The Eastern Caribbean Supreme Court

In the Court of Appeal

Territory of the Virgin Islands

BVIHCVAP2013/0014

BETWEEN:

Kenneth M. Krys
(as Liquidator of Fairfield Sentry Limited (In Liquidation))

Appellant

and

Farnum Place LLC

Respondent

Certificate of Result of Appeal

This appeal was heard on 17th July, 2014 before His Lordship, the Hon. Mr. Davidson Kelvin Baptiste, Justice of Appeal, His Lordship, the Hon. Mr. Mario Michel, Justice of Appeal and Her Ladyship, the Hon. Mde. Gertel Thom, Justice of Appeal in the presence of Mr. Gabriel Moss, QC for the appellant and Ms. Sue Prevezer, QC with her, Mr. Richard Evans for the respondent.

I HEREBY CERTIFY that on the **10th** day of **March** 2022 the Court made an Order as follows:

1. **The appeal is dismissed.**
2. **Costs of the appeal shall be costs in the liquidation.**

Dated the **10th** day of **March** 2022.

Chief Registrar

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2013/0014

BETWEEN:
In the Matter of the Insolvency Act 2003

And In the Matter of Fairfield Sentry Limited
(In Liquidation)

KENNETH M. KRYS
(as Liquidator of Fairfield Sentry Limited (In Liquidation))

Appellant

and

FARNUM PLACE LLC

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Mr. Gabriel Moss, QC for the Appellant
Ms. Sue Prevezer, QC with her, Mr. Richard Evans for the Respondent

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2014: July 17;
2022: March 10.

Civil appeal – Exercise of discretion by trial judge - Appellate interference with exercise of judicial discretion – Refusal of sanction to appeal to US Second Circuit Court of Appeals – Section 186(3) of the Insolvency Act 2003 – Whether learned judge erred in exercise of his discretion in refusing sanction to appeal to US Second Circuit

Fairfield Sentry Limited ("Fairfield") is a company incorporated in the Territory of the Virgin Islands ("BVI"), which is the subject of winding up proceedings both in the BVI and New

York. Mr. Kenneth Krys ("the Liquidator") was appointed by the BVI court as Liquidator of Fairfield. A Trade Confirmation, governed by US law, was entered into between Fairfield and Farnum Place LLC ("Farnum"), in which Fairfield agreed to sell its claim in the liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS"). The Trade Confirmation was made subject to an express condition requiring that approval be obtained by a "Final Order" from both the BVI court and the US bankruptcy court.

The Liquidator sold the claim to Farnum subject to the approval of both the BVI and US courts in their respective proceedings. Before such approvals were obtained, the claim became far more valuable. Lifland J, in the US bankruptcy court approved the assignment of Fairfield's claim pursuant to the Trade Confirmation. The Liquidator was advised by US lawyers that Lifland J's decision was wrong under US law and should be appealed to the district court. Before mounting the appeal, the Liquidator had to obtain sanction from the BVI court. Bannister J in the BVI court approved the sale but declined to allow the Liquidator to mount the appeal. Bannister J's decision was reversed by the Court of Appeal, who ruled that he had erred in construing the clear words of the Trade Confirmation. The Court also gave the Liquidator sanction to appeal Lifland J's decision.

Hellerstein J, the US district judge, however, affirmed Lifland J's decision. The Liquidator was then advised by two US law firms and a former US bankruptcy judge, that Hellerstein J's decision was also erroneous and that he should appeal to the US Second Circuit Court of Appeals. The Liquidator sought sanction to appeal Hellerstein J's decision however, Bannister J refused his application.

Bannister J, in refusing to sanction the appeal held, inter alia, that the question of whether to sanction the appeal was a question to be determined by reference to BVI law. The judge found that it was irrelevant that, if he were sitting as a bankruptcy judge in the United States, different considerations may have been considered. He further considered that it would not be right for the court, which confirmed and approved the transaction, to lend its efforts to causing the contract to become aborted.

Being dissatisfied with judge's decision, the Liquidator appealed. The main issue on appeal was whether the learned judge erred in the exercise of his discretion in refusing to sanction the appeal. The Liquidator contended that the learned judge failed to consider relevant matters including the fact that the creditors supported the appeal and the views of the liquidation committee. Further, the Liquidator argued that the judge erred in characterising the proposed appeal as part of efforts to cause the contract to become aborted.

Held: Dismissing the appeal, and ordering that the costs in the appeal be costs in the liquidation, that:

> An appellate court would not interfere with the exercise of a trial judge's discretion unless it can be shown that the trial judge was plainly wrong, or that he took into account matters he should not have taken into account or disregarded matters which he should have regarded. The burden for the appellant is a high one and an appellate court should resist the temptation to substitute their own discretion for that of the judge. On the facts, the learned judge examined the matter holistically, and

took into account all the circumstances. He rightly recognised that the question of whether to sanction the appeal was a matter for determination by reference to BVI law. Furthermore, he did not err in considering it inappropriate for the court to sanction attempts to cause the agreement to become frustrated. The learned judge did the necessary evaluation, paid regard to the material factors and attributed such weight as he thought necessary. The judge clearly explained the factors which informed his decision and thus, it cannot be said that he was plainly wrong or that he erred in his discretion in refusing to sanction the Liquidator's appeal.

Dufour and others v Helenair Corporation Ltd. and others (1996) 52 WIR 188 followed; **Piglowska v Piglowski** [1999] 1 WLR 1360 applied.

JUDGMENT

[1] **BAPTISTE JA:** This is an appeal by the appellant, Mr. Kenneth Krys ("the Liquidator") against the decision of Bannister J dated 22nd July 2013 by which the learned judge refused the Liquidator's application for sanction to pursue an appeal to the United States of America Second Circuit Court of Appeals (the "Second Circuit") from US decisions approving an agreement made between Fairfield Sentry Limited (In Liquidation) ("Fairfield") and Farnum Place ("Farnum") in respect of the assignment of Fairfield's claim in the liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS").

Background

[2] Fairfield is a company incorporated in the Territory of the Virgin Islands ("BVI") which operated as a feeder fund for BLMIS, the latter being a company which went into liquidation under the United States Securities Investor Protector Act ("SIPA"). Fairfield is the subject of both winding up proceedings in the BVI, conducted under BVI law and Chapter 15 US Bankruptcy Code proceedings in the Federal Bankruptcy Court for the Southern District of New York. Mr. Kenneth Krys was appointed by the BVI court as the Liquidator of Fairfield.

[3] Farnum was granted permission to intervene in this appeal by this Court on 23rd October 2013. The Court was satisfied that Farnum has a legitimate interest in the

relief sought in the appeal, namely the right sought by the Liquidator to pursue further appeal proceedings in the United States.

[4] By the terms of an agreement (the "Trade Confirmation") entered into on 13th December 2010 between Fairfield and Farnum, Fairfield agreed to sell its SIPA claim in the liquidation of BLMIS, the vehicle used for Mr. Madoff's Ponzi scheme. Fairfield's SIPA claim has been admitted in the BLMIS liquidation in the sum of US$230 million. The actual recovery depended on the assets available to meet the claim in the BLMIS estate. Under the Trade Confirmation, the sale price was fixed as 32.125 percent of the value of Fairfield's admitted claim.

[5] The Trade Confirmation was made subject to an express condition requiring that approval be obtained by a final order from both the BVI court and the US Bankruptcy court.[1] Since each court was operating pursuant to its own law, the parties were in effect agreeing that the approval of the BVI court in the winding up would be sought under BVI law and the approval of the US Bankruptcy court in the US Chapter 15 Bankruptcy Code proceedings would be sought under US law.

[6] The Liquidator sold the claim to Farnum subject to the approval of both the BVI and the US courts in their respective proceedings. Before such approvals were obtained, the claim became far more valuable. The Honourable Burton R. Lifland ("Lifland J") in the United States Bankruptcy court for the Southern District of New York approved the assignment of Fairfield's claim in the SIPA liquidation of BLMIS pursuant to the Trade Confirmation entered into between Fairfield as assignor and Farnum as assignee. Lifland J held that there was no basis for disapproval of the Trade Confirmation because the sale of the SIPA claim was not reviewable under section 363 of the United States Bankruptcy Code as it did not involve a transfer of interest in property within the territorial jurisdiction of the United States and further that comity dictated deference to the judgment of the learned judge in the Commercial Court which approved the sale.

[1] See Trade Confirmation under "Other Terms of Trade".

[7] The Liquidator was advised by US lawyers that the decision of Lifland J was wrong under US law and should be appealed to the district court. By the terms of the order under which the Liquidator was appointed, he required the sanction of the local court to prosecute the appeal as an appeal mounted without such sanction would be a nullity. Bannister J approved the sale and declined to allow the Liquidator to mount the appeal.

[8] On 25th February 2013, the decision of Bannister J was reversed by the Court of Appeal. The Court found that Bannister J had erred in construing the clear words of the Trade Confirmation and that the learned judge was wrong to hold that it had become unconditional upon the handing down of Judge Lifland J's decision. On that basis, the Court of Appeal gave the Liquidator sanction to appeal Judge Lifland J's decision to the district court.

[9] On 3rd July 2013, Lifland J's decision was affirmed by the district judge, Hellerstein J but on different grounds from those held by Lifland J. He considered the matter as if section 363 of the Bankruptcy Code did apply to the Trade Confirmation (unlike Lifland J who did not) but concluded that its application should be constrained by considerations of comity. Hellerstein J also declined to have regard to changes of circumstances since the date of the Trade Confirmation.

[10] The Liquidator received advice from two US law firms and a former US bankruptcy judge that the reasoning in each case had been erroneous, and that should the Liquidator appeal to the US Court of Appeals to the Second Circuit (the "Second Circuit"), such appeal was likely to succeed.[2]

[11] On that basis, the Liquidator sought sanction to appeal Hellerstein J's decision to the Second Circuit pursuant to section 186(3) of the **Insolvency Act 2003**.[3] On

[2] Reference is made to the opinions of Messrs. Brown Rudnick, Messrs. Stroock and Stroocktake and the affidavit of Melanie Cyganowski, (a former Chief Judge of the US Bankruptcy Court for the Eastern District of New York).

[3] Act No. 5 of 2003, Laws of the Virgin Islands.

22nd July 2013, Bannister J refused to sanction the appeal. The Liquidator has appealed the refusal of sanction to this Court.

The learned judge's decision

[12] Bannister J, in his judgment, dismissed the application for sanction to appeal the decision of Hellerstein J to the Second Circuit. The learned judge held that the question of whether to sanction an appeal by the Liquidator was a question to be determined by reference to BVI law. He found that it was irrelevant that, if he were sitting as a bankruptcy judge in the United States, different considerations may have been taken into account or that the duties of a trustee in that court might have been different from those of a liquidator appointed by the BVI court. He also determined that the decision to appeal the judgment of Hellerstein J was based upon a misconception of the contractual position that was reached on 10th January 2013. At paragraph 13(2) of his judgment, he stated that:

> "…The approval of the Bankruptcy Court to the transaction was then obtained. The only conceivable reason why it might not become 'Final' on 2nd August 2013, when time to appeal Judge Hellerstein's order expires, is if Fairfield appeals it. Any such appeal would be a device on the part of Fairfield to cause the contract to become frustrated, in order that the Liquidator will no longer be bound by it. As I have mentioned, it is not open to one party to a contract to take steps, after it has become binding to cause its frustration and in my judgment it would not be right for this Court to sanction the taking of steps designed to achieve such a result."

[13] The learned judge also noted that Professor Perillo and Judge Bellacosa, in their expert evidence given at the sanction hearing in March 2012 on New York State contract law (by which the Trade Confirmation is governed) were clear that each of the parties to it had an implied obligation of good faith and fair dealing. Bannister J found that efforts to cause the contract to become aborted were a breach of that implied covenant. On that basis, he stated that he "…did not consider it right for this court, which confirmed and approved the transaction, to lend its efforts which necessarily involve breaching such a solemn obligation."

[14] Bannister J went on to state that when the BVI court approved the Trade Confirmation, it did so in the expectation that, subject to the approval of the Bankruptcy Court, it would be performed timeously. He noted that as the contract was concluded on 13th December 2010, the court was being asked, over two and a half years later, to sanction a period of indeterminate further delay in the circumstances where two attempts by Fairfield to undo the Trade Confirmation had failed. The learned judge did not consider such a course of action to be appropriate. Further, he found that it was undesirable to subject Farnum to expensive litigation in New York, the costs of which would not be recoverable.

[15] Additionally, Bannister J noted that liquidators, as officers of the court, were expected to be straightforward in their dealings and must not rely upon technicalities to defeat the rights of others. The Liquidator, as noted by the judge, in acting as he proposed, overlooked that principle. At paragraph 13 of his judgment, he stated that:

> "…The only object of the step he [the liquidator] wishes the Court now to sanction is to defeat accrued rights in order to obtain a windfall. When parties deal with a Court appointed liquidator, they are dealing, in a sense, with the Court. I think that they are entitled to expect that the Court will not facilitate moves by its officer designed to frustrate proper bargains which it has formally approved."

[16] Bannister J also refused the Liquidator's application for a limited sanction to take the necessary steps to meet the 2nd August 2013 deadline for appealing Hellerstein J's decision, pending an application to this Court to reverse his refusal to sanction his appeal to the Second Circuit. Furthermore, the judge noted that it would be inconsistent with his view of the matter to give permission for any steps to be taken by way of an appeal to the Second Circuit.

Grounds of appeal

[17] The Liquidator, being dissatisfied with the decision of Bannister J, filed a notice of appeal containing several grounds of appeal. The Liquidator contends that the

learned judge, having correctly identified the question to be determined of what were the "commercial best interests of the company", erred in refusing to sanction the proposed appeal to the US Second Circuit Court of Appeals on the following bases:

(i) the learned judge disregarded the expressed support of creditors on the basis that he considered their view to be irrelevant.

(ii) The learned judge erred in considering that such an appeal "would be a device on the part of Fairfield to cause the contract to become frustrated, in order that the Liquidator will no longer be bound by it".

(iii) The learned judge mischaracterised the proposed appeal as part of "efforts to cause the contract to become aborted" and was wrong to characterise allowing the Liquidator to appeal, as sanctioning the breach of a solemn obligation.

(iv) The learned judge wrongly considered that it is "enough" that two US judges have sanctioned the sale and such a finding wrongly cuts the Liquidator off from an appeal which he has a right to attempt to bring under US law and which he has been advised by US lawyers to bring in the interests of the creditors.

(v) The learned judge wrongly considered that Fairfield is subjecting Farnum to irrecoverable costs in New York.

(vi) The learned judge wrongly characterised the proposed appeal as an attempt to "defeat accrued rights in order to obtain a windfall".

(vii) The learned judge further erred in his reasoning that "when parties deal with a Court appointed liquidator…they are entitled to expect that the Court will not facilitate moves by its officer designed to frustrate proper bargains which it has formally approved"

(viii) The learned judge also erred in failing at least to allow the deadline for lodging papers to be met pending an appeal against his decision in the BVI.

Issue on appeal

[18] The broad issue for determination on appeal is whether the learned judge erred in refusing to sanction the Liquidator's appeal to the Second Circuit.

The Liquidator's submissions

[19] Mr. Moss, QC referred to **Re Greenhaven Motors Ltd (in liquidation)**[4] regarding the question of whether the court should grant a sanction for a proposed course of action. Chadwick LJ held that in deciding whether to sanction a compromise, a court must consider whether the interests of creditors or contributories who have a real interest in the assets of a company in winding up are likely to be best served by permitting the company to enter into the compromise or by not so permitting it. He submitted that the principles applicable to an application for sanction to bring proceedings were the same as those applicable to an application for sanction to compromise a claim.

[20] Mr. Moss, QC also noted the dictum of Chadwick LJ who stated that the question of whether the court should sanction a compromise which provided no discernible benefit, but which might do some harm to the creditors and contributories, should be answered in the negative, especially where not entering into the compromise would do the company no harm. Further, subject to being able to disregard the views of any creditors or contributories who would have no real interest in the liquidation, "the court will give weight to the wishes of creditors and contributories whose interests it has to consider, for the reason that creditors and contributories, if uninfluenced by extraneous circumstances, are likely to be good judges of where their own bests interests lie." Chadwick LJ went to state that "for the same reason

[4] [1999] BCC 463.

the court will give weight to the views of the liquidator, who may, and normally will, be in the best position to take an informed and objective view."

[21] Mr. Moss, QC also referred to **Re Edennote Ltd. (No.2)**[5] which concerned an application by the liquidator for sanction for a compromise of proceedings. Lightman J held that on such an application, the concern of the court was to decide what was in the commercial best interests of the company in liquidation and its creditors. At page 92 of the judgment, Lightman J held that:

> "Where a liquidator seeks the sanction of the court and takes the view that a compromise is in the best interests of the creditors, in any ordinary case, where (as in this case) there is no suggestion of lack of good faith by the liquidator or that he is partisan the court will attach considerable weight to the liquidator's views unless the evidence reveals substantial reasons why it should not do so, or that for some reason or other his view is flawed."

[22] Learned Queen's Counsel, Mr. Moss, submitted that the learned judge erred in refusing to sanction the appeal to the Second Circuit on several points. Mr. Moss, QC further argued that the learned judge failed to take into consideration or give sufficient weight to the potential gain to Fairfield, its creditors and contributors, should the US appeal be pursued and be successful. Instead, the learned judge appeared to consider that any such outcome would be a "windfall" for Fairfield. Mr. Moss, QC also asserted that the judge wrongly disregarded the views of the liquidation committee, incorrectly characterising them as having nothing to do with commercial judgement. In fact, as learned Queen's Counsel posits, there is no question of any "device" or "frustration" – there is simply a proposed appeal on the question of whether the US bankruptcy court should approve the sale under US law, which is a step necessary for the sale to become unconditional.

[23] Additionally, Mr. Moss, QC states that the learned judge mischaracterised the proposed US appeal as part of "efforts to cause the contract to become aborted",

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[5] [1997] 2 BCLC 89.

however, the appeal simply relates to the US law issue of whether the contract has become or will remain valid, given the condition of US Court approval.

[24] Queen's Counsel further argued that, based on the definition of "Final Order" in the Trade Confirmation as:

> "…an order of either the US Bankruptcy Court or the BVI Court, as applicable, which has not been reversed, stayed, modified, amended or vacated and at to which (a) there has been a final determination or dismissal of any appeal, petition for certiorari or motion for rehearing or reconsideration that has been filed or (b) the time to appeal, seek certiorari or move for reconsideration or rehearing has expired and no appeal, petition for certiorari or motion for reconsideration or rehearing has been timely filed."

there has not been a final order and the US court has not therefore approved the sale by final order.

[25] He also contends that the Liquidator has a duty to the Court and the creditors to maximise the value of the assets and the returns to creditors as a matter of BVI law and US Bankruptcy law. The SIPA claim is an asset in the estate, and it became far more valuable prior to either the BVI court approval or the Lifland J approval. Further, he contended that if the Trade Confirmation did not become effective due to failure of the condition, the potential increase in the assets of the estate, and returns so available to creditors and contributories was very significant – at least US$23 million and possibly in the region of US$87 million greater than the price agreed with Farnum.

[26] Mr. Moss, QC also highlights that the Liquidator has been advised by US counsel that he has a duty to challenge the Trade Confirmation because of his fiduciary status in US Bankruptcy law. Further, learned Queen's Counsel posits that the application of section 363 of the US Bankruptcy Code relating to the approval by the court of sales, which is mandatory, and on the advice of US counsel, applies to the Trade Confirmation, would result in US Bankruptcy court approval for the Trade Confirmation being withheld.

[27] He also contends that the cost to the company of pursuing the US appeal will be minimal unless it is successful. The Liquidator has negotiated arrangements with his US counsel that have the effect that no fee will be payable to the US counsel unless the appeal is successful. As costs are generally irrecoverable in the US, an order to pay Farnum's costs in the event the appeal is unsuccessful is unlikely.

[28] Further, the Liquidator relies on advice obtained from US counsel on the prospects of appealing the decision of Hellerstein J. Messrs. Brown Rudnick opined that:

> "…Judge Hellerstein made two clear and fundamental errors of law in the manner he applied section 363. First, Judge Hellerstein erred in relying on Justice Bannister's decision to approve the Trade Confirmation under BVI insolvency law, based on principles of comity that Judge Hellerstein perceived to be applicable to the matter. Second, Judge Hellerstein erred in applying a section 363 standard that does not take into account facts and circumstances following the time when the relevant agreement (here the Trade Confirmation) was signed. Accordingly…we believe that there are substantial and viable grounds for an appeal to the Second Circuit."

[29] The Liquidator also relies on the advice of Messrs. Stroock and Stroocktake who also take the view that Hellerstein J's two key reasons above were wrong and that he was wrong to leave open the question of whether section 363 applied, and conclude that:

> "…there is a somewhat better than even chance that the Second Circuit will reverse the District Court Order and remand the case to the Bankruptcy Court for further proceedings consistent with the Second Circuit's decision. In particular, we believe that there is a substantial probability that the Second Circuit will determine that the District Court order erroneously took into account considerations of comity in its analysis of the application of section 363 of title 11 of the [Bankruptcy Code] to the proposed sale. We further believe that it is somewhat more likely than not that the Second Circuit will determine that the Bankruptcy Court should evaluate the proposed sale as of the time of a section 363 hearing on the sale, not as of the time that the parties originally agreed to the Trade Confirmation."

[30] Mr. Moss, QC submits that additional support for the US counsel's position is found in the affidavit of Melanie Cyganowski, a former Chief Judge of the US Bankruptcy Court for the Eastern District of New York. She states that, "I believe that an appeal

of the US District Court Order to the Second Circuit is warranted and is in accordance with the fulfilment by the liquidator of his fiduciary duties". Ms. Cyganowski further states that:

> "…I believe that there are substantial grounds for an appeal, including whether: (a) the District Court erred in its application of comity principles and deferring to the BVI Court's decision to approve the Trade Confirmation; (b) the District Court erred in its application of section 363 principles in failing to consider the facts and circumstances arising after the liquidator's entry into the Trade Confirmation; and (c) the District Court erred in failing to conclude that the SIPA claim is "property within the territorial jurisdiction of the United States", thus triggering the automatic application of section 363."

[31] It was also contended that the learned judge was wrong to characterise allowing the Liquidator to appeal as sanctioning a breach of a solemn obligation. Mr. Moss, QC in his submissions stated that there is no possible question of a breach – the issue is the validity or continuing validity of the Trade Confirmation. Further, even insofar as there might be an implied obligation of good faith, the learned judge failed to take into account the evidence before him to the effect that section 363 of the Bankruptcy Code has mandatory effect, and so would override any inconsistent obligation under the Trade Confirmation.

[32] Mr. Moss, QC also asserted that the learned judge failed to have regard to the evidence of the probable success of the US appeal, instead of deciding that it was "enough" that two US judges had sanctioned the sale. This wrongly cuts the Liquidator off from an attempted appeal which he has a right to attempt to bring under US law and which he has been advised by US lawyers to bring in the interests of the creditors.

[33] On the point that the learned judge wrongly characterised the proposed appeal as an attempt to "defeat accrued rights in order to obtain a windfall". Mr. Moss, QC argued that the purchaser's rights are not properly described as "accrued", or even if they are accrued, they are accrued on the contingent basis that the proposed appeal is not successful. The purchaser's rights are subject to "Approval by a Final

Order of…the Bankruptcy Court…of the assignment of the claim…". "Final Order" is defined as "…an order of…the US Bankruptcy Court…which has not been reversed…or vacated and as to which…the time to appeal…has expired and no appeal…has been timely filed." Mr. Moss, QC contends that the learned judge further erred in his reason that "when parties deal with a Court appointed liquidator…they are entitled to expect that the Court will not facilitate moves by its officer designed to frustrate proper bargains which it has formally approved."

[34] Two issues were raised challenging the correctness of this finding, namely, that the use of the word "frustrate" is plainly wrong as an appeal against the US sanction tests the correctness of the US order. Also, the Trade Confirmation expressly requires approval by both the BVI and US courts, the fact that the BVI court has given approval under its law is not a reason for preventing the US courts finally deciding the question of US court approval under US law.

[35] Further, Mr. Moss, QC contends that the learned judge erred in failing at least to allow the deadline for lodging papers to be met pending an appeal against his decision in the BVI. Merely lodging the papers could not cause any harm and would avoid irreparable loss to the estate and the creditors. The lack of interim sanction to take such steps would be likely to render the substantive appeal otiose. The learned judge's reasoning was that the matter should be "put to rest." Whether or not that is so can be determined on the hearing of any substantive appeal, which the Liquidator has stated will be pursued with maximum possible expedition, but is not a good reason to negate any possibility of any appeal having any purpose, by rendering it impossible to comply with the deadline for lodging the US appeal.

Farnum's Submissions

[36] Farnum opposes the Liquidator's appeal and contends that Bannister J was correct in refusing to sanction the appeal to the Second Circuit for several reasons.

Learned Queen's Counsel, Ms. Prevezer argued that what is clear from both Lifland J's and Hellerstein J's judgments, is that both judges accepted that the liquidation of Fairfield is a BVI liquidation in which the BVI court is the primary supervisory court to which the Liquidator is responsible. What is also important is that they found that the Trade Confirmation was a bona fide transaction voluntarily entered into by the Liquidator, for which there are no grounds under BVI law for setting aside.

[37] Ms. Prevezer, QC further argued that the 'Final Order' requirement in the Trade Confirmation does not apply to the approval of it. Therefore, even if the section 363 issue relied on by the Liquidator has any merit, the 'Final Order' requirement in the Trade Confirmation is not engaged. Additionally, Ms. Prevezer, QC urged the Court to keep in mind that the 'Final Order' referred to in the Trade Confirmation is a 'Final Order' with regard to the SIPA Court BLMIS proceedings. It is simply not correct that as long as the appeal is lodged with the Second Circuit, the US Bankruptcy Court has not approved the sale by 'Final Order'.

[38] She also submits that the reference to the "US Bankruptcy Court" in the Trade Confirmation is a reference to the Bankruptcy Court in the BLMIS proceedings, i.e. the SIPA court. She contends that this is because section 363 of the US Bankruptcy Code, the provision that the Liquidator claims as the basis to undermine the Trade Confirmation does not apply in a SIPA proceeding. Further, the fact that the Liquidator seeks to appeal Hellerstein J's order does not mean that the Trade Confirmation is still conditional. As such, the Liquidator's contention that it remains conditional is incorrect.

[39] Learned Queen's Counsel also states that the principles in **Re Greenhaven** are not applicable in the present appeal. This is because the Liquidator obtained the court's sanction with regard to the Trade Confirmation when he caused Fairfield to enter into it in December 2010. She also posits that the relevant 'commercial judgement' of the Liquidator for the purposes of the appeal is the commercial

judgement of the Liquidator when he decided to enter into the Trade Confirmation, and this judgment is not impugned. Additionally, she states that the Trade Confirmation was an arm's length transaction which was then in the commercial best interests of Fairfield – when the transaction closed, the bargain was a good one.

[40] She also disputes the reliance placed on **Re Edennote**. She states that the decision has no application to the present appeal as the equivalent to the 'compromise' sought to be sanctioned by the court in **Re Edennote** was the Trade Confirmation, which the Liquidator obtained sanction to enter into in December 2010. Further, it is beyond argument that the Trade Confirmation was in the commercial best interests of Fairfield in December 2010, and that was the view of the Liquidator then.

[41] Ms. Prevezer, QC also argued that as Bannister J was exercising a discretion when considering the Liquidator's application for sanction, this Court should not interfere with the learned judge's decision unless satisfied that the judge applied a wrong principle, took into accounts matters which he should not have taken into account, disregarded matters to which he should have regard and/or was plainly wrong. Further, she states that as the court in **Re Greenhaven** pointed out, the correct approach for the BVI court to adopt in circumstances where it is exercising its discretion, is not that the Liquidator's wish to appeal should prevail unless it is satisfied that the Liquidator was not acting bona fide. As it is a matter for the discretion of the BVI court, the court is entitled to have regard to and give such weight as it considers appropriate to all the relevant circumstances and factors when exercising that discretion.

[42] She submits that the best price reasonably obtainable for the SIPA claim was that agreed under the Trade Confirmation at the time it was entered. She contends that when the Trade Confirmation was agreed, the bargain was a good one, having been concluded after an open auction process selected by the Liquidator. She

explained that whilst the asset might have realized more had it been sold later, that is irrelevant to the issues. She further contends that the fact that under the Trade Confirmation the procedural assignment of the SIPA claim is subject to a 'Final Order' of the SIPA court does not mean that the rights under the Trade Confirmation did not accrue on signing.

[43] She posits that the commercial best interests of Fairfield are not best served by permitting an appeal to the Second Circuit. She claims that the Liquidator's sole objective in pursuing a further appeal is to frustrate the completion of the contract he has entered into voluntarily. Further, she states that the BVI court does not regard the Liquidator as having a duty to act in the best interests of creditors at all costs. Additionally, as the BVI court has approved the Trade Confirmation, it ought to be given effect. Queen's Counsel also contends that if the Trade Confirmation were to be set aside, the stakeholders of Fairfield may be better off, but not in a way that this court can or should approve. She states that they would have received a 'windfall' which is contrary to the policy of the BVI **Insolvency Act**, which regards contracts such as the Trade Confirmation as agreements which bind the Liquidator and ought to be performed. Moreover, she claims that if the Trade Confirmation were to be set aside, the windfall would be made by Fairfield, while Farnum would lose the benefit of an arm's length bargain.

[44] Additionally, learned Queen's Counsel argues that the Liquidator has now twice had an unequivocal answer from two US courts and is thereby in a position to achieve the result that the BVI court regards as the correct one, that is, compliance with the obligations in the Trade Confirmation. She went on to submit that the court, in giving directions to its officeholder, is concerned with the legitimate interests of the creditors. Those legitimate interests do not, as a matter of BVI law, include taking any further attempts to avoid contractual obligations freely and voluntarily incurred. Ms. Prevezer, QC further submits that the BVI court did have regard to the views of the Liquidation Committee at the time when the Trade Confirmation was entered into. She posits that Bannister J rightly concluded that

the fact that the Liquidation Committee is in favour of an appeal has nothing to do with commercial judgement and everything to do with "a human and understandable desire to receive a greatly inflated return" in Fairfield's winding up. She contends that the Liquidator's own views were properly considered by Bannister J and he rightly concluded that the Liquidator's efforts to cause the contract to be aborted are in breach of the implied covenant of good faith in the Trade Confirmation and not proper for a court appointed officer. Also, she argues that the costs to Farnum if the appeal were allowed to be pursued are very considerable.

Discussion

[45] This appeal essentially represents a challenge to the exercise of a discretion entrusted to the first instance judge. The liquidation of Fairfield is a BVI liquidation in which the BVI court is the primary supervisory court to which the Liquidator is responsible. In refusing the application for sanction to appeal the decision of Hellerstein J to the Second Circuit, Bannister J was exercising a discretion which turned on a number of different factors. The primary responsibility for the exercise of the discretion lay with him.

[46] The principles governing appellate interference with the exercise of a judicial discretion are well established. In short, the discretionary decision of a judge should not be set aside unless he erred in principle, took into account irrelevant matters, failed to take account of relevant matters or was plainly wrong in his conclusion.[6] The question is not whether the appellate court would have reached a different conclusion. The burden for the appellant is a high one whenever a challenge is made to the outcome of a discretionary exercise. An appellate court should resist the temptation to subvert the principle, that they should not substitute their own discretion for that of the judge, by a narrow textual analysis which enables them to claim that he misguided himself.[7]

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[6] See Dufour and others v Helenair Corporation Ltd. and others (1996) 52 WIR 188.
[7] See Piglowska v Piglowski [1999] 1 WLR 1360 at page 1372.

[47] I agree with Ms. Prevezer that the correct approach for the BVI court to adopt in circumstances where it is exercising its discretion, is not that the Liquidator's wish to appeal should prevail unless it is satisfied that the Liquidator was not acting bona fide. As the court is exercising discretion, it is entitled to have regard to and give such weight as it considers appropriate to all the relevant circumstances and factors in exercising that discretion. In my judgment, Bannister J was quite cognisant of that, as his judgment illustrates. It is also well established that weight is a contextual evaluation for the judge; the weight to be given to specific factors is a matter for the trial judge and it is inappropriate for this Court to interfere with that evaluation unless it is perverse.

[48] Bannister J recognised that the question whether to sanction an appeal by the Liquidator is a matter to be determined by reference to BVI law. The learned judge's observation that it was irrelevant that, if he were sitting as a bankruptcy judge in the United States, different considerations may be taken into account or that the duties of a trustee in that court might be different from those of a liquidator appointed by the BVI court, is quite valid.

[49] Bannister J noted that when the BVI court approved the Trade Confirmation, it did so in the expectation that, subject to the approval of the Bankruptcy Court, it would be performed timeously. In that regard, the learned judge stated that the court was being asked, two and a half years later, to sanction a period of indeterminate further delay in the face of two failed attempts by Fairfield to undo the Trade Confirmation. Bannister J did not consider such a course to be appropriate.

[50] Bannister J was also concerned that any such appeal by Fairfield would be an attempt on its part to cause the contract to become frustrated, in order that the Liquidator would no longer be bound by it. Therefore, it would not be right for the court to sanction the taking of steps designed to achieve such a result.

[51] The learned judge stated that the fact that the liquidation committee was in favour of an appeal had nothing to do with commercial judgment and everything to do with "a human and understandable desire to receive a greatly inflated return in Fairfield's winding up." Bannister J noted that the liquidators, as officers of the court, were expected to be straightforward in their dealings and must not rely on technicalities to defeat the rights of others. The learned judge also stated that the only object of the step the Liquidator wished the court now to sanction was to defeat accrued rights in order to obtain a windfall. He opined that when parties deal with a court appointed liquidator, they were entitled to expect that the court would not facilitate moves by its officer designed to frustrate proper bargains which it had formally approved.

Conclusion

[52] In my judgment, it cannot be said that Bannister J was plainly wrong in exercising his discretion to refuse to sanction the appeal. From his judgment, it can be seen that the learned judge examined the matter holistically, took into account all the circumstances, did the necessary evaluation, paid regard to the material factors and attributed such weight as he thought necessary. It cannot be said that his attribution of weight was perverse, and he clearly explained the factors which informed his decision. Paying regard to the principles pertaining to appellate interference with the exercise of discretion by a judge, this is not a fit case for appellate intervention.

Order

[53] The appeal is accordingly dismissed. Costs of the appeal shall be costs in the liquidation.

I concur
Mario Michel
Justice of Appeal

I concur
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar