ENGLISH COURT OF APPEAL CONSIDERS THE TEST FOR FORTIFICATION OF CROSS-UNDERTAKINGS

Energy Venture Partners Ltd v Malabu Oil and Gas Ltd [2014] EWCA Civ 1295

Introduction

When a claimant successfully applies for an injunction against another party, its success is usually conditional on its provision of an undertaking in damages in order to provide compensation for the other party in the event that the injunction turns out to have been wrongly granted. The courts may from time to time review the amount of the undertaking, and may order it to be "fortified" by the giving of additional security.

In *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295 (09 October 2014), the English Court of Appeal dismissed the claimant's appeal against a decision requiring them to fortify their cross-undertaking given pursuant to their obtaining of a worldwide freezing order against the Defendant's assets.

The question of what an applicant for fortification was required to establish had previously been considered several times at first instacne, including twice by Lord Justice Briggs (as he has now become) in *Harley Street Capital v Tchigirinski* [2005] EWHC 2471 (Ch) and in *Jirehouse v Beller* [2008] EWHC 725 (Ch). The test for fortification arising out of these judgments required the applicant to show: (a) that there was an intelligent estimate by the court of the defendant's likely loss arising from the injunction; (b) a sufficient level of risk to require fortification; (c) that the grant of the injunction would be the cause of the contemplated loss.

In *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2014] EWCA Civ 1295, the test for fortification was considered for the first time by the Court of Appeal, which has authoritatively upheld these principles as the proper test for fortification.

Background

The Appellant/Claimant is a BVI company, with a Nigerian sole director and shareholder, operating in relation to transaction and exploration opportunities in an entrepreneurial capacity. The Respondent/Defendant is a Nigerian company that had been awarded in 1998 a 100% ownership interest in an oil prospecting licence for a major offshore oilfield in Nigeria.

In the substantive litigation, the Appellant claimed that it was wrongfully excluded from a transaction between the Respondent and the Federal Government of Nigeria whereby the Respondent was due to be paid approximately US$1bn in return for the surrender of the Respondent's assets in the oilfield. The Appellant claimed that this amounted to breach of an oral variation to an exclusivity agreement made in about January 2010 pursuant to which the Respondent had agreed to pay US$200m to the Claimant for services provided in connection with the sale of the Respondent's assets in the oilfield.

On 3 July 2011, the Appellant obtained a without notice worldwide freezing order from Griffith Williams J against the Respondent up to the value of US$215m.

In July 2011, David Steel J heard various interim applications and made *inter alia* the following orders:

(a) the freezing order was to be continued but modified;
(b) the Federal Government of Nigeria was to give a payment instruction to JP Morgan for US$215m to be paid into court and the balance to be paid to the Respondent;
(c) the Appellant was required to fortify its cross-undertaking in damages in the sum of US$150m to reflect the fact that the sum of US$215m had not yet been paid into court;
(d) the Respondent was free to apply for an increase in the amount of such fortification in the event that JP Morgan paid US$215m into court.

In August 2011, JP Morgan paid US$215m into court, and the Respondent applied for further fortification.

First Instance

The application for further fortification came before Hamblen J on 13 January 2012.

The Respondent contended that it had a good arguable case to be entitled to fortification pursuant to the requirements that must be satisfied, as set out in *Harley Street Capital v Tchigirinski* [2005] EWHC 2471 (Ch) (per Mr Michael Briggs QC, as he then was, sitting as a Deputy High Court Judge), which are as follows:

(a) the court has made an intelligent estimate of the likely amount of loss which might result to a defendant by reason of the injunction;
(b) the applicant for fortification has shown a sufficient level of risk of loss to require fortification;
(c) the contemplated loss would be caused by the grant of the injunction.

Having risen to the Bench, Briggs J (as he then was) in *Jirehouse Capital v Beller* [2008] EWHC 725 (Ch) summarised those principles "as a requirement that the applicant for fortification show a good arguable case for it".

Applying these principles, Hamblen J concluded that fortification of the undertaking was required, in line with the view expressed by David Steel J at the July 2011 hearings. Fortification was ordered in the amount of US$10m.

On Appeal

On 11 October 2012, Rix LJ gave the Appellant permission to appeal the decision of Hamblen J limited to the following questions:

(a) whether Hamblen J had applied the correct test for deciding whether fortification should be ordered in respect of a cross-undertaking in damages;
(b) if the correct test was applied, whether the Appellant should have been ordered to provide fortification;

(c) if fortification should have been ordered, whether Hamblen J had, in assessing the amount by reference to a borrowing rate of interest, assessed the amount correctly.

Between November and December 2012, Gloster LJ (as she had then become) heard the substantive trial, giving judgment on 17 July 2013 ([2013] EWHC 2118 (Comm)]. On 26 March 2014, Longmore LJ dismissed applications to appeal the substantive judgment. The appeal against the decision of Hamblen J was therefore academic.

The Court of Appeal considered the existing first instance authorities relating to fortification, including:

(a) *Sinclair Investment Holdings v Cushnie* [2004] EWHC 218 (Ch) per Mann J;
(b) *Harley Street Capital v Tchigirinski* [2005] EWHC 2471 (Ch) per Mr Michael Briggs QC (sitting as a Deputy High Court Judge);
(c) *Jirehouse Capital v Beller* [2008] EWHC 725 (Ch) per Briggs J;
(d) *Bloomsbury International Ltd v Holyoake* [2010] EWHC 1150 (Ch) per Floyd J;
(e) *Fortress Value Recovery Fund v Blue Skye Special Opportunities* [2012] EWHC 1486 (Comm) per Blair J.

Decision

Tomlinson LJ (with whom McFarlane LJ and Sir David Keene agreed) held:

(a) that the approach in the existing first instance authorities and of Hamblen J with his "resort to symmetry" was correct:
i) "*since the Claimant has obtained a freezing order preserving assets over which it may be able to enforce on the basis of having shown the court that it has a good arguable case, it is only appropriate that if the Defendant can show that it too has a good arguable case that it will suffer loss in consequence of making the order, it should be equally protected*";
ii) to require the Defendant to come up to the balance of probabilities on such an application would encourage wasteful satellite litigation and was contrary to principle;
iii) as to causation, it is sufficient for the court to be satisfied that the making of the order or injunction was a cause without which the relevant loss would not have been suffered (*Air Express v Ansett* [1981] 146 CLR 249 per Gibbs J);
(b) Mr Justice Hamblen correctly applied the test and correctly assessed the amount of fortification: the prima facie effect of the freezing order is that in order to meet any liabilities the Respondent would be required to borrow. The normal level of compensation for the loss of use of money is simply an interest claim based on the usual cost of borrowing an equivalent sum.

Concluding Remarks

The correct test for applications for fortification of a cross-undertaking has now been authoritatively determined by the Court of Appeal, which will be of assistance to judges in achieving fair and just decisions when considering freezing orders, especially where such orders were originally sought without notice.

11 November 2014