

Limitless: Liquidators, injunctions and cross-undertakings in damages

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The English Court of Appeal (the **Court of Appeal**) has recently issued a judgment which will be of particular interest to liquidators and those that they pursue in the case of Hunt v Ravneet Ubhi [2023] EWCA Civ 417.

Background

The case concerns a creditors' (the **Petitioners**) petition to wind up Black Capital, alleged to be an insolvent partnership between Mr Sarju Patel (**Mr Patel**) and Mr Ravneet Ubhi (**Mr Ubhi**). The same day that the petition was presented, without notice applications were made for the appointment of a provisional liquidator, Mr Stephen Hunt (the **Provisional Liquidator**), and associated freezing orders. The applications were successful as follows:

- the Provisional Liquidator was appointed; and
- the Provisional Liquidator immediately applied for and was granted freezing orders against Mr Patel and Mr Ubhi for a maximum sum of £19m (the **Injunctions**).

The Provisional Liquidator gave an undertaking in damages in respect of the Injunctions but, crucially, a limited one. The cross-undertaking read:

"If the court later finds that this order has caused loss to the Respondent, and decides that the Respondent should be compensated for that loss, the Applicant will comply with any order the court may make, save that this undertaking shall be limited to the amount of monies and the net realizable value of the unpledged assets of Black Capital (in provisional liquidation) taken into the custody or under the control of the Applicant in the course of the liquidation less the costs, expenses or other disbursements of the liquidation" (the **Limited Undertaking**).

The Petitioners went on to present bankruptcy petitions against Mr Ubhi and Mr Patel. Both the winding-up and bankruptcy petitions became before a Deputy Insolvency and Companies Court Judge, who dismissed the winding-up petition and the bankruptcy petition against Mr Ubhi and also set aside the statutory demand served upon him.

The Petitioners sought and obtained leave to appeal and an order was made staying the order to dismiss the petition to wind up Black Capital and the appointment of the Provisional liquidator.

But what about the Injunctions? A decision had to be made as to whether they should be continued. By this time, the Provisional Liquidator had given evidence to the effect that he considered Black Capital to have operated as a "Ponzi scheme" and it was decided by a Deputy High Court Judge (the **Judge**) that the Injunctions should be continued.

Mr Ubhi appealed the continuance of the Injunctions.

The appeal

The appeal gave rise to three main issues. This article focuses on issue one namely, whether it was wrong to accept the Limited Undertaking provided by the Provisional Liquidator.

The Court of Appeal honed in on the English decision of JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev [2015] EWCA Civ 139 and, in particular, the dicta that:

" [t]he default position is that an applicant for an interim injunction is required to give an unlimited cross-undertaking in damages', that there is a possible exception 'where the applicant has no personal interest in the litigation and is bringing the action on behalf of others' and that 'the burden is on the applicant to show why they should not be required to give an unlimited cross-undertaking in damages' "

The Court of Appeal went on to extrapolate the following principles from *Pugachev* (being the leading authority on the provision of cross-undertakings in damages in England):

1. The extent of the cross-undertaking in damages which an applicant for an interim injunction is required to give is a matter of discretion for the judge who hears the application.
2. However, the "default position" is that an unlimited cross-undertaking in damages should be provided, being the "price" for interfering with the defendant's freedom before he has been found liable for anything.
3. A cross-undertaking is not required when the applicant is a law enforcement agency simply enforcing the law in the public interest.
4. It may be appropriate to depart from the "default position" where the applicant has no personal interest in the litigation and is bringing the claim on behalf of others (such as a provisional liquidator or liquidator).
5. That said, the mere fact that the litigation is being brought by a liquidator (or provisional liquidator) does not automatically mean that the cross-undertaking should be capped.
6. The burden rests on the applicant to persuade the court as to why an unlimited cross-undertaking is not appropriate.
7. Whether one or more creditors could indemnify the applicant is a relevant consideration. Where there are numerous small creditors, it may be impractical to obtain an indemnity. The position might be different where there are larger creditors.
8. The availability of insurance to the applicant is a relevant consideration.
9. A defendant need not show that a freezing order is likely to cause them loss before an unlimited cross-undertaking is required.
10. Whether an unlimited cross-undertaking is required is a separate question from whether an applicant should fortify the cross-undertaking by the provision of security (cash collateral, for example).

The decision

The appeal was successful on issue one and the Injunctions were discharged.

The Court of Appeal found that it was incumbent upon the Provisional Liquidator to carefully explain why it was appropriate for the Limited Undertaking to be given, thereby departing from the "default position" in *Pugachev*; it being clear that the fact that the applicant is a liquidator is not itself sufficient to avoid giving an unlimited cross-undertaking.

It was held that very little evidence of any relevance to this issue had been put before the Judge and the Court of Appeal noted, amongst other matters, that the Judge may not have appreciated that the Limited Undertaking could be worthless in the event that a winding up order was not made given the terms of the Limited Undertaking. As set out above, the winding-up petition had been dismissed, albeit stayed pending the determination of an appeal. The prospect of a liquidation being ordered in respect of Black Capital remaining very much uncertain.

In addition, the fact that the Provisional Liquidator was "acting in the interests of all creditors, of whom the [Petitioners] were the minority" was not sufficient to depart from the "default position" in *Pugachev*.

The Court of Appeal also noted (in connection with a different issue relating to full and frank disclosure) that what was said when the Injunctions were first obtained was misleading. It noted that that liquidators are sometimes excused from giving unlimited cross-undertakings, but that the Petitioners' counsel had overstated the position when submitting that it was "usual" for the undertaking required of a provisional liquidator to be limited to the assets in the estate.

Ultimately, the Provisional Liquidator had failed to advance any sufficient reason to depart from the "default position". Consequently, the Court of Appeal held the Limited Undertaking to be inadequate and discharged the Injunctions on this basis.

Commentary

Although not binding in offshore jurisdictions, this decision is likely to be persuasive before all the Courts where Collas Crill operates (and elsewhere in the common law world).

Insolvency office holders who are considering applying for without notice injunctive relief should

(1) acknowledge that a cross-undertaking in damages will need to be given and

(2) unless the court is persuaded to depart from the "default position", an unlimited cross-undertaking will need to be provided.

In this case, the Court of Appeal was keen to emphasise that the Petitioners had their own causes of action which impacted upon the unacceptability of a limited cross-undertaking, as follows:

"where a provisional liquidator seeks to bring a claim for the benefit of creditors who have themselves a cause of action and are in a position to obtain a freezing order for which an unlimited cross-undertaking would be required, strong reasons will be

needed to justify the grant of a freezing order to the provisional liquidator without such a cross-undertaking being given."

The position might therefore be different where the petitioning creditors are not in a position to obtain a freezing order. Furthermore, it is not uncommon for liquidators who have no direct personal interest to try to limit the cross-undertaking to the assets of the insolvent estate. There are often good reasons to, particularly where a company has been the victim of a fraud and its assets spirited away. It would not be appropriate for the liquidator to offer up their personal assets and there are strong public policy considerations surrounding placing the bar too high and discouraging liquidators for applying for injunctions, all to the advantage of the less honourable.

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