

FSD NO: 0219/2010

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

IN THE MATTER OF SECTION 64(b) OF THE COMPANIES LAW (2010 REVISION)

AND IN THE MATTER OF HERIOT AFRICAN TRADE FINANCE FUND LIMITED



NOTICE OF ORIGINATING MOTION



TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on \_\_\_\_\_ 2010 at \_\_\_\_\_ a.m., or as soon thereafter as counsel can be heard, by counsel on behalf of Deutsche Bank (Cayman) Limited of Boundary Hall, Cricket Square, 171 Elgin Avenue, Grand Cayman, Cayman Islands (the **Applicant**), as the holder of not less than 23.47% of the issued shares in the Company (in its capacity as the nominee of Aris Multi-Strategy Lending Fund Limited and Aris Africa Fund Limited, both of 152 West 57<sup>th</sup> Street, 19<sup>th</sup> Floor, New York NY-10019, United States of America (collectively, **Aris**)), for the following orders:

1. Kris Beighton of KPMG, 2<sup>nd</sup> Floor, Century Yard, Cricket Square, Grand Cayman, Cayman Islands and Sandile Hlophe of KPMG South Africa, KPMG Crescent 85 Empire Road Parktown, Johannesburg, Gauteng, South Africa (the **Inspectors**) be appointed as inspectors pursuant to Section 64 of the Companies Law (2010 Revision) for the purpose of examining into the affairs of Heriot African Trade Finance Fund Limited of The Dundee Bank, Waterfront Centre, 2<sup>nd</sup> Floor, 28 North Church Street, Grand Cayman, Cayman Islands (the **Company**) and its subsidiaries and reporting to the Court thereon.

2. Without prejudice to the generality of paragraph 1, the Inspectors shall:
- (a) identify the assets and liabilities of the Company and its subsidiaries, including without limitation the nature and extent of the Company's interests in the Chambua and Black Rock Macarthy manganese mines in South Africa (the **Mines**);
  - (b) examine the trading activities of the Company and its subsidiaries during the period from 17 April 2007 to the present, including without limitation the circumstances in which the Company came to acquire interests in the Mines notwithstanding the terms of its offering documentation;
  - (c) carry out a review of all related party transactions, including without limitation all transactions during the period from 17 April 2007 to the present relating to or involving the Company and/or Webster Minerals Limited (**Webster**) and/or Chambua Minerals (Pty) Limited (**Chambua**) and/or Black Rock Macarthy Mining (Pty) Ltd (**Black Rock**) and/or Heriot Investment Management (Cayman) Ltd (the **Investment Manager**) and/or Heriot Commodity Trade Finance (Pty) Limited (the **Investment Advisor**) (and/or each of their respective directors and/or shareholders) (including without limitation the transaction by which the beneficial owners of the shares in Webster which are held in the name of the family trusts of the principals of the Investment Advisor may receive a percentage of the sale proceeds of the Mines which is disproportionate vis-a-vis the size of the Company's shareholding in Webster);
  - (d) carry out a review of the audited and unaudited financial statements of the Company and its subsidiaries for the period from 17 April 2007 to the present and examine and report any irregularities or discrepancies;

- (e) carry out a review of all payments exceeding US\$25,000 made by the Company and Webster during the period from 17 April 2007 to the present;
  - (f) carry out a review of all subscriptions for and redemptions of shares in the Company during the period from 17 April 2007 to the present;
  - (g) carry out a review of the reasons for and circumstances in which the directors of the Company resolved in or around March 2009 to suspend the determination of NAV and the redemption of participating shares in the Company; and
  - (h) if thought appropriate by the Inspectors, examine upon oath such directors, officers and agents of the Company and/or its subsidiaries (including where any such agent is a company, the directors and officers of such company) in whichever jurisdictions such directors, officers and agents are located.
3. The Inspectors shall prepare a report to the Court which shall be filed and served on the shareholders of the Company within 60 days of the date of their appointment.
  4. The Inspectors shall have liberty to apply to the Court for further or other directions upon giving not less than five business days' prior notice to all shareholders of the Company.
  5. Such other and / or alternative orders as the Court deems fit.
  6. The costs of and incidental to this application, including without limitation the fees and expenses incurred by the Inspectors, be reserved to a hearing on a date to be fixed after the Inspectors have filed their report to the Court.

**AND FURTHER TAKE NOTICE** that the grounds of this application, further details of which will be contained in the evidence filed in support of this application, are that the affairs of the Company require investigation by inspectors for the following reasons:

**The Company's egregious breaches of its investment objective, investment strategy and process, product focus, risk management criteria and representations to investors**

1. The vast majority of the Company's assets are currently invested in highly illiquid equity interests in the Mines, which constitutes a breach of various important provisions of the Company's Private Placement Memorandum dated June 2007 (the **PPM**) based on which investors (including the Applicant as nominee for Aris) subscribed for redeemable shares in the Company. In particular, it breaches:
  - (a) the Company's stated primary investment objective, which is to invest in commodities and act as a provider of trade finance (as its name suggests) through its trading company, Heriot Trading Limited;
  - (b) the Company's stated investment strategy and process, which is to utilise share subscription proceeds as collateral security to secure banking facilities in the form of documentary credits and short-term collateralised loans and other financial instruments to purchase commodities against orders from qualifying African commodity traders and to assist in the provision of trade finance for import and export related transactions;
  - (c) the Company's stated product focus, which is *"the supply of commodities that demonstrate certain characteristics. These commodities are, on the whole, referred to as "softs". Whilst the term "softs" is a well known and accepted term in the world commodity markets, generally referring to agricultural products, the Fund extends the definition to commodities with reference to their nature, liquidity, market volatility, branding, packaging and security of supply. Qualifying commodities are therefore homogeneous, non-branded, non-*

*perishable, form part of a liquid in-country market, are easily transported, usually packaged in bulk and subject to a worldwide accepted quality standard or grading. These products generally tend to fall into the category of agricultural products”*; and

(d) the Company’s stated risk management criteria, which provide that:

(i) *“no single client exposure, secured or unsecured, shall exceed more than 25% of the total asset base of the [Company]”*;

(ii) *“financial exposure to any one commodity shall not exceed 30% of the total asset base of the [Company]”*; and

(iii) *“the aggregate exposure to any one country shall not exceed 25% of the total asset base of the [Company]”*.

2. The Company’s ownership of these equity interests in the Mines also constitutes a breach of representations made in the Alternative Investment Management Association’s Illustrative Questionnaire for Due Diligence of Hedge Fund Managers (which was completed on 25 May 2007 by Stuart McArthur, a director and Chief Operating Officer of the Investment Advisor, as the Company’s agent) (the **AIMA Questionnaire**), which stated at paragraph 1.7.5 that only liquid commodities would be traded by the Company and at paragraph 12.3.2 that any *“illiquid positions would be liquidated within 4 weeks”*.
3. The Company admitted in a letter to investors dated 20 March 2009 that it *“is not set up to manage mining businesses”*, and yet that is what it has been attempting to do since 2008.
4. The Applicant contends that these egregious breaches of the Company’s investment objective, investment strategy and process, product focus, risk management criteria and representations to investors, and its admission that it is not “set up” to manage the

businesses which it is managing, in and of themselves warrant an investigation by independent inspectors appointed by the Court.

#### **The Company's accounting failures and irregularities**

5. As a regulated mutual fund, the Company is required pursuant to section 8 of the Mutual Funds Law (2009 Revision) to have its accounts audited annually and send such accounts to the Cayman Islands Monetary Authority. Pursuant to the terms of the PPM, the Company is required to send to all shareholders copies of (a) its audited annual accounts within six months of the end of each financial year, and (b) its unaudited half-yearly interim reports within six months of the end of the half-yearly period.
  
6. In breach of those obligations, the Company was 12 months late in producing its first audited financial statements for the financial year ending on 30 June 2008. That audit report by Deloitte and Touche was in any event qualified. Deloitte stated that 91.44% of the fair value of the Company's assets had been estimated by the directors themselves, that due to the *"limited information available, we were unable to satisfy ourselves as to the carrying value of such receivables"* and that the values estimated by the directors *"may differ significantly from the values that would have been determined if a public market for these receivables existed"*. The Company has yet to produce any qualified or unqualified audited financial statements for the financial years ending on 30 June 2009 and 30 June 2010. Nor has the Company ever provided the Applicant or Aris with any unaudited half-yearly interim reports. The Company's true financial position therefore is and always has been unclear.
  
7. The Applicant contends that the Company's failure to produce and distribute on a timely basis or at all either audited accounts or unaudited half yearly interim reports since it was incorporated in and of itself warrants an investigation by independent inspectors appointed by the Court.

### **The suspicious related party transactions**

8. The Company's equity interests in the Mines are held indirectly, through its shareholding in Webster. The Applicant understands that Webster holds shares in Chambua and Black Rock, which in turn hold prospecting rights in relation to the Chambua and Black Rock Mines respectively. It is further understood by the Applicant that Webster is the operator of both of the Mines.
9. All of the issued shares in Chambua had been purchased for a price of 300 South African Rand by Gianfranco Cicogna, a director and the Chief Executive Officer of the Investment Advisor, on 16 March 2006, i.e. before the Company was incorporated in April 2007.
10. From around November 2007, a significant portion of the Company's assets were allocated by the Investment Manager to the Mines, notwithstanding the terms of the PPM referred to in paragraph 1 above.
11. Webster was incorporated in Bermuda on 22 January 2008. Two of the directors of Webster are John Pickles and Judy Wright, who are also both directors of the Investment Manager. On 1 February 2008, Mr Cicogna transferred his shares in Chambua to Webster.
12. By October 2008, a total of US\$43 million had been loaned by the Company in respect of the Mines. The Applicant is not aware to which entity or entities or on what terms those loans were advanced, but it is understood that following a default under the loans the Company began to convert the debt into equity by acquiring shares in Webster.
13. The Company currently holds 99.998798% of the shares in Webster. The other shareholders therefore hold the remaining 0.000012% of the issued shares. On 7 August 2009, the Company entered into an Agreement with the "*Shareholders of Webster*

*Minerals Limited*” in respect of the division of the proceeds of sale of Webster’s assets (the **Sale Proceeds Agreement**). The other shareholders in Webster are not identified in the Sale Proceeds Agreement, but the Company has admitted that they include First Island Trustees (Guernsey) Limited (**First Island Trustees**), and that First Island Trustees holds shares in Webster as trustee of the Ashbourne Trust and the Derbyshire Trust. The Applicant has not been informed and is not aware of the identity of the beneficiaries of those trusts, but the AIMA Questionnaire describes the Ashbourne Trust as the “*McArthur Family Trust*” and the Derbyshire Trust as the “*Cicogna Family Trust*”. As noted above, Stuart McArthur and Gianfranco Cicogna are directors and the Chief Operating Officer and Chief Executive Officer respectively of the Investment Advisor. It appears therefore that shares in Webster are held by First Island Trustees on trust for the family trusts of two of the directors and senior management of the Investment Advisor.

14. Under Clause 4.1 of the Sale Proceeds Agreement, the Company is entitled to receive 100% of the net proceeds of sale of Webster’s assets up to the sum of US\$83,185,223 and 85% of any sale proceeds in excess of that amount. The other shareholders are entitled to receive 15% of any sale proceeds in excess of US\$83,185,223, despite the fact that they only hold 0.000012% of the shares in Webster.
  
15. On 13 April 2010 (i.e. approximately eight months after the Sale Proceeds Agreement was entered into), Stuart MacArthur swore an affidavit in which he stated in relation to the Mines that “*[o]ne drilling programme has been successfully completed and led to an offer of US\$50 million for the assets. Another drilling programme is on-going and, depending on the results, the value could increase to US\$120-130 million*”. It was therefore anticipated that the sale of the Mines could realise as much as US\$130 million. If a sale had been or is completed at that price, the other shareholders in Webster (including the beneficiaries of the family trusts of two of the directors of the Investment Advisor) would purportedly be entitled to receive US\$7,022,216 from the sale proceeds pursuant to the terms of the Sale Proceeds Agreement. Had the Sale Proceeds Agreement

not been entered into by the Company, those shareholders' pro rata share of the sale proceeds in those circumstances would have been just US\$1,560.

16. Webster is now purportedly in the process of negotiating the sale of its shares in Chambua and Black Rock for a price, allegedly agreed with the prospective purchaser, ranging from US\$20,000,000 up to US\$90,000,000 depending on the outcome of drilling verification programmes. If the sale completes at a sale price of US\$90,000,000, the other shareholders in Webster (including the beneficiaries of the family trusts of two of the directors of the Investment Advisor) will still purportedly be entitled to receive US\$1,022,216 from the sale proceeds pursuant to the terms of the Sale Proceeds Agreement. Had the Sale Proceeds Agreement not been entered into by the Company, those shareholders' pro rata share of the sale proceeds in these circumstances would have been just US\$1,080.
17. The Investment Manager holds all of the voting shares in the Company. On 21 September 2010 Aris requested in writing that Messrs Beighton and Hlophe be appointed as inspectors of the Company by special resolution pursuant to Section 67 of the Companies Law (2010 Revision) to investigate its affairs and if necessary examine on oath the agents of the Company, failing which the Applicant would commence these proceedings seeking equivalent relief from this Court. The Applicant had not received any indication that such a special resolution would be passed by the time of filing of this Notice of Originating Motion. Further, notwithstanding the fact that a price for the sale of the Company's interests in the Mines had purportedly been agreed by 21 September 2010, just two days later on 23 September 2010, Stuart McArthur informed a representative of Aris that he was tendering his resignation. Given the timing of Mr McArthur's resignation Aris enquired by email on the same day whether he had resigned in order to avoid being examined by inspectors. No explanation of his decision to resign was provided in response to that email.
18. The Applicant contends in the above circumstances that the transactions involving the Company and/or Webster and/or Chambua and/or Black Rock and/or the Investment

Manager and/or the Investment Advisor in and/of themselves warrant an investigation by independent inspectors appointed by the Court, and that such an investigation is warranted urgently given that Webster is purportedly in the process of selling its shares in Chambua and Black Rock.

**The Company's protracted and indefinite suspension of the calculation of NAV and the redemption of shares**

19. On 20 March 2009, less than two years after it had commenced operating, the Company informed investors that it had suspended the calculation of NAV and the redemption of shares. That suspension remains in place and the Company has not informed the Applicant when it will be lifted.
20. The Applicant contends that the circumstances in which the directors of the Company resolved to impose the suspension and the reasons why it has not been possible to lift the suspension for more than 18 months in and of itself warrant an investigation by independent inspectors appointed by the Court.

Dated the 4<sup>th</sup> day of October 2010

  
\_\_\_\_\_  
**Campbells, Attorneys-at-law for the Applicant**

To: The Registrar of the Financial Services Division

And to: Heriot African Trade Finance Fund Limited, The Dundee Bank, Waterfront Centre, 2<sup>nd</sup> Floor, 28 North Church Street, Grand Cayman, Cayman Islands

This Notice of Originating Motion was filed by Campbells, Attorneys-at-law for the Applicant, whose address for service is 4th Floor Scotia Centre, George Town, Grand Cayman KY1-1103, Cayman Islands (Ref: JRM/GM/17314).