



Press Summary

15 November 2023

Primeo Fund (in Official Liquidation) (Appellant) v Bank of Bermuda (Cayman) Ltd and another (Respondents)

[2023] UKPC 40

On appeal from the Court of Appeal of the Cayman Islands

Justices: Lord Reed (President), Lord Hodge (Deputy President), Lord Lloyd-Jones, Lord Kitchin, Lord Sales

Background to the Appeal

This appeal concerns litigation arising from the multi-billion-dollar Ponzi scheme operated by Bernard Madoff.

The Appellant (“**Primeo**”) operated as an investment fund. It sought funds from its customers and from 1994 invested them with Bernard L Madoff Investment Securities LLC (“**BLMIS**”). BLMIS represented that it invested these funds in securities which were safely held in designated accounts on behalf of all its clients. BLMIS offered consistently high rates of return which were attractive to Primeo and its customers, so that over time Primeo invested large sums with it.

It later emerged that BLMIS was only able to offer such high rates of return because it was the vehicle used by Bernard Madoff to carry on the fraudulent Ponzi scheme. Under that scheme BLMIS accepted funds from clients, including Primeo, but rather than purchasing securities with them for those clients as it was supposed to do, it immediately diverted them to make payments to other clients to prop up the scheme and give the illusion that client funds had been properly invested so as to achieve high rates of return.

From 2004, as well as investing directly with BLMIS, Primeo began investing indirectly with it by purchasing shares in two feeder funds associated with Bernard Madoff, called Alpha Prime Fund Limited (“**Alpha**”) and Herald Fund SPC (“**Herald**”). On 1 May 2007, Primeo entered a transaction whereby it switched its remaining direct investments in BLMIS to turn them into an indirect investment through Herald. Primeo received shares in Herald in return for transferring to Herald its rights in respect of its direct investments with BLMIS (“**the Herald Transfer**”). Thereafter, all Primeo’s investments with BLMIS were held indirectly.

In order to operate its investment fund, Primeo appointed the First Respondent (“**Bank of Bermuda**”) as administrator of its fund and the Second Respondent (“**HSBC**”) as custodian of the assets held in that fund. In order to fulfil its obligations as custodian, in 2002 HSBC appointed BLMIS as sub-custodian of the securities which were supposed to be held for the benefit of Primeo’s customers. As a result of that arrangement, it is agreed that HSBC was liable from 2002 until the Herald Transfer took effect on 1 May 2007 for any breach of duty committed by BLMIS in relation to failing to keep those securities safe, regardless of whether HSBC was at fault itself or not (“**the strict liability claim**”).

The Respondents also had administrator and custodian responsibilities in relation to the funds operated by Alpha and Herald.

Eventually, the Ponzi scheme carried on by BLMIS collapsed. On 11 December 2008 Bernard Madoff was charged with fraudulently operating that scheme. It emerged that BLMIS was massively insolvent and that the securities it was supposed to be holding for its clients did not exist. Primeo could not recover the funds it had invested directly and indirectly with BLMIS and so was placed into liquidation. The liquidator has sought to pursue various claims on behalf of Primeo in an effort to recover some of the monies it has lost.

On 20 February 2013 Primeo brought claims against the Respondents in the Grand Court of the Cayman Islands for breach of their contractual duties as Primeo’s administrator and custodian. The trial judge dismissed Primeo’s claims, principally on the basis that no loss had been caused by the Respondents. The claims were also held to be barred by the rule against recovery of reflective loss which prevents a shareholder (in this case, Primeo) from claiming for the same loss suffered by the company in which shares are held (Alpha and Herald) against the same alleged wrongdoers (the Respondents). The Court of Appeal of the Cayman Islands dismissed Primeo’s appeal primarily on the basis that its claims were barred by the reflective loss rule. However, the court also ruled on a range of other issues which would be relevant if Primeo succeeded in an appeal against the reflective loss determination.

Primeo has appealed to the Judicial Committee of the Privy Council with the leave of the Court of Appeal. The Respondents have cross-appealed on various issues. The Judicial Committee heard the appeal against the reflective loss determination as a preliminary point, because if that appeal failed none of the other issues in the case would arise. In 2021 the Judicial Committee allowed Primeo’s appeal against the reflective loss determination: [2021] UKPC 22. This meant that the wide range of other issues decided by the judge and the Court of Appeal did arise and had to be determined. The issues arising are grouped under three headings: (1) the extent of liability and damages; (2) statutory limitation of claims; and (3) contributory negligence. The judgment now promulgated by the Judicial Committee addresses Primeo’s appeal and the Respondents’ cross-appeal to challenge from their competing perspectives the decisions of the Court of Appeal on those issues.

Judgment

The Judicial Committee’s judgment is unanimous. It allows Primeo’s appeal in part and also allows the Respondents’ cross-appeal in part.

Reasons for the Judgment

(1) Liability and damages

The Judicial Committee holds, first, that each time Primeo invested cash in BLMIS and BLMIS misappropriated the money for the purposes of the Ponzi scheme, Primeo suffered an

immediate and real loss for which HSBC was liable and those losses were in principle capable of being measured [56], [71], [84], [91]. However, Primeo sought to calculate its losses by reference to the cash payments it made to BLMIS in the period which is relevant to the strict liability claim (2002-2007), but such losses were mitigated by payments which Primeo received back from BLMIS in that period as purported realisations of or returns on its investments; the amount of the repayments exceeded the amount of the cash payments to BLMIS, so the loss calculated for that period on this basis was nil [98]. Secondly, the Judicial Committee holds that the Bank of Bermuda was negligent in performing its contractual obligation as administrator to calculate Primeo's net asset value from time to time in the period between 1996 and 2005 [119], and was grossly negligent in making such calculations from 2005 onwards, when its knowledge of the relevant state of affairs had changed [127], [143]-[144].

The Judicial Committee rejects alternative claims for damages introduced by Primeo for the first time on its appeal to the Court of Appeal, namely claims that HSBC had assumed responsibility for the purported value of the funds invested in BLMIS on the relevant dates, that causation of loss could be established on the basis of loss of a chance for Primeo to withdraw investments if it had been better informed, and other procedural claims. In accordance with the principle of finality in litigation, a party is required to advance its whole case at trial and may not introduce new claims on an appeal; the Judicial Committee holds that it would not be fair to the Respondents to allow the new claims introduced by Primeo on its appeal to the Court of Appeal to be admitted, nor would this be consistent with the efficient and proportionate resolution of commercial disputes [169], [175], [187]-[188], [198]. For the same reason, the Judicial Committee rejects a new defence introduced by the Respondents for the first time on appeal, regarding the alleged elimination of Primeo's loss by reason of the assignment of rights and remedies to Herald under the Herald Transfer [211].

(2) Limitation

The relevant ordinary limitation period in the Cayman Islands is six years. However, section 37(2) of the Cayman Islands Limitation Act (1996 Revision) postpones the commencement of the ordinary limitation period where there has been a "deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time". In agreement with the Court of Appeal, the Judicial Committee holds that recklessness as to whether a breach of duty has been committed is distinct from a "deliberate" commission of a breach of duty, as required by section 37(2). This accords with the judgment of the UK Supreme Court in *Canada Square Operations Ltd v Potter* [2023] UKSC 41, handed down on the same day as judgment in the present case. Primeo cannot show that either of the Respondents deliberately breached the duties they owed to Primeo. Therefore, any of Primeo's rights of action against the Respondents arising prior to 20 February 2007 and based on their own fault are time-barred [225]. However, the commencement of the limitation period in relation to Primeo's strict liability claim against HSBC was postponed. The Judicial Committee holds that none of Primeo's claims in respect of HSBC's responsibilities as custodian are time-barred under section 37(1)(b), or under 37(1)(a) which refers to fraud, since there was fraud and deliberate concealment of relevant facts by BLMIS as HSBC's sub-custodian. BLMIS was HSBC's agent in fulfilling HSBC's own obligations owed to Primeo as its custodian [278].

(3) Contributory Negligence

Section 8(1) of the Cayman Torts (Reform) Act (1996 Revision) provides for adjustment of any damages recoverable where there is fault on the part of a claimant and the case is one in which the defence of contributory negligence would have been available at common law.

That provision is modelled on the rule applicable in the UK in section 1(1) of the UK Law Reform (Contributory Negligence) Act 1945. The Judicial Committee confirms that this statutory defence of contributory negligence applies to a claim based on a contractual duty of care if, prior to 1945, the defence of contributory negligence was available under the common law where there existed concurrent claims in contract and in tort for breach of a duty of care and where negligence (failure to exercise due care) was an essential ingredient in both rights of action [310]. It is not necessary that the claimant sue on a right of action in tort, but it is sufficient that the right of action is founded on an act or omission which would give rise to liability in tort [332]. On the facts, the Judicial Committee holds that the defence is not available to HSBC because its specific duties in contract were not the same as any concurrent duty in tort such as an obligation to exercise reasonable skill and care [367]-[370]. In respect of the claim against the Bank of Bermuda, where the defence does apply, the Judicial Committee holds that the Court of Appeal was right to allow Primeo's appeal against a reduction of 75% in its damages as decided by the judge and to rule instead that a reduction of 50% was appropriate, because the judge had not attached proper weight to the fact that the Bank of Bermuda was a professional service provider which was as much at fault as Primeo in causing the damage [380]-[382].

References in square brackets are to paragraphs in the judgment.

NOTE:

This summary is provided to assist in understanding the Judicial Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Judicial Committee is the only authoritative document. Judgments are public documents and are available at: [Decided cases - Judicial Committee of the Privy Council \(JCPC\)](#)