IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 36 OF 2011 (PCJ)

The Hon Sir Peter Cresswell
In Open Court on 29 to 31 January and
5 February 2013

BETWEEN

ORIGAMI PARTNERS III, LP

Plaintiff

AND: **(1) PURSUIT CAPITAL PARTNERS (CAYMAN) LTD**
(2) PURSUIT CAPITAL PARTNERS MASTER (CAYMAN) LTD
(3) PURSUIT INVESTMENT MANAGEMENT LLC

Defendants

Appearances

Mr. Neil Timms QC instructed by and with Mr. George Keightley of Mourant Ozannes for the Plaintiff.

Mrs. Sandie Corbett and Mr. Nicholas Dunne of Walkers for the Defendants

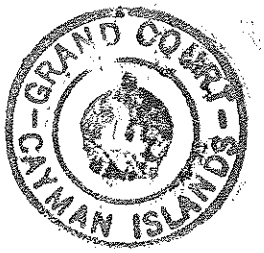
JUDGMENT

B. The Holdback Issues. NAV. Holdback under the Confidential Offering Memorandum. The Audit

The Reasons for the order of 16 January 2013

The Proceedings in the United States

Conclusion



[In this judgment I will use the term "Pursuit" to refer to one or more of the Defendants as the context requires and "Russell" or the "Russell Investors" to refer to the First Defendant's shareholders or the parties to the Deed of Settlement as the context requires]

Paragraphs 1 – 24 are taken from the agreed Case Memorandum

Summary of the Case

1. The Defendants are a Cayman Master Fund, its Cayman Feeder Fund ("the Feeder Fund") and their Delaware Investment Manager. The Plaintiff alleges that it is the assignee of certain rights of certain of the First Defendant's shareholders (Russell), pursuant to a Purchase Agreement dated 30 November 2010 and Deed of Assignment dated 7 January 2011 (the "**Assignment**").

2. On 26 February 2008 the Investment Manager informed investors that due to then prevailing market conditions the Directors of the Funds had determined to suspend the calculation of its Net Asset Value ("NAV") and redemptions. A restructuring proposal was sent by the Investment Manager to investors on 21 January 2009.

3. Russell owned approximately 34% of the Participating Shares in the Feeder Fund and did not agree with the restructuring proposal. Russell issued an Originating Summons in the Grand Court on 23 February 2009 ("the Application") seeking the appointment of Inspectors over the Feeder Fund pursuant to section 64 of the Companies Law (2007 Revision).

4. Subsequent negotiations between the parties resulted in the Application being compromised by a Deed of Settlement dated 1 April 2009 (the "Deed of Settlement") between Russell and the Defendants. The Deed of Settlement provided for mutual releases and for compulsory redemption of Russell's shares by the Feeder Fund and payment to Russell by Pursuit of their pro rata share of the cash and other assets held by the Master Fund proportionate to their indirect investment in the Master Fund (the "Pro Rata Share").

5. It is common ground that the total value of Russell's Pro Rata Share was calculated to be US$144,576,595.52 ("the Settlement Proceeds"). There is a dispute between the parties as to whether this figure was provisional or final. The sum of US$4,337,297.87 (the "Holdback") was held back from the cash portion of the Settlement Proceeds.

6. Subsequently on 7 January 2011, Russell purportedly assigned its rights under and in the Deed of Settlement to the Plaintiff. The Plaintiff (as Russell's alleged assignee) claims in these proceedings that it is entitled to be paid the Holdback and sues for immediate payment together with interest.

7. The Defendants assert (i) that the purported assignment was invalid; (ii) that the Plaintiff does not have standing to sue for recovery of the Holdback as Russell's assignee and (iii) that the Holdback is in any event not due and owing.

Agreed Facts

8. The Parties agree that

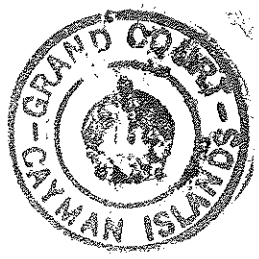
   a. Russell invested in the shares of the Feeder Fund variously between 1 November 2006 and 1 September 2007.

   b. Russell and Pursuit discussed settlement in a telephone call referred to in the Recitals to the Deed of Settlement and the in principle understanding about any holdback was set out in the letter dated 9 March from Pursuit's attorneys also referred to in the Recitals.

c. The Russell Investors were compulsorily redeemed as of 31 March 2009, were removed from the register of members as at that date and ceased to be legal and registered shareholders in the Feeder Fund on 31 March 2009.

d. A NAV of the Master and Feeder Funds was determined as of 31 March 2009 and the NAV per share of the Russell Investors' shares was determined in accordance with the Feeder Fund's Articles.

e. Thereafter Pursuit paid the sum of $98,323,498.96 into respective bank accounts operated by State Street on behalf of Russell on 13 and 14 May 2009. The in-kind distribution of various securities was made on various dates into a securities account operated by State Street on behalf of Russell with the final distribution being made in 3 September 2009.



Issues to be Determined

A Validity of the Assignment

9. Pursuit's case now on assignment is summarized in a letter from Walkers to Mourant dated 18 January 2013. In short, the Defendants challenge the effectiveness of the assignment on grounds:

a. That the right to receive a redemption payment is an interest in shares and as the Plaintiff is a non-eligible investor pursuant to the terms of the Articles and/or PPM of the Fund, it cannot take an assignment of any interest in the shares without consent of the Fund's Directors, which was , it is agreed, not sought or obtained.

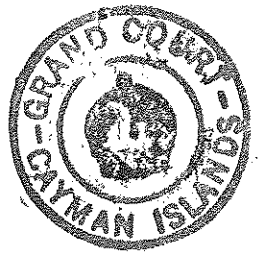
b. The right to compel completion of any conditions precedent to the release of the Holdback pursuant to the Constitutional Documents is a right that can only vest in the shareholder or former shareholders of the Fund. Pursuit now asserts that an audit is such a condition precedent.

c. The Deed of Settlement only permits payment of the redemption proceeds to "a suitable single vehicle or account" which must be owned by each of the Russell entities in proportion to their investment in the Fund and thus, absent amendment of the Deed of Settlement, the proceeds cannot be paid to the Plaintiff.

10. The Plaintiff says that propositions advanced by Pursuit are wrong in law and fact.

11. In relation to 9(c) above, there is an issue as to the true meaning and construction of clause 1 A iii of the Deed of Settlement; whether or not it was a mere mechanism for payment, the consequences of the in kind distribution having been made and the effect of the clause on any outstanding cash payment.

12. The Plaintiff's position is that it is a creditor of each of the Defendants and that what was assigned to it was not rights in shares or a transfer of shares but a sum equivalent to the Holdback which is recoverable as a debt.



The Holdback

NAV

13. The parties agree that a NAV of the Master and Feeder Fund as at 31 March 2009 was determined in accordance with the Constitutional Documents.

14. The Defendants' case is that no obligation to pay arose until the final NAV of the Master Fund as at 31 March 2009 has been determined and that therefore no obligation to pay any redemption proceeds has arisen because a final NAV has not yet been struck.

15. The Plaintiff's case is that (i) the Defendants have acknowledged (see para 13) that the NAV was determined in accordance with the Deed of Settlement and (ii) the Defendants' pleaded case is unsustainable.

Hold back under the Confidential Offering Memorandum

16. The Defendants' position is that the Confidential Offering Memorandum ("COM") dated 24 July 2008 empowers the Directors to withhold payment of up to 5% of any redemption payment pending completion of the Fund's audit for the relevant year and that it is not presently possible to complete the audit for the relevant year.

17. It is agreed that the Feeder Fund Articles do not expressly grant the Fund the powers set out at p.12 of the COM and there remains an issue as to whether the Fund can be given any such power, other than by the Articles.

18. The Defendants say that the Fund was contractually entitled pursuant to the COM (which is binding between the Fund and its shareholders) to make a holdback from redemption payments.

19. The Plaintiff says that:

    a. Only the Articles can confer such power on the Directors and the purported powers in the COM relating to redemption otherwise have no legal effect.

    b. Even if they were valid exercisable powers, on a true construction of the COM (together with the Articles) they relate to redemption by shareholders and are not conferred on the Directors in a compulsory redemption.

    c. In the event that the Plaintiff is wrong about (i) and (ii) above, any exercisable powers in the COM were not incorporated into the Deed of Settlement.

The Audit

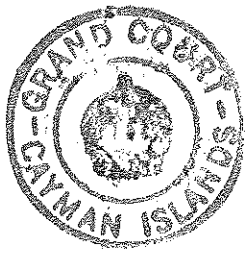
20. In the event that the Directors in April 2009 exercised a validly existing power to hold back a portion of the Settlement Proceeds, it is in issue whether, in all the circumstances, they are in breach of contract because they have unreasonably delayed the completion of the audit by unreasonably declining to give a management representation letter to the auditors or otherwise.

21. The Defendants contend that none of them have any obligation to pay the Balance of the Contract Price until the Feeder Fund's 2009 audit is completed.

22. The Defendants further contend that the audit of the 2009 financial statements has not yet been completed because the Feeder Fund Directors declined to give to the auditors a management representation letter, because of an outstanding contingent liability ('the contingent liability"). The Defendants contend that accordingly, the auditors issued no audit report and were entitled to withhold the same because no management representation letter was given. The Defendants assert that it is reasonable for the Directors to decline to sign a management representation letter until the contingent liability can be ascertained and quantified and for the audit to remain incomplete until then.

23. The Defendants assert that it is not yet possible to complete the audit as a result of outstanding liabilities attributable to the relevant accountancy year, and that it is reasonable to withhold a management representation letter until the contingent liabilities of the Fund can be established. It is further said that until the 2009 Audit is completed, no obligation arises to repay the balance of the Settlement Proceeds.

24. The Plaintiff argues that the Directors have unreasonably delayed the completion by declining to give a management representation letter to the auditors or otherwise, and that, absent their failure to co-operate, the audit is properly capable of completion.



Maples' letter of 9 March 2009

On 9 March 2009 Maples on behalf of the Defendants wrote to Conyers on behalf of Russell:-

"Pursuit Capital Partners (Cayman) Ltd. (the "Fund")

We act as Cayman Islands legal counsel to the Fund and are writing to you in your capacity as Cayman Islands counsel to Russell Alternative investment Funds PLC, Russell Alternative Strategies Fund II PLC and Russell Diversified Alternative Fund – U.S. Benefit Plan Ltd. (each a "Russell Fund" and, together, "Russell"). Further to the telephone conference call this morning with our respective clients, the following sets out our client's current in principal understanding of the agreement between our clients.

The matters that our clients have agreed are as follows:

1. Russell or its nominated agent or payee will receive pro rata portion of the cash and other assets held by the Pursuit Master (as defined in your clients' affidavit) as a direct in kind distribution. Russell will arrange for a suitable single vehicle or account to be available to receive such distribution on behalf of the Russell Funds. The Pursuit Master anticipates that it will be able to effect a pro rata split of each of the individual positions left in the Pursuit Master. To the extent that this occurs, no independent valuation will be required. To the extent that there are any positions that cannot be split pro rate, an independent valuation of such assets will be obtained.

2. Our client will request that Cogent provide a written confirmation that Russell are receiving their proportionate share of the assets held by the Pursuit Master.

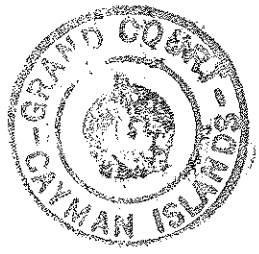
3. Russell will receive its proportionate share of all cash that becomes unencumbered as a result of the closing out of derivative positions held by the Pursuit Master.

4. Our client will work to ensure that all distributions are made as soon as practicable. Distributions will be made in full with holdbacks only relating to ordinary course of business expenses such as legal, administrative and accounting expenses.

Please confirm that on the basis of the above understanding, your clients will agree to adjourn the application for the appointment of an inspector (the "Application"). We should be grateful for your confirmation that you are urgently taking steps to vacate tomorrow's hearing.

As discussed, this in principal agreement is subject to being more fully documented over the coming days. Finally, and for the avoidance of doubt, once final agreement between our clients is reached, we expect that the Application will be dismissed with no order for costs."

The Deed of Settlement



The Deed of Settlement was in the following terms:-

"

DEED OF SETTLEMENT

This Settlement Agreement and Mutual Release (the "Agreement") is entered into by and between Russell Alternative Investment Funds PLC, Russell Alternative Strategies Fund II PLC, Russell Diversified Alternatives Fund - U.S. Benefit Plan Ltd. and State Street Custodial Services (Ireland) Limited (collectively, "Russell", each a "Russell Entity"), on the one hand,

and Pursuit Capital Partners (Cayman) Ltd (the "Fund"), Pursuit Capital Partners Master (Cayman) Ltd. (the "Pursuit Master"), and Pursuit Investment Management, LLC (the "Investment Manager") (collectively, "Pursuit"), on the other hand.

WHEREAS, Russell hold non-voting participating redeemable Class A shares issued by the Fund (the "Russell Shares");

WHEREAS, substantially all of the assets of the Fund are comprised of shares in Pursuit Master;

WHEREAS, Pursuit are proposing to implement a restructuring proposal affecting its Class A shareholders;

WHEREAS, as action was commenced by Russell on or about February 24, 2009 in the Grand Court of the Cayman Islands as Cause No. 88 of 2009 seeking the appointment of an inspector pursuant to Section 64 of the Companies Law (2007 Revision) (the "Originating Summons"), and a hearing was thereby scheduled on March 10, 2009 (the "Hearing");

WHEREAS, subsequent to a telephone conference call held on March 9, 2009 for the purposes of discussing a settlement which would dispose of the Originating Summons, Pursuit, through its Cayman Islands legal counsel, Maples and Calder, sent a letter dated March 9, 2009 containing the in principle understanding of this Agreement to Russell's Cayman Islands legal counsel, Conyers, Dill and Pearman (the "Letter");

WHEREAS, upon receipt of the Letter, Russell agreed to send, and thereafter their Cayman Islands attorneys did in fact transmit to the Honourable Mr. Justice Foster, the judge presiding over the Originating Summons (the "Judge"), a request for adjournment of the Hearing sine die pending finalization of the settlement terms, and the Judge thereafter granted the request for adjournment;

WHEREAS, without making any admissions as to the merits of the Originating Summons, Russell and Pursuit (each, a "Party," and collectively, the "Parties") seek to resolve the Originating Summons and to bring the relationship between Russell and Pursuit to an end by agreeing the basis on which the Russell Shares will be redeemed by the Fund; and

WHEREAS, Pursuit and Russell agree that the Russell Shares shall be redeemed and that Russell shall receive a pro rata share of the cash and other assets held by the Pursuit Master, proportionate to the Russell Funds' indirect investment in the Pursuit Master, on the terms set out more fully in this Deed.

NOW, THEREFORE, in consideration of the terms, conditions, and mutual promises contained herein, the sufficiency of which the Parties acknowledge, and intend to be legally binding, the Parties hereby agree as follows:

1. Redemption Terms: The following shall be the "Redemption Terms":

A. The Fund will effect a compulsory redemption of the Russell Shares as of March 31, 2009, and the Fund will satisfy these redemption requests in accordance with the terms hereof (which, the Parties agree, is in compliance with the Confidential Offering Memorandum dated July 24, 2008 (the "PPM") and the Amended and Restated Articles of Association (the "Articles") of the Fund as adopted on 24 July 2008 (together the "Constitutional Documents")). The Parties agree that the redemption terms of the option letter received by Russell from the Fund on or about January 21, 2009 will not apply to this redemption and that the following terms will govern, and upon their completion shall constitute Russell's redemption in full from the Fund.

i. As promptly as practical after March 31, 2009, the Fund will procure the Investment Manager to determine:

(I) the amount of cash available for distribution anticipated by the Parties to be approximately 60% of the total value of Russell's redemption requests,

including (without limitation) cash that becomes unencumbered as a result of the closing out of Pursuit Master's derivative positions, which shall be closed out in proportion to Russell's redeemable share interest in the Fund, **and less amounts withheld as reserves for accrued expenses and final valuation adjustments** ("Available Cash"); and

(II) those securities held by Pursuit Master as at March 31, 2009 which are reasonably capable of being divided and transferred into units which reflect and are proportionate with Russell's pro rate (indirect) shareholding in Pursuit Master (including after taking into account any other divisions which must be effected to allow for any other pro rata direct in kind distributions to Pursuit Capital Management Fund SPV, LLC and other shareholders) (the "Divisible Securities"). Any securities which cannot be so divided are herein called the "Invisible Securities".

ii. As promptly as practical after March 31, 2009, Pursuit shall pay the redemption proceeds to the Russell Nominee (as defined below) by delivering to the Russell Nominee legal and beneficial title to its pro rata share of (I) the Available Cash; and (II) the Divisible Securities, and thereafter, the balance of the redemption proceeds (if any) shall be paid as further provided by subclause vi below. Notwithstanding the foregoing, Russell acknowledges and agrees that Pursuit will not distribute any cash or securities to Russell until the Pursuit Master's net asset value as at March 31, 2009 has been determined in accordance with the Constitutional Documents and past practice.

iii. Russell will arrange for a suitable single vehicle or account to be available to receive such distribution on behalf of Russell (the "Russell Nominee"). Russell hereby expressly acknowledges that the Russell Nominee, at the time it receives the direct in kind distribution, will be owned by each of the Russell Entities in the same proportion in which each is currently invested in the Fund. Russell further represents and warrants that the Russell Nominee is or will be at the time of any distribution validity and legally existing, in full compliance with all securities, anti-money laundering or other applicable laws, and is or will be fully able and authorized to accept the in kind distribution on behalf of Russell, in full satisfaction of Russell's redemption requests. Russell will cooperate with the Fund, its

Investment Manager, custodian, brokers and administrator to facilitate the transfers and deliveries of securities by providing all account information and "know your customer" information necessary to comply with applicable anti-money laundering requirements and all other reasonable requirements imposed by any issuer or counterparty necessary to transfer the securities.

iv. No independent valuation of the Divisible Securities will be required. To the extent that there are any Indivisible Securities an independent valuation of such assets will be obtained from the independent valuer, chosen by Pursuit (the "Valuer"). For the purpose of calculating the payment of Russell's redemption proceeds (including pursuant to subclause vi. below), the Valuer's valuations shall be conclusive and binding on the parties. Pursuit shall use all reasonable efforts to minimize the number of Indivisible Securities remaining in the Fund.

v. Insofar as the Russell Nominee receives bonds as part of its distribution of in kind assets, Pursuit shall provide a list to Russell for each individual bond so received detailing, to the extent reasonably available, the following information:

(I) the name of the issuer;

(II) the unique identifier or ISIN number of the bond;

(III) the distribution value of the bond;

(IV) the date of purchase of the bond;

(V) the Cusip of the bond;

(VI) the Sector of the bond;

(VII) the Sub-sector of the bond;

(VIII) the Collateral of the bond;

(IX) the Maturity of the bond;

(X) the Rating of the bond;

(XI) the Coupon Structure of the bond;

(XII) the bond's Daycount;

(XIII) the Last Payment Day of the bond;

(XIV) the Next Payment Day of the bond;

(XV) the bond's Coupon;

(XVI) the Current Factor of the bond;

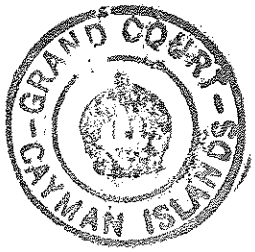
(XVII) the Total Current Face of the bond;

(XVIII) the Current Final PX;

(XIX) the Yield of the bond;

(XX) the WAL of the bond; and

(XXI) the Modified Duration of the bond.



vi. Pursuit shall distribute to the Russell Nominee additional cash and Indivisible Securities having a value equal to the difference between the net asset value of Russell's shares in the Fund on March 31, 2009 and the amount of Available Cash and Divisible Securities to be distributed to Russell pursuant to paragraph 1(A)(ii) above.

B. Pursuit will request that its independent administrator, SS&C Technologies, Inc. ("SS&C"), provide a written confirmation that Russell are receiving their proportionate share of the Divisible Securities held by the Pursuit Master. Such written confirmation by SS&C will be in substantially the following form:

> "Based on our internal records we confirm that Russell are receiving their pro rata share based on their indirect percentage shareholding of the Pursuit Master as of March 31, 2009 of the cash available for distribution and the Divisible Securities in the Pursuit Master's portfolio. Please note that the information used to perform this calculation is unaudited."

C. Pursuit will use its reasonable best efforts to effect the distribution of the Divisible Securities as soon as practicable following March 31, 2009, but shall have no obligation to deliver cash or securities to Russell at any time that may be earlier than such time required in the Constitutional Documents. Russell acknowledges and agrees that cash and security positions may be delivered in multiple installments as and when Pursuit becomes able to transfer such positions to Russell. Notwithstanding anything to the contrary above, Pursuit undertakes not to impose any further suspension of redemptions on the Fund until Russell has been fully redeemed on the terms set out in this Agreement. **When made, distributions will be**

in full with reserves and holdbacks only relating to reasonable expenses, including legal, administrative and accounting expenses. Russell acknowledge and agree that such reasonable expenses may include their pro rata share of the Fund's accrued but unpaid expenses, including expenses incurred by the Fund in connection with the Originating Summons and this Agreement.

D. The Parties acknowledge and agree that, upon the Russell Nominee receiving payment in cash and in kind in accordance with the balance of this clause 1, Russell's redemption proceeds will be (and in any event, will for all purposes be deemed to have been) paid in full by Pursuit.

E. Pursuit does not provide any assurance that Russell will ultimately receive, upon the eventual sale of the assets Russell receive in kind, net cash proceeds in an amount equal to the value of such securities on March 31, 2009 employed for purposes of establishing the Fund's or the Pursuit Master's net asset value on such date. Russell acknowledge and agree that the Fund, and any of the Fund's directors, affiliates, delegates or representatives, including without limitation, its Investment Manager and administrator, and their officers, members, employees and agents shall not be liable for any losses, expenses, judgments, settlement costs, fees and related expenses (including attorneys' fees and expenses), costs or damages of any kind whatsoever, that Russell may incur as a direct or indirect result of the sale or disposition of the assets distributed in kind to Russell. Russell also hereby acknowledge and agree that Russell have no right to participate in any future settlement or judgment obtained by the Pursuit subsequent to March 31, 2009, in respect of any litigation or claim.

2. Releases: The following releases shall become effective on the date when this Agreement has been executed by all Parties (the "Release Effective Date").

A. Release by Russell of Pursuit: In consideration of the Redemption Terms set forth in Paragraph 1 above, the mutual releases set forth in this Paragraph 2, the discontinuation of the Originating Summons set forth in Paragraph 3 below, and other good and valuable

consideration, receipt of which is hereby acknowledged, Russell do, as of the Release Effective Date, unconditionally release, acquit, settle with, and forever discharge the Fund, the Pursuit Master, their Investment Manager and their respective directors, officers, employees and agents (the "Pursuit Released Parties") of and from any and all actions, causes of action, choses in action, cases, claims, costs, suits, debts, dues, losses, fees (including but not limited to attorneys', accountants', and experts' fees, including costs of the Originating Summons), sums of money, agreements, promises, injuries, harms, damages, interest payments, penalties, fines, judgments, remedies, taxes and liabilities whatsoever, in law, equity, or otherwise, whether made directly or derivatively, foreseen or unforeseen, matured or unmatured, known or unknown, which the Russell ever had, now have, or may in the future have against the Pursuit Released Parties (collectively, "Claims") relating to the facts alleged in the evidence filed in support of the Originating Summons.

B. Release by Pursuit of Russell: In consideration of the mutual releases set forth in this Paragraph 2, the dismissal of the Originating Summons set forth in Paragraph 3 below, and other good and valuable consideration, receipt of which is hereby acknowledged, the Pursuit Released Parties, as of the Release Effective Date, unconditionally release, acquit, settle with, and forever discharge Russell of and from any and all Claims relating to the facts alleged in the evidence filed in support of the Originating Summons.

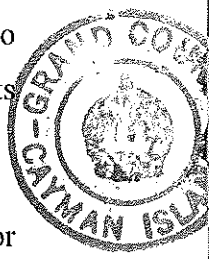
C. Claims Not Released: Notwithstanding anything to the contrary set forth in Paragraph 2(A) or 2(B), nothing herein shall release, acquit, settle, or discharge Claims relating to the enforcement of this Agreement.

3. Discontinuation of Originating Summons: Within one (1) business day after the Release Effective Date, the Russell and Pursuit shall take all steps necessary to file a consent order (substantially in the terms of the draft order attached hereto as Schedule "A") with the Grand Court of the Cayman Islands to the effect that the Originating Summons be discontinued with no order as to costs.

4. Absolute Bar: The Agreement may be pleaded and tendered by any party as an absolute bar and/or defense to any proceeding brought or continued in breach of the terms of this Agreement.

5. Further Assurances: Each Party shall, at its own cost, use all reasonable endeavours to do or procure to be done all such further acts and things and execute or procure the execution of all such other documents as may from time to time be reasonably required for the purpose of giving each Party the full benefit of the provisions of this Agreement.

6. Entire Agreement: The Parties understand and agree that this Agreement contains the entire agreement among them with regard to the subject thereof and that no Party shall be liable or bound to any other Party in any manner by any representations, omissions, warranties, covenants, promises, and agreements except as specifically set forth herein. The Parties further understand and agree that this Agreement supersedes and merges any and all prior agreements or understandings between the Parties pertaining to the subject matter herein. The Parties also understand and agree that this Agreement may not be altered, modified or amended, or any of its provisions waived, unless by a writing executed by the Parties.



7. Severability: If any part or all of any provision of this Agreement is illegal or unenforceable, it may be severed from this Agreement and the remaining provisions of this Agreement continue in force.

8. No admission of Liability: The Parties agree that nothing contained herein, and no action taken by any Party with respect to this Agreement, shall be construed as an admission of liability.

9. Russell and Pursuit To Pay Their Own Costs and Attorneys' Fees: Russell and Pursuit understand and agree that each of them shall pay the costs and attorneys' fees they incurred in connection with the Originating Summons and this Agreement, and that neither Russell nor Pursuit is to pay the costs or attorneys' fees incurred by the other.

10. Acknowledgments: Each Party hereby represents, acknowledges, and agrees that it has had the advice of counsel, that it has read this Agreement, that it understands this Agreement,

and that it voluntarily accepts its terms. Each Party further represents that (i) this Agreement has been duly and validly authorized by all necessary corporate or other action of such Party, (ii) the representative signing below on its behalf has the full power and authority to execute, deliver, and perform such Party's obligations under this Agreement and to give the releases as provided herein, and (iii) upon execution and delivery, this Agreement will be enforceable against such Party in accordance with its terms. Each Party also represents that in executing this Agreement, such Party does not rely upon any inducements, promises, or representatives made by anyone other than those expressly embodied herein.

11. Complete and Unconditional Settlement: The Parties understand and agree that this Agreement shall not be subject to any claim of mistake of fact that it is intended to release any and all Claims that the Parties have or may have against each other as and to the extent set forth in the mutual release in Paragraph 2 above.

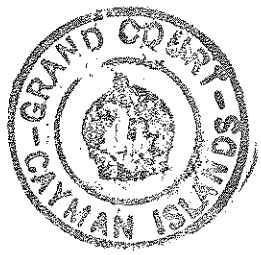
12. Condition Precedent: This Agreement is not binding on any Party until signed by all the Parties.

13. Execution in Counterparts: This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument.

14. Construction of Agreement: The terms of this Agreement have been negotiated by the Parties, and the language of the Agreement shall not be construed in favour of or against any particular Party. The section headings contained in this Agreement are for purposes of reference only and shall not limit, expand, or otherwise affect the construction of any provisions of this Agreement.

15. Governing Law and Jurisdiction: The governing law of this Agreement shall be the substantive law of the Cayman Islands, and the Parties hereby submit to the exclusive jurisdiction of the Courts of the Cayman Islands for the purpose of any disputes arising in connection with this Agreement."

[Emphasis Added]



Deed of Assignment

The Deed of Assignment dated 7 January 2011 between Russell and the Plaintiff provided:-

"1 Assignment

The Assignors hereby irrevocably assigns to the Assignee all of the Assignors' rights entitlements, claims, title, interests and benefits under and to the Deed of Settlement which includes, but is not limited to, any and all of the Assignors' actual or potential rights, entitlements, benefits, claims, title and interest in and to the Outstanding Redemption Proceeds."

The Russell Investors ceased to be shareholders in the Feeder Fund on 31 March 2009

On 3 August 2012 Walkers for the Defendants wrote to Mourant Ozannes for the Plaintiff enclosing documents showing that the Russell Investors were compulsorily redeemed as of 31 March 2009, were removed from the register of members as at that date and ceased to be legal and registered shareholders in the Feeder Fund on 31 March 2009.

It is most regrettable that it was not until 3 August 2012 that this was accepted by the Defendants, and that they maintained a contrary position on the pleadings prior to August 2012.

Oral Evidence

The court heard oral evidence from Mr Leverett (who was Managing Director of Hedge Funds for Russell) and from Mr Canelas (a founding partner of the Third Defendant and a Director of the First and Second Defendant). Mr Leverett's evidence was consistent with the contemporary documents. My reservations about parts of Mr Canelas' evidence are referred to below.

Mr Bullmore and Mr Floyd were called by the Plaintiff and Defendants respectively as expert witnesses on accountancy issues. Their Joint Report is dated 22 January 2013.

The issues – analysis and conclusions

A. Validity of the Assignment

The Defendants do not question the validity of the Deed of Assignment per se. They contend that an interest in shares cannot be assigned. The Plaintiff says that the Russell Funds' shares were fully redeemed and that a debt was assigned.

The Constitutional Documents, Settlement Deed and Deed of Assignment are all governed by the laws of the Cayman Islands. Accordingly, it is common ground that the laws of the Cayman Islands (including common law principles relevant to the issues) will determine whether the Russell Funds' shares were fully redeemed and the validity of the assignment.

The parties accept that the principles set out in Chitty on Contracts, 31st Edition, Vol 1 Chapter 19, in particular paragraph 020 et seq are an accurate statement of the law of the Cayman Islands in relation to the legal principles governing assignment.

The relevant legal principles

It is convenient to set out the following extracts from Chitty on Contracts which the parties accept are an accurate statement of the law of the Cayman Islands. I refer to, but do not set out, the footnotes and the cases there cited.

"19-043 Rights declared by contract to be incapable of assignment. If rights arising under a contract are declared by the contract to be incapable of assignment, a purported assignment will be invalid as against the debtor. ...

19-054 Personal contracts. The benefit of a contract is only assignable in:

"... cases where it can make a difference to the person on whom the obligation lies to which of two persons he is to discharge it." Tolhurst v Associated Portland Cement Manufacturers Ltd [1902] 2 K.B. 660, 668; affirmed [1903] A.C. 414.

It is to be noted that the question whether an assignment makes any difference to the debtor must be decided by the court on objective grounds, having regard to the nature of the contract and of the subject-matter of the rights assigned. It may in some circumstances make a great deal of difference to a debtor whether his creditor is of an indulgent character, or whether he is likely to enforce his legal rights ruthlessly, but considerations of this kind are ignored by the courts in determining whether a right is assignable or not.

"19-055 Prima facie contractual rights to, for example, the payment of money, and to the sale or occupation or use of land, or to building work, do not involve personal considerations and are capable of assignment. A right to be indemnified against a monetary liability may in some circumstances be assignable, but the benefit of a motor vehicle insurance policy involves personal considerations and is not assignable. Indeed, any contractual right involving personal skill on the part of the creditor, or other personal qualifications (such as his credit), is incapable of assignment. Hence neither an author nor his publisher may assign the right to performance of the other's obligations under a publishing agreement, although an author's right to be paid royalties may be assigned; and if the author has actually transferred the copyright in the work to the publisher, he can of course assign that as an item of property. The right to employ a person under a contract of employment is clearly not assignable, though wages or salary due to the employee are normally assignable by him. The mere presence of an arbitration clause in a contract does not as a general rule render the contract incapable of assignment.

Commercial contracts. Rights arising under ordinary commercial contracts (e.g. for the sale of goods) are prima facie readily assignable, at least if there is no question of credit being granted to the assignee. But commercial contracts may sometimes be

drafted so as to make the requirements of one of the parties a material consideration in determining the obligations of the other. In such circumstances there is often difficulty in deciding whether the benefit of the contract is assignable. In Tolhurst v Associated Portland Cement Manufacturers Ltd, the defendant was the owner of certain land upon which there were chalk quarries. He sold part of this land to a company in order to enable the company to carry on there the business of manufacturing Portland Cement. He contracted to supply the company, which was in a small way of business, with 750 tons of chalk per week for 50 years "and so much more as the company shall require for the manufacture of Portland cement upon their said land". The company subsequently assigned the contract, sold its undertaking to the claimant company, which was in a large way of business, and went into voluntary liquidation. The House of Lords held that the new company was entitled to the benefit of the contract and could maintain an action against the defendant in its own name. There were two grounds for this decision: (1) The defendant's liability was measured by the capacity of the original company's land:

> "... the [original] company were not entitled to an unlimited supply of chalk, but only to so much as they might want for making cement on their own piece of land."

Consequently the effect of the assignment was not to increase the burden on the defendant, for the original company might have increased its capital and worked its land more intensively; (2) By entering into a long-term contract the defendant must have contemplated that the benefit of it might be assigned. The contract should therefore be construed as if it had been made between the defendant and his successors and assignees owners and occupiers of the quarries and the company, its successors and assignees owners and occupiers of the cement works. On the other hand, in Kemp v Baerselman the defendant contracted to supply X, a cake manufacturer, with all the eggs that he should require for manufacturing purposes for one year: and X undertook not to purchase eggs elsewhere. X transferred his business to a company, and it was held that the contract was not assignable, because the defendant's liability was not

limited to the capacity of a particular piece of land, and because X's contract not to purchase eggs elsewhere introduced a personal element inasmuch as this obligation would not have been binding on the assignee."

"19-057 Contracts with companies. It has been held that the fact that one of the parties to a contract is a limited company is no ground for assuming that the personality of that party is immaterial to the other party. ..."

Professor Guest in "Guest on the Law of Assignment" First Edition says in relation to Personal Contracts at 4-36

"The question whether a contractual right is or is not personal depends upon the construction of the contract, that is to say, it depends upon the intention of the parties, determined objectively, having regard to the nature and terms of the contract and the circumstances prevailing at the time it was made."

Mrs. Corbett for the Defendants submitted that the purported Assignment and the purported notice thereof were invalid and of no legal effect.

In particular Mrs Corbett submitted;

(a) The effect of the purported Assignment on its face was to assign the rights derived from the Deed of Settlement from Russell to the Plaintiff. It does not purport to assign the right to sue for the redemption proceeds pursuant to the terms of the Constitutional Documents of the Fund ("the Fund Documents");

(b) What was purportedly assigned by Russell to the Plaintiff was not a debt, but the right to receive an unquantified sum forming part of the redemption price for Russell's shares;

(c) The obligation to pay redemption proceeds arises under the Fund Documents, not the Deed of Settlement, which merely sets out the basis upon which payment would be made;

(d) Russell's right to receive redemption proceeds was exclusively derived from their status as a shareholder of the Fund and was thus an interest in shares;

(e) The Fund Documents define the category of persons eligible to hold shares in the Fund and also provide that the Fund is not bound to recognise an interest in Shares other than that of the Registered Holder;

(f) The Plaintiff is not an eligible investor, nor is or was it the Registered Holder;

(g) Accordingly, the Plaintiff cannot take a valid assignment of an interest in shares in the Fund, nor is the Fund obliged to recognise any such interest purportedly transferred to the Plaintiff.

(h) Further, the terms of the Deed of Settlement prohibit the assignment of the right to receive the redemption proceeds to the Plaintiff because:-

(i) The Deed expressly provides that Russell will arrange for a suitable single vehicle or account to be available to receive the distribution;

(ii) The Fund has not consented to a variation of the Deed of Settlement;

(iii) Accordingly, it was not open to Russell to assign their right to receive the redemption proceeds to any party that does not satisfy these criteria;

(iv) The Plaintiff does not satisfy the criteria.

Mr Timms QC for the Plaintiff submitted that the Assignment was valid and effective for reasons set out in his written and oral submissions, which included many of the points referred to in my analysis below.

My analysis and conclusions on the arguments raised by Mrs Corbett are as follows.

The Russell Investors were compulsorily redeemed as of 31 March 2009, were removed from the register of members as at that date and ceased to be legal and registered shareholders in the Feeder Fund on 31 March 2009.

A NAV of the Master and Feeder Funds was determined as of 31 March 2009 and the NAV per share of the Russell Investors' shares was determined in accordance with the Feeder Fund's Articles. No distribution of cash or securities was to take place to Russell until the Pursuit Master's net asset value as at March 31, 2009 had been determined in accordance with the Constitutional documents and past practice (see clause 1 A(ii)).

Thereafter Pursuit paid the sum of $98,323,498.96 into respective bank accounts operated by State Street on behalf of Russell on 13 and 14 May 2009. The in-kind distribution of various securities was made on various dates into a securities account operated by State Street on behalf of Russell with the final distribution being made in 3 September 2009.

In my opinion a debt of $4,337,297.87 was assigned less any deductions from that sum permitted by the terms of the Deed of Settlement ("the assigned debt").

I turn to answer Mrs Corbett's submissions.

(a) (b) and (c)

In my opinion on its true construction, by the Deed of Settlement the Defendants agreed to satisfy Russell's redemption requests in accordance with the particular terms of the Deed. The Deed did not provide for the redemption proceeds to be paid pursuant to the Fund Documents. It provided (I repeat) for payment in accordance with the particular terms of the Deed.

The fact that the parties agreed that the terms of the Deed were in compliance with the PPM and Articles does not mean that the parties intended to revert to the provisions of those documents.

The Deed of Settlement was a one off, specially constructed settlement against the background of the Application seeking the appointment of Inspectors.
The terms of the Deed of Assignment on their true construction were apposite to assign the assigned debt.

(d) (e) (f) (g)
I repeat that the Russell Investors were compulsorily redeemed as of 31 March 2009, were removed from the register of members as at that date and ceased to be legal and registered shareholders in the Feeder Fund on 31 March 2009.

As at the date of the Assignment what was assigned was the assigned debt.

(h)
The Deed of Settlement on its true construction did not contain any prohibition on assignment. It contained in clause 1A(iii) a mechanism to facilitate in particular the "in kind distribution".

As to the principles in relation to personal contracts, the assignment made no difference to the Defendants, looking at the matter objectively having regard to the nature of the Deed of Settlement and the subject matter of the rights assigned. It is important to note that unlike many of the cases as to personal contracts, in the present case the relationship between Russell and the Defendants had come to an end. This case is not a case where what was assigned was a contract which would continue for months or years ahead, involving personal considerations.

Mrs Corbett submitted in the alternative that:-

(i) Payment of the outstanding balance of the redemption proceeds is contingent upon completion of the audit for the year ended 31 December 2009;

(j) The right to compel completion of the audit (or any other prerequisite to release of the Holdback) arises under the Fund Documents;

(k) Such right can thus only vest in the former shareholders of the Fund as it is a right personal to them derived from their residual post-redemption rights, and is therefore not assignable to a non-shareholder.

I turn to consider these submissions.

(i) and (j)

For reasons set out below in my opinion payment of the outstanding balance (the assigned debt) was not contingent upon completion of the audit for the year ended 31 December 2009.

(k)

For these reasons the right to the assigned debt was not personal to the former shareholders. It was not derived from their residual post-redemption rights as alleged. It was derived from the particular provisions of the Deed of Settlement.

The Holdback Issues. NAV. Holdback under the confidential Offering Memorandum. The Audit.

It is both necessary and convenient to refer to the Defendants' pleaded Defence in relation to these Issues. It reads

"4. ...

(i) the Deed contemplated the compulsory redemption of the Russell Shares;

(ii) redemption proceeds payable to Russell arising out of the compulsory redemption of the Russell shares were to be paid partly in cash and partly in securities, in unspecified proportions;

(iii) in accordance with paragraph 1A(ii) of the Deed... no obligation to pay redemption proceeds arises in accordance with the terms of the Deed until such

time as the net asset value of the Second Defendant as at March 31 2009 has been determined, ...

(iv) the Second Defendants net asset value as at 31 March 2009 is yet to be determined and accordingly the obligation to pay redemption proceeds (less permitted reserve and holdback amounts) to the Russell Nominee pursuant to the Deed is yet to arise; and

(v) In the alternative, if the Second Defendant's net asset value as at 31 March 2009 has been determined (which is denied):-

(a) the amount of US $4,339,297.87 is a reserve and/or holdback relating to reasonable expenses, including, but not limited to, legal, administrative and accounting expenses, together with the accrued, but unpaid expenses of the First Defendant; further, or in the alternative

(b) pursuant to the First Defendant's Confidential Offering Memorandum, upon redeeming all or substantially all of a shareholder's shares, the First Defendant is entitled to retain up to 5% of the redemption proceeds payable to the shareholder pending completion of the First Defendant's audit for the year of redemption. Furthermore: -

1. the redemption contemplated by the Deed provided for the compulsory redemption of all of the Russell Shares; accordingly the redemption was, and is, subject to the retention set out above;

2. the First Defendant's audit for the year ending 31 December 2009, being the year in which the redemption of the Russell Shares was made, is yet to be completed; and

3. accordingly, the amount of the US$4,339,297.87 (or any other amount), representing 3% of the redemption proceeds with respect to the compulsory redemption of the Russell Shares is not yet due and payable to Russell, and accordingly not payable to the Plaintiff."

For reasons set out below paragraph 4(v)(a) was struck out on 16 January 2013 for failure to comply with an unless order.

Mrs Corbett's submissions followed and developed the remaining defences set out above. Thus she submitted that there are two powers to hold back from redemption proceeds:

(1) A power under paragraph 1(C) of the Deed of Settlement. (The Defendants do not rely upon this power.)

(2) A power under the First Defendant's Confidential Offering Memorandum dated 24 July 2008 under the heading "Redemption Payments".

I set out below what appears in the COM at the start of the section headed "Redemptions, Dividends & Distributions" so that what appears under the heading "Redemption Payments" can be seen in context.

"REDEMPTIONS, DIVIDENDS & DISTRIBUTIONS

Redemption Rights

...

After the one year anniversary of the purchase of the applicable Shares, a Shareholder may redeem his investment or any portion of his investment as to which the lock-up has expired only as of the last Business Day of a calendar quarter (each a "Redemption Date") upon no less that 90 days' prior written notice to the Investment Manager, ... The Fund, in consultation with the Investment Manager, may find it necessary upon redemption by a Shareholder to withhold a certain portion of the Shareholder's investment upon any such redemption in order to establish reserves for the payment of contingent or undetermined liabilities (including certain taxes). The Directors may, in their sole discretion, reduce or waive any of the terms on which Shares may be redeemed, generally or in specific cases.

Mandatory Redemptions

The Fund may redeem some or all of a Shareholder's Shares at any time, for any reason, on five days notice.

Redemption Payments

Shareholders redeeming all or substantially all of their Shares (as determined by the Fund, generally approximately 90% or more of the Shares held by such Shareholder) will receive at least 95% of the Net Asset Value of the Shares being redeemed within 45 days of the effective date of redemption. The remainder (valued as of the effective date of redemption) will be paid as

promptly as practicable following the completion of the Fund's audit for the year of redemption. ..."

Mrs Corbett submitted that the power under the heading "Redemption Payments" in the COM was referred to in paragraph 1(A)i(I) of the Deed of Settlement. Thus the Defendants' case is that the COM dated 24 July 2008 empowered the Directors to withhold payment of up to 5% of any redemption payment pending completion of the Fund's audit for the relevant year and that it was and is not presently possible to complete the audit for the relevant year.

Mrs Corbett accepted that the Feeder Fund Articles do not expressly grant the Fund the powers under the heading "Redemption Payments" in the COM (but disputed the Plaintiff's submission that the Fund can only be given such power by the Articles).

The Defendants say that the Fund was contractually entitled pursuant to the COM (which is binding between the Fund and its shareholders) to make a holdback from redemption payments.

Mr Timms submitted:-

(i) that under the Deed of Settlement any reserves or holdbacks could only be pursuant to the express provisions of clause 1. A i(I) or 1.C of the Deed. The clause 1 C holdback power is no longer relevant. It is not suggested that a power in Clause 1 A i(I) was exercised.

(ii) On a proper construction of the Deed no power in the COM was incorporated.

(iii) If the purported powers under the COM were incorporated, the Articles do not confer such powers on the directors.

(iv) If (which is denied) the powers under the COM were validly exercisable, they do not apply in a compulsory redemption.

(v) In the event that the COM was incorporated and the directors exercised a validly existing power to holdback, they unreasonably delayed the completion of the audit.

(vi) Without prejudice to the above, any contingent liability should have been treated in the 31 December 2009 financial statements in accordance with generally accepted accounting principles.

I turn to consider these competing submissions.

(1) In my opinion on a true construction of the Deed of Settlement there are only two provisions in the Deed of Settlement which relate to what may be reserved or held back being

- clause 1A i(I)
  and
- clause 1C.

Given that it is not open to the Defendants to rely on the latter, it is only necessary to consider the true construction of the words "less amounts withheld as reserves for accrued expenses and final valuation adjustments" in clause 1 Ai(I).

(2) The court is here concerned with the construction of an express term or phrase in the Deed of Settlement. No implied term is relied on and a claim for rectification was abandoned.

(3) In my opinion "final valuation adjustments" means adjustments to the determination made by the Investment Manager. I refer to the determination in the document dated 27 April 2009 for illustrative purposes. Final valuation adjustments might involve (as Mr Timms submitted) adjustments to correct any errors in or changes required to the 49 calculations of Market Value made on 27 April 2009, because of exchange rate errors or the like. In my opinion the parties did not intend by these words that the Defendants or any of them were entitled to retain up to 5% of the redemption proceeds pending completion of the First Defendant's audit for the year ended 31 December 2009. Very different language would have been required to bring about that result.

(4) It is common ground that

"When the words in the operative part of an instrument are ambiguous, the recitals and other parts of the instrument may be used to fix the appropriate meaning of those words. But clear

words in the operative part of an instrument cannot be controlled by recitals." (Chitty on Contracts Volume 1 para 12-066).

In my opinion the words in the operative part of the Deed of Settlement (Clause 1Ai (I)) are clear. I record that if, contrary to my opinion, the words are ambiguous and if (repeat if), it is permissible to look at the Maples' letter of 9 March 2009 referred to in the recitals, there is nothing in that letter that supports the construction contended for by the Defendants.

(5) In view of my conclusions set out above it is unnecessary to consider arguments (iii) and (iv) above relied on by Mr Timms.

(6) For completeness I record that in his witness statement Mr Canelas (a founding partner of the Third Defendant and a Director of the First and Second Defendants) said:-

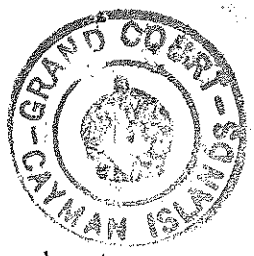
"46 When that statement was prepared it was expected that the final figures would emerge in the ordinary process of audit. The reason is that the Funds face unquantifiable liabilities to potential creditors in the face of which the directors have decided not to distribute any further assets until the position is known. Those unquantifiable liabilities have led to the Directors of the Funds (myself included) begin unable to sign-off on a representation letter regarding those liabilities. That is pre-condition to completion of the audited accounts. The underlying reason for these unquantifiable liabilities is an ongoing SEC investigation into the Investment Manager, which has the benefit of an indemnity from the Funds. The investigation began in April 2010 with the service of an extremely broad subpoena that called for virtually all records and data in possession of the manager from the inception of the Funds through the date of the subpoena."

I do not accept Mr Canelas' explanation that

"Those unquantifiable liabilities have led to the Directors of the Funds (myself included) being unable to sign-off on a representation letter regarding those liabilities."

On the material before the court it does not appear that the audit for the year ended 31 December 2009 got as far as a draft representation letter. No draft letter was produced.

(7) Again for completeness I record that had it been necessary to resolve the differences between the expert witnesses on accounting issues, I would have preferred the evidence of Mr Bullmore. His evidence appeared to me to be more balanced and in accord with the realities of accounting practice. Mr Floyd placed reliance in oral evidence on materials not referred to in the Joint Report.



The Reasons for the order of 16 January 2013

On 16 January 2013 I ordered that paragraph 4 (v)(a) of the Re-Amended Defence be struck out for failure to comply with an unless order of 21 November 2012. I now give my reasons for making the order of 16 January.

The background to the unless order of 21 November is set out in the first affidavit of Alexandra Bethell of 16 November 2012. I refer to the history of failures on the part of the Defendants to comply with previous orders of the court as to discovery, set out in Ms Bethell's affidavit.

By order dated 22 October 2012 it was ordered that the Defendants should by 29 October 2012, (1) swear an affidavit in the terms of paragraphs 1 and 2 of the Plaintiff's summons dated 19 October 2012 and (2) serve particulars of the quantum of the reasonable expenses they claimed they were entitled to deduct from the sum of US$4,339,297.87 (irrespective of any issues relating to the SEC investigation). Such particulars were to include a full breakdown of each expense, how and when incurred, for what purpose and how the same was calculated together with the relevant documents. The relevant documents were to be linked by marking to the particular item of expense to which they related.

On 26 October 2012 Walkers for the Defendants wrote to Mourant Ozannes for the Plaintiff:-

"As you are aware, paragraphs 6 and 7 of [the] Order [of 22 October] requires our clients to disclose particulars of the reasonable expenses that they claim to be entitled to deduct from the holdback irrespective of any issues relating to the SEC investigation, including the relevant supporting documentation. ...

Whilst our clients are endeavouring to collate this material as quickly as possible, they have indicated to us that they will not be able to complete this exercise by 29 October 2012 as originally scheduled. Bearing this in mind, we would be grateful if you would agree to a one week extension for the provision of this information, that is to say unil 5 October 2012 ..."

By order dated 7 November the time for the Defendants to comply with the order of 22 October was extended to 12 November.

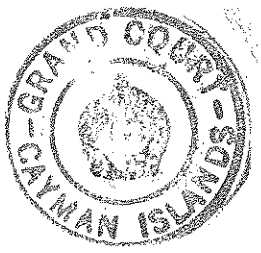
In his fourth affidavit on behalf of the Defendants of 20 November 2012 Mr Canelas said:-

"I confirm that, save as is set out at paragraph 5 below, there are no further relevant documents within the Defendants' possession, custody or control other than those contained in the seven Lists of Documents produced by the Defendants in this matter. ...

There are in fact further documents in existence which have not been disclosed and which relate to expenses that fall to be deducted from the holdback, in addition to the large number of legal invoices which have already been disclosed. ... at the present time we have do not have the staff resources to be able to comply. We are effectively at full capacity as a result of the work necessary to recover from Hurricane Sandie, the approaching year end and the maintenance of our day-to-day business, and did not anticipate the need to comply with further broad orders for discovery. ... as matters stand we simply do not have the necessary resources to extract the documents requested within a limited timeframe."

An unless order was made on 21 November. The unless order took into account the time the Defendants' attorneys said it would take to comply with the outstanding order. The unless order (to which I refer for its full terms) was in wider terms as to what would be struck out in the event of non-compliance, than the order made on 16 January 2013.

In his fifth affidavit of 14 January Mr Canelas said:-



"3. I confirm that, save as is set out... at paragraph [4] below, there are no further relevant documents within the Defendants' possession, custody or control other than those contained in the Lists of Documents produced by the Defendants in this matter.

4. In my Fourth Affidavit I confirmed that, other than documents relating to the calculation of accrued expenses, the Defendants have disclosed all material within their possession, custody or control relevant to this matter. ...

5. ... with the assistance of Pursuit's US attorneys and fund administrator a series of detailed spreadsheets were produced detailing all transaction conducted on Second Defendant's account during the period January 2009 to July 2012. ...

6. Having been provided with this information, I believe that the Plaintiff has all the material necessary to allow it to prepare for trial. The Defendants do not seek to suggest that there are any expenses incurred prior to the Date of the Deed of Settlement that fall to be deducted and I do not believe that there is any question as to the reasonableness of the application of funds that cannot be answered with reference to the information contained in the spreadsheet and the invoices already disclosed.

7. I am advised by the Defendant's attorneys that the nature of the expenses that were in fact incurred are not relevant to the determination of the proper construction of the meaning of "reasonable expenses" in the Deed of Settlement, and would only become relevant in the event that the Court, having determined that reasonable expenses incurred after the Deed of Settlement can be deducted from the holdback, goes on to assess the quantum of those expenses.

8. I am further advised that the issue of "reasonable expenses" is not relevant to the Defendants' case that no obligation to pay redemption proceeds arises under the Deed of Settlement until such time as the Net Asset Value of the Second Defendant as at 31 March 2009 has been struck, nor to the case that the funds retained are an audit holdback pursuant

to the terms of the fund's constitutional documents that is not due to be paid until completion of the Second Defendant's audit for 2009.

9. In the circumstances, I believe that the Defendants have substantially complied with the terms of the Order and that any default that may have occurred causes no material prejudice at all to the Plaintiff. Against that background, the Court is humbly requested to revisit the terms of its Order of 21 November and revoke the "unless" order made on the date.

10. Alternatively, given the documents within the scope of the Court's orders for discovery that have not been produced are not relevant to the defences set out at paragraph 8 above, the Court is invited to limit the scope of its Order so as to strike out the holdback defences only insofar as they plead matters to which the documents are material. ..."

Thus Mr Canelas acknowledged that there were further documents that should have been disclosed in compliance with the unless order of 21 November, but maintained that these were not relevant to the defence that no obligation to pay redemption proceeds arises under the Deed of Settlement until such time as the Net Asset Value of the Second Defendant as at 31 March 2009 has been struck, nor to the case that the funds retained are an audit holdback pursuant to the terms of the Fund's constitutional documents that is not due to be paid until completion of the Second Defendant's audit for 2009.

The matter came before the court on 8 January but was adjourned because the Defendants had given inadequate notice of their application for relief from the sanctions contained in the unless order of 21 November. On that date it was pointed out by the Plaintiff that there had been express reference by the Defendants to an invoice relating to a payment of US$5,750 made to Eisner on 30 November 2011. For this reason I made an order for specific discovery of that invoice.

There is power to relieve from the sanction imposed by an unless order if sufficient cause is shown (O. 24 rule 21). The court must consider all the circumstances of the case. The test on an application for relief from the sanction imposed by an unless order (here of 21/11/12) is whether – notwithstanding that the order was a proper order to make for the purposes of furthering the overriding objective in the circumstances known at the time – it remains appropriate, in the circumstances known at the time of the application for relief, to allow the sanction to take effect. (See the judgment of Sir John Chadwick in Tarn Insurance Services Ltd v Kirby and others 27.1.09 [2009] EWCA Civ 19 at paragraphs 78 and 79). In my opinion the order I made on 16 January was the appropriate and proportionate order in the circumstances known on 16 January. There had (on Mr Canelas' assertions in his affidavits) been partial compliance with the order of 22 October 2012.

On 16 January Mr Dunne for the Defendants informed the court that although he had in his possession the Eisner invoice which the court had ordered to be disclosed on 8 January, he was under specific instructions from the Defendants not to hand it over ie not to comply with the court's order. The least that can be said about this is that it provided further justification for striking out paragraph 4 (v)(a) of the Re-Amended Defence.

The Proceedings in the United States

I respectfully refer to the judgment of the Honourable Stefan Underhill USDJ on 21 December 2012 granting the motion to dismiss the Defendants' complaint in the Connecticut proceedings in its entirety.

Conclusion

For the reasons set out above I find that the Plaintiff is entitled to judgment against the Defendants for US$4,337,297.87 plus interest.

The only basis open to the Defendants for deduction from the above sum is in clause 1A i(I) of the Deed of Settlement. It is not suggested that any adjustment to the figures in the statement dated 27 April 2009 to correct errors etc is called for. For the reasons set out above the Defendants are not entitled to retain any sums pursuant to the First Defendant's COM.

Dated this 5th day of February 2013

Cresswell J

The Honourable Mr. Justice Peter Cresswell
JUDGE OF THE GRAND COURT