

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0040

BETWEEN:

**[1] FAIRFIELD GREENWICH LIMITED
[2] FAIRFIELD GREENWICH (BERMUDA) LIMITED**

Appellants

and

**[1] KENNETH KRYS
[2] CHARLOTTE CAULFIELD
(as liquidators of Fairfield Sentry Limited and
Fairfield Sigma Limited)**

Respondents

HEARD TOGETHER WITH:

BVIHCMAP2018/0041

BETWEEN:

**[1] WALTER NOEL
[2] JEFFREY TUCKER**

Appellants

and

**[1] KENNETH KRYS
[2] CHARLOTTE CAULFIELD
(as liquidators of Fairfield Sentry Limited and
Fairfield Sigma Limited)**

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Louise Esther Blenman
The Hon. Mde. Gertel Thom

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Ben Mays and Ms. Olga Osadchaya for the Appellants

2019: July 16;
2020: May 13.

Commercial appeal — Contractual indemnity clause — Whether claim in Fairfield Sentry litigation was for loss suffered within the terms of contractual indemnity clause or solely an action for restitution based on unjust enrichment — Whether claim for repayment of overpaid funds in Picard II litigation fell within contractual indemnity clause — Indemnity provisions in articles of association — Whether claim for diminution of share value fell within indemnity provisions for directors and company officers under articles of association — Recoupment of reflective loss — Whether presumption against recoupment of reflective loss applies

Fairfield Greenwich Limited and Fairfield Greenwich (Bermuda) Limited (“the FG appellants”) were investment managers of Fairfield Sentry Limited and Fairfield Sigma Limited (together referred to as “the Funds”). Mr. Walter Noel was a director of the Funds and a principal of the FG appellants. Mr. Jeffrey Tucker was a principal of the FG appellants. The respondents to the appeals are the liquidators of the Funds (together they are referred to as “the Liquidators”).

The Funds were placed into liquidation following the exposure and collapse of the Madoff Ponzi Scheme. The appellants made creditors’ claims in the liquidation. The FG appellants, in their claims, contended that pursuant to indemnity provisions contained in Investment Management Agreements (the “IMA Indemnity”), they were entitled to be indemnified against costs, losses and expenses they incurred and continue to incur in defending several litigation in relation to the Funds as a consequence of the Madoff fraud. The Liquidators rejected their claims on the basis that the IMA Indemnity applies only to claims, demands, liabilities and expenses for loss suffered by the Funds themselves and not to the losses claimed by the FG appellants, which were of a different nature. On the other hand, Mr. Noel and Mr. Tucker, together, sought to be indemnified pursuant to the indemnity provisions contained in the Funds’ Articles of Association (“the Articles Indemnity”). The Liquidators also rejected their claims on the basis that the Articles Indemnity applied only in respect of liabilities for things done by directors and officers in their capacities as directors or officers of the Funds, and not those liabilities claimed by them.

The appellants applied to the High Court to reverse the decision of the liquidators and to allow the claims to be admitted to proof in the liquidation. The specific issues before the learned judge in relation to FG appellants were: (a) the correct interpretation to be given to

the IMA Indemnity; and (b) whether the claims fell within the ambit of the IMA Indemnity. The issue in relation to Mr. Noel and Mr. Tucker was whether their claim fell within the Articles Indemnity. The learned judge dismissed the applications and found that neither of the indemnity provisions applied to the appellants' claims.

Being dissatisfied with the decision of the learned judge, the FG appellants appealed against both his interpretation and application of the IMA Indemnity, in relation to two sets of claims referred to as "the Fairfield Sentry litigation", which was a claim by the Funds against the FG appellants to recover overpaid fees paid to the FG appellants; and "the Picard II litigation", which was a claim instituted by the bankruptcy trustee of Madoff's brokerage firm, the Bernard L. Madoff Investment Securities LLC ("BLMIS"), to recover sums transferred to the Funds. Mr. Noel and Mr. Tucker appealed against the judge's application of the Articles Indemnity.

Held: dismissing the appeals with costs to the respondents to be assessed by a judge of the commercial court, if not agreed within 21 days, that:

1. The IMA Indemnity very clearly covers claims made for loss suffered by the Funds. While it is true that the Funds would have suffered some form of loss, the claim for unjust enrichment by the Funds in the Fairfield Sentry litigation was not for any loss they had suffered in the ordinary sense in which the term "loss" is used, but rather for a reversal of the transfer of excess fees paid to the FG appellants. The learned judge was therefore correct in finding that such a claim would not fall within the ambit of the IMA Indemnity.

Investment Trust Companies v Revenue and Customs Commissioners [2018] AC 275 considered; **Goff & Jones: The Law of Unjust Enrichment**, 9th Edn. Sweet & Maxwell Ltd (United Kingdom) (2016) at p.1-17 considered.

2. In order to determine whether the claim against the FG appellants in the Fairfield Sentry litigation falls within the IMA Indemnity, the court must examine the entirety of the claim and determine firstly the nature of the claim made against them. When the claim is examined as a whole, it is clear that its intent was to recover a particular sum which represents the overpaid fees. It was not a claim for loss, within the meaning of the IMA Indemnity.
3. For the Fairfield Sentry litigation to fall within the terms of the IMA Indemnity, the FG appellants were required to prove that the claim against them was for loss suffered by the Funds as a result of their (the FG appellants') acts or omissions. Whether loss to the Funds resulted from acts or omissions by the FG appellants, was not argued or in issue before the learned judge. It was therefore not open to the judge to make findings on that point. The FG appellants have therefore failed to prove that the claim against them was for loss suffered by the Funds and

accordingly that they were entitled to be indemnified within the terms of the IMA Indemnity.

4. The Picard II litigation against the FG appellants did not seek to recover any sums due or belonging to the Funds, but rather sought to recover loss suffered by BLMIS. While some of the sums recovered by Picard II from the FG appellants would go towards reducing the liability of the Funds to BLMIS, BLMIS simply cannot recoup their loss twice, both from the FG appellants and from the Funds. Furthermore, the claim made by Picard II is that acts and omissions by the FG appellants resulted in loss to BLMIS and not the Funds. The learned judge therefore did not err in finding that the claim by Picard II was not for a loss suffered by the Funds.
5. To fall within the Articles Indemnity, Mr. Noel and Mr. Tucker had to establish that the loss for which they sought to be indemnified, was a direct loss caused by some act or omission by them in the discharge of directors' duties to the Funds. Based on their pleadings, Mr. Noel and Mr. Tucker, as shareholders of Fairfield International Managers Inc. ("FIM"), were claiming that their shares suffered a diminution in value because of losses suffered by FIM. The diminution in value of the shares in FIM is a reflective loss. Mr. Noel and Mr. Tucker have not shown that FIM has no recourse to deal with its depletion of assets. Accordingly, and in all the circumstances, the loss claimed by them does not fall within the ambit of the Articles Indemnity.

Prudential Assurance Co Ltd v Newman Industries Ltd and others (No 2) [1982] 1 All ER 354 considered; **Johnson v Gore and Wood & Co (A firm)** [2001] 1 All ER 481 applied; **Giles v Rhind** [2008] EWCA Civ 118 considered.

6. In order to engage the Articles Indemnity, a person must also show that their costs, loss or expense arose out of some act or omission in their capacity as a director or officer of the Funds. The onus was on Mr. Noel and Mr. Tucker to establish all of the elements of the indemnity and prove that the indemnity applied. The matters referred to by Mr. Noel and Mr. Tucker in the court below do not evidence any act or omissions by Mr. Noel and Mr. Tucker as directors of the Funds, which resulted in the loss. The learned judge therefore did not err in concluding that the Articles Indemnity did not apply and in dismissing their application on that basis.

JUDGMENT

- [1] **THOM JA:** These two appeals were heard together as the same issues arise in both appeals.

- [2] The appeals are part of the ongoing litigation relating to the liquidation of Fairfield Sentry Limited and Fairfield Sigma Limited, following the exposure and collapse of the Madoff Ponzi Scheme.

Background

- [3] The appellants in Appeal No. 40, Fairfield Greenwich Limited (“FGL”) and Field Greenwich (Bermuda) Limited (“FGBL”) (together referred to as “the FG appellants”) were investment managers of Fairfield Sentry Limited (“Sentry”) and Fairfield Sigma Limited (“Sigma”) (together referred to as “the Funds”). The FG appellants’ services to the Funds were provided pursuant to Investment Management Agreements (“IMAs”) which were materially in the same terms.¹
- [4] The first appellant in Appeal No. 41, Mr. Walter Noel (“Mr. Noel”), was a director of the Funds and a principal of the FG appellants. The second appellant in that appeal, Mr. Jeffrey Tucker (“Mr. Tucker”), was a principal of the FG appellants.² He also claimed that he was an officer of the Funds. This was initially disputed in the lower court, but the parties agreed that it was not an issue which had to be determined at that stage and further that, if he was an officer of the Funds, his position would be the same as Mr. Noel. The position on appeal remains the same. For brevity, reference will only be made to Mr. Noel in this judgment since the position would be the same for Mr. Tucker.
- [5] The respondents to both appeals are the liquidators of the Funds (together they are referred to as “the Liquidators”).
- [6] The Funds having been placed into liquidation, the appellants made creditors’ claims in the liquidation.

¹ See Original Bundle, Tab 13, pages 141-171 and 270-282.

² The appellants in both appeals are hereinafter collectively referred to as “the appellants”.

[7] The FG appellants in their claims contended that pursuant to the indemnity provisions in the IMAs (the “IMA Indemnity”), they were entitled to be indemnified against costs, losses and expenses they incurred and continue to incur in defending several litigation in relation to the Funds as a consequence of the Madoff fraud. The Liquidators rejected their claims on the basis that the IMA Indemnity applies only in respect of claims, demands, liabilities and expenses “for loss suffered by the Funds”, that is, where the claim or demand made against the FG appellants seeks to recover from the FG appellants a loss suffered by the Funds themselves. The Liquidators were of the view that the various litigation against the FG appellants did not seek to recover loss suffered by the Funds. Therefore, the IMA Indemnity did not apply.

[8] Mr. Noel in his claims in connection with the several litigation brought against him, sought to be indemnified pursuant to the indemnity provisions in respect of liabilities of company directors and officers in the Funds’ Articles of Association (“the Articles Indemnity”). In rejecting his claims, the Liquidators were of the view that the Articles Indemnity applied only in respect of liabilities for things done by directors and officers in their capacities as directors or officers of the Funds.

The proceedings below

[9] Pursuant to section 273 of the **Insolvency Act, 2003**, the appellants applied to the High Court to reverse the decision of the liquidators and to allow the claims to be admitted to proof in the liquidation. The section reads:

“A person aggrieved by an act, omission or decision of an office holder may apply to the court and the court may confirm, reverse or modify the act, omission or decision of the office holder.”

[10] The parties agreed that the judge would determine the following preliminary issues which were outlined in the order of Wallbank J:

“1. The meaning and effect of the contractual indemnities including any issues of contractual interpretation.

2. Whether as a matter of principle a claim in relation to each proceeding relied on by each alleged indemnitee falls within the scope of and/or triggers any of the indemnity provisions and if so which provisions; and

3. In relation to any proceeding that is held to fall within the scope of and/or trigger, any indemnity provision whether and if so on what basis the alleged indemnitee can claim any indemnity in respect of sums paid not by the alleged indemnitee but instead by other persons or entities.”

[11] The specific issues before the learned judge in relation to FG appellants were: (a) the correct interpretation to be given to the IMA Indemnity; and (b) whether the claims fell within the ambit of the IMA Indemnity.

[12] The issue in relation to Mr. Noel was whether his claim fell within the Articles Indemnity.

[13] The learned judge found that the IMA Indemnity only applied to claims for loss suffered by the Funds which arose out of any act or omission by the Investment Manager Indemnitee. Applying this interpretation to the appellants’ claims, the judge found they were not for loss suffered by the Funds save for the litigation referred to as the “Morning Mist litigation” which the Liquidators agreed fell within the IMA Indemnity. In relation to Mr. Noel, the learned judge found that his claims did not fall within the Articles Indemnity.

[14] Being dissatisfied with the decision of the learned judge, the FG appellants appealed against both his interpretation and application of the IMA Indemnity in relation to two sets of claims which I shall refer to as “the Fairfield Sentry litigation” and “the Picard II litigation”, while Mr. Noel and Mr. Tucker appealed against the judge’s application of the Articles Indemnity.

[15] This Court (differently constituted) heard and determined the FG appellants’ appeal against the judge’s interpretation of the IMA Indemnity and upheld the judge’s decision. The judge’s interpretation of the IMA Indemnity having been

upheld, these appeals are concerned with the judge's application of the indemnities to the appellants' claims for costs and losses they have incurred and continue to incur in relation to the Fairfield Sentry litigation and the Picard II litigation.

The FG appellants

- [16] I will deal first with the appeal by the FG appellants. In so doing, I will consider the appeal in relation to the claim based firstly on the Fairfield Sentry litigation and secondly the Picard II litigation.

The Fairfield Sentry litigation

- [17] The Fairfield Sentry litigation is a claim by the Funds to recover overpayment of fees paid to the FG appellants. The FG appellants contend that pursuant, to the IMA Indemnity, they are entitled to be indemnified for the cost, loss and expenses incurred and which they continue to incur in defending the litigation. The IMA Indemnity provisions on which they rely are set out in clause 9(b) and read as follows:

"Clause 9

Each Investment manager Indemnitee shall not be subject to, and the Fund shall indemnify to the fullest extent permitted by law and hold each Investment manager Indemnitee free and harmless from and against any and all claims, demands, liability or expense for any loss suffered by the Fund arising out of or (sic) any act or omission of an Investment manager Indemnitee relating to the Fund, except to the extent such act or omission constitutes willful misconduct, or reckless disregard of the duties of the Investment manager or on the part of (sic) of the Investment manager Indemnitee."

- [18] The learned judge found that in order for the FG appellants to fall within the IMA Indemnity, the claim must be for a loss suffered by the Fund and the loss must be as a result of the act or omission of the FG appellants in relation to the Funds. The learned judge dismissed the FG appellants' claim on the following bases:

(1) any loss due to overpayment was not as a result of the act or omission of the FG appellants, but was rather as a result of the act of the administrator, Citco Fund Services (Europe) BV ("Citco"). The learned judge was of the view that it was the mistaken instruction of Citco that gave rise to the overpayment and not the physical payment by the FG appellants.

(2) The learned judge agreed with the submission of the liquidators that the litigation by the Funds was a claim in restitution to recover an overpayment on the basis of unjust enrichment, it was not a claim for a loss. The learned judge reasoned that a claim in restitution does not turn upon whether the Funds has suffered a loss because a claim to recover sums based on unjust enrichment is not a claim for a loss. The fact that the Funds may have suffered loss as a result of the overpayment in his words was "extraneous to the claim".

[19] The FG appellants contend that the learned judge erred in so finding for the following reasons: (a) the learned judge misunderstood the law of restitution; (b) in any event, the claim by the Funds was not solely a claim for restitution it also included claims for compensatory damages for breach of fiduciary duties; and (c) the issue whether the loss was as a result of the act or omission of the FG appellants was not an issue in contention before the learned judge.

Restitution

[20] In relation to the restitution point, while the FG appellants acknowledged that a claim for restitution cannot be established where a defendant has not enjoyed a gain, they argue that the learned judge erred because recovery of loss by a claimant is a key element of a claim for restitution. Both elements of loss and gain must be present. A claim for restitution is unlike a compensatory claim for damages which does not require both a gain by a defendant, as well as a loss by a claimant, but only a loss by the claimant. In support of this submission they relied on the judgment of the United Kingdom Supreme Court in the case of **Investment**

Trust Companies v Revenue and Customs Commissioners³ and the passage in **Goff & Jones – The Law of Unjust Enrichment**⁴ referred to by the learned judge.

[21] The FG appellants submit that the above authorities show that a claim for restitution should be construed to mean that the claim is a claim for loss even though it is not compensatory in nature.

[22] The Liquidators submit in response that a claim for restitution is juristically based on a defendant's gain rather than on a claimant's loss, therefore the Funds' claim was not one for loss suffered by the Funds, but to recover a gain the FG appellants mistakenly received. Further, since the Funds' claim was a claim to recover overpaid fees to which the FG appellants were not contractually entitled to receive, it was simply a taking back of sums they should not have received. There was, therefore, no claim for loss suffered by the Funds for which FG appellants should be indemnified. If it were otherwise, the result would be an absurd interpretation of the indemnity provision as it would mean that the Funds would not, in practice, be able to recover fees that were mistakenly overpaid to the FG appellants. They would be entitled to retain fees that they were not entitled to receive.

[23] In the **Investment Trust Companies** case, the United Kingdom Supreme Court per Lord Reed discussed, at length, the principle of unjust enrichment. The passage upon which the parties rely is at paragraphs 43 – 45. They read as follows:

“43. The nature of the various legal requirements indicated by the “at the expense of” question follows from that principle of corrective justice. They are designed to ensure that there has been a transfer of value, of a kind which may have been normatively defective: that is to say, defective in a way which is recognized by the law of unjust enrichment (for example,

³ [2018] AC 275.

⁴ Goff & Jones: The Law of Unjust Enrichment, 9th Edn. Sweet & Maxwell Ltd (United Kingdom) (2016) at p.1-17.

because of a failure of the basis on which the benefit was conferred). The expression 'transfer of value' is however, also too general to serve as a legal test. More precisely, it means in the first place that the defendant has received a benefit from the claimant. But that is not in itself enough. The reversal of unjust enrichment, usually by a restitutionary remedy, is premised on the claimant's also having suffered a loss through his provision of the benefit.

44. This was recognized in the *Menelaou* case, as was noted in para 37 above. It was explained more fully by Lord Clyde in the *Banque Financiere* case [1991] 1 A.C. 221, 237, citing a maxim of Pomponius:

'My Lords, the basis for the appellants' claim is to be found in the principle of unjust enrichment, a principle more fully expressed in the Latin formulation, *nemo debet locupletari aliena jactura* [no one should be enriched by another's loss] ... Without attempting any comprehensive analysis, it seems to me that the principle requires at least that the plaintiff should have sustained a loss through the provision of something for the benefit of some other person with no intention of making a gift, that the defendant should have received some form of enrichment, and that the enrichment has come about because of the loss.'

45. It should be emphasized that there need not be a loss in the same sense as in the law of damages: restitution is not a compensatory remedy. For that reason, some commentators have preferred to use different terms, referring for example to a subtraction from, or diminution in, the claimant's wealth, or simply to a transfer of value. But the word "loss" is used in the authorities, and it is perfectly apposite, provided it is understood that it does not bear the same meaning as in the law of damages. The loss to the claimant may, for example be incurred through the gratuitous provision of services which could otherwise have been provided for reward, where there was no intention of donation. In such a situation, the claimant has given up something of economic value through the provision of the benefit, and has in that sense incurred a loss."

[24] In my view, these statements make it clear that in a claim based on unjust enrichment, the claimant must show that they suffered loss, but that loss is not the same as compensatory loss, and a mere parting with something of value (even a gratuitous provision of services where not intended as a gift) would suffice. As the

learned authors of **Goff & Jones – The Law of Unjust Enrichment**⁵ stated in discussing the meaning of the phrase “at the claimant’s expense”:

“This deceptively simple term signifies that the claimant must have suffered a loss that was sufficiently closely linked with the defendant’s gain for the law to hold that a benefit was transferred from the claimant to the defendant. This rule reflects the principle that the law of unjust enrichment is not concerned with the disgorgement of gains by defendants, nor with compensation for losses sustained by claimants but with the reversal of transfers of benefits between claimants and defendants.”

[25] The IMA Indemnity covers claims made for loss suffered by the Funds. While it is true that the Funds, in making the overpayment, would have suffered loss, the claim for unjust enrichment by the Funds was not for any loss they had suffered in the ordinary sense in which the term “loss” is used, but rather for a reversal of the transfer of excess fees paid to the FG appellants. In my view, the learned judge was correct in finding that such a claim would not fall within the ambit of the IMA Indemnity.

[26] The FG appellants argue further that the Funds’ claim was not solely one for restitution. The Funds also claimed damages for breach of contract, breach of fiduciary duty and duty of care arising out of the FG appellants’ conduct and inaction. They alleged that the FG appellants failed to use their best efforts to oversee the Fund’s investments, and such failure amounted to gross negligence. They argue that these claims were claims for loss to which the learned judge did not address his mind, and that, had he done so, he would inevitably have found that the claims, being for loss, were within the IMA Indemnity.

[27] The Liquidators submitted, in response, that the learned judge was required to consider the pleading as a whole and determine what was the substance of the complaint. While the Funds’ claim was pleaded in several ways, the substance of the claim was undoubtedly one for the return of overpaid fees.

⁵ See n.4 above.

[28] I agree that a claim for breach of contract and a claim for breach of duty are claims for loss. The IMA Indemnity provides indemnity to the FG appellants for any claim made against them including a claim by the Funds for “loss suffered” by the Funds. To determine whether a claim against the FG appellants falls within the IMA Indemnity, the Court must examine the claim and determine exactly the nature of the claim made against them. When the claim is examined as a whole,⁶ the claim, while made in several ways, is really to recover the exact sum which represents the overpaid fees. It was not a claim for loss within the meaning of the IMA Indemnity.

Acts or omissions

[29] The learned judge found, at paragraphs 88 and 89 of his judgment, that the overpayment of fees to the FG appellants was caused neither by an act nor omission of the FG appellants since the calculation of the fees which led to the overpayment was done by Citco and not the mere physical act of payment by the FG appellants.

[30] The FG appellants submitted that this finding was wrong firstly because the issue of acts or omission was not a basis on which the joint Liquidators rejected the FG appellants claim. This point was not an issue raised before the learned judge, and so it was not argued. They submit further that the discussion relating to the issue of Citco determining the fees based on net asset values did not arise in the context of any act or omission to trigger the indemnity. They further argue that the Funds’ litigation was expressly based on their acts or omissions. The Funds expressly relied on the conduct and inaction of the FG appellants in alleging that the FG appellants failed to use their best efforts to oversee the Funds’ investment activities when performing their duties.

[31] The Liquidators, in response, submitted that the learned judge was correct to find that the claim did not arise out of any act or omission of the FG appellants in their

⁶ See Record of Appeal, Volume 6 at page 2767 onward.

capacities as investment managers because the overpayment was as a result of the acts or omissions of the Funds' administrator, Citco.

[32] I agree with the submissions of the FG appellants that whether the loss was as a result of the acts or omissions of the FG appellants, was not in issue before the learned judge, and accordingly there were no arguments before the judge on that point. It was therefore not open to the learned judge to find as he did. The passage in the transcript of the discussion between counsel for the FG appellants and the learned judge to which Mr. Midwinter, QC referred the Court, when read in context, was not in relation to the issue of "act or omissions" requirement in the IMA Indemnity. The exchange was in relation to whether the IMA Indemnity would apply to mistakenly paid fees. The learned judge posed the following question to counsel for the FG appellants:

"The question is let's suppose there was an overpayment of fees simply by virtue of mistake, someone wrote a cheque or made a bank transfer ten times what it was meant to be. Do you say that the claim by the Funds to recover that payment, made on a mistaken basis, would be within or outside the indemnity?"

[33] It was during this discourse that counsel for the FG appellants made the point that it was not the FG appellants who made the calculation of the payment due to the appellants, but it was done by Citco, the administrator.⁷ Indeed, the learned judge acknowledged at paragraph 90 of the judgment that the Liquidators' case was argued on a different basis, that is, that their claim was in restitution. Further, the Funds did plead several acts and omissions of the FG appellants when they alleged the FG appellants were in breach of their fiduciary duties.

[34] To succeed, the FG appellants had to satisfy both limbs of the IMA Indemnity, being that: (a) the claim was for a loss suffered by the Funds; and (b) the loss was occasioned by the acts or omissions of the FG appellants. They have failed on the first limb, the appeal on this ground therefore fails.

⁷ See Core Bundle at pages 348 – 353.

Picard II

- [35] The Picard II litigation is a claim instituted by the bankruptcy trustee of Madoff's brokerage firm, the Bernard L. Madoff Investment Securities LLC ("BLMIS"), to recover sums transferred from BLMIS to the Funds, some of which were subsequently transferred from the Funds to the FG appellants, as preference payments. The claim was brought against the Funds, the FG appellants and others. While the claim against the Funds is settled, the claim continues against the FG appellants. The FG appellants contend that they are entitled to be indemnified for their costs and losses in defending the claim since it falls within the ambit of the IMA Indemnity. The learned judge found that the Picard II litigation was not a claim for loss suffered by the Fund. The claim arose out of payments made to the Fund. Secondly, the loss did not arise out of any act or omission of the FG appellants in relation to the Funds.
- [36] The FG appellants submit the learned judge was wrong to so conclude. They argue that the claim was for a loss suffered by the Funds since the Funds suffered a direct loss by incurring a liability to repay BLMIS, which they agreed to settle. Further, as part of the settlement of the claim against the Fund, the Liquidators stand to recover some of the money through Picard II. The settlement agreement provides that the Funds will receive 15% of the amount over \$200 million received by Picard II from the FG appellants which would partially reduce the Funds' loss.⁸ Since the claim is to recover sums paid by the Funds to the FG appellants, that is a loss to the Fund. They contend further that the claim does not have to be brought by the Funds for it to be for a loss suffered by the Fund. Indeed, such was the case in the Morning Mist litigation, which was settled. I agree with this latter point.
- [37] The Liquidators in response submitted that the Picard II litigation is not a claim for loss suffered by the Funds. Rather, it is a claim for loss suffered by BLMIS. This

⁸ See Hearing Bundle, Volume 4 of Tab 13, at pages 2813 – 2814.

is evident since the claim is also brought against the Funds who they allege also caused the loss, and who recovered from BLMIS sums they were not entitled to receive. They further submit that in the Picard II litigation against the Funds, the appellants and others alleged that BLMIS was at all material times insolvent, and redemptions paid out by it were fraudulent preferences or transfers voidable pursuant to the United States Chapter 11 Bankruptcy Code. Mr. Picard also claims that he is entitled to recover the money as customer property because the statute allows him to do so. In response to this latter argument, the FG appellants submit that no expert evidence of US law was before the court, and therefore that the court could not determine what was to be pleaded to make good such a cause of action. I agree with this submission by the FG appellants. No expert evidence was before the learned judge to enable him to determine the matter on this basis.

- [38] As indicated earlier, one requirement of the IMA Indemnity is that the claim must be for a loss suffered by the Fund. The FG appellants are entitled to be indemnified where claims are made against them for loss suffered by the Funds as a result of any act or omission (excepting willful misconduct or recklessness) by them relating to the Funds. It was therefore incumbent on the FG appellants to show that the claim against them was for a loss suffered by the Funds. An examination of the Picard II litigation against the FG appellants shows that it relates to loss suffered by BLMIS - they are indeed seeking to recoup sums paid out by BLMIS. It is of no moment that there was a settlement agreement between Picard II and the Funds which provides that if the Picard II litigation is successful against the FG appellants, then the Funds' liability to BLMIS may be reduced. The terms of the Picard II settlement does not transform the nature of the Picard II litigation against the FG appellants into a claim for loss suffered by the Funds. Indeed, what is important is the nature of the claim that is made against the FG appellants. The Picard II litigation is not seeking to recover any sums due or belonging to the Funds, but rather seeks to recover loss suffered by BLMIS. While some of the sums recovered would go towards reducing the liability of the Funds to BLMIS, as the Liquidators pointed out in their submissions, with which I agree, it

is simply a situation where BLMIS simply cannot recoup their loss twice. I am therefore of the view that the learned judge did not err in finding that the claim by Picard II was not for a loss suffered by the Funds. On this ground, the appeal in relation to Picard II fails, as both requirements of clause 9(b) of the IMA Indemnity have not been satisfied. Nonetheless, I will consider the second limb of the FG appellants' argument.

- [39] The FG appellants submit further that the claim was in relation to acts or omissions in relation to the Funds since there were numerous claims of fraudulent conveyance which alleged acts or omissions other than preference payments. By way of example, they referred to parts of parts VII, VIII, and IX of the claim. Part VII is headed "The Defendants Role in Facilitating the Fraud" where Mr. Picard alleged that the FG appellants, among others, served as the gatekeepers to keep investors in the dark, conspired with Madoff to hide his involvement from the SEC (Securities Exchange Commission) and made false statements about Madoff's operations. The FG appellants willfully ignored red flags and failed to perform adequate due diligence and inquiry into the possibility of fraud. I agree that these alleged acts are acts relating to the Funds, but the claim made by Picard II is that these acts resulted in loss suffered by BLMIS and not the Funds – the first limb was not satisfied.

Mr. Noel

- [40] Mr. Noel is one of the defendants in the Funds' litigation and the Picard II litigation. His claim in the liquidation to be indemnified pursuant to the Articles Indemnity in the Articles of Association of the Funds for his losses in defending the claims, was rejected by the Liquidators.

- [41] In the court below, the learned judge, having examined the claim by Mr. Noel, referred to the following part:

"Fairfield International Inc. ("FIM" is a Delaware corporation formed on January 4, 1988. For the Years 2009-2016, FIM had a 34.7% interest in each of FGL and (FGBL). FGB and (FGBL) are check-the-box entities

which pass-through their losses to their shareholders, including FIM. In the years 2009-2016 FGL and (FGBL paid millions of dollars of legal fees, costs and expenses on behalf of the FG-related defendants, including Mr. Noel. Mr. Noel claims and demands his share of these losses relating to Sentry and the Claimed Matters and must be indemnified pursuant to Sentry's articles of association.For the years 2009-2016 (Mr. Noel) had a 25% interest in FIM.”⁹

and determined that Mr. Noel's claim did not fall within the Articles Indemnity.

- [42] In the learned judge's view, Mr. Noel was not seeking an indemnity against his own costs. His claim was not in respect of any liability of his own. The learned judge described his claim as follows: “What Mr. Noel is seeking here is not an indemnity against his own costs but an indemnity against the ultimate economic costs to him of the costs of all Fairfield defendants in the relevant proceedings”. In other words, the loss claimed by Mr. Noel was a reflective loss.
- [43] The learned judge was further of the view that, for the indemnity to be engaged, it was necessary for Mr. Noel to identify, with clarity, the specific act he conducted in his capacity as director of the Funds which brought the losses upon him. The judge noted that counsel for Mr. Noel had acknowledged that most of the claims against Mr. Noel were in his capacity as director of the FG appellants.
- [44] Mr. Noel contends that in so finding the learned judge erred. Firstly, the learned judge in finding that the loss was reflective loss proceeded on the false premises that the costs of the claims by the Funds had been borne solely by Fairfield International Managers Inc. (“FIM”) whereas the affidavit evidence of Mr. McKeefry shows that there were costs which were borne personally by Mr. Noel. Those costs he submits are a direct loss not reflective loss. Only Mr. Noel could recover the loss. He contends that where acts are attributable to him in different capacities there has to be apportionment, but this would be at the quantification stage.

⁹ See paragraph 97 of the judge's judgment.

[45] Mr. Noel contends further that the claims through FIM are also losses. The learned judge only considered whether Mr. Noel's claim for costs were within the Articles Indemnity. The learned judge failed to consider whether the claims for losses suffered through FIM were within the Articles Indemnity. Those losses, he contends, were a direct loss to him as a shareholder of FIM. Further reflective loss would be an issue of apportionment rather than a right to claim.

[46] The Liquidators in response submitted that Mr. Noel's claim was only in respect of his loss through FIM. Mr. Noel does not seek an indemnity for costs incurred by him, but against the ultimate costs of all Fairfield Defendants. The issue therefore before the learned judge was whether the loss suffered by reason of his shareholding in FIM was within the Articles Indemnity. They argue such a reflective loss was outside the terms of the Articles Indemnity. The claim made by Mr. Noel was a claim as a shareholder of FIM.¹⁰ The judge was correct to find that the losses claimed were reflective of reduction in the value of his shareholding in FIM. The claim has nothing to do with Mr. Noel's position as a director of the Funds. Mr. Noel is listed in the claim as one of several defendants. Reference to him as a director in the claim was merely incidental.

Discussion

[47] The provisions of the Articles Indemnity read as follows:

"Each Director, Secretary or other Officer of the company shall be indemnified by the Company against... all costs, losses and expenses which any such Director or officer may incur or become liable for by reason of any contract entered into, or act or thing done by him as such Director or Officer in any way in the discharge of his duties."

[48] To fall within the Articles Indemnity, Mr. Noel had to establish that: (1) he was a director or officer of the company – it is not disputed that at all material times he was a director of the Funds; (2) the loss, costs or expense for which he seeks to be indemnified was his loss. It must be a direct loss; and (3) the loss or costs must

¹⁰ See Hearing Bundle, Volume 1 of Tab 13 at page 31.

have been as a result of some act or omission by him in his capacity as director, in the discharge of his duty as director of the Funds.

- [49] The evidence on which Mr. Noel relied in support of his submission that the loss was a direct loss to him is outlined in paragraph 69 of Mr. McKeefry's affidavit and reads as follows:

"69. Mr. Noel and Mr. Tucker paid the costs in the D&O claims. These payments were made either directly to a law firm or by contributing cash to FGG ("the Fairfield Greenwich Group) to make payments to the law firm on their behalf. The amounts of those contributions can be proven through tax, accounting and banking records of the applicants and of FIM, Mr. Noel and Mr. Tucker pass-through entity in which their ownership of FGL and FGBL is held. Again, applicants believe that that this is another issue for discussion in the next phase of the claim review (i.e. the quantification stage) and it is not an issue of principle before the court at present. Nonetheless the applicants are willing to provide evidence regarding the cash payments and contributions by Mr. Noel and Mr. Tucker in due course, if the court so wishes."

- [50] This evidence was unchallenged. It was not referred to by the learned judge in his judgment since the learned judge found, at paragraph 98, that Mr. Noel was not seeking an indemnity against his own costs. The learned judge stated: "Mr. Noel has not claimed in respect of any liability of his own to discharge his costs. The Liquidators were right to reject his claim." He continued at paragraph 99:

"That means that it is strictly unnecessary to consider the extent to which Mr. Noel, had he incurred personal liability for costs in relevant litigation would in any case be entitled to recover under the articles of association".

- [51] As the Liquidators rightly, in my view, pointed out, an examination of Mr. Noel's claims in the liquidation show that they were made on two bases, one unrelated to these litigations, the other was for their loss through FIM. Mr. Noel's claims were very specific. There was no claim in the liquidation for sums paid personally by Mr. Noel. The Liquidators were only required to consider claims which were before them which they did. They having rejected the claim through FIM, Mr. Noel's application before the learned judge was to: (a) reverse the Liquidators'

decision to reject his claims; and (b) to allow those claims to be admitted to proof in the liquidation. The learned judge was therefore only required to make determinations in relation to the claims that were rejected by the Liquidators.

Reflective Loss

[52] As indicated earlier, for a loss to fall within the ambit of the Articles Indemnity it must be a direct loss of the indemnitee. The issue which arises is whether the loss suffered by Mr. Noel, as a shareholder of FIM, falls within the ambit of the Articles Indemnity. Mr. Noel says it does because the loss is direct and not reflective. FIM cannot recover the loss, he is the only person who can recover the loss. He argues that the rule against reflective loss does not apply.

[53] The rule against reflective loss precludes a shareholder from recovering the diminution of the value of his shares where that is merely a reflection of the loss suffered by the company. Only the company could make such a claim. The rule is stated in the decision of the English Court of Appeal in **Prudential Assurance Co Ltd v Newman Industries Ltd and others (No 2)**¹¹ as follows:

“But what (the shareholder) cannot do is to recover damages merely because the company in which he is interested in suffered damage. He cannot recover a sum equal to the diminution in the market value of his shares, or equal to the likely diminution expected, because such a loss is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only “loss” is through the company in the diminution in the value of net assets of the company in which he has “say” a 3 per cent shareholding. The plaintiff’s shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all of the shares as his own absolutely unencumbered “property”.

[54] In **Johnson v Gore and Wood & Co (A firm)**,¹² the House of Lords agreed with principle as stated in **Prudential Assurance**. Lord Millet opined that:

¹¹ [1982] 1 All ER 354 at 366.

¹² [2001] 1 All ER 481 at 532.

“The test is not whether the company could have made a claim in respect of the loss in question, the question is whether treating the company and the shareholder as one for this purpose, the shareholder’s loss is franked by that of the company. If so such a reflective loss is recoverable by the company and not by the shareholder.”

[55] In **Giles v Rhind**,¹³ the English Court of Appeal established an exception to this rule being that a shareholder can claim for reflective loss where the company was unable to pursue the claim itself.

[56] Based on his pleadings as set out by the learned judge in the judgment, Mr. Noel being a shareholder of FIM is claiming his shares suffered a diminution in value because of the loss of FIM, being a shareholder in the FG appellants who suffered a reduction in assets in meeting the costs of the Funds’ litigation against the FG appellants, Mr. Noel and other defendants. Mr. Noel’s diminution in value of his shareholding in FIM is a reflection of FIM’s loss as a shareholder of the FG appellants. Applying the test in **Johnson v Gore and Wood & Co (A firm)** it is for FIM to deal with the issue of the depletion of its assets. Mr. Noel has not shown that FIM has no recourse to deal with its depletion of assets. The fact that FIM is not covered by the Articles Indemnity is of no moment. In my view the loss claimed by Mr. Noel being the diminution in the value of his shareholding in FIM does not fall within the ambit of the Articles Indemnity.

Acts and Omissions

[57] Mr. Noel also submits that the learned judge erred in finding that he was required to specifically identify the specific acts or omission as director of the Fund which resulted in the loss to the Funds. Firstly, he argued that it was not a requirement of the Articles Indemnity for him to identify the specific acts or omissions which resulted in the loss; and secondly, in the event that it did, then Mr. Noel did identify the specific acts and omissions in the affidavit of Mr. McKeefry which shows that

¹³ [2008] EWCA Civ 118.

the claims against Mr. Noel included claims for breach of fiduciary duty in his role as director of the Funds.

[58] The Liquidators in their response submit that, based on the provisions of the Articles Indemnity, the person claiming to be entitled to be indemnified must show that they have incurred loss by virtue of actions or omissions by him as director of the Funds. They further submit that the test in the Articles Indemnity is one of causation. Mr. Noel was therefore obliged to identify the specific act or things which he did as directors of the Funds which caused loss to the Funds. Mr. Noel is entitled to be indemnified for acts or things done by him as director of the Funds, but not for things done in other roles particularly in his role as a principal of the Fairfield Group. The litigation by the Funds being a claim for restitution of fees paid to him in his role as a principal of the FG appellants and not as fees that he received as a director of the Funds cannot possibly be classified as a claim that arose out of any act or omission done by him as director of the Funds. Moreover, a claim for return of overpaid fees does not involve any loss on the part of the person who has been overpaid against which an indemnity can sensibly be granted.

[59] Similarly, the claim against him in Picard II does not fall within the Indemnity since the claim was not based on his role as director but as principal of the FGL Group. Therefore, the claims were such that they would have been made against him even if he was not director of the Fund. This is fortified by the fact that the same claim is made against several other persons who were not directors or officers of the Fund.

[60] As indicated earlier the provisions of the Articles Indemnity are very clear. In order for the Articles Indemnity to be engaged a person must show that their costs, loss or expense arose out of some act or omission in their capacity as a director or officer of the Funds. In relation to the Funds' litigation he relied on the claim in the

liquidation.¹⁴ I found earlier that in the Funds' litigation, there were acts and omissions of the FG appellants identified in the claim. This was also the case in relation to Mr. Noel in his capacity as director of the Funds.

[61] In relation to the Picard II litigation, Mr. Noel relied on paragraphs 193 to 195 of the Picard II claim which read as follows:

“193. Walter Noel: Defendant Noel is a founding partner of FGG and sat on its Board of directors. He also served as a director of Fairfield Sentry Sigma, and FGB and as a general partner to GS from 1992 to 1998. Noel is also an indirect shareholder in FGB.

194. As one of FGG's founding partners, Noel was intimately involved with its operations. Noel made day-to-day management decisions regarding the Feeder Funds and the FGG Affiliates. He was also involved in marketing the Feeder Funds as well as the preparation and review of sales and marketing materials.

195. As further described below, Noel was acutely aware of many facts and red flags that put him on actual and/or inquiry notice that BLMIS was engaging in fraud, and yet failed to conduct any proper independent and reasonable due diligence or follow up.”

[62] The learned judge did not make any reference to these claims in his judgment. In my view the abovementioned paragraphs refer to acts and omissions of Mr. Noel in his role as principal of the FG appellants. While Mr. Noel is mentioned in paragraph 193, that paragraph simply identifies the various offices which Mr. Noel held. The paragraphs do not identify any act or omissions by Mr. Noel in his office as director of the Funds. Since Mr. Noel was claiming that the indemnity applied, the onus was on Mr. Noel to establish all of the elements of the indemnity. He was required to identify the act or omission as director of the Funds which resulted in the loss. The learned judge did not err in dismissing his application to reverse the decision of the Liquidators on this basis.

¹⁴ See Record of Appeal, Volume 1, Tab 1.

[63] For all the above reasons, I would dismiss both the appeal by the FG appellants and the appeal by Mr. Noel and Mr. Tucker with costs to the Liquidators such costs to be assessed by a judge of the commercial court, if not agreed within 21 days.

I concur.

Dame Janice M. Pereira, DBE

Chief Justice

I concur.

Louise Esther Blenman

Justice of Appeal

By the Court

Chief Registrar