

The Insolvency Act 2003  
The Insolvency Rules 2005

# Originating Application (Company)



Rule 14

The Eastern Caribbean Supreme Court  
In The High Court of Justice  
Virgin Islands  
Commercial Division

Matter No:	BVIHC (Com) <u>133</u> of 2011
Applicant:	FARNUM PLACE, L.L.C
Respondents:	(1) JOANNA LAU AND KENNETH KRYS (AS JOINT LIQUIDATORS OF FAIRFIELD SENTRY LIMITED (IN LIQUIDATION))  (2) FAIRFIELD SENTRY LIMITED (IN LIQUIDATION)

IN THE MATTER OF THE INSOLVENCY ACT, 2003

AND

IN THE MATTER OF FAIRFIELD SENTRY LIMITED (IN LIQUIDATION)

*For Court Use Only*

To

This application will be heard by the Master/Judge at

on the 28<sup>th</sup> day of November 2011 at 10.00 o'clock.

If you do not attend at the time shown the Court may make an order in your absence.

Conyers Dill & Pearman of P.O. Box 3140, Commerce House, Wickhams Cay 1, Tortola, British Virgin Islands applies on behalf of Farnum Place, L.L.C ("the Applicant") for:

- i. an order under section 273 of the *Insolvency Act, 2003* that the Joint Liquidators of the Respondent, Fairfield Sentry Limited (In Liquidation) (the "Company"), do carry out the obligations under a New York Law governed transaction dated 13 December, 2010 between the Company and the Applicant (the "Transaction") evidenced by a Trade Confirmation Agreement (the "Agreement") and in particular that they take the necessary steps to bring to fruition the agreed actions recorded at paragraphs (ii) and (iii) on page 4 of the Agreement;
- ii. in the alternative, an order pursuant to section 175(1)(c)(i) of the *Insolvency Act, 2003* that the Applicant be at liberty to commence proceedings against Company seeking specific performance of the Agreement, or, alternatively, damages resulting from breach of the covenant of good faith and fair dealing applicable under New York law,
- iii. an order pursuant to CPR 32.6(1) that the Applicant may file and rely on the expert evidence of a New York law expert to assist the Court with New York law issues arising under the Trade Confirmation,
- iv. such further or other directions as the Court shall consider appropriate; and
- v. the costs of this Application

A draft of the order sought is attached.

The grounds of the application are as follows:

1. Following an auction process that lasted several months and multiple bids, on or

about December 13, 2010, the Company, acting through its liquidators, Kenneth Krys and Joanna Lau (the "Joint Liquidators"), agreed to sell Farnum all of the Company's rights, title and interest to any allowed customer claim against a Bernard L. Madoff Investment Securities, LLC ("BLMIS") (hereinafter, the "Customer Claim"). The agreement was memorialized in a contract, (namely the Trade Confirmation) signed by the Applicant and by Joanna Lau on behalf of the Company.

2. Because Company was in liquidation in the British Virgin Islands pursuant to an Order made by the Commercial Court on 21 July, 2009 , the actual transfer of the Madoff Claims from the Company to the Applicant was subject to approval by the BVI Court. Accordingly, in the Trade Confirmation, the Joint Liquidators expressly agreed to *"endeavour to obtain promptly the approval of the BVI Court of the terms and conditions of this Trade Confirmation."*
3. In June, 2011, some several months after the Trade Confirmation was signed, the Joint Liquidators entered into a settlement agreement with BLMIS regarding the Customer Claim. Under the terms of that settlement, the Company would obtain, among other things, an allowed customer claim of \$230 million in the BLMIS liquidation proceedings.
4. The Trade Confirmation always placed the risk on the Applicant that the expected recovery on the Customer Claim could fluctuate depending on events in the BLMIS proceedings – if, after execution of the Trade Confirmation, the value of the Customer Claim increased, the Applicant stood to gain, but if the value of the Customer Claim decreased, the Applicant could lose.
5. After execution of the Trade Confirmation, customer claims in the BLMIS proceedings began to trade at prices above what was set forth in the executed

Trade Confirmation. As a result, the Joint Liquidators embarked upon an effort to avoid their obligations under the Agreement and prevent transfer of the Customer Claim to the Applicant. As part of that effort, the Joint Liquidators have failed to promptly and in good faith seek approval from the BVI court for the transfer of the Customer Claim to the Applicant, in violation of their express and implied obligations under the Trade Confirmation. They have evidenced an intention not to perform their outstanding obligations under the Trade Confirmation.

6. As a result of the foregoing, the Applicant is a person aggrieved by the acts omissions and decisions of the Joint Liquidators.
7. Further, and in the alternative, the Applicant seeks the permission of this Honourable Court to bring proceedings against the Company in respect of the Liquidators' conduct seeking an order for specific performance, damages or both damages and specific performance.
8. By reason of Section 175(1)(c)(i) of the Insolvency Act 2003, the permission of the Court is required before any action or proceedings may be commenced against the Company. In all the circumstance, it is just and convenient that such permission be granted in the present case.
9. The Trade Confirmation is governed by New York law and its true meaning, import and effect cannot be properly understood without evidence on New York law in this regard. Accordingly, the Applicant seeks the Court's permission to file and rely on expert evidence on relevant aspects of New York law.

The Witness Statement of James F. Mooney is filed in support of this Application.

The names and addresses of the persons required to be given notice of this application pursuant to the Act and the Rules (if any) are as follows:

**1) JOANNA LAU AND KENNETH KRYS (AS JOINT LIQUIDATORS OF FAIRFIELD SENTRY LIMITED (IN LIQUIDATION)),** Commerce House, 2nd Floor, 181 Main Street | Road Town, PO Box 930, Tortola, VG1110

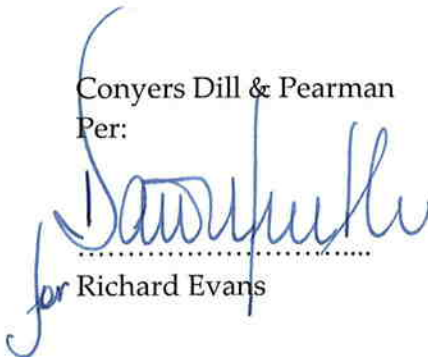
**(2) FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) c/o Joanna Lau and Kenneth Kryes (as Joint Liquidators of Fairfield Sentry Limited (In Liquidation)),** Commerce House, 2nd Floor, 181 Main Street | Road Town, PO Box 930, Tortola, VG1110

This application is filed by Conyers Dill & Pearman, the legal practitioners for the Applicant Company whose address for service is: P.O. ox 3140, Commerce House, Wickhams Cay 1, Road Town, Tortola, British Virgin Islands.

Dated 27<sup>th</sup> day of October, 2011

Conyers Dill & Pearman

Per:



for Richard Evans

## Form R14A

The Insolvency Act 2003  
The Insolvency Rules 2005

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Matter No: BVIHC (Com) of 2011
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Respondents: <b>(1) JOANNA LAU AND KENNETH KRYS (AS JOINT LIQUIDATORS OF FAIRFIELD SENTRY LIMITED (IN LIQUIDATION)</b>  <b>(2) FAIRFIELD SENTRY LIMITED (IN LIQUIDATION)</b>

<b>IN THE MATTER OF THE INSOLVENCY ACT, 2003</b>  <b>AND</b>  <b>IN THE MATTER OF FAIRFIELD SENTRY LIMITED</b>
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