[2025] UKPC 43
Privy Council Appeal No 0006 of 2024

JUDGMENT

Kenneth M Krys (as Liquidator of Fairfield Sentry Ltd (In Liquidation)) (Appellant) *v* Farnum Place LLC (Respondent) (Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Virgin Islands)

before

Lord Sales
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
22 September 2025

Heard on 20 January 2025

Appellant
Andrew Westwood KC
Alistair Abbott
(Instructed by Forbes Hare (BVI))

Respondent
Sue Prevezer KC
Richard Evans
Ben Woolgar
(Instructed by Conyers Dill & Pearman and Sinclair Gibson LLP)

LORD RICHARDS:

Introduction

1. This is an appeal by Kenneth Krys ("the Liquidator"), as liquidator of Fairfield Sentry Ltd ("Sentry"), against the decision of the Eastern Caribbean Court of Appeal ("the Court of Appeal") dated 10 March 2022, dismissing an appeal from an order in the High Court by Bannister J on 22 July 2013.

2. By his order, Bannister J refused an application by the Liquidator to sanction a second appeal by the Liquidator in proceedings in the United States ("the US Appeal"). By interim orders pending the hearing of the appeal against Bannister J's order, the Court of Appeal authorised the Liquidator to pursue the US Appeal. The Liquidator succeeded in the US Appeal with, as explained below, beneficial results for the liquidation of Sentry. The order allowing the US Appeal was made on 26 September 2014.

3. The Court of Appeal had heard the appeal against Bannister J's order on 17 July 2014 and reserved judgment. On 26 September 2014, the Liquidator's lawyers sent a copy of the US Appeal judgment to the Court of Appeal. The other party in the US proceedings unsuccessfully applied in the US for a review or reconsideration of that judgment, which the Court of Appeal authorised the Liquidator to oppose.

4. Over seven years later, on 10 March 2022, the Court of Appeal handed down judgment on the Liquidator's appeal against the refusal by Bannister J to sanction the US Appeal. It dismissed the Liquidator's appeal on the grounds that Bannister J's decision was a proper exercise of his discretion. The Court of Appeal made no reference in its judgment to the Liquidator's success in the US Appeal.

5. The Liquidator submits that his success in the US Appeal was clearly a material change in circumstances from those existing at the time of Bannister J's order, which the Court of Appeal ought to have taken into account and which should have led the Court of Appeal to allow the appeal.

Facts and procedural history

6. Sentry is a company incorporated in the British Virgin Islands ("BVI") which operated as one of the largest feeder funds for Bernard L. Madoff Investment Securities LLC ("BLMIS"). BLMIS was placed into liquidation under the United States Securities Investor Protection Act. A petition to wind up Sentry was presented to the High Court in

the BVI ("the BVI Court") on 11 June 2009 and a winding-up order was made on 21 July 2009 ("the BVI proceedings").

7. The large number of people who invested in BLMIS through Sentry did so by subscribing for redeemable shares in Sentry. They are not creditors of Sentry but they have claims for the redemption of their shares or claim that they have lost the value of their investments, and they are the persons wholly or principally concerned in its liquidation. They are victims of the fraud perpetrated on a massive scale by Bernard Madoff.

8. On 14 June 2010, Sentry filed a petition under Chapter 15 of the US Bankruptcy Code for the recognition of the BVI proceedings as Sentry's main insolvency proceedings, in the US Bankruptcy Court for the Southern District of New York, which recognition was granted on 22 July 2010. The court also made an order entrusting the administration or realisation of Sentry's assets within the territorial jurisdiction of the United States to the Liquidator.

9. Sentry made a claim in the liquidation of BLMIS and the Trustee of BLMIS made cross-claims against Sentry. On 9 May 2011, following negotiations between the Liquidator and the Trustee, Sentry's claim was admitted in the liquidation of BLMIS in the sum of US$230 million, conditional on Sentry making a payment of US$70 million to BLMIS.

10. Previously, on 13 December 2010 Sentry, by the Liquidator, had entered into an agreement ("the Trade Confirmation") for the sale to the Respondent, Farnum Place LLC ("Farnum"), of its claim in the liquidation of BLMIS at a rate of 32.125 cents in the dollar. As claims against BLMIS were at this time trading in the range of 20 to 30 cents in the dollar, this represented a good price. The admission of Sentry's claim for US$230 million had the effect of fixing the price under the Trade Confirmation at approximately US$74 million. The net benefit of the sale to the estate of Sentry, after payment of the sum due to BLMIS, would therefore be US$4 million.

11. The Trade Confirmation was governed by New York law. Completion of the sale was conditional on (among other things) "[a]pproval by the BVI Court of the terms of this Trade Confirmation and the form of Assignment of Claim" and "[a]pproval by a Final Order of each of the US Bankruptcy Court and the BVI Court of the assignment of the Claim by Seller to Buyer". A "Final Order" was defined 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 as 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".

12. Very shortly after the Trade Confirmation was entered into, the prevailing price of claims against BLMIS rose sharply. The rise was due to a settlement being reached between the trustee of BLMIS and the estate of Jeffrey Picower, under which US$5 billion was to be paid to the BLMIS Trustee. The settlement was announced four days after the Trade Confirmation was signed.

13. The effect was substantially to increase the value of Sentry's claim. Based on trading prices after the announcement, it would place a value of some US$125 million on the claim, or some US$50 million more than the price agreed under the Trade Confirmation.

14. Against this background, the Liquidator contended that Sentry was not bound to complete the sale under the Trade Confirmation. He did not take steps to obtain the approval of the BVI Court to the terms of the Trade Confirmation or the assignment of the claim. On 27 October 2011 Farnum issued an application in the BVI Court for an order pursuant to section 273 of the BVI Insolvency Act 2003 requiring Sentry (acting by the Liquidator) to seek the approval of the BVI Court to the terms and conditions of the Trade Confirmation and "to take the necessary steps to bring to fruition" other conditions including making an application to the US Bankruptcy Court. It was heard by Bannister J over three days in March 2012. He heard expert evidence on behalf of both parties on New York State contract law and US federal bankruptcy law.

15. On 27 March 2012 Bannister J handed down judgment, by which (among other things):

(i) He held that, as a matter of BVI law, the Court should approve the Trade Confirmation and the assignment of the claim to Farnum, which approval he gave.

(ii) He declined to rule on the applicability of section 363 of the US Bankruptcy Code ("Section 363"), which Sentry had argued was applicable, but directed the Liquidator to take all necessary steps to bring before the US Bankruptcy Court an application for approval or non-approval by that Court of the Trade Confirmation. He said at para 51 of his judgment: "I leave it to the Liquidator to decide what is the appropriate way for that to be done but I make clear that it must be done in such a way that the US Bankruptcy Court is presented with a choice whether or not to approve it".

16. The Liquidator duly made an application to the US Bankruptcy Court for the Southern District of New York. That application was heard by Judge Lifland. By his judgment of 10 January 2013, Judge Lifland held that there was no basis for disapproval of the Trade Confirmation on the grounds that:

(i) the sale of the claim was not subject to review under Section 363 because it did not involve a transfer of an interest in property within the territorial jurisdiction of the United States; and

(ii) comity dictated deference to the judgment of Bannister J approving the sale of the claim.

17. On 21 January 2013, Bannister J refused the Liquidator's application for sanction to appeal the ruling of Lifland J to the US District Court. On 25 February 2013, the Court of Appeal reversed that decision and, with the sanction of the Court of Appeal, the Liquidator pursued an appeal against Judge Lifland's decision.

18. On 3 July 2013 the US District Court (Judge Hellerstein) affirmed the decision of Judge Lifland, albeit for different reasons.

19. On 22 July 2013 Bannister J dismissed the Liquidator's application for sanction to appeal Judge Hellerstein's decision to the US Court of Appeals for the Second Circuit ("the SCCA"). He refused permission to appeal and he also refused to give the Liquidator limited sanction to take the steps necessary to meet the deadline for appealing Judge Hellerstein's decision, pending an application to the Court of Appeal for permission to appeal.

20. On 31 July 2013 the Court of Appeal granted permission to appeal and gave the Liquidator interim sanction, specifying steps necessary to preserve the appeal to the SCCA, pending the determination of the appeal against Bannister J's decision. An appeal was duly lodged with the SCCA.

21. Further interim orders to sanction steps in the US Appeal were made by the Court of Appeal: on 23 October 2013, to file a written brief; on 18 February 2014, to file a written reply brief; and, on 30 April 2014, to retain legal counsel to appear and present oral argument.

22. The US Appeal was heard by the SCCA on 21 May 2014, and judgment was reserved.

23. The Liquidator's appeal against Bannister J's order was heard by the Court of Appeal on 17 July 2014, and judgment was reserved.

24. On 26 September 2014 the SCCA delivered its judgment, allowing the US Appeal. It held that the sale of the claim was a transfer of an interest in property within the territorial jurisdiction of the United States and therefore subject to review under Section 363 and that comity did not require deference to Bannister J's order of 27 March 2012. Accordingly, the SCCA vacated the order affirming Judge Lifland's order and remanded the matter to the District Court with instructions to remand it to the Bankruptcy Court for review under Section 363.

25. On the same day, 26 September 2014, the Liquidator's legal representatives wrote to the Court of Appeal enclosing a copy of the SCCA's judgment and informing it that the Liquidator's appeal had been successful.

26. On 18 November 2014 the Court of Appeal gave the Liquidator sanction to take whatever steps might be necessary in relation to a petition issued in the SCCA by Farnum on 10 October 2014 for reconsideration or en banc review of the SCCA's decision of 26 September 2014. On 13 January 2015 the SCCA denied Farnum's petition.

27. On 13 February 2015 the Liquidator filed an application with the US Bankruptcy Court requesting Section 363 review of the sale consistent with the principles set out in the SCCA decision and, upon that review, disapproval of the sale and the Trade Confirmation.

28. On 13 October 2015 Judge Bernstein of the US Bankruptcy Court disapproved the sale of the claim to Farnum. His decision was affirmed by the US District Court on 2 June 2016 and by the SCCA on 22 May 2017. On 2 October 2017, the US Supreme Court denied Farnum's petition for certiorari.

29. The Court of Appeal handed down the judgment under appeal on 10 March 2022.

Bannister J's judgment

30. Bannister J was not sympathetic to the Liquidator's desire, in the interests of the investors in Sentry, to be free of the sale of its claims against BLMIS under the Trade Confirmation. He rejected the submission made on behalf of the Liquidator that the refusal of sanction to bring the US Appeal would cause an inevitable loss to the investors. He said at para 10:

> "That seems to me to be misconceived. Refusal of sanction would cause no loss. It is common ground that when the transaction closed the bargain was a good one. It is illegitimate to describe as 'loss' a profit that might have been obtained had the relevant asset been disposed of at some different time. … Similarly misconceived is the complaint that unless the Trade Confirmation is set aside Farnum will obtain a 'windfall'. If the Trade Confirmation were set aside the windfall would be made by Fairfield, while Farnum would lose the benefit of an arms length bargain."

31. Bannister J refused to authorise the Liquidator to bring the US Appeal, for reasons that he set out in paragraph 13 of his judgment. These included:

(i) "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 upon him, 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."

(ii) On the basis of the expert evidence on New York contract law, the Trade Confirmation contained an implied obligation of good faith and fair dealing. In Bannister J's view, the US Appeal would be an effort to cause the contract to be aborted and thus a breach of that implied term. He added: "I do not consider that it is right for this Court, which confirmed and approved the transaction, to lend its sanction to efforts which necessarily involve breaching such a solemn obligation".

(iii) When Bannister J originally approved the Trade Confirmation, he expected that, subject to the approval of the US Bankruptcy Court, it would be performed timeously. That approval was ultimately obtained in January 2013 and one appeal had failed. Over two and a half years after the contract was made, the court was being asked to sanction a period of indeterminate further delay. Two US judges had rejected the Liquidator's case under Section 363 and "enough is enough".

(iv) In reliance on the principle enunciated in *Ex parte James* (1874) LR 9 Ch App 609 regarding the conduct to be expected of liquidators as officers of the court, he said:

> "The only object of the step he 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."

The Court of Appeal's judgment

32. The judgment of the Court of Appeal was given by Baptiste JA (with whom Michel and Thom JJA agreed).

33. As mentioned above, the judgment makes no mention of the Liquidator's success in the US Appeal or of the orders made by the Court of Appeal authorising on an interim basis the steps taken by the Liquidator to prosecute the US Appeal.

34. At paragraph 45 of his judgment, Baptiste JA observed that the appeal "essentially represents a challenge to the exercise of a discretion entrusted to the first instance judge". The proper approach to the exercise of the discretion was not that the Liquidator's wish to appeal should prevail unless the court was satisfied that he was not acting bona fide. Instead, the court was entitled to have regard to and give such weight as it considered appropriate to all the relevant circumstances and factors, weight being a matter for the judge's own evaluation.

35. Baptiste JA summarised the grounds on which Bannister J had relied for his decision and concluded at paragraph 52 that he had taken account of all material factors and attributed such weight to them as he thought necessary. It could not be said that his decision was plainly wrong, and it was not a fit case for appellate intervention.

Whether to set aside the Court of Appeal's order

36. The Liquidator submits that the order of the SCCA which allowed the US Appeal, and directed that the application for approval of the Trade Confirmation be heard again by the US Bankruptcy Court on the basis that Section 363 applied, was clearly a material change in circumstances since the time at which Bannister J made his decision and that the Court of Appeal should have taken it into account. The Liquidator did not rely on the remarkable delay before the Court of Appeal gave judgment, save as indicating that the likely explanation for the absence of any reference to the US Appeal was that the Court of Appeal overlooked it.

37. While Farnum accepted that it would have been preferable if the Court of Appeal had in its judgment referred to the SCCA's decision, it submitted that it could have made

no difference to the decision of Bannister J, in view of the reasons he gave, or to the Court of Appeal's review of his decision which, as the Court of Appeal emphasised, was an exercise of his discretion. For that reason, the SCCA decision did not represent a *material* change of circumstances.

38. The Board is in no doubt that the SCCA decision was a material change in circumstances which the Court of Appeal should have taken into account. The decision was the outcome of the very appeal for which sanction was sought. The Board finds it impossible to see how it was not at least a material factor to take into account. Moreover, one of the principal reasons given by Bannister J for his decision was that he was being asked to sanction "a period of indeterminate further delay" in "the ultimate hope" that the Trade Confirmation would be set aside. The delay ceased with the SCCA's decision, followed by the substantive review heard by Judge Bernstein in March 2015 and his decision given in October 2015.

39. It follows that, having failed to take into account a material change in circumstances, the order of the Court of Appeal affirming Bannister J's decision must be set aside. One course which the Board could take is to remit the case back to the Court of Appeal for it to reconsider Bannister J's decision. However, given the delay which has occurred and the fact that the Board is in as good a position as the Court of Appeal to undertake that task, it is right for the Board to do so. Neither party supported the matter being remitted.

Should Bannister J's decision be set aside and sanction granted to the Liquidator?

40. It appears to the Board that the correct starting point is the terms of the Trade Confirmation. It provided that completion of the sale was conditional on approval of the assignment of the claim by a Final Order of the US Bankruptcy Court. "Final Order" was defined expressly in terms which contemplated the possibility of appeals. What the contract required was a valid and properly-based approval by the US Bankruptcy Court and the availability of appeals was the means by which that was expressly to be achieved. It was the decision of the SCCA that the original decision of the Bankruptcy Court did not conform to the applicable law. Judge Lifland had ruled that Section 363 did not apply to the Trade Confirmation but, the SCCA held, he had been wrong. It therefore remanded the matter so that it could be re-heard by the Bankruptcy Court. When it was re-heard, the Court ruled that the Trade Confirmation should not be approved. This is a sequence of events which was in line with the terms of the Trade Confirmation.

41. The Board has summarised above the principal factors on which Bannister J relied for his refusal to sanction the US Appeal. One was his concern that he was being invited to sanction indeterminate further delay which, as already explained, ceased to be a relevant factor when the SCCA gave its judgment in September 2014.

42. All the other principal factors on which Bannister J relied focus on the suggestion that the Liquidator would be acting contrary to the terms of the Trade Confirmation by pursuing the US Appeal.

43. The first reason was the US Appeal would be "a device… to cause the contract to become frustrated". It was "not open to one party to a contract to take steps, after it has become binding upon him, to cause its frustration" and it would not be right for the BVI Court to sanction any such steps. The judge accepted that the sale became unconditional only if and when the US District Court's order affirming Judge Lifland's order became a Final Order (as defined) but he considered that an appeal to the SCCA was a step which was not open to the Liquidator because, if successful, it would frustrate the sale after it had become binding on Sentry. With respect to the judge, this reasoning contradicts itself and cannot stand. If the Liquidator caused Sentry to take a step contemplated by the terms of the Trade Confirmation – an appeal to the SCCA – Sentry cannot be taking a step which was not open to it. Bannister J referred to no evidence of New York contract law to support this reason, and none was cited to the Board.

44. The second ground is closely linked with the first. Bannister J referred to the expert evidence on New York contract law being clear that each of the parties to the Trade Confirmation was under an implied obligation of good faith and fair dealing. The judge continued: "*In my judgment* efforts to cause the contract to become aborted are a breach of that implied covenant" (emphasis added), and the BVI Court should not give its sanction to efforts "which necessarily involve breaching such a solemn obligation". In other words, the Liquidator would be causing Sentry to act in breach of contract if the US Appeal was brought.

45. There is a similar difficulty with this second ground as with the first. Bannister J referred to no evidence of New York contract law to support his view that, by bringing the US Appeal, Sentry would be acting in breach of its implied obligation of good faith and fair dealing, nor was any cited to the Board. The parties confirmed to the Board that this was not argued by Farnum in either of the appeals brought in the United States.

46. The third principal ground, based on *Ex parte James*, was that a liquidator as an officer of the court should not "rely upon technicalities to defeat the rights of others" and that a court "will not facilitate moves by its officer designed to frustrate proper bargains which it has formally approved". The only object of the US Appeal was "to defeat accrued rights in order to obtain a windfall".

47. This third ground was based on a misunderstanding. Until the time for bringing the US Appeal had expired, Farnum did not have accrued rights under the Trade Confirmation. Its right to acquire the claims against BLMIS was conditional on a Final Order approving the assignment. In other words, if Section 363 applied (which the SCCA

ruled that it did), the US Bankruptcy Court had to be satisfied that the assignment should be approved. Once the US Bankruptcy Court addressed that issue on the proper basis, Judge Bernstein ruled that it should not be approved.

48. It may be observed that all these grounds, if well-founded, would also have applied to the Liquidator's first appeal to the US District Court, but that appeal was brought with the sanction of an order made by the Court of Appeal (on appeal from Bannister J's refusal to sanction it).

49. If the position had been that, by bringing the US Appeal, the Liquidator would have been causing Sentry to act in breach of contract or to defeat accrued rights, that might have provided a ground for refusing sanction, even once the outcome of the US Appeal was known. But there was no proper basis for Bannister J's conclusions on those points. In the absence of those points, the Board considers that there were no arguable grounds on which the Court of Appeal could have refused to sanction the US Appeal once it knew of its outcome.

50. Moreover, once the SCCA allowed the US Appeal in September 2014, it would not assist Farnum if sanction for it were refused. At that point, there was no Final Order of the US Bankruptcy Court approving the assignment, and therefore the completion of the sale remained subject to obtaining such order. If Farnum wanted to proceed with the assignment, the renewed application for approval had to be heard by the US Bankruptcy Court and, once Judge Bernstein refused to approve it and the appeal process in the US courts was exhausted, the Trade Confirmation fell away.

51. The Board has struggled to understand why in those circumstances there is any point in refusing (retrospective) sanction for the US Appeal. It was first submitted by Ms Prevezer KC, appearing for Farnum, that without sanction the US Appeal was a nullity. However, there is no evidence of US law to support this submission, which appears to be highly implausible, given that the courts at all levels of the US federal system have made orders on the basis that the US Appeal and the SCCA's order allowing the appeal were valid and binding on the parties. Ms Prevezer submitted, alternatively, that the Liquidator had no authority to take the subsequent steps which led to Judge Bernstein's refusal to approve the assignment. We are not required to resolve that issue but, even if it were correct, it cannot assist Farnum because, as stated above, the effect of the SCCA order was that there was then no Final Order giving approval and none was thereafter obtained. A third reason advanced was that, if it remains the position that the Liquidator did not have authority to pursue the US Appeal, Farnum has a claim for breach of contract against Sentry which it wishes to bring in the United States. It is wholly unclear to the Board what this claim might be, but in any event, if it is right to sanction the US Appeal, the existence of this alleged US claim is irrelevant. It does no more than explain why Farnum is opposing this appeal.

52. Without sanction for the US Appeal, it might be the case that the Liquidator could not recoup the costs involved from the estate of Sentry. In the Board's view, and in the circumstances set out above, that would be a perverse result in view of the very significant benefit of the US Appeal to the estate and the investors.

Conclusion

53. For the reasons set out above, the Board will humbly advise His Majesty to allow the appeal and to order that sanction is granted for the Liquidator's actions in bringing the US Appeal.