**BRITISH VIRGIN ISLANDS**
**EASTERN CARIBBEAN SUPREME COURT**
**IN THE HIGH COURT OF JUSTICE**
**COMMERCIAL DIVISION**

**CLAIM NO. BVIHC (COM) 30/2010 AND 7 other Claims**

**BETWEEN:**

**FAIRFIELD SENTRY LIMITED (IN LIQUIDATION)**

**BANK JULIUS BAER & CO. LTD & 33 Others**

**Appearances:** Mr Dominic Chambers QC and Ms Arabella di Iorio for the Maples & Calder Defendants
Lord Falconer of Thoroton QC, Mr Paul Webster QC and Ms Nadine Whyte for the O'Neal Webster Defendants
Mr Mark Hapgood QC, Mr Alan Roxburgh, Mr Philip Kite and Mr Kissock Laing for the Harneys Defendants
Mr David Lord QC, Mr Robert Foote and Ms Claire Goldstein for the Ogier Defendants
Mr Michael Brindle QC, Mr Andrew Westwood and Mr William Hare for the Claimant

**JUDGMENT**

[2011: 28, 29 July 16 September]

(Preliminary issues - claimant mutual fund in liquidation – claimant suing pre-liquidation redeemers for return of redemption moneys on grounds of mistake – claimant alleging NAV's calculated under mistake of fact induced by fraud of BLMIS – claimant alleging that true NAV's nil or nominal – whether claimant precluded from recovering by Articles of Association – whether binding certificate – whether claimant precluded from recovering by fact that redeemers gave consideration by surrendering their shares – whether claimant precluded absolutely or only as to true value of shares at time of surrender)

[1] **Bannister J [ag]:** Fairfield Sentry Limited ('Sentry'), a BVI registered company, was a well known feeder fund for Bernard L Madoff Investment Securities Limited ('BLMIS'). It is said, although there are no figures to back this up, that 95% of funds placed with it for investment went into BLMIS. BLMIS collapsed in December 2008 when its proprietor, Bernard L Madoff, admitted that it had been run as a Ponzi scheme. BLMIS is now in SIPA liquidation in the United States. Sentry was placed in liquidation here on 21 July 2009.

[2] From early 2010 onwards and with the permission of the Court the joint Liquidators of Sentry caused it to bring proceedings against various investors who had, prior to the liquidation, made requests under Sentry's Articles of Association for some or all of their shares to be redeemed and who had, as a result, surrendered those shares in exchange for the redemption price. That price was calculated, or at any rate was supposed to have been calculated, in accordance with the provisions of Article 11 of Sentry's Articles of Association. It is Sentry's case in these and related proceedings that hundreds of millions of dollars were paid out in response to redemption requests made by the defendants to those claims whereas, so it is alleged, the true NAV's upon which the redemption prices were based were nil or little better than nil because, so it is pleaded, BLMIS was operated as a Ponzi scheme.

[3] This contention raises some interesting questions in itself. If, for example, BLMIS and, correspondingly, Sentry was always worth nothing or little better than nothing, how was it able to find the US$135m that is said to have been returned to redeeming investors in the specimen case which has been used for the trial of these preliminary issues during March 2004 alone? How are the joint Liquidators going to prove that Sentry was at all material times worth nothing? How are they going to show, if they ever get that far and if it should turn out that reimbursement is to be measured by deducting the true value of the shares at the moment of redemption from the redemption price received for them, what was the true value of the shares surrendered in respect of any given redemption? If the NAV's should at all times have been nil or little more, what right has Sentry to the money which it seeks to recover from redeemers and, correspondingly, who can show an entitlement to such money as may be recovered?

[4] Fortunately, these questions do not need to be decided in the course of this application, which arises from an order which I made on 20 April 2011 for the trial of preliminary issues. The issues were scheduled to the order, but before setting them out I think it would be helpful if I stated some of the factual background.

**Sentry's Articles of Association**

[5] Sentry's Articles of Association are by implication governed by BVI law. Redemption of shares was governed by Article 10. It was common ground that a member wishing to redeem all or part of his shareholding had to submit a redemption request to Sentry not later than 5 pm Amsterdam time not less than fifteen days before the last business day of the month. If he did

that Sentry was obliged to redeem the shares. In practice, the request would be submitted to Citco Funds Services (Europe) BV ('Citco'), to which Sentry had delegated (among other things) the tasks of calculating and publishing NAV's and processing and dealing with all correspondence relating to redemptions. These functions and tasks were delegated pursuant to a written Administration Agreement dated 20 February 2003, terminable on 90 days notice either side. It was not suggested by Mr Michael Brindle QC, who appeared together with Mr Andrew Westwood and Mr William Hare for Sentry, that the Administration Agreement had been terminated at any time before Sentry went into liquidation

[6] Article 10 provided that the redemption should be effected at a price determined in accordance with the provisions of Article 11 ('the redemption price') and that in the ordinary way the redemption price would be paid within thirty days after the relevant NAV had been determined. Since the relevant NAV for the purposes of redemptions was the NAV determined as at the last business day of the month in which the redemption request was received by Citco ('the Valuation Day'), it follows that the redeeming member would not know, when submitting his redemption request, the price which he would be paid on redemption. That could not be ascertained until Citco, on behalf of the directors, had completed the necessary calculations during the following month.

[7] Article 11(1) was in the following terms:

> 'DETERMINATION OF NET ASSET VALUE
>
> 11(1) The Net Asset Value per Share of each class shall be determined by the Directors as at the close of business on each Valuation Day (except when determination of the Net Asset Value per Share has been suspended under the provisions of paragraph (4) of this Article), on such other occasions as may be required by these Articles and on such other occasion as the Directors may from time to time determine.
>
> The Net Asset Value per Share shall be calculated at the time of each determination by dividing the value of the net assets of the Fund by the number of Shares then in issue or deemed to be in issue and by adjusting for each class of Shares such resultant number to take into account any dividends, distributions, assets or liabilities attributable to such class of Shares pursuant to paragraph (2) of Article 4, all determined and calculated as hereinafter provided.
>
> Any certificate as to the Net Asset Value per Share or as to the Subscription Price or Redemption Price therefor given in good faith by or on behalf of the Directors shall be binding on all parties.'

[8] Article 10(4) provided (among other things, that

> 'Upon the redemption or purchase of a Share being effected pursuant to this Article, the Member shall cease to be entitled to any rights in respect of that Share . . . and accordingly his name shall be removed from the Register [of Members] with respect thereto.'

**The Private Placement Memorandum and 'Long Form' Subscription Agreement**

[9] I was referred to certain passages in these documents as either supplementing or reflecting the provisions of the Articles of Association. There was no discussion as to their admissibility as an aid to construction of the Articles of Association and I mention them merely to indicate the nature of the material with which I was provided and to identify some of the more significant parts of these documents.

[10] The Private Placement Memorandum ('PPM'), for example, tells the prospective investor that all decisions on the value of assets and liabilities of Sentry and the determination of NAV will be made by the directors. It refers to the position of Citco, as briefly outlined in paragraph [5] above. There is heavy emphasis on the risky nature of making an investment in the fund and it is expressly stated that investors bear the risk of any decline in NAV between the submission of a redemption request and the calculation of the redemption price on the next following Valuation Day. Mr Brindle QC drew my attention to the fact that the word 'certificate' is used in the PPM in the context of verification of documents of identity and so forth.

[11] The Long Form Subscription Agreements mention that monthly 'statements' will be provided and warn investors that valuations contained in them may be based on estimated and unaudited figures. There is further heavy emphasis on risk.

**The documents relied upon by the defendants**

[12] I was shown some of the monthly statements sent out by Citco and which are mentioned in the Long Form Subscription Agreements ('monthly statements'). Most of them appear to have been sent out about two weeks after the end of the month. Each sets out in its top right hand corner the date of the statement and the date upon which the latest valuation was made. In a section of the monthly statement headed 'Fund Net Asset Values' are set out the NAV as at the last preceding Valuation Day and as at the Valuation Day last preceding that. In the next section of the monthly statements, headed "Account Value', are set out the value of the member's account as at these two dates and any dealings on the account in the interval

between those two dates are summarised. Those dealings (if any) are further particularised in the final section of the statement headed 'Summary of Activity.' As would be expected the figures disclosed are supported in each case by the NAV per share upon which the account was valued at each valuation day and at which each reported transaction completed.

[13] Each monthly statement had a rubric at its foot stating:

> 'For more information or any inquiries, please contact [Citco]'

[14] I was also shown what have been referred to on this application as 'contract notes.' These documents, too, were sent out by Citco and contained the rubric which I have mentioned above. Their opening statement was

> 'In accordance with your instructions we confirm having REDEEMED the following voting shares from FAIRFIELD SENTRY LIMITED.'

There then followed: (1) the relevant valuation and trade[1] dates at which the shares were treated as valued and redeemed; (2) the number of shares redeemed; (3) the redemption price of each share redeemed; (4) the gross redemption proceeds; (5) the net redemption proceeds;[2] (5) the 'proceeds paid to date (which were apparently always identical to the last two preceding figures); and (6) a note of the number of shares (if any) held by the investor following the redemption.

[15] I was also taken to various emails sent out by Citco or by Fairfield Greenwich (Bermuda) Limited, Sentry's fund manager, ('FGG') to members telling them of the final NAV of the relevant Sentry shares held by the recipient as at the preceding valuation day.

[16] Finally I was shown a typical screenshot from a dedicated website maintained by FGG which allowed members in possession of the relevant code to access current NAV's for their Sentry shares. The screenshot contained both estimated and final NAV.

**The Issues**

[17] The issues are as follows:

> (1) Whether any (and, if so, which) of the documents copies of which are exhibited at pages 2 to 17 inclusive of exhibit PRK-1 to the affidavit of

[1] this was the first business day after the valuation day

[2] these figures were invariably identical, since it was not the practice to make deductions permitted by the Articles from the redemption price

Philip Kite sworn in the proceedings the short title and first reference to which is Fairfield Sentry Limited (in liquidation) –v- Bank Julius Baer & Co Limited and others BVIHC(COM) 30/2010 on 8 March 2011 (or copies of any further documents which may be exhibited to any witness statement made in connection with this issue) ("the documents") is a certificate within the meaning of Article 11(1) of the Articles of Association of the Claimant ("Article 11(1)", "the Articles");

(2) If the answer to (1) is yes, whether any (and, if so, which) of the documents is
(a) A certificate as to the Net Asset Value per share ('NAV') or
(b) A certificate as to Redemption Price
within the meaning of the Articles;

(3) If the answer to (2)(a) or (b) is yes:
Whether the publication or delivery by the Claimant
(a) as a matter of information only, or
(b) in connection with a redemption request
of a document containing substantially the same items of information as a document identified as falling with (2)(a) or (b) above to a redeeming or redeemed Member of the Claimant precludes the Claimant from asserting that money paid to that redeeming or redeemed Member or redemption exceeded the true Redemption Price and as such is recoverable as to the excess from such redeeming Member.

For the purposes of this issue 'document' includes emails and materials accessible on a website maintained by the Claimant or Citco Fund Services (Europe) BV or Fairfield Greenwich Group.

(4) Whether a redeeming Member of the Claimant in surrendering its shares gave good consideration for the payment by the Claimant of the Redemption Price and, if so, whether that precludes the Claimant from asserting that the money paid to that Member on redemption exceeded the true Redemption Price and as such is recoverable as to the excess from such redeeming Member.'

[18] Issues (1) to (3) involve the construction of Sentry's Articles of Association and the question of mixed fact and law whether any particular documents issued by or on behalf of Sentry or its board of directors amounted to a certificate for the purposes of Article 11(1). Issue (4) is largely a question of general law said to arise from the mechanisms by which redemptions were carried out.

**Discussion**

**(A) Issues (1) to (3)**

[19] There was no controversy as to issue (2), so that this part of the application turned on issues (1) and (3).

[20] I was taken by Counsel for the Defendants to two authorities in relation to the certificate point. The first, **Reg v The Vestry of St Mary, Islington**,[3] was concerned with the question whether a letter from a churchwarden to the vestry asking to be paid £500 to enable him to discharge his liabilities under a contract which he had entered into at their behest was a certificate for the purposes of the Burials Act 1855 ('the Act') and thus entitled him to reimbursement. Pollock B noted that the Act did not require any particular matter to be certified and that the word 'certificate' was perfectly general. He noted that the letter did not specify the purpose for which the churchwarden required the money, but that the implication was that it was for the repairs which he had been asked to carry out. He concluded on this basis that the requirement for a certificate was amply satisfied by the letter. AL Smith J, concurring, said that for the purposes of the Act a certificate must be in writing and must be a certificate of expenses that have to be paid. He held that the document signed by the churchwarden satisfied those requirements.

[21] I was also taken to **Rexhaven v Nurse**[4], where HH Judge Colyer QC, sitting as a deputy Judge of the Chancery Division, held that a letter sent by a landlord's agents to a tenant stating that

> 'we are pleased to detail below our estimate for service charge expenditure for the period to December 24. 1993'

satisfied the conditions of a lease requiring the managing agent of a block of flats to send the lessees a certificate on or before the usual quarter days estimating the amount of service charge for the following quarter and providing that a certificate so sent would be binding and conclusive and that the amount so certified was to be paid by the lessee on demand.

[22] The Judge held that a certificate must be in writing and that it must formally attest to a fact. He did not say what he meant by 'formally', but added that some degree of solemnity or formality was needed for the document to satisfy the requirement of the lease in question.

[23] I note that one thing which these cases have in common is that in neither did the Court hold that a document could not be a certificate unless it had the word 'Certificate' at its head. While the

[3] (1890) 25 QBD 523
[4] (1996) HLR 241

cases show that a certificate must be in writing and that, provided that the purpose of a certificate can be gathered from its terms and context, the Court will not be astute to invalidate it for defects of form and are helpful to that extent, they were dealing with rather different situations. The decision which had to be made in each case was whether a particular document was effective to trigger the obligations of another party to a particular contract[5] or statutory scheme.[6] No obligation of any party to Sentry's Articles of Association is triggered or set in motion by the issue of a certificate within the meaning of Article 11(1). So that this case is not *in pari materia* with either **St Mary, Islington**[7] or **Rexhaven**.[8]

[24] In order to determine whether any of the documents relied upon by the Defendants is a certificate for the purposes of Article 11(1), Article 11(1) must be considered (a) as a whole (b) in the context of the entirety of Sentry's Articles of Association and (c) against the background of the commercial purposes which Sentry's Articles of Association were intended to regulate.

[25] The structure of Article 10 is that the parties[9] to the Articles of Association agree that on receipt of a timely redemption request Sentry must[10] redeem the shares specified in the request at the redemption price. The redemption price is the NAV per share as determined in accordance with Article 11 on (in short) the next following Valuation Day.[11] The submission of a timely redemption request thus concludes a contract for the surrender of the shares by the redeeming member and their purchase by Sentry, but the price at which that trade is to take place will not be ascertained at that moment. Article 11(1) provides that the NAV is to be determined by the Directors.[12] Articles 11(2) and 11(3) establish the principles upon which the Directors are to determine the NAV. The final paragraph of Article 11(1) provides that any certificate as to the NAV per share or (for present purposes) the Redemption Price given by or on behalf of the Directors in good faith shall be binding on all parties.

[26] In my judgment this scheme is the familiar one in which parties agree to sell and purchase property at a price to be determined by a third party.[13] Ordinarily the third party to whom the valuation is entrusted will be an expert in the subject matter of the bargain selected by the

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[5] **Rexhaven** (supra)
[6] **St Mary, Islington**(supra)
[7] (supra)
[8] (supra)
[9] s 11 Business Companies Act, 2004
[10] Article 10(1)
[11] Articles 1 and 10(2)
[12] for ease of reading I shall refer in what follows to the Directors without mentioning the fact of delegation of the task of calculation to Citco
[13] compare **Campbell v Edwards** [1976] 1 WLR 403

parties. In Sentry's case the parties have selected the Directors, presumably on the grounds that they or the persons to whom their powers have been delegated are best placed to establish the value of the fund's assets.

[27] I agree that to come within the final paragraph of Article 11(1) a certificate must be in writing. Mr Brindle QC submits that it must also be signed by the Directors or on their behalf. I accept this submission. In my judgment, an unsigned certificate is, in the absence of some special agreement governing the case, a contradiction in terms.[14] This approach is, in my view, consistent with the use of the word 'given' in the final paragraph of Article 11(1). 'Given by', followed by the name of the giver, means, in respect of a document, 'signed by,' as in the now rather outdated expression 'given under my hand, etc.' 'All parties', in the context of Articles of Association, must mean all parties bound by those Articles – i.e. the membership *inter* se and each member on the one hand and Sentry on the other.

[28] In my judgment a certificate will fall within the final paragraph of Article 11(1) only when it is a certificate given by or on behalf of the Directors in their character as the body responsible for determining Net Asset Value under Article 11. I say this because in order so to qualify the certificate must certify a valuation carried out by or on the instructions of the Directors. They may authorise a third party to carry out the calculation and to sign the certificate of determination on their behalf, but the certificate remains that of the Directors, not of the authorised signatory. A third party might inform others of the value of the NAV determined by the Directors, but it would be an abuse of language, in my judgment, to describe such a third party as *certifying* the determination.

[29] The question, therefore, is whether any of the documents relied upon by the Defendants on this application is a certificate 'as to' the Net Asset Value and/or Redemption Price which has been signed by or on behalf of the Directors.

[30] The contract notes cannot, in my judgment, be certificates within the meaning of Article 11(1). Not only are they unsigned, but their purpose was not to certify a determination made by the Directors but to evidence the terms upon which Sentry itself was purchasing the shares of the redeeming member. They are documents produced on behalf of Sentry, not on behalf of the Directors as the body responsible for determining NAV.

[14] cf per AL Smith J in **St Mary, Islington** (supra) at 529

[31] The monthly statements certainly contain, within the section headed 'Fund Net Asset Values,' the information which one would expect to find in a certificate given by or on behalf of the Directors, but that does not, in my judgment, make them certificates signed by or on behalf of the Directors under Article 11. They are documents from which the inference may be drawn that the Directors have arrived at the valuation contained in the relevant section of the statement but that is not, in my judgment, the same as a certificate 'given' by or on behalf of the Directors. The statements are not signed by or on behalf of the Directors. If the question is asked whether the monthly statements, or any particular parts of the monthly statements, are certificates given on behalf of the Directors as to their valuation of the fund at any particular date, the answer must, in my judgment, be 'No'. They are documents distributed by the fund administrators informing investors, among other things, of the NAV determined, it is to be inferred by the recipient, by or on the instructions of the Directors at given dates. That does not make them certificates given by or on behalf of the Directors. Chestertons' letter of 21 March 1974[15] was a certificate. The monthly statements, in my judgment, are not.

[32] For the same reasons, none of the emails (certainly not the emails from FGG) can be regarded as a certificate given by or on behalf of the Directors. The same goes for the screenshot.

[33] The documents relied upon by the Defendants are compelling evidence of the NAV determined by the Directors as at particular Valuation Days but they are not, in my judgment, certificates within the meaning of Article 11(1).

**(B) Issue (4)**

[34] Left to myself I would have held that the redemption of shares in this case amounted to a bargain and sale for which the consideration received by Sentry was the surrender of the rights of the redeeming shareholder. I cannot see how the subsequently discovered fact that BLMIS was a Ponzi scheme can be said to have vitiated that bargain so as to entitle Sentry to recover the redemption money/purchase price any more than could the discovery that a planning authority had not in fact granted consent for residential development vitiate a contract for the purchase of building plots by reason of the purchaser's own mistaken assumption that it had.[16] I further fail to understand how Sentry can recover the redemption price in circumstances in which *restitutio in integrum* is no longer possible.

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[15] **Campbell v Edwards** (supra)

[16] see per Lord Scott in **Deutsche Morgan Grenfell Group plc v IRC** [2006] UKHL 49 at paragraphs 84, 85

[35] I was referred to **Aiken v Short**.[17] and **Barclays Bank Ltd v WJ Simms Son & Cooke Southern Ltd**.[18] Neither case involved a sale and purchase. In the first, a bank paid off a debt due by a customer to a third party in the mistaken belief that the debt was secured on property which stood as security for the customer's account. It was held that the third party creditor had given good consideration by accepting the payment as discharging the debt due to her from the bank's customer. In his short judgment Pollock CB said:

> 'Suppose it was to be announced that there was to be a dividend on the estate of a trader, and persons to whom he was indebted went to an office and received instalments of the debts due to them, could the party paying recover back the money if it turned out that he was wrong in supposing that he had the funds in hand?'

That appears to me to expose the fallacy upon which the present case is founded. **Barclays Bank v Simms**[19] takes the matter no further. It decided that payment on a cheque made by a bank in breach of mandate was ineffective to discharge the drawer's obligation on it and the bank was thus entitled to recover, in contradistinction to the situation in **Aiken v Short**.[20] The cases are authority for the proposition that a party will not be able to recover a payment made by mistake where the payer has received consideration from the payee.

[36] In my judgment, therefore, it is not open to Sentry now to seek to recover the price which it paid for the purchase of the shares of redeeming investors simply because it calculated the NAV upon information which has subsequently proved unreliable for reasons unconnected with any of the redeemers.

**Conclusion**

[37] My answer to issues (1) and (2), therefore, is 'No'. Issue (3) does not fall for determination. My answer to issue (4) is yes.

**Commercial Court Judge**
16 September 2011

[17] (1856) 1 H&N 210
[18] [1980] QB 677
[19] (supra)
[20] (supra)