Neutral Citation Number: [2010] IEHC 334

THE HIGH COURT

2009 3069 P

BETWEEN

HEADSTART GLOBAL FUND LIMITED

PLAINTIFF

AND

CITCO BANK NEDERLAND NV AND NEXUS MANAGEMENT PTY LIMITED

AND (BY ORDER OF CHARLETON J. DATED 20TH JULY, 2009)

RMF MARKET NEUTRAL STRATEGIES (MASTER) LIMITED

DEFENDANTS

JUDGMENT of Mr. Justice Clarke delivered the 30th July, 2010

1. Introduction

1.1 This case involves the obscure (at least to the uninitiated) world of hedge funds and repo transactions. The case also involves a long standing difficulty which the courts have faced in cases which might loosely be said to involve the problem of two innocents. In such cases, due to wrongdoing on the part of a third party, one person loses property which ultimately ends up (or so it might be argued) in the hands of a second. Neither the original losing party nor the ultimate receiving party have done any wrong. The intervening wrongdoer either has disappeared or has no assets. The court is left with a choice of restoring the property to the original owner (which might seem unfair in many cases to the party ultimately acquiring the property) or leaving it where it is (which may seem equally unfair to the original owning party). By and large the courts have attempted to grapple with this difficult problem by attempting to follow the ownership of the property concerned through whatever series of transactions may have intervened between the handing over of the property from its original owner to its ultimate receipt by the other contender.

1.2 The plaintiff ("Headstart") operates as a hedge fund. The other real contender in these proceedings is the third named defendant ("RMF") which also operates as a hedge fund. The first named defendant ("Citco") is a bank located in the IFSC where, on Headstart's case, the funds, the subject matter of these proceedings, ultimately ended up. As will become clear in the course of this judgment, funds were frozen in an account held by RMF at Citco pending the result of these proceedings. It became clear at the very commencement of the proceedings that no accusation against Citco itself was being made. In those circumstances, counsel for Citco withdrew and Citco agreed to abide by any order which the court might make. The second named defendant ("Nexus") did not enter an appearance nor did it take any part in these proceedings. Nexus was involved in the original transaction whereby monies were paid out by Headstart in circumstances which Headstart alleges amounts to fraud.

1.3 Ultimately Headstart says that what it claims to be its money ended up in the account maintained by RMF at Citco. Headstart argues that the monies remain its monies and that it is entitled to have them back. RMF says that it received the relevant monies as payment of sums already due. That fact is not, in itself, contested. The case turns, therefore, principally, on the question of whether, following the ownership trail of the monies concerned, the monies ultimately paid into Citco Bank to the credit of RMF and ultimately frozen there are, in truth, Headstart's monies.

1.4 Quite an amount of the factual background to these proceedings is not in dispute and I turn, therefore, to that factual background.

2. The Factual Background

2.1 Headstart is a Cayman Island registered company which, as I have pointed out, operates as a Hedge Fund. RMF is also a Cayman Island registered investment company. In the context of the transactions which are at the heart of these proceedings, it is also necessary to identify some other players. DD Growth Premium Fund ("DD") is a further Cayman Island registered Hedge Fund. It, like the other Cayman Islands funds referred to, is entitled to dispense with the Ward Limited in its name. The investment manager of that Fund is an English registered company based in London called DD Capital Management Limited ("Management"). On the evidence it is clear that a Dr. Alberto Micalizzi ("Dr. Micalizzi") was at least a significant person in relation to DD and Management. It will be necessary to return to the precise status of Dr. Micalizzi in due course.

2.2 From March, 2007 Headstart had dealings with DD, starting with an initial investment of US$5,000,000.00 at that time. RMF also had dealings with an associated entity from September, 2007 investing an initial sum of approximately US$25,000,000.00 into a related fund known as the DD Growth Premium 2X Fund ("DD2X"). Both DD and DD2X are so called feeder or investor funds for what was called the DD Growth Master Fund ("the Master Fund"). Management was also the manager of DD2X and the Master Fund.

2.3 It is appropriate at this stage to say something about those funds and their inter relationship. The Master Fund invested in so called "pairs" of companies. For these purposes a pair of companies involve two companies in broadly the same business which are quoted on major international stock exchanges. Thus, investments in such companies are highly liquid with the funds invested being capable of being realised in short course. While the precise method of investment used by the Master Fund is not of particular relevance to the issues which I have to decide, it would appear on the evidence that the strategy followed by the Master Fund was to invest in such a pair of companies at a time when the share price of the respective companies relative to each other appeared to have moved out of kilter with the norm. The underlying rationale of the investment strategy was that companies in the same broad general business have, traditionally, and for hardly surprising reasons, followed a broadly similar trend as to their share price. The assumption is that any such short term deviation from the historical relationship between the share prices of the two shares in question is likely to be corrected. With that in mind, the Master Fund typically took what is called a long position in the share which was lower than expected. Likewise, a so called short position was taken on the share that was higher than expected. In the event that the expected re-convergence of the share price, as and between the two shares, occurs, then the fund will make a profit because the share price of the lower share will recover during the currency of the long position thus revealing a profit, while the share

price of the other company will remain higher during the short period in respect of which the investment in that company operated.

2.4 It would appear that actual investments in shares in such publicly quoted pair companies were held through the Master Fund. Both DD and DD2X invested in the Master Fund and, thus, shared in its profits (should it be successful). The difference between DD and DD2X was that investments in DD2X were geared up by virtue of that Fund borrowing a matching amount of money to the relevant investment. Thus, for every US€1.00 put into that Fund by an investor US$2.00 (being the original investment plus an equivalent amount of borrowing) was ultimately invested in the Master Fund. It follows that, by virtue of that gearing, investors in DD2X would obtain twice (hence the name 2X) the profits of those in DD, but would be liable for twice the losses in the event that the investment strategy was unsuccessful.

2.5 It should, however, be emphasised that the three Funds were distinct legal entities. While there was clearly a connection between them, and between each of them and Dr. Micalizzi, the precise legal relationship between them is a matter which will need further consideration in due course.

2.6 In any event, as has been pointed out, both Headstart and RMF had a relationship with the DD Funds generally and with Dr. Micalizzi well before the events which give rise to these proceedings.

2.7 Against that general background it is necessary to move to the latter part of 2008 and the early part of 2009, when the events which give rise to these proceedings occurred. It will be recalled that that time was one of almost unprecedented volatility in financial markets. Lehman Brothers had collapsed in the autumn of 2008, Mr. Bernard Madoff had been exposed in December and the whole international financial system was in a state of turmoil.

2.8 During that period two separate sets of transactions relevant to these proceedings were ongoing involving respectively Headstart and RMF. On the RMF side a decision was taken to redeem a significant portion of its investment in DD2X. It will be recalled that each of the funds was intended to be highly liquid. With that in mind, the terms of investment in each of the funds permitted an investor to obtain a repayment in early course. Given the liquid nature of the investments, no difficulty should have been encountered in the relevant fund liquidating a sufficient part of its investments to repay any investor within such a short timeframe. RMF partially redeemed its investment in DD2X by redemption exercised on the 29th and 31st October, 2008. Any such redemption had a redemption date by reference to which the value of the interest of the investor concerned in the relevant fund was to be valued. In this case the redemption date was the 30th November and RMF was, therefore, entitled to be paid funds as of the 14th December. Some but not all of the funds due were paid but an amount remained owing to RMF. In the latter part of December, 2008 and through January, 2009, RMF were pressing DD2X for payment. It is not disputed but that RMF were entitled to be paid those monies by DD2X .

2.9 In parallel, and on the 16th January, 2009, the evidence establishes that Dr. Micalizzi approached Headstart with a proposal for a so called "repo transaction". A repo transaction is, in legal form, a sale and repurchase transaction normally involving a financial asset. Under the terms of a typical repo transaction a purchaser agrees to buy the relevant asset at a price significantly below its market value. However, there is a further agreement that it be resold back to the original seller after a pre-defined period and at a pre-defined profit. Assuming all goes well, the seller will have the benefit of the cash price for the agreed period while the purchaser will obtain a profit in the shape of the difference between the sale price and the resale price. The purchaser will, of course, have to meet any transaction costs out of that profit so the difference between the sale and resale price should not be taken as pure profit. In the ordinary way, the purchaser is given comfort in that it owns the relevant asset during the period when it is out of its money. Indeed, given that the asset has been purchased at a fraction of its true value, the ownership of the asset during the relevant period should, in most cases, provide very significant comfort.

2.10 In commercial substances, although not in legal form, the transaction is in reality a loan secured by the transfer of the ownership of an asset worth significantly more than the amount of the loan.

2.11 The proposal originally put to Headstart involved Nexus. The approach was made by Dr. Micalizzi. The connection of Nexus with Dr. Micalizzi is not clear and the subject of some controversy. It was said at the time by Dr. Micalizzi that Nexus was itself an investor in the DD funds. The original proposal was made by email which noted that an unnamed investor in what was described as the DDGP had US$75,000,000.00 worth of investments. It was suggested that that unnamed investor needed a one week repo for US$25,000,000.00. The suggested profit was to be US$1.25M.

2.12 It will be necessary to say something more about the course of dealing between Headstart and Dr. Micalizzi in relation to the repo transaction in due course. However, ultimately the transaction went ahead in part. Headstart indicated that it was not interested in a transaction at US$25,000,000.00 but would be interested at US$5,000,000.00. The text of relevant contractual arrangements was agreed with legal assistance. In substance, the deal appeared to be one in which Headstart would buy part of the holding of Nexus in a DD Fund for US$5,000,000.00. There was to be a gross profit of 7% for two weeks with further amounts in the event of delay or default. The money was to be paid to Nexus.

2.13 However, at the last minute, it was suggested by Dr. Micalizzi that, rather than the purchase price of US$5,000,000.00 being transferred to Nexus, it should be transferred into a UK account held by the Master Fund. This was agreed. The reason given for the suggestion was that Nexus was based in Australia and that the timing differential between Australia and Europe could be alleviated by transferring to an account in the United Kingdom.

2.14 A further difficulty emerged concerning the actual transfer of what was said to be Nexus' interest in the relevant DD Fund. It was said that rather than that transfer taking place instantaneously, it might be delayed for a day. It subsequently proved impossible for Headstart to obtain any timely registration of Headstart's interest in the Nexus investment.

2.15 The period of the investment was lengthened by agreement. However, ultimately Headstart became frustrated and suspicious by reason of a combination of factors, not least the difficulty in securing repayment within the period agreed or even the extended period allowed, coupled with the difficulty in securing registration of the ownership of the relevant asset. This latter problem was said, by the company charged with affecting such registration, to be due to a failure on the part of Nexus to have complied with money laundering legislation.

2.16 In any event, Headstart employed a former senior UK policeman, now operating as a private investigator, to look into the matter. In circumstances which it may be necessary to address in due course, that investigator appears to have become aware of a money trail which lies at the heart of this case. The proper characterisation of that money trail is, indeed, one of the issues between the parties. However, it was established in evidence that there were a series of transactions, immediately following the payment from Headstart into the relevant DD account (i.e. the Master Fund account) of the US$5,000,000.00 to which I have referred. All bar the last of those transactions involved payments as and between entities within the DD stable. The final payment was into the RMF

account at Citco which payment was in partial discharge of the liability of DD2X to RMF, to which I have already referred.

2.17 Subsequently, funds in that RMF account at Citco were, as I have pointed out, frozen.

2.18 Against that general background it is next necessary to turn to the issues which arise in these proceedings.

3. The Issues

3.1 The case made by Headstart involves a number of propositions. First, it is said that the circumstances leading to the payment by Headstart into the Master Fund account amounted to fraud. It is said that, as a consequence, the Master Fund had only a voidable title to the monies so paid.

3.2 That question gives rise to the first issue in these proceedings. Is it proper to characterise the payment by Headstart of US$5,000,000.00 as conferring only a voidable title on the Master Fund? If the Master Fund obtained full title to the monies, then no question as to the ownership of those funds thereafter could arise. RMF contests Headstart's claim that it has been established that the Master Fund had a voidable title to the monies.

3.3 The second element of Headstart's case involves tracing the monies from their initial payment by Headstart until their ultimate payment into the RMF account at Citco. It is said by Headstart that, in accordance with the equitable rules on tracing, it is appropriate to treat the monies passing at each step of the relevant transactions as being the same monies so that, on the basis of that argument, the monies ultimately paid into the Citco account on behalf of RMF are said to be Headstart's monies. On a variety of grounds RMF contest that suggestion. The second set of issues, therefore, concern whether, on the assumption that the Master Fund only had a voidable title in the relevant monies when same were received by them from Headstart, the equitable doctrine of tracing will treat the monies, as paid over by DD2X to RMF, as being the same monies and subject to the same voidable title.

3.4 The third issue arises out of the circumstances in which the relevant monies came to be paid to RMF. It is common case that RMF were already owed at least US$5,000,000.00 by DD2X. The monies were, therefore, paid in discharge of a lawful and genuine debt. In those circumstances the question arises as to whether RMF should be treated as a *bona fide* purchaser for value so that RMF would acquire good title to the monies, even if the title of DD2X up to that point was voidable.

3.5 So far as the series of transactions are concerned there are, therefore, three issues. They concern the beginning, middle, and end of the series of transactions.

3.6 In addition, some further points are made on behalf of RMF. First, it is said that it is inappropriate for Headstart to maintain these proceedings without joining some or all of the DD Funds (especially the Master Fund and DD2X) and/or Dr. Micalizzi. The basis for that suggestion stems from the fact that the fraudulent activity is said to be that of those funds acting through Dr. Micalizzi or Dr. Micalizzi personally and that the monies passed through the hands of those funds. There is no doubt that the factual basis for RMF's suggestion is correct. It will be necessary to address the legal consequences of that situation in due course.

3.7 In addition, RMF make a complaint about the manner in which the investigation report to which I have referred was compiled. It is said that the appropriate inference to draw from the evidence is that the investigator concerned obtained information in breach of the duty of confidence of various banks or others involved in the financial transaction system. In addition, it is said that there was a lack of candour displayed on behalf of Headstart when an order was originally applied for seeking the freezing of the monies in the relevant Citco account. It may be necessary to go into the facts of that issue in more detail and also to deal with any possible legal consequences of such facts as might be found.

3.8 However, it is clear that the starting point for a consideration of the issues must be to determine the question as to whether the original payment by Headstart to the Master Fund only gave DD a voidable title in the relevant property. It should, however, be noted that that issue is closely linked to the question raised by RMF which seeks to place reliance on the fact that Dr. Micalizzi was not joined. I also propose to address that issue in the next section of this judgment. I, therefore, turn to those issues.

4. The Original Headstart Payment

4.1 Leaving aside, for the moment, those issues arising from the non-joinder of Dr. Micalizzi, the evidence given on behalf of Headstart, *prima facie,* establishes a number of matters.

4.2 First, the various DD Funds were always presented as being highly liquid funds. That was part of their attraction. An investor would be entitled to get its money back in relatively short order should the investor concerned require it. Indeed, evidence given on behalf of RMF confirmed that fact.

4.3 Second, it is clear that, by the latter part of 2008, the DD Funds generally were suffering a significant liquidity problem. Reports of liquidators appointed in the Cayman Islands to the various DD Funds registered there make clear that the funds had suffered significant losses throughout 2008 (doubtless due to the then prevailing international conditions). It seems clear on the evidence that the DD Funds had not admitted those losses to their investors. Indeed, I am satisfied on the evidence that Dr. Micalizzi continued to represent that the funds remained highly liquid during the period in question. Witnesses called on behalf of both Headstart and RMF agreed that, what they were respectively being told in their capacity as investors by Dr. Micalizzi at the relevant time was clearly untruthful. It would appear that, in substance, much of the funds which should have been invested in companies quoted on major stock exchanges, ultimately came to be invested in some form of Russian bond whose status is unclear but whose liquidity was, on any view, highly limited.

4.4 There can be not doubt, therefore, but that at the relevant time, that is to say early 2009, Dr. Micalizzi was knowingly involved in giving a false picture of the then current status of the DD Funds to his investors. Indeed, it is clear that part of the reason why RMF became concerned about its investment was because, in the words of one of its witnesses, it became clear that Dr. Micalizzi was lying to them. That the DD Funds were not, as of early 2009, as they were being held out to be, is manifestly clear. That the representations being made generally about the funds by Dr. Micalizzi were knowingly false is also clear.

4.5 The precise situation in relation to the Nexus repo transaction is not, however, so clear. The precise role of Nexus is shrouded in doubt. A number of possibilities exist. First, it is possible that Nexus was simply a vehicle either controlled by Dr. Micalizzi or, although independently controlled, was happy to work along with Dr. Micalizzi, and in either event was used for the purposes of creating a false repo transaction so as to extract some money from an investor such as Headstart to meet the pressing cash flow demands such as those which were, at the relevant time, being pressed by RMF. On that scenario Nexus, whether independent or controlled by Dr. Micalizzi, was simply a knowing vehicle for a transaction which was entirely false.

4.6 A second possibility is that Nexus was a genuine party who had the cash flow needs identified by Dr. Micalizzi and who *bona fide* entered into the repo transaction. In that eventuality, it remains the case that representations made by Dr. Micalizzi to Headstart about the transaction were false (and false to Dr. Micalizzi's knowledge). The representations were false because the ultimate security for the transaction was Nexus' holding in relevant DD Funds, which in turn depended on the status of those funds being as it appeared. For the reasons I have already set out that was not the case, and it would have been known by Dr. Micalizzi that the representations as to the then current status of relevant DD Funds was false. The question which arises in that context, however, is as to whether the fact that Dr. Micalizzi made representations to Headstart which were false could affect the title of Nexus to any monies properly paid over on foot of the relevant transaction (on the assumption, which underlies this part of the judgment, that Nexus was a genuine and *bona fide* party).

4.7 A further issue arises as to the circumstances in which the monies due to Nexus by Headstart under the repo transaction came to be paid into a DD account. There are again two possibilities. It would appear that, at some stage, Dr. Micalizzi suggested to Headstart personnel that the true reason for payment in that way was that Nexus owed money to relevant DD Funds so that, even if the monies were, *prima facie*, due to Nexus, it was appropriate to arrange for them to be paid into a DD account in discharge of that alleged Nexus obligation. That is, therefore, one possibility. On that scenario, the monies were genuinely owed by Headstart to Nexus on foot of the transaction (subject to that transaction being possibly capable of being avoided by virtue of Dr. Micalizzi's fraudulent misrepresentation), but a similar sum was also owed by Nexus on foot of a commitment to invest in DD Funds which had not been fully met. On that scenario, there would be nothing wrong, in itself, provided Nexus agreed, with the monies being transferred direct to the DD Fund in question. Whether Nexus did agree in such an eventuality is a question upon a question.

4.8 The alternative scenario is, of course, that, even if Nexus was a genuine party, it too was defrauded by Dr. Micalizzi who, on that scenario, fraudulently diverted the monies from the original intention that same be paid direct to Nexus, into a DD account.

4.9 It is against the background of those (and, indeed, other possible) scenarios that it is necessary to consider the evidence and also to consider the affect, if any, of the non-joinder of Dr. Micalizzi.

4.10 So far as the repo transaction itself is concerned, it is the failure to join Dr. Micalizzi that is principally relied on. The failure to join the relevant DD Funds (that is the Master Fund who received the original money from Headstart and DD2X which made the payment into the RMF account at Citco) are concerned more with the second question as to tracing.

4.11 It is said on behalf of RMF that it is inappropriate for Headstart to seek to persuade the court that a fraud was committed on it by Dr. Micalizzi without joining Dr. Micalizzi as a party. A similar suggestion is made in respect of Manager. I am not satisfied that that submission is well founded. Dr. Micalizzi does not appear to have any proprietary right in any of the assets which are the subject of these proceedings. Any finding of fact by the court in proceedings to which Dr. Micalizzi was not a party cannot bind him. He cannot have any legal rights affected by any judgment which the court might give in these proceedings. It is, of course, the case that the courts are reluctant to allow unnecessary evidence, which may cause reputational damage to parties not before the court, to be given. However, in some proceedings such evidence may be necessary. A party should not be required to be joined simply because accusations about that party are to be made where no relief is being sought, either against that party or in relation to matters which would affect the legal rights of that party. The situation might well be otherwise were the reliefs claimed capable of affecting the legal interests of such a party. That seems to follow from the judgment of Lynch J. in *Tassin Din v. Ansbacher & Co* (Unreported, High Court, Lynch J., 20th April, 1987).

4.12 That being said it does not, of course, follow that the absence of Dr. Micalizzi from the proceedings may not have an effect on the evidence. For example, had Dr. Micalizzi been joined (and had he participated) it might be that greater clarity could have been brought to the precise circumstances in which Nexus became involved. However, it is illustrative to note that the joinder of Nexus did not bring any such clarity.

4.13 In my view it is necessary for the court, as in all cases, to reach such conclusions as to the facts as it can on the admissible evidence presented and having regard to the onus of proof. In my view the evidence supports the fact that, on the balance of probabilities, Dr. Micalizzi was suffering a significant cash flow problem in the early part of 2009. Indeed, the very fact that RMF had lost confidence in him and were pressing for payment of monies already due supports that conclusion. In my view it is unnecessary on this point to determine whether Nexus was a willing party to a scheme on the part of Dr. Micalizzi to improve his cash flow by putting in place a repo transaction, or whether Nexus themselves were duped as part of such a transaction. In either event, the transaction as a whole was put in place by Dr. Micalizzi as part of a fraudulent scheme to obtain US€5,000,000.00 from Headstart so to enable DD2X to pay off some of its obligations. I have come to that view for a number of reasons.

4.14 First, all of the evidence (including evidence from RMF) suggests that Dr. Micalizzi was lying about the status of the DD Funds generally at the relevant time. Dr. Micalizzi was under significant pressure to pay debts from the funds and same conflicting explanations at different times. In addition, I am satisfied on the evidence that Dr. Micalizzi was the driving force behind all of the arrangements put in place. All of the evidence points to substantive dealings with the funds being principally with and to Dr. Micalizzi. It seems clear that both RMF and Headstart treated any high level dealings with the funds as being dealings which they were likely to have with Dr. Micalizzi personally. It is, however, true to note that the signatories on a number of the relevant transactions were persons other than Dr. Micalizzi.

4.15 In that context it is proper to have regard to the decision of the Supreme Court in *Salthill Properties Limited v. Porteridge Trading Limited* [2006] IESC 35. It is clear from the judgment of McCracken J. in that case that a court is entitled to impute to a company, the knowledge of a person who exercises a reasonable degree of control over the affairs of the company, even though the person concerned may not actually be formally a director. While *Salthill* specifically turned on the onus of proof in such cases, it is clear from the judgment of McCracken J. that, had the defendant company in that case discharged a *prima facie* onus of proof on it, it would have been open to the plaintiff the satisfy the court by evidence that the closeness of the relationship between the principal of the defendant company (who was not a director) and the extent of control which he exercised over its affairs, was such as would entitle the court to impute to the company any knowledge which that principal might have.

4.16 Likewise, it seems to me that it is open in principle to Headstart in this case to seek to impute to any of the funds any knowledge which Dr. Micalizzi might have, for it is clear on the evidence that there was a very close relationship between Dr. Micalizzi and each of the funds such that Dr. Micalizzi appeared to be able to speak for the funds in dealings with third parties such as both Headstart and RMF. Indeed, RMF's dissatisfaction with the funds was attributed the fact that Dr. Micalizzi was, in the view of RMF, lying to them.

4.17 I am, therefore, satisfied that the money paid by Headstart into the Master Fund account, as the initial part of the series of relevant transactions, was part of a fraudulent scheme on the part of Dr. Micalizzi to procure monies from Headstart for the purposes

of satisfying urgent cash flow demands. Whether the Master Fund can be fixed with the consequences of that fact is the next question that arises.

4.18 It is also necessary to consider the fallback argument made on behalf of Headstart which relied on the fact that the transaction with Nexus was procured by a fraudulent misrepresentation on the part of Dr. Micalizzi concerning the current status of the DD Funds. It is clear that Dr. Micalizzi did falsely represent the then status of the funds. Rather than being in good order and highly liquid the funds had lost very substantial sums of money and were heavily invested in a highly illiquid Russian bond. As the repo transaction itself related to a sale and repurchase of an interest in the funds, then representations concerning the status of the funds was necessarily highly material. I accept Headstart's evidence that it would not have contemplated entering into the repo transaction had it not been for the representations as to the status of the fund. That those representations were false to Dr. Micalizzi's knowlege is also clear. There is, however, a question as to whether Dr. Micalizzi can be said to have been acting as an agent on behalf of Nexus in the transaction. Clearly if it were the case that Nexus was either a vehicle for Dr. Micalizzi or a willing partner in a plan by Dr. Micalizzi to solve his cash flow problems, then it would undoubtedly be appropriate to characterise Dr. Micalizzi as an agent of Nexus such that Nexus would be fixed with the consequences of the undoubted fraudulent representations made by Dr. Micalizzi on the occasion in question. If, on the other hand, Nexus was itself duped by Dr. Micalizzi, then a more difficult question might arise as to whether Nexus could be said to have to bear responsibility for Dr. Micalizzi's fraudulent misrepresentation. I am not satisfied that it has been established on the balance of probabilities that Nexus was aware of the fraudulent intent of Dr. Micalizzi. It may have been. It is simply that I am not satisfied that there is sufficient evidence to allow such a conclusion to be reached.

4.19 It is next necessary to turn to the consequences of the finding that Dr. Micalizzi was guilty of fraud. In that context, I turn to the issue concerning the non-joinder of the Master Fund and DD2X.

4.20 Before dealing with the question of whether the relevant funds can be traced through the various accounts of different DD Funds prior to their ultimate transmission to the RMF account at Citco, it is necessary to deal with the fact that none of the relevant DD Funds were parties to these proceedings. As pointed out earlier in the context of the non-joinder of Dr. Micalizzi, different considerations may apply where a judgment of the court can have an effect on the actual legal rights and liabilities of parties who are not joined. It seems to me that a judgment in these proceedings in favour of Headstart has a real potential to have an affect on the entitlements of the various DD Funds. It must be recalled that the DD Funds are now undergoing an insolvency procedure in the Cayman Islands. In truth, the entitlements of the DD Funds are now the entitlements of their creditors which, of course, include both Headstart and RMF but also other parties. A finding by this Court along the lines urged on behalf of Headstart has, in my view, at least a potential to affect the rights of those funds and through them their creditors. The question which arises is as to whether it would, therefore, be appropriate to make any such order without giving those currently in charge of the funds (presumably the liquidators) an opportunity to be heard. In my view it would not. While I have, in the previous section, expressed the view that, on the evidence before me, Headstart had established that the arrangements entered into by Dr. Micalizzi were part of a fraudulent scheme on his part in respect of which knowledge might be imputed to the relevant DD Funds, it seems to me that any consequences of such a finding which could affect the proprietorial or property interests of the DD Funds cannot be made without giving the relevant DD Funds an opportunity to be heard.

4.21 It certainly cannot be ruled out that a finding in favour of Headstart in this case could affect the entitlements of various DD Funds or their creditors. As pointed out on behalf of RMF, the liquidators of the funds have indicated that they may seek to reverse transactions entered into by the funds in the period prior to the funds going into liquidation. Without giving the funds an opportunity to be heard in these proceedings, it is possible that there could be unintended consequences for the ability of the liquidators to give effect to remedies to which they might otherwise be entitled with adverse consequences. Thus, the property or proprietorial interests of the funds have the potential to be affected by any judgment which I might deliver in this case. In those circumstances it does not seem to me that it would be appropriate to form a view as to whether the title acquired by any of the DD Funds is capable of being challenged without giving the current representatives of those funds (i.e. the liquidators) an opportunity to be heard. As currently constituted I am not, therefore, satisfied that it is open to me to make the findings urged on behalf of Headstart.

5. Conclusions

5.1 In the light of that finding, it seems to me that I should afford the parties an opportunity to consider this judgment and to make submissions as to what the consequences should be.

5.2 When the parties have had an opportunity so to do, I will arrange to have the matter re-listed to enable further consideration to be given.