IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 22 OF 2024 (IKJ)

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP ACT (2021 REVISION)

AND IN THE MATTER OF ONE THOUSAND & ONE VOICES AFRICA FUND I, L.P. (IN VOLUNTARY LIQUIDATION)

BETWEEN:

AFRICA INVESTMENTS, LLC

Petitioner

-and-

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

Respondent

IN COURT

Before: The Hon. Justice Kawaley

Appearances: Mr David Allison KC of Counsel with Mr Rupert Bell, Ms Siobhan Sheridan and Mr Sam Hall of Walkers (Cayman) LLP, for the Petitioner

Mr Phillip Marshall KC of Counsel with Mr Ben Hobden and Ms Rhiannon Zanetic of Harneys (Cayman) LLP, for the Respondent

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RULING ON JURISDICTION

Introductory

1. This jurisdictional Ruling raises a point of statutory construction which has not previously received the benefit of any argument in a comparable factual context. The Respondent, the general partner ("GP") of One Thousand & One Voices Africa Fund I, L.P. (the "ELP") contends that this Court has no jurisdiction under section 36(13) of the Exempted Limited Partnership Act (2021 Revision) (the "Act") to appoint alternative liquidators contrary to the express terms of the applicable Limited Partnership Agreement ("LPA"). That is the primary relief sought by the Petitioner, a limited partner supported by other limited partners with an aggregate stake of approximately 97% in the ELP, by its Petition presented on 25 January 2024.

2. My provisional view, having read the written arguments and heard Mr Allison KC orally in opening was that the point raised by the Respondent was not only unappetising but indigestible. By the conclusion of Mr Marshall KC's oral submissions, however, the statutory construction dispute turned out to be quite "a dainty dish" to set before the Court.

Section 36 of the Act: preliminary view

3. Section 36 of the Act provides as follows:

> "***Dissolution***
> *36. (1) An exempted limited partnership shall be voluntarily wound up in accordance with the provisions of the partnership agreement —*
>
> *(a) at the time or upon the occurrence of any event specified in the partnership agreement; or*
> *(b) unless otherwise specified in the partnership agreement, upon the passing of a resolution of all the general partners and a two-thirds majority of limited partners.*
>
> *(2) Upon the completion of the winding up of an exempted limited partnership, the general partner or other person appointed as liquidator in accordance with the provisions of subsection (12) shall file a notice of dissolution with the Registrar and subject to section 37, an exempted limited partnership shall not be dissolved by an act of the partners or otherwise until a notice of dissolution signed by a general partner or liquidator has been filed with the Registrar.*
>
> *(3) Except to the extent that the provisions are not consistent with this Act, and in the event of any inconsistencies, this Act shall prevail, and subject to any express provisions of this Act to the contrary, the provisions of Part V of the Companies Act (2021 Revision) and the Companies Winding Up Rules, 2018 shall apply to the winding up of an exempted limited partnership and for this purpose —*
>
> *(a) references in Part V to a company shall include references to an exempted limited partnership;*
> *(b) the limited partners shall be treated as if they were shareholders of a company and references to contributories in Part V shall be construed accordingly, except that the application of the provisions shall not cause a limited partner to be subject to any greater liability than that limited partner would otherwise bear under this Act, but for the application of this paragraph;*
> *(c) references in Part V to a director or officer of a company shall include references to the general partner of an exempted limited partnership;*
> *(d) except for sections 123, excluding subsection (1)(b) and (c), 129, 140, 145, and 147 of the Companies Act (2021 Revision), Part V shall not apply to a voluntary dissolution and winding up under subsection (1);*
> *(e) in the case of a voluntary winding-up of an exempted limited partnership under subsection (1) where the partnership was registered under section 9 prior to 11th May 2009, the necessary time period for compliance with the requirements of section 123 (1) of the Companies Act (2021 Revision) shall be at least twenty-eight days prior to the final distribution of the assets of the exempted limited partnership to partners rather than within twenty-eight days of the commencement of its voluntary winding-up;*

(f) the Insolvency Rules Committee established pursuant to the Companies Act (2021 Revision) shall have the power to make rules and prescribe forms for the purpose of giving effect to this section or its interpretation; and

(g) on application by a partner, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable.

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

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

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

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

(a) the death];
(b) the commencement of liquidation, bankruptcy or dissolution proceedings; or
(c) the withdrawal, removal or making of a winding up or dissolution order,
in relation to the sole or last remaining qualifying general partner and in this section each event is referred to an 'event of withdrawal'.

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

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

(10) The winding up of an exempted limited partnership shall be deemed to commence upon the earlier to occur of any of the following —

(a) the passing of a resolution for winding up;
(b) subject to subsection (9), the automatic wind up date;
(c) the expiry of the period fixed for the duration of the exempted limited partnership by the partnership agreement;

> *(d) the occurrence of an event provided by the partnership agreement upon which the exempted limited partnership is to be wound up; or*
> *(e) where a winding up order has been made, the presentation of the petition for winding up.*
>
> *(11) In the event that an exempted limited partnership is required to be wound up in accordance with the provisions of subsection (9) then the date of commencement of winding up shall be the date falling ninety days after the service of notice of an event of withdrawal.*
>
> *(12) If a majority of limited partners specified in the partnership agreement as being entitled to vote to elect a new general partner in accordance with the terms of the partnership agreement elects one or more new qualifying general partners by the automatic winding up date —*
>
> *(a) the exempted limited partnership shall not be required to be wound up and dissolved; and*
> *(b) the business of the exempted limited partnership may be resumed and continued as provided for in the partnership agreement or any subsequent agreement.*
>
> *(13) Following the commencement of the winding up of an exempted limited partnership its affairs shall be wound up by the general partner or other person appointed pursuant to the partnership agreement unless the court otherwise orders on the application of any partner, creditor or liquidator of the exempted limited partnership pursuant to subsection (3)(g).*" [Emphasis added]

4. A straightforward reading of the emphasised provisions of section 36(1) and (13) of the Act suggest the following. Subsection (1) firstly provides:

   (a) that a voluntary winding-up takes place in accordance with the partnership agreement;

   (b) that a voluntary winding-up commences at such times and upon the occurrence of such events as have been agreed; and

   (c) that if the agreement is silent, a voluntary liquidation shall commence upon the resolution of all general partners and a two-thirds majority of limited partners.

5. Subsection (13) secondly provides that after a (voluntary) winding-up commences, the winding-up shall be conducted by the general partner or such other person as has been agreed, unless the Court otherwise orders. It seems obvious that this subsection applies to voluntary windings-up, because an official liquidation by virtue of Part V of the Companies Act (applied pursuant to section 36(3)

of the Act) would have to be conducted by official liquidators. Accordingly, the subsection appears to empower the Court to appoint an alternative to the general partner or other (contractually prescribed) liquidator on the application of a partner, creditor or liquidator.

6. This preliminary view is consistent with two previous decisions of this Court where the thesis advanced by the Respondent in the present case was not considered. In *XiO Diamond LP* [2020 (2) CILR 270, where a winding-up order was eventually granted on an unopposed basis, I observed:

> "*25.The general rule created by section 36(13) logically applies in all instances when a voluntary winding-up has commenced on a date specified in any of subsections (a) to (d) of section 36(10). Where no voluntary winding-up has commenced independently of the making of a winding-up order, it is not easy to see how the question of appointing someone in place of the general partner arises…*"

7. In *Malaysia Capital Management Berhad-v-ECM Straits Fund I LP et al,* FSD 230 of 2022 (RPJ), Judgment dated 20 December 2022 (unreported), Parker J granted the application of a limited partner to appoint liquidators in place of the general partner which had been struck-off the register and was unable to act. The application under section 36 (13) as read with section 36 (3) (g) was unopposed, but the Court clearly had the benefit of careful argument including reference to the general legislative purpose of section 36 based on extracts from Hansard. Justice Parker (at paragraph 36) accepted the following submission as to the legislative purpose of section 36 (13):

> "*(a) there is a clear need for a mechanism for a voluntary liquidation to be brought under the supervision of the Court in cases where it is discovered that there is a need for independent, qualified Court-appointed liquidators to take control (such as in cases of insolvency, malfeasance, or where it is otherwise more effective or efficient);…*"

8. It was against this background that my starting assumption was that the Petitioner's case on jurisdiction appeared to be irresistible.

Section 36: Merits of the Respondent's proposed construction

Preliminary

9. The Respondent's jurisdictional challenge was erected on the following key foundations:

(a) the amendments to the Act introduced in 2014 were intended, with a view to making Cayman Islands exempted limited partnerships more attractive, to elevate the status of limited partnership agreements to make the parties' commercial bargain "King";

(b) section 361) mandated the application of the liquidation provisions of the LPA;

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

(d) if section 36(13) applied to voluntary liquidations at all, it only applied to fill gaps, e.g. (1) where the limited partnership agreement was silent as to the identity of the voluntary liquidator, and/or (2) where the contractually agreed mechanism was not available.

10. Section 13.2 (a) of the LPA provided in salient part as follows:

"*Upon the winding up of the Partnership, the Liquidating Agent shall proceed, subject to the provisions of this ARTICLE XIII, to liquidate the assets of the Partnership, and the Liquidating Agent shall apply the proceeds of such liquidation, or in its sole discretion distribute the Partnership assets, in the following order of priority:*

(i) First, to creditors in satisfaction of debts and liabilities of the Partnership …

(ii) Second, to the Partners in satisfaction of any loans or advances that may have been made by any of the Partners to the Partnership …

(iii) Third, to the Partners as soon as practicable in accordance with the positive balances of the Partners' Capital Accounts, as determined after taking into account all adjustments to Capital Accounts for the Partnership taxable year during which the liquidation occurs …".

The Act's general purpose

11. I find Mr Marshall KC was entitled to rely on the legislative history of the amendments to the Act of which section 36 formed part with a view to providing general context for ascertaining the purpose of the enactments. He made no attempt to ascertain the meaning of specific words by reference to statements made by the promotors of the relevant Bill. Mr Allison KC objected that the *Pepper-v-Hart* [1993] AC 593 requirements were not met. But Parker J took into account a more pertinent part of the legislative history of section 36 itself without feeling constrained by the requirements of *Pepper-v-Hart* in *ECM Straits Fund I LP*, upon which the Petitioner heavily relied. Those constraints do not apply to attempts to elucidate the mischief or broad policy purpose behind new enactments. It is today well settled that it is "*permissible as a first step to look at Hansard to try to identify the mischief at which the amendment …was aimed and its objective setting*": *The Presidential Insurance Company Limited (Appellants) v Resha St. Hill* [2012] UKPC 33.

12. The legislative history referred to by the Respondent's counsel and considered by Parker J in *ECM Straits Fund I LP* is not in my judgment of very great assistance. Judicial notice can be taken of the fact that amendments to legislation regulating investment vehicles designed for international investors are enacted to respond to market needs subject to appropriate safeguards against potential commercial abuse.

13. The extent to which the Act now provides that the parties' agreement is "King" can only sensibly be assessed by reference to its terms. After all, as Mr Allison KC rightly pointed out, the drafting approach adopted is to explicitly spell out which legislative provisions are or are not "trumped" by the terms of the limited partnership agreement.

Does section 36(1) mandate the application of the terms of a limited partnership agreement to a voluntary winding-up?

14. It was essentially argued that section 36(1) mandates that a voluntary winding-up should be conducted in accordance with the applicable terms of the limited partnership agreement. Reliance was placed on little more than very general support from the legislative history for the broad proposition that a policy of deference to the parties' bargain underlay the statutory provisions. This lynchpin argument was a beguiling one, but in my judgment it does not justify overriding a more straightforward meaning derived from the natural and ordinary meaning of the relevant words in their wider statutory context.

15. Section 36(1) of the Act must be read most significantly in the context of section 36 as a whole. In my judgment subsection (1) is more sensibly understood as providing as follows:

(a) Firstly, where a limited partnership agreement provides for a voluntary winding-up, it shall commence when the events prescribed by the agreement or by the subsection (in default of agreement); and

(b) Secondly, subject to the rest of section 36 itself, a voluntary liquidation shall be conducted in the contractually agreed manner.

16. It is inconsistent with the elementary canons of statutory construction to read subsection (1) in a de-contextualised manner, divorced from its wider legislative context. Such an approach would only be justified if it contained terms such as 'notwithstanding any other provision in this section/Act'. Moreover, it is clear that the following subsections explicitly or implicitly apply to voluntary liquidations commenced under subsection (1) and are superimposed over the regime set out in the partnership agreement:

(a) subsection (2) imposes a regulatory filing obligation in relation to dissolution, which implicitly applies to liquidations commenced and conducted pursuant to subsection (1);

(b) subsection (3) explicitly and implicitly applies to voluntary liquidations commenced pursuant to subsection (1) by extending certain aspects of Part V of the Companies Act to voluntary liquidations and providing a jurisdictional gateway for commencing

winding-up proceedings by the Court in relation to exempted limited partnerships under other provisions of Part V of the Companies Act by analogy with the company winding-up regime;

(c) subsection (4) preserves the enforcement rights of secured creditors in relation to voluntary liquidations;

(d) subsections (5)-(8) impose regulatory filing-type requirements which implicitly apply to voluntary liquidations commenced and continued under subsection (1); and

(e) subsection (10) explicitly makes provision for the winding-up commencement date of, *inter alia*, voluntary liquidations commenced by an event prescribed by subsection (1).

17. Accordingly, section 36(1) must be read in the context of the section as a whole and cannot sensibly be understood as imposing an unqualified requirement to wind-up voluntarily in accordance with the terms of the relevant limited partnership agreement.

Does section 36 (13) apply to voluntary liquidations at all?

18. The suggestion that subsection (13) does not apply to voluntary liquidations commenced under subsection (1) of section 36 at all is ultimately a hopeless proposition. As was noted in the course of Mr Allison KC's submissions, this contention begs the following question: to what does subsection (13) apply? It is helpful to revisit its entirely straightforward terms:

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

19. Subsection (1) begins section 36 by setting out the primary events for triggering the commencement of a voluntary winding-up. Subsection (9) supplements those methods by providing for an "*automatic wind up date*", subject to the terms of the agreement. Subsection (13) appears simply to deal with the separate topic of who shall conduct a voluntary winding-up. It does this by

providing that the starting position is the general partner or other person prescribed by the agreement, subject to the qualifying words "*unless the court otherwise orders*".

20. The only seriously arguable basis which Mr Marshall KC advanced for doubting this straightforward reading arose from the reference to "*an application…pursuant to subsection (3)(g)*". Section 36(3)(g) can at first blush most naturally be read as applying only to windings-up conducted under Part V of the Companies Act, and not to voluntary liquidations at all. Some legislative schemes are drafted with more precision than others, and the Respondent's counsel frankly acknowledged that section 36 was not at the top of the precision scale. The clearest illustration of this is the following provision which I find almost dispositive of the question at hand:

> "*(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."* [Emphasis added]

21. The reference to "*subsection (12)*" can only sensibly be read as referring to subsection (13), because subsection (13) is the only subsection which confers a power to appoint liquidators. This provision is clearly dealing with what happens at the end of a voluntary winding-up, and expressly contemplates that it may be completed by a liquidator appointed under subsection (13). This subsection by itself does not resolve the question of how subsection 3(g) can be read as applying to voluntary liquidations. However, the following subsection helps to resolve this sub-issue:

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

22. Section 36(9) provides an additional "*automatic wind up date*" linked to an "*event of withdrawal*", which is essentially a specified event resulting in the general partner not being able to continue to manage the affairs of an exempted limited partnership. This provision is explicitly intended to apply

only when the partnership agreement is silent on what should happen when an "*event of withdrawal*" occurs. What is significant for present purposes is that subsection (9) expressly contemplates that a voluntary winding-up may be administered or managed, not only in accordance with the partnership agreement, but also in accordance with "*the orders or directions the court may make or give in accordance with subsection (3)(g).*"

23. This is, in my judgment, the clearest possible manifestation of a legislative intention that section 36(3)(g) is intended to confer on the Court a general power to supervise voluntary liquidations. It may properly be viewed as, in effect, a freestanding subsection within section 36 rather than as a sub-paragraph of subsection (3), limited by that subsection's prefatory words. This conclusion is supported by the conclusions Parker J reached as to the general purpose of section 36 in *ECM Straits Fund I LP*.

Does section 36 (13) only apply to fill gaps?

24. It follows from the above analysis that the argument that the Court's powers under section 36(13) of the Act are only available when a partnership agreement is silent, or its prescribed liquidation procedure has broken down, can only properly be rejected. Not only is there no justification in the statutory language for reading section 36(13) in such a peculiar way, it is also inconsistent with the legislative history of the provisions.

25. The primary conclusions recorded above about the construction of section 36(13) are supported by the legislative history of the provision, which is revealed by *TNT v Logispring* [2009 CILR 456] as well as by the historical provisions the Petitioner's counsel placed before the Court. This Court had an express jurisdiction to appoint liquidators in relation to exempted limited partnerships in both the 2003 and 2009 versions of the Act. Section 7(5) of the 2003 Revision provided as follows:

> "*In the event of the dissolution of an exempted limited partnership its affairs shall be wound up by the general partner unless the court otherwise orders*."

26. In 2009, after the words "*general partners*", the words "*or such other person as may be appointed pursuant to the partnership agreement*" were inserted. By 2012, it is clear from *Re Cybernaut* [2013 (2) CILR 413], substantially similar provisions to sections 36(13) and 36(3) (g) were in force. It is

true that the Court of Appeal in *TNT* (Vos JA, as he then was) acknowledged that certain amendments had been introduced in 2009 which gave priority to the partnership agreement. However, there is no suggestion from either Hansard, or any other source referred to, that Parliament intended to repeal or restrict the supervisory jurisdiction of this Court.

27. For the major sea-change Mr Marshall KC contended for to take place in a manner impacting on the construction of section 36(13), more explicit exclusionary language would have been required. The need for plain language is particularly the case since it is a notorious fact that the high-level trajectory of legislated regulatory oversight in recent years has been consistently in the direction of enhancing regulatory oversight rather than relaxing it.

28. Moreover, as Mr Allison KC was at pains to demonstrate, the draftsman of section 36 clearly took considerable care to specify precisely when the provisions of the Act would give way to contrary provisions in the partnership agreement. No such language appears in section 36(3)(g) or 36(13). The right of access to the Court in relation to voluntary liquidations under section 36 of the Act is seemingly greater than it is in relation to the right to present a winding-up petition under Part V of the Companies Act. That Act expressly provides that it is permissible to contract out of the right to present a winding-up petition (section 95(3)). No such provision exists in section 36 or elsewhere in the Act. Even if such a provision did exist, it could not have been invoked in relation to Article XIII of the LPA in this case.

Provisional views: merits of Petition

29. I expressed concern during the hearing that the Respondent was engaging in time-wasting tactics. I was ultimately persuaded that the jurisdiction argument was arguable, although I have now concluded that it was unmeritorious. I now set out provisional views on the merits of the Petition with a view to obviating the need for a further oral hearing or any further hearing of any nature.

30. The remaining issues include a dispute as to the level of evidential scrutiny that is required to adjudicate the merits of the Petition. That issue has been canvassed in the written submissions and briefly addressed by the Respondent's counsel in oral argument. The Petitioner's case, in a nutshell, amounts to this. It would be inconsistent with elementary principles of winding-up law for the Court not to replace the General Partner when it has unarguably lost the trust and confidence of 97% of the economic stakeholders of the ELP, no matter what the reasons may be. There is no need

for the Court to consider the merits of the original complaints laid against the GP. That position appears to be an unassailable one.

31. Section 36(13) of the Act confers an unfettered discretion on the Court. There are no statutory conditions to satisfy as in the case of applications for a Supervision Order under section131 (b) of the Companies Act, as in *Re Asia Private Credit Fund* [2020 (1) CILR 134]. The need to evaluate whether the jurisdictional requirements for appointing Official Liquidators have been met do not arise in relation to an application to give effect to the majority stakeholders' wishes as to whom the voluntary liquidators of the ELP should be. The very fact that the GP does not apparently accept the fundamental principle that in a liquidation the wishes of the majority stakeholders prevail (assuming the opposition to the Petition is maintained) appears to demonstrate the need for a fresh appointment.

32. Unfortunately, the opposition to the present Petition has an all too familiar ring. The best way for a manager who has lost the confidence of the investors to demonstrate their probity is to step aside, demonstrating confidence that their impugned management of the fund will be vindicated by independent scrutiny. Instead, the importance of their continuing at the helm is apparently given priority over the wishes of the investors, and the recalcitrant manager claims to know better than the investors where their best commercial interests lie. Regrettably, whatever unique expertise the scorned manager truly possesses, the distinct impression is created that the determination to cling to office is motivated by self-interest at best or the desire to forestall independent investigation into suspect dealings at worst.

33. In the instant case it is admittedly extremely plausible that the GP's Mr Jordaan has specialist knowledge of and unique contacts with the businesses the ELP has invested in. The appointment of independent liquidators would not necessarily preclude his expertise being deployed if this was demonstrably in the best interest of the investors as a whole.

34. In summary, at this juncture, the likelihood that this Court can find a rational basis for declining to grant the relief sought by the Petitioner seems quite fanciful in all the circumstances of the present case.

Conclusion

35. For these reasons, I find that the Court has the power under section 36(13) of the Act to appoint independent joint voluntary liquidators in place of the Liquidating Agent under clause XIII of the LPA. Unless either party applies by letter to the Court within 21 days of the date of delivery of this Ruling, the Respondent shall pay the Petitioner's costs of the jurisdiction issue to be taxed if not agreed on the standard basis.

36. The Respondent has liberty to apply within seven days of the date of delivery of the present Ruling to be heard orally or on the papers in order to seek to demonstrate that the substantive Order sought by the Petitioner should not be granted.

THE HONOURABLE IAN RC KAWALEY
JUDGE OF THE GRAND COURT