IN THE GRAND COURT FOR THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 151 OF 2015 (IMJ)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF THE WASHINGTON SPECIAL OPPORTUNITY FUND, INC.

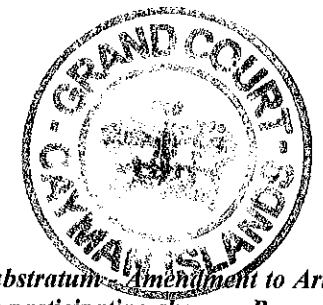
Appearances: **Mr. Matthew Goucke and Ms. Annalisa Shibli of Walkers for the Petitioner**
Mr. Stephen Atherton QC instructed by Mr. Tony Heaver-Wren of Appleby for the Respondent Company.

Before: **Justice Ingrid Mangatal**

Heard in Open Court: 12, 13, 14 January 2016
Further submissions made by email and clarified in brief hearing 29 January 2016

Draft Judgment Circulated: **26 February 2016**

Judgment Delivered: **1 March 2016**



HEADNOTE

Company Law - Winding Up - Just and equitable ground - Loss of substratum - Amendment to Articles of Association consented to in class meetings by shareholders holding participating shares - Reasonable expectations of shareholders based on constitutional and offering documents

Oppression - Lack of probity and loss of confidence in management - Need for an investigation

Just and equitable winding up jurisdiction - Whether or not to wind up company on the just and equitable basis - Inference of law to be drawn from the facts existing at the time of the hearing - Winding up of a company a drastic measure - Complaints in relation to matters of some antiquity - Whether equitable to wind up based upon complaints of past ills

JUDGMENT

1. The Washington Special Opportunity Fund, Inc. ("the Fund") was registered in the Cayman Islands on 8 June 2004 as an exempted limited company with registration number 136680 pursuant to the Companies Law (as amended "the

Law"). The registered office of the Fund is at Maples Corporate Services Limited, P.O. Box 309, Ugland House, South Church Street, Grand Cayman KY1-1104, Cayman Islands.

2. The Fund has an authorized share capital of US$50,000, comprising shares of US 1,000 Management Shares of US$1.00 par value each and 4,900,000 Participating Shares of US $0.01 each.

3. The Fund is managed by Patriot Investment Management LLC (the "Manager").

4. Washington Special Opportunity Fund LLC ("the Onshore Fund") is a Delaware limited liability company managed by the Manager and is a "sister fund" to the Fund, offered primarily to US taxable investors.

5. Xena Investments Limited of Harneys Services (Cayman Limited), 4th Floor Harbour Place, 103 South Church Street, George Town, Grand Cayman KY1-1002, ("the Petitioner"), was registered as an exempted company in the Cayman Islands with registration number 220718.

6. The Petitioner holds 9,217.3367 Class R shares in the Fund, representing 17.7% of the non-voting participating shares in the Fund.

GRAND COURT CAYMAN ISLANDS

7. On the 18 September 2015 the Petitioner filed a Petition dated 17 September 2015 ("the Petition") under the **Law**, in which it seeks a winding up order in respect of the Fund, on the basis that it is just and equitable for the Fund to be wound up.

8. In the Petition it is averred, that in addition to the Petitioner, a number of other stakeholders, including but not limited to, Eden Rock Unleveraged Finance Master Limited, Eden Rock Asset Based Lending Master Limited, Eden Rock Finance Master Limited/SFR Holdings Limited and ZAM Asset Finance Fund Limited (together the "Investor Group") support the Petition.

9. The Petitioner makes allegations about numerous matters ranging over the period 2008 to September 2015. It is therefore very difficult to provide a complete background. However, I have tried to set out some of the relevant circumstances.

BACKGROUND

10. The investment objective of the Fund described at page 1 of the Amended and restated Private Offering Memorandum of the Fund dated February 2007 ("OM") is stated to be to achieve above-average returns by investing primarily in portfolios of financial, real estate and/or operating assets and/or loans and fixed-income securities secured by the same, where such investments have strong cash flow and risk-adjusted yield characteristics.

11. In 2008, the Fund received a large number of redemption requests for June and September 2008 redemption dates, which the Fund's Directors were of the view required them to take action in order to manage the Fund's liquidity and to slow the pace of redemptions. This eventually led to the Fund resolving to:

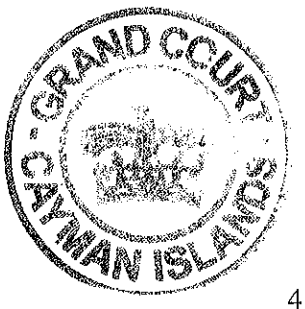
a. Compulsorily redeem all shareholders at 31 July 2008;

b. Pay a proportion of a redeeming shareholder's redemption amount with the shareholder's *pro rata* portion of the Fund's available cash and other liquid assets; and

c. Convert the balance of shareholders' interests into new Class R shares which would be redeemed on a "slow pay" basis as assets were liquidated.

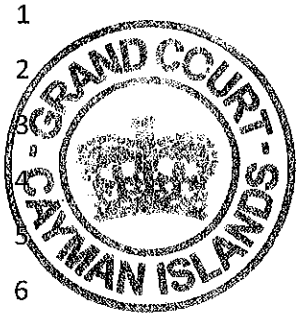
12. This "slow-pay" option required an amendment to the Fund's articles. The Amendment to the Fund's articles on 30 July 2008, was consented to by all shareholders. The amendment to the Fund's articles was passed by special resolution of the Fund's Manager (as holder of the Fund's Management Shares), following receipt by it of the consents of the Fund's then existing classes of Participating Shares, Class A and Class B, as required by article 38 of the Fund's articles.

13. The validity of the amendment to the articles has not been challenged. The amendment represented the third proposal put before the shareholders by the Fund's directors, this time successful.



14. The relevant amendment to article 30(b) is set out in full as follows:

> *"(b) (i) Subject to the Company's ability to delay payment of redemption proceeds as set forth in this Article 30(b), within 30 calendar days after each Redemption Date, the Initial Payment Amount(as defined below) due to any redeeming shareholder shall be distributed. The "Initial Payment Amount" to be made to each Shareholder that has requested redemption of any Shares will equal such Shares' pro rata portion of (i) the cash and cash equivalents of the Company, and (ii) in the sole discretion of the Directors on the advice of the Investment Manager, any other liquid assets of the Company.*
>
> *(ii) The remainder of the redeeming Shareholder's Shares (the "Remainder Shares") will be converted into Class R Shares having an aggregate Net Asset Value equal to the Remainder Shares that such redeeming Shareholder has requested to be redeemed on such Redemption Date. Such conversion will be made by a compulsory redemption of the Remainder Shares followed by a deemed subscription for Class R Shares.*
>
> *(iii) Assets allocated to Class R Shares shall be managed and valued in accordance with the rules and procedures set out in the Articles, and shall be subject to any management fee and Performance Allocation chargeable to Shares and included in the Offering Memorandum. Upon the sale of any portion of an asset allocated to Class R Shares or the receipt of other payments (such as dividends, principal and interest) relating thereto, the net proceeds of such sale will be held as cash or cash equivalents, with a maturity not to extend past the end of the next scheduled Class R*



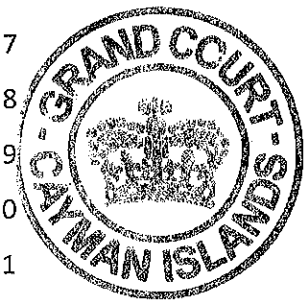
Redemption Date (as defined below). Notwithstanding the foregoing, the Company shall have the right to reserve from such proceeds capital to (i) fund necessary cash reserves, (ii) fund ongoing funding obligations, (iii) pay down leverage as deemed advisable and (iv) make protective investments intended to maintain the value of the assets attributable to the Class R Shares.

(iv) The Directors shall cause the Company to redeem compulsorily Class R Shares at their current Net Asset Value to the extent of net proceeds, after deduction of any accrued management fees, Performance Allocation (or other performance fees) included in the Offering Memorandum and allocated expenses ("Available Funds"), on each Class R Redemption Date. The "Class R Redemption Date" shall be the 30th day following the end of each calendar quarter of the Company, and such other dates (not more often than monthly) established from time to time by the Directors. To the extent Available Funds for a Series of Class R Shares are insufficient to redeem such Series in full, such redemption shall be effected pro rata among all holders of Class R Shares of such Series. On each Class R Redemption Date, each redeeming Shareholder will receive its pro rata portion of any Available Funds.

(v) The Directors, on the advice of the Investment Manager, may, in their sole discretion, cause the Company to compulsorily redeem at any time all or a portion of any or all series of Class R Shares at the current Net Asset Value thereof; provided, that if only a portion of a series of Class R Shares are redeemed, then an identical percentage, to the

extent practicable, of each Shareholder's Class R Shares of that Series must be redeemed.

(vi) The Company may delay part or all of the payments to Shareholders requesting redemptions of Shares (other than Class R Shares) if the Company is unable to liquidate positions, there is default or delay in payments due to the Company from banks, brokers or dealers or other entities, if raising the cash to pay such redemptions would, in the Directors' good faith judgment, be unduly burdensome to the Company or if the Directors in their sole discretion determine such delay to be in the best interest of the Company."



15. On 30 December 2013, the Fund sent out an Investors Letter in which it reported on distributions to investors and estimated that the wind down of the Fund's affairs might be completed by 30 June 2016.

16. On 1 June 2015 the Fund sent an Investor letter providing an update on matters and the Fund's state of affairs. The letter reported that the portfolio was reduced to 12 line items, had no debt, US$15.5 million in hard assets, and US$10 million in cash, which cash was to be retained for protective advances in respect of the three assets, namely, sell "as is", develop through joint ventures, or develop alone.

17. On 4 September 2015 an Investor letter was sent which proposed the Second Reverse Auction. The letter also updated investors that since the last letter in June

2015, the Fund had realised only a few small investments, which aggregated to less than US$1 million.

18. The Petition was served on the Fund on 18 September 2015.

19. The Fund did not receive any prior notification from the Petitioner or the Investor Group, expressing any concern about the Second Reverse Auction. The Petition was accompanied by a letter from the attorneys for the Petitioner, Walkers, seeking an undertaking that the Second Reverse Auction would not be pursued.

20. On 21 September 2015 the Fund confirmed by letter that it would not pursue the Second Reverse Auction, in light of certain shareholder objections. This it says it agreed to do, despite the fact that the Fund, its Manager and other shareholders, continued to support this solution as a way to provide some investors with an exit from the Fund, where they were seeking immediate liquidity.

21. On 21 December 2015 the Fund resolved to make two further distributions totalling US$13 million.

22. On 22 December 2015 the Fund paid US$4 million to Class R Shareholders.

23. On 7 January 2016 the Fund paid US$9 million to Class R Shareholders.

GROUNDS FOR PETITION

24. The Petitioner seeks a winding up order on the basis that it is just and equitable for the Fund to be wound up for reasons set out in paragraph 10 of the Petition as follows:

> "....
>
> ***Oppression, Wilful Disregard and Undermining of the Petitioner's and the Investor Group's rights and interests***
>
> *(a) The Manager continues to conduct the business of the Fund in such a way that the rights and interests of the Petitioner and the other participating shareholders have been disregarded and undermined such that it would be unjust and inequitable for them to remain as members in the Company or to be forcibly redeemed upon the terms of the Second Dutch Auction....*
>
> *(i) The Manager has attempted and is attempting to force the investors to sell their shares in the Fund at a significant discount instead of properly resolving the payment issues that face the Fund, including most recently through the purported use of a reverse Dutch auction, which is prejudicial to the interests of the investors as a whole, including the Investor Group. The proposed payment date in respect of this proposed arrangement is 30 September 2015 and the deadline for submission is 21 September 2015;*
>
> *(ii) The Manager has consistently attempted to pursue an uncertain, and unauthorized, reinvestment/ growth strategy in respect of the Fund's remaining assets in contradiction to the Manager's mandate. For example, attempts to transfer the Fund's assets into a special purpose acquisition company or 'SPAC'....instead of finalizing the limited*

monetization process voted for and approved by investors in 2008;

Lack of Probity and Loss of Confidence in Management

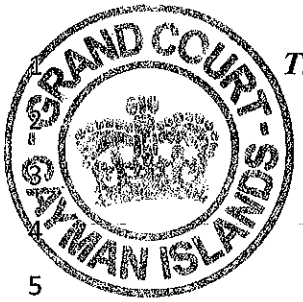
(b) The Investor Group have justifiably and irretrievably lost all trust and confidence in the Manager's ability or willingness to manage the Fund's affairs in the best interests of the Fund as a whole, without favouring its interests over those of the investors. The Manager has abused and misused its power and authority in connection with its control and management of the Fund and has acted in a manner that favours its own interests to the detriment of the interests of the investors.

.....

[Particulars of this allegation are given, which are discussed further later in the Judgment]

Loss of substratum

(c) The Company's [Fund's] *substratum has been lost as the Manager is not conducting the affairs of the Fund pursuant to the Manager's mandate and instead is continuing with an unexplained and detrimental strategy. Without further capital, the Fund cannot make additional investments in accordance with the purposes set forth in its articles of association and the OM. Failed attempts to restructure the Fund into permanent capital vehicles and now the potential development of real estate projects clearly indicate that the Manager is pursuing its own agenda at the expense of investors of the Fund. The Manager has failed to complete its mandate after seven years.*



The need for an independent investigation

(d) It is abundantly clear that independent investigation of the Fund's affairs by suitably qualified professionals is required on an urgent basis."

25. Together, the Investor Group have a legal and/or beneficial interest in a majority of the participating shares in the Fund, in that they have 51.3% of the Class R shares.

26. The Fund and the Manager have vigorously opposed the Petition. A Defence has been filed, followed by the Petitioner's responsive Reply. The Fund had also initially claimed that four other investors support what it has described as its "Liquidation plan" and oppose the Petition. These are Francis M. Cimperman, East River Capital LLC, VR Capital Group, and Montrose Asset Management Limited ("Montrose").

27. However, by letter dated 11 January 2016 addressed to the Court, Montrose has subsequently changed its mind, and has now indicated that it supports the Petition. It has therefore been argued on behalf of the Petitioner that it now has nearly 53% support, as Montrose were said to have approximately 1.42% of the Class R shares.

28. At paragraph 11 of the Petition, the Petitioner reinforces that it and the Investor Group hold participating non-voting shares in the Fund. They have no contractual

or other ability to remove or change the composition of the Fund's Board of Directors or the Manager. The Petitioner and the Investor Group claim that they have sought to engage with the Manager through correspondence on numerous occasions but to no avail. They therefore argue that the Petitioner's complaints can only properly be dealt with by way of the appointment of independent official liquidators who will be able to properly and independently investigate the Petitioner's and the Investor Group's concerns and wind up the Fund's affairs and distribute the assets in accordance with the applicable law. The Petitioner therefore pleads that it has no other more suitable remedy to pursue. – see ***Camulos Partners Offshore Limited v Kathrein and Company*** [2010 (1) CILR 303].

29. It is undisputed that the Fund is presently solvent on a cash flow basis and therefore it would appear that the Petitioner has a tangible interest in a liquidation. Further there are no issues as to the Petitioner's locus standi to present the Petition.

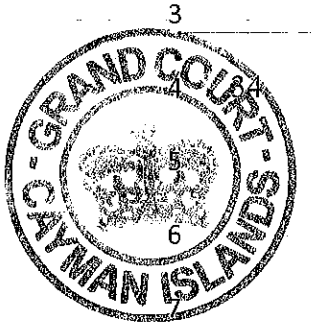
30. The Petition has been verified by the First Affidavit of Mr. Lewis Chester, sworn to on the 17 September 2015 in accordance with Order 3, rule 3 of ***The Companies Winding Up Rules 2008*** *("the CWR").*

31. Mr. Chester has also sworn on 24 September 2015, a Supplementary Affidavit. In his First Affidavit at paragraph 4, Mr. Chester stated that he is the Chief

Executive Officer of Pentagon Capital Management PLC ("Pentagon"). In paragraph 4 (a) he stated that he has been concerned in and has personal knowledge of the matters giving rise to the Petition by virtue of his role as a director of the Petitioner. In his supplementary affidavit at paragraph 4, Mr. Chester states that he omitted to include the words ("in administration") after the words "Pentagon Capital Management PLC" and he confirmed that Pentagon was placed in administration on 28 June 2012. Mr. Chester testified that the administrators of Pentagon were aware of the action that Pentagon is taking in connection with the Petition and that he is duly authorized by the Administrators to do all such things as may be necessary in relation to it. At paragraph 5 Mr. Chester states that there were errors in paragraph 4 (a) of his First Affidavit, and that he should have stated instead that he has been concerned in and has personal knowledge of the matters giving rise to the Petition by virtue of his role as Chief Executive Officer of Pentagon, the investment manager of the Petitioner.

32. The Petition is also supported by the affidavit evidence of Mr. Michael Staveley, who states that he is the Chief Investment Officer of Eden Rock Capital Management LLP, ("Eden Rock"), which is in turn the appointed Investment Advisor of the Eden Rock Entities. Mr. Chester and Mr. Staveley and the entities that they both represent were amongst the shareholders who consented to the 30 July 2008 Amendment.

33. The Petition is otherwise compliant with Order 3 of the CWR, including the fact that the proposed joint official liquidators have sworn the required consents.



On behalf of the Fund, affidavits have been filed by Mr. John Howe, a Director of the Fund. Mr. Howe is also the Chief Executive Officer of Old Hill Partners Inc., the Managing member of the Manager.

CROSS-EXAMINATION

35. On 18 December 2015 I heard and considered an application on behalf of the Fund seeking cross-examination of Mr. Chester and Mr. Staveley. The application was vigorously opposed. On the 23 December 2015 I ordered that all affiants for both the Petitioner and the Fund should attend Court on the hearing of the Petition for the purpose of being cross-examined on their respective affidavits. I did so on the basis that in my judgment, separate and apart from aspects of the case having to do with whether there had been a loss of substratum, the grounds to do with oppression, loss of confidence and lack of probity raise a number of substantial disputes as to fact which are incapable of being properly resolved on the affidavit evidence alone. I also made this order because there are, as Mr. Heaver-Wren argued on behalf of the Fund, a number of very serious and grave allegations made by the Petitioner, particularly in relation to the probity and character of Mr. Howe, the Fund's only witness. I relied upon the dicta and reasoning of Smellie J. (as he then was) in the case of ***Banco Economico S.A. v. Allied Leasing and***

Finance Corporation [1998] CILR 92 (a Creditor's Winding Up Petition), where at page 99, Smellie J. referred to:

> *"...the well-advised approach adopted in re ABC Coupler & Engr Ltd. [1962] 1 WLR 1236 and considered by Templeman J in In re Armvent ([1975] 1 WLR 1679 at 1684-1685) which is that -*
>
> > *"where grave charges were levelled against individuals the court could not in the exercise of its discretionary jurisdiction be satisfied with prima facie evidence but require the petitioner to substantiate his case more fully; that in such cases it would require where practicable the evidence of witnesses with direct knowledge of the matters to which they were testifying and upon which they could be cross-examined and which conformed to the ordinary rule of admissibility."*

36. Mr. Goucke, whilst opposing the application, stated that he accepted that this was a hotly contested contributory's petition. However, he submitted that it would be unusual to order cross-examination because the proceedings were ordered, (at the parties request), to be treated as proceedings against the Fund, as opposed to being inter partes proceedings between members of the Fund. However, see in any event, the permissive wording of CWR.0.3, R.11(h). In my judgment, that is not the true consideration. The real question is, (whatever the nature of the proceedings) as I said in my decision in ***Carl Clappison and Beric Evans v. the Proprietor Strata Plan No. 381*** (Unreported 4 May 2015) (in relation to Originating Summons proceedings), referred to by Mr. Goucke, what is the true nature of the issues involved in the case?

37. At the time of making the order I had indicated that written reasons would follow. On reflection, I do not think there is a need for more reasons than I have set out in the above two paragraphs.

38. After I had made the order for cross-examination, an application on behalf of the Petitioner, for, amongst other relief, that the cross-examination take place by way of video-link, was heard by me on 7 January 2016. Again, this application was strongly contested. Given the close proximity of the application to the hearing date, I gave an oral ruling in which I ordered that Mr. Chester attend Court personally for cross-examination, and permitting Mr. Staveley to be cross-examined by way of video-link.

39. I note that although both Mr. Staveley and Mr. Chester were cross-examined by Queen's Counsel on behalf of the Fund, Mr. Howe though present throughout most of the proceedings, was not cross-examined, (although my order had allowed for this to take place). This was because Counsel for the Petitioner maintained his stance that cross-examination was unnecessary and would not assist with the resolution of the issues.

THE FUND'S DEFENCE

40. In the Skeleton Arguments, Counsel for the Fund, at paragraph 83, provides a useful summary of the Fund's Defence. Mr. Atherton Q.C. submits that the allegations made against the Fund and its Manager are without substance. Further,

that at all times, the Fund and those responsible for its management and stewardship have acted within the proper ambits of the constitutional and commercial documents that govern the operation of the Fund. He submitted that they have conducted themselves by reference to their legal obligations to act in good faith and in the best interests of the Fund (as represented by the interests of investors).

41. Paragraph 84 of the Skeleton states as follows:

> *"84. None of the allegations made can be regarded as forming a proper and legitimate basis for the invocation of the Court's jurisdiction to place a corporate entity into liquidation:*
>
> *(1) The Fund is viable and continues to operate within the ambit of the governing documents and the proper expectation of investors when measured by reference to the content of the relevant documents;*
> *(2) No actionable wrongs have been committed;*
> *(3) There has been no lack of probity;*
> *(4) Investors have not been unfairly treated or "oppressed":*
> *(a) There has been no lack of transparency;*
> *(b) Nothing has been done to "force" investors to part with their investments on anything other than a voluntary and commercial basis:*
> *(c) Due and proper regard has been paid to the wishes and opinions of investors;*
> *(d) The strategy adopted by the Fund and its management has extracted the fullest value from distressed and sub-prime assets;*
> *(e) As a result, all of the Fund's debt has been discharged and distributions to investors of circa USD 79 million have been made between 2008 and 8 January 2016."*

THE LAW - WINDING UP ON THE JUST AND EQUITABLE BASIS

42. The Petitioner seeks to wind up the Fund on the just and equitable basis, which is set out in section 92 (e) of the **Law** as follows:

> *"92. A company may be wound up by the Court If -...*
>
> *(e) the Court is of the opinion that it is just and equitable that the company should be wound up".*

43. Section 95 of the **Law**, so far as relevant, provides as follows:

> *"Powers of the Court*
>
> *95(1) Upon hearing the winding up petition the Court may –*
>
> *(a) Dismiss the petition;*
> *(b) Adjourn the hearing conditionally or unconditionally;*
> *(c) Make a provisional order; or*
> *(d) any other order that it thinks fit,*
>
> .....
>
> *(3) If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely-*
>
> *(a) An order regulating the conduct of the company's affairs in the future;*
> *(b) An order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;*
> *(c) An order authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or*
> *(d) An order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly."*

44. Neither the Petitioner nor the Fund have, to date, made any suggestions as to appropriate alternative orders. The Petitioner has in any event stated that it unequivocally seeks a winding up order. The Fund says that as there is no foundation for a winding up petition, these alternative orders do not arise for consideration. The Court of Appeal in ***Camulos Partners Offshore Ltd. v Kathrein*** [2010] 1 CILR 303, has made it clear that the "...gateway to an order under section 95(3) is that the Court is satisfied that (but for that order) it would be "just and equitable "to wind up the company" per Chadwick P. at paragraph 38.

45. The authorities make it clear that categorizing the types of situations that are captured under the rubric of "just and equitable" is to be deprecated. However, at the same time the case law does provide assistance in illustrating the types of cases that may fall for consideration.

46. All of the heads under which the Petitioner in this case lays claim have been examined and discussed in decided cases. I will first look at the claim of loss of substratum. As Mr. Goucke has argued, this is a ground that depends principally on the construction of the relevant documents and case law and is not fact-sensitive in the sense of being dependent upon cross-examination.

LOSS OF SUBSTRATUM GROUND - PETITIONER'S SUBMISSIONS

47. I have been referred by both sides to a number of recent decisions of the Grand Court, and elsewhere, in relation to loss of substratum as a ground for winding up. The Petitioner relies upon the leading Cayman Islands authority, a decision of Jones J. in ***Belmont Asset Based Lending Limited*** 2010 (1) CILR 83. In his written submissions on behalf of the Petitioner, Mr. Goucke at paragraph 41, submits that ***Belmont*** is clear authority which demonstrates that (i) the Fund is clearly non-viable by being in (admitted) soft wind-down and has therefore lost its substratum and should be wound up accordingly; and (ii) the Petitioner and the Investor Group are entitled to have the Fund liquidated by professional independent liquidators, such as the proposed JOLs, in accordance with the CWR. Reference was made by Counsel to paragraph [12] of ***Belmont***, where, after considering a number of leading 19th Century English cases, Jones J. stated:

> *"To translate these statements into a modern context, it can be said that it is just and equitable to make a winding-up order in respect of an open-ended corporate mutual fund if the circumstances are such that it has become impracticable, if not actually impossible, to carry on its investment business in accordance with the reasonable expectations of its participating shareholders, based on representations contained in its offering document. If such a company organized as an open-ended mutual fund, has ceased to be viable for whatever reason, the court will draw the inference that it is just and equitable for the winding up order to be made."*

48. Reference was also made to paragraph 15 of the Judgment where Jones J. went on to observe:

"... In the present case, the fund's inability to meet redemption requests and the sudden collapse of its NAV occurred in September and October 2008 as a result of the combined effects of the Petters fraud and unprecedented credit crunch. There is no suggestion that the fund's difficulties were caused by any fault on the part of Harcourt. The allegations made against Harcourt (now withdrawn) related to their attempts to liquidate the fund following suspension of NAV, not the manner in which they had invested and managed the fund's assets prior to the events of September 2008. There are sound policy reasons for making a winding up order in respect of non-viable mutual funds, in spite of the fact that this situation has arisen without fault on the part of its management."

49. At paragraph 16 Jones J. elaborated as follows:

"16. Typically, mutual funds are established in the Cayman Islands by foreign financial services companies which then act as investment manager or adviser pursuant to a contract, the terms of which will be summarized in the offering document. The skill set required of a successful investment manager is wholly different from that required of professional liquidators. Investment management agreements are invariably made on the assumption that the fund is a going concern and that the investment manager will be responsible for making investment decisions and managing investments, with the result that its terms may be inappropriate to the situation where the fund is being liquidated. Typically, the investment managers are remunerated on the basis of a percentage of NAV, often coupled with performance fees calculated as a percentage of realized gains. This basis of remuneration will become inappropriate if the fund ceases to be viable and the investment manager ceases to perform at least some of the

> *functions contemplated by the investment management agreement and instead attempts to adopt a liquidation role. Investment management agreements rarely, if ever, contemplate the scenario in which the service provider's role changes from that of investment manager to that of liquidator.*
>
> (My emphasis)

50. At paragraph 17, Jones J. developed the point he was making as to policy with respect to the desirability of a wind-down being undertaken by independent professional liquidators, rather than the investment manager. He opined as follows:

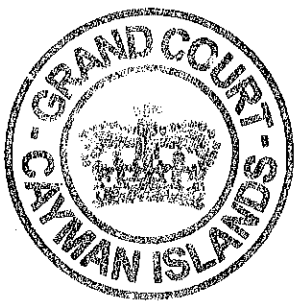
> "*An investor's decision to subscribe for shares will be based upon the reputation and past performance of the investment manager. So long as a fund's assets are being invested and managed in accordance with investment criteria and guidelines set out in the offering documents, shareholders cannot and do not expect to have any say in the investment decisions. The position changes if the fund ceases to be viable with the result that the calculation of NAV is suspended and the principal or only function left for management is to realize the assets for the benefit of creditors and shareholders. This exercise may involve an investigation and pursuit of claims against the investment manager and other professional services providers which can only be undertaken by professional independent liquidators. Even if a fund is solvent on a balance sheet test and there is no apparent cause of complaint against any of its service providers, its investors should still not be deprived of the advantages of having the task performed by professional independent liquidators. Nor should they be deprived of the protections provided by the Companies Winding Up Rules*

simply because the investment manager (which may not have been at fault) chooses to undertake the task itself."

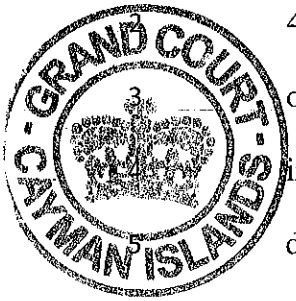
51. The Petitioner's Counsel submits that immediate and inescapable parallels with the fund in ***Belmont*** and the Fund can be seen, for example, in relation to the investment objective. Mr. Goucke argues that one can also see clear judicial disapproval of the concept of charging management fees based on a percentage of NAV in circumstances where a "soft wind-down" has been initiated. The Petitioner submits that what is happening in the Fund is even more objectionable as 1.5 % is being charged to hold *cash* (Counsel's emphasis). Further, that the complaints are exacerbated and aggravated by the fact that the Petitioner alleges cash has been "hoarded" and improperly withheld from distribution.

52. The Petitioner's submission continues that it is inarguable that the Fund is on "soft wind-down" and has therefore lost its substratum. Reference was made to Mr. Howe's First Affidavit, at paragraph 6, where he described the plan as "the Manager's liquidation plan". Reference was also made to characterizations by other investors, seen in letters written by them, as follows:

"Putting the company in liquidation when it is already in liquidation makes no sense",
"The Manager provided a satisfactory update to all shareholders on the progress of the wind down of the Fund with a letter in June."



53. The Petitioner relies upon the decision of Foster J. in ***Re Freerider*** [2010] 1 CILR 486, where Foster J., although not having before him an entity which was an open-ended mutual fund, adopted the loss of substratum test described by Jones J. in ***Belmont***. (It would appear that Foster J. in any event found that the test laid down in the older authorities was also met in the case before him).



54. The decision of Foster J. was upheld on appeal – see ***Re Freerider*** [2011] 2 CILR 103, but the Court of Appeal do not appear to have discussed the particular point under discussion here.

55. The Petitioner also relies upon the decisions of Jones J. in ***In re Wyser-Pratte Eurovalue Fund Ltd.*** [2010] (2) CILR 194 and in ***In re Heriot African Trade Finance Fund Ltd.*** [2011] (1) CILR 1.

56. It was argued that a number of the relevant facts in ***Wyser-Pratte***, are similar to the facts in the present case, albeit, notably, the petition in ***Wyser-Pratte*** was brought by a very small minority shareholder, holding only 0.85% of the economic value of the company.

57. According to the Petitioner, largely similar to the present circumstances, in ***Wyser-Pratte***, the investment manager had sought to implement a soft wind-down. Reference was made to paragraphs 21 and 23 of the Judgment, where Jones J. observed:

(at paragraph 21)

> *"By definition a company cannot be said to be carrying on business as an open-ended mutual fund if its ability to redeem shareholders in cash and its ability to accept new subscriptions has been terminated permanently."*

(and at paragraph 23)

> *"In my judgment, Counsel's submission is highly artificial and ignores the commercial realities. There is nothing in the company's offering document which would lead its shareholders to anticipate that the suspension of redemptions and the imposition of a wind-down plan is something which may happen "in the ordinary course of business". Nor is there anything in the offering document which suggests that a liquidation of the company will necessarily be carried out under the supervision of its directors, rather than professional insolvency practitioners, or that it will be carried out pursuant to a plan devised by the investment manager without shareholder approval, or that the investment manager will continue to be paid a percentage of NAV during the liquidation process, or that there will be no formal mechanism whereby the shareholders can intervene and influence the process. In fact, the offering document is wholly silent about what will happen in the event that it becomes necessary to put the company into liquidation."*

58. The argument continues that, just as was the case in ***Wyser-Pratte***, there is nothing in the offering memorandum of the Fund which suggests that a liquidation of the Fund will be carried out by its directors rather than professional insolvency practitioners. It was submitted that, as was the case in ***Wyser-Pratte***,

the offering memorandum here provides a similar statement about limited liquidity, although under the heading "Limited Redemption and Transfer Rights".

59. Counsel then referred to the Second Slow Payment Option Amendment to the Articles, and stated that however, distributions to investors since the implementation of the Second Slow Payment Option have been withheld unreasonably, despite large amounts of cash on balance sheet, and in contravention of the clear terms requiring payments within 30 days of the end of each fiscal quarter. The Petitioner avers that, as of 31 December 2014, 46 % of the remaining assets consisted of cash, i.e. US$13.6 million. Further, that despite the substantial cash balance, no distribution whatsoever was made to investors during 2015 until the "belated" US$4 million payment on 21 December 2015, this being several months after the presentation of the Petition.

60. At paragraph 56 of the written Skeleton Argument, the Petitioner concedes, that "Whilst it is true that in our case, there was a degree of investor consultation", the terms of the Second Slow Payment Option are nothing more than an agreement to delay payment to redeeming investors. There is, it was submitted, certainly no mention in the amendments of a *permanent* soft wind-down by the Manager, which is contractually incapable of being transformed into an official liquidation pursuant to an appropriate petition, as contemplated by section 95(2) of the Companies Law.

61. The Petitioner relies upon the ***Wyser-Pratte*** decision as manifesting "clear judicial reprobation" attaching to a management fee on cash assets in a soft wind-down. – see paragraph 30.

62. The Petitioner also made reference to ***Heriot***. In this case Jones J. based his decision on the same principles and policies which he had discussed in ***Belmont***. However, importantly, in ***Heriot***, unlike in ***Belmont***, Jones J. had the benefit of full, opposing argument on behalf of the Company which the Petitioner sought to have wound up. In ***Heriot***, the entity involved was another open-ended mutual fund. After describing the fund's operation Jones J. went on to say, at paragraph 35:

> *"35. The application of this formulation involves identifying the nature and scope of a mutual fund's investment business by reference to its offering document. The key characteristics of the fund, as set out in its PPM are as follows. First, it is a regulated mutual fund which has been registered with CIMA under s.4 (3). Secondly, subscriptions and redemptions will be accepted quarterly at the NAV Ruling on the applicable quarter days...The right to redeem on 120 days' notice (subject to a typical suspension provision) is one of the fund's key characteristics. Thirdly, the PPM contemplates that the fund will continue in business indefinitely. It was not established as a limited duration company. Fourthly, the fund's investment objective and strategy is described as acting as a principal trade in commodities and provider of trade finance for African commodity producers. Having thus described the fund's business, it is relevant to note what is <u>not</u> said in the PPM. The fund was not set up as a*

liquidation fund. The PPM is wholly silent about the circumstances in which it might be put into liquidation, and the only reasonable inference to draw is that it will be liquidated in accordance with the provisions of Part V of the Companies Law and the applicable rules. The PPM does not describe any "soft wind-down" procedure. Nor does it say that the investment adviser may assume the role of liquidator. The PPM describes the circumstances in which the participating shareholders' right to redeem may be suspended, but it does not state that the right to redeem at the option of the shareholder may be suspended permanently, that is to say, terminated as part of a 'soft wind-down" or ad hoc liquidation procedure."

(My emphasis)

63. As Counsel for the Petitioner points out, Jones J. accepted that there might conceivably be specific circumstances where a fund was set up as a limited duration company, in order to liquidate distressed assets. However, it was Mr. Goucke's submission that just as in ***Heriot***, such circumstances do not exist or apply in the instant case. Reference was made to paragraphs 41 and 42 of the Judgment where the learned judge stated as follows:

> *"....However, I do recognize that there may be circumstances in which it can be said that a liquidation is being carried out in the ordinary course of a company's business, as contemplated by its articles of association and offering documents. A fund may be set up as a limited duration company, in which case its articles of association will set out when, how and by whom the company is to be liquidated at the end of its pre-determined life. In these circumstances, it may be said that the liquidation is itself part of*

the company's business, in which case it would not be appropriate for the court to interfere in the process by making a compulsory winding-up order, at least in the absence of serious breach of duty or serious mismanagement on the part of those responsible for the company's liquidation.

The present case is wholly different. The fund's ad hoc liquidation has been forced upon its management by a combination of extraordinary events outside their control. It is said that the credit crunch of September 2008 caused a complete collapse in the commodity markets which, in turn, led to defaults on the part of all the fund's counterparties and a sudden influx of redemption requests. Whether or not management's decision to concentrate the fund's counterparty risk in breach of the investment restrictions contributed to its failure is an open question. In my judgment, it cannot be said that an ad hoc liquidation of the fund, conducted informally by management, is something which, in these circumstances, the participating shareholders should have anticipated would happen in the ordinary course of business."

64. Reference was also made to paragraphs 49 and 50 of the learned Judge's Judgment, where he concluded as follows:

*"**Conclusions***

49. I am satisfied that it is just and equitable to make a winding-up order on the basis that the fund is no longer viable, in the sense that it is practically impossible to carry on its business in accordance with the reasonable expectations of its participating shareholders, based upon the representation contained in the PPM. The evidence is that all the participating shareholders agree that the fund should be liquidated and the management have in fact

been engaged in an ad hoc liquidation at least since March 2009 when they suspended redemptions. There is no basis upon which it can be said that an ad hoc liquidation conducted by management is itself part of the fund's business, such that the participating shareholders should not have any reasonable expectation that the fund would be liquidated in accordance with the Companies Law and the Companies Winding Up Rules. To the contrary, investors who put their money into mutual funds incorporated in the Cayman Islands have every reason to expect that the companies' affairs will be conducted in accordance with Cayman Law, including the Companies Winding Up Rules.

50. The fund is being liquidated because it failed commercially and because it is now practically impossible to carry on the business for which it was established, with the result that the investors want to withdraw what is left of their capital and deploy it elsewhere. The investors agree that the fund should be liquidated. In these circumstances there are strong policy reasons for saying that the liquidation should be conducted by qualified insolvency practitioners in accordance with the provisions of the Companies Winding Up Rules. This would be so even if there was no breach of duty on the part of the company's management. In this case I have concluded that the evidence relied upon in support of the alleged breaches of fiduciary duty does not disclose a triable issue. The investment adviser did act in breach of duty in connection with the investment restrictions. Whether that breach materially contributed to the fund's failure remains an open question."

65. In ***Wyser-Pratte***, Jones J. adjourned the Petition and then, on the adjourned hearing, made alternative orders under s.95(3) of the **Law**, because although

satisfied that it was just and equitable to wind up the Company, events had overtaken the proceedings and the "liquidation" had by then been satisfactorily completed. At paragraphs 63 and 64 of the Skeleton Arguments, the Petitioner argues as follows:

> *"63. The Fund has already been in soft wind-down for some seven and a half years, with no real end in sight. The Petitioner's evidence is that this is likely to take until at least 2018 (notwithstanding the Manager's representations of mid-2016): see paragraph 40 of Mr. Staveley's Second Affidavit and the note of the call between Eden Rock and the Manager referred to therein. It is respectfully submitted by Counsel that this factor is critical and clearly militates in favour of the Court exercising its discretion to make a winding up order, rather than some form of alternative relief contemplated by section 95(3) of the Companies Law.*
>
> *64. This factor distinguishes the facts in Wyser-Pratte, i.e. whilst it is abundantly clear that the Investor Group's persistence and the presentation of the Petition has had an immediate and valuable impact, namely:*
>
> > *(a) The hasty abandonment of the Second Dutch Auction on 21 September 2015 (days after presentation of the Petition on 17 September 2015); and*
> > *(b) In the fact of the Petitioner's entirely justified complaints that zero cash had been distributed during the entirety of 2015, the belated and self-serving distributions of some US$13 million in cash to investors on 22 December 2015 and 7 January 2016, which reinforce the Petitioner's view that the cash was being held for no reason other than for the Manager to receive fees thereon: see paragraph 6 of the Second Howe Affidavit.*

66. Additionally, Mr. Goucke on behalf of the Petitioner has made a submission that he candidly says whilst logical, he has not been able to find any precise authority

in support. It has to do with the fact that in this case the Petition is supported by the majority of the participating shareholders.

67. In this case, the Petition is supported by members of the Investor group who together have a legal and/or beneficial interest of at least 51.3% of the Class R Shareholders (more, if Montrose is included in the percentage calculation). It was submitted that accordingly, whilst there is clear authority that the Court is empowered to exercise its jurisdiction to make a winding up order on the just and equitable basis even if (i) the Petition is presented by a minority contributory and (ii) against the wishes of a substantial majority, it is submitted that in circumstances where there is clear majority support for a winding up order, the Court should act even more readily and in accordance with the reasonably held views of the Petitioner and the Investment Group. Further reference was made to sub-section 115(1) of the **Law**, which provides that:

> *"The Court shall, as to all matters relating to the winding up have regard to wishes of the creditors or contributories..."*

LOSS OF SUBSTRATUM GROUND - THE FUND'S SUBMISSIONS

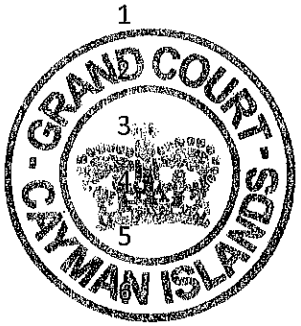
68. Mr. Atherton Q.C. also handed up comprehensive written skeleton arguments. In addition to referring to ***Belmont***, ***Wyser-Pratte***, ***Heriot*** and ***Re Freerider***, learned Queen's Counsel also referred the Court to the decision of the Court of Appeal in ***ABC Company (SPC) v J & Company Ltd*** [2012] 1 CILR 300, and the recent

unreported decision of Clifford J. in ***Re Harbinger Class PE Holdings (Cayman) Ltd.***, Judgment delivered 10 November 2015.

69. It was submitted that the current state of the law in the Cayman Islands is unsatisfactory. Learned Queen's Counsel asked the Court not to follow ***Belmont.*** He submitted that the decision is plainly wrong, in that it wrongfully expands the test for loss of substratum in a funds context. It was submitted that after ***Re Harbinger***, under Cayman law as it now stands, there would appear to be two different tests for loss of substratum, one in the funds context, and one for all other companies, which, it was submitted was an unnecessary complication.

70. Mr. Atherton submitted that the traditional common law approach to loss of substratum in England and which also reflects the law of Scotland, and the law of the British Virgin Islands ("BVI") and is the test that is now applied to all Cayman companies other than open-ended investment funds (assuming ***Belmont*** is continued to be treated as still good law), is whether the business of the company has become impossible to pursue.

71. Reference was made to ***Re Suburban Hotel Company*** (1867) LR 2Ch. App 737 (CA), in which the winding up of a company was sought on the basis that the hotel business for which the company had been established ought to be considered a total failure. At page 744, Lord Cairns, in an oft-quoted passage stated as follows:



"It is not necessary now to decide it; but if it were shown to the Court that the whole substratum of the partnership, the whole of the business which the company was incorporated to carry on, has become impossible, I apprehend that the Court might, either under an Act of Parliament, or on general principles, order the company to be wound up."

72. Reference was made to the decision of Clifford J. where in ***Re Harbinger***, the learned judge pointed out that Lord Cairns' dicta was followed in a number of English and Scottish cases. Examples given are numerous, including ***Re Diamond Fuel Company*** (1879) 13 Ch D 400, ***Re Haven Gold Mining Company*** (1882) 20 Ch D 151, ***Re German Date Coffee Company*** (1882) 20 Ch D 169, ***Re Baku Consolidated Oilfields Ltd.*** [1944] 1 All E.R. 24, and ***Re Kitson & Co. Ltd.*** [1946] 1 All E.R. 435.

73. The submission continues, that following the advent of the financial crisis, this line of authority was then followed in ***Citco Global Custody NV v. Y2 K Finance Inc.***, a decision of the Commercial Court of BVI. In that case, Bannister J. (as he then was), described the statement in ***Re Suburban*** as a *"powerful general principle of the highest authority"*- paragraph [21]. He went on to say:

> *"In my judgment where, under modern conditions, it becomes necessary to inquire whether a company's substratum has been lost and where the question cannot be answered by reference to a specific objects clause, the information upon which the decision is made must simply be collected from elsewhere."*

74. In this BVI case the investment fund had received a number of different redemption requests which had required the fund to realize assets, unwind its positions and suspend the calculation of NAV. The fund accepted that it eventually had to go into liquidation, but that before that was put in train they wanted to end suspension of NAV and the shares of all requesting investors be redeemed out of the remaining available funds. At paragraph [24] Banister J. stated:

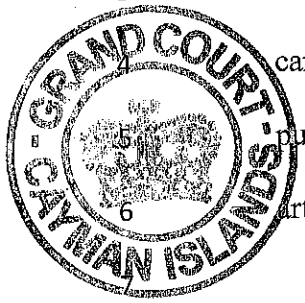
> *"A redemption of the shares of those investors who wish to redeem is not a distribution by way of ad hoc liquidation.....It is wholly different from liquidation both in law and in fact. It is a carrying on, albeit for the last time, of the business of Y2K in accordance with the contractual rights of members under Y2K's Articles of Association. If after that has been done, there remain investors who do not wish to be redeemed, then liquidation must follow, since the surplus cannot lawfully be distributed in this circumstances except in accordance with the statutory scheme. But while Y2K is solvent (that fact is not challenged), it seems to me that there is nothing in the authorities which suggests that it would be a proper exercise of discretion for the Court to step in and shut the company down while it remains in a position to carry out the last commercial functions for the benefit of those investors who have requested it to do exactly that."*

75. In ***Aris Multi-Strategy Lending Fund Ltd. V Quantek Opportunity Fund*** a decision again of Bannister J., delivered 15 December 2010, the learned judge was referred to Jones J.'s decisions in ***Belmont*** and in ***Wyser-Pratte***. At paragraphs [34] and [35], Bannister J. stated as follows:

"[34] It appears to me that the learned judge was confining his reasoning to the position of open ended investment funds. If he was, then I respectfully disagree from him. There cannot, in my view, be a separate principle applying only to a particular type of business. While the application of principle to the facts of a particular business, finding itself in a particular situation, may throw up different results in different cases, the principle itself, must, I would suggest, be universal.

[35] Nor, if I may say so, do I consider it helpful to introduce the concept of viability. A business may be said not to be viable on a number of bases - for example, it cannot currently be carried on at a profit; or because it makes negligible profits which do not justify the capital invested; or because its financial statements cannot be drawn up on a going concern basis. No doubt there are as many other circumstances under which a company could be said without misusing language not to be viable. So that it seems to me that the concept of 'non viability' is too uncertain to ensure consistency of application. I prefer to hold to the underlying principle which I have attempted to extract from the authorities referred to earlier in this judgment and say that a company will not be wound up on substratum grounds-not certainly, against the wishes of a majority-unless it can be shown that it is impossible for the business of the company to be carried on-whether that is because (regardless of the company's circumstances) what it was set up to do could never have been done or can no longer be done, or whether it is because the circumstances in which it finds itself means that the company cannot continue its business because it lacks the ability or means to do so."

76. Counsel for the Fund submitted that, to the extent that the line of authority originated by Jones J. retains any precedential value, the Fund relies on the dicta in paragraph [41] of ***Heriot*** as regards the facts of the present case, by which it can be seen that the "wind down" or "run-off" of the Fund's affairs is being pursued in accordance with the terms of its memorandum of incorporation, its articles (as amended) and its offering memorandum.



77. The next case referred to by Mr. Atherton Q.C. was the very important Court of Appeal decision in ***Re ABC Company (SPC) v. J & Company Ltd.*** [2012 (1) CILR 300]. In that case an appeal was allowed in respect of a decision of Jones J in which he refused an application to strike out a petition brought against a Cayman segregated portfolio company which was incorporated as an open ended investment vehicle. One of the company's segregated portfolios was invested in German real estate. In 2008, the German portfolio suspended redemptions, but, before the manager of the portfolio communicated to investors that it was to liquidate the portfolio over the next three years and make *pro rata* distributions to shareholders as liquidity allowed, the company's articles of association were amended to give the company the power to do this, and class meetings were held at which the proposed amendments to the articles were approved by all classes of participating shares. On that basis, the Court of Appeal held that there was no realistic prospect of the petitioner establishing that the fund had lost its substratum and thus struck out the petition. At paragraphs 42-50 (inclusive) Chadwick P. discussed the relevant considerations and principles as follows:

"42. It is, I think, common ground that the "reasonable expectations of [the company's] shareholders" –in the context of addressing a contention that "the substratum of the company has failed" – are not to be determined, or (at the least) not to be determined exclusively, by reference to the memorandum of association of the company. The objects for which the company was established were stated in the memorandum of association in the widest terms" The objects for which the company is established are unrestricted and the company has full power and authority to carry out any object not prohibited by any law as provided by the Companies Law."

43. In order to determine the reasonable expectations of the company's shareholders it is necessary to have regard to the company's articles of association and the relevant offering documents. The company's articles of association permit the issue of "participating shares". A participating share is defined as "A participating redeemable share referred to as such in art.11 issued subject to and in accordance with s. 37 of the Law and these articles..."

44. Article 30 of the company's articles of association –as they were before amendment in 2010- provided that the company might issue one or more classes of participating shares "which are to be redeemed or are liable to be redeemed at the option of the company or the holder at such times and on such notice as is determined by the Board of Directors before the issue of the relevant class. "Article 32(a) provided that members might redeem participating shares on a redemption date by giving the company such prior written notice as the offering memorandum in respect of the relevant participating shares required. Article 32(c) was in these terms (so far as material:

> *"If the determination of the net asset value of participating shares of any class is suspended beyond the day on which it would normally occur by reason of a declaration by the directors under art. 50 (suspension of the valuation in respect of the class) the member's right to have his participating shares of that class redeemed under this article will be similarly suspended....*

45. Article 50 gave the directors power to declare a suspension of the determination of net asset value (with a consequential suspension of the right to redeem under article 32(c) for the whole or any part of a period during (inter alia) "(b) the existence of any state of affairs which, in the directors' opinion, constitutes an emergency as a result of which disposal of investments by the company owned by it would not be reasonably practicable or would be seriously prejudicial to the members..."

46. Article 165 of the company's articles of association provided that, "subject to and insofar as permitted by the Law, the company may be special resolution alter or amend its memorandum of association or these articles in whole or in part". That provision was to be read with art. 54 which required that:

> *(a) The rights attached to any class of shares may be varied either whilst the company is a going concern or during or in contemplation of a winding up, with the consent in writing of the holders of not less than three-fourths of the issued shares of that class, or with the sanction of a resolution passed at a meeting of the holders of the shares of that class by a majority of three-fourths of the votes cast at that meeting, but not otherwise....*
> *(b) No substantial change in the company's business or affairs, nor any change of capitalization or other measure, may be effected except with the prior approval of a majority of any class of shares affected voting at a meeting..."*

47. As alleged in the amended petition, the articles of association of the company were amended, following class meetings held during 2010. Article 32(a) (which conferred on shareholders the

right to redeem) was replaced by a new article, art. 50(a) , which was in much the same terms. Articles 32 (c) and 50 (suspension of the right to redeem following suspension of the determination of the new asset value) were, in effect, replaced by a new provision, under the heading "Suspension":

> *"59. The directors may, from time to time, in their absolute discretion and for any reason, declare a suspension. The directors shall promptly notify all affected shareholders of any suspension and shall promptly notify such shareholders upon termination of such suspension."*

"Suspension" in that context, has the meaning given in art. 2 ("Interpretation") of the amended articles of association:

"Suspension" - a determination by the directors to postpone or suspend (i) the calculation of the net asset value of participating shares of one or more classes and/or series (and the applicable valuation date); (ii) the issue of participating shares of one or more classes and/or series (and the applicable subscription date: (iii) the redemption of participating shares of one or more classes and/or series (and the applicable redemption date); and/or (iv) the payment of any redemption proceeds (even if valuation dates and redemption dates are not postponed)."

48. It is important to keep in mind that the amended articles of association were adopted by resolutions passed (with the requisite three-fourths majority) at class meetings of all classes of participating shares. The amendments must be taken to reflect the wishes of shareholders generally; their effect is not restricted to the holders of segregated portfolio shares issued in respect of the German Fund, or to the holders of segregated portfolio shares issued in respect of real estate funds. A requisite majority (or majorities) of shareholders generally determined in 2010, that the directors of the company should have the power of suspension

which was introduced by the new article 59. That had been explained in a notice to shareholders dated April 23rd, 2010. That notice includes the statement that:

> *"The company's original articles were drafted nearly 10 years ago in 2000, since when the operation of offshore funds has moved on a long way.*
> *The principle changes to the articles are:*
> *The ability to suspend the calculation of the net asset value, the issue of participating shares and the payment of redemption proceeds. "*

49. It is important, also, to keep in mind that-notwithstanding the allegations made in paragraph 23-25 of the amended petition – there is no challenge to the validity of the resolutions pursuant to which the articles were amended.

50. It follows, therefore, that-if and insofar as the "reasonable expectations" of the shareholders are to be determined by reference to the articles of association of the company, as amended in 2010 - it is impossible for the petitioner to contend that a bona fide exercise by the directors of the power (conferred by art. 59 of the amended articles) to declare a suspension in relation to the Fund-and other real estate funds- was outside the reasonable expectations of the holders of segregated portfolio shares issued in respect of that fund or those funds; or outside the reasonable expectations of shareholders generally . Rather, it must be accepted that, when voting on the resolutions to amend the articles of association in 2010, shareholders appreciated, and intended, that the directors (acting bona fide) should be able to exercise that power if, in their discretion, they determined that the interests of the company so required."

(My emphasis)

78. Learned Counsel also pointed to the fact that the Court of Appeal expressly noted the difference in view as to the test of the loss of substratum in Cayman Law and BVI Law, but took the view that the particular appeal before the Court did not require that conflict to be resolved on that appeal. At paragraph 67, the learned President expressed the matter thus:

> *"67. It must be anticipated that an appeal will come before this court in which it will be necessary to choose between the approach of Jones J in Belmont and Heriot on the one hand, and that of Banister J in Aris v Quantek on the other hand: or perhaps, to decide that the true approach in this jurisdiction should lie somewhere between the two approaches respectively adopted in those cases. But this is not that appeal. The reason why it is not is that-as I have sought to explain earlier in this judgment-the issue in this case is not whether it would be just and equitable to wind up the German Fund. The issue in this appeal is whether(absent an alternative remedy under s. 95(3) of the Law) it is arguable that it would be just and equitable to wind up the company on the basis of such of the allegations made in the amended petition as the petitioner has any realistic prospect of establishing at trial."*

79. The most recent decision on the law in Cayman as to loss of substratum is that of Clifford J. in the unreported decision ***In the matter of Harbinger Class PE Holdings (Cayman) Ltd.***, *Cause No FSD 0080/2015,* Judgment delivered 10 November 2015. I understand that the Judgment might be under appeal but an appeal but has not yet been heard. In the ***Harbinger*** case, Clifford J. carried out a comprehensive review of the old English cases, and of the Cayman and BVI

cases, including the Court of Appeal's decision in ***ABC Company***. Having commented that the Court of Appeal had decided that it was not necessary to determine the difference in approach of the cases in the Jones J. line of cases, and the decisions of Bannister J. in the BVI, at paragraph 57 Clifford J. also expressed the view that he did not have to make that choice either. Clifford J. applied the traditional impossibility test and found that the test of loss of substratum had not been made out in the case before him.

80. At paragraphs 57 and 58 Clifford J. held as follows:

> *"57. Nor is it necessary to make any such choice in the present case. By common consent the Company here is not, and never has been, an open-ended corporate mutual fund, one that issues shares to, and redeems the shares of, investors at any time investing the net investment proceeds in investments for the benefit of shareholders.*
>
> *58. In my judgment, therefore, the test to be applied in this case in determining whether there has been a failure of substratum is founded upon the established underlying principle of the line of authorities referred to which requires the Court to determine whether it has become impossible for the company to achieve the purpose for which it was formed. It is a question that must be determined by ascertaining the principal or main objects of the company and then deciding whether it has become impossible for the company to attain those objects."*

81. I agree with learned Queen's Counsel Mr. Atherton's submission that the reasoning and decision of the Court of Appeal in the **ABC Company** case are

determinative of the claim to an alleged loss of substratum in favour of the Fund in the present case. That is because in the instant case also there was due approval of the Fund's Wind-down process by amendment to the Fund's articles on 30 July 2008, and which amendment was consented to by all shareholders. In order to determine the reasonable expectations of the company's shareholders it is necessary to have regard to the company's articles of association and the relevant offering documents and that means that the Court must of necessity look at the articles as amended. It is not reasonable for the Petitioner to contend that a bona fide exercise by the directors of the power conferred by the amended article 30(b) to redeem Class R shares on a "slow-pay" basis was outside the reasonable expectations of the shareholders generally. Rather, it must be accepted that, when voting on the resolutions to amend the articles of association in 2008, shareholders appreciated, and intended, that the directors (acting bona fide) should be able to exercise the powers granted if, in their discretion, they determined that the interests of the company so required. The amendment included the power, for example to from such proceeds as are allocated to Class R shares retain or reserve capital to (i) fund necessary cash reserves, (ii) fund ongoing funding obligations, (iii) pay down leverage as deemed advisable and (iv) make protective investments intended to maintain the value of the assets attributable to the Class R Shares.

82. In my judgment, the words of Jones J. in paragraph 41 of his decision in ***Heriot*** are wide enough to encompass the facts of the present case, by which the wind-

down or run-off of the Fund's affairs is being pursued in accordance with the terms of its memorandum of incorporation, articles (as amended) and its offering documents. Amendment and the fact that the Funds shareholders consented following class meetings is logically a matter that must make a difference to the relevant considerations, as pointed out so clearly in the Court of Appeal's decision in ***Re ABC Company***. Reasonable expectations gain their nature and characteristics from the contents of the relevant documents at the operative time, whether amended or otherwise. The fact that amendments represent a change from what was originally contained in the relevant documents is really mainly of historical interest; it is the documents as amended and as agreed by the shareholders, that encapsulates the reasonable expectations of the shareholders. There is therefore in my judgment no need in the circumstances of this case for me to have to examine the merits of the difference in views as to the loss of substratum test expressed by Banister J in the BVI and Jones J in the Cayman cases.

83. However, in any event, because of the view which I have taken of the effect of the constitutional documents of the Fund, including the articles of association as amended, and the Fund's activities and affairs as they are being conducted by the Manager, I am of the view that neither on the ***Belmont*** line of authority, nor on the more traditional impossibility test, is there room for properly finding that this Fund has lost its substratum or that it is non-viable. This is not a fund in respect of which it could properly be said, as Jones J. said of the fund in ***Heriot*** (paragraph

50), that it had "failed commercially". In other words, on the evidence, it has not been demonstrated that it is either actually impossible, or impracticable for the Fund to carry on its business in accordance with the reasonable expectations of its investors.

84. It does seem to me that, as Mr. Howe states in paragraph 27 of his First Affidavit, given that the Slow Payment Option represented the third proposal put to shareholders:

a. proposals that were not favoured by shareholders were not adopted by the Fund;

b. The Fund only adopted a proposal to which the Fund's shareholders consented following Class meetings held in accordance with the Fund's articles; and

c. The terms in which the approved proposal was implemented (in the Amendments to the Articles) were orthodox and seemingly appropriate.

85. As Mr. Howe also states in paragraph 26, this is not a situation where the Fund like others responded to the 2008 global financial crisis by (a) entering into a soft wind-down without the shareholders' consent and in a manner contrary to their reasonable expectations (because, for example, there is nothing in the relevant fund's constitutional or offering documents to lead investors to expect the fund to carry out that process itself following a suspension of redemptions, or (b) a fund enters into a wind-down but fails to return any money to its shareholders, or the fund is insolvent.

86. The Petitioner also alleged that the Fund has lost its substratum (Ground 10(c) of the Petition), essentially, on the following bases:

(a) The Manager is not conducting the affairs of the Fund in accordance with its mandate;

(b) It is pursuing an unexplained and detrimental strategy;

(c) The Fund cannot make additional investments as envisaged by the Fund's articles and offering memorandum without the need for further capital;

(d) The Manager is pursuing its own agenda at the expense of the Fund's investors; and

(e) The Manager has failed to complete its mandate after seven years.

87. It would seem to me that the matters listed at sub-Paragraphs (a), (b), and (d) above do not fall comfortably for consideration under the issue of whether the Fund has lost its substratum and really are better discussed as part of the claims that there has been a loss of confidence in management on the grounds that there has been a lack of probity or in relation to the allegation of oppression.

88. As regards the matter at (e), whether that is or is not a prudent state of affairs, it is important to note that no time-frame seems to have initially been fixed or committed to by the Fund or Manager by which it was thought that the wind-down of the Fund's affairs would be completed. Yet the shareholders did not protest or insist on a time estimate; they agreed to the Amendment as it stands, without a time-frame. It was by letter dated 30 December 2013, that the Fund

wrote to investors estimating that wind-down might be completed by 30 June 2016. – see Mr. Howe's First Affidavit, paragraph 75.

89. At paragraphs 76 of his First Affidavit, Mr. Howe states as follows:

> *"76. As before, no complaints were received from investors, including the Petitioner and the investor group, in respect of this estimate that the wind-down would take until 30 June 2016, given the nature of the remaining assets in the portfolio."*

90. On the other hand, the Petitioner's evidence is that it is likely to take until at least 2018 for the wind-down to be completed. At paragraph 40 of Mr. Staveley's Second Affidavit, he states:

> *"40. In further response to paragraph 70, no complaints were made as to the projected end date of the Slow Payment Option of 23 February 2016. The Investor Group's concern, which remains unanswered by the Manager, is that, given significant assets remain in the Fund, the Slow Payment Option is now more likely to take until 2018 at the earliest to conclude, unless this Court acts. My view is based on a call between David Gervais (analyst at Eden Rock) and Jeff Haas (the Chief Operating Officer of the Manager) on 5 February 2015 in which he emphasized that the Slow Payment Option would take another two years to complete."*

91. Having regard to the fact that no actual time estimate was initially given, the nature of a number of the assets, being real estate of a particular type, and the fact that at least as at the date of the 30 December 2013 letter, there were no

complaints made to the Fund about the time estimate, in my view there is no solid foundation on these bases for an assertion that there has been a loss of substratum.

92. Counsel for the Fund have also argued and pointed to evidence that the Fund had remained viable and remained entitled to issue new shares and has in fact done so.

93. In my judgment, this ground of loss of substratum has not been made out.

OPPRESSION, WILFUL DISREGARD AND UNDERMINING OF THE PETITIONER'S AND THE INVESTOR GROUP'S RIGHTS AND INTERESTS

94. In the **Law**, there is no statutory reference to "oppression" except as one of the conditions for appointment of provisional liquidators-see section 104(2)(b)(ii). However, cases of oppression are simply an example, or sub-set of cases in which it may be just and equitable to wind up a company. In one of the oft-cited and leading Scottish cases on this area, ***Elder v Elder and Watson Ltd*** [1952] SC 49, Lord President Cooper stated as follows, in relation to the relevant pre- 1947 practice under the "just and equitable" clause:

> *"Under the former practice, winding up has been ordered in many types of case which involved no true element of oppression to shareholders, eg. where the substratum of the company had vanished, and such cases will doubtless continue to arise. On the other hand the justice and equity which led to the grant of a winding up order have often been found in conduct reasonably capable of being described as "oppressive" to some part of the company's members, the oppression being usually exerted by a*

person with predominating voting power which was employed for his own advantage to the detriment of a helpless minority. The decisions indicate that conduct which is technically legal and correct may nevertheless be such as to justify the application of the "just and equitable" jurisdiction, and, conversely, that conduct involving illegality and contravention of the Act may not suffice to warrant the remedy of winding up, especially where alternative remedies are available. Where the "just and equitable" jurisdiction has been applied in cases of this type, the circumstances have always, I think, been such as to warrant the inference that there has been at least an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy. The phrase "oppressive to some part of the members" acquires a certain colour from its collocation in section 165 with such stronger expressions as " intent to defraud", "fraud", "misfeasance", or "other misconduct", and the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely."

95. See also the decision of the Judicial Committee of the Privy Council in ***Re Kong Thai Saw Mills*** [1978] 2 MU 227.

96. Some of the Petitioner's principal complaints are as follows:

(i) The Manager continues to conduct the business of the Fund in such a way that the rights and interests of the Petitioner and the other participating shareholders have been disregarded and undermined such that it would be unjust and inequitable for them to remain as members in the Company or to be forcible redeemed upon the terms of the Second Dutch Auction....

(ii) The Manager has attempted and is attempting to force the investors to sell their shares in the Fund at a significant discount instead of properly resolving the payment issues that face the Fund, including most recently through the purported use of a reverse Dutch auction, which is prejudicial to the interests of the investors as a whole, including the Investor Group. The proposed payment due in respect of this proposed arrangement is 30 September 2015 and the deadline for submission is 21 September 2015;

(iii) The Manager has consistently attempted to pursue an uncertain, and unauthorized, reinvestment/ growth strategy in respect of the Fund's remaining assets in contradiction to the Manager's mandate. For example, attempts to transfer the Fund's assets into a special purpose acquisition company or ' SPAC' .... Instead of finalizing the limited monetization process voted for and approved by investors in 2008."

97. At paragraphs 28-32 of his First Affidavit, Mr. Chester stated the following in relation to the Second Reverse Dutch Auction:

"Second Reverse Dutch Auction

28. Despite the fact that the First Dutch Auction was rejected by over 80% of the Fund's investors, more recently, on 4 September 2015, the Manager gave notice to all investors that a resolution

had been passed by holders of all the Management shares in the Fund to hold a second reverse Dutch auction ("the Second Dutch Auction").

29. Under the terms of the Second Dutch Auction, those investors who return a Contingent Redemption Request indicating that they are willing to sell their participating shares at a discount of at least 15% of their 31 July 2015 NAV will be considered for a redemption in advance of other investors. The deadline for submitting a contingent Redemption is 21 September 2015.

30. The redemption payments under the Second Dutch Auction are to be paid on or before September 30, 2015.

31. I am of the view that, similarly to the First Dutch Auction, if the Second Dutch Auction is allowed to take place, it will be extremely prejudicial to investors because it allows those shareholders who submit a Contingent Redemption Request to accept a discount on their interest in the Fund in return for receiving a priority over other investors.

32. Any distributions made pursuant to the Second Dutch Auction would inevitably decrease the pool of assets available to those investors who do not submit a Contingent Redemption Request. Also, as was the case with respect to the proposed First Dutch Auction, such an arrangement is contrary to the provisions of the Second Slow Payment Option which stipulate [sic] *that available cash is to be distributed pro rata to investors."*

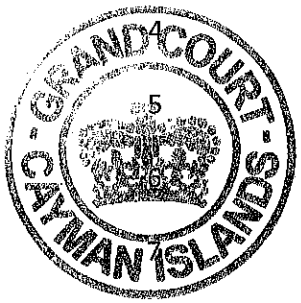
98. The Fund answers these allegations in essence as follows (see for example paragraphs 87 and 88 of Mr. Howe's First Affidavit). In order to assist investors who were seeking liquidity, the Directors proposed another reverse auction. Mr. Howe claims that he was aware that other funds had used this technique in similar

circumstances. Although it was known that this type of proposal had met with significant shareholder resistance back in 2010 (and was not as a result pursued by the Fund) the Directors say they had no way of knowing how the proposal would be received at the time, given the passage of time (5 years) and the changing economic circumstances of each investor.

99. Having put the proposal to the shareholders, the Fund did not pursue it just as it had not, when shareholder objections were made known five years before. The Fund recounts the sequence as being, the proposal was put to the shareholders by letter of 4 September 2015, the Petition was then filed and served by the Petitioner on 18 September 2015, under cover of a letter requesting that the second auction would not be pursued. The Fund then confirmed that the Second Reverse Auction would not be pursued by an Investor letter three days later, on 21 September 2015. The Fund maintains that prior to the issuing of the Petition, there had been no communication from investors as to their opposition to the proposal.

100. It is also the Fund's stance that at no time did it or the Manager seek to force the investors to sell shares at a discount. They claim that all they sought to do was to provide options (as had been done in the past), for investors who desired or needed liquidity to realize their investment, albeit that this was being done at a discount, with a view to trying to balance the interests of all shareholders, i.e. those who chose to redeem and those who chose to remain in the Fund.

101. It is the Fund's position that it has not pursued an "uncertain reinvestment/growth strategy". The Fund's case is that since 2008, its strategy has consistently been to realize investments prudently, to pay down the Fund's debt and return funds to investors where possible, while also: (i) retaining sufficient cash to protect its investments and facilitate further realisations; and (ii) considering and proposing appropriate options to allow investors to exit their investment by selling their shares. The Fund's strategy prior to the Petition was, it states, most recently communicated in the 1 June 2015 Investor letter.



102. The Fund contends that this letter set out three options for realizing the remaining real estate assets: (1) selling the land "as is" (2) contributing the land in a joint venture or (3) developing the land itself. The Fund says that it explained its preference was selling land "as is", but raised the possibility that if the values that could be achieved were too low, it would consider the second and third options. The letter made, learned Counsel posits, clear that all options were being considered and the ultimate decision would be determined by what would achieve the best value for the Fund. Cash, it was argued, was required to be retained to allow the Fund the ability to pursue the third of these options, and that distributing cash early would have limited the Funds options to maximize the return on some of the investments remaining in the Portfolio.

103. It was noted also that the fund had recently decided to make the further distributions of US$4 million and US$9 million to investors. In his Second

Affidavit, at paragraph 8, Mr. Howe states that there are reasons why these two payments were not made before. With regard to the US$4 million paid on 22 December 2015, he said that this payment was originally scheduled to be made in September 2015, but that once the Petition was filed and served, it was decided that the cash would be retained in the hope of reaching a rational settlement with the Petitioner. Once it became clear in December 2015 that there was no prospect of settlement being reached, it was resolved to make the payment in any event. In relation to the US$9 million paid on 7 January 2016, Mr. Howe stated that the Fund was only in a position to make that payment on further monetization of portfolio investments in the last quarter of 2015.

104. There was a very important exchange during cross-examination of Mr. Staveley which I think expressly and substantively goes to the root of some of the areas of disagreement between the Petitioner, the Investment Group and the Fund and its Managers. It was Mr. Staveley's evidence that the Second Reverse Dutch Auction just confirmed the concerns these investors had with the Manager, and he stated that it was the 1 June 2015 letter that led to the instruction and preparation of the Winding Up Petition. At pages 303-308 of the well-prepared transcript arranged by the parties, there followed an important exchange during the cross-examination of Mr. Staveley by learned Queen's Counsel Mr. Atherton:

> *"Q:...So there you've got specific reference to assets, what they're proposing to do, and another example of why they need protective funding.*

A: That letter was a major issue for us. As I said, it's what caused us to start the process of engaging Walker's. What that letter says is: we have 10 million in cash; we're not going to send it to you because we would like to keep it to develop these assets. And it uses the words "maximize recoveries". And it appears all over these documents. Maximize recoveries is not the mandate of the funds that was put in to wind down. The mandate of the Fund is to raise cash and distribute it to investors.

Holding 10 million of cash for these-again, admittedly we have very little transparency here so we don't know what the assets are, but what the manager should have been doing is distributing that cash and then making a decision on when or how to sell those assets, not looking to develop them.

……

Q: That's exactly what the letter says. It says it has a number of options, and at the moment, all the land is on sale. All the land is on sale.

A: Right. So why isn't it..

Q: Because in an effort to maximize recovery for investors, they're retaining that cash, as they are entitled to do, Mr. Staveley.

A: Their job is not no maximize recoveries; it's to distribute cash. All that is the crux... one of the cruxes of our issue with this fund.

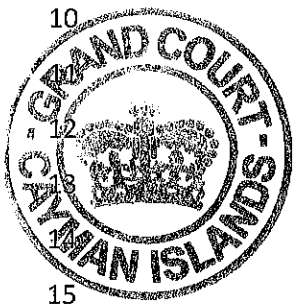
Q: Well, with respect, then, Mr. Staveley, you don't...with respect, I mean that... you don't understand what is happening in this fund, and you don't understand what this fund is intended to do nd entitled to do, do you?

A: I can't say I don't understand, because I understand these businesses. However, I've not been provided the transparency to know what's going on in this fund. As the manager wrote me in

2013, I believe, saying, I will not enter into selective correspondence with you anymore.

So we don't have the information to be able to understand what's going on. ...

And in our investments, we work with managers. They explain what's going on. They look for our support to their decisions, especially...a winding-down of a fund is a redemption. So they're managing our investors' money. Therefore, they need to work with us to explain what they're doing and make sure that we're comfortable with it. In this case, it's very difficult for me to opine, because I don't have the transparency. But what I do know is: If the assets he's describing here do not require 10 million of protective advances, that money could be distributed to investors and the sale process could be continued.



Q: Well, how can you say that? You say you don't know anything about it. So you can't say what you've just said. You don't know anything about this fund. So how can you say, it can't possible need $10 million in order to put protective advances? You've just contradicted yourself, I'm afraid, Mr. Staveley. You have the audited accounts every year which give you details of the assets, details of the cash flows, details of the mark-down on the assets, independently audited. So that's another line of information which you have available. And I know you read them, because you've emailed the manager to say you've read them and you asked questions about them. Correct?

A: Which he refused to answer.

Q: Well, there's one instance of that, and that's the high-water mark of your case, Mr. Staveley, and we'll come to it, but I just want to take you, so we can try and cauterize the refrain that

you're giving me, if you go to tab 17 in the first bundle, I think, Mr. Staveley.

...[Having referred to the Articles of Association, as amended in 2008]...

Q: So, the fund, as I previously suggested to you, is entitled to do what it says it's been doing in those letters I've just taken you to, isn't it?

....

A: The fund... it's entitled to make sure it's got adequate cash to operate its business and to manage its investments, correct. But I don't see it as a carte blanche to horde cash and overcharge fees and for the manager to do whatever he likes with the investors' money. It's not a license to do that; it's to allow the fund to operate correctly and to pursue the mandate that was given to it in the soft wind-down.

Q: The mandate which was given to it is as expressed in the amended Articles of Association, which you are now looking at, and that includes at Roman numeral IV the ability to do what it's been doing in the letters I've just taken you to: isn't that correct?

A: It is correct, yes.

Q: It is correct. Thank you, Mr. Staveley.

A: I don't think it gives them the license to do whatever they want.

Q: I didn't ask you, Mr. Staveley, whether it's a license or not. It's entitled to do what it's doing; correct, isn't it?

A: Correct."

(My emphasis)

105. In my judgment, this aspect of the evidence is very revealing. I formed the impression that Mr. Staveley was genuinely trying to explain how he sees the

problems and issues that he and the entities that he represents had with the Fund. However, it seems to me that the operations of the Fund, the nature of the 2008 Amendment, and the nature of the assets remaining in the Fund, combine to make the situation a lot less simple than Mr. Staveley, Mr. Chester and those supporting the Petition would like it to be.

106. In my view the Fund's explanations are quite acceptable and do not cross the forbidden line so as to constitute a visible departure from standards of fair dealing and the conditions of fair play which a shareholder is entitled to expect. In relation the Second Reverse Auction in particular, I found plausible Mr. Howe's explanation as to the rational for exploring it, i.e. to provide liquidity to those investors who were seeking it more pressingly than others. The letter of 4 September 2015 expressly told the investors that it was after receiving many liquidity requests, and considering many options to address the liquidity problem, that it was felt that the Second Dutch Auction would be the fairest to all shareholders. The letter also plainly stated that the auction was not intended to be coercive and that none of the investors should feel a compulsion to submit a contingent redemption request. Further, I accept that the Fund did quickly decide not to pursue that option after the service of the Petition. It is a relevant consideration that there was no warning to the Fund that the proposal was not acceptable prior to the Petition being served. Additionally, the evidence plainly is that when in 2010 some Shareholders expressed discontent with the First Reverse Auction, it was also not pursued.

LACK OF PROBITY AND LOSS OF CONFIDENCE IN MANAGEMENT

107. One of the oft-cited cases setting out the principles relating to loss of confidence and lack of probity is the case of ***Loch v John Blackwood Ltd.*** [1924] AC 783. It was there stated by Lord Shaw that:

> *"It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable "rule, there must be a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up."*

108. Two of the leading cases on this area emanating from this jurisdiction, are ***RCB v Thai Asia Fund Ltd.*** [1996] 1 CILR 9 and ***in Re Fortune Nest Corporation,*** an unreported Judgment of Cresswell J., 5 February 2013.. In the ***RCB*** case, the petitioning investment manager, which had a known established policy of harassing fund companies, sought to argue that the respondent company had acted in bad faith with the improper motive of preferring the company's largest shareholder by suspending a share re-purchasing programme before it triggered a requirement for him to make an offer for the entire company. It was also alleged

that the fund had wrongfully changed the investment manager to favour the majority shareholder's son-in-law. In rejecting the allegations of bad faith and justifiable loss of confidence in management, the learned Chief Justice stated:

> *"There can be no sustainable argument that that decision was taken for any but the obvious commercial reasons then stated by the directors i.e. the programme had been but a temporary success...In a leading case on winding up for loss of confidence, Loch v John Blackwood....it was the denial of the legitimate expectation of the petitioners that gave rise to the loss of confidence in which the petition sounded....The same must be true if the alleged oppression arises from the suspension of the buy-back programme. Without a right to expect the directors to repurchase or redeem shares, no oppression can be shown from their decision not to do so.....To my mind, all the petitioners are able to point to is their alleged subjective loss of confidence arising from dissatisfaction about the domestic policy of the company. The authorities are clear that that is not enough."*
>
> (My emphasis)

109. In ***in Re Fortune Nest Corporation*** Cresswell J. makes a number of helpful points, relying on Derek French's well-known work "Applications to Wind Up Companies". For present purposes, the ones I found particularly helpful are as follows:

(a) Paragraphs 15 and 16 of the Judgment:

> *"In order to justify the winding up of a company that is not a quasi partnership company, lack of confidence in those in control of the company, must be justified by their lack of probity-French, p.643*

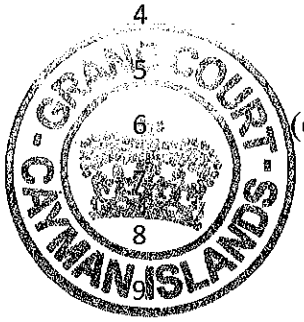
The burden of proving a lack of probity is on the Petitioner, - French-p.643."

(b) Paragraph 17:

"The lack of confidence in those in control of the company must be objectively justified by their lack of probity-French at page 643."

(c) Paragraph 24:

"French states at page 647, Refusal to allow the petitioner to inspect accounting records which the petitioner does not have a right to inspect cannot be a ground for complaint."



THE PETITIONER'S ALLEGATIONS

(i) ***The Manager will not properly engage with investors or provide appropriate information on the status and monetization strategy of the portfolio.***

110. It is the Fund's evidence and submission that it has communicated regularly and appropriately with investors and that the Manager has provided more information on the portfolio and its assets to investors than it was obliged to. I am of the view that the evidence plainly supports that. In cross-examination, both Mr. Chester and Mr. Staveley had to concede that there were a number of matters in respect of which they had originally made complaint that they were not informed, but that in fact they were informed and provided with communication and information from the Fund.

111. For example, in cross-examination, contrary to what was stated in their affidavit evidence, both Mr. Chester and Mr. Staveley agreed that the investors were in fact informed in advance of Mr. Howe's appointment.

112. Although in his affidavit evidence Mr. Staveley had said that the change in auditor was unexplained, in cross-examination, both he and Mr. Chester conceded that a reason was given by the Fund for changing the auditors to Halpern & Associates and that the reason stated was to reduce costs.

113. Further, in cross-examination Mr. Staveley agreed that Mr. Howe did claim that the Fund took advice, albeit not necessarily legal advice, as to whether the suggestion of a reverse auction was inconsistent with the Slow Pay Option and was advised that it was not.

114. In relation to this aspect of the matter, I accept the Fund's evidence that, since the 2008 Amendment, it has, in addition to sending e-mails, and making calls, done the following:

a. Delivered over forty-five Investor letters;

b. Delivered over eighty monthly NAV statements;

c. Delivered seven annual, independently audited, sets of financial statements; and

d. Held meetings with investors.

(ii) ***The Manager has already conducted a number of improper and illegitimate actions in order to solicit legal releases from investors, including:***

(1) Withholding redemption payments; and

(2) Making the provision of information to investors conditional on investors signing non-disclosure agreements that include a full litigation release for past and future actions of the Manager.

115. I must remark (again) that some of these allegations date back many years. I have found the Fund's explanations for a number of these complaints acceptable, or at any rate based upon commercially defensible reasons, even if this caused the Petitioner and Investor Group subjective dissatisfaction or lack of confidence. For example, the releases referred to were included in a draft non-disclosure agreement and a draft disclosure authorization agreement, both of which were prepared by , and on the advice of the Fund's U.S. Counsel, as part of the voluntary provison of detailed information to investors and as part of disclosing investor information to nominated third parties. The Fund's position is that the clauses contained in these draft agreements were sought to be included on the advice of Counsel. They further assert that they were nowhere near as far reaching as the Petitioner asserts; they were not "Full Litigation Releases", they were only releases from claims which may be brought based upon the information disclosed by the Fund. To the extent that it is appropriate for this Court to have to go delving back into this past set of transactions and occurrences, it seems to me that the Fund's position can be justified, and was not unreasonable or without

explanation provided to the investors. Further, the fact, (which I have accepted) that the documents contained these clauses because of the advice of legal counsel, provides a further layer of insulation from an allegation of impropriety.

116. As regards the complaint that redemptions were withheld by the Manager in circumstances where the Manager sought a release in respect of the payments of such redemptions to an alleged new custodian of the relevant shares, again, this was a matter which arose some time ago. In the event, I again agree that the actions of the Manager in the circumstances seem consonant with prudence and there is no demonstrated lack of probity.

(iii) ***The Fund has retained significant amounts of cash with no apparent reason or benefit other than to allow the Manager to collect substantial management fees on cash balances (instead of making interim distributions to investors).***

117. There has been much duplication and repetition under the various grounds. However, as previously discussed, under the amended article 30(b), the Fund has an express right to retain cash, and for a number of reasons. Further, under article 25 and the offering memorandum, the Fund had an express right to create reserves in respect of contingent liabilities, for example the Drieir litigation reserve. In cross-examination, both of the Petitioner's witnesses had to concede that the Fund had indicated that the reserve had been made as a result of advice from Counsel.

118. In relation to the always vexed subject matter of fees, it would seem that the Fund has the right, as evidenced by the Offering Memorandum, and the Manager's Investment Management Agreement, to take a fee in respect of the assets held by the Fund, including the cash balances. It seems plain that the Manager has the right to retain cash to fund necessary cash reserves, fund ongoing fund obligations, pay down leverage as deemed advisable and make protective investments intended to maintain the value of the assets attributable to the Class R shares. It must be remembered that there are a significant number of investors who oppose the Petition (although the Petitioner alleges that some of them are connected, and to Mr. Howe). This is in my view not a case of something underhand or improper occurring in respect of the Manager's fees. It therefore cannot justifiably and objectively be maintained that the Fund retained cash for no apparent reason but to facilitate management fees.

(iv) ***Dealings between the Fund and the Onshore Fund appear to have involved significant conflicts of interest by the Manager.***

119. It is clear that the prospect of conflicts of interest and the nature of the types of conflict that could arise in relation to the operation of the Fund were there in the Fund's offering memorandum for the investors to see and to decide whether they would wish to invest with the Fund.

120. All told, I agree with learned Counsel for the Fund that there is no proper basis for a case that the Manager or the Fund's directors have acted with any lack of probity and the evidence falls far short of demonstrating that there has been mismanagement of the affairs and business of the Fund. The Peitioner and the Investor Group plainly hold a subjective dissatisfaction and "hovering" sense of suspicion in relation to the Manager. Both Mr. Staveley and Mr. Chester, being experienced investors (Mr. Staveley being an Investment Advisor), it did seem to me that there was a subjective difference of view as between themselves and the Manager as to how they would manage this Fund. This is not capable of establishing necessary touchstone of objectively justified lack of probity. Further, to a large extent these claims are founded on matters of some antiquity, none of which, taken alone, or together, are in my view sufficient to invoke the Court's jurisdiction to wind up.

(v) ***The Lack of transparency, unexplained transactions and dire financial performance of the Fund evidences the need for an independent investigation by independent official liquidators (officers of this Honourable Court) into the affairs of the Fund. Between 2008 and 2014 the Fund lost at least US $70 million.***

The need for an independent investigation.

121. What the Petitioner here complains about is that, since it has no contractual or other ability to remove or change the composition of the Fund's board of directors

or the Manager, they have tried, to no avail, to engage the Manager through correspondence upon numerous occasions. It is the Petitioner and the Investor Group's view that these complaints can only be properly dealt with by having independent official liquidators appointed to investigate the concerns and wind-up the affairs of the Fund and distribute the assets in accordance with the applicable laws.

122. There are a number of leading Cayman cases on this area. One of these is the decision in ***In Re Parmalat Capital Fin Ltd.*** [2006] CILR 171, ***Re GFN Corporation Ltd.*** [2009] CILR 135 and in ***ICP Strategic Credit Income Fund Ltd.*** Grand Court, unreported, Jones J., 10 August 2010. These, and other cases, demonstrate that it has been accepted in this jurisdiction that the need for an investigation into the affairs of a company can be a free-standing basis for the making of a winding-up order on the just and equitable ground. For a contrary view, see the Second Edition of Derek French's Work Applications to Wind Up Companies, paragraph 7.7.6.2.

123. Again, a lot of the allegations and complaints here are based upon old matters and there simply does not seem to be any proper justification for the Court being required to embark on an examination of all sorts of allegations, ranging from as far back as 2008. In my judgment, no proper basis has been established.

124. I must say that at first, I attempted to go through each and every complaint that the Petitioner and the Investor Group have made. However, upon reflection, it cannot be the Court's function to go looking through every nook and cranny, which the Petitioner has now brought up, over seven years after the amendment to the Fund's Articles. It is no part of the Court's function to deal with old claims. This is particularly so where, as in the instant case (admitted in cross-examination), no complaint was previously made in respect of a number of matters. In their written submissions, the Fund's Counsel used an expression that I think, accurately summarizes the manner in which this Petition has been presented, as being an *ex post facto* trawl. I wholly agree with that description - (paragraph 3). It helps to explain why the Court's task has at times seemed unduly meandering and ponderous. Whilst I accept, and make allowance for the fact that a Petitioner could have combined grounds for complaining about the management of a company, some of which are old and some fresh, for example where there has been a persistently wrong course of conduct or pattern over time, it seems to me that this is not that case. The Fund's well-made submission is as follows:

> *"3. It is submitted that the Petitioner has clearly been engaged in an ex post facto "trawl" through the entire history of the Fund since 2008 seeking to latch on to any possible ground for complaint. ....the Petitioner relies on a number of the Fund's "actions" since 2008 as grounds for complaint, many of which were, however, simply proposals which the Fund quite properly did not pursue when sufficient shareholder dissent was communicated to the Fund and its Manager. Notwithstanding this*

apparent long-standing dissatisfaction, the Petition was only presented in the last quarter of 2015."

(My emphasis)

125. During the course of the submissions, given the antiquity and sweeping nature of the complaints, I asked Counsel on both sides to do some research to see whether there was any concept akin to waiver and acquiesce in the law of contract, and in employment law, which applies in relation to companies and winding up petitions. Learned Queen's Counsel Mr. Atherton helpfully referred me to the following passage from Derek French's Applications to Wind Up Companies, 3rd Edition, paragraph 8.137-139 and the cases there referred to. What the learning suggests is that the Court is not to be concerned to deal with stale claims. The relevant paragraphs state as follows:

"The Court's Approach

Inference from facts

Whether it is just and equitable that a company should be wound up is an inference of law from the facts of the situation. The equity must be founded on the facts alleged in the petition.

For a contributory to show that it is just and equitable to wind up a solvent company is not so simple and uncomplicated as for an unpaid creditor to show that a winding up should be ordered because the company is unable to pay its debts.

That question as to its being just and equitable has reference, of course, to what is just and equitable in a judicial point of view, regard being had to all the circumstances of the case...

...grounds must be given which can be examined and justified.

Whether or not it is just and equitable to wind up a company must be decided in the light of the circumstances which exist at the time of the hearing. In Re Hillcrest Housing Ltd. the petitioners and the other shareholders had resolved their disputes about the day- to-day management of the company by an agreement embodied in a consent judgment and had operated under that agreement for more than six years. MacDonald CJTD said, at p233:

> *"The principle set forth in Re Fildes Bros Ltd, that it is the facts existing at the time of the hearing which are relevant, prevents the regurgitation of past ills. To wind up a company is a drastic measure and to do so based on past complaints would certainly not be an equitable decision.""*

(My emphasis)

126. In addition, in his First Affidavit, Mr. Howe raises a number of matters of concern under the heading: "**Questionable Conduct and Motivation of the Petitioner and Individuals Submitting Supporting Affidavits**". At paragraphs 89-102 (inclusive), Mr. Howe states:

> *"89. In light of the range of factual disputes in this matter, the severity of the allegations against me, the Manager and the Fund, given the matters referred to above, the Fund has serious concerns as to the bona fides of the principal of the Petitioner and accordingly invites the Court to consider the following matters pertaining to Mr. Chester.*
>
> *90. The Petitioner...is controlled directly or indirectly by Mr. Chester, one of the individuals who submitted an Affidavit in support of the Petition. Mr. Chester is no stranger to litigation, having been charged in 2008 by the US Securities and Exchange*

*Commission (**SEC**) with defrauding US Mutual Funds through Late Trading and Deceptive Market Timing.*

*91. In March 2012, after a seventeen day trial, in the US Southern District of New York before Judge Robert W. Sweet, Mr. Chester and his management company,...(**Pentagon**) were found to have "intentionally and egregiously" violated the antifraud provisions of the securities laws by engaging in a late trading scheme to defraud US mutual funds. The Judge ordered monetary relief, jointly and severally, against Chester and Pentagon in the amount of USD 98.6 million, which consisted of disgorgement, interest and penalties. Judgment was subsequently entered in the amount of USD$ 98.6 MILLION.*

92. By Order of the 2nd US Circuit Court of Appeals dated 8 August 2013, the penalty portion was reduced (and the case remanded back to the District Court), due to the expiration of the statute of limitations, but the Court of Appeals affirmed the liability of Mr. Chester and Pentagon stating...that "Pentagon and Chester engaged in similarly deceitful behavior. They sought out brokers who would engage in late trading. As evidenced by Mr. Chester's email, they knew that the trade sheets were time-stamped before 4 p.m., even though they had no intention of trading before that time. Finally, they issued a false and deceitful letter of assurance...."

93. It is my understanding that Pentagon and Chester appealed such decision to the US Supreme Court...and that the US Supreme Court declined to hear the case on 30 June 2014.

94. For the reasons set out below, it is my belief that the timing of the filing of the Petition relative to the Supreme Court denying Pentagon's appeal and other antecedent events is no coincidence:

a. On 9 April 2009, Pentagon Select, Ltd. (a fund managed by Pentagon) requested the Manager's approval

to transfer its shares in the Fund to Xena Investments Limited, the current shareholder...;

b. In retrospect, given the commencement of enforcement proceedings against Pentagon, the above transfer of shares in the Fund from the Pentagon entity to the Petitioner could be vulnerable to attack as a transfer made for the purpose of defeating Pentagon's creditors. It is my understanding, based on discussion with the Fund's US counsel, that this risk would exist even though the Pentagon entity pursued by the SEC was not the same Pentagon entity that formerly held shares in the Fund, and that there could be scope for the SEC to recover against assets held elsewhere in the Pentagon group (that were dissipated to avoid the SEC's enforcement), if the circumstances were such as to justify that outcome;

c. The Fund's assets being distributed pursuant to a liquidation would, presumably and if there were a genuine basis for such an outcome, be a further barrier to any recovery by the SEC against the shares in the Fund now held by the Petitioner.

d. I also note that Pentagon re-located its offices from London to Switzerland at around the time of the SEC complaint being filed.

...

98. Mr. Staveley is a principal in Eden Rock Capital Management LLP, which owns 50% of ERG Asset Management, LLC ("ERG"). ERG is in the business of taking over the management of funds from Managers and liquidators, by offering shareholders a lower fee alternative to dispose of assets. It has attempted to do so on a number of occasions, including with Medley Opportunity Fund and Quantek Opportunity Fund.

***The fake internet "allegations"** and articles relied upon to question my probity*

99. As I mentioned at the outset of this Affidavit, at paragraph 66 of the Affidavit of Mr. Chester and more extensively at paragraphs 14(vi) and 55 of the Affidavit of Mr. Staveley, reference is made to certain allegations made in respect of the Manager on the internet, including that private hedge funds which I am involved in

managing are under investigation by the United States "Inland" Revenue Services (by which, I assume, Mr. Staveley intended to refer to the Internal Revenue Service). The basis for these comments in Mr. Chester's and Mr. Staveley's affidavit was two articles from the websites "Whistleblowers International" and "Complaint Wire".

100. It is, to say the least, surprising to see these "articles" still being relied upon as truthful, in light of information more readily available on the internet, post-dating the "articles" on which the Petitioner relies, which more recent material makes clear that:

> *a. the "articles" relied upon in the Petitioner's evidence were maliciously posted by a Mr. Fustolo who was being pursued by the Manager for exercising its fiduciary duty to the investors (including Mr. Chester and Mr. Staveley) by seeking the repayment of funds lent by the Fund to Mr. Fustolo's now failed real estate business;*
> *b. that Mr. Fustolo has been restrained by both the Federal Bankruptcy Court in Boston and the State Courts of Florida (the latter by way of a permanent injunction to which Mr. Fustolo consented) from continuing to post such material on the internet, and that he has also been required to remove this material;*
> *c. that Mr. Fustolo has been held to be in contempt of these Bankruptcy Court injunctions; and*
> *d. that, in the first case of its kind, the state police arrested Mr. Fustolo on 17 July 2015 and the Attorney General of Massachussetts is criminally prosecuting him for the malicious posting of precisely the material which the Petitioner seeks to put before this Court as proof that there are SEC and IRS investigations against me or investment firms with which I am involved.*

101. I have exhibited to this affidavit three articles...which I can only assume Mr. Chester and Mr. Staveley must have seen, since... they are as readily available as the articles that they have cited when searching these issues on the standard internet search engines. I have also exhibited the official press release of Attorney

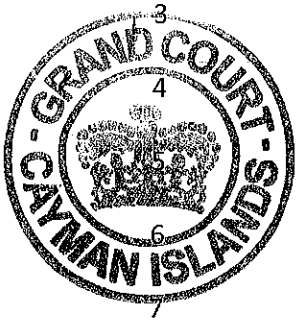
General of Massachusetts confirming the criminal case being brought against Mr. Fustolo.

102. It goes without saying that if this later material exposing the truth of the matter had been seen by Messrs. Chester and Staveley, but has not been mentioned in an attempt to suppress evidence to both mislead this Honourable Court and to seek to call into question my reputation,; at its absolute lowest, that must be relevant in considering whether a winding up order should be made on the "just and equitable" basis...."

127. In cross-examination, Mr. Chester conceded and withdrew his evidence that he had increased concerns about Mr. Howe after he learnt that Mr. Howe was being investigated by the SEC for fraud, in light of the information which now showed that none of that was true. (Mr. Staveley also back-tracked, but not quite as readily or unreservedly as Mr. Chester). Further, Mr. Chester also revealed that the reason that Pentagon is in administration is because of the Judgment which the SEC had obtained against himself and Pentagon. Mr. Chester admitted that he and Pentagon were found liable in the U.S. Southern District of New York Court for having engaged in Securities Fraud.

128. In my judgment, none of the grounds upon which the Petitioner seeks a winding up order on the just and equitable basis have been made out. In addition, I do find that the motivation and timing of the filing of this Petition, and the matters that were initially relied upon by the Petitioner and the Investor Group in relation to Mr. Howe's alleged lack of probity, leave me with a sense of judicial unease and

disquiet. This is particularly so because Mr. Chester did not in his affidavit evidence tell the Court anything about the SEC Judgment against himself and Pentagon; it was Mr. Howe who revealed this to the Court. Further, it was only in cross-examination that Mr. Chester disclosed that Pentagon had been placed in administration because of the SEC Judgment. It is also to be noted that it was not until his Second Affidavit that Mr. Chester indicated that Pentagon is in administration.



129. Whilst I appreciate that the equitable principle of coming with clean hands and the propriety of the Petitioner's own actions and responsibility are usually considered in direct relation to the matters of which complaint is made in the Petition, at the same time, credibility remains an issue in respect of some of the factual matters in this case. Further, general equitable considerations must come into play when the Court is asked to have regard to all of the circumstances. It is for the Petitioner to establish the case that it is just and equitable for the Fund to be wound up, and motivation and good faith must be relevant, if even marginally, to such consideration.

130. In my judgment, the Petitioner and the Investor Group have within this Petition engaged in a substantial regurgitation of stale claims and alleged past ills. To wind up a company is indeed a drastic measure and to do so based upon past complaints, particularly in all the circumstances of this case, would not in my view be an equitable decision.

131. I have also considered Mr. Goucke's submission that the Court should place weight on the fact that it is here a majority of investors who support the application to have the Fund wound up. However, it seems to me that if the grounds are not capable of being made out and are not supported by the evidence, it makes no difference that there is majority support for the making of a winding up order. This is not a circumstance in which there would be strength in numbers.

132. In all of the circumstances, I am of the view that the Fund should be allowed to continue to function and to continue in "run off" and in slow wind-down as has been contemplated and indicated in the relevant documents, particularly the amended Articles. It should be noted that neither the Petitioner nor the Fund asked me to consider whether it would be appropriate to adjourn the hearing of the Petition until after June 30 2016, the date at one stage estimated by the Fund for completion of the wind-down process. However, in the circumstances of this case, I would not in any event have thought it appropriate merely to have adjourned the Petition until that time, given the gravity of the allegations made, and the nature of the Fund's operation and assets.

133. In my judgment, on the facts and circumstances extant at the time of the hearing, the appropriate order is for the Petition to be dismissed and I so order. I will hear further submissions from the parties in respect of costs at a hearing to be fixed by the Registrar of the Financial Services Division. This hearing may, if still

necessary, take place by video-link as previously discussed with Counsel at the Petition hearing.

THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT

GRAND COURT · CAYMAN ISLANDS