Neutral Citation Number: [2011] IEHC 5

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 on the 10th day of January, 2011

1. Introduction

1.1 I have already given a partial judgment in these proceedings on 30th July, 2010 (2010) IEHC 334. Terms and descriptions are used in this judgment in the same way as in that judgment ("the first judgment"). In a very real sense, this judgment is a continuation of the first judgment and needs to be read together with it. For the reasons set out in the first judgment, I determined some of the issues in the case at least partially in favour of Headstart. In general terms, Headstart argues, in these proceedings, that US$5 million of its money was procured through a fraudulent scheme, such that the money was held in various accounts through which it is said that it passed on a voidable title. It is also said that the money finally ended up in an account held by RMF at Citco in Dublin. It is said that the voidable title, having now been voided, the money is, in substance, Headstart's, and should be paid back to it. On the other hand, RMF contends that the money was paid to it in discharge of a legitimate existing liability and that the money remains its property. There clearly are a number of steps in the process which need to be analysed in order to determine the competing claims of the parties. In the first judgment, I indicated that I was satisfied that the relevant money had been procured to be paid over by Headstart as a result of a fraudulent scheme operated by a Dr. Micalizzi. I also found in that judgment that I was not satisfied on the evidence that Nexus (who, while served, had never appeared to the proceedings) was a knowing party to any such fraud. However, I went on to indicate that I had concerns as to the legitimacy of going further along the line of analysing the ownership of the monies concerned without the parties, through whose accounts those monies passed prior to their payment into the RMF account at Citco, being parties to these proceedings. The matter was put back to allow the parties to consider those concerns. In that context, it is appropriate to turn, first, to the subsequent procedural history.

2. The subsequent procedural history

2.1 As noted in the previous judgment, the funds passed through accounts owned by the Master Fund and DD2X. Both of those funds are in official liquidation in the Cayman Islands under a winding up order by the Financial Services Division of the Grand Court of the Cayman Islands, which, in each case, was made on 29th May, 2009. The liquidators of those funds as a result of those court orders are a Mr. G. James Cleaver and a Mr. Richard Fogarty. Those persons were notified of my judgment of 30th July, 2010. Mr. Fogarty, on behalf of both liquidators, having been so notified, wrote to the court by letter of 7th October, 2010. Having noted the provisions of paragraphs 4.20 and 4.21 of my previous judgment to the effect that the question which arose was 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", the joint liquidators expressed the view that the cash currently held in the name of RMF at Citco should be repaid and is subject to a recision claim by the fund. The joint liquidators expressed the view that as Headstart is a Cayman Island registered fund, any claims that Headstart may have against the fund should be brought in the liquidation of the fund, which is under the jurisdiction of the Cayman court.

2.2 Headstart made no application to seek to have the liquidators joined to these proceedings so that the issue of whether it would be appropriate so to do did not arise. It is, of course, the case that Headstart does not seek directly to bring a claim against any of the relevant funds. Its claim is, in substance, against RMF, for Citco has indicated that it will abide by any order of the court. Likewise, in the light of the finding in my previous judgment in relation to Nexus, the claim as against that company no longer is of any relevance.

2.3 The claim, therefore, is by Headstart against RMF. The concern which I expressed in the paragraphs to which the joint liquidators made reference was not in relation to a claim against the DD funds, as such, for there is no such claim, but rather, whether it was appropriate to make findings in proceedings concerning the ownership of monies in circumstances where the ownership of the monies, on the claimant's case, necessarily involves determining the ownership of those monies at various points when they were in the hands of the DD funds, but where the funds were not joined. The first issue which arises is, therefore, as to whether, on the ground alone that the relevant funds were not joined, these proceedings should be dismissed. However, it is also important to note that, at a brief hearing subsequent to receipt of the joint liquidators' letter to which I have referred, counsel for both sides made clear that, irrespective of the view which I took on that point, they would consider it useful if I could also make findings as to the view which I would have taken on Headstart's case, even should I be against Headstart on that question. It seems to me that the point made by counsel is a good one. There is every risk that these proceedings will be the subject of an appeal. It would be unfortunate if I were to determine the matter solely on the basis of the non-joinder of the relevant DD funds, only to find that the Supreme Court took a different view, but were unable to deal with the substance of the remainder of the case because no findings had been made in this court in relation to those matters. In the light of that procedural history, I propose to deal first with the issue arising from the non-joinder of the relevant DD funds and then go on to deal with the other issues.

3. The non-joinder of RMF

3.1 Nothing that has occurred since I delivered the first judgment has led me to change the tentative view which I expressed in paragraph 4.20 of that judgment to the effect that a decision in these proceedings in favour of Headstart has a real potential to have

an effect on the entitlements of the various DD funds. This is not simply a claim by Headstart against RMF for the payment of monies. If it were, then it is difficult to see how it could have any effect on any party who had not been joined to the proceedings. However, this case is a claim by Headstart that it actually owns the monies now frozen in the RMF account at Citco. If Headstart owns those monies, then it follows that those monies were not validly paid over by DD2X to RMF by their being paid into the relevant Citco account, in the sense that the monies so paid over would, on the basis that Headstart be correct, have been paid over with only a voidable title which title has since been avoided. In those circumstances, it is by no means certain that adverse consequences, not otherwise remediable, could flow from such a finding which could affect DD2X, and through DD2X, other DD funds. This claim is a proprietorial claim to property in the shape of the relevant monies rather than a claim that money is owed. It is a proprietorial claim which involves the court making findings as to the status of the ownership of that property at various times by parties not before the court. In my view, in those circumstances, it is inappropriate for the court to reach a conclusion as to the ownership of those monies, which conclusion has the potential to affect third parties not before the court, in circumstances where those parties have not been joined. On that basis alone, it would seem to me that Headstart's claim must be dismissed.

3.2 Before leaving this issue, I should indicate that I fully recognise that there may well be arguments which could be mounted by DD2X or any of the other relevant DD funds (presumably, now, through their liquidators) in a claim in which they sought to recover the monies from Headstart (should Headstart have succeeded in these proceedings) and in which reliance was placed on the fact that the relevant DD funds were not parties to these proceedings. However, the basic contention which I understand that the liquidators might wish to make is that the monies should not have been paid over to RMF, for the payment to RMF was an inappropriate preference (or the like) at the time when it was made. If, as a result of the decision of this court, it is determined that RMF was not, in fact, paid (because RMF was given monies with only a voidable title), it is impossible to be certain what consequences such a finding might ultimately have for any claim which the liquidators might otherwise be able to maintain. It is not, therefore, that there is a certainty that the interests of the DD funds might be affected, but the fact that there is a real risk that that might be, that leads me to the conclusion which I have already reached. Finally, as this Court has *prima facie* jurisdiction to determine the ownership of assets situated in the jurisdiction and where no party to this case has suggested a basis for the non exercise of that jurisdiction, I am satisfied that I should determine all matters notwithstanding the suggestion by the joint liquidators that the courts of Grand Cayman were more appropriate.

3.3 However, as already indicated, I propose to go on to consider the other issues which arise. The first such issue concerns the money trail from the payment of US$5 million into the Master Fund account to the ultimate payment into Citco. The question which arises is as to whether the monies can properly be said to be traceable through those transactions. I now turn to that question.

4. Tracing

4.1 It is appropriate to start by noting certain uncontroverted facts which were established by the calling of witnesses on *subpoena* (and in one case, on commission) from those banks through which the monies are said by Headstart to have passed.

4.2 On the evidence, it would appear that, when the monies were paid into the Master Fund account by Headstart, there was a very substantial sum indeed resting in that account. To use a neutral term, an equivalent sum of money (being US$5 million) was, within a very short period of time, paid out of that account and into an account of DD2X. On the evidence, there was no money in the relevant DD2X account on the occasion in question, nor did any other money come into that DD2X account prior to the US$5 million being transmitted to the RMF account at Citco. No difficulties, therefore, seem to arise in respect of the second leg of the transaction. The money came into the DD2X account and went out of it. It is very difficult to see how it could not properly be said that any infirmity attaching to the money when it came in, also attached to it when it went out. However, there is an argument about the proper characterisation of what happened in relation to the Master Fund account.

4.3 RMF argues that, on the proper application of the law, there is a presumption that a person who may have monies with a voidable title because of, for example, a fraud, uses their own money first. On that basis, it is argued that the US$5 million which was paid in by Headstart into the Master Fund account, remained there and that the US$5 million that was paid out of the Master Fund account into the DD2X account must be taken to be a different US$5 million.

4.4 Based on those facts, RMF argues that the so-called rule in *Clayton's* case [1814-23] All E.R. Rep. 1 applies in its favour. Under the rule in *Clayton's* case, a "first in, first out" rule is applied to monies going through bank accounts so that any payment out is taken to be the monies first in. On the application of the rule in *Clayton's* case to trust monies, I agree with the observations in Delany on '*Equity and Law of Trust in Ireland*' (4th Ed. Thompson Round Hall 2007) at page 759, where the following is stated:

> "In theory, it applies to competing claims of beneficiaries of different trusts and of beneficiaries and innocent volunteers and the effect of the rules is 'first in, first out'. So if a trustee pays €1,000 from one trust fund into a bank account and then pays a further sum of €1,000 from another fund into the account and later withdraws €1,000, the loss is borne wholly by the first trust on the basis of the principle of 'first in, first out'."

4.5 An ordinary application of the rule in *Clayton's* case to the facts which arise in these proceedings would, therefore, suggest that the money paid out of the Master Fund account into the DD2X account should be taken to have been part of the monies already in that account (prior to the payment into it from Headstart), rather than the Headstart monies, for the monies already in the account were first in (indeed, in principle, the monies paid out must be taken to have been the US$5 million which had been in that account for the longest period of time). There can be little doubt, therefore, that an application of the rule in *Clayton's* case favours the view that the monies paid into the Master Fund account by Headstart remained there after an equivalent sum was, within a very short period, paid out to DD2X. In passing, it should be recalled that, as there was nothing in the DD2X account, other than the monies that came in, to which I have referred, the rule in *Clayton's* case has no application to that payment.

4.6 It is clear that there are some established exceptions to the rule in *Clayton's* case. I did not understand counsel for Headstart to argue that any of those exceptions did apply. There is, however, in my view, one question that needs to be addressed. Presented with the facts of this case, I suspect that any ordinary person might well describe the monies leaving within a matter of hours from the Master Fund account as being the same monies that were paid in a few hours earlier. If, for example, three colleagues give a fourth a sum of €100 to enable that colleague to spend €400 buying tickets for a major event, most people would regard a banking transaction whereby the collecting colleague lodged the three cheques and then paid out a fourth cheque for the total sum as being transactions involving the same money, even though there might well have been other funds in the relevant account at the relevant time. There can be little doubt that the rule in *Clayton's* case is an appropriate way for assessing a large series of largely unconnected transactions passing through the same account. The question which arises is as to whether an exception to that rule should be recognised where there is a clear *nexus* between a specific payment in and a specific payment out, such that ought lead the court to treat the payment out as being of the same monies, even though there were other monies in the account at the relevant time. While there are certain attractions to adopting such a course of action, I have come to the view, on balance, that it would be inappropriate.

4.7 It would create a degree of uncertainty about which money was which, which uncertainly could add unnecessary complications to the exercise of tracing and other questions connected with the ownership of particular monies impressed with a trust. Just how close would the connection have to be, both in time and in substance? What if the sums were not exactly the same? What if money came in in a different number of tranches than the money went out? In my view, it is safer to rest on an application of the established rule, which is that money in first should be treated as going out first.

4.8 On that basis, I am of the view that the monies paid into the Master Fund account by Headstart remained there and, subject to an analysis of what happened in that account subsequently, continued to remain there, at least until, on an application of the rule in *Clayton's* case, such monies can be said to have been paid out. On that basis, even if I had been satisfied that it was appropriate to reach conclusions about the ownership of the money in issue in the absence of the various DD Funds being joined, I would have come to the view that any tracing would necessarily have had to have stopped at the payment into the Master Fund account. Lest I be wrong in that conclusion, the next issue which needs to be considered is the circumstances in which the money came to be paid over by DD2X to the RMF account at Citco. As pointed out, no tracing difficulties can be encountered in relation to the passage of the money through the DD2X account so that if, contrary to the view which I have expressed, the monies which were paid into the DD2X account were, indeed, Headstart's monies, then it equally follows that it was the same monies that were paid into the RMF account at Citco. However, it is clear that DD2X owed that money (and more) to RMF. The question which arises is as to whether, in those circumstances, RMF should be treated as a *bona fide* purchaser for value. I turn to that question.

5. Is RMF a *bona fide* purchaser for value?
5.1 I did not understand it to be disputed but that at the level of principal, the law treats property which comes into the hands of a *bona fide* purchaser for value without notice as being no longer susceptible to an equitable tracing claim, and that any claim for recision cannot operate against such a person. There was no suggestion that RMF knew anything about the fraud perpetrated by Dr. Micalizzi. RMF was, therefore, certainly without notice of any defect that might have existed in the title of DD2X to the monies which were paid into the Citco account in its favour. As RMF were undoubtedly without notice, the question is can they be said to be a purchaser for value.

5.2 It is necessary, in those circumstances, to recall how the money came to be owing. RMF was itself, as has been pointed out, an investor in DD generally. RMF had, in accordance with the terms of its investment, purported to redeem part of that investment, thereby giving up some of its share in the fund in return for an entitlement to be paid. True it is that the payment was overdue, but, nonetheless, the payment was in respect of a redemption of the interest (at least, in part) of RMF in the relevant DD fund. I find it difficult to see how a payment in respect of that obligation cannot properly be construed as a payment for value. RMF gave up its interest in the fund; it received in return a payment. There was, therefore, real and substantial consideration for the payment being the giving up by RMF of a part of its interest in the fund. I am satisfied, therefore, that RMF should properly be treated as a *bona fide* purchaser for value.

5.3 It is, perhaps, somewhat counter-intuitive to treat someone who receives money as a purchaser. However, where the property in dispute is, in itself, money, then it seems to me that a recipient of money can be said to be a *bona fide* purchaser for value of that money, where the recipient gives something of value in return for the money. If, for example, the US$5 million had been used to by DD2X buy something from RMF, then it could hardly be said that DD2X were not a *bona fide* purchaser for value in respect of the monies, for DD2X would have given away the monies in return for whatever had been bought with same. It does not seem to me that there is any difference in principle where what is given away is an entitlement to an interest in a fund which is relinquished in return for the monies. On any application of the basic principles of Contract Law, there is consideration on both sides. By no stretch of the imagination could RMF be regarded as a volunteer in respect of those monies.

5.4 Even if, therefore, DD2X had a voidable title to the monies, I am satisfied that RMF would have acquired good title to them by virtue of being a *bona fide* purchaser for value without notice. One further issue under this heading arises in relation to the monies as they were ultimately held in the Citco account. I now turn to that issue.

6. The monies in the Citco account
6.1 As pointed out in the first judgment, a court order freezing monies in the RMF account at Citco was made at an interim stage. However, prior to the making of that order, there had been movements in the RMF account at Citco, such that on any view at least much of the US$5 million was dispersed in various *bona fide* transactions by RMF prior to the freezing of the account. It would not, in any event, have seemed to me that Headstart, even if it could trace the monies into the Citco account, could have retained any interest in those monies once they were *bona fide* dispersed by RMF which was, after all, innocent of any wrongdoing and unaware of the voidable title which might have attached to those monies. It does not seem to me, therefore, that Headstart's claim could be for any sum greater than the minimum balance which existed in the relevant RMF account at Citco, post the receipt of the US$5 million.
6.2 Even if I am wrong in each of the other conclusions up to this point, so that the monies which came into the RMF account at Citco were held on a voidable title, then those monies must also be considered in accordance with the rule in *Clayton's* case. An analysis of the movements in the relevant account demonstrates that an application of the rule in *Clayton's* case would lead to the conclusion that all of the US$5 million was paid out of the Citco account some considerable time before it was frozen on 1st April, 2009. It is clear that those monies were paid out in the ordinary course of business and without any notice of any claim on the part of Headstart to those monies.

6.3 Even if, therefore, RMF, contrary to the views which I have expressed earlier in this judgment, acquired only a voidable title to those monies when they were received into its account at Citco, those monies were dispersed in the ordinary course of business at a time when RMF had no notice of any problem, and in those circumstances it does not seem to me that any claim could continue to be maintained in respect of those funds, as of this time. For any or all of those reasons, it does not seem to me that there can be any continuing maintainable claim in respect of the monies now held in the RMF account at Citco.

6.4 Before concluding, there is one other issue on which I should touch. That is the question of whether the interim and interlocutory injunctions obtained in this case which led to the freezing of the relevant monies were obtained in circumstances which ought lead the court, at this stage, to reject Headstart's claim even if it were otherwise well-founded.

7. Alleged wrongdoing in the process
7.1 The principal contention made under this heading concerns the manner in which a Private Investigator (a Mr. Page who had formerly been a senior Police Officer in the United Kingdom) came to be able to conclude that the series of financial transactions which are at the heart of these proceedings actually took place. That Mr. Page became able to analyse the relevant series of transactions is not in doubt. It is suggested, on behalf of RMF, that the only reasonable inference to draw is that Mr. Page must have induced (wrongfully, and in breach of confidence) officials at either a bank or a clearing house or some entity involved in the relevant

series of financial transactions, to give him account and transaction information. It does seem likely that the only parties who could have known the relevant information were either the parties to the relevant transactions or persons involved in the financial institutions or financial transaction facilitators who handled the relevant transactions. Certainly, those involved at the financial end would not appear to have had any authority to disclose the relevant transactions unless authorised to do so by the parties. On that analysis, it seems clear that the only way in which there could have been a proper disclosure of the relevant information was either by or with the authority of the principals, who, for all practical intents and purposes, are DD or entities in the DD stable. RMF made clear that they had not authorised any such disclosure. It seems, therefore, that there are only two possibilities. Either Mr. Page was able to get information from, or authorised by, personnel within DD, or he was able to persuade persons in the financial system to breach their confidence to DD. Without any evidence, it would not seem to me to be appropriate to reach a conclusion on such a serious matter as to which of those eventualities is more likely. No one from DD or any of its associated entities gave evidence. There is no doubt that DD was in something of a mess at the relevant time. It would not seem to me to be fanciful to rule out the possibility that it was possible to obtain information at that time from DD.

7.2 In any event, the consequences of any wrongdoing at that stage was that an interlocutory order was procured, perhaps in circumstances where not all relevant material was put before the court. However, if it had been the case that I was satisfied that, on a proper application of the law to the facts, the US$5 million paid into the RMF account at Citco was truly Headstart's money, it would not have seemed to me to be appropriate to deprive Headstart of that money because of any inappropriate action in the lead up to the commencement of the proceedings or in the procuring of the interim or interlocutory injunctions. To so deprive Headstart in those circumstances would, in my view, have been a disproportionate punishment for any wrongdoing that might have been established. Had, therefore, I been satisfied that Headstart were truly entitled to the relevant monies, I would not have declined to make appropriate orders based on the accusations under this heading.

8. Conclusions

8.1 I have, therefore, come to the view that it would be inappropriate for the court to make a finding which could have an effect on the proprietorial interest of DD entities as to the status of their ownership of certain monies without those entitles being joined. Headstart, having chosen not to join those entitles, it seems to me that I should not, on that ground alone, make any order in favour of Headstart which could have an effect on the property interests of relevant DD funds, and for that reason alone, the proceedings must be dismissed.

8.2 However, lest I be wrong in that conclusion, and for the reasons which I have analysed, it seems to me that the tracing exercise through the various accounts falls at a number of hurdles so that on the basis that any one of my conclusions under that heading are correct, there no longer remains a claim by Headstart to any monies currently standing in the RMF account at Citco. On any of those bases, also, I would have dismissed the proceedings.

8.3 However, if I was wrong on those conclusions such that, in principle, the monies (or some of them) standing to the account of RMF at Citco are, properly speaking, Headstart's monies, then I would not have declined to make an order in favour of Headstart on the basis of the alleged process wrongdoing to which I have referred.

8.4 For those reasons, the proceedings will be dismissed.