



16 April 2014

PRESS SUMMARY

Fairfield Sentry Limited (in Liquidation) (Appellant) v Alfredo Migani and others
(Respondent) [2014] UKPC 9
On appeal from the Court of Appeal of the British Virgin Islands

JUSTICES: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Sumption, Lord Toulson

BACKGROUND TO THE APPEAL

Bernard Madoff and his company BLMIS operated what was probably the largest Ponzi scheme in history. Such a scheme involves a fund manager stealing the money invested in his funds, and hiding this theft by paying withdrawals through new money invested in the funds. In March 2009 Mr Madoff pleaded guilty in a New York court to a number of counts of fraud, and was sentenced to 150 years imprisonment.

Fairfield is a company incorporated in the BVI as a mutual fund, which invested money for clients, almost all of it with BLMIS. Its clients participated indirectly in these placements by subscribing for shares in Fairfield at a price dependent on Fairfield's net asset value ("NAV") per share, and were entitled to withdraw funds by redeeming their shares under the provisions of Fairfield's Articles of Association ("the Articles") at a price dependent on NAV. Fairfield's administrator was Citco Fund Services BV, which was responsible for day-to-day administrative services including calculation of the NAV and communication with shareholders.

It is inherent in a Ponzi scheme that those clients who withdraw their funds before the scheme collapses escape without loss, and the loss falls on clients whose funds are still invested when the scheme fails. Clients who redeemed before 18 December 2008 recovered the NAV attributable to their shares on the basis of fictitious reports from BLMIS, leaving the loss to be borne by those who were still clients at that date.

Fairfield seeks to recover the redemption money paid to certain institutions which redeemed some or all of their shares before December 2008 ("the defendants"), on the footing that it was paid in the mistaken belief that funds placed with BLMIS had the values stated by BLMIS, whereas they were in fact worthless.

Bannister J in the High Court of the BVI decided two preliminary issues. The first was whether certain documents ("the documents") issued by Citco recording the NAV per share or the redemption price were binding under Article 11 of the Articles, which deals with the effect of certain "certificates". The second issue concerned a question of consideration. It is now common ground that if the first issue is decided in favour of the defendants, then the present claim would fail, and the second issue would not arise.

Bannister J decided the first issue in favour of Fairfield, holding that the documents were not "certificates" for the purpose of Article 11. But he held in favour of the defendants on the second issue, and on that basis summarily dismissed the action. He was affirmed on both points by the Eastern Caribbean Court of Appeal.

JUDGMENT

For reasons given in a judgment delivered by Lord Sumption, the Board will humbly advise Her Majesty that the defendants' appeal against the Court of Appeal on the first issue should be allowed and that Fairfield's appeal on the second issue should be dismissed. Three of the documents constituted "certificates" for the purpose of Article 11, and so were binding on Fairfield.

REASONS FOR THE JUDGMENT

Restitution

A claim for restitution arising out of a transaction governed by the Articles is subject to the same law which governs the Articles, BVI law, which is the same for present purposes as English law. A payee of money is not unjustly enriched if he was entitled to receive the sum paid to him. So Fairfield's claim to recover the redemption payments depends on whether it was bound to make the payments it made. That depends on whether Fairfield was obliged on a redemption to pay the NAV per share (i) in accordance with what is now known about Madoff's frauds, or (ii) determined by the Directors of Fairfield ("the Directors") at the time of redemption. If (ii) is correct, the sums paid were properly due and are irrecoverable [17-19].

The Articles

Articles 9 and 10 are respectively concerned with those who subscribe for shares and the subscription price, and those who redeem shares and the redemption price. Unless the Directors otherwise decide, a Valuation Day is the last business day of any month, and with respect to redemptions a Dealing Day is the first business day thereafter [10]. Both the subscription price and the redemption price depend on the NAV per share determined under Article 11, which provides that the NAV will be determined by the Directors and that "any certificate" as to the NAV, the subscription price, or the redemption price "given by or on behalf of the Directors shall be binding on all parties". Under Article 9, the issue of shares "shall be made on the Dealing Day", and the subscription price is payable at a time fixed by the Directors. Under Article 10, the redemption of shares "shall be made on the Dealing Day", and the redemption price is paid as soon as practicable after the Dealing Day. The whole scheme depends upon the price being definitively ascertained by the Dealing Day and known to the parties shortly thereafter. It is unworkable on any other basis [21].

The Articles envisage the subscription and redemption prices being definitively ascertained at the time of the subscription or redemption; therefore the NAV per share on which those prices are based must be that determined at the time. The provision for certification in Article 11 was included as part of the mechanics of subscription and redemption, and it must refer to the ordinary transaction documents recording the NAV per share or the subscription or redemption price, which will be generated and communicated to the Member at the time, and not to some special document issued at the discretion of the Directors [24].

The certification question

As a matter of language, a "certificate" ordinarily means (i) a statement in writing, (ii) issued by an authoritative source, which (iii) is communicated by whatever method to a recipient or class of recipients intended to rely on it, and (iv) conveys information, (v) in a form or context which shows that it is intended to be definitive. There is no reason to think that a document must satisfy any other requirements, unless the purpose or context requires them. There is nothing in the context of these Articles which does [27].

In the Board's opinion a monthly email, and a monthly statement of account routinely sent to all clients, as well as the contract note sent to a subscribing or redeeming client in respect of any subscription or redemption, are all "certificates". They communicated information in documentary form to Members, were issued by Citco under the authority of the Directors, and the context in which they were issued plainly demonstrates that they were intended to be definitive [28-30]. The Board leaves open the question whether the statements posted on the Citco website are also "certificates" [32].

NOTE

This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html.