IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No.: FSD 18 of 2015 (RMJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)

AND 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)**
AND:	
	(1) JOHN BATCHELOR AND DAVID GRIFFIN (JOINT OFFICIAL LIQUIDATORS OF ARDON MAROON ASIA MASTER FUND)
	(2) MAROON ASIA CAPITAL LIMITED

IN OPEN COURT

Appearances:	**Mr. Tom Smith Q.C instructed by Mr. Jan Golaszewski, Mr. Peter Sherwood, and Mr. Tim Baildam of Carey Olsen for the Applicants**
	Mr. Jonathan Gaisman Q.C instructed by Mr. Paul Madden, and Ms. Jacqueline Ziemniak of Harneys for the Respondents
	Mr. Chris O'Keefe of Walkers
Before:	**The Hon. Justice Robin McMillan**
Heard:	**12, 13, 14, December 2017** **3, 4 May 2018**
Draft Judgment Circulated:	**13 July 2018**
Judgment Delivered:	**17 July 2018**

HEADNOTE

The function of the Court in relation to an appeal against a liquidator's rejection of a proof of debt-The proper approach to the construction of articles of association - The doctrine of corporate responsibility and its implications for Directors – The limited significance of investment industry methodology and practice.

JUDGMENT

Introduction

1. The present proceedings concern an application by the Joint Official Liquidators (the "Dragon JOLs") of Ardon Maroon Asia Dragon Feeder Fund (In Official Liquidation) ("Dragon") for the rejection, by notice dated 15 March 2016, of Dragon's proof of debt by the Joint Official Liquidators (the "Master Fund JOLs") of Ardon Maroon Asia Master Fund Limited (In Official Liquidation) (the "Master Fund") to be set aside, and for Dragon's claim to be admitted to proof in the amount of US$15 million, together with post-liquidation interest, if applicable.

2. Dragon's proof of debt concerns the alleged redemption by Dragon of shares in the Master Fund worth US$15 million. Dragon contends that this redemption occurred following Dragon receiving and accepting a redemption request (the "UBS Redemption Notice") from one of its investors, UBS Fund Services (Cayman) Ltd. Ref: Northview Investment Fund Ltd ("UBS"), dated 11 August 2014.

3. The Master Fund JOLs rejected Dragon's proof of debt on the basis, *inter alia*, that the Master Fund JOLs considered that Dragon had not complied with certain requirements that were needed to effect a redemption of Dragon's shares in the Master Fund.

4. The Master Fund was incorporated as an exempted company on 12 April 2012.

5. Dragon was incorporated as an exempted company on 12 April 2012 and was registered as a mutual fund with the Cayman Islands Monetary Authority on 29 April 2013.

6. Dragon was one of two feeder funds for the Master Fund, along with Ardon Maroon Asia Eagle Feeder Fund, L.P. (In Official Liquidation) ("Eagle", and together with Dragon, the "Feeder Funds"). The Master Fund JOLs are also the Joint Official Liquidators of Eagle.

7. The Feeder Funds and the Master Fund (together, the "Funds") were established as a "Master-Feeder" structure, by which investors would subscribe for shares in the Feeder Funds and the Feeder Funds would use this capital to subscribe for shares in the Master Fund.

8. The same individuals served as Directors of Dragon and the Master Fund at all relevant times.

9. The Funds' administrator was Citi Fund Services (Asia) Limited (the "Administrator"), pursuant to the terms of a fund administration services agreement dated 18 May 2012.

10. The Funds' transfer agent was Citibank N.A. Singapore Branch (the "Transfer Agent"), pursuant to a transfer agency services agreement dated 18 May 2012.

11. Ardon Maroon Fund Management Limited (the "Investment Manager") provided investment management services to the Funds pursuant to the terms of a Management Agreement dated 26 June 2012.

12. The Investment Manager received advisory services from Ardon Maroon Fund Management (Hong Kong) Limited (the "Advisor").

13. The Master Fund's Amended Memorandum and Articles of Association were adopted on 25 June 2012 (the "Master Fund Articles"). Dragon's Amended Memorandum and Articles of Association were adopted on 29 April 2013.

14. The Master Fund's Amended Memorandum and Articles of Association were adopted on 25 June 2012 (the "Master Fund Articles"). Dragon's Amended Memorandum and Articles of Association were adopted on 29 April 2013.

15. UBS made the following subscriptions for "Group F" shares in Dragon: (i) 100,000 shares on 2 May 2013; (ii) 196,345.154315 shares on 2 December 2013; and (iii) 100,000 shares on 1 April 2014.

16. At the relevant times, UBS was the registered shareholder in Dragon and held the shares as nominee for Northview Investment Fund Ltd ("Northview").

17. Northview, Dragon and the Investment Manager entered into a "side letter" on or around 1 August 2013 (the "Northview Side Letter"). The Directors of Dragon and the Master Fund ratified the Northview Side Letter in a board meeting on 29 October 2013.

18. UBS submitted an electronic copy of the UBS Redemption Notice to the Transfer Agent via email on 11 August 2014, which the Transfer Agent received on 12 August 2014. This was the first (and only) redemption notice submitted to Dragon by one of its shareholders. There had been no redemption requests previously submitted to Eagle by any of its shareholders.

19. The Transfer Agent emailed UBS on 12 August 2014 acknowledging receipt of the electronic copy of the UBS Redemption Notice.

20. The relevant Redemption Day, as defined in Dragon's PPM, in respect of the UBS Redemption Notice was 3 October 2014.

21. On 19 August 2014, the Transfer Agent notified the Investment Manager that it had received the electronic copy of the UBS Redemption Notice.

22. On 2 October 2014, the Transfer Agent notified UBS that it had not received the original UBS Redemption Notice. On the same day, UBS responded by saying that it had couriered the originals "*today*".

23. FedEx tracking records show that a parcel from UBS was signed for by the Transfer Agent on 7 October 2014. However, the Transfer Agent appears to have either lost or misfiled the original Redemption Notice.

24. On 6 November 2014 the Transfer Agent confirmed to UBS that a certified copy of the UBS Redemption Notice could be provided in its place.

25. Email communications and other correspondence were exchanged between UBS, Northview, the Transfer Agent, the Advisor, the Investment Manager, Dragon and the Master Fund in relation to the UBS Redemption Notice and the Northview Side Letter between 12 August 2014 and February 2015.

Suspension of Redemptions and Payment of Redemption Proceeds

26. Dragon did not retain any liquidity or own any assets other than its shareholding in the Master Fund. Dragon invested all of its capital in shares in the Master Fund.

27. The Master Fund's assets were illiquid and could not be readily realised to raise US$15 million to meet the Redemption Request.

28. On 30 October 2014, the Directors of Dragon and the Master Fund resolved to suspend redemptions and the payment of redemption proceeds from both funds.

29. On 9 December 2014, the Directors of Dragon resolved by written resolution that the Administrator should be instructed to record the redemption proceeds as a debt due to UBS in the books of Dragon and adjust the NAV of Dragon accordingly.

30. Between September and December 2014, discussions occurred between UBS, Northview, Dragon, the Master Fund, the Advisor and the Investment Manager in relation to the UBS Redemption Notice and a potential purchase by Northview of certain of the Master Fund's assets in satisfaction of the US$15 million UBS sought to redeem, for the benefit of Northview, pursuant to the UBS Redemption Notice. These negotiations were ultimately unsuccessful.

Liquidation of the Funds

31. On 29 December 2014, the Directors of Dragon and the Master Fund held board meetings by telephone conference and resolved to recommend to their respective shareholders that Dragon and the Master Fund should be wound up voluntarily.

32. On 30 December 2014, the shareholders of Dragon and the Master Fund passed special resolutions resolving that Dragon and the Master Fund should be wound up voluntarily and appointing Mr Griffin and Mr Batchelor of FTI Consulting (Cayman) Ltd and FTI Consulting (Hong Kong) Ltd respectively as joint voluntary liquidators.

33. Mr Griffin and Mr Batchelor were appointed as Joint Official Liquidators of Dragon and the Master Fund on 13 February 2015, and as Joint Official Liquidators of Eagle on 6 March 2015.

34. On 5 March 2015, UBS lodged a proof of debt in the liquidation of Dragon (the "UBS Proof of Debt"), which Mr Griffin and Mr Batchelor rejected on 14 April 2015.

35. On 1 May 2015, UBS filed a Summons appealing the rejection of the UBS Proof of Debt. The appeal was stayed by consent on 21 May 2015.

36. On 25 June 2015, Mr Walker and Mr Conway of PwC Corporate Finance and Recovery (Cayman) Limited were appointed as the Dragon JOLs in place of Mr Griffin and Mr Batchelor. Mr Shakespeare replaced Mr Walker as one of the Dragon JOLs on 30 June 2016 following Mr Walker's retirement.

37. The Dragon JOLs admitted the UBS Proof of Debt by Consent Order dated 23 March 2016.

38. On 23 December 2015, Dragon submitted a proof of debt in the liquidation of the Master Fund for the amount of US$15 million (plus any applicable post-liquidation interest).

39. The Master Fund JOLs rejected Dragon's proof of debt on 15 March 2016.

40. On 1 April 2016, the Dragon JOLs filed this Appeal in the Grand Court against the rejection of Dragon's proof of debt by the Master JOLs.

41. On 17 August 2016, certain of Dragon's shareholders (Global Opportunities Fund Ltd. SPC, iNtRON Biotechnology Inc., and Daewoo Securities Co. Ltd.) filed an application to expunge the UBS Proof of Debt. The application was stayed by order of this Honourable Court on 16 January 2017.

42. On 8 December 2016, the Court ordered that Dragon's Application shall be adjudicated as an *inter partes* proceeding between Dragon and Eagle. Also on 8 December 2016, the Court appointed the main investor in Eagle, Maroon Asia Capital Limited ("MACL"), as the representative of Eagle for the purposes of Dragon's Application.

43. On 21 September 2017, the parties agreed to terms of a Consent Order containing Directions up to and including the trial of Dragon's application.

44. According to the parties, the issues in dispute are as follows:

"*The Court is respectfully requested to consider the following list of issues in determining whether to grant Dragon's application:*

1 *What were the requirement(s) for a valid redemption of Dragon's shares in the Master Fund? In particular:*

(a) *Do the Master Fund Articles permit the issue of redeemable shares on terms that the shareholders could redeem their shares otherwise than in accordance with Article 37 of the Master Fund Articles and, in particular, without a Redemption Notice?*

(b) *If so, did the Directors of the Master Fund make a determination pursuant to Article 36(a) and/or Article 37 of the Master Fund Articles as to the terms and/or manner in which redeemable shares issued by the Master Fund could be redeemed?*

(c) *If so, what was such determination? In particular, did the Directors determine that, upon the receipt by a Feeder Fund of a valid redemption* *request from one of its shareholders, the equivalent value of the Feeder Fund's shares in the Master Fund would be redeemed without the need for a separate written redemption request made by the Feeder Fund to the Master Fund?*

2 *Were the requirement(s) for a valid redemption of Dragon's shares in the Master Fund met or (if possible) waived by the Master Fund (or persons on its behalf)? In particular:*

(a) *If Dragon <u>was</u> required to submit a separate written redemption notice to the Master Fund:*

(i) *Was this requirement capable of being waived, and was it in fact waived?*

(ii) *Was this requirement fulfilled by the receipt by the Transfer Agent of the Redemption Notice?*

(b) *If Dragon was <u>not</u> required to submit a separate written redemption notice to the Master Fund, was it necessary for UBS' redemption of shares in Dragon to be valid in order for the corresponding redemption of Dragon's shares in the Master Fund to be valid?*

3 <u>*If it is necessary for the Court to consider the validity of the purported redemption of UBS' shares in Dragon, were the requirements for that redemption met or (if possible) waived? In particular:*</u>

(a) <u>*Was UBS entitled to redeem shares it held in Dragon worth US$15 million?*</u>

(b) <u>*Was the receipt by the Transfer Agent of the original of the Redemption Notice a prerequisite for the validity of the redemption, or for the payment of redemption proceeds only?*</u>

[MACL does not agree that paragraph 3 is an issue to be determined in the present proceedings]"

The Function of the Court

45. At this point the Court reminds itself that an Appeal against rejection of a proof of debt is to be treated as a *de novo* adjudication of the creditor's proof, and that the alleging creditor is entitled to rely upon additional evidence in support of its claim.

46. The task for the Court on such an Appeal is to examine the evidence placed before it and to come to a view whether, on balance, and taking into account the merits of the claim of the creditor whose proof is being considered, the claim has been established and, if so, in what amount: see McPherson's Law of Company Liquidation, 3rd ed., paragraph 12-064.

47. A potential creditor must provide satisfactory proof that the creditor's claim is founded on a real debt. Therefore in the absence of a potential creditor having discharged that burden and duly satisfied the Court upon a balance of probabilities no legal obligation would then arise to admit the proof of debt.

48. Putting the matter another way, a claim which is based upon tenuous and/or inadequate proof will not succeed.

49. In more general terms as to the issue of the standard of proof required by law in admitting or rejecting proofs of debt, it was held in *Home and Colonial Insurance Company, Limited* [1930] 1 Ch 102 at page 102 (vi) "*that the position of a liquidator examining a proof for admission or rejection in a winding up is the same as that of a trustee in bankruptcy, as decided in Re Van Laun [1907] 2 K.B. 23.*"

50. The headnote of the *Van Laun* case states that the trustee in bankruptcy has a "*right and duty to investigate the nature and grounds of the claim made against the bankrupt's estate*"; the trustee is therefore "*to require satisfactory evidence that the debt on which the proof is founded is a real debt.*"

51. Cozens-Hardy M.R. states at page 30 of that case:

"All that we now decide is, that the trustee is entitled to say, "I will not admit your proof until you have given me reasonable means of satisfying myself whether the debt in respect to which you are proving is to any and what extent justifiable and reasonable."

52. Similarly Buckley LJ states at page 32:

"I think the trustee is entitled in every case, whether there be account stated, covenant or judgment, to say to the creditor who comes into the bankruptcy to prove, "Very well, you say you are a creditor; make out your case as if there was no account status or no covenant or no judgment. Satisfy me that the amount for which you say you are creditor is right."

The *Van Laun* principle was more recently re-affirmed in *Re Exchange Securities & Commodities Ltd. (In Liquidation)* [1988] 1 Ch. 46 by Harman J. at pages 57D-58E.

53. In conclusion, the burden is upon the identified potential creditor to satisfy the liquidator, and upon appeal the Court, as to the creditor's claim.

54. The Court has expressly chosen to refer to these determinative principles because, notwithstanding the learned submissions of counsel, the responsibility of the Court in this regard while an important one is also a narrow one. The Court is not concerned to pass general judgment on the methodology and practices of the investment industry but instead it is concerned to come to a conclusion upon a specific Appeal and in relation to specific probative evidence relevant to that Appeal.

The Evidence

55. The Appellant has adduced evidence from Mr. Jess Shakespeare, one of the Joint Official Liquidators of the Appellant. There has also been evidence from Mr. Greg Bennett, a Director of both Dragon and the Master Fund, and from Mr. Alan Milgate, who also became a director of both Dragon and the Master Fund. Expert evidence was also provided by Mr. Don Seymour, a prominent figure in the Cayman Islands hedge fund industry.

56. Documentary evidence was produced for MACL by Mr. Paul Madden, attorney-at-law and in addition there was expert evidence from Mr. Ronan Guilfoyle, another highly qualified figure in the Cayman Islands hedge fund industry.

57. Notwithstanding the volume of material as to local industry practice and procedure which these witnesses have cumulatively provided, the Court has found this evidence in the main to be largely irrelevant and unhelpful in terms of the legal task which the Court has previously identified.

58. However, Mr. Guilfoyle's Report dated 20 October 2017 does contain a number of references to basic principles which in the wide context of the arguments put forward were of a useful nature.

59. For example, he states at paragraph 3.8 that a company is a separate legal entity distinct from its members. Therefore it is separate at law from its shareholders, directors, promoters, etc. and as such is conferred with rights and is subject to certain duties and obligations: "*For this reason, among others, and because each entity is a separate and distinct legal entity, it is of the utmost importance that each Fund keeps full and accurate separate legal records.*"

60. The Court pauses to remind itself that in relation to the propositions which Dragon urges upon it the supporting documented records appear to be surprisingly weak, and even in some respects non-existent.

61. Mr. Guilfoyle states at paragraph 4.3 that for a redemption request to be valid it must follow the prescribed terms outlined in the constitutional documents. This includes the situation where a written redemption notice is required under the particular articles of the company.

62. At paragraph 6.5 he comments that Mr. Bennett and Mr. Milgate contend that an automatic redemption at Master Fund level is normal and/or universal practice in the hedge fund industry. However, he then makes the point that this can only happen if it is allowed by the constitutional documents.

63. He adds at paragraph 6.25 that while the *"back-to-back"* redemption process is suggested to be vital to avoid the risk that the liquidity profiles between the Master Fund and Feeder Fund would not be aligned, that factor "*does not however provide any evidence of an automatic redemption process*".

64. In his Report dated 17 November 2017, Mr. Seymour provides an account of how the Master Fund/Feeder Fund dichotomy arose. Feeder Funds could be established in the most tax efficient manner, and then in terms of the Master Fund there would then be a "*pooling of interests for operational purposes*" (paragraph 2.4).

65. It is this pooling aspect of the single "*fund*" operation which Mr. Seymour considers to be crucial.

66. He states at paragraph 4.5 that the automatic "*back-to-back*" redemption process is consistent with the fundamental purpose of the Master-Feeder structure as he has explained it.

67. He also appears to take the view at paragraph 4.7 that even if the process is not always clearly documented, some fund operators consider this redemption process "*uncontroversial and perfunctory industry practice*".

68. With no disrespect to any of these witnesses, the questions for this Court to resolve are narrow ones only and in this context the evidence of the witnesses themselves is of only limited assistance.

The Power of the Master Fund to Issue Redeemable Shares

69. A major contention put forward in these proceedings is that the Directors of the Master Fund did not have power to issue shares on terms that they were capable of being redeemed without a written redemption notice being served.

70. MACL contends that the Directors do not have power under Articles 36 (a) or Article 37 to determine that no Redemption Notice from a Shareholder is required, nor do they have power to waive the requirement for a Redemption Notice, but only power to waive the notice period.

71. In approaching this issue of construction, the parties have drawn to the Court's attention the decision of the Privy Council in *Innimore Fund Management Ltd. v. Fenris Consulting Ltd.* [2016] UKPC 9, and the English law principles set out in *Arnold v. Britton* [2015] AC 1619.

72. This Court clearly accepts the following proposition in interpreting the meaning of the relevant words in a written contract: 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

document, (iii) the overall purpose of the clause and the document, (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.

73. Dragon also emphasizes that terms should be construed in a manner tending to business efficacy, and that such a result is preferable to one which would or might prove unworkable.

74. MACL on the other hand equally properly points out that there are significant respects in which the approach to the construction of company articles is stricter than that applicable to an ordinary commercial contract. MACL argues this is because articles are a registered statutory contract on which potential shareholders may rely.

75. 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.

76. The Master Fund Articles are Amended and Restated Articles which were adopted by shareholder resolution on 25 June 2012, as previously indicated.

77. In Article 1 "*Redeeming Shareholder*" is defined as "*a Shareholder who has requested the redemption of part or all of his Shares in accordance with these Articles*."

78. *"Redemption Notice"* is defined as "*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.*"

79. Article 9 of the Master Fund Articles provides as follows:

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

(b) grant options with respect to such Shares and issue warrants or similar instruments with respect thereto;

and for such purposes, the Directors may reserve an appropriate number of Shares for the time being unissued."

80. Article 36 of the Master Fund Articles provides, so far as material, as follows:

"Subject to the Law, the Company may:

a) issue shares on terms that they are to be redeemed or 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) ..."

81. Articles 37 provides as follows:

"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 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 Shareholders Shares on a Redemption Day at the Redemption price for the relevant Class and Series..."

82. MACL makes this submission at paragraph 76 of its Closing Submissions:

"*76. Thus, pursuant to Articles 1 and 37 the Directors have power to determine the form of the Redemption Notice and the period of prior notice that must be given by a shareholder wishing to redeem, and the Redemption Days. The Directors also have discretion under Article 37 to waive or to reduce the period of notice determined upon. But they do not have power under Article 36 (a) or Article 37 to determine that no Redemption Notice from a shareholder is required, nor do they have power to waive the requirement for a Redemption Notice, only the notice period. As set out further below, Dragon seeks to argue that there is such a power under Article 9 (a) and/or Article 36(a). However, this reading depends on reading these Articles in isolation and divorced from the remainder of the Articles of which they form part and from the legislative framework.*"

83. Dragon relies upon Article 9 (a) as conferring an unfettered power upon the Directors to issue shares and to determine the rights attached to the shares. It also contends that because the Directors were clearly intended to have power to issue shares which were to be redeemed on a fixed redemption date, without a Redemption Notice being served, this example illustrates how wide the Directors' powers actually are.

84. 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. This Court accepts MACL's submission as correct and is persuaded by it.

85. On the one hand Dragon's argument is one tending to favour obscurity but on the other hand MACL's argument relies upon clarity of language and certainty of intent. Moreover it appears to this Court that if Directors are to be held accountable for their responsibilities it is vitally important for anyone reading the Articles to know what those responsibilities in reality are.

86. Accordingly Dragon's submission on this aspect of their Appeal is rejected.

87. The next issue for the Court to consider is whether, in the event that the Directors did in fact have the authority to dispense with the Redemption Notice procedure, they did indeed make any determination to that effect.

A Relevant Determination by the Directors

88. Dragon submits inter alia at paragraphs 93 and 94 of its Closing Submissions that the terms on which shares were issued including the requirements for redemption and the form of any Redemption Notice which was required were not the subject of a formal resolution of the Directors of the Master Fund, nor equally importantly did they need to be.

89. Instead, the Appellant relies upon the proposition of law that Directors can act informally and that all that is required is that they concurred in the relevant matter.

90. The question therefore for the Court would be whether there is any probative evidence of the alleged determination.

91. In this critical regard Dragon relies upon the following submission at paragraph 96:

> "*96. In the present case, the determination of the Directors on these matters is evidenced by the terms of the Dragon PPM which was provided to investors in Dragon, and reflects the general practice followed in relation to master-feeder fund structures as understood by the Directors. The same individuals were the Directors of both Dragon and the Master Fund at the relevant time.*"

92. This is a reference to the Appellant's Private Placement Memorandum ("the Dragon PPM").

93. Then in paragraph 101 Dragon again asserts that in the present case there is clear evidence of the relevant determination made by the Master Fund Directors contained in the Dragon PPM issued by Dragon. This argument is presumably based on the fact that the Appellant and the Master Fund share the same Directors.

94. The argument continues at paragraph 102, 103 and 104 as follows:

> "*102. The Dragon PPM explicitly provided that: "the redemption procedure for the Master Fund is identical to [Dragon's] procedure." On any view, this is a clear statement of intention as to the redemption procedure for the Master Fund.*
>
> *103. The terms of the Dragon PPM provided, in relation to the procedure for the redemption of shares in Dragon as follows:*
>
> > *(1) a "Redemption Day" was "the first Business Day of the month of each calendar quarter (being the first Business Day in January, April, July and October), or any other day or days the Directors, in consultation with the Manager, designate, including, a day on which a compulsory redemption of Shares occurs;"*
> >
> > *(2) a "Redemption Notice" was "a written notice given by a Shareholder to [Dragon] (or to the Transfer Agent or its affiliate on behalf of the Fund) requesting the redemption of all or some of that Shareholder's Shares";*

> (3) *the Redemption Notice was to be received by Citibank (the Transfer Agent) no later than 5pm (Singapore time) on a business day at least 45 days prior to the relevant Redemption Day";*
>
> (4) *the payment of the redemption proceeds was to be made as soon as possible after the relevant Valuation Day (i.e. the last business of the preceding month) and generally within 30 days after the Redemption Day.*
>
> *104. The clear and express statement in the Dragon PPM that "the redemption procedure for the Master Fund is identical to [Dragon's] procedure "was clearly intended to apply that same redemption procedure both for the purposes of redeeming shares in Dragon and for the purposes of redeeming shares in the Master Fund. Accordingly, for example, the Directors thereby determined the relevant Redemption Days for both Dragon and the Master Fund.*
>
> *105. These statements thus evidence both the Dragon Directors' determination of these matters for the purposes of the redemption of shares in Dragon and the Master Fund Directors' determination of these matters for the purposes of the redemption of shares in the Master Fund."*

95. Two points of immediate concern to the Court in relation to this analysis are that a statement of intention per se is not a determination and that there appears to be underlying the argument a conscious infringement of the doctrine of corporate responsibility. In other words, if two companies have the same Directors that surely does not make them one company or enable them to function as one company.

96. Nonetheless by way of elaboration Dragon maintains that because the Directors of Dragon passed a Resolution on 29 April 2013 approving the Dragon PPM, also described as the Offering Memorandum, then given that the Directors of the Master Fund were the same as the Directors of the Appellant Dragon there was "*clear concurrence by the Directors of the Master Fund to the terms of the Dragon PPM.*"

97. The Court has serious concerns as to the conclusory nature of this factual logic, quite apart from the Court's separate concern as to the purported merging of corporate identities.

98. However, their argument then continues as to how this identical procedure, however that term may be interpreted, is to be construed in relation to the requirement to serve a Redemption Notice.

99. Dragon borrows language from an opinion of Mr. Anthony Zacarolli Q.C. (now Mr. Justice Zacarolli), which was obtained by the Dragon JOLs stating at paragraph 116:

> "*116. As Mr. Zacarolli Q.C (as he then was) pointed out, read literally, the statement in the Dragon PPM is capable of being interpreted in two different ways:*
>
> *(1) First, that the requirements for redemption set out in the Dragon PPM literally apply mutatis mutandi to the redemption by Dragon of shares in the Master Fund. On this reading, all the requirements for the redemption set out in the Dragon PPM for the redemption of shares in Dragon apply separately, and have to be repeated, for the redemption of shares in the Master Fund;*
>
> *(2) Secondly, that the procedure for redemption of shares in the Master Fund is absolutely identical to the procedure set out in Dragon PPM, i.e. that a Redemption Notice is served by the investor in Dragon on the Transfer Agent at least 45 days prior to the relevant Redemption Day, and subject to the other conditions set out in the Dragon PPM. On this approach, there is a single procedure which results in the simultaneous redemption of shares at the Dragon level with an automatic corresponding redemption at the Master Fund level.*
>
> *117. As Mr Zacaroli explained in his opinion, and as is further explained below, it is clear that the second interpretation is the correct one.*"

100. It is at this point of Dragon's argument that it introduces the evidence of Mr. Bennett, Mr. Milgate and Mr. Seymour as to industry practice. Accordingly, within the framework of Mr. Zacarolli's second theory the Appellant submits as follows at paragraphs 128-129:

> "*128. This evidence is key to the determination of the present appeal, and is fatal to the arguments being advanced by MACL. This is because the Court has clear, unequivocal, credible and independent evidence from the Directors involved at the time as to what their understanding and intentions were as regards the applicable redemption process. In light of this evidence, it is clear beyond any argument that the understanding and intentions of the Directors was that there would be an automatic back-to-back redemption of the Master Fund's shares upon Dragon receiving a valid redemption request from an investor.*
>
> *129. In circumstances where (a) the subjective intentions and understanding of the Directors at the time are unequivocally clear and (b) it is clear that the Directors had a broad discretion under the Master Fund Articles to determine the applicable redemption procedure, then the only question is whether the subjective intentions and understanding of the Directors was made sufficiently manifest in order to amount to a "determination". The answer to that is obviously "yes", given the terms of the Dragon PPM which made expressly clear that the procedure for redemption of the shares in the Master Fund was the same as that for the redemption of shares in Dragon.*"

101. Having set out this reasoning as best it can, the Court has great difficulty in regarding it as other than tortuous, speculative and unpersuasive.

102. In principle there is of course 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 a Master Fund level to be served. The real questions are whether such a course has been constitutionally authorized and if so whether a determination to that effect has been made.

103. Ultimately those elementary and important matters must be proved on a balance of probabilities if Dragon is to succeed. Simply setting out a theory is in itself entirely insufficient.

104. In addressing the question of whether the Directors at Master Fund level made a determination as to dispensing with a second Redemption Notice, MACL relies inter alia on the Written Resolution of the Master Fund Directors dated 1 June 2012.

105. Helpfully reference is made to it in an opinion of Mr. Glen Davis Q.C. Mr. Davies states at paragraph 33 of the opinion:

"*Significantly, paragraph 3.2 (g) relating to redemption expressly contemplates a notice from the Feeder Funds requesting redemption of shares, and that being received and accepted by the Master Fund. Specifically, it provides:*

"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 an 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."

106. This is obviously direct as distinct from indirect evidence of some importance, and MACL proceeds to characterize it in this way at paragraph 127.1.6 of its Closing Submissions:

"*In other words, the Directors of the Master Fund resolved that they would only redeem shares if a Redemption Notice was received "from [the] Feeder Fund". Dragon seeks, in paragraph 175 (1) (ii) of its written closing, to argue that this is not inconsistent with the Directors of the Master Fund determining that, when an investor redeems its shares in Dragon "that redemption notice also serves as notice for the redemption by Dragon of its shares in the Master Fund." This is a hopeless argument. The Master Fund Articles refer to the service of a Redemption Notice from the Feeder Fund; these Resolutions refer to the service of a Redemption Notice from the Feeder Fund. They can only sensibly be construed as meaning what they say.*"

107. This Resolution clearly provides objective evidence in contrast to the theoretical constructions put forward by Dragon, on whom the burden of proof rests in this Appeal.

108. Indeed, in paragraph 154 of MACL's Closing Submissions it is argued that the relevant determination by the Master Fund Directors as to the redemption procedure for shares in the Master Fund in fact occurred when the Master Fund Directors approved the Master Fund Launch Resolution on 1 June 2012. In terms of the standard of proof applicable to Dragon in this case, this is a conclusion which at a minimum at least is just as well arguable and as credible as the contrary argument of Dragon which has been put forward.

109. The Court also carefully notes MACL's submission at paragraph 127.3 concerning the Written Resolution of the Dragon Directors dated 29 April 2013:

"The Written Resolutions of the Dragon Directors dated 29 April 2013 do not evidence, and are flatly inconsistent with the existence of, an "automatic back-to-back" redemption procedure. Rather, they (rightly) treat separately a request by an investor to redeem its shares in Dragon, and the consequent redemption by Dragon of shares in the Master Fund. They provide, so far as relevant, as follows:

"It is resolved that…

(h) upon receipt of duly completed redemption notices ("Redemption Notices") in accordance with the terms of the Offering Memorandum (as it may be amended from time to time) and the Articles, and such Redemption Notices 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 Notices, be redeemed and cancelled in accordance with the Offering Memorandum (as it may be amended from time to time) and the Articles and the Administrator be authorised to make all relevant entries in the Register;

(i) the Company [i.e Dragon] 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."

110. Once again, this material is seemingly at complete variance with Dragon's case, unless it can be established by Dragon somehow that the Directors have in fact determined otherwise.

111. 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.

112. Ultimately, and as a matter of formal proof, the Court is unable to accept that a proof of debt can be properly founded and proved on a balance of probabilities on such a fragile basis as has been put forward.

<u>The Market Environment</u>

113. Dragon has emphatically contended throughout that such evidence as there is of contemporary market practice is strongly supportive of its case.

114. MACL on the other hand contends that this proposition is significantly blunted by the fact that for many months after Dragon's proof of debt had been submitted no one on behalf of Dragon had identified this as being the only basis on which Dragon claims that the redemption from the Master Fund had been effected. The point made here by MACL is essentially one of advocacy, because as the Court has observed Dragon also relies for

instance on the critical sentence contained in the PPM, upon which the Court has already expressed its considered view.

115. In any event, Dragon makes recourse to certain email exchanges between the Appellant's Transfer Agent and a Ms. Collett of Walkers in which she had sought an explanation of the applicable redemption process.

116. By email dated 19 May 2015 Ms. Collett sought confirmation of her own understanding, summarised in relevant part as follows:

"Master Feeder – the "Real" redemptions

For "real" redemptions arising from requests from investors to redeem, the process was:

1. *Redemption request made by investor to Citi Singapore ("Citi SNG") (as transfer agent).*
2. *Redemption request received by Citi SNG and put into "SHARP" system.*
3. *There is an "automatic" redemption as between Master and Feeder and no additional notice between them.*
4. *Each month, a SHARP report is generated by Citi SNG and sent by Citi SNG to the client and cc'd to Citi HK.*
5. *Citi HK puts the information from the SHARP report into it [and calculates NAV?]. Yes, Citi HK captures the capital movement from Sharp report for valuation of NAV*
6. *Citi HK sends NAV sheet to Citi SNG after NAV is approved by client. This should be step 7*
7. *Citi HK puts the NAV price into its SHARP system. This should be step 6*
8. *Citi SNG prepares and issues monthly NAV from its SHARP system.*
9. *Payment to redeemer is made (usually in the third week of the month) by either transfer of funds from the Prime Broker (holding cash assets) to the Master Fund to the Feeder Fund to the Investor)"*

117. In turn the email reply received from a Mr. Lam on 29 May 2015 indicates that the process described by Ms. Collett was "*vastly correct*", meaning as one understands it, essentially correct.

118. While such material may well be of explanatory and historical significance and technically admissible, the Court nonetheless considers it to be of no actual probative value to Dragon's case.

119. Far from coincidentally, the Court has formed similar reservations as to the broader factual and expert evidence on the subject of hedge fund practice adduced on Dragon's behalf.

120. Dragon argues at paragraph 162 of its Closing Submissions:

> "*162. Ultimately, the evidence as to the general market practice and understanding as to redemption procedures between Feeder Funds and Master Funds is strongly supportive of the Dragon JOLs' case. Contrary to MACL's arguments, there is no basis for thinking that the Directors of the Master Fund intended to adopt a fundamentally different procedure which was out of line with the general practice and understanding. On the contrary, it is clear that they intended to follow the general practice and understanding which was based on automatic, back-to-back redemptions between feeder and Master Funds.*"

121. Dragon makes the point again at paragraph 175 (3) (ii):

> "*(ii) the relevant "determination" in the present case was the determination of the Directors, evidenced by the Dragon PPM, that, in the case of redemptions by investors in Dragon, then the process for redeeming Dragon's shares in the Master Fund would be the same as the process for redeeming the investor's shares in Dragon;*"

122. Once again, the submission is repeated at paragraph 57 of Dragon's Reply Closing Submission:

> "*57. This is a far-fetched argument and should be rejected. The existence of the well understood general practice in relation to Master-Feeder Fund*

> *redemptions is an important part of the context in which the questions of whether the Directors made a determination as to the redemption terms attaching to the shares in the Master Fund issued to Dragon and, if so, what that determination was, fall to be determined. The existence of the well understood general practice no doubt explains why it was not considered necessary to record the determination, all that was necessary was for the Directors to indicate their assent and agreement with that general practice. On any view, the terms of the Dragon PPM demonstrate that."*

123. With great respect, making the same argument over and over again does not serve to make the argument any stronger. In summary, the Court finds this particular argument, which is based upon market practice alone, to be distinctly unpersuasive.

124. In the course of this Appeal, it is perhaps the case that somewhat less attention has been paid to the mechanical requirements of Order 16 rule 18 than would have been ideal.

125. However, as the Court has previously indicated, a dissatisfied creditor carries both a legal and an evidential burden and the creditor must satisfy the Court upon a balance of probabilities as to the merits of its claim.

126. The Court has duly considered the evidence, the submissions and the law.

127. In the present instance, and subject to the issue of waiver which the Court will ultimately consider, the Court has concluded that Dragon has failed in its Appeal upon the balance of probabilities, and in this respect Dragon has not established the facts upon which it relies to found the debt.

128. Furthermore, for the avoidance of any uncertainty the Court agrees with MACL as to the principles of law to be applied in considering this matter.

129. It is not the responsibility of the Court to define what is lawful operational procedure in the hedge fund industry, subject only to there being that which is constitutionally and legally permissible. The Court is not concerned with market practice at large. Instead it is only concerned with the merits of this particular Appeal.

Waiver

130. Dragon puts forward in this Appeal the alternative submission that if there was a requirement for a separate, additional Redemption Notice to be served by Dragon on the Master Fund, then this requirement was waived in the present case by the Master Fund. This Court understands waiver in this context to mean the voluntary relinquishment of legal rights that the Master Fund would normally have if the waiver did not exist.

131. Dragon formally describes the concept in these terms at paragraph 181 of its Closing Submissions:

"181. A waiver will arise where one party accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, or where, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation. A waiver may be oral or written or inferred from conduct."

132. It would seem that both with the Court's summary description and with Dragon's more developed description, voluntary intention must be established.

133. The argument proceeds in this manner at paragraphs 178-179:

"178. In particular:

(1) The view of Directors was that the redemption was effective at the Master Fund level: see, for example, the email exchanges of 24 October 2014 and 8 December 2014 referred to in paragraphs 41 and 48 above.

(2) The Board Meeting of the Master Fund of 30 October 2014 proceeded on the basis that the Redemption Notice served by UBS had been effective to trigger a redemption of shares in the Master Fund. Indeed, it was because the Master Fund lacked the liquidity to meet this redemption that the Directors of the

Master Fund resolved to suspend the payment of redemption proceeds and any further redemptions (see para 4.2 of the minutes);

(3) The Board Meetings of the Master Fund of 18 December 2014 (para 3.1 (d) of the minutes) and 29 December 2014 (para 3.3 (a) of the minutes) proceeded on the basis that the redemption proceeds due following the redemption of the shares was a due debt of the Master Fund, albeit not immediately payable due to the Suspension;

(4) Indeed, it was for this reason that resolutions were passed for the winding up of the Master Fund (and Dragon).

179. In these circumstances, the Directors of the Master Fund permitted the Transfer Agent to proceed on the basis that the redemption in relation to the Master Fund had been effective. So far as Dragon is concerned, it was clear that the Master Fund was not taking any point that the redemption of shares had been ineffective due to any failure by Dragon to serve a further Redemption Notice on the Master Fund."

134. MACL seeks to counter this argument as follows in its Closing Submissions at paragraphs 224-225:

"224. The first and fundamental difficulty is that the requirement under the Master Fund Articles for a written notice from Dragon was not capable of being waived: see paragraphs 76 to 88 above. The Master Fund Directors had power, under Article 37, to waive the period of notice. They did not have power under the Master Fund Articles, whether pursuant to Article 36 or Article 37 or otherwise, to dispense with the express clear requirement in the Master Fund Articles for a Redemption Notice, either by making a determination that no such Redemption Notice was required, or by waiving that requirement in any particular case.

> *225. In this regard, it is telling that paragraph 180 of Dragon's written closing has (illogically) to deny the very premise on which this part of Dragon's argument necessarily proceeds (namely that the Directors did not have unfettered powers under the Master Fund Articles). Paragraph 180 states that: "given that the Directors of the Master Fund have power under the Master Fund Articles to set the terms required for redemption, there is no reason why they would not have power to waive any requirement for redemption set under those terms". But that is the wrong assumption at this stage of the argument. Thus, if Dragon is wrong in its contention as to the Director's powers under the Articles, its waiver arguments also falls at the first hurdle."*

135. 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 apply 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.

136. Even if the concern of the Court as to this point is incorrect, nonetheless as previously indicated the Court also finds persuasive merit in the following argument which MACL puts forward at paragraphs 226-227:

> "*226. But even if the Master Fund Directors did have power to waive the requirement for a Redemption Notice, no such waiver arises on the facts here. Waiver is a term which covers different legal concepts, but in any case it requires an "unequivocal representation": see the analysis of Lord Goff in The Kanchenjunga [1990] 1 Lloyds's Rep 391 at 397-400, especially 399 col.2. None has ever been identified here. Dragon's written closing does not begin to advance a proper case as to the representations said to have been relied upon. Paragraph 182 baldly asserts that: "it is clear that the Master Fund represented expressly and by conduct that the redemption of shares in the Master Fund represented expressly and by conduct that the redemption shares in the Master Fund had been effective". No specific representations are alleged in paragraph 182. As set out in paragraphs 33 to 38 above, the contemporaneous documents do not record or represent that there had*

> *been a valid redemption at the Master Fund level. Insofar as Dragon relies on the documents identified in paragraph 178, these documents are clearly not capable of constituting the "unequivocal representation" required to found a waiver: first, because these documents did not represent that there was an effective redemption at the Master Fund level, notwithstanding that no redemption notice had been served by Dragon, and in any event, secondly, because they were simply too late, post-dating the redemption date, and so cannot have been relied upon by Dragon in the Manner alleged.*
>
> *227. Insofar as Dragon's case rests upon the fact that the register of the Master Fund was updated to record the Redemption, the simple answer is that this did not occur until far too late, well after the redemption date and the date on which redemptions were suspended: see paragraph 191 above.*"

137. In summary, the Court is not satisfied upon the evidence that Dragon has discharged the burden of showing upon a balance of probabilities that the Directors of the Master Fund unequivocally and intentionally permitted the Transfer Agent to proceed on the basis that the redemption in relation to the Master Fund had been effective notwithstanding a failure by Dragon to serve a further Redemption Notice on the Master Fund.

138. As in the other respects considered in this Judgment, Dragon's theories are not supported by the facts in the way that the law prescribes for Dragon to succeed in this *de novo* hearing.

Conclusion

139. For the reasons which have been stated above Dragon's Summons seeking that the rejection of Dragon's proof of debt (by notice dated 15 March 2016) be set aside is hereby refused.

Robin McMillan

THE HON. JUSTICE McMILLAN
JUDGE OF THE GRAND COURT