

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **FINANCIAL SERVICES DIVISION**

3 **CAUSE NO. FSD 36 OF 2011 (PCJ)**

4 **The Hon Sir Peter Cresswell**
5 **In Open Court on 29 to 31 January and**
6 **5 February 2013**
7

8 **BETWEEN**

9 **ORIGAMI PARTNERS III, LP**

Plaintiff

10
11
12 **AND: (1) PURSUIT CAPITAL PARTNERS (CAYMAN) LTD**
13 **(2) PURSUIT CAPITAL PARTNERS MASTER (CAYMAN) LTD**
14 **(3) PURSUIT INVESTMENT MANAGEMENT LLC**

15 **Defendants**

16
17 **Appearances**

18
19 Mr. Neil Timms QC instructed by and with Mr. George Keightley of Mourant Ozannes for the
20 Plaintiff.

21
22 Mrs. Sandie Corbett and Mr. Nicholas Dunne of Walkers for the Defendants
23

24 **JUDGMENT**

25 Summary of the Case

26 Agreed Facts

27 Issues to be Determined

28 Maples' letter of 9 March 2009

29 The Deed of Settlement

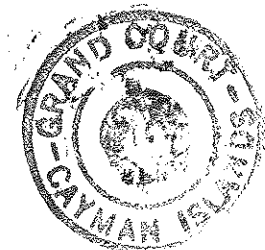
30 The Deed of Assignment

31 The Russell Investors ceased to be shareholders in the Feeder Fund on 31 March 2009

32 Oral Evidence

33 The issues – analysis and conclusions

34 A. Validity of the Assignment



1 B. The Holdback Issues. NAV. Holdback under the Confidential Offering Memorandum. The
2 Audit
3
4 The Reasons for the order of 16 January 2013
5 The Proceedings in the United States
6 Conclusion



7
8 [In this judgment I will use the term "Pursuit" to refer to one or more of the Defendants as the
9 context requires and "Russell" or the "Russell Investors" to refer to the First Defendant's
10 shareholders or the parties to the Deed of Settlement as the context requires]

11 Paragraphs 1 – 24 are taken from the agreed Case Memorandum

12

13 **Summary of the Case**

14 1. The Defendants are a Cayman Master Fund, its Cayman Feeder Fund ("the Feeder Fund")
15 and their Delaware Investment Manager. The Plaintiff alleges that it is the assignee of
16 certain rights of certain of the First Defendant's shareholders (Russell), pursuant to a
17 Purchase Agreement dated 30 November 2010 and Deed of Assignment dated 7 January
18 2011 (the "Assignment").

19 2. On 26 February 2008 the Investment Manager informed investors that due to then
20 prevailing market conditions the Directors of the Funds had determined to suspend the
21 calculation of its Net Asset Value ("NAV") and redemptions. A restructuring proposal
22 was sent by the Investment Manager to investors on 21 January 2009.

23 3. Russell owned approximately 34% of the Participating Shares in the Feeder Fund and did
24 not agree with the restructuring proposal. Russell issued an Originating Summons in the
25 Grand Court on 23 February 2009 ("the Application") seeking the appointment of
26 Inspectors over the Feeder Fund pursuant to section 64 of the Companies Law (2007
27 Revision).

1 4. Subsequent negotiations between the parties resulted in the Application being
2 compromised by a Deed of Settlement dated 1 April 2009 (the "Deed of Settlement")
3 between Russell and the Defendants. The Deed of Settlement provided for mutual
4 releases and for compulsory redemption of Russell's shares by the Feeder Fund and
5 payment to Russell by Pursuit of their pro rata share of the cash and other assets held by
6 the Master Fund proportionate to their indirect investment in the Master Fund (the "Pro
7 Rata Share").

8 5. It is common ground that the total value of Russell's Pro Rata Share was calculated to be
9 US\$144,576,595.52 ("the Settlement Proceeds"). There is a dispute between the parties
10 as to whether this figure was provisional or final. The sum of US\$4,337,297.87 (the
11 "Holdback") was held back from the cash portion of the Settlement Proceeds.

12 6. Subsequently on 7 January 2011, Russell purportedly assigned its rights under and in the
13 Deed of Settlement to the Plaintiff. The Plaintiff (as Russell's alleged assignee) claims in
14 these proceedings that it is entitled to be paid the Holdback and sues for immediate
15 payment together with interest.

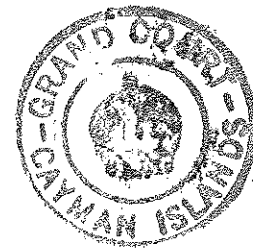
16 7. The Defendants assert (i) that the purported assignment was invalid; (ii) that the Plaintiff
17 does not have standing to sue for recovery of the Holdback as Russell's assignee and (iii)
18 that the Holdback is in any event not due and owing.

19 **Agreed Facts**

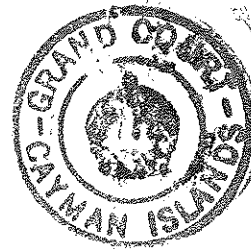
20 8. The Parties agree that

21 a. Russell invested in the shares of the Feeder Fund variously between 1 November
22 2006 and 1 September 2007.

23 b. Russell and Pursuit discussed settlement in a telephone call referred to in the
24 Recitals to the Deed of Settlement and the in principle understanding about any
25 holdback was set out in the letter dated 9 March from Pursuit's attorneys also
26 referred to in the Recitals.



- 1 c. The Russell Investors were compulsorily redeemed as of 31 March 2009, were
2 removed from the register of members as at that date and ceased to be legal and
3 registered shareholders in the Feeder Fund on 31 March 2009.
- 4 d. A NAV of the Master and Feeder Funds was determined as of 31 March 2009
5 and the NAV per share of the Russell Investors' shares was determined in
6 accordance with the Feeder Fund's Articles.
- 7 e. Thereafter Pursuit paid the sum of \$98,323,498.96 into respective bank accounts
8 operated by State Street on behalf of Russell on 13 and 14 May 2009. The in-
9 kind distribution of various securities was made on various dates into a securities
10 account operated by State Street on behalf of Russell with the final distribution
11 being made in 3 September 2009.



12
13 **Issues to be Determined**

14 **A Validity of the Assignment**

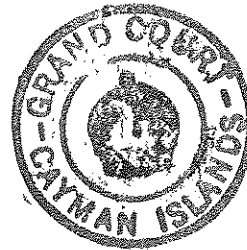
- 15 9. Pursuit's case now on assignment is summarized in a letter from Walkers to Mourant
16 dated 18 January 2013. In short, the Defendants challenge the effectiveness of the
17 assignment on grounds:
- 18 a. That the right to receive a redemption payment is an interest in shares and as the
19 Plaintiff is a non-eligible investor pursuant to the terms of the Articles and/or
20 PPM of the Fund, it cannot take an assignment of any interest in the shares
21 without consent of the Fund's Directors, which was , it is agreed, not sought or
22 obtained.
- 23 b. The right to compel completion of any conditions precedent to the release of the
24 Holdback pursuant to the Constitutional Documents is a right that can only vest
25 in the shareholder or former shareholders of the Fund. Pursuit now asserts that
26 an audit is such a condition precedent.

1 c. The Deed of Settlement only permits payment of the redemption proceeds to "a
2 suitable single vehicle or account" which must be owned by each of the Russell
3 entities in proportion to their investment in the Fund and thus, absent amendment
4 of the Deed of Settlement, the proceeds cannot be paid to the Plaintiff.

5 10. The Plaintiff says that propositions advanced by Pursuit are wrong in law and fact.

6 11. In relation to 9(c) above, there is an issue as to the true meaning and construction of
7 clause 1 A iii of the Deed of Settlement; whether or not it was a mere mechanism for
8 payment, the consequences of the in kind distribution having been made and the effect of
9 the clause on any outstanding cash payment.

10 12. The Plaintiff's position is that it is a creditor of each of the Defendants and that what was
11 assigned to it was not rights in shares or a transfer of shares but a sum equivalent to the
12 Holdback which is recoverable as a debt.



13
14 **The Holdback**

15 **NAV**

16 13. The parties agree that a NAV of the Master and Feeder Fund as at 31 March 2009 was
17 determined in accordance with the Constitutional Documents.

18 14. The Defendants' case is that no obligation to pay arose until the final NAV of the Master
19 Fund as at 31 March 2009 has been determined and that therefore no obligation to pay
20 any redemption proceeds has arisen because a final NAV has not yet been struck.

21 15. The Plaintiff's case is that (i) the Defendants have acknowledged (see para 13) that the
22 NAV was determined in accordance with the Deed of Settlement and (ii) the Defendants'
23 pleaded case is unsustainable.

1 **Hold back under the Confidential Offering Memorandum**

2 16. The Defendants' position is that the Confidential Offering Memorandum ("COM") dated
3 24 July 2008 empowers the Directors to withhold payment of up to 5% of any redemption
4 payment pending completion of the Fund's audit for the relevant year and that it is not
5 presently possible to complete the audit for the relevant year.

6 17. It is agreed that the Feeder Fund Articles do not expressly grant the Fund the powers set
7 out at p.12 of the COM and there remains an issue as to whether the Fund can be given
8 any such power, other than by the Articles.

9 18. The Defendants say that the Fund was contractually entitled pursuant to the COM (which
10 is binding between the Fund and its shareholders) to make a holdback from redemption
11 payments.

12 19. The Plaintiff says that:

13 a. Only the Articles can confer such power on the Directors and the purported
14 powers in the COM relating to redemption otherwise have no legal effect.

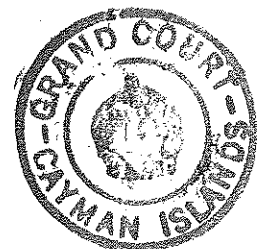
15 b. Even if they were valid exercisable powers, on a true construction of the COM
16 (together with the Articles) they relate to redemption by shareholders and are not
17 conferred on the Directors in a compulsory redemption.

18 c. In the event that the Plaintiff is wrong about (i) and (ii) above, any exercisable
19 powers in the COM were not incorporated into the Deed of Settlement.

20

21 **The Audit**

22 20. In the event that the Directors in April 2009 exercised a validly existing power to hold
23 back a portion of the Settlement Proceeds, it is in issue whether, in all the circumstances,
24 they are in breach of contract because they have unreasonably delayed the completion of
25 the audit by unreasonably declining to give a management representation letter to the
26 auditors or otherwise.



- 1 21. The Defendants contend that none of them have any obligation to pay the Balance of the
2 Contract Price until the Feeder Fund's 2009 audit is completed.
- 3 22. The Defendants further contend that the audit of the 2009 financial statements has not yet
4 been completed because the Feeder Fund Directors declined to give to the auditors a
5 management representation letter, because of an outstanding contingent liability ('the
6 contingent liability"). The Defendants contend that accordingly, the auditors issued no
7 audit report and were entitled to withhold the same because no management
8 representation letter was given. The Defendants assert that it is reasonable for the
9 Directors to decline to sign a management representation letter until the contingent
10 liability can be ascertained and quantified and for the audit to remain incomplete until
11 then.
- 12 23. The Defendants assert that it is not yet possible to complete the audit as a result of
13 outstanding liabilities attributable to the relevant accountancy year, and that it is
14 reasonable to withhold a management representation letter until the contingent liabilities
15 of the Fund can be established. It is further said that until the 2009 Audit is completed, no
16 obligation arises to repay the balance of the Settlement Proceeds.
- 17 24. The Plaintiff argues that the Directors have unreasonably delayed the completion by
18 declining to give a management representation letter to the auditors or otherwise, and
19 that, absent their failure to co-operate, the audit is properly capable of completion.

20

21 **Maples' letter of 9 March 2009**

22

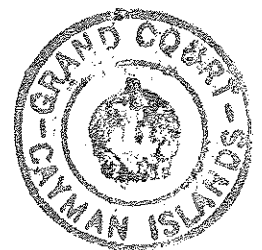
23 On 9 March 2009 Maples on behalf of the Defendants wrote to Conyers on behalf of Russell:-

24

25 "Pursuit Capital Partners (Cayman) Ltd. (the "Fund")

26

27 We act as Cayman Islands legal counsel to the Fund and are writing to you in your capacity as
28 Cayman Islands counsel to Russell Alternative investment Funds PLC, Russell Alternative
29 Strategies Fund II PLC and Russell Diversified Alternative Fund – U.S. Benefit Plan Ltd. (each a
30 "Russell Fund" and, together, "Russell"). Further to the telephone conference call this morning
31 with our respective clients, the following sets out our client's current in principal understanding
32 of the agreement between our clients.



1 The matters that our clients have agreed are as follows:
2

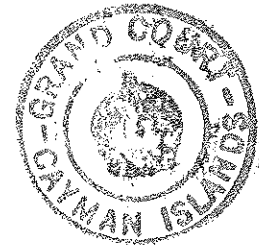
- 3 1. Russell or its nominated agent or payee will receive pro rata portion of the cash and other
4 assets held by the Pursuit Master (as defined in your clients' affidavit) as a direct in kind
5 distribution. Russell will arrange for a suitable single vehicle or account to be available
6 to receive such distribution on behalf of the Russell Funds. The Pursuit Master
7 anticipates that it will be able to effect a pro rata split of each of the individual positions
8 left in the Pursuit Master. To the extent that this occurs, no independent valuation will be
9 required. To the extent that there are any positions that cannot be split pro rate, an
10 independent valuation of such assets will be obtained.
11
- 12 2. Our client will request that Cogent provide a written confirmation that Russell are
13 receiving their proportionate share of the assets held by the Pursuit Master.
14
- 15 3. Russell will receive its proportionate share of all cash that becomes unencumbered as a
16 result of the closing out of derivative positions held by the Pursuit Master.
17
- 18 4. Our client will work to ensure that all distributions are made as soon as practicable.
19 Distributions will be made in full with holdbacks only relating to ordinary course of
20 business expenses such as legal, administrative and accounting expenses.
21

22 Please confirm that on the basis of the above understanding, your clients will agree to adjourn
23 the application for the appointment of an inspector (the "Application"). We should be grateful
24 for your confirmation that you are urgently taking steps to vacate tomorrow's hearing.
25

26 As discussed, this in principal agreement is subject to being more fully documented over the
27 coming days. Finally, and for the avoidance of doubt, once final agreement between our clients
28 is reached, we expect that the Application will be dismissed with no order for costs."
29

30 **The Deed of Settlement**

31 The Deed of Settlement was in the following terms:-
32



33 “
34

35 DEED OF SETTLEMENT

36
37

38 This Settlement Agreement and Mutual Release (the "Agreement") is entered into by and
39 between Russell Alternative Investment Funds PLC, Russell Alternative Strategies Fund II PLC,
40 Russell Diversified Alternatives Fund - U.S. Benefit Plan Ltd. and State Street Custodial
41 Services (Ireland) Limited (collectively, "Russell", each a "Russell Entity"), on the one hand,

1 and Pursuit Capital Partners (Cayman) Ltd (the “Fund”), Pursuit Capital Partners Master
2 (Cayman) Ltd. (the “Pursuit Master”), and Pursuit Investment Management, LLC (the
3 “Investment Manager”) (collectively, “Pursuit”), on the other hand.

4
5 WHEREAS, Russell hold non-voting participating redeemable Class A shares issued by
6 the Fund (the “Russell Shares”);

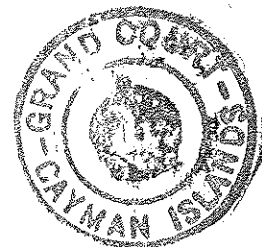
7
8 WHEREAS, substantially all of the assets of the Fund are comprised of shares in Pursuit
9 Master;

10
11 WHEREAS, Pursuit are proposing to implement a restructuring proposal affecting its
12 Class A shareholders;

13
14 WHEREAS, as action was commenced by Russell on or about February 24, 2009 in the
15 Grand Court of the Cayman Islands as Cause No. 88 of 2009 seeking the appointment of an
16 inspector pursuant to Section 64 of the Companies Law (2007 Revision) (the “Originating
17 Summons”), and a hearing was thereby scheduled on March 10, 2009 (the “Hearing”);

18
19 WHEREAS, subsequent to a telephone conference call held on March 9, 2009 for the
20 purposes of discussing a settlement which would dispose of the Originating Summons, Pursuit,
21 through its Cayman Islands legal counsel, Maples and Calder, sent a letter dated March 9, 2009
22 containing the in principle understanding of this Agreement to Russell’s Cayman Islands legal
23 counsel, Conyers, Dill and Pearman (the “Letter”);

24
25 WHEREAS, upon receipt of the Letter, Russell agreed to send, and thereafter their
26 Cayman Islands attorneys did in fact transmit to the Honourable Mr. Justice Foster, the judge
27 presiding over the Originating Summons (the “Judge”), a request for adjournment of the Hearing
28 sine die pending finalization of the settlement terms, and the Judge thereafter granted the request
29 for adjournment;



1 WHEREAS, without making any admissions as to the merits of the Originating
2 Summons, Russell and Pursuit (each, a “Party,” and collectively, the “Parties”) seek to resolve
3 the Originating Summons and to bring the relationship between Russell and Pursuit to an end by
4 agreeing the basis on which the Russell Shares will be redeemed by the Fund; and
5

6 WHEREAS, Pursuit and Russell agree that the Russell Shares shall be redeemed and that
7 Russell shall receive a pro rata share of the cash and other assets held by the Pursuit Master,
8 proportionate to the Russell Funds’ indirect investment in the Pursuit Master, on the terms set out
9 more fully in this Deed.
10

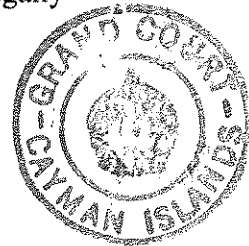
11 NOW, THEREFORE, in consideration of the terms, conditions, and mutual promises
12 contained herein, the sufficiency of which the Parties acknowledge, and intend to be legally
13 binding, the Parties hereby agree as follows:
14

15 1. Redemption Terms: The following shall be the “Redemption Terms”:
16

17 A. The Fund will effect a compulsory redemption of the Russell Shares as of
18 March 31, 2009, and the Fund will satisfy these redemption requests in accordance with the
19 terms hereof (which, the Parties agree, is in compliance with the Confidential Offering
20 Memorandum dated July 24, 2008 (the “PPM”) and the Amended and Restated Articles of
21 Association (the “Articles”) of the Fund as adopted on 24 July 2008 (together the “Constitutional
22 Documents”). The Parties agree that the redemption terms of the option letter received by
23 Russell from the Fund on or about January 21, 2009 will not apply to this redemption and that
24 the following terms will govern, and upon their completion shall constitute Russell’s redemption
25 in full from the Fund.
26

27 i. As promptly as practical after March 31, 2009, the Fund will
28 procure the Investment Manager to determine:
29

30 (I) the amount of cash available for distribution anticipated by
31 the Parties to be approximately 60% of the total value of Russell’s redemption requests,

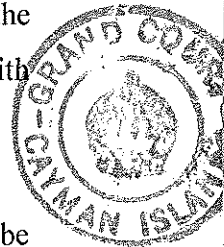


1 including (without limitation) cash that becomes unencumbered as a result of the closing out of
2 Pursuit Master's derivative positions, which shall be closed out in proportion to Russell's
3 redeemable share interest in the Fund, **and less amounts withheld as reserves for accrued**
4 **expenses and final valuation adjustments** ("Available Cash"); and

5
6 (II) those securities held by Pursuit Master as at March 31,
7 2009 which are reasonably capable of being divided and transferred into units which reflect and
8 are proportionate with Russell's pro rate (indirect) shareholding in Pursuit Master (including
9 after taking into account any other divisions which must be effected to allow for any other pro
10 rata direct in kind distributions to Pursuit Capital Management Fund SPV, LLC and other
11 shareholders) (the "Divisible Securities"). Any securities which cannot be so divided are herein
12 called the "Invisible Securities".

13
14 ii. As promptly as practical after March 31, 2009, Pursuit shall pay
15 the redemption proceeds to the Russell Nominee (as defined below) by delivering to the Russell
16 Nominee legal and beneficial title to its pro rata share of (I) the Available Cash; and (II) the
17 Divisible Securities, and thereafter, the balance of the redemption proceeds (if any) shall be paid
18 as further provided by subclause vi below. Notwithstanding the foregoing, Russell
19 acknowledges and agrees that Pursuit will not distribute any cash or securities to Russell until the
20 Pursuit Master's net asset value as at March 31, 2009 has been determined in accordance with
21 the Constitutional Documents and past practice.

22
23 iii. Russell will arrange for a suitable single vehicle or account to be
24 available to receive such distribution on behalf of Russell (the "Russell Nominee"). Russell
25 hereby expressly acknowledges that the Russell Nominee, at the time it receives the direct in
26 kind distribution, will be owned by each of the Russell Entities in the same proportion in which
27 each is currently invested in the Fund. Russell further represents and warrants that the Russell
28 Nominee is or will be at the time of any distribution validly and legally existing, in full
29 compliance with all securities, anti-money laundering or other applicable laws, and is or will be
30 fully able and authorized to accept the in kind distribution on behalf of Russell, in full
31 satisfaction of Russell's redemption requests. Russell will cooperate with the Fund, its

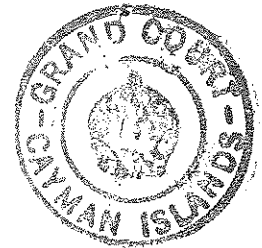


1 Investment Manager, custodian, brokers and administrator to facilitate the transfers and
2 deliveries of securities by providing all account information and “know your customer”
3 information necessary to comply with applicable anti-money laundering requirements and all
4 other reasonable requirements imposed by any issuer or counterparty necessary to transfer the
5 securities.

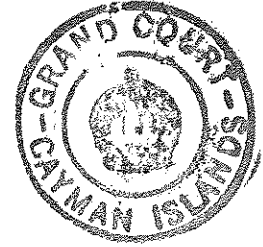
6 iv. No independent valuation of the Divisible Securities will be
7 required. To the extent that there are any Indivisible Securities an independent valuation of such
8 assets will be obtained from the independent valuer, chosen by Pursuit (the “Valuer”). For the
9 purpose of calculating the payment of Russell’s redemption proceeds (including pursuant to
10 subclause vi. below), the Valuer’s valuations shall be conclusive and binding on the parties.
11 Pursuit shall use all reasonable efforts to minimize the number of Indivisible Securities
12 remaining in the Fund.

13 v. Insofar as the Russell Nominee receives bonds as part of its
14 distribution of in kind assets, Pursuit shall provide a list to Russell for each individual bond so
15 received detailing, to the extent reasonably available, the following information:
16

- 17 (I) the name of the issuer;
- 18 (II) the unique identifier or ISIN number of the bond;
- 19 (III) the distribution value of the bond;
- 20 (IV) the date of purchase of the bond;
- 21 (V) the Cusip of the bond;
- 22 (VI) the Sector of the bond;
- 23 (VII) the Sub-sector of the bond;
- 24 (VIII) the Collateral of the bond;
- 25 (IX) the Maturity of the bond;
- 26 (X) the Rating of the bond;
- 27 (XI) the Coupon Structure of the bond;
- 28 (XII) the bond’s Daycount;
- 29 (XIII) the Last Payment Day of the bond;
- 30 (XIV) the Next Payment Day of the bond;
- 31 (XV) the bond’s Coupon;



- 1 (XVI) the Current Factor of the bond;
2 (XVII) the Total Current Face of the bond;
3 (XVIII) the Current Final PX;
4 (XIX) the Yield of the bond;
5 (XX) the WAL of the bond; and
6 (XXI) the Modified Duration of the bond.



7
8 vi. Pursuit shall distribute to the Russell Nominee additional cash and
9 Indivisible Securities having a value equal to the difference between the net asset value of
10 Russell's shares in the Fund on March 31, 2009 and the amount of Available Cash and Divisible
11 Securities to be distributed to Russell pursuant to paragraph 1(A)(ii) above.
12

13 B. Pursuit will request that its independent administrator, SS&C
14 Technologies, Inc. ("SS&C"), provide a written confirmation that Russell are receiving their
15 proportionate share of the Divisible Securities held by the Pursuit Master. Such written
16 confirmation by SS&C will be in substantially the following form:
17

18 "Based on our internal records we confirm that Russell are receiving their pro rata share
19 based on their indirect percentage shareholding of the Pursuit Master as of March 31,
20 2009 of the cash available for distribution and the Divisible Securities in the Pursuit
21 Master's portfolio. Please note that the information used to perform this calculation is
22 unaudited."

23 C. Pursuit will use its reasonable best efforts to effect the distribution of the
24 Divisible Securities as soon as practicable following March 31, 2009, but shall have no
25 obligation to deliver cash or securities to Russell at any time that may be earlier than such time
26 required in the Constitutional Documents. Russell acknowledges and agrees that cash and
27 security positions may be delivered in multiple installments as and when Pursuit becomes able to
28 transfer such positions to Russell. Notwithstanding anything to the contrary above, Pursuit
29 undertakes not to impose any further suspension of redemptions on the Fund until Russell has
30 been fully redeemed on the terms set out in this Agreement. **When made, distributions will be**

1 in full with reserves and holdbacks only relating to reasonable expenses, including legal,
2 administrative and accounting expenses. Russell acknowledge and agree that such
3 reasonable expenses may include their pro rata share of the Fund's accrued but unpaid
4 expenses, including expenses incurred by the Fund in connection with the Originating
5 Summons and this Agreement.
6

7 D. The Parties acknowledge and agree that, upon the Russell Nominee
8 receiving payment in cash and in kind in accordance with the balance of this clause 1, Russell's
9 redemption proceeds will be (and in any event, will for all purposes be deemed to have been)
10 paid in full by Pursuit.
11
12

13 E. Pursuit does not provide any assurance that Russell will ultimately
14 receive, upon the eventual sale of the assets Russell receive in kind, net cash proceeds in an
15 amount equal to the value of such securities on March 31, 2009 employed for purposes of
16 establishing the Fund's or the Pursuit Master's net asset value on such date. Russell
17 acknowledge and agree that the Fund, and any of the Fund's directors, affiliates, delegates or
18 representatives, including without limitation, its Investment Manager and administrator, and their
19 officers, members, employees and agents shall not be liable for any losses, expenses, judgments,
20 settlement costs, fees and related expenses (including attorneys' fees and expenses), costs or
21 damages of any kind whatsoever, that Russell may incur as a direct or indirect result of the sale
22 or disposition of the assets distributed in kind to Russell. Russell also hereby acknowledge and
23 agree that Russell have no right to participate in any future settlement or judgment obtained by
24 the Pursuit subsequent to March 31, 2009, in respect of any litigation or claim.
25

26 2. Releases: The following releases shall become effective on the date when this
27 Agreement has been executed by all Parties (the "Release Effective Date").
28

29 A. Release by Russell of Pursuit: In consideration of the Redemption Terms set
30 forth in Paragraph 1 above, the mutual releases set forth in this Paragraph 2, the discontinuation
31 of the Originating Summons set forth in Paragraph 3 below, and other good and valuable

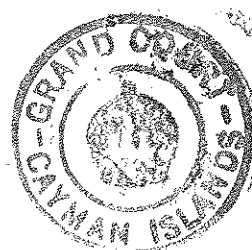


1 consideration, receipt of which is hereby acknowledged, Russell do, as of the Release Effective
2 Date, unconditionally release, acquit, settle with, and forever discharge the Fund, the Pursuit
3 Master, their Investment Manager and their respective directors, officers, employees and agents
4 (the "Pursuit Released Parties") of and from any and all actions, causes of action, choses in
5 action, cases, claims, costs, suits, debts, dues, losses, fees (including but not limited to attorneys',
6 accountants', and experts' fees, including costs of the Originating Summons), sums of money,
7 agreements, promises, injuries, harms, damages, interest payments, penalties, fines, judgments,
8 remedies, taxes and liabilities whatsoever, in law, equity, or otherwise, whether made directly or
9 derivatively, foreseen or unforeseen, matured or unmatured, known or unknown, which the
10 Russell ever had, now have, or may in the future have against the Pursuit Released Parties
11 (collectively, "Claims") relating to the facts alleged in the evidence filed in support of the
12 Originating Summons.

13 B. Release by Pursuit of Russell: In consideration of the mutual releases set
14 forth in this Paragraph 2, the dismissal of the Originating Summons set forth in Paragraph 3
15 below, and other good and valuable consideration, receipt of which is hereby acknowledged, the
16 Pursuit Released Parties, as of the Release Effective Date, unconditionally release, acquit, settle
17 with, and forever discharge Russell of and from any and all Claims relating to the facts alleged in
18 the evidence filed in support of the Originating Summons.

19
20 C. Claims Not Released: Notwithstanding anything to the contrary set forth
21 in Paragraph 2(A) or 2(B), nothing herein shall release, acquit, settle, or discharge Claims
22 relating to the enforcement of this Agreement.

23
24
25 3. Discontinuation of Originating Summons: Within one (1) business day after the
26 Release Effective Date, the Russell and Pursuit shall take all steps necessary to file a consent
27 order (substantially in the terms of the draft order attached hereto as Schedule "A") with the
28 Grand Court of the Cayman Islands to the effect that the Originating Summons be discontinued
29 with no order as to costs.



1 4. Absolute Bar: The Agreement may be pleaded and tendered by any party as an
2 absolute bar and/or defense to any proceeding brought or continued in breach of the terms of this
3 Agreement.

4
5 5. Further Assurances: Each Party shall, at its own cost, use all reasonable endeavours
6 to do or procure to be done all such further acts and things and execute or procure the execution
7 of all such other documents as may from time to time be reasonably required for the purpose of
8 giving each Party the full benefit of the provisions of this Agreement.

9
10 6. Entire Agreement: The Parties understand and agree that this Agreement contains
11 the entire agreement among them with regard to the subject thereof and that no Party shall be
12 liable or bound to any other Party in any manner by any representations, omissions, warranties,
13 covenants, promises, and agreements except as specifically set forth herein. The Parties further
14 understand and agree that this Agreement supersedes and merges any and all prior agreements or
15 understandings between the Parties pertaining to the subject matter herein. The Parties also
16 understand and agree that this Agreement may not be altered, modified or amended, or any of its
17 provisions waived, unless by a writing executed by the Parties.

18
19 7. Severability: If any part or all of any provision of this Agreement is illegal or
20 unenforceable, it may be severed from this Agreement and the remaining provisions of this
21 Agreement continue in force.

22
23 8. No admission of Liability: The Parties agree that nothing contained herein, and no
24 action taken by any Party with respect to this Agreement, shall be construed as an admission of
25 liability.

26
27 9. Russell and Pursuit To Pay Their Own Costs and Attorneys' Fees: Russell and
28 Pursuit understand and agree that each of them shall pay the costs and attorneys' fees they
29 incurred in connection with the Originating Summons and this Agreement, and that neither
30 Russell nor Pursuit is to pay the costs or attorneys' fees incurred by the other.

31
32 10. Acknowledgments: Each Party hereby represents, acknowledges, and agrees that it
33 has had the advice of counsel, that it has read this Agreement, that it understands this Agreement,



1 and that it voluntarily accepts its terms. Each Party further represents that (i) this Agreement has
2 been duly and validly authorized by all necessary corporate or other action of such Party, (ii) the
3 representative signing below on its behalf has the full power and authority to execute, deliver,
4 and perform such Party's obligations under this Agreement and to give the releases as provided
5 herein, and (iii) upon execution and delivery, this Agreement will be enforceable against such
6 Party in accordance with its terms. Each Party also represents that in executing this Agreement,
7 such Party does not rely upon any inducements, promises, or representatives made by anyone
8 other than those expressly embodied herein.

9
10 11. Complete and Unconditional Settlement: The Parties understand and agree that this
11 Agreement shall not be subject to any claim of mistake of fact that it is intended to release any
12 and all Claims that the Parties have or may have against each other as and to the extent set forth
13 in the mutual release in Paragraph 2 above.

14
15 12. Condition Precedent: This Agreement is not binding on any Party until signed by all
16 the Parties.

17 13. Execution in Counterparts: This Agreement may be executed in one or more
18 counterparts, each of which shall be deemed to be an original but all of which together shall
19 constitute one and the same instrument.

20
21 14. Construction of Agreement: The terms of this Agreement have been negotiated by
22 the Parties, and the language of the Agreement shall not be construed in favour of or against any
23 particular Party. The section headings contained in this Agreement are for purposes of reference
24 only and shall not limit, expand, or otherwise affect the construction of any provisions of this
25 Agreement.

26
27 15. Governing Law and Jurisdiction: The governing law of this Agreement shall be the
28 substantive law of the Cayman Islands, and the Parties hereby submit to the exclusive
29 jurisdiction of the Courts of the Cayman Islands for the purpose of any disputes arising in
30 connection with this Agreement.”

31 [Emphasis Added]



1 **Deed of Assignment**

2

3 The Deed of Assignment dated 7 January 2011 between Russell and the Plaintiff provided:-

4

5 “1 Assignment

6 The Assignors hereby irrevocably assigns to the Assignee all of the Assignors’ rights
7 entitlements, claims, title, interests and benefits under and to the Deed of Settlement which
8 includes, but is not limited to, any and all of the Assignors’ actual or potential rights,
9 entitlements, benefits, claims, title and interest in and to the Outstanding Redemption Proceeds.”

10

11

12 **The Russell Investors ceased to be shareholders in the Feeder Fund on 31**

13 **March 2009**

14

15 On 3 August 2012 Walkers for the Defendants wrote to Mourant Ozannes for the Plaintiff
16 enclosing documents showing that the Russell Investors were compulsorily redeemed as of 31
17 March 2009, were removed from the register of members as at that date and ceased to be legal
18 and registered shareholders in the Feeder Fund on 31 March 2009.

19

20 It is most regrettable that it was not until 3 August 2012 that this was accepted by the
21 Defendants, and that they maintained a contrary position on the pleadings prior to August 2012.

22

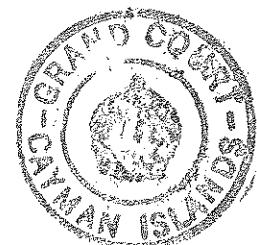
23 **Oral Evidence**

24

25 The court heard oral evidence from Mr Leverett (who was Managing Director of Hedge Funds
26 for Russell) and from Mr Canelas (a founding partner of the Third Defendant and a Director of
27 the First and Second Defendant). Mr Leverett’s evidence was consistent with the contemporary
28 documents. My reservations about parts of Mr Canelas’ evidence are referred to below.

29

30 Mr Bullmore and Mr Floyd were called by the Plaintiff and Defendants respectively as expert
31 witnesses on accountancy issues. Their Joint Report is dated 22 January 2013.



1 **The issues – analysis and conclusions**

2
3 **A. Validity of the Assignment**

4
5 The Defendants do not question the validity of the Deed of Assignment per se. They contend
6 that an interest in shares cannot be assigned. The Plaintiff says that the Russell Funds' shares
7 were fully redeemed and that a debt was assigned.

8
9 The Constitutional Documents, Settlement Deed and Deed of Assignment are all governed by the
10 laws of the Cayman Islands. Accordingly, it is common ground that the laws of the Cayman
11 Islands (including common law principles relevant to the issues) will determine whether the
12 Russell Funds' shares were fully redeemed and the validity of the assignment.

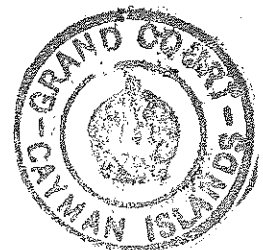
13
14 The parties accept that the principles set out in Chitty on Contracts, 31st Edition, Vol 1 Chapter
15 19, in particular paragraph 020 et seq are an accurate statement of the law of the Cayman Islands
16 in relation to the legal principles governing assignment.

17
18
19 **The relevant legal principles**

20
21 It is convenient to set out the following extracts from Chitty on Contracts which the parties
22 accept are an accurate statement of the law of the Cayman Islands. I refer to, but do not set out,
23 the footnotes and the cases there cited.

24
25 “19-043 Rights declared by contract to be incapable of assignment. If rights arising under a
26 contract are declared by the contract to be incapable of assignment, a purported
27 assignment will be invalid as against the debtor. ...

28
29 19-054 Personal contracts. The benefit of a contract is only assignable in:

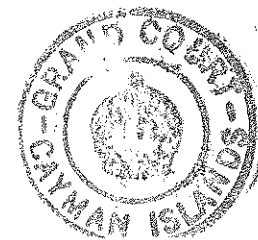


1 "... cases where it can make a difference to the person on whom the obligation lies to
2 which of two persons he is to discharge it." Tolhurst v Associated Portland Cement
3 Manufacturers Ltd [1902] 2 K.B. 660, 668; affirmed [1903] A.C. 414.

4
5 It is to be noted that the question whether an assignment makes any difference to the
6 debtor must be decided by the court on objective grounds, having regard to the nature
7 of the contract and of the subject-matter of the rights assigned. It may in some
8 circumstances make a great deal of difference to a debtor whether his creditor is of an
9 indulgent character, or whether he is likely to enforce his legal rights ruthlessly, but
10 considerations of this kind are ignored by the courts in determining whether a right is
11 assignable or not.

12
13 "19-055 Prima facie contractual rights to, for example, the payment of money, and to the sale
14 or occupation or use of land, or to building work, do not involve personal
15 considerations and are capable of assignment. A right to be indemnified against a
16 monetary liability may in some circumstances be assignable, but the benefit of a motor
17 vehicle insurance policy involves personal considerations and is not assignable.
18 Indeed, any contractual right involving personal skill on the part of the creditor, or
19 other personal qualifications (such as his credit), is incapable of assignment. Hence
20 neither an author nor his publisher may assign the right to performance of the other's
21 obligations under a publishing agreement, although an author's right to be paid
22 royalties may be assigned; and if the author has actually transferred the copyright in
23 the work to the publisher, he can of course assign that as an item of property. The
24 right to employ a person under a contract of employment is clearly not assignable,
25 though wages or salary due to the employee are normally assignable by him. The
26 mere presence of an arbitration clause in a contract does not as a general rule render
27 the contract incapable of assignment.

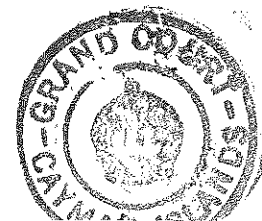
28
29 Commercial contracts. Rights arising under ordinary commercial contracts (e.g. for
30 the sale of goods) are prima facie readily assignable, at least if there is no question of
31 credit being granted to the assignee. But commercial contracts may sometimes be



1 drafted so as to make the requirements of one of the parties a material consideration in
2 determining the obligations of the other. In such circumstances there is often
3 difficulty in deciding whether the benefit of the contract is assignable. In *Tolhurst v*
4 *Associated Portland Cement Manufacturers Ltd*, the defendant was the owner of
5 certain land upon which there were chalk quarries. He sold part of this land to a
6 company in order to enable the company to carry on there the business of
7 manufacturing Portland Cement. He contracted to supply the company, which was in
8 a small way of business, with 750 tons of chalk per week for 50 years “and so much
9 more as the company shall require for the manufacture of Portland cement upon their
10 said land”. The company subsequently assigned the contract, sold its undertaking to
11 the claimant company, which was in a large way of business, and went into voluntary
12 liquidation. The House of Lords held that the new company was entitled to the benefit
13 of the contract and could maintain an action against the defendant in its own name.
14 There were two grounds for this decision: (1) The defendant’s liability was measured
15 by the capacity of the original company’s land:

16
17 “... the [original] company were not entitled to an unlimited supply of chalk, but
18 only to so much as they might want for making cement on their own piece of
19 land.”

20
21 Consequently the effect of the assignment was not to increase the burden on the
22 defendant, for the original company might have increased its capital and worked its
23 land more intensively; (2) By entering into a long-term contract the defendant must
24 have contemplated that the benefit of it might be assigned. The contract should
25 therefore be construed as if it had been made between the defendant and his successors
26 and assignees owners and occupiers of the quarries and the company, its successors
27 and assignees owners and occupiers of the cement works. On the other hand, in *Kemp*
28 *v Baerselman* the defendant contracted to supply X, a cake manufacturer, with all the
29 eggs that he should require for manufacturing purposes for one year: and X undertook
30 not to purchase eggs elsewhere. X transferred his business to a company, and it was
31 held that the contract was not assignable, because the defendant’s liability was not



1 limited to the capacity of a particular piece of land, and because X's contract not to
2 purchase eggs elsewhere introduced a personal element inasmuch as this obligation
3 would not have been binding on the assignee."
4

5 "19-057 Contracts with companies. It has been held that the fact that one of the parties to a
6 contract is a limited company is no ground for assuming that the personality of that
7 party is immaterial to the other party. ..."

8
9 Professor Guest in "Guest on the Law of Assignment" First Edition says in relation to Personal
10 Contracts at 4-36

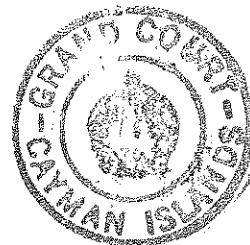
11
12 "The question whether a contractual right is or is not personal depends upon the construction of
13 the contract, that is to say, it depends upon the intention of the parties, determined objectively,
14 having regard to the nature and terms of the contract and the circumstances prevailing at the time
15 it was made."

16
17 Mrs. Corbett for the Defendants submitted that the purported Assignment and the purported
18 notice thereof were invalid and of no legal effect.

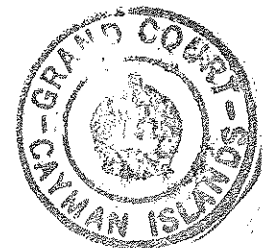
19
20 In particular Mrs Corbett submitted;

21
22 (a) The effect of the purported Assignment on its face was to assign the rights
23 derived from the Deed of Settlement from Russell to the Plaintiff. It does
24 not purport to assign the right to sue for the redemption proceeds pursuant
25 to the terms of the Constitutional Documents of the Fund ("the Fund
26 Documents");

27 (b) What was purportedly assigned by Russell to the Plaintiff was not a debt,
28 but the right to receive an unquantified sum forming part of the
29 redemption price for Russell's shares;



- 1 (c) The obligation to pay redemption proceeds arises under the Fund
2 Documents, not the Deed of Settlement, which merely sets out the basis
3 upon which payment would be made;
- 4 (d) Russell's right to receive redemption proceeds was exclusively derived
5 from their status as a shareholder of the Fund and was thus an interest in
6 shares;
- 7 (e) The Fund Documents define the category of persons eligible to hold
8 shares in the Fund and also provide that the Fund is not bound to recognise
9 an interest in Shares other than that of the Registered Holder;
- 10 (f) The Plaintiff is not an eligible investor, nor is or was it the Registered
11 Holder;
- 12 (g) Accordingly, the Plaintiff cannot take a valid assignment of an interest in
13 shares in the Fund, nor is the Fund obliged to recognise any such interest
14 purportedly transferred to the Plaintiff.
- 15 (h) Further, the terms of the Deed of Settlement prohibit the assignment of the
16 right to receive the redemption proceeds to the Plaintiff because:-
- 17 (i) The Deed expressly provides that Russell will arrange for a
18 suitable single vehicle or account to be available to receive the
19 distribution;
- 20 (ii) The Fund has not consented to a variation of the Deed of
21 Settlement;
- 22 (iii) Accordingly, it was not open to Russell to assign their right to
23 receive the redemption proceeds to any party that does not satisfy
24 these criteria;
- 25 (iv) The Plaintiff does not satisfy the criteria.



1 Mr Timms QC for the Plaintiff submitted that the Assignment was valid and effective for reasons
2 set out in his written and oral submissions, which included many of the points referred to in my
3 analysis below.

4
5 My analysis and conclusions on the arguments raised by Mrs Corbett are as follows.

6
7 The Russell Investors were compulsorily redeemed as of 31 March 2009, were removed from the
8 register of members as at that date and ceased to be legal and registered shareholders in the
9 Feeder Fund on 31 March 2009.

10
11 A NAV of the Master and Feeder Funds was determined as of 31 March 2009 and the NAV per
12 share of the Russell Investors' shares was determined in accordance with the Feeder Fund's
13 Articles. No distribution of cash or securities was to take place to Russell until the Pursuit
14 Master's net asset value as at March 31, 2009 had been determined in accordance with the
15 Constitutional documents and past practice (see clause 1 A(ii)).

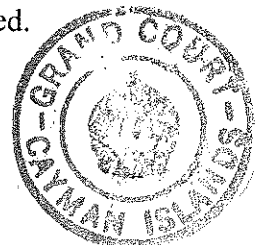
16
17 Thereafter Pursuit paid the sum of \$98,323,498.96 into respective bank accounts operated by
18 State Street on behalf of Russell on 13 and 14 May 2009. The in-kind distribution of various
19 securities was made on various dates into a securities account operated by State Street on behalf
20 of Russell with the final distribution being made in 3 September 2009.

21
22 In my opinion a debt of \$4,337,297.87 was assigned less any deductions from that sum permitted
23 by the terms of the Deed of Settlement ("the assigned debt").

24
25 I turn to answer Mrs Corbett's submissions.

26
27 (a) (b) and (c)

28 In my opinion on its true construction, by the Deed of Settlement the Defendants agreed to
29 satisfy Russell's redemption requests in accordance with the particular terms of the Deed. The
30 Deed did not provide for the redemption proceeds to be paid pursuant to the Fund Documents. It
31 provided (I repeat) for payment in accordance with the particular terms of the Deed.



1 The fact that the parties agreed that the terms of the Deed were in compliance with the PPM and
2 Articles does not mean that the parties intended to revert to the provisions of those documents.

3
4 The Deed of Settlement was a one off, specially constructed settlement against the background
5 of the Application seeking the appointment of Inspectors.

6 The terms of the Deed of Assignment on their true construction were apposite to assign the
7 assigned debt.

8
9 (d) (e) (f) (g)
10 I repeat that the Russell Investors were compulsorily redeemed as of 31 March 2009, were
11 removed from the register of members as at that date and ceased to be legal and registered
12 shareholders in the Feeder Fund on 31 March 2009.

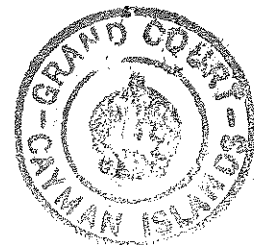
13
14 As at the date of the Assignment what was assigned was the assigned debt.

15
16 (h)
17 The Deed of Settlement on its true construction did not contain any prohibition on assignment. It
18 contained in clause 1A(iii) a mechanism to facilitate in particular the “in kind distribution”.

19
20 As to the principles in relation to personal contracts, the assignment made no difference to the
21 Defendants, looking at the matter objectively having regard to the nature of the Deed of
22 Settlement and the subject matter of the rights assigned. It is important to note that unlike many
23 of the cases as to personal contracts, in the present case the relationship between Russell and the
24 Defendants had come to an end. This case is not a case where what was assigned was a contract
25 which would continue for months or years ahead, involving personal considerations.

26
27 Mrs Corbett submitted in the alternative that:-

28
29 (i) Payment of the outstanding balance of the redemption proceeds is contingent upon completion
30 of the audit for the year ended 31 December 2009;



1 (j) The right to compel completion of the audit (or any other prerequisite to release of the
2 Holdback) arises under the Fund Documents;
3 (k) Such right can thus only vest in the former shareholders of the Fund as it is a right personal
4 to them derived from their residual post-redemption rights, and is therefore not assignable to a
5 non-shareholder.

6

7 I turn to consider these submissions.

8

9 (i) and (j)

10 For reasons set out below in my opinion payment of the outstanding balance (the assigned debt)
11 was not contingent upon completion of the audit for the year ended 31 December 2009.

12

13 (k)

14 For these reasons the right to the assigned debt was not personal to the former shareholders. It
15 was not derived from their residual post-redemption rights as alleged. It was derived from the
16 particular provisions of the Deed of Settlement.

17

18 **The Holdback Issues. NAV. Holdback under the confidential Offering**
19 **Memorandum. The Audit.**

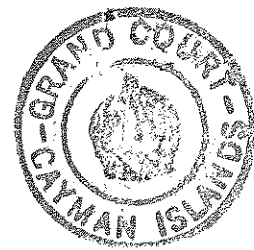
20

21 It is both necessary and convenient to refer to the Defendants' pleaded Defence in relation to
22 these Issues. It reads

23

24 "4. ...

- 25 (i) the Deed contemplated the compulsory redemption of the Russell Shares;
- 26 (ii) redemption proceeds payable to Russell arising out of the compulsory redemption
27 of the Russell shares were to be paid partly in cash and partly in securities, in
28 unspecified proportions;
- 29 (iii) in accordance with paragraph 1A(ii) of the Deed... no obligation to pay
30 redemption proceeds arises in accordance with the terms of the Deed until such



1 time as the net asset value of the Second Defendant as at March 31 2009 has been
2 determined, ...

3 (iv) the Second Defendants net asset value as at 31 March 2009 is yet to be
4 determined and accordingly the obligation to pay redemption proceeds (less
5 permitted reserve and holdback amounts) to the Russell Nominee pursuant to the
6 Deed is yet to arise; and

7 (v) In the alternative, if the Second Defendant's net asset value as at 31 March 2009
8 has been determined (which is denied):-

9 (a) the amount of US \$4,339,297.87 is a reserve and/or holdback relating to
10 reasonable expenses, including, but not limited to, legal, administrative and
11 accounting expenses, together with the accrued, but unpaid expenses of the
12 First Defendant; further, or in the alternative

13 (b) pursuant to the First Defendant's Confidential Offering Memorandum, upon
14 redeeming all or substantially all of a shareholder's shares, the First Defendant
15 is entitled to retain up to 5% of the redemption proceeds payable to the
16 shareholder pending completion of the First Defendant's audit for the year of
17 redemption. Furthermore: -

18 1. the redemption contemplated by the Deed provided for the compulsory
19 redemption of all of the Russell Shares; accordingly the redemption was,
20 and is, subject to the retention set out above;

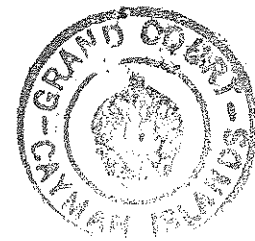
21 2. the First Defendant's audit for the year ending 31 December 2009, being
22 the year in which the redemption of the Russell Shares was made, is yet to
23 be completed; and

24 3. accordingly, the amount of the US\$4,339,297.87 (or any other amount),
25 representing 3% of the redemption proceeds with respect to the
26 compulsory redemption of the Russell Shares is not yet due and payable to
27 Russell, and accordingly not payable to the Plaintiff.”

28
29 For reasons set out below paragraph 4(v)(a) was struck out on 16 January 2013 for failure to
30 comply with an unless order.

31
32 Mrs Corbett's submissions followed and developed the remaining defences set out above. Thus
33 she submitted that there are two powers to hold back from redemption proceeds:

34
35 (1) A power under paragraph 1(C) of the Deed of Settlement. (The Defendants do not rely
36 upon this power.)



1 (2) A power under the First Defendant's Confidential Offering Memorandum dated 24 July
2 2008 under the heading "Redemption Payments".

3
4 I set out below what appears in the COM at the start of the section headed "Redemptions,
5 Dividends & Distributions" so that what appears under the heading "Redemption Payments" can
6 be seen in context.

7 "REDEMPTIONS, DIVIDENDS & DISTRIBUTIONS

8
9 Redemption Rights

10 ...

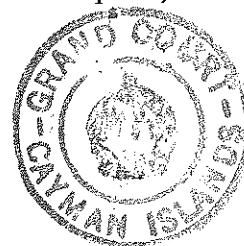
11 After the one year anniversary of the purchase of the applicable Shares, a Shareholder may
12 redeem his investment or any portion of his investment as to which the lock-up has expired only
13 as of the last Business Day of a calendar quarter (each a "Redemption Date") upon no less than
14 90 days' prior written notice to the Investment Manager, ... The Fund, in consultation with the
15 Investment Manager, may find it necessary upon redemption by a Shareholder to withhold a
16 certain portion of the Shareholder's investment upon any such redemption in order to establish
17 reserves for the payment of contingent or undetermined liabilities (including certain taxes). The
18 Directors may, in their sole discretion, reduce or waive any of the terms on which Shares may be
19 redeemed, generally or in specific cases.

20
21 Mandatory Redemptions

22 The Fund may redeem some or all of a Shareholder's Shares at any time, for any reason, on
23 five days notice.

24
25 Redemption Payments

26
27 Shareholders redeeming all or substantially all of their Shares (as determined by the Fund,
28 generally approximately 90% or more of the Shares held by such Shareholder) will receive at
29 least 95% of the Net Asset Value of the Shares being redeemed within 45 days of the effective
30 date of redemption. The remainder (valued as of the effective date of redemption) will be paid as



1 promptly as practicable following the completion of the Fund's audit for the year of redemption.
2 ...”

3
4 Mrs Corbett submitted that the power under the heading “Redemption Payments” in the COM
5 was referred to in paragraph 1(A)i(I) of the Deed of Settlement. Thus the Defendants' case is
6 that the COM dated 24 July 2008 empowered the Directors to withhold payment of up to 5% of
7 any redemption payment pending completion of the Fund's audit for the relevant year and that it
8 was and is not presently possible to complete the audit for the relevant year.

9
10 Mrs Corbett accepted that the Feeder Fund Articles do not expressly grant the Fund the powers
11 under the heading “Redemption Payments” in the COM (but disputed the Plaintiff's submission
12 that the Fund can only be given such power by the Articles).

13
14 The Defendants say that the Fund was contractually entitled pursuant to the COM (which is
15 binding between the Fund and its shareholders) to make a holdback from redemption payments.

16
17 Mr Timms submitted:-

18
19 (i) that under the Deed of Settlement any reserves or holdbacks could only be pursuant to the
20 express provisions of clause 1. A i(I) or 1.C of the Deed. The clause 1 C holdback power is no
21 longer relevant. It is not suggested that a power in Clause 1 A i(I) was exercised.

22
23 (ii) On a proper construction of the Deed no power in the COM was incorporated.

24
25 (iii) If the purported powers under the COM were incorporated, the Articles do not confer such
26 powers on the directors.

27
28 (iv) If (which is denied) the powers under the COM were validly exercisable, they do not apply
29 in a compulsory redemption.

30 (v) In the event that the COM was incorporated and the directors exercised a validly existing
31 power to holdback, they unreasonably delayed the completion of the audit.



1 (vi) Without prejudice to the above, any contingent liability should have been treated in the 31
2 December 2009 financial statements in accordance with generally accepted accounting
3 principles.

4

5 I turn to consider these competing submissions.

6

7 (1) In my opinion on a true construction of the Deed of Settlement there are only two provisions
8 in the Deed of Settlement which relate to what may be reserved or held back being

9

10 - clause 1A i(I)

11 and

12 - clause 1C.

13

14 Given that it is not open to the Defendants to rely on the latter, it is only necessary to consider
15 the true construction of the words “less amounts withheld as reserves for accrued expenses and
16 final valuation adjustments” in clause 1 Ai(I).

17 (2) The court is here concerned with the construction of an express term or phrase in the Deed of
18 Settlement. No implied term is relied on and a claim for rectification was abandoned.

19 (3) In my opinion “final valuation adjustments” means adjustments to the determination made by
20 the Investment Manager. I refer to the determination in the document dated 27 April 2009 for
21 illustrative purposes. Final valuation adjustments might involve (as Mr Timms submitted)
22 adjustments to correct any errors in or changes required to the 49 calculations of Market Value
23 made on 27 April 2009, because of exchange rate errors or the like. In my opinion the parties
24 did not intend by these words that the Defendants or any of them were entitled to retain up to 5%
25 of the redemption proceeds pending completion of the First Defendant’s audit for the year ended
26 31 December 2009. Very different language would have been required to bring about that result.

27 (4) It is common ground that

28 “When the words in the operative part of an instrument are ambiguous, the recitals and other
29 parts of the instrument may be used to fix the appropriate meaning of those words. But clear



1 words in the operative part of an instrument cannot be controlled by recitals.” (Chitty on
2 Contracts Volume 1 para 12-066).

3 In my opinion the words in the operative part of the Deed of Settlement (Clause 1Ai (I)) are
4 clear. I record that if, contrary to my opinion, the words are ambiguous and if (repeat if), it is
5 permissible to look at the Maples’ letter of 9 March 2009 referred to in the recitals, there is
6 nothing in that letter that supports the construction contended for by the Defendants.

7 (5) In view of my conclusions set out above it is unnecessary to consider arguments (iii) and (iv)
8 above relied on by Mr Timms.

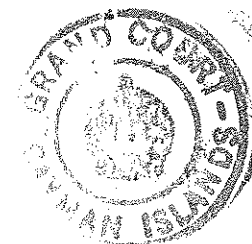
9 (6) For completeness I record that in his witness statement Mr Canelas (a founding partner of the
10 Third Defendant and a Director of the First and Second Defendants) said:-

11 “46 When that statement was prepared it was expected that the final figures would emerge in the
12 ordinary process of audit. The reason is that the Funds face unquantifiable liabilities to potential
13 creditors in the face of which the directors have decided not to distribute any further assets until
14 the position is known. Those unquantifiable liabilities have led to the Directors of the Funds
15 (myself included) begin unable to sign-off on a representation letter regarding those liabilities.
16 That is pre-condition to completion of the audited accounts. The underlying reason for these
17 unquantifiable liabilities is an ongoing SEC investigation into the Investment Manager, which
18 has the benefit of an indemnity from the Funds. The investigation began in April 2010 with the
19 service of an extremely broad subpoena that called for virtually all records and data in possession
20 of the manager from the inception of the Funds through the date of the subpoena.”

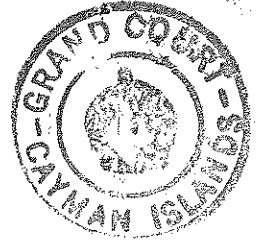
21 I do not accept Mr Canelas’ explanation that

22 “Those unquantifiable liabilities have led to the Directors of the Funds (myself included) being
23 unable to sign-off on a representation letter regarding those liabilities.”

24 On the material before the court it does not appear that the audit for the year ended 31 December
25 2009 got as far as a draft representation letter. No draft letter was produced.



1 (7) Again for completeness I record that had it been necessary to resolve the differences between
2 the expert witnesses on accounting issues, I would have preferred the evidence of Mr Bullmore.
3 His evidence appeared to me to be more balanced and in accord with the realities of accounting
4 practice. Mr Floyd placed reliance in oral evidence on materials not referred to in the Joint
5 Report.



6
7 **The Reasons for the order of 16 January 2013**

8
9 On 16 January 2013 I ordered that paragraph 4 (v)(a) of the Re-Amended Defence be struck out
10 for failure to comply with an unless order of 21 November 2012. I now give my reasons for
11 making the order of 16 January.

12
13 The background to the unless order of 21 November is set out in the first affidavit of Alexandra
14 Bethell of 16 November 2012. I refer to the history of failures on the part of the Defendants to
15 comply with previous orders of the court as to discovery, set out in Ms Bethell's affidavit.

16
17 By order dated 22 October 2012 it was ordered that the Defendants should by 29 October 2012,
18 (1) swear an affidavit in the terms of paragraphs 1 and 2 of the Plaintiff's summons dated 19
19 October 2012 and (2) serve particulars of the quantum of the reasonable expenses they claimed
20 they were entitled to deduct from the sum of US\$4,339,297.87 (irrespective of any issues
21 relating to the SEC investigation). Such particulars were to include a full breakdown of each
22 expense, how and when incurred, for what purpose and how the same was calculated together
23 with the relevant documents. The relevant documents were to be linked by marking to the
24 particular item of expense to which they related.

25
26 On 26 October 2012 Walkers for the Defendants wrote to Mourant Ozannes for the Plaintiff:-

27
28 "As you are aware, paragraphs 6 and 7 of [the] Order [of 22 October] requires our clients to
29 disclose particulars of the reasonable expenses that they claim to be entitled to deduct from the
30 holdback irrespective of any issues relating to the SEC investigation, including the relevant
31 supporting documentation. ...

1 Whilst our clients are endeavouring to collate this material as quickly as possible, they have
2 indicated to us that they will not be able to complete this exercise by 29 October 2012 as
3 originally scheduled. Bearing this in mind, we would be grateful if you would agree to a one
4 week extension for the provision of this information, that is to say until 5 October 2012 ...”

5
6 By order dated 7 November the time for the Defendants to comply with the order of 22 October
7 was extended to 12 November.

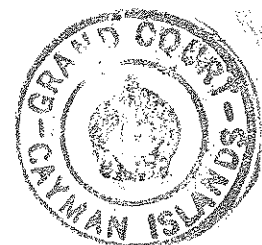
8
9 In his fourth affidavit on behalf of the Defendants of 20 November 2012 Mr Canelas said:-

10
11 “I confirm that, save as is set out at paragraph 5 below, there are no further relevant documents
12 within the Defendants’ possession, custody or control other than those contained in the seven
13 Lists of Documents produced by the Defendants in this matter. ...

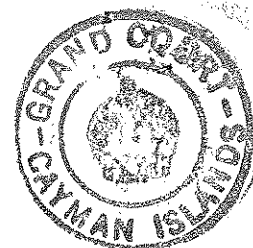
14
15 There are in fact further documents in existence which have not been disclosed and which relate
16 to expenses that fall to be deducted from the holdback, in addition to the large number of legal
17 invoices which have already been disclosed. ... at the present time we do not have the staff
18 resources to be able to comply. We are effectively at full capacity as a result of the work
19 necessary to recover from Hurricane Sandie, the approaching year end and the maintenance of
20 our day-to-day business, and did not anticipate the need to comply with further broad orders for
21 discovery. ... as matters stand we simply do not have the necessary resources to extract the
22 documents requested within a limited timeframe.”

23
24 An unless order was made on 21 November. The unless order took into account the time the
25 Defendants’ attorneys said it would take to comply with the outstanding order. The unless order
26 (to which I refer for its full terms) was in wider terms as to what would be struck out in the event
27 of non-compliance, than the order made on 16 January 2013.

28
29 In his fifth affidavit of 14 January Mr Canelas said:-



- 1 "3. I confirm that, save as is set out... at paragraph [4] below, there are no further relevant
2 documents within the Defendants' possession, custody or control other than those
3 contained in the Lists of Documents produced by the Defendants in this matter.
4
- 5 4. In my Fourth Affidavit I confirmed that, other than documents relating to the calculation of
6 accrued expenses, the Defendants have disclosed all material within their possession,
7 custody or control relevant to this matter. ...
8
- 9 5. ... with the assistance of Pursuit's US attorneys and fund administrator a series of detailed
10 spreadsheets were produced detailing all transaction conducted on Second Defendant's
11 account during the period January 2009 to July 2012. ...
12
- 13 6. Having been provided with this information, I believe that the Plaintiff has all the material
14 necessary to allow it to prepare for trial. The Defendants do not seek to suggest that there
15 are any expenses incurred prior to the Date of the Deed of Settlement that fall to be
16 deducted and I do not believe that there is any question as to the reasonableness of the
17 application of funds that cannot be answered with reference to the information contained in
18 the spreadsheet and the invoices already disclosed.
19
- 20 7. I am advised by the Defendant's attorneys that the nature of the expenses that were in fact
21 incurred are not relevant to the determination of the proper construction of the meaning of
22 "reasonable expenses" in the Deed of Settlement, and would only become relevant in the
23 event that the Court, having determined that reasonable expenses incurred after the Deed of
24 Settlement can be deducted from the holdback, goes on to assess the quantum of those
25 expenses.
26
- 27 8. I am further advised that the issue of "reasonable expenses" is not relevant to the
28 Defendants' case that no obligation to pay redemption proceeds arises under the Deed of
29 Settlement until such time as the Net Asset Value of the Second Defendant as at 31 March
30 2009 has been struck, nor to the case that the funds retained are an audit holdback pursuant



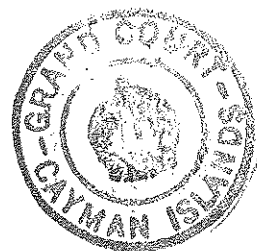
1 to the terms of the fund's constitutional documents that is not due to be paid until
2 completion of the Second Defendant's audit for 2009.

3
4 9. In the circumstances, I believe that the Defendants have substantially complied with the
5 terms of the Order and that any default that may have occurred causes no material prejudice
6 at all to the Plaintiff. Against that background, the Court is humbly requested to revisit the
7 terms of its Order of 21 November and revoke the "unless" order made on the date.

8
9 10. Alternatively, given the documents within the scope of the Court's orders for discovery that
10 have not been produced are not relevant to the defences set out at paragraph 8 above, the
11 Court is invited to limit the scope of its Order so as to strike out the holdback defences only
12 insofar as they plead matters to which the documents are material. ..."

13
14 Thus Mr Canelas acknowledged that there were further documents that should have been
15 disclosed in compliance with the unless order of 21 November, but maintained that these were
16 not relevant to the defence that no obligation to pay redemption proceeds arises under the Deed
17 of Settlement until such time as the Net Asset Value of the Second Defendant as at 31 March
18 2009 has been struck, nor to the case that the funds retained are an audit holdback pursuant to the
19 terms of the Fund's constitutional documents that is not due to be paid until completion of the
20 Second Defendant's audit for 2009.

21
22 The matter came before the court on 8 January but was adjourned because the Defendants had
23 given inadequate notice of their application for relief from the sanctions contained in the unless
24 order of 21 November. On that date it was pointed out by the Plaintiff that there had been
25 express reference by the Defendants to an invoice relating to a payment of US\$5,750 made to
26 Eisner on 30 November 2011. For this reason I made an order for specific discovery of that
27 invoice.



1 There is power to relieve from the sanction imposed by an unless order if sufficient cause is
2 shown (O. 24 rule 21). The court must consider all the circumstances of the case. The test on an
3 application for relief from the sanction imposed by an unless order (here of 21/11/12) is whether
4 – notwithstanding that the order was a proper order to make for the purposes of furthering the
5 overriding objective in the circumstances known at the time – it remains appropriate, in the
6 circumstances known at the time of the application for relief, to allow the sanction to take effect.
7 (See the judgment of Sir John Chadwick in Tarn Insurance Services Ltd v Kirby and others
8 27.1.09 [2009] EWCA Civ 19 at paragraphs 78 and 79). In my opinion the order I made on 16
9 January was the appropriate and proportionate order in the circumstances known on 16 January.
10 There had (on Mr Canelas’ assertions in his affidavits) been partial compliance with the order of
11 22 October 2012.

12
13 On 16 January Mr Dunne for the Defendants informed the court that although he had in his
14 possession the Eisner invoice which the court had ordered to be disclosed on 8 January, he was
15 under specific instructions from the Defendants not to hand it over ie not to comply with the
16 court’s order. The least that can be said about this is that it provided further justification for
17 striking out paragraph 4 (v)(a) of the Re-Amended Defence.

18

19 **The Proceedings in the United States**

20

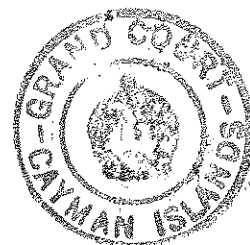
21 I respectfully refer to the judgment of the Honourable Stefan Underhill USDJ on 21 December
22 2012 granting the motion to dismiss the Defendants’ complaint in the Connecticut proceedings in
23 its entirety.

24

25 **Conclusion**

26

27 For the reasons set out above I find that the Plaintiff is entitled to judgment against the
28 Defendants for US\$4,337,297.87 plus interest.



1 The only basis open to the Defendants for deduction from the above sum is in clause 1A i(I) of
2 the Deed of Settlement. It is not suggested that any adjustment to the figures in the statement
3 dated 27 April 2009 to correct errors etc is called for. For the reasons set out above the
4 Defendants are not entitled to retain any sums pursuant to the First Defendant's COM.

5
6

7 Dated this 5th day of February 2013

8
9

10 *Cresswell J*

11

12 **The Honourable Mr. Justice Peter Cresswell**
13 **JUDGE OF THE GRAND COURT**

