BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 2011/0133

BETWEEN:

FARNUM PLACE LLC

Applicant

and

JOANNA LAU
KENNETH KRYS

Respondents

Appearances: Ms Sue Prevezer QC, Mr Richard Evans and Ms Dawn Smith for the Applicant
Mr Paul Girolami QC and Mr William Hare for the Respondent

JUDGMENT

[2012: 13, 14, 15, 27 March]

(Second Respondent ('Sentry') entering into agreement in writing to assign claim in BLMIS bankruptcy to Applicant – agreement subject to law of State of New York - BLMIS claims subsequently trading at higher prices than that fixed by the agreement - agreement expressed to be binding subject to approval of its terms and conditions by the BVI Court – no such approval previously obtained – Sentry obliged 'subject to Sentry's exercise (in Sentry's sole discretion) of its fiduciary duties and obligations as Court appointed liquidator' to endeavour to obtain promptly the approval of the BVI Court of the terms and conditions of the agreement – whether term binding before approval by the BVI Court of terms of agreement – whether Liquidator excused from performance if he considers that seeking approval of BVI Court contrary to the exercise of his fiduciary duties and obligations as Court appointed Liquidator – nature of such obligations for the purposes of the agreement - whether seeking approval of agreement from BVI Court would amount to a breach of Liquidator's fiduciary duties as court appointed liquidator - whether Liquidator excused from seeking approval of BVI Court if he considers that he is under a duty to seek a higher price from a new bidder – whether Liquidator excused from all further performance in those circumstances – completion subject to approval of US Bankruptcy Court – whether agreement void as not yet having been approved pursuant to 11 USC § 363 – whether BVI Court should approve terms and conditions of the agreement)

[1] **Bannister J [ag]:** This is an application by Farnum Place LLC ('Farnum') under section 273 of the Insolvency Act, 2003[1] ('the Act') for an order compelling Fairfield Sentry Limited ('Sentry') (by its Liquidator) to seek the approval of this Court of the terms and conditions of a contract entered into between Sentry and Farnum on 13 December 2010 and to take the necessary steps to bring to fruition, as it is put, certain other conditions[2] to which the contract is expressed to be subject. There was an alternative claim which was not pursued at the hearing.

Background

[2] I can deal with the background quite shortly. Sentry was what is known as a feeder fund for Bernard L Madoff Investment Securities LLC ('BLMIS'). BLMIS went into liquidation under the United States Securities Investor Protection Act[3] ('SIPA') on 15 December 2008 and its liquidation is being conducted in the United States Bankruptcy Court for the Southern District of New York ('the US Bankruptcy Court') with Irving H Picard, Esq as the appointed Trustee ('the Trustee'). The Judge supervising BLMIS' liquidation is the Honorable Burton R Lifland. Sentry, which is a BVI incorporated company, followed BLMIS into liquidation under the Act in this jurisdiction on 21 July 2009 and its Liquidator[4] is Mr Kenneth Krys ('the Liquidator'). As a matter of BVI law Sentry has no creditors, although there is a large number of members/investors who had not redeemed their shares before Sentry's liquidation and who are obviously interested to recover as much as may be possible from assets realisable in the liquidation.

[3] On 22 July 2010 the US Bankruptcy Court recognised Sentry's BVI liquidation as a foreign main proceeding pursuant to Chapter 15 of 11 USC ('Chapter 15') and made an order under 11 USC § 1521(5) entrusting the administration or realisation of Sentry's assets within the territorial jurisdiction of the United States to the Liquidator. The Chapter 15 proceedings are also under the supervision of Judge Lifland.

[4] As an investor in BLMIS Sentry *prima facie* had a claim in BLMIS' SIPA liquidation. The Trustee, however, took the view that he had cross claims against Sentry. The Trustee and the Liquidator entered into negotiations in an attempt to reach a net figure payable one way or the other and thus avoid complex and protracted litigation. The same process was being gone through with respect to other of BLMIS' investors and a market appears to have developed for the sale of SIPA claims by investors to interested parties, such as hedge funds, wishing to speculate[5] in the acquisition and, possibly, on-selling of such claims. Until the Trustee and any particular investor had reached agreement on the quantum of a net claim, no precise figure could be put upon the amount which the Trustee was prepared to admit, but from publicly available information about the recoveries being made by the Trustee and a general feel about the total of all claims, the market was able to make a judgment about the cent per dollar value of claims as and when finally admitted. The evidence shows that in the autumn of 2010, when the Liquidator decided to market Sentry's claim,

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[1] section 273 provides that 'a person aggrieved by an act, omission or decision of a [liquidator] may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the [liquidator]'

[2] described in the application as 'agreed actions'

[3] 15 USC

[4] at the time of the events with which this application is concerned Mr Krys had a co-Liquidator, but she has since resigned

[5] I use the term non-pejoratively

BLMIS claims were trading at around 20 to 30 cents in the dollar. A number of bids were received by the Liquidator and after some negotiation Farnum offered 32.125 cents in the dollar for whatever[6] might turn out to be Sentry's allowed claim in the SIPA liquidation. No one suggests that this was not an excellent price at the time. This offer was accepted and on 14 December 2010 Sentry[7] entered into a written agreement[8] with Farnum described as a Trade Confirmation and providing for the assignment to Farnum of Sentry's allowed claim at that price.

[5] By an agreement between the Trustee and the then joint Liquidators dated 9 May 2011, the Trustee admitted Sentry's claim in the SIPA liquidation at a figure of US$230 million, which fixed the price payable by Farnum under the Trade Confirmation at around US$74 million. The admission by the Trustee of Sentry's claim at a figure of US$230 million was conditional upon Sentry making a cash payment to the Trustee of US$70 million. The Liquidator has paid US$24 million of that amount, but US$46 million remains outstanding. If that sum is paid and if the sale to Farnum completes, the result will have been a net accrual to the estate of some US$4 million. Although the estate has received an interim distribution of some US$4 million in the BLMIS liquidation, it is important to understand that there is no certainty when (assuming that the balance of the US$70 million is paid to the Trustee by the Liquidator) a final dividend will be paid to Sentry in the BLMIS liquidation or what, in the final outcome, the amount of that dividend will be.

[6] On 17 December 2010, three days after execution of the Trade Confirmation, the Trustee announced that he had reached a settlement with the estate of a deceased investor ('Mr Picower') which provided for payment to the Trustee of over US$7 billion,[9] bringing the total available to the Trustee in the BLMIS estate up to a figure of around US$10 billion. The announcement prompted an immediate spike in bids for SIPA claims in the market and the evidence is that at one stage they traded at up to 70 cents in the dollar, although current prices are said to be somewhere between fifty and sixty cents in the dollar. Taking a figure of fifty five cents places a theoretical value on Sentry's SIPA claim[10] of somewhere in the region of US$125 million – or some US$50 million more than the price payable by Farnum.

[7] It is against this background that the Liquidator, with the support, it is alleged of all of Sentry's remaining investors, maintains that he either never has been or else is no longer bound by the obligations of the Trade Confirmation. The hearing was concerned to establish, among other things, whether he is right.

The Trade Confirmation

[8] The Trade Confirmation was drafted and negotiated by New York attorneys and is expressed to be governed by and to be construed in accordance with the laws of the State of New York.

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[6] this is a simplified version of Farnum's offer, which had upper limits and which catered for the various methods of calculation that might be adopted by the Trustee, but is sufficient for present purposes

[7] by the other of its then joint Liquidators

[8] dated 13 December 2010

[9] there was some evidence that this receipt is subject, at least in part, to appeals (by whom was not made clear) but for present purposes the important fact is the effect upon the value of SIPA claims in the market

[10] subject to payment to the Trustee of the outstanding US$46 million

[9] The parties to the Trade Confirmation are Farnum as Buyer and Sentry as Seller. Although the document recognises that Sentry acts by its Liquidator, he is not party to it.

[10] The Trade Confirmation contains an entire agreement provision and is expressed to supersede all prior agreements and communications. This, of course, is an indication that it was intended to be of immediate binding effect and in the same section of the agreement, entitled 'Binding Effect', it is expressly stated that the Trade Confirmation constitutes a binding agreement between the parties subject to the approval of its terms and conditions by the BVI Court. The BVI Court is defined as the Commercial Division of the Supreme Court of Justice, British Virgin Islands.

[11] A section of the Trade Confirmation entitled 'Other Terms of Trade' is introduced by the following words:

> The parties agree that, if the other conditions to settlement are met, settlement of this transaction also shall be subject to:

There are then set out eight numbered conditions. Of these, the first (i) is entry by Sentry and the Trustee into a Settlement Agreement. That condition, as I have already explained, was satisfied on 9 May 2011. The second condition (ii) is approval by the BVI Court of the terms of the Trade Confirmation and of the form of assignment to be used (described as the 'Assignment of Claim' and supposed to be, but not in fact exhibited as Exhibit A to the Trade Confirmation). Condition (iii) requires approval by each of the US Bankruptcy Court and the BVI Court of 'the assignment'. Condition (iv) is for the approval by each of the US Bankruptcy Court and the BVI Court of the settlement agreement between Sentry and the Trustee. Those approvals were obtained and became effective on 8 July 2011. Condition (v) provided for the execution and delivery of an assignment in form substantially similar to the document (not) exhibited as Exhibit A. Since the Trade Confirmation provided that settlement was only to be treated as completed once Sentry had confirmed receipt of the price, the characterisation of this term as a condition is not as strange as it might appear at first blush. Sentry was expressed to be under an obligation to perform condition (v) promptly and in good faith once all other conditions had been met. Condition (vi) provided for the delivery of any reasonably requested lien releases. Condition (vii), which was also subject to an obligation of prompt compliance in good faith, was for the delivery of any reasonably requested guarantees or legal opinion; and condition (viii) was for the filing by Farnum of the Notice of Transfer of Claim pursuant to Rule 3001(e) with the US Bankruptcy Court. This last condition (which would appear to operate only post completion) is a reference to an order made by Judge Lifland on 10 November 2010 providing for the registration of transfers of BLMIS SIPA claims and for disputes arising in connection with transfers of such claims to be resolved by the US Bankruptcy Court.

[12] At the commencement of the hearing none of conditions (ii), (iii) or (v) to (viii) had been satisfied.

[13] In the final section of the agreement, entitled 'Miscellaneous', there is a provision in these terms:

> Subject to Seller's exercise (in Seller's own discretion) of its fiduciary duties or obligations as court-appointed liquidator, Seller shall endeavor to obtain promptly the approval of the BVI Court of the terms and conditions of this Trade Confirmation.

Sentry is not, of course, a court appointed liquidator, nor does it owe any fiduciary duties or obligations, but the parties were content to treat this provision as binding the Liquidator even though he is not a party to the Trade Confirmation.[11] It is described by the Liquidator as a 'fiduciary out'.[12] Although Farnum objected to the term, I shall adopt it as a convenient description of the first limb of this provision. I shall refer to the second limb as the approval obligation.

[14] The Liquidator has never endeavoured to obtain the approval of this Court to the terms and conditions of the Trade Confirmation in compliance with the approval obligation. So far from that, he has invited the Court, on one occasion, to declare him released from performance by reason of the fiduciary out and in circumstances where he contended that the value of the allowed claim had materially increased (an application which was made without notice and which I refused) and, on another, for directions that he be permitted to seek the sanction of the US Bankruptcy Court on the grounds that such sanction was sure to be refused, thus preventing completion of the sale. That application was also made without notice and which was similarly refused.

[15] The Trade Confirmation contains elaborate provisions regarding the setting up of an Escrow Account as soon as reasonably practical after public disclosure of the settlement agreement between Sentry and the Trustee. Although the evidence shows that this event had occurred by 19 May 2011,[13] neither party has taken any steps to establish any such account.

[16] I should mention some other terms of the Trade Confirmation.

[17] First, wording identical to that of the fiduciary out is used to qualify two other obligations of Sentry (or, more accurately, of the Liquidator). The first is an obligation of confidentiality and the second is an obligation, after completion, to comply with provisions, to be contained in the assignment document, obliging the Liquidator to observe the terms of the Settlement Agreement made between the Liquidator and the Trustee or the orders of the US Bankruptcy Court or the BVI Court. Each of these obligations is expressed to be subject to [the Liquidator's] exercise (in [the Liquidator's] sole discretion) of [his] fiduciary duties or obligations as court-appointed Liquidator.' How the exercise of such duties could excuse disobedience to the orders of the US Bankruptcy Court or of this Court was not explored at the hearing before me. Thus it can be seen that whenever the Trade Confirmation purports to impose an obligation on the Liquidator personally, that obligation is always qualified by the fiduciary out, regardless of the nature of the obligation in question and (in one instance) regardless of whether its insertion made any sense.

[18] Secondly, the Trade Confirmation stipulated that time was of the essence and there was some discussion of this term in relation to the word 'promptly' where it occurs in the approval obligation. I can say straight away that in my judgment the 'time of the essence' provision applies, if at all,[14] to

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[11] subject to Sentry's submission that none of the terms of the Trade Confirmation had ever achieved binding effect

[12] an expression familiar to New York lawyers intended (where effective) to give fiduciaries the right in specified circumstances not to proceed with their obligations under a contract

[13] paragraph 39 of the first affidavit of James F Mooney

[14] it was Judge Bellacosa's opinion that as a matter of New York State law it could not apply even to these provisions

those parts only of the Trade Confirmation which are conditioned upon specific time limits.[15] It has no effect upon the ordinary meaning of the word 'promptly' where it occurs in the approval obligation, nor, with respect to Professor Perillo, one of the experts on New York State contract law who assisted the Court on this occasion, can I accept that it somehow adds an element of urgency to the Trade Confirmation taken as a whole.

The application

[19] The Liquidator having made no application to secure this Court's approval of the terms and conditions of the Trade Confirmation, on 21 October 2011 Farnum issued this application, to which both Sentry and the Liquidator are parties, seeking an order that they carry out their obligations under the Trade Confirmation and in particular their obligations arising out of conditions (ii) (approval by this Court of the terms of the Trade Confirmation and form of Assignment of Claim) and (iii) (approval by both this Court and the US Bankruptcy Court of 'the assignment').

[20] At the hearing it became clear that the relief requested was rather different. Ms Prevezer QC, who appeared together with Mr Richard Evans and Ms Dawn Smith for Farnum, asked me to approve the Trade Confirmation as a binding agreement and to direct the Liquidator to seek the approvals required by the Trade Confirmation of the US Bankruptcy Court. Mr Paul Girolami QC, who appeared together with Mr William Hare for Sentry and the Liquidator, protested that the relief as sought at the hearing was not the relief sought in the originating application, but in my judgment the relief now sought is a sub-set of the relief claimed in the application and is within the scope of section 273. It is true that the upshot will be that the Court will be treating an application for approval as having been made, rather than merely reversing the Liquidator's decision not to make one, but it does not seem to me that that affects the jurisdiction to make the order sought. Mr Girolami QC opposed the suggestion that I should approve the Trade Confirmation, but he had no objection to a direction that the Liquidator approach the US Bankruptcy Court, provided that he was not positively directed to seek that Court's approval for the transaction. I shall have to return to this aspect of the matter at the end of this judgment.

The evidence

[21] There was some evidence of fact. The Liquidator summarised the history of the matter, evidence from which the opening section of this judgment is largely derived. Mr James F Mooney, a signatory of Farnum and director of Baupost LLC ('Baupost'), a fund through which Farnum is held, gave evidence as to the dealings with the Liquidator leading up to the entry into the Trade Confirmation and as to the hiatus which followed. He also gave evidence which went to the Liquidator's knowledge, as at 14 December 2010, when the Trade Confirmation was signed, of the likelihood of a significant increase in the funds available to the Trustee as a result of the then anticipated settlement with the estate of Mr Picower. The purpose of this evidence seemed to be to show that the Liquidator knew when the agreement was entered into that it might turn out that he

[15] the 'Settlement Date', which must occur within two business days of satisfaction of the conditions to which the Trade Confirmation is subject; Farnum's right to terminate the agreement if the BVI Court has not approved the Trade Confirmation by 11 February 2011; and an obligation on Farnum to pay the price within 5 business days if Farnum elects to complete following a settlement between Sentry and the Trustee occurring after an Escrow Return Date (as defined)

had sold cheap. I find as a fact that he did, but that seems to me to be irrelevant to the construction of the Trade Confirmation or to the resolution of the question whether the Liquidator is entitled, as he frankly says he wishes, to walk away from it. The same goes for evidence given by Mr Mooney of the consequences for Sentry of entering into the Trade Confirmation (locking out risk of fluctuation in value of the SIPA claim). Similar (although more anecdotal) evidence was given by Mr McKee, an investment analyst with Baupost, who was more closely involved with the Liquidator on the ground in the run up to the closing of the Trade Confirmation, which for the same reason I found of no assistance. I do not intend, therefore, to say any more than this about the factual evidence.

[22] Of quite different significance was the expert evidence of New York State contract law and of United States bankruptcy law which the Court had the privilege and pleasure of receiving during the hearing.

[23] Professor Joseph M Perillo gave evidence of New York State contract law on behalf of Farnum. He is Distinguished Professor of Law, Emeritus, at Fordham University Law School. He is the author, together with JD Calamari, of 'The Law of Contracts' and has revised, alone or jointly, several volumes of Corbin on Contracts and supervised editorially the revision of other volumes of that work. He holds a number of distinguished advisory posts.

[24] Professor Perillo was matched in distinction by Judge Joseph W Bellacosa, who gave evidence of New York State contracts law on behalf of Sentry. He served as Judge of the Court of Appeals of New York State between 1987 and his retirement as Senior Associate Judge in 2000. He served as Dean and Professor of Law at St John's University Law School.

[25] Charles D Axelrod, Esq, gave evidence for Farnum on relevant parts of US bankruptcy law and of the separate, although related, law of and procedures under SIPA. He is Adjunct Professor of Law at Thomas Jefferson School of Law and a former partner of Gibson, Dunn & Crutcher. He subsequently became senior shareholder of Stutman, Treister & Glatt, Professional Corporation, a boutique firm specialising in insolvency and matters. He has served three times as a SIPA trustee.

[26] Sentry's US bankruptcy law expert was retired Judge Hon Melanie L Cyganowski, now in practice as a partner of Otterbourg, Steindler, Houston and Rosen PC. She was a US Bankruptcy Judge for the Eastern District of New York between 1993 and 2007 and Chief US Bankruptcy Judge for the last three of those years. She told me that she had only once been reversed on appeal. She, too, is an adjunct Professor at St John's University School of Law.

[27] Each expert witness produced a separate report and each pair of witnesses produced a joint report carefully setting out the areas of agreement and disagreement between them and explaining the reasons for those differences. It goes without saying that each expert witness gave his or her oral evidence with the greatest of care and clarity. The Court owes a debt of gratitude to each of them for the assistance and guidance which it has derived from their testimony and scholarship.

New York State contracts law

[28] It is important to appreciate that Professor Perillo and Judge Bellacosa gave their evidence without any consideration of the impact (if any) which US bankruptcy law might have upon their conclusions, although they agreed that in case of conflict New York State law would yield to federal law under the supremacy principle.

[29] With that qualification, Professor Perillo and Judge Bellacosa agreed that the Trade Confirmation was of immediate binding effect and that the obligations which it contained were subject to an implied covenant of good faith and fair dealing. They also agreed that under New York State law the fact that a bargain subsequently turned out to be less advantageous for one party than he had contemplated at the time of closing did not excuse that party from performance. Both experts considered that the approval obligation had contractual effect. The disagreement was about the effect of the fiduciary out to which it is subject. Professor Perillo's view was that the fiduciary out was, as he put it, trumped by the operation of the covenant of good faith and fair dealing. In support of this opinion he relied upon a number of authorities, of which not all were examined during the course of evidence. The extracts from certain of those authorities show that it is the law of New York that where a contract confers a sole discretion on one of the parties to it, the exercise of that discretion is subject to the implied obligation of good faith;[16] other authorities relied upon by Professor Perillo are to the effect that sole discretion does not confer a right to act for any reason whatsoever, no matter how arbitrary or unreasonable.[17] I did not understand Judge Bellacosa to differ from that part of Professor Perillo's analysis.

[30] Where, in my judgment, the experts diverged was in their contrasting views about whether it would contravene the duty to act in good faith for the Liquidator to rely upon the fiduciary out in circumstances where to do so would deprive Farnum of the benefit (or 'fruits') of the Trade Confirmation. Professor Perillo's opinion was that if a decision by the Liquidator not to seek the approval of this Court would deprive Farnum of the benefit of the Trade Confirmation, then that would amount to a breach of the implied term which the Court would intervene to prevent or compensate. The opinion of Judge Bellacosa was that if a contract provides that, in specified circumstances, one party has the right in his sole discretion to bring it to an end, then provided that the right is not exercised arbitrarily or irrationally no breach of contract is involved. He said (I paraphrase – I hope accurately) that the Trade Confirmation is an agreement to sell subject to the Liquidator's right (if exercised in good faith and, thus, not arbitrarily) not to seek the approval of its terms and conditions by this Court and that provided that reliance by the Liquidator upon the fiduciary out was in good faith and not irrational or arbitrary, neither the Liquidator nor Sentry would be in breach of contract in not seeking approval of the terms and conditions of the Trade Confirmation by the BVI Court.

[31] At the end of the day I do not think that it is critical, for reasons which I will explain in a moment, which of these two analyses I prefer. Given the great care with which the experts approached the problem, however, I think that it would be discourteous of me not to give at least an indication as to which approach I find the more attractive. Broadly speaking, I prefer the approach of Judge

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[16] **Sweetheart Cup Co., Inc. v Buchberg Investment Holdings, Inc.**, 2005 WL 1515405 (SDNY 2005); **Travellers Intn'l, AG v Trans World Airlines, Inc.** 41 F.3rd 1570, 1575 (2nd Cir. 1994)

[17] **Tymshare, Inc. v Cowell** 727 F.2nd 1145, 1154 (DCCir 1984)

Bellacosa on this part of the case. Professor Perillo did not cite any New York authority for the proposition that a party to a contract with the benefit of an option in certain circumstances to resile from it prior to completing performance could not, as a matter of law, do so. I accept, of course, that in what must be the rare cases where such an option is available to a contracting party, the option must, as a matter of New York law, be exercised in good faith and not arbitrarily or irrationally. The difficulty which I felt about accepting the analysis of Professor Perillo *in toto* was that it seemed to me to rob the fiduciary out of what little contractual purpose or effect it may have.

[32] That still leaves the question what is the effect of the Liquidator's refusal to approach the Court for approval of the terms and conditions of the Trade Confirmation. The answer, in my judgment, is to be found in Judge Bellacosa's opinion that the failure of the Liquidator to approach the Court had no effect on the binding nature of the Trade Confirmation which, in his view, continued in full force and effect notwithstanding the fact that the Liquidator had not sought approval of its terms and conditions and could not be criticised for not having done so. He went on to say that that would remain the position until (as I have it in my note) 'resolution of approval or non-approval.' I have no hesitation in accepting that evidence, which also disposes of Professor Perillo's point that a failure on the part of the Liquidator to seek the approval of the BVI Court would deprive Farnum of the fruits of the bargain. Judge Bellacosa's approach provides the insight that the fruits of the Trade Confirmation are not the obtaining of the approval of this Court to its terms and conditions, but the completion of an assignment at the agreed price.

[33] It will be noticed that so far as practical outcome is concerned, the different approaches of Professor Perillo and Judge Bellacosa yield the same result. Whichever route is taken, failure or refusal on the part of the Liquidator to seek the approval of the BVI Court to its terms and conditions leaves the contract on foot. Both experts are agreed that the fiduciary out to which the approval obligation is subject is no more a licence to abort the Trade Confirmation than is the fiduciary out applied to the duty of confidentiality or to the duty to comply post completion with the terms of the Settlement Agreement which has been reached with the Trustee and with any relevant Court orders. The fallacy in the Liquidator's position is to elevate a merely subordinate provision of the Trade Confirmation into something which neither expert suggested that it was – an option to bring the entire agreement to an end.

[34] Since it cannot have been the intention of the parties that the contract would continue indefinitely, with the Liquidator perpetually unable to sell the claim to anyone other than Farnum and Farnum perpetually bound to acquire it provided that the 'Other Terms of Trade'[18] were satisfied, it must further follow that if one party does not seek 'resolution of approval or non-approval,' that it is open to the other to initiate the process, which is what Farnum has done in bringing the present application. There is no provision in the Trade Confirmation reserving to the Liquidator the exclusive right to approach the BVI Court for approval of the terms and conditions of the Trade Confirmation and neither expert suggested that that was the position.

[35] Mr Girolami QC pressed me with the decision of the Privy Council in **Marley v Mutual Security Merchant Bank and trust Co Ltd.**[19] But that was a case of a contract whose binding effect was expressly conditioned on Court approval. The present case (subject to the impact of US

[18] see paragraph [11] above
[19] [1991] 3 All ER 198

bankruptcy law) involves a contract binding *ab initio* and which in the opinion of the Liquidator's own expert remains on foot.

[36] This conclusion makes it strictly unnecessary for me to consider the true construction and effect of the fiduciary out itself, but since the issue naturally occupied a considerable amount of time and energy, I shall express a view on the questions that were canvassed.

[37] Both Professor Perillo and Judge Bellacosa were of the opinion that it was entirely a matter for this Court to determine what was the nature of the fiduciary duties to which the fiduciary out refers. If I were to do that by reference to BVI law, it would turn out that none of the duties classically treated by BVI law as fiduciary (the duties to avoid conflicts of interest, to make no personal profit, to be loyal to the interests of the company in liquidation and its stakeholders) would or could have any impact upon a decision by the Liquidator whether or not to seek BVI Court approval. It seems to me that the parties cannot have contemplated such an absurd result and in my judgment the proper interpretation of the fiduciary out is to treat the word 'fiduciary' (in its strict BVI law sense) as surplus. Parties contracting under New York law on the advice of New York attorneys would not and could not be expected to know the precise significance given by BVI law to the word 'fiduciary.' Many of the cases to which I was referred during the course of the hearing showed that it is usual in decisions of the Courts of the State of New York and of the US Bankruptcy Court to refer to bankruptcy trustees as fiduciaries, without more, and to describe the whole battery of duties to which they are subject as fiduciary duties. In the context of this agreement, therefore, it seems to me that the expression should be construed in harmony with what would be the understanding of parties as to the meaning of the expression under New York or US bankruptcy law. This can be done by blue-penciling the word 'fiduciary.'

[38] It follows that if it is (as I accept that it is) the Liquidator's honest opinion that endeavouring to obtain BVI Court approval for the terms and conditions of the Trade Confirmation would be contrary to his duty generally towards stakeholders in his conduct of Sentry's administration, then it seems to me that he is absolved by the fiduciary out from the requirement to do so. But that is all that he is absolved from and his failure to seek approval has no other effect contractually.

[39] In particular, the fiduciary out does not entitle the Liquidator to abandon the contract and deal with the claim in the market. That was made clear not only by Professor Perillo and Judge Bellacosa but also by Judge Cyganowksi in paragraph 18 of her report, as expanded upon in her oral evidence. That position would be reached, as both Professor Perillo and Judge Bellacosa agreed, only if this Court or the US Bankruptcy Court *refused* to grant one (or more) of the approvals still outstanding and required by the Other Terms of Trade,[20] thus making it impossible for the Trade Confirmation to go unconditional.

[40] I therefore find, approaching the question purely as a matter of the law of contract of the State of New York, that the Trade Confirmation is valid and subsisting. In making that finding I do not overlook the fact that the New York State Courts would in practice take account of federal law where (as in the present case) that was in play.

[20] summarised in paragraph [11] above

US bankruptcy law

[41] The significance of US bankruptcy law for present purposes is, as I have said, that Sentry's liquidation has been recognised by the US Bankruptcy Court as a foreign main proceeding. Further, in so recognising it, Judge Lifland went on to make an order under 11 USC § 1521(5) entrusting the administration or realisation of all or part of Sentry's assets within the territorial jurisdiction of the United States to the Liquidator.

[42] 11 USC § 1520(a)(2) provides that § 363 of 11 USC applies to the transfer of an interest in property of the debtor that is within the territorial jurisdiction of the United States to the same extent that the section would apply to property of an estate. 11 USC § 1520(a)(3) provides that unless the [US Bankruptcy] Court otherwise orders, the foreign representative may operate the debtor's business and may exercise the rights and powers of a trustee under § 363 (and under another section of 11 USC which is not germane for present purposes). There has been no order of the US Bankruptcy Court to the contrary.

[43] 11 USC § 363 allows bankruptcy trustees to make dispositions of a company's property in the ordinary course of business without reference to the Court in cases where (as here) the trustee is authorised to carry on its business. Dispositions of property outside the ordinary course of business, however, may be made only after notice and a hearing (§ 363(b)(1)). It was common ground that in the absence of objection it is not necessary to obtain a Court order before making a disposal outside the ordinary course of business.

[44] There was considerable debate at the hearing about whether the Trade Confirmation is caught by § 363 at all and, if it is, whether the agreement to sell the SIPA claim is a transaction in the ordinary course of business. Mr Girolami QC, supported by the opinion of Judge Cyganowski, submitted that the Trade Confirmation was caught by the requirement of notice and a hearing and went on, relying upon three decisions in the US Bankruptcy Court for the Southern District of New York, to submit that as a result the Trade Confirmation has no binding effect unless and until it has been approved by the US Bankruptcy Court, so that the Liquidator is able, as things stand, to resile from it (something which he has not notified Farnum that he has purported to do). Since it is the opinion of the two experts on New York State contract law that the New York State Courts would defer to federal law on the impact upon the Trade Confirmation of 11 USC § 363, the consequence, according to Mr Girolami QC, is that there is no agreement in existence for this Court to approve (or disapprove) and that Farnum cannot have *locus standi* to make the present application because it has nothing about which it can nourish a 'grievance' – it never having acquired any rights in the first place.

[45] Ms Prevezer QC, relying on the opinion of Mr Axelrod, disputed this conclusion and submitted that the approval of the US Bankruptcy Court required by the Trade Confirmation was the approval of that Court in the exercise of its SIPA jurisdiction, in which 11 USC § 363 is not engaged, not in the exercise of its Chapter 15 jurisdiction. Alternatively, if that is wrong, that in the context of Chapter 15 recognition, a purposive construction must be given to 11 USC § 1520(a) so as to apply only the permissive, rather than the restrictive elements of § 363 in a Chapter 15 setting. Mr Axelrod was also of the opinion that the Trade Confirmation was or involved a transaction in the ordinary course of Sentry's then current business.

[46] Resolution of these issues would require me to decide, as a minimum and as things now stand, (a) whether only the permissive elements of § 363 are imported into Chapter 15 by 11 USC § 1520; (b) whether the Trade Confirmation/assignment is a transaction in the ordinary course of the business of Sentry; (c) whether Sentry's claim in the SIPA liquidation of BLMIS is properly to be described as an interest in property within the territorial jurisdiction of the United States within the meaning of 11 USC § 1520(a)(2); and (d) whether, if all these questions are to be answered in favour of the Liquidator, Farnum has nothing capable of being approved by this Court in Sentry's liquidation here in the BVI.

[47] If I had been able to reach the conclusion, on the evidence which I have heard, that the answer to these questions was plain and obvious, I would have felt obliged to accept Mr Girolami's submission. Not only does it not seem to me that the answers to questions (a) to (c) are plain and obvious, but even if they are answered in the sense for which Mr Girolami QC contends, I cannot accept his conclusion – that there is nothing for me to approve or for Farnum to be aggrieved about. Neither bankruptcy expert addressed the extra-territorial reach of § 363 and I am not prepared to assume, without more, that it is an effect of the provision (whatever might be its impact on a decision of a Court in New York State) that the Court having carriage of the foreign main proceedings is prevented from treating as binding an agreement entered into by its own officer where it is otherwise satisfied of its validity. Unless persuaded, on the totality of the New York State contract law evidence together with the US bankruptcy law evidence, that the Trade Confirmation is void for all purposes worldwide (which I am not) I should not accede to a submission urging me to refuse approval here on that basis and thus deprive the Trade Confirmation of all effect, present or potential. Furthermore, even if Judge Cyganowski is correct on every point, Farnum must at the very least have a right to put the Trade Confirmation before the US Bankruptcy Court and to urge its approval. At any rate, it was not suggested that it has not. That, it seems to me, is more than a mere *spes*. It is a right pregnant with value and well capable, in face of the Liquidator's stubborn inertia, of affording a grievance to Farnum capable of supporting an application under section 273 of the Act.

[48] In these circumstances it is not only unnecessary, but, it seems to me, it would be unwise for me to express views on the issues that will arise for determination by the US Bankruptcy Court when, as I propose to direct, the matter is brought before it by the Liquidator. If that Court decides, for whatever reason, to withhold approval of the Trade Confirmation, that will bring the Trade Confirmation to an end, but I do not propose to contemplate doing that at long range by deciding here issues which are properly ones for the US Bankruptcy Court. This is not to suggest that I have not been immensely assisted by the evidence of Mr Axelrod and Judge Cyganowski. Indeed, it is only because I have had the benefit of their evidence that I have been able to reach the conclusions which I have come to in this section of this judgment.

Whether this Court should approve the Trade Confirmation

[49] As a matter of BVI insolvency law, the Liquidator did not require the approval of this Court in order to cause Sentry to enter into or complete performance of the Trade Confirmation. He appears to have decided to seek it (before he changed his mind) in order to protect himself from criticism for having entered into the agreement. Such a step is frequently taken by liquidators or trustees even though not strictly required where transactions, as here, are particularly significant. In such a case the Court will start with a predisposition to assume that a professional man, such as the Liquidator, even though wanting the comfort of Court approval, will not be asking it to approve a bargain with

which he was not commercially satisfied as made. In such circumstances, the Court would ordinarily withhold approval only if it identified a feature of the sale overlooked by the Liquidator and which rendered the bargain defective as made or which it considered made completion of the transaction objectionable on policy grounds.[21] No such considerations arise here. The approach should be no different merely because in the events which have happened it is Farnum which is obliged to seek approval of the Liquidator's bargain.

[50] On a factual basis, also, I have no doubt that this Court should approve the Trade Confirmation. It was negotiated at arms length by sophisticated parties with full awareness of the market and with the benefit of skilled professional advice. Subject to satisfaction of the conditions to which it is subject, it was obviously intended to be completed or consummated in short course. As a matter of BVI insolvency law, which in this respect operates upon the same principles as those set out in **In re Gennerich's Will**,[22] to which my attention was drawn by Professor Perillo, the fact, if it is of any significance,[23] that the market has risen since the transaction closed is irrelevant. All other considerations aside, it seems to me that it would be unwise for the Court to refuse approval and thus destroy the bargain unless it had before it compelling evidence that the Liquidator is (not might be) in a position to engage with a purchaser presently willing to contract on terms no less advantageous than those of the Trade Confirmation and at a higher price. I have no such evidence.[24]

Conclusion

[51] I therefore approve the terms and conditions of the Trade Confirmation, from which it follows that I also approve the assignment to Farnum of Sentry's claim in the SIPA liquidation of BLMIS at the price stipulated for in the Trade Confirmation. I will direct the Liquidator to take the necessary steps to bring before the US Bankruptcy Court the question of approval (or non-approval) by that Court of the Trade Confirmation. 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. The necessary application(s) must be made within fourteen days after the handing down of this judgment. Unless the US Bankruptcy Court directs otherwise, Farnum is to be notified of all hearings and supplied with all materials (other than privileged materials) to be used in the course of such application(s). I am not directing the Liquidator to take any particular stance in the US Bankruptcy Court. I know that I can rely upon him to conduct himself mindful of and discharging all of his duties, in his capacity as a foreign representative, to that Court.

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[21] this is not intended to be an exhaustive list

[22] 125 NYS 2d 572, 576 (NY Sur 1953)

[23] in the absence of any evidence that there is currently any offeror ready and willing to buy the SIPA claim for more than 32.125 cents in the dollar and on terms no less advantageous to Sentry than the terms of the Trade Confirmation

[24] I do have evidence, which I accept, that following the announcement of the Picower settlement the Liquidator has received unsolicited inquiries from a number of institutions interested in acquiring the SIPA claim, but that is not the same thing

[52] The question was raised in the course of the hearing whether any such application should be made before the US Bankruptcy Court sitting in the exercise of its SIPA jurisdiction or in the exercise of its Chapter 15 jurisdiction. It seems to me that that is a question for the US Bankruptcy Court.

Commercial Court Judge

27 March 2012