



JUDGMENT

Culross Global SPC Limited v Strategic Turnaround Master Partnership Limited

From the Court of Appeal of the Cayman Islands

before

**Lady Hale
Lord Brown
Lord Mance
Sir John Dyson SCJ
Sir David Keene**

**JUDGMENT DELIVERED BY
Lord Mance
ON**

13 December 2010

Heard on 3 November 2010

Appellant
Michael Todd QC
Ross McDonough
(Instructed by Alan Taylor
and Co)

Respondent
Anthony Akiwumi

(Instructed by Janes
Solicitors)

LORD MANCE

Introduction

1. This appeal arises from the Respondent's application to strike out as an abuse of the process a petition to wind up the Respondent, Strategic Turnaround Master Partnership Ltd., issued by the Appellant, Culross Global SPC Ltd., on 10 June 2008. Whether the petition was an abuse of the process depends upon whether, at the date of its issue, the Appellant was a current creditor, with standing to issue it, or at best only a prospective creditor, in which case it would have no such standing. The courts below did not accede to the Respondent's application but the Court of Appeal (in disagreement with the Grand Court) limited the basis upon which the petition could proceed in a way with which the Appellant takes issue. Hence, this appeal.

2. The Respondent is incorporated under the Companies Law and regulated as a mutual fund under the Mutual Funds Law. As such, it was only permitted to offer its facilities to those investing at least US\$50,000, and for this purpose, it issued a Confidential Explanatory Memorandum ("CEM") dated May 2006. The monies which it received from investments were in turn largely invested in Strategic Turnaround Equity Partners, L.P. (Cayman) ("the Master Fund"). A Delaware company, Strategic Turnaround Equity Partners, L.P. (Delaware) ("the Onshore feeder") also invested in the Master Fund. The Master Fund itself invested primarily in the US micro-cap turnaround sector.

3. The Appellant subscribed for shares in the Respondent between November 2006 and May 2007 for a total price of US\$1.84 million. On 31 October 2007, it gave notice to redeem all these shares. A redemption date of 31 March 2008 was subsequently agreed (with the Respondent waiving any early redemption fees). On 11 April 2008 the Respondent's administrator, Citi Hedge Fund Services (Cayman) Ltd. ("Citi") confirmed to the Appellant's custodian's nominee, Banco Nominees (Isle of Man) Ltd. ("Banco") that "full redemptions are approved for March 31 2008" and that "90% of the redemption proceeds will be paid within 30 days", with "balance to follow upon completion of the annual audit".

4. On 17 April 2008 the Respondent's board resolved to suspend all redemptions, having regard to the "extremely volatile and illiquid" state of the US micro-cap turnaround sector; and on 22 April 2008 the board further and more formally resolved that:

“1. It is in the best interests of the Company and all shareholders in the Company that, in accordance with the Articles the calculation of the Net Asset Value of Shares be suspended (“the Suspension”);

2. No Shares in the Company be redeemed nor new shares issued until such time as the Directors have lifted the Suspension;

3. All notices of redemption received by the Company be suspended until such time as the Directors have lifted the Suspension, although the Directors note that the relevant redeeming shareholders may revoke his [sic] notice of redemption during the period of Suspension.”

5. Recital 4 to this resolution noted that “the articles of association permit the Directors, from time to time and for any reason, to declare a suspension of the determination of the Net Asset Value of Shares and the issue and redemption of shares....”. This was a reference to articles 55-56, to be read with article 32, to which the concluding part of resolution 3 above was referring. Recitals 6 and 7 noted that the Directors believed that the Master Fund’s portfolio values were temporarily depressed and at a level at which liquidating positions “will negatively impact all investor’s interests in the Company”, and that “this situation has evolved since several of the Company’s shareholders representing approximately 27.5% of the Company’s shareholders, as well as several of the limited partners in the Onshore Feeder, concerned by current U.S. market conditions, have given notice to redeem”.

6. On 30 April 2008 the Net Asset Value (“NAV”) of the Respondent as at 31 March 2008 was determined, and on 14 May 2008 Citi, as the Respondent’s administrator, notified the Appellant that the NAV applicable to its shares as at 31 March 2008 was US\$980,508.97. The Respondent’s failure to pay any part of this sum led to the Appellant’s issue on 10 June 2008 of its petition to wind up the Respondent.

7. By its judgment delivered on 12 December 2008, the Court of Appeal held that, on the true construction of the Respondent’s articles and the CEM dated May 2006, “the Company had power to suspend the payment of redemption proceeds after the Redemption Date but before payment of those proceeds”. It followed that, if the power was properly and validly exercised, the Appellant was, at the date of issue of the petition, at best only a prospective creditor. The principal issue on this appeal relates to the correctness of these conclusions. However, the Court of Appeal refused to strike out the petition pending determination of an issue as to whether the power had been properly or validly exercised, permitting its

amendment to seek to wind the Respondent up on the ground that winding up was just and equitable.

The legal and contractual framework

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

9. Article 1 contains definitions, including:

“**Net Asset Value**” means the amount determined pursuant to these Articles as being the net asset value of the Company;”

“**Period of Suspension**” means any period of suspension or limitation of, if any, the issue or redemption of Shares, the determination of Net Asset Value, the determination of Net Asset Value per Share, the determination of the value of a Class Account as determined in accordance with these Articles;”

“**Redemption Date**” means generally the last Business Day of each calendar quarter or such other day as may be determined from time to time by the Board of directors in its discretion;”

“**Redemption Price**” means the price at which Shares shall be redeemed as calculated in accordance with these Articles;”

“**Valuation Date**” means the Business Day or Business Days determined from time to time by the Directors to be the day or

days on which the Net Asset Value per Ordinary Share is calculated;”

10. Subsequent articles provided as follows:

“ISSUE OF SHARES

17. Subject to these Articles, Shares shall be issued on the terms referred to in the [CEM], unless otherwise determined by the Directors.

18. Subject to these Articles, and upon receipt of an application the Directors may allot, issue, grant options over and otherwise dispose of any of the Shares on any Subscription Day

....

20. Any issue of Shares made after the initial offer period shall be generally as of the Subscription Day at a price equal to the Net Asset Value per Share of the Class referable to such Share as determined on the Valuation Date and in accordance with the [CEM] and these Articles.

....

REDEMPTION OF SHARES

31. Subject to any provisions relating to the Shares set out in these Articles, or in any resolution constituting Shares, a Member may redeem all or any of such Member’s Shares by serving a Redemption Notice on the Company, to be received by the Company at least 60 Business Days prior to the Redemption Date provided such capital has been invested in the Company for at least 2 years which shall be required to be received on a Redemption Day with respect to such Shares (or such number of Business Days prior to such Redemption Day as may be determined by the Directors), however, if a Member elects to redeem all or any of such Member’s Shares within the 2 year period, specified herein, the Directors may in their absolute discretion charge an early redemption fee of 5% for any redemptions

made within the first year and 3% for any redemptions made within the second year. Any Member redeeming Shares shall submit to the Directors the share certificate (if any) issued in respect of those Shares. The Company shall redeem such Shares at the Redemption Price being an amount equal to:

1. the Net Asset Value per Share calculated on that Redemption Day (or if the Redemption Day does not coincide with a Valuation Day then on the immediately preceding Valuation Day); less
2. the Redemption Fee calculated on the Redemption Day (or if the Redemption Day does not coincide with a Valuation Day then on the immediately preceding Valuation Day).

32. A Member may not revoke a Redemption Notice once submitted to the Directors unless the Directors shall have declared a Suspension. If a Suspension has been declared by the Directors the right of the Member to have his Shares redeemed shall be suspended and during the period of Suspension he may withdraw his Redemption Notice. Any withdrawal of the Redemption Notice shall be made in writing and shall only be effective if actually received by the Directors before the termination of the period of Suspension. If the Redemption Notice is not withdrawn the redemption of the Shares shall be made at the Redemption Price calculated at the Valuation Point on the Valuation Day next following the end of the Suspension.

33. Notwithstanding any other provisions of these Articles, the Directors may temporarily suspend redemptions in order to effect orderly liquidation of the Company's assets in relation to Shares or if the Directors determine that the disposal of the Company's assets or the calculation of the Net Asset Value in relation to the Shares is not practicable or reasonable and that it would prejudice the interests of the Members.

34. If the Directors receive Redemption Notices in respect of Shares on any Redemption Date which in aggregate exceed such percentage of the Net Asset Value on such Redemption Date as the Directors may determine, the Directors may refuse to redeem all such Shares which are subject to the Redemption Notices, but in such circumstances the Directors may scale down the amounts to be redeemed pro rata in response to such extent as they consider may be necessary and may further determine that any Redemption Notices which have been postponed from any prior Redemption Day shall have priority on any subsequent Redemption Day.

....

37. Notwithstanding any other provisions of these Articles, the Company may, in the absolute discretion of the Directors, refuse to make a redemption payment to a Member if the Directors suspect or are advised that the payment of any redemption proceeds to such Member may result in a breach or violation of any anti-money laundering law by any person in any relevant jurisdiction, or such refusal is necessary to ensure the compliance by the Company, its Directors or the Administrator with any anti-money laundering law in any relevant jurisdiction.

38. Any amount payable to a Member for the redemption of Shares shall be paid in Dollars. The Company shall remit redemption proceeds (net of the costs of remittance) by cheque or wire transfer within such period as the Directors shall determine. In the absence of directions as to payment the Company shall remit redemption proceeds by cheque to the address for the Member appearing on the Register of Members. The Company shall not be liable for any loss resulting from this procedure.

39. On a redemption of a Share the Directors shall have power to divide in specie the whole or any part of the assets of the Company and appropriate such assets in satisfaction or part satisfaction of the Redemption Price and any other sums payable on redemption as provided in these Articles.

40. Once a Share is redeemed the Member shall cease to be entitled to any rights in respect of it (except the right to receive a Dividend which has been declared prior to such redemption). The Member's name shall be removed from the Register of Members in respect of that Share and that Share shall be available for re-issue, and until re-issue shall form part of the authorised and unissued capital of the Company.

....

COMPULSORY REDEMPTION

42. The Board of Directors may compulsorily redeem all or any portion of the Shares of any Member at any time upon 48 hours prior written notice for any reason or no reason.

43. The Redemption Price for any compulsory redemption of Shares shall be the Net Asset Value per Share of the relevant Class (net of

any Management Fees or other charges and reserves for contingencies) as at the close of business on such Redemption Date.

44. The procedure and timing for payment of redemption proceeds upon a compulsory redemption shall follow the procedure and timing set out in the Articles in relation to a redemption at the option of the Member.

45. A Member will have no Member rights with respect to the Shares to be compulsorily redeemed after the close of business on the Redemption Day, except the right to receive the redemption proceeds therefore and all costs incurred in a compulsory redemption of Shares shall be for the account of the Member thereof and may be withheld from the proceeds of the redemption.

DETERMINATION OF NET ASSET VALUE

47. The Net Asset Value and the Net Asset Value per Share shall be determined by the Directors as at the Valuation Date (or such other times as the directors may determine).

48. The Net Asset Value of Shares shall be determined by dividing the Net Asset Value by the number of Shares then in issue.

49. In calculating the Net Asset Value the Directors shall apply such generally accepted accounting principles as they may determine.

....

52. The price to be paid for Shares which have been applied for shall be deemed to be an asset of the Company and any costs in connection with that issue shall be deemed to be liabilities of the Company at the beginning of the Business Day following the Subscription Day upon which the application was made.

53. The price to be paid for Shares which are to be redeemed shall be deemed to be a liability of the Company from the close of business on the Redemption Day until the price is paid.

....

SUSPENSION

55. The Directors may, from time to time, in their absolute discretion and for any reason declare a Suspension of the determination of the

Net Asset Value of Shares and the issue and redemption of the Shares.

56. A Suspension shall take effect at such times as the Directors shall specify but not later than the close of business on the Business Day next following the declaration and thereafter there shall be no determination of the Net Asset Value of Shares until the Directors shall declare the Suspension at an end. The Suspension shall terminate in any event on the day following the first Business Day on which the condition giving rise to the Suspension shall have ceased to exist, provided that the Directors shall not have declared a Suspension on other grounds. The Directors shall promptly notify the Members of any such Suspension and shall promptly notify them upon termination of such Suspension.”

11. The Appellant subscribed through Banco for its initial shareholding of US\$500,000 by Subscription Agreement dated either 31 October or 1 November 2006 (the apparent date is 31 October, but in later documents the date is referred to as 1 November). This read:

“The undersigned (the ‘subscriber’) hereby acknowledges receipt of the [CEM] dated May 2006 (‘Memorandum’) as amended from time to time

3. The Subscriber agrees that this subscription is being made and any Shares of the Company hereby subscribed will be held, subject to the terms and conditions of the Memorandum, the Memorandum and Articles of Association of the Company, as amended from time to time, and this Subscription Agreement”

The appeal has proceeded on the footing that all subsequent subscriptions by the Appellant were made on the same basis or on the basis of additional subscription agreements in like same terms.

12. The CEM includes various statements regarding its nature and intended status. At its front were three pages, which, after identifying the number of shares on offer, their par value, the minimum initial subscription and the price payable per share, included this warning, in capitals:

“Prospective investors are not to construe the contents of this memorandum as legal, investment or tax advice. Each investor should consult his personal counsel, accountants and other advisers as to the legal, tax, economic and related aspects of the investment described herein and its suitability for such investor.”

In the main body of the CEM, under the head “The Fund”, investors were told:

“This Memorandum sets forth the investment objective and method of operation of the Fund, the principal terms of its Investment Management Agreement, its Articles of Association and certain other pertinent information. However, the Memorandum does not set forth all the provisions and distinction of those documents that may be significant to a particular prospective shareholder. Each prospective Shareholder should examine this Memorandum and the Subscription Agreement and Revocable Proxy accompanying this Memorandum, and any other document available to the Fund or relating to the Fund in order to assure itself that the Fund’s investment program is satisfactory to it.”

Under the head “Description of The Fund’s Ordinary Shares” appeared the statement:

“All Shareholders are entitled to the benefit of, are bound by and are deemed to have notice of the provisions of the Memorandum and Articles of Association of the Fund.”

Finally, under the head “General Comments”, investors were told:

“The foregoing summary does not purport to be and should not be construed as a complete description of the Memorandum and Articles of Association of the Fund, the Management Agreement or the Administration Agreement, copies of which will be made furnished on request made to the Fund at its principal office.”

13. The main body of the CEM opens with a summary of general information about the Fund, the investment manager, investment objective and approach and portfolio strategy and under the head “Redemptions” the following outline:

“Shareholders will have the right to require all or, subject to the minimum holding requirements, a portion of their Shares to be redeemed on the last Business Day of each calendar quarter at the Redemption Price then prevailing, pursuant to written notice which must actually be received by the Fund at least 60 Business Days prior to the redemption date; provided that such capital has been invested in the Fund for at least 25 months.”

14. After the summary, the main body of the CEM contained sections dealing with all aspects of the Fund, including its aims, management, shares, risks and taxation. Under the head “The Fund”, it stated:

“OFFERING OF ORDINARY SHARES

Offering of Shares

The Fund is conducting an offering of its Ordinary Shares to a limited number of investors who meet the requirements set forth in the ‘Subscription Agreement and Revocable Proxy’ accompanying this Memorandum. The minimum initial subscription for each investor is US\$500,000. The Board of Directors, in its sole discretion, may accept subscriptions of a lesser amount or establish different minimums in the future; provided that no initial subscription for less than US\$50,000 will be accepted. The Board of Directors, may reject a subscription for any reason or no reason.

Offering Price

Ordinary Shares of each new class or series will be offered at a price of US\$1,000 per share. Thereafter, Ordinary Shares will be offered at the prevailing net asset value per share of the class or series

REDEMPTIONS

General

Any holder of Ordinary Shares has the right, in accordance with and subject to the applicable provisions of the Articles of Association of the Fund and the laws of the Cayman Islands, to have all or a portion of his Ordinary Shares redeemed as of the last Business Day of each calendar quarter provided that the redemption request is received by the Fund in proper written form actually received by the Fund at

least 60 Business Days prior to the Redemption Date; provided that the Shares to be redeemed have been held by the Shareholder for at least 25 months. Subject to the following sentence, any notice provided by a Shareholder to the Fund in connection with a redemption of Shares will be deemed irrevocable. The Board of Directors may, in its sole discretion, elect to waive any notice period or allow a notice to be revoked.

Notwithstanding anything to the contrary herein, if as of the end of any calendar quarter, redemption requests are received representing, in the aggregate, more than 25% of the Fund's Net Asset Value, the amount permitted to be redeemed by each Shareholder will be prorated on the basis of the number of Ordinary Shares held by each Shareholder requesting a redemption on such date that no more than 25% of the Fund's Net Asset Value will be paid out.

....

Payments Upon Redemption. Payment of the Redemption Price will be made as soon as practicable but, except in cases otherwise described herein, a Shareholder who is making a redemption will receive at least 90% of the Redemption price no later than 30 days following the date of redemption. Promptly after the Fund has determined the Net Asset Value of the Ordinary Shares as of the date of redemption which will be after the Fund's independent public accountants have completed their examination of the fund's annual financial statements, the Fund will pay to such Shareholder the balance, if any, of the amount to which such Shareholder is entitled, or such Shareholder will be obligated to repay the Fund the excess, if any, of the amount previously paid over the amount to which such Shareholder is entitled, in each case together with interest thereon at an annual rate equal to the broker's call rate charged by the Fund's prime broker for the period from the effective date of redemption through the date of payment. Redemption payments will be made in cash (in US dollars) or, in the discretion of the Fund, in securities or partly in cash and partly in securities, as further described below.

....

Suspension of Redemptions. The Board of Directors may declare a suspension of the determination of the Net Asset Value or subscription or redemption of the shares or the payment of redemption proceeds for the whole or any part of any period when:

- (i) any market or exchange on which a substantial part of securities owned by the Fund are traded is closed,

- otherwise than for ordinary holidays, or dealings thereon are restricted or suspended; or
- (ii) there exists any state of affairs which constitutes a state of emergency or period of extreme volatility or illiquidity as a result of which (a) disposal of a substantial part of the investments of the Fund would not be reasonably practicable and might seriously prejudice the Shareholders or the Fund or (b) it is not reasonably practicable for the Fund to determine fairly the value of its net assets.

The Fund may compulsorily redeem a Shareholder's Shares for any reason or no reason upon prior written notice. In the event of a compulsory redemption, the Redemption Price will be the NAV per Share of the respective class or series as of the close of business on the relevant Redemption Date. The Shareholder will have no Shareholder rights with respect to the Shares to be redeemed after the close of business on the Redemption Date, except the right to receive the redemption proceeds therefor."

Analysis

15. The Board turns in the light of these provisions to the issue whether "the Company had power to suspend the payment of redemption proceeds after the Redemption Date but before payment of those proceeds" (para 7 above). The Court of Appeal drew upon Victorian authority for a conclusion that "a redeeming shareholder remains a member of the company until he has received payment and his name has been removed from the register of members" (paras 49, 53-54 and 56). It held that the process of redemption continued until this point (para 52) and that "under the Articles as explained in the CEM" the Respondent had power "to suspend both (a) the effective redemption on 31 March 2008 and (b) the payment of the redemption proceeds due to the [Appellant]" (para 61).

16. The issue depends, in the Board's view, upon the construction of the Appellant's articles, read with such other documents as may be incorporated or referred to therein. The existence and extent of any power to suspend the payment of redemption proceeds after the Redemption Date is a subject upon which the members were at liberty to make "any contract inter se which they pleased", as the Earl of Selborne LC said in *Walton v Edge* (1884) 10 App Cas 33, 35 with regard to an issue regarding the effect of a provision allowing a member of a building society "to withdraw (provided the funds permit) ... by giving" either seven days' or one month's notice according to the amount. The discussion of the concept of redemption in the Australian case of *In re HIH Insurance Ltd. (in Liquidation)*

[2008] FAC 623, to which the Respondent referred the Board, took place in a very different context to the present, and cannot obviate the need for a detailed examination of the Appellant's articles and documentation to answer the present issue. The issue is not to be approached on the basis of any a priori view that, until payment of the redemption proceeds, a shareholder must or should necessarily remain a member of a company which is (as the Respondent was) due to make such payment upon or after a certain redemption date; and the fact that a person's name continues to remain on a company's register as member does not mean that it should have done so under the provisions of the Articles: see e.g. *Reese River Silver Mining Company Ltd v Smith* (1869) 4 HL 64, 80; *Michaels v Harley House (Maylebone) Ltd* [1997] 2 BCLC 166, 174.

17. Any power to withhold payment of the redemption proceeds must be authorised by or pursuant to the articles of association. The Board understood this to have been ultimately common ground before it. In any event, it follows from the terms of section 37 of the Companies Law, and it remains so, therefore, despite the Subscription Agreement's general reference to the subscription being made and any Shares of the Company subscribed being held subject to the terms and conditions of the CEM. To the extent that articles 17 and 20 refer to the CEM, the terms of the CEM are expressly relevant under the articles, but it is in issue between the parties whether these references extend to redemption.

18. The Board starts with the articles which deal expressly with redemption, determination of the NAV and suspension; that is articles 31 through to 56. Article 31 provides when a member may serve a Redemption Notice; and it defines the Redemption Date and Reference Price by reference to which a Redemption Notice will take effect and the NAV per share will be calculated. Article 38 provides for the Company to "remit redemption proceeds ... within such period as the Directors shall determine". Article 37 enables a Company "in the absolute discretion of the Directors, [to] refuse to make a redemption payment to a Member" in limited situations, such as suspected breach or violation of any money-laundering law.

19. The clarity and formality of the provisions regarding the giving of a Redemption Notice and the ascertainment of the Redemption Date and Price contrast with the open provision regarding payment of the redemption proceeds in article 38. However, article 38 cannot permit the Respondent's directors to delay payment beyond a reasonable time, and this is highlighted by article 37, which is the only provision in terms expressly authorising the withholding of payment of a redemption payment which has become due. Article 39 enables the Respondent to satisfy all or any part of "the Redemption Price and any other sums payable on redemption" in specie. Article 53 provides that "The price to be paid for shares which are to be redeemed shall be deemed to be a liability of the Company from the close of business on the Redemption Day until the price is paid".

20. The focus of these provisions is on the Redemption Date by reference to which the Redemption Price payable is crystallised and from which the Price is deemed to be a liability of the Respondent; the remittance of the “redemption proceeds” is treated as a matter of supplementary procedure, although it may be refused on in particular money-laundering grounds. Both stages may be said to be part of a continuing process, but it does not follow that “redemption” within the meaning of articles 55 and 32 only occurs at the conclusion of that whole process. Nor, in the Board’s view, can article 40 assist on the question what constitutes redemption under articles 55 and 32, as the Court of Appeal (in para 52 of its judgment) thought. Article 40 is largely neutral as to the date at which “a share is redeemed”, at which the member ceases to be entitled to any rights, except a dividend “declared prior to such redemption”, and at which the member’s name falls to be removed from the register in respect of the share and the share is available for re-issue.

21. So far as it is possible to gain any assistance from the provisions of article 40, the Board regards it as unlikely that it should have been intended that a redeeming member, the value of whose share fell to be ascertained at, say 31 March, could claim a subsequently declared dividend, merely because the Directors had not yet paid the redemption proceeds, or, presumably, any part of them. The Board is unimpressed by the linguistic contrast (relied upon by the Court of Appeal in its para 53) between article 40 and article 45, dealing with compulsory redemption. The Board does not consider that this demonstrates or suggests that article 40 must mean that, in cases of voluntary redemption, membership and the right to receive dividends declared survives until payment in full of the redemption proceeds, still less that redemption must be read in such a sense in other articles.

22. Other articles may be relied upon as tending to favour one or the other party’s interpretation. The language of article 39 seems marginally more consistent with the Appellant’s case, phrased as it is to give power “on” redemption and in respect of sums payable “on” redemption, rather than “in” redemption. On the other hand, reliance is placed by the Respondent upon the provision in article 53 that the price to be paid for shares which “are to be” redeemed shall be “deemed” to be a liability from the Redemption Date until payment. The Board cannot however see real significance in this. Just as article 52 states the price “to be paid” for shares which have been applied for, so article 53 states the price for shares which are to be redeemed, which is quite capable of being understood as meaning under a Notice of Redemption or compulsory redemption notice. As to the use of the word “deemed”, this reflects the position, which the Board understands to be common ground between the parties, that as from the Redemption Date (and subject to any right, if any, which there might be to alter the position by retrospective suspension), there was an existing right to receive a NAV yet to be calculated and therefore only payable in the future. In the present case, the NAV at

31 March 2008 was calculated on 30 April and communicated to the Appellant on 14 May 2008.

23. This Board turns to articles 55-56 and 32, upon which the Respondent's directors were evidently relying in passing their resolutions of 17 and 22 April 2008. The "Suspension" contemplated by these articles is, in the Board's view, a single or composite declaration, preventing the (future) determination of any NAV and consequently precluding the (future) issue and redemption of any shares. This is also how the Suspension of 17 and 22 April 2008 was phrased.

24. Article 32 contemplates the possibility that, at the date of declaration of a Suspension, there might be outstanding a Redemption Notice submitted by a member. In that event, the member is given the choice of withdrawing the outstanding notice or maintaining it, but in the latter case redemption will be made at a Redemption Price calculated at the next Valuation Date after the Suspension, rather than at the Valuation Date relevant under the Notice as given before the Suspension.

25. These provisions, on their face, leave untouched the situation of a Suspension declared after a Redemption Notice has expired and the Redemption Date has passed. This too is consistent with what happened, since a NAV was fixed and was communicated to the Appellant for the Appellant's shares after the Suspension declared on 17 and 22 April 2008. The natural inference from article 32 is that it was not contemplated or intended that Suspension under articles 55-56 could or should affect the position once a Redemption Notice had expired and a Redemption Date had passed. Bearing in mind the evident importance attached in the articles, and likely to be attached by investors, to the Redemption Notice period and the Redemption Date, it would in the Board's view require clear words before the articles could or should be read as entitling the Respondent retrospectively to reverse or alter the effect of the passing of the Redemption Date pursuant to a valid Redemption Notice. There are no clear words to that effect in the present articles, which read naturally to the opposite effect.

26. Likewise, although not relevant on the facts of this case, it would not, in the Board's view, be open to the Directors to declare "temporarily [to] suspend redemptions" under article 33, once the Redemption Date had expired. The power there temporarily to suspend arises only in order to effect orderly liquidation of assets or if the Directors determine that the disposal of assets or the calculation of NAV in relation to shares is not practicable or reasonable and that it would prejudice the interests of the Members, and its limitation to temporary suspension is underlined by the absence (in contrast with article 32) of any quid pro quo in the investor's favour in the form of a right to withdraw any notice of redemption already given. Again, this all makes sense in any situation where the Redemption

Date has not passed. The notice period gives the Respondent the opportunity to cover the forthcoming redemption or determine that circumstances are such that this or the calculation of NAV will not be practicable or reasonable and would prejudice other members' interests, and in that event to act under article 33.

27. There is, in the Board's view, nothing surprising about such a conclusion; on the contrary. Article 31 gave the Respondent a measure of security against early redemption (though the Respondent in fact waived any 3% early redemption fees in respect of the Appellant's redemption on 31 March 2008), as well as a minimum of 60 days notice in respect of all redemptions. Investors on the other hand were entitled to the knowledge that, once they had given a Redemption Notice and the Redemption Date had passed, they would receive the NAV of their shares at the latter date. The Respondent's submission that article 32 can apply to such a situation does not fit with the language used; and it would mean that a past Redemption Date could retrospectively be replaced by another, uncertain future date within whatever might happen to be the period which it took the Respondent to remit the redemption proceeds.

28. In this regard, the Respondent's case has fluctuated. The CEM (under the heading Payments Upon Redemption), and the Respondent on 11 April 2008, held out a position according to which the Appellant would receive "at least 90% of the Redemption Price proceeds no later than 30 days following the date of redemption", while the balance would be paid promptly "after the Fund's independent public accountants had completed their examination of the Fund's annual financial statements". In an affidavit sworn 23 June 2008, Mr Herman, a director, argued that "The shares are redeemed after the 90% payment has been made". But there is no logic in this half-way house, or in the variant faintly suggested during oral submissions according to which redemption must take place not later than 30 days after the Redemption Date. Either redemption occurs for the purposes of articles 55-56 and 32 *on* the Redemption Date, or it must be postponed until payment *in full* of the redemption proceeds. On the latter analysis, a shareholder must remain correspondingly uncertain as to whether he will actually receive any proceeds and, if so by reference to what Redemption Date and NAV, so long as any sum remains outstanding under his original Redemption Notice; indeed, so long as that uncertainty lasted, he might (as the Respondent submitted orally) find himself having to repay part of the 90% advance or any other sum that he had up to that point received. Where the Redemption Date has been fixed, and a 90% sum has been paid on account of the NAV, there may always be a small risk that the final calculation of NAV may show a NAV less than the 90% payment made, and then no doubt there might have to be a repayment. But that risk is as nothing compared with the risk arising if the original Redemption Date could retrospectively be replaced by a new Redemption Date, months or years after the first.

29. As far as commercial sense is concerned, the Respondent's analysis appears unattractive for investors in the Fund, and so for the Fund as an institution seeking investors. The Fund is on its face an investment vehicle to which investors can for a defined period commit funds, and which at the same time offers investors, for obvious commercial reasons, the relative security of a defined route by reference to which they may recover the value of their investments as at a defined date. Until the defined date, investors are subject to the risk of a full Suspension or a temporary suspension. The Respondent's analysis subjects them to different and much greater insecurity.

30. The Court of Appeal, in reaching an opposite conclusion, relied largely, if not exclusively, upon the terms of the CEM, particularly those headed Payments Upon Redemption and Suspension of Redemptions set out in para 14 above. It treated these as expressly incorporated in the articles by article 17. In the Board's view, this is an incorrect analysis. The CEM served various distinct purposes. One was to identify the commercial terms upon which shares were available for issue. Another was to convey information about the Fund, the Investment Adviser, the investment objective, approach and strategy and reporting, risk factors, fees and expenses and tax. A yet further aim was to describe the effect of the Respondent's memorandum and articles and certain other legal documents. But, as the CEM made repeatedly clear (see para 12 above), the last description was intended as no more than that. The CEM was not to constitute legal advice, and investors were to be both "entitled to the benefit of [and] bound by and deemed to have notice of the provisions of the Memorandum and Articles of Association of the Fund".

31. In these circumstances, there is every reason to read the reference in article 17 to shares being issued "Subject to these Articles" on "the terms referred to in the [CEM]" as referring only to those terms of the CEM which identify the terms of subscription - in particular as regards timing, numbers, par value and price - set out in the CEM, and not to the description in the CEM of the terms of the articles relating to matters such as redemption. This is consistent with the only references in the articles to the CEM appearing under the heading "Issue of Shares". There are no references to the CEM under the headings in the articles dealing with Redemptions, NAV and Suspension. It also follows from the statements in the CEM set out in para 12 above that, even if the articles were treated as referring more extensively to the CEM, the reference would be circular, since the CEM refers back to the articles, and makes clear that the legal relationship between the Respondent and its shareholders is defined by the articles, not the CEM. These points dispose of the Respondent's submission that the articles and CEM can in some way be read together, with the former supplementing the latter, where not flatly inconsistent.

32. The Board adds that it is not concerned with a situation in which an investor is claiming the benefit of the effect of the description of the articles given in the

CEM. Despite the disclaimers in the CEM, it may be that an investor who had relied upon the description in the articles might have an arguable case for being entitled in one way or another to do so. In the present case, it is the Respondent itself that is seeking to draw advantage from what appears to the Board to be a discrepancy between its own description of the articles in the CEM and the reality; and in this situation the Board sees no basis for entitling the company to rely in its own favour upon its own mis-description of its own articles.

33. Two of the provisions of the CEM call for further mention. The first, under the heading “Payments Upon Redemption”, contains assurances regarding the timing of payment of any redemption proceeds which have no parallel in the articles. These may be regarded as the Directors’ determination, for the time being, of the periods within which such proceeds are to be remitted, under article 38 (subject to the money-laundering provisions of article 37, which are not referred to in the CEM). The other, headed Suspension of Redemptions, covers an amalgam of articles 32-33, 42-43 and 45 and 55-56. It does so in terms which describe the power to suspend as in some respects more limited, but in one important respect as wider, than the power which the Board finds in the articles. The stated conditions (i) and (ii) are more limited. But the power to suspend in such conditions is stated baldly as extending to determination of the NAV *or* subscription *or* redemption *or* to the payment of the redemption proceeds for the whole or any part of any period when such conditions exist.

34. The word “or” in each case represents an extension going beyond the articles. As the Board has already noted, the “Suspension” contemplated by articles 55-56 and 32 is a single or composite declaration, while that contemplated by article 33 relates to redemptions alone. More importantly, none of these articles extends, in the Board’s view, to permit suspension of the payment of redemption proceeds after the Redemption Date has passed. Nor does article 38 permit any such suspension, and article 37, which does permit a refusal to pay redemption proceeds, does so in quite different circumstances to those indicated in conditions (i) and (ii).

35. Quite how it came about that the CEM contained terms so very different to those in the articles, whose effect it purports to summarise, is a matter of conjecture. The description in the CEM may have been intended to describe the limited circumstances in which the Directors envisaged that it would ever be necessary to exercise the very general powers of suspension contained in the articles. But, in so far as the description embraced powers going beyond those in the articles, the description was and is, in the Board’s view, of no legal effect as against investors such as the Appellant. The Board notes in parenthesis that the Respondent has never purported to exercise a power to suspend payment of the redemption proceeds, as distinct from a power to suspend redemptions under article 55. That might not have mattered, had the provision headed Suspension of

Payments in the CEM had contractual effect, bearing in mind that the Respondent has in fact withheld payment. But the Respondent's view that the only provisions which might be relevant to justify such withholding were those of articles 55-56 and 32 is nonetheless of interest.

36. The Board returns to the Victorian cases upon which the Court of Appeal and the Respondent have relied (para 15 above). All of them related to building societies, where there is a strong mutual element, reflected in the power to change the rules from time to time featuring in some of such cases. The first case, chronologically, is *In re Planet Benefit Building and Investment Society* (1872) LR 14 Eq 441. During the period of one month's notice to withdraw given by a member, the society passed a new rule providing expressly that, upon the expiration of such a notice, the members should cease to be a member, but remain entitled to dividends and to be paid the balance of his investment when the funds of the society would admit it, in such instalments as the directors might determine. The case is of no relevance to the present, where the issue is whether the existing articles enable suspension of payment *after* the Redemption Date. The next case is *Walton v Edge* (1884) 10 App Cas 33. As the Board has already noted, the case indicates that the effect of the expiry of a period of notice to withdraw depends on the relevant contractual arrangements. The decision was that a provision for withdrawal "provided the funds permit" enabled the society to defer payment after expiry of the notice period, but meant that the member acquired a right "in praesenti, although it is solvendum in futuro", which gave the withdrawing member priority over other members, after payment of outside creditors.

37. The third case, *Walker v General Mutual Building Society* (1887) 36 Ch D 777, is the case on which the Respondent most relies. Again, the member's right to withdraw on notice was expressly qualified, in that he was entitled "(provided there shall be sufficient funds available) within one month after such notice to receive all the subscription moneys paid on account of such shares". Within a month of such a notice, the society said that it had insufficient funds available, and a dispute arose. The issue was whether the member was bound to arbitrate the dispute under a clause applying to all disputes "arising between the society and any member or person claiming on account of any member". Unsurprisingly, the Court of Appeal held that the dispute must be referred to arbitration. Cotton LJ noted that, under the decision in *In re Planet*, the withdrawing member stood in a position of preference to other members who had not given notice, but observed that the "question is not whether ... he is a creditor, but whether, if and so far as he is a creditor, he is bound qua member by the rules of the society, and therefore, by the rule under which disputes between the society and its members are to be referred to arbitration" (pages 782-783). Bowen LJ noted pertinently that "we should only get into difficulties by discussing the abstract question whether a person claiming as the present Plaintiff does is a creditor or not. The right way is to go to the rules and Acts of Parliament, and to consider whether the person is a

member within the meaning of the rule if it is rule that is in question” (page 785). Fry LJ said that the dispute was “between the society and the Plaintiff in his capacity as member”, in that “His rights arise entirely from his membership, he is a withdrawing member, and till he has received payment it appears to me he remains a member” (page 786). The last statement cannot be pressed into service as a general proposition that any member withdrawing funds from any building society remains a member until payment for all purposes and whatever the rules - still less that the same applies in relation to a member redeeming shares under provisions not existing and in a manner not possible when any of these Victorian cases was being decided.

38. In *Sibun v Pearce* (1890) 44 Ch D 354 the question was whether a member who had given a notice of withdrawal which had expired remained a member for the purposes of a requirement that any resolution for winding up the society be with the assent of three-fourths of the members. The question turned upon the construction of a statute - which Lindley LJ said was “less obscure than usual” (page 369) - and of rules made under it. The court held that the member remained, in Lindley LJ’s words, “a member who has given notice of withdrawal, and is entitled to payment”, and should be taken into account when deciding whether the necessary three-fourths majority had been met (page 371). The case merely underlines the fact that all depends upon the particular provisions or rules.

39. The Respondent relies, lastly, upon *Pepe v City and Suburban Permanent Building Society* [1893] 2 Ch D 311. In that case a member gave one month’s notice to withdraw under the rules on 5 January 1891, but payment was not received, and in May 1892 the society resolved by three-fourths majority to alter the relevant rule to authorise the directors to pay off in priority members not having more than £50 to their credit. Chitty J cited Lindley LJ’s analysis of the legal position in *Sibun v Pearce*, and held that, despite his vested right, the member and so the right remained subject to the society’s power to change its rules. It is unnecessary to express any view as to the correctness of this decision, since it turns upon a different scheme of legislation and rules.

40. The Appellant, on the other hand, has referred to a series of recent first instance decisions, in which it has been held or contemplated that redemption of redeemable shares issued in various investment vehicles took place at the expiry of the relevant notice to withdraw, converting the member into a simple creditor as from that date, even though payment had not yet been received: *Basis Capital Funds Management Ltd v BT Portfolio Services Ltd* [2008] NSW SC 766, *Western Union International Ltd v Reserve International Liquidity Fund Ltd* (Claim No. BVIHCV 2009/322, unrep’d, judgment dated 26 January 2010), *SV Special Situations Fund Ltd v Headstart Class F Holdings Ltd* (Claim No. BVIHCV 2008/239, unrep’d, judgment dated 25 November 2008), *BNY AIS Nominess Ltd v Stewardship Credit Arbitrage Fund, Ltd* (Sup. Ct. Bermuda, judgment dated 27

November 2008), *In re Livingston International Fund Ltd (in liquidation)* (Claim No. BVIHCV 2002/0197) and *In re New Stream Capital Fund Ltd* (Sup. Ct. Bermuda, judgment dated 18 December 2009). These decisions all turn on the particular statutory and contractual provisions in question in them, and they are as stated first instance decisions. They do no more than lend some comfort that the view which the Board takes of the present contractual scheme is unlikely to be regarded as unusual or surprising.

41. The Appellant relied upon a further point which the Board will address shortly. On the Respondent's analysis, the Appellant was both a creditor whose debt fell under article 53 to be regarded as a liability of the Respondent from the Redemption Date and would fall to be taken into account in any balance sheet, and at the same time a shareholder whose shareholding would continue to be included in the company's capital until payment of the debt. The result of this double-counting would be to dilute the company's NAV, to the potential detriment of present shareholders and benefit of prospective shareholders. No satisfactory response to this point was, to the Board's mind, forthcoming from the Respondent's side, but, since the point was not explored in detail in the light of relevant statutory and accounting principles, the Board need not rely upon it to decide the issue before the Board.

42. The Respondents' written case also advances a point considered briefly by the Court of Appeal, to the effect that, even if the Appellant was a current creditor as at 10 June 2008, nonetheless it did not have standing to petition on the ground that the Respondent was insolvent, since in that event the only persons interested would be outside creditors, behind which it would rank: see *Walton v Edge* (para 36 above). The point was not developed orally before the Board. The Court of Appeal rejected it on the grounds that on the evidence the Respondent may prove solvent and that the Appellant could then still petition on the ground that winding up was just and equitable, and it permitted amendment of the petition to aver this. But the Board also notes that, insolvency, whether in the sense of inability to pay debts as they fell due or in the sense that liabilities exceeded assets, would not necessarily mean that the Respondent lacked sufficient assets to make any payment in a winding up to the Appellant as a current creditor ranking behind outside creditors, but ahead of continuing members of the Respondent.

43. The Board is grateful for the helpful written cases and well-organised oral submissions received from counsel on each side. It has not proved necessary to follow every avenue which they opened up, but they have greatly facilitated the Board's task.

Conclusion

44. The Board will humbly advise Her Majesty that:

- i) the appeal be allowed;
- ii) the first recital to the order dated 23 December 2008 made by the Court of Appeal should be replaced by a recital reading in terms:

“Upon the Court holding that, on the proper construction of the Articles of Association, and of the Confidential Explanatory Memorandum so far as relevant thereunder, the Company had no relevant power after 31 March 2008 or at the date of the petition issued on 10 June 2008 to suspend the payment to the Appellant of the redemption proceeds relating to its shares the subject of its Redemption Notice given 31 October 2007.”

- iii) the last 33 words of the third recital (“but excluding the allegation” onwards) should be deleted;
- iv) subject to any representations which the parties may wish to make in writing within 21 days of the issue of this judgment and to any reconsideration by the Board of this proposed order in their light, the order for costs made by the Court of Appeal should be replaced by an order that the Respondent do pay the costs of the Respondent’s application to strike out the Appellant’s petition for the Respondent’s winding up in both courts below as well as before the Board.