IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN
FINANCIAL SERVICES DIVISION

Cause No: FSD 23/2012

IN THE MATTER OF MEDLEY OPPORTUNITY FUND, LTD

BETWEEN:

MEDLEY OPPORTUNITY FUND, LTD

PLAINTIFF

AND:

1. **FINTAN MASTER FUND, LTD**
2. **NAUTICAL NOMINEES LIMITED**

DEFENDANTS

Appearances: **Mr. Thomas Lowe Q.C. instructed by Ms. Rachael Reynolds of Ogier on behalf of the Plaintiff**

Mr. Ross McDonough and Mrs. Kirsten Houghton on behalf of the Defendants

Before: **The Hon. Mr. Justice Charles Quin**

Heard: **14th June 2012**

<u>JUDGMENT</u>

INTRODUCTION

1. By an Originating Summons issued on the 17th February 2012 the Plaintiff, Medley Opportunity Fund, Ltd., ("the Fund"), seeks the following relief:

1 i. A declaration that the rights of the Second Defendant, as shareholder in
2 the Plaintiff as nominee for and on behalf of the First Defendant, to
3 redeem, and/or to receive from the Plaintiff distributions or payments in
4 respect of, the shares that it holds in the Plaintiff and are the subject of
5 Option 2 of the 2008 Plan and/or Option 2 of the 2009 Plan (the
6 "Shares" and the "2008 and 2009 Options" respectively) elected for by
7 the Second Defendant (for and on behalf of the First Defendant), are
8 those rights conferred by the 2008 and/or the 2009 Options, to the
9 exclusion of any rights of redemption or distribution or payment or
10 other rights conferred by the Letter Agreement dated the 30th August
11 2007 made between the Plaintiff and the First Defendant (and Medley
12 Capital LLC) (the "Side Letter").

13 ii. A declaration that the Defendants, having elected the 2008 and/or the
14 2009 Options, are estopped from relying on the terms of the Side
15 Letter, insofar as those terms are inconsistent with the provisions of the
16 2008 and/or the 2009 Options. The Plaintiff chose not to pursue this
17 relief.

18 iii. A declaration that, in respect of the shares, the Second Defendant is
19 entitled to pro-rata quarterly distributions by the Plaintiff in accordance
20 with the 2008 and/or the 2009 Options and to no other rights of
21 distribution or payment relating to the Shares, whether in respect of
22 redemption or otherwise.

1 iv. A declaration that the redemption request dated the 31st December 2011
2 served on the Plaintiff by the Second Defendant for and on behalf of
3 the First Defendant (the "Redemption Request") is invalid and of no
4 effect.

5 v. In the alternative to paragraph iii above, a declaration that the
6 Redemption Request is invalid and of no effect insofar as it relates to
7 the Shares.

8 vi. Further or other relief.

9 vii. Costs

10 2. In response to the Plaintiff's Originating Summons, the First Defendant seeks
11 competing declaratory relief set out in paragraph 8 of the Affidavit of Robert
12 Andrew Harrison ("Mr. Harrison") and in paragraph 6 of the Defendants' Skeleton
13 Argument, which declaratory relief is as follows:

14 i. That the redemption request dated the 21st December 2011 is valid, and
15 that all the shares in the Fund registered in the name of Nautical
16 (Fintan's nominee) ("the Fintan Shares") are therefore due to be
17 voluntarily redeemed on the 30th June 2012.

18 ii. That pursuant to paragraph 4 of the Side Letter, the Fund is required to
19 pay the proceeds of redemption of the Fintan Shares to Nautical and/or
20 Fintan in cash, unless immediate payment in cash is impossible.

iii. That if and to the extent that the Fund held or holds at any time in the period between the receipt of the Defendants' redemption request on the 21st December 2011 and the redemption date of the 30th June 2012 (i) cash or (ii) assets which are or were capable of being realised for cash which it did not or does not require to pay debts and liabilities of the Fund (other than debts and liabilities due to members or former members in their character as such) the Fund is to be regarded as being in a position to make an immediate payment in cash for the purpose of paragraph 4 of the Side Letter.

iv. That if and to the extent that (as the Fund contends) the Fund is or was obligated to make pro rata quarterly distributions of "excess cash" to any or all of its shareholders by way of compulsory partial redemptions of their shares, "excess cash", for that purpose shall mean cash which the Fund does not require to meet its liabilities to its creditors, including, without limitation, its actual or future liability to pay the proceeds of redemption of the Fintan Shares to Nautical and/or Fintan in cash.

v. That elections of Options made by investors in the Fund pursuant to 2008 and/or 2009 Plans do not constitute redemption requests within the meaning of the Fund's Articles of Association.

SUMMARY OF THE FACTS

3. The Court is in a fortunate position in that, the chronology, and the facts, are not in dispute. Accordingly, I herewith set out the relevant facts as set out in the affidavits of Brook Taube ("Mr. Taube") and contained in the Skeleton Arguments of the parties.

4. On the 24th August 2006 the Fund was incorporated as a Cayman Islands exempted limited company, with its registered offices at Ogier Fiduciary Services (Cayman) Limited, Grand Cayman.

5. Mr. Taube is a director of the Plaintiff and one of the managing members of the investment manager, Medley Partners LLC., ("Medley Partners") which is a Delaware USA limited liability company.

6. The First Defendant is a Cayman Islands exempted company and the Second Defendant is a company incorporated under the laws of Bermuda

7. The Fund's Administrator is SEI Global Services Inc., which is located in Oaks, Pennsylvania, in the United States.

8. It is uncontroversial that the Plaintiff was incorporated in the Cayman Islands for the purpose of investing its assets in accordance with its investment objective, namely, to generate superior risk adjusted returns by opportunistically acquiring and originating a diversified portfolio of corporate credit and asset base investments, primarily in North America, Latin America, Western Europe and Asia, as described in the Plaintiff's Confidential Explanatory Memorandum ("CEM") dated October 2006.

9. The CEM provides the method of operation of the Plaintiff and the summary of the principal terms of the Plaintiff's Memorandum and Articles of Association, dated the 15th September 2006.

10. The Plaintiff initially offered Class A and Class B shares pursuant to the terms of the CEM, together with the Plaintiff's Articles of Association.

11. In May 2007 the CEM was updated and the Plaintiff continued to offer Class A and Class B shares. The Plaintiff's Class A and Class B shares are redeemable in accordance with the Articles of Association and the CEM. Class A and Class B shareholders may upon, at least one hundred and eighty (180) days' prior written notice to the Plaintiff – through the Plaintiff's Administrator – redeem shares as at the last day of the calendar quarter, occurring on or after the first anniversary of the day such shares were issued, and on the last day of each calendar quarter thereafter, subject to staggered redemption fees and a possible gate.

ARTICLES OF ASSOCIATION

12. The Plaintiff's Articles of Association set out the usual provisions to cover the members' right to redeem shares, and the manner in which members could redeem those shares.

13. It is helpful to note at this stage that under Article 37(a) of the Plaintiff's Articles of Association, a member may request the Fund to redeem all or some of its shares, other than the designated invested shares, as of any redemption day, in accordance with the provisions of this Article.

1 14. Articles 37(i) and 37(j) provide the Plaintiff's directors with the power to suspend a
2 member's right to redeem, or alternatively to impose a gate on redemptions in
3 certain defined circumstances.

4 15. Article 38 gives the Plaintiff's directors, in certain defined circumstances, the
5 power to compulsorily redeem a member's shares, and any such redemption falls to
6 be treated as if it were a voluntary redemption by the affected member.

7 16. Article 39(f) allows for the repayment of the redemption price to be at the
8 discretion of the Plaintiff's directors, and to be made in kind, by the transfer of
9 investments; which may be transferred to a "liquidating account" to be sold by the
10 Plaintiff for the member's benefit, at the member's expense, without any time
11 constraint and without any right on the member's part to receive interest on the
12 redemption proceeds.

13 17. Article 53 permits the Plaintiff to enter into an agreement with an existing or
14 prospective member, providing that terms, other than those set out in the Articles,
15 shall apply to the shares of that member, including different redemption rights.

16 18. On the 30th August 2007 the First Defendant entered into an agreement with the
17 Plaintiff and Medley Partners, referred to as the "Side Letter". Paragraph 4 of this
18 Side Letter reads:

19

20

1 *"All distributions from the Fund to Fintan upon redemption, liquidation or*
2 *otherwise shall be paid in cash. If it is not possible for a distribution to be paid*
3 *immediately in cash, securities equal in value to the amount that would*
4 *otherwise be distributed will be deposited by the Fund into a separate*
5 *liquidation account on Fintan's behalf, with the proceeds therefrom to be*
6 *distributed to Fintan in cash as such securities are liquidated. Any and all*
7 *expenses in connection with such liquidation account will be paid by the Fund."*

8

9 19. The other provisions in this Side Letter clearly provide the First Defendant with
10 favourable terms, with the Plaintiff agreeing to notify the First Defendant, should it
11 enter into a Side Letter with any comparable investor and provide that other
12 investor with more favourable terms than those offered to the First Defendant.

13 20. On the 4th September 2007 the Second Defendant, acting as the nominee of the First
14 Defendant, initially subscribed for Class A shares in the Plaintiff.

15 21. On the 1st October 2007 and the 1st November 2007 the Second Defendant, acting
16 as the nominee of the First Defendant, made additional subscriptions for Class A
17 shares. The Second Defendant subscribed for four blocks of Class A shares in the
18 Fund, with a total subscription price of US$45 million in the period 4th September
19 2007 to the 1st February 2008.

20 ***2008 RESTRUCTURE***

21 22. On the 24th November 2008, Medley Capital wrote on behalf of the Plaintiff to all
22 its members explaining that the Plaintiff was proactively addressing the redemption
23 and liquidity issues currently facing the alternative investment industry and that the
24 purpose of the 2008 Plan was to allow:

1 "*...a large portion of the existing investor base to remain invested, and along*
2 *with new subscribers fund new transactions...*"

3

4 The Plaintiff further explained that it believed the Plan:

5 "*...carefully balances the liquidity needs of some investors with those seeking*
6 *to benefit from the growing opportunity for [the Fund]*"

7

8 23. In furtherance of the 2008 Plan the Plaintiff asked that shareholders choose between
9 two options [the details of which were set out in the body of the 2008 letter and in
10 the Appendix to the letter headed "Exhibit A"]:

11 a. Option 1 – "Elect to join Class C" by subscribing for new Class C shares,
12 which were divided into two subclasses. Option 1 provided that the next
13 available redemption date would be the 31st December 2009. If the shareholder
14 elected Option 1, they agreed to rescind any pending redemption request
15 submitted by the date of the letter.

16 b. Option 2 – By this Option a shareholder could "*...elect to remain in MOF and*
17 *receive quarterly cash distributions*." By selecting Option 2 it was provided
18 that the shareholder would remain in the Fund and rescind any pending
19 redemption request submitted prior to the date of the letter.

20 24. On the 2nd December 2008 the Second Defendant entered into the 2008 Plan by
21 signing a document headed "Approval of Plan and Election of Subclass." The
22 Second Defendant signed for the benefit of the First Defendant and stated that it:

> "...approves the Plan (as defined in the letter) and accepts Option 1 and Option 2 as described in the letter in respect of the percentage of the shares held by the shareholder in MOF, indicated below. The undersigned agrees to all of the terms described in the letter in respect of the Options selected below."

25. The Second Defendant elected Option 2, as regards US$10,000,000.00 in the value of its shares, and Option 1, as regards the balance, which at the date of the 2008 agreement was to the value of US$39,438,522.12. Consequently, the Second Defendant held a combination of both Class A and Class C, subclass C1 shares on behalf of the First Defendant.

2009 Restructure

26. On the 11th November 2009 the Plaintiff sought the approval of shareholders to a further restructuring Plan. In a letter dated the 11th November 2009 from Medley Capital the Plaintiff explained that the purpose of the 2009 Plan was to allow existing and new shareholders to invest "*without the overhang of potential redemption requests*" and that the Plaintiff :

> "...*endeavour to treat all parties as fairly as possible and believes that this Plan carefully balances the liquidity needs of some shareholders with those seeking to benefit from the continuing investment opportunity for MOF*."

27. Pursuant to this restructure the Plaintiff would no longer offer Class C shares, but instead would offer a new class of shares, being Class D shares. Only holders of Class C shares were offered Class D shares, and a choice between:

a. Option 1 – electing to join the new Class D. Class Ds were subject to a 1.5% management fee and a 10% incentive fee. Annual redemptions would be permitted at the end of each calendar quarter, with a one-year notice period. The balance of the terms relating to Class C shares would remain, except that the next redemption day would be the 31st December 2013;

b. Option 2 – electing to maintain existing Class C shares, rescind any pending redemption requests, and participate in an orderly payout, by agreeing to accept pro-rated quarterly distributions of excess cash by way of a partial redemption of shares as cash is generated from the existing assets. There would be no change to the fee structure.

28. The Second Defendant elected Option 2 in respect of 100% of its subclass C1 shares, and continued to hold its Class A shares on the terms of the 2008 Agreement.

29. On the 19th November 2009 the Second Defendant signed the Approval of Plan and Election of Subclass for the benefit of the First Defendant and again stated that it "*approves the Plan as defined in the letter (and)....agrees to all of the terms described in the letter in respect of the Options elected below.*"

30. On the 21st December 2011 the Second Defendant submitted a redemption request on behalf of the First Defendant requesting the redemption of all its shares. This letter was signed by Stephen Costello ("Mr. Costello"), the same authorised signatory who signed the approvals to the 2008 and 2009 Restructuring Plans on behalf of the Second Defendant.

1 *UNITED STATES PROCEEDINGS*

2 31. On the 6th March 2012 the First Defendant commenced proceedings against the
3 Plaintiff and the investment manager in the Supreme Court of the State of New
4 York, County of New York, claiming breach of contract and a declaratory
5 judgment, very much on the same grounds as in the proceedings before this Court.
6 The First Defendant claims that the 2007 Side Letter with the Plaintiff governs the
7 redemption terms, thereby overriding the agreements to the 2008 and 2009
8 Restructuring Plans signed by the Second Defendant on behalf of the First
9 Defendant.

10 *CAYMAN PROCEEDINGS*

11 32. On the 12th March 2012 the Plaintiff issued an *ex parte* Summons with notice to the
12 Defendants for an anti-suit injunction, restraining the First Defendant from
13 continuing to prosecute the proceedings in the Supreme Court of the State of New
14 York.

15 33. On the 13th March 2012 the Plaintiff's application was heard before Henderson J.,
16 with the First Defendant's attorneys present.

17 34. On the 13th March 2012 Henderson J. granted the Plaintiff's *ex parte* application,
18 restraining the First Defendant from continuing or prosecuting its claim in the
19 Supreme Court of the State of New York, County of New York.

20 35. On the 22nd March 2012 Campbells, attorneys at law for the Plaintiff, entered an
21 acknowledgement of service of the Originating Summons on behalf of the First

1 Defendant and, on the 29th March 2012 Campbells entered an acknowledgment of
2 service on behalf of the Second Defendant.

3 36. The Court does not have to consider whether to continue Henderson J's anti-suit
4 injunction dated the 13th March 2012 because counsel on behalf of the Defendants
5 has graciously given an undertaking on behalf of the First Defendant not to take any
6 steps to prosecute its proceedings in the United States until the proceedings before
7 this Court have been finally concluded.

8 ***POSITION OF THE PLAINTIFF***

9 37. The Plaintiff submits that the Second Defendant is bound by the terms of the
10 variation agreements of 2008 and 2009, to accept pro rata quarterly distributions of
11 excess cash by way of partial redemption of its shares in lieu of other redemption
12 rights.

13 38. The Plaintiff submits that the Fund would have been willing to negotiate a right for
14 the Second Defendant, or indeed any shareholder, to be redeemed "in kind".

15 39. The Plaintiff stated that in light of the economic climate in 2008 and 2009 there was
16 a cash or liquidity problem. In order to stem what has been colourfully described as
17 a "tide of redemption requests" from members the Plaintiff gave all the investors an
18 option to agree not to redeem. It was open for the Second Defendant, or, indeed,
19 any member, to accept redemptions on the basis that they be paid in kind, that is, a
20 "vertical slice" of the assets. It is uncontroversial that one member entered into such
21 an agreement.

1 40. The Plaintiff's position is that the Second Defendant entered into the variation
2 agreements, and the effect was to replace any pre-existing redemption rights with
3 those set out in the variation agreements signed by the Second Defendant on the 2nd
4 December 2008, and on the 19th November 2009.

5 41. The Plaintiff submits that the 2008 and 2009 restructuring options were entirely
6 voluntary, that is, it was open to the Second Defendant to choose whether or not to
7 adopt either of these options, or to insist on their existing redemption rights. The
8 Second Defendant chose to sign and return the approval, setting out its elections.
9 The Second Defendant chose to enter into the variation agreements and is therefore
10 bound by them.

11 42. Furthermore the Plaintiff submits that Article 53 permits the Plaintiff to enter into
12 bilateral agreements to alter any rights within the Articles and specifically to alter
13 redemption rights.

14 43. Consequently, the Plaintiff seeks a declaration of the rights of the Second
15 Defendant, or those rights conferred by the variation agreements to the exclusion of
16 any rights of redemption, conferred by pre-existing agreements made between the
17 Plaintiff and the Second Defendant, or indeed, the Plaintiff and the First Defendant.

18 44. The Plaintiff further submits that the Side Letter does not deal with the rights of
19 redemption, but merely with the payment of distributions in the event that there is a
20 right of redemption.

21 45. The Plaintiff submits that the right of redemption was altered by the variation
22 agreements. The variation agreements provide that cash will be distributed to the

Second Defendant and to all shareholders, pro rata, by way of redemption. These are the redemption rights to which the Second Defendant is bound, and for which the Side Letter does not provide any additional rights.

46. The Plaintiff argues that the effect of signing up to these variation agreements is that the Second Defendant is precluded from submitting any further redemption requests. In effect, leading counsel for the Plaintiff argues that the Second Defendant has exchanged its right to redeem under the traditional machinery contained in the Articles for automatic quarterly redemptions. Leading counsel for the Plaintiff argues that any other interpretation of the 2008 and 2009 variation agreements would make commercial nonsense and render them entirely pointless. Mr. Lowe submits that this is the approach of Lord Clarke of Stony-cum-Ebony JSC in the leading Supreme Court authority of ***Rainy Sky S.A. v. Kookmin Bank*** [2011] 1 W.L.R. 2900 and is one which he urges this Court to apply.

47. Counsel for the Plaintiff refutes the Defendants' suggestion that this is a similar situation to that in ***Culross Global SPC Ltd v. Strategic Turnaround Master Partnership Limited*** [2010] (2) CILR 364. Counsel for the Plaintiff submits that ***Strategic Turnaround*** is a question of the construction of the Articles, and that the issue in that case was that the true construction of the redemption provision and was the effect of that that they remained a shareholder, for example, after the redemption date had passed? The question in ***Strategic Turnaround*** was that the manner in which any redemption of shares could be effected needed to be authorised by or pursuant to a company's Articles of Association, and the Privy Council decided in ***Strategic Turnaround*** that on a true construction of the Articles

1 of Association the Respondent did not have the power to suspend the payment of
2 redemption proceeds after the redemption date. The Articles did not permit the
3 Respondent to refuse (or delay beyond a reasonable time) payment of redemption
4 proceeds, except in limited circumstances, none of which applied in ***Strategic***
5 ***Turnaround***. Leading counsel for the Plaintiff argues that the case before me is a
6 very different case from ***Strategic Turnaround*** because there is no controversy
7 over the Plaintiff's Articles of Association and the question for the Court here is
8 what construction should be put on the 2008 and 2009 variation letters.

9 48. Leading counsel for the Plaintiff submits that the shares in the Plaintiff Company
10 are held by the Second Defendant, and the Second Defendant is not a party to the
11 Side Letter. Accordingly the Second Defendant cannot now claim the benefit of a
12 previous agreement to which it was not a party.

13 49. Leading counsel for the Plaintiff also contends that the First Defendant is not a
14 party to the variation agreements, as these were signed by the Second Defendant as
15 the registered shareholder in the Plaintiff Company.

16 50. The Plaintiff submits that the variation agreements are not inconsistent with the
17 terms of the Side Letter. The Side Letter provides that payments upon redemption,
18 liquidation or otherwise shall be paid in cash if possible, and the variation
19 agreements provide that the quarterly payments would be by way of redemption in
20 cash as such cash becomes available.

21 51. The Plaintiff submits that the Side Letter does not confer a right of redemption, but
22 it simply includes provisions concerning payment of redemption proceeds.
23 Accordingly, the Plaintiff seeks the declaration of the rights of the Second

1 Defendant as shareholder in the Plaintiff, as nominee for and on behalf of the First
2 Defendant, to redeem and/or to receive from the Plaintiff distributions or payments
3 in respect of the shares that it holds in the Plaintiff, and which are the subject of
4 Option 2 of the 2008 Plan, and/or Option 2 of the 2009 Plan elected for by the
5 Second Defendant. Indeed, the rights conferred by the 2008 and 2009 restructuring
6 plans bind the Second Defendant, to the exclusion of any rights of redemption and
7 distribution or payment or other rights conferred by the Side Letter dated the 30th
8 August 2007, made between the Plaintiff and the First Defendant.

9 52. The Plaintiff further seeks a declaration in respect of the shares that the Second
10 Defendant is entitled to pro rata quarterly distributions by the Plaintiff in
11 accordance with the 2008 and/or the 2009 Options, and to no other rights of
12 distribution or payment relating to the Shares, whether in respect of redemption or
13 otherwise.

14 53. Finally the Plaintiff seeks a declaration that the redemption request dated the 31st
15 December 2011 served on the Plaintiff by the Second Defendant for and on behalf
16 of the First Defendant is invalid and of no effect.

17 ***POSITION OF THE DEFENDANTS***

18 54. The Defendants, and in particular, the First Defendant, contend that the 2008 and
19 2009 restructuring plans do not have the effect contended for by the Plaintiff,
20 because they do not contain clear words indicating that the effect would be to
21 restrict (or suspend) future redemption rights under the Articles, nor are they
22 sufficient to constitute a waiver or variation of the clear terms of the Side Letter

1 entered into by the First Defendant and the Plaintiff with regard to payment of
2 redemption proceeds.

3 55. The First Defendant also contends that the 2008 and 2009 Restructuring Plans
4 cannot constitute any form of redemption process (whether voluntary or
5 compulsory) since they do not comply with the provisions and procedures set out in
6 the Articles of Association for redemptions.

7 56. Otherwise stated, the First Defendant contends that at the time of the receipt of the
8 2008 letter from the Plaintiff it had a right to redeem in accordance with the
9 Articles, and an additional right, pursuant to the Side Letter, to receive payment of
10 redemption proceeds in cash rather than in kind – at least so long as the Fund was
11 able to make an immediate distribution in cash.

12 57. The First Defendant maintains that its redemption rights are regulated by the
13 Articles of Association, as modified by the terms of the Side Letter. The First
14 Defendant also submits that, in accordance with the Privy Council decision in
15 ***Culross Global SPC Ltd v. Strategic Turnaround Master Partnership Limited***
16 [2010] (2) CILR 364, in the case of a conflict between the documents, it is clearly
17 established that it is the Articles which shall prevail. The First Defendant submits
18 that its right to redeem is clearly set out in Article 37(3)(c), and that it has served a
19 valid redemption request, giving the required 180 days' notice for a redemption,
20 effective on the 30th June 2012.

21 58. The First Defendant contends that the Second Defendant's agreement to the 2008
22 and 2009 restructuring does not constitute an unequivocal waiver of the rights that
23 the First Defendant enjoys under the Side Letter. The First Defendant relies

1 specifically on paragraph 7 of the Side Letter which, it submits, prohibits the right
2 of the Plaintiff to suspend the First Defendant's redemptions, unless such
3 suspension is due to events outside the control of the directors.

4 59. The Defendants submit that no distinction should be drawn between the position of
5 the First Defendant and that of the Second Defendant.

6 60. The Defendants submit that the Plaintiff's Originating Summons recognises that the
7 Second Defendant holds the shares a nominee for the First Defendant, and, indeed,
8 the Originating Summons largely treats the First Defendant and the Second
9 Defendant as having single indivisible rights.

10 61. The Defendants submit that the Plaintiff's evidence discloses that the Plaintiff
11 recognises the First Defendant as the shareholder and the true party in interest, and
12 treats the First Defendant and the Second Defendant as being one and the same
13 person for the purposes of this dispute.

14 62. Counsel for the Defendants contends that the Plaintiff is using a belated and
15 opportunistic attempt to resile from its previously clearly stated position – that
16 being that the First and the Second Defendants are one and the same.

17 63. The Defendants submit that the Plaintiff is to be estopped from now resiling from
18 its previously adopted position. For this purpose the Defendants rely on the House
19 of Lords decision in ***Republic of India v. India Steamship Co. Ltd., The India***
20 ***Grace*** (No. 2) [1998] AC 878 in which Lord Steyn said at paragraph E on page
21 913:

1 *"It is settled that an estoppel by convention may arise where parties to a*
2 *transaction act on an assumed state of facts or law, the assumption being either*
3 *shared by them both or made by one and acquiesced in by the other. The effect*
4 *of an estoppel by convention is to preclude a party from denying the assumed*
5 *facts or law if it would be unjust to allow him to go back on the assumption.....*
6 *It is not enough that each of the two parties acts on an assumption not*
7 *communicated to the other. But it was rightly accepted by counsel for both*
8 *parties that a concluded agreement is not a requirement for an estoppel by*
9 *convention."*

10

11 64. Counsel on behalf of the First Defendant submits that it has provided the Plaintiff
12 with the required 180-day notice period, which is sufficient time for the Plaintiff to
13 realise the cash necessary for the said redemption. Accordingly, the First Defendant
14 submits that the redemption request dated the 21st December 2011 is a valid
15 redemption request and therefore due to be voluntarily redeemed on the 30th June
16 2009. The First Defendant submits that the Plaintiff is required to pay the proceeds
17 of redemption of the shares to the First or Second Defendant in cash, unless
18 immediate payment in cash is impossible. The First Defendant submits that the
19 election of options made by the Second Defendant in the Fund pursuant to the 2008
20 and 2009 restructuring plans do not constitute redemption requests within the
21 meaning of the Plaintiff's Articles of Association.

22 65. Counsel for the First Defendant submits that in addition to the rights that the First
23 Defendant has in relation to redemption under the Articles of Association, the First
24 Defendant took the time and trouble to negotiate and secure the concessions that
25 were granted in Side Letter, and that the Side Letter did contain enhanced rights in
26 relation to the First Defendant's rights of redemption. The Side Letter granted the
27 First Defendant a favoured status, with rights not afforded to any registered
28 members. Accordingly, counsel for the First Defendant submits that this Defendant

has an unimpaired right to redeem and a right to receive the redemption proceeds in cash on the 30th June 2012.

66. In addition, counsel for the Defendants submits that Option 2 of the 2009 restructuring plan constitutes a prohibition of cash in new transactions, and a pro rata quarterly distribution of excess cash, rescinding any pending redemption requests submitted prior to the date of the letter, and further, saying not a word about any future redemption requests.

67. Counsel for the Defendants submits that other investors may be happy to get what he describes as a "trickle of cash" quarterly, because their only other option was redemption in kind. This is not the First Defendant's position because of the specific rights it negotiated under the Side Letter dated the 30th August 2007.

68. Counsel on behalf of the Defendants also submits that there is ambiguity and uncertainty with both the 2008 and the 2009 options. The Defendants submit that there are at least two alternative interpretations of these letters. The Defendants submit that paragraph 2 of Option 2 in the 2008 and 2009 Plans cannot be construed as requests by shareholders for a voluntary redemption in accordance with the provisions of the Articles. In addition, if there is any ambiguity, the Defendants rely on the doctrine of *contra proferentem*, that the Court should construe any interpretation of the two Option agreements against the Plaintiff.

69. Accordingly the First Defendant seeks a declaration that its redemption request dated the 21st December 2011 is valid, and that all the shares in the Fund registered in the name of the Second Defendant are therefore due to be voluntarily redeemed on the 30th June 2012.

70. Furthermore, pursuant to paragraph 4 of the Side Letter, the Plaintiff is required to pay the proceeds of redemption of the shares to the Second Defendant and/or the First Defendant in cash, unless immediate payment in cash is impossible.

71. The First Defendant seeks a declaration that if, and to the extent that, the Plaintiff held or holds any time in the period between the receipt of the Defendants' redemption requests on the 21st December 2011, and the redemption date of the 30th June 2012 (1) cash or (2) assets, which are, or were capable of being realised for cash, which it does not require to pay debts and liabilities of the Plaintiff, (other than debts and liabilities due to members or former members and their character as such) the Plaintiff is to be regarded as being in a position to make an immediate payment in cash for the purpose of paragraph of the Side Letter.

72. The First Defendant seeks a declaration that if and to the extent that the Plaintiff is or was obligated to make pro rata quarterly distributions of "excess cash" to any or all of its shareholders by way of compulsory partial redemption of their shares, "excess cash" for that purpose shall mean cash which the Fund does not require to meet its liabilities to its creditors, including, without limitation, its actual or future liability to pay the proceeds of redemption of the shares to the Second Defendant and/or the First Defendant in cash.

73. The First Defendant seeks a declaration that elections of options made by investors in the Fund, pursuant to the 2008 and/or 2009 Plans do not constitute redemption requests within the meaning of the Fund's Articles of Association.

ANALYSIS AND CONCLUSION

SIDE LETTER

74. On the 30th August 2007 the First Defendant entered into a Side Letter with the Plaintiff and the investment manager, which stated that all distributions from the Fund to Fintan upon redemption, liquidation or otherwise shall be paid in cash. It added that if it was not possible for a distribution to be paid immediately in cash, securities equal in value to the amount that would otherwise be distributed will be deposited by the Plaintiff into a separate liquidation account on the First Defendant's behalf, with the proceeds therefrom to be distributed to the First Defendant in cash as such securities are liquidated. The Side Letter ensured that the investment manager would notify the First Defendant of *"(a) any suspension of redemptions (b) the reason for the suspension and (c) the conditions necessary to terminate the suspensions."*

Further the Side Letter purportedly ensured that Fintan's right to redeem its interest in the Fund could not be suspended for more than twelve months.

In addition, the investment manager and the Plaintiff agreed that they would inform the First Defendant if any other investor received more favourable terms.

75. It is noteworthy that, for whatever reason, the Defendants chose not to make the Second Defendant a party to the Side Letter. The Side Letter does not affect, nor does it attempt to affect, the provisions of the Plaintiff's Articles of Association, nor does it alter, or in any way vary the rights that the Second Defendant enjoys as a shareholder in the Plaintiff.

1 76. I do not accept the Defendants' contention that they are one and the same, nor do I
2 accept the contention that they have single indivisible rights. The First Defendant, a
3 Cayman Islands company, is not the same entity as the Second Defendant, which is
4 a Bermudian company. They are both entirely different legal entities incorporated
5 in two different jurisdictions.

6 77. I accept that the Second Defendant is the nominee for the First Defendant. The
7 nominee agreement between the two Defendants is not before the Court, and one
8 cannot be certain as to whether the Second Defendant is the agent or the trustee or
9 the nominee of the First Defendant. The Court accepts that the First Defendant is
10 the ultimate beneficiary but observes that one main purpose of any nominee
11 agreement is to create two distinct and separate legal entities.

12 78. In my view, there is no basis on which the Defendants can contend that because
13 some may have viewed the two Defendants as one entity, that this could create an
14 estoppel by convention. There is no legal or factual basis for concluding or even
15 assuming that the First and the Second Defendants are one and the same.
16 Consequently I find that the Side Letter does not provide the Second Defendant
17 with any enhanced rights or favoured status as a registered member of the Plaintiff.
18 The Second Defendant has the same rights and obligations as any other registered
19 shareholder under the Plaintiff's Articles of Association.

20

21

22

1 ***2008, 2009 RESTRUCTURES***

2 79. The first question I must ask myself in relation to the 2008 and 2009 restructuring
3 plans is whether the Plaintiff had the authority under the Articles of Association to
4 offer these Options and conclude these agreements with the registered members of
5 the Plaintiff Company?

6 80. I repeat in full the provisions of Article 53 referred to in paragraph 17 above:

7 "*Notwithstanding any other provision of these Articles, the Company (acting*
8 *through the directors or any duly authorised agent) may enter into a written*
9 *agreement with an existing or a prospective member in respect of shares of a*
10 *certain class or subclass providing for offering terms that vary from those*
11 *applicable to other members of the same class or subclass, including, without*
12 *limitation, the waiver or reduction of fees payable in respect of such shares and*
13 *different redemption terms, and in such circumstances the directors may issue*
14 *the shares of the same class or sub class to such member, or may determine to*
15 *issue a separate class or subclass of shares to such member.*"

16

17 I find from a reading of Article 53 that the Plaintiff had the necessary authority to
18 give its members the Options set out in its two letters dated the 24th November 2008
19 and the 11th November 2009. It was a matter for the members as to whether they
20 wished to exercise the existing power of redemption or agree to one or both of the
21 Options set out in the two letters.

22 81. On the 2nd December 2008 it is the Second Defendant who agrees, on behalf of the
23 First Defendant, to "*all of the terms described in the (Plaintiff's) letter in respect of*
24 *the Option(s) elected below.*"

82. On the 19th November 2009 the Second Defendant again agreed, on behalf of the First Defendant, to all of the terms described in the letter in respect of the 2009 restructuring plans.

83. The Second Defendant agreed to remain in the Plaintiff Class C shareholding with no change to the current fee allocation structure. Furthermore, the Second Defendant agreed to receive pro rata quarterly distributions of cash by way of partial redemption of shares. Furthermore, the Second Defendant, as with all members, agreed to rescind any pending redemption requests by the shareholders, submitted prior to the date of this letter.

84. Nothing was said in the restructuring plans about any future redemption requests because, it appears to me from reading the letters that the agreement, understood that the member – in this case, the Second Defendant – was accepting pro rata quarterly redemptions of excess cash by way of partial redemption of shares.

85. The question the Court must ask itself is whether, by signing up to these restructuring plans, was the Second Defendant, and indeed any member, bound by the terms and conditions of the variations contained in the two letters sent on behalf of the Plaintiff? In considering this question one must consider how best to interpret the terms and conditions contained in the two restructuring plans.

86. Both counsel have helpfully drawn the Court's attention to the Supreme Court's decision in ***Rainy Sky SA v. Kookmin Bank*** [2011] 1 W.L.R. 2900 which has been described as the leading authority when it comes to the correct approach to the construction of agreements such as the 2008 and 2009 variations. I find it both necessary and helpful to cite considerable portions of the Judgment of Lord Clarke

in which he reviewed the leading authorities. I commence at paragraph 14 on page 2906 where Lord Clarke states:

> "*For the most part, the correct approach to construction of the bonds, as in the case of any contract, was not in dispute. The principles have been discussed in many cases, notably of course, as Lord Neuberger of Abbotsbury MR said in* ***Pink Floyd Music Ltd v. EMI Records Ltd.*** *[2010] EWCA Civ 1429, para 17, by Lord Hoffmann in* ***Mannai Investment Co. Ltd. v. Eagle Star Life Assurance Co. Ltd*** *[1997] A.C. 749, passim, in* ***Investors Compensation Scheme Ltd. v. West Bromwich Building Society*** *[1998] 1 W.L.R. 896, 912F-913G and* ***Chartbrook Ltd. v. Persimmon Homes Ltd. (Chartbrook Ltd. Part 20 defendants)*** *[2009] A.C. 1101, paras 21-26. I agree with Lord Neuberger (also at para 17) that those cases show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person what have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the* ***Investors Compensation Scheme*** *case [1998] 1 W.L.R. 896, 912H, the relevant reasonable person is one 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.*"

Lord Clarke went on to state at para 21 on page 2908 of ***Rainy Sky*** :

> "*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 commonsense and to reject the other.*"

87. At paragraph 25 on page 2902 Lord Clarke states:

> *"In 1997, writing extra-judicially in "**Contract law: Fulfilling the reasonable expectations of honest men**" 113 LQR 433, 441, Lord Steyn expressed the principle thus:*
>
> > *"Often there is no obvious or ordinary meaning of the language under consideration. There are competing interpretations to be considered. In choosing between alternatives a court should primarily be guided by the contextual scene in which the stipulation in question appears. And speaking generally commercially minded judges would regard the commercial purpose of the contract as more important than niceties of language. And, in the event of doubt, the working assumption will be that a fair construction best matches the reasonable expectations of the parties."*

88. Lord Clarke agreed and also cited Lord Steyn in ***Society of Lloyd's v. Robinson*** [1999] W.L.R. 756, 763:

> *"Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which a reasonable commercial person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis and niceties of language."*

89. Lord Clarke then referred to Mance LJ (as he was then) in ***Gan Insurance Ltd. v. Tai Ping Insurance Co. Ltd***. (No. 2) [2001] 2 All E.R. (Comm) 299 Mance LJ said:

> *"Construction, as Sir Thomas Bingham MR said in **Arbuthnott v. Fagan** [1995] CLC 1396, 1400 is thus 'a composite exercise, neither uncompromisingly literal nor unswervingly purposive'. To para 5, one may add as a coda words of Lord Bridge of Harwich in **Mitsui Construction Co. Ltd. v. Attorney General of Hong Kong** (1986) 10 Con LR 1, cited in my judgment in **Sinochem International Oil (London) Co. Ltd. v. Mobil Sales and Supply Corpn (Sinochem International Oil Co Ltd, Third Party)** [2000] 1 All E.R. (Comm) 474, 482. Speaking of a poorly drafted and ambiguous contract, Lord*

Bridge said that poor drafting itself provides: 'no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language that they have used interpreted in the light of the relevant factual situation in which the contract was made. But the poorer the quality of the drafting, the less willing the court should be to be driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention, if the language used, whatever it may lack in precision, is reasonably capable of an interpretation which attributes to the parties an intention to make provision for contingencies inherent in the work contracted for on a sensible and businesslike basis."

90. Lord Clarke also referred to intermediate situations and Professor Guest's observation in ***Chitty on Contracts*** (28th ed) (1999), vol 1, para 12-049 that, "*a 'balance has to be struck' through the exercise of sound judicial discretion*."

91. Finally Lord Clarke set out two extracts from the Judgment of Longmore LJ in ***Barclays Bank plc v HHY Luxembourg SARL*** [2011] 1 BCLC 336, paras 25 and 26:

> *"25. The matter does not of course rest there because when alternative constructions are available one has to consider which is the more commercially sensible. On this aspect of the matter Mr. Zacaroli has all the cards...*
>
> *"26. The judge said that it did not flout commonsense to say that the clause provided for a very limited level of release, but that, with respect, is not quite the way to look at the matter. If a clause is capable of two meanings, as on any view this clause is, it is quite possible that neither meaning will flout commonsense. In such circumstances, it is much more appropriate to adopt the more, rather than the less, commercial construction."*

92. Lord Clarke concluded at paragraph 30 on page 2911 of ***Rainy Sky*** :

> "*In my opinion Longmore LJ has there neatly summarised the correct approach to the problem. That approach is now supported by a significant body of authority. As stated in a little more detail in para 21 above, it is in essence that, where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense.*"

93. Upon reviewing the letters sent on behalf of the Plaintiff setting out the purpose and proposed terms of the 2008 and 2009 variations, and in light of the ***Rainy Sky*** principles comprehensively set out by Lord Clarke, I find that the plain commercial purpose of Option 2 in both variation agreements was to require the Second Defendant to exchange its existing redemption rights for periodic cash distributions effected pro rata with all other investors accepting this Option. This allowed the Plaintiff to have the advantage of minimizing a liquidity squeeze and avoiding a fire sale of assets. The benefit to the Second Defendant and all the members was to allow the Second Defendant to benefit from the expected recovery in asset prices, to avoid a disorderly scramble for assets under liquidation, and to be treated equally and fairly, with the other members.

94. It is this construction which I find that the Plaintiff and the Second Defendant intended, and it is the one which accords with business commonsense.

95. As was submitted on behalf of the Plaintiff, it was open for the Plaintiff to stem the tide of redemptions by the provisions contained in the Articles of Association. The Plaintiff could have considered imposing a suspension or a gate which can cause concern, if not alarm, amongst investors. The Plaintiff chose to opt for the consensual route, by giving the Second Defendant and the other members the opportunity to come to an agreement under the 2008 and 2009 restructuring plans. I find that the Second Defendant understood the terms and opted to elect for the second option. Consequently, I find that the Second Defendant is bound by the terms and conditions of the 2008 and 2009 restructuring plans.

POSITION OF FIRST DEFENDANT

96. If commercial business is to be conducted sensibly and with the required degree of certainty, I find that, by entering into these agreements, the Second Defendant bound the ultimate beneficiary the First Defendant to remain in the Plaintiff Fund and to accept a pro-rated distribution of excess cash on a quarterly basis, which ensured an orderly return of monies to all members.

97. It would cause great confusion and make no sensible commercial business sense if members such as the Second Defendant were allowed to enter into these agreements only to then try and redeem and enforce a redemption right by a different route.

98. The Defendants chose to have the Second Defendant, and not the First Defendant, subscribe for shares in the Plaintiff Company. The Court assumes that this decision by the Defendants was with the full knowledge of the pre-investment Side Letter, which the First Defendant entered into with the Plaintiff and the investment manager.

99. The Court can only assume that the First Defendant appointed the Second Defendant to subscribe for the shares and become a registered member of the Plaintiff Fund. Furthermore, the Court can only assume that the First Defendant chose to allow the Second Defendant to sign up to the restructuring plans of the Plaintiff. All the members, including the Second Defendant, were informed by the restructuring plan letters dated the 24th November 2008 and the 11th November 2009, of the reasons for the restructuring proposals. The purpose of the restructuring was to allow the Plaintiff to treat all members as fairly as possible and

to ensure that there would be "*an orderly runoff of the investment portfolio of the Plaintiff.*"

100. If the First Defendant did not like the terms of the restructuring plans, it should have ensured that its nominee, the Second Defendant did not sign up to them at the relevant time. To put it another way, if the First Defendant chose to hold its investment through a nominee, it cannot suddenly recant from what its nominee has done, in entering into the restructuring plan agreements with the Plaintiff.

101. I am reminded of the Court of Appeal decision in ***Svanstrom and Nine Others v Jonasson*** 1997 CILR 192 where at the third holding on page 193 the Court stated:

> "*...the common law principle that a company was not obliged to recognise a trust affecting its shares was reflected in each company's articles of association, which stated that the company was not bound to recognise any equitable interest but would regard a registered shareholder as being absolutely entitled.*"

102. In addition, Article 14(a) of the Plaintiff's Articles of Association reads:

> "*Except as required by law, no person shall be recognised by the Company as holding any share upon any trust, and the company shall not be bound by or recognise (even when having notice thereof) any equitable, contingent, future or partial interest in any share, or (save only as these Articles otherwise provided or as by law required) any other right in respect of any share except an absolute right thereto in the registered holder.*"

103. Accordingly, I find that the pre-investment Side Letter entered into by the First Defendant and the Plaintiff and the investment manager is superceded by the nominee agreement with the registered shareholder who had since exercised the rights attached to the shareholders by virtue of the Articles of Association. The First

Defendant is not the registered shareholder and therefore has no right of redemption or distribution or payment.

104. The terms of the nominee/trust agreement, entered into between the First and the Second Defendant, are not known to me, and, it may be that the First Defendant has some redress against the Second Defendant for acting without the First Defendant's authority.

105. On reading the terms of the variation agreement, signed by the Second Defendant, I find that no further redemption requests could be entertained from the Second Defendant, or indeed, from any member who signed up to the variation agreements.

106. The Second Defendant elected in writing to approve the 2008 and 2009 Plans – one assumes with the constructive knowledge of the First Defendant. It was clear that any member could choose whether or not to adopt either of those Options, or to insist on their existing redemption rights. However, the Second Defendant chose to sign and return the approvals setting out its elections. Its agreement to these Options would take effect under Article 53 of the Articles of Association, and, it is my view, that the Second Defendant chose to enter into the restructuring variation agreements and is therefore bound by them.

107. For the above reasons I find that the First Defendant is not entitled to the declarations it seeks as set out in paragraph 18 of Mr. Harrison's affidavit dated the 1st May 2012 and set out in paragraph 6 of the Defendant's Skeleton Argument dated the 5th June 2012.

1 108. Furthermore, and for the above reasons, I grant the following relief sought in the
2 Plaintiff's Originating Summons as follows:

3 i. A declaration of the rights of the Second Defendant, as shareholder in
4 the Plaintiff as nominee for and on behalf of the First Defendant, to
5 redeem, and/or to receive from the Plaintiff distributions or payments in
6 respect of, the shares that it holds in the Plaintiff and are the subject of
7 Option 2 of the 2008 Plan and/or Option 2 of the 2009 Plan (the
8 "Shares") and the 2008 and 2009 Options respectively, elected for by
9 the Second Defendant (for and on behalf of the First Defendant), or
10 those conferred by the 2008 and/or the 2009 Options, to the exclusion
11 of any rights of redemption or distribution or payment or other rights
12 conferred by the letter agreement dated the 30th August 2007 made
13 between the Plaintiff and the First Defendant (and Medley Capital
14 LLC) (the "Side Letter").

15 ii. A declaration that in respect of the shares the Second Defendant is
16 entitled to prorated quarterly distributions by the Plaintiff in accordance
17 with the 2008 and/or the 2009 Options, and to no other rights of
18 distribution or payment relating to the shares, whether in respect of
19 redemption or otherwise.

20 iii. A declaration that the redemption request dated the 31st December 2011
21 served on the Plaintiff by the Second Defendant, for an on behalf of the
22 First Defendant, is invalid and of no effect.

1 109. As costs follow the event I order that the costs of the Plaintiff's application are to

2 be paid by the Defendants and to be taxed on a standard basis if not agreed.

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5 **Dated this the 21st June 2012**

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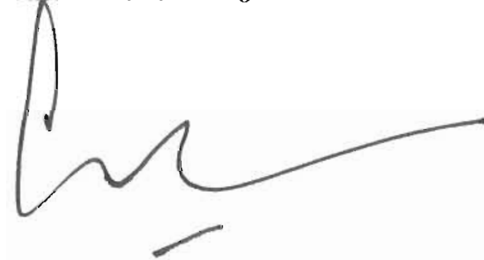

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8 **Honourable Mr. Justice Charles Quin**
9 **Judge of the Grand Court**