

BERMUDA SUPREME COURT

IN THE MATTER OF STURGEON CENTRAL ASIA BALANCED FUND LTD. AND IN THE MATTER OF THE COMPANIES ACT 1981 [2017] (Bda) 55 Com (14 July 2017)

WINDING UP ON JUST AND EQUITABLE GROUNDS - FUND - RIGHTS OF PARTICIPATING SHAREHOLDERS - CONSTRUCTION OF BYE-LAWS

A petition was brought by participating shareholders in the Sturgeon Central Asia Balanced Fund (the "Fund"), a closed-ended investment fund for Japanese regulatory purposes, was listed on the Irish Stock Exchange and therefore was open-ended to wind it up on just and equitable grounds. The central complaint brought on behalf of the participating shareholders was that the management shareholders, had overridden the right conferred in the bye-laws, which, it was alleged, entitled the participating shareholders to vote on whether or not the fund should be wound up. The underlying commercial issue was that the investors wanted an exit and sought to construe the bye-laws as either requiring the company to be wound up on a certain date and/or as conferring on them the right to vote to determine whether it should be wound up.

The case contains a helpful summary of the principles to be applied in construing the bye-laws of a Bermuda company; in particular, the extent to which regard can be had to extrinsic evidence. The Court concluded, that in the case of ordinary contracts the court is concerned to ascertain what a reasonable person having all the background knowledge which would have been available to the parties, would have understood them to be using the language to mean. However, in the context of construing bye-laws of companies, because of the peculiar nature of the statutory contract and, in particular, because shares may change hands, it is not possible to imply terms into the bye-laws by reference to extrinsic circumstances. Terms may be implied purely on the basis of the language and construction of the document itself. Extrinsic evidence as to circumstances may be admissible to identify persons or other subject matter, but it will not be allowed to impose obligations beyond the language of the documents on "business efficacy" grounds. Therefore, the Court held that extrinsic evidence of the negotiating history of the bye-laws concerned, was not

admissible as an aid to construction. The Court also held that, where the bye-law was ambiguous, a shareholder could rely on the *contra preferentum* rule. Notwithstanding those findings the Court did look at the surrounding commercial context, but held that it did not, in any event, assist the exercise. It held that on a true construction of the bye-laws, the Fund could only have been wound up if both the management and the participating shareholders agreed. The Court also considered whether an investor would have reasonably expected the fund to be wound up on 31 December 2017 the date contended for by the Participating Shareholder even if the bye-laws did not have this effect. Without analysing the scope of a doctrine that would have allowed such a reasonable expectation to override the bye-laws, the Court held on the facts there was insufficient evidence to support that contention.

In light of the Court's findings on the construction points, there was no conduct which would lead to a conclusion that there was a justifiable lack of confidence in the conduct and management of the Fund's affairs, or any circumstances which led to a conclusion of bad faith on the part of those in control of the Fund. Notably, the Court relied on the Cayman case of *Re the Washington Special Opportunity Fund* FSD No 51 2015.

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