

BRITISH VIRGIN ISLANDS PRIVY COUNCIL

Fairfield Sentry Limited (in Liquidation) et al -v- Migani and et al [2014] UKPC 9

APPEAL TO HER MAJESTY IN COUNCIL - CALCULATING THE NET ASSET VALUE OF AN INSOLVENT FUND - LIABILITY TO DISGORGE - CONSTRUCTION OF THE ARTICLES OF THE FUND - MEANING OF CERTIFICATES

In this case, the Privy Council was invited to consider the vexed issue of how to establish the net asset value of an insolvent, fraud-tainted fund.

Fairfield Sentry was the largest feeder fund into what transpired to be a Ponzi-based scheme that was Bernard L. Madoff Investment Securities LLC (“BLMIS”).

Upon the revelation of the true nature of the Ponzi Scheme being perpetuated by BLMIS, Fairfield Sentry was placed into liquidation. In due course, its liquidator took the view that those investors who had made redemptions prior to the suspension of the calculation of NAV (which was quickly followed by the fund’s liquidation), had unfairly profited at the expense of those who were still investors at the time of its collapse. The basis upon which they had been redeemed was, he contended, mistaken, and they were liable to disgorge their payment, in favour of a rateable payment to all investors, irrespective of when they redeemed (or indeed, whether they had redeemed).

At first instance, the Commercial Court Judge determined that (i) the documents relied upon by the redeemed investors as binding were not “certificates” for the purpose of Article 11 of the Funds Articles but (ii) that by surrendering their shares, the redeemers had given good consideration, and on that basis he dismissed, summarily, the liquidator’s claim.

The first instance decision was affirmed, on both points, by the Eastern Caribbean Court of Appeal.

The Privy Council conducted a root and branch analysis of the Fund’s Articles and relevant contractual documents, including the subscription agreements. Applying a literal (and it is respectfully suggested, a common sense approach) Lord Sumption in providing the judgment of the Court concluded that the monthly e-mails, contract notes and monthly statements of account provided by the fund administrator were plainly “certificates” for the purpose of the Fund’s Articles. They satisfied all of the touchstones of a certificate, namely: (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.

On this basis, the liquidator’s appeal was dismissed. The decision has generally been welcomed both for the certainty that it brings to a formerly confused area, and also for its plain and sensible analysis.

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