IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No 19 of 2018
(Formerly FSD 18 of 2015 (RMJ))

IN THE MATTER OF ARDON MAROON ASIA MASTER FUND (IN OFFICIAL LIQUIDATION)

BETWEEN:

JESS SHAKESPEARE AND SIMON CONWAY
(Joint Official Liquidators of Ardon Maroon Asia Dragon Feeder Fund)

Appellants

AND

(1) JOHN BATCHELOR AND DAVID GRIFFIN
(Joint Official Liquidators of Ardon Maroon Asia Master Fund)
(2) MAROON ASIA CAPITAL LIMITED

Respondents

BEFORE:

THE RT. HON SIR JOHN GOLDRING, President
THE HON JOHN MARTIN, Justice of Appeal
THE HON. C DENNIS MORRISON, Justice of Appeal

Appearances: **Ms. Felicity Toube QC instructed by Mr. Jan Golaszewski, Mr. Peter Sherwood and Mr. Tim Baildam of Carey Olsen for the Appellants.**
Mr. Simon Salzedo QC instructed by Mr. Paul Madden and Mr. James Eggleton of Harneys for the Respondent.

Heard: **11 April 2019**

Draft circulated: **29 April 2020**

Judgment delivered: **20 May 2020**

JUDGMENT

MARTIN JA:

1. This is an appeal from an order dated 17 July 2018 of McMillan J. By that order, the judge dismissed an application to set aside the rejection of a proof of debt lodged by Ardon Maroon Asia Dragon Feeder Fund ("Dragon") in the liquidation of Ardon Maroon Asia Master Fund

("the Master Fund"). The essential issue in the appeal is whether a notice to redeem served by one of its investors on Dragon automatically brought about the redemption of Dragon's equivalent investment in the Master Fund. The liquidators of the Master Fund thought not, and the judge upheld their view.

Background

2. The Master Fund was incorporated in the Cayman Islands on 12 April 2012. It was established to invest primarily in equity and equity-linked instruments in Asian companies. On the same date, Dragon was incorporated as one of two feeder funds for the Master Fund, the other being Ardon Maroon Asia Eagle Feeder Fund LP ("Eagle"). Investors in the funds would subscribe for redeemable shares in Dragon or limited partnership interests in Eagle, and they in turn would use all the invested funds to subscribe for redeemable shares in the Master Fund. As stated in Dragon's Confidential Private Placement Memorandum ("the Dragon PPM") dated 1 June 2013, the intention was that Dragon "will invest all its investable assets through the Master Fund in a 'master-feeder' arrangement".

3. The same individuals acted as directors of the Master Fund and of Dragon. Administrative and investment management services were provided to both by the same persons.

4. Between 2 May 2013 and 1 April 2014 UBS Fund Services (Cayman) Ltd ("UBS") subscribed for a total of some 396,345 redeemable shares in Dragon as nominee for Northview Investment Fund Ltd ("Northview"). Dragon used the subscription monies to subscribe for redeemable shares in its name in the Master Fund.

5. On 11 August 2014 UBS gave notice to Dragon to redeem shares to the value of US$15m. This was the first and only redemption notice received by either Dragon or Eagle. Dragon did not give a corresponding notice of its own to redeem shares of equivalent value in the Master Fund.

6. The Redemption Day in respect of UBS's notice was 3 October 2014, although Dragon was entitled to defer payment until 2 November 2014. Because all of Dragon's funds were invested in the Master Fund, it had no resources of its own from which to meet the cost of redemption. The Master Fund itself was invested in illiquid assets, and it did not have enough available money to redeem US$15m of the shares held by Dragon even if it had been obliged or inclined to do so. In those circumstances, on 30 October 2014 the directors of Dragon and the Master Fund passed resolutions suspending the redemption of shares and the payment of redemption proceeds. On 30 December 2014, negotiations with Northview having failed, Dragon and the

Master Fund were wound up voluntarily and the liquidations of both subsequently came under the supervision of the Court.

7. On 5 March 2015 UBS lodged a proof of debt in the liquidation of Dragon. This proof was initially rejected, but was ultimately accepted on 23 March 2016 following the appointment of Messrs Conway and Walker of PwC, upon the resignation of Messrs Griffin and Batchelor of FTI.

8. On 23 December 2015 Dragon lodged a proof of debt in the liquidation of the Master Fund for US$15m (and post-liquidation interest if applicable). The official liquidators of the Master Fund rejected this proof on 15 March 2016 on the ground that Dragon had not complied with the formalities necessary for redemption of shares.

9. On 1 April 2016 the official liquidators of Dragon appealed to the Grand Court against the rejection of Dragon's proof of debt. The appeal was brought pursuant to the Companies Winding-Up Rules, 2008 (since repealed and replaced by the Companies Winding Up Rules, 2018), Order 16, rule 17, which provides that "If a creditor is dissatisfied with the official liquidator's decision with respect to his proof (including any decision on the question of priority), he may appeal to the Court for the decision to be reversed or varied".

10. On 16 December 2016 the Grand Court directed that Dragon's appeal should be treated as an inter partes proceeding between Dragon and Eagle, and appointed Maroon Asia Capital Limited ("MACL"), the main investor in Eagle, as the representative of Eagle for the purposes of Dragon's application. The significance of the dispute is that, if Dragon has successfully redeemed shares in the Master Fund, it will to that extent take priority as a creditor of the Master Fund over unredeemed shareholders (although not over other creditors): see ***Pearson v Primeo Fund*** [2017] UKPC 19.

11. Dragon's application was heard over four days in December 2017 and May 2018, and judgment was given on 17 July 2018. The application was dismissed on three principal grounds: that the procedure for redemption of shares was exclusively set out in article 37 of the Master Fund's articles of association and required notice of redemption; that even if it were open to the directors of the Master Fund to decide on some other procedure, they had not done so; and that the directors had not waived the requirement of a notice.

12. Dragon's Notice of Appeal to this Court was filed on 31 July 2018. It challenges the judge's conclusions on all three principal grounds.

13. MACL filed a Respondent's Notice, which does not appear to raise any fresh issues. Its ambivalent nature is indicated by the following introductory sentence:

> "MACL will rely on the grounds set out below as additional/varied grounds insofar as not already relied upon by the Judge in the Judgment (which MACL contends that they were)".

The points it makes are reflected in the discussion below.

Legal framework

14. As I have indicated, the mechanism for investment in the Master Fund, and in Dragon, was the purchase of redeemable shares. Because the redemption of shares involves a return of capital by the company, it is prohibited except to the extent permitted by statute. As Lord Mance said in the Cayman Islands case of ***Culross Global SPC Ltd v Strategic Turnaround Master Partnership Ltd*** (***"Strategic Turnaround"***) 2010 (2) CILR 364, [2010] UKPC 33 at [8]:

> "It is a basic principle of company law that capital subscribed to a company may not be returned to shareholders otherwise than as prescribed by statute. Section 37(1) of the Companies Law permits the issue by a company of shares liable to be redeemed at the option of the company or shareholder, and section 37(3)(c) goes on to provide that "Redemption of shares may be effected in such manner as may be authorised by or pursuant to the company's articles of association". It is uncontroversial that this means that the manner in which any redemption may be effected must be authorised by or pursuant to the articles of association. As Gower and Davies observe in *Principles of Modern Company Law* (7th ed) (2003) pages 248 and 250, in relation to similar, albeit not identical, provisions in the English Companies Act 1985, s 160 (3), "In order to protect the shareholders whose shares are not to be redeemed, the terms and manner of the redemption must be set out in the company's articles".

15. However, as the same judge emphasised in ***Pearson v Primeo Fund*** (supra) (also a Cayman Islands case), once redemption of shares is permitted a company has substantial freedom as to the terms and manner of redemption:

> "The Board is unable to accept Lord Goldsmith's general proposition that redemption has an autonomous statutory meaning that prevails over any definition found in or meaning to be derived from the articles. The essence of redemption or purchase being the moment when the prior shareholding interest is extinguished or acquired by the company, that is necessarily a moment which can be defined and shaped by the articles, which constitute the

> relevant agreement between all the members and the company. There is no reason to treat the Companies Law as containing prescriptive provisions in this regard, which do not appear in its text. On the contrary, section 37 (3) (c) provides that "Redemption or purchase of shares may be effected in such manner and upon such terms as may be authorised by or pursuant to the company's articles of association". That is a clear indication of the freedom that shareholders and the company have to shape their relationship as regards redemption or purchase of the company's shares" ([2017] UKPC 19 at [15]).

16. As those passages indicate, in the Cayman Islands the ability to issue and redeem redeemable shares is regulated by section 37 of the *Companies Law* (2018 Revision) ("*the Law*"). That section, which has been amended since the decision in ***Strategic Turnaround***, notably by the addition of a new subclause (3)(da), provides so far as relevant as follows:

> "(1) Subject to this section, a company limited by shares or limited by guarantee and having a share capital may, if authorised to do so by its articles of association, issue shares which are to be redeemed or are liable to be redeemed at the option of the company or the shareholder and, for the avoidance of doubt, it shall be lawful for the rights attaching to any shares to be varied, subject to the provisions of the company's articles of association, so as to provide that such shares are to be or are liable to be so redeemed. …
>
> (3) …
>
> (c) Redemption or purchase of shares may be effected in such manner and upon such terms as may be authorised by or pursuant to the company's articles of association.
>
> …
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> (d) For the avoidance of doubt –
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> (i) the company's articles of association; or
>
> (ii) a resolution of the company,
>
> may authorise the company's directors to determine the manner or any of the terms of, any such redemption or purchase not being inconsistent with such articles of association or resolution and subject to such restrictions (if any) as may be provided therein."

17. For the purposes of the present case, this means that the Master Fund was able to issue redeemable shares if its articles authorised it to do so (and there is no dispute that they did). It also means that the manner and terms of redemption could either be authorised by or pursuant to the articles, or be determined by the directors of the Master Fund if they were authorised to do so by the articles (or by resolution of the directors, although that is not said to have happened in the present case); but in the case of determination by the directors, the manner and terms of redemption could not be inconsistent with the articles (or the resolution).

18. It is Dragon's case that the Master Fund articles on their proper construction permitted the directors of the Master Fund to make a determination that redemption could be effected without service of a notice ("the construction issue"), and that the directors did in fact make such a determination ("the determination issue"). Alternatively, Dragon contends that the directors of the Master Fund were entitled to and did waive any requirement for a separate redemption notice from Dragon ("the waiver issue"). I take these points in turn.

The construction issue

19. Dragon contends that articles 9(a) and 36(a) of the Master Fund's Articles gave the directors power to issue redeemable shares on terms that no written notice was required to effect redemption, and the provisions of article 37 and subsequent articles applied only where the terms of issue required notice of redemption. Additionally, article 36(a) contemplated the issue of shares with a fixed redemption date, so it was clear that the directors had power to issue shares that were redeemable without notice. The judge had wrongly disregarded commercial realities, and in particular had failed to take into account evidence of an established practice in relation to Cayman Islands master-feeder fund structures by which the service on a feeder fund of a redemption notice would automatically trigger a corresponding redemption in the Master Fund without the need for a second notice.

20. In the course of her oral submissions, Ms Toube QC clarified Dragon's position on the evidence. She said that there was no need for us to revisit the expert evidence as to established practice: Dragon had only served its evidence in response to MACL's evidence, and its only relevance was that it was consistent with Dragon's construction of the Master Fund articles. None of the experts had ever seen a case where a feeder fund was required to serve, or had served, a redemption notice on a master fund. However, she accepted that that evidence did not prove that Dragon's interpretation of the articles was correct, as the judge appeared to have believed Dragon's argument to be. Nor was she challenging the judge's findings of fact; but it was relevant to consider if the factual and expert evidence was more consistent with one interpretation than another. On that basis, it is unnecessary to consider the detail of any of the evidence.

21. The provisions of the Master Fund's articles which are primarily relevant are articles 9, 36 and 37.

    (1) Article 9 (a) is in the following terms: "Subject to these Articles, all Shares for the time being unissued shall be under the control of the Directors who may: (a) issue, allot and dispose of the same to such

Persons, in such manner, on such terms and having such rights and being subject to such restrictions as they may from time to time determine".

(2) Articles 36 and 37 appear in a section prefaced by the heading "Redemption, Purchase and Surrender of Shares", which encompasses articles 36 to 52. Articles 38 to 52 are set out in an appendix to this judgment; so far as material, articles 36 and 37 are in the following terms:

"36. Subject to the Law, the Company may:

(a) issue Shares on terms that they are to be redeemed or are liable to be redeemed at the option of the Company or the Shareholder on such terms and in such manner as the Directors may determine, or as may otherwise be determined from time to time;

(b) purchase its own Shares (including any redeemable Shares, and including (for the avoidance of any doubt) Designated Investment Shares) on such terms and in such manner as the Directors may determine and agree with the Shareholder;

(c) make a payment in respect of the redemption or purchase of its own Shares in any manner authorised by the Law; and

(d) accept the surrender for no consideration of any paid-up Share (including any redeemable Shares) on such terms and in such manner as the Directors may determine. …

37. Subject to the Law, these Articles and any rights and restrictions for the time being attached to any Class or Series:

(a) On receipt by the Company or its authorised agent of a Redemption Notice upon at least such number of days' prior notice in writing as the Directors, in consultation with the Investment Manager, may from time to time determine (subject to the discretion of the Directors, in consultation with the Investment Manager, to waive or reduce such period of notice) the Company shall redeem all or any portion of such Redeeming Shareholder's Shares on a Redemption Day at the Redemption Price for the relevant Class and Series; and

(b) Shares may only be redeemed following the expiration of any applicable Lock-Up Period (unless the Directors or their authorised agents in their absolute discretion waive or reduce such Lock-Up Period)."

(3) Relevant definitions are contained in article 1. A "Shareholder" is "a Person who is registered as the holder of Shares in the Register"; "Redeeming Shareholder" means "a Shareholder who has requested the redemption of part or all of his Shares in accordance with these Articles"; and "Redemption Notice" means "a notice in writing in such form as the Directors may from time to time determine from a Shareholder requesting the redemption of part or all of his shares".

22. The judge rejected Dragon's contentions that articles 9 and 36 give a general power to the directors to issue redeemable shares on such terms as they may determine, and that article 37

does not prescribe an exclusive mechanism for redemption. At paragraph [84] of his judgment, he said this:

> "With great respect, the Court is unable to accept Dragon's contention on this point. Given the comprehensive nature of the redemption procedure actually set out, it makes no sense to confer on the Directors a further power to disregard that procedure entirely, unless the power so to disregard the procedure is clearly set out".

23. Dragon's grounds of appeal attack this conclusion on the following (summarised) bases:

(i) The judge had failed to address the language of articles 9 and 36, which conferred express power on the Master Fund directors to issue shares on such terms as they determined or might determine from time to time. He should have concluded that there was no reason for departing from the natural and ordinary meaning of that language.

(ii) In reaching his conclusion, the judge had failed to deal with Dragon's arguments:

(a) that the fact that article 37 provided for what was to happen if a redemption notice were served did not mean that the directors could only issue shares on terms that a notice was required to redeem them;

(b) that neither article 37 nor any other of the articles provided that the only circumstances in which redemption of shares could take place was following receipt of a redemption notice; and

(c) that since article 37 was expressly subject to "any rights … attached to any Class or Series", it could not apply to shares issued on terms that no redemption notice was required;

(iii) The judge had also failed to deal with the fact that article 36 allowed the company to issue "shares which are to be redeemed", so that the company had power to issue redeemable shares which would be automatically redeemed on a fixed date without need for a redemption notice. He should have concluded that this meant, contrary to the contention accepted by him, that shares could be issued on terms which permitted redemption without service of a redemption notice;

(iv) The judge's conclusion meant that the powers of the directors of the Master Fund to set the terms on which shares were issued were substantially restricted. There was no commercial reason why that would have been intended;

(v) The judge had wrongly failed to take into account evidence of the established Cayman market practice that a feeder fund receiving a redemption notice did not need to serve a second redemption notice of its own on a master fund.

24. The principles affecting the construction issue were largely agreed between the parties. As confirmed by the Privy Council in ***Ennismore Fund Management Ltd v Fenris Consulting Ltd*** [2016] UKPC 9 at [17] per Lord Clarke, they are those set out in ***Arnold v Britton*** [2015] AC 1619 at [14]-[23]. The general principle, as stated at paragraph [15] in the latter case, is as follows:

> "When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in ***Chartbrook Ltd v Persimmon Homes Ltd*** [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

25. There was, however, some disagreement about the application of that principle to the construction of articles of association. Dragon emphasised that articles are essentially commercial and business documents and must be interpreted in a commercial and business like way. It referred to ***Chong v Alexander*** [2016] EWHC 735 (Ch) at [106], where Richard Spearman QC (sitting then as a deputy High Court judge) said this:

> "Because articles of association are business documents, they should be construed in a manner tending to business efficacy and, if necessary, terms will be implied in the articles in order to make them work".

Dragon referred also to similar statements in leading textbooks.

26. MACL did not dispute that articles are to be construed in a way consistent with commercial common sense; but it contended that the ability to imply terms on the basis of extrinsic evidence was strictly limited. This question was authoritatively considered in ***HSBC Bank Middle East v Clarke*** [2006] UKPC 31 (Bahamas), where Lord Walker said this:

> "[4) ... But there are severe limits on the use of evidence of surrounding circumstances as an aid to the construction of a company's constitutional documents: see ***Bratton Seymour Service Co Ltd v Oxborough*** [1992] BCL C6 93, in which Steyn LJ said (at 698):
>
> > "I will readily accept that the law should not adopt a black letter approach. It is possible to imply a term purely from the language of

> the document itself: a purely constructional implication is not precluded. But it is quite another matter to seek to imply a term into articles of association from extrinsic circumstances.
> Here, the company puts forward an implication to be derived not from the language of the articles of association but purely from extrinsic circumstances. That, in my judgment, is a type of implication which, as a matter of law, can never succeed in the case of articles of association. After all, if it were permitted, it would involve the position that the different implications would notionally be possible between the company and different subscribers."

Similarly, Sir Christopher Slade observed (at 699):

> "I accept that, in construing the articles of association of a company, evidence of surrounding circumstances may be admissible for the limited purpose of identifying persons, places or other subject matter referred to therein. [Counsel], however, has not invoked extrinsic evidence of surrounding circumstances in the present case for that limited purpose. He has sought to invoke it for the purpose of imposing additional financial obligations on the members far beyond those which the language of the articles of association of the company, read fairly on its own, would impose on them, because, he says, such an implication is required to give the articles business efficacy. No authority has been cited to us which begins to support the proposition that extrinsic evidence is admissible for that wide purpose in construing the statutory contract created by the articles of association of a company. In my judgment, the admission of such evidence for such purpose would be quite contrary to the principles governing this type of statutory contract".

> [5] The same principle must apply even more strongly to a company's memorandum of association. The factual summary which follows provides at least a partial explanation of how the problems facing the liquidators have arisen. But the surrounding circumstances can assist on issues of construction only to the very limited extent indicated in ***Bratton Seymour Service Co Ltd v Oxborough***."

27. In ***Cosmetic Warriors Limited v Gerrie*** [2015] EWHC 3718 (Ch) (upheld on appeal: [2017] 2 BCLC 456) at [27] the deputy judge – again Richard Spearman QC – said this:

> "… the cases establish that (a) there is no absolute prohibition on considering extrinsic material for the purpose of interpreting the articles of association of the company; (b) however, the admissible background for the purposes of construction is limited to what any reader of the articles would reasonably be supposed to know; and (c) in contrast, an implication based on extrinsic evidence of which only a limited number of people would have known is impermissible".

I agree with this summary, and in particular with the distinction drawn between an implication arising from facts generally known and one arising from facts known only to a limited number of people.

28. A criticism levelled by Dragon in its written submissions at the judge's judgment in the present case is that "insofar as the Judge indicated that he was minded to construe the articles in a more strict manner than an ordinary contract, he was wrong to do so". This is part of the general criticism that the judge did not have proper regard to commercial considerations or (so far as it was relevant) to the expert evidence.

29. There is no substance in this criticism. At paragraph [72] of his judgment the judge accurately set out the ***Arnold v Britton*** principles of construction. At paragraph [75] he said this:

> "At this juncture the Court wishes to state that while it is inclined towards adopting the more cautious approach to construction advocated by MACL, nonetheless in the present proceedings the Court finds no difficulty in coming to a clear conclusion as to the natural and ordinary meaning of the Articles in question in the circumstances of this case, while at the same time bearing in mind and paying due respect to commercial common sense and business efficacy".

As appears from paragraph [84] of the judgment (quoted in paragraph 22 above), the judge's conclusion on construction was founded on a view that the comprehensive nature of the redemption procedure set out in the articles meant that there was no scope for a further power in the directors to adopt a different procedure. It is clear that he came to that view simply on the basis of what he regarded as the natural and ordinary meaning of the articles, and did not adopt a strict approach to their construction. In any event, as Ms Toube acknowledged in her oral submissions, Dragon was not seeking to imply or add words, so that whether or not a strict approach were adopted would make no difference in practice.

30. The foundation of Dragon's argument on the construction issue is the assertion that articles 9 and 36 of the Master Fund's articles give a general discretion to the directors as to the terms on which shares may be redeemed. In particular, it is said that article 36 (a) in terms allows shares to be issued on terms that they are to be redeemed at the option of a shareholder "on such terms and in such manner as the Directors may determine". Dragon points out that, whereas article 9 is stated to be "subject to these articles", article 36 is stated only to be "subject to the ***Law***". It is said to follow that, however comprehensive the nature of the redemption procedure set out in article 37 and subsequent articles, article 36 gives an overriding power to decide on the terms

of redemption so long as they are not contrary to the provisions of the ***Law***. This is said to be reinforced by the fact that article 37(a) is itself said to be "subject to these articles and any rights … for the time being attached to any class or series".

31. Dragon also says that the language of article 36 (a), which itself reflects the language of section 37(1) of the ***Law***, contemplates three different circumstances in which shares may in principle be redeemed: where they "are to be redeemed"; where they "are liable to be redeemed … at the option of the company"; and where they "are liable to be redeemed … at the option of the shareholder". The procedure identified in article 37 cannot apply to the first two circumstances: where the shares "are to be redeemed" they will be issued with a fixed redemption date and will be automatically redeemed on that date; and where the shares are liable to be redeemed at the option of the company, the process of redemption will be triggered by the company, not by the shareholder. In neither case will an article 37 redemption notice be required; and it follows that the article 37 procedure is not comprehensive. That procedure applies only when shares are issued on terms that require or enable them to be redeemed by notice and such a notice is served. That might be the case for "internal" or "dummy" redemptions required as between a feeder fund and the Master Fund to generate cash to pay service provider fees and to ensure clarity of accounting records; but if shares are issued on terms that they are automatically redeemed when a redemption notice is served on a feeder fund, article 37 has no application.

32. Additionally, Dragon contends that the limitation on the powers of the directors which is the consequence of the judge's conclusion makes no commercial sense. Such a limitation would amount to a substantial reduction in the directors' freedom of action, and would have no purpose in light of the approach taken in the legislation (and in particular in section 37 (3) (da)) of leaving matters relating to the issue and redemption of redeemable shares to the discretion of the directors.

33. In my judgment, the judge was right on the construction issue. That is for the following reasons.

34. Article 9 is no more than a general provision indicating that the shares are under the control of the directors. It makes no reference to redeemable shares; and if it stood alone it would not amount to the authorisation that section 37 (1) requires if redeemable shares are to be issued.

35. Article 36(a) does provide that authorisation, and does so in general terms; but it does so "subject to the Law". Section 37(3)(c) of the ***Law*** allows redemption in such manner and upon such terms as may be authorised by the articles or pursuant to them. The only mechanism for redemption which the articles themselves authorise is that set out in article 37 and subsequent

articles. It is possible to treat article 36(a) as constituting authorisation pursuant to the articles for the directors to determine the manner and terms of redemption of redeemable shares; but section 37(3)(da) makes clear that any determination by the directors must not be inconsistent with the articles. The question then becomes whether a decision by the directors to issue redeemable shares on terms that no notice was necessary for their redemption would be inconsistent with the articles.

36. It is true that article 36(a) does not in terms expressly prohibit the issue of shares that may be redeemed by a shareholder by some other mechanism than that set out in article 37 and subsequent articles. Nor does it say in terms that the mechanism set out in those articles is the exclusive mechanism by which shares in the company may be redeemed by shareholders. However, the clear intention of the comprehensive regime set out in those articles is that it is to provide the mechanism by which redeemable shares issued by the company can be redeemed. That is clear in particular from three related matters.

37. First, the Master Fund, Dragon and Eagle were set up from the outset to operate in a master/feeder fund structure utilising redeemable shares. That structure inevitably meant that the Master Fund would have a very small number of investors (although the Master Fund reserved the right to accept individual investors), all of whose investments would be in the form of redeemable shares; so that the number of persons bound by the contractual terms contained in the articles would itself be very small. In those circumstances, the only possible purpose of the elaborate redemption regime set out in articles 37 and subsequent articles is to define how the feeder funds could realise their investments. As the judge remarked in paragraph 84 of his judgment, it makes no sense to suppose that the directors were to have an unfettered ability to offer redeemable shares on some other terms.

38. Secondly, the regime set out in articles 37 to 52 makes detailed provision for a number of matters of greater or lesser importance likely to arise, or capable of arising, on the redemption of shares. Some, but not all, of them expressly depend upon the existence of a redemption notice. Thus, for example, article 39 allows the directors to treat a redemption notice that is served late as served on the following day; article 42 provides that a redeeming shareholder may only withdraw a redemption notice with the consent of the directors; and article 43 deals with the effect on a redemption notice of a suspension of redemptions (allowing the investment manager to cancel a redemption notice, and a shareholder to withdraw his notice). The latter two at least of these address potentially controversial matters; but they cannot apply unless a redemption notice has been served. It is inconceivable that the articles were intended to be construed in a way which, by allowing shares to be issued on terms that did not require the

service of a redemption notice, left such matters without any means to resolve them. Even those articles which on the face of it are capable of application whether or not a redemption notice is served are all part of a scheme predicated on the existence of a redemption notice; and the overwhelming majority of them – articles 40, 42, 43, 44, 45, 46, 47 and 50, in addition to article 37 itself - presuppose the existence of a Redeeming Shareholder, which as I have said means "a Shareholder who has requested the redemption of part or all of his Shares in accordance with these Articles". The suggestion that it was open to the directors to issue shares on terms that made no provision for any of these matters is manifestly wrong.

39. Thirdly, almost all of articles 37 to 52 give a discretion to the directors to determine defined matters, the only exceptions being articles 47 (default redemption on a first-in, first-out basis), 50 (cessation of rights on redemption) and 51 (requirement for Restricted Persons to serve a redemption notice). The detailed specification of matters about which the directors are to have a discretion impliedly excludes any more general discretion to issue shares on different terms.

40. It is no answer to these points to say, as Dragon does, that the regime set out in article 37 to 52 is capable of applying to internal redemptions (that is to say, redemptions by a feeder fund not triggered by a redemption notice served on it but required in order to provide funds for expenses), so that it is capable of serving a purpose even if shares are issued on other terms as to redemption. The question is not whether the regime is capable of serving any purpose, but how much purpose it was intended to serve; and it is absurd to suppose that its detailed provisions were intended to be capable of applying only to a small number of low value internal redemptions. Nor is it an answer to the points to say that a "Redeeming Shareholder" is capable of including a shareholder who has "requested the redemption of part or all of his Shares" by some other means than service of a Redemption Notice. That is principally because the definition of "Redemption Notice" makes clear that it is a notice "requesting redemption". Again, it is no answer to say that the articles contemplate the issue of shares with fixed redemption dates, or ones that are redeemable by the Master Fund: articles 37 and subsequent articles do not purport to deal with such situations, but they do prescribe the procedure to be followed when an investor in the Master Fund wishes to redeem. And again, it is no answer to suggest that articles 43 and 47, which speak of a Redeeming Shareholder submitting, or who has submitted, a Redemption Notice, impliedly contemplate that there may be Redeeming Shareholders who have not submitted a Redemption Notice but are nevertheless entitled to redeem: any implication from these articles is far too insignificant to stand against the manifest intention to be derived from the articles as a whole.

41. Potentially the most telling point in Dragon's favour is the wording "subject to … any rights and restrictions for the time being attached to any Class or Series" appearing at the outset of article 37. Taken at face value, this is capable of meaning that certain shares could be issued on particular terms that might otherwise conflict with the terms of article 37. But it is important to appreciate that the wording only applies to article 37 itself (although it is replicated at the outset of article 38), and can therefore only affect the matters with which article 37 is itself concerned. That article does not require service of a redemption notice; it merely specifies what is to happen if one is received by the Master Fund, and prevents redemption until the expiration of any applicable lock-up period. The wording would no doubt permit shares to be issued on terms that adjusted those elements of the procedure (so that, for example, shares might be issued on terms that shortened or lengthened the notice period, or permitted redemption during a lock-up period on payment of a penalty, matters which the article in any event leaves to the discretion of the directors); but, because the article proceeds on the footing that a redemption notice is served, it would not permit shares to be issued on terms that no notice was necessary.

42. In the circumstances, article 36 (a) is to be read as designed to make it clear that, notwithstanding the general rule that I have mentioned in paragraph 14 above, Dragon was entitled to issue redeemable shares. It is not to be understood as giving to the directors a general discretion as to the terms applicable to such shares: those terms were preordained by article 37 and subsequent articles.

43. In consequence, the judge was in my judgment right to determine the construction issue in the way he did.

The determination issue

44. As a result, the determination issue does not strictly arise. However, since it was fully argued, I think it desirable to deal with it.

45. There are in principle two aspects to this issue: did the directors make a determination at all? And if so, what was its content? Dragon complains that the judge did not deal with the first of these aspects, but I do not think that he can be criticised for that. The way in which he dealt with the matter was to consider and reject Dragon's argument on the second aspect; so that, in his view, even if the directors had made the determination contended for by Dragon it would not have entitled Dragon to succeed. It is in fact common ground between the parties that a determination was made, although they are in dispute about its content.

46. Dragon's case now is that the relevant determination is contained in the Master Fund Launch Resolution ("the Launch Resolution") made by the Master Fund's directors on 1 June 2012. The Launch Resolution approved the Dragon PPM, which stated that the Master Fund redemption procedure was identical to Dragon's procedure. Dragon contends that, on its proper construction, this meant that the set of steps required to perform the redemption procedure had only to be performed once in order to effect redemption of shares both in Dragon and in the Master Fund. The judge's holding to the contrary meant that all of the service professionals involved at the time of UBS's redemption had acted on a wrong basis.

47. MACL accepts that the Launch Resolution amounts to a determination by the Master Fund directors (whilst making the point that it is for Dragon, not for MACL, to establish that there was a determination and what its terms were); but it disagrees that the effect of the determination is as Dragon suggests.

48. Much of the argument on the appeal was conducted on the basis of quotations from the Launch Resolution contained in an opinion of Mr Glen Davis QC, or on the terms of an equivalent resolution made by the directors of the Master Fund on 28 June 2013. By the end of the hearing, however, a copy of the Launch Resolution itself had emerged. Dragon complained about this, saying that there was no good reason why it could not have been produced before; but its terms are to substantially the same effect as the materials used during the argument, and neither add to nor detract from the arguments of either party.

49. I note in passing that Dragon's case below was largely founded on a resolution of the Dragon directors dated 29 April 2013 ("the 2013 Dragon resolution"), in which the Dragon directors approved the Dragon PPM. Dragon's case was that, since the directors of the Master Fund were the same individuals as the directors of Dragon, the 2013 Dragon resolution evidenced a determination by the Master Fund directors. Dragon's case on the determination issue still depends upon approval by the Master Fund directors of the Dragon PPM; but the determination is now said to be constituted by the terms of the Launch Resolution, in which the Master Fund directors themselves approved the terms of the Dragon PPM.

50. The purpose of the Launch Resolution appears from paragraph 3 of it, which so far as relevant was in the following terms:

> "3.1 IT IS NOTED that: (a) the Company is to be the master fund in a master/feeder structure involving [Dragon] and [Eagle] (together, the "Feeder Funds"); (b) each of the Directors has received and carefully reviewed forms of the Confidential Private Placement Memorandum of each of the Feeder Funds to be dated June 2012 (together, the "Offering

> Memoranda") describing more fully, inter-alia, the structure of the Feeder Funds and the Company; ... (e) it is anticipated that all or substantially all of the proceeds of subscriptions received by the respective Feeder Funds will be applied in subscribing for Shares of a Class or Classes corresponding substantially to the equity interests to be offered by each of the Feeder Funds as contemplated by each of the Offering Memoranda ("Offered Shares") (and any other investments as may be permitted) in accordance with the terms of the Offering Memoranda.
> 3.2 IT IS RESOLVED that (a) the Offering Memoranda, so far as they relate to the Company, and the use of the Company's name therein be approved."
> [3.2(g) is also relevant, and is referred to below.]

51. The Dragon Offering Memorandum, the Dragon PPM, contained 12 introductory pages and 100 other pages. The Redemption Process was dealt with at pages 23 to 26; and the passage relied on by Dragon is as follows:

> "The Fund allows redemptions of Shares (other than liquidating Shares and Group D Shares) on a Redemption Day provided that a Redemption Notice has been received by the Transfer Agent [Citibank N. A. Singapore] no later than 5 pm (Singapore time) on a Business Day that is at least 45 calendar days prior to the relevant Redemption Day, subject to the occurrence of certain conditions, as described in more detail below. Redemptions are not allowed on any date other than a Redemption Day unless permitted by the Directors following consultation with the Manager in its absolute discretion. **The redemption procedure for the Master Fund is identical to the Fund's procedure"** (emphasis added).

52. Putting together the Launch Resolution approving the Dragon PPM, and the statement in the Dragon PPM that the Master Fund's redemption procedure is "identical" to Dragon's procedure, Dragon argues that the Master Fund's directors determined that a redemption notice served by an investor on Dragon should operate by the same token as a notice by Dragon to the Master Fund.

53. The success or otherwise of this argument depends upon what is meant by the sentence "the redemption procedure for the Master Fund is identical to [Dragon's] procedure", and in particular upon what is meant by the word "identical" in that sentence.

54. Dragon identified two possible and mutually inconsistent meanings of the sentence: first, that in order to redeem its shares in the Master Fund a feeder fund would have separately to carry out the same steps as were required of a redeeming investor in the feeder fund; secondly, that the steps taken by a redeeming investor in a feeder fund would serve identically as the steps to be taken by the feeder fund to redeem its shares in the Master Fund.

55. Dragon contended for the second meaning. It bolstered its argument by reference to the fact that Dragon invested all its assets in the Master Fund and had no other assets from which to meet a redemption request. As a result, any redemption made by an investor in Dragon inevitably required there to be a corresponding redemption of Dragon's shares in the Master Fund. That latter redemption would necessarily be in the same amount as the redemption of shares in Dragon. Just as Dragon was the conduit for the payment of funds from the ultimate investor to the Master Fund, so its purpose in the redemption procedure was to act as a conduit for the return to the ultimate investor of the redemption proceeds triggered by the service of the investor's redemption notice. In effect, Dragon dropped out of the picture, and the investor's single notice served all – or identical – purposes in the redemption process. Had the intention been otherwise, unnecessary risks would have arisen: the relevant individual might have failed to serve a corresponding notice from Dragon on the Master Fund; if a redemption notice were received by Dragon late in the day there might not be time to serve a corresponding notice on the Master Fund for the same redemption day; and if redemptions occurred on different dates there was a potential for differences in net asset value.

56. MACL's principal response was that the statement in the Dragon PPM that the redemption procedure in the Master Fund was identical to that in Dragon meant that the same procedure had to be followed twice, once at the feeder fund level and again at the Master Fund level. It relied additionally upon two further points: that the Launch Resolution made clear that a redemption notice was required, and that the 2013 Dragon resolution demonstrated that the directors of the Master Fund (the same individuals as the Dragon directors) intended that redemption of shares in the Master Fund would require service of a separate notice by a feeder fund.

57. In relation to the first point, MACL relied upon paragraph 3.2 (g) of the Launch Resolution as demonstrating that the directors expected redemption notices to be served by the feeder funds. The subparagraph was in the following terms:

> "Upon receipt of notice from any Feeder Fund requesting the redemption of any Offered Shares, and such redemption notice (a "Redemption Notice") being accepted by or on behalf of the Company, and subject to the Company having sufficient distributable profits and other reserves and accounts to make such redemption, or such redemptions being made out of a new issue of Shares, the Offered Shares, the subject of such Redemption Notice, be redeemed and cancelled in accordance with these resolutions and the Articles and the Administrator be authorised to make all relevant entries in the Register".

In relation to the second point, MACL relied on paragraph 3.2 of the 2013 Dragon Resolution, which contained (in paragraph 3.2 (h)) wording to the same effect as quoted immediately above in relation to redemption notices served on Dragon, but then in paragraph 3.2 (i) resolved that:

> "the Company redeem all or such portion of its Master Fund Shares as the Directors, the Investment Manager or the Administrator from time to time determine is necessary or desirable to facilitate a redemption of Offered Shares".

Although this was a resolution by the directors of Dragon, rather than the directors of the Master Fund, they were the same individuals; and, consistently with the way in which the case had been argued by Dragon below (as to which see paragraph 49 above), MACL contended that this subparagraph showed clearly that the service of a redemption notice by an investor in Dragon did not automatically trigger redemption of Dragon's corresponding shares in the Master Fund, since a decision was required at some level within Dragon as to the number of shares held by it in the Master Fund "necessary or desirable" to be redeemed to "facilitate" the redemption of the investor's shares in Dragon.

58. In response to these last two points, Dragon contended that subparagraph 3.2 (g) of the Launch Resolution spoke merely of receipt by the Master Fund of a notice without specifying what if any formalities were necessary, so that transmission by Dragon of a notice served on it by an investor would fall squarely within the terms of the subparagraph. As to subparagraph 3.2 (i) of the 2013 Dragon resolution, all it contemplated was a determination within Dragon; and, in the absence of any subsequent determination, the statement in the Dragon PPM to the effect that the redemption procedures were identical, adopted by the directors both of the Master Fund and of Dragon, constituted the required determination.

59. The judge dealt with these matters primarily between paragraphs 102 and 111 of his judgment. Having pointed out that, in principle, there was "nothing in the least amiss with the concept that a redemption at Feeder Fund level can lead to an automatic corresponding redemption at the Master Fund level without any need for an additional separate redemption notice at Master Fund level to be served", he said that it was necessary if Dragon were to succeed for it to prove on a balance of probabilities that such a course had been constitutionally authorised and if so whether a determination to relevant effect had been made. He regarded subparagraph 3.2 (g) of the Launch Resolution and subparagraph 3.2 (i) of the 2013 Dragon resolution as "seemingly at complete variance with Dragon's case, unless it can be established by Dragon somehow that the Directors have in fact determined otherwise"; and then, in paragraph 111, he said this:

> "Quite apart from the issue of whether there was a specific determination by the Directors of the Master Fund, and even accepting for the purposes of this argument that the Directors of Dragon and the Master Fund somehow function in a uniform and inclusive manner, nonetheless it is still possible for the Court separately to dispose of the matter simply as one of construction. Where a statement is made that the redemption procedure for the Master Fund is identical to the Dragon Fund's procedure, in the opinion of the Court that statement contemplates two separate identical procedures and not simply one procedure that serves automatically for two purposes. This surely is the natural and ordinary meaning of the language used."

60. In my view, the judge was right about this. It is just about possible to accept that the expression "the redemption procedure for the Master Fund is identical to the Fund's procedure" is capable of meaning that steps taken in relation to redemption of shares in Dragon serve also as steps taken in relation to redemption of shares in the Master Fund; but that is far from the obvious meaning. In common with the judge, I consider that expression means no more than that similar procedures for redemption have been adopted at Master Fund and feeder fund levels.

61. Moreover, even if it were possible for the Master Fund's directors to determine upon a redemption procedure different from that set out in article 37, and even if the statement about identical redemption procedures bears the meaning Dragon seeks to put upon it, it seems to me impossible to treat the statement as a determination to that effect. The statement appears in a document aimed at investors in Dragon, not at investors in the Master Fund, and it was approved by the Master Fund's directors on that basis. The statement is intended merely to convey information, not to constitute a decision about anything. It is one sentence in a document which extends to 112 pages, and appears in a section of more than three pages dealing with the mechanics of redemption of shares in Dragon. Taking the sentence in isolation is unsatisfactory, not least because in the same section there is a statement that "redemption proceeds are *generally* raised through the sale of investments held by [Dragon]" (my emphasis) - which is on the face of it inconsistent with Dragon's case that service of a redemption notice automatically triggered a corresponding redemption of Dragon's shares in the Master Fund.

62. If, despite this, approval of the Dragon PPM could in theory be treated as a determination about the redemption procedure in the Master Fund, it is – as the judge remarked – plainly inconsistent with subparagraph 3.2 (g) of the very same resolution in which Dragon contends that the determination was made. I do not accept Dragon's contention that that subparagraph merely contemplates transmission by Dragon of a notice served on it, and so is not inconsistent with approval in the same document of an "identical" regime under which one notice serves two purposes. That interpretation fails to give due weight to the words "notice from any Feeder

Fund requesting the redemption of any Offered Shares", which clearly contemplate that the notice will be from – not merely transmitted by – the feeder fund and will relate to Offered Shares in the Master Fund, not to shares in the feeder fund. It seems to me also that there is force in MACL's point concerning subparagraph 3.2 (i) of the 2013 Dragon resolution, which plainly expects that a decision will be made within Dragon as to the means by which a redemption request made to it should be implemented. Although this resolution post-dates the Launch Resolution, it predated the issue of shares to UBS, and it clearly indicates that the shares were issued on the basis that a two-stage redemption process would operate.

63. In these circumstances, it seems to me impossible for Dragon successfully to argue that the Master Fund directors ever resolved to issue shares on terms as to redemption other than those set out in article 37, even if it was competent for them to make such a determination. Accordingly, I would have rejected Dragon's contention on the determination issue had it been necessary to do so.

The waiver issue

64. On the footing that redemption of Dragon's shares in the Master Fund was (contrary to its primary case) subject to a requirement of a separate notice, Dragon contends that the requirement was waived. It says that the Master Fund represented by its conduct that there had been an effective redemption of shares in the Master Fund consequent on the service of UBS's notice, and that Dragon acted in reliance on that representation by not serving a notice of its own or asking for a formal waiver of the notice requirement.

65. As Dragon recognises, it can only succeed on this issue if, as a matter of construction of the Master Fund's articles, the Master Fund directors retained a power to allow redemptions to take place without service of a written notice. In light of the outcome of the construction point, that is not the case; but again, since the point was argued, it is desirable to deal briefly with it.

66. The factual basis of Dragon's argument is the actions taken by the directors of the Master Fund following service of the UBS's notice. These actions included in particular the suspension of redemptions in the Master Fund and its ultimate liquidation, neither of which would, according to Dragon, have been necessary if no valid redemption notice had been received by the Master Fund. Additionally, Dragon relied upon the terms of resolutions of the Master Fund directors leading up to the decision to suspend redemptions. In particular, reference was made to a telephone meeting of the directors of the Master Fund held on 30 October 2014, the minutes of which included the following:

> "4.1 (c) "The Dragon Feeder Fund received on 12 August 2014 a redemption request for US $15 million from USB Fund Services (Cayman) Ltd ref Northview Investment Fund Ltd (the "Investor"), to be implemented on the 30 September 2014 redemption day of the Company (the "Redemption Request");
> (e) "the Directors have carefully considered the suspension provisions in the Articles and the Offering Memorandum and have discussed the ability of the Company to satisfy a redemption request from Dragon Feeder Fund to put it in funds to satisfy the Redemption Request,…
> (f) consequently, the Directors wish to exercise their powers noted above to suspend the redemption of the shares of the Company (the "Company's Shares") and the ability of the Company to pay redemption proceeds to the Feeder Funds generally, and specifically in relation to the redemption proceeds that would be payable to the Dragon Feeder Fund to satisfy any redemption request made by it as a consequence of the Redemption Request received from the Investor, on the basis of such suspension".

67. On the basis of these and other similar materials, Dragon said that it would have been clear to Dragon that the Master Fund directors were not taking any point that redemption of Dragon's shares in the Master Fund was ineffective by reason of the absence of a separate redemption notice; and that Dragon, and the Transfer Agent, proceeded on that basis.

68. The judge treated this issue as concluded by his decision on the construction point. At paragraph 135 of the judgment, he said this:

> "Given the construction which the Court has already given to Article 37, it appears to the Court that the same constraints apply to waiver as indeed applied to determining that no Redemption Notice from the Appellant was required. In other words, the argument falls once again at the preliminary hurdle as a matter of construction".

69. In my judgment, the judge was again right on this issue. It is a necessary consequence of the resolution of the construction issue that the only mechanism available for redemption of shares in the Master Fund is that set out in article 37 and subsequent articles, which requires service of a redemption notice and prescribes those areas in which the directors retain a discretion. Moreover, article 37 (b) expressly permits the directors to waive compliance with the notice period and to waive the prohibition on redemption before expiration of an applicable lock-up-up period, thereby impliedly excluding an ability to waive any of the other requirements. It is simply wrong to say, as Dragon does, that an ability to waive compliance with the notice period implies an ability to waive the need for service of a notice at all.

70. Additionally, there is obvious artificiality in the contention that the same individuals (in their capacity as directors of the Master Fund) made a representation to themselves (in their capacity as directors of Dragon) and then in the latter capacity relied on it. The reality is that, even if Dragon is right on the facts, there was no more than a misapprehension. But in fact the resolution of 30 October 2014, quoted above, shows that there was no misapprehension: after referring to the UBS redemption request received by Dragon, it speaks of "the ability of the Company to satisfy a redemption request from Dragon Feeder Fund to put it in funds to satisfy the Redemption Request" and its ability "to satisfy any redemption request made by [Dragon] as a consequence of the Redemption Request received from the Investor". Both statements plainly contemplate a notice that is separate from the UBS redemption request, and are inconsistent with any belief that the notice served on Dragon by UBS automatically triggered a redemption of Dragon's shares in the Master Fund.

71. Dragon's case on the waiver issue accordingly fails.

Conclusion

72. For the reasons I have given, I would dismiss this appeal.

MORRISON JA:

73. I agree.

GOLDRING P:

74. I also agree.

APPENDIX

[Master Fund articles 38-52]

38. Subject to any rights or restrictions for the time being attached to any Class or Series, the Directors shall be entitled to impose such restrictions as they may determine on the number and/or the aggregate Net Asset Value of Shares of any Class or Series that may be redeemed on a particular date or during a particular period.

39. Any Redemption Notice received by the Company or its duly authorised agent after such time and in such place on a Business Day as the Directors may determine, or received on a day other than a Business Day may be deemed by the Directors to be received on the next following Business Day.

40. The Directors may determine that a Redeeming Shareholder shall not be permitted to redeem part only of his holding of Shares of any Class or Series if such redemption would

result in such Redeeming Shareholder holding Shares with an aggregate Net Asset Value of less than such amount as the Directors may from time to time determine. The Directors shall not be required to redeem fewer than such minimum number of Shares of any Redeeming Shareholder calculated by reference to their Net Asset Value per Share as they may from time to time determine.

41 The Directors may levy a charge of such amount as they may from time to time determine on the redemption of Shares of any Class or Series which are redeemed within such periods of the date of issue or in such other circumstances as the Directors may from time to time determine. Such charge may be waived by the Directors or paid to the Company or to such other Person as the Directors may determine.

42. Subject to these Articles, a Redeeming Shareholder shall not be entitled to withdraw a Redemption Notice duly submitted in accordance with these Articles except with the prior consent in writing of the Directors.

43. If a determination is made to effect a suspension of the voluntary redemption of Shares pursuant to these Articles:

(a) the Investment Manager may, at its discretion, and without the consent of any affected Shareholder, cancel any Redemption Notice submitted to the Company prior to the date of declaration of the suspension; and

(b) a Redeeming Shareholder who has submitted a Redemption Notice may, subject to the approval of the Investment Manager, withdraw his Redemption Notice during the period of suspension. Any withdrawal of a Redemption Notice under the provisions of these Articles shall be made in writing and shall only be effective if actually received by the Company or its duly authorised agent before termination of the period of suspension. If the Redemption Notice is not so withdrawn the redemption of the Shares shall be made at such time and in such order of priority as the Directors may determine.

44. In the event that a Redeeming Shareholder redeems any or all of his Shares on any one Redemption Day, and there is a subsequent adjustment to the Net Asset Value of the Shares redeemed by such Redeeming Shareholder on such Redemption Day, the Directors may either determine to pay an additional amount to such Redeeming Shareholder, retain such amount for the benefit of the Company or take such action as is necessary to recover the overpaid amount from such Redeeming Shareholder, as the case may be. In the event of a partial redemption of a Redeeming Shareholder's Shares, the Directors shall, in addition to the foregoing, have the discretion to adjust the number of Shares held by such Redeeming

Shareholder (by way of redemption or further issuance) to take account of any subsequent adjustments to the Net Asset Value of the Shares redeemed by such Redeeming Shareholder as at the relevant Redemption Day.

45. The timing of payments to a Redeeming Shareholder of the redemption proceeds to which such Redeeming Shareholder is entitled upon a redemption of Shares pursuant to these Articles, the amounts of each such payment, the currency in which such redemption proceeds shall be paid and the extent to which amounts may be withheld therefrom and the interest (if any) to be applied thereto shall be determined by the Directors from time to time.

46. Amounts payable to a Redeeming Shareholder in connection with the redemption of Shares will be paid in cash (unless the Directors determine to pay the Redemption Price (or any amount thereof) by way of delivery of assets in specie) and normally will be posted or sent by wire transfer upon the Redeeming Shareholder's request and at his expense.

47. If any Redeeming Shareholder submitting a Redemption Notice does not identify the date of purchase of Shares of the relevant Class or Series thereof to be redeemed, the Company will redeem Shares of the relevant Class or Series in the order in which they were first purchased by the Redeeming Shareholder (that is on a "first-in first-out" basis).

48. The redemption, purchase or surrender of Shares under the provisions of these Articles shall be deemed to be effected at close of business on the Redemption Day in the jurisdiction in which the applicable Register is maintained (or, in the event that the Company has established any Branch Register, in the jurisdiction in which the Principal Register is maintained), or at such other time as the Directors may determine.

49. The nominal value of Shares may be redeemed out of the proceeds arising from the issue of an equal number of Shares and the premium (if any) on such Shares shall be paid from the Share Premium Account provided always that at the discretion of the Directors such Shares may be redeemed out of the profits of the Company which would otherwise have been available for dividends and any premiums thereof may be paid out of the profits of the Company or, if permitted by the Law, out of capital.

50. Upon the redemption of a Share being effected pursuant to these Articles, the Redeeming Shareholder shall cease to be entitled to any rights in respect thereof (excepting always the right to receive a dividend which has been declared in respect thereof prior to such

redemption being effected or any redemption proceeds payable under these Articles) and accordingly his name shall be removed from the Register with respect thereto.

51. A Person who becomes aware that he is or may be considered by the Directors to be a Restricted Person shall promptly either deliver to the Company a Redemption Notice in accordance with these Articles or transfer his Shares in accordance with these Articles to a Person who would not thereby be a Restricted Person.

52. Upon the redemption of any Shares being effected pursuant to these Articles, the Directors shall have the power to divide in specie the whole or any part of the assets of the Company and appropriate such assets in satisfaction or part satisfaction of the Redemption Price to one or more Redeeming Shareholders on such terms as they may determine.