

BVI Commercial Court Confirms Implied Cross Undertaking in Damages in Receivership Order

In a recent *ex tempore* judgment of Wallbank J in the long-running matter, *JTrust Asia Pte. Ltd v Mitsuji Konoshita and Anor BVIHC(COM)2017/0226*, the British Virgin Islands ("BVI") Commercial Court has, in a first for the Territory, determined that a cross undertaking in damages will be implied into a receivership order unless the usual requirement it be provided was expressly considered and dispensed with by the Court when the order was made.

Background

The Claimant, *JTrust Asia Pte Ltd* ("JTrust"), commenced proceedings in the BVI in 2017 (the "BVI Claim"). The BVI Claim sought, *inter alia*, recovery of approximately US\$95 million from the Defendants, *Mitsuji Konoshita* ("MK") and *APF Group Limited* ("APF").

JTrust is a company incorporated in Singapore, and APF is a BVI company which holds a controlling stake in *Showa Holdings Co., Ltd* ("Showa"), a Japanese holding company listed on the Tokyo Stock Exchange.

On 13 February 2018, JTrust obtained a freezing order *ex parte* against the assets of MK and APF (the "Freezing Order"). On 5 July 2018, on the basis of alleged non-compliance with the

Freezing Order, JTrust obtained a further order appointing interim receivers over APF (the "Receivership Order"). The wide powers conferred on the receivers included a power to remove and replace the board of directors of Showa.

Since the Receivership Order, Showa (represented by Maples Group), JTrust and the receivers, have been embroiled in satellite proceedings concerning the receivers' attempts to remove and replace Showa's board of directors (the "Showa Proceedings").

Cross Undertaking in Damages

The Freezing Order contained the usual cross undertaking in damages, which was given by JTrust to the Court as the price for obtaining injunctive relief.

On the application for the Receivership Order, the requirement for a cross undertaking in damages had not been dispensed with, nor had the subject of the cross undertaking been canvassed with the Court. It was the Defendants' case that the parties' common intention was that the express cross undertaking in damages contained in the Freezing Order extended to the Receivership Order. This was on the basis that it too was a form of

interlocutory injunction in respect of which a cross undertaking was a usual requirement. Further, that the Receivership Order had been granted for the express purpose of policing the Freezing Order.

The issue of whether a cross undertaking in damages had been given in respect of the Receivership Order was triggered by the Showa Proceedings, due to the potential for imminent damage to Showa and its stakeholders threatened by the receivers' attempts to interfere with Showa's board. In that context, it emerged that JTrust did not accept that a cross undertaking had been given in respect of the Receivership Order, and opposed Showa's contention that a cross undertaking is a normal requirement for a receivership order, which will be implied into the order unless it was expressly considered and dis-applied by the Court.

This development caused the Defendants to issue an application seeking, amongst other things, a declaration that the Receivership Order contained an implied cross undertaking in damages. Showa successfully sought to intervene in that application as an interested third party.

The Judgment

The Court, in its *ex tempore* judgment of 15 April 2021, confirmed that:

- (a) A receivership order operates as a form of injunction;
- (b) Generally, the price for an injunction, granted either *ex parte* or on an *inter partes* basis prior to judgment, is the giving to the Court of a cross undertaking in damages;
- (c) As stated in *Snell's Equity*, such a cross undertaking is to be implied upon the grant of an interlocutory injunction;
- (d) Absent express dispensation by the Court, the correct approach is that a cross undertaking in damages should be implied into an interim receivership order or any other form of interlocutory injunction; and
- (e) The implied undertaking takes effect from the time the receivership order was made.

If you would like any further information, please liaise with your regular Maples Group contact or any of the persons listed below.

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