Neutral Citation Number: [2009] IEHC 173

THE HIGH COURT

COMMERCIAL

2009 656 S

BETWEEN

CONSULNOR GESTION SGHC S.A.

PLAINTIFF

AND

OPTIMAL MULTIADVISORS IRELAND PLC

DEFENDANT

JUDGMENT of Mr. Justice Kelly delivered on the 27th day of March, 2009

Introduction
This is another piece of litigation spawned by the criminal dishonesty of the by now infamous Bernard Madoff of New York and a company under his control called Bernard L. Madoff Investment Securities LLC.

The application to which this judgment relates is one for summary judgment in the sum of €3,241,474.90 sought by the plaintiff against the defendant.

Before considering the evidence in the case it is desirable that I should briefly address the legal principles which are applicable to an application of this sort.

Summary Judgment
This application is brought pursuant to O. 37, r. 7 of the Rules of the Superior Courts. That rule describes the powers invested in the court on an application of this sort. The court may do one of three things. It may grant judgment to the plaintiff or dismiss the action or adjourn the case for plenary hearing as if the proceedings had been originated by plenary summons.

The principles applicable to an application for summary judgment have been considered in recent years by both the Supreme Court and this Court on quite a number of occasions. I mention just a few of the cases.

In *First National Commercial Bank Plc v. Anglin* [1996] 1 I.R. 75, Murphy J. speaking for the Supreme Court said:-

> *"For the court to grant summary judgment to a plaintiff and to refuse leave to defend it is not sufficient that the court should have reason to doubt the bona fides of the defendant or to doubt whether the defendant has a genuine cause of action (see Irish Dunlop Co. Ltd. v. Ralph (1958) 95 I.L.T.R. 70).*
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> *In my view the test to be applied is that laid down in Banque de Paris v. de Naray [1984] 1 Lloyd's Law Rep. 21, which was referred to in the judgment of the President of the High Court and reaffirmed in National Westminster Bank Plc v. Daniel [1993] 1 W.L.R. 1453. The principle laid down in the Banque de Paris case is summarised in the headnote thereto in the following terms:-*
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> > 'The mere assertion in an affidavit of a given situation which was to be the basis of a defence did not of itself provide leave to defend; the Court had to look at the whole situation to see whether the defendant had satisfied the Court that there was a fair or reasonable probability of the defendants having a real or bona fide defence.'
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> *In the National Westminster Bank case, Glidewell L.J. identified two questions to be posed in determining whether leave to defend should be given. He expressed the matter as follows:-*
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> > 'I think it right to ask, using the words of Ackner L.J. in the Banque de Paris case, at p. 23, 'Is there a fair or reasonable probability of the defendants having a real or bona fide defence?'. The test posed by Lloyd L.J. in the Standard Chartered Bank case, Court of Appeal (Civil Division), Transcript No. 699 of 1990 'Is what the defendant says credible?', amounts to much the same thing as I see it. If it is not credible, then there is no fair or reasonable probability of the defendant having a defence.'"

In *Aer Rianta C.P.T. v. Ryanair Limited* [2001] 4 I.R. 607, McGuinness J. identified the above passage from the judgment of Murphy J. as being the correct test to be applied in deciding whether to grant summary judgment.

More recently in this Court, McKechnie J. in *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, summarised the principles applicable by reference to the preceding case law. I do not intend to set out all of those principles in the course of this ruling. It is sufficient if I refer to just some of them.

In all, McKechnie J. laid out twelve matters which inform the approach of the court to an application for summary judgment. The seventh of those matters he identified as follows:-

> *"The test to be applied, as now formulated is whether the defendant has satisfied the court that he has a fair or reasonable probability of having a real or bona fide defence; or as it is sometimes put, 'is what the defendant says credible?', which latter phrase I would take as having as against the former an equivalence of both meaning and*

result."

He went on to say that that test:-

> *"is not the same as and should not be elevated into a threshold of a defendant having to prove that his defence will probably succeed or that success is not improbable, it being sufficient if there is an arguable defence."*

In the present case, counsel on both sides have accepted that that is the appropriate test to apply. They also accept that the threshold which has to be reached by the defendant in order to defeat the plaintiff's application for summary judgment is not a high one.

The defendant puts forward five different grounds upon which it says it can demonstrate an arguable defence to the plaintiff's claim. It is of course only necessary that it should demonstrate an arguable defence on any one of these to result in the application of the plaintiff for summary judgment being refused.

The Grounds of Defence
I set out in summary form the five separate grounds which are relied upon by the defendant by way of defence. In order to make sense of them it will be necessary to refer to the factual background against which they arise. That I will do later, but it is useful to summarise them at this juncture.

They are as follows:-

> (1) The defendant contends that it has validly exercised the power under its articles of association to temporarily suspend redemption of shares in the Optimal Strategic U.S. Equity Ireland Euro Fund of the defendant. As a consequence of that suspension, there is no obligation to pay the monies the subject of this application.
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> (2) Because of the circumstances leading to the aforesaid suspension the Net Asset Value (NAV) of the plaintiff's shares which was struck on 10th December, 2008 was manifestly erroneous and is no longer reliable or effective to trigger the payment obligation the subject of this application.
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> (3) It would be unfair to other shareholders to pay the amount claimed by the plaintiff on foot of the aforesaid NAV.
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> (4) There was a fundamental mistake as to the existence of the assets that were the subject matter of the NAV upon which the plaintiff relies. That mistake vitiates the redemption transaction thereby removing any payment obligation.
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> (5) The redemption transaction has in all of the circumstances been frustrated thereby discharging any obligation on the part of the defendant to make the payment in question.

Relevant Facts
The plaintiff is a Spanish company whilst the defendant is an Irish one. The defendant is authorised as a *"Qualifying Investor Fund"* (QIF) by the financial regulator in this jurisdiction.

The defendant is constituted as an umbrella fund with a number of sub-funds. The investment policy of the relevant sub-funds is to invest 100% of their assets in a series of share classes in the Optimal Strategic U.S. Equity Series of Optimal Multiadvisors Limited (Optimal Bahamas). Optimal Bahamas is a multi-portfolio investment company with two "series" each of which has a definite investment objective. The assets of each series are traded through a separate trading company.

The plaintiff invested in a sub-fund of the defendant which is known as Optimal Strategic U.S. Equity Ireland Euro Fund (Optimal Euro sub-fund). This sub-fund invested all or nearly all of its assets in shares in the Optimal Strategic U.S. Equity Series of Optimal Bahamas (the SUS Series). The assets of Optimal Bahamas corresponding to the SUS Series are held by it through its Bahamian trading subsidiary, Optimal Strategic U.S. Equity Limited (Optimal SUS). Optimal S.U.S. established a discretionary account with Bernard L. Madoff Investment Securities LLC (BMIS) a United States broker dealer in order to execute its trading strategy. All of the assets of the Optimal Euro sub-fund were invested with BMIS through the SUS Series and Optimal SUS.

The financial regulator in this jurisdiction obliges every investment fund to use the services of an independent Irish administrator and an independent Irish custodian. H.S.B.C. Securities Services (Ireland) Limited (H.S.B.C. Administrator) and H.S.B.C. Institutional Trust Services (Ireland) Limited (H.S.B.C. Custodian) were appointed to both the defendant and Optimal Bahamas.

When an investor such as the plaintiff wishes to redeem its investment, it must follow a detailed process.

This process is primarily dealt with in the defendant's articles of association but also in other documents which I need not refer to in any detail for the purposes of this ruling.

The plaintiff desired to redeem some 19,735,007 shares. As is prescribed, it completed a redemption form and sent it to H.S.B.C. Administrator. That must be done at least 40 calendar days in advance of the relevant dealing day. The dealing day for the Optimal Euro sub-fund is the first business day of a calendar month. Four redemption forms were sent to H.S.B.C. Administrator on 29th September, 2008. The relevant dealing day was therefore 1st December, 2008.

On receipt, H.S.B.C. Administrator was required to notify the investment manager of the redemption request and did so.

Arrangements then have to made to insure that there are sufficient funds in the cash account to pay out the redemption request at the conclusion of the redemption process. That normally involves the submission of a redemption request to Optimal Bahamas in order to redeem shares held by the Optimal Euro sub-fund in the SUS series. Such redemption requests were submitted to H.S.B.C. Administrator.

The next step in the process is the calculation or *"striking"* by H.S.B.C. Administrator of the NAV of the Optimal Euro sub-fund. The valuation day is the last business day of the month preceding the dealing day. The process for calculating the NAV commences after the dealing day and normally is not finalised until ten days after that dealing day.

The NAV of the SUS Series was struck on 9th December, 2008 and the NAV of the Optimal Euro sub-fund was struck on the following day, 10th December, 2008. Both were released for publication on 11th December, 2008. Redemption proceeds fall to be paid within one month after the dealing day. For this to happen, Optimal Bahamas would normally have to receive the funds from BMIS and remit the redemption proceeds to H.S.B.C. Custodian. No money has been received by Optimal Bahamas from BMIS in respect of these redemption requests. The reason for that is no mystery.

On 11th December, 2008 it was reported that Bernard Madoff, the principal of BMIS had been arrested in New York for alleged fraud in connection with the operation of a *"Ponzi"* scheme through BMIS. It was said that that scheme could involve sums up to $50b. At that time, the Optimal Euro sub-fund had assets under management with BMIS totalling €411,505,000. As it is now well known, Bernard Madoff has since pleaded guilty to a series of dishonesty offences and is awaiting sentence before a United States Court.

When, however, on 11th December, 2008 news of his activities became public, the board of directors of the defendant held a series of emergency meetings. They *inter alia* resolved to suspend all share redemptions and to inform shareholders that the valuation published on 11th December, 2008 could not be relied upon. As a result, the redemption payments would not be paid pending clarification of the position about BMIS.

On 16th December, 2008, the directors of the defendant issued a notification of suspension of the determination of the NAV which was forwarded to H.S.B.C. Administrator for distribution.

On the preceding day, Optimal Bahamas also suspended all redemptions.

The defendant contends that the concerns of its directors were well founded in light of the fact that it now appears that BMIS did not conduct any trades in the last thirteen years which would, it is said, mean that the assets on which the NAV was based did not exist.

The plaintiff contends that whilst all this may be very interesting, it has done nothing more than operate in a *bona fide* manner the redemption procedure to the letter. The procedure had reached a stage where the plaintiff's entitlement to payment had crystallised and thus no resolution of the directors can set that at nought. In any event, the resolution, with its alleged consequences for the plaintiff, is not one which is accommodated by the articles of association, it is argued.

The Resolution
The resolution to suspend was passed at a meeting of the board of directors held on 12th December, 2008 at 5.30p.m. Irish time. The resolution reads:-

> *"It was resolved to suspend redemptions in the shares of Optimal Strategic U.S. Equity Ireland U.S. Dollar Fund and Optimal Strategic U.S. Equity Ireland Euro Fund and that such suspension would apply to any redemptions made for the 1 December dealing day in those two subfunds and any future redemptions."*

The plaintiff contends that this resolution is ineffective to produce the result which is contended for by the defendant. The defendants contend otherwise and argue that this resolution was authorised by the articles of association and had the desired result from their point of view. This, in turn, calls attention to the articles of the defendant under which this resolution was purportedly passed.

The Articles of Association
Part 5 of the articles of association deals with redemption of shares. Part 6 deals with suspension of redemption, valuation and dealings.

Article 21 deals with temporary suspensions. Insofar as it is relevant, it empowers the directors to declare a temporary suspension of the determination of the NAV and of the issue and redemption of any class of shares during…:-

> *"the whole or any period of a period when, as a result of political, economic, military or monetary events or any other circumstances outside the control, responsibility and power of the directors, any disposal or valuation of investments of the relevant fund is not, in the opinion of the directors, reasonably practicable without this being seriously detrimental to the interests of owners of shares in general or the owners of shares of the relevant fund or if, in the opinion of the directors, the net asset value cannot fairly be calculated or such disposal would be materially prejudicial to the owners of shares in general or the owners of shares of the relevant fund."*

The directors may also declare a temporary suspension:-

> *"during the whole or any part of any period when the company is unable to repatriate funds required for the purpose of making redemption payments or when such payments cannot, in the opinion of the directors, be effected at normal prices or normal rates of exchange or during which there are difficulties with or it is envisaged that there will be difficulties with the transfer of monies or assets required for subscriptions, redemptions or trading."*

The effect of such a suspension is defined at Article 23(b). It recites as follows:-

> *"Any such suspension shall take effect immediately and thereafter there shall be no determination of net asset value and issue of shares or redemption of shares until the directors shall declare the suspension at an end…"*

In a word, the plaintiff contends that this power of the directors can have prospective effect only and cannot affect its

entitlement to be paid given the stage the redemption process initiated by it had reached.

It is important to bear in mind that Part 5 and in particular article 20 of the articles of association deal with redemption. The redemption process is specifically stated to be subject to the provisions thereafter provided. Article 20(a)(iii) provides:-

> *"In the event that the determination of the net asset value per share has been suspended in accordance with Article 23 the right of the applicant to have his shares repurchased or redeemed pursuant to this Article, shall be similarly suspended and during the period of suspension he may at the discretion of the directors withdraw his request for redemption and his certificate if applicable."*

Article 20(d) provides that upon the redemption of a share being effected pursuant to the articles, the holder ceases to be entitled to any rights in respect thereof and his name is to be removed from the register and the relevant shares are to be treated as cancelled.

Article 21 deals with the redemption price. Under Article 21(d), it is provided that:-

> *"Payment of redemption proceeds shall be made in the currency as set out in the relevant redemption request subject to Article 23."*

Article 23 is, of course, the one which deals with the entitlement to temporarily suspend.

The defendants say that at the time when the resolution of 12th December was passed, the directors were aware that the NAV appeared to have no basis in reality or at the very least, that there was serious risk that such was the case. That was because of the activities of BMIS. The decision to suspend redemption, to view the NAV as being unreliable and not to pay redemption proceeds is, it is contended, a proper exercise of the powers conferred under article 23 and has the effect of disentitling the plaintiff to payment.

The defendant contends that the argument of the plaintiff that the power to suspend redemptions does not include the suspension of payment of redemption proceeds is ill founded. Redemption is completed, it is argued, only when the one month period for payment has expired and payment is duly made and the shareholders name has been removed from the register. In the instant case, the one month period had not expired and would not do so until January 2009. Furthermore, the plaintiff's name had not been removed from the register in respect of the redeemed shares.

This interpretation, it is argued, is consistent with the grounds for suspending redemption contained in the articles which include the fact that the company *"is unable to repatriate funds required for the purpose of making redemption payments"* or that *"there are difficulties with or it is envisaged that there will be difficulties with, the transfer of monies or assets required for subscriptions, redemptions or trading"*.

The argument that redemption includes all stages up to redemption payments being made is, it is argued, supported by a recent decision of the Cayman Court of Appeal in *In Re Strategic Turnaround Master Partnership Limited* (Unreported, Cayman Court of Appeal, 12th December, 2008).

That court reversed the decision of Smellie C.J. which, *inter alia,* held that the exercise by the directors of a company of a power of suspension of redemption was *ultra vires* the articles of association which are not dissimilar to the ones in suit. He reached that conclusion on the basis that there was no power to suspend redemption payments, as opposed to suspending redemption in advance of the redemption date. The Chief Justice gave five reasons for so doing but none of them was considered sufficient by the Court of Appeal.

Vos J.A. said:-

> *"Redemption in these Articles must be referring to the entire process of redemption including*
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> a. the notice to redeem;
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> b. the debt that arises on the redemption date;
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> c. valuation of the N.A.V. at the redemption date and, as a consequence, the redemption sum;
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> d. the payment of the redemption sum; and
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> e. the removal of the member from the register."

Later, he said:-

> *"The suspension power exercised by the company was a power to suspend the payment of redemption proceeds. Since the proceeds had not been paid in April 2008, when the resolutions were passed, the exercise of this power cannot have been retrospective. This point would only hold water if the petitioner had been right to suggest that the redemption process was complete on 31st March, 2008. As I have already held, however, the redemption was not complete on that date, not least because the proceeds had not been paid."*

The factual situation in that case was not identical to this and there was an additional complicating factor in that a confidential memorandum defined the power of suspension as extending to the determination of the NAV, the redemption of shares and the payment of redemption proceeds, whilst the articles of association contained no such definition. Nonetheless, the court held that the extra detail in the confidential memorandum was not inconsistent with the articles but merely explained in detail how the powers in the articles might be used in practice.

I regard the decision of the Cayman Court as providing persuasive authority in support of the defendant's case. It is

sufficient to satisfy me that it has achieved the necessary threshold of proof in respect of this first line of defence. I hold that there is an arguable defence to the effect that the temporary suspension effected by the resolution of 12th December, 2008 was efficacious to absolve the defendant from payment of the amount in suit given that the redemption process was incomplete.

Having so held, it is not necessary for me to consider in detail the other lines of defence which have been outlined. I do not propose to do so save to comment that on at least some of them I am equally satisfied that the defendant has demonstrated an arguable defence.

Conclusion
Having found as I do that an arguable defence has been demonstrated it follows that the plaintiff is not entitled to summary judgment. Instead, I will adjourn the case for plenary hearing and give the defendant leave to defend.

The defendant, through counsel, gave an undertaking that pending trial it would not, without notice being given to the plaintiff, make any payments to shareholders or former shareholders. This undertaking is accepted and will be recorded in the formal order of the court.