

BRITISH VIRGIN ISLANDS HIGH COURT

Farnum Place LLC -v- Joanna Lau and Kenneth Krysz

COMPANIES - WINDING UP - TRANSACTION APPROVAL PROCEEDINGS - DUTIES OF LIQUIDATOR

The Claimant Farnum Place LLC applied under Section 273 of the *Insolvency Act, 2003* for an order compelling Fairfield Sentry (by its Liquidator) to seek the approval of the court of the terms and conditions of a contract entered into between Sentry and Farnum (the "Trade Confirmation") and to take the necessary steps to bring to fruition certain other conditions to which the contract is expressed to be subject. The terms of the Trade Confirmation is governed by New York law.

The Liquidator maintained that he either never has been or else is no longer bound by the Trade Confirmation and that he is entitled to walk away because of the existence of a "fiduciary out" clause in the Trade Confirmation.

The Court held that, if it is in the Liquidator's honest opinion that endeavoring 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 pursuant to the fiduciary out he was not requested to do so. His failure to seek approval has no effect contractually and it does not entitle the liquidator to abandon the contract and deal with the claim in the market. The Court also held that the Liquidator did not require the approval of the Court to cause Sentry to enter into or complete performance of the Trade Confirmation. However, the Court went on to consider whether it would in any event give approval and held that it would ordinarily withhold approval where for example there was a feature of the sale overlooked by the liquidator which rendered the bargain defective or which it considered made completion objectionable on public policy grounds.

The Court approved the Trade Confirmation. It was persuaded by the fact that it was negotiated at arms length by sophisticated

parties with full awareness of the market and with the benefit of skilled professional advice. The Court considered irrelevant, the fact that the market has risen since the transaction closed. All other considerations aside, the Court said it would be unwise for it to refuse approval thus destroying the bargain struck unless it had before it compelling evidence that the Liquidator was in a position to engage with a purchaser willing to contract in terms no less advantageous to those of the Trade Confirmation and at a higher price.

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