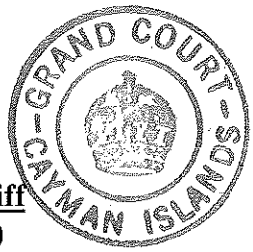
IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 12 OF 2013 (AJJ)

The Hon Mr. Justice Andrew Jones QC
In Open Court, 5th June and 24th July 2013



BEETWEEN: **SWISS-ASIA GENGHIS HEDGE FUND** **Plaintiff**
(as assignee of SOMERS NOMINEES (FAR EAST) LIMITED)

AND: **MAOMING FUND** **Defendant**

Appearances: Mr. Ross McDonough of Campbells for the Plaintiff
Mr. Jeremy Walton and Mr. Shaun Tracey of Appleby for the Defendant

JUDGMENT

Introduction

1. This action concerns the enforceability of a contract relating to the redemption of a shareholding in the Maoming Fund. Originally, both the Plaintiff and Defendant made applications for summary judgment, but it was agreed that those applications would be withdrawn and that the action should be tried on the basis of an agreed bundle of documents without the need for any witness statements.

The Parties

2. The Plaintiff, Swiss-Asia Genghis Hedge Fund, is incorporated under the Companies Law and carries on business as an open ended investment fund. Its investment manager is Swiss-Asia Financial Services Pte Ltd. Somers Nominees (Far East) Limited is a member of the

HSBC group of companies and carries on business as a securities custodian in which capacity it acts on behalf of Swiss-Asia. The Defendant, Maoming Fund ("the Fund"), was launched in February 2006 as an open ended investment fund and is managed by Maoming Investment Management Ltd. It is a relatively small fund with assets under management of only around US$64 million as at the third quarter of 2011. Both the Fund and its investment manager were incorporated under the Companies Law (2004 Revision) on 24 August 2005. The Fund's independent administrator is Apex Fund Services Ltd (based in Bermuda) which delegated part of its functions to Apex Fund Services (HK) Limited (based in Hong Kong) and Apex Investment Consulting (Shanghai) Co Ltd (based in Shanghai, PRC). For present purposes it will be convenient to refer to the Fund's administrator simply as "Apex" without distinguishing between these three companies. Unless the context requires that I distinguish between these two funds and their respective investment managers, it will be convenient to use the expressions "Swiss-Asia" and "the Fund" to mean the Plaintiff and the Defendant acting by their respective investment managers.[1]

The Evidence

3. By a subscription agreement dated 30 September 2009 Somers subscribed for US$2 million worth of shares in the Fund on behalf of Swiss-Asia. On 12 October 2009 Apex issued a confirmation that 8,787.32 shares had been issued at a price of US$226.12 per share and registered in the name of *Somers Nominees (Far East) Limited A/C 754804*. The account number 754804 refers to Swiss-Asia's custody account with Somers. The fact that Somers was acting as custodian for Swiss-Asia was of course known to the Fund, with the result that all the communications and negotiations arising out of Somers' subsequent redemption request were conducted directly between the Fund and Swiss-Asia (acting by their respective investment managers) without reference to Somers. Nothing turns on the fact that 1,044.09 of these shares were redeemed on the August 2011 Dealing Date at an NAV of US$239.44 per share. The redemption proceeds of US$250,000 was duly paid on or about 6 September 2011. The issues raised in this action relate to the balance of the shareholding (7,805.92

[1] Some members of the Fund's investment management team acted in a dual capacity because they were also directors of the Fund. It did not have any independent directors. If Swiss-Asia's directors played any role in the relevant events, it is not apparent from the agreed documentary evidence.

shares) in respect of which Somers served a redemption request[2] on 19 August 2011 by which it required all these shares to be redeemed on the next applicable Dealing Day, which was 3 October 2011. On 11 October 2011 Apex sent a confirmation to Somers that the NAV for 30 September 20011 (being the relevant Valuation Day for the purposes of this redemption request) was US$213.83 per share with the result that Somers became entitled to receive US$1,669,110.66 as custodian on behalf of Swiss-Asia. I shall refer to this transaction as "the October Redemption".

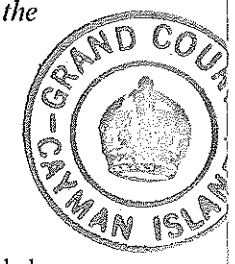
4. On 26 October 2011 the Fund's directors (all of whom are also shareholders and directors of the investment manager) signed a unanimous written resolution by which they suspended the calculation of NAV and the subscription/redemption of shares. By itself, this decision had no bearing upon Somers which was then a creditor of the Fund for US$1,669,110.66. However, the reason for suspending NAV was that the Fund was then suffering from acute liquidity problems which were explained to the Swiss-Asia investment management team in a telephone conference call on 28 October 2011. They were told that the Fund wanted to delay payment of the redemption proceeds until the end of the year. On 3 November 2011 a circular letter was sent to all shareholders (including Somers) who had redeemed on the October Dealing Day. It offered them various choices. It stated that the directors had decided to effect the redemptions by making *in specie* transfers of securities. As an alternative, redeemed shareholders were asked to sign a "redemption waiver form" by which they would agree to waive their right to receive payment in cash for a 110 day period, although the letter made clear that payment in cash at the end of this period (mid March 2012) was not guaranteed. Finally, the letter referred to the possibility of executing what was referred to as a "Re-Subscription application" which must mean that they were being given the option of re-subscribing for shares at the September NAV in consideration for releasing the Fund from its obligation to pay the outstanding redemption proceeds.

5. There then followed a negotiation between Swiss-Asia and the Fund. This negotiation was conducted by e-mails passing amongst various members of the parties' respective investment

[2] I use the expression "redemption request" because it is the one generally reflected in the documentary evidence. However, it is slightly misleading. It is not a "request" in the sense that the Fund has an option whether or not to comply with it. It would be more accurate to describe it as a "notice" because the Fund is bound to act upon a valid request, unless the directors exercise their powers relating to gating and suspension contained in Articles 7.9, 7.12 and 17.

management teams. Somers was not copied in on any of the pre-contract e-mails. The negotiation resulted in an agreement which is set out in a letter dated 21 December 2011 (which I shall refer to as "the Letter Agreement"), the enforceability of which is the central issue arising in this action. It is written on the letterhead of Swiss-Asia Financial Services Pte Ltd, as investment manager on behalf of the Genghis Hedge Fund and is addressed to the Fund, with copies to the investment manager and Apex. On or about 5 January 2012 it was counter-signed on behalf of the Fund by two of its directors. The Letter Agreement constitutes a variation of the terms offered in the 3 November 2011 circular letter.[3] It states as follows :-

> *"Dear Sirs,*
>
> *Further to our e-mail correspondence dated the 01 December 2011, we are agreeable to cancel our redemption request placed in the registered name of Somers Nominees A/c 754804 for dealing date 3rd Oct 2011 subject to the below conditions;*
>
> *Maoming Fund Ltd. (KYG580471046) (the "Fund") commits to re-purchase shares of at least one sixth of our current entire holding every month starting on the 1st January 2012 dealing date and ending the 1st June 2012 dealing date, by when our entire remaining investment should have been fully re-purchased. It is also understood that if there is sufficient liquidity in the fund that allows it to re-purchase a larger portion of our shareholding at any given month, it will do so.*
>
> *On or before 3rd February 2012, the Fund will liquidate one sixth by value (calculate by reference to Fund Administrator's best estimate of the Fund's net asset value on or about 1 January 2012), or such greater proportion as liquidity in the Fund's portfolio permits, of that portion of the Fund's entire portfolio which is equal to our percentage shareholding in the Fund immediately before the 1st February 2012 dealing date. The price for such repurchase will be such amount of net cash as is received by the Fund from the realization of those liquidated securities. On or before 1st March 2012 the Fund will liquidate one fifth by value (calculated by reference to Fund Administrator's best estimate of the Fund's net asset value on or about 3 February 2012), or such greater proportion as liquidity in the Fund's portfolio then permits, of that portion of the Fund's entire portfolio which is equal to our percentage shareholding in the Fund immediately before 1st March 2012, and so on for each month thereafter until our entire shareholding has been re-purchased. The re-purchase price for March 2012 and each subsequent month shall be calculated in the same manner as the calculated of the re-purchase price in January 2012. Payment will be made as soon as reasonably practicable after the relevant dealing day.*



[3] The 3 November 2011 circular letter offered, inter alia, payment of redemption proceeds (as at the September NAV) in full, in cash at the end of 110 days, within would be mid March 2012. The Letter Agreement also provided for payment in cash but on the basis of a staggered redemption (at future indicative NAVs) over a six month period from February to July 2012. Whether the terms of the Letter Agreement can be said to be more or less favourable than the terms offered in the November circular is a matter about which I was not addressed.

The Fund should also treat the above re-purchase commitments in priority to any redemption requests received after our cancelled redemption request originally made on the 19th of August 2011.

Please confirm your agreement by signing and returning a copy of this letter.

Yours faithfully

Swiss-Asia Financial Services Pte Ltd, Investment Manager of the Genghis Hedge Fund".

6. The agreed documentary evidence reflects that the Fund's directors sought to implement the "cancellation" of the October Redemption in accordance with the Letter Agreement by means of two unanimous written resolutions, both dated 1 January 2012. Somers was treated as having re-subscribed for 7,805.92 shares on the January 2012 Dealing Day at the 30 September 2011 NAV, thus putting it back in the same economic position that it would have been in had the October Redemption not taken place.[4] The first resolution recites the directors' power to suspend subscriptions and redemptions and goes on to state –

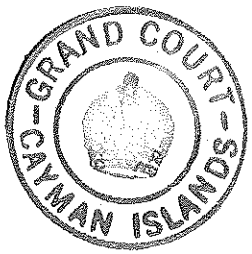
> *"Whereas, the Investment Manager is seeking approval by the Board of Directors of the Company to close the Fund to subscriptions other than the Somers Nominees.*
>
> *Whereas, the Director signed a side letter with the investor and agreed to pay redemption in 6 trenches.*
>
> *Resolved that the Directors hereby approve that the Fund accept the Somers Nominees subscription."*

In this context, I think that it is important to note that the Fund's indicative NAV fell between 30 September and 31 December 2011, with the result that re-instating Somers as a shareholder at the 30 September NAV operated to the economic advantage of the other shareholders. If Somers had subscribed US$1,669,110.66 for shares at the 31 December indicative NAV, it would have been entitled to the issue of more than 7,805.92 shares. The effect of eliminating US$1,699,110.66 from the Fund's balance sheet and re-instating Somers as the holder of *only* 7,805.92 shares was to increase the NAV per share for the remaining shareholders.

[4] The agreed documentary evidence includes the confirmation issued by Apex reflecting that Somers was re-instated as a shareholder at the September NAV. The underlying books and records maintained by Apex have not been put in evidence.

7. The second resolution, also dated 1 January 2012, sets out the consequential payment schedule as follows –

> *"RESOLVED that the cancellation of 100% of the redemption received from Swiss Asia is, hereby approved.*
>
> *RESOLVED that hundred per cent (100%) of the shares held by Swiss Asia will be reimbursed starting February 2012 along the following lines:*
>
> *1/6 of the value of the shares based on Feb 1st 2012 indicative NAV*
>
> *1/5 of the value of the shares based on March 1st 2012 indicative NAV*
>
> *1/4 of the value of the shares based on April 1st 2012 indicative NAV*
>
> *1/3 of the value of the shares based on May 1st 2012 indicative NAV*
>
> *1/2 of the value of the shares based on June 1st 2012 indicative NAV*
>
> *The remaining value of the shares based on July 1st 2012 indicative NAV"*



8. However, Apex had not been told about the Letter Agreement. When asked on 9 January 2012 by Swiss-Asia whether six monthly redemption requests should be submitted, it responded by saying its records reflected that Somers was no longer a shareholder and that it could not re-subscribe for shares in the Fund until after the suspension was lifted. Having been provided with a copy of the Letter Agreement and a copy of the original redemption request marked "Cancelled as per agreement between Maoming Fund Ltd and Swiss-Asia Financial Services Pte Ltd (the Genghis Hedge Fund) dated 21 Dec 2011", Apex proceeded to "cancel" the October Redemption and sent an e-mail to Somers on 13 February 2012 confirming that it still held 7,805.92 shares in the Fund at an estimated NAV of US$202.47 per share as at 31 January 2012.[5] The Fund's directors sought to deal with the point raised by Apex by signing a further unanimous written resolution on 28 February 2012, the relevant part of which states as follows –

> *"2. Acceptance of Somers Nominees Subscription*
>
> *Whereas, a suspension Letter has been sent to the shareholders as of 30 October, 2011 advising that the Directors had resolved with immediate effect and until further notice to*

[5] The documentary evidence reflects that the expressions "estimated NAV" and "indicative NAV" are used interchangeably and have the same meaning. I shall use the expression "indicative NAV".

suspend the calculations of the NAVs of the fund and consequently, the subscription and rights of redemption of the shares; and

Whereas, all subscriptions and redemptions were rejected but with the following exception; and

Whereas, the Investment Manager is seeking approval by the Board of Directors of the Company to close the Fund to subscriptions other that the Somers Nominees subscription dated 1 January 2012, and

Whereas, the Director signed a side letter with the investor and agreed to pay redemption in 6 tranches.

It is Resolved as follows:

(i) that the Directors hereby accept the Somers Nominees subscription as of 1 January, 2012;

(ii) that the actions of the Directors in approving the acceptance of the subscription from Somers Nominees be ratified and confirmed.."

9. Having decided to deal with the cancellation of the October Redemption in this way, Apex sent an e-mail to the Fund on 27 February 2012 in which it said that *"The estimated market value as of 31st Jan 2012 is $1,580,499.59. According to the agreement you made with Swiss Asia, for [Dealing Day] 1st Feb, redemption is 1/6 of the market value which is $263,416.60. Please find the redemption Contract note as attached for your approval to distribute to investor."* A redemption confirmation dated 8 March 2012 for US$263,416.60 (equating to 1,300.99 shares as at the 31 January indicative NAV) was issued to Somers in respect of the first payment (for the 1 February Dealing Day) under the Letter Agreement. This exercise was repeated for the March, April and May Dealing Days but the Fund paid only US$50,000 on or about 21 March 2011. No redemption confirmations were issued in respect of June and July dealing days but Swiss-Asia's case is that it has a contractual right to require that the remaining shares be repurchased by the Fund. The total amount due in respect of the four repurchases recorded by the Fund is US$980,731.54 and, based upon the estimated NAV of US$173.82 (as at 29 June 2012) stated in Apex's e-mail of 31 July 2012, Swiss-Asia claims US$678,412.51 being the amount due for the June and July repurchases. Having given credit for the US$50,000.00 received, Swiss-Asia now claims US$1,609,144.04, being the balance of amount due under the Letter Agreement or alternatively as damages for breach of contract,

plus interest pursuant to statute. The Fund's defence is that the Letter Agreement is not binding and enforceable in accordance with its terms with the result that Somers (or Swiss Asia) is still a creditor for US$1,619,110.66, being the amount due in respect of the October Redemption (less US$50,000 already paid), and that it discharged this liability on 4 February 2013 (after the writ was issued) by tendering a distribution of securities having a value of US$1,621,819.31 as it was entitled to do under Article 7.6 of the Fund's articles of association. Counsel for the Fund argues that, as a matter of law, the Letter Agreement cannot be binding and enforceable for the following reasons.

Was the October Redemption, once completed, capable of being cancelled and reversed?

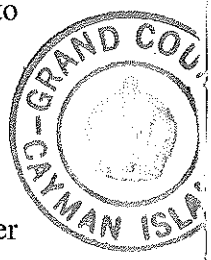
10. Counsel for the Fund recognises that, subject to obtaining the directors' consent, any redemption request is capable of being withdrawn at any time prior to it having taken effect. By section 37(3)(c) of the Companies Law (2012 Revision) the redemption of shares by a company may be effected in such manner and upon such terms as may be authorised by or pursuant to its articles of association. By section 37(3)(g), shares which have been redeemed are treated as having been cancelled. The parties are agreed that the balance of Somers' shares were validly redeemed in accordance with Article 7 of the Fund's articles of association and that they must be treated as having been cancelled on 3 October 2011 (being the relevant Dealing Day), whereupon Somers ceased to be a shareholder and became a creditor for the amount of the unpaid redemption proceeds. Counsel for the Fund argues that, as a matter of law, once a redemption request has taken effect and the shares in question have been cancelled, the directors have no power to reverse the transaction and put the parties back in their original position. I do not accept this proposition. By Article 102 of the Fund's articles of association, the directors are given the widest possible powers to manage its business. The directors' power to enter into contracts on behalf of the Fund includes the power to agree with any counter-party that a contract shall be varied, rescinded, cancelled or discharged and replaced with a new one. It follows that the directors have power to cancel a subscription or redemption of shares unless, upon a true construction of Article 6 (subscriptions) or Article 7 (redemptions), their general power is restricted. I should add that if the power to cancel a redemption does exist, its exercise will always give rise to difficult issues for the directors because it necessarily involves re-writing economic history in a way

which will impact upon all the shareholders. However, the parties in this case appear to be agreed that if the power to cancel the October Redemption does exist, the Letter Agreement constitutes a bona fide exercise of the power in a way which was in the interests of the Fund as a whole. As I have already said, the cancellation was carried out by allowing Somers to re-subscribe for 7,805.92 shares on the January Dealing Day at the September NAV in consideration for releasing the Fund from its obligation to pay the sum of US$1,669,110.66. Leaving aside for the moment the fact that subscriptions had been suspended on 26 October, the more difficult question is whether they were entitled to do so at the historic September NAV rather than the current December NAV.

11. All subscriptions and redemptions of shares must be done in a manner which is authorised by the Fund's articles of association. (See the decision of the Privy Council in *Culross Global SPC Limited v. Strategic Turnaround Master Partnership Limited* 2010(2) CILR 364). Article 7 does not contain any express power to cancel or reverse the economic effect of a redemption transaction. Counsel for Swiss-Asia relies upon the last sentence of Article 7.2 which states that *"A redemption request, once given, may not be withdrawn without the prior written consent of the Company."* I think that the express terms of this provision are clear and free from ambiguity. It is intended to deal only with the circumstance in which a shareholder changes his mind and decides to withdraw a redemption request before it has taken effect. One might think that a shareholder should have an unrestricted right to withdraw his redemption request at any time prior to the point at which it takes effect. However, the Fund's investment manager may have taken positive action in response to a redemption request by, for example, realising an asset, deferring an investment or borrowing money. For these reasons I think that Article 7.2 gives the Fund's directors the power to insist that a redemption request must be implemented if they consider that its withdrawal would inconvenience or harm the Fund in some way. I agree with Counsel for the Fund that Article 7.2 does not constitute an express authority to cancel or reverse the economic effect of a completed redemption transaction.

12. Article 6 deals with subscriptions for shares. Article 6.6 provides that *"generally"* redeemable shares will be offered at the NAV prevailing on the last relevant Valuation Day, which means that any shares issued on the January 2012 Dealing Day would be issued at the

NAV prevailing on the December 2011 Valuation Day. However, the use of the word *"generally"* implies that the directors have power to depart from the normal regime. This is confirmed by the last sentence of Article 6.15 which provides that *"Subject to, and to the extent permitted under applicable law, the Directors may waive or modify the subscription or redemption provisions of these Articles.....for a specific transaction."* This provision also provides an answer to the point raised by Apex. Article 6.7 states that *"No Redeemable Shares of any Series shall be issued whilst the calculation of the Net Asset Value for the Company is suspended."* It seems to me that this provision empowered the directors to modify the suspension by permitting redeemed shareholders to re-subscribe at September NAV, being the last one to be determined and published prior to the suspension. Indeed, this is actually one of the options referred to in the directors' circular letter of 3 November 2011 and Somers was not the only redeemed shareholder allowed to re-subscribe in this way. I conclude that the directors were empowered by the Fund's articles of association to enter into the Letter Agreement.



Is the Letter Agreement binding and enforceable in accordance with its terms?

13. Counsel's next point is that, even if the directors had power to enter into the Letter Agreement, it constitutes a contract only between Swiss-Asia and the Fund, which is not capable of conferring any rights or obligations upon Somers as the former registered owner of the shares and the party to whom the redemption proceeds of $1,699,110.66 was then owed. I do not agree with this proposition.

14. The Fund's investment managers knew that Somers was acting as custodian for Swiss-Asia. They knew that the shares registered in the name of *Somers Nominees (Far East) Ltd A/C 754804* belonged to Swiss-Asia. By engaging in negotiations with the Fund, Swiss-Asia's investment manager was impliedly representing that it had a contractual right to give instructions to Somers in respect of this shareholding and/or the receivable due from the Fund. Although the Fund is entitled to treat Somers (and only Somers) as its shareholder, it is perfectly entitled to negotiate and contract with someone who has apparent authority to act on behalf of Somers in respect of the shares if it chooses to do so. It seems to me perfectly understandable that the Fund's investment manager would proceed on the basis that Swiss-Asia has authority to act on behalf of Somers to the extent that it is contractually entitled to

give instructions which Somers is bound to perform. The Fund knows that Somers, as custodian, will issue or cancel a redemption request only on the instructions of Swiss-Asia. It knows that Somers will re-subscribe for shares in consideration for the release of the Fund's obligation to pay the redemption proceeds if, and only if, it is instructed to do so by Swiss-Asia. These are matters which invariably fall within the scope of a securities custody agreement. By representing that it has actual authority to give instructions to Somers in respect of the subject-matter of the Letter Agreement (which is not in dispute), it seems to me that Swiss-Asia has apparent authority to act on behalf of Somers in respect of that subject-matter. By agreeing to cancel the October Redemption, Swiss-Asia impliedly agreed to instruct Somers to release the Fund from its obligation to pay US$1,699,110.66 in consideration for the issue of new shares, which would be registered in the name of Somers. In my judgment, it was never open to Swiss-Asia to ignore the Letter Agreement and instruct Somers to demand payment of the redemption proceeds. Conversely, it is not open to the Fund to ignore the Letter Agreement simply on the basis that Somers is not expressed to be a party to it.

15. Counsel for the Fund relied upon an unreported decision of Quin J in *Medley Opportunity Fund, Ltd v. Fintan Master Fund, Ltd* (21 June 2012) as authority for establishing a broad proposition of law that any contract relating to shares in a company or rights arising out of a shareholding will be unenforceable unless the registered holder (or former registered holder) of the shares in question is party to the contract. In my view the decision in *Medley* does not support this proposition. What happened in that case was that Fintan Master Fund, Ltd (Fintan") proposed to make an investment in the Medley Opportunity Fund Ltd ("Medley"). Medley was authorised by its articles of association to enter into agreements with prospective shareholders to the effect that they could subscribe on terms which were different from those contained in the articles. Fintan entered into such an agreement (which is usually referred to in the hedge fund industry as a "side letter") on 4 August 2007. However, Fintan itself never in fact executed any subscription agreement at all. Instead, on 4 September, 1 October and 1 November 2007 its custodian, Nautical Nominees Limited ("Nautical"), entered into a series of subscription agreements on the standard terms, without reference to the side letter or the special terms. Quin J held (at paragraph 103) that the pre-investment side letter agreed between Fintan and Medley was superseded by the subsequent subscription agreement made

between Nautical and Medley and that the shares were therefore issued on the standard terms reflected in the articles. The judge also rejected an argument that, because Nautical was acting as custodian for Fintan, the Court should in some way treat the two companies as one and the same entity. The decision in *Medley* is based upon an entirely different factual scenario from that with which I am concerned and Quin J. did not express the general proposition of law upon which counsel seeks to rely.

Estoppel by convention

16. Counsel for Swiss-Asia made various other points (affirmation, part performance and waiver) but the only one that I need deal with concerns estoppel by convention. The concept of an estoppel by convention is based upon the proposition that it is just that the parties to a transaction be precluded from denying what has been assumed between them as the essential factual basis. Counsel referred me to the statement of Lord Steyn in *Republic of India v. India Steamship Co Ltd.* [1998] 1 AC 878, at pages 913-4 in which he said –

> *"It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption".*

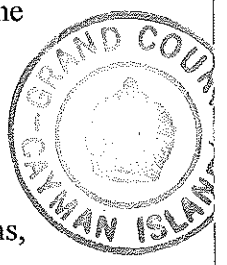
The assumed state of facts, and the evidence of their assumption by the parties, are to be found in the circumstances surrounding the Letter Agreement and the recital contained in its first paragraph, not in the operative part of the letter. The estoppel arises because the true construction of the Letter Agreement leads to the conclusion that the parties must have agreed to assume certain facts as the conventional basis upon which they founded their contract. They must have agreed to assume that Swiss-Asia is the beneficial owner of the shares registered in the name of Somers A/C 754804; that Swiss-Asia was contractually entitled and would in fact give all necessary instructions to Somers and that the Fund would act upon the instructions received Somers, thus enabling both parties to perform their respective obligations under the Letter Agreement. I think that they must also have assumed that Somers would not be instructed to do anything which was inconsistent with Swiss-Asia's obligations or refrain from doing anything which would be necessary to perform Swiss-Asia's obligations. In other words, I think that Swiss-Asia and the Fund agreed to assume

that the Letter Agreement would be binding and enforceable in accordance with its terms notwithstanding that the shares had originally been registered in the name of Somers; that the redemption proceeds were due to Somers and that the re-subscription for new shares would be executed by Somers. In my judgment both parties are now estopped from denying the factual and legal assumptions which formed the foundation upon which they contracted. It would be unjust to allow the Fund (or Swiss-Asia) to walk away from their obligations simply because they chose not to make the registered shareholder a party to the Letter Agreement.

17. Clearly, the Fund was entitled to insist that Somers be made a party to any contract relating to October Redemption, the redemption proceeds or any re-subscription for shares in consideration for the release of the debt due from the Fund. There are sound policy reasons for the well-established common law rule that a company is not bound to deal with anyone other than the registered owner of shares and this rule is reflected in the Fund's articles of association.[6] (See the decision of the Court of Appeal in *Svanstrom v. Jonasson* [1997] CILR 192). Whilst the Fund was not bound to deal with Swiss-Asia, it was perfectly entitled to do so. There is no rule of law which precludes the Fund from dealing directly with its investors rather than the custodians in whose name their shares are registered. Any such rule would be wholly impractical and inconsistent with commercial practice as reflected by what took place in this case. As counsel for Swiss-Asia rightly points out, the Letter Agreement was partially performed in accordance with its terms. The Fund's directors duly passed the resolutions which they considered to be necessary in order to cancel the October Redemption. Swiss-Asia must have given all necessary instructions to Somers which acted accordingly. The confirmation issued by Apex reflects that the new shares were in fact issued and registered in the name of Somers at a price based upon the September NAV. The Fund subsequently issued the first four redemption confirmations to Somers. To this extent the parties performed their obligations on the assumption that the Letter Agreement was binding and enforceable in accordance with its terms. The Fund defaulted by paying only US$50,000 in respect of the

[6] Article 11 of the Fund's articles of association constitutes a provision (stated in what I regard as a common form) to the effect that the Fund shall not be obliged to recognize any equitable interest or any other rights other than those of the registered holder.

redemption proceeds due in respect of the first four redemptions and failing to carry out the final two redemptions.



Was the Letter Agreement subject to unfulfilled pre-conditions?

18. Even if the Letter Agreement is binding and enforceable in accordance with its terms, counsel for the Fund argues that it is subject to conditions precedent which were never fulfilled or capable of being fulfilled, with the result that the contract never came into effect. In my view, this argument is untenable. It turns upon the meaning and effect of the first paragraph of the Letter Agreement which states that Swiss-Asia was agreeable to cancelling the October Redemption "subject to the below conditions:" What follows is the operative parts of the agreement. It is plainly obvious that the word "conditions" is being used to mean "terms and conditions" not "pre-conditions". It would make no commercial sense to construe the Letter Agreement to mean that the Fund will pay the redemption proceeds in cash as soon as reasonably practical *if* the whole of the shares have been redeemed and the necessary cash has been realised by liquidating assets.

Payment of redemption proceeds *in specie*

19. Finally, I turn to the question whether the Fund has discharged, or would be entitled to discharge its obligation to pay redemption proceeds by making a distribution in kind, comprising a proportionate share of the securities comprised in its investment portfolio. The Fund's case is that the Letter Agreement is unenforceable and its only obligation is to pay the balance of US$1,649,110.66 due in respect of the October Redemption, having taken account of the US$50,000.00 paid on 27 March 2012 in part payment of the obligations arising out of the Letter Agreement which it then considered to be enforceable. It is now said that the Fund satisfied this obligation on 4 February 2013 by means of tendering a distribution in kind. Although not necessary for the purposes of my decision, I make the following observations about this argument. Article 7.6 does empower the Fund's directors, in their absolute discretion, to effect a redemption payment to any or all redeeming shareholders, either in whole or in part, in specie or in kind rather than in cash. So far as practicable, this must be done by transferring a "vertical slice" of the securities held by the Fund. When Article 7.6 is read together with Article 7.7, which says that redemption payments will generally be paid

within 30 days of the relevant Dealing Day, I think that it is an implied term that the directors must generally make a decision within 30 days either to pay cash or make a distribution in kind or delay payment for a specific period. I think that the Fund complied with this obligation by distributing the circular letter within 30 days, as it did on 3 November 2011. In principle, it seems to me that the acceptance by a shareholder of one or other of the options stated in the circular letter would constitute a contract which is binding and enforceable in accordance with its terms. The Letter Agreement constitutes a variation of the cash option reflected in the circular letter. If I am wrong and the Letter Agreement is unenforceable (for a reason which was obviously not contemplated by the parties), then it seems to me that Swiss-Asia/Somers should be treated as having accepted the original cash offer contained in the circular letter. Having offered to pay the full amount in cash by mid March 2012, it seems to me that it would be an abuse of the directors' discretionary power (at least in the absence of some material change of circumstance about which I have no evidence) to decide in February 2013 (in response to the issue of the writ) that it would deprive Swiss-Asia/Somers of the cash option and insist upon making a distribution in kind. For the reasons explained by Chadwick P. in *FIA Leveraged Fund v. Firefighters' Retirement System et al* (Unreported, 1 August 2012), it is no answer for the directors to say that Article 7.6 gives them an absolute discretion in the matter.

Conclusions

20. It is well established that a company's directors are not entitled to issue or redeem shares except in accordance with its articles of association. On a true construction of Articles 6 and 7, I conclude that the Fund's directors were empowered to cancel the October Redemption on the January 2012 Dealing Day by re-issuing 7,805.92 new shares at the published September 2011 NAV. They were also empowered to redeem the new shares in six tranches at the indicative NAV pursuant to the terms of the Letter Agreement.

21. The Letter Agreement is binding and enforceable in accordance with its terms. Swiss-Asia was obliged to the Fund to instruct Somers to cancel the October Redemption and the Fund was obliged to Swiss-Asia to accept Somers' re-subscription for shares in consideration of its release of the debt due in respect of the October Redemption.

22. The Letter Agreement was partially performed in that the October Redemption was cancelled and Somers was reinstated on the January 2012 Dealing Day as the registered holder of 7,805.92 shares in Fund in consideration for the release of the debt of US$1,699,110.66.

23. The Letter Agreement was further performed in that Somers was permitted (as stated in the unanimous written resolution signed by the Fund's directors on 1 January 2012) to redeem the first four tranches of shares on the February, March, April and May 2012 Dealing Days at the indicative NAVs determined by Apex, as a result of which a total of US$980,731.54 became due and payable to Somers.

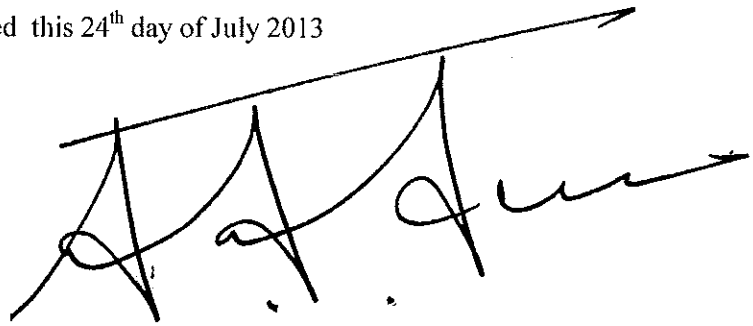
24. The Fund had an obligation to Swiss-Asia to redeem the balance of the shareholding on the June and July 2012 Dealing Days or an obligation to pay an amount equivalent to the redemption proceeds had it redeemed the shares in accordance with the indicative NAVs produced by Apex for the June and July 2012 Valuation Days. The best evidence of the indicative NAV for these Valuation Days is US$173.82 per share, being the indicative NAV determined by Apex for 29 June 2012 and communicated to Somers and Swiss-Asia on 31 July 2012. Accordingly the amount due in respect of the redemption of the final two tranches is US$678,412.51 (3,902.96 shares x $173.82 per share).

25. In order to avoid the need for Somers to be joined as a plaintiff in this action, its right to receive these redemption proceeds was validly assigned to Swiss-Asia by a deed of assignment dated 5 December 2012, notice of which was given on the same day in a letter sent by Swiss-Asia's attorneys to the Fund's attorneys. Swiss-Asia is therefore entitled to judgment for US$1,609,144.05, having given credit for the US$50,000.00 received by Somers on its behalf in March 2012.

26. Swiss-Asia is entitled to interest at the prescribed rate of 2.5% calculated from the date upon which the debt became due. The Letter Agreement provided that payment would be made "as soon as reasonably practical after the relevant dealing day". On this basis I award interest for a period of one year in the sum of US$40,228.60 and continuing at the daily rate of US$110.22 until payment.

27. In the absence of any submission to the contrary, I order that the Fund pay Swiss-Asia's costs to be taxed on the standard basis if not agreed.

Dated this 24th day of July 2013



The Hon. Mr. Justice Andrew J, Jones QC
JUDGE OF THE GRAND COURT