

Formation & Organization

A Fresh Look at Exempted Limited Partnerships in the Cayman Islands

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On August 31, 2009, the Cayman Islands Court of Appeal delivered an important judgment on exempted limited partnership agreements in the Cayman Islands which also commented upon the Exempted Limited Partnership Law (2007 Revision) (ELPL), as amended by the Exempted Limited Partnership (Amendment) Law 2009. The decision emphasized a need for deference to the terms of the underlying limited partnership agreement itself. In light of this development, enhanced attention should now be paid to the precise drafting of the terms of these agreements given their heightened importance.

Parties

Plaintiff and appellant was the majority limited partner in a Cayman Islands exempted limited partnership (Partnership) formed as a venture capital fund investing in the logistics field. Defendant and respondent was the general partner of the Partnership (General Partner). The Partnership was governed by a detailed Limited Partnership Agreement (LPA) entered into a few years earlier, in which other limited partners also participated and invested.

Background Facts

Plaintiff served notice on the General Partner under an article of the LPA requiring the General Partner to dissolve the Partnership. In light of certain differences between Plaintiff and the General Partner, Plaintiff then sought, inter alia, the appointment of an independent liquidator in substitution for the General Partner as liquidator. The principal legal issue in dispute was whether the terms of the LPA themselves excluded a limited partner's right to apply to the court for the appointment of a liquidation in accordance with the general right to apply under Section 7(5) of the ELPL.

The application was heard before a Judge of the Grand Court who ruled that in this instance a provision in the LPA itself prevented a limited partner from seeking to appoint or replace the liquidator. Plaintiff then appealed, arguing, inter alia, that the Judge was wrong to hold as a matter of construction that the LPA amounted to an agreement to exclude a limited

partner's right to apply to the Court under Section 7(5) of the ELPL for a liquidator to be appointed, other than the General Partner.

Relevant LPA Term

The most relevant provision of the LPA to what had to be decided was Article 10.1, which provided:

Following dissolution, the Partnership's assets shall be liquidated in an orderly manner. The General Partner shall be the liquidator to wind up the affairs of the Partnership pursuant to this Agreement; provided, however that pursuant to the ELP Law, the Courts may, upon an application of a creditor of the Partnership, appoint another liquidator.

Relevant ELPL Provisions

Section 7(5) of the ELPL was amended by Section 5 of the Exempted Limited Partnership (Amendment) Law 2009 and now provides as follows:

In the event of the dissolution of an exempted limited liability partnership, its affairs shall be wound up by the general partner or such other person as shall be appointed pursuant to the partnership agreement unless the court otherwise orders on the application of any partner or creditor of the exempted limited partnership pursuant to section 15(4)(f).

Section 15(4)(f) of the ELPL now provides:

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

The Court of Appeal noted that Section 7(5), as amended, introduced the possibility that someone other than the General Partner might be appointed pursuant to the LPA to wind up the exempted limited partnership. Significantly, the Court also noted that the new Section 15 "defers to the partnership agreement in several places."

Reasons for Court of Appeal Decision

The Court of Appeal made a declaration to the effect that on a true construction of Article 10.1 of the LPA, a limited partner was not prevented from making an application to the Court to appoint or replace a liquidator pursuant to Section 7(5) and Section 15 of the ELPL. The Court of Appeal took the view that Article 10.1 contained only "a partial statement" of what can be done by the Court under Sections 7(5) and 15, in that the Court may appoint a liquidator on the application of a creditor or on the application of a partner. The Court stated the issue thus:

As we have said, the question in this case is whether by including, in the proviso to article 10.1, an express reference to the power of the court to appoint a liquidator on the application of a creditor, the parties must be taken to have intended to exclude the power to appoint a liquidator on the application of a partner.

The Court held that the parties must be presumed to have known that the ELPL included Section 7(5) and to have known that Section 7(5) allows for an application by a partner. As the Court explained:

Had the parties intended to exclude the statutory right of a partner to apply to appoint a liquidator, they would, as it seems to us, have wanted to make it clear that, so far from being "pursuant" to section 7(5), the proviso was specifically excluding part of that section.

The Court also relied upon dicta by Wills J in *Colquhoun v Brooks* (1887) Q.B.D. 400, 406 and by Lopes LJ in the Court of Appeal (1888) 21 QBD 52, 65 in concluding that the maxim, *expressio unius est exclusio alterius*, was a maxim "to which the court should be slow to have recourse." According to the Court, if Article 10.1 were intended to have the effect of excluding the statutory right of a partner to apply to the Court for the appointment of a liquidator, "it would have been drawn in clearer terms than those which appear in the LPA." The Court also commented that were the General Partner to be removed for misconduct, the Judge's construction would leave limited partners unable to ask the Court to fill the void by appointing a liquidator, where the partnership had no creditors or none able or willing to apply.

Conclusion

The approach of the Court of Appeal clearly emphasizes the importance of clarity and precision in the drafting of exempted limited partnership agreements. Where necessary, the Court will intervene to declare the true construction of disputed terms in accordance with their natural meaning. The decision also suggests that the Court will have regard to the relevant statute law as itself constituting a helpful guide to correct contractual interpretation, rather than merely seeking to nullify the contractual term on the basis that it is contrary to the governing law. In both of these respects, it is anticipated that the decision will encourage transactional lawyers to draft these agreements with considerable particularity, and that in so encouraging them, the decision should in principle deter such further litigation as might otherwise ensue. Finally, the case provides a salutary reminder that limited partnership agreements entered into before the Exempted Limited Partnership (Amendment) Law 2009 should be carefully reviewed to ensure that they are in compliance with both the spirit and the letter of the current legislation.

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