

CAYMAN ISLANDS COURT OF APPEAL

FIA Leveraged Fund -v- Firefighters' Retirement System, New Orleans Firefighters Pension & Relief Fund, Municipal Employees Retirement System of Louisiana, CICA Appeal No. 6 of 2012, Cause No. FSD 0013/2012, Chadwick J., President, 18 February 2013

APPEAL OF AN ORDER FOR WINDING UP ON THE BASIS THAT THE COMPANY WAS UNABLE TO PAY ITS DEBTS - DEBT ALLEGED TO HAVE BEEN SATISFIED BY THE TRANSFER OF CERTAIN SHARES TO THE REDEEMING SHAREHOLDERS – IN-KIND DISTRIBUTION MUST BE FROM ASSETS OF THE FUND WHEN THE DEBT CRYSTALLISED - TRANSFER OF SHARES WITHOUT REAL UNDERLYING VALUE NOT SUFFICIENT TO DISCHARGE THE DEBTS IN ANY EVENT - APPEAL DISMISSED

The articles of association of FIA Leveraged Fund (the "Fund") permitted the holder of any class of participating shares the right to be redeemed on delivery of a redemption request. The Fund was obliged to redeem at the value fixed on the redemption date. Payment could be made in cash or in-kind. In response to a redemption request, the Fund transferred to the redeeming investors certain shares in another entity which were not assets of the Fund on the redemption date. In fact, the Company whose shares were so transferred was not in existence at the relevant date.

The Court of Appeal held that the power to make an in-kind distribution does not extend to the distribution of an asset which did not exist at the time when the investor was entitled to be paid his redemption monies. Furthermore, there was no evidence that the Directors of the Fund ever applied their minds to the proper valuation of the shares in question. The valuation applied by the Directors could not be accepted as a rational exercise of discretion, and while the Directors did have broad discretion to value assets under the articles and offering documents, there remains an implicit requirement that such a valuation should be carried out rationally. The appeal was dismissed.

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