also made to a recent decision of the Australian Supreme Court in *Nelson*
7 *v Moorcraft* [2014] WASCA 212, where *Moss v. Elphick* was applied. It was forcefully
8 submitted that there could be no proper basis for holding that Clause 5.12 was contrary to
9 public policy. Further, that there is no proper basis for finding that s.s.95(2) is
10 inapplicable, or should be inapplicable to the instant case. Mr. Lowe opined that this legal
11 point is unanswerable.

12

13 29. A corollary to that submission was that if the Petitioners could not present a winding up
14 petition that had any prospect of success, by reason of s.s.95(2), then the Petitioners could
15 not properly make out a *prima facie* case for a winding up order as required by
16 s.s.104(2)(a). If the Petitioners do not have a *prima facie* case, the argument continued,
17 then they could not properly obtain provisional relief.

18

19 **THE PETITIONERS' ARGUMENTS**

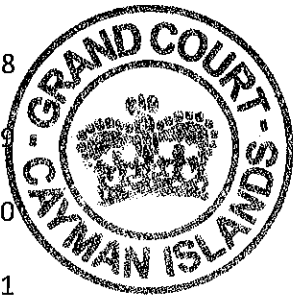
20 30. Learned Queen's Counsel Mr. Asif relied upon the submissions made at the *ex parte*
21 hearing, namely that Clause 5.12 of the LPA is unenforceable, as being contrary to public
22 policy, or at least arguably so. Mr. Asif further submitted that unless the Court is satisfied
23 that that point is not even arguable by the Petitioners, then it is a matter that must be

1 determined at the final hearing of the winding up petition, and not on a summary basis at
2 this stage.

3
4 31. Mr. Asif contended that s.s.95(2) does not in any event impact the argument that the
5 Petitioners had already addressed to the Court because:

6 (a) S.s.95(2) clearly leaves the Court with a residual discretion to order
7 winding up, even in cases where there is a purported contracting out of the
8 statutory provisions. Reference was made to the words “or adjourn” in
9 s.s.95(2) as supporting the position that the Court has a discretion to
10 consider what it is right to do in the particular circumstances of a given
11 case. Reference was also made to s.s.95(3) of the Companies Law, and it
12 was submitted that where the ground stated for winding up was the “just
13 and equitable” ground, the Court’s powers are flexible.

14 (b) On a proper construction of s.s.95(2), it is aimed at the situation where the
15 parties have put in place some alternative dispute resolution mechanism; it
16 encourages the Court to give force to that mechanism in preference to
17 Court mandated winding-up. However, the submission continued, there is
18 no contractually agreed alternative dispute mechanism in the instant case
19 and there is no alternative to a winding up ordered by the Court. It was
20 submitted further or in the alternative, that if the Court took the view that
21 s.s.95(2) did apply, then justice and fairness would point towards
22 adjourning the hearing of the Petition, to allow for alternative dispute
23 resolution.





1 (c) *Cybernaut*, to which Mr. Asif Q.C. had referred at the *ex parte* hearing,
2 was decided after s.s.95(2) came into force and therefore that Jones J.'s
3 comments at paragraph 7 of the judgment concerning public policy issues
4 remain in play.

5

6 32. No authority, as far as I can recall, was cited for the submission at (b) as to the Court's
7 powers and duties under s.s.95(2) to adjourn for dispute resolution.

8

9 33. It was submitted that *Moss v Elphick* and the case of *Nelson v Moorcraft* are not relevant
10 because the statutory provisions under consideration in those cases are not the same as
11 the provisions under consideration here in the *ELPL*, and are not the same as the winding
12 up provision in s.s.95(2).

13

14 34. It was also submitted that whereas, in certain sections of the *ELPL* the expression
15 "Subject to any express or implied term of the partnership agreement to the contrary" is
16 used, for example in s.22, s.24, s.s.32(13) and s.35, in s.s.36(3)(g) that expression is not
17 used. Therefore it was submitted, the *ELPL* has express provision giving power to the
18 Court to wind up an exempted limited partnership, which is not qualified by any
19 expression of ability of the parties to agree something different. It was therefore
20 submitted that s.s.36(3)(g) "trumps" s.s.95(2) of the *Law*. Further, that Clause 5.12 of the
21 LPA was therefore void and unenforceable.

22

1 35. Learned Queen's Counsel Mr. Asif accordingly submitted that the Court should dismiss
2 the Summons taken out by the Respondents and allow the Petition to proceed.

3
4 **PRELIMINARY CONSIDERATION WHETHER POINT TO BE RESOLVED AT THIS**
5 **HEARING OR AT HEARING OF THE PETITION**
6

7 36. The overriding objective of the Court, as set out in the Preamble to the *Grand Court*
8 *Rules 1995* ("the GCR"), and in the recently issued (August 2015) Second Edition of the
9 Financial Services Division Guide ("the Guide") is to deal with cases justly,
10 expeditiously, and in an economical way. In that regard, in furthering the overriding
11 objective the Court is mandated to actively manage proceedings. This includes
12 identifying the issues at an early stage, and deciding promptly which issues need full
13 investigation and trial and which issues can be disposed of summarily - see A4., s.s.4.2(a)
14 and (b) of the Guide and s.s.4.2(a) and (b) of the Preamble to the GCR.

15
16 37. In my judgment, contrary to the submission of learned Counsel Mr. Asif, it would not be
17 a proper exercise of the Court's case management powers to delay dealing with the
18 subject legal issue now, given the alleged consequences of the effect of the Petition and
19 the Order. Further, full, comprehensive argument and submissions were deployed by both
20 sides in respect of what is really a discreet legal point. The hearing took place for two full
21 days hearing in August. That this issue should properly be resolved at an early, rather
22 than later, stage in the proceedings was made even more imperative and clear as this case
23 concerns winding up proceedings, in the Financial Services Division of the Court. It is
24 for these reasons that I made my ruling on 18 August 2015.



1 **RELEVANT STATUTORY PROVISIONS**

2 38. For ease of understanding and reference and to put the submissions in context, I now set
3 out the main statutory provisions of the *ELPL*, and the *Law* that are relevant to this issue.
4 I also set out provisions of the *Partnership Law (2013 Revision)* (“the *Partnership Law*”),
5 which neither side referred to in any detail, or at all, but which are in my view, very
6 relevant.

7
8 39. S.3, s.s.4(1) and (2), s.35, and s.s.36(1)-(4), and (13) of the *ELPL* provide as follows:

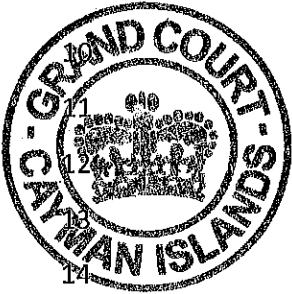
9 *“Saving of Rules of Equity and common law*

10 *3. The rules of equity and of common law applicable to partnerships as*
11 *modified by the Partnership Law but excluding sections 31, 45 to 54 and*
12 *56 to 57 shall apply to an exempted limited partnership, except where*
13 *they are inconsistent with the express provisions of this Law.*

14 *Constitution*

15 *4. (1) An exempted limited partnership may be formed for any lawful*
16 *purpose to be carried out and undertaken either in or from within the*
17 *Islands or elsewhere upon the terms, with the rights and powers, and*
18 *subject to the conditions, limitations, restrictions and liabilities mentioned*
19 *in this Law but an exempted limited partnership shall not undertake*
20 *business with the public in the Islands other than so far as may be*
21 *necessary for the carrying on of the business of that exempted limited*
22 *partnership exterior to the Islands.*

23 *(2) An exempted limited partnership shall consist of one or more persons*
24 *called general partners who shall, in the event that the assets of the*
25 *exempted limited partnership are inadequate, be liable for all debts and*
26 *obligations of the exempted limited partnership, and one or more persons*
27 *called limited partners, who shall not be liable for the debts or obligations*
28 *of the exempted limited partnership save as provided in the partnership*



1 *agreement and to the extent specified in sections 20(1) and 34(1), but a*
2 *general partner, without derogation from his position as such, may, in*
3 *addition, take an interest as a limited partner in the exempted limited*
4 *partnership.*

5

6 *Manner in which partnership may not be dissolved*

7 **35. Subject to any express or implied term of the partnership agreement**
8 **to the contrary-**

9 *(a) an exempted limited partnership shall not be dissolved nor the*
10 *partnership agreement terminated by-*

11 *(i) changes in, additions to or substitutions of any one or*
12 *more of the partners;*

13 *(ii) the transfer of the whole or part of the partnership*
14 *interest of a limited partner;*

15 *(iii) the death, bankruptcy, dissolution, removal,*
16 *withdrawal or winding up of a limited partner, or a limited*
17 *partner's withdrawal or redemption of, or repurchase by*
18 *the partnership of, any limited partnership interest;*

19 *(iv) the incapacity of a limited partner;*

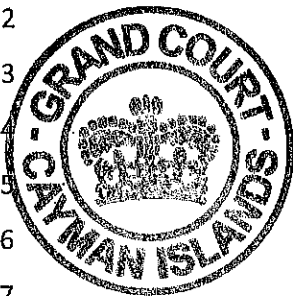
20 *(v) any one or more of the limited partners granting a*
21 *mortgage, charge or other form of security interest over the*
22 *whole or part of his partnership interest;*

23 *(vi) the sale, exchange, lease, mortgage, pledge or other*
24 *transfer of any of the assets of the exempted limited*
25 *partnership; or*

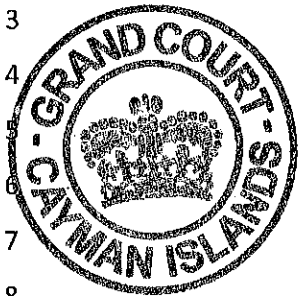
26 *(vii) a de-registration of the exempted limited partnership*
27 *pursuant to section 41 or 43; and*

28 ***(b) a limited partner shall not be entitled to wind up and dissolve***
29 ***the partnership by notice.***

30 *Dissolution*



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36. (1) *An exempted limited partnership shall be voluntarily wound up in accordance with the provisions of the partnership agreement-*

(a) at the time or on the occurrence of any event specified in the partnership agreement;

or

(b) unless otherwise specified in the partnership agreement, upon the passing of a resolution of all the general partners and a two-thirds majority of limited partners.

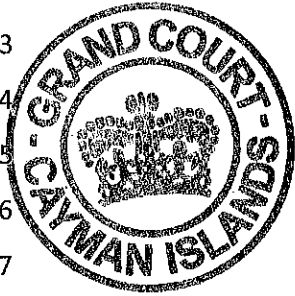
(2) Upon the completion of the winding up of an exempted limited partnership, the general partner or other person appointed as liquidator in accordance with the provisions of subsection (12) shall file a notice of dissolution with the Registrar and subject to section 37, an exempted limited partnership shall not be dissolved by an act of the partners or otherwise until a notice of dissolution signed by a general partner or liquidator has been filed with the Registrar.

(3) Except to the extent that the provisions are not consistent with this 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;

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(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 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 11th 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 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.

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

.....



1 (13) *Following the commencement of the winding up of an exempted*
2 *limited partnership its affairs shall be wound up by the general partner or*
3 *other person appointed pursuant to the partnership agreement unless the*
4 *court otherwise orders on the application of any partner, creditor or*
5 *liquidator of the exempted limited partnership pursuant to subsection*
6 *(3)(g)."*

7 (My emphasis)

8
9 40. The relevant sections of the *Law* that call for consideration are, the definition section,
10 s.89, s.92, and s.s.95(1)-(3). These sections and sub-sections provide as follows:

11 ***"Part V-Winding up of Companies and Associations***

12 ***Introductory***

13 ***Definitions***

14 89. *In this Part-*

15

16 *"limited partnership" means an ordinary limited partnership registered in*
17 *accordance with section 49 of the Partnership Law(2013 Revision) or an*
18 *exempted limited partnership registered in accordance with Section 9 of*
19 *the Exempted Limited Partnership Law (2013 Revision)*

20

21 ***Winding up by the Court***

22 ***Circumstances in which a company may be wound up by the Court***

23 92. *A company may be wound up by the Court if-*

24 (a) *the company has passed a special resolution requiring the*
25 *company to be wound up by the Court;*

26 (b) *the company does not commence its business within a year from*
27 *its incorporation, or suspends its business for a whole year;*

28 (c) *the period, if any, fixed for the duration of the company by the*
29 *articles of association expires, or whenever the event, if any, occurs,*



1 upon the occurrence of which it is provided by the articles of
2 association that the company is to be wound up;

3 (d) the company is unable to pay its debts; or

4 (e) the Court is of the opinion that it is just and equitable that the
5 company should be wound up.

6

7 ***Powers of the Court***

8 ***95(1) Upon hearing the winding up petition the Court may-***

9 (a) *dismiss the petition;*

10 (b) *adjourn the hearing conditionally or unconditionally;*

11 (c) *make a provisional order; or*

12 (d) *any other order that it thinks fit,*

13 *but the Court shall not refuse to make a winding up order on the*
14 *ground only that the company's assets have been mortgaged or*
15 *charged to an amount equal to or in excess of those assets or that*
16 *the company has no assets.*

17 (2) *The Court shall dismiss a winding up petition or adjourn the*
18 *hearing of a winding up petition on the ground that the petitioner*
19 *is contractually bound not to present a petition against the*
20 *company.*

21 (3) *If the petition is presented by members of the company as*
22 *contributories on the ground that it is just and equitable that the*
23 *company should be wound up, the Court shall have jurisdiction to*
24 *make the following orders, as an alternative to a winding up order ,*
25 *namely-*

26 (a) *an order regulating the conduct of the company's affairs in*
27 *the future;*

28 (b) *an order requiring the company to refrain from doing or*
29 *continuing an act complained of by the petitioner or to do an*
30 *act which the petitioner has complained it has omitted to do;*



1 (c) *an order authorising civil proceedings to be brought in the*
2 *name and on behalf of the company by the petitioner on such*
3 *terms as the Court may direct; or*

4 (d) *an order providing for the purchase of the shares of any*
5 *members of the company by other members or by the*
6 *company itself and, in the case of a purchase by the company*
7 *itself, a reduction of the company's capital accordingly."*

8 (My emphasis)
9

10 41. S.s.35(b) of the ELPL indicates that, subject to any express or implied term of the
11 partnership agreement to the contrary, a limited partner shall not be entitled to wind up
12 and dissolve the partnership by notice. However, as I understand s.3 of the ELPL, insofar
13 as s.s.26(1) and s.32 and s.58 of the Partnership Law are not inconsistent with the express
14 provisions of the ELPL, they apply to exempted limited partnerships. Therefore, in my
15 judgment, the principles set out in s.s.26(1) and s.s.32(c), which concern determination
16 and dissolution of a partnership by notice, continue to apply to general partners, although
17 not to limited partners, of an exempted limited partnership. Those sections of the
18 *Partnership Law* provide as follows:

19 *Retirement from Partnership at will*

20 *26.(1) Where no fixed term has been agreed upon for the duration of the*
21 *partnership, any partner may determine the partnership at any time on*
22 *giving notice of his intention so to do to all the other partners.*

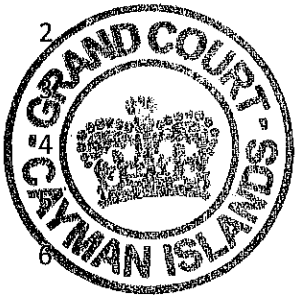
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25 *Dissolution by expiration or notice*

26 *32. Subject to any agreement between the partners, a partnership is*
27 *dissolved-*

28 (a) *if entered for a fixed term, by the expiration of that term;*



1 (b) if entered into for a single adventure or undertaking, by the
2 termination of that adventure or undertaking; or

3 (c) if entered into for an undefined time, by any partner giving
4 notice to the other or others of his intention to dissolve the
5 partnership:

6 *Provided that in this case the partnership is dissolved as from*
7 *the date mentioned in the notice as the date of dissolution, or, if*
8 *no date is mentioned, as from the date of the communication of*
9 *the notice.*

10

11 *Saving for rules of equity and common law*

12 58. *The rules of equity and of common law applicable to partnerships*
13 *shall continue in force, except so far as they are inconsistent with the*
14 *express provisions of this Law."*

15 (My emphasis)

17 DISCUSSION AND ANALYSIS

18 42. I turn now to an examination of the cases cited. In the instant case, it is not in dispute that
19 the Petitioners had contracted not to present a winding up petition. It is to be noted that
20 s.s.26(1) and s.s.32(c) of the English Partnership Act, 1890, quoted in the reports of *Moss*
21 *v Elphick* appear to be *in pari materia* to the similarly numbered sections of the
22 *Partnership Law*.

23
24 43. In *Moss v Elphick*, an agreement of partnership had been entered into by two persons for
25 the carrying on of a tobacconist's business in Brighton, England. The agreement provided
26 that the partnership should be terminated "by mutual arrangement only". On 2 March
27 1909, the plaintiff gave the defendant a fortnight's notice in writing of his intention to

1 terminate the partnership. The defendant contended that the notice was inoperative upon
2 the ground that by clause 4 of the agreement, the partnership could only be determined by
3 mutual consent. The plaintiff thereupon commenced an action in the county court,
4 claiming, amongst other relief, the appointment of a receiver and manager of the
5 partnership business and that the affairs of the partnership be wound up by the Court. The
6 county court judge gave judgment for the defendant upon the ground that the partnership
7 could only be determined by the parties by mutual consent.

8
9 44. The plaintiff's appeal firstly, to the Divisional Court, and subsequently, to the Court of
10 Appeal were both dismissed. In the Divisional Court ([1909] 1 K.B.465), Darling J., at
11 page 468, stated:

12 *"Section 32, however, enacts that its provisions are to apply "subject to*
13 *any agreement between the partners" The agreement between the plaintiff*
14 *and the defendant provides that it shall be terminated by mutual*
15 *arrangement only. That being so, I think that there is an agreement*
16 *between the parties that the partnership can only be terminated in the way*
17 *specified, and that consequently, by s. 32 it cannot be terminated by one of*
18 *the partners giving notice of his intention so to do. I therefore think that*
19 *the county court judge came to a right conclusion and that this appeal*
20 *should be dismissed."*

21
22 45. Pickford J., at pages 468-469 stated:

23 *"I agree. I find it extremely difficult to reconcile the two sections of the*
24 *Partnership Act, 1890. Section 26 is quite unqualified in its terms, whilst*
25 *s.32 is qualified by the words "subject to any agreement between the*
26 *partners" at the beginning of the section. Where there are two sections*
27 *dealing with the same subject matter, one section being unqualified and*

1 the other containing a qualification, effect must be given to the section
2 containing the qualification.”

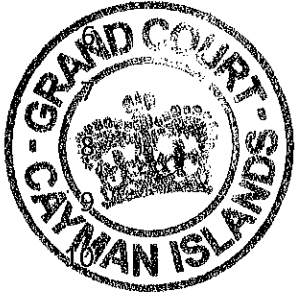
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4 46. In the Court of Appeal’s judgment, [1910] 1 K.B. 846, at page 847, Vaughan Williams
5 L.J. makes the following insightful observation:

6 *“The arguments of the plaintiff’s counsel have not convinced me that it*
7 *was the intention of the Act that persons becoming partners should not be*
8 *able, if they wished, to provide in the agreement of partnership that the*
9 *partnership should not be at will, but should be determinable only by*
10 *mutual agreement. In a case like the present, where a considerable sum*
11 *has been paid by one of the partners on entering into the partnership, I*
12 *cannot think that it would be in the contemplation of the parties that the*
13 *partnership should be determinable at any time by a mere notice given by*
14 *one of the partners, and it was obviously reasonable that the agreement*
15 *should be on the terms expressed in clause 4, which provides that “this*
16 *agreement shall be terminated by mutual arrangement only.it is*
17 *impossible to come to the conclusion that it was intended by the Act to*
18 *forbid persons entering into partnership from making such a stipulation as*
19 *that contained in clause 4 of the agreement in this case. I think that the*
20 *judgment of the Divisional Court was right and must be affirmed.*

21 (My emphasis)

22
23 47. So too the analysis conducted by Fletcher Moulton L.J. (pages 848-849) and Farwell L.J.
24 (page 849) is lucid and provides guidance as follows:

25 *“Fletcher Moulton L.J. I am of the same opinion. I do not think that it was*
26 *intended by the Partnership Act, 1890, to limit the power of persons to*
27 *enter into an agreement of partnership upon such terms with regard to the*
28 *duration of the partnership as they might think fit. The Act was intended to*
29 *deal partly with matters of procedure, and partly with the implications*
30 *that arise from the relation of partners as regards the ordinary incidents*



1 of partnership business....It is argued that this provision [sub-section
2 26(1)] refers to all cases in which a definite period of time has not been
3 fixed by the agreement of partnership for the duration of the partnership.
4 That does not appear to me to be the true meaning of the sub-section. I
5 think that it refers only to cases where the partnership agreement is silent
as to the duration of the partnership; that it is not meant to nullify any
provision which the parties have chosen to make as to the duration of the
partnership, but only to take effect where they have made no such
provision at all. In this case it is provided that "this agreement shall be
terminated by mutual arrangement only"; or, in other words, that the
partnership shall, in effect, be for the joint lives of the parties, unless
terminated by mutual agreement. There is, therefore, a specific provision
as to the duration of the partnership in the partnership agreement; and it
is in that sense a partnership for a fixed, i.e. defined term, and
consequently, in my opinion, s.26, sub-s 1, does not apply to the case;..."

11 ...
12 Farwell L.J.The construction of the Act contended for by the Plaintiff's
13 counsel involves the conclusion that the insertion of a bargain to
14 determine a partnership by mutual agreement only is forbidden-a
15 conclusion so extravagant that nothing short of express unambiguous
16 words would induce me to adopt it. In my opinion, s. 26, subs-1, applies to
17 partnerships at will only. I agree with the statement contained in Lindley
18 on Partnership, 7th ed., p. 142, where, after quoting sub-s 1, of the
19 Partnership Act, 1890, the learned author says" In other words, the result
20 of a contract of partnership is a partnership at will, unless some
21 agreement to the contrary can be proved."

22 (My emphasis)
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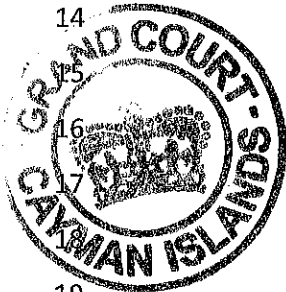
1 48. As Mr. Lowe Q.C. argued, the English Court of Appeal's decision in *Moss v Elphick* has
2 been applied quite recently by the Supreme Court of Australia in *Nelson v Moorcraft*
3 [2014] WASCA 212 - see paragraphs [90]-[98] (inclusive).

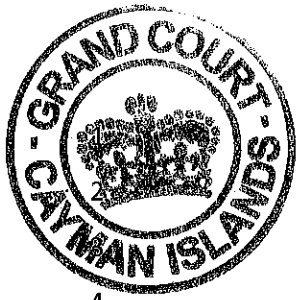
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5 49. I now turn to examine the two cases cited by Mr. Asif Q.C. at the *ex parte* hearing and
6 which he also relied upon at this *inter partes* hearing; *TNT NV v Logispring* and
7 *Cybernaut*. In both cases there are references to the question of partners having power to
8 contract out of the *ELPL*. However, I agree with Mr. Lowe Q.C. that in both the point
9 was not decided upon.

10
11 50. In *TNT NV v Logispring* Vos J.A., in delivering the Judgment of the Court of Appeal, at
12 paragraphs 26 and 27 stated:

13 “26. First, if the parties had intended to exclude the statutory power of the
14 court to appoint a liquidator on the application of a partner- assuming in
15 the present context that that course was open to them as a matter of law- it
16 is difficult to accept that they would have sought to have done so by a
17 proviso which purports to be neither exclusionary nor exhaustive....”

18 27. The parties must be presumed to have known that the *ELPL* included s.
19 7.5 and to have known that s. 7.5 allowed for an application by a partner.
20 Had the parties intended to exclude the statutory right of a partner to
21 apply to appoint a liquidator, they would, as it seems to us, have wanted to
22 make it clear that, so far from being “pursuant” to s. 7.5, the proviso was
23 specifically excluding part of that section. They could have been expected
24 to have used the words “notwithstanding the *ELPL*,” rather than
25 “pursuant to the [*ELPL*].” And they could have been expected to include
26 the word “only” in the proviso to make it clear that only a creditor could





apply for the appointment of a liquidator, if it were their intention that a partner was not to be permitted to do so.”

(My emphasis)

4

5 51. In *Cybernaut* at paragraph 4 of his judgment, Jones J. quoted paragraph 27 of *TNT NV v*
6 *Logispring* and stated that that analysis applied equally to the case before him. At
7 paragraph 5 Jones J. stated:

8 “5. Having reached the conclusion that the parties to the LPA have not
9 contracted out of the provision of sections 7(5) and 15 of the Law, it is not
10 necessary for me to determine whether it is possible as a matter of law, to
11 do so. This point was left open by the Court of Appeal in the TNT case and
12 I shall not address it.

(My emphasis)

14

15 52. I agree with Mr. Lowe Q.C. that *TNT NV v Logispring* is a case that was heard and
16 decided before s.s.95(2) came into force and that, in any event, the provisions and facts
17 were materially different from those being considered here. Further, I agree that Jones J.
18 in *Cybernaut* had for consideration a very differently worded clause than Clause 5.12 of
19 the LPA. Jones J. made it plain that since he had decided that the parties had not
20 contracted out of the *ELPL* and out of their statutory right to present a winding up
21 petition, it was not necessary for him to consider whether partners could do so as a matter
22 of law. In any event, there is nothing to suggest that s.s.95(2) was brought to the attention
23 of Jones J., and indeed, nor would he have had to consider it since he had decided that the
24 clause before him did not amount to a contracting out of rights. Jones J. was also
25 considering a differently worded, earlier Revision of the *ELPL*.

26

1 53. In my judgment, it is patently clear that the ability of Partners to agree that the
2 Partnership should be determinable only by mutual agreement does have a long history at
3 common law. That position has survived both in the *Partnership Law* and in the *ELPL*
4 and applies to all the Partners in an exempted limited partnership. It would seem to me
5 that if Partners can agree that the Partnership only be determinable by mutual agreement,
6 they can also agree not to present a winding up Petition, and not to do any of the other
7 matters set out in Clause 5.12 of the LPA. There is nothing in s.s.95(2) of the *Law* that is
8 inconsistent with the *ELPL* and there is no express provision in the *ELPL* that would
9 make s.s.95(2), (which falls squarely within Part V) of the *Law*, inapplicable. Indeed, the
10 contents of s.s.95(2) are entirely consistent with the reasoning in *Moss v Elphick*.

11
12 54. There is no public policy principle that Clause 5.12 offends, quite the contrary. Indeed, in
13 *Moss v. Elphick* the Courts discussed a number of reasons why it is in keeping with
14 public policy that partners be allowed to enter into such agreement as to the duration of
15 the partnership as they think fit. Vaughan Williams L.J. has even given a commercial
16 rationalisation for why it is conceivable, even likely, that partners may want to agree that
17 one partner could not terminate without the agreement of the other partner or partners.
18 This would be the situation where a partner (as is said by the Respondents to be the case
19 here - see for example paragraphs 8 and 17(f) of the First Affidavit of A.R. Thane
20 Ritchie, filed 5 August 2015), has spent considerable sums in entering into the
21 partnership. The learned Appeal Judge opined that in those circumstances it would be
22 understandable if it was not in the partners' contemplation for one partner to merely



1 decide on his own motion to terminate or apply to wind up. In any event, I agree with Mr.
2 Lowe, Q.C. that public policy could not override the clear statutory provision of s.s.95(2).

3
4 55. Further, I agree that s.s.95(2) is in mandatory terms, and that in the instant case and
5 present circumstances there would be no proper basis upon which to adjourn the Petition.
6 I am persuaded by Mr. Lowe's submission that the Court would only adjourn a petition
7 presented by a party who is contractually bound not to present one, if there is some useful
8 purpose to be served. For example, if there was a creditor with an interest in having the
9 company wound up and who has not so contractually bound himself not to present a
10 petition, who could be substituted as the petitioner. In *In re Chesterfield Catering Co*
11 *Ltd* [1975] 1 Ch. 373, cited by the Respondents, Oliver J. held that the petitioner had no
12 *locus standi* to petition for the winding up of the company because he could not establish
13 that as a member of the company he stood to gain some advantage or to reduce some
14 disadvantage accruing to him by virtue of his membership in the company, as opposed to
15 some other personal advantage or interest. Oliver J., in the interests of saving time and
16 costs in respect of a company that he indicated would in all probability ultimately be
17 wound up in any event, stood the petition over for a short period to allow for a creditor to
18 be substituted as petitioner. A winding up order was subsequently made on the petition in
19 respect of which the substitution was made - see page 382 of the judgment. However, I
20 agree with the Respondents that the facts and circumstances in this case are completely
21 different and do not at all merit adjournment of the hearing of the Petition.



1 56. I disagree with Mr. Asif Q.C.'s submission that the Court has a discretion, because the
2 Petition is presented on the just and equitable ground, to go on and hear the Petition and
3 to make the orders set out at s.s.95(3). The section states quite clearly that the Court can
4 only make those orders as an alternative to making a winding up order. This suggests to
5 me that the Court would have to have the power to make a winding up order in the first
6 place. In my judgment, the word "shall" in s.s.95(2) provides for a mandatory meaning.
7 Once the Court finds that the Petitioner is contractually bound not to present a petition,
8 then save for the type of circumstance such as the existence of an interested creditor who
9 wishes to be substituted, then the Petition must be dismissed. It would otherwise be an
10 exercise in futility to simply adjourn the Petition rather than striking it out.

11
12 57. It was for these reasons that I made the decision and order striking out the Petition.

13
14 58. In the circumstances, having struck out the Petition as being an abuse of the process of
15 the Court, I acceded to the Respondents' application that costs be awarded against the
16 Petitioners on the indemnity basis, such costs having been incurred unnecessarily.

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21 
22 THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT

