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Kenneth M Krys (as Liquidator of Fairfield Sentry Ltd (In Liquidation)) v Farnum Place LLC [2025] UKPC 43

SEPTEMBER 2025

Court: Privy Council (from the Court of Appeal of the Eastern Caribbean Supreme Court (BVI))
Subject: Material changes in circumstances as ground for retrospective sanction for successful US appeal
Judges: Lord Sales, Lady Rose, Lord Richards

Summary

Kenneth Krys (KK), as the liquidator of Fairfield Sentry Ltd (Sentry), a BVI company, successfully appealed to the Privy Council against refusal of sanction to pursue a second appeal in the US.

Sentry was subject to winding-up proceedings in the BVI and New York. Sentry had a claim in the liquidation of another entity, BM. Fairfield agreed, under a US law governed contract, to sell that claim to Farnum. The sale was for a fixed price, and subject to approval from both BVI and US bankruptcy courts. Before the court approvals were secured, the value of the BMM claim rose significantly in value.

Both the US Bankruptcy Court and BVI High Court (BVIHC) then approved the sale contract. KK appealed the US approval in the US District Court (USDC), which the USDC dismissed. KK then sought to appeal the USDC decision, to the US Court of Appeals for the Second Circuit (SCCA). However, under an existing BVIHC court order, the BVIHC had to sanction any appeal to the SCCA. The BVIHC refused to grant the Appellant this sanction. KK appealed that refusal to the SCCA, in the Eastern Caribbean Court of Appeal (ECCA). The ECCA hearing took place in July 2014. Pending its full judgment, the ECCA granted the Appellant an interim sanction to take necessary steps to protect its position regarding the disputed USDC decision.

Therefore, KK appealed the USDC decision to the SCCA. The SCCA allowed the Appellant's appeal in September 2014. The Appellant gave the ECCA a copy of the SCCA decision. However, the ECCA gave judgment in March 2022, dismissing the Appellant's appeal. The ECCA determined that the BVIHC had been entitled to refuse the Appellant its sanction to appeal to the SCCA, despite the fact that the ECCA had several years' notice that KK had already successfully appealed to the SCCA. The ECCA made no mention of KK's successful appeal or the orders authorising on an interim basis the steps taken by KK to prosecute the US appeal.

- Read the full Privy Council judgment here.

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Material change in circumstances

The Board was 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. Moreover, one of the principal reasons given by the Judge at first instance was that he was being asked to sanction “a period of indeterminate further delay”. However, that delay had clearly ceased by no later than October 2015.

Having failed to take into account a material change in circumstances, the ECCA's decision had to be set aside.

Determination of sanction application

Neither party supported the matter being remitted. Given the extant delay and the fact that the Board was in as good a position as the ECCA to determine whether sanction should be granted, the Board proceeded to determine the same.

In granting sanction, the Board rejected the suggestion that KK would be acting contrary to the terms of the agreement of the sale to Farnum of the BM claim. Moreover, the Board rejected Farnum's submission that, without sanction the US appeal was a nullity; there was no evidence of US law to support this and in any event it seemed highly implausible.

The Board considered that without sanction for the US appeal, it might be that the liquidator could not recoup the costs involved from Sentry's estate. However, the Board made it clear that in the circumstances, and given the very significant benefit of the US appeal to the estate, that would be a perverse result.

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