

BRITISH VIRGIN ISLANDS COURT OF APPEAL

Quilvest Finance Limited & others -v- Fairfield Sentry Limited (in Liquidation) **HCVAP 2011/041-062**

SHARE REDEMPTION - BVI APPEAL - MISTAKE OF FACT - CERTIFICATE OF VALUE - RESTITUTION

Between 1997 and 2008, Fairfield Sentry Limited had invested a large portion of its funds into Bernard L. Madoff Investment Securities LLC (“BLMIS”) on behalf of its Shareholders. The collapse of BLMIS resulted in the liquidation of Fairfield Sentry Limited (“Fairfield”). Fairfield’s Liquidators brought proceedings in the British Virgin Islands (and elsewhere) against former Shareholders who had redeemed their shares in Fairfield prior to its collapse (the “Shareholders”). The articles of association of Fairfield provided that the price at which shares were to be redeemed was to be calculated by reference to Fairfield’s net asset value (“NAV”) and that value would need to be certified. Fairfield’s articles also provided that a certificate of NAV “given in good faith by or on behalf of the Directors” was to be binding on all parties.

The Liquidators argued that the NAV calculated for the purpose of the redemptions in question had been calculated under a mistake of fact since BLMIS was in fact operating a Ponzi scheme and Fairfield’s investments were lost, and therefore valueless, from the point at which they were invested. It followed that the relevant NAV was nil or nominal and the redemption price ought similarly to have been nil or nominal. The Liquidators contended that the Shareholders had been unjustly enriched by the redemption at Fairfield’s expense and were liable to make restitution of the sums paid to them on redemption.

The Shareholders argued that the certificate as to the NAV in accordance with the provisions of the articles was conclusive and binding on Fairfield (the “Articles point”). They also argued that, in surrendering their shares for redemption, they had given good consideration for the payment of the price and that this

constituted a complete defence to the liquidators’ claim (the “Consideration point”).

These two arguments were tried as a preliminary issue by Bannister J who found in favour of the Liquidators on the articles point but in favour of the Shareholders on the Consideration point. On the application of one of the Shareholders for summary judgment on the basis of the Judge’s determination of the Consideration point, Bannister J then dismissed the Liquidators’ claims.

The Liquidators appealed the Judge’s findings on the Consideration point and on summary judgment. The Shareholders appealed on the Articles point.

The Court of Appeal (Pereira, Baptiste JJA and Mitchell JA (Ag)) dismissed both the Liquidators’ appeals. So far as the Articles point was concerned, the Court of Appeal agreed with Bannister J’s conclusion. It found there had, as a matter of fact, been no “certificate”. The Shareholders had argued that a “certificate” could be spelled out from various contract notes issued by the Fund administrators but Bannister J dismissed these arguments. The contract notes and other documents were not described as certificates, they were not signed and their purpose was to evidence the terms upon which Fairfield was purchasing shares not to certify a determination of NAV by the Directors.

Mitchell JA (Ag), giving the Judgment of the Court of Appeal on this issue, agreed with the Judge that there was no certificate: the contract notes were not certifications of a determination of NAV given by the directors.

The Court of Appeal also agreed with the Judge's conclusion on the Consideration point. Pereira JA, who gave the judgment of the Court on this issue, concluded that the effect of the articles of association was to create a contractual obligation on the part of Fairfield to redeem the shares and to pay the redemption price, calculated as provided, which was triggered by a submission of the shareholder of a request for redemption. The mistake, which went only to the NAV, therefore post-dated the formation of the contract at a point at which the tendering Shareholder had done everything which it was required to do under the provisions of the articles. This, the Court held, gave rise to a debt at the point at which the request for redemption was tendered in respect of which, the Shareholders having fully performed their part of the contract, gave good consideration.

This Judgment is of relevance for Liquidators of funds seeking to recover from investors who have redeemed their investment. It is clear that the fact that the Fund may have invested in a fraudulent scheme will not, without more, mean that redemption payments calculated in ignorance of the fraud will be forfeited. It is also of wider interest because it provides analysis of how and when a company becomes contractually bound to a redeeming shareholder and what does and what does not constitute a "certificate" for the purpose of a binding calculation of NAV where the value of shares is to be determined.

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