Neutral Citation Number: [2025] CIGC (FSD) 126

Cause No: FSD 2024-0203 (JAJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

BETWEEN:

LETTERONE TREASURY SERVICES S.A.

Plaintiff

-and-

EISLER CAPITAL MULTI STRATEGY FUND LTD

Defendant

Appearances:	**Mr Tom Smith KC of counsel instructed by Mr Jonathon Milne and Ms Clare Bradin of Conyers Dill & Pearman LLP for the Plaintiff** **Mr John Machell KC of counsel instructed by Mr Adam Huckle and Mr Justin Naidu of Maples and Calder (Cayman) LLP for the Defendant**
Before:	**The Honourable Justice Jalil Asif KC**
Heard:	**25 March 2025**
Judgment:	**30 December 2025**

Civil procedure—summary judgment—test to be applied

Investment fund—investor subject to compulsory redemption—delay in paying redemption proceeds—investor prohibited from claiming interest by Articles of Association—whether redemption proceeds held on trust for redeemed investor—whether fund owed fiduciary duty to redeemed investor—whether fund obliged to account for profits made from use of redemption proceeds before payment

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JUDGMENT

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A. Introduction

1. This case raises the question of who, between the Plaintiff or the Defendant, should be entitled to receive the profits upon redeemed investment funds that were held by the Defendant for the Plaintiff over an extended period of approximately 16 months due to regulatory issues with disbursing the funds to the Plaintiff following redemption.

2. The Plaintiff accepts that it does not have a claim against the Defendant for breach of contract in failing to pay the redemption proceeds sooner and also that it does not have a claim for interest on the redemption proceeds either, due to the terms of the Defendant's Articles of Association. Instead, the Plaintiff says that it is entitled to recover such profits or interest under equitable principles on the basis of an alleged trust in its favour or breaches of fiduciary duty owed to it by the Defendant. The Defendant denies the claims and contends that the Plaintiff's case is untenable. The Defendant therefore applies by summons filed on 27 September 2024 for reverse summary judgment under GCR O.14, r.12 or GCR O.14A, r.1 to dismiss the Plaintiff's claim and for judgment to be entered in the Defendant's favour. The Plaintiff resists the summons and contends that its case is correct or, at the very least, it raises complex issues that should be determined at a trial, not on a summary basis.

3. I have been provided with very helpful and admirably brief skeleton arguments prepared by Mr John Machell KC for the Defendant and Mr Tom Smith KC for the Plaintiff. I also have two affidavits sworn by Ms Heidi Kubba on behalf of the Defendant and one affidavit sworn by Ms Elaine MacLaughlin-Pickford on behalf of the Plaintiff. Ms Kubba is the senior in-house counsel of the Defendant's investment manager, which is a company associated with the Defendant. Ms MacLaughlin-Pickford is general counsel within the group of companies that includes the Plaintiff and has responsibility for the Plaintiff's legal matters. Their affidavits are succinct and to the point, which is also to be praised.

4. The Defendant's summons was listed before me for hearing on 25 March 2025. The delay in listing from September 2024 appears to have been due to the limited availability of the parties' attorneys and chosen leading counsel. I am very conscious that delivery of this judgment since the conclusion of oral argument on 25 March 2025 has taken very substantially longer than it should have done. Due to the volume of business before the court following that hearing, I have been considerably delayed in my ability to complete my judgment. I am grateful to the parties for their patience.

5. Following the conclusion of oral argument, the Plaintiff filed and sought to rely on a further affidavit exhibiting certain correspondence said to be relevant to an argument it had made orally during the hearing, and the Defendant filed and sought to rely on a further affidavit from Ms Kubba in response. Neither party sought leave to rely on this further evidence and, as it did not assist me with resolving the arguments on the Defendant's summons, I have not given leave to either side to rely on this further evidence.

B. The relevant factual background

6. The parties agree that there is no significant dispute between them on the facts that are in evidence before me, which I can therefore summarise as follows.

7. Both parties are investment vehicles. The Plaintiff is a company registered in Luxembourg, and the Defendant is an exempted company incorporated in the Cayman Islands. The Defendant is a feeder fund for its related master fund, which is also a Cayman Islands incorporated company ("the Master Fund").

8. The Plaintiff invested approximately US $219.4 million in the Defendant in two tranches on 29 June 2021 and 2 February 2022 and obtained redeemable shares in the Defendant in return. Each investment was governed by:

    8.1 a subscription agreement dated 29 June 2021;

    8.2 a private placement memorandum dated June 2021;

    8.3 the Defendant's Amended and Restated Articles of Association dated 11 June 2021; and

    8.4 a side letter dated contemporaneously with each of the investments.

9. In each case, clause 3(a) of the relevant side letter gave the Defendant a right to redeem the Plaintiff's shares compulsorily where the Plaintiff's continued investment:

> *"[…] could reasonably be expected to have [a] materially adverse legal, tax, regulatory or pecuniary effect (including with respect to any applicable anti-money laundering or anti-bribery regime) on the Fund or the investors in the Fund."*

10. Whilst not expressly addressed in the evidence, I assume for present purposes that the Defendant invested all of its available funds, net of expenses and overheads, in the Master Fund and received redeemable shares in the Master Fund in the usual way for a master / feeder structure.

11. On 10 March 2022, the Defendant gave notice to the Plaintiff by a Redemption Notice that it was redeeming the Plaintiff's shares compulsorily because individuals connected with the Plaintiff were subject to sanction regimes, which could result in an adverse legal, pecuniary or reputational effect on the Defendant.

12. The value of the shares redeemed was subsequently stated by the Defendant as US $229,705.238.05 at the redemption date of 10 March 2022. The Defendant instructed its fund administrator, CITCO, to transfer the redemption proceeds to the Plaintiff. However, the transfer was delayed, apparently because CITCO had its own concerns that the Plaintiff was a designated person under applicable sanctions regimes or was associated with such persons. As a result, the redemption proceeds were not paid to the Plaintiff until 25 July 2023, some 16 months after the date of the Redemption Notice and the stated redemption date.

13. The Defendant's case, as set out in its Defence and Further & Better Particulars and in Ms Kubba's affidavit evidence, is that the practical arrangements for making payment to the Plaintiff were as follows:

    13.1 Sufficient funds to enable payment of the redemption proceeds to be made were transferred on 24 July 2023 from a UBS prime brokerage account belonging to the Master Fund to a CITCO operational account.

    13.2 On the same day, the funds were transferred from the CITCO operational account to a second CITCO account ("the CBN Account") and held overnight.

    13.3 On 25 July 2023, CITCO paid the redemption proceeds from the CBN Account to the Plaintiff.

13.4 The Defendant states that the CBN Account is the account used by CITCO for the purpose of administering subscriptions and redemptions and is not a segregated account.

C. Outline of the claim and the defence

14. The Plaintiff complains that it has not received any compensation for the delay in payment to it of the redemption proceeds. The Plaintiff's dissatisfaction is exacerbated because, as indicated above, it appears that CITCO did not draw down the redemption proceeds from the Defendant or the Master Fund while it was resolving its regulatory concerns and that the Defendant did not draw down the redemption proceeds from the Master Fund either. Instead, the inference to be drawn from the Defendant's account of how payment to the Plaintiff was made is that the redemption proceeds remained with the Master Fund throughout the period from 10 March 2022 until 24 July 2023.

15. There is no suggestion that the Master Fund treated the redemption proceeds any differently from other assets under its management. Moreover, the Plaintiff's claim is predicated on the assumption, which I accept for present purposes, that the Master Fund treated the redemption proceeds as part of its general assets under management. I therefore proceed on the assumption in the Plaintiff's favour that the Master Fund continued to invest the redemption proceeds, along with its other assets under management, in accordance with its investment criteria over the period from 10 March 2022 to 24 July 2023. I further assume in the Plaintiff's favour that the Master Fund made a profit from its use of the redemption proceeds over that period, with a consequential increase in the value of the Defendant's shares in the Master Fund and of the shares in the Defendant itself, thereby benefitting the continuing investors in the Defendant but not the Plaintiff.

16. The Defendant has refused so far to disclose what it, or the Master Fund, did with the redemption proceeds before 24 July 2023, and to disclose the amount of any profit generated, despite repeated requests by the Plaintiff that it do so. Further, the Defendant has refused to make any payment to the Plaintiff in respect of any increase in the net asset value of the Defendant or the Master Fund over the relevant period. The Defendant asserts that the Plaintiff was redeemed as an investor on 10 March 2022 and lost any right to share in any investment gains from that date onwards, just as it would not have been liable to contribute to any loss that occurred after that date.

17. The Plaintiff commenced these proceedings on 5 July 2024 and, by its Amended Statement of Claim dated 2 September 2024, alleges breach of trust and breach of fiduciary duty against the Defendant. The Plaintiff seeks an account of the profits made by the Defendant using the redemption proceeds; or equitable compensation reflecting the profit that would have been made if the redemption proceeds had been properly invested; or interest in lieu at a rate to be determined by the court, together with interest on all sums ordered to be paid. Given that the redemption proceeds were just short of US $230 million, the sum in question is likely to be substantial, probably in the low to middle tens of millions of US dollars.

18. The Defendant's defence is that redemption of the Plaintiff as a shareholder occurred on 10 March 2022. At that point, the relationship between the Plaintiff and the Defendant became one of creditor and debtor, and the Plaintiff lost any rights as a shareholder in the Defendant. The Defendant's Amended and Restated Articles of Association, to which the Plaintiff agreed or is deemed to have agreed, expressly provide that a redeemed shareholder is entitled to be paid the redemption proceeds without interest. In addition, the Defendant is permitted by its Articles to suspend payment of redemption proceeds if reasonably necessary to comply with anti-money laundering requirements. The delay in payment of the redemption proceeds was thus entirely lawful, and catered for in the Defendant's Articles.

19. The Defendant denies that there was any trust which arose in respect of the redemption proceeds and denies that it was a trustee or fiduciary as regards the Plaintiff. As a result, it says that it cannot be liable in either of those capacities. The Defendant says that even if it were a trustee or fiduciary, then the scope of the Defendant's duties would have to be consistent with the Defendant's Amended and Restated Articles of Association and so would not have imposed any obligation upon the Defendant to invest the redemption proceeds or to account to the Plaintiff for interest or any profit generated from the redemption proceeds.

20. The Defendant argues that the Plaintiff is seeking to obtain a share in the increase in the value of the fund as if it remained a shareholder, with a corresponding dilution of the continuing shareholders, notwithstanding that the Plaintiff was redeemed as a shareholder on 10 March 2022.

D. The test for summary judgment

21. The test to be applied when considering an application for summary judgment under GCR O.14 is well known and is not in dispute before me. Comprehensive guidance is set out in the judgment of Lewison J (as he then was) in the English case of *EasyAir Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at paragraph 15. This has regularly been cited before the Grand Court, including in *Bradley v Frye-Chaikin* (unreported, 04/09/24), to which I was referred by the Defendant. In brief, and suitably recast to reflect that this is an application by a defendant for reverse summary judgment, a defendant must show that the plaintiff has no real prospect of success on its claim. Once the defendant has adduced evidence to meet that threshold, the burden shifts to the plaintiff to satisfy the court that its claim does have a realistic prospect of success, which means that the claim must be more than merely arguable.

22. The court will refuse summary judgment if it concludes that there are matters of fact or law that should be determined at a trial. In making that assessment, the court can take into account evidence that can reasonably be expected to be available at trial, even if not before the court on the summary judgment application. However, the court must be careful not to be drawn into a mini-trial of disputed issues.

23. For GCR O.14A, the question is whether there is an issue of law or construction that is amenable to resolution on the incontrovertible facts without the need for a full trial and which disposes of the entire case or of an important aspect of the case: see *Arnage Holdings Limited v Walkers* [2019] 2 CILR 382 per Smellie CJ at [18].

24. For an application under GCR O.14 or under O.14A, it does not follow from the appearance of simplicity that a case should be decided summarily without the fuller investigation into the facts inherent in a trial. The court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, if there are reasonable grounds for believing that a fuller investigation into the facts of the case would add to or alter the interpretation of the evidence available to the judge and might affect the outcome of the case as a result. If it is shown that documents or oral evidence that would put the documents before the court in another light are not currently before the court but are likely to exist and can be expected to be available at trial,

then it would be wrong to give summary judgment. This is because in that situation there would be a realistic, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something might turn up that could have a bearing on the question before the court.

25. In the same vein, an application under GCR O.14 or O.14A may raise a short point of law or construction. If the court is satisfied that it has all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to argue their positions, the court should grasp the nettle and decide the point: if the respondent's case is bad in law, they will in truth have no real prospect of succeeding on their claim or successfully defending the claim against them, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined the better, in order to avoid wasting everyone's time and costs.

26. In light of the tests to be applied for GCR O.14 and O.14A, Mr Machell understandably seeks to persuade me that the Defendant's defence is bound to succeed. Mr Machell argues that the case raises a pure question of construction of the four documents identified earlier, which formed the basis for the Plaintiff's investment, and their legal effect. He contends that there is no further evidence relevant to the issues of liability that is not available now and is likely to become available at trial. Mr Machell submits that I should confront the question of construction and make a final determination of the liability issues now.

27. Mr Smith for the Plaintiff disagrees and argues that there should be discovery so that the court can have a fuller picture. He identifies two areas where he says discovery is needed and will shed light on liability:

    27.1 the Defendant's board resolution by which it determined to redeem the Plaintiff's shares – Mr Smith says that the resolution and, I assume, the supporting board papers have not been disclosed – Mr Smith says that this material may well give rise to issues that will need to be explored in cross-examination; and

    27.2 evidence about what the Defendant did with the redemption proceeds before 24 July 2023.

28. I do not accept this part of Mr Smith's argument.

28.1 As regards the Defendant's resolution to redeem the Plaintiff, the Plaintiff has not pleaded any complaint about the decision to redeem it as a shareholder. Instead, the Plaintiff's pleaded claim, and the claim argued before me by Mr Smith, is entirely focussed on the financial consequences of the implementation of the Defendant's decision. I therefore do not see how discovery of the Defendant's resolution to redeem the Plaintiff, or of the supporting documents that led to the resolution being passed, is likely to be relevant to the issues in the case, let alone to shed light on liability.

28.2 As regards the use of the Defendant's redemption proceeds before 24 July 2023, any discovery on this point would go to quantum rather than liability. But in any event, as I have indicated, for the purpose of this application, I am assuming in favour of the Plaintiff and against the Defendant that the Master Fund retained and invested the redemption proceeds for the period from 10 March 2022 to 24 July 2023, in the usual way for a master / feeder fund structure, and generated a profit for its feeder funds as a result, for them to pass on to their investors.

Accordingly, I do not accept that discovery of the kind identified by Mr Smith is likely to shed further light on the merits of the Plaintiff's claim.

29. Mr Smith submits that, in any event, the Plaintiff's claims involve complex and novel questions of law and of construction of the documents, and also about the nature of the relationship between the Plaintiff and the Defendant as regards the redemption proceeds, which should not be determined summarily, but require full argument at a trial. He therefore invites me to dismiss the Defendant's summons.

30. In connection with this last submission, I record that: (a) whilst the skeleton arguments on both sides were refreshingly succinct, they do not appear to have sacrificed quality for brevity; (b) the joint authorities bundle contained 50 items and filled two full lever arch files; and (c) the oral argument occupied a full day. It is not apparent to me what more of substance the parties would be likely to say or to put before the court at a trial, compared to what was argued before me.

31. Nevertheless, the course I will take is to consider the issues raised by the parties on the Defendant's summons on the material that is before me, and then consider whether there is likely to be any further evidence or argument that might make a difference to my provisional view, before reaching a final conclusion.

E. <u>The relevant terms of the contractual documents</u>

32. I have set out the relevant part of clause 3(a) of the side letters in respect of each investment earlier in this judgment. Articles 23, 24 and 25 of the Defendant's Amended and Restated Articles of Association deal with redemptions. Article 23 primarily addresses voluntary redemptions, and includes the following provisions:

> *"23.5 Ordinary Shares will be redeemed at the relevant Net Asset Value per Share prevailing on the Redemption Date, after payment of any incentive fees, on which the redemption request is effective […]*
>
> *23.9 Notwithstanding any other provisions of these Articles, the Directors and/or the Administrator may, by written notice to any Member, suspend payment of redemption proceeds to such Member if the Directors and/or the Administrator reasonably deem it necessary to do so to comply with anti-money laundering laws and regulations applicable to the [Defendant], the Investment Manager, the Administrator or any of the [Defendant's] other service providers.*
>
> *[…]*
>
> *23.12 In the sole discretion of the Directors, the Company may make distributions in cash or, to the extent received from the Master Fund, in kind, or in a combination thereof, in connection with a redemption from the Company by a Member or pursuant to a compulsory redemption. In each case, the assets to be distributed in kind to any redeeming Member (including, without limitation, shares, debentures, or securities of any other company whether or not held by the Company or the Master Fund on the Redemption Date in question) may be allocated to such redeeming Member in such amounts, as determined by the Directors in their sole discretion. […]"*

33. In addition to Article 23.12 applying to compulsory redemptions, the situation of a compulsory redemption is addressed more fully in Article 24:

> *"24.1 The Directors may, in their sole discretion, compel the redemption of all or any portion of the Ordinary Shares held by a Member at any time, without prior notice, for any reason or no reason […] A Member that is required to redeem […] will be treated for all purposes and in all respects as a Member that has given notice to voluntarily redeem such Ordinary Shares, except that any gates as disclosed in the Offering Memorandum will not apply with respect to such redemption. […]*
>
> *[…]*
>
> *24.5 The proceeds of redemption, less an amount equal to any fiscal charges, fees or expenses incurred by the [Defendant] as a result of the compulsory redemption, will be deposited by the [Defendant] in a bank for payment to the former holder of the Ordinary Shares subject to compulsory redemption against the proffering of such evidence as the Directors may require. Upon the deposit of the proceeds, the former holder shall have no further interest in such Ordinary Shares or any of them or any claim against the [Defendant] in respect thereof except the right to receive the proceeds so deposited (without interest) upon proffering such evidence. Subject thereto, the [Defendant] may make payment of the proceeds to the relevant former holder in such manner as it thinks fit."*

34. Article 25 then continues as follows:

> *"25.1 […] in the case of a compulsory redemption, the redemption of Ordinary Shares subject to such compulsory redemption shall be effected from the close of business on the date specified in the notice of compulsory redemption.*
>
> *25.2 Upon the redemption of an Ordinary Share being effected on the Redemption Date (or in the case of a compulsory redemption, on the date specified in the notice of compulsory redemption) the holder shall cease to be entitled to any rights in respect thereof (excepting always the right to receive his redemption proceeds […]). For the avoidance of doubt, an Ordinary Share will be treated as redeemed on the relevant Redemption Date (or in the case of a compulsory redemption, from the close of business on the date specified in the notice of compulsory redemption) irrespective of whether such Member's name has been removed from the Register of Members or whether the redemption proceeds have been physically paid to such Member and such Member will be treated as a creditor for the redemption proceeds, rather than a Member from the relevant Redemption Date."*

35. Finally of relevance, the Defendant notes that the private placement memorandum dated June 2021 includes at page 43:

> *"Shareholders will be removed from the register of members upon the redemption proceeds being paid. Insofar as investors remain as Shareholders until such time as the relevant Net Asset Value per Share has been calculated and the register of members updated, investors will be treated as creditors for the redemption proceeds, rather than Shareholders from the relevant Redemption Date, and will rank accordingly in the priority of the Fund's creditors."*

F. No claim available for contractual interest, unjust enrichment or statutory interest

F.1 Contractual interest

36. As indicated at the outset of this judgment, the Plaintiff accepts that Article 24.5 of the Defendant's Articles of Association, in stating that a redeemed shareholder's right is to "*the proceeds so deposited (without interest)*", expressly negatives any entitlement to interest upon redemption proceeds that are not immediately paid for any reason. Further, Article 23.9 allows the Defendant to suspend payment of the redemption proceeds "*to comply with anti-money laundering laws and regulations applicable*". Thus, it is clear that the Plaintiff cannot bring any such claim.

F.2 Unjust enrichment or statutory interest

37. The Plaintiff also concedes that it cannot bring a restitutionary claim for unjust enrichment on the current state of the law. This is based on the line of authority at the highest level which prevents a restitutionary claim from being advanced in these circumstances, starting with the Supreme Court in *Prudential Assurance Co Ltd v HM Revenue and Customs* [2018] UKSC 39 at [68]-[80], and applied by the Privy Council in *Sagicor Bank Jamaica Ltd v Seaton* [2022] UKPC 48 (Jamaica), *Shanda*

Games Ltd v Maso Capital Investments Ltd [2020] UKPC 2 (Cayman Islands) and *Moses v Moses* [2022] UKPC 42 (Trinidad and Tobago). In these cases, the Supreme Court and Privy Council have concluded that withholding repayment of money due merely gives the holder of the funds the opportunity to use the plaintiff's money already in their possession. Any benefit obtained by the holder of the money is a consequence of their retention of those funds; it does not involve an additional transfer of value giving rise to a separate claim for unjust enrichment. Instead, the plaintiff's claim should be for interest on the money wrongfully retained by the defendant.

38. In the Cayman Islands, however, such a claim for interest under section 34 of the Judicature Act (2021 Revision) requires a subsisting claim for debt or damages. The Plaintiff in this case does not have such a claim because the Defendant has paid the redemption proceeds, albeit substantially later than when it gave notice of compulsory redemption. The Plaintiff says that this highlights a lacuna in the law, which was recognised by the Supreme Court in *Prudential Assurance* at [78] but not resolved. The result is that the Plaintiff must frame its claims against the Defendant as an alleged breach of trust or breach of fiduciary duty, rather than for unjust enrichment or for statutory interest.

39. Mr Machell for the Defendant responds to this argument by saying that, in fact, the Plaintiff does not have a valid restitutionary claim because the retention of the redemption proceeds was expressly permitted by the contractual documents: there was no wrongful act by the Defendant at all and so there is no question of any kind of unjust enrichment occurring. He continues that there is no lacuna in the law of the kind put forward by the Plaintiff; instead, the inability of the Plaintiff to recover interest is a simple consequence of the contractual terms to which it agreed.

G. The parties' respective positions

G.1 The Plaintiff's claims for breach of trust and breach of fiduciary duty

40. The Plaintiff alleges that the Defendant held the redemption proceeds on an express or implied trust. Mr Smith says that Article 24.5 of the Defendant's Articles of Association expressly required the Defendant to deposit the redemption proceeds in a bank for payment to the Plaintiff, which Mr Smith argues means a segregated bank account. The redemption proceeds were thus not at the Defendant's free disposal but should have been held in a segregated bank account by the Defendant for the purpose of repayment to the Plaintiff. The Plaintiff's case is that this is indicative that the redemption proceeds

were impressed with a trust, with the Defendant having legal title and the Plaintiff having beneficial ownership. In addition to *Lewin on Trusts* at paragraphs 9–064 and 9–065, Mr Smith relies on a number of English authorities to support the Plaintiff's position that the circumstances gave rise to a trust: namely *Henry v Hammond* [1913] 2 KB 515; *Re Fleet Disposals Ltd* [1995] BCC 605; *Re Nanwa Gold Mines* [1955] 1 W.L.R. 1080; *Re Kayford* [1975] 1 W.L.R. 279; and *Re English and American Insurance Ltd* [1994] BCC 649. Further, Mr Smith draws an analogy with lender cases, where it is well established that a lender's requirement that funds should be deposited in a separate account for payment to the borrower gives rise to a *Quistclose*-type of purpose trust. Mr Smith submits that the same approach should apply in this case: from the redemption date onwards, the Defendant should have been holding the redemption proceeds in a bank for the purpose of repayment to the Plaintiff.

41. Alternatively, Mr Smith contends that the Plaintiff had a proprietary interest in the redemption proceeds, which the Defendant was obliged by Article 24.5 to segregate from its other assets. Mr Smith argues that the redemption proceeds were therefore subject to a constructive trust in the Defendant's hands for the following reasons:

41.1 The Plaintiff lost its rights in the shares at the point of redemption (Article 25.2).

41.2 The redemption proceeds were calculated by reference to the net asset value per share at the date of redemption; and the Plaintiff did not have legal title to the proceeds (Article 24.4).

41.3 Article 24.5 expressly states that the redemption proceeds were to be *"deposited by the [Defendant] in a bank for payment to the [Plaintiff]"*. Compliance with this required the Defendant to separate and move the redemption funds from the general pool of investment assets in its hands.

41.4 The Plaintiff had a specific entitlement to *"the proceeds so deposited"* (Article 24.5); and to *"his redemption proceeds"* (Article 25.2) (emphasis added), which is consistent with the Plaintiff having a proprietary interest in the redemption proceeds.

41.5 The Plaintiff's right was not contingent but was an absolute right to call for the redemption proceeds, and the right subsisted *"always"* (Article 25.2).

Accordingly, Mr Smith submits, if there were no express or implied trust then the factual and legal context would give rise to a constructive trust in respect of the redemption proceeds.

42. Mr Smith argues for the Plaintiff that if the Defendant were a trustee, then it must have owed the Plaintiff fiduciary duties, including a duty not to profit from its ability to use the redemption proceeds in the period before they were paid to the Plaintiff.

43. Alternatively, Mr Smith asserts that if there were no trust, then the Defendant would still owe fiduciary duties to the Plaintiff on the basis of there being a relationship of trust and confidence between them, and the Defendant owing the Plaintiff a duty of loyalty: see *Tulip Trading v Bitcoin Association for BSV* [2023] EWCA Civ 83, applying *Bristol & West Building Society v Mothew* [1998] Ch 1 and *F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)* [2011] EWHC 1731 (Ch). This would arise on the basis that the Plaintiff trusted the Defendant to remit the redemption proceeds and not to profit from any delay in doing so, grounded on the Defendant's obligation to deposit the funds into a (segregated) bank account.

44. Mr Smith argues that the Plaintiff had a legitimate expectation that the Defendant: (a) would diligently and carefully manage the redemption proceeds pending their remission to the Plaintiff, including preserving them for the Plaintiff; (b) would provide full and accurate information as to the amount and state of the redemption proceeds until they were remitted; (c) would act honestly and in good faith with respect to the Plaintiff regarding the redemption proceeds so as not to prefer its own interests over those of the Plaintiff or place itself in a position of conflict; and (d) would not profit from its position and would account to the Plaintiff for any profits earned on the redemption proceeds.

45. Mr Smith submits that a person can owe a fiduciary obligation in respect of part of a relationship only: *"a person ... may be in a fiduciary position quoad a part of his activities and not quoad other parts"* per Lord Wilberforce in *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126 (PC) at 1130.

G.2 The Defendant's response

46. The Defendant's position is that the Plaintiff did not obtain or have any beneficial interest in the redemption proceeds and that the relationship between the Defendant and the Plaintiff was the traditional one in this context of debtor / creditor. Mr Machell relies on *Pearson v Primeo Fund* [2017] UKPC 19, and the similar cases of *Culross Global SPC Limited v Strategic Turnaround Master*

Partnership Ltd [2010] UKPC 33; *Fairfield Sentry Ltd v Migani* [2014] 1CLC 611; and *DD Growth Premium 2X Fund v RMF Market Neutral Strategies (Master) Ltd* [2017] UKPC 36.

47. Mr Machell submits that the language of the Defendant's Articles of Association did not create an express trust, and the contractual documents and surrounding circumstances do not support the existence of an implied or constructive trust. Mr Machell argues that, even if there were some kind of trust that was created, the purpose of the trust can only have been to secure payment to the Plaintiff of the debt due as a result of the redemption, which has been paid and the trust performed.

48. In addition, Mr Machell argues that, correctly understood, the Plaintiff's claim is not actually for breach of trust at all. Instead, he says it should be characterised as a claim for breach of contract for failing to perform the contractual obligation in Article 24.5 to create a trust in respect of the redemption proceeds. He submits that the Plaintiff's case is not that the Defendant acted in breach of a contractual obligation in Article 24.5 to create a trust and that it has suffered a loss as a result of that breach of contract. Rather, the Plaintiff's case appears to be that, the Defendant having failed to create a trust as required by Article 24.5, some different form of trust was created, namely, a trust over funds in the Master Fund's brokerage account.

49. Further, Mr Machell submits that in any event, the assets that the Plaintiff says constituted the trust property did not belong to the Defendant, but to the Master Fund, which is another reason why the Plaintiff's trust argument must fail.

50. Mr Machell also argues against the existence of any trust on the ground that a trust over the Defendant's assets to secure payment of a sum due on redemption would be unenforceable as a matter of public policy as being inconsistent with, or an illegitimate attempt to contract out of, s.37 and/or s.49(g) of the Companies Act.

51. As to the Plaintiff's allegation that the Defendant owed fiduciary duties to the Plaintiff, Mr Machell argues that the Plaintiff is approaching the question of whether such duties existed from the wrong end. He says the correct approach is to consider whether the nature of the relationship between the Plaintiff and the Defendant in relation to the redemption proceeds was apt to give rise to any relevant fiduciary duties, which he argues it was not.

52. Finally, Mr Machell argues that the Plaintiff's suggestion that fiduciary obligations are to be superimposed on the commercial contractual relationship between the Plaintiff and the Defendant is hopeless. He submits that the Plaintiff's attempt to try to rely on a trust or fiduciary relationship is a meritless ploy to sidestep the terms of the bargain to which the Plaintiff willingly agreed when it made its investments, namely that the Articles provide for a redeemed shareholder's rights to be limited to payment of the redemption amount without interest, and give the Defendant the contractual right to suspend payment in the applicable circumstances, which it lawfully did from 10 March 2022 to 25 July 2023.

G.3 The Plaintiff's reply

53. The Plaintiff contends that, if the Defendant is correct that it (or more accurately, the Master Fund) was entitled to use the redemption proceeds as part of its general investment pool until the sanctions issues were resolved and payment could properly be made to the Plaintiff then this has the result that any redemption was not completed until that time. Mr Smith argues that this is the effect of the statement in Article 24.5 that the Plaintiff's loss of its rights as a shareholder was to occur *"[u]pon the deposit of the proceeds"* by the Defendant *"in a bank"*. Mr Smith says that unless and until the Defendant made the deposit of the redemption proceeds, the Plaintiff's rights as a shareholder continued to subsist because the redemption process had not been effected by trading the shares for the future payment of the redemption funds. The Plaintiff says that the deposit of the redemption funds is fundamental to the redemption exercise.

H. <u>Discussion</u>

H.1 Was there an express, implied, resulting or constructive trust in respect of the redemption proceeds?

54. None of the documents governing the basis on which the Plaintiff made its investments in the Defendant expressly refer to any trust in respect of or lien over redemption proceeds in favour of the redeemed shareholder. In those circumstances, the starting point must be that the parties did not create a trust unless the contractual documents, upon a proper construction, had the effect of giving rise to a trust, nonetheless.

55. Mr Smith argues that notwithstanding the absence of trust wording, the intention of the parties to be discerned from the documents is such that a trust was created. Mr Smith relies on *Snell's Equity (35th ed)* at paragraph 22-013, under the heading *"Intention to Create Trust"* (omitting footnotes):

> *"No particular form of expression is necessary for the creation of a trust if, on the whole, it can be gathered that a trust was intended. It is unnecessary for the settlor to use the word 'trust': the court construes the substance and effect of the words used, against the background of any relevant surrounding circumstances. Indeed, the settlor need not even understand that his words or conduct have created a trust if they have this effect on their proper legal construction. […] The settlor's intention must be clear on two main questions: (1) that they intended the trustee to owe legally enforceable duties rather than duties of a merely social or moral nature; (2) that if they intended to create a legal relationship, it was to involve trust duties as distinct from some kind of legal relationship, such as a simple relationship of debtor and creditor."*

Whether the Defendant's intention, as expressed in its Articles of Association and the other contractual documents, satisfies the second requirement of intention identified by the learned authors of *Snell's Equity* is the core question for determination of the Plaintiff's express or implied trust claim in this case.

56. The Plaintiff also relies on paragraphs 9-064 and 9-065 in *Lewin on Trusts (20th ed)* to found its argument that there was an express, implied or constructive trust. Paragraph 9-065 of *Lewin* states:

> *"It has been said that the effect of the authorities is that a requirement to keep moneys separate is normally an indicator that they are impressed with a trust and the absence of such a requirement, if there are no other indicators, normally negatives it. Such trusts may be* Quistclose *trusts, or they may on their construction be express trusts in which the settlor is the recipient or the provider of the money; if the settlor is the recipient, the trust is an express trust made by the recipient in favour of the payer should the purpose of payment fail. In that case, if such a trust is inadequately constituted, the recipient or its creditors will accordingly take the money, but it is enough that the purpose for which the money is to be applied is expressed with sufficient certainty to enable the restriction on the payee's use of the money to be identified, and it does not matter that a particular transaction in which the money is to be applied is not identified."*

57. As authority to support the statements in *Snell* and *Lewin*, the Plaintiff draws my attention first to *Henry v Hammond* [1913] 2 KB 515, where Channell J said at 521:

> *"It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his* cestui que trust*. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor."*

The context for Channell J's statement of the law was a claim against English shipping agents by a French average adjuster. A ship carrying coal was wrecked off the coast of Kent in 1883. The cargo

was salvaged and the plaintiff, acting for the cargo insurers, engaged the shipping agent to sell the coal and pay all expenses out of the proceeds of sale. Having done so, the shipping agent was left with an unexpected surplus of £96. The shipping agent recorded the surplus in its accounts for several years as a debt owed to an unidentified international client, before writing it off and taking the money itself. In 1912, the plaintiff discovered that the shipping agent had retained the £96 and sued for its return. The defendant raised a limitation defence. In order to counter this defence, the plaintiff argued that the defendant was a trustee of the surplus funds. The county court judge and Channell and Bray JJ, on appeal, held that there was no trust and that the situation was simply one of debtor / creditor so that the defendant's limitation defence succeeded.

58. The second English case relied on by Mr Smith is ***Re Fleet Disposals Ltd*** [1995] BCC 605. The defendant, which was insolvent, was engaged in selling cars as an agent for the claimant and other sellers. The defendant's terms of business made clear that it was acting as agent. The claimant asserted that the proceeds from sales of its cars, which were in one of the defendant's bank accounts and mixed with proceeds from the company's sales of cars for other principals (but not mixed with money from sales of cars by the defendant on its own behalf), were impressed with a trust so that it was entitled to make a proprietary claim to the monies, obtaining priority over the unsecured creditors.

59. Lightman J (as he then was) explained that in determining whether the defendant company was a trustee of the plaintiff's funds such that the plaintiff had a proprietary interest in the monies, notwithstanding that they were in a mixed account:

59.1 the question was one of the proper construction of the agency agreement in the light of the surrounding circumstances at the time that the agreement was made; and

59.2 the surrounding circumstances included the intentions of the parties, express or to be inferred; but

59.3 the relevant intentions of the parties are limited to those which the parties communicated to each other or are reasonably to be inferred; they do not include private uncommunicated intentions.

60. The learned judge considered that the following were part of the relevant surrounding circumstances, which led to him concluding that the monies were subject to a trust:

60.1 the terms of the agency agreement, which did not include any express reference to a trust but included language that was indicative of a trust relationship and inapposite to an accounting relationship or maintaining a running account;

60.2 the fact that the defendant had maintained a separate bank account for receipt of the proceeds from selling cars as agent and paid the principals from that account, and represented to the claimant that that arrangement was intended to continue following a meeting between them prompted by the insolvency of another agency used by the claimant, and in that connection the defendant also sold cars as principal, and paid those monies into a different bank account; and

60.3 the nature of the relationship between the claimant and the defendant – Lightman J noted that the commercial relationship of principal and selling agent is one where the courts are more willing to infer a trust because it is not readily to be inferred that an agent is intended to be able to finance their own business out of the proceeds of sale of the principal's property.

Re Fleet Disposals Ltd seems to me to be a somewhat different case from this one, grounded as it is, on a commercial agency arrangement. Apart from the indication that it is necessary to consider the terms of the contractual documents binding the parties, I do not find it helpful.

61. Thirdly, Mr Smith relies upon *Re Nanwa Gold Mines* [1955] 1 W.L.R. 1080 concerning whether subscription funds paid in respect of an intended share issue were the company's money or belonged to and were returnable to the subscribers. The subscription funds had been paid into a separate bank account, but there were insufficient subscribers to proceed with the share issue. A debenture holder then enforced and appointed a receiver over the company's assets. The dispute was therefore between the debenture holder and the subscribers as to priority in the insolvency in respect of the subscription monies. At page 1083-4, Harman J discussed the case of *Moseley v Cressey's Co* (1880) 13 Ch.D 696, where it had been held by the Vice Chancellor, Sir William Page Wood, that a statement that subscription monies would be returned was insufficient to make the subscribers more than mere creditors. Harman J said:

> *"It was held by Sir William Page Wood that such a '.... statement did not bind moneys, consisting mainly of these deposits, standing in a bank to the credit of the company, with a trust or lien in favour of the depositors, as against creditors of the company. ...' He said: 'The plaintiffs say not only that these promoters are liable as for money had and received, but that they have no authority to deal with it otherwise than upon the trust by which it was to be returned to the depositors. But if the object had been to create a lien of this kind, the obvious way of doing so would have been to have said in the prospectus that there would be a lien on the deposits until the company was established, or that it was to be set apart as a trust fund in the names of trustees, to be returned*

in the event of the company not being established. Nothing of that kind was done; nor was that the contract. The contract was—'You are to pay so much per share when you apply for shares, and your deposits will be returned if no allotment is made'—not that the actual thing so deposited was to be paid back; for payment to the company's bankers to the account of the company made the moneys ipso facto part of the company's assets.'"

62. Harman J continued in the second following paragraph at 1084:

> *"If, therefore, the words had been merely a promise to refund, that case would (supposing it to be right) have been an authority that no lien is created by such a transaction. But here 1 have not only those words, but the promise to retain the money 'in a separate account.' What is the point of making such a promise? It seems to me quite clearly to be a representation that the money will be set apart; not in the company's ordinary coffers, but in a separate account. It is not a promise, of course, to put it into joint names, although that in fact was done. There is no evidence that any of the subscribers knew that there was any arrangement to put it into joint names, all they knew was that there was a promise to pay it into a separate account; and I cannot but think that the whole object of making such a promise was to indicate that it would be kept apart and separate, not mixed with the company's moneys, until the board saw whether the conditions were fulfilled. It seems to me that the promise to keep the money 'in a separate account' distinguishes the present from* Moseley's *case.*
>
> *It is conceded that the mere fact that the money was placed in a separate account, so that one could point to it and say: 'There it is,' would not of itself ex post facto create a trust. That appears from* Lister & Co. v. Stubbs*, which shows that because A can point to some money in the hands of B and say: 'That is where my money went to,' it does not follow that the position between them is other than that of debtor and creditor. [...] But here it is not the fact of the money being in the joint account which is relied on, but the promise made in the document on the faith of which the application was made."*

Thus, *Re Nanwa Gold Mines* is a case where the conclusion that there was a trust depended on the existence of a requirement to keep the monies in question in a *"separate"* bank account as well as the fact of doing so.

63. Mr Smith then relies on *Re Kayford* [1975] 1 W.L.R. 279 to extend the scope of his argument. He notes that at page 282 in the report:

> *"Megarry J explained:*
>
> > *'Payment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust, but of course there is nothing to prevent the company from binding itself by a trust even if there are no effective banking arrangements';*
>
> *The point being made in that case was that payment into a separate bank account is an indicator of the creation of a trust, but it is not essential in that a trust can still be created over monies even if there is no segregated bank account. See further as applied in* Re English and American Insurance Ltd *[1994] 1 BCLC 649 [...]"*

However, in *Re Kayford*, the customers' money in question was paid into a separate bank account maintained by the company with the intention of protecting it in the event of the company's

insolvency and where there was an imminent risk of such insolvency occurring. Megarry J's statement relied upon by Mr Smith was therefore not part of the essential reasoning of his judgment.

64. Further, Megarry J prefaced the statement quoted by Mr Smith with the following:

> *"In* In re Nanwa Gold Mines Ltd. *[1955] 1 W.L.R. 1080 the money was sent on the faith of a promise to keep it in a separate account, but there is nothing in that case or in any other authority that I know of to suggest that this is essential."*

This is difficult to reconcile with Harman J's discussion of *Moseley v Cressey's Co* and *Lister & Co v Stubbs* in *Re Nanwa Gold Mines Ltd* that I have set out. It also appears to be contradicted by the Supreme Court's judgment in *Re Lehman Brothers International (Europe)* [2012] UKSC 6. Lord Hope said at [2]:

> *"2. Under English law the mere segregation of money into separate bank accounts is not sufficient to establish a proprietary interest in those funds in anyone other than the account holder. A declaration of trust over the balances standing to the credit of the segregated accounts is needed to protect those funds in the event of the firm's insolvency. Segregation on its own is not enough to provide that protection. Nor is a declaration of trust, in a case where the client's money has been so mixed in with the firm's money that it cannot be traced. So segregation is a necessary part of the system. […]"*

Lord Collins at [186] quoted with approval from Professor Gower's report on investor protection as follows:

> *"186. […] In his report* Review of Investor Protection, Report: Part 1 *(1984) (Cmnd 9125) (which preceded the Financial Services Act), para 6.31, Professor Gower noted that under English law mere segregation of funds was not enough to protect those funds from the firm's creditors in the event of its insolvency, and investors' money could be safeguarded by segregation only if it was segregated in such a way that ownership remained with them, ie under a trust:*
>
> > *'The ultimate safeguard for investors is an assurance that on the failure of the investment business such of their money or investments as have not been disposed of in the legitimate conduct of that business are recoverable by them. In most cases this can be achieved only by a combination of two methods. The first is by the segregation of clients' money and investments from the firm's money and investments. This is effective only if clients' money and investments are segregated in such a way that ownership remains with them. This is not achieved merely by holding their money in a designated clients' account. Unless that account is held on trust for the clients it will not afford protection, as many clients of recently liquidated investment managers and commodity dealers have learnt to their cost.'"*

Lord Collins' reliance on Professor Gower's statement was approved by Lord Hope at [18] and by Lord Walker at [84] notwithstanding that Lords Hope and Walker disagreed with the majority of the Lords of Appeal on other aspects of the appeal.

65. Finally, Mr Smith relied upon *Re English and American Insurance Ltd* [1994] 1 BCLC 649. Whilst Harman J in that case referred back to *Henry v Hammond* and *Re Kayford*, it is clear from the law report that the contractual agreement governing the basis on which the company held client funds expressly recorded that the funds were to be kept segregated from the company's other assets and liabilities, and the evidence was that the company did so, although its accounting treatment of the funds in question became a little confused as time passed. That case therefore does not assist in resolving the arguments in this matter.

66. I take from these authorities that, in order for the court to conclude that the parties effectively created a trust despite the absence of express wording in their contractual documents, there must be a promise or obligation to keep the money in question segregated and it should in fact be segregated. I do not consider that Megarry J's *obiter dictum* in *Re Kayford* that segregation of money is not required is correct in law, in light of *Re Lehman Brothers International (Europe)*.

67. The first question is therefore whether the Defendant was subject to an obligation to keep the redemption proceeds segregated from its other assets. Mr Smith submits that by Article 24.5 the parties agreed that the redemption proceeds were to be *"[...] deposited by [the Defendant] in a bank for payment to [the Plaintiff ...]"* (emphasis added). He says that the language chosen by the parties makes clear that they intended to refer to the specific proceeds of redemption, and that the Defendant had undertaken to deposit those proceeds in a bank account and to segregate them. He says that this is, at least, arguably sufficient to establish the existence of the putative trust.

68. In my judgment, there are several difficulties with this argument. The first is that Article 24.5 does not say anything about an obligation to segregate the redemption proceeds and does not suggest that there is any lien over the redemption proceeds in favour of the redeemed shareholder. It simply says that the redemption proceeds should be paid into a bank account for payment to the Plaintiff "*against the proffering of such evidence as the Directors may require*". There is no indication in Article 24.5 that the bank account must be a client account, a trust account or some other form of segregated account containing client monies only.

69. Secondly, the Plaintiff's argument ignores the terms of Article 23.12, which I have set out earlier in this judgment. Article 23.12 gives the Defendant a discretion to make distributions to a redeemed

shareholder in cash or in kind, including in the case of a compulsory redemption. It states that distributions may take the form of shares, debentures, or securities of any other company, and whether or not owned by the Defendant or the Master Fund on the relevant redemption date. Thus, the Defendant is not constrained to make distributions in cash only, and Article 24.5 must be construed with that in mind: the ability of the Defendant to make redemptions in kind causes an inconsistency in approach, if the Plaintiff's argument is correct, regarding the status of redemptions in kind compared with redemptions in cash. Article 23.12 does not include any language that requires the Defendant, if making a distribution in kind, to segregate or to keep separate from its other assets the shares, debentures or securities to be transferred to the redeemed shareholder, corresponding to the wording in Article 24.5 on which the Plaintiff relies. This makes it difficult to see how a trust can be said to have been intended in relation to such shares, debentures or securities. On the Plaintiff's case, this then produces a significant inconsistency in treatment between the two kinds of redemption that is illogical and does not make any commercial sense.

70. Thirdly, it is notable that rather than using words indicative of the existence of a trust, the parties expressly described their relationship following a redemption as one of debtor and creditor. This was both in the Articles and in the private placement memorandum. Article 25.2 states:

> *"[…] For the avoidance of doubt, an Ordinary Share will be treated as redeemed on the relevant Redemption Date (or in the case of a compulsory redemption, from the close of business on the date specified in the notice of compulsory redemption) irrespective of whether such Member's name has been removed from the Register of Members or whether the redemption proceeds have been physically paid to such Member and such Member will be treated as a creditor for the redemption proceeds, rather than a Member from the relevant Redemption Date."*

To similar effect, the private placement memorandum states:

> *"[…] Insofar as investors remain as Shareholders until such time as the relevant Net Asset Value per Share has been calculated and the register of members updated, investors will be treated as creditors for the redemption proceeds, rather than Shareholders from the relevant Redemption Date […]"*

71. Mr Machell for the Defendant relies on <u>*Pearson v Primeo Fund*</u> [2017] UKPC 19, an appeal to the Privy Council from the Cayman Islands Court of Appeal. Lord Mance, giving the unanimous opinion of the Board, made clear that the relationship between a company and a redeeming shareholder is one of debtor and creditor. He said at [13]:

> *"13. In the Board's opinion, payment is, as a matter of general principle, clearly not an inherent element of the redemption or purchase by the company of its own shares. The provision in the articles for its deferral for a short time was, no doubt, a convenience to the company. The essence*

> *of redemption is, however, the surrender of the status of shareholder, with all attendant rights, just as the essence of purchase is the transfer of property. If this occurs, the deferral of payment of the price is no more than a grant of a short period of credit to the company, without any reservation of property or interest."*

Lord Mance returned to this issue at [21], where he stated:

> *"21.* Fairfield Sentry *(above) involved an attempt to recover redemption moneys which had already been paid. The present issue did not there arise, and it was not necessary to draw the precise line between 'those investors whose funds are still invested' and 'those who were still members of the fund' at the critical date, which is here the commencement of the winding up.* ***That line falls now to be drawn, and the Board's conclusion is that the critical moment is when an investor has redeemed and so ceased to be a member of the fund, becoming instead a creditor owed the redemption proceeds.*** *[...]"* (emphasis added)

72. Mr Smith seeks to distinguish *Primeo* on the ground that the Board was concerned there with a question of priorities between redeeming shareholders and other creditors in an insolvency context, and that there was no allegation of a proprietary interest in the money in question. However, that does not seem to me to be a valid ground for taking a different approach to the proper characterisation of the relationship between company and redeemed shareholder in this case. As Mr Machell puts it, the underlying rationale for the existence of a trust in the present case, if any, must be to protect a redeemed shareholder's interest upon an insolvency.

73. In this context, it is also pertinent to note that the Privy Council in *DD Growth Premium 2X Fund v RMF Market Neutral Strategies (Master) Ltd* [2017] UKPC 36, another appeal from the Cayman Islands, proceeded throughout on the basis that the relationship between a company and its redeeming shareholders is one of debtor and creditor, applying *Primeo*. The issue in that case was whether redemption payments that had been made by the company were recoverable as fraudulent preferences on the basis that the redemption payments were unlawful because the company was cashflow insolvent at the time they were made. The approach of the Privy Council makes clear that the debtor / creditor analysis of the relationship between company and redeemed shareholder applies not just when seeking to determine priorities between shareholders on an insolvency.

74. I therefore conclude that Article 24.5 does not create an obligation on the Defendant to segregate redemption proceeds due to a redeemed shareholder or otherwise create a trust in respect of redemption proceeds due to a redeemed shareholder. It simply has the effect that, where the redemption proceeds are reduced into cash, then the Defendant should pay them into a bank account for onward payment to the redeemed shareholder upon presentation of any evidence of entitlement

that the Defendant requires. In other words, as Mr Machell submits, Article 24.5 is simply setting out the mechanism by which redemption proceeds to be paid in cash are to be returned to a redeemed shareholder.

75. The second question is whether the redemption proceeds were in fact segregated. The evidence before me indicates, and it is the Plaintiff's case, that the redemption proceeds were not paid into any bank account until 24 July 2023, when they were paid from an account maintained by the Master Fund, not by the Defendant, to an account maintained by CITCO and then paid into a second, general mixed account maintained by CITCO. As already indicated, it appears likely, and it is the Plaintiff's case, that at all times from 10 March 2022 until 24 July 2023 the redemption proceeds remained with the Master Fund and were invested by the Master Fund as part of its general assets under management. Thus:

    75.1 it is unlikely that the redemption proceeds were reduced to cash until shortly before 24 July 2023;

    75.2 it is unlikely that the redemption proceeds were in fact segregated from the Master Fund's other assets until shortly before 24 July 2023, if at all; and

    75.3 it is even less likely that the redemption proceeds were in the possession of the Defendant at any relevant time and were segregated by the Defendant.

Mr Smith does not suggest that there was any trust relationship between the Plaintiff and the Master Fund, and it is very difficult to see how he could do so. The apparent factual position regarding both ownership of and segregation of the redemption proceeds is therefore also unsupportive of the existence of a trust in the way argued by the Plaintiff.

76. I can deal with the Plaintiff's argument based on a ***Quistclose***-type purpose trust more briefly. If there were any such resulting purpose trust, it must have arisen at the time that the Plaintiff made its investment and would have required that the investment funds paid by the Plaintiff to the Defendant were used only for the purpose of investing in the Defendant and, through it, in the Master Fund. That is what happened. Any resulting purpose trust that came into existence ran its course when the purpose was fulfilled, namely when the Defendant used the Plaintiff's monies to invest in the Master Fund, as was the parties' common intention. I do not see that the compulsory redemption of the Plaintiff as an investor had the effect of creating a new purpose trust. There was no transfer of monies impressed

with an intended purpose at that time: the redemption proceeds appear very likely to have remained with the Master Fund until 24 July 2023, and to have remained in the form of investments in third parties rather than as cash. I am not aware of any authority, and none has been shown to me, to indicate that a *Quistclose*-type resulting purpose trust can arise in the absence of a transfer from one party to the other of the funds subject to the intended purpose, where the "purpose" is simply the payment of a debt owed by the holder of the money to the other party.

77. As to Mr Smith's alternative case that the Plaintiff obtained a proprietary interest in the redemption proceeds, which were then subject to a constructive trust, there are two reasons why I conclude that this argument fails. The first is that by Article 23.12, the Defendant has discretion to choose whether the redemption proceeds should be paid in cash or kind. Article 23.12 is silent on when the Defendant should make that decision. However, the necessary implication from the fact that Article 23.12 permits the Defendant to distribute shares, debentures or securities that were not owned by the Defendant at the redemption date is that the Defendant may exercise that discretion at any time up to the moment when the redemption proceeds are transferred to the redeemed investor. The ability of the Defendant to exercise its discretion to change the nature of the redemption and the specific items by which redemption is achieved at any time is inconsistent with the Plaintiff having a proprietary interest in the redemption proceeds from the moment of redemption. Secondly, the fact that Article 23.12 permits the Defendant to return shares, debentures or securities that were not owned by the Defendant at the redemption date is also inconsistent with the creation of a proprietary interest in the redemption proceeds at the moment when the investor was redeemed.

78. I therefore conclude that the Plaintiff's claim that there was a trust in respect of the redemption proceeds, whether it arose as an express, implied, resulting or constructive trust, does not have any realistic prospect of success on the material currently before me.

79. In the circumstances, I do not need to address Mr Machell's fall-back position that the asserted trust would be unenforceable in light of s.37 and/or s.49(g) of the Companies Act.

80. If, nonetheless, the documents providing the basis on which the Plaintiff's investments were made were effective to create a trust, then I agree with Mr Machell that it does not necessarily follow, as the Plaintiff argues, that the Defendant was subject to obligations to invest the redemption proceeds

as trust property and not to profit as a result. The correct question is whether the Defendant, as trustee, was under any such obligations. This must be determined against the background of the documents governing the terms on which the Plaintiff's investments were made and the underlying commercial purpose of the operation of the Defendant and the Master Fund. However, against Mr Machell, I conclude that it is reasonably arguable that the Defendant may have been subject to such duties if it were a trustee. Contrary to Mr Machell's argument, such duties would not necessarily be inconsistent with its obligation to its unredeemed investors to invest their monies with the Master Fund with a view to making a profit if, contrary to the conclusion I have reached earlier, it were the case that the redemption proceeds were held by the Defendant on trust for the Plaintiff or the Plaintiff did have a proprietary interest in the redemption proceeds.

H.2 Was redemption delayed until 24 July 2023?

81. I do not accept Mr Smith's argument, in response to the Defendant's position, that redemption did not occur until 24 July 2023 because payment of the redemption proceeds into a bank was an essential feature of the redemption process. In my view, this is putting more weight on the wording of Article 24.5 than it can properly bear, and is contradicted by other provisions in the Articles.

82. First, Article 25.1 states expressly, using the imperative *"shall"*, that:

> *"25.1 […] in the case of a compulsory redemption, the redemption of Ordinary Shares subject to such compulsory redemption shall be effected from the close of business on the date specified in the notice of compulsory redemption."*

There is no qualification in Article 25.1 that effecting the redemption is delayed if payment of the redemption proceeds is delayed or suspended for reasons permitted by the Articles.

83. Secondly, Article 25.2 makes clear that:

> *"25.2* ***Upon the redemption of an Ordinary Share being effected*** *on the Redemption Date (or in the case of a compulsory redemption,* ***on the date specified in the notice of compulsory redemption****) the holder shall cease to be entitled to any rights in respect thereof (excepting always the right to receive his redemption proceeds […]).* ***For the avoidance of doubt, an Ordinary Share will be treated as redeemed*** *on the relevant Redemption Date (or in the case of a compulsory redemption,* ***from the close of business on the date specified in the notice of compulsory redemption) irrespective of*** *whether such Member's name has been removed from the Register of Members or* ***whether the redemption proceeds have been physically paid to such Member*** *and such Member will be treated as a creditor for the redemption proceeds, rather than a Member from the relevant Redemption Date."* (emphasis added)

84. Thirdly, this argument ignores the Defendant's power to make a redemption in kind rather than in cash. If the Plaintiff's argument were correct, then a redemption in kind would be eternally delayed from taking effect because there would never be any redemption proceeds paid into a bank. This makes no commercial or logical sense.

85. Further, even if Mr Smith were correct that redemption was delayed until the date when funds were paid into a bank account for onward payment to the Plaintiff, that does not result in any increase in the sum to be paid to the Plaintiff. This is because Article 23.5 provides that:

> *"23.5 Ordinary Shares will be redeemed at the relevant Net Asset Value per Share prevailing on the Redemption Date, after payment of any incentive fees, on which the redemption request is effective […]"*

By Articles 25.1, 25.2 and 24.1, in the situation of a compulsory redemption, the *"Redemption Date"* in Article 23.5 should be taken as meaning the date specified in the notice of compulsory redemption, which in this case was 10 March 2022:

> *"25.1 […] in the case of a compulsory redemption, the redemption of Ordinary Shares subject to such compulsory redemption shall be effected from the close of business on the date specified in the notice of compulsory redemption."*

Article 24.1 states:

> *"24.1 […] A Member that is required to redeem […] will be treated for all purposes and in all respects as a Member that has given notice to voluntarily redeem such Ordinary Shares, except that any gates as disclosed in the Offering Memorandum will not apply with respect to such redemption. […]"*

H.3 Did the Defendant owe any fiduciary duty to the Plaintiff?

86. It is important to bear in mind that the relationship between the Plaintiff and the Defendant in this case was a commercial one between an investor and an investment fund. There is no suggestion that the Defendant was engaged to provide the Plaintiff with investment advice: the investment transactions were, what is sometimes described as, execution only.

87. The commercial background does not necessarily exclude the existence of a fiduciary duty owed by the Defendant to the Plaintiff, but the starting point in any analysis must be the terms applicable to the commercial relationship, as set out in the subscription agreement, private placement memorandum, the Defendant's Amended and Restated Articles of Association and the side letters. If the Defendant did owe any fiduciary duties to the Plaintiff, then the nature and scope of such duties

must be delimited by and be consistent with the contractual obligations between the parties. This is well established in the authorities: see Mason J in *Hospital Products v United States Surgical Corp* (1984) 156 CLR 41 at 97; *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567 per Lord Walker at [30]; *Ross River Ltd v Cambridge City Football Club* [2008] 1 All ER 1004 at [197] to [198]; *Breen v Williams* (1996) 186 CLR 71 per Gaudron and McHugh JJ at page 110; *F&C Alternative Investments (Holdings) Ltd v Barthelemy (No.2)* [2012] Ch 613 at [223]; *New Zealand Netherlands Society v Kuys* [1973] 1 WLR 1126 per Lord Wilberforce at 1130A.

88. In the seminal authority of *Bristol & West Building Society v Mothew* [1998] Ch 1, Lord Millett explained at [18] that:

> *"A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr. Finn pointed out in his classic work* Fiduciary Obligations *(1977), p. 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."*

89. In my judgment, Mr Machell is right to say that there is nothing in the relationship between the Plaintiff and the Defendant to support the Plaintiff's argument that the Defendant owed the Plaintiff a single-minded duty of loyalty; that the Defendant was engaged to manage the Plaintiff's investments on the Plaintiff's behalf; that the Defendant had agreed to subordinate its own interests to those of the Plaintiff; or that the Defendant had undertaken to prefer the interests of the Plaintiff above those of the other investors in the Defendant; or that the Plaintiff had a legitimate expectation that the Defendant had accepted any such obligations. In the absence of indicators that any such duties were owed by the Defendant to the Plaintiff, it is not realistically arguable that the Defendant owed any fiduciary duty to the Plaintiff, and certainly not a fiduciary duty to invest any redemption proceeds owed to the Defendant over the period when payment was delayed or suspended for reasons permitted by the commercial agreement between them.

90. Whilst Mr Smith says that the Plaintiff "trusted" the Defendant to remit the redemption proceeds and not to profit from any delay in doing so, I do not consider this is sufficient to give rise to an arguable

case that the Defendant owed the Plaintiff fiduciary duties of the kinds asserted by the Plaintiff. I am guided to this conclusion by the judgment of Gloster J (as she then was) in JP Morgan Bank v Springwell Navigation Corp [2008] EWHC 1186 (Comm) at [573], where she said:

> *"[…] AP certainly relied upon, or 'trusted' JA's views, recommendations and advice. He may have trusted EM, FS and others at Chase. But the mere fact that one party to a commercial relationship 'trusts' the other does not predicate a fiduciary relationship. The word 'trust', like the word 'advice' has a variety of meanings. […] Springwell no doubt 'trusted' Chase to conduct itself in a commercially appropriate manner. But I do not consider that Springwell had any legitimate expectation that, in its commercial dealings with Springwell, Chase would subordinate its interests to those of Springwell. […]"*

I also bear in mind the passage from the judgment of Lord Mustill in *Re Goldcorp* [1995] 1 AC 74 at 98, which Gloster J quoted in her own judgment at [575], which includes the following:

> *"No doubt the fact that one person is placed in a particular position vis-a-vis another through the medium of a contract does not necessarily mean that he does not also owe fiduciary duties to that other by virtue of being in that position. But the essence of a fiduciary relationship is that it creates obligations of a different character from those deriving from the contract itself. Their Lordships have not heard in argument any submission which went beyond suggesting that by virtue of being a fiduciary the company was obliged honestly and conscientiously to do what it had by contract promised to do. Many commercial relationships involve just such a reliance by one party on the other, and to introduce the whole new dimension into such relationships which would flow from giving them a fiduciary character would (as it seems to their Lordships) have adverse consequences far exceeding those foreseen by Atkin LJ in* Re Wait *[1927] 1 Ch. 606. It is possible without misuse of language to say that the customers put faith in the company, and that their trust has not been repaid. But the vocabulary is misleading; high expectations do not necessarily lead to equitable remedies."*

H.4 Review of provisional views

91. As indicated earlier, having reached the provisional views I have set out so far in this judgment, I have stepped back to consider whether it is likely that there is further evidence that can reasonably be expected to be available at trial or further argument that might be advanced at trial but was not raised before me on the Defendant's summons, and which might realistically affect the outcome of the case. I have also considered carefully whether there are reasonable grounds for believing that a fuller investigation into the facts at trial would add to or alter the interpretation of the evidence available to me now, and whether further documents or oral evidence adduced at trial might put the documents before me now in another light and might realistically point towards a different result.

92. I do not consider that there is a legitimate basis to reach the conclusion that the outcome might be different if I permit the matter to go to trial. I am satisfied that I have the relevant documents governing the relationship between the Plaintiff and the Defendant before me, that the parties have

had a proper opportunity to argue their respective positions and that, as the authorities state and Mr Machell invites me, I should grasp the nettle now and determine that the Plaintiff's case is bad in law.

93. Whilst I have concluded that it is reasonably arguable that the Defendant might be subject to fiduciary duties if it were a trustee in relation to the redemption proceeds, in light of the other conclusions that I have reached – in particular that the Defendant was not a trustee – I do not consider that the outcome of that argument would be likely to affect the overall result in this case.

94. I therefore confirm the provisional views set out in this judgment, namely that:

94.1 I do not consider there is likely to be discovery or factual witness evidence that is likely to be relevant to the liability issues and which would justify sending this case to a trial.

94.2 I do not consider that the Plaintiff's claim raises complex or novel points of law that require determination at trial – I consider that it is well established by the Privy Council that the relationship between a company and an unpaid redeemed shareholder is one of debtor / creditor. I do not consider that there are any factors specific to this case that might reasonably lead to a different conclusion.

94.3 The documents governing the relationship between the Plaintiff and the Defendant did not expressly seek to create a trust. There is no proper basis to conclude that they gave rise to an implied, resulting or constructive trust.

94.4 There is also no proper basis for concluding that the Plaintiff had a proprietary interest in the redemption funds.

94.5 The Defendant's delay in paying the redemption proceeds into a bank account for payment to the Plaintiff did not result in redemption itself being delayed until 24 July 2023. The redemption of the Plaintiff occurred on 10 March 2022, as stated in the Redemption Notice.

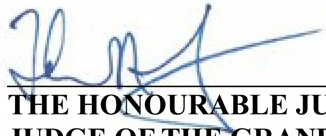
94.6 Even if the delay in payment of the redemption proceeds had the effect of delaying when redemption occurred, that outcome would not result in any increase in the Plaintiff's entitlement upon the redemption.

94.7 The Defendant did not owe any relevant fiduciary duty to the Plaintiff outside the existence of a trust that would enable the Plaintiff to seek to recoup any profit made by the Master Fund

and accruing for the benefit of shareholders in the Defendant, or to claim interest from the Defendant in equity.

95. Within 14 days of handing down of this judgment, counsel should indicate: (a) whether they wish to be heard on costs and any consequential matters, providing their agreed available dates for a hearing; or (b) whether they will submit written submissions on those points within 14 days. In either case, counsel should provide a draft order, agreed if possible, in advance of the hearing or with their written submissions.

Dated 30 December 2025



THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT