EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2014/0026

In The Matter of The Insolvency Act

And In The Matter of The Liquidation of Fairfield Sentry Limited

BETWEEN:

FAIRFIELD SENTRY LIMITED (In Liquidation)

Appellant

and

FARNUM PLACE LLC

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal

Appearances:

Mr. Andrew Westwood for the Appellant
Ms. Sue Prevezer, QC, with her, Mr. Richard Evans for the Respondent

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2018: February 28;
June 13.

Commercial Appeal – Costs – Variation of costs order – Part 64 of Civil Procedure Rules 2000 – Whether there was a material change of circumstances to warrant revisiting the judge's costs order – Whether the decision of the United States Court of Appeals constitutes a material change of circumstances – Whether the costs order can be sustained in view of the change of circumstances – Who was was the overall successful party in light of the change of circumstances – Exercise of discretion afresh by Court of Appeal to vary costs order.

Fairfield Sentry is a British Virgin Islands ("BVI") incorporated company which operated as a feeder fund for Bernard L Madoff Investment Securities LLC ("BLMIS"). BLMIS went into

liquidation under the United States Securities Investor Protection Act ("SIPA") and the liquidation was conducted in the United States Bankruptcy Court under the supervision of Judge Lifland. Farnum Place LLC ("Farnum") sought an order from the Commercial Court in the BVI (the "Commercial Court") that Fairfield Sentry, by its liquidator, carry out certain obligations recorded in an agreement (the "Trade Confirmation") entered into by Fairfield Sentry and Farnum, for the purpose of confirming the sale of Fairfield Sentry's claim in the liquidation of BLMIS to Farnum. Farnum also sought the approval by the Commercial Court of the terms of the Trade Confirmation as well as approval by both the Commercial Court and the United States Bankruptcy Court of the assignment of Farnum's claim brought under SIPA.

A learned judge of the Commercial Court approved the Trade Confirmation as well as the assignment of the SIPA claim. Farnum's expert, Professor Axelrod, gave testimony before the Commercial Court in favour of Farnum's position as to the nature and scope of United States Bankruptcy law. The judge accepted the opinion of Professor Axelrod that the BVI court was required to approve the Trade Confirmation. The judge directed Fairfield Sentry to make the relevant application to the United States Bankruptcy Court. This was done and that application was heard by Judge Lifland, who held, that there was no basis on which the Trade Confirmation should be disapproved because the sale of the SIPA claim was not reviewable under the United States Bankruptcy Code.

Thereafter the learned judge of the Commercial Court, in dealing with the outstanding issue of costs in respect of the originating application, made an order awarding costs to Farnum on the basis that Farnum was overall the successful party before the Commercial Court and before Judge Lifland.

Subsequent to the decision of the judge on costs, Fairfield Sentry appealed Judge Lifland's decision to the First District Court. That court affirmed Judge Lifland's decision. A further appeal to the United States Court of Appeals for the Second Circuit (the "SCCA") held that the sale of the SIPA claim was subject to review, thereby overturning the previous decision of the District Court. The SCCA's decision is at variance with Professor Axelrod's expert opinion which was accepted in the Commercial Court.

As a consequence of the decision of the SCCA, Fairfield Sentry has appealed to this Court for a variation or reversal of the costs order of the judge of the Commercial Court on the basis of a material change of circumstances. Specifically, they assert that the learned judge had relied on and accepted Professor Axelrod's expert opinion, which was subsequently rejected by the SCCA and that in awarding costs to Farnum, the judge paid regard to that expert opinion and the judgment of Judge Lifland, the latter which has been ultimately overturned. The issue before this Court is whether this Court has jurisdiction to reverse or vary the costs order made by the learned judge in view of the subsequent events and if so, whether the Court should exercise its discretion to do so.

Held: allowing the appeal to the extent of varying the costs order of the learned judge of the Commercial Court by disallowing the costs of the expert opinion of Professor Axelrod and; ordering that costs of this appeal be assessed if not agreed to within 21 days, that:

1. As a general rule, the successful party is entitled to receive its costs. In deciding who is the successful party, the court must have regard to all of the circumstances of the case. A successful party, for the purposes of the costs order, is to be determined in a commonsensical way and not as a technical term. Having determined who is the successful party, the court has the discretion to award only a specified proportion of the costs.

   Delta Petroleum (Nevis) Limited v OOJJ'S **Ltd (Doing business as OOJJ's** Service Station) SKBHCVAP2013/0016 (delivered 10th October 2016, unreported) followed; Rule 64.6(2) Civil Procedure Rules 2000 applied; Rochamel Construction Limited v National Insurance Corporation SLUHCVAP2003/0010 (delivered 24th November 2003, unreported) followed.

2. The appellate court has the discretion to revisit the costs order of the judge of first instance if it can be shown that there was a material change of circumstances. In the present case, the judge relied on Professor Axelrod's expert opinion and accepted Judge Lifland's decision as correct in awarding costs to Farnum. As a consequence of the SCCA's decision, Professor Axelrod's opinion on United States Bankruptcy law has been rejected and Judge Lifland's judgment has been overturned. The present position is therefore different from what it was when the judge rendered his judgment on costs. Cumulatively, these amount to a material change of circumstances.

   Chanel Ltd. v F. W. Woolworth & Co. Ltd. And Others [1981] 1 WLR 485 applied; Thevarajah v Riordan and others [2015] UKSC 78.applied; Rule 64.6 Civil Procedure Rules 2000 applied.

3. In light of the material change of circumstances, Farnum can no longer be regarded as the overall successful party. It therefore falls to this Court to exercise its discretion afresh, as a matter of principle. In doing so, it would be unfair to allow Fairfield Sentry to pay Farnum the costs of Professor Axelrod's expert opinion. Accordingly, Farnum should bear the costs of Professor Axelrod's opinion.

   Adamson v Halifax plc [2002] All ER (D) 463 (Jul). applied; Rule 64.6(3) Civil Procedure Rules 2000 applied.

JUDGMENT

[1] BLENMAN JA: This is an appeal against the decision of a learned judge of the Commercial Court in the British Virgin Islands (the "Commercial Court"), in which he awarded costs against Fairfield Sentry (in liquidation) ("Fairfield Sentry") in favour of Farnum Place LLC ("Farnum"). Fairfield Sentry asserts that in light of a material change of circumstances, this Court ought to reverse the costs order of the learned judge as the

learned judge would have granted costs in their favour instead, had he been made aware of those events. Farnum resists this appeal and argues that they are entitled, in any event, to the costs that were awarded by the judge. They say that the new developments did not impact the costs that were awarded by the judge, since in any event they have prevailed.

[2] I will now address the background in some detail so as to place the appeal into context.

Background

[3] Fairfield Sentry, a British Virgin Islands incorporated company, operated as a feeder fund for Bernard L Madoff Investment Securities LLC ("BLMIS"), the latter being a company which went into liquidation under the United States Securities Investor Protection Act ("SIPA"). The liquidation was conducted in the United States Bankruptcy Court for the Southern District of New York and was supervised by Judge Lifland. On 13th December 2010, Fairfield Sentry and Farnum entered into an agreement (the "Trade Confirmation") confirming the sale to Farnum of Fairfield Sentry's claim in the liquidation of BLMIS under the SIPA, subject to the satisfaction of certain conditions.

[4] By originating application dated 27th October 2011, filed in the Commercial Court, Farnum sought an order pursuant to section 273 of the Insolvency Act, 2003[1] that Fairfield Sentry, by its liquidator, carry out the obligations under the Trade Confirmation. In particular, Farnum sought an order that Fairfield Sentry take the necessary steps to bring to fruition the agreed actions recorded in the Trade Confirmation, namely the approval by the Commercial Court of the terms of the Trade Confirmation and approval by the United States Bankruptcy Court as well as the Commercial Court of the assignment of its claim under SIPA. Fairfield Sentry initially resisted Farnum's requests in the Commercial Court.

[5] At the hearing of the originating application, Ms. Prevezer, QC, who then appeared on behalf of Farnum, asked the Commercial Court to approve the Trade Confirmation as a binding agreement and to direct the liquidator to seek the approvals required by the Trade

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

Confirmation of the United States Bankruptcy Court. Mr. Girolami, QC who then appeared on behalf of Fairfield Sentry, opposed the application that the Commercial Court should approve the Trade Confirmation, but he had no objection to a direction that the liquidator approach the United States Bankruptcy Court, provided that they were not directed to seek that court's approval of the transaction. There was considerable debate about whether the Trade Confirmation was caught by section 363 of the United States Bankruptcy Code and if it was, whether the assignment of the SIPA claim was a transaction in the ordinary course of business. Fairfield Sentry took the position that the validity of the Trade Confirmation was a matter for the consideration of the United States Bankruptcy Court and not the Commercial Court.

[6] The Commercial Court heard a substantial amount of expert evidence and legal argument on New York State contract law and on United States Federal Bankruptcy law and held that as a matter of British Virgin Islands law, the court should approve the Trade Confirmation and the assignment of the SIPA claim. Accordingly, the learned judge approved the terms and conditions of the Trade Confirmation and the assignment of the SIPA claim at the price stipulated in the Trade Confirmation. The learned judge however, declined to rule on the applicability of section 363 of the United States Bankruptcy Code, but directed the liquidator of Fairfield Sentry to take the necessary steps to bring before the United States Bankruptcy Court, an application for approval or non-approval by that Court of the Trade Confirmation. The judge further directed the question of costs to be addressed at a later date.

[7] Of great significance is the fact that Farnum's expert on United States bankruptcy law, Professor Axelrod, testified as to the nature and scope of that law and supported Farnum's position before the Commercial Court. The learned judge accepted Professor Axelrod's opinion that the Commercial Court was required to approve the Trade Confirmation.[2] This was in the face of the clear resistance by Fairfield's Sentry's expert, Judge Cyganowski in his competing opinion.

[2] The cost of Professor Axelrod's opinion was $237,462.14 United States Dollars. See Schedule of Costs claimed by the Applicant filed on 31st January 2014, Record of Appeal, Part 4.

[8] On the direction of the learned judge, the liquidator of Fairfield Sentry made the necessary application in the United States Bankruptcy Court. The application was heard by Judge Lifland, who, by his judgment dated 10th January 2013, 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.

[9] It is noteworthy that on 5th March 2013, the learned judge of the Commercial Court heard the outstanding issue of costs in respect of the originating application. I will however, return to the essential details of the costs hearing later, since the costs order has been succeeded by several important events in the United States which bear on the issues to be determined. Suffice to say that, the learned judge awarded costs to Farnum on the basis that Farnum was overall the successful party and it is this decision which forms the subject of this appeal. It is important to mention that Fairfield Sentry advocates that the subsequent events, which will be addressed later, indicate that in fact they had won and not Farnum, as the judge had previously thought. They argue that as a consequence, the costs order should be varied, at the very least.

[10] It is appropriate to record at this juncture that, the liquidator of Fairfield Sentry appealed the decision of Judge Lifland to the First District Court which by order, dated 3rd July 2013, affirmed the decision of Judge Lifland but for different reasons. The liquidator of Farfield Sentry then launched a further appeal to the United States Court of Appeals for the Second Circuit (the "SCCA"). By its judgment dated 26th September 2014, the SCCA overturned the decision of the District Court affirming the order of Judge Lifland. The SCCA concluded that the sale of the SIPA 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 was not warranted.

[11] The SCCA's conclusion on the United States Bankruptcy law was at variance with the expert opinion of Professor Axelrod that Farnum had adduced in the Commercial Court and which was accepted as a correct reflection of the law by the learned judge of the Commercial Court. The effect of the SCCA judgment is to undermine the correctness of the legal opinion that was advanced by Professor Axelrod. The SCCA's judgment accords with the position and legal opinion that Fairfield had advanced in the Commercial Court.

[12] In the circumstances, Fairfield Sentry has appealed the costs order of the learned judge. Fairfield Sentry's main complaint is that the learned judge, relied on and accepted the opinion of Professor Axelrod which has subsequently been proven wrong. Fairfield Sentry also contends that in awarding costs to Farnum, the learned judge of the Commercial Court paid regard to the judgment of Judge Lifland and that this latter judgment has been overturned. It is on this basis that Fairfield Sentry submits that this Court should vary or reverse the costs order of the judge.

The Commercial Court – The Costs hearing

[13] Ms. Prevezer, QC, who appeared on behalf of Farnum before the learned judge, submitted that Farnum did not only succeed before the learned judge but it also succeeded before Judge Lifland and Judge Lifland was firmly of the view, as they had submitted, that section 363 of the United States Bankruptcy Code did not apply. She emphasised that Judge Lifland came down in their favour based on the same submissions that were presented to the learned judge of the Commercial Court. Ms. Prevezer, QC told the Court that in relation to Farnum's expert evidence, Farnum should get all the costs in full as Farnum had ultimately succeeded on every aspect of the case. She also told the Court that Farnum's position was that the matter need not have gone to New York because section 363 of the Code was not engaged.

[14] Learned Counsel Mr. Girolami, QC, who then appeared on behalf of Fairfield Sentry, strenuously opposed the application stating that it is simply wrong to say that Farnum was successful on every aspect of the case and that that needs to be reflected in any costs

order that the judge ought to have made. Learned Queen's Counsel, Mr. Girolami said that the main issue on which the majority of the time and in particular costs on experts was spent was on whether or not it was necessary to go to New York, and if it had nit been the position of Farnum that it was unnecessary to go there, the hearing would have been considerably short, and the expense of it would have been very considerably reduced. That is why he said that it is right to reflect properly in any costs order made, the fact that the majority of the time was expended on an issue on which, in reality, Farnum was substantially unsuccessful.

[15] The learned judge of the Commercial Court, having heard the parties' rival contentions accepted Farnum's submissions and summarised the position thus: 'it seems to me that I have to treat that as a total success, and it further seems to me that it's quite impossible for me to apportion success or failure on the various extreme positions that were taken and reflect that in a costs order.'[3]

[16] At pages 24 and 25 of the transcript the learned judge expressed himself thus:

> "The effect of the decision was that this Court approved the Trade Confirmation. I think I added that I also approved the assignment which was envisaged by the Trade Confirmation which also needed the approval of this Court before the contract could become unconditional and decided that the other conditions which turned on the ancillary liquidation being carried on in the Bankruptcy Court in the Southern District of New York should go off for determination there. The result in New York is common ground.
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> "It seems to me that the reality of the situation is that, to use non-legal language, the joint liquidators… on behalf of Farnum Place [Fairfield Sentry] were digging their heels in and attempting by any legitimate means at their disposal to avoid completion of this Trade Confirmation and had to be dragged kicking and screaming to New York [this court] in order for the counter party to make any progress."

[17] Accordingly, the learned judge awarded costs to Farnum, having received "total success" and on the basis that the result in New York being common ground. Fairfield Sentry, in view of the turn of events and being dissatisfied with the learned judge's decision, has

[3] At page 27 of the transcript of the hearing in the Commercial Court

appealed. Fairfield Sentry maintains that insofar as subsequent events have revealed, it is wrong to say that Farnum has had total success or was the successful party and therefore seeks a reversal or variation of the judge's costs order to reflect that in effect, it was successful in view of the subsequent events. Significantly, Fairfield Sentry seeks a disallowance of Professor Axelrod's costs to Farnum for the expert opinion.

[18] I turn now to the issues that arise to be resolved.

Issues

[19] Fairfield Sentry advanced several grounds of appeal against the learned judge's decision which could properly be crystallised into two main issues:

(a) Whether in view of the subsequent events there should be a reversal of the costs order in the Commercial Court; and

(b) If so, what is the appropriate costs order that should be made?

Fairfield Sentry's Submissions

[20] The gravamen of Fairfield Sentry's case was that in light of matters as they are now known, Farnum cannot reasonably be viewed as the "successful party" and thus the costs order made by the learned judge should be reversed. Learned counsel Mr. Westwood, who appeared on behalf of Fairfield Sentry, submitted that at the costs hearing Farnum expressly relied upon, and prayed in aid, the result in the United States as it then stood, namely the decision of Judge Lifland, in support of its submissions that it had "succeeded in full on every aspect of this case". He stated that the learned judge clearly considered the decision of Judge Lifland to be relevant. This, he said was demonstrated by the fact that the judge saw it fit to make express reference to the position in the United States in his judgment, stating that the result in New York was common ground. More importantly, Mr. Westwood submitted that in coming to his decision, the judge accepted and relied on Professor Axelrod's expert opinion on the United States bankruptcy law.

[21] Mr. Westwood contended that the decision of Judge Lifland at the time of the hearing before the learned judge was common ground. Indeed, Judge Lifland had held that the sale of the SIPA claim was not subject to review under section 363. However, that result has now been overturned by the decision of the SCCA, which has held consistent with Fairfield Sentry's position and in accordance with its expert opinion which was advanced before the learned judge and contrary to Farnum's position that, the sale is subject to review under section 363. He emphasised that the result in New York is therefore fundamentally different now as compared to when the costs hearing took place before the learned judge.

[22] Mr. Westwood argued that Farnum has in effect lost and that much time was spent on Professor Axelrod's expert evidence which Farnum adduced and has now been proven to be wrong in the SCCA. Mr. Westwood submitted that Farnum's expert evidence persuaded Judge Lifland and was accepted by the learned judge of the Commercial Court but has since been rejected by the SCCA. He said that, contrary to the position as it appeared at the time of the costs hearing, it is Fairfield Sentry and not Farnum that has succeeded on the issue of whether approval of the Trade Confirmation was required. It was always Fairfield Sentry's position that the Trade Confirmation would have to be reviewed under section 363 and this would inevitably lead to a disapproval of the Trade Confirmation. The SCCA has held this position to be correct. Mr. Westwood asserted that there is no reason why Fairfield Sentry should have to pay Farnum's costs of advancing the contrary (and wrong) opinion before the judge of the Commercial Court. He was adamant that Fairfield Sentry has now won based on 'the big picture' and should not have to pay the costs of Farnum's incorrect expert opinion provided by Professor Axelrod.

[23] In these circumstances, Mr. Westwood submitted that in exercising his discretion as to costs, the learned judge took into account and was also influenced by the decision in the United States as it stood at the date of the hearing before him. Mr. Westwood asserted that since the decision has now been overtaken by the decision of the SCCA, it necessarily follows that the judge took into account and gave too much weight to a matter (the decision of Judge Lifland) which has now been proven to be wrong. Conversely, he said that the

judge could not have given, any or any sufficient weight to the decision of the SCCA because it was not known at the time when he made his decision as to costs. He said that it follows that the judge's exercise of discretion is flawed and it falls to this Court to exercise its discretion afresh. He accordingly, urged this Court to allow the appeal against the costs order or at the very least vary the costs order that was made by the judge. Mr. Westwood said that in view of the SCCA's order, the costs order of the Commercial Court below cannot be sustained.

Farnum's Submissions

[24] Learned Queen's Counsel Ms. Prevezer accepted that, as a matter of principle, a subsequent decision or event can impact on a previous decision of the court, including a costs order. She had no objection to this Court having regard to the decision of the SCCA, but her point of contention was that the decision of Judge Lifland did not impact the costs order that was made by the learned judge. Ms. Prevezer, QC said it is immaterial that since the making of the costs order, the SCCA has overturned the ruling of the courts and in any event this is no basis for disturbing the Commercial Court judge's exercise of discretion in making the costs order at the conclusion of the trial. She told the Court that Farnum's submission that it had prevailed before Judge Lifland was of no great weight and that it was made in the context of updating the Court about what had occurred since the trial. She posited that indeed, given that the costs application was filed in April 2012, long before any decision was rendered in the United States, Farnum's submissions were focused on the originating application and not the aftermath of the trial.

[25] Learned Queen's Counsel Ms. Prevezer opined that although the learned judge referred to Judge Lifland's decision in his judgment, the reference was made only in passing and that Farnum won despite what the SCCA held. She submitted that Farnum has won, notwithstanding that the SCCA has held that the Trade Confirmation was invalid. She said that the liquidator of Fairfield Sentry was refusing to go to the Commercial Court to obtain the approval for the Trade Confirmation and that is why the originating application was made before the learned judge.

[26] Ms. Prevezer, QC maintained that there is no basis on which this Court can properly interfere with the exercise of the learned judge's discretion, which was plainly right at the time it was made and remains correct. She told this Court that the fact that the SCCA has made a ruling since the learned judge's order is nothing to the point. The fact remains that the learned judge found in Farnum's favour and against Fairfield Sentry and, in the exercise of his discretion, visited the costs consequences on Fairfield Sentry as he was more than entitled to do in all the circumstances. Accordingly, Ms. Prevezer, QC urged the Court to dismiss the appeal as the learned judge committed no error of principle in the exercise of his discretion. She said that there is no basis upon which the judge's decision can be assailed.

Discussion

[27] In my view, this is a very short point. Stripped of all its niceties, the issues essentially boil down to whether this Court should reverse or vary the costs order made by the learned judge of the Commercial Court in circumstances where he accepted and acted on Farnum's expert legal opinion, provided by Professor Axelrod - an opinion which has since been rejected by the SCCA, as a correct statement of United States bankruptcy law. Connected to this issue is whether the decision of the learned judge can be assailed on the basis that in arriving at his costs order, he relied on the decision of Judge Lifland which has been overturned by the SCCA.

[28] In my judgment, it is useful to outline the general rules about costs and the entitlement to costs contained in Part 64 of the Civil Procedure Rules 2000 ("CPR"). As a general rule arising from CPR 64.6(1), costs follow the event. This means that the successful party is entitled to receive its costs from the unsuccessful party. However, the court has wide discretionary powers to vary the application of the general rule. Indeed, this discretion must be exercised judicially in accordance with reason and justice and in the furtherance of the court's overriding objective of dealing with cases justly. This Court has rendered several decisions including Rochamel Construction Limited v National Insurance Corporation[4] in which it has faithfully applied this principle.

[4] SLUHCVAP2003/0010 (delivered 24th November 2003, unreported).

[29] I turn now to look briefly at additional rules of relevance:

CPR 64.6(1) and 64.6(2) are in the following terms:

> "64.6 (1) Where the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.
>
> (2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs."

[30 It is settled law that the court may make a costs order at any stage in a case, in particular on the hearing of an application.[5] Pursuant to CPR 64.6(2) the court may order a successful party to pay all or part of the costs of an unsuccessful party. Further, CPR 64.6(3) gives the court jurisdiction in particular to award a party only a specified proportion of another person's costs and in deciding who should be made to pay costs, the court must have regard to all of the circumstances of the case. CPR 64.6(6) provides useful guidance on the factors to which the court must have specific regard. If the court departs from the general rule of giving costs to the successful party, reasons are to be provided for the departure.

[31] For the purposes of the costs order, the question of who is a successful party is to be determined in a commonsensical way and not as a technical term.[6] This principle finds support in the decision of this Court in Delta Petroleum (Nevis) Limited v **OOJJ'**S Ltd **(Doing business as OOJJ's Service Station)**.[7] At paragraph 38, the learned Chief Justice Pereira stated:

> "if a court decides to award costs, it must order the 'unsuccessful party to pay the costs of the successful party.' Notwithstanding this, however, as recently opined in the Jamaican case of VRL Operations Limited v National Water Commission and others 'the Court may, of course, depart from the general rule, but it remains appropriate to give 'real weight' to the overall success of the winning party: Scholes Windows v Magnet (No.2) [2000] ECDR 266 at paragraph 268.' The question to be determined, then, is who is the successful or winning party, as only then is the Court likely to approach costs from the right perspective. The question of who is the successful party 'is a matter for the exercise of common sense', given that 'success', for the purposes of the CPR, is 'not a technical term but a

[5] Halsbury Laws of England 5th edn., vol. 12, para. 1738.
[6] See Day v Day [2006] EWCA Civ 415 which applied BCCI v Ali (No. 4) 149 NLJ 1222.
[7] SKBHCVAP2013/0016 (delivered 10th October 2016, unreported).

> result in real life'. On the basis of the foregoing, I accept that the issue of whether the appellant in the case at bar, Delta Petroleum (Nevis) Limited, was the successful party is a matter that must be looked at in a realistic and commercially sensible way."

[32] As I have indicated earlier, the lynchpin of Fairfield Sentry's case was that Farnum should not be regarded as the successful party in light of the material change of circumstances and accordingly the costs order should be varied or reversed. Mr. Westwood's main argument was that Farnum placed substantial reliance on Professor Axelrod's expert opinion and the outcome of the United States proceedings as it stood at the time of the costs hearing, and in making his order, the learned judge took into account and was influenced by that outcome.

[33] It is of significance that learned Queen's Counsel, Ms. Prevezer, in her oral submissions, before this Court, agreed that as a matter of principle, a subsequent decision or order by another court could, in its effect, impact or undermine a costs order that was originally made. The point of departure is that she said that there is no basis for this Court to vary the learned judge's costs order since Farnum had indicated to the judge that even if they were to fail in the appeal against Judge Lifland's judgment, Farnum was still entitled to the costs before the learned judge. She said that in this regard, the judgment of Judge Lifland was irrelevant.

[34] I find the arguments advanced by Mr. Westwood on this point to be attractive and persuasive. It is clear that Farnum placed substantial reliance on the outcome of the United States proceedings as it stood at the time of the costs hearing, and in making his order, the learned judge of the Commercial Court took into account and was influenced by that outcome. In my view, Farnum's emphasis on its victory before Judge Lifland is clear from its submissions that it "succeeded in full on every aspect of this case" and that "[Judge Lifland] was firmly of the view, as we had submitted to your Lordship, that section 363 of the Bankruptcy Code didn't apply, and that was the argument we put to [the learned judge]".

[35] Based on a close reading of the transcript as a whole, another thing that is pellucid is that the learned judge considered and was influenced by Professor Axelrod's expert opinion and the decision of Judge Lifland. I am far from persuaded, as Ms. Prevezer, QC suggested, that the learned judge's reference of the decision of Judge Lifland was 'only made in passing' and the reversal of Judge Lifland's decision is therefore immaterial. I cannot for a moment accept this submission based on a reading of the record of the hearing. The learned judge, irrespective of how he may have expressed it, was at all times influenced by Professor Axelrod's expert opinion on United States bankruptcy law and the decision of Judge Lifland, the latter which has since been overturned by the SCCA. Indeed, from statements of the learned judge that Farnum had enjoyed a "total success" and that it was "quite impossible for [him] to apportion success or failure" it can be clearly inferred that the learned judge considered the result in the United States.

[36] In my view, the judge, at the time of the costs hearing, cannot be faulted for accepting the opinion of Professor Axelrod as a correct statement of the law. Indeed, the decision of the SCCA would not have been rendered as yet. In the circumstances, the judge's order can only be revisited if Fairfield Sentry can show that there has been a material change of circumstances. This principle of material change of circumstances was enunciated by the Court of Appeal in Chanel Ltd. v F. W. Woolworth & Co. Ltd. And Others[8] and endorsed by the Supreme Court in Thevarajah v Riordan and others.[9]

[37] In Thevarajah v Riordan and others, Lord Neuberger examined the principle in relation to the court's case management powers in relation to an application or relief from sanctions and cited Lord Dyson MR in Tibbles v SIG plc (trading as Asphaltic Roofing Supplies)[10] :

> "The discretion [exercisable under CPR 3.1(7)] might be appropriately exercised normally only (i) where there had been a material change of circumstances since the order was made; (ii) where the facts on which the original decision was made

[8] [1981] 1 WLR 485.
[9] [2015] UKSC 78.
[10] [2012] 1 WLR 2591

had been misstated; or (iii) where there had been a manifest mistake on the part of the judge in formulating the order."[11]

[38] Further his Lordship opined:

> "…as a matter of ordinary principle, when a court has made an interlocutory order, it is not normally open to a party subsequently to ask for relief which effectively requires that order to be varied or rescinded, save if there has been a material change in circumstances since the order was made. As was observed by Buckley LJ in *Chanel Ltd v FW Woolworth & Co Ltd* [1981] 1 WLR 485, 492-493:
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> > 'Even in interlocutory matters a party cannot fight over again a battle which has already been fought unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter.'"[12]

[39] Applying the above principle to the case at bar, I am fortified in my view that there has been a material change of circumstances and that the costs order of the learned judge can justifiably be revisited, as a matter of principle. I reiterate that the present outcome of the United States proceedings is very different from the outcome as it stood at the time of the costs order that is under appeal and that the "common ground" of the result in the United States proceedings referred to by the judge in his judgment has changed. The result is such that it is no longer a "total win" for Farnum, but rather a win for Fairfeld Sentry in the United States Bankruptcy Court, and a win from which there is no further challenge. This reinforces my acceptance of Fairfield Sentry's argument that there has been a material change of circumstances insofar as it relates to the reversal by the SCCA of Judge Lifland's decision and the Trade Confirmation in the Commercial Court. Critically, the learned judge accepted the opinion of Professor Axelrod on United States bankruptcy law, which has not been accepted by the SCCA as a correct statement of the law.

[40] I make no criticism of the learned judge's approach in accepting the opinion of Professor Axelrod and arriving at the costs order. The question is whether in view of the material change of circumstances that costs order can be sustained. I see no reason why Fairfield Sentry should be made to pay for Professor Axelrod's expert opinion, which has not been

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[11] At para. 15.
[12] At para. 18.

accepted by the SCCA as correct and which in part formed the basis upon which the learned judge came to his decision. In my judgment, it is unfair for Fairfield Sentry to be made to pay the costs of an expert opinion that the SCCA refused to accept and at the very least Farnum should bear the costs of its own expert witness, Professor Axelrod. In light of the material change of circumstances, in the exercise of this Court's discretion, the learned judge's order has to be varied in order to reflect the correct state of affairs. CPR 64.6(3) empowers the Court to disallow the portion of costs which relates to Professors Axelrod's expert opinion.

[41] For the sake of completeness and as I have indicated earlier, costs are in the discretion of the trial judge and this Court will only interfere with the exercise of that discretion on well-defined principles. Indeed, it is not unusual for the appellate court to vary or set aside the costs order of the lower court.[13] The court in Adamson v Halifax plc[14] cited the decision in Roache v News Group Ltd[15] [1998] EMCR which stated:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

[42] This Court has on numerous occasions discussed the instances in which the Court of Appeal would interfere with the discretion of the learned judge to the point that the principles are well-known and need no recitation. I have already indicated that the decision of the SCCA constitutes a material change of circumstances which would allow for this Court to exercise its discretion afresh as a matter of principle. In light of matters as they are now known, the inescapable conclusion which I have reached is that Farnum cannot reasonably be viewed as the overall successful party in view of the material change of circumstances. It follows that the learned judge's order cannot stand for this reason.

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[13] See Toussaint v A-G of Saint Vincent and the Grenadines [2007] UKPC 48 where the Privy Council set aside the costs of the lower courts

[14] [2002] All ER (D) 463 (Jul).

[15] [1998] EMCR at 172

[43] As events have unfolded, it cannot be said that Farnum received total success in relation to its application. Farnum brought the originating application and has succeeded on some aspects of its application. Therefore, it would be wrong and unfair to allow the appeal in its entirety. Exercising our discretion afresh and taking into account all of the relevant factors including the material change of circumstances referred to above, I would vary the costs order of the judge in the Commercial Court only to the extent that I would disallow the costs of the expert opinion of Professor Axelrod.

Conclusion

[44] For the above reasons and being cognizant of the material change of circumstances, I would allow Fairfield Sentry's appeal to the extent that I would vary the costs order made by the learned judge of the Commercial Court by disallowing the costs awarded to Farnum in relation to the expert evidence of Professor Axelrod. The costs of this appeal are to be assessed if not agreed within 21 days.

[45] I gratefully acknowledge the assistance of all learned counsel.

I concur
Davidson Kelvin Baptiste
Justice of Appeal

I concur
Mario Michel
Justice of Appeal

By the Court

Chief Registrar