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UPDATE

Fortification of Cross-Undertakings in Damages

Update prepared by Shane Donovan (British Virgin Islands)

In *Von der Heydt Invest SA v Multibank FX International Corporation*,[1] the Eastern Caribbean Court of Appeal followed the test applied by the English Courts in determining whether an applicant for a freezing order should be required to fortify its cross-undertaking in damages.

The Undertakings in Damages and Fortification

An applicant for an interim injunction, such as a worldwide freezing order, is usually required to give the court an undertaking to compensate persons suffering losses as a result of the injunction if the court later finds that the injunction should not have been granted. The undertaking is the price that an applicant pays for being granted interim injunctive relief. The undertaking provides the respondent with a procedure to recover losses suffered as a result of an interim injunction that should not have been granted. The principle has statutory force in the British Virgin Islands in rule 17.4(2) of the Civil Procedure Rules 2000 which provides that '*[u]nless the court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting or extension of the order*.'

Fortification is not automatic. Freezing orders are usually granted without fortification if the court accepts a cross-undertaking in damages offered by the applicant. But if the applicant does not have sufficient assets within the jurisdiction, and/or for any other sufficient reason, the court may order the applicant to fortify the undertaking by paying into court a sum of money estimated by reference to the likely amount of loss that the respondent will suffer as a result of the injunction, or by providing some other form of security such as a bank guarantee. Conversely, if the applicant has sufficient assets in the jurisdiction the court is not likely to order fortification.

The Parties

Mex Group Worldwide Limited (**MGW**) is the holding company of a group of companies known as the Multibank Group. The Multibank Group is a global financial derivatives broker specialising in providing markets access to financial instruments, including forex, metals, indices, shares and commodities. In 2017, MGW established an index fund that issued notes (the **Notes**). The Notes were issued by Mex Securities SARL (**Mex Securities**).

The respondent to the appeal, Multibank FX International Corporation (**Multibank**), is a BVI company. It runs a foreign exchange trading platform and is regulated by the BVI Financial Services Commission. Mex Clearing Ltd (**Mex Clearing**), is a regulated broker company in the United Arab Emirates. Both Multibank and Mex Clearing are subsidiaries of MGW and part of the Multibank Group.

The appellant, Von der Heydt Invest SA (**VDHI**), is a Luxembourg investment management company. VDHI managed three funds that invested in the Notes.

[1] BVIHCMAP2022/0008, 21 February 2023.

The Background

On 10 December 2020, Mex Clearing issued a claim in the British Virgin Islands against Mex Securities and Multibank for €36,385,509.52. The following day the parties to the claim entered into a consent order (the Consent Order) giving judgment for Mex Clearing on the claim and ordering that the €36,385,509.52, which was then in accounts of Mex Securities at Multibank, be transferred to Mex Clearing. The money was transferred on 18 December 2020.

On becoming aware, on 21 April 2021, that the €36,385,509.52 had been removed from the accounts at Multibank, VDHI applied *ex parte* to the BVI Court on 23 April 2021 for a worldwide freezing order (the WFO) and other interim relief against the defendants, including Multibank. The Court granted the WFO. It contained the usual cross-undertaking in damages by which VDHI undertook that if the Court later finds that the WFO has caused loss to the defendants (or any of them), and that the defendants should be compensated for that loss, VDHI will comply with any order that the Court may make. Fortification of the cross-undertaking in damages was not required.

Following the grant of the WFO, VDHI issued a claim against the defendants by which is sought to set aside the Consent Order on the basis that it had been obtained by fraud. It also claimed a declaration that the €36,385,509.52 paid pursuant to the Consent Order, or the traceable proceeds thereof, are held on constructive trust for Mex Securities and/or the Noteholders.

Multibank unsuccessfully applied to set aside the WFO. In refusing to discharge the WFO, the Court found, among other things, that '*VDHI have shown a good arguable case of fraud*'. Multibank appealed against the refusal to set aside the WFO. However, that appeal was dismissed, with the Court of Appeal affirming the finding that there was a good arguable case of fraud.

Multibank applied for fortification of VDHI's cross-undertaking in damages. On 15 July 2022, the Court granted Multibank's application and ordered VDHI to pay US$20 million into Court within 14 days as fortification of its undertaking (the Fortification Order). VDHI appealed the Fortification Order.

The Criteria to be Met Before the Court Orders Fortification

The Court of Appeal confirmed that the criteria that an applicant seeking fortification of an undertaking in damages are as set out in the English Court of Appeal decision in *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd*,[2] and the decision of the English High Court in *PJSC National Bank Trust & Anor v Boris Mints & Ors*:[3]

1. Can the applicant show a sufficient level of risk of loss to require fortification, which involves showing a good arguable case to that effect?
2. Can the applicant show, to the standard of a good arguable case, that the loss has been or is likely to be caused by the granting of the injunction?
3. Is there sufficient evidence to allow an intelligent estimate of the quantum of the losses to be made?

The Court of Appeal considered each of these criteria in turn by reference to the facts of the case.

1 Risk of Loss

The Court held that an applicant for fortification must prove that there is a good arguable case that there is a real risk that it will suffer losses as a result of the freezing order. This must be established by '*a solid, credible evidential foundation that the claimed loss has been or will be suffered*'.

However, the Court was willing to accept that that there was a risk of loss to Multibank on the basis of a submission that, in many circumstances, the Court will readily accept a risk of loss being caused by a WFO from the surrounding circumstances and inherent probabilities. The Court of Appeal upheld the finding of the Court below that, as a 'financial services company trading on trust', there was a risk to Multibank, subject to the qualification that with the passage of time since Multibank applied for fortification in June 2021, there was no evidence of further losses above the amounts alleged in the application, suggesting that the risk had diminished.

[2] [2014] EWCA Civ 1295.

[3] [2021] EWHC 1089 (Comm).

2 Causation

Under the causation criterion of the test, the applicant for fortification is required to show a good arguable case that, but for the WFO, the loss would not have been suffered.

After considering the way in which the test had been described in both *Malabu* and *Mints*, the Court summarised the test as follows:

> '*In short, the test for whether the WFO is the cause of the losses suffered by Multibank is whether the losses would not have been suffered but for the WFO. To show this, the applicant must show that the WFO was the effective cause of the loss or the cause without which the loss would not have been suffered. These two phrases do not in my opinion create a separate test for causation or raise the level of proof required to show that the loss would not have been suffered but for the freezing injunction. In the final analysis, an applicant for a fortification of a freezing injunction must present a good arguable case that the loss would not have been suffered but for the freezing injunction. How this is done will vary from case to case.*'

The Court of Appeal considered that there were two other principles relating to causation that were relevant to this case:

1. The presence of two or more competing causes for the loss is not fatal to an application for fortification. In this case, the competing causes were the WFO and the allegations of fraud against Multibank in the underlying proceedings. It was for the applicant to show that, despite competing causes, the WFO was the effective cause of the losses or the cause without which the losses would not have been suffered.
2. The applicant must show that it is the coercive or preventive effect of the WFO that caused the loss. The mere presence of a WFO is not enough. It must have prevented the applicant or persons dealing with the applicant from doing something that resulted in the loss to the applicant.

The Court of Appeal held that the allegations in the underlying proceedings were an additional or concurrent cause of the loss. However, this did not mean that the WFO could altogether be disregarded as a cause of the loss. The underlying allegations of fraud as an effective cause of the loss suffered by Multibank, and the fact that the loss suffered from the WFO included reputational loss from the effect of the WFO, were matters to be factored into the assessment of the loss in fixing the level of fortification.

3 Quantification of Losses

The Court found that Multibank, on whom the burden lay, did not satisfy the third criterion because:

(i) The loss must be established by solid, credible evidence objectively assessed. The evidence of loss relied upon consisted of assertions without supporting documents or other independent support. It was not updated to reflect the loss actually suffered by Multibank during the year since the evidence was filed;
(ii) The Court below did not take account in the assessment the allegations of fraud as an additional cause of the loss;
(iii) The Court below did not take account of the fact that some of the loss allegedly caused by the WFO was or could have been caused by the reputational effect of the WFO on Multibank. This type of loss is not recoverable under the undertaking. Only losses caused by the coercive or preventive effect of the WFO are recoverable;
(iv) There was no attempt by Multibank to disentangle (a) the loss caused by the allegations of fraud (which they deny) from the loss caused by the WFO; and (b) the loss caused by the coercive or preventive effect of the WFO from the loss caused by the reputational effect of the WFO.

The Court below had accepted an estimate made by Multibank's counsel that $20 million was the minimum loss likely to be suffered. The Court of Appeal held that this estimate did not have any evidential basis, and that the Court below had erred in accepting that figure without conducting its own estimate of the loss.

The Court of Appeal found that Multibank had failed to discharge the burden of showing an intelligent estimate of the loss from the WFO. The Fortification Order was therefore set aside. The Court was unwilling to consider the issue afresh (or remit the matter for further consideration) on the basis that the evidence was insufficient to make an intelligent estimate of the loss.

Conclusion

The Court of Appeal's decision provides invaluable judicial guidance on the approach that will be taken by BVI Courts in determining whether an applicant for an injunction, including freezing orders, should be required to fortify its cross-undertaking in damages.

The decision also highlights the importance of properly addressing matters in evidence. An applicant for an injunction who wishes to avoid having to provide fortification will need to adduce evidence to show that the undertaking provides sufficient protection without fortification. This may include evidence of sufficient assets within the jurisdiction or other evidence of sufficient means to be able to compensate the respondent for any loss suffered if it turns out that the injunction should not have been granted.

A respondent to a freezing order who applies for fortification will also need to ensure that it adequately addresses each of the three criteria including solid evidence that loss has been or will be suffered although, in certain circumstances, such as in the case of a substantial trading entity, it may be possible to infer that the risk is inherently probable. It will also need to be able to show that the loss is caused by the coercive or preventive effect of the injunction, and that there is a proper evidential basis for making an intelligent estimate of the amount of the loss.

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