

Cash or Security: The Cost of an Interim Injunction in BVI Proceedings

In the recent judgment of *Von der Heydt Invest S.A. v Multibank FX International Corporation* (BVIHCMA2022/0008), the Eastern Caribbean Court of Appeal affirmed the criterion to be satisfied on an application by an applicant for fortification of the cross undertaking in damages contained in a freezing order.

Background

On 26 April 2021, the Appellant, Von der Heydt Invest S.A. ("VDHI") obtained a Worldwide Freezing Order ("WFO") in the British Virgin Islands ("BVI") Commercial Court ("BVI Court") against the Defendants, Mex Clearing Limited ("Mex Clearing"), Mex Securities S.A.R.L and Multibank FX International Corporation ("Multibank").

The cross undertaking in damages contained in the WFO was not fortified. VDHI later applied to continue the WFO and Multibank and Mex Clearing cross-applied to discharge the WFO. Justice Jack continued the WFO until trial or further order.

On 24 June 2021, Multibank applied for fortification of VDHI's cross undertaking in damages and security for costs. Justice Jack ordered VDHI to pay US\$20 million into court within 14 days as fortification for the WFO, failing which the WFO will be lifted (the "Fortification Order").

VDHI appealed the decision of Justice Jack and applied for a stay of the Fortification Order.

Decision

Giving the lead judgment on behalf of the Court of Appeal ("CoA"), Webster JA allowed VDHI's appeal and set aside the Fortification Order. In doing so, Webster JA identified among other things, the three step criteria, as set out in *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295 ("Malabu Gas") and followed in *PJSC National Bank Trust and another v Boris Mints and others* [2021] EWHC 1089 (Comm) ("Malabu / Mints test"), that must be satisfied before the court can order fortification:

- (1) The applicant must show a good arguable case that there is a real risk that it will suffer loss which goes beyond a 'mere assertion of a risk'.
- (2) The applicant must show a good arguable case that loss will be caused by the injunction. Webster JA stated "*the applicant must show that the WFO was the effective cause of the loss or that the injunction was the cause without which the losses would not have been suffered.*" The CoA identified two additional principles that underpin this criterion: (i) "*the presence of two or more competing causes for the loss is not fatal to an application for fortification*"; and (ii) "*the applicant must show that it is the coercive or preventive effect of the freezing injunction that caused the loss.*"
- (3) The evidence must be sufficient to allow the court to make an intelligent estimate of the

quantum of the losses. The CoA confirmed (i) that he who asserts must prove by evidence to the required standard; and (ii) "*the burden of disentangling the loss and showing what portion of it was caused by the freezing injunction rests squarely on the applicant for fortification.*"

Multibank had not satisfied the Malabu / Mints test and therefore the CoA could not maintain the order for fortification. Consequently, the CoA could not provide any detailed consideration of any discretionary factors that underpin criteria 3 above.

Comment

This decision provides further guidance on the legal principles that guide the BVI Court's ability to order an applicant to fortify the cross undertaking in damages contained in a freezing order. Moreover, the judgment reflects the BVI Court's ability to tackle complex legal issues that continue to arise in BVI commercial litigation.

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