IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN
FINANCIAL SERVICES DIVISION

Cause No: FSD 103/2011
(Formerly Cause No. 246/2009)

IN THE MATTER OF THE COMPANIES LAW (2011 REVISION) (AS AMENDED)

AND IN THE MATTER OF MATADOR INVESTMENTS LIMITED (IN OFFICIAL LIQUIDATION

BETWEEN:

1. **LANSDOWNE LIMITED**

2. **SILEX TRUST COMPANY LIMITED**

PETITIONERS/APPELLANTS

AND:

1. **MATADOR INVESTMENTS LIMITED**

2. **ENGLEFIELD HOLDINGS CORP. AND MARITIME GUERRAND-HERMÈS**

RESPONDENTS

Appearances:	**Mr. Francis Tregear Q.C. instructed by Mr. Matthew Goucke of Walkers on behalf of the Appellants**
	Mr. Matthew Collings Q.C. instructed by Mr. Jayson Wood of Appleby on behalf of the Second Respondents
	Mr. Nigel Meeson Q.C. and Mr. Fraser Hughes of Conyers Dill and Pearman on behalf of the Official Liquidator
Before:	**The Hon. Mr. Justice Charles Quin**
Heard:	**28th and 29th June 2012**
Supplementary Submissions:	**Supplementary written submissions filed by all three parties on the 23rd and 24th July 2012.**

JUDGMENT

INTRODUCTION

1. The Appellants are Lansdowne Limited ("Lansdowne"), a company incorporated in Nevis, and Silex Trust Company Limited ("Silex"), a company incorporated in Switzerland on behalf of the Bronze Trust of Tortola, British Virgin Islands.

2. The Company, Matador Investments Limited, otherwise known as the Fund, was incorporated on the 18th April 2005 as an exempted company under the laws of the Cayman Islands, to operate as a private investment fund, and its registered office is located in George Town, Grand Cayman, Cayman Islands.

3. On the 15th May 2009 the Appellants presented their Petition to the Grand Court of the Cayman Islands, seeking the winding up of Matador, pursuant to s.92(d) of the Companies Law (2007 Revision) (As Amended).

4. On the 27th August 2009 the Court acceded to the Petition and the Company was wound up in accordance with the Companies Law, and Hugh Dickson of Grant Thornton Specialist Services (Cayman) Limited, was appointed as the Official Liquidator of the Company.

5. On the 26th February 2010 the Appellants lodged their proofs of debts with the Official Liquidator.

6. On the 2nd February 2011 the Official Liquidator rejected the Appellants' proofs of debts.

7. On the 23rd February 2011 the Appellants filed appeals and sought the following Orders.

a. Both Appellants ask that the rejection of their respective proofs of debt be set aside;

b. Silex asks that its claim be admitted to proof in the sum of £1,170,915.39, plus post-liquidation interest at the rate of 7.75% per annum, in accordance with s.149 of the Companies Law, O.16 r.12 of the Companies Winding Up Rules and the Schedule to the Judgment Debts (Rates of Interest) Rules.

c. Lansdowne seeks an Order that its claim be admitted to proof in the sum of US$1,397,446.40 and £1,673,577.75 – with post liquidation interest at the same rate as in the Appeal submitted by Silex, set out in b. above.

d. Both Appellants seek an Order that their costs be paid out of the assets of Matador.

8. On the 16th March 2012 all the parties entered into a Consent Order which stated as follows:

> "*1. That the appeals be listed for the hearing of a preliminary issue with a time estimate of one day on the first available date convenient to counsel for the Appellants, the Official Liquidator and the other Shareholders (together, the "Parties") after forty-two (42) days from the date of this Order ("the Hearing") for the purpose of determining the following legal issues on the basis of the agreed statement of facts provided for in paragraph 5 below:*
>
> *a) Does the agreement, if any, referred to in Waters4 and made between Mrs. Waters and Eva Gerrand-Hermès, bind Matador Investments Limited (the "Company") and therefore, the Official Liquidator?*

b) *If the answer to 1(a) is "yes", is the effect of such agreement that the entities through which Mrs. Waters invested were not subject to any terms (contained in the Company's Articles of Association or otherwise) that would have the effect of limiting, preventing or delaying either redemption or payment of redemption proceeds?*

c) *If the answer to 1(b) is "yes", does that mean that the redemption rights of the entities through which Mrs. Waters acquired shares in the Company are not limited or affected by suspension of redemptions, suspension of payment of redemption proceeds or any gate which may have been imposed?*

d) *If the answer to 1(c) is "yes", does that mean the Official Liquidator would (assuming the Appellants ultimately prevail on the appeals and prove the allegations made in Waters4) be obliged to admit the Appellants' proofs of debt in full on the basis of pleaded "Primary Claim/Claim A" namely:*

i. *The sum of:*

1. *US$1,397,446.40 and £1,673,577.75 in respect of Lansdowne and*

2. *£1,170,915.39 in respect of Silex; or alternatively,*

ii. *Some other amounts (and, if so, what amounts),*

(the "Preliminary Issue'). For the avoidance of doubt the matters to be argued on the hearing at the Hearing shall be limited to the Preliminary Issue.

2. *If the Appellants are wholly unsuccessful on the preliminary issues the Parties agree that:*

a) *The Appellants shall take appropriate measures to discontinue the Appeals*

b) *The Official Liquidator shall be at liberty immediately to proceed with the Winding Up of the Company's estate, pay distributions to admitted creditors and pay any surplus to the Company's members in accordance with the Companies Law.*

3. *If the Appellants are successful in whole or in part, on the preliminary issue, the parties agree that:*

a) *A further directions hearing in respect of the substantive hearing of the Appeals shall be listed for hearing on the first available date thereafter.*

b) *For the avoidance of doubt in this event the Appellants shall be entitled to adduce evidence in reply to the evidence filed and served by the other shareholders on the Appeals.*

4. *The Other Shareholders shall have leave to appear and be heard on the Appeals and the Hearing.*

AND IT IS DIRECTED THAT

5. *Waters4 shall stand as the Agreed Statement of Facts in respect of and for the sole purpose of the Hearing.*

6. ....."

9. For the sole purpose of this Hearing the Fourth Affidavit of Mrs. Pricilla Waters ("PW") sworn on the 9th September 2011 ("Waters 4") shall stand as the Agreed Statement of Facts.

10. The Court has also read and reviewed the First and Second Affidavits of the Official Liquidator dated the 1st June 2011 and the 25th May 2012, respectively.

RELEVANT CHRONOLOGY AND FACTS

11. In 1999 PW" met Eva Guerrand-Hermès ("EGH"), who was then known as Eva Blazek. EGH told PW that she was involved in the financial investments industry and was a money manager. EGH told PW that she ran the Eastern European division of Credit Suisse.

12. PW recalls that EGH sought to persuade her ex husband, Roger Waters ("Mr. Waters"), to invest money with Credit Suisse. PW could not recall whether Mr. Waters did invest or not.

13. Waters4 discloses that in July 2001 PW separated from Mr. Waters and around this time EGH was very supportive. From 2001 to 2004 PW and EGH became very good friends. EGH married Olaf Guerrand-Hermès ("Olaf"). Olaf's father was Patrick Guerrand-Hermès – one of five siblings that presently control the Hermes luxury goods empire. PW confirmed that Olaf's mother, Martine Guerrand-Hermès, was one of the other shareholders in Matador. PW assumed that Olaf and EGH had a great deal of family money. EGH and Olaf had a daughter, Aquila, and they asked PW to be her godmother. At this time, PW and EGH were firm family friends.

14. After PW's divorce PW has some significant funds and made certain investments in the United States. EGH told PW that her existing investments were not properly structured and that she should consider other options. EGH told PW that she, EGH, was making a lot of money from her own investments and that PW could have the same opportunities. EGH told PW that professional money management options such as private or investment bankers would charge her very high fees. EGH told PW that she would therefore be much better off concentrating all of her money in a joint venture with EGH.

15. EGH discussed entering into a joint venture with PW. EGH talked about them setting up a new fund, which they would establish together and run as partners. EGH knew that PW had no experience, but that she was a fast learner and EGH would teach PW everything she needed to know, and, together, they would control how their money would be invested.

16. On the 12th or 13th October 2004 EGH came to PW's house and they decided to embark upon a joint venture in which they would work together in partnership, as PW was inexperienced in financial matters.

17. In October 2004 PW asked Mr. John MacKay ("Mr. MacKay") who was a director of Mount Street Advisory Services Limited and Mount Street Investment Management Limited to give her financial advice. PW asked Mr. McKay to attend the meeting with EGH in October so that he could hear what EGH was proposing. PW stated in Waters4 that she knew that if she agreed to go into this joint venture with EGH she would also need Mr. MacKay's assistance to cash in her US investments in order to make her investment in the proposed joint venture.

18. In October 2004 EGH introduced PW to James Loughran ('Mr. Loughran"), an English solicitor, who apparently had significant experience advising high net worth individuals in connection with offshore investments. PW recalled that Mr. Loughran was well known to EGH and her family. EGH and Mr. Loughran advised PW that she needed to get her money out of the US and invest it offshore, and that the joint venture would be her opportunity to do that.

19. Over the next few months EGH and Mr. Loughran arranged for Lansdowne to be incorporated and for the Bronze Trust to be set up on PW's behalf. PW understood that these entities were to be used as her investment vehicles into the new Fund. PW avers that to the best of her recollection Mr. MacKay arranged for Silex to act as Trustee of the Bronze Trust.

20. PW was told that the reason these entities were formed was that they would be tax-effective structures for her investments into the joint venture that EGH and PW had been discussing.

21. EGH and Mr. MacKay became directors of Lansdowne. PW said she acquiesced and agreed to this structure because she trusted EGH's judgment. PW had full trust and confidence in EGH – that EGH would look out for her and her interests in connection their discussions generally and in relation to Matador. PW avers that EGH was aware of where PW's money was, and that EGH constantly pressed her to get all her money offshore, and, in particular, to invest it all into Matador.

22. Discussions between PW and EGH continued in early 2005. PW avers that all the conversations with EGH generally dealt with two distinct issues. First was the joint venture and the setting up of the Fund generally, and that both of them would make substantial investments in the Fund – which was a significant term of the joint venture. The second issue discussed was the basis upon which PW's personal investment in the Fund would be made.

23. The substance of these early 2005 discussions for the proposed joint venture were summarized in the fax from EGH to PW dated the 1st March 2005 in which EGH proposed the following:

a. The Company would be a "fund of funds" – likely Cayman Islands domiciled;

b. The Company would be called *Mont Arbois Investments*;

c. The Company would have US$20,000,000.00 in private family funding (i.e. EGH and PW through their associated companies would be the initial

investors), although they would seek to raise additional third party funds at a different time.

d. The Company would also look to raise US$8,000,000.00 in leverage funding from *Credit Agricole Indosuez*.

e. The Company would never accept US investors;

f. There would be a management company called Mont Arbois Management, which would receive a 1% management fee and 10% of the "upside incentive allocation."

24. PW states that during this time EGH told her that Olaf would have some slight involvement "*floating around in the background, keeping an eye out for us*" but, mainly dealing with "*the legal side of things*".

25. PW stated that, along with EGH, she had a number of discussions about the best name for a Fund. After Mont Arbois Limited, EGH proposed "Matador" because, as she told PW, "*Olaf had a tattoo of a Matador*". PW said she liked Matador better and they agreed to proceed with Matador.

26. During March and April 2005 EGH and PW continued to speak regularly about the new Matador joint venture. PW said that she and EGH discussed the basis of PW's investment in the Fund. EGH told PW to prepare a budget of her future financial needs so that PW would know how much money she would need to withdraw from the Fund from time to time. PW said that EGH told her that she should be able to withdraw as much money as she needed every quarter. PW added in Waters4 that EGH knew that she would be investing virtually all her liquid assets into the Fund

and that, therefore, she, PW, would need to make regular redemptions to meet her living expenses and to meet any unforeseen requirements.

27. PW said it was agreed that there would have to be distinct and separate terms under which she would be prepared to make her investment. PW said the discussions focused on two issues – i.e. (a) her personal investment in the new Fund and how that would be structured and (b) the new business venture generally. PW said it was intended that they would start up with a new Fund into which both EGH and herself would invest personally. Once the new Fund was "up and running" it would be opened up to third party investors.

28. On or about April 2005 PW retained Mr. MacKay to advise her generally in connection with setting up the Fund and the joint venture. PW said that, as she had no real experience in this area, she felt she needed assistance going forward in connection with agreeing the final form of the documentation that would generally be applicable to the Fund and to all "third party" investments that would be made in the Fund. PW wanted Mr. MacKay to act as her agent for her investment vehicles and to act for them (EGH and PW) in connection with actually making her initial investment in the Fund.

29. PW said it surprised her when she learned that after Matador was incorporated in April 2005, the two directors were EGH and Olaf. PW said she did not realise that Olaf intended to be a director, as it had been agreed that the directors would have been EGH and herself.

30. On or about the 15th April 2005 PW met with EGH and Mr. MacKay to discuss the tax implications of terminating her existing investments and investing her money in Matador.

31. On the 19th April 2005 EGH sent PW and Mr. MacKay an email setting out various matters which needed attention in order for PW to make an investment in Matador. This email made it clear that EGH and John MacKay were going to be signatories of Lansdowne, Rothschild was going to be custodian, and the Rothschild signatories would be EGH and Mr. MacKay.

32. In this email of the 19th April 2005 EGH said she would forward a blank copy of the subscription documents. EGH said she would ask Mr. Loughran to provide certified copies of the Articles of Association, confirmation of registration from the trade and companies registrars and a list of authorised signatories. EGH promised to forward the private placement memorandum and subscription documents for PW's and Mr. MacKay's information.

33. On the 21st April 2005 PW and Mr. MacKay received an email from Mr. Pierre De Backer ("Mr. DeBacker") of Rothschild, in which he stated that pursuant to EGH's instructions he was forwarding, as an attachment, a Private Placement Memorandum ("PPM") for Matador, an Investor Pack for Matador, the Investment Management Agreement between Matador and Matador Management Ltd., the Memorandum and Articles of Association of Matador and of Matador Management Ltd. Mr. DeBacker added that these documents were the latest draft versions available and would be subject to minor amendments prior to the launch of

Matador. Mr. DeBacker also added that, should PW and Mr. MacKay have any questions regarding the foregoing, they should not hesitate to contact Rothschild.

34. PW said that around this time she received a telephone call from EGH, who told her (PW) not to concern herself with these draft documents, as the terms of her investment into Matador would not be governed by the strict terms of the documents which would govern other contemplated third-party investors' investment in the Fund, and these draft documents were the standard Fund documents intended for other future investors. PW said that, by that time, she had already retained Mr. MacKay and she intended to leave it to him to finalise the Fund documentation with EGH.

35. On or about the 25th April 2005, Mr. MacKay arranged, on PW's behalf, for the transfer of 5.3 million US dollars (US$5,300,000.00) and GBP 1.4 million (£1,400.000.00), to be made in order for PW's investment vehicles, Lansdowne and Silex, to invest in Matador on her behalf.

36. On the 27th April 2005 PW and EGH signed an "Agreement in Principle" which PW believed was drafted by Mr. MacKay. This Agreement in Principle stated:

> *"PW and EGH agree that they will draft and sign the shareholder agreement between them with regards to Matador Management Ltd., the management company of the investment fund, Matador Investment Limited – both Cayman companies. PW and EGH also agreed the basic principles for sharing the net fees after the fund and management company related costs. They included that all net fees accrued to Matador Management Ltd. would be allocated 50% - 50% between PW and EGH. All net incentive fees would be allocated 75% to EGH and 25% to PW."*

The "Agreement in Principle" also stated:

> *"PW and EGH agree that the Private Placement Memorandum for Matador Investments is to be amended as agreed between the two shareholders. These amendments will include, inter alia, amendments to the sections regarding hedging, equalization, the custodian and administrative agreement with Rothschild, the investment objectives and policies, the investment restrictions (including maximum investment size), gearing, short selling, leverage, redemption rights (monthly or quarterly, with 90 days notice, or as otherwise agreed by PW and EGH), fee structure, the appointment of directors and the appointment of auditors."*

The "Agreement in Principle" between PW and EGH continued:

> *"The timing for the above documentation amendments to be finalised is in the four weeks following the signature of this agreement or as otherwise agreed between PW and EGH."*

37. In Waters4 PW said that she was very inexperienced in matters of this sort and did not feel that she was equipped to deal with the details of the Fund documentation that needed to be finalised. Accordingly, from this point on, she left it for Mr. MacKay to act as her agent in the setting up of the joint venture and to work with EGH in finalizing the documentation that would be applicable to the Fund generally.

38. On the 1st February 2011 Mr. MacKay provided PW with a letter which confirmed his presence at two meetings with EGH and/or Olaf, and which also explained his understanding of the terms of PW's investment in Matador. Mr. MacKay said that he recalled two meetings in which PW's financial investment was discussed, as was PW's requirement to be able to sell the shares in order to provide her with an

income and with necessary funds for other purposes, as was the ownership of the investment manager and the share of management fees attributable to PW.

Mr. MacKay said,

> *"...to the best of my recollection EGH did specifiy to PW that the investment made was liquid in nature, and the existence of any clause that would restrict PW from recovering the sums invested was not mentioned."*

Mr. MacKay said,

> *"I understood that such a restriction was one of the conditions imposed on PW's investment."*

In conclusion Mr. MacKay said,

> *"...it was expressly agreed that PW should be the beneficiary of a proportion of the income of the management fees (including performance fees) paid by the investment structure, which I believe was formalized thereafter in writing."*

39. PW confirmed in Waters4 that the terms of the draft PPM, which were to be agreed between EGH and PW, were never, in fact, discussed further with her.

40. The Court learns from Mr. Dickson's Second Affidavit that the Initial Subcription Form in respect of Silex was signed by Leonard O'Brien, ("Mr. O'Brien") who was a director of Silex on the 10th May 2005.

41. In October 2005 EGH and her family were involved in a very serious car accident in which EGH's daughter, Aquila, who was also PW's goddaughter, died. Olaf remained in a coma for some months and the relationship between EGH and PW

appears to have deteriorated. PW said there was no opportunity to discuss the joint venture any further and PW said she was not consulted about anything to do with the Fund, at all, from that point.

42. It was not until very early 2007 that there was any further contact – that was when PW introduced her new financial adviser, Nick Moss ("Mr. Moss"). Mr. Moss had advised PW that she needed to redeem the entirety of her investment in Matador for tax reasons.

43. PW was then in contact with EGH on a regular basis and PW averred that EGH told her that EGH would be able to fund the redemption by introducing family money into the Fund and then paying PW out.

44. PW deposed in Waters4 that, in summary, she would agree to invest in Matador on the following basis:

a. It was essential that investment was liquid and it could be realized as and when she needed funds;

b. EGH and PW would be equally involved in the management fund;

c. EGH and PW would receive a 50% share of the management fee and would share the incentive between themselves 75% to EGH and 25% to PW;

45. PW said that she and EGH had no discussions in relation to the terms of the Fund documentation. PW said that, had she been aware that the documents contained provisions which gave the Fund power to impose any gate or to suspend redemptions in respect of any investment made by her, through the Appellants,

Lansdowne and Silex, she would not have caused the Appellants to invest in the Fund.

46. In Waters4 PW averred that:

> *"EGH knew, as a result of our discussions leading up to the formation of the Fund, that the money I was intending to invest was all the money I had to live on, and support my family with, and that I could not and would not make any investment into a structure that inhibited in any way my ability to liquidate assets as and when I needed funds."*

PW also averred that EGH made representations to the effect that:

> *"There would be no restrictions imposed upon my investment vehicles and the ability to withdraw money from the Fund in order to preserve my liquidity, by which I mean that it was clearly understood and agreed between me and Eva that my assets would at all times remain liquid while invested in the Fund."*

47. PW said that EGH and herself did not discuss the draft PPM or the Articles, and, in fact, EGH had actively encouraged PW to disregard them as irrelevant, as they did not contain the terms which would govern PW's investment, and would only apply to future investors.

48. Accordingly PW said did not pay much attention to the draft documentations when they were sent to her, and she left it to Mr. MacKay to discuss those documents with EGH and finalise them.

49. On or about the 27th March 2008 Lansdowne submitted redemption requests for all of its shares in the Fund – 22,829.3623 shares of the subclass of the US dollar

subclass, and, 18,911.8441 shares of the GBP subclass of the Fund for an effective redemption date of the 30th June 2008.

50. On or about the 1st April 2008 Silex submitted its redemption request for all its shares in the Fund, namely, 13,232.8037 shares of the GBP subclass of the Fund, for an effective redemption date of the 30th June 2008.

51. On the 27th June 2008 the directors of the Fund resolved to impose a 10% scale down or "gate" on redemptions at 30th June 2008, and for all following redemption days until further notice.

52. Accordingly, the Fund maintains that on the 30th June 2008 redemption day the Fund was only required to pay 10% of the overall value of the shares in the Fund, with a further 10% payable at the next redemption day on the 31st December 2008, and on successive redemption dates until the gate was lifted or the scale down redemption request was satisfied.

53. On the 4th August 2008 the Fund made a part payment of £401,671.00 to Silex and part payments of US$1,237,062.01 and £573,905.80 to Lansdowne.

54. On the 15th May 2009 the Appellants, Lansdowne and Silex, presented a Petition for the winding up of Matador pursuant to s.92(d) of the Companies Law (2007 Revision).

55. On the 27th August 2009 the Court made an Order that Matador be wound up in accordance with the Companies Law and that Mr. Hugh Dickson of Grant Thornton Specialist Services (Cayman) Limited be appointed as Official Liquidator of the Company.

56. On the 26th February 2010 Lansdowne submitted a proof of debt to the Liquidator, with a primary claim for the total sum of US$1,397,446.40 and £1,673,577.75, which is based on a full redemption by Lansdowne of all its shares in the US dollar subclass and all its shares in the GBP subclass of the Fund, as at the 30th June 2008.

57. On the 26th February 2010 Silex submitted its proof of debt and its primary claim was for the sum of £1,170,915.36 based on a full redemption of its shares of the GBP subclass of the Fund as at the 30th June 2008.

58. On the 2nd February 2011 the Liquidator rejected Lansdowne's primary claim and relied upon the 10% gate imposed on the 30th June 2008, which the Liquidator says was applicable to the 30th June 2008 redemption day and to subsequent redemption days. The Liquidator maintains that both the primary claims of Silex and Lansdowne do not recognise the effective imposition of the 10% gate by Matador for the 30th June 2008 and subsequent redemption dates.

59. The Liquidator confirmed that the Appellants claims are both subject to the application of the 10% gate to the total as at 31st December 2008, and, accordingly, is prepared to distribute, in the case of Lansdowne, £114,404.17 and in the case of Silex £114,404.17.

60. As I stated in paragraph 7 above, on the 23rd February 2011 the Appellants filed Appeals, petitioning that the Liquidators' rejection of their respective proofs of debt be set aside, and further, that their claims be admitted in full, and the monies distributed forthwith.

POSITION OF APPELLANTS

Issue A: Does the Agreement bind the Fund and therefore the Official Liquidator?

61. Leading Counsel for the Appellants submits that, the "Agreement in Principle" between PW and EGH contained terms to the effect that certain documentation relating to the Fund and information set out in the PPM determining the basis upon which investments in the Fund would be met, would not apply to certain shareholders, i.e. the Appellants, and, in particular, the Appellants would be able to redeem their entire investment or any part thereof upon any of the redemption dates.

62. Furthermore, Counsel for the Appellants argued that only the Fund, i.e. Matador itself, and not an individual shareholder in the Fund, can enter into a legally binding and effective agreement upon such terms as these. Counsel argues that it was the intention of EGH and PW that these terms would be legally binding and effective, as they must both have intended that EGH would cause the Fund to enter into an agreement in her capacity as a director of the Fund.

63. Leading Counsel on behalf of the Appellants submits that on the agreed statement of facts contained in Waters4, it is evident that both PW and EGH did indeed intend these terms of the agreement to be legally binding.

64. Furthermore, counsel relies upon PW's evidence, as set out in paragraph 45 above, and submits that any analysis to a contrary effect is not rational.

65. The Appellants submits that evidence from Waters 4 makes it clear that both parties intended the agreement to include a term that there would be no restriction upon PW's ability to redeem her investment, which would be binding upon the Fund.

66. The Appellants argue that when EGH gave the assurances to PW, which they submit, subsequently became terms of the Agreement, EGH held herself out and was held out as doing so in her capacity as a director of the Fund and, PW believed and was intended to believe that this was the capacity in which EGH was acting so that the agreement would be binding upon the Fund.

67. The Appellants concede that while some of the terms of the Agreement in Principle were negotiated, or being discussed prior to the incorporation of the Fund, the parties only entered into, and concluded, the Agreement on the 25th April 2005 – the date upon which PW's investment vehicles first committed to investing and did invest in the Fund. The Appellants submit that, by this time, the Fund was incorporated and capable of entering into transactions and EGH was a director. Consequently, the Appellants submit that EGH had the authority to enter into the Agreement with PW on behalf of the Fund and the Agreement is therefore binding upon the Fund.

68. The Appellants rely upon Article 54(b) of the Fund's Articles of Association, which provides that:

> *"....the sole director [such as EGH] shall be entitled to exercise all of the powers and functions of the directors which may be imposed on them by law or by these Articles."*

69. Accordingly, the Appellants submit that EGH therefore had actual authority to bind the Fund to the terms of the Agreement as its agent.

70. In the alternative, the Appellants submit that EGH had usual or ostensible authority to act as agent of the Fund when entering into the Agreement, for the following reasons:

i. EGH entered into the Agreement with the knowledge and agreement of all the shareholders in the Fund, i.e. the vehicles of her and PW. Thus the conduct of the members amounted to a representation that EGH had authority to enter into the agreement on behalf of the Fund.

ii. The conduct of the directors of the Fund also amounted to a representation that EGH had authority to bind the Fund to the terms of the agreement as to which:

a) PW believed that, pursuant to the terms of the agreement, she and EGH were the two directors of the Fund. Clearly, therefore, PW believed that both directors of the Fund had conferred authority upon EGH to enter into the agreement on behalf of the Fund;

b) In fact, Olaf and EGH were the two directors of the Fund. However, Olaf had participated with EGH in making the assurances and promises which formed the terms of the Agreement upon which PW now seeks to rely.

71. The Appellants submit that both directors of the Fund had represented that EGH had authority to enter into the agreement on behalf of the Fund.

72. In addition, the Appellants submit that in the case of the Appellant, Lansdowne, the subscription agreements were signed by EGH in her capacity as director of Lansdowne, and the Lansdowne investment could not have been made without her signature. EGH is the authority to sign on behalf of Lansdowne, and was quite clearly doing so upon the terms of the Agreement.

73. The Appellant Lansdowne submits that Matador, also acting by EGH, was aware that EGH's authority was so limited and was, accordingly, bound by the terms of the Agreement.

74. In relation to the first Issue (A) contained in my Order dated the 16th March 2012, the Appellants submit that EGH and PW intended that EGH enter into the Agreement in her capacity as a director of the Fund, and, secondly, EGH had authority, actual or ostensible, to bind the Fund to the terms of the Agreement. Therefore, the Appellants submit that the Agreement is binding upon the Fund, and therefore upon the Official Liquidator.

Issue (B): If so, is the effect of such Agreement such that the Appellants were not subject to any terms (contained in the Fund's Articles or otherwise) that would have the effect of limiting, preventing or delaying either redemption or payment of redemption proceeds?

75. In relation to this second issue the Appellants' leading Counsel, Mr. Tregear contends that it was a term of the agreement between PW and EGH that certain documentation attached to Mr. DeBacker's email dated the 21st April 2005, which

included the Draft PPM, the Investor Pack, and the Articles would not apply to the Appellants, and was only intended to apply to third party investors.

76. Alternatively, leading Counsel for the Appellants argues that it was a term of the Agreement that the draft PPM, the Investor's Pack and Articles of Association, should not apply to the Appellants to the extent that they were inconsistent with the Agreement between PW and EGH.

77. As such, Leading Counsel for the Appellants submits that the Appellants were not subject to any terms contained in documentation which purported to limit, prevent or delay redemption or payment of redemption proceeds.

78. The Appellants submit that, in any event, pursuant to the Agreement in principle, a final PPM was to be agreed between PW and EGH within four weeks thereafter. The Appellants contend that this did not happen and so no final PPM ever came into effect.

79. Leading Counsel on behalf of the Appellants submits that, aside from this, the terms of the Agreement also expressly provided that PW's investment vehicles would be entitled to redeem their entire investment in the Fund, upon any Redemption Date, with no restrictions on receiving the proceeds of each Redemption.

80. Mr. Tregear, argues that even in the absence of a separate term to the effect that the PPM and Articles did not apply to PW, any term, whether in the Articles, the PPM or elsewhere, which purported to limit, prevent or delay Redemption or the payment of Redemption proceeds, would be contrary to the agreement. It would, accordingly, not be open to the Fund, and would be in breach of the agreement for

the Fund to seek and enforce any such term. Counsel argues that the PPM was never in final form. In fact, Mr. Tregear argues that this was a home-made, unorthodox vehicle, put together "round the kitchen table."

81. In addition, the Appellants contend that it is common practice for Hedge Funds to enter into side letters or agreements with one or more investors granting preferential terms of investment. Preferential terms frequently include greater liquidity or an absence of restrictions upon lockups or gates, which apply to the main body of investors.

82. In the case before Court the Appellants contend that the Agreement was an oral side agreement between the Fund and PW, setting the terms upon which her investment was made. The existence of the agreement, they submit, was disclosed to all of the investors in the Fund, being the vehicles of EGH and PW.

83. Accordingly, the Appellants submit that the Agreement therefore had the legal effect of overriding any provisions and any of the corporate documentation with which it was incompatible so far as redemption by the Appellants was concerned.

84. The Appellants argue that the PPM is simply a document providing information to prospective investors to enable them to make an informed decision as to whether to invest in a particular Fund.

85. The Appellants argue that it is clearly possible for a Fund to reach agreement with an individual investor, prior to their investing, and that particular provisions of the PPM, including any restrictions or limitations upon Redemptions, would not apply to that particular investor. Furthermore, the Appellants state that, in the absence of

clear words in the Articles of Association to the contrary, the legal relationship between a Cayman Islands Fund and its investors is typically defined by the Articles of Association and not the Offering Document. (See Lord Mance's dicta at paragraph 31 of ***Strategic Turnaround Master Partners Limited*** 2012 (2) CILR 364.

86. The Appellants contend that the provisions in the PPM upon which the Official Liquidator sought to rely when, ruling that a gate upon redemptions had been effectively imposed, allows the directors of the Fund to scale down redemptions to 10% of the issued and outstanding shares of any particular subclass on any redemption date in the event that they determine that the redemption request would materially prejudice the interests of the other shareholders.

87. Consequently, the Appellants argue that it is evident that this is incompatible with the terms of the Agreement, to the effect that there would be no restriction upon PW's ability to redeem her investment in the Fund, and that, accordingly, the provision in the PPM does not apply to PW's investment vehicles and cannot be enforced against them (the Appellants). Accordingly, the Appellants submit that any attempt to enforce this provision of the PPM against the Appellants constitutes a breach of contract and is unlawful. The Appellants contend that the Fund is not and was not entitled to impose any gate on the redemption by the Appellants.

88. Article 5(m) of the Fund's Articles of Association reads:

"*If so stated in the Offering Memorandum, if the Company receives any request for redemption in respect of any one Redemption Day, either singly or when aggregated with other redemption requests so received, representing more than 10% of the net assets of the Company, the Directors may refuse to honour all such redemption requests that exceed 10% of the net assets of the Company on the relevant Redemption Day. In determining which redemption requests are to be satisfied out of the Company's available cash reserves, requests for redemptions will be reduced proportionately and for any subsequent Redemption Day, outstanding deferred redemption requests will be honoured prior to new redemption requests at the Net Asset Value per share on such subsequent Redemption Day.*"

89. In addition the words "Offering Memorandum" are defined in the Articles as:

"*The Private Placement Memorandum or other offering documents, pursuant to which and on the terms and conditions of which the Redeemable Shares of each Class are offered for purchase as the same may be amended or supplemented by the Directors from time to time.*"

The Appellants submit that this provision in the Articles, which they claim were only provided to them in draft form, and which EGH specifically told PW to disregard on the basis that it had no application to her, is the provision in the Articles upon which the Official Liquidator is relying in its rejection of the Appellants' proof of debt.

The Appellants contend, as with the equivalent provision in the PPM, that any intent to enforce this provision in the Articles, as against the Appellants, would constitute a breach of the agreement between EGH and PW.

90. Furthermore, the Appellants contend that Article 5(m) expressly states at that the provisions set out therein are only enforceable if so stated in the PPM.

91. In this case, the Appellants submit that the PPM itself, or such parts of the PPM that seek to impose restrictions upon redemptions contrary to the agreement between EGH and PW, are not enforceable against the Appellants. They further submit that no final PPM was ever agreed in accordance with the agreement in principle, and therefore it follows that Article 5(m), referable to and dependent upon such restrictions, can have no application as against the Appellants.

92. In summary, in relation to Issue B, the Appellants submit:

i. Any attempt to enforce restrictions, limitations or gates upon redemptions as against the Appellants would not be open to the Fund and would be a breach of the Agreement; and

ii. Accordingly, any terms purporting to have such effect contained in the PPM, the Articles or otherwise, are unenforceable as against the Appellants; and

iii. Alternatively, Article 5(m) relied upon by the directors in purporting to enforce a gate, takes effect only so far as the PPM allows this action to be taken. As against the Appellants, the PPM does not, so this Article is ineffective; and

iv. In any event, it was an expressed term of the Agreement that the PPM and the Articles would not apply to the Appellants' investments in the Funds.

Issue C: "...if so, does that mean that the Redemption rights of the Appellants are not limited or affected by any suspensions of redemptions, suspension of payment of redemption proceeds or an gate which may have been imposed?"

93. The Appellants contend that if the answers to Issues A and B are yes, then any attempt to suspend redemptions, suspend payment of redemption proceeds, or impose a gate upon redemptions, as against PW or the Appellants, would amount to a breach of the Agreement and would be unlawful, irrespective of any provisions in the PPM, the Articles of Association or other documentation.

94. The Appellants contend that there is no lawful mechanism whereby the Appellants' redemption rights may be limited without the Fund breaching the Agreement.

95. Accordingly, the redemption rights of the Appellants cannot be and have not been limited or affected by suspensions or gates, which may have been purportedly imposed.

Issue D: "...if so, does that mean that the Official Liquidator would be obliged to admit the Appellants' proofs of debt in full on the basis of pleaded primary Claim A?"

96. The proofs of debt in respect of the primary claim/Claim A of each of the Appellants seek payment of the amount which would have been payable to that Appellant upon a full redemption of all its share in the Fund upon the 30th June 2008, less the amount which was received on or around the 4th August 2008 in respect of that redemption date.

97. The Appellants state that, with respect to their redemption request, the position is that:

i. On or about the 27th March 2008 Silex submitted a redemption request to Rothschild for all its remaining shares in the Fund, being 13,232,8037 shares of the GBP subclass of the Fund, for a Redemption Day of the 30th June 2008. The net asset value per GBP share as at that date, as calculated by Rothschild was £118.84. Accordingly, Silex was due to receive £1,572,586.39 upon redemption;

ii. On or about the 27th March 2008 Lansdowne submitted a redemption request to Rothschild for all its remaining shares in the Fund, being 18,911,8441 shares of the GBP subclass of the Fund, and 22,829,3623 shares of the USD subclass of the Fund, for a Redemption Day of the 30th June 2008. The net asset value per GBP share as at that date as calculated by Rothschild was £118.84 and per USD share was US$115.40. Accordingly, Lansdowne claims it was due to receive £2,247,483.55 and US$2,634,508.41 upon redemption.

iii. The redemption requests referred to in subparagraphs i and ii above were submitted properly and there is no question surrounding their validity.

iv. On the 27th June 2008 EGH and Olaf in their capacities as directors of the Fund, purported to pass a written resolution of the Fund resolving to "*apply the rules of deferral of redemptions' gate at June 30th and all following redemption days until further notice.*"

v. EGH and Olaf maintain that as a result of the operation of the gate, PW was only entitled to redeem shares representing a maximum of 10% of the shares in issue of any particular subclass. Accordingly, in August 2008:

a) Silex received £401,671.00 in respect of its redemption, leaving £1,170,915.39 outstanding; and

b) Lansdowne received £573,905.80 and US$1,237,062.01 in respect of its redemption, leaving £1,673,577.75 and US$1,397,446.40 outstanding.

vi. In any event the partial redemption proceeds referred to in paragraph v. above, were substantially in excess of 10% (almost 20%).

vii. But for the purported imposition of the gate by resolution, dated the 27th June 2008, Lansdowne and Silex would have been entitled to receive, and the Fund would have been obliged to pay to them, the amount set out in sub paragraphs i. and ii above.

98. The Appellants therefore submit that if the answers to questions A, B, C are yes, the directors could not have imposed a gate or any other form of restriction upon the redemption requests, and Silex and Lansdowne would have been entitled to redeem their investments in full. Accordingly, the effect of this is that the Fund owes, and continues to owe to each of the Appellants the sums set out in paragraphs i. and ii above minus the part payments already received which are set out in paragraph 97(v) above.

99. The Appellants contend that, in the liquidation of the Fund, the Appellants are therefore actual unsecured creditors of the Fund to the extent of these amounts, less the amounts which have been paid to each of them in part satisfaction of these debts.

100. Accordingly, in such circumstances, each Appellant's primary claim A, for the difference between what Lansdowne and Silex would have received, had the gate not been imposed, and what they did actually receive, must succeed, and the Official Liquidator is obliged to admit the Appellants' proofs of debts in full in respect of these claims.

POSITION OF THE SECOND RESPONDENTS

101. The Second Respondents submit that s.37 of the Companies Law (2007 Revision) which was in force at the material time, provides a complete answer to the Appellants' case. Section 37 of the Companies Law deals with Redemption and purchase of shares and reads as follows:

> *"37. (1) Subject to this section, a company limited by shares or limited by guarantee and having a share capital may, if authorised to do so by its articles of association, issue shares which are to be redeemed or are liable to be redeemed at the option of the company or the shareholder....*
>
> *(2) Subject to this section, a company limited by shares or limited by guarantee and having a share capital may, if authorised to do so by its articles of association, purchase its own shares, including any redeemable shares.*
>
> *(3) (a) ....*
>
> *(b) ....*
>
> *(c) Redemption ....of shares may be effected in such manner as may be authorised by or pursuant to the company's articles of association."*

102. The Second Respondents rely on the Privy Council decision in ***Culross Global SPC Ltd v. Strategic Turnaround Master Partnership Limited*** [2010] (2) CILR 364, and in particular, the dicta of Lord Mance, where he stated at paragraph 8 regarding s.37:

> *"It is a basic principle of company law that capital subscribed to a company may not be returned to shareholders otherwise than prescribed by statute. Section 37(1) of the Companies Law permits the issue by a company of shares liable to be redeemed at the option of the company, or shareholder, and s.37(3)(c) goes on to provide that "redemption of shares may be effected in such manner as may be authorised by or pursuant to the company's articles of association." It is uncontroversial that this means that the manner in which any redemption may be effected must be authorised by or pursuant to the articles of association. As* ***Gower and Davies*** *observed in* ***Principles of Modern Company Law*** *(7th Ed) 2003, at 248: In relation to similar, albeit not identical, provisions in the English Companies Act 1985, section 160(3), "In order to protect the shareholders whose shares are not to be redeemed the terms and manners of the redemption must be set out in the company's articles"."*

Lord Mance continued at paragraph 17:

> *"Any power to withhold payment of the redemption proceeds must be authorised by or pursuant to the articles of association. The board understood this to have been ultimately common ground before it. In any event, it follows from the terms of section 37 of the Companies Law, and it remains so, therefore, despite the subscription agreement's general reference to the subscription being made, and any shares of the company are subscribed being held subject to the terms and conditions of the CEM."*

103. Leading counsel for the Second Respondents submits that s.37(1) provides that a Company may issue redeemable shares if authorised to do so by its Articles and further relies on s.37(3)(c) which provides that redemption "*may be effected in such manner and upon such terms as may be authorised by or pursuant to the Company's Articles.*"

104. Mr. Collings states that this is a complete statutory code, and a mandatory one as Lord Mance in the Privy Council observed. Mr. Collings submits that its purpose is to enshrine the basic Company Law principles of maintenance of capital, protection of shareholders, and transparency of the company's constitution. Consequently Mr. Collings submits that it is not therefore possible to agree matters concerning redemption which are outside the provisions in the Articles dealing with redemption, because such would be outside the statutory regime and unlawful. Put simply, it is not possible to "contract out of" the Companies Law.

105. Leading counsel draws the Court's attention to the fact that Lord Mance delivered his judgment in ***Culross Global SPC Ltd v. Strategic Turnaround Master Partnership Limited*** on the 13th December 2010, which was only five days after he had given one of the Supreme Court judgments in ***Progress Property Company Limited v. Moore*** [2011] 1 W.L.R. 1 at page 13. The Second Respondents contend that this is an important recent authority on the maintenance of capital, and on distributions amounting to a return of capital being unlawful and *ultra vires* the Company. Leading counsel for the Second Respondents contends that it is significant that this section comes in part III of the Companies Law (Distribution of Capital) and is directly concerned with the maintenance of capital. In ***Progress Property*** Lord Walker, (with whom Lord Mance agreed), referred to the Court of Appeal judgment at paragraph 15 on page 7 in the case:

> *"PPC's case as finally formulated at first instance, relied ....on what Mummery LJ referred to at para 23, as "the common law rule": "The common law rule devised for the protection of the creditors of a company is well settled: a distribution of a company's assets to a shareholder, except in accordance with specific statutory procedures such as a winding up of the company, is a return of capital, which is unlawful and ultra vires the Company". The rule is*

essentially a judge-made rule, almost as old as company law itself, derived from the fundamental principles embodied in the statutes by which Parliament has permitted companies to be incorporated with limited liability."

The Second Respondents rely on this dicta and further maintain that this is exactly why the principles are carefully prescribed, and in-roads into the maintenance of capital must be strictly followed. The Second Respondents submit that s.37 is therefore an important statutory code which needs to be adhered to rigorously.

106. Consequently, the Second Respondents submit that, from what Lord Mance stated in ***Culross Global SPC Ltd v. Strategic Turnaround Master Partnership Limited***, it is therefore clear that s.37(3)(c) requires that the manner in which any redemption may be effected must be authorised by or pursuant to the Articles; and the terms and manner of redemption must be set out in the Articles. To support this proposition the Second Respondents rely on the Eighth Edition of ***Gower*** and, submit that the reason these must be set out is so that "*all would know the position*" and to protect the other shareholders and indeed creditors.

107. The Second Respondents submit that the Articles do not have to provide for a comprehensive and complete code, with all the precise terms of redemption spelt out. The Second Respondents submit that the answer is found in the Australian case of ***TNT Australia Pty. Ltd. v. Normandy Resources NL*** [1990] 1 AC SR 1. In this case, the Supreme Court of South Australia was dealing with sections 120(8) and 120(3) of the Companies (SA) Code, which is relevant for our purposes because s.120(3) corresponds with s.37(3)(c) of the Cayman Companies Law, namely that "*shares shall not be redeemed (a) except on such terms and in such manner as are provided by the Articles.*"

108. O'Loughlin J. proceeds to address both sections and says at line 13 on page 23:

> *"...it is incumbent on Normandy to satisfy the court that its articles "sufficiently set out" the terms of redemption and the manner of redemption as required by s.120(3)(a)...."*

The Second Respondents highlight that this is a slight addition to Lord Mance's requirements in ***Culross Global SPC Ltd v. Strategic Turnaround Master Partnership Limited*** that the Articles must set out the terms and manner of redemption.

109. Leading Counsel relies upon O'Loughlin J's dicta, which is not to expect a Company to set out all the inflexible details in its Articles because such would be unduly restrictive. At line 29 on page 25 O'Loughlin J. applies the "*sufficiently set out*" test, and refers at lines 48 and 49 to interpretations so as to "*give commercial efficacy*."

110. Leading counsel for the Second Respondents refers to O'Loughlin J's Judgment at page 26, where he states at lines 3-5:

> *"....a company should be free to deal with its shareholders by negotiating subsidiary terms as to interest rates, dates of repayment, the mechanics of an option and the like*."

111. Mr. Collings does submit that s.37 of the Companies Law read with the Articles of Association, does entrench rights as follows:

i. The Company can only issue redeemable shares if authorised to do so by its articles – s.37(1);

ii. A Company may then redeem shares (i.e. purchase its own shares) but only if authorised to do so by its Articles – s.37(2);

iii. Both these provisions are subject to this section, i.e. subject to what follows which, for present purposes, is s.37(3)(c);

iv. Section 37(3)(c) provides (as judicially interpreted) that the manner of redemption must be sufficiently set out in the Articles.

To put it another way, Mr. Collings submits that these provisions must be complied with for there to be a lawful right of redemption: if they are not, either there is no such right of redemption; or any arrangements which are contrary to these provisions are unlawful and of no effect.

112. The Second Respondents take issue with the Appellants' contention that there is no Offering Memorandum, and that to have a draft PPM is not a proper and effective Offering Memorandum.

113. The Second Respondents submit that although the PPM may be marked "draft" it can, nevertheless, be effective and acted upon.

114. The Second Respondents submit that the PPM was an Offering Memorandum as defined in Article 2(a)(xiv) which reads:

> "*The Private Placement Memorandum or other offering document pursuant to which, and on the terms and conditions of which the Redeemable Shares of each Class are offered for purchase....*"

115. The Second Respondents submit that PW engaged Mr. MacKay to act as her agent and to ensure that her investments were made. The Second Respondents submit that the investments made by the Appellants were made on the basis of the material sent under cover of the email dated the 19th April 2005 from EGH, which included the PPM dated April 2005, the Articles, and the subscription form, which included the following:

> "*As investor, I hereby expressly declare and approve the following: (1) I have read a copy of the latest Prospectus of the Fund…*"

The Second Respondents therefore submit that the investments made by Silex and Lansdowne were made on the basis of the PPM, which therefore constitutes the Offering Memorandum, and that the Appellants and the Company all proceeded on this basis.

116. Accordingly, the condition precedent in Article 5(m) is therefore fulfilled and the power to impose a gate on redemptions is prima facie available.

117. The Second Respondents highlight one point of detail: Matador was incorporated on the 18th April 2005 and on the same day, its Memorandum and Articles were registered. These Articles accord with the Draft Articles.

118. On the 28th March 2007 it was resolved to amend the Articles and adopt new Articles. The effect of the amendment was essentially to change the denomination of the shares from Euros to US dollars, to change the definition of Redemption Day, and to add a new provision permitting the directors to set lockup periods. The Official Liquidator exhibits the original Articles, and then the newer March 2007 Articles of Association. For the purposes of this Judgment, it is clear that there are

no material differences between the April 2005 Articles and the March 2007 Articles.

119. The Second Respondents contend that the agreement between PW and EGH was a secret agreement and is not referred to in the Articles or even in the PPM. The Second Respondents contend that there is no inconsistency between the Articles and the PPM, but there is a fundamental inconsistency between the Articles and the secret agreement between PW and EGH. The Second Respondents contend that the Articles provide for a power to gate redemptions, whereas the agreement in principle between PW and EGH provides that there can be no such gate in respect of one particular shareholder. In such a case, and in such a situation, the Second Respondents contend that the Articles prevail. Furthermore, the position is *a fortiori* where s.37(3)(c) applies because it specifically provides that the manner of redemption must be sufficiently set out in the Articles.

120. In any event, the Second Respondents submit that Article 5(m) does refer to the "Offering Memorandum" and therefore it identifies the document to be considered and it is, after all, a document which will ordinarily and readily available to the Appellants and to all investors.

121. The Second Respondents point out that in ***Culross Global SPC Ltd v. Strategic Turnaround Master Partnership Limited*** Lord Mance had no difficulty with the Articles referring to the Offer document, although inconsistency was resolved in favour of the Articles.

122. What the Second Respondents do contend is that the secret agreement between PW and EGH is not sufficiently set out in the Articles, unlike the PPM, and further, it is not even referred to in the Articles.

123. The Second Respondents ask the question: How can it be said that the Articles traditionally set out the manner of redemption when there is a secret agreement which, the Appellants submit, overrides the Articles and the PPM, and which dis-applies the power to gate, thereby giving that shareholder preferential redemption status.

124. Furthermore, the Second Respondents highlight the fact that the Appellants are not arguing that this could undermine the entire redemption regime in the Articles, particularly because they have already benefitted substantially from redemptions.

125. The Appellants argue that the agreement binds Matador, and therefore the Official Liquidator. The Second Respondents contend that it does not bind Matador or the Official Liquidator, and the agreement is not sufficiently set out in the Articles, and is therefore unlawful and of no effect.

126. To put it another way, the Second Respondents' position is: For a fundamental provision concerning redemptions to be effective, especially one which countermands the provisions of the Articles and the PPM, s.37 says that it must be in the Articles themselves.

127. The Second Respondents re-state the preliminary question as to whether the Agreement between PW and EGH binds Matador and therefore the Official Liquidator.

128. The Second Respondents' leading counsel points to paragraph 16 of the Appellants' Skeleton Argument and state that the Appellants correctly submit:

> "*Only the Fund, and not an individual shareholder in the Fund, can enter into a legally binding and effective agreement upon such terms as these.*"

129. The Second Respondents contend that, for an Agreement to bind the Company must have entered into it, and for a Company to enter into an Agreement it must be effected by someone with the requisite authority to commit the Company to it.

130. The Second Respondents take issue with the Appellant's submission that EGH had the relevant authority. The Second Respondents rely on the recent House of Lords decision in ***Criterion Properties PLC v. Stratford UK Properties LLC*** [2004] 1 W.L.R. 1846 and submit that there can be no actual authority to do something unlawful. Additionally, it is not the case that apparent authority can be relied upon by somebody who knows that there is no actual authority (and people are taken to know what is lawful). Thus, the Second Respondents submit EGH cannot bind the Company to a redemption regime which is outside the statutory scheme, and one which is different from that enshrined in the Articles.

131. The Second Respondents also argue that if a Company makes a misrepresentation, then the injured party may well have a claim in damages. However, the Second Respondents submit that the application of the Company's Articles cannot be overridden by any secret agreement which conflicts with them, nor can s.37 be overridden by an Agreement or an estoppel. Leading counsel on behalf of the Second Respondents submit that it is not possible to agree not to be bound by, or to

seek to contract out of, the statutory provisions of the Companies Law, and this is *a fortiori* when it comes to provisions concerning maintenance of capital.

132. The present case is concerned with an Agreement allegedly made by PW with Matador, conferring preferential status on PW's redemption requests. This is an Agreement which cannot stand and which could not, in any event, bind Matador.

133. In summary Mr. Collings submits that the agreement between PW and EGH is inconsistent with the Articles and it is the Articles which prevail. Mr. Collings further states that this *a fortiori* when s.37 of the Companies Law applies – being an important statutory code dealing with the maintenance of capital. Furthermore, the agreement is not set out in the Articles, it is not referred to in the Articles, and, it is wholly inconsistent with the Articles. The Second Respondents contend that the agreement is unlawful and of no effect and that the Agreement between PW and EGH, if there is in fact such an agreement, seeks improperly to fetter the exercise of the directors' discretion. To put it another way, Mr. Collings contends that the purported agreement is a secret arrangement creating preferential redemption treatment for PW – effectively giving PW a special class of share with enhanced redemption rights. The Second Respondents contend that this is impermissible and of no effect.

THE LIQUIDATOR'S POSITION

134. The Appellants lodged proofs of debt in the Matador liquidation claiming to be redeemed shareholders entitled to creditor claims pursuant to s.37(7)(a) of the Companies Law (2011 Revision). The Liquidator partially rejected the proofs of debt on the basis that Matador had gated and suspended a portion of the

Silex/Lansdowne redemption requests, such that they remain shareholders and not creditors in respect of the gated and suspended portions.

135. The Appellants now appeal these partial rejections, arguing that they ought not to be bound by Matador's gating and suspension provisions attaching to their shares because representations were made by EGH, who was a director of both the Appellant Lansdowne and Matador, to PW, who was a shareholder in Lansdowne and, apparently, and indirect beneficiary in Silex; to the effect that the Appellants would not be bound by the subscription documents they duly executed, Matador's Articles of Association, or Matador's Private Placement Memorandum.

136. Leading counsel on behalf of the Liquidator, Mr. Nigel Meeson, maintains that the gating and suspension provisions of Matador's Articles apply to the Appellants because:

a. Pursuant s.37(3)(c) of the Companies Law, a Cayman Islands Company's Articles governs the Redemption process, and for that reason alone the Appellants' appeals fail;

b. Even if that were not the case, the specific alleged representations made by EGH do not support the Appeals advanced by Silex and Lansdowne; and

c. Even if EGH's representations did support the conclusions advanced by the Appellants, they are not capable of defeating the expressed written agreement between Matador and the Appellants or Matador's Articles as a statutory contract under s.25(3) of the Companies Law and the applicable case law.

137. Mr. Meeson submits that the essence of the Appellants' arguments is that they ought to be relieved of their written and statutory contracts because they were executed in contravention of the wishes of their shareholder and ostensible beneficiary, PW, because PW was told that the Appellants would not be bound by these contracts.

138. Mr. Meeson submits that this is a matter between the Appellants and PW and not one open to the corporate entities to avoid their legal obligations as against Matador.

139. The Liquidator contends that he is an officer of this Court, and he has a duty to preserve the assets of the Matador state – but only to the extent that he objectively and impartially determines that doing so is strictly in accordance with Cayman Islands law.

140. The Liquidator's position is that there was no agreement between Matador and the Appellants – Silex and Lansdowne – that could have invalidated Matador's power to gate and suspend redemptions as set out in its constitutional documents.

141. Consequently, Mr. Meeson submits on behalf of the Liquidator that the answer to all of the four preliminary questions presented by the Appellants, in respect of these preliminary issues, is no.

142. Mr. Meeson further submits that on the evidence before the Court in this Application, the only connection that PW has to the parties appears to be as a shareholder of Lansdowne. The Liquidator concedes that the Court may infer from the evidence that PW is also an indirect beneficiary under the Bronze Trust, but the

Liquidator contends that there is no allegation or evidence to support PW having any capacity to enter into agreements on behalf of the Appellant, Lansdowne, or the Appellant Silex, or indeed, otherwise.

143. The Liquidator points out that the Appellant, Lansdowne subscribed for shares pursuant to a subscription form executed on the 24th April 2005 by EGH and Mr. MacKay on behalf of Lansdowne, and, the Appellant Silex subscribed for shares pursuant to a subscription form executed on the 10th May 2005 by Mr. O'Brien on behalf of Silex.

144. The subscription forms executed by the Appellants stated the following:

> *"I have a read a copy of the latest Prospectus of the Fund and received a copy of the latest available financial reports. I am fully aware of, and understand the financial risks associated with a subscription to the Fund and I accept that market fluctuations may lead to a loss of all or part of my capital. However I confirm that this investment is appropriate for my needs."*

145. The Liquidator says, whether it is described as a PPM or a Draft PPM, there is no other document that the "Prospectus of the Fund" could reasonably be, other than a Private Placement Memorandum – which is attached to the subscription form, incorporating the terms of the PPM by reference. The Liquidator maintains that the PPM was part of the package of documents attached to the email from Mr. DeBacker to PW and Mr. MacKay, and which also included the Investor Pack, the Investment Management Agreement between Matador and Matador Management Ltd., and the Memorandum and Articles of Association of Matador Management Ltd.

146. The Liquidator submits that by signing the subscription agreements, the Appellants not only acknowledged the existence of the PPM as attached to the email and agreement, but also expressly indicated that they had read it. The first page of the PPM stated the following:

> "*The shares of Matador... referred to in this Memorandum, are offered solely on the basis of the information contained herein. In connection with the offer made hereby, no person is authorised to give any information or to make any representations other than those contained in this Memorandum, and any purchase made on the basis of statements or representations not contained in or inconsistent with the information contained in this Memorandum shall be solely at the risk of the purchaser.*"

147. Leading counsel on behalf of the Liquidator maintains that it is clear from this Statement that no one, including EGH, is authorised to make any representations inconsistent with the terms of the PPM. Furthermore, Mr. Meeson submits that the appellants entered into the subscription agreement solely on the basis of the information contained within the PPM, including both gating and suspension provisions.

148. Mr. Meeson further submits that any representations made by EGH to PW were not authorised by Matador as they were inconsistent with the information provided within the PPM, and therefore cannot be relied upon as binding. Consequently, the Liquidator submits that the answer to all of the questions asked by the Appellants in respect of these preliminary issues is no.

149. The Liquidator maintains that redemptions may not be effected in a manner that is not authorised by the Articles of Association. Matador's Articles permit its

directors to impose gating and suspensions, and do not authorise redemptions to be accepted in contravention of those gates and suspensions.

150. Mr. Meeson submits that Articles are a statutory contract and not subject to oral variation, and relies upon s.25(3) of the Companies Law. Articles are not a simple party contract. They are akin to a collective agreement that creates collective rights and obligations as between the Company and all its shareholders, and its shareholders *inter se*. In addition, they are registered documents upon which third parties are entitled to rely when purchasing shares.

151. Furthermore, Mr. Meeson submits that even if the allegations in Waters4 amounted to representations from Matador to the Appellants, they were inconsistent with Matador's Articles, and therefore could not change the redemption and suspension process set out in the Articles.

152. To put it another way, Mr. Meeson submits that, in the Skeleton presented by the Appellants, the Appellants argue that an analogy to a "Side Letter" ought to apply to the representations alleged in Waters4. The Liquidator's response to this argument is that no law is presented to establish that "Side Letters" are legal and enforceable, no matter how common they are alleged to be. In any event, the Liquidator could not waive gating and suspension provisions in respect of one shareholder only. To put it another way, a term of a Side Letter agreeing not to suspend a gate would be to agree to the opposite of what is expressly contained in the Articles, and not merely an Agreement to exercise a discretion in a certain manner. This would amount to a material misrepresentation in the Articles to a third party purchasing Matador shares.

153. Finally, Article 12(a) sets out the provisions for the determination of Matador's net asset value, which states as follows:

> *"The Net Asset Value of the Company shall be calculated in accordance with the Offering Memorandum as at each Valuation Day, for each Class (or at such other times or on such other days as the Directors or their agents may determine) and means the total assets of the Company attributable to the relevant Class including, without limitation, all cash, cash equivalents and other securities (each valued at market value or otherwise herein provided) less the total liabilities of the Company attributable to the relevant Class, determined as herein provided or otherwise by or on behalf of the Directors in good faith, in accordance with the relevant generally accepted accounting principles or standards applicable to the Company consistently applied under the accrual method of accounting."*

154. The Liquidator maintains that Article 12(a) relies heavily on the PPM for the interpretation for the provisions for calculating the net asset value. It is submitted that the only method of calculating the NAV is by way of reference to the PPM. Without its existence, the NAV calculated for the purposes of Silex and Lansdowne's gated redemption would be unauthorised.

155. In summary, the Liquidator's submissions are as follows:

a. The Appellants were provided with the PPM as an attachment to the subscription agreement, and an attachment to the email of the 21st April 2005.

b. The Appellants signed the subscription agreement indicating that they had read the terms of the PPM.

c. The PPM limits authorised representations to those which are consistent with the terms of the PPM.

d. The representations now relied upon by Waters4/PW are inconsistent with the PPM and cannot be considered to be binding on Matador.

e. Therefore the answer to all of the questions asked by the Appellants in respect of the preliminary issues is no.

f. Further, if the Appellants are correct, in that the PPM, as provided, does not apply to the Articles, then any redemptions made would be unauthorised. Also, without reference to the PPM, Matador is unable to calculate the NAV.

g. As such, the suspension in gating provisions of Matador's Articles bind the Appellants, and the Liquidator cannot be obliged to accept the Appellants' proofs of debt that are premised upon the Articles not binding them.

CONCLUSION

EGH'S REPRESENTATIONS AND THE AGREEMENT IN PRINCIPLE

156. The Appellants rely heavily upon the following representations made by EGH to PW which, the Appellants submit, allow the Appellants, Lansdowne and Silex, not to be governed by the gating and suspension provisions contained in the Articles and relied upon by the Respondent:

i. An oral representation made "*during March and April …*" 2005 that EGH told PW "*... that PW should be able to withdraw as much money as (she) needed every quarter.*";

ii. On or about the 21st April 2005 EGH said to PW that *"... PW should not concern (herself) with these draft documents as the terms of (her) investment into Matador would not be governed by the strict terms of the documents which would govern other contemplated (third party) investors' investments in the Fund and these draft documents were the standard Fund documents intended for future investors."*;

iii. The executed document that describes itself as *"... an agreement in principle between PW and EGH" whereby the two agree "that they would draft and sign a shareholder agreement between them...."*;

157. I agree with leading counsel on behalf of the Liquidator, that it is unclear whether the representation is made by EGH on behalf of Matador, which was not incorporated until the 18th April 2005, or as a director of Lansdowne, or in some other capacity.

158. The statement that PW "*should be able to withdraw as much money as*" she needed, does not amount to a representation that the Appellants' redemptions would never be gated or suspended. Indeed, as Mr. Meeson submits, it could also be read to mean the exact opposite, meaning that PW should be able to withdraw her funds, but there would be no guarantees.

159. The first representation and the second representation referred to in paragraph 156 were not representations made by Matador to either Appellant. The directors of Lansdowne and the directors of Silex executed documents that could never have reflected that view. As the Liquidator has maintained, these are merely representations by EGH, who is a director of both Matador and Lansdowne to PW

who is a shareholder of Lansdowne, and possibly a beneficiary of Silex; and yet, the Appellants proceeded to execute documents that conflicted with these representations. Furthermore, the oral representations made by EGH would appear to pre-date the execution of the subscription forms by both Lansdowne and Silex.

160. In any event, both Appellants entered into written agreements with Matador to purchase shares which were the subject of both gating and suspension provisions contained both in Matador's PPM and its Articles.

161. The wording of the Agreement in Principle between EGH and PW would appear to be an agreement between them to enter into a shareholder's agreement at a future date.

162. I agree with leading Counsel for the Liquidator, that the Agreement in Principle does not appear to contain any terms that are inconsistent with Matador's right to impose a redemption gate and/or a suspension of payment of redemption proceeds to the Appellants. The Agreement in Principle is only an agreement between EGH and PW. Neither of the Appellants, Silex or Lansdowne, were parties to the Agreement in Principle.

163. The Court has some sympathy for PW because, clearly, she was induced by EGH to place her funds with the Fund. At the time she was discussing her investment with EGH, PW admits she was unfamiliar as to how a Cayman Islands Hedge Fund operated, and she relied upon what EGH and Olaf told her. For example, she was told that she would be a director of the Fund's investment manager and entitled to fees payable to this entity. Subsequently she found out that she was never a director

of the Fund's investment management company, nor was she paid a share of the management fee to which she felt she was entitled.

164. Furthermore, PW obviously relied upon the advice of Mr. MacKay – when she engaged him to advise her in connection with agreeing the final form of the documentation that would generally be applicable to the Fund and to all "third party" investments that would be made in the Fund. It is clear from the evidence in Waters4 that PW relied on Mr. MacKay to finalise the final documentation with EGH.

165. PW left it to EGH and to Mr. O'Loughlin to arrange for Lansdowne to be incorporated and for the Bronze Trust to be set up, and in the same way, she left it to Mr. MacKay to arrange for Silex to act as Trustee for Bronze Trust. EGH said that Olaf would keep "*an eye out*" for EGH and PW, but it would appear from Waters4 that Olaf had no regular day job, nor was he in need of one.

166. PW was led to believe that she and EGH would also be directors of Matador. Subsequently, PW found out that the directors of Matador were not EGH and PW, but in fact EGH and Olaf. EGH had indicated that the PPM would be amended and agreed between PW and EGH. It appears from Waters4 that there was never any discussion between PW and EGH regarding the PPM or any amendment to it and there is no evidence before this Court that the PPM was ever amended.

167. The Agreement in Principle indicates that PW and EGH would draft and sign (at some time in the future) a shareholder's agreement between them but, regrettably, there is no evidence of any shareholder's agreement relating to PW or of any having been executed by PW. The evidence is that EGH had told PW that the PPM

and the Articles were irrelevant, and PW candidly admits that she did not pay much attention to this document. It is clear from Waters4 that PW left it to Mr. MacKay to discuss and finalise the documentation with EGH..

168. Furthermore, there is no evidence that any of the representations made by EGH to PW were authorised by Matador, and in any event, the representations were inconsistent with the PPM and the Articles of Association of Matador.

169. PW now realises that she was very naïve and an unsophisticated investor. She further realises that after lengthy discussions with her attorneys, her investment in a Cayman Islands Hedge Fund is governed by subscription agreement signed by the Appellants, the Articles of Association of Matador and the PPM.

170. It is beyond question that the Appellants, Lansdowne and Silex, are shareholders of Matador. They signed the subscription agreement so, on the basis of the PPM and the Articles of Association and the investor pack, they became the registered shareholders in Matador.

171. Article 9 of the Articles of Association reads as follows:

> "*Equitable Interest – except as required by law, no persons shall be recognised by the Company as holding any share upon any trust, and the Company shall not be bound by or be compelled in any way to recognise even when having notice thereof any equitable, contingent or future partial interest in any Share (except only as by these Articles, or by law, otherwise provided, or under an order of a court of competent jurisdiction" or any other rights in respect of any Share except an absolute right to the entirety thereof in the registered holder, but the Company may in accordance with the law issue fractions of Shares up to four decimal places.*"

172. In the recent unreported case of ***Medley Opportunity Fund Ltd. v. Fintan Master Fund Ltd. and Nautical Nominees Ltd***. FSD 23 of 2012, dated the 21st June 2012, I applied and adopted the principle set out by the Court of Appeal in ***Svanstrom and Nine Others v. Jonasson*** 1997 CILR 192 where the Court stated in the third holding on page 193:

> *"The common law principle that a company was not obliged to recognise a trust affecting its shares was reflected in each company's articles of association, which stated that the company was not bound to recognise any equitable interest but would regard a registered shareholder as being absolutely entitled."*

173. On the basis that it was only Silex and Lansdowne that in fact executed subscription forms and were not party to any agreement with EGH or anybody else, I cannot find any basis to support the contention that the agreement, if any, between PW and EGH binds Matador or the Liquidator in relation to the redemption requests of the Appellants. To put it another way, even if there were an agreement between EGH and PW, there was no agreement between Matador and the Appellants that could invalidate Matador's power to gate and suspend the Appellants' redemptions, as set out in its constitutional documents.

174. Mr. Meeson, leading counsel for the Liquidator, relies upon s.25(3) of the Companies Law which reads:

> *"When registered the said articles of association shall bind the company and members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors and administrators to conform to all the regulations contained in such articles subject to this Law; and all monies payable by any member of the company, in pursuance of the conditions or regulations shall be deemed to be a debt due from such member to the company."*

As has often been cited, Articles of Association are not a simple two-party contract. They are akin to a collective agreement that creates collective rights and obligations, as between the company and all of its shareholders, and its shareholders inter se. In addition they are registered documents upon which third parties are entitled to rely when purchasing shares.

175. I accept the submission of the Liquidator that even if the allegations in Waters4 amounted to representations from Matador to the Appellants, that were inconsistent with Matador's Articles, they would not change the redemption and suspension process set out in the Articles.

176. As Lord Justice Steyn (as he then was) stated in ***Bratton Seymour Service Co. Ltd. v. Oxborough*** [1992] BCLC 693 at 698-699:

> "*Here the company puts forward an implication to be derived, not from the language of the articles of association but purely from extrinsic circumstances. That, in my judgment, is a type of implication which, as a matter of law can never succeed in the case of articles of association. After all, if it were permitted it would involve the position that the different implications would notionally be possible between the company and different subscribers, just as the company or an individual member cannot seek to defeat the statutory contract by reason of special circumstances such as misrepresentation, mistake, undue influence and duress, and is furthermore not permitted to seek a rectification, neither the company or any member can seek to add to or to subtract from the terms of the articles by way of implying a term derived from extrinsic surrounding circumstances. If it were permitted in this case it would be equally permissible over the spectrum of company law cases. The consequences would be prejudicial to third parties, namely potential shareholders who are entitled to look to and rely on the articles of association as registered.*"

177. The Appellants submit that an analogy of a "side letter" ought to apply to the representations made by EGH to Waters4 and PW. If I were to accept that the representations made by EGH to PW – agreeing to allow PW to access funds at any

time – it would be the opposite of what is expressly contained in the Articles of Association, and the opposite of that which governs the subscription agreements entered into by the Appellants with Matador.

178. The position is clear and unequivocally stated by Lord Mance ***in Strategic Turnaround*** when quoting from Gower and Davis's ***Principles of Modern Company Law*** 7th Edition:

> *"In order to protect the shareholders whose shares are not to be redeemed, the terms and manner of the redemption must be set out in the company's Articles."*

179. The Agreement in Principle between PW and EGH was not set out in the Articles and cannot vary or invalidate the Articles of Association of Matador. If PW and the Appellants had intended the Appellants to be entitled to redeem their investment, they should have ensured that such provision granting that entitlement was inserted in the Articles, and further, the Appellants should have executed a written agreement with the directors of Matador that the gating and suspension provisions in the Articles do not apply to them. The Articles gave the directors power to gate and suspend redemptions, and there is nothing contained in the PPM or the Articles to prevent them exercising this power. In fact, the provisions of the Articles, as read with the PPM, specifically empowered the directors to impose the gate and suspension they subsequently imposed.

SECTION 37 OF THE COMPANIES LAW

180. The Second Respondents and Liquidator both submit that Section 37 of the Companies Law (2007 Revision) is a complete answer to the Appellant's submissions.

181. I refer to Lord Mance's dicta in ***Strategic Turnaround*** referred to above in paragraph 178 and find that based on the binding Privy Council authority of ***Strategic Turnaround*** it is clear that s.37(3)(c) requires that the manner in which any redemption may be effected must be authorised by or pursuant to the Articles of Association, and further, the terms and manner of redemptions must be set out, or sufficiently set out, in the Articles of Association.

182. I find that the decision of O'Loughlin J. in the South Australian case of ***TNT Australia Pty. Ltd. v. Normandy Resources LL*** applies to the circumstances of this case. It represents a minor variation to Lord Mance's requirement that the Articles of Association must set out the terms and manner of redemption. The dicta of O'Loughlin J. in ***TNT Australia Pty. Ltd. v. Normandy Resources LL*** states that the Articles of Association must, "*....sufficiently set out the terms and manner of redemption in the Articles.*"

183. When one reads O'Loughlin J.'s judgment in ***TNT Australia Pty. Ltd. v. Normandy Resources LL*** and Lord Mance's dicta in ***Strategic Turnaround***, as read with s.37 of the Companies Law, the following principles are clear and I so find:

i. A company can only issue redeemable shares if authorised to do so by its Articles – s.37(1) Companies Law;

ii. A company may then redeem shares, but only if authorised to do so by its Articles – s.37(2) of the Companies Law;

iii. Both these provisions (*supra*) are subject to s.37(3)(c) of the Companies Law; and

iv. Section 37(3)(c) provides that the manner of redemption must be sufficiently set out in the Articles.

184. I agree with the submission from leading counsel for the Second Respondents that the agreement referred to by the Appellants plainly falls foul of these entrenched rights and for these reasons the agreement between PW and EGH does not bind Matador or the Liquidator.

185. The Appellants maintain that their shares were entitled to be redeemed as a result of the secret agreement between EGH and PW, notwithstanding the gating and the suspension imposed by Matador. Upon the authority of ***Strategic Turnaround*** and ***TNT Australia Pty. Ltd. v. Normandy Resources LL,*** as read with s.37, it is clear that provisions of the Articles cannot be trumped by the Agreement in Principle between EGH and PW, which conflicts with the Articles of Association, nor can s.37 be overridden by this purported agreement or an estoppel.

PRIVATE PLACEMENT MEMORANDUM (PPM)

186. Article 5 of the Articles of Association sets out the provisions for redeeming shares in Matador. Throughout these provisions, the "Offering Memorandum" is referred to and therefore critical to the understanding of the operation of Matador's shareholder redemption rights.

187. The Articles of Association defines "Offering Memorandum" as follows:

> "*The Private Placement Memorandum or other offering document, pursuant to which and on the terms and conditions of which the Redeemable Shares of each Class are offered for purchase as the same may be amended or supplemented by the Directors from time to time.*"

188. Leading counsel for the Liquidator submits that for the purpose of interpreting the provisions for redeeming shares found in Article 5, the "Offering Memorandum" means the PPM that was received and read by the Appellants, before the subscription agreements were executed.

189. Article 5(j) reads:

> "*Subject to the provisions of and the restrictions contained in the Law, a holder of Redeemable Shares each Class shall be entitled to redeem all or any of such Redeemable Shares on any Redemption Day for the relevant Class by prior written notice to the Company as provided in the Offering Memorandum, and other in such form given in such manner as the Directors as shall, from time to time determine but no Redeemable Shares of a particular Class shall be redeemed whilst the calculation of the Net Asset Value of the Class is suspended.*"

190. Article 5(m) gives Matador the power to impose a gate on redemptions and reads:

> "*If so stated in the Offering Memorandum, if the Company receives any requests for redemption in respect of any one Redemption Day, either singly or when aggregated with other redemption requests so received, representing more than 10% of the net assets of the Company, the Directors may refuse to honour all such redemption requests that exceed 10% of the net assets of the Company on the relevant Redemption Day. In determining which redemption requests are to be satisfied out of the Company's available cash reserves,*

requests for redemptions will be reduced proportionately and for any subsequent Redemption Day outstanding deferred redemption requests will be honoured prior to new redemption requests, at the Net Asset Value per share on such subsequent Redemption Day."

When one reads Article 5, the PPM has been incorporated by reference throughout, and one cannot make sense of Article 5 without reference to the PPM.

191. I agree with the Liquidator's leading Counsel when he submits that without the existence of the PPM the Appellants cannot redeem their shares, and further, any redemption in the past made without reference to the PPM would be unauthorised.

192. The Appellants, Silex and Lansdowne, were provided with the PPM as an attachment to the subscription agreement and, in addition, as an attachment to the email sent by Mr. DeBacker to Mr. MacKay and PW. The PPM was sent to Mr. MacKay and PW with the investor pack for Matador and the Memorandum and Articles of Association of Matador.

193. The Appellants executed the subscription agreement indicating that they had read the terms of the PPM. The PPM specifically limits authorised representations to those consistent with the terms of the PPM. The representations made by EGH to PW are inconsistent with the PPM and, in my view, cannot be considered binding on Matador.

194. Consequently, I accept the submissions of the Second Respondents and the Liquidator that the answer to preliminary question A is no, and, further, the answer to preliminary questions B, C, and D is also no. The Agreement, if any, referred to

in Waters4, and made between PW and EGH, does not bind Matador and does not bind the Official Liquidator.

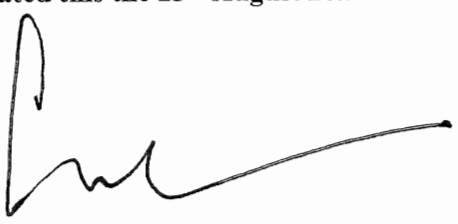
195. The suspension and gating provisions of the Articles of Association of Matador bind the registered shareholders – Silex and Lansdowne – and consequently the Liquidator cannot be obliged to accept the proofs of debt of either Appellant, because they are premised upon the Articles of Association not binding them.

196. The purported Agreement in Principle between EGH and PW is inconsistent with the Articles of Association and it is the Articles which prevail. The Agreement is not sufficiently set out in the Articles, it is not referred to at all in the Articles and, it is wholly inconsistent with the Articles. Section 37 of the Companies Law applies, and any the purported agreement between EGH and PW is unlawful and of no effect.

197. Accordingly I reject the Appellants' application that the Liquidator's rejection of their respective proofs of debt be set aside, and I refuse the other relief sought in their Summons dated the 23rd February 2011.

198. Should counsel wish to address me on the question of costs I will hear submissions at a later date convenient to all the parties.

Dated this the 23rd August 2012



Honourable Mr. Justice Charles Quin
Judge of the Grand Court