

## The Rocky Road to Redemption 赎回的坎坷路

Investors will undoubtedly agree that “the path to redemption is not always smooth” as stated by Lord Mance in the Privy Council’s recent judgment in *Pearson -v- Primeo Fund* [2017] UKPC 19. The judgment brings finality to the dispute between Herald Fund SPC (in Official Liquidation) (“Herald”) and Primeo Fund (in Official Liquidation) (“Primeo”) regarding the redemption of shares. The Privy Council dismissed Herald’s appeal, confirming the earlier decisions of the Cayman Islands Court of Appeal and Grand Court. All three courts found that an investor who had properly redeemed its shares, but had not been paid, will be a creditor of the company in respect of its redemption proceeds. Accordingly, its claim (as a creditor) will rank ahead of the remaining investors in the liquidation of the company, albeit behind those of ‘ordinary’ creditors.

### The Dispute between Herald and Primeo

Herald, an open-ended investment fund, invested the majority of its funds in Bernard L. Madoff Investment Securities LLC. Primeo also carried on business as an open-ended investment fund. From 2004 onwards, Primeo invested in Herald which resulted in Primeo becoming an indirect victim of the Madoff Ponzi scheme.

On 1 December 2008 (or at some earlier redemption date), a number of investors’ redemption requests (represented in the Privy Council by Primeo) were accepted by Herald in accordance with Herald’s articles (the “December Redeemers”).

毫无疑问，投资者会同意枢密院近期对 *Pearson -v- Primeo Fund* [2017] UKPC 19一案的判决中曼斯（Mance）勋爵所说的“赎回之路不一定平顺”。此判决最终解决了 Herald Fund SPC（正式清盘中）（下称“Herald”）与 Primeo Fund（正式清盘中）（下称“Primeo”）间有关赎回股份的争议。枢密院驳回了Herald的上诉，确认开曼群岛上诉法院及大法院早前的判决。以上三间法院均认为，若一投资者已适当赎回其股份但未获支付赎回股款，则该投资者就其赎回所得款项而言，是公司的债权人。因此，其索偿（作为债权人）在公司清盘中的优先顺序尽管在‘普通’债权人之后，但在剩余的投资之前。

### Herald与Primeo间的纠纷

Herald是一支开放式投资基金，其大部分资金投资于 Bernard L. Madoff Investment Securities LLC，而 Primeo亦作为开放式投资基金开展业务。自2004年起，Primeo投资Herald，导致Primeo成为Madoff 庞氏骗局的间接受害方。

2008年12月1日（或某个较早的赎回日期），Herald根据其公司细则接受多位投资者的赎回要求（由Primeo在枢密院作为代表）（下称“十二月赎回人”）。

On 11 December 2008, the Madoff fraud was exposed and Herald took immediate steps to suspend the calculation of its net asset value and the issuance and redemption of shares, doing so at 5:00 pm on 12 December 2008. The December Redeemers had not been paid.

Herald's position was that all investors who were unpaid on 12 December 2008 rank as ordinary shareholders and should therefore be paid *pari passu*. Primeo's position was that the December Redeemers were owed simple debts by Herald and so should rank in the liquidation as ordinary creditors (above unredeemed investors).

### The Interveners

In addition to the Privy Council hearing the dispute between Primeo and Herald in relation to the December Redeemers, the Privy Council also heard arguments from two additional parties:

- Reichmuth & Co appeared representing the interests of investors who, before 5pm on 12 December 2008, gave notice to redeem on a subsequent date (the "Late Redeemers"); and
- Natixis SA appeared representing investors who made requests to redeem after 5pm on 12 December 2008 (the "Later Redeemers").

Neither party had been heard in the courts below.

### The Law

The fundamental question for the court was whether (and to what extent) Section 37(7)(a) of the *Companies Law (2006 Revision)* applied to each group of redeemers. Section 37(7)(a) provides that:

*Where a company is being wound up and, at the commencement of the winding up, any of its shares which are or are liable to be redeemed have not been redeemed or which the company has agreed to purchase have not been purchased, the terms of redemption or purchase may be enforced against the company, and when shares are redeemed or purchased under this subsection they shall be treated as cancelled:*

*Provided that this paragraph shall not apply if-*

- (i) *the terms of redemption or purchase provided for the redemption or purchase to take place*

2008年12月11日，Madoff骗局被揭发，Herald立即采取措施，于2008年12月12日下午五时整暂停其资产净值的计算以及股份发行及赎回。十二月赎回人未获支付赎回股款。

Herald的观点是，所有于2008年12月12日未获支付赎回股款的投资者应列为普通股东，因此应按相同比例获支付股款。Primeo则认为Herald欠付十二月赎回人的是单纯债务，因此十二月赎回人应在清盘中按普通债权人排序（高于未赎回投资者）。

### 加入诉讼人

枢密院除了审理Primeo与Herald间有关十二月赎回人的纠纷外，亦听审了另外两方的论证：

- Reichmuth & Co出庭代表于2008年12月12日下午五时整之前发出通告将于随后某日进行赎回的投资者（下称“延迟赎回人”）的权益；以及
- Natixis SA出庭代表于2008年12月12日下午五时整之后要求赎回的投资者（下称“更迟赎回人”）。

双方均未在以下法院进行聆讯。

### 公司法

法院面临的根本问题是公司法（2006年修订本）第37(7)(a)条是否（及在多大程度上）适用于各组赎回人。第37(7)(a)条规定：

*若一间公司正在清盘，而在开始清盘时，其任何股份将被赎回或有义务被赎回但尚未赎回，或该公司已同意购买但尚未购买，则赎回或购买条款可对该公司强制执行，且当股份根据本分条进行赎回或购买时，应被视为已注销：*

*但在下列情况下，此段不适用-*

- (i) *赎回或购买条款规定赎回或购买须在开始清盘日期之后的某日期进行...*

at a date later than the date of the commencement of the winding up...

The Privy Council found that:

*“Section 37(7) is thus addressing situations in which redemption or purchase ought to have been, but was not, effected by the company before the commencement of the winding up, and allows the relevant shareholder to enforce the terms of redemption or purchase notwithstanding the winding up.... [Section 37(7) was not] designed to lower or reverse the status of a shareholder who had by a redemption or sale already become a creditor. Indeed, it is difficult to see any basis in the Companies Law or in Herald’s articles whereby such a redemption or sale could be regarded as reversed, or a former shareholder reconverted to the status of a shareholder.”*

Therefore, so the Privy Council said, Section 37(7) did not apply to the December Redeemers (whose shares had been redeemed pursuant to the articles of Herald but who remained unpaid). Accordingly, the December Redeemers were found to be creditors of Herald and therefore entitled to claim in priority to the unredeemed shareholders in the liquidation of Herald.

The Late Redeemers accepted that Section 37(7) applied to them, but argued that the proviso at Section 37(7)(a)(i) did not apply and that therefore they should be entitled to enforce their redemption requests against Herald. The Late Redeemers argued that the redemption was expected to take place in February 2009, before the winding up of Herald in July 2013 (although it did not occur as a result of the suspension on 12 December 2009). The Privy Council found that the effect of the suspension was that redemption could not occur under the articles of Herald. As the suspension continued until the commencement of the winding up of Herald, the terms of the redemption must be regarded as having provided for redemption to take place at a date later than the date of commencement of the winding up. Accordingly, the Section 37(7)(a)(i) proviso applied to the Late Redeemers and they were unable to enforce the redemption against Herald under Section 37(7)(a). Given the findings in relation to the Late Redeemers, it followed that the Later Redeemers were also unable to enforce under Section 37(7)(a). The Privy Council also noted that the redemption requests by the Later Redeemers after suspension may have been invalid under the articles of Herald (but did not need to decide this point).

枢密院认为:

*“因此，第37(7)条乃应对公司原本应该但并没有在开始清盘前进行赎回或购买的情况，并准许相关股东执行赎回或购买条款，尽管正在清盘...[第37(7)条并非]旨在降低或推翻已透过赎回或出售成为债权人的股东的身份。确实很难在公司法或Herald的公司细则中找出任何依据令该等赎回或出售可被视为已撤销，或前股东再转回股东身份。”*

因此，枢密院表示，第37(7)条不适用于十二月赎回人（其股份已根据Herald的公司细则赎回但仍未获支付赎回款）。故此，十二月赎回人被确认为Herald的债权人，因而有权在Herald清盘中优先于未赎回股东提出索偿。

延迟赎回人接受第37(7)条对其适用，但提出第37(7)(a)(i)条的规定不适用，因此彼等应有权对Herald执行其赎回要求。延迟赎回人提出，赎回预计于2009年2月进行，是在2013年7月Herald清盘之前（尽管由于2009年12月12日的暂停而并未发生）。枢密院认为暂停的影响是赎回不能按照Herald的公司细则进行。由于暂停持续至Herald开始清盘，赎回条款须视为已规定赎回将在开始清盘日期之后的某日期进行。因此，第37(7)(a)(i)条的规定适用于延迟赎回人，根据第37(7)(a)条，彼等无法对Herald强制执行赎回。鉴于有关延迟赎回人的裁决，更迟赎回人因此亦无法在第37(7)(a)条下强制执行。枢密院亦注意到更迟赎回人在暂停后提出的赎回要求在Herald的公司细则下可能已无效（但无需就此点作出裁定）。

## Conclusion

Fund managers and investors will welcome the Privy Council's judgment which confirms, and is consistent with, the earlier decisions of the Cayman Islands Court of Appeal and Grand Court. The Privy Council's comments that shareholders and companies have the freedom to shape their relationship as regards redemption or purchase of the company's shares will also be well received.

While the path to redemption may not always be smooth, the Privy Council decision marks, at least, the end of the road for Primeo.

**This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.**

## 结论

基金经理及投资者将愉快地接受枢密院的判决，该判决确认且符合开曼群岛上诉法院及大法院早前的判决。枢密院对于股东与公司可自由就赎回或购买公司股份塑造其关系的意见亦将得到广泛接受。

虽然赎回之路并非总是平顺，但枢密院的判决至少标志着Primeo的法律路途终于达到了终点。

本文并非法律意见，其内容亦非详尽无遗，只可作为概览及一般参考资料。感谢您的垂阅!

### FOR FURTHER INFORMATION, PLEASE CONTACT:

Conyers Dill & Pearman  
29th Floor  
One Exchange Square  
8 Connaught Place  
Central  
Hong Kong  
Tel: +852 2524 7106  
Fax: +852 28459268  
Email: [hongkong@conyersdill.com](mailto:hongkong@conyersdill.com)  
Web: [www.conyersdill.com](http://www.conyersdill.com)

### 欲了解更多资讯，请联络：

康德明律师事务所  
香港中环康乐广场 8 号  
交易广场 1 期 29 楼  
电话: +852 2524 7106  
传真: +852 2845 9268  
电邮: [hongkong@conyersdill.com](mailto:hongkong@conyersdill.com)  
网址: [www.conyersdill.com](http://www.conyersdill.com)

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