MAPLES GROUP

UPDATE

Interim Receivership Orders: Cross-Undertaking Requirement Clarified

On 11 May 2022, a judgment by the Eastern Caribbean Court of Appeal in *JTrust Asia PTE. Ltd. v Mitsuji Konoshita et al and Showa Holdings* provided fresh guidance on the circumstances where upon application by a claimant to appoint interim receivers, a cross-undertaking in damages will be required as a condition of the grant.

Background

The Appellant, JTrust Asia PTE. Ltd. ("JTrust") is a company incorporated in Singapore. The first respondent, Mitsuji Konoshita, is a director and majority shareholder of the second respondent, A.P.F. Group Co. Ltd. ("APF") (together, "the Respondents"). The intervenor, Showa Holdings Co. Ltd ("Showa"), for whom Maples and Calder, the Maples Group's law firm, acts in the proceedings, is a Japanese holding company listed on the Tokyo Stock Exchange and a subsidiary of APF.

In 2017, JTrust commenced proceedings in the British Virgin Islands ("BVI") seeking recovery against the Respondents of approximately US$95 million.

On 24 December 2017, JTrust obtained an *ex parte* freezing order against the Respondents restraining them from disposing of their assets up to a value of US$45 million until the determination of the claim (the "Freezing Order"). The Freezing Order contained the usual cross-undertaking in damages, which was proffered by JTrust and accepted by the court as a condition of the grant. The Freezing Order also obliged the Respondents to disclose details of their assets, which the court subsequently found the Respondents not to have complied with.

As a result of the Respondents' non-compliance with the Freezing Order, JTrust applied for the appointment of receivers over APF to ensure the preservation of the status quo until the substantive dispute could be resolved, and to facilitate the policing of the Freezing Order. On 5 July 2018, at a hearing the court appointed Nicholas Gronow and John Ayres as interim receivers over APF (the "Receivers" and the "Receivership Order", respectively). The issue of a cross-undertaking in damages was not expressly raised by the Respondents at that hearing and JTrust did not offer a cross-undertaking in respect of the Receivership Order. Consequently, the Receivership Order did not contain a cross-undertaking in damages.

On 30 November 2020, the Receivers obtained sanction to remove and replace the board of directors of Showa, which the Respondents and Showa contend will have disastrous consequences for Showa and its stakeholders. It was in the context of the Receivers' sanction application that Showa highlighted the issue that a cross-undertaking in damages was not expressly provided for in the Receivership Order. Showa and the Respondents suggested therefore

that it must be implied, which JTrust did not accept.

In February 2021, after a series of interlocutory hearings connected to the substantive claim, the Respondents applied for a declaration that the cross-undertaking in damages given by JTrust in the Freezing Order extended to the Receivership Order or was to be implied into it *ab initio*. Alternatively, that JTrust must file with the court, within 48 hours, a written undertaking in similar terms and subject to conditions proposed by the Respondents. That application was heard by Wallbank J, who determined that the cross-undertaking in damages was to be implied into the Receivership Order. In coming to his decision, the learned judge held that:

- The Receivership Order operates as a form of injunction.
- The Receivership Order was ancillary to the Freezing Order.
- The cross-undertaking in damages given by JTrust should be implied in the Receivership Order.
- The judge who had presided over the application to appoint the Receivers should have considered requiring a cross-undertaking in damages from JTrust as a condition of the Receivership Order.
- JTrust should pay the costs of the Respondents and Showa of the application.

JTrust appealed the decision of Wallbank J, and the Respondents and Showa filed counter-notices of appeal seeking to uphold the decision.

Decision

The Court of Appeal ultimately allowed JTrust's appeal and set aside the order of Wallbank J. In doing so, it found, among other things, that:

- Where a receivership order has the effect of interfering with the assets of a respondent, or his control of those assets, such an order can have the effect of an injunction and as such an applicant must offer a cross-undertaking in damages.
- However, each case must be decided on its own facts as a receivership order does not always have the effect of an injunction and as such, does not always require a cross-undertaking in damages.
- It is not the appointment of the receiver that triggers the need for the undertaking, but the consequences of the appointment.
- In this case, the learned judge was correct to find that the Receivership Order operated as an injunction and that, as a result, the principles relating to cross-undertakings in damages on the grant of an injunction applied.
- An order is ancillary where it provides necessary support to the primary order – in this case, the Receivers were appointed because the Respondents did not comply with the disclosure obligations in the Freezing Order, hence the Receivership Order was ancillary to or in support of the Freezing Order.
- Nevertheless, the Receivership Order is a separate order to the Freezing Order, and there is no reason in principle why it should not be supported by a cross-undertaking to cover losses caused by the appointment of the Receivers for which the court thinks the Respondents and / or Showa should be compensated.
- In the territory of the BVI, an applicant for the appointment of a receiver should provide a cross-undertaking in damages when the application is being made for the appointment of protective receivers before the trial of the action, or at any time when the appointment will result in losses to the

defendant company or a loss of control of the assets or affairs of the company.

- However, a cross-undertaking in damages is not required for every receivership order, and it is in the judge's discretion whether to require an undertaking based on all the circumstances of the case.
- A cross-undertaking in damages is a voluntary promise that an applicant for an interim injunction or freezing order gives the court to abide by any order for damages that the court may make if the respondent to the application suffers loss as a result of the order of the court, and the court is of the opinion that the applicant should compensate the respondent for such loss – it cannot be imposed by the court.
- In this case, where: (a) JTrust had not given such an undertaking for the receivership and was not willing to give one; (b) there was an absence of an undertaking in the Receivership Order with no prior challenge from the Respondents; and (c) there was a delay of three years before the Respondents asked the court to impose one, Wallbank J erred in implying the cross-undertaking in the Receivership Order.
- He should instead have enquired of counsel whether JTrust was offering a cross-undertaking in damages for the Receivership Order.
- The Court of Appeal considered the issue in the present case was now whether the Receivership Order should continue absent a cross-undertaking in damages, and it held that it should not.

Upon application of the court's reasoning above, the court determined that it was empowered to invite JTrust to offer a retrospective cross-undertaking at this stage in the proceedings, to cover any losses past, present and future that have or may yet be caused by the Receivership Order. The court found that this is an appropriate case for the continued appointment of the Receivers to be supported by a cross-undertaking in damages, as the appointment was made on an interim basis, the Receivers have taken control of APF and have sanction to take control of Showa, and the Respondents asserted in their evidence that this will have severe consequences for APF, Showa and their respective stakeholders.

The Court of Appeal invited JTrust to provide a cross-undertaking in damages by 4:00pm on 17 May 2022, failing which, the Receivers will immediately and automatically be discharged from office.

Conclusion

This decision is the first in the BVI to deal specifically with these principles, and acts as a reminder that a cross-undertaking in damages should always be dealt with by the parties, and considered by the court, as part of an application seeking the appointment of an interim receiver.

Furthermore, the BVI Court has a discretionary power to invite an applicant for an injunction or receivership to offer a cross-undertaking in damages at any point during the life-cycle of such interim orders, with such cross-undertakings being liable to have retrospective as well as prospective effect.

The judgment suggests that, in theory, there may be instances where the appointment of a receiver may have little or no potential consequences to the company, making a cross-undertaking in damages unnecessary. It postulates that an appointment for the purpose of the receiver simply holding the balance of power or over an isolated asset may fall within this category. However, it acknowledges that no authority was cited where a cross-undertaking in damages had

been dispensed with in this context. It will be interesting to see how this jurisprudence develops and in what circumstances, if at all, this power of dispensation will be exercised in practice.

The firm continues to represent Showa in these and other proceedings arising from the Receivership Order, which litigation has been longstanding and has involved applications at every appellate level, including to the Judicial Committee of the Privy Council.

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