

1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **FINANCIAL SERVICES DIVISION**

3 **Cause No.: FSD 18 of 2015 (RMJ)**  
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6 **IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)**

7 **AND IN THE MATTER OF ARDON MAROON ASIA MASTER FUND (IN OFFICIAL**  
8 **LIQUIDATION)**

9 **BETWEEN: JESS SHAKESPEARE AND SIMON CONWAY**  
10 **(JOINT OFFICIAL LIQUIDATORS OF ARDON MAROON ASIA**  
11 **DRAGON FEEDER FUND)**

12 **AND:**

13 **(1) JOHN BATCHELOR AND DAVID GRIFFIN**  
14 **(JOINT OFFICIAL LIQUIDATORS OF ARDON MAROON ASIA**  
15 **MASTER FUND)**  
16 **(2) MAROON ASIA CAPITAL LIMITED**

17 **IN OPEN COURT**

18 **Appearances: Mr. Tom Smith Q.C instructed by Mr. Jan Golaszewski, Mr. Peter**  
19 **Sherwood, and Mr. Tim Baidam of Carey Olsen for the Applicants**

20  
21 **Mr. Jonathan Gaisman Q.C instructed by Mr. Paul Madden, and Ms.**  
22 **Jacqueline Ziemniak of Harneys for the Respondents**

23  
24 **Mr. Chris O'Keefe of Walkers**

25  
26 **Before: The Hon. Justice Robin McMillan**

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28 **Heard: 12, 13, 14, December 2017**  
29 **3, 4 May 2018**

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32 **Draft Judgment**

33 **Circulated: 13 July 2018**

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35 **Judgment**

36 **Delivered: 17 July 2018**  
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## HEADNOTE

*The function of the Court in relation to an appeal against a liquidator's rejection of a proof of debt-The proper approach to the construction of articles of association - The doctrine of corporate responsibility and its implications for Directors – The limited significance of investment industry methodology and practice.*

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## JUDGMENT

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### Introduction

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1. The present proceedings concern an application by the Joint Official Liquidators (the "Dragon JOLs") of Ardon Maroon Asia Dragon Feeder Fund (In Official Liquidation) ("Dragon") for the rejection, by notice dated 15 March 2016, of Dragon's proof of debt by the Joint Official Liquidators (the "Master Fund JOLs") of Ardon Maroon Asia Master Fund Limited (In Official Liquidation) (the "Master Fund") to be set aside, and for Dragon's claim to be admitted to proof in the amount of US\$15 million, together with post-liquidation interest, if applicable.
  2. Dragon's proof of debt concerns the alleged redemption by Dragon of shares in the Master Fund worth US\$15 million. Dragon contends that this redemption occurred following Dragon receiving and accepting a redemption request (the "UBS Redemption Notice") from one of its investors, UBS Fund Services (Cayman) Ltd. Ref: Northview Investment Fund Ltd ("UBS"), dated 11 August 2014.
  3. The Master Fund JOLs rejected Dragon's proof of debt on the basis, *inter alia*, that the Master Fund JOLs considered that Dragon had not complied with certain requirements that were needed to effect a redemption of Dragon's shares in the Master Fund.
  4. The Master Fund was incorporated as an exempted company on 12 April 2012.



- 1 5. Dragon was incorporated as an exempted company on 12 April 2012 and was registered as  
2 a mutual fund with the Cayman Islands Monetary Authority on 29 April 2013.
- 3 6. Dragon was one of two feeder funds for the Master Fund, along with Ardon Maroon Asia  
4 Eagle Feeder Fund, L.P. (In Official Liquidation) ("Eagle", and together with Dragon, the  
5 "Feeder Funds"). The Master Fund JOLs are also the Joint Official Liquidators of Eagle.
- 6 7. The Feeder Funds and the Master Fund (together, the "Funds") were established as a  
7 "Master-Feeder" structure, by which investors would subscribe for shares in the Feeder  
8 Funds and the Feeder Funds would use this capital to subscribe for shares in the Master  
9 Fund.
- 10 8. The same individuals served as Directors of Dragon and the Master Fund at all relevant  
11 times.
- 12 9. The Funds' administrator was Citi Fund Services (Asia) Limited (the "Administrator"),  
13 pursuant to the terms of a fund administration services agreement dated 18 May 2012.
- 14 10. The Funds' transfer agent was Citibank N.A. Singapore Branch (the "Transfer Agent"),  
15 pursuant to a transfer agency services agreement dated 18 May 2012.
- 16 11. Ardon Maroon Fund Management Limited (the "Investment Manager") provided  
17 investment management services to the Funds pursuant to the terms of a Management  
18 Agreement dated 26 June 2012.
- 19 12. The Investment Manager received advisory services from Ardon Maroon Fund  
20 Management (Hong Kong) Limited (the "Advisor").
- 21 13. The Master Fund's Amended Memorandum and Articles of Association were adopted on  
22 25 June 2012 (the "Master Fund Articles"). Dragon's Amended Memorandum and Articles  
23 of Association were adopted on 29 April 2013.
- 24 14. The Master Fund's Amended Memorandum and Articles of Association were adopted on  
25 25 June 2012 (the "Master Fund Articles"). Dragon's Amended Memorandum and Articles  
26 of Association were adopted on 29 April 2013.



- 1 15. UBS made the following subscriptions for "Group F" shares in Dragon: (i) 100,000 shares  
2 on 2 May 2013; (ii) 196,345.154315 shares on 2 December 2013; and (iii) 100,000 shares  
3 on 1 April 2014.
- 4 16. At the relevant times, UBS was the registered shareholder in Dragon and held the shares  
5 as nominee for Northview Investment Fund Ltd ("Northview").
- 6 17. Northview, Dragon and the Investment Manager entered into a "side letter" on or around  
7 1 August 2013 (the "Northview Side Letter"). The Directors of Dragon and the Master  
8 Fund ratified the Northview Side Letter in a board meeting on 29 October 2013.
- 9 18. UBS submitted an electronic copy of the UBS Redemption Notice to the Transfer Agent  
10 via email on 11 August 2014, which the Transfer Agent received on 12 August 2014. This  
11 was the first (and only) redemption notice submitted to Dragon by one of its shareholders.  
12 There had been no redemption requests previously submitted to Eagle by any of its  
13 shareholders.
- 14 19. The Transfer Agent emailed UBS on 12 August 2014 acknowledging receipt of the  
15 electronic copy of the UBS Redemption Notice.
- 16 20. The relevant Redemption Day, as defined in Dragon's PPM, in respect of the UBS  
17 Redemption Notice was 3 October 2014.
- 18 21. On 19 August 2014, the Transfer Agent notified the Investment Manager that it had  
19 received the electronic copy of the UBS Redemption Notice.
- 20 22. On 2 October 2014, the Transfer Agent notified UBS that it had not received the original  
21 UBS Redemption Notice. On the same day, UBS responded by saying that it had couriered  
22 the originals "today".
- 23 23. FedEx tracking records show that a parcel from UBS was signed for by the Transfer Agent  
24 on 7 October 2014. However, the Transfer Agent appears to have either lost or misfiled  
25 the original Redemption Notice.



1 24. On 6 November 2014 the Transfer Agent confirmed to UBS that a certified copy of the  
2 UBS Redemption Notice could be provided in its place.

3 25. Email communications and other correspondence were exchanged between UBS,  
4 Northview, the Transfer Agent, the Advisor, the Investment Manager, Dragon and the  
5 Master Fund in relation to the UBS Redemption Notice and the Northview Side Letter  
6 between 12 August 2014 and February 2015.

7 **Suspension of Redemptions and Payment of Redemption Proceeds**

8 26. Dragon did not retain any liquidity or own any assets other than its shareholding in the  
9 Master Fund. Dragon invested all of its capital in shares in the Master Fund.

10 27. The Master Fund's assets were illiquid and could not be readily realised to raise US\$15  
11 million to meet the Redemption Request.

12 28. On 30 October 2014, the Directors of Dragon and the Master Fund resolved to suspend  
13 redemptions and the payment of redemption proceeds from both funds.

14 29. On 9 December 2014, the Directors of Dragon resolved by written resolution that the  
15 Administrator should be instructed to record the redemption proceeds as a debt due to UBS  
16 in the books of Dragon and adjust the NAV of Dragon accordingly.

17 30. Between September and December 2014, discussions occurred between UBS, Northview,  
18 Dragon, the Master Fund, the Advisor and the Investment Manager in relation to the UBS  
19 Redemption Notice and a potential purchase by Northview of certain of the Master Fund's  
20 assets in satisfaction of the US\$15 million UBS sought to redeem, for the benefit of  
21 Northview, pursuant to the UBS Redemption Notice. These negotiations were ultimately  
22 unsuccessful.

23 **Liquidation of the Funds**



- 1 31. On 29 December 2014, the Directors of Dragon and the Master Fund held board meetings  
2 by telephone conference and resolved to recommend to their respective shareholders that  
3 Dragon and the Master Fund should be wound up voluntarily.
- 4 32. On 30 December 2014, the shareholders of Dragon and the Master Fund passed special  
5 resolutions resolving that Dragon and the Master Fund should be wound up voluntarily and  
6 appointing Mr Griffin and Mr Batchelor of FTI Consulting (Cayman) Ltd and FTI  
7 Consulting (Hong Kong) Ltd respectively as joint voluntary liquidators.
- 8 33. Mr Griffin and Mr Batchelor were appointed as Joint Official Liquidators of Dragon and  
9 the Master Fund on 13 February 2015, and as Joint Official Liquidators of Eagle on 6  
10 March 2015.
- 11 34. On 5 March 2015, UBS lodged a proof of debt in the liquidation of Dragon (the "UBS  
12 Proof of Debt"), which Mr Griffin and Mr Batchelor rejected on 14 April 2015.
- 13 35. On 1 May 2015, UBS filed a Summons appealing the rejection of the UBS Proof of Debt.  
14 The appeal was stayed by consent on 21 May 2015.
- 15 36. On 25 June 2015, Mr Walker and Mr Conway of PwC Corporate Finance and Recovery  
16 (Cayman) Limited were appointed as the Dragon JOLs in place of Mr Griffin and  
17 Mr Batchelor. Mr Shakespeare replaced Mr Walker as one of the Dragon JOLs on 30 June  
18 2016 following Mr Walker's retirement.
- 19 37. The Dragon JOLs admitted the UBS Proof of Debt by Consent Order dated 23 March 2016.
- 20 38. On 23 December 2015, Dragon submitted a proof of debt in the liquidation of the Master  
21 Fund for the amount of US\$15 million (plus any applicable post-liquidation interest).
- 22 39. The Master Fund JOLs rejected Dragon's proof of debt on 15 March 2016.
- 23 40. On 1 April 2016, the Dragon JOLs filed this Appeal in the Grand Court against the rejection  
24 of Dragon's proof of debt by the Master JOLs.



1 41. On 17 August 2016, certain of Dragon's shareholders (Global Opportunities Fund Ltd.  
2 SPC, iNtRON Biotechnology Inc., and Daewoo Securities Co. Ltd.) filed an application to  
3 expunge the UBS Proof of Debt. The application was stayed by order of this Honourable  
4 Court on 16 January 2017.

5 42. On 8 December 2016, the Court ordered that Dragon's Application shall be adjudicated as  
6 an *inter partes* proceeding between Dragon and Eagle. Also on 8 December 2016, the  
7 Court appointed the main investor in Eagle, Maroon Asia Capital Limited ("MACL"), as  
8 the representative of Eagle for the purposes of Dragon's Application.

9 43. On 21 September 2017, the parties agreed to terms of a Consent Order containing  
10 Directions up to and including the trial of Dragon's application.

11

12 44. According to the parties, the issues in dispute are as follows:

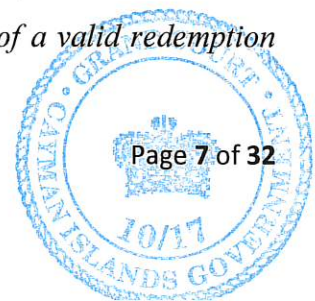
13 *“The Court is respectfully requested to consider the following list of issues in determining*  
14 *whether to grant Dragon's application:*

15 1 *What were the requirement(s) for a valid redemption of Dragon's shares in the*  
16 *Master Fund? In particular:*

17 (a) *Do the Master Fund Articles permit the issue of redeemable shares on terms*  
18 *that the shareholders could redeem their shares otherwise than in*  
19 *accordance with Article 37 of the Master Fund Articles and, in particular,*  
20 *without a Redemption Notice?*

21 (b) *If so, did the Directors of the Master Fund make a determination pursuant*  
22 *to Article 36(a) and/or Article 37 of the Master Fund Articles as to the terms*  
23 *and/or manner in which redeemable shares issued by the Master Fund*  
24 *could be redeemed?*

25 (c) *If so, what was such determination? In particular, did the Directors*  
26 *determine that, upon the receipt by a Feeder Fund of a valid redemption*



1                    *request from one of its shareholders, the equivalent value of the Feeder*  
2                    *Fund's shares in the Master Fund would be redeemed without the need for*  
3                    *a separate written redemption request made by the Feeder Fund to the*  
4                    *Master Fund?*

5            2        *Were the requirement(s) for a valid redemption of Dragon's shares in the Master*  
6                    *Fund met or (if possible) waived by the Master Fund (or persons on its behalf)? In*  
7                    *particular:*

8                    (a)        *If Dragon was required to submit a separate written redemption notice to*  
9                    *the Master Fund:*

10                    (i)        *Was this requirement capable of being waived, and was it in fact*  
11                    *waived?*

12                    (ii)       *Was this requirement fulfilled by the receipt by the Transfer Agent*  
13                    *of the Redemption Notice?*

14                    (b)        *If Dragon was not required to submit a separate written redemption notice*  
15                    *to the Master Fund, was it necessary for UBS' redemption of shares in*  
16                    *Dragon to be valid in order for the corresponding redemption of Dragon's*  
17                    *shares in the Master Fund to be valid?*

18            3        *If it is necessary for the Court to consider the validity of the purported redemption*  
19                    *of UBS' shares in Dragon, were the requirements for that redemption met or (if*  
20                    *possible) waived? In particular:*

21                    (a)        *Was UBS entitled to redeem shares it held in Dragon worth US\$15 million?*

22                    (b)        *Was the receipt by the Transfer Agent of the original of the Redemption*  
23                    *Notice a prerequisite for the validity of the redemption, or for the payment*  
24                    *of redemption proceeds only?*





1 [MACL does not agree that paragraph 3 is an issue to be determined in the present  
2 proceedings]”

3  
4 **The Function of the Court**

5  
6 45. At this point the Court reminds itself that an Appeal against rejection of a proof of debt is  
7 to be treated as a *de novo* adjudication of the creditor’s proof, and that the alleging creditor  
8 is entitled to rely upon additional evidence in support of its claim.

9  
10 46. The task for the Court on such an Appeal is to examine the evidence placed before it and  
11 to come to a view whether, on balance, and taking into account the merits of the claim of  
12 the creditor whose proof is being considered, the claim has been established and, if so, in  
13 what amount: see McPherson’s Law of Company Liquidation, 3<sup>rd</sup> ed., paragraph 12-064.

14  
15 47. A potential creditor must provide satisfactory proof that the creditor’s claim is founded on  
16 a real debt. Therefore in the absence of a potential creditor having discharged that burden  
17 and duly satisfied the Court upon a balance of probabilities no legal obligation would then  
18 arise to admit the proof of debt.

19  
20 48. Putting the matter another way, a claim which is based upon tenuous and/or inadequate  
21 proof will not succeed.

22  
23 49. In more general terms as to the issue of the standard of proof required by law in admitting  
24 or rejecting proofs of debt, it was held in *Home and Colonial Insurance Company, Limited*  
25 [1930] 1 Ch 102 at page 102 (vi) “*that the position of a liquidator examining a proof for*  
26 *admission or rejection in a winding up is the same as that of a trustee in bankruptcy, as*  
27 *decided in Re Van Laun [1907] 2 K.B. 23.*”



1 50. The headnote of the *Van Laun* case states that the trustee in bankruptcy has a “*right and*  
2 *duty to investigate the nature and grounds of the claim made against the bankrupt’s*  
3 *estate*”; the trustee is therefore “*to require satisfactory evidence that the debt on which the*  
4 *proof is founded is a real debt.*”

5  
6 51. Cozens-Hardy M.R. states at page 30 of that case:

7 “*All that we now decide is, that the trustee is entitled to say, “I will not admit your proof*  
8 *until you have given me reasonable means of satisfying myself whether the debt in respect*  
9 *to which you are proving is to any and what extent justifiable and reasonable.*”

10  
11 52. Similarly Buckley LJ states at page 32:

12 “*I think the trustee is entitled in every case, whether there be account stated, covenant or*  
13 *judgment, to say to the creditor who comes into the bankruptcy to prove, “Very well, you*  
14 *say you are a creditor; make out your case as if there was no account status or no covenant*  
15 *or no judgment. Satisfy me that the amount for which you say you are creditor is right.*”

16 The *Van Laun* principle was more recently re-affirmed in *Re Exchange Securities &*  
17 *Commodities Ltd. (In Liquidation)* [1988] 1 Ch. 46 by Harman J. at pages 57D-58E.

18  
19 53. In conclusion, the burden is upon the identified potential creditor to satisfy the liquidator,  
20 and upon appeal the Court, as to the creditor’s claim.

21  
22 54. The Court has expressly chosen to refer to these determinative principles because,  
23 notwithstanding the learned submissions of counsel, the responsibility of the Court in this  
24 regard while an important one is also a narrow one. The Court is not concerned to pass  
25 general judgment on the methodology and practices of the investment industry but instead  
26 it is concerned to come to a conclusion upon a specific Appeal and in relation to specific  
27 probative evidence relevant to that Appeal.



1

2 **The Evidence**

3 55. The Appellant has adduced evidence from Mr. Jess Shakespeare, one of the Joint Official  
4 Liquidators of the Appellant. There has also been evidence from Mr. Greg Bennett, a  
5 Director of both Dragon and the Master Fund, and from Mr. Alan Milgate, who also  
6 became a director of both Dragon and the Master Fund. Expert evidence was also provided  
7 by Mr. Don Seymour, a prominent figure in the Cayman Islands hedge fund industry.

8

9 56. Documentary evidence was produced for MACL by Mr. Paul Madden, attorney-at-law and  
10 in addition there was expert evidence from Mr. Ronan Guilfoyle, another highly qualified  
11 figure in the Cayman Islands hedge fund industry.

12

13 57. Notwithstanding the volume of material as to local industry practice and procedure which  
14 these witnesses have cumulatively provided, the Court has found this evidence in the main  
15 to be largely irrelevant and unhelpful in terms of the legal task which the Court has  
16 previously identified.

17

18 58. However, Mr. Guilfoyle's Report dated 20 October 2017 does contain a number of  
19 references to basic principles which in the wide context of the arguments put forward were  
20 of a useful nature.

21

22 59. For example, he states at paragraph 3.8 that a company is a separate legal entity distinct  
23 from its members. Therefore it is separate at law from its shareholders, directors,  
24 promoters, etc. and as such is conferred with rights and is subject to certain duties and  
25 obligations: *“For this reason, among others, and because each entity is a separate and  
26 distinct legal entity, it is of the utmost importance that each Fund keeps full and accurate  
27 separate legal records.”*

28



- 1 60. The Court pauses to remind itself that in relation to the propositions which Dragon urges  
2 upon it the supporting documented records appear to be surprisingly weak, and even in  
3 some respects non-existent.  
4
- 5 61. Mr. Guilfoyle states at paragraph 4.3 that for a redemption request to be valid it must follow  
6 the prescribed terms outlined in the constitutional documents. This includes the situation  
7 where a written redemption notice is required under the particular articles of the company.  
8
- 9 62. At paragraph 6.5 he comments that Mr. Bennett and Mr. Milgate contend that an automatic  
10 redemption at Master Fund level is normal and/or universal practice in the hedge fund  
11 industry. However, he then makes the point that this can only happen if it is allowed by the  
12 constitutional documents.  
13
- 14 63. He adds at paragraph 6.25 that while the “*back-to-back*” redemption process is suggested  
15 to be vital to avoid the risk that the liquidity profiles between the Master Fund and Feeder  
16 Fund would not be aligned, that factor “*does not however provide any evidence of an*  
17 *automatic redemption process*”.  
18
- 19 64. In his Report dated 17 November 2017, Mr. Seymour provides an account of how the  
20 Master Fund/Feeder Fund dichotomy arose. Feeder Funds could be established in the most  
21 tax efficient manner, and then in terms of the Master Fund there would then be a “*pooling*  
22 *of interests for operational purposes*” (paragraph 2.4).  
23
- 24 65. It is this pooling aspect of the single “*fund*” operation which Mr. Seymour considers to be  
25 crucial.  
26
- 27 66. He states at paragraph 4.5 that the automatic “*back-to-back*” redemption process is  
28 consistent with the fundamental purpose of the Master-Feeder structure as he has explained  
29 it.



1

2 67. He also appears to take the view at paragraph 4.7 that even if the process is not always  
3 clearly documented, some fund operators consider this redemption process  
4 “*uncontroversial and perfunctory industry practice*”.

5

6 68. With no disrespect to any of these witnesses, the questions for this Court to resolve are  
7 narrow ones only and in this context the evidence of the witnesses themselves is of only  
8 limited assistance.

9

10 **The Power of the Master Fund to Issue Redeemable Shares**

11

12 69. A major contention put forward in these proceedings is that the Directors of the Master  
13 Fund did not have power to issue shares on terms that they were capable of being redeemed  
14 without a written redemption notice being served.

15

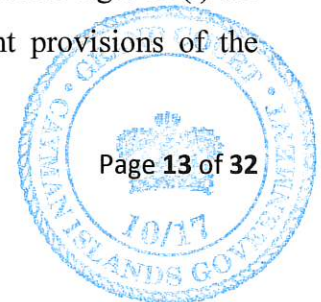
16 70. MACL contends that the Directors do not have power under Articles 36 (a) or Article 37  
17 to determine that no Redemption Notice from a Shareholder is required, nor do they have  
18 power to waive the requirement for a Redemption Notice, but only power to waive the  
19 notice period.

20

21 71. In approaching this issue of construction, the parties have drawn to the Court’s attention  
22 the decision of the Privy Council in *Innimore Fund Management Ltd. v. Fenris Consulting*  
23 *Ltd.* [2016] UKPC 9, and the English law principles set out in *Arnold v. Britton* [2015] AC  
24 1619.

25

26 72. This Court clearly accepts the following proposition in interpreting the meaning of the  
27 relevant words in a written contract: that meaning has to be assessed in the light of (i) the  
28 natural and ordinary meaning of the clause, (ii) any other relevant provisions of the



1 document, (iii) the overall purpose of the clause and the document, (iv) the facts and  
2 circumstances known or assumed by the parties at the time that the document was executed,  
3 and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's  
4 intentions.

5  
6 73. Dragon also emphasizes that terms should be construed in a manner tending to business  
7 efficacy, and that such a result is preferable to one which would or might prove  
8 unworkable.

9  
10 74. MACL on the other hand equally properly points out that there are significant respects in  
11 which the approach to the construction of company articles is stricter than that applicable  
12 to an ordinary commercial contract. MACL argues this is because articles are a registered  
13 statutory contract on which potential shareholders may rely.

14  
15 75. At this juncture the Court wishes to state that while it is inclined towards adopting the more  
16 cautious approach to construction advocated by MACL, nonetheless in the present  
17 proceedings the Court finds no difficulty in coming to a clear conclusion as to the natural  
18 and ordinary meaning of the Articles in question in the circumstances of this case, while at  
19 the same time bearing in mind and paying due respect to commercial common sense and  
20 business efficacy.

21  
22 76. The Master Fund Articles are Amended and Restated Articles which were adopted by  
23 shareholder resolution on 25 June 2012, as previously indicated.

24  
25 77. In Article 1 "*Redeeming Shareholder*" is defined as "*a Shareholder who has requested the*  
26 *redemption of part or all of his Shares in accordance with these Articles.*"



1 78. *“Redemption Notice” is defined as “a notice in writing in such form as the Directors may*  
2 *from time to time determine from a Shareholder requesting the redemption of part or all of*  
3 *his Shares.”*

4  
5 79. Article 9 of the Master Fund Articles provides as follows:  
6

7 *“Subject to these Articles, all Shares for the time being unissued shall be under the control*  
8 *of the Directors who may:*

9 *(a) issue, allot and dispose of the same to Persons, in such manner, on such terms, and*  
10 *having such rights and being subject to such restrictions as they may from time*  
11 *determine; and*

12 *(b) grant options with respect to such Shares and issue warrants or similar instruments*  
13 *with respect thereto;*

14 *and for such purposes, the Directors may reserve an appropriate number of Shares*  
15 *for the time being unissued.”*  
16

17 80. Article 36 of the Master Fund Articles provides, so far as material, as follows:

18 *“Subject to the Law, the Company may:*

19 *a) issue shares on terms that they are to be redeemed or liable to be redeemed at*  
20 *the option of the Company or the Shareholder on such terms and in such*  
21 *manner as the Directors may determine, or as may otherwise be determined*  
22 *from time to time;*

23 *b) ...”*  
24

25 81. Articles 37 provides as follows:

26 *“Subject to the Law, these Articles and any rights and restrictions for the time being*  
27 *attached to any Class or Series:*



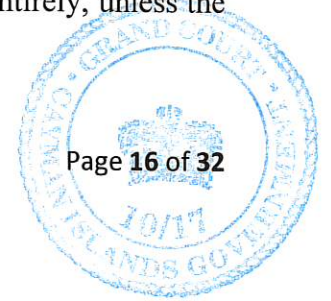
1 a) *on receipt by the Company or its authorised agent of a Redemption Notice upon at*  
2 *least such number of days' prior notice as the Directors, in consultation with the*  
3 *Investment Manager, may from time to time determine (subject to the discretion of*  
4 *the Directors, in consultation with the Investment Manager, to waive or reduce*  
5 *such period of notice) the Company shall redeem all or any portion of such*  
6 *Redeeming Shareholders Shares on a Redemption Day at the Redemption price for*  
7 *the relevant Class and Series...*"

8  
9 82. MACL makes this submission at paragraph 76 of its Closing Submissions:

10 "76. *Thus, pursuant to Articles 1 and 37 the Directors have power to determine the form*  
11 *of the Redemption Notice and the period of prior notice that must be given by a*  
12 *shareholder wishing to redeem, and the Redemption Days. The Directors also have*  
13 *discretion under Article 37 to waive or to reduce the period of notice determined*  
14 *upon. But they do not have power under Article 36 (a) or Article 37 to determine*  
15 *that no Redemption Notice from a shareholder is required, nor do they have power*  
16 *to waive the requirement for a Redemption Notice, only the notice period. As set*  
17 *out further below, Dragon seeks to argue that there is such a power under Article*  
18 *9 (a) and/or Article 36(a). However, this reading depends on reading these Articles*  
19 *in isolation and divorced from the remainder of the Articles of which they form part*  
20 *and from the legislative framework."*

21 83. Dragon relies upon Article 9 (a) as conferring an unfettered power upon the Directors to  
22 issue shares and to determine the rights attached to the shares. It also contends that because  
23 the Directors were clearly intended to have power to issue shares which were to be  
24 redeemed on a fixed redemption date, without a Redemption Notice being served, this  
25 example illustrates how wide the Directors' powers actually are.

26  
27 84. With great respect, the Court is unable to accept Dragon's contention on this point. Given  
28 the comprehensive nature of the redemption procedure actually set out, it makes no sense  
29 to confer on the Directors a further power to disregard that procedure entirely, unless the





1 power so to disregard the procedure is clearly set out. This Court accepts MACL's  
2 submission as correct and is persuaded by it.

3  
4 85. On the one hand Dragon's argument is one tending to favour obscurity but on the other  
5 hand MACL's argument relies upon clarity of language and certainty of intent. Moreover  
6 it appears to this Court that if Directors are to be held accountable for their responsibilities  
7 it is vitally important for anyone reading the Articles to know what those responsibilities  
8 in reality are.

9  
10 86. Accordingly Dragon's submission on this aspect of their Appeal is rejected.

11  
12 87. The next issue for the Court to consider is whether, in the event that the Directors did in  
13 fact have the authority to dispense with the Redemption Notice procedure, they did indeed  
14 make any determination to that effect.

15  
16 **A Relevant Determination by the Directors**

17 88. Dragon submits inter alia at paragraphs 93 and 94 of its Closing Submissions that the terms  
18 on which shares were issued including the requirements for redemption and the form of  
19 any Redemption Notice which was required were not the subject of a formal resolution of  
20 the Directors of the Master Fund, nor equally importantly did they need to be.

21  
22 89. Instead, the Appellant relies upon the proposition of law that Directors can act informally  
23 and that all that is required is that they concurred in the relevant matter.

24  
25 90. The question therefore for the Court would be whether there is any probative evidence of  
26 the alleged determination.



1 91. In this critical regard Dragon relies upon the following submission at paragraph 96:

2 “96. *In the present case, the determination of the Directors on these matters is evidenced*  
3 *by the terms of the Dragon PPM which was provided to investors in Dragon, and*  
4 *reflects the general practice followed in relation to master-feeder fund structures*  
5 *as understood by the Directors. The same individuals were the Directors of both*  
6 *Dragon and the Master Fund at the relevant time.*”

7 92. This is a reference to the Appellant’s Private Placement Memorandum (“the Dragon  
8 PPM”).

9  
10 93. Then in paragraph 101 Dragon again asserts that in the present case there is clear evidence  
11 of the relevant determination made by the Master Fund Directors contained in the Dragon  
12 PPM issued by Dragon. This argument is presumably based on the fact that the Appellant  
13 and the Master Fund share the same Directors.

14 94. The argument continues at paragraph 102, 103 and 104 as follows:

15 “102. *The Dragon PPM explicitly provided that: “the redemption procedure for the*  
16 *Master Fund is identical to [Dragon’s] procedure.” On any view, this is a clear*  
17 *statement of intention as to the redemption procedure for the Master Fund.*

18 103. *The terms of the Dragon PPM provided, in relation to the procedure for the*  
19 *redemption of shares in Dragon as follows:*

20 (1) *a “Redemption Day” was “the first Business Day of the month of each*  
21 *calendar quarter (being the first Business Day in January, April, July and*  
22 *October), or any other day or days the Directors, in consultation with the*  
23 *Manager, designate, including, a day on which a compulsory redemption of*  
24 *Shares occurs;”*

25 (2) *a “Redemption Notice” was “a written notice given by a Shareholder to*  
26 *[Dragon] (or to the Transfer Agent or its affiliate on behalf of the Fund)*  
27 *requesting the redemption of all or some of that Shareholder’s Shares”;*



1 (3) *the Redemption Notice was to be received by Citibank (the Transfer Agent)*  
2 *no later than 5pm (Singapore time) on a business day at least 45 days prior*  
3 *to the relevant Redemption Day”;*

4 (4) *the payment of the redemption proceeds was to be made as soon as possible*  
5 *after the relevant Valuation Day (i.e. the last business of the preceding*  
6 *month) and generally within 30 days after the Redemption Day.*

7 104. *The clear and express statement in the Dragon PPM that “the redemption procedure*  
8 *for the Master Fund is identical to [Dragon’s] procedure “was clearly intended*  
9 *to apply that same redemption procedure both for the purposes of redeeming*  
10 *shares in Dragon and for the purposes of redeeming shares in the Master Fund.*  
11 *Accordingly, for example, the Directors thereby determined the relevant*  
12 *Redemption Days for both Dragon and the Master Fund.*

13 105. *These statements thus evidence both the Dragon Directors’ determination of these*  
14 *matters for the purposes of the redemption of shares in Dragon and the Master*  
15 *Fund Directors’ determination of these matters for the purposes of the redemption*  
16 *of shares in the Master Fund.”*

17 95. Two points of immediate concern to the Court in relation to this analysis are that a statement  
18 of intention per se is not a determination and that there appears to be underlying the  
19 argument a conscious infringement of the doctrine of corporate responsibility. In other  
20 words, if two companies have the same Directors that surely does not make them one  
21 company or enable them to function as one company.

22 96. Nonetheless by way of elaboration Dragon maintains that because the Directors of Dragon  
23 passed a Resolution on 29 April 2013 approving the Dragon PPM, also described as the  
24 Offering Memorandum, then given that the Directors of the Master Fund were the same as  
25 the Directors of the Appellant Dragon there was “*clear concurrence by the Directors of the*  
26 *Master Fund to the terms of the Dragon PPM.*”



1 97. The Court has serious concerns as to the conclusory nature of this factual logic, quite apart  
2 from the Court’s separate concern as to the purported merging of corporate identities.

3 98. However, their argument then continues as to how this identical procedure, however that  
4 term may be interpreted, is to be construed in relation to the requirement to serve a  
5 Redemption Notice.

6 99. Dragon borrows language from an opinion of Mr. Anthony Zacarolli Q.C. (now Mr. Justice  
7 Zacarolli), which was obtained by the Dragon JOLs stating at paragraph 116:

8 “116. *As Mr. Zacarolli Q.C (as he then was) pointed out, read literally, the statement in*  
9 *the Dragon PPM is capable of being interpreted in two different ways:*

10 (1) *First, that the requirements for redemption set out in the Dragon PPM literally*  
11 *apply mutatis mutandi to the redemption by Dragon of shares in the Master*  
12 *Fund. On this reading, all the requirements for the redemption set out in the*  
13 *Dragon PPM for the redemption of shares in Dragon apply separately, and*  
14 *have to be repeated, for the redemption of shares in the Master Fund;*

15 (2) *Secondly, that the procedure for redemption of shares in the Master Fund is*  
16 *absolutely identical to the procedure set out in Dragon PPM, i.e. that a*  
17 *Redemption Notice is served by the investor in Dragon on the Transfer Agent*  
18 *at least 45 days prior to the relevant Redemption Day, and subject to the other*  
19 *conditions set out in the Dragon PPM. On this approach, there is a single*  
20 *procedure which results in the simultaneous redemption of shares at the*  
21 *Dragon level with an automatic corresponding redemption at the Master Fund*  
22 *level.*

23 117. *As Mr Zacaroli explained in his opinion, and as is further explained below, it is*  
24 *clear that the second interpretation is the correct one.”*

25 100. It is at this point of Dragon’s argument that it introduces the evidence of Mr. Bennett, Mr.  
26 Milgate and Mr. Seymour as to industry practice. Accordingly, within the framework of  
27 Mr. Zacarolli’s second theory the Appellant submits as follows at paragraphs 128-129:

1           “128. This evidence is key to the determination of the present appeal, and is fatal to the  
2           arguments being advanced by MACL. This is because the Court has clear,  
3           unequivocal, credible and independent evidence from the Directors involved at the  
4           time as to what their understanding and intentions were as regards the applicable  
5           redemption process. In light of this evidence, it is clear beyond any argument that  
6           the understanding and intentions of the Directors was that there would be an  
7           automatic back-to-back redemption of the Master Fund’s shares upon Dragon  
8           receiving a valid redemption request from an investor.

9           129. In circumstances where (a) the subjective intentions and understanding of the  
10          Directors at the time are unequivocally clear and (b) it is clear that the Directors  
11          had a broad discretion under the Master Fund Articles to determine the applicable  
12          redemption procedure, then the only question is whether the subjective intentions  
13          and understanding of the Directors was made sufficiently manifest in order to  
14          amount to a “determination”. The answer to that is obviously “yes”, given the  
15          terms of the Dragon PPM which made expressly clear that the procedure for  
16          redemption of the shares in the Master Fund was the same as that for the  
17          redemption of shares in Dragon.”

18       101. Having set out this reasoning as best it can, the Court has great difficulty in regarding it as  
19       other than tortuous, speculative and unpersuasive.

20       102. In principle there is of course nothing in the least amiss with the concept that a redemption  
21       at Feeder Fund level can lead to an automatic corresponding redemption at the Master Fund  
22       level without any need for an additional separate redemption notice at a Master Fund level  
23       to be served. The real questions are whether such a course has been constitutionally  
24       authorized and if so whether a determination to that effect has been made.

25       103. Ultimately those elementary and important matters must be proved on a balance of  
26       probabilities if Dragon is to succeed. Simply setting out a theory is in itself entirely  
27       insufficient.



1 104. In addressing the question of whether the Directors at Master Fund level made a  
2 determination as to dispensing with a second Redemption Notice, MACL relies inter alia  
3 on the Written Resolution of the Master Fund Directors dated 1 June 2012.

4 105. Helpfully reference is made to it in an opinion of Mr. Glen Davis Q.C. Mr. Davies states at  
5 paragraph 33 of the opinion:

6 *“Significantly, paragraph 3.2 (g) relating to redemption expressly contemplates a notice*  
7 *from the Feeder Funds requesting redemption of shares, and that being received and*  
8 *accepted by the Master Fund. Specifically, it provides:*

9 *“Upon receipt of notice from any Feeder Fund requesting the redemption of any Offered*  
10 *Shares, and such redemption notice (a “Redemption Notice”) being accepted by or an*  
11 *behalf of the Company, and subject to the Company having sufficient distributable profits*  
12 *and other reserves and accounts to make such redemption, or such redemptions being made*  
13 *out of a new issue of Shares, the Offered Shares, the subject of such Redemption Notice, be*  
14 *redeemed and cancelled in accordance with these resolutions and the Articles and the*  
15 *Administrator be authorised to make all relevant entries in the Register.”*

16 106. This is obviously direct as distinct from indirect evidence of some importance, and MACL  
17 proceeds to characterize it in this way at paragraph 127.1.6 of its Closing Submissions:

18 *“In other words, the Directors of the Master Fund resolved that they would only redeem*  
19 *shares if a Redemption Notice was received “from [the] Feeder Fund”. Dragon seeks, in*  
20 *paragraph 175 (1) (ii) of its written closing, to argue that this is not inconsistent with the*  
21 *Directors of the Master Fund determining that, when an investor redeems its shares in*  
22 *Dragon “that redemption notice also serves as notice for the redemption by Dragon of its*  
23 *shares in the Master Fund.” This is a hopeless argument. The Master Fund Articles refer*  
24 *to the service of a Redemption Notice from the Feeder Fund; these Resolutions refer to the*  
25 *service of a Redemption Notice from the Feeder Fund. They can only sensibly be construed*  
26 *as meaning what they say.”*



1 107. This Resolution clearly provides objective evidence in contrast to the theoretical  
2 constructions put forward by Dragon, on whom the burden of proof rests in this Appeal.

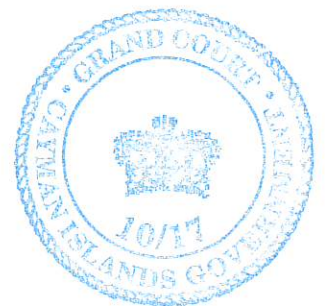
3 108. Indeed, in paragraph 154 of MACL’s Closing Submissions it is argued that the relevant  
4 determination by the Master Fund Directors as to the redemption procedure for shares in the  
5 Master Fund in fact occurred when the Master Fund Directors approved the Master Fund  
6 Launch Resolution on 1 June 2012. In terms of the standard of proof applicable to Dragon  
7 in this case, this is a conclusion which at a minimum at least is just as well arguable and as  
8 credible as the contrary argument of Dragon which has been put forward.

9 109. The Court also carefully notes MACL’s submission at paragraph 127.3 concerning the  
10 Written Resolution of the Dragon Directors dated 29 April 2013:

11 *“The Written Resolutions of the Dragon Directors dated 29 April 2013 do not evidence, and*  
12 *are flatly inconsistent with the existence of, an “automatic back-to-back” redemption*  
13 *procedure. Rather, they (rightly) treat separately a request by an investor to redeem its*  
14 *shares in Dragon, and the consequent redemption by Dragon of shares in the Master Fund.*  
15 *They provide, so far as relevant, as follows:*

16 *“It is resolved that...*

17 *(h) upon receipt of duly completed redemption notices (“Redemption Notices”) in*  
18 *accordance with the terms of the Offering Memorandum (as it may be amended from*  
19 *time to time) and the Articles, and such Redemption Notices being accepted by or on*  
20 *behalf of the Company, and subject to the Company having sufficient distributable*  
21 *profits and other reserves and accounts to make such redemption, or such redemptions*  
22 *being made out of a new issue of Shares, the Offered Shares, the subject of such*  
23 *Redemption Notices, be redeemed and cancelled in accordance with the Offering*  
24 *Memorandum (as it may be amended from time to time) and the Articles and the*  
25 *Administrator be authorised to make all relevant entries in the Register;*



1 (i) *the Company [i.e Dragon] redeem all or such portion of its Master Fund Shares as the*  
2 *Directors, the Investment Manager or the Administrator from time to time determine is*  
3 *necessary or desirable to facilitate a redemption of Offered Shares.”*

4 110. Once again, this material is seemingly at complete variance with Dragon’s case, unless it  
5 can be established by Dragon somehow that the Directors have in fact determined otherwise.

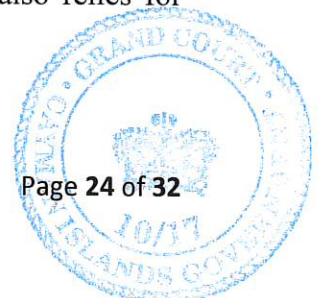
6 111. Quite apart from the issue of whether there was a specific determination by the Directors of  
7 the Master Fund, and even accepting for the purposes of this argument that the Directors of  
8 Dragon and the Master Fund somehow function in a uniform and inclusive manner,  
9 nonetheless it is still possible for the Court separately to dispose of the matter simply as one  
10 of construction. Where a statement is made that the redemption procedure for the Master  
11 Fund is identical to the Dragon Fund’s procedure, in the opinion of the Court that statement  
12 contemplates two separate identical procedures and not simply one procedure that serves  
13 automatically for two purposes. This surely is the natural and ordinary meaning of the  
14 language used.

15 112. Ultimately, and as a matter of formal proof, the Court is unable to accept that a proof of debt  
16 can be properly founded and proved on a balance of probabilities on such a fragile basis as  
17 has been put forward.

### 18 **The Market Environment**

19  
20 113. Dragon has emphatically contended throughout that such evidence as there is of  
21 contemporary market practice is strongly supportive of its case.

22 114. MACL on the other hand contends that this proposition is significantly blunted by the fact  
23 that for many months after Dragon’s proof of debt had been submitted no one on behalf of  
24 Dragon had identified this as being the only basis on which Dragon claims that the  
25 redemption from the Master Fund had been effected. The point made here by MACL is  
26 essentially one of advocacy, because as the Court has observed Dragon also relies for





1 instance on the critical sentence contained in the PPM, upon which the Court has already  
2 expressed its considered view.

3 115. In any event, Dragon makes recourse to certain email exchanges between the Appellant's  
4 Transfer Agent and a Ms. Collett of Walkers in which she had sought an explanation of the  
5 applicable redemption process.

6 116. By email dated 19 May 2015 Ms. Collett sought confirmation of her own understanding,  
7 summarised in relevant part as follows:

8 *"Master Feeder – the "Real" redemptions*

9 *For "real" redemptions arising from requests from investors to redeem, the process was:*

- 10 1. *Redemption request made by investor to Citi Singapore ("Citi SNG") (as transfer*  
11 *agent).*
- 12 2. *Redemption request received by Citi SNG and put into "SHARP" system.*
- 13 3. *There is an "automatic" redemption as between Master and Feeder and no additional*  
14 *notice between them.*
- 15 4. *Each month, a SHARP report is generated by Citi SNG and sent by Citi SNG to the*  
16 *client and cc'd to Citi HK.*
- 17 5. *Citi HK puts the information from the SHARP report into it [and calculates NAV?]. Yes,*  
18 *Citi HK captures the capital movement from Sharp report for valuation of NAV*
- 19 6. *Citi HK sends NAV sheet to Citi SNG after NAV is approved by client. This should be*  
20 *step 7*
- 21 7. *Citi HK puts the NAV price into its SHARP system. This should be step 6*
- 22 8. *Citi SNG prepares and issues monthly NAV from its SHARP system.*
- 23 9. *Payment to redeemer is made (usually in the third week of the month) by either transfer*  
24 *of funds from the Prime Broker (holding cash assets) to the Master Fund to the Feeder*  
25 *Fund to the Investor)"*



1 117. In turn the email reply received from a Mr. Lam on 29 May 2015 indicates that the process  
2 described by Ms. Collett was “*vastly correct*”, meaning as one understands it, essentially  
3 correct.

4 118. While such material may well be of explanatory and historical significance and technically  
5 admissible, the Court nonetheless considers it to be of no actual probative value to Dragon’s  
6 case.

7 119. Far from coincidentally, the Court has formed similar reservations as to the broader factual  
8 and expert evidence on the subject of hedge fund practice adduced on Dragon’s behalf.

9 120. Dragon argues at paragraph 162 of its Closing Submissions:

10 “162. *Ultimately, the evidence as to the general market practice and understanding as to*  
11 *redemption procedures between Feeder Funds and Master Funds is strongly*  
12 *supportive of the Dragon JOLs’ case. Contrary to MACL’s arguments, there is no*  
13 *basis for thinking that the Directors of the Master Fund intended to adopt a*  
14 *fundamentally different procedure which was out of line with the general practice*  
15 *and understanding. On the contrary, it is clear that they intended to follow the*  
16 *general practice and understanding which was based on automatic, back-to-back*  
17 *redemptions between feeder and Master Funds.”*

18 121. Dragon makes the point again at paragraph 175 (3) (ii):

19 “(ii) *the relevant “determination” in the present case was the determination of the*  
20 *Directors, evidenced by the Dragon PPM, that, in the case of redemptions by*  
21 *investors in Dragon, then the process for redeeming Dragon’s shares in the*  
22 *Master Fund would be the same as the process for redeeming the investor’s*  
23 *shares in Dragon;”*

24 122. Once again, the submission is repeated at paragraph 57 of Dragon’s Reply Closing  
25 Submission:

26 “57. *This is a far-fetched argument and should be rejected. The existence of the*  
27 *well understood general practice in relation to Master-Feeder Fund*



1                    *redemptions is an important part of the context in which the questions of*  
2                    *whether the Directors made a determination as to the redemption terms*  
3                    *attaching to the shares in the Master Fund issued to Dragon and, if so, what*  
4                    *that determination was, fall to be determined. The existence of the well*  
5                    *understood general practice no doubt explains why it was not considered*  
6                    *necessary to record the determination, all that was necessary was for the*  
7                    *Directors to indicate their assent and agreement with that general practice.*  
8                    *On any view, the terms of the Dragon PPM demonstrate that.”*

9    123.    With great respect, making the same argument over and over again does not serve to make  
10            the argument any stronger. In summary, the Court finds this particular argument, which is  
11            based upon market practice alone, to be distinctly unpersuasive.

12   124.    In the course of this Appeal, it is perhaps the case that somewhat less attention has been  
13            paid to the mechanical requirements of Order 16 rule 18 than would have been ideal.

14   125.    However, as the Court has previously indicated, a dissatisfied creditor carries both a legal  
15            and an evidential burden and the creditor must satisfy the Court upon a balance of  
16            probabilities as to the merits of its claim.

17   126.    The Court has duly considered the evidence, the submissions and the law.

18   127.    In the present instance, and subject to the issue of waiver which the Court will ultimately  
19            consider, the Court has concluded that Dragon has failed in its Appeal upon the balance of  
20            probabilities, and in this respect Dragon has not established the facts upon which it relies  
21            to found the debt.

22   128.    Furthermore, for the avoidance of any uncertainty the Court agrees with MACL as to the  
23            principles of law to be applied in considering this matter.

24   129.    It is not the responsibility of the Court to define what is lawful operational procedure in the  
25            hedge fund industry, subject only to there being that which is constitutionally and legally  
26            permissible. The Court is not concerned with market practice at large. Instead it is only  
27            concerned with the merits of this particular Appeal.



1 **Waiver**

2  
3 130. Dragon puts forward in this Appeal the alternative submission that if there was a  
4 requirement for a separate, additional Redemption Notice to be served by Dragon on the  
5 Master Fund, then this requirement was waived in the present case by the Master Fund.  
6 This Court understands waiver in this context to mean the voluntary relinquishment of legal  
7 rights that the Master Fund would normally have if the waiver did not exist.

8 131. Dragon formally describes the concept in these terms at paragraph 181 of its Closing  
9 Submissions:

10 *“181. A waiver will arise where one party accedes to a request by the other that he should*  
11 *forbear to insist on the mode of performance fixed by the contract, or where,*  
12 *without any request, one party represents to the other that he will forbear to enforce*  
13 *or rely on a term of the contract to be performed or observed by the other party,*  
14 *and the other party acts in reliance on that representation. A waiver may be oral*  
15 *or written or inferred from conduct.”*

16 132. It would seem that both with the Court’s summary description and with Dragon’s more  
17 developed description, voluntary intention must be established.

18 133. The argument proceeds in this manner at paragraphs 178-179:

19 *“178. In particular:*

20 *(1) The view of Directors was that the redemption was effective at the Master Fund*  
21 *level: see, for example, the email exchanges of 24 October 2014 and 8*  
22 *December 2014 referred to in paragraphs 41 and 48 above.*

23 *(2) The Board Meeting of the Master Fund of 30 October 2014 proceeded on the*  
24 *basis that the Redemption Notice served by UBS had been effective to trigger a*  
25 *redemption of shares in the Master Fund. Indeed, it was because the Master*  
26 *Fund lacked the liquidity to meet this redemption that the Directors of the*



1            *Master Fund resolved to suspend the payment of redemption proceeds and any*  
2            *further redemptions (see para 4.2 of the minutes);*

3            *(3) The Board Meetings of the Master Fund of 18 December 2014 (para 3.1 (d) of*  
4            *the minutes) and 29 December 2014 (para 3.3 (a) of the minutes) proceeded on*  
5            *the basis that the redemption proceeds due following the redemption of the*  
6            *shares was a due debt of the Master Fund, albeit not immediately payable due*  
7            *to the Suspension;*

8            *(4) Indeed, it was for this reason that resolutions were passed for the winding up*  
9            *of the Master Fund (and Dragon).*

10           *179. In these circumstances, the Directors of the Master Fund permitted the Transfer*  
11           *Agent to proceed on the basis that the redemption in relation to the Master Fund*  
12           *had been effective. So far as Dragon is concerned, it was clear that the Master*  
13           *Fund was not taking any point that the redemption of shares had been ineffective*  
14           *due to any failure by Dragon to serve a further Redemption Notice on the Master*  
15           *Fund.”*

16           134.    *MACL seeks to counter this argument as follows in its Closing Submissions at paragraphs*  
17           *224-225:*

18           *“224. The first and fundamental difficulty is that the requirement under the Master Fund*  
19           *Articles for a written notice from Dragon was not capable of being waived: see*  
20           *paragraphs 76 to 88 above. The Master Fund Directors had power, under Article*  
21           *37, to waive the period of notice. They did not have power under the Master Fund*  
22           *Articles, whether pursuant to Article 36 or Article 37 or otherwise, to dispense with*  
23           *the express clear requirement in the Master Fund Articles for a Redemption Notice,*  
24           *either by making a determination that no such Redemption Notice was required, or*  
25           *by waiving that requirement in any particular case.*



1           225. *In this regard, it is telling that paragraph 180 of Dragon's written closing has*  
2           *(illogically) to deny the very premise on which this part of Dragon's argument*  
3           *necessarily proceeds (namely that the Directors did not have unfettered powers*  
4           *under the Master Fund Articles). Paragraph 180 states that: "given that the*  
5           *Directors of the Master Fund have power under the Master Fund Articles to set the*  
6           *terms required for redemption, there is no reason why they would not have power*  
7           *to waive any requirement for redemption set under those terms". But that is the*  
8           *wrong assumption at this stage of the argument. Thus, if Dragon is wrong in its*  
9           *contention as to the Director's powers under the Articles, its waiver arguments also*  
10           *falls at the first hurdle."*

11       135. Given the construction which the Court has already given to Article 37, it appears to the  
12       Court that the same constraints apply to waiver as indeed apply to determining that no  
13       Redemption Notice from the Appellant was required. In other words, the argument falls  
14       once again at the preliminary hurdle as a matter of construction.

15       136. Even if the concern of the Court as to this point is incorrect, nonetheless as previously  
16       indicated the Court also finds persuasive merit in the following argument which MACL  
17       puts forward at paragraphs 226-227:

18       "226. *But even if the Master Fund Directors did have power to waive the requirement for*  
19       *a Redemption Notice, no such waiver arises on the facts here. Waiver is a term*  
20       *which covers different legal concepts, but in any case it requires an "unequivocal*  
21       *representation": see the analysis of Lord Goff in The Kanchenjunga [1990] 1*  
22       *Lloyds's Rep 391 at 397-400, especially 399 col.2. None has ever been identified*  
23       *here. Dragon's written closing does not begin to advance a proper case as to the*  
24       *representations said to have been relied upon. Paragraph 182 baldly asserts that:*  
25       *"it is clear that the Master Fund represented expressly and by conduct that the*  
26       *redemption of shares in the Master Fund represented expressly and by conduct that*  
27       *the redemption shares in the Master Fund had been effective". No specific*  
28       *representations are alleged in paragraph 182. As set out in paragraphs 33 to 38*  
29       *above, the contemporaneous documents do not record or represent that there had*

1            *been a valid redemption at the Master Fund level. Insofar as Dragon relies on the*  
2            *documents identified in paragraph 178, these documents are clearly not capable of*  
3            *constituting the “unequivocal representation” required to found a waiver: first,*  
4            *because these documents did not represent that there was an effective redemption*  
5            *at the Master Fund level, notwithstanding that no redemption notice had been*  
6            *served by Dragon, and in any event, secondly, because they were simply too late,*  
7            *post-dating the redemption date, and so cannot have been relied upon by Dragon*  
8            *in the Manner alleged.*

9            227. *Insofar as Dragon’s case rests upon the fact that the register of the Master Fund*  
10           *was updated to record the Redemption, the simple answer is that this did not occur*  
11           *until far too late, well after the redemption date and the date on which redemptions*  
12           *were suspended: see paragraph 191 above.”*

13        137. In summary, the Court is not satisfied upon the evidence that Dragon has discharged the  
14           burden of showing upon a balance of probabilities that the Directors of the Master Fund  
15           unequivocally and intentionally permitted the Transfer Agent to proceed on the basis that  
16           the redemption in relation to the Master Fund had been effective notwithstanding a failure  
17           by Dragon to serve a further Redemption Notice on the Master Fund.

18        138. As in the other respects considered in this Judgment, Dragon’s theories are not supported  
19           by the facts in the way that the law prescribes for Dragon to succeed in this *de novo* hearing.



1 **Conclusion**

2

3 139. For the reasons which have been stated above Dragon's Summons seeking that the rejection  
4 of Dragon's proof of debt (by notice dated 15 March 2016) be set aside is hereby refused.

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11 *Robin McMILLAN*

12 **THE HON. JUSTICE McMILLAN**  
13 **JUDGE OF THE GRAND COURT**

14

