MAPLES GROUP

UPDATE

BVI Court Puts Substance Over Form When Considering Technical Defences to Issues of Service and Injunctive Relief

Maples and Calder, the Maples Group's law firm, welcomes a recent judgment from the British Virgin Islands ("BVI") Commercial Court in *Durant International Corp (in Liquidation) v Flavio Maluf*, which brings clarification to important issues concerning overseas service of process and injunctive relief obtained by BVI officeholders.

Background

The action arises out of a substantial fraud carried out between 1993 and 1996 by *Paulo Salim Maluf*, the then mayor of Sao Paulo in Brazil. Paulo's son, Flavio Maluf, is the Defendant. It is alleged the two men received massive kick-backs and bribes at the expense of the municipality of Sao Paulo, which were laundered through various companies, including Durant International Corp ("Durant"), a BVI company which was placed into liquidation on 6 November 2017. Messrs Hellard and Richardson, both of Grant Thornton, are the current joint liquidators of Durant (the "JLs").

The claim concerns a loan agreement between Durant and the Defendant, under which substantial sums were transferred, and at least US$44.3 million of which remains outstanding. The JLs seek repayment of this sum, or compensation in equity in a like amount for breach of fiduciary duty, knowing receipt and / or dishonest assistance (the "Claim"). A worldwide freezing order was granted *ex parte* in support of the action (the "WFO"), with permission to serve the Claim outside the jurisdiction (in Brazil). Justice Jack also signed a letter rogatory addressed to the Brazilian authorities which sought, among other things, service of the Claim and enforcement of the WFO in Brazil.

The judgment results from the return date hearing of the WFO, whereat the Defendant sought to: (i) challenge service of the proceedings on him and the jurisdiction of the BVI Court; and, in any event, (ii) discharge the WFO.

Service

Service of BVI proceedings in Brazil is typically effected under the provisions of the Hague Convention. However, by May 2020, COVID-19 had caused the unit at the Foreign Office in London (which effects service in accordance with the provisions of the Hague Convention on behalf of the BVI) to close, rendering service through such diplomatic channels impossible. As a result, Durant couriered the Claim and the WFO directly to the Brazilian Superior Court of Justice. Before the formal process of serving Mr Maluf in Brazil was complete, the Defendant's Brazilian lawyers

gained access to the Brazilian Court file and obtained the Claim documents. As a result of this voluntary appearance by Mr Maluf's lawyers, the Brazilian Court later deemed that Mr Maluf had been served with the Claim. The authorisation code for the e-litigation portal, that permits a Defendant to access the online filing system of the BVI Court and file documents in reply to any claim or application, was not retrieved by the Defendant's Brazilian lawyers from the Brazilian Court file. At the return date hearing, it was alleged that under the Electronic Litigation Filing and Service Rules (the "Rules"), failure to serve the authorisation code was an irremediable defect fatal to the Claimant's attempt to serve Mr Maluf.

The validity of service in accordance with Brazilian law is a live issue between the parties, which the Defendant is continuing to challenge in Brazil's highest appellate court. Nevertheless, the most recent decisions of the Brazilian courts suggest that service by the means adopted by Durant was valid and effective. On this basis, Justice Jack agreed that "the evidence at present is in my judgment in favour of good service having taken place in accordance with Brazilian law". He held, therefore, that the requirements of CPR 7.8(1)(b) had been satisfied. With respect to the Rules, Justice Jack found the Defendant's argument to be a "surprising submission". In a welcome ruling, the Court held that it was perfectly sensible to interpret the Rules as deeming service not to have been effected "until the authorisation code is served". Justice Jack accepted Durant's submission that the purpose of service of the authorisation code was to ensure that judgment by default cannot be entered until the defendant has the code.

Notwithstanding his view that good service had been effected, Justice Jack considered that disposing of the issue on this basis was undesirable as that would probably lead to appellate challenges and more unnecessary litigation. Instead, applying the overriding objective, the learned judge decided to dispense with service under CPR 7.8B(1), subject to a proforma application being made. He held that the circumstances of the Claim were exceptional and, as the Defendant plainly knew about the Claim and the WFO (including their terms and effect), no injustice would be caused by "putting an end to [the Defendant's] wholly technical and unmeritorious arguments about whether or not service has technically been effected or not".

The WFO

Upon Durant's original *ex parte* application for the WFO, an unfortified cross-undertaking in damages limited to the value of the assets in the estate from time-to-time was offered to, and accepted by, the BVI court. In the course of doing so, the learned judge referred to the Defendant's conviction for money laundering (arising from the fraud), an extant risk of dissipation, relevant findings of fact against the Defendant by overseas courts of competent jurisdiction and the existence of significant (albeit currently illiquid) assets in the estate.

At the return date hearing, the Defendant contended that if the WFO were to remain, the court should require the JLs to provide an unlimited cross-undertaking in damages. By his judgment, Justice Jack held that "the real purpose behind the application for an uncapped undertaking is to dissuade the liquidators from pursuing the current claim" and rejected the application.

Comment

The BVI court has again demonstrated its willingness to take a pragmatic approach to claims arising from cross-jurisdictional liquidations and, by this judgment, has clarified issues engaging international service requirements and injunctive relief. This belt-and-braces approach sends a clear message that the BVI courts will exercise caution when presented with purely technical defences as to service and injunctive measures, especially when they are considered to represent an attempt to subvert due legal process. The Court's ruling on the proper interpretation of the Rules is a welcome clarification for practitioners in the Territory.

By his judgment, Justice Jack has revived his previous mantra (per his judgment in *Commercial Bank of Dubai v 18 Elvaston Place*) that "the proof of the pudding is in the eating" when it comes to service requirements, namely that the purpose of service is to inform a defendant of process and, if the defendant has been so informed and has not been prejudiced by technical non-compliance with service rules, the court will not put form over substance.

The Group's law firm continues to assist Grant Thornton in the Claim, with Adrian Francis, Scott Tolliss and Carl Moran appearing on behalf of Durant (by its JLs) at the hearing.

Further Information

If you would like further information, please reach out to your usual Maples Group contact or any of the persons listed below.

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