

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

3
4 **CAUSE NO: FSD 29/2009 (AJEF)**
5

6 **IN THE MATTER OF THE COMPANIES LAW (2009 REVISION)**
7

8 **AND IN THE MATTER OF FOUNDING PARTNERS GLOBAL FUND, LTD. (IN**
9 **OFFICIAL LIQUIDATION)**

10
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12 **OFFICIAL LIQUIDATION)**
13

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17 **Coram:** The Hon. Mr. Justice Angus Foster

18
19 **Appearances:** Applicant (Hibistar PTE Ltd.) – Mr. Nigel Meeson QC of Conyers Dill &
20 Pearman

21
22 Respondent (ABN AMRO) – Mr. Michael Makridakis of Ogier

23
24 JOLs – Mr. Kenneth Farrow, QC of Mourant Ozannes

25
26 **Heard:** Monday 23rd August 2010
27



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29
30 **RULING**
31

- 32
33 1. The issues in this matter concern the rights of different classes of shareholder in a feeder
34 fund in relation to certain assets represented by the shares of the feeder fund in a master
35 fund on the winding up of both the feeder and the master fund. There is also an issue as
36 to the position in the winding up of a shareholder who had redeemed his shares prior to
37 the suspension of redemptions but had not been paid the redemption proceeds prior to the
38 suspension of redemptions.

1 **Background**

2 2. Founding Partners Global Ltd. (“the Master Fund”) and Founding Partners Global Inc.
3 (“the Feeder Fund”) (together “the Fund”) were both incorporated as exempted
4 companies under the laws of the Cayman Islands on 29th July 1997. Their business was
5 to act as an investment fund. The Feeder Fund invested all of its capital in the Master
6 Fund in a master-feeder structure and all of the shares of the Master Fund are owned by
7 the Feeder Fund.

8
9 3. The Fund originally issued 2 classes of shares, Class A and Class B pursuant to a
10 confidential offering memorandum dated August 1997 (“the original offering
11 memorandum”). Subsequently (as I shall explain below), the Fund issued a third class of
12 shares, Class E, pursuant to a supplement to the original offering memorandum dated
13 August 1999 (“the supplemental offering memorandum”). A further supplement to the
14 original offering memorandum was also issued in December 2000 which related only to
15 the Class A and Class B shares and which changed the investment strategy in respect of
16 those share classes only.

17
18 4. The applicant is Hibistar PTE Ltd. (“Hibistar”), the holder of all the Class E shares.
19 Hibistar seeks declarations that, firstly, the Class E assets of the Master Fund are solely
20 attributable to and only available to the Class E shareholder of the Master Fund, namely
21 the Feeder Fund and, secondly, that the Class E shareholding in the Master Fund, which
22 is held by the Feeder Fund, is solely attributable to and only available to the sole Class E
23 shareholder of the Feeder Fund, namely Hibistar. Hibistar consequently seeks an order

1 that the JOLs of the Fund should distribute and transfer the entirety of the Class E assets
2 to Hibistar.

3
4 5. Hibistar's applications are opposed by ABN AMRO Fund Services Bank (Cayman)
5 Limited as custodian of KBC Investments Limited re ABL ("ABL"), which is the holder
6 of Class B shares in the Fund but in respect of some of which it has given notice of
7 redemption, although it has not been paid all of the redemption proceeds which are due to
8 it.

9
10 6. Hibistar has also sought an order that ABL should represent the interests of all Class A
11 and Class B shareholders for these purposes so that they are all bound by this Ruling.
12 ABL and the JOLs do not object to that and accordingly I will make such an order. I
13 should also mention that the JOLs take a neutral position with regard to the substantive
14 issues which have now arisen between the different classes of shareholders.

15
16 7. The articles of association ("the articles") of both the Master Fund and the Feeder Fund
17 are the same to all intents and purposes and the parties have treated the Master Fund and
18 the Feeder Fund as if they were one and the same for these purposes. I have done
19 likewise and have accordingly referred to them together as "the Fund". The articles
20 provide in identical terms for two separate share series to be created, namely Class A and
21 Class B and for the proceeds from the allotment of each share series to be applied in the
22 books of the company concerned to a designated share series fund, with assets and
23 liabilities effectively segregated to each such series fund, and for the assets so held to be
24 applied solely in respect of the share series to which such series fund is allocated. As a
25 result of the mirror provisions in the articles of both the Master Fund and the Feeder

1 Fund, the assets of each share series fund would flow down from the Master Fund to the
2 holders of the equivalent share series in the Feeder Fund, hence the treatment of the
3 Master Fund and the Feeder Fund as if they were one and the same for these purposes.

4
5 8. Although the articles provide for the creation of only two share series, namely Class A
6 and Class B shares, Hibistar, ABL and the JOLs all agree and accept that in fact the Fund
7 also subsequently issued another series of shares, namely Class E shares. They were
8 issued solely to Hibistar, which has never held any Class A or Class B shares. The
9 creation and issue of the Class E shares was effected notwithstanding that none of the
10 necessary corporate administrative steps appear to have been taken to enable each
11 company to issue and allot the Class E share series. However, the supplemental offering
12 memorandum was issued to Hibistar in respect of the offering to it of the Class E shares
13 and a separate shareholder register was duly created and maintained in respect of the
14 Class E shares, which are all registered in name of Hibistar. Hibistar is shown on the
15 Class E share register as having subscribed US\$8m for Class E shares on 1st January
16 2000 and a further US\$1m for additional Class E shares on 1st May 2006.

17
18 9. The Master Fund, the Feeder Fund, Hibistar and now the JOLs have at all times
19 proceeded on the basis that Class E was validly and effectively created as a share series
20 governed by the articles, that the Class E shares were duly and solely issued to Hibistar,
21 and that a Class E series fund was created and accounted for in the books of the Fund,
22 just as the articles provide in respect of the Class A and Class B series shares. It was
23 common ground between all parties that the failure to formally amend the articles does
24 not affect the legal analysis in this case in relation to the rights attributable to the different

1 share series on winding up, including the rights of those shareholders who have
2 redeemed.

3
4 10. According to a letter dated 11th February 2010 from the Cayman Islands attorneys
5 representing the JOLs to the attorneys in Bermuda representing Hibistar, the following
6 redemption requests were received in 2008/2009:

7
8 (i) *Class A and Class B requests amounting to US\$6m were received prior to 31st*
9 *July 2008 for redemption effective as at 30th September 2008. These were treated*
10 *as requests creating a creditor liability as at 1st October 2008 and, pursuant to*
11 *the articles, payable within 60 days.*

12
13 (ii) *Further Class A and Class B requests amounting to US\$21.5m were received*
14 *prior to 30th October 2008 for redemption effective as at 31st December 2008.*

15
16 (iii) *Further Class A and Class B requests amounting to approximately US\$132.1m*
17 *were received subsequent to 31st October 2008 for redemption effective as at 31st*
18 *March 2009, 30th June 2009 or later dates.*

19
20 (iv) *Class E requests by Hibstar amounting to US\$4.1m were received prior to 31st*
21 *January 2009 for redemption effective as at 31st March 2009.*

22
23 11. On 31st December 2008 the Fund suspended redemptions and the calculation of NAVs of
24 the series funds, pursuant to the articles. However, although it was accepted by the
25 parties that it was arguable that pursuant to the articles the directors were also entitled to
26 defer payment of, at least a portion of, the redemption proceeds payable to a shareholder

1 who has given valid notice of redemption, the directors did not in this case in fact
2 exercise such a power, notwithstanding their suspension of redemptions. There is
3 therefore no issue in that particular respect.

4
5 12. On 31st July 2009 the Feeder Fund was ordered to be officially wound up and on 13th
6 November 2009 the Master Fund was ordered to be officially wound up. The same Joint
7 Official Liquidators (“JOLs”) were appointed to each company (the JOLs had previously
8 been appointed as provisional liquidators to each company but nothing turns on that for
9 these purposes).

10
11 13. The assets of the series fund attributable to the Class E shares consist of two liquid
12 accounts in a bank in Bermuda totalling the equivalent of approximately US\$9.96m,
13 together with two investments which are presently illiquid. The assets of the series funds
14 attributable to the Class A and Class B shares respectively, which are entirely different
15 assets, amount in total to approximately US\$4m, together with substantial loans to a
16 Florida entity, Sun Capital Healthcare Inc., which is involved in litigation in the USA and
17 which loans are likely to take a considerable time to recover, if they can be recovered at
18 all.

19
20 **Procedure**

21 14. I should mention that at the start of the hearing there was an argument over the
22 admissibility and relevance of an affidavit by Mr. Ralph Lipford sworn on 28th July 2010.
23 Mr. Lipford was the managing director of Hartline Investment Corporation (“Hartline”),
24 which was, and remained, the investment advisor to Hibistar. Mr. Lipford’s affidavit set
25 out in some detail the background to the involvement of Hibistar and Hartline with the

1 Fund and the rationale for and intention of Hibistar in subscribing for the Class E shares
2 in the Fund. Counsel for ABL objected to the admissibility of Mr. Lipford's affidavit on
3 the ground that it contained evidence of preliminary negotiations, of the subjective
4 intentions of Mr. Lipford and Hibistar and of their subsequent actions in relation to the
5 Class E shares after Hibistar had subscribed to them. It was submitted that none of that
6 evidence was relevant or admissible as an aid to the construction of the articles and other
7 admittedly relevant documents (see *Prenn v Simmonds* [1971] 1 WLR 1381 and
8 *Investors' Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1
9 WLR 896). After hearing argument on the point, I accepted that submission and
10 accordingly excluded Mr. Lipford's affidavit except insofar as it exhibited copies of
11 admittedly relevant documents.

12
13 15. In 1997 when the Fund structure was created there was no segregated portfolio company
14 legislation in this country; that was not introduced until 2001. Accordingly the rights of
15 the shareholders in this case must be determined from the terms of the articles and the
16 offering memoranda, which were incorporated into the terms of investors' subscriptions
17 for shares in each case. It will accordingly be necessary to review those in some detail.

18
19 **The relevant parts of the documents**

20 16. The relevant parts of the articles provide as follows (those parts highlighted in bold are
21 my own emphasis):

22 *I.*

23
24
25 (6) "*Confidential Offering Memorandum*" means the *Confidential Offering*
26 *Memorandum dated July, 1997 or thereabouts as supplemented from time to time.*
27

1
2
3 (14) ***“Net Asset Value” means the value of a Series Fund determined in accordance***
4 ***with the provisions of Article 35.***
5

6
7 (20) ***“Share” means a Class A or Class B Ordinary Redeemable Voting Share in the***
8 ***capital of the Company of US\$0.01 nominal value issued subject to and in***
9 ***accordance with the provisions of Section 36 of the Law and of these Articles and***
10 ***having the rights provided for under these Articles.***
11

12
13
14 (25) ***“Series Fund” means each Series Fund maintained in accordance with Article***
15 ***9(5), to which the assets and liabilities and income and expenditure attributable***
16 ***or allocated to each separate Share Series shall be applied or charged.***
17

18 (26) ***“Share Series” means each separate series of Shares which shall be issued***
19 ***pursuant to Article 9(1).***
20

21
22
23 9. (1) ***The Class A Shares and the Class B Shares shall each constitute a***
24 ***separate Share Series. Class A Shares will be issued to subscribers in respect of***
25 ***subscriptions for up to \$2 million; Class B Shares will be issued to subscribers in***
26 ***respect of subscriptions for more than \$2 million. Each separate issue of Shares***
27 ***shall constitute a separate Share Series of the particular class.***
28

29
30
31 (5) ***The Directors shall establish a Series Fund for each Share Series which Series***
32 ***Fund shall be designated by reference to such Share Series and the following***
33 ***provisions shall apply thereto:-***
34

35 (a) ***the proceeds from the allotment and issue of Share Series shall be***
36 ***applied in the books of the Company to the Series Fund established for***
37 ***that Share Series and designated by reference to it, and the assets and***
38 ***liabilities and income and expenditure attributable thereto shall be***
39 ***applied to such Series Fund subject to the provisions of this Article 9(5);***
40

41 (b) ***where any asset is derived from another asset (whether cash or***
42 ***otherwise), such derivative asset shall be applied in the books of the***
43 ***Company to the same Series Fund as the asset from which it was derived***
44 ***and on each revaluation of an asset the increase or diminution in value***
45 ***shall be applied to the relevant Series Fund;***
46

- 1 (c) *in the case of an asset of the company which the Directors do not*
2 *consider is attributable to a particular Series Fund or Series Funds, the*
3 *Directors shall have discretion subject to the approval of the Auditors to*
4 *determine the basis upon which any such asset shall be allocated*
5 *between or among Series Funds and the Directors shall have power at*
6 *any time and from time to time subject to the approval of the Auditors to*
7 *vary such basis; provided that the approval of the Auditors shall not be*
8 *required in any case where the asset is allocated between or among all*
9 *the Series Funds pro rata to the aggregate Net Asset Value of the Share*
10 *Series to which they relate. Notwithstanding any other provision of these*
11 *Articles, in the event that United States federal, state or local laws or*
12 *regulations, or the rules or regulations of the National Association of*
13 *Securities Dealers, Inc. prohibit a Shareholder or other joint holder of any*
14 *Shares from sharing in the appreciation or depreciation in any asset held*
15 *directly or indirectly by the Company, the Directors, shall exclude the*
16 *Series Fund established for the Share Series owned by such Shareholder*
17 *or other joint holder of Shares from any allocation of such asset;*
18
19 (d) *where assets of the Company give rise to any net profits, the Directors*
20 *shall allocate such net profits to the Series Fund or Series Funds to*
21 *which such assets relate;*
22
23 (e) *the Directors shall have discretion subject to the approval of the*
24 *Auditors to determine the basis upon which any liability shall be*
25 *allocated between or among Series Funds and shall have power at*
26 *any time and from time to time subject to such approval to vary such*
27 *basis; PROVIDED THAT the approval of the Auditors shall not be*
28 *required in any case where a liability is allocated to the Series Fund or*
29 *Series Funds to which in the Directors' opinion it relates or, if in the*
30 *Directors' opinion it does not relate to any particular Series Fund or*
31 *Series Funds, between or among all the Series Funds pro rata to the*
32 *aggregate Net Asset Values of the Share Series to which they relate;*
33
34 (f) *subject to the approval of the Auditors, the Directors may in the books of*
35 *the Company transfer any assets to and from Series Funds if, as a result of*
36 *a creditor proceeding against certain of the assets of the Company or*
37 *otherwise, a liability would be borne in a different manner from that in*
38 *which it would have been borne under paragraph (e) above, or in any*
39 *similar circumstances;*
40
41 (g) *if the Directors shall so determine in their discretion the assets held in any*
42 *Series Fund may be applied in the acquisition of the issued share capital*
43 *of a company or companies which shall be designated by reference to*
44 *and held exclusively for the benefit of that Series Fund with the*
45 *intention of segregating the assets and liabilities of that Series Fund.*
46

1 *Save as otherwise in these Articles provided, the assets so held in each*
2 *Series Fund shall be applied solely in respect of Shares of the Share*
3 *Series to which such Series Fund is designated.*
4

5 (6) *The Directors may, subject to the provisions, if any, of the Confidential Offering*
6 *Memorandum, convert some or all of the Shares of one class or series into shares*
7 *of another class or series. Such conversions shall take effect at the Net Asset*
8 *Value of the respective Shares Series on the conversion date. Shares so*
9 *converted shall be available for reissue, and the appropriate transfer of assets*
10 *shall be made as between the Share Series.*
11

12
13
14 35. (1) *Net Asset Value for each Share Series shall be determined separately by*
15 *reference to the Series Fund designated by reference to that class of Shares and*
16 *shall be determined by the Directors as at the close of business on the last*
17 *Business Day of each month except when determination of Net Asset Value has*
18 *been suspended under the provisions of paragraph (2) of this Article 35. Net*
19 *Share Value shall be the Net Asset Value of a Series Fund divided by the*
20 *number of shares of such Series Fund in issue. Any determination of prices*
21 *made pursuant to this Article 35 shall be binding on all parties.*
22

23 (2) *The Directors may declare a suspension of the determination of the Net*
24 *Asset Value for the whole or any part of any period during which disposal of*
25 *assets or other transactions in the ordinary course of the Company's business*
26 *involving the sale, transfer, delivery or withdrawal of Securities, Commodities or*
27 *funds is not reasonably practicable or would be detrimental to the interests of the*
28 *holders of Shares.....Whenever the Directors shall declare a*
29 *suspension of the determination of the Net Asset Value under the provisions of*
30 *this paragraph of this Article 35, then as soon as may be practicable after any*
31 *such declaration the Directors shall cause a notice to be given to the holders of*
32 *the Shares*
33

34 (3) *The Net Asset Value of a particular Series Fund shall be calculated by (i)*
35 *aggregating the value of the Securities and other assets owned or contracted for*
36 *by the Company and comprised within the relevant Series Fund with the value*
37 *of the other assets of the Company comprised within the relevant Series*
38 *Fund..... deducting therefrom the liabilities of the Series Fund*
39 *and the liabilities of the Company attributable to the relevant Series Fund as*
40 *determined by the Directors. The Net Share Value of the shares of a particular*
41 *Series Fund shall be calculated by dividing the Net Asset Value of the*
42 *particular Series Fund by the number of Shares of the relevant Shares Series*
43 *outstanding.*
44

1 (8) For the purposes of this Article 35 and paragraph (2) of Article 36:-
2
3
4

5 (b) Shares of the Company to be redeemed under Article 36 hereof shall be deemed
6 to be outstanding until and including the close of business on the day as at
7 which the Net Share Value is determined and after that time until paid the price
8 thereof shall be deemed to be a liability of the Company.
9
10
11

12 **REDEMPTION OF SHARES**
13

14 36. (1) Shares shall not be redeemed in the first twelve months of purchase and
15 the first redemption opportunity after the end of the twelve month restriction period will
16 be at the end of the calendar quarter if the initial twelve month period falls at the end of a
17 quarter, or, if not, at the next regular quarterly redemption date. Subject to the
18 provisions of the Law and as hereinafter provided and subject always to such further
19 restrictions as the Directors may from time to time impose pursuant to Articles 9 or 12
20 upon any Shares to be allotted the Company shall on receipt by it or its duly authorized
21 agent of a written request from a Shareholder for the redemption of all or any Shares
22 of a Share Series held by him redeem such shares for an amount equal to Net Share
23 Value of that Share Series determined in accordance with Article 35 hereof,
24

25 (2) Subject to the following provisions of this Article 36 and unless otherwise
26 agreed by the Directors the redemption of Shares pursuant hereto shall take effect on
27 the last Business Day of the calendar quarter which next follows receipt of a written
28 request for redemptionat least sixty days prior to the end of such quarter and shall
29 be calculated at the Net Share Value as at the close of business on the date of such
30 redemption.
31
32
33

34 (6) Subject to the provisions of this paragraph (6) but notwithstanding any other
35 provisions of these Articles, the Company may temporarily suspend redemptions in
36 order to effect orderly liquidation of the Company's assets necessary to effect
37 redemptions.
38
39
40

41 38. (1) Amounts payable to the Shareholders in connection with the redemption
42 of Shares pursuant to Articles 36 or 37 hereof shall, unless the Directors determine
43 otherwise in respect of a particular Share Series, be paid.....
44 within 60 days provided that under certain circumstances the Company may delay a
45 portion of the payment to Shareholders
46

1 (2) Upon the redemption of a Share being effected the Shareholder shall
2 cease to be entitled to any rights in respect thereof (excepting always the right to receive
3 a dividend which has been declared in respect thereof prior to such redemption being
4 effected) and accordingly his name shall be removed from the Register of Shareholders
5 with respect thereto and the Share shall be available for re-issue as a Share of the
6 same Share Series without further designation by the Directors.
7
8

9 **WINDING-UP**

10
11 129. (a) If the Company shall be wound up the Liquidator shall apply the assets
12 of the Company in satisfaction of creditors' claims in such manner and order as
13 he thinks fit. The Liquidator shall in relation to the assets available for
14 distributions among the Shareholders make in the books of the Company such
15 transfers thereof to and from Series Funds as may be necessary in order that
16 the effective burden of such creditors' claims may be shared between the
17 holders of Shares of different classes in such proportions as the Liquidator in
18 his absolute discretion may think equitable having regard to the provisions of
19 Article 9(5) of the Articles.
20

21 (b) The assets available for distribution among the Shareholders shall then
22 be applied in the payment of the holder of each Share Series of any balance
23 then remaining in the relevant Series Fund.
24
25
26
27

28 17. The relevant parts of the original offering memorandum of August 1997, which was
29 issued in respect of only the Class A and Class B Shares provide inter alia:

30
31 **Redemptions** Shares generally may be redeemed as of the last business day of each
32 calendar quarter,

33
34 Shares will be redeemed at a per Share price based on their Net Asset
35 Value

36
37
38
39 The ability of the Fund to satisfy redemption requests will depend upon its
40 ability to redeem corresponding portions of its investment in the Master
41 Fund. The Board of Directors of the Master Fund may postpone
42 redemptions or settlement thereof
43 The Board of Directors to the Master Fund also may suspend
44 redemption rights for any and all shareholders

In addition, the Fund's Board of Directors may suspend redemption rights

18. The supplemental offering memorandum relating only to the Class E shares provides inter alia as follows:

"This Supplement to Confidential Offering Memorandum [the original offering memorandum] (the "Supplemental Memorandum") relates solely to the offering (the "Offering") of Class E shares of the Fund, par value, \$0.01 per Share (the "Class E Shares"). The investment objective of the Class E Shares is to achieve long term capital appreciation, while preserving capital and purchasing power.

The capital structure of the Fund will not be changed, except as necessary and appropriate in order to effect the issuance and sale of the Class E Shares, and the investment program of the Class E Shares. The terms and provisions of the Fund Memorandum and Articles of Association of the Fund (sic) with respect to the Class A Shares, the Class B Shares, the Class C Shares, and the Class D Shares will not be changed, [Class C and Class D Shares were, as I understand it, never issued] and except as otherwise provided herein, such terms and provisions shall apply to the Class E Shares as appropriate.

This Supplemental Memorandum supersedes any of the information set forth in the Fund [original offering] Memorandum to the extent inconsistent therewith.

.....The Investment Manager has selected Hartline Investment Corporation, [Hartline] a Registered Investment Advisor located in Chicago, Illinois, as Sub-Advisor for the Class E Shares.

The Fund has created the Class E Shares, as a new class of Shares under their respective Memorandum and Articles of Association.....The Fund is offering the Class E Shares, exclusively to persons who are not "U.S. Persons" or certain "Permitted U.S. persons") (i.e., tax exempt U.S. Persons) as described in the Fund Memorandum.

Expenses *The Class E Shares will bear a pro rata portion of the Fund's Expenses based upon their net asset value.....*

1 **Summary of the arguments**

2
3 19. In summary, it was argued on behalf of Hibistar that article 9 (5) of the articles
4 establishes that the assets of the Fund are to be segregated amongst the different share
5 series and in particular that the assets held in each series fund are to be applied solely in
6 respect of the shares of the share series to which such series fund is designated. It was
7 submitted that there is really no doubt that the holder of shares of a particular class who
8 seeks to redeem its shares may only look to the series fund allocated to that particular
9 class of shares for payment of the redemption price. It was contended that the only real
10 issue concerns the situation on a winding up of a shareholder who has given notice of
11 redemption and whose redemption proceeds were due for payment prior to the date of
12 suspension of redemptions and remain unpaid. That is the situation of ABL in respect of
13 its redemption of Class B shares.

14
15 20. It was not disputed that ABL, having given notice of redemption effective as at 30th
16 September 2008, and the period within which payment of the redemption proceeds was
17 due having passed prior to the suspension of redemptions, is a creditor of the Feeder Fund
18 in respect of the outstanding redemption proceeds. However, it was submitted for
19 Hibistar that a redeeming shareholder is bound by the terms of the offering memoranda
20 and the articles. It was said that accordingly the only contractual right which a redeeming
21 shareholder has is to be paid out of the assets belonging to the series fund to which the
22 redeemed shares relate and not out of any of the assets of other series funds designated to
23 other share series. In practical terms that means that ABL would be entitled to be paid
24 only out of the assets of the Class B series fund and not, in particular, out of the assets of
25 the Class E series fund.

1 21. On the other hand, it was submitted on behalf of ABL that, having given proper and
2 timely notice of redemption and the time within which payment of the redemption
3 proceeds was due having expired before notice of suspension of redemption was given,
4 ABL is no longer a member of the Feeder Fund but is simply a creditor. ABL is
5 therefore, it was argued, entitled pursuant to article 129 (a) to payment out of all the
6 assets held by the Fund, as any other creditor, including payment out of the assets of the
7 Class E series fund. It was submitted that article 129 (b) is no longer applicable to ABL
8 in respect of its outstanding redemption proceeds. I shall record and consider some of the
9 other arguments in my analysis and comment below.

10
11 **Submissions and comment**

12 22. Counsel for ABL accepted that, although the general principle is that a member of a
13 company whose notice to redeem has expired before the commencement of a winding up
14 is in a different position from that of the other non-redeeming members, the precise
15 consequences of that distinct position will depend upon the terms of the memorandum
16 and articles of association of the company concerned (and any other relevant admissible
17 documents) (see Walton v Edge (1884) 10 App Cas 33 and Walker v General Mutual
18 Building Society (1887) 36 Ch D 777).

19
20 23. Reference was also made in argument to Re Strategic Turnaround Master Partnership
21 Ltd. [2008] CILR 447; to Re Matador Investments Ltd. (unreported – 31 July 2009) and
22 to a British Virgin Islands case Western Union v Reserve International Liquidity Fund
23 Ltd. (unreported – 26 January 2010) all of which cases concerned the position of a
24 shareholder who had given notice of redemption but whose redemption proceeds had not

1 been paid and the *locus standi* of the shareholder in the particular circumstances to
2 petition as a creditor for winding up of the fund concerned. However, in the present case,
3 as I have already mentioned, it was not disputed that, notwithstanding the suspension of
4 redemptions and the apparent power in the articles to suspend, at least in part, payment of
5 redemption proceeds, that power had not in fact been exercised by the Fund directors.
6 Accordingly the unpaid redemption proceeds due and payable to ABL prior to the
7 suspension of redemptions (and accordingly prior to the date of the winding up) are
8 payable to it as a creditor. The issue is what are the consequences of that in light of the
9 terms of the articles and offering memoranda in this case.

10
11 24. Reliance was placed on behalf of ABL upon the provisions of Section 37 (7) of the
12 Companies Law (2010 Revision) (“the Law”). The relevant parts provide as follows:

13
14 “(a) *Where a company is being wound up and, at the commencement of the winding*
15 *up, any of its shares which are or are liable to be redeemed have not been*
16 *redeemed.....*
17 *the terms of redemption....may be enforced against the company, and when*
18 *shares are redeemed.....under this subsection they shall be*
19 *treated as cancelled.....*

20
21 (b) *There shall be paid in priority to any amount which the company is liable by*
22 *virtue of paragraph (a) to pay in respect of any shares –*

23
24 (i) *all other debts and liabilities of the company (other than any due to members*
25 *in their character as such);.....*

26
27 *but subject to that, any such amount shall be paid in priority to any amounts due to*
28 *members in satisfaction of their rights (whether as to capital or income) as members”.*
29

30
31 It was agreed that the wording of sub-paragraph (a) is not as clear as it might be but that
32 the words “.....*have not been redeemed*” must mean “*the redemption proceeds due have*
33 *not been paid*”. The argument for ABL was that sub-paragraph (b) (i) is no longer

1 applicable to it because the amount which the Fund is liable to pay to it in respect of the
2 redemption of its shares is not a debt or liability due to it “*as a member in its character as*
3 *such*” because having redeemed it is no longer a member in respect of the redeemed
4 shares. It was pointed out that, in accordance with article 38 (2) of the articles, ABL had
5 been removed from the share register in respect of its redeemed shares.

6
7 It was nonetheless accepted, as I understood it, on behalf of ABL that, in light of the
8 opening words of sub-paragraph (b), ABL was not, in the winding up, entitled to be paid
9 in priority to the debts and liabilities of the Fund to independent third party creditors,
10 only in priority to the members who had not redeemed or whose redemptions proceeds
11 were not due. That does not, however, resolve the question whether ABL is entitled to be
12 paid out of all the assets of the Fund or only out of the Class B series fund assets.

13
14 25. It seems to me that sub-paragraph (a) of Section 37 (7), in referring to the enforcement of
15 the terms of redemption against the company, does not (and could not) address precisely
16 the express terms of redemption which may be enforced against the company nor in what
17 way or to what extent. That must, as I understood all parties to agree, depend upon the
18 terms of the company’s articles, and other relevant documents, which establish the rights
19 of shareholders, including on redemption, in the particular case.

20
21 26. It was further submitted on behalf of ABL that while article 36 (1) of the articles provides
22 for the redemption price to be based on the NAV of the relevant series fund, neither the
23 articles nor the various offering memoranda provide expressly that payment of such
24 redemption price is to be made exclusively from the assets allocated to that particular
25 series fund or that, if such assets are insufficient, the redeeming shareholder may not seek

1 to recoup the balance of the outstanding redemption proceeds from all the assets of the
2 Fund, including the assets of other series funds. It was pointed out in this context that
3 article 9 (5) (e) provides for the allocation of liabilities of the Fund between and among
4 series funds.

5
6 27. Counsel for ABL also be placed considerable emphasis on the provisions of Article 129,
7 the effect of which, he contended, is that ABL, as a creditor, is to be paid out of the
8 “*assets of the company*”. It was said that since ABL is, in respect of the redeemed
9 shares, no longer a member of the Feeder Fund and is instead a creditor, it is entitled to
10 payment out of the global assets of the Feeder Fund as any other creditor.

11
12 28. Leading counsel for Hibstar relied, firstly, on Section 140 (1) of the Law which provides:

13
14 “(1) *Subject to subsection (2), the property of the company [in winding up] shall be*
15 *applied in satisfaction of its liabilities pari passu and subject thereto shall be*
16 *distributed amongst the members according to their rights and interest in the*
17 *company*”.

18
19
20
21 He argued to that the rights and interests of the shareholders in the Fund were determined
22 by the articles and the offering memoranda, which clearly established in this case that
23 particular classes of shares were not entitled to participate in the assets attributable to
24 other share classes and that this principle applied equally to a redeemed shareholder, who
25 was not in the same position as an independent third party creditor. Such a redeemed
26 shareholder can, it was submitted only be paid out of the assets of the series fund
27 allocated to the class of shares being redeemed. It was contended that this was clearly the
28 basis on which shareholders had invested in the Fund and was the overriding principal

1 upon which the Fund had been established as reflected in the offering memoranda and the
2 articles.

3
4 **Conclusions**

5
6 29. The articles clearly provide that the Class A shares and the Class B shares (and
7 accordingly subsequently the Class E shares) each constitute a separate share series
8 having the rights provided for under the articles. Article 9 (5), in my view, makes it clear
9 that the assets and liabilities attributable or allocated to each separate share series are
10 applied or charged to a separate series fund separately designated to the particular share
11 series. The final part of article (5) (g) makes it clear that the assets held in each series
12 fund are to be applied solely in respect of the designated share series. Reliance was
13 placed by counsel for ABL on the words "*save as otherwise in these articles provided*"
14 but in my opinion those words do not detract from the general intent of the articles with
15 regard to segregation of the relevant share series and their designated series funds. There
16 are provisions in the articles which give the directors discretion, subject to the approval
17 of the auditors, to allocate liabilities between or among series funds (see for example
18 article 9 (5) (e)) but it seems to me that in the context that relates to third party liabilities
19 and not to the kind of liability in issue here, namely liability in respect of share
20 redemption proceeds.

21
22 30. The Class E shares were clearly a separate series issued pursuant to the supplemental
23 memorandum and with their own investment advisor, namely Hartline. The further
24 offering memorandum of December 2000 which changed the investment strategy did not
25 relate to the Class E shares, only to the Class A and Class B shares. The investments

1 allocated to the Class E shares are entirely different from the assets allocated to the Class
2 A and Class B shares, reflecting, it is to be inferred, the fact that the Class E share series
3 had its own, different, investment advisor.

4
5 31. In my opinion the overall effect of the articles and the offering memoranda is, as I have
6 already explained, that the assets in each series fund are to be applied solely in respect of
7 the shares of the share series to which the share series fund is designated. Accordingly
8 the assets held in the Class E series fund are to be applied solely in respect of the Class E
9 shares. The corollary of that is that any unredeemed Class A or Class B shareholders are
10 only entitled to look for payment from the Class A or the Class B series fund
11 respectively, they are not entitled to look to the assets of the Class E series fund for
12 payment. Article 129 (b) makes it clear that this also applies on a winding up referring,
13 as it does, to "*the payment of the holder of each share series of any balance then*
14 *remaining in the relevant series fund*".

15
16 32. In my opinion it is correct that a shareholder who made valid redemption requests which
17 became due for payment prior to the suspension of redemptions on 31st December 2008 is
18 a creditor of the Fund in respect of such redemption proceeds. Those shareholders who
19 made redemption requests payment in respect of which was not due prior to 31st
20 December 2008 are not such creditors. Accordingly ABL is a creditor of the Fund in
21 respect of redemption proceeds due to it and currently outstanding. I did not understand
22 leading counsel for Hibstar to disagree with that.

23
24 33. With regard to the position of ABL in respect of the outstanding redemption proceeds
25 currently due to it, while the submissions made on its behalf had an initial attraction, on

1 analysis I do not accept that they reflect the correct position. Although it is right that
2 ABL is a creditor in respect of the outstanding redemption proceeds and is also no longer
3 a member, nonetheless the very subject of ABL's claim as a creditor is the outstanding
4 proceeds of its redemption of its Class B shares in the Fund. The amount of its claim is
5 based on the NAV of the relevant Class B series fund, not on any NAV of all the assets of
6 the Fund. The whole basis of ABL's claim is its investment in the Class B series fund
7 and its former holding of Class B shares pursuant to the articles. ABL would have no
8 claim if it had not been an investor in the Class B shares and had not been a member on
9 the terms of the articles. In my opinion ABL is not in the same position as an
10 independent third party creditor of the Fund and is not to be treated as such according to
11 the articles.

12
13 34. It was submitted on behalf Hibstar that the reference to creditors' claims in the first
14 sentence of article 129 (a) is to be interpreted in the context of the articles as a whole as a
15 reference to independent third party creditors and not to a redeeming former shareholder
16 such as ABL, which is a creditor only in respect of a share series redemption. In my
17 opinion that is an interpretation which is consistent with the construction of the articles
18 overall and in particular with article 9 (5).

19
20 35. I have already commented on the provisions of section 37 (7) of the Law. It seems to me
21 that the section simply addresses priorities but does not detract from the particular terms
22 of redemption pursuant to which, under the articles, redeeming shareholder creditors in
23 the present case may only enforce against the Fund a right to be paid their redemption
24 proceeds out of the particular series fund allocated to the share series in question. I am of

1 the opinion that the sub-section does not provide a right to be paid out of all the assets of
2 the Fund in such circumstances if that is contrary, as I consider it to be, to the articles. As
3 I have already mentioned it is not apparently disputed that ABL, as a Class B shareholder
4 who has redeemed and has ceased to be a member but is still owed relevant redemption
5 proceeds has priority over shareholders who have not redeemed. However, in my view, it
6 is the effect of the articles that such priority is over other Class B shareholders, that is
7 holders of the same class of shares. It does not operate to deprive the holders of other
8 classes of shares of the segregation of the assets held by the particular series fund
9 designated to them. Thus, while ABL will have priority over the other Class B
10 shareholders who may have given notice of redemption but whose redemption proceeds
11 were not liable for payment by the time of suspension of redemptions, it does not give
12 ABL any priority, or indeed any other rights, with regard to the Class E shares or the
13 assets allocated to the Class E share series fund.


14
15 36. In conclusion therefore, I consider that the overall effect of the articles and the offering
16 memoranda is that the liability of the Fund to ABL in respect of payment of the
17 outstanding proceeds in respect of its redeemed Class B shares is to pay ABL only out of
18 the assets belonging to the series fund to which the redeemed shares relate, namely the
19 Class B series fund. It is not a liability to pay out of the global assets of the Fund,
20 including the assets of the Class E series fund.

21
22 37. My conclusion expressed above do not, it seems to me, result in any injustice. ABL
23 invested in the Class B shares of the Fund on the basis of the original offering
24 memorandum and the articles (and the further offering memorandum of December 2000)

1 which, as I have said, clearly provide for investment of the Class B shares in the assets of
2 the Class B series fund. ABL can have had no reasonable expectation of payment on
3 redemption out of the assets of the Class E series fund and, for the reasons I have
4 summarized, it does not seem to me that its expectation can reasonably have been any
5 different on a winding up. Of course, if the provisions of the articles and the other
6 constituent documents had made it clear that the position on winding up was indeed to be
7 different then it would be otherwise but in my judgment that is not the case.

8
9 38. In the circumstances I will make the orders which Hibstar seek at paragraph 1, 2, 3 and 5
10 of its summons dated 21st July 2010. That leaves for future determination the question of
11 the extent to which the assets of the Class E series fund should contribute to the costs of
12 the liquidation, which question is, by consent, adjourned for a further hearing if it cannot
13 be resolved in the meantime. I will also reserve the question of costs.

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25 Dated: 21st September 2010


26 Hon. Mr. Justice Angus Foster QC
27 Judge of the Grand Court
28

