Application for a Preliminary Order, a number of Declarations and a number of Directions, in connection with the winding up of a Fund and sub-Funds.

[2019]GRC003

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

IN THE MATTER OF THE ARASBRIDGE UNIT TRUST

KLEINWORT BENSON (GUERNSEY) LIMITED
as Trustee of the Trust — **Applicant**

and

ARAS INVESTMENT MANAGEMENT LIMITED — **First Respondent**

as Manager of the Trust

and

ACTIVE FUND SERVICES LIMITED — **Second Respondent**

as Administrator of the Trust

and

JEREMY LE TISSIER — **Representative of the Unit Holders**

in his capacity as Representative of the Unitholders of the Trust

Judgment handed down: 18th February 2019

Before: Sir Richard Collas, Bailiff

Advocate for the Trustee: **Advocate J P Greenfield**
Advocate for the Administrator: **Advocate S Brehaut**
The Representative: **Advocate J T Le Tissier**

Background

1. This Application concerns the Arasbridge Unit Trust ("AUT" and "the Fund") which has previously been the subject of several applications to the Royal Court on which I have delivered a number of judgments. On 6 March 2018 the Court ordered that Kleinwort Benson (Guernsey) Limited in its capacity as trustee of the AUT ("the Trustee") shall be permitted, in exercise of its powers under the AUT, to implement and give effect to its decision to proceed with the winding up of the AUT.

2. The Trustee is now in the process of winding up the Fund and its sub-Funds but needs approval from the Court in respect to some of the issues that have arisen. The principal reason for the present application is that prior to the suspension of the AUT on 23 January 2009 ("the Suspension Date"), there had been difficulties in processing the calculation of

NAVs for several sub-Funds of the AUT, and in issuing Units and redeeming Units on behalf of investors. The Trustee cannot complete the winding-up of the Fund until it knows whether certain individuals are to be treated as creditors or as investors holding a number of Units in sub-Funds of the Fund.

This Application

3. By an Application dated 30 November 2018 ("the Application") the Trustee sought a Preliminary Order, a number of Declarations and a number of Directions. The Preliminary Order was a "Representation Order" to the effect that Advocate Jeremy Le Tissier be again appointed to represent all of the beneficiaries, subscribers and other applicants for subscription of or to the AUT. Similar Representation Orders had been made in his favour in respect of earlier applications and in view of his background knowledge of the Fund, I was pleased to make the Representation Order requested on this occasion. I am grateful to Advocate Le Tissier for all his submissions.

4. The first three Declarations sought concern the status to be attributed to subscribers and Unit Holders who had applied either to have Units issued to them or to have their Unit holdings redeemed prior to the Suspension Date but whose request had not been processed prior to that date and have never been processed. Should they be treated either as creditors of, or investors in, the relevant sub-Fund? The difference between the two is significant. If they are creditors, it is expected that their moneys will be returned to them in full. Whereas, if they are investors, they will have to share with other investors pro-rata whatever remains after creditors have been paid. The impact of that will be two-fold. First of all, the creditors concerned will benefit by receiving more than they would receive if they are treated as investors. On the other hand, the investors will receive a lower distribution at the end of the winding up and will thereby be disadvantaged.

5. The fourth Declaration sought relates to requests received to switch investments from one sub-Fund to another where those requests were received prior to the Suspension Date and including those related to the Arasbridge Capital Preservation Fund about which I say more below. The Declaration sought is whether those requests should be treated as invalid or treated as valid and processed accordingly.

6. The fifth Declaration sought is whether or not and to what extent Arasbridge Investment Management Limited ("AIML" and "the Manager") is entitled to the payment of any management fees in respect of the AUT.

7. Consequent upon my decisions on those Declarations, the Trustee sought a number of Directions, the purpose of which is to give effect to the Declarations and to direct that further steps be taken in accordance with a report by the Administrator included with the Application. I say more about the Directions below.

8. The Application also included applications in relation to costs.

Parties

9. The Trustee was represented by Advocate J P Greenfield. The First Respondent, AIML, had received notice of the application but did not appear. Its failure to do so is unsurprising as it has no directors, the last remaining directors having resigned some time ago.

10. The Second Respondent, Active Fund Services Limited ("Active" and "the Administrator"), the present Administrator of the AUT, was represented by Advocate Sarah Brehaut. The only other formal party was Advocate Jeremy Le Tissier in his capacity as Representative of the Unit Holders. Paul Schram of Irdaned BV, a company which describes itself as investment consultants and legal assistants, made written submissions on behalf of those Unitholders from whom he holds Powers of Attorney. He had hoped to be present to make oral submissions but his ferry sailing from Guernsey was re-scheduled to an earlier time due to forecast bad weather with the result that he was unable to attend the Court hearing.

11. I had the following documents before me:

    (a) the 9th Affidavit of Glyn Carré, a director of the Trustee, sworn on 26 October 2018;
    (b) the 4th Affidavit of Annette Bichard, representing Active, also sworn on 26 October 2018;

    (c) a Skeleton Argument filed on behalf of the Trustee dated 29 October 2018;

    (d) a Skeleton Argument filed by Advocate Le Tissier dated 20 November 2018 and comments filed by Mr Schram also dated 20 November 2018;

    (e) a Skeleton Argument filed on behalf of the Trustee in reply dated 30 November 2018 supported by the 10th Affidavit of Mr Carré, the 11th Affidavit of Mr Carré and the 5th Affidavit of Annette Bichard all dated 30 November 2018.

12. I received oral submissions from Advocates Greenfield, Brehaut and Le Tissier. The latter also made sure I was aware of any additional matters Mr Schram would have wished to raise had he been able to be present.

Jurisdiction

13. There was general agreement that the Court has the jurisdiction to grant declarations in appropriate circumstances, but it is a discretionary remedy which the Court will only grant when it is satisfied that it is appropriate to do so. (See, for example, Credit Suisse Trust v Haggiag, (Royal Court, unreported judgment 17/2017; Craven v Island Development Committee (1979 J.J. 1425 at 1430-1431); and In the Matter of Curatorship of X [2002] JLR 259).

Legal Principles

14. There was little legal authority cited to me to guide me as to the principles to apply when deciding how to identify whether subscribers and redeeming investors were to be treated either as investors or as creditors in the winding-up. Culross Global SPC Limited v Strategic Turnaround Master Partnership Limited [2010] UKPC 33 was a decision of the Judicial Committee of the Privy Council on appeal from the Court of Appeal of the Cayman Islands reported at [2008] CILR 447. The facts were different from the present. The case concerned the compulsory winding-up of a company where one issue was whether a redeeming shareholder is to be treated as remaining a member of the company until payment was received or to be treated as a creditor. The approach adopted by the Board is instructive in relation to the issue before me. It is summarised in the first sentence of paragraph 16 of the judgment:

"The issue depends, in the Board's view, upon the construction of the Appellant's articles, read with such other documents as may be incorporated or referred to therein."

15. I interpret that as requiring that I consider all the relevant documentation governing the structure and operation of the Fund and its several sub-Funds in order to establish the rights and responsibilities of the several parties concerned.

The Scheme Documentation

16. The AUT is constituted by a Trust Instrument dated November 2006 (the "Trust Deed"). Before looking in detail at the Declarations sought, it is helpful to set out some of the definitions. Terms are defined both in Appendix A to the Trust Deed and in the Scheme Particulars of the AUT (the "Scheme Particulars"). The two sets of definitions need to be read together where there are differences between them. A Dealing Day is normally once per month, on the 20th day of each calendar month. A Unitholder is defined in the Scheme Particulars as *"a person registered as a holder of a Unit or Units"* and a "Unit" is *"a Unit designated as such in respect of a Class Fund and "Units will be construed accordingly"*. In the Trust Deed, a "Unit" *"means one undivided share in the Trust and includes any fraction of a Unit…"* and "Holder" as *"the person for the time being entered on the Register as the Holder of a Unit…"*. The Register is defined in the Scheme Particulars as *"the register of Unitholders to be maintained by the Registrar"* and in the Trust Deed as *"the register of Holders referred to in Clause 3.3"*. The Registrar is defined in the Scheme Particulars as *"Nerine Fund Administrators Limited or such other registrar registered in Guernsey with the GFSC as may be appointed by the Trustee"*. At all material times, Nerine Fund Administrators Limited ("Nerine") was the Registrar. The "Unit Price" at which Units were issued or redeemed is calculated in accordance with the provisions of Appendix B and Appendix D respectively to the Trust Deed. The calculation is based on the Net Asset Value in relation to any Class Fund, calculated in accordance with Appendix J which provides for the calculation to be determined as at 23.59 hours on the Business Day preceding the relevant Dealing Day.

17. Many of the duties of the Manager were delegated by AIML to Nerine with the approval of the Trustee under a Fund Administration Agreement dated 22 November 2006. Delegation was permitted under paragraph 14 of Appendix F to the Trust Deed. The delegated duties included those relating to the issue and redemption of Units, the calculation of Net Asset Values and the calculation of the prices at which Units were to be issued or redeemed.

18. Section 3 of the Trust Deed details provisions relating to Units and their Holders; paragraphs 3.1 to 3.6 are relevant:

> *"3.1 The interest in a Class Fund of each Holder shall be represented by the Units for the time being registered in the name of such Holder and no Holder shall be entitled to any interest or share in any particular part of the scheme property.*
>
> *3.2 The Manager and/or any person appointed by the Manager for such purpose shall have the exclusive right to effect for the account of the Trust the Issue of Units subject to and in accordance with the provisions of Appendix B and for such purpose to accept subscription moneys and/or Investments for the*

account of the Trust. The Manager shall have an absolute discretion to accept or reject in whole or in part any application for Units.

3.3 A register of Holders (the Register) shall be kept by the Manager under the supervision of the Trustee in a form and manner approved by the Trustee and otherwise in accordance with the provisions of the Rules PROVIDED ALWAYS that the Manager may appoint the Administrator or any other person as its agent for the purpose of keeping the Register and every Holder shall be entitled to transfer the Units registered in his name in accordance with the provisions of Appendix C.

3.4 Units shall be issued in registered uncertificated form.

3.5 The Holder shall be the only person to be recognised by the Trustee or by the Manager as having any right, title or interest in or to Units registered in his name and the Trustee and the Manager may recognise such Holder as the absolute owner thereof and shall not be bound by any notice to the contrary and shall not be bound to take notice of or to see to the execution of any trust or, save as herein expressly provided or save as by some court of competent jurisdiction ordered, to recognise any trust or equity or other interest affecting the title to any Units.

3.6 Each Holder (other than the Manager) shall, subject to and in accordance with the provisions of Appendix D, be entitled on any Dealing Day to realise all or some of the Units held by him and any such realisation shall (subject as aforesaid) be affected (at the absolute discretion of the Manager) on the relevant Dealing Day:-

(a) by the purchase by the Manager of the relevant Units at a price not lower than the Unit Price applicable on such Dealing Day; or

(b) by the cancellation of the relevant Units and the payment out of the scheme property of the Unit Price or the transfer of relevant scheme property (as described in the Scheme Particulars) in respect of the Unit Price applicable on such Dealing Day; or

(c) partly in one manner and partly in the other."

19. In relation to the issue of Units, paragraph 3.2 states that the Manager has the *"absolute discretion to accept in whole or in part any application for Units"*. There is nothing in the Trust Deed to indicate how the discretion would be exercised save that Appendix B to the Trust Deed describes some preconditions that must be satisfied before Units will be issued to any person. They include that: someone must subscribe for the "Minimum Investment" or if he is an existing Unitholder, the "Minimum Additional Investment" (para 1.1); he must be a "Qualified Holder" (para 1.2); the Manager must have received cleared funds in advance of the Dealing Day (para 3); and the investor must have produced satisfactory evidence of identity and source of funds (para 5). I interpret the Manager's "absolute discretion" as meaning that, even if all the preconditions set out in Appendix B are satisfied, the Manager may nonetheless decline to issue Units to a subscriber.

20. In relation to redemptions, the phrase *"at the absolute discretion of the Manager"* in paragraph 3.6 relates to choosing between the two options (a) and (b), i.e. whether the Units

are to be purchased by the Manager or cancelled. They do not give the Manager discretion to decline the Unitholder's request. That is clear from paragraph 1 of Appendix D of the Trust Deed:

> *"1. SUBJECT to the following provisions of this Appendix D, upon receipt by the Manager or any of its duly authorised agents of a realisation request from a Holder which complies with the requirements of paragraph 2 and which is received by the Manager or any of its duly authorised agents by such time on or prior to the Dealing Day as may from time to time be prescribed in the Scheme Particulars (or such other time, subject to the Rules, as the Trustee with the agreement of the Manager may determine either generally or in any specific case), the Manager shall (subject to the provisions of paragraph 2), effect the realisation of the Units specified in the realisation request on such Dealing Day or, if such realisation request is received after the prescribed time, on the next following Dealing Day."*

21. Under that section, the Manager has no discretion as to whether to redeem the Units when requested by a Unitholder to do so provided that the requirements for serving a valid notice have been met. Paragraph 2 deals only with the provision of satisfactory evidence of the Unitholder's title to the Units to be redeemed. Paragraph 3 sets out how the Unit price of a Class Fund is to be ascertained on any Dealing Day.

22. Paragraph 4 of Appendix D states that any amount payable to a redeeming Unitholder will *"normally be paid to the bank account of such Holder no later than the close of business on the 30th calendar day following the Dealing Day on which the Holder's Units are redeemed".* Paragraph 5 provides:

> *"5. WHERE realisation is to be effected by cancellation of Units the Manager shall proceed to effect any sales of Investments necessary to provide the cash required and shall notify the Trustee that the said Units are to be realised and cancelled in accordance with the provisions of this Appendix and in such event the scheme property shall be reduced by the cancellation of the said Units and the Trustee shall pay to the Manager out of the scheme property in respect of the cancellation of the said Units the Unit Price thereof and the Manager shall (subject as otherwise provided in this Trust Instrument) pay over the same to the Holder."*

23. Paragraph 8 enables the Manager to limit the value of Units to be redeemed on any Dealing Day to 10% of the Net Asset Value of the relevant Class Fund:

> *"8. THE Manager may limit the value of Units in any Class Fund to be redeemed (other than redemptions made in respect of the Early Encashment Charge Free Withdrawal Option) on any Dealing Day to 10% of the Net Asset Value of the relevant Class Fund on that Dealing Day. Where this restriction applies, redemptions will be on a pro rata basis and any redemptions which, for this reason, do not occur in respect of any particular Dealing Day will be carried forward for realisation on the next Dealing Day, as if the redemption request was in respect of that Dealing Day, in priority to redemption requests subsequently received by the Manager."*

24. Paragraph 8 of Appendix D to the Trust Deed is repeated in paragraph 7 of Part 3 of the Scheme Particulars of the AUT (the "Scheme Particulars"). That paragraph also contains a number of provisions relating to redemptions when requested by a Unitholder. Most of the paragraph is not relevant but it does provide that a notice to redeem Units must be received thirty calendar days prior to the relevant Dealing Day on which the Unitholder wishes the redemption to take place, failing which the request is to be held over to the next Dealing Day.

25. The practical arrangements for the issuance of Units are described in Annette Bichard's Fifth Affidavit at paragraph 13:

> *"**C. ISSUANCE OF UNITS***
>
> *13. In case it is helpful to the Court, I hereby set out the process which concludes in the issuance of units. This process assumes that all of the documentation (including internal checks) are in place and deals with the flow of funds and the issue of units thereafter:*
>
> *13.1 Subscription monies received into the Aras Investment Management Ltd ("AIML") Client Account, either directly or via the Aras Trust Company ("ATC") Client Accounts.*
>
> *13.2 On the Dealing Day, the Administrator instructs their Banker to transfer the subscription monies to the Bank account of the Class Fund being invested into, thereby accepting the investors into the Class fund.*
>
> *13.3 The Fund follows the standard practice of Forward Pricing. Forward pricing ensures that units are purchased and sold at a price that reflects the changes in fund composition which may have occurred since the previous valuation. The valuation point is 23.59 on the business day immediately preceding the relevant dealing day). Therefore the Net Asset Value (NAV) of the Class Fund will not have been calculated by the dealing day.*
>
> *13.4 The Fund has in place a Derogation from 13.02(2) of the Collective Investment Schemes (Designated Persons) Rules 1988 (now 10.1.1 of the Licensees (Conduct of Business) Rules 2016), which permits a contract note to be sent before the close of business on the **thirtieth** business day following the day on which the transaction [i.e. subscription] is effected.*
>
> *13.5 The Administrator calculates the amount that is due to be invested into the target fund(s).*
>
> *13.6 In time for the target fund(s) dealing day, the Administrator instructs the Trustee to make the investment into the target fund(s) and to debit the bank account of the respective Class Fund in payment.*
>
> *13.7 The Administrator calculates the NAV as at the valuation point of each Class Fund, however only once it has the NAV of the target*

fund(s) which can take several weeks due to the type of investments held in the target funds.

13.8 Once the Administrator has calculated the NAV of each Class Fund then the corresponding number of units can be issued in the unit register and the contract note sent to the investor, with the contract note confirming the subscription date as the dealing date."

26. The client accounts mentioned are client accounts held in the name of the Manager. Monies in those accounts are held for the subscriber and will be returned to the subscriber if the subscription request is not accepted by the Manager or by the Administrator under its delegated authority. If the application for subscription is to be declined, that will happen before the subscriber's money is transferred to the Class Fund. It is my understanding of the documentation and the procedure previously adopted that the transfer of money to the Class Fund is evidence of acceptance of the request for subscription. Following the transfer, the subscriber becomes an investor who is entitled to all the rights attaching to a Unitholder. In other words, he is entitled to have a number of Units issued to him and to be entered in the Register as a Unitholder. In simple contractual terms, the contract between the subscriber and the Fund is complete at that moment. The transfer of the subscriber's subscription money is evidence that his offer to invest has been accepted by the Administrator and consideration has passed from the subscriber to the Fund. The further processes of investing in the target fund(s) and the subsequent calculation of the number of Units to be issued to the subscriber are matters of procedure that follow the acceptance of the investment.

The First Declaration

27. The First Declaration sought is:

> *"In respect of all valid Unitholder redemption requests received prior to the suspension of the AUT on 23 January 2009 ("the **Suspension Date**") for any Dealing Day which occurred prior to the Suspension Date, whether such Unitholders are:*
>
> *(a) creditors of the AUT and such redemption requests should be processed accordingly; or*
> *(b) investors in the relevant Sub Funds and such redemption requests should be disregarded accordingly."*

28. A large part of Advocate Le Tissier's submissions, as Representative, focussed on the practical consequences of any order. A particular concern was the fact that the value of investments held by the various Class Funds have fallen since the Suspension Date. Hence, if a redeeming investor is to be given the value that he would have received if his investment had been redeemed promptly as it should have been, it will result in the realisation of more investments than would have had to be sold at the due time with a consequential reduction in the value to be received by those continuing investors who had not served notice of redemption.

29. A further submission, forcefully made by Mr Schram, is that the Register of Unitholders is definitive and cannot now be changed; the definition of "Unitholder" quoted above means that a person is only classified as such if they are registered as a holder of a Unit or Units.

30. Mr Schram also submitted that before deciding the issue, it is necessary to know which Unitholders are affected.

31. In my judgement, that is unnecessary. In applying the approach of the Privy Council in Culross, I conclude that it is necessary to look at the Trust Deed in conjunction with other relevant documents, especially the Scheme Particulars, in order to determine the legal status of a Unitholder who has submitted a redemption request but has not received the proceeds of the redemption and is still registered in the Register as the Holder of the Units.

32. A Unitholder who has made a redemption request that complies with the preconditions as to service of a valid redemption request has the right, under the terms of the scheme documents referred to above, to receive the value of the Units that are being redeemed thirty days after the Dealing Day at which his redemption request is eligible. A request is "eligible" if it was received at least thirty calendar days before the Dealing Day. The Suspension Date was 23 January 2009 so the last Dealing Day was 20 January 2009 (a Tuesday and hence a Business Day). Therefore all redemption requests received before 21 December 2008 (30 calendar days before 20 January) should have been processed.

33. The provisions concerning "Suspension of calculation of Net Asset Value and dealings in Units" are in paragraph 12 of Part 3 of the Scheme Particulars. The effect of suspension is that *"Any suspension declared by the Manager shall take effect immediately and there shall be no dealing in Units until the Manager shall declare the Suspension at an end"*. The practicalities of issuing and redeeming Units are such that they could not physically have been completed within three days. Hence, even if the Fund had been operating as it should have been, there would have been redemption and subscription requests for dealing on 20th January that would not have been completed three days later. Nonetheless, my interpretation is that the issue and redemption of Units is deemed to have occurred on the Dealing Day. There is nothing in Appendices B and D to the Trust Deed to suggest that any dealings that should have taken place prior to the Suspension Date but had not been completed prior to that Date should be suspended. I therefore conclude that any dealing which should have occurred on 20 January 2009 is unaffected by the Suspension three days later and should be treated as if it had been processed on the Dealing Day.

34. The same paragraph 12 provides that *"During any suspension a Unitholder or prospective Unitholder may withdraw any application for the redemption or subscription of Units by notice in writing to the Manager".* It begs the question as to whether the Fund is to be considered as still being under suspension. I was not addressed on the point but my view is that the suspension ended when the Court ordered the Fund to be wound up. If any party wishes to submit that the Fund is still under suspension and hence that requests for subscription or redemption may be withdrawn, I will hear those submissions.

35. In conclusion, on a true construction of the rights and obligations arising from the scheme documentation (the Trust Deed and the Scheme Particulars), any Unitholder who made a valid request to redeem all or part of his holding of Units in sufficient time that the request should have been processed on or before 20th January 2009 (the last Dealing Day before the Suspension Date) should no longer be treated as an investor from the appropriate Dealing Day point. The failure to process the request prior to the Suspension Date is a breach of the obligations arising under the scheme documentation.

36. I have carefully considered the submission that the Register is definitive and cannot now be altered. This is an issue raised by Advocate Le Tissier and by Mr Schram. The submission is

that any person who is inscribed on the Register must be treated as a Unitholder and that only those persons who are registered on the Register are Unitholders. I am not persuaded. In my judgment, any person who has done whatever they are required to do to redeem their Units has the right to be treated as having had Units redeemed as at the first Dealing Day on which the request was eligible to be processed. Any failure to amend the Register to reflect the transaction does not alter the legal status of the Unitholder. Furthermore, the fact that the Manager is no longer active does not prevent the Register being amended to correct errors. The responsibility to maintain the Register was delegated to the Administrator. A person, whether a Unitholder or a creditor may only claim in the winding-up of the Fund for what he is legally entitled to receive. If that is not accurately recorded in the Register at present, the Register must be corrected or alternatively the Trustee must adjust that person's claim to reflect his or her correct entitlement.

37. I mentioned above that the Manager may limit the value of Units to be redeemed on any Dealing Day to 10% of the Net Asset Value of the relevant Class Fund. However, that did not happen and it is now too late to do so.

38. My decision on the First Declaration is therefore to support paragraph (a) and declare that:

> **In respect of all valid Unitholder redemption requests received prior to the suspension of the AUT on 23 January 2009 ("the Suspension Date") for any Dealing Day which occurred prior to the Suspension Date, such Unitholders are creditors of the AUT and such redemption requests should be processed accordingly.**

The Second Declaration

39. The Second Declaration sought is:

> *"In respect of Unitholder redemption requests received prior to the Suspension Date for any Dealing Day falling after the Suspension Date, whether such Unitholders are:*
> *(a) creditors of the AUT and such redemption requests should be processed accordingly; or*
> *(b) investors in the relevant Sub Funds and such redemption requests should be disregarded accordingly."*

40. Advocate Le Tissier submitted that the appropriate Declaration is sub-paragraph (b).

41. I agree. The answer flows from the effect of a suspension in dealings as described in paragraph 12 of Part 3 of the Scheme Particulars which I set out above. Any suspension takes immediate effect and there can be no dealing after a suspension has been declared. Therefore any redemption requested for a Dealing Day after the Suspension Date cannot be processed.
42. The Second Declaration I make is that:

> **In respect of Unitholder redemption requests received prior to the Suspension Date for any Dealing Day falling after the Suspension Date, such Unitholders are investors in the relevant Sub Funds and such redemption requests should be disregarded accordingly.**

The Third Declaration – ARF

43. The Third Declaration sought is:

> *"In respect of all subscription requests during the periods specified in sections F, G and H of the Ninth Affidavit of Glyn Carré into (i) the Arasbridge Absolute Return Fund; (ii) the Arasbridge Enhanced Return Fund; and (iii) the Arasbridge Capital Preservation Fund, whether such subscribers are:*
>
> *(a) creditors of the AUT and such subscription requests should be disregarded accordingly; or*
>
> *(b) investors in the relevant Sub Funds and such subscription requests should be disregarded accordingly."*

44. Section F of the Ninth Affidavit deals with the Arasbridge Absolute Return Fund ("ARF"). The only target investment for the ARF was FuturesOne Diversified Fund (EUR) Class K2 ("FuturesOne"). It suspended dealings and calculation of an NAV in December 2008. FuturesOne rejected subscription monies received from ARF for September and October dealings and returned the subscription monies to ARF.

45. The investment objectives of the ARF were not restricted to FuturesOne. The "Intended Exposures" in the Scheme Particulars for the ARF were "0% to 100% - Alternative Strategies & Hedge Funds and 0% to 10% - Cash or cash equivalents". Mr Carré acknowledged in his Ninth Affidavit that although, in principle, the subscription monies returned form FuturesOne could have been invested by ARF in other target investments, that could not have happened before April 2009 when the monies were returned to ARF from FuturesOne and by that time all dealings in ARF, along with the remaining Class Funds of AUT, had been suspended.

46. The Trustee suggested that the investors concerned should be treated as investors in the ARF, not as creditors of it. Advocate Le Tissier agreed that the subscribers should not be treated as creditors of the AUT. However, rather than be treated as investors, he submitted there was a case for treating them as beneficiaries. His submission relied upon the definition of "Holder" in the Trust Deed and on the provisions regarding the maintenance of the Register from which it could be said that a subscriber cannot be treated as an investor if they are not recorded in the Register as being the "Holder" of Units. He quoted from Re Rose [1949] Ch 78 (p31-32) and paragraph 3-037 of Lewin on Trusts in support of a contention that as the donee or trustee has done everything in his power to constitute the trust, the trust is properly constituted. The subscribers affected have provided consideration by investing their own money with the AUT with the intention of becoming a Unitholder but cannot be treated as such because they are not recorded on the Register. Instead they are a beneficiary.

47. My analysis is along the lines of the approach I followed above in connection with the First Declaration. A subscription amounted to an offer to subscribe in ARF which was accepted when the subscription monies were paid from the Manager to the bank account of the ARF. From that moment a subscriber became an investor in the ARF. As an investor, the subscriber had no right to demand the return of his subscription monies. The investor's right or entitlement was not to have his funds returned but to have issued to him some Units in the ARF and to be entered as a Unitholder in the Register. The failure to issue Units and enter a person in the Register did not convert his status from that of an investor to one of being a creditor.

48. Consequently, I declare that:

In respect of all subscription requests during the periods specified in section F of the Ninth Affidavit of Glyn Carré into the Arasbridge Absolute Return Fund ("ARF"), such subscribers are investors in ARF and such subscription requests should be processed accordingly.

The Third Declaration – ERF

49. Section G of the Ninth Affidavit deals with the Arasbridge Enhanced Return Fund ("ERF"). Although the ERF had a wide range of target investments available to it, it only invested in two target funds, both of which were actively dealing until June and July 2011, more than two years after the Suspension Date. However, Nerine never instructed the Trustee to invest the December 2008 subscriptions into the ERF targets. A possible explanation is that the subscription monies were transferred to ERF on 5 January 2009 which was after the ERF targets' December dealing day. No January investments were instructed due to the AUT being suspended on 23 January, three days after what should have been a Dealing Day.

50. The Trustee's assessment was that the ten subscription requests for the December 2008 Dealing Date, and investment on 5 January 2009, ought to have been invested in the target funds. The fact that those Units were not issued is not by itself a reason to treat those investments differently; the funds had moved from the client accounts to the ERF sub-Fund account with the intention of having Units issued to the subscribers.

51. Advocate Le Tissier applied the same reasoning to the ERF as to the ARF.

52. I apply the same reasoning as I have applied for the ARF. The subscribers' requests for subscription had been accepted. They had no right to demand the return of their subscription monies. Their entitlement was to receive Units in the ERF. They must be treated as investors, not creditors. My declaration is that:

    In respect of all subscription requests during the periods specified in section G of the Ninth Affidavit of Glyn Carré into the Arasbridge Enhanced Return Fund ("ERF"), such subscribers are investors in ERF and such subscription requests should be processed accordingly.

The Third Declaration – CPF

53. Section H of the Ninth Affidavit deals with the Arasbridge Capital Preservation Fund ("CPF"). CPF had a broad investment strategy which covered a large range of potential targets but in fact it invested in only one, Castlestone Capital Income plus EUR Class DD ("Castlestone"). In June 2008, Castlestone resolved to redeem all investors compulsorily. The cash proceeds were received and credited to the CPF in August that year. The proceeds remained in cash and were not invested in any other targets. An unsigned minute of a board meeting of AIML held on 18 November 2008 states:

    "It was noted that this fund [CPF] which was relatively small, simply held cash.
    It was agreed that on behalf of the Investment Committee, Messrs Lane and Nys would review the holding which in all probability they would be minded to close out.
    It was further agreed that they would report back to the Board of Directors not later than 28th November 2008."

54. A "Fund Update Note" of the AIML Investment Committee dated 5 December 2008 said that *"The Investment Committee understands that the [CPF's] portfolio should be 100% cash at bank".* It noted that the Board had been advised that the portfolio value was €22,299.17 which the Investment Committee could not reconcile. The Investment Committee did not wish to recommend another investment target, it proposed that the fund be closed to new subscriptions and suggested that Unitholders be advised of the situation and offered the opportunity to redeem their Holdings in CPF and to invest in another fund within the AUT. In fact, nothing else happened formally before the Suspension Date. The last subscriptions were received in October 2008.

55. Paragraph 1 of Appendix I to the Trust Deed provides for monies received by the Manager to be applied forthwith at the discretion of the Manager in the acquisition of investments subject to a proviso that *"all or any amount of cash may during such time or times as the Manager may think fit be retained in cash ....."* The proviso enabled the Manager to retain cash whilst deciding which investments to acquire. Consequently, it was not a breach of the investment provisions of the Trust Deed to retain a cash holding after Castlestone closed down and whilst alternative investments were considered or, as it happened, whilst a decision was taken as to whether to close the sub-Fund.

56. The options put forward by the Trustee are either to (a) treat all Unitholders as investors in the CPF, albeit their investment is represented by cash only within the sub-Fund; (b) redeem all Unitholders of the CPF at the December 2008 NAV of the CPF, treating them as creditors; or (c) treat the "uninvested CPF subscribers" as creditors of the CPF and the Unitholders whose subscriptions had originally been invested in the now "redeemed Castlestone" underlying target investment as investors.

57. The Representative sees no reason to treat CPF differently from ARF or ERF.

58. I agree for the same reasons given above. All the subscribers were investors whether they had invested before Castlestone closed or subscribed later. When their application to subscribe in the CPF was accepted and their monies were transferred, they became investors and should be treated as such. My declaration is that:

> **In respect of all subscription requests during the periods specified in section H of the Ninth Affidavit of Glyn Carré into the Arasbridge Capital Preservation Fund ("CPF"), such subscribers are investors in CPF and such subscription requests should be processed accordingly.**

The Fourth Declaration – Switch requests

59. The Fourth Declaration sought is:

> *"In respect of all outstanding "switch" requests received prior to the Suspension date for any Dealing Day which occurred prior to the Suspension Date, including those related to the Arasbridge Capital Preservation Fund, whether such requests are:*
>
> *(a) invalid and should be disregarded accordingly; or*
> *(b) valid and should be processed as redemption and subscription requests accordingly."*

60. This Declaration relates to requests from Unitholders to switch their investment from one sub-Fund to another within the AUT. It involves a request to redeem a Holding in one sub-Fund and to subscribe for a Holding within a different sub-Fund. When the AUT was trading and operating "normally", the Manager and Administrator permitted investors to switch. However there is no provision under the Trust Deed, the Scheme Particulars or any other scheme documentation giving the right for Unitholders to do so.

61. Previously I have agreed with the Trustee that any switch requests should be ignored. The Representative has not put forward any submissions contrary to that approach.

62. I again apply the principles in Culross and have regard to the rights and obligations arising under the scheme documentation. I am satisfied that any switch requests should be ignored on the ground that there is no right for Unitholders to switch and no obligation for the Trustee, Manager or Administrator to give effect to any such requests.

63. It might be considered that switch requests submitted by CPF investors must be treated differently because they may have been prompted by the redemption of the CPF's investment in Castlestone. The documentation now available is unclear but Mr Carré suggests in his Ninth Affidavit that those requests may have been based on communications between Unitholders and their financial advisors. I agree with his view that they should nonetheless be ignored.

64. I therefore make a Declaration that:

> **In respect of all outstanding "switch" requests received prior to the Suspension date for any Dealing Day which occurred prior to the Suspension Date, including those related to the Arasbridge Capital Preservation Fund, such requests are invalid an should be disregarded accordingly.**

The Fifth Declaration – Management Fees

65. The Fifth Declaration sought is:

> *"whether or not and to what extent AIML is entitled to the payment of any Management Fees in respect of the AUT."*

AIML was incorporated with the sole purpose of managing the AUT. Its licence issued under the Protection of Investors (Bailiwick of Guernsey) Law, 1987 was suspended on 30 April 2013. The last payment to AIML, its quarterly fee, was paid in June 2011. All the directors of the company have resigned and the company would normally have been struck off but the Companies Registrar has not done so, pending the outcome of these proceedings.

66. The obligations of the Manager are set out in Appendix G of the Trust Deed entitled "Retirement or removal of the Trustee of the Manger". The Trustee relies upon section 9 which provides:

> *"9. A Trustee or Manager who has retired or been removed:*
>
> *9.1 shall be paid all fees and expenses to which it is entitled down to the date of retirement or removal but shall not be entitled to any compensation for loss of office;*

9.2 shall deliver without delay to its successor Trustee or Manager, as the case may be, all investments, cash, documents and other material in its possession, custody or power relating to the Trust."

67. The Trustee recommends that no further fees or expenses be paid to AIML. The Representative agrees. His only issue was whether this is a proper matter for a Declaration.

68. The Court's jurisdiction to grant declarations extends to declaring the rights of parties and the existence of facts where those rights and facts have been established to the Court's satisfaction (see for example Credit Suisse Trust v Haggiag (unreported, Judgment 17/2017)). That judgment holds that *"when considering whether to grant a declaration or not, the court must take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should not grant the declaration."*

69. Whilst AIML has had notice of the hearing of the Application in that it was served at the former registered office of the company, it has not participated and indeed would not be able to do so when it exists in name only and has no directors. It is most unlikely that the company will be revived but if it were to be, the directors might wish they had made submissions. Whilst I am satisfied on the evidence before me that there is no legal basis on which AIML could claim any additional fees, I am reluctant to make a declaration to that effect. Even if there were jurisdiction to make the Declaration requested I would not do so, mindful that it is a discretionary remedy. Instead, I consider it is sufficient to issue a direction to the Trustee that it need make no provision for the payment of any Management Fees to AIML during the course of the winding-up unless, on application by AIML, the Court were to order otherwise.

70. Mr Schram questioned what might happen if the Manager were to be revived and Unitholders were to bring claims for compensation for the losses suffered as a result of failings on the part of the Manager. It is not for me to speculate on claims that are not presently before the Court but I do not think it would be beyond the wit of an Advocate acting for a successful claimant to ensure that any Management Fees that might be payable by the AUT would be available to meet any judgments obtained by investors.

71. Accordingly, rather than making a Declaration, I give a direction that:

> **In winding-up the AUT, the Trustee shall not pay any Management Fees, and shall make no provision for the payment of any Management Fees to AIML unless ordered to do so by the Court following an application in that regard by AIML.**

Directions

72. The Trustee also seeks a number of Directions in order to give effect to the Declarations ordered above. I agree that all the Directions requested are appropriate consequential orders following on from the Declarations. The only exception is that as I did not make the Declaration requested in relation to Management Fees, there is no requirement to give further Direction in relation to those Fees. Regarding paragraph 3.3, I do not direct the Trustee to take the steps set out in the Administrator's Report but I will note that it proposes to do so.

73. I order as follows:

> **"3. That the Court directs that in respect of the winding up of the AUT, all outstanding subscriptions and redemption requests required to be processed in accordance with the first to fourth Declarations above (for the October 2008, November 2008, December 2008 and January 2009 Dealing Days) should be processed at prices based on (i) the October 2008 NAVs determined, but not published by, Nerine Fund Administrators Limited, (ii) adjusted on each such Dealing Day for price movements in the underlying target holdings, and (iii) adjusted on each such Dealing Day for any compensation due from Nerine; and not to levy any Early Encashment Charge which may otherwise apply to redemptions for the November 2008 Dealing Day;**
>
> **4. The Court notes that the Trustee and the Administrator will take such further steps in the winding up of the AUT as set out in the Administrator's Report;**
>
> **5. The Trustee and the Administrator shall be relieved and excused wholly from any liability and be fully indemnified for any acts or things done in accordance with these orders. This Order does not affect any cause(s) of action, if any, which may have already accrued.**

Ancillary orders

74. I order that the fees and expenses of the Trustee and the Administrator properly incurred in relation to the Application be paid out of the AUT. That the Trustee, upon request, disclose to the Representative information of its costs and expenses paid from the AUT in respect of this Order to enable the Representative to consider whether such costs and expenses were either unreasonably incurred or had been incurred in an unreasonable manner.