

## THE FINANCIAL CRISIS: OFFSHORE PERSPECTIVES

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## Key areas

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1. Impact generally
2. Hedge fund redemptions
3. Just & equitable winding up: loss of substratum
4. Other interesting developments

## Hedge fund redemptions

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- Culross Global SPC Limited v Strategic Turnaround Master Partnership Ltd [2010] UKPC 33
- CICA held redemption was a process, could be suspended at any time prior to completion (i.e. could suspend payment)
- Different approach in other jurisdictions
- PC rejected CICA approach
- Matter governed by relevant agreement between the fund and its investors (i.e. the Articles of Association)
- After redemption has taken place, can only suspend payment if clear words
- Powers in Information Memorandum must be properly incorporated into Articles to be effective against investors

## Loss of substratum

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- Divergence in approach between Jones J (Cayman Islands) and Bannister J (BVI)
- Traditional approach: wind up if impossible to carry on business but where the business is solvent it is not for the court to override the will of the majority and order winding up (Lord Cairns LJ, *In re Suburban Hotel Company* (1867))
- *Aris Multi-Strategy Lending Fund Ltd v Quantek Opportunity Fund Ltd*, 15 December 2010 (BVI)
- "It seems to me that the underlying principle which is to be extracted from these cases, with the exception of *In re Bristol Joint Stock Bank*, is that a minority seeking a winding up on the grounds that the business life of a company has come to an end will only be permitted to overcome the will of the majority if they can show that further conduct of the company's business is impossible" (Bannister J)

## Impossible v Impractical

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- Belmont Asset Based Lending Ltd (21 January 2010), ICP Strategic Credit Income Fund Ltd (10 August 2010), Wyser-Pratte Eurovalue Fund Ltd (9 September 2010), Heriot African Trade Finance Fund Limited (4 January 2011)
- "it is just and equitable to make a winding up order ... if ... it has become impractical, if not impossible, to carry on its investment business in accordance with the reasonable expectations of its participating shareholders, based upon representations contained in its offering document" (Jones J in Belmont)
- Winding up orders made in Belmont and ICP
- In Wyser-Pratte petition adjourned to allow wind down plan to be implemented by investment manager

## Management cannot wind down?

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- Heriot followed Belmont and applied impracticality test
- Unlike Wyser-Pratte, proposed wind down by investment manager was not a reason for refusing a winding up order
- Found Articles and OM did not provide for any "soft wind down" procedure
- Relied on Re Perfectair Holdings Ltd [1990] as authority for the principle that directors cannot liquidate a company because that is the function of a liquidator
- "I tend to think, but I suppose I need not go so far for the purposes of the present case, that if ... members have manifested an intention that the company should cease to carry on its principal objects and should liquidate, but where the liquidation is being conducted ... simply by management ... it would be just and equitable ... for the company to be wound up" (Scott J in Perfectair)

## Where are we now?

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- Conflicting first instance authorities
- Real difficulties in appealing winding up orders – difficult to obtain a stay of execution and likely security for costs will have to be provided
- Section 95(2) Companies Law (2010 Revision) provides for the court to dismiss a winding up petition where “the petitioner is contractually bound not to present a petition against the company”
- Unresolved issue as to whether this applies only to debt petitions or also to just and equitable petitions
- New funds are contractually barring investors from petitioning on the loss of substratum basis (and sometimes more generally)

## Other interesting developments

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- Madoff claims for the Cayman court to “give effect to the position under US law either pursuant to Cayman choice of law rules or as a matter of discretion”
- Enforcement by way of appointing an equitable receiver over a personal power (TMSF v Merrill Lynch)
- Freezing third party assets (Ahmad Hamad Algozaibi & Brothers Company v Saad Investments Company Limited & Others)

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