29 July 2019

PRESS SUMMARY

Skandinaviska Enskilda Banken AB (Publ) (Appellant) v Conway and another (as Joint Official Liquidators of Weavering Macro Fixed Income Fund Ltd) (Respondents) (Cayman Islands) [2019] UKPC 36
On appeal from the Court of Appeal of the Cayman Islands

JUSTICES: Lord Reed, Lord Wilson, Lord Lloyd-Jones, Lord Briggs, Sir Donnell Deeny

BACKGROUND TO THE APPEAL

The appeal concerns share redemption payments made by the Respondent, Weavering Macro Fixed Income Fund Ltd ("**Company**"), to the Appellant, Skandinaviska Enskilda Banken AB (Publ) ("**SEB**"), between December 2008 and February 2009.

The Company was incorporated in April 2003 as an open-ended investment company pursuant to the law of the Cayman Islands. Mr Magnus Peterson controlled the Company for all relevant purposes through an English company that was the Company's investment manager.

Those who wished to invest in the Company acquired redeemable participating shares in it. SEB, a Swedish financial institution, was such an investor. Between 2006 and 2008 SEB subscribed for shares on behalf of, amongst others, two Swedish mutual funds.

The collapse of Lehman Brothers in September 2008 prompted a wave of redemption requests from the Company's participating shareholders, including SEB. The payments due to shareholders on the redemption of their shares were based on the Company's net asset value ("**NAV**"). Unlike other creditors, SEB was able to redeem all of the shares it held in the Company on behalf of its clients on the basis of the Company's NAV. It subsequently transpired that the Mr Peterson had been fraudulently inflating the NAV.

On 19 March 2009 the Company went into liquidation. In August 2014, the liquidators issued proceedings against SEB seeking a declaration that the redemption payments were invalid as preferences under section 145(1) of the Companies Law (2013 Revision) and an order that the monies be repaid plus interest. Section 145(1) provides that "[e]very conveyance or transfer of property … made … by the company in favour of any creditor at a time when the company is unable to pay its debts … with a view to giving such a creditor a preference over the other creditors shall be invalid".

At first-instance, it was held that the redemption payments were invalid and SEB was ordered to repay the monies. This was upheld in the Court of Appeal.

JUDGMENT

The Board humbly advises Her Majesty that the appeals should be dismissed. The Board delivers a judgment to which all its members have contributed. Sir Donnell Deeny, with whom Lord Wilson agrees, also delivers a concurring judgment which reaches the same conclusion as the majority of the Board on the first issue but for different reasons.

REASONS FOR THE JUDGMENT

There are six issues in total, but the third and fifth issues do not, in the end, arise, because they are contingent on the second and fourth issues respectively. **[47]**, **[58]**

The first issue is whether the redemption payments fell outside the scope of section 145(1), because the NAVs had been inflated as a result of Mr Peterson's fraud, with the result that no redemptions had ever taken place in accordance with the Company's Articles of Association, and, therefore, no redeemers had ever become creditors of the Company within the meaning of section 145. **[16(a)]** The Board considers that it would be necessary for a party who wished to have the NAV avoided because of fraud to bring proceedings to do so. But SEB has not been defrauded; it has, in fact, received payments on behalf of its clients substantially in excess of the entitlement it would have had had the NAV been accurate. It would necessarily be a condition of any order setting aside the NAV on the application of SEB that SEB repay the sums it received on the basis of that NAV. For that reason alone, this argument must fail. **[30]-[31]**

The second issue is whether payments to the first group of redeemers, whose "Redemption Day", as defined by the Company's Articles of Association, was 1 December 2008, only fell due 30 days later. If so, the Company would not have been insolvent on 19 December when the first payment was received by SEB on behalf of one of its clients. **[16(b)]** The Board rejects this argument and holds that the redemption price became a liability of the Company on 1 December 2008. As the Company was then unable to pay all of those shareholders who had served notices of redemption taking effect on that date, it was unable to pay its debts for the purposes of section 145(1) at the time the first payment was made to SEB **[44]**

The fourth issue relates to the question of whether the second and third payments made on 2 January and 11 February 2009 to SEB as nominee of one of its clients were made with a view to preferring that client. SEB concedes that there was a clear intention to prefer the other client on whose behalf it received a full payment on 19 December 2008. **[48]-[49]** The major flaw with the argument is that the payments on 2 January and 11 February fully discharged that claim for redemption, whereas other clients whose Redemption Day was the same received only a fraction of their full entitlements. This demonstrates an intention to prefer. **[50]**

The sixth issue consists of a number of sub-issues. Firstly, in the event that the payments were held to be voidable under section 145(1) of the Companies Law, was the liquidators' claim to restitution of the monies statutory in nature or did it arise under the common law? Secondly, if it arose at common law, was SEB entitled to defend the claim on the basis that (1) it had not been enriched by the payments, since it had received them as the nominee of its clients, and (2) it had changed its position on the faith of the payments, by remitting them to those funds, and would suffer an unjust detriment if it were now required to repay them? **[59]**

Section 145(1) renders a transfer or payment voidable but does not itself create a statutory right to recover. Since section 145(1) is silent as to the consequences of the invalidation of the payment, those consequences must be regulated by the general law, which is to say by any other statutory provisions or, in their absence, the common law. There is no other statutory provision. The basis of the right to restitution is accordingly the common law. **[63]**, **[74]** The Board rejects SEB's argument that it was not enriched: it dealt with the Company as a principal, not an agent, and received the payments to which it was entitled as a shareholder in the Company. **[92]** The change of position defence is not available to SEB. In the context of a claim by a liquidator for the restitution of money paid to a preferred creditor following the avoidance of the payment under section 145, the common law should not undermine the operation of the statutory scheme of pari passu distribution which section 145 is intended to support.**[103]**

As a consequence, the liquidators are entitled to recover from SEB the amount which they received and remitted to the funds on whose behalf they were acting. **[122]**

NOTE
This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html.