Michaelmas Term

[2017] UKPC 36

Privy Council Appeal No 0050 of 2016

JUDGMENT

DD Growth Premium 2X Fund (In Official Liquidation) (Appellant) v RMF Market Neutral Strategies (Master) Limited (Respondent) (Cayman Islands)

From the Court of Appeal of the Cayman Islands

before

Lord Mance

Lord Sumption

Lord Carnwath

Lord Hodge

Lord Briggs

JUDGMENT GIVEN ON

23 November 2017

Heard on 4 and 5 October 2017

Appellant	Respondent
Tom Smith QC	David Chivers QC
Adam Al-Attar	Paul Smith
Jeremy Snead	Ben Hobden
(Instructed by Peter McMaster QC of Appleby (Cayman) Ltd and by Alan Taylor and Co)	(Instructed by Herbert Smith Freehills LLP and by Conyers Dill & Pearman)

LORD SUMPTION AND LORD BRIGGS: (with whom Lord Carnwath agrees)

Introduction - the issues

1.
In late 2008, just after the Lehman Brothers crash, a group of investors in a Cayman Islands open-ended investment company called DD Growth Premium 2X Fund ("the Company") decided to cash in their investments by exercising their right to have their shares in the Company redeemed. The management of the Company responded, in January 2009, by paying some of the investors in full, and some of them nothing. The largest payments were made to one investor, RMF Market Neutral Strategies (Master) Limited ("RMF"), in the aggregate sum of US$23m odd, but this was less than

40% of the amount owed to RMF by way of redemption. The Company then ran out of money and, shortly thereafter, went into insolvent liquidation. The liquidator then caused the Company to claim the US$23m back from RMF but the claim failed, both in the Grand Court and in the Cayman Islands Court of Appeal.

2.
The Company's appeal from the Court of Appeal raises issues about Cayman company law, as it was between 1989 and 2011, in relation to payments by the Company of premium due on the redemption of its shares, on largely undisputed facts which were either agreed at the outset of the litigation, or found by the Chief Justice of the Cayman Islands, at the trial of preliminary issues in 2014.

3.
The first and second issues are about the interpretation of section 37 of the Cayman Companies Law (2007 Revision) in its statutory and historical context. Section 37 permits a company to issue redeemable shares and regulates the circumstances in which, and the manner in which, they may be redeemed. The 2007 Revision will be referred to as the Companies Law. The third issue is about the common law, which in this respect is not suggested to be different as between the Cayman Islands and England, and concerns the nature of the remedies available to the company or to its liquidator for the recovery of a redemption payment rendered unlawful by section 37.

4.
Cayman law (like the law of the UK) has always contained restrictions upon the ability of a company to reduce its capital, primarily for the protection of its creditors. Although originally to be found in judge-made law, they are now almost completely statutory. The particular restriction in issue on this appeal consists of a form of solvency test which must be satisfied by a company if it is lawfully to pay for the redemption of shares out of capital. It is to be found in section 37(6) of the Companies Law in the following form:

"(6)(a) A payment out of capital by a company for the redemption or purchase of its own shares is not lawful unless immediately following the date on which the payment out of capital is proposed to be made the company shall be able to pay its debts as they fall due in the ordinary course of business.

(b) The company and any director or manager thereof who knowingly and wilfully authorises or permits any payment out of capital to effect any redemption or purchase of any share in contravention of paragraph (a) is guilty of an offence and liable on summary conviction to a fine to fifteen thousand dollars and to imprisonment for five years."

5.
The first issue is mainly a question of interpretation or application of the phrase "its debts as they fall due in the ordinary course of business" in section 37(6)(a). The question is whether generally that phrase is apt to include the debts constituted by the redemption price payable to shareholders who have exercised their right to redeem ("a redemption debt"). A subsidiary question is whether in any event redemption debts were incurred by this Company in the ordinary course of its business, as the judge held. It is common ground that, if redemption debts are generally, or are in the context of this Company's business, within section 37(6)(a), then the Company was insolvent at the material time. There is a factual dispute whether, if not, the Company had other debts which rendered it insolvent within the meaning of section 37(6)(a). The judge found it unnecessary to resolve that question and, for reasons which will appear, so does the Board. This issue will be referred to as "the Solvency Issue".

6.
The second, and main, issue in the appeal is whether a payment out of a company's share premium account towards the premium payable on redemption of shares (rather than towards the nominal amount of those shares) is a capital payment within the meaning of section 37(6)(a). If it is, then a company may not use sums standing to the credit of its share premium account for payment of the premium due on redemption of shares unless it satisfies the solvency test in section 37(6)(a).

7.
The appellant liquidators also challenged the lawfulness of the redemption payments made by the Company in this case by two alternative submissions which do not involve reliance upon section 37(6)(a). For reasons which will become apparent the Board has not found it necessary to address those in detail. Since all three routes of challenge question the legality of the redemption payments made, these issues will be referred to collectively as "the Illegality Issue".

8.
The third issue, which will be called "the Remedies Issue", may be summarised in this way. The Companies Law creates no express statutory cause of action or other civil remedy against the recipient of an unlawful redemption payment. There is only a criminal sanction against the company, its directors and managers. It is not in dispute that the directors of a company who procure the making of an unlawful redemption payment would be liable to the company for breach of trust, and that a recipient with knowledge of the facts as to the unlawfulness of the payment would be liable as a constructive trustee. The question is whether a claim for the recovery of an unlawful redemption payment may be pursued by the company or its liquidator against a recipient which received the payment without knowledge of the facts giving rise to the illegality, and in settlement (or part-settlement) of the debt constituted by the Company's obligation to pay the redemption price after a valid exercise of the shareholder's right to redeem, by means of a claim in unjust enrichment, subject only to established defences, such as change of position.

The Facts

9.
The Company is a Cayman Islands company limited by shares which, until placed in official liquidation in March 2009, carried on business as a feeder fund for the facilitation of investment in the DD Growth Premium Master Fund ("the Master Fund"). That was a hedge fund which, until the collapse of Lehman Brothers in late 2008, pursued what the judge described as a well-known trading strategy of investment in correlated stocks. The mechanism whereby the Company made this facility available to investors was by the issue of redeemable ordinary shares at a premium, and by using the proceeds of the issued shares as investments in the Master Fund. Investors could realise their investments through the Company in the Master Fund by making written requests to redeem their shares on one of a regular monthly series of redemption days. Both the issue price payable by the investor and the redemption price payable by the Company was to be calculated by reference to Net Asset Value ("NAV") calculations based upon the market value, from time to time, of the Company's investment in the Master Fund on the relevant issue or redemption date.

10.
The use of redeemable shares as the vehicle for investment in this way was a common business practice in the Cayman Islands, and involved both the issue and the redemption of the ordinary shares at a very substantial premium. By way of example, the NAV per US$ share of the Company's ordinary shares ranged during the period from January to June 2008 between US$106,575 and US$112.288,

whereas the nominal value per share was US$0.001. Thus, an incoming investor during that period would pay for the issue of shares an amount consisting almost entirely of premium, and the payment to an outgoing investor on a redemption day during that period would be similarly constituted.

11.
As a feeder fund, the Company's ordinary business consisted of the issue of shares, the transmission to the Master Fund of the proceeds of the issue, the receipt from the Master Fund of payments necessary to fund redemptions, and the payment out of redemption moneys to redeeming shareholders. The company had no separate trading activities of its own.

12.
The timetable for redemption laid down by the Company's articles may be summarised as follows:

i)
A shareholder is required to give 30 days' written notice of its wish to redeem, prior to a redemption day.

ii)
Redemption days were scheduled for the first business day of each month.

iii)
The NAV per share was to be assessed by the Administrator at the close of business on the day prior to the first business day of each month.

iv)
On the redemption day redeeming shareholders redeemed their shares at a price per share based on the NAV per share of the relevant class of share. They ceased to be shareholders and became creditors of the Company for that price on that day.

v)
Payment of the redemption price was to be made by the Company within 14 business days of the redemption day.

13.
The conversion of the status of a redeeming investor from a shareholder to a creditor on the redemption day, in advance of payment, was expressly laid down by the articles, and the validity of that first stage in the redemption process was affirmed by the Board in Pearson v Primeo Fund [2017] UKPC 19.

14.
By August 2008 the Respondent RMF Market Neutral Strategies (Master) Limited ("RMF") was a substantial investor in the Company's US$ denominated shares. The Company operated a substantially similar Euro denominated share structure, which can be ignored for the present purposes. One effect of the Company's trading was that it had a substantial surplus of share premium available for redemption of shares, although it did not maintain a formal share premium account in its books.

15.
The seismic shock to the derivatives markets which was triggered by the collapse of Lehman Brothers in late September 2008 had a catastrophic effect upon the investment strategy, and therefore the asset value, of the Master Fund. This meant that, in reality (and as later calculated by the Master

Fund’s liquidators), the Master Fund had a net asset value of minus US$69m odd by the end of November 2008, having lost US$76m odd in October and US$173m odd in November.

16.
The manager of the Master Fund, and of the Company, was Dynamic Decisions Capital Management Limited which was itself run by a Mr Alberto Micalizzi, who was also a director of the Master Fund and of the Company. It appears that, under his supervision, the Master Fund concealed its catastrophic losses by investments in worthless bonds (the Asseterra bonds) which were attributed a value in the Master Fund’s books sufficient both to conceal its insolvency and to portray to the world, and in particular to those responsible for the calculation of the NAV, a continuing state of profitability.

17.
Meanwhile, RMF and six other investors decided to redeem shares in the Company, giving redemption notices effective on the 1 December 2008. Of its 693,630.656 ordinary US$ shares, RMF gave notice to redeem 87,466.106 on 29 October and 437,330.534 on 31 October 2008, both effective on the 1 December redemption day. This left RMF holding 168,834.016 shares thereafter, which it unsuccessfully sought to redeem in January 2009.

18.
Based upon the false information provided by or on behalf of the Master Fund, the NAV per US$ share for the December redemption date was calculated at US$118.880. Accordingly RMF became a creditor of the Company on 1 December 2008 in respect of its two redemption notices in the aggregate sum of US$62,387,824.

19.
The Company had no cash of its own at that time. Nonetheless those managing the Master Fund managed to scrape together sufficient cash, made available first on 8 January 2009, to enable the Company to make part payment to the investors who redeemed in December. In summary, RMF was paid (between 12 January and 6 February 2009) US$23m odd, amounting to some 36.89% of what it was owed. Of the other six investors, the aggregate of whose redeemed shares was much less than that of RMF, three were paid in full, but three were paid nothing.

20.
The Company suspended its redemptions shortly thereafter and in March 2009 was placed in official liquidation. By these proceedings the liquidators seek, through the Company, to recover the whole of the US$23m odd paid in January 2009 to RMF, on the basis that those redemption payments were rendered unlawful by section 37, or alternatively section 34, of the Companies Law.

21.
Since the Company had no assets other than its investment in the Master Fund, it followed that it had in truth a negative asset value by 1 December 2008, and at all times thereafter. It was also common ground that, if the debts to redeeming shareholders are to be taken into account, the Company failed the solvency test imposed by section 37(6)(a) both on 1 December 2008, and when the part payments of the Company’s redemption debts to RMF were made. The Company submits (and asserted before the judge) that it also owed debts to creditors other than redeeming shareholders which it was from December 2008 onwards unable to pay in the ordinary course of business. The judge found it unnecessary to reach any conclusions about that.

The Proceedings

22.
RMF initiated this litigation with a claim for a negative declaration (ie that it was not liable to repay the US$23m) in February 2011. The Company cross-claimed for recovery of that sum, on the alternative bases that (1) it was the aggregate of unlawful redemption payments, recoverable by way of unjust enrichment or constructive trust and (2) that the payments constituted fraudulent preferences.

23.
In his judgment handed down on 17 November 2014 (after a trial of preliminary issues in September) the Chief Justice held that:

i) The payments were not unlawful, being a legitimate use of the share premium account pursuant to sections 34 and 37 of the Companies Law.

ii) That the Company was insolvent, both within the meaning of section 37(6)(a) and generally, at the material time.

iii) That the fraudulent preference claim failed on the facts.

24.
In the circumstances, the judge found it unnecessary to decide any part of the remedies issue. Indeed, the facts relevant to any claim based in constructive trust were neither agreed nor determined as part of the preliminary issues.

25.
The Company's liquidators have not sought to appeal the judge's rejection of the claim based on fraudulent preference. Apart from that, the Company sought to pursue its unsuccessful claims in full by way of appeal.

26.
By its judgment handed down on 20 November 2015 the Court of Appeal (Mr John Martin, Sir Richard Field and Sir Alan Moses JJA) dismissed the Company's appeal, in substance agreeing with the judge's interpretation of sections 34 and 37, albeit partly for different reasons. Like the judge, the Court of Appeal found it unnecessary to address any issues about remedy. Nor does it appear that the Court of Appeal addressed RMF's challenge, raised by Respondent's notice, to the judge's finding of insolvency within the meaning of section 37(6)(a).

The Solvency Issue

27.
It is convenient to take this issue first since, if the Judge's finding that the Company failed the section 37(6)(a) solvency test was unsound, this undermines the claim for recovery based upon the alleged unlawfulness of the redemption payments.

28.
It is common ground between the parties that, if redemption debts owed to the shareholders redeeming on the 1 December 2008 redemption day are to be taken into account, then the Company was then unable to pay its debts as they fell due. This is because the payments challenged satisfied only part of the December redemption debts, and the Company was thereafter unable to pay the rest. It is also necessary to bear in mind at the outset that it is common ground that the December redemptions were themselves valid in the sense that, with effect from 1 December 2008, both RMF

and the six other redeeming shareholders were converted from shareholders to creditors in respect of the shares being redeemed, and the shares cancelled. It is also part of that common ground that, although the NAV of US$118.880 per share had been calculated upon false information, it was nonetheless a valid NAV for the purpose of crystallising the amount of the redeeming shareholders' debt: see Fairfield Sentry Ltd (in liquidation) v Migani [2014] 1CLC 611.

29.
The insolvency test laid down by section 37(6)(a) is quoted in full at the beginning of this judgment. The main submission made for RMF was that "debts" should be held, on a purposive construction, to exclude debts due to former shareholders. This, it was said, is because section 37(6) is part of a statutory buttress for the maintenance of capital, and maintenance of capital is something designed for the protection, not of contributories, but of ordinary creditors, so that it would be perverse to read section 37(6) as designed to ensure that former shareholders could not be paid on redemption, merely because of a shortfall available to pay all redeeming shareholders in full. Accordingly, the test should address only the question whether, after the proposed payment, the company would be able to pay its ordinary creditors (principally trade and expense creditors), and since this Company was not proved to have had any such creditors at the material time, it could not be said to have failed this solvency test.

30.
In the Board's judgment this submission should be rejected, for the following reasons. First, although there is force in the proposition that the underlying purpose of any statutory or common law provisions or principles for the maintenance of capital is to protect ordinary creditors rather than shareholders or former shareholders, the protection afforded by section 37(6) would not be effective if debts still owing to former shareholders who had redeemed could not be paid after the proposed payment. This is because those creditors would, pending any liquidation, be competing for payment with the company's "ordinary" creditors, and the existence of those competing debts would hamper the ability of the company to pay its ordinary creditors in full as and when their debts became due. It is in that context nothing to the point that section 49 of the Companies Law postpones claims of members of a company to the claims of ordinary unsecured creditors, precisely because it only operates in the context of a liquidation. Until then, former shareholders with redemption debts are as much entitled to exercise creditors' remedies as any other creditors.

31.
Secondly, there is no textual basis within section 37(6) on which this purposive restriction can be founded. The words "in the ordinary course of business" in section 37(6)(a) do not operate so as to disqualify some debts rather than others. They are words which amplify the meaning of the phrase "as they fall due". The question whether a company is able "to pay its debts as they fall due" is now a well-known test for commercial rather than balance sheet solvency, and requires that regard be had to the company's forthcoming liabilities, and to its likely forthcoming resources with which to discharge them. It would be an entirely artificial exercise in the context of a company with substantial redemption liabilities to former shareholders who have, in respect of their redeemed shares, become creditors, to leave the debts owed to them out of any test for commercial solvency.

32.
Thirdly, as the judge found, the payment of debts owed to redeeming creditors lay right at the heart of the ordinary business of this Company. It is an open-ended investment company. Thus, even if the phrase "in the ordinary course of business" qualified the type of debt to be taken into account, payment of redeeming shareholders fell squarely within this Company's ordinary course of business.

33.
The Board therefore approaches the larger and more difficult illegality issue on the basis that the judge was right to find that the Company could not satisfy the section 37(6) solvency test when it made the payments now claimed to have been unlawful.

The Illegality Issue

34.
It is convenient at this point to set out in full the provisions of the Companies Law which bear in any way upon this issue. As consolidated in 2007 they represent provisions introduced in 1963, 1987 and 1989. It cannot be doubted that their clarity suffers to a substantial extent from the piecemeal way in which they have come together over time.

“34.(1) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount of the value of the premiums on those shares shall be transferred to an account called ‘the share premium account’. Where a company issues shares without nominal or par value, the consideration received shall be paid up share capital of the company.

(2) The share premium account may be applied by the company subject to the provisions, if any, of its memorandum or articles of association in such manner as the company may, from time to time, determine including, but without limitation -

(a) paying distributions or dividends to members;

(b) paying up unissued shares of the company to be issued to members as fully paid bonus shares;

(c) in the manner provided in section 37;

(d) writing off the preliminary expenses of the company;

(e) writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;

and

(f) providing for the premium payable on redemption or purchase of any shares or debentures of the company:

Provided that no distribution or dividend may be paid to members out of the share premium account unless, immediately following the date on which the distribution or dividend is proposed to be paid, the company shall be able to pay its debts as they fall due in the ordinary course of business; and the company and any director or manager thereof who knowingly and wilfully authorises or permits any distribution or dividend to be paid in contravention of the foregoing provision is guilty of an offence and liable on summary conviction to a fine of fifteen thousand dollars and to imprisonment for five years. …

37.(1) Subject to this section, a company limited by shares or limited by guarantee and having a share capital may, if authorised to do so by its articles of association, issue shares which are to be redeemed or are liable to be redeemed at the option of the company or the shareholder.

(2) Subject to this section, a company limited by shares or limited by guarantee and having a share capital may, if authorised to do so by its articles of association, purchase its own shares, including any redeemable shares.

(3) (a) No share may be redeemed or purchased unless it is fully paid.

(b) A company may not redeem or purchase any of its shares if, as a result of the redemption or purchase, there would no longer be any other member of the company holding shares.

(c) Redemption of shares may be effected in such manner as may be authorised by or pursuant to the company's articles of association.

(d) If the articles of association do not authorise the manner of purchase, a company shall not purchase any of its own shares unless the manner of purchase has first been authorised by a resolution of the company.

(e) The premium, if any, payable on redemption or purchase must have been provided for out of the profits of the company or out of the company's share premium account before or at the time the shares are redeemed or purchased or in the manner provided for in subsection (5).

(f) Shares may only be redeemed or purchased out of profits of the company or out of the proceeds of a fresh issue of shares made for the purposes of the redemption or purchase or in the manner provided for in subsection (5).

(g) Shares redeemed or purchased under this section shall be treated as cancelled on redemption or purchase, and the amount of the company's issued share capital shall be diminished by the nominal value of those shares accordingly; but the redemption or purchase of shares by a company is not to be taken as reducing the amount of the company's authorised share capital.

(h) Without prejudice to paragraph (g), where a company is about to redeem or purchase shares, it has power to issue shares up to the nominal value of the shares to be redeemed or purchased as if those shares had never been issued:

Provided that where new shares are issued before the redemption or purchase of the old shares the new shares shall not, so far as relates to fees payable on or accompanying the filing of any return or list, be deemed to have been issued in pursuance of this subsection if the old shares are redeemed or purchased within one month after the issue of the new shares.

(4) (a) Where, under this section, shares of a company are redeemed or purchased wholly out of the company's profits, the amount by which the company's issued share capital is diminished in accordance with paragraph (g) of subsection (3) on cancellation of the shares redeemed or purchased shall be transferred to a reserve called 'the capital redemption reserve'.

(b) If the shares are redeemed or purchased wholly or partly out of the proceeds of a fresh issue and the aggregate amount of those proceeds is less than the aggregate nominal value of the shares redeemed or purchased, the amount of the difference shall be transferred to the capital redemption reserve.

(c) Paragraph (b) does not apply if the proceeds of the fresh issue are applied by the company in making a redemption or purchase of its own shares in addition to a payment out of capital under subsection (5).

(d) The provisions of this Law relating to the reduction of a company's share capital apply as if the capital redemption reserve were paid-up share capital of the company, except that the reserve may be applied by the company in paying up its unissued shares to be allotted to members of the company as fully paid bonus shares.

(5) (a) Subject to this section, a company limited by shares or limited by guarantee and having a share capital may, if so authorised by its articles of association, make a payment in respect of the redemption or purchase of its own shares otherwise than out of its profits or the proceeds of a fresh issue of shares.

(b) References in subsections (6) to (9) to payment out of capital are, subject to paragraph (f), references to any payment so made, whether or not it would be regarded apart from this subsection as a payment out of capital.

(c) The amount of any payment which may be made by a company out of capital in respect of the redemption or purchase of its own shares is such an amount as, taken together with -

(i) any available profits of the company being applied for purposes of the redemption or purchase; and

(ii) the proceeds of any fresh issue of shares made for the purpose of the redemption or purchase,

is equal to the price of redemption or purchase, and the payment out of capital permitted under this paragraph is referred to in subsections (6) to (9) as the capital payment for the shares. Nothing in this paragraph shall be taken to imply that a company shall be obliged to exhaust any available profits before making any capital payment.

(d) Subject to paragraph (f), if the capital payment for shares redeemed or purchased and cancelled is less than their nominal amount, the amount of the difference shall be transferred to the company's capital redemption reserve.

(e) Subject to paragraph (f), if the capital payment is greater than the nominal amount of the shares redeemed or purchased and cancelled, the amount of any capital redemption reserve, share premium account or fully paid share capital of the company may be reduced by a sum not exceeding, or by sums not in the aggregate exceeding, the amount by which the capital payment exceeds the nominal amount of the shares.

(f) Where the proceeds of a fresh issue are applied by a company in making any redemption or purchase of its own shares in addition to a payment out of capital under this subsection, the references in paragraphs (d) and (e) to the capital payment are to be read as referring to the aggregate of that payment and those proceeds.

(6) (a) A payment out of capital by a company for the redemption or purchase of its own shares is not lawful unless immediately following the date on which the payment out of capital is proposed to be made the company shall be able to pay its debts as they fall due in the ordinary course of business.

(b) The company and any director or manager thereof who knowingly and wilfully authorises or permits any payment out of capital to effect any redemption or purchase of any share in contravention of paragraph (a) is guilty of an offence and liable on summary conviction to a fine of fifteen thousand dollars and to imprisonment for five years.

(7) …"

35.
Beginning again with section 37(6), and leaving aside the issue about the meaning of "debts as they fall due in the ordinary course of business", there is nothing difficult or uncertain about its purpose and effect, which is to subject any payment out of capital for the redemption or purchase by a company of its own shares to the solvency test as a condition for its lawfulness. But it immediately

begs the question what is “a payment out of capital”. That question is answered in terms by section 37(5)(b), which is expressed to apply in the context of subsections (6) to (9). It is “any payment so made, whether or not it would be regarded apart from this subsection as a payment out of capital”. It is common ground, and clearly correct, that the phrase “any payment so made” means any payment referred to in section 37(5)(a); ie “a payment in respect of the redemption or purchase of its own shares otherwise than out of its profits or the proceeds of a fresh issue of shares”. Since a payment out of share premium account is plainly not a payment out of profits or out of the proceeds of a fresh issue of shares, it is deemed to be a payment out of capital, provided only that it is made “in respect of” the redemption or purchase of the company’s own shares. It was common ground, and plainly correct, that the phrase “in respect of” is wide enough to include a payment of the premium due on the redemption of shares.

36.
In the Board’s judgment that is the end of the matter. Section 37(6) is, on its face, a free-standing condition for the lawfulness of a particular type of payment for the redemption or purchase of shares, namely payment out of capital. Section 37(5)(a) and (b) operate, expressly, as a form of definition of the meaning of “payment out of capital” and do so for the purpose of deeming that to be capital whether it would or would not otherwise be so regarded. The conclusion that, therefore, a payment in respect of the redemption of shares out of share premium account is a deemed payment out of capital subject to the section 37(6) solvency test is a straightforward application of clear statutory language, the displacement of which would require very strong pointers to the contrary.

37.
The main arguments that there are sufficient pointers to the contrary, advanced for RMF, have thus far persuaded both the courts below. They may conveniently be divided into three classes, namely:

i) Arguments based on section 37(3)(e);

ii) Arguments based on section 34; and,

iii) Arguments based on the legislative history behind these provisions, both in the UK and in the Cayman Islands.

38.
Section 37(3)(e) provides for three permitted ways or “gateways” whereby the premium payable on redemption for purchase of shares may be provided for, namely: (1) out of profits (2) out of share premium account or (3) “in the manner provided for in subsection (5)”. RMF submitted that section 37(3)(e) permits the use of share premium account to pay premium on redemption, regardless of the restriction in section 37(6), which only applies if the third gateway, namely the manner provided for in subsection (5), has to be employed for the purpose. The submission therefore treats section 37(6) as if it is purely parasitic upon section 37(5).

39.
While attractively argued by Mr David Chivers QC for RMF, the Board has not been persuaded that this analysis is correct. Neither on its own nor when aggregated with the other arguments to which reference will be made below is it sufficient to displace the clear meaning and effect of subsection (6), read with and interpreted by reference to subsection (5)(a) and (b). The reasons follow.

40.

First, section 37(3)(e) is silent as to whether the use of share premium account for the payment of premium on redemption is, or is not, subject to the solvency test. The answer to that question lies elsewhere. Secondly, subsections (5) and (6) are both expressly concerned with conditions for payment of redemption amounts whereas subsection (3)(e) is, by its terms, concerned with the making of provision in advance of, or at the time of, redemption.

41.
Thirdly, the third gateway in subsection (5)(e), namely “the manner provided for in subsection (5)” could, had this been intended, easily have referred also to subsection (6), or subsection (6) could itself have been framed so as to be expressly confined to payments sought to be achieved by using the subsection (5) gateway. In short, subsection (6) could have been, but is not, expressed to be parasitic upon subsection (5). It is only if that parasitic relationship between the two subsections is assumed, rather than treated as the issue to be determined, that the alternative construction, advanced by RMF and favoured by Lord Hodge, gains strength.

42.
Fourthly, this argument pays insufficient attention to what appears to be the main purpose of subsection (3)(e), read in the context of its sister, subsection (3)(f). Subsection (3)(f) is designed to identify the legitimate resources for payment of the nominal amount due on redeemed shares, whereas subsection (3)(e) is about resources for the payment of premium. Reading the two together, they both permit the use of profits and the manner provided for in subsection (5), but they prohibit the use of share premium account for the payment of the nominal amount due, and they prohibit the use of a fresh issue of shares for payment of the premium amount. That purpose is unrelated to the question whether any of the permitted methods, and in particular the use of share premium account, amounts to a deemed capital payment, thereby triggering the solvency test in subsection (6).

43.
Finally, if the legislature had intended to exclude share premium account from the reach of the deeming effect of subsections (5)(a) and (b), this could so easily have been expressly stated in subsection (5)(a), by adding a reference to share premium account in the words following “otherwise than”. This is incidentally just what the legislature did do in 2011, although that is irrelevant for the purposes of construction.

44.
Turning to section 34, the argument is that, when subsection (2) is read as a whole, it appears to contemplate and indeed authorise the use of share premium account for providing for the premium payable on redemption or purchase of shares without any solvency requirement. This is because the provision on redemption is given in subsection (2)(f), whereas the proviso, which contains an identical solvency test to that in section 37(6)(a), is expressed to apply only to distributions or dividends which are authorised by subsection (2)(a). Again, this is an attractive argument, and one which strongly influenced the judge and the Court of Appeal.

45.
The Board has not been persuaded by this argument, for two main reasons. The first is that the provision for a solvency test in relation to distributions or dividends in section 34 does not mean or imply that there is not some other solvency test applicable to one or more of the other permitted uses of share premium account, such as that in section 37(6). Section 34 is the only place in the Companies Law in which the use of share premium account for distribution or dividends is dealt with. By contrast

the use of share premium account for redemption for purchase is just mentioned in the non-exclusive list in section 34(2), but dealt with in detail in section 37.

46.
The second reason derives from the history of the piecemeal introduction of these provisions, and reinforces the first. The provisions for the use of share premium account on redemption of shares, including earlier versions of what are now sections 37(3)(e) and (f), and section 37(5) and (6), were introduced in 1987, as parts of what were then section 34. At that stage section 32 (which was the earlier version of what is now section 34) made no mention of the use of share premium account for distribution or dividends, made no reference to any solvency test and merely noted that it could be used in providing for the premium payable on redemption of any shares or any debentures of the company. The permission to use share premium account for distribution or dividends was introduced, side by side with the solvency proviso now in section 34(2), in 1989. If the provisions newly introduced in 1987 subjected the use of share premium account to the solvency test, it could not sensibly be suggested that the 1989 addition of distribution and dividends, side by side with its own solvency test, was intended by a side-wind to release the use of share premium account for redemption from a solvency requirement.

47.
Turning to the wider legislative history, counsel for both parties travelled at length through the history of the common law and statutory provision for the maintenance of capital, beginning with Trevor v Whitworth (1887) 12 App Cas 409 and continuing through the UK Companies Acts from 1929 onwards into the Cayman Islands legislation which, in its original form in 1963, mirrored that to be found in the UK Companies Act 1948. Thereafter the two legislative schemes diverged.

48.
The argument for RMF was that, in the context of a progressive liberalisation of the regime for the maintenance of capital, share premium account had, from 1948 in the UK and from 1963 in the Cayman Islands, been available for the payment of a premium on redemption of shares without any requirement for commercial solvency. For completeness, it was pointed out that this has clearly been the position from 2011, when share premium account was, by further amendment of section 37(5)(a), clearly excluded from the definition of capital payments. Why, it was asked rhetorically, should there have been a blip in that process of liberalisation which applied a solvency test to the use of share premium account for this purpose, which had previously been absent?

49.
The answer in the Board's judgment is that, prior to 1987, Cayman law permitted only the issue and redemption of preference shares, rather than equity shares, following in that respect the precedent set by the Companies Act 1948. In sharp contrast with shares of the type in issue in these proceedings, where the premium may exceed the nominal amount by several orders of magnitude, the premium likely to be payable upon the redemption of preference shares would typically be modest, limited to some capitalisation of coupon, unpaid on early redemption. The propensity for permitting the premium payable on redemption of equity shares to undermine capital maintenance, by comparison with preference shares, was perceptively analysed by Professor Gower in 1980 in his consultative report "The Purchase by a Company of its Own Shares" (Cmnd 7944). At para 22, after pointing out that section 58 of the Companies Act 1948 permitted a premium payable on redemption to be provided for out of share premium account, he continued:

“This anomaly may not matter much in the case of preference shares in the strict sense, where the premiums are likely to be small. But in relation to redeemable equity shares the premiums might well be many times the nominal value, resulting in a substantial reduction of capital on redemption. It is therefore suggested that sections 56 and 58 should be amended so as to prevent redeemable shares from being redeemed otherwise than out of profits or an issue of new capital without any use of share premium account which would be left intact.”

50.
In due course, the UK Parliament followed that advice and prohibited the use of share premium account for the payment of premium on redemption of shares, when extending the ability of a company to issue and redeem shares from preference shares to equity shares. This was done in the Companies Act 1981. By contrast, in 1987 the Cayman Islands adopted a more nuanced approach. The ability to issue and redeem shares was extended from preference shares to equity shares, and share premium account was permitted to be used for funding the premium payable on redemption. It is not surprising in that context that the Cayman Islands legislature took the more modest step of imposing a solvency test from the use of share premium account for that purpose rather than, as in the UK, prohibiting it altogether. It may well be that this was done specifically to permit or encourage the use of shares and share premium as an investment vehicle in the way commonly used by open-ended investment companies as illustrated by the facts of this appeal. There was no time before 2011 at which, in the Cayman Islands, redeemable equity shares could be issued, or redeemed, when there was also an uncontrolled right to fund premium payable on redemption out of share premium account. If the solvency test was imposed in 1987, as the Board considers that it was, it cannot in the light of the legislative history sensibly be described as some unaccountable blip in an otherwise seamless liberalisation of the capital maintenance regime.

51.
Lord Hodge criticises this analysis, in particular the reference to Professor Gower’s report, as a misuse of UK legislative history and policy for the interpretation of the undoubtedly different provisions of the Cayman Company Law. But when Professor Gower reported in 1980 the statutory provisions regulating the issue and redemption of shares were substantially the same in both jurisdictions, and the risks arising from the extension of the redemption of shares from preference to equity shares were therefore also the same. Professor Gower was doing no more than point out the logical consequences of providing for the redemption of equity shares upon the maintenance of capital.

52.
Lord Hodge draws support from a detailed textual analysis of the progressive development of the Cayman regime regulating the issue and redemption of shares from 1963, through 1987 and 1989 to 2007, for a conclusion that the solvency test now in section 37(6) was never intended to apply to the use of share premium account for the payment of premium on redemption. In the Board’s view the question turns primarily upon the construction of the 2007 Revision. If the 1987 Revision had clearly not applied the solvency test, then this might have been a sufficient contra-indication to displace the apparently clear meaning of section 37(6) read with the definition of payment out of capital in subsection (5), in the 2007 Revision. But the Board’s view is that the broadly equivalent provisions of the 1987 Revision do not lead to any different conclusion, construed on their own, and the modest textual changes to what is now section 37 introduced in 1989 make no significant difference.

53.

The judge was clearly influenced in his approach to the construction of sections 34 and 37 by a perception that to subject the lawfulness of a payment of redemption premium out of share premium account to a solvency test would expose investors in companies of this kind to unacceptable risks of uncertainty because of the risk of claw-back claims, sometimes long after redemption, arising from facts internal to the issuing company, unknown to the investor but affecting the commercial solvency of the company. If those claw-back claims could indeed be made against innocent investors (ie without knowledge of the facts about the company's solvency giving rise to the illegality) then the judge's concerns would be understandable. Nonetheless, as will shortly appear, the Board considers that the answer to those concerns lies in the limited nature of the remedy, rather than in adopting a strained construction of sections 34 and 37.

54.
The conclusion that the solvency test in section 37(6) applies to the use of share premium account for payment of premium on redemption means that it is unnecessary to address in detail either of the other grounds upon which the Company argued that the payments in issue were unlawful. For completeness there follows a brief explanation why the Board found neither of them persuasive.

55.
The first was that, separately from section 37(6), and although only applicable to payment of the nominal amount due on the redemption of shares, section 37(3)(f) was nonetheless itself a cumulative condition which would render the use of share premium account for payment of the premium under section 37(3)(e) unlawful, if the nominal amount was not to be funded out of proceeds of a fresh issue or in the manner provided for in subsection (5). Although generally the conditions for redemption are cumulative in section 37, subsections 3(e) and (f) deal with quite different aspects of the manner in which redemption is to be funded. Once a valid redemption has occurred (as is common ground in these proceedings) then the company owes a debt to the redeeming shareholder equivalent to what will always be the aggregate of the nominal amount and any relevant premium. It does not follow, merely because the nominal amount is not provided for or paid in a manner which renders the payment lawful, that this necessarily affects the lawfulness of the payment of the premium amount.

56.
The second alternative submission was that, in the context of the payment of premium on redemption, where there was no lawful payment of the nominal amount, the payment of the premium would be a distribution or dividend, separately subjected to a solvency test by section 34(2). Again, the concession that there was a valid redemption, sufficient to convert the redeeming shareholders into creditors and to bring to an end their rights as shareholders, necessarily means that a payment then or thereafter made to them is neither a dividend nor a distribution. Accordingly, it is not subject to the solvency test in section 34(2).

57.
For the reasons already given, the Board has concluded that the payments in issue in these proceedings were unlawful payments, because they were capital payments which triggered the solvency test in section 37(6), with which the Company was at the time unable to comply.

The Remedy Issue

58.
If, as the Board concludes, payment of the redemption proceeds was unlawful by virtue of section 37(6)(a) of the Companies Law, the next question is whether they are recoverable by the Company. The liquidators' primary case is that they are recoverable at common law on the ground of unjust

enrichment. Alternatively they submit that they are recoverable in equity on the ground that the redeeming shareholder is accountable as a constructive trustee on the footing of knowing receipt. Conceptually these two proposed bases of recovery are very different. A common law liability in restitution depends on the defendant having been unjustly enriched by the receipt. The liability of a constructive trustee is essentially a custodial liability comparable to that of an express trustee, which is imposed on him because he has sufficient knowledge to affect his conscience. The difference is of some practical importance in the present case. If the payments are recoverable only on the footing of knowing receipt, the company must establish that the redeeming shareholder had sufficient knowledge of the facts which made the payment unlawful. But knowledge of the facts giving rise to a right of restitution is generally irrelevant.

59.
A number of uncontroversial points should be made by way of introduction. First, section 37(6)(a) of the Companies Law prohibits a payment out of capital of the redemption proceeds, but does not prohibit the redemption itself. It is, as the Board has observed, common ground that the redemption itself was lawful and effective. It follows that on the relevant Redemption Days the transaction was executed. The redeemed shares were thereupon cancelled and the Company's issued share capital was reduced by their nominal value: see the Companies Law, section 37(3)(g). Secondly, there is nothing in the Companies Law to prevent the redemption proceeds from being payable at some time after the Redemption Day. Under the terms of the Offering Memorandum for the shares in question, the redemption proceeds were payable within 14 days. It follows, as the parties agree, that on the Redemption Day, the Company came under a liability to pay the redemption proceeds by the due date. The debt was incurred by the Company in consideration of the cancellation of the shares, and the payment was in consideration of the discharge of that debt. Thirdly, the prohibition in section 37(6)(a) is directed at the Company, ie at the directors by whom it acts. Fulfilment of the conditions imposed by section 37(6)(a) is a matter of internal administration. It is a breach of trust on the part of the directors to authorise the payment of the redemption proceeds if the conditions in section 37(6)(a) are not satisfied.

60.
In principle, money paid under an ineffective (eg a void) transaction is recoverable: Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1994] 4 All ER 890 (Hobhouse J), approved (obiter) on appeal to the House of Lords [1996] AC 669, 681-682 (Lord Goff), 714 (per Lord Browne-Wilkinson), 723 (per Lord Woolf); Guinness Mahon & Co Ltd v Kensington and Chelsea Royal London Borough Council [1999] QB 215. As the editors of Goff & Jones, The Law of Unjust Enrichment, 9th ed (2016), Chapter 13, explain, the ground of recovery in these cases is failure of basis. The transfer was not intended to be gratuitous, but the ineffectiveness of the transaction means that there never was any consideration for it. The same is in principle true if the reason why the transaction is ineffective is that it is illegal, although in this case the position is complicated by the public policy against the recovery of money paid for an illegal purpose: Smith v Bromley (1760) 2 Doug KB 696n; Patel v Mirza [2016] 3 WLR 399, paras 146-148 (Lord Neuberger), 194-197 (Lord Mance), 251-252 (Lord Sumption).

61.
The present case is, however, rather different. The basis for the payment of the redemption proceeds is that the shares have been redeemed and cancelled and a valid debt is owed by the Company. That basis has not failed. On the contrary, the redemption was lawful. The shares have been duly cancelled and the nominal share capital of the company adjusted accordingly. The Company's payment of part of

the proceeds discharged pro tanto the lawful debt that arose in consequence. It is accepted by the liquidators that if it had not been paid, it could have been proved as a debt in the liquidation of the company. It follows that although the Company acted illegally in making the payment, upon receipt it discharged a valid legal entitlement of the redeeming shareholder.

62.
It is fundamental that a payment cannot amount to enrichment if it was made for full consideration; and that it cannot be unjust to receive or retain it if it was made in satisfaction of a legal right. As Professor Burrows has put it in his Restatement of the English Law of Unjust Enrichment (2012), para 3(6), "in general, an enrichment is not unjust if the benefit was owed to the defendant by the claimant under a valid contractual, statutory or other legal obligation". The proposition is supported by more than a century and a half of authority: see, in particular, Aiken v Short (1856) 1 H & N 210, 215, Barclays Bank Ltd v W J Simms, Son and Cooke (Southern) Ltd [1980] QB 677, Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 AC 548, 574-577, 580-581, Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349, 408 (Lord Hope), Fairfield Sentry Ltd (in liquidation) v Migani [2014] 1 CLC 611 (JCPC), para 18.

63.
The liquidators submitted that, subject to any change of position defence, there was a right to restitution because the purpose of section 37(6)(a) was the protection of the company's assets for the benefit of its creditors. In support of this submission, he cited Smith v Bromley (1760) 2 Doug KB 696n, Browning v Morris (1778) 2 Cowp 790, and Kiriri Cotton Co Ltd v Dewani [1960] AC 192. These are all decisions about the rule of public policy against the recovery of money paid for an illegal purpose. They are authority for the proposition that although in principle money paid for an illegal purpose is not recoverable, there is an exception for cases where the parties to the illegal transaction were not in pari delicto. One circumstance in which they will not be in pari delicto is that the illegality consisted in the breach of an obligation laid upon the defendant for the protection of the very class of persons to which the claimant belonged. Thus in Kiriri Cotton Co Ltd a tenant was entitled to restitution of an illegal premium which he had paid by agreement to the landlord, because the duty not to charge it was laid by statute on landlords for the protection of tenants. This line of cases needs to be revisited in the light of the decision of the Supreme Court in Patel v Mirza [2016] 3 WLR 399, in which every member of the court (albeit for different reasons) recognised a more general right to restitution of money paid under an illegal transaction. But this does not matter, for these cases have no bearing on facts like those presently before the Board. They assume a prima facie right to restitution and address the circumstances in which the illegality of the underlying transaction may afford a defence, whereas in the present case there is no prima facie right to restitution to call for such a defence. They go on to assume (as was in fact the case in all of them) that the party seeking restitution was party to the illegality, whereas in the present case the redeeming shareholder simply received payments which were due to him under lawful transactions. The purpose of the rule which made the transaction illegal may be relevant to defeat reliance on the principle of public policy ex turpi causa non oritur actio. But it cannot create a right of restitution which would not otherwise exist.

64.
The Board concludes that the Company is not entitled to recover the payments at common law on the ground of unjust enrichment. The reality of the present case is that a payment has been received from a company for lawful consideration but it has been authorised by its directors in breach of their duties to the Company. This is the proper domain of the law of constructive trusts. Not even in return for

good consideration can a person retain assets which he knows to have been paid to him in breach of the statutory duties of the directors. But knowledge, especially in relation to apparently routine transactions where lawfulness depends on the internal affairs of the Company, may be hard to prove.

65.
The Board will humbly advise Her Majesty that this appeal must be allowed, and a declaration made that the payments of redemption proceeds pursuant to the respondents' redemption requests dated 29 and 31 October 2008 were unlawful by virtue of section 37(6)(a) of the Companies Law. The courts below did not deal with the right of recovery because they considered that the payments were lawful. Accordingly, there are no findings of fact to found the claim to make the redeeming shareholder accountable on the footing of knowing receipt. The matter must therefore be remitted to the Grand Court to determine whether the respondent is accountable for those payments as a constructive trustee.

LORD HODGE: (dissenting) (with whom Lord Mance agrees)

66.
I agree with the judgment of Lord Sumption and Lord Briggs on the solvency issue and also on the remedy issue if the repayment of the premium on the redeemed shares were illegal. I am not however persuaded that the Chief Justice and the Court of Appeal of the Cayman Islands erred in their conclusions on the illegality issue.

67.
The relevant provisions of the 2007 Companies Law are the consolidation of provisions introduced in 1963, 1987 and 1989. The legislative history of the current provisions, which have been set out in para 33 above, differs markedly from the way in which companies legislation in the United Kingdom has regulated the share premium account. The policies behind the legislation in the United Kingdom do not, in my view, provide a reliable guide as to the meaning of the 2007 Companies Law.

68.
The 1963 Companies Law, in section 32, treated the share premium account as a species of capital by applying the provisions of the 1963 Law relating to the reduction of share capital to the share premium account "as if the share premium account were paid-up share capital". But that deeming provision was qualified in subsection (1) by the words "except as provided in this section". It was therefore subject to exceptions in subsection (2), of which the relevant one was that the share premium account could be applied "in providing for the premium payable on redemption of any redeemable preference shares or of any debenture of the company". Section 34 of the 1963 Law, which empowered a company, if authorised by its articles, to issue redeemable preference shares, drew a distinction between the redemption of shares and the repayment of the premium on those shares. It provided (i) that the shares were to be redeemed out of profits otherwise available for dividend or out of the proceeds of a fresh issue of shares made for the purposes of the redemption (section 34(1)(a)) and (ii) that any premium payable on redemption must have been provided for out of profits or the share premium account before the shares are redeemed (section 34(1)(c)). The 1963 Law reflected the relevant provisions (sections 56 and 58) of the United Kingdom's Companies Act 1948. No other provision was needed to authorise the use of funds in the share premium account in paying the premium on redemption of the preference shares.

69.
At that time, the only redeemable shares which a company was authorised to issue were preference shares, which would normally have only a modest premium payable on redemption. But in 1987

company law in the Cayman Islands was altered radically when companies were empowered to issue redeemable equity shares. The 1987 Law substituted a new section 32 which did not alter the basic rule which treated the share premium account as if it were capital but, by extending the exception of the provisions of that section from that deeming provision, allowed the use of that account to provide for the premium payable on the redemption of any shares or of any debenture of the company. The substituted section 34, providing for the redemption and purchase of shares, preserved the substance of section 34(1)(c) of the 1963 Law by providing (in subsection (2)(e)):

"The premium (if any) payable on redemption or purchase must have been provided for out of the profits of the company or out of the company's shares [sic] premium account before or at the time the shares are redeemed or purchased."

The section retained the distinction between the use of the share premium account to pay the premium on redemption or purchase and the repayment of the nominal value of the shares on redemption or purchase by providing (in subsection 34(3)(f)):

"Subject to the provisions of subsection (5), shares may only be redeemed or purchased out of profits of the company or out of the proceeds of a fresh issue of shares made for the purposes of the redemption or purchase." (emphasis added)

But, as the emphasised words show, the repayment of the nominal value of the shares was subjected to a new regime, which is in substance that which is now contained in section 37(5) and (6) of the 2007 Act. That regime allows the company to make a payment in respect of the redemption or purchase of its own shares otherwise than out of its profits or the proceeds of a fresh issue of shares but deems such payments to be a payment out of capital and subjects those payments to the solvency test in subsection (6).

70.
The 1989 Law by repealing subsections (1) and (2) of section 32 removed the provision that the share premium account was to be subjected to the rules relating to the reduction of capital as if it were paid up share capital, except as provided in that section. It replaced those subsections with the provisions which are now found in section 34 of the 2007 Law and are set out in para 33 above. Those amendments preserved the share premium account but no longer deemed the share premium account to be capital for any purpose. The new subsection (2) provided that the share premium account may be applied in such manner as the company may determine. The enumerated uses of the account were stated not to limit that discretion. Those uses included the paying of distributions or dividend to members, which use alone was subjected to the solvency test in what is now the proviso to section 34(2) of the 2007 Act. The uses which were not so subjected included and include the application of the share premium account "(f) providing for the premium payable on redemption or purchase of any shares or debentures of the company".

71.
Another use which was not subjected to the solvency test in section 34(2) of the 1963 Law as amended in 1989 is the application of the share premium account "(c) in the manner provided in section 34" (now section 37 of the 2007 Law). This would allow the funds in the share premium account to be used to redeem the nominal value of shares, but such application would fall under what under the 2007 Law is the section 37(5) regime and thus the section 37(6) solvency test.

72.
The 1989 Law amended section 34(3)(e) of the 1963 Law to read:

“The premium (if any) payable on redemption or purchase must have been provided for out of the profits of the company or out of the company’s share premium account before or at the time the shares are redeemed or purchased or in the manner provided for in subsection (5).” (emphasis added)

This provision as amended thus provided an additional source of the funds, deemed capital under subsection (5), which a company could use to pay the premium payable on redemption or purchase. The 1989 Law also amended section 34(3)(f) by deleting the opening words emphasised in para 69 above and by adding the words emphasised below so as to read:

“Shares may only be redeemed or purchased out of profits of the company or out of the proceeds of a fresh issue of shares made for the purposes of the redemption or purchase or in the manner provided for in subsection (5).” (emphasis added)

Thus the nominal value of redeemed or purchased shares could be paid for out of profit, out of the proceeds of a fresh issue of shares made for that purpose or out of deemed capital as provided in subsection (5). Changes were also made by the 1989 Law to section 34(5) (now section 37(5) of the 2007 Law) but they are not relevant.

73.
From this legislative history the following conclusions can be drawn. First, the legislation has throughout authorised the application of the share premium account to pay the premium on the redemption of redeemable shares. Secondly, when redeemable equity shares were introduced, the 1987 Law preserved a distinction between the repayment of the premium on redeemable shares (now including redeemable equity shares) and the repayment of the nominal value of those shares by subjecting only the latter to the provisions of subsections (5) and (6) in the opening words of section 34(3)(f) (para 69 above). Thirdly, this distinction is preserved by the amendments introduced by the 1989 Law which expressly provide for an additional optional source of payment in both section 37(3)(e) and section 37(3)(f) of the 2007 Law. Thus the premium on redemption of shares may be paid out of (a) profits or (b) the share premium account or (c) as provided for in subsection (5) (ie a deemed capital payment subject to a solvency test). The nominal value of the shares on the other hand may be paid (a) out of profits or (b) out of the proceeds of a fresh issue of shares or (c) as provided for in subsection (5) (ie a deemed capital payment subject to the solvency test). The use of the disjunctive “or” in section 37(3)(e) means that the payment of the premium on redemption or purchase out of the share premium account is not subjected to the regime under subsections (5) and (6). This is consistent with section 34 of the 2007 Law, which does not impose a solvency test on the use of the share premium account when it is used to provide the premium payable on the redemption or purchase of shares.

74.
Lord Sumption and Lord Briggs start their analysis with section 37(6) of the 2007 Law, and thereby bypass the restrictions on the scope of section 37(5) on which subsection (6) is parasitic. Subsection (6) is parasitic on subsection (5) because the solvency test imposed by that subsection is applied only to the payments out of capital or out of that which subsection (5) deems to be capital when used to make a payment in respect of the redemption or purchase of the company’s own shares. But, as I have shown, under the 1963 Law and the 1987 Law the share premium account was not treated “as if [it] were paid up capital” when it was used to pay the premium on the redemption of shares because such use was exempted from the deeming provision. In the 1989 Law the share premium account ceased to be subject to the provisions of the Law relating to the reduction of share capital. Thus, under the 2007 Law the share premium account is not capital and therefore is not caught by section 37(6) unless

subsection (5) applies to make it so. But section 37(5)(a), which introduces the regime for payment in respect of the redemption or purchase of shares out of deemed capital, is stated to be "[s]ubject to this section", which requires reference to the other provisions of section 37, including subsection (3)(e), in order to determine the scope of subsection (5).

75.
Lord Sumption and Lord Briggs in paras 40 and 42 above interpret section 37(3)(e) and (f) of the 2007 Law as being concerned only with "the making of provision" or being "to identify the legitimate resources" for the payment of the premium and the nominal amount of the redeemed shares, while they construe section 37(5) as providing the authorisation for payment subject to the subsection (6) solvency test (paras 35 and 36 above). On their approach, section 37(3), when read with section 34(2), does not authorise the use of those funds. I respectfully disagree. Section 37(3)(e) of the 2007 Law performs a purpose which can be traced back to section 34(1)(c) of the 1963 Law (para 68 above). It identifies the sources of the payment of the premium on redemption and one source is the share premium account, which under section 34(2) of the 2007 Law (and formerly section 32(2) of the 1963 Law both as originally enacted and as amended in 1987 and 1989) can be applied in providing for the premium payable on redemption. Under the 1963 Law, and the 1948 UK Act on which it was modelled, no other authorisation for the payment was required. The amendments to section 34(3)(f) of the 1963 Law in 1987 (para 69 above) and to both section 34(3)(e) and (f) of that Law in 1989 (para 71 above) preserved this position. Against this legislative background, I am not persuaded that the introduction of what is now section 37(5) of the 2007 Law overrode the authorisation given by the combination of section 34(2) and section 37(3)(e) of that Law.

76.
This view of the scope of the deeming provisions in section 37(5)(a) and (b) of the 2007 Law does not empty those provisions of content. The deeming provisions would cover liquid assets of the company, such as cash obtained by borrowing, if they were to be used in respect of the redemption or purchase of the company's shares. Further, the conclusion that the share premium account is available for the payment of premium on the redemption of redeemable shares is consistent with the altered status of that account which ceased to be deemed in any circumstances to be capital for the purpose of the provisions of the Law relating to reduction of capital in 1989. But for the imposition of the solvency test in relation to the use of the share premium account in paying distributions and dividends to members (now by section 34(2) of the 2007 Law) the share premium account would have reverted to its pre-1963 status in Jamaican (and Cayman) law in the Jamaican Companies Act 1864 (as amended) as profits available for distribution: In re Hoare & Co Ltd [1904] 2 Ch 208; Drown v Gaumont-British Picture Corporation Ltd [1937] Ch 402. In this regard the amendments made to the Law in 1989 confirm my view that the legislature in 1987 by making only section 34(3)(f) subject to section 34(5) did not include the use of the share premium account to pay the premium on the redemption or purchase of shares within the section 34(6) solvency test.

77.
It is undoubtedly correct that the legislation could have been more clearly drafted as Lord Sumption and Lord Briggs have stated. But the legislative history which I have set out does not suggest that the legislature altered the substance of the 2007 Law when in 2011 it amended section 37(5) expressly to exclude payments out of the share premium account from the extended definition of capital and thus from the solvency test. In short, the legislature of the Cayman Islands in 1987 adopted a radically different approach to the use of the share premium account from that which Professor Gower recommended to the UK government and which the UK Parliament adopted in the Companies Act

1981. The 1987 Law extended the authorised use of the share premium account in payment of the premium on the redemption of shares, which previously had been limited to redeemable preference shares, to provide for the payment of the premium on the redemption of equity shares, notwithstanding that the premium commanded by such shares would often be much larger. In so doing, it did not impose on such use of the share premium account the solvency test now contained in section 37(6).

78.
I agree with the conclusion of Lord Sumption and Lord Briggs that the Company's other submissions, namely (i) that there were cumulative conditions in section 37(3)(f) and (e) of the 2007 Law and (ii) that the payment of the premium to a former shareholder would be a distribution subject to the solvency test in the proviso to section 34(2) of the 2007 Law, fall to be rejected for the reasons which they have stated in paras 51 and 52 of the judgment.

Conclusion

79.
I would therefore have dismissed the appeal.