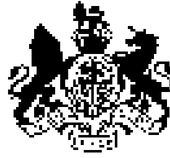
[2009] SC (Bda) 39 Civ (28 August 2009)



IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION
(COMMERCIAL COURT)

2009: 23, 149, & 150

BETWEEN:

(1) KINGATE GLOBAL FUND LTD
(2) KINGATE EURO FUND LTD

Plaintiffs

-V-

(1) THE BANK OF BERMUDA LIMITED (HSBC)

Defendant

(2) KNIGHTSBRIDGE (USD) FUND LIMITED
(3) FORTIS BANK (NEDERLAND) N.V.
(4) STANDARD CHARTERED BANK

Interveners/Defendants

And

BETWEEN:

(1) KNIGHTSBRIDGE (USD) FUND LIMITED
(2) FORTIS BANK (NEDERLAND) N.V.
(3) STANDARD CHARTERED BANK

Plaintiffs by Counterclaim

And

(1) KINGATE GLOBAL FUND LTD
(2) THE BANK OF BERMUDA LIMITED (HSBC)

Defendants to Counterclaim

JUDGMENT

Date of Hearing: July 7-8, 2009
Date of Judgment: August 28, 2009

Mr. Victor Lyon Q.C. and Mr. Nathaniel Turner,
Attride-Stirling & Woloniecki,
for the Interveners/Counterclaimants

Mr. Stephen Atherton QC of Counsel
and Mr. Dennis Dwyer, Wakefield Quin,
for the Plaintiffs/Counterclaim Defendants

Mr. Alan Dunch, Mello Jones & Martin,
for the Bank of Bermuda Ltd.

Introductory

1. This action concerns whether subscription monies paid for shares the issuance of which was suspended in December 2008 (following the arrest of Bernard Madoff in New York) by a Fund which is now insolvent is repayable as a debt or is held on trust for the would-be subscribers. It is common ground that this central legal issue falls to be determined by a construction of the terms upon which the subscription monies were paid. The primary facts and the governing legal principles, as distinct from the inferences to drawn from those facts and the application of those principles to the applicable factual matrix, were not materially in dispute.

2. Kingate Global Fund Ltd. ("Kingate") is a company incorporated in the British Virgin Islands ("BVI"). It issued shares to investors wishing to invest in Bernard L Madoff Investment Securities LLC ("BLMIS") in New York. The Interveners/Counterclaimants ("the Subscribers") were two such investors. Knightsbridge (USD) Fund Ltd ("Knightsbridge"), a Caymanian company (acting by and/or through its agent Fortis Bank (Nederland) NV) remitted US$6 million to Kingate's account in Bermuda with the Bank of Bermuda Limited ("the Bank") by way of subscription for Kingate shares. Standard Chartered Bank ("SCB"), a British company, remitted US$3 million. In each case, the subscription monies were remitted on or about November 28, 2008. Before the subscription applications had been approved, Bernard Madoff was arrested on December 11, 2008 and, the following day Kingate suspended all share issues and redemptions, as well as the calculation of its net asset value ("NAV").

3. After the US District Court for the Southern District of New York on December 15, 2008 appointed Irving Picard as Trustee to liquidate BLMIS in the US Bankruptcy Court and, in effect, to secure BLMIS assets at home and abroad, the Bank froze all monies it held in Bermuda for Kingate and Kingate Euro Fund Ltd. in response to the Trustee's claims. On January 28, 2008, both Kingate companies applied to this Court in Civil Jurisdiction 2009: No. 23 for a declaration that the Bank was not entitled to freeze these monies. Kingate's position at this juncture was that the Subscribers were entitled to be repaid their money. However, with the BLMIS Trustee threatening Kingate in late February, 2009 with a claim for the return of the $100 million received from BLMIS in late 2008, Kingate's lawyers in mid-March made it clear that the question of whether or not the subscription monies were held on trust was in dispute. On May 8, 2009 Kingate placed itself into provisional liquidation in BVI. On May 26, 2009, Knightsbridge and SCB filed proceedings (Civil Jurisdiction 2009: Nos. 149 and 150) against Kingate and the Bank seeking, inter alia, declarations that they each possessed a proprietary interest in the subscription monies.

4. On May 5, 2009, Bell J (on the Subscribers' application to intervene in the Kingate proceedings) consolidated all three actions and gave directions for an expedited trial. This resulted in the present dispute being tried within two months of the Subscribers issuing proceedings and within six months of Kingate issuing its Writ. Due to sensible case management by the parties, there was no oral evidence at trial, with reference being made to affidavits and agreed documents in a single '*Speedy Trial Bundle*'.

Undisputed facts

5. The Bundle contained ten substantive affidavits. Three were sworn by Christopher Wetherhill, a director of Kingate, on January 28, April 17 and May 6, 2009, respectively. The latter was in fact filed in the Eastern Caribbean Supreme Court (BVI High Court) in support of the application to appoint joint provisional liquidators for Kingate. One affidavit was sworn by David Addington on behalf of the Bank on March 19, 2009. Two affidavits were sworn by Susan Lo Yee Har, a corporate director of Knightsbridge, both dated May 26, 2009 and filed in support of interlocutory matters. Two affidavits were sworn by SCB's Group Legal counsel, Tahir Salman Khan on May 27, 2009, in support of the corresponding interlocutory applications made by SCB. Finally, an affidavit was sworn on June 3, 2009 by one of the two Joint Provisional Liquidators ("JPLs") of Kingate, William Tacon, managing partner of Zolfo Cooper.

6. The May 6, 2009 Wetherhill Affidavit explains the background to Kingate's insolvency and suggests that the company's management responded to the unprecedented crisis which confronted it in December 2008 with considerable care after taking appropriate legal advice. The company's business involved raising money from investors who would subscribe for redeemable shares. All

monies raised were managed by BLMIS, Kingate's Investment Advisor from the outset. The Information Memorandum's description of the "*split strike conversion*" would have identified BLMIS to investors as a Bernard Madoff entity. Although all money invested was forwarded to BLMIS in New York, "*some cash was kept by the Company in its account with the Bank e.g. for the payment of fees and redemption requests*" (paragraph 19). Because of a large number of redemption requests between October and December 2008, BLMIS forwarded $100 million to Kingate's account with the Bank: "*Sometimes cash from the subscriptions for new shares were used to pay redemptions*" (paragraph 28).

7. The May 6, 2009 Wetherhill Affidavit proceeds to describe the action taken by Kingate following the arrest of Bernard Madoff, which "*came as an enormous shock to the Company's board*" (paragraph 31). Kingate notified investors of the BLMIS liquidation and kept them informed of various developments, and the day following the arrest suspended the calculation of the NAV and all redemptions and subscriptions. When the Bank froze its assets in early January 2009, Kingate applied to immediately release money to pay immediate operating expenses, as well as to challenge the validity of the Bank's action altogether. It later became clear that the Bank's action was in response to pressure from BLMIS' Trustee, who asserted the right to recover the $100 million from Kingate by letter dated February 27, 2008 on the grounds that the payment constituted a preference. This claim was formally asserted against Kingate in the US Bankruptcy Court on April 17, 2009. As a result of the Bank's freeze, the indefinite suspension of business (its sole business had been destroyed) and the assertion of the Trustee's and Subscribers' claims, Kingate was insolvent and the directors resolved to place the company into liquidation.

8. The dispute between the Kingate JPLs and the Subscribers in the present action is not whether or not Kingate is liable to repay the subscription monies now that it is clear that the applications will never be approved. The controversy turns on whether the monies when initially received became the property of Kingate or whether the funds were received on terms that they remained (in equity) the property of the subscribers until such time as the subscriptions were approved. The disputants are agreed that this question is one of contractual construction, to be resolved without regard to the subjective intention of the parties. So while the affidavit evidence sheds light on the surrounding circumstances, it is to the subscription documentation that one must ultimately turn to resolve this fundamental issue.

9. Knightsbridge and SCB each executed a Subscription Agreement "*for non-US Investors*". It is self-evident that these are standard form documents prepared by Kingate, which are essentially filled in by investors, as opposed to individualised contracts negotiated in each case. The first paragraph of the Agreement, set out in the form of a letter from each subscriber to Kingate, states as follows:

"*The undersigned subscriber (the 'Subscriber') acknowledges having received, reviewed and understood the Amended and Restated information Memorandum dated as of 6 October, 2008 as may be further amended and restated (the 'Information Memorandum') for the Offering of USD Participating Common Shares (the 'Shares') of Kingate Global Fund, Ltd. (the 'Fund') and hereby subscribes for as many Shares as may be purchased for the amount indicated below on the terms of the information Memorandum and subject to the provisions of the Memorandum and Articles of Association of the Fund.*"

10. The subscriber makes various representations, including the fact that he/it is a professional investor and the fact that the only representations relied upon are those contained in the Information Memorandum, receipt of which is acknowledged. The conditional nature of the application is acknowledged in representation (u):

   "*Subscriptions.* *The Subscriber acknowledges that the Fund reserves the right to reject in its absolute discretion this and any other subscription for Shares in whole or in part, in any order, at any time prior to a Subscription Date (as defined in the Information Memorandum), notwithstanding prior receipt by the Subscriber of notice of acceptance of the subscription. If the Shares are oversubscribed, the Fund will determine in its sole discretion which subscriptions shall be accepted. If this subscription is rejected or if the sale of Shares is not completed for any reason (in which event this subscription shall be deemed to be rejected), the Fund shall as soon as practicable return any funds transferred by the Subscriber (without interest) along with this Agreement and any other documents delivered by the Subscriber.*"

11. The Subscribers also agree that the Subscription Agreement is governed by BVI law (which is assumed to be the same as Bermuda law for all relevant purposes) and submit to the non-exclusive jurisdiction of the BVI courts. Other heads of representations made by subscribers include anti-money laundering representations. The next most important document to consider is the Information Memorandum. The first paragraph on page (i) under "*SUMMARY*" reads as follows:

   "*The information set out below should be read in conjunction with, and is qualified in its entirety by, the full text of this Amended and Restated Information Memorandum, as may be further amended and restated ("the Memorandum"), the memorandum and articles of association ("the Memorandum and Articles of Association") of Kingate Global Fund, Ltd. and the documents and agreements referred to herein, all of which are available from the Administrator upon request.*"

12. The banking and custody and subscriptions arrangements are summarised at pages (iii)- (iv) as follows:

> "*The Bank of Bermuda Limited (the "Bank), based in Hamilton, Bermuda, has been appointed as the Fund's banker for purposes of receiving subscription funds, disbursing redemption payments and processing cash transactions not directly related to the Fund's investment portfolio. Additionally, the assets of the Fund represented by the USD Shares (the "USD assets") are held in the custody of the Bank pursuant to a Custodian Agreement, and the Bank (herein the Custodian Agreement). The bank does not provide custodian services for assets held with sub-custodians or with regard to assets maintained at the Investment Advisor. See "MANAGEMENT – Banking and Custody."*
>
> *The USD Shares may be purchased by Eligible Investors (as defined herein) as of the first Business Day (as defined below) of the month (herein the "Subscription Date") at a price equal to the Net Asset Value per USD Share as of the last Business Day of the immediately preceding calendar month (the "Valuation Date) plus any applicable subscription charges. "Business Day" refers to any day when the central banking systems of the U.S. and Bermuda are open and operating. See "Subscription Charge" below.*
>
> *Minimum Subscription. The minimum initial investment per subscriber is U.S. $250,000. The minimum subsequent investment per subscriber is U.S. $100,000. Such amounts may be waived or reduced at the discretion of the Directors.*
>
> *Procedure. Completed Subscription Forms must be received by the Administrator by the Business Day prior to the first Business Day of the month in which prospective investors wish to subscribe for Shares and cleared funds must be received by the Bank at the latest by the Subscription Date. All subscriptions are required to be made in U.S. Dollars. Fractional Shares are not issued and refunds of subscriptions funds are made only if the surplus amount (corresponding to non-issued fractional Shares) is in excess of U.S. $450. The Fund reserves the right to accept or reject any subscription in its absolute discretion. The Manager, in its sole discretion, may permit subscriptions on other than the first Business Day of a month.*
>
> *Subscription Charge. A sales charge of up to five percent (5%) of the amount invested is payable on subscription of the USD Shares, but such charge may be waived in whole or in part at the sole discretion of the Manager. The Manager may grant all or part of such charge to dealers and independent third parties in connection with the solicitation of subscriptions.*"

13. This opening Summary is then fleshed out in the body of the Information Memorandum. On page 1, it is stated that: "*The information in this Memorandum*

is qualified in its entirety by the Fund's memorandum and articles of association…and operative agreements, all of which are available from the Administrator." At pages 22-23, the position regarding "*Temporary Suspension of Dealings and Determination of Net Asset Value*" are explained as follows:

> "*The Fund's Directors may declare a temporary suspension of the determination of the Fund's Net Asset Value and the sale, allotment, issue or redemption of the Share during: (i) any period during which, in the opinion of the Board, disposal by the Fund of securities which constitute a substantial portion of the assets of the Fund is not practically feasible or as a result of which any such disposal would be materially prejudicial to Shareholders; (ii) any period when, in the opinion of the Board, for any reason it is not possible to transfer monies involved in the acquisition or disposition or realization of securities which constitute a substantial portion of the assets of the Fund at normal rates of exchange; (iii) any period when, in the opinion of the Board, for any reason the prices of any securities which constitute a substantial portion of the assets of the Fund cannot be reasonably, promptly or accurately ascertained; (iv) any period (other than customary holiday or weekend closings) when any recognized exchange or market on which the Fund's securities are normally dealt in or traded is closed, or during which trading thereon is restricted or suspended; or (v) any period when proceeds of any sale or redemption of the Shares cannot be transmitted to or from the Fund's account. The Fund may with hold payment to any person whose USD Shares have been tendered for redemption until after any suspension has been lifted.*"

14. In explaining the NAV calculation, the assets are described on page 23 as including "*all cash and cash equivalents, including bank deposits*". The one document not in the Speedy Trial Bundle which was referred to at trial was the Kingate audited accounts for the years ending 2007 and 2006. These explicitly show that "*Subscriptions received in advance*" are treated as a liability, and this accounting entry by necessary implication demonstrates that such subscription monies are also treated as assets under the line item "*Cash and cash equivalents*". Kingate clearly treated the subscription monies received from subscribers prior to the issuance of shares to them as part of its own assets, for accounting purposes at least. However, it seems equally clear (to the extent-which must be doubted- that this has any pivotal relevance to the main issue in controversy) that the value of subscription monies which have not yet been accepted as consideration for the issuance of shares which is accounted for as an asset is cancelled out by the corresponding liability, so that such monies cannot fairly be said to form part of the "*Net assets*" figure used for NAV calculation purposes. This is confirmed by regulation 55 of the Articles of Association.

15. It is also common ground that the subscription monies were not held in a separate account segregated from Kingate's own assets. This is confirmed in a general way by clause 5 of the Custodian Agreement between *inter alia,* the Bank and Kingate.

There was controversy as to what inferences could be drawn from the fact that the relevant account did not hold monies that were being invested and that the account was seemingly used for limited purposes.

16. Regulation 59 of the Articles of Association provides as follows:

> "*59. The directors may suspend the determination of Net Asset Value of a class of a class of shares, and consequently may suspend the right of members to require the Company to the issue or redeem shares of that class, for the whole or part of any period when:*
>
> *(a) the disposal by the Company of assets that constitute a substantial portion of its assets is not feasible;*
>
> *(b) it is not possible to promptly transfer monies involved in the acquisition, disposition or realization of investments that constitute a material portion of the assets of the Company at normal rates of exchange;*
>
> *(c) proceeds of any sale or redemption of the Shares cannot be transmitted to or from the Company's account;*
>
> *(d) for any reason the prices of any investments that constitute a material portion of the assets of the Company cannot be reasonably, promptly or accurately ascertained;*
>
> *(e) any recognized exchange or market in which the Company's investments are normally dealt or traded is closed (other than customary holiday or weekend closings), or when trading thereon is restricted or suspended;*
>
> *(f) the Company does not have sufficient liquidity in the assets attributable to the relevant class or classes of shares to discharge its liabilities upon the requested redemption;*
>
> *(g) if the directors or members have adopted a resolution for the dissolution and liquidation of the Company; or*
>
> *(h) the directors at their discretion determined it to be in the interests of the members.* "

17. This regulation confirms that a decision to place the company into liquidation is merely one of several crisis-type events which is contemplated will result in the suspension of *inter alia*, the redemption of issued shares and the issue of new shares.

Applicable legal principles: special purpose trust

18. The Subscribers firstly seek to formulate their proprietary claim to the subscription monies by reference to the special purpose trust doctrine. Simply put, they contend that the monies were impressed with a trust because they were remitted for a particular purpose-the issuance of shares in Kingate. Accordingly, they retained an equitable interest in that money until such time as the purpose was carried out, with the result that legal and beneficial ownership never passed to Kingate at all. It would be an affront to justice, it was contended if the Subscribers were held to be mere creditors of an insolvent company, because they would end up contributing a windfall to the insolvent estate having received nothing at all.

19. Kingate contends that the terms on which the monies were remitted were not sufficiently particular to give rise to such a trust, and that the logical extension of the Subscribers' argument would be that all creditors of insolvent companies would be regarded as secured. Mr. Atherton cautioned the Court against succumbing to the temptations of vague notions of discretionary justice, and submitted that the proper approach required the application of "*hard-nosed property rights*": *Foskett-v-McKeown* [2001] 1 AC 102 at 109C (per Lord Browne-Wilkinson). This latter submission I accept as sound.

20. The form of special purpose trust contended for may be divided for present purposes into three broad commercial contexts. Most straightforward is the case of the lawyer or other agent who receives money for his principal and is expressly or impliedly required to keep his client's money separate from his own. As Kingate's counsel submitted in reliance on *R-v-Clowes* (No.2) [1994] 2 All ER 316 at 325 (per Watkins LJ):

> "*As to segregation of funds, the effect of the authorities seems to be that a requirement to keep moneys separate is normally an indicator that they are impressed with a trust, and that the absence of such a requirement, <u>if there are no other indicators of a trust</u>, normally negatives it.*"

21. Also more straightforward than the present case is the situation of the lender advancing money to a troubled company, who advances funds with the prospect of insolvency and the need for security very much in mind. Such a case was *Barclays Bank*-v-*Quistclose Investments Ltd* [1970] AC 567. Kingate's counsel distinguished the evidence in that case from the case at Bar by reference to the following passage in the speech of Lord Wilberforce[1]:

> "*It is not difficult to establish precisely upon what terms the money was advanced by the respondents to Rolls Razor Ltd. There is no doubt that the loan was made specifically in order to enable Rolls Razor Ltd. to pay the dividend. There is equally, in my opinion, no doubt that the*

[1] At 579H-580C.

loan was made only so as to enable Rolls Razor Ltd. to pay the dividend and for no other purpose. This follows quite clearly from the terms of the letter of Rolls Razor Ltd. to the bank of July 15, 1964, which letter, before transmission to the bank, was sent to the respondents under open cover in order that the cheque might be (as it was) enclosed in it. The mutual intention of the respondents and of Rolls Razor Ltd., and the essence of the bargain, was that the sum advanced should not become part of the assets of Rolls Razor Ltd., but should be used exclusively for payment of a particular class of its creditors, namely, those entitled to the dividend. A necessary consequence from this, by process simply of interpretation, must be that if, for any reason, the dividend could not be paid, the money was to be returned to the respondents: the word "only" or "exclusively" can have no other meaning or effect."

22. The third factual scenario encompasses cases where monies are advanced by way of investment or for some other specified purpose in circumstances where no conscious regard is had to the possibility of insolvency. In these circumstances, if the shares are for some reason not issued and the company becomes insolvent, it will be more difficult for the subscriber to advance a valid claim that the subscription monies are impressed with a trust. The case of *In re Nanwa Gold Mines* [1955] 1 WLR 1080, to some extent, straddles the second and third scenarios, because in this case the investment vehicle had been in financial difficulties and new investors' were encouraged to invest by the promise that the subscription monies would be held in a separate account until a crucial resolution was passed. Nevertheless, I accept Mr. Atherton's submission that the *Nanwa Mines* case is most significant in illustrating the significance, albeit on the facts of that case, of an agreement to keep the subscription monies separate from the company's assets. Harman J's judgment in that case does not cast doubt, in any considered or reasoned way, on the decision in *Moseley-v-Cressey's Company* (1865) 1 LR Eq 465.

23. Where, as in the present case, the current insolvency of the investment company (i.e. as at the time when the relevant investment or other advance of funds is being made) is the last thing on the company and the subscribers' minds, an express agreement to segregate the payer's monies from the recipient's may well be less likely to be found. In my judgment, the existence, in this commercial context, of a fiduciary duty in respect of the monies received will equally be somewhat implausible, absent the proof of particularly clear contractual terms from which the inference sought can properly be drawn.

24. In all of these various factual scenarios, the legal question is essentially the same. Did the trust claimant part with his money on terms that expressly or impliedly resulted in him retaining a proprietary interest in the money until it was applied for the specified purpose. Within the third category of cases, where money is remitted for a specified purpose in circumstances where insolvency of the payee is

not obviously contemplated, one may also distinguish those cases where the alleged trustee was never intended to become owner of the money from those cases where the alleged trustee was intended to become owner of the money if the particular object of the purpose was fulfilled. This type of trust is also referred to in some cases as a resulting trust, because it arises in equity to determine the beneficial interest in monies caught up in a venture which has failed for unexpected reasons, such as failure of contractual purpose. A proprietary claim on the part of the payer is perhaps more likely to be found to exist in a situation where the recipient of the money was never envisaged to be able to deal with the money as his own. Such facts arose in *Twinsectra Ltd.-v- Yardley* [2002] 2 AC 164, which was another loan case. As Lord Millett opined in that case[2]:

> "*73. A Quistclose trust does not necessarily arise merely because money is paid for a particular purpose. A lender will often inquire into the purpose for which a loan is sought in order to decide whether he would be justified in making it. He may be said to lend the money for the purpose in question, but this is not enough to create a trust; once lent the money is at the free disposal of the borrower. Similarly payments in advance for goods or services are paid for a particular purpose, but such payments do not ordinarily create a trust. The money is intended to be at the free disposal of the supplier and may be used as part of his cash-flow. Commercial life would be impossible if this were not the case.*
>
> *74.The question in every case is whether the parties intended the money to be at the free disposal of the recipient: In re Goldcorp Exchange Ltd [1995] 1 AC 74, 100 per Lord Mustill. His freedom to dispose of the money is necessarily excluded by an arrangement that the money shall be used exclusively for the stated purpose, for as Lord Wilberforce observed in the Quistclose case [1970] AC 567, 580:*
>
>> *"A necessary consequence from this, by a process simply of interpretation, must be that if, for any reason, [the purpose could not be carried out,] the money was to be returned to [the lender]: the word 'only' or 'exclusively' can have no other meaning or effect."*

25. The context of subscriptions for shares involve subscribers remitting money to the company whose shares they wish to purchase on terms that such monies will become the property of the company either upon receipt (at the earliest) or when the shares are issued (at the latest). The predominant purpose of the typical transaction is that the presumably solvent company should receive legal and beneficial ownership of the money in return for the issue of shares. It is

[2] At page 185 E-H.

quintessentially a commercial transaction where the court should ordinarily start from the assumption that no trust relationships were intended to arise. Nevertheless, as Lord Millett also observed in the *Twinsectra Ltd*. case[3]:

> "72. … *A settlor must, of course, possess the necessary intention to create a trust, but his subjective intentions are irrelevant. If he enters into arrangements which have the effect of creating a trust, it is not necessary that he should appreciate that they do so; it is sufficient that he intends to enter into them. Whether paragraphs 1 and 2 of the undertaking created a Quistclose trust turns on the true construction of those paragraphs."*

26. *Moseley-v- Cressey's Company* (1865) LR 1 Eq 405 held that where subscribers remit subscription monies in return for a bare promise of repayment if the subscription fails, this was insufficient without more (e.g. a promise to segregate the monies received) to make the recipient company a trustee. Mr. Lyon rightly pointed out that the reasoning in this decision is somewhat weakened by the great importance the trial judge placed upon the unique facts of that case. Unlike the typical share subscription case, the subscribers' deposits were viewed as having been used by the company to obtain credit, so that the subscribers were to some extent culpable for the creditors' loss. But, I reject the submission that the case was wrongly decided. The case, in any event, is not authority for the broad proposition that there *must be* an agreement to segregate subscription monies for a trust to arise. It illustrates the general principle that such an agreement will usually be regarded as cogent evidence of a trust obligation.

27. This point may also be demonstrated with reference to the more modern criminal case of *R-v- Clowes and another (No. 2)*[1994] 2 All ER 316, upon which Kingate's counsel relied. But, the following passage indicates that the subscription documentation must be viewed as a whole and that no single criterion is crucial for the creation of a trust in respect of subscription monies. According to Watkins LJ (at 327g-328h):

> "*It should be noted that the Court of Appeal, in reaching its conclusion that there was a common trust fund, construed the brochures as a whole, not just the application form. We respectfully agree with that approach. For example, para 5 of the brochure, which provides the means by which the investor may receive his income or capital growth, and para 6 of it, which provides for him to receive monthly statements of the performance of his investment, are plainly contractual terms. In our judgment, the judge was correct to regard the whole brochure in the case of each portfolio investment as a contractual document. However, we agree with Mr Suckling that even if the contract were confined to the application form alone it constituted Barlow Clowes a trustee of moneys invested pursuant to it.*

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[3] At page 185 B-C.

As to the application form itself, we regard the following features of it as clear indicators that Barlow Clowes received investment funds on trust to invest them in British government stocks and was authorised to place any such moneys elsewhere only temporarily and pending such investment or reinvestment or return to the investors. (1) It required the investor's cheque to be made payable to an account designated as a 'Client Account' of Barlow Clowes. (2) It authorised Barlow Clowes to buy and sell British government stock 'on my [ie the investor's] behalf' on a fully discretionary basis. (3) It did not expressly include in that authorisation the buying and selling of any other form of investment. (4) The ensuing words 'and to place any uninvested funds with any bank, local authority, corporation or other body on such terms and conditions as you see fit whether bearing interest or not' are distinguishable from the opening part of the authority as to buying and selling British government stock in the use of the terms 'to place' and 'uninvested funds'.

In our view, the use of these terms makes plain that the purpose of this provision was, as the judge ruled, only to authorise Barlow Clowes 'to make such placements as action ancillary to using the funds to buy and sell gilts'. The connecting word 'and' at the beginning does not, in our view, act conjunctively to add a second and almost unlimited category of investment to that of buying and selling British government stocks on the investor's behalf. In particular, it did not authorise the lending of investors' funds to Clowes personally as a 'minimerchant bank' to treat as his own. Apart from the broader question of construction, neither Barlow Clowes, which was a partnership, nor Clowes, was a corporate body for the purpose of the provision.

As to the remainder of the brochure, the following passages, in highlighting the nature of the investment scheme as one for investment in and the management of British government securities for the purpose of capital gain, underline the role of Barlow Clowes as a trustee of funds invested with it for that purpose and for that purpose only. Again, no other form of investment is mentioned:

> *'Portfolio 68 has been created by Barlow Clowes one of the leading specialists in the management of British government securities for private investors. This portfolio provides investors with a high secure income tax efficiency and access to capital at all times.*
>
> *1. A High Return -- Portfolio 68 is an investment service offering capital gains from the management of British government securities . . .*
>
> *2. Security -- Security and quality of service are hallmarks of Barlow Clowes. The Group . . . has become a recognised leader in the development of investment programmes based on British government stock . . .'*

> *The following passage in para 2 of the brochure, also under the heading 'Security', goes to the heart of the relationship proposed, expressly committing Barlow Clowes to placing investors' funds in a separate, 'designated', account and to treating the investors as beneficial owners, and hence Barlow Clowes as trustees, of such funds:*
>
> > *'All moneys received are held in a designated clients account and clients are the beneficial owners of all securities purchased on their behalf . . .'*
>
> *The following provision as to tax efficiency and taxfree capital gains would be of no effect unless investors' moneys were invested in British government stocks. Investment in other stocks did not attract such tax benefit:*
>
> > *'3. A Tax Efficient Investment -- The actual return will be paid in the form of realised capital gains, without the deduction of any tax . . . UK residents enjoy a personal exemption and, from 2nd July 1986, gains on gilt edged securities are free of capital gains tax.'*
>
> *See also the various references in paras 4, 5 and 6 of the brochure to 'your investment', 'your capital investment', 'capital gains' and 'our management fee'.*
>
> *In our judgment, the brochure as a whole, not just that part of it containing the application form, constituted the contract."*

28. This case also illustrates the interaction between civil law and criminal law when theft charges may depend on proof that money said to be misappropriated was held on trust for the payer. The criminal law looks to the civil law to determine whether there is legal and equitable title to money, and so the civil law analysis has potential criminal law consequences which justify further caution in finding that commercial arrangements have given rise to a trust. Not only, in the context of analysing a share subscription agreement, is the segregation of assets issue important, but a careful analysis of all of the relevant documentation is required.

29. Section 336 of the Bermudian Criminal Code is a statutory deeming provision which is consistent with the civil law cases in requiring the Court to consider whether the money or other property was paid subject to a direction that required the recipient to use the money only for the specified purpose, and not to treat the money as his own to deal with as his own irrespective of what other personal obligations might be owed to the payer.

30. The third share subscription case[4] on which Mr. Atherton relied rejected the claim that subscription monies were held on trust even though they were paid into a

[4] A fourth case, *Stewart –v- Austin* (1866) Law Rep. 3 Eq. 299, was also a case involving subscription monies remitted to the promoters of one proposed company who invested it in another company, it was held this second company did not receive the monies impressed with a trust. The distinctive facts made this case of marginal relevance.

"trust account" : *In re Fada (Australia) Ltd* [1927] State Reports 590. The terms of the subscription agreement do not appear clearly from the report of the case, but it is clear that the Court concluded that the mere obligation to repay subscription monies if the shares were not issued (in this case because of intervening insolvency) was not sufficient. However, I would not follow an important part of the reasoning in that case, namely Piper J's assertion that: "*Even words sufficient to declare trusts do not turn the speaker or writer into a trustee of his own property unless he intends that consequence.*" The preponderance of more modern English authority cited on both sides at trial suggests that the subjective intentions of the parties are irrelevant and that an objective view of the arrangements is what is crucial. This case carries little or no persuasive weight for present purposes.

31. Finally, as Mr. Lyon submitted in paragraph 37a of the Subscribers' Skeleton Argument, it may be that the two subscription cases where a trust was rejected may be distinguished on the grounds that in those cases there was a concluded contract for the shares. I am not satisfied that it is possible to clearly extract from the reports of those old cases the factual conclusion that the contracts were concluded, although this seems highly plausible, a point which highlights the importance of scrutinizing the facts applicable to the present case. Nevertheless, it must be right that where monies are remitted for the purchase of shares and the subscription application has been granted, it will almost invariably be the case that both legal and equitable title to the subscription monies will be viewed as having passed to the recipient company. Of course, where there is an agreement that the subscription monies will only be applied for investment in a specific type of investment product and none other (as in *R-v- Clowes and another (No. 2)* [1994] 2 All ER 316), the subscriber's beneficial interest may subsist until a later time if the funds are misapplied.

Applicable legal principles: equitable lien

32. In my view, the alternative equitable lien case cannot succeed if the special purpose trust claim fails. An equitable lien may be found to attach to a particular debt where the debtor has agreed to discharge a debt out of a specific fund. In the present case, there is no suggestion any such lien was created after the subscription application was deemed to be rejected, so the equitable interest the Subscribers assert falls to be determined based on the terms on which the monies were held before the 'debt obligation' arose.

33. When Kingate received the subscription monies, there was a contingent liability to repay the monies if the applications for shares were refused. Either the monies were segregated at the outset (in which case the primary special trust claim more logically succeeds) or they were not. After share dealings were suspended on December 12, 2008, it is not suggested that any or any operative fresh promises to repay the Subscribers out of any particular fund were then made. In January, 2009, Kingate indicated that it might, with the Trustee's consent, pay the

subscription monies into a separate account. But, such consent was not forthcoming, and the potential segregation never took place.

34. An alternative way in which an equitable lien may arise is where a contractual obligation which is specifically enforceable in respect of specific property operates in a way similar to an equitable assignment or an equitable charge. Again, on the facts of the present case, it is difficult to see how an equitable interest would arise in circumstances where the special purpose trust failed, particularly since there is no or no credible evidence that the subscription monies were segregated in any meaningful or traditional sense.

35. I accept the submissions of Mr. Atherton as the applicable law in this regard, with reference to *Swiss Bank Corporation –v- Lloyds Bank Limited* [1982] AC 584, and *Napier-v- Hunter* [1993] AC 713.

Applicable legal principles: Constructive Trust

36. Mr. Lyon submitted that a constructive trust should be found to exist because it would be unconscionable for Kingate to be able to treat the subscription monies as its own while the Subscribers' applications were being processed. He placed reliance on *Neste Oy-v- Lloyd's Bank Plc* [1983] 2 Lloyd's Rep 658, and *Westdeutsche Bank-v- Islington LBC* [1996] AC 669. This claim seemed even more improbable on the facts of the present case. In effect this was a submission that, assuming the other equitable claims were rejected, the Subscribers had entered into an unconscionable bargain.

37. It was difficult to avoid the impression that this alternative basis of claim entailed an almost subliminal attempt to suggest that the injustice of the Subscribers being paid as unsecured creditors, which flowed from the insolvency which supervened after the monies were received, could operate retrospectively to the date when the monies were received. In the *Neste Oy* case, Bingham J as he then was applied the constructive trust doctrine in a commercial context where the parent of the recipient company had resolved to cease trading *prior to the date when the monies were received*. The Subscribers' Skeleton Argument refers to two passages in the *Westdeutsche* case (which primarily considered whether a resulting trust was created where money was received under a void or *ultra vires* contract), neither of which appears to support the present proprietary claims.

38. In the first passage, Lord Browne-Wilkinson discusses cases where the alleged trustee has received money without his knowledge in circumstances where no gift was intended, and a resulting trust is subsequently created when the trustee realises he has no entitlement to the money[5]. In the second, the same Law Lord states:

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[5] [1996] AC 669 at 705G-706F.

"*Although the mere receipt of the monies, in ignorance of the mistake, gives rise to no trust, the retention of the monies after the recipient bank learned of the mistake may well have given rise to a constructive trust: see Snell's Equity p. 193: Pettit Equity and the Law of Trusts 7th edn. 168: Metall and Rohstoff v. Donaldson Inc. [1990] 1 Q.B. 391 at pp. 473-474.*"[6]

39. There is no suggestion here that the subscription monies were paid to Kingate by mistake, let alone under a void contract. Moreover, Kingate has never in any meaningful sense sought to 'retain' the funds at all.

40. Finally Mr. Atherton reminded the Court of the cautionary words found earlier in Lord Browne-Wilkinson's speech, which I accept apply to all heads of the Subscribers' claims:

> "*My Lords, wise judges have often warned against the wholesale importation into commercial law of equitable principles inconsistent with the certainty and speed which are essential requirements for the orderly conduct of business affairs: see Barnes v. Addy (1874) L.R. 9 Ch.App. 244. 251,255; Scandinavian Trading Tanker Co. A.B. v. Flota Petrolera Ecuatoriana[1983] 2 A.C. 694, 703-704. If the Bank's arguments are correct, a businessman who has entered into transactions relating to or dependent upon property rights could find that assets which apparently belong to one person in fact belong to another; that there are "off-balance-sheet" liabilities of which he cannot be aware; that these property rights and liabilities arise from circumstances unknown not only to himself but also to anyone else who has been involved in the transactions. A new area of unmanageable risk will be introduced into commercial dealings.*"[7]

Findings: the Applicant's special purpose trust claim

41. The narrow question which falls to be determined in this action is whether the subscription monies were received by Kingate on terms that Kingate was not entitled to treat the monies as their own unless and until it granted the applications and was entitled to add the subscription monies (net of any applicable charges) to the capital of the company for NAV purposes and/or otherwise. Subsidiary to this central issue are the following two questions: (a) was there a contract, and if so, what were its crucial terms; and (b) were the monies segregated upon or after receipt and/or was this expressly required by any agreement between the parties.

[6] At page 715 B-C.
[7] At page 704H-705B.

Was there a contract and, if so, what were its crucial terms?

42. I find that there was a binding contract between the parties whereby Kingate promised conditionally to (a) issue shares on terms of the standard form subscription agreements in consideration for the Subscribers remitting the subscription monies, and (b) to return the monies if the subscription application was refused. It matters not whether the formal offer is viewed as emanating from Kingate when it made available the application materials, or by the Subscribers when they submitted the application and the subscription funds. This agreement may be said to have been incomplete in part to the extent that the subscription application was never accepted, but the Subscribers had a contractual right to the return of 'their' monies.

Were the subscription monies segregated or expressly required to be segregated?

43. I find that the subscription monies were not segregated nor required to be segregated by any express contractual term. Both counsel tended to exaggerate the way in which Kingate dealt with the subscription monies, however. I reject the suggestion advanced by Mr. Lyon that the monies were *de facto* segregated because they were held in account which served as a conduit between investors and the investment capital in New York. But I also reject the argument advanced by Mr. Atherton to the effect that the monies upon receipt formed part of the capital of the company taken into account for NAV calculation purposes.

44. What was clear from the audited financial statements, as read with the contractual documentation, was that Kingate overtly treated subscription monies which might have to be repaid as part of its own assets, albeit subject to a corresponding liability to repay in the event an application was refused. But, as was pointed out by Channel J in *Henry –v- Hammond* [1913] 2 KB 515 at 521[8]:

> "*The only use of looking at the facts to see whether in a particular case he has kept the money in a separate account is to see whether he has recognized his obligation*".

45. This type of obligation is most significant in the agency or loan context where the parties' dealings in the absence of such an obligation to segregate would on the face of it be more consistent with a debtor and creditor relationship. In the context of a one-off transaction such as an application to purchase shares where the subscriber is effectively invited to apply on the terms offered, or not at all, the absence of an express agreement to segregate the subscribers' money is to my mind less significant than in the context of parties whose dealings involve multiple monetary transfers and any intention on the payer to retain an equitable interest in monies being remitted as part of a running account with the recipient would have to made explicit.

[8] Cited by Bingham J in *Neste Oy-v- Lloyd's Bank Plc* [1983] 2 Lloyd's Rep 658 at 664.

46. Nevertheless, absent an express agreement to pay monies into a separate account, even in the context of a one-off transaction, the Court cannot conjure an equitable relationship out of thin air and can only draw an inference of a trust from sufficiently clear explicit terms. However, if documented terms evincing an objective intention to create equitable rights and/or obligations are sufficiently clear, the mischief of unexpected consequences for related third parties resulting from the importation of equitable concepts into a commercial context is likely to be reduced, if not avoided altogether.

Were the subscription monies received on terms that precluded Kingate from treating such monies as their own property unless and until the share purchase application was granted?

47. I find that the subscription monies were received on implied terms that required Kingate to treat the monies as separate from their own assets until either (a) the subscription applications were granted or (b) the monies were returned because the applications were refused. Objectively viewed, the parties dealt with each on terms that the Subscribers only agreed to convey legal and equitable ownership in the funds they remitted to Kingate if the applications were granted so that the funds were available for application towards the specified investment purpose.

48. This conclusion, though it may accord with common sense and general notions of fairness, is ultimately obvious on an analytical reading of the relevant documentation. This finding does, therefore, also reflect the application of "*hard-nosed property rights*". The relevant analysis may be summarised as follows. It may fairly be said that the Information Memorandum makes it clear that all monies in the company's account are treated as its assets, and that the promise to repay does not (on its face in isolation from the wider contractual context) amount to more than a promise to repay an equivalent sum of money. In the Subscription Agreement, each subscriber makes the following representation:

> "(u) *Subscriptions. The Subscriber acknowledges that the Fund reserves the right to reject in its absolute discretion this and any other subscription for Shares in whole or in part, in any order, at any time prior to a Subscription Date (as defined in the Information Memorandum), notwithstanding prior receipt by the Subscriber of notice of acceptance of the subscription. If the Shares are oversubscribed, the Fund will determine in its sole discretion which subscriptions shall be accepted.* **If this subscription is rejected or if the sale of Shares is not completed for any reason (in which event this subscription shall be deemed to be rejected), the Fund shall as soon as practicable return any funds transferred by the Subscriber (without interest)** *along with this Agreement and any other documents delivered by the Subscriber.*" [emphasis added]

49. The express terms of this crucial wording admittedly are, on their surface, decidedly neutral in terms of shedding light on the implication of the Subscribers retaining a proprietary interest in the subscription monies. But, the highly conditional nature of the subscription process, influenced in part by the modern anti-money laundering regime, sets this factual matrix apart from the sale of goods scenarios which Mr. Atherton referred to in argument and illustrated by reference to *Re Goldcorp Exchange* [1995] 1 AC 74. The subscription monies are not being forwarded to pay for goods which will definitely be sold (subject to unforeseen contingencies). The monies are not being paid on account of services already rendered. They are in a sense being advanced to demonstrate that the applicants are serious, to make it worthwhile for the company to carry out their 'know your customer' checks, and to ensure that the shares may be issued promptly once the application is approved and that the investors' money can promptly be put to work. It is difficult to see any commercial logic behind the inference on these facts that the parties agreed that irrespective of whether the applications were granted, the company was free to treat the subscriptions as part of their own property leaving the Subscribers as unsecured creditors in the event that (a) the applications were refused, and (b) insolvency intervened before the repayment obligations could be discharged. Nevertheless, if this were the only operative contractual provision, it would be insufficient to support an inference of the retention of an equitable interest in the subscription monies.

50. The most important portions of the documents which evidence the terms on which the monies were received by Kingate are accordingly those that shed light on the nature of the repayment obligation as regards rejected subscription applications, particularly in the event that the issuance of shares is suspended. This is because the relevant applications in this case were clearly "*deemed to be rejected*" under clause (u) of each Subscription Agreement when trading in the shares was suspended on December 12, 2008. The Information Memorandum's explanation of what happens in relation to a "*Temporary Suspension of Dealings and Determination of Net Asset Value*" has been reproduced in full above. This Memorandum advises subscribers of their rights both before and after their application has been processed. It primarily addresses what will happen if the shares are issued, the scenario which is presumed to apply in most cases. But the document also explains that the directors may in certain circumstances suspend "*the sale, allotment, issue or redemption of shares.*" I find it noteworthy that the final sentence of that section of the Information Memorandum (summarizing the position under the Articles) provides as follows:

> "*The Fund may withhold payment to any person whose USD Shares have been tendered for redemption until after any suspension has been lifted.*"

51. There is no suggestion whatsoever that the repayment of subscription monies may be affected by any suspension events, the majority of which involve liquidity and

financial stability concerns, in addition to a proposed liquidation[9]. So, a subscriber reading the Information Memorandum and not bothering to read the Articles of Association would be entitled to infer that a suspension of share dealings would not impact on his repayment rights if his application was deemed rejected because it could not be completed. However, the Information Memorandum explicitly provides that "*the information in this Memorandum is qualified in its entirety by the Fund's Memorandum and articles of association… and operative agreements, all of which are available from the Administrator.*" The Custodian Agreement is also part of the Subscription Agreement, but in my judgment it applies primarily to the relationship between the company and its shareholders. Even if it evidences the absence of any promise by the company to segregate subscription monies upon receipt, it is not dispositive on the issue of whether or not the monies were impressed with a trust upon initial receipt by Kingate.

52. So the company's constituent documents apply not just to those to whom shares are issued, but also (as may be relevant) to those who apply for shares and are only (apparently) routinely supplied with the Memorandum and subscription agreement forms as well. What the articles say about the subscription process was, quite rightly, heavily relied upon by Mr. Lyon and is in my judgment crucial to the question under consideration. Article 14 expressly provides that "*no shares shall be issued*" during any period when the calculation of the NAV is suspended. Article 59 (reproduced in full above) expressly provides that the issue of shares may be suspended in various instances of liquidity crisis including (a) if the company is unable to meet a redemption request (article 59(f)), and (b) when the directors or members have resolved to liquidate the company (article 59(g)). So the articles (together with the related subscription documents) expressly contemplate the impact of insolvency on the rights of shareholders and subscribers, and (1) expressly state that insolvency impacts on the right to redeem, and (2) clearly imply that insolvency will not impact on the right of subscribers who applications have been deemed refused to be repaid their subscription monies.

53. Carefully analysed, the subscription documentation may fairly be construed as demonstrating that the parties agreed that the repayment obligations in respect of rejected subscriptions would not be adversely impacted by insolvency and that until the subscription applications were approved, the relevant monies did not form part of the company's assets. The fact that the issue of shares will not be possible during periods when trading in the shares is suspended is referred to in the Information Memorandum, the Subscription Agreement and the Articles of Association. There is nothing in these documents that credibly suggest (in light of these crucial suspension of trading provisions) that subscription monies received in respect of pending applications are to be treated as part of the assets of the company, for NAV purposes or otherwise.

[9] Article 59(a), (b), (d), (f) and (g).

54. It is true that the repayment obligation does not require the company to pay any interest on subscription monies which are returned, which might be said to be consistent with the company's ownership thereof. However, at page 18 of the Memorandum, it is stated that "*The subscription charge will be deducted from the subscriber's payment for the purpose of determining the net amount available for investment in USD shares.*" This discretionary charge will only be levied against subscription monies where applications have been approved and the monies are being applied towards the specified investment, so rejected subscribers do not bear the cost of the vetting process. The subscription scheme envisages a process which would ordinarily last no longer than, perhaps, a few weeks, so it is not obviously illogical for subscribers to forego any claim to interest while their funds are being held, as it were, in escrow, as clause (u) in the Subscription Agreement provides.

55. So having regard to the fact insolvency or concerns about insolvency constitute the main broad circumstances in which the issuing of shares may be suspended, in my judgment the following words can only fairly be read as evincing a mutual intention that the subscription monies prior to approval of the application remained in equity the property of the Subscribers:

> "***If this subscription is rejected or if the sale of Shares is not completed for any reason (in which event this subscription shall be deemed to be rejected), the Fund shall <u>as soon as practicable</u> return any funds transferred*** *by the Subscriber (without interest) along with this Agreement and any other documents delivered by the Subscriber."[emphasis added]*

56. I do not think the words "*return any funds transferred*" according to their natural and ordinary meaning connote any earmarking as the Subscribers' counsel contended. Used in reference to money, the word "return" is indistinguishable from "repay". As Mr. Atherton vividly put it, there was no "bag of money" involved here. But, in the factual matrix of this case, linked with the undertaking to return or repay "*as soon as practicable*" if the issue cannot be completed "*for <u>any</u> reason*" including, by necessary implication, circumstances of insolvency, these words clearly signify that the subscription monies in respect of applications which have yet been approved are not intended to form part of the company's property. This is because insolvency normally results not only in a suspension of distributions to shareholders (whose claims become subordinated to those of creditors), as is contemplated by the Information Memorandum and Article 59. It also normally results in a suspension of payments to unsecured creditors, because their right to be paid in full in the ordinary course of business is replaced with a right to prove in the liquidation and to be paid a rateable share of the insolvent company's net assets after the prior payment of liquidation expenses and other preferred claims. Under Bermuda law this result flows from section 225 of the Companies Act 1981, which is merely reflective of principles which are fundamental to insolvency law throughout the common law world.

57. These principles apply with mandatory statutory force after liquidation proceedings have been commenced, but also apply wherever doubts about a company's solvency will render payments made to shareholders or creditors after a point when management ought to have been aware a company was or might be insolvent liable to be set aside by a liquidator if a winding-up is subsequently commenced. Directors may be liable for breach of fiduciary duty for trading while insolvent. It is based on similar principles of US bankruptcy law that the BLMIS Trustee is seeking recovery of the $100 million transferred to Kingate in the months leading up to the New York-based management company's own bankruptcy. Article 59 (and the Information Memorandum's discussion of the suspension of trading issue) explicitly explains how, *inter alia*, liquidity concerns and the pending commencement of insolvency proceedings will impact on the issuing and redemption of shares. The issuing process would, incidentally, impact not just on new subscribers, but existing shareholders applying for new shares as well (Knightsbridge falls into the former and SCB falls into the latter category). The omission of any assertion in the Articles and/or the Information Memorandum that the suspension of new share issues will result in a suspension of repayment of monies received in respect of rejected subscriptions is combined with (a) an express statement (in Article 59 and the Memorandum) that redemption payments may be suspended and (b) an express statement (in the Subscription Agreement, paragraph (u)) that where a subscription application " *is not completed <u>for any reason</u>*" repayment "*the Fund shall <u>as soon as practicable</u> return <u>any funds transferred</u> by the Subscriber*" (emphasis added).

58. The contractual documentation supports a clear inference that the parties did not objectively intend that the Subscribers should be unsecured creditors in respect of their repayment rights in respect their rejected applications, should dealings in the shares be suspended as occurred on December 12, 2008. I am further fortified in this view by the fact that great care is taken in the Information Memorandum to warn of various investment risks after the assets are invested in New York, including the risk of fraud. Investors are cautioned that they should be able to afford a long-term investment, as this is the dominant purpose of the Fund. In the context of this sort of factual matrix, one can think of no more significant a risk to be warned about (in the suspension of share trading context) than the risk that the subscription monies related to rejected applications might not be repaid promptly or in full at all if suspension occurred. Not only is such a risk not positively identified; the relevant documentation explicitly suggests that no such risk will arise.

Alternative claims

59. I would reject the alternative claims if I were required to find that the subscription monies were not held on trust for the Subscribers on the basis that they were received by Kingate for a specific purpose on terms that if the primary purpose (the issue of shares) failed, the recipient company would not acquire both legal

and equitable ownership of the funds in question. If the company did not receive the monies on terms that impressed the funds with a trust, there was nothing which occurred afterwards which would give rise to an equitable lien or a constructive trust in the Subscribers' favour.

Summary

60. The monies were remitted on terms that they were to remain in equity the property of the Subscribers unless the application was granted and the monies became available to be applied towards the specified investment purpose. Such clear representations as to the Subscribers' rights in the event that the issuance of shares were suspended are not negated by either (a) the absence of either an express undertaking to segregate such monies or the failure to segregate the monies in practice, or (b) the general reluctance to import equitable obligations into commercial relationships where such obligations were not clearly contemplated.

61. For the above reasons the Subscribers are entitled to a declaration that the sums of $6 million and $3 million, respectively, received by Kingate and placed in an account with the Bank of Bermuda Limited for the special purpose of allowing them to subscribe for shares in Kingate are held upon trust for Knightsbridge and SCB, and to an order that the said sums be paid. I will hear counsel as to costs (although it is not obvious why costs should not, as regards the main protagonists, follow the event), and as to any other incidental matters flowing from the present decision, if required.

Dated this 28th day of August, 2009 ____________________

KAWALEY J