# The Court of Appeal for Bermuda

**CIVIL APPEAL No. 14 of 2017**

**IN THE MATTER OF STURGEON CENTRAL ASIA BALANCED FUND LTD**

**AND IN THE MATTER OF THE COMPANIES ACT 1981**

**B E T W E E N:**

**CAPITAL PARTNERS SECURITIES CO LTD**

**Appellant**

**- v -**

**STURGEON CENTRAL ASIA BALANCED FUND LTD**

**Respondent**

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**Before:** **Baker, President**
**Bell, JA**
**Clarke, JA**

**Appearances:** Mark Diel and Katie Tornari, Messrs Marshall Diel & Myers, for the Appellant;
Stephen Atherton QC and Samuel Riihiluoma, Messrs Cox Hallet Wilkinson, for the Respondent

**Date of Hearing:** **7 and 8 March 2018**
**Date of Judgment:** **23 March 2018**

**JUDGMENT**

*Long term investment Fund – true construction of the Articles – right of one class of shareholders to resolve to wind up the company at 2014 AGM – wrongful denial*

*of that right by shareholders of another class and wrongful amendment of the Bye-Law conferring the right – whether just and equitable to wind the company up.*

**CLARKE, JA**

1 This is an appeal from a decision of the Chief Justice dismissing a petition to wind up a Fund on the just and equitable basis.

**The Basic Facts**

2 On 20 March 2007 Kazakh Compass Fund Ltd ("the Fund") was incorporated as a Bermuda exempt company. It is now named Sturgeon Capital Asia Balanced Fund Ltd and is the Respondent to this appeal.

3 The shares in the fund are in two classes – Management Shares and Participating Shares. The issued and fully paid up capital consists of 100 Management Shares with a par value of $ 0.01; and 8,000,000 Participating Shares with a par value of $ 1. The Management Shares were originally held by Compass Asset Management Ltd ("Compass"), the original Investment Manager, which subscribed for 100 shares, at a total price of $ 1. From 28 November 2012 they were held by Sturgeon Holdings Ltd: see [14] below.

4 For Japanese regulatory purposes the Fund is classified as closed-ended meaning that the number of Participating Shares was fixed and redemption rights in respect of both Participating and Management Shares were strictly curtailed. For the purposes of the Irish Stock Exchange it is classified as open-ended because there is a limited right of redemption. The shares of the fund are listed on that exchange but it is not apparent that any trading in those shares has been done there. Any sale or purchase of Participating Shares requires the prior consent of the Board of the Fund: see Bye-Law 16.

5 Capital Partners Securities Co Ltd ("CPS"), the appellant, is a licensed Japanese Securities Company regulated by the Financial Services Agency in Japan. It was in 2007 the sole subscriber for the 8,000,000 Participating Shares at $ 10 per share and became the sole registered holder thereof[1]. It acted as the Fund's Distributor and Placement Agent for marketing the shares to Japanese investors. Between 2012 and 2016 another Company – Citivic Nominees Ltd ("Citivic") - became the registered holder of the Participating shares. This is said to have been a matter of "housekeeping" because Euroclear, the securities clearing house, wanted the positions to be held through Citivic. In 2016 – see [30] below CPS again became the registered holder of most of the Participating Shares.

6 CPS currently holds 7,234,000 of the 8,000,000 originally issued Participating Shares for the benefit of others and 328,000 in its own right. Citivic holds 13,000 shares on behalf of SMBC Trust Bank Ltd and 25,000 shares on behalf of Oceanwide Securities Ltd for the account of a client. 400,000 shares are now held by Citivic on behalf of the Fund as Treasury shares.

**The Subscription Agreement**

7 CPS entered into a Subscription Agreement which acknowledged that its subscription was made on the terms of a Placing Memorandum of 30 May 2007. This provided that CPS:

> "(*a) hereby acknowledges that it has received and considered the Placing Memorandum and the application is made on the terms thereof and subject to the provisions of the Company's Memorandum of Association and Bye-Laws from time to time. The Subscriber hereby further undertakes to observe and be bound by the provisions of the Memorandum of Association and Bye-Laws (as amended from time to time) of the Company ……*

[1] The Chief Justice was in error when he said in his judgment [49] that CPS "*was not initially the holder of any of the Participating Shares*".

*(b) hereby acknowledges that it has read and fully considered and understood the Placing Memorandum in connection with the application for Shares in the Company and that it has evaluated its proposed investment in the Company in the light of its financial conditions and resources. The Subscriber confirms that…(ii) it is applying for Shares on the basis of the Placing Memorandum …*

*…..*

(i) *if acting as trustee, agent, representative or nominee for a Subscriber (a "Beneficial Owner"), understands and acknowledges that the representations, warranties and agreements made hereunder are made by the Subscriber (i) with respect to the Subscriber and (ii) with respect to the Beneficial Owner.*"

**The Placing Memorandum**

8 The investment objective of the Fund, as expressed in the Placing Memorandum of 29 May 2007, was to seek long-term capital appreciation of its assets by investing in companies in, or with business exposure to business opportunities in, Kazakhstan and Central Asia, and in debt securities, including in other funds. I shall refer to the terms of the Placing Memorandum further hereafter.

**The Bye-Laws**

9 The Bye-Laws as initially approved by a statutory meeting of the Fund on 29 March 2007, included the following provisions:

***"Bye-Law 1***

***1 DEFINITIONS AND INTERPRETATION***

*1.1. In these Bye-Laws:*

*"**Management Shares**" means ordinary voting, non-participating, nonredeemable shares of the Company entitling the holder(s) thereof to the rights and being subject to the restrictions set out in these Bye-Laws*

*"**Participating Shares"** means non-voting participating shares in the capital of the Company entitling the holder(s) thereof to the rights and being subject to the restrictions set out in these Bye-Laws and where the context so permits includes Classes, Series of Classes and fractions of Participating Shares;*

*"**Placing Agent**" means [CPS] or such other person as the Company may from time to time appoint as its placing agent;*

*"**Resolution**" means a resolution of the Shareholders passed in general meeting or, where required, of a separate class or separate classes of shareholders passed in a separate general meeting or in either case adopted by resolution in writing in accordance with these Bye-Laws";*

*"**Shareholder"** means "a member of the Company holding one or more shares …*

*"**Special Resolution"** means a resolution requiring the consent of not less than three-fourths of the Shareholders passed in general meeting or, where required, of a separate class or separate classes of shareholders*

*1.2. In these Bye-Laws, unless inconsistent with the context or the contrary intention appears a reference to*

*"**may**" shall be construed as permissive*

*"**shall**" shall be construed as imperative.*

*"**share**" means "a share in the capital of the Company, including an Ordinary Share or a Participating Shae of any Class or Series, or a fraction of a share, as the context requires or admits.*

*1.3 The singular includes the plural and vice versa.*

***Bye-Law 2***

***2 SHARE CAPITAL***

*2.1. As of the date of adoption of these Bye-Laws, the share capital of the Company is divided into:*

*2.1.1. Management Shares*
*2.1.2 Participating Shares*

*2.2 The Participating Shares may be divided into different Classes and/or Series within a Class, from time to time at the direction of the Board.*

*2.3. Each Class of Participating Shares and Series within such Class (if any) shall entitle the holders thereof to the rights and be subject to the restrictions relevant to that Class or Series of a Class of Participating Shares as set out in these Bye-Laws and/or in the resolution of the Board pursuant to which such Class or Series of a Class is created for issue.*

***Bye-Law 3***

## *3 RIGHTS OF SHARES*

### *3.1 Management Shares*

*The holders of Management Shares*

*3.1.1 shall be entitled to receive notice of, and attend and vote at, general meetings of the Company;*

*3.1.2 shall not be entitled to any dividend or other distribution;*

*3.1.3 shall, in the event of a winding-up or dissolution of the Company, whether voluntary or involuntary or for a re-organisation or otherwise or upon distribution of capital, be entitled to receive the amount of capital paid up on their Management Shares after payment of the capital paid up on the Participating Shares to the holders thereof, but, shall not be entitled to participate further in the surplus assets of the Company; and*

*3.1.4 shall not be entitled to redeem their Management Shares nor shall their Management Shares be subject to redemption at the option of the Company.*

### *3.2 Participating Shares*

*The holders of the Participating Shares of each Class or Series of a Class*

*3.2.1 save to the extent provided by the Act and in these Bye-Laws shall not be entitled to receive notice of, nor to attend or vote at, general meetings of the Company;*

*3.2.2 shall, in the event of a winding-up or dissolution of the Company, whether voluntary or involuntary or for a re-organisation or otherwise or upon distribution of capital, be entitled to receive the amount of capital paid up on their Participating Shares in priority to the holders of the Management Shares and after payment of the capital paid up on the Management Shares to the holders thereof, to all surplus assets of the Company attributable to the Participating Shares, the relevant Class or Series of a Class (as the case may be); and*

*3.2.3 shall be entitled to such dividends as the Board may from time to time declare in respect of the Participating Shares of the Company, the relevant Class or Series of a Class (as the case may be);*

*3.2.4 shall, not be entitled to redeem their Participating Shares, and shall, subject to the provisions of these Bye-Laws, be subject upon notice from the Company to compulsory redemption of their Participating Shares based upon the Net Asset Value thereof.*

***Bye-Law 4***

## *4 MODIFICATION OF SHARE RIGHTS*

*4.1 Subject to the Act, all or any of the rights for the time being attached to any Class or Series of a Class for the time being issued may from time to time (whether or not the Company is being wound up) be altered or abrogated with the consent in writing of the holders of not less than seventy-five percent (75%) of the issued shares of that Class or Series of a Class as the case may be, or with the sanction of a resolution passed with a like majority at a separate general meeting of the holders of such shares on the Register of Shareholders at the date on which notice of such*

*separate general meeting is given. The provisions of these Bye-Laws as to general meetings shall apply mutatis mutandis to any such separate general meeting but so that the necessary quorum shall be two (2) persons holding or representing by proxy not less than one-third of the used shares of the Class or a Series of a Class (but so that if at any adjourned meeting of such holders a quorum as above defined is not present, those holders of the shares of the Class or Series of a Class who are present shall form a quorum), that every holder of shares of the relevant Class or Series of a Class shall be entitled on a poll to one vote for every share held by him and that any holder of shares of the Class or Series of a Class present in person or by proxy may demand a poll……"*

***Bye-Law 7***

***7 REGISTERED HOLDER OF SHARES***

*7.1. Except as ordered by a court of competent jurisdiction or as required by law, no person shall be recognised by the Company as holding any share upon trust and the Company shall not be bound by or required in any way to recognize (even when having notice thereof) any equitable, contingent, future or partial interest in any share ……*

***Bye-Law 12***

*12* ***COMPULSORY REDEMPTION***

*12.1. Holders of Participating Shares have no right to require their Participating Shares to be redeemed by the Company. However, the Board may, in its absolute discretion and subject to the Company having available cash, consider requests from Shareholders to redeem their Participating Shares. Any such redemptions may only be made at a redemption price per Participating Share that represents a discount on not more than 15% of the Net Asset Value per Performing Share*

*12.2 The Company may from time to time, on not less than 30 calendar days' notice, require compulsory redemption of all or any Participating Share held by a Shareholder for any reason and without assigning any reason therefor.*

***Bye-Law 78***

***78 WINDING-UP/DISTIRBUTION BY LIQUIDATOR***

*78.1 The Shareholders may resolve by Special Resolution proposed at the Annual General Meeting held in the year 2014 to wind up and dissolve the Company with effect from 31 December 2015 subject to the right to extend the effective date of the winding up for a further two consecutive years but in no event shall such a period extend beyond 31 December 2017.*

*78.2 If no Special Resolution is approved at the Annual General Meeting pursuant to Bye-Law 78.1, the Company may hold a Special General Meeting to determine the date, if any, on which the winding up and liquidation of the Company shall occur.*

*78.3. If the Company is wound up, the liquidator may, with the sanction of a Resolution of the Shareholders and any other sanction required by the Act, divide among the Shareholders in cash or kind the whole or any part of the assets of the Company (whether THEY shall consist of property of the same kind or not) and may for such purposes set such values as he deems fair upon any property to be divided as aforesaid and may determine how such division shall be carried out as between the Shareholders or different classes of Shareholders. The liquidator may, with the like sanction, vest the whole or any part of such assets in trustees upon such trust for the benefit of the contributories as the liquidator, with the like sanction, shall think fit, but so that no Shareholder shall be compelled to accept any shares or other assets upon which there is any liability.*

***Bye-Law 82***

***82 ALTERATION OF BYE-LAWS***

*These Bye-Laws may be amended from time to time by resolution of the Board, but subject to approval by Resolution."*

***Bye-Law 83.***

***83 CHANGE OF INVESTMENT OBJECTIVE***

*The investment objective and policies of the Company during the period of three years from the date of admission of the Participating Shares to the Official List of the Irish Stock Exchange may only be changed with the approval of a Special Resolution of the holders of the Participating Shares*

10 As is apparent from Bye-Law 12, the Participating Shareholders had no right to redeem their shares at any point and, subject to the passing of a resolution to wind up the company under Bye-Law 78 (or a decision by the company in general meeting), and in the absence of a sale or redemption of Shares with the consent of the Board, were locked in for an indefinite period.

11 Between 7 and 29 May 2007 nearly 2,000 investors, to whom the Fund had been marketed by CPS, agreed to take up (beneficially) 8,000,000 shares at $ 10 per share, thus raising some $ 80,000,000. On 30 May 2007 CPS alone subscribed for all 8,000,000 shares at $ 10 per share, for the benefit (apart from some shares held for its own account) of its customers or clients – hereafter the ultimate beneficial owners ("UBOs") – who had accounts with CPS[2].

12 As appears from [5 *check] above, for a period the Participating Shares were transferred by CPS to Citivic and held for the UBOs by the latter.

**Developments after launch**

13 In 2008 the global financial crisis occurred and thereafter the NAV of the Fund dropped sharply. By 2012 Compass had become reluctant to continue as Investment Manager.

[2] It may be that some of those for whose accounts CPS held the shares were themselves holding their interest for the benefit of others, in which case the persons ultimately entitled were further down the chain from CPS' customers/clients. That notwithstanding it is convenient for present purposes to use the acronym "UBOs" for the latter.

14 On **28 November 2012** Sturgeon Holdings Limited purchased the Management Shares from Compass. Sturgeon Holdings is owned by Mr Clemente Cappello, who is its principal. He also owns Sturgeon Capital Ltd, a regulated investment manager, which became the Investment Manager of the Fund in place of Compass. With effect from 21 December 2012 the name of the Fund was changed to Sturgeon Central Asia Balanced Fund Ltd.

15 On **21 December 2012** the Board of the Fund unanimously approved its entry into a 10-year Investment Management Agreement with Sturgeon Capital Ltd. (The IMA was, however, terminable if either party was dissolved). Sturgeon Capital Ltd and CPS also executed on 28 May 2013 a Promotion Agreement with each other for 7 years from 1 January 2013 extendable by mutual agreement. The Agreement was terminable on 30 business days' notice at any time 6 months after 1 January 2018. Under this agreement CPS was to receive 1/3rd of the management fee payable to Sturgeon Capital, which had been reduced to 2.25% per annum from the 2.5% previously payable, and 25% of all performance fees paid by the Fund on all investors introduced by CPS: which had also been reduced from its previous level to a maximum of 10% of NAV.

16 In the period 2013 to 2014 the Fund embarked on a cost cutting exercise with a view to reducing overheads in order to increase returns for Participating Shareholders. It also decided to try to stimulate a secondary market in Participating Shares. To that end in October 2013 the Fund redeemed 400,000 Participating Shares which it designated as Treasury Shares, with a view to them being resold by CPS as the Fund's promoter. This endeavour was not as successful as had been hoped. The Fund contends that this was because CPS failed to carry out any promotional work to encourage new investors.

17 In early 2013 Mr Toyoharu Tsutsui of CPS endorsed a widening of the Fund's investment objectives proposed by Sturgeon Capital, extending the definition of

Central Asia to include investments in Caucasus, Armenia, Azerbaijan, Georgia and Mongolia where investments would be potentially long term.

18 The Fund relies on the matters set out in [15] and [17] as showing that CPS had no understanding that the Fund had to be wound up by 2017 at the latest.

19 The NAV of the fund per share was as follows on the following dates:

| | |
|---|---|
| *January 2018* | *$ 5.69* |
| *November 2017* | *$ 5.301* |
| *31.10.16* | *$ 4.426* |
| *30.6.16* | *$ 4.012* |

**The 2014 amendment to the Bye-Laws**

20 On **8 May 2014** the Board of the Fund resolved by a majority (Mr Tsutsui of CPS dissenting) to recommend to shareholders the adoption of amended Bye-Laws including the deletion of Bye-Laws 78.1 and 78.2.

21 At the AGM of that day the Management Shareholder resolved by written resolution (described as constituting the 2013 [sic] AGM of the Company) to adopt the 2014 Amended Bye-Laws.

22 The Amended Bye-Laws removed what had been Bye-Laws 78.1 and 78.2 and amended Bye-Laws 12.1 and 12.2 so as to provide:

> "*12.1 Subject to Bye-Law 12.2, the holders of Participating Shares have no right to require their Participating Shares to be redeemed by the Company.*
>
> *12.2 Subject to Bye-Law 12.2 [sic], (a) each holder of Participating Shares may request redemption of 5% of its Participating Shares every two calendar years effective from 1 March 2015 and (b) each holder of Participating Shares may request redemption of its Participating Shares at any other time, and the Board may, in its absolute discretion*

*and subject to the Company having available cash, consider requests from Shareholders to redeem their Participating Shares. Any such redemptions will be on such terms as the Board decides, provided that if the Company agrees to redeem any Participating Shares it must offer that right of redemption to all holders of Participating Shares pro rata. Any such redemptions may only be made at a redemption price per Participating Share that represents a discount of not more than 15 per cent of the Net Asset Value per Participating Share."*

The old Bye-Law 78.3 remained in place, but now simply as Bye-Law 78.

23 No Resolution to wind up the Fund was placed before the 2014 AGM; nor were the Participating Shareholders given notice of the meeting or permitted to attend it or vote at it.

24 The effect of the new Bye-Law 12 was that a Participating Shareholder could ask to redeem; but whether he was allowed to do so was at the absolute discretion of the Board; and even under the timetable contemplated by Bye-Law 12.2 (a) it would take 40 years to redeem the whole, and then at a substantial discount to Net Asset Value[3].

25 On **26 May 2014** Mr Tsutsui of CPS sent a letter of protest to Mr Capello of the Fund protesting at the deletion of Articles 78.1 and 78.2. without the Special Resolution of Participating Shareholders required by Article 4.1 of the Bye-Laws.

**The "Participating Shareholders" Resolution**

26 On **9 May 2014** CPS sent to the UBOs a notice in respect of a "Special Resolution of a Class Shareholders Meeting by Participating Shareholders" (which strictly speaking they were not) seeking to determine whether or not they wanted the

[3] In the light of the provisions of new Bye-law 12 it is not particularly surprising that no attempt appears to have been made to redeem any of the Participating Shares under the amended Bye-law 12, save by Quam Limited which, in the event was bought out by CPS for what Mr Diel characterised as "tactical reasons…in a de facto state of war" between CPS and the Fund.

liquidation and, if so, whether on December 31 2015 or December 31 2017. The notice indicated that a failure to reply would be considered an indication that the intention of the Shareholder was for liquidation. Further notices to the same effect were sent out on 12 and 28 May 2014. The response came in the form of completed forms in which the voters declared their wishes as to winding up or the communication of those wishes by email, fax or telephone. The upshot was that UBOs holding circa 82.6% [4] of the shares voted by 4 June 2014 in favour of the winding up of the Fund on December 31 in 2015 or 2017 (the two dates referred to on the form – the vote was circa 79% in favour of the former date); circa 4.8% voted not to liquidate and circa 12.5% abstained. If the abstainers' votes are taken into account 95.1% are to be treated as having been in favour of winding up the Fund.

27 On **21 November 2014** CPS requested the Board of the Fund to wind up the Company in the light of the Resolution of the Participating Shareholders.

28 The Fund regarded this Resolution as ineffective for any purpose, on the basis that it was not passed in accordance with the Fund's Bye-Laws and the power to wind up was not in the hands of the UBOs.

**The Petition**

29 On **5 August 2015**, a written resolution was adopted by CPS to petition the Court to wind-up the Fund. In doing so CPS proceeded on the basis that the number of votes from the UBOs in favour of winding up was the same as it was the previous year, given that it had never received any indication from them that their vote had changed since the 2014 voting exercise. In his 8th Affirmation of 31 March 2017 Mr Mitsugu Saito recorded that CPS kept the UBOs up to date

[44] I use the expression "*circa*" because the figures set out in this paragraph are taken from Mr Mitsugu Saito's affirmation of 31 March 2017. Contemporaneous records of 4 June and 21 October 2014 show percentages of 81.97%, 4.59% and 13.4 %. The discrepancy, which is miniscule, appears to be because the figures in that affirmation take account of internal cross trades that had occurred by its date with the result that some of those who voted in 2014 had slightly different interests in 2017.

in relation to the progress of the litigation and in his 10th Affirmation of 21 April 2017 reiterated that it remained the case that no indication of a change of vote had been received.

30 On **17 August 2015** CPS presented its petition to wind up the Fund on the ground that it would be just and equitable to do so. That petition was withdrawn by a Notice of Withdrawal of 10 March 2016, because on 17 August 2015 CPS was not registered as a shareholder in the Fund and had no standing to petition under section 163 (1) (a) of the Companies Act. Citivic then transferred 7,562,000 Participating Shares to CPS and the Register was rectified to reflect that fact. On **12 September 2016** a fresh petition to wind up was presented.

**The judgment below**

31 The judgment of the learned Chief Justice is long and detailed. After referring to what he described as the Core Documents (the Bye Laws in their original version, the Subscription Agreement, the Placing Memorandum and the Prospectus through which the Participating Shares were marketed in Japan), he considered – [22] – [34] - the drafting history of the Core Documents as adopted in 2002 and as amended in 2014. He prefaced that consideration in the following terms:

> *"22 Reference was made in the course of argument to correspondence and draft documents relevant to the evolution of the Core Documents. CPS argued that these supported its reasonable understanding of what its share rights were and the Fund argued that the documentary record as to CPS's involvement made it wrong for it to complain of misrepresentations in the same way which an outsider might seek to do. More significantly still, the drafting history showed that CPS positively knew that Participating Shareholders were not intended to be accorded voting rights under Byelaw 78.*

> *23. The historical documents do, in a general sense, support each side's position to varying extents. Ultimately, whether CPS can seek a winding up Order based on an improper variation of its Participating Share rights is to be determined by a construction of the Bye-Laws and an assessment of whether the Fund's management acted so improperly as to justify the extraordinary remedy of a winding up order. CPS is clearly, in general terms, an insider with no right to complain that it was misled by inconsistent statements made in the Placing Memorandum, For example…*

32 He then considered the drafting history and the extent to which it supported each side's position.

33 In [35]- [38] the Chief Justice considered the commercial context in which Bye-Law 78 was originally adopted and found, in conclusion:

> *"that the commercial context in which Bye-Law 78 was originally adopted was one in which it was mutually understood by the Investment Manager and CPS that Participating Shareholders were to have as little control over the Fund as possible, both in general management terms but as regards the right to seek a winding up as well."*

**Drafting of the Bye-Laws**

34 In [39] the Chief Justice considered the principles governing the construction of the Bye-Laws and the admissibility of extrinsic evidence for that purpose. He said that there was in this respect "*only one pivotal question*" which was whether an email from Appleby, the Fund's then lawyers, of April 4 2007 was admissible as against CPS as part of the background knowledge of the intended meaning of Bye-Law 78. The content and background of that email is as follows.

35 On **March 29, 2007**, Mr Ueoka Kazuyuki of CPS circulated a draft of the Placing Memorandum (then named "the Offering Memorandum") under cover of an email which noted that a number of amendments had been made to certain paragraphs including:

> "*7.3. Rights Attaching To The Shares - Participating Shares have no voting right*
>
> *7.8 Termination of the Company – Deleted. It needs a Special Resolution to wind up"*
>
> *8.2. Duration of the Company – Initially we assume 7 years of duration".*

36 On **4 April 2007**, as the Chief Justice recorded, Japanese lawyer Fumiaki Shimazaki, the Fund's lawyer, (on whom CPS claim to have relied in the drafting process) emailed Ms Gores of Appleby, and, *inter alios*, the Compass team and Mr Ueoka of CPS together with two other members of the CPS Product Division responsible for overseeing the project. That included the following:

> *"Thank you for your email with the latest draft of the Bye-Laws. With respect to the Bye-Laws I have noticed a couple of points.*
> *…*
> *Section 78 provides for the Company's winding-up and dissolution.* ***Section 78.1 does not seem to give the holders of the Participating Shares [sic] to attend and vote at the AGM for the winding-up and the dissolution to be held in 2014. Therefore, the holder of the Management Shares in sole discretion is entitled to determine the winding-up and dissolution of the Company effective from 31 December 2015 to 31 December 2017****. Section 78.2. provides for the SGM in case of failure to obtain the relevant approval at the AGM. This provision says that the holders of the Management Shares shall have voting rights equal to three times the number of Participating Shares. This wording implies that the holders of Participating Shares are entitled to vote at the SGM. If that is the case, I think that section 78.2 should be reworded so as to clearly indicate that the holders of Participating Shares are entitled to a voting right at least at the SGM to be held under section 78.2 if such voting right is to be conferred upon the holders of Participating Shares in the event of the proposed winding-up and dissolution."*
>
> [Bold added in this as in other citations].

37 The reply from Ms Gores of Appleby on the same day stated:

> "*I confirm that the Bye-Laws of the company provide that the participating shares (in general) have no voting rights save for circumstances in which the rights attaching to the shares are to be modified, and that the participating shares are not entitled to attend or receive notice of the annual general meeting of the company or vote thereon, therefore I have amended Bye-Law of the 78[sic] of the Bye-Laws to make it clearer that the approval which is required to place the company in voluntary liquidation is given by the holders of the management shares only. Please find clean and marked copies of the Bye-Laws attached showing the changes I have made since the previous version which was circulated to you. I would be grateful if the parties could confirm that this document is acceptable...."*

38 The amended Bye-Laws to which Mr Shimazaki was referring did not alter Bye-Law 78. 1 (which was then in the form it later took) and, therefore, did nothing to clarify the meaning of "*The Shareholders*" in it. The amendment was to Bye-Law 78.2. It made "*special general meeting*" read "*Special General Meeting*" and excised a sentence which had previously been there which read:

> *"At the special general meeting the holders of the Management Shares shall have voting rights equal to three times the number of Participating Shares then in issue calculated on a pro rata basis, with any fractional shares being rounded up to the next decimal place"*

39 That provision would indeed have suggested that the Participating Shareholders were entitled to vote at the meeting of "*the Company*" for which Bye-Law 78.2 provided, since, if only the Management Shareholders could vote, there would be no need to load their voting rights in this way.

40 The Chief Justice recorded that the Fund conceded (as it does before us) that that email was inadmissible for the purpose of construing the Bye-Laws.

Nevertheless, in paragraphs 40-46 the Chief Justice rehearsed the relevant principles by reference to a number of well-known English authorities in relation to contractual interpretation and the particular case of the contractual relations between a company and its shareholders.

41 These included the observations of Lord Neuberger in paragraphs 15 of *Arnold v Brittan* on the interpretation of written contracts in which he observed that "*meaning has to be assessed in the light of …(ii) the overall purpose of the clause and the lease…. but (vi) disregarding subjective evidence of any party's intentions*". The Chief Justice expressed the view that, in the light of those principles, the parties' mutual understanding as to the drafting history of Bye-Law 78 and the intention "*to make it clearer*" that only the Management Shareholder could vote, would have been admissible. That proposition is, in my view, debatable since it depends on whether that understanding, gained as part of the drafting history, is to be regarded as establishing the overall purpose of the clause or constitutes part of the negotiating history and subjective evidence of the parties' intentions. It is not, however, necessary to resolve this question.

42 He then referred to a number of cases providing for specific rules of interpretation in relation to the construction of a company's bye laws (which constitute a contract between the company and the shareholders and between the shareholders themselves) and limiting the use of extrinsic evidence and other documents e.g. *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCLC 693; *HSBC Bank Middle East v Clarke* [2006] UKPC 31; *McKillen v Midland Cyprus Investments Limited* [2011] EWHC 3466; and *Culross Global SPC v Strategic Turnaround Master Partnership Limited* [2010] UKPC 33.

43 As the Chief Justice said in relation to *Bratton*:

> "*This decision supports a general prohibition on using extrinsic evidence about what those involved in the*

> *establishment of company knew about, inter alia, the drafting history of the Bye-Laws in a subsequent interpretation of the registered byelaws*."

44 It also establishes, as do other cases, that, because of the special position of the Articles of Association of a company the court has no jurisdiction to rectify the Articles even if they do not accord with what is proved to be the concurrent intention of the signatories of the Memorandum at the moment of signature. Nor can implications be drawn which are not derived from the language of the Articles but from extrinsic circumstances. Nor can a member seek to defeat the statutory contract by reason of misrepresentation, mistake, undue influence or duress: see further [144ff] below.

45 Thus, at [49] the Chief Justice found in terms that evidence as to "*the negotiating history*" was not admissible as an aid to construction.

46 In [50] the Chief Justice referred to CPS' reliance on Lord Diplock's observation in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201 that:

> "*if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense."*

47 At [52] the Chief Justice recorded that it was not disputed that, to the extent that the Bye-Laws were ambiguous, CPS was entitled to rely on the *contra proferentem* rule. However, it appears from the transcript that the application of this rule was disputed on two grounds. The Fund maintained that there was no ambiguity, in which case the rule has no application. It also submitted that, given that CPS was one of the architects of the Fund and had extensive knowledge and involvement in the terms on which the Fund was established, it must itself be regarded as a *proferens.*

48 In [53] the Chief Justice recorded that the Fund contended that the only relevant documents were the Bye-Laws and the Placing Memorandum but only to the extent that "*those documents*" were relied upon for the purpose of evidencing the terms upon which the Participating Shares were allotted. In paragraph 54 he referred to the fact that the wording in the Subscription Agreement:

> *"on its face gave primacy to the Fund's constitutional documents as regards the substantive legal relationship between the Fund and subscribers once the relevant shares were issued.* ***Accordingly, the Byelaws comprise the crucial document which was must [sic] be interpreted, as the Fund rightly contended.****"*

49 The Chief Justice was correct in this conclusion which reflects what was said by Hellman J in *Kingate Global Fund Limited v Kingate Management Limited* [2015] SC (Bda) 65 Comm at [43]:

> *"The Information Memorandum* [equivalent to the Placing Memorandum] *formed part of the contract between the investor and the Fund…, because the Subscription Agreement for shares in the Fund provided that the subscription was on the terms of the relevant Information Memorandum and subject to the provisions of the Memorandum and Articles of Association of the Fund.* ***Thus, in the event of a discrepancy between the Information Memorandum and the Articles, the Articles would prevail".***

**The Chief Justice's findings on the true interpretation of Bye-Law 78**

50 On the central question as to the true interpretation of the Bye-Laws in their unamended form the Chief Justice found as follows:

> *(i) Bye-Law 78 clearly envisaged that the 2014 AGM would address the winding-up issue [58];*

*(ii) Clauses 78.1 and 78.2 make no sense at all if the Fund could, at its own election, not bother to table the winding up resolution at all. As CPS's counsel argued, "may resolve" speaks permissively about the way the votes may be cast, not about the tabling of the Special Resolution itself. On the other hand, CPS's contention that the clauses provide a mandatory winding up date of December 31, 2017 is clearly unsupportable on any sensible reading of the relevant language [58].*

*(iii) the surrounding commercial context is not a decisive consideration in the context of the present case. It has a neutral effect in determining whether or not "Shareholders" in 78.1-78.2 includes Participating Shareholders. The commercial logic of the Management Shareholder alone voting on winding up is no more compelling than the countervailing contention that Participating Shareholders would have expected a counterweight to the lack of automatic redemption rights [61];*

(iv) *the most important consideration in favour of CPS' construction was that the Bye-Laws did contemplate that Participating Shareholders would have "special voting rights" in certain special circumstances: see*

(a) Bye-Law 3, which by the use of the words "*save to the extent provided by the Act and these Bye-Laws*" provided that voting rights for Participating Shareholders were not excluded altogether;

(b) Bye-Law 4.1, which impliedly gave a class of shareholders a right to vote on any modification of the rights attached to the class; and

(c) Bye-Law 83, which required a Special Resolution of Participating Shareholders to change the investment objective and policies of the Company in the first three years.

(It is right, however, to observe that (b) and (c) apply only to separate general meetings of the Participating Shareholders);

(v) since the Bye-Laws created two main classes of Shareholder and expressly contemplated the Participating Shares being divided into different classes or series within a class, the concept of a Special Resolution fitted more naturally with Participating Shareholders in the commercial context of a single Management Shareholder company [65].

51 As to (v) the Fund submits that the Chief Justice's reasoning was that there was only one Management Shareholder and no contemplation of there being more than one, whereas this was not the case in relation to Participating Shareholders. So, a Special Resolution which requires a 75% majority of shareholders at a general meeting could only be relevant to Participating Shareholders and was therefore a reference to the voting of Participating Shareholders.

52 The Fund contends that point (v) is flawed. The 100 Management Shares are now held by a single entity. But that does not mean that there could never be more than one Management Shareholder. Sometimes in funds of this kind there are

several. Bye-Law 3 itself contemplates this when it refers to "*The holders of Management Shares".* Further at the outset of the Fund there was only one Participating Shareholder and that could happen again if the other holders of Participating Shares sold them to CPS. Accordingly, the premise for the Chief Justice's conclusion that the definition of Special Resolution was only applicable to Participating Shareholders was erroneous.

53 I do not regard the Chief Justice to be holding that the definition of Special Resolution was only applicable to Participating Shareholders; merely that, in practice the concept of a 75% vote was more likely to apply to Participating Shareholders, not least because the Bye-Laws contemplated splitting them into classes. I would accept that this is something of a pointer; but a limited one, especially when for a substantial period there was only one Management and only one Participating Shareholder.

54 The kernel of the judgment of the Chief Justice is contained in the following two paragraphs:

> *"67 In my judgment it is on balance clear and free from ambiguity that the relevant Byelaw provisions apply, as Mr Diel primarily argued, to Management and Participating Shareholders. It is impossible to fairly read the word "Shareholders" as meaning "Participating Shareholders" alone, because that limitation is not expressed (as it was in Bye-Law 83). Although Bye-Law 78.3 is not directly relevant because it deals with voting post-winding up, the term "Shareholders" in that context clearly embraces both Management and Participating Shareholders, because it is patently absurd to read the clause as empowering the Management Shareholder alone to make decisions in relation to Participating Shareholders' priority distribution rights.*
>
> *….*
>
> *"69 It is entirely consistent with the wider context of the Bye-Laws in their commercial context, as contended for by*

> *Mr Atherton QC for the Fund, to read 78.1-78.2 as requiring* ***a Special Resolution of both Management and Participating Shareholders with this practical result.*** *Having rejected the unlikely argument that Bye-Law 78 contained a Long-Stop Date, the Fund could only have been wound up if both the Management and Participating Shareholders agreed. The default position in the absence of consensus was that the Fund would continue as it was intended to be of unlimited duration. What Bye-Law 78 essentially required was for the Management Shareholders to afford Participating Shareholders an opportunity to express their views. If the Management Shareholder favoured winding-up, this judgment could not be foisted onto the Participating Shareholders without their consent. On the other hand, conversely, if the Participating Shareholders wished to wind up but the Management Shareholder did not, the investors lacked the power to foist their choice on the Management Shareholder who was for all ordinary purposes the sole shareholder competent to make management decisions for the Fund."*

55 In essence the Chief Justice held that, in order for the Fund to be wound up there would have to be separate Special Resolutions on the part of (a) the Management and (b) the Participating Shareholders. As to this conclusion the judge said this:

> *"This construction result is difficult to arrive at when one knows that this effect was not actually intended by the drafters of the relevant clauses. However, to the extent that there was any ambiguity as to the meaning of Bye-Law 78.1 and 78.2, those ambiguities would fall to be resolved against the Fund. Properly analysed, however, the construction CPS contended for and which I accept did not confer quite as powerful a right as CPS suggested.* ***It was, in effect, a right to be consulted on the winding-up exit route after seven years, not a right to unilaterally exercise the exit option"***

.

56 The Respondent's primary position before us was that the decision of the Chief Justice was right for the reasons that he gave. Alternatively, Mr Stephen Atherton QC for the Fund renewed the submission that he had made below that

it was only the Management Shareholder that could vote at the AGM under Bye-Law 78.

**Discussion**

57 There are, as it seems to me, three critical questions on the construction issue:

(i) When Bye-Law 78.1 in its original form says that "*the Shareholders may resolve by Special Resolution"* who are the Shareholders for this purpose?

(ii) Was the Management Shareholder under any obligation to put the Special Resolution to the 2014 AGM and were the Participating Shareholders entitled to notice of the meeting and the opportunity to vote at it?

(iii) What material other than the Bye-Laws themselves is properly to be taken into account in determine their true meaning?

58 Questions (i) and (ii), although separate, are inter-related. If "*the Shareholders*" in Bye-Law 78.1 means the Management Shareholders alone, any obligation to put forward the resolution and to give the Participating Shareholders notice of the meeting is otiose. If it includes Participating Shareholders, they could expect there to be a Special Resolution, to be given notice of it and to be entitled to a vote.

**Question (i)**

59 In relation to question (i) there are four possibilities. "*The Shareholders may resolve*" in Bye-Law 78.1. could mean:

(a) The Management Shareholders;

(b) The Participating Shareholders;

(c) Both classes of Shareholders voting on a single Resolution;

(d) Both classes of Shareholders, voting separately on separate Resolutions.

60 I agree with the Chief Justice that "*the Shareholders*" in Bye-Law 78.1. means both Management and Participating Shareholders for the reasons set out below. In reaching this conclusion I do not find it necessary to rely on the *contra proferentem* rule. I begin with the fact that the natural meaning of "*the Shareholders*" is that it refers to all, and not some, of them. That that is so is supported by the following considerations.

61 First, the definition of "*Shareholder*" is "*a member of the Company holding one or more shares"* and of "*share*" is "*a share in the capital of the Company, including an Ordinary Share or a Participating Share.*" The Shareholders, thus, *prima facie* means "*the members of the Company holding one or more shares including Ordinary or Participating Shares*".

62 Second, the definition of "*Special Resolution*" is apt to cover both a resolution of all the Shareholders ("*A resolution requiring the consent of not less than three-fourths of the Shareholders passed in general meeting*") and, but only where required, a resolution requiring the consent of "*a separate class or classes of shareholders passed in a separate general meeting".* Bye-Law 78.1. contains no such requirement. It provides for a Special Resolution at the 2014 AGM.

63 Third, if the draftsman meant "*the Shareholders*" in Bye-Law 78.1. to mean "*the Management Shareholders*" it would have been easy to say so. It is the Fund's construction which requires the insertion of words that are not there.

64 Fourth, other provisions of the Bye-Laws distinguish between Management Shares and Participating Shares and the holders thereof. These includes Bye-Law 3.1 and 3.2 ("Rights of shares") and Bye-Law 83 which limits its application to Participating Shareholders. Bye-Laws 5.1, 6.1, 40.1, 42.1. and 44 use language which provides for powers to be exercised from time to time by "*a Resolution of the holders of the Management Shares*". The fact that express reference is made to Management Shareholders and Participating Shareholders in references to the Shareholders in other Bye-Laws serves to confirm that the reference to "*the Shareholders*" in Bye-Law 78.1. means all of them.

65 Fifth, Bye-Law 77.2 provides that "*Any notice or other document shall be seemed to have been served on or delivered to any Shareholder by the Company*" by various different modes. "*Any Shareholder*" must cover both Management and Participating Shareholders.

66 The position is, however, not, perhaps, quite as clear cut as the above analysis might suggest. There are four instances in the Bye-Laws where, unlike in the case of the Bye-Laws referred to in [64] above, the Byelaw does not specify which Shareholders are to vote on a Resolution and, indeed, does not refer to Shareholders at all. These are Bye-Laws 3.5 (Issue of shares may be by Resolution of the Company); 4.6 (Board are to manage the business of the Company subject to any directions given by the Company by Resolution); 71 (the Company may by Resolution fix any date as the record date), and 82 (amendment of the Bye-Laws by the Board is subject to approval by Resolution)[5]. The reason (if there ever was one) why the drafter of the Bye-Laws sometimes did, and sometimes did not, specify the holders of the Management Shares as the Shareholders who were to vote on a Resolution is unclear.

[5] Arguably Bye-law 40.2 falls into the same category but it is clear from Bye-law 40.1 to which it refers that it is concerned with a Resolution of the holders of the Management Shares, to whom Bye-law 40.1, itself, refers.

67 If any amendment, e.g. under Bye-Law 3.5 or 82, would modify the rights of Participating Shareholders it would require the consent in writing of the holders of not less than 75% of the issued shares of that Class or the sanction of a resolution passed with a like majority at a separate general meeting – see Bye-Law 4.1. But, assume that the proposed amendment to the Bye-Laws under Bye-Law 82 would neither alter nor abrogate the rights of the Participating Shareholders, would it then have to be the subject of a Resolution of all the shareholders? That does not seem to me to be consistent with the basic structure of the Bye-Laws that, generally speaking, the Participating Shareholders have no voting rights in general meetings, at any rate when there is no indication to the contrary. Mr Diel for CPS accepted that, in the case of an amendment under Bye-Law 82, the Resolution would not have to be one of all the Shareholders; and the same appears to me to apply to Resolutions under Bye-Laws 3.5, 4.6 and 71.

68 The fact that, in some instances, a "*Resolution"* means (without saying it) a Resolution of the Management Shareholders only might be viewed as some indication that "*The Shareholders*" in Bye-Law 78 does not necessarily mean all of them, on the footing that, if a "*Resolution*" can be a Resolution of the Management Shareholders only, so can a "*Special Resolution*".

69 The considerations that cause me to hold that "*the Shareholders*" in Bye-Law 78 means all of them are threefold:

(a) the matters set out in paragraphs [60] – [65] above;

(b) the considerations set out in the next paragraph;

(c) the fact that if the words mean "*the Management Shareholders*" Bye-Laws 78.1 and 78.2. are unnecessary and odd; and Bye-Law 78.3 is absurd.

70 As to (b), the fact that reference to a "*Resolution*" can mean a Resolution of the Management Shareholders only is quite insufficient to detract from the very strong indication arising from the matters set out in [60] – [65] above that in Bye-Law 78.1 it is not so limited. It is noticeable that, when the draftsman referred to Shareholders he specified which ones he meant. In other cases he referred only to a Resolution. In those latter cases the basic general principle that only the Management Shareholders have a vote applies. Careful consideration of the use by the draftsman of reference to Shareholders, on the one hand, and The Company/Resolution on the other, thus confirms the conclusion that I have reached rather than detracts from it. The draftsman made the same distinction in Bye-Law 78.2 where he made no reference to Shareholders of any kind and simply provided that the Company might hold an SGM.

71 As to (c), If "*the Shareholders*" in 78.1 means "*the Management Shareholders*" it is difficult to see what purpose Bye-Laws 78.1 and 78.2 were intended to serve. The Management Shareholder[s] did not need either of those provisions because under section 201 of the *Companies Act* a company shall be wound up voluntarily when the company resolves in general meeting that the company be wound up voluntarily. The Act requires no special resolution. In those circumstances it makes little sense to provide for a winding up by Special Resolution at the 2014 AGM at which only the Management Shareholder[s] vote.

72 It is common ground that under the different wording in Bye-Law 78.2. ("*the Company may hold a Special General Meeting*") any resolution at an SGM falls to be passed by a simple majority of Management Shareholders. It is, then, difficult to see why the Bye-Laws should provide that a Special Resolution may be passed at the 2014 AGM by the Management Shareholders, but, if it is not, they are then given another bite at the cherry, as it were, to resolve to do so at a Special General Meeting but by ordinary resolution. Further, the distinction in language

between "*the Shareholders*" in Bye-Law 78.1 and "*the Company"* in Bye-Law 78.2 suggests that they are not making the same provision.

73 If the Shareholders in Bye-Law 78 means "*the Management Shareholders*", then Bye-Law 78.3, set out *in extenso* reads as follows:

> *"If the Company is wound up, the liquidator may, with the sanction of a Resolution of the Management Shareholders…. divide among the Management Shareholders in cash or kind the whole or any part of the assets of the Company (whether they shall consist of property of the same kind or not) and may for such purposes set such values as he deems fair upon any property to be divided as aforesaid and may determine how such division shall be carried out as between the Management Shareholders or different classes of Management Shareholders. The liquidator may, with the like sanction, vest the whole or any part of such assets in trustees upon such trust for the benefit of the contributories as the liquidator, with the like sanction, shall think fit, but so that no Management Shareholder shall be compelled to accept any shares or other assets upon which there is any liability."*

74 I agree with the Chief Justice that this result is absurd. The interest of the Management Shareholder[s] in the winding up of the Company is that it is/they are to receive $1 after the paid-up capital of the Participating Shareholders is paid; and the remaining assets are to go to the Participating Shareholders. The idea of a division among the Management Shareholders of the assets of the company in cash or kind in order to give them $1 is risible; as is the setting of any values upon property to be divided so that the Management Shareholder[s] can get $ 0.01 per share; or the vesting of assets upon trust for the Management Shareholder[s]. In addition, the Bye-Laws do not provide for different classes of Management Shareholders.

75 The position would be less nonsensical if the qualification "*Management"* only applies to Shareholders where that word first appears in Bye-Law 78.3. But it

cannot be right that the same word should mean different things in different places in Bye-Law 78.3; or that the words "*the Shareholders*" should mean something different in Bye-Law 78.1 to what they mean in Bye-Law 78.3.

76 As I have indicated, the Chief Justice regarded it as *"patently absurd to read the clause as empowering the Management Shareholder alone to make decisions in relation to Participating Shareholders' priority rights. …*" To read the clause as having that effect requires the word "*Management*" only to apply to the first reference to "*the Shareholders*". Assuming (contrary to my view) that that is possible, the Fund submits that there is no such absurdity. The priority rights of the two classes of shares are fixed by the Bye-Laws. Any resolution of the Management Shareholders under Bye-Law 78.3 is purely ministerial, i.e. it simply sanctions the division of assets decided on by the liquidator which he/she will have determined to be appropriate in the exercise of his/her own discretion. No Resolution passed by the Management Shareholders could alter or impair the rights of the Participating Shareholders and, if it did purport to do so, then, in the light of Bye-Law 4.1., it could only have effect if voted for by 75% of the Participating Shareholders.

77 Here again I agree with the Chief Justice. The financial interest of the Management Shareholders in the distribution following a liquidation is to no more than $ 1. The Participating Shareholders, by contrast, are entitled to the return of their capital, and then, after the payment of $ 1 to the Management Shareholders, to the balance – likely to be in the region of millions of dollars. A decision which the Bye-Law 78.3. Resolution is intended to sanction may not involve any alteration or abrogation of the rights of the Participating Shareholders. Indeed, it should not do so. But it may, nevertheless, be something in which they have a keen interest e.g. as to who shall get a distribution in cash and who in kind, and of what, and what values shall be used for this purpose.

78 By contrast, to take "*The Shareholders*" in Bye-Law 78 to mean the Management and the Participating Shareholders produces a sensible result. All the shareholders, including the Participating Shareholders, have their opportunity to vote for winding up at the 2014 AGM. That has to be by Special Resolution so that, provided there is sufficient support from the Participating Shareholders, they can procure an exit from the Fund. If no vote is passed then, the Company can vote for a winding up at a later date; and the usual rules about voting rights will apply.

**Question (ii)**

79 In relation to question (ii) if, as I would hold, "*the Shareholders*" means all of them, the Bye-Law must at the lowest contemplate (a) that the Resolution is put before the 2014 AGM (which Bye-Law 22 requires to be held); (b) that the Participating Shareholders are given notice that the Resolution is to be put at that AGM; and (c) that they have an opportunity to vote at it. The Bye-Law provides that "*the Shareholders may resolve by special resolution proposed at the AGM held in the year 2014*". If no resolution is put forward; or the Participating Shareholders are not given notice of the meeting; or they are to have no vote at it, there is no way that they can so resolve. In truth they may not do so. In any of these cases they would be disabled from resolving and the power which Bye-Law 78 confers on the Shareholders would be illusory. The Participating Shareholders would be deprived of their only chance to redeem their investment without the consent of the Board.

80 In short, I agree with what the Chief Justice said at [58]:

> *"In my judgment these clauses make no sense at all if the Fund could, at its own election, not bother to table the winding up resolution at all. As CPS's counsel argued, "may resolve" speaks permissively about the way the votes may be cast not about the tabling of the Special Resolution itself."*

81 That the Participating Shareholders were entitled to notice of a Resolution to wind up to be determined at the AGM and entitled to attend and vote thereat is, in my view, implicit in the wording of 78.1. I would further regard it as implicit in the Bye-Law that the Management Shareholder would co-operate and "… *do all such things as are necessary on his part to enable the other party to have the benefit of the contract*" (as to which, see *Butt v M'Donald* (1896) 7 QLJ 68 at 70-71, approved in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 607; see also *Mackay v Dick* (1881) 6 App Cas 251.

82 Such a conclusion is not inconsistent with the provision of Bye-Law 3.2.1, which provides that the Participating Shareholders are not to be entitled to receive notice of nor to attend or vote at general meetings of the Company, because that applies "*save to the extent provided by the Act and in these Bye-Laws".* The Fund submits that the only exclusion provided by the Bye-Laws is in Bye-Law 4 and Bye Law 83. In fact, those Bye-Laws are not qualifications of the position in relation to general meetings of the Company. Bye-Law 4.1 calls for a separate general meeting of the holders of the Participating Shares; as does Bye-Law 83. The exclusion is therefore, readily applicable to the AGM 2014 to be held under Bye-Law 78.1. Indeed, I have not discerned in relation to what other Bye-Law it would be applicable.

**The Chief Justice's conclusion**

83 The conclusion of the Chief Justice that there must be Special Resolutions at separate meetings of the two classes of shareholder was not one argued for by either side, nor was it the subject of pleading or evidence; nor is it apparent to me on what basis the Chief Justice reached it. I cannot regard it as right. There is nothing in the wording of the Bye-Law that indicates that the Shareholders, if that means both Management and Participating Shareholders, are to vote separately. The definition of Special Resolution extends to separate general

meetings of different classes of shareholders "*where required*". But, as I have said, Bye-Law 78.1 contains no such requirement and simply refers to a Resolution to be proposed at the Annual General Meeting – not at separate general meetings of separate Classes. Nor does the Bye-Law say anything about the Management or the Participating Shareholders having what is in effect a right of veto in respect of the Resolution to wind up or about the voting rights of the Participating Shareholders amounting to no more than a right to be consulted. If that was intended it would have been easy to say so.

84 In [69] the Chief Justice said that "*If the Management Shareholder favoured winding-up, this judgment could not be foisted onto the Participating Shareholders without their consent*". But that is exactly what section 201 of the *Companies Act* permitted. And, in any event, Bye-Law 78.2 would entitle the Management Shareholders to vote for a winding up whatever happened at the 2014 AGM, very soon after it.

**My conclusion**

85 I would, therefore hold that the meaning and effect of Bye-Law 78.1 is that a Resolution was to be put forward by the Management Shareholder at the 2014 AGM to wind up the company; that the Participating Shareholders were to be given notice of that meeting at which the body of shareholders i.e. Management and Participating Shareholders were to vote on the resolution; and, if at least the requisite 75% vote was achieved in favour, the Fund would be wound up.

86 By changing the Bye-Laws so as to remove Bye-Law 78.1 the Fund was altering or abrogating the rights of the Participating Shareholder. This required, pursuant to Bye-Law 4.1, the consent in writing of not less than 75% of the issued Participating Shares or the sanction of a resolution passed with a like majority at a separate general meeting of the holders of such shares. The same applies to the introduction of Bye-Law 12.2 which represented a new right of redemption (of a kind), although this is of limited significance if Bye-Law 78.1

and 78.2. were validly eliminated (which they were not), because, on that footing, Bye-Law 12.2. offered Participating Shareholders some potential benefit.

87 The conclusion that separate Resolutions are required of Management and Participating Shareholders renders Bye-Law 78 practically useless to them. It gives them only a right to be consulted on their views, which they were perfectly able to put forward anyway (and did so). If every Participating Shareholder and every beneficial owner wanted there to be a winding up it still would not happen, if the Management Shareholders did not want it.

88 These considerations support the conclusion that I have reached. As Jenkins LJ said in *Holmes v Keyes* [1959] Ch 199, 215, referred to with approval by the Privy Council in *Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988:

> *"I think that the articles of association of the company should be regarded as a business document and should be construed so as to give them reasonable business efficacy, where a construction tending to that result is admissible on the language of the articles, in preference to a result which would or might prove unworkable"*

89 This conclusion gives rise to a question of some technicality. As at April 2014 there were two registered shareholders – Sturgeon Capital and Citivic. A "*Special Resolution*" requires the consent of not less than 3/4 of the Shareholders passed in general meeting. If there are only two shareholders there could not be at least 3/4 of them who consented unless both of them voted in favour. 2 x 3/4 = 1.5. So, 1 will not do.

90 There are, however, the following provisions of the Bye-Laws:

> "Bye Law 32

"*Unless a poll is demanded in accordance with these Bye-Laws, at any general meeting, a resolution put to vote of the meeting shall be decided on a show of hands or by a count of votes received in the form of electronic records and, subject to any rights or restrictions for the time being lawfully attached to any Class of shares and subject to these Bye-Laws, each Shareholder entitled to vote and present in person or proxy at that meeting shall be entitled to one vote and shall cast that vote by raising his or her hand or by communicating their vote in the form of an electronic record.*"

Bye Law 34

"*34.1 At any general meeting of the Company, in respect of any question proposed for consideration of the Shareholders (whether before or in the declaration of the result of the show of hands or count of votes received in the form of electronic records or on the withdrawal of any other demand for a poll) a poll may be demanded by:*

*34.1.1 the chairman of the meeting; or*

*34.1.2 any Shareholder or Shareholders present in person or represented by proxy and holding between them not less than one tenth (1/10) of the total voting rights of all the Shareholders having the right to vote at such meeting; or*

*34.1.3 a Shareholder or Shareholders present in person or represented by proxy holding shares conferring the right to vote at such meeting, being shares on which an aggregate sum has been paid up equal to not less than one tenth (1/10) of the total sum paid up on all such shares conferring such right.*

*34.2 Where, in accordance with these Bye-Laws, a poll is demanded, subject to any rights or restrictions for the time being lawfully attached to any Class of shares, every person present at that* ***meeting shall have one vote for each share of which that person is the holder or for which that person holds a valid proxy*** *and such vote shall be counted in such manner as the chairman of the meeting may direct* ***and the result of the poll shall be deemed to be the resolution of the meeting at which***

***the poll was demanded and shall replace any previous resolution upon the same matter which has been the subject of a show of hands or a count of votes received in the form of electronic records."***

91 I cannot regard the definition of "*Special Resolution*" which requires 3/4 of the Shareholders to vote to mean that Bye-Laws 32 and 24 are inapplicable; nor was that suggested to us. Were it otherwise it would be impossible to pass Resolutions, for which Under Bye-Law 31.1 only a simple majority is required, if there were 2 Management Shareholders (as there well might be), even if their shareholdings were disparate. The definitions of "*Resolution*" and "*Special Resolution*" are, as it were, the starting point, and if a poll is demanded it is Bye-Laws 32 and 34 which apply.

**Question (iii)**

92 It was common ground and accepted by the Chief Justice that the Appleby opinion of April 2007 was not admissible for the purposes of construing the Bye-Laws. The position in respect of the Placing Memorandum is potentially different. Under the Subscription Agreement "*The Subscriber confirms that…(ii) it is applying for Shares on the basis of the Placing Memorandum …"*

93 Mr Atherton in his alternative submission contended that the judge had taken too austere a view about the relevance of the Placing Memorandum. In the event of any conflict between the Placing Memorandum and the Bye-Laws the Bye-Laws would prevail. But the Placing Memorandum could be used as an aid to construction and in particular to clarify which shareholders were intended to be referred to in Bye-Law 78, namely, so he submitted, the Management Shareholders.

94 The Placing Memorandum contains a number of references which bear on this question. They are as follows:

(a) The definition of "*Investment Term*":

> *"The term of the Company commencing on the date of issue of the Participating Shares and ending on such date as may be determined by the holders of* ***the Management Shares*** *by Special resolution at the general meeting held in the year 2014, being 31 December 2015 or such later date as so determined* ***but in no event later than 31 December 2017."*** *(Placing Memorandum, definitions);*

(b) Under the heading "*KEY COMPANY INFORMATION*" and the sub-heading "*Limited Duration*" the Placing Memorandum states expressly:

> "*The Company has been established for an unlimited duration. However, the Bye-Laws* ***allow*** *the Company to put before its Annual General Meeting in 2014 a Special Resolution to wind up the Company effective in 2015 or 2017. See "Duration of the Company" below."*

*(c)* Under the heading "*1.2. Investment and Share Capital*" and the sub-heading "*Share Capital*" it was explained that

> *"No holder of a Participating Share is entitled to vote at any meeting of the Company other than at any meeting called to vary the rights attacked to the Participating Shares"*

A similar message appeared at paragraph 7.3. "*Rights attaching to the Shares"*

*(d)* Paragraph 8.2. of the Placing Memorandum provides as to the "*Duration of the Company":*

> "*The Company has been established for an unlimited duration. However, at the annual general meeting of the Company held in the year 2014, a Special Resolution to wind up the Company effective 31 December 2015 or 31 December 2017 shall be put before the meeting*[6]*. If a Special Resolution is not passed, a special general meeting will be called for*

[6] This sentence also appears under the heading "Duration" at two places in the Prospectus.

> *the purposes of reconsidering the date on which winding up will occur.*"

(e) The second paragraph on the final page of the Placing Memorandum states:

> "*There can be no assurance that the investment objectives of the Company will be achieved. Investors should be aware that they will be required to bear the financial risks of this investment for the whole investment period. The intended investment term is seven-year, subject to reduction or extension as provided therein.*"

95 I do not regard these provisions as mandating a different result. Their overall effect is, on any view, an inaccurate summary of the position. The "*Investment Term*" states that the term of the Company will in no event be later than 31 December 2017. That is not what the Bye-Laws provide. Bye-Law 78.1 does not mandate a cessation by 31 December 2017 (the "*may*" makes that clear); and Bye-Law 78.2 refers to "*the date, if any, on which the winding up and liquidation of the Company will occur*". The words under "*Duration of the Company*" are inconsistent with a mandatory 31.12.17 date, and the references to the fact that, if a Special Resolution at the 2014 AGM is not carried, "a *special general meeting will be called for the purpose of considering the date on which winding up will occur"* is inaccurate. An SGM may be called and a winding up may or may not be decided on. The paragraph on the final page is inconsistent with a mandatory 31.12.17 exit and, also, with the definition of "*Investment Term*".

96 The Placing Memorandum is, thus, on close inspection, an inaccurate summary of the Bye-Laws. It also does not deal with any of the considerations which have led me to the conclusion I have reached as to the true construction of Bye-Law 78. In those circumstances I cannot regard its observations about the Management Shareholder as being a satisfactory guide to the true construction of the Bye-Laws. Far from clarifying the position, the Placing Memorandum obfuscates it; and it is not legitimate to cherry pick parts of it in order to support

a particular construction. That applies also to those passages in the Placing Memorandum which refer to the disentitlement of Participating Shareholders to vote at meetings of the Company other than meetings called to vary their rights (see under "Share Capital "at page 85 and at clause 7.3(a)). Further, the Bye-Laws themselves are the key instrument and, in the event of a conflict between them and the Placing Memorandum, as there is, it is the Bye-Laws that must prevail. The true construction of those Bye-Laws is as I have set out above.

**CPS' alternative submission – the Longstop Date argument**

97 CPS' alternative submission was that it was reasonably entitled to assume and did assume that the investment was made on terms that the Fund would be wound up no later than December 31 2017 even if the Bye-Laws did not have that effect. This submission rendered potentially relevant all the evidence, including the drafting negotiations in respect of the Bye-Laws and CPS' subjective understanding, that bore on the question as to whether CPS reasonably had that assumption, even though such evidence was inadmissible for the purpose of interpreting the Bye-Laws.

98 In the light of my conclusion as to the true construction of Bye-Law 78.1 it is not necessary to reach any decision on this question; and Mr Diel indicated that he did not put this alternative submission at the forefront of his argument. I shall therefore deal with it briefly.

99 I entertain considerable doubt as to whether a shareholder who has subscribed for shares in a Company/Fund whose Bye-Laws on their true construction do not provide for winding up by 31 December 2017 and who has not, on the true construction of the terms of his subscription, invested on the footing that the company would be wound up by then, would be entitled to a winding up order on the just and equitable basis because he assumed (wrongly but reasonably) that his investment was made on those terms. It is not, however, necessary to come to a decision on this point.

100 The judge was satisfied that Mr Atherton for the Fund had:

> "*demonstrat[ed] primarily by reference to* ***the drafting history of the initial Bye-Law and the Board records of the prelude to the 2014 amendments****, that CPS clearly understood or must be deemed to have understood before they acquired the bulk of their present shareholding shortly prior to the presentation of the present Petition:*
>
> *(1) that Bye-Law 78 was explicitly designed to empower the Management Shareholder alone to vote on the winding up issue; and*
>
> *(2) that Bye-Law 78 was not intended to create a Long-Stop Date for the Fund which could be enforced by the investors"*

101 I agree that CPS, who were parties to the March/April 2007 email correspondence were on notice that the intention of the drafter was that the Participating Shareholders should not have rights to attend and vote at the 2014 AGM or at any SGM under Bye-Law 78.2.

102 The Chief Justice went on to hold that he would still reject the argument "*had it been advanced by a complete stranger to the Fund's internal affairs".* He recorded that the high point of CPS' case on the Core Documents was *"that the following express representations were made of a year end 2017 Long-Stop Date*:" He then referred to the definition of "*Investment Term*" in the Placing Memorandum and the paragraph reading "*The investment term is seven years."*

103 As to that the Chief Justice said at [74]:

> *"It is difficult [sic] how any 'outsider' could reasonably expect a fixed term investment reading the Placement Memorandum and the Prospectus as a whole, let alone reading those documents with the Bye-Laws which any reasonable subscriber would appreciate was the governing*

> *document. Only the definitions clauses in the Placement Memorandum and the Prospectus unambiguously represented that the investment term would end no later than year end 2017. Substantive clauses in each document made it clear that a longer than seven year term was possible and stated that the Fund was of unlimited duration and cautioned that investment was only suitable for those seeking a long-term investment. Bye-Law 78, read in a straightforward way, was consistent with the other Core Documents, although perhaps far clearer, in signifying that the December 31, 2017 winding up date was an optional one."*

104 I respectfully agree. No one could make a reasonable assumption about whether the company in which he was investing was bound to be wound up by 31 December 2017 without studying the Bye-Laws. It is plain from the language of Bye Law 78.1 in its original form that whether a resolution to wind up is passed at the 2014 AGM is a matter for the discretion ("*may*") of the Shareholders. Bye-Law 78.2 expressly contemplated that no Special Resolution may be approved at the 2014 AGM for winding up whether on 31 December 2015 or 2017 in which case "*the Company may hold a Special General Meeting to determine the date, if any, on which the winding up and the liquidation may occur*". The words underlined are wholly inconsistent with a mandatory wind up date of 31.12.17. The definition of "*Investment Term*" in the Placing Memorandum states that the investment term would end by 31 December 2017; but that, itself was inconsistent with the second paragraph on the final page ("*The intended investment term is seven years, subject to reduction or extension as provided herein")* and also with Bye-Laws 78.1. and 78.2.

105 In the light of my conclusion in the previous paragraph it is strictly unnecessary to consider *"the Board records of the prelude to the 2014 amendments"* to which Mr Atherton referred. These may, however, be of relevance in considering whether a winding-up order should be made. They also provide a further ground

for rejecting CPS' alternative submission that 31 December 2017 was reasonably understood to be a Longstop date, and I shall refer to it briefly

**The drafting history and the prelude to the 2014 amendments**

**2012 onwards**

106 In 2012/3 the Board of Directors took legal advice from Appleby, still then its legal advisers, about the possibility of removing or amending Bye-Law 78 so as to remedy any perceived uncertainty for new investors about the Fund's longevity. Neither Appleby nor CPS brought to the Directors' attention the legal advice given by Appleby in 2007.

107 A Board Meeting took place on **20 December 2012**. The Chief Justice referred to the record in the minutes of the following statements of Mr Taco Sieburgh Sjoerdsma of Sturgeon Capital, the Fund Director (TS) and Mr Tsutsui (TT) of CPS, and observed that the Fund relied on what TT had said and CPS on what TT said:

> - *TS states that the bylaws need to be changed, and he specifically wants to eliminate clause 78. They need to figure out how to remove it. Either to have a shareholders meeting in March or* ***have a special shareholders meeting so*** *that the people can vote on the new articles.*
>
> - *TT says that they need to have a structure to convince investors.* ***If the fund is a good size it will continue forever.*** *In Japan there is no maturity for the fund. That is the Japanese style.*
>
> - *TS says that they are proposing that the shareholders have a meeting following the presentations, the shareholders will get to vote on the new bylaws which will include clauses of share buy back but will exclude clause 78 re winding up….*

- *….TS responds that with the closed-end fund it will be good to get it to $ 100m. The shareholders are entitled to not change the bylaws. Bylaws will mean that only if the fund is less than $ 10m then they can have the meeting in 2015 and liquidate the fund if the shareholders say no to that.*

- *TS to check with Appleby what the voting procedures are*

108 As the Chief Justice observed:

> *"The quoted Minutes support two very clear conclusions on what the parties' nominee directors mutually understood the Bye-Laws to mean, in December 2012 at least. Firstly, it was common ground that there was no longstop date and that the initially assumed end date of December 31 2017 could be extended. Secondly, it was common ground that Participating Shareholders should be entitled to vote on the exclusion of the winding-up provisions in Bye-Law 78."*

109 In an email of **11 February 2013** from Mr Sjoerdsma to Ms Eve of Appleby, which was copied to CPS, he observed in relation to an email of Ms Eve:

> *"You have not addressed the issue regarding clause 78, i.e. that shareholders can vote to liquidate the company we want this altered so that it reads only if AUM is below $ 20m that such a vote can take place"*

110 It is apparent from this email that Mr Sjoerdsma thought that the shareholders (not just the Management Shareholders) had the right to vote to wind up the Fund by a Special Resolution at the 2014 AGM. That is certainly what Mr Mitsugu Saito, CPS' then general manager, said that he understood. The response was:

> "*This requires board and shareholder approval. It should be noted that ¾ of the shareholders would need to approve this as this will be an alteration of their rights"*

111 In an email of **26 February 2013** Ms Eve of Appleby gave Mr Sjoerdsma further advice in relation to, *inter alia*, the Bye-Laws. She said that she had had a discussion with a partner of the firm and concluded that it was only the Management Shareholder who was entitled to receive notice of, and vote at, general meetings of the company. Accordingly, it was the Management Shareholder who had the right to resolve to wind up at the AGM in 2014. The advice also concluded that:

> "*…it is possible to amend Bye-Law 78 to include that this is subject to AUM being less than 20 million. This change could be done with the consent of the Board and Management Shareholder.* ***However, if you wished to change the 31 December 2017 date or delete the provision in its entirety that this would need the consent of the Board and all categories of shareholders including Participating Shareholders,"***

112 The Chief Justice regarded this passage as providing a possible clue as to why CPS would genuinely believe its Petition to be a valid one.

113 The reasoning behind the distinction in analysis between the first possible change (Bye-78.1 Resolution only to be available if AUM < $ 20 million) and the two in the last sentence quoted above (change of 31 December 2017 date or deletion of the provision) is unclear to me. But it would appear to involve a recognition that changes in the latter category would be an alteration of the rights of the Participating Shareholders under Bye-Law 78. Why it should be an alteration or abrogation of the rights attached to their shares (a) to change the date for winding up to be included in a Resolution upon which the Management Shareholder alone could vote (but not a breach if Bye-Law 78.1. was to be amended so that any the Resolution was only to be on "subject to AUM < $ 20 million" terms), or (b) to delete a provision relating to such a Resolution is unexplained. The advice would appear to rest either on the invalid proposition that the Management Shareholder was bound to vote for a 31 December 2017

winding up at the latest; or that the Participating Shareholders had the right to have the Management Shareholder decide whether or not to wind up at 31 December 2015 or 2017.

114 On 29 October 2014 Ms Eve confirmed to Mr Tsutsui that Appleby's advice in 2013

> *"was that the management shareholder could decide not to wind up the Company up to any point prior to the 31 December 2017 however that if they wanted to change the 31 December 2017 date they would need the consent of all the shareholders (management and participating shareholders) as the change in the 2017 date would constitute a variation of their rights*".

**2014**

115 In **April 2014** the Board revisited the issue of amendment of the Bye-Laws and obtained advice from its new legal advisers, Cox Hallet Wilkinson ("CHW"). This change of attorney was made without seeking Ms Tsutsui's approval. Their advice of **7 May 2014** drew attention to the word "*may*" in Bye-Law 78.1 as showing that the requirement to consider a Special Resolution to wind up was optional and observed that pursuant to the Bye-Laws the holders of the shares entitled to receive notice of and vote at AGMs were the holders of Management Shares unless rights attached to a class or series of a class of shares in issue were being abrogated. The opinion drew attention to the fact that, so far as Bye-Law 78.2 was concerned, Bye-Law 23.1 gave the Board power to convene general meetings whenever it thinks fit and that Bye-Law 23.2 provided that the Board must convene a SGM on the requisition of the holders of 1/10$^{th}$ of the paid-up capital carrying the right to attend and vote at general meetings.

116 CHW also drew attention to the use of the words "*if any*" in Bye-Law 78.2 which showed that the requirement to hold an SGM was optional. In short, their opinion was that there was no requirement to wind up the Company at the 2014

AGM or on the Management Shareholders, who were the only Shareholders entitled to attend and vote, to resolve to wind up the company.

117 It was in the light of that advice that on **8 May 2014** the Board, by a majority, resolved to amend the Bye-Laws so as, inter alia, to remove Bye-Law 78.1 and 78.2 and extend the ambit of Bye-Law 12. A CHW lawyer attended and advised the Board that Participating Shareholder approval was not required to remove the 31.12.17 longstop date. Mr Tsutsui, who only received CHW's opinion the day before, is recorded as vigorously opposing the change and threatening a "*lawsuit*". He appears to have made no mention of the 26 February 2013 Appleby opinion and is only recorded as complaining about prejudice to the Japanese investors in general terms.

118 These communications provide further reasons as to why it seems to me impossible for CPS to say that before the 2014 amendment, or before it became a registered shareholder in 2016, that it reasonably assumed that 31 December 2017 was a Longstop Date. The position in relation to the entitlement of the Participating Shareholders to wind up at the 2014 AGM was that CHW had expressed the clear view that they were not so entitled as had Appleby, although they had indicated (not in a formal opinion and by an unclear process of reasoning) that Participating Shareholders had an entitlement not to have Bye-Law 78.1 or the December 31 2017 date in it deleted.

**Just and equitable**

119 In the light of his findings the Chief Justice dismissed the Petition. He said that:

> *". In my judgment there is no room for sensible doubt in the present case that if CPS's central complaint were to be fully made out, it would be, prima facie, just and equitable for the Fund to be wound up. The central complaints are that (1) the*

> *Management Shareholder unlawfully amended the Bye-Laws to deprive the Participating Shareholders of their contractual right to vote on when the Fund should be wound up, and (2) unlawfully deprived the Participating Shareholders of their contractual right to exit the Fund through a winding up no later than December 31, 2017 (the so-called Long-Stop Date).* ***CPS further (and crucially) complains that this action was carried out by the Fund's management in bad faith in the knowledge that CPS's share rights were being modified without its consent"***

120 The Chief Justice considered that the position was that:

(1) CPS had succeeded in establishing that Bye-Law 78 conferred voting rights on Participating Shareholders which the Management Shareholder unlawfully expropriated through the 2014 amendments;

(2) CPS has failed to establish that Participating Shareholders were deprived of a positive right to a winding up by December 31, 2017; and

(3) The voting rights of which CPS and other Participating Shareholders were deprived were <u>consultative</u> voting rights in the sense that unless the Management Shareholder also voted in favour of winding up, the Participating Shareholders' Special Resolution alone was insufficient to carry the day and enable them actually to exercise the winding up option.

121 The Chief Justice held that the "*preponderance of the evidence relating to how the 2014 Bye-Law amendments took place was inconsistent with any bad faith finding, a finding upon which the success of the Petition crucially depends*". He also concluded that the conduct of which CPS complained and which it had established unlawfully occurred - in the sense that it was contrary to the Bye-Laws - was that described in 120 (1) above. But, if that had not occurred, CPS would be in no better position because the Management Shareholder would

simply have blocked any Participating Shareholder's Special Resolution. The wrong that had occurred was more technical than formal in substance and effect.

122 He also held that there were no grounds for finding that it was unreasonable for the Fund to rely on the "*well-reasoned Cox Hallet Wilkinson opinion*" on the construction of the Bye- Law and it followed that the Petition must be dismissed:

> "*because CPS has failed to prove that any conduct capable of giving rise to a "justifiable lack of confidence in the conduct and management of the company's affairs" (Loch-v-John Blackwood Ltd [1924] A.C 783 at page 790) occurred. In other words, I find that the Fund's management's conduct did "not cross the forbidden line so as to constitute a visible departure from the standards of fair dealing and the conditions of fair play which a shareholder is entitled to expect": Re The Washington Special Opportunity Fund, FSD No. 151 of 2015, Judgment dated March 1, 2016 (Mangatal J, at page 59*

123 Overall the Chief Justice said:

> "84 *I find that the Petitioner has failed to make out a case for a just and equitable winding up* ***because I reject its central thesis that the Fund, acting in bad faith, appropriated the rights of the Participating Shareholders to vote in 2014 under Bye-Law 78 on whether the Fund should be wound up at year end 2015 or, at the latest, year-end 2017.*** *Voting rights were conferred on Participating Shareholders, but their wishes could be blocked by the Management Shareholder whose support was required in any event for any resolution in favour of winding up to be passed. The Fund acted reasonably in introducing the 2014 Amended Bye-Laws and by acting in accordance with credible legal advice."*

124 In the light of the conclusion that I have reached the position is different. I would accept that CPS has not made out that the Fund has acted in bad faith in failing to put a Resolution to wind up the Fund before the 2014 AGM. It acted on the

basis of respectable legal advice in relation to an issue which the Chief Justice described as "*a most difficult …construction conundrum*" [8] in respect of Bye-Laws which are not a masterpiece of the draftsman's art.

125 Nor would I accept that the Chief Justice should have found that the Board was engaging in an exercise in pure advice shopping in order to achieve a result that it wanted (continuation of the Fund) for the benefit of Sturgeon Capital. The Board members were Mr Tsutsui representing CPS, Mr Sjoerdsma representing Sturgeon Capital and Mr Michael Cartler as an independent. It is apparent that the, or a, primary reason for the change of attorney was what was regarded as unacceptable delay on the part of Appleby: see Mr Sjoerdsma's email of 19.2.14 to CHW. In addition, it appears that Mr Chandler was not acting in any biased way but was trying to act as an honest broker in the dispute between CPS, in the person of Mr Tsutsui, and Sturgeon Capital, in the person of Mr Cappello. It was in that context that he observed, in an email of 28 May 2014 that the core of any possible agreement was that there should be no pressure on Mr Capello to liquidate the fund for the next 3-4 years.

126 CPS submitted that the prime reason for Sturgeon Capital and the majority of the Board taking the stance that they did was to enable the Investment Manager and, thus Mr Cappello, to earn its reward from managing the Fund. Again, it does not seem to me that the Chief Justice should have found some want of probity. There were conflicting considerations. The UBOs wanted the Participating Shareholder to exercise what they and CPS regarded as a right to decide to wind up as a means of redeeming (in effect) what was left of their investment, rather than face the wholly uncertain prospect of attempting to do so in the future (and at a discount to NAV). On the other hand, the Investment Manager could point to the fact that, as a result of steps that it took, the NAV of the Fund was improving from the low base to which it had fallen under Compass' management. Further the new Investment Manager only came on board in December 2012, at which stage a long term IMA was entered into. It had invested

time and resources in fulfilling that role. In 2013 the objective of the Fund was widened in 2013 - a change which could lead to the taking of potentially long-term positions. On 28 May 2013, CPS entered into the 7-year PA 2013, which was set to end not before 2020 (i.e. 3 years beyond the Fund's alleged long-stop date). In those circumstances it was legitimate (if the decision on winding up was wholly in the hands of the Management Shareholder) not to wind up the Fund which, absent such a decision, was to be of unlimited duration. The Board was, on that hypothesis, entitled to take the view that continuation was in the best interest of the Fund.

127 But the effect of what the Management Shareholders did, by their unilateral act in voting to change the Bye-Laws, was to deprive the Participating Shareholder of what I have held to be its right to vote at the 2014 AGM on a Resolution put before all the shareholders to wind up the Fund on 31 December 2015 or 2017. That deprivation was wrongful in that it was contrary to the provisions of the Bye-Laws. That right is properly to be described as fundamental since it was the only means under the Bye-Laws by which the Participating Shareholder[s] could, for the benefit of themselves and those who stood behind them, procure, in effect, the redemption of their interest by the winding up of the Fund without the consent of the Management Shareholders; and thus affected the core question of the length of life of the Fund.

128 The decision to remove Bye-Laws 78.1 and 78.2 was, of course, a deliberate act, whose purpose was to make it clear that the Participating Shareholders had no right to vote for a winding up at the 2014 AGM when in fact, as I hold, they did have that right. If the advice given to the Fund about those Bye-Laws was correct the Board could, of course, have simply declined to put any resolution before the AGM or the Management Shareholders could have voted against any such Resolution. The removal of those Bye-Laws at the 2014 AGM was intended to foreclose any argument that the Participating Shareholders had any rights under Bye-Law 78. A change had been contemplated since 2012, with, according to Mr

Sjoersdma, a view to avoid potential new investors being put off by the prospect of imminent winding up.

129 It is clear to me that in 2014 there would have been a vote in favour of a winding up on 31 December 2015 by Citivic. Citivic was the Participating Shareholder and would, I have no doubt, have voted as CPS wanted. CPS had a wide discretion to act on behalf of the UBOs pursuant to its agreements with them – see paragraph 39 of Mr Mitsugu Saiuto's 8th affirmation - and would have wanted a vote in accordance with the wishes of an overwhelming majority of the UBOs, which coincided with its own. The Fund complains that it was not given an opportunity to make a case to the UBOs as to the prospects of the Fund – a contention somewhat at odds with its submission for other purposes that it was concerned to deal only with the registered Participating Shareholder. I do not, however, regard the fact that it was not afforded that opportunity (to which it had no entitlement) as invalidating the conclusion that a vote in 2014 for winding up would have been passed taken if the Special Resolution had been put forward at the 2014 AGM.

130 The question arises as to whether that is sufficient to make it just and equitable to wind the company up.

**The authorities**

131 Both sides referred us to the well known decision of *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 where Lord Wilberforce stated at page 379 that *the 'just and equitable'* provision does not entitle one party to disregard the obligation he assumes by entering into a company nor the Court to dispense him from it. However, it enables the Court to subject the exercise of legal rights to equitable considerations. Lord Wilberforce said this:

> "…. *The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the*

*cases may be open to criticism, it is that* ***the courts may sometimes have been too timorous in giving them full force****. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it.* ***It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations****; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.*

***It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise****. ….”*

132 It is apparent from this passage that the jurisdiction to wind up is to be determined by broad considerations of justice and equity and that Courts should not be afraid to give those words full force.

133 The Chief Justice referred to the Privy Council decision of *Loch v John Blackwood, Ltd* [1924] AC 783. There it was held that the words "*just and equitable*" in a similar provision to s161 of the Companies Act 1981 in the Barbados Companies Act 1910 were not to be read as *ejusdem generis* with the preceding words of the section. Lord Shaw held as follows:

> "*It is undoubtedly true that at the foundation of applications for winding-up, on the "just and equitable" rule, there must* ***be a justifiable lack of confidence in the conduct and management of the company's affairs****. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs, or on what is called the domestic policy, of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is, under the statute, just and equitable that the company be wound-up.*"

134 Lord Shaw also gave an indication of what was required for a just and equitable winding up in citing at pp 793, 794 the judgment of Lord Clyde, Lord President in *Baird v Lees* 1923 SC 83:

> *"I have no intention of attempting a definition of the circumstances which amount to a "just and equitable" cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way.* ***And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute****, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is*

*that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the court to wind up the company."*

**The Fund's submissions**

**Submission 1**

135 Before us Mr Atherton had three essential submissions. The first was that it was simply wrong to characterise the Participating Shareholders as locked in to the fund. They could seek to redeem under Bye-Law 12.2. Moreover, CPS had affected transfers of the beneficial interest of some of the UBOs by buying the interest of one UBO and selling it to another (generating a profit for itself on the turn). A spreadsheet of trades in the year April 2014 to March 2015 revealed 53 transactions (20 purchases and 33 sales). 305,000 "shares" were bought by CPS and 308,000 sold. All save 3,000 appear to be matching trades. Thus, on 9 May 2014 a CPS client bought 200,000 from CPS at $ 4.50 and a number of other clients sold various parcels of shares, totalling 200,000 at $ 4.20. Moreover, it was open to a UBO to seek to transfer his beneficial interest to a third party. In those circumstances it would be wrong or, in any event, inappropriate to take the drastic step of winding up the Fund.

136 I do not regard this as a good ground for declining to order a winding up. The ability of the Participating Shareholders to redeem is wholly dependent on the Board accepting that they should be allowed to do so, and on there being sufficient cash or liquid assets in the Fund to enable that to be done. Sales of beneficial interests either as between existing UBOs through CPS or to third parties were no doubt possibilities. There could not, however, be said to be what would properly be termed "a market" in which any UBO could buy or sell. The saleability of an investment which, under the new Bye-Laws, may never be redeemable absent the agreement of the Board, and which, under Bye-Law 12.2 (a) would take 40 years to complete, must be very limited as must the prospect

of delivering what could properly be called a secondary market. The number of shares in respect of which there was a transfer of beneficial interest in 2004/5 was a very modest proportion (about 4% of the outstanding shares, if you count the purchase by CPS and the sale to another UBO as one transaction). The prospect of a majority, or even a sizeable minority, of UBOs being able to dispose of their interest seems remote[7]. What Bye-Law 78.1, on its true construction, provided was a right (upon the passing of a Special Resolution at the 2014 AGM) to have the Fund wound up and its assets distributed, for which a prospect of redemption at the discretion of the Board at a discount of 15% of NAV or of a sale of a beneficial interest (to the extent obtainable) would be a poor and inadequate substitute.

**Submission 2**

137 The second submission was that it would be more appropriate to seek relief under section 111 of the *Companies Act* on the grounds that the affairs of the Fund have been conducted in a manner oppressive or prejudicial to CPS. It was not wholly clear to me exactly what relief was contemplated under this heading as potentially appropriate, although Mr Atherton made reference to measures for the encouragement of active marketing. But, in any event, in circumstances, where the right that has been abrogated was one to vote for liquidation, the grant of lesser relief seems to me insufficient to achieve justice and equity. It is true that liquidation is often said to be a "drastic" step to take in the case of a solvent company; but where the right denied is a right to procure a liquidation sought by a large majority of those having the economic interest in the company the Court should be more ready to bring about that which the denial of the right has prevented.

[7] In June 2014 i.e. after the UBOs vote in May, a brokerage firm named Jefferies offered to buy a small tranche of the 7,600,000 Participating Shares through Bloomberg Chat at a discounted price which CPS did not regard as acceptable. Further CPS regarded itself as under a duty to seek to wind up the Fund and effectively redeem all of the UBO's shares.

**Submission 3**

138 The third submission was that CPS, the petitioner, was disentitled to claim the relief that it sought in the Petition because it knew, when the Bye-Laws were first formulated, that the Fund's intention was that Participating Shareholders would not have any entitlement to notice of, or to vote at, the AGM in 2014 for a Special Resolution to wind up the Company. Whatever might be the position in relation to other petitioners CPS could not seek a winding up of the Company in the light of what it knew or must be taken to have known. Moreover, the Court should be blind to the interests of the UBOs.

139 This contention, which was not raised before the Chief Justice, raises the question whether, in determining what is just and equitable the court is:

(a) bound either to limit its consideration to the position of the petitioning Participating Shareholder itself or to regard it's suggested want of equity as overriding any consideration of the interests of the UBOs;

(b) entitled to consider the interests of the UBOs and to regard them as of preponderant importance.

140 Mr Atherton submits that the Court must, or at any rate should, limit its consideration to the position of the petitioning Participating Shareholder. That would be consistent with Bye-Law 7. It would be wrong, he submits, to order a winding up at the suit of a Participating Shareholder who must be taken to have known that Bye-Law 78.1 was never intended to allow Participating Shareholders to procure a winding up. CPS, he submits, not only knew what the intended position was but should have told all its clients about what was intended.

141 Mr Atherton is, in my view, right in saying that CPS was on notice in April 2007 that Appleby as the drafter of the Bye-Laws intended that only the Management Shareholders should have rights under Bye-Law 78.1. Whilst Ms Gores' email of

4.4.07 does not say that expressly, the email to which she was responding pointed out that Bye-Law 78.1 did not appear to give the holders of the Participating Shareholders the right to vote at the 2014 AGM; and her response was to confirm that the Bye-Laws provided that the participating shares in general had no voting rights and were not entitled to attend or receive notice of the AGM or vote thereon – the very circumstance to which Bye-Law 78.1 related. That was a clear confirmation from her that what appeared to be the case was the case. She also asked all parties to confirm that the document was acceptable. No one seem to have said that it was not.

142 If this be right, the following questions would appear to arise. At the time of the 2014 AGM Citivic was the Participating Shareholder. If it had launched the Petition in 2014 – 6, would it be disabled from doing so because of CPS' knowledge of what was intended in 2007? Mr Atherton would contend that Citivic would have been disabled because it was a nominee of CPS, which was itself a nominee for the UBOs. Assume, however, that a transfer of the Participating Shares had been made to a company which was ignorant of the drafting exchanges in 2007. In that case the disability of CPS to seek a winding up upon which Mr Atherton relies would be inapplicable to the new Participating Shareholder. Would the disability then re-arise upon the transfer of the Participating Shares back to CPS? Mr Atherton's answer is that, whenever and howsoever CPS is or becomes the Participating Shareholder, it cannot seek to wind up on the grounds that Bye-Law 78.1 gives Participating Shareholders the right that I have found that it does. Presumably CPS could have avoided this problem by a transfer of its shares to an ignorant assignee.

143 In my view the Court (i) is not bound to regard CPS as (alone) disentitled to seek a winding up order; and (ii) is entitled to take into account in determining what is just and equitable the position of the UBOs.

144 As to (i) the rationale for excluding evidence of the drafting history of the Bye-Law is that the contract between the Shareholders and the Fund embodied in the Bye-Laws is a special form of statutory contract in relation to which only very limited extraneous material is admissible and which is not subject to the usual principles of misrepresentation, mistake or rectification. Neither CPS nor the Fund could seek to rectify the Bye-Laws so as to give effect to what they were (wrongly) understood to mean.

145 As Dillon LJ put it in *Bratton Seymour,* as cited by the Chief Justice:

> *"These articles were registered when the company was incorporated. The articles thus registered are one of the statutory documents of the company open for inspection by anyone minded to deal with the company or to take shares in the company. It is thus a consequence, as was held by this court in Scott v. Frank F. Scott (London) Ltd [1940] Ch. 794,* ***that the court has no jurisdiction to rectify the Articles of Association of a company****,* ***even if those articles do not accord with what is proved to have been the concurrent intention of the signatories of the Memorandum at the moment of signature.***
>
> *It is because of the statutory force of the articles, when registered, that that conclusion was reached. The articles, if not in accordance with the intention of the subscribers, have to be altered by the statutory procedure of a special resolution if the appropriate majority of the members agree to such an alteration."*

146 Steyn LJ, as he then was, spoke to the same effect:

> *"Just as* ***the company or an individual member*** *cannot seek to defeat the statutory contract by reason of special circumstances such as misrepresentation, mistake, undue influence and duress* ***and is furthermore not permitted to seek a rectification,*** *neither the company nor any member can seek to add to or to subtract from the terms of the articles by way of implying a term derived from extrinsic surrounding circumstances. If it were permitted in this case,*

> *it would be equally permissible over the spectrum of company law cases. The consequence would be prejudicial to third parties, namely, potential shareholders who are entitled to look to and rely on the Articles of Association as registered."*

147 Were the position otherwise the contract would differ according to which Participating Shareholder was invoking it – the very situation which the special rules in relation to the interpretation of Bye-Laws are designed to preclude. If, however, Mr Atherton's submissions be right, that result would follow and the Bye-Laws are, in effect, to be treated as rectified vis a vis CPS (but not otherwise) or CPS is to be treated as estopped by convention from relying on the true construction of the Bye-Laws. I accept Mr Diel's submission that Mr Atherton's contentions are inconsistent with the reasoning and principle which underly the *Bratton* line of authority. Even if that would be too strict a view in the case of a Participating Shareholder with the whole beneficial interest in the shares – on the basis that the discretion to wind up is a wide one and permits consideration of what the petitioner was told or must be taken to have understood, regardless of whether the contract could be rectified or any estoppel arises - this is not such a case.

148 As to (ii) the UBOs are the persons who have the real beneficial and economic interest in the Fund. They are the persons behind it. It is for their benefit that it was established. Although they were not registered as Participating Shareholders they can be treated as having invested on the basis that their rights were, via CPS, contained in the Bye-Laws (interpreted in the light of such evidence as is properly admissible for that purpose). It is not to be supposed that they were told of any qualification derived from the drafting history (nor is there any evidence that they were). Moreover, they ought not to be in a worse position than they would have been in if they had become Participating Shareholders themselves rather than had their representative/ nominee become the only registered Participating Shareholder, particularly when the Subscription Agreement

contained a provision that CPS understood and acknowledged that the agreements made under it were made with respect to it and also "*with respect to the Beneficial Owner*".

149 Lastly, Mr Atherton's contention was not advanced before the Chief Justice; nor was it pleaded. The result is that the Chief Justice has not, in fact, made any finding as to whether CPS knew that the Fund's intention was that Bye-Law 78.1 would confer no right on the Participating Shareholders to vote at the 2014 AGM. Much less has he found that, if rectification were available (which it is not) the Fund would be able to rectify the Bye-Laws or that CPS would be estopped by convention from asserting any right under Bye-Law 78.1.

150 In [22] the Chief Justice recorded the Fund's contention that CPS positively knew that Participating Shareholders were not intended to be accorded voting rights under Bye-Law 78. Then in [23] he held that the historical documents "*do (in a general sense support each side's position to varying extents"*. He held that "*CPS [was] clearly, in general terms, an insider with no right to complain that it was entitled to rely on inconsistent statements made in the Placing Memorandum*". He then considered the history of events from 2007 to 2013 and concluded at [27]:

> *"A high level view of the impact of the drafting history of the Core Documents is that this history (a)* ***potentially*** *supports the Fund's position that from the outset CPS understood or ought to have understood that the Management Shareholder had the right to amend Bye-Law 78, and (b) more clearly supports the Fund's case that CPS could only reasonably have understood that the so-called Longstop Date was not cast in stone".*

151 This finding does not amount to a finding that the conditions for rectification or estopppel by convention were established. At the opening of the appeal Mr Atherton indicated that he would seek leave to pursue an argument based on estoppel by convention but he did not pursue that application. In those

circumstances I do not think that we should proceed on the basis that, assuming that a claim to rectification or an estoppel was possible (which it is not), the conditions for rectification or estoppel have been made out.

**Probity**

152 Lastly, I would not accept that in order for the Court to order the winding up of a company it must be established that there has been some want of probity on the part of the board or a class of shareholders in their conduct of the company's affairs. If there has been want of probity that is likely to be a very strong factor in favour of a winding up. But want of probity is not a prerequisite. Action which deprives a class of shareholders of a fundamental right may justify winding up especially when the right is to vote for one, even if the action was *bona fide* (but wrong). As Lord Wilberforce observed in *Ebrahim* [381G-H] "*to confine the application of the just and equitable clauses to proved cases of mala fides would be to negative the generality of the words*": see, also Lord Cross at 386 C-E to like effect.

**Conclusion**

153 What has happened here is that in 2014 the Participating Shareholder had its fundamental right to procure the winding up of the company by a Special Resolution at the 2014 AGM wrongly taken away from it and, in the absence of relief from the court, irretrievably lost. That right was one that existed for the benefit of the UBOs. It was not unreasonable for it to seek to exercise that right (if it had it) and the Chief Justice made no finding to that effect. I would regard the fact that the Board and the Company both denied the Participating Shareholder the right and, at the same time, by amendment to the Bye-Laws, removed it as giving rise to "*a justifiable lack of confidence in the conduct and management of the company's affairs*". The business of the Fund has not been conducted "*in accordance with the principles of commercial administration*" as laid down in the Articles to which the Participating Shareholders subscribed. If the

right contained in Bye-Law 78.1 had not been removed the likelihood is that the Fund would have been wound up – on 31 December 2015 or, at the latest by 31 December 2017.

154 Mr Diel drew our attention to the fact that in summarizing the *Ebrahimi* case in the Fund's written submissions at first instance, Mr Atherton noted that:

> "*The crucial question in each case is whether the exercise of legal rights created by the articles, or some other equitable right or interest that is found to exist has been wrongfully overridden or ignored such that it is appropriate for the Court to intervene so as to give effect to those legal and/or equitable rights.*"

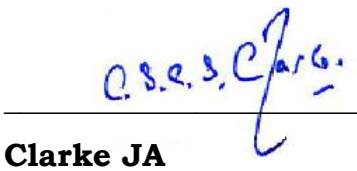
155 I agree. I would answer that question in the affirmative. Accordingly, I would allow the appeal and order that the Fund be wound up.

**BAKER, P**

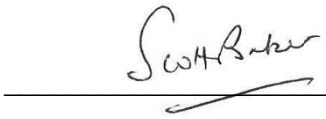
156 I agree.

**BELL, JA**

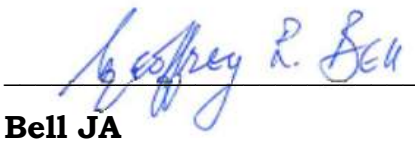
157 I agree.



**Clarke JA**



**Baker P**



**Bell JA**