



In The Supreme Court of Bermuda

(COMMERCIAL COURT)

CIVIL JURISDICTION

2011: No. 220

BETWEEN:

ALPHA PRIME FUND LIMITED

Plaintiff

-v-

PRIMEO FUND LTD

(in liquidation in the Cayman Islands)

Defendant

RULING

(APPLICATION TO DISCHARGE EX PARTE INJUNCTION)

(In Chambers)

Date of Hearing: July 26, 2011

Date of Ruling: August 12, 2011

Mr. Cameron Hill, Sedgwick Chudleigh, for the Applicant/Defendant
Mr. Rod Attride-Stirling and Mr. Nathaniel Turner,
Attride-Stirling & Woloniecki, for the Respondent/Plaintiff

Introductory

1. By an Originating Summons dated July 7, 2011, the Respondent/Plaintiff (“Alpha Prime” or “the Company”) seeks a permanent injunction restraining the Applicant/Defendant (“Primeo”) from presenting a winding-up petition based on the assertion that Alpha Prime has failed to pay certain sums claimed in a Statutory Demand dated June 17, 2011. An Ex Parte Summons seeking corresponding interim relief was also issued on July 7, 2011 and heard by me on July 8, 2011 when I granted the interim injunction sought (“the Ex Parte Injunction”).
2. On July 25, 2011, Primeo, in Official Liquidation in the Cayman Islands, applied to discharge the interim injunction. On the effective hearing of this application, I modified the wording of the interim injunction to make it clear that Primeo were only restrained from presenting a petition based on the Statutory Demand, but not otherwise. The entitlement of Alpha Prime to the interim injunction was still hotly contested and, although both counsel would perhaps have liked more time for oral argument, the application was fully argued as regards the sole ground upon which the Ex Parte Injunction was obtained.
3. As is always the case in applications such as this, the central issue was whether or not Primeo could establish with sufficient clarity that the Statutory Demand was based on a debt that was not disputed on substantial grounds. While the legal principles governing injunctions to restrain the presentation of a winding-up petition have in general terms been settled under Bermuda law for some time, how those principles are to be applied as regards investors seeking to redeem their shares in hedge funds has been somewhat contentious in recent years.

Principles applicable to restraining the presentation of winding-up petitions

4. In obtaining the Ex Parte Injunction, Mr. Attride-Stirling submitted that Alpha Prime had to make out a *prima facie* case that any petition Primeo might present based on a claim that it was an actual creditor would be an abuse of process: ‘*McPherson’s Law of Company Liquidation*’, 1st UK edition, pages 101-106; *Coulson Sanderson & Ward-v-Ward* (1986) 2 BCC 99. These principles were not challenged by Mr. Hill at the *inter partes* hearing.
5. Alpha’s Prime’s case was that it was solvent on a balance sheet basis and Primeo was not a creditor, principally because Alpha Prime had validly suspended, in accordance with its

corporate constitution, any payment rights that Primeo might otherwise have been entitled to assert.

When is a Hedge Fund Redemption Creditor's Claim not a Disputed Debt?

6. Whether or not a hedge fund shareholder who has purported to redeem his shares but has not been paid is a creditor is a question which ultimately turns on a construction of the contract pursuant to which the relevant investment was made. This question has been considered in a number of cases to which Primeo's counsel referred, including: *BNY AIS Nominees –v-Stewardship Credit Arbitrage Fund Ltd.* [2008] Bda L.R. 67 (Bell J); *Professional Offshore Opportunity Fund Limited-and- Daiwa Securities Trust and Banking (Europe) PLC as Custodian for KBCZAF*, High Court of Justice British Virgin Islands, Claim No: 0006 of 2009, Judgment dated June 4, 2009 (Bannister J (ag)); and *Culross Global SPC Limited-v-Strategic Turnaround Master Partnership Limited* [2010]UKPC 33.
7. In *BNY AIS Nominees –v-Stewardship Credit Arbitrage Fund Ltd.* [2008] Bda L.R. 67, it was essentially common ground that the relevant redemption proceeds were payable; argument centred on whether the debt had been effectively discharged through the issue of certain instruments. On the question of whether the petitioner was a creditor, Bell J concluded (at paragraph 55) as follows:

“Quite apart from the authorities upon which Mr. Potts relied, it seems to me to be both sensible and obvious to find that a failure on the part of the Company to discharge its redemption obligations puts the Gottex Funds in the position of creditor, and I so find.”
8. In *Professional Offshore Opportunity Fund Limited -and- Daiwa Securities Trust and Banking (Europe) PLC as Custodian for KBCZAF*, the redemption proceeds became due and payable before payment was suspended by the company. Bannister J apparently held that a Statutory Demand could be relied upon because prior to the purported suspension of the obligation to make payment, the debt had already become both due and payable.
9. *Culross Global SPC Limited -v- Strategic Turnaround Master Partnership Limited* [2010]UKPC 33, it was held that the company had no power at the material time (after the redemption date had passed) to suspend the payment of redemption proceeds. Lord Mance (on behalf of the Privy Council Board) opined as follows:

“15. The Board turns in the light of these provisions to the issue whether Appellant’s articles, read with such other documents as may be incorporated or referred to therein. The existence and extent of any power to suspend the payment of redemption proceeds after the Redemption Date is a subject upon which the members were at liberty to make “any contract inter se which they pleased”, as the Earl of Selborne LC said in Walton v Edge (1884) 10 App Cas 33, 35 with regard to an issue regarding the effect of a provision allowing a member of a building society “to withdraw (provided the funds permit) ... by giving” either seven days’ or one month’s notice according to the amount. The discussion of the concept of redemption in the Australian case of In re HIH Insurance Ltd. (in Liquidation) [2008] FAC 623, to which the Respondent referred the Board, took place in a very different context to the present, and cannot obviate the need for a detailed examination of the Appellant’s articles and documentation to answer the present issue. The issue is not to be approached on the basis of any a priori view that, until payment of the redemption proceeds, a shareholder must or should necessarily remain a member of a company which is (as the Respondent was) due to make such payment upon or after a certain redemption date; and the fact that a person’s name continues to remain on a company’s register as member does not mean that it should have done so under the provisions of the Articles: see e.g. Reese River Silver Mining Company Ltd v Smith (1869) 4 HL 64, 80; Michaels v Harley House (Maylebone) Ltd [1997] 2 BCLC 166, 174.

17. Any power to withhold payment of the redemption proceeds must be authorised by or pursuant to the articles of association. The Board understood this to have been ultimately common ground before it. In any event, it follows from the terms of section 37 of the Companies Law, and it remains so, therefore, despite the Subscription Agreement’s general reference to the subscription being made and any Shares of the Company subscribed being held subject to the terms and conditions of the CEM. To the extent that articles 17 and 20 refer to the CEM, the terms of the CEM are expressly relevant under the articles, but it is in issue between the parties whether these references extend to redemption.”

Alpha Prime’s Bye-Laws and the scope of the right to suspend the payment of redemption monies

10. Bye-law 12 of the Bye-Laws provides that a Redemption Request:

“12.2 must be received by the Sub-Administrator (or whoever the Board may elect from time to time) by the close of business on the 24th day of the

month prior to the Redemption Date on which the Participating Shares which are the subject of that Redemption Request are to be redeemed, provided that:

12.2.1 the Board may, either generally or in a particular case and after having received a Redemption Request, extend the notice period within which that or any other Redemption Request must be received to such notice period of greater duration as the Board may determine if the Board (in consultation with the Investment Manager) in its discretion deems such an extension as being in the best interests of the Company and its non-redeeming Members; and

12.2.2 the Board may in its discretion waive or reduce the notice period, either generally or in any particular case”.

11. “Redemption Date”, according to Bye-Law 1, “means a day on which the Participating Shares may be redeemed being the last Business Day of each month and/or such other times as the Board may in its sole discretion decide”. Mr. Attride-Stirling relied on Bye-Law 18(3), which provided for the suspension of the determination of the calculation of net asset value (“NAV”) in seemingly unremarkable terms, as read with the following crucial Bye-Law:

“13.1.8 during any period when the determination of the Net Asset Value is suspended pursuant to these Bye-Laws:

13.1.8.1 Participating Shares may not be redeemed; and

13.1.8.2 no Redemption Request or Switching Requests may be given,

and any Redemption Request or Switching Request which has been given shall be processed so that the relevant Participating Shares shall be redeemed or repurchased, or converted, as the case may be, on the Redemption Date falling after the end of the period of suspension. Such Participating Shares shall be valued based on the Net Asset Value of such Participating Shares of the Company, of the relevant Class or Series of a Class (as the case may be) at that time.”

12. The above provisions very arguably provide that where the Company's NAV has been suspended and a Redemption Request has not already been processed for payment on the scheduled Redemption Date, the Redemption Date is postponed until the end of the suspension period. The definition of "Redemption Date" read with Bye-Law 2.2 arguably signifies that, unless another date is designated by the Board, redemptions shall take place on the last day of the month within which the Redemption Request is made, provided requests are made no later than the 24th day of the month.

The processing of Primeo's Redemption Request

13. At the hearing of the ex parte application, Alpha Prime was unable to produce the relevant Redemption Requests. It was simply asserted that indirect evidence suggested that a redemption request was made in late November, and before it became payable the NAV was suspended together with any obligation to make payment. Primeo produced its Redemption Request which was sent by HSBC Services (Luxembourg) SA ("HSBC Lux") acting as Primeo's agent and acknowledged by HSBC Lux acting as Alpha Prime's agent. Alpha Prime filed a suit in Luxembourg against HSBC Lux in connection with the Madoff fraud and its role as custodian on October 20, 2010.
14. The two Redemption Requests were each dated November 27, 2008 (Euro Class A-€2,203,000.00 and US\$ Class A-US\$202,000) and stated to be for a "*Dealing date*" of "*01-Dec-2008*". They were formally received (but not necessarily accepted) on this basis. Mr. Attride-Stirling suggested this was "obviously" a mistake and was intended to refer to January 1, 2009. This is far from obvious as the HSBC Lux confirmations of receipt in fact stated as follows:

"We confirm receipt of your instruction to REDEEM from ALPHA PRIME EQUITY HEDGED FUND [Euro Class A/US\$ Class A] at the next dealing date

Trade Date *Dec/01/2008*

Valuation/NAV Date *Nov/28/2008...*

Upon completion of the transaction a confirmation of the trade will be forwarded to you. Completion of transaction depends upon receipt of signed original documentation."

15. Subject to arguments about whether HSBC Lux had authority from the Board to waive the late submission of the Redemption Requests so as to become eligible for a December 1, 2008 Redemption Date, which cannot be resolved at this stage, it at first seems somewhat plausible to contend that Primeo's Redemption Requests crystallized on December 1, 2008. It seems self-evident, and is supported by the documentation, that

HSBC Lux on November 27, 2008 had possession of the original documentation as they were performing dual agency functions. What appears to be the original Redemption Requests are stamped as received, so it might be contended that all that was outstanding was to assign a payment date and effect payment. However, all that Alpha Prime had clearly done as of November 1, 2008 was to:

(1) promptly “*confirm receipt of [Primeo’s] instruction to REDEEM*”; and

(2) advise Primeo that “*Upon completion of the transaction a confirmation of the trade will be forwarded to you.*”

16. The calculation of NAV was suspended on December 12, 2008 as notified to investors by letter dated December 15, 2008. The Madoff trustee on December 5, 2010 sued Alpha Prime and other HSBC entities for the purpose of recovering monies distributed to Alpha Prime from New York. On June 27, 2011, Alpha Prime notified its Shareholders that it “*is at present having promising talks with attorneys of the Madoff/BLMIS Trustee in New York*”. These talks would, Alpha Prime contends, be prejudicial causing serious damage to the Company if a winding-up petition were to be presented.
17. At the time that the suspension of NAV calculation took place on December 12, 2008, however, it is common ground that the actual payment of the redemption proceeds had not been effected. Primeo presently has no or no cogent evidence that the monies had in any way been earmarked for payment, either by way of transfer into a special bank account or by way of the drawing of a cheque (in fact the evidence suggests a wire transfer of some sort was contemplated). It relies on clear documentary evidence that Alpha Prime’s agent acknowledged receipt of the Redemption Requests for payment as of December 1, 2008, without adducing any or any clear evidence that Alpha Prime agreed to process the Redemption Requests as of the requested date.
18. Having regard to Bye-Law 12.2’s requirement that a Redemption Request must be received by the 24th of the month preceding the Redemption Date, clear evidence of acceptance of the December 1, 2008 proposed Redemption Date is needed to justify the inference that the Board (or the Sub-Administrator with authority from the Board) waived this notice period pursuant to Bye-Law 12.2.2. The best and presently available evidence suggests that the Company had not processed the Redemption Request (save acknowledging receipt) by December, 11, 2008 when the calculation of NAV was suspended.

Interlocutory finding: was Alpha Prime entitled to suspend payment to Primeo?

19. Alpha Prime has made out a good arguable case that on December 12, 2008 when it suspended calculation of NAV pursuant to Bye-law 18.3, the provisions of Bye-Law 13.1.8 were engaged in relation to Primeo's Redemption Requests. These Requests had apparently been made but not accepted for payment as of December 1, 2008 or any other Redemption Date. According to the crucial provisions of Bye-Law 13.1.8:

"...any Redemption Request or Switching Request which has been given shall be processed so that the relevant Participating Shares shall be redeemed or repurchased, or converted, as the case may be, on the Redemption Date falling after the end of the period of suspension. Such Participating Shares shall be valued based on the Net Asset Value of such Participating Shares of the Company, of the relevant Class or Series of a Class (as the case may be) at that time."

20. Mr. Hill may well be right that this Bye-Law does not apply to suspending the bare right to payment, in the sense that once a Redemption Request has not just "*been given*" but has also been accepted, this automatic suspension provision may not bite. In such a case it might be contended that the redemption claim had crystallized because the Company (a) had accepted the Redemption Request, (b) agreed to pay a specific sum on a specific date, and (c) processed all substantive aspects of the redemption save for the purely administrative aspects of payment. But on the facts as they presently appear to be, this question does not arise for determination at this stage.
21. I find for present purposes that Alpha Prime was very arguably entitled to suspend the processing the relevant Redemption Requests pursuant to Bye-Law 13.1.8 and that as of December 12, 2008, and for so long as the suspension of the calculation of NAV continues, *prima facie* Primeo is not an actual creditor in respect of the amounts claimed in the Statutory Demands which are based on the November 27, 2008 Redemption Requests.

Interlocutory finding: would presentation of a winding-up petition by Primeo based on the Statutory Demand be an abuse of process?

22. It follows from the above findings, that both the existence and the quantum of the debts upon which the Statutory Demand is based are disputed *bona fide* on substantial grounds. It would, *prima facie*, be an abuse of process for Primeo to present a winding-up petition in circumstances where the putative creditor's right to petition is seriously in question. As Storr AJ of this Court concluded in *Annuity & Life Reassurance Ltd.-v- The*

Manufacturers Life Insurance Company (Barbados Branch) [2003] Bda L.R. 16, a case upon which Alpha Prime’s counsel relied at the ex parte hearing:

“Accordingly, the prospective petitioner, Manulife, having made it clear that it is petitioning on the footing of a debt alleged to be presently due, and there being a bona-fide dispute on substantial grounds as to it being presently due, this Court will restrain the presentation of a petition otherwise in terms which make it plain that, for the purpose of the petition, the petitioner is no more than a contingent creditor.

Winding up proceedings are not suitable proceedings in which to determine a genuine dispute about whether the company does or does not owe the sum in question and nor are winding up proceedings suitable proceedings for determining whether the liability is an immediate liability or only a prospective or contingent liability.”¹

23. The application to discharge the interlocutory injunction restraining the presentation of a winding-up petition based on the Statutory Demand served by Primeo on or about June 17, 2011 is accordingly refused.

Alternative grounds upon which Primeo’s status as a creditor is disputed

24. I decline to make any interlocutory findings on the other grounds upon which Alpha Prime relied in disputing Primeo’s standing as a creditor, namely (a) Primeo is not itself a registered shareholder of the Company; and (b) Alpha Prime has substantial cross-claims against Primeo. These issues were not fully argued and would require a further hearing or supplementary submissions²; requiring the parties to incur the additional costs attendant upon a full interlocutory determination of these issues does not appear to be justifiable in light of the conviction with which I have reached my primary findings above. All of these

¹ At page 3, approving *Re Bryant Investment Co. Ltd* [1974] 1 WLR 826,828; *Re Elgar Heights Pty. Ltd.* [1985] 3 ACLC 683 (citing Buckley LJ in *Stonegate Securities Ltd.-v- Gregory*[1980] Ch 576 at 587); *First Line Distribution Pty. Limited-v- Paul Whiley and Others* [1995] 13 ACLC 1216, 1218.

² As I was preparing a final draft of the present Judgment for circulation to counsel for editorial comments, I received from the Assistant Registrar an electronic version of a letter from Attride-Stirling & Woloniecki dated August 11, 2011 complaining about an August 10, 2011 letter purportedly sent directly to me by Sedgwick Chudleigh and containing supplementary submissions which had not been solicited by the Court. If such a letter was sent, it was not received or read prior to the finalization of this Ruling.

issues can be fully canvassed if and when Primeo seeks to finally establish its claim as an actual creditor, in these or any other proceedings it may deem appropriate.

Conclusion

25. The application to discharge the interlocutory injunction granted on July 8, 2011 is dismissed. Unless either party applies by letter to the Registrar to be heard as to costs within 21 days, the costs of the present application shall be awarded to the Plaintiff/Respondent (Alpha Prime), to be taxed if not agreed.

Dated this 12th day of August, 2011 _____
KAWALEY J