

Cayman's Grand Court rules on suspension of redemptions in light of Strategic Turnaround

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Harneys previously reported on the far reaching implications of the landmark case of Strategic Turnaround in an [earlier client update](#). Recently, in the case of Matador Investments Ltd, on which judgment was handed down on 27th August 2009, the Grand Court of the Cayman Islands has had occasion to consider the extent of the Strategic Turnaround decision.

Both cases fall along similar, but not identical facts. Both involve redemption requests from shareholders in a hedge fund, subsequent attempts by the hedge fund to suspend redemptions and both involve the presentation of a winding up petition by an investor whose redemption proceeds were unpaid due to the decision to suspend.

However, there were two principal differences identified by the court:

- 1) In Strategic Turnaround, the fund's articles and offering documents, when read together, empowered the fund to suspend redemptions and explicitly included the right to suspend the payment of redemption proceeds. In Matador the fund's articles and offering documents only explicitly empowered the fund to suspend redemptions; they did not explicitly allow the suspension of the right to receive redemption proceeds.
- 2) The Directors' resolution in Strategic Turnaround came before the date on which payment of the redemption proceeds fell due. In Matador the resolution to suspend redemptions was only made after the payment date had passed.

As a result of the differences the Court in Matador decided that the unpaid redemption proceeds were due to be paid. This was on the grounds that there had been no suspension in place at the date on which the redemption proceeds fell to be paid as well as that, in any event, the fund had no right to suspend the payment of redemption proceeds. The Court went on to hold that the Petitioner had standing to bring the Petition as a petitioning creditor given that the time for payment had expired well before the purported suspension.

Quinn J made some clear statements regarding the extent to which the Court of Appeal's approach in Strategic Turnaround would be applied generally:

“The parties have a right to determine as a matter of contract how the redemption process operates and similarly any rights by the Company to suspend redemptions or the right to receive payment of the redemption proceeds. Unlike Strategic Turnaround, there is no wording in relation to a state of emergency or period of ‘extreme volatility or illiquidity’ which would give the Company the right to suspend ‘payment of the proceeds after redemption,’ nor can this Court infer any such power from the documentation.” . . .

“The Court of Appeal in Strategic Turnaround did not lay down a uniform code to apply to the construction and interpretation of Articles and accompanying Offering Memorandum of Cayman Islands Mutual Funds companies. Strategic Turnaround is no authority for the proposition that a Fund may impose a suspension on an investor’s right to receive redemption proceeds at any time. Furthermore, there is no authority of which this Court is aware, that a Fund, in the absence of an express power, may purport to institute a retrospective suspension of payment of redemption proceeds. This Fund, like any other fund, must have regard to the redemption dates and times for payment as stipulated in the pertinent fund documents and agreed between the parties.” [Emphasis added.]

This case provides clear guidance to managers and directors of funds when considering whether and to what extent they can suspend redemptions. In particular, the case suggests that the Court:

- will interpret each set of articles and offering documents on their face;
- will not imply terms into suspension of redemption provisions that are contrary to the effect of the express terms contained in the articles and offering documents; and
- is likely to interpret the term “suspension of redemptions’ narrowly and so will not automatically include all five of the elements identified by Vos, ¹ as making up the process of redemption into this phrase unless there is a clear intention to do so evidenced in the governing documents.

What was not directly considered in this case and still remains in question is whether the Court would find that an investor had standing to bring the Petition as a petitioning creditor if an attempt was made to suspend the redemption process after the Redemption Date had passed but before the Net Asset Value calculation had been finalised in circumstances where there was an absolute timescale for payment of redemption proceeds after the Redemption Date.

¹ As set down at paragraph 59 of Strategic Turnaround, the five stages of redemption are: (a) the notice to redeem; (b) the debt that arises on the Redemption Date; (c) valuation of the NAV at the Redemption Date and, as a consequence, the redemption sum; (d) the payment of the redemption sum; (e) the removal of the Member from the Register.

The Matador case serves as a timely reminder, if one were needed, of the central importance of ensuring that each fund's articles and offering documents have explicit and clear provisions detailing all the rights the directors may need in order fully and effectively to suspend the redemption process.

We understand that steps have been taken to appeal the decision in Matador. Until that appeal is resolved, this case provides a good indication of how Strategic Turnaround is being applied in practice by the Lower Court.

If you have any questions about this case please contact Tim Clipstone (tim.clipstone@harneys.com) or Nicholas Fox (nicholas.fox@harneys.com), of our Cayman Islands' Funds and Litigation Departments respectively.

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