IN THE GRANT COURT OF THE CAYMAN ISLANDS

CAUSE NO: FSD 0013 OF 2012 (ASCJ)

IN THE MATTER OF THE COMPANIES LAW (2011 REVISION)

AND

IN THE MATTER OF THE COMPANIES LAW (2011 REVISION)

IN THE MATTER OF FIA LEVERAGED FUND ("THE COMPANY")

IN OPEN COURT
THE 4TH AND 5TH APRIL 2012; 18TH APRIL 2012
BEFORE THE HON. CHIEF JUSTICE

APPEARANCES: Mr. Ross McDonough of Campbells for the Petitioners, with him Mr. Guy Cowan

Mr. Stephen Atherton QC instructed by Mr. Barnaby Gowrie of Walkers for the Company

Mrs. Gail Goring for the Cayman Islands Monetary Authority

JUDGMENT

1. This is the judgment on a petition to wind up the Company. The petition is brought by Fire Fighters Retirement Systems ("FRS"), Municipal Employees Retirement Systems of Louisiana ("MERS"), and New Orleans Fire Fighters' Pension and Relief Fund ("NOFF") (collectively "the Petitioners). The Petitioners' proceed on the basis of a combined debt of USD 144,500,000 claimed to be owed to them by the Company.

BACKGROUND

2. The Company was incorporated as an exempted company under the Companies Law (1998 Revision) of the Cayman Islands with limited liability on 13 March 1998. It is an open ended investment fund and is registered as a mutual fund under the Mutual Funds Law (as amended). It is the corporate vehicle for a feeder fund which forms part of a "master-feeder" fund structure, with "intermediate" funds between the Company and the ultimate master fund which is Fletcher International Ltd, a company incorporated in Bermuda ("the Master Fund").

3. The first intermediate fund in the structure, in which the Company has directly invested its assets, is Fletcher Income Arbitrage fund Limited ("FIAF"), an exempted company also incorporated under the laws of the Cayman Islands. FIAF has, in turn, invested its assets in a Delaware incorporated company, Fletcher International Inc., which in turn has invested its assets in the Master Fund.

4. Fletcher Assets Management Inc. is the investment manager of the Company, the Master Fund and the other intermediate funds within the group structure ("the Investment Manager").

5. According to the Confidential [(Offering)] Memorandum of the Company ("the COM") relating to Series N Shares, all the assets of the Company including monies obtained through leverage, will be invested in the Master Fund.

6. The Master Fund's investment objective is described as to achieve returns in the range of 10-15% per annum primarily by exploiting price inefficiencies and anomalies in both equity and fixed income securities around the world.

7. Series N Shares – those to which the Petitioners subscribed – were offered on the following basis as described in the COM:

(At page 2).

> *"There is no public market for the Series N shares, and Series N Shares will not be transferable except under certain limited exceptions. No shareholder will be permitted to redeem any Series N Shares until after the second anniversary of their date of purchase. Thereafter, Series N Shares may be redeemed at the end of any calendar month on 30 days' prior written notice to the Fund (subject to the discretion of the Board of Directors to waive such notice). Each date as of which Series N Shares may be redeemed is herein referred to as the "Redemption Date".*
>
> *Series N Shares will be redeemed at a per share price based on Net Asset Value. With respect to Series N Shares, the fund will pay at least 90% of redeemed amounts in cash or in kind without interest generally within 15 calendar days after the applicable redemption date and the fund, subject to the discretion of the Directors will retain up to 10 % of such redemption until no later than 30 calendar days after the completion of the audit of the*

financial statements related to the fiscal Year of the Fund in which the redemption occurred...."

....

(At page 25)

If any redemption amount is paid in assets of the Fund other than cash, the value of the assets so paid shall be determined by the Board of Directors in consultation with the Investment Manager in its sole discretion as of a date reasonably contemporaneous with the date on which the Redemption Amount is paid to the shareholders."

8. Of relevance also to the present dispute; Clause 9(f) of the COM provides:

"On the relevant date of redemption the holder of the Participating Shares to be redeemed shall cease to be entitled to any rights in respect of that share (excepting always the right to receive a dividend which has been declared in respect thereof prior to such redemption being effected) and accordingly his name shall be removed from the Register of Members with respect thereto and the shares shall be available for re-issue and until re-issue shall form part of the unissued share capital of the Company.

No interest will accrue on the redemption monies pending payment."

9. (And finally, for present purposes, at Clause 24, page 12):

"Any valuation made pursuant to these Articles shall be binding on all persons".

10. The Petitioners had invested one hundred million dollars (USD 100,000,000) with the Company by end of March 2008, for subscription in Series N Shares, the series of shares as customised (and as described above), for their investment by negotiation with the Investment Manager.

11. The Petitioners sought to redeem their investment by a series of requests (to be explained more fully below) in keeping with the terms of the COM and it is common ground that they became effectively redeemed and were no longer to be shareholders by, at latest, 31st August 2011.

12. It should therefore also be common ground, that, while the main dispute underlying the petition is whether liabilities owed to the Petitioners have in fact been discharged or redeemed by the Company, they claim as creditors of the Company, not as shareholders. And this is, of course, of crucial importance to their standing under the Companies Law (now in its 2001 Revision "the Law") to petition to wind up the Company.

13. It is nonetheless of importance to a proper understanding of this matter that the circumstances surrounding the disputed redemptions are described.

14. In the petition, it is averred (and is not disputed by the Company) that Redemption Requests were submitted by each of the petitioners as follows:

(a) MERS

An initial redemption request was made by MERS, in writing on 3 march 2011 ("First MERS Request") seeking the redemption of shares held in the

Fund by MERS with an aggregate redemption value of USD15,000,000. Acknowledgement of the First MERS Request was sent by the Investment Manager to MERS by way of letter dated 15 June 2011.

Pursuant to the terms of the COM, the Redemption Date for the First MERS Request was 31 March 2011.

A further redemption request was made by MERS, in writing, on June 22 2011 ("Second MERS Request") seeking the redemption of all remaining shares credited to its account in the Company. Acknowledgement of the Second MERS Request was provided by the Investment manager in its letter to MERS dated 15 September 2011.

Pursuant to the terms of the COM, the Redemption Date for the Second MERS Request was 31 August 2011.

(b) FRS made an initial Redemption Request on 14 March 2011 seeking the redemption of shares with an aggregate value of USD17,000,000, in writing on 15 March 2011. Pursuant to the COM, the Redemption Date for the First FRS request was 31 May 2011.

A further redemption request was made by FRS on 27 June 2011 seeking the redemption of all remaining shares credited to its account in the Company. FRS' second request was acknowledged by the Company Administrator in writing on 27 June 2011. Pursuant to the COM, the Redemption Date was 31 August 2011.

(c) NOFF made a Redemption Request on 27 June 2011 seeking the redemption of all shares credited to its account in the Company. NOFF's

request was acknowledged by the Company Administrator in writing on 27 June 2011 and the Redemption Date was August 31 2011.

15. It is a ground of complaint in the Petition that despite various requests from the Petitioners, the Company has failed to provide any calculations of Net Asset Valuations ("NAVs") and/or audited valuations in respect of any of the redemption requests made by the Petitioners to date. In addition, and despite repeated requests from the Petitioners, the Company has failed to provide or file audited accounts since 2008.

16. In light of the Company's failures in those respects, the Petitioners, understandably, claim to be unable to place a precise value upon the aggregate amounts due to them pursuant to their Redemption Requests but, based on monthly statements provided by the Company, the Petitioners understand that as at 30 June 2011, their collective investments in the Company were valued at approximately USD144,500,000 (subject to redemptions). This is the basis of the sum of the debt claimed in the Petition.

17. The handsome return on capital that that sum represents, would reflect the terms of the COM that afford the holders of Series N Shares a preferential return on their investment. In practical terms, this would amount to 100% of the Company's net profit in proportion to their respective Investment Account, until they have received allocations equal to 12% per annum compounded annually ("the Preferred Return"). Shortfalls in the yield of profit payable on Series N Shares are to be made good from the Investment Accounts of the Non Series N

Shareholders. The latter, in effect, therefore benefit only when there are returns greater than the Preferred Returns.

18. Citing that background, the Petition proceeds upon two alternative grounds, the first under Section 92(d) and the second under Section 92(e) of the Law as follows:

(At paragraphs 27-29):

> *"In their letter of 20 January 2012, Campbells (the Petitioner's Cayman attorneys) requested that the Company, by 4:00 pm on 27 January 2012, provide the Petitioners with:*
>
> *(a) Confirmation of the value of the Systems' (Petitioners') shares in the Fund as at the Redemption Dates of 31 May 2011 and 31 August 2011; and*
>
> *(b) Full payment in respect of the same, either in cash or in kind.*
>
> *Since receiving that letter the Company has failed to provide confirmation of the precise amounts due to the Petitioners or to pay any amounts to the Petitioners. The Company's failure to pay any of the amounts which are presently due and owing to the Petitioners demonstrates that the Company is unable to pay its debts and that it should be would up pursuant to Section 92(d) of the Companies Law (2011 Revision).*
>
> *Further and/or alternatively, it is just and equitable that the Company be wound up pursuant to section 92(e) of the Companies Law (2011 Revision) so that official liquidators may investigate the Company's affairs and take control of its assets in circumstances where:*

(a) *the Company has failed to file audited accounts since 2008;*

(b) *the Company appears to have had no directors for the period from 21 November 2011 (when its last director, who was affiliated to the Investment Manager, resigned) until 24 January 2012;*

(c) *the replacement directors are also directors and/or advisors of the Investment Manager and the Investment Manager appears to be the subject of an investigation by both the U.S. Securities Exchange Commission and the U.S. Federal Bureau of Investigation.*

19. This last assertion of the Petition relies on newspaper reports of the investigations mentioned and the Company, through Mr. Atherton Q.C., protests the absence of any real evidence to support it.

20. CIMA, as the Cayman regulator of the Company as an investment fund, informed the Court, through Mrs. Gail Goring, that its investigation into the affairs of the Company is ongoing and so it takes no stance, one way or the other, in relation to the Petition (or any of the allegations raised in it).

21. The Company opposes the Petition.

22. It asserts primarily, through the affidavits of Mr. Stewart Turner, a director of the Company that, in response to the notices of redemption served on the Company by the Petitioners and in discharge of the liabilities created by those notices of redemption, the Company (as it was entitled to do) made valid and effective *in specie* distributions to each of FRS, MERS and NOFF, which the Petitioners have impermissibly purported to reject.

23. Further that, in such circumstances, that is: where the liability that is the subject of the Petition has effectively been paid by the Company, or at the very least where there is a genuine and substantial dispute that this is the case, and where the Company is solvent (as is said to be the case here and where the evidence of solvency is unchallenged); the Petitioners have no standing to continue to pursue the Petition and it must be dismissed.

24. Thus, the battle lines around the Petition are clearly drawn: there is no dispute that the Petitioners were entitled to and have effectively exercised their rights to redeem their investments in the Company. The issue, first of all, is whether the Company has effectively redeemed the liabilities owed to the Petitioners by its payment *in specie*, of the indebtedness created by the exercise of redemption. And, further, if there is a genuine dispute about that, whether the Petitioners are entitled to wind up the Company, a solvent entity.

25. The nature of the purported distributions *in specie* in respect of the Petitioners' redemption claim is of obvious importance and is quite involved. It began with the issuance of promissory notes to MERS and FRS in respect of their First Redemption Requests made in March 2011 (for USD15,000,000 and USD17,000,000 respectively).

26. The view taken by the Company in seeking to redeem *in specie* by issuance of those promissory notes, is explained by Mr. Atherton as follows:

27. If, despite not having an obligation to satisfy redemptions by payment in cash, the Fund had chosen to realise assets in order to discharge the MERS and FRS redemption requests made in March 2011 (and other anticipated redemptions

then), given the prevailing market conditions, the realisations might well have been less than might otherwise have been expected. As the Petitioners were explicitly aware, and as they agreed in writing in their respective subscription agreements, the terms of the Petitioners' investments were designed to ensure that the Company would be able to invest a significant portion of its assets in securities that could – under certain circumstances – remain illiquid for a substantial period. As a consequence, by way of an *in specie* distribution, the Company issued each of MERS and FRS with an assignment of promissory notes that had been issued in favour of the Company by the Master Fund.

28. The principal sums of the promissory notes were expressed to be due and payable on June 15 2012.

29. FRS and MERS have each (eventually) purported to reject the distribution made by the Fund in respect of their redemption requests made in March 2011, albeit that the promissory notes and attendant assignments were only returned to Walkers, the Company's local attorneys, on 14 March 2012.

30. Of importance also from the Company's point of view, the promissory notes were returned after their principal and accrued interest had purportedly already been prepaid pursuant to the terms of the promissory notes by a second *in specie* distribution in the manner explained below.

31. Insofar as necessary the Fund maintains that the issuing of the promissory notes and attendant assignments to each of FRS and MERS was valid and sufficient to and did discharge the liabilities created by the redemption requests made by

MERS and FRS (USD15,000,000 and USD17,000,000 respectively) in March 2011.

32. The Company maintains that neither FRS nor MERS has proffered any credible reason why either of the promissory notes and assignments did not validly discharge the Funds' obligations in respect of the redemption requests made in March 2011. As a matter of contract neither MERS nor FRS had the right simply to purport to reject the *in specie* distribution represented by the issue of the promissory notes and assignments.

33. For the purpose of trying this petition, this question of the redemption by distribution *in specie* by way of valid promissory notes, has, however, been overtaken by events.

A Second *in specie* distribution

34. The Company asserts that as a specific accommodation to the Petitioners; and whilst maintaining the validity and propriety of having issued the promissory notes to FRS and MERS the Company; on 13 February 2012 it initiated the discharge of the entirety of the indebtedness owed to the Petitioners by a further distribution *in specie* to them, the nature and structure of which is explained as follows:

35. Certain assets of the Master Fund were transferred into FILB Co-Investments LLC ("FILBCI"), a newly and specially incorporated Delaware company. The shares of FILBCI were then registered in the names of each Petitioner in purported discharge of each of the Petitioners' claims for redemption of its shares in the Company, including those claims of MERS and FRS arising from their

requests of March 2011 which the Company considered had previously been discharged by the issuance of the promissory notes and attendant assignments.

36. By the FILBCI arrangement, the Master Fund remains in control as "manager" or "managing member" of FILBCI, but is obliged to enter the name of each of the Petitioners as a member in proportion to the shares said to be allocated by way of redemption of its debts.

37. The Master Fund remains responsible for the management of the assets (that is, the assets of the Master Fund transferred to FILBCI) for the benefit of the Petitioners.

38. It is asserted by the Company that the Petitioners effectively have full control of FILBCI and the FILBCI Agreement (struck as between the Master Fund and FILBCI only) states that the Petitioners may replace the Managing Member and themselves exercise significant control over FILBCI.

39. Of critical importance to these proceedings, it is asserted by the Company (per paragraph 37 of the 1st Affidavit of Mr. Stewart Turner); that the assets contributed to FILBCI by the Master Fund had an aggregate value of USD136,135,806 as of the date of the second redemption *in specie*. This is said to be in accordance with the valuation of an external valuation expert firm, Quantal, that values the 136,135.806 shares of FILBCI at USD1000 each.

40. Thus, the Master Fund distributed 17,581.90370 FILBCI shares, purportedly having a net asset value of USD1000 per share and an aggregate value of USD17,581,903.70 as payment in satisfaction of all principal and outstanding

interest on the promissory note "held by" FRS, which therefore discharged in full the liability created by the FRS March 2011 request.

41. The Master Fund then distributed 43,958,372.15 shares in satisfaction of approximately 90.10% of the second FRS request – said to represent the balance of its investment (save for 9.9% to be paid in keeping with the COM after the relevant audit).

42. Distributions of 15,513.4444 and 39,177.09292 FILBCI shares were similarly made to MERS purportedly in discharge of its March 2011 request (and promissory notes) and second redemption requests respectively, for aggregate values of USD15,513,444.44 and USD39,177,092.92 (a total of 90.10% of the MERS investment and with the 9.9% to be paid).

43. And in respect of NOFF, the Master Fund distributed 19,904.99279 FILBCI shares, having a net asset value of USD19,904,992.79 in satisfaction of approximately 90.10% of the NOFF redemption request (with the 9.9% to be paid).

44. According to Mr. Stewart, the Company does not anticipate any issues with respect to the payment of the remaining amounts (approximately 9.90%) respectively owed to the Petitioners upon completion of the relevant audit for the following reasons:

    (a) As noted in its management accounts, the Company has a significant excess of capital that is available to meet the further redemptions after audit (valued approximately at USD37 million); and

(b) Having completed the large redemption of the Petitioners (said to have required 70% of the capital available to the Fund structure), the Fund will have much less leverage and less volatility further decreasing the likelihood that a major problem will occur that could interfere with the Series N Shares

redemption final payment.

[(I note in parenthesis here, that the approach taken by the Company in its arguments in opposition to the Petition, appears to treat the assets of the Fund structure (ultimately of the Master Fund) as synonymous with the assets available to the Company itself for redemption of the Petitioners.)]

45. Mr. Stewart further asserts that in accordance with the Articles, the Company will pay the remaining 9.90% to each of the Petitioners once the fiscal year audit has been completed.

46. By reliance on articles 52 and 55 of the Master Fund articles (which apply to investors in the Company for these purposes), the Company asserts that the value that the Master Fund has ascribed to the assets – where no market exists for them or where the Directors, in consultation with the Investment Manager and the Master Fund Administrator, decide that the market price as determined does not fairly represent the real value of the investment – shall be binding on all persons (which would include any shareholders of the Company). In practical terms then, this would mean that the binding value of the FILBCI Shares is that which was adopted by the Directors of the Company after the internal process of consultation; and in this context having regard to the Quantal valuation.

47. On behalf of the Company, Mr. Stewart thus confirms that all redemptions with respect to the Petitioners have been carried out in accordance with the applicable provisions of the Company's articles, the Master Fund articles, the COM and the Master Fund Confidential [Offering] Memorandum (other than the fact that the relevant redemption payments were not paid within 15 days of the redemption date). Accordingly, they represent a proper and binding *in specie* distribution.

48. The Company thus ultimately contends that it has complied fully with its contractual obligations, with the Petitioners "paid all amounts that are properly due and owing to them" and that the Petitioners are no longer actual present creditors of the Company.

49. The Petitioners do not accept these assertions. They point to the nature of the assets transferred to FILBCI, describing them as "near worthless" and refute that such assets could possibly represent a valid and effective *in specie* redemption of their indebtedness which has been admitted to be worth at least USD136,000,000 (or as much as USD144,500,000) being the accrued value of their cash investment of US100,000,000.

50. The primary issue underlying the petition thus devolves into whether the FILBCI shares represent a valid *in specie* distribution.

The nature of the FILBCI assets

51. In essence, the FILBCI assets comprise a right acquired by the Master Fund on 1st April 2010, to invest USD65,000,000 in what are described as Series C Convertible Preferred Stock in United Community Banks Inc. ("UCBI") – a publicly traded company on the NASDAQ having a market capitalisation of some

503 million dollars ("the preferred investment"). The preferred investment (more precisely, the right to make the preferred investment) has a possible further right to a perpetual preferred income stream, but may be called under certain circumstances by UCBI five years after the date of investment. In that case, the right to a preferred income would be converted to a right to common stock of UCBI. Assuming that the full amount of USD 65,000,000 is invested, an additional USD 35,000,000 of common stock warrants on different terms would be issued by UCBI concomitantly to the Master Fund ("the B Warrant").

52. Also, in 2010, the Master Fund received warrants to buy USD30,000,000 of common stock in UCBI ("the A Warrant").

53. The "assets" which the Master Fund has transferred to FILBCI in purported redemption of the Petitioners' investment do not include the A Warrant. They include the preferred investment, the B Warrant and USD606,667 owed by UCBI to the Master Fund by way of a "non-registration penalty". For the sake of convenience, I will refer to the first two of these three "assets" as the "Stock Option".

54. The deadline for the exercise of the Stock Option, unless extended by the operation of certain provisions in the Share Purchase Agreement, is 26 May 2012.

55. The clear implication then, is that unless the Petitioners are willing and able to invest USD65,000,000 in the Stock Option by the time required, the Stock Option will fall away and will be of no value. And thus, if the Company is correct in its contention that it has discharged entirely its indebtedness owed to the Petitioners, the Petitioners would have lost entirely their investment.

56. It is necessary then, that there is an understanding of the nature of the Stock Option and of its value.

57. There are, according to the Quantal valuation, three components to the preferred investment element:

- **The "bond value":** The preferred stock would pay a stream of dividend income that is a function of LIBOR; this dividend would be perpetual if (the Master Fund) didn't convert the preferred stock to common stock at any time, if UCBI didn't impose its conversion right after five years, and if UCBI doesn't default on the payment of dividend. The value today of the dividend stream after pricing in default risk, is termed "the bond value."

- **The redemption right**: The Master Fund has the right to convert the preferred stock by giving up the dividend stream and receiving common stock in its place. This conversion or redemption right to receive common stock, is a second source of value for the preferred investment. Ignoring for the moment UCBI's conversion right, the transferability of the preferred stock allows its value to be assessed as the sum of its bond value and its redemption value.

- **UCBI's conversion**: A third determinant of value for the preferred investment is UCBI's right to "call" the preferred stock by converting it to equity. This UCBI right contributes negatively to the value (to the Master Fund) since it may be assumed that UCBI will "kill off" the Master Fund's valuable redemption right plus the preferred dividend stream by forcing

(the Master Fund) to redeem as soon as UCBI is able legally to do so under the Stockholder Purchase Agreement

58. The Quantal valuation does not discuss the USD30 million "Warrant A" purchase, treating it, understandably, as irrelevant for the valuation of the Master Fund's investment in the UCBI USD65 million Series C preferred investments, as it is an asset already acquired by the Master Fund carrying a right to exercise within the time stipulated by Warrant A.

59. However, the other Warrant, "Warrant B" is relevant to this valuation exercise, because it is exercisable into USD35 million of UCBI common stock, and will be received when the USD65 million Series C preferred investment is made. The maturity of Warrant B is nine years from the date of the agreement (with extensions for non-registration, etc.) and the strike price is $6.02. Exercise of the Warrant may be made on a cashless basis; (that is, the net number of shares to be delivered would be less than if the Warrant were exercised by payment of cash).

60. Valuation of the Series C preferred investment and Warrant B by Quantal has not been a straightforward matter. It has been complicated especially by actions taken unilaterally by UCBI.

61. On June 17 2011, UCBI issued a press release announcing that its shareholders had approved a reclassification of its stock pursuant to which each 5 shares of UCBI's stock would be reclassified into 1 share and that this consolidation or "reverse stock-split" would be effective as of 5 pm on that day.

62. The potential detriment to the Master Fund's right of investment in UCBI became immediately apparent. Instead of the redemption price of the Series C preferred

investment and Warrant B into UCBI common stock being at the strike prices of $5.25 and $6.02 respectively, the strike prices would become $26.25 and $30.10 respectively.

63. In this scenario, UCBI would of course, also be entitled to adjust the number of specified shares and deliver to the Master Fund a "reverse-split adjusted" number of shares upon share redemption or warrant exercise.

64. The bond value of the Series C preferred investment could be substantial since it would provide a secured dividend stream of income (subject to default risks) based on the lesser of 8% or LIBOR, plus 4%. It would, however, as already noted, not be secured into perpetuity because UCBI could force the Master Fund to redeem by converting to common stock after five years. The Master Fund can assume that UCBI would exercise its conversion right as soon is it is able to do so, since doing so would extinguish the holder's ability to earn the preferred dividend premium.

65. It is in the event of that conversion that the strike price ($5.25 per share as agreed or $26.25 per share as per the reverse stock-split) carries potentially catastrophic consequences for the Master Fund investment.

66. Of course, if UCBI were to force the redemption into common stock as soon as it were able (that is: immediately upon the expiry of five years) the Net Present Value of the anticipated income stream of the bond value would also be fundamentally reduced as redemption would mean that the Master Fund would immediately surrender the future dividend stream for common stock which, from

its point of view, would have been foisted upon it at five times their actual market value.

67. Unsurprisingly, the Master Fund has not acceded to UCBI's right to impose the reverse stock-split and its attendant consequences and has (or is about to) file suit in New York to challenge it.

68. Not having as yet exercised the Stock Option (that is, for the Series C preferred investment and Warrant B), the Master Fund's law suit could, as yet, be only in respect of Warrant A. The Master Fund sees the principles to be resolved as, nonetheless, being applicable across the board so as ``to applied even now, in the context of this petition, to the Stock Option.

69. What is more, and recognising that with such a dispute in the balance, the *in specie* redemption of the Petitioner's investments – (by distribution of the FILBCI shares as carrying the value of the Stock Option) – could not truly be said to be complete, I was told by Mr. Atherton QC that the Master Fund undertakes to see the necessary litigation though to completion. This would be at its expense, so as to be able to "perfect title"(my words) in the UCBI investment for the Petitioners.

70. With such variables and uncertainties attending the Stock Option, Quantal have more recently been asked to value it based on two different scenarios, doubtless to my mind, with the Company's eye turned as well to its ability to defend this petition.

71. Insofar as the Master Fund's investment rights are concerned, the two scenarios taken by Quantal contemplate the impact of the reverse stock-split as follows:

1. UCBI delivers the number of shares specified in the shareholders Purchase Agreement ("SPA") upon exercise by the Master Fund (or assignees) of Warrant B or pursuant to redemption of the Preferred Stock (that is, at the strike price contemplated by the SPA).

2. UCBI makes an adjustment to the shares specified in the SPA and delivers a reverse-split-adjusted number of shares upon warrant exercise or share redemption. Specifically, Quantal was asked, under this, the second scenario, to consider the situation in which "reverse split adjustments" are made to the redemption and conversion prices for the Series C Preferred Stock, and for the strike price on Warrant B, which became $26.25 (current Master Fund redemption price) $60.20 (UCBI conversion price assuming what would otherwise have been a strike price of $12.04 per share after five years given current market trends), and $30.10 (Warrant B strike price) respectively.

72. Both scenarios are based on the assumption that the Warrant B exercise would be cashless.

73. By having regard to the implications of each scenario, Quantal has presented two very different valuations of the securities transferred to FILBCI as follows (as at 13 February 2012 when the closing UCBI Stock Market Price was $9.04 per share):

Scenario 1

Assets	Value
Series C Preferred Investment Right	$103,134,278
Accompanying $35 million Warrant B	32,394,861
Non-Registration Penalty (refund)	606,667
Total	136,135,806

74. I note in passing that this Scenario 1 valuation must be the basis for the value ascribed to the *in specie* distribution made by the Company (and the Master Fund) in purported redemption of the debt owed to the Petitioners. It would beggar belief to suppose that the similarity between this value and that admittedly ascribed by the Company to the Petitioners' investment is mere coincidence. This last observation carries further implications to be discussed in this judgment.

75. I return to the Quantal valuation.

Scenario 2

Assets	Value
Series C Preferred Investment Right	$39,430,100
Accompanying $35 million Warrant B	2,335,291
Non-Registration Penalty (refund)	606,667
Total	42,372,058

76. It will be immediately apparent that under Scenario 2 (and as things presently stand with the UCBI declared reverse stock-split being effective), the purported *in specie* distribution to the Petitioners would be in real terms, worthless.

77. Indeed, if they were ill-advised enough to accept and exercise the Stock Option within the deadline, their further investment of USD65 million required to do so

would immediately result in a loss of some USD23 million. Let alone the loss of their existing investment admittedly valued at least at USD136 million; which would have been lost also as part of the price of having been redeemed by the distribution of the FILBCI shares.

78. Even under Scenario 1 the position is hardly tenable. In order to acquire assets valued at USD136.13 million, the further investment of USD65 million would be required.

79. While Mr. Atherton argued that that sum of USD65 million should be added to the sum of USD136.13 million to arrive at the full value of the UCBI investment, that contention is not supported by the Quantal valuation. Rather, it is confounded by its conclusions where the valuer (at page 5) deducts the USD65 million purchase price in the process of calculating the Scenario 1 valuation of the Series C preferred investment to arrive at the value of USD103.1 million shown above.

80. The plain result then would be, that even under Quantal's Scenario 1, the Petitioners, in order to realise the UCBI investment, would be required to invest a further USD65 million to acquire assets valued at USD136.13; a net reduction in value of their investment in the Company (admittedly worth USD136 million) to USD61 million.

81. The foregoing has regard to the Quantal valuations alone. Reference to a third scenario – a UCBI value ascribed to the Series C preferred convertible stock – paints an even more dismal picture for a prospective investor. This value appears in the UCBI Notes to Consolidated Financial Statements for period ended 30

September 2011 filed with the UCBI regulator, the United States Securities and Exchange Commission. In those Notes at page 24, UCBI cites a value of USD22.2 million for the Master Fund's Stock Option, a value said to be as determined by an independent valuation firm. Accordingly, unless and until UCBI's common stock price actually exceeds USD23.95 per share – that currently ascribed by UCBI based on the reverse stock split – the Stock Option would be worth no more than USD22.2 million.

82. As this third scenario of the UCBI valuation tracks the consequences of the reverse stock-split, it may be compared directly to the Quantal Scenario 2 valuation of some USD42 million. And, if yet a fourth scenario were taken for present purposes, (as propounded by the Petitioners) the value of the *in specie* redemption of the Petitioners' investment in the Company, would still be hopelessly in the red.

83. To be more specific, the implications of the UCBI valuation for the Petitioners, if the distribution *in specie* were regarded as an effective redemption of their investments, would be as follows (according to the Petitioners):

(a) If it had been exercised on 1st April 2010 and converted immediately upon acquisition by the Master Fund, the UCBI Stock Option investment would have resulted in a holding of 18,194,905 UCBI common shares with $4.77 each (the market price at that time) – a total of USD86,789,690;

(b) As at the date of the purported redemption in kind, and allowing for the effect of the reverse stock-split, the option (if exercised and converted immediately) would have resulted in a holding of 3,638,981 UCBI shares.

(c) At a share price of $23.85 (the UCBI reverse stock-split price) these 3,638,981 UCBI shares would be worth USD86,789,696;

(d) However, at a share price of $9.04 (the current market price) these 3,638,981 UCBI shares are actually worth USD32,896,388.

84. Thus, in real terms, the "assets' deployed for the *in specie* distributions have lost more than USD53 million in value since 1st April 2010, and now have a "value" that is negative when the USD65 million required is taken into account.

85. On the foregoing examination of the differing scenarios, the conclusion is unavoidable that the Petitioners – if regarded as having had the debt due to them discharged – would have suffered massive losses.

86. Is there nonetheless, a genuine dispute about whether the debt has been validly discharged by the Company?

87. This is the first question that arises from the foregoing examination of the circumstances of the case.

88. A genuine dispute, over whether or not the Petitioners have been given an *in specie* distribution that realistically represents the value of their investment, would not be one suitable for resolution by winding up the Company. Such a dispute would be suitable for trial by way of writ.

89. But the emphasis in the context is upon the word "genuine". It is well understood, since ***Mann v Goldstein*** *[1968] 2 All E.R. 759* (per Ungood-Thomas J.) that a dispute about the existence of a debt will not justify a winding up petition for non-payment of the debt, if the Court is satisfied that the *"debt is disputed on some substantial ground (and not just on some ground which is*

frivolous or without substance and which the court should, therefore, ignore)". Further, *"it is clear that mere honest belief that payment is not due is not sufficient. There has to be a substantial ground for disputing liability to justify non-payment"* (per Harman J. in ***Re A Company** (No. 006685 of 1990) [1991] BCLC 464*). And perhaps most completely in ***Re A Company** (No. 006685 of 1996) [1997] 1 BCLC 639*, per Chadwick J. (as he then was) at page 645:

> *"The general rule under which this court refuses to entertain a petition founded on a disputed debt applies only where the dispute is a genuine dispute founded on substantial grounds; and does not preclude this court from determining – or entitle this court to decline to determine – the question whether or not there are substantial grounds for dispute."*

90. These principles, described as settled principles of practice though not of law (as they permit of a discretion to wind-up even where there appears to be a genuine dispute of the debt) are now well established in this court. See ***Parmalat Capital Finance Ltd. v Food Holdings** [2009] 1 BCLC 274* and ***Re GFN Corporation Limited** 2009 CILR 650*.

91. The Company says that there is a genuine dispute by pointing to the COM which not only permits the redemption of shareholders' investments by means of distributions *in specie*, but also permit the Board of Directors in consultation with the Investment Manager "in its sole discretion", to determine the value of the assets to be distributed (see page 25 of the COM).

92. Moreover, said Mr. Atherton, the Petitioners cannot have it both ways: If, as they say, the *in specie* distribution is worthless, as the assets distribution represent the great majority in value of the assets of the Fund structure, then the Petitioners must accept that they have in fact, as shareholders, made a bad investment. They cannot ascribe a negative value to a very significant asset of the Company while asserting that they remain entitled to a hugely valuable distribution; *in specie* or otherwise.

93. Further, that the Directors have not, as alleged, "cherry picked" assets which they seek to foist upon the Petitioners.

94. And further still, that the Petitioners' arguments in support of the Petition is in stark contrast to their own earlier public acknowledgement of their acceptance (as published in the *New Orleans Times – Picayune)* that the Company had assets to satisfy their redemptions.

95. This, Mr. Atherton emphasised, was after the Petitioners had been allowed access to the books and the records of the Company. The position now taken by the Petitioners therefore arises because they consider that as shareholders in the Company, they have made a bad investment.

96. Finally, that the Petitioners can point to no provision in the COM (or for that matter in the articles of the Company) that would permit them to insist upon a right of acceptance – prior to distribution – either of the nature of the assets used for distribution *in specie* or of their value.

97. For their part, the Petitioners submit that there can be no genuine dispute: that it is fallacious to assert that the debt due and owing pursuant to their redemption

requests has been paid. Moreover, they are in no sense any longer to be regarded as shareholders, their names having been or are bound to be removed from the Register of Members (citing ***Strategic Turnaround** 2008 CILR 447 C.A.*)

98. Further, that they remain creditors of the Company for a substantial sum and the Company is clearly unable to pay its debts as they have fallen due. The asserted rights and obligations purportedly transferred to FILBCI are, to all intents and purposes worthless and the notion that there is a bona fide dispute in relation to the debt is entirely fanciful. In such circumstances, the Petitioners are entitled to a winding-up order *ex debitio justitiae* (citing dicta from ***Re Pritchard** [1963] All E.R.* per Upjohn LJ *at 881c* and from ***In Re Western of Canada Oil Co.** (1873) L.R. 17 Eq. I*).

99. To support the averment that the Company is unable to pay its debts as an element of the statutory requirements of the petition, Mr. McDonough made further specific points. He pointed out that while the Company has repeatedly argued that a winding-up would be inappropriate for not being in the interest of the Petitioners or the Company itself, at the same time the Directors are clearly the authors of the current situation: pursuant to its articles the Company had the right, inter alia, to suspend the redemption of any class or series of Participating Shares, but for reasons best known to them, the Company never chose to do so. The Company was unable to satisfy the First MERS Request and the First FRS Request by way of cash payments (instead purporting to satisfy those requests by assigning promissory notes). Further, it must be assumed that the Company was unable to invest USD65 million in order to exercise the Stock Option prior to 26th

May 2011, and, instead, was forced to pay a USD3.25 million penalty to UCBI (a basis upon which the right to exercise has been extended to 26 May 2012).

Conclusions

100. In support of the first ground of the Petition, Mr. McDonough advanced further arguments of a technical nature which I think I only need mention in passing. They include that the distributions *in specie* were, in any event, non-complaint with the COM because they were required to be made from "assets of the Fund" which, by implication, must mean assets held by the Fund at the date of redemption. As the assets purportedly distributed – the FILBCI shares – did not even come into existence until circa 13 February 2012 when FILBCI was incorporated, those assets do not meet the requirements of the COM.

101. This could be a decisive point but for the need for the Court to consider, in the exercise of discretion, the more fundamental question whether the Petitioners have actually received value for the debts due to them pursuant to their Redemptions and so have the right to petition.

102. I conclude that there can be no genuine dispute about whether the Company owes a very substantial debt to the Petitioners which has not been satisfied.

103. The starting point for such a conclusion is, of course, the Law itself. As relevant to the first ground of the Petition, section 92 reads:

> *"A company may be wound up by the Court if ...*
> ...
> *(d) The company is unable to pay its debts."*

104. And section 93:

> *"A company shall be deemed to be unable to pay its debts if–*
>
> *(a) a creditor by assignment or otherwise to whom the company is indebted at law or in equity in the sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under his hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor."*

105. It will be immediately apparent from those relevant extracts from the Law, that the question whether a company is unable to pay its debts when due, is not to be answered by reference only to a consideration of whether it has available or could have available to it, assets capable of paying or discharging its debts. The test applicable here is one to be measured against the present ability of the company to pay the debt when due (the so-called "cash flow" test); not that proposed by the Company in its response to the petition, by reference to the overall state of its assets (the so-called "balance sheet" test).

106. Therefore, having already concluded that there is a very substantial debt due to the Petitioners, it would also follow as a matter of the Law, that they have the right to petition for the winding-up of the Company on the basis that it is unable to pay its debts.

107. I recognise, however, that that conclusion does not avoid the need to explain my resolution of the first issue that underpins the petition; which is whether the purported distribution *in specie* provided value sufficient to discharge the debt.

108. First, the distribution *in specie* of the FILBCI shares could have been of no real consequence unless those shares had real underlying value. But such value, even that purported by the Company itself, can lay no existing claim to a substantial proprietary interest in UCBI. What the Company can claim (treating the Company for these purposes as the Master Fund) is only the right to exercise the Stock Option within the time allowed by UCBI; that is, until 26th May 2012.

109. The "right" the Company has, seen in that light, could in no real sense therefore be regarded as itself being worth anything resembling the very substantial debt due to the Petitioner.

110. In order to acquire this right to exercise the Stock Option, the Company/Master Fund would have expended perhaps only the USD3.25 million, paid by way of penalty to UCBI when it failed to exercise the Stock Option on 26th May 2011. Paid as a penalty, perhaps not even that amount can properly be taken as defining the value of the "right" to exercise the Stock Option. The right of exercise remains entirely inchoate until it is exercised.

111. When this asset (the "right" so defined) of the Company is viewed in the context of a Fund structure contended to be worth USD37 million in excess of the USD136 million attributed to assets already distributed; the selection and valuation of this asset for use to satisfy a distribution *in specie* admittedly worth USD136 million, is bound to raise among many others, the question why select this asset; and is the selection reflective of a bona fide exercise of discretion by the Directors?

112. No probable answer appears to suggest that the Directors were simply and genuinely seeking to give true commercial efficacy to the contract between the Company and the Petitioners – that which governs the Redemption of their shares – in a way that the rules of construction of such contracts would permit.

113. The requirement that a contract must be construed in a way that gives it commercial efficacy is long established: ***The Moorcock** [1886-90] All E.R. Reprint 539.*

114. It is a requirement that could not, in my view, permit what these Directors have purported in exercise of their discretion to do, by way of the distribution *in specie.*

115. This requirement of commercial efficacy must all the more be imposed where the contract carries statutorily binding, not only ordinary contractually binding effect; which is how the Law regards the constitutional instruments of a company that it governs. By this I mean of course, the widely accepted principle that the articles and COM are the constitutional documents of a company such as the Company that comprise the contract between the Company and its investors.

116. In the modern world, while the approach to the construction of contracts will allow the words used in the contractual documents to speak for themselves, the words used must ultimately be understood to bear the meaning which they would convey to a reasonable person against the relevant background of the transaction entered into. (See ***Mannai Investment Co. Ltd. v Eagle Star Life Ass. Co. Ltd. [1999] A.C. 749*** and ***Investors Compensation Scheme Limited v West Bromwich Building Society [1988[1 W.L.R. 896*** – the former as already followed by this

Court in ***Bank American Trust and Banking Corp. Cayman) Limited v Trans-World Telecom Holdings Limited et al 1999 CILR 110)***

117. Thus, when approaching the question of what meaning is to be given to the words used in the COM, it would not be reasonable to conclude that they vest in the Directors an exclusive and absolute discretion to distribute *in specie,* assets which could not realistically be expected to give commercial efficacy to the contractual obligations owed to the Petitioners.

118. This is a construction which can only be reinforced by the consideration that the Directors (like any other corporate officers) owe their shareholders and investors a fiduciary duty of care to act in good faith and the terms of the corporate contracts will not be construed as having impliedly swept that duty aside: ***In Re Bristol Fund 2008 CILR 317.***

119. One is compelled to the conclusion from the circumstances examined above, that no commercial efficacy was sought by the Directors to be given to the contract between the Company and the Petitioners. The asset chosen for the distribution *in specie* to them is commercially worthless when compared to the value of the debt it purports to redeem. It did not discharge the debt due to them for which they had served their statutory demand in keeping with section 93(a) of the Law.

120. My conclusion on the first ground of the Petition, based on the Company's patent failure to pay the debt due to the Petitioner, could be regarded as avoiding the need to decide on the second ground – that is: that it is in any event just and equitable that the Company be wound up.

121. Nonetheless, I record that I would grant the petition on this ground as well.

122. Apart from anything else, this decision would be justified (and as a matter of law sustainable:. ***In Re Strategic Turnaround*** (above) whether the Petitioners stand as creditors or as shareholders.

123. Quite apart from its deemed inability to pay its debts arising from the conclusions above, on any view, the Company is very doubtfully solvent.

124. Its admission in arguments that it (and by extension the Master Fund) has "surplus" net assets of some USD37 million after the purported redemption of the Petitioners, is very telling. This is so because that admission was made in the context of the Company's attribution of value to the assets sought to be used for the redemption at USD136 million. Those "assets" as discussed above, are virtually worthless, unless there is available immediately USD65 million to exercise the Stock Option and even then would be of highly doubtful advisability as an investment.

125. Viewed objectively from the point of view of reasonable shareholders who invested USD100 million, it is clear that it is no longer possible for the purposes for which the Company was formed – to maximise shareholders' investments – to be achieved. Put in terms more usually adopted: there is a reasonable basis for apprehension on the part of the Petitioners as investors in the Company, that its substratum has failed. I say this against the background of the further consideration, which is that, in the Company, the Petitioners have been acknowledged to hold some 70% of the assets and so hold (or have held) a clear majority interest.

126. The test whether the substratum has failed is one which in my view would therefore be satisfied whether the more established dictum of ***In Re Suburban Hotel Company (1867) LR 2 Ch App 737*** or that of Jones J. in ***Belmont Asset Based Lending Ltd. Cause FSD No. 15 of 2009, 21 January 2009 [2010 (1) CILR 83]***, is adopted (both helpfully discussed by Bannister J. in ***Aris Multi-Strategy Lending Fund Ltd and Quantek Opportunity Fund Ltd.; Claim No. BVIHCOM 2010/0129)***. The discussion centres around whether a petitioner needs to show that attaining the objectives of the subject company is "no longer possible" or whether it needs only be shown that the objectives have become "impracticable".

127. As a matter of the requirements of the Law, such considerations as those I have identified above, justify a petition to wind up on the just and equitable ground, whichever of those tests is applied.

128. The Petition is granted, as are the prayers for relief pleaded in it.

Hon. Anthony Smellie
Chief Justice

Judgment delivered on 18th April 2012
Written Judgment released for publication on 23rd April 2012