

Sergey Taruta v JSC VTB Bank: Receiverships, Sanctions and Service

On 25 January 2023, the Eastern Caribbean Court of Appeal handed down its long-awaited decision in *Sergey Taruta v JSC VTB Bank (heard together with Arrowcrest Ltd v JSC VTB Bank and Anor)*, by which it issued important guidance on, among other things:

- (i) Principles relating to the appointment of equitable receivers in the territory; and
- (ii) The impact of recent sanctions legislation on the court's powers and jurisdiction to manage, terminate or vary its receivership orders and related injunctive relief.

The order that was subject to appeal was a receivership order obtained by sanctioned Russian bank, JSC VTB ("VTB"), appointing receivers by way of equitable execution over assets indirectly owned by a prominent Ukrainian businessman and Member of Parliament, Sergey Taruta ("Mr. Taruta").

Adrian Francis, Scott Tolliss and Carl Moran, of the Maples Group's Dispute Resolution & Insolvency practice in the British Virgin Islands ("BVI"), represented Mr. Taruta in both the appeal and the proceedings below.

Background

Proceedings Before the Court Below

Proceedings initiated by VTB against Mr. Taruta have been ongoing for a number of years, through which the now-sanctioned bank has sought to have

a judgment of the Russian court recognised and enforced in the BVI.

On 15 June 2021, the BVI Court held that VTB was entitled to judgment against Mr. Taruta. The precise amount was stood over for determination on 25 November 2021, at which hearing judgment was entered in the amount of US\$29,993,498.25 (the "BVI Judgment").

Having obtained the BVI Judgment, VTB immediately applied to appoint receivers by way of equitable execution over the shares of a BVI company, Enard, which is owned by a Cypriot company, Arrowcrest, of which Mr Taruta is the sole shareholder. On 29 November 2021, the BVI court granted the order sought (the "Receivership Order") for reasons contained in a judgment of the same date (the "Receivership Judgment"). By the Receivership Judgment, the judge held that the court had jurisdiction to appoint receivers over Mr. Taruta's so-called "*Duomatic power*" to direct how the shares in Arrowcrest, and thus the shares in Enard, should be voted. He reasoned that the shares in Enard were hence assets against which the BVI Judgment could be enforced.

On 24 February 2022, Russian military forces mounted an illegal invasion of Ukraine. As a response, the UK imposed sanctions on various Russian individuals and entities, including VTB (the "Sanctions"). In response to the Sanctions, the judge below invited the parties and the Honourable Attorney General to make submissions on whether the court should take action in respect of the

Receivership Order and, if so, what that action(s) should be.

The Maples Group, on behalf of Mr. Taruta, sought an unconditional discharge of the Receivership Order, contending that its maintenance contravened the Sanctions, as *"its purpose is, and its effect will be, to realise, or make available, assets, funds and / or economic resources for the benefit of VTB, contrary to the sanctions regulations"*. Alternatively, that it should be discharged on grounds of public policy, it running contrary to the spirit and objectives of the Sanctions.

It was submitted on behalf of VTB, its counsel acting as officers of the Court, that the Receivership Order should continue, with the receivers permitted to get in the assets of Enard, but prevented from effecting a sale of them pending the obtaining of a licence or the Sanctions being lifted.

On 22 March 2022, in its judgment on these issues (the "Sanctions Judgment"), the Court declined to discharge the Receivership Order, leaving the receivers *in situ* but with neither the ability to get assets in, nor to distribute them, without a licence from the Governor. The Court ruled that it had no jurisdiction to discharge the Receivership Order on the grounds this would amount to a dealing with VTB's judgment debt, and thus would not be lawful without a licence from the Governor. The court declined to weigh in the balance issues of public policy, finding that such issues *"are matters for the Governor acting in conjunction with the Foreign, Commonwealth and Development Office"*.

Mr. Taruta appealed against the Receivership Judgment, and Arrowcrest appealed against the Sanctions Judgment (to which appeal Mr. Taruta was also a party). VTB filed a counter notice of

appeal in which it sought to uphold the conclusions of the judge below on additional grounds.

The Appeals

In a judgment handed down by Chief Justice Janice Pereira, the Court distilled the issues on appeal into the following three broad categories:

- (i) Whether the judge below erred in appointing receivers over the shares (or Mr. Taruta's power to exercise *"Duomatic control"* over those shares) in Enard (the "Duomatic Issue");
- (ii) Whether the judge below erred in finding that the receivership order could not be discharged as a result of the Sanctions (the "Sanctions Issue"); and
- (iii) Whether the judge below erred in adding Arrowcrest as a party to the proceedings and dispensing with service (the "Arrowcrest Issue").

The Duomatic Issue

The Court firmly rejected the judge's *"Duomatic power"* theory. It held that it was *"manifestly clear from the authorities that a shareholder, whether or not he is a sole shareholder, has no right to dispose of the property of a company, either for his own benefit or for that of others."* The learned Chief Justice dismissed the reasoning of the judge below that Mr. Taruta's ability to vote the shares in Enard, by virtue of him being the sole shareholder of its parent, rendered the assets of Enard available for enforcement by VTB.

Accepting the submissions made by the Maples Group, on behalf of Mr. Taruta, the Court remarked that *"[the reasoning of the court below] cannot and could not have been applied to the present case... While a sole shareholder of a company may have the power to direct the way the shares in that*

company are voted, this de facto control does not bestow on that shareholder a right to deal with or dispose of the company's assets for any purpose other than the furtherance of the objective of the company. "Accordingly, it was held that the principles established by *Re Duomatic* were irrelevant to this case; that the court had no jurisdiction to make the Receivership Order; and, that the judge below had wrongly "resorted to *Duomatic* principles to attempt to circumvent the hurdle created by the corporate veil." For these reasons, the Receivership Order should be discharged.

The Sanctions Issue

The Court determined that the Receivership Order was an 'economic resource' of VTB within the meaning of that term in the Sanctions. Regulation 11(5) thereof provides that a person 'deals with' economic resources if they exchange them for funds, goods or services, or if they use the resource in exchange for funds, goods or services (whether by pledging them as security or otherwise). As the receivers had not begun to perform their duties under the Receivership Order, which had been stayed since imposition of the Sanctions, the Court held that it existed "*in name only*" and that its discharge would not result in any funds being bestowed on, or made available to, VTB. There would hence be no dealing with an asset of VTB that would infringe the Sanctions.

Moreover, on a point of general importance across jurisdictions, the Court held that, contrary to the concerns of the judge below, the legislation does not oust the jurisdiction of the court to exercise its normal functions. In accordance with well-established principles of statutory construction, the Court confirmed that any such ouster would have to be explicitly stated:

"The imposition of sanctions pursuant to the relevant legislation does not prevent this Court from reviewing or setting aside an order of the lower court or indeed the court in appropriate circumstances setting aside its own order... having already found that the learned judge had no jurisdiction to make the receivership order, I find that there is nothing in the sanctions legislation which ousts this Court's jurisdiction to set aside an order unlawfully made."

The Arrowcrest Issue

The Court, accepting the appellant's submissions, determined that the judge below had erred in adding Arrowcrest as a party to the proceedings, dispensing with service absent an application, and finding that Arrowcrest had submitted to the jurisdiction. The learned Chief Justice held that, as there was no substantive claim or cause of action against Arrowcrest, nor an application before the judge below to serve Arrowcrest with the proceedings outside the jurisdiction, the court had no jurisdiction to add it as a party and there was no gateway in the CPR through which it could have been served in Cyprus. On the basis there was no applicable gateway for service upon Arrowcrest, the Court also found that the judge below erred in dispensing with service.

Importantly, the Court disagreed with the finding of the judge below that Arrowcrest had submitted to the jurisdiction of the BVI court. The test for submission, the Court confirmed, was whether there had been a "*wholly unequivocal*" submission which, in Arrowcrest's case, it was held there had not. Further, it was determined that the filing of an acknowledgment of service was not sufficient to demonstrate submission in circumstances where it was the only available means by which Arrowcrest could have sought any type of relief.

Resulting from the above findings, the learned Chief Justice allowed the appeals unconditionally, and dismissed VTB's counter-notices of appeal. The Receivership Order was therefore set aside.

Conclusion

This decision is thought to be the first in the Commonwealth that addresses the impact of sanctions legislation on receivership orders and related injunctive relief. It brings welcome clarity from the Court of Appeal as to the court's ability to deal with and police its own orders, even where international sanctions are engaged.

The judgment also makes clear that BVI courts will respect the separate legal personality of so-called "one man" companies. Those investing in, or lending to, such companies may therefore do so in confidence their assets may not be resorted to meet the liabilities of their ultimate beneficial owners.

The Maples Group continues to represent Mr. Taruta in these and other proceedings arising from VTB's applications for recognition and enforcement in the territory, which litigation has been longstanding and has involved a number of hard-fought hearings before both the Commercial Court and Court of Appeal.

Further Assistance

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

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