IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 370 OF 2023 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

AND IN THE MATTER OF TYR CAPITAL PARTNERS SPC LTD

Before:	The Hon. Justice David Doyle
Appearances:	Quentin Cregan and Luke Armitage for Maples and Calder (Cayman) LLP on behalf of TYR Capital Partners SPC Ltd Tom Smith KC, Chris Keefe and Chris Beck of Walkers (Cayman) LLP on behalf of TGT GP in its capacity as general partner of TGT LP
Heard:	31 May 2024
Draft Judgment circulated:	18 June 2024
Judgment delivered:	21 June 2024

Company law – Section 95(2) of the Companies Act (2023 Revision) – whether the Petitioner is contractually bound not to present a winding up petition against the Fund and if so whether the petition should be dismissed – principles of the construction of contracts – necessity for clear and express language where rights and remedies are being abandoned – objective consideration of the natural and ordinary meaning of the words and the agreement as a whole in the relevant factual, corporate and documentary context

JUDGMENT

Introduction

1. Tyr Capital Partners SPC Ltd (the "Fund") applies by way of summons dated 23 February 2024 (the "Summons") for an order that the winding up petition (the "Petition") presented by TGT GP in its capacity as general partner of TGT LP (the "Petitioner") against the Fund:

> "be struck out pursuant to section 95(2) of the Companies Act (2023 Revision) on the ground that the Petitioner is contractually bound not to present a winding up petition against the Fund."

2. In this case, so far as is material, the Petitioner agreed that "it shall not, under any circumstances … institute against the Fund … any liquidation proceedings under any Cayman Islands law …"

Section 95(2)

3. Section 95(2) of the Companies Act (2023 Revision) provides:

> "The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company." ("Section 95(2)")

Rhone Holdings LP

4. At first instance in *Rhone Holdings LP* (unreported judgment delivered with errata 29 September 2015) Mangatal J gave her reasons for making an order that a winding up petition be "struck out as an abuse of the process of the Court" (paragraph 13 and 14), on the basis that the petitioners were precluded from pursuing "winding up relief" by way of a "contractual agreement" (paragraph 16). Mangatal J felt that there was "no public policy principle" that clause 5.12 of the relevant agreement offended (paragraph 54):

"… I agree with Mr. Lowe, Q.C. that public policy could not override the clear statutory provision of s.s95(2)."

5. At paragraph 55 Mangatal J added:

"Further, I agree that s.s.95(2) is in mandatory terms, and that in the instant case and present circumstances there would be no proper basis upon which to adjourn the Petition. I am persuaded by Mr Lowe's submissions that the Court would only adjourn a petition presented by a party who is contractually bound not to present one, if there is some useful purpose to be served. For example, if there was a creditor with an interest in having the company wound up and who has not so contractually bound himself to present a petition, who could be substituted as the petitioner."

6. Mangatal J at paragraph 56 stated:

"I disagree with Mr. Asif Q.C.'s submission that the Court has a discretion, because the Petition is presented on the just and equitable ground, to go on and hear the Petition and to make the orders set out at s.s.95(3). The section states quite clearly that the Court can only make those orders as an alternative to making a winding up order. This suggests to me that the Court would have to have the power to make a winding up order in the first place. In my judgment, the word "shall" in s.s.95(2) provides for a mandatory meaning. Once the Court finds that the Petitioner is contractually bound not to present a petition, then save for the type of circumstance such as the existence of an interested creditor who wishes to be substituted, then the Petition must be dismissed. It would otherwise be an exercise in futility to simply adjourn the Petition rather than striking it out."

7. The Court of Appeal, in the context of any application for an extension of time to apply for leave to appeal, considered Section 95(2) in *Rhone Holdings LP* 2016 (1) CILR 46 and 273. Rix JA dismissed an argument that Section 95(2) should "simply be ignored on the grounds that an agreement not to present a petition … is contrary to public policy." Rix JA gave that argument short shrift:

> "But that submission is an impossible submission where s.95(2) which applies generally, of course, to companies … makes it plain that such a contract or agreement not to present a petition against a company or an exempted limited partnership is not contrary to public policy but, on the contrary, represents the policy of law by express enactment because the express terms of s.95(2) give statutory strength to what would otherwise merely be a contractual agreement not to present a petition by stating that the court shall dismiss a petition or adjourn it when the parties have bound themselves contractually not to present such a petition. Such an agreement not to present a petition cannot possibly be contrary to public policy." (paragraph 22 of judgment starting on page 46 and paragraph 25 of the judgment starting on page 273).

8. At paragraph 28 of the judgment starting on page 273 Rix LJ referred to the "underlying message" of Section 95(2) namely that "where parties have agreed not to present a petition, then you are not to be permitted to act in breach of that agreement and the court will uphold that agreement."

9. In *FamilyMart China Holding Company v Ting Chuan (Cayman Islands) Holding Corporation* 2020 (2) CILR 201 the Court of Appeal referred to Section 95(2) at paragraph 123 and to *Rhone Holdings* 2016 (1) CILR 46 at paragraph 124 and Moses JA quoted paragraphs 22 and 23 of Rix JA's judgment and stated:

> "It is established, and was not disputed, that an express agreement not to present a winding up petition is lawful and will trigger the mandatory stay or an adjournment under this section."

10. As Don Henley sang in *The End of Innocence* "lawyers dwell on small details" and in passing, at the risk of being perceived by some as unduly pedantic, I note that Section 95(2) requires the court to "dismiss" a winding up petition or "adjourn" the hearing. It does not refer to a "mandatory stay", or indeed a "strike out". The "mandatory stay" does not arise from Section 95(2). In *FamilyMart*, as is clear from Lord Hodge's judgment, the "mandatory stay" arose from section 4 of the Foreign Arbitral Awards Enforcement Act (1997 Revision). The Fund in its Summons requested that the Petition be "struck out pursuant to" Section 95(2), although its skeleton argument at paragraph 1.1 requested an order that the Petition "be struck out or dismissed."

11. In the subsequent appeal to the Judicial Committee of the Privy Council [2023] UKPC 33 Lord Hodge delivering the judgment stated:

> "104. It will be recalled that section 95(2) states that the court shall dismiss or adjourn a hearing of a winding up petition if the petitioner is contractually bound not to present a petition against the company. In this case there is no contract binding FMCH not to present a winding up petition. The arbitration agreement in the SHA requires certain matters to be determined by arbitration but is silent as to the presentation of a winding up petition against the Company. The Board is satisfied that the contractual obligation on the parties to determine those matters by arbitration entails an obligation not to have those matters determined by a court. That obligation is enforced by the court's grant of a stay of the winding up petition pro tanto. It does not amount to a contractual prohibition against the initiation of winding up proceedings. Section 95(2) is therefore not relevant to the dispute between the parties and the Board will say no more about it."

12. Having considered the law on Section 95(2) I now turn to the law on the construction of contracts.

The construction of contracts

13. Although I was not addressed upon it in any great detail, there was no dispute in respect of the general legal principles to be applied when construing a contract.

Main principles

14. The construction of a contractual provision involves identifying what the parties had meant through the eyes of a reasonable reader and, save in a very unusual case, that meaning was most obviously to be gleaned from the language of the provision. Although the less clear the relevant words were, the more the court could properly depart from their natural meaning, it was not to embark on an exercise of searching for drafting infelicities in order to facilitate a departure from the natural meaning. Commercial common sense was relevant only to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date on which the contract had been made. Moreover, since the purpose of contractual construction was to identify what the parties had agreed, not what the court thought that they should

have agreed, it was not the function of a court to relieve a party from the consequences of imprudence or poor advice.

15. 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". It does so by focusing on the meaning of the relevant words, in their documentary, factual and commercial context. That meaning is to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (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. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Each of the rival meanings is checked against the provisions of the contract and its commercial consequences are investigated. There must be a basis in the words used and the factual matrix for identifying a rival meaning (*Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 at paragraphs 15-20, 23, 66, 76-77 applying dicta of Lord Hoffmann in *Chartbrook v Persimmon Homes Limited* [2009] 1 AC 1101 at paragraph 15 and of Lord Clarke in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at paragraph 21). Where the parties have used unambiguous language, the court must apply it (Lord Clarke in *Rainy Sky* at paragraph [23]).

16. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and equality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning (*Wood v Capita Insurance Services Ltd I* [2017] UKSC 24; [2017] AC 1173, *Rainy Sky* and *Arnold v Britton* explained).

17. Contractual construction has been described as a unitary exercise which involves an iterative process which, where there are genuinely rival meanings, involves checking them against the provisions of the contract and testing the commercial consequences (Lord Mance in *In re Sigma Finance Corp* [2009] UKSC 2, [2010] 1 ALL ER 571 at paragraph [12]).

18. Where the iterative process of construction produces a clear answer the court must be very wary of assuming that it knows what is or is not commercially sensible (Lewison LJ in *Napier Park European Credit Opportunities Fund Limited v Harbourmaster Pro-rata Clo 2BV* [2014] EWCA Civ 984 at [37]).

19. Neuberger LJ in *Skanska Rashleigh Weatherfoil Ltd v Somerfield Stores Ltd* [2006] EWCA Civ 1732 stated at paragraph [22]:

> "Particularly in these circumstances, it seems to me that the court must be careful before departing from the natural meaning of the provision in the contract merely because it may conflict with its notions of commercial common sense of what the parties may must or should have thought or intended. Judges are not always the most commercially-minded, let alone the most commercially experienced, of people, and should, I think, avoid arrogating to themselves overconfidently the role of arbiter of commercial reasonableness or likelihood. Of course, in many cases, the commercial common sense of a particular interpretation, either because of the peculiar circumstances of the case or because of more general considerations, is clear. Furthermore, sometimes it is plainly justified to depart from the primary meaning of words and give them what might, on the face of it, appear to be a strained meaning, for instance where the primary meaning of the words leads to a plainly ridiculous or unreasonable result."

20. Some years later, Lord Neuberger in *Arnold v Britton* at paragraph [17] also emphasised that:

> "… the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook*, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been

specifically focusing on the issue covered by the provision when agreeing the wording of that provision."

21. It is also important to avoid looking at the relevant provision with the benefit of hindsight. Lord Neuberger at paragraph [19] stated:

> "… commercial common sense is not to be invoked retrospectively … Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made …"

22. Insofar as these principles are applicable to the construction of contracts generally they are also applicable, with any necessary modifications, to corporate documents such as subscription agreements and articles of association (*Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10; *Origo Partners Plc v Brookes Macdonald Asset Management (International) Limited* 2015 MLR N-12, *Learn Capital Venture Partners v NBRL Global* (Parker J, FSD unreported judgment 29 June 2017) and *Kes Power Limited* (Segal J, FSD unreported judgment 31 May 2024)).

National Commercial Bank of Jamaica

23. Lord Hodge in *National Commercial Bank Jamaica Ltd v NCB Staff Association* [2024] UKPC 2 drew attention, in characteristically clear and concise language, to what he described as "certain principles of contractual interpretation" which were germane to the construction of the document in that case:

> "32. First, the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement, having regard to the contract as a whole. Secondly, in so doing the court has regard to the factual background known to the parties at or before the date of the contract, but excluding evidence of prior negotiations. Thirdly, where there are rival meanings of the relevant contractual provision considered in its context, the court can give weight to the implications of the rival meanings, by considering which construction is more consistent with business common sense. But, fourthly, the

court does not depart from an interpretation of the natural language of words just because the contractual arrangement has proven to be a bad bargain for one of the parties. Fifthly, the weight to be attached to the precise words used in the contract will vary depending upon the sophistication of the contractual drafting and whether skilled professionals have been involved in creating the contract. But, sixthly, even where there has been a process of sophisticated professional drafting, the court must be alive to the possibility that the text of a provision, which has been accepted to conclude a contract, is a compromise between parties with conflicting aims or the result of a failure of communication between the parties. Where that is so, the court may give more weight to the factual matrix or the purpose of similar provisions in contracts of the same type. Finally, events and the actions of the parties after the conclusion of the contract are not relevant to its interpretation. The court has regard to the facts and circumstances which existed at the time the contract was made and which were known or reasonably available to both parties."

Belize Telecom

24. In *Attorney General of Belize v Belize Telecom Ltd* [2009] UKPC 10 the Judicial Committee of the Privy Council had to consider a question on the construction of the articles of association of a company and arguments in respect of implied terms. Lord Hoffmann (a judge with a keen interest in the principles of construction and author of some of the leading judgments in this area of the law) delivered the judgment of the Board and at paragraph 16 stated:

> "16 Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable personal having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament,

> or the intention of whatever person or body was or is deemed to have been the author of the instrument."

25. At paragraph 21, again in the context of implied terms, Lord Hoffmann stated:

> "There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?"

Rainy Sky

26. In *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 Lord Clarke (with whom Lord Phillips, Lord Mance, Lord Kerr and Lord Wilson agreed) stated:

> "21. The language used by the parties will often have more than one potential meaning. I would accept the submission made on behalf of the appellants that the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and reject the other."

27. At paragraph 23 Lord Clarke referred to another authority to the effect that "one cannot rewrite the language which the parties have used in order to make the contract conform to business common sense. But language is a very flexible instrument and, if it is capable of more than one construction, one chooses that which seems most likely to give effect to the commercial purpose of the agreement." It is necessary when construing a commercial document to strive, where permissible and appropriate, to attribute to it a meaning which accords with business common sense.

Lamesa Investments

28. Sir Geoffrey Vos, in his then capacity of Chancellor of the High Court, in *Lamesa Investments Limited v Cynergy Bank Limited* [2020] EWCA Civ 821 at paragraph 18 was content with the summary of the English and Welsh principles of contractual construction provided in the judgment of His Honour Judge Pelling KC sitting as a first instance deputy judge of the High Court in that case:

> "i) The court construes the relevant words of a contract in their documentary, factual and commercial context, assessed in the light of (i) the natural and ordinary meaning of the provision being construed, (ii) any other relevant provisions of the contract being construed, (iii) the overall purpose of the provision being construed and the contract or order in which it is contained, (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 – see *Arnold v. Britton [2015] UKSC 36 [2015] AC 1619* per Lord Neuberger PSC at paragraph 15 and the earlier cases he refers to in that paragraph;
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> ii) A court can only consider facts or circumstances known or reasonably available to both parties that existed at the time that the contract or order was made – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 20;
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> iii) In arriving at the true meaning and effect of a contract or order, the departure point in most cases will be the language used by the parties because (a) the parties have control over the language they use in a contract or consent order and (b) the parties must have been specifically focused on the issue covered by the disputed clause or clauses when agreeing the wording of that provision – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 17;
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> iv) Where the parties have used unambiguous language, the court must apply it – see *Rainy Sky SA v. Kookmin Bank [2011] UKSC 50 [2011] 1 WLR 2900* per Lord Clarke JSC at paragraph 23;

v) Where the language used by the parties is unclear the court can properly depart from its natural meaning where the context suggests that an alternative meaning more accurately reflects what a reasonable person with the parties' actual and presumed knowledge would conclude the parties had meant by the language they used but that does not justify the court searching for drafting infelicities in order to facilitate a departure from the natural meaning of the language used – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 18;

vi) If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other – see *Rainy Sky SC v. Kookmin Bank* (ibid.) per Lord Clarke JSC at paragraph 2 – but commercial common sense is relevant only to the extent of how matters would have been perceived by reasonable people in the position of the parties, as at the date that the contract was made – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 19;

vii) In striking a balance between the indications given by the language and those arising contextually, the court must consider the quality of drafting of the clause and the agreement in which it appears – see *Wood v. Capital Insurance Services Limited [2017] UKSC 24* per Lord Hodge JSC at paragraph 11. Sophisticated, complex agreements drafted by skilled professionals are likely to be interpreted principally by textual analysis unless a provision lacks clarity or is apparently illogical or incoherent – see *Wood v. Capita Insurance Services Limited* (ibid.) per Lord Hodge JSC at paragraph 13; and

viii) A court should not reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight, because it is not the function of a court when interpreting an agreement to relieve a party from a bad bargain – see *Arnold v. Britton* (ibid.) per Lord Neuberger PSC at paragraph 20 and *Wood v. Capita Insurance Services Limited* (ibid.) per Lord Hodge JSC at paragraph 11."

Origo Partners

29. 9 years ago in *Origo Partners Plc v Brooks Macdonald Asset Management (International) Limited* 2015 MLR N-12 (judgment of the High Court of Justice of the Isle of Man delivered on 9 July 2015) in my capacity as First Deemster I set out the relevant Manx law on the construction of provisions in the articles of association of a company. Amongst other authorities I considered and applied *Prenn v Simmonds*, *Attorney General of Belize v Belize Telecom Ltd*, *Chartbrook Limited v Persimmon Homes Limited*, *Rainy Sky SA v Kookmin Bank* and *Arnold v Britton*. At paragraph 94 (1) to (19) I set out a summary of the position in Manx law in respect of the construction of articles of association. The Isle of Man, like many common law jurisdictions worldwide, followed English law in the area. Paragraph 94 read as follows:

> "*Summary of the position in Manx law in respect of the construction of articles of association*
>
> 94. The Isle of Man's vibrant corporate sector is important to its economy. It is also important that Manx law in respect of the construction of the articles of association of Manx companies is clear and easily accessible. I provide the following guidance based on the authorities already referred to in this judgment (on some occasions directly and on others by way of analogy):
> (1) when construing the articles of association of a Manx company the court is concerned to find the intention of the company and its members by reference to what a reasonable person with knowledge of the corporate world and market place, having all the relevant and admissible background which would have been available to the members of the company at the time the articles were adopted, would have understood them, by using the language in the articles, to mean (Lord Neuberger at paragraph 15 in *Arnold* summarising Lord Hoffmann in *Chartbrook* paragraph 14);
> (2) the court construes the articles by focusing on the meaning of the relevant words in their documentary, factual and corporate context. The court assesses the meaning of the relevant words in light of (i) the natural and ordinary meaning of the words (ii) the overall purpose of the articles of association (iii) any other provisions of the articles (iv) the relevant and admissible background which could reasonably be expected to be available to ascertain what would objectively and reasonably have been understood to be the intention. The relevant and admissible background would not include subjective evidence of intention nor would it include extrinsic facts which were known only to certain persons (v) corporate common sense (*Marley v Rawlings* as applied in Manx law in *FPA* at paragraph 32 and in *Simpson* at paragraphs 31 and 38; *Belize Telecom* as applied in Manx law in *RAB; Trilogy*; Lord Neuberger in *Arnold* at paragraph 15);
> (3) the meaning which the articles would convey to a reasonable person was not the same as the meaning of the individual words of the articles, which was a matter of dictionaries

and grammars (Lord Hoffmann in *ICS* at 912 as applied by Deemster Kerruish in *Lasala* at paragraph [35] and as summarised by Lord Wilson in *Boufoy-Bastick* at paragraph 25);
(4) a useful starting point for ascertaining the meaning of the articles was for the court to put itself into the position of the hypothetical reasonable member (cf Lord Lloyd in *ICS* at 902 as summarised by Lord Wilson in *Boufoy-Bastick* at paragraph 25);
(5) the background material which the hypothetical reasonable member may have regard to in construing the articles may include any relevant material provided to all members of the company in advance of the meeting which was due to consider the adoption of the articles such as the notice convening the meeting and any other explanatory documents made available to all members and in certain cases it may be appropriate to consider the company's previous articles of association (Kenny J in *Coopers* at pages 28-29);
(6) when construing a provision in the articles one can only take into account facts or circumstances which existed at the time that the articles were adopted and which were known or reasonably available to the company and all members (cf Lord Neuberger in *Arnold* at paragraph 21). It is permissible to have regard to the surrounding circumstances known to the company and its members at the time of the creation of the articles together with the underlying purpose and object of the articles (Lander J in *Coopers* at page 50);
(7) the fact that the words in the articles are capable of a literal application is no obstacle to evidence which demonstrates what a reasonable person with knowledge of the background would have understood the company and its members to mean, even if this compels the court to say that they used the wrong words. In this area, we no longer confuse the meaning of words with the question of what meaning the use of the words was intended to convey (Lord Hoffmann in *Mannai* at page 779);
(8) the general modern trend in matters of construction has been to try to assimilate judicial techniques of construction to those which are used by a reasonable speaker of the language in the interpretation of any serious utterance in ordinary life. Almost all the old intellectual baggage of legal interpretation has been discarded (Lord Hoffmann in *BCCI* at paragraph 39 and *ICS* at page 912);
(9) if there are two possible constructions of the articles the court is entitled to prefer the one which was consistent with corporate common sense and in the event of competing constructions the working assumption should be that a fair construction best matched the reasonable expectations of the company and its members (Arden L J in *Golden Key* at paragraph 28; Lord Clarke in *Rainy Sky* at paragraphs 21 and 25 as summarised by Lord Wilson in *Boufoy-Bastick* at paragraph 25);
(10) where possible articles should be construed so as to give them reasonable and practical effect; technicality should be avoided and if the consequences of one of the possible constructions was unduly impractical or over-restrictive, another of the constructions might well be appropriate (Lord Wilson in *Boufoy-Bastick* at paragraph 26 summarising Arden L J's judgment at paragraphs 26 and 28 in the English Court of Appeal in *British Airways Pension Trustees Ltd v British Airways PLC* [2002] Pens LR 247);
(11) words in articles ought to be interpreted in the way a reasonable person with knowledge of the corporate world would construe them. The reasonable person operating within a competitive corporate world can safely be assumed to be unimpressed with technical constructions and undue emphasis on niceties of language especially where such

would produce commercially unworkable or perhaps commercially inconvenient or inefficient results. The reasonable person operating within a competitive corporate world can safely be assumed to value efficiency, convenience and cost effectiveness alongside workability and practicality of corporate operations (cf Arden L J in *Golden Key* at [28]). If a detailed and syntactical analysis of words in the articles is going to lead to a conclusion which flouts corporate common sense it must yield to corporate common sense (cf Lord Steyn in *Robinson* at page 764);

(12) if there is only one plain and ordinary meaning of the words used in the articles this can be displaced if it produces a corporate absurdity (Lord Diplock in *The Antaios* [1985] AC 191 at 201; Lord Dyson in *Thompson* at paragraph [18]);

(13) when the language used in the articles gives rise to difficulties of construction the process of construction does not require the court to formulate some alternative form of words which approximates as closely as possible to that used in the articles. It is to decide what a reasonable person would have understood the company and members to have meant by using the language which they did. The fact that the court might have to express that meaning in language quite different from that used by the company and its members is no reason for not giving effect to what they appear to have meant (cf Lord Hoffmann in *Chartbrook* at paragraph 21);

(14) the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook* at paragraphs 16-26) should not be invoked to undervalue the importance of the provision which is to be construed; the exercise of construing a provision in the articles involves identifying what was meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision (Lord Neuberger in *Arnold* at paragraph 17);

(15) when considering the centrally relevant words to be construed, the less clear they are or the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it (in effect Mr Maher's neon lights test). The court is not justified in embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning (Lord Neuberger in *Arnold* at paragraph 18);

(16) while corporate common sense is a very important factor to take into account when construing articles, a court should be very slow to reject the natural meaning of the relevant provisions in the articles simply because it appears to have been a very imprudent or unpractical provision that has been inserted. The purpose of construction is not to identify what the court thinks should have been inserted into the articles. Accordingly, when construing a provision in the articles a Deemster should avoid re-writing the articles (cf Lord Neuberger in *Arnold* at paragraph 20 and Arden L J in *Golden Key* at paragraph 25);

(17) terms can be implied into articles to ensure business efficacy (Lord Hoffmann in *Belize Telecom* at paragraph 22 and Deemster Kerruish in *RAB* at paragraph 26);

(18) the remedy of rectification is not available in respect of articles of association *(Scott v Frank F Scott (London) Ltd* [1940] Ch 794 applied in *Simon v HPM Industries Pty Ltd* [1989] 15 ACLR 427 (Hodgson J in the Supreme Court of New South Wales));

(19) there can however be correction of mistakes by construction provided there is a clear mistake (on the wording of the articles having regard to their background and context) and it must be clear what correction ought to be made in order to cure the mistake (Lord Hoffmann in *Chartbrook* at paragraphs 22-25);"

Tempo Group

30. The Cayman Islands has also followed English law in the area of the construction of contracts. In *Tempo Group Limited v Fortune East Asia Holding Corporation and Wynner Group Limited* 2015 (2) CILR N-5 (CICA 5 November 2015) the Court of Appeal appears to have applied *Rainy Sky SA v Kookmin Bank*. Sir John Chadwick, President, stated:

"38. At paragraphs 7 to 12 of his judgment the judge referred to observations of high authority [including *Rainy Sky SA v Kookmin Bank*] which, as he said, inform the proper approach to the construction of written agreements ….

54. … with the guidance given by the Supreme Court in *Rainy Sky SA v Kookmin Bank* – that, if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other …".

Cayman Shores

31. Segal J in *Cayman Shores Development Limited v Registrar of Lands* 2021 (2) CILR 1 had to deal with "puzzling documents" (paragraph 87) and at paragraph 86 summarised the "basic principles of contract interpretation" as follows:

"(a) The job of the court in working out what a document means is not to work out what either party itself thought it meant, but what a reasonable person would have understood the contracting parties to have meant by the language used.

(b) That reasonable person is taken to be someone who has all the background knowledge which would reasonably have been available to the parties in the

situation in which they were at the time of the contract. This exercise involves looking at the words used in the context of the contract overall, and bearing in mind any factual background. The exercise also involves looking at the result which rival interpretations yield, in terms of whether they make business sense.

(c) The essential question of construction (as *Preston & Newsom* note, *op. cit.*, para. 6-009, at 149-150) is the meaning that the instrument would convey to a reasonable person having all the background knowledge that would have been reasonably available to both parties in the situation in which they were at the time of the contract. This includes knowledge to be gained from the whole instrument and also such other background knowledge as the reasonable person would consider relevant, and it is good practice for a party to plead the extrinsic matters on which it relies."

32. Segal J at paragraph 108 stated:

"I must, and have sought to, base my decision on the words used by the parties in those documents, understood having regard to the terms of the instruments as a whole and the relevant background factual matrix."

33. The Court of Appeal (Sir John Goldring President, Sir Richard Field JA and Sir Jack Beatson JA) in a judgment delivered on 7 March 2023 allowed the appeal but did not criticise the legal principles of construction as outlined by Segal J. At paragraph 79 the Court of Appeal referred to "the natural and ordinary meaning of the words used in the clause construed against the background of the whole Agreement." At paragraph 80 there was reference to a construction which did "not accord with commercial common sense". On the issue of implication the Court of Appeal at paragraph 81 applied "the approach to the implication of terms authoritatively laid down in *M&S* and *Ali*, the Restrictive Agreement Term was not a term that the parties would have regarded as being too obvious to need to be expressed in the Agreement; nor was its implication necessary to give the Agreement business efficacy." The Court of Appeal at paragraph 83 cautioned against an interpretation of a clause which "conflicts with the ordinary and natural meaning of the clause."

Learn Capital

34. Parker J in *Learn Capital Venture Partners v NBRL Global* (FSD unreported judgment 29 June 2017) at paragraph 7 stated:

> "7. The critical question is to determine what "quorum" means within the articles. I accept that the articles have to be read as a whole and should be construed as a business document so as to give them business efficacy. The well-known recent decision of the UK Supreme Court in Arnold v Britton [2015] UKSC 36 makes it clear that (per Lord Neuberger) the test is that of a reasonable person in possession of the relevant facts. There is an even more recent decision of the UK Supreme Court in Wood v Capita Insurance Services Ltd [2017] UKSC 24 per Lord Hodge who said that (at paragraphs 10 and 12): "The court's task is to ascertain the objective meaning of the language in which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause, but the court must consider the contract as a whole and depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching the view as to that objective meaning … This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated.""

Kes Power

35. In a judgment delivered coincidentally on the day of the hearing of the present case (and which I duly brought to the attention of counsel) Segal J in *Kes Power Limited* (FSD unreported judgment 31 May 2024) dealt with construction of a shareholders agreement ("SHA") in the context of an argument on Section 95(2) and set out the relevant law by referring at paragraphs 32-34 to the judgment of Lord Clarke in *Rainy Sky* (at paragraphs [21]-[23] and [25]) and the judgment of Sir Geoffrey Vos in *Lamesa*. At paragraph 35 Segal J stated that the relevant wording "needs to be considered and interpreted in light of the natural and ordinary meaning of the language used; the other provisions of the SHA; the terms and wording in the Articles … and the overall commercial

purpose of the … wording in the context of the SHA as a whole and the Articles." Segal J, at paragraph 36, stated that he focused in that case on the purpose of the wording but did take "into account the evidence filed as to the relevant factual matrix (the facts and circumstances known or assumed by the parties at the time that the SHA was entered [in] to) but this has been limited and is contested" and the court was obviously not in a position at that interlocutory stage to resolve disputed issues of fact.

36. In *Kes Power* Segal J held that the relevant covenant in that case, properly interpreted, did not prohibit shareholders from presenting a winding up petition on the just and equitable ground.

37. These Cayman authorities make it reasonably clear that the law of the Cayman Islands, in respect of the construction of contracts and corporate documents such as subscription agreements, other shareholder agreements and articles of association, follows the law of England and Wales.

Necessity for clear and express language where rights and remedies are being abandoned

38. I am also conscious that clear and express language is required in order to reach the conclusion that a party intended to give up a valuable right or remedy. Tom Smith KC, on behalf of the Petitioner, referred to three authorities, namely (1) *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 (HL); (2) *Seadrill Management Services Ltd v OAO Gazprom* [2010] EWCA Civ 691 and (3) *Bahamas Oil Refining Company International Ltd v Owners of the Cape Bari* [2016] UKPC 20; [2016] 2 Lloyd's Rep 469 (JCPC).

Gilbert-Ash

39. *Gilbert-Ash* concerned a building contract. Lord Diplock at page 717, in a passage frequently quoted subsequently, stated:

> "It is, of course, open to parties to a contract for the sale of goods or for work and labour or for both to exclude by express agreement a remedy for its beach which would otherwise arise by operation of law … But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its beach arising by

operation of law, and clear express words must be used in order to rebut this presumption …"

Seadrill Management Services

40. *Seadrill Management Services* concerned a contract on the terms of the International Daywork Drilling Contract Offshore form. Moore-Bick LJ, sitting in the Court of Appeal of England and Wales, at paragraph [29] referred to Lord Diplock's dictum which he said was "essentially one of common sense; parties do not normally give up valuable rights without making it clear that they intend to do so."

Bahamas Oil Refining

41. *Bahamas Oil Refining* concerned whether the owner of Sea Berth no 10 at Freeport in Grand Bahamas had, by way of a contract, waived their right to limit their liability under the Convention on Limitation of Liability for Maritime Claims 1976. Lord Clarke (with whom Lord Neuberger, Lord Mance, Lord Sumption and Lord Toulson agreed) stated:

> "30. The question is essentially one of construction of that clause. There is no dispute as to the relevant principles. As it is put in BORCO's case, the object of construing a contract is to identify the parties' objective intention by reference to the language used, the factual background which was known or ought to have been known to both parties and the commercial purpose of the contract. As submitted on behalf of the owners, the overarching question is what is the meaning that the words of the agreement, especially clause 4, would convey to a reasonable person having the background knowledge which would reasonably have been available to the parties in the position they were in when the contract was made.
>
> 31. The principles which are principally relevant in a case of this kind are those which are applicable where it is alleged that the agreement excludes a legal right, including a legal right under a statute. The Board accepts the submission that, for a party to be held to have abandoned or contracted out of valuable rights arising by operation of law, the provision relied upon must make it clear that that is what was intended."

42. At paragraph 32 Lord Clarke stated that the "principle has been applied in very many contexts" and gave some examples including *Gilbert-Ash* and *Seadrill Management Services*.

43. Quentin Cregan, on behalf of the Fund, in support of an argument that the non-petition clauses in this case contain much more than a hint that the Petitioner is giving up a statutory right to present a winding up petition, also referred the court to paragraph 38 of Lord Clarke's judgment which read as follows:

> "38. It is noteworthy that, notwithstanding the provision in section 3(1) of the 1989 Act that the provisions of the 1976 Convention "shall have the force of law in The Bahamas", there is no reference in clause 4 or any other part of the Conditions of Use to any part of those provisions. In particular there is no reference to articles 1, 2.1 or 2.2 of the Convention. In the opinion of the Board, if the parties had intended to agree that the owners should not be entitled to exercise their right to limit their liability in accordance with article 1 they would have so provided. Construed in the way most favourable to BORCO, the property claims (including claims for an indemnity) which were to be "subject to limitation of liability" were those set out in article 2.1(a) and 2.2. Provided the claims were claims so defined, it appears to the Board that the owners were entitled to limit their liability under the Act. There is nothing in clause 4 which contains even a hint that the owners were agreeing to waive their right to limit their liability under the Convention."

The factual and corporate context

44. The factual and corporate context seems relatively straightforward. Put simply the relevant entities are interested in finance and the Petitioner is an investor in the Fund. The legal relationship between them is governed by various documents which I will consider when dealing with the documentary context. I also refer to some of the factual and corporate context when considering Mr Smith's arguments.

45. I note the contents of the Petition and the proposed amendments to it.

46. Insofar as it is relevant and appropriate to do so, I have regard to the uncontested evidence before the court in respect of the factual and corporate context. It appears common ground that the Petitioner and the Fund are two sophisticated commercial legal entities. The court certainly does not appear to be dealing with unsophisticated legal entities, naïve in the world of finance and investments. No-one has suggested that these two corporate entities entered into a corporate relationship together without their eyes wide open.

47. It is common ground that the Petitioner presently holds the following participating non-voting shares in the Fund referable to the TGT Capital Arbitrage Segregated Portfolio:

(1) 12.805187 Class B BTC shares;
(2) 265.610207 Class D USDC shares and
(3) 21,794.70279 FTX Special Investment Class shares

(paragraph 7 of the second affidavit of Casey McDonald).

The documentary context

48. I now turn to consider the documentary context.

The Agreement and the non-petition clause

49. The Petitioner subscribed for its Class B, Class C and Class D Participating Shares in the Fund by way of a subscription agreement dated 27 December 2021 (the "Agreement"). The Petitioner entered into a similar agreement on 29 June 2022 when it subscribed for Class E Participating Shares (the "Second Agreement"). The non-petition clause was identical in both agreements as were the other relevant provisions so I can focus, as counsel did at the hearing, mainly on the Agreement and do not need to duplicate reference to the Second Agreement. No separate subscription agreement was entered into when the Fund issued, apparently by way of conversion, the FTX Special Investment Class Shares to the Petitioner. I will refer to these shares in more detail later in this judgment.

50. The first paragraph of the Agreement provides that the Agreement "is being submitted by the undersigned (the "*Investor*") in connection with an offering (the "*Offering*") of non-voting, redeemable participating shares, $0.01 par value per share ("*Interests*") …". The undersigned is the Petitioner. The first paragraph goes on to state:

> "Pursuant to the Offering, the Investor desires to subscribe for Interests and become a shareholder of the Fund ("*Shareholder*") upon the terms and conditions set forth in this Agreement, the Confidential Memorandum of the Fund and the Segregated Portfolio Supplement for this Segregated Portfolio, as the same may be amended, restated and/or supplemented from time to time (together the "*Memorandum*"), the Memorandum and Articles of Association of the Fund, as the same may be amended from time to time (the "*Articles*" and, together with the Memorandum and this Agreement, the "*Fund Documents*") …".

51. Clause 1 is headed "Subscription" and at (a) the following words appear "Subject to the terms and conditions set forth herein, the Articles and the Memorandum, the Investor irrevocably subscribes for and agrees to purchase such number of Interests that may be purchased with the aggregate subscription amount set forth on the signature page hereto …". Clause 1 (d) refers to the "rights attaching to the Interests." Clause 2 (b) (i) refers to "the Fund will issue Interests to the Investor and the Investor shall become a "Shareholder" and 2 (b) (ii) adds "the Investor shall be subject to, and shall comply with, all of the provisions, terms and obligations set forth in the Articles, the Memorandum, and this Agreement."

52. Clause 17 provides:

> "17. Entire Agreement. This Agreement and the other Fund Documents (and any applicable side letters) constitute the entire arrangement and understanding between the Fund and the Investor regarding the subject matter thereof and supersede any prior or contemporaneous agreements, arrangements and understandings, written or oral, between the parties regarding the same."

53. We now come to the most relevant clause in respect of the issues presently before the court namely clause 21 the non-petition clause which provides as follows:

> "21. **Non-Petition**. The Investor agrees that it shall not, under any circumstances, (i) institute against the Fund or this Segregated Portfolio, or join or assist any other person in instituting against the fund or this Segregated Portfolio any bankruptcy, reorganizations, arrangement, insolvency, receivership or liquidation proceedings under any Cayman Islands law or similar law of any jurisdiction or (ii) apply for a receivership order under section 225 of the Companies Act (As Revised) of the Cayman Islands in respect of this Segregated Portfolio." ("Clause 21").

54. Clause 23 provides that the "Agreement shall be governed by and construed and enforced in accordance with the laws of the Cayman Islands, without regard to the conflicts of law principles thereof …" and the Investor agrees any proceedings in respect of the Agreement and the Fund may be brought in the courts of the Cayman Islands and the "Investor irrevocably submits to the non-exclusive jurisdiction of such courts …".

The Confidential Memorandum

55. Mr Smith and Mr Cregan both referred to what Mr Cregan described as the "Offering Memorandum" namely a document entitled the "Confidential Memorandum" dated 1 January 2022. That date is after the date of the Agreement but before the date of the Second Agreement. Justin Wright of the Petitioner in his first affidavit at paragraph 38 stated that on "around 14 and 17 December 2021" the Petitioner received a copy of the Confidential Memorandum which at paragraph 19 of his affidavit he had said was "dated 1 January 2022." I do not think anything turns on this especially as the Articles contain similar provisions. The Confidential Memorandum summarised the term "Special Investments" and stated that:

> "A Segregated Portfolio of the Fund may from time to time invest its assets in securities, financial instruments or other assets that, following the purchase of such assets, become illiquid or lack a readily ascertainable market. In this instance, the Board, following consultation with the Investment Manager, may (but is not required to), in its sole discretion, designate such securities, financial instruments or other assets (together with related hedges, financings or similar investments) as special investments (each, a "*Special Investment*"). Capital held as Special Investments generally is not available for redemption

> or dissolution until the Special Investment is liquidated or distributed, or until the Investment Manager determines (following consultation with the Board) that such investment need not be treated as a Special Investment anymore (such determination, a "deemed realization" of such Special Investment). The Investment Manager will use commercially reasonable efforts to quickly liquidate any Special Investments taking all relevant factors then available into consideration, acting always in accordance with the Investment Manager's fiduciary obligations."

56. Mr Cregan also directed the court to the detailed wording next to "Special Investment Interests". There is reference to "In the event an asset of a Segregated Portfolio of the Fund is deemed to be a Special Investment, the Fund will issue a new class of non-redeemable participating shares (any such class of shares, "*Special Investment Interests*"). Generally, promptly after a Special Investment is designated as such, a pro rata portion of the Interests held by each Investor (as defined herein) will be converted by way of redemption and reissue into Special Investment Interests with no requirement for notice to be served on such Investor, with a separate class being issued in respect of each Special Investment …".

57. Next to the word "Interests" the following appears, "Upon acceptance of a Subscription, the Fund will issue Interests in the desired class to an Investor. Interests will be issued in registered, book-entry form and will be designated by class."

58. Next to the word "Subscriptions" appears the following: "Each Segregated Portfolio of the Fund may accept subscriptions ("*Subscriptions*") for non-voting, participating shares, $0.01 par value per share, designated in one or more classes (collectively, the "*Interests*" and each an "*Interest*") from eligible shareholders (the "*Investors*" and each an "*Investor*") as part of an offering of the Interests …". Generally, "Investors who purchase Interests after a Segregated Portfolio designates a particular Special Investment are not entitled to receive any Special Investment Interests relating to such Special Investment or to participate in the gain, loss or income relating to such Special Investment Interests …".

59. It is also stated (in a passage much relied upon by Mr Cregan):

> "Generally, once a Special Investment is designated as such, it will be treated, for all practical purposes, as though it were being placed in a separate vehicle and any unrealized appreciation or depreciation attributable to it will not be allocated to the Interests of a Segregated Portfolio of the Fund (which instead will be segregated and represented by the Special Investment Interests) for purposes of the periodic determinations of, and adjustments to, the Net Asset Value of such Interests, except to the extent that such Special Investment is realized or deemed realized (in whole or in part), at which time the relevant Special Investment Interests will be converted (in whole or in part), by way of redemption and re-issue, to the original class of Interests from which they were originally converted. An Investor generally will not be permitted to redeem its Special Investment Interests."

60. I have also considered the provisions for "Closings; Subscription Procedures". Each Segregated Portfolio of the Fund may accept Subscriptions at closing and normally completed Subscription Documents (including a Subscription Agreement) with respect to any initial or additional Subscriptions for Interests generally must be received at least 3 business days prior to the requested Closing Date. To subscribe for Interests, each prospective Investor generally will be required to execute and return a completed Subscription Agreement. It is also provided that "An existing Investor may make an additional Subscription by completing, executing and returning to the Fund an Additional Subscription Form …".

The Redemption Confirmation

61. One of the cryptocurrency exchanges through which Tyr Capital Partners Sarl (the Manager) made trades for and on behalf of the Fund's segregated portfolios was FTX (which although not defined in the skeleton arguments was at paragraph 46 of the first affidavit of Justin Wright referred to as "FTX Trading Ltd (together with its affiliates, "FTX")" and defined as such at paragraph 35 of the Petition). In November 2022 FTX entered into Chapter 11 bankruptcy in the United States. The Fund says that the assets on FTX became a claim of the Fund and given the illiquidity of the claim and its initial uncertainty of value, in November 2022 the Fund's board decided to exercise the Fund's powers to issue non-redeemable FTX Special Investment Shares. Casey McDonald, a director of the Fund, in his affidavit sworn on 23 February 2024 at paragraph 49.1 referred to the board resolving to establish a separate non-redeemable class of shares called the "FTX Special Investment Class Shares" and added:

"Such a process is known as "side-pocketing" of illiquid or distressed assets, such that the assets can be sold as and when possible or when their value improves, without the risk of shareholders submitting redemption requests that could not be met in the interim and thereby causing a distress situation."

62. There is in evidence a document entitled "Redemption Confirmation" and dated 23 December 2022 (the "Redemption Confirmation") pursuant to which the Fund confirms that on 30 November 2022 the Fund redeemed 20,021.77538600 with redemption amount USD 13,898,231.15 in respect of "Class D USDC Non-voting, participating shares of $0.01 par value." On the penultimate line are the words "Conversion of shares to FTX Special Investment Class Shares".

The Subscription Confirmation

63. In the evidence there is also a document entitled "Subscription Confirmation" and dated 23 December 2022 (the "Subscription Confirmation") pursuant to which the Fund confirm that the Fund has issued 2,272.9554300 "Non-voting, non-redeemable participating shares of $0.01 par value (FTX Special Investment Class)" and the subscription amount is specified as USD 2,272,955.43. On the penultimate line are again the words "Conversion of shares to FTX Special Investment Class Shares."

The Articles

64. Article 15 of the Articles of the Fund is headed "Compulsory Redemption" and Article 15.1 provides that the directors may cause the Fund to "redeem any or all of the Participating Shares held by any person at the appropriate Redemption Price" in certain circumstances.

65. Article 16 is an important article, in the present context, and provides as follows:

"16 Special Investments

The Directors may, in their discretion, designate certain of the Company's investments which are deemed by the Directors or the Investment Manager to be illiquid or lack a readily ascertainable market as "Special Investments". Once so

designated, Special Investments shall be represented by a separate Class and/or Series of Participating Shares which, unless otherwise determined by the Directors, shall be allotted only to those Members who are holders of Participating Shares at the time of such designation. The gains and losses attributable to Special Investments shall be segregated and separately calculated and attributed amongst Members holding Shares of the relevant Class or Series in such manner as is consistent with the relevant provisions of the Offering Memorandum or the applicable Portfolio Supplement. Participating Shares of any such separate Class and/or Series may be issued by way of bonus or by way of conversion or exchange of all or part of a Member's holding of Participating Shares of another Class and/or Series. Similarly, Shares of a Special Investment Class and/or Series may be converted or exchanged back into Participating Shares of the original Class and/or Series upon the Directors making a determination that the relevant investment no longer qualifies as a Special Investment. The power to convert or exchange Participating Shares of one Class and/or Series into Participating Shares of another Class and/or Series may be effected by the Directors in any manner permitted by the Statute and the Articles, including the compulsory redemption of Participating Shares of one Class and/or Series and the application of the proceeds of redemption in subscribing for Participating Shares of the other Class and/or Series or by redesignating a portion of the Participating Shares of any existing Class and/or Series as thereafter belonging to a new Class and/or Series. Shares of a Class or Series of Shares which represent Special Investments shall not, unless the Directors otherwise determine, be redeemable at the option of the Members holding such Participating Shares. Where investments are classified as Special Investments and Participating Shares of a separate Class and/or Series are issued by way of a bonus, the requirement of these Articles to ensure proper value is transferred to the Separate Account of the Participating Shares of the original Class and/or Series to which such investments were originally allocated shall not apply."

Determination

66. I now turn to my determination of the various issues arising.

The primary construction issue

67. I deal first of all with the primary construction issue before turning to the Petitioner's secondary arguments.

68. I have regard to the natural and ordinary meaning of the words used in Clause 21 and construe them against the whole Agreement and its background. I consider the relevant corporate context.

69. Furthermore, it is common ground that express and clear words are necessary if the statutory right to present a winding up petition is to be removed. I also have regard to the purpose of clause 21. In my judgment its clear purpose was to prevent the Petitioner, an investor in the Fund, from instituting against the Fund any liquidation proceedings.

70. I have considered all that Mr Smith has had to write and say about the context of Clause 21 and arguments as to commercial sense. I have not found this primary construction issue an easy one to resolve. I do not however think it permissible for this court to go against the unambiguous, clear and express wording of the non-petition clause in the Agreement. It was plainly professionally drafted and was agreed between sophisticated legal entities. In such circumstances the non-petition clause should be interpreted principally by way of textual analysis. The language is clear. The court would not be justified in departing from the natural and ordinary meaning of the words used. The interpretation pressed upon me by Mr Cregan does not produce a corporate absurdity. It does not offend commercial sense. The express and unambiguous language leads to only one meaning. I have concluded that there are not two possible reasonable constructions. Mr Cregan is right when, with refreshing and engaging simplicity, he says that Clause 21 does exactly what it says on the tin. It is a "Non-petition" clause. The Petitioner is restrained "under any circumstances" from instituting against the Fund any liquidation proceedings under any Cayman Islands law. I do not think that such submission is too simplistic or ignores the context.

71. In my judgment looking at the natural and ordinary meaning of the words in Clause 21 and taking into account the Agreement as a whole, the context and the relevant background, it is clear on the face of the clause that the Petitioner is contractually bound not to present a winding up petition against the Fund. A winding up petition presented pursuant to the Companies Act (2023 Revision) falls squarely within the wording used in Clause 21 "liquidation proceedings under any Cayman

Islands Law". Clause 21 is headed in bold "Non-Petition". It could not be any clearer. The word "Investor" is defined as the "undersigned". The "undersigned" is the Petitioner. The restriction is not limited to the type of shares held by the Petitioner. The agreement in respect of the non-petition clause and the fact that it covers redeemable and non-redeemable shares does not mean that it is commercially absurd. The Petitioner, as an investor, entered into a non-petition clause with the Fund and it is contractually bound not to present a winding-up petition against the Fund. It really is as simple as that.

72. I have to say that at times (and I mean this as a compliment rather than a criticism) I think that if Tom Smith KC started off a submission with the words "It's a giraffe" he could conceivably cause a judge to doubt whether the elephant physically present in the court room was really an elephant. In my judgment, however, having had time to reflect upon the written and oral submissions presented to the court in this case, Clause 21 is indeed a non-petition clause and the Petition falls to be dismissed pursuant to Section 95(2) as the Petitioner is contractually bound not to present it.

The construction arguments

73. Faced with the clear wording of Clause 21, Mr Smith had to resort to somewhat complicated and tortuous construction arguments although they were, as always, presented with great eloquence and actively engaged the audience to which they were directed. I turn now to consider his main arguments. The first one I refer to was mercifully clear, simple, straightforward and instantly easy to understand. I had no hesitation in accepting the principle of it but differ from Mr Smith in its application to this case.

The statutory right argument

74. The Petitioner as a contributory has, subjection to Section 95(2), a statutory right to present a winding up petition to the Grand Court under section 94(1)(c) of the Companies Act (2023 Revision). As Martin JA said in *Tianrui (International) Holding Company Limited v China Shanshui Cement Group Limited* 2019 (1) CILR 481 at paragraph 47:

> "The right to petition for a just and equitable winding up is a remedy available as a right by statute."

75. Lord Hodge in *FamilyMart China Holdings Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* [2023] UKPC 33 at paragraph 89 stated "In invoking the jurisdiction of the Court on the just and equitable ground FMCH is seeking a statutory remedy of an equitable nature: *In re Westbourne Galleries Ltd; Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379 per Lord Wilberforce; *Lau v Chu*, para 64 per Lord Briggs …"

76. Section 95(2) however directs the court to dismiss a winding up petition if it is contrary to an agreement not to present a winding up petition against a company.

77. I agree that *Gilbert-Ash*, *Seadrill Management Services*, and *Bahamas Oil Refining Company* all teach us that the courts should look for express and clear wording in cases where it is averred that a party has agreed to waive or abandon any of its legal rights or remedies and the starting point must be a presumption that a party should not normally be treated as having intended to abandon its rights and/or remedies in the absence of express and clear wording. In other words, parties do not normally give up valuable rights or remedies without making it crystal clear that they intend to do so. As Segal J stated in *Kes Power* at paragraph 47 "a covenant covering a winding up petition on the just and equitable ground would need to be clearly and explicitly expressed. The Court should only take away the important statutory right if clear words are used …"

78. Mr Smith says that the principles outlined in *Gilbert-Ash* and subsequently applied on numerous occasions apply equally to the present case as to the question of whether the parties intended that the non-petition clause would apply to all shares subsequently held or acquired by the relevant investor by whatever means. His argument continued to the effect that unless it could be said that it was clear that this was the intention, then the point must be resolved against the Fund, and the Petitioner left with its right to present a petition for the winding up of the Fund.

79. I agree with Mr Smith that a party should not be taken to have given up rights or remedies without express and clear wording. In my judgment, however, Clause 21 does provide express and clear wording. On its proper construction the Petitioner has indeed given up its statutory right to present a winding up petition against the Fund and this restriction is not based on the type of shares held by the investor.

80. Such construction is not inconsistent with or rendered inappropriate by a consideration of the Agreement as a whole, the Articles, the Confidential Memorandum, the corporate structure, or the factual and corporate matrix.

The argument based on the wording in the Agreement

81. Mr Smith submitted that (1) the opening words and clauses 1(a) and (d) of the Agreement made it expressly clear that its terms only apply to the particular shares being subscribed for by the investor under the Agreement (defined in the Agreement as "Interests"); (2) read in context, the non-petition clause is clearly referrable to the subscription of those Interests which are the subject of the subscription; (3) it cannot be taken out of context and applied more generally to all shares which happen to be held from time to time by the investor, whether or not they were the subject of the subscription agreement in question; and (4) Clause 21 expressly refers and applies to the "Investor" and this, he adds, clearly means the relevant person in its capacity as the subscriber for the Interests which are the subject of the subscription provided for by the Agreement. I do not accept these submissions. The Agreement simply defines the Investor as the "undersigned", namely the Petitioner. Nowhere is it stated that Clause 21 is limited to the Investor in its capacity as the holder of the Interests. Clause 21 is not limited only to those Interests. As Mr Cregan also pointed out, the word "Interests" does not appear in Clause 21.

82. If it was intended by the parties that Clause 21 was only applicable to the Petitioner's standing as a holder of the Interests (as submitted by Mr Smith) it would have been easy for them to expressly say so, but they did not. They kept Clause 21 in broad and general terms. An investor in the Fund, whatever the class of shares held by it, was subjected to a non-petition clause. Under clause 2(b)(ii) of the Agreement the Petitioner expressly acknowledged and agreed that it was subject to and would comply with all of the provisions, terms, and obligations, of the Agreement including Clause 21.

83. At times Mr Smith's arguments seemed to inappropriately conflate or at least confuse the precise nature of the Petitioner's standing to present a winding-up petition as a contributory and the Petitioner's personal contractual obligation not to present a winding-up petition. Clause 21 prohibits the Petitioner from presenting a winding-up petition, full stop. It is not dependent on what type of shares the Petitioner holds. Moreover, the Articles expressly contemplate the issue of Special Investment Shares. The Petitioner signed up to Clause 21 with the knowledge of the

possibility under the Articles that non-redeemable Special Investment shares could in the future be issued to the Petitioner. The Petitioner in its capacity as an investor in the Fund is bound by the non-petition clause.

Different agreements for different shares argument

84. As an extension of his primary construction argument based on the wording of the Agreement, Mr Smith further stressed that each subscription for shares made by an investor in the Fund would be the subject of its own subscription agreement, the terms of which might differ. He said that the matter could be tested in this way: if an investor subscribed for some shares under a subscription agreement which contained a non-petition clause, but later subscribed for more shares under a further subscription agreement which did not contain such a clause, it could hardly be suggested that the non-petition clause in the earlier agreement would apply to prevent the investor from presenting a winding-up petition based on the shares acquired later under the further agreement, but the logic of the Fund's argument is that the investor would be so barred. I think that example misses the point. In the present case the Petitioner as an investor signed up to the Agreement which incorporated reference to the Articles. Article 16 made provision for the Fund to issue non-redeemable Special Investments Shares. Existing shares of a certain class are in effect converted to Special Investment Class Shares and may be converted back. If prior to the issue of the Special Investment Shares the Petitioner and the Fund had expressly agreed that Clause 21 would not apply to such shares then that would have been a different matter but they did not do so in this case. I am not persuaded by Mr Smith's arguments in respect of the different classes of shares being governed by different agreements and the non-petition clause only being applicable to certain classes of shares and not others. I appreciate that provisions in respect of the subscription and issue of shares are contained in the Articles and I have full regard to them but in construing Clause 21 in the Agreement it is not permissible for this court to have regard to the subsequent Second Agreement. This would offend a primary rule of contractual construction namely that the court may only have regard to the circumstances before and at the time of the contract and not as Lord Hodge powerfully reiterated in *National Commercial Bank Jamaica* at paragraph 32: "… events and the actions of the parties after the conclusion of the contract are not relevant to its interpretation …". I do however have regard to the Second Agreement in its own right and note that it contains a similar non-petition clause but for present purposes it suffices to focus on Clause 21 of the Agreement.

85. Leaving aside any issues as to the variation of class rights, it appears that the Class D (redeemable) Shares were redesignated or rather converted to FTX Special Investment Class Shares (non-redeemable). I have already quoted the wording on the Redemption Confirmation and the Subscription Confirmation namely "Conversion of shares to FTX Special Investment Class Shares."

86. Article 15 of the Articles provides for compulsory redemption and Article 16 of the Articles provides for special investments. Under Article 16 the directors may designate certain of the Company's investments as "Special Investments" and such shall be represented by a separate class and/or series of participating shares which shall be allotted to members at the time of such designation. The shares may be issued "by way of conversion" and "may be converted … back into Participating Shares of the original Class and/or Series" by way of a determination by the directors. Article 16 also highlights that the shares which represent Special Investment shall not, unless the directors otherwise determine, be redeemable at the option of the members. The Petitioner has via the Agreement also in effect "signed up" to the Articles.

87. Even if it is right, in the context of construing Clause 21, to consider the type of shareholding which gives the Petitioner standing, in light of the Articles it makes sense to me that the non-petition clause in the Agreement applies not only to the Interests referred to in that Agreement but also to any redesignation or conversion of such Interests into Special Investments represented by, in this case, the FTX Special Investment Class Shares.

88. Mr Smith stressed that the starting point was to understand the Fund's constitutional documents and how subscriptions actually worked in practice. In practice, in relation to each and every subscription the investor would enter into a fresh subscription agreement with the Fund in respect of the shares the investor was subscribing for. Mr Smith referred to the Confidential Memorandum and the section entitled "Closings; Subscription Procedures". Each time a subscription is made it is made under a separate set of documents which may or may not be the same. Mr Smith submitted that if Mr Cregan was right in his construction of Clause 21 you would only need one subscription agreement at the outset to cover all shares you subsequently subscribe for but that it is not what happened in this case. Conceptually the arrangements only work on the basis that each subscription is governed by its own subscription agreement. Mr Smith submitted, that in such circumstances, the argument that the original subscription agreement applies to all subsequent subscriptions simply

does not work. In respect of the FTX Special Investment Class Shares there was no specific subscription agreement and no non-petition clause. For the reasons stated in this judgment, I think Mr Cregan's argument that Clause 21 of the Agreement applies to the Petitioner and it is bound by such clause no matter what shareholding it uses to give it standing to present a winding up petition, does indeed "work". In my judgment the Petitioner is bound by Clause 21 and it is not restricted only to the Petitioner's standing insofar as such standing is referrable to the Interests as defined in the Agreement. The Petitioner is bound by Clause 21 irrespective of the shareholding it uses to establish its standing.

89. I do not think that Mr Smith's teasing and thought-provoking rhetorical question to the effect "why have the second subscription agreement with a non-petition clause, if the Agreement covered all shares ever held in the name of the Petitioner" takes the matter any further. The Second Agreement covered a lot more than simply the non-petition clause. Moreover I cannot take the Second Agreement into account when construing Clause 21 of the Agreement, as it post dates the Agreement.

No commercial sense argument

90. Mr Smith submitted the Fund's argument that the non-petition clause applies generally to all shares held by the relevant investor no matter how they were acquired makes no commercial sense as the Class A-D Participating Shares were redeemable under the Articles (so the Investor would be able to exit the Fund by redeeming its shares pursuant to Article 13) but the Special Investment Shares are not redeemable. Mr Smith submitted that no reasonable investor would agree to not being able to redeem or petition for winding up. A number of points arise in respect of this submission.

91. Firstly, as the authorities make clear where the iterative process of interpretation produces a clear answer the court must be very wary of assuming that it knows what is or is not commercially sensible. The parties in this case chose clear language in Clause 21 and can be reasonably assumed to have understood the commercial context of their agreement and to have intended the result which the plain wording indicates. Where the plain language points to one obvious construction the court should be very cautious in dealing with submissions that sophisticated commercial entities would have regarded the commercial consequences as anything other than would flow from the plain words used.

92. Secondly, it is stretching it too far to say that it makes no commercial sense for an investor to invest in non-redeemable shares and also agree to a non-petition clause. There could be many commercial reasons as to why an investor would sign up to such a clause in respect of non-redeemable shares. At the risk of providing evidence to make good Lord Neuberger's comment to the effect that judges are not always the most commercially minded, let alone the most commercially experienced and they are not good arbiters of commercial reasonableness (para [22] of *Skanska Rashleigh*) let me try and give just one simple example. At the most simplistic level of the thought processes of investors, investors may think they will receive excellent returns and are willing to take a risk and agree to such terms to secure their investment even if exit routes would be blocked if and when trouble arose. Even with non-redeemable shares there is hope of returns. See also Article 16 in respect of reconversion. I should not however speculate on the potential commercial motivations of investors. Suffice to say, on the evidence and arguments presented to the court, I am simply not persuaded that to construe Clause 21 as restricting the Petitioner as a holder of redeemable and non-redeemable shares from presenting a winding up petition would amount to a commercial absurdity or make no commercial sense.

93. Thirdly, I accept that "commercial sense" may also be relevant where there are two possible constructions and the court is then entitled to prefer the construction which is more consistent with business common sense and reject the other. We are however not in that territory either. In my mind there is only one reasonable construction to Clause 21.

94. Fourthly, the Petitioner in this case has signed up to Clause 21 (which has plainly been professionally and formally drafted) and its meaning is plain on its face. It is not for the court to relieve the Petitioner from what it may now, with hindsight, think was a bad or "uncommercial" bargain. It is not for the court to introduce terms that make the bargain fairer or more reasonable or more "commercial". The court cannot rewrite the language which the parties have used in order to make the contract conform to what one party may regard, with hindsight, as business common sense. This court cannot add to Clause 21 wording to the effect that "this clause does not prevent the Investor from presenting a winding up petition in its capacity as the holder of shares other than the Interests."

95. Fifthly, the Petitioner must be taken to be aware of the Articles including Article 16 which provided for the issue of Special Investment non-redeemable shares by way of conversion.

96. Sixthly, I also take account of Mr Cregan's submissions that the Petitioner is not without a remedy. Mr Cregan refers to possible claims in contract and tort and seeking leave to pursue a derivative action on behalf of the Fund. Moreover there is reference to the complaint against the Manager in proceedings in Switzerland. Justin Wright of the Petitioner at paragraph 54 of his first affidavit says that the Petitioner instructed "lawyers to pursue available legal avenues in order to bring to light the suspected wrongdoing and seek recovery of losses, primarily by way of the Swiss Criminal Proceedings …". Mr Smith does not regard claims in tort, contract, derivation actions or the claims in Switzerland as providing effective remedies. I am not, however, for the reasons stated in this judgment persuaded by Mr Smith's "no commercial sense" arguments.

97. Furthermore, I do not think there is any legitimate room to imply or read words into Clause 21 to the effect that the clause only restricts the Petitioner in presenting a winding up petition in its capacity as holder of the shares it subscribed to pursuant to the Agreement. Mr Smith did not seek to argue that there should be a term implied into Clause 21 to the effect that it only applied to the standing of the Petitioner to institute liquidation proceedings obtained by virtue of the shares issued pursuant to the Agreement. That speaks for itself. It was not obvious nor was it required to give business efficacy to the Agreement. It is not a commercial nonsense for a party to agree that as an investor in a company it will not present a winding up petition even where certain or indeed all of its shares are non-redeemable.

98. The Petitioner has expressly and clearly abandoned its statutory right to present a winding up petition against the Fund. Whether it was wise to do so is not a factor that should influence this court in arriving at a proper construction of Clause 21. The Petitioner has agreed that it shall not "under any circumstances" institute against the Fund any liquidation proceedings under any Cayman laws. Presenting a winding up petition pursuant to the Companies Act offends Clause 21. Section 95(2) mandates this court to dismiss the Petition, as the Petitioner is contractually bound not to present it. I must therefore, subject to consideration and determination of two secondary arguments presented on behalf of the Petitioner, dismiss the Petition.

Summary on construction arguments

99. Initially I felt that there may have been some force in Mr Smith's well presented argument to the effect that the non-petition clause in the Agreement was limited to restricting the Petitioner from presenting a winding up petition in the capacity as a shareholder of the Interests as defined in the Agreement. Mr Smith emphasised that in respect of other shares subsequently acquired by subscription by the Petitioner there was a further subscription agreement (the Second Agreement) which also contained a non-petition clause but in respect of the FTX Special Investment Class Shares these shares were simply issued to the Petitioner without subscription and the terms of their issue did not include a non-petition clause and this made commercial sense because they were non-redeemable and no reasonable person of commerce would sign up to a non-petition clause in respect of non-redeemable shares otherwise there would be no exit route. These submissions appeared superficially attractive. Time and time again, however, when struggling to get my head around these eloquently presented submissions and the proper construction of Clause 21, I kept returning to the plain and clear wording of the non-petition clause. I did not do so in a blinkered, narrow way ignoring the well-established principles of contractual construction. I did so considering the wording of Clause 21 and the relevant factual, corporate and documentary context prior to and on the day of the execution of the Agreement. In Clause 21 the Investor is not defined as the holder of a particular class of shares or indeed the shares subscribed for under the Agreement. Investor is defined in the Agreement simply as "the undersigned". The undersigned is the Petitioner, plain and simple. It is not the Petitioner in its capacity as the holder of the Interests as defined in the Agreement. The Petitioner has agreed not to institute against the Fund "under any circumstances, liquidation proceedings under any Cayman Islands law". At the risk of yet further repetition, the plain wording of Clause 21 is crystal clear.

100. Despite the eloquence with which all these arguments, and others, were presented to the court by Mr Smith I found them unpersuasive for the reasons stated in this judgment. Moreover, despite Mr Smith's references to the importance of the wishes of the sole holder of the Participating Shares in a solvent Fund and the general justice of this case and the need for the Fund to be wound up and placed under the control of independent liquidators rather than left in the hands of present management including the Fund's independent committee, it was my judicial task to construe Clause 21 in light of the well established principles of construction, and that is what I have sought to do in this judgment.

The Petitioner's secondary arguments

101. Having decided the primary construction issue against the Petitioner, I now turn to the two secondary arguments advanced by Mr Smith on behalf of the Petitioner.

102. Mr Smith relied on two further, at first glimpse, superficially ingenious arguments which on closer inspection simply do not amount to a row of beans. Not even the considerable intelligence, ingenuity and eloquence of Mr Smith can, on this occasion, turn a sow's ear into a silk purse.

The just and equitable secondary argument

103. Firstly, he says that even if the construction point is decided against him there remains the separate question of whether it is a proper exercise of the powers of the directors of the Fund to cause it to rely on the non-petition clause in the circumstances of this case. In this respect he heavily relies, by way of a somewhat strained analogy, on *Re Aquapoint LP* (CICA unreported judgment 4 October 2023) a case which arose in a very different context. Mr Smith in effect says that in *Aquapoint* if the court can disregard an entire agreement clause it can, in dealing with just and equitable winding up petitions, disregard a non-petition clause as when considering the just and equitable provision the court may relieve a party from his bargain in such cases. To accept such a bold argument would be to fly in the face of and run a coach and horses through the express provisions of Section 95(2) and I have no intention of doing that. As interesting as Mr Smith's imaginative arguments are on this point I am unable to accept them. Non-petition clauses have been given express statutory recognition in Section 95(2). They are not against public policy (*Rhone Holdings*) and ambitious arguments that their effectiveness can be questioned by the court at a hearing in the context of just and equitable considerations are, put simply, quite hopeless. They are bound to fail. Section 95(2) mandates a court to dismiss a petition where a petitioner is contractually bound not to present a petition. It does not enable a court to hear a winding up petition and consider whether it is proper for the company to rely on a non-petition clause under the court's just and equitable jurisdiction. It is also interesting to note Lord Hodge's comment in *FamilyMart* at paragraph 89 in respect of the just and equitable ground: "… in the Board's view, in the exercise of this equitable jurisdiction the court must have regard to a party's contractual obligations …". Clause 21 puts a clear contractual obligation upon the Petitioner.

The alternative relief secondary argument

104. Secondly, Mr Smith, in another hopeless submission that is bound to fail, says that the other relief claimed under section 95(3) of the Companies Act (2023 Revision) does not include the making of a winding up order and such other relief does not fall within the scope of the non-petition clause. Mr Smith adds that the alternative relief itself does not amount to the commencement of any kind of insolvency or liquidation proceeding as referred to in the non-petition clause. In Mr Smith's favour is that he had the good grace to describe this argument as "very much a fall back" argument.

105. This quite hopeless argument continues along the lines of putting forward the submission that there is no reason why the court should not grant alternative relief on a winding up petition even where the Petitioner is contractually barred from seeking the remedy of winding up. There is in fact a very good reason to the contrary. The only way in which the Petitioner can seek the alternative relief in section 95(3) is by presenting an application by way of petition under section 94(1) for the winding up of the Fund. The presentation of a winding up petition under the Companies Act of the Cayman Islands would fall foul of the prohibition in Clause 21 in respect of "liquidation proceedings under any Cayman Islands law." There is no separate stand-alone petition that can be presented simply for section 95(3) relief. This as a matter of Cayman law, is crystal clear.

106. If anything further is required to support the conclusion that Mr Smith's alternative argument in respect of section 95(3) relief is of no merit, one only has to turn to the well-known passage in *Tianrui (International) Holding Company Limited v China Shanshui Cement Group Limited* 2019 (1) CILR 481 where Martin JA, delivering the judgment of the Court of Appeal, at paragraph 14 stated:

> "14 As this court has pointed out on a number of previous occasions, s.95(3) is not a direct equivalent of what is now s.994 of the UK Companies Act 2006 (formerly s.459 of the Companies Act 1985). The latter section gives a separate remedy by petition to a member of a company who complains of unfairly prejudicial conduct of the company's affairs. The petition is not a winding-up petition, and is not based on the contention that it would be just and equitable to wind up the company. In the Cayman Islands, however, the only mechanism for complaining of unfairly prejudicial conduct of a company's affairs is a winding-up petition presented on the just and equitable ground. Such a petition is the sole gateway to obtaining the alternative relief set out in s.95(3). The position was stated as follows by Chadwick, P. in *Asia Pacific Ltd. v. ARC Capital LLC (2)* (2015 (1) CILR 299, at paras. 38–39): …"

107. Further support, at the highest level, can be obtained from Lord Hodge's comments in *FamilyMart* where at paragraph 15 the Deputy President referred to section 95(3) of the Companies Act of the Cayman Islands and added:

> "As is well known, the Cayman Islands has not provided in its company law for a self-standing petition (separate from a winding up petition) by a member of a company for a remedy where the affairs of the company are being or have been conducted in a matter that is unfairly prejudicial to the interests of members."

108. Lord Hodge in *FamilyMart* at paragraph 19 referred to Moses JA "holding that under section 92 of the Companies Act the court's consideration of whether it is just and equitable that a company should be wound up is a threshold question and not a question of relief. Section 92 was the sole gateway to obtaining alternative relief under section 95(3) …"

109. If yet any further reinforcement of a summary dismissal of this secondary argument presented by Mr Smith is required it can be found at paragraph 56 of Mangatal J's judgment in *Rhone Holdings* (29 September 2015).

110. The Petitioner is contractually bound not to present a winding up petition against the Fund. The only way in which it can legitimately seek the section 95(3) alternative relief is by presenting a winding up petition which it is contractually bound not to do. I do not think I should waste any more words on this hopeless secondary "very much a fall back" argument. This court has no alternative but to do what Section 95(2) mandates it to do. I dismiss the Petition.

Leave to amend

111. As I have dismissed the Petition the application for leave to amend it falls away. Formally I dismiss it.

Order

112. Counsel should within the next 7 days of the delivery of this judgment provide a draft Order reflecting the determinations contained in this judgment, for my approval.

Ancillary applications

113. Any ancillary applications (such as applications for costs) should be filed and served together with concise (no more than 5 pages) written submissions in support within 14 days and any concise (no more than 5 pages) in opposition to be filed and served within 14 days thereafter. I am minded to deal with any ancillary applications on the papers without the need for another hearing.

114. I am most grateful to counsel for their continuing assistance to the court.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT