

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)**

CLAIM No: BVIHC (COM) 2018/0172

BETWEEN:

**(1) SUMITOMO MITSUITRUST (UK) LTD
(2) STERLING TRUST (CAYMAN) LTD
(3) ZAM ASSET FINANCE LTD
(4) ZAM SPECIALIST OPPORTUNITY LIQUIDATING STAR TRUST**
Claimants
and
SPECTRUM GALAXY LTD
Defendant

Appearances:

Mr. Peter McMaster QC and Mr. Frazer Mitchell of Appleby for the Claimants
Mr. Tim Prudhoe, with him Mr. Timothy de Swardt and Mr. Merrick Ricardo
Watson of Kobre & Kim (BVI) LP for the Defendant

2021: February 8-12, 25-26
April 14

JUDGMENT

[1] **JACK, J [Ag.]:** The effects of the global financial emergency of 2008-09 have not yet played out. The current case concerns investments totalling \$15,226,000 made by the claimants between 1st September 2006 and 1st July 2007 into a fund (“the Fund”) originally called the MG Collateralised Debt Fund, but now called the MG Secured Debt Fund. Much of the money has been lost.

- [2] The claimants are all companies in the stable of Zen Asset Management. The first and second claimants are beneficially owned by the third and fourth claimants. I shall call the claimants collectively “ZAM”.
- [3] The purpose of the Fund was to invest in mezzanine debt secured on real estate development projects. Although other originators were possible, the debt instruments were in fact all sourced by Jericho State Fund Consulting LCC (“Jericho”). In turn Jericho was responsible for controlling, monitoring and servicing the loans. The Fund was created as the offshore counterpart to an onshore investment Fund in the United States with the same objectives called the Jericho All-Weather Opportunity Fund. Jericho was a part of the business of Magnum US Investment Inc (“Magnum”).
- [4] The defendant (“Spectrum”) is a BVI company incorporated on 21st November 1995. (It was originally called the Magnum Focus Fund Ltd, but changed its name shortly afterwards.) It was established as a limited liability open-ended investment company: Memorandum of Association Art 4.1. Shares in Spectrum are divided into sponsor shares and twenty classes of participation shares: *ib* Art 7. One of these latter classes comprises the Fund. Investors in the Fund are allocated shares in that class of participation shares. These shares are, as is normal for an open-ended investment company, redeemable.

Overview of the facts

- [5] ZAM’s initial investments in the Fund comprised \$3 million on 1st September 2006 and \$1 million on 1st October 2006. On 30th October 2006 Spectrum issued a side letter to another investor, KBC Investors Ltd. I shall call this company and its assignee, Xena Investments Ltd (“Xena”), “Pentagon”, after the name of the fund on behalf of which it was investing. After the giving of the side letter to Pentagon, ZAM invested further sums as follows: 1st November 2006 \$502,000 and \$3,514,000, 1st April 2007 \$1½ million, 1st May 2007 \$2 million, 1st June 2007 \$3 million and 1st July 2007 \$¾ million. (There is an issue on the pleadings as to \$2,000 of the \$502,000 invested on 1st November 2016 and the whole of the

\$3,514,000 invested on the same day.) The result of these investments by ZAM is that the first claimant holds 17.2 per cent of the Fund and the second claimant holds 7.5 per cent.

- [6] The Pentagon side letter gave Pentagon the right to redeem on the Class Redemption Dates, but allowed Pentagon to give only 60 days' notice of its intention to redeem. Mr. Cremer, who gave evidence for ZAM and was not challenged on this aspect of his evidence, explained in paras 62 to 64 of his witness statement that:

“the effect of a side letter giving preferential redemption terms is to subordinate ZAM's shares to those held by Pentagon and anybody else with such terms. That is because in a situation where investors in the Fund decide that they want to exit the Fund, Pentagon can exit ahead of ZAM (and others). That is capable of affecting ZAM detrimentally by making it harder for ZAM to exit at all. This risk increases (a) as the fund becomes less liquid and (b) as the stake of Pentagon relative to the Fund overall becomes larger.

Being able to redeem first is potentially detrimental to other investors because in an open ended fund like this one, when an investor redeems, the Fund has to raise money by selling assets or otherwise to make the redemption payment. When the Fund is not liquid that becomes (or may become) more and more difficult as investors successively exit the Fund. When an investor with a significant stake in a fund that is not liquid has the ability to exit first and uses it, then there is a real prospect that the fund will have exhausted its liquidity to satisfy that investor's redemption leaving the other investors locked in the fund.”

- [7] On 24th December 2007, ZAM placed a redemption request for \$4 million on 30th June 2008. On 30th April 2008 Pentagon placed a redemption request for its full investment of \$21 million with the same redemption date of 30th June 2008. When 30th June 2008 arrived, the net assets of the Fund were about \$87 million, but the liquid assets were much less. Neither ZAM nor Pentagon were paid.

- [8] These dates need to be seen against the commencement of the Global Financial Emergency, which I described as follows in **Van Geens v Jyske Bank (Gibraltar) Ltd**:¹

“On 13th September 2007 depositors queued to withdraw their savings from Northern Rock. It was the first run on a British bank since 1866. The flames of the economic catastrophe which was to engulf the world claimed its first victim. The firestorm spread to the United States of America. On 15th March 2008 Bear Stearns was rescued by JP Morgan. The fire worsened. Over the weekend of 13th and 14th September 2008, Hank Paulson, the United States Treasury Secretary, decided that government money would not be extended to bail out Lehman Brothers. On 15th September 2008 the firm filed for bankruptcy. This turned the blaze into an inferno.”

- [9] On 30th September 2008 Spectrum suspended redemptions in the Fund. There is no dispute that it was entitled to do so. Various of the borrowers to whom the Fund had extended loans had, as a result of the financial emergency, been unable to service or refinance the loans made by the Fund. The effect of the suspension was this. ZAM had a fixed claim for \$4 million due on 30th June 2008 and a continuing share in the Fund representing the balance of the investment of \$11,266,000. Pentagon had a fixed claim for \$21 million due on 30th June 2008. If Pentagon had had to give six months’ notice of redemption, the effect would have been that the earliest it could have redeemed would have been 31st December 2008, after the suspension of redemptions. Pentagon would have had only a share of the (probably rapidly diminishing) value of the Fund, rather than a fixed claim for \$21 million. ZAM would have had a claim to its \$4 million to be paid from the liquid resources of the Fund, whereas in the events which have happened, its claim is diluted by Pentagon’s entitlement to its \$21 million.

The constitutional documents of the Fund

- [10] Art 8.4(c) of the Memorandum provides:

¹ Supreme Court of Gibraltar, case no 2012-G-179 (judgment of 4th December 2014, unreported) at para [1].

“The following actions may not be taken without the sanction of a special resolution of the holders of the Class of Participating Shares concerned, namely:

- (i) modifying or abrogating the rights attaching to the class of Participating Shares of which they are the holders; and
- (ii) creating or issuing a new class of shares having rights prior to or preferential to the Class of Participating Shares of which they are the holders in respect of assets attributable to such Class.”

[11] Arts 9.3 and 9.4 of the Memorandum provide:

“9.3. Except as otherwise provided in this Memorandum or the Articles, the Sponsor Shares and the shares in each Class of Participating Shares in the Company all rank *pari passu* in all respects.

9.4. The Sponsor Shares and each Class of Participating Shares shall have such additional designations, powers, preferences, rights, qualifications limitations and restrictions not inconsistent herewith as the Board may in its discretion determine provided that all such designations, powers preferences, rights, qualifications, limitations and restrictions shall be identical within each Class.”

[12] The Articles of Association, so far as relevant, provide:

“4. Subject to the provisions of the Act, the Memorandum and these Articles, any share may be issued on the terms that it is at any time redeemable, or that at the option of the company is liable to be redeemed, and the terms and matter of redemption of the said redeemable shares shall, unless fixed by the provisions of the Memorandum or these Articles, be fixed by a resolution of the Board.

5. Any shares may be issued on such terms and conditions and with such rights, privileges, conditions or restrictions which are not inconsistent with the Memorandum or these Articles as the Board may from time to time determine, provided that rights, privileges, conditions or restrictions previously attaching to any shares or any Class of shares shall not be modified or abrogated otherwise than pursuant to the Memorandum and these Articles. The rights conferred upon the holders of the shares of any Class issued with preferred or other rights shall not, unless otherwise expressly provided by the term so issue of the shares of that Class, be

deemed to be varied by the creation or issue of further shares ranking pari passu therewith. The holders of the shares of the company shall not have any pre-emptive right to purchase or subscribe for any shares of the company, unless expressly provided by the terms of the issue of the shares of that Class.

...

15. ...[T]he Company shall, on receipt... of a Redemption Request in relation to any class of Participating Shares, redeem or repurchase the number of Participating Shares of that Class held by the member making the Redemption Request as specified therein at the appropriate Class Redemption Price as determined in accordance with these Articles, provided that:

...

15.2 ...the Redemption Request must be received by the Administrator at least one month (or such longer or shorter period as the Board may determine) before the Class Redemption Day on which the redemption is to take place...

15.8 subject as hereinafter provided, the Board may redeem Participating Shares in any Class other than on a Redemption Day (but otherwise in accordance with these Articles), if the Board is of the opinion that the Class Redemption Price in respect thereof is not material in relation to the assets of the Company and that no prejudice would be suffered by the Company or the other holders of Participating Shares in that Class by effecting such redemption.

...

[Art 33 of the Articles gives the Board as power 'in its absolute discretion' to suspend determination of the Class Net Price in various circumstances, including where no accurate or reliable valuation of the company's investments was possible or:]

33.5 During any period when insufficient liquidity is available to the company in respect of any particular Class of Participating Shares and the Board is of the opinion that any disposal of Investments by the company might seriously prejudice the holders of such Class of Participating Shares.

...

75. Subject to the provisions of the Act, the rights, privileges and conditions attached to any Class of shares shall not be modified in any way or abrogated except by special resolution of the members of that Class."

- [13] By Share Class Particulars dated 1st January 2006, the board determined that the Fund "comprises a class of shares of Spectrum... The Fund's shares are offered on the basis of the Share Class Particulars and the current Private Offering

Memorandum with respect to Spectrum Galaxy Fund.” I shall call the Offering Memorandum the “OM”.

[14] The Class Redemption Dates were 31st March, 30th June, 30th September and 31st December. The Particulars provided that after an initial twelve month lock-up period, shares might be redeemed on six months’ notice expiring on a Class Redemption Date.

[15] The OM contained what Spectrum argued was a “whole contract” provision in these terms:

“Participating Shares... in the Fund will be offered on the basis only of the information contained herein and such additional documents(s), if any, as may be issued by the Fund expressly in conjunction with the issue of this Private Offering Memorandum, which shall be deemed to form part of this Private Offering Memorandum. Any further information or representations made by any dealer or other person must be regarded as unauthorised and must accordingly not be relied upon. The delivery of this Private Offering Memorandum or the offer, issue or sale of shares shall not in any way constitute a representation that the information and representations given herein or in such documents are correct as at any time subsequent to the date of such documents.”

The pleaded claim and defence

[16] ZAM argues that the giving of the Pentagon side letter was a breach of the Memorandum and Articles. Firstly, Art 8.4(c)(ii) of the Memorandum required a special resolution of the existing shareholders in the class of shares comprising the Fund before the Pentagon side letter could be issued, because the effect of the side letter was to make Pentagon’s shares in the Fund a separate class. Secondly, Art 8.4(c)(i) prevented a change in the rights of ZAM without a special resolution. The rights which were potentially altered by the Pentagon side letter were ZAM’s rights under Arts 5 and 75 of the Articles of Association.

- [17] ZAM accepts that these claims for breach of contract (and what is pleaded as the preferential terms warranty) are barred by the **Limitation Act 1961**.² Likewise it accepts that any claims in respect of negligence are statute-barred. Instead ZAM claims relief for unfair prejudice under section 184I of the **Business Companies Act 2004**.³ It argues that the breaches of contract (even though statute-barred) can be relied on to show unfair prejudice. It also seeks rescission for misrepresentation of the contracts under which it made investments of \$11,266,000 into the Fund after 30th October 2006, when the Pentagon side letter was issued. I shall discuss below the way in which there is said to have been an actionable misrepresentation.
- [18] Spectrum denies that issuing the Pentagon side letter was a breach of either the Memorandum or the Articles. It says that, if (contrary to Spectrum's primary case) there was a breach of contract, then the expiry of the limitation period means that ZAM can no longer, or should no longer be able to, rely on the breaches to found an unfair prejudice claim. It denies that there was any misrepresentation in connection with the Pentagon side letter and that, even if there were, the representation would not have been actionable. Further any claim of misrepresentation is barred either by the **Limitation Act** or in equity on analogy with the **Limitation Act** periods of limitation or by the equitable doctrine of *laches*.
- [19] Lastly, both sides prayed various matters in aid as going to the merits. I shall discuss these when they arise, but at least as ultimately put to me, the parties did not argue that these affected the respective legal claims and defences directly.

The chronology

- [20] Magnum started to market the Fund in 2006. On 7th April 2006 Pawel Majewski ("Mr. Majewski") of ZAM emailed Magnum to ask for details of the Fund. The same day Nick DaCosta of Magnum replied attaching a copy of the brochure for

² No 20 of 1961, Revised Laws of the Virgin Islands.

³ No 16 of 2004, Laws of the Virgin Islands.

the Fund. Later that day, David Friedland ("Mr. Friedland"), the president of Magnum, sent Mr. Majewski a generic due diligence questionnaire dated March 2006.

- [21] ZAM at this time was a comparatively new investment company with only a limited staff. The main investment manager was Glen Cremer ("Mr. Cremer"). The marketing for ZAM was done by Paul Steers ("Mr. Steers"), who described himself as ZAM's principal. ZAM was negotiating with Merrill Lynch, the well-known American bank, for Merrill Lynch to obtain investors for a fund of funds to be managed by ZAM.
- [22] ZAM reached an agreement with Merrill Lynch on 10th June 2006. One of the matters on which Merrill Lynch insisted was that investments made by ZAM on behalf of Merrill Lynch clients would not be the subject of a "hard lock". Often investment funds require investors to commit to keeping an investment in place for a minimum period of time before being able to redeem the investment. Spectrum's Particulars for the Fund included such a hard lock for the first twelve months of an investment.
- [23] On 8th August 2006 Spectrum made an agreement with a Mr. Frohlich of Coastal Capital Ltd, an Australian company, for an investment of US\$300,000 in the Fund on terms that special redemption terms of not less than three months' notice after a twelve month lock-up.
- [24] On 22nd August 2006 Magnum returned a due diligence questionnaire served on Spectrum by ZAM. At para 3(vi) of the questionnaire ZAM asked: "Are there any special arrangements for different investors (e.g. side letters with preferential terms), including, without limitation, those relating to fees, transparency or liquidity?" The answer given was: "One investor has the ability to withdraw on 3 months' notice provided there is sufficient liquidity in the fund." ZAM rely on this answer as constituting what it pleads as the "preferential terms representation".

- [25] As a result of Merrill Lynch's requirements, ZAM negotiated with Spectrum for a soft lock provision applying to the Fund. On 23rd August 2006, the following day, there was a telephone conversation between Mr. Steers and Mr. Cremer for ZAM and Mr. Friedland for Spectrum. In this call, ZAM alleges that Mr. Friedland said that all investors would be given a soft lock coupled with 120 days' notice and that "only the investor... mentioned in the answer 3(vi) of ZAM [questionnaire] would receive more favourable terms and that the more favourable terms would be restricted to US\$1 million." This is pleaded as the "preferential terms assurance". Whether this assurance was given is hotly disputed. The preferential terms assurance and the preferential terms representation are also pleaded as the contractual "preferential terms warranty".
- [26] It was agreed that redemptions during the initial twelve month period would be permissible, but only on payment of a three per cent early redemption fee, and that redemptions on 120 days' notice would be possible after the end of the soft lock period. The term was included in an email dated 25th August 2006, where Scott Svirsky ("Mr. Svirsky") of Jericho explained: "We were planning on changing our documents when our credit facility was in place to reflect the... terms" which are then set out. The arrangement was confirmed in two letters both dated 30th August 2006 ("the ZAM side letters"). The first side letter did not mention the 120 day notice period, but the second did. (In fact, ZAM never relied on either the soft lock provision or the reduced notice period.)
- [27] Subsequently Spectrum gave a number of different investors preferred terms in the form of side letters, however, I only need to consider the Pentagon side letter issued on 30th October 2006 in order to decide the current action. The other side letters raise no different issues. If ZAM cannot win in relation to the Pentagon side letter, it cannot win in relation to the other side letters.
- [28] After 30th June 2008, when the Fund was unable to pay ZAM or Pentagon, the Fund was suspended on 30th September 2008. On 18th July 2008 Mr. Friedland emailed ZAM to say that, because Pentagon had redeemed over \$20 million

effective on 30th June 2008. As a result, he said, the Fund had insufficient liquid funds to redeem ZAM's \$4 million redemption.

[29] There was initially a standstill agreement between Pentagon and Spectrum. After this elapsed, however, Pentagon issued an application in this Court for the appointment of a liquidator. That application was granted by Bannister J on 27th July 2010.⁴ The judge accepted that Xena (as assignee) had standing to apply to wind up Spectrum, relying on his own decision in **Western Union International v Reserve International Liquidity Fund Ltd**.⁵ He appointed joint liquidators over Spectrum. The **Western Union** case, however, was subsequently disapproved by the Court of Appeal in **Westford Special Situations Fund Ltd v Barfield Nominees Ltd and others**.⁶ An attempt by Mr. Friedland to end the liquidation was refused by Bannister J on 6th June 2011.⁷ An appeal out of time against Bannister J's original order of 27th July 2010 succeeded, on the basis that a person entitled to redemption proceeds lacked standing to apply to appoint a liquidator.⁸ Accordingly, the joint liquidators were discharged from acting.

[30] The management of the Fund was thus put back in the hands of Mr. Friedland. ZAM says that persons and companies associated with Mr. Friedland are claiming substantial fees from the Fund. Mr. Friedland, Mr. Svirsky and an associate of Mr. Friedland called Chwatt, were earning \$75,000 a month from the Fund. The investment manager was earning \$300,000 a year and the administration company \$96,000. Both were associated companies. The Fund had taken loans at a high rate of interest from yet another associated company with interest payable of between \$1.4 and \$1.7 million. This was to be contrasted, Mr.

⁴ BVIHC (COM) No 83 of 2010, unreported.

⁵ [2010] ECSCJ No 26, BVIHCV 2009/0322 (determined 26th January 2010).

⁶ [2011] ECSCJ No 61, HCVAP 2010/0014 (determined on 22nd September 2010 with reasons given on 28th March 2011)

⁷ [2011] ECSCJ No 345, *sub nom* Friedland v Xena Investments Ltd and others.

⁸ [2012] ECSCJ No 221, *sub nom* Spectrum Galaxy Fund Ltd v Xena Investments Ltd, HCVAP 2011/040 (determined 7th April 2012, with reasons on 23rd July 2012)

McMaster QC said, with the failure to pay even a nickel, still less a dime, to ZAM and the other investors in the Fund.

- [31] Although Mr. Friedland largely accepted that there was an entitlement to those sums, he said that in fact many of the fees etc were not paid, because the Fund lacked liquidity. Although the accounts of the Fund suggested that there were substantial assets (at one point of \$90 million), in fact, he said this was not the case. The real estate developments which had been foreclosed were very difficult to sell and it was doubtful if they were worth anything like the sums at which they stood in the accounts. The figures for assets values in the accounts were historic figures, not anything based on up-to-date valuations. There had been no purpose incurring valuers' fees.
- [32] Although ZAM complain about these matters, they are not pleaded allegations made as part of the legal claims made in this action against Spectrum. (Whether they could have afforded a ground for the liquidation of Spectrum on the "just and equitable" ground was not an issue before me.) Instead they were put forward as part of the general merits of ZAM's position.
- [33] Whilst Spectrum was in liquidation, the joint liquidators produced two reports. Spectrum says that the first report dated 4th October 2010 should have put Mr. Cremer and ZAM on notice of the fact that Pentagon had been able redeem early. I shall consider this issue later.
- [34] On 22nd December 2015 the current third and fourth claimants issued proceedings in New York against Spectrum. Those proceedings were dismissed without prejudice on jurisdictional grounds. They were recommenced in Florida, where an issue was raised as to whether the proceedings were a derivative action which required permission of this Court. Such permission was subsequently sought but

refused by Kaye J on 27th April 2017.⁹ The Florida proceedings thereafter did not proceed.

[35] In the course of the proceedings before Kaye J, however, in 2017, Mr. Friedland revealed the terms of the Pentagon side letter. It is common ground that this was the first time Mr. Cremer or anyone else at ZAM actually saw the letter, but Spectrum allege ZAM should have been aware of it, or at least on notice of it, from the first liquidators' report.

[36] The current proceedings were issued on 5th October 2018.

The preferential terms assurance

[37] Was the preferential terms assurance given on 23rd August 2006? If it was, did Mr. Cremer rely on it? Mr. Prudhoe submits that the exchange of emails on 25th August is inconsistent with the conversation which was alleged to have happened on 23rd August. He points out that there is no contemporaneous documentation of what was said on 23rd August. The only evidence I heard was from Mr. Cremer on ZAM's behalf and Mr. Friedland on Spectrum's behalf. Mr. Prudhoe submitted that I should draw **Wisniewski** inferences¹⁰ against ZAM from their failure to call Mr. Steer. It was, Mr. Prudhoe submitted, inherently improbable that Mr. Cremer could remember this conversation nearly a decade and a half later.

[38] In considering which evidence to believe I have well in mind the modern approach to evidence, which I set out at length in **IsZo Capital LP v Nam Tai Property Inc and others**¹¹ at paras [75] to [79]. (See also **Re Mumtaz Properties Ltd.**¹²) However, in the absence of contemporaneous documentary evidence of the 23rd August conversation, I have to do the best I can with the oral testimony of Mr. Cremer and Mr. Friedland.

⁹ Re Spectrum Galaxy Fund Ltd; Sumito [sic] Misuitrust (UK) Ltd and others v Spectrum Galaxy Fund Ltd BVIHC (COM) 118 of 2016.

¹⁰ See Wisniewski v Central Manchester Health Authority [1998] PIQR P324; [1998] Lloyd's Rep Med 223.

¹¹ [2021] ECSCJ No 478, BVIHC (COM) 2020/0165) (determined 3rd March 2021).

¹² [2011] EWCA Civ 610, [2012] 2 BCLC 109 at paras [12] and [14].

- [39] In assessing the testimony of each man, I have to remember that Mr. Cremer has very little financial interest in the matter. ZAM has been wound down. The investment in the Fund is one of the few remaining assets which will stand to be distributed to investors. By contrast, Mr. Friedland, through his various companies, is, at least potentially, receiving substantial fees for managing the remaining assets of the Fund. (The loans which defaulted were the subject of foreclosure, whereby Spectrum recovered possession of the land. At any rate the bulk of the underlying real estate has not been sold and still needs to be managed.)
- [40] I prefer the evidence of Mr. Cremer to that of Mr. Friedland. Mr. Cremer was an impressive witness with a good grasp of detail. I accept his evidence that the terms of redemption were a key issue for him. It is therefore more probable, even after the passage of time, that he would remember the preferential terms assurance. By contrast Mr. Friedland often had to be pressed to give a straight answer to questions and was generally a less satisfactory witness. As to Mr. Prudhoe's point on the 25th August exchanges being redundant, assuming matters had been substantially settled on 23rd August, there is in my judgment no real inconsistency. Work still needed to be done to agree the ZAM side letters. Mr. Svirsky had not participated in the 23rd August discussion, so inevitably there would need to be some going over matters already discussed.
- [41] Further I do not accept Mr. Friedland's evidence that he discussed the Pentagon side letter with Mr. Cremer in the period 2008 to 2013. This allegation only appears in Mr. Friedland's second witness statement. Given the importance of the allegation its absence in his first witness statement is significant.
- [42] As to the **Wisniewski** point, Mr. Steers had long since left ZAM. There was no very obvious way to compel him to give evidence on ZAM's behalf. In my judgment his absence merely leaves a blank in the evidence. It would be wrong to make assumptions against ZAM by reason of its failure to call him.

[43] I find as a fact that the preferential terms assurance was given by Mr. Friedland on Spectrum's behalf. I further find that Mr. Cremer relied on it in deciding to make all the investments ZAM made into the Fund.

Is the preferential terms assurance actionable?

[44] That, however, leaves the question: is the preferential terms assurance actionable? Mr. McMaster QC accepts that the misrepresentation on which he relies was an innocent misrepresentation. ZAM makes no allegation of fraud.

[45] Here it is necessary to note that the **Misrepresentation Act 1967** (UK)¹³ is not part of the law of this Territory. Section 1 of the 1967 Act provides:

“Where a person has entered into a contract after a misrepresentation has been made to him, and—

(a) the misrepresentation has become a term of the contract; or

(b) the contract has been performed;

or both, then, if otherwise he would be entitled to rescind the contract without alleging fraud, he shall be so entitled, subject to the provisions of this Act, notwithstanding the matters mentioned in paragraphs (a) and (b) of this section.”

[46] This Act increased the scope for claims in respect of innocent misrepresentation very substantially, but only in England and Wales. The ability at common law to obtain a remedy for innocent misrepresentation was very circumscribed. At common law, if an innocent misrepresentation was incorporated as a term of a contract, then the aggrieved party's remedy was limited solely to breach of contract. As Branson J said in **Pennsylvania Shipping Co v Compagnie Nationale de Navigation**:¹⁴

“The first matter for consideration is whether representations which have induced a contract remain a ground for setting that contract aside although they have been embodied in the contract and become part of its

¹³ 1967 c 7.

¹⁴ [1936] 2 All ER 1167 at p 1171.

terms. The point appears never to have been decided, which is perhaps not surprising, considering that normally the remedy of the injured party for breach of the contract would be fuller than it would be if he were confined to rescission. In fact, it only becomes material in the present case on the question whether the arbitrator ever got jurisdiction to decide between the parties. Light is thrown upon it in the discussion of the distinction between representations inducing a contract and terms of a completed contract in **Anson on Contract**.¹⁵ It is there pointed out that at common law if an innocent misrepresentation did not afterwards become part of the contract its untruth was immaterial. In such a case equity might intervene to avoid or rescind the contract. But where the representation has been embodied in the contract, there the courts of common law could deal with it according to whether it was a condition entitling the injured party to repudiate the contract or a warranty giving rise only to an action *ex contractu* for damages. The representation thus becomes merged in the higher contractual right, and there was no need to resort to equity for rescission. The fusion of law and equity does not affect this result, as **Anson** correctly states at p 183:

‘It is perhaps well to add that the **Judicature Act**¹⁶ has not of course affected the common law rules regarding an innocent representation which has become a term of the contract, but the further discussion of this matter falls under the subject of breach of contract. The equitable remedy of rescission merely supplements these rules, as it can provide for the case, to which they did not apply, of an innocent misrepresentation which is not a term in the contract.’

The plaintiffs cannot get rescission of the contract on the ground of misrepresentation inducing it.”

[47] The English Court of Appeal accepted the same proposition in **Leaf v International Galleries (A Firm)**, a case concerning the sale of (what at least purported to be) a painting of Salisbury Cathedral by John Constable:¹⁷

“There was a term in the contract as to the quality of the subject-matter: namely, as to the person by whom the picture was painted — that it was by Constable. That term of the contract was, according to our terminology, either a condition or a warranty. If it was a condition, the buyer could reject the picture for breach of the condition at any time

¹⁵ 17th Ed (1929), at pp 173ff.

¹⁶ 36 & 37 Vict. c 66 and 38 & 39 Vict. c 77.

¹⁷ [1950] KB 86 at pp 89-90.

before he accepted it, or is deemed to have accepted it; whereas, if it was only a warranty, he could not reject it at all but was confined to a claim for damages.

I think it right to assume in the buyer's favour that this term was a condition, and that, if he had come in proper time he could have rejected the picture; but the right to reject for breach of condition has always been limited by the rule that, once the buyer has accepted, or is deemed to have accepted, the goods in performance of the contract, then he cannot thereafter reject, but is relegated to his claim for damages."

[48] In the current case, the preferential terms assurance is actually pleaded as a contractual claim called the "preferential terms warranty". All the other ways in which the misrepresentation point is put equally give rise to a claim for breach of contract. As Mr. McMaster QC put it in his written opening: "83. All of the representations that [ZAM] relies upon are set out in the OM and Share Class Particulars." In my judgment, in the absence in this Territory of legislation corresponding to the 1967 Act, ZAM is limited to its contractual claims. There is no scope for reliance on any innocent misrepresentation. Any representation has been incorporated into a contract. By the metaphysics of "merger into a higher contractual right", the equitable claim to rescind for innocent misrepresentation is lost.

[49] Further in the current case, ZAM's investments in the Fund have all taken place. The purchase of the shares in the Fund is no longer executory. It was well-established before the 1967 Act came into force, that once a contract for the sale of land had been completed, it was not possible to set aside the conveyance for innocent misrepresentation. In **Wilde v Gibson**, Lord Campbell said:¹⁸

"If there be, in any way whatever, misrepresentation or concealment which is material to the purchaser, a court of equity will not compel him to complete the purchase, but where the conveyance has been executed, I apprehend, my Lords, that a court of equity will set aside the conveyance only on the ground of actual fraud. There would be no safety for the

¹⁸ (1848) 1 HL Cas 605, [1843-60] All ER Rep 494 at p 502.

transactions of mankind if, upon a discovery being made at any distance of time of a material fact not disclosed to the purchaser of which the vendor had merely constructive notice, a conveyance which had been executed could be set aside.”

- [50] The extent to which this extended beyond contracts for the sale of land and was a general rule that rescission for innocent misrepresentation was not possible in all cases of an executed contract was (and is) unclear. **Spencer Bower & Handley on Actionable Misrepresentation**¹⁹ summarises the caselaw on rescission of executed contracts for innocent misrepresentation in this way:

“**Seddon v North Eastern Salt Co Ltd**²⁰ is usually cited, but the decision rests on affirmation and it is not clear that misrepresentation was proved. Many of the other decisions are also of doubtful authority on this point eg **Rawlins v Wickham**;²¹ **A-G v Ray**;²² **Redgrave v Hurd**;²³ **Newbigging v Adam**.²⁴ In **MacKenzie**²⁵ the Judicial Committee upheld rescission of an executed contract. It is not always easy to determine from the cases whether the contract was ‘executed’ or ‘executory’. The issue has been confused with the question whether restitution is possible: **Mackenzie**; **Senanayake v Cheng**;²⁶ **Root v Badley**;²⁷ **Alati v Kruger**.²⁸

- [51] **MacKenzie** was a case of a guarantee obtained by an innocent misrepresentation, where the duty to hold the bank secure against the guaranteed primary obligation was an ongoing obligation. **Senanayake** was a case of a partnership, which again entailed ongoing obligations. Arguably these are contracts which have executory elements, even if not fully executory. Where a contract can be finally performed with nothing further to be done by either party, for example, on passing property in

¹⁹ 5th Ed (2014) at para 15.02 footnote 3. Chitty on Contracts (33rd Ed, 2020) at paras 7-004 and 7-113 also discusses the point.

²⁰ [1905] 1 Ch 326.

²¹ (1858) 3 De G & J 304.

²² (1874) 9 Ch App 397.

²³ (1881) 20 Ch D 1.

²⁴ (1886) 34 Ch D 582.

²⁵ **MacKenzie v Royal Bank of Canada** [1934] AC 468.

²⁶ [1966] AC 63.

²⁷ [1960] NZLR 756.

²⁸ (1955) 94 CLR 216.

a sale of goods case, then the caselaw favours that being a bar to rescission: see **Leaf v International Galleries**. A completed sale of goods with property passing is a quintessential example of an executed contract. If that is right in relation to chattels, then the same would go for the sale of shares in the Fund in the current case.

[52] The matter was not, however, argued before me. In the light of my conclusion on the incorporation point²⁹ I do not need to decide this issue.

[53] Mr. Prudhoe argued that any representation would have been a representation as to the future. I do not agree. The preferential terms assurance, if it were otherwise actionable, would in my judgment be a continuing representation, but I do not need to examine this further.

The exclusion clause

[54] I turn then to Mr. Prudhoe's "entire agreement" argument. It is well established that exclusion clauses, of the type on which Mr. Prudhoe relies, must be construed *contra proferentem*. In England, the degree of strictness with which the *contra proferentem* rule is applied was very significantly reduced after the **Unfair Contract Terms Act 1977 (UK)**³⁰ was passed: **Ailsa Craig Fishing Co Ltd v Malvern Fishing Co Ltd**³¹ and **George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd**.³²

[55] Lord Denning MR sitting in the Court of Appeal in **George Mitchell** recounted the way in which firms before the 1977 Act had able to impose their own oppressive exclusion clauses:³³

²⁹ Which was raised: see Transcript Day 1, p 54.

³⁰ 1977 c 50.

³¹ [1983] 1 WLR 964 at pp 969-970 (Lord Fraser of Tullybelton).

³² [1983] 2 AC 803. See also my discussion in Adrian Jack, *English Law and Standard Terms* (2005) at pp 95ff.

³³ [1983] QB 284 at p 296.

“Faced with this abuse of power — by the strong against the weak — by the use of the small print of the conditions — the judges did what they could to put a curb upon it. They still had before them the idol, ‘freedom of contract.’ They still knelt down and worshipped it, but they concealed under their cloaks a secret weapon. They used it to stab the idol in the back. This weapon was called ‘the true construction of the contract.’ They used it with great skill and ingenuity. They used it so as to depart from the natural meaning of the words of the exemption clause and to put upon them a strained and unnatural construction. In case after case, they said that the words were not strong enough to give the big concern exemption from liability; or that in the circumstances the big concern was not entitled to rely on the exemption clause. If a ship deviated from the contractual voyage, the owner could not rely on the exemption clause. If a warehouseman stored the goods in the wrong warehouse, he could not pray in aid the limitation clause. If the seller supplied goods different in kind from those contracted for, he could not rely on any exemption from liability. If a shipowner delivered goods to a person without production of the bill of lading, he could not escape responsibility by reference to an exemption clause. In short, whenever the wide words — in their natural meaning — would give rise to an unreasonable result, the judges either rejected them as repugnant to the main purpose of the contract, or else cut them down to size in order to produce a reasonable result. This is illustrated by these cases in the House of Lords: **Glynn v Margetson & Co**,³⁴ **London & North Western Railway Co v Neilson**,³⁵ **Cunard Steamship Co Ltd v Buerger**,³⁶ and by **Canada Steamship Lines Ltd v The King**³⁷ and **Sze Hai Tong Bank Ltd v Rambler Cycle Co Ltd**³⁸ in the Privy Council; and innumerable cases in the Court of Appeal, culminating in **Levison v Patent Steam Carpet Cleaning Co Ltd**.³⁹”

[56] Since the 1977 Act is not in force in this Territory, the older approach to construction as exemplified by **Canada Steamship Lines Ltd v The King** in my judgment still applies.

[57] What Mr. Prudhoe describes as the “entire agreement” clause is not well drafted. The provision that shares “will be offered on the basis only of the information

³⁴ [1893 AC 351.

³⁵ [1922] 2 AC 263.

³⁶ [1927] AC 1.

³⁷ [1952] AC 192.

³⁸ [1959] AC 576.

³⁹ [1978] QB 69.

contained herein” may be sufficient to cover *contractual* terms outside the OM, but says nothing about non-contractual representations. The next sentence excluding “further information or representations made by any *dealer* or other person” is not apt to cover information or representations made by Spectrum itself. It refers to third parties, like dealers, who act as introducers. A representation made by Spectrum is thus not covered by the exclusion clause in my judgment. The last sentence excluding continuing representations only applies to representations contained in the OM (or documents incorporated in the OM). It does not exclude representations outwith the OM from being continuing representations.

- [58] Accordingly, if ZAM could otherwise rely on misrepresentation to rescind its contract, the “entire agreement” clause would not in my judgment have barred them from rescission.

Limitation and delay

- [59] I can also deal with limitation quite quickly. Rescission for innocent misrepresentation is an equitable remedy. There is no express limitation period for exercise of the right to rescind. In England, after the passing of the **Misrepresentation Act 1967** the Court has a discretion to declare a contract subsisting, notwithstanding that it was induced by a misrepresentation, and award damages: section 2(2). Claims under section 2(2) are probably subject to the six year limitation period contained in section 9(2) of the **Limitation Act 1980** (UK).⁴⁰ However, none of this is part of the law of this Territory, which is still subject to the common law and rules of equity. In certain cases of equitable claims, equity applied by analogy the limitation periods applicable to common law causes of action. However, this doctrine was abolished in England by the **Limitation Act 1939**.⁴¹ It seems improbable that our **Limitation Act 1961**, which is closely

⁴⁰ 1980 c 58.

⁴¹ 2 & 3 Geo VI c 21.

modelled on the 1939 Act, allowed the survival of the doctrine. In any event, however, delay in this case would in my judgment be fatal to ZAM's right to rescind in equity.

[60] Mr. Cremer's evidence was that he was unaware that preferential terms had been offered to another investor until he saw the Pentagon side letter in 2016. He says that he had not read the parts of the liquidators' report which would have put him on notice that a substantial investor had preferential redemption terms.⁴² I accept that he was a witness of truth. However, he (and ZAM) did have the means of knowing or investigating that such terms had been offered by paying close attention to what the liquidators had written in their first report. Coupling that information with the email of 18th July 2008 would have put ZAM on inquiry. Mr. Cremer accepted in cross-examination⁴³ that he did not trust Pentagon and those behind it, which again put him and ZAM on inquiry.

[61] Indeed in the proceedings brought in the Supreme Court of the State of New York in 2015, ZAM was able to plead in its complaint (the equivalent of our statement of claim): "43. Then on April 30, 2008, Pentagon placed a redemption request in the amount of \$21 million... 45. Moreover, Pentagon's redemption request should have resulted in an effective redemption date of December 31, 2008 (due to the requirement for six months' notice). But Friedland, Chwatt and Svirsky instead violated the Share Class Particulars and provided Pentagon with an irregular effective redemption date of June 30, 2008."

[62] I find that ZAM could and should have discovered the facts surrounding Pentagon's redemption much earlier than 2017. Any claim to rescind would in my judgment be barred by delay.

Breach of the Memorandum and Articles

⁴² Transcript, Day 2, p 56.

⁴³ Transcript, Day 2 pp 52-53.

- [63] I turn to the next issue of law. Was the granting of the Pentagon side letter a breach of the Memorandum and Articles of Spectrum? Mr. McMaster QC submits that the early redemption rights given to Pentagon by that side letter were given to Pentagon in its capacity as a shareholder in the class of shares which represented the Fund. As a class right, it could only properly be granted if the holders of that class of share approved the grant by special resolution pursuant to Art 75 of the Articles. Spectrum was therefore in breach of contract in granting the Pentagon side letter.
- [64] Mr. Prudhoe submits that the Pentagon side letter did not give Pentagon special rights in its capacity as a shareholder. It was a private arrangement between Spectrum and Pentagon of a type which was very common in the industry. ZAM indeed had its own side letter. ZAM could have protected itself by insisting in its own side letter on a “best investors” clause, which would have guaranteed it the same early redemption rights Pentagon had insisted upon. Further, there was no breach of the Articles, because Art 5 of the Articles always gave the Board a power to determine “from time to time” the terms on which redemption would be allowed. ZAM, just like Pentagon, could ask Spectrum to exercise its discretion to allow early redemption. There was no difference of treatment *qua* shareholder.
- [65] The leading case on what constitutes a right attaching to a class of shareholder and what constitutes a class of shareholders is **Cumbrian Newspapers Group Ltd v Cumberland & Westmoreland Herald Newspaper & Printing Co Ltd**.⁴⁴ In that case, the plaintiff had purchased ten per cent of the shares in the defendant. At the time of the purchase the Articles of Association were amended so as to give the plaintiff various preëmption rights in the event that other shareholders in the defendant proposed to sell. The defendant decided to call a general meeting of shareholders to replace the Articles with new Articles which did not include the plaintiff’s preëmption rights. The plaintiff sought a declaration that as the holder of a class of shares (namely shares with the preëmption rights) the new Articles

⁴⁴ [1987] Ch 1 at pp 15-17.

could only be introduced if it, the plaintiff, as a class of shareholder affected by the change, approved the change by special resolution.

[66] Scott J, as he then was, held that there were three categories of rights and benefits which stood to be considered.

“First, there are rights and benefits which are annexed to particular shares... If articles provide that particular shares carry particular rights not enjoyed by the holders of other shares, it is easy to conclude that the rights are attached to a class of shares...

A second category of rights or benefits which may be contained in articles... would cover rights or benefits conferred on individuals not in the capacity of members or shareholders of the company but, for ulterior reason, connected with the administration of the company's business or the conduct of its affairs. **Eley v Positive Government Security Life Assurance Co Ltd**⁴⁵ was a case where the articles of the defendant company had included a provision that the plaintiff [who was not then a shareholder] should be the company solicitor... [I]f... the rights or benefits conferred by the article were not conferred on the beneficiary in the capacity of member or shareholder of the company, then the rights could not, in my view, be regarded as class rights. They would not be rights attached to any class of shares...

That leaves the third category. This category would cover rights or benefits that, although not attached to any particular shares, were nonetheless conferred on the beneficiary in the capacity of member or shareholder of the company...

[The legislation] was intended... to cater for the variation or abrogation of any special rights given by the memorandum or articles of a company to any class of members — that is to say, not only rights falling into the first category I have described, but also rights falling into the third category...

In my judgment, if specific rights are given to certain members in their capacity as members or shareholders, then those members become a class. The shares those members hold for the time being, and without which they would not be members of the class, would represent, in my view, a ‘class of shares’...”

⁴⁵ (1875) 1 Ex D 20.

[67] Scott J was considering a provision in the Articles of the defendant company. Does the fact that the special rights being given to Pentagon were given in a side letter rather than in the Memorandum and Articles make a difference? The Memorandum and Articles constitute a contract between the various shareholders in Spectrum, whereas the side letter is at least ostensibly a contract between Spectrum and Pentagon. In some cases, this might be a critical distinction. A contract between Spectrum and Pentagon might well fall into Scott J's second category. On the facts of this case, however, the Board's power to determine the terms on which shares might be redeemed is in my judgment a power delegated to the Board under Arts 4 and 5. When the Board agreed the Pentagon side letter, it was agreeing (or at least purporting to agree) the terms on which Pentagon, as a shareholder in Spectrum, might redeem its shares.

[68] In my judgment, the Pentagon side letter falls into Scott J's third category. It was an agreement with Pentagon *qua* shareholder. There was no satisfactory evidence adduced before me of how common it was for side letters to be issued in the industry, but it does not seem to me to be relevant. Spectrum's Memorandum and Articles have to be construed on their own terms. In my judgment there is no scope on the facts for implying some term into these constitutional documents so as to allow side letters. Such an implication is not necessary for business efficacy, because the marketing of the Fund would be perfectly possible without the issuance of side letters. Nor, for the reasons expressed by Mr. Cremer, which I have set out above, would such a term have been obvious to an outside observer. I am reinforced in this view by the consideration that, if side letters were permissible, the provisions protecting holders of particular classes of shares by requiring special resolutions by such shareholders and giving them *pari passu* rights would be rendered largely nugatory.

[69] This is also the answer to Mr. Prudhoe's last point. Yes, if the Board gave all shareholders in the Fund the same redemption rights, then there would be an exercise of the discretion given by Art 5. (Indeed, that is what was being proposed in the ZAM side letter.) This does not permit the Board to give rights to some

shareholders in the Fund, but refuse it to others. That is in my judgment a straightforward breach of the shareholders' rights to be treated *pari passu*.

[70] Mr. Prudhoe sought to rely on **White v Bristol Aeroplane Co Ltd**⁴⁶ for the proposition that issuing further shares to Pentagon would not affect ZAM's rights *qua* shareholder in the Fund. In that case, the plaintiff held preference shares in the defendant. The defendant proposed to issue a large number of further preference shares without obtaining a special resolution from the existing preference shareholders. At first instance, Danckwerts J restrained the company from issuing the shares on the basis that they would dilute the plaintiff's voting rights. The Court of Appeal disagreed. It drew a distinction "between an affecting of the rights and an affecting of the enjoyment of the rights." The fact that the dilution of voting rights might in a business sense deleteriously affect the existing preference shareholders did not prevent the issue of shares, because the existing shareholders' right were not changed at all.

[71] Now here it is true, as Mr. Prudhoe submitted, that ZAM's rights to redeem were not affected by the grant of preferential treatment to Pentagon. That, however, in my judgment is irrelevant to the question whether ZAM was being treated *pari passu* with other shareholders, such as Pentagon. In **White** the new preference shareholders were being given the same voting rights as the plaintiff. The position would have been quite different in my judgment, if the new preference shares were being issued with, say, double voting rights. Likewise here. Giving Pentagon better redemption rights directly affected ZAM's ability to redeem and to be paid on redemption. If (as in the event happened) there was a rush by investors to exit their investment in the Fund, a right held by Pentagon to redeem more speedily could (and did) significantly prejudice ZAM, because Spectrum might well have to invoke Art 33.

⁴⁶ [1953] 1 Ch 65 at p 74.

[72] It is also true, as Mr. Prudhoe submitted, that ZAM did not ask for a “best investors” clause. However, in my judgment ZAM did not need to. Its rights were already protected.

[73] I find that Spectrum was in breach of contract by giving Pentagon the favourable redemption terms contained in the Pentagon side letter. The Pentagon side letter created a class of shareholder, comprising Pentagon, with preferential rights over ZAM in breach of Art 8.4(c)(ii) of the Memorandum.

[74] If I am wrong in that conclusion, I would in the alternative find that Spectrum were in breach of Art 75 of the Articles coupled with Art 8.4(c)(i) of the Memorandum.

Unfair prejudice

[75] The second issue of law is whether that breach of contract gives rise to a claim for unfair prejudice at the suit of ZAM. Section 184I of the 2004 Act provides:

“(1) A member of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity, may apply to the Court for an order under this section.

(2) If, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit, including, without limiting the generality of this subsection, one or more of the following orders

- (a) in the case of a shareholder, requiring the company or any other person to acquire the shareholder’s shares;
- (b) requiring the company or any other person to pay compensation to the member;
- (c) regulating the future conduct of the company’s affairs;
- (d) amending the memorandum or articles of the company;
- (e) appointing a receiver of the company;
- (f) appointing a liquidator of the company under section 159(1) of the Insolvency Act on the grounds specified in section 162(1)(b) of that Act;
- (g) directing the rectification of the records of the company;
- (h) setting aside any decision made or action taken by the company or its directors in breach of this Act or the memorandum or articles of the company.

(3) No order may be made against the company or any other person under this section unless the company or that person is a party to the proceedings in which the application is made.”

[76] **Joffe on Minority Shareholders**⁴⁷ summarised the law as to what constitutes unfair prejudice as established by the House of Lords in **O’Neill v Phillips**⁴⁸ as follows:

“[U]nfairness may be established... where:

(a) there has been some breach of the terms on which it has been agreed that the affairs of the company should be conducted, for example, a breach of the articles or of a collateral shareholders’ agreement; or

(b) equitable considerations,⁴⁹ arising at the time of the commencement of the relationship or subsequently, make it unfair for those conducting the affairs of the company to rely on their strict legal powers under the company’s constitution. ‘The unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.’⁵⁰”

[77] What is the effect of the contractual claims being barred by the **Limitation Act**? I agree with analysis in **Joffe** at paras 6-286ff, which identifies two issues from delay. The first is that, if the applicant delays and takes financial advantage from the company, the Court may well find that there is no ongoing prejudice and that the applicant has elected to accept the position. The second is that the Court may in its discretion refuse to give relief where there is excessive delay. The fact that the limitation period on the underlying matter of complaint has expired is a material, and often a very material, factor: **Hollington on Shareholder Rights**.⁵¹

⁴⁷ 6th Ed (2019) at para 6-80.

⁴⁸ [1999] 1 WLR 1092.

⁴⁹ Citing *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at p 379, a case on winding up on just and equitable grounds.

⁵⁰ Citing *Re Phoenix Office Supplies Ltd* [2003] 1 BCLC 76 at para [24] and *Grace v Biagioli* [2006] 2 BCLC 70 at para [61].

⁵¹ 9th Ed (2020) at para 7-87.

However, it is not conclusive. Firstly, the expiry of the limitation period for breach of contract merely bars the remedy not the right. Secondly, there is no limitation period for claiming unfair prejudice.

[78] As Fancourt J put it in **Estera Trust (Jersey) Ltd (formerly known as Appleby Trust (Jersey) Ltd and another v Singh**:⁵²

“[T]he right approach is to consider how the delay in question should affect the exercise of the court’s discretion under [the equivalent of section 184I] to make such order as it thinks fit. There is no statutory time limit for issuing a petition, nor does the equitable doctrine of laches strictly apply where the relief sought is not equitable relief. However, unjustified delay resulting in prejudice or an irretrievable change of position (the essential ingredients of a defence of laches) are likely to be significant factors in the exercise of the court’s discretion to grant or refuse a particular remedy. So too is any evidence that the Petitioners have previously acquiesced in the state of affairs of which they now complain, which is the basis of a number of the authorities to which I was referred. If, in view of the delay and the reasons for the delay, it is unfair or inappropriate in all the circumstances for the Petitioners to obtain the relief that they seek, the Court will exercise its discretion to refuse it.”

[79] Mr. McMaster QC submitted that a shareholder was under no duty of diligence to investigate the conduct of a company, relying on *dicta* in **Re Tobian Properties Ltd**.⁵³ **Tobian** was not a case where the Court was considering delay as a discretionary factor in deciding whether to grant relief against unfair prejudice. In any event, on the facts of the current case, ZAM were put on notice of potential irregularities from at least 2010.

[80] In my judgment, the delay here is excessive. The underlying complaints on which the unfair prejudice claim is founded are statute-barred contractual claims. Mr. McMaster QC accepts that no extension of the statutory period is possible under section 25 of the **Limitation Act 1961**. ZAM was put on notice by the liquidators’

⁵² [2018] EWHC 1715 (Ch) at para [571]. Also cited as *Re Edwardian Group Ltd*.

⁵³ [2012] EWCA Civ 998, [2013] Bus LR 753.

report of 4th October 2010. They were able to plead sufficient facts relating to Pentagon to plead a case in the 2015 New York proceedings. They had the Pentagon side letter in early 2017. It took ZAM until October 2018 to issue the current proceedings.

[81] I have to stand back and consider the overall picture. A concerning feature of this case is that there seems no likelihood of Spectrum or the Fund being wound up in the near or even future. There is more than a suspicion that Mr. Friedland is happy to allow matters to carry on more or less indefinitely with him and his associates recovering fees (at any rate as and when monies are freed up by selling the foreclosed real estate assets).

[82] The difficulty is, however, that these points are completely unrelated to the alleged particulars of unfair prejudice. The obvious relief (assuming the suspicions about Mr. Friedland's behaviour are born out) is to wind up Spectrum, so that the real estate assets can be liquidated. However, the prayer in the re-re-amended statement of claim makes no claim for such relief. Instead the main relief sought is rescission of the investments made after the issue of the Pentagon side letter, either at par or at the value of the shares on the date of the Pentagon side letter. The reason is clear: rescission is the only way to have a claim in any later winding up for the full amount of the investment. Appointing liquidators without rescission of the later investments would mean that Pentagon had a first claim for \$21 million with ZAM able to claim only \$4 million. Those two claims potentially exhaust the assets of the Fund either wholly or in part, leaving ZAM with only a (possibly worthless) claim in respect of the balance of its investment in the Fund against a percentage of any rump of assets in the Fund. (Mr. McMaster QC rightly criticises the evidence and disclosure of Spectrum on the current asset position of the Fund.) If the assets of the Fund have reduced in value, then the effect of giving ZAM rescission is that it has a first claim for \$15,226,000 instead of just \$4 million.

[83] In my judgment, the delay in this matter is such that in the exercise of my discretion I should refuse to grant ZAM relief for unfair prejudice. The breaches of

contract which give rise to the unfair prejudice alleged are all statute-barred, certainly by 2014 (six years after the 30th June 2008), if not by 2012 (six years after 30th October 2006). ZAM should have been aware from at latest October 2010 of irregularities surrounding Pentagon. ZAM was able to bring a fully pleaded claim in New York against those behind Spectrum in 2015. It had full knowledge of the Pentagon side letter in early 2017. Permission to bring derivative proceedings was refused by this Court in April 2017. It took until October 2018 for ZAM to issue the current proceedings. Overall the delay in my judgment is excessive. I accept Mr. McMaster QC's submission that ZAM did not affirm the contract between it and Spectrum. However, taking all these factors into account relief should be refused.

Conclusion

[84] Accordingly, I dismiss the action. I shall hear the parties on costs, on whether any issues-based costs orders should be made and on what, if any, rights of set off ZAM might have.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar