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KEY POINTS

- Contrary to the position in the Cayman Islands, in the British Virgin Islands ('BVI') an investment fund is not at risk of being wound up on the application of an unpaid redeeming shareholder.
- In a departure from a long line of authority, Jones J in the Cayman Islands has introduced a wholly novel element to the test for loss of substratum at odds with the approach taken by Bannister J in the BVI.
- The debate is as to whether investment funds which suspend subscriptions and redemptions are an exception to the general rule.
- If Jones J's test survives an appeal to a higher court, the future for mutual funds who have suspended subscriptions and redemptions looks bleak – meanwhile the prospects appear significantly more rosy in the BVI.

Author Stephen Moverley Smith QC

Clear blue water: the deepening divide between the Cayman Islands and the BVI on winding up investment funds

In this article, Stephen Moverley Smith QC considers the diverging approaches of the courts of the Cayman Islands and the BVI over whether a member of a company can bring a claim for redemption proceeds in the liquidaton of the company and whether a member can seek the winding up of a fund on the ground that the fund has lost its 'substratum'.

In the middle of the last decade it was all the rage to invest in exotic hedge funds which often speculated on a global basis in distressed companies, distressed debt and developing technologies. The vehicle of choice for these funds was an offshore open-ended investment company; generally incorporated in either the Cayman Islands or the BVI. Investments took the form of redeemable non-voting shares, which were subscribed for and subsequently redeemed at a price determined by reference to the company's then net asset value ('NAV'). While the underlying investments were generally long term and illiquid, in an era when credit was cheap and freely available the funds had little difficulty in raising the money needed to pay out redeeming investors.

All this of course changed in the autumn of 2008, in the wake of the collapse of Lehman Brothers. New subscriptions dried up, along with credit. Faced with this crisis, many funds sought to implement provisions invariably found in the companies' subscription agreements or articles enabling the calculation of the NAV to be suspended, and with it the redemption process. Investors, many of whom had parted with tens if not hundreds of millions of dollars in the belief that they could redeem at will, now found themselves locked in to speculative investments for an indefinite period of time, during which the fund managers, who continued to manage the underlying assets, naturally continued to draw fees.

In some cases redemption requests had been accepted and NAVs declared (thus fixing the redemption price) but the funds had then found themselves without the ability to make the requisite payments. This gave rise to the question whether in such circumstances a fund could rely on a power to suspend redemptions to suspend its obligation to make payment. That in turn raised the issue of whether, and if so, when, a redeeming investor becomes a creditor. This was of particular importance as it appeared that a creditor would have the ability to seek the winding up of the fund.

A resolution of sorts was provided by the Privy Council in the Cayman case of *Culross Global PC Ltd v Strategic Turnaround Master Partnership Ltd* [2010] UKPC 33. The fund in that case had sought to strike out a winding-up petition brought by an unpaid redeemer on the ground that it was not a creditor until the redemption process was complete. It had had some success in the Court of Appeal, but the Privy Council was singularly unimpressed by the argument. In its view the issue was essentially one of construction of the fund's articles and contractual documentation, which clearly provided that a redeemer became a creditor on the redemption date, even if the redemption process was at that stage ongoing. While parties were entirely free to contract as they wished, it would require clear words for the redemption date not to be treated as the trigger date. This paved the way, at least in the Cayman Islands, for unpaid redeemers to seek winding up orders as creditors.

In the BVI the position was not quite so straightforward. To obtain a winding up order there it is necessary to have a claim which is admissible in the liquidation of the company. Section 197 of the Insolvency Act 2003 provides that a member or past member of a company may not claim in the liquidation of a company for a sum due to him in his character as a member and expressly identifies redemption proceeds as such a sum.

While the legislation seemed clear, the BVI courts were reluctant to find that a redeeming investor could not be a creditor and went to some lengths to avoid that conclusion. First in time was *SV Special Situations Fund Ltd v Headstart Class F Holdings Ltd* [BVIHCV2008/0239] (25 November 2008), a decision of Olivetti J. She took the slightly curious view that the exclusionary provisions of s 197 only took effect after liquidation and therefore could not be prayed in aid to determine who was a creditor for the purposes of obtaining a winding up order. *Headstart* was followed by *Western Union International Ltd v Reserve*

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International Liquidity Fund Ltd [BVIHCV 2009/322] (26 January 2010) a decision of Bannister J. The articles of association in that case provided that upon redemption of a share the holder ceased to have any rights with respect thereto, except the right to receive redemption proceeds and any dividend declared but unpaid prior to the redemption being effected. The judge found that the shares in question had been redeemed and that the only right the redeemer then had in respect of those shares was the right to receive the redemption proceeds. With not a little ingenuity, the judge then went on to conclude that a claim to redemption proceeds was not a claim brought by a member or a past member for a sum due to him in his character as a member, but as someone the company had agreed to pay because, and only because, he had ceased to be a member of the company, having sold those rights back to it – a result that ignored the fact that s 197 expressly applied to past members' claims and to redemption proceeds.

The third in this line of cases was *Westford Special Solutions Ltd v Barfield Nominees Ltd* [BVIHCA 2010/14] (28 March 2011), a decision of the BVI Court of Appeal. At first instance Bannister J had simply followed his own decision in *Western Union*. On appeal that approach and the approach of Olivetti J in *Headstart* was successfully challenged. In a robust judgment the Eastern Caribbean Court of Appeal overturned the winding up on a number of grounds, which crucially included a determination that the legislation was quite clear that unpaid redeemers did not have locus to seek a liquidation as creditors.

While *Westford* has provided funds in the BVI with some welcome relief not available to their cousins in the Cayman Islands, the divergence of approach has become more stark over the vexed question of whether a member can seek the winding up of a fund on the ground that it has lost its *'substratum'*. The ability of a member to petition for the winding up of a company on the ground that it has lost its substratum has its genesis in the English Court of Appeal decision of *In re Suburban Hotel Company* (1867) LR 2 Ch. App 737, decided in the early years of joint stock companies. In that case a company had as its objects in essence the building and running of hotels. The company constructed a hotel on Hampstead Heath. The hotel posted a loss from year to year and there was a very high improbability that it could be carried on at a profit. A minority of the members applied to wind up the company. Lord Cairns LJ stated that a case might occur when the court would be willing to give a minority of shareholders a winding up order when it became impossible 'in the strict sense of the term', that is to say *'completely impossible to carry on business any longer'*. It was not impossible that, with a different course of management and with different arrangements, the hotel might be carried on at a profit and that so long as there was capital that might be expended it was impossible to say that the capital of the company could not be made productive of profit just in the way in which it was expected to be made productive when the company was formed. As he saw it:

> '… the winding-up process of the Court, cannot be used, and ought not to be used, as the means of evoking a judicial decision as to the probable success or non-success of a company as a commercial speculation … it is not for this Court to pronounce … that this is likely to be an unprofitable speculation; and that, therefore, at the wish of a minority of shareholders, against the will of a large majority, the company should be wound up and put an end to.'

"The divergence of approach has become more stark over whether a member can seek the winding up of a fund on the ground that it has lost its '*substratum*'."

In the same vein is *In re German Date Coffee Company* (1882) 20 Ch D 169. There a company was formed to exploit a patent for the manufacture of a partial substitute for coffee made from dates. Jessel MR concluded that the memorandum of the company, when fairly read, was simply to acquire and work the patent, with or without improvements. As the patent did not exist, and could not exist, the company ought to be wound up. Baggallay LJ concurred, stating that the principle involved in *In re Suburban Hotel Company* was that if the court has proof of the impossibility of carrying on the business contemplated by the company at the time of its formation, that is a sufficient ground for winding up the company and that the question was, was there an impossibility of carrying out the objects of the company?

Moving to the 20th century, the question of loss of substratum arose in two cases decided in 1946. The first in time is *Re Kitson & Co Ltd* [1946] 1 All ER 435. The company had been incorporated in 1899. One paragraph of its memorandum stated that it was established to acquire an existing engineering business, but other paragraphs stated that it was established to carry on a wide variety of engineering businesses. The existing business was sold. It was successfully argued at first instance that the substratum of the company had been destroyed. On appeal, however, on construing the memorandum, Lord Greene MR concluded that the main and paramount object of the company was to carry on an engineering business of a general kind. As he saw it:

> '… there was every difference between a company which on the true construction of its memorandum is formed for the paramount purpose of dealing with some specific subject matter and a company which is formed with wider and more comprehensive objects … A patent is a defined subject matter … but, when you come to subject matter of a totally different kind like the carrying on of a totally different type of business, then, so long as the company can carry on that type of business, it seems to

me that prima facie at any rate it is impossible to say that its substratum has gone.'

On the question of the company's intention, he continued:

'To say that the question whether substratum has gone or has not gone can be affected by the intention that happens to exist in the minds of the board at a given moment appears to me to be going into irrelevant considerations. First of all, the board is not the company. Let it be supposed that at the time of the sale … so far as the board was concerned they thought that there was no chance and that it was not desirable for the company ever to start again into engineering. It certainly is not proved or was proved that the shareholders had any such intention, but assume it was. A little time afterwards something might happen to make them change their minds. They might see a profitable opportunity of using the company's money again in the engineering business. What has intention got to do with it? We are dealing with the question of substratum, and to say that the substratum can exist at one moment and cease to exist a moment later, or vica versa, simply through a change of intention of the board or of the shareholders … seems to me to lead into a morass.'

In Scotland, a similar result obtained in *Galbraith v Merito Shipping Co* (1947) SC 446. There a shipping company had sold its fleet of ships and had for many years ceased to carry on its principal object, the business of ship owning. It was however in a position to purchase other ships when a suitable opportunity occurred. Lord Moncrieff concluded, echoing Lord Cairns in *Re Suburban Hotel Company* (at p 456):

'… before the substratum should be found to have been withdrawn, business within the objects of incorporation should have become at least in a practical sense impossible'.

Kitson and *Galbraith* were subsequently followed in Hong Kong in *Re Chinese Estates Ltd* (1975) (McMullin J – unreported). There a company sold its main asset, a building in Hong Kong which it had owned for 50 years. It was unsuccessfully suggested that this amounted to loss of substratum by reference to the alleged intentions of the directors, which, following *Kitson*, McMullin J found to be irrelevant.

It will be seen that up to this point there was an entirely consistent and large body of high authority to support the propositions:(a) that in order to establish that the substratum of a company has gone it is necessary to show that it is practically impossible to carry on the principal object of the company as expressed in its memorandum; and (b) that the present intention of the board is an irrelevant consideration.

Contrary to this line of authority, in the last few years a series of decisions emerged from Bermuda and the Cayman Islands which suggested that there was in fact a far more general principle in play.

The first of these cases was *Re Stewardship Credit Arbitrage Ltd* (27 November 2008). That case concerned an application by an unpaid redeemer to wind up an investment company. The company was one of the victims of the notorious Petters fraud. The redeemer claimed to be a creditor, alternatively that it was entitled to a winding up order on just and equitable grounds. It sought the appointment of a provisional liquidator. In deciding whether to make the appointment the court had to consider whether the redeemer had made out a *prima facie* case for a winding up order. Bell J determined that the redeemer's debt could not be disputed and that there was a good *prima facie* case that the company was balance sheet insolvent. He then turned to consider the just and equitable grounds, and in particular the suggestion that the substratum of the company had gone. He expressed his view in these terms:

'But the critical complaint to my mind is the one which was argued by Mr Potts in argument, namely that the substratum of the Company has gone. From the time of the 9 June 2008 directors' meeting [when it was resolved to suspend determination of the NAV of the fund and the payment of redemptions for an indefinite period] the Company has effectively ceased to carry on business in practical terms. I have no doubt that the prospect of its carrying on its business in any real way in the future has long since disappeared. It is not just that the Company has suspended its NAV calculation, and suspended redemptions; given the minutes of the 9 June 2008 directors' meeting [recited at §66] show that there were then approximately £50million in redemption requests, which of course includes [the petitioner's] redemptions, and more particularly given the magnitude of the Petters Fraud, there are no grounds for thinking that the company will ever be able to do anything other than pursue recoveries where possible, and wind up its affairs as best it can.'

"He did not consider whether it was practically impossible for the company to carry on its business as expressed in its memorandum."

He concluded that in consequence at least a good *prima facie* case had been made out that the company would be wound up on just and equitable grounds. It is to be noted that in expressing himself in this way Bell J did not refer to any authority or seek to apply any of the established tests. In particular, he did not consider whether it was practically impossible for the company to carry on its business as expressed in its memorandum, and in referring to the board minutes of 9 June 2008 he appeared to have been taking into account the intentions of the directors. The company Bell J was dealing with had suffered a massive fraud and was in his view insolvent, being a debtor of the petitioner in the sum of some US$100m. It may be that these factors would have justified the conclusion that it was practically impossible for the company to carry on its business and that that was what the judge was intending to convey. If so, then it can be viewed simply as an orthodox application of *Re Suburban Hotel Company*.

Following *Stewardship Credit*, in January 2010 an application was made in the Cayman Islands in *Re Belmont Asset Based Lending Ltd* to wind up another company that operated as an open-ended investment fund that had been the subject of the Petters fraud. The judge, Jones J, found that by September 2008 it had been accepted by all those involved in the management of the fund that it was no longer in a position to pursue its investment objective and that it was not then viable as a mutual fund. The directors had themselves stated that the continued operation of the fund was no longer viable and that steps should be taken to realise the fund's portfolio and to place the fund into voluntary liquidation. When the directors did not place the company into voluntary liquidation a winding up petition was presented making a number of allegations including loss of substratum. The company sent the petition and other documents to all shareholders and known creditors, together with a covering letter accepting that there had been a loss of substratum. The other allegations being abandoned, the directors did not oppose the making of a winding up order on the basis of 'loss of substratum' but the judge concluded that notwithstanding that the company and the petitioner agreed that the company could be wound up on that basis, he had to be satisfied that it was a proper case to make a winding up order. Turning to the authorities, Jones J made reference to some of the cases referred to above, but in doing so took no notice of the fact that they uniformly stated the test as being one of practical impossibility to carry out the primary object of the company as expressed in its memorandum, without reference to the current subjective intentions of the board. On the contrary, he suggested that the statements made in the cases, translated into a modern context, established that 'it is just and equitable to make a winding up order in respect of an open ended corporate mutual fund if the circumstances are such that it has become impractical, if not actually impossible, to carry on its investment business in accordance with the reasonable expectations of its participating shareholders, based upon representations contained in its offering documents'.

Indeed, Jones J went further, stating 'wherever it is proved that a company established as an open ended mutual fund is no longer viable as such, for whatever reason, the Court will ordinarily conclude that it is just and equitable to make a winding up order.' The only case the judge referred to in support of this proposition was the Cayman decision of Henderson J in *Philadelphia Alternative Asset Fund Ltd* (19 December 2005) (unreported), although in fact in that case there had been no dispute that there had been a total loss of substratum of the fund and that it should accordingly be wound up: the only dispute was as to how that should be done. While the judge did not elaborate on the elements that made the company 'non-viable' it appears that he had in mind the inability to meet redemption requests and the collapse of the company's NAV as a result of the Petters fraud and the credit crunch.

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The judge suggested that there were sound policy reasons for making winding up orders in relation to non-viable mutual funds, but there are, it is submitted, other considerations. In particular, many funds have highly specialised investments which, in order to maintain value, need to be realised over a period of time; liquidators appointed over such funds will need to employ specialised managers to maintain investments and in consequence the effect of liquidation may well be simply to insert a further layer of fees charged by the liquidators; liquidators are likely in any event to obtain lower prices for investments because of the perception that they are engaged in a 'fire sale'; existing management may well be engaged in realisation negotiations that will be disrupted, delayed and possibly destroyed by liquidation. Beyond all this it must not be forgotten that the holding and realisation of investments over time is one of the fundamental features of an investment fund and invariably investors will have signed up to an investment that expressly contemplated the possibility that subscriptions and redemptions might be suspended.

Hard on the heels of *Belmont* was a further Cayman case, *Re Freerider Ltd* (27 April 2010), a decision of Foster J. There the company had been established to exploit an invention. It was part of a complicated corporate structure to avoid tax in the Netherlands established by two joint venture partners – the inventor and a financier – who subsequently fell out with each other. The inventor petitioned to wind up the company on just and equitable grounds on the basis that it was a quasi-partnership and that, because the tax avoidance scheme had failed, the substratum of the company had been lost. The judge found that the whole purpose and rationale for the incorporation of the company was to enable royalty payments to be made to an entity in a tax-free jurisdiction in order to avoid or mitigate Dutch tax and that that objective could not be achieved because the Dutch tax authorities had determined that the company was resident in the Netherlands for tax purposes. He recognised that Jones J in *Belmont* had adopted a different test (paraphrased as whether circumstances are such that it is impractical, if not actually impossible, for the company to carry on its business in accordance with the reasonable expectations of its participating shareholders) to that found in the earlier cases (which he sought to paraphrase as whether the underlying purpose for which the company was incorporated was incapable of achievement), but saw no reason not to apply both tests, which he held were both satisfied.

As Jones J in *Belmont* claimed to have been applying the test found in earlier cases, translated into a modern context, it is perhaps surprising that Foster J concluded that it was a different test. Logically, it might have been thought that if he had concluded that Jones J had propounded a different test in purporting to restate the existing test, he should have concluded that the judge had erred. Equally surprising is the fact that in concluding that the whole purpose and rationale for the incorporation of the company was a tax purpose, Foster J made no reference to the memorandum of the company, which is the touchstone in applying the loss of substratum doctrine.

The issue resurfaced, again before Jones J, a few months later in *Wyser-Pratte Eurovalue Fund Ltd* (9 September 2010). The judge was there faced with a fund that had suspended redemptions and was carrying out a liquidation of its assets according to a plan that had been devised by its investment manager, without consultation with its investors. Perhaps not entirely surprisingly, he chose to rely on his own earlier decision of *Belmont*, concluding that the company had lost its substratum because it had, in his view, ceased to be viable as the offering documentation had not contemplated that redemptions would be suspended indefinitely, that a liquidation of the company would be carried out by the directors without shareholder approval whilst the manager continued to be paid fees, or that there would be no formal mechanism by which the shareholders could intervene in the process.

The decision is open to much the same criticism as that which can be directed against *Belmont* itself. The judge essentially decided that because the company's affairs were no longer being conducted in the manner contemplated in the offering memorandum, pursuant to which investors had subscribed for shares, that of itself made it non-viable and thus it had suffered the loss of its substratum. However, *Wyser-Pratte*, on analysis, goes further: in that case there was no catastrophic loss of assets through fraud or a collapse of the company's NAV. It was simply a (potentially reversible) decision of the fund's board to realise current investments, not make new investments, and to suspend redemptions pending receipt of realisation proceeds, which would thereafter be applied in making partial redemptions. Following *Kitson*, *Taldua*, *Galbraith* and *Re Chinese Estates*, it is suggested that the court should have held that the expressed current intentions of the fund's board, and its subsequent (potentially reversible) actions were irrelevant.

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The business of an open-ended investment fund has several distinct phases: (i) it solicits investment; (ii) it invests funds obtained from share subscriptions; (iii) it holds investments; (iv) it realises those investments and (v) uses the proceeds either to make further investments or to pay redeemers. The fund in *Wyser-Pratte* continued to carry out phases (ii) to (v), albeit that: (a) the rate at which investments were realised and redeemers were paid was restricted by economic circumstances; and (b) the proceeds do not appear to have been earmarked for the making of any further investment. The judge therefore appears to have based his conclusion that the fund was non-viable simply because it was not inviting new subscriptions (and therefore not receiving any new money) (although in theory it could have done if economic circumstances had changed) and not paying out redeemers other than by reference to the proceeds of realisation (any redemption then being only partial). It is very difficult to see how these features in any sense equate to a loss of substratum, however generous an interpretation is given to those words.

Meanwhile, the issue had not escaped the attention of the courts of the BVI. *Citco Global Custody NV v Y2K Finance Inc* [BVI HCV 2009/0020A] (25 November 2009), which came before Bannister J, was another mutual fund case. There it was not disputed that the commercial life of the fund was at an end, in that it did not intend to and would never resume operation as a mutual fund. The fund's assets had been realised and the fund wished to employ the proceeds in paying out the redeeming investors, thereafter putting the fund into voluntary liquidation. Certain of the investors wished to put the fund into compulsory liquidation immediately with the aim, it seems, of persuading the liquidators to pursue the directors for alleged breaches of duty in paying earlier redemptions in breach of the fund's articles. In this unusual set of circumstances the applicant sought to persuade the court to put the fund into compulsory liquidation on the grounds that it had itself expressed that its life had come to an end and that it no longer had any reasonable expectation of meeting its objects as a mutual fund, which the court interpreted as a plea of loss of substratum.

Bannister J noted that in England, at least, 'loss of substratum' has more than one meaning. First, are the cases where the company has no prospect of commencing, or continuing the business defined in a specific objects clause in the memorandum. Secondly, where legislation makes express provision for particular situations where the company eg has not commenced, or has suspended its business (of no relevance in the BVI where there is no such provision). As the judge pointed out, the first category has no application where the company has

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an extremely widely drawn objects clause (as almost all companies now do) and suggested that there is a further third category, namely those cases where the question of whether it is impossible to carry on the business for which the company was incorporated cannot be answered simply by reference to a specific objects clause but depends upon information collected from elsewhere. In this context it is important to note that the court nonetheless expressly followed and applied the test established by *Re Suburban Hotel Company*: has 'the whole of the business which the company was incorporated to carry on, become impossible?', stating that the passage in which it had been postulated was 'a powerful statement of general principle of the highest authority'.

The court found, applying that test, that it was beyond doubt that, in the broad sense, the substratum of the fund had been lost, as it could not resume business as an active mutual fund seeking investors and running a fund on their behalf – it had of course realised all its investments – and it accepted that it must go into liquidation. However, it refused to direct the compulsory winding up of the company stating:

> 'But while Y2K is solvent (that fact is not challenged), it seems to me that there is nothing in the authorities which suggests that it would be a proper exercise of discretion for the Court to step in and shut the company down while it remains in a position to carry out the last of its commercial functions for the benefit of those of its investors who have requested that it should do exactly that.'

Y2K was decided only shortly before *Belmont*. It was not until a little later that the BVI court had the opportunity, in *Re Quantek Opportunity Fund*, to consider whether Jones J's approach was correct. The fund in *Quantek* had ceased to accept new subscriptions, but was making a series of partial redemption payments. This was not enough for one creditor, who even though it had a mere 1.6 per cent holding, proceeded to apply to put the company into liquidation on loss of substratum grounds, relying on *Belmont*.

Having considered the 19th and 20th-century cases referred to above, Bannister J concluded that the underlying principle to be extracted from them was that a minority seeking a winding up on the grounds that the business life of the company has come to an end would only be permitted to overcome the will of the majority if they could show that further conduct of the company's business was impossible, in the sense that it was 'impossible as a practical matter to carry on.' Turning to *Belmont* and Jones J's reasoning, Bannister J commented:

> 'It appears to me that [Jones J] was confining his reasoning to the position of open ended investment funds. If he was, then I respectfully differ from him. There cannot, in my view, be a separate principle applying only to a particular type of business. While the application of principle to the facts of a particular business, finding itself in a particular situation, may throw up different results in different cases, the principle itself must, I would suggest, be universal. Nor, if I may say so, do I consider that it is helpful to introduce the concept of "viability". A business may be said not to be viable on a number of bases … the concept of "non-viability" is too uncertain to ensure consistency of application … In my judgment the only purpose for which liquidators are appointed by the Court is in order for them to manage the final moments of companies which the Court has decided, according to established principles, ought to be put out of existence, whether because they are insolvent, or because their members cannot continue their management harmoniously, or because it has become impossible for them to carry on their businesses and the only course is for them to be put down like stricken animals. This applies, in my judgment, to open ended investment companies in the same way as it applies to all other companies. There is, in my view, no principle justifying the Court in appointing liquidators on the grounds that the activities of the company at any particular stage of its career are such that they would, in the opinion of the Court, be better carried out by the liquidator than by current management.'

In what appears to have been an attempt to take the sting out of these criticisms, Bannister J observed that Jones J, in reaching his decision, had not had the benefit of opposing argument.

Very shortly afterwards Jones J was given the opportunity to respond when *Re Heriot African Trade Finance Fund* (6 January 2011) came before him. This was again a Cayman mutual fund in what the judge termed 'run off'. An attempt was made by counsel for the fund to rely on *Quantek*. He was given short shrift: as Jones J saw it, if *Quantek* represented the law in the BVI, then BVI law differed from Cayman law on the point; a slightly surprising conclusion given that both Jones J and Bannister J claimed simply to be applying established legal principles.

For Jones J, it was just and equitable to make a winding up order on the basis that the fund was no longer viable 'in the sense that it is practically impossible to carry on its business in accordance with the reasonable expectations of its participating shareholders, based upon the representation contained in its [private placement memorandum]'. A comparison between this passage and the corresponding passage of Jones J's judgment in *Belmont* reveals a shift from 'impractical, if not actually impossible' to 'practically impossible'; but it will nonetheless be seen that even with this refinement the approach he advocates, while paying lip service to the practical impossibility test, introduces a wholly novel element, the reasonable expectations of shareholders, and with it, a wholly new layer of uncertainty.

It remains to be seen whether the viability test applied by Jones J in *Belmont* and, in a slightly redefined form, in *Heriot*, survives an appeal to a higher court. If it does survive then the future for mutual funds who have suspended subscriptions and redemptions looks bleak. In the interim it can fairly be said that their prospects appear significantly more rosy in the BVI. ■